



Dear reader,

This issue of our journal marks our tenth anniversary. I would like to first thank and congratulate all those involved in the publication of the journal, including the editors and members of the editorial board as well as the numerous authors for their indispensable and fruitful contributions. I am grateful also to our readers, whose continuing and growing interest has been the motivation and reason for publishing the journal. *Juridica International* has gained more and more readers every year; the content has also changed substantially over the journal's 10-year history. Although *Juridica International*, as the name says, is mainly intended for the international reader, its content also reflects the development of Estonian law and legal scientific thinking. Since 1996 when the first issue of *Juridica International* was published, Estonian law and legal science have developed rapidly and substantial changes have taken place. From the regaining of Estonia's independence in 1991 through the beginning of the 2000s, intensive work was carried out to create for the country a legal system of its own. It was natural that the articles published in the first issues of *Juridica International* were largely dedicated to legal drafting in Estonia; foreign readers were mainly introduced to issues that were topical from the standpoint of creating the new Estonian legal system. Estonian legal drafting was significantly influenced by the country's new status as a member state of the European Union, which meant taking European Union law into account in the legal drafting process. There was no great need to harmonise Estonian laws with EU law after Estonia became an EU member state on 1 May 2004, as the harmonisation requirements had already been taken into account in preparing the acts previously adopted. The issues involved in accession to the EU, and the related legal harmonisation issues, have been considered for some time by *Juridica International* also, since the late 1990s. Compared to the earlier years of the journal — the second half of the 1990s — more recent issues have seen the content become more international; introduction of Estonian law is no longer in the foreground, and the journal contains more and more articles discussing the wider issues that are topical in Europe and elsewhere. This is a major change of direction — the journal's main task is no longer to introduce Estonian law to those abroad but to participate in the international discussion of important legal issues. Of course, the solutions offered and positions expressed in Estonian law and legal science are part of the analysis. Development of the content of *Juridica International* has also been greatly influenced by the fact that a greater number of internationally acclaimed jurists have contributed to our journal in recent years. This is a growing trend.

The tenth-jubilee issue of the journal is accompanied by the international conference 'European Legal Harmony: Goals and Milestones' to be held in Tartu on 6 December 2005, which will be dedicated to the tenth anniversary of *Juridica International*. The title of the conference is also the title of the tenth issue of the journal. The conference will focus on the further development of European private law and the issues involved in drafting a European civil code. The high international standard of the conference is illustrated by the fact that 10 other countries are represented among the speakers — Belgium, Denmark, Finland, Germany, Italy, Latvia, Lithuania, Poland, Sweden, the UK. The speakers include 11 members of the Study Group on a European Civil Code, headed by the chairman of the group, Professor Christian von Bar. This issue of *Juridica International* contains five articles based on speeches at the conference: the papers by Professor Christian von Bar (Germany), Professor Hugh Beale (UK), Professor Peter Schlechtriem (Germany), Professor Valentinas Mikelenas (Lithuania), and Professor Kaspars Balodis (Latvia). The presentations of all the other speakers will be published in *Juridica International* 2006.

We promise to our readers that *Juridica International* will continue to be interesting and worthwhile reading over the next 10 years and that the journal will continue to develop.

Paul Varul
Editor-in-Chief

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The Development of European Private Law and the European Commission's Action Plan on Contract Law^{*2}

1. Introduction

My purpose in this paper is to provide a brief overview of developments in European contract law and to introduce the work of some of the groups involved. By 'European contract law' I do not mean the 'hard law' of the EC directives or regulations but the work that is being done by groups in comparative study of the various systems and the development of 'soft law' in the form of statements of common principles underlying the various laws of contract of the member states. In particular, I will speak about the Commission on European Contract Law, which was led by Professor O. Lando of Copenhagen, and its successor, the Study Group on a European Civil Code (SGECC)^{*3}, which is led by Professor C. von Bar of Osnabrück. First, I will give an overview of what has been or is being done, then I will explain the uses that we think may be made of the work of the Lando and von Bar groups under the European Commission's Action Plan on European Contract law.

¹ The views expressed are purely personal.

² This paper is based on a lecture given at a seminar on the future of European contract law, held in Helsinki in June 2003 (see Lakimies 7–8 (2003), pp. 1119–1133) and at the Society of Legal Scholars Conference on European Contract Law in Sheffield (November 2004, unpublished).

³ I am a member of the steering and co-ordinating committees, and also of the Drafting Group.

2. The Principles of European Contract Law

Many of you may have seen the Principles of European Contract Law produced by the Commission on European Contract Law led by Professor Lando.⁴ These are often called the PECL or, by everyone except Lando himself, the Lando Principles. The Lando Principles are in the form of a series of articles, accompanied by a commentary explaining how they relate to each other and the principles as a whole, to give the reader help in understanding them. There are also notes that explain how each article relates to the various national laws, with references to primary or secondary sources in each national system.⁵

Essentially, the project was to produce a statement of the principles that the group thinks underlie the private law of all the individual member states of the EU. I will return to the purpose of the principles after I have described the SGECC.

3. The Study Group on a European Civil Code

Professor von Bar was a member of the Lando group, and his project grew out of it. Its aim is to do what the PECL have done for general contract law for, more or less, the rest of private law.

The SGECC comprises several teams. Each team is led by a distinguished professor. Most consist of a team leader and a number of young researchers — usually students who are at the same time working on their PhDs — who do much of the comparative research. The teams are based in universities in different countries. In Germany (under Professor C. von Bar in Osnabrück) there are teams working on torts, unjust enrichment, and *negotiorum gestio* ('benevolent intervention') and (under Professor U. Drobnig at the Max-Planck-Institut in Hamburg) on personal security and security of movable property. In the Netherlands, there are teams working on sales (under Professor E. Hondius in Utrecht); service contracts (under Professor J. Barendrecht in Tilburg); and long-term contracts such as those of agency, distribution, and franchising (under Professor M. Hesselink in Amsterdam). More recently, other teams have begun work: one on the transfer of property in movables (under professors B. Lurger in Graz and J. Rainer in Salzburg); one on rental of moveable property (led by Professor K. Lilleholt in Bergen)⁶; and one on trusts (headed by Dr. Swan at Osnabrück).⁷

The Lando group has been subsumed into this larger study group, and an additional team has commenced revision of the PECL to take care of issues that have arisen both in the work on specific contracts and more generally.

4. Other groups

What other groups are there, and what are they doing? I am not able to give an account of all of them, but it may be of interest to outline the work of those with which I am most familiar.

A number of groups apart from the SGECC are working on restatements of the common principles of European law. The works will have a roughly similar format — statements of principles in the form of articles. These groups include:

- the Academy of European Private Lawyers (Gandolfi group), which has produced a code of general contract law⁸;
- the EC group on tort and insurance law (sometimes called the Spier group, as Professor Jaap Spier was a founding member)⁹; and
- a team, established by the late Professor F. Reichert-Facilides and now chaired by Professor Heiss, working on insurance contracts.¹⁰

⁴ See Principles of European Contract Law, Parts I and II. O. Lando, H. Beale (eds.). Kluwer 2000; Principles of European Contract Law, Part III. O. Lando, E. Clive, A. Prüm, R. Zimmermann (eds.). Kluwer 2003.

⁵ For further information, see the Lando group's Web site: http://www.cbs.dk/departments/law/staff/ol/commission_on_ecl/index.html.

⁶ See <http://www.sgecc.net/>.

⁷ See <http://www.elsi.uos.de/privatelaw>.

⁸ The draft proposal for a body of general European contract law was published in G. Gandolfi (ed.). Code Européen des Contrats – Avant-projet. Giuffrè, Milan 2001. See also R. Schulze, R. Zimmermann (eds.). Basistexte zum Europäischen Privatrecht. 2nd ed. Baden-Baden 2002.

⁹ See <http://civil.udg.es/tort/>.

¹⁰ See <http://www2.uibk.ac.at/zivilrecht/restatement/>.

Also working in part on statements of principles, but taking a slightly different line, is the European Research Group on Existing EC Private Law (*Acquis* Group).^{*11} This group is working specifically on the principles and policies that underlie the existing *acquis communautaire*. There is a second group based in Turin, looking at terminology in EC contract law.^{*12}

Then there are a number of groups that take other approaches. Three will be well known to this audience. The Common Core of European Private Law (or Trento) Project looks at how typical cases would be resolved in the various national systems.^{*13} The Leuven Centre for a Common Law of Europe is producing the Casebooks on the Common Law of Europe series, which aims to present what is common to the various national laws and is found in the *acquis* to a student audience.^{*14} The Society of European Contract Law organises conferences on the general theme of European contract law and publishes the conference papers.^{*15} Many of the papers take an interdisciplinary approach — e.g., employing economic analysis of law.

There are, of course, a number of well-established comparative law institutions that have shown some interest in European contract law. I would mention in particular the Association Henri Capitant^{*16} and the Société de Législation Comparée.

In addition, a number of new groups have been established in the last few months, of particular note being the Research Group on the Economic Assessment of Contract Law Rules, organised from Tilburg, and the Study Group on Social Justice in European Law.^{*17}

5. A European Civil Code?

The name of the study group led by Professor von Bar suggests that its aim is no less than to produce a European civil code, starting with the law of obligations. Is this really what it is about? Was the aim of the Commission on European Contract Law to produce a single European law of contract?

To be honest, views differ. To some people, the case for a European code is obvious. First, having different legal systems within the EU hinders trade within the internal market and is inconvenient. We have managed to achieve technical harmonisation in, for example, the voltages for electrical appliances; we should do the same for our laws. Secondly, the continued existence of different national legal orders perpetuates the national barriers that the EU is seeking to overcome. For some, a European civil code would serve the same purpose of aiding political integration that civil codes have so often served in the past.

Thus, for years there have been strong voices in favour of a European code, or at least a European code of contract law. Professor Lando himself envisaged as long ago as the late '70s that his Principles of European Contract Law might form the basis of a harmonising code.^{*18} In 1989, the European Parliament passed a resolution requesting that a start be made on the preparatory work for drawing up a European code of private law.^{*19} It is clear that the body contemplated unification of the different private laws that are important for the development of a single market.

There are many arguments both for and against a European civil code. Even within the Lando group, there were many who were at best ambivalent about the notion of a European code of contract law that would replace the various individual national laws, or even harmonise them by acting as a form of directive that member states would have to implement by changing the substance of their laws. Quite apart from the difficulty of seeing any legal base for a code in the existing treaties, especially in light of the decision of the

^{*11} See <http://www.acquis-group.org/>.

^{*12} See <http://www.dsg.unito.it/ut/>.

^{*13} See, e.g., R. Zimmermann, S. Whittaker (eds.). *Good Faith in European Contract Law*. Cambridge: CUP 2000. See <http://www.jus.unitn.it/dsg/common-core/home.html>.

^{*14} See, e.g., *Tort Law* (the contributions by, e.g., W. van Gerven, J. Lever, and P. Larouche). Hart Publishing, Oxford 2000; *Contract*. H. Beale, A. Hartkamp, H. Kötz, D. Tallon (eds.). Oxford: Hart Publishing 2002. See <http://www.law.kuleuven.ac.be/casebook/>.

^{*15} For example, S. Grundmann, J. Stuyck (eds.). *An Academic Green Paper on European Contract Law*. Kluwer 2002. See <http://www.secola.org/>.

^{*16} See <http://membres.lycos.fr/HenriCapitant/sommaire.htm>.

^{*17} See their manifesto 'Social Justice in European Contract Law: A Manifesto'. — *European Law Journal*, November 2004 (10) 6, pp. 653–674. There is not space here to consider the challenge the group makes to the democratic legitimacy of the CFR project. I do not think the criticism is valid so long as the CFR remains merely a 'toolbox' that (more or less) democratically elected or appointed legislators will use to draft legislation.

^{*18} See the preface to Parts I and II, at p. xi; and the introduction, at p. xxiv.

^{*19} Resolution of 26 May 1989, OJ C 158/401 of 26.06.1989, repeated in 1994 (Resolution of 6 May 1994, OJ C 205(519) of 25.07.1994); see PECL Parts I and II, Introduction, p. xxiii.

European Court of Justice in the 'Tobacco Advertising' case²⁰, many members of the Commission thought that the real value of European principles lay in less ambitious aims. Moreover, whatever the views in the European Parliament may be, there is no sign in recent European Commission documents²¹ that unification or even substantive harmonisation is anywhere on their agenda. So — and because I am one of the doubters — I want to concentrate in this paper on the other uses to which the Lando Principles and the work of the SGECC may be put.

6. The value of statements of principles

First, there is the question of contracts between parties in different jurisdictions. Private international law allows the parties, broadly speaking, to choose which law shall govern their contract and lays down rules to determine which law shall apply if the parties have not made a choice. But, as Professor Lando so clearly saw, that is only a partial solution to the problem. One of the parties will have to find out about a foreign legal system, and the same party may suspect that the other party will derive some advantage from working under its 'own' law. An alternative is to use a third national system; for example, English law has been adopted very widely as the law governing international transactions between parties who have no other connection with England. If both parties are in fact familiar with English law as well as with their own law, that may well be a good solution; but one or even both of them may not have that familiarity.

Some parties seek to avoid this problem by agreeing that their contract shall be governed by the *lex mercatoria* or 'internationally accepted principles of commercial law'. The first question is whether such a provision is valid. A number of legal systems give such a choice partial recognition, in that they permit the parties to have their disputes resolved by arbitration in accordance with such principles, even though, technically, the arbitration takes place under a national law (and therefore subject to its mandatory rules). But there was until recently also a second problem: what is the modern *lex mercatoria*? What principles of commercial law are internationally accepted? It was very difficult to say until a modern statement of these principles was provided, for use within Europe, by the PECL and — more or less simultaneously and in very similar terms but obviously intended for worldwide use — the UNIDROIT Principles of International Commercial Contracts.²²

An even more obvious solution is for the parties to specify a particular internationally agreed set of rules, preferably one that represents a balance between the different systems, as the law to govern their contract. The prime example is 1980's Vienna Convention for International Sale of Goods (CISG), but that, of course, applies only to sales of goods and has not been ratified by some countries (including my own, though I have been told by those who should know that a decision in principle to ratify it was reached a few years ago²³ and a fresh consultation on the question is under way). But there were no rules for other kinds of contracts until the PECL and UNIDROIT Principles were produced; and in any event they cannot replace national law completely.

The PECL may have other uses in international contracts, even where the contract in question is governed by one or the other party's national law. They may serve to increase our understanding of each other's legal systems and as a translation tool. Let me explain what I mean.

The work of the Lando group has shown that, if a functional approach is taken, in the sense that we look not at the language or concepts used but at the actual outcomes in concrete cases, in the field of general contract law there are actually very few major differences of substance between the legal systems in the European Union — in other words, under most systems, the results of the majority of concrete cases will be broadly the same. The problem is that the concepts and language used by the various laws of contract across Europe are very different from each other. However, the Commission found it possible to set out basic principles, which, by and large, seem not only to be acceptable to lawyers in all member states but also to be readily understandable by them. The 'Comments' that accompany the articles, and more particularly the comparative 'Notes', mean that these principles can be used as a kind of tool for translation from one system to another, or a search engine to enable one to find out whether a rule in one system has an equivalent in another. As one of my Dutch colleagues put it, we envisage a day when the principles will make it possible for a lawyer sitting at her computer terminal to find out what the relevant answer is to a point on contract law

²⁰ *Germany v. Council, Parliament, and Commission*, Case C-376/98. – ECR 2000, I-8419. For a very full discussion of the implications of this case in terms of the legal basis, see S. Weatherill. The European Commission's Green Paper on European Contract Law: Context, Content and Constitutionality. – *Journal of Consumer Policy* 2001 (24), pp. 339–399.

²¹ See further below.

²² Principles of International Commercial Contracts (UNIDROIT, Rome 1994).

²³ A bill was prepared for introduction in the House of Lords, but the unfortunate illness of its sponsor, Lord Clinton Davies, led to its abandonment.

in every legal system in the European Union. She will be able to identify how the principles deal with the particular point in which she is interested and then, through the Notes to the relevant article, to find the equivalent rule in each system listed.

Finally, common principles can also provide shared terminology and concepts for European Community legislation. At present, it is often very difficult to interpret directives. To take a simple and well-known example, if a directive calls for a consumer to be able to recover 'damages', what does that mean? In the *Simone Leitner* case²⁴, the European Court of Justice had to decide whether the damages to which a consumer was entitled under the provisions of the Package Travel Directive must include compensation for non-pecuniary loss suffered when the holiday was not as promised. This type of damages is recognised by many national laws but was not recognised under Austrian law.

I suspect that further sectoral harmonisation measures will be adopted by the European Union in years to come. There remain quite a few areas in which differences between national laws are still thought to create some hindrance to trade within the internal market. By no means all of them relate to consumer contracts. So to provide a shared legal language for the drafting of EU legislation is important.

7. Non-contractual liability

These arguments can be used to justify work on general principles of contract law and even on specific contracts, since the parties are, more or less, free to adopt whatever rules they wish to govern their contract. But the parties cannot choose which law of tort should apply. Surely, it might be argued, there is no point in working on tort unless you are in favour of unification of the law of tort across Europe. I disagree, for a number of reasons.

First, I think that sooner or later the various legal systems are going to have to reclassify many of the obligations recognised under modern law. In some arenas, this is already beginning to happen. For example, some still refer to *culpa in contrahendo* as a kind of non-contractual liability, but it is one that is dealt with as part of the law of contract. Similarly, in this country it is slowly being recognised that liability for what we call negligent misstatement²⁵ has as many analogies with contract as it does with tort — and many cases that, because of our doctrine of privity of contract²⁶, we have had to deal with as cases in tort would in other countries be treated as cases of contract. I think that the parties should be free to choose which legal regime is to govern liability for some forms of *culpa in contrahendo* or negligent misstatement. The same is true for the law governing liability for defects in property when the property has been sold by the original contracting party to the claimant, and of many forms of liability in restitution.

Secondly, it is obvious that parties based in one country who are thinking of carrying out operations in another may become subject to tort liability in the country in which they are operating. The simplest example is a construction project, where causing injuries to third parties and interference with their property are very real risks. While actions in tort are normally brought in the jurisdiction where the tort has occurred, and thus will involve local lawyers, that will not necessarily be the case in all situations, and, in any event, the construction company will need to know what legal risk it is running when it prepares its bid and administers the contract. It will usually find it cheaper and more convenient to use lawyers in its own country to provide advice on the various matters involved, if they are able to do so. So the need for 'translation tools' applies equally to non-contractual liability.

Thirdly, any directive that deals with liability in contractual situations may have to deal also with issues of non-contractual liability. It is my guess that gradually the European Commission's efforts to harmonise specific sectors will move further beyond consumer protection measures and will encompass business-to-business relations, and that this will lead to moves to harmonise some areas of non-contractual liability. Liability to subsequent owners for defects in immovable property is one possible example.

²⁴ Case C-168/00, *Simone Leitner v. TUI Deutschland*. — ECR 2002, I-2631.

²⁵ See *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* — AC 1964, 465, House of Lords.

²⁶ Recently modified, but not abolished, by the Contracts (Rights of Third Parties) Act 1999.

8. The European Commission: the Communication on European Contract Law

What is the position of the European Commission on these questions of unification, harmonisation, and the drawing up of 'principles' of European contract law? It has varied over time. The European Commission gave financial support to the early work of the Commission on European Contract Law, but this was later withdrawn, ostensibly on the ground that the principle of subsidiarity prevented it. Now the European Commission appears once more to be taking the matter seriously. On 11 July 2001, it published a 'Communication from the Commission to the Council and the European Parliament', effectively a green paper for discussion, on European contract law.^{*27} In essence, this paper did two things. First, it asked for evidence as to whether differences between legal systems genuinely cause barriers to trade within the single market. Secondly, it set out four options for future EC initiatives. These were^{*28}:

- no EC action;
- promote the development of common contract law principles leading to more convergence of national laws;
- improve the quality of legislation already in place; and
- adopt new comprehensive legislation at EC level.

In fact, the options were not, strictly speaking, alternatives; for example, it is possible to adopt options II and III both. Moreover, Option IV includes several sub-options, as the paper contemplated (without giving any detail) a choice of instrument. The choices ranged from, at one extreme, a regulation, which I assume would simply impose a unified system of contract law upon member states, or a directive, which would give member states a certain degree of flexibility in adapting their law to the directive, to, at the other extreme, a recommendation, which would leave the member state free to follow the code only as far as it wished to do so.

The reactions to this communication were many and varied. First, on the question of whether differences between national laws hindered intra-Community trade, some took the view that this is definitely the case. Others said that differences in particular sectors did so. For example, the difference in mandatory requirements for insurance and other financial services make it difficult to sell these services across borders and, consequently, give an advantage to domestic companies over outsiders. However many denied that differences 'obstructed' trade between the member states. It is perhaps unfortunate that the paper used this term — some respondents seem to have interpreted this question as asking whether trade was actually prevented, which they denied. However, at the same time, some of them agreed that the need to find out about the law of another country might add to cost. That is surely a hindrance to trade.

As to the options, few thought that Option I, leaving things to the market, would suffice. Conversely, almost everyone seems to have been in favour of Option III, improving the quality of the *acquis*. Most were also in favour of Option II, the so-called restatement option. Some however, like our national government, remarked that, while they saw value in it, they did not regard greater convergence of national laws as an end in itself. Rather, they saw diversity as a virtue. Parties may have differing preferences and should retain the freedom to choose the law they wish to govern their contract.

Inevitably, Option IV attracted a great deal of comment, ranging from enthusiastic support to, in the case of the UK government, opposition to the option in any of its forms.

So what happens now? There was by no means consensus within EU organs. The Council of Ministers produced a rather low-key document^{*29} that principally emphasises the need to improve the coherence of the *acquis communautaire*. It also suggested that the Commission should look at whether differences in non-contractual liability and property law constitute barriers to the functioning of the internal market. The Commission subsequently arranged for such a study to be carried out.

In contrast, the European Parliament reacted by requesting a detailed action plan^{*30}, setting very ambitious deadlines:

- by the end of 2004: to compile a database, in all Community languages, of national legislation and case law in the field of contract law and to promote, on the basis of such a database, comparative law research and co-operation between interested parties, academics, and legal practitioners;

²⁷ COM (2001) 398 final. The paper is available on the Internet at http://europa.eu.int/comm/off/green/index_en.htm.

²⁸ See Communication, para. 4.

²⁹ <http://register.consilium.eu.int/pdf/en/01/st12/12735en1.pdf>.

³⁰ COM (2001) 398 final, C5-0471/2001 – 2001/2187(COS). – OJ C 140 E, 13.06.2002, p. 538.

- in parallel to the above, by the end of 2004: on the basis of detailed expert advice, to put forward legislative proposals aimed at consolidation (for example, streamlining, simplification, and standardisation of legal concepts, as well as codification, extension, and abrogation) of the law;
- by the beginning of 2005: in co-operation with the European Community's Office for Official Publications, to publish the comparative analysis and common legal concepts and solutions in the appropriate form;
- from 2006: to enact European legislation implementing the common legal principles and terminology for cross-border or national contractual relations, with the possibility of abrogating contracts;
- at the beginning of 2008: to review the extent to which the common legal principles and uniform terminology in European law have proved their value in practice, with consideration of whether uniform European provisions should be laid down in respect thereof, so as to lead, in the longer term, to uniformity in contract law within the EU and as regards the laws of its member states; and
- from 2010: establishment and adoption of a body of rules on contract law in the European Union that takes account of the common legal concepts and solutions established under previous initiatives.

The Economic and Social Committee said it would prefer to see European contract law in the form of a regulation.^{*31} This would not replace national laws, however. It would be a set of rules that the parties could choose to govern their contract in place of national law. It would contain consumer protection measures, since the Economic and Social Committee sees the new law as being particularly valuable to consumers and SMEs.

9. The Commission's action plan and *The Way Forward*

In the light of these various reactions, in January 2003 the European Commission produced its *Action Plan on a More Coherent European Contract Law*.^{*32} The action plan called for comments on three proposed measures: increasing the coherence of the *acquis*; promoting the elaboration of EU-wide standard contract terms; and further examining whether there is a need for a measure that is not limited to particular sectors, such as an 'optional instrument'. In October 2004, the Commission published a further paper, *European Contract Law and the Revision of the Acquis: The Way Forward*^{*33}, which confirms and develops in more detail its plans under each heading.

10. Improving the *acquis*: the Common Frame of Reference

Improving the coherence of the *acquis* was Option III of the 2001 communication. What is interesting is that the Commission is in effect combining this with Option II. Its principal proposal for improvement is to develop a common frame of reference (CFR), which should then be used by the Commission as a tool in both drafting new legislation and creating a review of the existing *acquis*.^{*34}

This seems a very sensible reaction to the problems that were suggested or confirmed in the consultation process. However, the *Action Plan* was not very clear on some intriguing questions about the CFR. What will it look like? What will it cover? And how will it be produced?

On the question of what the CFR will look like, the *Action Plan* gave some broad hints that the CFR would not be just a set of definitions: the *Action Plan* seemed to envisage a statement of rules.^{*35} This seems to be confirmed by the *Way Forward* paper, which states:

³¹ ECOSOC INT/117 European contract law. – OJ C 241, 7.10.2002, p. 1.

³² COM (2003) final, OJ C 63/1.

³³ Communication from the Commission to the European Parliament and the Council, COM (2004) 651 final, 11 October 2004. This is available at http://europa.eu.int/eur-lex/de/com/cnc/de_cnc_month_2004_10.html.

³⁴ Action Plan para. 72.

³⁵ See, e.g., Action Plan paras. 62–63.

The structure envisaged for the CFR (an example of a possible structure is provided in Annex I) is that it would first set out common fundamental principles of contract law, including guidance on when exceptions to such fundamental principles may be required. Secondly, those fundamental principles would be supported by definitions of key concepts. Thirdly, these principles and definitions would be completed by model rules, forming the bulk of the CFR.^{*36}

Annex I to *The Way Forward*, in which the Commission sets out a possible structure for the CFR, envisages three separate chapters — for principles, definitions, and model rules, respectively.

I am not quite sure what is intended by the various headings. 'Model rules' is clear enough, but how are 'Principles' different from 'Model rules', and what is to be included in the 'Definitions' in Chapter II?

On 'Principles' we can get some idea from Annex I, in which the Commission suggests the possible content of each chapter. As examples of the principle to be included in Chapter I of the CFR, the annex lists 'the principle of contractual freedom', 'the principle of the binding force of contract', and 'the principle of good faith'.^{*37} Thus, principles in this context are simply the most general provisions of contract law. The annex refers also to 'exceptions' qualifying such general principles, so that 'freedom of contract' is qualified by 'application of mandatory rules', 'in particular where a contract is concluded with a weaker party'.^{*38}

The scope of the 'Definitions' in Chapter II is rather less clear. The annex gives as examples:

Examples: definition of contract, damages. Concerning the definition of a contract, the definition could for example also explain when a contract should be considered as concluded.

Obviously, some brief definitions in the narrow sense would be needed, but in the PECL there is a very limited number of these.^{*39} There is no single definition of either damages or when a contract is concluded. The 'definitions' have to be derived from a series of articles^{*40}, and, to be honest, I think it would be hard to draft short definitions concerning such complex topics. Perhaps what is intended is the kind of broad statement that of itself carries no force but is merely a reference to other, more detailed, provisions. If this is right, then any difference from the PECL is largely one of drafting technique.

Thus, I think that in terms of its form, the core of the CFR is envisaged as being similar to the articles of the PECL — a set of principles that set out basic concepts and how they interrelate in the form of a series of rules.

I hope that the CFR will include not only rules, similar to the articles of the PECL, but also a commentary explaining the interrelationship of the rules and giving examples. Such commentaries can be enormously helpful in understanding the operation of the rules and are widely used in restatements, both national (as with the American Law Institute's 'Restatements') and international, as with the UNIDROIT Principles of International Commercial Contracts.^{*41} Even the UK Parliament is coming close to having a commentary on its legislation, in the form of the 'Explanatory Notes' that accompany bills. It would be a great shame if the CFR did not include comments on the rules.

In terms of content, the model rules that are envisaged by the annex to *The Way Forward* seem to be the equivalent of the rules of the PECL. Sections I and III–VII follow very closely the scheme of the PECL, not only parts I and II but also Part III. Part III deals with a number of topics that either are applicable not only to contract claims but other areas of law^{*42} or were omitted from the earlier work.^{*43} Annex I of *The Way Forward* includes most of the former but not the latter.

This suggests that the core of the CFR will be general principles of contract law, the infrastructure on which rules governing specific contracts are built. Indeed, that is just where a CFR is most needed, because it is in those general principles that we find the greatest divergences in concepts and terminology. However, *The Way Forward* contains additional items that are of considerable significance.

First, the paper envisages that the CFR will deal not only with general principles but with some specific contracts. Annex I lists sales and insurance contracts. The *Action Plan* had stated that service contracts as well should be covered.^{*44} It mentioned rules for areas in which we can expect further legislation — finan-

³⁶ Way Forward para. 3.1.3, p. 11.

³⁷ Way Forward Annex I, p. 14.

³⁸ Annex I, p. 14.

³⁹ See arts. 1:301–1:305.

⁴⁰ Conclusion of a contract, from arts. 2:101–2:211; damages, from arts. 9:501–9:510.

⁴¹ See now the 2004 edition.

⁴² Plurality of parties, assignment of claims, substitution of new debtor / transfer of contract, set-off, and prescription. The annex includes all but set-off.

⁴³ Illegality, conditions, and capitalisation of interest. The annex does not refer to these, save that 'interest' is mentioned in the remedies section without indication as to whether simple or compound interest is meant.

⁴⁴ Action Plan para. 63.

cial services and insurance — and also said that credit securities on movable goods and the law of unjust enrichment should be covered.^{*45} Whether the omission of these from *The Way Forward* represents a change of heart or merely a reluctance to appear overambitious I do not know.

Secondly, *The Way Forward* makes it clear that the primary purpose of the CFR is to help in the revision of the *acquis*, and it goes beyond the *Action Plan* in setting out a plan and a timetable for this revision. Most of the *acquis* deals with consumer contracts, and it is evident that the Commission intends that the CFR deal with specific issues relating to consumer contracts as well as lay down general rules that might apply to business-to-business contracts. The paper states:

A distinction between model rules applicable to contracts concluded between businesses or private persons and model rules applicable to contracts concluded between a business and a consumer could be envisaged.^{*46}

Thus, it seems that the rules may have to deal specifically with consumer contracts in general, as well as — I assume — consumer sales and consumer insurance. That will be quite a contrast to the PECL, which do not have specific consumer provisions. The point is made even clearer in Annex I. Section II of the model rules might deal with pre-contractual duties and, in particular, pre-contractual information obligations — phrases that to an English lawyer at least suggest consumer protection rules rather than rules for contracts in general. I will return to this issue later.

I think that the CFR needs to contain even more than rules dealing with consumer contracts, however. We have to remember that the CFR is not to be a set of binding rules. Rather, it is to provide definitions and concepts, and to be a model that legislators may apply or otherwise follow when drafting or revising Community instruments. The legislators will want to know why one approach or concept might be preferable to another. This might be for reasons of tradition — that the approach in question reflects the laws of the majority of member states or of the majority of the existing Community instruments that touch the topic. Here detailed notes on the derivation of the rules and a comparative evaluation would seem to be essential. In addition, I think the CFR should contain, or be accompanied by, a fairly full discussion of underlying policy — for example, concerning why a particular kind of safeguard for consumers is thought to be justified in one type of case but in another case to be an unnecessary restriction of freedom of contract (in other words, what justifies the particular exception to the ‘principle’ of freedom of contract). There may need to be some general discussion of competing policy approaches or philosophies of contract law in general, and of how a suitable balance between the competing approaches may be achieved.

As to how the CFR is to be produced, the *Action Plan* referred to the ongoing research process and stated explicitly that it did not wish to reinvent the wheel; further research projects should be undertaken only where ongoing research leaves a gap. Thus, it seems that the Commission intends to rely largely on the work of the various groups that are already in existence.

The Way Forward makes it clear, however, that it does not wish to rely on a wholly academic product. ‘Stakeholder participation’ is essential. The paper stated that the Commission will establish a network of stakeholder experts to engage with the academic researchers and that there will be regular workshops ‘to enable stakeholders to identify practical issues to be taken into account and give feedback’.^{*47} There will also be working groups composed of experts from member states.^{*48}

The *Action Plan* suggested that research funds will be made available to these groups via the Sixth Framework Programme, which specifically included a call for research in this area, and this is indeed happening. Funding has been given to the Joint Network on European Private Law, whose work Professor von Bar will describe in his paper.

Before I conclude, however, I will say a few words about three matters. First, how will the draft CFR be turned into the final product; secondly, if it is to be used to revise the *acquis*, how will it have to differ from the PECL; and, thirdly, what uses are to be made of the CFR, and what must it therefore contain?

⁴⁵ *Ibid.*

⁴⁶ *Way Forward* para. 3.1.3, p. 11.

⁴⁷ *Way Forward* para. 3.1.2, p. 10.

⁴⁸ *Ibid.*

11. From CoPecL to CFR

What is to happen after the network has submitted its 'draft CFR' to the Commission? The Commission plans to turn the researchers' draft into the CFR. How this will be achieved is not wholly clear, even after the *Way Forward* paper. I can envisage the input to the Commission, and I have said what I think the outcome will look like; however, the process of production will take place in what for the moment remains a mysterious black box. *The Way Forward* states that the EP, the Council, and the member states 'will be invited to examine the researchers' final report and the Commission's evaluation [...] Consultation of Member States could be continued through the same working group of national experts which will track the preparatory work.'⁴⁹ This suggests that production of the CFR will involve a political process within the Community organs and member states. Whether that is desirable is a question to which I will return.

In the *Action Plan*, the Commission said that it will consult 'with stakeholders and other interested parties', in which it seemed to include industry, retail business, legal practitioners, and consumers.⁵⁰ *The Way Forward* states that after the 'political' process just mentioned, there will be a six-month consultation with stakeholders. This rather suggests that stakeholders will have input for the research efforts only via the workshops etc., before the CoPECL are delivered to the Commission, and the six-month consultation period at the end.

12. Differences from the PECL: general rules of consumer law

We have seen that the Commission wants and needs a CFR that will help it to revise and possibly extend the *acquis* of consumer legislation. Thus, it must either lay down rules on consumer protection that the legislator may wish to adopt or, as I have suggested, explain in what circumstances departure from the general rules of contract law may be justified and what type of consumer protection device is appropriate to each circumstance. This strikes me as quite a challenge.

Of course, much of the work of the *Acquis* Group, a leading partner in the Joint Network on European Private Law, is aimed at just this. The group is concerned to extract the principles (if any) that underlie the existing *acquis*, much of which is consumer law. However, the *acquis* does not deal with every issue of consumer protection, even as concerns the individual rights of consumers, and does not necessarily contain the correct answers, as the Commission's paper acknowledges.⁵¹ In particular, the Commission is interested in whether the 'minimum harmonisation' clauses of the directives allow the directives to achieve the goals of a high level of consumer protection and the elimination of market barriers.⁵² As will be apparent to those who have considered the impact of the draft Directive on Unfair Commercial Practices as a set of broad standards governing what is to be forbidden and its 'maximum harmonisation' clause, the abandonment of minimum harmonisation in any revised directive might bring a considerable diminution in consumer protection unless the replacement directive has quite tough requirements. Thus, the Commission may envisage moving from what might be called (not wholly accurately) a 'lowest common denominator' directive, one setting fairly low requirements but allowing member states to give consumers additional protection, to a genuinely high level of consumer protection. Obviously, that may go beyond anything in the existing *acquis*. The Commission is quite right to say that the model rules should draw not only on the *acquis* but on 'best solutions found in Member States' legal orders'.

The Commission on European Contract Law did not attempt to deal with consumer protection — indeed, it deliberately avoided issues of consumer law on the ground that these 'raise policy issues more appropriately determined by Community law and national legislation'.⁵³ The PECL are aimed at providing the 'infrastructure' of general rules on which rules for specific contracts and consumer contracts may be built, though in some cases they may be directly applicable to business-to-business or other non-consumer contracts because there is no more specific regulation. Nor to date has detailed analysis of national consumer protection regimes taken place in the discussion of the Co-ordinating Committee of SGECC. This is because the principal chapters that have been finalised are either on topics already regulated by EU directives (sales) or

⁴⁹ *Way Forward* para. 3.2.3, p. 12.

⁵⁰ *Action Plan* para. 65.

⁵¹ See the questions posed in *Way Forward* pp. 3–4.

⁵² *Way Forward* p. 3.

⁵³ PECL Parts I & II, Introduction, p. xxv.

on topics that primarily concern business-to-business contracts (long-term contracts). It therefore seems to me that work on general common principles of consumer protection beyond the *acquis* needs to be done by one of the Principle Drafting Groups.

13. The goals and contents of a Common Frame of Reference

13.1. Use as a toolbox

The CFR may have to differ from the PECL in other ways also, ways that reflect its purpose. What is required of the CFR as a 'toolbox' may differ from what is needed for its possible use as the basis for an optional instrument or even as a modern statement to be followed by legislators looking to update their contract law, in the way that the Lando group suggests.

To me the point of the CFR as a toolbox seems to be twofold. First, it should set out what the common principles of the current laws of the member states **are**. As I have argued earlier, for the most part the laws do achieve rather similar results; the problem is one of translation between differing terminology and conceptual structures. The issue is not to fix what European legislation should be but to provide an agreed language by which we can try to ensure that it achieves what is wanted in each system. But the CFR should not try to hide differences. True, it has to come up with a rule of some kind — a majority rule, for example. But the Notes should clearly explain when the rule stated does **not** represent the laws of some member states, so that the differences can be taken into account in drafting the relevant EU legislation. Equally, so far as possible, different traditions in applying principles such as good faith should be studied and explained openly, so that we may know of them.

Secondly, the CFR should by all means reflect what the researchers and stakeholders conclude is the 'best' of the national approaches to achieve a particular policy outcome — if there is an agreed policy and if it can be agreed that one technique of achieving it is clearly superior to others. However, I suspect that more usually there will be a range of policy outcomes as well as of techniques. I think that, for the purpose of using the CFR as a toolbox, the researchers should then content themselves with adopting that policy approach that seems to reflect the majority position, or perhaps 'the modern trend'. But whatever happens, the other policy approaches and other techniques should not be suppressed. On the contrary, they should be flagged very clearly in the Notes, and the choice discussed in the evaluative commentary. The aim of the CFR as a toolbox should not be to legislate; it should be to present the legislators with options.

The fact that stakeholders are taking part in the process does not show that the aim is different. It is true that practitioners and other stakeholders often have political aims; lawyers often argue for outcomes that they believe will suit their clients. For this reason, it will be important to ensure that the stakeholders are drawn from each side of any divide. I believe it is important that they be there, however, to ensure that issues of policy and social justice are flushed out into the open. It is even more important that the researchers who will be responsible for the CoPECL, and whoever at the Commission has the task of turning the CoPECL into the CFR, recognise policy issues for what they are and set out the arguments on each side. A failure to do that — for example, through the simple enunciation of a rule that in fact represents a contested policy choice — would not only be an academic failure; it would be an improper arrogation of decision-making powers.

I must confess that I am worried by the plan to make the approval of the CFR subject to some political consultation. At that stage, I think there may well be attempts to make policy choices — or at least, by fixing the terms of the CFR, to rule out some for the future. I also worry that what I believe could be, technically speaking, a very fine product will be ruined by last-minute alterations of a political nature. We cannot afford the sort of nonsensical insertions that were made in the Fundamental Charter of Rights: phrases that sound fine at the moment of proposition but are very uncertain in their legal effect — or devoid of any effect at all. And it should be clear from what I have said that I believe political input to be unnecessary at the stage of creating the CFR as a toolbox. The CFR will be only a kind of 'draughtsman's handbook'; the legislators will have absolute control over whatever goes into any new or revised instrument at the time it is passed.

13.2. The optional instrument

Were the CFR to be used as the basis for an optional instrument, the final result would have to be different again. Let me say a few words about the third proposal of the Commission, that we should continue to reflect on the need for an optional instrument that might be based on the CFR.

It is worth noting what is meant by an optional instrument. At least in informal discussion, some commentators on the Communication document of 2001 seemed to suggest that, as not all countries would agree to a European contract code to replace national laws, there might instead be a new treaty adopting an optional code, to which countries might adhere if they wished. In other words, the situation might be a bit like adoption of the common currency, with another two-speed Europe and, no doubt, with endless arguments as to which group is the tortoise and which the hare. But this is not what the Communication referred to explicitly⁵⁴, nor what the *Action Plan* or *Way Forward* envisages. They speak of a set of contract rules that the parties might choose to govern their contract, rather as now parties in the countries that have ratified the CISG can choose to use it instead of one of their national laws. And if the optional instrument were to be adopted via an international or Europe-wide convention, then, like the CISG, it could replace the national system of law.

In fact, that may not be necessary. The European Commission has circulated a separate consultation paper on reform of the Rome Convention⁵⁵, and one of its questions is whether said convention should be amended to allow the parties to adopt a non-national system, such as the PECL or the UNIDROIT Principles, in place of a national law.⁵⁶

I believe that this should be permitted, though, obviously, careful thought will need to be given to which sets of principles should be permitted. I would not want a situation in which 'principles' drawn up by, for example, a business association representing only the interests of its members could be used in place of national law. Some have raised other objections — that the rules are likely to be incomplete, the issue of what is to happen if one party is in a signatory country but not the other, and so on. But I do not see that these objections have any more force than they do in relation to the CISG, and the CISG seems to be working reasonably well.

There are more questions about the optional instrument, however. One is whether it should be a system that the parties must opt in to; or one that will apply if they do not opt out, as with the CISG where international sales are concerned. The answer must be linked to the second major question: should it apply only to cross-border transactions within the EU or also to domestic transactions?

I think these questions are difficult. My initial reaction is to say that I think it would be acceptable to permit parties to choose the optional instrument even for domestic transactions if they so wish — but that they should have to make a positive choice, rather than be bound by it unless they opt out. The latter would pose too large a threat to national laws.

But this begs the question of whether there should be an optional instrument at all. I suspect that the UK government for one may not favour it. It seems to threaten the national system. However, I am not convinced that this is a legitimate ground for opposing the optional instrument.

I think I should make my position plain. I have argued elsewhere that there is a positive value in diversity.⁵⁷ It allows us to have different rules for countries that still do not exactly have similar social and economic conditions; as Professor T. Wilhelmsson has eloquently argued⁵⁸, it allows us to experiment; and, most importantly, I wish to preserve pluralism in our society for its own sake. We might need to surrender pluralism where diversity creates real problems; but I do not think that legal differences must necessarily do so.

I have argued elsewhere⁵⁹ that we should have harmonisation of law to the extent that we remove major differences that might constitute serious, hidden traps for those seeking to do business across national borders, particularly differences that might expose parties when they are unlikely to be insured or to be able to take other precautions. Beyond that, unification or even harmonisation of contract law is unnecessary because for most consumer and business transactions all that matters is that the different laws are approximately the same and that any major differences are easy to discover. This is because most consumer and

⁵⁴ See para. 66.

⁵⁵ COM (2002) 654 final of 14 January 2003.

⁵⁶ Question 8.

⁵⁷ Finding the Remaining Traps Instead of Unifying Contract Law. — S. Grundmann, J. Stuyck (eds.). An Academic Green Paper on European Contract Law. Kluwer 2002, pp. 67–72; The Principles of European Contract Law and Harmonisation of the Laws of Contract. — Andersen, Fejø, Nielsen (eds.). Festschrift til Ole Lando. 1997, pp. 21–40.

⁵⁸ T. Wilhelmsson. Private Law in the EU: Harmonised or Fragmented Europeanisation? — European Review of Private Law 2002, p. 77.

⁵⁹ See Note 57, pp. 67–72.

business transactions do not depend on precise assessment of the legal rules; provided the parties know roughly what their position is, they will not be discouraged from transactions across borders by small differences that are likely to be of importance in only a minute proportion of cases. It is only in the case where a dispute arises and the parties are unable to reach a negotiated commercial settlement that it will become necessary to descend into the finer points of law and to work out which law governs the contract and precisely what that implies in terms of contractual liability. This is going to be, in percentage terms, a very small number of cases.

There are some businesses that require much greater certainty than do the manufacturers who formed the subject of the studies to which I have referred. In particular, where markets fluctuate greatly — for example, commodity markets or the charter market — it is very common for the parties to plan the contract in very considerable detail (using standard forms that are signed by both parties) and to use arbitration or litigation as a way of solving disputes. For these parties, the answer is either a known national law (in many cases, that is English law) or use of a neutral international system — and the optional instrument could provide just such a system.

Perhaps the strongest argument for an optional instrument, at least if it is employed on an opt-in basis, is simply this: if parties wish to use such an instrument, what grounds do we have to stop them? Those who argue against unification of our law often give as a reason the preservation of freedom to choose a particular system of law that suits the needs of the transaction. Exactly the same argument supports the creation of an optional instrument. And if gradually the optional instrument comes to displace national laws, it will be as the result of more or less conscious choice by the users of the law. To me that appears an entirely legitimate outcome.

But when an optional instrument is to be created, it will then not set out options for legislators; it will have to embody legislative decisions on policy. Explanatory Comments, and Notes comparing the optional instrument to national laws would still be very useful; but the instrument would set out choices for legislators. It would, in other words, be much more like the PECL than I think the CFR 'toolbox' will be.^{*60}

14. Conclusions

In conclusion, I would say that the plans proposed in the Commission's *Action Plan* and elaborated upon in *The Way Forward* are generally to be welcomed. With the possible exception of the 'opt-out' optional instrument, they do not represent a threat to national contract laws; rather, the CFR and the improvement of the *acquis* to which it should lead will, I hope, have the effect of making it easier to incorporate EU legislation into national laws. An opt-in optional instrument might lead to national laws being used less because parties choose to apply the instrument. I see no reason to object, at least when the choice is a truly free and informed one. However, the optional instrument would have to be fashioned in a way that will protect those parties — and they might be the majority — who are not wholly free or fully informed, and it is then that difficult decisions about content and process will have to be made.

However, my conclusions do rest on the assumption that the CFR and any optional instrument are executed well. Making sure that they are prepared properly is something to which I think both academic and practising lawyers with an interest in contract law, in its widest sense, can and should contribute, whether or not they have any expertise in European or comparative law. I very much hope that all who can will do so.

⁶⁰ Such an instrument, even only for international transactions, would involve political choices of the kind that concerns the Social Justice Group (see above, Note 17). That would be so even were it an opt-in instrument. Parties would frequently opt in without knowing exactly, or even approximately, what rules would then apply to their transaction and the degree of protection that they would be afforded, and they might not have the bargaining power to avoid the optional instrument or something even less favourable. The rules of the optional instrument would not be a purely technical matter; legislative choices over them would have to be made. Some means of ensuring both a reasonable degree of social justice in the provisions of the instrument and a modicum of democratic input would be essential.



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Working Together Toward a Common Frame of Reference

1. Introduction

This year's December meeting of the Study Group on a European Civil Code^{*2} is taking place in Tartu because there are colleagues in this country whose organisational abilities are beyond comparison. Whilst at the 2004 December meeting in Milan, I spoke with Professor Paul Varul during the morning coffee break and wondered whether he could accept the 50 members of the Co-ordinating Group at his university in a year's time. By lunchtime on the same day, he had said to me that it was as good as arranged! It would be a dream if we were as successful as Professor Varul in dealing with the themes of the forthcoming working week — renting of movables, loan contracts, real securities, tort law, unjustified enrichment law, and problems relating to the drafting of our proposal for a common frame of reference. We are grateful for the privilege of being here!

After Professor Beale has explained to you the significant stages of our work leading up to the establishment of the so-called Network of Excellence 'Common Principles of European Contract Law' under the Sixth Research Framework Programme of the EU^{*3}, it falls to me to speak on the current situation and some of the difficulties we are now facing. Whilst preparing my short submission, I wondered whether I should add a question mark to its title, 'Working Together Toward a Common Frame of Reference'. This was because by no means everybody seems ready to constructively play a part in the development of this common frame of reference. We have had to deal with a significant number of very critical voices. It is part of my role, however, to spread optimism, and that, despite all of the bumps in the road, I mention that I would like it not to be forgotten how exciting it is to witness the creation of a new *jus commune europaeum*.

¹ I am grateful to Paul McKane, LL.B. (Ling. Germ.), for translating the draft.

² This is the thirteenth meeting, after: Utrecht in autumn 1999, Rome in June 2000, Salzburg in December 2000, Stockholm in June 2001, Oxford in December 2001, Valencia in June 2002, Oporto in December 2002, Helsinki in June 2003, Leuven in December 2003, Warsaw in June 2004, Milan in December 2004, and Berlin in June 2005.

³ More in section 3.

2. The Lando Commission and the Study Group

The modern documents of the constitutional organs of the Community regarding the ongoing work on the Common Frame of Reference document succinctly and cleanly divide the participants into two distinct groups, namely ‘stakeholders’ and ‘researchers’. Above them — *divide et impera* — is the European Commission, which for its part is involved with several Directorates-General (those for research, the internal market, and consumer protection), whose interests and hopes can prove difficult to marry. Apart from this, it also has to co-operate with the European Parliament, with the Council, and with the member states’ governments, which also can lead to abrupt changes in the aims and goals.

In any event, we, the Study Group on a European Civil Code⁴, belong to the group identified as ‘the researchers’. This could — and I hope I am mistaken — prove to be politically ‘helpful’, as such an identification, if necessary, can also isolate us. Should the project fail, or should the results of our work not concur with what at that time would be politically opportune, then it would be easy to dismiss our results as being ‘too academic’. The game has already begun. Legal scholars are, however, not a homogeneous group that follows orders but are, rather, highly individual minds, which do not allow themselves to be easily forced into administrative structures. They are also, incidentally, ‘stakeholders’, in the sense that they feel co-responsible for the quality of European private law. The classification of us according to specific groups could be even more problematic if one thinks of the many academics who critically or benevolently observe the process of the Europeanisation of private law. They appear to have been given the role of onlookers, which hardly contributes to our popularity amongst our colleagues.

What do we actually do? The Study Group on a European Civil Code was founded in 1999 and is the successor to the Commission on European Contract law, known all over the world as the Lando Commission. The Study Group has taken upon itself the task of drafting common European principles for the most important aspects of the law of obligations and for certain parts of the law of movable property that are especially relevant for the functioning of the common market. The two groups pursue(d) identical aims. However, the Study Group has a more far-reaching focus in terms of subject matter. Both groups have undertaken to ascertain and formulate European standards of ‘patrimonial’ law for the member states of the European Union. The Commission on European Contract Law has already achieved this for the field of general contract law.⁵ Its Principles of European Contract Law (PECL)⁶ are being adopted with adjustments by the Study Group on a European Civil Code to take account of new developments and input from its research partners. The Study Group is itself dovetailing its principles with those of the PECL, extending their encapsulation of standards of patrimonial law in three directions: (i) by developing rules for specific types of contracts; (ii) by developing rules for extra-contractual obligations — i.e., the law of tort/delict, the law of unjustified enrichment, and the law on benevolent intervention in another’s affairs (*negotiorum gestio*) — and (iii) by developing rules for fundamental questions in the law on mobile assets — in particular, transfer of ownership and security for credit. We have undertaken this endeavour on our own personal initiative. We have always taken care to identify the legal position of the member states of the European Union and to set out the results of this research in the introductions and notes. That, of course, does not mean that we have only been concerned with documenting the pool of shared legal values or that we simply adopted the majority position among the legal systems where common ground was missing. Rather we have consistently striven to draw up ‘sound and fitting’ principles; that is to say, we have also recurrently developed proposals and concepts for the further development of private law in Europe. Each part of the project was the subject of debate on manifold occasions, some stretching over many years. Where a unanimous opinion could not be achieved, majority votes were taken. As far as possible, the articles drafted in English were translated into the other languages either by members of the team or by third parties commissioned for the purpose.

The first volumes of the findings of the Study Group have in the meantime gone to print, with more on the way. In order to leave no room for misunderstanding, it is important to stress that these principles have been prepared by impartial and independent-minded scholars whose sole interest has been their devotion to the subject matter. None of us have been rewarded for taking part or mandated to do so. None of us would want to give the impression that we claim any political legitimisation for promoting harmonisation of the law. Our legitimisation is confined to curiosity and an interest in Europe. In other words, the volumes in the Study Group on a European Civil Code series are to be understood exclusively as the results of scholarly legal research within large international teams. Like every other scholarly legal work, they restate the cur-

⁴ More details are available on our Web site (<http://www.sgecc.net/>).

⁵ O. Lando, H. Beale (eds.). Principles of European Contract Law, Parts I and II, Combined and Revised. The Hague 2000; O. Lando, E. Clive, A. Prüm, R. Zimmermann (eds.). Principles of European Contract Law, Part III. The Hague 2003.

⁶ A newer bibliography concerning the PECL (Parts I–III) is to be found in R. Zimmermann. Die Principles of European Contract Law als Ausdruck und Gegenstand europäischer Rechtswissenschaft. Bonn: Zentrum für europäisches Wirtschaftsrecht der Universität Bonn, Vorträge und Berichte 2003, No. 138. Just recently published is the German translation of part III: C. von Bar, R. Zimmermann (translator). Die Grundregeln des Europäischen Vertragsrechts. Part III. München 2005.

rent law and introduce possible models for its further development, no less but also no more. We are not a homogenous group whose every member is an advocate of the idea of a European Civil Code. We are, after all, only a **study** group. The question of whether a European Civil Code is or is not desirable is a political one on which each member can only express an individual view.

3. The so-called network of excellence 'Common Principles of European Contract Law'

Were it not for the political developments, what we do and the reason we have gathered here in Tartu would, therefore, be by all means unspectacular. I personally would have been happier had we had longer, in peace and without outside pressures, to discuss our principles, comments, and notes. Things should have proceeded differently. Coincidentally, at practically the same time as the Study Group first met in 1999 in the Dutch city of Utrecht, the European heads of government convened in the Finnish city of Tampere, where they decided, among other things, that 'in a true European area of justice, individuals and businesses should not be prevented or discouraged from exercising their rights by the incompatibility or complexity of legal systems in the Member States'. The conclusions of this summit were summarised in Chapter VII (Greater Convergence in the Area of Civil Law) under paragraph 39, with the declarative statement that 'as regards substantive law, an overall study is requested on the need to approximate Member States' legislation in civil matters in order to eliminate obstacles to the good functioning of civil proceedings'.⁷ Suddenly and without us having any conscious part in the ignition, the wheels of motion had started on a political level. From then on, the work progressed from strength to strength. Numerous resolutions of the European Parliament⁸, a range of important communications of the European Commission⁹, a further summit of the Council (Brussels 2004¹⁰), positive statements and comments from individual heads of government¹¹, and common and decided governmental declarations¹² were formulated, sometimes in interplay¹³ with ideas proposed by the Commission on European Contract Law and the Study Group on a European Civil Code.¹⁴

⁷ European Council meeting at Tampere, 15–16 October 1999, Conclusions of the Chair, SI(1999) 800, Point 39. For more, see C. von Bar. Ein gemeinsamer Referenzrahmen für das marktrelevante Privatrecht in der Europäischen Union. – Festschrift für Erik Jayme 2004, pp. 1217–1231.

⁸ See in particular the more recent resolutions of 15 November 2001 (OJ C 140 E, 13.06.2002, p. 538) (see C. von Bar. – ZEuP 2002, pp. 629–633) and of 2 September 2003 (OJ C 76 E 2004, 95). A further resolution is expected for autumn 2005. Earlier resolutions are dated 26 May 1989 (OJ C 156, 26.06.1989, p. 400) and 6 May 1994 (OJ C 205, 25.07.1994, p. 518).

⁹ These include the 'Communication on European Contract Law' of 11 July 2001 (OJ C 255, 13.09.2001 (see C. von Bar. Die Mitteilung der Europäischen Kommission zum Europäischen Vertragsrecht. – ZEuP 2001, pp. 799–804)), with which the Commission reacted to the Council meeting in Tampere, and the communication of 12 February 2003 titled 'A more coherent contract law: an action plan' (OJ C 63, 16.03.2003) as well as the communication of 11 October 2004 'European contract law and the revision of the *acquis*: the way forward' (OJ C 14, 20.01.2005, 6; reprinted in part in ZEuP 2005, pp. 462–469).

¹⁰ The summit in Brussels passed the so-called Hague Programme for the Strengthening of Freedom, Security and Justice in the European Union (OJ C 53, 03.03.2005) and with it 'development of a common frame of reference' (Point 3.4.4; *loc. cit.* c. 14). For an in-depth analysis and documentation of the materials and writings, see Schmidt-Kessel. Auf dem Weg zu einem gemeinsamen Referenzrahmen: Anmerkungen zur Mitteilung der Kommission vom 11. Oktober 2004. – GPR 2005, pp. 2–8.

¹¹ Thus, for example, German Chancellor Schröder. Sieben Chancen für mehr Wachstum in Europa. – Handelsblatt 26. October 2004; printed in part also in ZEuP 2005, p. 106.

¹² A striking document, albeit one not aimed directly at the common frame of reference, wherein the readiness of the participating states to bring laws closer together is addressed, is the Franco-German Common Declaration of the 40th anniversary of the Elysée Treaty. Point 22 states: 'In order to intensify the coming together of our societies and to realise new advances on a European level, we strive to harmonise our national legislation in significant areas which affects the lives of our citizens. We call on our government ministers to systematically consult with their partners during the preparation stages of law-making and to look at the current status and development of the law in the neighbour state in order to achieve agreement as far as possible. We especially hope that legislative projects would be considered which aim at drawing aspects of civil law, most particularly family law, together.' Available at: http://www.bundesregierung.de/emagazine_entw,-463558/Gemeinsame-Erklärung-zum-40.-.htm.

¹³ The Action Plan of the European Commission referred to suggestions from the 'Communication on European Contract Law: Joint Response of the Commission of European Contract Law and the Study Group on a European Civil Code' (submitted on behalf of the two groups by C. von Bar, O. Lando, and S. Swann) (reprinted, amongst others, in ERPL 2002, pp. 183–248 and in Europa e diritto privato 2002, pp. 133–199). Also, the resolution of the European Parliament of 15 November 2001 (see above, Note 7) accepted a large number of suggestions of European legal science — in particular, several suggestions from a study submitted to the Committee on Legal Affairs and the Internal Market of the European parliament entitled 'Examination of the private law systems of the EU with regard to discriminations and the creation of a European Civil Code.' European Parliament, General Direction Science, Working Document. Legal issues JURI 103 EN (10/1999, headed and co-ordinated by C. von Bar).

¹⁴ All of these documents concerning European contract law are available on the Commission's Web site under: http://europe.eu.int/comm/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/index_en.htm.

It is in the context of this interplay of European constitutional organs and European legal science that the above-mentioned founding of the Network of Excellence ‘Common Principles of European Contract Law’, the co-ordinator of which is Professor Hans Schulte-Nölke of Bielefeld University, must be seen. The story of how this ‘Network of Excellence’ (an expression from the bureaucratic nomenclature of the European Commission, which has earned us a lot of teasing) came into being would be worth an article of its own. After the success of a pre-application submission to bring European private law under the Sixth Framework Programme, there began a six-month-long application stage, which culminated in December 2003 in a 450-page submission. The ensuing evaluation phase took another nine months, after which there followed an eight-month phase of intensive and difficult negotiations. Although the contract was finally signed in May 2005, the Commission began as early as July to try to change some of its content significantly. These discussions are ongoing

We applicants understood too late that in no way were we merely dealing with the Directorate-General for Research and its conditions, aims, and experts. Our submission to finance our research works was exclusively aimed at achieving urgent scientific desiderata and additionally toward the creation of a European legal science community. Therefore the contract was formally signed with 17 European universities and research institutions, but the substantial work would be carried out by the Study Group, the *Acquis* Group, and a group that would deal with insurance contracts. These so-called drafting groups — i.e., the teams who prepare the commented and annotated ‘principles’ or ‘rules’ — are joined by a range of ‘evaluation teams’, who, among other things, concern themselves with economic and jurisprudential questions, promote the expansion of databases, and organise case studies on the basis of the rules developed by the drafting teams. The evaluation teams have it easy. They are not subject to a definite timeframe, nor has anyone ever attempted to prescribe what exactly they should be doing. Things are a little different for us drafting teams. Their work covers the entire range of subjects dealt with by the Study Group (that is to say, the law of specific contracts, extra-contractual obligations, and elements of property law). Furthermore, they concentrate on legal issues relating to consumer protection and the *acquis communautaire* that has developed from this. The inclusion of the law on insurance contracts has been encouraged by political actors. Our evaluators, however (correctly, in my opinion), had criticised us for this inclusion and therefore even deducted half a point from our evaluation score on account of it. The Commission, however, paid no heed to this, in the same way as the content of the entire evaluation did not concern them too much. What was important was only the end result. Thus, and this I understood far too late, we were part of an attempt to siphon monies out of the well-stocked research budget into the meagre budgets of the Internal Market and Consumer Protection departments.

Suddenly we were in another world. At the very outset of the negotiations regarding the Network of Excellence, we were informed that the work that we had to carry out should (also) significantly relate to the PECL. Upon our arrival at the first meeting in Brussels, we were presented with the draft of the Commission’s communication of 11 October 2004 (‘European contract law and the revision of the *acquis*: the way forward’¹⁵), and I asked with great astonishment which research submission we were actually dealing with. I had never reckoned on gaining financial backing for the revision (not to say for the transcription) of a book that was already on the shelves! Naturally, we had not requested any money for the subject matter of the PECL, nor later on did we get any. This has encumbered the work — above all, the common endeavours with the stakeholders — to this very day. I will come back to this. We ourselves had not only a different timescale but also an entirely different approach to the project; indeed, we wanted to postpone the revision of the PECL, and the working in of the *acquis*, to a time when we would have completed addressing those matters that we ourselves wanted to deal with. Instead, we experienced a short time later keen awareness that we would be constrained by the contract relating to the Network of Excellence to accept that we would deliver the complete proposal for a common frame of reference by the end of 2007 (that is to say, within a timeframe of only two and a half years, the contract being retrospective to the 1 of May 2005). Suddenly everything had to happen all at once. The motivation was and is, as one says, political: either it happens now, during the term of office of the Barroso Commission, or never. One needs a further two years for the final consultation process on a political level, and by the end of 2009 everything must be ready. Thus we arrived at the date December 2007. When I see before me what we have agreed to, my head is swimming. We have committed ourselves to delivering a text compiled from comparative introductions, rules (or principles), comments, and notes relating to all significant aspects of the law of obligations and movable property within two and a half years! Naturally, we knew that we could look back on almost 20 years of preparations on the part of the Lando Commission and our own texts. One must nonetheless imagine what it means to lay down almost all important elements of the law of obligations and property law in a series of coherent rules, to provide each rule with its own commentary, and to demonstrate whether or not such a rule is to be found in each of the individual member states. With certain highly complex areas we could begin only after the issue of financing was resolved, after the contract was signed with Brussels and the money had been transferred. I refer to, for example, the law relating to contracts for loans.

¹⁵ See Note 8.

4. Research in the face of politics and interest groups

Unfortunately, my report is not yet finished. This is because the European Commission had already founded the so-called stakeholder network CFR-net at the start of 2005, after announcing it in the middle of 2004. This, in turn, was done without having consulted with us. We were subjected to official announcements that most likely would have an effect on us without us being able to react to or become involved in them. The rules of the Directorate-General for Science and Research did not allow for this. The stakeholders' network was already a topic for discussion at a time when we were ourselves still wholly uncertain whether or not we would be granted financial support under the Sixth Framework Programme on Research. The stakeholders' network was established approximately six months before we signed our contract with the Commission. It consists of approximately 160 lawyers for industry and consumer groups, judges, and legal practitioners from all or nearly all of the member states. However, interest in participating in it is not shared equally by all member states. In particular, there are too many Germans, and that, in some circles, creates an additional problem.

The foundation of a stakeholder network was certainly a good idea. In the beginning its realisation, however, took place in such a way that the entire plan of the creation of a common frame of reference or even an optional instrument could be jeopardised. Warnings fell on deaf ears; a catastrophe seems unavoidable. The convening of a group of experts from other legal professions to critically analyse the documents of the Lando Commission and the Study Group on a European Civil Code, in order to first test the practicalities of our work, certainly was (and is) a worthwhile idea. The way in which this process began could easily have led to its subsequent destruction. One must understand that there were practically no advance discussions. A plenary session involving all participants never convened, so the researchers could not outline the processes that led to the writing of their texts. There was no overview of the intentions of the project. It was unclear to many stakeholders what indeed the common frame of reference had to do with the PECL at all. It was not even clear to everybody what the differences between 'rules', 'comments', and 'notes' was, nor did we ever have the opportunity to say anything preventive regarding the name of our group, the Study Group on a **European** Civil Code. A not altogether small part of the first workshop was taken up with the discussion of such general questions, most especially that of whether the Commission was not **really** pushing for a European Civil Code.

The Commission simply went *medias in res*. It was decided that we begin with a very long text on the law of service contracts. The researchers did not know what they ought to say, the stakeholders did not know how they should deal with the abundance of text, and the working teams within the Commission were so busy with issues of organisation and finance that they had no opportunity at all to have read at least some of the texts. The Commission's accompanying Web site was not yet up and running. The researchers were worried about both copyright and their independence. The reason we began with service contracts and subsequently dealt with distribution contracts (i.e., commercial agency and franchising), personal securities, *negotiorum gestio*, and the law of unjustified enrichment was that we had to name within a very short space of time (one or two days) subject matter for the workshops. Certainly, it would have been sensible to begin with the PECL, but it was impossible within the time constraints to name 'reporters' for the individual PECL chapters. Thus I had to suggest themes from among those I knew the Study Group had looked at and that were already in 'presentable condition'. The first meetings ended in an uproar, as it was perceived as a disadvantage to deal with 'finished' texts; one could not intervene any further, rendering the groups only talking shops. Next time, when we explicitly presented 'work in progress', we of course heard that this could not be discussed either, as it was not ready! So at the beginning there was a hellish mess that appeared to be very dangerous, so dangerous in fact that I was worried that the entire project would be whipped away in the wind.

Massive resistance followed. Stakeholders contacted politically influential players in Brussels and in their own countries. This all happened at roughly the same time that the French and Dutch people rejected the European Constitutional Treaty in referenda. The Commission was forced to react. They considered an about-face; suddenly focussed almost exclusively on the *acquis communautaire* and, with that, on consumer protection; and considered — now, thankfully, in counsel with us — an improvement of the entire process. We were also afforded some time in that the planned conference in London in July was cancelled and rescheduled for the end of September due to the horrific terrorist attacks.

What we have agreed with the Commission in the interim is not a secret, and therefore I will outline it at this point. We have adamantly refused to cut back the entire large research project to a study on the law of consumer protection. This we neither want nor are allowed to do — according to the contract, the possibility of such an about-turn is ruled out. We have, however, in part on our own suggestion, decided to fit a portion of our work to the political developments and to bear the load of additional work on our shoulders:

- Our research drafts will indicate which parts have been ‘harvested’ from, or fall within, the scope of the consumer or other EU-related *acquis* and to which provisions of the *acquis* these parts relate;
- Our drafts will contain rules applicable to all parties (private-to-private, or P-to-P, contracts) and, where appropriate, specific rules applicable to business-to-consumer (B-to-C) contracts, with the reasoning for the insertion of B-to-C rules being explained in the comments;
- Our drafts will identify policy choices/suggestions and explain their reasons in the comments;
- Mandatory rules will be clearly identified as such in the black-letter rules, and their mandatory character will be explained in the comments;
- We agreed to transmit a draft overall structure for the CFR so that a workshop on this matter can be organised;
- We accepted that the rules contained in different books will not be interwoven in such a way that it would turn out impossible to delete single books contained in our draft CFR from the final CFR;
- We agreed to participate in combined or mixed workshops on overlapping issues (e.g., the consequences of termination, withdrawal, and unjustified enrichment);
- We confirmed, regardless of some doubts on their usefulness, that the draft CFR shall contain a list of definitions (in Annex I); and
- In order to answer the criticism of the European Parliament, member states, and stakeholders that the draft rules of the CFR are too detailed, we accepted the task of trying to indicate in the final overall draft CFR which parts of the black-letter rules are specifically relevant for what the European Commission now seems to identify as the immediate use of the CFR (namely, the review of the *acquis*), though I have to admit that we do not yet really have a clue how to identify this ‘specific *acquis*-relevance’.

I still somewhat doubt that we can achieve all of these in addition to handling the current workload, which in itself remains to be managed. Above all, I remind you of the enormous effort that goes with the compilation of the national notes. However, we will persevere. Undoubtedly the time pressures that the European Commission has created also have their positive sides: we are forced to progress continuously. Nonetheless, we must also make sure that the constraints of time that we are faced with do not lead to a loss of quality in the work and that we do not lose our autonomy. This will include our going beyond the realm of general contract law in our draft CFR, most especially delving into the law of extra-contractual obligations and the above-mentioned items of property law. The rationale for this I have already explained elsewhere.¹⁶ Above all, the draft CFR will not merely tackle the *acquis*; rather, it shall follow the approach taken by the PECL — i.e., formulating a private law regime for the internal market. We are convinced that this is the correct approach to take and that to focus exclusively on the area of consumer protection would be the wrong idea. Without a general law of obligations and law of property, it would not be possible to create a specific law of consumer protection. Apart from this, we will not allow our Network of Excellence to be rerouted in an arbitrary manner; we have come too far for that. But, naturally, one must always take into account new surprises from Brussels.

5. What actually is a Common Frame of Reference?

For a researcher it is in no way easy to operate within the nest of imponderabilities of the political process. I have not yet even come to what is possibly the greatest of these uncertainties, that of what the common frame of reference actually *is*, or, in other words, what the document to be published at the end of 2009 will contain! For us researchers it has always been clear, and we felt that this was underpinned by all of the early announcements of the Parliament and Commission, that the PECL should form the model for the common frame of reference. Therefore, we took it for granted in all undertakings of the Study Group as well as the Network of Excellence that the PECL would be extended to areas that had not yet been dealt with. Accordingly, we understood and continue to understand the term ‘Common Frame of Reference’ to refer to a text bearing a resemblance to a codification. Unlike a codification, however, it is not binding and, furthermore, contains a commentary on its own rules as well as elaborate details on the law of the member states and the European Community. Our draft Common Frame of Reference document will share similarities with the American ‘Restatement’ documents, while not being identical to them. The latter would be impossible anyway, for the variations in European legal systems surpass the width of the legal spectrum in the USA;

¹⁶ C. von Bar, Drobni (eds.). *The Interaction of Contract Law and Tort and Property Law in Europe*. Munich 2004; C. von Bar. *Zur gegenständlichen Reichweite des Gemeinsamen Referenzrahmens*. Festschrift Rajski. Warsaw 2006 (in print).

there are also more languages to deal with than in the USA, if nothing else. A mere ‘restatement’ will not suffice; on occasion, we must try to formulate what appear to us to be ‘best solutions’. We must therefore submit policy choices and, moreover, insert our rules into a coherent system the like of which has thus far never been developed for Europe as an entity. In my experience, the actual difficulty of the entire undertaking is this coherent system, a difficulty that continues to be underestimated. Resolving this issue also means the development of a terminology that is understood all over Europe.

Nonetheless, in discussions with the stakeholders, and at the same time in discussions with some of the representatives of the European Commission, it became clear that there were differences in what was considered for the contents and formation of the Common Frame of Reference. Our approach would almost inevitably give credence to the oft-mentioned suspicion that in truth we want to create a European Civil Code. There thus emerged attempts to suggest a number of alternative models, including the idea that the Common Frame of Reference was to operate as a form of legal dictionary (i.e., to provide a mere catalogue of terminologies) or that we should restrict ourselves to proposing improvements to the texts of individual directives or their mutual coherence. A considerable amount of the intervention of the Commission in our research work — itself not an unproblematic procedure — can be traced back to these varied perceptions. It was against this background that the Commission introduced a new term, whose meaning is not altogether clear: the Common Frame of Reference ought to be considered a ‘toolbox’ for the improvement of the *acquis*. What then is a ‘toolbox’ aimed at improvement of European legislation in the area of private law? The term allows for a wide range of meanings. Perhaps it was chosen for this reason, and if that was the case, then it fills an obvious political function. This is because it allows for a vast range of meanings, none of them to be set in stone at this early stage. The idea of a toolbox allows those who manage and handle the political process to buy time before taking a final decision.

6. Another two years — what then?

How will the project continue at a practical level? At the beginning of this year, and therefore long before the contract with the European Commission had been signed, we formed a subcommittee. This subcommittee deals with the editing of the Draft Common Frame of Reference document that we must submit. The significant responsibility of this team is to make proposals to the plenary meetings of the individual research groups (in our case, the Co-ordinating Committee of the Study Group) as to the overall structure of the Draft Common Frame of Reference and as to the revision and amendment of the already existing rules and comments. Furthermore, the subcommittee has the task of ensuring that we members deliver those national notes still absent. At present, members of the subcommittee, on which Professor Varul represents Estonia, are busy with the integration of the PECL into the entire structure^{*17} and modernising it in the face of more recent findings.

If we do not give way under the pressures of time, we should actually succeed in presenting the European Commission with a complete draft of a common frame of reference, complete with ‘rules’, ‘comments’, and ‘notes’, by the end of 2007. This draft will contain all the provisions formulated by the research team plus those suggestions from the stakeholders that the researchers accepted, in complete independence, as improvements to their rules and comments. What then happens to the draft will, unsurprisingly, be beyond our influence. One possibility is that the draft, wholly or in part, will be published as a white paper, or in any case as a topic for intensive discussions and consultations within the politically responsible organs of the EU. The results of our work will be evaluated in light of the political atmosphere of the time. It will, of course, never be implemented word for word, but we, naturally, hope that a significant proportion will be retained. The ball will then lie in the court of the Commission, who will need a lot of strength to see the work through till the end. It would be good if they could receive far more support than they did at the start. The Governmental Conference in London in September 2005 made a contribution to improving the general position of the project. That the political atmosphere has started to ‘tilt’ in our favour has been shown in a recent survey showing an altogether different picture from that put forward by lobby groups earlier on.^{*18} When a large number of firms were asked whether they would support the introduction of a ‘European Contract Law’, the overwhelming majority of them in all member states responded in the affirmative.^{*19} The chance to create European-level private law is more realistic than ever before. It is up to us to grab hold **now**!

¹⁷ See annex.

¹⁸ Every now and then, correspondents from Brussels for national interest groups speculate in a misleading manner in their internal publications, as well as other publications, including research journals, which speculations find their way into the national press. Occasionally, these reports ‘know’ more about the researchers and their relationship with the Commission than the immediate parties themselves do. See, e.g., Wiesner. Ist das Europäische Zivilgesetzbuch noch zu stoppen? – DB 2005, pp. 871–875.

¹⁹ Telling are the results of a report published as part of a brochure for the legal firm Clifford Chance, ‘The Clifford Chance Survey: European Contract Law’. In nearly every country, the approval ratings for a European law of contract were between 80% and 100%. Only in the United Kingdom was there ‘merely’ 70% approval.

7. Annex: a possible structure for the draft Common Frame of Reference

The Draft Common Frame of Reference that has been tackled by the research teams will not be ready for some time. Before it can be made public, the members of the Study Group will publish projects covering portions of it and initiate public discussion. Also, the development of the Draft Common Frame of Reference may be subject to a number of changes. The research teams, however, have for their part already agreed on its main features²⁰:

Preamble

Fundamental principles

- General functions of a contract
- Binding force of a contract and right of withdrawal
- Good faith
- General functions of contract law
- Promoting the integration of the internal market
- Freedom of contract and its restrictions
- Protection of certain parties to the contract
- Information
- Non-discrimination
- Notion of contract and excluded contracts
- Public law

Book I General Provisions

Book II Contracts and Other Juridical Acts

Chapter 1 General provisions on contracts

Chapter 2 Pre-contractual obligations

Pre-contractual information

No general obligation to provide information

Duty to prevent use of misleading or false information

Obligation to provide information in respect of particular transactions

Availability of information on request in respect of particular transactions

Format in which information is to be provided

Specific sanctions for failure to provide information

Non-discrimination

Discrimination

Remedies

Particular remedies

Time limits

Chapter 3 Formation of a contract

General

Offer and acceptance

Withdrawal

Applicability

Duty to inform about right of withdrawal

Consequences of failure to inform

²⁰ Text in italics to be drafted by the *Acquis* Group.

Performance during withdrawal period

Exercise of right of withdrawal

Consequences of withdrawal

Connected transactions

Unwinding the contract after withdrawal

- Chapter 4 Authority of agents in relation to contracts
- Chapter 5 Validity of contracts (including illegality)
- Chapter 6 Unfair terms
- Chapter 7 Interpretation of contracts
- Chapter 8 Contents and effects of contracts
- Chapter 9 Application of the above rules to other juridical acts

Book III Contractual and Non-contractual Rights and Obligations

- Chapter 1 Performance of contractual obligations
- Chapter 2 Non-performance of contractual obligations
- Chapter 3 Particular remedies for non-performance of contractual obligations
- Chapter 4 Application of the above rules to non-contractual obligations
- Chapter 5 Conditional rights and obligations
- Chapter 6 Plurality of debtors and creditors
- Chapter 7 Change of parties
 - Assignment of right to performance
 - Substitution of new debtor
 - Transfer of one party's entire legal position (rights and obligations)
- Chapter 8 Set-off
- Chapter 9 Prescription

Book IV Specific Contract Types

Sales

- Chapter 1 General provisions
- Chapter 2 Obligations of the seller
- Chapter 3 Obligations of the buyer
- Chapter 4 Remedies
- Chapter 5 Passing of risk
- Chapter 6 Consumer goods guarantees

Services

- Chapter 1 General provisions
- Chapter 2 Construction
- Chapter 3 Processing
- Chapter 4 Storage
- Chapter 5 Design
- Chapter 6 Information
- Chapter 7 Treatment

Long-term contracts

- Chapter 1 General provisions
- Chapter 2 Commercial agency
- Chapter 3 Distribution
- Chapter 4 Franchising

Loans

[Chapter headings yet to be completed]

Personal security

Chapter 1 Common rules

Chapter 2 Dependent personal securities (suretyship guarantees)

Chapter 3 Independent personal securities (indemnities)

Chapter 4 Persons requiring special protection

Leasing of movables

Chapter 1 General provisions

Chapter 2 Period of lease

Chapter 3 Obligations of lessor

Chapter 4 Obligations of lessee

Book V Benevolent Intervention in Another's Affairs

Chapter 1 Scope of application

Chapter 2 Duties of intervener

Chapter 3 Right and authority of intervener

Book VI Non-contractual liability for damage

Chapter 1 Fundamental provisions

Chapter 2 Legally relevant damage

Chapter 3 Accountability

Chapter 4 Causation

Chapter 5 Defences

Chapter 6 Remedies

Chapter 7 Ancillary rules

Book VII Unjustified Enrichment

Chapter 1 Fundamental provisions

Chapter 2 Justification and absence of justification

Chapter 3 Enrichment, disadvantage, and attribution

Chapter 4 Reversal of enrichment

Chapter 5 Defences

Chapter 6 Relation to other rules

Book VIII Transfer of Movables

[Chapter headings yet to be completed]

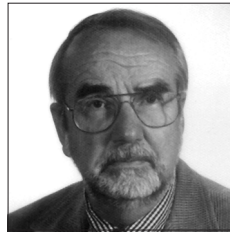
Book IX Security Rights in Movables

[Chapter headings yet to be completed]

Book X Trusts

[Chapter headings yet to be completed]

Annex 1 Terminology / definitions of terms



Peter Schlechtriem

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Basic Structures and General Concepts of the CISG as Models for a Harmonisation of the Law of Obligations

1. Some preliminary remarks

The United Nations Convention on Contracts for the International Sale of Goods (CISG) has become a tremendous success story, unexpected even by its staunchest supporters. To date, 65 countries have ratified, accepted, or approved this convention¹, among them most of the great trading nations of the world except Japan and England. Thousands of cases decided by state courts or arbitration tribunals are reported upon via electronic databases² or in legal journals; voluminous commentaries in several languages, such as English, Swedish, Polish, and German, have analysed the provisions of the convention in light of cases considered, and the contributions by legal writers to law periodicals, journals, anthologies, etc. are so numerous that it is impossible to keep track. Tens of thousands of law students all around the world are instructed in international sales law, and many become experts on the CISG by participating in the annual Willem C. Vis moot competition.

This overwhelming success has many causes, not least among them the high quality of the CISG and the craftsmanship of its drafters, who over the long ‘gestation period’ of this Uniform International Sales Law worked on it and fine-tuned its provisions and solutions in consideration of extensive comparative analyses of domestic sales laws. In this process, they took into account many critical contributions of academics and practitioners as well as of governments and international organisations such as the International Chamber of Commerce, which were published or otherwise addressed to them in the course of the elaboration of the

¹ See, as of 1 July 2005, Office of Legal Affairs, Treaty Section, United Nations, NY. Available at: http://www.uncitral.org/uncitral/en/uncitral_texts/sale/_goods/1980CISG_status.html.

² See also CLOUT, UNILEX, at <http://www.cisg-online.ch/>.

convention. Thus, they proved false the claims sometimes made that the convention was the product of theoreticians lacking contact with the reality of international trading.³ And this — i.e., the high quality of the CISG — may also explain its success in an area additional to its direct application to cross-border sales: its indirect influence as a model for other international, regional, or domestic developments and reforms of sales laws and, more generally, the law of obligations. To this I would like to devote the following tentative observations.

2. International and regional unification or harmonisation of law

The CISG has left its imprint on a number of international projects for the unification or harmonisation of rules in the field of commercial and general contract law. Basic concepts of the CISG have influenced the development of international or regional projects of unification and harmonisation on two levels. Firstly, the prerequisites for application in its Articles 1–7 have repeatedly been used as a model. Secondly, its substantive law provisions on the contractual relations of the parties to an exchange contract in general and its provisions concerning sales contracts in particular had a noticeable influence on such projects.

In international conventions, draft conventions, and model laws for certain cross-border contracts, the first threshold is always the prerequisites for application. While CISG predecessors ULIS and ULFIS⁴ had set up a rather complicated system of requirements for application of uniform law, the CISG in its Art. 1 (1) (a) uses very simple prerequisites — namely, that the parties have their places of business in different (contracting) states; in addition, Art. 1 (1) (b) of the CISG allows application if the conflict of law rules of the forum determine the law of a contracting state to be applicable law.⁵ This has proved to be quite workable, and the basic prerequisite of ‘internationality’ that the parties have their places of business in different states as the main, if not the sole and decisive, ‘trigger’ for applying a uniform law has since been used frequently — e.g., in Art. 3 of the UN Convention on the Limitation Period in the International Sale of Goods (1974) as amended by the Protocol of 11 April 1980; in the 2001 Convention on the Assignment of Receivables in International Trade in its articles 1 (1), 3 in the drafts for an instrument on the carriage of goods, and 2 (place of receipt for carriage and place of delivery in different states); or Art. 1 (3) (a) of the Model Law on International Commercial Arbitration of 1985.

Uniform law provides at first only verbal uniformity, and there is always a great danger of, in the application and/or interpretation of a uniform law, practitioners and legal writers paying only lip service to the uniform law, reading and applying it in a manner in keeping with their domestic law.⁶ Article 7 of the CISG offers several safeguards to prevent a ‘re-nationalization’ of international uniform law by, firstly, stating directives for its interpretation⁷ and, secondly, providing for gap-filling.⁸ These, too, have become almost standard clauses for international instruments — e.g., in Art. 7 of the Limitation Convention (*supra*), Art. 6 (1) of the 1983 (Geneva) draft Convention on Agency in the International Sale of Goods, Art. 4 (1) of the UNIDROIT

³ This is a criticism often voiced in countries that have not yet completed ratification, such as the UK, in order to justify this abstention (cf. A. Mullis. Avoidance for Breach under the Vienna Convention: A Critical Analysis of Some of the Early Cases. – M. Andreas, N. Jarborg (eds.). Anglo-Swedish Studies in Law. Lustus Forlag 1998, p. 326 *et passim*).

⁴ See Note 11.

⁵ I shall omit here the possibility of a reservation under Art. 95 of the CISG, which, if actualised — as, e.g., by the USA and China — could make matters more complicated since, with the great number of contracting states, Art. 1 (1) (b) and the consequences of declaring a reservation under Art. 95 have lost some of their importance and difficulties.

⁶ See also, as an example, the Spanish case of the court of first instance (*Juzgado de primera instancia*) Tudela of 29 March 2005 (No. 1016 at <http://www.cisg-online.ch>), starting with a statement that the CISG applies to the case, then going on to apply provisions of the Spanish Civil Code; for an extensive treatment with many more examples of cases respecting foreign judgements as persuasive authority, thus preserving uniformity of interpretation and application of the CISG, see C. B. Anderson. The Uniform International Sales Law and the Global Jurisconsultorium, www.cisg-online.ch/cisg/The_Uniform_Sales_Law_and_the_Global_Jurisconsultorium.pdf, sub 2: The Genesis of the CISG — a Phoenix of the Scholarly Global Jurisconsultorium.

⁷ Art. 7 (1) of the CISG states three directives for interpretation of the convention: that regard is to be had (a) for the international character of the convention, thus ensuring autonomous interpretation; (b) for the need to promote uniformity in its application, thus ensuring the persuasive authority of precedents; and (c) for observance of good faith, thus ensuring the influence of international trade practices. For details, see my comments in P. Schlechtriem, I. Schwenzer (eds.). Commentary on the UN Convention on the International Sale of Goods (CISG), second edition. Oxford: Oxford University Press 2005, Art. 7, paras. 10–18; C. B. Anderson (Note 6), sub 5: The Importance of International Case Law (with further references) *et passim*.

⁸ Art. 7 (2) CISG provides that, as a first step, a gap should be filled by uniform rules derived from principles on which the convention is based; as a second step (only), recourse is to be had to the domestic law determined by the conflict of laws rules of the forum (for details, see also P. Schlechtriem (Note 7), Art. 7, para. 27 *et passim*).

Convention on International Factoring of 1988 (Ottawa), Art. 6 (1) of the UNIDROIT Convention on International Financial Leasing of 1988 (Ottawa), Art. 7 (1) of the 2001 UN Convention on the Assignment of Receivables in International Trade, and Art. 5 of the Convention on International Interests in Mobile Equipment (Cape Town Convention) of 2001.

In the context of my paper, the effects of the substantive law provisions of the CISG on projects of international or regional — in particular, European — projects of unification or harmonisation of the law are especially interesting, and I shall sketch out in brief but a few of them.

The UNIDROIT Principles of International Commercial Contracts, published in a second, enlarged edition in 2004 by the Rome Institute for the Unification of Private Law⁹, are closely interwoven with the development of a uniform sales law through its final form, for it was there in Rome at the UNIDROIT Institute that the idea was conceived in the 1920s¹⁰ to add to the then-ongoing endeavours to unify or harmonise the law of negotiable instruments and cross-border transport in a uniform law instrument for international sales, an idea that bore fruit in 1964 in the form of the so-called Hague Uniform Sales Law Conventions¹¹, which, while in themselves not becoming a success, for only nine states ratified them, did become the basis for the later work of UNCITRAL and its final result, the CISG. So, both the UNIDROIT Principles and the Uniform Sales Law were drawn from the same well, and there was also some identity of drafters, for a number of experts who had worked on the CISG later joined UNIDROIT's working teams.¹² Thus, it is little wonder that the key solutions and central concepts of the CISG and the UNIDROIT Principles are closely related, and that they look very similar, particularly if compared with rules and codification of domestic sales laws.

The so-called Principles of European Contract Law, published in three parts — in 1995 (I), 1999 (I and II), and 2003 (III) — by a private group of scholars that grew from the small circle assembled around the founder of this project, Copenhagen's Professor of Commercial Law Ole Lando (and, therefore, was long known as the Lando Commission), to a group quite impressive in both scholarship and numbers¹³, also show similarities with the core solutions of the CISG, although, like the UNIDROIT Principles, they cover a wider area of the portion of law that Europeans tend to qualify as the law of obligations and tend to address more details, not always avoiding the risks of provisions that are too detailed. Nevertheless, the 'European Principles' have become a basis and framework for further attempts on the European level — in particular, the work of the Study Group on a European Civil Code, founded and chaired by Professor Christian von Bar of Osnabrück, Germany, and now entrusted by the EC Commission to draft a Common Frame of Reference for a European Contract Law.¹⁴

Regarding these European projects, it seems that the influence of the CISG is especially visible and strong in Europe, an impression that is further corroborated by the famous EC Directive 1999/44/EC of 1999 of the European Parliament and of the Council 'on certain aspects of the sale of consumer goods and associated guarantees', which in its definition of the 'conformity of goods' has taken its cues from the CISG¹⁵ and, thereby, introduced this key concept into the legal sales law systems of member states when they implemented the directive (see *infra* at 3).

But it must also be mentioned here that OHADA¹⁶, the Organisation of 27 African States, striving for a harmonisation of trade law equivalent to the EC's harmonisation, promulgated Uniform Rules for Contracts that obviously followed the model of the UNIDROIT Principles¹⁷ and, thusly, though indirectly, the CISG model.

⁹ The first edition was published in 1994 by the International Institute for the Unification of Private Law (UNIDROIT).

¹⁰ Concerning this early development, see O. Riese. – *RebelsZ* 1965 (29) 2, p. 1 et seq.; E. von Caemmerer. – *RebelsZ* 1965 (29), p. 101 et seq.; P. Schlechtriem. *Commentary on the Convention on the International Sale of Goods*, second edition. Oxford: Oxford University Press 2005, Introduction; C. B. Amderesen (Note 6), *sub* 2: The Genesis of the CISG — a Phoenix of the Scholarly Global Jurisconsultorium.

¹¹ Convention Relating to a Uniform Law on the International Sale of Goods, and Convention Relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods of 1 July 1964; the texts of the Uniform Sales Law ULIS and the Uniform Law on Formation ULFIS were annexed to these conventions.

¹² It is also worth remembering that work on the UNIDROIT Principles by a special working group had begun in 1980 (see the introduction to the first edition), when hope for the success of the Sales Law Conventions was very low. It could well be assumed that the founders of the UNIDROIT Principles project were also motivated by the desire to preserve the great treasure of comparative law solutions that went into the sales-related projects.

¹³ See the preface to part III, published as parts I and II by Kluwer Law International. The Hague, London, New York, pp. xiii, xv, *et passim*.

¹⁴ For details, see the contribution to this volume by Ch. von Bar, Working together Towards a Common Frame of Reference.

¹⁵ Openly conceded in the first draft of this directive of 1996, KOM (1995), p. 520, and in the response of the EC Commission to the proposals of the Parliament of 19 January 1999, KOM (1999) p. 16.

¹⁶ *L'Organisation pour l'Harmonisation en Afrique du Droit des Affaires* was founded by a treaty signed on 17 October 1993.

¹⁷ See M. Fontaine. *Le projet d'Acte uniforme OHADA sur les contrats et les Principes UNIDROIT relatifs aux contrats du commerce international*. – *Uniform Law Review* 2004 (262) 2, p. 253 *et passim* with details on OHADA itself, its member states, and the project of uniform contract rules.

3. Influence of the CISG on domestic sales and contract laws

The CISG has influenced the developments and reform of domestic laws through several channels, an obvious one being the implementation of EC directives — e.g., the Sale of Consumer Goods Directive mentioned in the preceding para. 2, which in its use of certain concepts, such as that of conformity, was given form by the CISG.

Some countries have enacted the CISG not only as their law for cross-border sales but also as their domestic sales law. The Scandinavian countries are the examples that are best known, although there are some differences in their respective implementations. While Sweden and Finland introduced the CISG alongside domestic sales laws based on the CISG, Norway enacted just one sales law — Kjøpsloven — for both international and internal sales.^{*18} Norway is not the only example of a nation implementing the CISG both as an international convention and as its domestic sales law — and, lacking codified rules on the general law of obligations, thereby provisions on breach of contract and the obligee's remedies in general. The Tokelau Islands, so far a trust territory of New Zealand in the South Pacific, which will gain independence in 2006, enacted the CISG in 2004 as a sales law both for international and for domestic sales, along with some supplementation to make it a basic set of rules for contracts in general.^{*19}

Although not as obvious, the influence of the Uniform Sales Law on new codes or on the reform of old codes might be even more important in the long run for the thesis to be advanced here that the CISG has become a kind of common sales law of the world, for the law of obligations has undergone a process of reform in many countries around the globe and the CISG and other uniform law projects have had a noticeable influence on these developments.

This is most obvious in the former socialist states, which, in the process of transforming and restructuring their societies and economic systems to accommodate democratic and market-oriented Western-style systems, also reformed and re-codified their legal systems. The CISG model was one of those considered, compared, and weighed, especially in countries that had implemented it already — or were to implement it — as their international sales law, and the Estonian Law of Obligations Act (LOA) is a noteworthy example. Since 10 of these former socialist states have become members of the European Union and had to implement the European *acquis* — i.e., the legal rules of the EU enacted as regulations, directives, etc. — they had also to implement the Directive on the Sale of Consumer Goods mentioned above, thereby instantiating another 'channel of influence' of the CISG.

But the transformation of former socialist states and their accession to the EU is but one instance of the CISG's influence on the reform and development of domestic laws in the field of sales, and contractual relations in general. Besides the countries mentioned above under 2, which have introduced the CISG as their domestic sales law and, thereby, as a general part of the law of contractual obligations, there are other countries that have reformed their law of (contractual) obligations either as part of a general civil code or in a code of the law of obligations, taking uniform law into account. The 'old' Hague Sales Laws ULIS and ULFIS^{*20} have already influenced the New Netherlands Code Civil (Nieuw Wetboek) and its Book 6 on the Law of Obligations enacted on 1 January 1992.^{*21} The German *Schuldrechtsreform* (reform of the law of obligations), which was begun in the 1980s, was from the very beginning (i.e., the thorough and lengthy expert opinions submitted to the German Ministry of Justice and, in particular, the opinions on sales and on *Leistungsstörungen* (breach of obligations) by Ulrich Huber) but also in the Draft of the *Schuldrechtsreformkommission* (Commission on the Reform of the Law of Obligations) of 1984 strongly influenced by the uniform laws ULIS and ULFIS and later influenced by the CISG, an influence that could be preserved despite later revisions by more tradition-minded members of the second reform commission.^{*22} Of course, in Germany, too, the implementation of the Consumer Goods Directive strengthened the CISG-influenced features of the new law.

But the influence reaches beyond the borders of Europe: If one analyses the New Code of Obligations of China, one finds many legal concepts and institutions familiar from the CISG, and the similarities are con-

¹⁸ For details — and criticism of this — see J. Lookofsky. *Understanding the CISG in Scandinavia*, second edition. Copenhagen 2002, para. 1; J. Lookofsky. *The Scandinavian Experience*. — F. Ferrari (ed.). *The Uniform Sales Law. Old Issues Revisited in the Light of Recent Experiences*. Milan 2003, pp. 95–127.

¹⁹ It replaced the 19th-century SGA (Sales of Goods Act) of English provenance.

²⁰ *Supra*, under 2.

²¹ See also A. S. Hartkamp. *Verbintenissenrecht*. Deel 1. Deventer: Kluwer 2004, p. 20 in regard to impossibility.

²² As to this reform and its history, see W. Rolland in L. Haas, D. Medicus, W. Rolland, C. Schäfer, H. Wendland. *Das neue Schuldrecht*. Munich: C.H. Beck 2002, p. 2 *et passim*; P. Schlechtriem. *International Einheitliches Kaufrecht und neues Schuldrecht*. — B. Dauner-Lieb, H. Konzen, K. Schmidt (eds.). *Das neue Schuldrecht in der Praxis*. Carl Heymanns Verlag 2003, pp. 71–86.

firmed by a comparative analysis of Chinese law and the CISG, as was undertaken recently in the Chinese edition of this author's book on 'Internationales UN-Kaufrecht'.²³ This is no accident, for the drafters of the new Chinese law admittedly used the CISG — which the People's Republic of China was one of the first states to implement, in 1988 — as a source of inspiration.

To evaluate the impact of the CISG on projects of unification and harmonisation as well as on domestic contract law, however, one has to examine concrete rules and solutions for concrete issues. This can be done only by analysing certain key concepts in several systems.

4. Key concepts as reflected in the provisions on remedies

The law of contracts can best be characterised and understood by its remedies in case of breach of contractual obligations. Although continental European tradition emphasises the rights and obligations of the parties, their interdependence in the case of exchange contracts, and their respective weight in the contractual web (i.e., the distinction of 'main' and 'ancillary' obligations etc.), the real test is always the consequences of breach in whatsoever a form, be it non-performance, late performance, or malperformance of the contract. Obligations and remedies in the event of their breach are, however, dependent on the degree of party autonomy granted by the respective legal systems; where, as in case of the CISG under its Art. 6 and a number of other provisions, almost all codified rules are default rules — that is, rules applicable if the parties have not agreed on other terms for their contractual relations — additional remedies, or limitations of remedies, can be established by the parties, an example being penalties or disclaimers in case of breach. These cannot be reported and compared here, but party autonomy in itself is a major point. Here, obviously, an important distinction is that involved in separating business-to-business (B2B) contracts from those with consumers and similar non-business parties. But party autonomy in the projects and legal systems considered here was not introduced by or on account of the CISG but, rather, as a rule based on the same policies as the CISG. Its mention here is intended only to remind the reader that the similarities of remedies to be elaborated upon here are only those of legal or other black-letter provisions.

Breach of contract can trigger various remedies, but the two most important are 'avoidance' (or: termination, rescission, cancellation) of the contract and damages for its breach. I shall use the terminology of the CISG, although it has been rightly observed that 'avoidance' might lend itself to misunderstandings.

4.1. 'Avoidance' on account of breach of a contractual obligation

A party aggrieved by a breach of its contract often wants to extricate itself from the contract in order to be free to conclude other contracts to secure the same interest. Although the idea of getting out of a contract impaired by breach can be found in all legal systems, the details in domestic systems have shown a great variety of technical solutions.²⁴ Three issues have to be considered: First among these is that of the requirements for an avoidance, second is the means to achieve avoidance, and third is the matter of the consequences of avoidance.

Although, as G. Treitel observed in his important comparative law analysis concerning the remedies in case of breach, avoidance as the most severe deviation from the basic principle of *pacta sunt servanda* requires a breach of some seriousness, this was only partially the case, for all legal systems of Roman law heritage knew the *actio redhibitoria* in one or the other form — i.e., the buyer's right to avoid the contract even in cases of minor defects in the goods. English law allowed and still allows, under the so-called perfect tender rule, rejection of goods not fully in conformity with the contract such as in the end results in termination of the contract even in cases of minor non-conformities.²⁵ The CISG, on the other hand, does indeed allow avoidance only in cases of very serious breach, for which it coined the concept of fundamental breach and tried to define it in Art. 25. Balance between the interests of the promisee aggrieved by a breach in getting

²³ Internationales UN-Kaufrecht, third edition. 2005; the Chinese edition of this book, by Li Huang, will be published in 2005 by Peking University Press. It compares all provisions of the CISG with their counterparts in the Chinese Law of Obligations.

