



**Dear reader,**

The developments towards closer international integration that have taken place in the world over the past few decades have increased the dependency of different societies and countries on communication; more precisely on its efficiency and quality. Law also serves as a means of communication, and the role of law in communication along with how the law itself should be developed in changing situations, under the circumstances of greater social integration, are important issues.



Legal regulations depend on geographic, social, economic and other influences. Various international fora discussing the question of global legal integration have also raised the issue of regulatory communication developing on its basis.

The present issue of the journal mainly derives from the underlying ideas of two international fora held in Tartu. The fora focussed both on legal integration and topics of regulatory communication. The fora included the jubilee conference of *Juridica International* entitled *European Legal Harmony: Goals and Milestones*, held on 6 December 2005, and the symposium *Regulatory Communication and Communication Structure in the Rule of Law, Global and Worldwide Domain*, held on 21 April 2006. Several papers that have been published were also submitted independently of the fora.

The former of the above fora was dedicated to the harmonisation of private law, above all to contract law. Namely, contract law constitutes the core of the proposed European Civil Code. Harmonisation of law on the level of European Union secondary law has reached the stage in which the formulation of uniform provisions has brought about the development of advanced communication structures. Here we understand the structure of regulatory communication as a system of structured and organised relations, the objective of which is to create sets of harmonised regulatory provisions. The latter conference indicated that it was characteristic of jurists to attempt to classify law and the related issues as explicit structures, institutions and systems. Thus, the identity of the state and law was discussed from the perspective of communication and systems theory, while procedural communication was discussed in nationally organised legal systems along with the politicisation of law, etc.

The modern concept of law is no longer solely recognition of rights and duties, legal provisions and facts. Besides legal positivism, post-modern realistic (adequate) legal thinking is gaining ground, aimed at communication and attempting to encompass the entire legal domain both from the aspect of legal provisions and behaviour. Schools, doctrines, and customs of law have evolved in different European countries over centuries, yet contemporary Europe strives for a European common existence, highlighting definition of the common share in law, which would ensure the necessary integration, including communication. At the same time, communication must also ensure better integration.

However, to date, no systematically developed theory is available for tackling the relationship between provisions and behaviour from the aspect of regulatory communication both in the legal and social theory perspectives. But the studies carried out in various fields of law in different countries certainly help make the necessary generalisations that may serve as the basis for relevant theory. We very much hope that the articles published in this issue will make their proper contribution to the expansion of the area of recognition of regulatory communication.

Enjoy your reading.

Raul Narits

Paul Varul

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# General Objectives of Legal Theory and Significance of Values in the Context of Globalisation<sup>\*1</sup>

This article will discuss some of the important issues that are related to the developments and prospects that have taken place in legal orders over the past few years, proceeding from both the aspect of doctrine and that of legal practicality. It is important to note that for quite a while, the developments that have taken place, and the future prospects, are emerging in a completely new context — in the context of globalisation.<sup>\*2</sup>

## 1. Contemporary law as a global information and communication medium

Over the past few decades, developments in the world, including the integration process in Europe, have rendered societies and countries increasingly dependent on the efficiency and quality of communication. A number of countries, both in Europe and elsewhere, have set out to systematically explore the changes that

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<sup>1</sup> The postulates included in this article were presented by the author at the international conference “Ratification of the Treaty establishing a Constitution for Europe: impacts on national constitution”. Tallinn, November 2005; at the conference “Role of courts in developing the European common judicial area”. Tallinn, January 2006; at the international conference “Regulatory communication and communication structure in the rule of law, global and worldwide dimension”. Tartu, April 2006.

<sup>2</sup> At the same time, it is perfectly clear that not only the Estonian legal order has had to meet new challenges. For example, B. Rüthers writes in his article *Method Realism in Jurisprudence and Justice* that no country or generation of lawyers has acquired so much methodical know-how for reconceptualising the entire legal order as German jurists between the years 1919 and 1990. The German jurisprudence has had six different constitutions during a period of 70 years: the constitutions of the *Keiserreich*, Weimar Republic, Nazi and occupation regimes as well as the former constitution of the Federal Republic of Germany, the new constitutions of the German Democratic Republic and the Federal Republic of Germany, which were strongly influenced by the supranational law of the European Union. Professor B. Rüthers also writes that this is the very reason why German jurists have developed into ‘experts on change’ and world champions in the savoury discipline of ‘political change of system’. – B. Rüthers. *Methodenrealismus in Jurisprudenz und Justiz*. – *Juristen Zeitung* 2006/2, pp. 54–55.

are characteristic of information societies as well as the need for reflecting them in law, along with the possibilities of law in these new circumstances. At international fora, people are speaking more and more often about global legal integration since one of the most characteristic features of contemporary communication is its cross-border nature. However, applicable legal regulation is frequently limited in geographical, social, economic, information technology and other terms. The issue of the globalisation of law concerns the feasibility, reality, necessity and advisability of globally applicable law. M. Shapiro in his article recalls E. Zitelman, who as early as in 1888 raised the question of the feasibility of world law.<sup>3</sup> The concept suggests that global law is the worldwide (global) integration of law. This can be achieved if states are proclaimed to be subjects of global legal integration. Yet the subjects of such integration are not only individual states but also regional, supraregional and world organisations.

Historically, the European judicial area has been shaped primarily by two different types of legal culture: the continental European or regulation-based one, which can be conditionally referred to as civil law, and common law or the overall law generated by the work done by courts, in which the premier source of law is a court judgement or more specifically the binding part of it — *ratio decidendi*. The traditions have served as the bases for long-term developments in national legal orders. The Estonian legal order belongs, through historical developments, to the legal order based on civil law. That is why it has been important for our jurisprudence to proceed from the dynamic doctrine of continuity after Estonia re-established its independence. However, it was equally important to understand that the interrelationships of all societies structured as states, as well as other subjects of international law, were organised by international law as a system comprising provisions of law, generally recognised legal principles and customs, which regulated the relations between sovereign states and other subjects of international law. The law of the European Communities or European Union law must be regarded as the third structure of law. In fact, since 1993, it has been correct to speak about European Union law which is connected to the entry into force of the Maastricht Treaty. Fourthly, it must be noted that the European Union is an integration organisation, above all, through its law, and the European Court of Justice plays a very important role in it. According to article 7 of the Treaty establishing the European Community and according to article 3 of the Treaty establishing the European Atomic Energy Community, the tasks entrusted to the Community shall be carried out by the five central institutions which comprise the European Court of Justice, founded in 1952. Namely, the Court of Justice develops European law, shaping and even establishing the general principles of law, while also ensuring the protection of human rights in the European Union. The Court of Justice has a decisive say in interpreting European law and in determining its applicability. Thanks to the decisions of the Court of Justice, *ius scriptum*, or written law, may be reshaped.

All of the named legal domains are related to certain parts of reality and are thus relatively independent social systems when proceeding from the systems theory. The two main characteristics of each system are its non-amorphous nature and integrity. The non-amorphous nature means that the system may contain different elements that are related to each other in a particular manner, while integrity or homogeneity implies that the system is separated from other systems. Taking this underlying principle of the systems theory as the basis, we must understand and recognise at least the very nature of the legal realities existing in the European judicial area and their mutual relationships.

However, just as important as seeing and distinguishing between the various contemporary legal structures it is important to acknowledge that the legal systems of the modern world do not ultimately serve as different and independent structures. In the context of the systems and communication theory, this means that the legal structures of the modern world are not independent communication systems, but instead comprise a global information and communication system.<sup>4</sup> Here it is appropriate to recall that less than two years ago a collection of works with the bearing the interesting title “Constitution in Discourse with the World”, was published to celebrate the 70<sup>th</sup> birthday of the well-known European expert in constitutional law P. Häberl.<sup>5</sup> The problem is that integration processes in Europe and on a wider scale the globalisation process as a whole, have sharply highlighted relations between different legal orders. This means, *inter alia*, that questions about the legal order of a state and its legitimacy, have gone beyond the traditional legal paradigm and serve in essence as a problem of law as a cross-border regulatory communication.<sup>6</sup> In the bulletin of the

<sup>3</sup> E. Zitelman. Die Möglichkeit eines Weltrechts. Unveränd. Abdr. der 1888 erschienen Abhandlung. München 1916. *Ibid.*: M. Shapiro. The Globalization of the Law. – Indiana Journal of Global Legal Studies 1993/1.

<sup>4</sup> The contemporary literature on theory of law increasingly recognises that the theory of law has been structured proceeding from the information and communication theory. See, for example, W. Krawietz. Jenseits von national und staatlich organisierten Rechtssystemen – normative Kommunikation von Recht in der modernen Weltgesellschaft. – Kommunikation und Recht in der modernen Wissensgesellschaft – national oder international? Rechtstheorie 2003. Vol. 34. Book 3, p. 331.

<sup>5</sup> Verfassung im Diskurs der Welt: Liber Amirocum für Peter Häberle zum siebzigsten Geburtstag. A. Blankenagel (Hrsg.). Tübingen 2004.

<sup>6</sup> The author of this article consistently supports the concept of law as a regulatory information and communication medium, which, in other words, means that law and the legal order alike cannot be functionally and socially described and explained when proceeding in principle from the free *a priori* unrelated subjects of law. Law encompasses everything that is related to the legally relevant part of human behaviour. Hence, for perceiving law, it is very important to see and recognise the regulatory correlation that stands between law and society (societies). See also R. Narits. Õiguse entsüklopeedia (Encyclopaedia of Law). Tallinn 2004, p. 40 (in Estonian).

international conference “Regulatory Communication and Regulatory Communication Structure of Legal Systems in the Rule of Law, Global and Universal Dimensions” Tartu, 2006, the Associate Professor I. Kull writes in her theses: “Regulatory communication as interaction represents by nature the co-existence of at least two important dimensions, those being distribution and dissemination.” The harmonisation of law on the level of the secondary legislation of the European Union has reached the stage in which the formulation of uniform provisions on the level of *acquis* has given rise to the development of novel regulatory communication structures. The purpose of the EU common frame of reference<sup>7</sup> is to improve the logical coherence between the applicable *acquis* and the one to be adopted in the future and to promote the development of consumer policy strategy, specific guidelines, and the terms of contract comprising the entire EU, to furnish legal notions with clear definitions, to formulate the main principles of contract law and coherent exemplifying rules, proceeding from the legal order of the European Communities and the best solutions available in the legal order of the member states. Thus, regulatory communication structures are created by means of the guidelines determined by the Commission of the European Communities, through which new information will be distributed and disseminated in national legal orders. She rightly adds that the activities of jurists in introducing, explaining and extrapolating their national law are above all significant for the internal development of national law, contributing to the understanding of the development of law, influences originating from other legal orders and relation with the other walks of social life.<sup>8</sup> The contemporary literature on legal theory uses the term ‘glocalisation’ to denote a situation in which the global and the local are closely interrelated.<sup>9</sup> Every state that is shaping its national legal order today must take account of such regulatory and institutional relationships. We first mentioned the significance of the doctrine of continuity for the development of the Estonian legal order after the reestablishment of independence. In other words, restitutive legal policy was implemented in Estonia after restoration of independence. This was very reasonable; yet the multiplicity of legal reality — to be more precise, of legal realities — puts in the limelight not only relations between ethics, policy and law, but the question of a particular political and legal world ethos. This is ‘the foundation of a world union to be created’.<sup>10</sup> Regulatory landmarks that have been fixed by symbols and culturally shaped are found not only in ethics, politics or religion. They are also found in law. Hence, the methodologically verifiable legal perception must also be communicated rationally and not get stuck in some limited space and time. That is how the legal theory developing on the basis of perceptive and scientific programmes can offer ‘suggestions for conduct’.

## 2. Horizon of value jurisprudence<sup>\*11</sup>

The Estonian legal order is in a state of discourse, in a state of discourse with Europe and why not also with the entire world. T.-H. Ilves, who represents Estonia in the European Parliament, writes: “If you want to be with us, Europe announces, become like us. That was an offer that was hard to refuse. Chasing the carrot of European Union membership, the parliaments and governments had to overcome many difficulties that had seemed unsurpassable, and at times to also tolerate the blows of refusal and non-recognition. That process of self-colonisation, in which the states voluntarily adopted European Union laws and habits, was largely similar to the process of voluntary westernisation undergone by pagan Europe when it was illiterate and lacked a legal system in the 13th century, when towns adopted the Lübeck or Magdeburg law that granted them, for example, membership in the Hanseatic League. Just as such an agreement was beneficial to all parties, the same applies to agreement with the EU.”<sup>12</sup> However, one cannot agree with T.-H. Ilves, when he continues:

<sup>7</sup> C. von Bar. Working Together Toward a Common Frame of Reference. – *Juridica International* 2005 (X), pp. 17–26.

<sup>8</sup> The French civil law expert P. Ancel writes that the draft general private law regulations within the framework of Europe concern an altogether different question. These drafts do not originate from European agencies but have been born in universities, they are products of legal teaching and created under the auspices of scientific traditions. He refers to the Principles of European Contract Law, developed by the Lando group, to the European Contract Code by the European Academy of Law, and the draft European Code prepared under the leadership of professor von Bar. However, many French jurists have reservations about these drafts and have frequently demonstrated their negative attitude. French jurists have been convinced over a long period of time that their *Code civil* is the king of law books. See P. Ancel. Der französische Code civil im Jahr 2005 – Monument oder Gespenst. – *Juridica International* 2005 (X), pp. 40–41. P. Ancel has a positive attitude toward European Union directives, since at the beginning, they do not influence national legal order, but can be integrated into it later on. See P. Ancel. *Ibid.*, p. 40. It seems that such an approach is entirely justified and conforms to the principle of *mutatis mutandis*.

<sup>9</sup> See, e.g., W. Krawietz. Glokalisierung der Rechtskommunikation? Zum Globalisierungsdiskurs in der modernen Rechts- und Gesellschaftstheorie. – *Gewohnheitsrecht – Rechtsprinzipien – Rechtsbewusstsein. Transformationen der Rechtskultur in West- und Osteuropa. Rechtstheorie* 2004. Vol. 35. Book 3/4, pp. XVII–XXI.

<sup>10</sup> *Ibid.*, p. XVII.

<sup>11</sup> Discussion about values continues to be one of the most important areas, above all, in philosophy of law. See, e.g., the collection *Values, Rights and Duties in Legal and Philosophical Discourse* compiled on the basis of the 21<sup>st</sup> World Congress of the International Association for Philosophy of Law and Social Philosophy held in Lund (Sweden). – *Rechtstheorie. Beiheft* 21. Berlin: 2005.

<sup>12</sup> T.-H. Ilves. Suur laienemine ja suur Hiina müür (Great Enlargement and Great Wall of China). – *Riigikogu Toimetised* (Proceedings of the *Riigikogu*) 2003 (7), p. 29 (in Estonian).



“Eastern Europeans are willing to do whatever is necessary to act like the European Union, to adhere to its laws and customs [...]”<sup>13</sup>

It is clear that the integration process in Europe has shaped new forms that articulate the economic, social, political and legal reality and that put to test a number of the ordinary concepts of the categories which have become familiar and customary to us.<sup>14</sup> There is no way one could stay away from the objective processes taking place in Europe. M. Nutt who continues to be active in politics today, already wrote in 1991: “Estonia cannot become a viable country by staying away from the European integration processes and the EC. The transition to it will require thorough reorganisation both in the economy and in the legal system”.<sup>15</sup> Yet the question is not only about reorganisations as such, but in the very content of these reorganisations. We must also know that even today there is much that has stood the test of time and that must be consistently protected. This includes, for example, the well-known and recognised principles of law. But what is most important — changes must be made and accepted in the context of values. The majority of the European national legal orders have transitioned over to value jurisprudence both in the perception of the legal orders themselves and in planning and implementing the changes. Jurisprudence in Estonia cannot and must not be left behind this trend. Naturally, it is good when something has stood the test of time and consequently proven to be of value. At the same time, values are not absolute categories but to a great extent relative, as a certain *topoi*’s they maintain a certain topographic value. U. Reinsalu, the Chairman of the Constitutional Committee of the *Riigikogu*, writes: “As a result of diverse legal cultures and political influences, the legal system of the European Union is very hard to grasp. There are several reasons for that, beginning with the interests of the member states and ending with the effects of the relations between the legal services of two EU institutions, the Commission and the Council.”<sup>16</sup> Although the legal reality is hard to grasp, Estonia is showing visible signs that ‘the horizon of jurisprudence’ is not an ambiguous entity somewhere in the distance, but is instead a clear landmark. In order not to go astray in the world of values, it would be necessary — which would be a value on its own already — to agree, at least in Europe, on the essential connection between the different actually existing legal orders through our own analytic discourse and in the course of it. Such an agreement presumes a preliminary agreement on how to treat the integrated and integrating Europe. That is why I believe that eastern Europeans are not willing to do whatever it takes to act like the European Union.

### 3. ‘Umbrella’ or ‘home’

If we are not ready to take the steps required, then what steps are we prepared to take and on what conditions will we take them?

The first, and perhaps not the most effective method, regards Europe proceeding from the principle of the separation of the institutions and sources of law. In that case, EU matters and member state matters would belong to different domains. This would, in principle, also imply different legal orders. However, such a view would be incorrect mostly because it would not mirror reality. In reality, communication works and all attempts to exclude it are not in line with reality. In professional literature, it is referred to as the umbrella principle<sup>17</sup> and can be applied to a federal state system or to the cooperation between states in some narrow area. However, there is also another possibility. Namely, to regard the European Union as a combination of institutions and sources of law on all levels. This principle can be referred to as the principle of home.<sup>18</sup> Although the umbrella principle seems to be easier to understand at first glance and seems to protect the sovereignty of the state, while the principle of home does not seem so clear at first glance, the principle of home protects the national diversity of Europe and is in every way competent with regard to law. From the point of view of the philosophy of science, the principles described are metatheoretical, but the selection between them largely determines the content of theory of law and the later practice based upon it. In the final

<sup>13</sup> *Ibid.* pp. 29–30.

<sup>14</sup> There are multiple manifestations of increasingly close cooperation in Europe. In the constitutional law perspective, the relevant notion would be constitutionalisation. The ever-increasing integration leads step by step to the formalisation of legal structures that make way to the development of a constitutional order on the continent. See A. von Bogdany. *Konstitutionalisierung des europäischen öffentlichen Rechts*. – *Juristen Zeitung* 2005/11, pp. 529–540; G. F. Schuppert, C. Bumke. *Die Konstitutionalisierung der Rechtsordnung: Überlegungen zum Verhältnis von verfassungsrechtlichen Ausstrahlungswirkung und Eigständigkeit des „einfachen“ Rechts*. 1<sup>st</sup> ed. Baden-Baden 2000; J. H. H. Weiler. *The Constitution of Europe*. Cambridge 1999, p. 221 et seq.

<sup>15</sup> M. Nutt. *Kas me oleme iseseisvad (Are We Independent)?* – *Postimees*, 30.09.1991 (in Estonian).

<sup>16</sup> U. Reinsalu. *Märkmeid Eesti õigussüsteemi tulevikuks (Notes about the Future of the Estonian Legal System)*. – *Riigikogu Toimetised (Proceedings of the Riigikogu)* 2005 (12), p. 42 (in Estonian).

<sup>17</sup> M. Rosentau. *Suveräänsus Euroopa Liidus (Sovereignty in the European Union)*. – *Riigikogu Toimetised (Proceedings of the Riigikogu)* 2003 (8), pp. 14–15 (in Estonian).

<sup>18</sup> “This principle may be called compositional all-inclusiveness — all public things that take place on any level in Europe serve simultaneously as European matters and those of the relevant level”. – M. Rosentau (Note 17), p. 15.

stage, the legal status or subjection of Estonia, for example, depends on the entry into the relevant preliminary agreement.<sup>\*19</sup>

No matter which walk of life we are speaking about, we always find ourselves at the identity problem. This means that we arrive at attitudes, culture, language, traditions and values. The identity of every nation has developed in its own characteristic way and, as it seems to me, that one of the key questions facing Estonia as a member of the European Union is the preservation of its identity. It is only natural that all of us in Europe have a set of common values such as democracy, human rights and rule of law; yet besides that there exists today and in the future, the obligation to preserve and develop national identity while acknowledging European values. And here national parliaments have a certain mission to carry out. In principle, the role of national parliaments in shaping European Union legislation must increase. The reason for this is not the ambitions of national parliaments. The problem is, however, that the law, which has been collectively prepared in the European Union, concerns the organisation of concrete reality in a concrete space, that is, in a member state. To put it yet more precisely, legislation is not drafted in Europe for some abstract body but for the people living in the member states. National parliaments that are closest to local people are perhaps best at knowing and perceiving the interests and needs of the people. However, until recently there was quite a bit of discussion about the decreasing role of national parliaments in the European Union. Today, Benelux is very seriously discussing how to become stronger and more cooperative. The same issue is on the agenda in the Nordic Council; the activities of the Baltic Assembly are gaining impetus. The enlargement of the European Union has itself stimulated this type of closer regional communication.<sup>\*20</sup>

Returning, specifically, to the perception of the Estonian legal order, it seems to me that when acting in line with the principle of home we do not come into conflict with the doctrine of the European single — perhaps it would be more appropriate to say common — judicial area. Estonia's membership in the European Union would thus, in the context of the European common judicial area, mean the recognition and implementation of the principle contained in § 1 of the Republic of Estonia Constitution ("Estonia is an independent and sovereign democratic republic") that is more in line with the actual contemporary reality. It means that it is possible to successfully ensure the continuation of the Constitution of the Republic of Estonia and consequently its legal order, while being part of the European Union. I would put it even more precisely: we must find measures to ensure the control of the *Riigikogu* over the impact of the European Union, including its legal influences, and guarantee for the Estonian people, as the highest vested bearers of sovereignty, the realisation of their principal needs as Europeans.<sup>\*21</sup>

## 4. Contribution of jurists

It is clear that political discourse is not the domain of jurists. What can jurists and jurisprudents still do and continue to do for shaping one of the important features of a state — legal order — and more specifically for developing its conceptual foundations, taking into account the objective movement towards a European common judicial area?

It is my opinion that the help and support of jurisprudents can consist in the application of the very theory of legal order to contemporary circumstances. This theory can in principle be broken down into the two underlying principles that have, through their approximation (even harmonisation), made their way into modern legal thinking. They involve the theory of institutions on the one side and the normative theory on the other side. According to the theory of institutions, the legal order is not a mere set or group of regulations but involves inherent unity that is very difficult to explain by means of scientific abstractions, i.e. notions. Pursuant to this approach, legal provisions are the goal of a legal order and they make the legal order active.

<sup>19</sup> In the University of Tartu, jurisprudents proceed from the principle of home. Namely, the research topic financed by the Department of Law of the University of Tartu TOIAO1782 "Estonian judicial area in a global judicial area" for the first time sets as its goal to systematically study law, taking as the basis Estonia's reality and its legal order, but linking it through all fields of law to the global judicial area.

<sup>20</sup> A situation in which the system of international relations acquires a new quality can be witnessed in Europe for quite some time already. As J. Zielonka writes, the international system of Westphalia is being replaced by a neo-medieval international system. In the opinion of the author of this article, this neo-medieval international system has several qualities and among them are collective bargaining over laws, procedures and the institutional structure of the empire. The Westphalian nation state that developed in its classical form in the 19<sup>th</sup> century and was based on a single centre of power is no longer a reality. See J. Zielonka. *Europe as Empire. The Nature of the Enlarged European Union*. Oxford 2006. 293 p.

<sup>21</sup> As it is known, perhaps the most vivid wording of the parliament's role with regard to the state and the European Union can be found in Finland. According to the amendments made to the Constitution in 2000, the *Eduskunta* must participate in the preparation of issues related to the European Union, while the responsibility for that lies with the Government of Finland. In Sweden, the role of the parliament has been established by four main statutes and the rules of procedure of the *Riksdag*. Pursuant to that, the Government is obliged to inform the *Riksdag* about all issues related to the European Union. Denmark applies a practice, in which the Government is obliged to inform the Parliament about all issues concerning the European Union, which directly or indirectly affect Denmark.



In the normative theory, the legal order itself is the element that helps define law. As we can see, both approaches take order as the basis for defining law and furnishing it with the content. Now we have to proceed to the next step and describe the order, not forgetting that order is founded upon regulations. A rationally perceived unity (in the European context common) judicial area, as an order, is applicable, because applicability is an immanent quality for order. However, applicability is not an inseparable characteristic of regulations that serve as the basis of order. For regulations, applicability is only one of their features. This means that the applicability of order surpasses the limits of strict legal study since we can speak about the validity of an order founded on regulations, as well as about unity, only together with society. Particularly with the behaviour of the members of society. The inference is that order is in fact applicable only when the regulations aimed at a society organised as a state are adopted by the members of such society. It should be clear that law does not exist only to supply work for parliaments. In the hands of a state, law is in essence the only means through which, and with the help of which, the state can organise and guide the behaviour of subjects of law, doing it imperatively, if required. Figuratively speaking, the question how much law there is in society is ultimately answered by subjects of law when they “demonstrate” it with their behaviour.<sup>\*22</sup> It is this kind of communication that both the national legislator and the European Union legislator must keep in mind when creating law. In the context of what has been said, it is only natural that the debates in legislation on the level of states and in the European Union are not becoming simpler but more complicated.<sup>\*23</sup> The law must not remain a mere ‘dead letter’ but must be manifested in the behaviour of subjects of the law. And here I share the view that the continuing internal development of law, its enrichment on a local, regional and supranational level, contributes to, rather than jeopardises, the adaptation of the understanding of law with social reality. Though the process of globalisation may develop a vision of national identities being lost, including the legal order or even legal culture. However, rational understanding still implies that the strength of integrating Europe lies in the diversity of national legal orders. Therefore, along with solving the development problems of national legal orders, jurists have to continually participate in shaping supranational federalism today. Language, cultural, social, economic, ideological, geographical, traditional and other differences must not become a source of problems in the European Union. Perhaps the greatest challenge for the European Union is to overcome objective and major differences between its member states. I believe that it is necessary to receive a certain part of national legal orders at a supranational level. Above all, time naturally requires receipt of the constitutional key institutes. Only in this way is it possible to shape federal collective existence in terms of its diversity. Doctrines, schools, legal positions, etc. have developed in different European countries over a period of centuries. Thus, the legal order of the European Union also necessitates finding a certain common ground for the sake of the common judicial area. Supranational federalism is the instrument that allows for transposing legal figures (figures of dogmatics) to EU law. The development of such positions can be explained by the fact that the European Union has evolved and is developing on the basis of nation states that have an independent identity, which strive for a European type of common coexistence, yet do not intend to form by regions a European federal state.<sup>\*24</sup>

## 5. Methods to develop legal order

At the beginning of the article, we noted that the primary subjects of global legal integration were states, alongside which regional, supraregional and even world organisations had to be recognised. Below, we will discuss the measures of global legal integration, the implementation of which could lead to the provision of

<sup>22</sup> The *Riigikogu* discussed as an important national item ‘the future of Europe’ on 6.04.2006. Although no decision was adopted as a result of the discussion (it was not planned either), the underlying idea expressed was that Europe would be stronger if France remained France, the UK remained the UK and Estonia remained Estonia. It would be rather silly to force them into a framework of a fictitious European identity (K. Ojula). One of the opinions expressed was that the fear that the European Union would transform into a federation or super-state was exaggerated (E. Eesmaa). See <http://www.riigikogu.ee/ems/stenograms/2006/04/m06040610.html> (in Estonian).

<sup>23</sup> At the already mentioned discussion ‘the future of Europe’, the Chairman of the Constitutional Committee U. Reinsalu spoke about problems in relation with the Treaty establishing a Constitution for Europe or in other words with the future of European legal integration. He said that the Treaty was not a goal in itself but a tool for increasing wellbeing in the European area and for providing additional safeguards to rights and security. The good practice of reaching a compromise between different countries for setting common goals persists but it has self-evidently become harder. The member of the Parliament I. Gräzin, however, had a different opinion: “Things turned out in the way they did; today, Europe has come to a legal standstill [...] the former life of the Constitutional Treaty has come to an end, it is over, *finita, adieu, schluss, alta la vista...*” See *ibid*.

<sup>24</sup> Regulatory communication between national legal orders has largely taken place through the private initiative and activities of research groups. The work of the *Study Group on a European Civil Code* could serve as an example. As a result of years of work, the principles of European contract law have been prepared, which proceed from the principles, notions and concepts generally recognised in national legal orders. In many cases, the principles lack similarity with the regulations of any national legal order, yet they reflect the common part found through cooperation. For instance, on the 3<sup>rd</sup> European Jurists’ Forum, held in Geneva on 7.–9.09.2005, one of the sections worked to develop the European Code of Civil Procedure. 4. One section will assemble on the European Jurists’ Forum in Vienna (in May 2007) to discuss the feasibility of the European Criminal Code.

solutions for each national legal order, including the Estonian legal order, in the context of globalisation. At the same time, the measures of legal integration should not only involve the traditional concept of a measure as a mere activity. In the context of legal integration, measures should be seen as activities, sources as well as doctrine. All in all, measures in their wider sense should be seen as (a) unilateral legal integration, which above all means review and presentation of national realities and possibilities; (b) multilateral activities (*sponsoring organization*), referring to a situation in which perception must still be rendered to serve different legal orders, even in the absence of supranational legislators; (c) a voluntary unilateral parallel legislation that involves use of different sources of law (those that provide an example and deserve to be incorporated); (d) use of transnational economy both based on self-regulation and objective right (*lex mercatoria*); (e) recognition of regulations applying to the judiciary and examination of the opportunities provided by them. This problem has been unjustifiably left aside in the continental European legal culture; (f) doctrine or jurisprudence as a whole, which can be referred to in the context of the topic of this article as general legal theory principles.

It seems that the body of these measures, or more precisely, the use of the body of these measures, which is naturally accompanied by analytical discourse, helps to find not only the necessary links between legal orders but also helps provide modern solutions in the judicial area as a whole, integrating the judicial area into the global judicial area, creating a catalogue of forms of regulations and creating a model of the development of a national legal order. And one more thing. The observation of the methods of developing legal order and their mobile use perhaps also identifies and helps *inter alia* feel the boundaries of legal order. One must simply admit that law is only one of the social regulators. Along with law, several other social norms 'produce' law in society. This also means that not everywhere and not at all times is law the social phenomenon that is most efficient in organising the behaviour of subjects of law.

## 6. Practical enhancement of legal order: 'case of the adoption of the euro'

Perhaps it does not suffice to attempt only to furnish the 'principle of home', the principle of supranational federalism or modern methods of legal integration. It is necessary to see, recognise and implement them in legal practice.

In January of this year, the *Riigikogu* of the Republic of Estonia requested the position of the Supreme Court in the case of the interpretation of § 111 of the Republic of Estonia Constitution in conjunction with the Republic of Estonia Constitution Supplementation Act and European Union law.<sup>25</sup> The problem was that the adoption of the single currency of the EU member states, the euro, when the conditions necessary for adopting the single currency have been met, is an obligation of a member of the European Union on the basis of article 4 of the Act of Accession to the European Union and article 122 (2) of the Treaty establishing the European Communities as defined in § 2 of the Constitution Amendment Act.<sup>26</sup> At the same time, § 111 of the applicable Republic of Estonia Constitution provides that the Bank of Estonia has the sole right to issue Estonian currency. However, the Republic of Estonia Constitution Supplementation Act provides that the Republic of Estonia Constitution shall be applied when Estonia is a member of the European Union, taking into account the rights and duties arising from the Accession Treaty. It is known that after Estonia becomes a full member of the Economic and Monetary Union, the Estonian kroon will no longer be used and the European Central Bank shall have the exclusive right to authorise the issuing of bank notes within the Community, according to article 105a (1) of the Treaty establishing the European Community. Thus, the *Riigikogu* took interest in the position of the Supreme Court concerning § 111 of the Republic of Estonia Constitution in conjunction with the Republic of Estonia Constitution Supplementation Act and European Union law.

It should not be forgotten here that at the time when the Constitution applicable in Estonia was developed, at the beginning of the 1990s, democracy on the one hand and ideas of strong national sovereignty on the other hand certainly prevailed. Furnishing of legal order — i.e. furnishing of constitutional law — today requires its analysis in conjunction with European Union law. Thus, finding the answer presumes interpretation of § 111 of the Constitution in conjunction with § 2 of the Republic of Estonia Constitution Supplementation Act and the relevant provisions of EU law. The Supreme Court assumed the position that the Bank of

<sup>25</sup> See decision No. 550 of the *Riigikogu* of 25.01.2006 — X "Request for the position of the Supreme Court concerning the interpretation of § 111 of the Republic of Estonia Constitution in conjunction with the Republic of Estonia Constitution Supplementation Act and the European Union law".

<sup>26</sup> According to article 1 (2) of the Accession Treaty, the Act of Accession to the European Union is an inseparable part of the Treaty (Accession Treaty) meant in § 2 of the Constitution Supplementation Act. — Riigi Teataja (State Gazette) II 2004, 3, 8 (in Estonian). At the same time, pursuant to article 2 of the Act of Accession to the European Union, the entire *acquis communautaire* becomes binding on the new member states, including Estonia.

Estonia would not have the sole right to issue Estonian currency and the Estonian kroon in the circumstances of the full membership of the Economic and Monetary Union.<sup>\*27</sup> The decision also includes an explanation of what was brought about for Estonian constitutional order by the Constitution Supplementation Act adopted at the referendum on 14.09.2003 and often called 'the third act'.<sup>\*28</sup> At the referendum on accession to the European Union, a model was used for amending the Constitution, according to which the provisions of the Constitution were not formally changed but the obligation to implement the requirements arising from the Accession Treaty was contained in a separate constitutional act. Section 2 of the Constitution Supplementation Act serves as an interpretive rule, according to which the text of the Constitution must always be regarded together with the Supplementation Act, and everything contained in the text of the Constitution, which is not in conflict with the accession conditions, can be further applied. In other words, with the adoption of 'the third act', European Union law became an immanent basis for the interpretation and implementation of both the Constitution and other parts of the legal order. Figuratively speaking, a legal order consists of many layers, starting from the fact that the Constitution itself has changed in regards to the parts that are not in line with European Union law. The applicability of the provisions of the Constitution, which are in conflict with European Union law, will be suspended. Hence, in order to explain which part of the Constitution is applicable, the Constitution must always be compared to the European Union law that became binding on Estonia through the Accession Treaty.<sup>\*29</sup>

Still, we have to elaborate on the discussion to find out whether such an interpretation of the Constitution is in line with the underlying principles of the Constitution. Namely, § 1 of the Constitution Supplementation Act provides that Estonia may belong to the European Union, proceeding from the underlying principles of the Republic of Estonia Constitution. During the legislative proceeding of the Constitution Supplementation Act in the *Riigikogu*, it was noted in relation to the corrections made to the text in the explanatory memorandum that the objective of § 1 of the Act was: "To ensure adherence to the underlying principles of the Estonian Constitution in a situation in which European Union law comes into conflict with the Estonian Constitution contrary to the Accession Treaty or interpreting the competence of the European Union institutions in an expanding manner [...] The underlying principles of the Constitution should be considered to comprise, above all, the democratic principles listed in the preamble and §10 and 11 of the Constitution."<sup>\*30</sup>

Since the Constitution Supplementation Act and its explanatory memoranda provide only very general guidelines for defining the underlying principles, we must refer to the existing constitutional writings concerning the underlying principles of the Constitution.

Although the jurisprudents who have written about the Republic of Estonia Constitution, so far, share the view that the underlying principles of the Constitution are the most important principles, the list of specific principles that have been regarded as the underlying principles of the Constitution by jurisprudents varies to an extent.

Thus, in its final report, the Expert Commission on the Republic of Estonia Constitution lists as the main principles of the Constitution the principles of human dignity, a state based on social justice, democracy, a state based on the rule of law, freedom, equality and a nation state.<sup>\*31</sup> In the opinion of R. Alexy, the following main principles have been set out in the Estonian Constitution: human dignity, freedom, equality, a state based on the rule of law, democracy, a state based on social justice, and Estonian identity.<sup>\*32</sup> The comments on the Constitution agree with the catalogue of the main principles offered by R. Alexy.<sup>\*33</sup> T. Annus considers the underlying principles of the Constitution to be the principle of democracy, parliamentary order,

<sup>27</sup> See the opinion of the Constitutional Review Chamber of the Supreme Court about the interpretation of § 111 of the Constitution in matter 3-4-1-3-06.

<sup>28</sup> The series of acts include the Constitution *per se*, the Constitution Implementation Act and the Constitution Supplementation Act.

<sup>29</sup> In his annual overview of the courts administration, administration of justice and uniform application of laws in the *Riigikogu*, the Chief Justice of the Supreme Court M. Rask said in the part of his presentation concerning the above-mentioned case: "With the explanations provided, the Supreme Court did not intend to start another discussion about whether Estonia needs a new constitution, but pointed out the fact how complicated and multilayered our constitutional legal system has become." He even considered it necessary to add: "Perhaps it is a question of perception when the text of our Constitution loses its simple regulative effect through such interpretations and becomes a document of legal history." See the shorthand notes of X *Riigikogu*, VII session, 8 June 2006. Available at <http://www.riigikogu.ee/ems/stenograms/> (in Estonian). At the same time, M. Rask has also expressed an idea that the interpretation acts themselves cannot be everlasting: "If a court decision cannot convince society, society will, sooner or later, convince the court to reevaluate its decisions and will do that through social values, not by the majority of decision-makers." – Riigikohtu lahendid Eesti õiguskorras: tähendus ja kriitika (Decisions of the Supreme Court in Estonian Legal Order: Significance and Criticism). Riigikohtu teadustööde konkursi kogumik (Collection of Papers of the Research Contest of the Supreme Court). Tartu 2005, p. 5 (in Estonian).

<sup>30</sup> See <http://www.just.ee/10731> (in Estonian).

<sup>31</sup> *Ibid.*

<sup>32</sup> R. Alexy. Põhiõigused Eesti põhiseaduses (Fundamental Principles in Estonian Constitution). – Juridica eriväljaanne 2001 (Special edition of Juridica), p. 89 (in Estonian).

<sup>33</sup> Eesti Vabariigi põhiseadus. Kommenteeritud väljaanne (Republic of Estonia Constitution. Commented Edition). Juura, Õigusteabe AS 2002, p. 105 (in Estonian).

statehood based on the rule of law, statehood based on social justice, republic, unitary state, nation state and protection of fundamental rights.<sup>\*34</sup>

The working group for the constitutional law analysis of the Treaty establishing a Constitution for Europe presented a catalogue of the underlying principles of an open constitution in its report: the protection of the sovereignty of people, the foundation of the state on freedom, justice and law, internal and external peace, the preservation of the Estonian nation and culture through time, respect for human dignity, statehood based on social justice, democracy, statehood based on the rule of law, fundamental rights and freedoms and the proportionality of the activities of the state authority.<sup>\*35</sup> The catalogue of open underlying principles is also supported by H. Schneider, according to whom the Constitution of the Republic of Estonia highlights the following generally recognised values and underlying principles: respect for human dignity, the protection of freedom, justice, foundation on justice, democracy, internal and external peace, social success and overall benefit, preservation of the national identity, development of continuity and cooperation between states.<sup>\*36</sup> In addition, H. Schneider thinks that the underlying principles should include a selective number of provisions of the general principles, and Chapter I of the Constitution and the Constitution Supplementation Act as a whole.<sup>\*37</sup>

The regulation under examination does not generally prejudice the principles considered to be the underlying principles of the Constitution mentioned above. The exceptions are perhaps the principle of the state based on the rule of law via the requirements of legal certainty and legal clarity, since the competence of the Republic of Estonia has been cut by a feature of independent statehood — the right to issue currency. The combined effect of the Constitution and the EU law arising from § 2 of the Constitution Supplementation Act counterbalances the above prejudice. The combined effect of the rights and duties derived from the Accession Treaty with EU law ultimately also changes the content of the underlying principles of the Constitution, mainly as concerns the emphases.

One must also take into account that the Constitution Supplementation Act adopted at the referendum, pursuant to which the Constitution is applied insofar as this is in accordance with the obligations accompanying the EU membership, proceeded from an assumption that there was no conflict with the underlying principles of the Constitution since the Accession Treaty already provided for the conditions of joining the Monetary Union.

## 7. Conclusions

In an ideal situation, the dimensions of law in a legal order should be homogenous both in the quantitative and qualitative sense. The quantitative homogeneity would mean that the judicial area is 'covered' by legal texts and the addressees of the texts have a clear understanding of their content, and hence, law carries a practical significance, i.e. it creates order and provides security. The quantitative homogeneity would mean that people's ideas of law conform to the content of law and also the solutions of legal disputes are in line with their idea of conformity with law. The existence of a legal system is always a matter of degree.<sup>\*38</sup> Firstly, law cannot operatively cover all situations in need of resolution and secondly, globalisation has rendered legal orders objectively multi-layered. However, neither the first nor the second option means that there is no law or that it has been somehow automatically positioned outside a particular judicial area. Law has always meant not only creation of law as a text but its interpretation and introduction into practice. The analysis of each legal order must include dynamics. Law itself lives in different periods of time — a legal text, its interpretations and implementation of law usually follow each other in time. The theory of law and the implementation decisions of law help clarify and specify the meaning of legal texts, pinpointing their logical interpreter, and as correctly noted by H. T. Klami for more than a couple of decades ago, the interpretations clarifying the content of such texts could gain greater weight in explaining the content of law over time than the original one, so that one is tempted to say as if they replaced the original text.<sup>\*39</sup> The understanding of law as a medium of communication dispels such fear and compels over and over again, keeping in mind the horizon of value jurisprudence, the search for and finding of (modern) solutions that conform to law. Perhaps Roman jurists were right when they said that *in magnis et voluisse sat est* — will suffices for great things.

<sup>34</sup> T. Annus. Riigikogus (Constitutional Law). Tallinn, 2001, pp. 49–95 (in Estonian).

<sup>35</sup> Euroopa põhiseaduse lepingu riigikogusliku analüüsi töörühma seisukohad lepingu ratifitseerimise küsimuses (Positions of the Working Group on the Constitutional Analysis of the Treaty Establishing a Constitution for the European Union Concerning the Ratification of the Treaty). See [www.riigikogu.ee](http://www.riigikogu.ee) (in Estonian).

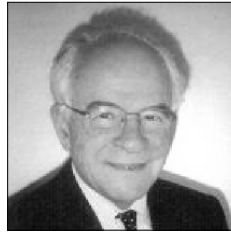
<sup>36</sup> H. Schneider. Põhiseaduse aluspõhimõtete seaduse ja võimalikke lahendusi (Problems and Potential Solutions Related to the Underlying Principles of the Constitution). – Riigikogu lahendid 2005 (Decisions of the Riigikogu 2005). Juura, Õigusteabe AS 2006 /accept/, pp. 7–8 of the manuscript (in Estonian).

<sup>37</sup> *Ibid.*, pp. 9–10.

<sup>38</sup> L. L. Fuller. Positivism and Fidelity of Law – a Reply to Professor Hart. – Lloyd's Introduction To Jurisprudence. M. D. A. Freeman (ed.). London 1994, p. 397.

<sup>39</sup> H. T. Klami. Anti-legalism: Five Essays in the Finalistic Theory of Law. Turku 1980, p. 69.





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# On Legislative Style and Structure

Should a legislator write in legal language that gives precision to his intentions but which the average citizen may have difficulties in understanding? Or should he instead use simple and popular language, which the citizen can understand but is less precise?

Issues of style and structure are closely related. In the structure of a statute or code a legislator may use legal criteria, as some legislators do when they separate the law of obligations from the law of property, and address the property aspects of the sale of goods in one book and the mutual obligations of the parties to a sales contract in another. That enables treatment of issues relating to property and to obligations together, but the citizen then has to find material on these two aspects of a sale in different places. It would be easier for him if all the rules relating to the sale of goods were located together.

Should the code or statute be exhaustive and cover all of the issues that one can imagine being touched upon by a subject, or should it cover only some important issues, leaving the others to be developed by the courts? Should the statute provide broad principles, letting the courts then fill them in, or detailed rules, which give the courts little freedom of discretion?

In the following discussion, I will address the ways in which English, German, and French legislators have dealt with these problems. The focus will be on the statutory provisions relating to obligations. In addition, I will discuss the style and structure of the UN Convention on Contracts for the International Sale of Goods (CISG); the Principles of European Contract Law<sup>\*1</sup> (PECL), which were prepared by the Commission on European Contract Law; and the UNIDROIT Principles of International Commercial Contracts<sup>\*2</sup> (UPICC), which were the fruit of UNIDROIT work.

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<sup>1</sup> O. Lando, H. Beale (eds.). Principles of European Contract Law, Parts I and II, Prepared by the Commission on European Contract Law 1999 (PECL I & II). There are now Italian, Spanish, and German versions of the book. Dutch, Japanese, and Korean versions are in preparation. Also, O. Lando, E. Clive, A. Prüm, R. Zimmermann (eds.). Principles of European Contract Law, Part III. The Hague 2003 (PECL III). There have been German and Italian versions of the latter book published.

A French edition — Principes du droit européen du contrat, préparée par georges rouhette, avec le concours de isabelle de lamberterie, denis tallon, et claude witz. Paris 2003 — comprises parts I, II, and III.

See, on the Web site of the Commission on European Contract Law, [http://frontpage.cbs.dk/law/commission\\_on\\_european\\_contract\\_law/](http://frontpage.cbs.dk/law/commission_on_european_contract_law/).

<sup>2</sup> See UNIDROIT Principles of International Commercial Contracts, published by UNIDROIT, Rome 2004. These principles have been published in many languages.



## 1. England

From the British one learns to be cautious when drafting black-letter rules, and not to draft rules that are too broad and general. The members of the two groups, the Commission on European Contract Law and the UNIDROIT Working Group, realised that their English colleagues were walking dictionaries for their cases, who could often point to English decisions showing the adverse consequences of a proposed rule.

However, neither the Commission on European Contract Law nor the UNIDROIT Working Group adopted the elaborate style of the English legislature. In Great Britain, most statutes were originally enacted to counteract some mischief created by the case law, and the English courts did not like them. They regarded statutes “as an evil, a necessary evil no doubt, which disturbed the lovely harmony of the Common Law”<sup>3</sup>. So when they interpreted the statutes, they applied them only to the precise situations that they unquestionably covered, applying a narrow and pedantic construction of statutes.