²⁴ See G. Treitel. Encyclopedia of Comparative Law, Vol. VII. Tübingen: J.C.B. Mohr 1976, Chapter 16, sec. 161; still informative is E. Rabel. Recht des Warenkaufs, Vol. 1 19 – Vol. 2 19.

²⁵ Concerning this and US law in comparison to CISG Advisory Council CISG opinion No. 5 (reporter Ingeborg Schwenzer), see http://www.cisg-online.ch/publications_sub/No.2.2.

out of the contract and the interests of the promisor in breach in keeping the contract going, if possible, is struck by the institution of an additional period of time for performance, the lapse of which allows avoidance even in cases of non-serious breaches, with the exception of non-conformity.²⁶ It gives the obligor in breach a second chance to 'save' the contract if performance and saving of the contract is possible at all, and it prevents the waste of economic resources that almost always follows from a breakup of contractual relations and the unwinding of performances necessitated thereby. This system of first having a high threshold for avoidance and secondly incorporating an additional period of time (i.e., a 'second chance' for the obligor in breach, often called by its German name 'Nachfristsystem' on account of it having its legal origin in the German Civil Code (the former §§ 325 and 326, now 323 and 326 of the BGB) and the Swiss Code of Obligations (OR arts. 107 and 108) but also in mercantile practice) has proved to be very attractive and can be found in the UNIDROIT Principles in arts. 7.3.1 and 7.1.5; in the Principles of European Contract Law in Art. 9:301 and Art. 8:106 (3); and in the domestic laws influenced by this basic concept of the CISG, such as the Scandinavian laws, the Estonian LOA in § 116 (1), (2) (avoidance in case of fundamental breach) and in para. 5 in connection with § 114 (additional period of time), and the Chinese Contract Law in § 94 No. 1 (fundamental breach as non-performance on account of supervening events) and No. 3 (additional 'reasonable' period of time). Likewise, the notion of an anticipatory breach, in particular by repudiation, being the most 'fundamental' breach, as regulated in Art. 72 (1) and (3) of the CISG, has taken hold in the legal systems (re-)codified under the influence of the CISG — e.g., in § 323 (2) No. 1 of the German BGB, § 94 No. 2 of the Chinese Contract Law, or § 117 of the Estonian LOA. Of course, there are many variations, related to, e.g., partial performance or breach of instalment contracts, in the definition of 'fundamental breach' etc., but nevertheless there is a common core familiar to all jurists in the countries having introduced the CISG and the twins 'fundamental breach' and 'additional period of time' as prerequisites for avoidance in case of breach in implementing the CISG and/or these concepts as part of their domestic contract law. So, if I have to negotiate with a Chinese lawyer over a contract gone sour and perhaps, therefore, terminated, we shall speak the same conceptual language and can concentrate on the facts and the evidence.

Avoidance is brought about under the CISG by a unilateral declaration ('notice') on the part of the party aggrieved by the breach to the other party (Art. 26 of the CISG). This, too, deviates from many domestic laws not (yet) influenced by the CISG, notably the systems based on the French *Code Civil*, which require that a *résolution* (avoidance) of a contract be effected by a court decision. But it has become the standard instrument to terminate a contract in the event of breach — e.g., in Art. 7.3.2 of the UNIDROIT Principles, Art. 9:303 (1) of the European Principles, § 96 of the Chinese Contract Law, and §§ 188 (1) and 195 (1) of the Estonian LOA, among other laws. It has the obvious advantage of achieving a clear termination of the contract at once and without lengthy litigation, although, of course, such litigation may follow nevertheless if the party in breach contests the existence of the prerequisites for an effective declaration of avoidance.

Finally, there is remarkable innovation in the consequences of an avoidance — i.e., in the rules on unwinding a contract avoided on account of breach: often and traditionally (e.g., in the Italian Civil Code but also in the English Law Reform (Frustrated Contracts) Act of 1943) avoidance is regarded as a kind of invalidation of the contract resulting in an unwinding of performances under rules of unjust enrichment law. This has unwelcome side effects, for one needs ancillary rules in order to secure, or explain, the 'survival' of contract provisions on the settlement of disputes, via arbitration clauses, jurisdiction clauses, and the like. A more modern approach holds that, in essence, an avoidance keeps the contract as a framework intact, extinguishing only the main obligations to perform and reversing them insofar as performances have already taken place, thus resulting in contractual restitution claims (Art. 81 (1) and (2) of the CISG). This, basically, was followed in Articles 7.3.5 and 7.3.6 of the UNIDROIT Principles, in Art. 9:305-9:309 of the European Principles — although with some disputable variations²⁷ — and in the national codes mentioned above under 3.2.2 — e.g., in §§ 188 (2) and (3); 189; and 195 (1), (2), and (5) of the Estonian Law of Obligations Act. Again, the advantage of communicating in the same legal language (i.e., using the same basic concepts) is obvious: if, say, a contract between an Estonian and a Chinese trader is terminated on account of breach, there can be no serious dispute concerning the validity of an arbitration clause in the contract, regardless of avoidance, and even if there is a controversy over the application of the CISG, clauses on the settlement of disputes are clearly unaffected by the breach and the ensuing avoidance.

²⁶ For details, see I. Schwenzer (Note 25), *sub* No. 3.2.

²⁷ See also the critical analysis by Coen. *Vertragsscheitern und Rückabwicklung — Eine rechtsvergleichende Untersuchung zum englischen und deutschen Recht, zum UN-Kaufrecht sowie zu den Unidroit-Principles und den Principles of European Contract Law*. Berlin: Duncker & Humblot 2003, p. 253 *et passim*.

4.2. Damages

The most important remedy in the event of breach of a contract is a claim for damages. This under the CISG rests on three pillars:

1. the prerequisites of liability and excuses,
2. calculation of damages, and
3. limitation of recoverable losses (the 'foreseeability test').

Two of these — both the limitation of recoverable losses by the so-called foreseeability rule and prerequisites and excuses — have found their way into the projects and domestic legislation previously mentioned, while the calculation of damages caused by breaches concerning cross-border sales poses problems specific to international trade and, therefore, is less suited for generalisation in the field of law of contractual obligations.^{*28}

Claims for damages are triggered by a breach of an obligation arising from a contract. Since this is universally so, it would be preposterous to claim that the CISG had influenced the development of contract law rules in international or domestic projects. But it is the possibility of excuses, 'negative prerequisites' of liability, where the CISG and its Art. 79 (1) had a recognisable influence. First of all, it avoided the theoretical schism of systems basing liability on fault and those basing it on mere breach, by clearly defining the circumstances that the party in breach can raise as an excuse. This, of course, has led to diverging dogmatic interpretations, our English colleagues suspecting that the fault principle had entered through the back door of the excuses under Art. 79 (1) of the CISG^{*29}, while (German) scholars suspected seeing the devil's cloven hoof of strict contractual liability. But the basic policy underlying this excuse of, in essence^{*30}, impediments beyond control (i.e., *force majeure*) has proved to be so attractive that it is to be found in the excuse provisions of the UNIDROIT Principles (in Art. 7.1.7) and the European Principles of Contract Law (Art. 8:108) as well as in some of the new reform codes, such as in § 117 (2) of the Chinese Contract Law or § 103 (2) of the Estonian LOA.^{*31}

All legal systems have to cope with the problem of remote damages caused by breach of a contractual obligation or a non-contractual duty. Often, qualifications of the causal nexus between the first violation of an obligation or duty are used, but corresponding terms like 'direct or indirect' or 'too remote' are just verbal vessels for the gut feeling of the judge or arbitrator applying them. The CISG uses a test of 'foreseeability' as a concept for limiting recoverable losses. This is a misleading term, however, and it may be misunderstood in several ways. First of all, almost every event is imaginable and, therefore, foreseeable. If it is taken literally, almost no limitation could be achieved. Secondly, the problem of limitation of damages in case of contractual liability is quite different from the problem in cases of extra-contractual liability. In the case of contractual liability, it is, as the well-known and oft-reported history of the limitation rule and the concept of risks in the contemplation of the parties show, a consequence of an assumption of foreseeable risks in concluding a contract, while unforeseeable risks are not assumed by the contracting obligor and, therefore, have to lie where they fall.^{*32} The UNIDROIT Principles use the same concept (see Art. 7.4.4), as do the European Principles in Art. 9:503, the Estonian LOA in § 127 (3), and the Chinese Contract Law in its § 113. Unfortunately, the German reform legislators did not deal with and amend the provisions on damages, but the concept of the protective reach of obligations incurred is based on the same policy and leads to the same results.

²⁸ Cover transactions as under Art. 75 CISG are less frequent outside sales, and so are 'current prices' as used in Art. 76 of the CISG as a calculating factor.

²⁹ See also B. Nicholas. Prerequisites and Extent of Liability for Breach of Contract under the UN-Convention. — P. Schlechtriem (ed.). *Einheitliches Kaufrecht und nationales Obligationenrecht*. Baden-Baden: Nomos 1987, p. 287.

³⁰ The excuse is, of course, more differentiated than can be explained here; e.g., the counter-exception of foreseeability of an impediment beyond control is based on the policy of assumption of risks foreseen and not disclaimed in the contract.

³¹ But it must be added that the Estonian LOA provided for liability based on fault for certain contracts, too; see § 104 defining the levels of culpability.

³² The counter-exception to the exception of an excuse in Art. 79 (1) that the party in breach is liable despite an impediment beyond his control, if and insofar as the impediment was reasonably foreseeable at the time of conclusion of the contract and, nevertheless, was not disclaimed in the contract, is based on the same policy of holding someone liable for reasonably foreseeable risks as has been assumed by conclusion of the contract.

5. Price reduction

Price reduction in cases of non-conforming goods, as provided for in Art. 50 of the CISG, has a bad reputation in common law countries as a typical legacy of Roman law, the *actio quanti minoris*. The great Allan Farnsworth, one of the fathers of the CISG and the UNIDROIT Principles, once remarked, in one of the first conferences presenting the results of the Vienna UN conference (i.e., the CISG): ‘We don’t understand it and we don’t like it’³³, explaining that his (the US) delegation swallowed this concept only as a compromise. But one should have reminded him that his colleague John Honnold, another of the founding fathers of the Uniform Sales Law, in an influential article published in 1949, dealing with the unwelcome effects of the perfect tender rule (the right of the buyer to refuse goods or documents on account of the slightest deviation from conformity), pointed out in the context of the revision of the, then, US SGA that it was a mercantile practice of long standing in common law countries that the buyer instead of rejecting tendered goods not fully conforming could only reduce the price.³⁴ Price reduction is just one instance of adjusting the value relation of performance and counter-performance — the relation of the value of the goods to the price the buyer accepted paying, a relationship on which the parties had based their agreement — to the non-conformity of the goods, thereby avoiding not only rejection but also disputes over liability for damages, and it is no surprise that this instrument was accepted in the European Principles 9:401³⁵ as well as in the modern contract codes of countries whose previous sales law system already had the remedy of price reduction, while the UNIDROIT Principles, on the other hand, have no comparable rule. But being a tool for the adjustment of contracts, the European Principles have to be lauded for extending the remedy to all exchange contracts and other instances of malperformance not in conformity with the contract, a model followed by, e.g., the Estonian LOA in § 112, which allows price reduction in the event of any ‘defective performance’.

I have to stop here in order not to exceed the space allowed to me. What I have sketched out as examples is just the beginning, and more extensive probing would reveal many more examples of concepts in the CISG that have influenced international and domestic developments, thus resulting in a *lingua franca* of legal concepts used and understood all over the world and, thereby, facilitating legal communication immensely. Otherwise — i.e., if domestic laws with no concepts common to both parties and their counsel had to be used in a legal dispute — help would be required from interpreters, comparative law experts, and other auxiliaries, increasing the costs considerably and often out of proportion to the sums involved in the litigation. Thus, if a trader from the Tokelau Islands has bought goods from a Scandinavian exporter, some dispute arises from this contract, and the matter is to be tried in Tallinn under Estonian Law on account of a jurisdiction + choice of law clause, the parties and their counsels at least speak the same legal language for pinpointing the issue, which in the end might have to be tried by a court or an arbitration tribunal.

³³ E.A.Farnsworth, Rights and Obligations of the Seller. – The 1980 Vienna Convention on the International Sale of Goods. Schweizerisches Institut für Rechtsvergleich (ed.). Zürich: Schulthess 1985, p. 81 *et passim* at p. 105.

³⁴ J. Honnold, Buyer’s Right of Rejection — A Study in the Impact of Codification Upon a Commercial Problem. – U. Pa.L.Rev. 1949 (97), pp. 457–481.

³⁵ But it is telling to read in the comments that ‘this Article generalises the remedy provided by the *actio quanti minoris*’.



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Der französische Code civil im Jahr 2005 – Monument oder Gespenst?^{*1}

Im Jahre 2004 wurde das zweihundertjährige Jubiläum des Code civil mit vielen Festlichkeiten begangen, in Frankreich selbst wie auch im Ausland. Weltweit wurden 50 Kolloquien und Kongresse organisiert, sechs neue Bücher und unzählbare Artikel erschienen, eine prächtige Zeremonie im Beisein von ranghohen Vertretern aus Politik und Gesellschaft fand im März 2004 statt^{*2}, mehrere Ausstellungen waren und sind noch zu sehen, mit einer neuen Briefmarke zum Thema können die Franzosen ihre Post verzieren.

Nicht um mich für einen abgedroschenen Artikel zu rechtfertigen weise ich auf alle diese Beiträge hin, sondern um zu betonen, wie bedeutend der Code civil heutzutage ist, vielleicht nicht für alle Franzosen (die oft Code civil und Code pénal verwechseln!), sicherlich aber für alle französische Juristen. Jean Carbonnier, vielleicht der berühmteste französische Jurist im 20. Jahrhundert, nannte ihn die „constitution civile de la France“ (d. h. das bürgerliche Grundgesetz). Das Zitat wurde von Präsident Jacques Chirac wiederholt, als er die offizielle Jubiläumsfeier eröffnete. Nachdem er an den bekannten Satz Napoleons erinnert hatte: „Mein wahrer Ruhm gründet nicht auf dem Sieg in vierzig Schlachten. Was nicht auszustecken sein, was ewig leben wird, ist mein Gesetzbuch“, erklärte der Präsident: „Zweihundert Jahre später ist das Gesetzbuch von Napoleon und Portalis noch immer da, Grundstein unseres Rechtssystems, bürgerliches Grundgesetz Frankreichs, außergewöhnlicher Botschafter des französischen Rechts“.

In vielen schriftlichen oder mündlichen Beiträgen wurde bemerkt, dass die Zweihundertjahrfeier viel prächtiger war als die Zeremonie im Jahre 1904.^{*3} Die herrschende Meinung ist, dass der Code civil schon damals veraltet war, weil die sozialen Verhältnisse sich im Laufe des 19. Jahrhunderts drastisch geändert haben und der Code von 1804 schien nicht mehr wirklich auf die neuen Bedürfnisse zu antworten. Auch war das deutsche BGB erst kurz zuvor in Kraft gesetzt worden und schien den alten Code civil zu bedrohen. So sagten viele Juristen in dieser Zeit das nahe Ende des Code civil voraus und seine komplette Neufassung wurde vielfach diskutiert.

¹ Dieser Artikel ist eine neu bearbeitete Fassung eines Vortrags, den ich im September 2004 zum Eröffnungsfeier der Salzburger Summerschool über europäisches Privatrecht (von Prof. M. Rainer organisiert), gehalten habe.

² Le Code civil 1804–2004. Livre du bicentenaire. Dalloz-Litec 2004.

³ z.B.: Y. Lequette. D'une célébration à l'autre (1904–2004). – Le Code civil: un passé, un présent, un avenir. Dalloz 2004.

Auf den ersten Blick ist der Tonfall des heutigen Diskurses so negativ nicht. Der Code wird gewöhnlich – und mit vollem Recht – als ein Monument der Rechtswissenschaft und als ein wertvoller Schatz der französischen Kultur betrachtet. Man lobt seine Ästhetik, seine Ausgewogenheit zwischen dem Pragmatismus des Common law und der abstrakten Dogmatik des BGB. Sicherlich wird heute die dreiteilige, von Gaius ererbte Struktur kritisiert⁴, sie scheint aber für die Anwendung des Code civil nicht störend und hat seine außergewöhnliche Langlebigkeit nicht gefährdet. So denkt heute niemand an einen kompletten Umbau des Code civil. Lediglich Teilrevisionen sind vorhergesehen.

Hinter der prächtigen Jubiläumsfeier, hinter den bewundernden Worten kann man jedoch in vielen Vorträgen und schriftlichen Äußerungen eine tiefe Unruhe entdecken – eine Unruhe bezüglich der Zukunft des Werkes. Wie der belgische Professor Marcel Fontaine es so treffend formuliert, klingt darin eine Art „postmoderner Blues“.⁵

Haben unser schöner Code und unsere reiche, auf ihm gründende juristische Tradition, noch ihren Platz im 21. Jahrhundert? Ist der Code civil in Frankreich selbst nicht schon unheilbar veraltet und wird von der Entwicklung des bürgerlichen Rechts in den Gesetzen und in der Rechtsprechung völlig überholt? Und wenn man den Code unter internationalen Verhältnissen betrachtet, welche Rolle kann er dann noch spielen? Wird die Zukunft des Code civil nicht von innen und von außen bedroht?

Diese zwei Fragen will ich im Folgenden diskutieren. Dabei ist es nicht ikonoklastisch, sie zu stellen, wenn die Zeiten nach den Feierlichkeiten nicht zu schwierig werden sollen.

1. Der französische Code civil: von innen überholt?

Natürlich – und glücklicherweise – ist das heutige bürgerliche Recht in Frankreich ganz anders, als es 1804 im Code Napoleon war. Man kann sogar sagen, dass das bürgerliche Recht ganz verschieden ist, von dem, was man im heutigen Code civil lesen kann. Unzählige neue Gesetze, besonders seit 1960, und eine reiche Rechtsprechung haben bei vielen Sachlagen die Rechtsnormen geändert. Das ist die normale Entwicklung eines Rechtssystems, und natürlich keine Eigenart des französischen Rechtes allein, das sich entsprechend den sozialen Verhältnissen verändern muss. Man muss diese Entwicklungen aber in Betracht ziehen, wenn man über das zweihundertjährige Bestehen des Code civil spricht. Hier kann man, meiner Ansicht nach, zwei Arten von Veränderungen unterscheiden. Ein Teil der Entwicklung ist im Code civil, oder durch den Code civil geschehen – und diese Änderungen zeugen mehr von der Lebenskraft unseres Gesetzbuches als von seinem Lebensalter (A). Anders verhält es sich mit Änderungen, die im Gesetz oder in der Rechtsprechung, außerhalb oder manchmal im Widerspruch zum Code geschaffen wurden (B).

1.1. Änderungen im oder durch den Code civil

Zunächst muss man feststellen, dass viele Teile des Code Napoleons im Laufe der Zeit ganz neu formuliert wurden und heute fast nichts mehr mit dem Originaltext zu tun haben. Das wird besonders im Personen- und Familienrecht deutlich. Einige dieser Änderungen gehen bis ins 19. Jh. zurück, die meisten aber stammen aus der zweiten Hälfte des 20. Jahrhunderts: Gesetze über Minderjährigkeit (1964) Ehegüterrecht (1965), Abstammung (1972), Ehescheidung (1975, mit einer erneuten Reform 2003), elterliche Gewalt (viele Gesetze seit 1970), Erbrecht (1966, 2000). Prof. Catala hat alle Änderungen gezählt: Von den 343 Artikeln des „Titre I“ sind nur noch 39 in der ursprünglichen Form erhalten, also ungefähr elf Prozent.⁶ Nur die Artikel über die Ehe sind in diesem Teil weitgehend unberührt geblieben. Alle diese Reformen haben sich aber problemlos in den Code einfügen lassen: Die grundsätzliche Struktur bleibt unberührt, der Gesetzgeber hat die alte Nummerierung behalten, anders als in allen anderen französischen Gesetzbüchern. Und man muss natürlich sagen, dass die Hauptteile des Code über Sachen- und Schuldrecht im Laufe der Zeit fast völlig unberührt blieben: Im Sachenrecht (Titre II) bleiben 155 der 194 Originalartikel, im allgemeinen Schuldrecht 238 von 269! So stellt sich das Bild eines Greises mit vielen Prothesen ein: Zahnersatz, ein neues Herz und neue Nieren ... und doch ist es noch immer dieselbe Person, weil das Gehirn das gleiche geblieben ist. Wenn man an die Existenz der Seele glaubt, wird man sagen: Die Seele bleibt immer erhalten! Und so bleibt der Code civil immer der Code civil.

Die Seele bleibt unverändert, wenn die Rechtsprechung auch im Laufe der Zeit neue Auslegungen einzelner Artikel erlaubt hat. Kein französischer Jurist glaubt noch, dass die Bedeutung eines Textes für ewig wie in

⁴ z.B.: Fn. 2.

⁵ Les obligations contractuelles: 1804–1904–2004 et l’avenir. – Le droit des obligations contractuelles et le bicentenaire du Code civil. Sous la direction de P. Wery. Bruxelles: La Charte 2004.

⁶ Fn. 3.

der Zeit Napoleons festgeschrieben sein muss: Die Auslegung kann und muss sich mit den gesellschaftlichen Verhältnissen ändern. Zum Beispiel hat heute der Begriff „*erreur sur la substance*“ (gründlicher Irrtum) im Artikel 1110 überhaupt nicht mehr dieselbe Bedeutung wie im Jahre 1804. Auch Artikel 1121 über „*stipulation pour autrui*“ (Vertrag mit Wirkung für Dritte) gestattet eine neue Interpretation. Und es ist für mich ein Wunder zu beobachten, wie die *Cour de cassation* dem Artikel 1134 Absatz 3 über die „*bonne foi*“ oder dem Artikel 1131 über die „*cause*“ eine zweite Jugend verliehen hat, indem sie aus diesen allgemeinen Begriffen Instrumente für das vertragliche Gleichgewicht entwickelte. In diesen Fällen bleibt der Text ein Fundament. Der Sinn hat sich geändert, man hat einen Begriff mit neuer Bedeutung gefüllt, kann aber nach wie vor diesen neuen Sinn mit dem ursprünglichen Text verknüpfen. Die Änderungen geschehen hier durch den Code civil, und sie weisen darauf hin, wie anpassungsfähig dieser Code bezüglich der generellen Klauseln ist.

Anders ist es, wenn die neuen Normen, die von der Rechtsprechung begründet werden, von der gesetzlichen Basis ganz getrennt sind. In diesen Fällen findet die Entwicklung wirklich außerhalb, manchmal im Widerspruch zum Code civil statt.

1.2. Änderungen außerhalb oder im Widerspruch zum Code civil

Erstens muss man beobachten, dass viele Gesetze, die im bürgerlichen Recht Platz finden, nicht in den Code civil integriert sind, aber als isolierte Gesetze verbleiben, oder selbst in anderen Gesetzbüchern gesammelt werden. Ich spreche natürlich nicht von autonomen Rechtszweigen, die sich seit langem vom bürgerlichen Recht abgetrennt haben (Handelsrecht, Arbeitsrecht, öffentliches Recht). Vielmehr denke ich an die zahlreichen besonderen Gesetze, die heute wichtige Aspekte des Lebens der Bürger regeln und dabei dennoch außerhalb des Code geblieben sind. So haben wir im Code fünf Artikel über die deliktische Haftung, aber die in der Praxis wichtigsten Fälle des Schadensersatzrechts, die Verkehrsunfälle, sind in einem Gesetz von 1985 und nicht im Code geregelt. Wir haben die Artikel 1713 bis 1778 über Mietverträge, und besonders die Artikel 1752 bis 1762 „*Des règles particulières aux baux à loyer*“ (Besondere Regeln über den Mietvertrag eines Hauses), diese Texte haben aber heute fast keinen Sinn mehr, weil diese Verhältnisse in den meisten Fällen durch ein Gesetz von 1989 geregelt sind. Und was bedeutet heute der Titel „Von der Bürgschaft“, seit der Gesetzgeber 2003 eine besondere Regelung für alle von natürlichen Personen gegebenen Bürgschaften verkündet hat, die nicht in den Code civil, dafür aber in das Verbrauchergesetzbuch (*Code de la consommation*) eingefügt wurde?

Man kann mir entgegenhalten, dass diese Gesetze besondere Gesetze sind, die keinen Platz im Code civil finden, wo nur das „allgemeine Recht“ (*droit commun*) geschrieben steht. Zum Beispiel hätte der Code civil nur mit dem Vertragspartner im Allgemeinen, nicht mit dem Verbraucher, mit der Sache im Allgemeinen, nicht mit dem Auto, etwas zu tun. So denken viele französische Juristen, besonders wenn die Gesetze eine europäische Herkunft haben. Ich halte dem entgegen, dass auch im Code Napoleon selbst viele besondere Regelungen stattgefunden haben: Das Mietvertragsrecht unterscheidet zwischen Wohnhäusern und Landgütern, die Texte über Delikthaftung kennen nicht nur „die Gegenstände“ sondern auch die Tiere (Art 1385) und die verfallenen Gebäude (art 1386), die in der Entstehungszeit des Code civil die gefährlichsten Sachen waren. Diesem Beispiel folgend, sollte man in das „bürgerliche Gesetzbuch“ die Regelungen integrieren, die in den meisten Fällen Anwendung finden und für die „Bürger“ im alltäglichen Leben am wichtigsten sind. Sonst kann ein Problem für die Sicherheit entstehen. Auch bezüglich der Rechtskenntnis der Bürger kann es problematisch werden – besonders deutlich gilt dies für Bürger anderer Nationen – wenn das Lesen des Gesetzbuchs zu einer verfälschenden Idee des anwendbaren Rechts führt.

Dieselbe Schwierigkeit hat man heute mit den Konstruktionen der Rechtsprechung, die in einigen Fällen mit den Texten nichts mehr zu tun haben.

Zunächst muss man beachten, dass im Code Napoleon viele Lücken waren – und es gibt sie noch immer im schriftlichen Text –, nicht nur bezüglich einzelner Fragen, aber manchmal ganze Sektoren des Zivilrechtes betreffend. Das ist besonders im Schuldrecht zu beobachten. So haben die Verfasser des Code civil keinen Artikel über den dynamischen Bildungsvorgang des Vertrags formuliert: Nach der Lektüre von Artikel 1108 weiß man nur, dass der Wille (le „*consentement*“) ein grundlegendes Element des Vertrags ist, man weiß aber nicht wie und wann der Wille der Parteien den Vertrag bildet. Es war Aufgabe der französischen Rechtsprechung, von der Rechtslehre unterstützt, die Regeln über diese Fragen zu begründen. Ebenso finden wir im Code civil fast nichts über die Nichtigkeit des Vertrags, außer einigen einzelnen und sehr unklaren Artikeln. Alles was heute bezüglich dieser Frage Gültigkeit hat, alles was ich meinen französischen Studenten diesbezüglich lehren kann – und besonders der wesentliche Unterschied zwischen „relativer“ und „absoluter“ Nichtigkeit – ist das Werk der Rechtslehre und der Rechtsprechung. So auch die Regeln, die für die einseitigen Rechtsgeschäfte anwendbar sind, weil der Code nur den Vertrag, nicht aber das Rechtsgeschäft im allgemein kennt.

Bezüglich anderer Fragen waren die Regeln im Code civil zu finden. Die französische Dogmatik aber hat aus diesen Texten ganz verschiedene Konstruktionen entwickelt, in denen die Verfasser des Code civil wahrscheinlich nichts mehr von ihrem Werk erkennen würden! Zwei Beispiele dazu. Das erste ist das berühmteste: Ich spreche hier von der Rechtsprechung über die Artikel 1382 bis 1386, die die Delikthaftung regeln. Im Sinne des Code Napoleon war das Verschulden der normale Grund der Haftung und die Bedingung für einen Schadensersatzanspruch? Der Code kannte nur zwei Fälle der Haftung ohne Verschulden: Die Haftung für Tiere und die Haftung für verfallene Gebäude, die in der generellen Formel des Artikels 1384 angekündigt festgestellt? wurden. In ihrer berühmten Entscheidung „Jandheur“ von 1930 hat die französische *Cour de cassation* dieses System zur Explosion gebracht: Sie sah im Artikel 1384 ein allgemeines Prinzip der Haftung ohne Verschulden für jeden Schaden, der von einer Sache verursacht wurde. Die Artikel 1382 bis 1386 waren nie geändert worden, nur in Einzelheiten. Unser System der Delikthaftung hat aber mit dem ursprünglichen System nichts mehr zu tun. Ich werde für mein zweites Beispiel im Rahmen des Schadensersatzrechts bleiben, jetzt aber über die Verhältnisse zwischen vertraglicher und deliktischer Haftung sprechen. In einem viel beachteten Artikel⁷ hat Prof. P. Rémy unterstützt, dass im Code civil jenes, was wir heute „vertragliche Haftung“ nennen, keine Haftung im modernen Sinn ist, also die Pflicht einen Schaden zu reparieren, sondern die Verpflichtung einen gleichwertigen Ersatz zur Verfügung zu stellen. Die Partei, die den Vertrag nicht erfüllt hat, muss diese Pflicht anders, mit der Zahlung einer Geldsumme, erfüllen, auch wenn die andere Partei keinen Schaden erlitten hat. Die moderne Fassung, die hier eine Schadensersatzpflicht sieht, wäre, P. Rémy folgend, eine Erfindung Planiols vom Ende des 19. Jahrhunderts.

Es ist umstritten, ob wir an der ursprünglichen Fassung festhalten sollten, und die meisten Autoren denken es wäre besser eine Veränderung vorzunehmen. Man kann aber der Ansicht sein, dass wir jetzt eine dogmatische Konstruktion haben, die eine schwere Diskrepanz gegenüber dem Text und auch dem Geist des Code gegenüber civil darstellt. Man könnte natürlich viele andere Beispiele geben: Was bleibt heute bezüglich der Doktrin von Vertragsketten und Vertragsgruppen vom Artikel 1165 über die relative Wirkung des Vertrags? Hat der Artikel 1184 noch eine Bedeutung, seit die *Cour de cassation* 1998 und 2001 entschieden hat, dem Gläubiger gegen schlimme Nichterfüllungen ein einseitiges Kündigungsrecht zu geben?⁸ Und was kann man heute vom Erfüllungszwang eines Vertrags verstehen, wenn man den Artikel 1142 liest, der diesen Zwang ausdrücklich ausschließt, während dagegen die Rechtsprechung seit dem 19. Jahrhundert dem Gläubiger ein Recht zur Erfüllung des Vertrags zugesteht?

Kann man solchen Diskrepanzen gegenüber noch von der Anpassungsfähigkeit des Code civil sprechen?⁹ Sind sie nicht im Gegenteil der Beweis, dass der Code civil überholt ist? Kann man nicht, wie der schon zitierte Marcel Fontaine im belgischen Buch des zweihundertjährigen Jubiläums sagen: Dieser Code civil, den man so glänzend feiert, ist nur ein Gespenst!? Im selben Sinn fragt P. Rémy, ob der Code nicht schon längst tot ist, „tot, nachdem er zu lange gelebt hat“. „Haben wir noch ein Gesetzbuch?“, fragt dieser Autor.¹⁰ Diese Formulierungen sind sicherlich übertrieben. Es bleiben im Code civil noch viele Begriffe, viele Konstruktionen, die lebendig sind und die das Denken der französischen Juristen tief prägen: Der Konsensualismus der Eigentumsübertragung, unsere Fassung des Vertrags mit seinen vier Grundelementen. Jedoch kann man sagen, dass der Code civil, den wir heute in Frankreich anwenden und lehren, ein anderer Code civil ist, als der, den man lesen kann. Wenn man davon ausgeht, dass eine der Funktionen eines Gesetzbuches ist, den Zugang zum Recht leichter zu machen, ist diese Diskrepanz natürlich keine gute Sache.¹¹

Es kommt heute nicht in Frage, unseren ganzen Code civil neu zu gestalten, aber zumindest muss man die bis jetzt unveränderten Teile überprüfen, um sie mit dem tatsächlichen Recht in Einklang zu bringen. Das war der erste Zweck der beiden Revisionskommissionen, die in den Jahren 2003 und 2004 zwei Teile des Gesetzbuchs bearbeitet haben. Eine offizielle, vom Justizministerium gebildete Kommission für Sicherheitsrecht, hat im April 2005 ihren Bericht abgegeben, und dieser Teil des Code civil wird wahrscheinlich im Laufe dieses Jahres völlig geändert werden.¹² Eine andere, inoffizielle, von Universitätsprofessoren spontan gebildete, aber von der Regierung anerkannte Kommission stellt Überlegungen zur Anpassung des Schuldrechts an. Diese Gruppe sucht die wichtigsten Konstruktionen der Rechtsprechung in den Code zu integrieren, ohne die Lösungen grundlegend zu ändern.

Ist es aber noch sinnvoll, das in einer Periode zu tun, in der der Code civil und das französische bürgerliche Recht im Allgemeinen von außen bedroht zu sein scheinen?

⁷ P. Rémy. La „responsabilité contractuelle“: histoire d'un faux concept. – RTDCiv1997, s. 323.

⁸ Cass civ1 13 octobre 1998: Bull civ I n° 300; Cass civ1 20 février 2001: Bull I n° 40; Cass civ1 28 octobre 2003: Bull I n° 21.

⁹ Y. Lequette (Fn. 3).

¹⁰ Regards sur le Code. – Livre du bicentenaire, p. 99 s.

¹¹ Zu dieser Frage: P. Ancel: Une régression du modèle légal? – Forces subversives et forces créatrices en droit des obligations. Sous la direction de G. Pignarre. Dalloz 2005, p. 47 s.

¹² Den Bericht der Kommission kann man auf der Website des Justizministeriums finden: <http://www.justice.gouv.fr/publicat/rapport/rapportgrimaldi.htm>.

2. Der zweihundertjährige Code civil: Von außen bedroht?

In einer globalisierten Welt ist es natürlich unmöglich nur im Rahmen Frankreichs an die Zukunft des Code civil zu denken. Können die französischen Juristen vom internationalen Standpunkt aus heute bezüglich seiner Zukunft optimistisch sein? Auf den ersten Blick scheint ein zu großer Optimismus unsinnig, wenn man sieht, wie der Code civil als Modell weltweit und besonders in Europa an Einfluss verloren hat (A). Wir müssen aber diesen ersten negativen Eindruck überwinden, wenn wir wollen, dass unser System, unser Code civil, eine Rolle in der unvermeidlichen Bewegung in Richtung eines allgemeinen europäischen Privatrechts spielen soll (B).

2.1. Der Code civil als Modell

Alle Juristen wissen, welchen Einfluss der Code civil in ganz Europa aber auch in anderen Teilen der Welt im 19. Jahrhundert hatte.^{*13} Dieser Einfluss war nicht nur eine Folge der napoleonischen Kriege und später des Kolonialismus, besonders in Afrika und im südwestlichen Asien. Viele Staaten haben auch im Laufe des 19. Jahrhunderts das französische Gesetzbuch als Modell gewählt, nicht nur aufgrund seiner formellen Qualitäten, sondern auch weil der Inhalt dieses Gesetzbuches, das von den Idealen der französischen Revolution geprägt ist, auf die Bestrebung der Völker nach Freiheit gute Antworten fand. So kann man den wichtigen Einfluss des Code civil besonders in Südamerika erklären.

Jeder weiß aber auch, dass die Situation heute eine ganz andere ist. Am Anfang des 20. Jahrhunderts hatte der hundertjährige Code civil natürlich die Konkurrenz des jungen BGB und in geringerem Maße die des schweizerischen Gesetzbuches zu befürchten. Und viele Gesetzbücher, die ursprünglich fast nur Kopien des französischen waren, wurden durch Begriffe der pandektistischen Tradition erneuert. Der neue *Codice civile* in Italien von 1942 ist ein bekanntes Beispiel. Nach und nach hat der Code civil seine Rolle als wichtigstes Modell verloren. Die meisten neuen Kodifizierungen scheinen heute eine Mischung mehrerer Traditionen, wobei das *common law* oft eine Hauptrolle spielt und die Regeln, die aus dem französischen Recht kommen, ziemlich selten sind. So zum Beispiel der neue Code civil in Quebec. Auch in Afrika, wo viele Gesetzbücher dem französischen Code civil noch sehr nah sind, hat die OHADA, die jetzt ein allgemeines Vertragsrecht vorbereitet, ihr Modell in den Prinzipien des europäischen Vertragsrechts gefunden. Im Laufe eines Gesprächs mit meiner estnischen Kollegin Irene Kull war ich sehr erstaunt und ein bisschen bekümmert, weil sie als Quellen des neuen estnischen Gesetzbuches zwar das niederländische Gesetzbuch, das Common law, den Code civil von Quebec, von Louisiana und die Prinzipien für europäisches Vertragsrecht der Lando Kommission nannte. Kein Wort aber fiel über den französischen Code civil. So hat mit vollem Recht mein französischer Kollege Prof. Revet als Abschluss des Buches „Code civil et modèles“ seinen Vortrag wie folgt gegliedert: „I - Le Code civil fut un modèle; II - Le Code civil n'est plus un modèle“ (Der Code civil war ein Modell; Der Code civil ist kein Modell mehr).^{*14}

Man kann auch glauben, dass unser Code civil, der die staatlichen Gesetzgeber nicht mehr inspiriert, auch die Vertragsparteien im internationalen Handel nicht mehr interessiert, wenn sie für ihren Vertrag ein nationales Recht wählen. Auf dem Markt der Rechte der Welt ist vielleicht unser so traditionsreiches, so kompliziertes Vertragsrecht nicht sehr wettbewerbsfähig. Soll man deshalb mit Professor Denis Tallon, der in der Lando Kommission eine große Rolle spielte, schließen, dass unser Code civil die anderen Nationen nicht mehr interessiert oder selbst – ich zitiere ihn – dass er im Ausland ein „repoussoir“ (Kontrastfigur) ist?^{*15}

Mit Sicherheit nicht! Ich glaube, dass der französische Code civil für viele ausländische Juristen sein enormes Prestige behalten hat. Und dieses Ansehen kann jeder ermesen, der die hohe Zahl der Kongresse und Kolloquien, die im Jahr 2004 in der ganzen Welt anlässlich des Jubiläums organisiert wurden, betrachtet. Ich habe ungefähr 36 Veranstaltungen über den alten Code gezählt: In Belgien natürlich, in Kanada, in Mexiko, in Peru, in Russland, in der Ukraine, im Libanon. Sicher bleibt unser Code in der Welt ein Monument der juristischen Wissenschaft. Das Problem ist, dass er nicht wie ein Museum besucht, wie ein Denkmal betrachtet werden darf. Er soll nicht nur ein *lieu de mémoire* sein, aber ein lebendiges Haus. Er darf nicht, wie die Schlösser des bayerischen König Ludwig II, nur eine schöne Ausstattung und vom Leben getrennt sein. Wir französischen Juristen müssen uns dringend davon überzeugen, wenn wir eine Rolle in der Gestaltung eines allgemeinen europäischen Privatrechts spielen wollen.

¹³ Zu dieser Frage: Code civil et modèles: des modèles du Code au code comme modèle. Dir T. Revet. – LGDJ 2005.

¹⁴ *Op cit*, p. 593.

¹⁵ Fn. 3.

2.2. Der Code civil im Rahmen der Entstehung eines allgemeinen europäischen Privatrechts

Im europäischen Rahmen nimmt diese Bewegung zwei sehr verschiedene Wege, die keine Bedrohung für den französischen Code civil zu sein scheinen.

Erstens muss man die Rechtsnormen erwähnen – Ordnungen und Rechtslinien – die von der Europäischen Gemeinschaft erlassen werden. Obwohl diese Texte zunächst keinen Einfluss auf das bürgerliche Recht hatten, bleibt der Code civil von diesen neuen Normen heute nicht mehr unberührt. So haben wir 1998 in Frankreich, als wir (sehr spät) die Richtlinie über Produkthaftung umsetzten, in den Code civil in Artikel 1386-1 bis 1386-18, die den alten Artikeln über die Delikthaftung folgen, integriert. Diese Einbeziehung geht aber nicht ohne Schwierigkeiten vonstatten, weil die von außen erlassenen Texte, an denen der Staatsgesetzgeber nichts ändern soll, nicht immer gut zur alten Struktur passen. In diesem konkreten Fall haben wir große Schwierigkeiten, um die neue Haftung mit dem Unterschied zwischen Delikthaftung und Vertragshaftung zu verbinden. So kann man verstehen, dass diese Regelungen von vielen französischen Juristen als Fremdkörper betrachtet werden. Deshalb bleiben diese europäischen Normen in den meisten Fällen außerhalb des Code civil. So wurde die Richtlinie über rechtsmissbräuchliche Klauseln in das Verbrauchergesetzbuch integriert, auch wenn dieses Schutzmittel der schwachen Vertragsparteien jetzt ein wesentlicher Teil unseres Vertragsrechts ist. Durch eine endgültige Regelung vom 17. Februar 2005 hat die französische Regierung nach heftigen Auseinandersetzungen in der Rechtslehre die Richtlinie von 1999 zu bestimmten Aspekten des Verbrauchsgüterkaufs und der Garantien für Verbrauchsgüter in das Verbrauchergesetzbuch umgesetzt, ohne (wie z.B. in Deutschland und Österreich) die Gelegenheit zu ergreifen, die alten Texte des Code civil mit der unklaren Unterscheidung zwischen Defekt und Vertragswidrigkeit zu erneuern. So haben wir jetzt in Frankreich drei verschiedene Regelungen der Garantie: Die allgemeine im Code civil, die in der Wiener Konvention für internationale Kaufverträge geltende und die europäische Regelung für Verbraucher! In diesen Fällen hat man die Reinheit des Code civil bewahrt, man trägt aber dazu bei, den Code civil von dem in den meisten Fällen anwendbaren Recht zu trennen.

Eine ganz andere Frage stellt sich zu den aktuellen Entwürfen allgemeiner Privatrechtregelungen im Rahmen Europas. Diese Entwürfe stammen nicht von den europäischen Behörden, auch wenn die Kommission sie heute übernimmt. Sie sind in den Universitäten geboren, sie sind Werke der Rechtslehre und entstanden im Rahmen einer wissenschaftlichen Tradition, die in einigen Fällen im historischen und besonders im romanistischen Erbe die Wege einer Erneuerung des Privatrechts sucht. Hier denke ich besonders an die „Prinzipien des europäischen Vertragsrechts“ der Lando Gruppe, an das „Europäische Vertragsgesetzbuch“ der Akademie europäischer Privatrechtswissenschaftler und noch mehr an den Entwurf eines europäischen Gesetzbuches unter der Leitung von Professor von Bar. Bezüglich dieser Entwürfe sind noch heute viele französische Juristen sehr reserviert und zeigen in nicht wenigen Fällen eine eindeutig Abneigung¹⁶. Als Professor von Bar vor zwei Jahren vor der französischen Cour de cassation einen Vortrag hielt, und (vielleicht unvorsichtig) vorhersagte, dass in fünf Jahren der europäische Code civil in allen Universitäten studiert werden würde, konnte man in den französischen Fachzeitschriften sehr heftige Reaktionen lesen¹⁷ – einige aus wenig sachlichen Gründen: Zum Beispiel, dass die Sprache in den Sitzungen dieser Gruppen englisch und nicht französisch sei oder dass von Bars Entwurf ein Mittel der deutschen Hegemonie in Europa wäre! Tatsächlich empfinden es viele französische Juristen als schwer erträglich, dass der so eng mit der nationalen Kultur verbundene Code civil in einigen Jahren von einem neuen, seelenlosen Gesetzbuch ersetzt werden könne. So betreiben heute viele die „Politik des leeren Stuhls“ und meinen so an der Erhaltung unserer rechtlichen Tradition mitzuwirken.

Meiner Ansicht nach ist dieses Abkapselungsverhalten sehr schädlich. Wenn wir etwas von unserem Code civil retten wollen, müssen wir es akzeptieren, unsere Regeln mit anderen Traditionen zu konfrontieren. Wir dürfen unsere Begriffe und unsere Strukturen nicht außerhalb der Diskussion belassen. Jedes Jahr nehme ich mit Kollegen aus ganz Europa in Salzburg an einer „Summerschool“ teil, wo wir einige Aspekte der nationalen Privatrechte vor Studenten (die auch aus ganz Europa kommen) vergleichen. Oft arbeiten wir am Beispiel der Eigentumsübertragung und wir sehen, dass, auch wenn die Begriffe sehr verschieden zu sein scheinen, die Lösungen nicht immer so weit voneinander entfernt sind. Das ist eine der wichtigsten Lektionen des Rechtsvergleiches und ich denke, ich hoffe, dass eine bessere Kenntnis der verschiedenen europäischen Rechte langsam zu einer fast „natürlichen“ Harmonisierung des bürgerlichen Rechts in Europa führen wird. Sicher ist dieses Umdenken nicht immer leicht für Juristen meiner Generation, die noch zu oft Gefangene ihrer Traditionen sind; besonders für französische Juristen, die lange überzeugt waren, dass ihr Code der

¹⁶ z.B.: B. Oppetit. *Droit commun et droit européen*. Mélanges Y. Loussouarn. Dalloz 1994, p. 311–319 ; L'eurocratie ou le mythe du législateur suprême: D. 1990, chron. p. 76; G. Cornu. *Un code civil n'est pas un instrument communautaire*, D. 2002.351; Ph. Malinvaud. *Réponse – hors délai – à la Commission européenne: à propos d'un Code européen des contrats*, D. 2002.

¹⁷ z.B.: Y. Lequette. *Quelques remarques à propos du projet de code civil européen de M. Von Bar*, D. 2002.2202.

König der Gesetzbücher ist. Im Einklang mit anderen französischen Juristen^{*18} denke ich, dass unsere Mitwirkung bei der Entwicklung des allgemeinen Privatrechts eine Notwendigkeit ist, damit ein Teil der Seele unseres Rechts, und besonders unseres französischen Code civil, sich in diesem allgemeinen Recht wiederfindet.

¹⁸ B. Fauvarque-Cosson. Faut-il un Code civil européen? – Revue trimestrielle de droit civil 2002, p. 463. Pensée juridique française et harmonisation européenne du droit. Société de législation comparée. Coll. Droit privé comparé et européen. Paris 2003; C. Witz. Plaidoyer pour un Code européen des obligations: D. 2000, chron. 79.

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The Main Features of the New Lithuanian Contract Law System Based on the Civil Code of 2000

1. Introduction

The Seimas (Parliament) of the Republic of Lithuania adopted the new Civil Code of Lithuania on 18 July 2000.¹ The new code entered into force on 1 July 2001, replacing the Civil Code of 1964. The adoption of the new Civil Code was a great event in the life of Lithuanian society, as this legal act must be described as the 'Constitution of Private Law', which establishes the main principles of the civil relationships between legal and natural persons. Many new rules were introduced by the Civil Code in company law, family law, law of succession, property law, law of obligations, and other areas. However, from the economic point of view, the most important changes took place in the area of contract law. The Civil Code of 1964 provided only a few general rules and some special rules regarding specific contracts. For example, the Civil Code of 1964 had no General Part of Contract Law, and it did not establish the principle of freedom of contract. Such a situation caused by the planned economy was understandable because the main role in the planned economy belonged not to the contract but to the plan.

In the market economy, contract law plays a crucial role. A contract is the legal form of business relationships. The market economy, based on private property and private initiative, needs effective rules concerning contracts. These must provide legal mechanism for a fair and equal realisation of such private initiatives. Therefore, the main task in the process of drafting the new Civil Code was to create new, modern and effective contract rules, which had to correspond to the changed economic situation. On the other hand, contract law is an institution of private law in which the ideas of unification and harmonisation of law are realised in the broadest manner. Thus, the creation of new national rules for contracts means in fact the

¹ Valstybės žinios (Official Gazette), 2000, No. 74-2262 (in Lithuanian).

transformation of results of the regional or transnational unification and harmonisation of contract law at the level of the national legal system. This is true in respect of the new Civil Code of Lithuania — many contract law provisions of this code were borrowed from such well-known instruments of unification and harmonisation of contract law as the UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law.^{*2}

The aim of this article is to describe the main rules of Lithuania's General Part of Contract Law and to demonstrate how some results of international unification and harmonisation of contract law have been integrated into the new Civil Code of Lithuania.^{*3}

2. The place of contract law in the structure of the Civil Code

The contract as a bilateral legal transaction is one of the sources of obligations. This means that contract law is one of the institutions of law of obligations. Naturally, the main rules of contract law are contained in Book 6 of the Civil Code, titled 'Law of Obligations'. Due to the systematic nature of the Civil Code, the contract law provisions are divided into two portions in Book 6 — the General Part (arts. 6.154–6.228) and the Special Part (arts. 6.305–6.1018) of Contract Law. The rules of the General Part provide the notion of a contract; kinds of contracts; principles of contract law; and the main requirements involved in the formation, interpretation, and performance of contracts. The rules of the General Part are *lex generalis* and are applicable to all kinds of contracts except in cases where special rules establish different provisions.

The Special Part, which regulates specific contracts, provides *lex specialis* rules for a number of specific contract types. These are foreseen in this part as being traditional contracts, such as contracts of sale, loan, and lease, and, secondly, modern contracts, like factoring, franchising, and leasing contracts. In total, the Special Part includes rules in respect of 53 specific contract types. In addition, article 6.155 of the Civil Code provides that special rules for certain contracts may be established by other laws. This provision is already being realised in practice; for example, public procurement contracts, contracts for the public sale of securities, and some other specific contract types are regulated not by the Civil Code but by special laws.

Book 6 also contains the General Part of the Law of Obligations (arts. 1.1–6.153). The rules of this General Part specify sources of obligations, modalities of obligations, rules for the fulfilment of obligations, grounds for the nullification of obligations, and so on. Unless any exceptions from general rules are established by norms regulating contractual relationships, the provisions of the General Part that contain regulation covering general questions concerning the Law of Obligations must likewise be applied to contracts. For example, rules on the fulfilment of obligations (arts. 6.38–6.65) are, *mutatis mutandis*, applied in respect of contracts as well.

Rules on contractual liability are of two kinds. General rules on contractual liability are provided in Chapter XXII, 'Civil Liability', of Book 6. This chapter provides general rules, common to contractual and tortious liability, and specific rules applicable only in the case of contractual liability (arts. 6.256–6.262). Special rules of contractual liability applicable to specific contracts are provided by the corresponding articles of the Special Part of Contract Law dealing with specific contract types.

As has already been noted, due to the systematic nature of the Civil Code, other books of the Civil Code are also of great importance in contract law. Book 1, 'General Provisions', provides general rules on legal transactions, validity of legal transactions, limitation of actions, and so forth. These rules are applicable to contracts as well. For example, Part 2 of article 6.154 establishes what contracts are subject to the norms of the Civil Code that regulate bilateral and multilateral transactions (arts. 1.63–1.96). Thus, for example, the rules regarding nullity of a contract are found in Book 1, not in Book 6. There is one more reason for Book 1 being especially important for contract law. This book contains the rules on private international law, including the rules concerning the law applicable to contractual relationships (arts. 1.37–1.42).

Book 2, 'Persons', also includes some important rules relating to contract law. The relevant articles of Book 2 establish provisions addressing the legal capacity of natural and legal persons (including contractual capacity), restriction of capacity, rules on agency, and rules on the validity of contracts made by agents and by management bodies of legal persons.

² For more information, see V. Mikelenas. Unification and Harmonisation of Law at the Turn of the Millennium: The Lithuanian Experience. — Uniform Law Review 2000/2, pp. 253–261.

³ For a more detailed introduction to Lithuania's new contract law, see D. Mikeleniene, V. Mikelenas. Contracts. Lithuania. — International Encyclopedia of Laws. Contracts. The Hague: Kluwer Law International 2004.

The provisions of Book 3, 'Family', are linked with special rules regulating contracts and contractual capacity in the area of family law. For example, relevant articles of Book 3 establish special requirements for the form and content of a marriage contract (arts. 3.101–3.108) and special provisions on the validity of contracts related to the disposal of assets that belong to family property or are in the common ownership of spouses.

As Book 4, 'Real Rights', deals with various real rights — ownership, possession, mortgage, servitudes, etc. — its rules are important in contract law for several reasons. Firstly, the rules of this book establish provisions concerning the moment of transfer of ownership. Secondly, the rules in this book provide protection of the good-faith possessor of things acquired under an onerous contract. Thirdly, the relevant articles impose special requirements for the form and content of some kinds of contracts on real rights, such as mortgage and pledge contracts (arts. 4.170–4.228).

Some important rules for contract law purposes may be found in Book 5, 'Succession'. Examples include rules on the liability of heirs for the contractual obligations of a deceased person (arts. 5.50–5.67) and rules on the voluntary division of the estate between heirs upon succession (arts. 5.69–5.70).

3. Principles of Lithuania's Contract Law

The main principles of Lithuania's Contract Law distinguished by the doctrine of law are freedom of contract, good faith, consensualism, *pacta sunt servanda*, the equality of parties, etc.⁴ Some of these principles are distinctly determined by the Civil Code. For example, article 6.156 establishes the principle of freedom of contract. According to this article, the content of the principle of freedom of contract consists of several elements. First of all, freedom of contract means that the parties are free to enter into contracts and determine their mutual rights and duties at their own discretion. Thus it is recognised that a contract is the result of the free expression of the will of the parties and it is prohibited to compel another person to conclude a contract, except in cases when the duty to enter into a contract is established by law or a free-will engagement. For example, in the event of a public contract, a legal person (businessman) who renders services or sells goods to an indefinite number of persons — i.e., to everyone who makes a request (enterprises in transport, communications, electricity, heating, gas, water supply, and other areas) — is obliged to enter into contracts with the consumers (art. 6.161).

Another element of the principle of freedom of contract opens up the possibility for the parties to conclude contracts other than those that are established by the code if this does not contradict laws — i.e., so-called innominate contracts. The parties may also form a contract that contains elements of contracts of several classes. Such contracts are governed by the norms regulating the separate classes of contracts unless otherwise provided for by the agreement of the parties or this contradicts the essence of the contract.

One more element of the principle of freedom of contract is the right of the parties to specify the conditions of a contract at their own discretion, except in those cases where certain conditions of a contract are determined by requirements set forth by law. Where the conditions of a contract are established by a non-mandatory law rule, the parties may agree on non-application of these conditions, or they may agree on any other conditions. If the parties do not enter into such agreement, the conditions of a contract must be determined in accordance with the non-mandatory rules. Where particular conditions of a contract are not regulated either by laws or by the agreement of the parties, in cases of dispute such conditions are determined by a court on the basis of consideration of usages and the principles of justice, reasonableness, and good faith, as well as by application of analogies to statutes and the law.

The second main principle of Lithuania's Contract Law as established by the Civil Code is good faith. According to article 6.158, all parties to a contract are obliged to act in good faith and in accordance with the principle of fair dealing in their contractual relationships. The parties may not change or exclude by their agreement the duty to act in good faith or that of fair dealing. This principle is not just a significant rule governing the behaviour of parties to a contract. It is also an effective tool for the courts in deciding civil cases related to disputes between parties to a contract. For example, in one of its recent cases, the Supreme Court of Lithuania ruled that, notwithstanding the fact that there is no duty to enter into a contract, it is nevertheless the duty of both parties to act in good faith during the negotiations.⁵

The principle of *pacta sunt servanda* is established by article 6.189, which provides that a contract formed in accordance with the provisions of the law and valid has the force of law between its parties. A contract binds the parties not only as to what it expressly provides but also in all the consequences deriving from its nature or determined by law. A contract must be performed by the parties in a proper way and in good faith

⁴ V. Mikelenas. Contract Law. General Provisions of Contract Law: A Comparative Study. Vilnius: Justitia 1996, pp. 89–90.

⁵ Supreme Court, judgement of 19 January 2005, Case 3K-3-35/2005.

(art. 6.200). However, there are several exceptions to the principle of *pacta sunt servanda*: article 6.204 of the Civil Code provides an institution of changed circumstances. According to this article, the performance of a contract is considered to be obstructed under such circumstances as fundamentally alter the balance of contractual obligations — i.e., either the cost of performance has essentially increased or the value thereof has essentially diminished. In the event that the performance of a contract becomes obstructed, the aggrieved party has the right to make a request to the other party for a modification of the contract. Such a request must be made immediately after the occurrence of obstructions, and the grounds on which the request is based must be indicated therein. The request for the modification of the contract does not in itself entitle the aggrieved party to the right to suspend performance of the contract. Where within a reasonable time the parties fail to reach an agreement on the modification of the contractual obligations, any of them may bring an action before a court. The court may dissolve the contract and establish the date and terms of its dissolution or modify the conditions of the contract with a view to restoring the balance of the contractual obligations of the parties. Other exceptions to this principle are the doctrines of impossibility of performance, *force majeure*, and gross disparity of the parties.

The principle of consensualism, as the opposite of the principle of formalism, means that the agreement of the parties is the sufficient (the only necessary) element of a contract. The Civil Code defines a contract as an agreement of two or more persons to establish, modify, or terminate legal relationships by which one or several persons make themselves beholden to one or several other persons to perform certain actions (or to refrain from performing certain actions) while the latter persons obtain the right of claim (art. 6.154). According to article 6.159, the agreement of legally capable parties is the essence of the contract. The form of the contract is a necessary element of the contract only in cases where this is directly prescribed by law in a mandatory manner.

The principle of equality of parties is guaranteed by special rules on the formation of contracts (e.g., rules regarding standard terms of contracts) and by the institutions of gross disparity of parties (art. 6.228) and changed circumstances, among others.

4. Types of contracts

Classification of contracts into various types according to different criteria is the task of legal doctrine. However, keeping in mind that classifications are important for a proper qualification of contractual obligations, interpretation of a contract, and application of the corresponding legal rules, the Civil Code directly provides several criteria for the classification of contracts.

First of all, it is clear from article 6.160 of the Civil Code that all contracts are divided into two large groups: commercial contracts and consumer contracts. Commercial contracts are those contracts concluded by natural or legal persons for commercial (business) or professional purposes. A consumer contract is a contract for the acquisition of goods or services that is concluded between a natural person (the consumer) and a person who sells such goods or services (the supplier) for purposes not related to the consumer's commercial or professional activities — i.e., for the satisfaction of the consumer's personal, family, or household needs, as opposed to needs related to business or professional activity (Part 1, art. 1.39). It is very important to make the distinction between commercial and consumer contracts, as their legal regulation differs in the emphasis consumer contracts place on the priority of protection of the consumer's rights. For example, the Civil Code provides some special rules concerning the formation, content, and performance of a consumer contract (in, e.g., art. 6.188). As has already been mentioned, these rules are intended for the protection of the consumer's rights and interests, as the consumer is the weaker party to the contract. But these rules are not applied in respect of commercial contracts.

Another criterion in the classification of contracts is the manner of the conclusion of a contract. The Civil Code provides for two kinds of contracts: contracts entered into as the result of mutual agreement through negotiations and contracts of adhesion (Part 2, art. 6.160). A contract of adhesion is a standard contract — i.e., a contract containing standard contractual terms. According to article 6.185, standard terms of contract are provisions that are prepared in advance for general and repeated use by one contracting party without their content being negotiated with the other party and that are used in the formation of contracts, again without negotiation with the other party. The Civil Code provides special rules applicable only to standard contracts. These special provisions regulate the formation of standard contracts, disclosure of standard contract terms, battle as to forms, surprising standard contract terms, and so on. For example, according to Part 2 of article 6.185, standard contract terms prepared by one of the parties are binding for the other if the latter was provided with an adequate opportunity to become acquainted with said terms.

The introduction of one of the special kind of contracts — a public contract — can be explained by the difficulties of the period of transition from planned economy to market economy. There still remain some monopolies in various sectors of the economy. Therefore, it is necessary to provide certain legal protection

for market participants against possible abuse of a dominant position by these monopolies. One of the tools of such protection is the institution of the public contract. A public contract is defined by article 6.161 of the Civil Code as a contract concluded by a legal person that renders services or sells goods to an indefinite number of persons (as mentioned above, to everyone who so requests). Freedom of contract in the case of a public contract is limited by the mandatory rules concerning the formation and content of contracts. For example, in rendering services or selling goods, any legal person (businessman) is bound to enter into contracts with every person who applies for those services, with the exception of cases approved in accordance with the procedure established by law. When concluding public contracts, a legal person (businessman) may not give preference to one or another person except in cases provided for by the law. Prices and other conditions of goods and services under public contracts must be equal for all consumers of the same category, except in cases expressly provided for by law where preferential conditions may be applied to separate categories of consumers. In the cases specified by law, a legal person (businessman) is obliged to submit standard conditions of a public contract to be approved by a relevant state institution. In addition, in cases specified by law, public contracts may be concluded in accordance with standard conditions approved by the corresponding state institution and obligatory for both parties.

Article 6.160 designates some other kinds of contracts as well: unilateral and bilateral contracts; onerous and gratuitous contracts; consensual and real contracts; contracts of successive performance and of instantaneous performance; and aleatory and commutative contracts. Such classification of contracts according to the above-mentioned criteria stems from the doctrine of law and is important in the decision of practical questions on the conclusion, performance, and interpretation of a special kind of contract.

5. Pre-contractual relationships

Among the totally new provisions of the Civil Code are the rules on the pre-contractual relationships of parties. These rules were introduced for several reasons. First of all, the reality is that many contracts, especially commercial ones, are the result of protracted negotiations between the parties, and such a negative situation needed to be changed. Another reason was the lack of legislative provisions in this respect. This used to cause some difficulties for courts' practice; e.g., there was no clarity as to how to qualify the pre-contractual agreements between the parties and how to resolve the issue of pre-contractual liability.

According to article 6.163 of the Civil Code, parties are free to begin negotiations and negotiate, and are not liable for a failure to reach an agreement. However, in the course of pre-contractual relationships, parties must conduct themselves in accordance with good faith. There are some practical examples — instances of acting in bad faith in pre-contractual relationships. For example, a party is considered to be in bad faith if entering into negotiations or continuing them without intending to reach an agreement with the other party.*⁶

The second duty of the parties in pre-contractual relationships is the duty to disclose information. According to Part 4 of article 6.163, the parties are bound to disclose to each other the information they have that is of essential importance for the conclusion of a contract.

The third duty of the parties in pre-contractual relationships is the duty of confidentiality — where in the course of negotiations one party furnishes the other with confidential information, the party that has learned or received such information is under the obligation not to disclose it or use it unlawfully for its own purposes, irrespective of whether a contract is subsequently concluded (art. 6.164). Non-disclosure of important information or violation of the duty of confidentiality is also considered to be acting in bad faith. A party acting in bad faith during negotiations is liable for the damages caused to the other party.

Of special interest is a specific type of contract — the preliminary contract — covered in the new Civil Code. According to article 6.165, a preliminary contract is an agreement of parties by which they obligate themselves to conclude in the future another, principal contract under the conditions negotiated in the agreement. As a prerequisite of validity the Civil Code provides that the preliminary contract must be made in writing. In the preliminary contract, the parties are obliged to establish a time limit within which the principal contract must be formed. In the event that a time limit is not established in the preliminary contract, the principal contract must be formed within one year from the date of the conclusion of the preliminary contract. If, after the conclusion of the preliminary contract, a party without due grounds avoids entering into, or refuses to enter into, a principal contract, he is bound to render compensation to the other party for damages inflicted. In the case where the parties fail to form a principal contract within the time limit determined in the preliminary contract, the obligation to form that contract is terminated.

⁶ V. Mikelenas. Commentary of Book VI of the Civil Code. Vilnius: Justitia 2003, p. 256.

6. Formation of contracts

The rules on the formation of contracts (arts. 6.162–6.188) correspond to the main provisions of the UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law. According to article 6.162 of the Civil Code, a contract is concluded either by the proposal (offer) and the assent (acceptance) or by any other actions of the parties that are sufficient to show their agreement. Where the parties agree on all essential conditions of a contract, the contract is deemed effective, even if the parties have reserved an agreement as to secondary conditions. If the parties do not reach agreement on the secondary conditions, the dispute may be resolved by the court taking account of the nature of the contract; non-mandatory rules; usages; and the principles of justice, reasonableness, and good faith.

A contract is considered to be formed at the moment when the offeree's acceptance of conclusion of the contract reaches the offeror, unless otherwise provided for by the contract. The place of contract formation is considered to be the place where the offeror's residence or his business is located, unless otherwise provided for by law or the contract (art. 6.181).

An offer is defined as a proposal for concluding a contract such as is sufficiently definite and indicates the intention of the offeror to be restricted in his rights by a contract and to be bound in the case of acceptance (art. 6.167). An offer may be addressed to a definite person or to an indeterminate number of persons (an offer to the public). An offer to the public is a proposal for concluding a contract where said proposal is addressed to everyone, examples being the display of goods with the indicated prices on the shelves in a shop or in a shop window and a promise to pay for the performance of certain actions. Price lists, prospectuses with prices, catalogues including prices, tariff lists, and other informational materials are not considered to be an offer to the public unless there are exceptions established by law that indicate otherwise (art. 6.171).

An offer enters into effect when received by the offeree. An offer, even if it is irrevocable, may be revoked by the offeror if notice of revocation reaches the offeree before or at the same time as the offer (art. 6.168). Until a contract is concluded, an offer may be revoked if the revocation reaches the offeree before he has dispatched the acceptance. Nevertheless, an offer cannot be revoked if it is indicated therein, whether by statement of a fixed time limit for acceptance or otherwise, that it is irrevocable, or if there were reasonable grounds for the offeree to rely on the offer as being irrevocable and he acted accordingly (art. 6.169). An offer loses its effect when notice of its rejection reaches the offeror or when no reply to the offer has been received within the established time limit (art. 6.170).

Acceptance is defined as a statement made by the offeree or any other conduct thereof indicating assent to the offer. Silence or inactivity *per se* does not imply acceptance of an offer. Acceptance of an offer becomes effective when it reaches the offeror. If by virtue of the offer, or as a result of practices that the parties have established between themselves, or of existing usages, the possibility of accepting an offer without notice to the offeror (by silence or by performing concrete actions) is foreseen, the acceptance is legally effective from the moment when certain actions expressing the will of the offeree are performed (art. 6.173).

A reply to an offer that contains additions, limitations, or other modifications of conditions set forth in the offer is considered to be a rejection of the offer and constitutes a counter-offer. A reply to an offer that purports to be an acceptance but contains additional or different conditions that do not alter the essence of the conditions of the offer constitutes acceptance if the offeror, after receiving the reply, does not immediately object to the discrepancy. If the offeror does not object, the contract is deemed to be concluded under the conditions of the offer with the modifications contained in the acceptance (art. 6.178).

In cases where no time limit is fixed, an offer must be accepted within the time limit fixed by the offeror — within reasonable time in view of concrete circumstances, including the capacities of the means of communication used by the parties. An oral offer must be accepted immediately unless, in consideration of concrete circumstances, a different conclusion may be reached (art. 6.174).

Acceptance becomes invalid if the notice of revocation reaches the offeror before or at the same time as the acceptance becomes effective (art. 6.177).

The time limit for acceptance indicated by the offeror in his telegram or a letter is calculated as beginning at the moment the telegram is handed in for despatch or from the date written on the letter, or, if no date is indicated in the latter case, from the date shown on the envelope (the postmark). Time for acceptance indicated by the offeror by means of telecommunication terminal equipment begins to run at the moment the offer reaches the offeree. Official holidays or non-working days are included in calculation of the time limit established for acceptance. However, if notice of acceptance cannot be delivered to the offeror because the last day of the time limit falls on an official holiday or a non-working day, the period is extended until the first working day thereafter (art. 6.175).

Late acceptance is deemed to hold force if the offeror without delay informs the offeree about it or sends him a notice to that effect. If it is possible to establish from a letter or any other written notice containing a late

acceptance that it was in fact sent in time, and if under normal circumstances it would have reached the offeror in due time, the late acceptance is deemed to be effective as acceptance unless the offeror without delay informs the offeree that his offer has been withdrawn (art. 6.176).

The Civil Code provides special rules on the formation of public contracts and contracts of adhesion, and also special rules on the conflict of standard conditions, among other matters. Unfortunately, the Civil Code does not provide any special rules on the formation of a contract by means of electronic communication.

7. The form of contracts

The rules in the new Civil Code that concern formal requirements for contracts could be described as a turn from formalism toward consensualism. The previous Civil Code provided many strict provisions regarding the form of a contract, violation of which resulted in the nullity of the contract.

The new Civil Code introduced a general rule that the form of a contract is not a necessary element of the contract. Article 6.159 of the Civil Code provides that the majority of contracts are binding *solo consensus*. However, there are exceptions to this general rule. According to article 6.159 of the Civil Code, in cases prescribed by law, the form of a contract can be a necessary element of the contract.

The formal requirements of contracts are established by article 6.192 of the Civil Code. This article provides that the provisions of arts. 1.71–1.77 of the Civil Code that regulate the form of transactions, are applied in respect of the form of a contract as well. According to these articles, the parties may enter into transactions orally or in writing (in the ordinary or notarial form), or the formation of a transaction may be implied from the behaviour in fact of the parties (art. 1.71). A transaction in respect of which there is no specific form established by law is deemed to be formed if a person demonstrates by his behaviour the will to form a transaction (a contract formed by factual acts).

For some contracts the Civil Code introduces ordinary written form as mandatory. According to article 1.73 of the Civil Code, the following contracts must be executed in the ordinary written form: contracts made by natural persons in the event that at the moment of their formation the value of the property concerning which the transaction is undertaken exceeds five thousand litas, except such transactions when performed at the time of their formation; contracts for the establishment of legal persons; contracts for purchase and sale of goods by instalment; insurance contracts; arbitration agreements; contracts of lease of a movable thing for a term of over one year; preliminary contracts; contracts of life annuity (contracts of rent); and compromise agreements. This list is not exhaustive, because not only the Civil Code but other laws as well can specify mandatory written form for certain contracts. However, the notion of ‘ordinary written form’ is understood in a broad sense. Written form refers not only to the drawing up of one document signed by all the parties or the exchanging of separate documents by the parties. Information transmitted by means of modern telecommunications is also recognised by the Civil Code as an ordinary written form. According to article 1.73 of the Civil Code, documents signed by the parties and transmitted by means of telegraph, facsimile communication, or any other forms of communication terminal equipment are accorded the same power as those having been made in written form, provided that the inviolability of the text is guaranteed and the signature can be identified. So, the Civil Code clearly provides the possibility of concluding a contract by means of electronic communication.

However, the parties may agree to adopt additional requirements for the written form of a transaction (signatures of certain persons, affixation of a stamp to the document, assignment of a special form for the document, etc.) and establish certain legal consequences for non-compliance with such requirements. In the event of the parties failing to comply with the requirements established, the transaction is not considered to be formed unless the parties agree otherwise.

If the parties have agreed to adopt a specified form for a contract under conclusion, the contract is deemed to be concluded only where it conforms to the form agreed, even though pursuant to the law such a form is not mandatory for contracts of that particular class.

Article 1.74 of the Civil Code provides that the following contract types must be executed before and verified by a notary: contracts concerning the transfer of the real rights in an immovable thing and contracts on the encumbrance of real rights and of an immovable thing; contracts of marriage (prenuptial and postnuptial); and other contracts that are to be notarised in accordance with the mandatory provisions of the Civil Code. Indeed, the notarial form of a contract can be established only by the Civil Code; i.e., other laws cannot establish such a form for a contract. However, parties to a contract have the right to execute other contracts in the notarial form; that is, they can choose a more qualified form for their contract.

A contract not made in the form required by law in this particular case should be void only when such a consequence is expressly indicated by law (art. 1.93). Non-observance of the mandatory notarial form required by the law as a necessary element of a contract results in the nullity of the contract in any case (art. 1.93). There is one exception to this general rule: where one party fully or partly performs his obliga-

tions arising from a contract that must be notarised while the other party avoids the notarisation thereof, the court may, on the action of the party who has fulfilled his obligations, declare said contract valid. In such an event, subsequent notarisation of the contract is not required (art. 1.93).

For reasons of safety and stability of the market, the Civil Code provides the obligation to register contracts of certain kinds in a public register. Therefore, the law may establish a mandatory registration of certain contracts. For example, a contract of mortgage of an immovable thing must be registered in a public register (art. 4.185). The general rule is that a contract produces its effects between the parties even if it is not registered in the mandatory order. In such instances, the rights and duties of the parties produce their effects between the parties not from the moment of registration of a contract but from the moment established by the law or by agreement of the parties, except in cases where it is expressly specified by the Civil Code that the rights and duties of the parties arise only from the moment of the registration of the contract. To take the earlier example, the mortgage of an immovable thing is valid only in the event of the registration of the contract establishing mortgage in the public register (art. 4.187). Another general rule is that the registration of a contract has only evidentiary effect against third parties. This general rule is laid down in article 1.94 of the Civil Code. According to it, the parties to an unregistered contract may not invoke the fact of the contract against third parties and argue their rights against third parties by relying on other means of proof. If the same real rights or the same thing is acquired by several acquirers but only one of them registers that contract, the acquirer who has registered the contract is considered to be vested with that thing or with the real rights in that thing. If none of the acquirers registers the contract, the acquirer who is the first to enter into a contract is considered to be vested with the rights in question. If several persons register their property rights or real rights in the same thing, the person who is first to register that transaction is vested with these rights (art. 1.75).

8. Interpretation of contracts

The rules on the interpretation of contracts form another institution introduced by the new Civil Code, as the previous Civil Code did not include any provisions in this respect. Some methods of interpretation of contracts were developed by legal doctrine and courts' practice, these factors being of great value and serving as a useful contribution in the drafting of the relevant chapter of the Civil Code.

The rules on the interpretation of contracts are set forth in Chapter XIV of Book 6 of the Civil Code (arts. 6.193–6.195).

The main rule and requirement for the interpretation of contracts is good faith: article 6.193 requires a contract to be interpreted in accordance with the principle of good faith. On the other hand, the Civil Code provides a subjective method for the interpretation of contracts: in interpreting a contract, it is necessary to seek the real intentions of the parties without being limited by the literal meaning of the words. However, in the event that the real intentions of the parties cannot be established, a contract must be interpreted in accordance with the meaning that could be attributed to it in the same circumstances by reasonable persons in positions corresponding to those in which the parties were at the time.

A systematic approach to the interpretation of contracts is introduced by Part 2 of article 6.193: all conditions of a contract must be interpreted taking into account their interrelation, the nature and purpose of the contract, and the circumstances under which it was formed. In interpreting a contract, regard must also be taken of the ordinary conditions, irrespective of their expression in the contract. In the event of doubt over notions that may have several meanings, these notions must be understood in the sense most suitable in light of the nature, essence, and subject matter of the contract.

Part 4 of article 6.193 definitely sets up the principle of *contra proferentem*, according to which conditions of a contract must, in the event of doubt, be interpreted adversely to the contracting party that suggested them and in favour of the party that accepted said conditions. But in all cases, the conditions of a contract must be interpreted in favour of the consumers and the adhering party.

In interpreting a contract, regard must be paid also to the preliminary negotiations between the parties, practices that the parties have established between themselves, the conduct of the parties subsequent to the conclusion of the contract, and the existing usages.

Where a contract is drawn up in two or more languages and all of these versions of the contract are of equal legal power, in the event of discrepancy between versions in different languages, preference is given to the version that was first to be drawn up (art. 6.194).

Article 6.195 allows the court to fill the gaps of a contract where the parties have left without being discussed certain conditions that are necessary for the performance of a contract. Such gaps in the contract may, at the demand of one of the parties, be eliminated by a court, which is to determine appropriate conditions by taking into consideration non-mandatory legal norms; the intentions of the parties; the purpose and essence of the contract; and the criteria of good faith, reasonableness, and justice.

9. Content, performance, and termination of contracts

Due to the principle of freedom of contract, the General Part of Contract Law provides only a few rules in respect of the content of a contract. The most important rule is established by article 6.196, which provides that the terms of a contract may be express or implied. Implied contract terms have to be discovered from the essence and purpose of the contract; the nature of the relationships established between the parties; and the criteria of good faith, reasonableness, and justice.

The rules on the quality of performance and contract price, borrowed from the UNIDROIT Principles of International Commercial Contracts, are also important.

The main requirements for the performance of contracts are contained in article 6.200 of the Civil Code. According to this article, a contract must be performed by the parties in a proper way and in good faith. In performing a contract, each party is bound to contribute to and to co-operate with the other party. The parties are bound to use the most economical means in the performance of the contract. Where, on account of a contract or its nature, a party in exercising certain actions is bound to make the best effort in the performance of a contract, this party is bound to make such effort as a reasonable person would make in the same circumstances.

Article 6.204 establishes the principle of *rebus sic stantibus* and provides the possibility of modification or termination of a contract in the event of a change of circumstances.

As a consequence of the principle of co-operation, article 6.208 of the Civil Code provides the possibility for the debtor to eliminate defects of performance and certain conditions for the realisation of such a possibility.

One of the aims of the new rules for contracts was to ensure the stability of contractual relationships, as the stability of contractual relationships is one of the factors that ensure the stability of the whole market. For these reasons, the Civil Code establishes some general rules regarding the termination of contracts. Firstly, a party may dissolve the contract where the failure of the other party to perform it, or defective performance, is considered to be an essential violation of the contract (art. 6.217). In the event of an essential violation, the contract may be terminated in an extra-judicial manner — i.e., without a court judgement. However, the Civil Code requires due notice and relevant co-operation in the exercise of this right. Secondly, on any other grounds except that of fundamental breach, the contract may be dissolved only within the judicial proceedings resulting from an action of the interested party. Thirdly, a contract for an indefinite period may be terminated by either party, provided the party gives notice about his intention to dissolve the contract to the other party a reasonable time in advance unless otherwise provided for by law or in a contract.

In most cases, the creditor has the option of choosing either termination or any other remedy (e.g., a specific performance). However, there are specific rules that provide special regulation of the exercise of the right to terminate a contract and establish special conditions for the realisation of this right. For example, in cases of a sale of energy, a lease, etc., the possibility of the termination of a contract is limited (art. 6.390).

10. Conclusions

The analysis of the new Lithuanian Contract Law enables one to draw some conclusions. First of all, it is evident that the majority of the new rules on contracts correspond to the provisions of the well-known international instruments, the effectiveness of which has been proved in practice. Secondly, the Civil Code distinctly establishes in law the difference between commercial and consumer contracts and provides special provisions for the protection of consumers' interests. Thirdly, there are special institutions introduced that ensure the reasonable balance of the interests of both parties and do not allow any gross disparity among the parties or a possibility of abuse of the dominant position of one of the parties. Finally, there are special provisions protecting the stability of contractual relationships. Indeed, the effectiveness of all of these new provisions directly depends upon the activity of courts. The implementation of international uniform rules in the form of national statutory law requires use of the comparative law method by the national courts as well. The application of uniform law is not possible without uniform court practice. However, the aim of achieving uniform practice on the part of the courts is more complicated than — or even utopian in comparison with — the aim of achieving uniform statutory law.



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Damage arising from Defect in Object of Contract to Creditor's Absolute Legal Rights: Contractual or Delictual Liability?

1. Damage to creditor's absolute legal rights by defect in object of contract

During the performance of a contract, the creditor's interests can suffer damage in a number of ways. For example, the debtor can be late with a delivery of raw materials, which could obstruct the activities of the creditor's entire enterprise. Or, the debtor can fail to supply any raw material at all, and the creditor will have to procure it from other sources for a higher price. In such cases, the creditor will be entitled to claim compensation for damage from the debtor under § 115 of the Estonian Law of Obligations Act. Furthermore, damage can also be caused if the debtor sells to the purchaser a car with faulty brakes, repairs the brakes deficiently or provides a leased apartment in a condition which is hazardous to health. Such defects can damage creditors' absolute legal rights, and particularly their life, health or property. It would be traditional to assert that any such damage to the other party's absolute legal rights can also be covered by the creditor's contractual claim for compensation for damage.^{*1} Nonetheless, this article is aimed at demonstrating that such an assertion is no longer absolutely valid in the context of the Law of Obligations Act^{*2} (LOA), which is presently applicable in Estonia. Rather, on the contrary: on the basis of the following examples we shall have to admit that as a rule, prevention of such damage is not the purpose of the debtor's contractual obligation (LOA § 127 (2)) and therefore, such damage is not compensable under the contract. Inasmuch as this regards legal rights that are absolute and are therefore protected by the law of delict, the debtor will be liable under LOA §§ 1043 et seqq.

¹ O. Palandt. Kommentar zum Bürgerlichen Gesetzbuch, 64. Aufl. H. Heinrichs, W. Weidenkaff (Contributors). C.H. Beck 2005, § 280, para. 18; § 536a, para. 14. As regards damage to property, see also: P. Schlechtriem, I. Schwenzer (eds.). Commentary on the UN Convention on the International Sale of Goods (CISG), second edition. H. Stoll, Dr. Gruber (Contributors). Oxford 2005, art. 74, para. 2 (protection of indemnity interest); O. Lando, H. Beale. Principles of European Contract Law. Kluwer Law International 2000, pp. 439, 441. See also CCSCd 3-2-1-69-05. Available at: www.nc.ee (in Estonian).

² Võlaõigusseadus (Law of Obligations Act). – RT I 2001, 81, 487 (in Estonian).

In order to explain this conclusion, which may seem surprising at first sight, I should like to describe two hypothetical cases. Let us suppose that an appliance shop sells to a purchaser an extension lead for a price of 50 krooni, and a latent defect in the extension lead causes a short circuit, which results in a fire accident in the purchaser's house leading to a damage of 500,000 krooni. Should the shop compensate for the damage caused to the purchaser's property regardless of the fact that the defect in question was not detectable upon external inspection and it would be unreasonable to expect the shop to separately test or disassemble each item on sale?

Or, let us take another example in which an elderly lady lets out a house inherited from her sister. Unfortunately, substances which are poisonous and hazardous to health have been used in the construction of the house. The lessor is unaware, and even cannot be aware, of that since it is not reasonable to assume that an ordinary lessor would order, before letting out a house, a general technical expert analysis to make sure that the house has been built completely safely. The lessee moves in and suffers damage to health, and maybe even dies, because of the poisonous substances. Should the lessor compensate for the funeral expenses, pay support to the lessee's dependants (LOA § 129) and additionally satisfy the Health Insurance Fund's recourse claim to the extent of the medical treatment expenses under § 26 of the Health Insurance Act?

In both of these cases, the debtors have breached their contractual duty to deliver a thing which conforms to the contract.³ Characteristically of both cases, the creditor's absolute legal rights have been damaged by a defective object of contract while the debtor was not, and did not have to be, aware of such defect. We also saw that such damage can be extremely large and, in the author's opinion, it is questionable in terms of legal policy whether a debtor can be expected to take such risks for e.g. a purchase price of 50 krooni or a monthly rent of 3000 krooni. This is particularly questionable in a situation in which all provisions regarding legal remedies available to the weaker party (i.e. the consumer or the lessee) are absolutely imperative: under Estonian law, neither the seller nor the lessor may contractually subject their liability to a condition of fault or limit their liability with regard to certain types of damage (LOA §§ 237 (1) and 275).⁴ It would also be unreasonable to expect lessors to insure their possible liabilities before concluding a residential lease contract — all the more so as, to the author's knowledge, conclusion of such insurance contracts in Estonia is presently not possible. But how then can such claims for compensation be avoided or limited?

2. Preclusion of claims for compensation on grounds of force majeure?

In the search for limits of contractual compensation for damage, the question of the existence of debtor's liability as such will inevitably come up: a distinction should be made between the question of the extent of the debtor's liability and the question of whether the debtor is liable at all.⁵ Even in the above-described cases, the question of the debtor's liability in general will be the first to arise.⁶ The sale of a defective thing or the delivery of a deficient work or defective object of lease may indeed be excusable by LOA § 103 but the question lies in whether the excusability can arise solely from the fact that the debtor was not, and did not have to be, aware of the defect in the object of contract.

In order to answer that question, the difference between fault-based liability and a stricter⁷, excusability-based type of liability must be explained in the first place. In Estonian legal literature, justified positions have been expressed that the practical difference between those concepts becomes apparent, first of all, in the case of 'result-oriented obligations' (i.e. *obligations de résultat* known in French law) referred to in LOA § 24 (1) (the first alternative).⁸ Both of our cases deal specifically with result-oriented obligations, in

³ As for the seller: LOA §§ 217 (1), 217 (2) 2); as for the lessor: LOA § 276 (1).

⁴ In Germany, on the other hand, the strict liability provided for in BGB § 536a, can be derogated by the contract and so the debtor's liability can be subjected to fault. C. Ahrens. Mietrechtliche Garantiehaftung — Widersprüchlichkeiten im neuen Schuldrecht. — ZGS 2003/4, p. 138. For consumer sale contracts, a claim for compensation for damage can be also subjected to limitations to the extent that this will not conflict with the provisions in the regulation of standard conditions, see BGB § 475 (3). An absolutely imperative regulation of claims for compensation for damage suffered by consumers or lessees is probably not justified in Estonia, either.

⁵ H. McGregor. The Law on Damages. 15th edition. London: Sweet&Maxwell 1988, p. 61.

⁶ In accordance with LOA § 103 (1) and (2), a debtor is always liable for non-performance of the debtor's duties unless the non-performance is excused, i.e. the non-performance was due to *force majeure*.

⁷ K. Sein. Mis on vääramatu jõud (What is *force majeure*)? — Juridica 2004/8, p. 512 (in Estonian); I. Kull, M. Käerdi, V. Kõve. Võlaõigus I: üldosa (Law of Obligations I: General Part). Tallinn: Juura 2004, p. 195 (in Estonian).

⁸ I. Kull et al. (Note 7), pp. 192–193, where the contractor's duty to complete a work which conforms to the contract is provided as an example of a result-oriented obligation; O. Lando, H. Beale (Note 1), pp. 303–304. In other cases, a party is obligated to achieve the result, anyway, only by making such efforts as would be reasonably made by a debtor in the same field of activity, as provided in LOA § 24 (2).

which the debtor can be exempted from liability only by proof that the defect in the object of contract was caused by force majeure. In order to decide when a defect in the object of contract may be regarded as due to force majeure, let us take a look at the practice of interpreting article 79 of the Vienna Convention on Contracts for the International Sale of Goods (CISG), as the concept of strict liability provided in Estonian LOA § 103 has its origins right there.

In creating the CISG, the common-law concept of seller's absolute liability was not incorporated into the convention.⁹ However, at the same time, the principle of fault-based liability was also knowingly left aside.¹⁰ Therefore, correct interpretations of LOA § 103 should not be based on the principle, prevailing in German law, whereunder a seller is not liable for damage caused by selling a defective item to a purchaser if the seller was unaware of the defect, had obtained the sold item from a trustworthy source and would not have detected that defect even by such methods of examination as could have been reasonably expected from the seller in such situation.¹¹ The general position regarding CISG art. 79 is that the seller is liable even for such a thing the defects of which are hidden from the seller, and that is the case both when the sold item has not been manufactured by the seller but, rather, purchased from a third party (e.g. importer)¹² and (or particularly) when the sold goods have been manufactured by the seller.¹³ A few exceptions, e.g. if the defect is caused by terrorist act, are conceivable but extremely rare in real life.¹⁴

As demonstrated above, a defect in a sold thing belongs to the risk sphere of the seller, who thus cannot use LOA § 103 as an excuse.¹⁵ In the case of a residential lease contract, it must similarly be admitted that the lessor is practically always liable for damage caused by a defect in the object of lease under LOA §§ 276 (1), 115 and 103.¹⁶

3. Preclusion of claims for compensation under the foreseeability rule (LOA § 127 (3))?

Compensation for damage in the above-described cases could actually be precluded for the reason that the damage could not be reasonably foreseen by the debtor at the moment of concluding the contract (LOA § 127 (3)). It is often stressed in legal literature that strict liability and the foreseeability rule are closely or even inseparably interrelated.¹⁷ However, upon closer analysis it can be noted that the foreseeability rule is

⁹ In common-law countries, release of the seller from liability in the event of breach of warranty, i.e. the delivery of a thing which does not conform to the contract, would be absolutely out of the question. U. Krüger. *Modifizierte Erfolgshaftung im UN-Kaufrecht: die Haftungsbehebung bei Lieferung vertragswidriger Ware gemäß Art. 79 CISG*. Frankfurt am Main, Lang 1999, pp. 34, 200. For English law, see: M. Schmidt-Kessel. *Standards vertraglicher Haftung nach englischem Recht: limits of frustration*. 1st ed. Baden-Baden: Nomos-Verl.-Ges. 2003, pp. 229, 235, 271.

¹⁰ C.M. Bianca, M.J. Bonell. *Commentary on the International Sales Law*. D. Tallon (Contributor). Milano 1987, p. 573. In the preparation of the CISG, jurists from common-law countries were afraid that in practice, article 79 would be equalised with fault-based liability by German courts. P. Schlechtriem. *Anmerkung zum Urteil des BGH v. 24.3.1999 – VIII ZR 121/98*. – JZ 1999, pp. 795, 797.

¹¹ In German law, contractual claims for compensation for damage are, as a general rule, based on the requirement of the debtor's fault, see BGB §§ 280 (1) and 276. A similar interpretation for CISG art. 79 is, however, supported by H. Stoll – P. Schlechtriem, I. Schwenzer (Note 1), art. 79, para. 40.

¹² U. Huber. *Die Haftung des Verkäufers für Verzug und Sachmängel*. Österreichische Juristische Blätter, 1989/5, p. 284; P. Schlechtriem (Note 10), pp. 796-797; C.M. Bianca, M.J. Bonell (Note 10), p. 580; German Federal Supreme Court Decision of 24 March 1999, CISG-online No. 396. As regards professional sellers, the irrebuttable presumption of the seller's awareness of the defect is applied also in France and Luxembourg. C. von Bar, U. Drobnig. *Study on Property Law and Non-contractual Liability Law as they relate to Contract Law*, p. 78. Available at: http://europa.eu.int/comm/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/study.pdf.

¹³ See German Federal Supreme Court Decision of 9 January 2002, CISG-online No. 651.

¹⁴ U. Huber (Note 12), p. 283. Similarly, M. Schmidt-Kessel (Note 9), p. 237.

¹⁵ The same position with regard to Estonian law has been taken by M. Käerdi. *Abgrenzung der vertraglichen und außervertraglichen Haftungssysteme im deutschen und estnischen Kaufrecht und im Einheitsrecht — eine rechtsvergleichende Studie* (yet unpublished; the author has a copy of the manuscript), pp. 117–118.

¹⁶ However, a different position towards this question has been taken by U. Huber (*Gutachten und Vorschläge zur Überarbeitung des Schuldrechts*. Vol. I. Bundesministerium der Justiz (eds.). 1981, p. 722), in whose opinion a defect in the object of lease does not constitute a 'circumstance which should have reasonably been taken into account by the debtor'.

¹⁷ L. Vekas. *The Foreseeability Doctrine in Contractual Damage Cases*. – *Acta Juridica Hungarica* 2002 (43), p. 172; U. Huber (Note 16), p. 729. Both the foreseeability rule and the principle of liability without fault are based on the idea of a reasonable risk distribution, and the limitation of compensation for damage to only such damage as could be foreseen at concluding the contract should alleviate the strict liability, which otherwise could result in too adverse consequences. Therefore, in countries where the debtor must compensate for the damage caused only upon culpable breach, the need for any methods to additionally limit the extent of compensation for damage is less than in those countries which apply liability without fault.

not very suitable for application in the case of damaged absolute legal rights.^{*18} Namely, for the foreseeability of damage under LOA § 127 (3), it is not material whether or not the debtor foresaw or must have foreseen the breach of contract or, in other words, that the object of contract delivered by the debtor did not conform to the contract within the meaning of LOA § 217 (1) or § 276 (1). Hence the foreseeability of damage does not depend on whether the debtor was aware of the defect in the delivered thing: the only matter of relevance here is whether the debtor foresaw or must have foreseen that the defect in question could result in such damage.^{*19}

Therefore, in the described cases, we must ask the question of whether the lessor would have foreseen the damage to the lessee's health caused by the defect in the house if she had known of such defect at the time of concluding the contract. However, it is obvious that if the debtor had known that living in the house could be hazardous to health, she would have certainly, or at least must have, foreseen that this could result in health damage and medical treatment expenses. The same applies to the seller of the extension lead. Thus the foreseeability rule provided in LOA § 127 (3) will not enable, within its empirical sense, to reasonably limit a claim for compensation for damage since such damage is very often objectively foreseeable.

Commentaries on the CISG express the position that in such cases, the question is whether the damage has resulted from the realisation of the risk which has been caused by the seller by delivery of the defective thing and which must be borne by the seller.^{*20} Therefore this requires an assessment of which damage risks the seller was, by default, ready to be liable for upon concluding the contract. In other words, we must ask whether the breached obligation (i.e. the duty to deliver the thing without any defects) was aimed at protecting the creditor against such damage as has been caused by the defect (LOA § 127 (2)).

4. Preclusion of claims for compensation through the purpose of breached obligation (LOA § 127 (2))?

Under LOA § 127 (2), damage will not be compensated for to the extent that prevention of damage was not the purpose of the obligation due to the non-performance of which the damage arose. This so-called theory of the purpose of breached obligation^{*21} not only determines the extent of any claims for compensation for contract damage (LOA § 127 (2)) but in addition, the cumulation of contractual and delictual claims is thereby also precluded (LOA § 1044 (2)). Namely, damage to the other party's absolute legal rights will give rise to the question of whether the creditor can claim compensation for such damage on the grounds of contractual liability (LOA §§ 100 et seqq.) or the provisions on non-contractual liability (LOA §§ 1043 et seqq.).^{*22} In Estonia, the principle of *non-cumul* contained in LOA § 1044 (2) precludes, as a general rule, any delictual claims if a contractual claim exists, i.e. the free concurrence of claims cannot occur.^{*23} This is non-applicable only in the event of health damage (LOA § 1045 (3)).

Hence, if the duty to deliver an extension lead which conforms to the contract were primarily aimed at enabling the purchaser to use a thing matching his or her expectations, and not to protect the purchaser against any damage that may be caused to his or her property (LOA § 127 (2)), a contractual claim by the purchaser would lapse and a delictual claim would become an option (LOA § 1044 (2)).^{*24} This would mean that the protection of the debtor's absolute legal rights would not be included in the purpose of the lease or

¹⁸ L. Vekas (Note 17), p. 161; P. Schlechtriem, I. Schwenzer (Note 1), art. 74, para. 47.

¹⁹ K. Sein. Kahju ettenähtavuse reegel kahjuhüvitise piiramise alusena (The rule of foreseeability of damage as a basis for limiting compensation for damage). – Juridica 2003/4, p. 245 (in Estonian); P. Schlechtriem, I. Schwenzer (Note 1), art. 74, para. 47.

²⁰ P. Schlechtriem, I. Schwenzer (Note 1), art. 74, para. 47; J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch: mit Einführungs-gesetz und Nebengesetzen, Ergänzungsband. U. Magnus (Contributor). Wiener UN-Kaufrecht: (CISG). Berlin: Sellier de Gruyter 1999, art. 74, para. 46.

²¹ That theory (*Schutzzwecktheorie* in German) originates from the German jurist, E. Rabel. See E. Rabel. Das Recht des Warenkaufs. Vol. 1. Berlin: Walter de Gruyter und Co 1936, pp. 495–511.

²² Violation of absolute legal rights is unlawful under LOA § 1045 (1) 1), 2) and 5). All over the world, such legal rights are traditionally protected through law of delict. C. von Bar. Gemeineuropäisches Deliktsrecht. Bd 1. C.H. Beck 1996, p. 439.

²³ The question of whether a claim is contractual or delictual has practical significance in Estonian law primarily in the following aspects: firstly, the standard of liability (independent of fault in the case of a contractual claim; fault-based in the event of a delict; cf. LOA §§ 103 and 1050); secondly, different limitation periods in cases other than health damage, cf. GPCCA §§ 146 (1) and 1050; and thirdly, several provisions precluding or limiting the debtor's liability in contract law, e.g. the examination and notification duty of a purchaser in economic activity under LOA §§ 219, 220. The liability, however, is presumed in Estonian law both in the case of contractual and delictual claims under LOA §§ 103 (1) and 1050 (1).

²⁴ Likewise, it can be stated that the purpose of the duty to deliver a non-defective object of lease is not to protect the lessee against possible damage to health but, rather, to enable the lessee to reside in the apartment, the condition of which is contractual.

sale contract, which, in turn, would result in a situation in which those legal rights would be protected not by contractual but only by non-contractual liability.

The answer to the question of when the duty to protect the other party's absolute legal rights is encompassed in a contract will, first of all, require an explanation of the functions and purposes of contractual and non-contractual liability, the differences between, and the interests and values protected by, those functions.

4.1. Functions of contractual and non-contractual liability

The law of delict provides rules of conduct which must be observed by everyone in respect of everybody else, i.e. which are 'generally and always applicable to interpersonal relations'^{*25}, and violations of which result in liability under the law. It is the function of the law of delict to protect persons' interests in that their legal rights may not be violated by other persons.^{*26} Hence the law of delict is directed to maintaining the status quo of a person's legal rights. By its very nature, the regulation of compensating for damage caused to absolute legal rights belongs specifically to the area of the law of delict (including, often, the liability of producer).^{*27}

Contract law, on the contrary, is aimed at effecting the transfer something of value from one person to another by means of the conclusion of contracts. Usually, the purpose of concluding a contract is to increase one's wealth^{*28} and not to protect one's existing legal rights, which the parties, as a general rule, do not even think of in the case of normal economic transactions. Nor has the risk of such damage been included in the contract price as a rule. Moreover, in most cases, only the object of contract and, often, the time and place of performance are expressly agreed in everyday transactions. Everything else is derived from either the law or interpretations of the contract or e.g. the principle of good faith. This means that through extensive interpretation, and interpretation based on the hypothetical intention of the parties, of the contract, its content is regarded as inclusive of also such terms that were never actually negotiated.^{*29} At the same time, the debtor's liability is thereby extended to include such risks of damage that have not been taken into account by the debtor at the time of concluding the contract. This is particularly problematic in a situation in which a mere fact of a breach of contract (delivery of a thing which does not conform to the contract) is sufficient to give rise to a claim for compensation for damage, without any need for the debtor's fault to be the basis of liability.^{*30}

4.2. Protection of creditor's life and health as purpose of contractual obligation?

Certainly, there are contracts the purpose of which is specifically to protect the creditor against damage to health: for example, medical services contracts, contracts concluded with babysitters or contracts for the carriage of passengers. However, for the reasons set out in the preceding paragraph, protection of the creditor's life and health is, as a rule, not the purpose of the debtor's (principal) contractual obligation.^{*31} Although the debtor's principal obligation may be constituted by the duty to deliver a thing which conforms to the contract, the purpose of this obligation is nevertheless to protect the debtor's so-called interest in equivalence, i.e. the interest in receiving goods or services which are equivalent to the consideration paid, rather than to protect the debtor's absolute legal rights.^{*32}

Could protection of the debtor's life and health be, however, the purpose of a contractual collateral obligation or an independent protection obligation? Or would this, depending on the situation, be simply a delict-

²⁵ I. Kull (Note 7), p. 255.