This led the English legislators to go into great detail in order to force the courts to give effect to their intentions. Hein Kötz gives an example of this. He recalls the way in which article 6 of the European Directive on Liability for Defective Products is implemented in the British Consumer Protection Act 1987. One of the factors in determining whether a product is safe is ‘the presentation of the product’. In implementing this directive, the British act succeeds in expanding these five words into 45 without adding anything of substance. The language on the presentation of the product becomes “the manner in which and the purpose for which, the product has been marketed, its get-up, the use of any mark in relation to the product and any instructions for, or warning with respect to doing or refraining from doing anything with or in relation to the product”.<sup>4</sup>

One wonders whether it is still necessary for the British legislation to go into such detail. In the last few decades, the English courts have moved, in Lord Diplock’s words, from the “purely literal towards the purposive construction of statutory provisions”.<sup>5</sup>

It seems, however, that the traditional style has got into the bloodstream of British lawyers. We find traces of it with the Study Group on a European Civil Code, which is in the process of amending the PECL. Article 2:102 (1) of the PECL lays down the general rule that “each party must act in accordance with good faith and fair dealing”. Under British influence, this paragraph has been amended to read: “A person has a duty to act in accordance with good faith and fair dealing in negotiating or concluding a contract or other juridical act and in exercising a right or performing an obligation.” Here, 12 words have become 34 words.<sup>6</sup>

## 2. Germany

The Germans — most notably, the Pandectists of the 19th century — made great efforts to refine the legal language. They set the imprint of precision and consistency on the German Civil Code (BGB), which came into force in the year 1900. Its draftsmen strove to find the most clear and precise expressions, to use words in the same sense wherever they appeared in a text, to utilise one expression universally for the same phenomenon, to avoid unnecessary repetition, and to place the more general rules before the more special ones. These techniques were later adopted by many of the world’s legislators.

However, the structure of the BGB is not only very carefully thought through but also very complicated. The idea of placing the more general rules before the more specific was carried into action with great consistency. Book 1 covers the rules that apply to the obligations, property, family matters, and matters of succession that are addressed by Books 2, 3, 4, and 5, respectively. This book provides, among other things, rules on the elements of agreements, the authority of agents to bind their principals, and prescription.

The style and main structure of the Civil Code was retained when the law of obligations was revised in 2001. Today, Book 2 (on obligations) has eight parts. Part 1 deals mainly with the contents of the obligation. In this and in parts 4–7, all obligations are handled via the same provisions, whether they are contract, tort, or restitution obligations. This has made it necessary to lift them to a high degree of abstraction and disembodiment.

<sup>3</sup> K. Zweigert, H. Kötz. *An Introduction to Comparative Law*. 3<sup>rd</sup> ed. 1998, p. 265.

<sup>4</sup> *Idem*, p. 267 et seq.

<sup>5</sup> See Lord Diplock in *Carter v. Bradbeer*, 1 WLR 1204 (1975), here cited from K. Zweigert, H. Kötz (Note 3), p. 266.

<sup>6</sup> SGECC Working Paper on DFR books I and II submitted by the Compilation and Redaction Team (CRT) to the Tartu Meeting in December 2005, p. 5. The added words may be explained by the new paragraph 3, which provides:

Breach of the duty does not give rise directly to the remedies for non-performance of an obligation but may preclude the person in breach from exercising or relying on a right which that person would otherwise have.

In § 241 BGB, which begins Book 2 and applies to all obligations, it is provided in paragraph 1 that the debtor is obliged to tender the performance he owes. This, as some writers note, is obvious.<sup>\*7</sup>

Among the new provisions of the revised edition of the BGB, some deal with *culpa in contrahendo*, fault in contracting. This subject was not treated in the BGB; rather, rules had been developed by the courts.<sup>\*8</sup> In § 241 (2) it is now provided that the debtor must also pay regard to the rights, 'legal goods', and interests of the other party. The debtor has what the Germans call *Schutzpflichten*, duties of care, toward the other party. But a party who negotiates a contract is not yet a debtor, as there is not yet a contract. The BGB's § 313 (1), which is in Part 3 (dealing with obligations arising out of a contract), takes care of that. It specifies that the duties of care provided for in § 241 (2) may also arise out of contract negotiations. Also, § 280 (1) BGB, which is in Part 1, provides that a party may claim damages for the loss he suffers when the other party violates duties arising out of a 'debt relationship'. Thus it is that the rules on *culpa in contrahendo* are to be found in a conjunction of §§ 241, 313, and 280. A general duty of care is established in § 241, with § 313 (1) extending that duty to negotiations and § 280 imposing liability for violating the duty. This is logical and carefully considered. However, in order to understand it, one must be a well-informed German lawyer. And the rules state only that a liability exists; there are no indications as to the situations to which they apply. In order to know that, one would have to consult the case law.

This style differs from the one used in the PECL's article 2:301 (2)<sup>\*9</sup> and in UPICC article 2.1.15 (2) on negotiations in bad faith. These provide that a party who has negotiated, or broken off negotiations, in bad faith is liable for the losses caused to the other party. And they both give examples illustrating what constitutes behaviour in bad faith.<sup>\*10</sup>

The BGB's § 242 provides that the debtor must perform his duty in accordance with good faith and fair dealing, having regard for commercial practices. Originally this rule was not meant to play a very significant role. But, due to the turbulent history of Germany and to a growing need for social justice, § 242 now has paramount importance. It has operated as a sort of 'super-provision' — a king of the Code, as it were — that has modified other statutory provisions, and it has been applied to change the rigorous individualism of the original contract law of the BGB, so as to adapt the law to the changed social and moral attitudes of the society.<sup>\*11</sup> On the basis of § 242, the German courts have created a number of obligations (called institutions), which ensure the loyal behaviour of the parties. They have, for instance, set aside unfair contract terms, most notably in standard-form contracts. This section of the BGB has been so widely invoked both in private and in public law that its application extends much further than its language can carry.

Some of the obligations that the courts created under § 242 have now been laid down in the revised BGB — for instance, the rules on standard-form contracts and the above-mentioned provisions on *culpa in contrahendo* — but most of the institutions established by the courts still remain under § 242. The new BGB retains § 242 but does not tell us where the king rules.

In § 276, we find laid down the main rule on liability, contractual and non-contractual.<sup>\*12</sup> The debtor is liable only for his deliberate and negligent acts, unless the existence of a stricter or more lenient degree of liability is specified or to be inferred from the other subject matter of the obligation — in particular, the assumption of a guarantee or an acquisition risk.

Thus German law has retained the rule that the remedy of damages is fault-dependent. In this respect, it differs from the Common Law, CISG, PECL, and UPICC terms, which set forth strict liability as the main principle. Some prominent German academics have emphasised the 'fairness' and the 'obvious ethical supe-

<sup>7</sup> E. Kramer. — Münchener Kommentar zum BGB. 4<sup>th</sup> ed. 2003 (§ 241's marginal note 2), and H. Heinrichs. — O. Palandt. Bürgerliches Gesetzbuch. 64<sup>th</sup> ed. 2005 (§ 241's marginal note 1).

<sup>8</sup> See, on fault in contracting, B. Markesinis, H. Unberath, A. Johnston. The German Law of Contract: A Comparative Treatise. 2<sup>nd</sup> ed. 2006, p. 91 et seq.

<sup>9</sup> Article 2:301, 'Negotiations Contrary to Good Faith', states:

- (1) A party is free to negotiate and is not liable for failure to reach an agreement.
- (2) However, a party who has negotiated or broken off negotiations in a manner contrary to good faith and fair dealing is liable for the losses caused to the other party.
- (3) It is contrary to good faith and fair dealing, in particular, to enter into or continue negotiations with no real intention of reaching an agreement with the other party.

<sup>10</sup> Unlike the PECL and UPICC, the German *culpa in contrahendo* embraces not only situations where a party is held liable for negotiations but also those where said party is liable for other behaviour in the course of preparation of a contract. The manager of a supermarket has been held liable when a client, while visiting the shop, slipped on a banana skin on the shop's floor.

<sup>11</sup> See K. Zweigert, H. Kötz (Note 3), p. 148 et seq. as well as B. Markesinis, H. Unberath, A. Johnston (Note 8), p. 119 et seq.

<sup>12</sup> In § 276, entitled 'Liability of the debtor', it is stated:

- (1) The debtor is liable for deliberate and negligent acts or omissions, unless the existence of a stricter or more lenient degree of liability is determined or may be inferred from the content of the obligation, in particular by the assumption of a guarantee or the acquisition risk. The provisions of §§ 827 and 828 apply mutatis mutandis.

riority' of the rule<sup>\*13</sup>, while others are less enthusiastic.<sup>\*14</sup> However, there are important exceptions. A stricter liability may be determined or may follow from the contents of the obligation — in particular, through the assumption of a guarantee or an acquisition risk.

What is it to assume an acquisition risk? In order to know that, one must be familiar with the German case law on the subject. The seller of generic goods is the main example of a debtor who has assumed such a risk, but also other suppliers may carry it, and there are cases where a seller of generic goods has not assumed it.<sup>\*15</sup> Additionally, what only the best-informed lawyer knows is that the rule is also a gateway to a politically desirable tightening up of liability, bringing this aspect of the German law of obligations closer to the international level.<sup>\*16</sup>

It is with some regret that I saw the German legislators of 2001 stick to the style and structure of the original BGB of 1900. They claimed — without any remorse — that this was their proud tradition.<sup>\*17</sup>

### 3. France

France produced the *Code Napoleon*, which gained world renown and became the greatest legal export article ever seen in modern times. This code reflected the spirit of the Enlightenment and the newly gained freedom and equality; its pithy language was that of great writers. It had, and still has, a remarkable vitality.

Still, the *Code Napoleon* is old. Several of its articles are now obsolete, but they are still there, and to remedy that the French courts have given them a meaning different from the one they had when the code was promulgated in 1804. This happens to old codes and was also envisaged by the authors of the code. It was expressed in famous words on legislative drafting. “The task of the legislator”, Jean-Étienne-Marie Portalis wrote, “is to lay down the general maxims of the law, to establish principles which are rich in implications, and not to go down into a detailed regulation of all the issues that may arise in every matter”.<sup>\*18</sup> However, even broad principles cannot resist the ravages of time.

In addition, several provisions of the code are incomplete, some terms are ambiguous, and some lack the necessary terminological exactitude.

For instance, in article 544 et seq., the word ‘*propriété*’ refers to ownership of movable and immovable things, and in the title of Book 3, which deals with the acquisition of *propriété*, it means wealth of all kinds. The code mentions *cause* as a requirement for the formation and validity of a contract, but it does not explain what exactly *cause* is, and there are many conflicting explanations.<sup>\*19</sup> Some Frenchmen make fun of it. According to one of them, if somebody thinks that he understands what *cause* is, this is because it has been badly explained to him. But the French courts still invoke *cause* in several contexts.

To cleanse the portion of the code that deals with obligations of its ambiguities and obscurities and to render it up to date, a group of some 30 French academics under the chairmanship of Professor Pierre Catala has prepared an *Avant projet de réforme du droit des obligations et du droit de la prescription*, a draft reform of the law of obligations and of the law of prescription (PrC). The draft was submitted to the Garde des Sceaux, the Minister of Justice, in September 2005.<sup>\*20</sup>

<sup>13</sup> See B. Markesinis, H. Unberath, K. Johnston (Note 8), p. 444 et seq.

<sup>14</sup> P. Schlechtriem. Schuldrecht. Allgemeiner Teil. 5<sup>th</sup> ed. Tübingen 2005, p. 342.

<sup>15</sup> The seller of goods is not liable if the production of the goods in question suddenly stops and they can be obtained only from a few dispersed retailers or if the only producers of the goods suddenly refuse delivery to the seller. See O. Palandt (Note 7), § 276's marginal note 32.

<sup>16</sup> See P. Schlechtriem (Note 14), p. 342.

<sup>17</sup> For further examples of the complicated structure and style of the new rules of the BGB, see O. Lando. Das neue Schuldrecht des Bürgerlichen Gesetzbuchs und die Grundregeln des europäischen Vertragsrechts. – Rabels Zeitschrift für ausländisches und internationales Privatrecht 2003, pp. 231–245.

<sup>18</sup> “L’office de la loi est de fixer, par des grandes vues les maximes générales du droit: d’établir des principes féconds en conséquences, et non de descendre dans le détail des questions qui peuvent naître sur chaque matière” — see Jean-Étienne-Marie Portalis. Discours préliminaire au premier projet de Code civil. (L’an VIII), reprinted in Éditions confluences — Voix de la cité. Paris 1999, pp. 18–19.

<sup>19</sup> Thus, Francois Terré, Philippe Simler, and Yves Lequette appear to support *une analyse dualiste de la cause*; see Droit civil Les obligations. 8<sup>th</sup> ed. 2002, p. 334 et seq. Cause in the sense of a reasonable ground is a requirement for the existence of the obligation, whereas cause in the sense of a **legitimate** ground is required when the question is whether the contract is valid. In the PrC’s introduction to the rules on *Validité-Cause*, on p. 26, Jacques Ghestin seems to prefer *une notion unitaire*. See also PrC, article 1124. Cause refers to the reason behind the undertaking, and that covers both its existence and its validity.

<sup>20</sup> Avant projet de réforme du droit des obligations (articles 1101 à 1386 du Code civil) et du droit de la prescription (articles 2234 à 2281 du Code civil) Rapport à Monsieur Pascal Clément, Garde des Sceaux, Ministre de la Justice, 22 Septembre 2005.

Many of the rules of the PrC are clear and easily understood, but several of them are so loaded with implications, so *fécondes en conséquences*, and held in such abstract terms that the lay citizen could not understand their true scope. *Cause* is still there, and the style and main structure of the existing code have been preserved.

The Civil Code of 1804 had no rules on formation of contracts. It was left to the courts to establish the rules. The *Cour de Cassation* considers several aspects of the formation to be questions of fact, which are left to the sovereign appreciation of the lower courts.<sup>21</sup> Since their decisions are incoherent, there is some uncertainty as to which rules apply. The courts seem to agree that the offer is revocable. However, in cases where the offeree had reason to believe that the offer had been made irrevocable, the offeror, though not bound by the contract, is held liable in relation to damages, if he nevertheless revokes his offer.

The PrC still makes it possible for the offeror to withdraw his offer until it is accepted. The PrC does not say this, but it may be inferred from article 1105 (4)<sup>22</sup>, where it is provided that if an offer addressed to a specific person contains an engagement to uphold it for a certain period, an untimely revocation does not prevent the contract from coming into existence. The same rule is to be found in PECL article 2:202 (3) (b), CISG article 16 (2) (a), and UPICC article 2.1 4 (2) (a).

One may ask whether this is the only exception to the rule on revocability. The PrC does not mention the other exceptions provided for in the PECL's article 2:202 (3)<sup>23</sup> — namely that “a) the offer indicates that it is irrevocable and c) it was reasonable for the offeree to rely on the offer as being irrevocable, and the offeree has acted in reliance of the offer”; see also CISG article 16 (2) b and UPICC article 2.1 4 (2) b. It may not be necessary to provide the former exception; however, we do not know whether the courts may establish the latter rule on reliance or whether they can hold the offeror liable for damages if he withdraws the offer.

Another question is whether the PrC upholds the existing French case law under which the parties may be bound by the contract even if there is a minor disagreement between them as to the terms<sup>24</sup> or whether the PrC imposes an absolute mirror image rule, which does not tolerate any disagreement.

Article 1105-5 provides:

- An acceptance is a unilateral act by which its author expresses his will to be bound by the terms of the offer.
- An acceptance **which is not in agreement with the terms of the offer** has no effect, except that it constitutes a new offer [emphasis added].

In article 1109-1's Chapter 2, section 1, on the agreement (*consentement*), it is provided that there is no agreement when there has not been a meeting of the minds concerning the **essential parts** of the contract. Can one conclude from these two provisions in different chapters that an acceptance is effective if the disagreement does not affect the essential parts of the contract, or does article 1109 address a situation different from the offer and acceptance rule provided in article 1105-5? If so, which situation? And if not, whose terms should prevail: those of the offeror or those of the offeree?<sup>25</sup>

The PrC has provided articles that leave lacunae and, at least for the uninitiated, some ambiguities<sup>26</sup>. We do not know, for instance, to which extent the PrC intends to uphold the existing case law. It is with some regret that I see the French academics stick to a style of drafting very similar to the one adopted in 1804. They, too, maintain that this is their proud tradition.

<sup>21</sup> See K. Zweigert, H. Kötz (Note 3), p. 359 et seq.

<sup>22</sup> This states: “Cependant lorsque l’offre adressée à une personne déterminée comporte l’engagement de la maintenir pendant un délai précis, [...] sa révocation prématurée [...] ne peut empêcher la formation du contrat.”

<sup>23</sup> Article 2:202, ‘Revocation of an offer’ states:

- (1) An offer may be revoked if the revocation reaches the offeree before it has dispatched its acceptance or, in cases of acceptance by conduct, before the contract has been concluded under article 2:205 (2) or (3).
- (2) An offer made to the public can be revoked by the same means as were used to make the offer.
- (3) However, a revocation of an offer is ineffective if:
  - (a) the offer indicates that it is irrevocable; or
  - (b) it states a fixed time for its acceptance; or
  - (c) it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer.

<sup>24</sup> See F. Terré, P. Simler, Y. Lequette (Note 19), p. 131, as well as Arthur von Mehren’s 1992 Formation of Contracts. International Encyclopaedia of Comparative Law. Volume VII. Chapter 9, section 164.

<sup>25</sup> For further examples of lacunae and ambiguities, see O. Lando. L’avant projet de réforme du droit des obligation et les Principes du droit européen du contrat. Analyse de certaines différences. – Revue du contrat 2006, pp. 167–175.

<sup>26</sup> Section 2 of chapter 1 of ‘Sous-titre’ I, on contracts and contractual obligations in general, deals with the formation of contracts. Articles 1104, 1104-1, and 1104-2 deal with the negotiations, and articles 1105 and 1105-1-6 address the offer and its acceptance. The rest of the section on contract formation deals with preliminary agreements to conclude contracts, pre-emption, and — in article 1107 — the date and place of the formation.



## 4. The PECL and UPICC

The citizens very often have difficulties in finding and understanding foreign laws. For them, and especially for those engaged in cross-border trade, uniform contract rules would be a great relief. This has been confirmed by the success of the UN Convention on Contracts for the International Sale of Goods, which in June 2006 had been adopted by 67 countries.

To give further help to the international trade community, the UNIDROIT Working Group on the Principles of International Commercial Contracts and the Commission on European Contract Law started to work on the UPICC and PECL, in around 1980. Most of the members of these two groups were academics, who arrived with the stylistic traditions of their own country in mind. However, I cannot remember a discussion as to principle on that matter, although the style and structure that were finally adopted in these two instruments differed from those of the statutes and codes of several countries — among them the English statutes, the German Civil Code, and the French *Code civil*.

The CISG served as model both for the Commission on European Contract Law and for the UNIDROIT group. As described by John Honnold<sup>27</sup>, the authors of the CISG wished to avoid abstract, disembodied concepts, and endeavoured to use plain language that refers to things and events for which there are words with common content in the various languages. Another object was to draft broad rules. Since both groups took many of the CISG's provisions verbatim, the CISG's style was adopted without much ado. However, also in those provisions that were 'new', plain language as in the CISG was used. Latin words were avoided. The authors were reluctant to use words and expressions with a special legal meaning in English. They went even further than the CISG when they used the expression 'non-performance' instead of 'breach of contract', since in English law there is breach only if the aggrieved party can claim damages, not when he can only terminate the contract. They needed a term for the failure to perform for which the aggrieved party has at least one remedy, be it damages, termination, reduction of price, or something else.

This style was in accordance with Jean-Étienne-Marie Portalis's famous words on legislative drafting. However, although both groups described their provisions as for **principles of contract law**, they did not go too far in laying down, through supplying a broad perspective, the general maxims of the law if this might have made the rules difficult to understand. With a few exceptions, they tried to concretise and visualise their intentions.

It seems as if Eugen Huber's recipe for the Swiss Civil Code<sup>28</sup> guided the majority in the two groups. "The code must speak in popular terms", he said, continuing thus: "The man of reason who has thought about his times and their needs should have the feeling as he reads it that the statute speaks to him from the heart." As far as the material permits, he said, the law should "be comprehensible for everyone, at least to those who are involved in the activities regulated by the code. [...] Its provisions must mean something to the educated laymen, even if they will mean more to the specialist". Huber advocated the use of short articles, short paragraphs, and simple and short sentences.

However, there were people in the groups who did not agree on these devices. There were those who wanted consistency and logic to govern the drafts even at the expense of plain and simple language, and who preferred precision and detail to a language rich in implications. It was not easy always to live up to the visions of Portalis and Huber. Some policies could not be expressed in pithy and pregnant language. The authors had to go into some detail when, for instance, in a rule on change of circumstances they wanted to give a contracting party the opportunity of having his contract renegotiated and of, when re-negotiation failed, having the contract modified or ended by the court.<sup>29</sup> They had to be rather explicit and detailed

<sup>27</sup> J. Honnold. *Uniform Law of International Sales*. 2<sup>nd</sup> ed. Deventer 1991, section 87.

<sup>28</sup> E. Huber. *Schweizerisches Zivilgesetzbuch. Erläuterungen zum Vorentwurf 1902*, 2.12.

<sup>29</sup> Article 6:111, 'Change of circumstances', states:

- (1) A party is bound to fulfil its obligations even if performance has become more onerous, whether because the cost of performance has increased or because the value of the performance it receives has diminished
- (2) If, however, performance of the contract becomes excessively onerous because of a change of circumstances, the Parties are bound to enter into negotiations with a view to adapting the contract or terminating it, provided that:
  - (a) the change of circumstances occurred after the time of conclusion of the contract,
  - (b) the possibility of a change of circumstances was not one which could reasonably have been taken into account at the time of conclusion of the contract, and
  - (c) the risk of the change of circumstances is not one which, according to the contract, the party affected should be required to bear.
- (3) If the Parties fail to reach agreement within a reasonable period, the court may:
  - (a) end the contract at a date and on terms to be determined by the court; or
  - (b) adapt the contract in order to distribute between the Parties in a just and equitable manner the losses and gains resulting from the change of circumstances.

In either case, the court may award damages for the loss suffered through a party refusing to negotiate or breaking off negotiations contrary to good faith and fair dealing.



when they made rules on appropriation of performance in cases where a party has to perform several obligations of the same nature and the performances tendered do not suffice to discharge all of the obligations.<sup>\*30</sup>

## 5. Conclusions

Over the last few decades, world trade has expanded considerably. Many of the EU Member States export a large proportion of their domestically produced goods and services. The exporters and importers encounter more and more frequently contracts that are subject to foreign laws, which are hard for them to access fully. In spite of this, commercial law remains national law, and there is still much resistance to the idea of establishing a readily accessible European Civil Code. Given this scenario, it becomes increasingly important for the national statutes and codes — most notably, those relating to contracts — to be accessible to foreigners.

As has been seen, the style of the PECL, UPICC, and CISG did not persuade the Germans who drafted the new rules on obligations for the German Civil Code in 2001; nor has that style influenced those who drafted the French *Avant projet* of 2005 to substitute the rules on obligations of the French *Code civil*. Admittedly, drafting laws for domestic use is not the same as drafting uniform rules. Those who draft for domestic use do not have to resort to a language for which there are words of common contents in the various languages. This does not, however, mean that the draftsmen should prepare rules that the citizens cannot understand. It is, therefore, submitted that the CISG style as described by Honnold and advocated by Huber should be of importance in the mind of anyone who drafts laws.

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<sup>30</sup> Article 7:109, 'Appropriation of Performance', sets forth the following:

Where a party has to perform several obligations of the same nature and the performance tendered does not suffice to discharge all of the obligations, then subject to paragraph 4 the party may at the time of its performance declare to which obligation the performance is to be appropriated.

If the performing party does not make such a declaration, the other party may within a reasonable time appropriate the performance to such obligation as it chooses. It shall inform the performing party of the choice. However, any such appropriation to an obligation which:

(a) is not yet due, or (b) is illegal, or (c) is disputed, (d) is invalid.

In the absence of an appropriation by either party, and subject to paragraph 4, the performance is appropriated to that obligation which satisfies one of the following criteria in the sequence indicated:

the obligation which is due or is the first to fall due;

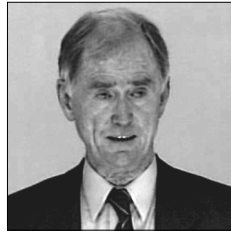
the obligation for which the creditor has the least security;

the obligation which is the most burdensome for the debtor;

the obligation which has arisen first.

If none of the preceding criteria applies, the performance is appropriated proportionately to all obligations.

In the case of a monetary obligation, a payment by the debtor is to be appropriated, first, to expenses, secondly, to interest, and thirdly, to principal, unless the creditor makes a different appropriation.



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# On the Need for a Progressive Harmonisation of Private Law in The European Union:

## The Role of Legal Science and Education

### 1. Introduction

Progressive harmonisation of private law in the European Union meets the requirements of contemporary European economy and societies. It appears to be in harmony with the historical process of development of private law in European countries, which have been largely shaped by three major traditions: the Romano-Germanic, the Scandinavian, and the Common Law tradition. This is why it seems useful to preface discussion of the questions under consideration by presenting some remarks on the historical trends of development of private law in Europe in order to show that we may return progressively to our common European roots.

The Romano-Germanic tradition is linked to the renaissance of the idea of law in the twelfth and thirteenth centuries in Western Europe. The new ideas favouring the renaissance of law originated in the centres of culture created in Western Europe, the most important of these being the universities. The university scholars progressively elaborated a common legal science and constantly adapted it to the requirements of a changing Europe. The Romano-Germanic tradition developed on the basis of the progress of a community of culture, independently of any political influences and ambitions.

The mediaeval universities aspired to distil and formulate the essence of justice. The law they taught was presented as a model for social organisation. The basis of this teaching was Roman law and canon law<sup>\*1</sup>, with the help of which university law faculties attempted to articulate the rules best expressing a sense of justice and a well-ordered society. Systematised and adapted by jurists to the needs of society, the law taught by the university founded on Reason was suited for universal application. The teaching of national law started at the universities in the seventeenth century. Swedish law was taught in Uppsala from 1620, and a chair of French law was created at the Sorbonne in Paris in 1679, but in most countries in Europe the

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<sup>1</sup> R. David. *Major Legal Systems in the World Today*. New York 1978, p. 37; R. David, C. Jauffret-Spinozi. *Les grands systemes de droit contemporains*. Paris 1992, p. 31 et seq.

national law was not taught in the universities until the eighteenth century: in 1707 at Wittenberg, the first university of the Empire to teach *Deutsches Recht*; in 1758 at Oxford; and in 1800 in Cambridge. Until the nineteenth century and the era of national codification, instruction in Roman law remained the main subject in the syllabus in all universities while national law occupied an altogether secondary place.<sup>\*2</sup>

## 2. The 1800s: Universalism gives way to a national focus

The Natural School of Law elaborated, at the end of the eighteenth century, a new concept of codification, very different from that of earlier compilations. This permitted achievement of the aim of transforming the taught but ideal law into a real, applicable body of law. Codification was conceived as a universal formula and technique serving to modernise and rationalise the law, which put an end to its fragmentation, as well as the multiplicity of customs and other archaisms involved. Thus, it helped to establish principles of a rejuvenated *ius commune*, adjusted to the circumstances of the European societies of the nineteenth century. However, the decline of the universalistic spirit and the rise of nationalism in the nineteenth century made the true achievement of this aim impossible.

Under these conditions, codification was used as an instrument of 'nationalisation of law', associated with the legislative sovereignty of each national state. As successive European states adopted their own codes, which resulted in fragmentation of European law, the very idea of a European *ius commune* virtually disappeared.

Nationalism in law-making, judicial decisions, and legal science brought about profound decline in the common European legal culture. University teaching was limited to national law. In their studies and research, writers concerned with doctrine concentrated on national law, showing no interest in foreign law, nor in writings outside the national milieu. Thus, the legal science lost much of its universal value, just as the legal education became particularised and national.

## 3. A return to the comparative

This picture has progressively changed over the last century. There has been a visible trend toward development of comparative law studies and research. Eventually, this facilitated discovery of significant similarities among various national legal systems arising from different legal traditions.

The development of comparative law teaching reintroduced elements of universalism in university legal education. The resurgence of a comparative approach to law contributed to the renewal of legal science, which in its very nature should be trans-national. This helped to deepen international understanding of various legal systems, which, accordingly, have progressively ceased to be treated in splendid national isolation. It also contributed to promoting international unification of private law.

Thus the development of a comparative approach to legal science has contributed to its transformation, and it introduced elements of universalism that have played an important role in the development of law in Europe.

## 4. The route toward EU harmonisation

Profound changes in the European political, social, and economic environment after World War II, which resulted in European integration, contributed to substantial changes in the European legal landscape. The complex process of integration in the framework of the EEC and subsequently the EU has had to be supported by progressive harmonisation of certain rules of law. Further development and consolidation of European integration should be accompanied by the development of European legal culture (based on shared fundamental values), without which the European structures would be deprived of any solid foundations.

Private law has always been an essential part of legal culture and civilisation. This is why its intra-European harmonisation and progressive unification appears to be of particular importance for the future of European integration more generally.

<sup>2</sup> R. David (see Note 1), p. 40; R. David, C. Jauffret-Spinosi (see Note 1), p. 33.

This need cannot be fully satisfied by multiplying European directives dealing with particular subject matter. Taken together, these works show a fragmentary picture, lacking a coherent legal background and framework, as the documents have been prepared in an internally non-harmonised law-making process. The existing directives can be improved by removing inconsistencies and clarifying concepts and rules.

Problems of differing or uncertain interpretation of directives can be resolved to a certain degree by the construction of a common frame of reference. Nevertheless, the directives cannot establish a solid, homogeneous, and properly structured system of European private law.

In these circumstances, practitioners of legal science, which made an essential contribution to the development of modern systems of private law in many countries, should intensify efforts to develop it in the framework of the European Union.

A number of legal thinkers have expressed willingness to contribute to the revival of the original concept of a universal (i.e. pan-European) codification and to see in the comparative law approach a means to discovering and progressively developing a contemporary European *ius commune*.

The technique of codification may well serve this purpose, as it permits opening for consideration in a systematic way — different from the ‘sectoral approach’ followed in European directives — the rules adapted to the requirements of contemporary European societies.

## 5. The first steps on the road

Among the various initiatives undertaken in this direction, the most successful was that of a group of experts organised as the Commission on European Contract Law under the chairmanship of Professor Ole Lando. The group which commenced its work in 1981. Composed of well-known specialists in civil law — and, in particular, in the law of contracts — from all of the then EU Member States, this group elaborated the Principles of European Contract Law. The principles aimed at, *inter alia*, creating a general contract law infrastructure to support specific European Community measures undertaken in the form of directives affecting some specific types of contracts.<sup>3</sup>

One of the immediate aims of the principles has been to establish a modern European *lex mercatoria* — in particular, in the area of intra-community contracts. The European Commission also expressed its hope for the principles to serve as a model for judicial and legislative development of contract law, both at a national and at the European level. The long-term objective of the Principles of European Contract Law has been to help bring about harmonisation of general contract law within the European Union.

Another initiative undertaken in this direction was that of a group of academic lawyers and judges from all European countries, organised in the framework of the Academy of European Private Lawyers. It began to draft a European Code of Contracts in 1995. A preliminary draft of Book One of the code, on contracts in general, was published recently.<sup>4</sup>

A number of other groups are working on restatements of common principles of various branches of European private law.<sup>5</sup> One example is the EC group on tort and insurance law founded by Professor Jaap Spier, and another is the team established by the late Professor F. Reicher-Facilides, and now chaired by Professor Heiss, which is working on insurance contracts.

The European Research Group on Existing Private Law (the Acquis Group) has been working on the principles and policies that underlie the existing *acquis communautaire*.

<sup>3</sup> See O. Lando, H. Beale (eds.), *Principles of European Contract Law*, Parts I and II. The Hague 2000, Introduction, p. xxii; O. Lando, E. Clive, A. Prüm, R. Zimmermann (eds.), *Principles of European Contract Law. Part III*. The Hague 2003; and *Principes du droit européen du contrat* (version française préparée par G. Rouhette, avec le concours de I. de Lamberterie, D. Tallon, & C. Witz), Paris 2003, as well as German text in C. von Bar, R. Zimmermann (Hrsg.), *Die Grundregeln des Europäischen Vertragsrecht*. The Hague, London, New York 2000 and 2003.

<sup>4</sup> *Code Européen des contrats. Avant projet, livre premier*. Milan 2004. See G. Gandolfi. *The Academy of Private Lawyers and the Pavia Draft of a ‘European Contract Law’*. Trier: ERA Forum 2003.

<sup>5</sup> See H. Beale. *The Development of European Private Law and the European Commission’s Action Plan on Contract Law*. — *Juridica International* 2005 (X), pp. 5–6. Within the EU’s Fifth Framework Programme, ‘Improving Human Potential’, the Department of Law of the University of Turin is co-ordinating the Uniform Terminology for European Private Law project. This initiative aims to build a research training network to facilitate the national reception of European Community policy within the field of private law. The network links seven universities: in Italy, the University of Turin; in Spain, the University of Barcelona; France’s University of Lyon 3; the University of Münster in Germany; the University of Nijmegen in the Netherlands; in the United Kingdom, the University of Oxford; and the University of Warsaw in Poland.

## 6. Today: The Study Group on a European Civil Code

One of the most important recent initiatives was the creation in 1999 of the Study Group on a European Civil Code by a group of legal thinkers led by Professor Christian von Bar. The founders of the study group were convinced of the necessity of a progressive Europeanisation of private law, which needs a strong foundation in legal thinking.

The study group has been composed of scholars from all EU Member States (many of them also practising lawyers or Supreme Court judges) who are devoted to the aim of reinforcing the European private law culture. They have expressed their willingness to contribute to the advancement of the process of progressive Europeanisation of private law. To this end, they have been creating a new school of legal thought, which gradually has been giving way to a concern for discovering and establishing the principles underlying coherent European private law.

The main areas of the current work of the group, based on extensive comparative law studies and research, have been:

- (a) developing rules for specific types of contracts in order to complete the Lando Principles of European Contract Law in their integration into the framework of future 'Principles of European Private Law';
- (b) developing rules for extra-contractual obligations — i.e. the law of tort (*delict*) — as well as the law of unjustified enrichment, and on the benevolent intervention in another's affairs (*negotiorum gestio*); and
- (c) developing rules for fundamental questions in the law on mobile assets — in particular, addressing transfer of ownership and security for credit.

The study group's ultimate goal is to prepare a detailed, coherent set of model European rules of patrimonial private law.

In 2005, the group formed the Network of Excellence, together with the Acquis Group and other European research groups and institutions, which will collaborate in the preparation of a 'Common Frame of Reference' as envisaged in the European Commission Action Plan document concerned with a more coherent European contract law and its follow-up Communication document 'European contract law and the revision of the *acquis*: The way forward' (2004).<sup>6</sup> This presents a new opportunity to contribute to the further development of European private law.

The Principles of European Contract law were the product of approximately 20 years of extensive work on the part of a group of experts from all member states. The Study Group on a European Civil Code expects to accomplish its task after at least 10 years of study, research, and work involving many experts from all EU Member States, who represent various legal traditions, schools of legal thinking, and areas of legal practice. Thus, the future Principles of European Patrimonial Private Law shall be a product of approximately 30 years of intensive study, consideration, and other in-depth work conducted by hundreds of experts from all EU Member States who are devoted to the common cause of development of the European private law culture.

The European lawmaker would not be able to devote even a small fraction of such time and effort to the task of progressive harmonisation of private law. Let us hope that those making the decisions make proper use of the results of this enormous undertaking based on profound expert knowledge and experience, which have been gathered through a long process of well-organised, extensive *travaux préparatoires*.

## 7. The role of education

The doctrinal promotion and support for the progressive harmonisation and unification of private law in the European Union should be accompanied by a progressive and extensive Europeanisation of legal education. A new approach to legal education is required. The universities' faculties of law may take advantage of their long tradition, stretching back to when teaching was of a universal nature, being based on a common legal culture and law. They should believe in the mission of law and its essential role in the development of the European Union and European societies.

<sup>6</sup> See C. von Bar. Working Together toward a Common Frame of Reference. — *Juridica International* 2005, p. 19 et seq.



Contemporary university teaching should no longer be limited to national law, the model that prevailed even into the last century. It has to regain its universal and European values. One of its most important aims should be to contribute to the development of a European legal culture and to provide the necessary grounding for a new generation of lawyers (*'formation juridique européenne'*) who are prepared well to work efficiently in the European legal environment.

## 8. Conclusions

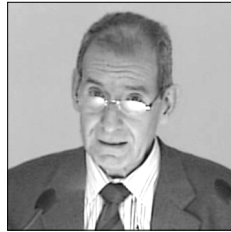
Dynamic harmonisation and unification of private law in the European Union is of great importance for the development of European integration. Intensification of European integration (in both its economic and social dimension) should be supported by the growth of a European legal culture (based on shared fundamental values). Without it, the European structures would be deprived of solid and lasting foundations.

Private law has always been an important component of the legal culture. Therefore, its intra-European harmonisation and progressive unification is of great importance for the future of European integration. These processes should be inspired and supported by legal science, which has exerted a great influence on the development of the legal systems of the EU Member States. The developing current doctrine in the legal discipline, which may be described as the emerging European School of Law, may be placed in the historical context of development of legal science on the European continent, part of a more long-term trend. It aspires to formulate the essence of European private law culture. Mindful of common historical roots shared by contemporary legal systems of the EU Member States, it insists on addressing their similarities — a functional approach to law permits these to become more visible — and discovers the contemporary *ius europeae*.

This approach shows that different traditions and technical approaches can be reconciled in the efforts to bring about harmonised solutions. Thus, the law ceases to be considered only as a national phenomenon and is perceived also from the European perspective, as an important component of the developing European culture respecting different yet connected legal traditions.

The emerging European School of Law may be described as an 'applied legal science', as it attempts to articulate rules best expressing a sense of justice and that are adjusted to the requirements of the European economy and societies of the 21<sup>st</sup> century. It has created and expanded upon a new concept of codification different from both traditional Romano-Germanic codifications and American Common Law restatements. A new formula of codification may bring forth a technique that enables realisation of the ambition of a progressive Europeanisation of private law in the European Union. It may consolidate the evolution of European scholarship in recent decades and systematically illuminate principles of European private law of the 21<sup>st</sup> century.

Thus may a new stage in the development of European legal culture and European integration be ushered in.



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# Common Frame of Reference: Conciliation or Clash?<sup>\*1</sup>

In the beginning there was separation. According to the Communication of 12 February 2003, there were two favoured options from among the four originally cited in the Communication of 11 July 2001 for application in the pursuit of a ‘more coherent European contract law’ (which was the subtitle of the Action Plan document enacted by the same communication of February 2003). One was the promotion of a set of common principles in the field of contract law; the other was the improvement of the existing legislation. These two options were set forth in the context of a relationship of a means to an end: the end would be the improvement of the existing and the future *acquis*, and the means would be a common frame of reference (items. 2, 3, and 4 of the Action Plan).

Still, in the Communication of 11 October 2004<sup>\*2</sup> we read that “the Common Frame of Reference (CFR) will be developed to improve the coherence of the existing and future *acquis*” (from the document’s introduction). But by that stage something had changed. In the same document, we find one page later, in the direction we have just mentioned, that “the Commission will use the CFR as a toolbox [...] to improve the quality and coherence of the existing *acquis* and future legal instruments in the area of contract law” but soon after that “the CFR will provide clear definitions of legal terms, fundamental principles and coherent model rules of contract law, drawing on the EC *acquis* and on best solutions found in Member States’ legal orders”. Finally, and possibly in a more clear way, it is stated (in item 3.1.3) that “the research preparing the CFR will aim to identify best solutions, taking into account national contract law [...] the EC *acquis* and relevant international instruments”. At that stage, what is conceived is a kind of mixture between option II (common principles) and option III (improvement of existing EC contract law).

Thus we are told that this is a ‘new orientation’, by which “the *acquis communautaire* is able to provide in turn a basis for the preparation of the future European contract law”.<sup>\*3</sup> Thus arises the question of whether the merger of the *acquis* with the common frame be a good chance for this project.

If one looks at the origins and ends of European Community private law and of what may be termed the ‘common principles’ movement, they appear to be in opposition, since the latter, as the word ‘principles’ shows, is essentially characterised in terms of generality in the sense of traditional contract law, whereas the *acquis communautaire* is constituted by rules related to specific situations — moreover, specified with regard to the consumer as one of the parties to the contract. On one side there is the attitude, which has been typical of classic codifications, according to which one may refer to the man without qualities, as I once expressed

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<sup>1</sup> This writing will appear also in the collection of Essays in honour of Ewoud Hondius.

<sup>2</sup> Communication from the Commission. European Contract Law and the Revision of the *Acquis*: the Way Forward. Brussels 11.10.2004, COM(2004) 651 final.

<sup>3</sup> R. Schulze. Principi sulla conclusione dei contratti nell’*acquis communautaire*. – Contratto Impresa Europa 2005, p. 405.

this idea<sup>4</sup>, while on the other side there is a unique qualification around which many rules have been introduced. These two regulative trends correspond to two different ideas of what a uniform law in Europe should be.

In the preface to the PECL, Ole Lando tells us that his original idea for setting up what became the Principles of European Contract Law was to “establish the legal uniformity necessary for an integrated European market”.<sup>5</sup> The introduction of the PECL speaks of ‘harmonization’ as a foundation for the “efficient conduct of cross-border business within Europe”<sup>6</sup> and, moreover, of a “statement” — not a re-statement, indeed — to serve as “in effect a modern European *lex mercatoria*”. Thus, the clear aim was that of creating a set of rules on commercial contract law drafted with the technique of general private law unifying civil and commercial law, in the manner of the Swiss Code of Obligations and the Italian civil code of 1942. Apart from some material specifically dedicated to professionals (articles 2:209 and 2:210), that was the model.

The *acquis communautaire*, which in our context is European Community law with reference to contracts, has been generated by a very different idea of harmonisation of private law in Europe: that which has been filled by the idea of protection of the consumer, an idea that originally was alien to European community law. What I am saying is that the original Treaty of Rome did not envisage the protection of consumers. However, protection of consumers has, historically, constituted much of the content of what has been set up formally as the uniform law considered necessary to the establishment of a common market.

The basic difference between the ‘principles’ idea and the consumerist one implies a series of others.

First of all, the approach adopted by the PECL starts from freedom of contract, as “parties are free to enter into a contract and to determine its contents, subject to the requirement of good faith and fair dealing, and the mandatory rules established by (the) Principles”. In general, it is non-mandatory law: “for the most part the Principles provide rules which the parties are free to vary or exclude”, states the ‘Survey of chapters 1–9’ introducing the principles. And this is the meaning of article 1:102 paragraph 2. In contrast to this, European Community law is ‘*zwingendes Recht*’, mandatory law, since it is set up to attain specific ends precisely in consideration of the fact that they are not achievable through pure freedom of contract. Of course, the principles put good faith and fair dealing together with mandatory rules in order to constitute a kind of fence against the abuse of freedom of contract. But this is not the case for community contract law. Whereas the first rules operate, so to say, inside and around what the parties freely determine, the latter imposes models originally designed to protect one of the parties.

Protection is indeed another feature from which angle European Community private law can be viewed. If at some time there is written a history of the European Community’s private law, it should be interesting to note the way in which the historians explain how it was that, in order to build a common market, the result was consumer protection law. The reason can fairly be indicated as being that, at some point, social policies in the individual member states exerted pressure toward more consumer-friendly law but to enact it in a different way for each legal order would have produced different outcomes, impairing the idea of a common market. The transposition of the directive on unfair contract terms can be mentioned as a typical example. Once enacted in Germany, a new law on that subject — what we can call the equal protection clause for professionals, since here they were subjected to a unique regime in terms of their relationship to consumers — called for the same treatment for all European undertakings. Paradoxically, what appears to be, and in fact is, a protection law for consumers was originally a way to protect the actors involved in business competition. The necessity of implementing freedom of industry and trade for production and sale of products in a situation of equal rules for the various actors has paved the way to equal protection for consumers. Paradoxically again, protection of consumers became a fundamental aim of community law after it had already become fact in large measure, since a duty of the European Community to contribute to the strengthening of consumer protection was set forth in the European Community Treaty only in 1991, when some of the directives, such as those on door-to-door selling<sup>7</sup>, on consumer credit<sup>8</sup>, and on liability related to products<sup>9</sup>, had already been enacted.

The natural insularity of the directives made it clear that, as the introduction to the PECL puts it, “there [was and still] is no general contract law infrastructure to support these specific Community measures”.<sup>10</sup> The PECL and the *Code européen des contrats*<sup>11</sup> were then devoted to constituting this infrastructure, which

<sup>4</sup> C. Castronovo, Contract and the Idea of Codification in the Principles of European Contract Law. Festschrift til Ole Lando. Copenhagen 1997, p. 112, echoed by B. Lurger, Grundfragen der Vereinheitlichung des Vertragsrechts in der Europäischen Union. Vienna–New York 2002, p. 420.

<sup>5</sup> O. Lando, H. Beale (eds.), Principles of European Contract Law. Parts I and II. The Hague, London, Boston 2000, p. xi.

<sup>6</sup> *Ibid.*, p. xxi.

<sup>7</sup> Council Directive 85/577 EEC.

<sup>8</sup> Council Directive 87/02 EEC, amended by Council Directive 90/88 EEC.

<sup>9</sup> Council Directive 85/374 EEC.

<sup>10</sup> O. Lando, H. Beale (eds.) (see note 5), p. xxii.