²⁶ S. Leicht. Die Qualifikation der Haftung von Angehörigen rechts- und wirtschaftsberatender Berufe im grenzüberschreitenden Dienstleistungsverkehr. Tübingen: Mohr-Siebeck 2002, p. 152; H.-J. Meyer. Rule of Foreseeable Damage. Das Haftungsbeschränkungsprinzip für vertragliche Schadensersatzansprüche im Common Law. Regensburg 1986, p. 102.

²⁷ See U. Huber. Der UNCITRAL-Entwurf eines Übereinkommens über internationale Warenkaufverträge. *RabelsZ* 1979/43, pp. 500–501; P. Schlechtriem. Einheitliches Kaufrecht – wissenschaftliches Modell oder praxisnahe Regelung? Heidelberg 1978, pp. 52–53.

²⁸ D. Harris, D. Campbell, R. Halson. Remedies in Contract and Tort, second edition. Butterworths 2002, p. 5. At the same time it must be admitted that today, contract law and law of delict are becoming more and more intertwined, their functions have approached in several points and one can no more be distinctly separated from the other. U. Drobnig, C. von Bar (Note 12), pp. 436–437.

²⁹ S. Leicht (Note 26), p. 149. For a more detailed analysis of extensive interpretation of contracts, see I. Kull. Hea usu põhimõtte kaasaegses lepinguõiguses (Principle of good faith in modern contract law). Tartu 2002, pp. 133 et seqq. (in Estonian).

³⁰ It has also been emphasised by M. Pellegrino that a claim for compensation for damage arising from breach of a protection obligation can be an option only in the case of the debtor's fault. *Subjektive oder objektive Vertragshaftung?* – *ZEuP* 1997/1, p. 57.

³¹ For contracts of sale, such a position has been taken by M. Käerdi (Note 15), p. 199.

³² *Ibid.*, pp. 18–19, 30–31.

ual duty of care^{*33} which is applicable *erga omnes* and which would give rise to liability only under the provisions of LOA §§ 1043 et seqq.^{*34}

German law is of the position that in addition to the parties' duties of performance, an obligation also contains protection duties, which are not aimed at carrying out the duty assumed in the contract but, rather, at protecting the other party's absolute legal rights (see BGB § 241 (2)). It is, though, arguable, whether such protection obligations are contractual collateral obligations^{*35} derivable from the principle of good faith or independent obligations arising out of law.^{*36} In any case, breach of such a protection obligation in Germany results in contractual or quasi-contractual but not delictual liability.

Should the existence of such collateral or protection obligations, aimed at protecting life and health, also be approved of in Estonian law? Their existence could be derived from LOA § 2 (2), whereunder the nature of an obligation may oblige the parties to the obligation to take the other party's rights and interests into account in a certain manner.^{*37} At the same time, it is questionable, given the structure and conceptual solutions of the Estonian law of obligations, whether or not such protection obligations, breach of which would result in liability under LOA §§ 100 et seqq., i.e. liability without fault, could anyhow exist in relation to the other party's absolute legal rights. The author of this article is of the opinion that this should be negated.

In general, it can be said that the stronger the protection of persons' legal rights under a state's law of delict (i.e. the easier it is to receive compensation for damage under the law of delict), the less the existence of such contractual collateral or protection obligations should be expected.^{*38} The fact that e.g. in German law, many cases typical of what would *per se* constitute delictual liability have been transferred to the sphere of contractual or quasi-contractual liability, is due to deficiencies in the German law of delict. Problems are caused there particularly by BGB § 831.^{*39} In so far as the law of delict fails to provide sufficient protection to the aggrieved party in Germany, there is a wish to bring compensation for damage caused by violation of other persons' absolute legal rights into the scope of contract law by using different legal constructions to vest the right to claim compensation for damage from breach of contract in a person who has not concluded any actual contract with the tortfeasor. This area of application of contractual liability is enlarged through creating extensive collateral and protection obligations, particularly by means of the institutions of *culpa in contrahendo* and contracts with protective effect for third parties.^{*40}

However, in Estonia there is no major need to implement such complex constructions, as according to the author's appraisal, the Estonian law of delict offers sufficient protection to the aggrieved party. Firstly, we have the presumption of tortfeasor's culpability (LOA § 1050 (1)). Secondly, under LOA § 1054, the service user's liability for damage caused by the service provider is substantially stricter than under German BGB § 831, covering, under subsection (2), also any damage caused by the so-called independent operators, provided that the service user has used such operators in the performance of its duties and the damage was caused or the occurrence thereof was made possible through the performance of such duty. Moreover, claims for compensation for damage to health will expire at the same time regardless of whether their basis is contractual or delictual (§ 153 of the General Part of the Civil Code Act (GPCCA)).^{*41}

³³ The concept of the 'duty of care' has been expounded by J. Lahe as follows: 'if a person creates or controls a danger of some kind, that person must take all possible and reasonable measures to keep that danger under control and prevent its materialisation'. J. Lahe. Süü deliktioõigused (Fault in law of delict). Tartu 2005, p. 56 (in Estonian).

³⁴ This position has been taken by e.g. C. von Bar. Verkehrspflichten. Köln: C. Heymanns Verlag 1980, p. 312; P. Schlechtriem. Vertragliche und ausservertragliche Haftung. – Gutachten und Vorschläge zur Überarbeitung des Schuldrechts. Vol. II. Köln 1981, pp. 1662–1663; as regards an object of sale damaging the purchaser's absolute legal rights, the same position has been expressed by M. Käerdi (Note 15), pp. 31, 199: to design and produce the product so that it will be safe in respect of other persons' legal rights is a delictual duty of care of the producer. Such a duty of care is incumbent primarily on the producer and, as a rule, not on the reseller of the thing.

³⁵ O. Palandt (Note 1), § 241, paras. 1, 7.

³⁶ C.-W. Canaris. Schutzgesetze-Verkehrspflichten-Schutzpflichten. München: FS Larenz 1983, pp. 84–90.

³⁷ This position has been expressed by I. Kull (Note 29), p. 157, in whose opinion such protection obligations can exist in respect of not only the other contracting party but also third parties. See also: I. Kull et al. (Note 7), p. 24 and pp. 39–41. Approval of collateral obligations has been regarded as problematic by T. Tampuu. Deliktioõigus võlaõigusseaduses. Üldprobleemid ja delikti üldkoosseisul põhinev vastutus (Law of delict in the Law of Obligations Act. General problems and liability based on the general elements of delict). – Juridica 2003/2, p. 72 (in Estonian).

³⁸ C. von Bar (Note 22), p. 415.

³⁹ Under BGB § 831, a service user is not liable for damage inflicted by the service provider if he has exercised due care in the choice of, and in the supervision over, the service provider. In so far as service users can often release themselves from liability under this provision, there is a wish to rely, instead, on BGB § 278, applicable in contract law, whereunder the service user is liable for a fault of the service provider as if it were the service user's fault.

⁴⁰ E. von Caemmerer. Wandlungen des Deliktrechts. – Gesammelte Schriften. Bd. I. Tübingen: Mohr-Siebeck 1968, pp. 460–461; C. von Bar. Verträge mit Schutzwirkung zugunsten Dritter, Drittschadensliquidation and extension of duty of care. – Toward Comparative Law in the 21st Century. Chuo University Press 1998, p. 3. See also: I. Kull (Note 29), pp. 154 and 156.

⁴¹ Tsiviilseadustiku üldosa seadus (General Part of the Civil Code Act). – RT I 2002, 35, 216; 2003, 78, 523 (in Estonian).

Therefore the author is of the position that damage caused to a creditor's health by a defective object of contract must, as a general rule, be compensated for only under the provisions on delictual liability, even if a contract between the parties exists or if the parties are conducting precontractual negotiations.^{*42} In other words, it can be said, as a general rule, that a contractual obligation does not have the purpose of preventing damage to the other party's health (LOA § 127 (2)) and hence, a delictual claim is the only option for compensation for such damage.

At first sight, such a position seems to be erroneous with regard to our case of the residential lease contract: how can one state that a duty to deliver non-defective residential premises does not serve the purpose of protecting the lessee against health damage that could result from it? Nevertheless, only this kind of argumentation will eventually lead to fair results: the lessor will not be liable for damage to the lessee's health on a contractual basis but, rather, only on a delictual basis; a delictual claim would, however, lapse because of the absence of the lessor's culpability (LOA § 1050 (1)). This will also preclude the unreasonable situation in which the standard of lessor's liability would depend on whether the lease contract is effective or, for some reason, void.^{*43}

Also, a contractual claim of the lessee under LOA §§ 115, 276 (1) would not be completely irrelevant, nor would the lessor's contractual liability be non-existent in that respect. Thus the lessee could claim, on the basis of the contract, compensation for the expenses of moving to live elsewhere or for the price difference if the lessee rents a similar but non-defective house for a higher price (see LOA §§ 115 (2), 135 (1)); likewise, a contractual claim for compensation could cover the expenses of the expert analysis which established that the health damage in question indeed arose from a defect in the object of lease (LOA § 128 (3)). Such damage of a purely economic nature would not be claimable by the lessee under the delictual provisions. Therefore, the described solution has the advantage that it allows to flexibly adjust the compensation for damage. While contractual liability depending on culpability will result in 'all or nothing', i.e. the claim for compensation for damage will lapse completely in absence of the debtor's fault, the above-described solution enables to compensate the aggrieved contracting party for at least one part of the damage, i.e. to the extent that this conforms to the contractual distribution of risks. This means that the creditor will be compensated for the so-called interest in equivalence independently of the debtor's culpability (under a contractual claim) but compensation for health damage can be effected only under delictual provisions, i.e. generally only if the debtor is at fault.^{*44}

4.3. Protection of creditor's property as the purpose of contractual obligation?

It is somewhat more complicated to answer the question of whether or not the duty to deliver a non-defective object of contract has the purpose of protecting the creditor's property. In this aspect, problems arise particularly in those cases in which a defective object of contract causes damage to the sold item or the work itself^{*45} as well as those in which damage is caused to the creditor's legal rights which were to be protected by the sold item or the performed work or if such item or work, upon its end-use, comes into contact with, and damages, other things belonging to the creditor.^{*46} Due to the size limit set for this article, I should like to point out, above all, two arguments why damage caused to the creditor's property by a defect in the object of contract should, in Estonian law, *de lege lata*, be compensable primarily through delictual liability.

Let us vary our case of the extension lead so that the purchaser did not buy the extension lead from a shop but directly from the factory, and the fire accident took place three years after the purchase of the extension lead. If we said that the damage caused to the purchaser's house by the defect in the purchased extension lead must be compensated on the basis of the contract, the limitation period of a claim for compensation for damage caused to the purchaser would begin, under LOA § 227, as of the delivery of the thing to the

^{*42} Health damage caused by violations of general duties of care (e.g. a patient skids on a banana skin in a hospital and falls) is included in the protective scope of a contract (i.e. is subject to compensation) to an even lesser extent. This way of thinking is not actually novel for Estonian law since e.g. occupational accidents have been classically regarded here to be encompassed by law of delict, i.e. as a non-contractual liability of the employer.

^{*43} In the first case the lessor would be liable under the contract and in the latter case, under the law of delict. At the same time it would be difficult to justify why the lessor's liability for health damage in the case of an effective contract should be stricter than in the case of a void contract.

^{*44} Health damage is compensable only under the law of delict also in e.g. Spain, Portugal and, as a rule, in Italy. C. von Bar (Note 22), pp. 446–447.

^{*45} In accordance with LOA §§ 225 and 649, such damage is compensated for under the contract.

^{*46} For further details in this respect, see also: P. Schlechtriem (Note 35), pp. 1663–1669; I. Schwenzer. Sachgüterschutz im Spannungsfeld deliktischer Verkehrspflichten und vertraglicher Leistungspflichten. – JZ 1988, pp. 525–531; M. Käerdi (Note 15), pp. 116–128, 183–188.

purchaser. This means that in accordance with GPCCA § 146 (1)⁴⁷, the purchaser's claims would already have expired by the moment of the fire accident and the purchaser would not be able to assert any delictual claims due to the provision in LOA § 1044 (2). However, if the defective extension lead caused damage to the property of a third person, that third person would be in a better position than the purchaser as the third person could make use of the more generous limitation periods of the delictual claim. This result, which is most obviously unfair, can be avoided by the assertion that prevention of damage to property was not the purpose of obligations arising out of the contract of sale (LOA §§ 127 (2), 1044 (2)). By this means, the three-year limitation period of non-contractual liability will be applicable; this limitation period will, differently from that of a contractual claim, begin as of the moment when the entitled person became or should have become aware of the damage and of the person obligated to compensate for the damage (GPCCA § 150 (1)). *De lege ferenda*, however, it should be reconsidered whether the principle of *non-cumul* contained in LOA § 1044 (2) should be abandoned and, thus, free cumulation of contractual and non-contractual claims be allowed.

The second argument for the preclusion of such contractual liability, which is not conditional on the seller's culpability, for damage to the purchaser's property lies in the obvious disproportion between the consideration and the possible risk of damage. An assertion that every shop selling extension lead is also liable for a possible fire accident in a purchaser's house would result in a situation in which all damage will eventually be incumbent on the shop if the shop's right of recourse (LOA § 228) against the producer is precluded due to a contractual limit of liability or the producer's insolvency, and this could, in turn, lead to the bankruptcy of the shop. In terms of economic policy, this would produce a result where small shops could become extinct, leaving the market to only big store chains, who can afford such risks of liability or insure themselves against such damage. A situation of practice in which the majority of sellers are forced to conclude a liability insurance contract to cover possible compensations for damage exists e.g. in France, where a seller involved in economic and professional activity is liable for all damage, even from latent defects, caused to the creditors, including their absolute legal rights, regardless of whether that seller is a producer or merely a reseller. This means that even a small reseller may be liable for an unexpectedly extensive damage, which, in turn, could result in that reseller's bankruptcy.⁴⁸ Whether such solution is also sought in Estonia or whether such situation would be desirable, will eventually be up to the legislator to decide but in the author's opinion, such solution should rather be negated.

5. Protection of absolute legal rights by contracts with protective effect for third parties (LOA § 81)?

Now let us further suppose that in our case of the residential lease contract, health damage was suffered not only by the lessee but also by children living with the lessee. They had no contract with the lessor and hence, in principle, only a delictual claim is available to them. On the other hand, one could assert that the lease in question constitutes a contract with protective effect for a third party (i.e. the lessee's family members) under LOA § 81.⁴⁹ However, as pointed out above, the fact that in Germany, the institution of contracts with protective effect for third parties is very often used even for the compensation for damage from violation of absolute legal rights, in order to make up deficiencies in the German law of delict, especially those arising from BGB § 831.⁵⁰ The same applies to other countries where contracts with protective effect for third parties exist, in particular Austria and France: there, too, the institution in question is aimed at compensating for certain deficiencies in the law of delict.⁵¹ As shown above, such deficiencies practically do not exist in the Estonian law of delict and thus there is no need to protect absolute legal rights through the institution of contracts with protective effect for third parties. All the more so as due to the principle of *non-cumul* provided in LOA § 1044 (2), serious problems would ensue in Estonia from the fact that the third party pro-

⁴⁷ The limitation period for a claim arising from a transaction is three years.

⁴⁸ This would also produce the economically harmful result that each seller or reseller is forced to obtain insurance against such liability risks in order to avoid the risk of bankruptcy, which will eventually mean multiple insurances against one and the same risk. R. Bittner. Schutz des französischen Käufers vor Mangelfolgeschäden. Regensburg 1987, pp. 146–150.

⁴⁹ Such a position has been expressed by T. Uusen-Nacke. Kolmandat isikut kaitsev leping. Asjatundja vastutus kolmandate isikute ees (Contracts with protective effect for third parties. The expert's liability to third parties). – Juridica 2003/8, p. 536 (in Estonian).

⁵⁰ E. von Caemmerer Verträge zugunsten Dritter. In: Gesammelte Schriften. Bd. III. Tübingen: Mohr-Siebeck 1983, pp. 189–190.

⁵¹ C. von Bar (Note 22), pp. 482–483. Von Bar also points out that in cases when the institution of contracts with protective effect for third parties is used in Germany, Austria or France, only law of delict is applied in e.g. the Netherlands or Greece. *Ibid.*, pp. 480–481.

ected by the contract will depend on the limit of liability agreed between the parties in the contract.^{*52} If the debtor's liability has been e.g. quantitatively limited by the contracting parties, such limit of liability would also apply to the third party, which, in turn, would deprive the third party of a delictual claim in the event of damage to property, due to LOA § 1044 (2). This would produce an obviously unfair result, whereby the third party holding a claim under LOA § 81 would be in a worse situation than a person who is not entitled to a contractual claim and who could therefore assert a claim to the full extent under LOA §§ 1043 et seqq.!

Hence, the above reasons lead to the position that in Estonian law, LOA § 81 as a basis for claims in the event of damage to absolute legal rights will be out of the question and the scope of that institution must be limited to damage of a purely economic nature.^{*53} For our case of residential lease, this means that the health damage suffered by the lessee as well as the lessee's children is subject to compensation pursuant to LOA §§ 1043 et seqq., and thus all persons will be treated as equal regardless of whether the injured party has a contract with the debtor or not.

6. As an aside: protection of the other party's absolute legal rights through *culpa in contrahendo*?

Lastly, it would be quite difficult not to touch on the question of the nature of *culpa in contrahendo* as a legal institution, which has recently been a subject of dispute in Estonian legal literature. The dispute has focused primarily on the question of whether liability arising out of precontractual negotiations should be qualified as delictual^{*54} or, rather, the contractual legal remedies provided in LOA §§ 100 et seqq. should be applied to it.^{*55} The author of this article is in favour of the position expressed by J. Lahe that in the event of breach of precontractual duties, LOA §§ 1043 et seqq. should apply, i.e. this would constitute a non-contractual liability. In any event, this is applicable to the duty to protect the other party's absolute legal rights. Such legal rights must be, and as a rule they are, protected only through the law of delict. If a person opens a supermarket and its visitors happen to be hit by a falling shelf, the liability of the supermarket to those persons who intended to purchase something, i.e. were, so to say, in the process of precontractual negotiations, should not be different from its liability to such persons who did not intend to purchase anything or even could not purchase anything because of their restricted active legal capacity. One should rather take the position that the owner of the supermarket has a general duty of care in relation to all persons present, and upon violation of such duty, the owner's delictual liability will ensue.^{*56}

In the author's opinion, considering the structure of the Estonian law of obligations, liability based on *culpa in contrahendo* (LOA § 14) should actually be consequent on primarily just those cases for which it was initially developed by R. Jhering, i.e. as a sanction for precontractual negotiations conducted in bad faith. In no case should duties to protect the other party's absolute legal rights be derived from that obligation through LOA § 2 (2). Such protection obligations are known only in the legal orders of Germany, Austria and Greece, and in all of those countries, the development of such duties has resulted from the deficiencies in the law of delict that have already been mentioned above.^{*57} Inasmuch as in the Estonian law of delict, absolute legal rights are protected to a sufficient degree, a concept of delictual duties of care should rather be developed by the judicial practice: the need for and possibility of that have already been repeatedly stressed in Estonian legal literature.^{*58}

⁵² This is the position in German judicial practice, see E. von Caemmerer (Note 50), p. 194. The same would be applicable in Estonia, in view of the formulation in LOA § 81 (1). Limitation of claims for compensation for damage in residential lease contracts is, however, not possible due to LOA § 275.

⁵³ Suggestions of the same direction have been expressed by I. Kull et al. (Note 7), p. 444: primarily in those cases which deal with damage of a purely economic nature, i.e. damage which is not consequent on violation of delictually protected legal rights.

⁵⁴ Such a position has been expressed by J. Lahe (Note 33), p. 135. That position is prevalent in Europe, see C. von Bar (Note 22), p. 478. Even in common-law countries, where the institution of *culpa in contrahendo* is not known, such violations of obligation are, as a rule, penalised through the law of delict. H.-J. Meyer (Note 26), p. 10; C. von Bar (Note 22), p. 475.

⁵⁵ As expressed by I. Kull (Note 7), pp. 79–86.

⁵⁶ E. von Caemmerer (Note 40), p. 462–463; C. von Bar (Note 34), pp. 314–315; F. Ranieri. *Europäisches Obligationenrecht*. Wien: Springer 1999, p. 137.

⁵⁷ C. von Bar (Note 22), p. 478.

⁵⁸ T. Tampuu (Note 37), pp. 75–77; J. Lahe (Note 33), pp. 54–60; M. Käerdi (Note 15), p. 120.



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Forms of Liability in the Law of Delict:

Fault-Based Liability and Liability without Fault

Through times, the question of strictness of liability has been one of the principal problems in the law of delict. Thus there has been a search for the limit to the extent of which damage must be borne by the aggrieved party and for the point from where on the aggrieved party must be compensated for the damage by a third person, i.e. generally the tortfeasor.¹ Or, more specifically, whether a fact of causing damage is sufficient to give rise to delictual liability or the tortfeasor's fault is also required for that purpose has remained a timeless question.

This article is aimed at analysing what the prevailing form of liability is in delictual law and what it should be. In addition, the article will seek an answer to the question of what the trends of development are as regards the strictness of delictual liability. Understandably, this sphere of problems is specific not only to Estonia: the problems in question are topical in all legal orders.

This article is divided into four subtitles: the first provides a brief review on the historical development of liability in the law of delict and the second addresses the forms of delictual liability in present-day legal orders. The third subtitle offers an analysis regarding the rationale of different forms of liability in the law of delict. The final, fourth subtitle is dedicated to exploring whether and to what extent possible developments of liability in the law of delict can be pointed out on the basis of the present tendencies.

¹ R.W.M. Dias, B.S. Markesinis. *Tort Law*, second edition. Oxford: Clarendon Press 1989, p. 29.

1. Historical development of liability in the law of delict

In **the archaic legal orders**^{*2}, liability under the law of delict was independent of fault. The purpose of liability was not to compensate for damage but, first of all, to ‘heal’ the violated legal order through a magical procedure.^{*3} Already **in the beginning of civilisation**, causal liability existed in most societies (e.g. in Babylonian, earliest Roman^{*4} and English law)^{*5}, and delictual liability was a consequence of breach of the peace caused by an improper act.^{*6} The beginning of fault-based liability can be connected with as late a period as the end of **the Roman Republic**^{*7}, and after the end of the Roman State, the principle of fault had to wait until the 17th or 18th century, when it was redeclared by natural-law jurists.^{*8} After the Christianisation of law, sin, which always originated from evil will, became the central concept in liability. Fault was the core of sin.^{*9}

In the 19th century, **the principle of fault** scored a triumph, making its way to the presently applicable civil codes. Thus, in the beginning of that century, fault-based liability was implemented in the French *Code Civil*, (hereinafter *Code Civil*), thereafter also in the Austrian civil code, which entered into force in 1812, and causal liability became an exception.^{*10} Even for the drafters of the German Civil Code (hereinafter ‘BGB’), which entered into force on 1 January 1900, fault was the major requisite for liability under the law of delict.^{*11} It was said that liability without fault, or strict liability, did not serve the development of commerce in any case but it also imposed unreasonable restrictions on individuals’ freedom of movement.^{*12} The same notion also served as a basis for other legislators and scientists of the 19th century.^{*13} Thus the US scientist R.L. Rabin sees the explanation for the inception of fault-based liability in the United States in that at those times many judges believed that the economic development of the young country would be obstructed by a possibility that the entrepreneurs should be liable for damage arising purely from accidents.^{*14}

The establishment of the principle of fault can be regarded as a consequence of the 19th-century liberality.^{*15} According to such a way of thinking, it was said that by the nature of things, a sanction or an obligation to compensate for damage could only follow from reproachable behaviour. The prevailing principle was *nulla indemnitas sine culpa*: no indemnity without fault.^{*16}

The period of the (almost) absolute rule of the principle of fault did not last long: **strict liability** became necessary when, as increasingly high risks were handled, fault-based liability could no longer serve its balancing function (for the reason that due care was not directed to avoiding the risk but to handling the risk in a suitable manner).^{*17} Another reason for the inception of strict liability was the fact that when economic

² According to H. Hattenhauer, ‘archaic’ means initial, early, original. Archaic societies have the characteristic that persons belonging to such societies cannot think abstractly but keep to their traditions, the heritage of their fathers. See H. Hattenhauer. Euroopa õiguse ajalugu. I raamat (History of European Law. Book I). Tartu: Fontes Iuris 1995, pp. 27, 31 (in Estonian). Thus the present approach, in which an analysis of Roman law follows an analysis of archaic law, is tentative as the existence of archaic societies did not end with the creation of the Roman State.

³ See H. Hattenhauer (Note 2), pp. 25–76.

⁴ Thus the fault of the tortfeasor was not required for liability in the so-called Law of 12 Tables, which originates from the 5th century B.C.

⁵ On earlier English law, see C.B. Gray (ed.). The Philosophy of Law. An Encyclopedia. New York, London: Garland Publishing Inc. 1999, p. 292. See also: M. Adams. Ökonomische Analyse der Gefährdungs- und Verschuldenshaftung. Heidelberg: R. v. Decker’s Verlag, G. Schenck 1985, p. 114.

⁶ A. Erler, E. Kaufmann. Handwörterbuch zur Deutschen Rechtsgeschichte. Bd I. Berlin: Erich Schmidt Verlag 1971, p. 1902.

⁷ C. B. Gray (Note 5), p. 293.

⁸ K. Zweigert, H. Kötz. Introduction to Comparative Law, third edition. Oxford: Clarendon Press 1998, p. 597.

⁹ H. Hattenhauer. Grundbegriffe des Bürgerlichen Rechts. Historisch-dogmatische Einführung. München: C.H. Beck’sche Verlagsbuchhandlung 1982, pp. 100–101.

¹⁰ C.B. Gray (Note 5), p. 293.

¹¹ E. Schmidt, G. Brüggemeier. Zivilrechtliches Grundkurs. 6. Aufl. Neuwied und Kriftel: Hermann Luchterland Verlag 2002, p. 292. This is also due to the fact that BGB contains only one set of elements of strict liability: the liability of an animal keeper. Thus it is clear that the legislator has seen the principle of fault as the fundamental basis of liability, and strict liability can be regarded as a special phenomenon. On this, see H. Kötz, G. Wagner. Deliktsrecht. Neunte, überarbeitete Auflage. Neuwied, Kriftel: Luchterhand 2001, p. 136.

¹² H. Kötz, G. Wagner (Note 11), p. 13.

¹³ H. Strickler. Die Entwicklung der Gefährdungshaftung: auf dem Weg zur Generalklausel. Bern, Stuttgart: Verlag Paul Haupt 1983, p. 10.

¹⁴ R.L. Rabin. Perspectives on Tort Law, second edition. Boston, Toronto: Little, Brown and Company 1983, p. 38.

¹⁵ See also K. Zweigert, H. Kötz (Note 8), p. 608; K. Larenz. Lehrbuch des Schuldrechts. Bd 1. Allgemeiner Teil, 13. Aufl. München: C.H. Beck’sche Verlagsbuchhandlung 1982, p. 258.

¹⁶ H. Strickler (Note 13), pp. 9–11.

¹⁷ E. Deutsch, H.-J. Ahrens. Deliktsrecht. Unerlaubte Handlungen. Schadenersatz. Schmerzensgeld, 4. Aufl. Köln, Berlin, Bonn, München: Carl Heymanns Verlag 2002, p. 163.

stability and welfare was achieved by countries, there was no longer need for legislators and courts to support the economy.^{*18}

In Germany, strict liability was first introduced into positive law in 1838 by the Prussian Railway Act. In 1909, liability without fault was established for possessors of motor vehicles (*Kraftfahrzeuggesetz*, § 7), and other areas followed. The French Court of Cassation adopted a judgment pioneering for strict liability in 1896 by awarding damages to a widow for her spouse, who had been killed in an industrial accident, although the company's fault could not be proved.^{*19} In Great Britain, a foundation for strict liability was laid in 1868 by the House of Lords in *Rylands v. Fletcher*.^{*20}

It can be noted in summary that fault has not always and not in every society been a pre-requisite for liability under delictual law. There is no way but to agree with the thesis of B.S. Markesinis that the role of fault has changed through times; fault as a basis of tortious liability has been ignored, glorified and questioned at different times.^{*21} The valuation or discarding of fault has depended primarily upon social values (e.g. the liberal way of thinking, which became a cradle for fault) as well as general views on life, and, from the 19th century also upon the needs of the economy. In any case it is obvious that estimates for the future are relatively difficult to provide on the basis of how liability in delictual law has developed historically as a whole, since the needs and judgments of the society have changed rapidly and may do so in the future.^{*22}

2. Present-day forms of liability in delict law

In the present time, liability based on the general elements of delict, strict liability and producer liability can be distinguished in the laws of delict of most countries. Fault of the tortfeasor is usually required for general delictual liability. Thus § 1043 of the Estonian Law of Obligations Act^{*23} (LOA) provides that a person (tortfeasor) who unlawfully causes damage to another person (victim) must compensate for the damage if the tortfeasor is culpable of causing the damage or is liable for causing the damage pursuant to law.^{*24}

The principle of fault has been also used as a basis for regulating liability resulting from the general elements of delict e.g. in the Russian Federation Civil Code, § 1064^{*25}; the BGB § 823; the Italian Civil Code, § 2043; the *Code Civil*, §§ 1382-1383; the Greek Civil Code, § 914; the Swiss Civil Code, § 41 (1); the Austrian civil code, § 1295 (1); the Hungarian Civil Code, § 339; etc. General delictual liability depends on culpability also in e.g. Finland^{*26} and Sweden.^{*27} Even in common-law countries, the so-called negligence liability constitutes the most important set of elements of liability.^{*28} As a general rule, an obligation to compensate for damage will ensue only from a culpable act also in Japan (Japanese Civil Code, § 709)^{*29} and China.^{*30}

As observed above, delictual liability can also arise without the tortfeasor's fault in most modern legal orders. Such a situation has been reached by introducing respective provisions into civil codes, by adopting

¹⁹ See H. Kötz, G. Wagner (Note 11), p. 13. In French law, the development of strict liability has remained a judicial task. See H. Kötz, G. Wagner (Note 11), p. 135.

²⁰ In *Rylands v. Fletcher*, strict liability was applied to a land owner, whose property was a source of a harmful emission from a non-natural source, which had an impact on another property. It should be noted in addition that as the precedent of *Rylands v. Fletcher* did not develop into a general clause on strict liability in Great Britain, the introduction of sets of elements for strict liability has remained to be the task of primarily the legislator. An example of that was the Nuclear Installations Act of 1965. C. v. Bar, J. Shaw. *Deliktsrecht in Europa. Systematische Einführungen, Gesetztexte, Übersetzungen*. Landberichte Dänemark, England, Wales. Köln, Berlin, Bonn, München: Carl Heymanns Verlag 1993, pp. 12–43. On the same subject, see also: H. Kötz, G. Wagner (Note 11), p. 135.

²¹ R.W.M. Dias, B.S. Markesinis (Note 1), p. 28.

²² It is, however, possible to do this to some extent on the basis of those processes from the recent past that have influenced liability. In the final subtitle of this article, the author offers a review on some development trends in fault-based liability and in the entire delictual liability.

²³ *Võlaõigusseadus* (Law of Obligations Act). – RT I 2001, 81, 487; 2002, 53, 336 (in Estonian).

²⁴ General delictual liability was dependent on fault also under the Estonian SSR Civil Code, § 448 (2), which was applicable before the entry into force of the Law of Obligations Act. That Civil Code was adopted by the Supreme Council of the Estonian Soviet Socialist Republic on 12 June 1964. – ÜNT (Supreme Council Gazette) 1964, 25, 115; RT I 1997, 48, 775 (in Estonian).

²⁵ The general part of the Russian Federation Civil Code was adopted by the State Duma on 21 October 1994 and the special part thereof was adopted on 22 December 1995.

²⁶ W.V. Gervén, J. Lever, P. Larouche, C. v. Bar. *Common Law of Europe Casebooks. Torts. Scope of protection*. Oxford: Genevieve Viney, Hart Publishing 1998, p. 44.

²⁷ S. Strömholm. *An Introduction to Swedish law*, second edition. Norstedts 1998, p. 304.

²⁸ D.J. Cooke, D.W. Oughton. *The Common Law of Obligations*, second edition. London, Dublin, Edinburgh: Butterworths 1993, pp. 166, 179.

²⁹ See also H.P. Marutschke. *Einführung in das japanische Recht*. München: C.H. Beck'sche 1999, p. 183.

³⁰ H. Oda. *Japanese Law*. London–Dublin–Edinburgh: Butterworths 1992, p. 210; H.R. Zheng. *China's Civil and Commercial Law*. Butterworths, Singapore, UK, USA, Canada, Australia, New Zealand 1988, p. 37.

specific acts (primarily in the German law of delict^{*31}) or as a result of judicial legislation (in French law and in common-law countries).^{*32} This regards mainly strict liability and producer liability, in respect of which the question of fault is put in the background (in the event of producer liability) or altogether disregarded (in the event of strict liability).

The number of the sets of elements giving rise to strict liability is increasing all the time, and for example, in common-law countries, more and more disputes can be settled on the basis of strict liability.^{*33} Today, the actual situation is seen rather as such that most of the damage cases are already covered by the regulation of strict liability and producer liability, and hence an overwhelming majority of damage cases are settled on the basis of liability without fault.^{*34} Thus it can be asserted that although fault is required in the general elements of delictual liability, fault-based liability is increasingly losing its dominant position to liability without fault or strict liability in modern legal orders.

Caution should be exercised in assessing whether fault-based liability or strict liability is essentially applied to specific cases in a legal order. The reason for this is the possibility of a smooth transition from fault-based liability to strict liability. Such a transition can be noticed particularly in those legal orders where the law provides only a few or no sets of elements for strict liability. Thus, for example, there is yet no specific regulation for compensation for damage caused by motor vehicles or aircraft in Great Britain, the United States and even France. Although courts of those countries should use general fault-based liability as a basis in such cases, a closer observation shows that in fact, the liability there is not less strict than in Germany, where courts can rely on specific sets of elements for strict liability. Such a result is achieved by reversing the burden of proof, by establishing a very high standard of care and by other means.^{*35}

In summary it can be stated that although some jurists regard the general elements of delict as applicable even without the tortfeasor's fault, recognition of the principle of fault is still the dominant direction all over the world, as regards general delictual liability. Mainly, derogations from the principle of fault are made only by adding sets of elements for strict liability. As noted above, there is naturally the separate problem of how much importance can be attributed to the fault-based general set of elements of delict, when less and less cases of damage can be classified under the general set of elements due to the rapid triumph of strict liability. It would be too venturesome to agree with the statement that the sets of elements of strict liability can be characterised as exceptions and do not pose any danger to the applicability of the principle of fault. We should rather adopt the standpoint that in delictual liability, the principle of fault is far from unassailable any longer and its dominant position has become a very disputable issue due to the introduction of the sets of elements of strict liability and producer liability into the law, which should actually be regarded as justified steps in general.

It is noteworthy that no modern system of liability is purely fault-based or purely causal. Rather, the question lies in whether a system is dominated by fault-based or causal liability. As noted above, fault-based liability presently seems to be more and more obviously losing its position to strict liability to an increasingly large degree. Hence it is no longer easy to defend R. von Ihering's idea that 'The obligation to compensate for damage does not arise from the damage but, rather, from fault — this is a sentence as simple as the chemists' postulate that what burns is not fire but oxygen contained in the air'.^{*36}

³¹ In German law, strict liability has been established by special acts, largely; only the liability of an animal keeper has been established by the BGB. K.-H. Gursky, too, finds that most of the sets of elements for compensation for damage are based on the principle of fault and cases of strict liability are exceptions, and the sets of elements of strict liability must not be applied to similar cases by analogy. See K.-H. Gursky. *Schuldrecht. Besonderer Teil*, 3. Aufl. Heidelberg: C.F. Müller Verlag 1999, p. 188.

³² On the development of strict liability by way of administration of justice and on interpretation of the provisions of fault-based liability with results which are similar to strict liability, see also: H. Kötz, G. Wagner (Note 11), p. 135.

³³ J. Spier (ed.). *The Limits of Liability. Keeping the Floodgates Shut*. The Hague, London, Boston: Kluwer Law International 1996, p. 13.

³⁴ M. Adams (Note 5), p. 111. The position of strict liability in the law of delict could also be at least indirectly coloured by the fact that during the recent five years, the Estonian Supreme Court has awarded judgments in 18 cases concerning motor liability insurance or damage from sources of greater danger. At the same time, under the key phrase 'unlawful causing of damage', only 13 judicial decisions could be found from the same period (exclusive of the cases of damage caused by a source of greater danger). See <http://www.nc.ee> (in Estonian).

³⁵ H. Kötz, G. Wagner (Note 11), p. 107.

³⁶ K.P. Finke, W. Hempel. *Gefährdung und Verschulden im Strassenverkehr*. Athenäum Verlag 1978, p. 25.

3. Fault-based delictual liability and strict liability

3.1. Principal positions of advocates of strict liability

The following analysis is focused on the question of whether fault-based delictual liability or strict liability should be the dominant one in modern society. This is an interesting and intriguing question of the strictness of liability, largely reducible to the problem of who should cover the damage caused by no one's fault.^{*37} In the opinion of R.-D. Pfahl, a solution to that problem will require an assessment of which party stands closer to the damage: either the tortfeasor as the person who caused the damage or the aggrieved party as the damage was caused in his or her personal or proprietary sphere. The answer cannot be simple. Therefore, a more correct way to put the question could be as follows: should the damage caused be left to be borne **rather** by the aggrieved party or **rather** by the tortfeasor?^{*38} This means a decision of whether to prefer the aggrieved party or the tortfeasor. The first option of preference would be realised by strict liability without fault, and the second option would be realised by means of fault-based liability under the law of delict.

The advocates of strict liability, a majority of whom are in favour of strict liability in only certain spheres while others think that it should replace all fault-based liability completely, justify their positions with mainly the following arguments. The primary idea of strict liability can be regarded as expressed in the position of the German penal jurist, K. Binding, who stated that the absence of fault is a basis for precluding liability in penal law but not in the law of compensation for damage. An obligation to compensate for damage is not a punishment.^{*39}

It is found that in a modern society, cases of damage can occur even if nobody can be blamed for culpable behaviour. This happens primarily in cases of handling particularly dangerous items. In such cases, strict liability enables to protect the aggrieved party and leaves greater damage caused by the source of danger to be borne by the person who created that danger in its own interest.^{*40} In other words, as business operators gain profits from their enterprises, they should also sustain the risk of damage. Generally, a business operator is also more capable of compensating for damage than an individual person, the aggrieved party.^{*41}

In the case of fault-based liability, damage caused in consequence of the so-called accidents without anyone's fault should be borne by the aggrieved party, which does not seem fair.^{*42} In other words: if no one is culpable of causing the damage, it may be less fair to leave such damage to be borne by the aggrieved party rather than the tortfeasor, because it was the tortfeasor, and not the aggrieved party, who caused the damage.^{*43} It could be said that in such cases, strict liability serves the purpose of balancing the interests of the aggrieved party and the tortfeasor.^{*44}

M. Adams finds that the invention and general acceptance of the idea of fault has yet had a remarkably short legal tradition. In M. Adams's opinion, the fact that in today's legal practice, all major spheres of activity where accidents occur are covered by the system of strict liability or social security, justifies the idea that fault-based liability as a general principle does not conform to the citizens' values or expectations and thus collides with the law's function of securing the peace. With legal certainty and social costs in mind, M. Adams recommends a full-scale transition from fault-based liability to strict liability.^{*45}

In the opinion of B.S. Markesinis, one of the reasons for the principle of fault-based liability to falter may also lie in its frequent conflicts with the common sense of fairness: namely, there are very many persons who, though having culpably caused damage, will never have to sustain the consequences of their activities.^{*46} Often, the actual offender will not have to compensate for the damage because of not being worth an

³⁷ J. L. Coleman has provided a comment to the point: 'Tort law is unjust either to victims or injurers, probably to both.' J.L. Coleman. *Risks and Wrongs*. Cambridge University Press 1992, p. 221.

³⁸ R.-D. Pfahl. *Haftung ohne Verschulden als sittliche Pflicht*. Düsseldorf: Patmos Verlag 1974, p. 131.

³⁹ H. Strickler (Note 13), p. 27.

⁴⁰ B. Baudisch. *Die Gesetzgeberischen Haftungsgründe der Gefährdungshaftung*. Aachen: Shaker Verlag 1998, pp. 188–191. About the same position, see also: H. Kötz, G. Wagner (Note 11), p. 13. Historically, the establishment of strict liability has been based on the presumption that the thing or activity for which strict liability is established emanates a greater danger, is new and is not completely controllable. *Ibid.*, p. 137.

⁴¹ R.-D. Pfahl (Note 38), pp. 112–113.

⁴² B. Baudisch (Note 40), p. 194.

⁴³ J. L. Coleman (Note 37), p. 224.

⁴⁴ B. Baudisch (Note 40), p. 194.

⁴⁵ M. Adams (Note 5), pp. 114–115.

⁴⁶ R.W.M. Dias, B.S. Markesinis (Note 1), p. 30.

action, and the actual liability will be borne by the offender's employer or insurer.^{*47} The aggrieved party's inability to prove the actual tortfeasor's fault may be another reason why the latter is not held liable. In the case of strict liability, however, the aggrieved party does not have to go through the complicated process of proving the fault.^{*48} As regards the principle of fault, Esser has found that a basis for it was not provided by moral motives but by those of economic policy. Thus, the aggrieved party was, in essence, sacrificed to economic development.^{*49}

The reasonableness of strict liability has also been upheld by the argument that producers who have strict liability can insure their liability and include the costs of that insurance in the price of their products.^{*50} However, the author is of the opinion that such an argumentation is not utterly convincing since it cannot be used as a justification for all cases of strict liability. For example, animal keepers (e.g. dog owners) often cannot recover their insurance expenses.

According to the position of K. Zweigert and H. Kötz, there may be a multitude of reasons to establish strict liability: the need to protect the aggrieved party (including the complexity of proving the fault in some areas), the acceptance of risks in a society only if strict liability is provided for the event of their realisation, the uncomplicated insurability of the respective risks, etc.^{*51} Hence it can be noted that justifications for strict liability have been provided in several manners and, for the most part, convincingly.

3.2. Principal positions of advocates of fault-based liability in the law of delict

It could be stated that if a person, without intent or negligence, causes damage to another person, there is generally no basis why that first person should compensate for the damage.^{*52} It is found that according to the common perception of morals, only the person who has behaved culpably must pay compensation to the person who suffered the damage.^{*53} An opposite kind of situation could unjustifiably restrict the individual freedom to act (and, *inter alia*, the development of economy).^{*54} Likewise, J. Horder takes the position that courts should deliberate on whether the result of strict liability is of a high enough value for the principle of individual autonomy to give way to it.^{*55} B.S. Markesinis has noted that fault has an educational and social value inasmuch as it helps to balance an individual's freedom to act and the obligations (including liability) arising out of such activity.^{*56}

Technical development is rapidly bringing about an increasing number of objects and activities which pose greater-than-normal dangers to third parties. However, what distinguishes a special threat from a normal one is not always obvious.^{*57} Insofar as the question of what a source of a greater danger is often a question of fact, it could be stated that strict liability also restricts the principle of legal certainty.^{*58}

In T. Tampus's opinion, strict liability has the shortcoming that it is accompanied by the propagation of liability insurance, which obfuscates the preventive effect of the law of delict and the objective to attain fairness, as the person usually escapes personal liability.^{*59} Tampus adds that on the basis of the principle of fairness, the law of delict must, first of all, enable the actual civil liability of the person who caused damage and who can be blamed for it.^{*60} One has to agree with that position, with the addition that by establishing a

⁴⁷ R.F.V. Heuston, R.A. Buckley. Salmond and Heuston on the Law of Torts. 19th edition. London: Sweet&Maxwell 1987, p. 25.

⁴⁸ C. Huber. Das neue Schadenersatzrecht. Bonn: Deutscher Anwalt Verlag 2003, p. 169.

⁴⁹ H. Kötz, G. Wagner (Note 11), p. 15.

⁵⁰ B. Baudisch (Note 40), p. 175.

⁵¹ K. Zweigert, H. Kötz (Note 8), p. 671.

⁵² R.F.V. Heuston, R.A. Buckley (Note 47), p. 24.

⁵³ G. Williams, B.A. Hepple. Foundation of the Law of Tort, second edition. London: Butterworths 1984, p. 136.

⁵⁴ See the same position by T. Tampus. Riskivastutus ja tootja vastutus võlaõigusseaduses (Strict liability and producer liability in the Law of Obligations Act). – Juridica 2003/3, p. 161 (in Estonian). Actually it is also admitted by M. Adams that liability for damage caused without fault will restrict persons' freedom of movement to a regrettable extent. M. Adams (Note 5), p. 117.

⁵⁵ J. Horder. Strict Liability, Statutory Constructions, and the Spirit of Liberty. F.M.B. Reynolds (ed.). The Law Quarterly Review. Vol. 118. London: Sweet&Maxwell 2002, p. 461.

⁵⁶ R.W.M. Dias, B.S. Markesinis (Note 1), p. 29.

⁵⁷ B. Baudisch (Note 40), p. 196.

⁵⁸ For example, a ski lift was not judged to be a source of greater danger by the Finnish Supreme Court (Judgment No. 1992:141 of 20 October 1992).

⁵⁹ T. Tampus (Note 54), p. 161.

⁶⁰ T. Tampus. Deliktiõigus võlaõigusseaduses. Üldprobleemid ja delikti üldkoosseisul põhinev vastutus (Law of delict in the law of obligations. General problems and liability based on the general elements of delict). – Juridica 2003/2, p. 71 (in Estonian).

lower threshold for liability insurance coverage it is possible to decrease, to a certain extent, the obfuscation of the preventive effect of the law of delict and the attainment of the principle of fairness.^{*61}

Thus it can be noted that the necessity of both fault-based liability as well as strict liability can be relatively successfully justified. Before presenting the final conclusions, the problem in question will also be analysed from the viewpoint of legal economy as well as the philosophical viewpoint.

3.3. Legal economy aspect of the discussion

The discussion on the justifiability of fault-based liability or strict liability in terms of legal economy is, in summary, a matter of which of those liability forms is so to say economically less costly. Thus R. Cooter and T. Ulen also assert that the economic purpose of delictual liability is to minimise the instruments used to prevent damage and damage in total. Thus we have to reduce the set of social costs made up by the expenses of preventing the damage, those of the damage itself and the administrative expenses.^{*62}

P. Cane is of the position that individuals take decisions on whether and to what extent expenses on preventing damage should be incurred on the basis of whether or not the expenses caused by damage will exceed those of preventing the damage.^{*63} If expenses of damage are higher than those of preventing the damage, the latter are incurred regardless of whether this is the question of fault-based or strict liability. In the opinion of P. Cane, the strictness of liability does not remarkably alter the general level of safety in a society.^{*64} W.L. Prosser, too, has found that in general, there is no basis for choosing between strict liability and fault-based liability, as regards the prevention of accidents.^{*65}

This position is opposed by G. Williams, who finds that since the law of delict is aimed at, *inter alia*, the prevention of damage, it is the strict liability that specifically assists to the fulfilment of this aim.^{*66} The discussion is developed further by R.L. Rabin, who offers an interesting example: if liability were fault-based, a car driver would decide on how much to drive only on the basis of how much he would like to do it. However, things would be different in the case of strict liability. Since the driver would have to compensate for any damage from an accident, he should decide on the activity of his driving.^{*67}

The author of this article agrees with the lastly presented positions and admits that the regulation of strict liability can make individuals more careful, of course if compensation for damage can be reduced to the extent of the aggrieved party's own role in causing the damage. Insofar as strict liability also has an impact on the activity of individuals, it can also reduce the total costs of damage. Nonetheless, we have to keep in mind the fact that legal economy is not aimed at making the society safer but at judging which regulation will be less costly in summary. In other words, if damage itself is less costly than its prevention, legal economists will let the damage happen without worry.

All in all, the question of whether to prefer fault-based or strict liability is reducible to the question of who should sustain the damage caused by accidents. In the system of strict liability in which compensation for damage can be reduced due to the aggrieved party's role, if any, in causing the damage, the difference between fault-based and strict liability is that in the latter case, the costs of an accident which could be avoided only by expenses higher than the damage itself have been left to the tortfeasor. In fault-based liability, such costs have been left to be borne by the aggrieved party.^{*68} In the opinion of S.R. Perry, this is the very reason why fault-based liability is not economically justifiable: if the tortfeasor can use the excuse that due care was exercised in respect of the aggrieved party, it follows that the tortfeasor can enjoy the income from an activity but the expenses of such activity are left to be sustained by another person.^{*69} At the same time it has also been found that the argument of leaving the expenses of an activity to be borne by

⁶¹ On that see also: B. v. Eyben. *Alternative Compensation Systems*. P. Wahlgren (ed.). *Scandinavian Studies in Law*. Vol. 41. Tort Liability and Insurance. Stockholm: The Stockholm University Law Faculty 2001, p. 232.

⁶² R. Cooter, T. Ulen. *Law and Economics*, second edition. United States: Addison-Wesley Educational Publishers Inc. 1998, p. 288. On that see also: B.S. Byrd. *The Law & Language of Contracts and Torts*. Anglo-Amerikanisches Vertrags- und Deliktsrecht. München: C.H. Beck'sche; Wien: Manz'sche Verlags- und Universitätsbuchhandlung; Bern: Verlag Stämpfli AG 1998, p. 162.

⁶³ P. Cane. *The Anatomy of Tort Law*. Oxford: Hart Publishing 1997, p. 45.

⁶⁴ M.A. Franklin, R.L. Rabin. *Cases and Materials on Tort Law and Alternatives*, third edition. New York: The Foundation Press 1983, p. 653.

⁶⁵ *Scil.*, even fault-based liability can be economically efficient if an efficient position is provided to the degree of due care. See R.L. Rabin (Note 14), p. 655.

⁶⁶ G. Williams, B.A. Hepple (Note 53), p. 138.

⁶⁷ R.L. Rabin (Note 14), pp. 225–226.

⁶⁸ M.A. Franklin, R.L. Rabin (Note 64), p. 654.

⁶⁹ E.J. Weinrib (ed.). *Tort law*. Aldershot, Hong-Kong, Singapore, Sydney, 1991, p. 182. In strict liability, such expenses can often also be distributed between consumers. See R.L. Rabin (Note 14), p. 656.

another person is not convincing enough. On the one hand, a person driving a car enjoys his or her activity, but on the other hand, motor vehicles are beneficial to the entire society. The situation is similar in the case of producer liability: it cannot be said that benefits of the product are enjoyed only by the producer as they are also enjoyed by the consumers.^{*70}

Costs of administration must also be taken into account, as regards the economic aspect of the regulation by the law of delict.^{*71} In the case of strict liability, the administrative costs are lower than in the case of fault-based liability.^{*72} Although strict liability results in a larger number of claims, those claims are easier to settle; fault-based liability results in a lesser number of claims but the settlement of those claims is substantially more complex.^{*73}

In reality, the insurance system is also of significant importance in the described discussion since a material portion of damage costs is actually sustained by insurance. R.L. Rabin is of the position that strict liability has the effect of forcing the tortfeasor to insure its liability. Rabin finds that if the tortfeasor's (liability) insurance is less costly than the aggrieved party's (loss) insurance, there exists an economic argument in favour of strict liability. However, Rabin finds it difficult to confirm whether it is actually so.^{*74}

Hence, it can be concluded on the above basis that given the costs of preventing damage, the costs of damage itself and the administrative costs as well as taking account of the total amount of such costs, the system of strict liability seems to be the more justified one in economic terms.^{*75}

3.4. Legal philosophy aspect of the discussion

The provisions in the law of delict must not invade the society's sense of fairness. Norms of the law of delict must be automatically acceptable to the people, otherwise there will be difficulties in implementing those provisions.^{*76} By presenting positions of legal philosophers in the following paragraphs, the author will attempt to answer the question of how the preference of fault-based or strict liability can be justified by the attainment of fairness as one of the objectives of the law of delict.

Naturally, for that purpose, an answer should first be provided to the question of what kind of regulation is fair.^{*77}

By the Aristotelian approach, fairness in the general sense and in the individual sense can be treated as distinct. As regards fairness in the general sense, there are two concepts: legality and equality. Fair means legal, equal and honest; unfair means illegal, unequal or dishonest. With regard to individual fairness, there are also two distinguishable aspects: the fairness of distribution and the corrective justice. The fairness of distribution is applicable to the distribution of social values (e.g. honour, money), and such distribution can be equal or unequal between the members of society.^{*78} Corrective justice is directed to protecting the share of each citizen. If a person has forfeited his or her share to another person, he or she has a claim against that other person.^{*79}

One of the most important developers of the theory of corrective justice, R. Epstein, and other supporters of that theory find that protection of individuals' freedom is the task of the law of delict. The theory is based on

⁷⁰ W.B. Dufwa. Development of International Tort Law. Till the Beginning of the 1990's From a Scandinavian Point of View. P. Wahlgren (ed.). Scandinavian Studies in Law. Vol. 41. Tort Liability and Insurance. Stockholm: The Stockholm University Law Faculty 2001, p. 95.

⁷¹ R.L. Rabin (Note 14), p. 656.

⁷² It is clear that administrative costs could best be avoided by the absence of delictual liability. See R. Cooter, T. Ulen (Note 62), p. 288.

⁷³ R. Cooter, T. Ulen (Note 62), p. 289. In fault-based liability, administrative costs are very high primarily in common-law countries, where also the jury must learn to understand the necessary matters concerning fault.

⁷⁴ R.L. Rabin (Note 14), p. 655. In this point, the author would like to stress that as insurance influences the care of negatively insured persons, a lower threshold of liability (an excess) must be established with regard to the insured in order for the system of compensation for damage to function, regardless of whether the question is about non-life insurance in general or its subtype, the liability insurance. That lower threshold should be established on such a level that would force the person to act with care but would, at the same time, not lessen that person's interest in concluding an insurance contract. However, the author admits that the preventive effect of the law of delict is, in any case, somewhat decreased by insurance; the lower threshold of liability would help to limit such a decrease.

⁷⁵ Fault-based liability has been criticised for its economic inefficiency by R. Posner. See E.J. Weinrib (Note 69), p. 175.

⁷⁶ W.B. Dufwa (Note 70), p. 164.

⁷⁷ At this point it should be noted that e.g. I. Tammelo has stated that discussions regarding fair decisions and norms will not lead to graspable results. See I. Tammelo. Theorie der Gerechtigkeit. Freiburg, München: Verlag Karl Alber, 1977, p. 101. The author is of the opinion that notwithstanding the truthfulness of that statement, legal philosophical discussions should not be avoided.

⁷⁸ H. Kelsen. What is Justice? Justice, Law and Politics in the Mirror of Science. New Jersey: The Lawbook Exchange LTD Union 2000, pp. 125–126.

⁷⁹ R.O. Brooks, J. B. Murphy (eds.). Aristotle and Modern Law. England: Dartmouth Publishing Company 2003, p. 1589.

the idea that all humans have a right to autonomy and interventions with this freedom are acceptable only if damage from the exercise of this freedom is suffered by a third party. On moral considerations, the tortfeasor must put the aggrieved party in the situation which would have prevailed if the damage had not occurred.^{*80}

In the opinion of S.R. Perry, strict liability is the form of delictual liability compatible with the concept of corrective justice. If the tortfeasor causes damage to the aggrieved party, the tortfeasor must compensate for the damage even if the risks taken by the tortfeasor were reasonable.^{*81} Upon the assumption that persons are different in their situations and abilities and it would be fair if everyone acts and takes positions according to his or her abilities, it could also be claimed, reversely, that it would be fair if persons had to be liable for their behaviour only if they had behaved below the level of such abilities. Such an approach to fairness seems to be in favour of fault-based liability or even a subjective standard of fault.

The nature of fairness has been analysed by several other authors, including e.g. J. Rawls^{*82}, H. Römer^{*83}, H. Kelsen^{*84} and others, but a single answer to the question of whether the law of compensation for damage should prefer fault-based or strict liability has not been provided by works of legal philosophy.

3.5. Justified form of liability in the law of delict

On the basis of the above-presented analysis, it can be concluded that the question of strictness of liability or, more exactly, of whether fault-based or strict liability should dominate in the law of delict, is intriguing and interesting. At the same time this question cannot be answered on the basis of what has been presented: namely, there are only a few authors who unconditionally favour one or the other form.^{*85} Thus, positions have been expressed in recent legal literature that fault-based liability and strict liability are two equivalent forms of liability, which complement each other.^{*86} While fosterers of the legal economic method of research tend to support strict liability, neither of the liability forms can be preferred to the other under the legal philosophical approaches.

Therefore the author of this article adopts the position that in today's society, it is not right to prefer one form of liability to the other. It is justified to maintain individuals' freedom to act as far as no damage can obviously arise from such activity provided that due care is exercised. Otherwise, economic activity would be unreasonably obstructed as well. Thus, the author is of the opinion that unless dealing with a source of greater danger which can cause damage regardless of the care exercised by the person, fault-based liability should be regarded as appropriate.^{*87}

At the same time, the author admits that fault-based liability is inappropriate in some spheres of activity. Namely, the aggrieved party would be left without compensation in the cases in which damage has been caused by a source of greater danger (as in such cases, damage can arise without the tortfeasor's fault, i.e. by an accident) and that would certainly not be fair or reasonable. Damage caused by accidents should be borne by the keeper of the source of greater danger because he or she can decide whether and how to keep, use or handle that source of greater danger.

Establishment of strict liability cannot be justified only by stating that persons can insure their liability. Namely, an individual cannot insure all liability that could potentially follow from that individual's behaviour and even if insurers agreed to sign such contracts, the insurance premiums would be unreasonably high. This would, however, lead to a situation in which persons do not insure their liability and their freedom to act would still be restricted in an unreasonable manner.

⁸⁰ W.B. Dufwa (Note 70), p. 170.

⁸¹ E.J. Weinrieb (Note 69), p. 176.

⁸² O. Höffe. John Rawls. *Gerechtigkeit als Fairness*. Freiburg, München: Verlag Karl Alber 1977, pp. 19–20.

⁸³ H. Römer. *Privatrecht. Intensivkurs*. 4. Aufl. München, Wien: R. Oldenbourg Verlag 1999, p. 18.

⁸⁴ H. Kelsen (Note 78), p. 295.

⁸⁵ As noted above, there are some authors who do not regard fault as an important element of liability in the law of delict, and there are also some authors who have adopted the position that as the sets of elements of strict liability do not have the requirement of fault, strict liability should not even be considered to be a part of the law of delict. See M. Gruber. *Freiheitsschutz als ein Zweck des Deliktsrechts. Versuch einer methodengerechten Begründung*. Berlin: Duncker&Humblot 1998, p. 203.

⁸⁶ B. Baudisch (Note 40), p. 212.

⁸⁷ In modern theoretical literature, the answers to the question of what the general form of delictual liability should be are in general explicit: fault-based and strict liability. See E.J. Weinrieb (Note 69), p. 175. Regarding the same position, see: K. Zweigert, H. Kötz. *Einführung in die Rechtsvergleichung auf dem Gebiete des Privatrechts*, 3rd ed. Tübingen: Mohr 1996, p. 652.

4. Development trends of liability in the law of delict

Since the beginning of the 19th century, the law of delict has been developing in one important direction: protection of the aggrieved party has been increasing in the regulations of liability.^{*88} In addition, it cannot go unmentioned that economic efficiency of the system of damage compensation may become an increasingly important goal in modern society. It is obvious that these developments imply the domination of strict liability in the future.

However, the complete replacement of fault-based liability by strict liability will not yet take place in the near future. The reasons for this are the following. Although the replacement of the principle of fault with causal liability has been recently considered, such a plan has not been implemented yet at least in European legal orders.^{*89}

Secondly, it must be remembered that even today, jurists and legislators still see the principle of fault as viable. This is also endorsed by the Tort-Law Book of the European Civil Code project^{*90}, art. 1:101:1 of which provides that a person who suffers legally relevant damage has, under that Book, a right to reparation from a person who caused the damage intentionally or negligently (or who is otherwise accountable for the causation of the damage). Assessors of developments in the European law of delict have adopted the position that negligence liability and strict liability are two equally important forms of liability, which are not opposed to each other. Rather, they are interconnected: on the one hand, fault-based liability does not require an actual fault of the tortfeasor or the possibility of blaming the tortfeasor subjectively for the damage; on the other hand, strict liability is not absolute but more of a hybrid institution between causal liability and fault-based liability.^{*91}

Likewise, the national laws of most states (and also the scientific research) still firmly cling to the principle of fault. On the above basis it can be asserted that at least in the near future, the general elements of delict, which include fault as one of the elements, will continue to apply. At the same time it is no longer correct to say that strict liability will continue to apply by its side: fault-based liability will rather remain applicable by the side of strict liability.

In discussing developments in the law of delict, the impact of developments in the **insurance system** should certainly not be neglected. After all, the development of the insurance system lead to the situation in which there were no more reasons to protect business operators^{*92} and opened up the way for strict liability. Therefore it could be asked whether e.g. a sudden drop in economic welfare or the pace of development would not force the legislators to reglorify the principle of fault. The author still finds this to be quite unlikely.

The increased role of the insurance system has been accompanied by a decrease in the importance of the law of delict.^{*93} The British jurist M.A. Jones also states that the role of insurance in modern tort law is decisive. Courts award high damages that are unaffordable to individuals as well as smaller companies.^{*94}

⁸⁸ W.B. Dufwa (Note 70), p. 91. It has been found that the protective sphere of tort law has significantly expanded in recent times and this does not concern only the phenomenon of the United States. See E. Hondius (ed.). *Modern Trends in Tort Law. Dutch and Japanese Law Compared*. The Hague, London, Boston: Kluwer Law International 1999, p. 261.

⁸⁹ For example, the Peason Commission (the Royal Commission on Civil Liability on Compensation for Personal Injury, set up in 1978) in Great Britain seriously considered the introduction of delictual liability without fault but still did not recommend it to the parliament. See C. v. Bar, J. Shaw (Note 20), p. 71.

⁹⁰ The Study Group on a European Civil Code came together in the middle of 1999 and it is considered to be the successor of the Commission on European Contract Law. See C. v. Bar. *Konturen des Deliktsrechtskonzeptes der Study Group on European Civil Code — Ein Werkstattbericht*. Zeitschrift für Europäisches Privatrecht. 9th year of issue. München: Verlag C.H.Beck, 2001, p. 515. Although upon external observation, the law of liability in European legal orders offers diverse picture at first sight (N. Jansen. *Auf dem Weg zu einem europäischen Haftungsrecht*. Zeitschrift für Europäisches Privatrecht. 9th year of issue. München: Verlag C.H. Beck 2001, p. 30), the creation of a European law of delict was considered as relatively probable at least at the end of the 20th century. See U. Magnus. *Elemente eines europäischen Deliktsrechts*. Zeitschrift für Europäisches Privatrecht. 6th year of issue. München: Verlag C.H. Beck 1998, p. 614. The project materials of a European Civil Code are available at: http://www.sgecc.net/index.php?subsite=subsite_4

⁹¹ N. Jansen (Note 90), p. 47.

⁹² R.W.M. Dias, B.S. Markesinis (Note 1), p. 30.

⁹³ W.B. Dufwa (Note 70), p. 98. There are well-developed insurance systems also in the Nordic countries. On that, see B. v. Eyben. *Alternative Compensation Systems*. P. Wahlgren (ed.). *Scandinavian Studies in Law*. Vol. 41. Tort Liability and Insurance. Stockholm: The Stockholm University Law Faculty 2001, p. 201.

⁹⁴ M.A. Jones. *Textbook on Torts*, 4th edition. London: Blackstone Press Limited 1993, p. 10.

Moreover, there are authors who consider it reasonable to replace the entire system of the law of delict with a system of insurance.^{*95} Such a tendency is also predicted by e.g. J. Fleming.^{*96} It is asserted that the system of the law of delict is not economically efficient because it requires more time and money than the functioning of an insurance system.^{*97} In many spheres of activity, insurance has already become the dominant mechanism of compensation for damage.^{*98}

The respective considerations of legal policy are still clouded by the bitter fact that society does not have the means to compensate for all the damage that can occur.^{*99} An all-inclusive system of insurance would be possible only if compensations for the aggrieved parties were significantly smaller than in the law of delict, e.g. if any compensation for intangible damage were unavailable. In the opinion of many prominent authors, including K. Zweigert, the need for a reformation is therefore not urgent.^{*100}

5. Summary

In summary, it can be noted that historically, the valuation or discarding of fault has depended primarily on social values and, from the 19th century, also on the needs of economy. Nowadays, the general delictual liability, which has the requirement of fault, is recognised everywhere. At the same time, the principle of fault is losing its dominant position since in the legal reality, a large part of damage cases is settled under the provisions of strict liability or producer liability.

The need for preferring either fault-based liability or strict liability can be successfully justified. The author is of the opinion that today, it is not correct to prefer one form of liability to the other. It is justified to maintain individuals' freedom to act as far as no damage can obviously arise from such activity provided that due care is exercised. Thus, unless the question is about a source of greater danger which can cause damage regardless of the care exercised by the person, fault-based liability should be, in the author's opinion, considered as appropriate.

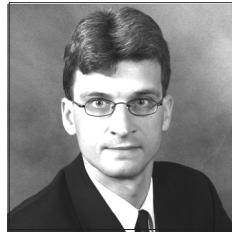
As regards possible developments in the law of delict, it can be noted that at least in the near future, fault-based delictual liability will still remain in the civil codes of European countries. Fault-based liability and strict liability are not opposed but, rather, complementary forms of liability.

⁹⁷ K. Zweigert, H. Kötz (Note 8), p. 679.

⁹⁸ S.P. James. *Introduction to English Law*, 11th edition. London: Butterworths 1985, p. 410.

⁹⁹ W.B. Dufwa (Note 70), p. 105.

¹⁰⁰ K. Zweigert, H. Kötz (Note 8), pp. 681-683. They find that an all-inclusive insurance system would be accompanied by several other problems. For example, it remains unclear whether those who were particularly careless with regard to the occurrence of damage should also be compensated for the damage. K. Zweigert, H. Kötz (Note 8), p. 681-683.



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Indispensability of the Law of Obligations in Employment Relationships:

Problems in Application of the Law of Obligations to Employment Relationships in Estonia

Discussions about whether the legal regulation of employment relationships should take place within the framework of civil law or outside it have been occurring from the moment of first enforcing different laws to regulate employment relationships.^{*1} The discussion continues to be topical in the 21st century, since the problems have remained the same. There are still countries in Europe where the main rules concerning employment contracts have been derived from civil codes. Although experts on labour law try to claim that labour law has a distinct status and has nothing in common with general contract law, they admit that general private law is also relevant to the legal regulation of employment contracts.^{*2}

Even though one of the first underlying investigations into the nature and peculiarities of the employment contract within the framework of the law of obligations was published in 1902^{*3}, the problem of the relationship between labour law and the law of obligations is still acute in both the old and new member states of the European Union. Examples can be cited of how the main rules of employment contracts have been provided in civil codes in the old European Union member states.^{*4} The new EU member states, however, have abandoned the principle that the general rules governing employment relationships and employment contracts should be dealt with by regulations in the law of obligations. The majority of the new European Union member states have adopted separate labour codes striving to provide exhaustive regulation of employment relationships, while providing for a conscious withdrawal clause according to which the general principles of the law of obligations are applicable in situations in which labour codes do not provide for a separate regulation.^{*5} Here we must point out that Estonia is the only one of the new European Union member states

¹ For a summary, see G. Annuss. *Der Arbeitsvertrag als Grundlage des Arbeitsverhältnisses*. – *Zeischrift für Arbeitsrecht* 2004/1, pp. 283–310.

² See *ibid.*, pp. 302 et seqq.

³ P. Lotmar. *Arbeitsvertrag*. I Bd. Leipzig 1902; II Bd. Leipzig 1908.

⁴ Germany, Switzerland, Austria, yet an analogous example may be brought forth from the new member states of the European Union (e.g., the Republic of Latvia).

⁵ See, e.g., the Polish Labour Code, Art. 300. *Labour Code. Act of 26 June 1974*. – *Journal of Laws* 2004.

that has so far been unable to take a clear position as to whether and to what extent the provisions of the law of obligations should be used in employment relationships and how the legal regulation of employment relationships should be organised.

This article aims at analysing the impact of the regulation of the law of obligations on the legal regulation of employment relationships. The main hypothesis in this article is the thesis that several of the principles applied in labour law to date have to be reassessed in the application of the provisions of the general part of the law of obligations. This, however, will not undermine the position of an employee in employment relationships.

1. The employment contract as one of many contracts under the Law of Obligations

1.1. Different points of departure in characterising employment relationships

The thesis that an employment contract is one of many contracts under the law of obligations is by nature self-evident, yet, as a rule, experts on labour law are often unwilling to agree with this idea, as they tend to fear that this may lead to the extinction of labour law and thus to the disappearance of an important matter of law. Nevertheless, it is a fact that almost the majority of the European Union member states recognise at least that the employment contract is one of many civil law contracts usually requiring a distinct status or separate and distinct regulation at least in certain respects.⁶ Above all, emphasis is placed on the social function of employment contracts and the status of an employee as a weaker party to the employment relationship who should benefit from differentiated treatment and greater social protection as would balance the legal status of the parties to the employment contract. Yet people in the Estonian legal context are unwilling to accept that the application of the provisions that stem from the law of obligations by their nature may be much more beneficial for both the employee and the employer than could be ensured through separate regulation of employment contracts.

Here we must clearly stress that no matter how hard people try to get around the regulation, dogmatics, and principles of the law of obligations, employment contracts will always be related to the general principles of the law of obligations. Nevertheless, such a situation does not always mean that the disputable questions of whether and to what extent such regulation should take place would disappear.

One must realise that discussions about labour law to a great extent emphasise that it is characteristic of labour law that the employee is a weaker party to an employment relationship, which in turn causes a situation in which application of the law of obligations provisions to an employment relationship does not produce a significant effect, but it is necessary to enforce several new rules supplanting the possibility of applying the law of obligations provisions as much as possible. It is necessary to apply to a greater extent a separate labour law regulation precluding the enforcement of law of obligations provisions. Yet we have to underscore that it may not always be wise to enforce separate regulation in labour law, as the regulation enforced under the law of obligations is in large part sufficient.

Various theories have been used to describe and characterise individual employment relationships over different periods of time. Thus, an individual employment relationship has been variously considered to be an individual–legal partnership relationship⁷, characterised as a special relationship of loyalty and care⁸, and characterised as a contractual relationship that differs from any other relationship under the law of obligations.⁹

The principle prevailing in the law of obligations — the principle of freedom of contract of the parties — has been significantly restricted in its application to employment relationships. It is true that the limitation is mainly applied in individual labour law, but the principle has also established itself in collective labour law.

⁶ See, e.g., the positions of German jurist G. Annus (Note 1), pp. 302–309, R. Schwarze. *Arbeitnehmerbegriff und Vertragstheorie*. – *Zeitschrift für Arbeitsrecht* 2005/1, p. 81 et seqq.

⁷ For a summary, see G. Annus (Note 1), pp. 299–302.

⁸ For a summary, see R. Schwarze (Note 6), pp. 92–93 et seqq.

⁹ See G. Annus (Note 1), pp. 302–310. Here it must be noted that such an approach was also characteristic of the former Soviet Union. Although the Labour Code of the Estonian SSR specified that an employment relationship was created under an employment contract, it did not recognise that the employment contract was merely one of many contracts in civil law. See Eesti NSV töökoodeks. Kommenteeritud väljaanne (Labour Code of the Estonian SSR, commented edition). Tallinn: Eesti Raamat 1978, p. 31 (in Estonian).

Collective labour law proceeds from the parity of the expedients of the parties, and thus the principles of equality and balance are fully acceptable here.^{*10}

Nevertheless, in individual employment relationships people have contributed significantly to the limitation of freedom of contract as applied to employment relationships also on the level of the European Union. Experts on labour law increasingly emphasise that the further development of labour law is largely determined by what provisions the European Union decides to enforce.^{*11} However, since the legal acts of the European Union are generated in co-operation among various member states, the member states consequently assume responsibility for the extent to which restrictions are imposed on employment relationships and to what extent the member states' freedom of choice is limited in deciding how to legally shape employment relationships. The European Union with its various labour law directives has significantly restricted freedom of contract in different areas of employment relationships recently. Here we must stress that it has not always been the case that the transposition of relevant directives into national legislation has been as liberal as the directives would allow.^{*12} Although the European Union with its directives has considerably restricted the principle of freedom of contract and is likely to continue to do so in the near future, this does not by its nature change the fact that the employment contract is one of the contracts falling under the law of obligations, and application of the principles contained in the law of obligations to employment relationships is inevitable and inescapable, regardless of the resistance of a considerable number of labour law experts.

1.2. Status of the employment contract in Estonia's legal system

In the Estonian legal system, the employment contract has unambiguously established itself in the law of obligations system, although in many cases lawyers, theorists, or practitioners are unwilling to admit to the fact.^{*13} In Estonian labour law, different labour law institutes have been regulated in separate legal acts, and thus there is no comprehensive labour code as it is the case in the majority of the older European Union member states. The main legislative act governing the legal aspect of individual employment relationships is the Republic of Estonia Employment Contracts Act (ECA), adopted already in 1992.^{*14} Although this act has undergone several changes because of the need to harmonise Estonian legislation with various European Union directives, the changes occurring in Estonian private law as a whole have not been taken into account in the Employment Contracts Act.

However, in 2002, Estonia adopted a new Law of Obligations Act^{*15} that is modern in the European Union context, and, according to § 1 of that act, its provisions apply also to employment contracts. This general clause does not include a reservation that the principles provided in the Law of Obligations Act are applicable only insofar as they are compatible with the peculiarities of labour law. Thus, in the Estonian legal system, the employment contract is one of many contracts falling under the law of obligations, but a regulation concerning independent employment contracts applies in addition to rules established under the law of obligations. The Law of Obligations Act and Employment Contracts Act were adopted at different times, and that is why conflicts arise between the two sets of regulations.

To a certain extent, the Law of Obligations Act entails new principles that were not previously known in employment relationships, which in turn gives rise to the need to change, above all, the attitude toward certain aspects of the employment relationship. Thus, the concept of bilateral relationships upon the performance of a contract has undergone a change, and the problem of combining the principles of good faith and application of the provision more favourable to the employee is important, along with the application of standard contract terms in the employment relationship. With regard to the Estonian legal landscape, the issue of a contract price also occupies a central position, having a direct impact on issues associated with remuneration.

¹⁰ While in employment relationships the primary concern is about the employee being the weaker party to the employment relationship and care must be taken to ensure protection of the employee against arbitrary actions on the part of the employer, such concerns have been abandoned in a collective employment relationship. Collective employment relationships do not proceed from the principle that employees are the weaker party to a collective employment relationship, and consequently additional securities should be established for them.

¹¹ See, e.g., A. Junker. *Grundkurs Arbeitsrecht*, 3. Aufl. Beck 2004, p. 16.

¹² G. Tavits. *Muudatused töölepinguliste suhete õiguslikus reguleerimises: kaitse otsinguil Euroopa Liidu abiga* (Changes in legal regulation of employment relationships: in search of protection with the help of the European Union). – *Juridica* 2004/8, pp. 550–559 (in Estonian).

¹³ See, e.g., Kavandatav töölepingu seadus on töötaja vaenulik (Planned Employment Contract Act is disadvantageous for employees). Confederation of Estonian Trade Unions. Available at: <http://www.eakl.ee/> (20.5.2004) (in Estonian).

¹⁴ Eesti Vabariigi töölepingu seadus (Republic of Estonia Employment Contracts Act). – RT 1992, 15/16, 241; I 2004, 86, 584 (in Estonian). An English translation is available at: <http://www.legaltext.ee/>.

¹⁵ Võlaõigusseadus (Law of Obligations Act). – RT I 2001, 81, 487; 2004, 90, 616 (in Estonian).

2. Legal regulation of employment contracts and the law of obligations: individual issues in the Estonian legal order

2.1. Contract price and remuneration

The Law of Obligations Act (LOA) provides in § 28 that contracts entered into as part of economic or professional activities are presumed to have a price. As employment contracts are usually entered into within the framework of economic or professional activities, these contracts are among those that have a price. In addition, this principle has been set forth in ECA § 26, according to which the mandatory provisions of employment contracts include wage conditions. The same principle has been laid down in the Wages Act (WA)¹⁶, whose § 3 (2) specifies that wage conditions are subject to agreement between the employee and the employer. Yet neither the Wages Act nor the Employment Contracts Act covers the situation in which wage conditions are not agreed upon in the employment contract and there are no other documents on which basis the wage conditions could be specified. An important rule is established in WA § 2 (7), according to which payment of remuneration of an employee in at least an amount equal to the minimum wage rate established by the Government of the Republic must be ensured for full-time employment.¹⁷

To date, the courts in their practice have adopted a position that if there is no written evidence concerning the amount of the wage payable to the employee, payment to the employee of remuneration equivalent to at least the amount of the minimum wage established by the Government of the Republic must be ordered.¹⁸ An employee may not always benefit from this requirement, as the amount of remuneration that used to be paid or is paid to the employee in the relevant area may be much higher than the minimum wage determined by the Government of the Republic.¹⁹ For such a situation, LOA § 28 (2) introduces a new option, providing that if a contract does not provide for the method for determining the price, the price to be paid shall be the price generally applied at the time of the entry into the contract at the place of performance of the contract for the fulfilment of such contractual obligations or, if no such price can be determined, a price reasonable under the circumstances. Above all, this provision gives the employee better opportunities to rely in wage disputes on the amounts actually paid by the employer or agreed upon therewith. When wage differences in different regions of Estonia are borne in mind, it is clear that an approach in which wage disputes proceed from the minimum wage clause as their basis is no longer sufficient and the principle provided in LOA § 28 (2) should be applied instead. The application of this principle guarantees the employee that the remuneration that the employer is ordered to pay is greater than the minimum wage and corresponds better to the remuneration to which the employee would have been entitled. As a rule, the remuneration paid in the various regions of Estonia is more than the minimum wage figures established by the Government of the Republic. As is clear even from this discussion alone, the principles provided in the law of obligations are not detrimental to the employee but may prove more beneficial for the employee than the principles set forth in labour laws.

2.2. Standard contract terms and employment contracts

The Law of Obligations Act prescribes conditions concerning standard terms that should primarily ensure protection for consumers. However, the provisions of these standard terms can be applied also to employment contracts. The application of such provisions to employment contracts has raised questions in specialist literature of whether the employee is a consumer and whether the employee should be subject to consumer protection in the wider sense of the word.²⁰ Identification of the employee with the consumer is impossible primarily due to major differences in the protection specified for an employee and a consumer. Yet it cannot be denied that standard terms play an important role also with respect to employment contracts. Thus, it is possible to say that, in the Estonian legal order, agreements on the probationary period and

¹⁶ *Palgaseadus* (Wages Act). – RT I 1994, 11, 154; 2005, 29, 213 (in Estonian). An English translation is available at: <http://www.legaltext.ee/>.

¹⁷ According to § 4 (1) of the Working and Rest Time Act, the general national standard for the working time of employees is eight hours per day or 40 hours per week. See the Working and Rest Time Act (*töö- ja puhkeaja seadus*). – RT I 2001, 17, 70; 2005, 24, 185 (in Estonian).

¹⁸ See I.-M. Orgo, M. Muda, G. Tavits, et al. *Tööõigus*. Loengud (Labour law. Lectures). 2003, p. 170 (in Estonian).

¹⁹ In 2005, the minimum wages approved by the Government of the Republic amounted to 2690 krooni, while the statistical average for wages in Estonia was 8291 krooni in the second quarter of 2005.

²⁰ For a summary, see R. Schwarze (Note 6), p. 96.

holiday terms in employment contracts serve as standard terms.^{*21} Internal work procedure rules are also governed by standard terms. According to the definition of standard terms provided in LOA § 35, a contract term that is drafted in advance for use in standard contracts or that the parties have not negotiated individually for some other reason, and that the party supplying the term uses with relation to the other party who is therefore not able to influence the content of the term, is deemed to be a standard term. Standard terms may be embodied in a contract or form a separate part of a contract. The internal work procedure rules established by the employer conform to the above definition. According to ECA §§ 39 (1) and 40 (1), the internal work procedure rules are a document prepared by the employer by which the employer determines the internal organisation of work in the enterprise. The regulation of internal work procedure rules that is contained in the Employment Contracts Act does not impose on the employer the obligation to negotiate the internal work procedure rules with each and every employee. At the same time, the internal work procedure rules become an inseparable part of the employment contract, and an employee not adhering to the obligations of the internal work procedure rules can be punished on the bases, and according to the procedure, provided for in the labour laws.^{*22} By the internal work procedure rules, the employer determines the beginning and end of the working time, occupational and fire safety rules, and the handling of issues related to the time and place of payment of wages. Besides that, the employer may determine other work-related matters in the internal work procedure rules. As the internal work procedure rules are the most important document in addition to the employment contract, the employment contract taken together with the internal work procedure rules forms the indispensable legal foundation determining the most important conditions of work. The internal work procedure rules are a universal document that applies to all of the employees working in the enterprise. When the employer introduces the internal work procedure rules, the employees may make proposals concerning the rules. The employer is obliged to take account of the employees' proposals only when they stem from law. Any other proposals remain to be judged solely by the employer. In LOA § 42 (3) is material covering conditions that are considered unfair. The list is to a large extent also applicable to the internal work procedure rules. Thus, when preparing the internal work procedure rules, the employer must take into account the provisions on standard terms that are set forth in the Law of Obligations Act, to forestall later disputes about the unfairness of some provisions in the internal work procedure rules.^{*23}

2.3. Requirement to fulfil reciprocal obligations

The employment contract is by nature a mutual contract, in which both parties — the employer and the employee — have both rights and duties. In Estonia, employment relationships are characterised by a prevailing attitude that the employee is the weaker party to an employment relationship and consequently the employer has more obligations to fulfil. Regardless of this, the principle of the protection of the employee does not change the nature of the employment contract as a synallagmatic contract. Although Estonian labour law, too, recognises the employment contract as a bilateral contract, the principles of performance of mutual contracts have not won significant recognition in employment relationships so far.

According to LOA § 111 (1), if the parties have mutual obligations arising from a contract, a party may withhold performance until the other party has performed, offered to perform, secured, or confirmed the performance. Although that principle may be self-evident in contractual relationships, it has not yet been fully applied in Estonian employment relationships. We can cite as an example the following case. According to ECA § 74 (2), an employer is required to return an employee's employment record book to the employee and to pay the final settlement on the date of termination of the employment contract. If the employee was not at work on the day of termination of the employment contract, the employer is required to return the employment record book to the employee on the date the employee makes such a request and to pay the final settlement within five calendar days from the date following the making of the request. Thus, if the employer was not at work on the date of termination of the employment contract, he must make a request to receive the final settlement. Unless the employee has made such a request, the employer is under no obligation to pay the final settlement. If we place the above scheme within the framework of the regulation of the law of obligations, the employer may refuse to pay the final settlement as long as the other party (that is, the employee) has not fulfilled his obligation — to make a request for the payment.

²¹ According to § 33 (1) of the Republic of Estonia Employment Contracts Act, the probationary period is a matter of agreement of the parties. According to the act, the duration of the probationary period is four months. The probationary period is frequently formulated in advance, and the matter is not subject to specific negotiations.

²² See the Employees Disciplinary Punishments Act (töötajate distsiplinaarvastutuse seadus; RT I 1993, 26, 441; 2000, 102, 674; in Estonian) § 2 (1).

²³ For example, the employee's right to demand compensation for damage caused is precluded, or an unreasonably high contractual penalty is imposed, for the violation of the obligations arising from the employment contract.

The Estonian labour laws and court practice have given rise to the problem that if the employee had not been at work and he has not made an unambiguous request for payment of the final settlement, this still automatically entails the employer's obligation to pay the final settlement. The above problem also has another aspect, on account of it being commonplace in Estonia for an employee's remuneration to be transferred to his bank account. Thus, for situations in which the employee was not at work on the day when the employment contract was terminated, court practice has demonstrated the conclusion that the employee need not make a separate request for payment of the final settlement, as the employer knows where and to what account the employer should transfer the amounts to be collected by the employee.^{*24} We cannot agree to such a position, as, above all, we must take into account the formulation of the employment contract where the payment of remuneration is concerned. If only the number of the bank account to which the main remuneration has to be transferred has been agreed upon in the employment contract with the employee, we cannot conclude on that basis that all amounts to be received by the employee can be transferred to that account. According to the Estonian Wages Act, the employee's wages and final settlement are two different wage categories and subject to different legal regulation. Thus, in order that the employee receive his final settlement, he must make the relevant request to the employer and indicate also the number of the account to which the employer should transfer the final settlement. As long as the employee has not performed this duty, the employer is entitled to refuse to fulfil its own obligations regarding the remuneration and the employer has not delayed the fulfilment of its obligations. Although, to date, Estonian court practice has ignored the fact that the employee has his own obligations that must be addressed in order for him to benefit from the securities provided for by law, it is only a matter of time before, in addition to the provisions formulated in the Employment Contracts Act, the general clauses contained in the Law of Obligations Act for shaping of contractual relationships are taken into account for determining the obligations of the parties in employment relationships.

2.4. Application of the provision more favourable to the employee and the principle of good faith

Employment relationships in their entirety have been based on the principle of application of the provision more favourable to the employee. This principle has been stated directly in the labour laws of some states, while in other states it has not been laid out directly in law but enforced by courts' actions.^{*25} Estonian theoretical literature on employment relationships has referred to the feasibility of application of the provision more favourable to the employee^{*26}, yet specific reference has not been made to the normative basis of the principle.

It has been provided in ECA § 17 that in the event of a conflict between provisions, the provision more favourable to employees applies. According to the comments issued pertaining to this section of the act, the principle applies only in the event of a conflict between provisions of the same legal act or between different provisions of the same contract.^{*27} However, in the event of a contradiction between the wording of legal acts that belong to different levels of the system, the problem is solved proceeding from the hierarchy of legal acts at different levels. As a result, the idea of the provision more favourable to the employee has not been directly introduced into Estonian legal acts to date. However, we also have to examine the Collective Agreements Act.^{*28} It states that if a condition(s) provided in the Collective Agreements Act is or are worse than what has been provided in law, the provision more favourable to the employee must be applied.^{*29} This provision serves not as a specific clause concerning the provision more favourable to the employee but as a restriction according to which one may not agree in the employment contract or collective agreement upon terms that are worse for the employee than those specified by law. Consequently, no general clause concerning provisions more favourable to the employee can be found in Estonian labour laws.

Yet it is always difficult to apply the principle of the provision more favourable to the employee, as it is not always possible to unambiguously determine which is the provision more favourable to the employee in a particular case. Thus, it is difficult to decide on the issue of the more favourable provision in a situation in which the employer can choose between two options — either to continue to pay the wages on the previous

²⁴ See Jõgeva County Court judgement 2-40/05 (in Estonian).

²⁵ See, e.g., W. Dütz. *Arbeitsrecht*, 9. Aufl. Beck 2004, p. 263 et seqq.

²⁶ See Note 18, p. 34.

²⁷ See I.-M. Orgo, H. Siigur, G. Tavits. *Töölepingu seadus: kommenteeritud väljaanne* (Employment Contracts Act, commented edition), third edition. Juura 1997, p. 28 (in Estonian).

²⁸ *Kollektiivlepingu seadus* (Collective Agreements Act). – RT I 1993, 20, 353; 2002, 61, 375 (in Estonian). An English translation is available at: <http://www.legaltext.ee/>.

²⁹ § 4 (2) of the Collective Agreements Act.

terms and to declare insolvency in six months at the latest or to unilaterally impose a term according to which the remuneration of all the employees is decreased by 10% for one year to preserve the competitiveness of the company and jobs for the next five to 10 years. In Estonia, both the employees and trade unions would presumably take the same attitude to the changes made in such a situation — they would not agree to the wage cuts and would opt for the possibility in which the company goes bankrupt in the next six months. Besides, the applicable Estonian legislation does not give the employer an opportunity to temporarily and unilaterally introduce less favourable terms to the employment contract. The terms of the employment contract can be amended only by agreement of the parties, as a rule. The working conditions may be amended unilaterally only if the organisation of work and production is changed, but this presumes that employees are notified at least one month in advance. In a changed economic situation, we must seriously consider abandonment of the principle of application of the provision that is more favourable to the employee. The employee is no longer so vulnerable in the contemporary environment as he used to be, and consequently there is no need to protect the employee always and everywhere via a more favourable provision clause.^{*30} The labour legislation applicable in Estonia must also take into account to a significant extent the fact that the European economic framework presumes a more flexible labour market and that thus considerably more opportunities must be provided to the employer for shaping the working conditions in line with the changed economic circumstances. In changing this possibility, it is also important to proceed from the standpoint of the economic position of the state: which is more beneficial for the economy of the state — to preserve the jobs and provide more opportunities for the employer to change working conditions or to maintain a rigid framework of labour laws that do not allow for changing the working conditions, with the employer consequently compelled to terminate employment contracts instead of continuing them under changed conditions.

According to the Estonian Law of Obligations Act, the application of the provision more favourable for the employee is governed by the principle of good faith. Pursuant to LOA § 6, obligees and obligors shall act in good faith in their relations with one another. According to subsection 2 of the same section, nothing arising from law, a usage, or a transaction shall be applied to an obligation if it is contrary to the principle of good faith. The principle of good faith contained in the Estonian Law of Obligations Act subjects to control to a large extent all situations in employment relationships in which one should proceed from the principle of the provision more favourable to the employee in the event of any of various conflicts. Since the principle of good faith provided in the Estonian Law of Obligations Act allows not to apply the requirements arising from law, the correctness of all provisions of the Employment Contracts Act and their application to the changed economic situation could be controlled by the principle of good faith.^{*31} According to the principle of good faith, the provisions on the proprietary liability of employees that stem from the labour code adopted in the 1970s must be specified. According to the proprietary liability provisions of the labour code of the Estonian Soviet Socialist Republic, only the principles of two types of liability remain applicable to date — 1) the general principle of liability, pursuant to which the employee is always responsible to the extent of his average monthly wages if he has caused damage to the employer, and 2) full proprietary liability entered into under a separate written agreement. Although, on the basis of the labour code of the Estonian SSR, a separate list of employees and positions had been introduced for which it was possible to enter into an agreement on full proprietary liability, this is no longer applicable. The situation concerning proprietary liability has now developed to a stage in which an agreement on full proprietary liability is entered into with almost every employee. This is, *inter alia*, caused by the fact that the system of proprietary liability of employees that has been in use thus far in Estonia has become largely outdated and no longer corresponds to the employer's needs. However, in order to be certain that the damage caused can be compensated for by employees, agreements on proprietary liability are entered into with nearly all employees. When the current situation is analysed in light of the Law of Obligations Act, it cannot be considered one of success. Entry into an agreement on full proprietary liability with all employees is obviously not in conformity with the principle of good faith. Consequently, the agreements on proprietary liability with those employees are subject to the principle of good faith, and thus neither these agreements nor the relevant provisions of the labour code of the Estonian SSR should be applied.

³⁰ From the employee protection angle, the principle of the more favourable provision, according to which the working conditions may not be worse than the minimum working conditions agreed upon in the act, suffices. In the case of any other conflicts, the principle of application of the more favourable provision has become outdated.

³¹ On the application of the principle of good faith to employment relationships, see also G. Tavits. Töölepingu seadus ja muutunud majandusolustik (The Employment Contracts Act and changed economic circumstances). – Juridica 2003/10, pp. 694–696 (in Estonian).

3. Conclusions

Although there is a trend on the European Union level towards developing a European civil code and with that also common foundations of contract law, one cannot thus far perceive such a trend in the employment relationships in the European Union. Nevertheless, several European legal experts have analysed different labour law development scenarios. Examination of these scenarios has led to the conclusion that a higher degree of flexibility is required in employment relationships and civil law principles should be applied more. Yet some analyses have also pointed out that the changes that are currently being introduced to labour law to strengthen the social protection of employees are not likely to succeed. Above all, in such a sensitive area as the cancellation of employment contracts, European economic experts have recommended taking into account also the economic position of the employer as an entrepreneur in the course of establishing rules to protect against cancellation.

A more extensive application of the provisions of the law of obligations gives the employee an opportunity to shape employment relations more flexibly. Such an opportunity for more flexible regulation of employment relationships is necessary in modern economic conditions, as an employer in a context of increased competition must respond rapidly to changes in circumstances.

When the law of obligations and labour law exist side by side, one must proceed from the principle that it is not necessary to reason why the principles of civil law are applicable to employment relationships but is necessary to apply reason concerning situations of their non-application.^{*32}

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³² See G. Annuss (Note 1), p. 310.



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Contractual Aspects of Formation and Composition of Commercial Partnerships

1. Introduction

According to the principle of freedom of contract, the participants in a joint business undertaking are free to agree on the legal form of company that best suits their needs. One of the possibilities is setting up a commercial partnership. A partnership is a form of business entity known worldwide that enables two or more persons to engage in commercial activity without creating a company that is a legal person. The main feature of a partnership is that the partners are personally liable to the creditors of the partnership. Although nuances of the organisation of commercial partnerships may vary from one European country to another, the two main legal forms are the general partnership and the limited partnership. The main feature of a general partnership is that the liability of the partners to the creditors is not limited. In a limited partnership, there are general partners, who are personally liable without limit, and limited partners, whose liability is limited by the amount of their contribution to the capital of the partnership. In commercial partnerships, as contrasted against capital companies (private limited companies and public limited companies), there are more possibilities to fix the rights and obligations of the partners by contractual means. In private limited and public limited companies, the mutual relations of company members, composition, the powers and the duties of the management, and supervisory institutions are quite strictly regulated by law. The partnership agreement is the main legal tool shaping the structure and composition of a partnership. In a number of European countries — for example, Germany, Latvia, and Estonia — the regulation of commercial partnerships is closely connected with the rules governing civil law partnerships. Whereas commercial partnerships are founded for commercial purposes, civil law partnerships can be created for the attainment of any common goal through united efforts of the partners. Usually, the rules governing civil law partnerships can be found in the civil codes, whereas commercial partnerships are regulated in the commercial codes or other special laws. Unlike commercial partnerships, civil law partnerships cannot be registered in the commercial register. The civil code provisions governing partnership contracts apply also to commercial partnerships, to the extent that the special rules concerning commercial partnerships do not provide otherwise. Partnership agreements establishing commercial partnerships are contracts with features of both contract law and company law. They not only regulate the relationship of the partners but also create legal implications in relation to third parties.

2. Conclusion of a partnership agreement

A partnership agreement establishing a general or limited partnership can be concluded either by a natural person or by an entity possessing legal capacity. That means that not only legal persons but also other commercial partnerships can form a commercial partnership. Civil law partnerships and other entities that do not have legal capacity cannot be parties to a contract creating a commercial partnership. As a general principle, the partnership agreement is form-free and can be concluded even by implied conduct.^{*1} For example, an actual joint commercial activity undertaken by partners can qualify as conduct establishing a partnership agreement.^{*2} The general civil law rules on forms of legal transactions apply. Special form has to be observed only if the law provides formal requirements for specific obligations — e.g., if immovable property is contributed to the property of the partnership.^{*3} In any case, written form is advisable as a tool for evidence. As soon as the agreement is concluded, the partnership comes into existence. These principles regarding the form of a partnership agreement apply also to any subsequent changes in the agreement.^{*4} In relation to third parties, however, a partnership exists only from the time it is recorded in the commercial register or, alternatively, from the first entry into commercial transactions before registration.^{*5} The partners have broad discretion to choose the contents of the partnership agreement, in particular as regards issues such as decision-making, profit-sharing, and representation.^{*6} As far as the mutual relations of the partners are concerned, the principle of freedom of contract applies to the greatest possible extent. With regard to relations to third parties, the contractual freedom of the partners is restricted by law.^{*7}

3. The legal nature of a partnership agreement

The basic features of an agreement creating a commercial partnership are identical to those of civil law partnership agreements. Compared with other private law contracts, the partnership agreement is a specific one. On the one hand, a partnership agreement establishes performance duties — for example, an obligation to contribute to the property of the partnership. Thus, a partnership agreement has features of a contract establishing obligations. On the other hand, the agreement is an organisational contract aimed at the formation of an association of persons.^{*8} The partnership agreement is a reciprocal contract, though it is not aimed at exchange of performances.^{*9} The typical forms of reciprocal contract, such as sales contracts, leases, or employment contracts, entail an exchange of performances to fulfil contractual obligations. The aim of a partnership agreement is a consolidation of performances.^{*10} The reciprocity of contractual obligations in a partnership agreement means that any partner can request the other partners to perform in keeping with the agreement — in particular, to contribute to the property of the partnership.

Since there is no mutual exchange of performances under a partnership agreement, no partner, as a general principle, can deny performance on grounds that other partners fail to perform their duties.^{*11} According to the predominant view in German legal doctrine, a partner can withhold his performance only if 1) the partnership consists only of two members and the other member does not perform and 2) all other members of the partnership fail to perform.^{*12} Wider application of the right to withhold performance would lead to a

¹ T. Klauberg. *Gesellschaftsrecht in Estland, Lettland und Litauen*. Heidelberg, Munich, Berlin: Verlagsgruppe Hüthig Jehle Rehm 2004, p. 30; A. Baumbach, K.J. Hopt. *Handelsgesetzbuch*, 30. Aufl. Munich: Verlag C. H. Beck 2000, § 105 HGB para. 54; A. Loebers. *Tirdzniecības tiesību pārskaits*. Rīga: Valters un Rapa 1926.

² E.R. Führich. *Wirtschaftsprivatrecht*, 6. Aufl. Munich: Verlag Franz Vahlen 2002, p. 366.

³ J. Ensthaler. — J. Ensthaler (Hrsg.). *Gemeinschaftskommentar zum HGB*, 6. Aufl. Neuwied, Kriftel, Berlin: Luchterhand 1999, § 105 HGB para. 16; E. Klunzinger. *Grundzüge des Gesellschaftsrechts*, 12. Aufl. Munich: Verlag Franz Vahlen, 2002, p. 60; U. Eisenhardt. *Gesellschaftsrecht*, 10. Aufl. Munich: Verlag C.H. Beck 2002, para. 214; A. Meyer-Hayoz, P. Forstmoser. *Schweizerisches Gesellschaftsrecht*, 8. Aufl. Bern: Stämpfli Verlag 1998, § 12 N 75.

⁴ A. Baumbach, K.J. Hopt (Note 1), § 105 HGB Rn. 62.

⁵ The Commercial Law of Latvia (*Komerclikums*), section 89, para. 1. Available at: <http://www.ttc.lv/New/lv/tulkojumi/E0040.doc>; the German Commercial Code (*Handelsgesetzbuch*), section 123, para. 2.

⁶ Legal Framework for Doing Business in Latvia. Published by law firm Lejiņš, Torgāns, Vonsovičs. Rīga 2005, p. 41.

⁷ See the Commercial Law of Latvia, sections 89-96 and the German Commercial Code, sections 123-130b.

⁸ U. Eisenhardt (Note 3), para. 46.

⁹ H. Sprau. — Palandt. *Bürgerliches Gesetzbuch*, 62. Aufl. Munich: Verlag C.H. Beck 2003, § 705 BGB para. 13.

¹⁰ I. Saenger. — *Bürgerliches Gesetzbuch. Handkommentar*, 3. Aufl. Baden-Baden: Nomos Verlagsgesellschaft 2003, § 705 BGB para. 10.

¹¹ See A. Baumbach, K.J. Hopt (Note 1), § 105 HGB para. 48.

¹² I. Saenger (Note 10), § 705 BGB para. 10.

paralysis of the partnership.^{*13} In addition, from the time the partnership comes into existence in relation to third parties, no partner can withdraw from the agreement on grounds that another partner has failed to perform.^{*14} In such cases, according to German and Latvian partnership law, only notice of termination or, if good cause exists, a claim for termination of the partnership is possible as regards withdrawal.^{*15} Whereas the general rules governing withdrawal from a contract are contained in the law of obligations, the notice of termination and the termination claim are regulated by partnership law. According to section 99 of the Commercial Law of Latvia, notice of termination may be issued by a partner if the partnership was established to act for an indefinite time and the notice is issued not later than six months prior to the end of the accounting year. Any commercial partnership can be dissolved under section 98 of the Commercial Law of Latvia if a member, for good cause, submits a termination claim to a court. 'Good cause' is a general clause whose meaning has to be fleshed out in practice with a certain content by courts and legal doctrine. Section 98, para. 2 of the Commercial Law of Latvia provides a general characterisation for a 'good cause', declaring that good cause shall exist especially when another member of the partnership in bad faith or by allowing gross negligence does not perform significant duties imposed upon him by the partnership agreement or such duties have become impossible to fulfil. A German commercial law commentary lists libel, physical assault, denunciation, criminal charges against one partner by another, fierce enmity, conviction of a partner, lasting illness of a partner, and incompetence of the management as examples of a good cause.^{*16}

In some European countries, such as Germany, distinct rules on commercial transactions exist in addition to general contract law. In Latvia, a doctrine of commercial transactions has existed since the 1920s, although specific laws on commercial transactions have not been enacted so far. Currently, the Latvian Ministry of Justice is planning a draft of a commercial transactions part for the Commercial Law. The concept of a commercial transaction in Latvia is similar to the same notion in German commercial law. A transaction concluded in the course of commercial activities is considered a commercial transaction if at least one of the participants is a merchant.^{*17} The question is whether a partnership agreement can be considered a commercial transaction. This is an issue for those countries where commercial transactions are distinguished from other legal transactions and where the concept of a commercial transaction is inseparably bound to the legal status of a merchant. As a general principle, the conclusion of an agreement establishing a general or limited partnership is not a commercial transaction.^{*18} Such an agreement is a commercial transaction only if at least one of the partners is a merchant and the conclusion of this kind of agreement falls within his usual area of commercial activity.^{*19} According to the German doctrine, even in the rare situation where a partnership agreement is a commercial transaction, the commercial transaction rules of the Commercial Code do not apply to the mutual relations among the partners.^{*20}

4. Important issues of mutual relations of the partners

Significant issues of the mutual relations among the partners are the duties of contribution, the rights and duties of managing the partnership, the prohibition of competition, and loyalty duties. Mutual relations among the partners are primarily governed by the partnership agreement. In Latvia, section 79 of the Commercial Law declares that the mutual relations among the members of a general partnership shall be considered in accordance with the provisions of the partnership agreement and only in the absence of such provisions shall those of the Commercial Law that govern partners' mutual relations be applicable. The same applies to limited partnerships. Only a partner's rights to control the activities of the commercial partnership are not at the disposal of the parties. According to section 86 of the Commercial Law of Latvia, all members of a partnership at any time may ascertain the course of partnership-related matters; become acquainted with the accounting and other documents of the partnership; and prepare for themselves a report regarding the state of partnership property, balance sheets, and annual accounts, whereas agreements to the contrary shall

¹³ H. Sprau (Note 9), § 705 BGB para. 13.

¹⁴ U. Eisenhardt (Note 3), para. 49.

¹⁵ For German law, see I. Saenger (Note 10), § 705 BGB para. 10; A. Baumbach, K.J. Hopt (Note 1), § 105 HGB para. 48.

¹⁶ J. Ensthaler (Note 3), § 133 HGB para. 8.

¹⁷ K. Balodis. Recommended Regulation of Commercial Transactions in the Commercial Law of Latvia. – *Humanities and Social Sciences Latvia* 2003 (40) 3, pp. 116, 117.

¹⁸ A. Baumbach, K.J. Hopt (Note 1), § 105 HGB para. 49.

¹⁹ J. Ensthaler (Note 3), § 105 HGB para. 14.

²⁰ A. Baumbach, K.J. Hopt (Note 1), § 105 HGB para. 49.

be considered void. If not provided otherwise in the partnership agreement, the principle of equality of partners in all their rights and duties applies, including the duty of contribution.^{*21}

The mandatory duty of contribution is one of the most important obligations in the mutual relations of partners. In the absence of a specific agreement, the partners have to contribute equal shares to each other.^{*22} Everything that is appropriate for achieving the goals of the partnership can be contributed.^{*23} An appropriate form for a contribution is monetary payment, input of rights or corporal things, or provision of services.^{*24} In Latvia, the forms of contribution are stated in the Civil Law's section 2243, para. 1, which is part of the material containing provisions governing the civil law partnership. According to this provision, money, property, claims, or work may be contributed. A person who, pursuant to an agreement, may share in the profit without any contribution on his part shall not be considered a partnership member (Civil Law of Latvia, section 2243, para. 2). The contribution issue is important also in connection with the participation of the partners in the profits and losses of the partnership. As a general principle, the profits and losses of a partnership are divided among members in proportion to their contribution to the partnership.^{*25}

Another important contractual obligation is participation in the management of the partnership. The management of the partnership as an issue of mutual relations among the partners has to be distinguished from the representation of the partnership in relation to third parties. Unless otherwise agreed, all partners have a right and a duty of participating in the running of a general partnership. In a limited partnership, the limited partners are excluded from the management but the partnership agreement can provide otherwise. However, contrary to the joint management principle applying to civil law partnerships, a commercial partnership is governed by the principle of individual management.^{*26} This is because commercial activities require swift decisions and speedy action. Whereas in a civil law partnership the general principle is that each decision on management issues is made jointly, in a commercial partnership each member has a right and duty to make his own management decisions. Nonetheless, participation of all partners in the management of the partnership might be cumbersome. Therefore, there is a possibility of entrusting one or several partners with the management or spelling out in the agreement which decisions may be made by an individual partner.

The rules on prohibition of competition are, to some extent, different for a general and a limited partnership. According to section 82, para. 1 of the Commercial Law of Latvia, a member of a general partnership may not, without the consent of the rest of the members, conclude transactions in the sector of commercial activities of the partnership or be a member with full liability in another partnership that performs the same commercial activities. This rule does not apply to limited partners in a limited partnership, except in cases where pursuant to the partnership agreement they are granted rights to manage the partnership or also they have some other significant influence on the management of the partnership (Commercial Law of Latvia, section 122). In Germany, the competition prohibition rules are similar to those in Latvia, although the restrictions concerning limited partners are not explicitly mentioned in law (see sections 112 and 165 of the German Commercial Code). Under German law, the loyalty duties of partners imply that the prohibition of competition applies to a limited partner who manages the partnership or has some other significant influence on the management of the partnership.^{*27} The prohibition of competition is viewed as an expression of loyalty duties also in Swiss and Latvian law.^{*28} Competition prohibition rules are known in Estonian commercial law, too. The Estonian ones are only slightly different from those of Latvian and German law. According to section 95, para. 1 of the Commercial Code of Estonia, a partner shall not compete with the general partnership in the same area of activity or participate in a company that competes with the general partnership in the same area of activity, in a capacity affecting the commercial activities of said company. With regard to a limited partner, the competition prohibition rules for general partnerships apply only if the limited partner is granted the right to manage the limited partnership by the partnership agreement (Commercial Code of Estonia, section 129).

The prohibition of competition is an important expression of partners' loyalty duties, although not the only one. The main reason for loyalty duties is the close mutual relationship of the members of a partnership. The joint personal relationship among the partners is governed by the mutual consideration under the applica-

²¹ E.R. Führich. *Wirtschaftsprivatrecht*, 6. Aufl. Munich: Verlag Franz Vahlen, 2002, pp. 366, 367; U. Eisenhardt (Note 3), para. 231.

²² J. Nørgaard, M. Wegener. – Iversen, Nørgaard, Lindencrone Petersen, Wegener. *Danish Business Law*. Copenhagen: DJØF Publishing 2000, p. 466; see also § 86 (2) of the Commercial Code of Estonia.

²³ A. Meyer-Hayoz, P. Forstmoser (Note 3), § 12 N 37.

²⁴ E. Klunzinger (Note 3), p. 63; O. Zwingmann. *Lehrbuch des Handelsrechts*. Riga: Verlag Ernst Plates 1939, p. 143.

²⁵ See J. Nørgaard, M. Wegener. – Iversen, Nørgaard, Lindencrone Petersen, Wegener. *Danish Business Law*. Copenhagen: DJØF Publishing 2000, p. 467.

²⁶ E. Klunzinger (Note 3), p. 68; O. Zwingmann (Note 24), p. 138.

²⁷ A. Baumbach, K.J. Hopt (Note 1), para. 3; J. Ensthaler (Note 3), § 165 HGB para. 1a.

²⁸ A. Meyer-Hayoz, P. Forstmoser (Note 3), § 13 N 56; A. Loeber. *Die Gesellschaft nach dem lettländischen Zivilgesetzbuch vom Jahre 1937*. Riga: Zeitschrift für Rechtswissenschaft. Faximilausgabe. Bd. 10. 1937/1939. Riga 2003, p. 2796; O. Zwingmann (Note 24), p. 143.

tion of the principle of good faith.^{*29} Since the principle of good faith governs private law as a whole^{*30}, partnership agreements are one of the fields of its application. The loyalty duties' meaning is, in essence, that the interests of the partnership must be observed, whereas the personal interests of other partners shall be pursued as far as is necessary for the success of the co-operation among the partners.^{*31} On the other hand, a partner has to omit everything damaging to the interests of the partnership.^{*32} The loyalty duties govern the contractual relationship among the partners, notwithstanding any provisions to the contrary in the partnership agreement.^{*33} The loyalty duties include, for instance, a duty to inform other partners about any dangers that threaten the partnership, certain duties of confidentiality, and a prohibition to disclose commercial secrets.^{*34} A partner who violates a loyalty duty can be sued by other partners for damages or cessation of the violation.^{*35}

5. Implications of a partnership agreement for relations with third parties

The main implications of a partnership agreement for third parties are connected with legal capacity and representation of the partnership. Conclusion of a partnership agreement does not influence third parties automatically but, rather, creates preconditions for doing so. As a general principle, a commercial partnership possesses legal capacity from the time of its registration in the commercial register. Under its business name a commercial partnership may acquire rights and assume obligations, acquire property and other rights related to property, and be a plaintiff or defendant in a court.^{*36} This means that a commercial partnership acts as an independent entity in relations with third parties. In European countries, the question of whether a commercial partnership is a legal person is answered in different ways.^{*37} With regard to the only European supranational form of partnership, Council Regulation (EEC) No. 2137/85^{*38} of 25 July 1985, in Article 1, para. 3, provides that the member states shall determine whether or not the European Economic Interest Groupings registered in their registries have legal personality. Although a European Economic Interest Grouping does not have a purpose of gaining a profit, this form of partnership is treated as a general partnership by national laws^{*39}. Article 1, para. 2 of Council Regulation No. 2137/85 says that an EEIG shall, from the date of its registration, have the capacity, in its own name, to have rights and obligations of all kinds, to make contracts or accomplish other legal acts, and to sue and be sued. This set of rights and duties of a commercial partnership is common to all member states. The predominant view, at least in countries influenced by German partnership law, is that neither a general nor a limited partnership is a legal person. In Latvia, commercial partnerships do not have legal personality. No entities whose members are personally liable for the debts of the entity are considered legal persons in Latvia. However, a discussion about the personality of a commercial partnership is rather theoretical and has little practical importance.^{*40}

One of the most significant issues in relation to third parties is the representation of a partnership. As a general rule, each partner is entitled to represent the partnership if not excluded from representation by the partnership agreement. A partnership agreement may specify that all or several members of the partnership are entitled to represent the partnership only jointly (joint representation). These members may authorise one member or several members from among their number to conclude specific transactions or specific types of transactions. Restrictions on the scope of representation are not binding on third parties (Commer-

²⁹ E. Klunzinger (Note 3), p. 64; A. Baumbach, K.J. Hopt (Note 1), § 109 HGB para. 23.

³⁰ See I. Kull, Principle of Good Faith and Constitutional Values in Contract Law. – *Juridica International* 2002 (7), pp. 142, 143; K. Balodis, The Role of the Good Faith Principle in the Contemporary Civil Law of Latvia. – *Law and Justice* 2003. Selected articles of 2002, p. 2.

³¹ A. Baumbach, K.J. Hopt (Note 1), § 109 HGB para. 23.

³² J. Ensthaler (Note 3), § 109 HGB para. 14; E. Klunzinger (Note 3), p. 64.

³³ T. Klauberger, *Gesellschaftsrecht in Estland, Lettland und Litauen*. Heidelberg, Munich, Berlin: Verlagsgruppe Hüthig Jehle Rehm 2004, p. 32.

³⁴ E. Klunzinger (Note 3), p. 64.

³⁵ J. Ensthaler (Note 3), § 109 HGB para. 15; A. Baumbach, K.J. Hopt (Note 1), § 109 HGB para. 28.

³⁶ See section 90, para. 1 of the Commercial Law of Latvia.

³⁷ See A. Meyer-Hayoz, P. Forstmoser (Note 3), § 13 N 16.

³⁸ Council Regulation (EEC) No. 2137/85 of 25 July 1985 on the European Economic Interest Grouping (EEIG). – *Official Journal L* 199, 31.07.1985, pp. 0001–0009.

³⁹ See section 2, para. 1 of the Latvian Law on European Economic Interest Grouping of 17 June 2004, published in the official gazette 'Latvijas Vēstnesis', No. 106, 07.07.2004.

⁴⁰ See E. Klunzinger (Note 3), p. 54; O. Zwingmann (Note 24), p. 1383.

cial Law of Latvia, section 92, para. 2). A limited partner is excluded from representation of the partnership. Exclusion of a limited partner from representation is in compliance with a mandatory rule that protects third parties.^{*41} A provision in a partnership agreement enabling a limited partner to represent the partnership would be void. Nonetheless, a limited partner can acquire representation powers if he is issued a procuration.^{*42} Under the Commercial Law of Latvia, section 34, para. 1, a procuration is a commercial power of attorney that grants to the proctor the right to conclude transactions and to perform other legal activities associated with commercial activities on behalf of a merchant, including all procedural activities to be carried out in the course of legal proceedings (bringing of an action, settlement, appeal of a court adjudication, and the like). However, a proctor may alienate immovable property, pledge it, or encumber it with rights pertaining to property only if such rights have been specially granted to him (Commercial Law of Latvia, section 34, para. 2). The representation rights of a partner apply to all transactions and legal actions, including any dealings with immovable property and issuing of procuration. Thus, the scope of the representation rights of a partner in a general partnership is significantly broader than the rights of a proctor.

6. Conclusion

The principle of freedom of contract applies to a much greater extent to general and limited partnerships than to private limited or public limited companies. Many issues, especially those concerning the mutual relations of the partners, can be freely addressed in the agreement that establishes the respective commercial partnership. The law provides only the necessary minimum framework for regulation of commercial partnerships, whereby most of the requirements apply to the relations of the partners with third parties. The rules and principles governing general and limited partnerships are to a large extent similar across Europe, although certain features may differ. Commercial partnerships are governed not only by the special rules of commercial law but also by law of obligations provisions concerning partnership contracts. The general rules included in law of obligations legislation apply as far as the special provisions on commercial partnerships do not provide otherwise. In Latvia, as in a number of other European countries, partnership contracts are primarily governed by civil law, whereas the Commercial Law includes special rules pertaining to both types of commercial partnership. A partnership contract has a dual nature, as a contract establishing obligations and as a so-called organising contract. On the one hand, a partnership contract creates a number of obligations the partners have to fulfil — for instance, a duty of contribution. On the other hand, a partnership contract establishes an entity that can independently perform commercial activity under a joint business name. The predominant view is that general and limited partnerships are not legal persons, although they possess legal capacity. The different views as to the legal personality of partnerships in European countries are reflected in Council Regulation (EEC) No. 2137/85 of 25 July 1985, which provides that the member states themselves shall determine whether or not the European Economic Interest Groupings registered in their registries have legal personality.

⁴¹ U. Eisenhardt (Note 3), para. 392.

⁴² O. Zwingmann (Note 24), p. 174.



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On the Development and Objectives of Statutory Share Law in Estonia

The Estonian law of succession as a whole is unarguably a part of continental European legal culture and essentially follows the traditions of German law. But it is not a one-to-one copy of German law. It has been influenced by Swiss and other law. For example, the procedure by which a successor acquires the estate under the Estonian law of succession is similar to the estate acceptance system recognised in Italian law.^{*1}

The same may be said at the moment about the Estonian statutory share law. It has a distinct continental European basis, while being a unique mix of different families of law. The provisions of the Estonian Law of Succession Act regulating the statutory share have been influenced by German law but have characteristics of the French family of law as well, and the Soviet law that was earlier applicable in the Estonian territory. Following the latter's example, the Estonian law of succession relates the entitlement to a statutory share to the entitled person's incapacity for work, as was provided in § 540 of the former Civil Code of the Estonian Soviet Socialist Republic.^{*2} According to § 104 of the Law of Succession Act^{*3} (LSA), in effect since 1 January 1997, the ascendant or descendant or surviving spouse of the deceased is entitled to a statutory share only if incapacitated for work at the time of the opening of the succession.

The criterion of incapacity for work as a basis for entitlement to a statutory share has, however, caused practical problems and disputes, which have even gone so far that the Supreme Court *en banc* had to put forth a view. Namely, in the course of constitutional review proceedings on 19 October 2004, the Civil Chamber of the Supreme Court *en banc* raised a question to the Supreme Court *en banc* — that of assessing the conformity of LSA § 104 to § 32 of the Constitution^{*4} in conjunction with § 11 of the Constitution^{*5} and to answer the question of whether the entitlement to a statutory share of the persons listed in LSA § 104 who

¹ See also R. Hausmann, U. Liin. Grundzüge des neuen estnischen Erbrechts. – Jahrbuch für Ostrecht. Vol. XLI 2000, Part Vol. 2. München: Beck, pp. 261–281.

² Eesti NSV tsiviilkoodeks (Civil Code of the Estonian Soviet Socialist Republic). Tallinn: Eesti Raamat 1988 (in Estonian).

³ Pärimisseadus (Law of Succession Act). – RT I 1996, 38, 752; 2002, 53, 336 (in Estonian).

⁴ Eesti Vabariigi põhiseadus (Constitution of the Republic of Estonia). – RT 1992, 26, 349; I 2003, 64, 429 (in Estonian).

⁵ According to § 11 of the Constitution, rights and freedoms may be restricted only in accordance with the Constitution. Such restrictions must be necessary in a democratic society and shall not distort the nature of the rights and freedoms restricted.

do not need assistance, including persons factually capable for work, is in line with the principle arising from § 32 (4) of the Constitution that the right of succession is guaranteed.⁶

In its decision of 22 February 2005, the Supreme Court reached the conclusion that there was no contrarieness to the Constitution, because LSA § 104 can be interpreted so that the entitlement to a statutory share applies to only such persons listed in LSA § 104 as are actually in need of assistance and are not able to earn a living due to factual incapacity for work.⁷ The Supreme Court *en banc* found that 'testamentary freedom, like inviolability of property in general, is not an unrestricted fundamental freedom. According to § 32 (2) of the Constitution, everyone's right to freely possess, use, and dispose of his property may be restricted by law. As testamentary freedom is an expression of the freedom to dispose of property, it can be restricted by law; i.e., it is a fundamental freedom with a simple reservation by law. Therefore, the legislature is entitled to restrict testamentary freedom in the public interest for purposes that do not contradict the Constitution.'⁸

Over past decades, statutory share law has been one of the world's most debated issues concerning law of succession, alongside the spouse's right of succession. An optimal solution is being sought everywhere to the problem of the extent to which the restriction of a person's testamentary freedom corresponds with today's understanding of the family and the purposes of the right of succession. That is why the discussion that follows first examines the concept of testamentary freedom, its historical development, and the purposes of the right to a statutory share in general. This is followed by an analysis of the statutory share law applicable in Estonia and plans for its reform.

1. The concept of testamentary freedom and an overview of the development of this testamentary freedom in the European and Estonian legal arenas

The Estonian Constitution guarantees the right of succession (§ 32 (4) of the Constitution), which *inter alia* means that everyone can make such dispositions for bequeathing his property as he wishes. It is indeed so in most cases, but no freedom is absolute or unrestricted. A person making a disposition on his property, effective on his death, has to take into account both the general established legal procedure and good morals, as with any other transaction (§ 86 of the General Part of the Civil Code Act).⁹

Some restrictions to testamentary freedom arise from the very nature of the law of succession; according to these restrictions, certain dispositions are considered impermissible as they do not comply with the law and are hence legally void. One of the main restrictions on testamentary freedom, arising from the law of succession, is the entitlement of the closest family members of the deceased to a statutory share.

Testamentary freedom is thus a person's freedom to make such disposition on his property upon his death as do not contradict the general legal order and good morals of society and do comply with the restrictions established by the Law of Succession Act.

The principle of testamentary freedom is an expression of the principle of private autonomy, which is more broadly recognised in private law, being in turn closely related to the protection of private property.¹⁰ Testamentary freedom developed rapidly in ancient Roman law. At the same time, testamentary freedom was not particularly widespread in the Middle Ages, when the economy was based on the family as an economic entity and land ownership or the right to use land, which passed from generation to generation, was especially important. It was practically impossible to bequeath land by means of a will. The Church, however, was not pleased with this situation and exerted its influence to gradually reintroduce the will, which at first was still available for only very limited property. It may be said that, in the Middle Ages, the will was favoured mainly by the Church, which wanted to gain property *inter alia* by enabling pious people to bequeath their property to the Church. Such rather limited testamentary freedom prevailed for centuries in England¹¹ and elsewhere in Europe¹², including the Estonian territory. It was possible at that time only to

⁶ SCEbd 3-2-1-73-04, para. 7. Available at: <http://www.nc.ee/klr/lahendid/tekst/222478590.html> (23.02.2005) (in Estonian).

⁷ *Ibid.*, para. 40.

⁸ *Ibid.*, para. 18.

⁹ Tsiviilseadustiku üldosa seadus (General Part of the Civil Code Act). – RT I 2002, 35, 216; 2003, 78, 523 (in Estonian).

¹⁰ H. Brox. *Pärimisõigus* (Law of Succession). Tallinn: Juura 2003, para. 23, 27. See also SCEbd (Note 6), para. 17.

¹¹ A. Borkowski. *Textbook on Succession*. London: Blackstone Press Limited 1997, pp. 39–41.

¹² H. Lange, K. Kuchinke. *Lehrbuch des Erbrechts*. München: Beck 1995, p. 813.

bequeath one's personal movables earned by one's own work and not inherited from the family (see, e.g., §§ 1993–2004 of the Baltic Private Law (BPL)).^{*13}

Thus, according to the Livonian town and country law, a testator could not make disposition on death for a manor or land inherited from his family, and, according to Estonian law, for any property acquired via succession or the fruits of such property. All this had to pass to the heirs (BPL § 1995). Such property could be disposed by a will only if the testator was the last of the lineage or if all blood relatives entitled to intestate succession granted their consent (BPL § 1997).

According to Livonian and Estonian law, parents with minor children who were not yet able to earn a living had to leave their children a share of their property subject to free testation such as was necessary for their maintenance and raising, as determined by their status, until they were able to earn a living themselves (BPL § 2001). The same restrictions as were established in the Livonian country law also applied in the town of Narva (BPL § 2004).

One of the best known persons who voiced an opinion against the will as the means of disposal of one's property beyond one's death was the French philosopher and lawyer Montesquieu, who said that ownership died with the man.^{*14} In this view, testamentary freedom is not some fundamental right. Throughout its historical development, testamentary freedom has always been restricted; all legal orders since Roman law, as stated above, have placed the rights of the closest family members of the deceased above it.^{*15} For a certain time, under Roman judicial practice, a court would nullify a will in which the testator left his children or grandchildren without any estate without stating adequate reason. Such a will was declared to have been drawn up in a state of mental incapacity.^{*16}

As the liberal view of the world began to spread, the understanding that only the person himself has the right to decide who will inherit his property gained more and more ground. Only if the person abuses his freedom may the state interfere and protect the family members of the deceased by way of entitling them to a statutory share.^{*17}

According to modern German legal literature, the purpose of the right to a statutory share is to balance the principle of testamentary freedom and the principle of the family's hereditary succession. This effectively reveals the link between the principle of the family's hereditary succession and the Constitution — it is an elaboration of the guarantee to the right of succession (the subjective right of succession, in this meaning), and the principle of family protection. Based on society's sense of justice, it is not permissible in continental European legal culture to leave those closest to one without any estate.^{*18}

Simultaneously with the debate over the conformity of the right to a statutory share with the Constitution in Estonia, a similar debate continued for years in the Federal Republic of Germany. In its decision of 19 April 2005, the German court of constitutional review (*Bundesverfassungsgericht*) finally took the view that the entitlement of the children of the deceased to a statutory share is based on the universal solidarity of the family. This is a lifelong link that creates not only rights but also obligations. It is not only an economic but also a psychological link. The function of statutory share law is thus to carry on the psychological and economic unity of the family regardless of the children's own economic needs. Based on this and other arguments, the German court of constitutional review found that children's right to a statutory share, which is principally non-voidable and irrespective of the children's economic status, is in conformity with the Constitution of the Federal Republic of Germany^{*19} (GG Art. 14 (1) first sentence and Art. 6 (1)).^{*20}

At the same time, the extent of a person's rights and freedoms has significantly increased in today's world; one of its expressions is the much greater recognition by society of testamentary freedom, and the shrinking circle of persons entitled to a statutory share. In English law, the right to a statutory share depends on the applicant's ability to apply reasonable financial provision.^{*21} Also, as mentioned above, the right to a statu-

¹³ Liv-, Est- und Curländisches Privatrecht. St. Peterburg. In der Buchdruckerei der Zweiten Abtheilung Seines Kaiserlichen Majestät Eigener Kanzelei 1864.

¹⁴ A. Borkowski (Note 11), p. 239; H. Hattenhauer. Grundbegriffe des Bürgerlichen Rechts. Historisch-dogmatische Einführung. München: Beck 1982, p. 192.

¹⁵ A. Borkowski (Note 11), p. 240; J. N. Druey. Grundriss des Erbrechts. 3. Aufl. Bern: Verlag Stämpfli+Cie 1992, § 6 Rdn. 1; H. Hattenhauer (Note 14), pp. 192–195.

¹⁶ E. Ilus. Rooma eraõiguse alused (Bases of Roman Private Law). Ilo 2000, p. 181 (in Estonian).

¹⁷ H. Hattenhauer (Note 14), p. 203.

¹⁸ T. Kipp, H. Coing. Erbrecht: ein Lehrbuch. T. Kipp, H. Coing (Bearb.). 14. Bearb. Tübingen: Mohr 1990, pp. 51–53; J.N. Druey (Note 15), § 6 N 2; Parry & Clark. The Law of Succession. 10th edition. London: Sweet & Maxwell 1996, p. 121.

¹⁹ Grundgesetz für die Bundesrepublik Deutschland (GG). – BGBl. 1949, 1; BGBl. I p 2862/2863.

²⁰ BverfG, 1 BvR 1644/00 vom 19.4.2005, Absatz-Nr (1-98). Available at: http://www.bundesverfassungsgericht.de/entscheidungen/frames/rs20050419_1bvr164400.html (08.07.2005).

²¹ A. Borkowski (Note 11), pp. 256–264; C. Rendell. Law of Succession. Macmillan 1997, pp. 251–256.

tory share depended on the family member's own capacity for work under Soviet law, which tradition is followed in today's Estonian statutory share law. In this sense, Estonia may be regarded as a country that recognises a fairly broad testamentary freedom, where the right to a statutory share in the continental European meaning practically does not exist and where the liberal restrictions concerning the testator are closest to those of English law, of all of today's European legal orders.

2. Who is entitled to a statutory share under the Estonian law?

According to LSA § 104, the following persons are entitled to a statutory share:

- the spouse of the deceased;
- the children, grandchildren, and other descendants of the deceased; and
- the parents and grandparents of the deceased.

As already mentioned above, the Estonian law of succession imposes an important additional condition on these persons. Namely, they are entitled to a statutory share only if they are incapacitated for work at the time of the death of the deceased.

However, the requirement of incapacity for work has been subject to different understandings and disputes in the courts recently, and the courts have interpreted 'incapacity for work' in different ways.

In its decision of 4 July 2003, the Tartu County Court found that only persons who are incapacitated for work due to illness or the functional status of the organism at the time of opening of the succession should be regarded as incapacitated for work for the purposes of LSA § 104. So, the fact that the testator's daughters who requested a statutory share had reached pension age was not in itself sufficient in the Court's opinion to regard them as incapacitated for work for the purposes of LSA § 104. The Court took the view that only those persons incapacitated for work who would be entitled to maintenance under the Family Law Act should be entitled to a statutory share.^{*22}

The testator's pension-age daughters did not agree to this solution and appealed against the decision, after which the dispute was heard by the Tartu Circuit Court. In its decision of 11 February 2004, the Tartu Circuit Court, in contrast to the Tartu County Court, found that, for the purposes of LSA § 104, the testator's ascendants and descendants who are heirs should include persons who have reached pension age, regardless of whether they still work. According to the Circuit Court's interpretation, the objective of the statutory share institution was to guarantee, regardless of the testator's will, a share of the estate to those heirs who were left without estate and who had limited means of provision due to incapacity for work, which it considered to apply to persons who have reached pension age.^{*23}

The testator's son, who was the sole testamentary heir did not agree to this solution and filed an appeal in cassation against the decision of the Tartu Circuit Court. After that, the Civil Chamber of the Supreme Court gave its assessment of the dispute on 19 October 2004 and essentially supported the position of the Tartu Circuit Court concerning the interpretation of LSA § 104, stating in its ruling that, according to its interpretation of the above section, all persons listed in LSA § 104 were entitled to a statutory share regardless of their actual capacity for work.^{*24} The Civil Chamber of the Supreme Court expressed the same position in an earlier decision of 23 December 1998, according to which factual employment *per se* does not preclude entitlement to a statutory share.^{*25}

But this did not end the dispute over incapacity for work as a criterion for entitlement to a statutory share. Namely, in its ruling of 19 October 2004, the Civil Chamber of the Supreme Court *en banc* questioned the statutory share regulation as prescribed in the LSA and deemed it necessary to assess its conformity with the Constitution. To be more exact, the Civil Chamber of the Supreme Court sought an answer from the Supreme Court *en banc* to the question of whether such a restriction on testamentary freedom was necessary in a democratic society and whether it did not distort the nature of the right of succession as guaranteed under § 32 (4) (§ 11) of the Constitution.^{*26}

After a very long and thorough discussion, the Supreme Court *en banc* reached the following decision on 22 February 2005. In the application of LSA § 104, the basis for incapacity for work may be, in particular, age,

²² See SCEbd (Note 6), para. 4.

²³ Tartu Circuit Court decision 2-2-23/2004 (in Estonian).

²⁴ CCSCr 3-2-1-73-04 (in Estonian).

²⁵ CCSCd 3-2-1-134-98 (in Estonian).

²⁶ CCSCr 3-2-1-73-04 (in Estonian).

personal injury, or disability, due to which a person cannot yet or cannot any longer earn a living. At the same time, the criterion of need for assistance should be taken into account, since, in addition to the inability of earning a living, the application of LSA § 104 requires that the person have no adequate means of providing for himself in another way. The Supreme Court *en banc* found that the need for assistance should be identified by assessing whether the person who is entitled to a statutory share was maintained by the deceased at the moment of the death of the deceased or was entitled to maintenance due to his need for assistance. According to the Supreme Court *en banc*, it was reasonable to presume in the interpretation of the provision that its scope covers the minor descendants of the deceased. The need for assistance should be presumed in their case; i.e., in the event of a dispute, the other heirs would have to prove their lack of need for assistance by relying on the preclusion of their entitlement to a statutory share. In the case of this not occurring, a person claiming a statutory share should prove that he is incapacitated for work within the meaning of LSA § 104 — i.e., cannot earn a living and has no adequate means of subsistence in another way.^{*27}

The Supreme Court *en banc* thus found that if incapacity for work within the meaning of LSA § 104 were understood as the factual inability to earn a living and if adding to this is the criterion of the claimant's actual need for assistance, this provision is guaranteed to comply with the Constitution. By such an interpretation, the Supreme Court *en banc* essentially distanced itself from previous practice and gave new content to LSA § 104, which in turn coincides with the initial position of the Tartu County Court in this dispute.

The Supreme Court *en banc* found that the institution of the statutory share, based on the need for assistance of a heir who is incapacitated for work, is a suitable, necessary, and proportionate restriction to testamentary freedom to guarantee the coping of the family. Furthermore, 'There are no other measures of comparable efficiency that burden the testator less and would help to reduce the heir's need for assistance.'^{*28} The Supreme Court *en banc* justified its decision with the following arguments:

- If all pension-age descendants or ascendants and the spouse were entitled to a statutory share under LSA § 104, it would be difficult to find a constitutional justification for such a provision. This raises the question of the potential unjustified unequal treatment of persons due to the different ages for retirement pensions. The age of retirement pension receipt has changed over the years and is currently 63 years under § 7 (1) 9) of the State Pension Insurance Act²⁹ (SPIA), whereas a transition period applies to the pension age of women. Further, the SPIA provides for a number of options for retirement before the general pension age (SPIA § 9 (1), § 10).^{*30}
- It is also incorrect to presume that old age pensioners are automatically incapacitated for work and need assistance. This presumption might have been valid before Estonia's regained independence when there was a general obligation to work until pension age. The Supreme Court *en banc* believes that arrival at a certain age does not in and of itself mean that the person is no longer able to work and thus needs assistance. Therefore, the Supreme Court *en banc* finds that an interpretation of LSA § 104 by which all old age pensioners would be entitled to a statutory share without consideration being given to their need for assistance is not an adequately justified restriction on testamentary freedom so as to support the goal of supporting family members in need of assistance.^{*31}
- 'Using the factual incapacity for work as a basis is not justified, even if most persons who are factually incapacitated for work need special assistance, since, in the particular case, the entitlement to a statutory share of a person who is incapacitated for work yet has a high living standard could result in disproportionate restriction of testamentary freedom. The Supreme Court *en banc* does not see goals that would justify such disproportionate restriction in an individual case.'^{*32}
- 'Limiting the circle of persons entitled to a statutory share to close relatives and spouse who are factually incapacitated for work is not contrary to the principle of the family's hereditary succession. The principle of the family's hereditary succession does not give rise to a constitutional requirement for all relatives of the deceased to be entitled to a share of the estate in the event of testate succession. The legislator may, but is not required to, take account of the principle of the family's hereditary succession as an objective of restricting testamentary freedom. The principle of the family's hereditary succession should be given more weight in the event of intestate succession. This legislator has done so by ensuring the succession of the estate to the family members,

²⁷ SCebd (Note 6), para. 41.

²⁸ *Ibid.*, para. 40.

²⁹ Riikliku pensionikindlustuse seadus (State Pension Insurance Act). – RT I 2001, 100, 648; 2005, 37, 283 (in Estonian).

³⁰ SCebd (Note 6), para. 37.

³¹ *Ibid.*, para. 38.

³² *Ibid.*, para. 39.

not to the state or third parties. The legislator has no constitutional obligation to protect the family's interests against the exercise of the person's testamentary freedom.^{*33}

However, the position of the Supreme Court *en banc* was not nearly unanimous. Five of the 17 members of the Supreme Court did not agree to such interpretation and appended their dissenting opinions to the decision. These opinions in large part stated that the entitlement to a statutory share cannot be linked under the applicable law to the claimant's need for assistance, and some support was given to the view that the Estonian Constitution allows for guaranteeing all children equal rights to a statutory share.^{*34}

In connection with private law reform, there have been relatively few disputes of interest to the wider public in Estonia. Statutory share law certainly deserves more public discussion, to generate a well-justified solution that is acceptable to as large a majority as possible. It is hoped that the Supreme Court's decision is initiating such a debate. The debate should then continue over the text of the new draft Law of Succession Act, which is available to everyone on the Internet and for which, according to the Ministry of Justice, plans will be submitted by the government to the Riigikogu in autumn this year. Following is greater detail on the amendments planned for statutory share law in the course of the above reform.

3. About the reform plan of Estonian statutory share law

The above dispute in the courts has, in a certain sense, triggered the current reform of the Estonian law of succession. Namely, the draft Law of Succession Act Amendment Act that had already been drawn up by spring 2002 had as one of its objectives to reduce the circle of persons entitled to a statutory share so that the claimant's need for assistance would be added to the criterion of incapacity for work. This position was maintained as the draft amendment act was elaborated upon — meaning the draft Law of Succession Act Amendment Act published in the autumn of 2004 and sent to the Government of the Republic for approval at the end of the same year. In both cases, it was planned to replace the phrase 'incapacity for work' in LSA § 104 by means of a direct reference to the maintenance provisions of the applicable Family Law Act^{*35} (FLA). Maintenance duty, according to the principles of the applicable Family Law Act, presumes that the person claiming maintenance is either a minor or incapacitated for work and does not have the necessary means of coping (see FLA §§ 21, 60, 64, 65, 66).

According to the explanatory memorandum on the draft Law of Succession Act Amendment Act, the amendment is based on the 'consideration that a statutory share should help carry out the maintenance duty, which the testator already has and which takes account of the needs of the testator's relatives and spouse, also after the testator's death'.^{*36} The drafters of the Law of Succession Act Amendment Act thus consider it an excessive restriction on testamentary freedom if the receiver of a statutory share is actually not in need of assistance.

Following the Supreme Court's decision of February 2005 on the right to a statutory share, the reform committee at the Ministry of Justice prepared a new amendment to the part on statutory share law. Specifically, the document that the Ministry of Justice sent on for a new round of approvals in May 2005 and is now formalised as the text of the new draft Law of Succession Act omits the direct reference to the applicable Family Law Act. This means, amongst other things, that it will not be necessary to start amending the new Law of Succession Act immediately after its adoption. Along with the new text of the LSA, the Ministry of Justice plans to adopt a new Family Law Act, according to the draft of which the earlier principles of the mutual maintenance duty of family members are substantially changed.

According to the current reform plan, the right to a statutory share as set out in the Law of Succession Act in the future thus shall also directly depend on the maintenance duty rules provided in the (future) Family Law

³³ *Ibid.*, para. 43.

³⁴ See the dissenting opinions of Justices Ants Kull (available at: <http://www.nc.ee/klr/laheidid/tekst/222478593.html>, 23.02.2005), Erik Kergandberg (available at: <http://www.nc.ee/klr/laheidid/tekst/222478594.html>, 23.02.2005), Henn Jõks and Lea Laarmaa (available at: <http://www.nc.ee/klr/laheidid/tekst/222478595.html>, 23.02.2005), and Jaak Luik (available at: <http://www.nc.ee/klr/laheidid/tekst/222478596.html>, 23.02.2005) (in Estonian).

³⁵ *Perekonnaseadus* (Family Law Act). — RT I 1994, 75, 1326; 2005, 20, 124 (in Estonian).

³⁶ Explanatory memorandum of 27 May 2005 to the draft Law of Succession Act (available at: <http://eogus.just.ee/>); this position was presented in the same way also in the explanatory memorandum of 5 October 2004 to the draft Law of Succession Act Amendment Act and in the explanatory memorandum to the draft Law of Succession Act Amendment Act submitted by the Government of the Republic to the Riigikogu on 23 May 2002. Available at: <http://web.riigikogu.ee/ems/saros-bin/mgetdoc?itemid=021430016&login=proov&password=&system=ems&server=ragne1> (20.01.2005) (in Estonian). The testator's son in his counterclaim relied *inter alia* on this argument as a fact precluding his sisters' right to a statutory share (see the Tartu Circuit Court decision, Note 23).

Act. This is why it is still difficult to predict exactly how the Estonian statutory share law is going to develop in the near future.

However, it may already be said, based on the new draft Law of Succession Act, that another major change in the circle of persons entitled to a statutory share is that it will exclude the grandparents of the deceased. And this will be the case regardless of the fact that the new draft Family Law Act will maintain the principle recognised in the currently applicable Family Law Act that there is a maintenance duty between grandchildren and grandparents (FLA §§ 65, 66 and new draft FLA § 101).

It is worth noting in this context that the entitlement of grandparents to a statutory share is fairly rare in the succession law of European countries. For example, it does not exist in Germany (BGB^{*37} § 2303 (2)), Switzerland (ZGB^{*38} Art. 470 (1))^{*39}, Austria^{*40}, Italy^{*41}, the Netherlands^{*42}, the Nordic countries^{*43}, Lithuania (CK Art. 5.20)^{*44}, and elsewhere. It would be easier to list the countries where a grandparent's right to a statutory share is still recognised. These are: France (Cc^{*45} Art. 914), Belgium, Portugal^{*46}, Latvia (CL^{*47} Art. 423), Estonia (LSA § 104), and Serbia and Montenegro. According to the law of Serbia and Montenegro, like that of Estonia, grandparents are entitled to a statutory share only if they are incapacitated for work and do not have adequate means of subsistence.^{*48} The sisters and brothers of the deceased have the right to a statutory share on the same grounds as grandparents do under the law of Serbia and Montenegro.^{*49}

If we look back in time, grandparents, as a rule, were not entitled to a statutory share under Soviet law either (§ 540 of the Civil Code of the Estonian Soviet Socialist Republic). Grandparents could claim a statutory share only if they were heirs, and not second order but first order heirs as the dependants of the deceased, who were incapacitated for work. As a side note, the new succession law of the Russian Federation (Civil Code of the Russian Federation^{*50} Art. 1149 (1)), which entered into force on 1 March 2002, maintains the same principle.

Thus, it may be said in summary that since the right of grandparents to a statutory share is fairly rare, the change brought about by the Estonian succession law reform is fully justified.

Moreover, even the right of the parents of the deceased to a statutory share has been questioned for a length of time — e.g., in Germany — since parents often do not belong to the family within the meaning of today's small social group.^{*51} It should be pointed out by comparison that already parents do not have the right to a statutory share under the succession laws of European countries such as England^{*52}, Denmark^{*53} and other Nordic countries^{*54}, and the Czech Republic.^{*55}

³⁷ Bürgerliches Gesetzbuch (BGB). – BGBl., p. 195; BGBl. I, p. 3138.

³⁸ Schweizerisches Zivilgesetzbuch (ZGB). – Systematische Sammlung des Bundesrechts (SR) 210; Sammlung der eidgenössischen Gesetze (AS) 2005, 2117.

³⁹ However, grandparents, as well as the sisters and brothers of the deceased, had a right to a statutory share in Switzerland before 1 January 1988. See M. Näf-Hofmann, H. Näf-Hofmann. Das neue Ehe- und Erbrecht im Zivilgesetzbuch. Wirkungen der Ehe im allgemeinen, Ehegüterrecht und Erbrecht. Einführung für den Praktiker. Zürich: Schulthess Polygraphischer Verlag 1986, paras. 1334–1336.

⁴⁰ P. Bydliński. Grundzüge des Privatrechts für Ausbildung und Wirtschaftspraxis. 3. Aufl. Wien: Manz 1997, para. 178.

⁴¹ W. Zankl. Das gesetzliche Vorausvermächtnis des Ehegatten. Österreichisches Recht und Rechtsvergleichung. Wien: Manz 1996, p. 52.

⁴² G. van der Burght, M. Franssen. The Netherlands. – International Encyclopaedia of Laws. The Hague, London, Boston: Kluwer Law International 1997, p. 172.

⁴³ For Finland, see, e.g., M. Savolainen. Finland. – International Encyclopaedia of Laws. Family and Succession Laws. Volume 1, Suppl. 3 (December 1997), The Hague: Kluwer Law International 1998, pp. 120–121. For Norway and Sweden, see, e.g., M. Ferid, K. Firsching, H. Dörner, R. Hausmann. Internationales Erbrecht. Quellensammlung mit systematischen Darstellung des materiellen Erbrechts sowie des Kollisionsrechts der wichtigsten Staaten; M. Ferid, K. Firsching (Creator). H. Dörner, R. Hausmann (eds.). Stand der 42. Ergänzungslieferung., München: Beck 2000, Vol. XXIII, Norwegen, Texte 1, pp. 14–17; and Vol. XXXII, Schweden, Text 1, pp. 10–12.

⁴⁴ Lietuvos Respublikos Civilinis Kodeksas (Civil Code of Republic of Lithuania). Available at: <http://www3.lrs.lt/c-bin/eng/preps2?Condition1=245495&Condition2=16.02.2005>.

⁴⁵ Code Civil (French Civil Code). Available at: http://www.legifrance.gouv.fr/html/codes_traduits/code_civil_textA.htm (19.11.2004).

⁴⁶ C.T. Ebenroth. Erbrecht: juristisches Kurzlehrbuch für Studium und Praxis. München: Beck 1992, paras. 997, 998, 1001.

⁴⁷ Civillikums (Civil Code of the Republic of Latvia). See M. Ferid et al. (Note 43), Vol. XLII, Lettland Texte B, p. 18.

⁴⁸ M. Ferid et al. (Note 43), Vol. XLI., BR Jugoslawien, paras. 231, 235.

⁴⁹ *Ibid.*

⁵⁰ Graždanskij kodeks Rossyskoy Federatsy. Chast tretya. 3. Ts. Federal Law from 26 November 2001, code 146-ÔÇ.

⁵¹ T. Rauscher. Reformfragen des gesetzlichen Erb- und Pflichtteilsrechts. Bd. I., I. Grundlagen des Erbrechts. Regensburg: S. Roderer Verlag 1993, p. 93.

⁵² C. Rendell (Note 21), pp. 242–243.

⁵³ Danish Law in a European Perspective. B. Dahl, T. Melchior, L.A. Rehof, D. Tamm (eds.). Copenhagen: GadJura 1996, p. 180.

⁵⁴ See Note 43.

⁵⁵ C. Trilsch-Eckardt. Das tschechische Erbrecht im Vergleich zum deutschen und Reformüberlegungen. – Zeitschrift für Erbrecht und Vermögensnachfolge (ZEV) 1996, p. 8.

Apparently, Estonian society is not yet ready to leave parents without the right to a statutory share, although this issue could be at least discussed in the course of the current reform.

The above-mentioned changes are not the only ones that are desired in statutory share law. It is planned to change the legal meaning of a statutory share in the course of the reform. This means that the current 'material' system of rights to a statutory share (*Noterbrecht*), which gives the entitled person a minimum position as a heir, will be replaced by the statutory share as a financial right of claim (*Pflichtteil*), following the example of German law. The latter means in practice that a person who is disinherited under the beneficiary's will or succession contract but is entitled to a statutory share may claim from the heir under the will or the succession contract not the position of a co-heir but monetary compensation for the minimum share of the estate that the law provides for the person.

Such change is rationalised in the explanatory memorandum to the draft Law of Succession Act by the fact that the Estonian succession law follows the Swiss and French examples. The authors of the draft, however, believe that such a solution is based on 'a family as an economic entity, characteristic of an agrarian society, and its purpose is to keep the property of the deceased in the family. Another approach to a statutory share — i.e., that applicable in Germany — is based on a greater testamentary freedom, the needs of today's industrial society, and the speed and certainty of civil transactions.'⁵⁶

What exactly will this most fundamental change bring about in the current reform? As already mentioned, there are in practical application two systems of statutory share regulation in today's continental European legal system:

- 1) the 'French system', in which a share of the estate is left free (*portion disponible*) such that the testator may leave it to anyone he wants, while another share (*portion réservée*) must be left to the closest family members as listed by law⁵⁷ and
- 2) the 'German system', in which a person may bequeath all his property by means of a will and, after his death, the persons entitled to a statutory share have a financial right of claim against the testate heirs (Austria is another European country that has adopted this principle).⁵⁸

The drafters of the German BGB also considered using the material statutory succession right (*Noterbrecht*) but in the end decided in favour of the view of the statutory share as a financial claim (*Pflichtteil*), which was already recognised in the 1794 Prussian General Land Law (*Allgemeines Landrecht für die königlichen Preussischen Staaten*).⁵⁹ Although there have been discussions in Germany since the entry into force of the BGB over whether the statutory share should be a real share of the estate, this has been considered to be an excessive restriction on the testator's private autonomy.⁶⁰

The negative aspect of a statutory share as a right of claim, according to special literature, is that the applicant for a statutory share is in a much better situation than the testamentary heir. He does not have to deal with the creditors of the estate, perform any duties of governing the estate, or find the best buyer for the assets of the estate for paying debts or obtaining money for disbursing any statutory shares. So, in many cases of succession, the receiver of a statutory share with his lesser extent of rights is in a better position than the testamentary heir is.⁶¹ On the other hand, it is difficult for the person entitled to a statutory share to receive complete information on the size and value of the estate — for that, the possibilities for him amount to less than those for the heirs. This enables 'skilled' testamentary heirs to more easily damage the rights of the receiver of a statutory share.

It has been stated in German special literature that neither justice nor the idea of a statutory share requires the statutory share to be a real share of the estate. For example, if the integrity of an enterprise or property has to be maintained, a statutory share in the form of monetary compensation is justified.⁶²

⁵⁶ See the explanatory memorandum to the draft Law of Succession Act of 27 May 2005 (Note 36).

⁵⁷ E. Ilus. Tsiviilõiguse eriosa: Autoriseeritud konspekt E. Ilusa loengute järgi (Special Part of Civil Law: Authorised Conspect of the Lectures by E. Ilus); A. Rammul, E. Talvik (koost.). Tartu: Akadeemilise Kooperatiivi Kirjastus 1938, p. 96 (in Estonian).

⁵⁸ C.T. Ebenroth (Note 46), para. 1007; W. Schaer. Ist ein Pflichtteilsrecht ein erhaltenswertes Institut? Eine rechtspolitische Betrachtung zum schweizerischen Pflichtteilsrecht mit rechtsvergleichenden Hinweisen. Zürich: Schulthess Polygraphischer Verlag 1976, p. 32; E. Feil. Pflichtteilsrecht: Kurzkommentar für die Praxis. 2. Aufl. Wien: Linde 1998, para. 2; Schwimann. Praxiskommentar zum ABGB samt Nebengesetzen. 2. Aufl. M. Schwimann (Hrsg.). Bd 3. §§ 531–858; ABGB, AnerbG, KärntnerG, Tiroler HöfeG. B. Eccher, B. Eggelmeier, H. Hofmeister (Bearb.). Wien: Orac Verlag 1997. Schwimann – Eccher, § 764 para. 1; H.-K. Gursky. Erbrecht. 2. Aufl. Heidelberg: Schaeffers Grundriß C.F. Müller Juristischer Verlag 1994, p. 132. See also U. v. Lübtow. Erbrecht. Ein systematische Darstellung. Part Vol. 1. Berlin: Duncker & Humblot 1971, p. 555.

⁵⁹ U. v. Lübtow (Note 58), p. 21; Erman. Handkommentar zum Bürgerlichen Gesetzbuch. 9. Aufl. Bd. 2. Münster: Aschendorff, 1993. Erman – Schlüter, § 2303 Vorwort para. 1; H. Klingelhöffer. Pflichtteilsrecht. München: Beck 1996, para. 1.

⁶⁰ H. Hetmeier. Grundlagen der Privaterbfolge in der Bundesrepublik Deutschland und in der DDR. Berlin: Duncker & Humblot 1990, pp. 52–53.

⁶¹ H. Klingelhöffer (Note 59), para. 3.

⁶² U. v. Lübtow (Note 58), p. 556.

Practically all continental European countries except for Austria, the Netherlands and Germany belong to the French system. Even the Greek Civil Code, the succession law part of which is very similar to the German model, has adopted the French system when it comes to statutory succession.^{*63} According to this system, the person entitled to a statutory share may claim the position of a heir. The law guarantees for the closest family members the right to a certain minimum share of the estate, which cannot be disinherited by the will of the deceased. A disposition that conflicts with the statutory share requirement is not *eo ipso* void. A heir whose right to a statutory share has been violated must apply to the court for reducing the disposition made by the will during a specified period (*Herabsetzungsklage*; see, e.g., ZGB Art. 522 et seqq.).^{*64}

The Estonian statutory share law may indeed be classified as belonging to the French system, based on the above division. Although the Law of Succession Act does not expressly prohibit one covering the entire estate with a will or succession contract, any dispositions made for one's death should be regarded as void in line with the meaning of LSA § 104 insofar as they damage the right to a statutory share of the persons protected by law. According to LSA § 205, they receive one half of the share of the estate that they would have received in the event of intestate succession.

At the same time, the Estonian statutory share law does not follow the principle of the French family of law to the end but, rather, has borrowed a number of important elements from the German family of law. Namely, according to the Estonian law, a testator may preclude a person who is entitled to a statutory share from being part of the circle of heirs by designating a legacy that covers the value of the statutory share. This would not be possible under French law, but it is possible in German law. Thus, from this angle, testamentary freedom is restricted as little by Estonian succession law as it is in German law.

But there is another rather significant difference between the French and German laws. Under French law, a person's right of disposal is also restricted by free transactions *inter vivos*, referring to making a gift. For example, if a person grants an essential part of his property (more than the freely disposable part of it) before his death, the donor's child or spouse may reclaim the granted property even before the donor's death, under French law. This is not possible under German law; a certain possibility arises only after the donor's death. According to German law, the receiver of a statutory share may claim the annulment of the gratuitous contract only if the deceased has also made dispositions for other property — i.e., if he has bequeathed the rest of his property via a will. That is because the statutory share right is applicable only in the case of testate succession. But if the property remaining, property not granted, is subject to intestate succession, the persons entitled to a statutory share have no possibility of contesting the gratuitous contracts.^{*65}

Thus, under French law, the rights of one's family members to their future estate can be damaged neither by transactions between living persons nor by the last will. According to German law, close family members are protected, as a rule, only in the case of testate succession.^{*66} In this sense, the Estonian statutory share law is similar to German law (LSA § 106 (4)) and gives the testator a much greater testamentary freedom than does either French or Swiss law.

4. Summary

In summary, it may be said that the Estonian statutory share law is a unique mix of the principles of the French and German families of law and gives a person testamentary freedom practically as great as that enjoyed under German law. That is why one cannot fully agree to the assessment of the Estonian statutory share system made by the authors of the new draft Law of Succession Act, which states that this state of affairs does not meet the needs of today's industrial society and places excessive limits on a person's testamentary freedom.^{*67} On the contrary: Estonia's law of succession ensures both *de lege lata* and *de lege ferenda* testators a much greater testamentary freedom than German law does.

At the same time, the position of the Supreme Court *en banc* and of the current reform plans of the Ministry of Justice, according to which only a close relative or spouse who is factually incapacitated for work and in

⁶³ C.T. Ebenroth (Note 46), para. 997–1004, 1006; W. Schaer (Note 58), p. 31.

⁶⁴ U. v. Lübtow (Note 58), p. 21; Erman – Schlüter (Note 59), § 2303 Vorwort para. 1; H. Klingelhöffer (Note 59), para. 1; Kommentar zum Schweizerischen Privatrecht. H. Honsell, T. Geiser, N.P. Vogt (Hrsg.). Schweizerisches Zivilgesetzbuch 2. Art. 457–977 ZGB; Art. 1–61 SchlT ZGB. Basel, Frankfurt am Main, Helbing und Lichtenbahn 1998, ZGB-Staehelin, Art. 470 N 4; M. Ferid et al. (Note 43), Lfg. XIX, Italien, para. 182.

⁶⁵ A. Baumann. Gesetzliche Erbfolge und Möglichkeiten testamentarischer Erbeinsetzung im französischen Code Civil. Inaugural-Dissertation zur Erlangung des Akademischen Grades eines Doktors der Rechte durch die Rechtswissenschaftliche Fakultät der Westfälischen Wilhelms-Universität zu Münster 1996, pp. 78–89.

⁶⁶ *Ibid.*

⁶⁷ See the explanatory memorandum to the draft Law of Succession Act of 27 May 2005 (Note 36).

need of assistance can claim a statutory share following the principles of the family's maintenance duty, distances Estonian statutory law even further from the continental European tradition in its liberal nature, and hence is more similar to the stance of English law. This is even notwithstanding the fact that in other respects the continental European principles are followed and the amendments and improvements of Estonia's law of succession largely follow the example of German law. At a time when, in German law and practice, the statutory share law is, proceeding from the idea of the universal solidarity of the family, still a balancing element between two important principles of succession law — the family's hereditary succession and testamentary freedom — the nation's statutory share law has become a restriction on testamentary freedom only to the minimum extent, given the latest developments in Estonia. According to the position of the Estonian Supreme Court *en banc*, the regulation complies with the Constitution only if the purpose of the statutory share is to ensure the economic coping of the closest family members.^{*68} The law of succession reform committee supports this view.^{*69}

⁶⁸ SCebd (Note 6), paras. 34, 37, 39, 40, 41.

⁶⁹ See the explanatory memorandum to the draft Law of Succession Act of 27 May 2005 (Note 36).



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The Impact of Copyright Industries on Copyright Law

One of the driving forces that generated copyright industries as a phenomenon of the capitalist social order was the introduction of technologies that allowed for creative works to be used in ways different from the old.^{*1} The new types of use resulted in changes of values in society. The changed values propelled interest in information and art, as well as new types of entertainment. The increased interest and the accompanying demand for information, art, and entertainment drove the activities that offered them to develop into an 'industry', and their importance in society grew.

Modern copyright industries provide the central information that is used in other sectors of the information society's economy. Copyright law and copyright are at the centre of economic development in the 21st century.^{*2} The *status quo* raises the question of whether and how copyright industries influence copyright law. The purpose of this article is to answer that question.

In the first part of the article, the author defines copyright industries, stressing the link between copyright and copyright industries as clusters of activities. Copyright industries are characterised on bases that allow for predicting their potential economic interest in copyright law. The author has made unconventional use of socio-philosophical and economic studies of the cultural and entertainment industries in her study of copyright industries. In the second part of the article, the author indicates that the economic indicators of copyright industries prove the indirect influence of these industries on copyright law. In the third part, the author gives examples of how the existence of copyright industries has influenced changes in copyright law. To assess the impact of copyright industries on copyright law, it is necessary to study the consequences of this impact for various interest groups (copyright industries, authors, the public), as well as for the development of society as a whole. Such an analysis requires more extended discussion that is beyond the scope of this article. The author provides a general overview instead of in-depth analysis.

¹ See R. Towse. *Cultural Economics, Copyright and the Cultural Industries* (2000). Available at: <http://www.lib.uni-corvinus.hu/gt/2000-4/towse.pdf> (01.09.2005), p. 107.

² See R.G. Picard, T.E. Toivonen, M. Grönlund. *The Contribution of Copyright and Related Rights to the European Economy. Based on Data from the Year 2000. Final Report*, 20 October 2003. Available at: http://europa.eu.int/comm/internal_market/copyright/docs/studies/etd2002b53001e34_en.pdf (01.09.2005), p. 11.

1. Concept and nature of copyright industries

The concept of copyright industries^{*3} can be defined in many ways, depending on the purpose of the definition. The author believes that the cornerstone of studies and descriptions of copyright industries is the idea of the industries as a function of socialisation.^{*4} Socialisation is understood by the author^{*5} as adjustment to the needs of social groups. The needs of social groups change as their mutual relationships develop as regards the different aspects of social life. The approach from the socialisation function standpoint indicates that copyright industries emerge and develop in society at the time and in the ways determined by social relationships and the surrounding environment. Economic life, culture, the social sphere, and law influence the emergence and development of copyright industries; copyright industries in turn influence the changing of the economic sphere, culture, the social sphere, and law.

Based on the hypothesis of the study and the Estonian Copyright Act, the author defines copyright industries as economic activities closely related to the substantive rights of authors and other creative artists that are carried out as an independent industry or within a conventional industry, covering:

- printing and publishing of books, periodicals, etc., and music publishing;
- musical performances and sound recordings;
- theatre;
- film industries, cinemas, and video distribution;
- software industries;
- database and multimedia industries;
- online services;
- broadcasting;
- architecture;
- the visual arts;
- applied art;
- certain types of design (textile or clothing design);
- photography;
- advertising;
- other, similar production and distribution; and
- collective or individual management of rights and licensing.^{*6}

The author of the article uses ‘industries’ within the above definition of copyright industries in a special meaning as clusters of activities. The author’s approach is based on the approach of WIPO (the World Intellectual Property Organization): ‘industries’ mean clusters of activities that can be identified and are statistically measurable, as well as activities that have a certain scale and structure.^{*7}

From the macroeconomic or statistical classification angle^{*8}, copyright industries are not industries or a branch of industry^{*9}, as this field cannot be delimited institutionally — i.e., as a set of independent industrial enterprises.^{*10} Instead of copyright industries with a single economic organisation, there is plurality of copyright industries.^{*11} The differences in economic organisation arise from development of copyright industries

³ ‘Copyright industries’ is not the only concept used. Standard practice in other countries and legal, economic, and socio-philosophical literature use other terms instead of or in parallel with ‘copyright industries’: cultural industries, creative industries, and entertainment industries. Based on the relevant practice and special literature, the author has concluded that the areas of cultural, creative, and entertainment industries are often used as identical or close in scope to copyright industries. The cultural economics specialist R. Towse has referred to an increasing tendency toward defining cultural and creative industries via copyright industries. – See R. Towse. Introduction. – Copyright in the Cultural Industries. R. Towse (ed.). Cheltenham, Northampton: Edward Elgar 2002, pp. xvii–xviii.

⁴ The author of the idea is T. Adorno, who used it in creating and developing his theory of the culture industry. See H. Steinert. Kulturindustrie. Münster: Westfälisches Dampfboot 1998, p. 42. The author of the article uses this idea outside the context of Adorno’s critical-minded theory.

⁵ Socialisation has many meanings. Each definition depends on the science or discipline using it.

⁶ See A. Kalvi. Kultuuritööstuse olemus ja selle osatähtsus rahvamajanduses (The nature of cultural industry and its role in the national economy). – Juridica 2002/10, pp. 656–657 (in Estonian).

⁷ WIPO Guide on Surveying the Economic Contribution of the Copyright-based Industries. WIPO: Geneva, 2003, p. 26.

⁸ E.g. International Standard Industrial Classification, ISIC, Rev. 3.1. Available at: <http://unstats.un.org/unsd/cr/registry/regcst.asp?Cl=17>; Statistical Classification of Economic Activities in the European Community, NACE, Rev.1.1. Available at: <http://www.stat.ee/klaskifikaatorid>.

⁹ See T. Price. The Economic Importance of Copyright. London: The Common Law Institute of Intellectual Property 1993, p. 9; A. Kalvi (Note 6), p. 658 with references.

¹⁰ Cf. the approach of I. Maaros: copyright industries are a cluster of enterprises engaged in activities producing or using copyright-protected materials. – I. Maaros. Autoriõigusel põhinev tööstus Eesti Vabariigis. Diplomitöö (Copyright-based industries in the Republic of Estonia. Diploma thesis). Supervisor H. Pisuke. Tartu University, 1992, p. 5 (in Estonian).

¹¹ See M. Dorland. Cultural Industries and the Canadian Experience: Reflections on the Emergence of a Field. – The Cultural Industries in Canada: Problems, Policies and Prospects. M. Dorland (ed.). Toronto: James Lorimer & Company Publishers 1996, p. 359.

based on the way the copyright-based product reaches the consumer.^{*12} In view of these circumstances, the Ministry of Culture of the Republic of Estonia uses the term 'creative economy' instead of 'copyright industries'.^{*13} The creative economy is defined in Estonia on the following mainstays:

1. reliance on an idea, talent, skills, and/or verbal creative work and
2. the concepts of copyright and intellectual property.^{*14}

In the Estonian study, the creative economy covers ten sectors: architecture, design, the visual arts, museums, music, theatre, literature and publishing, audiovisual arts, advertising, and entertainment software (computer games etc.).^{*15}

The mainstays and sectors of the Estonian creative economy directly refer to the UK definition of creative industries.^{*16} The Estonian concept of creative economy is not identical to that applied under the WIPO approach and by the author of this article to copyright industries or to WIPO's approach to the creative industries. According to WIPO, 'creative industries' is a broader concept, covering cultural industries and all live and industrial artistic and cultural production (including the production of single articles).^{*17}

The majority of the economic activities of copyright industries are closely related to the use of authors' rights. The conditions of exploitation of an author's rights are prescribed by copyright law.^{*18} Consequently, copyright law influences the bases and conditions of the economic activities of copyright industries. To be more exact, copyright law is the legal framework for market transactions involving the results of creative work.^{*19} In the global economy, protection of copyright creates the basis for copyright industries. Copyright is thus a powerful source of economic growth, job creation, and trade stimulation.^{*20} These arguments give rise to a hypothesis that copyright industries may have a potential interest in influencing copyright law in a direction beneficial for copyright industries.

Copyright industries have a certain function of a producer and communication intermediary. An author's work or a performing artist's performance becomes an ordinary commodity via the role of copyright industries. The role of copyright industries as communication intermediary allows such commodities to be distributed to the persons interested in those commodities. At the same time, the communication intermediary's role enables copyright industries to have control over what content is intermediated and to whom, especially in the Internet environment. These two roles of copyright industries are closely related to the exercise of the author's substantive rights — specifically, the right to reproduce and distribute the work or communicate it in an intangible form. The author's substantive rights are provided for by copyright law. One may presume that copyright industries have an interest in copyright law, owing to their position in society.

The economic activity of copyright industries as producers and distributors is mainly carried out in the private sector.^{*21} Because of the incidental nature of, and a certain non-elasticity in, the demand for cultural products^{*22}, copyright industry activities have always been considered a risky business. Despite the financing risks, investment in copyright industries or in some of their activities has grown popular and profitable as society becomes more prone to exploit and value information and symbols. Good examples can be found in the US copyright industries.^{*23} Reduction of high risks through suitable legal regulation is the next potential presumption as to why copyright industries may be interested in influencing copyright law.

¹² See T.D. Selz, M. Simensky. *Entertainment Law: Legal Concepts and Business Practices*. Vol 1. Colorado Springs, Colorado: Shepard's/McGraw-Hill 1984, § 1-02, pp. 1–5.

¹³ The term was proposed by the staff of the Estonian Institute of Economic Research. Source: private conversation with institute staff.

¹⁴ K. Herkül. *Mis loom on loomemajandus (What is creative economy?)* – Postimees, 1 June 2005 (in Estonian).

¹⁵ *Ibid.*

¹⁶ Creative industries are those industries that have their origin in individual creativity, skill, and talent and that have a potential for wealth and job creation through the generation and exploitation of intellectual property. See *The Creative Industries Mapping Document 2001*, Part 1. Available at: <http://www.culture.gov.uk/NR/rdonlyres/338EFCBC-F706-4191-A1A4-CCB7EFF7EDAE/0/foreword.pdf> (29.06.2005).

¹⁷ According to WIPO, the cultural industries produce products of culturally significant content by way of industrial-scale reproduction. This industrial activity combines the creation of a work or another intangible and cultural form of expression, making copies, and marketing these. See the WIPO Guide (Note 7), pp. 18, 85.

¹⁸ See also, concerning the economic features of copyright, R. Towse. *Copyright and Cultural Policy for the Creative Industries*. – Economics, Law and Intellectual Property. O. Granstrand (ed.). Boston etc.: Kluwer Academic Publishers 2003, p. 421 et seqq.

¹⁹ For greater detail, see the WIPO Guide (Note 7), p. 20 et seqq.

²⁰ *Ibid.*, p. 2.

²¹ A.H. Olsson. *Copyright in the National Economy*. Some reflections on the basis of a Swedish study on the economic impact of copyright law. – Copyright 1982/4, p. 132; R. Towse (Note 1), p. 107; A. Kalvi (Note 6), p. 658.

²² For greater detail, see J.-G. Lacroix, G. Tremblay. *The 'Information Society' and Cultural Industries Theory*. London etc.: SAGE Publications 1997, p. 45.

²³ See R. Bettig. *Copyrighting Culture. The Political Economy of Intellectual Property*. Westview Press 1996, pp. 37–38.

In examining the social dimension, it should be noted that it was thanks to copyright industries that social groups of authors and other creative artists emerged. Copyright industries cannot function without authors and performers. Hence, copyright law that completely inhibits the creative work of authors and performers could not be in the interest of copyright industries.

2. Impact of copyright industries on copyright law via economic effects

The author of this article sees the impact of copyright industries on copyright law in the enactment of legal rules that are beneficial, or the non-enactment of legal rules that are non-beneficial, to copyright industries. Lobbying among politicians and officials is an instrument of influence for copyright industries. Lobbying may be conducted on various territorial levels: domestic, regional, and global. Although lobbying is one of the backstage areas for development of today's copyright law and policy, it is usually not addressed by scientific sources dealing with copyright.^{*24} Because of the scarcity of these sources, it is difficult to demonstrate the impact of copyright industries' lobby on copyright law in this article. Therefore, the author demonstrates the indirect impact of copyright industries on copyright law by pointing out the importance of copyright industries in the national economy.

To prove the indirect impact of copyright industries, the author presents below the percentage of GDP achieved by copyright industries. The author uses the following logic in proving this indirect impact.^{*25} When copyright industries have a substantial share in the economic indicators of their country of origin or operation, copyright industries are presumed to have a certain economic importance and value in that country. Copyright industries are interested in securing their future importance, using, *inter alia*, positive law. Hence, copyright industries are interested in the content of copyright law and presumably lobby toward the goal of making copyright law more beneficial for their business.^{*26} On the regional and global levels, copyright law can be influenced by copyright industries having economic importance and power on the local level. Through representation and collaboration mechanisms, copyright industries with smaller-scale economic indicators also have their influence on the regional and global levels.

The author's logic concerning the indirect impact of copyright industries on copyright law is supported by many studies on the economic indicators of copyright industries.^{*27}

The contribution of copyright industries to GDP within the European Union (EU) was assessed on the basis of statistical data from the year 2000. The study focused on the turnover, value added, and employment of copyright industries.^{*28} The share of the EU copyright industries in foreign trade was not assessed. In contrast to the scope of the activities of the core copyright industries in the WIPO classification scheme^{*29}, the EU study included only two branches of copyright industries: the core copyright industries and copyright-dependent industries. The EU classification excluded, *inter alia*, the activities of collective management organisations.^{*30}

It was found as a result of the study that the contribution of the copyright industries of the 15 member states to the EU GDP was 5.27%, of which 3.99% was accounted for by the core copyright industries.^{*31} The productivity of the EU core copyright industries was 1/3 higher than that of dependent industries. The authors of the EU study concluded that copyright industries had remarkable possibilities for further economic growth.^{*32} However, this conclusion of the EU study can hold true as regards future annual economic growth of copyright industries only if the scope of copyright industries is not extended to activities that exhibit little or no economic growth.^{*33} This conclusion was developed in the USA in a study published in 2004.

²⁴ One exception is T. Hoeren. Entwurf einer EU-Richtlinie zum Urheberrecht in der Informationsgesellschaft – Überlegungen zum Zwischenstand der Diskussion. – MMR 2000, Book 9, p. 515.

²⁵ For the background of this logic, see H. Cohen Jeroham. Kritische Überlegungen zur wirtschaftlichen Bedeutung des Urheberrechts. – GRUR Int. 1989, Book 1, pp. 25–26; A. Kalvi (Note 6), p. 656 et seqq.

²⁶ See also the theory of P. Drahos. – P. Drahos. A Philosophy of Intellectual Property. Dartmouth 1996, p. 145 et seqq.

²⁷ See, providing a summary of this, A. Kalvi (Note 6), p. 664 et seqq.

²⁸ EU copyright contribution (Note 2), p. 1.

²⁹ Cf. WIPO Guide (Note 7), p. 31.

³⁰ Cf. EU copyright contribution (Note 2), pp. 20–23.

³¹ *Ibid.*, pp. 1–2.

³² *Ibid.*, p. 9.

³³ The activities of the new EU member states' copyright industries are added to this.

An important conclusion of the authors of the EU study is that the share of copyright industries to the GDP^{*34} is influenced by the strength (or weakness) of other industries and sectors in addition to the activities of the copyright industries themselves in the national economy.^{*35} Thus, if the activities of conventional industries are at a low point for a few years, then copyright industries as well exhibit a low at that time.

It was concluded in the EU study that the contribution of copyright industries to the GDP exceeds the economic contributions of many other industries.^{*36} When value added as a percent of total value added is considered, the contribution of copyright industries to the EU economy is calculated to be 2.5 times more than that of the transport equipment industry.^{*37} These comparison data refer to the strong economic position of the EU copyright industries when it comes to lobbying to guarantee copyright laws and policies suitable for them.

In the United States, nine earlier studies^{*38} on the role of copyright industries in the economy were updated in 2004, and updated data were published for that year.^{*39} The updated study, based on the WIPO guidelines and the UN International Standard Industrial Classification (ISIC) reported the contribution of the core copyright industries and total copyright industries to the US GDP to be 5.98% and 11.97%, respectively, in 2002.^{*40} The increased size of copyright industries in this updated study resulted in a decline in its annual growth rates for the copyright industries over time. According to the new methodology, the real annual growth rate of the US core copyright industries' value added over the period 1997 through 2002 was 3.51%, while the real annual growth rate for total copyright industries was only 1%. This relatively low annual growth rate was, *inter alia*, caused by the slower economic growth rate of the copyright-dependent industries.^{*41}

The growth rate in value added achieved by the US core copyright industries for the period 1997-2000 (3.48%) exceeded that of the US economy as a whole (2.47%); the growth rate in value added of total copyright industries for the same period was lower (2.07%).^{*42}

These data on the economic contribution of the US copyright industries to the GDP confirm the economic power of these industries and their interest in maintaining and strengthening their economic power via copyright law.

The above data on the contribution of the EU and US copyright industries to GDP indicate that the economic 'say' of the US copyright industries is potentially stronger on the international level in absolute terms. The comparison is speculative, as the data are not directly comparable.^{*43}

The following summary may be made on the basis of the above as well as other studies:

1. The contribution of copyright industries to the GDP is larger than it was predicted to be before the studies were carried out.^{*44}
2. Copyright industries are a rapidly and dynamically developing sector of the economy today.^{*45} The share of copyright industries in foreign trade is also increasing.^{*46}
3. The employment rate of copyright industries is higher than the average employment rate of the country concerned.^{*47}
4. The principle of copyright protection contributes to such development of copyright industries.^{*48}
5. The study results have already been used for lobbying with the legislative and executive powers of many countries. Lobbying is aimed at the paying of more attention to the development of

³⁴ Also the contribution of copyright industries to employment.

³⁵ EU copyright contribution (Note 2), p. 120.

³⁶ *Ibid.*, p. 8.

³⁷ *Ibid.*

³⁸ Carried out in 1997-2001.

³⁹ See S.E. Siwek. Copyright Industries in the U.S. Economy – the 2004 Report. Available at: www.iipa.com/pdf/2004_SIWEK_FULLL.pdf (28.02.2005).

⁴⁰ *Ibid.*, p. iii.

⁴¹ *Ibid.*, p. iv.

⁴² S.E. Siwek (Note 39), p. iv.

⁴³ See A. Kalvi (Note 6), pp. 662-664 with references.

⁴⁴ WIPO Guide (Note 7), p. 11.

⁴⁵ *Ibid.*, pp. 12, 37.

⁴⁶ Unfortunately, this has been studied in few countries so far. See WIPO Guide (Note 7), p. 12.

⁴⁷ *Ibid.*, p. 12.

⁴⁸ See WIPO Guide (Note 7), p. 9.

copyright law and a suitable copyright policy. In some cases, the study results led to the establishment of new copyright law.^{*49}

Summary of the study results confirms the author's logic concerning the indirect impact of copyright industries on copyright law.

The Ministry of Culture of the Republic of Estonia initiated a study of the creative economy in 2004.^{*50} The first stage of the study involves defining the scope of the creative economy, identifying its links with other areas of the economy, and assessing its importance and potential as a sector of the economy. The second stage is mapping and economic analysis: measuring the volume, employment level, turnover, number of enterprises, tax burden, and contribution to the GDP of the creative economy. Foreign trade indicators are not currently included in the working plan of the study group. The third stage of the study comprises assessment and specific proposals.^{*51} The study group^{*52} plans to present the results of the creative economy mapping to the government for discussion before the end of the year (2005).^{*53}

The Estonian study follows the lead of a study of the UK creative industries.^{*54} Since studying the economic indicators and relationships of the creative industries is beyond the legal system, the differences in the copyright traditions of Estonia and the UK do not present a problem here. Nevertheless, the author of this article suggests that the next study of the Estonian creative economy be based on the WIPO study methodology for copyright industries. The author relies on the fact that using a single study methodology will enable Estonia to compare its creative economy indicators in the near future with those of the other European Union member states that use the WIPO methodology and share a similar economic environment. More importantly, a common methodology allows for study into the implementation and impacts of economic, copyright, and cultural policy measures relating to the cultural industries^{*55} in the European Union and elsewhere. The author of this article believes that the globalisation of the economy, including globalising copyright industries, is another reason to use a common methodology.

Before the current study of the creative economy was undertaken, the indicators of the Estonian copyright industries were informally studied by student I. Maaros in 1990.^{*56} According to Maaros, copyright industries included, *inter alia*, advertising, computer software, and various types of consultation. The indicators studied were the number of copyright industry enterprises, their turnover and product characteristics, and the number of employees and their wages.^{*57}

The study by Maaros showed that in 1990 copyright industries contributed 8.9% to the Estonian GDP; Estonia's major copyright industries in 1990 were architecture, the music industry, and publishing.^{*58} When the current study of the creative economy yields results similar to those obtained by Maaros, a hypothesis can be established for new studies concerning the prospects of the Estonian creative economy and its power in both enriching economic life and influencing copyright law in Estonia. It is already known, however, that the Estonian statistics on which basis copyright industries could be studied contain large gaps.

⁴⁹ See WIPO Guide (Note 7), p. 11.

⁵⁰ The term 'creative industry' was initially used instead of 'creative economy'. See Kultuuriministeerium peab oluliseks loovtööstuste levikut (The Ministry of Culture attributes importance to the spread of the creative industry). – Uudised (News), 26.10.2004. Available at: <http://www.kul.ee/> (10.12.2004) (in Estonian).

⁵¹ K. Herkül (Note 14), p. 18.

⁵² Kultuuriministri 03.12.2004 käskkiri nr 239: Töörühm loovtööstuse sektori kaardistamisprotsessi ettevalmistamiseks ja läbiviimiseks (Ministry of Culture Directive No. 239 of 3 December 2004: Working Group for Preparations for and Conduct of Mapping of the Creative Industry Sector). Available at: <http://www.kul.ee> (10.12.2004) (in Estonian).

⁵³ Kultuuriministeerium soovib arendada loovtööstuse sektorit (The Ministry of Culture wishes to develop the creative industries sector). – Uudised (News) 15.12.2004. Available at: <http://www.kul.ee> (16.12.2004) (in Estonian).

⁵⁴ This is confirmed by the fact that the British Council's creative industries programme, which includes advising on creative industries studies, has been extended to the Baltic States. Under the British Council project, experts familiar with the UK creative industries will help our Ministry of Culture define and map the creative industry and carry out awareness-raising activities. See Central and Eastern European Pilot Project: Latvia, Lithuania, and Estonia. Available at: <http://www.britishcouncil.org/arts-creative-economy-transitional-economies-latvia.htm> (01.06.2005).

⁵⁵ A. Kalvi (Note 6), pp. 667–668.

⁵⁶ See I. Maaros (Note 10).

⁵⁷ *Ibid.*, p. 18. The author collected the study data through a survey of enterprises and local governments. The research methods were statistical and logical analysis and comparison. See I. Maaros (Note 10), pp. 16–17.

⁵⁸ I. Maaros (Note 10), p. 28.

3. Change in copyright law with influence from copyright industries

Political, economic, and legal measures can be used to influence copyright law on the international, regional, and national levels.

For example, on the international level, the USA, as a major exporter of copyright-based products, pursues a foreign trade policy that invites other states to eliminate trade barriers to the export of goods and services from the USA, as well as to investments by US undertakings in other countries.^{*59} The US foreign policy related to copyright industries has influenced the Agreement on Trade-related Aspects of Intellectual Property Rights (the TRIPS agreement) annexed to the 1994 Agreement Establishing the World Trade Organization.

Economic measures include, for example, trade barriers restricting the import of the products of another country's copyright industries until the state amends its copyright law.

Legal measures can be taken under international treaties. The most important international agreements of contemporary copyright are the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) adopted at the WIPO Diplomatic Conference in 1996. These treaties have been referred to as the Internet-era treaties, setting out new standards of copyright protection raised by the development of digital communication technologies. Therefore, these treaties are certainly important for the copyright industries.

The WCT and WPPT enable copyright industries to legally protect the technological measures that these industries use in connection with the results of creative work.^{*60} Modern digital and other technologies enable certain technological measures to prevent or restrict the use or accessing the results of creative work that is not authorised by rightholders. For example, phonorecords can be released on non-copiable CD-like discs or ones that can be copied only once, certain TV programmes can be viewed only through the use of a certain decoding device, etc.

The WCT and WPPT indirectly gave a green light to copyright industries for using such technologies: the countries having ratified these treaties have to ensure legal measures for the protection of such technologies. This approach is beneficial for copyright industries: relying on legislation, the industries can apply control over who can access the results of creative work and how. Securing the use of technological protection measures by legal means does not, however, mean that the purpose of the WCT and WPPT was to prejudice against the interests of consumers of creative works. How to balance the interests of consumers as the public against the interests of copyright industries in technological protection methods is up to each sovereign adopting such legal measures.^{*61}

In European Community (EC) law, copyright is an important area of harmonisation. In each copyright system a balance between the interests of copyright owners and the public at large must be ensured.^{*62} Although this principle is widely recognised in EC copyright law, it is not the cornerstone for copyright harmonisation.

The harmonisation of copyright law proceeded in the European Communities from the objective of completing the European Communities' internal market. The harmonisation of copyright had to eliminate any negative impacts of differences in legislation on the trade of copyright-based products in the common market.^{*63}

The principle of common market completion has remained a main goal in the further harmonisation of copyright law. For example, it was the main objective of one of the latest directives, Directive 2001/29/EC^{*64} of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.^{*65}

⁵⁹ H.L. Hefter, R.D. Litowitz. *Intellektuaalse omandi kaitse* (Protection of intellectual property). – Sari 'Majanduslik õitseng' ('Economic prosperity' series). Vienna: USIA Regional Program Office, *sine anno*, pp. 8–9 (in Estonian).

⁶⁰ See WCT Art. 11; WPPT Art. 18.

⁶¹ Concerning relevant practice in the EU member states, see S. von Lewinski. *Rights Management Information and Technical Protection Measures As Implemented in EU Member States*. – IIC 2004/7, pp. 844–849.

⁶² S.M. Stewart. *International Copyright and Neighbouring Rights*. 2nd ed. London: Butterworths 1989, p. 5.

⁶³ White Paper on the Completion of the Internal Market. COM (85) 310. See also H. Cohen Jehoram. *The EC Copyright Directives, Economics and Authors' Rights*. – IIC 1994 (25) 6, p. 821.

⁶⁴ Hereinafter 'the InfoSoc directive'.

⁶⁵ Its preamble states: '[...] Having regard to the Treaty establishing the European Community, and in particular Articles 47 (2), 55 and 95 thereof, [...] Whereas: 1) The Treaty provides for the establishment of an internal market and the institution of a system ensuring that competition in the internal market is not distorted. Harmonisation of the laws of the Member States on copyright and related rights contributes to the achievement of these objectives.' – OJ L 167, 22.06.2001, p. 10 et seqq.

The common market principle is also what triggers the harmonisation of the principles of collective management of rights in the EU.^{*66} Under collective management of rights, licensing agreements are concluded and a fee is collected for creators for the use of their work. Common principles in this area again simplify the use of works in the common market. Such a trend is highly favourable for copyright industries and has also been influenced by the size of copyright industries' contribution to the EU's GDP.

It has been mentioned that the harmonisation of copyright law in the EU has taken account of the growing economic importance of copyright industries at least from 1988^{*67} to this day.

Given the nature of the European Communities and the environment created by the modern market economy, as well as the competition between developed countries as regards national economic indicators, such an approach to the harmonisation of copyright law is logical. At the same time, it creates a potential that, if necessary, copyright rules could be interpreted such that copyright industries as actors in the market and contributors to national economy become the main beneficiaries of these rules, before authors and the public. This and the above-mentioned national economy indicators suggest that developments in society (including the existence of copyright law) have lead to a situation where copyright industries have become a considerable economic force and can influence the interpretation of copyright law if necessary. At this moment, copyright law is fortunately interpreted following the principle of balance between the interests of different social groups.

The US and EU copyright industries have also had their direct or indirect impact on amendments to the Estonian Copyright Act.

The first Estonian national Copyright Act was adopted in 1992.^{*68} The first notable influence of foreign copyright industries on our Copyright Act dates to 1999, when a package of amendments to the Copyright Act was adopted.^{*69} Those amendments included the legal definition of a pirated copy and improved copyright enforcement measures. In the fight against piracy, some grounds for the free use of works that were earlier allowed under the Berne Convention for the Protection of Literary and Artistic Works were cancelled.^{*70}

The amendments of 1999 were in part caused^{*71} by an address of the USA to the Government of the Republic of Estonia in connection with piracy of copyright-protected works. The US copyright industries are interested in effective enforcement and copyright protection in countries importing their products. The lack of effective intellectual property law (including copyright law) is treated in the USA as a strong trade barrier. Every year, the USA lists the countries that it considers do not provide adequate protection of intellectual property; after more serious cases manifest themselves, trade sanctions^{*72} or other measures may be employed against some countries.

The main objective of the 1999 amendments to the Copyright Act^{*73} was to harmonise it with the EC copyright standards. The first noteworthy amendment concerned the purpose of the act. An economic dimension was added alongside the cultural dimension in the purpose of the Copyright Act. Besides the consistent development of culture, the purpose of the updated act is to ensure the development of copyright-based industries and international trade.^{*74} This wording expressly fixed the ensuring and protection of the interests of copyright industries in the Estonian Copyright Act. This addition was triggered by the TRIPS agreement. Hence, the amendment was indirectly influenced by copyright industries, which have a certain power over international trade.

The Copyright Act set out the rights for the makers of databases and producers of the first fixations of films. This also meant a broadening of the circle of copyright industries for whom the law guarantees individual exclusive rights to protect investments made in the production of creative works or information processing.

⁶⁶ See Communication from the Commission to the Council, the European Parliament and the European Economic and Social Committee. The Management of Copyright and Related Rights in the Internal Market. COM (2004) 261.

⁶⁷ For more detail, see H. Cohen Jehoram (Note 63), p. 838, here presented without further reference.

⁶⁸ Autoriõiguse seadus (Copyright Act). – RT 1992, 49, 615 (in Estonian).

⁶⁹ Autoriõiguse seaduse, haldusõiguserikkumiste seadustiku, kriminaalkoodeksi, tarbijakaitseseaduse ja tolliseaduse muutmise ja täiendamise seadus (Copyright Act, Code of Administrative Offences, Criminal Code, Consumer Protection Act and Customs Act Amendment Act). – RT 1999, 10, 156 (in Estonian).

⁷⁰ These provisions had already been restored by the end of 1999.

⁷¹ For other reasons, see H. Pisuke. Autoriõigus ja autoriõigusega kaasnevad õigused: saavutused ja perspektiivid (Copyright and related rights: achievements and prospects). – Õigusinstituudi Toimetised 2000/3, p. 4 (in Estonian).

⁷² H.L. Hefter, R. D. Litowitz (Note 59), pp. 8–9.

⁷³ Autoriõiguse seaduse ja sellega seonduvate seaduste muutmise seadus (Copyright Act and Related Acts Amendments Act). – RT I 1999, 97, 859 (in Estonian).

⁷⁴ Subsection 1 (1) of the Copyright Act. See also H. Pisuke. Cultural Dimension in Estonian Copyright Law. – *Juridica International* 2004 (IX), pp. 45–46.

Such exclusive rights arose from harmonisation with the EC copyright standards. However, another reason behind the provision of these substantive rights for database-makers and producers of the first fixations of films was a development in social and economical life in EU that necessitated the extension of the scope of related rights. Hence, these changes in the Estonian copyright law arose from the natural course of development of the EU copyright industries. It is important that these new rights vested in copyright industries do not prejudice against the authors' rights. Authors' rights continue to be well protected, besides investors' rights.

On 16 October 2002, the Riigikogu passed an act^{*75} aimed at harmonising the regulation of copyright contracts of the Copyright Act with the corresponding regulation of the Law of Obligations Act^{*76} and maintaining in the Copyright Act those provisions that arise from the specificity of copyright.^{*77} The Law of Obligations Act is based on the principle of freedom of contract. The principle has been in general transplanted in to the author's contract provisions of the Copyright Act. Since Estonian practice regarding authors' contracts is strongly in favour of the stronger party to the contract, the undertaker, some restrictions were provided on the principle of freedom of contract.^{*78} The author of this article believes that such a solution on the level of a legislative act is balanced. From the standpoint of practice, these restrictions are currently not sufficient for so-called primary author's contracts, i.e. those contracts to which the author himself or herself is a party. Estonian practice regarding author's contracts demonstrates a lack of knowledge and experience on our authors' part, leaving them at the mercy of copyright industry businesses as the stronger party to the contracts. The author as the weaker party does not have adequate copyright guarantees in the Copyright Act for protecting his own interests, a contrast to, e.g., German copyright law. Thus, the plain application of the principle of freedom of contract in the Estonian handling of author's contracts may become our copyright industries' ball in the authors' goal. The author of this article hopes that Estonian practice related to author's contracts shall develop in the coming years and that there will be no need to establish further restrictions on the freedom of contract as regards so-called primary author's contracts. Copyright and related rights management organisations constitute the most active part of the Estonian copyright industries as regards participating in copyright law amendment. These organisations and other copyright industries have for the most part participated in amending the Copyright Act via the work of the copyright committee and by reviewing the draft amendments. The copyright committee is a committee of copyright experts set up with the Republic of Estonia's Ministry of Culture. Eight of the 14 members of the committee are currently representatives of or directly related to copyright industries.^{*79} According to the Copyright Act, the committee monitors the compliance of the level of protection of copyright and related rights with the international obligations assumed by the Republic of Estonia, analyses the country's practice in implementation of copyright legislation, and makes proposals to the Government of the Republic for amendment of copyright legislation and accession to international agreements.^{*80} The committee's reports on the copyright situation in the Republic of Estonia, which the committee draws up for the government twice a year, give a good overview of how the committee manages its tasks, including proposals for amendments to copyright law.^{*81} The most recent review was completed in June 2005.^{*82}

The author of this article has information that texts of draft laws for the amendment of copyright law, prepared on the initiative of the Ministry of Culture, have been presented to the Estonian collective management organisations for examination and opinions. The opinion of the Estonian copyright industries on the amendment of copyright law has so far not been contrary to the authors' interests. The author believes that, for the Estonian copyright industries to be able to consistently and transparently participate in the discussions of draft copyright laws, such participation should be organised and made a tradition. To secure compliance by the principle of the balance of interests, more authors' representatives should be involved in the discussion of the amendments to copyright law.

In summary, it should be said that, although Estonian copyright law has been influenced by the local, EU, and US copyright industries, our copyright has remained the author's right.^{*83} The fact that the Copyright

⁷⁵ Autoriõiguse seaduse muutmise seadus (Copyright Act Amendment Act). – RT I 2002, 92, 527 (in Estonian).

⁷⁶ Võlaõiguse seadus (Law of Obligations Act). – RT I 2001, 81, 487; 2004, 90, 616 (in Estonian).

⁷⁷ Seletuskiri 'Autoriõiguse seaduse muutmise seaduse' eelnõule (Explanatory memorandum to the draft Copyright Act Amendment Act). 08.05.2002. Available at: www.kul.ee (in Estonian).

⁷⁸ For more details, see: A. Kalvi. Autorilepingu uus kuub (New author's contract format). – *Juridica* 2003/4, p. 255 (in Estonian).

⁷⁹ See Autoriõiguse asjatundjate komisjoni moodustamine. Vabariigi Valitsuse 12.02.2002 korraldus nr 113-k ('Setting up a committee of copyright experts', Government of the Republic Order No. 113-k of 12.02.2002). – *RTL* 2002, 28, 399; 2005, 57, 815 (in Estonian).

⁸⁰ Copyright Act § 7 (1) 1–3).

⁸¹ These reviews are available in Estonian at: <http://www.kul.ee>, valdkonnad>autoriõigus>autoriõiguse asjatundjate komisjon (in Estonian).

⁸² Ülevaade Vabariigi Valitsusele autoriõigusealasest olukorras Eesti Vabariigis. Autoriõiguse asjatundjate komisjon, Kultuuriministeerium, juuni 2005 (Review of the copyright situation in the Republic of Estonia for the Government of the Republic. Committee of copyright experts, Ministry of Culture, June 2005). Available at: http://www.kul.ee/webeditor/files/Raport_2005_I_ilma_lisata.rtf (1.09.2005) (in Estonian).

⁸³ See H. Pisuke (Note 74), p. 50.

Act reflects an economic approach and references to copyright industries, in keeping with the development of socio-economic life, has not, as a rule, infringed authors' rights or made the law solely an instrument of the copyright industries. Hence, the indirect impact of the copyright industries on the Estonian Copyright Act has not, at least on the legislative level, caused imbalance between the interests of copyright owners and those of the public. This state of affairs shows that the impact of copyright industries on copyright may be beneficial for other social groups as well.

A similar conclusion can be drawn concerning the impact of copyright industries on copyright law in the EU and at the global level. Although the level of socialisation strengthens the position of copyright industries in regional and global trade and thus increases their potential interest in influencing copyright law, the law cannot so far be identified as having negative consequences for the authors or the public. This conclusion does not preclude judicial practice related to copyright matters having an unfavourable influence on authors or the public. But this is a topic for another study.

4. Summary

The author, based on her hypothesis and the Estonian Copyright Act, has defined copyright industries as economic activities based on the exploitation of the rights of authors and other creative artists such as is carried out in an independent industry or within a conventional industry.

The impact of copyright industries on copyright law means the enactment of copyright rules that favour these industries or the non-enactment of such rules that do not favour them. The article first demonstrated the indirect impact of copyright industries on copyright law — i.e., via the contribution of copyright industries to the GDP. Studies of the contribution of the EU and US copyright industries to the respective GDP show that copyright industries are a rapidly and dynamically developing sector of the economy in the EU and USA. Such development of copyright industries is largely contributed by copyright law. The assessments given in these studies demonstrate the strong economic position of copyright industries to lobby for copyright law suitable for the industry. Relevant assessments have already been used for lobbying with the legislative and executive powers of many countries.

The Ministry of Culture of the Republic of Estonia commenced a study of the creative economy in 2004, based on a study of the UK creative industries. In the author's opinion, it would be justified to follow the study methodology worked out by WIPO, as the latter would enable Estonia in the near future to compare its creative economy's economic contribution with the other European Union member states that use this methodology and have a similar economic environment. The study of the creative economy will be completed in 2005.

Of copyright industry members domiciled in Estonia, collective management organisations are the most active to take part in amendments to copyright law. These organisations and others in copyright industries have participated in amending the Copyright Act, mainly via the work of the copyright committee and by reviewing the draft amendments. Estonian copyright law has been influenced by the EU and US copyright industries as well. Nevertheless, copyright has remained the author's right in Estonia. The economic approach taken in the Estonian Copyright Act does not damage the rights of authors or make the law an instrument for the copyright industries. Thus, the indirect impact of copyright industries on the Estonian Copyright Act has not, at least on the level of legislation, lead to imbalance between the interests of copyright owners and the public.



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The Leniency Programme in Estonia — Illusion or Reality?

1. Background on the fight against cartels in the EU and Estonia

The fight against cartels has been a long-term top priority for the European Commission (hereinafter ‘Commission’). The reason for this is pragmatic: an arrangement between undertakings at the same level in the same market concerning division of the market, price fixing, etc. — known as a cartel — is most damaging to competition and deals the heaviest blow to the consumer, one way or another. Since 1996, the Commission ‘involved’ cartel members themselves in the anti-cartel fight¹ — it formalised the idea of giving undertakings that were ‘coming out’ a chance of immunity or favourable treatment if they betrayed other cartel members. The initiative was called a ‘leniency programme’, and the immunity and favourable treatment were granted on the ‘first come, first served’ principle. A renewed legal framework for the leniency programme was adopted with great expectations in 2002: the Commission notice on the non-imposition or reduction of fines in cartel cases.² It seems now that these expectations have been or are being fulfilled.

According to the Commission, after the adoption of the renewed leniency notice, applications for immunity or favourable treatment became the main trigger for instituting the Commission’s procedures against the most severe violations of EU competition rules.³ Reliable and unambiguous statistics that could confirm this argument are lacking, as the Commission itself is not prone to delivering exact statistics to the wider public.⁴ However, one cannot deny the fact that a large number of applications for favourable treatment have been submitted under the 2002 leniency programme. For example, the 2003 Competition Policy

¹ Commission notice on the non-imposition or reduction of fines in cartel cases. — OJ 1996/C No. 297, p. 4.

² Commission notice on immunity from fines and reduction of fines in cartel cases. — OJ 2002/C No. 45, p. 3 (hereinafter also ‘leniency notice’).

³ E. Paulis, E. De Smijter. Enhanced enforcement of the EC competition rules since 1 May 2004 by the Commission and the national competition authorities. The Commission’s view.

⁴ For example, neither the Web site of the European Commission nor the 2004 Competition Policy Report contains information on the number and success of leniency applications.

Report⁵ declares: ‘Since the entry into force of the new leniency notice in February 2002, the Commission has received 34 applications for immunity, concerning at least 30 individual alleged breaches’. Secondly, from 2001 to 2003 the Commission issued an average of eight cartel decisions a year, which is enormous growth from the previous 30 years’ average of 1.5 decisions a year.⁶ The comparison suggests that most cartel cases that have reached a penalty decision were initiated under the leniency programme.

Presumably inspired by the Commission’s success in uncovering cartels via the leniency procedure, leniency procedures are now in place in the domestic legislation of 18 EU member states.⁷ Domestic leniency procedures have yielded good results in, among the EU member states⁸, the Netherlands and, among other countries, Australia.⁹

A leniency programme has also been formally implemented in the Republic of Estonia, as affirmed by the Competition Board. The Competition Board casts light on the target group of the Estonian leniency programme as regards its legal bases as follows: ‘The leniency programme in Estonia arises from § 205 of the Code of Criminal Procedure (hereinafter ‘CCrP’), which provides for the termination of criminal proceedings in connection with assistance received from a person upon ascertaining facts relating to the subject of proof.’¹⁰ By all presumptions, leniency applications should also be submitted in Estonia and a larger number of cartels identified than earlier.