<sup>11</sup> G. Gandolfi (co-ordinator), Code européen des contrats. Milan 2000.

could not but be basic contract law. Thus, the recent observation that the Lando Commission has not even considered consumer contract law to be an essential part of modern contract law<sup>\*12</sup> cannot be taken as a criticism, since at the time the PECL were conceived there was not a body of consumer contract law such as to be generalised within the text of ‘principles’. The logic of the special law that characterised consumer law appeared to be just the opposite of what is intended to be general law. On the other hand, what could be converted into a general provision, in a principle indeed in accordance with the meaning this word has now acquired thanks to the PECL and the UNIDROIT Principles, was taken into account. This happened particularly strongly with respect to unfair contract terms. Article 4:110 of the PECL provides that “a party may avoid a term which has not been individually negotiated if, contrary to the requirements of good faith and fair dealing, it causes a significant imbalance in the parties’ rights and obligations [...] to the detriment of that party”. In the notes to that article we find all that we must know and understand about the provision:

Article 4:110, as the notes read, is in the same terms as [the] Council Directive on Unfair Terms in Consumer Contracts<sup>\*13</sup>, save that it is not limited to terms used against consumers. This reflects the law in many Member States. First, before passing any specific legislation many systems had adopted or developed judicial controls over unfair terms. These are not usually limited to consumer contracts and, for the most part, they continue to apply. Second, many Member States have legislation on unfair terms which applies to unfair terms, particularly those in general conditions of contract, even when neither party is a consumer.<sup>\*14</sup>

But the PECL have done better than the Directive on Unfair Terms in Consumer Contracts, in that they provided a specific rule, article 2:104, concerning the prerequisites for contractual terms not individually negotiated to be binding. In fact, the generalisation operated by the PECL is not a development of a properly consumer-oriented rule: rather, it was European consumer law that embezzled what originally was meant to be a necessary new aspect of general contract law. The first European source of law dealing with general conditions of contract was the Italian civil code of 1942. Article 1341 regulates protection of the weak party, with regard to the way in which general conditions enter the content of a contract, and, correspondingly, to their unfairness, without distinguishing among categories of contracting parties. Similarly this later happened with German law on general conditions, in 1976, as well as with the English Unfair Contract Terms Act of 1977.

Whenever we speak in terms of protection and judicial control, we cross the line separating formal law from substantive law, if we wish to adopt Max Weber’s distinction<sup>\*15</sup>, within which he defines the latter as characterised with reference to substantive justice and the specific aim of the rule, whereas formal law might be said to be self-referent, solving problems not with attention to real situations but as a mere application of the internal logic of the law. Now the case of general conditions shows that not only formal law but also substantive law is apt to be generalised. Generalisations, however, cannot operate when substantive law is at the same time special law. Status law is special law by its very nature, and so it is with consumer law. To generalise either seems to be a contradiction, and, thus, when an attempt of this nature is made, the class of persons to which it initially referred loses the original quality, as seen under the law, that set it apart as deserving of a special set of rules.<sup>\*16</sup>

The difficulty I have been pointing out in co-ordination between the level of reference proper to the PECL and that of the *acquis communautaire* may be clarified and simplified, making it clear that PECL interpret a model of codification, whereas the *acquis* as part of the common frame of reference shall be similar to what in continental systems is called consolidation<sup>\*17</sup>, a true restatement of what has already been adopted as European Community law, irrespective of what the rule of law should be: it is as the rule of law as it has been enacted through the years as European Community law, right or wrong, that this could be considered. That is why, as it has been written, there is a European Community law, consisting in special regulations, from which it is far from evident that a true European uniform contract law, consisting in uniform general rules, can derive.<sup>\*18</sup>

<sup>12</sup> R. Schulze (Note 3), p. 406.

<sup>13</sup> EEC Directive 93/13 of 5.04.1993. – OJ L95/29.

<sup>14</sup> O. Lando, H. Beale (eds.) (Note 5), p. 270.

<sup>15</sup> *Economia e società* (Italian trans.). Milan 1974, II, pp. 16, 186, 192. M. Rheinstein (ed.). *Max Weber on Law in Economy and Society* (English trans.). Cambridge, MA 1954, p. 301 et seq. Recently, C. W. Canaris. *Wandlungen des Schuldvertragsrechts. Tendenzen zu seiner ‘Materialisierung’*. – *Archbold’s Practice* 2000 (200), p. 273 et seq., has attracted attention to ‘substantivation’ of law, making reference to J. Habermas and F. Wieacker but not, as far as I can see, to M. Weber.

<sup>16</sup> In fact, C. W. Canaris (Note 15), p. 360 et seq., speaks of the consumer as a ‘jedermann’. This, however, appears to contradict the evidence of the facts. Were this true, there would have been consumer protection evident in the legal codes of the 19<sup>th</sup> century.

<sup>17</sup> Compare A. Cavanna. *Storia del diritto moderno in Europa*. Vol. 2. Milan 2005, p. 43.

<sup>18</sup> R. Alessi. *Luci ed ombre del nascente diritto europeo dei contratti*. – *Diritto europeo e autonomia contrattuale*. Palermo 1999, p. 9. See also G. Vettori. *Buona fede e diritto europeo dei contratti*. – *Europa e diritto privato* 915 s., 918 holds that, if one starts from the corpus of the European directives, it is not possible to build up a unitary law but that, if anything, one may find some orientation consistent with communitarian principles.



After all, some special rules are not fit to be extended to all situations that can be considered identical as to the asymmetry between professional and consumer but different in economic substance, as is the case with different types of contract. The consideration arising from this remark is that the *acquis communautaire* stands at a level of generality that is much lower and cannot be compared with that of general rules on contract law.<sup>\*19</sup> Moreover, it is not suitable for the generalisation of the kind the latter imply.

Attempts to summarise the peculiarities of European Union private law have identified them in the following features: (1) duties of information at the negotiation stage, (2) periods of time within which consent of the consumer to the contract is revocable, (3) invalidity or unenforceability of contract terms not individually negotiated, and (4) formal requirements in the formation of contracts.<sup>\*20</sup> Some of these features cannot be extended beyond consumer contracts.

Take, for example, the rules on formation of contract that are provided for in the directives on contracts negotiated away from business premises and on distance contracts, or those on time sharing and on consumer financial services.<sup>\*21</sup> It is true that some authors have advocated the right of withdrawal from the contract, provided for by these directives, as a new principle of the law of contract.<sup>\*22</sup> This would imply that in every contract the party that, in a short time, finds a better price or better contractual conditions may be freed from the already stipulated contract. And this would be an expression of a '*kompetitives Vertragsrecht*'. It is odd, though, to refer to as competition what is, in fact, the negation of it. Competition implies that each party struggles for the best conditions up to the moment at which the contract is concluded. A second choice after the parties have agreed on the contract would appear to be a remedy of different kind, something overcoming competition and establishing a new logic, that of protection of a weak party. In speaking against that strange idea of a contract that would not be binding, it has been observed that this would mean turning upside down the fundament of contract law — i.e. the principle *pacta sunt servanda*.<sup>\*23</sup> Indeed, the right to unilaterally cancel the contract has not been repeated in the directive on sale of consumer goods, nor could anybody seriously conceive of adopting it in that field. The 'cooling-off period' is to be considered alien to commercial contracts as well as to contracts in general, and so with the requirement of writing, and, in actuality, the PECL, have adopted neither the first nor the latter.

If we look at what is expected to be Chapter 4 of Book II of CoPECL (the name given to the draft mixing the PECL and the *acquis*), whose title could resemble *The Consumer's Right to Withdraw from Certain Contracts*, it may be presumed that this is going to reflect the right to withdraw from a contract to the same extent as has already been provided in the directives we have mentioned above. Indeed, if we compare the degree of generality of these rules with that of the others included in Book II, it would appear that those related to the right of withdrawal are limited to 'certain contracts' only: precisely those related to consumers. In fact, the right to withdraw from a contract introduces a very radical modification to the law of contract, which needs to have a serious legitimacy<sup>\*24</sup> and thus can be afforded only in situations fit to justify this deviation. In addition, there shall present itself a need to choose among different periods of time set up in each directive as terms for the valid exercise of this right: not less than seven days (Dir. 85/577), at least seven working days (Dir. 97/7), within 10 working days (Dir. 94/47), and 14 calendar days for distance contracts in general and 30 calendar days for those relating to life insurance (Dir. 2002/765).

On the contrary, suitable for a true general level are the rules on duties of provision of information prior to the conclusion of a contract, examples being found in article 4 of the directive on package travel<sup>\*25</sup>, article 3 of the directive on purchase of immovables on a timeshare basis<sup>\*26</sup>, article 4 of the directive on distance contracts<sup>\*27</sup>, and article 3 of the directive on distance marketing of financial services.<sup>\*28</sup> These rules only

<sup>19</sup> I wonder whether this judgement would change if one were to adopt the perspective of C. W. Canaris (see note 15), p. 360, according to which it is not just the consumer who deserves protection but, on the contrary, is the professional who must be less protected through exceptional rules. I do not think, though, that by now the perspective of European community law has moved on to consider the professional with regard to the consumer. Rather, it proceeds from the consumer with regard to the professional. As L. Mengoni, in *Problemi di integrazione della disciplina dei «contratti del consumatore» nel sistema del codice civile*. — Scritti in onore di Pietro Rescigno. III. Milan 1998, p. 537 et seq., points out, in contrast to the logic of commercial codes, consumer law attracts contracts between the professional and consumer to an area of discipline derogating to general law in favour of the consumer.

<sup>20</sup> L. Mengoni (Note 19), p. 536 et seq.

<sup>21</sup> Respectively, Council Directive 85/577 ECC, Council Directive 97/7 ECC, Council Directive 94/47 ECC, and Council Directive 2002/65 ECC.

<sup>22</sup> For example, H. Micklitz. *Perspektiven eines Europäischen Privatrechts*. — *Zeitschrift für Europäisches Privatrecht* 1998, p. 265.

<sup>23</sup> C. W. Canaris (Note 15), p. 344 et seq.

<sup>24</sup> *Ibid.*, pp. 343, 345.

<sup>25</sup> Directive 90/314/EEC on package travel, package holidays, and package tours.

<sup>26</sup> Directive 94/47/EC on certain aspects of purchase of the right to use immovable properties on a timeshare basis.

<sup>27</sup> Directive 97/7/EC on the protection of consumers in respect of distance contracts.

<sup>28</sup> Directive 2002/65/EC concerning the distance marketing of consumer financial services.



point out an aspect of precontractual good faith<sup>29</sup> and, more generally, of good faith as a general duty as it is imposed upon the parties to the contract by article 1:102 (1) PECL. That this provision, as well as that of article 1:201 and of article 2:301, specifically refers to precontractual liability arising from negotiations contrary to good faith appears to be necessary, since from consideration of European law in its totality it has been pointed out that good faith, not being recognised in all member states, still cannot be considered a general principle<sup>30</sup> of the European law of contracts and obligations. What the principles have done, and consequently what the common frame of reference is going to do, is just to generalise the good faith that, apart from the differences among national legal systems, is already rooted in the law of the European Union. In this sense, one can recall the reference to good faith in the directive on unfair contract terms, which in its article 3 qualifies as unfair a contract term not individually negotiated “if, contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer”.

But then, taking seriously the idea of using the *acquis* as a source of principles, one can refer to an example from Italian legislation, which, in transposing Directive 98/27 through the legislative decree of 30 July 1998, no. 281, “on injunctions for the protection of consumer interests”, has indicated as fundamental rights of consumers those included in the directives listed in the annex to the same Directive 98/27, as follows:

- (a) protection of health;
- (b) security and quality of products and services;
- (c) adequate information and fair advertising;
- (d) education as consumers;
- (e) fairness, clarity, and equity in the relationships concerning goods and services;
- (f) promotion and development of free associations among consumers;
- (g) supply of high-quality, efficient public services.

In this way, the *acquis* has attained the highest level of generality, because the rights referred to are considered relevant in all situations in which a consumer is involved. It is still consumer law but applicable to all consumers, in all situations. And if, according to the communication of October 2004 as mentioned at the start of this article, “the CFR will provide clear definitions of legal terms, fundamental principles and coherent model rules of contract law, drawing on the EC *acquis* and on best solutions found in Member States’ legal orders”, to this extent the *acquis* has been shown to be fit for the purpose.

Thus, notwithstanding the different points of departure and structure and goals, the PECL and *acquis*, being destined to go together, shall compose the common frame of reference. The two components provide the best character for the part of each: the Principles of European Contract Law the true structure of the product and fundamental rules and the *acquis*, together with some main points of consumer law, the importance of already being part of European enacted law, able to attract toward the state of grace of positive law what for the moment still remains only fruit of an academic work.

<sup>29</sup> Literally referring to ‘the principles of good faith in commercial transactions’ are article 4 (2) of Directive 97/7 on distance contracts and article 3 (2) of Directive 2002/65 on distance marketing of consumer financial services.

<sup>30</sup> K. Riesenhuber. *Europäisches Vertragsrecht*. Berlin 2003, p. 221.



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# European Harmonisation of Civil Law from a Nordic Perspective

## 1. A Nordic perspective?

According to the title of my paper, I am supposed to provide a Nordic perspective on European harmonisation of civil law. I am sorry to disappoint you — such a promise is impossible to fulfil. The ongoing discussion in the Nordic countries shows almost as many perspectives as there are speakers.<sup>1</sup> Opinions differ strongly, with some being critical and others enthusiastic. I can only offer you my personal views and perhaps feel a bit sorry for my colleagues who are not presenting their views here.

## 2. Legal transplants

Let me begin from a less controversial angle, with some historical facts. Here I will take Finland as an example: a small, rather young nation on the periphery of Europe. In many ways, we in Finland share our history with our neighbours: the Scandinavian countries, Estonia, and Russia. For more than 700 years, until 1809, Finland was a part of Sweden, and the intellectual heritage of this time is still strong in our legal

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<sup>1</sup> Some recent examples are C. von Bar. A Civil Code for Europe. – Juridisk Tidskrift (JT) 2001/2, pp. 3–14; U. Bernitz. En europeisk civillag? — aktuell utveckling och svensk hållning. – JT 2003–2004, pp. 503–521; E. Eftestøl-Wilhelmsson, T. Wilhelmsson. Att använda *acquis communautaire* som källa vid utformningen av en europeisk kontraktsrätt. – Juridiska föreningens tidskrift (JFT) 2005, pp. 434–451; T. Håstad. Inför en europeisk sakrätt — några principfrågor. – JT 2002/3, pp. 745–777; T. Håstad. En europeisk civillag och den nordiska kontraktsrätten, Nordiska jurismötets förhandlingar i Helsingfors. Bd I. 2002, pp. 341–366; O. Lando. European Contract Law in the 21<sup>st</sup> Century. – JFT 2005, pp. 560–571; D. Michalsen. Hvad er ‘europeisk rettskultur’? Tidsskrift for Rettsvitenskap 2004, pp. 20–49; C. Ramberg. Mot en gemensam europeisk civillagstiftning. – Svensk Juristtidning 2004, pp. 459–474; L. Sisula-Tulokas. To be or not to be — harmonisering av den europeiska avtalsrätten. – JFT 2001, pp. 708–720; and T. Wilhelmsson. En EU-kontraktsrätt eller en europeisk experimentell rätt? Ett nordiskt svar. – JFT 2001, pp. 736–753.

<sup>2</sup> This was probably around 1530. See, e.g., P. Letto-Vanamo. Internationella idéer och nationella realiteter. Helsinki: Festskrift till Lars Björne 2004, pp. 117–120; J. Tontti. Some general rules that a judge should closely abide by. Associations 2000, pp. 113–128; and L. Sisula-Tulokas (ed.). Twenty Cases from the Finnish Supreme Court. Helsinki 2001, p. 11.

culture. One of the real pearls of our common legal tradition is Olaus Petri's Guidelines to the Judges, dating back to the beginning of the 16<sup>th</sup> century.<sup>\*2</sup> We still print these guidelines on the first pages of Swedish and Finnish law books. They contain elements from the old Roman law, from Jewish legal tradition, and from *ius commune*, as well as German and Swedish (Germanic-family) traditions. They provide a true mixture of legal transplants and local tradition. The rule that is my personal favourite is number 9:

What is not just and fair cannot be law either, for it is on account of the fairness that dwells in the law that the law is accepted.

From 1809 until our independence in 1917, Finland had an autonomous position as a grand duchy in connection with Russia. Even in the Russian era, we had our own parliament, a separate currency, and our own legal institutions. The old Swedish laws were still followed. In many of the new Finnish laws from those days one can trace a strong European influence. One of the most obvious examples is the Maritime Code of 1875, which replaced the old code from 1667, originally written by a Dutchman living in Stockholm. The new Finnish Maritime Code was firmly anchored in the new Swedish, Norwegian, German, and Russian legislation.

Since our independence, we have behaved more or less in the same way: we have been borrowing ideas from here and there, albeit mostly from Sweden and the other Nordic countries. For instance, we managed many decades without a Sales of Goods Act because we used the Scandinavian Sales Act and called it trade usage. To put it bluntly, throughout our legal history we have never been afraid of stealing ideas, of using legal transplants, whenever suitable.

### 3. More or less organised co-operation

At the same time, however, another characteristic feature of the Nordic legal culture is a more or less organised co-operation between our countries. It all began with the first Nordic Lawyers' Meetings in 1876. Since then, these meetings have been held regularly. Today, they are huge social happenings where about a thousand lawyers congregate. These meetings still strengthen the feeling of belongingness, as in the very beginning.

At the meeting in 1948, the Danish professor Fr. Vinding Kruse presented his first draft of a Nordic civil code, which gave rise to much discussion. He presented his second draft in 1962. The draft covered many of the same subjects that the Study Group has been working with but also addressed family and inheritance law. The code consisted of almost 1,500 articles.<sup>\*3</sup> We all know that these drafts never led to a common Nordic civil code.

As a result of the long-standing Nordic co-operation, many of our basic legal acts, especially within civil law, are more or less common. Take, for instance the Contracts Act, the Sales of Goods Act, the Tort Liability Act, and so on, and so on... They are Nordic but, of course, strongly influenced by European law. The 90-year-old Contracts Act serves as a good illustration. The great Nordic scholars behind the act openly borrowed ideas from French, German, English, Swiss, and Hungarian law. The Contracts Act is also an example of Nordic co-operation at its best.

But the co-operation has not always been a walk in the park. For instance, the much younger Nordic Sales of Goods Act, from the 1980s, illustrates less successful co-operation. The Swedish and Finnish acts are identical, as is also the Norwegian act in substance<sup>\*4</sup>, while Denmark never accepted the new act. They still have the old Sales Act from 1906.

Our new sales acts follow closely the CISG, but they are not merely simplified versions of the convention meant for internal use. We have also added some special Nordic features. Some of these have been heavily criticised, and rightly so, but I will not go into that.

The fate of the CISG reveals something of the Nordic soul, I am afraid. Proud of our Nordic legal tradition, our countries made two reservations as to the application of the convention. According to the first one, we do not apply the CISG in sales between the Nordic countries, even if these sales no doubt are international in nature. Instead, we each use our respective Nordic Sales Act<sup>\*5</sup>, despite the fact that one of them, the Danish, strongly differs from the rest. But it does not stop here. According to reservation number two, the Nordic countries do not apply CISG Part II, the part dealing with the formation of a contract.<sup>\*6</sup> Instead, we apply our

<sup>3</sup> Fr. Vinding Kruse. *En Nordisk Lovbog*. 2. udg. Copenhagen 1962.

<sup>4</sup> In Norway, the CISG is integrated — in a translated and, in some respects, rewritten form — into the Sales of Goods Act. This act contains provisions concerning consumer sales also.

<sup>5</sup> CISG, article 94.

<sup>6</sup> CISG, article 92.

old Contracts Act. It is fortunate that the old act does not differ very much from the CISG. In fact, one has to be an expert to know the differences among the systems. My point here is that the Nordic countries nourish the idea, the feeling, that we are a little bit special: we have a common legal heritage and culture, and we just love it.

The success of Nordic legal co-operation is said to be based on common legal values, not, as in the EU, on common legal goals.<sup>7</sup> It has been based on free will, not dictated from above. In the end, each country has felt free to accept the results as they stand, to accept them only partly, or to reject them. The Nordic approach has, at the same time, been practical. For small countries, co-operation saves resources on many levels, beginning with the law-making process. It is a well-known secret that we Finns very closely study the developments in Sweden. There are voices saying that we often copy the Swedes. That is, of course, not true, but now and then it happens that we make use of our neighbour's mostly well-prepared groundwork (*travaux préparatoires*). It is true that the Swedes always use too many words, so we have to cut down the text to a readable level and translate it.

The resource-saving effect does not stop here. The legal co-operation results in a much richer source of case law and jurisprudence, in common model contracts, and so on. For a long time now, we have had common law reports<sup>8</sup> and legal journals<sup>9</sup>, and at our universities we use each other's textbooks and other literature.

To sum up, since the last century we have had a well-functioning harmonisation at regional level in many fields of civil law. It has been based on a sense of having a common legal tradition, and on free will and practical considerations.

## 4. Readiness to accept a European harmonisation of civil law

And now we come to the basic question: Are we ready to accept a European harmonisation of civil law? If the Nordic countries are as accustomed to legal transplants and regional co-operation as I have tried to prove, the question must be purely rhetorical. It is not. And a question like that can be answered only with a clear 'no'.

Firstly, what are we supposed to accept? Through the EU, we are all blessed with more and more European legislation, but the directives and conventions have not yet touched the fundamentals of our civil law — at least we believe and hope not. Something called a European Civil Code or even a Common Frame of Reference is much more frightening. Before the question makes any sense, we have to know what we are discussing.

If somebody 20 years ago had asked whether we were ready to accept a European Contracts Act, I bet the answer would have been a unanimous 'no'. Today, we have the PECL, and the importance of these principles is widely recognised. The text is balanced and solid; it takes into account well-known international instruments, such as the CISG and UNIDROIT Principles; and it contains broad principles at the same time as it tries to answer practical questions. In addition, and perhaps most importantly, the PECL do not serve as mandatory law. In other words, before the question of a European harmonisation makes any sense, we need to have drafts to discuss and analyse.

If one wishes to quickly kill the discussion of a European harmonisation, one need only describe the idea as an attempt to write a complete, perfect civil code that is going to solve every legal problem, for now and forever, and that will be forced upon every European country within a couple of years. One must carefully avoid such words as 'simplicity' — broad principles rich in implications, logic, and structure.

If one wants to analyse the idea more closely, one has to describe it as an honest attempt to test the possibility of creating, step by step, common rules serving practical needs within a common market. The core question is: can this ever be achieved? In other words, we have already reached the point where we need to discuss the concrete drafts. As we all know, the Lando Group has done a brilliant job. Now the Study Group is stepping into the legal crossfire. The working groups are producing and publishing drafts. It is time to discuss these. Some of them may be easily accepted, somewhat in the same way as the PECL. Others, no doubt, are going to give rise to criticism, rethinking, and rewriting, and they may have an uncertain future. Nevertheless, an honest discussion brings the different national systems closer to an understanding, and the next attempt might turn out to be more successful. It is, of course, the case that some parts of civil law are easier to

<sup>7</sup> See, e.g., P. Letto-Vanamo in *Civilrättens integration ur Nordisk synvinkel*. S. Tuominen (ed.). Helsinki 2001, p. 11.

<sup>8</sup> Such as *Nordiske domme i sjøfartsanliggender*, since 1900, and *Nordisk domssamling*, since 1959.

<sup>9</sup> Examples include *Nordisk Försäkringstidskrift*, published since 1919; *Nordiskt Immateriellt Rättsskydd*, since 1931; and *Scandinavian Studies in Law*, since 1957.

harmonise, while others need more time. I may remind you that the CISG, providing non-mandatory rules concerning international sales of goods — after all, a very narrow subject — needed 60 years to become the success it is today.

Secondly, the harmonisation of civil law opens up many related questions — for instance, how to create functioning systems for amendments when so many countries are involved and what the role of the European Court of Justice is to be. But I think such questions belong to the next stage in the development.

Thirdly, I have asked myself what kind of Nordic values we are afraid to lose in a European harmonisation. When we look at the real world, the world outside the law, the picture of today is confusing. Including Iceland, we are five small countries without a common language, without a common currency; some of us are members of the EU, some not; and some are members of NATO while others are not. Yes, in all of our countries the winters are long and dark, we drink too much alcohol, and we have special heart diseases. But we share the same music, literature, films, soap operas, and fashion as with the rest of Europe; we eat the same pizzas; and we have the same shops everywhere. On this level, the European similarity is almost boring.

Trying to answer the question of what could be specific, Nordic legal values, one should not only use cold, scientific analyses but also take into account the sometimes irrational feelings of belongingness. After all, legal approaches and practice are much easier to change. I am not able to give you a common Nordic answer. Some of us may speak about the level of abstraction of the legal norms in combination with a very practical, down-to-earth legal reasoning, some of us may stress the social orientation in law, and some may speak about the flexibility of our legal system. Our politicians always mention as our basic values the ideology of the welfare state, the standard of education, and — nowadays — our international competitiveness, as well as all of those other wonderful things. But these are not values monopolised by the Nordic countries. As always, the answers depend on whom you ask. My personal answer is that a European harmonisation is not a legal revolution from a Nordic perspective. It is not going to lead to the loss of our legal identity. But the time is ripe, I think, to consider new forms of Nordic co-operation and to invite the Baltic states to take part in this work if they are interested.

What I am trying to say is that we have reached the point where a general ‘yes’ or ‘no’ discussion on the harmonisation is no longer of interest and should be left to rest for a while. It is more fruitful to discuss the new drafts coming from, for instance, the Study Group; to analyse them one by one, book by book; to find out their weaknesses and strengths; and to suggest improvements. I am looking forward to an intense and creative European legal discussion in which the Nordic countries, in a broad sense, will participate constructively.





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# Freedom of Contract:

## Mandatory and Non-mandatory Rules in European Contract Law<sup>\*1</sup>

Although I am not French, I shall divide this paper into two parts. The first part deals with the position and function of common European rules in respect of limitations to freedom of contract and with the role of mandatory and non-mandatory rules in general. The second part addresses the different techniques restricting freedom of contract that we find in the PECL, the *acquis communautaire*, or the draft 'common frame of reference' (CFR).

### 1. The position and function of common European rules in respect of mandatory and non-mandatory rules of contract law

The preceding papers of the Tartu conference dealt with many questions surrounding the harmonisation of contract law in Europe, and its aims and methods. I will start from a moderate — and, in my view, rather realistic — perspective, which sees a future for multilevel contract law with different sources.

At least in the foreseeable future, private law is going to continue to spring from many sources, governmental and non-governmental. I will not enter here into the discussion of whether a contract itself can be seen as a source of law — which it does, in my view, to a certain extent.

As to governmental sources, on the other hand, we will, at least for the foreseeable future, have to accept living with, and continue to live with, a multilevel government with at least two legislative levels, those being the European Union and its member states. In many parts of Europe, we will continue to have three levels — namely, in federal states where regions have legislative powers, as is the case today for some jurisdictions even in the field of contract law. Further, the reality of harmonised law in this foreseeable future is going to be a law that is applied to a very large extent by national or regional judges in different languages, in contexts with different understandings of the harmonised law. Harmonisation does not equal uniformity.

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<sup>1</sup> This paper was originally presented at the conference European Legal Harmony: Goals and Minestones, 10<sup>th</sup> Anniversary of Juridica International (<http://video.ut.ee/juridica10.htm>), in Tartu on 6.12.2005.

Thus we have to find ways to organise this diversity, not to eliminate diversity but to organise it in such a way that it is contained within certain limits and is to a certain extent predictable. This is, in my opinion, especially necessary in the field of contract law, at least when we concern ourselves with freedom of contract. It is key to point out that we have to take care that the various limitations to freedom of contract should be predictable and contained within certain limits.

Am I, in so doing, avoiding the question of whether uniform contract law is necessary or not? This question is, at least to a certain extent, misleading because it all depends on what is meant by ‘uniform contract law’ and there are many possible answers apart from a mere ‘yes’ or ‘no’. In its most radical sense, it would mean completely replacing national and/or regional contract law and transferring the competence in this field from national and/or regional legislators to some centralised European institution as a sole legislator, whereby the former surrenders every competence. It could involve installing concurrent powers, with priority given to the European rules. It could mean independent powers of both levels to formulate contract laws that are competing in practice, or at least competing in the case of international contracts. It could mean restricting national contract law to non-international contracts. It could mean the existing practice of piecemeal legislation on the European level with priority over national law but dealing only with specific questions, mainly in relation to consumer contracts. It could also entail a model law that, at least for the moment (and if it were up to me, also for the future), leaves it within the competence of national legislators to deviate therefrom. That is the American model of the Uniform Commercial Code, which is — and it is important to stress this — not a federal code but a code that has been adopted by most, if not all, state legislatures. In this model, the state legislators retain their competence to change the model law if they wish; in reality, the force of the uniform law is so strong that they do not. That may, however, seem an ideal model from an ideal world, which probably is not made for the European Union.

## 1.1. Two forms of intransparency

In any case, I believe that the problem is not diversity in contract law as such; it is, rather, intransparent or unpredictable diversity in contract law. Now, there are two forms of this intransparency and unpredictability. In the first form, the rules limiting freedom of contract are substantially the same but look different; in the second form, they appear to be the same when they are, in fact, different.

### 1.1.1. Intransparencies due to differences in structure

The first form of intransparency is caused by the fact that rules limiting freedom of contract in different jurisdictions may be qualified differently and found in very different places under different headings according to different theories, even if they are the same in substance. For someone from another jurisdiction, the problem may thus be not that the rule is different but that it is not recognised. Also, where the rules are effectively different, the difference may not be very transparent, for the same reason. Substantially equivalent limitations to freedom of contract are to be found in some jurisdictions in the rules on formation of contracts, in others under the topic of validity, and in still other systems in rules on the contents of a contract. Rules that one may find in general contract law in some jurisdictions are addressed in relation to specific contracts in others. Rules that in some systems are drafted in the form of very specific predictable rules are in other systems hidden behind vague norms like good faith, reasonableness, public policy, and so on.

This difficulty is often as serious as substantive differences in law are, although it could perhaps be set aside more easily. It can be solved by using a common structure and common categories of rules in contract law. Under a common structure, it becomes much easier to see similarities and differences among jurisdictions; one no longer has to search through the whole of the law, in every possible place.

Transparency and predictability can thus already be enhanced substantially without imposition of uniform solutions on national legislative bodies, on the condition that a common structure and terminology can be found. In my opinion, national and/or regional legislators should indeed retain basic-level competence in private law, even in contract law — on the condition, however, of their competence being exercised in a more transparent way by using a common frame of reference in the sense of a common structure and terminology. Put more clearly, they could remain competent in respect of the way they fill in the content and at the same time lose competence for the overall scheme.

### 1.1.2. Intransparencies due to differences in interpretation

The second type of unpredictability is linked to the use of vague norms or general norms, such as good faith and fair dealing, reasonableness, or public policy. As one can readily imagine, the vaguer a norm is, the larger the number of different interpretations it may have within a national system but also varying from system to system. These vague norms are means to create a fake legal unity such that people think the same

rule applies but whereby it may be interpreted in very different ways. We should not forget that different jurisdictions have quite different national traditions in the relationship between judges and legal rules, as to the way in which judges interpret and develop legal rules.

Recently, in our Compilation and redaction team, we faced a very difficult discussion on the notion of implied terms (former PECL article 6:102<sup>2</sup>); it turned out that it was difficult to agree on the rule concerning implied terms of a contract because Continental lawyers wanted to have an article granting the judges the authority to imply some terms that are hidden additional legal rules, whereas common lawyers did not want to leave so much open as their judges in any event have the authority to develop legal rules without having to hide behind implied terms of a contract. The same was true concerning the role of the principle of good faith: Continental lawyers need it in order to give judges the possibility of developing the legal rules step by step, a power for which common law judges do not need a vague norm on good faith. Again, the provision on good faith could be restricted to some extent with it having been made clear that the draft CFR accepted generally that judges do develop the law incrementally anyway and are authorised to do so.

It was clear to all of us that we need techniques that avoid petrification of the law and allow for development of the law through case law. Vague norms such as good faith are the traditional continental technique; I have defended elsewhere<sup>3</sup> the view that good faith and reasonableness precisely are instruments for organising a contained and predictable diversity. I must confess, however, that this is not the ideal technique: whereas it allows the necessary degree of diversity within a harmonised framework, it lacks transparency and predictability. For these reasons, I tend to share the opinion of our colleague Maurits Barendrecht, who argued that judges should have the authority to make new precise rules on a more concrete scale rather than invent new rules on the basis of very vague norms such as good faith.<sup>4</sup>

## 1.2. Uniform mandatory rules or a uniform structure of contract law rules in general?

Whereas it is usually argued that, from the perspective of the ‘internal market’, the priority in the field of contract law consists in harmonising the diverse mandatory rules in order to eliminate substantive differences that cannot be resolved on the basis of party autonomy (and thus distort competition), the former leads me to a different conclusion. My priority is rather a common model law that defines the categories and terminology and has a full set of model rules, from which national or regional legislators can deviate. This is not a hard but piecemeal harmonisation, a pointillism of some uniform mandatory rules; on the contrary, it is a soft but full-scale model law. This model law should then be an obligatory reference for legislators, although they would retain the competence to deviate from it. Such deviation should, however, be explicit and specific, while still adaptable to the structure of the common frame of reference.

In a certain sense, this is a complete reversal of the actual process in place, whereby the rules of European law have priority over national law, and is a return to the dialectic of the old European *ius commune*, where the local law had priority over the *ius commune* law but was interpreted restrictively (*statuta sunt strictissime interpretanda, omissa statuto manent in dispositione juris communis*<sup>5</sup>). This dialectic is not fundamentally different from the relationship between statutes and common law in the Anglo-American tradition. Such a

<sup>2</sup> The original PECL article was article 6:102, ‘Implied terms’, with the text:

In addition to the express terms, a contract may contain implied terms which stem from

- (a) the intention of the parties,
- (b) the nature and purpose of the contract, and
- (c) good faith and fair dealing.

After discussion in the CRT, it became II.9:102, ‘Terms of a contract’ (PECL 6:102), which states:

- (1) The terms of a contract may be derived from the express or tacit agreement of the parties, from rules of law or from practices established between the parties or usages.
- (2) Where it is necessary to provide for a matter which the parties have not foreseen or provided for, a court may imply an additional term, having regard in particular to
  - (a) the nature and purpose of the contract;
  - (b) the circumstances in which the contract was concluded; and
  - (c) the requirements of good faith and fair dealing.
- (3) Any term implied under paragraph (2) should, where possible, be such as to give effect to what the parties, had they provided for the matter, would probably have agreed.
- (4) Paragraph (2) does not apply if the parties have deliberately left a matter unprovided for, accepting the consequences of so doing.

<sup>3</sup> M. E. Storme. Good Faith and Contents of Contracts in European Private Law. – Electronic Journal of Comparative Law (<http://www.ejcl.org>), 6:1(2003), and at <http://www.storme.be/goodfaithlleida.pdf>.

<sup>4</sup> J. M. Barendrecht. Recht als model van rechtvaardigheid, Beschouwingen over vage en scherpe normen, over binding aan het recht en over rechtsvorming. Tilburg 1992.

<sup>5</sup> See W. Zwalm. Interpretatieproblemen voor de codificatie. – Liber memorialis François Laurent. Brussels: Story 1989, p. 447 et seq.

dialectic obliges national legislators to work within the structure of the common frame of reference, without being bound by the specific model rules in it. But it requires us to finally be willing to call into question the axiom of the priority of European law over national and regional law in this field.

### 1.3. The importance of non-mandatory model rules

It is probably not necessary to develop before this readership again the arguments in favour of having default rules of contract law. Default rules play a very important role, although they are not mandatory and thus can be set aside by contractual clauses. Default rules are very useful, as they enable parties to make contracts without spelling out all the terms of a contractual relationship that are not yet determined by mandatory law, whereas the absence of default rules would oblige them to do so in every single case. This saves a lot in terms of transaction costs. Also, in a market economy where barter is replaced by contracts of sale or other contracts whereby the performance due from one party is expressed in monetary terms, the price mechanism can function only if it is possible to conclude a contract by merely agreeing on the object and the price, which requires that all other aspects of the contractual relationship can be left open because there are default rules.

Default rules also oblige the parties to be more transparent: when they deviate from default rules, they have to make that clear — first of all, to each other. This creates more transparency in contractual relationships.

Further, default rules are traditionally a form of guidance for judges — and, to a certain extent, even for legislators; they guide judges in the interpretation of norms invalidating contractual clauses or causing them to be set aside. Especially in order for one to judge the fairness or unfairness of contractual clauses, there must be some default model — the standard content of a contract — in reference to which the fairness of deviating contractual clauses can be evaluated. On this point as well, we face the difficulty of determining whether these default rules must be very precise or whether they can be rather vague, which is a permanent paradox in our exercise.

Especially in view of the harmonisation of contract law in Europe, default rules also have an important function for mandatory consumer contract law. In meetings discussing the harmonisation of contract law and the common frame of reference, one often hears people arguing that we only need to harmonise the mandatory contract law, especially the consumer contract law, and that default rules must be left to the market or to the national legislative bodies. However, mandatory consumer contract law builds, to a large extent, upon non-mandatory common contract law. Consumer contract law should remain in close contact with general contract law. The best solution is generally to have essentially the same rules for consumer contracts and for all other contracts but with some of these made mandatory in relation to consumers (and non-mandatory in other cases). This model has been followed to some extent in the drafting of the Consumer Sales Directive (the basic concepts of which go back to the CISG, the Vienna Sales Convention) and is being followed clearly in the Study Group. Is it worth noting as an aside at this point that there are no examples of it in the PECL, because the PECL dealt only with general contract law and not with specific rules for consumer contracts only; however, the PECL did incorporate rules that are found in consumer law but without making them mandatory in general. In essence, the mandatory consumer contract rules are general contract rules made mandatory only for consumer contracts. This method is to be preferred for several reasons, one of them being that the distinction between consumer contracts and non-consumer contracts is too simplistic. There are other contracts than B2B and B2C contracts, and there are also intermediate cases. These categories are useful, but, because they oversimplify the manifold reality of contractual relationships, they should not have too much effect either.

## 2. Evaluation of legal techniques restricting freedom of contract

### 2.1. The function of contract law

In discussing the restrictions on party autonomy and freedom of contract, we should not forget that the very first function of contract law is not to impose certain forms of behaviour but, rather, to enable certain forms of behaviour, to enable parties to exchange goods and services in the marketplace. Contract law enables exchanges that would otherwise not take place, by giving certainty to parties as to promises made by other parties. I know that some literature on the economic analysis of law has argued that we could do without contract law and that tort law is sufficient in itself; this requires a rule qualifying breaking of promises as a tort. In such a system, damages would, however, have to be measured in terms of only the reliance interest

and not the expectation interest. I will not discuss this here at length, but I tend to believe that a separate contract law is a useful thing and that when a contract is concluded or a promise made, the protection of the expectation interest is the better rule.

One of the great advantages of contract law and leaving the determination of the goods or services to be exchanged to the market participants is precisely that this approach does not involve centralising the decision-making concerning the damages to be paid (or other sanctions in cases of breach) in the hands of the government or in the hands of a judge. The law is not determining the content of every single exchange; it is creating a framework, which allows a market to function. Contract law is an essential part of that framework, competition law another one. Contract law can function properly only if one has a body of competition law also, if fundamental guarantees are in place that there is sufficient access to the market for new competitors, for new providers of goods and services. In that sense, rules of competition law are not restricting freedom of contract; on the contrary, they are creating it.

As should be evident, this does not mean that everything should be subject to the market mechanism and treated as a mere commodity. Traditionally, many 'values' were excluded from the market, *extra commercium*; they were protected against the market and in that sense excluded from party autonomy. Misconceptions concerning human freedom have gradually subjected many of these human values to market forces, with, e.g., the near abolition of anything that can seriously be called family law as one result in many Western European countries. This is, however, again outside the scope of the topic I address here.

## 2.2. Categories of restrictive devices

If we look at the various rules and principles found in European and national law that restrict freedom of contract, we can distinguish five categories of such rules or principles. Thereby we have to take into account as well the restriction of the freedom to conclude a contract or not to do so, such as the restrictions on the freedom to choose with whom one wants to, or does not wish to, establish a contract and the restrictions of the freedom to determine the contents of one's contracts. These rules consist of, in summary:

- (1) rules protecting reliance even when it deviates from the intention of the parties;
- (2) rules protecting the integrity of consent;
- (3) general norms relating to illegality;
- (4) specific mandatory rules on specific types of terms in contracts in general, or in certain types of contracts;
- (5) norms imposing contracts upon parties not willing to enter into a contract, or imposing extra transaction costs, especially so-called non-discrimination rules.

## 2.3. Protection of reliance

A first set of rules deals with the protection of reliance between the parties. These are not really restrictions on freedom of contract and party autonomy, and they are contrary to only one specific interpretation of party autonomy. The reliance principle is clearly present in the PECL. We find it already in article 2:102 of the PECL, 'Intention', which reads:

The intention of a party to be legally bound by contract is to be determined from the party's statements or conduct as they were reasonably understood by the other party.

I would call this a typical expression of the moderate reliance doctrine. This rule relates to the question of whether a contract has been concluded or not, but it is also relevant for the contents of contracts. Parties can avoid being bound by a statement or conduct by making clear that they do not intend something that might otherwise reasonably be deduced from it.

If we look next at the rules on interpretation of contracts, we come to article 5:101 of the PECL, which consists of three paragraphs. The first gives priority to the common intention of the parties where there is a common intention and it can be established. If a common intention cannot be established, other interpretation rules enter into play. These reliance-based rules are found in paragraphs 2 and 3. According to paragraph 2, "[i]f it is established that one party intended the contract to have a particular meaning, and at the time of the conclusion of the contract the other party could not have been unaware of the first party's intention, the contract is to be interpreted in the way intended by the first party". Thus, if a party is aware of the intention of the other party but does not warn that other party that he disagrees, he is bound by the intention of said other party. Finally, paragraph 3 states that "[i]f an intention cannot be established according to (1) or (2), the contract is to be interpreted according to the meaning that reasonable persons of the same kind as the parties would give to it in the same circumstances", thus referring to the normal meaning of



terms. The article has to be supplemented, *inter alia*, by article 5:103, setting forth the *Contra Proferentem* Rule: “Where there is doubt about the meaning of a contract term not individually negotiated, an interpretation of the term against the party which supplied it is to be preferred.”

These are all classical rules. They are not limitations to freedom of contract as such. They only oblige people who are concluding a contract to express themselves more clearly. There is nothing wrong with that.

Another important rule is found in article 6:101 of the PECL, on “Statements giving rise to contractual obligations”. This relates to the difficult borderline between contractual and non-contractual obligations, and especially between contract and pre-contractual information. As most contract law systems do, the PECL proceed from the idea that contract rules protect the expectation interest (‘positive interest’) and not only the reliance interest in the narrow sense of that expression (‘negative interest’), and thus follow the classical distinction between contract and tort. According to this classical distinction, statements not becoming part of the contract can give rise to damages only in tort; this also applies to pre-contractual information. Article 6:101 provides a rule for deciding upon the extent to which pre-contractual information becomes part of the contract — c.q., constitutes a promise.\*<sup>6</sup>

## 2.4. Protection of the integrity of consent

A second series of rules deals with the protection of the integrity of consent. In the PECL we find the traditional defects of consent addressed, such as mistake (4:103), fraud (4:107), and threats or coercion (4:108).<sup>7</sup> The mistake rule is to a large extent centred on the question of giving false information or retaining information; in the latter case, the question is also which of the parties had to provide the information. Finally, there is also a general rule on avoidance for excessive benefit or unfair advantage (PECL, article 4:109); in the new draft, the title of the article is to be ‘Unfair exploitation’. The new title makes it even clearer that the excessive benefit as such does not make the contract unfair; it is not objective balance that is required but the protection of the integrity of consent. Nor does imbalance as such constitute a ground for avoidance; there has to be a form of exploitation. The exploitation of dependence, trust, ignorance, needs, distress, improvidence, or the inexperience or lack of bargaining skills of the other party is a necessary element in order for the contract to be set aside. Surely, there is a danger of arbitrariness because of the rather vague character of the norm, and especially because it also applies to individual terms even when they have been individually negotiated. Although such a norm can lead to serious limitations of freedom of contract, it is a reasonable price to be paid for extending the market mechanism to weaker participants. The alternative to such a rule is a much more serious limitation of freedom of contract, consisting of regulation of the contents of contracts, strict price control, etc. The PECL rule does not install a doctrine of *iustum pretium* or something similar; this extra control does not apply to the price as such. If there are sufficient guarantees for normal functioning of the market, this is also the correct solution.

Further, the PECL have extended the control over terms that are not individually negotiated, as found in the unfair terms directive for consumer contracts, to all contracts (article 4:110). This article is not being revised, and the existing consumer *acquis* shall be integrated more specifically. The PECL adhere to the classical rule that this extra control does not apply to the core terms, such as price, and to individually negotiated terms.

Finally, some other rules can also be seen as protecting the integrity of a contract, such as rights of withdrawal (mainly in consumer contracts) and some requirements as to form. They are absent from the PECL but found in the *acquis* and are to be integrated into the draft CFR.

<sup>6</sup> The original PECL version (which is to be modified in the draft CFR) reads:  
Article 6:101: Statements giving rise to Contractual Obligations.

- (1) A statement made by one party before or when the contract is concluded is to be treated as giving rise to a contractual obligation if that is how the other party reasonably understood it in the circumstances, taking into account:
  - (a) the apparent importance of the statement to the other party;
  - (b) whether the party was making the statement in the course of business; and
  - (c) the relative expertise of the parties.
- (2) If one of the parties is a professional supplier which gives information about the quality or use of services or goods or other property when marketing or advertising them or otherwise before the contract for them is concluded, the statement is to be treated as giving rise to a contractual obligation unless it is shown that the other party knew or could not have been unaware that the statement was incorrect.
- (3) Such information and other undertakings given by a person advertising or marketing services, goods or other property for the professional supplier, or by a person in earlier links of the business chain, are to be treated as giving rise to a contractual obligation on the part of the professional supplier unless it did not know and had no reason to know of the information or undertaking.

<sup>7</sup> A ‘fifth’ defect of consent can be found in article 3:205 of the PECL, on avoidance by a principal of a contract concluded in his or her name by a representative involved in a conflict of interest.

## 2.5. Substantive invalidity

Some national systems, the PECL, and the draft CFR have different types of provisions leading to a judgement of substantive invalidity of a contract or contractual clause:

- a general clause that contains an independent ground for invalidity (15:101 PECL),
- rules spelling out the effects on the validity of the contract of prohibitions or mandatory prescriptions found in other rules of law (15:102 PECL), and
- rules invalidating specific types of clauses.

Examples of the last category are:

- the rule providing for the possibility of terminating contracts set forth as applying for an indefinite time (article 6:109 of the PECL), in order to avoid a situation where, in general, people can be bound for the rest of their life to a contract;
- the rule restricting penalty clauses (PECL, article 9:509);
- the rule restricting exemption clauses (PECL, article 8:109);
- the rule restricting agreements concerning prescription (PECL, article 14:601); and
- many other examples from the consumer *acquis* or in rules on specific types of contracts.