But what is the real situation? It seems to meet expectations where the number of cases initiated and growth in the number of cases are concerned. In 2004, the Competition Board undertook proceedings in seven cases the object of which was an alleged horizontal agreement, decision, or co-ordinated activity between undertakings — i.e., a cartel.¹¹ One year earlier, in 2003, one proceeding was commenced on grounds of horizontal co-operation.¹² One year further back, in 2002, also, one proceeding was instituted on grounds of suspected cartel agreement.¹³ Thus, in 2004 when § 205 of the new CCrP entered into force (01.07.2004), the number of proceedings in cartel cases indeed increased, but there is no indication that they were based on leniency applications.

To the contrary, the authors have information that in the last few years’ operation of the Competition Board, proceedings addressing situations with the elements of a cartel agreement have been initiated in only one case that deserved public attention; subject to the proceedings were local tere purchasers. In other words, the current practice in the Republic of Estonia does not confirm that the leniency programme has yielded any notable results in the fight against cartels — i.e., led to the discovery of a greater number of cartels, as in many other countries utilising leniency procedures. It is also possible that there are no cartels in Estonia.

It is known that identifying cartels is a complicated task because of their highly secret nature, usually based on oral agreements, regardless of the quality of substantive or procedural law. By introducing leniency procedures, the European Union admitted its failure — as it sought help from the cartel members — while also launching a counterattack. The extensive reform of the leniency procedure to increase its legal certainty, reliability, and transparency just six years after the initial introduction of the leniency procedure shows that the Commission believes in the success of the counterattack, shadowed by an admission to failure, and work is constantly being done to improve the quality of the counterattack, even in a direction that reduces the Commission’s discretion. If we believe that cartels do exist in Estonia, we should consider how to make better use of the nation’s leniency programme.

The purpose of this article is to identify the main pluses and minuses of the Estonian leniency procedure (allegedly grounded on CCrP § 205) in comparison with the EU leniency procedure. An attempt is made also to indicate whether we are dealing with a correctable mistake in the existing framework or a conceptual problem that has its own prerequisites.

⁵ XXIIIrd Report on Competition Policy. Brussels, Luxembourg 2004, p. 24.

⁶ J.M. Joshua, P.D. Camesasca. Where angels fear to tread: the Commission’s ‘new’ leniency policy revisited. *Global Competition Review*. Available at: <http://www.globalcompetitionreview.com/ear/cartels.cfm>.

⁷ Authorities in EU Member States which operate a leniency programme. Available at: http://www.europa.eu.int/comm/competition/anti-trust/legislation/authorities_with_leniency_programme.pdf.

⁸ In the building industry sector in the Netherlands, more than 400 applications for the leniency procedure had been submitted as of June 2004; allegedly, this covered about one third of building sector undertakings (source: report by Attorney-at-Law Martijn Snoep of the Dutch law office De Brauw Blackstone Westbroek at the Competition Law Forum in Brussels, 24–25 June 2004).

⁹ In Australia, 14 applications for immunity or favourable treatment were submitted over two years (source: report by Attorney-at-Law Peter Armitage of the Australian law office Blake Dawson Waldron at the Competition Law Forum in Brussels, 9–10 June 2005).

¹⁰ Annual Report of the Competition Board for 2004. Competition Board. Available at: <http://www.konkurentsiamet.ee>, p. 17 (in Estonian and English).

¹¹ Annual Report of the Competition Board for 2004 (Note 10), pp. 7–8.

¹² Annual Report of the Competition Board for 2003. Competition Board. Available at: <http://www.konkurentsiamet.ee>, p. 7 (in Estonian and English).

¹³ Annual Report of the Competition Board for 2002. Competition Board. Available at: <http://www.konkurentsiamet.ee>, p. 8 (in Estonian and English).

2. Essence and implementation principles of the Estonian leniency programme (CCrP § 205)

As mentioned above, the Competition Board — the domestic competition supervision authority and the conductor of potential leniency procedures but not the authority deciding on the application of the procedure — has taken the view that the Estonian leniency procedure arises from CCrP § 205.

According to this provision, the **Public Prosecutor's Office may terminate criminal proceedings** with regard to a natural or legal person suspected or accused:

- (a) if the suspect or accused has significantly facilitated the ascertaining of facts relating to a subject of proof of a criminal offence that is important from the point of view of public interest in the proceedings and
- (b) if without the assistance, detection of the criminal offence and collection of evidence would have been precluded or especially complicated,

whereas the Public Prosecutor's Office may resume proceedings:

- (c) if the person has discontinued facilitating the ascertaining of facts relating to a subject of proof or
- (d) if the person has intentionally committed a new criminal offence within three years after termination of the proceedings.

It is true that the regulation of § 205 itself does not give any reason that these grounds for the termination of proceedings should not be applied to cartel cases for preferential treatment similarly to the leniency procedure. Moreover, since the termination of criminal proceedings ends the possibility of punishing a person, § 205 provides for even more favourable treatment in certain cases than the 'original' leniency notice of the Commission does.

Nevertheless, lenient treatment under the regulation of § 205 requires that several prerequisites be met that are not necessary for attaining the goal of lenient treatment, and that the procedure and its consequences be derived by interpretation that renders the leniency programme unattractive for undertakings.

2.1. Can an undertaking check its eligibility for leniency before, during, or at the end of the procedure?

The EU leniency procedure is structured so that cartel members can check their eligibility for leniency before the procedure — i.e., in a legally regulated and formal preliminary procedure (for the purposes of the Estonian legal order, before the criminal proceedings) — by supplying the Commission with the hypothetical abstract circumstances of the violation and the related evidence (indicating the nature and content of the evidence). This is 'situation A'¹⁴, where the violation-related procedure has not yet commenced and the Commission's goal is to collect sufficient source information and evidence for the procedure and to carry out a 'dawn raid' — a procedure for collecting actual evidence at the place of operation of the cartel members. In situation A, the undertaking files a leniency application, usually anonymously via a solicitor. The Commission informs the undertaking in writing of its eligibility for leniency, after which the undertaking can decide whether or not to submit the actual evidence to the Commission and apply for (preliminary) conditional protection.

In Estonia, situation A does not fall within the spectrum of the leniency procedure. As CCrP § 205 lays down the grounds for termination of criminal proceedings, it may be applied only if criminal proceedings have already been commenced. Moreover, since CCrP § 205 allows for terminating criminal proceedings with respect to a specific person, lenient treatment can be applied via this provision with respect to a specific person being the subject of favourable treatment. So, for the ability to decide as to the application of the leniency procedure, including eligibility for leniency, certain preconditions have to be met; i.e., pre-trial criminal proceedings have to be instituted against the person.¹⁵

Although the application of CCrP § 205 is essentially similar to the end of the first stage of the EU leniency procedure, or granting of conditional protection by the Commission, the wording of CCrP § 205 implies that eligibility for leniency is decided **after** co-operation has commenced — criminal proceedings may be termi-

¹⁴ Point 8 (a) of the leniency notice: 'the undertaking is the first to submit evidence which in the Commission's view may enable it to adopt a decision to carry out an investigation [...] in connection with an alleged cartel affecting the Community' (situation A). Situation B means that: 'the undertaking is the first to submit evidence which in the Commission's view may enable it to find an infringement of Article 81 EC in connection with an alleged cartel affecting the Community.'

¹⁵ Leaving aside the almost always available possibility of informal preliminary discussion outside criminal proceedings.

nated with respect to a person who ‘has sufficiently facilitated [...]’. The Estonian leniency procedure lacks the stage of determining the person’s eligibility for leniency (checking of prerequisites); it is merged with the stage of providing evidence, or the co-operation stage.

Initiation of criminal proceedings has two risks that could be regarded as negative side effects for a rational undertaking. Firstly, the public could become aware of the proceedings and the suspected cartel agreement. In view of the requirements of CCRP § 6 and public pressure, it is difficult to imagine that the Competition Board would waive further proceedings also with respect to the undertaking itself — i.e., the applicant. Secondly, the information collected in the course of criminal proceedings that the Competition Board is obliged to conduct might at some point acquire such quality and quantity that the information disclosed by the undertaking becomes irrelevant to the final result of the proceedings. The undertaking places itself at the mercy of the values of the person conducting the proceedings, which is a further risk because the immediate proceedings are conducted by the Competition Board while the Public Prosecutor’s Office decides on the application of CCRP § 205.

In contrast to those being dealt with under the Commission’s leniency programme, which offers the possibility to contribute to the detection of a cartel without immediate risk, Estonian cartel members face a risk in any case — whether they report or not.

One gets the impression that the goal of CCRP § 205 has never been to reveal the circumstances of the act that is the object of the crime — the motive for the criminal proceedings (i.e., realisation of situation A) — but to establish the fact of a crime that is the subject of criminal proceedings (in which there are several suspects or one chain of events has caused the suspected commission of many crimes) instituted and conducted on the basis of facts already known.¹⁶ It is not allowed under CCRP § 205 for anyone to attain any considerable certainty or position favourable to that of others **before** criminal proceedings.

Of course, another approach could be taken to the issue. We can imagine that the anonymous application of CCRP § 205 could be developed in Estonia — by extraprocedural oral explanatory work with the Competition Board and the Public Prosecutor’s Office. Such explanatory work needs to be done in both institutions, because, as already mentioned, it is the Public Prosecutor’s Office that has been granted the possibility of applying leniency procedure in Estonia, which is why the Competition Board, which essentially conducts the proceedings in the matter, cannot give any factual guarantees of the leniency procedure applying in any given case. However, such extraprocedural co-operation would lack all those qualities and incentives of the leniency procedure that should motivate an undertaking to disclose a cartel — legal certainty; transparency; and predictability, including the objectively expressed commitment of the body conducting the proceedings.

While in the EU leniency procedure, after identifying the essential eligibility for leniency on the basis of hypothetical information and before the hypothetically described evidence is presented, the Commission gives the applicant written confirmation that the type and content of the evidence hypothetically described by the undertaking allow for fulfilling or do fulfil the conditions for granting immunity, **no prior or even conditional preliminary decisions concerning essential eligibility for leniency are provided for in the case of application of CCRP § 205**. The application of CCRP § 205 includes many preconditions based on subjective assessments (the relevance of facilitation, preclusion of the detection of the crime without co-operation, etc.), so that the undertaking cannot obtain any reasonable legal protection before it has irrevocably ‘turned itself in’. Adequately formalised legal protection (e.g., a written statement of eligibility for leniency by the Competition Board) should contain maximally clear procedures and steps that should be taken for the termination of the proceedings under CCRP § 205, and which could also be reversed against the body conducting the proceedings if the leniency procedure turns out to be just a feint by the state.

In summary, the essential need (facilitating the detection of crime) and the reciprocity (avoidance of sanction) are overlapping in the Estonian and EU leniency procedures, but the sequence of ‘coming out’ and the risks thereby assumed are completely different. While the EU leniency procedure allows a person to check his eligibility for leniency in a legally regulated procedure where the interim results are fixed, the Estonian leniency programme does not provide for anything of the kind, at least not on the level of written law. It is quite clear that this is a fundamental problem. **The Estonian leniency procedure focuses on a choice of ‘guilty’ or ‘not guilty’, not on the detection of cartels (situation A).**

2.2. Immunity, reduction of fines, or both?

As stated above, a person may be eligible for immunity or the reduction of fines in the EU leniency procedure. The favourable treatment of undertakings is differentiated based on the time at which the application is made and the quality and relevance to the charging procedure of the person’s co-operation, whereas the

¹⁶ However, the explanatory memorandum to the draft act by which CCRP § 205 was passed indicates that the ‘predecessors’, in a certain sense, of CCRP § 205 — namely §§ 164 (3), 164¹ (3), and 165 (3) of the Criminal Code — attempted to initiate reporting through creating an air of distrust. The content and effect of these provisions are discussed in several further connections in the present article.

conditions are known in advance by all, including other potential applicants. Although utterly cynical, such differentiation of potential favourable treatment is an essential part of the concept of the leniency programme — it causes competition for immunity among the cartel members in an atmosphere of mutual distrust and uncertainty. Only the one who files a leniency application first and meets all the other conditions is entitled to immunity — competition is the driving force.

If we presume that it is CCRP § 205 that serves as the legal basis and source for the Estonian leniency procedure, we may conclude that **lenient treatment in cartel matters in Estonia consists solely of the termination of proceedings** — i.e., **granting immunity** to the undertaking under suspicion or accused, or to a member of its directing body.^{*17} If the person turns out to be eligible for leniency and meets the condition of unconditional co-operation, the proceedings are terminated as regards the person in question.^{*18} So there is no question in Estonia about alleviating potential punishment under the leniency procedure and when its preconditions are met.

It may seem at first glance that the Estonian leniency programme allows for broader protection of the co-operating cartel members than the EU leniency procedure does. This is essentially true, but it has almost no effect in terms of achieving the main goal of lenient treatment — reporting on cartels. The reasons for that are given below.

2.3. Are competition and timing relevant to favourable treatment?

Neither CCRP § 205 nor any other legal act provides for the dependence of immunity or the possibility of obtaining it on first confessing and beginning co-operation, or any other condition that could be practically met by only one member of a cartel. Therefore, the **Estonian leniency programme theoretically allows for the immunity of not only one but two or more undertakings that meet the conditions set out in CCRP § 205**. Reporting on a cartel (which the first submission of an application essentially means) does not give the reporting cartel member any objective or irrefutable advantage over the other cartel members — **the sequence (timing) of applying for the application of CCRP § 205 has no objective meaning in the Estonian leniency procedure in terms of the possibility or content of favourable treatment**.^{*19} The implication for the undertaking is that the body conducting the proceedings may choose on legal grounds to which person immunity is to be granted. We demonstrated above that commencing co-operation entails risk for an undertaking. The fact that one undertaking has taken the risk has no meaning under the law. It certainly does not make the law more efficient.

On the contrary, considering the regulation of CCRP § 205, we would find it reasonable to instead (a) monitor the activities of the Competition Board; (b) be prepared to make a co-operation proposal if there is risk of criminal proceedings (e.g., if administrative proceedings are commenced); (c) let the Competition Board show its cards in the course of the proceedings, at least in part; and (d) address the Competition Board and the Public Prosecutor's Office to identify the possibilities of applying CCRP § 205 if evidence is revealed that allows for detecting a violation or may lead to other evidence allowing for the same. The non-existence (abolishment) of timing as a major qualitative condition deserves attention also because the regulation of §§ 164 (3), 164¹ (3), and 165 (3) of the Soviet Criminal Code^{*20}, whose example CCRP § 205 followed, allowed for the favourable treatment of the person who stepped forth first; the whole concept of favourable treatment was actually built on that.

2.4. The possibility of annulment of immunity, and the grounds for this

Similarly to the leniency procedure conducted by the Commission, the Public Prosecutor's Office may resume the proceedings on its own initiative or at the request of, e.g., the Competition Board. The first case involves an Estonian analogue of grounds existing in the EU leniency procedure: an undertaking that was initially granted favourable treatment (conditional protection) stops facilitating the ascertainment of facts relating to

¹⁷ Although (a) § 57 (1) 3) of the Penal Code enables the courts to take account of such mitigating circumstances as appearance for voluntary confession or active assistance in detection of the offence, and (b) § 56 (1) of the Penal Code allows for taking into account the type of intent or negligence involved in commission of the offence and mitigating the person's punishment depending on the level of guilt, such grounds are, presumably, provided for in the penal law of all EU member states. Yet this is not considered part of the leniency procedure anywhere. It is part of general penal law.

¹⁸ Note that CCRP § 205 can be applied without the condition of precluding its application to the undertaking that solicited other undertakings to participate in the offence — immunity is thus available to all participants.

¹⁹ Let us disregard the fact that sincere confession is a generally recognised mitigating circumstance in criminal law.

²⁰ Criminal Code (RT I 1992, 20, 287; 2001, 65, 378; in Estonian), invalid since 01.09.2002.

a subject of proof of a criminal offence. This basis for resumption of proceedings should also, within the meaning of CCrP § 205, cover both express waiver of facilitation and apparently insufficient facilitation.

At the same time, proceedings terminated under CCrP § 205 may also be resumed on grounds of any other **intentional criminal offence by the immune person within three years after the termination of the proceedings**. In the context of the leniency procedure as a special procedure concerning only violations of competition law, this basis for resumption of proceedings is obviously too broad. It is not even limited to criminal offences that could be categorised as competition offences.²¹ Without it being limited to competition offences, an undertaking may find itself in a situation where it is deprived of immunity in respect of a competition matter because of, e.g., an environmental offence. This is not necessary or reasonable in the context of the leniency procedure. We may discuss whether the Competition Board or the Public Prosecutor's Office would in fact actualise the possibility of resuming proceedings, but this could not help but be an overly theoretical discussion, given the unambiguous text of the law.

The possibility of annulling immunity has a negative impact on the possibilities for applying the leniency procedure, particularly for the main target group of the procedure — i.e., undertakings that are legal persons. Namely, the regulation of the Estonian penal law regarding the liability of legal persons allows for the conviction of a legal person for an offence that is carried out by a 'senior official'²² in the interests of the legal person²³, of which offence the management of the legal person or the narrower circle of persons aware of the leniency procedure may not even know. Decision or informal approval by the management is not relevant to ascribing the offence to the legal person.

Again, in a situation where the effectiveness of the leniency proceedings does not depend only on the activities of the undertaking (in the narrow sense of the word) and its management (who actually decided to participate in the cartel and organised their participation), it cannot be reasonably presumed that the undertaking decided at the management level to use the leniency procedure — the number of circumstances not depending on the undertaking as an organisation is too large.

3. Access to the leniency file

3.1. On the meaning of limited access

The protection that the leniency procedure offers against fines or in the form of reduction of fines does not protect a favoured undertaking against the civil law consequences of participating in a cartel — e.g., damage claims by third parties. The principle is recognised that the information supplied by an undertaking in the course of the leniency procedure, which has value as evidence (that is, the 'leniency file') may be disclosed and used only for purposes of enforcement of Article 81 of the Treaty establishing the European Community (or a corresponding domestic legal provision). This principle is realised in the EU leniency procedure also via an unambiguous and generally applied legal rule.²⁴ Potential plaintiffs thus have no access to the undertaking's information that has been supplied to or recorded by the Commission in a format that can be reproduced in writing. Without the guarantee of a 'closed file', it is difficult to imagine that cartel members themselves would reveal the cartel.

What about access to the file under the Estonian leniency procedure?

²¹ The Estonian penal law criminalises the abuse of a dominant position by an undertaking; agreements, decisions, and concerted practices prejudicing free competition; concentration restricting competition (essentially, failure to notify of concentration and violation of a prohibition on concentration or the conditions of a decision granting concentration permission); and violation of obligations by undertakings with special or exclusive rights or in control of essential facilities, if committed intentionally.

²² 'Senior official' is an undefined term in penal law, one that might in practice not coincide with the persons having the civil law mandate to represent the legal person. Rather, 'senior official' is defined case by case depending on the person's freedom of decision and ability to direct the will of the legal person.

²³ 'Interest' is not limited to property gain by a legal person (increase in property, avoidance of decrease in property) but covers also such acts in the sphere of action of a legal person by which the legal person gains, e.g., a time advantage (e.g., in the processing of an application for an activity licence).

²⁴ Article 33 of the leniency notice provides: 'Any written statement made vis-à-vis the Commission in relation to this notice, forms part of the Commission's file. It may not be disclosed or used for any other purpose than the enforcement of Article 81 EC'. However, the author has information that some success has been achieved in breaking through this 'wall' at least once via the EC courts. Nonetheless, closing the leak is a highly topical matter, with the Commission declaring its readiness to protect the inviolability of the leniency file and hence the mainstays of the leniency procedure to the very end.

3.2. An injured party's right to examine the file

It follows from CCrP §§ 205 and 206 that criminal proceedings are terminated under the section that provides for the possibility of the leniency procedure on the basis of an order by the Public Prosecutor's Office, which has to be delivered to the injured party. By law, the natural or legal **person who has the status of an injured party in the proceedings may examine the criminal file**, meaning access to the leniency file within 10 days after receiving a copy of the termination order. Since the injured party's status in the proceedings allows for access to the file, central to the protection of the leniency file is the question of who the injured parties are in the case of cartel offences and how and when the status of injured party is acquired.

The answer to this question is simple and complicated at the same time. Firstly, under procedural law, an injured party is a person who has been caused immediate physical, proprietary, or moral damage by the criminal offence (the prohibited co-operation between undertakings, in this case) — the basis for acquiring the status of an injured party in the proceedings is **the very fact of incurring damage**, and no other acts are required by the body conducting the proceedings.²⁵ Therefore, a person has the rights and obligations of an injured party in the proceedings purely on the basis of whether he was caused damage by the criminal offence. Does definition of the status of injured party in the proceedings only via the fact of alleged²⁶ damage render the criminal file accessible to an unidentified number of persons?

In the context of the definition of an injured party and prevailing judicial practice, one has to take the view that damage caused by a criminal offence in an arbitrary and indirect way is not sufficient to accord the party in question the status of an injured party in the proceedings. There has to be a direct and immediate causal relationship between the criminal offence and the alleged damage. The question arises of whether there is such a direct and immediate relationship between the fixing of an (unreasonably high) product price by the cartel members (criminal offence) and the damage that the consumer incurs by paying a price higher than a price in keeping with market conditions. Maybe there is. Or maybe not. It cannot be predicted how an official of the Competition Board in the capacity of an investigator conducting proceedings concerning a competition offence would decide this question without clear instructions.

Following from the above, it is likely that the issue of granting or not granting the status of injured party in the proceedings would be decided case by case. An undertaking is thus vulnerable, by virtue of the access granted to the file, at least during the criminal proceedings. We note that the injured party's rights include the filing of a civil action for compensation of the damage caused by the unlawful act. It is also not prohibited to prove the facts on which the civil action is based via the use of evidence originating from, e.g., criminal proceedings.

But is it possible for, after proceedings are terminated under § 205, a large number of 'injured parties' to come forth to examine the file? According to CCrP § 206 (3), the period during which injured parties may examine the file depends on when they receive a copy of the termination order. If a person has not received a copy of the order, does it mean that the term for examination has not yet elapsed? Although this does not seem reasonable, the applicable law does not expressly preclude this possibility.

Until the law contains a clear and understandable legal provision that would preclude the possibility of any third party examining the leniency file, the situation remains such that (a) an injured party who appears during the criminal proceedings may examine the leniency file, and (b) there is a certain possibility that an injured party who appears after the termination of the proceedings also has such a right.

3.3. Access to the file under the general procedure after the termination of criminal proceedings under CCrP § 205

Pursuant to CCrP § 209 (1), the **file on criminal proceedings terminated under CCrP § 205 is archived** according to the procedure and for the term established by the Government of the Republic (hereinafter 'Procedure').²⁷ Subsection 4 (6) of the Procedure states that a criminal file is maintained at the Public Prosecutor's Office after the termination of criminal proceedings, until the end of the above-mentioned three-year 'probationary period'²⁸, and is then forwarded to the Competition Board. However, the Proce-

²⁵ Kriminaalmenetluse seadustiku eelnõu (eelnõu nr 594 SE I) seletuskiri (Explanatory memorandum to the draft Code of Criminal Procedure (draft No. 594 SE I)). Available at: <http://web.riigikogu.ee/ems/plsql/motions.show?assembly=9&id=594&t=E> (in Estonian).

²⁶ The actual incurrence of damage and the perpetrator's guilt in it are established only in the criminal proceedings.

²⁷ Vabariigi Valitsuse 30.07.2004.a. määrus nr 261 'Kriminaaltoimiku arhiivimise kord ja toimiku säilitamise tähtsajad pärast kriminaalmenetluse lõpetamist' (Government of the Republic Regulation No. 261 of 30 July 2004: 'The procedure for archiving criminal files and the terms for preservation of the files shall be established by a regulation of the Government of the Republic'). – RT I 2004, 60, 430 (in Estonian).

²⁸ A reminder: this is the period during which the Public Prosecutor's Office may annul the immunity on grounds of the subject of favourable treatment committing a new intentional criminal offence.

dures regulates neither the legal status of files on criminal proceedings terminated under CCrP § 205 nor the requirements or procedure for access to such files. Section 2 of the Procedure only provides that archival (i.e., managing the file after the termination of criminal proceedings) is understood as archiving within the meaning of the Archives Act.^{29, 30} The fact that there is no special regulation and the further management of the file could be regarded as archiving creates many essential problems as regards the inviolability of the file.

Firstly, as regards the lack of special regulation, a remarkable fact that illustrates the practical situation and attitudes is that the draft Procedure prepared by the Ministry of Justice³¹ did contain a special provision (its Section 9, 'Examination of criminal files') according to which access to the files on terminated criminal proceedings was to be regulated by the archiving rules of the investigative body or the county and city court (the internal legal procedure of the court!). This leads to two conclusions: (1) **a fundamental right of access is recognised on the level of the executive power** (including to leniency files) and (2) the content of the access rights — i.e., the circle of entitled persons and the scope of their rights — should have been decided by the investigative body (Competition Board) or the court involved. The wording of the Procedure established by the Government of the Republic omitted this special provision. It is possible that this was because of the State Chancellery's observation during the approval of the draft that, according to the Public Information Act³² and the Archives Act, access to information intended for public use has to be guaranteed, and these acts also apply to investigative and judicial bodies. So, for securing the inviolability of leniency files it is important to know whether these acts allow for restricting access to leniency files. The answer is by no means clear, and it largely depends on the interpretation of law.

Information collected by the Competition Board in the course of the leniency procedure is basically 'public information'³³ and thus subject to the regulation of the Public Information Act. Therefore, the Competition Board as the investigative body of the pre-trial procedure or the Public Prosecutor's Office as the body competent to terminate proceedings under CCrP 205 must declare information collected in criminal proceedings or misdemeanour procedures as **information intended for internal use** (i.e., restricted information), but only **until the case is referred to a court** and not for longer than until the end of the limitation period (§ 35 (1) 1 of the Public Information Act). In Estonia, a cartel offence is an offence in the second degree, and its limitation period is five years.³⁴ Could the Competition Board or Public Prosecutor's Office declare a leniency file to be for internal use throughout the limitation period for a case of cartel offence on grounds that it has not been referred to the courts but has been terminated in the pre-trial procedure? It seems illogical. Once criminal proceedings have been terminated, there cannot be a limitation period. The purpose of the above provision should be to protect information collected on a matter that is in the pre-trial procedure stage and is presumably not yet complete. Could the situation be changed because of the fact that criminal proceedings terminated under CCrP § 205 have been only 'floatingly' terminated (i.e., are resumable when special conditions are met) until the above-mentioned three-year term has elapsed?

In the context of the Procedure, it is impossible to understand without doubt whether and during what time the file on criminal proceedings terminated under CCrP § 205 could be regarded as a file on 'floatingly' terminated proceedings, which are current rather than irrevocably terminated proceedings. However, (1) the three-year possibility of resumption itself; (2) the Procedure's § 4 (6), which provides for forwarding the file to the Competition Board — i.e., archival only after three years — and (3) the fact that the possibility of resumption (i.e., the right to annul immunity on grounds of co-operation stopping) is not limited by a similar term suggest that criminal proceedings 'terminated' under CCrP § 205 have not irrevocably ended for the person and could fall under § 35 (1) 1 of the Public Information Act.

However, the lines of reasoning and the justifications for protecting the file, as presented by the authors under this and the previous headings, are essentially artificial and are too complicated for an ordinary undertaking to be perceived as reliable.

²⁹ Arhiiviseadus (Archives Act). – RT I 1998, 36/37, 552; 2004, 28, 188 (in Estonian).

³⁰ The latter in turn generally provides general regulation of the organisation of preservation, destruction, and accessing of all documents and records, both private and public. It distinguishes between: (1) information in the stage of active communication and (2) information past the stage of active communication — i.e., at the stage of having been archived. Access to the latter is regulated at least in part by the same Archives Act; access to the former is regulated by other laws.

³¹ Vabariigi Valitsuse määruse 'Kriminaaltoimiku arhiivimise kord ja toimiku säilitamise tähtsajad' eelnõu ja seletuskiri (Draft of and explanatory memorandum to the Government of the Republic Regulation 'Procedure for archiving criminal files and the terms for preservation of the files'). Available at: <http://eoigus.just.ee/> (in Estonian).

³² Avaliku teabe seadus (Public Information Act). – RT I 2000, 92, 597; 2004, 81, 542 (in Estonian).

³³ According to the Public Information Act, public information is understood as information that is recorded and documented in any manner and using any medium and which is obtained or created upon performance of public duties provided by law or legislation issued on the basis thereof.

³⁴ Subsection 4 (3) and § 400 of the Penal Code set out that a cartel offence is an offence in the second degree, whereas, pursuant to § 82 (1) 2), nobody may be convicted of or punished for committing a criminal offence in the second degree when five years have passed between commission of the offence and the entry into force of the court judgement.

3.4. Summary concerning the protection of files

An undertaking (its management) opting for the leniency procedure may be predicted to attempt to clarify the extent to which the leniency procedure can contribute to filing and, especially, proving civil law claims, especially against the undertaking itself (and, via the undertaking, the members of its directing bodies). The mere exposure of a cartel can be presumed to lead to many claims for damages. However, the resulting financial loss could in reality be limited to mainly legal expenses as far as the plaintiffs are not given ‘external’ help with evidence — in this context, access to the file as an arsenal of proof is invaluable. Since there is no 100% guarantee (without considering the ‘human factor’) or even any reliable guarantee of the protection of the file on criminal proceedings terminated under CCRP § 205 but only interesting theoretical lines of reasoning, a potential applicant will probably not avail itself of the leniency procedure option. In this context, it is difficult to imagine that undertakings would be ready to submit for the file materials and information that could be used as evidence against them in other proceedings so long as there is no special provision prohibiting any third party access to the leniency file.

4. On the protection of members of directing bodies

Finally, another angle should be highlighted, which on one hand, concerns the Estonian leniency procedure — i.e., the application of CCRP § 205 — but, on the other, has direct effect also on the possibility of applying the EU leniency procedure. This is the protection of the members of the directing bodies of a legal person applying for favourable treatment. Or rather, their unprotectedness. While the EU competition law does not allow the Commission to prosecute the members of a fined undertaking, the **Estonian penal law allows for separately prosecuting the undertaking and the members of its directing bodies in the case of a cartel offence**. The Competition Board can thus institute criminal proceedings against both an undertaking and one or more member of its directing body — and hence selectively terminate these criminal proceedings under CCRP § 205.

This opportunity opens up a real Pandora’s box: at the threat of criminal punishment, an undertaking that is a legal person and participates in a cartel and the members of a directing body of the undertaking (or some of them) can be placed on different sides. It seems an attractive procedural tactic: the final goal is to punish the undertaking, and to achieve this goal, a current (or, worse, former) member of a directing body of the undertaking is offered an opportunity for co-operation and immunity under CCRP § 205. This opportunity arises in particular when the cartel has essentially been uncovered already. However, the readiness of the directing body member for such co-operation (even when the cartel is disclosed) can be cooled down to zero by potential contractual or non-contractual (e.g., arising from a violation of the loyalty obligation) claims against the member of the directing body by the undertaking itself, its shareholders, or creditors.

Moreover, the possibility that the members of a directing body could be brought to justice separately may actually reduce the readiness of these members to make a confession on the part of the undertaking — i.e., to disclose the cartel. This means that the possibility of punishing the members of a directing body (and defencelessness from such punishment) has an effect counter to the achievement of the main goal of the leniency procedure — disclosure and termination of cartels. For obvious reasons, this fact has a direct effect also on the EU leniency procedure. A situation where granting immunity to an undertaking in a leniency procedure on the EU level does not eliminate the possibility of a member of a directing body being punished under domestic law has a direct inhibiting effect on the application of the EU leniency procedure.

The authors believe that **it is vital that the protection arising from lenient treatment of the undertaking be extended also to the members of the directing bodies** — members of directing bodies protect both themselves and the association they represent by applying for the leniency protection of the undertaking. In that case, they are interested in using the possibilities of the leniency procedure, from the angle of both personal liability and work performance, in a situation where the other prerequisites have been met. As far as leniency protection does not extend to the members of a directing body, the Competition Board may achieve certain results in securing a criminal conviction for the already disclosed cartel offences, but it will not be successful in disclosing new cartels. When tackling the issue of protecting the members of directing bodies, one should first study the example of, among others, the UK mechanism for protecting the members of the directing bodies of an undertaking that participated in a cartel and is applying for leniency protection: the ‘letters of non-action’ system.

5. In summary

The article posed as the main question whether the leniency procedure is an actually used and feasible possibility in Estonia or exists merely in legal theory. The authors believe that the leniency procedure as understood in European competition law does not exist in the Estonian legal order. We reiterate that the relevant European competition law is not an issue *per se*, but it provides a good example where its content corresponds to the needs of society and its individual members.

The Commission's leniency procedure was established to involve cartel participants themselves in the detection of cartels. The whole procedure is structured so as to be an economically attractive and risk-reducing option also for a cartel participant. The Estonian leniency procedure is structured paternalistically — sincere confession by (a) cartel member(s) and co-operation with the Competition Board may be followed by a release order from the Public Prosecutor's Office with respect to one or several cartel members. Considering that the economic activities of legal persons are rational and risk-optimising, and considering also the lack of positive examples of application of the leniency procedure, we find that the paternalistic legal approach cannot be successful.

The specific features of the Estonian leniency procedure are as follows:

- There is no preliminary procedure (analogue with the first sentence of article 16 of the leniency notice), which is why undertakings have no effective possibility to check their eligibility for lenient treatment before they commence co-operation — the body conducting the proceedings, on the other hand, can see all of the undertaking's cards before granting conditional protection.
- An undertaking can be granted only one form of favourable treatment — immunity. The possibility of obtaining it is not related to objective criteria and rules that would entitle only one undertaking to immunity. Therefore, there is no competition between a cartel's members for disclosing the cartel. The body conducting the proceedings can choose at its own discretion 'who has best reported on the others'.
- Obtaining immunity depends on the Public Prosecutor's Office, which does not, however, directly conduct the proceedings. In essence, an undertaking depends both on the Public Prosecutor's Office and on the Competition Board, as consent of the Public Prosecutor's Office without the approval of the Competition Board is highly unlikely.
- The conditional immunity of an undertaking can be annulled when the undertaking commits an offence that is not related to the offence concerned here and does not constitute a competition offence. The body conducting the proceedings can pursue goals of general prevention and punish the undertaking on easily reasoned grounds regardless of the undertaking's co-operation in the competition offence matter.
- There is no adequate and unambiguous regulation to ensure the inviolability of the leniency file — i.e., restrict access to the leniency file to only that required for purposes of cartel offence proceedings. An undertaking is unprotected if a third party uses the evidence presented in the leniency procedure against said undertaking in other legal proceedings.
- The conditions on separately prosecuting and punishing an undertaking that applies for lenient treatment and the members of its directing bodies do not contain special regulation that would extend the conditional immunity of the undertaking to the members of its directing body. The body conducting the proceedings can use the members of the undertaking's directing bodies against the undertaking and vice versa.

If we presume that cartels exist in Estonia and that help from the cartel members is needed to detect those cartels, the leniency procedure needs to be assessed from the standpoint of the cartel members. Such assessment suggests that the above characteristics are also substantial shortcomings of the Estonian leniency procedure. By way of broader generalisation of the above, we may claim that the Estonian leniency programme has been derived from the provisions of CCrP § 205, which actually do not provide for a leniency procedure. The general regulation of criminal procedure is not suitable in light of the specificity of cartels, and the launch of a real leniency programme requires clear and integral special regulation that takes greater account of cartel members' needs.



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Sustainable Development as the Fundamental Principle of Europe's Environmental *Ius Commune*

1. Goals of the research

Environmental law professors M. Heldeveg, R. Seerden, and K. Deketelaere have in their article 'Public Environmental Law in Europe: A Comparative Search for a *Ius Commune*' analysed the common ground that can be found in the environmental law of different European states. They have discovered many common threads in the basic principles of states' environmental law, the legal methods of regulating environmental risks, and the standards regulating environmental proceedings. It is possible to conclude, based on these authors' analysis, that the environmental *europa ius commune* is framed by the sustainable development principle.

The goal of the present article is to analyse the legal content of the sustainable development principle. Conducting this type of research is based on the recognition that, even though the word combination 'sustainable development' can be found frequently in material produced over the last few decades in legal acts, policy documents, and scientific literature, the specification of the content of sustainable development (especially in the legal arena) is not at all unanimous. Often it is believed that in the case of sustainable development, one is dealing only with the foundation for the development of environmental policy, which is entirely lacking clearly specified legal substance. At the same time, the opinion continues to spread that sustainable development has become one of the modern principles of environmental law and that it's not just a political slogan. This opinion has been shared by the International Court of Justice in the Gabcikovo–Nagymaros case.¹ In this case, the court actually recognised the standard nature of the principle of sustainable development and 'the need to unite economic development with environmental protection'.

¹ Case Concerning the Gabcikovo–Nagymaros Project (*Hungary v. Slovakia*). Judgement of 25.09.1997. Available at: http://www.icj-cij.org/iccjwww/idoocket/ihs/ihsjudgement/ihs_ijjudgment_970925_frame.htm (14.03.2005).

This article is composed of three sections — in the first, sustainable development as the guiding principle of environmental policy is discussed; in the second, the author presents his vision of what the legal status is of the nature of the principle of sustainable development; and in the third, the role of open proceedings in the realisation of sustainable development is investigated.

2. Sustainable development as the guiding principle of environmental policy

2.1. Development of environmental policy goals

Even though, in the case of environmental policy, this is quite a young area of policy, individual elements of environmental protection can be found even in the very distant past. The first appearances of environmental policy were related to the negative consequences of the urbanisation process. Even in sources of information dating from antiquity, one can read complaints regarding the stench in the air and the pollution of drinking water in cities. At the same time it should be noted that, naturally, this type of regulation in ancient times was not based upon the recognition of the need to preserve the environment but, rather, brought about, most likely, by social and economic factors.

The first time of environmental protection awareness can be labelled an indirect and utilitarian environmental era, which lasted from the Industrial Revolution until the 1960s. This environmental protection era was characterised by the following attributes. Informed regulation of the use of natural resources took place, even though the goal was not preserving (saving) natural resources but ensuring the availability of raw materials for industry.² An interesting provision was contained in the Weimar Republic Constitution, in which § 155 established the requirement for the intensive use of land and the essential natural resources the land contained.³ The above-mentioned provision clearly confirms that the use of natural resources was addressed only where raw materials were concerned. They were to be used as extensively as possible. The deforested areas of Western Europe reflect the results of this type of policy. Industrial pollution was governed by the same goal of unlimited economic development, which was supported by release of work, greater industrial freedom, and the freedom to choose one's trade. H. Hohman quotes the 1808 Prussian government's instructions, in which it was written that

'[...] the law and administration must be implemented in unison in order to transcend those conditions which prevent the complete and total realisation of the talent, skills and energy of citizens.'⁴

We now know that humans have used their talents, among other things, for the destruction of the environment and in the development of ever more effective methods of achieving this end.

In conclusion, it should be noted that during this phase of development in environmental policy, regulation was directed toward the improved stockpiling of natural resources, without taking into consideration the exhaustibility of these natural resources. In terms of pollution control, legal regulations were used to directly and indirectly compromise the health and security of the people, and uncertain risks were completely ignored.

The second period of environmental policy development began in the 1960s when the first laws directed at environmental protection began to be enacted in Europe and elsewhere.

This stage was characterised by the following attributes. Regulation was directed toward compensation for damage already caused by industry and for the removal or alleviation of direct and confirmed health and environmental hazards.⁵ Alongside the principle of direct hazard prevention developed the second principle of environmental law, the 'polluter pays' principle, which, in its original form, applied the theory of the adaptive capacity of the environment and foresaw that the burden of expenses and damages related to pollution control should be carried by the polluter.⁶ It would be even more accurate to call this period's 'polluter pays' principle the 'who pays pollutes' principle. It was discovered according to this line of rea-

² See Z. Plater. From the Beginning, a Fundamental Shift of Paradigms: A Theory and Short History of Environmental Law. – *Loyola of Los Angeles Law Review* 1993–1994 (27), p. 1995.

³ See H. Hohman. Precautionary Legal Duties and Principles of Modern International Environmental Law. – *The Precautionary Principle: International Environmental Law Between Exploitation and Protection*. Graham and Trotman / Martinus Nijhoff 1994, p. 6.

⁴ *Ibid.*, p. 6.

⁵ See A. Kiss, D. Shelton. *Manual of European Environmental Law*. Cambridge University Press 1997, pp. 10–11.

⁶ See B. Yandle. Coase, Pigou, and Environmental Rights. *Who Owns the Environment?* P. Hill, R. Meinert (eds.). Rowman and Littlefield Publishers 1998, pp. 120–121.

soning that it was almost always possible to compensate for the consequences of pollution, while it was only important who paid.

The third phase in the development of awareness in environmental policy, which began in the 1980s, is best described by the rise of the principle of sustainable development and the increase in support for this principle. Since that time, the principle has become the foundation for environmental policy in the European Union member states and many other countries.

2.2. Giving substance to the principle of sustainable development

An important milestone in the development of environmental policy occurred in 1972, when the United Nations Environmental Conference was held in Stockholm. Since then, people have been talking about the 'ecological' period in the development of mankind. In 1983 the Brundtland Commission was formed, with the goal of identifying global environmental problems and making suggestions about possible solutions to those problems. The results of the commission's three years of work can be found in the report 'Our Common Future'⁷ presented to the UN General Assembly. This document's main keyword is sustainable development — what is it; what is its importance to mankind; and what is the policy, social, and economic background of sustainable development? The Brundtland Commission defined the concept of sustainable development as a path of development that fulfils the current generation's needs and aspirations without placing in danger the similar interests of future generations. In other words, the basic principle that we cannot burden our children with our sins was applied.

Ensuring sustainable development is critical, because if this development is not achieved we will not be just placing our collective welfare in danger but will be imposing an even more hopeless future on our children and grandchildren. If the preservation of mankind itself is not in danger here, then at least the preservation of the quality of life of future generations is.

It is important to understand that even though in most cases the common understanding goes against sustainable development and economic progress, it is also true that just as economic progress is unthinkable without the preservation of natural resources and an environment worthy of humanity, environmental protection requiring large investments is impossible without economic development. Thus, it is important to find balanced solutions, without resorting to extremes.

The principle of sustainable development can be treated in a wider context. The principle of sustainable development affects the deep-seated interrelationship of mankind and the environment, and ensures the continued existence of both, encompassing in doing so aspects of philosophy and policy development.⁸ The principle deals with the re-evaluation of the growth model chosen by much of mankind during the time of the Industrial Revolution, in the 18th century. The previous sustainable development growth model kept an eye primarily on economic and industrial growth and the material well-being related to it. It was also this way when the rapid reconstruction of economies took place after the Second World War, followed by even more rapid growth, which brought with it large-scale environmental problems. By the beginning of the 1970s, a state had been reached where there was a need for awareness of environmental problems and a more sustainable-development-oriented model for nature needed to be chosen. In 1971, the well-known German social researcher R. Inglehart had already published the opinion that the economic growth that took place after World War II in the economically developed countries caused a transition from 'materialistic' or 'liberal' values to 'postmaterialistic' values.⁹ If materialistic values encompassed, above all else, economic considerations and direct personal security¹⁰, then the core of postmaterialistic values was made up of the non-material aspects of people's quality of life.¹¹ The environment undoubtedly falls within the area of concern of a value set emphasising non-materialistic quality of life, serving not just as the satisfier of people's material interests but also as the carrier of internal, non-material values. It goes without saying that such a shift in the scale of values in welfare states also expresses its influence in terms of which point of origin environmental values are judged from, which of them is placed in the foreground, how this affects interest directed toward the environment, and how the various values are weighed during decision-making.

⁷ Our Common Future. World Commission on Environment and Development, 1987.

⁸ See G. Orians. Economic Growth, the Environment, and Ethics. – *Ecological Applications* 1996 (6) 1, pp. 26–27.

⁹ See R. Inglehart. The Silent Revolution in Europe: Intergenerational Change in Postindustrial Societies. – *American Political Science Review* 1971 (65), pp. 991–1017.

¹⁰ See R. Inglehart, P. Abramson. Measuring Postmaterialism. – *American Political Science Review* 1999 (93), p. 665.

¹¹ See R. Inglehart, P. Abramson. Economic Security and Value Change. – *American Political Science Review* 1994 (88), pp. 337–339.

Sustainable development is also set as one of the more important goals of the European Union. Pursuant to Article I-3 (3) of the Treaty establishing a Constitution for Europe 'the Union shall work for the sustainable development of Europe based on balanced economic growth, a social market economy, highly competitive and aiming at full employment and social progress, and with a high level of protection and improvement of the quality of the environment.'¹²

The sustainable development triangle is very clearly presented here. This consists of the fact that in making and implementing various types of policy-influencing decisions, economic and social considerations, as well as the high standard required for environmental protection, should be addressed. There must be balance among the three. Economic development and the resolution of social problems cannot occur at the expense of significant damage to the environment.

3. Sustainable development as the fundamental principle of environmental law

3.1. The idea of a sustainable state based on the rule of law

The well-known German jurist R. Alexy has stated that

'[...] internal security in a liberal state based on the rule of law is in the highest good of the central collective. Environmental protection defines this latest variant: an ecological state based on the rule of law [...].'¹³

So far, the recognition of an ecological state as the new historical result of a country's development has not been widespread in the literature. Alexy would rather cite an exception here. More often, the concept of a sustainable country or a sustainable state based on the rule of law is used in the context of sustainable development.¹⁴ A sustainable state is defined as a state that has recognised its responsibility for supporting sustainable development and its responsibility to reshape society in order to guarantee its continued survival. The tradition of the liberal state based on the rule of law negated any paternalistic welfare services from the government. The current high level of government attention to environmental protection in the implementation of sustainable development comes from the understanding that for the first time in the history of mankind, the threat of the Earth's surface becoming uninhabitable is real — if the current production and consumption model continues to be applied.¹⁵

Definitions of sustainable development as a legal principle are numerous, but the author of this article prefers to break sustainable development down into three components.

Firstly, sustainable development is related to the precautionary principle, which is one of the two foremost modern principles of environmental law, second to the principle of sustainable development.

Secondly, sustainable development is defined in the above-mentioned Brundtland Commission report¹⁶ as a development path that responds to the current generation's needs and aspirations without placing in danger the similar interests of future generations. Therefore, the principle of sustainable development is related to 'intergenerational equity'.

Thirdly, the fourth principle of the 1992 Rio declaration, ratified by the UN Environment and Development Conference in Rio de Janeiro, requires that, in order for sustainable development to be achieved, environmental protection be included in all development processes. Also, article 6¹⁷ of the Treaty establishing the European Community provides that

'[...] the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.'

¹² Available at: http://europa.eu.int/eur-lex/lex/LexUriServ/site/et/oj/2004/c_310/c_31020041216et00110040.pdf (12.08.2005).

¹³ R. Alexy. Kollisioon ja kaalumine kui põhiõiguste dogmaatika põhiprobleemid (Conflict and consideration as the primary dogmatic problems in fundamental rights). – *Juridica* 2001/1, p. 8 (in Estonian).

¹⁴ See The Law of Sustainable Development. General Principles. Luxembourg: Office for Official Publications of the European Communities 2000, p. 41; J. Wolf. Developmental and Environmental Responsibilities of the 'Rechtsstaat', pp. 3–7. The latter is available at: <http://www.puk.ac.za/lawper/1999-1/wolf.doc> (12.03.2005).

¹⁵ See The Law of Sustainable Development (Note 14), p. 41.

¹⁶ It was the final report: Our Common Future (Note 7), presented by the World Commission on Environment and Development, established by the United Nations General Assembly in 1983.

¹⁷ The integration principle was included in the treaty in 1987 with the Single European Act. See also L. Krämer. E. C. Treaty and Environmental Law. Sweet & Maxwell 1998, p. 71.

Therefore, the principle of sustainable development is related to integration requirements, pursuant to which environmental considerations must be taken into account in the implementation of all other policies.

Next I will address the components of the principle of sustainable development individually.

3.2. Sustainable development and the precautionary principle

One of the most widely recognised German scholars of the precautionary principle, S. Boehmer-Christiansen has treated the precautionary principle as one of the most important methods used in creating the principle of sustainable development, which places the responsibility for the protection of the natural foundation of life for current and future generations with the government and gives government the right to intervene in the structure of the liberal consumption society with its short-term perspective. In Germany the precautionary principle was recognised, above all else, as the state's legal basis for an active environmental policy.^{*18} The author of this article has reached the same conclusion, that the precautionary principle is indeed one of the more important cornerstones in the implementation of the sustainable development model. The precautionary principle has developed into the conceptual core of environmental law, and its most substantive feature is the creation of a safety coefficient for the preservation of the natural foundation of life.^{*19} The goal of the precautionary principle is different when compared to other legislation or principles protecting the lives of people. The difference stems from the highest good protected by the precautionary principle (the habitability of the Earth's surface), which is, in the most direct and broadest sense, existential.

The primary reason for the precautionary principle coming to the forefront was a loss of faith in the environmental theory of the 'assimilative capacity approach'. The cited theory is supported by three prerequisites. Firstly, a certain level of pollution-causing agents in the environment does not cause any noticeable damage to the environment, including the various ways in which it is used. Secondly, the environment has a high level of resistance and regenerative ability. Third of all, the environment's regenerative ability can be quantitatively determined and knowledgeably used.^{*20} Therefore, in the case of application of this theory, the ability of science to adequately predict and determine risks to the environment and to develop technical solutions to eliminate the risks, including the environment's ability to resist pollution, is monitored and utilised. If this approach is successful, there is always sufficient time remaining for action. Unfortunately, practice has shown that, too often, scientific understanding of the harmful effects of certain activities or substances comes too late. It often takes scientists years to process actual conditions and to explain and debate their causative mechanisms. The precautionary principle is a method for acting in situations where science is uncertain, where an objective appraisal of the situation and reasonable suspicion are applied.^{*21} The principle takes into consideration the fact that a lack of evidence regarding the cause of damage does not mean in any way that the occurrence of damage has been averted.^{*22}

The precautionary principle and sustainable development are also related in the language of several international policy documents. I will provide only two examples. In the Bergen Ministerial Declaration for Sustainable Development in the ECE Region (1990) it is written:

'In order to achieve sustainable development, policies must be based on the precautionary principle. Environmental measures must anticipate, prevent and attack the causes of environmental degradation. Where there are threats of serious or irreversible environmental damage, lack of full scientific certainty [...] cannot be a reason for postponing measures.'^{*23}

The Ministerial Declaration of the Second World Climate Conference (1990) draws attention to the fact that

'in order to achieve sustainable development in every country and to meet the needs of present and future generations, precautionary measures to control climate change must be applied [...]. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing [...] measures to prevent [...].'^{*24}

¹⁸ See S. Boehmer-Christiansen. *The Precautionary Principle in Germany: Enabling Government. – Interpreting the Precautionary Principle.* T. O'Riordan, J. Cameron (eds.). London: Earthscan 1994, p. 55.

¹⁹ See T. O'Riordan, J. Cameron, A. Jordan. *The Evolution of the Precautionary Principle. – Reinterpreting the Precautionary Principle.* T. O'Riordan, J. Cameron, A. Jordan (eds.). Cameron May 2001, pp. 19–20.

²⁰ C. Barton. *The Status of the Precautionary Principle in Australia: Its Emergence in Legislation and As a Common Law Doctrine. – The Harvard Environmental Law Review* 1998 (22), p. 512.

²¹ See M. MacGarvin. *Precaution, Science and the Sin of Hubris. – Interpreting the Precautionary Principle.* T. O'Riordan, J. Cameron (eds.). London: Earthscan 1994, pp. 73–74.

²² See E. Fisher. *Precaution, Precaution Everywhere: Developing a 'Common Understanding' of the Precautionary Principle in the European Community. – Maastricht Journal of European and Comparative Law* 2002 (3) 1, p. 9.

²³ *Ibid.*, p. 431.

²⁴ *Ibid.*, p. 475.

Therefore, it can be claimed that in order for sustainable development to be achieved, the obvious environmental threats, along with those that are obscured by scientific uncertainty, must be assessed.

3.3. Sustainable development and intergenerational equity

In his lectures addressing the history of environmental law, S. Westerlund, environmental law professor at Uppsala University, has claimed environmental law to be the historical cradle of neighbourhood rights. The legal control of environmental problems (non-scientific) was present in ancient Roman times via neighbourhood rights, which prevented a landowner from using his land in a manner that would cause excessive damage to his neighbour — for instance, in the directing of his wastewater onto a neighbour's land. The 20th century saw the addition of transnational rights to this: rights that do not permit states to allow activities within their territory that may cause cross-border environmental damage to their neighbours. The sustainable development paradigm adds intergenerational neighbour relations and requires that today's actions and decisions not cause harm to the interests of future generations.

Decisions based on the environment may have very long-term and unforeseen consequences. Perhaps one of the more vivid examples is nuclear power, especially the question of leftover nuclear waste. Nuclear waste remains potentially hazardous for tens of thousands of years, which is, without doubt, longer than the life span of the current generation. It is crystal clear that nobody can guarantee safety for such a long period of time.^{*25} However, does this mean that the potential for harm occurring in the future can be completely ignored? Probably not.

The movement of intergenerational relations to the forefront of consideration is found not only in the wording of the sustainable development model but elsewhere as well — for instance, in subsection five of the preamble to the Treaty establishing a Constitution for Europe, speaking of 'awareness of their responsibilities toward future generations and the Earth', and in the preamble to the Estonian Constitution where it is stated that the state shall 'provide security for the social progress and general benefit of present and future generations'. Intergenerational relations have also been mentioned in several environmental conventions. The final section of the preamble of the 1992 Convention on Biological Diversity establishes that the states participating in the convention have decided to 'conserve and sustainably use biological diversity for the benefit of present and future generations'. In Article 3 (1) of the 1992 Convention on Climate Change, it is established that 'parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity'. The final example is exceptional because, if the question of intergenerational equity is typically addressed in preambles, then here it is inserted directly into the convention's main text.^{*26} The example of the Convention on Climate Change very clearly brings to the foreground the question of what the legal content of intergenerational equity is, and how many aspects of it are related to the law or to ethics.^{*27}

In the literature, the main argument concerns whether the rights of future generations should be taken into consideration in intergenerational relations or whether we are dealing only with our responsibility to take into consideration the interests of future generations.^{*28} In other words, can we discuss only the collective interests of future generations, or can we address, by contrast, their protected collective rights? E. Weiss finds that taking the rights of future generations into consideration has become a standard of international common law. The majority of authors^{*29}, though, including this author, do not share this opinion. One must agree with W. Beckerman, who finds that subjects not yet in existence cannot possess any rights.^{*30} This does not mean, in any way, that environmental law does not possess any mechanisms the main goal of which is the passing of the planet Earth, in good condition, to future generations. I have concluded that in

²⁵ See R. Attfield. *Environmental Ethics and Intergenerational Equity*. – *Inquiry* 1998 (41), pp. 208–209; K. Arrow. *Intergenerational Equity and the Rate of Discount in Long-Term Social Investment*, p. 2. Available at: <http://www-econ.stanford.edu/faculty/workp/swp97005.pdf> (14.10.2005).

²⁶ There are authors who believe that the intergenerational element is contained in conventions governing the protection of human rights. See E. Weiss. *Our Rights and Obligations to Future Generations for the Environment*. – *American Journal of International Law* 1990 (84) 1, pp. 198–207.

²⁷ See A. D'Amato. *Do We Owe a Duty to Future Generations to Preserve the Global Environment?* – *American Journal of International Law* 1990 (84) 1, pp. 190–198.

²⁸ See L. Gundling. *Our Responsibility to Future Generations*. – *American Journal of International Law* 1990 (84) 1, pp. 210–211; J. Gaba. *Environmental Ethics and Our Moral Relationship to Future Generations: Future Rights and Present Virtue*. – *Columbia Journal of Environmental Law* 1999 (24), pp. 255–253.

²⁹ See also P. Barres. *Advocacy, Frame, and the Intergenerational Imperative: A Reply to Professor Weiss on 'Beyond Fairness to Future Generations'*. – *Tulane Environmental Law Journal* 1998 (11), pp. 433–434.

³⁰ See W. Beckerman. *The Precautionary Principle and Our Obligations to Future Generations*. – *Rethinking Risk and the Precautionary Principle*. J. Morris (ed.). Butterworth & Heinemann 2000, p. 47.

intergenerational relations the responsible party is the state, which has to take into consideration the long-term perspective, which also encompasses the interests of future generations, in the drafting of legislation, as well as in implementing laws. In the German Constitution there is a provision (§ 20a) that requires the state to protect 'the natural foundation of life'. It is crystal clear that this refers to life in the long-term sense.^{*31} It is believed that a global convention establishing the basic environmental obligations of states in terms of future generations is necessary.^{*32}

This begs the question of what those obligations for states, directed towards the future, should be. In an often-used argument, the question is presented of who really knows what the future generation's values and interests will be. Nobody knows for sure, and this is why I believe that among the requirements directed towards the future, the most important for future generations is the conservation of options.^{*33} Above all else, this means that in making decisions directed towards the future, the safety coefficient stemming from uncertainty must be taken into consideration; in other words, the precautionary principle must be applied. Environmental decisions and activities with long-term consequences depend, foremost, on the reserves of natural resources and diversity, as well as on the outcome of global environmental problems, on the resolution of which rests Earth's habitability. Even here we can find connections between sustainable development and the precautionary principle. A primary task of the precautionary principle is the preservation of buffer zones in the environment, with the goal of not approaching the environment's tolerance limit, let alone exceeding it. This safety coefficient is necessary, above all else, because the environment's tolerance limit is difficult to specify and judge. A good example here is § 5 of the Estonia's Sustainable Development Act^{*34}, which divides reserves of renewable resources into critical reserves and usable reserves and establishes that the size of critical reserves is determined by the Government of the Republic, taking into consideration the uncertainty of future reserves. Here, the law refers to the need to consider the ability of science to determine the precise extent of critical reserves and the need to take into consideration additional reserves in order to ensure the availability of resources for future generations.

It can be fairly confidently stated that nearly all of the more important conventions in this field, such as the those for the preservation of biological diversity, the preservation of the ocean environment, predicting climate change, ozone layer preservation, and the handling of hazardous materials, all follow the sustainable development principle (and the precautionary principle)^{*35} and make it a goal to not leave Earth in worse condition than that in which the current generation received it. The influence of the conventions also reaches internal state laws.

3.4. Incorporation of sustainable development and environmental considerations in other fields (the integration principle)^{*36}

As an introduction, it is necessary to provide a reminder of Article 6^{*37} of the above-mentioned Treaty establishing the European Community, which establishes that:

'[...] the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principles of sustainable development.'

The requirement for integration is not met with the same strength in any of the other political fields in the European Union. Also, in Article 37^{*38} of the Charter of Fundamental Rights of the European Union it is prescribed that:

³¹ This is the place to remind the reader once again about the void that exists in Estonian Constitution § 53. This provision requires everybody to 'preserve life and the natural environment'. In the context of the Constitution, this does not directly mean the state. See R. Alexy. *Põhiõigused Eesti põhiseaduses* (Fundamental rights in Estonia's Constitution). – Juridica special edition 2001, pp. 29–30 (in Estonian).

³² See L. Gundling. *Our Responsibility to Future Generations*. – *American Journal of International Law* 1990 (84) 1, p. 212.

³³ See G. Supanich. *The Legal Basis of Intergenerational Responsibility: An Alternative View — the Sense of Intergenerational Identity*. – *Yearbook of International Environmental Law* 1992 (3), pp. 95–96; C. Redgwell. *Intergenerational Trust and Environmental Protection*. Manchester: Juris Publishing 1999, p. 77.

³⁴ *Säästva arengu seadus* (Sustainable Development Act). – RT I 1995, 31, 384 (in Estonian).

³⁵ See P. Birnie, A. Boyle. *International Law and the Environment*. Oxford University Press 2002, pp. 88–89.

³⁶ This concerns outside integration. In addition to this, there is talk about the internal integration of environmental law, which is related, above all else, to integrated environmental permits and the incorporation and codification of environmental law. See J. Zöttl. *Towards Integrated Protection of the Environment in Germany?* – *Journal of Environmental Law* 2000 (12) 3, pp. 284–285.

³⁷ The integration principle was entered in the treaty in 1987 with the Single European Act. See also L. Krämer (Note 17), p. 71.

³⁸ For more information about this article, see F. Ermacora. *The Right to a Clean Environment in the Constitution of the European Union*. – *The European Convention and the Future of European Environmental Law*. J. Jans (ed.). Groningen: Europa Law Publishing 2003, pp. 29–42.

'a high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.'³⁹

In this article, the integration principle is discussed, along with its relation to sustainable development (and also the precautionary principle), primarily in the European Union context.⁴⁰

One of the most distinguished scholars of EU environmental law, J. Jans, believes the requirement for the integration of environmental considerations into the Treaty establishing the European Community to be the most important provision concerning the environment.⁴¹ I agree with this completely and find that Article 6 of the Treaty on European Union, along with Article 37 of the Charter of Fundamental Rights of the European Union, gives environmental protection a whole new meaning in the European Union context. This means that now there is no longer any area of policy (including law) influencing the environment where environmental concerns do not have to be taken into consideration. For all such fields, environmental protection has become 'personal', not as it was before, when environmental protection was considered to be, along with the environment, the responsibility of institutions whose job it was to deal directly with the environment.⁴² With the aid of the integration principle, entry of environmental considerations into nearly all fields of human activity is occurring. This tendency is sometimes called ecological modernisation, which follows the idea that economic and social development are not allowed to be, and should not be, a cause of environmental damage. In certain cases, economic and social development may bring with them an improvement in the quality of the environment.⁴³

What is the legal content of the integration principle? This question is still sufficiently open-ended. For instance, J. Jans finds that it is not entirely clear what should be included in other policies, to what extent, and whether this falls under the jurisdiction of the European Courts.⁴⁴ In the framework of the theme in question, the above-mentioned questions are just as important.

The question regarding what should be integrated into other policies can be answered in the following manner. In keeping with the principle of sustainable development, the first thing that should enter into policies in other fields should be the requirement for the use of the precautionary method in the event of scientific uncertainty. One of the last is one of the primary legal means by which environmental protection and sustainable development are supported at an advanced level. The principle of sustainable development also presumes the taking into consideration of elements obscured by uncertainty during decision-making and selective implementation of the precautionary principle. Putting precaution into practice is a beneficial administrative task, allowing for setting of ambitious environmental goals in such a manner that substantiating their legitimacy does not require proof of potential environmental damage until the end, or association of a value with the damage's costs.⁴⁵

4. The role of open proceedings in the implementation of the sustainable development triangle

On the basis of the above, it can be claimed that the implementation of the sustainable development principle requires the precautionary principle to be used in the event of environmental risks obscured by scientific uncertainty in the course of taking into consideration future generations during decision-making and keeping in mind environmental considerations in all of the fields of human activity that significantly affect the environment. This type of convergence brings with it risks in the economic and social spheres and may also occasion new environmental risks. A typical example is the development of hydropower and the building of dams, resulting in the flooding of large areas, in order to reduce the amount of greenhouse gases released into the atmosphere. In this instance, one environmental problem may be replaced by another — a loss of biological diversity. Even the development of nuclear power brings, along with environmental pres-

³⁹ The exact same is repeated in Article II-37 of the draft Treaty establishing a Constitution for Europe.

⁴⁰ See also European Commission Communication on Environmental Integration. – *Journal of Environmental Law* 1999 (11) 1, pp. 221–227.

⁴¹ See J. Jans, *European Environmental Law*. Kluwer Law International 1999, p. 25.

⁴² See M. Faure, *The Harmonisation, Codification and Integration of Environmental Law: A Search for Definitions*. – *European Environmental Law Review*, June 2000, p. 178.

⁴³ See J. Hertin, F. Berkhout, *Ecological Modernisation and EU Environmental Policy Integration*, pp. 2–3. Available at: <http://www.au.dk/~cesamat/ecolo-papers.html> (12.03.2005).

⁴⁴ J. Jans, *European Environmental Law*. Groningen: Europa Law Publishing 2000, pp. 18–23.

⁴⁵ See S. Boehmer-Christiansen, *The Precautionary Principle in Germany: Enabling Government*. – *Interpreting the Precautionary Principle*. T. O'Riordan, J. Cameron (eds.). London: Earthscan 1994, p. 55.

ervation (reduction in the greenhouse effect), the threat of catastrophic accidents and the extremely serious problem of nuclear waste. There are many other, similar examples.

Environmental decisions are always unique and unlike any other type. This is due to the uniqueness of environmental impact and the scientific uncertainty obscuring it, and includes the — typically irrational and unpredictable — public reaction. Even environment-related interests may differ from person to person.

During the implementation of the sustainable development principle, problems related to the bases for and the legitimacy of decisions made always arise.^{*46} In an uncertain situation, proof regarding the suitability, necessity, extent, and moderation of methods may be absent. It should also be noted that decisions regarding the implementation of the principle cannot be based entirely on facts. Therefore, it is believed that the primary method for alleviating legitimacy problems is the use of open proceedings in decision-making, in which all persons and interests affected are included.

The goal of environmental decision-making is not the legitimisation of decisions through proceedings alone, but also the ensuring of a better-quality decision.^{*47} Active public recruitment brings with it additional information, which ensures, through deliberation, higher-quality decisions as well as greater justification and acceptability. As mentioned above, environmental decisions are not made based solely on the facts. When they are made, differing interests and values must be taken into consideration. The more that people directly or indirectly affected by the decision are included, the more adequate the presentation of differing views and values related to the environment becomes. It should also be taken into consideration that the courts may review discretion regarding environmental decisions. The Estonian Supreme Court has taken the position in the case^{*48} of Jämejala Park that

‘the court may also interfere in the exercise of the right of discretion when the decision falls within the limits of the right of discretion but disagreements occur in regard to the rationality of the decision. Dealing with discretionary flaws occurs especially in instances where the administrative organ has applied prohibited considerations or left some important aspect unrecognised.’

The Supreme Court found in this case that social and economic factors had been given too great a weight in comparison with environmental influences and that this, in itself, forms a significant discretionary flaw. It can be claimed that if, as a result of the public not being included, some interests are not represented and important interests or values are disregarded, then the legality of the content of the decision falls under suspicion. In other words, if potentially hazardous conditions obscured by scientific uncertainty but related to environmental or health hazards remain unnoticed, this is most likely because of a discretionary error.

As seen above, the sustainable development principle foresees that in all types of decisions affecting the environment, in addition to economic and social factors, environmental considerations must be taken into account. At the same time, consideration of economic and social situations usually occurs automatically and ‘naturally’, while the environment is often forgotten. Powerful examples are the Saaremaa deep harbour and the previously mentioned Jämejala Park cases, where fiscal advantages and employment were given priority. In both cases (as many times before), environmental concerns were clearly secondary to the developers’ wishes. Environmental considerations were taken into account later, thanks entirely to the involvement of the public, who represented previously ignored environmental protection interests and the worth of the environment.

Over the course of history, the principles of open proceedings have gone through major changes. Beginning in the 1970s, the need for the participation of the public in the decision-making process began to be recognised. Much of the change was due to the activity of the environmental protection movement. In the beginning, active public participation was passive. The public was informed and included in the later stages of proceedings, when all of the important decisions had already been made. Justifiably, F. Lynn describes this as the ‘right-to-hear-what-has-already-been-decided’ approach.^{*49} The modern position demands that the public be included for the proceedings in their entirety.^{*50}

Estonian law guarantees open proceedings in the environmental decision-making process. General provisions regulating open proceedings are listed in the third paragraph of the Administrative Procedure Act.^{*51}

^{*46} See E. Fisher. The Precautionary Principle As a Legal Standard for Public Decision-Making: The Role of Judicial and Merits Review in Ensuring Reasoned Deliberation. – Perspectives on the Precautionary Principle. R. Harding, E. Fisher (eds.). Federation Press 1999, p. 90.

^{*47} See E. Fisher, R. Harding. The Precautionary Principle in Australia: From Aspiration to Practice? – Reinterpreting the Precautionary Principle. T. O’Riordan, J. Cameron, A. Jordan (eds.). Cameron May 2001, pp. 224–225.

^{*48} ALCSCd 3-3-1-54-03. – RT III 2003, 31, 317 (in Estonian).

^{*49} See F. Lynn. Public Participation in Risk Management Decisions: The Right to Define, the Right to Know, and the Right to Act. – Risk: Issues in Health and Safety 1990 (1), pp. 95–96.

^{*50} See also R. Rick, R. Griffin, S. Friedman. Introduction: The Challenge of Risk Communication in a Democratic Society. – Risk: Health, Safety and Environment 1999 (10), pp. 189–196.

^{*51} Haldusmenetluse seadus (Administrative Procedure Act). – RT I 2001, 58, 354 (in Estonian).

In the case of environmental proceedings, openness is prescribed for the stage of assessing the effects on the environment and for when all of the more important environmental permits are issued. Unfortunately, in the case of the more important environmental laws, the particulars of open proceedings are regulated separately. I find that there is no basis for such variation. Differences appear between fields in the form of the following approaches. In some instances, notification is given in connection with the receipt of permit requests; in a second field, notice is given of the approval of a request for proceedings; and in a third field, notification is provided of the beginning of the proceedings. Only for certain instances are there provisions for regulating the contents of notifications, and even these vary. In some instances, there are provisions determining who has the right to present objections (this differs), and this type of regulation is missing altogether in other cases. The grounds for holding public proceedings are regulated differently. In one case, the openness is stated as necessary in order to make the right decisions and to balance opposing interests. In another instance, the goal cited is protection of persons to whom the issuance of a pollution permit may cause property damage or another form of damage to their interests. In one instance, the requirements concerning the contents of a notification of the issuance of permits are completely unregulated, while this is regulated in another instance, but once again differently. I believe these differences should be disregarded during the process of codification of Estonian environmental laws, and what follows should be taken into consideration.

The inclusion of affected individuals is critical for the protection of their rights and to ensure the right of recourse to a court of law in the future. It is the opinion of the author of this article that in order to determine the identities of affected persons and to include them in the proceedings for a cardinaly important permit (or assessment of environmental effects), a preliminary notice should be directed toward the public — a notice of the beginning of the assessment of planning or environmental effects and a notice of the environmental permit being accepted for proceedings. This must contain elements that allow persons to associate their rights and interests (or general environmental protection interests) with the activity for which permission is being sought. In the case of environmental decisions, the circle of affected persons is usually very wide.⁵² In the environmental field, the notification directed to the public must contain preliminary assessments regarding the possible type and extent of effects. There are usually no such requirements under Estonian law for the content of preliminary notices. Requirements concerning the content of notices are instead prescribed in the Water Act⁵³ and in the Integrated Pollution Prevention and Control Act.⁵⁴ If the notification concerning the beginning of the proceedings is very laconic, it does not fulfil its goal, which is the identification of the affected persons and their invitation to participate in the public proceedings.

The Estonian Supreme Court has emphasised the need to ensure the timely and effective notification of people regarding decisions that could affect the status of the environment. The Supreme Court has, in the case⁵⁵ of the Pirita protected area, noted:

‘[P]ursuant to the principles of democracy and good administrative practices, the body must provide greater public notification than prescribed by law, if it is foreseen that any of the channels approved by law for notification are not sufficient to ensure that the notice actually reaches the interested parties and that an additional notice does not bring with it any unreasonable costs. Otherwise, the actual realisation of the right to object would not be ensured. This requirement applies especially in the case of environmental decisions. Currently, this principle is expressed by Article 6 (9) of the Aarhus Convention, according to which the appropriate procedure must be used for notification of the general public [...].’

On administrative matter 3-3-1-56-02⁵⁶, the Supreme Court has added:

‘the Supreme Court [...] finds that based on grounds of humanity, in a state based on the rule of law, effective legal protection, and the principle of good governance, each person who may be affected by the conscientious carrying out of administrative duties that may limit his or her rights must be included in the administrative proceeding. In taking into consideration these constitutional principles, better informing of the body is ensured, the body is forced during the decision-making process to consider the interests of persons, and the quality level of the content of the administrative decision is raised. The hearing for the person affected also has procedural value, because a body making judgments by default treats the person as a procedural object and not as a citizen with legal rights.’

The primary conclusion, in the opinion of the author, is that civilians must actively participate in decision-making regarding environmental and health protection, because these decisions affect the interests of not

⁵² See also M. English. Who Are the Stakeholders in Environmental Risk Decisions? How Should They Be Involved? – Risk: Health, Safety and Environment 2000 (11), pp. 243–254.

⁵³ Veeseadus (Water Act). – RT I 1994, 40, 655 (in Estonian).

⁵⁴ Integrated Pollution Prevention and Control Act. – RT I 2001, 85, 512 (in Estonian).

⁵⁵ ALCSCr 3-3-1-31-03. – RT III 2003, 18, 167 (in Estonian).

⁵⁶ ALCSCr 3-3/1-56-02. – RT III 2002, 25, 283 (in Estonian).

just the current generation but future generations as well, and that during the decision-making process people's concerns regarding uncertain but possible dangers must be taken into consideration.

Proceedings in the environmental field are characterised by the complexity of solvable questions, the scope of the right of discretion, the unspecified weight of legal decisions, and typically also the interaction of unspecified legal decisions with the right of discretion. Therefore, adherence to procedural provisions and proof of claims in these proceedings is especially important.^{*57} In many cases, open proceedings are the only means ensuring that environmental considerations are taken into account.^{*58} I believe that the participation of the public in the making of sensitive decisions regarding implementation of the sustainable development principle is such a critical requirement for the proceedings that any violations of this should *a priori* be considered critical and potentially influencing of the decision, the end result of which may bring with it the cancellation of the decision.

The openness of the proceedings is not solely an important condition of the national decision-making process. It also has international aspects. Prominently rising to the forefront has been the public's participation in the development and implementation of globalisation and trade policy in the framework of the World Trade Organization (hereinafter 'WTO'). Up to now, this has been a closed process between governments, to which the public has had no access. Only non-governmental organisations are ensured participation, but even these to a very limited extent.^{*59}

It is frequently alleged that there is a lack of democracy and a distancing of the decision-making institutions from the people of the European Union. A basis for such criticism does exist, but the situation in the European Union is most assuredly better than that in the WTO. I find that this is one of the reasons for the European Union's support for the more radical sustainable development methods being more extensive and persistent in this context.

5. Summary

In conclusion, it can be claimed that sustainable development, as one of the guiding principles of contemporary environmental policy, has also developed into one of the fundamental principles of environmental law, with a clearly defined legal content. In the opinion of the author of this article, the principle of sustainable development can be reduced, in a legal sense, to three components. Firstly, sustainable development is bound to the precautionary principle, which is the second most important of the contemporary principles of environmental law (the first being the principle of sustainable development). The precautionary principle also requires the control of those environmental risks that are obscured by scientific uncertainty, and its essential characteristic is the creation of a safety coefficient for the preservation of the natural foundation of life, which is one of the requisites for sustainable development.

Secondly, sustainable development is defined in the above-mentioned Brundtland Commission report^{*60} as a type of development that fulfils the current generation's needs and aspirations without endangering the similar interests of future generations. Therefore, the principle of sustainable development is related to 'intergenerational equity'. In terms of intergenerational relations, the responsible party is the state, which has to take into consideration a long-term perspective, encompassing the interests of future generations, in the drafting of legislation as well as in implementing laws.

Third, required by the fourth principle of the Rio Declaration, ratified by the UN Conference on Environment and Development, which took place in Rio de Janeiro in 1992, as well as Article 6 of the Treaty establishing the European Community, is that in order to achieve sustainable development, environmental protection shall constitute an integral part of the development processes and ensure that economic as well as social development does not occur at the expense of the environment. The implementation of the sustainable development triangle often plays a decisive role in open proceedings. The goal of environmental decision-making is not only the legitimisation of decisions through proceedings but also ensuring the better quality of decisions.^{*61} Active public participation brings with it additional information, which supports better consideration and thus better-quality decisions, as well as justification and acceptability.

⁵⁷ J. Tickner. A Map Towards Precautionary Decision-Making. – Protecting Public Health and the Environment: Implementing the Precautionary Principle. C. Raffensperger, J. Tickner (eds.). Island Press 1999, pp. 175–176.

⁵⁸ E. Fisher. Is the Precautionary Principle Justiciable? – Journal of Environmental Law 2001 (13) 3, p. 319.

⁵⁹ See S. Gaines. International Trade, Environmental Protection and Development As a Sustainable Development Triangle. – Review of EC and International Environmental Law 2002 (11) 3, pp. 270–272.

⁶⁰ See Notes 7 and 16.

⁶¹ See E. Fisher, R. Harding (Note 47), pp. 224–225.



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Polish Plumbers, the EU Constitutional Treaty, and the Principle of the Welfare State

It is most intriguing to write on the principle of the welfare state in the Draft Treaty Establishing a Constitution for Europe (Constitutional Treaty) at a time when the French and Dutch people have rejected this treaty mostly because of lack of satisfactory social standards therein.^{*1}

In France, the central metaphor used in the 'no' campaign was the Polish plumber, a symbol of the cheap workforce coming from Eastern Europe and taking all of the French jobs away from the French people.^{*2} Thus, the French have feared that the Constitutional Treaty would further neo-liberal ends and allow a *laissez-faire* approach in the Central and Eastern European labour markets^{*3}, resulting in social dumping in competition with the so-called old member states.^{*4}

My aim is to demonstrate that the French and the Dutch were right in fearing changes in their welfare model but were mistaken to believe that the Constitutional Treaty would not foresee the principle of the welfare state.^{*5} Thus, my thesis is that the Treaty Establishing a Constitution for Europe contains a principle of the

¹ See J.-M. Dehousse, O. Lafontaine, P. Larrourou, C. Salvi. Renégocier le traité, sinon l'Europe va dans le mur. – *Le Monde*, 13 May 2005. Available at: <http://www.lemonde.fr/web/article/0,1-0@2-3232,36-649409@51-641597,0.html>; C. Marsden. The Netherlands: decisive 'no' vote on European constitution. Available at: <http://www.wsws.org/articles/2005/jun2005/neth-j02.shtml> (01.08.2005).

² See T. Fuller. The Workplace: For French, cheap labor is a threat. – *International Herald Tribune*, 25 May 2005. Available at: <http://www.iht.com/articles/2005/05/24/business/workcol25.php> (01.08.2005).

³ See J.-M. Dehousse (Note 1).

⁴ See T. Fuller. In the East, many EU work rules don't apply. – *International Herald Tribune*, 15 June 2005. Available at: <http://www.iht.com/articles/2005/06/14/news/europe.php> (01.08.2005).

⁵ Due to the vibrant discussion of the appropriateness of using tools and terms of constitutional law in analysing either the treaties establishing the European Union or, more specifically, the Constitutional Treaty, I will briefly disclose my position in this regard. I agree with the approach proposed by Ingolf Pernice, that the EU establishing treaties and/or Constitutional Treaty together with the national constitutions of the Member States form part of a multilevel constitutionalism, a sort of European constitutional order (*Verfassungsverbund*). See I. Pernice. Die neue Verfassung der Europäischen Union – ein historischer Fortschritt zu einem Europäischen Bundesstaat? – *Forum Constitutionis Europae Spezial* 1/03, p. 2. Available at: <http://www.whi-berlin.de/pernice.htm> (01.06.2005). The use of terms of constitutional law is thus justified. However, taking into account the terminology of the debate so far, I will also refer to the reformed European social model as an equivalent of the principle of the welfare state at the supranational level.

reformed welfare state, also known as the reformed European social model⁶, which is meant to influence and change the domestic welfare state models of the member states gradually. The most drastic changes are to be seen in countries that have adopted the corporatist welfare state model⁷ — including France and the Netherlands — as this model differs the most from the model advocated by the European Union.⁸

In exploring the text of the Constitutional Treaty with regard to the principle of the welfare state I will proceed from the premise that the principle can be textually expressed by making reference to its constitutive elements — the principles of equality, solidarity and non-discrimination; protection of economic, social, and cultural rights; as well as declarations of improvement of living conditions and the well-being of individuals — or references to the social market economy.

After having completed the general textual analysis, I will also take a brief look at the possible implications of the inclusion of the reformed European social model in the Constitutional Treaty for Estonian welfare state arrangements.

1. Textual references to the underlying social model

The text of the Constitutional Treaty provides us with an excellent opportunity to understand what the European Union has really become like. As a result of the simplification and clarification process administered by the European Convention, references to the European social model have also become much more visible, in contrast to the earlier confusing and blurred picture.

2. The preamble

As Andras Sajó has rightly pointed out, textual references to the social agenda of the European Union begin with the values and objectives of the European Union.⁹ To name just a few, reference is made to social justice and protection, solidarity between generations, protection of children's rights, and the combating of social exclusion and discrimination.¹⁰

I would, however, begin my analysis with the Preamble of the Constitutional Treaty, as not infrequently the most creative judicial constructions have been inspired by preambles of constitutional texts. The second and third recitals of the Preamble stipulate that the European venture is 'based on the universal value of equality and 'continues along the path of [...] progress and prosperity for the good of all its inhabitants, including the weakest and most deprived, [...] open to culture, learning and social progress, [...] it] wishes to strive for [...] solidarity.'

Although most of the principles and values referred to in the Preamble can be found in Title One of Part One of the Constitutional Treaty, the Preamble serves as a connecting point between the European integration thus far and the developments to be based on this treaty in the event it enters into force. Even if it might come as a surprise to some audiences that there is a distinct European social model enshrined in the European architecture, it is the result of decades of slow but firm progress in creating Social Europe. The reformed European social model, based on a delicate balance between the social end and competitiveness concerns, is the expression of the so-called Lisbon conclusions.¹¹ According to the conclusions, the main

⁶ See, for example, K. Aiginger. *Towards a New European Model of a Reformed Welfare State: An Alternative to the United States Model*. — *Economic Survey of Europe* 2005 (1), pp. 105–115; M. Kleinman. *A European Welfare State? European Union Social Policy in Context*. Houndmills, Basingstoke, Hampshire, New York: Palgrave 2002, pp. 57–58.

⁷ See the landmark study of welfare state models by Gosta Esping-Andersen, where he differentiates between the corporatist, liberal, and social democratic model (as applied in the Nordic countries). See G. Esping-Andersen. *The Three Worlds of Welfare Capitalism*. Cambridge: Polity Press 1998, pp. 26–28; According to Ian Gough, France and the Netherlands both fall under the corporatist welfare model. See I. Gough. *Social Aspects of the European Model and Its Economic Consequences*. — W. Beck, L. van der Maesen, A. Walker (eds.). *The Social Quality of Europe*. The Hague, London, Boston: Kluwer Law International 1997, p. 80.

⁸ C. de la Porte. *Is the Open Method of Co-ordination Appropriate for Organising Activities at European Level in Sensitive Policy Areas?* — *European Law Journal*, March 2002 (8) 1, p. 49.

⁹ A. Sajó. *Social Rights: A Wide Agenda*. — *European Constitutional Law Review* 2005/1, p. 39.

¹⁰ Art. I-3 of the Constitutional Treaty.

¹¹ Presidency conclusions of the Lisbon European Council, 23–24 March 2000. Available at http://www.bologna-berlin2003.de/pdf/PRESIDENCY_CONCLUSIONS_Lissabon.pdf (28.08.2005).

aim of ‘becoming the most competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth with more and better jobs and greater social cohesion’ was to be achieved by ‘modernising the European social model, investing in people and combating social exclusion.’^{*12} Elsewhere in the Lisbon conclusions, the modernised European social model is also called an active and dynamic welfare state.^{*13} It must be noted, however, that nothing new was invented at the Lisbon European Council — a modernised European social model supportive of economic growth and competitiveness was suggested as early as in 1996 by the Comité des Sages.^{*14}

What is behind the rhetoric of ‘progress and prosperity for the good of all its inhabitants, including the weakest and most deprived’? If the social and economic objectives collide, which set shall prevail? Is it a matter of case-by-case balancing, or does the principle of the active welfare state refer to the privileged status of social concerns in the European Union?

If the answer to this question has not been clear at all in the political process up to now^{*15}, the European Court of Justice seems to have made up its mind long ago. In the case of *Deutsche Telekom AG v. Lilli Schröder*^{*16}, the Court was faced with the need to interpret Art. 119 of the EC Treaty, a typically twofold Community law provision. The Court retained its earlier view and acknowledged that the principle of equal pay for men and women advances both economic and social objectives.^{*17} The Court went on to state that ‘the Community [...] is not merely an economic union but is at the same time intended, by common action, to ensure social progress and seek constant improvement of the living and working conditions of the peoples of Europe, as is emphasised in the Preamble to the Treaty’.^{*18} Referring to earlier case law and relying on the status of the equal treatment principle as a fundamental human right, the Court then stipulated that the economic aim is secondary to the social aim pursued by the same provision.^{*19}

While reference was not made to the Preamble of the Constitutional Treaty in this case, the way the Court has used it in striking a balance between the social and economic objectives reinforces once again the role of a preamble in the interpretation of the establishing treaties. I would like to stress, however, that it depends greatly on the interpreting court whether and, if at all, to which extent the directive principles stated in the Preamble are relied upon or considered proper for this purpose. A good example is the Preamble of the Constitution of the United States, which, albeit containing an express reference to promotion of ‘the general Welfare’, has been used neither alone nor in combination with the later added Fourteenth Amendment’s Equal Protection Clause to this effect.^{*20}

It must be kept in mind, however, that the Constitutional Treaty differs from its predecessors in that it has a considerably longer introductory part including, besides the Preamble, values and objectives of the European Union.

Besides showing the value judgements of the ECJ Justices, the same case is also illustrative as to the status and rank of social rights in the European Union. I will analyse this aspect of the Schröder case later on, when I come to dealing with economic, social and cultural rights in the Constitutional Treaty.

3. The values of the Union

Besides the underlying value of human dignity, Art. I-2 of the Constitutional Treaty mentions the weighty values of equality and respect for human rights. These values are supposed to be common to the member states in a society in which pluralism, non-discrimination, tolerance, justice, solidarity, and equality between women and men prevail.

What is the role of the values of the EU as compared to the objectives of the same entity? There needs to be a reason behind mentioning more or less overlapping aims twice in a rational constitutional document.

¹² *Ibid.*, point 5 of the ‘Conclusions’.

¹³ *Ibid.*, point 24 of the ‘Conclusions’.

¹⁴ For a Europe of civic and social rights: report by the Comité des Sages, Brussels, October 1995 – February 1996 / rapporteur Jean-Baptiste de Foucauld; European Commission, Luxembourg: Office for Official Publications of the EC 1996, pp. 30–33.

¹⁵ If the Constitutional Treaty enters into force, the European Union will be bound by Art. III-117, which requires it to take into account the requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion, and a high level of education, training, and protection of human health in the definition and implementation of policies.

¹⁶ C-50/96 Judgement of the ECJ in the case *Deutsche Telekom AG v. Lilli Schröder*. – European Court Reports (2000), I-743.

¹⁷ Para. 53 of the Schröder Judgement.

¹⁸ Para. 55 of the Schröder Judgement.

¹⁹ Para. 57 of the Schröder Judgement.

²⁰ This does not mean that the litigants have not tried to achieve it. See E. Bussiere. *Disentitling the Poor: Constitutional Welfare Rights in the Supreme Court, 1965–1975*. Pennsylvania State University Press 1997.

Besides the solemn declaration of the common values dear to all Europeans, Article I-2 has a very pragmatic role to play — it serves as a filter for selection of prospective candidate countries^{*21} and as a tool for disciplining the member states from too great deviations from the European traditions with a threat of suspension of the membership rights of the member state concerned.^{*22}

Thus in this context the subtle reference to a welfare state or a welfare society in Article I-2 attains great importance. While necessitating that the candidate countries indeed move towards an active welfare state/welfare society model, if there has been no such commitment before, the effect of Articles I-2 and I-59 on the member states of the European Union is not so clear. The latter provision becomes applicable only in respect of a member state in danger of deviating considerably from the values enshrined in Art. I-2 of the Constitutional Treaty.

Is suspension of membership rights applicable with regard to a member state that is in disagreement with the chosen social model and pursues a classical *laissez-faire* approach instead, but does fulfil all the other requirements — democracy, rule of law, respect for civil and political human rights, etc.? For now, it can only be a matter of speculation what, if anything, the other member states and the European Union would do in such a situation, but it is clear that the solutions chosen would definitely reveal whether and how the listed values are ranked at a particular point of time.

Given the danger of social dumping of such a member state and the impact on the monetary and fiscal stability of the EU^{*23}, deviations from the principle of the welfare state or the European social model would definitely not go unnoticed.

4. The objectives and competences of the Union within the social sphere

With a view to their being a potential justification for extension of the European Union's competence by the Council^{*24}, the objectives of the European Union should be read carefully. In addition to confirming once again the commitment of the European Union to the reformed European social model^{*25}, the objectives of the EU reveal most clearly the nature of the chosen social model. Thus, Art. I-3 of the Constitutional Treaty makes references to 'a highly competitive social market economy, aiming at full employment and social progress' as well as 'combat [of] social exclusion and discrimination, and [promotion of] social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child' as well as 'social cohesion and solidarity between member states'.

Viewed through the prism of traditional European welfare regimes as identified by G. Esping-Andersen^{*26}, these objectives present a mix of characteristics of the liberal and the social democratic (i.e., the Nordic) model. Thus, full employment and equality between women and men have long been desirable ends of the Nordic welfare state model. Whereas the concept of social market economy seems to refer to the German corporatist welfare model, as German scholarship deems a social market economy an expression of the welfare clause of the Basic Law^{*27}, this does not constitute a sufficient ground for arguing that the corporatist male breadwinner model has been taken aboard in the great European venture. In fact, the objectives of fighting against social exclusion and combating gender inequalities seem to refer to a diametrically different approach. A commitment to 'free and undistorted competition' and 'a highly competitive economy' shows that the European Union is not aiming to interfere with free markets more than absolutely necessary for pursuing the social ends — this tilts the overall balance towards the Anglo-Saxon liberal model. This is obviously one of the reasons why the French and Dutch voters, traditionally accustomed to the corporatist welfare, felt uncomfortable with the Constitutional Treaty and decided to reject it on their respective referenda.

Although quantitative analysis does not seem to be proper at this point, it must be pointed out that social sphere commitments form two thirds of the enumerated objectives of the European Union. This corre-

^{*21} See Art. I-58 of the Constitutional Treaty.

^{*22} See Art. I-59 of the Constitutional Treaty.

^{*23} S. Regent. The open method of co-ordination: A New Supranational Form of Governance? – European Law Journal, April 2003 (9) 2, p. 192.

^{*24} See Art. I-18 of the Constitutional Treaty.

^{*25} See, *inter alia*, the reference to 'promotion of well-being of its peoples' in Art. I-3, para. 1 of the Constitutional Treaty.

^{*26} G. Esping-Andersen (Note 7), pp. 26–28.

^{*27} E. Benda, W. Maihofer, H.-J. Vogel (Hrsg.). Handbuch des Verfassungsrechts der Bundesrepublik Deutschland, 2. Aufl. Berlin, New York: Walter de Gruyter Verlag 1995, p. 793.

sponds to the thesis of Goran Therborn that a state — in this case a polity — can be regarded as a welfare state or welfare society if the majority of its activities are dedicated to improvement of the social conditions therein.^{*28}

As it has been stipulated above, there is a direct link between the objectives and the sphere of competence of the EU. Thus, the flexibility clause enshrined in Art. I-18 of the Constitutional Treaty empowers the Council of Ministers, acting unanimously on a proposal from the European Commission and after obtaining the consent of the European Parliament, to adopt measures that are deemed necessary for achievement of any of the European Union objectives beyond the competencies of the EU. Even if taking such measures promises to be exceptional, it is still a means for interfering with the sovereignty of the member states. As could have been expected in this context, the objectives of the European Union have been formulated in broader and vaguer terms as the competencies — I restrict myself here to analysing the social objectives and the powers of the European Union in the social sphere only.

A fairly good example in this regard is the objective of promoting social justice and protection as well as solidarity between generations. While the objective sounds highly promising and raises the expectations of most vulnerable groups of society, the European Union does not have any remarkable competencies in the sphere of subsistence benefits or pensions besides the soft law tool of the open method of co-ordination.^{*29} The emphasis is rather on attaining a higher rate of employment.^{*30}

The open method of co-ordination plays an important role in the involvement of the European Union in matters of social policy and employment. It is far more than a mere soft law instrument. The EU institutions use this method to reach and influence areas where they have either no or not enough competencies, particularly in the social field.^{*31} As a result of the non-willingness of the member states to delegate more powers to the EU in the field of social policy and pressed by the necessities of balancing EU monetary and fiscal policy^{*32}, the European institutions intend to redesign national social models gradually through a non-binding multi-layer system^{*33} that is based on political authority.^{*34} The increasing usage of this new governance^{*35} approach in the social sphere raises a number of important issues, however.

Firstly, adding one more variable to the division of powers scheme alongside the principles of subsidiarity and flexibility blurs further the vertical division of competencies between the European Union and its member states^{*36} — member states can never be sure upon which question the European Union is taking action. Thus, there certainly is a problem with transparency and legal certainty at stake. This concern is supported by the fact that there have been examples of use of the open method of co-ordination without any basis in the establishing treaties already in the pre-Constitutional-Treaty time.^{*37}

Secondly, it has been pointed out that the supranational non-binding standard-setting in the social sphere in the form of the open method of co-ordination might curtail the meaning of social rights enshrined in the EU Charter of Fundamental Rights and Freedoms (Part II of the Constitutional Treaty), because if a social right would be violated by the use of the open method of co-ordination, there would be no means of redress available.^{*38}

Another link between the social objectives of the European Union and its policy competencies can be found in Art. III-117 of the Constitutional Treaty. By obliging the EU to take into account the social objectives in

²⁸ G. Esping-Andersen (Note 7), p. 20.

²⁹ See Art. III-210 of the Constitutional Treaty; N. Bernard. A 'New Governance' Approach to Economic Social and Cultural Rights in the EU. – T. Harvey, J. Kenner (eds.). *Economic and Social Rights under the EU Charter of Fundamental Rights: A Legal Perspective*. Oxford, Portland, Oregon: Hart Publishing 2003, p. 248.

³⁰ Presidency Conclusions of the Stockholm European Council, 23–24 March 2001, point 9. Available at: http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/ec/00100-r1.%20ann-r1.en1.html (28.08.2005); Art. I-3 and Art. III-205 of the Constitutional Treaty.

³¹ See, generally, C. de la Porte (Note 8), pp. 38–58; D.M. Trubek, L.G. Trubek. Hard and Soft Law in the Construction of Social Europe: The Role of the Open Method of Co-ordination. – *European Law Journal*, May 2005 (11) 3, pp. 343–364.

³² S. Regent (Note 23).

³³ The EU Commission elaborates guidelines or targets for member states, then the member states report on a regular basis as to whether and how their policies comply with the EU-set goals in the field in question and receive non-binding feedback from the EU institutions, including suggestions on how to meet the targets better. At the same time, best practices of member states are being identified and promoted; member states are encouraged to give advice to each other. See C. de la Porte (Note 8), pp. 39–45.

³⁴ D.M. Trubek, L.G. Trubek (Note 31), p. 343.

³⁵ J. Scott, D.M. Trubek. Mind the Gap: Law and New Approaches to Governance in the European Union. – *European Law Journal* 2002 (8) 1, pp. 5–6.

³⁶ F.C. Mayer. Competences — reloaded? The vertical division of powers in the EU and the new European Constitution. – *International Journal of Constitutional Law*, May 2005 (3) 2–3: Special Issue, p. 507.

³⁷ C. de la Porte (Note 8), p. 52.

³⁸ N. Bernard (Note 29), p. 256.

defining and implementing any EU policies, the Constitutional Treaty establishes the principle of the welfare state in EU law similarly to domestic constitutions as a directive principle to the legislative and executive powers.^{*39}

5. The core of the principle of the welfare state: fundamental social rights and social citizenship

According to T. H. Marshall, social citizenship forms the core idea of a welfare state.^{*40} Thus, rights ranging from ‘the right to a modicum of economic welfare and security to the right to share to the full in the social heritage and to live the life of a civilized being according to the standards prevailing in the society’^{*41}, which have found their way to the EU Charter of Fundamental Rights and Freedoms enshrined in Part II of the Constitutional Treaty, serve as a further piece of proof that the European Union is meant to adhere to the principle of the welfare state. However, given their limited legal effect and restrained wording, and a very slight chance of having standing before the ECJ in a social rights case, there is no reason to regard this catalogue of social rights as the triumph of a social Europe.

The provisions regulating application of the Charter rights^{*42}, including the fundamental social rights, clearly reflect the fears of the member states.

This is why the EU Charter of Fundamental Rights and Freedoms is legally binding for the European institutions, whereas member states have to follow the Charter only when they are implementing EU law.^{*43} The fear that the fundamental rights shall be a justification for extension of the EU’s competencies has been eliminated using double protection — both a very restrictive wording of the rights that concern a sphere where the EU has limited competencies and an express statement to this effect in Art. II-111. This is obviously why the wording of social welfare rights hardly promises anything besides the respect and recognition of the right as it has been defined by the laws of the Union and member states. On the other hand, it must be taken into account that careful wording and reference to the legislature is characteristic for these rights in general. At the same time, the employment rights are concisely stated and seem to produce a direct effect. In addition to confirming the thesis that the EU protects social rights only insofar as it has competencies, this indicates once again that the European Union’s social model is employment-market-centred.

Accordingly, it can be concluded that the European Union is protecting social rights instrumentally — those rights that serve the needs of the labour market directly are protected to a greater extent than those only relating to it. Another explanation could be that the European Union is respecting the *status quo* of division of powers in the social sphere. But keeping in mind the existence of the open method of co-ordination as such, it is hard to believe that the second explanation is correct.

The labour-market-centred rights’ protection seems to be a relic of the initial approach taken in European Union (then Community) social policy. If the free movement Chapter of the Constitutional Treaty seems to indicate that social privileges are limited to workers, the European Court of Justice has changed this in recent years using the concept of EU citizenship.^{*44} More specifically, the Court has used in the cases of *Martinez Sala* and *Grzelczyk* the ban of discrimination based on citizenship as a vehicle for complementing the modest set of EU social rights with full entitlement to the same social benefits as enjoyed by nationals of the member state where the EU citizen resides.^{*45} This move has definitely made EU social citizenship more meaningful.

While it can be learned from these cases that an entitlement for a social benefit prevails for persons who have exercised their right to free movement and hold EU citizenship, it is not so clear what would happen if a market freedom conflicts with a fundamental social right.

Whereas the *Schröder* case referred to above seems to suggest that a fundamental social right would prevail in such a case^{*46}, no generalisations can be made. First of all, it must be taken into account that the funda-

³⁹ In the case of the German Basic Law, the principle of the welfare state is justiciable only in exceptional cases. In routine case law it has been defined as a guiding principle for the legislative and executive branch. See E. Benda, W. Maihofer, H.-J. Vogel (Note 27), p. 760.