I will concentrate now on the general clause containing an independent ground for invalidity, found in the PECL's article 15:101, 'Contracts contrary to fundamental principles':

A contract is of no effect to the extent that it is contrary to principles recognised as fundamental in the laws of the Member States of the European Union.

Differing from article 15:102, this rule first of all provides an independent ground for invalidity that is formulated in very general terms. It also dictates as a necessary consequence the voidness of the contract, even though it was — *ex hypothesi* — freely concluded by the parties to it. This is clearly a very strong restriction on freedom of contract. And with all due respect to my colleagues who drafted or adopted these rules, I do believe that this is the wrong type of rule.

First of all, this rule is superfluous where the principle infringed upon is also embodied in a mandatory rule of law, as article 15:102 precisely states that the normal procedure is to look at the purpose of the rule, the seriousness of the infringement, and some other elements. Or, rather, article 15:102 declares the contract void even if there is no mandatory rule that is violated or where the purpose of the mandatory rule does not require the contract to be void and is satisfied with a less drastic effect. Nevertheless, if the infringed principle can be called 'fundamental', the contract must be void. It is clear that such a rule is too broad, too general.

It is too general for two reasons. First, the notion of "principles recognised as fundamental in the laws of the Member States of the European Union" is too vague. If we look at the comments to this article, we find that it refers to a very long list of fundamental principles: the fundamental freedoms set forth in the EC Treaty (free movement, etc.), the market competition principles in the EC Treaty, all of the rights listed in the European Convention on Human Rights, and even all of the human rights contained in the excessively long list of the EU Charter on Human Rights (also incorporated into the draft 'Constitution'). The comments even stress that the article refers to a very broad conception of fundamental principles.

This is going too far, especially because the article does not qualify at all the way in which a principle has to be infringed upon in order for the contract to be rendered void. Any type of infringement of such a principle leads to the voidness of the contract.

This contrasts against the tradition of the *ius commune* as well as the *Code Napoléon*. These more balanced legal systems did not use such a general idea. Instead, more specific categories of illegality were employed — essentially, three categories, upon which I shall now elaborate a bit more:

**(a) Performance of the contract would be illegal.** The first category consists of contracts where the object — in the sense of the agreed or promised performance — is in itself illegal, where 'in itself' means 'irrespective of the counter-performance'. A clear example is contracts whereby one promises to commit a crime or to do something that constitutes a crime. Another example is the contract whereby one engages in practices restricting competition or a contract whose performance requires that a non-licensed party carry out an activity that only licensed professionals may perform.

Even in this first case, voidness is not always the required sanction. That depends on the *ratio legis*, which can be the protection of the other party, or of third parties in general, or of the general interest. Further, the contract should not be deemed illegal if the performance is promised only on the condition of its not being illegal.

**(b) The *vinculum iuris* is illegal.** A second type of illegality is found where the performance is not illegal but it is contrary to fundamental principles of law to be bound by such a promise. The correct sanction is not voidness in the strict sense but — in most cases — unenforceability. Some examples may be of use here. Such a contract could involve a promise to marry another person (engagement); its performance is legal, but the promise cannot be binding; while it is not going to be forbidden to marry that person, one cannot be legally bound by a promise to do so. Other examples include a promise of some strictly personal act, which should not be enforceable; a promise to work for a certain employer until the age of retirement; a promise to engage oneself in an activity entailing unacceptable danger; and a promise to give blood. Further examples may include contracts whereby one promises in general to refrain from acquiring property or administering one's own property, or contracts excessively restricting the right to alienate specific goods or property.

However, not every contract whereby one engages oneself not to exercise certain fundamental freedoms is illegal in the sense of (at least) being unenforceable. Clauses in contracts limiting, e.g., freedom of speech 'on the job', freedom to engage in certain activities on rented premises, etc. should in general be held to be valid even though they limit fundamental freedoms. Such clauses should be invalid only when the party stipulating them has a monopoly, or at least a dominant position, in the marketplace **and** the stipulated restriction cannot reasonably be justified by the nature of the job, the premises, etc. Even in those circumstances, the sanction should instead be voidability, a sanction that would probably already follow from the article on unfair exploitation. But, again, the standard of infringement of a fundamental principle is insufficient to dictate voidness.

**(c) The exchange is illegal.** Finally, there is a third category of illegal contracts in the *ius commune*, one for which there is no promise of either a performance that is illegal in itself or a performance to which a person should not be held bound but is an illegal exchange. The contract is illegal because the promise of a performance that is in itself legal (e.g., payment of a sum of money) should not be made in exchange of the agreed counter-performance. The traditional formulation of this case is that it is not the object that is illicit but the cause of the contract (illicit cause). A clear example is the promise to pay a sum of money to a person as compensation for his or her commission of a crime (either a promise to a person who has already committed the crime or a promise to pay in the event that a crime is committed later). The object of the promise — to pay a sum of money — is not illegal, but the cause in the sense of exchange is. Other traditional examples include a promise to reward someone if (s)he marries or divorces a certain person, a promise to pay for sexual intercourse, etc., but in listing these examples, it already becomes clear that such contracts are not necessarily void in all situations. There are some contracts that have always been accepted and at least indirectly deal with these kinds of exchange, such as donations in view of and on condition of marriage (e.g., by parents to their children).

For this category it is also explained that certain promises may take the form of a gratuitous promise or a donation, but not of a promise for value, especially for money — a traditional example would be blood or organs, which may in many legal systems be donated but not sold. In other cases, conditional promises may be effected whereby the object of the condition is something that could not be held in obligation (the examples mentioned under 'b' above) — but such a condition is not always void.

The *ratio legis* is, in essence, that certain human values — such as family relationships, sexual relationships, etc. — should remain *extra commercium*, not simply being treated as commodities, which can be bought and sold. Many of these values have come under pressure of commodification in recent times, as I have mentioned above. The law should maintain rules preventing these values becoming such commodities and therefore keep them away from the market or allow them to be marketed only under special conditions. Surely, there is something like a marriage market in our societies, but it should nevertheless be kept separate from other markets and not take the form of a monetarised market.

**(d) Other categories and conclusions.** It is not helpful to replace these well-defined categories of illegality with a vague and general norm on fundamental principles. It is not helpful either to add a fourth category wherein neither the performance nor the exchange is illegal but illegality would follow from illegal intent or purpose of the contract. Also, the fact that a party in performing a contract might act illegally — e.g., by using illegal child labour or otherwise exploiting persons or by violating tax laws — is not a good standard. Such circumstances should render the contract void only if the other party participates in the illegality by exploiting this, such as by charging higher rent for letting the tenant engage in illegal or immoral activities on the rented premises, being complicit in tax fraud, negotiating a rebate in exchange for allowing the other party to act illegally, etc. — precisely the conditions under which the contract would already fall into our third category.

I hope the foregoing has shown that we do not need a vague rule such as that of PECL article 15:101 but instead would benefit from more precise rules on types of illegality. The legal effect of 'fundamental principles' — especially if intended to be a very wide category, such as everything that might, by some, be called a human right — cannot be put in a Procrustean bed of voidness only. The appropriate remedy is often another one than voidness, and voidness does not always advance the fundamental principle either.

Also, some fundamental principles are more fundamental than others. It is always very dangerous to have such a general transversal provision. The same is true, by the way, for Constitutional instruments dealing with fundamental freedoms. Some constitutions are in this respect clearly superior to others — namely, when they have precise rules on restrictions and remedies. The European Convention on Human Rights and the German Constitution have, for the most part, followed this wise model. The EU Charter has, regrettably, applied the opposite model, with vague general rules about the restrictions to fundamental rights and freedoms, such as article II-52 et seq. of the draft EU Constitution — and especially the infamous article II-54 on the prohibition of abuse of rights: “Nothing in this Charter shall be interpreted as implying any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms recognised in this Charter or at their limitation to a greater extent than is provided for herein.Ó Such a rule assigns too much importance to some rights and not enough to others, by treating them all as equally fundamental. Such a rule also shifts too much power over restriction of fundamental freedoms like freedom of contract toward bodies that are not democratically legitimated, such as courts, certain other governmental bodies, or non-governmental organisations.

I conclude that a vague general principle on voidness for infringement of fundamental principles is not very helpful and is actually often wrong.\*<sup>8</sup>

## 2.6. Imposition of contracts and its impostures

The final point of this paper deals with rules imposing contracts, or at least contractual negotiations, upon a party not willing to conclude such a contract. There are, in essence, two techniques for doing this: the direct and indirect. The indirect mode is seen where conclusion of a contract is made a condition for receipt of some benefit. For example, in order to receive subsidies from the government, to obtain a certain monopoly, to receive a certain licence, or the like, one is obliged to conclude contracts with any person soliciting a certain good or service. I will, however, deal only with direct interference with contractual freedom. The main form of such interference consists of so-called anti-discrimination law, in so far as it applies to the conclusion of contracts.\*<sup>9</sup>

Such rules are very different from the former type of technique. They do not protect reliance, they do not protect integrity of consent, they do not restrict the content of a contract by setting aside unfair terms, and they do not protect the fundamental freedom except in a very indirect way. They impose contracts by entitling persons — in theory, every person but, in practice, only members of protected groups — to obtain a contractual benefit from certain categories of persons in the market and sometimes even persons not so engaged. I have serious doubts about this technique as a legitimate approach limiting freedom of contract.\*<sup>10</sup>

### 2.6.1. Where a non-discrimination principle is legitimate ...

It is correct that non-discrimination is a traditional and justified principle for public services and for services provided by monopolists. In those cases, the principle is legitimate, because there is no alternative. If there is a monopoly on a certain service, which may thus be provided (or in fact is provided) by a single provider only, such a monopolist should be obliged to offer that service equally to all members of the society in question. It is the monopoly that justifies an obligation to treat all members of a given society equally. This is legitimate only with respect to goods and services that the market cannot provide, in exceptional cases where unique centralised planning and decision-making is better for the society than is decentralised decision-making by market participants. This may be the case for some public services, but it is not for goods and services in general.

<sup>8</sup> Meanwhile, the compilation and redaction team for the draft CFR has decided to modify article 15:101 of the PECL by means of an article that reads:

A contract is void to the extent that (a) it infringes a principle recognised as fundamental in the laws of the Member States of the European Union; and (b) nullity is required to give effect to that principle.

<sup>9</sup> See Council Directive 2000/43/EC of 29.06.2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin; Council Directive 2004/113/EC of 13.12.2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services; and Council Directive 2000/78/EC of 27.11.2000 establishing a general framework for equal treatment in employment and occupation.

<sup>10</sup> I have developed my critique of anti-discrimination law in other respects in some other contributions, such as the 2005 G. de Molinari lecture ‘De meest fundamentele vrijheid: de vrijheid om te discrimineren’ (The most fundamental freedom: The freedom to discriminate) — at <http://www.storme.be/vrijheidsprijs.pdf>, inter alia.



### 2.6.2. ... and where it creates fewer instead of more opportunities ...

However, to impose an obligation to treat all members of a society equally on market participants without monopoly or dominant position creates collective impoverishment. Equal opportunities generally mean fewer opportunities, not more.<sup>\*11</sup> Under this approach, it is not left to the many citizens with varying needs and preferences to decide which characteristics of other persons they consider relevant when negotiating and concluding contracts. Instead, legislators or, even worse, judges decide whether characteristics of other market participants with whom a person is willing or not willing to undertake a contract are relevant and proportionate and therefore legitimate in the eyes of the legal system. We give judges the power to determine in each individual case whether a preference of a contracting party for another contracting party is in that case relevant and proportionate — and thus legitimate unequal treatment or forbidden discrimination. We are completely centralising this evaluation in the hand of judges, but in a well-functioning market, an open market, irrational discrimination is penalised by the market itself<sup>\*12</sup> in a process of decision-making that is at once more democratic and a creator of more opportunities. If there is no monopoly, if access to the market is open, there are always going to be service providers who precisely fill the gap that is left by those who discriminate without a rational basis. The problem is that, in reality, the factors that a centralised decision-maker, like a legislator or judge, considers in general to be irrelevant or unacceptable for application in refusal of contracts (ethnic background, nationality, sex, etc.) are in reality relevant in many individual cases.<sup>\*13</sup> Probably not in general but in specific cases they can be perfectly rational and/or perfectly relevant.

### 2.6.3. ...and is even contrary to the equal protection of the law...

Moreover, imposing a duty not to discriminate gives the impression of equal protection being assured, but it is a far cry from guaranteeing equal protection. It is, rather, a form of social harassment, stimulated by the law; under the guise of equal rights, it grants unequal rights to members of certain categories against members of certain other categories.

It is unequal in two respects. Firstly, it imposes duties only on service providers, sellers, or employers, whereas the other party in the market remains free to discriminate, maybe not in theory but in all cases in practice. The employee still has the possibility to discriminate against employers in deciding whether (s)he wants to take a job or not, but the employer does not have this opportunity, so we see a form of unequal treatment under the guise of equal treatment.

Secondly, in practice such rules grant rights or claims only to members of protected categories, even if these protected categories are not necessarily always the same (e.g., in certain contexts, it may be women and in others it may be men, etc.).

In an earlier contribution<sup>\*14</sup>, I developed an explanation addressing why these anti-discrimination laws have developed in recent decades. The main reason is that the welfare state has made many more promises than it can fulfil. The welfare state has promised heaven on earth to all citizens, and it is impossible to deliver on these promises because, in order for this to be done, taxes should have been doubled. As the state can no longer pay for its promises by shifting the burden to the taxpayers as such, it pays for them by granting claims to any citizen against any other citizen — or, more precisely, against those persons who are so unfortunate as to be the nearest to be attacked with such claims. For the state, it is a much cheaper approach; it doesn't cost anything.

### 2.6.4. ... and destroying the open society

The way states have granted citizens the right 'not to be discriminated against' — i.e., the right to attack and harass other citizens who are active in markets or in civil society — is also destroying the open society and creating a society of distrust. Instead of favouring access of so-called weaker parties to goods and services, it prevents goods and services from publicly entering the market. Especially risk-averse parties will simply not make any public offers any longer, instead offering their goods and services only within private networks. I would be very stupid to publish a job offer if I have a good chance of finding a qualified person to

<sup>11</sup> See, for example, R. Epstein. *Equal Opportunity or More Opportunity? The Good Thing about Discrimination*. London: Civitas Institute for the Study of Civil Society 2002.

<sup>12</sup> Compare R. Epstein (see Note 11), p. 19.

<sup>13</sup> Compare R. Epstein (see Note 11), p. 13: "The factors regarded by anti-discrimination law as irrelevant for decision making are in fact highly relevant."

<sup>14</sup> M. E. Storme. *De juridisering van sociale verhoudingen van de negentiende eeuw tot vandaag*. — D. Heirbaut, G. Martyn, R. Opsommer (ed.). *De geschiedenis van het recht in de twintigste eeuw*. Iuris Scripta Historica series. Brussels: Royal Flemish Academy of Sciences and Arts 2005, p. 27 et seq., earlier in J. Velaers (ed.). *Vrijheid en gelijkheid: de horizontale werking van het gelijkheidsbeginsel en de nieuwe antidiscriminatiewet*. Antwerp: Maklu 2003, p. 147 et seq.



fill the position without making public that I am looking for someone and thereby risking this social harassment based on anti-discrimination laws. As a result, the 'weaker parties' for whom such laws are said to be made get even fewer opportunities, unless the state intervenes with even more totalitarian policies, interfering even in the strictly private spheres and networks. Insofar as the lack of chances to obtain certain goods and services of certain categories of persons is really a serious problem, there are much better solutions than anti-discrimination laws — solutions that are transparent, more equal and just, and less disturbing of legal certainty. These solutions require improving access to markets for new offerors, spreading the social risk to all by means of transparent taxation, and providing tax advantages for those who shoulder more than their share of this social responsibility. By contrast, anti-discrimination laws are forms of concealed taxation but unjustly spread, creating legal uncertainty and stimulating social harassment.

Let me thus finish with my *Ceterum censeo*: all prohibitions against discrimination by citizens without a monopoly have to be abolished.



Hent Kalmo

*Magister iuris,  
Doctoral Candidate, Université Paris X Nanterre*

# How Comparable are Legal Concepts?

## The Case of Causation

It seems that nowadays more and more lawyers share Rudolf von Jhering's obsession: to "compare everything that comes [their] way, domestic with the foreign, or the present with the past".<sup>1</sup> As the focus tends to shift from large legal families to particular institutions or individual legal concepts, it has already become a professional convention to add to almost every legal monograph, however limited its scope, a comparative section. It is also at the level of individual concepts that comparative law is generally taught. Emphasis on micro-comparison<sup>2</sup> has been promoted also by the work of the Study Group on a European Civil Code, which has been accompanied by the publication of a wealth of comparative studies. In tort law, for example, such books have been published on fault, damages, causation, contributory negligence, and on many other concepts. Many of these comparative studies and the work of the study group, often conducted in the face of 'massive resistance'<sup>3</sup>, share the aim of working out a draft European Civil Code that could serve as a 'common frame of reference' for future work. This is to be done, as Christian von Bar has put it, "without losing time and without wearing oneself out on generalities".<sup>4</sup> Now, it is to be hoped that this sense of urgency does not lead to a complete indifference of comparative law toward more theoretical issues. One such question, whose practical relevance might make us hesitate to categorise it among 'generalities', concerns the comparability of legal concepts. Eminent comparativists have in fact warned us not to compare 'apples with oranges'<sup>5</sup>, and every comparatively minded lawyer can probably enumerate many instances of seemingly similar concepts that function in a very different way in different legal systems. Limiting our attention to tort law, is the French concept of damages, for example, equivalent to the Belgian one? Or do the significant national differences in the use of the requirement of causation allow us to speak of 'the same' concept of causation or even of its 'common core' spanning different legal systems? As in translations from one language to another, we sometimes intuitively feel that the foreign counterpart of our domestic concept is not quite equivalent to it, carrying particular connotations that are not known to our domestic law.

<sup>1</sup> R. von Jhering, *Bilder aus der römischen Rechtsgeschichte. Das Occupationsrecht an herrenlosen Sachen einst und jetzt. Eine romanistische Elegie.* – *Juristische Blätter* 1880/11, cited in K. Zweigert, K. Siehr, *Jhering's influence on the comparative legal method.* – *The American Journal of Comparative Law* 1971 (19), p. 215.

<sup>2</sup> For the relative roles that macro-comparison and micro-comparison have had in the history of comparative law, see the succinct remarks of Hein Kötz in *Comparative Law in Germany Today.* – *Revue internationale de droit compare* 1999/4, pp. 753–768.

<sup>3</sup> See C. von Bar, *Working Together toward a Common Frame of Reference.* – *Juridica International* 2005, p. 21.

<sup>4</sup> C. von Bar, *Le groupe d'études sur un code civil européen.* – *Revue internationale de droit compare* 2001/1, p. 129.

<sup>5</sup> B. Markesinis et al. *Compensation for Personal Injury in English, German and Italian Law.* – Cambridge University Press 2005, p. 2.

The analogy from translation suggests an apparently easy way to account for the intuitive incomparability of legal concepts — affirming that the notions concerned do not have the same **meaning** in different legal systems. But it is evident that in making this claim we implicitly appeal to some view of legal meaning, and it is here that real difficulties begin. Many comparativists who conceive of law as a specific technique for achieving certain practical goals take as a rule what has been described by Herbert L. Hart<sup>6</sup> as the ‘operative’ use of legal language. Such an instrumental view of legal concepts — that the latter have no reference independent of the social purposes that they serve — also seems to underlie the ‘fundamental principle of comparative law’<sup>7</sup>, functional equivalence, according to which, despite all their dogmatic differences, most legal systems are expected to provide “identical or at least surprisingly similar”<sup>8</sup> solutions to a great number of practical problems. Practical similarity in spite of divergent normative vocabulary is, however, only the positive side of functional equivalence. Negatively, the principle implies that because it is only at the level of **integral** institutions that convergence of legal systems is to be expected, the comparison of **single** concepts may well turn out to be meaningless.

The aim of this article is to study this question in some detail. An effort will be made to show that the problem of incomparability of concepts across legal systems is closely related to their indeterminacy, which, in turn, results from what we shall call their functional indifference. My belief is that our understanding of both of these problems can profit considerably from bringing together two threads of academic research that have hitherto tended to run a parallel course: comparative law and the study of legal reasoning. In the material that follows, I set forth to discuss the comparability of legal concepts from a semantic point of view. The first question asked is therefore of a more general nature: what is the meaning of legal terms? Without hoping, of course, to offer even an approximate answer to this notoriously difficult question, I concentrate on two theories that emphasise, respectively, the meaning in ordinary language and the specifically legal meaning of legal language. I then go on to analyse some features of legal argumentation and show how these are partly responsible for the indeterminacy of legal concepts. Taking causation as an example, I argue that it is generally not an individual concept but a whole institution, a legal technique, that is the most useful unit of comparison. Finally, I undertake to point out a few limits to the purely instrumental view of legal language that the first part of the paper might seem to suggest, by showing how the ‘inertia’ of legal concepts can impose real constraints on legal argumentation and often stands in the way of completely equivalent solutions in legal systems with different dogmatic structures.

## 1. From a legal alphabet to individual decisions: The tribulations of legal meaning

The question that serves as the focus of this article can be phrased in the following way: how similar is the meaning of ‘causation’, or any other concept, in different legal systems? Obviously, if ‘A caused B’ implies something entirely different in two systems, comparing the two concepts is not necessarily very illuminating. We “cannot compare the incomparable”<sup>9</sup>, as Konrad Zweigert has put it. In fact, this approach itself, focusing on individual notions, might not seem well-advised. Our starting point can, however, be justified by considering that many legal theorists have believed that concepts are the most fundamental building blocks of law. Before his pragmatist turn, Rudolf von Jhering, for example, thought that fundamental legal concepts (such as legal impossibility or the difference between nullity and contestability) can be compared to the letters of an alphabet: just as the latter are concatenated to form words and phrases, legal notions are combined to create legal norms. Jhering considered this alphabet to be both universal and timeless. “All lawyers of all countries and of all ages”, he wrote, “speak the same language”.<sup>10</sup> To indicate this dependence of complex legal notions on more fundamental ones, Karl Bergbohm, an attentive reader of Jhering, envisaged the possibility of naming them in the manner applied for chemical substances.<sup>11</sup> Such ‘atomic jurisprudence’, intent on grounding the whole dogmatic edifice of law in hard and fast legal notions, marked its zenith in the work of Bernard Windscheid, who argued that a decision in law is “the result of a calculus in which legal concepts are the terms”.<sup>12</sup> In other words, legal reasoning was to be a “matter of pure calcula-

<sup>6</sup> See H. L. A. Hart. *Problems of the Philosophy of Law. – Essays in Jurisprudence and Philosophy*. Oxford: Clarendon Press 1983, p. 96.

<sup>7</sup> K. Zweigert. *Des solutions identiques par des voies différentes. – Revue internationale de droit comparé* 1966/1, p. 5.

<sup>8</sup> K. Zweigert. *Methodological Problems in Comparative Law. – Israel Law Review* 1972/4, pp. 466–467.

<sup>9</sup> *Ibid.*

<sup>10</sup> R. von Jhering. *Geist des römischen Rechts auf den verschiedenen Stufen seiner entwicklung*. Sechste Auflage. III Teil. 1. Abteilung. Leipzig: Verlag von Breitkopf & Härtel 1921, p. 9.

<sup>11</sup> K. M. Bergbohm. *Jurisprudenz und Rechtsphilosophie*. Bd. 1. Einleitung. Abh. 1. Das Naturrecht der Gegenwart: kritische Abhandlungen. Leipzig: Verlag von Duncker & Humblot 1892, p. 82.

<sup>12</sup> B. Windscheid. *Lehrbuch des Pandektenrechts*. Erster Band. 3. Aufl. Verlagshandlung von Julius Buddeus. Düsseldorf 1873, p. 60, paragraph 2.

tion in which the contents of the legal concepts are unfolded by logical deduction".<sup>\*13</sup> If such were still our vision of the law, the natural way for a comparativist to go about his or her task would be to compare fundamental legal notions across many legal systems; it would be at this level that all similarities and differences could ultimately be explained. In fact, it is interesting to note that such an inductive-comparative method was considered by Bergbohm to be the first stage in the creation of a truly general legal science.<sup>\*14</sup>

The theoretical underpinnings of this kind of conceptualism, or 'jurisprudence of concepts' (*Begriffsjurisprudenz*), were subjected to a ruthless, and profound, critique by Hans Kelsen. The author of *The Pure Theory of Law* intended to purify all legal notions of any non-positive, supposedly universal content. According to Kelsen, legal notions are nothing but convenient labels for bundles of norms, their meaning being entirely exhausted by the latter.<sup>\*15</sup> Such a 'dissolution' of legal concepts into individual norms has two important implications. First, even the commonest concepts can be absent from some legal systems. Consider, for example, 'nationality'. Kelsen stresses that, as this concept is not a conceptually necessary element of the state, it is in no way universal. In fact, it is perfectly imaginable that the norms of which the concept of nationality is made up might not belong to a given legal system. "If it was decided to confer political rights on all who inhabit, in a durable manner, the territory of the state [...]; if no one was guaranteed the right of abode or if the political procedure to expulse undesired persons from the territory of the state was abandoned; if there was no obligation to military service [...]; if, in addition, the state ceased to offer its subjects diplomatic protection abroad — there would be no reason to adopt the institution of nationality."<sup>\*16</sup> Of course, Kelsen did not have the intention to argue that the institution of nationality is not useful or even inevitable. At issue, rather, is showing that this inevitability is not of a conceptual but of an entirely practical nature — the role of the concept of nationality is to discriminate among the inhabitants of the territory of the state. Kelsen writes: "To what extent [...] the institution of nationality is superfluous is a different question. Even if it was admitted that it is **indispensable**, it would not follow that it is **theoretically** necessary."<sup>\*17</sup> Kelsen thus insists that, although there is no necessary link between the state, or a legal system, and the institution of nationality, the practical usefulness of the distinctions that this notion incorporates might still be such that the latter will in fact be a serviceable concept for describing most legal systems one might consider.

The second implication of Kelsen's view of legal concepts is that even if the same term appears in two legal orders, its meaning is very unlikely to be identical in the two systems. Let us consider the most paradigmatic of all legal concepts, that of the contract. If 'contract' is taken to refer to some non-legal phenomenon described as a 'meeting of minds', then we could indeed say that all legal systems make use of the same concept — minds are, after all, likely to meet more or less in the same way in, e.g., Estonia and South Africa. If, on the other hand, 'contract' is seen as a convenient heading under which norms that regulate certain ways of creating and changing rights and obligations are grouped, it becomes clear that this 'sameness' can refer only to some degree of similarity. It is, after all, hardly ever the case that the norms regulating the formation, modification and termination of contracts completely match those in other legal orders. The lesson that comparative law can draw from Kelsen's theory of legal concepts is therefore one of caution: even if it turns out that many legal systems make use of similar notions, their meaning can nevertheless be radically different. In other words, because there can be only a partial overlap of the norms that concepts stand for in different systems, "the comparison of systems by their concepts can lead to confusion and inaccuracies", as Basil Markesinis has written.<sup>\*18</sup>

There is one other point concerning which Kelsen's views are of great relevance for the purposes of this article. I will call it the theory of imposed meaning. It is well known that many 'ordinary' words undergo a change of meaning when incorporated into legal texts.<sup>\*19</sup> Even though this phenomenon is familiar to all

<sup>13</sup> H. L. Hart. *Jhering's Heaven of Concepts and Modern Analytical Jurisprudence. Essays in Jurisprudence and Philosophy*. Oxford: Clarendon Press 1983, p. 266.

<sup>14</sup> K. M. Bergbohm (Note 11), p. 64. For more details, see H. Kalmo. *Le positivisme de Karl Magnus Bergbohm: son arrière-plan et ses reflets dans la théorie pure du droit de Hans Kelsen*. — *Droits* 2006/42, pp. 199–228.

<sup>15</sup> In a similar vein, Niklas Luhmann has argued that "it has been very detrimental to the discussion of legal concepts that concepts have been considered in a wholly punctual manner, as if determined by discernible characteristics". The meaning of 'delegation', for example, is made up of individual decisions about whether it is necessary for the validity of delegation that its extent be specified, whether delegated authority may be delegated in its turn, etc. In other words, it is through such individual decisions that the meaning of legal terms is gradually defined. See N. Luhmann. *Das Recht der Gesellschaft*. Frankfurt am Main: Suhrkamp 1993, p. 387.

<sup>16</sup> H. Kelsen. *La naissance de l'État et la formation de sa nationalité: les principes; leur application au cas de la Tchécoslovaquie*. — *Revue de droit international* 1929 (4) 3, pp. 613–641 reprinted in C. Leben. *Hans Kelsen, Écrits français de droit international*. — PUF 2001, pp. 27–57. See pp. 51–52.

<sup>17</sup> *Ibid.*

<sup>18</sup> S. B. Markesinis. *Unité ou divergence: à la recherche des ressemblances dans le droit européen contemporain*. — *Revue internationale de droit comparé* 2001/4, p. 812.

<sup>19</sup> See F. Ost, M. van de Kerchove. *Le "jeu" de l'interprétation en droit. Contribution à l'étude de la clôture du langage juridique*. — *Archives de philosophie du droit* 1982 (27), p. 398.

lawyers, there is no generally shared opinion on how pervasive it is and whether it allows us to speak of anything like a specific legal meaning in general terms. It seems that Herbert L. Hart was of the view that a specifically legal meaning of words that also appear in ordinary language is the exception rather than the rule. He concedes that there are divergences between the legal and non-legal usage of notions such as ‘will’, ‘intention’, and ‘motive’. Hart also admits that law “because of difficulties of proof or as a matter of social policy, may often adopt what are called external or objective standards, which treat certain forms of outward behaviour as conclusive evidence of the existence of mental states or impute to an individual the mental state that the average man behaving in a given way would have had”.<sup>20</sup> Nevertheless, according to Hart, the fact that there are many legal rules that are inconsistent with the idea that a complex psychological fact — a ‘meeting of minds’ that jointly ‘will’ a certain set of mutual rights and duties — is required for a contract to come into existence, does not mean that the law cannot make the validity of a contract depend on certain ‘mental elements’ and thus approximate to the non-legal meaning of these terms. The Hart/Honoré book on causation also relies on the idea that it is the common-sense notion of cause — or, rather, a variety of causal concepts — that underlies the legal use. Of course, “the determination of the ground of responsibility falls within the province of legislators and, in default of clear guidance from them, of judges”. But once the decision has been reached to make causal issues relevant, it is the common-sense notion of causality and not some legal construct that is in play. Although there are other grounds, such as policy considerations, for determining the allocation of responsibility, these ‘second-stage considerations’ are brought to bear only after causal issues have been resolved and should therefore be kept separate from the latter.<sup>21</sup> Tony Honoré has thus explicitly contended that there is no special legal meaning of causation.<sup>22</sup>

The position I call Kelsenian implies the opposite point of view: because of the institutional nature of law, it is the authoritatively imputed meaning that should be our starting point: “If a legal order attaches to a certain fact as condition a certain consequence, then it must determine in what manner, and especially by whom, the existence of the conditioning fact is to be established. [...] It is a fundamental, though often overlooked, principle of legal technique that in the province of law there are no absolute, directly evident facts, no facts ‘in themselves’, but only facts established by the competent authority in a procedure prescribed by the legal order. [...] In the province of law only the authentic opinion, that is, the opinion of the authority instituted by the legal order to establish the fact, is decisive. Any other opinion as to the existence of a fact as determined by the legal order is irrelevant from a juristic point of view.”<sup>23</sup> In deciding whether some legally relevant requirement is fulfilled, we cannot thus, according to Kelsen, have recourse to some common-sense criterion but, rather, need to adopt the perspective of the administrators of law. “It is not the actual will, the actual intention, that the judge has to identify in certain cases — for these he can not identify — and that belong to conditions of responsibility but [...] external conditions on which the judge relies to **presume** the presence of mental states,” he writes.<sup>24</sup> It also follows from this that the kind of metamorphosis that extralegal language undergoes by being incorporated into positive law hinges to a considerable extent on the area of law to which the relevant norms belong. In other words, the specificity of legal language does not result only from the autonomy of the legal system as a whole; it also stems from the peculiarities of its different component parts. Hart and Honoré treat causation in criminal law and tort law as essentially the same. We should, however, also take into account the fact that the rules governing the producing of evidence — and, by way of consequence, the establishment of conditioning facts — tend to be so different in criminal law and tort law that the same word or expression naturally has a very different meaning in these two areas of law. In many countries where parts of the social security law make use of the requirement of causation, the interpretation diverges from that applied under tort law. Although in Switzerland, for example, both tort law and social security law distinguish between a natural and an adequate relationship between cause and effect (defining these terms identically), the case law is not the same.<sup>25</sup> The main reason for this is, of course, that considerations of fairness play a more conspicuous role in social security law. But an additional, less visible circumstance might be that the rules of procedure also diverge in these two branches of law.

<sup>20</sup> H. L. A. Hart (Note 6), p. 96.

<sup>21</sup> H. L. A. Hart, T. Honoré. *Causation in the Law*. Second edition. Oxford: Clarendon Press 1985, p. xlvii.

<sup>22</sup> T. Honoré. *Necessary and Sufficient Conditions in Tort Law*. – D. G. Owen (ed.). *Philosophical Foundations of Tort Law*. Oxford 1995, p. 363.

<sup>23</sup> H. Kelsen. *The Law as a Specific Social Technique*. – *University of Chicago Law Review* 1941/9, p. 94. See also H. Kelsen. *Reine Rechtslehre*. Anhang: ‘Das Problem der Gerechtigkeit’. 2., bearb., erw. Auflage. Wien: Deuticke 1983, p. 323.

<sup>24</sup> H. Kelsen. *Hauptprobleme der Staatsrechtslehre entwickelt aus der Lehre vom Rechtssatze*. Zweite Auflage. Tübingen: J. C. B. Mohr 1923, p. 103. According to Hart’s reading of Kelsen, the latter would have little to say in opposition to juristic definitions that contain psychological elements, “[f]or [he] expressly says that in the case where the law itself makes such elements relevant, e.g. where mens rea is a condition of criminal responsibility, then the sanction is directed to a psychologically qualified delict.” See Hart’s *Kelsen Visited* in H. L. A. Hart (Note 6), p. 297, referring to Kelsen’s *The General Theory of Law and State*. Cambridge, MA: Harvard University Press 1949, pp. 55, 66. It seems, however, that Hart is here understating the imputational element in the Austrian lawyer’s position, for Kelsen’s criterion of legal relevance is not ‘being found in the relevant law’ but, rather, ‘being applicable by the administrator of law’.

<sup>25</sup> See A. Rumo-Jungo. *The Impact of Social Security Law on Tort Law in Switzerland*. – U. Mahnus (ed.). *The Impact of Social Security Law on Tort Law*. Vienna: Springer 2003, p. 204.



That legal science reaches not to the real mental will but only to the legal presumption of it is, assuredly, not a very novel claim. Kelsen does not, however, limit himself to pointing out such observational constraints. He goes further and argues that it is the application of sanctions that implicitly defines the meaning of legal terms. He states: “A decision that establishes [someone’s] fault says nothing more nor nothing less than [a decision] that ascertains the presence of a punishable illegal act. We must also get used to the idea that it is not correct to conclude: a fault, therefore a sanction, but on the contrary [...]: just as it is the sanction that makes a certain act illegal, and as it is thus from a sanction that the [illegality of an] act is to be concluded, so we must deduce: because and in so far as the sanction, therefore and to that extent the fault.”<sup>26</sup> This is the other side of the preceding argument: because of the institutional character of the application of law, not only are there no facts ‘in themselves’ in law but also there is no meaning ‘in itself’. Although it must be admitted that Kelsen’s remarks are somewhat mysterious, his aim seems to be to propose a ‘realist’ definition of ‘fault’ that would rely not on any extralegal usage, nor even on the vocabulary that the administrators of law themselves use, but exclusively on the way this term is related to the substance of law — the sanction. If a legal norm makes the application of a sanction conditional on a certain type of behaviour and if, in addition, fault is held to be a condition of illegality, then this kind of behaviour implies *eo ipso* fault. In other words, if we adopt a purely descriptive viewpoint on law, then we should take the tangible element in it, the sanction, as a guide — our aim being to obtain a realist definition of legal terms, we should read it from the legal solution. Although concepts are used to justify decisions in law, the latter are the determinant, not the determined element, for an observer of law.

It must be admitted that Kelsen does not expand this idea of a norm as a backward definition of legally relevant terms into a full-fledged theory of juristic meaning. But nothing seems to stand in the way of such generalisation. We can say that what counts as the meaning of a word in a legal text is the way the word is implicitly defined in the actual administration of law. It is not our own or someone else’s non-authoritative beliefs about the ‘ordinary’ or ‘natural’ usage, nor this usage itself. From a purely descriptive perspective, it would thus not be correct to interpret the requirement of causation in law as if referring to some extralegal phenomenon that is somehow given the power to bring about legal changes. We should instead adopt a rigorously *ex post* point of view: any time someone’s liability for some loss is affirmed in law, the existence of a causal link between this person’s behaviour and the damage is also to be assumed in a retrospective manner. It is only by grouping together all such instances of imputed causation and by comparing them with our common-sense notion of causality that we can ascertain whether any similarity between the two exists or if even any uniform semantic core emerges from these decisions. Of course, no-one would wish to deny that in many cases legal and ordinary meanings coincide. Communicative demands, as Robert S. Summers has pointed out<sup>27</sup>, are enough to ensure that the two do not drift too far apart. The extralegal meaning might also have great heuristic value in accounting for court decisions. These considerations notwithstanding, it seems clear that the institutional setting within which law is embedded is sure to stamp at least some mark on **all** words that appear in legal reasoning. Legal use is, as Hart himself has argued, an operative use of language where conformance to the ordinary meaning is by no means the only goal. In any case, such conformity can certainly not be taken for granted. As Kelsen suggests, juristic meaning is not a premise but the endpoint of our description of a legal system.

## 2. The same solution by different means

Even if we admit that the meaning of legal terms is ‘endogenous’ in the sense of being implicitly determined by the administration of law, we have not advanced a great deal until we have pointed to some method for extracting this meaning from the available body of case law. Now, someone might claim that a rigorously descriptive approach precludes us from trying this: we should halt at this stage and refrain from a largely speculative and inevitably non-authoritative interpretation of court decisions. In other words, we should content ourselves with a list of solved cases and should not look for a way to justify the decisions therein. Such an extremely restrained position would, however, hardly allow us to resolve any of the practical issues that face a lawyer. For this, we must try to make sense of individual decisions and find out what they imply as to the meaning of terms that happen to interest us. Of course, this is not an easy task. Take the following example.<sup>28</sup> Suppose a statute provides that certain documents shall be filed not later than 5:00 pm on a certain date. Suppose further that A files these documents on the required day but at 5:31 pm. The responsible clerk, enforcing the statute, refuses to accept them. Learning this, A files an action for extraordinary relief, asking the court to order the clerk to accept the documents in question. Fortunately for him, the court

<sup>26</sup> H. Kelsen (Note 24), p. 142.

<sup>27</sup> R. S. Summers. The Argument from Ordinary Meaning in Statutory Interpretation. – Northern Ireland Legal Quarterly 1992 (43), p. 226.

<sup>28</sup> This is a simplified version of the case of *Hunter v. Norman* reported by Frederick Schauer. See F. Schauer. Formalism. – Yale Law Journal 1988 (97), p. 515.

issues the order but without giving any reasons for the ruling. Now, faced with the need to interpret the decision, should we take it to mean that, for legal purposes, 5:31 pm is held to be equivalent to 5:00 pm? There would certainly be nothing paradoxical about this 'liberal' interpretation of '5:00 pm'. The mere possibility of this interpretation does, however, not mean that it is necessarily the most convincing way to account for the ruling. It should be noted that what is at issue here is not a **causal** explanation, in terms of motives, secret ends, etc., of the way the decision came about. We are interested in a retrospective justification of the ruling, not to convince ourselves of its well-foundedness but to find out what it implies concerning the meaning of legal terms. Here, it seems clear that the decision does not imply anything with regard to other instances where '5:00 pm' or similar expressions appear in legal texts. Instead, the case can be explained much better by saying that, although A was late — and the rule barring him from filing the documents is applicable in principle — an exception from the rule was made in his favour. It therefore appears that while the interpretation of court decisions must always remain somewhat speculative, given the rules of justification in a legal system, not all explanations are equally convincing.

But let us take a more topical, and a more complicated, example.<sup>29</sup> Suppose that the power supply of an entire neighbourhood has been cut off by an act of D, a building company. The cables belong to the supplier of electricity. A factory plant (P1) and its customers (P2) suffer damage. P1 and P2 sue D. Now, suppose the court decides that D is liable for the damage caused to P1 but does not have to compensate P2's loss. Here, we might have real difficulties in interpreting the decision. What we can infer is that because wrongfulness, a causal connection and damage all are conditions of liability, these must have been held to be present as far as the relationship between D and P1 is concerned. The lack of responsibility toward P2 can, however, be explained in a number of ways. It might be that there was held to be no relevant damage (e.g., the damage was held to be pure economic loss), that the causal link was not adequate or did not exist at all, that there was no fault because this type of loss does not fall within the category of risk against which the relevant statute was designed to protect, or something else entirely. Again, it is obvious that the manner in which the solution is to be justified depends very much on the kind of conceptual distinctions that are available in the legal system concerned. What this example serves to illustrate is how difficult it can be to extract the meaning of legal terms from their 'implicit definitions'. It is usually not one individual concept that is defined in such complex decisions but, rather, a number of interrelated concepts. In the case of belatedly filed documents, there was a more or less obvious way to reconstruct the reasoning behind the decision, but this is not always so. We are generally not able to give 'realist' definitions, in a Kelsenian sense, of legal terms because there is simply no way in which we could unequivocally link them to the application of sanction or whatever the final result of the court decision might be. It is also not entirely correct to say that courts interpret legal terms if this is taken to mean that in deciding individual cases courts impute a determinate meaning to them. Legal meaning is instead the result of our own *ex post* reconstruction, which is certainly not as easy as the Kelsenian idea of a backward definition might lead us to think.

It could perhaps be claimed that the type of indeterminacy I have been describing arises from an insufficiency of case law to interpret. That this is not the case can be seen by considering the following hypothetical situation. Suppose there are two legal systems with an identical dogmatic structure. Suppose further that a great number of factually equivalent tort cases have been solved in these systems in exactly the same manner (in the sense that responsibility has been assigned identically). Now, even with such an abundant body of cases, we could still not say whether the concept of causation functions similarly in the two systems. This is because there is theoretically an infinite number of ways to rearrange terms in the 'equation of responsibility' (to borrow an expression from Basil Markesinis) and still arrive at the same end result. To negate someone's responsibility, we can say that there was no fault, no damage, or no causal link between the defendant's behaviour and the loss of the victim<sup>30</sup>; that the damage was extraordinary; or anything else from a rather long list of possibilities. Lord Denning, considering the problem of economic loss, has expressed this in very clear terms: "The more I think about these cases, the more difficult I find it to put each into its proper pigeon-hole. Sometimes I say: 'There was no duty.' In others I say: 'The damage was too remote.' So much so that I think that the time has come to discard these tests which proved so elusive. It seems to me better to consider the particular relationship in hand, and see whether or not, as a matter of policy, economic loss should be recoverable, or not."<sup>31</sup>

But if the only information we had were the facts of the cases and the decisions rendered as to who is to bear the damage, we would have nothing to guide us in apportioning the aggregate meaning — the allocation of responsibility — among individual concepts. Court decisions are, of course, not generally so arcane as to make reconstruction of the reasoning behind them altogether impossible. The problem is, however, real enough, and it is hardly unusual to see many competent lawyers argue about which 'theory' explains the

<sup>29</sup> Many of the examples in this article, including the following one, come from J. Spier (ed.). *The Unification of Tort Law: Causation*. The Hague: Kluwer Law International 2000 (Unification of Tort Law), pp. 4–7.

<sup>30</sup> There seem to be significant differences in the way decisions are justified in tort law depending on whether responsibility is affirmed or negated, but this is an issue we cannot pursue here.

<sup>31</sup> Cited in S. Deakin, A. Johnston, B. Markesinis. *Markesinis and Deakin's Tort Law*. 5<sup>th</sup> ed. Oxford: Clarendon Press 2003, p. 84.

case law best — whether it can be described, for example, as an application of some ‘theory’ of causation, as proceeding from a certain typology of damages or still something else. Even within a given legal system, there are often many different ways to approach the same question. It has, for example, been written that “[t]he fluidity and equivocation of the basic concepts of negligence make it important to avoid too rigid an insistence on finding the ‘correct’ technical form in which to phrase an issue. Some questions may equally well be put in terms of either duty or causation [...]”.<sup>32</sup> The hypothetical situation of ignorance I described previously — two legal systems having reached precisely the same solutions — demonstrates that it is not only the paucity of, or contradictions in, the available cases that are at the source of the vagueness of legal concepts. The latter can be indeterminate even if the available case law is neither scarce nor erratic.

The problems we have been discussing — indeterminacy of legal terms and their limited comparability across legal systems — are, as already pointed out, partly rooted in the circumstance that it is possible to arrive at the same result in many different ways. In comparative law, this idea goes under the name ‘functional equivalence’, a notion that Zweigert has expressed as follows: “[D]ifferent legal systems find equal or at least astonishingly similar solutions — often down to the details — for similar problems, in spite of all differences in historical development, systematical and theoretical concepts and style of practice”.<sup>33</sup> Although the ‘law of functional equivalence’ is usually taken to refer to the practical convergence of institutions that belong to several legal orders, we can make use of a similar principle, the one referred to in this work as functional indifference, that is also relevant in describing individual legal systems: it is possible to rely on different arguments, or concepts, to arrive at the same desired solution. The word ‘concept’ is used in a broad sense here, embracing all available distinctions that can be used to justify a decision. Following Niklas Luhmann, we can view legal terms as depositories of distinctions that have been made in the past and can henceforth be relied on to justify conclusions in law. In fact, different legal systems sometimes articulate apparently similar notions in very different ways. For example, courts in Germany often distinguish between, on the one hand, a causal link between the tortious act and the infringement of the victim’s right and, on the other hand, a causal link between the infringed right and the ensuing damage. This distinction makes it possible to argue against responsibility by saying that while one type of causation is present, the other is not. A very common distinction, that is to be found in some form in most legal systems, is the distinction between cause in fact and a legal cause or between an immediate and a remote cause. Alternatively, instead of ‘breaking down’ the concept of causation in this way, supple application of rules can be achieved by introducing a distinction between direct and indirect damages, by distinguishing among different degrees of fault, etc. Analogous to scholastic *distinctiones*, such conceptual means make possible an almost endless array of ‘yes but’ arguments that can all be relied on to find ‘similar solutions to similar problems’.

The principle of functional indifference — ‘the same solution by different means’ — can be illustrated well by the Belgian case law on causation. Under Belgian law, there is in principle no difference between factual and legal causation: to be qualified as a cause, an event must fulfil the sole requirement of being a *conditio sine qua non* for the ensuing damage. Obviously, if this broad formulation of the theory of the equivalence of causes were taken at its face value, one would be tempted to conclude that the way the Belgian courts apply liability rules must be very different indeed from the approach seen in other countries. “From judging published case law, however, it appears that, although lip service is consistently paid to the theory of equivalence of conditions, its application does not really lead to unacceptable results,” according to Herman Cousy and Anja Vanderspikken.<sup>34</sup> In other words, different means are found to take the sting out of the equivalence theory. Or consider a somewhat more exotic example. Under the Ottoman Mejelle Code, as also under the Roman *lex Aquilia*, only damage by direct physical influence, *damnum corpore corpori datum*, was actionable. For example, when an animal, frightened at the view of someone, escaped and got lost, the person was not held to be responsible. Similarly, if someone let out a caged bird, no responsibility followed because there was no direct contact with the bird. We would, however, be mistaken if we were to think that, because of its restrictive concept of causation, the Mejelle Code allowed those malicious persons who took pleasure in frightening animals or freeing birds to go entirely unpunished. Here, as the commentator puts it, “[the] intention to harm makes up for the lacking causal connection *corpore corpori*”.<sup>35</sup> So, when the animal was frightened or the bird freed **on purpose**, responsibility still followed. These are only a few examples showing that legal systems are not, in fact, at the mercy of their concepts. In many cases, the solution can admittedly be ‘built up’ of concepts without regard to the end result, and this can very well be the way in which many ‘easy’ cases are actually solved. Windscheid’s idea of a decision in law as a mere calculus is certainly grounded in the everyday practice of lawyers. When, however, a serious compensation gap or a similar undesired consequence is seen as a solution to this calculus, some concept is sure to be found elastic enough to make up for the perceived deficiency of others. Sometimes, concepts can even be called upon to render

<sup>32</sup> *Ibid.*, p. 83.

<sup>33</sup> K. Zweigert (Note 8), p. 469.

<sup>34</sup> H. Cousy, A. Vanderspikken. Causation under Belgian Law. – The Unification of Tort Law (Note 29), p. 26.

<sup>35</sup> C. Chenata. La théorie de la responsabilité civile dans les systèmes juridiques des pays du proche-orient. – Revue internationale de droit compare 1967/4, p. 891.

some *ad hoc* service, such as when a causal link is held to be present only because some of the defendants happen to be insolvent.<sup>\*36</sup>

The implications of functional indifference are largely similar to these that have been drawn from the notion of functional equivalence. Just as it is only at the level of a whole institution that comparison is likely to be meaningful, it is within the context of a conclusion of law, resulting in a practical solution, that the meaning of legal terms can be understood. It has been written that “[t]he statement [...] that there is no *Grundbuch* system in the United States would be incorrect if one failed to add the fact that the functions of the Civilian official title registration — the *Grundbuch* — have been taken over to a considerable extent by privately owned title insurance companies”.<sup>\*37</sup> In a similar vein, it could be said that the statement that Belgium applies a one-step approach to causation, the but-for theory, is incorrect if one does not add that “somehow — and mostly via other ways than by openly declaring a departure from the official equivalence theory — the courts manage to reintroduce most of the limitations which are sought by other theories”.<sup>\*38</sup> In other words, similarly to language, which refers to extra-linguistic reality only at the level of a whole phrase — saying something to someone here and now<sup>\*39</sup> — the content and tenor of individual legal terms is revealed only at the level of a decision of an administrator of law on some practical question here and now. This is the semantic aspect of functional indifference. The comparative aspect is that even in the case of very similar dogmatic frameworks, the comparison of individual concepts across different legal systems might still turn out to be of very limited value if the function assigned to the compared concept diverges considerably in the two systems. Thus, comparing causation in a country where it is used as a means of apportioning liability and a country where the same purpose is fulfilled by having regard for the respective gravity of the faults of the defendant and the victim might well amount to comparing apples with oranges. It, of course, always remains open to us to ask how the division of labour among different concepts is to be effected in view of the desirability of enhancing the flexibility and the ease of administration of a given scheme of liability — to ask, for example, whether a certain type of cases is better seen from the angle of causation or that of wrongfulness. Such an evaluation would be very much in line with Zweigert’s call “to consider and to prove which of several solutions of a problem is more practical and more just”.<sup>\*40</sup> However, this can be undertaken only when all of the conceptual methods for achieving the same result have been considered.

### 3. Limits to a purely instrumental view of legal language — the ‘inertia’ of concepts

We have seen how legal terms can be applied in many, sometimes ingenious, ways to tip the end result in the desired direction. This has led some comparativists to adopt an openly instrumental view of legal vocabulary. Basil Markesinis has gone so far as to claim that tort law concepts “are nothing but words that help to phrase decisions and not reasons for these decisions”.<sup>\*41</sup> He reminds those who tend to take legal concepts too seriously that the latter can generally be manipulated to “espouse the positions of legal policy”.<sup>\*42</sup> Thus, the language of cause often serves “to decide questions of policy, such as which of the parties is best placed to shift the loss in question or which outcome will best promote loss prevention in that context in the future”.<sup>\*43</sup> Under the compulsory accident insurance schemes in social security law, establishing the causal link is also often influenced by social considerations (so-called *sozialrechtliche Theorie der wesentlichen Ursache*). In ‘formalistic’ European legal systems, where political considerations can generally not be directly relied on, many issues of social policy are indeed often addressed by agile use of concepts like wrongfulness, causation, and damage. As Deakin, Markesinis, and Johnston argue, flexible, sometimes even amorphous concepts allow us to use old tools — often of Roman origin — “to meet social needs of a new and different era”.<sup>\*44</sup>

But does all of this justify a view that legal reasoning is nothing but a surface appearance, offering little resistance to the undercurrents of legislative policy? Admittedly, the requirement of causation is sometimes used very liberally indeed. Concepts do not, however, seem so malleable as to permit **any** use to be made of

<sup>\*36</sup> For an argument along these lines, see S. Galand-Carval. Causation under French Law. The Unification of Tort Law (Note 29), pp. 53–61.

<sup>\*37</sup> K. Zweigert, K. Siehr (Note 1), p. 222.

<sup>\*38</sup> J. Spier, O. A. Haazen. Comparative Conclusions on Causation. — The Unification of Tort Law (Note 29), p. 130.

<sup>\*39</sup> See P. Ricoeur. *La métaphore vive*. Paris: éditions du Seuil 1975, p. 95.

<sup>\*40</sup> K. Zweigert (Note 8), p. 473.

<sup>\*41</sup> S. B. Markesinis. Réflexions d’un comparatiste anglais sur et à partir de l’arrêt *Perruche*. — *Revue trimestrielle de droit civil* 2001/1, p. 94.

<sup>\*42</sup> S. B. Markesinis. Unité ou divergence: à la recherche des ressemblances dans le droit européen contemporain. — *Revue internationale de droit compare* 2001/4, p. 821.

<sup>\*43</sup> S. Deakin, A. Johnston, B. Markesinis (Note 31), p. 185.

<sup>\*44</sup> *Ibid.*, p. 61.



them in practice. An analogy may be discerned here with the role of the normative vocabulary that is employed for the description and evaluation of political life. It has often been assumed that the connection between ideology and political action is a purely instrumental one, as if the former relates to the latter in an entirely *ex post facto* way. But this, as Quentin Skinner tells us, must be a misunderstanding: “Consider, for example, the position of an agent who wishes to say of an action he has performed that it was honourable. [...] [As] Machiavelli shows, the range of actions which can plausibly be brought under this heading may turn out — with the exercise of little ingenuity — to be unexpectedly wide. But the term obviously cannot be applied with propriety to describe [just] **any** Machiavellian course of action, but only those which can be claimed with some plausibility to meet the preexisting criteria for the application of the term.”<sup>45</sup> From this, Skinner draws the conclusion that “the problem facing an agent who wishes to legitimate what he is doing at the same time as gaining what he wants cannot simply be the instrumental problem of tailoring his normative language in order to fit his projects. It must in part be the problem of tailoring his projects in order to fit the available normative language.”<sup>46</sup>

Now, the available normative language is not the same in all legal systems, and whereas in both politics and law everything can be justified in principle, this is not necessarily so within the established conceptual distinctions. Because of the principle of *res judicata*, the formal validity of court decisions obviously does not hinge on their conformity to the prevailing doctrine or the precedent of case law. It would, however, amount to a confusion between formal validity and acceptability to conclude from this that the reasoning of the administrators of law is not constrained at all. It is significant that in making his case for legal justification as a ‘surface’, Markesinis refers to a very exceptional case solved by the highest civil court in France. The *Cour de cassation* can certainly side-step many constraints that limit the manoeuvring room of lower-level courts. If new distinctions and qualifications can always be introduced, then there is surely no limit at all to what can be justified in law. Most judges are, however, very unwilling to engage in revolutionary semantic innovation; they try to justify the solutions they adopt within the existing conceptual framework. This framework, as it stands, is generally rigid enough to exclude at least some arguments. It is remarkable that even economic analysts of law, who have worked out an entirely policy-oriented notion of causation, seem to feel constrained to respect at least to some extent the ‘pre-existing criteria for the application of the term’. As Martin Stone writes: “If private liability actions are to be a means of spreading accident losses, there is no reason, at least so far as concerning the realization of **this** goal, for there to be **any** causal relationship between the parties. (Quite possibly, a party not — even remotely — connected to the accident, say [...] a manufacturer with a large sales base, would be an even more effective loss-spreader if **it** were liable).”<sup>47</sup> Similarly, to continue this line of reasoning, it might well occur that someone who is not at all — or who is very remotely — connected to the accident happens to be either the cheapest cost avoider or the cheapest insurer. If we apply the purely economic criterion of causation, it inevitably follows that the behaviour of this ‘outsider’ should be held to be the cause of the accident. The reason this cannot be done convincingly is obviously that this interpretation would be very difficult indeed to reconcile with the way the requirement of causation is generally applied.

In addition to the semantic ‘inertia’ of concepts, legal argumentation is also subjected to constraints that result from the internal configuration of legal systems.<sup>48</sup> To illustrate this point, we propose the following example. Suppose a statute requires a carrier by sea to keep animals in pens, the purpose of this requirement being to prevent the spread of disease. While P’s animals are being carried on deck without pens they are swept overboard in a storm. If they had been penned, they would not have been lost. Now, let us assume that the judge who is called upon to solve this case feels that it would be an unsatisfactory result to make the carrier liable but the legal system concerned does not admit the ‘protective purpose’ theory. There are several means to achieve this result: it could be claimed that there was no fault; the relevant law may, as it does in Italy<sup>49</sup>, list several dangers that exonerate the carrier from liability, storms being among them; etc. Some arguments, although possible, would be difficult to adduce. It would, for example, be hard to argue that the defendant’s omission was not a but-for cause or even an adequate cause of the loss of animals if the storm clearly wasn’t such that the animals would have perished anyway. The point we wish to underscore is that, despite the argumentative equivalence of these justifications — they would all result in no responsibility for the carrier — making recourse to any one of them might not be easy and might in fact involve a substantial ‘cost’ for the judge. One component of this cost is the external effects of the conclusion: the declaration that there was no fault could have implications for other aspects of the case that the court might very well want to avoid. Such a normative ‘spill-over’ is sometimes avoided by limiting the effects of the interpretation to one branch of law. A case in point is the divergent qualification of the same legal acts for civil and adminis-

<sup>45</sup> Q. Skinner. *The Foundations of Modern Political Thought*. – Cambridge University Press 1978, p. XII.

<sup>46</sup> *Ibid.*

<sup>47</sup> M. Stone. *Focusing the Law: What Legal Interpretation is not*. – A. Marmor (ed.). *Law and Interpretation*. Oxford University Press 1995, p. 38.

<sup>48</sup> For a detailed analysis of many such constraints, see M. Troper et al. *Théorie des contraintes juridiques*. Paris: L. G. F. J. 2005.

<sup>49</sup> F. D. Busnelli, G. Comandé. *Causation under Italian Law*. – *The Unification of Tort Law* (Note 29), p. 85.



trative law purposes. If normative effects are disconnected in this way, it could very well be the case that a contract is null and void in one area of law and perfectly valid in the other. Should different interpretative practices develop, it is also possible to apply the requirement of causation liberally in social security law, in the service of fairness, without thereby impairing the foreseeability of the application of general tort law norms. There is, however, no reason to believe that the normative implications of a decision can always be localised in this way. In solving individual cases, it might be difficult to avoid the extension of a certain qualification — the presence of a causal link, the degree of fault, etc. — to other aspects of the same or closely related accidents.

An even more important component of the cost of manipulating concepts consists in the generalisability of conclusions in law not only to other aspects of the particular case in hand but also to other, similar instances. We already had occasion to refer to Luhmann's description of legal concepts as repositories of distinctions that have been made in the past. When a court makes use of a legal term, it adds to this historical weight, and this can evidently have unwanted consequences. Consider a case in which the owner of a car does not remove the key from the lock, despite the fact that many cars have been stolen in the area. T steals the car and causes an accident to P. Now suppose that, because of exceptional circumstances, the court does not want to deem the owner liable but finds it difficult to negate the causal link and the occurrence of loss in this case. The obvious way to handle the matter would be to claim that there was no fault. This, on the other hand, sends out a normative message that leaving keys in one's car will not entail liability when the car happens to be stolen and someone injured as a result. It is true that "the judge's vision of the law tends to be fragmented" and "likely to be strongly influenced by the facts of the particular case"<sup>50</sup>, but this does not mean that such cases are solved without any regard for the implications of the reasoning adopted for other cases. The court is thus likely to wish to avoid such a normative message. Another way to achieve the desired no-responsibility result would be to appeal directly to the exceptional circumstances. Although many legal systems allow exceptional circumstances to be taken into account, judges in formalistic European countries tend to make limited use of general principles to break the force of clear-cut rules. It is thus as if, in the case we are considering, the court would simply have no choice but to declare the owner liable. The reason is not that the facts are so well established and the meaning of the relevant legal terms — fault, causation, and damage — so clear that the owner's responsibility could not be plausibly negated, for it was implied that the concept of fault is of a sufficiently open texture to permit the decision to go either way. The inevitability of the undesired result is, rather, as we already pointed out, due to the need to avoid normative 'spill-over'.

## 4. Conclusions

It has been argued in this article that, for a number of reasons, comparing individual concepts across legal systems can be difficult and sometimes actually quite confusing. It is within a whole institution, serving a tangible social function, that the meaning of legal terms is revealed. The idiosyncrasies of many concepts are thus easily explained when their interaction with other concepts is taken into account. In addition, the functional character of legal concepts cannot be seen as something that comes into play only at a second stage, superimposed on their ordinary meaning if such exists<sup>51</sup>. Paradoxically, the more formalistic a legal system is, barring direct recourse to substantive arguments, the more likely it is that legal notions will be put in the service of legislative policy. In other words, concepts have to bear the weight of strategic vagueness, making them flexible enough to meet changing social needs. But because of the functional indifference of many concepts — many can be made use of to achieve the same practical result — it is not necessarily the same concept that bears this weight in different legal systems. We should not, however, overplay the theoretical difficulties involved in comparing legal concepts. That their content is not likely to be equivalent implies in no way that we would always be comparing apples with oranges. Only a purist declares translation impossible because no foreign word can ever be quite the same as the one from his own language. Just as translation is carried out every day, so is legal comparison — both are theoretically difficult but practically feasible.<sup>52</sup> Nor should we underestimate the importance of the conceptual minutiae of legal systems. The precise character of the argumentative constraints to which courts are subject depends to a considerable degree on the conceptual particularities of a legal system. Differences, even minor ones, in the architecture of legal orders can also significantly change the perspective from which certain issues are addressed. In spite of the overall convergence of practical results, predicted by the principle of functional equivalence, comparing legal concepts can therefore sometimes be very rewarding — provided, of course, that it is not done in a too blinkered way.

<sup>50</sup> S. Deakin, A. Johnston, B. Markesinis (Note 31), p. 57 (citing Lord Goff).

<sup>51</sup> This is perhaps not evident in the case of causation, where causes in fact are generally distinguished from legal causes. Nevertheless, as Markesinis et al. remind us, this should not lead us to think that the but-for stage is a simply technical enquiry from which policy factors are absent. See Markesinis et al., *ibid.*, p. 186.

<sup>52</sup> See P. Ricoeur. *Le paradigme de la traduction*. — Sur la traduction. Paris: Bayard 2004, p. 27.



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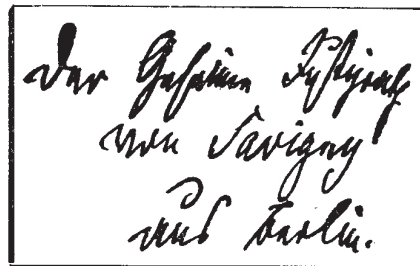
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# Friedrich Carl von Savigny, the Legal Method, and the Modernity of Law\*

Two very famous elements of the European history of law are connected by the title of this article: modernity and Savigny.

‘Modernity’ is a big word. It appears impressively in the all-encompassing singular, as ‘modernity’ and not ‘modernities’, and it divides our complete history into the modern and pre-modern, or the modern and the old. The old may be forgotten. In speaking of modernity as an ‘unfinished project’, it is strictly the future that is examined; only there can completion be expected. It was the famous German philosopher Jürgen Habermas from Frankfurt who has stressed this perspective since 1980 in argument against several so-called post-modernists, such as Wittgenstein, C. Schmitt, and Lyotard as well as such conservatives as Foucault, Bataille, Derrida, and Nietzsche, again and again. Therefore, it was he who elaborated the formula ‘modernity — an unfinished project’ into a well-known *topos* for many of the battles to come against a new conservatism.

‘Savigny’, too, is a big word. Savigny was the most famous lawyer not only of his epoch. His name has surpassed those of many luminaries of past centuries and the current one. Even today he occupies an important place in every legal, many biographical, and even some of the major literary encyclopaedias. He may enter the discussion with ease and is now able to announce himself simply with his ‘calling card’, as becomes clear.



Savignys card to Goethe, announcing his visit in 1832.\*<sup>1</sup>

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\* Lecture given in Tartu in March 2006.

<sup>1</sup> O. Liebmann (ed.). Die juristische Fakultät der Universität Berlin von ihrer Gründung bis zur Gegenwart in Wort und Bild ... Berlin 1910, p. 85.

Two celebrities are good for a starting point but ‘do not a summer make’ — as we say when the swallows return in spring: A single swallow does not make a summer. One hopes they’ll finally return soon, together. So, how may we make these two celebrities meet? What do they have in common? Why Savigny? What can be learnt from them for the modernity of law? Allow me to make my small and modest contribution to this.

## 1. The modernity of law

What is meant by this formula — to what texts, people, legal thoughts, and figures does it refer? I shall call some elements to mind to illuminate the connection to Savigny.

The ‘project of modernity’ notion combines two messages: one of a historical nature and the other of a practical kind. Modernity is seen as a historical process, and its completion is a practical task. Therefore, the method is to connect proper cognition and proper action in one single project.

Seen from a historical standpoint, the view is one with its origins in the time of the Enlightenment, which was nearly before all else an enlightenment of the old legal world. It may be summarised thus, in brief: enlightened philosophers, in the form of thinkers such as Voltaire, Hume, and Kant; enlightened criminal law through the work of Beccaria and Feuerbach; enlightened public law such as the Virginia Bill of Rights, the *Declaration des Droits de l’Homme et du Citoyen*, and the US Constitution of 1787 and the French Constitution of 1789; enlightened private law in the *Code Civil* and the Austrian *Allgemeines Bürgerliches Gesetzbuch* of 1804 and 1811; and in the work of jurists such as Cambacères and Portalis in France, Zeiller in Austria, Bentham in England, and jurists in the German *Reich* (Hugo, Hufeland, and Thibaut, as well as, perhaps, Savigny, too).

What is the message of these names and laws? It is that of (1) the emancipation of man from his self-created dependence, in keeping with Kant, the message of autonomy and freedom as a native right of all mankind; (2) the law’s independence of religion and morals; (3) law as a guarantee for preservation of both, of the common and individual freedom; (4) law as a common and equal imperative; (5) civil rights for all men instead of rights only for states and nations; and (6) so-called eternal peace. This becomes more concrete when the various sections of law are examined. This consideration turns first to criminal law.

Enlightened criminal law is moulded by the following nine elements: (1) the law to punish humans by humans only, not in the name of God or pure reason; (2) the general form of written law as an essential protection with regard to foreseeable and equal treatment; (3) the strict commitment to written law in imposition of the hazardous evils called punishment now and then; (4) precise and specific written laws; (5) exclusive codification to create the latter; (6) fair trial before punishment, with only limited reasons for arrest, and with the abolition of torture; and (7) public and oral trial, and the social prevention of crime. In brief, the aim was to allow punishment only as a necessary and utmost evil.

For public law and the system of judicature the main task was to create inalienable human rights, as proclaimed in 1776, which are independent of state, guaranteeing liberty and property, as well as to secure them in different ways: through constitutions as solemn written texts, by separation of powers, via strict commitment of the judiciary to the law and independent courts and judges, through the priority of the constitution and special constitutional courts with judicial control, and by equal chances of participation in legislation through popular assemblies and parliaments as far as possible. Another task was to control the administration by creating administrative law and protection through courts. In short, the aims are human rights, a constitutional state, rule of law, and judicial control.

In private law, personal freedom was to be created by shaking off the traditional impositions from above — at first by making private law independent from dangerous public law and then by casting off the shackles of status and profession, by abolishing the personal distinction among a serf or farmer in the countryside, a citizen in commerce and trade, and a nobleman in military and civil service. Furthermore, private autonomy should be strengthened by cancelling so-called *Preistaxen*, referring to obligations to conclude a contract; by cancelling prohibitions of contracting, compulsions of approval, and tight privileges in the law of contract; then by abolishing the feudal bindings of property and the trappings of religion and of politics and clans with respect to the rights of domestic relations and inheritance. In brief the doctrine of individual private autonomy was the main purpose.

For enlightened jurisprudence the most important point was human autonomy, with independence gained first from religion, morality, morals, politics, and philosophy, those old companions of law. It was most important to create both, a legal subject of its own and a related legal method. Therefore, ‘positive’ law (a word newly in vogue) — meaning human, visible, and specially institutionalised rules — was emphasised. But this did not refer just to legal rules in the modern sense of the term. Since there existed no codifications of private law but a long chain of Roman, domestic, and Canon law, the analysis and formation of the law as an independent unified entity had to be the main purpose. To manage this, the positive law could be dealt

with in either a practical–juridical or a scientific way. In any case, law was to be presented as a system — the second word to enter the vogue, in about 1800 — instead of as, polemically spoken, a mere ‘aggregate’. A system was said to be a unity structured by principles (see, for example, Kant). One matter of serious debate was where the unity of the positive law originated: from the outside (e.g., the arranging mind) or the inside, the subject itself. The difference between so-called external, or formal, and internal, or material, systems still separates the main concepts of law and its method — for example, in German legal theory with Larenz and Kelsen. What role does Savigny play here? We again return to the ‘Why Savigny?’ question.

## 2. Why Savigny?

Today’s German and European jurisprudence has left behind nearly all of Savigny’s texts. Textbooks on private law and legal methods, and sometimes even decisions, only remind us of his theory of the four interpretation canons: the theory of the grammatical, logical, historical, and systematic element of every legal interpretation. This is not much but is at least something, since the other authors of Savigny’s era, and even indeed of the entire 19<sup>th</sup> century, are paid even less attention. Only in the history of science and in very cultured speeches is there more memory to find.

But is Savigny of crucial importance for the modernity of law? Was his contribution so fundamental that it is worth remembering? Should we not be better served by taking a glance at the ‘modern’ Rudolf von Jhering, the preacher of the motto ‘the purpose creates all law’, and his contemporary Karl Marx? This sounds modern. Or should we look at Eugen Ehrlich, the father of the sociology of law, or at Feuerbach, the father of modern criminal codes, or at the really radical modernists like the Königsberg-Kantians Theodor von Hippel and Christian Morgenbesser, whose books survived censorship only by accident? In 1798 we read it in *Beiträge zu einem republikanischen Gesetzbuch* — the terms for ‘republican’ and ‘code’ are the modern key words in this title.

There are important reasons to devote oneself sincerely to these authors, but there are some good reasons attending Savigny as well. Living in 1779–1861, he joined the debates in the deciding phase of the first crucial steps into the modernity of law. The battles were fought a little later. In the final part of the 19<sup>th</sup> century, modern constitutions and codes were established nearly all over Germany and Western Europe; there were even general and equal voting rights in the *Reich* (1871); there was a fundamental free private law; there were strict codes of criminal law and procedural law; and a far-reaching independent administration of justice was attained. The project of modernity had thrived at a profound level in law (even in family law and labour law), but it had not so deeply established itself in society and politics.

In addition, Savigny lived in a centre for the German development, in Berlin, and in the state of Prussia, which was more vigorous than others and clearly displayed the problems accompanying the modernisation of the state, economy, and society.

Those crucial struggles and centres for achievement always deserve our special interest, because they show above all the motives and connections of a certain problem — e.g., the modernity of law. Savigny therefore is part of the decisive group of comrades in arms in the fight for the modernity of law. Accordingly, he is of great interest where this topic is concerned.

At least, when it comes to the subject itself, one can make a discovery with Savigny. The only prerequisite involves ridding oneself of at least three prejudices and misunderstandings. These are:

- (1) the Left Hegelian and Marxist point of view, that Savigny was just a juridical reactionary;
- (2) the opinion that he only wanted to preserve conservatively what had become obsolete already;
- (3) and, especially, the view that his theory of legal method had become obsolete and useless.

The two political prejudices I shall deal with only in brief at the end of this lecture, as I would like to examine the last point a little more closely. This is even more relevant because how this otherwise most remembered work, his theory of interpretation, is misunderstood proves paradoxical as well as instructive. Savigny is going to be shown to be much more modern than is generally assumed.



### 3. Savigny, the legal method, and the legal decision

At first sight, Savigny's texts on legal method seem to come from another world with regard to their language and subject. His classical German is deceptive when it comes to the unknown meanings of his words. And, most importantly, legal method as a methodical decision, as we know it today, does not interest Savigny to begin with. Two examples inspire today's understanding.

#### 3.1. Legal method as method of decision

Nowadays, instructions for the correct solution of a legal case, for the application and interpretation of law, for the theory of argumentation, for the assessment of interest, for the judicial decision — all words of today — are to be found in books with titles bearing phrases such as 'legal method'. In the centre of their attention is the judicial decision. Two examples may prove this. My choice was moulded not by originality but by significance.

Some years ago, a highly detailed portrayal was published, whose name translates to *Legal Methods: From Classical Rome to the Present*.<sup>2</sup> The author, known as a civilian lawyer, indicates — already in the first sentence of his book — that he considers legal method to be "methods of thinking, leading to the 'correct' resolution of cases"<sup>3</sup>. For him the entire history of jurisprudence is transformed into a practical instruction, especially for the correct interpretation of law and the so-called canons mentioned above. That is, the grammatical, historical, logical, and systematic arguments are elements of any decision, in the author's view.

My second example originates from Germany's favourite book on legal methods, which replaced the 'method of scientific jurisprudence' of Karl Larenz from 1960: the short and precise textbook *Juridical Method* by a famed public lawyer from Erlangen, Reinhold Zippelius. The first edition was published in 1971, the ninth in 2005. Zippelius introduces his theme in a more general manner than most other authors do, by stating that "[t]he subject provides the method" (p. 1). But even for him legal rules do not revolve around the 'discovery of the world', as it were, but, as he emphasises, arise out of the 'order of the actions', because law first was 'rule of conduct', 'rule of action', and 'command'. Law of this kind is decisive, he says, for the "'entry' into the solution of a legal case" and the "updating of the law". Put briefly, law reaches its aim only with what he calls concretisation and application. Accordingly, the problems of deciding a case are the main subject. This theory of legal method provides a more philosophical foundation than others but looks equally for a practical perspective and for methods of decision. Now we remember and see illustrated the difference in the books' titles: 'jurisprudence' no longer appears in titles of textbooks on legal methods as it did for Larenz's *Method of Scientific Jurisprudence*. It vanished with regard to legal method. But not with Savigny. We may now turn naturally to the question of his famous legal method as scientific method.

#### 3.2. Legal method as scientific method

Savigny's texts do not contain a special chapter relating to legal method in its practical meaning. He nevertheless solves cases but, obviously, in a different way. Savigny's starting point is a different one. It is the study of law and the scientific analysis and formation of law.

With regard to the study of law, Savigny held special lectures in 1802/03 and 1809, named — as we read on the title page — 'Legal Methodology', or in the lecture catalogue 'An instruction to the self-study of jurisprudence'. Unfortunately, it is nowadays known well under the misleading title 'Legal Method', which was chosen in 1951 for the first printed edition by Wesenberg, published in 1952. There are considerable differences between 'legal methodology' and today's 'legal method'. Legal method is the way to decide things legally, while legal methodology is the way of studying law. These days, neither study nor practice would distinguish between the two subjects, since the 'study' of law serves as lengthy preparation for the state examination, which is nearly completely based on decision upon cases legally.

Studying in Savigny's sense means something completely different. Studies shall instruct jurists in how to work scientifically and independently. This is what Savigny wanted to teach. Even legal practice should become scientific. Very significantly, Savigny was called a 'machine of studies' — which is reported by

<sup>2</sup> P. Raisch. Vom Nutzen der überkommenen Auslegungskanonnes für die praktische Rechtsanwendung. Heidelberg 1988.

<sup>3</sup> *Ibid.*, p. 1.





Friedrich Carl von Savigny. Drawing by Ludwig Emil Grimm, 1809.<sup>\*4</sup>

his poet friend Brentano, who could observe Savigny's diligence in Marburg and felt rather neglected as a friend.<sup>\*5</sup> Everything revolves around the study of law and not around its practice of deciding cases. We are able to see the study machine with the eyes of the painter L. Grimm. We understand as follows: The method and science of law are placed in the centre, and in a different way from the approach of today. Savigny's 'method' developed a concrete "new view for science"<sup>\*6</sup>, as he stressed in 1809, and therefore differed strongly from the tradition. The new word '*Rechtswissenschaft*' (legal science) occurs constantly from 1802 to 1842. It became a buzzword in a way, and a model for the entire 19<sup>th</sup> century and beyond.

'Method' is very important in the works of Savigny as "the direction of the mental power to make every scientific work succeed", as he emphasises in 1802 right at the beginning of his lecture on legal methods. Literary models, from those applied by Roman lawyers to the models of the present, are the source of this method — and they are the only aid. Savigny does not try, as jurists usually did and still do, to develop a set of practical rules for the application of general legal provisions. The reason for this is a theoretical one, originating from the theory of the possibility of judgement, as developed by Kant. I shall return to the latter. Even if the expression 'legal method' does occur once in 1802<sup>\*7</sup>, for Savigny it is identical with scientific method.

The legal rules and the legal imperatives result here from fundamental continuity, which is recognised by Savigny's new so-called 'truly historical method'. This method does not collect examples for decisions but works out legal evolutions with the character of inner necessity. Savigny explains this as follows: the "historical treatment in its true sense, that is the contemplation of legislature as being self-moving and self-growing during a certain period of time", is now the decisive moment.<sup>\*8</sup> This phrasing co-ordinates the

<sup>\*4</sup> See A. Stoll. *Der junge Savigny*. Berlin 1927, after p. 398.

<sup>\*5</sup> A. Stoll. *Friedrich Carl von Savigny. Ein Bild seines Lebens mit einer Sammlung seiner Briefe*. Vol. I. Berlin 1927, p. 176.

<sup>\*6</sup> F. C. von Savigny. *Vorlesungen über juristische Methodologie 1802–1842*, issued and introduced by A. Mazzacane 1993, p. 88 (= 1802, fol 4r) (the citation refers to the original text; its foliation is annotated in the second, 2004 edition as well).

<sup>\*7</sup> *Ibid.*, p. 88 (= 1802, fol. 3v).

<sup>\*8</sup> *Ibid.*, p. 88 (= 1802, fol. 4r).

method of law and the subject of law — the treatment and the being. Both are understood in a new way. The new historical work must neither tell nor elegantly collect facts and dates, nor may it put these in a pragmatic (causal or functional) order, as was done before. Its subject was meant to be something self-growing. The word ‘self’ is crucial and changes a great deal. If ‘legislation’ is understood as something self-growing, then it is thought of as being without an actual legislator, as something *quasi* subjectless and purely internal — that is, as being a procedure carrying itself out in the legislature. The lawyers then work on ‘law itself’, even if working on legal texts. The legal text, accordingly, is just a manifestation of law itself. Consequently, Savigny later stresses, legal rules only pronounce the juridical ‘thought’, “to make it objective and preserve it”.<sup>9</sup> This changes everything. It is now the objectively existing thought behind the legal text that becomes decisive. The rule itself only expresses this thought in a more or less appropriate manner.

This law behind the legal text is for Savigny a ‘system’, and he wants to examine it as constantly moving through time. With this, it gains — even though open during the passage of this time — the desired completeness as a codification does but, as he says, in “a different way” and with an inner unity instead of external casuistry and in a manner independent of chance and contingency.

‘Truly historical’, as Savigny repeated often, therefore referred to a legal method that is juridical as well as scientific and is not oriented toward the decision of cases — a method integrating the insight into reality and into its worth. Consequently, we have to ask as jurists whether this is a legal method that does not involve decision.

### 3.3. Is this a legal method without decision?

Savigny wants to recognise the law as a scientific matter and understands it as a continuity that ‘truly’ exists as something objective and historical. Therefore, one is tempted to say, the lawyers’ process of decision is completely transformed into a process of cognition. Accordingly, Savigny was part of a truly pre-modern objectivist position. As the reader knows, to recognise the law as a truth was part of the pre-modern theories of natural law, regardless of whether their foundation was a recognition of nature, God’s creation, human nature, reason, or something else. But it would be wrong to place Savigny in this context. His message is of interpretation and legal hermeneutics.

### 3.4. Interpretation as legal method — interpretation, not application

Savigny knows and accepts the juridical work of deciding. Where and how Savigny positions this work is best explained with regard to a *locus classicus*, which was in our day hardly ever understood, let alone ever found. Obviously, Savigny’s 124 pages relating to this subject and published in 1840 have never been read properly to the end, and their systematics were never taken seriously. I am talking about Savigny’s explanations for the four interpretation canons. As already mentioned, they are nowadays the most loved and cited showpieces of his major work *System of the Present Roman Law (1840–1848)*. Even though Savigny has been quoted only rarely in dogmatic textbooks since the 1930s, and not by chance since this date, the timeless elegance of his description of the four elements of every interpretation is still highly appreciated. The way he emphasised that the four elements have to be tied together and that with this the ‘thought inherent in the law’, as it were, could and should be reconstructed is praised as well.<sup>10</sup> However, hand in hand with this praise comes a criticism: Savigny’s recommendation was in reality absolutely worthless, since it was impossible to decide, without referring to a rule of priority, which of the four elements should be the decisive one in the event of a conflict. In addition, the highly important teleological element was said to be missing. The interpretation therefore remained arbitrary, the elements useless in the end.

This criticism is thoroughly misleading. It is biased by today’s thinking on decisions and does not pay attention to the original way in which Savigny understands the task of the canons. They serve as an aid in completely understanding the legal texts only when these are of what he describes as “good condition”.<sup>11</sup> Thought and expression meet in this ‘good condition’ anyway. Both can be understood only at a rough and approximate level, depending on the use of all four elements. This is what matters to him at this point. We learn that Savigny starts with general hermeneutics of law, which commences not with the traditional special case of opaque legal texts but with the understanding of law itself. It is not the pathology of law, the opaque

<sup>9</sup> *Ibid.*, p. 89 (= 1802, fol. 4v).

<sup>10</sup> F. C. von Savigny. *System des heutigen Römischen Rechts*. Vol. I. Berlin 1840 (reprinted Aalen 1981), p. 222.

<sup>11</sup> *Ibid.*



legal text, the lacunae in law, the unclear case, and so on that are most important to him; rather, it is the law as a whole in its good condition and its normal recognition. Indeed, at this point there cannot occur any conflict with regard to the interpretation, since thought and expression harmonise perfectly. Rules of priority or hierarchy are therefore not necessary and are, in fact, pointless.

But what about teleology and hierarchy? One has to continue reading and then finds passages referring to the interpretation “of legal texts in a poor condition”. Savigny’s text is, as we have to bear in mind, strictly systematised. The table of contents illustrates this very well.<sup>\*12</sup> It is this second part that refers to the important cases of indefinite or wrong expression of law as well as to the problems of lacunae. Savigny calls this activity *Rechtsfortbildung*<sup>\*13</sup> — just as we might do. It proves problematic to translate this formula into English — the concept of updating of the law doesn’t fit, as it belongs to the world of law-making, whereas the idea of *Fortbildung* applies to a mixture of continuation and creation. It is a matter of German philosophy — untranslatable perhaps but, I hope, understandable. In any case, Savigny creates special rules concerning how this work should be accomplished. Here he commences with a subject that is said to be absent today: rules of priority. He refers to a ‘hierarchy’ of aids to interpretation<sup>\*14</sup> and allows — bound to this context — teleological arguments as well. However, he does restrict them, because it would be too easy to play the spirit against the letter of the words and thereby exceed one’s judicial competence and the bounds of loyalty. At this point, we now can see more clearly that Savigny fully recognises the unavoidable element of decision as part of a lawyer’s work. And we understand also that he does not offer merely a theory of interpretation of legal provisions. He provides much more — general juridical hermeneutics of texts at all. At this point we meet the borders of interpretation, carrying us forward to consider the constitutional domain.

### 3.5. The constitutional dimension of Savigny’s legal method

As decision for Savigny is as inevitable as it is dangerous, he finally tries to master it from a constitutional perspective. At this time, in 1840, he had been a judge for years, with experience of much activity in the so-called ‘court of revision and annulment or cassation’ for the Prussian Rhineland. On the basis of these experiences he proposed the concentration of the delicate *Fortbildung* in one special supreme court, comparable to the French court of revision and cassation.<sup>\*15</sup> He gave as reasons for this institutional solution the fact that with regard to legal texts in a ‘poor condition’ it was impossible to impose clear limits between interpretation and overcoming, or between simple understanding of the law and independent activity. One seems to hear the voice of the experienced man who had been a Prussian judge since 1819 and was to be a minister in 1842, who could not easily chat anymore. Jakob Grimm complains about the latter after 1842, when the minister and state counsel adorned with gold braid visited him occasionally between the meetings. We see experienced professor and judge Savigny pleading for a solution that combines administration of justice and constitutional law, expressed in a modern way: a procedural solution.

With this we have reached the first answer to modernity: Savigny betrayed neither the modernity of law with his beloved teleology nor the certainty of the law, nor did he abandon the commitment of the judges. His solution simply prevented three major illusions of a juridical optimum. Savigny did not believe in the blessing of a king of judges, in the strict *bouche de la loi* as Montesquieu wrote, nor did he hold stock in *référé législatif* and sharp prohibitions of interpretation and commenting as in the ALR of 1794 or believe in the friendly People’s Courts as Georg Beseler did.<sup>\*16</sup> And he didn’t say a word about the illusions of his opponent in regard to codification, Anton F. J. Thibaut. Thibaut had emphatically stated in 1801 that the lawyer should be obliged to interpret poor legal texts in a most restricted way, to force the legislature to improve the written law.<sup>\*17</sup> This was rather consistent but completely illusory, as we know after 200 years of modern legislation, and Savigny recognised that immediately. We are now able to note with respect that Savigny resolved the problem of juridical decision in a very clear and realistic way. And, above all, he embeds it in a scientific analysis of the law itself as well as in the institutional mastering of the remaining difficulties in dealing with legal texts of ‘poor condition’ by a special court.

<sup>12</sup> *Ibid.*, p. viii.

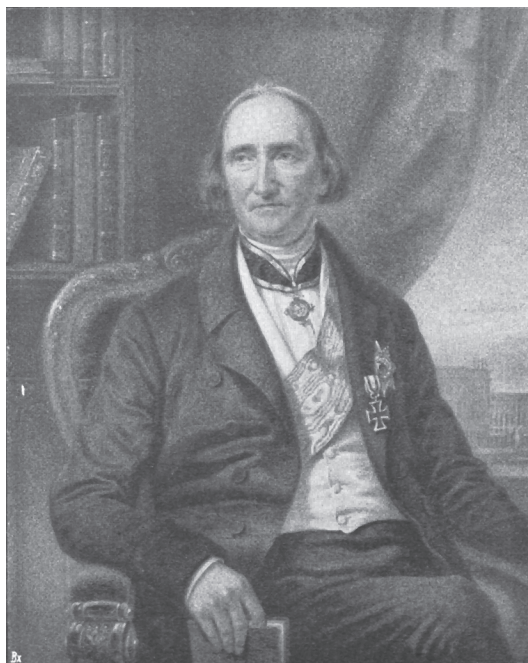
<sup>13</sup> *Ibid.*, pp. 18, 238, 291 et seq.

<sup>14</sup> *Ibid.*, pp. I 225, 228 et seq.; J. Rückert. *Juristische Methode und Zivilrecht beim Klassiker Savigny (1779–1861)*. – J. Rückert (ed.). *Fälle und Fallen in der neueren Methodik des Zivilrechts seit Savigny*. Baden-Baden 1997, pp. 25–70.

<sup>15</sup> F. C. von Savigny (Note 10), pp. 330, 327.

<sup>16</sup> G. Beseler. *Erlebtes und Erstrebtes. 1809–1859*. Berlin 1884, appendix, p. 1843.

<sup>17</sup> A. F. J. Thibaut. *Versuche über einzelne Theile der Theorie des Rechts* (1801). Vol. 2. 2<sup>nd</sup> ed. Jena 1817 (reprinted Aalen 1970), p. 173.



Savigny in official dressing, painted by Franz Krüger, 1855.\*<sup>18</sup>

Therefore, it was in one way correct to assert that Savigny did not deal with the moment of decision. He always emphasised that the main juridical task is to recognise the principles and rules in general, not to offer concrete rules for the solution of cases, as would a method aiming to give primary practical instructions. At the same time, it is misleading that Savigny even claimed to be ‘practical’ with energy. How is this possible?

### 3.6. ‘Truly historical method’ as ‘really practical method’

Savigny stressed the practical element in the winter of 1818 in a very strong way. For this we have to thank his opponents from Heidelberg, who founded the most lively, even today, journal *Archive for the Civil Law Practice* in 1818. Right at the beginning of his lecture in the winter of that year, Savigny dealt with the new demand for a practical method. He admitted that the study of Roman law had nearly always been based on ‘the material’. As he puts it, “that is the rules of law, that originated from Roman law as final results and which the judicature can use immediately”. Following Savigny, these ‘results’, which one could call case rules nowadays, “were their final aim, and even though the scientific requests were neglected, the practical need was satisfied — at least apparently — for a good deal”.<sup>19</sup> The critical words ‘were their final aim’ relate to “most [lawyers] of all times” — that is, nearly the entire tradition before him.

Savigny thinks of himself, in contrast to them all, as the promoter of real modernity of law.

As his own solution Savigny emphasises, not surprisingly, his famous ‘historical method’. Completely different from the practical method of the ACP’s programme just mentioned was the other one, that one, in his words, “which is called historical”.<sup>20</sup> But a surprisingly clear and firm Savigny insists that his historical method was, as he puts it, the “really practical” method.<sup>21</sup> Savigny therefore claims that the more self-aware formula is the better one for a truly practical method. He supplies the following reasons: His solution was better because it was impossible in any case to gain material completeness with regard to the legal rules<sup>22</sup>, “not just because of the quantity, but especially because of the constantly growing diversity of cases”.<sup>23</sup> Therefore, complete casuistry, as was aspired to by the Prussian Code of 1794 with its approximately 20,000

<sup>18</sup> See e.g. O. Liebmann (Note 1), p. 80.

<sup>19</sup> F. C. von Savigny (see Note 6) p. 195 et seq. (= 1818, fol. 78r).

<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid.*, p. 197 (= 1821, fol. 80r).

<sup>22</sup> *Ibid.*, p. 197 (= 1831, fol. 99r), (e.g., pp. 215, 211).

<sup>23</sup> *Ibid.*, p. 211 (=1827, fol. 94v).

paragraphs, seemed to be hopeless for Savigny. The Prussian Code thought of itself as part of the project of modernity. It was an attempt to, in the words of Savigny's description from 1814, "contain in advance a decision for every possible case. The opinion was, as if it were possible and good, first to know every single case by experience and then to solve it by using the decisive rule of the code."<sup>24</sup> Savigny's rejoinder to this opinion was that one was obliged to "learn the method of finding rules, not the rules themselves"<sup>25</sup>, that it was useless to accumulate case rules. Further, he added that, whereas completeness as was aspired to by the Prussian Code was impossible, the finding of 'leading principles' was the decisive and possible task. Because, with regard to these leading principles, a "completeness of a different kind"<sup>26</sup> could be achieved in reality. This, he stressed, was the only possible way to master the diversity according to rules and was the future of the principles.

What do these statements of Savigny prove about his modernity? He does not strike out against the enlightening and modern idea of binding the lawyers to the rules of law. On the contrary, he pleads for another and a better way to reach this goal.