⁴⁰ G. Esping-Andersen (Note 7), p. 21.

⁴¹ T.H. Marshall’s definition of social rights as reproduced in M. Kleinman (Note 6), p. 192.

⁴² Art. II-111 through II-114.

⁴³ Art. II-111 of the Constitutional Treaty.

⁴⁴ Consider in this regard the judgements of the European Court of Justice in cases C-85/96 *Martinez Sala*. – European Court Reports (1998), I-2691 and C-184/99 *Grzelczyk*. – European Court Reports (2001), I-6193.

⁴⁵ While in the case of *Martinez Sala* there was a child-care benefit at stake, the *Grzelczyk* case concerned a subsistence benefit.

⁴⁶ Para. 57 of the *Schröder* Judgement, see Note 16, *supra*.

mental human right at stake in this case was equal treatment with regard to remuneration for men and women, a right at the core of the labour-market-related rights. Secondly, there was a provision with a dual aim at stake. So the measure was suitable for furthering both economic and social ends at the same time, and there was not necessarily a conflict at stake.

The Omega^{*47} case, a recent case involving a conflict between the principle of human dignity and free movement of services, explains quite adequately my doubts as to the success of social rights cases. In that case, the Court did not balance the principle of human dignity, the basis of all fundamental rights, with the freedom to provide services freely. Instead, it used human dignity as a mere public interest to substantiate the standard exception, public order. Although the public order concerns were declared legitimate this time, it must be kept in mind that, in that kind of scheme, all exceptions to the freedom to provide services, or any other basic European Union freedom, must be interpreted restrictively. Therefore, it is not clear at all whether a public interest of social inclusion would be weighty enough to prevail over a market freedom.

However, these questions shall be answered if and when the ECJ comes across a suitable case involving a genuine conflict between a market freedom and a fundamental social right. Then it shall also be clear whether the Court would let the social aims prevail and which kinds of techniques and justifications it would use for that purpose.

6. A brief glance at the Constitutional Treaty from the perspective of a member state

Based on the premise that the constitutional structures of member states and the European Union are interconnected^{*48}, it is only fair to bring in the other side of the coin — the member state perspective. I will do this from the perspective of Estonia.

From the point of view of Estonia, the most important question seems to be whether and how the welfare state model chosen by the European Union influences interpretation of the welfare state clause (e.g., the welfare state regime adopted) and the social rights anchored in the Constitution.

In a situation where the powers of the state are shared with the European Union in the fields of employment and social policy, the legislative and executive branch would be faced with the European social model in the form of directives or the open method of co-ordination in any case and would have to try to reconcile the domestic and the European dimension of the social policy. The role of courts would be different, however. The courts would be required to follow the Constitutional Treaty charter of social rights while applying EU law.^{*49} Application of EU law could range from application of acts of Parliament based on EU directives to guaranteeing equal rights to EU citizens.

Article 10 of the Constitution of the Republic of Estonia stipulates the principle of the welfare state as a basic principle of the Constitution. This is complemented by a fairly generous set of social rights. The domestic case law suggests that the requirements of the welfare state clause have been fulfilled if the state guarantees its inhabitants a possibility of meeting their basic needs.^{*50} It must be kept in mind that the state shall be liable to intervene only in cases where the family of the needy person is not able to support him.^{*51} These features seem to be characteristic of the liberal and corporatist model of Esping-Andersen respectively.

As the Constitutional Treaty has not entered into force yet and there are, understandably, no cases to analyse, I will construct a hypothetical situation based on the available initial information, however scarce. Thus, the European Union might consider the corporatist principle of subsidiarity of state involvement to be in direct conflict with its aim of combating social exclusion. In case this would be found in the open method of co-ordination process, the EU could only exert political pressure on Estonia to change its Constitution. If there were to be a conflicting provision of EU law, it would prevail over the Constitution under the principle of supremacy of EU law and the courts should apply European Union law, not the provision or principle of the Constitution conflicting with it.

⁴⁷ Judgement of the European Court of Justice in the case C-36/02 *Omega Spielhallen- und Automatenaufstellungs GmbH v. Oberbürgermeisterin der Bundesstadt Bonn*. – European Court Reports (2004), p. I-9609

⁴⁸ Consider the theory advocated by I. Pernice (Note 5).

⁴⁹ Art. II-111 of the Constitutional Treaty.

⁵⁰ Judgement of the Constitutional Review Chamber of the Supreme Court of Estonia of 21 January 2004 in case 3-4-1-7-03. – RT III 2004, 5, 45 (in Estonian).

⁵¹ *Ibid.*

Due to the limited duration of the nation's European Union membership, there have been no cases where the Supreme Court would have applied EU law instead of domestic laws so far. The only prospective case before the Supreme Court, where there was a chance to reinterpret a provision of the Constitution concerning freedom of association with political parties in accordance with provisions of the Treaty Establishing the European Community, was declared inadmissible on formal grounds.^{*52}

Section 1 of the Constitution of the Republic of Estonia Amendment Act^{*53}, which allows Estonia to belong to the European Union in accordance with the basic principles of the Constitution, provides another interesting insight into the matter. This provision seems to be the Estonian version of the *so lange* judgements of the German Constitutional Court.^{*54} It is not clear however, what the government would do if it were to find out that the European Union is violating the principle of the welfare state enshrined in the Constitution.

For now, it seems, there is no basis for such concerns. Given the very modest welfare regime chosen by the Republic of Estonia, it is quite probable that the effect of the reformed European social model on the Estonian welfare state arrangement will be to increase the level of protection provided for the state's inhabitants.

7. Conclusions

It must be concluded that the Constitutional Treaty is fully permeated with the idea of a reformed European social model or the principle of the active welfare state. References to this can be found throughout the whole Treaty. When comparing this approach with that of the domestic constitutions, the difference is visible. By and large, the latter texts only mention the welfare state principle, stipulate the principles of equal treatment and solidarity, or enumerate social rights. But in no case is reference made to so many features of a particular social model. Moreover, in the conservative discourse on constitutional law, it is not considered advisable to mention a particular economic model, like the social market economy, in the text of a constitution.^{*55}

Reasons for drafting such a detailed and transparent net of provisions concerning the European social model could be manifold. First of all, doing so could serve the purpose of mapping the existing arrangements. Secondly, the member states would like to have the European Union and the reformed European social model distinctive of it as visible as possible, in order not to accept something elusive or hidden with the Constitutional Treaty. Thirdly, in view of the frequent amendment of the existing establishing treaties, it could have been considered a normal state of things to make the treaty so detailed, given its being subject to changes to be made in the near future. Fourthly, in a context of a decade and a half of debates as to the decay of the welfare state as such, the drafters might have wanted to make sure that there would be some sort of welfare state model anchored in the Constitutional Treaty, so as to prevent the member states from a complete race to the bottom in the globalisation-driven regulative competition.

In addition to the technical question of why the principle was formulated in the treaty in this particular way, it is far more important to understand why the principle was included in the Constitutional Treaty at all. In my opinion, the most fundamental reason was the need to legitimise the European Union further. Besides the attempt to bring the European Union closer to the people through the concept of EU citizenship in the Maastricht Treaty, adding a set of fundamental rights and bringing in reference to citizens as the source of legitimacy of the EU throughout the Constitutional Treaty^{*56} was obviously considered not enough for achieving this aim. Something more meaningful and understandable to people was needed. And the principle of the welfare state is well-suited for that.

Another consideration, of a more pragmatic nature, might have been the concern that the European Monetary Union is most vulnerable to extensive welfare spending, as it could endanger the budgetary balance of the member state concerned.^{*57} Thus, the European Union needed to have some control over the social policy activities of the member states. With a view of the diversity of social models and unwillingness of the member states to delegate powers to the EU in the social sphere, the EU has ended up circumventing the obstacles in inventive ways — using broad policy guidelines in the form of EU values and objectives and the process of the open method of co-ordination.

⁵² Decision of Supreme Court *en banc* of 19 April 2005 in case 3-4-1-1-05. – RT III 2005, 13, 128 (in Estonian). See in particular the separate opinion of Justices J. Laffranque, T. Anton, P. Jerofejev, H. Kiris, I. Koolmeister, and H. Salmann.

⁵³ Eesti Vabariigi põhiseaduse täiendamise seadus. – RT 2003, 64, 429 (in Estonian).

⁵⁴ See BVerfGE 89, 155; BVerfGE 73, 339.

⁵⁵ See, for example, E. Benda, W. Maihofer, H.-J. Vogel (Note 27), p. 800.

⁵⁶ See, for example, Art. I-1 and Part II of the Constitutional Treaty.

⁵⁷ S. Regent (Note 23).

The reformed European social model contains elements of the social democratic and liberal models of Esping-Andersen. This is why it is probably going to be hard to accept for inhabitants of traditionally corporatist-regime countries, like France and the Netherlands.

In view of the minimalist welfare state regime that Estonia has chosen, it will definitely not need to make use of the protection clause of the Constitution of the Republic of Estonia Amendment Act in order to safeguard the principle of the welfare state against negative interference by the European Union during the validity of the Constitutional Treaty. This is, of course, if the Constitutional Treaty enters into force at all.



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Social and Economic Fundamental Rights in Estonian Constitutions Between World Wars I and II: A Vanguard or Rearguard of Europe?

The Constitution of 1937^{*1}, which followed the first Estonian Constitution (of 1920), is the basis for the present Constitution of Estonia. A series of fundamental rights was present in all of the country's constitutions. In human rights theory, fundamental rights are divided into three categories: fundamental rights of the first, second, and third generation. First-generation rights are those that contemporary Estonian lawyer E. Laaman defined as personal (or civil) rights, by which the state is not allowed to restrict the citizen in certain fields, such as the right to liberty and equality or freedom of property. The second-generation rights are social (and economic) rights, by which the citizen has the right to demand from the state a certain action. Examples are the right to work and to education.^{*2} This definition is recognised also in both contemporary and later European literature.^{*3}

Although the Constitutions of 1920 and 1937 are direct predecessors of the present Constitution, there has been relatively little research done with respect to them and what they contain, especially concerning fundamental rights. As during the interim between the two World Wars there was a relatively strong emphasis on

¹ Constitution of Republic of Estonia (Eesti Vabariigi põhiseadus; RT 1992, 26, 349; in Estonian), preamble.

² E. Laaman. Kodaniku põhiõigused ja kohused (Fundamental rights and duties of citizen). – Põhiseadus ja Rahvuskogu (Constitution and Constitutional Assembly). Tallinn 1937, p. 342 (in Estonian).

³ Although social fundamental rights or social human rights were defined in the literature very differently at different times from the 1920s onward, there are some basics common to the definitions provided: there is a demand (often in the sense of a subjective right) for a certain positive performance from the state. See T. Marauhn. Das Grundrecht auf Zugang zu den Leistungen der sozialen Sicherheit: Anmerkungen zur Normkategorie der sozialen Grundrechte. – Erweitertes Grundrechtsverständnis – internationales Rechtssprechung und nationale Entwicklungen. Kehl am Rhein: Engel 2003, p. 253, with further references. For human rights in general, see P. Malanczuk. Akehurst's Modern Introduction to International Law, 7th revised edition. London, New York: Routledge 1997, p. 210.

social and economic fundamental rights (SEFR) in Europe^{*4}, also at constitutional level, this article is meant to fill this gap and throw light on social and economic human rights in the Constitutions of 1920 and 1937. The social and economic rights covered in this article are understood in a very broad sense, as all human rights are included that influence the social and economic sphere — the right to private property, the right to strike, and so on. As the principle of equality is a very important basis for the application of SEFR, gender equality will be discussed as well. On the other hand, some of the traditional rights of the second generation, such as the right to education and minority and cultural rights^{*5}, are omitted from the discussion.

As every legal system is influenced by others, the Estonian Constitutions have to be put in context in order for one to find out what has influenced them, and how.

1. Constitution of 1920

1.1. The drafting of the chapter on fundamental rights, and its models

Two pre-constitution documents in 1918^{*6} had already established some SEFR: the right to an adequate standard of living; the right to acquire land for agriculture and exploitation; the right to gain employment and labour protection; and the right to state support for those who are old, young, unable to work, and so on.

Finally, in the Constitution of 1920, these rights were specified and widened, while not being changed in principle. In the drafting of the Constitution, it was first discussed whether fundamental rights should be included in the constitutional text at all, as doing so was not common for that time, let alone before. For example, most constitutions in German states after 1848 did not make mention of the fundamental rights, for they were considered in legal theory to be self-evidently guaranteed. Still, it was found in the Weimar Constitution that, to tie the Constitution with the one from 1848, an extended series of fundamental rights should be established.^{*7}

In the case of the Estonian Constitution of 1920, there were also doubts as to whether the Constitution should have a human rights series at all, as it had in Latvia in 1922. But in Estonia there was demand on both counts, from the right wing and the left, so the fundamental rights were enshrined in the Constitution as legal guarantees.^{*8}

In the opinion of Laaman, the Estonian Constitution of 1920 was influenced by the French Declaration of the Rights of Man and of the Citizen, by extreme collectivism in Soviet Russia^{*9}, and by the Weimar Constitution.^{*10} The Weimar Constitution and the French declaration were held as the best examples at that time. The French work was an example for all constitutions developed after its adoption, and the Weimar Constitution was held up as a model of a modern and democratic constitution of the 20th century, and also as being one of the most advanced constitutions of its time.^{*11} So the best constitutions were chosen as models.

Although the human rights series of the French Declaration of the Rights of Man and of the Citizen^{*12} contained, in essence, the personal rights (such as the equality of the sexes and freedom of private prop-

⁴ H. Dreier. *Die Zwischenkriegszeit. – Handbuch der Grundrechte in Deutschland und Europa. Bd. I. Entwicklung und Grundlagen.* D. Merten, H.-J. Papier (Hrsg.). Heidelberg: C.F. Müller 2004, p. 196. In this article, mainly the term 'fundamental rights' is used, but 'human rights' is not excluded.

⁵ More research has been done on minority and cultural rights, so the need to treat them in this article was not so urgent. See: C. Hasselblatt. *Minderheitenpolitik in Estland: Rechtsentwicklung und Rechtswirklichkeit 1918–1996.* Bibliotheca Baltica 1996; C. Thiele. *Selbstbestimmungsrecht und Minderheitenschutz in Estland.* Berlin: Springer 1999; K. Aun. *Der völkerrechtliche Schutz nationaler Minderheiten in Estland 1917–1940.* Hamburg: Heitmann 1951; O. Angelus. *Die Kulturautonomie in Estland.* Flensburg 1951.

⁶ The first was 'Manifest kõigile Eestimaa rahvastele' (Manifest for all peoples in Estonia) of 24 February 1918 by Maapäeva Vanematenõukogu (RT 1918, 1, 1; in Estonian), and the second 'Eesti Vabariigi valitsemise ajutine kord' (Temporary regime of government of Republic of Estonia) of 4 July 1919 (RT 1919, 44, 345; in Estonian).

⁷ F. Hartung. *Die Entwicklung der Grundrechte seit 1776. – Die Entwicklung der Menschen- und Bürgerrechte von 1776 bis zur Gegenwart.* F. Hartung, G. Commichau. *Quellensammlung zur Kulturgeschichte. Bd. I. W. Treue (Hrsg.).* Göttingen: Muster-Schmidt Verlag 1985, pp. 28–29.

⁸ E. Laaman. *Isik ja riik Eesti põhiseadustes* (Person and state in Estonian Constitutions). – *Õigus* 1937/3, pp. 102–103, 106 (in Estonian).

⁹ The extreme collectivism in Soviet Russia influenced the Estonian Constitution in the opposite way, pushing it in the liberal direction.

¹⁰ E. Laaman (Note 8), pp. 102–103, 106.

¹¹ H. Dreier (Note 4), p. 158.

¹² *Déclaration des droits de l'homme et du citoyen. – Staatsverfassungen. Eine Sammlung wichtiger Verfassungen der Vergangenheit und Gegenwart in Urtext und Übersetzung.* G. Franz (Hrsg.). München: Oldenbourg 1964, pp. 302–307. At the time when the French Declaration of the Rights of Man and of the Citizen was published, there was need for the freedom rights, and, as the social and economic human rights are also called 'the rights of the second generation', the need for them arose after the freedom rights were established.

erty^{*13}) and no social rights, as were provided in the Constitution of 1920 in Estonia, there can be seen some general influence. Into the Constitution of 1920 the liberal spirit of the French human rights declaration was incorporated. Above all, that containing the fundamental rights series was the first section to follow the introductory part in both the French document and the Estonian Constitution of 1920. Secondly, very characteristic of the general aim and essence of the Constitution of 1920 was the title of the chapter on human rights: 'About Fundamental Rights'. Although the main influence upon the Constitution of 1920 came, in my opinion, from the Weimar Constitution of 1919, there are some differences. In the Weimar Constitution and in the Estonian Constitution of 1937, the chapter was called 'About Fundamental Rights and Duties'. For the Weimar Constitution, the critical question is raised by J. Rückert: '[...] damit wird der Rechtsbefund janusköpfig. Wann gilt Recht, wann Pflicht, wird die Frage. Was vom Recht bleibt, wenn die Pflicht daneben tritt, wird entscheidend, vor allem in der Durchsetzung'.^{*14} This problem of duties was not present in the Constitution of 1920 but was to be present after adoption of the Constitution of 1937. Unfortunately, the time from the adoption of the Constitution of 1937 until the Second World War was too short to evaluate and characterise further developments in this context. In the case of the Weimar Constitution, the problem was evident for the latter generation, but the difficulties that could arise were not understood until the rise of the Nazi regime.

In comparison to the Constitution of 1937, that of 1920 has been held to be very liberal and to stress the individual and his rights or freedoms. Also, the individual had very few social rights under it, comparatively speaking.^{*15} This could be the influence of the French declaration, again.

In the Constitution of 1920^{*16}, the basic norm for social and economic rights was § 25, which stated that economic life in Estonia has to be in accordance with equity and that the aim of it is for persons to secure adequate housing through laws that concern the acquisition of land, a place to live, etc., and via laws that concern the right to assistance in the case of young or old age, incapacity for work, loss of a provider, need, and so forth.

Freedom of mobility and to change living place were set forth in § 17, § 19 established the freedom to choose one's profession and freedom of trade, and § 18 provided the freedom to strike and associate. The general equality of all men was established in § 6: no one should be discriminated against on the basis of gender in the public sphere. Section 12 contained the norm of compulsory primary education, and § 24 specified the freedom of private property.

As was mentioned before, this Constitution was very much influenced by the Weimar Constitution. Although the Constitution of 1920 set itself apart from the German tradition^{*17}, according to which the human rights series, inclusive of the social and economic human rights, was traditionally very thorough (the Weimar Constitution contained 56 sections)^{*18}, we find some of the social and economic fundamental rights in the same wording also in the Estonian Constitution of 1920.^{*19}

As in the Weimar Constitution, some of the norms had a declarative nature. Such was the case with § 25 of the Constitution of 1920 (the same applies to article 151 of the Weimar Constitution), which was in legal literature characterised as giving just the principal, overall aim that legislation was to strive toward.^{*20} Rückert is of the opinion that this article, which uses the wording found in the Weimar Constitution, contains an aim

¹³ Andrezej Wasilewski is of the opinion that freedom of trade, although not *expressis verbis* mentioned in the Declaration of Human Rights, was at that time understood as a 'logical consequence of the overall freedom of the citizen'. A. Wasilewski. Wirtschaftsfreiheit als Grundrecht. – Staat – Verfassung – Verwaltung. Festschrift anlässlich des 65. Geburtstages von Prof. Dr. Dr. H.c. Friedrich Koja. H. Schäffer et al (Hrsg.). Wien: Springer 1998, p. 467.

¹⁴ J. Rückert. Weimars Verfassung zum Gedenken. – Rechtshistorisches Journal 1999 (18), p. 218.

¹⁵ See, e.g., H.-J. Uibopuu. Üldised inimõigused Eesti 1920., 1937. ja 1992. aasta põhiseadustes (General human rights in Estonian Constitutions of 1920, 1937, and 1992). – Juridica 1997/2, pp. 236–237 (in Estonian).

¹⁶ Eesti Vabariigi põhiseadus. – RT 1920, 113/114, 897 (in Estonian).

¹⁷ See J. Rückert: 'Diese deutsche Tradition [Vollverfassung mit ausführlichen Grundrechten – *the remark by the author*] hat zu tun mit der Betonung von Gemeinschaftsidealen, seien sie christlich oder sozial oder genossenschaftlich oder kollektivistisch geprägt oder eine Mischung davon' (Note 14), pp. 218–219.

¹⁸ It did contain extra sections covering community life, the education system, and economic life. Weimarer Verfassung 1919. – Staatsverfassungen. Eine Sammlung wichtiger Verfassungen der Vergangenheit und Gegenwart in Urtext und Übersetzung. G. Franz (Hrsg.). München: Oldenbourg 1964, pp. 212–222. This extensive series of fundamental rights was later held as a weakness of the Weimar Constitution, with the claim that most of them were expressed in only programmatic sentences and were properly tasks for the legislator, not legal and binding norms. For more on this, see J. Rückert (Note 14), especially p. 220 et seqq. and H. Dreier (Note 4), especially p. 162 et seqq.

¹⁹ For example, the right that economic life be in accordance with equity (§ 25 of the Estonian Constitution and the first sentence of article 151 of the Weimar Constitution).

²⁰ E. Janson. Eesti Vabariigi riigiõigus (Constitutional law of Republic of Estonia). Tartu: Notitia 1935, p. 13 (in Estonian). In 1923, E. Berendts noted that the laws that should be formulated in the form of concrete legal norms on the basis of the declarations of Chapter II were still works in progress and that the realisation of those very promising principles was still not completed. E. Berendts. Die Verfassungsentwicklung Estlands. – Jahrbuch des öffentlichen Rechts. Piloty. Koellreutter (Hrsg.). 1923/24, Bd. XII. Tübingen: Mohr 1924, p. 196.

against the aim, a rule against the rule, and a right against the duty. Who should draw the lines of demarcation is left open.^{*21} For the Estonian constitutions, the question of where the lines should be drawn was, at the time, still unanswered.

Indirectly, the Supreme Court too has found that § 25 has a declarative nature and that the courts cannot use this as the basis for a decision, as it ruled in one other case that 'the court has to use the law (*ius*), principally staying within the bounds of equity (*aequitas*). If there is a contradiction between the law and equity, the legislator can change the law, and the court may not depart from the norms of law for purposes of satisfying the needs of equity'.^{*22} Thus, equity is the guideline for the court only when this is provided within the law. This does also mean that the Supreme Court of Estonia decided to assign itself a very positive role in interpreting laws.

Comparing the Constitution of 1920 with the Constitution of Finland, which was adopted at about the same time, in 1919, we can say that the Finnish work contained just very basic social and economic human rights, such as the protection of property and the worker (§ 6), freedom of movement (§ 7), equality in satisfying the cultural and economic needs of Finnish and Swedish citizens (§ 14), and from among the civil rights the equality of all citizens (§ 5).^{*23}

The Constitution of 1920 has been considered very liberal and individual, and this can be affirmed without much debate. As the models for this constitution the best examples of its time were chosen. Progressive for the time was the series of fundamental rights, and a little more attention was drawn to the social and economic side of the constitutional norms, as compared to what was set forth in, e.g., the Finnish constitution or French declaration.

1.2. Application of the fundamental rights provisions in the supreme courts

In the interim between the two world wars, the application of the fundamental rights provisions in the rulings of the courts, especially the supreme courts, was very different. In Finland, the opinion prevailed in constitutional literature and practice that no authority had the right to oversee the constitutionality of the formal law after it was ratified. Finnish law placed an emphasis on preventive control, and it was, moreover, executed through the nation's parliament.^{*24} This applied not only for judicial control over the laws but also for the constitutional norms providing the fundamental rights. The latter had no direct effect: their application could not be controlled by the Supreme Court.

Opinions differ concerning the direct effect of the fundamental rights included in the Weimar Constitution in Germany. Some of them were, in general, held to be directly applicable, while other norms were only programmatic and considered to be the stuff of tasks for the legislator — this was the case with the social and economic rights, in particular, and the main basis for criticism of the fundamental rights chapter of the Weimar Constitution. So judicial control over the programmatic norms was not possible. The control of constitutionality by courts where other, directly applicable fundamental rights were concerned was possible in certain cases.^{*25}

In Estonia, the constitutionality of norms could be controlled by the Supreme Court. While the court could not abolish the law, it had an obligation to decide cases in such a way that the unconstitutional norm or law was rendered not there in practice.^{*26} The Supreme Court had the right to interpret the constitutional norms as well^{*27}, and the violation of fundamental rights could be claimed in the courts. Only a few of the decisions

²¹ J. Rückert (Note 14), p. 225.

²² Decision No. 5 of 19 April 1926. – 1926. aasta Riigikohtu otsused (Judgments of Supreme Court of 1926). Õiguse lisa. Tartu 1927, pp. 7–8 (in Estonian).

²³ Die Verfassung Finnlands (1919). Available at: <http://www.verfassungen.de/fin/finnland19.htm>; Suomen Hallitusmuoto. 17.07.1919/94. – Suomen laki. II. Helsinki: Lakimiesliiton kustannus 1993, pp. A1, 1–2. This can be explained as an echo of the Finnish Civil War, as the war is called a war between rich and poor. The poor were defeated, so the social side was also left out from the Constitution and only the liberal personal rights stressed and included.

²⁴ This despite the fact that Suomen Hallitusmuoto § 92 provided that a public authority could not apply a regulation that went against parliamentary law or basic law. J. Husa. Guarding the Constitutionality of Law in the Nordic Countries: A Comparative Perspective. – The American Journal of Comparative Law Vol. 48, No. 3, summer 2000, pp. 364, 368.

²⁵ H. Dreier (Note 4), pp. 174–175, 180 with many references. See, for the different opinions on the direct effect, p. 174 et seqq. and, on judicial control, p. 180 et seqq.

²⁶ Õiguse üldõpetus dotsent Uluotsa loengute järele programme vastavalt kokku seadnud Tartu Ülikooli juura üliõpilased (General theory of law, notes compiled by law students of University of Tartu according to lectures of senior lecturer Uluots). Tartu: Chr. Jürgensi paljundusbüroo 1923, p. 49 (in Estonian).

²⁷ See, e.g., the decision of the Supreme court of Estonia of 5 April 1921. – Riigikohus. Otsuste valikkogumik 1920–1940 (Supreme Court. Selected judgments 1920–1940). Compiled by T. Anepaio. Tartu: Elmatar 1999, p. 25 (in Estonian).

of the Supreme court of Estonia of this time have been published^{*28}, and others are very difficult to access, so only preliminary conclusions can be drawn. As the most important cases were chosen for publication^{*29}, we can, however, get some picture of these and see the tendency.

In general, among the most important cases that were published from 1921 until 1930, there were one to six cases every year concerning some of the fundamental rights. Most often, they dealt with minority and cultural rights or freedom of religion, but there were also two cases concerning the general equality principle, one concerning freedom of movement, and two dealing with the right to strike and associate contained in § 18. These cases will be discussed next.

The first case concerns a woman who applied for the post of candidate judge. The application was rejected on the ground that the Law of the Courts did not allow appointing women to the position of judge. In the opinion of the Supreme Court, the law provided only formal conditions for the naming of judges and, as these were not mentioned in the rejection of the application, the assumption that the ground was gender was not justified. 'Even if there were some doubts pointing to the contrary following the Constitution entering into force, and § 6 does provide equality of gender [...], the doubts are not validated,' stated the opinion. Women have the right to be appointed to the position of judge.^{*30} It should still be remarked that regardless of this decision from 1924, there were no female judges in Estonia in 1918-1940.^{*31} There was probably a problem in guaranteeing equality of gender in practice...

The basis for the second case was a requirement that, according to the law, the head of the community should be elected only from among the house owners. Here the Supreme Court decided that election from among only those owning a house would not be in accordance with § 6 which provided for general equality in the public sphere.^{*32}

The third case concerned freedom of movement, provided in § 17. Four men were applying for passports to go to Brazil and remain there. The Minister of Internal Affairs refused to grant them passports on the ground that although there was freedom of movement, it did not apply if there was a plan to go abroad and stay there, giving up all one's duties to the home state. The ruling declared that passports should not be given in the case of going abroad for a stay, because there were too many going to South America and the Estonian state had to bring them back because of their lack of money. The freedom of movement provided in § 17 is provided only for movement within Estonia and thus could not be applied in the case, read the ruling.^{*33}

Today, this argumentation appears amazing. In the Constitution of 1992, in force today, the material on freedom of movement is divided between two articles. Section 35 states: 'Everyone has the right to leave Estonia. This right may be restricted in the cases and pursuant to procedure provided by law to ensure the administration of court or pre-trial procedure, or to execute a court judgment'.^{*34} Under this section a person can bring an action before the courts if the passport is not delivered.^{*35}

According to the commentary accompanying the Constitution, such a situation as occurred in the above-mentioned case should at present be excluded.

The two cases concerning the right to associate and strike are very interesting, as the Supreme Court determined through them the limits of § 18. In the first case, the Minister for Internal Affairs who had the authority to register an association, refused to register the association of the railway workers. The reason was that the statutes of the association stated that the aim of the association included organising strikes, while the law prohibited railway workers from striking. The association of railway workers was of the opinion that the refusal of the minister was in violation of § 18, which mentioned everyone's right to strike and that the right could be restricted only in public interests. The court held that, as the appellants declared, the right to strike was not unrestricted and that in that case penal law prohibited striking, in the public interest, only to the railway workers.^{*36} What these public interests were in that this case the court did not determine.

In another case, the Minister for Internal Affairs refused to register an association of the workers of the town of Pärnu to which all workers could belong. The association too had as one of its aims organising strikes. In that case, the Supreme Court held that the minister could refuse to register the association only when the

²⁸ Riigikohus. Otsuste valikkogumik 1920–1940 (Note 27) and Riigikohtu otsused (Judgments of Supreme Court). Õiguse lisa.

²⁹ T. Anepaio. Eesti Vabariigi Riigikohus (Supreme Court of Republic of Estonia). – Riigikohus. Otsuste valikkogumik ... (Note 27), p. 16.

³⁰ The decision of the Supreme Court of Estonia of 1 September 1924. – Riigikohus. Otsuste valikkogumik ... (Note 27), pp. 41–44.

³¹ T. Anepaio. Eesti Vabariigi kohtunikekorpus 1918–1940 (Judges in Republic of Estonia in 1918–1940). Tartu 1994 (Master's thesis; in Estonian).

³² Decision No. 23 of 20 March 1923. – Riigikohtu otsused (Judgments of Supreme Court). Õiguse lisa. Tartu 1924, pp. 52–54.

³³ Decision of the 10th administrative department of 9 September 1926. – Riigikohus. Otsuste valikkogumik (Note 27), pp. 96–98.

³⁴ Eesti Vabariigi põhiseadus (Constitution of the Republic of Estonia). – RT 1992, 26, 349 (in Estonian).

³⁵ Eesti Vabariigi põhiseadus. Kommenteeritud väljaanne (Constitution of the Republic of Estonia. Commented edition). Tallinn: Juura 2002, p. 284 (in Estonian).

³⁶ Decision No. 22 of 2 September 1926. – Riigikohtu otsused (Judgments of Supreme Court). Õiguse lisa. Tartu 1926, pp. 36–37.

statutes of the association were not in accordance with the law. As there was the freedom to strike and no law enacted after adoption of the Constitution prohibited **all** workers from striking, the decision of the minister was declared void. Even if it was prohibited for some members to strike, there could not be reason for prohibiting the registration of the association. If workers to whom the prohibition applied chose to strike, then they should have been held responsible, said the ruling.^{*37}

In these two cases, the Supreme Court proceeded from the constitutional right to strike and determined in which cases the right could be restricted, and when not.

The exercise of such control for securing fundamental rights was not self-evident at that time. The Constitution of 1920 was, with its series of fundamental rights and their general control, liberal and modern. On the other hand, the non-equality of gender in the private sphere and the restriction of freedom of movement to apply only within one's home country show a very conservative and narrow approach.

2. Constitutional reform of 1933

In 1933, the Constitution of 1920 was amended. There were no changes in the human rights chapter of the Constitution^{*38}, but the other amendments, together with the change of the political regime, were so important that many have spoken of the 'Constitution of 1933'. As Laaman writes: 'the authors of reform have changed their approach to constitutional matters from individualism to collectivism'.^{*39}

Using a right given him through the amendment of the Constitution, Prime Minister K. Päts, who fulfilled also the obligations of the head of state, declared on 12 March 1934 a state of national defence, which was prolonged many times^{*40} and did not end before World War II. The period was called the Silent Age, as the state was ruled without parliamentary action. The most important doctrine used by the government and opposition during this regime was solidarism. According to the doctrine, both the individuals and the state were subordinated to the welfare of society and the state could accept certain sacrifices on the part of the individual in the public interest. The executive power — that is, the government — was the most important institution. The other elements of the democratic political system slowly lost their importance, and the political opposition was marginalised.^{*41}

Some changes concerning the Supreme Court may also indicate that the change of political regime influenced the decision-making of the courts, too. According to § 70 of the Constitution of 1920, the Supreme Court had the authority to appoint judges. With the amendments of 1933 and also in the Constitution of 1937, the authority for appointing judges belonged to the head of state and the Supreme Court had only an advisory role. K. Päts as the head of state prescribed on several occasions the persons to serve in that advisory capacity.^{*42}

The seat of the Supreme Court was the matter of many discussions in Estonia and turned out to be the symbol of the independence of the court system from the executive power. On the basis of the decree of the head of state of 8 June 1934, the Supreme Court was moved to Tallinn, to the capital city despite the opposition of the Supreme Court itself. Where public opinion was concerned, this meant clearly that the judicial power was subordinated to the executive power. Taking into account the events of 1934 and the arrest of some judges without prior permission from the Supreme Court (where the opinion of the Supreme Court was very calm and mild), we can say that the independence of the judicial power had been subverted earlier.^{*43}

This conclusion of T. Anepaio could be confirmed by the fact that after 1930 (and until 1939) among the published — and thus most important — Supreme Court cases there were no longer any cases where fundamental rights in general or social and economic rights in particular were interpreted, discussed, or given reference. We should bear in mind that until that time the Constitution was quite often the subject of legal analysis (including among the published cases). Even if we need more analysis of the unpublished Supreme

³⁷ Decision No. 31 of 28 September 1926. – Riigikohtu otsused. Õiguse lisa (Note 36), pp. 49–50.

³⁸ Eesti Vabariigi põhiseaduse muutmise seadus (Republic of Estonia Constitution Amendment Act). – RT 1933, 86, 628 (in Estonian).

³⁹ E. Laaman (Note 2), p. 344.

⁴⁰ J. Põld. Loenguid Eesti riigiõigusest (Lectures on constitutional law of Estonia). – Tartu: Sihtasutus Juridicum 2001, pp. 25–26 (in Estonian). The change of political regime in Estonia was moving in step with European developments. In 1933, Hitler came to power, and the regime had already turned authoritarian in Poland and Italy.

⁴¹ T. Karjahärm. (V. Sirk). Vaim ja võim. Eesti haritlaskond 1917–1940 (Spirit and power. Estonian intellectuals 1917–1940). Tallinn: Argo 2001, pp. 285–286.

⁴² T. Anepaio (Note 29), pp. 10–11.

⁴³ T. Anepaio (Note 29), p. 14.

Court cases in order to draw a firm conclusion on this point, just the fact that the SEFR are not present in the published argumentation of the court at that time shows us the direction in which the judicial power moved. Analysing this, one can conclude with ease that the chapter on fundamental rights was just ignored during the Silent Age. The argument of the courts was now directed more to the level of simple laws. All this affirms that a different approach had come to the fore, as has been claimed also by Laaman.

3. Constitution of 1937

In 1937, a new constitution was adopted. The history of the creation of this work is well documented and easy to follow. Many participants in the Constitutional Assembly have described the discussions and brought out the reasons behind including a certain norm, and the choice of language. All authors who have written about the Constitution of 1937 have praised it; there are no critical remarks.

J. Uluots, one of the main figures involved with the Estonian Constitutions, has characterised the Constitution of 1937 by saying that the then-new Constitution remained loyal to individualism and liberalism, as we could see from the second chapter (on fundamental rights). He continues by arguing that fundamental rights are not innate to a human being (i.e., inborn). They come from the society of the state. In that line of reasoning, they belong to the citizens on this basis and thus may be restricted in the interests of the society, and obligations and duties correspond to one's rights.⁴⁴ So the Constitution of 1937 attempted to develop the ideas of individualism and liberalism further, for more social solidarity within the state.⁴⁵ Uluots also stressed that the Constitution was based on the nature of the Estonian nation. In Estonians' life, certain institutions had appeared, like a family and a home. Without a doubt, one characteristic of Estonians was a certain deference to the professions and, more generally, every single field of work.⁴⁶

During the speeches at the Constitutional Assembly, most of the speakers expressed the opinion that one of the best ideas established in the Constitution was the increased presence of SEFR. This cannot be challenged. Another matter is how these constitutional principles were applied in reality and whether they were used at all. H.-J. Uibopuu has stated that 'the number of social rights did increase, at least formally'. He added that 'in this part of the Constitution, nothing turned to the disadvantage of the individual'.⁴⁷ Despite the increase in SEFR, not in the Constitution of 1920 nor in the Constitution of 1937 nor even in the Constitution of 1992 was the principle of *Sozialstaat* (the welfare state) introduced. This could be an indication that the social aspect was stressed less and the focus was placed on the collectivist side of things, where the individual has the obligations before the state and his fundamental rights are also restricted by duties before the state. If we turn the saying of Uluots in this way, it is not clear at all that the Constitution preserved its individualistic and liberal ideas.

The draft of the Constitution of 1937, presented by head of state K. Päts, was discussed in multiple commissions and in three stages at the Constitutional Assembly. In this article, the most interesting problems that arose will be brought out and also the final version of the norm will be supplied.

In contrast to the Constitution of 1920, which did not contain very many SEFR, to the final version of the Constitution of 1937 were added special articles about protection of family (§ 21) and economic life (§ 23), state's aid to facilitate finding of employment (§ 27), and state's aid for older people, as well as state aid in the event of inability to work or in cases of need (§ 28).

One of the most important and most discussed themes was the protection of the family and the education of young people. There were opinions that in the Constitution of 1920 were not stressed enough. Concern was expressed that the Constitution should stress, on one hand, the need for more children and, on the other, the obligations of the state and community concerning promotion of the family. Another idea was that children should be educated in the national spirit.⁴⁸

⁴⁴ One of the contemporary German lawyers, C. Schmitt, wrote in 1932, analysing the Weimar Constitution: 'Grundpflichten, welche in ihrer Struktur Grundrechten entsprechen, sind im bürgerlichen Rechtsstaat undenkbar'. Inhalt und Bedeutung des zweiten Hauptteils der Reichsverfassung. – Handbuch des deutschen Staatsrechts. Vol. 2. G. Anschütz, R. Thoma (eds.). Tübingen 1932, p. 597. The theme of the Janus-head of such provisions is covered in this article under point 1.2, with references.

⁴⁵ J. Uluots. Eesti uue Põhiseaduse ideestikust (Foundations of the new Estonian Constitution). – Õigus 1937/7, p. 290 (in Estonian).

⁴⁶ J. Uluotsa kõne Rahvuskogu esimese koja põhiseaduse eelnõu üldaruandjana. Rahvuskogu esimese koja koosolekul 8. juunil 1937 (Speech of J. Uluots as general reporter of first chamber of Constitutional Assembly on draft Constitution. At the meeting of first chamber of Constitutional Assembly on 8 June 1937). – Põhiseadus ja Rahvuskogu (Constitution and Constitutional Assembly). Tallinn: Rahvuskogu üldkoosoleku juhatause väljaanne 1937, pp. 115–116 (in Estonian).

⁴⁷ H.-J. Uibopuu (Note 15), pp. 236–237.

⁴⁸ A. Mägi. Põhiseaduse koostamise käik Rahvuskogus (Drafting of Constitution in Constitutional Assembly). – Põhiseadus ja Rahvuskogu (Note 46), p. 178. Educational matters were regulated in §§ 22 and 23 of the Constitution of 1937, and both did contain the provisions of § 12 of the Constitution of 1920 although in a more profound manner.

The commissions also found that by nature it was not possible to have full equality between spouses and, to make things clearer, other basic characteristics of the family should be brought out. Also, the policy of protection of mother and child was defective.^{*49} The final version of § 21 provided^{*50}:

The family, being fundamental to the preservation and growth of the nation and as the basis of society, shall be protected by the state.

The laws regulating marriage are based on the principle of equality of husband and wife as far as it is in accordance with the common interest of the family, with the interest of the children and reciprocal support. The relations of property will be regulated by law, but the regulation cannot restrict the capability of one spouse to deal with property matters.

The protection of mothers and children shall be provided by law.

Families with many children are under special protection.

As the Weimar Constitution was still in force at that time, we can see that, in the drafting of the Constitution of 1937, the Weimar Constitution again was one of the models. The first sentence of the relevant sections (§ 21 of the Constitution of 1937 and article 119 of the Weimar Constitution) is almost the same, as is the whole article stressing the protection of families with many children and of mothers and children. The essential difference with the Weimar Constitution lies in the field of gender equality. The Weimar Constitution provides that '[Die Ehe] beruht auf Gleichberechtigung der beiden Geschlechter' (art. 119) — it establishes gender equality without any conditions. Here we can see that the prohibition of discrimination on the basis of gender in the public sphere in the Constitution of 1920, and in the same wording also in the Constitution of 1937, was not there by accident, but it was also in accordance with § 21, which provided equality within the family. We can see that even in the year 1937 and at the constitutional level, the idea of gender equality, especially within the family, was not quite entrenched. From this it follows clearly that there was no gender equality in the private sphere.

On the other hand, a provision of that nature was a step further in stressing the importance of family, as the Constitution of 1920 did not contain such an article, regardless of the Weimar Constitution being an available model for that also. Of course, the family as the basic and first building block of society, together with education in the national spirit and so on, was one of the main principles of national socialism. Here we can see that the drafters of the Constitution were aware of these ideas, and there seemed to be enough reason to apply these ideas also in practice.

Section 25 of the Constitution of 1920 was now divided into different articles. In the draft provided by Päts, § 24 stated: 'The organisation of economic life in Estonia is under the protection of the state.' As it lacked an 'equity principle'^{*51}, after discussions the final version of § 25 provided that the organisation of economic life in accordance with the principles of equity has to promote overall wealth, adequate housing, and the expression of creative powers. Section 25 established also freedom of trade, economic association, and profession.

Some sections have remained almost identical — e.g., § 6 of the Constitution of 1920 and § 9 of the Constitution of 1937 (on gender equality), § 17 of 1920 and § 13 of 1937 (on freedom of mobility), and § 17 of 1920 and § 18 of 1937 (on freedom of association).

Where regulation of employment protection is concerned, it has been concluded that the state does not have to find employment for the unemployed. The drafters were also worried about the tendency for physical labour to be regarded as dishonourable and especially women going abroad to find work as chambermaids. At the same time, everyone should find employment himself.^{*52} So, the final section, § 27, stated that work is under state protection and that the state helped one to find work. Citizens were obliged to seek work themselves also and to take into account that 'work is the honour and duty of every citizen who is able to work'. Labour disputes were regulated by law. Section 28 stated that the family had to be responsible for the care of its dependent members and that the care was taken over by the state only if there were no family members. This article was meant to supersede § 25 of the Constitution of 1920 that did not place enough emphasis on the social obligations of the state.

Section 27 seems to strike out on its own, as at least at constitutional level the duty to work was not provided in other constitutions. For example, article 163 of the Weimar Constitution provided that 'to every German

⁴⁹ A. Mägi (Note 48), pp. 178, 215.

⁵⁰ See RT 1937, 71, 590. Compare to § 27 of the Constitution of 1992, which provides: 'The family, being fundamental to the preservation and growth of the nation and as the basis of society, shall be protected by the state. Spouses have equal rights. Parents have the right and the duty to raise and care for their children. The protection of parents and children shall be provided by law. The family has a duty to care for its needy members.' The provisions about gender equality have changed significantly, but the portion concerning the family has essentially remained the same.

⁵¹ A. Mägi (Note 48), p. 180.

⁵² E. Laaman (Note 2), p. 357.

should be given the possibility to achieve his maintenance thorough his work'. This duty to work was represented in § 28 of the Constitution of 1937, under which it was possible to take all who did not want to work, did not care for their family members, and did not perform other duties on account of being in need of help into forced guardianship.^{*53} The provision quite soon had practical consequences: the presidential decree of 7 July 1938 introduced camps for shirkers. The decree defined shirkers as persons who were able to work but did not want to do so and, secondly, persons who were able to work and did so but had problems with alcohol or drugs and wasted their salaries (§§ 2 and 3).^{*54} The decree was sent to Parliament for amendment. The Parliament discussed the need for such camps only superficially, with little focus on the need for such camps — some of the members of Parliament argued, even further, as to whether there should be more persons defined as shirkers, such as those who did not pay taxes properly.^{*55} As we can see, the title 'About the fundamental rights and duties' was not only declaration but reality. This is one more reason to speak with Rückert about the *Janusköpfigkeit* of these provisions. The right to work seems to be more duty than right. The duty to work is inherent for the autocratic state and for both socialism and national socialism.

Laaman's evaluation of fundamental rights as seen in the Constitution of 1937 is that we can see the proportionality: the individual rights are more restricted; social and corporal rights are more expanded. The individual rights have remained the same except that they are more restricted.^{*56} The opinion of A. Mägi is the same.^{*57} These evaluations clearly underestimate the possibilities the Constitution of 1937 provided for turning the freedoms into duties.

4. Conclusion

Answering the question posed in the title of the present paper, we have to distinguish between the Constitutions of 1920 and 1937. The Constitution of 1920 was in many ways very progressive and liberal. Not every constitution of that time contained SEFR. Not only that — control over their application was established, too. Still there was the problem of gender equality even at constitutional level in the private sphere. For the public sphere, the situation was better, but things were still not secured, as shown in the case of the woman applying to be a judge. In the European context, even this was quite progressive.

With the constitutional reform in 1933 began ideological change, which changed not the formulation of norm but their interpretation. The Constitution of 1937 was a logical continuation of this. It has been stressed that as regards the regulation concerning the head of state, with the Constitution of 1937 Estonia reverted from an authoritarian regime to a parliamentary one, but the change to democracy did not take place in the human rights arena. We can state in the case of SEFR that in the Constitution of 1937 more attention was paid to the rights, and that the rights changing to obligations did not widen the freedom but in fact did the opposite. As the constitutional fundamental rights were not applied in decisions of the Supreme court any longer, their importance in reality is questionable. In this development the Constitution of 1937 was following the authoritarian, national socialist, and collectivist ideas of the European State. The last doctrine was applied in a very particular manner as the duty to work and the corresponding right of the state to take shirkers into forced guardianship. This leaves the impression of a fervent prentice.

⁵³ See also A. Mägi. Inim- ja kodanikuõigused Eesti Põhiseadustes (Human and citizens' rights in Constitutions of Estonia). – Akadeemia 1995/1, p. 83 (in Estonian).

⁵⁴ RT 1938, 62, 614.

⁵⁵ Riigivolikogu stenograafilised aruanded. I. Koosseis. I ja II istungjärg. 1.–45. koosolek (Shorthand reports of State Council. I. Members. Sessions I and II. Sitings 1–45). Riigi Trükikoda 1938, pp. 226–241 (in Estonian).

⁵⁶ E. Laaman (Note 8), p. 117.

⁵⁷ A. Mägi (Note 53), p. 81.



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Which Continuity:

The Tartu Peace Treaty of 2 February 1920, the Estonian–Russian Border Treaties of 18 May 2005, and the Legal Debate about Estonia’s Status in International Law

1. Introduction

On 18 May 2005 in Moscow, the foreign ministers of the Republic of Estonia and the Russian Federation signed the treaties establishing the mutual state borders at land and at sea. Except for slight modifications to the current control line, the treaties essentially recognise the current Estonian–Russian control line as the state border. The substance of the treaties had been negotiated during the mid-1990s, but the signing had been postponed by the Russian Federation. Russia claimed that it would not sign the border treaties until other contested political issues between the Russian Federation and the Republic of Estonia were resolved in a satisfactory manner. Political analysts have suggested that Moscow’s willingness to sign the treaties was enhanced by the accession of the Republic of Estonia to the EU on 1 May 2004. On the one hand, the absence of the border treaties did not become an obstacle to Estonian accession to the EU, since Estonia could claim that it had been ready to sign the treaties since, at the latest, their initialling in Saint Petersburg on 5 March 1999. On the other hand, it has grown more urgent for Russia to have its western borders officially recognised, as Russia has expressed its interest in achieving visa freedom for its citizens within the EU and Brussels insisted that resolution of the border issues with Estonia and Latvia be one of the inevitable preconditions for this.

The Estonian parliament, the Riigikogu, ratified the border treaties on 20 June 2005 — i.e., approximately one month after their signing.¹ The law of ratification, as adopted by the Riigikogu, contains an introductory declaration² that has been mistakenly termed a ‘preamble’ by various of the media. The introductory

¹ Eesti Vabariigi ja Vene Föderatsiooni vahelise Eesti–Vene riigipiiri lepingu ning Eesti Vabariigi ja Vene Föderatsiooni vahelise Narva ja Soome lahe merealade piiritlemise lepingu ratifitseerimise seadus (Estonian–Russian State Border Treaty between the Republic of Estonia and Russian Federation and Narva and Gulf of Finland Sea Territory Delimitation Treaty between the Republic of Estonia and Russian Federation Ratification Act). – RT II 2005, 18, 59.

² The general idea of the necessity of such a declaration was, it seems, first suggested by this author in the op-ed article ‘Tartu rahuleping: kehtiv või kehtetu (Tartu Peace Treaty: valid or invalid)?’ – Eesti Päevaleht, 7 February 2005 (in Estonian).

declaration states that the treaties were ratified ‘proceeding from the legal continuity of the Republic of Estonia proclaimed on 24 February 1918, as it is established in the Constitution of the Republic of Estonia, in the 20 August 1991 decision of the Supreme Council of the Republic of Estonia “On the Independence of Estonia” and in the 7 October 1992 declaration of the Riigikogu “On the Restoration of the Constitutional State Power”’. The declaration adopted by the Riigikogu in connection with the ratification of the border treaties goes on to say that the land border treaty concluded with Russia ‘partially changes the line of the state border established in article III, para. 1 of the Tartu Peace Treaty of 2 February 1920, does not have impact on the rest of the [Tartu Peace] Treaty, and does not determine the treatment of other bilateral questions that are not connected to the border treaty’.

The Russian reaction to the outcome of the ratification procedure in the Riigikogu was negative. Mikhail Margelov, a leading Russian foreign policy maker, expressed his dissatisfaction about the fact that Estonia ‘reduced us to 1918 in the final version’ while ‘the treaty’s architects used the 1944 borders as a basis’.³ Margelov argued that this would leave it open for the Republic of Estonia to present ‘territorial claims’ in the future. Moreover, Russian foreign policy officials argued that the Estonian foreign minister, Urmas Paet, had promised in Moscow on 18 May 2005 that Estonia would not add any additional declaration to the law of ratification (a claim that was rebuffed by the Estonian minister of foreign affairs). As the parliamentarians were quick to point out, would a promise indeed have been made, it would have had to be regarded as non-binding for the legislative body.

On 27 June 2005, the Russian ministry of foreign affairs delivered a note to the Estonian ambassador in Moscow, informing Estonia about Russia’s decision to start its domestic procedures to free itself from legal obligations stemming from the signing of the border treaties. On 1 September 2005, President of the Russian Federation Vladimir Putin signed an order rescinding Russia’s signature of the border treaties with Estonia.

Why then did such a declaration on the part of the Riigikogu turn out to be so disturbing for the Russian Federation that its president went so far as to rescind Russia’s signature? And what explains the adoption of such a declaration by the Riigikogu in the first place? Are not Russia and Estonia interested in the establishment of an undisputed common border under international law? Is there some rationality in the adoption of such a declaration by the Riigikogu, in its rejection by Moscow, or in both?

These questions have both legal and political aspects, and it is hardly possible to understand the legal issues without understanding the different political positions of the parties. Therefore, before the law can be addressed, relevant diplomatic and political exposition has to be provided.

2. The diplomacy of legal positions during Estonian–Russian border negotiations in 1991–2005

In order to understand the meaning and context of the declaration made at the ratification of the border treaties by the Estonian parliament, one needs to look back at the history of the Russian–Estonian border negotiations of the 1990s. On 20 August 1991, the Supreme Soviet of the Republic of Estonia⁴ proclaimed the restoration of the Republic of Estonia. Due to the illegality of the Soviet occupation and annexation of 1940, the Republic of Estonia proclaimed legal identity and continuity with its pre-World-War-II name-sake.⁵ Soviet Russia had recognised the independence of the Republic of Estonia in the Tartu Peace Treaty of 2 February 1920. Since this treaty⁶ was signed following the Estonian War of Independence (1918–1920), the borders established by it reflected Estonia’s military and diplomatic success. Several villages beyond the river of Narva and in Setumaa (Pechorski rayon) that were inhabited by a predominantly Russian-speaking population became part of the territory of the Republic of Estonia.

It lies in the logic of wars that the winners try to benefit from them. The same is true when what could otherwise be achieved only through a successful war can be achieved through other forms of pressure and

³ See ‘Russia Against Border Treaty Ratified by Estonia — Top Lawmaker’. — MosNews, 20 June 2005. Available at: www.mosnews.com.

⁴ In the self-contradictory and question-begging name of this elected body are reflected the legal complexities of the process of the separation of Estonia from the USSR.

⁵ See, further, L. Mälksoo, *Illegal Annexation and State Continuity: The Case of the Incorporation of the Baltic States by the USSR — A Study of the Tension Between Normativity and Power in International Law*. Leiden, Boston: Martinus Nijhoff 2003. Translations of this book in the Estonian and Russian languages were published in 2005 by Tartu University Press.

⁶ There is also another Tartu Peace Treaty from the same year, concluded between Finland and Soviet Russia on 14 October 1920 in the house of the Estonian Students’ Society in Tartu. This treaty is not discussed in the present article.

force short of war. In 1940, the USSR was able, through a chain of ultimata and broken treaties, to incorporate the republics of Estonia, Latvia, and Lithuania in its composition, as Soviet republics. In 1941–1944, the Baltic States were occupied by Germany. The Red Army returned victorious in September 1944.

In 1944 and 1945, the USSR, ‘responding to the demands of the local people’, unilaterally ‘corrected’ the inner-Soviet border of the Russian SSFR with the Estonian and the Latvian SSRs. Approximately 5% of the pre-WWII territory of the Republic of Estonia was ‘returned’ to Soviet Russia. The Soviet-imposed Russian–Estonian border was as ethnically purist in nature as was the border established by the Tartu Peace Treaty — a number of villages of the Setu people, who consider themselves to belong to Estonia rather than Russia, were claimed as part of the Russian SSFR.

This was the situation when the independence of Estonia was restored in August 1991. When the new, constitutionally elected Estonian government became operational in 1992, it followed the logic of a policy of state restorationism and put forward to the Russian Federation a claim to the state borders as established in the 1920 Tartu Peace Treaty. However, Yeltsin’s Russian Federation rejected this claim, and Estonia was unable to gather significant diplomatic support for its demands. In 1994, the Estonian foreign minister hinted that it is unrealistic to expect the restoration of the borders as set forth in the Tartu Peace Treaty *in toto*. Instead, Estonian diplomacy was aiming at the return of ethnic Setu villages to the composition of the Republic of Estonia, or, as one commentator put it, ‘a dignified compromise’. However, Yeltsin’s Russian Federation’s ‘nyet’ remained unchanged. The Russian Federation has maintained that the Tartu Peace Treaty ceased to be a legally relevant treaty between two independent states in 1940 when the Republic of Estonia ‘entered’ the USSR and was transformed into a Soviet republic.

In 1995, Estonian foreign policy took a more conciliatory approach, partly because a certain soberness and realism regarding the prospects for restoration of the borders of the Tartu Peace Treaty reached Estonian public opinion, and partly because the EU insisted that it would not take up accession negotiations with Estonia unless the latter were to resolve its border issues with the Russian Federation. The essence of the 1995 ‘Tarand initiative’ (named after Andres Tarand, then prime minister of the Estonian cabinet) was the separation of the issue of the Estonian–Russian border from the general question of whether the Tartu Peace Treaty is in force or not. The Estonian government gave in to the extent that it agreed that the 1944–1945 Soviet-created *status quo* would be transformed into the mutually recognised border between the Russian Federation and the Republic of Estonia. However, Estonia insisted that it considers the 1920 Tartu Peace Treaty to have been, and remain, continuously valid, with the exception of its borders being modified by the new border treaties essentially recognising the Soviet *fait accompli* of 1944–1945.

To ‘give up’ the Tartu Peace Treaty altogether would not have been a constitutionally available option for the Estonian government. Article 122 of the Constitution of the Republic of Estonia, adopted with the popular referendum of 28 June 1992, states that ‘the land border of the Republic of Estonia shall be determined by the Tartu Peace Treaty of 2 February 1920, and other international border treaties’. A constitutional debate ensued during the 1990s as to whether this stipulation in the constitution permits the Estonian government in any way to conclude other border treaties that diverge from the lines of the Tartu Peace Treaty. While the hardline interpretation denied such a possibility, the then legal chancellor of the Republic of Estonia, Professor Eerik-Juhan Truuväli, suggested that as long as the new border treaties would reflect the border of the Tartu Peace Treaty in some (symbolic) areas, the requirements of the constitution would be formally fulfilled. Thus, the Estonian delegation during border negotiations suggested that the new border treaties would have to go back to the border line of the Tartu Peace Treaty — at least in symbolic yet formally significant part. It was then agreed that the border at Pskov lake between Russia and Estonia would reflect the pre-WWII border. This was an inventive solution offered by legal imagination in order ‘to satisfy the needs of both parties’ — while the uncompromising minority opinion in Estonia criticised this solution as a cheap trick.

Initially, Estonia insisted that, as *quid pro quo* for its ‘territorial concessions’ to Russia, the new border treaties mention the general applicability of the Tartu Peace Treaty; i.e., Russia should explicitly recognise the peace treaty’s continued legal validity as such. Since Russia, being afraid of the consequences of acknowledgement of the Soviet occupation as such, refused to do so, the Estonian side took the view that the Tartu Peace Treaty — never having been invalidated or suspended — would continue to be in force anyway (i.e., even without explicit mention in the new treaties). In that case, Estonia maintained, the Tartu Peace Treaty would only be implicitly modified through another treaty (the new border treaties). This position — that the modified Tartu Peace Treaty would continue to be in force notwithstanding the fact that a newer border treaty made no explicit reference to it — was the Estonian position when the new border treaties were signed on 18 May 2005.

It is also interesting to note that in 2004, when Russia signalled to Estonia that obstacles in the way of signing the border treaties had finally faded away, it first suggested accompanying the border treaties with a declaration concerning the shared history of the two countries. The draft of the declaration suggested by the Russian Federation was soon leaked to the Estonian media and published in the daily *Eesti Päevaleht*. It was harshly criticised by Estonian public opinion since its wording was quite unanimously considered Russia’s

attempt to impose on Estonia, in connection with the conclusion of the new border treaties, the official Russian view of the history of the 20th century, denying the internationally wrongful acts committed against the Republic of Estonia by the USSR and pushing aside the occupation claim. Thus, by rejecting the draft of the common declaration first offered by the Russian ministry of foreign affairs, Estonia rejected Russia's claim about its preferred interpretation of Estonia's international legal status. In its turn, by expressing its dissatisfaction over the declaration unilaterally adopted by the parliament of the Republic of Estonia (even to the extent of suggesting a restart to the border negotiations), the Russian foreign ministry made it clear that it was not prepared to accept Estonia's claim of illegal Soviet occupation in 1940–1991.

3. The debate about the validity of the Tartu Peace Treaty: historical symbolism and the pursuit of recognition

The Estonian–Russian debate about common state borders (in the legal sense almost identical to the Latvian–Russian border debate) has a link to the more general problematic of state identity, state status in international law.⁷ Thus, the Republic of Estonia and the Russian Federation do not disagree about their mutual borders any longer; rather, they disagree about their 'stories' (history) and international legal status as states.

The core of the debate is the refusal of the Kremlin to recognise the illegality of the Soviet occupation and annexation of the three Baltic republics in 1940. Almost all countries, historians, and international law scholars confirm the Baltic view that the Soviet 'incorporation' of these republics violated international law in force at that time. But the government of the Russian Federation continues to deny this view.

The Russian government has done so in part because the debate about the international legal status of the Republic of Estonia has more than just symbolic-historical connotations. Many of the practical issues involved here are, from the legal point of view, related to the Tartu Peace Treaty border issue. Consider the issue of the citizenship rights of the Russian-speaking minority in Estonia. Russia and Estonia have two quite different legal starting points or benchmarks for discussing this important question. After 1991, Estonia did not grant citizenship automatically to the Soviet-era settlers, insisting on the restoration of citizenship and the possibility for naturalisation and integration through learning of the Estonian language. Moscow has criticised this approach as discriminatory and blamed Estonia for 'using the events of 1940' in order to discriminate against the ethnic Russians. If the birth date of the Republic of Estonia was indeed 20 August 1991, the citizenship policy would have no doubt been discriminatory and unacceptable from the point of view of international law. On the other hand, however, the continuator state of the former occupying power would hardly have any legal or moral right to present itself as the defender of the human rights of the settlers who were transplanted in contravention of international law in the first place (and who could have been automatically given Russian citizenship upon the dissolution of the USSR). Luckily, the intensity surrounding the issue seems to be fading away, as there has recently been considerable progress in the integration of the Russian-speaking minority in Estonia.

Another issue of the same general nature is whether the Republic of Estonia would be entitled to compensation for the repression and crimes carried out against its citizens during the Soviet era. The politically motivated arrests, imprisonments, and mass deportations during the 1940s and 1950s, in particular, have been singled out as crimes against humanity by Baltic courts and commissions concerned with international history, such as the Estonian International Commission for the Investigation of Crimes Against Humanity, chaired by former Finnish diplomat Max Jakobson.⁸ One of the reasons that Russia has been so reluctant to recognise Estonia's claim of state continuity (and, in connection therewith, the Tartu Peace Treaty) has been its fear of compensation claims from Estonia and the other two Baltic States.

Some of the more complex issues are the fate of the Tartu (Iur'ev) University museological collection that was removed in 1918 to Voronezh, Russia, which according to the Tartu Peace Treaty had to be returned to the university in Tartu, Estonia. Russia did not fulfil this obligation in the 1920s–1930s, and the valuable collection remained in Voronezh. Were Russia now to recognise the validity of the Tartu Peace Treaty, it would have no argument for the collection not being returned to Tartu or an explanation as to why it was not

⁷ See, on issues of state identity/continuity in the context of the three Baltic States (Estonia, Latvia, and Lithuania), e.g., B. Meissner. *Die Sowjetunion, die baltischen Staaten und das Völkerrecht*. Köln: Verlag für Politik und Wirtschaft 1956; W.J.H. Hough III. *The Annexation of the Baltic States and Its Effect on the Development of Law Prohibiting Forcible Seizure of Territory*. – New York Law School Journal of International and Comparative Law 1985 (6), pp. 301–533.

⁸ See further material at www.historycommission.ee.

returned to Tartu in the first place. A related issue is the fate of the festive insignia of pre-WWII Estonian president Konstantin Päts that Moscow keeps in its state archives as a form of ‘booty’. Estonia has demanded that the insignia of President Päts be returned, and Moscow has hinted that it is in principle prepared to do so; however, the return has to wait for ‘politically better times’. Again, it makes a difference whether the Republic of Estonia has a legal right to the return of these state symbols or it would be simply an act of friendliness and grace on Russia’s part, in the anticipation of reciprocity in the form of gifts from Estonia.

Nevertheless, the most important aspect of the question of state identity/continuity for the Republic of Estonia remains the symbolic one, the fact that it affects the fundamental and constitutionally enshrined self-understanding of the Republic of Estonia. It was not so much because of old museological collections or probably even hopes for compensation for persecution by the Soviet regime (most Estonians consider it unlikely that the Russian government would ever pay such damages) that the general validity of the Tartu Peace Treaty (minus borders) was reconfirmed by the Estonian parliament. Lawyers and historians have unanimously called the Tartu Peace Treaty of 2 February 1920 the ‘birth certificate’ of the Republic of Estonia. This treaty was the first treaty in the history of international law in which secession was *expressis verbis* recognised on the basis of the right of peoples to self-determination.

Article II of the Tartu Peace Treaty states:

‘On the basis of the right of all peoples freely to decide their destinies, and even to separate themselves completely from the state of which they form a part, a right proclaimed by the Federal Socialist Republic of Soviet Russia, Russia unreservedly recognises the independence and autonomy of the State of Estonia and renounces voluntarily and forever all rights of sovereignty formerly held by Russia over the Estonian people and territory of Estonia by virtue of the former legal situation, and by virtue of international treaties, which, in respect of such rights, shall henceforth lose their force.

No obligation to Russia devolves upon the Estonian people and territory from the fact that Estonia was formerly part of Russia.’⁹

Seen in this light, the debate about the continued validity of the Tartu Peace Treaty is in the first place a symbolic one, one about the recognition already given. The recognition that Estonia sought from Russia and achieved in 1920 was unconditional and ‘forever’. The Estonian negotiators insisted at the Tartu Peace Conference that the treaty contain references to Estonia and Russia as states and not to their respective and potentially fluctuating forms of government (‘bourgeois’ republic, Soviet republic, etc.).¹⁰ Yet in 1939–1940 Stalin’s Soviet Russia grossly violated the Soviet Russian recognition granted in 1920. It is now very difficult for Russia to prove convincingly what exactly in international law terminated, in 1940 or subsequently, the applicability of Article II of the Tartu Peace Treaty. Since today’s Russia has been incapable of and/or unwilling to apologise concerning the Soviet aggression of 1940, it was the forward-looking *raison d’état* of the Republic of Estonia to make it clear that the Estonian acquiescence to the Soviet-imposed borders did not imply the retrospective legalisation of the Soviet occupation and annexation.

4. Legal questions concerning future solutions

Taking into account the fact that the Russian Federation maintains that the Tartu Peace Treaty became invalid more than sixty years ago (in 1940), can the Republic of Estonia seriously maintain that the 1920 peace treaty continuously remains valid and applicable?

International treaties can be terminated either by *ad hoc* mutual consent of the parties or by using provisions explicitly contained either in the relevant treaties or more generally in the Vienna Convention on the Law of Treaties.¹¹ The Tartu Peace Treaty, being a *traité-loi* and creating a new international legal status for Estonia, was such a fundamental and groundbreaking treaty that it, obviously, did not contain any provisions for its termination. Of the general principles contained in the Vienna Convention, Russia cannot invoke the principle of fundamental change of circumstances, *clausula rebus sic stantibus*, since the USSR not only ‘contributed’ through internationally wrongful acts to the circumstances that could now be invoked but through its wrongful acts brought such circumstances into being. Therefore, Russia has from the legal standpoint a quite weak case in favour of the argument that the Tartu Peace Treaty was terminated in 1940. No other state seems to share Russia’s officially represented view that the Baltic States ‘joined the USSR voluntarily’ and did so in accordance with international law.

⁹ Peace Treaty of Tartu, 2 February 1920. League of Nations Treaty Series. Vol. XI, pp. 51–52.

¹⁰ A. Piip. Mälestused iseseisvuse võitluspäevilt. II köide. Vabadussõda 1918–1920 (Recollections of independence fight. Vol. II. War of Independence 1918–1920). Tallinn: ‘Rahvaülikooli’ kirjastus 1930, p. 391 (in Estonian).

¹¹ Adopted on 22 May 1969, United Nations Treaty Series, Vol. 1155, p. 331.

Thus, until the Russian Federation would come up with a serious legal argument as to why the Tartu Peace Treaty has been invalidated and why the USSR did not occupy Estonia (illegally) in 1940, the Republic of Estonia can in fact consider the Tartu Peace Treaty to be a continuously valid international treaty. The recognition given to Estonia's statehood in the Tartu Peace Treaty cannot be taken back — just as the historical fact cannot be taken back that in 1940 this recognition was violated.

Politically, the overreaction of the Russian government to the declaration added by the parliament of Estonia to the law of ratification of the 2005 border treaties seems to demonstrate that official Russia will continue to refuse to recognise the illegality of the Soviet occupation of the Baltic States in 1940 and afterwards. It will probably continue to do so until it feels that its own state identity is symbolically threatened. Possibly, it will be ready to recognise the fact of occupation and make formal apology only when it receives a guarantee to the effect that no practically harmful consequences for Russia are to follow from the acknowledgement of the occupation (for example, when all of the Baltic victims of Soviet repression are dead).

Retrospectively, we may conclude from the ensoubering ratification procedure that it was either naïve or wishful thinking to believe that conclusion of the Estonian–Russian border treaties would have been possible in a state of disagreement about fundamentals, especially the question of the illegality of the occupation and annexation of 1940 and the corresponding international legal status (in terms of state continuity) of the Baltic States.

To make the kind of declaration ('preamble' to the ratification law) that the Estonian parliament adopted when ratifying the border treaties on 18 May 2005 is in itself not uncommon practice for states. States ratify treaties yet consider it sometimes necessary to explain their interpretation stance with respect to certain aspects of the treaty in question. The Estonian unilateral declaration is not a reservation under the Vienna Convention (reservations are not allowed for bilateral treaties), nor is it a preamble to the treaty itself (since it is not the act of both parties). The Russian Federation could still have ratified the treaties and made a declaration of its own, setting forth **why** the Estonian interpretative declaration was unacceptable to Russia. The most striking feature of the Russian decision is, again, the lack of any serious legal argumentation as to why Russia disagrees with the Riigikogu about the question of occupation or the principle of Estonia's state continuity. It is misleading to say that it was wrong of the Estonian parliament to make such a declaration since doing so was not agreed upon during the negotiations. The Estonian position on those issues has been unchanged since 1991–1992; it was simply reconfirmed and re-communicated to the treaty partner. As far as the references to previous declarations made by the Estonian parliament are concerned, the earlier declarations of the Riigikogu are there in the legal field in any case; nothing and nobody has changed them since they were made in 1991–1992.

The foreign ministry of Estonia has taken the view that it has no intention to restart negotiations about the border since there is nothing left to discuss. Estonia has ratified the treaties and considers the case closed. A unilateral declaration added at the ratification of a bilateral treaty is not technically part of the treaty itself; it is the context in which a treaty partner sees the treaty. The other party may agree to this interpretation or disagree with it. Moreover, foreign policy analysts argue that, since the current demarcation line between Estonia and Russia has *de facto* functioned as a state border anyway, there is not even immediate need for ratification of the border treaty on both sides.

Nevertheless, the existing outcome of the border treaties debate should not satisfy either of the parties. In the future, the Russian Federation may still want to choose to ratify the treaties. Another possibility would be common revisiting of the issue and compromise that could be envisaged along the lines of adding the reconfirmation of Article II of the 1920 Tartu Peace Treaty as a general part of the text of the 2005 border treaties, as substantive content.

5. Summary

This article has tackled international law issues — or, rather, the central international law issue — related to recent diplomatic developments regarding the state border between the Republic of Estonia and the Russian Federation. On 18 May 2005, the foreign ministers of both countries signed border treaties in Moscow (one concerning the land border, the other the sea border) between their countries. One month later, the Estonian parliament, the Riigikogu, ratified both treaties — adding, however, to the ratification a legal-historical declaration that referred to the continuity of the Republic of Estonia. On 1 September 2005, President Putin of Russia signed an order rescinding Russia's signature of the border treaties.

The article has examined the role of the underlying issue, that being the different visions that Russia and Estonia have of the international legal status of the latter, the Estonian insistence on there having been Soviet occupation (1940–1941, 1944–1991), and the claim of the continuity of the Republic of Estonia.



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Justice Laws of 1889 — a Step in Estonia's Constitutional Development

1. Introduction

Considering Estonia's history and history recording traditions, it may be understood why the history of written constitutions of Estonia, or to be more exact, records of the related history, usually start with the birth of the Constitution of 1920.

The written history of Estonian law indicates that the acts preceding the constitutions have been referred to only in a few cases. Moreover, the prevailing understanding of these writings is that the principles of the rule of law and the first legal provisions characteristic of a state governed by the rule of law reached the Estonian legislation only when the country became independent and republican constitutions were drawn up after World War I.

This article attempts to give insight into the meaning of the 1889 reform for Estonia's constitutional development, focusing on the implementation of various rule of law principles and provisions in the Estonian legislation before 1917. It should be admitted that those principles and provisions were not implemented fully or without hindrances; the 1889 reform is thus not claimed to have created a state governed by the rule of law in one area of the empire. The article mainly focuses on the procedural codes and the laws regulating courts administration at the time. They are viewed in conjunction because of the historically close intertwining of procedural law and the courts administration.*¹

¹ G. Dahlmanns. Frankreich. – Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte. Bd. 3. Das 19. Jahrhundert. Zweiter Teilband. Gesetzgebung zum Allgemeinen Privatrecht und zum Verfahrensrecht. H. Coing (Hrsg.). München 1982, p. 2489.

2. Public nature of judicial power

The public nature of the administration of justice is taken for granted today and does not usually deserve much attention. However, in the historic view, the state monopoly of justice is a fairly young phenomenon; until the beginning of the 19th century it was common in Europe that the administration of justice (especially in civil matters) was largely non-public or even private.^{*2} The central power had to share the judicial power with many other subjects.

Estonia is no exception, although already in the 1630s a large-scale judicial reform was carried out here (mainly in South Estonia), led by J. Skytte, in which course a (Swedish) state court system was established, topped by the creation of the highest court in Tartu.^{*3} The reform also established state control over non-public courts.^{*4} In later history, fully public courts almost disappeared in Estonia and (Russian) state control over non-public courts weakened substantially. For example, in the Estonian province, the judges working outside of towns were not appointed by any state institution in the 19th century, and they were not remunerated by the state.^{*5}

2.1. Earlier research

Literature discussing the judicial system of the Baltic provinces in the 19th century and the judicial reform of 1889 generally states that the pre-reform courts were class courts. There is no detailed characterisation of the courts; even the public or non-public nature of the courts and the issue of patrimonial courts have not been given a closer view.^{*6} As regards the issue, or rather, silence on the issue of the public nature of the courts, both Baltic-German, Russian and Estonian researchers hold surprisingly similar opinions, but there is reason to believe that their opinions do not arise from the same grounds.

The former Baltic-German elite, especially the knighthood, for a long time tacitly relied on the premise that the 'Baltic Land State' (*Landesstaat*) was indeed a state and its institutions were state institutions. Classes, especially knighthoods, understood themselves to be the *Land*.^{*7} This opinion still prevailed in the 18th, but not in the 19th century.

The traditional way of thinking was still for a long time one of the leads in the Baltic-German approach to history, especially due to political and ideological factors. For example, the *Landtage* of the knighthood are time and again compared to a parliament and not a local council.^{*8} Today's German researcher J. Baberowski uses the term '*die baltische Eigenstaatlichkeit*' to characterise the situation at the time.^{*9} Relying on A. v. Tobien, G. v. Pistohlkors points out the lack of a state as such in Eastern and Central Europe before World War I. He claims that many (public and communal) functions were carried out by various class and patrimonial corporations.^{*10}

² W. Reinhard. *Geschichte der Staatsgewalt. Eine vergleichende Verfassungsgeschichte Europas von den Anfängen bis zur Gegenwart*. München 1999, pp. 291–306. Hereinafter the phrase 'non-public' is used as it also covers private administration of justice. Private and non-public justice are not further distinguished here from the legal and historical viewpoint.

³ E. Blumfeldt. *Gustav II Adolfi reformide ajastu. – Eesti ajalugu III. Rootsi ja Poola aeg (Gustaf II Adolf reform era. – History of Estonia III. Swedish and Polish periods)*. H. Kruus (chief ed.). Tartu 1940, pp. 152–153 (in Estonian).

⁴ A. Tering. *Über die Juristenausbildung der Mitglieder des Hofgerichts in Dorpat (Tartu) 1630–1710. – Tartu Ülikooli Toimetised. Vihik 868; Iz istorii juridicheskogo obrazovaniya v Estonii v XVII–XIX vv.* Tartu 1989, p. 28.

⁵ *Svod Mestnyh Zakonov Gubernii Ostzeiskih. Chast pervaya. Utchrezhdeniya. Sankt-Peterburg 1845, §§ 848–853, 892–894, 921–926, 928, 966, 971.*

⁶ In his thorough monography 'Vallakohus Eestis 18. sajandi keskpaigast kuni 1866. aasta reformini' ('Parish courts in Estonia from mid-18th century to the 1866 reform') (Tallinn 1980), A. Traat does not use the term 'patrimonial court'. For example, in the division into periods of parish court history, he distinguishes between parish courts of the period of demise of serfdom and feudalism (mid-18th century to 1866) on one hand and those of the capitalist period (1866–1940) on the other hand. The only author whose approach suggests a distinction is J. Jegorov. See J. Jegorov. *Voprosy istorii gosudarstva i prava Estonskoi SSR do Oktyabrskoi revolyutsii*. IV. Tartu 1978, Contents. His textbook 'Istorija gosudarstva i prava Estonskoi SSR' (Tallinn 1981), however, lacks such distinction. According to F.G. v. Bunge, the patrimonial courts of landlords disappeared in Estonia and Livonia already as a result of the laws of 1802–1804. See F.G. v. Bunge. *Geschichte des Gerichtswesens und Gerichtsverfahrens in Liv-, Est- und Curland*. Reval 1874, p. 309.

⁷ J. v. Ungern-Sternberg. *750 aastat Eestimaa rüütelkonda (750 years of knighthood in Estonia)*. – *Akadeemia* 2002/10, pp. 2028–2029 (in Estonian).

⁸ *Ibid.*, pp. 2036–2038.

⁹ J. Baberowski. *Autokratie und Justiz. Zum Verhältnis von Rechtsstaatlichkeit und Rückständigkeit im ausgehenden Zarenreich 1864–1914*. Frankfurt am Main 1996, p. 375.

¹⁰ G. v. Pistohlkors. *Die Ostseeprovinzen unter russischer Herrschaft (1710/95 – 1914)*. – *Deutsche Geschichte im Osten Europas. Baltische Länder*. G. v. Pistohlkors (Hrsg.). Berlin 1994, p. 363.

The leaders of the 1864 judicial reform in the Russian Empire viewed the existing courts as state courts and the 1864 Judicial Authorities Act did not specifically address this aspect. The problem of landlords' patrimonial justice was considered solved together with the elimination of serfdom under item 7 of the Manifest of 19 February 1861 and §§ 25–28 of the act.^{*11} Earlier Russian researchers have adopted the views of the Russian politicians of the time without critique; at least the historiography of the time does not question the issue of the public nature of the courts. According to the prevailing opinion, the courts acting in Russia before the 1864 judicial reform were class courts, but in any case they were state courts.^{*12} This position arises from the peculiarity of development of the Russian legal and judicial system, in which the state and the autocrat played a special role. According to F. Kaiser, **the central power** at the time of Katherine II **granted** the classes the opportunity and right to participate and represent their interests in the administration of justice. The state itself constantly empowered the voice of the aristocracy for various reasons; from 1831 the state allowed the aristocracy to elect the chairman of the provinces court of appeal.^{*13}

Unfortunately, this understanding like some other positions^{*14} has been transposed without further consideration also to the Baltic and Polish provinces of the empire, but as opposed to Russian society, the class corporations here were not a 'state venture'^{*15} without their own original traditions, including in the sphere of administration of justice. The classes and class institutions in the Baltic provinces were original, they were not created by the central power of the Russian empire. The administration of justice was also originally in the hands of the classes themselves and in these provinces, the central power rather attempted to subject to state control the administration of justice that belonged to and was executed by the classes. It should be reminded that apart from the magistrates that administered justice in the towns, the court members and officials of all levels in the Estonian province were elected by the knighthood and they did not require any approval by the representatives of state power to take office.^{*16}

The phrase 'class court' thus bears a different meaning in the Russian and Estonian legal historical writings.

As regards Marxist researchers, an inquiry into the public nature of the courts was prevented by the frameworks of historical-dialectic materialism, and the predefined use of the main categories of this theory — 'basis' and 'superstructure' in the narrow Soviet interpretation. The court belonged to the 'superstructure' of social, political and legal institutions. The court as a repressive punitive body that protected the interests of the governing exploitative class was an inseparable part of the superstructure, the most important part of which was the state. The court in turn came into being after people were divided into the exploited and the exploiters and after private property and statehood emerged.

According to F. Engels, during the primitive communal order (in the archaic legal culture) life ran: 'without soldiers, gendarmes or police; without nobles, kings, governors, prefects or judges; without prisons, without trials....'^{*17} According to J. Stalin: 'The state emerged by a division of society into hostile classes; it emerged to control the exploiting majority in the interests of the minority being exploited. The main instruments of exercising state power are the army, punitive bodies, intelligence service and prisons.'^{*18} From these arguments it was derived that 'Two parallel forms of state duress run in through the entire history of exploitative societies: all forms of administrative duress, of which the strongest is military suppression, on one hand, and the judicial form of state duress, on the other hand.'^{*19}

This opinion was not swayed throughout the Soviet-Marxist legal discourse. Based on the general views of historical-dialectic materialist and Soviet-Marxist legal theory, it was inappropriate in the Soviet legal discourse to question whether the court was actually a public function within the legal meaning of its time, in one stage of history of another.

¹¹ Reformy Aleksandra II. O. Tshistiakov, T. Novitskaya (Sost.). Moskva 1998, p. 25; Manifest 19. fevralya 1861 ob osvobozhdenii pomechtshchikh krestian iz krepostnoi zavisimosti. — Konets krepostnichestva v Rossi. V. Fjodorov (Sost.). Moskva 1994, p. 214; Obchtsee polozhenie o krestjanah, vyzedshikh iz krepostnoi zavisimosti. — Reformy Aleksandra II. O. Tshistiakov, T. Novitskaya (Sost.). Moskva 1998, pp. 43–44.

¹² If it was actually so, is another question.

¹³ F.B. Kaiser. Die russische Justizreform von 1864. Zur Geschichte der russischen Justiz von Katharina II bis 1917. Leiden 1972, p. 21.

¹⁴ For example, T. Karjahärm states that a bar association was established in the Baltic provinces in the course of the 1889 reform. — T. Karjahärm. Ida ja Lääne vahel. Eesti-Vene suhted 1850–1917 (Between east and west. Estonian–Russian relation 1850–1917). Tallinn 1998, p. 81 (in Estonian). In reality, attorneys-at-law had operated in these provinces for a length of time. The 1889 reform eliminated the former requirements for and the organisational structures of attorneys-at-law. — See K. Grau. Advokatuuri õigusajaloolise arengu põhijooni Eestis (Some of the main features of the legal historical development of the Bar Association). — Õigus 1939/8, pp. 357–373 (in Estonian); W. v Rüdiger. Aus dem letzten Kapitel deutsch-baltischer Geschichte in Lettland 1919–1945. Gern 1954, p. 52.

¹⁵ D. Geyer. Gesellschaft als staatliche Veranstaltung. — Jahrbücher für Geschichte Osteuropas. Neue Folge 1966/14, pp. 21–50.

¹⁶ Svod Mestnyh Uzakonenii Gubernii Ostzeiskih. Tshast pervaya. Utchrezhdenija. Sankt-Peterburg 1845, §§ 848–853, 892–894, 921–926.

¹⁷ F. Engels. Perekonna, eraomanduse ja riigi tekkimine (Emergence of family, private property and state). Tallinn 1946, p. 97 (in Estonian).

¹⁸ J. Stalin. Leninismi küsimusi (Leninist issues). Tallinn 1945, p. 530 (in Estonian).

¹⁹ S. Golunski, D. Karev. NSV Liidu kohtukorraldus. Õpperaamat juriidilistele koolidele (USSR courts administration. Textbook for law schools). Tallinn 1949, p. 13 (in Estonian).

Estonian researchers of different periods have tacitly accepted the positions of both Baltic-German and Russian Marxist and non-Marxist authors.

Following from the above, the public nature of justice has not been tackled by the studies of the 1889 judicial reform in Estonia. It is quite an ordinary argument that the German judicial system was replaced by the Russian system^{*20}, but neither the German nor Russian judicial system is a defined legal term. On the other hand, it has been stressed time and again that the courts of the Russian judicial system established by the 1889 reform were, with a few exceptions, non-class courts.^{*21} This is often accompanied by the argument that the maintenance of parish class courts was a most vivid remnant from the feudal system.^{*22}

2.2. Establishment of public judicial power

The fact that a principal change occurred in Estonia in 1889 — a transfer from non-public to public administration of justice — has not actually caught the attention of researchers. Such an approach is surprising for many reasons.

Firstly, the public nature of courts was one of the requirements of the Estonian nationalist movement. Items 7, 8 and 9 of the memorandum submitted to Alexander III by the envoys of Estonian societies on 19 June 1881 concerned the administration of the courts. It was requested in the memorandum that a 'new law on courts' be effected; it was separately pointed out that judges should be appointed by a 'minister of the courts'.^{*23} According to M. Päss, the memorandum stressed the main rights of state power in court administration issues and requested that the pre-emptive rights of the knighthood be abolished.^{*24} These requests were repeated in the petitions submitted during the review by the senator N. Manassein (1882–1883).^{*25}

Secondly, the abolishment of patrimonial courts and transfer to a public judicial system has been regarded as an essential element of the liberation of peasants from serfdom, which formally signifies the completion of the liberation of peasants.^{*26} The abolition of serfdom in turn is one of the problems most studied in the history of peasants both in the national and Soviet historiography.

Thirdly, the public nature of the administration of justice is a primary element of modern court administration under the rule of law, and the transfer to public administration of justice on all levels has a remarkable role in the European judicial history of the 18th–19th centuries. The requirement for public administration of justice was on an important place in the programmes of both French and German middle class–liberal movements and political parties, which saw it as a prerequisite to the equality of all citizens before law. Public administration of justice was also supported by the conservative government of many monarchist states, who saw in it a good opportunity to reduce the power of the classes and subordinate them more firmly to the central power of the state.

The first motive is noticeable in the abolition of patrimonial and seigniorial courts by Decision 4–5 of the French Constituent Assembly of 1789.^{*27} The same motive is also noticeable in the adoption of the Constitution by the German Frankfurt National Assembly in 1849. According to § 174 of the Constitution adopted by the National Assembly, state was the authority with judicial power.^{*28}

²⁰ T. Karjahärm (Note 14), p. 81 (in Estonian).

²¹ See e.g. Eesti Entsüklopeedia. (Estonian encyclopaedia). Vol. 11. Tallinn 2002, p. 287 (in Estonian); E. Hiio. Vallakohtute asutamisest Eestimaa kubermangus (On the establishment of parish courts in the Estonian province). – Ajalooline Ajakiri 1998 (102) 3, p. 89 (in Estonian).

²² V. Kalnyn. Otsherki istorii gosudarstva i prava Latvii XI–XIX vekah. Epoha feodalizma i domonopolisticheskogo kapitalizma. Riga 1980, pp. 167–168; J. Jegorov. Voprosy istorii ... (Note 6), p. 82; V. Peep. Pilguheit Eesti õiguse ja kohtute arengule (A Glance on the development of Estonian law and courts). – Kleio. Ajaloo Ajakiri 1995 (11) 5, p. 23 (in Estonian).

²³ Rahvusliku liikumise radikaalse suuna programm. Eesti seltside saadikute märgukiri Aleksander III-le ajalehes Sakala (19. juuni 1881). Eestirahva saadikute märgukiri. – Venestamine Eestis 1880–1917. Dokumente ja materjale (Programme of the radical branch of the nationalist movement. Memorandum by envoys of Estonian societies to Alexander III in the *Sakala* newspaper (19 June 1881). Memorandum by Estonian envoys. – Russianisation in Estonia 1880–1917. Documents and materials). T. Karjahärm (Comp.). Tallinn 1997, pp. 139–140 (in Estonian).

²⁴ M. Päss. Eestlaste petitsioonid ja kohtureform 1889. a (Petitions by Estonians and judicial reform of 1889). – Õigus 1939/5, p. 219 (in Estonian).

²⁵ *Ibid.*, pp. 220–223.

²⁶ M. Laur. Mõiste 'Bauernbefreiung' tänapäeva saksa ajalookirjanduses (The concept of 'Bauernbefreiung' in modern German history literature). – Kleio. Ajalooline Ajakiri. 1997 (21) 3, p. 41 (in Estonian).

²⁷ Rozhdenije frantsuzskoi burzhuaiznoi politiko-pravovoi sistemy. (K 200-letiju Velikoi frantsuzskoi burzhuaiznoi revolutsii.). A. Koroljov, K. Livantsev (Red.). Leningrad 1990, p. 12.

²⁸ Dokumente zur deutsche Verfassungsgeschichte. Bd. 1. Deutsche Verfassungsdokumente 1803–1850. E.R. Huber (Hrsg.). 3. Aufl. Stuttgart 1978, p. 394.

The second motive is noticeable for example in Germany, when the King of Württemberg liquidated patrimonial administration of justice by his rescript of 10 May 1809.^{*29} The king's order did not only eliminate the judicial power of clerical and secular estate owners (*Grundherr*) (i.e. patrimonial judicial power in the narrow meaning), but also the judicial power of imperial institutions (*Reichstift*), imperial knights (*Reichsritter*) and lords of the estate (*Standesherr*) who had lost their independence during mediatisation (patrimonial judicial power in the broad meaning).

In implementing the Russian judicial reform of 1864 in the inner Russian provinces, the educated and liberal circles of Russian society largely support the first motive, i.e. the equality of all citizens before law, although it is not associated with public administration of justice, but with class justice. Complying with the motive that inspired the liberal circles was not an aim for the Russian autocracy; its aim was to create a more efficient state by importing the latest achievements of Western (legal) science and statehood.^{*30}

In the 1889 judicial reform in the Baltic provinces, the second motive is more noticeable — the central government's wish to gain stronger control of the diverse population and territory by way of creating state courts.^{*31} Naturally, the Baltic-German elite sensed the central government's motive and saw the establishment of public administration of justice as the breaking of the former constitution and an element of Russianisation.^{*32}

These views were carried over to the later historiography of the judicial reform, which is why it has often been treated in the particular context of Russianisation.^{*33} Only in later historiography did the approach become more differentiated, seeing modernising elements besides Russianisation.^{*34}

Speaking about the public nature of the judicial power, it should be admitted that the administration of justice did not become fully public.

Clerical courts continued to exist side by side with public courts and they had extensive competence in family law and matrimonial law. The Orthodox and Lutheran churches operated in parallel in Estonia, but had different relations with the Russian state authority.

Secondly, the peasants' parish court remained, which has been generally assessed in a negative way as a remnant from the previous period.^{*35} A fact overlooked is that as opposed to the peasants' courts operating before the 1889 reform, the peasant courts that existed after the reform were integrated into the state court system. The state, i.e. the state court in the form of the local district court appointed the members of the parish court of their area, who were elected by the plenary in a secret ballot. The district court could choose not to appoint the parish court members only in the cases expressly and exhaustively listed in law, i.e. if the rules of the election procedure were violated or unsuitable candidates were elected.^{*36} The parish court's instance of appeal was the peasant court of second instance, whose chairman was also appointed by the state, i.e. the central state power represented by the Minister of Justice.^{*37} The cassation instance of the peasant courts was the district court, in which a representative of the prosecuting authority participated when reviewing the decisions of the peasant court of second instance by way of cassation proceedings. The district court had the function of general administration and supervision of the peasant courts in its area. The state laid down the competence of peasant courts in civil and criminal law by legislation, providing fairly exact procedural rules.

²⁹ S. Werthmann. Vom Ende der Patrimonialgerichtsbarkeit. Ein Beitrag zur deutschen Justizgeschichte des 19. Jahrhunderts. Frankfurt am Main 1995, pp. 49–53.

³⁰ J. Baberowski. Europa in Rußland: Justizreformen im ausgehenden Zarenreich am Beispiel der Geschworenengerichte 1864–1914. – Reformen im Rußland des 19. und 20. Jahrhunderts. D. Beyrau, I. Cicurov, M. Stolleis (Hrsg.). Frankfurt am Main 1996, p. 151.

³¹ E. Jansen. Aleksander III venestusreformid ja eesti avalikkus (Russianisation reforms of Alexander III and the Estonian public). – Acta Historica Tallinnensia 1999/3, p. 47 (in Estonian).

³² G. Pistolkohrs. Ritterschaftliche Reformpolitik zwischen Russifizierung und Revolution. Göttinger Bausteine zur Geschichtswissenschaft. Bd. 48. Göttingen 1978, pp. 22–23.

³³ A. Tobien. Die Livländische Ritterschaft in ihrem Verhältnis zum Zarismus und russischen Nationalismus. Bd. I. Riga 1925, Bd. II. Berlin 1930; M. Haltzel. Der Abbau der deutschen ständischen Selbstverwaltung in den Ostseeprovinzen Russlands. Ein Beitrag zur Geschichte der russischen Unifizierungspolitik 1855–1905. Marburg/Lahn 1977, p. 72.

³⁴ Deutsche Geschichte im Osten Europas. Baltische Länder. G. Pistolkohrs. Berlin 1994, p. 400; Russification in the Baltic Provinces and Finland, 1855–1914. E.C. Thaden (ed.). Princeton 1981, pp. 306–313. Of Estonian authors, see E. Jansen (Note 31), pp. 39–65.

³⁵ V. Kalnyn. Otsherki istorii gosudarstva i prava Latvii XI–XIX vekah. Epoha feodalizma i domonopolitistsheskogo kapitalizma. Riga 1980, pp. 167–168; J. Jegorov. Voprosy istorii... (Note 6), p. 82; V. Peep (Note 22), p. 23.

³⁶ Polnoe Sobranie Zakonov Rossiiskoi Imperii. Izdanie 3 (hereinafter PSZ-3) Nr. 6188. Polozheniye o preobrazovanii krestyanskikh prisutstvennykh mest v Pribaltiiskikh guberniakh. Tshast A. Volostnoi sudebnyi ustav, § 13.

³⁷ PSZ-3. Nr. 6188. Polozheniye o preobrazovanii krestyanskikh prisutstvennykh mest v Pribaltiiskikh guberniakh. Tshast A. Volostnoi sudebnyi ustav, § 30.

3. Separation of powers

Speaking about the principles characteristic to a state governed by the rule of law, the principle of separation of powers has an important role, being one of the primary elements of modern courts administration and one of the guarantees to the independence of the judicial power. In the historical context, this chiefly means freeing the executive power of the duties of administration of justice, which were transferred to independent judicial bodies.^{*38}

3.1. Concealment of the separation of powers

As opposed to the issue of the public nature of courts, the problem of separation of powers in the judicial reform has been clearly acknowledged. Considering the political situation in the autocratic Russia, it is not so much the separation of powers, but the resulting independence of the courts that is being talked about. No distinction has been made between the two levels of the courts' independence: the level of objective independence on the one hand and the level of personal independence on the other hand.

Section 1 of the Bases for the Court Reform, approved by Alexander II on 29 September 1862, expressly states that

‘Judicial power shall be separated from executive, administrative and legislative powers.’^{*39}

The next section of the Bases for the Court Reform, also repeated in § 1 of the Judicial Authorities Act of 1864, clearly states that judicial power is vested only in district courts, circuit courts, courts of appeal and the Supreme Court:

‘District court judges and assemblies thereof, circuit courts, courts of appeal and the Supreme Court as the highest court of annulment have judicial authority.’^{*40}

The principle of independence of the judicial power was also reflected in the Code of Civil Procedure (§§ 1, 2, 9, 10) and the Code of Criminal Procedure (§§ 1, 2, 3, 4, 5, 12, 13).

Section 1 of the Code of Civil Procedure stated:

‘Any civil law dispute shall be settled by the courts.’^{*41}

Section 1 of the Code of Criminal Procedure (Criminal Court Procedure Act) stated:

‘Nobody must be investigated by the courts for a crime or offence unless he has been brought to justice by the procedure set out in the rules of this Act.’^{*42}

The concealment of the problem of the separation of powers behind the wording of the independence of the courts was carried forward to the legal dogmatic literature of the Russian empire of that time.^{*43}

Remarkably, the Soviet Russian legal history literature continued the traditions of the 19th century legal writing, speaking about the independence of the courts, but avoiding the underlying theory of the separation of powers.^{*44} The independence of the courts is discussed in very narrow frames, understanding it only as

³⁸ E. Holthöfer. Ein deutscher Weg zu moderner und rechtsstaatlicher Gerichtsverfassung. Das Beispiel Württemberg. Veröffentlichungen der Kommission für Geschichtliche Landeskunde in Baden-Württemberg. Reihe B. Forschungen. Bd. 137. Stuttgart 1997, pp. 7–8.

³⁹ Sudebnye Ustavy 20. noyabrya 1864 goda s izlozheniem rasuzhdenii, na koikh oni osnovany. Vtoroe dopolnennoe izdanie. Ts. III. Utshrezhdenie sudebnykh ustanovlenii. Sankt-Peterburg 1867, p. XLII. This division differs from the usual division into three.

⁴⁰ Keisri Aleksandri Teise Kohtuseaduses ühes seadustega kohtuolu ja talurahva koosoleku kohtade uuendamisest Balti kubermangudes ja Rahukohtumõistjatelt pääle pandavate nuhtluste seadusega (Courts Act of Tsar Alexander II with laws on updating court administration and peasant meeting places in the Baltic provinces and the law on punishments imposed by district judges). K. Tiisik, J. Truusman, T. Vares (Transl.). Eraväljaanne. Kohtukohtade seadlus. Väljaanne aastast 1883, kuhu 1886. a. jätku paragrahvid sisse on võetud ja 1887. a. jätku paragrahvid juurde lisatud (Private publication. Courts Act. Criminal Court Procedure Act 1883 Publication including the 1886 and 1887 continuation sections). Tallinn 1889, p. 3 (5) (in Estonian).

⁴¹ *Ibid.* Tsiviilkohtupidamise seadus. Väljaanne aastast 1883, kuhu 1886. a. jätku paragrahvid sisse on võetud ja 1887. a. jätku paragrahvid juurde lisatud (Civil Court Procedure Act 1883 publication including the 1886 and 1887 continuation sections). Tallinn 1889, p. 3 (53) (in Estonian).

⁴² *Ibid.* Kaelakohtupidamise seadus. Väljaanne aastast 1883, kuhu 1886. a. jätku paragrahvid sisse on võetud ja 1887. a. jätku paragrahvid juurde lisatud (Criminal Court Procedure Act 1883 publication including the 1886 and 1887 continuation sections). Tallinn 1889, p. 3 (160) (in Estonian).

⁴³ See e.g. J. Vaskovski. Kurs grazhdanskogo protsesssa. T. I. Subiekty i obiekty protsesssa, protsessualnyaotnoshenia i deistvia. Moskva 1913 (contents and index); A. Golmsten. Utshebnik russkogo grazhdanskogo sudoproizvodstva. 4. izd. Sankt-Peterburg 1907, pp. 28–33; I. Foinitski. Kurs ugolovnogo sudoproizvodstva. T. I. 4. izd. Sankt-Peterburg 1912, index.