Savigny very well recognises the moment of decision and the vital role of most concrete case rules for the sake of jurisprudence. But this is secondary to him; indeed, he shows that it is even misleading to try to achieve certain law by travelling this road. In contemporary language, we might say that the lawyer cannot be a directory, but he can learn the grammar of the network and give reliable information — if the network has a grammar. It is exactly this that Savigny assumed to be true for the law. For him, it consists of 'natural' legal relations foremost. Today, contrary to this, we usually dissent, holding a view that law is, rather, a sum of legally relevant human acts of decisions, and we consider all law to be contingent, and in this sense positive. Thus, we end up running anew into an old problem. Since scientific analysis and formation of law usually aims for a certain duration and stability of its results, major problems are created by this contingency, up to the famous text on the 'worthlessness of jurisprudence as a science' (written by the Prussian attorney Kirchmann in 1847–48). We cannot have the cake of security, stability, and justice as well as eat in every contingent moment. At this point, we should begin to wonder about our familiar models of application of law, subsumption, and judgement.

### 3.7. The model of application of law, subsumption, and judgement

At the start of this paper, I announced a far-reaching theoretical consolidation. The time is ripe for it. Savigny's sceptical position with regard to casuistic case rules and codified solutions contains a fundamental scepticism relating to the favourite model of application of rules. According to this, rules are sufficient by being binding, and it is necessary only to subsume the cases; the more casuistic and exact these rules are, the better. Savigny's scepticism with regard to those ideas about law and the application of rules has many well-grounded theoretical underpinnings. Their basis is the problem of power and ability of judgement, as it was analysed by Immanuel Kant at that time.<sup>27</sup> Kant's conclusion was that it is impossible to create rules that connect recognition and action by applying general sentences to concrete situations, since doing so has always demanded additional rules stating whether the general sentence fits the concrete case or not — and this leads to infinite recursion. Therefore, only some technical or pragmatic rules are possible at this point. Our methods of deciding cases are all pragmatic. We use such rules nearly every day in legal practice. All pragmatic jurisprudence therefore can be understood just in a technical pragmatic way, at least as long as the model of application moulds jurisprudence. But if it is understood as the task recognising the already existing rule in a traditional or practised behaviour, one does not apply abstract terms in a subsuming way. On the contrary, the starting point there is of given rules and not decisions, and we develop these 'naturally', from one group of cases to another. The perfect example of such a juridical proceeding has always been the customary law. It is developed from given conduct. Therefore it is possible and important for Savigny to state that every law arises in a way as customary law.<sup>28</sup> His favourite examples are the law on bills of exchange and that on bid price (that is, the law of currency).<sup>29</sup> Both indeed originate in events that have neither been created by legal provisions nor been planned but are the results of a spontaneous, gradually growing order.

<sup>24</sup> F. C. von Savigny. *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft*. Heidelberg 1814, various reprints, critical edition in F. C. von Savigny. *Politik und Neuere Legislationen*. Materialien zum "Geist der Gesetzgebung". H. Akamatsu, J. Rückert (eds.). Frankfurt am Main 2005, p. 21.

<sup>25</sup> F. C. von Savigny (Note 6), p. 211 (=1827, fol. 94v).

<sup>26</sup> F. C. von Savigny (Note 24), p. 22.

<sup>27</sup> I. Kant. *Kritik der Urteilkraft*. 3<sup>rd</sup> ed. 1799 (original work: Berlin 1790).

<sup>28</sup> F. C. von Savigny (Note 24), p. 13.

<sup>29</sup> Compare K.-P. Ott. *Geld- und Geldwerttheorien im Privatrecht der Industrialisierung (1815–1914)*. *Ökonomische Wechsellagen in der sogenannten Begriffsjurisprudenz*. Berlin 1998.



Another example introduced by Savigny is found in the way he develops the long-missing first principle of the law of unjust enrichment, which is valid even today. His way of looking for principles by examining major consented cases and groups of cases is especially characteristic of Savigny<sup>30</sup>; in particular, the way he moved from the given material to the general rule was specific to his legal method as legal science.

Therefore, it is not simply historical, political, or ideological reasons that have induced Savigny not to stress the search for immediate results and immediate rules for cases. There have been also carefully considered theoretical reasons, which led him to his 'scientific treatment' of the law. In his eyes, this was the only path toward a better juridical security, a modern value to which he accorded great import. Savigny did not feed the illusion that it was really possible to calculate in terms of concepts, as a famous sentence of 1814<sup>31</sup> might suggest. Nevertheless, legal certainty and security, understood as continuity in legal practice, were favoured principles of Savigny, too.

### 3.8. Summary in ten points or even in three terms

We may now offer a summary. In its three-term form, it consists of Savigny key words: science, system, and positive law. What they mean together can be stated in 10 points:

- (1) Savigny presents very well a legal method for single cases, but it is very different from our method.
- (2) It is decisively a scientific and cognitive method and is less practical-decision- and case-oriented, in the present sense.
- (3) This difference fundamentally changes the fundamental legal concepts and legal work.
- (4) Law becomes able to be treated as an academic object with an 'inner system', which is essentially independent from concrete statutes and judicature. Case rules are only the smallest units in this wide-ranging system.
- (5) It is only the 'truly historical method' that identifies the right continuities and the 'leading principles', and that can develop this inner system.
- (6) The inner system and the leading principles secure together the aspired-to completeness. They are the real guide that is to be used in order to solve the always endless number of cases. Therefore, the scientific approach is superior to a mere case-distinguishing approach for legal practice.
- (7) Acknowledging 'imperfect' legal texts, Savigny assigns the problem of deciding cases not the highest but the lowest priority. A careful method of teleology might have a legitimate place here, but only here, for 'imperfect' texts.
- (8) Savigny's starting point is the 'healthy condition of norms', not an imperfect, pathological state. In this 'healthy' condition, the legal rules simply result from the words and circumstances themselves. The law is just there as customs are. His attributes are inner coherence, system, and principle. There is no need for rules conflicting with interpretations here.
- (9) Savigny's method is part of his general legal hermeneutics, which includes the solution of single cases but has its origin in another starting point, being born of natural conditions and not out of conflict.
- (10) Savigny explained his solution in very general terms. In that, he was able to offer, and accepted, participation far more than other jurists did in the philosophical and general political discussion of his time. His solution was neither non-progressive nor Jacobinic (as the Vienna government had suggested in 1819). In terms of political history, it was the position of a reform conservative.

<sup>30</sup> J. Rückert. Dogmengeschichtliches und Dogmengeschichte im Umkreis Savignys. – Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanische Abteilung 1987 (104), pp. 666–678.

<sup>31</sup> F. C. von Savigny (Note 24), p. 29.

## 4. The modernity of law in Savigny's legal theory

We may now set forth several conclusions concerning the modernity of law as related to Savigny's conceptualisations in his legal theory.

1. Savigny shares fundamental targets of legal modernity. These targets are the universality, security, stability, and autonomy of law. On the basis of these principles, he defines the role and the duties of jurists in legal science and practice. Loyalty to norms in the process of interpretation is most important for Savigny. He has no illusions about the remaining free play with 'imperfect' statutes. He has no illusions on the question of how to develop the law either. His solution for a hard case is, consequently, focused on the constitution of the courts. Like that of today, it is an institutional procedural solution. He does not turn to judge-made law as a new, elegant source or to teleology, which would cast him into a circular argument. Both solutions extend the competence of the legal profession, which runs counter to the modern concept of egalitarian participation. Very appropriately, Savigny distinguishes clear law, which does not ask for special competencies, and hard cases, which absolutely refer to judge-made law and teleology. In this way he also recognises the constitutional implications of methodology. He subscribes to the following very modern formula: questions of legal method are questions of constitution. Hence, Savigny's approach here is perfectly in line with the project of modernity.

2. Even his famous antipathy where codification is concerned is less contradictory to modernity than one might suppose.

Savigny is a master of differentiation. He surely was against codification as a perfect tool for private law. His scepticism and criticism were justified to a certain extent, especially in the realm of modern private law as the competence of individuals. The parties have to practice and to formulate good private law as habit, custom, or common usage. It must be an open law for new needs. All of these points contradict a systematic and complete fixation and pre-setting. Nevertheless, he accepted the importance of fixed rules for procedural law and, above all, for criminal law. This was nothing else than the project of a modern procedural and criminal law.

3. Savigny's accent of legal academia, or, as one might more readily say, legal science, is a harder point to address. In his opinion, legal science is the only way to achieve true law and an accurate legal practice. His project of 'legal science' was modern in its structure. He emphasises the importance of principles and leading principles in the existing and 'healthy' condition of law. Savigny prefers to ascertain these principles instead of just solving hard cases. He takes the undisputed rules and cases as the legal standard. The method applied at present has proceeded down the other path, to case-distinguishing, judge-made law, with casuistic and selective statutes.

But the key question is that of what is more suitable for the project of modernity. The analysis of principles and the application of systematic thinking are defences against arbitrariness even where the single case decision is concerned. Every comparison of older textbooks on private law from the 19<sup>th</sup> century to the 1960s (leaving aside the Nazi era) with a newer book reveals the increasing confusion in language, systems, creation of norms, and orientation. Thus, theory becomes the slave of the legal practice in a legal environment that favours case law. Surely, systems and principles are not able to prevent every arbitrariness, but they do make it difficult for the courts to abuse the methods of interpretation. On our European continent, only informal statutes on instances and organisation are binding on practice in the courts. There are no principal rules and habits for precedents as in Common Law and English case law. Furthermore, the application of principles that are embedded in the existing positive law preserves the connection of law and the autonomy of its users. This connection might be preserved even against a statute. This was a current conflict in Savigny's time, as when the monarch's statutes or decrees were under dispute. Today, a conflict between the democratic legislation and civil society seems unimaginable, because both describe the same subject. In the end, Savigny's recourse to a 'true law' besides the 'statute' has a Jacobinic and very modern touch indeed. We recognise here a democratic right to resist an unconstitutional government or power.

4. Savigny's project even contains modern elements in substance. His concept of law is based on his famous idea of the 'spirit of the people' (*Volksgeist*). That means that it perceives the law more as a spontaneous order than as a planned and implemented structure. In this respect, the enlightened project of modernity seems to be ambiguous and undetermined. The codes and not the customs are its ideal law. This law, planned by an authority, does not serve only to order and to channel approved matters; it also serves to shape society and direct it further against all unwelcome ideas. For this reason, the relation between the pivotal point of the project of modernity and its implementation comes under pressure. Human autonomy is the pivotal point, but the implementation can be directed against this autonomy of the individual, as the history of the 20<sup>th</sup> century proved. Today, democracy shall relieve the tension. Savigny does not choose this option. At least he

charges the lawyers with looking at the ‘spirit of the people’, which is the self-aware life of law. This was a first step toward democratic modernity and by no means a little step of the time.

5. Finally, I wish to turn now to some standard critical arguments in respect of Savigny and modernity.

#### (1) Savigny’s rejection of codes

Savigny’s rejection of the French *Code Civil* and the Austrian General Civil Code (ABGB), the two most liberal codes of the day, is well known. But he mainly criticised the technique of codification. Savigny shared the aims of completeness and security of law, but he had other tools in mind. He wanted to achieve these aims through legal science — namely, by learning the legal principles of the existing law. Abstract systematic, comprehensive casuistic approaches and ‘mechanical security’<sup>\*32</sup> were not his means. Savigny’s method was most suitable for private law, which has been in a non-codified state for centuries and always needs the technique of non-positive roles.

As regards contents, in 1814 Savigny turned against the “indescribable power, which the mere idea of uniformity [of the law in one country] [...] exercised for such a long period in Europe”.<sup>\*33</sup> However, this did not relate to the equality of human beings. He was particularly critical of the technical weaknesses, which caused “huge legal uncertainty”, in his opinion.<sup>\*34</sup> He did not criticise important modern principles of the *Code Civil* like equal legal capacity or the freedom to act. The same is true for the Austrian code. In his ‘System’ of 1840, Savigny declared all men equal before the law.<sup>\*35</sup>

Criminal law and constitutional law were more problematic areas. Savigny’s view on the ‘true’ law behind the legal provisions clashed with the urgent necessity of secure and precise criminal norms, which he described as “an external fact, determining the rights of the citizens” (1802, unpublished).<sup>\*36</sup> Surprisingly, but consequently, Savigny very early on advocated legislation for criminal law. Unpublished but fairly well-established sources prove that. Savigny lectured on this in 1816–17 before the Prussian crown prince, who was his private student<sup>\*37</sup> (1816–1817, unpublished). He defended and implemented his position when this later king appointed him in 1842 as minister of legislation. The famous Prussian criminal code of 1851 and the German Imperial Criminal Code of 1871 were the results. Hence, Savigny pleaded for codification in the field of criminal law. Despite his general denial of codification, his position on criminal law is not inconsequential. In the concrete case of criminal law and in the tradition of the Enlightenment, the urgent need for legal security outweighs the disadvantage of fixing norms. Furthermore, Savigny’s criminal code is milder than Feuerbach’s ambitious and famous Bavarian code of 1813. Savigny’s code postulates the principle of *nulla poena sine lege* as well (§ 2).<sup>\*38</sup> Some scholars even ascertained it to be the “spirit of the liberal Rechtsstaat”.<sup>\*39</sup> We see that Savigny’s rejection of codes is not general and contains very modern elements.

#### (2) Savigny’s rejection of contract theory

As is general knowledge, Savigny condemned the prevailing contract and sovereignty theories in constitutional law. He claimed that the state was an “integrated whole by nature” (*Naturganzen*), no ‘machine’ as the theory of the Enlightenment declared it, and that it was a “corporeal stature of the living community of people” (*leibliche Gestalt der lebendigen Volksgemeinschaft*), not a mere instrument (1840).<sup>\*40</sup> In Savigny’s conception, the people and their law were not constituted but only a “visible and organic emergence” (*sichtbare und organische Erscheinung*).<sup>\*41</sup> For him, the concept of ‘people’ described an organic substance, not a political subject. The concrete monarch, the concrete people, the concrete legislator, and jurists are only the ‘organ’ of the ‘true law’. They had only to “recognise and to pronounce the law, which existed irrespective of them”<sup>\*42</sup>. On the other hand, they had sometime helped to constitute it.

In comparison to Savigny’s approach, here the project of modernity is more radical and accredits complete sovereignty only to a concrete nation. Savigny did not choose this solution, because he had in mind the bloody tyranny of the popular government during the French Revolution.

<sup>32</sup> F. C. von Savigny (Note 24), p. 5.

<sup>33</sup> *Ibid.*, p. 41.

<sup>34</sup> *Ibid.*, p. 81.

<sup>35</sup> F. C. von Savigny (Note 10), p. 2.

<sup>36</sup> J. Rückert. *Idealismus, Jurisprudenz und Politik bei Friedrich Carl von Savigny*. Ebelsbach 1984, p. 126.

<sup>37</sup> J. Rückert. *Juristische Methode und Zivilrecht beim Klassiker Savigny*. ... p. 57; J. Rückert (Note 36), p. 164; A. F. Berner. *Die Strafgeseztgebung in Deutschland vom Jahre 1751 bis zur Gegenwart*. Leipzig 1867 (reprinted Aalen 1978), p. 236.

<sup>38</sup> J. Rückert. Das “gesunde Volksempfinden”. Eine Erbschaft Savignys. – *ZSGerm* 1986 (103), p. 240 et seq.; V. Krey. Keine Strafe ohne Gesetz. Einführung in die Dogmengeschichte des Satzes “nullum crimen, nulla poena sine lege”. Berlin 1983, pp. 90, 21.

<sup>39</sup> V. Krey (Note 38), p. 21.

<sup>40</sup> J. Rückert (Note 36), pp. 312, 328; F. C. von Savigny (Note 10), pp. 14, 15.

<sup>41</sup> F. C. von Savigny (Note 24), p. 13.

<sup>42</sup> Compare K.-P. Ott. *Geld- und Geldwerttheorien im Privatrecht der Industrialisierung (1815–1914)*. Ökonomische Wechsellen in der sogenannten Begriffsjurisprudenz. Berlin 1998.

Savigny seemed to reject the principle of freedom when he reformulated it as a principle of ‘true’ freedom (1815) and criticised non-positive basic rights (*Urrechte*).<sup>\*43</sup> Yet he argued in favour of a free private law in principle, which can be described as liberalism in private law.<sup>\*44</sup> He preserved freedom for private law but not for public law. As a portrayal of positive law in Prussia and Germany for the year 1840 this seems to be adequate and realistic. Savigny was fully aware that the boundary between a free private law and a less free public law was a crucial question. But on this point he was not very clear. On account of this lack of accuracy, Savigny’s distinction was too open for the enlightened project of modernity. We see that Savigny’s rejection of contract theory had its foundation in dangerous elements for his time, not in a generally divergent position.

### (3) Savigny’s metaphysics?

At first glance, Savigny’s objective-idealistic approach to metaphysics does not appear to fit into the project of modernity. He uses his metaphysics to secure the existing law against rational and planned changes by legislation. Savigny’s metaphysics represents a double concept of law — ‘a law within the law’ — even within the sphere of positive law. His metaphysics also represents a juristic thinking, which creates ambivalence but also a shelter for tradition against the future and containment for the concept of freedom. In contrast and far away from Savigny, the project of modernity ties up with Kant’s subjective idealism.

Yet Kant’s project is not completely free of metaphysics, even if one thinks in terms of Habermas’s juristic ‘inalienabilities’. Evidently, the project of modernity has to set its first starting point itself, just as other projects do. And, indeed, it began with human autonomy for the first time. The project of modernity must not fall back beyond this starting point and must not choose another outset. But this choice at the beginning can only be based either on an indisputable/imperative solution or on empirical/logical arguments. The ‘first promoter’ choice must be described as metaphysics. In this light, two forms of metaphysics are seen to be simply juxtaposed one with the other.

I hope this work has provided the reader with a clear sense that the standard critics of Savigny do not offer proof against the modernity of the key elements of his jurisprudence. In the end, we see a great deal of modernity in Savigny’s legal theory, which this work has been an attempt to illuminate, in demonstration against some very misleading simplifications made today. In this way, I hope, we’ll not only learn history but learn from history.

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<sup>43</sup> J. Rückert. Dogmengeschichtliches und Dogmengeschichte im Umkreis Savignys. – Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanische Abteilung 1987 (104), pp. 666–678.

<sup>44</sup> F. C. von Savigny (Note 24), p. 29.



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# The Ambivalence of Reforms and their Absence: Baltic Lessons of the 19<sup>th</sup> Century

## 1. Introduction

Post-reindependence Estonia has been known as the most reform-inclined country in at least Eastern, if not all of, Europe. Be it the rapid restructuring of the Soviet-style planned economy in the spirit of economic liberalism, unharnessing of private law from the Soviet *étatisme* and its reconstitution upon the foundation of private autonomy, introduction of a penal code grounded on the rule-of-law principles, adaption of the legal system to the EU accession requirements, fundamental reorganisation of the higher education system according to the so-called Bologna model, or something else — decisions to reform are made swiftly and without having long discussions. Thus it is no wonder that locals joke that in the Estonian (legal) culture, only one thing is traditionally constant: the tradition of disruptions.

This statement seems to be supported by the 20<sup>th</sup> century's changeful political and legal history, spent in a field of tension between various foreign rules and independence. In the beginning of the century, the territories of present Estonia and Latvia constituted as divided into autonomous Baltic provinces — *Estland* (Estonia), *Livland* (Livonia) and *Kurland* (Courland) — still a part of the Russian Empire. The autonomy of the provinces had been strongly contested by the great judicial reform of 1889<sup>1</sup>; however, the class-based constitution was retained up to the First World War, and the local administration remained the “knighthoods’ self-government”. From the disintegration of empires in World War I, the present day Baltic States emerged as democratic republican nation states, whose one of the first commitments was to abolish social ranks by means of respective laws. The authoritarian tendencies in Europe during the 1930s had their effect also on the constitutions and law of the Baltic States. The Soviet occupation of 1940 brought with itself something unprecedented: the abolishment of the entire applicable legal order and its replacement with the laws of the Russian Socialist Soviet Federative Republic. During the Nazi-German occupation, all of Soviet law was, in turn, entirely abolished and the law of the nation states restored — however, with the reservation of supremacy

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<sup>1</sup> More of this by T. Anepaio. Justice Laws of 1889 — A Step in Estonia's Constitutional Development. — *Juridica International* 2005 (X), p. 150 et seq.; *Idem*. Die Justizreform von 1889 in den Ostseeprovinzen und das Baltische Privatrecht: die gegenseitige Beeinflussung. — J. Eckert, K.-Å. Modéer (Hrsgs.). *Geschichte und Perspektiven des Rechts im Ostseeraum*. Frankfurt/M u.a. 2002, p. 59 et seq.; *Idem*. Dialogue or Conflict? The Legal Reform of 1889 and Baltic Private Law Code. — *Juridica International* 2000 (V), p. 168 et seq. In this article, the judicial reform of 1889 is discussed in point 3.1.



for German martial law. The second Soviet occupation and annexation in 1944–1945 brought back the Soviet law which remained applicable up to the collapse of the Soviet Union in 1991. Thereafter have the Baltic States gone through a large number of reforms on their own initiative as well as in the name of accession into the EU.

Against the background of such mobility, the earlier history, although not without changes in power<sup>\*2</sup>, seems almost like a constitutional and legal stagnation. Post-World War I Republic of Estonia inherited from the Russian Empire's Estonian and Livonian governorates a medieval legal particularism, of which, for example in private law, it still had not managed to free itself by 1940.<sup>\*3</sup> The roots of the aforementioned self-government of the knighthoods went back to the Medieval Ages and it retained its early-modern-era-structure, as well as its ruling position in the local class society up to World War I. The so-called Long Middle Ages<sup>\*4</sup>, usually considered to have ended approximately in the middle of the 19<sup>th</sup> century, continued in the local constitution up to the beginning of the 20<sup>th</sup> century. In law, the influence lasted even longer, partly extending up to the current era of reforms.

On the other hand, it can hardly be said that the European 'saddle era'<sup>\*5</sup> ventured past the Baltic provinces of the Russian Empire without leaving a trace. In Tartu (then called Dorpat), a German-language university was active from 1802 onwards. The university saw as its important mission the task of communicating European scientific culture to the Russian empire.<sup>\*6</sup> Although the abolishment of serfdom happened gradually, it still became true decades earlier than in the so-called Inner Russia.<sup>\*7</sup> Unlike in Russia, the Baltic agrarian reforms became a foundation for the development of small land ownership.<sup>\*8</sup> About in the middle of the 19<sup>th</sup> century started certain processes which give a testimony of the intrinsic modernisation of the society: the beginnings of an organisation movement based on voluntary associations, gradual urbanisation, development of the Estonians' and Latvians' national identity, the evolution of both the Baltic-German and Estonian newspapers into a medium of the modern public sphere, the beginnings of industrialisation in both towns and the countryside, etc. All those processes have also been looked into in both Estonian and Baltic-German history writing.<sup>\*9</sup> However, very little attention has been paid to important reform discussions that directly concerned the constitution and law of the provinces: namely, the attempt in 1860s made to reform the Baltic provinces' judicial order and procedural law. The aim of this article is to compensate a bit for this lack of attention (Section 2). Even though it is not yet based on the results of an extensive study, it is nonetheless already possible to correct the picture brought forward in previous studies of the legal policy and jurisprudence of the Baltic provinces in the second half of the 19<sup>th</sup> century. As the local modernisation attempts were unexpectedly resisted by the unifying modernisation policy of the Russian Empire, its consequences will also be analysed (Section 3).

<sup>2</sup> From the beginning of the 13<sup>th</sup> century onwards, Estonian territories have either partly or entirely been ruled over by almost all of the Baltic Sea powers at one time or another: to the Holy Roman Empire of the German Nation (up to 1561), Northern Estonia to the Kingdom of Denmark (1238–1347; the island of Saaremaa/Ösel 1559–1645), Southern Estonia to the Rzeczpospolita as a part of the Grand Duchy of Lithuania (1542–1629); to the Kingdom of Sweden (Northern Estonia in 1561–1710, Southern Estonia in 1629–1710); to the Russian Empire (1710–1917).

<sup>3</sup> More on this by M. Luts. *Aktuelle Zivilrechtsreform in Estland als eine historische Herausforderung*. – H. Heiss (Hrsg.). *Zivilrechtsreform im Baltikum*. Tübingen 2006 (= *Studien zum ausländischen und internationalen Privatrecht* 161), p. 31 et seq.

<sup>4</sup> Cf. J. Le Goff. *La Civilisation de l'Occident medieval*. Paris 1984. I have used the Estonian translation thereof, entitled: *J. Le Goff. Keskaja Euroopa kultuur* (Medieval European Culture). Tallinn 2001, p. 11 et seq.

<sup>5</sup> The 'saddle era' is a concept of German history, which was introduced in one of the most remarkable works of the last few decades, that can only in very tentative terms be regarded as a work of conceptual history: R. Koselleck. *Einleitung*. – O. Brunner, W. Conze, R. Koselleck (Hrsg.). *Geschichtliche Grundbegriffe. Historisches Lexikon zur politisch-sozialen Sprache in Deutschland*. Bd. 1. Stuttgart 1972, p. XIV. This refers to the era approximately between the years 1750 and 1850, when Europe was swiftly moving from the long centuries of the *ancien régime* into vortices of a new modern era.

<sup>6</sup> More on this by M. Luts. 'Eine Universität für Unser Reich, und insbesondere für die Provinzen Liv-, Ehst- und Kurland': Die Aufgaben der Juristenfakultät zu Dorpat in der ersten Hälfte des 19. Jahrhunderts. – *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Germanistische Abteilung*. Bd. 117. 2000, p. 615 et seq.

<sup>7</sup> The personal liberation of peasants in the Baltic provinces was carried out under the Peasant Regulations of 1816, 1817 and 1819. In Russia, this was not accomplished until 1861.

<sup>8</sup> The Livonian Peasant Regulations of 1849 and 1860 and the Estonian Peasant Regulations of 1856 and 1859 regulated very precisely the procedure of separating farmsteads from the manorial property and, eventually, selling the ownership of farmstead lands to peasants. The 1861 reform in Russia provided for communal land ownership, the peasants only having rights of use.

<sup>9</sup> With references: M. Luts. *Modernisierung und deren Hemmnisse in den Ostseeprovinzen Est-, Liv- und Kurland im 19. Jahrhundert*. – T. Giaro (Hrsg.). *Modernisierung durch Transfer im 19. und frühen 20. Jahrhundert*. Frankfurt/ M 2006 (= *Studien zur europäischen Rechtsgeschichte*. Bd. 205; *Rechtskulturen des modernen Osteuropa. Traditionen und Transfers*. Bd. 1), p. 190 et seq.

## 2. Modernisation ‘from below’

### 2.1. The judicial reform attempt in 1860s: a project of progressive intellectuals?

In Baltic-German history writing, the modernisation-readiness of the 2<sup>nd</sup> half of the 19<sup>th</sup> century has often been associated with intellectuals. Gert von Pistohlkors argues that especially in the towns and especially on the initiative of the academic circle, a ‘liberally-minded public’ was formed, and — as never before in Baltic history — ‘upheld by the political press’.<sup>\*10</sup> The flagship of the progressive circles, and their most lasting achievement in that context, is without doubt the magazine *Baltische Monatsschrift*, which was first published in 1859 and reached its last annual volume, i.e. Volume No. 62, in 1931.

The discussion around reforms concerning local procedural law and courts administration, that we are concerned with now, was given a decisive push by the plans for judicial reform in the Russian Empire. In 1862, the main principles of the reform were approved by the Governing Senate and published in the Baltic Sea provinces in German translation.<sup>\*11</sup> This became the kick-off for a lively discussion on the shortcomings of the existing law and commencement to an avalanche of reform proposals. E. Winkelmann’s bibliography compilation contains 51 entries on articles and published drafts from 1862 to 1873 in the section dedicated to the judicial reform in the Baltic provinces.<sup>\*12</sup>

That this discussion was not merely academic is apparent already from the fact that from the beginning of the 1860s onward, the knighthoods of all three provinces had all been working on procedural law. Even there, something completely new happened. In the years 1864–1865, a Common Central Judicial Committee of the Baltic Sea Governorates (*Zentraljustizkommission* in German) was carrying out its activities in Tartu.<sup>\*13</sup> The novel aspect of this board was, first of all, the fact that it included representatives from the knighthoods of all three provinces as well as representatives from the towns and the university. However, its objective was even more innovative: to prepare drafts for courts administration order and procedural law that, while shared by all three provinces would lie the foundation for a common court procedure. No earlier codification<sup>\*14</sup> had attempted to harmonise the laws of the Baltic Sea provinces. Neither had it as its aim the codification of local private law, concurrently in preparation, approved by the emperor in 1864 and came into force in 1865.<sup>\*15</sup>

It is obvious that in order to harmonise the procedural law of the three provinces, the discrepancies in existing laws had to be eliminated. This is the point in which the reform discussions of the 1860s showed their nature as that of a true modernisation discussion. In newspapers and scholarly works, as well as in draft laws, changes to the existing (procedural) law were proposed. This was a completely new attitude in the legal policy of the Baltic provinces, where, until then, the exercise of the provinces’ autonomy was often seen in the maintenance of the existing law. The procedural-law drafts of the 1860s, based on the principles of hearing and publicity, spoke the language of modern law and demonstrated a readiness for modernisation.

A new procedural law would also have required a new system of courts administration. This topic was also a subject of heated discussion. In previous studies, it has been emphatically stressed that the draft of the Central Judicial Committee still did not emerge from the idea of a radical modernisation of the class-based judicial system but maintained a more conservative position.<sup>\*16</sup> Baltic-German history writing has attributed

<sup>10</sup> More on this by G. v. Pistohlkors. *Die Ostseeprovinzen unter russischer Herrschaft (1710/95–1914)*. – G. v. Pistohlkors (Hrsg.). *Deutsche Geschichte im Osten Europas: Baltische Länder*. Berlin 1994, p. 365 et seq.; in detail also by M. Haltzel, 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. 40 et seq.

<sup>11</sup> *Die Reorganisation der Rechtspflege in Russland*. Nach dem Original-Text übersetzt. Riga 1862.

<sup>12</sup> E. Winkelmann. *Bibliotheca Livoniae Historica*. Berlin 1875, p. 156 et seq. Cf. that the previous subdivision contains only 14 entries on provincial-law codification although the period of 1818–1866 was a substantially longer one.

<sup>13</sup> Concisely by G. von Pistohlkors (Note 10), p. 372 et seq.; in more detail by G. von Pistohlkors. *Das “Hineinragen” der ständischer Strukturen in die sich modernisierende baltische Region: Die gescheiterte ständische Justizreform in den 1860er Jahren*. – G. von Pistohlkors. *Vom Geist der Autonomie. Aufsätze zur baltischen Geschichte*. Zum 60. Geburtstag des Verfassers hg. v. Michael Garleff. Köln 1995, p. 43 et seq.

<sup>14</sup> The first two volumes of the intended five-volume codification of the law of the Baltic provinces were completed in 1845: *Provinzialrecht der Ostseegouvernements. Erster Theil: Behördenverfassung*. St. Petersburg 1845; *Provinzialrecht der Ostseegouvernements. Zweiter Theil: Ständerecht*. St. Petersburg 1845.

<sup>15</sup> *Provinzialrecht der Ostseegouvernements. Dritter Theil. Privatrecht: Liv-, Est- und Curländisches Privatrecht*. Zusammengestellt auf Befehl des Herrn und Kaisers Alexander II. St. Petersburg 1864. Regarding the codification method which attempted to compile and fix all kinds of class and territorial differences, see M. Luts. *Private Law of the Baltic Provinces as a Patriotic Act*. – *Juridica International* 2000 (V), p. 157 et seq.

<sup>16</sup> Of the contemporaries, see O. Schmidt. *Rechtsgeschichte Liv-, Est- und Curlands*. E. von Nottbeck (Hrsg.). – *Dopater juristische Studien*. Bd. 3. Jujew (Dorpat) 1894, p. 325, which also gives an overview of the further fate of the drafts.

this fact to the inertia and durability of the class-based way of thinking.<sup>\*17</sup> In that respect, Gert von Pistohlkors has provided a quite thorough synopsis of the conservative views of the magistrate of Estonia, Baron Robert von Toll (1802–1876), regarding the defence of the existing judicial and administrative order.<sup>\*18</sup> At the same time it has not been explained why Baron Toll had to stand up so decisively to defend the existing constitution. His letter to the master of the Estonian knighthood<sup>\*19</sup> was actually merely a reaction to the proposals of the committee formed within the knighthood for the purpose of reorganising the judicial and administrative institutions of the Estonian governorate.<sup>\*20</sup> R. von Toll had correctly understood that the knighthood's committee with its new judicial order were attacking the existing constitution. He also made a list of those basic points which, according to the committee's proposal, would have brought principal changes into the existing courts administration and the administrative structure of the knighthood in general:

- (1) land ownership and matriculation could no longer be required from persons who were to be elected judges;
- (2) permanent judges;
- (3) professional jurists as standing members of judicial institutions;
- (4) salaries for judges;
- (5) a new organisation of judicial institutions.<sup>\*21</sup>

All these points suggest an intention to determinedly modernise the judicial system and, thereby, to modernise nothing less than the existing constitution of the province. Among other things, it included a proposal to establish a new administrative structure. It would have been topped by a governorate government composed of 8 magistrates from the knighthood, 4 representatives from towns and later (after the ownership of 1/3 of all the farm lands would have been transferred to peasants) also 4 representatives from peasantry.<sup>\*22</sup> It is clear that all those innovative ideas concerned only the administrative and judicial powers while the establishment of general norms had to remain within the competence of the knighthood. Hence, it never came to the Finnish idea of a general Land Council. It is nonetheless remarkable that so radical amendment proposals were circulating in the most conservative of the corporations of the Baltic Sea provinces, the knighthood of Estonia.

Already those brief hints demonstrate that the ranks in the 1860s' discussions around a judicial reform were not at all clearly defined as conservative rural aristocracy *versus* progressive-minded citizenry, intellectuals and scholars. It rather seems that reform supporters were to be found in all social strata. Furthermore, it is clear that the discussion around the reforms was not limited to the provinces' German-speaking upper classes. The newly-awakened ethnic national movements of Estonians and Latvians also participated in it with their own petitions.<sup>\*23</sup> As with the furiously conservative Baron Toll in the knighthood of Estonia, anti-reformists were represented apparently also among intellectuals and nationalists. The present status of the research does not yet enable to give a proper overview of the 1860s judicial reform on the Baltic provinces' own initiative. However, it can already be said with absolute certainty that a readiness for modernisation in that field existed and encompassed circles that were much wider than just intellectual ones.

## 2.2. The resultlessness of the reform attempt and the conservative resignation?

The reform of procedural law and the judicial system did not, however, take place according to the provinces' own suggestions. Still, the Russian central government did not intend to leave the local judicial system unreformed. Nevertheless, this was not supposed to happen in the way 'let us create a new and modern judicial organisation, which is, however, different from the rest of the land's', Russia's powerful striving towards unification and, in a structural sense, the empire becoming a modern state, pointed out, to the Baltic Sea provinces, the limits of their autonomy. The extension of the Russian rural self-government system (*semstvo*) to the Baltic governorates in 1864 was planned and also demanded by the provinces'

<sup>17</sup> G. von Pistohlkors (Note 13).

<sup>18</sup> *Ibid.*, p. 51 et seq.

<sup>19</sup> Schreiben des Landsrath Baron von Toll an den Herrn Ritterschaftshauptmann, 16. Oktober [1863]. – The Estonian Historical Archives in Tartu, 854-2-300. Unpaginated dossier. The letter of R. Toll (on 10½ pages) has been printed for in-house use by the knighthood.

<sup>20</sup> Grundzüge zur Organisation der Landesbehörden Ehstlands. Als Manuskript gedruckt. [1863]. – The Estonian Historical Archives in Tartu, 854-2-300. Unpaginated dossier.

<sup>21</sup> R. von Toll (Note 19), p. 1.

<sup>22</sup> Abweichende Meinungen und Vorschläge einzelner der Herren Landräthe zu den Grundzügen zur Organisation der Landesbehörden Ehstlands. [1863]. – The Estonian Historical Archives in Tartu, 854-2-300. Unpaginated dossier.

<sup>23</sup> On the demands of the Estonian national movement in connection with the judicial reform, see T. Anepaio. Rahvuslikud lootused ja riiklikud vastused. Rahvusliku liikumise õiguslikud nõudmised ja 1889. aasta reform (National Hopes and the State's Answers. Legal Demands of the National Movement and the Reform of 1889.) – Acta Historica Tallinnensia 2005 (IX), p. 3 et seq. (in Estonian with a German summary 'Nationale Hoffnungen und staatliche Antworten. Rechtliche Forderungen der nationalen Bewegung und die Justizreform 1889', p. 26 et seq.).

peasantry. Still, it did not become true. The imperial town law of 1870, however, was extended to the Baltic provinces already seven years later. Neither in that case were the viewpoints of the local towns paid attention to.<sup>\*24</sup> The Russian Empire determined heteronomously a new constitution for the towns and cities, which, at the same time, meant a modernisation of the existing one.

In this pressure situation, the local jurist corps demonstrated a kind of novel inventiveness, which supports the argument that an interior readiness for reforms had awoken in the Baltic provinces. Although the procedural-law drafts of the Central Judicial Committee did not receive imperial affirmation, opportunities to introduce makeshift amendments to the existing procedure were nonetheless found locally. Oswald Schmidt (1823–1890), the professor of provincial law at the university who had energetically participated in the foregoing reform discussion and even dedicated most of his writings to procedural law, published in *Zeitschrift für Rechtswissenschaft*, the new journal of the faculty of law, his ideas on how to cope with the worst shortcomings in the system without changing it principally.<sup>\*25</sup> On the basis of these suggestions, the Higher Provincial Court of Estonia and the Council of the City of Tallinn in 1872, and the High Court of Livonia in 1876 issued their so-called constitutions, which nevertheless partly amended the existing procedural law.<sup>\*26</sup> Therefore the local reform discussion and modernisation-readiness still yielded some results. Moreover, the fate of Schmidt's proposals shows that both the city council recruited among the urban patriciate as well as higher judicial institutions of the knighthood were ready to act upon the instigations of academic circles. This proves that the knighthoods were indeed ready to reform the judicial system and procedure. It is also noteworthy that at least from the 1870s onward, modern professionalisation began to happen in the judicial system managed by the knighthoods.<sup>\*27</sup>

The already mentioned *Zeitschrift für Rechtswissenschaft*, which was the longest-standing (1868–1892; 11 volumes)<sup>\*28</sup> legal journal of the 19<sup>th</sup> century, also came into being in a certain sense as a reaction to the actions of the central administration. Its first issue was first published in 1868 and, therefore, its connection to the censorship arrangements of 1865 remains somewhat obscure. The new censorship arrangements were a painful setback for the local press, which had already developed the character of a modern political discussion forum.<sup>\*29</sup> That discussion, particularly on the pages of the *Baltische Monatsschrift*, also involved jurists. While the press was generally subjected to strict censorship, the faculty of law of the university decided to found a scientific professional journal. The theological *Dorpatier Zeitschrift für Theologie und Kirche*, published already from 1859, was there as an example. When the faculty of law decided to found its own journal in the autumn of 1866, they planned to name it *Dorpatier Zeitschrift für Rechtswissenschaft*.<sup>\*30</sup> It is important to note that as a publication of the university, the journal of the faculty of law was also free from censorship. Remarkably, procedural law remained the main subject in the journal during its first years of issue, thus carrying on the debates that had been interrupted in the general press.

The Baltic-German history writing describes the 1870s in the Baltic Sea provinces of the Russian Empire as an era of resignation. After 'The Livonian Answer'<sup>\*31</sup> by Carl Schirren (1826–1910), the conservative retention of the existing legal order was supposed to have become a main virtue of any Livonian or, in more general terms, any inhabitant of the Baltic provinces. Anyone daring to criticise the social situation or legal institutions of the provinces was extensively condemned by his compeers. The local politics of the 1870s should thus have been characterised by resignation and conservatism.<sup>\*32</sup>

<sup>24</sup> Further on this by O. Schmidt (Note 16), p. 328.

<sup>25</sup> O. Schmidt. Vorschläge zur Reform des in Liv-, Est- und Curland geltenden Civilprocesses. – *Zeitschrift für Rechtswissenschaft*. Jg. 3. Dorpat 1871, p. 216 et seq.

<sup>26</sup> Further on this by O. Schmidt (Note 16), p. 360.

<sup>27</sup> Further on this by M. Luts: Juristenausbildung im Richteramt (baltische Ostseeprovinzen im 19. Jh.). – J. Eckert, K.-Å. Modéer (Hrsg.). *Juristische Fakultäten und Juristenausbildung im Ostseeraum*. Stockholm 2004 (= Rättshistoriska Skrifter 6), p. 297 et seq.

<sup>28</sup> On the basis of studying 19<sup>th</sup>-century legal scientific journals of the Baltic Sea provinces, I have completed two German-language treatises of a more extensive nature. 'Die *respublicae litterariae* um die juristischen Fachzeitschriften in den baltischen Ostseeprovinzen im 19. Jh.' provides an analysis of the body of authors published in the journals and their connections with the University of Tartu. It will be published in the digest of the 3<sup>rd</sup> Day of Legal Historians of the Baltic Sea Area entitled 'Juristen im Ostseeraum' (Helsinki–Turku, 20.–22.05.2004). The second work, 'Die juristischen Zeitschriften der baltischen Ostseeprovinzen Russlands im 19. Jh. – Medien der Verwissenschaftlichung der lokalen deutschen Partikularrechte' takes a broader look at the legal context of publishing the journals as well as their contents. It will be published by M. Stolleis ja T. Simon in the digest of the conference 'Juristische Zeitschriften in Europa' of the Max-Planck-Institute for European Legal History (Frankfurt am Main, 30.09.–1.10.2004). The statements provided in this article with regard to legal journals of the 19<sup>th</sup> century have been substantiated in those articles by reference to sources.

<sup>29</sup> Further on this by G. von Pistohlkors (Note 10), p. 374 et seq.

<sup>30</sup> Protokoll der Fakultätssitzung, 5. Oktober 1866. – The Estonian Historical Archives in Tartu, 402-9-114, l. 77.

<sup>31</sup> C. Schirren. *Livländische Antwort an Herrn Juri Samarin*. Leipzig 1869. Samarin criticised the feudal medievalism of the provinces and attempted to present them as a stronghold of backwardness in the progress-seeking Russian empire. Schirren countered Samarin's critique with the position that while incorporating the Baltic provinces, Russia had confirmed their legal and constitutional autonomy and must respect it.

<sup>32</sup> G. von Pistohlkors. F. G. von Bunge und das ständische Denken in den Ostseeprovinzen bis 1905/06. – T. Rosenberg, M. Luts (Vlja.). *Tundmatu Friedrich Georg von Bunge (The Unknown Friedrich Georg von Bunge)*. Tartu 2006, p. 188 et seq. (in Estonian).



The *Zeitschrift für Rechtswissenschaft* definitely seems to fail to fit into that picture of resignation and lethargic conservatism. The new legal journal became a forum for professional and academically educated jurists. The active authors of the journal also included practising lawyers. Most of them were themselves graduates of the faculty of law of the University of Tartu and had thus natural relations with the faculty. Nevertheless it cannot be said that the faculty or the professors would have had a dominant position among the authors. The scientific quality of the journal did not suffer for that reason; even the articles written by practising lawyers are on a sufficiently high scientific level. Thus the central government's attempts to control the press of the Baltic Sea provinces by means of censorship turned out to be an unexpected favour: it necessitated the establishment of a professional journal which efficiently contributed to the scientific analysis and development of the provincial law. In any case, the reader of the journal is not left with the impression that conservative retention of the existing provincial legal order and its maintenance for any price had among the writing jurists of the Baltic Sea provinces declared to be a fundamental virtue.

Jurisprudence which had ascended to the height of a self-conscious autonomy in the 19<sup>th</sup> century, functioned as a factor in the modernisation of law particularly in space of German culture and science.<sup>\*33</sup> The question of whether we can say the same about the local jurisprudence, cannot be answered without additional thorough research. Until now, there have been no studies on whether anything, and if so, then what, of that new scientific enlivenment actually made its way into judicial practice. Likewise, there is a need for a thorough analysis of the essential argumentation concerning the legal scientific approaches of that time, inter alia, in light of modernisation matters. However, it is important to note that the pressure, which became perceptible from the second half of the 1860s in the provincial policy of the Russian central government, did not yield any discouraging effect on the scientific analysis of the local law but, rather, encouraged it. Nothing before the determined Russification of the university in 1892–1893 significantly injured the Baltic-German jurisprudence.

### 3. Modernisation 'from above'

#### 3.1. The reforms of russian central administration — a success story of modernisation?

The extension of the Russian general town law to the Baltic Sea provinces in 1877 and the resulting changes as a manifestation of modernisation have already been briefly mentioned in this article. Indeed, the constitution of medieval origin, based on guilds and city councils, was replaced with a self-government following the example of the Prussian town order. The strict property requirements in the election of self-government bodies of course rules out the possibility of calling it democratic, but it was no longer a medieval main and administrative constitution either. In larger towns, magistrates were still retained but city administration was no longer within their competence. They remained only as judicial institutions. Thus the administrative and judicial powers had been separated in the towns. Structurally, it meant a big step towards modernisation. Whether this happened in the essentially modern sense is another question. To what extent judicial control over the decisions of administrative bodies was possible and realised has not yet been researched, as far as I know. Yet to be researched is an entire range of other questions that would enable us a glimpse into whether and how the inner development of substantive town law was influenced by the modernisation of the main order in cities and towns as imposed by the Russian central administration.

In a legal-structural sense, the great police and judicial reform of 1888–1889 can also be regarded as the same — modernisation from above. On one hand, that reform was an extension of the Russian judicial reform of 1864 to the Baltic Sea provinces. On the other hand, changes in the initial judicial order were so extensive that this could be regarded as a separate reform. Thus, changes in judicial order that were effected at the same time in Russia have been seen as counter-reformatory.<sup>\*34</sup>

In Baltic Sea provinces, the judicial reform meant a dismantling of the existing judicial system, which had been managed by the knighthoods. This as well as other reforms of the Russification period are specifically regarded as 'dismantling' especially by Baltic-German authors. In more recent writings on legal history, Estonian authors have suggested that the judicial reform of 1889 was also an important modernisation re-

<sup>33</sup> About the science of jurisprudence in modern development and ensuring of legal autonomy in the 19<sup>th</sup>-century Germany see J. Rückert. *Autonomie des Rechts in rechtshistorischer Perspektive*. Hannover 1988, p. 56 et seq.

<sup>34</sup> Cf. J. Baberowski. *Autokratie und Justiz. Zum Verhältnis von Rechtsstaatlichkeit und Rückständigkeit im ausgehenden Zarenreich, 1864–1914*. Frankfurt/M 1996, p. 206 et seq. Baberowski sees the counter-reform mainly in the beginning of restrictions to the competence of juries in the 1880s. At the same time, he does not provide an answer to the question of how the essential aspect of the administration of justice was influenced by the changes in courts administration.



form.<sup>\*35</sup> At this point, mention should be made of a few keywords pointed out by T. Anepaio: state administration of the judicial power, separation of the judicial, police and administrative powers, homogenisation of jurisdictions<sup>\*36</sup>, even partial modernisation of substantive law.<sup>\*37</sup> To this list should definitely be added the statutory requirement of law education for judges and the principles of hearing and publicity of proceedings.

These were mostly the same innovations that had been demanded aloud during the local reform discussions of the 1860s. However, the reform of 1889 also resulted in something not demanded by anyone in the Baltic provinces: Russian as the language of public administration. This is apparently the reason why Baltic-German, Estonian and Latvian literature show the tendency of referring to ‘Russification’ rather than ‘modernisation’ of the judicial system. In effect, it is unclear without conducting in-depth research, whether the above-referred structural characteristics of modernisation really resulted in modernising changes in the legal reality. A separation of administrative and judicial powers will have a modernising effect only if the activities of the administrative power can indeed be controlled by the justice. The state administration of the judicial power must, in this context, also mean independence of the courts and administration of justice on strictly legal grounds. Homogenisation of jurisdictions will have a modern effect if equality and uniformity are provided for by the general rules on legal personality. The lack of law education among pre-reform-period judges was probably rather well compensated by the law education of court registrars, who were responsible for all essential legal preparations for the proceedings.<sup>\*38</sup> However, this was the time when proceedings were conducted in written form. The principles of publicity and hearing introduced by the judicial reform naturally called for judges who were educated in jurisprudence and now had to resolve legal matters by themselves.

The judicial reform of 1889 was, without doubt one of most important breakthroughs, in the history of our local law during the period of the Russian Empire, if not the most important one. In this respect, it must, however, be taken into account that the reform in question was dictated and imposed heteronomously. We do not know whether, and to what extent, the modern possibilities of legal protection established by the reform were embraced by the population of the local provinces. Perhaps they rather returned to such conciliation mechanisms that were carried out extrajudicially (but in their mother tongue). This could be assumed especially concerning the nobles but cannot be ruled out even regarding the citizenry and the peasantry.

### 3.2. The disadvantages and advantages of the university reform

The university reform of 1892–1893 and the following ‘Yurev period’<sup>\*39</sup> in the history of the University of Tartu are also ambivalent, allowing very different, even extreme points of view. The earlier, rather well-functioning German-speaking faculty of law was almost completely dismantled.<sup>\*40</sup> Those not dismissed left the faculty on their own initiative. On the other hand, the consequent Russian-speaking faculty of law was a quite remarkable phenomenon. The new academic staff were mainly young and in the beginning of their academic careers. Almost without exception, they had also studied abroad in addition to Russia or even abroad exclusively.<sup>\*41</sup> A special role had been played by the Roman-law seminar in Berlin, established with the specific objective of preparing future professors for Russian universities.<sup>\*42</sup> The activities of the

<sup>35</sup> T. Anepaio. Justice Laws of 1889 — a Step in Estonia’s Constitutional Development. – *Juridica International* 2005 (X), p. 150–160; *Idem*. Die Justizreform in der zweiten Hälfte des 19. Jahrhunderts in den Ostseeprovinzen – Russifizierung oder Modernisierung? – *Acta Baltica*. Bd. 35. Königstein 1997, p. 257–272.

<sup>36</sup> T. Anepaio. Justice Laws (Note 1).

<sup>37</sup> On changes in substantive private law brought about by judicial reform: T. Anepaio. Die Justizreform (Note 1), p. 59 et seq.; *Idem*. Dialogue or Conflict? (Note 1), p. 168 et seq.

<sup>38</sup> Further on this by M. Luts (Note 27), p. 304 et seq.

<sup>39</sup> Yurev was the Russian name for Tartu used in 11<sup>th</sup>-century Russian chronicles and later, officially, in 1893–1918. [Translator’s note.]

<sup>40</sup> For a concise overview of legal education offered by the German-language faculty of law at Tartu in the 19<sup>th</sup> century, see M. Luts. Der lange Beginn einer geordneten Juristenausbildung an der deutschen Universität zu Dorpat (1802–1893). It will be published in the digest of the conference ‘Juristische Ausbildung in Osteuropa bis zum ersten Weltkrieg’ that took place in the Max-Planck-Institute for European Legal History in Frankfurt am Main on 26.–29.11.2004.

<sup>41</sup> The last category included, e.g., Leon Victor Constantin Casso, who had studied jurisprudence in Paris and Berlin and who worked in Tartu in the years 1892–1895. See T. Anepaio. Leon Victor Constantin Casso (1865–1914). Ein russischer (?) Jurist an der Universität Tartu. – *Juristische Fakultäten* (Note 27), p. 313 et seq.

<sup>42</sup> In recent years, this institution has become a centre of interest for both German and Russian researchers: M. Avenarius. Das russische Seminar für römisches Recht in Berlin (1887–1896). – *Zeitschrift für Europäisches Privatrecht* 1998, p. 893 et seq.; A. Kartsov. Русский институт римского права при Берлинском университете (1887–1896). (Russian institute of Roman law at the Berlin University.) – *Древнее Право* 2003 (12) 2, p. 120 et seq. (in Russian); an extensive monography by F. Kolbinger: *Im Schleppseil Europas? Das russische Seminar für römisches Recht bei der juristischen Fakultät der Universität Berlin in den Jahren 1887–1896*. Frankfurt/Main 2004.

Russian(-speaking) faculty of law in Tartu coincided with a period of extensive modernisation of Russian jurisprudence in the footsteps of Western European, particularly German jurisprudence. Several of the members of the University of Tartu/Yurev's academic staff of those times are even today, or actually, at last, regarded as 'classics' of Russian jurisprudence.<sup>\*43</sup> Not all of them taught Russian law, but also studied and developed further the local law.<sup>\*44</sup> How much of an effect these treatises had on local legal climate cannot be determined without conducting special research. The Baltic-German counter-reaction to the Russification of a German-language university was entirely understandable, and likewise, one can understand their disinclination to see anything positive in that university. The remarkable scientific potential of the faculty of law has been pointed out primarily by Estonian legal historians.<sup>\*45</sup> Still, this has been one of the least-studied periods in the history of the faculty of law. By this I mean in-depth research that would take a closer look at the academic and scientific activities at the University of Tartu during those times, putting it into a modern Russian and European context.

Until now, insufficient attention has been paid to how the Russification of the faculty of law resulted in the appearance of another legal journal, *Dorpat juristische Studien* (4 volumes; 1893–1896), which was the last vigorous manifestation of the German faculty of law but published already outside of the university. Unlike all its predecessors in the local legal literature, this journal had an extraordinarily rapid publication rhythm. The journal had three publishers. The only one still employed by the university was Johannes August Engelmann (1832–1912), professor of Russian law, who still tried to do what he could to save Germany and the German language in the University of Tartu. The professor of local law, Carl Eduard Erdmann (1841–1898), had been dismissed from the university because he refused to lecture in Russian. Woldemar Eduard von Rohland (1850–1936) had left voluntarily, so to say, and was already continuing his academic career as a professor of the University of Freiburg in Germany. Thus the three publishers represented the three possible fates of the old faculty of law. Contentwise, the new journal, the first two annual volumes of which still indicate *Dorpat* as the place of publication and the following two appear as published in *Jurjew* (*Dorpat*), now indeed carried on the conservative and defensive Baltic-German spirit, which had earlier manifested itself primarily in the general provincial press. This manifests itself also in large proportion of legal historical treatments published in the journal. These included 'The History of the Law of Livonia, Estonia and Courland',<sup>\*46</sup> which was compiled from the manuscripts of Oswald Schmidt and has remained an unsurpassed general treatise even today.

In spite of all that, *Dorpat juristische Studien* is not a tombstone for Baltic-German local jurisprudence. From Tartu, its intellectual centre moved to Riga, the capital of the Governorate of Livonia, and even during the Republic of Latvia of the interwar years, German-language jurisprudence continued to flourish there. Its vitality can be seen, e.g., from the publication of the German-language *Rigasche Zeitschrift für Rechtswissenschaft* from 1926–1937. It may sound somewhat cynical from the German-language university of Tartu/Dorpat's point of view, but the Russification of the University of Tartu paradoxically resulted in enlivenment of the local legal science. Firstly, the new academic staff of the University of Tartu were now also contributing to the scientific discussion of local law. Secondly, impetus was added by the defiant self-conscience of Baltic-Germans.

Remaining somewhat aside from the local jurisprudence activities of the Baltic Sea provinces and studying in Russia rather than Tartu or Riga, a generation of ethnic Estonian jurists appeared. They had to bear the burden of establishing Estonian-language legal education and jurisprudence as well as reorganising the imperial legal order after World War I. Nevertheless, the new disruption still always picked up something of the old or allowed the old live on in a new way.

<sup>43</sup> A series of reprints entitled 'The Classics in Russian Civil Law' is being published in Russia. The series has included or will include the works of several civil-law specialists who worked in Tartu: Mikhail Pokrovskiy (1868–1920), Yevgeni Passek (1860–1912), Alexander Krivtsov (1868–1910) et al. Vladimir Hrabar (1865–1956), professor of international law, can definitely be regarded as world-famous.

<sup>44</sup> See T. Anepaio (Note 41), p. 321 et seq.; about Alexander Nevzorov's (1861–1936) publications on the law of the Baltic provinces see T. Anepaio. Die juristische Universität zu Jurjew (1889–1918). It will be published in the digest of the conference 'Juristische Ausbildung in Osteuropa bis zum ersten Weltkrieg' that took place in the Max-Planck-Institute for European Legal History in Frankfurt am Main on 26.–29.11.2004.

<sup>45</sup> P. Järvelaid. 360 aastat Tartu ülikooli õigusteaduskonda (III) (360 Years of the Faculty of Law in the University of Tartu.) – Eesti Jurist 1992/3, p. 247 et seq. (in Estonian); in the context of Humboldtian scientific and education ideals: M. Luts. Scientific Legal Education and the Faculty of Law of the University of Tartu. – *Juridica International* 1996 (1), p. 135 et seq.; of recent studies, particularly in the previously referred works of T. Anepaio.

<sup>46</sup> O. Schmidt (Note 16).



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# Scientific Tradition of Roman Law in Dorpat: *usus modernus* or Historical School of Law?

Private law, in the contemporary sense, has its origins in the 19<sup>th</sup> century, when conceptual changes in law took place all over Europe. However, not everywhere was private law modernised according to the same pattern. It was done by codifying private law into a common code in both France (1804 — *Code civil*) and Austria (1811 — *Allgemeines Bürgerliches Gesetzbuch*), while in Germany, it was mostly achieved through administration of justice and jurisprudence. The 19<sup>th</sup> century saw the heyday of the historical school of law<sup>\*1</sup> established by Friedrich Carl von Savigny, and its methods and system were also exported elsewhere. The elite in the Baltic provinces of the Russian Empire belonged to the sphere of influence of German language and culture and hence the local jurisprudence was also mainly influenced by developments in Germany. The Baltic provinces also lacked a modern civil code, and it was necessary to ensure legal certainty in them by other means (e.g., through science, like in Germany).

The founder of Baltic provincial jurisprudence is considered to be Friedrich Georg von Bunge, who worked as a professor of provincial law at the University of Tartu from 1831 to 1842 and compiled the Baltic Private Law.<sup>\*2</sup> It is also claimed that it was Bunge who introduced the method of the historical school into the Baltic Sea provinces.<sup>\*3</sup> M. Luts has indicated in her doctoral thesis 'Juhuslik ja isamaaline: F. G. von Bunge provintsiaalõigusteadus' (Contingent and patriotic: the provincial jurisprudence of F. G. von Bunge) that Bunge rather proceeded from an earlier method of *usus modernus pandectarum* which was used in the 18<sup>th</sup> century.<sup>\*4</sup> Yet it is not possible, based solely on this, to declare that private law was not modernised through scientific approaches in the Baltic provinces. Savigny's method was obviously known here, at least theoretically.<sup>\*5</sup> Nevertheless, it is not clear whether the method of the historical school was also applied when writing research papers.

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<sup>1</sup> See F. Wieacker. *Privatrechtsgeschichte der Neuzeit*. 2<sup>nd</sup> ed. Göttingen 1996, p. 348 et seq.

<sup>2</sup> See E. Landsberg. *Geschichte der Deutschen Rechtswissenschaft*. Part III. Half-vol. 2. Text. München/Berlin 1910, p. 559; P. Järvelaid. Bunge sajand (Century of Bunge). II. – *Ajalooline Ajakiri* (Historical Journal) 1998 (102) 3, p. 17 et seq. (in Estonian).

<sup>3</sup> E.g., P. Järvelaid. F. G. von Bunge als Professor an der Universität Dorpat/Tartu (1831–1842). – *Tundmatu Friedrich Georg von Bunge* (Unfamiliar Friedrich Georg von Bunge). *Verhandlungen der Gelehrten Estnischen Gesellschaft*. XXXV. Tartu 2006, pp. 70–71.

<sup>4</sup> See M. Luts. *Juhuslik ja isamaaline: F. G. von Bunge provintsiaalõigusteadus* (Contingent and Patriotic: the Provincial Jurisprudence of F. G. von Bunge). – *Dissertationes iuridicae universitatis Tartuensis* 3. Tartu 2000, p. 11 et seq., p. 185 et seq. (in Estonian).

<sup>5</sup> M. Luts. *Die Begründung der Wissenschaft des provinziellen Rechts der baltischen Ostseeprovinzen im 19. Jh.* – *Rechtshistorische Reihe*. Bd. 251. *Geschichte und Perspektiven des Rechts im Ostseeraum*. J. Eckert., K. Å. Modéer (Hrsg.). Frankfurt a. M.: Peter Lang 2002, p. 150 et seq.

Within the historical school, a distinction is made between the so-called Romanists (who studied Roman law and developed a modern private law system on that basis) and Germanists (who studied the law with the so-called German origin, or new branches of law such as commercial law, etc.).<sup>6</sup> Bunge, as a researcher of provincial law, belonged to the Germanists, while Roman law was also studied and taught at the University of Tartu.

The objective of this article is to examine whether the scientific method of the historical school might have been also used by the Romanists of the University of Tartu. The first professor of Roman law at the University of Tartu<sup>7</sup>, who did not come from elsewhere but had been cultivated at the University of Tartu itself, was Ottomar Meykow (7.01.1823–5.02.1894). Therefore, I will analyse the scientific method taught at the University of Tartu on the basis of one of his works, namely *Die Lehre des römischen Rechts von dem Eigentumserwerb durch Specification* submitted to apply for a degree of a Candidate in the Faculty of Law of University of Dorpat (today Tartu) in 1846.<sup>8</sup> Together with three other research papers of the same kind it was published in 1849.<sup>9</sup> His work was not yet a work of a famous scientist, yet this paper by Meykow was widely known: J. Passek writes that Meykow's work has gotten the attention of German scientists.<sup>10</sup> By the time the paper was written, Meykow had not yet studied elsewhere, being consequently 'unspoiled' and most likely not very independent — his research method was such as he had been taught at the university. Thus, when studying his work methods, we can determine according to which method students were instructed to do research at the University of Tartu at the time of Meykow's studies from 1842 to 1847. Was it rather *usus modernus pandectarum*, used by Bunge in his provincial law, or did Meykow apply the methods of the historical school of law?

The theme of Meykow's work — the question of ownership after specification<sup>11</sup>, that is, when somebody, who is not the owner, has made something out of material belonging to someone else — has been one of the most discussed topics since Roman times. The fate of the reprocessed outcome already elicited different comments from Roman jurists, which shows that it was both disputable and intriguing. At the same time, the problem was also important in practice: when answering the question of who is the owner of the new thing, it also becomes clear whether it is the owner or the deliverer/reprocessor who enjoys more support. Such a choice always includes social, economic and political values and considerations. This article has been founded on the paper written by Meykow, purely out of scientific interest in the method used by him and the Romanists of the University of Tartu, while trying to identify whether the future professor of Roman law at the University of Tartu was inclined to observe the earlier or the later scientific tradition.

This article will first give some key points of the methods of *usus modernus pandectarum* and the historical school. As Meykow deals with specification on the basis of Roman law sources, the context of classical Roman law will then be given, to be followed by an analysis of the statements and structure of the paper on the basis of two problems chosen from the work of Meykow, in order to perceive them in the context of Roman jurisprudence.

<sup>6</sup> F. Wieacker (Note 1), pp. 377–378.

<sup>7</sup> With master's thesis 'De duplae stipulationis computatione' he had got the master's degree in 1847 and a doctor's degree with 'Die Diction der römischen Brautgabe' in 1850. J. Passek, O. Meikow. – Biografichesky slovar professorov i prepodavateley Imperatorskogo Yurevskogo Universiteta za sto lety evo sushchestvovaniya (1802–1902). Tom I. (redaktsiy Levitskogo) Yurev: Tipografiya K. Matisena 1902, pp. 604–606.

<sup>8</sup> O. Meykow. *Die Lehre des römischen Rechts von dem Eigentumserwerb durch Specification* (1846). – Dorpater Juristische Studien. E. Osenbrüggen (Hrsg.). Dorpat: Verlag von E.J. Karow 1849, pp. 149–183.

<sup>9</sup> E. Osenbrüggen. Vorwort. – Dorpater Juristische Studien. E. Osenbrüggen (Hrsg.). Dorpat: Verlag von E. J. Karow 1849, p. V.

<sup>10</sup> E.g., a reference is made to him in the article 'Die Lehre von der Specification. Ein Beispiel römischer Juristenphilosophie in ihrem Verhältnis zur modernen Gesetzgebung' by P. Sokolowski, a professor of the University of Moscow at the time (who is considered a German scholar). Published: Zeitschrift der Savigny-Stiftung für Rechtsgeschichte. Romanistische Abteilung 1896 (17), p. 253 et seq. J. Passek also writes that the work by Meykow was well known in Germany: O. Meikow. – Biografichesky slovar professorov i prepodavateley Imperatorskogo Yurevskogo Universiteta za sto lety evo sushchestvovaniya (1802–1902). Tom I. (redaktsiy Levitskogo) Yurev: Tipografiya K. Matisena 1902, p. 605. With a reference to J. Passek, the same is stated by J. Engelmann. See O. M. Meykow. *Allgemeine Deutsche Biographie*. Vol. 55. Nachträge bis 1899. Wandersleb – Zwirner. Historische Kommission bei königlichen Akademie der Wissenschaften (ed.). Leipzig: Duncker & Humblot 1910, p. 841.

H. Elbert still refers to him in the second half of the 20<sup>th</sup> century. *Die Entwicklung der Spezifikation im Humanismus, Naturrecht und Usus modernus*. Inaugural-Dissertation zur Erlangung der Doktorwürde einer Hohen Rechtswissenschaftlichen Fakultät der Universität zu Köln. Manuscript. Cologne 1969, p. 56 et seq.

<sup>11</sup> The term *specificatio* was unknown to Roman lawyers. They did use descriptions such as *cum quis ex aliena materia speciem aliquam suo nomine fecerit* or *Cum ex aliena materia species aliqua facta sit ab aliquo* or did specify the problem: *si ex uvis meis vinum feceris* [...] As the notion has become popular among Romanists and is also contained in the title of O. Meykow's paper, it also takes a central position in this article.



# 1. *Usus modernus pandectarum* and the historical school of law

*Usus modernus pandectarum* (the modern application of pandects) was in fact characterised by very different approaches. They all shared the importance of the practical usage value of provisions. Until that time, the reception of Roman law had mostly consisted of a scientific discussion of and comments on the sources, and it had been legitimised by the so-called universal nature of Roman law provisions. *Usus modernus* came to link the scientific and the practical approaches. The earlier *usus modernus* had attempted to link Roman private law and its principles with local (particular) law and the use of their sources, while actually implementing them in practice, resulting in the Roman-German *ius commune*.<sup>\*12</sup> A typical example is the title of a work by D. I. A. Hellfeld ‘*Iurisprudentia forensis secundum Pandectarum ordinem in usum auditorii proposita*’<sup>\*13</sup>, that is, law for (judicial) practice structured according to pandects. Thus, the title of the work comprises both Roman law principles and practice systematised by the Digests; the text makes use of other authors, while still referring to *Corpus iuris civilis* (CIC). Neither Hellfeld nor any other jurists of *usus modernus* paid attention to the time when the sources of Roman law had been created or to the development of institutes of law over time. The sources of Roman law were considered equally valid and relevant also in the 18<sup>th</sup> century. Thus, unlike in the German historical school, it was not important to return to the original sources, and Roman law was discussed in the already developed form of *ius commune*.

The later period of *usus modernus* was characterised by the attempt to systematise law according to the structure of ‘Institutions’ by Justinian, as it was much easier to link German law institutes with those of Roman law this way.<sup>\*14</sup>

The founder of the historical school F. C. von Savigny<sup>\*15</sup> has established that rules with a general content must be created in law, which are not affected by randomness<sup>\*16</sup>, but must express a certain inevitability (an idea of law or internal principle of life).<sup>\*17</sup> Thus, law is simultaneously both historical (*historisch, in der Zeit*) and philosophical (*überzeitlich*), not only one or another.<sup>\*18</sup> All sources of law serve merely as the external form of a superior and self-generating true law<sup>\*19</sup>, in or behind which lays the internal idea of law, a certain metaphysical inevitability.<sup>\*20</sup>

The discipline dealing with law had to be both historical and systematic at the same time. Historically, it was necessary to reach the roots of a legal phenomenon — for example, the original approach to the problem of specification, the CIC comprising the works of the jurists of the classical period. Since the systematic approach had to be combined with the historical one, by the historical roots of the institute of law, we have to inquire about the systematic position, the nature of the institute. The historical part was necessary for identifying the principle of life for law but the outcome had to be a valid and organised legal system. The internal idea of a legal phenomenon did not have to be clearly inferable from the original sources; rather, it remained hidden behind the letter and the jurist had to trace it there. Unlike in contemporary Science of Roman law, it was not important to, so to say, reconstruct history, but the sources of Roman law had to be studied for their practical contemporary use.<sup>\*21</sup> Savigny had described his work method as follows: firstly, one must study the

<sup>12</sup> F. Wieacker (Note 1), pp. 204–215; C. Wollschläger. Savignys Landrechtsvorlesung: ein Beitrag zu wissenschaftlicher Juristenausbildung. – B. Dölemayer, H. Mohnhaupt (Hrsg.). 200 Jahre Allgemeines Landrecht für Preussischen Staaten. Frankfurt a.M.: Klostermann 1995, p. 196; H. Coing. Europäisches Privatrecht. Bd. I. Älteres Gemeines Recht (1500–1800). München: Beck 1985, p. 16.

<sup>13</sup> According to the schedule of lectures of the University of Tartu, the paper was used to teach Roman law in 1803–1818. D. I. A. Hellfeld. *Iurisprudentia forensis secundum Pandectarum ordinem in usum auditorii proposita*. D. G. E. Oeltze (ed.). Editio Quarta. Jenae: Officina libraria Crockeriana 1806, pp. 794–797.

<sup>14</sup> K. Luig. Die Theorie der Gestaltung eines nationalen Privatrechtssystems aus römisch-deutschem Rechtsstoff. – H. Coing, W. Wilhelm (Hrsg.). Wissenschaft und Kodifikation des Privatrechts im 19. Jahrhundert. Frankfurt a.M.: Klostermann 1974, pp. 217–221; P. G. Stein. Römisches Recht und Europa. Die Geschichte einer Rechtskultur. – W. Benz. Europäische Geschichte. 3. Aufl. Frankfurt a. M.: Fischer 1999, pp. 160–181.

<sup>15</sup> The later jurists have not reached a consensus concerning the legal method of F. C. von Savigny. As the dispute is not the core subject of this article, I will take as the basis J. Rückert, who has highlighted the different opinions of F. C. von Savigny, and M. Luts, who has studied the legal teaching of Savigny.

<sup>16</sup> J. Rückert. Savignys Konzeption von Jurisprudenz und Recht, ihre Folgen und ihre Bedeutung bis heute. – Tijdschrift voor rechtsgeschiedenis. D. LXI. Antwerpen: Kluwer 1993, p. 72 (with further references).

<sup>17</sup> M. Luts. Das Verhältnis der Rechtsgeschichte zur Rechtsdogmatik im Werk von F. G. von Bunge. – Tundmatu Friedrich Georg von Bunge (Unfamiliar Friedrich Georg von Bunge). Verhandlungen der Gelehrten Estnischen Gesellschaft. XXXV. Tartu 2006, pp. 212–213.

<sup>18</sup> J. Rückert (Note 16), p. 73.

<sup>19</sup> *Ibid.*, p. 79.

<sup>20</sup> M. Luts (Note 17), p. 212.

<sup>21</sup> *Ibid.*, pp. 212–214.

sources of law (particularly those of Roman law), and thereafter everything that has been written about them<sup>\*22</sup> and on that basis identify the true law that would be applicable also today.<sup>\*23</sup>

## 2. The problem of specification in Roman law

To give an idea about the problem of specification, the descriptions from Roman law sources will be referred to. In Justinian's Institutes, the problem is described as follows:

Inst. 2, 1, 25: *Cum ex aliena materia species aliqua facta sit ab aliquo, quaeri solet, quis eorum naturali ratione dominus sit, utram is qui fecerit, an ille potius qui materiae dominus fuerit: ut ecce si quis ex alienis uvis aut olivis aut spicis vinum aut oleum aut frumentum fecerit [...].*<sup>\*24</sup>

This discussion was particularly evident between the two Roman legal schools: Sabinians and Proculians. A Roman lawyer of the classical period Gaius describes their opinions in his *Institutiones*:

G. 2, 79: [...] *quaeritur, utrum tuum sit id, quod ex meo effeceris, an meum. Quidam materiam et substantiam spectandam esse putant, id est, ut cuius materia sit, illius et res, quae facta sit, uideatur esse, idque maxime placuit Sabino et Cassio; alii uero eius rem esse putant, qui fecerit, idque maxime diuersae scholae auctoribus uisum est [...].*<sup>\*25</sup>

As we can see, the Sabinians considered the owner to be the owner of substance and not the person who made the new thing (*nova species*). The result of the theory of the Sabinians is that if the *nova species* is made of the material of many owners, they all will have part of the ownership and it belongs to all of them as *condominium*.<sup>\*26</sup> The Proculians claimed that the person, who made the new thing, should also be its owner. In the case when the materials of many owners are used the result is still the same.

A solution to this discussion came with *media sententia*, which is described by Gaius in *Rerum cottidianarum* in the 2<sup>nd</sup> century and taken over by Justinian in the 6<sup>th</sup> century:

Dig. 41, 1, 7, 7 [...] *est tamen etiam media sententia recte existimantium, si species ad materiam reverti possit, verius esse, quod et sabinus et cassius senserunt, si non possit reverti, verius esse, quod nervae et proculo placuit. ut ecce vas conflatum ad rudem massam auri vel argenti vel aeris reverti potest, vinum vero vel oleum vel frumentum ad uvas et olivas et spicas reverti non potest [...].*<sup>\*27</sup>

As a result of *media sententia*, the viewpoint of Sabinians is applied if the *nova species* could be changed back into the different materials, e.g., as is the case with a vase. If this is not possible, the standpoint of the Proculians is used as it is with wine that cannot be transformed back into grapes.

The varying opinions of Roman jurists in resolving the problem of specification have provided grounds for centuries of discussions up to the present day. One of those intrigued by the topic was also O. Meykow, and I will discuss the issues referred to in his work.

<sup>\*22</sup> A letter of Savigny to W. Erdmann, dated 21.2.1803 (J. Rückert (Note 16), p. 81).

<sup>\*23</sup> M. Luts (Note 17), p. 213.

<sup>\*24</sup> "Suppose one man makes something out of another's materials. Who is it reasonable to see as the owner, the maker or the owner of the materials? Suppose, for example, that one man makes wine, oil, or grain from another's grapes, olives, or corn; [...]." Justinian's Institutes. P. Birks, G. McLeod (ed.). London 1987.

<sup>\*25</sup> "[...] there is a question, whether what you made from my property is yours or mine. Some people think that one should look to the materials and substance, that is, whoever owns the materials owns what was made from them; this view was taken especially by Sabinus and Cassius. On the other hand, others think the thing belongs to the person who made it, and this appealed especially to the authorities of the other school. [...]" The Institutes of Gaius. Translated with an introduction by W. M. Gordon and O. F. Robinson; with the Latin text of Seckel and Kuebler. London: Duckworth 2001.

<sup>\*26</sup> A. Paret. Die Lehre vom Eigentumserwerb durch Spezifikation in ihrer Entwicklung bis zum Entwurf eines bürgerlichen Gesetzbuches für das deutsche Reich. Leipzig 1892, pp. 39–40.

<sup>\*27</sup> There is however, the intermediate view of those, who correctly hold that if the thing can be returned to its original components, the better view is that propounded by Sabinus and Cassius but if it cannot be so reconstituted, Nerva and Proculus are sounder. Thus a finished vase can be so reduced to a simple mass of gold, silver or copper; but wine, oil or flour cannot again become grapes, olives or ears of corn [...]. The Digest of Justinian. Translation edited by A. Watson. Vol. 2. Philadelphia: University of Pennsylvania Press 1998.

### 3. Structure and problems of Meykow's work

Meykow starts his work with a historical part where the theories of specification of the Sabinians and Proculians and *media sententia* are discussed. Here the main points of the second, the dogmatical part, are mentioned, but not discussed further.

In the historical part, Meykow focuses on sources of law. When writing the second part of his work, he refers to both the more important contemporary literature on law and earlier authors starting from glossators — hence, studies pursuant to Savigny's method of what has been written about the problem but does this by closely following the sources of Roman law and assessing the statements made by others on that basis. Already such division into the historical and dogmatical is similar to the historical and systematic treatment referred to by Savigny. The work method described by Savigny is also suitable for describing Meykow's accomplishments at least in these two aspects. The approaches of *usus modernus*, however, (such as Hellfeld) lacked such historical part and although the references were included in the footnotes, they were discussed via other authors.

Meykow focuses on four main points in his work. Firstly, the systematic position of specification as a class of *acquisitiones originariae*. Secondly, when and who has invented the *media sententia* which Justinian follows.<sup>\*28</sup> Thirdly, whether the specification *bona* or *mala fide* made any difference in the ownership of the new thing for the Roman lawyers. And fourthly, whether the intention, in German *die Wille* (will), was important for the acquisition of the new thing. The former and the latter have been chosen in this article to study the legal method of Meykow. The former of the discussed problems coincides with one of the subtitles in Meykow's dogmatic part. The remaining ones of the four issues have been analysed within the text and not in subtitles.<sup>\*29</sup> He essentially examines the four issues specified above.

It may be said in advance that in several issues, Meykow appears to have proceeded from the opinions held by K. A. Vangerow in his work 'Leitfaden für Pandecten-Vorlesungen'.<sup>\*30</sup> Taking into account that Meykow was about to graduate from the university at that time, it may be presumed that he was not — and was not supposed to be — very independent in his approach. Yet, he sometimes also objects to Vangerow. However, as the main issues and answers are concerned, Meykow's opinion coincides with that of Vangerow as in the classification of specification. Vangerow has highlighted as disputable in his era and also discussed the time of creation and the author of *media sententia* as well as the necessity of *bona fides* for acquiring the processed thing. Vangerow still does not mention the issue of processor's intention or intention as such.

#### 3.1. Occupation, accession or a special class of acquisitions

According to Meykow, a large number of conflicting opinions have evolved in a relatively limited area such as specification because 'there is not enough research done about the question of the position of specification among other methods of acquisition'.<sup>\*31</sup> In fact, as H. Coing notes in 'Europäisches Privatrecht', the question about the position of specification is a relatively old problem and was one of the problems for the lawyers of *usus modernus*.<sup>\*32</sup> At the same time, the question of the systematic position of each institute is also important for Savigny. However, Savigny does not understand the systematic position of a legal institute directly as its location but rather as its nature. It is still possible to reach one through another and Meykow's opinion that conflicts in understanding the topic of specification have arisen, due to lacking research, appears to refer also to the Savignian problem of understanding the nature.

Yet the question about the position of specification among the types of acquisition may already arise due to its position in the sources of Roman law. Especially if we try to look into different sources: into *Institutiones*

<sup>\*28</sup> Meykow prefers the opinion that *media sententia* was invented after Gaius has written his 'Institutiones'. The reason is that G. 2, 79 does not mention the *media sententia* but he does this in 'Rerum cottidianarum' in the Digest. This work was written by Gaius later and Meykow refers to Gaius in that as 'geradezu ein Anhänger von *media sententia*'. O. Meykow (Note 8), p. 156.

<sup>\*29</sup> The subtitles are the following: 'Notion of technical expressions *specificatio* and *specificans*', 'Systematic position of the study of specification', 'Specifier', 'Reprocessed material', 'Legal remedies of the owner of reprocessed material'.

<sup>\*30</sup> Unfortunately, only the edition of 1839 was accessible to me. K. A. Vangerow. Leitfaden für Pandecten-Vorlesungen. Vol. 1. Part 1. Marburg/Leipzig: Elwert Verlag 1839, pp. 494–499. Meykow refers to the 1845 edition.

Since Vangerow discusses specification only on some pages in his book, it is not possible to make serious inferences about their similarity or difference. As only Vangerow highlighted the two problems analysed by Meykow this way, it is most likely that this work was taken as the basis.

<sup>\*31</sup> O. Meykow (Note 8), p. 162.

<sup>\*32</sup> H. Coing (Note 12), p. 300. The same way also H. Elbert (Note 10), pp. 66–75.

of Gaius, *Institutiones* of Justinian and also the Digest. The classification made in these sources is not very clear and can be understood in many ways.<sup>\*33</sup>

The list of the authors and their works to which Meykow refers, and who are supporting one or another of the three possibilities, is long. Supporters of the theory that it was a type of *accessio*<sup>\*34</sup> could be found among the representatives of all periods of jurisprudence from glossators to Meykow's contemporaries.<sup>\*35</sup> The list of proponents of the occupation theory<sup>\*36</sup> developed by Meykow began with Donellus and led to the very contemporaries of Meykow<sup>\*37</sup>, while Meykow mentioned only authors of the 19<sup>th</sup> century as the advocates of specification as an independent type.<sup>\*38</sup> Meykow's own opinion about the theories is not very clear from his work: at first he claims, concerning all three variants, that they are not correct but then notes later that the occupation theory of the Proculians is the right one.

Meykow first claims that the solution of the Proculians — the specification as a class of *occupatio* — is false. This theory is based on the presumption that the transformed materials disappear in reality, or fictitiously, and there is a totally new thing that could be occupied. But 'this theory does not only create interdependence between human will and external circumstances but also comes into a public conflict with the prohibition to prescribe stolen items'. Also the *media sententia* has, in his view, taken over the theory of occupation.<sup>\*39</sup>

On the contrary, Sabinus has, in the system of his *Libri tres iuris civilis*, placed the specification under the accession. In Meykow's view, this is not true either, as it presumes the existence of a principal and accessory thing.

The defenders of this theory have argued that the form is the principal thing and material accessory.

This does not seem very convincing to Meykow.<sup>\*40</sup> However, it is hard to understand why Meykow finds that the Sabinians and the defenders of their theory of *accessio* should consider the form as primary. It has been

<sup>33</sup> *De adquirendo rerum dominio* is in the Digest of Justinian discussed in 41.1 and it begins with occupation. This is followed by *allovio* and other cases where the river is changing its bed; this is followed by specification (Dig. 41, 1, 7, 7), *confusio* and *commixtio* with the same examples as in Justinian's Institutes; and *inaedificatio* — building another's ground (This book of Digest is based mainly on Gaius's *Rerum cottidianarum*).

In Justinian Institutes until Inst. 2, 1, 24, the ways how one can acquire ownership by occupation are specified (Clearly until Inst. 2, 1, 19 — after that it seems to change to the accession — because *alluvio* is mostly considered as a class of *accessio*. But in Inst. 2, 1, 22, it is mentioned that '*insula, quae in mari nata est, [...] occupantis fit*' — so it sounds to be occupation again or still). In Inst. 2, 1, 25 we can find the above-referred fragment about specification with *nova species*. To this follows the case with purpur in another's robe and it is said that it belongs to the robe as *accessoire* — consequently accession. In Inst. 2, 1, 27, there are the different materials of different owners mixed (*confusio*) and it is held by Romanists to be a class of *accessio*. On the other hand, it is in the fragment presented in the same example as in the previous Inst. 2, 1, 25. Inst. 2, 1, 27: *sed si diversae materiae sint et ob id propria species facta sit, forte ex vino et melle mulsum [...], idem iuris est: nam et eo case communem esse speciem non dubitatur*. (The same applies where the materials are different and their fusion produces a new substance, for instance mead from wine and honey [...] the result becomes the common property of both.) This fragment is followed up further with the cases of accession.

In the Institutes of Gaius, *acquisitiones originariae* are even less structured. He begins with *occupatio* (G. 2, 66) and continues in G. 2, 70 with *alluvio*, which seems to be another class as he cites again: that '*id [...] eodem iure nostrum fit*'. With G. 2, 79, specification which begins again with reference to the natural law: '*In aliis quoque speciebus naturalis ratio requiritur*,' the part of the natural law *acquisitio* ends. So on the basis of the Institutes of Gaius, we could place the specification to the accession or to hold it to be an independent class.

<sup>34</sup> As a result of *accessio*, two things merge or are joined, which may also belong to different owners. One may often be considered the principal and the other an accessory thing, and in such case, the accessory thing merges with the principal thing. However, when a distinction cannot be made between the principal and the accessory thing, the joined or merged thing is in the co-ownership of the owners.

<sup>35</sup> E.g., Placentinus (1535) and Voetius (1779), but also Hugo (1826), Thibaut (1846), etc.

<sup>36</sup> *Occupatio* means the occupation of a thing that does not have an owner. It is presumed in the occupation theory that a processed thing loses its former essence or form and thus the thing itself disappears and a new thing appears — which does not consequently have an owner and can be occupied.

<sup>37</sup> Donnellus (16<sup>th</sup> century), Puchta (1844 — Pandecten), Vangerow (1845), etc.

<sup>38</sup> Schilling (1837), Mühlenbruch (1842), Puchta (1842 — *Cursus der Institutionen*) and Christiansen (1843). H. Elbert mentions already earlier authors such as Oldendorp (1544), Duarenus (1584), Haunold (1671), etc., p. 74, although he notes that specification came to be treated as an independent type later than the others. H. Elbert (Note 10), p. 66.

<sup>39</sup> O. Meykow (Note 8), p. 158.

<sup>40</sup> *Ibid.*, pp. 164–165. P. Sokolowski explains the differences between schools by differences in the philosophical foundations. Namely, in his opinion, the Sabinians were influenced by Stoic philosophy, and placed the matter in the foreground instead of the form. P. Sokolowski (Note 10), p. 279. (F. Wieacker et al generally agree with Sokolowski as regards the philosophical influences of both schools. F. Wieacker u.a. *Spezifikation. Schulprobleme und Sachprobleme. – Festschrift für Ernst Rabel*. Vol. 2. H. Dölle et al. (ed.). Tübingen: J. C. B. Mohr (Paul Siebeck) 1954, pp. 282–283.) At the same time, Meykow says that the Sabinians considered the form as more important. According to Sokolowski, preference of form is based on Aristotelean philosophy, pursuant to which the form determines and delimits the matter; matter in itself is nothing, but its significance lies in the fact that it is indispensable for achieving the goal. P. Sokolowski (Note 10), p. 260. The Aristotelean teachings served as the basis for the Proculian opinions that did not presume the existence of main and accessory things, but the disappearance of one and creation of another thing. Meykow does not explain the philosophical foundations of one or another school.



clearly stated in G. 2, 79 that matter was more important for Sabinus and Cassius (the founders of the Sabinian school), to which the form was added but not *vice versa*. Hence, such objection by Meykow — and also, according to him, that of the others — seems pointless. The Sabinians did not find that the form should prevail, to which an accessory thing is added. Yet Meykow never refers to any authors saying so.

Also the third possibility that the specification could be an independent class of *acquisitio originaria* is, according to his opinion, incorrect. He does not substantiate this argument and argues again against the occupation theory.<sup>\*41</sup> Neither does he provide an answer to the problem but just lets it be.

However, when later discussing the issues of *bona fide*, Meykow still finds that ‘some jurists have rightly considered the acquisition through specification as a subclass of occupation’.<sup>\*42</sup> It thus appears that his very position in this issue is not too clear or at least expressed so clearly.<sup>\*43</sup> Vangerow also thinks that specification falls under occupation, thus he agrees with Meykow and his opinion about Justinian’s position.

The opinions of different authors to whom Meykow refers<sup>\*44</sup> can in some cases be interpreted in different ways. Concerning most of the authors, I shared Meykow’s views of the place of specification, but when Meykow, e.g., claimed that in Schweppe’s<sup>\*45</sup> opinion it was an independent class, I understood it as occupation.

Meykow claims about Puchta that in ‘Pandecten’, dating from 1844, he places specification under occupation.<sup>\*46</sup> In ‘Cursus der Institutionen’ (1857), Puchta views specification on the one hand as *accessio*, yet on the other hand as an independent class<sup>\*47</sup>, while Meykow finds that Puchta holds specification to be an independent class.<sup>\*48</sup> So it seems that different interpretations are possible and one author may also change his view.

Savigny, in his *Pandektenvorlesung*, has treated specification as an independent mode of acquisition and has not pinpointed anything besides the differing opinions of Romans.<sup>\*49</sup> The Nordic authors at the end of the 19<sup>th</sup> century have in their works viewed it as a class of *accessio* or as independent.<sup>\*50</sup>

Hellfeld, in his work, considers specification as a subclass of *accessio*, referring only to the opinion appealing to Justinian, i.e. *media sententia*.<sup>\*51</sup> If we agree with Meykow that *media sententia* had taken up the theory of occupation after the Proculians, then Hellfeld’s approach is contradictory. However, when we presume that the main thing does not change and an accessory thing is added to it as *res nullius*, it is still possible to combine these two theories. The work of Hellfeld does not unfortunately reveal the reasons why it serves as a subclass of *accessio*.

If we ask about the systematic place of the institute and especially in the face of sources of Roman law, where different inferences can be made based on various sources, it is possible to understand why it was a problem both for the jurists of *usus modernus*, and the historical school. In addition, the judgment about the nature of specification was also dependent on its position. Both are important and interrelated, if we wish to have a system of modern law mostly based on the Roman sources.

<sup>\*41</sup> O. Meykow (Note 8), p. 165–166.

<sup>\*42</sup> *Ibid.*, pp. 168.

<sup>\*43</sup> About 15 years later in his ‘Grundriss des Pandektenrechts’ (1866), in a study-book for students, Meykow sees specification more as an independent class. O. Meykow. Grundriss des Pandektenrechts. Dorpat: H. Caakmann 1866, pp. 40–43. The same also O. Meykow. Grundriss der Institutionen des römischen Rechts. Dorpat: Schnakenburg’s Buchdruckerei 1880, pp. 18–20.

<sup>\*44</sup> I have tried to have a look myself into different books of authors, to which Meykow has referred — unfortunately, it was these books that were missing in the library of the University of Tartu, so I took others by the same authors, or earlier or later prints.

<sup>\*45</sup> A. Schweppe. Römische Rechtsgeschichte und Rechtsaltertümer mit erster vollständiger Rücksicht auf Gajus und die Vaticanischen Fragmente. 3. Aufl. C. A. Gründler (Hrsg.). Göttingen: Vandenhoeck und Ruprecht 1832, p. 494. (Meykow refers to A. Schweppe. Römische Rechtsgeschichte und Rechtsaltertümer mit erster vollständiger Rücksicht auf Gajus und die Vaticanischen Fragmente. 2<sup>nd</sup> ed. C. A. Gründler (ed.). Göttingen: Vandenhoeck und Ruprecht 1826, p. 399).

<sup>\*46</sup> This is also my opinion on the basis of Lehrbuch der Pandecten by G. F. Puchta. Leipzig 1838, p. 121, which I have in my possession.

<sup>\*47</sup> G. F. Puchta. Cursus der Institutionen. 2. Bd. 5. Aufl. U. Andorff (Hrsg.). Leipzig: Breitkopf und Härtel 1857, pp. 691–692.

<sup>\*48</sup> O. Meykow (Note 8), p. 163.

<sup>\*49</sup> F. C. von Savigny. Pandektenvorlesung 1824/25. H. Hammen (Hrsg.). – Ius Commune. Veröffentlichungen des Max-Planck-Instituts für Europäische Rechtsgeschichte Frankfurt am Main. Sonderhefte. Studien zur Europäischen Rechtsgeschichte, 62. Savignyana. Texte und Studien. J. Rückert (Hrsg.). Frankfurt am Main: Klostermann 1993, p. 112.

<sup>\*50</sup> In J. Serlachius ‘Lärobok. Sakrätten’, the specification is followed by the classes of *accessio*, so it could be seen as independent class or accession. See J. Serlachius. Lärobok. Sakrätten. Enligt gällande finsk rätt. I. Helsingfors: Akademiska bokhandeln 1899, p. 93. In Wredes ‘Inhemst civilrätt. Sakrätt’ (1899) he says that in Roman law it is one class of *accessio* and regards it as such. See R. A. Wrede. Inhemsk Civilrätt. Sakrätt. I. Ny öfversedd upplaga. Helsingfors: Lindstedts Antikvariska Bokhandel 1899, p. 117 et seq.; the same to the book published in Helsinki in 1946. See R. A. Wrede. Esineoikeuden pääpiirteet. 2<sup>nd</sup> ed. I. Caselius (ed.). Helsinki: Söderström & Co 1946, p. 235 et seq.

<sup>\*51</sup> D. I. A. Hellfeld (Note 13), pp. 794–797.

For the modern literature on Roman Law, the place of specification is no longer a problem and generally specification belongs to accession.<sup>\*52</sup> On the one hand, we can explain this by the needs of the time: today, the Romanists do not try to construct a valid and applicable system of law for use but reconstruct the ‘old’ Roman law as far as possible. Meykow instead seems to try to identify the ‘true’ or ‘real’ place of specification and after analysing different positions of the specification in Roman sources he analyses them according to the substance.