⁴⁴ B. Vilenski. Sudebnaja reforma i kontreforma v Rossii. Saratov 1969, pp. 335–338.

independence from the executive power of the state. Following this narrow approach, it could be said that the courts of the Baltic provinces (especially the Estonian province) were sufficiently independent from the executive power of the Russian empire already before the reform, and took decisions that were indeed not approved by the empire (for example, the case of the Tallinn Mayor W. Greiffenhagen).^{*45} However, the question about the relation of the class courts of the time to the other class institutions has not been answered.

I believe that this is not an accidental phenomenon, but the approach of the Soviet legal history writing is rooted in the Marxist-Leninist legal theory. According to Soviet authors, already F. Engels assessed the theory of the separation of powers to be 'ridiculous', completely unfeasible, and a manifestation of mankind's fear of itself.^{*46} According to Soviet legal theory, 'the Soviet power was standing on the unity of the power of the workers from top to bottom'.^{*47} The fullness of the power was centred around the councils, particularly the Supreme Council of the Soviet Union.^{*48} This opinion was not merely a theoretical point of view, but had a firm position in political programme documents.^{*49}

3.2. Breaking the separation of powers in the empire

In line with the general focus of the Marxist historiography of the judicial reform on counter reforms rather than the reform itself, Soviet authors have paid most attention to breaking the independence of the judicial power on the institutional level. Two legislative acts are pointed out: the Emergency Situations Act of 14 August 1881 and the District Bailiffs Act of 12 July 1889.^{*50}

The act of 14 August 1881, or to be more exact, the decision of the Committee of Ministers, codified and systematised the repressive acts of earlier years. This act has deserved quite different evaluations in non-Marxist historiography.^{*51} The US researcher R. Pipes calls it the most important act between the 1861 manifest abolishing serfdom and the 1905 October Manifest, a constitution under which Russia was governed.^{*52} This, however, is not an original view, as already V. Lenin called this Act the factual Russian Constitution and his assessment was used also in the Soviet historiography.^{*53}

According to this act, an enhanced state of defence (*usilennaya ohrana*) could be declared by the Interior Minister or a governor general in his subordinate province. An emergency state of defence (*tshrezvytshainaya ohrana*) could be declared by the Interior Minister with the consent of the Committee of Ministers, subject to the tsar's approval.^{*54} In an enhanced state of defence, governors general, or in their absence, governors and town mayors could issue regulations and instructions to secure public order. Any violations of such regulations and instructions were handled by the aforementioned officials, who could impose a fine of up to 500 roubles or three months arrest. They could prohibit all public and private meetings and gatherings, close commercial and industrial undertakings, etc.

In an emergency state of defence, governors generals or deputy governors (*glavnonatshalstvujushchi*) separately appointed by the tsar had much greater powers. Besides other measures of securing order, they could

⁴⁵ M. Haltzel. Der Abbau der deutschen ständischen Selbstverwaltung in den Ostseeprovinzen Russland. Ein Beitrag zur Geschichte der russischen Unifizierungspolitik 1855–1905. Marburg, Lahn 1977, p. 85.

⁴⁶ S. Golunski, D. Karev. NSV Liidu kohtukorraldus. Õpperaamat juriidilistele koolidele (USSR courts administration. Textbook for law schools). Tallinn 1949, p. 19 (in Estonian). It is indeed a position of the Soviet legal theory, since F. Engels in this context speaks about the trinity of legislative power (*trijedinstvo zakonodatelnoi vlasti*), consisting in England of monarchist, aristocratic and democratic elements. See F. Engels. Polozhenie Anglii. Angliiskaya konstitutsia. – K. Marks, F. Engels. Sotshinenia. T. 2. Izd. 2. Moskva 1955, pp. 620–623.

⁴⁷ A. Vyshinski. Nõukogude riigiõigus. Õpperaamat juriidilistele instituutidele (Soviet constitutional law. Textbook for law institutes). Tartu 1941, p. 311 (in Estonian).

⁴⁸ *Ibid.*, p. 314.

⁴⁹ Item 5 of the Communist Party of the Soviet Union: 'Ensuring the working masses an incomparably broader opportunity than under bourgeois democracy and parliamentarism, to proceed with the election and removal of delegates in the easiest and best accessible way for workers and peasants, the Soviet power simultaneously destroys the dark sides of parliamentarism, especially the separation of legislative and executive powers, the separation of representative bodies from the masses, etc.' See A. Vyshinski (Note 47), p. 311.

⁵⁰ PSZ-3 Nr. 350 Polozhenie o merakh k ohraneniu gosudarstvennogo porjadka i obshtshestvennogo spokoistvia; it was later codified Svod Zakonov T. XIV Svod ustavov o preduprezhdenii i presetshenii prestuplenii § 1 primetshaniye 2 pril. I Izd. 1890; PSZ-3 T. IX Nr. 6196, 6484.

⁵¹ J. Baberowski gives a positive assessment of this act, as it provides a legal frame for emergency situation and restricts the arbitrary action of local representatives of executive power. Thus, it has functions that increase and also restrict the powers of officials. – J. Baberowski (Note 9), pp. 704–705.

⁵² R. Pipes. Rossia pri starom rezhime. Moskva 1993, p. 398.

⁵³ A. Davidovits. Samoderzavie v epokhu imperializma. (Klassovaja sushtshnost i evolyutsiya absoljutyizma v Rossii). Moskva 1975, p. 225.

⁵⁴ Earlier Estonian literature (until 1940) also uses the terms 'elevated' and 'extraordinary watch' (see K. Trakman. Kaitseseisukord (State of defence). – Õigus 1930/1, pp. 3–16 (in Estonian)). Later literature also makes use of the term 'enhanced vigilance' (see T. Karjahärm (Note 14), p. 122).

impose up to three months of imprisonment (including imprisonment in a fortress) or a fine of up to 3000 roubles by an administrative procedure. They could also remove any officials, including judges, from their offices.^{*55}

The District Bailiffs Act (or Acts, to be more exact) of 12 July 1889 eliminated the district courts elected in most European areas of Russia, replacing them by district bailiffs. The latter were judicial-administrative state authorities appointed by the Interior Minister. So, the separation of judicial and administrative powers was indeed waived in the case of minor civil and criminal matters.

According to B. Vilenski, those two acts annulled the independence of the judicial power.^{*56} The authors of the commentaries to the source publication of 1991 stress the importance of the Emergency Situations Act of 14 August 1881, which according to them abolished the exclusive right of the courts to impose punishments.^{*57} It has been tacitly presumed that these views also applied to the Baltic provinces as parts of the Russian empire, which were increasingly unified with the remaining areas of the empire.

3.3. ... and its maintenance in the Baltic provinces

This simplified approach, however, is misleading. At first, it should be made clear that one of the main goals of the empire-wide judicial reform besides modernising the administration of justice was to unify the legislation (at least some areas of it) on the whole territory of the empire^{*58}, but this was not achieved.

The act of 12 July 1889 was not implemented in the Baltic provinces; no judicial-administrative institutions were founded in these provinces. On the contrary, the act of 9 July 1889 on the Implementation of the Justice Reform in the Baltic Provinces helped the principle of separation of powers to a final victory, ensuring the independence of judicial power from executive power even on the lowest level of local class government.^{*59}

The Emergency Situations Act of 14 August 1881 was chiefly aimed against mass riots and criminal offences against the state; it was not applied in ordinary situations. The special attention of Marxist historiography to this act and its treatment as the normal situation is, on one hand, explained by the researchers' focus not on normal situations, but the revolutionary movement (*pro*: class struggle) and its countermeasures. Paradoxically, the tsarist government implemented the act of 14 August 1881 for the first time not to suppress revolutionary riots, but to suppress the anti-Semitic pogroms in Kiev and other Ukrainian towns (Konotop, Radom, Chernigov) in 1881.^{*60} On the other hand, the enhanced attention to this act is of course explained by the fact that the tsarist government constantly extended the emergency situation, which was originally declared for only three years, although not on the whole territory of the empire.^{*61} How far the constant extension was related to the scope of the revolutionary struggle or the institutional backwardness of Russia is another question.

Marxist researchers have overlooked the fact that the act of 14 August 1881 did not introduce many new rules; rather, it codified the provisions that already applied.^{*62} J. Baberowski even considers it to have restricted the arbitrary action of the local executive power.^{*63}

⁵⁵ Except for officials of the highest three classes.

⁵⁶ B. Vilenski. *Sudebnaya reforma i kontrreforma v Rossii*. Saratov 1969, p. 338.

⁵⁷ B. Vilenski. *Ustav ugolovnogo sudoproizvodstva. Kommentarii*. – *Sudebnaya reforma. Utsrezhdenie sudebnykh ustanovlenii. Ustav ugolovno sudoproizvodstva. Ustav o nakazaniyah, nalagayemykh mirovymi sudyami*. Otv. B. Vilenski (Red.). Rossiiskoje zakonodatelstvo X–XX vekov. O. Tshistiakov (Ob. Red.). T. 8. Moskva 1991, p. 252.

⁵⁸ It should be kept in mind in the case of the 1889 reform that unification was undertaken on various levels and in various areas. Firstly, the legislation of the Baltic provinces and the empire is unified. Secondly, the legislation of the Baltic provinces is unified, e.g. bankruptcy law and right of security contained in the BPL. Thirdly, unification was carried out on the level of the peasant laws of the Baltic provinces. An example is the penal law in the peasants' laws. Part IV of the Baltic Parish Courts Act 'Temporary Rules of Punishment Imposed by Parish Courts' extended the application of the maintained penal law provisions of the Peasants Act of Livonia to the area of application of the Peasant Acts of Estonia, Saaremaa and Curland. The new rules contained in the same act also applied on the territories of all the three provinces. – PSZ-3. Nr. 6188. *Polozhenije o preobrazovanii krestyanskikh prisutstvennykh mest v Pribaltiiskih guberniyakh*. Tshast A. *Volostnoi sudebnyi ustav*. Otd. IV. *Vremennye pravila o nakazaniyah, nalagayemykh volostnymi sudyami*.

⁵⁹ Earlier steps in this direction were taken in the Towns Act of 26 March 1877, which separated judicial and administrative powers on the town level. Former magistrates were maintained only as judicial bodies, town government passed on to the elected town councils and the town governments formed by them. The competence of peasants' class government and judicial bodies was delimited by the 1866 Rural Communities Act, known as the Parishes Act in Estonian literature.

⁶⁰ J. Baberowski. *Autokratie und Justiz. Zum Verhältnis von Rechtsstaatlichkeit und Rückständigkeit im ausgehenden Zarenreich 1864–1914*. Frankfurt am Main 1996, p. 770.

⁶¹ For example, it was constantly in force in 1881–1905 in the provinces of St. Petersburg, Moscow, Kharkov, Kiev, Volynia, Podolia, the towns of Rostov and Nikolayev and in the areas subject to the mayors of Odessa and Taganrog.

⁶² V. Gessen. *Iskljutitelnoje polozhenije*. S.-Peterburg 1908, pp. 160–161; M. T. Ohrana. *Entsiklopeditsheski slovar*. Brokgauz-Efron. Tom XXII. S.-Peterburg 1897, pp. 508–509.

⁶³ J. Baberowski (Note 9), pp. 704–705.

Regarding Estonia, it should be added that an emergency situation in the form of a state of war (not an enhanced or emergency state of defence) was fully established on the Estonian territory only on 20 December 1905 and it was lifted on 15 September (26 August) 1908.^{*64} According to T. Karjahärm, an enhanced state of defence was thereafter established and it lasted until 4 September 1911, after which it was maintained only in Tallinn and Riga.^{*65} Thus, it may be said that neither of the acts that signify the breaking of the independence of the judicial power according to the Soviet Russian understanding was implemented in Estonia until 1908.

If we adopt the view that mere the adoption of the Emergency Situations Act of 14 August 1881 broke the independence of the courts, it should be concluded that there was no independence of the courts based on the separation of powers also in the Republic of Estonia from the beginning. This could be claimed on the grounds of Decision No. 32 of the Republic of Estonia Supreme Court of 1926, in which the court took the view that all three tsarist Russian state of emergency laws applied to Estonia. The Supreme Court claimed in the same decision that the Government of the Republic declared namely a state of war.^{*66} In fact, there was a state of war in certain areas of Estonia until 1940 practically without interruption.^{*67} Despite the above, even Marxist researchers who cannot be suspected of excessive sympathy for the Republic of Estonia have stated that there was no separation of powers in Estonia.

Coming back to the judicial reform in the Baltic provinces in 1889, it should be said that as opposed to the other areas of the Russian empire, the judicial reform did not begin but ended the process of separating the administration of justice from the executive power. It was the justice laws of 1889 that rendered judicial power independence from executive power also on the provincial level.

In the town level, judicial power was separated by the Town Act of 26 March 1877, which vested town government in elected town councils and the town governments formed by the councils. The former magistrates continued to operate only as judicial bodies. The competence of peasants' class government and judicial bodies was delimited by the 1866 Rural Communities Act, known as the Parishes Act in Estonian literature. Parish courts were re-established in Estonia under this act according to the instructions of the governor general of Estonia, Livonia and Courland of 18 October 1866.^{*68}

Comparing the implementation of the 1864 judicial acts in the inner Russian provinces and their implementation in the Baltic provinces in 1889, it should be kept in mind that a considerably body of judicial practice had formed over the 25 years. The published decisions of the cassation departments of the Supreme Court are especially relevant, because according to the procedural codes of the time, all decisions and rulings duly published were mandatory not only for the court to which the matter was referred for a new hearing by way of cassation proceedings, but for all courts.^{*69} This position was arguable in the Russian legal literature, but the Supreme Court interpreted this rule in a very straightforward way on several occasions — the decisions were mandatory.^{*70} By 1889 the Supreme Court had taken many decisions protecting the independence of the courts.^{*71} After the 1889 reform, these earlier decisions of the court of cassation were also mandatory for the newly established judicial bodies of the Baltic provinces. As regards the positions of the Supreme Court as the court of cassation, it should be taken into account that in the 1870s and 1880s it became the place of 'exile' for many liberal-minded senior officials of the reform period, including the authors of the judicial reform and their followers. The Supreme Court thus became a 'safe haven' for the more liberal representatives of legal thought in the 1870s–1880s.^{*72}

⁶⁴ Eesti ajalugu. Kronoloogia (Estonian History. Chronology). S. Vahre (Koost.). Tallinn 1994, p. 124, 127; T. Karjahärm (Note 14), pp. 110, 122.

⁶⁵ T. Karjahärm (Note 14), p. 122.

⁶⁶ Otsus nr. 32. Administratiivosakond. 21. septembril/1. oktoobril 1926. a. Vene-Balti Laevahituse ja Mehaanika A/S voliniku vann. adv. Otto Strandmann'i kaebus siseministri määruse peale 29. jaanuarist 1926. a. a/s varanduse sekvestri alla võtmise pärast (Decision No. 32. Administrative department. Complaint of 21 September/1 October 1926 by Attorney-at-Law Otto Strandmann, representative of Vene-Balti Laevahituse ja Mehaanika A/S against the Interior Minister Regulation of 29 January 1926 on sequestration of property). – 1926. aasta Riigikohtu otsused (Supreme Court decisions of 1926). Riigi Teataja Lisa (State Gazette Supplement). Tallinn 1927, p. 52 (in Estonian). For details see K. Trakman (Note 54), p. 8.

⁶⁷ H. Kruus. Tallinn 30 aastat sõjaseisukorras (30 years of state of war in Tallinn). – Huvitav Žurnaal 1935 (summer), pp. 38–41 (in Estonian); RT 1934, 22, 156; 1938, 77, 701 (in Estonian).

⁶⁸ Pravila o sostave i predmetah vedomstva volostnyh sudov v Estljandskoi gubernii i porjadke deloproizvodstva v onyh. Prilozhenija, pp. 16–23.

⁶⁹ Ustav Grazhdanskogo Sudoproizvodstva (Izd. 1883) § 815; Ustav ugovolnogo Sudoproizvodstva (Izd. 1864) § 933.

⁷⁰ I. Foinitski. Kurs Ugolovnogo Sudoproizvodstva T. I 4. izd. Sankt-Peterburg 1912, pp. 177–182; Ustav Grazhdanskogo Sudoproizvodstva s sistematizirovannym sobraniejm zakonodatelnyh motivov ko vsem uzakonenijam i razjasnenii Pravitelstvujushtshego Senata i Ministerstva Justitsii. V. Gordon (Sost.). Izd. 6-e. S.-Peterburg 1914, pp. 628–629; J. Vaskovski. Kurs grazhdanskogo protsessu. Moskva 1913, p. 214; G. Shershenevitsh. Nauka grazhdanskogo prava v Rossii. Kazan 1893, pp. 235–236.

⁷¹ Reshenije 246. 1879 g. oktjabrja 10 dnja. Po prosheniju pov. zheny gvardii sht.-kapitana Jeleny Popovoi, kol. reg. Marka, ob otmene reshenija Aleksandrovskogo Mirovogo Sjezda. – Polnyi Svod Reshenii Grazhdanskogo Kassatsionnogo departamenenta Pravitelstvujushtshego Senata (natshinaja s 1866 goda). za 1879 g. Nr. 167–341. 2. Izd. Neofitsalnoje. Jekaterinoslav 1912, pp. 766–767.

⁷² P. Liessem. Verwaltungsverichtsbarkeit im späten Zarenreich. Der Dirigierende Senat und seine Entscheidungen zur russischen Selbstverwaltung (1864–1917). Frankfurt am Main 1996, pp. 124–125; J. Baberowski (Note 9), pp. 708–709.

4. Equality of citizens before the court

The equality of citizens before the court (*Gleichheit des Gerichtsstandes*) is an important principle of the rule of law. This is a principle whose establishment has usually been hidden behind the view of abolition of class courts in Estonian literature. After implementing the judicial reform, subjects of tsarist empire usually fell into the jurisdiction of the same courts and privileged jurisdiction was generally eliminated. Jurisdiction was defined not so much by a person's class status, but the value of the particular civil matter or the severity of the offence. For example, parish courts had jurisdiction over claims of up to 100 roubles, claims for restoration of violated possession within the parish limits if less than a year had passed from the beginning of the violation, etc.^{*73} District courts had jurisdiction over civil matters of up to 500 roubles and claims for the restoration of violated possession (BPL §§ 682–699).^{*74} Circuit courts had jurisdiction over all civil matters that did not fall within the competence of district courts.

This rule was not general, since various clerical court and parish courts as special peasant courts were maintained even in the Baltic provinces. Compared to the issue of the independence of the courts discussed earlier, a change of accents stands out in the historiography up to that time — while the negative and deviant is stressed with respect to the independence of the courts, the general rules are stressed when it comes to the equality of the citizens, leaving deviations without much attention.

How justified it is to stress the class nature of the Estonian peasant courts at the end of the 19th century similarly to the Russian peasant courts is another question. It may be said that according to the 1889 rules of the Baltic Parish Courts Act regulating the handling of civil matters provided that parish courts had jurisdiction over the mutual civil claims of peasants and 'other members of the local parish community' with a value not exceeding 100 roubles.^{*75} This provision clearly indicated that all members of the parish community need not be peasants and the parish court's jurisdiction need not be limited to peasants according to the legislator.^{*76}

Viewing the issues of class status and the equality of citizens in the legal history literature about the 1864 judicial reform, it may be said that the discussion is usually limited to parish courts (and the respective natives' courts) and clerical courts. It is usually not mentioned that a special court procedure applied to the members of the empire's governing dynasty.^{*77} For disobedience to the emperor, the tsar could, by his individual decision, deprive a person of his rights or prosecute him at the tsar's own discretion. This provision is similar e.g. to the laws of the Kingdom of Württemberg, according to which the members of the governing dynasty were subject in criminal matters only to an *ad hoc* family council, and in civil matters to the highest tribunal of the kingdom.^{*78}

Secondly, § 945 1) of the Code of Criminal Procedure provided that in certain cases, court decisions that had entered into force would be submitted to the tsar for a review prior to enforcement. This was necessary if noblemen, officials, clergymen or persons who had been granted awards that could be withdrawn only with the tsar's consent were subjected to punishments accompanied by the deprivation of all class rights and privileges or special rights and privileges. This provision was heatedly discussed during the drafting of the judicial reform laws, because the majority of the Imperial Senate saw it as the abandonment of the principles of equal administration of justice.^{*79}

The tsar, however, no longer decided the issue of guilt or innocence, but only the issue of the punishment. He could either approve it or alleviate it at his discretion, but the emperor could not increase the punishment.

⁷³ PSZ-3. Nr. 6188. Polozhenije o preobrazovanii krestjanskikh prisutstvennykh mest v Pribaltiiskikh gubernijah. Tshast A. Volostnoi sudebnyi ustav, § 7.

⁷⁴ PSZ-3. Nr. 6188. Polozhenije o preobrazovanii sudebnoi tshasti v Pribaltiiskikh gubernijah. Tshast A. O primenenii sudebnykh ustavov Imperatora Aleksandra II. III Po ustavu grazhdanskogo sudoproizvodstva, § 69.

⁷⁵ PSZ-3. Nr. 6188. Polozhenije o preobrazovanii krestjanskikh prisutstvennykh mest v Pribaltiiskikh gubernijah. Tshast A. Volostnoi sudebnyi ustav. Otd. II Pravila o proizvodstve grazhdanskikh del, § 7.

⁷⁶ The openness of the membership of the parish community and a weakening of the narrow class nature of the parish community is already evident from earlier legislation. In the Estonian province, the peasants' private law provisions of the Peasants Act applied not only to the members of the peasant community, but all taxable persons and artisans who lived in the territory of the rural parish community. Section 1045 of the 1856 Estonian Peasants Act: 'The private law of Estonian peasants contains rule by which the private matters of persons of the peasant status are to be handled; these laws also apply to **other persons of taxable statuses** living within the borders of the community.'

⁷⁷ Svod Zakonov. T. I Tsh. I Svod Osnovnykh Gosudarstvennykh Zakonov. Izd. 1906. Osnovnye Gosudarstvennye Zakony, § 222.

⁷⁸ E. Holthöfer. Ein deutscher Weg zu moderner und rechtsstaatlicher Gerichtsverfassung. Das Beispiel Württemberg. Veröffentlichungen der Kommission für Geschichtliche Landeskunde in Baden-Württemberg. Reihe B. Forschungen. Bd. 137. Stuttgart 1997, p. 12.

⁷⁹ Sudebnyi Ustav 20. noyabrya 1864 goda s izlozhenijem razuszhdenii, na koikh oni osnovany. Vtoroje dopolnennoe izdanie. Tsh. II. Ustav ugolovnogo sudoproizvodstva. Sankt-Peterburg 1867, pp. 342–343.

5. Summary

As we know, the formation of middle-class society and the respective legal system is a lengthy and not nearly linear process. There are often dead ends and back roads; even in the case of Europe one cannot make broad generalisations. However, since the 1789 French revolution at the latest, Europe adopted a view that a written constitution is one of the pillars of the legal system of a middle-class society.^{*80} This should give the citizens a catalogue of their fundamental rights and an exhaustive description of the public order, being also the guarantor of the prescribed public order and fundamental rights by virtue of its position on the top of the state legislation. Whether it has always been so is another question.

However, the function and meaning of the provisions of the constitution and some other law and their mutual relations have not always in the history of legal development corresponded to society's current understanding. It is irrelevant whether we speak about private law or public law provisions. In his discussion of the relations between the fundamental rights of a state governed by the rule of law and modern private law, D. Grimm has indicated that in a situation where there are no constitutions declaring and guaranteeing fundamental rights, private law may have the function of substituting for a constitution.^{*81} W. Schubert claims that in the Rhine provinces that became part of the monarchist Prussia after the end of Napoleon's wars, the French judicial laws and especially the law on courts administration (*Gerichtsverfassung*) that remained in force in these provinces were substituting for a constitution.^{*82}

Considering the nature and goal of the Baltic Private Law that entered into force in Estonia from 1 July 1865 — to perpetuate the law rooted in the Middle Ages by the force of a modern law^{*83} —, it may be claimed that the private law in force in Estonia at the end of the 19th century was not able to perform this function. The laws on which the 1889 judicial reform was based were one of the first legislative acts in Estonia's legal development where several principles of the rule of law (public administration of justice, separation of powers, formal equality of citizens) were so extensively (of course of fully!) and complexly implemented. This allows to claim that the function of substituting for a constitution belonged to the procedural codes on which the 1889 judicial reform was based, together with the Courts Administration Act. The judicial laws were able to perform their substituting role in the legal historical development of the Estonian constitution all the more successfully since as opposed to many other areas of the Russian empire, no state of emergency was declared in the Baltic provinces before the revolutionary events of 1905.

⁸⁰ H. Hattenhauer. *Europäische Rechtsgeschichte*, 3. Auf. Heidelberg 1999, p. 530.

⁸¹ D. Grimm. *Recht und Staat der bürgerlichen Gesellschaft*. Frankfurt 1987, pp. 192–212.

⁸² W. Schubert. *Die deutsche Gerichtsverfassung (1869–1877). Entstehung und Quellen*. Frankfurt am Main 1981, p. 25.

⁸³ M. Luts. *Juhuslik ja isamaaline: F. G. v. Bunge provintsiaalõigusteadus* (Incidental and patriotic: the provincial legal science of F.G. v. Bunge). Tartu 2000, p. 149 (in Estonian).



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Systematisation of Objective Law: From Codification to Reformation of Law

1. Context

On account of its historical development, the Estonian legal order belongs to the continental European legal tradition. Continental European legal culture knows three broad areas of law: private law, public law, and penal law. A legal provision is the fundamental unit of each of these areas of law. It is through the creation of provisions that the continental European legal culture has developed. Certain areas of reality are regulated by the rules contained in legal provisions. Life shows that the increasingly complicated nature of reality and the accompanying regulations creates a need for more and more new legal provisions. The apparent satisfaction of this need indeed brings about a positive result, the desired pattern of human behaviour at a certain level of quality. On the other hand, the drafting of legal provisions has its problems. Contradictions and repetition can occur in the building blocks of the legal order. The set of applicable provisions has a formal hierarchy that enables the creator of an upper-level provision not to look down, while the creator of a provision at a lower level of priority might not know or even consider looking upward at the higher provisions, and so on. In this way, even signs of disorder can appear instead of order.

2. What Estonia has to reckon with

What should be on the agenda in Estonia today when we speak about systematising the legal order? The idea of systematisation of legal provisions has deep roots in legal thinking. Simply said, the problem lies in finding the most adequate place for the various legal provisions in the sources of law. The point of departure should be knowing that we should not, and actually cannot, step outside the cultural arena to which we are accustomed. However, we do need to be able to perceive and take into account the qualitative developments that have taken place as legal culture as a whole develops, as well as the quantitative and qualitative changes specific to the Estonian legal order. The tasks of legal scientific research are to clarify the content of legal provisions on one hand and to systematise them on the other. Systematising objective law is not merely a technical task. Systematisation of legal provisions creates and develops the system of concepts that frames all legal thinking — including clarification of the content of legal provisions. In its final stage, systematisation

of objective law is an essential tool in implementing the rule of law as an idea in applied form. It is therefore not correct to reduce codification as a traditional element of systematising legal provisions to merely compiling a code from the different parts of a legal order or set of laws.

In considering the history of system teaching, it is impossible not to overlook the approach of F.C. von Savigny. According to von Savigny, a real scientific system is characterised by unity created by its inner harmony. It must contain general content and answer the common task of legal science and all legislation.^{*1} Systematisation issues thus even have a philosophical nature.

Historically speaking, the key for systematisation of the current Estonian legal order — legal consistency — should be sought at the beginning of the second independence. It is related to the birth of the Constitution of the Republic of Estonia, of which the President of the Republic of Estonia said: ‘This principle was a directing and thought-organising companion both in the restoration of independence and in the creation of the legislation that came before the Constitution, as well as in the drafts submitted to the Constitutional Assembly. Legal consistency means not simply treating two separate legal systems as one whole [meaning the legal systems of different time periods and situations: that of 1918–1940 and that created since 1991] but also the lawful development of the legitimate legal order. Therefore, it is important to point out that the Constitutional Assembly did not have to start drafting the Constitution from scratch. Legal consistency requires theoretical consistency also. This conclusion becomes especially topical as we begin to give legal content to the organisation of the state as a member state of the European Union.’^{*2} In this context, it should also be clear that the legal consistency required for systematising legal provisions is not related merely to developments in the Estonian legal order. The sources of continental European legal culture can be found in ancient Roman law. In antiquity, the legal order was developed through and with the help of legislative drafting, and it holds examples and principles to which we can usefully refer today.

Systematisation is often formally arranged such that the necessary set of basic concepts is organised hierarchically.^{*3} Although this is a common picture of systematisation, it is one-sided, if not misleading. One has to distinguish between a legal order and a legal system. Order has always been and shall remain a phenomenon of the social exercise of power. Legislative power establishes legal provisions, which taken as a whole constitute the legal order. A system is something more than merely a legal organisation of power. Where a certain sphere of life is organised by legal provisions, this is achieved, ideally, through a rational articulation or systematisation of things. Figuratively speaking, things that essentially belong together are gathered under common titles, and an attempt is made to separate them from each other through attention to clear characteristics. And this is done for each area of life that is organised by law. Now we have not just separate organisations of power as such but groups of provisions organised by close intrinsic relationships. Systematisation is thus the tool or method of building a system from essentially uneven and irregularly linked provisions.

For the purposes of legal science, the main task of systematisation may be seen as involving a further organisation of a basic system of express legal provisions. Organisation of the basic system does not arise from nothing. It is always based on some already established set of provisions, which of course need not be merely legal in nature. The new thus amends, supplements, or elaborates on the old. The aspects of reality so far unregulated by legal provisions form a totality, but changing some of them in whole or in part does not change the totality.^{*4} Systematisation also has its technical side: systematisation is a certain activity (consisting also of a set of activities) the rational core of which lies in seeing the links of certain things with other things. Where a need has been detected for further differentiation of the original provisions or an interest in so doing is evidenced, an attempt is made to this end, even to the point of changing the basic system.

¹ F.C. von Savigny. *Juristische Methodenlehre nach der Ausarbeitung des Jacob Grimms*. G. Wesenberg (Hrsg.). Stuttgart 1951, p. 15.

² A. Rüütel. *Mõned tagasisivaated põhiseaduse tulekule* (The birth of the Constitution in retrospect). – *Põhiseaduse tulek. Kogumik* (Birth of the Constitution. Compilation). Tallinn: Ministry of Justice 2002, pp. 9, 13 (in Estonian).

³ A. Aarnio. *Õiguse tõlgendamise teooria* (Theory of interpretation of law). Tallinn 2002, p. 224 (in Estonian).

⁴ The Finnish jurist A. Aarnio cites the example of the renewal of succession legislation in Finland in 1965. Several single institutions, such as the statutory share, initial tax withholding, and the will, were renewed then. Also, new institutions such as the successor's right to support were introduced to the legislation. But many principles of the succession structure were maintained despite the changes. See A. Aarnio (Note 3), p. 225. This and other, similar examples suggest that the main task of systematisation in legal science is to further organise the basic system that is expressed in laws. It may happen that even new and previously alien concepts are introduced and associated in a way that the law itself does not know. The ongoing process of legal scientific systematisation continues the systematisation carried out by legislators. The level of systematisation is higher in the legal scientific system than in the ‘original system’ of law, which must precede it.

2.1. About systematisation work in Estonia

The development plan of the Ministry of Justice of the Republic of Estonia extending to 2005 cited as one of the main functions of the ministry the correspondence of laws to society's expectations. To that end, the development plan provided for preparations for co-ordinated codification plans.⁵ The document contained observations of the idea of, need for, and methods of codification, and recommendations on how to codify Estonian law. It was stressed that the main purpose of codification was to create legal certainty and clarity, by making it simpler for those applying the law to find the necessary regulation and providing a more general view of the applicable law. The purpose of codification was seen in the development plan as harmonisation of legal regulations, leading to a harmonised development of law as a whole. It is especially important to note that the context of codification was unambiguously tied to the continental European legal tradition. As noted above, the Estonian legal order is part of the continental European legal family, which is closely related to the most deeply rooted traditions of codification. While the document expressed the import of codification, it was admitted that at the time (2003), the main reform in different areas of law had already been or would soon be finalised and that creation of systematic bases of written law had been completed. In this undertaking, the focus has to be on the stability, clarity, and unambiguously of the legal order. At the same time, this does not mean that the functionality and system of the laws not yet systematised should be questioned. In view of the fact that many important legal acts have been adopted within a notably short span of time and have been in force for only a few years, codification work should concentrate on analysing the practical application of legal acts and the impact of regulation. In parallel with analytical work, a codification method should be found that suits Estonia's circumstances — provided that the need for codification as the systematisation of legislation is identified and relevant political decision is initiated. It seems that there is indeed a need for developing and applying a codification method that suits the Estonian situation.

3. About some bottlenecks

Estonian legal literature provides sufficient examples of bottlenecks, largely caused by the inadequacy of systematics. Supreme Court Justice V. Kõve sees the problem of extrajudicial settlement of civil disputes in Estonia as such an example. He concludes that there are several problems concerning the competence of the bodies that settle civil disputes extrajudicially. On the one hand, he sees the cause in the power of habit, but he also finds that the cause lies in the legislative's unwillingness to think more broadly about the prospect of administering justice in civil matters. He further admits that there is a radical difference between the relevant Estonian practice and the general practice of other European countries in introducing mediation proceedings.⁶ The problems are not eliminated by the solutions proposed in two relatively new pieces of legislation, the Court Code of Civil Procedure and the draft Code of Enforcement Procedure Application Act.⁷ On the approach of the fourth anniversary of the adoption of the Penal Code, P. Pikamäe analyses the issues of its birth and effectiveness. He writes: 'Based only on the text of the Penal Code, it must be admitted today, when four years will soon have passed from its adoption, that the two large parts of the Penal Code — the general part and the special part — are, unfortunately, unequal in their level of elaboration and quality. If we can say without exaggeration that the general part of the Penal Code was drafted with a high-level international team and that the extensive experience of Western European penal law (mainly German penal law) was available to the working group in setting out the institutions of the general part, the drafting of the special part of the Penal Code did not measure up to anything like this... In retrospect, some organisational mistakes have to be admitted in the preparation of the draft special part of the Penal Code. One of the shortcomings is the drafting of the special part on a chapter basis wherein a separate working group was set up to draft each chapter. Although common source principles were established before the chapters were drafted, the criminal policy approaches and general world views of the authors, as well as the selection of source texts, were sometimes so different that it became difficult due to a shortage of time to compose a coherent special part from the single chapters and conduct a thorough analysis of the submissions of the

⁵ It should be noted that the ministry is currently working on the basis of a development plan prepared at the end of 2003, which extends to 2007 and does not provide for codification and systematisation of legislative drafting as expressly as did what had been stated in the Ministry of Justice development plan for up to 2005. The change of the government coalition in 2005 brought about work on a new development plan. The author of this article was informed by the Minister of Justice's adviser H. Pevkur that ensuring the systematisation of the Estonian legal order is certainly among the ministry's priorities and that relevant guidelines will be included in the ministry's development plan.

⁶ V. Kõve. Tsiviilvaidluste kohtuväline lahendamine Eestis (Extrajudicial settlement of civil matters in Estonia). – *Juridica* 2005/3, pp. 152–166 (in Estonian).

⁷ *Ibid.*, p. 165.

working groups.”⁸ The Supreme Court of the Republic of Estonia has heard cases that, in my opinion, indicate that our legal order has systematisation errors. In one case, a solution was sought to a situation where objective law contained different legal consequences for essentially similar situations. Namely, § 81 (3) of the Penal Code provides that the statute of limitations for a misdemeanour is two years from the commission thereof before the entry into force of the corresponding judgement or decision. Section 160 of the Taxation Act, however, provides that a misdemeanour addressed in this chapter ‘expires’ after three years have passed between the commission thereof and the entry into force of the corresponding judgement or decision. The general part of the Penal Code apparently presumes its inherent provisions being concentrated in one place. Exceptions to the general part by way of other laws blur the regulation provided by the general part. Exceptions are possible, but an appropriate place has to be found for them. In this case, that place would be the General Part of the Penal Code Act. An example of this may be found in the case of competition offences: the exception was provided properly in the General Part of the Penal Code Act (while the general financial penalty applicable to a legal person is up to 50,000 krooni, the penalty for competition offences is up to 500,000 krooni). Another example concerns prohibition of driving a motor vehicle.⁹ In earlier law, the suspension of the right to drive (called ‘deprivation of the right to drive’) was a supplementary punishment applied for administrative offences. The Penal Code no longer provided for such supplementary punishment for misdemeanours. Still, clauses 41³ (1)–(8) of the Traffic Act provide for suspension of the right to drive pursuant to a decision on a misdemeanour matter that has entered into force. The Motor Vehicle Registration Centre implements the suspension within three days, and the suspension is obligatory. The system was rendered stricter by this change. Although the Supreme Court found that suspension of the right to drive on the grounds set forth in § 41 (3) 5) of the Traffic Act is not contrary to the *ne bis in idem* principle, this does not mean that all problems regarding suspension of the right to drive on such grounds were solved.¹⁰ Several issues have arisen in recent years’ judicial practice¹¹ that concern the mutual relationship between administrative proceedings and the potential administrative court procedure that follows, on one hand, and the infringement proceedings (criminal and misdemeanour proceedings), on the other. Supreme Court adviser J. Sarv writes: ‘For example, peculiar problems arise in a situation where the same circumstances of life come within the sphere of interest of administrative (court) procedure and criminal or misdemeanour proceedings.’¹² He further admits: ‘The possibility of a conflict of procedures is naturally characteristic not just of the mutual relations between administrative (court) proceedings and misdemeanour proceedings. Conflicts may also arise between the results of criminal and civil court proceedings or between those of civil and administrative court proceedings.’¹³ The author of this article agrees in part with Sarv, who believes the reason for the current situation to be that the ‘interpretation conflict between parallel proceedings is explained by the simple and inevitable fact that bodies carrying out proceedings independently from each other (courts in the final instance) may give different content to one legal provision or another’.¹⁴ It is true that bodies conducting proceedings independently from each other may give different content to legal provisions. But it is certainly an exaggeration to consider this situation inevitable. After all, before development of a real legal system, agreement has to be reached on the content of the concepts to be contained in it. Concepts have decisive meaning for each system. Recalling the teaching of von Savigny, we remember that it is important to know that each concept needs to have ‘legal reality’ and legal provisions can be organised into a single system only after the concepts have been clarified.¹⁵ Estonia’s membership in the EU also requires a co-ordinated codification plan. Namely, the judicial practice of the European Court of Justice is essentially case law, while analysis of the impact of legislation is crucial in the European Union context. And, naturally, the task of analysing the impact of legislation would be partly unfulfilled if it were not followed by specific activities to enhance the quality of legislation by various methods (such as simplification and/or codification). I would like to address the example of the Republic of Estonia’s golden share in AS Eesti Raudtee (the Estonian Railway Company). Given the practice of the European Court of Justice, there may be a problem of compliance with EC law in the case of the Republic of Estonia’s special rights in AS Eesti Raudtee.¹⁶ If the Republic of Estonia is not represented at the general meeting of the company, the

⁸ P. Pikamäe. Karistusseadustiku eriosa probleeme: õiguspoliitilised lahendused ja edasine areng (Issues of the Special Part of the Penal Code: legal policy solutions and further development). – Juridica 2005/2, p. 85 (in Estonian). The author of the article proposes potential further legal policy developments, while focusing on the content rather than the mode of action.

⁹ SCebd 3-3-1-69-03; ALCSCd 3-4-1-10-04; SCebd 3-3-1-29-04. Available at: <http://www.nc.ee/> (in Estonian).

¹⁰ S. Lind. Mootorisõiduki juhtimise keelud Eesti õiguses (Prohibitions on driving a motor vehicle in Estonian law). – Juridica 2005/1, p. 50 (in Estonian).

¹¹ See, e.g., SCebd 3-1-1120-03; SCebr 3-3-1-69-03; SPSCr 3-3-4-2-04. Available at: <http://www.nc.ee/> (in Estonian).

¹² J. Sarv. Mõningatest haldus(kohtu)menetluse ja süüteomenetluse paralleelsusega seotud probleemidest (About some problems of the parallel nature of administrative (court) proceedings and infringement proceedings). – Juridica 2005/5, p. 308 (in Estonian).

¹³ *Ibid.*, p. 310. See, e.g., CCSCd 3-21-41-05; CCSCd 3-2-1-14-04. Available at: <http://www.nc.ee/> (in Estonian).

¹⁴ *Ibid.*, p. 310.

¹⁵ F.C. von Savigny (Note 1), p. 37.

¹⁶ See I. Kuznetsov. Euroopa Ühenduse õiguse mõju kuldaktsiale Eestis (Impact of European Community law on the golden share in Estonia). – Juridica 2005/6, pp. 396–404 (in Estonian).

general meeting is not quorate in cases of certain issues. The Republic of Estonia holds a share of 34%, and according to articles 5.2.6 and 5.2.8 of the company's articles of association, certain decisions of the general meeting may be adopted only if all shareholders are represented. The articles of association do not specify any criteria or room for discretion for application of the state's veto. Therefore, it may be said that the golden share held by the Estonian state is discretionary and violates the principle of proportionality. The European Court of Justice has assessed such a situation in its decision in the *Commission v. France* case, said decision stating that this may inspire uncertainty in investors and convince potential stakeholders not to make an investment.^{*17} It is apparently good that codification results in a certain stability of the legal order as a whole. However, legal literature warns of the hidden dangers of codification. One of the dangers is a stoppage of the development of law (stagnation). I believe that codification or the related different methods of systematisation of the massive body of law cannot themselves prevent anything from being amended, added, or revoked in the future. Rather, the important question is what content should be given in Estonia today to the codification idea, which inherently belongs to continental European legal culture.^{*18}

4. Codification and legal literature

The problems of codifying legislation reached contemporary Estonian legal literature as an independent topic powerfully in the year 2001 when *Gesetzgebung und Rechtspolitik*, a special issue of the journal *Rechtstheorie*, was issued, mainly dedicated to the developments in the Estonian legal order after the country regained its independence in 1991. The foreword of the special issue, written by one of the publishers, Professor W. Krawietz was: 'Codierung und Kodifikation neuer Regelsysteme des Rechts — Zum Verhältnis von Gesetzgebung und Rechtspolitik Estland'.^{*19} But Estonian legal literature had tackled the issue before.^{*20} The current aspects of codifications were focused upon in the issue's articles by J. Laffranque, former secretary general for legislative drafting of the Ministry of Justice and now Supreme Court Justice, and E. Catta, technical advisor to the French higher codification committee.^{*21} The need for systematising the legal order is expressed differently depending on the phase of development of the state in question. The need is greater when the legal order has been developed over a great length of time and the body of law is large and even partly contradictory. Yet need may be great also when the legal order has not been developed over quite some time but, rather, emerged over a relatively short span of time, in an extensive burst of activity. Major qualitative and at the same time quantitative changes have taken place in the Estonian legal order over the past 15 years. If the issues of systematisation of law are not tackled in this situation in a serious and co-ordinated fashion, the consequences could be quite severe. Difficulties may arise in finding the necessary provision, but what is most important — the realisation of law in its immediate forms, as well as the mediated form of realisation of law (that is, application of law) — become much more complicated and problematic.^{*22} The author believes that such a situation now exists in Estonia.

¹⁷ C-483/99, *Commission v. France*, pp. 50–51, 53.

¹⁸ I am glad to note that at the XXVIII Estonian Jurists' Days, which took place on 22–23 October 2004 in Tartu, codification issues in the Estonian legal order were among the main issues discussed at the plenary meeting. Presentations were made by Jérôme Richard, head of the legal department of the local governments directorate of the French Ministry of the Interior, and the author of this article. The content of systematisation of Estonian law was discussed also at the legal chancellor's scientific conference on data protection on 13 May 2005 in Tallinn. One of the moderators of the conference was Minister of Justice of the Republic of Estonia R. Lang, who voiced his opinion, regarding data protection, that Estonia's problem lies in the discrepancy between three Estonian laws: the State Secrets Act, the Personal Data Protection Act, and the Public Information Act. These acts were analysed by different authorities. In an interview with the newspaper *Eesti Ekspress*, the minister answered the question: 'You want to also tackle personal data protection?' by saying that the problem existed and he needed to consult the minister of the interior on this matter. He added that the Constitutional Committee of the Riigikogu had to understand that dissemination of information is one of the most important issues of fundamental rights and freedoms. See Mina võitlen suure venna vastu (I Fight Big Brother). – *Eesti Ekspress*, 12 May 2005. The fact that Estonian lawyers' recent devotion of discussion to codification issues marked practically the first time practitioners have paid concerted attention to the matter since Estonia regained independence shows clearly that the Estonian legal order needs a systematising view and adequate models of action for further organisation.

¹⁹ See *Rechtstheorie. Sonderheft Estland. Gesetzgebung und Rechtspolitik*. Vol. 31. 2000. Book 3/4. Berlin: Duncker&Humblot VII–XII.

²⁰ See, e.g., M. Luts. Kodifikatsioon ja õigusreform (teoses Eesti kriminaalõiguse arenguteedest (Codification and legal report (in: On developments in Estonian criminal law). Tartu 1997, pp. 58–71 (in Estonian)), which treated codification in the traditional sense of the word and in a largely historical vein; H. Veinla. Codification of Environmental Law. Major Challenges and Options. – *Juridica International* 2000/5, pp. 58–68.

²¹ J. Laffranque. Õigusaktide kodifitseerimise tähendusest ja vajadusest (On the implications of and need for codification of legislation). – *Juridica* 2002/9, pp. 586–587 (in Estonian); E. Catta. Kodifitseerimise ja süstematiseerimise tähtsus õige seaduse leidmise lihtsustamisel (Implications of codification and systematisation for simplifying the finding of the right act). – *Juridica* 2002/9, pp. 588–592 (in Estonian).

²² Russian lawyers note with good reason that 'in circumstances of major change, during revolutionary reformation of the legal system when changes are undertaken in whole blocks of provisions regulating relations that have exhausted their function and need reformation, when a qualitatively new socio-economic system is created that objectively requires laws of a new quality, systematisation is pushed into the background. – A.S. Pigolkin. Seadusandluse süstematiseerimine (Systematisation of legislation). – *Obstaya teoriya gosudarstva i prava. Akademitseskii kurs*. Tom 2. Moskva: Teoria prava 1988, pp. 197–198.

It should be clear to us in Estonia that we have reached a stage of development in legal drafting where laws covering all essential areas of life have been adopted; some important laws are already 'on the second round'. I support the idea of J. Laffranque: 'Legal drafting should remain and, more than previously, become creation in both the Estonian and European Union context. Interest groups and researchers should be more involved, and more attention should be paid to the analysis of the potential effects of adopting a law; the implementation practice of the existing legal acts needs more analysis, and skills in clear and understandable legal writing need improvement.' She adds: 'Legal drafting stabilises as society stabilises. At the same time, constant developments occur in society, which the legal framework has to reckon with. Still, these additions and changes are not so cardinal as the drafting of new extensive laws is. There is thus an opportunity to take one's time and review the work already done, **systematise**, and think about a unified approach'²³ (emphasis mine).

5. About codification methods

Systematisation of legislation is traditionally understood as four relatively independent activities, each with its own legal implications:

- 1) the activities of state agencies, enterprises, and other agencies and organisations in collecting sources of law and filing them according to a system — this form could be called 'accounting for' the sources of law;
- 2) preparation and publication of sets and bodies of different types of sources of law — this activity could be called 'incorporation';
- 3) gathering of different provisions and sets of provisions of the same quality into a single compilation — this activity could be called the 'consolidation of law'; and
- 4) preparation and adoption of new sources of law — this is the codification of legislation.

Directly related to 'accounting for' sources of law are many important considerations accompanying the systematisation of law. These include the efficiency of the pre-project stage of legal drafting, the effectiveness of implementation of law, and why not also the legal educational element? It would be reasonable to follow certain principles when organising these activities. These are those of, firstly, the completeness of the body of information; secondly, the reliability of the information; and, thirdly, the convenience of use. It is clear that the most modern way of collecting sources of law pertains to computers and relevant computer programs. Incorporation is a constant activity of state agencies and other organisations for the purpose of supporting a 'controlled status' of the legal *corpus*, to supply the broadest range of subjects of law with the necessary information on objective (i.e., applicable) law.²⁴ The need for consolidation of law is related to the fact that, over time, a large quantity of regulatory documentation accumulates in the legal order, which is a similar object of legal regulation. The massive body of law thus developed often contains contradictions. Consolidation can be used to remove these contradictions. The source of law obtained by consolidation is usually approved by the legislative body of the state. It should be stated here that there is a wealth of practice in consolidation of law in the world. For example, in the UK dozens of acts are issued that combine pieces of legislation adopted by the parliament that are of the same kind. The British parliament even adopted a special law on the consolidation of statutory law at the end of the 19th century. The adoption of 'codes' each containing the existing regulatory provisions for a particular topic is also common practice in France.²⁵ The 'French doctrine' knows four ways of carrying out codification.²⁶ The first of these is reformatory codification (innovative codification); the second option is constant law codification; the third option is consolidation; and the fourth is compilation. Recasting of law is another option, used in the context of systematisation of European Union law. I believe that none of these methods of systematisation of the legal

²³ J. Laffranque (Note 21), p. 586.

²⁴ As a historical digression, probably the most remarkable act of codification in the history of law was the *Corpus Iuris Civilis* (528–534), the codification of Roman law by the emperor Justinian, which is not a code in the traditional sense of the word. Justinian did not intend to create a completely new set of laws. The code was a collection incorporating provisions of earlier imperial laws, including codes. It should be added that Digests were also only a summary of the work of the lawyers of the classical period of Roman law.

²⁵ Codification based on constant law has been in use in France since 1948, and 46 codes have been created in this manner. A higher codification committee has been in operation since 1989, headed by the French prime minister. The committee plans and co-ordinates the preparation of the codes by the ministries. The drafts are sent to the state council (*Conseil d'Etat*) before they are adopted by the parliament. As a rule, codification also means a parallelism of forms in France: he who is competent to establish a provision is competent also to codify it. — E. Catta (Note 21), p. 590.

²⁶ I am pointing out the French doctrine because the Ministry of Justice of the Republic of Estonia has pursued co-operation with French colleagues in the field of codification.

order should be disregarded. The question is that of where and to what extent any of these techniques should be used. For example, extensive use of the reformatory codification method is probably irrelevant to the Estonian situation. Although reformatory codification is attractive (because this is where new concepts are integrated, the area of law is reformulated, etc.), the formation of a qualitatively new legal order has been a separate activity from codification in Estonia, although this activity has been very extensive and naturally involved a new quality. What could be done here is that the method could be successfully used for taking into account judicial practice when amendments to objective law are introduced. I would like to add that reformatory codification is still just a vehicle of making larger or smaller changes in legal regulation, a vehicle of renewal. The scale of utilisation of the possibilities of constant law codification is much broader. Although constant or administrative codification of law does not create new law, it requires content analyses. It gives an overview of the existing situation and makes way for potential (necessary) reforms. The drawback of this method is that it disregards existing judicial practice. Perhaps reformatory and constant codification should be compared as the dynamic and static systematisation of the mass of law. The first method aspires to ideal regulation, while the second one maintains the regulations already stipulated in the sources of law. Consolidation was discussed above, and complication as a method of systematisation lies in grouping the sources of law without prior changes or proposed changes. Recasting is gaining ground in the European Union alongside codification. Recasting means that the content of pieces of legislation is changed to ensure their correspondence with the development of society, technology, and the economy. The author has information that the European Commission ordered a recasting programme for the year 2004. This method can be used both simultaneously with and after codification.

Of course, codification should not be based only on the experience of other countries, no matter how positive that experience may have been in the given country's context. But the experience still may be of use in other contexts and must be known.²⁷ It would be reasonable to create a competence centre in Estonia for systematising objective law. I made a proposal relevant to this in my presentation at the XXVIII Estonian Jurists' Days on 23 October 2004. I would like to refer again to the French case, where the higher codification committee is chaired by the prime minister. This clearly shows how highly systematisation of law is regarded in France. Perhaps a good institutional example is the situation in the Republic of Estonia's Ministry of Justice in 1940. The Ministry of Justice in 1940 consisted of a general department, a codification department including the editorial office of the *Riigi Teataja* (State Gazette), and the prison administration. Codification of law was one of the duties of the Ministry of Justice. Unfortunately, the Soviet occupation then ended the codification of Estonian laws that had started in 1935; only four volumes of the planned 15-volume set of laws had been published by June 1940. The harmonisation of Estonian, Latvian, and Lithuanian legislation was also disrupted.

6. Summary

A time has arrived in Estonia when codification work is not regarded merely as finding the right place for legal provisions. Rather, it is based on the conviction that a set of legal provisions can be subjected to common logic as regards both form and content. The systematisation of the legal order involves not only creating an order. Systematisation of the legal order has to be accompanied by a better (more adequate) image of the content of the legal order. Several methods of codification have been referred to above, each of them serving a somewhat different purpose. However, it may be said by way of generalisation that the most important task of codification in Western legal culture is the facilitation of legal reforms. Modern Estonian legal science has lacked the necessary discussion on codification work in the context of legal reform. But we are not hopelessly late yet.

²⁷ See, e.g., H.P. Glenn. *Legal Traditions of the World: Sustainable Diversity in Law*. Oxford 2000. Comparative knowledge is especially important for ensuring the dynamic development of transformation societies. For example, the Russian jurist V. Nersesiants writes: 'Different national legal systems and 'families of law' have their own specific concepts of the systematisation of the sources of applicable law, their own peculiarities and understandings of the methods and types of systematisation of various kinds of legislative acts.' – V. Nersesiants. *Obstaya teoria prava i gosudarstva*. Moskva 2001, p. 447.



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The Claim for Elimination of Unlawful Consequences and the Claim for Compensation for Damage under Estonian State Liability Law

1. Introduction

Everyone's right to compensation for damage caused by unlawful action has been set forth in § 25 of the Constitution of the Republic of Estonia.¹ This rule represents a constitutional guarantee behind Estonian state liability law. The present article examines the principles that have been established in the Estonian State Liability Act for remedying unlawful actions of the executive. Primary attention in so doing has been paid to the claim for elimination of the unlawful consequences of acts of administrative authorities. The goal of this article is to delimit the claim for elimination of unlawful consequences and the claim for compensation for damage. The article sets out to investigate whether the elimination of unlawful consequences serves as simply a variation of the claim for compensation for damage or, rather, as an independent state liability claim, and it explores how the issue has been addressed in Estonian state liability law.

If we think about the obligation to economise on public resources and the principle of effective legal protection, it is clear that such a restitution claim plays at least as important a part in state liability law as the claim for monetary compensation does. Also the European Court of Human Rights — although being an international court — considers it increasingly necessary, in the interests of effective legal protection of individu-

¹ Põhiseadus (Constitution). – RT 1992, 26, 349; I 2003, 64, 429 (in Estonian).

als, to demand of the member states violating the convention not only compensation for damage but also the factual elimination of unlawful consequences.^{*2}

In Estonian court practice, the claim for elimination unlawful consequences has thus far been obviously overshadowed by the claim for monetary compensation for damage.

The procedural law problems of the claim for elimination of unlawful consequences cannot be discussed within the scope of this article.

2. The main features of Estonian state liability law

The principle of the rule of law obliges the state authority to act lawfully. This underlying principle of the Estonian legal order has been specified in § 3 (1) of the Estonian Constitution, according to which state authority shall be exercised solely pursuant to the Constitution and laws that are in conformity therewith. As may any other state authorities, the executive power may restrict persons' rights only if there is a legal basis for doing so and if the administrative activities are in accordance with a superior legal provision. The guarantee of persons' rights and freedoms is the duty of the legislative, executive, and judicial powers (Constitution §§ 13 (2) and 14). If a public authority nonetheless has violated a person's rights, the person has been guaranteed in § 15 (1) of the Constitution the right of recourse to the courts. The right to demand compensation has been provided in § 25 of the Estonian Constitution:

Everyone has the right to compensation for moral and material damage caused by the unlawful action of any person.

The right to compensation for damage has been regarded in the Estonian legal order as a fundamental right.^{*3} The Estonian Supreme Court has considered the implementation of Constitution § 25 feasible even without more specific legal regulation in place.^{*4}

To guarantee the lawfulness of administrative activities, restoration of lawful situation and the protection of persons' rights, the Estonian parliament, the *Riigikogu*, has adopted several important legal acts: the Administrative Procedure Act^{*5}, providing for the principles of administrative procedure and prerequisites for the lawfulness of administrative activities; the Substitutive Enforcement and Penalty Payment Act^{*6}, which governs the procedure for imposition of coercive measures; and the State Liability Act^{*7}, aimed at the pro-

² For example, the Grand Chamber of the European Court of Human Rights, in two decisions made in 2004, for the first time obliged the countries who were respondents to release appellants who had been unlawfully detained. For details, see P. Leach. Beyond the Bug River — A New Dawn for Redress Before the European Court of Human Rights? — *European Human Rights Law Review* 2005/2, pp. 148–164.

³ M. Ernits. *Põhiõigused, vabadused ja kohustused. Sissejuhatus* (Fundamental rights, freedoms, and obligations, Introduction). — Eesti Vabariigi põhiseadus. Kommenteeritud väljaanne (Republic of Estonia Constitution, commented edition). Tallinn 2002, p. 74 (in Estonian); Eesti Vabariigi Põhiseaduse Ekspertiisikomisjoni lõpparuanne (Final report of the Expert Commission on the Republic of Estonia Constitution). Chapter 2 of the Constitution, 'Fundamental rights, freedoms, and obligations', clause 1.1. Available at: <http://www.just.ee/10716> (in Estonian).

⁴ Constitution § 25 was directly applied for the first time by the Civil Law Chamber of the Supreme Court, which in a 1996 decision assumed the position that although the General Part of the Civil Code Act did not provide for compensation for moral damage in relation to causing of bodily injuries, it was to be compensated directly on the basis of Constitution § 25. See CCSCd 3-2-1-111-96. — RT III 1997, 4, 39 (in Estonian). The special panel of the Supreme Court involving the Administrative Law Chamber and Civil Chamber established later that based on Constitution § 25, the absence of a legal act governing compensation does not in itself deprive a person of the right to claim compensation for damage caused to him by imposition of unlawful punishment. See ruling 3-3-4-2-01 of the Special Panel of the Administrative Law and Civil Chambers of the Supreme Court, para. 7. — RT III 2001, 31, 327 (in Estonian). The Administrative Law Chamber of the Supreme Court has considered the direct application of Constitution § 25 necessary in cases concerning compensation of persons for non-proprietary damage caused by the local government in relation to delaying decision on restitution for property unlawfully expropriated during the Soviet annexation. See ALCSCd 3-3-1-27-02. — RT III 2002, 18, 204 (in Estonian).

⁵ *Haldusmenetluse seadus* (Administrative Procedure Act). — RT I 2001, 58, 354; 2005, 39, 308 (in Estonian).

⁶ *Asendustäitmise ja sunniraha seadus* (Substitutive Enforcement and Penalty Payment Act). — RT I 2001, 50, 283; 2005, 39, 308 (in Estonian).

⁷ *Riigivastutuse seadus* (State Liability Act). — RT I 2001, 47, 260; 2004, 56, 405 (in Estonian). Before that time, the Civil Code dating from the Soviet era was applicable as a general-purpose act of general application. For discussion of court practice concerning state liability law at the time, see E. Vene. *Avaliku halduse kandja tekitatud kahju hüvitamine* (Compensation for damage caused by public administrative authority). — *Juridica* 2000/5, pp. 330–335 (in Estonian). The Supreme Court still directly or additionally applied constitutional rules and general principles of law, if necessary. See Note 4 and also ALCSCd 3-3-1-14-02 (RT III 2002, 12, 124; in Estonian), in which the Supreme Court considered it possible to impose, additionally, the obligation to present primary legal remedies as a general principle of compensation for damage also in the case of damage caused before the entry into force of the State Liability Act. Nevertheless, CCSCr 3-2-1-59-04 (RT 2004, 15, 185; in Estonian) did not agree with this position.

tection and restoration of the rights violated in the performance of public duties and compensation for damage. All of these entered into force on 1 January 2002.⁸

The State Liability Act (hereinafter also 'SLA') is an act of general application in state liability law.⁹ According to the legal definition of state liability, it comprises 'the bases of and procedure for the protection and restoration of rights violated upon the exercise of powers of a public authority and performance of other public duties and compensation for damage caused' (SLA § 1 (1)). The State Liability Act provides for — on different preconditions and to a different extent — the liability of the executive, legislative, and judicial powers for unlawful activities, and in certain cases also liability for the lawful activities of the executive.

The bulk of the State Liability Act is concerned with the liability of the executive power for unlawful acts caused upon performance of public duties. State liability claims related to the activities of the executive can be divided into primary and secondary claims. The State Liability Act has accorded a central — yet liability-limiting — role to the primary claims or primary legal remedies, since, as a rule, a person may not demand of a public authority compensation for damage caused to him (or elimination of unlawful consequences) when he has not tried to avoid the damage through timely contestation of the acts of the public authority. This principle has been provided in SLA § 7 (1).¹⁰ The Administrative Law Chamber of the Supreme Court has in its practice continually eased that strict requirement.¹¹ The secondary requirements claims for the executive are thus generally addressed only when damage has been caused to people person as a result of an unlawful act of the administration regardless of the implementation of the primary requirements claims. In such a case, a person may either demand either financial monetary compensation for the damage caused to him or elimination of the unlawful consequences of the administrative activity(s).

Estonian state liability law has used the model of direct state liability, according to which the state is liable to the injured party. The act of a natural person causing damage (e.g., an official) is ascribed to the public authority whose tasks the natural person was performing when the damage was caused. The natural person directly causing the damage is liable to the injured party personally only when this is prescribed by a specific law.¹² After compensating the injured party for damage, the state may file a claim of recourse against the official but only if the official was at fault in causing the damage (SLA § 19). The liability of the state depends on the fault of the activities of the public authority only in the case of compensation for loss of income and non-proprietary damage (SLA §§ 13 (2) and 9 (1)).

The model of direct state liability is significant as regards the restoration of rights violated in the performance of public duties. As the state assumes direct liability to the injured party, the injured party may demand of the state the implementation of all lawful measures falling within the state's competence, including also elimination of unlawful consequences. Thus, the model of direct state liability creates more extensive legal protection options than does the model of indirect state liability.¹³

⁸ The Administrative Co-operation Act (RT I 2003, 20, 117; 2004, 89, 603; in Estonian) entered into force within the framework of the administrative law reform on 1.7.2003. The draft Maintenance of Law and Order Act is still in the preparation stage. For the principles of the Estonian administrative law reform and details on its implementation, see Ü. Madise. Eesti haldusõiguse reformi kandvatest ideedest (About underlying ideas of Estonian administrative law reform). – Juridica 2003/1, pp. 38–44 (in Estonian); K. Merusk. Administrative law reform in Estonia: legal policy choices and their implementation. – Juridica International 2004, pp. 52–62.

⁹ Additional state liability claims may be prescribed, and restrictions may be provided in the prerequisites for and extent of the claims covered in the State Liability Act by special law (SLA § 2 (2)).

¹⁰ SLA § 7 (1): 'A person whose rights are violated by the unlawful activities of a public authority in a public law relationship (hereinafter 'injured party') may claim compensation for damage caused to the person if damage could not be prevented and cannot be eliminated by the protection or restoration of rights in the manner provided for in §§ 3, 4, and 6 of this act'. The claim for repeal of an administrative act is provided in SLA § 3, the claim for termination of a continuing measure in SLA § 4, and the claim for issue of an administrative act or taking of a measure in SLA § 6.

¹¹ According to the practice of the Administrative Law Chamber of the Supreme Court, the use of a primary legal remedy had to be actually possible for the injured party (ALCSCd 3-3-1-14-02, para. 19, Note 7); the possibility to avoid damage ('elimination') had to be understandable for the injured party; and there had to be good reason for failure to use a primary legal remedy (ALCSCd 3-3-1-11-02, para. 16. – RT III 2002, 12, 122; in Estonian). In addition, the Administrative Law Chamber of the Supreme Court has replaced its earlier position, according to which the injured party had to file the claim provided in SLA § 3, 4, or 6 in challenge or judicial proceedings (see Note 10), with the position that 'a person may comply with the requirement for prevention of damage arising from SLA § 7 (1) not only in challenge and court proceedings but also through the use of any other appropriate legal remedies'. Compare ALCSCd 3-3-1-8-04, para. 10 (RT III 2004, 9, 100; in Estonian) and ALCSCd 3-3-1-33-04, para. 15 (RT III 2004, 32, 335; in Estonian).

¹² For example, personal liability has been prescribed for notaries, bailiffs, and sworn translators in Estonia. In order to ensure liability, these acts also govern the obligatory liability insurance.

¹³ For instance, for historical reasons, an indirect public administration model continues to apply in Germany because BGB § 839 provides for personal liability that is taken over by the state under GG § 34. That is why the literature is of the opinion that natural restitution is not possible under a public liability claim (*Amtshaftungsanspruch*) since the official can pay the injured party usually only monetary compensation outside the area of his professional competence and not issue administrative acts or perform measures. Thus, the state can take over only the obligation to pay monetary compensation. See, e.g., F. Ossenbühl. Staatshaftungsrecht. 5th ed. München 1998, pp. 10–12.

3. Delimitation of claim for elimination of unlawful consequences with regard to claim for compensation for damage

3.1. The need for delimitation of both claims

In private law, a claim for the compensation for damage is usually viewed as a single claim regardless of the different methods available for compensation for damage.¹⁴ The State Liability Act mentions in the legal definition of state liability only the notion of ‘compensation for damage’ (SLA § 1 (1)), and the list of state liability claims includes as the only secondary claim the right of the injured party to request ‘compensation for damage caused’ (SLA § 2 (1) 5)). Chapter 3 of the State Liability Act is titled ‘Compensation for Damage’. The section headings for the general provisions of the chapter most often mention only compensation for damage (e.g., § 8, ‘Compensation for proprietary damage’; § 9, ‘Compensation for non-proprietary damage’; § 10, ‘Compensation for damage to third parties’; § 12, ‘Person obligated to compensate for damage’). The only exceptions are § 11, titled ‘Elimination of consequences’, and § 13, titled ‘Restriction of liability’. The sections governing procedural issues (§§ 17 and 18) provide only for the procedure for and terms of filing an application or action for compensation for damage.

If we examine a claim for compensation for damage more closely, it appears that the person whose rights the administrative authority has violated may demand compensation for both proprietary and non-proprietary damage. According to the wording of SLA § 8 (1), proprietary damage shall be compensated for only monetarily.¹⁵ SLA § 9 (1) provides for the cases in which a natural person may claim monetary compensation for non-proprietary damage.¹⁶ On the basis of these provisions, we could conclude that the law prescribes payment of monetary compensation as the only method of compensation for both proprietary and non-proprietary damage. Thus, SLA § 11 (1) may seem somewhat surprising, as it prescribes that ‘instead of monetary compensation’, an injured party may request from a public authority ‘the elimination of the unlawful consequences’ of a repealed administrative act or a partially amended administrative act.

The first sentence of SLA § 8 (1) appears to state clearly that ‘[p]roprietary damage shall be compensated for only in money’. The wording of SLA § 9 (1) as ‘[a] natural person may claim monetary compensation for non-proprietary damage upon fault-based degradation of dignity [...]’ can be interpreted such that in the case of non-proprietary damage one can claim only monetary compensation for damage. At the same time, it can also be interpreted such that the principle of *numerus clausus* provided in SLA § 9 (1) applies only to monetary compensation for non-proprietary damage, and not to compensation for non-proprietary damage in any other manner. As, according to SLA § 11 (1), the elimination of the unlawful consequences may be requested only ‘instead of monetary compensation’, it may be concluded that unless the prerequisites for monetary compensation for damage are met, elimination of the unlawful consequences may not be requested.

Does a claim for elimination of unlawful consequences in public law represent natural restitution as a method of compensation for damage (‘instead of monetary compensation’ — SLA § 11 (2)), in which the prerequisites for the claim are the same as with monetary compensation for damage, or does ‘elimination of the unlawful consequences’ imply a certain fundamental difference from a claim for compensation for damage?

This is a question that leads to several other questions. Are the notions of damage and unlawful consequences synonymous? Is the elimination of the unlawful consequences aimed at restoring the former (equivalent) situation or creating the sort of situation in which the injured party would be if his rights had not been violated? Does the claim for elimination of unlawful consequences include all the unlawful consequences that are in a causal relationship with the activity of the administrative authority, in the same way as the claim for compensation for damage, or only the direct consequences of the administrative authority action?

¹⁴ For example, as regards delictual liability in private law, the Estonian Law of Obligations Act (hereinafter also ‘LOA’; RT I 2001, 84, 487; 2004, 90, 616; in Estonian) provides for monetary compensation as the primary method of compensation for damage, with natural restitution possible only if it is prescribed by law or a contract or if it is reasonable in view of the circumstances (LOA § 136 (1) and (5)). The Law of Obligations Act does not provide for a general claim for the elimination of unlawful consequences; instead, a person may demand only that behaviour that causes damage be terminated or the making of threats of such behaviour be refrained from (LOA § 1055 (1)). The Law of Obligations Act tends to support a concept according to which the injured party himself eliminates the unlawful consequences caused to him, via the compensation. For example, if damage is caused to a thing, compensation for the damage shall cover, in particular, the reasonable costs of repairing the thing and the potential decrease in the value of the thing (LOA § 132 (3)).

¹⁵ SLA § 8 (1): ‘Proprietary damage shall be compensated for in money’.

¹⁶ SLA § 9 (1): ‘A natural person may claim monetary compensation for non-proprietary damage upon fault-based degradation of dignity, damage to health, deprivation of liberty, violation of the inviolability of home or private life or the confidentiality of messages, or defamation of the honour or good name of the person’.

It is important to furnish these notions with content also upon the implementation of specific laws. For example, according to § 9 of the Immovables Expropriation Act^{*17}, an expropriation applicant (that is a state or local government agency is required to compensate the owner of the immovable and any relevant third parties for all damage caused by the preliminary work for expropriation. Thus, in cases in which a specific law provides for a person's right to demand of the public authority compensation for damage, we need to know whether the person may claim only monetary compensation or also the elimination of the unlawful consequences.

The Administrative Law Chamber of the Supreme Court has not clearly delimited the claim for compensation for damage and the claim for the elimination of the unlawful consequences in its practice to date. In one of its recent decisions, that in *Malyshev v. Tartu Prison*, the Administrative Law Chamber of the Supreme Court took the position that elimination of the unlawful consequences presumed 'that the injured party has incurred proprietary or non-proprietary damage to be compensated for'.^{*18} The Supreme Court established the prerequisites for monetary compensation for non-proprietary damage in the decision and found that '[t]aking into account the circumstances of the case, the form and gravity of fault, and the effect of the compensation for non-proprietary damage and elimination of the unlawful consequences of the damage incurred by M. Malyshev and the public authority, the Administrative Law Chamber of the Supreme Court holds it justified to oblige the Tartu Prison to apologise in writing to M. Malyshev for unlawful search'.^{*19} The claim for monetary compensation for non-proprietary damage was not satisfied. We may infer that the Supreme Court considers the elimination of unlawful consequences to be a legal consequence of the claim for compensation for damage, not a separate secondary claim.

The wording of SLA § 11 (1) ('instead of monetary compensation'), the structure of the State Liability Act described above, and the position of the Supreme Court concerning the *Malyshev v. Tartu Prison* case together led to the conclusion that under applicable Estonian state liability law, the claim for monetary compensation for damage and the claim for elimination of unlawful consequences must be regarded as a single secondary state liability claim.

In order to examine whether they by nature constitute a single state liability claim or incorporate several and what relationship exists between the claim for compensation for damage and the claim for elimination of unlawful consequences under public law, we must scrutinise the nature of those claims, and examine the content, prerequisites, and extent of the two more closely.

3.2. The nature of a claim for compensation for damage

3.2.1. Content of a claim for compensation for damage

According to the State Liability Act, a public law claim for compensation for damage gives a person whose rights were violated by the unlawful activity of a public authority in a public law relationship the right to claim of the public authority compensation for damage caused to him (SLA § 7 (1)).^{*20}

Although SLA § 7 (1) mentions a public authority as the obligated party to the claim for compensation for damage, SLA §§ 7–13 above all govern the unlawful activities of an administrative authority in regulating and arranging individual cases.^{*21}

3.2.2. Prerequisites for a claim for compensation for damage

The elements of a claim for compensation for damage caused unlawfully by an administrative act or measure differ depending on the type of damage. The general prerequisites are:

- 1) an unlawful activity of an administrative authority (administrative act or measure);
- 2) incurrence of damage by a person (including the violation of a subjective right of a person^{*22}); and
- 3) a causal relationship between the measure and the damage.

¹⁷ Kinnisasja sundvõõrandamise seadus (Immovables Expropriation Act). – RT I 1995, 30, 380; 2005, 40, 312 (in Estonian).

¹⁸ ALCSCd 3-3-1-30-05, para. 18. – RT III 2005, 21, 211 (in Estonian).

¹⁹ *Ibid.*, p. 22.

²⁰ See Note 10.

²¹ Thus, the discussion that follows excludes legislative activities of administration as well as any other legislative activities and administration of justice.

²² A vivid example of violation of a subjective right as causing of damage is a case in which the return of an unlawfully expropriated residential building has been found to be unlawful because, due to lack of legislation (international agreement), the building may not be returned or privatised. Although the privatisation of the building would be legally impossible by reason of acquisition in good faith following the unlawful return of the building even after the enactment of legislation, the subjective right of the person requesting privatisation has not been violated so far (due to lack of legislation) and he has thus not incurred damage. See ALCSCd 3-3-1-92-04, para. 12. – RT III 2005, 9, 80 (in Estonian).

In the case of the claim for compensation for the loss of profit and for non-proprietary damage, the public authority must prove that it was not at fault in causing the damage. In the case of the claim for compensation for direct proprietary damage, fault is not a prerequisite for liability. However, a public authority shall be relieved of liability for damage caused in the course of performance of public duties if the damage could not have been prevented even if the diligence necessary for the performance of public duties had been fully observed (SLA § 13 (3)).

3.2.3. The extent of a claim for compensation for damage

A claim for compensation for damage covers all losses that are in a causal relationship with the unlawful activities of the administrative authority. Thus, the extent of the compensation for damage largely depends on how the causal relationship is furnished with content.^{*23}

The goal of the compensation is based on the principle of full compensation for damage (*restitutio in integrum*), according to which compensation shall create the financial situation in which the injured party would be had his rights not been violated (SLA § 8 (1)). The Supreme Court has proceeded from this principle in settling claims for the compensation of damage.^{*24} At the same time, satisfaction of a claim for compensation for damage is not to lead to the enrichment of the injured party; that refers to a situation in which the injured party is in a better economic situation than that he would have been in without damage having been incurred.^{*25}

3.3. The nature of a claim for elimination of unlawful consequences

In many cases, the injured party is interested not in monetary compensation but in the factual (in kind) elimination of the unlawful consequences of the activities performed by the public authority. In a typical instance of response to a claim for elimination of unlawful consequences, the unlawful (burdensome) administrative act is repealed retroactively but the harmful consequences of the administrative act persist. In such a case, the executive power is, in addition to annulling the unlawful administrative act, obliged to eliminate also the unlawful consequences of the administrative act, as they should not be present without the administrative act. Such examples can be found in very different spheres of life. For example, if a building constructed on the basis of a building permit issued by the city administration violates neighbouring rights, the owner of the neighbouring plot may demand reconstruction or demolition of the building to the extent to which his subjective public rights have been violated. Similarly, a person who has been unlawfully released from public service may wish to receive not compensation but reinstatement.^{*26}

The public authority and public in general should definitely be as interested in the elimination of the unlawful consequences as the injured party is. Namely, the unlawful consequences of administrative activities are eliminated usually when the compensation payable for the violation of the rights of the injured party would significantly exceed the costs of eliminating the consequences. In this way, elimination of unlawful consequences allows for economising on public resources.

A disadvantage of the institution of elimination of unlawful consequences is that often the elimination of unlawful consequences may be factually or legally impossible or unreasonable, requiring that the violation of a person's rights be remedied by payment of monetary compensation.

3.3.1. Content of a claim for elimination of unlawful consequences

As stated above, the issues concerning compensation for damage have been discussed in Chapter 3 of the State Liability Act. The first subsection of § 11 in the same chapter provides: Instead of monetary compensation, an injured party may request from a public authority the elimination of the unlawful consequences of a repealed administrative act or a partially amended administrative act or a measure.

²³ See section 3.3.4 of this article.

²⁴ See, e.g., ALCSCd 3-3-1-33-02, para. 13. – RT III 2002, 20, 234 (in Estonian). In this decision, the Administrative Law Chamber of the Supreme Court also noted that the value of the property to be compensated for as of the making of the decision is to be taken into account in determining the amount of the compensation. The Civil Chamber of the Supreme Court assumed the same position earlier in CCSCd 3-2-1-14-00. – RT III 2000, 11, 123 (in Estonian).

²⁵ The Supreme Court has also emphasised this principle. See, e.g., ALCSCd 3-3-1-64-04, paras. 32, 34. – RT III 2004, 36, 364 (in Estonian).

²⁶ According to SLA § 1 (3), private law regulation shall be applied upon compensation for damage caused by a public authority in certain areas. For example, the public authority shall be liable on the basis of private law upon the violation of its obligations as the owner of an immovable, road, body of water, or other thing (SLA § 1 (3) 2)).

It would be wise to start the processing of a claim for elimination of unlawful consequences with a question: who may request the elimination of unlawful consequences? The State Liability Act, in § 11, points out that such a person may be an injured person — that is, the individual whose rights have been violated by the unlawful activities of a public authority in a public law relationship (SLA § 7 (1)).

The person from whom the injured party may request the elimination of unlawful consequences is a public authority, according to SLA § 11 (1). However, it derives from the content of such a request, which may cover only administrative acts and measures, that a request may be made only to the executive power pursuant to SLA § 11. As a rule, an application may be submitted to the administrative authority that caused the damage or to an administrative court (SLA § 17 (1)). If the issue of an administrative act or taking of a measure necessary for the elimination of consequences is not within the competence of the public authority whose activities gave rise to the unlawful consequences, a competent public authority is obliged to perform the activities necessary for the elimination of the consequences (SLA § 12 (1) and (5)). Thus, the obligation to eliminate unlawful consequences applies to all national executive bodies regardless of their more specific position in the administrative organisation of the state.

The question of what the injured party may demand of the executive power is slightly more difficult. To that end, we first have to answer the question of whether the notion of unlawful consequence (SLA § 11) overlaps that of damage (SLA §§ 8 and 9). As noted above, the Supreme Court in its *Malyshev v. Tartu Prison* decision assumed the position that application of SLA § 11 (1) presumes that the injured party had incurred proprietary or non-proprietary damage subject to compensation.^{*27} Thus, the Supreme Court has treated the notions of unlawful consequence and damage as synonyms. However, we may still suspect that the notion of unlawful consequences is narrower than that of damage, encompassing not all damage that the injured party may incur in relation to the unlawful activities of the administrative authority but, rather, only the direct unlawful consequences of administrative acts. This directly links up with the extent of the claim for the elimination of unlawful consequences.^{*28} Not all unlawful consequences of administrative activities are to be eliminated. An unlawful administrative act that has not been repealed or amended continues to apply regardless of its unlawfulness, and the administrative act must be complied with. Thus, elimination of the unlawful consequences of the administrative act can be requested when the administrative act has (at least in part) been repealed retroactively. If an unlawful administrative act is repealed only proactively or only the unlawfulness of the applicable administrative act is established, SLA § 11 cannot be applied, as these cases concern only the so-called regularised unlawful consequences. At the same time, when the unlawfulness of the applicable administrative act is established, a claim for compensation of damage may be filed on the basis of SLA §§ 7–10.^{*29} Consequently, the damage to be compensated under SLA §§ 7–10 need not be subject to elimination on the basis of SLA § 11 (1).

Although, according to the wording of SLA § 11 (1), an injured party may request the elimination of the unlawful consequences of any repealed or amended administrative act, it derives from the above information that this still applies only to an administrative act that has been repealed (including amendment) retroactively (*ex tunc*).^{*30} The administrative act must also have been complied with, as only such an act can have factual consequences. In the case of elimination of the unlawful consequences of a measure, the unlawfulness of the measure serves as a prerequisite for a claim.

It is not entirely clear whether the requirement of unlawfulness applies only to the consequences of an activity performed by an administrative authority or to the activity itself. Although in the majority of cases, both the activity and its consequence are unlawful, there may be cases in which the legal regulation serving as the basis for the administrative act later ceases to exist, while the thing or money delivered under the administrative act continues to be in the possession of the administrative authority. German legal literature has convincingly substantiated the claim that one should proceed from the unlawfulness of the consequence of an activity of the administrative authority since it is the actual harm to the legal position of a person that is the deciding factor.^{*31}

The unlawful consequence must be permanent since if the unlawful consequence has ceased to exist or the situation has been regulated in the meantime, there is no unlawful consequence the elimination of which could be requested.

²⁷ See Note 18.

²⁸ See section 3.3.4 of this article.

²⁹ See, e.g., ALCSCd 3-3-1-14-02, para. 15 (Note 7).

³⁰ See also F. Ossenbühl (Note 13), pp. 312–314. The conclusion is confirmed also by § 69 (2) of the Administrative Procedure Act, according to which the State Liability Act applies to the return of and compensation for things and money transferred by a person on the basis of an administrative act that is repealed retroactively.

³¹ F. Ossenbühl (Note 13), pp. 312–313; S. Detterbeck, K. Windthorst, H.-D. Sproll. Staatshaftungsrecht. München 2000, pp. 229–230 (§ 12, para. 38); F. Schoch. Folgebeseitigung und Wiedergutmachung im Öffentlichen Recht. – Verwaltungs-Archiv 1988/1, p. 42.

3.3.2. Prerequisites for a claim for elimination of unlawful consequences

Thus, the prerequisites for a claim for elimination of unlawful consequences are the following:

- 1) a public law activity of an administrative authority (a retroactively repealed or amended administrative act, or unlawful measure),
- 2) violation of a person's subjective rights,
- 3) a causal relationship between the measure of the administrative authority and violation of the person's subjective rights, and
- 4) permanent unlawful consequence of the activity of an administrative authority.

3.3.3. The objective of a claim for elimination of unlawful consequences

Just as in the case of the claim for the compensation of damage, the principle that a person can request the elimination of unlawful consequences only to the extent to which the unlawful situation violates his rights applies also to the determination of the extent of the claim for the elimination of unlawful consequences.

One of the central questions in determining the extent of the claim for elimination of unlawful consequences is whether the claim for the elimination of consequences is aimed only at the restoration of the situation preceding the performance of the unlawful activity (*status ex ante*) or at creation of a situation as would occur if the unlawful activity of the administrative authority had never existed (*restitutio in integrum*³²). For example, if the police unlawfully removed a person's car and in addition to the loss of the car the person suffered any other harmful consequences (e.g., taxi fare and interests arising from failure to perform his contractual duties), the injured person is definitely interested in the elimination of all the negative consequences caused to him.

As it is the legislator's right and duty to specify the content of state liability claims, the objective of the elimination of unlawful consequences should derive from the text of the State Liability Act. Although SLA § 8 (1) provides that compensation shall create the financial situation in which the injured party would be had his rights not been violated, it is questionable whether the legislator considered that objective of monetary compensation for damage also to be the objective of the claim for the elimination of unlawful consequences.

For example, the Code of Administrative Court Procedure (hereinafter also 'CACP') gives the administrative court the authority to issue a precept for the 'reversal of the administrative act' if the administrative act is annulled (CACP § 26 (1) 1)). The provision directly refers to the restoration of the original situation although it is a procedural, not substantive law. The Administrative Procedure Act speaks about only the return of things and money transferred by a person to an administrative authority on the basis of an administrative act that is repealed retroactively (§ 69 (2) of the Administrative Procedure Act).

Estonian legal literature has so far been of the opinion that the objective of the elimination of unlawful consequences is the restoration of the situation preceding the violation.³³ Thus far, the Supreme Court has not discussed the issue in greater detail in its practice.³⁴ German court practice and legal literature, which have had a significant effect on the development of Estonian administrative law, have almost uniformly adopted the position that it is enough for the situation preceding the violation to be restored.³⁵ Yet we have to note that relevant explanations are hard to find in German legal literature.

³² P. Schlechtriem has furnished restitution with content as follows: 'restoration of a situation that would have existed without the violation of the interest' (p. 189), 'restoration of the full intact benefit situation' (p. 211), and 'restoration of the benefit situation transformed through a damaging event' (p. 180). P. Schlechtriem. *Võlaõigus. üldosa* (Law of obligations: general part). Tallinn 1999 (in Estonian). However, the European Court of Human Rights recognises only the restoration of the situation preceding the violation as *restitutio in integrum*. See, e.g., *Papamichalopoulos and Others v. Greece* (Article 50), judgement of 31.10.1995, Series A No. 330-B, pp. 58–59, § 34.

³³ I. Pilving. *Riigivastutuse dogmaatika ja Eesti kehtiv riigivastutusõigus* (State liability dogmatics and state liability law applicable in Estonia). – *Juridica* 1999/8, p. 384 (in Estonian).

³⁴ Some of the positions of the Administrative Law Chamber of the Supreme Court indicate that also the Supreme Court may regard as elimination of unlawful consequences only the restoration of the situation preceding the violation. For example, the Supreme Court has noted in a decision that '[a]nnulment of the orders serving as the basis for privatisation in itself would not lead to the restoration of the pre-privatisation situation and remedy of damage if the privatisation has been completed. The situation could be restored only by reversal of the privatisation decisions. The possibility of reversal of an administrative act in itself does not preclude the requirement for monetary compensation.' See ALCSCd 3-3-1-14-02, para. 19 (Note 7).

³⁵ See, e.g., F. Ossenbühl (Note 13), pp. 301–302; H. Maurer. *Allgemeines Verwaltungsrecht*. Vol. 13. München 2000, pp. 791–792 (§ 29, paras. 1–2). For criticism, see, e.g., F. Schoch (Note 31), pp. 47–49; M. Redeker. *Was beseitigt das Folgenbeseitigungsanspruch? – Die Öffentliche Verwaltung* 1987/5, pp. 197–198.

The principles of constitutional and administrative law allow for setting both the restoration of the situation preceding the violation and full restitution as the objective of the elimination of unlawful consequences. It is important to understand that restoration of the previous situation does not usually eliminate all unlawful consequences; the unlawful consequences of an activity created between the beginning of the misconduct and the commencement of the elimination of its consequences remain for the injured party to bear. In other words, the person is ‘taken back to the past’, with no regard for the events following the misconduct and in the causal relationship with it.

Proceeding from the central principle of the state based on the rule of law, according to which the executive must act lawfully, and the corresponding duty of the executive to liquidate the unlawful consequences of its activities, an important justification arising from the Constitution should be present to limit the duty to eliminate unlawful consequences. However, taking into account that in the case of monetary compensation for damage caused by administrative activities the principle of full compensation for damage applies, it is difficult to find a reason it should be different in the case of the elimination of unlawful consequences in kind. A person requesting the elimination of unlawful consequences should not be in a worse position than a person seeking monetary compensation for damage caused by the same unlawful activity. The elimination of all unlawful consequences caused by administrative activities may not be factually or legally possible or reasonable — above all, the executive power may lack a legal basis for the elimination of the consequences and the procedure may be too expensive — however, such limiting conditions apply also to other cases of elimination of unlawful consequences, so restriction of liability cannot be justified with these arguments alone.

The position that the elimination of consequences should serve to restore the situation preceding the unlawful acts would entail for the injured party an obligation to file a claim for the compensation for damage for the full remedy of the harmful consequences in the causal relationship with the unlawful activity and violating his rights. Thus, the person should in most cases file both a claim for the elimination of unlawful consequences and a claim for compensation for damage. In accordance with the principle of effective legal protection, a person must have the opportunity to protect his rights in relation to one event at costs as low as possible and within reasonable time.³⁶ In such a situation, the injured party would prefer to file only a claim for the compensation for damage, and thus, as a result of the claim for compensation for damage, such a situation should be created for the person as he would have been in if his rights had not been violated. Consequently, such a position (limitation of the claim for elimination of unlawful consequences to the restoration of the situation preceding the misconduct) in state liability law favours submission of a claim for the compensation of damage and evasion of the principle of restitution.

The opinion that elimination of unlawful consequences is aimed at the creation of such a situation as would obtain if the administrative authority had not committed the unlawful activity does not mean that the claim for the elimination of unlawful consequences overlaps with the claim for the compensation of damage, both claims have different prerequisites and different conditions preclude their satisfaction.

There exists at least one disadvantage to the complete elimination of unlawful consequences. Namely, it is difficult to avoid the enrichment of the injured party since, compared to the calculations made upon the assignment of monetary compensation (e.g., the amount of loss of profit), taking account of the expenditure that the injured party has saved upon the issue of an unlawful administrative act or measure is more difficult. In such cases, the same principle should apply as in the case of the shared fault of the injured party: the injured party should pay the administrative authority an amount that conforms to the expenditure saved by him via the unlawful activity, and if he does not do that, the unlawful consequences will not be eliminated, while the injured party retains the claim for compensation for damage.³⁷

3.3.4. Extent of the claim for elimination of unlawful consequences

The extent of implementation of the elimination of unlawful consequences depends on whether the person may request only the elimination of the direct unlawful consequences of the administrative authority or, by contrast, the elimination of all unlawful consequences that have a causal (i.e., also indirect) relationship with the activity of the administrative authority. For example, when the police unlawfully remove a person’s car and on the way to the parking lot a third party causes an accident in which the removed car is damaged, the owner still wishes to get his car back unscathed.

The answer to this question depends, above all, on the furnishing of the criterion of the causal relationship with the content. It is uniformly clear that with an adequate causal relationship between the activity of the administrative authority and the violation of the subjective right of a person, the claim for the elimination of unlawful consequences ceases to exist. However, at the moment it is unclear how the Administrative Law

³⁶ See, e.g., ALCSCd 3-3-1-13-04, para. 10. – RT III 2004, 11, 130 (in Estonian).

³⁷ As in SLA § 13 (4).

Chamber of the Supreme Court will furnish the criterion of the causal relationship with the content. In its many years of practice, the Supreme Court has been of the opinion that the claim for the compensation of damage is subject to a usual requirement for an adequate causal relationship, according to which not only the damage caused directly by the administrative authority but also any other damage that has an adequate causal relationship with the unlawful activity of the administrative authority is compensated.^{*38} For example, the Supreme Court has found that increase in the obligations to third parties, if caused by an unlawful administrative act, must also be regarded as damage, since it causes the person's financial status to deteriorate.^{*39} In its most recent decision concerning the causal relationship, which concerned the appellant's expenditure on legal assistance in voluntary challenge proceedings, the Supreme Court assumed the position that '[t]he requirement for a causal relationship means that the activity had to cause damage directly and inevitably'.^{*40} The court did not set forth reasoning for its possible change of opinion, and it is most likely not a change of the opinion at all. However, if the Supreme Court were to retain this position in settling claims for the compensation for damage, it would be a very important change in Supreme Court practice, and it is likely that the same position would be adopted with regard to the claim for the elimination of unlawful consequences. In such a case, only the direct unlawful consequences of the activity of an administrative authority would be eliminated under SLA § 11. So far, such Supreme Court practice does not exist.^{*41}

The terms 'direct' and 'indirect' in connection with damage or unlawful consequence are certainly ambiguous. Therefore, the area of protection of the specific violated rule, above all, should be taken as the basis in the establishment of the causal relationship.^{*42} It should be assessed to that end whether it is just to ascribe the change of situation related to the activity of the administrative authority to the injured party as a result of the area of protection of the rule on which the creation of liability is based.^{*43} For example, if a person complied with an administrative act voluntarily and according to the prescribed procedure but a similar administrative act was complied with by the administrative authority with regard to another person, the later annulment of the administrative act would probably cause an unjust situation in which only the unlawful consequences caused directly by the administrative authority would be eliminated in the first person's case, whereas all unlawful consequences would be eliminated in the case of the other person.

Thus, it would be more just if all unlawful consequences that have a causal relationship with administrative acts were eliminated. Obviously, there are few such cases in practice, on account of factual or legal impossibility; however, with no conditions restricting or precluding liability there are no significant reasons that the criterion of the causal relationship should be more limited in the claim for the elimination of unlawful consequences than it is in relation to the claim for compensation for damage.

3.4. Relationship between claim for elimination of unlawful consequences and claim for compensation for damage. Conditions restricting elimination of consequences

Besides the first subsection, which has thus far been discussed in greater detail by comparison, SLA § 11 also contains two other provisions concerning the elimination of unlawful consequences. Let us provide, for the sake of clarity, SLA § 11 (2) and (3) here:

- (2) A public authority is required, upon the elimination of consequences, to take all lawful measures, including the issue of administrative acts, taking of measures, and filing of claims in private law against third parties, if legal basis therefor exists and if the costs of elimination of consequences would not substantially exceed monetary compensation.

³⁸ See, e.g., ALCSCd 3-3-1-17-02, para. 15. – RT III 2002, 11, 110 (in Estonian); ALCSCd 3-3-1-14-02, para. 20 (Note 7); ALCSCd 3-3-1-33-02, para. 10 (Note 24). I. Pilving. Põhiseadusvastase määruse alusel tasutud maksuintressi tagasinõudmine (Recovery of tax interest paid under unconstitutional regulation). – *Juridica* 2002/10, pp. 704–705 (in Estonian); E. Vene (Note 7), p. 332.

³⁹ ALCSCd 3-3-1-32-02, para. 24. – RT III 2002, 20, 232 (in Estonian).

⁴⁰ ALCSCd 3-3-1-93-04, para. 12. – RT III 2005, 11, 107 (in Estonian). The Supreme Court established in the matter that, as the appellant could choose between challenge and court proceedings and the possibility of sharing legal costs in court proceedings is generally known, the appellant can avoid costs. As the damage caused by the unlawful administrative act was not inevitable, the Supreme Court found that there was no causal relationship between the administrative act and damage.

⁴¹ For example, it is an established position in German court practice that only direct unlawful consequences of administrative activities are eliminated. See, e.g., F. Ossenbühl (Note 13), pp. 302–305 and S. Detterbeck, K. Windthorst, H.-D. Sproll (Note 31), pp. 237–238 (§ 12, para. 54). For criticism, see F. Schoch. Der Folgenbeseitigungsanspruch. – *Jura* 1993/9, p. 484; F. Schoch (Note 31), p. 49.

⁴² According to LOA § 127 (2), damage shall not be compensated for to the extent that prevention of damage was not the purpose of the obligation or provision due to the non-performance of which the compensation obligation arose. This principle of compensation for damage is also applicable in state liability law (see SLA § 7 (4)).

⁴³ For details, see B. Bender. Zum Recht der Folgenbeseitigung. – *Verwaltungsblätter für Baden-Württemberg*. 1985/6, p. 203.

- (3) A public authority may, regardless of the request of the injured party, eliminate consequences in the manner provided for in subsection (2) of this section if monetary compensation would substantially exceed the costs of the elimination of consequences, unless the person has good reason for claiming monetary compensation.

These provisions reveal both the relationship between the claim for the compensation for damage and the claim for the elimination of consequences and the conditions precluding the elimination of unlawful consequences. The aim of both regulations is to protect the public interest. The public interest lies, above all, in seeing that violations are not remedied in a manner that is too burdensome on public resources.^{*44}

In the relationship between the claim for compensation for damage and the claim for the elimination of unlawful consequences, the injured party may, according to SLA § 11 (1), principally choose on his own account whether to claim monetary compensation or claim the elimination of unlawful consequences.

The law does not give the injured party the right to request the elimination of unlawful consequences in any case. SLA § 11 (2) provides for two conditions in the presence of which a claim for the elimination of unlawful consequences ceases to be valid:

- 1) if no legal basis exists for the elimination of unlawful consequences or
- 2) if the costs of elimination of consequences would substantially exceed those of monetary compensation.

Besides these two bases, SLA § 13 (4) also provides for a third option:

- 3) If the injured party cannot bear the costs corresponding to the part the injured party had in causing the damage, the unlawful consequences are not eliminated, but the injured party is entitled to claim monetary compensation corresponding to the public authority's part in it.

Although the State Liability Act does not provide that in place of the claim for the elimination of unlawful consequences the person retains the right to file a claim for the compensation of damage in the first two scenarios, the right must still be recognised by analogy (based on SLA §§ 11 (3) and 13 (4)). Also, the Supreme Court has noted in one of its decisions that '[t]he possibility of reversal of an administrative act in itself does not rule out a claim for monetary compensation'.^{*45} However, the Supreme Court did not satisfy the claim for the elimination of unlawful consequences in its *Malyshev v. Tartu Prison* decision because '[a]pology would not contribute in any way to the elimination of the unlawful consequence indicated by M. Malyshev', while not explaining why it did not consider it justified to replace the claim for the elimination of unlawful consequences with the claim for the compensation of damage. At the same time, a claim for compensation for damage concerning another instance of the same unlawful activity by the same appellant was satisfied, but instead of monetary compensation, the administrative authority was obliged to eliminate the consequences of the activity recognised as unlawful by means of a written apology.^{*46}

In its earlier practice, the Administrative Law Chamber of the Supreme Court established that if the administrative authority considers the claim for compensation for damage filed by the injured person justified and finds that monetary compensation would considerably exceed the cost of elimination of the consequences and the injured person does not have good reason to claim monetary compensation, it may settle with the injured party during the proceedings for the remedy of damage in any other manner.^{*47} Such a proposal can be made to the participants in the proceeding also by the court (CACP § 21 (2)). If the participants in the proceedings settle, the person may not have recourse to the courts in the same matter anymore (CACP § 24 (1) 6)). Thus, one secondary claim for state liability may be replaced by another secondary claim also during the proceedings. No such settlement was made in the *Malyshev v. Tartu Prison* decision.

As to the wording 'monetary compensation' used in § 11, it should be understood as a legal consequence of the claim for compensation for damage.^{*48} Excess costs for elimination of the consequences should also be

⁴⁴ This has been established also in the explanatory memorandum on the State Liability Act, clause 1. Available at: <http://web.riigikogu.ee/ems/saros-bin/mgetdoc?itemid=003672916&login=proov&password=&system=ems&server=ragne1>.

⁴⁵ ALCSCd 3-3-1-14-02 (Note 7).

⁴⁶ See ALCSCd 3-3-1-30-05, paras. 18–22 (Note 18). In that case, lawyer Malyshev filed with the administrative court a complaint in which he requested that the court oblige the Tartu Prison administration to apologise for its refusal to let him as counsel meet with an imprisoned person and to compensate for the moral costs caused in relation to the search in the amount of 10,000 krooni. The Supreme Court established that Malyshev had participated in the meeting with the imprisoned person as his counsel and that since the search was not justified, it was unlawful. It is a matter of question why the Supreme Court handled the claims separately, as the lawyer's meeting with the imprisoned person had taken place in fact and essentially only one unlawful act was involved, the search of the lawyer.

⁴⁷ ALCSCd 3-3-1-8-04, para. 22 (Note 11).

⁴⁸ Also the Administrative Law Chamber of the Supreme Court has referred to it in its decision 3-3-1-25-02, para. 25: 'Therefore, the Supreme Court considers it necessary to refer to the regulation of SLA § 11 (2) as the general principle of compensation for damage, according to which the elimination of consequences cannot be sought if the costs of elimination have exceeded the damage caused to the appellant.' – RT III 2002, 15, 172 (in Estonian). See also the wording of SLA § 11 (2): 'would not substantially exceed monetary compensation'.

applicable in instances in which the elimination of consequences is factually impossible (e.g., the case of destruction of an unlawfully expropriated irreplaceable thing or the death of a person).

The determination of the costs of elimination of unlawful consequences is not a simple task in practice. It is particularly difficult in situations in which elimination of unlawful consequences is precluded because of the presence of conditions that restrict the claim. We have to agree with the position expressed in the law of delict that in such a case, the amount of monetary compensation should be based on the value of the damaged benefit.⁴⁹ The value of the damaged benefit must certainly be accounted for also in those cases in which elimination of unlawful consequences is possible but costly. For example, an administrative authority may not refuse to refute false information purely on grounds of the costliness of the relevant announcement.

It may be generalised that on the basis of SLA § 11, the claim for the elimination of unlawful consequences is precluded in cases where the elimination of consequences is factually impossible, legally impermissible, contrary to the public interest (primarily economically unreasonable), or unacceptable for the injured party. In addition to that, another reason precluding state liability also arises from SLA § 13 (3), according to which a public authority shall be relieved of liability if the damage could not have been prevented even if the diligence necessary for the performance of public duties had been fully observed.

We must emphasise with regard to SLA § 11 (3) that the provision constitutes one of the most important public law provisions for compensation for damage, and one whose vigorous implementation in practice is hopefully to come. Although the rule is contained in the section concerning the elimination of unlawful consequences, it is actually applicable to cases in which the person has filed a claim for compensation for damage. To elaborate, SLA § 11 (3) imposes on an administrative authority the obligation to consider the elimination of unlawful consequences in every case of a claim for compensation for damage that is levelled against it, and the administrative authority may provide monetary compensation for the damage only if the elimination of consequences would be factually impossible, legally impermissible, considerably more costly, or unacceptable for the injured party and/or administrative authority for any other important reasons. Thus, the priority of natural restitution over monetary compensation for damage may be derived from SLA § 11 (3).⁵⁰

4. Conclusions

Present Estonian state liability law recognises the claim for compensation of damage as comprising both a claim for monetary compensation for damage and a request for the elimination of unlawful consequences. The purpose of this article was to show that the elimination of unlawful consequences cannot be regarded as simply a possible legal consequence of the claim for the compensation of damage. The prerequisites for a claim for the elimination of unlawful consequences do not coincide with the preconditions for a claim for monetary compensation for damage. E.g., when an administrative act need not be repealed upon monetary compensation for damage, the elimination of unlawful consequences is possible only when the administrative act has been repealed retroactively. Consequently, they should form independent secondary state liability claims.

However, the claim for the elimination of unlawful consequences as a restitution claim should not be identified with the general request for remedy. The main reason is that the unlawful consequences of administrative activities need not constitute all of the damage caused to a person by the violation of his rights. It is not always possible for a public authority to eliminate unlawful consequences. In such cases, damage can be relieved by monetary compensation. Proceeding from public interests, restitution should be preferred to compensation in state liability law. Thus, the administrative authority should first consider the possibility and reasonability of eliminating the unlawful consequences and only after the possibility of elimination of the consequences ceases to exist should the damage caused by violation of the person's right be compensated for monetarily.

Like the claim for compensation for damage, the claim for the elimination of unlawful consequences should be aimed at creation of the situation that would occur if the unlawful act of the administrative authority had never existed. Also, the injured party should have an opportunity to request the elimination of all unlawful consequences that have an adequate causal relationship with the activity of the administrative authority. In addition to the other arguments provided above, the restrictions on the claim for the elimination of unlawful consequences show that restrictions on the claim ensure sufficient consideration of the public interest and equal division of liability, so there is no need to fear that the implementation of the above principles would have a paralysing effect on state administration. Besides specific restrictions on claim, the obligation to present primary legal remedies and the regulation that takes account of the part of the injured party have their own effect of precluding or restricting liability.

⁴⁹ P. Schlechtriem (Note 32), p. 80.

⁵⁰ The same has been noted by I. Pilving (Note 33), p. 385.



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Penalty and Other Punitive Sanctions in the Estonian and European Legal Order

1. Introduction: sanctions and their position in the legal order

The notion of sanctions requires, above all, solving of the problem of whether the sanctions of each particular branch of law remain within the limits of the specifics of that branch of law or involve a more punitive matter or repressive element — that is why they have to be analysed essentially as penal law sanctions. The domestic angle is particularly important from the point of view of Estonia's young legal order, which is still in the development stage. The other, the international dimension, results primarily from the fact that sanction rules are contained both in European Union law and in other international acts, first and foremost in the Council of Europe conventions. All these provisions together must be co-ordinated with the national legal order to build an integrated system. However, we must say that European Union law is characterised by inconsistent terminology. The sanctions contained in European Union law are so varied that their analysis would presume scrutiny of individual issues, which surely goes beyond the scope of this article. We can only note that the notion of sanctions cannot be found in the text of the Treaty establishing a Constitution for Europe¹; the treaty mentions only that of a penalty. However, comparison of the English, French, German, and Finnish texts gives a somewhat more varied picture. All these treaty versions speak about penalty (*penalty, peine, Strafe, rankastus*) in Article II-109, where it is definitely adequate (offences and penalties). In Article III-271, however, the English, French, and Finnish versions speak about sanction (*sanction, seuraamus*), whereas the German one mentions the penalty concept (*Strafe*). It is the other way round in Article III-363: the English version refers to penalty, while the French and German versions mention sanction.

This article sets out to (1) analyse the notion of sanctions in penal law against the background of both national and European Union, as well as Council of Europe, law; (2) then examine the problems related to

¹ Available at: <http://europa.eu.int>; published also in print form but not widely available: the Treaty establishing a Constitution for Europe. Luxembourg: Office for Official Publications of the European Communities 2005.

public law sanctions as exemplified by suspension of the right to drive; and 3), finally, consider the prohibition of business in civil law as a punitive sanction.

2. Penal law

2.1. Penalties

The nature of penal law is eventually revealed in the penalty imposed for a wrongful act. Here we may ask whether each legal consequence in punitive law is a sanction or sanctions only include penal or punitive sanctions that give a negative assessment to an act. In fact, there are more questions to ask, such as that of the extent to which we can talk about sanctions in the case of a legal consequence that involves not imposition of a penalty but instead its rescission.

It is obvious that sanctions comprise penalties. The European Court of Human Rights points out the characteristics of a penalty that distinguish this sanction from the punitive sanctions contained in other branches of law. Firstly, a penalty must be contained in criminal or misdemeanour law (this criterion not being of any significance here); secondly, the nature of the delict is important, whether it is part of general penal law and aimed against general legal rights but is not a disciplinary offence; and, thirdly, the content of the sanction, the damage contained therein, and the resulting important preventive impact on the public are key.²

A penalty may be applied both actually and conditionally. The applicable Estonian penal law uses the French and Belgian *sursis* in the institution of conviction, in the case of which a person is convicted and is given a penalty that is not enforced but is conditional. According to the system of law, the conditional sentence is not regarded as an independent sentence type but as release from punishment (Chapter 5: 'Release from punishment'); however, it follows the punishable act and is a legal consequence determined by the degree of guilt, and thus it must be considered a sanction. During the period of probation, the convicted offender may be subjected to certain supervisory requirements or obligations; for example, he must reside at a permanent place of residence determined by the court, remedy the damage caused by the criminal offence, undergo the prescribed treatment, not meet certain persons, and so on (§ 75). Such requirements and obligations are not sanctions *per se* but form the substance of a conditional sentence as a sanction.

A person may be released from the conditional sentence not only during the imposition of the sentence but also during its service — that is, on parole (§§ 76 and 77). Here we can also say that the convicted offender continues to bear liability, though conditionally; thus, he is subject to sanction. Release from punishment due to terminal illness (§ 79 (1)), on the other hand, means unconditional release: the person no longer serves the sentence and is no longer sanctioned. *Poena naturalis* (§ 80) is a different issue. Namely, the court may release the convicted offender from the punishment if he is seriously injured as a result of committing the criminal offence. Though called a **natural punishment**, this does not, however, constitute a penalty in the legal sense and consequently does not serve as a sanction.

In addition to the principal and supplementary punishment, the sanction system underlying the Penal Code also recognises substitute punishments. For example, community service may be substituted for imprisonment (§ 69), while unpaid pecuniary punishment, a fine, or a fine to the extent of assets may be replaced by imprisonment, detention, or community service, respectively (Chapter 4, Division 3). Substitute punishment is definitely a sanction.

2.2. Other sanctions

Chapter 7 of the Penal Code, 'Other sanctions', comprises three types of legal consequences — confiscation (§§ 83–85), coercive psychiatric treatment (§ 86), and sanctions applied to minors (§ 87).

The classification of the latter as sanctions does not cause any problems, as, in the legal sense, a minor is released from punishment due to his diminished capacity for guilt; nevertheless, the sanctions imposed instead have features characteristic of penalties — these are measures designed to express social and ethical condemnation imposed for a wrongful act (see also section 4.2 below).

The two following measures described in Chapter 7 of the Penal Code can also be imposed for acts that are not wrongful. It is true that the object used to commit an offence may be confiscated from a person who has been convicted and punished (§ 83 (1) and (2)). However, this is not a punitive sanction by nature, since its

² Concerning the characteristics of the notion of punishment in terms of 'punishment is' and 'punishment must be', see N. Androulakis. Über den Primat der Strafe. – Zeitschrift für die gesamte Strafrechtswissenschaft 1996/8, p. 309 et seqq.

application does not depend on the degree of the person's guilt or the gravity of the offence. Such a measure is called a *securing non-punitive sanction*.³ Application of confiscation against a person who has aided in the use of the object for the commission or preparation of the offence or has acquired it in order to avoid confiscation (§ 82 (3)) resembles a penalty even less. In the absence of the permission necessary for the possession of a substance or object, confiscation is applied always, even if the person (for example, a child or a person of unsound mind) has not committed the offence wrongfully (§ 83 (5)). Recent professional literature in the field of law has pointed out that the regulation of confiscation contains much of that which might make it punitive. If assets acquired through an offence have been transferred or the confiscation thereof is impossible for another reason, the court may order the offender to pay an amount corresponding to the value of the assets subject to confiscation (§ 84). On the basis of § 73d (covering 'extended confiscation') German *Strafgesetzbuch*, assets may be confiscated from a person committing an unlawful act if there are grounds to believe that the assets were derived from an offence or used therefor. The net principle used to be applied to calculate the value of the assets to be confiscated, so that the amount of the assets to be confiscated was obtained via consideration of the balance of profit and loss, but the gross principle has been adopted more recently. According to that principle, everything obtained through an offence is confiscated, regardless of the expenditure involved. Such trends have given rise to complaints that, in essence, confiscation is a form of sanctions that should be applied in accordance with the principle of guilt.⁴ The objection proceeds from a purely legal argument — confiscation is not a punishment, and thus it is not necessary to take account of the principle of guilt.⁵ Here we also have to bear in mind the fact that while in Germany the underlying fine to the extent of assets related to confiscation in § 43a has been revoked as unconstitutional⁶, its analogue found in the Estonian Penal Code (§ 53) continues to apply.

It is a matter of substantive decision whether to regard confiscation as sanction or not. This may be done with regard to a convicted offender, while in the case of third parties such a conclusion is disputable. In such a case, confiscation is a legal consequence following an unacceptable act, but, as confiscation does not follow the unlawful act (for example, preparation for offence is not punishable according to applicable law, with the necessary elements of an offence not being present), there is no link between the unlawfulness of the act under penal law and its consequence.

An unlawful act with the elements necessary to be considered an offence may be followed by coercive psychiatric treatment. Manslaughter or arson on the part of a person of unsound mind is unlawful but not wrongful. By applying this measure, the state does not express condemnation (there is no point in condemning a disease) but responds to a dangerous situation by localising the danger (by hospitalising the dangerous person) or working toward its elimination (curing the ill person). The act and the consequence are directly linked, and the link is much stronger than it is in the case of confiscation.

It may be deduced from the above information that the two large categories of legal consequences in substantive penal law — punishments and other sanctions — can be regarded as sanctions. The treatment of non-penal measures as sanctions derives, according to the system applied in the Penal Code, from their inclusion in the same chapter but even more from the fact that they follow an act qualified under penal law. If we consider the direct link of the legal consequence with the unlawful act to be an essential feature of a sanction, the classification of confiscation as a form of sanctioning is questionable.

2.3. Procedural law

There is no doubt that procedural coercive measures whose objective is to ensure that the procedure proceeds may be eliminated from among the class of sanctions. The problem is, however, that procedural law also contains sanctions that are characterised as having a substantive law nature. Punishments applied in the course of simplified proceedings, such as alternative, settlement, and summary proceedings (Chapter 9 of the Code of Criminal Procedure, CCrP), are definitely sanctions because they are both legally and substantively punishments imposed by courts (CCrP §§ 238 (2), 248 (1) 4), and 254 (4) 2)).

In some cases, a legal consequence is applied to the accused also when the proceeding is not finalised, based on the principle of opportunity or proportionality, and the case is not sent to court. In certain cases, termination of a proceeding is not followed by a sanction, such as in the case of termination of a proceeding due to

³ See, e.g., Karistusseadustik. Kommenteeritud väljaanne (Penal Code. Commented edition). J. Sootak, P. Pikamäe (eds.). Tallinn: Juura 2004, § 83 comm. 1 (in Estonian).

⁴ F. Herzog. Gewinnabschöpfung und Vermögenssanktionen: Verbrechensbekämpfung durch Kostenmaximierung des Normbruchs? – Festschrift für Klaus Lüdersen. Baden-Baden: Nomos 2002, p. 247.

⁵ This is also the position adopted by the German Federal Constitutional Court. For details, see: U. Kindhäuser. Strafgesetzbuch. Lehr- und Praxiskommentar. Baden-Baden: Nomos 2005, § 73d/1.

⁶ Bundesgesetzblatt I, 1340.

lack of proportionality (CCrP § 203) and when criminal offences committed by foreign citizens or in foreign states are involved (§ 204). Neither is a legal consequence imposed upon an accused with respect to whom proceedings are terminated in connection with assistance received from the person upon the carrying out of proceedings (§ 205). The legal consequences imposed in other cases have to be discussed separately.

As we said above, according to § 87 of the Penal Code (PC), the court may impose on a minor aged 14 to 18 a sanction for a wrongful act if the court decides to release the person from punishment. Section 201 of the CCrP provides for certain legal consequences in the case of termination of proceedings. Namely, proceedings may be terminated with regard to a minor on two grounds: (a) if he is incapable of guilt because of age (below 14 years of age) under PC § 33 or (b) he is capable of guilt (at age 14 to 18) but his prosecution is not considered reasonable. In such cases, the investigative body or the Prosecutor's Office sends the materials on the case to a juvenile committee that may impose some of the sanctions provided for in the Juvenile Sanctions Act⁷ (§ 3: a warning, the obligation to live with a parent, community service, attending a special school, etc.). In the case of option *a*, a person is incapable of guilt who analogously with a mentally incompetent person (e.g., a person of unsound mind) has committed a non-wrongful act that still has the necessary elements of an offence and is unlawful, and thus the sanction imposed by the juvenile committee is not a punishment but a sanction because of the direct relationship between the unlawful act and the legal consequence. According to the same logic, any other sanctions imposed by the juvenile committee on a person capable of guilt (option *b*) must be regarded as sanctions, even more so on account of their following an act that, besides having the necessary elements to constitute an offence and being unlawful, is also wrongful.

As is known, criminal proceedings may be terminated on the basis of the principle of opportunity not only with regard to a minor but also with regard to an adult under CCrP § 202 if the person's guilt is negligible and there is lack of public interest in the pursuit of proceedings. It is possible for the proceedings to be simply terminated with no legal consequence, so we cannot speak of sanctions in this case. However, in certain cases the prosecutor or the court may apply particular sanctions — for example, imposing an obligation for the accused to pay a fixed amount into the public coffers or to perform community service. It is not difficult to notice that such legal consequences are either close to those specified by law as punishments (payment of an amount of money and pecuniary punishment) or coincide with them (community service), and their classification as punitive sanctions should be considered fully justified.

3. Punitive sanctions outside penal law

3.1. Suspension of the right to drive a vehicle

Outside penal law, the provisions of the Traffic Act⁸ (TA) in §§ 41 (3) 5) and 41³ governing suspension of the right to drive a motor vehicle deserve attention from the sanction problems standpoint. This is true regardless of the fact that we have had to use the past tense when speaking about the provisions since 1 October 2005, because the Riigikogu repealed the provisions of the Traffic Act governing the suspension of the right to drive on 16 June 2005 and replaced withdrawal of the right to drive by the Estonian Motor Vehicle Registration Centre (MVRC) with a supplementary punishment applicable for a traffic-related misdemeanour.⁹ Why is discussion of suspension of the right to drive still justified?

Firstly, we cannot disregard the fact that, as driving of vehicles has become an important part of daily life, the prohibition of driving is everywhere perceived as an important restriction; thus, it is an area causing disputes in various countries — testified by the fact that the European Court of Human Rights has had to repeatedly rule on issues related to driving prohibitions based on appeals submitted from different countries.¹⁰ The Estonian regulation has not been free of criticism and court actions either: in several instances, they even reached the Supreme Court *en banc*¹¹, while the Supreme Court had to adopt a position, *inter alia*, on whether suspension of the right to drive constitutes an administrative measure or a punitive coercive

⁷ Alaealise mõjutusvahendite seadus (Juvenile Sanctions Act). – RT I 1998, 17, 264 (in Estonian).

⁸ Liiklusseadus (Traffic Act). – RT I 2001, 3, 6; 2005, 40, 311 (in Estonian).

⁹ Väärteomenetluse seadustiku, karistusseadustiku ja liiklusseaduse muutmise seadus (Code of Misdemeanour Procedure, Penal Code, and Traffic Act Amendment Act). – RT I 2005, 40, 311 (in Estonian), which entered into force on 1 October 2005.

¹⁰ In addition to the decisions discussed in this article in the cases *Escoubet v. Belgium* and *Malige v. France*, the cases *Blokker v. Netherlands* and *Hangl v. Austria* could be mentioned. The judgements of the European Court of Human Rights are available at <http://cmiskp.echr.coe.int/tkp197/search.asp?skin=hudoc-en> (15.09.2005).

¹¹ Regardless of the fact that the Supreme Court did not declare the regulation unconstitutional, continuing criticism brought about the amendment of the act.

measure.^{*12} It is obvious that suspension of the right to drive on the basis of these provisions definitely served as a sanction — it was applied for violation of the traffic requirements specified in TA § 41³ (1)–(8), while suspension of the right to drive or a temporary prohibition to drive a motor vehicle definitely has a negative effect on the person concerned (demonstrated by widespread contestation of the decisions on suspension of the right to drive). Disputes were provoked by the question of whether it was an administrative measure or a punitive sanction — the persons concerned perceived it as a punishment, which gave rise to a question of violation of the *ne bis in idem* principle when a person is punished by a fine or detention in a misdemeanour procedure and, after the decision in the misdemeanour procedure has entered into force, the MVRC suspends the right to drive on that basis.

That is why there is a sufficient amount of court practice concerning the regulation, which, we might note, is not true about any similar provisions. Yet various laws still in force contain similar regulations concerning the withdrawal or suspension of special rights/licences^{*13}, which may give rise to the same issues that appeared in the disputes about the suspension of the right to drive. Thus, the opinions expressed in the cases involving suspension of the right to drive serve as guidelines from which to proceed in similar cases in the future.

3.2. The Traffic Act's regulation of suspension of the right to drive

According to TA § 41 (3) 5), a person's right to drive shall be suspended if a decision on punishment that prescribes suspension of the right to drive has entered into force in respect of the driver in misdemeanour proceedings. The list was given and the terms of suspension provided in TA § 41³ (1)–(8). Suspension was prescribed for more serious traffic misdemeanour^{*14}, such as driving while intoxicated, exceeding the speed limit by more than 20 km/h, and causing damage to property or the health of a person through negligence by violation of traffic requirements (i.e., causing a traffic accident). Somewhat more unexpected is the list's inclusion of the driving of a vehicle that has not been registered or that carries a wrong registration plate (the full list has been provided below). As a rule, suspension of the right to drive has been prescribed if several violations continue to apply, the exceptions being driving while intoxicated and activities impeding ascertainment of the state of intoxication (evasion of the examination for determination of the state of intoxication, consumption of alcohol after a traffic accident by the driver), ignoring a stop signal for vehicles, and failure to give notification of a traffic accident.

A decision on misdemeanours that entered into force in the particular case of traffic violations was not the only basis for suspension of the right to drive^{*15} under the Traffic Act. The act's § 41 (3) provided for suspension of the right to drive in the following cases:

1. the driver violated the provisions of § 20 (2)–(5) and (7) of the same act — i.e., drove the vehicle while intoxicated^{*16}, ill, or fatigued — or the owner, possessor, or driver of a motor vehicle per-

¹² To avoid a situation in which a person's procedural fundamental rights that must be respected in infringement proceedings are not ensured merely because due to the legislature's mistake or conscious choice a punitive sanction has been placed outside penal law, the Supreme Court has in its practice of constitutional review, following the example of the European Court of Human Rights, proceeded from the notion of autonomous criminal charges.

¹³ An example could be § 43 (1) 1) of the Weapons Act (RT I 2001, 65, 377; 2004, 54, 388; in Estonian), according to which the police prefecture that issued an acquisition permit or a weapons permit shall suspend the permit for one year if the holder of the permit has been punished under administrative procedure for driving a motor vehicle or rail vehicle, or flying an aircraft, under the influence of alcohol or narcotic, psychotropic, or psychotoxic substances.

¹⁴ The most serious violations of traffic requirements — driving a motor vehicle while intoxicated, if the person has been previously punished for the same act (PC § 424); intentional violation of traffic requirements or vehicle operating rules by a driver, thereby causing major damage to the health of a person or the death of a person through negligence (PC § 422); and violation of traffic requirements or vehicle operation rules by a driver through negligence, thereby causing major damage to the health of a person or the death of a person (PC § 423) — serve as criminal offences and remain beyond the scope of such regulation. This does not mean that the prohibition to drive may not be imposed for them — deprivation of driving privileges for up to three years has been provided for as supplementary punishment for traffic violations (PC § 50 (1)). The Supreme Court *en banc* expressed in para. 50 of the decision made in matter 3-4-1-2-05 on 27 June 2005 (RT III 2005, 24, 248; in Estonian) the position that the right to drive could not be withdrawn only in exceptional cases.

¹⁵ In addition, it is worth mentioning that, besides suspension of the right to drive, the Traffic Act recognises two other prohibitions on driving: the withdrawal of the right to drive (a supplementary punishment for a traffic violation, see also Note 2) and revocation of the right to drive (the title of Chapter 8 of the Traffic Act mentioned cancellation of the right to drive, but the chapter did not actually contain the institution replaced by revocation of the right to drive).

¹⁶ Prohibition of driving in a state of intoxication is actually contained only in TA § 20 (3), but according to Supreme Court practice (Criminal Chamber of the Supreme Court decision (CCSCd) 3-1-1-119-03. – RT III 2003, 32, 330; CCSCd 3-1-1-89-04. – RT III 2004, 34, 359; CCSCd 3-1-1-47-05. – RT III 2005, 21, 220; all in Estonian) also situations in which the alcohol content of the blood or exhaled breath of a person exceeds the permitted levels (TA § 20 (4)) must be qualified as intoxication. In turn, TA § 20 (5) considers the leaving of the

- mitted a person who met these criteria or who did not have the right to drive the vehicle to drive the vehicle;
2. the driving licence was sent for expert assessment due to suspicion regarding its authenticity;
 3. the driver did not pass the theory and driving tests specified in TA § 44^{*17};
 4. the state of health of the driver did not conform to the requirements specified in TA § 28 (2)^{*18}; and
 5. a decision on punishment that prescribed suspension of the right to drive had entered into force in respect of the driver in misdemeanour proceedings.

It is obvious that the latter basis for suspension of the right to drive — i.e., the one that is of interest to us — differs somewhat from the rest. Suspension of the right to drive in the cases described in items 1–4 in the list serves as a measure for the prompt prohibition of the right to drive^{*19} until the circumstances specified in the law cease to exist^{*20} as regards persons who are temporarily unsuitable as drivers of a vehicle due to there being reason to believe that they could, in driving, violate traffic safety. This is particularly obvious in the case of intoxicated, fatigued, or ill drivers^{*21}, who experience difficulties with clear perception of traffic conditions and adequate response, but also in the cases specified in the second and third items in the list. Thus, these are definitely administrative measures. Although the acts for which TA § 41 (3) 1)–4) prescribed suspension of the right to drive and which violate traffic requirements also serve as misdemeanours, such suspension of the right to drive is in no manner related to the guilt of the person and its ascertainment in infringement proceedings (the right to drive is suspended before guilt is ascertained in infringement proceedings, and independently thereof). It is the relationship of the measure to guilt that indicates that the measure is a punishment (*nulla poena sine culpa*).^{*22} It is the punishment that expresses condemnation for unlawful behaviour^{*23}, while guilt expresses disapproval of the person for opting for a wrongful activity and behaving contrary to rules.^{*24} The European Court of Human Rights (ECHR), which, similarly to the notion of a criminal charge, views the notion of punishment as autonomous of national law^{*25}, has also emphasised that assessment of whether a measure is a punishment proceeds from whether the application of the measure follows the conviction of the person of the criminal charge brought against him.^{*26} In the case *Escoubet v. Belgium*^{*27}, the court specifically stressed that the prompt suspension of the right to drive served as a preventive measure to secure the safety of other road users and that this was why the potentially dangerous driver was temporarily prohibited from driving a vehicle. This could be compared to a procedure for issue of driving licences that is definitely administrative in nature and aimed at ensuring that an individual is fit and qualified to drive on a public highway (para. 37 of the judgement).

The Administrative Law Chamber of the Supreme Court has explained the same position in its judgement in matter 3-3-1-1-04 of 23 February 2004^{*28}: ‘Suspension of the right to drive on the bases provided in TA

scene of an accident by the driver, refusal to allow the state of intoxication to be ascertained, or consumption of substances that may induce intoxication after it has been suggested that the state of intoxication be ascertained to be equivalent to driving while intoxicated. Thus, all the violations contained in TA § 20 (3)–(5) may be encompassed by driving while intoxicated. The prohibition of permitting a person to drive while intoxicated, ill, or fatigued arises from TA § 20 (2).

¹⁷ Section 44 of the Traffic Act governs the restoration of the right to drive of a person whose right to drive has been suspended or withdrawn. According to that section of the law, a person must pass a theory test if his right to drive has been suspended or withdrawn for longer than six months but for not longer than 12 months (TA § 44 (1)). A person must pass both the theory and driving test if his right to drive has been suspended for longer than 12 months. Thus, suspension of the right to drive on these grounds serves as an extension of the earlier prohibition to drive until the requirements prescribed by law are complied with.

¹⁸ This clause is in fact pointless, as the same basis for suspension is already contained in TA § 41 (3) 1).

¹⁹ This is testified to by the provisions governing the procedure for suspending the right to drive. Namely, suspension of the right to drive enters into force from the adoption of the decision, according to TA § 41 (6). This could not be applied unless the person became aware of the decision. Thus, TA § 41 (5) prescribes that a decision on suspension shall be prepared in two original copies, of which the first shall be immediately given to the driver, who shall confirm the receipt thereof by his signature.

²⁰ Pursuant to TA § 41 (7), the right to drive is restored after the grounds for suspension of the right to drive cease to exist.

²¹ However, the suspension of the right to drive of a person who has granted an intoxicated, ill, or fatigued person permission to drive a vehicle has been included in the list obviously mistakenly, as in such a case we cannot speak about the unfitness of the **person who has granted permission to drive the vehicle or transferred control of the vehicle**, so it is in no way justified to prohibit him immediately from driving. Also, a question arises of when the right to drive should be restored.

²² K. Kühl emphasises that, in Germany, the requirement that the punishment be related to guilt derives from the Constitution (arts. 1 and 20 of the GG). K. Kühl. *Karistusõigus: üldosa* (Penal law: general part.). Tallinn 2002, p. 224 (in Estonian).

²³ J. Sootak. *Karistusõiguse alused* (Foundations of penal law). Tallinn 2003, p. 178 (in Estonian).

²⁴ *Karistusõiguse alused*. Kommenteeritud väljaanne (Note 3), § 32 comm. 3.

²⁵ See *Welch v. UK*, judgement of 9 February 1995, para. 27; *Malige v. France*, judgement of 23 September 1998, para. 34.

²⁶ See *Welch v. UK* (Note 25), para. 28.

²⁷ Judgement of 28 October 1999.

²⁸ RT III 2004, 7, 73 (in Estonian).

§ 41 (1)–(4) can be regarded as an administrative measure, aimed at preventing a driver not meeting the requirements provided in the Traffic Act from driving a vehicle until the circumstance causing suspension of the right to drive ceases to exist (i.e., prevention of further violation) or until the substantive resolution of the relevant administrative matter. Such a measure infringes the person's freedom-right but is formally legitimate and generally proportional.'

3.3. Suspension of the right to drive based on enforced misdemeanour decision: administrative measure or punishment?

Unlike TA § 41 (3) 1)–4), clause 5 provided that the right to drive was suspended on the basis of a decision on punishment in misdemeanour proceedings that had entered into force. Consequently, there were grounds to ask whether this could have been a punitive sanction. Suitable criteria for determining whether it was a punishment have been developed by the ECHR in its practice, specifying the circumstances to be taken into account in the cases *Welch v. UK* (para. 28) and *Malige v. France* (para. 35): **treatment of the measure according to national law**²⁹, its **nature** and **objective**, the **procedure for its application**, and the **severity** of the measure. Here it must be noted that the latter case examined a regulation rather similar to that dealt with in TA § 41 (3) 5) — that concerning the violation points system used in France, according to which a certain number of points is associated with licence to drive. If a person is punished for a traffic violation, a particular number of points prescribed by law are deducted; if no more points are left, the driving licence becomes invalid. The compliance of the procedure with the requirements of Art. 6 § 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms³⁰ was disputed at ECHR level. The appellant was of the opinion that the deduction of points that was formally considered to be an administrative sanction actually functioned as punishment and that human rights prescribed at international level as protected were not ensured upon discussion of criminal charges.

The court established that in the case concerned, there was no doubt that the violation leading to the deduction of the points was a crime by nature.

After doing so, the ECHR noted that although deduction of points was an administrative sanction under national law and not related to penal law, the points were deducted in the context of, and after the outcome of, a prosecution. The criminal court first assesses the facts and then imposes a punishment. After this, proceeding from the conviction of the person, the Minister of the Interior deducts points according to the nature of the violation and using the scale established by law. Thus, deduction of points was an automatic consequence of the conviction. With regard to the severity of the measure, the ECHR noted that deduction of points could lead to withdrawal of the right to drive; nowadays, the right to drive a motor vehicle is very useful in everyday life and for carrying on an occupation.

The ECHR concluded that although the deduction of points had a preventive character, it also had a punitive and deterrent character and was, accordingly, similar to a secondary penalty.

What about withdrawal of the right to drive on the basis of TA § 41 (3) 5)? Suspension of the right to drive is by nature a restriction of a person's rights that may, depending on its reasons and objectives, serve both as a punishment and as an administrative sanction. Which one the legislation wished it to be cannot be said, unfortunately, since the draft act enacting the relevant regulation is silent on the matter.

The drivers whose right to drive was suspended regarded the measure as a punishment. In administrative courts, they requested that TA § 41³ (1), (4), and (8) not be applied, due to their perceived conflict with the prohibition of being punished again, which is provided in § 23 (3) of the Constitution. The Tallinn Administrative Court did not apply the relevant provisions of the Traffic Act and requested that the Supreme Court declare the provisions unconstitutional. The Supreme Court, which consequently had to establish the nature of the measure, arrived at the conclusion that it was a punitive sanction subject to § 23 (3) of the Constitution.³¹

²⁹ The ECHR discusses that in the reasons for its judgement, but, as the notion of punishment used by the ECHR is autonomous, it is not a decisive factor; rather, it is more important what the Court considers to be the actual nature and objective of the measure.

³⁰ Inimõiguste ja põhivabaduste kaitse konventsioon (Convention for the Protection of Human Rights and Fundamental Freedoms). – RT II 1996, 11/12, 34 (in Estonian).

³¹ Although the Supreme Court considered suspension of the right to drive to be a punitive sanction, the Supreme Court *en banc* did not see a conflict with the prohibition of double punishment contained in § 23 (3) of the Constitution. The Supreme Court *en banc* established that in the case of an automatic consequence of conviction, the misdemeanour procedure and the procedure for suspension of the right to drive in the MVCR could be regarded as a single whole. Double punishment such as imposition of a principal and supplementary punishment is in fact not forbidden. However, it is prohibited to conduct proceedings for the second time and punish in an independent proceeding (related to double jeopardy). Such a prohibition is related to the principle of legal certainty, protecting a person against the arbitrary action of the state — this guarantees the person's possibility of knowing the consequences characterised by the enforcement powers of the state such as may be imposed if his having committed the offence is established, and the possibility that he may be surprised by consideration of supple-

The Supreme Court admitted that formally it was an administrative sanction, as TA § 41³ (1), (4), and (8) did not formally serve as the provisions of the special part of penal law. The General Part of the Penal Code does not provide for supplementary punishments for misdemeanours; the principal punishments are only a fine and detention, according to PC § 3 (4). Finally, the Supreme Court *en banc* inferred that the legislature had positioned suspension of the right to drive on account of traffic violations in the Traffic Act (Chapter 8) apart from the necessary element of a misdemeanour provided in the same act (Chapter 14¹).

The above information may be supplemented by the fact that suspension of the right to drive had been placed within the competence of an administrative body — the MVRC. Märt Rask, the Minister of Justice at the time, explained the need for the regulation at the Riigikogu sitting on 12 June 2002 as follows: ‘The new procedure was caused by the fact that the General Part of the Penal Code does not provide for the withdrawal of the driving licence as a punishment imposed for a misdemeanour. The drivers committing dangerous violations must be removed from traffic, which is possible through suspension of the right to drive.’³² Indeed, also the fact that a person has repeatedly committed serious traffic violations is indicative of his unfitness to drive a motor vehicle. The driver so demonstrates his general careless attitude to traffic requirements and thus poses a danger to other road users.

At the same time, it must be admitted that suspension of the right to drive depended on the outcome of the misdemeanour proceedings — suspension of the right to drive was based on an enforced decision on punishment. Thus, suspension of the right to drive was directly related to the guilt of the person — if the danger that the person represented were taken as the basis, suspension would be justified also if the violation had been established as fact but the person had for some reason not been punished. The Traffic Act did not enable the MVRC to assess the person as a traffic hazard and decide on that basis whether and for how long to suspend the person’s right to drive; rather, it provided for the obligatory suspension of the right to drive for a specified term. The freedom of choice of the MVRC (more specifically, the absence thereof) is demonstrated by the fact that the Traffic Act used not the wording ‘shall decide on the suspension of the right to drive’, but ‘shall formalise the suspension of the right to drive by its decision’. Thus, the only one assessing the circumstances of the violation was the person processing the misdemeanour, who did so proceeding from the guilt angle. However, suspension of the right to drive may be considered an automatic consequence, similar in nature to the deduction of points discussed in the case *Malige v. France*.

A long time interval between the violation and suspension of the right to drive is also contrary to the treatment of suspension of the right to drive as an administrative sanction, and there are even two aspects to it. On the one hand, the person can continue driving; i.e., the danger persists. On the other hand, if the person does not commit any new violations during that time, this indicates that he has improved and thus there are no grounds for suspension of the right to drive.³³

Finally, we have to mention lack of combination possibilities as an argument against the administrative law measure and as a significant weakness of the system. To take an example, the Traffic Act prescribed suspension of the right to drive for one month if a person who had been given valid punishment for exceeding the speed limit by over 20 km/h again exceeded the speed limit by more than 20 km/h (TA § 41³ (2)); suspension of the right to drive was also prescribed if a person who had been given valid punishment for causing a traffic accident did so again (TA § 41³ (2)). Nevertheless, it was not possible to suspend the right to drive if a person who had been given a valid punishment for exceeding the speed limit caused a traffic accident and *vice versa*. The only provision that did not keep different violations apart was TA § 41³ (8), according to which a person’s right to drive was suspended for 24 months in the event of a fourth or subsequent violation if suspension of the right to drive was prescribed for the violation. However, it is obvious that the general traffic hazard of a driver is not manifested only by the fact that the person has exceeded the speed limit twice or caused a traffic accident twice but also by the fact that he commits more serious traffic violations over a relatively short span of time. In relation to this consideration, the points system is more flexible: in such a system, each violation specified in the law has a particular number of violation points associated with it, and after a certain number of points have accumulated, the right to drive is suspended.

The Supreme Court summarised that part as follows (Supreme Court *en banc* decision 3-4-1-10-04, para. 19): ‘No substantive proceedings are carried out in the MVRC upon suspension of the right to drive; the role of the agency is only to formalise suspension of the right to drive. Thus, an administrative body does not assess upon suspension of the right to drive the traffic hazard caused by a person. The person processing the misdemeanour is the only one to assess the circumstances of the violation but assesses only the guilt of the person when he hears the offence, which is why the fact that the person is guilty of committing a traffic offence must be regarded as a basis for suspending the right to drive.’

mentary punishment for the same act after the decision has entered into force is precluded. In this case, the person could foresee the suspension of the right to drive since its imposition on the basis of the punishment decision made in a misdemeanour procedure was prescribed at the level of a legal act. Supreme Court *en banc* decision 3-4-1-10-04. – RT III 2004, 28, 297 (in Estonian).

³² Shorthand notes of the sitting of the Riigikogu of 12 June 2002. Available at: <http://web.riigikogu.ee/ems/> (in Estonian).

³³ The same position was adopted by, e.g., the Administrative Court of Austria (decision of 24 August 1999 in matter 99/11/0168).

As to the severity of the measure, we have to agree with the position of the ECHR that the right to drive a motor vehicle is very useful in everyday life today and that, although the right to drive is not a fundamental right in itself, several fundamental rights can be exercised through it.³⁴ The duration of the suspension of the right to drive provided in TA § 41³ (1)–(8) ranged from one month (subsection 1) to 24 months (subsection 8). The Supreme Court established that prohibition of the right to drive that lasted for years was sufficiently severe. Shorter-term prohibitions are not sufficient, but the Supreme Court *en banc* did not consider it reasonable to draw a line within the regulation.

On the basis of the above, the suspension of the right to drive provided in TA § 41 (3) 5) is judged to serve as a punitive sanction, upon application of which the fundamental rights prescribed as applying upon hearing of criminal charges must be ensured for the person concerned.

4. Prohibition of business as punishment contained in civil law?

4.1. The notion and types of prohibition of business

Prohibition of business has been provided for in § 91 of the applicable Bankruptcy Act (BA). It is a restriction of freedom of enterprise that consists of a prohibition applied to certain persons to act as a sole proprietor, a member of a management body of a legal person or of the body replacing it, a member of the supervisory body, a general partner, the liquidator of a legal person, a procurator, and a trustee in bankruptcy.

The prohibition of business dealt with by BA § 91 (1) shall apply to a natural person automatically from the moment his bankruptcy is declared — he must not act as a sole proprietor, a member of a management body of a legal person, the liquidator of a legal person, or a procurator without the permission of the court. In the event of the bankruptcy of a debtor who is a legal person, the court may issue an order as to whom the prohibition of business should be applied to from among the persons specified in BA § 19 (1) and (3). It is common to subjects related to legal persons to whom the prohibition of business can be applied that they perform the management, representation, and supervisory function or at least one of these functions. The Civil Chamber of the Supreme Court established that with the existence of relevant bases, the prohibition of business could be applied to the persons specified in § 12 (4) of the Bankruptcy Act in effect before 1 January 2004 also if the person was released from his duties within one year before the commencement of the bankruptcy proceedings.³⁵ In the applicable Bankruptcy Act, the principle has been provided in §§ 91 (3) and 19 (3) *expressis verbis*.³⁶ Two types of prohibition of business are covered in BA § 91. The first one has been prescribed in subsections 1 and 2. It is a prohibition that is applicable during the bankruptcy proceedings and expires with the termination of the proceedings; i.e., it is a prohibition of business during bankruptcy proceedings. A prohibition of business can be applied starting from the declaration of bankruptcy. A relevant ruling may be issued later also, but if the bankruptcy is not declared because of abatement, the application of the prohibition of business during the proceedings is precluded. Bankruptcy Act § 91 (3) prescribes a prohibition that can be applied within three years after the termination of the bankruptcy proceedings — i.e., a prohibition of business following the bankruptcy proceedings. The prohibition of business following the bankruptcy proceedings can be applied only simultaneously with the termination of the proceedings, and it is valid for three years from termination of the bankruptcy proceedings. As BA § 91 does not contain the words ‘as long as’, the literal interpretation may lead to the conclusion that the court has no right of consideration as regards the length of the term.

4.2. Prohibition of business as punishment

The applicable law has given rise to a situation in which prohibition of business that is in fact equivalent to a criminal sanction is contained in bankruptcy law while performing its penal law function.

Prohibition of business is a means of liability under bankruptcy law for causing insolvency. In addition to liability for causing insolvency, the debtor’s liability may also comprise liability for non-performance of the

³⁴ The Supreme Court *en banc* has mentioned, above all, the right to free self-realisation (Supreme Court *en banc* decision (SCebd) 3-3-1-69-03; para. 33. – RT III 2004, 28, 297), as well as the freedom to choose a profession and the freedom of free movement (SCebd 3-4-1-2-05. – RT III 2005, 24, 248).

³⁵ SCebd 3-2-1-76-02. – RT III 2002, 21, 250 (in Estonian).

³⁶ Pankrotiseadus (Bankruptcy Act). – RT I 1997, 5, 32; 2002, 44, 284 (in Estonian).

duties arising during the bankruptcy proceedings. Such liability has been specified, above all, in Chapter 4 of the Bankruptcy Act. The debtor's duties may relate to criminal liability according to the Penal Code, civil liability manifested in the obligation to compensate for damage, or bankruptcy law liability manifested in specific legal remedies provided in the Bankruptcy Act (such as application of detention or the prohibition of business to the debtor).

The prohibition of business is a very serious restriction of freedom of enterprise. The goal of application of the prohibition of business after the end of the bankruptcy proceedings remains highly questionable. Doesn't such restriction of the freedom of enterprise imply the arbitrary action of the executive and judicial power, since prohibition of business is in several respects similar to a supplementary punishment in penal law — the occupational ban? At the same time, unlike in the case of the occupational ban, a clear basis or procedure has not been provided for application of prohibition of business.

4.2.1. Prohibition of business following bankruptcy proceedings versus the notion of punishment

The prohibition of business can be applied to the debtor according to BA § 91 (3) on the basis of a court ruling also during a term of up to three years after the end of the bankruptcy proceedings, if the debtor has been convicted of a bankruptcy offence or a criminal offence relating to execution procedure, a tax offence, or an offence related to a company. The guiding principle is that if the debtor has been convicted of any of the above offences, he is no longer trustworthy and, primarily due to preventive considerations, it is possible to subject him additionally to liability under bankruptcy law in the form of prohibition of business. However, relating the prohibition of business directly with conviction will further diminish the preventive nature of the measure and intensify its perception as a punitive measure.

Here it would be reasonable to compare the prohibition of business and the supplementary punishment provided for in PC § 49. Both the prohibition of business and an occupational ban restrict freedom of enterprise, which means a prohibition to act in a certain area. The prohibition of business prohibits specific areas of activity. In the case of the occupational ban, the court decides on the content of the restriction, determining the prohibited positions and areas of activity. The court may impose an occupational ban also so that it precisely coincides with the list of areas of activity covered by the prohibition of business. However, this cannot be said about the prohibition of business: the procedure for application of a prohibition of business is as concisely stated in the applicable Bankruptcy Act as in the Bankruptcy Act applicable before 1 January 2004 and has been largely left to develop in the course of legal practice. While the procedure for applying the prohibition of business is non-explicit, its implementation and monitoring procedures are also unclear, just as are the consequences accompanying a violation of the prohibition of business.^{*37}

We have to ask whether the prohibition of business serves as a supplementary punishment provided in the Bankruptcy Act or as a coercive measure of the executive and judicial powers.

When the prohibition of business imposed during bankruptcy proceedings is, just as a detention, comparable with a sanction imposed by the legislator to complete the bankruptcy proceedings as quickly and smoothly as possible, the legislator's initiative is not sufficient to justify the application of a prohibition of business following the bankruptcy proceeding. Here we must also take account of constitutional positions and the penal law principles stemming from them.

Prohibition of business is explained as a means of liability under bankruptcy law for causing insolvency.^{*38} If the debtor has destroyed, hidden, or wasted his assets or committed any other acts resulting in his insolvency or in a significant decrease in his solvency, prohibition of business following the bankruptcy proceedings can be imposed upon the conviction of the debtor in connection with an offence related to bankruptcy proceedings, execution procedure, a tax offence, or an offence related to a company. Thus, causing of insolvency is an unlawful act that may be followed by an imposition of a prohibition of business. Since the prohibition of business restricts a person's subjective right and freedom to engage in enterprise, causing loss and restriction to the person, the prohibition of business following the proceedings is, by nature, equivalent to punishment (see also 1.1). Although the prohibition of business is contained in bankruptcy law, it is applied as a supplementary punishment in relation to the offences related to companies that are specified in PC §§ 380–382 and for causing insolvency (§ 384).

Intentional causing of insolvency is covered under general penal law provisions, which are aimed against general legal rights. This arises from the meaning of PC § 385. There is no doubt about the general and special preventive content of the prohibition of business.

³⁷ P. Manavald. Ärikeeld kui ettevõtlusvabaduse riive (Prohibition of business as restriction of freedom of enterprise). – *Juridica* 2003/7, pp. 457–463 (in Estonian).

³⁸ P. Varul. Võlgniku vastutus pankroti korral (Debtor's liability in bankruptcy). – *Juridica* 2003/7, pp. 449–456 (in Estonian).

Based on the above, we may unambiguously conclude that the prohibition of business following the proceedings serves as a type of punishment used in bankruptcy law that resembles a supplementary punishment in criminal law. If the debtor is convicted of a bankruptcy offence or an offence relating to execution procedure, a tax offence, or an offence related to a company, he may, besides the principal punishment, be subjected to one or more supplementary punishments and on the basis of bankruptcy law also to the prohibition of business following the proceedings as a punishment. Thus, the Bankruptcy Act provides for a supplementary punishment outside the area of penal law, the application of which is independent of the criminal procedure and penal law principles. Such regulation, however, is contrary to § 23 (3) of the Constitution, according to which no-one shall be prosecuted or punished again for an act of which he has been finally convicted or acquitted pursuant to the law.

5. Conclusions

The events related to the regulation of suspension of the right to drive demonstrate well how thin the line can be between a punishment and an administrative measure. The features that are characteristic of both are inevitably intertwined: both the punishment and the administrative measure aimed at preventing a further offence have a repressive effect, both can be regarded as having as one of their goals raising people's awareness and motivating them to refrain from further offences, etc. However, court practice has developed criteria that allow for judging which of the two is involved in a particular case. An answer to the question of what the objective of a sanction is must be sought already at the legislative stage — the answer may be of significance in deciding whether the regulation is in accordance with the Constitution. Serious consideration should also be given to transferring the prohibition of business to penal law.

Since the objectives of the application of prohibition of business and the related procedure must both be inferred by the legislator through interpretation of law, there is a danger that this restriction of freedom of enterprise may be applied by violating people's fundamental rights. Whereas the simplified procedure for applying a prohibition of business during the proceedings can be justified by the preventive nature of the measure, in the case of prohibition of business applied following the proceedings its preventive nature is not sufficient justification. Prohibition of business that is applied after the proceedings is a sanction provided in the Bankruptcy Act whose content and duration coincide with a supplementary punishment provided for in the Penal Code — the occupational ban. Prohibition of business that is applied after the proceedings has been reduced to a subtype of occupational ban, and its application without adherence to the procedural rules provided for the application of an occupational ban is not justified.

We may say that in addition to substantive penal law, punitive sanctions are contained also in other branches of law. From the point of view of the further development of Estonia's relatively young legal system it is important to address the question of whether some sanctions contained in specific branches of law should belong to the sanction system of penal law as supplementary punishments.



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The Status and Protection of Unlawful Combatants

1. Introduction

The term ‘unlawful combatant’ became better known during the recent armed conflict in Afghanistan, when the Bush administration announced its decision to classify the captured Taliban soldiers and al-Qaeda fighters as unlawful combatants and, as a consequence, to deny them prisoner-of-war status.^{*1} This has provoked a heated debate over the exact status and protection of such persons. In view of the current security situation around the world, it has been asserted ever more frequently that unlawful combatants are not entitled to any protection whatsoever under international humanitarian law. These statements are clouded in emotional rhetoric and are also dangerous, as they lead to a situation where certain persons in armed conflict are left in a legal vacuum. Yet every person has the fundamental and undeniable right to recognition before the law. It is the general principle of the four Geneva Conventions (1949)^{*2} and their two Additional Protocols (1977)^{*3} that every person in enemy hands must have some status under international law — that of either a prisoner of war or a civilian. There is no intermediate status: nobody in enemy hands can be outside the law.^{*4} The present article will not discuss whether unlawful combatants should be treated as prisoners of war according to the Third Convention but, instead, will first shed some light on the status of unlawful combatants and then argue that they are protected as civilians under the Fourth Convention.

¹ See White House Fact Sheet. Status of Detainees at Guantánamo. Available at: <http://www.whitehouse.gov/news/releases/2002/02/20020207-13.html> (31.08.2005) for further information. The United States has still promised ‘to treat all of the individuals detained at Guantánamo humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of the Third Geneva Convention of 1949’.

² Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. – 75 United Nations Treaty Series 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea. – 75 United Nations Treaty Series 85; Geneva Convention relative to the Treatment of Prisoners of War. – 75 United Nations Treaty Series 135 (hereinafter ‘the Third Convention’); Geneva Convention relative to the Protection of Civilian Persons in Time of War. – 75 United Nations Treaty Series 247 (hereinafter ‘the Fourth Convention’).

³ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I). – 1125 United Nations Treaty Series 3 (hereinafter ‘the First Protocol’); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II). – 1125 United Nations Treaty Series 609 (hereinafter ‘the Second Protocol’).

⁴ J.S. Pictet (ed.). Commentary: IV Geneva Convention relative to the Protection of Civilian Persons in Time of War. International Committee of the Red Cross: Geneva 1958, p. 51.

2. Status of unlawful combatants

Unlawful combatants do not fit into the traditional categorisation of persons in armed conflict. International humanitarian law is constructed on the understanding that all persons in armed conflict can be divided into two opposite categories: combatants and civilians. In defining these categories, the First Protocol has adopted a so-called ‘negative approach’, which should ensure that each person in armed conflict belongs to one category or another; i.e., there are no uncertainties, and no-one is left out. After first defining who combatants are⁵, the First Protocol explains that all persons who are not combatants are then inevitably civilians.⁶ If there are doubts whether a person is a combatant or a civilian, that person must be considered to be a civilian. Such an approach is not only justified but also demanded by the fact that ‘the concepts of the civilian population and of the armed forces are only conceived in opposition to each other’.⁷

Before taking a closer look at the status of unlawful combatants, it is necessary to speak briefly about combatants and civilians, as this aids in understanding how unlawful combatants differ from other persons in armed conflict. The conditions for combatant status can be derived from Article 4 of the Third Convention and Article 43 of the First Protocol, which elaborated upon the earlier article. Generally speaking, combatants are members of armed forces as well as members of militias or volunteer corps forming part of such armed forces.⁸ In addition, members of other militias and volunteer corps, including those of organised resistance movements, belonging to a party to the armed conflict can also have combatant status if they (1) are commanded by a person responsible for his subordinates, (2) have a fixed distinctive sign recognisable at a distance, (3) carry arms openly, and (4) conduct their operations in accordance with the laws and customs of war.⁹ The defining feature of combatant status is the right to participate directly in hostilities; i.e., combatants have ‘a licence to kill or wound enemy combatants and destroy other enemy military objectives’.¹⁰ They may even cause incidental civilian casualties and damage (collateral damage) under certain circumstances. Due to their status, combatants are entitled to combat immunity, which means that they may not be prosecuted for taking part in hostilities and for lawful acts of war. Such immunity is valid even if their behaviour (for example, intentional killing of another human being) would constitute a serious crime in peacetime. However, combat immunity is limited and does not extend to acts that transgress the rules of international law applicable in situations of armed conflict. When combatants are captured, they are entitled to prisoner-of-war status and to benefit from the protection of the Third Convention. Violations of international law applicable to armed conflict themselves do not deprive combatants of their right to be prisoners of war, except in certain limited cases.¹¹ Even if this happens, these persons are given protection equivalent in all respects to those accorded to prisoners of war.¹²

In contrast to combatants, civilians may not take part in hostilities, except in the relatively rare event of a *levée en masse*, where inhabitants of a non-occupied territory on the approach of the enemy spontaneously take up arms to resist the invading forces. If the population rises spontaneously, there is no need to be organised or to wear emblems, although they are required to carry arms openly and to respect the laws of war. The resisting civilians should not be treated as marauders or criminals, for all they have done has been to spring to the defence of their country.¹³ Once captured, such inhabitants become prisoners of war.¹⁴ Due to the prohibition to take part in hostilities, civilians enjoy general protection against dangers arising from military operations.¹⁵ The belligerents must, accordingly, at all times distinguish between civilians and combatants and direct their operations only against military objectives.¹⁶ If civilians, nevertheless, choose to take direct part in hostilities, they remain civilians but become lawful targets of attacks for as long as they do so. Civilians are entitled to the protection provided in the Fourth Convention.

⁵ Article 43 of the First Protocol.

⁶ Article 50 (1) of the First Protocol.

⁷ Y. Sandoz, C. Swinarski, B. Zimmermann. Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949. International Committee of the Red Cross: Geneva 1987, p. 610.

⁸ Article 4 (A) (1) of the Third Convention.

⁹ Article 4 (A) (2) of the Third Convention.

¹⁰ Inter-American Commission on Human Rights, Report on Terrorism and Human Rights. OEA/Ser.L/V/II.116 Doc. 5 rev. 1 corr. (22.10.2002), para. 68.

¹¹ According to Article 44 (2)–(4) of the First Protocol, combatants forfeit their right to be prisoners of war if they fail to carry their arms openly during each military engagement and at such time as they are visible to the adversary while they are engaged in a military deployment preceding the launching of an attack in which they are to participate.

¹² Article 44 (4) of the First Protocol.

¹³ I. Detter. The Law of War, second edition. Cambridge University Press: Cambridge 2000, p. 140.

¹⁴ Article 4 (A) (6) of the Third Convention.

¹⁵ Article 51 (1) of the First Protocol.

¹⁶ Article 48 of the First Protocol.

The idea that there are only two categories of persons in armed conflict has always faced definitional challenges. Terms such as 'illegal combatants', 'unprivileged combatants', and 'unlawful combatants' have been around for as long as there have been laws governing the conduct of hostilities.^{*17} The usage and meaning of these terms have always depended on historical developments, but the idea behind them has never been very clear. There appear to be no international treaties actually providing a basis for these definitions.^{*18} One has to keep in mind that the concept of unlawful combatants is relevant only in international armed conflicts, because the law applicable to non-international armed conflicts does not foresee combatant status (thus, the issue of unlawful combatants does not arise).^{*19}

In brief, unlawful combatants are either combatants who fail to follow the laws of war or civilians who take part directly^{*20} in hostilities without being entitled to do so. It is most often the case that unlawful combatants disregard, in order to gain military advantage, the fundamental requirement that combatants distinguish themselves from civilians. Classic examples would be spies and saboteurs who, wearing civilian clothing, infiltrate enemy territory to collect information or to destroy designated objects. In the recent war in Iraq, the Fedayeen fighters dressed in civilian clothing and used civilians as human shields to protect themselves from attack. Another more recent, but also more alarming, form of unlawful combatants is civilians who have organised themselves as self-styled paramilitary fighters (not belonging to a party to the armed conflict). The best known real-life examples would be al-Qaeda fighters who were not incorporated in Taliban military units as part of the Taliban armed forces according to Article 4 (A) (2) of the Third Convention (at least there is no evidence of such incorporation).^{*21} A person is not allowed to wear two hats simultaneously: that of a civilian and the helmet of a soldier. Therefore, a person who engages in military raids by night while purporting to be an innocent civilian by day is neither a combatant nor a civilian.^{*22} Such a person is a legitimate military target, but, once captured, an unlawful combatant is not entitled to prisoner-of-war status. Before the adoption of the Geneva Conventions, international law permitted armies to deal harshly with unlawful combatants, even allowing them to be shot after capture.^{*23}

The status of persons captured on the battlefield is not always clear. Whenever there are doubts whether persons, having committed a belligerent act and having fallen into the hands of the enemy, are indeed combatants or instead unlawful combatants, such persons enjoy the protection of the Third Convention until such time as their status has been determined by a competent tribunal.^{*24} The latter does not have to be a military tribunal.^{*25} The matter of unlawful combatants is further complicated by the fact that they can be divided into two distinct categories on the basis of where they carry out their missions. Firstly, there are those who operate behind enemy lines in the enemy's home territory or in the occupied territory (for example, and before all, spies and saboteurs). Secondly, there are those who operate directly in the battlefield, where the opposing parties are fighting one another (they can be called battlefield unlawful combatants). These are persons who take direct part in hostilities without being entitled to do so and pose a specific threat to the enemy as well as to civilians because they fail to meet one or more of the four conditions for combatant status, especially as regards ignoring the duty to distinguish themselves from civilians. Such division is not theoretical but very much practical, as it appears to have, according to some opinions, legal significance in determining the proper protection to be granted to relevant persons. It is the status and protection of battlefield unlawful combatants that is a matter of question and problematic. For this reason, the next section deals foremost with the protection of such unlawful combatants.

¹⁷ See, generally, R.R. Baxter. So-Called 'Unprivileged Belligerency': Spies, Guerrillas, and Saboteurs. – *British Yearbook of International Law* 1951 (28), p. 323.

¹⁸ K. Dörman. The Legal Status of 'Unlawful/Unprivileged Combatants'. – *International Review of the Red Cross* 2003 (85), p. 46.

¹⁹ However, there is no rule that prohibits the government, during a non-international armed conflict, from according the member of dissident armed groups both combatant and attached prisoner-of-war status. Common Article 3 of all four Geneva Conventions, which applies specifically in non-international armed conflicts, recommends that the government and other parties to the non-international armed conflict conclude special agreements to apply all or part of the other provisions of the Geneva Conventions.

²⁰ See R.K. Goldman. International Humanitarian Law: Americas Watch's Experience in Monitoring Internal Armed Conflicts. – *American University Journal of International Law and Policy* 1993 (9), pp. 62–72 for a detailed discussion of the distinction between direct and indirect participation in hostilities.

²¹ G.H. Aldrich. The Taliban, al-Qaeda, and the Determination of Illegal Combatants. – *American Journal of International Law* 2002 (96), p. 893.

²² Y. Dinstein. *The Conduct of Hostilities under the Law of International Armed Conflict*. Cambridge University Press: Cambridge 2004, p. 29.

²³ J. Callen. Unlawful Combatants and the Geneva Conventions. – *Virginia Journal of International Law* 2004 (44), p. 1026.

²⁴ Article 5 (2) of the Third Convention.

²⁵ Indeed, the possibility that only a military tribunal may determine the status of a captured person was expressly left out of the final text of the Third Convention. See J.S. Pictet (ed.). *Commentary: III Geneva Convention relative to the Treatment of Prisoners of War*. International Committee of the Red Cross: Geneva 1960, p. 77.

3. Protection of unlawful combatants

If it is duly determined that the persons in question are not indeed lawful combatants and thus are not entitled to prisoner-of-war status, there remains a crucial question. Namely, are unlawful combatants entitled to some other form of protection under international humanitarian law, or are they completely excluded from the scope of its protection? If they are not protected by the Third Convention, then they are, logically, entitled to protection under the Fourth Convention. It may seem rather surprising that international humanitarian law should protect unlawful combatants. Those who take part in hostilities while not belonging to armed forces are acting deliberately outside the laws of war. Surely they know the dangers to which they expose themselves and therefore it would be simpler (one may say fairer even) to exclude them from the protection of international humanitarian law. However, the term ‘unlawful combatant’ has been used too lightly and applied to such trivial offences that it is not advisable to leave the accused at the mercy of those detaining them.

3.1. Protected persons

The Fourth Convention was devised to protect persons who ‘at the given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals’.^{*26} Although the definition of protected persons in the Fourth Convention seems all-embracing and appears to offer undoubted protection to unlawful combatants, such interpretation is subject to serious debates and controversy. By all means, it is true that the Fourth Convention does not cover all possible unlawful combatants, as Article 4 clearly limits its field of application in certain cases. It does not protect persons who are (1) nationals of the party or power in which hands they are, (2) nationals of a state not bound by that convention, (3) nationals of a neutral state in the territory of a belligerent state, and (4) nationals of a co-belligerent state with normal diplomatic representation in the state in whose hands they are.^{*27} Thus, Americans nationals fighting alongside al-Qaeda fighters in Afghanistan are not entitled to protection under the Fourth Convention if they fall into the hands of United States armed forces. However, the International Criminal Tribunal for the former Yugoslavia (ICTY) has developed a doctrine whereby individuals who have the nationality of their captors may still qualify as protected persons in situations where they may be assimilated with an enemy state.^{*28} Instead, relying on nationality, the tribunal’s decision turned on the ‘substantial relations’ between the person and enemy state, taking into consideration such factors as ethnicity, allegiance, and other close bonds with the enemy state.^{*29} This would then mean that a person who does not meet the nationality criteria may be assimilated to enemy nationality for the purpose of protection under the Fourth Convention. For example, a British national residing a long time in Afghanistan and fighting there with al-Qaeda may be regarded as an Afghan national instead of British, and therefore a protected person. Finally, those persons who are protected by the other three Geneva Conventions are not simultaneously protected by the Fourth Convention.^{*30}

The mere fact that a person has unlawfully participated in hostilities does not mean that he automatically loses all protection under the Fourth Convention. Indeed, a contrarian approach would simply place such a person outside the law and reduce the meaning of the Fourth Convention significantly. The latter serves as a safety net protecting all captured persons who fail to qualify for protection under other three Geneva Conventions. There are several arguments in support of the view that unlawful combatants are protected persons under the Fourth Convention. Firstly, at the International Committee of the Red Cross (ICRC) Stockholm Conference (1948), where the draft convention were approved, many delegates expressed their concern that the definition adopted for protected persons covered also those who ‘committed hostile acts without being members of the regular combatant forces’.^{*31} In other words, they understood that the approved definition included, among others, civilians unlawfully participating in hostilities.

Secondly, at the Geneva Diplomatic Conference, which adopted the convention in 1949, several delegations demanded certain exceptions for cases involving spies and saboteurs. The result of these demands was Article 5 of the Fourth Convention, which allows certain derogations from the protection of that convention but at the same time also supports the interpretation that the Fourth Convention covers unlawful combatants. Its paragraph 1 states that

²⁶ Article 4 (1) of the Fourth Convention.

²⁷ Article 4 (1)–(2) of the Fourth Convention.

²⁸ See *Prosecutor v. Delalije et al.*, Case IT-96-21-A, judgement of the Appeals Chamber, 20 February 2001, paras. 52–84 for a detailed discussion.

²⁹ *Ibid.*, paras. 82–83.

³⁰ Article 4 (4) of the Fourth Convention.

³¹ J.S. Pictet (Note 4), p. 52.

‘[w]here in the territory of a Party to the conflict, the latter is satisfied that an individual protected person is definitely suspected of or engaged in activities hostile to the security of the State, such individual person shall not be entitled to claim such rights and privileges under the [Fourth] Convention as would, if exercised in the favour of such individual person, be prejudicial to the security of such State.’

That provision permits derogations in cases involving any person whose acts are hostile or prejudicial to the security of the concerned state. The referenced hostile and prejudicial activity most certainly means direct participation in hostilities, not merely a political attitude with respect to the enemy. Thus, paragraph 2 indicates that paragraph 1 considers unlawful combatants protected persons under the Fourth Convention.

Thirdly, Article 45 (3) of the First Protocol provides, again, further implicit confirmation that unlawful combatants are protected under the Fourth Convention. The provision states that

‘[a]ny person who has taken part in hostilities, who is not entitled to prisoner-of-war status and who does not benefit from more favourable treatment in accordance with the Fourth Convention shall have the right at all times to the protection of Article 75 of [the First] Protocol.’

To what persons does this provision apply? In essence, it concerns any person who has taken part in hostilities but is not protected under the Third Convention as a prisoner of war or under the Fourth Convention as a civilian meeting the nationality criteria. The phrase ‘any person who has taken part in hostilities [...] who does not benefit from more favourable treatment in accordance with the Fourth Convention’ clearly has to mean that at least some unlawful combatants are protected under that convention. Otherwise, the very same phrase would be meaningless and unnecessary. In addition, the second sentence of Article 45 (3) provides that ‘in occupied territory, any such person, unless he is held as a spy, shall also be entitled, notwithstanding Article 5 of the Fourth Convention, to his rights of communication under that Convention’. This shows once more that unlawful combatants in occupied territories are covered by the Fourth Convention.

In addition, the commentary to Article 45 (3) asserts that ‘a person of enemy nationality who is not entitled to prisoner-of-war status is, in principle, a civilian protected by the Fourth Convention, so that there are no gaps in protection’.³² But, at the same time, it also observes that things are not always so straightforward in armed conflicts; for example, adversaries can have the same nationality, which renders the application of the Fourth Convention impossible, and there can arise numerous difficulties regarding the application of that convention. Thus, as the Fourth Convention is a safety net to persons who do not qualify for protection under the other three Geneva Conventions, Article 45 (3) serves yet again as a safety net for those who do not benefit from more favourable treatment in accordance with the Fourth Convention.

The view that a person is, generally speaking, protected by either the Third Convention or the Fourth Convention is supported also by ICTY case law. The Trial Chamber said in the case *Prosecutor v. Delalić et al.* that it is important to note that there is no gap between the two.³³ If an individual is not entitled to the protections of the Third Convention as a prisoner of war, he necessarily falls within the ambit of the Fourth Convention, provided that its Article 4 nationality requirements are satisfied. The tribunal then added that it felt such an approach to be ‘a satisfactory solution — not only satisfying to the mind, but also, and above all, satisfactory from the humanitarian point of view’.³⁴ The latter is a very powerful argument, as the object and purpose of international humanitarian law is, generally speaking, to provide the widest possible protection to persons in armed conflict. The exclusion of certain persons from the scope of international humanitarian law and leaving them in a legal black hole definitely does not contribute to the achievement of that objective. On the contrary, such interpretation would open a door for uncertainties and abuses, such as those reported to occur at Guantánamo Naval Base.³⁵

For the same reasons, it is most difficult to agree with claims that battlefield unlawful combatants who fought on the actual front line cannot be protected by the Fourth Convention simply because that convention does not contain special provisions applicable in the zone of military operations. It is true enough that the Fourth Convention provides different specific protections to (1) aliens in the territory of an enemy party to the conflict and (2) persons in occupied territory who are in the hands of the adverse party, but this does not, by any means, indicate that persons captured on the battlefield are again in a legally uncertain position (the general protections in Part II of the Fourth Convention are still applicable). Consequently, some authors assert that unlawful combatants are entitled to the specific protections of the Fourth Convention only if they

³² Y. Sandoz, C. Swinarski, B. Zimmermann (Note 7), p. 558.

³³ In reaching such a conclusion, the tribunal referred to Articles 43 and 50 and noticed that the terms ‘combatant’ and ‘civilian’ in these articles were defined as in opposition to each other — that is, using the ‘negative approach’ discussed above.

³⁴ See *Prosecutor v. Delalić et al.*, Case IT-96-21-T, judgement of the Trial Chamber, 16 November 1998, para. 271.

³⁵ See, for example, Human Rights Watch. Guantánamo: Detainee Accounts. Available at: <http://hrw.org/backgrounders/usa/gitmo1004/gitmo1004.pdf> (31.08.2005); Amnesty International. Guantánamo and Beyond: The Continuing Pursuit of Unchecked Executive Power. Available at: [http://web.amnesty.org/library/pdf/AMR510632005ENGLISH/\\$File/AMR5106305.pdf](http://web.amnesty.org/library/pdf/AMR510632005ENGLISH/$File/AMR5106305.pdf) (31.08.2005).

were operating in enemy or occupied territory at the time of their capture.^{*36} Such interpretation is flawed for a number of reasons. Most importantly, there is no intermediate area (buffer zone) between the territories of two adversarial parties to the armed conflict. If one party advances, the territory of another party then becomes occupied territory. The commentary to Article 6 of the Fourth Convention similarly explains that ‘there no intermediate period between what might be termed the invasion phase and the inauguration of a stable regime of occupation’.^{*37} The relations between the civilian population of a territory and troops advancing into that territory, regardless of whether they are fighting, are governed by the Fourth Convention. Equally, if battlefield unlawful combatants cross the front line, then they are in either the occupied area or enemy territory and protected by the Fourth Convention.

At some point, the captured battlefield unlawful combatants must be removed from the battlefield to either occupied or enemy territory. Does that fact change the protections they are given? The normal reflex would possibly, and probably, be that the law applicable to the place where they are held should apply.^{*38} This is also the direction in which Article 4 of the Fourth Convention is pointing, as that convention protects person who ‘*at the given moment and in any manner whatsoever*, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power’ (emphasis added). The fact that the captured battlefield unlawful combatants are to sooner or later receive full protection under the Fourth Convention renders the debate as to whether unlawful combatants captured on the battlefield are specifically protected by that convention essentially moot.

3.2. Substantial protections

3.2.1. Fourth convention

Unlawful combatants, as are all other persons of the countries in armed conflict, including persons otherwise excluded by Article 4^{*39}, are entitled to the general protections set forth in Part II of the Fourth Convention. Additional protections granted to unlawful combatants depend on their location:

- Part III, sections I, II, and IV, for persons in enemy territory;
- Part III, sections I, III, and IV, for person in occupied territory.

However, the protections in Part III are not absolute and can be derogated from under strict conditions as described in Article 5. Firstly, if a person in the enemy territory is definitely suspected of or engaged in activities hostile to the security of the state, the person is not entitled to rights and privileges as would be prejudicial to the security of said state.^{*40} Here is one of the article’s weak points, as it is very difficult to specify the acts previously mentioned. The clause cannot refer to a political attitude toward the state, so long as that attitude is not translated into action.^{*41} The rights referred to are not very extensive in the case of protected persons under detention. They consist essentially of the right to correspond, right to receive individual or collective relief, right to spiritual assistance from ministers of their faith, and right to receive visits from the representatives of both the protecting power and the International Committee of the Red Cross.^{*42} The security of the state cannot possibly be a justification for depriving such persons of protection under elementary provisions — for example, Article 38 stipulating that they should receive medical attention if their state of health so requires. Secondly, if a person in the occupied territory is detained as a spy or saboteur or as a person under definite suspicion of activity hostile to the security of the occupying power, he is regarded to have forfeited his rights of communication.^{*43} The application of that provision is strictly limited to cases of absolute military necessity (no such condition is attached to the first derogation) and rights of communication under the Fourth Convention.

³⁶ See, for example, R.R. Baxter (Note 17), p. 328 (‘unlawful belligerents in the zone of operations were not taken into account in connexion with [Articles 4 and 5]’); G.I.A.D. Draper. The Status of Combatants and the Question of Guerrilla Warfare. – British Yearbook of International Law 1971 (45), p. 197 (‘if [unlawful combatants] were operating in neither type of territory, their position is far from clear and their protection is speculative’); J. Callen (Note 23), p. 1039 (‘the limitations expressed in [paragraphs 1 and 3 of Article 5 of the Fourth Convention] are thus directed towards unlawful combatants who fight behind enemy lines, in areas away from what might traditionally be called the battlefield’).

³⁷ J. S. Pictet (Note 4), p. 60.

³⁸ K. Dörman (Note 18), p. 63.

³⁹ J.S. Pictet (Note 4), p. 118.

⁴⁰ Article 5 (1) of the Fourth Convention. One should not attach much attention to the word ‘privileges’, as this is the only article in the convention that speaks about privileges in addition to rights. The rights of protected persons are their privileges, as such rights are not enjoyed by persons not protected by the Fourth Convention.

⁴¹ *Ibid.*, p. 56.

⁴² J.S. Pictet (Note 4), p. 56.

⁴³ Article 5 (2) of the Fourth Convention.

Even if all possible derogations have been appropriately used, unlawful combatants should nevertheless be treated with humanity and, in the event of trial, should not be deprived of the rights associated with a fair and regular trial. In occupied territory, a fair and regular trial is ensured by Articles 64 to 76. There are no special provisions regarding fair and regular trial as would be applicable in enemy territory. However, Common Article 3 to all four Geneva Conventions is definitely applicable, and it requires, at minimum, 'a regularly constituted court affording all the judicial guarantees which are recognised as indispensable by civilised peoples'. The derogation foreseen in paragraphs 1–2 of Article 5 are to be used reasonably, and the full rights of a protected person should be restored at the earliest date consistent with the security of the state or occupying power.^{*44}

3.2.2. Additional protection

It was mentioned above that any person who has taken part in hostilities but who is not entitled to prisoner-of-war status and does not benefit from more favourable treatment in accordance with the Fourth Convention is always protected under Article 75 of the First Protocol.^{*45} Differently from the mentioned convention, application of that article in regard to unlawful combatants does not depend on whether a particular person meets the nationality criteria in Article 4 of the Fourth Convention. In order to benefit from the protection of Article 75, a person must simply fulfil three conditions:

- 1) he must be in the power of a party to the armed conflict;
- 2) he must be affected by armed conflict or occupation; and
- 3) he must not benefit from more favourable treatment under the four Geneva Conventions or the First Protocol.

Article 75 demands that all persons in the power of a party to the armed conflict be treated humanely in all circumstances and that they enjoy the protections listed therein without any adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or any criteria of a similar nature. The article contains a rather long list covering fundamental guarantees, which include numerous prohibited acts and accorded rights. It is important to point out here that all persons have extensive judicial guarantees. No sentence may be passed, and no penalty may be executed, against a person who has been found guilty of a penal offence related to the armed conflict except pursuant to a conviction that has been pronounced by an impartial and regularly constituted court that respects the generally recognised principles of regular judicial procedure.^{*46} The judicial guarantees in Article 75 (4) are especially important for unlawful combatants in enemy territory because, under the Fourth Convention, as briefly discussed above, such persons benefit only from the very general protections of Common Article 3. Even unlawful combatants in occupied territory get a few more judicial guarantees — for example, the presumption of innocence.

Article 75 both ensures that no person in the hands of a party to an armed conflict is excluded from the protection of international humanitarian law and expands the protection given under the Fourth Convention. This is especially relevant in the case of persons who are deprived of certain rights under Article 5 of the Fourth Convention. There can be no doubt that Article 75 constitutes a minimum standard that does not allow any exceptions.^{*47} Nowadays, Article 75 constitutes customary international law^{*48} and therefore is binding upon every state regardless of whether it is a party to the First Protocol or not.^{*49} The customary legal status of the central provisions of Article 75 is reinforced by the fact that its text addressing fundamental guarantees and penal prosecutions was drawn, *mutatis mutandis*, from the terms of Articles 4 and 6 of the Second Protocol, which in turn were based to a significant extent upon the corresponding provisions of the International Covenant on Civil and Political Rights.

⁴⁴ Article 5 (3) of the Fourth Convention.

⁴⁵ Article 45 (3) of the First Protocol.

⁴⁶ Article 75 (4) of the First Protocol. The paragraph itself includes a non-exhaustive list of fundamental judicial principles; for example, everyone should be informed without delay of the particulars of the offence alleged against him, everyone should have all necessary rights and means of defence, and no-one may be accused or convicted of a criminal offence on account of any act or omission that did not constitute a criminal offence under the national or international law to which he was subject at the time it was committed.

⁴⁷ Y. Sandoz, C. Swinarski, B. Zimmermann (Note 7), p. 870.

⁴⁸ See, for example, G.H. Aldrich (Note 21), p. 893; Inter-American Commission on Human Rights (Note 10), para. 76; C. Greenwood. International Law and the "War on Terrorism". – International Affairs 2002 (78), p. 316; R.K. Goldman, B.D. Tittmore. Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights under International Humanitarian and Human Rights Law. Available at: <http://www.asil.org/taskforce/goldman.pdf> (31.08.2005), p. 38.

⁴⁹ While the four Geneva Conventions have 192 parties (practically all existing states), the First Protocol has 163 parties, excluding such states as Afghanistan, Iran, Iraq, Israel, Pakistan, Sudan, Turkey, and the United States (data correct as of 24 August 2005). These numbers, but especially the selected names of non-parties, clearly show that the fact that Article 75 is always applicable as customary international law does make a difference.

Although the Fourth Convention and Article 75 have spelled out more or less detailed guarantees granted unlawful combatants, it is still worth mentioning that they benefit also from Common Article 3, which is called a ‘mini convention’ and constitutes a sort of summary of law in the very complex field of judicial guarantees. Although that article is designed to be applied particularly in non-international armed conflicts, it is actually relevant to all forms of armed conflict and in regard of all persons, irrespective of their status.^{*50} It is probably unnecessary to add that Common Article 3 has the undoubted status of customary international law and thus is, again, binding upon all states.

4. Conclusion

Before the ongoing ‘war on terror’, most people had never heard of ‘unlawful combatant’. But the term has since been used frequently in different contexts without there being a clear and uniform understanding of its substance and significance. The typical view is that unlawful combatants are simply terrorists who are not entitled to any protection under international humanitarian law. There is some truth in such a view, as the most troubling form of unlawful fighters at the moment is civilians organising themselves as self-styled paramilitary fighters, such as al-Qaeda militants. They are unlawful combatants because they are not entitled to participate directly in hostilities and when doing that they disregard, in order to gain military advantage, the fundamental requirement that fighters distinguish themselves from civilians.

For these reasons, unlawful combatants are not entitled to prisoner-of-war status when captured. But, contrary to what is widely claimed, this does not mean that they are completely outside the protection of international humanitarian law. The present article has demonstrated that unlawful combatants who meet the nationality criteria qualify as civilians under the Fourth Convention and therefore are entitled to the protection formulated therein. This is the only possible solution, as there is no third category of persons besides combatants and civilians. The mere fact that a person has illegally participated in hostilities is not a criterion for excluding application of the Fourth Convention, although it may give reason for derogating from certain rights in accordance with Article 5 thereof. The specific protection under the Fourth Convention depends not on the place where unlawful combatants were captured but on the situation in which such persons find themselves in enemy hands. The protection is most extensive in occupied territory, although the law applicable in enemy territory is also well developed. Article 75 of the First Protocol provides further guarantees, which constitute a minimum standard with no exceptions allowed. All unlawful combatants, regardless of their nationality, where they were captured, and whether they are covered by the Fourth Convention, are entitled to the guarantees of Article 75 at all times. Even if the Fourth Convention or the First Convention should leave some loopholes or uncertainties, Common Article 3 applies to all persons and regardless of whether a non-international or international armed conflict is involved.

⁵⁰ *Prosecutor v. Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 102; *Prosecutor v. Delalić et al.* (Note 28), para. 150; Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States*), Merits. – ICJ Reports 14 (1986), para. 218.



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Latin: The Common Legal Language of Europe?

In the current debate about European legal integration, it is frequently asserted that for integration of the national systems to succeed, it is necessary to develop a common legal language for Europe. The diversity of legal languages is an obstacle to integration, and therefore the plurality must be eliminated.*¹ This raises the issue of whether Europe can possibly develop a common legal language when it does not even have a common general language.

If we consider the relationship between language and law, we find the common opinion that the language of law differs from most other sub-languages in one important respect: while the language of natural science in particular is a universal language used by scientists across different societal and cultural boundaries*², legal language is culture-bound and intertwined with one particular society and its legal system.

The position of Latin in the development of law

In past centuries, Latin played the role of a common legal language, which was applied across the boundaries of local law. In a way, Latin can be called the common mother tongue of Western European culture, which has influenced the development of all major European languages. Its influence on the development of other languages began with the conquests by the Roman forces, which left their imprint first and foremost on the vocabulary and the syntactic rules of literary language. The Latin language was carried by Roman soldiers, administrators, settlers, and traders to the various parts of their growing empire. Sicily, Sardinia, Corsica, Dalmatia, and the southern and eastern coasts of Spain had been brought under Roman sway by the end of the third century BC, and the expansion continued until with Trajan's conquest of Dacia the Roman Empire reached its greatest extent, including Britain in the far west and the Hellenistic kingdoms in the east, with the northern frontier on the Rhine and the Danube. The consequence was that a common civilisation was developed that varied little from country to country.*³ Latin, the language of the new ruling power, was from this point on the language of government and administration, legislation and the judiciary, trade and army operations.

¹ S. Wright. *A Community That Can Communicate? The Linguistic Factor in European Integration. – Whose Europe? The Turn Towards Democracy.* Oxford: Blackwell 1999, pp. 79–103.

² A.L. Kjaer. *Epistemology and Methodology of Comparative Law.* M. van Hoecke (ed.). Oxford and Portland, Oregon: Hart Publishing 2004, p. 377.

³ L.R. Palmer. *The Latin Language.* London: Faber and Faber 1988, pp. 173–174.

After the collapse of the Roman Empire in 476 AD, Rome lost its political independence, but the significance of Latin, on the contrary, did not lessen. During the Middle Ages and in the Renaissance and Reformation and beyond, Latin was used in particular as the language of the church, education, and scientific realms. Communication between states and nations was conducted in Latin, as was the correspondence of intellectuals and scholars.

The place of Latin in the history of the development of the law in Western civilisation is also notable. The importance of Latin as a legal language may be traced back to 450–451 BC, when the Twelve Tables were created, forming the basis of the subsequent development of Roman law.^{*4} All major sources of our knowledge of Roman law are written in Latin — e.g., the collection of Roman Emperor Justinian known as the *Corpus Iuris Civilis*. This codification had a direct impact on the development of the legal systems of Europe, and it has even been considered^{*5} to be the most influential law book ever written. In addition, Latin was the language of the most prominent works on jurisprudence and legal philosophy, including famous tractates of Cicero, St. Thomas Aquinas, Hugo Grotius, and many others.

English — a new *lingua franca*?

Europe today does not have such a legal *lingua franca*. It follows that lawyers belonging to different legal systems have no shared language. Legal languages are dependent on the legal systems and cultures to which they belong. Therefore, communication between European lawyers is often hindered by language barriers and is typically characterised by misunderstandings caused by differences in legal experience.

For instance, when a French lawyer refers to *contrat*, this concept is radically different from the notion of *contract* in the mind of a common-law lawyer. Superficially, the concepts are the same, but, at the deep level of legal thinking, they form opposite approaches to contract formation.^{*6}

Lawyers from differing speech communities generally use English, but a good command of English is no guarantee of successful legal communication. On the contrary, English is probably the most inadequate language to apply as a legal *lingua franca*, because legal English is the language of Common Law.^{*7}

Likewise, the lack of immediate understanding among Europeans can be remedied by translation only imperfectly, because translation of legal texts is always unidirectional, transferring the legal concepts of the source language's legal systems into another language (the target language).^{*8} Hence, neither English nor legal translation can compensate for the lack of a neutral common ground for international legal communication in Europe. Legal languages are dependent on the legal systems and cultures to which they belong.^{*9}

Tammelo: creation of a methodical artificial language

Ilmar Tammelo in his 'Zur Philosophie der Gerechtigkeit' asserts that languages used for national-level and international communication have proven irrational and deficient for forming expressions that correspond adequately to the meaning desired.

To avoid the linguistic unfairness and constant problems with legal translations, he suggests creating a special methodical artificial language — an ideal language in the form of a 'trans-linguistic' instrument for communication.^{*10}

⁴ D. Tamm. *Roman Law and European Legal History*. Copenhagen: DJØF Publishing 1997, p. 191.

⁵ P. Birks, G. McLeod. *Justinian's Institutes*. London: Gerald Duckworth & Co 1987, p. 18.

⁶ P. Legrand. *European Legal Systems Are Not Converging*. – *International and Comparative Law Quarterly* 1996 (45), pp. 63–64; P. Legrand. *How to Compare Now*. – *Legal Studies* 1996 (16), p. 234.

⁷ A.L. Kjaer (Note 2), p. 384. More detailed description of the problems connected with the use of English as a legal *lingua franca*: M. Weston. *The Role of Translation at the European Court of Human Rights*. – *Protecting Human Rights: The European Dimension*. Köln, Berlin, Bonn, München: Carl Heymanns 1988, pp. 679–689.

⁸ See esp.: S. Sarcevic. *New Approach to Legal Translation*. The Hague, London, Boston: Kluwer 1997; P. Sandrini. *Übersetzen von Rechtstexten*. – *Fachkommunikation im Spannungsfeld zwischen Rechtsordnung und Sprache*. Tübingen: Narr 1999.

⁹ A.L. Kjaer (Note 2), p. 385.

¹⁰ I. Tammelo. *Zur Philosophie der Gerechtigkeit*; reference from: *Õiglus ja hool* (Justice and Care). R. Narits, M. Luts (eds.). Tartu: Ilmamaa 2001, pp. 31–50 (in Estonian).

Mutual understanding is achievable, irrespective of the linguistic and cultural differences of the communicators, if Latin is used as the neutral and common ground. For grasping the connections between English and other languages, including matters of verbal logic and conceptual extent, basic knowledge of Latin is often essential.*¹¹

The position of Latin in the modern legal literature

The usage of Latin terms and phrases in legal literature has increased markedly over the years, especially in the last couple of years. From the recent studies concerning the usage of the Latin language in Estonia and Finland*¹² we can see that Latin today retains a certain and firm position in legal writings and terminology. More than 600 Latin terms and phrases are part of the active vocabulary of Estonian and Finnish lawyers, used in rhetoric and for illustrative purposes or as normative arguments with specific juridical information.

The principles of the usage of Latin in Estonia and in Finland are very similar. The words most frequently occurring in legal language are *lex*, *ius*, *corpus*, and *forum*. This is not very surprising, as ‘the law’, ‘the right’, ‘the body’, and ‘the court of justice’ are the basic elements of the law. Similarly, the words that follow on the list correspond to the expectations: *culpa* (‘the fault, the negligence’), *ratio* (‘the reason’), *res* (‘the thing, the object’), *factum* (‘the fact, the deed’), *poena* (‘the punishment’), *crimen* (‘the crime’), *vis* (‘the force or violence’), and *pactum* (‘the pact’).

Commonly used terms and phrases in the legal works examined are *corpus iuris* (‘the body of law’), *lex mercatoria* (‘commercial law’), *de lege ferenda* (‘according to the law it is desirable to establish’), *culpa in contrahendo* (‘pre-contractual liability’), *lex fori* (‘the law of the court’), *de facto* (‘in fact’), *de lege lata* (‘according to the law in force’), *pacta sunt servanda* (‘agreements of the parties must be observed’), *lex specialis derogat generali* (‘a special statute overrules a general one’), *nullum crimen nulla poena sine lege* (‘there should be no crime and no punishment without a law fixing the penalty’), *in dubio pro reo* (‘in the case of doubt, the defendant is to be preferred’, the presumption of innocence), and *ne bis in idem* (‘not twice for the same’ — i.e., a man shall not be tried twice for the same crime).

In addition to juridical terms, commonplace Latin expressions and abbreviations are often used in legal texts: *op. cit.* for *opus citatum* or *opere citato* (‘quoted book, in the quoted book’) *expressis verbis* (‘pointedly’), *ca.* for *circa* (‘about, around’, usually in a temporal context), *sui generis* (‘of its own kind’), *ib.* or *ibid.* for *ibidem* (‘in the same place or book’), *ad hoc* (‘for this, for this special purpose’), *a priori* (‘from the former’), *supra* (‘above, upon’), *prima facie* (‘at first sight’), and many others.

The above-mentioned terms and phrases are not found solely in the legal materials of Estonia and Finland. Also, even more Latin terms can be found in the languages used by Western European lawyers, especially German. More precisely, many new Latin terms have been created in recent years — for example, *Societas Europaea* and *fumus boni iuris*, which is in use in the European Court of Justice.

Polysemy

Language, the instrument for communication, is created, adapted, and refined in response to the manifold and ever-changing demands of society and the environment in which it is set.*¹³ Accordingly, it must be noted that the traditions of the usage of Latin can vary a lot among major legal cultures. The difference is distinguishable between Latin terms as applied in Common Law and Continental Law. For example, the term *exitus* comes from the Latin word *exire* (‘to go out or away’). In Continental Law it signifies ‘the death’; dictionaries of Common Law, on the contrary, denote the meaning as ‘the children, offspring; the rents, issues, and profits of lands and tenements; an export duty; the conclusion of the pleadings’.*¹⁴

¹¹ A. Lill. Ladina keel õiguskeele alusena (Latin as the basis of legal language). – Õiguskeel 1996/4, p. 11 (in Estonian).

¹² M. Ristikivi. Ladina keel ajakirjas Juridica 1993–2002 (Latin in the Journal Juridica 1993–2002). – Juridica 2003/10, pp. 727–732; H.E. S. Mattila. Latinet i den finländska juridiska litteraturen. – Tidskrift utgiven av Juridiska Föreningen i Finland 2000/3, pp. 269–322; on the results of the research also: H.E.S. Mattila. Vertaileva oikeuslingvistiikka. Helsinki: Kauppakaari Lakimiesliiton Kustannus 2002, pp. 227–236.

¹³ L.R. Palmer (Note 3), p. 95.

¹⁴ *Exitus* – Black’s Law Dictionary by H.C. Black. 6th edition. by the publisher’s editorial staff; J.R. Nolan et al. (eds). St. Paul, Minnesota: West Group 1998, p. 574.

As most of the legal terms and phrases in Latin were adopted more than two thousand years ago, it is understandable that their meaning has changed over the centuries. For example, the term *ius civile* ('civil law') has numerous meanings. First, there are oppositions even within Roman law itself. There, *ius civile* refers to the portion of the law peculiar to one state (*civitas*) as opposed to that common to all peoples, the *ius gentium*. A different opposition contrasts the part of the law derived from statutes and juristic utterances against that part of the law based on the edicts of a magistrate, especially the urban praetor (*ius honorarium*).^{*15}

During the time of the Byzantine Empire and the Middle Ages in Europe, the *ius civile* signified Roman law in general. In a wider sense, its meaning was also the positive (in the sense of prescribed) law, in contrast with the divine law (*ius divinum*) and natural law (*ius naturae*).^{*16} The Middle Ages also saw the development of the meaning of the *ius civile* concept as we use it today. At that time, jurisprudence focused on the study of the *Corpus Iuris Civilis*, especially the examination of those passages in which legal relations between private persons were explained. At times, this discourse affected the usage of the term as well. From this derives the meaning of civil law in contemporary Europe — the body of law regulating the relations between private persons.^{*17}

Synonymy

Usage of Latin terms helps us improve and gain better knowledge of our own legal languages. Studies of legal language show that the synonyms are generally spread evenly through terminology, especially in legal translations.^{*18} Usually, except in the Romance languages, the same concept can be expressed both with a foreign word (with the Latin root) and with an 'original' word developed later, an example of this being *delictum* — delict — tort.

In legal language, partial synonymy (so-called quasi-synonymy) is used as well. In this case, particular care must be taken — if the meaning of the words coincides only partly, this may cause misunderstanding and misinterpretation. For example, the term 'agreement' can be expressed in Latin with the following words: *contractus*, *pactum*, *conventio*, *consensus*, and *stipulatio* — all coincide semantically, yet, according to their legal definitions, they are different concepts.

Conclusion

Usage of modern languages in international communication can often create misunderstanding. Therefore, the application of Latin in the position of common legal language of Europe would be effective in many ways, on account of:

- 1) this language's strong historical connection with the development of European law (a major portion of the legal literature until the most recent centuries was written in Latin),
- 2) Latin being an intensely economical language (translation into modern languages easily expands the original text to double its length), and
- 3) its complete and well-formed body of terminology (Latin terms and phrases create a basis for a legal discourse spanning the different legal cultures and various language boundaries of Europe).

The history of a language is nothing less than the history of a culture. Although we cannot use Latin today as extensively as in past centuries, it still helps us to understand better the meaning of legal concepts and use the terminology adequately.

¹⁵ P. Birks, G. McLeod (Note 5), pp. 8–9.

¹⁶ H.E.S. Mattila. Vertaileva oikeuslingvistiikka (Note 12), p. 172.

¹⁷ H. Roland, L. Boyer. Locutions latines du droit français. Paris: Litec 1998, pp. 240–241.

¹⁸ H.E.S. Mattila. Vertaileva oikeuslingvistiikka (Note 12), pp. 177–178.



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Baltic Yearbook of International Law — Five-Year Anniversary

The Baltic Yearbook of International Law was founded in 2001. The first volume contained articles by Baltic and international scholars about the various issues relevant to the debate about the occupation of the Baltic States in 1940 by Soviet troops and the restoration of their independence in 1990–1991. The year 2001 was important in the history of Estonia, Latvia, and Lithuania since the process of restoration of independence was completed ten years earlier.

Since the first volume, three additional volumes have appeared, and another is under preparation and will come out at the end of 2005. The yearbook is a Baltic endeavour, with an editorial board consisting of well-known international law scholars from the three Baltic States. It is assisted by an international advisory board. The yearbook is published by Martinus Nijhoff Publishers in the Netherlands. The main language is English, but, true to the yearbook's international character, articles in French and German can also be accepted for publication. The editorial office is based in Sweden at the Raoul Wallenberg Institute of Human Rights and Humanitarian Law, and it is largely thanks to this institute that the yearbook has become a reality, since the strength of academic institutions in the three Baltic States may not yet have reached the level where such an international project could be implemented.

International distribution, as provided by Martinus Nijhoff Publishers, is very important since it is a crucial feature of the yearbook to publish articles about Baltic affairs that may not be well known outside the Baltic region. At the same time, the yearbook is a forum for international debate not limited to Baltic issues or authors. It is a Baltic contribution to the strengthening of the international rule of law in international and regional affairs.

The Baltic Yearbook is discovering a new generation of international lawyers in the Baltic States and around the world and provides them with a forum for comments on issues that they have researched in international law. Applying a thematic approach, each volume of the yearbook is dedicated to a theme that is topical internationally or in the region. The issues published so far have covered these themes: 'International Legal Status of the Baltic States', 'Bioethics and Human Rights', 'Reparations for Internationally Wrongful Acts of States', and 'Enlargement and Further Integration of the European Union: A Uniform Vision for Europe?' An issue is under preparation on the use of force in international law. Additionally, the yearbook includes an annual section with a unique review of the practices of the Baltic States in international law. This section not only informs international readers about the statements and actions of state institutions that may have international legal implications but also tells Baltic politicians that their actions can translate to

normative effects. In addition, many topics of general interest have been addressed in articles published along with the thematic articles.

In 2004, the Baltic Yearbook introduced a new section, on the history of international law in the Baltic States. Its purpose is to revisit the traditions that the Baltic States have had in international law but may have forgotten in view of the 50-year occupation by the Soviet Union.

The Baltic Yearbook clearly continues to face many challenges, and some of these appear, at least indirectly, in this presentation on the occasion of the yearbook's five-year anniversary. The yearbook also has to address too many tasks at the same time. One can even draw some parallels with the fates of the three Baltic States, which, within a very short time, have had to catch up with everyone else in a community of democratic states while, at the same time, the events of the past did not go away easily (nor could they). The yearbook, in its choice of themes and reports from the region, is a mirror of some of these realities.

It will be interesting to see how the yearbook develops over, let us say, the next five years. One has to hope that its international and Baltic recognition will grow. Let us also hope that the number of international lawyers in the Baltic States will increase and that the contribution of the yearbook to the international debate will become more and more indispensable.

Interested persons can send articles, book reviews, or other communications to the Editorial Office of the Baltic Yearbook of International Law, P.O. Box 1155, 221 05 Lund, Sweden.

Concerning more information and subscription requests, all interested can consult the Web site of the yearbook at http://www.brill.nl/m_catalogue_sub6_id18745.htm.

Abbreviations

ALCSCd	decision of the Administrative Law Chamber of the Supreme Court of Estonia	ISIC	International Standard Industrial Classification
ALCSCr	ruling of the Administrative Law Chamber of the Supreme Court of Estonia	LOA	Law of Obligations Act
BA	Bankruptcy Act	LSA	Law of Succession Act
BGB	<i>Bürgerliches Gesetzbuch</i> (German Civil Code)	MVRC	Estonian Motor Vehicle Registration Centre
BPL	Baltic Private Law	OJ	Official Journal of the European Union (formerly Official Journal of the European Communities)
CACP	Code of Administrative Court Procedure	PC	Penal Code
CC	<i>Code Civil</i> (French Civil Code)	PECL	Principles of European Contract Law
CCSCd	decision of the Civil Chamber of the Estonian Supreme Court	RT	<i>Riigi Teataja</i> (State Gazette)
CCSCr	ruling of the Civil Chamber of the Estonian Supreme Court	SCebd	decision of Supreme Court <i>en banc</i>
CCrP	Code of Criminal Procedure	SEFR	social and economic fundamental rights
CFR	Common Frame of Reference	SGA	Sales of Goods Act
CISG	United Nations Convention on Contracts for the International Sale of Goods	SGECC	Study Group on a European Civil Code
CL	Civillikums, Civil Code of the Republic of Latvia	SPSCr	ruling of the Special Panel of the Supreme Court of Estonia
EC	Treaty establishing the European Community	TA	Traffic Act
ECA	Employment Contracts Act	TRIPS	Agreement on Trade-related Aspects of Intellectual Property Rights
ECHR	European Court of Human Rights	ULFIS	Uniform Law on the Formation of Contracts for the International Sale of Goods
ECR	European Court Reports	ULIS	Uniform Law on the International Sale of Goods
Estonian SSR	Estonian Soviet Socialist Republic	UNIDROIT	International Institute for the Unification of Private Law
FLA	Family Law Act	WA	Wages Act
GG	<i>Grundgesetz</i> (Constitution of the Federal Republic of Germany)	WCT	WIPO Copyright Treaty
GPCCA	General Part of the Civil Code Act	WIPO	World Intellectual Property Organization
HGB	<i>Handelsgesetzbuch</i> (German Commercial Code)	WPPT	WIPO Performances and Phonograms Treaty
		ZGB	<i>Schweizerisches Zivilgesetzbuch</i> (Swiss Civil Code)

The English translations of a number of Estonian legal acts are available at www.legaltext.ee