### 3.2. The will of the producer of the new thing

Another issue discussed by Meykow<sup>\*53</sup>, which I would also like to analyse in this article, is the issue of the will of the producer of the new thing.<sup>\*54</sup> The issue of will is also related to classification of specification — *animus rem sibi habendi* (the will to keep the thing in one’s possession) tends to be important in the case of occupation. In the case of *accessio*, the questions of will, its necessity and importance upon classification were more problematic, although not impossible, e.g., in Hellfeld’s treatment.

Meykow argues that the Proculians were the first ones to notice the importance of will (*die Wille*) of the producer of *nova species*. They have made only the mistake of giving him the unlimited power (*schrackenlose Eigenmacht*).<sup>\*55</sup> This is again connected to the first problem we discussed — to the classification. The producer of the new thing needs, in his view, only *animus rem sibi habendi*, as in all cases of occupation. The occupation of reprocessed things has two preconditions: firstly, the new thing must be fully completed and secondly, the reprocessor must decide that he wishes to have the thing, i.e. he must be aware of the wish to acquire the thing. While reprocessing the thing for someone else, he does not acquire it through his will to himself but to another person. Meykow claims that this view is only in the last time seen as *communis opinio* ‘so einfach und unzweifelhaft es auch scheint’.<sup>\*56</sup> Unfortunately, Meykow does not give here any reference.

The theory of will, as Meykow presents it, is not so commonly known in the books of the 19<sup>th</sup> century that he cites, as he claims. Yet, Coing does not mention it as a problem discussed by *usus modernus*. Hellfeld still says that if one of the things to be added to others does not belong to anyone yet, it will transfer to the owner of the principal thing through the will of acquisition (*animus sibi habendi*) in the same way as in the instances of occupation.<sup>\*57</sup> It is still a general principle applying to all cases of *accessio*. In specification, the problem generally was that reprocessed things had an owner.

Puchta also refers to *animus rem sibi habendi* as regards specification: ‘if someone creates by joining his and a strange thing a new thing that differs by nature from the old one by *animus sibi habendi*, [...] the production and the creation of the new thing add such weight to the will that the producer will become the owner of the entire thing’.<sup>\*58</sup> Mühlenbruch notes in his pandect book that if specification takes place with an underlying will to acquire the thing into one’s ownership, it is so in most cases. ‘Yet it was a subject of dispute for the Sabinians and Proculians, while one party assigned the new form [i.e. the thing] to the owner of the matter, the other party to the reprocessor [...]’.<sup>\*59</sup> Such wording again appears to imply the difference of the, so to say, modern law from Romans, and emphasises will. In the book of institutions, Mühlenbruch calls it *animus domini* (the will to be an owner).<sup>\*60</sup>

Whereas Meykow claims that *animus* is important particularly in the cases of occupation, both Mühlenbruch and Puchta opine in their works discussing *animus* that it is an independent method of acquiring things. Thus, the other authors are not that certain that *animus* is relevant only to *occupatio*.

One of the authors discussing the will, more specifically the will to possess, is F. C. von Savigny. The will to possess (*animus possidendi*) is in his opinion expressed through *animus domini* (the will to be an owner) or

<sup>\*52</sup> M. Kaser sees specification as a class of accession for the classical and post-classical period, but mentions that the Roman lawyer did not perceive these cases where different materials would be put together technically as *accessio*. M. Kaser. *Römisches Privatrecht (RPR) I. – Handbuch der Altertumswissenschaften*. Part 3. Vol 3. Section 1. München 1971, pp. 428, 431; RPR Section II. – *Handbuch der Altertumswissenschaften*. Part 3. Vol. 3. Section 2. München 1975, p. 289.

<sup>\*53</sup> K. A. Vangerow does not discuss the issue of will.

<sup>\*54</sup> H. Elbert finds that in specification, important problems include the notion and classification of the ‘new thing’, the principle of operation as a basis of acquisition, the issue of *bona fides* and presumption of *suo nomine*. He never refers to the will of the reprocessor, not even within the text. H. Elbert (Note 10), p. 2.

<sup>\*55</sup> O. Meykow (Note 8), p. 152.

<sup>\*56</sup> ‘[S]o simple and indisputable as it seems’. *Ibid.*, pp. 166–167.

<sup>\*57</sup> D. I. A. Hellfeld (Note 13), p. 794.

<sup>\*58</sup> G. F. Puchta (Note 47), pp. 691–692.

<sup>\*59</sup> S. F. Mühlenbruch. *Lehrbuch des Pandecten-Rechts*. Nach der dritten Auflage der Doctrina Pandectarum deutsch bearbeitet. 2. Theil. Halle: Schwetscke und Sohn 1836, p. 85.

<sup>\*60</sup> *Ibid.*, p. 165.

*animus sibi habendi* (the will to acquire the thing into one's ownership). It did not suffice that the thing was in the factual possession of a person, but he also had to have the will to possess it.<sup>\*61</sup> For Savigny, it is a so-called unavoidable element, a universal principle of law that had to be identified from the sources.<sup>\*62</sup>

I dare not say that Meykow arrived at the universal principle of law exactly as Savigny. Yet in my opinion the sentence 'Aus einer richtigen Auffassung der Stellung unserer Lehre im Rechtssystem ergibt sich mit Evidenz, dass der Specificant für den Erwerb der verarbeiteten Sache wie überall in Fällen der Occupation allein des *animus rem sibi habendi* bedarf'<sup>\*63</sup> indicates that it was his goal. In a word, he tries to find a place for his theory in the legal system — that is, to go beyond structuring that follows pandects or the institution system. This is also indicative of Meykow's will to get through analysing the sources to their underlying principle. According to Meykow, the reprocessor must also be aware of his will to acquire the processed thing, and this is a bottom line theme throughout Meykow's work. This may be seen as a certain parallel to what was expressed by Savigny, or at least as such a pursuit. Considering the age of the author, it need not be and, in fact is not, a mature and integrated concept.

Meykow also gets to the point that in more modern law, attempts have been made to restrict the will of such a reprocessor by the principle of *bona fides*, which has also been derived from the sources of Roman law. Meykow explains it by a subconscious wish to develop Roman law further and 'the only mistake that has been made is that the essentially correct idea has been presented as the position of Roman jurists'.<sup>\*64</sup>

## 4. Conclusions

To sum up Meykow's method, we may say that he has independently looked into sources but also used the works of earlier researchers to support or oppose his views. The division of the work into a historical and dogmatic part while the latter discusses the systematic position of the institute is similar to Savigny's historical and systematic approach.

If we consider one of the most characteristic features of *usus modernus* to be the association between practice and law as a discipline, then this cannot be found from Meykow's work. Neither has Meykow analysed particular rights along with the sources of Roman law. The discussion of both Baltic and German particular law remains beyond the limits of this work. At the same time, the problem had been sufficiently discussed in Roman law, so that there was no place for local law. The method of handling the sources was similar to that of Savigny rather than Hellfeld. Savigny and also Meykow proceeded from the sources in their analyses, although the opinions of later researchers did not go unnoticed either. Still, on reasoning their statements, both took Roman jurists as the basis. Although the jurisprudents of *usus modernus* referred to the sources in footnotes, specification was mostly analysed through other authors and the tradition developed later was more important.

The guiding principle of Meykow's work seems to be to identify the position of specification in the system of law and its underlying principles — just as Savigny's main principles. Thus, his work method reminds one of the German historical school rather than *usus modernus*. It seems that at least the Romanists of the University of Tartu already modelled their research according to the 19<sup>th</sup> century methods in the 1840s, and also passed such a working style on to their students.

Already as a very young researcher, Meykow tries to find the 'right answer' on the basis of Roman law sources, and come to his own conclusion and solution for modern times, as it was a habit and method for the lawyers of the German historical school in writing books about 'System des heutigen römischen Rechts'. Doing this, he stumbles over the same block that he himself points out: 'they unconsciously tried to develop Roman law further'.

<sup>61</sup> F. C. von Savigny. Das Rechts des Besitzes. Eine civilistische Abhandlung. 2. verbesserte Auflage. Giessen: bei Heyer 1806, p. 92 et seq.

<sup>62</sup> M. Luts (Note 4), p. 56. See also *ibid.* for the criticism of C. C. Dabelow about Savigny's approach to sources.

<sup>63</sup> O. Meykow (Note 8), p. 167.

<sup>64</sup> *Ibid.*, p. 168. Here Meykow may try to be supportive of C. C. Dabelow's position — when the latter criticised for the same thing Savigny upon creating 'Besitzwille'. For Dabelow's position, see M. Luts (Note 4), p. 56.



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# Liberal Communitarian Interpretation of Social and Equality Rights: a Balanced Approach?

## 1. Introduction

While it is commonplace for economic, social and cultural rights and equality rights to be the expression of the principle of the welfare state at the national level, not much scholarly interest has been devoted to their interplay and mutual influence. Looked through the prism of constitutional jurisprudence, however, understanding the influence of the principle of the welfare state on the interpretation of the rights might be helpful in explaining some peculiarities of the perception of these rights by individual constitutional tribunals. Furthermore, this part of constitutional jurisprudence can be linked to communitarianism, a theory that, according to Professor Raul Narits<sup>1</sup> and Professor Winfried Brugger, has gained popularity as a theory of interpretation of constitutions.<sup>2</sup> Whereas Professor Brugger confines his argument to the German Basic Law, Professor Narits notes a broader tendency in this regard.<sup>3</sup>

I will argue that constitutional tribunals tend to proceed from a liberal communitarian premise in interpreting fundamental social rights enshrined in their respective constitutions. This is why social and equality rights are construed narrowly and balanced with the collective interest. This tendency is more visible in the sphere of social rights jurisprudence, including cases pertaining to the equal enjoyment of social rights, because the communitarian understanding is easily compatible with the principle of the welfare state that underlies the concept of fundamental social rights, based on mutual dependency in achieving the goals of security and well-being for any member of the society.

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<sup>1</sup> R. Narits. Ühest tänapäevasest põhiseaduse mõttest arusaamise viisist (On One Contemporary Method of Understanding the Meaning of the Constitution). – *Juridica* 1999/10, p. 466 (in Estonian).

<sup>2</sup> W. Brugger. Communitarianism as the Social and Legal Theory behind the German Constitution. – *International Journal of Constitutional Law*, July 2004 (2) 3, p. 432.

<sup>3</sup> See Notes 1 and 2, *ibid*.



This approach differs from the atomic and one-dimensional approach adopted by the UN Committee on Economic, Social and Cultural Rights, which does not involve balancing. Whereas the only justification a state could put forward for not progressively guaranteeing social rights fully to its subjects is lack of resources, the principle of equal treatment (non-discrimination) must be realised immediately in full. Thus in the case of the right to enjoy social rights without discrimination, the right is to trump<sup>\*4</sup> all other considerations of national governments.

What follows is a seeming incompatibility of the national and international social rights approaches, as the traditional communitarian understanding of the principle of the welfare state informs the national constitutional social rights jurisprudence and the same is mostly lacking in the case law of the international tribunals adjudicating cases of social rights.<sup>\*5</sup> Some national and international tribunals have tried to overcome this incompatibility. This tendency is illustrated by two cases: the Five Pensioners case<sup>\*6</sup> of the Inter-American Court of Human Rights and the Social Care Act case<sup>\*7</sup> of the Constitutional Review Chamber of the Supreme Court of Estonia. I will try to analyse the advantages and disadvantages of both of these cases. Due to space limitations, I will omit the European level and shall therefore not deal with the social rights jurisprudence of the European Court of Justice and the European Committee of Social Rights here.

In this article, I will first explore the relationship of social and equality rights, the principle of the welfare state, and liberal communitarianism. I will then continue by presenting and comparing some national and international approaches to social and equality rights. Finally, I will analyse the two irregular cases mentioned above, the Five Pensioners case and the Social Care Act case.

## 2. Social and equality rights, the principle of the welfare state, and liberal communitarianism

The principle of the welfare state constitutes one of the principal sources of legitimisation of a secularised nation-state.<sup>\*8</sup> Although there is no agreement on the exact content of the principle<sup>\*9</sup>, its constitutive elements (or sub-principles) are clearly identifiable: (protection of) social rights and principles of equality (universality) and solidarity.<sup>\*10</sup>

According to a modern understanding, the principle of the welfare state is most closely related to the principles of human dignity and democracy. As a result, the principle of the welfare state is deemed to serve as a safeguard for the society that its members would be empowered to participate in the society and its common affairs in a dignified manner.<sup>\*11</sup> This explains also the emergence of the fourth sub-principle of the principle of the welfare state: the principle of autonomy. According to this principle, the (civil and political) rights of an individual should not be limited due to receipt of state assistance. All of the sub-principles are

<sup>4</sup> According to Ronald Dworkin, rights trump collective goals. See R. Dworkin. *Taking Rights Seriously* 1977, pp. xi–xii as referred to in M. Freeman. *The philosophical foundations of human rights*. – *Human Rights Quarterly*, August 1994 (16) 3, p. 499.

<sup>5</sup> Paragraph 8 of the General Comment No. 3 on the States parties obligations specifically emphasises that the Covenant is neutral and does not require a specific form of government or economic system. It can thus be concluded that the Covenant was not intended to refer to a concept of welfare state or the related communitarian understanding of rights. Available at [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/94bdbaf59b43a424c12563ed0052b664?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/94bdbaf59b43a424c12563ed0052b664?Opendocument) (1.07.2006).

<sup>6</sup> ‘Five Pensioners’ v. Peru, Judgement of 28.02.2003 of the Inter-American Court of Human Rights. Available at [http://www.corteidh.or.cr/seriecpdf\\_ing/seriec\\_98\\_ing.pdf](http://www.corteidh.or.cr/seriecpdf_ing/seriec_98_ing.pdf) (31.05.2006).

<sup>7</sup> Judgement of the Constitutional Review Chamber of the Supreme Court of Estonia in case number 3-4-1-7-03. Available via <http://www.riigikohus.ee/> (in Estonian). Also published in the *Riigi Teataja* (State Gazette) III 2004, 5, 45 (in Estonian).

<sup>8</sup> T. Kingreen. *Das Sozialstaatsprinzip im europäischen Verfassungsverbund. Gemeinschaftsrechtliche Einflüsse auf das deutsche Recht der gesetzlichen Krankenversicherung*. Mohr Siebeck Verlag 2003, p. 23.

<sup>9</sup> See, for example, A. Briggs. *The Welfare State in Historical Perspective*. *European Journal of Sociology* 1961; L. von Stein. *Geschichte der sozialen Bewegung in Frankreich von 1789 bis auf unsere Tage*. Leipzig 1850, Neudruck 1959; E. Forsthoff. *Rechtsstaatlichkeit und Sozialstaatlichkeit*. Darmstadt 1968; R. Mishra. *The Welfare State in Crisis: Social Thought and Social Change*. New York: Harvester Wheatsheaf 1984; E. Benda. *Das Sozialstaatsprinzip*. – E. Benda, W. Maihofer, H.-J. Vogel (Hrsg.). *Handbuch des Verfassungsrechts der Bundesrepublik Deutschland*. 2. Aufl. De Gruyter Verlag 1994; P. Kunig. *The Principle of Social Justice*. – U. Karpen (ed.). *The Constitution of the Federal Republic of Germany: Essays on the Basic Rights and Principles of the Basic Law with a Translation of the Basic Law*. Baden-Baden: Nomos Verlagsgesellschaft 1988.

<sup>10</sup> Hereby I modify slightly the triad offered by Robert Henry Cox. According to Cox, the broadly acceptable elements of a welfare state are protection of social rights, universalism, and solidarity. See R. H. Cox. *The Consequences of Welfare Reform: How Conceptions of Social Rights are Changing*. – *Journal of Social Policy* 2000 (27) 1, p. 1.

<sup>11</sup> Participation in the society as the goal of social rights has been emphasised both by the social citizenship theory of T. H. Marshall (T. H. Marshall. *Class, Citizenship and Social Development*. Garden City, NY: Doubleday 1964) and market-based theories of welfare state (S. Deakin. *Social Rights and the Market*. U. Mückenberger (ed.). *A Manifesto for Social Europe*. Brussels: ETUI 2001, p. 17).

closely intertwined and permeated by the aim to achieve greater collective well-being by means of co-operation. Whereas social rights embody an entitlement to a modicum of protection against certain social risks (unemployment, want, old age, handicap, sickness) and the principle of equality is supposed to guarantee that no-one would be left out of the scope of protection of these rights without a valid reason, the principle of solidarity presents the other side of the coin: fulfilment of the social rights can occur only if and insofar as members of the given society are willing to contribute to achievement of this goal by means of paying taxes or participating in compulsory insurance schemes on an ongoing basis. Anchoring social and equality rights in a constitution means that the promise of social protection may not be withdrawn at will and that, when the state fails to fulfil its obligations, members of the society in question can seek enforcement of these rights by the courts. On the other hand, social and fiscal policies have to respect the autonomy of the individual and may not result in deprivation of any rights in exchange for provision of some social protection.

In any event, it becomes clear that in the framework of the principle of the welfare state, social rights can be regarded primarily as a tool for achieving collective well-being carrying a concomitant thin<sup>\*12</sup> and instrumental<sup>\*13</sup> layer of individual protection with them. Moreover, this thin layer of individual protection can be achieved only by means of an extensive collective effort of building and financing compulsory mutual insurance schemes.

The crucial question in determining the influence of the principle of the welfare state on the interpretation of social rights and the concomitant right to non-discrimination in enjoyment of these rights in concrete cases is thus how to resolve the inherent tension between the interests of the individual and the collectivity (the community, the state).

Christian Wolff, one of the first scholars to address this question, suggested that collective interests should always be given precedence over individual ones.<sup>\*14</sup> In a modern society, this 18<sup>th</sup>-century approach can hardly be considered acceptable. Modern liberals such as Ronald Dworkin believe that individual rights should always trump collective goals.<sup>\*15</sup> It seems difficult to reinterpret a right that is in its essence directed towards achievement of collective good into an individualistic right that does not take into account the collective aims.<sup>\*16</sup> Thus, it seems only logical to proceed from the conclusion of the liberal communitarians that individual rights should be balanced against collective goals.<sup>\*17</sup> This balancing may, however, not reach the point of depriving the right of any meaning so as to let the collective interest prevail.

The starting point of communitarians is that an individual is part of a community and can maximise human fulfilment through self-determination in the community.<sup>\*18</sup> The core thesis of liberal communitarianism is that “a human being’s environment consists of several spheres of responsibility, or forms of association, reaching from the single individual and its near horizon (e.g., partner and family) to the far horizon of all human beings”.<sup>\*19</sup> Each of these communities has its own understanding of justice and its own standards for distributing advantages and disadvantages.<sup>\*20</sup> Some communitarians, like Michael Sandel, find rights “too individualistic, for they focus on their bearers without considering them in a wider social context, and allow them to impose demands on others at the expense of richer, less confrontational relationships”.<sup>\*21</sup> Proceeding from a communitarian premise then, the rights and duties of an individual should be determined in

<sup>12</sup> By thin layer of individual protection, I mean that in many countries social rights are either not justiciable at all or their use in courts is restricted. In case they may be relied upon in courts, there are no effective remedies for the individual applicant whose social rights have been violated. For an alternative discussion of the influence of the nature of social rights on their ability to be invoked before courts, see S. Hyttinen. A Second View from Elsewhere — the EU Debate on the Justiciability of Fundamental Social Rights and the International Justiciability Discourse. – Nordisk Tidsskrift for Menneskerettigheter (Nordic Journal of Human Rights) 2006 (24) 1, pp. 1–14.

<sup>13</sup> The instrumentality of individual social rights is obvious: the possibility to file complaints with a court is there so as to guarantee that the government abides by its social rights obligations flowing from the Constitution and not to further an individual gain of the applicant. The constitutionality of state activities constitutes, in turn, a public concern.

<sup>14</sup> Section 218: ‘Gemeine Wohlfahrt geht der besonderen vor’. Ch. Wolff. Vernünftige Gedanken von dem Gesellschaftlichen Leben der Menschen und Insonderheit dem gemeinen Wesen zur Beförderung der Glückseligkeit des menschlichen Geschlechts. Nachdruck der 4. Aufl. Frankfurt, u. a 1736, 1975.

<sup>15</sup> Consider, for example, Ronald Dworkin, referred to above in Note 4.

<sup>16</sup> Consider here the statement of Veli-Pekka Viljanen: “The liberalistic theory can, on the other hand, be criticized for not taking into account the preconditions necessary in society for ensuring these rights”. See V.-P. Viljanen. Abstention or Involvement? The Nature of State Obligations under Different Categories of Rights. K. Drzewicki, C. Krause, A. Rosas (eds.). Social Rights as Human Rights: A European Challenge. Turku, Finland: Åbo Akademi 1994, pp. 49–50.

<sup>17</sup> W. Brugger (Note 2), p. 460.

<sup>18</sup> *Ibid.*, p. 434.

<sup>19</sup> *Ibid.*, p. 440.

<sup>20</sup> M. Walzer. Spheres of Justice. New York: Basic Books 1983, p. 322.

<sup>21</sup> M. Sandel. Liberalism and the Limits of Justice. Cambridge University Press 1982 as referred to in C. Fabre. Social Rights under the Constitution: Government and the Decent Life. Oxford: Clarendon Press 2000, p. 23.

accordance with his membership in a given community. According to Sandel, social rights presuppose a strong sense of responsibility towards the needy by other people.<sup>\*22</sup> In his opinion, protection of social rights can be achieved only if the members of society feel that they are participating in a society in which all of the members are worthwhile.<sup>\*23</sup> Thus, social and equality rights of an individual must be read in a way that would not harm other members of the same community; on a constitutional level, this would mean balancing interests of the individual against the needs of the society in constructing the social rights concerned. This kind of balancing can occur by means of restrictive interpretation of the scope of application of a constitutional social right or, conversely, by balancing a broadly construed social or equality right explicitly against a compelling collective interest.

### 3. National constitutional jurisprudence

Examples of communitarian construction of social rights can be found in the case law of the Constitutional Court of South Africa and the Polish Constitutional Tribunal.

One of the cases where the collective and individual dimensions of the right to health care have conflicted sharply was the case *Soobramoney v. Minister of Health of KwaZulu-Natal*.<sup>\*24</sup> In that case, a terminally ill patient with heart disease and chronic renal failure was refused dialysis treatment by a state hospital. The hospital lacked sufficient means for providing everyone with dialysis treatment and had thus established guidelines, according to which persons with significant cardiac or vascular disease were not to qualify for the treatment. Soobramoney claimed that his right to emergency medical treatment, as enshrined in article 27 (3) of the Constitution, had been violated. The South African Constitutional Court rejected this argument. Having understood that granting relief to Soobramoney would have meant that every person with chronic renal failure would have been constitutionally entitled to dialysis at state expense, and could have resulted in less funding for other programmes, the Court arrived at a conclusion that the guidelines were necessary, as the problem of scarce resources was nationwide, and reasonable and have been applied fairly and rationally.

While it remains questionable whether the Court struck a fair balance between the collective and individual interests in this case, it is undisputed that the Court has engaged in balancing of these interests in solving the case. It also raises the question of the increasing selectivity<sup>\*25</sup> of rights.

The South African Constitutional Court continued the same line of reasoning in a perhaps better structured manner in the case *Government of the Republic of South Africa and others v. Grootboom and others*.<sup>\*26</sup> In this frequently cited right to housing case, the Court established standards for evaluating whether a social right has been violated. Accordingly, the constitutional requirements are complied with if there are reasonable legislative and other measures taken for achieving the fulfilment of the right concerned and short- and medium-term relief is provided to the most vulnerable persons. This kind of judgement seems to involve application of a well-balanced approach that leaves it to the community to decide through democratic decision-making which kinds of choices are best for advancing the right to housing but at the same time also sends a clear signal to the society that those in crisis can seek relief from the Court. Among other things, this case seems to confirm my argument concerning the instrumentality and thinness of social rights in the communitarian understanding.

A brilliant example of communitarian interpretation of social and equality rights is provided by the Polish Constitutional Tribunal in the case *on lower minimum wage for young employees*.<sup>\*27</sup> In this case, a trade union confederation contested an amendment to the Minimum Remuneration for Work Act, according to which young workers were to be granted — depending on their previous working experience — only 80% or 90% of the general minimum remuneration level. The Constitutional Tribunal rejected the claim of discrimination of the young workers by stipulating that the state is obliged by the Constitution to take measures to fight unemployment. Establishing a differential minimum remuneration level is a measure that may facilitate creation of new working places in a given labour market situation and remains within the margin of appre-

<sup>22</sup> M. Sandel. *Democracy's Discontent*. Cambridge, MA: The Belknap Press of Harvard University Press 1996, as referred to in C. Fabre. *Social Rights under the Constitution: Government and the Decent Life*. Oxford: Clarendon Press 2000, p. 24.

<sup>23</sup> *Ibid.*

<sup>24</sup> Judgement of the South African Constitutional Court of 27.11.1997 in case CCT 32/97, available at 1998 (1) SA 765 (CC), <http://www.constitutionalcourt.org.za/Archimages/1617.PDF> (1.07.2006).

<sup>25</sup> See Note 10.

<sup>26</sup> Judgement of the South African Constitutional Court of 4.10.2000 in case CCT11/00, available at 2001 (1) SA 46 (CC), <http://www.constitutionalcourt.org.za/Archimages/2798.PDF> (1.07.2006).

<sup>27</sup> Judgement K 31/03 on a lower minimum wage for young employees, of 10.01.2005.

ciation of the state. The Tribunal emphasised that the measure corresponds also to the requirements of social justice, as it creates a chance for young persons to become employed, even if this happens in exchange for a relatively low income.

Here, the Tribunal made it clear that the rights cannot be interpreted in a vacuum. The right of young workers (participants in the labour market) not to be discriminated against should be interpreted against the background of the needs of the labour market (a collective interest). The Tribunal justified the restrictive construction of the equality right with the needs of the community and was thus balancing the individual and collective interests in favour of the latter.

However, the Tribunal approach gives rise to the question whether the principle of the welfare state or the general interest, respectively, may be used so as to decrease the existing level of protection. Whereas it is clear that the national labour markets require increasingly more flexibility, lessening the level of protection by means of loosening the non-discrimination standards is generally not deemed acceptable according to international human rights standards. Although the need to guarantee a greater degree of flexibility in the labour markets qualifies well as a general interest of the community, and could therefore be used to balance rights, only compelling reasons may justify taking regressive measures under the disguise of the general interest.

## 4. The international level — the UN Committee on Economic, Social and Cultural Rights

Although the text of article 4<sup>\*28</sup> of the International Covenant on Economic, Social and Cultural Rights (ICESCR), especially the reference to restrictions “for the purpose of general welfare in a democratic society”, would allow the Committee on Economic, Social and Cultural Rights to adopt a similar approach to that of the Constitutional Courts discussed above, it has refrained from doing so thus far. Instead, the Committee has emphasised the importance of fulfilment of minimum core obligations under the Covenant<sup>\*29</sup> — in any case, a minimum level required by the right has to be guaranteed to anyone — and has moved towards an expansive reading of the Covenant by using increasingly the language of the duty to respect, protect, and fulfil.<sup>\*30</sup>

At first glance, the approaches of the national constitutional courts are not compatible with the Committee’s approach. Still, the Covenant is legally binding on its states parties — among others, South Africa and the Republic of Poland. Thus, the national constitutional courts are obliged to comply with its requirements.

Provided that the Committee is consistent in its jurisprudence, a concrete example of a possible conflict between the Committee’s approach and the jurisprudence of the Polish Constitutional Tribunal can be found in the 2002 Concluding Observations of the Committee on Economic, Social and Cultural Rights on the United Kingdom.<sup>\*31</sup> In paragraph 15 of the mentioned Concluding Observations, the Committee expresses concern that the minimum wage protection does not extend to workers under 18 years of age.<sup>\*32</sup> The Committee considers the minimum wage scheme to be discriminatory on the basis of age, as it affords payment of a salary below the standard minimum wage level to persons between 18 and 22 years of age.<sup>\*33</sup> This conclusion as to the non-compliance with the non-discrimination principle in the application of different minimum wages for different age groups conflicts directly with the position of the Polish Constitutional Tribunal in the above-mentioned case concerning a lower minimum income of younger employees. The different outcomes of interpretation of the non-discrimination principles of the Covenant and the Polish Constitution do not follow from the texts of the provisions concerned. The difference stems from the differing jurisprudential philosophies of the Committee on Social, Economic and Cultural Rights and the Polish Constitutional Tribunal and could thus be potentially resolved by means of some sort of convergence of the approaches adopted.

<sup>28</sup> “The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and **solely for the purpose of promoting the general welfare in a democratic society.**”

<sup>29</sup> See Note 5; paragraph 10 of General Comment 3.

<sup>30</sup> M. Sepúlveda. The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights. – School of Human Rights Research Series 2003 (18).

<sup>31</sup> Concluding Observations of the Committee on Economic, Social and Cultural Rights: United Kingdom of Great Britain and Northern Ireland, United Kingdom of Great Britain and Northern Ireland — Dependent Territories, 5.06.2002. Available at <http://www.unhchr.ch/tbs/doc.nsf/0/619d3c786801bc2cc1256bbc00568cea?Opendocument> (1.07.2006).

<sup>32</sup> *Ibid.*, paragraph 15.

<sup>33</sup> *Ibid.*



## 5. The Estonian approach: The way forward?

One possible way of reconciling the communitarian approach with the approach applied by the Committee is the one used by the Constitutional Review Chamber of the Estonian Supreme Court. In the *Social Care Act case*, concerning the right of students residing in dormitories to receive social benefits, the Court interpreted § 28 (2) of the Constitution, establishing the right to state assistance in case of want, by means of the text of the ICESCR and the case law of the European Social Charter on the adequate standard of living. In doing so, the Court pointed out that the minimum core of the right ('satisfaction of primary needs') should be guaranteed. However, it also made reference to the principles of the welfare state and human dignity enshrined in § 10 of the Constitution and stipulated that it means that the Court has to interfere with social rights only if the absolute minimum of dignified living standards is not guaranteed to an individual. Furthermore, proceeding from § 27 (5) of the Constitution, the Court emphasised that the state should interfere only if the family cannot assist its members by means of providing them with sufficient means for living. This conclusion of the Court flows from the text of § 27 (5), according to which the family shall take care of its members in need.

The Estonian Supreme Court has constructed § 28 (2) of the Constitution trying to reconcile the comparative interpretive approach<sup>34</sup> with the liberal communitarian understanding flowing from the text of the Constitution itself. However, in doing this, the Court has focused on the negative aspect of family duties only, without pointing out directly that the rights of an individual have to be balanced against the general collective interest. The latter can, however, be indirectly deduced from the fact that the Court decided to leave the other branches of government significant leeway in designing social policy. On the other hand, the statement that the primary needs of a person have to be guaranteed in any case implies that in any future balancing of social rights against the general interest, the Court will always guarantee the minimum core of the right to the applicant. Thus the scenario of Soobramoney does not seem to be possible before the Estonian Supreme Court.

Having declared the right to state assistance set forth in § 28 (2) of the Constitution justiciable for persons in severe need, the Supreme Court of Estonia went on to solve the case on the basis of the principle of equal treatment contained in § 12 (1) of the Constitution. Having emphasised once again that the legislator must be left with significant leeway in determining entitlements to social benefits, the Court found that there was no rational reason behind the differential treatment of the less advantaged persons who were living in dormitories as compared to all other persons using other types of accommodation when it came to granting of social benefits. It must be noted that the Supreme Court of Estonia used its less stringent equal treatment review standard in that case, whereas in cases involving an equal treatment claim in combination with a violation of a freedom right claim the Court routinely employs the much stricter proportionality analysis.<sup>35</sup>

It can be argued that the Estonian Supreme Court has chosen a more favourable approach to the individual applicant because of the prevalently individualistic and liberal nature of the Constitution, compared to the more egalitarian and social-justice-oriented South African Constitution. Namely, the Constitution of South Africa contains a larger number of social rights provisions, which are also more detailed, and the Preamble of the Constitution directly refers to the aim to "heal the divisions of the past and establish a society based on [...] social justice and fundamental human rights" and "improve the quality of life of all citizens and free the potential of each person". Conversely, it can be argued that the Constitution of the Republic of Estonia should be construed in a more socially just manner compared to the South African Constitution, because the social rights clauses of the Estonian Constitution do not contain any reference to the limitation of state obligation to the maximum of available resources as the Constitution of South Africa does.

As none of these textual arguments seems to explain in a convincing manner why the approaches of the South African Constitutional Court and the Supreme Court of Estonia differ, I conclude that the disparity follows from a differing understanding of the role and meaning of social rights in the two societies considered.

<sup>34</sup> See T. S. Orlin, A. Rosas, M. Scheinin (eds.). *The Jurisprudence of Human Rights Law: A Comparative Interpretive Approach*. Turku, Finland: Institute for Human Rights, Åbo Akademi 2000, p. 17.

<sup>35</sup> See, e. g., the judgement of the Constitutional Review Chamber of the Supreme Court of Estonia in case 3-4-1-13-05, p. 32. Available at <http://www.riigikohus.ee/> (in Estonian), also published in the Riigi Teataja (State Gazette) III 2005, 26, 262 (in Estonian).

## 6. Another possible direction of convergence: The Five Pensioners Case of the Inter-American Court of Human Rights<sup>\*36</sup>

The Peruvian *Five Pensioners case* is a remarkable case because the Inter-American Court of Human Rights has succeeded to capture in paragraph 147 of the judgement in that case the very essence of social and equality rights:

Economic and social rights have both an individual and a collective dimension. This Court considers that their progressive development, about which the United Nations Committee on Economic, Social and Cultural Rights has already ruled, should be measured in function of the growing coverage of economic, social and cultural rights in general, and of the right to social security and to pension in particular, of the entire population, bearing in mind the imperatives of social equity, and not in function of the circumstances of a very limited group of pensioners, who do not necessarily represent the prevailing situation.

The case concerned five pensioners who were not satisfied with the fact that their occupational pension scheme was changed so that they were not entitled to a pension equalling the salary that they would have earned were they still working. Besides being an excellent example of how to effectively ward off unjustified claims of discrimination in enjoyment of social rights, this case demonstrates how it is possible to reconcile the Covenant's approach with a liberal communitarian reading of social rights on the initiative of an international body adjudicating cases of social rights. It can be argued that the Inter-American Court of Human Rights engaged in balancing the common interest, the necessity to enhance the scope of protection of the right to a pension, with the right to equal treatment in entitlement to pension of the individual applicants, arriving at the conclusion that the general interest outweighed the individual interests of the five pensioners concerned.

## 7. Conclusions

National constitutional courts tend to interpret the fundamental social and equality rights enshrined in the respective constitutions in a manner that can be best described as a liberal communitarian reading of rights. This is at least partly the result of the collectiveness dimension entailed in social and equality rights being an expression of the principle of the welfare state.

While this approach allows reaching a result, where the needs of the collectivity are best served and the individual social and equality rights do not lose their meaning, it might lead to arbitrary outcomes undermining the meaning of rights, if all interests could be automatically regarded as important collective interests justifying lowering the established level of protection of particular rights. This danger is especially vividly illustrated by the Polish case referred to above. Thus, constitutional tribunals should try to act in a careful and principled way in this regard.

The United Nations Committee on Economic, Social and Cultural Rights has pursued an entirely different approach so far. The minimum core approach of the Committee, combined with an extensive reading based on the obligations to 'respect, protect, and fulfil', might be a suitable tool for guaranteeing that the necessary attention is paid to serious violations of rights, helping to bring about some change in individual countries, but it does not seem to be fully compatible with the domestic communitarian construction of social rights.

In a situation where there are a number of different human rights instruments concerning one particular right, it would be desirable to try to achieve some convergence in the different interpretive approaches, to make it easier for domestic courts to apply multiple instruments at the same time. This convergence is desirable for practical reasons even if theoretically these different layers of responsibility could be well explained by the liberal communitarian theory.

Given the flexibility contained in the text of the ICESCR, the Committee would be, at least in theory, able to change its approach for the liberal communitarian approach as has been demonstrated by the Inter-American Court of Human Rights in the *Five Pensioners case*. Or, conversely, national constitutional courts could opt for a combined reading of their constitution, using the comparative interpretive approach at the same time with the liberal communitarian one.

<sup>36</sup> Available at <http://www.corteidh.or.cr/> (31.05.2006).

Choosing the latter approach would enable the courts to combine the positive aspects of both models of review. Whereas the resulting review model of social rights would be more complex, it might lead to a fuller and more balanced protection of social rights. Reconciling the different approaches to the right to non-discrimination in enjoyment of social rights promises to be more complicated, however, as it presupposes nothing less than deciding for one or the other approach.



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# Recent Judgments and Decisions of the European Court of Human Rights towards Estonia

## 1. Introductory remarks

This article reviews the judgments<sup>\*1</sup> and decisions<sup>\*2</sup> that have been made by the European Court of Human Rights (ECHR) towards Estonia. It does not analyse every single case decided by the ECHR in the time span addressed here but instead looks at certain groups of decisions and judgments. First, it should be noted that in 2005 several cases were decided where the applicants complained about similar convention violations — about the refusal to grant residence permits to Russian nationals having served in the Soviet military or security forces, and their families. In these decisions, the ECHR adopted an approach to substantiating the inadmissibility of the applications that is largely novel from the perspective of general Strasbourg case law. Secondly, there is a group comprising decisions that address the question of whether Estonian courts when convicting some individuals for crimes against humanity for their actions in the late 1940s and early 1950s acted in accordance with the convention's requirements. These decisions do not offer significant new aspects

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<sup>1</sup> Judgments of the European Court of Human Rights are passed on the merits of the case, and they either establish that a violation of the European Convention for the Protection of Human Rights and Fundamental Freedoms has occurred or establish that there has been no violation. It should be mentioned that the ECHR is not a fourth-instance, or appellate, court, and, e.g., it cannot reverse or quash the judgments of domestic courts. On the basis of the principle of subsidiarity, it is up to the domestic judicial system to establish rules concerning if and how to re-open proceedings after the finding of a convention violation by the Strasbourg court.

<sup>2</sup> Decisions of the ECHR are not made on the merits. Usually the decisions relate to the admissibility of the case, which means that the case shall either be referred for observation on its merits by one of the Chambers of the Strasbourg court or be declared inadmissible according to article 35 of the convention. Sometimes, the decisions that declare a case inadmissible provide quite lengthy reasoning by the Strasbourg court, and frequently the decisions declaring a case inadmissible offer also guidelines for similar or comparable cases for future reference — as shall also be demonstrated in this paper with reference to some of the cases originating from applicants against Estonia.



from the perspective of Strasbourg case law development but do place Estonia into the group of former Soviet bloc countries from which cases dealing with crimes of former state officials have reached Strasbourg.<sup>\*3</sup>

After consideration of these groups of decisions and judgments, the article proceeds to examine whether some areas where Estonia has before been found in violation of human rights continue to be problematic and whether any new patterns of this sort can be noticed.<sup>\*4</sup>

The total number of judgments and decisions made in January 2005 through January 2006<sup>\*5</sup> and entered into the HUDOC (Human Rights Documents) database is 15.<sup>\*6</sup> The total number of entries in the database through January 2006 is 51. This figure by itself is not informative, as cases that are finally decided on their merits are included in the database on multiple occasions — first when the decision is made about admissibility and then for the judgment on the merits. However, the number of entries in the HUDOC database may be indicative of a possible growing frequency with which individual applicants from Estonia seek the protection of the ECHR. The first entry is from 1998, and for the years between 1998 and 2004, inclusive, the annual number of entries in the HUDOC database has been between two and eight.<sup>\*7</sup> Without the month of January 2006, in 2005, there were 12 entries made in the HUDOC database. This is around 50% more than in the previous year and a significant increase over the figures for 2001 through 2003.<sup>\*8</sup> At the time of the writing of this article (May 2006), there were 11 judgments on the merits included in the HUDOC database.<sup>\*9</sup> Four of these were made in 2005, which is slightly under one third of all cases decided towards Estonia. The trend is certainly growing.<sup>\*10</sup>

It is important to note that — leaving aside one case out of the 11 where judgment was made on the merits (this case being one where the parties reached a friendly settlement<sup>\*11</sup>) — there are 10 cases to consider where the Strasbourg court ruled on the merits of the case. In eight of these cases, the court ruled in favour of the applicant, establishing a convention violation as having occurred, and in only two cases was there found to be no violation of the convention.

It is possible to draw some preliminary conclusions through examination of these statistics. First, there is a growing trend in the decisions and judgments of the European Court of Human Rights towards Estonia.<sup>\*12</sup>

<sup>3</sup> It was demonstrated by Aeyal M. Gross already in 1996 that one of the three main groups of complaints made to Strasbourg from the former Soviet block countries comprised cases concerning public officials and the change of regime. According to the study, such cases originated from Bulgaria, the Czech Republic, Hungary, Poland, and the Slovak Republic. Although the Estonian cases discussed in this article are not directly assignable into this category, as they dealt with events occurring not during the collapse of the regime but when the occupation regime seemed at its peak, nevertheless the cases deal with former Soviet officials. See A. M. Gross. *Reinforcing the New Democracies: The European Convention on Human Rights and the Former Communist Countries — a Study of the Case Law.* — *European Journal of International Law* 1996 (7) 1, pp. 89–102.

<sup>4</sup> Kalle Merusk and the author have argued that an area in which there may seem to be a systematic problem of the Estonian judiciary in committing or not noticing human rights violations is that of court judgments in violation of article 7. These are cases where a reasonable individual cannot understand from the wording of the criminal law, not even with the assistance of courts or legal counsel, what behaviour may make him criminally liable. See K. Merusk, M. Susi. *Ten Years since Ratification — the European Convention on Human Rights and its Impact on Estonia.* — *German Yearbook of International Law* 2005 (48), pp. 327–367.

<sup>5</sup> The time period in question is one year and one month. The author has included January of 2006 in the analyses, as some interesting decisions fall into this month — underlying some of the assumptions of this article about the existence of certain problem areas for Estonia in terms of human rights violations.

<sup>6</sup> One may access the HUDOC database via <http://www.echr.coe.int/>. The total number of entries made during this period is 17, but two of these relate to information given by the Estonian government in the cases *Puhk v. Estonia* and *Veeber No. 2 v. Estonia*. Both adverse parties reported to the ECHR that, due to various individual and collective measures — like the change of the Penal Code, the quashing of some of the judgments in question by the Estonian Supreme court, and wide public debate on television and by relevant authorities — there “no longer exists any risk of new violations similar to those found in this case”. See Resolution ResDH (2005)61 concerning the judgment of the European Court of Human Rights of 10.02.2004 (final on 10.05.2004) in the case filed by Puhk against Estonia. Whether the public and judicial authorities in Estonia are truly aware of the nature of the violation in these cases and whether the risk of new, similar violations has indeed been effectively eliminated can be the subject of an entirely separate article and are thus not the focus of our attention here.

<sup>7</sup> The number of entries made in the HUDOC database for 2004 was eight, and it was seven for 1999, six for 2000, four for 2001, three for 2002, four for 2003, and seven for 2004.

<sup>8</sup> The somewhat higher number of decisions in the 1990s can be attributed to the fact that after Estonia ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms in 1996, there appeared a backlog of applications that had been awaiting a time when the ECHR could be involved. Often, these dealt with property matters or alleged violations falling into the time prior to Estonia’s ratification of the convention. All of these applications were declared inadmissible *ratione temporis*.

<sup>9</sup> There had not yet been any judgments on the merits for 2006.

<sup>10</sup> The HUDOC database does not include all decisions with which a case has been declared inadmissible. Frequently, the reasons for not reviewing a case on the merits may not necessitate deeper analysis and the applicant or his/her counsel is informed about the decision of inadmissibility through a simple and short decision. It would make the HUDOC database difficult to operate if all such decisions were included.

<sup>11</sup> ECHR, *Slavgorodski v. Estonia*, judgment (struck out of the list) of 12.09.2000, application No. 37043/97.

<sup>12</sup> This conclusion is not surprising, given the various reports about the growing frequency with which applicants from the Member States of the Council of Europe apply to Strasbourg.

And, secondly, at the time of this writing, 80% of the judgments made by the ECHR towards Estonia on the merits had established occurrence of a convention violation. It may therefore be safe to state that at this stage a decision by the ECHR that declares an application admissible is in itself more than half of a victory for the applicant, as the finding of a violation is likely to follow. This finding can be justifiably accorded additional weight by means of comparative data for Estonia's neighbouring countries of Latvia and Lithuania.<sup>\*13</sup> The current experience of the Baltic countries with the Strasbourg judicial system involves, on average, 85% of the cases declared admissible ending with the finding of a convention violation.<sup>\*14</sup> The other side of the coin is, as shall be demonstrated below, that often in decisions where a case is declared inadmissible, the ECHR also provides a comprehensive analysis of the case with references to relevant Strasbourg case law. This trend may be prompted by the need to economise on time and the human resources of the court while at the same time giving the applicants the opportunity to understand the position and reasoning of the ECHR on their particular case.<sup>\*15</sup>

It cannot be excluded that the practice by which the decision to admit an application means the strong likelihood of establishing a Convention violation, is a way by the Court to address the concerns of long proceedings within the Strasbourg system. When the future of Protocol No. 14 to the Convention, which is meant to considerably increase the effectiveness of the ECHR, is not at all clear, there is a need for temporary measures to shorten the time of uncertainty connected with the waiting of the final judgment.<sup>\*16</sup> This practice undoubtedly affects the majority of applicants. Recent statistics for 2005 show, that the ECHR made 28,581 decisions on the admissibility and at the same time handed down only 1105 judgments on the merits.<sup>\*17</sup>

## 2. Decisions about inadmissibility in cases of former officers of the Soviet Army

During the period under review in this article, three applications were decided upon by the ECHR where complaints from former officers of the Soviet Army and the Russian Army are concerned.<sup>\*18</sup>

In all three cases, the male applicant (the head of the family) had agreed to participate in the aid programme established in April and July 1993 by the president of the United States of America and the president of Russia, under which it was agreed to provide 5,000 units of housing for Russian military officers demobilised from the Baltic countries or elsewhere outside Russia. The former military officers were provided with funds by the US government to enable them to obtain a 'housing certificate' allowing them to purchase or construct an appropriate dwelling in Russia.<sup>\*19</sup> In order to become eligible for the programme, the former officers had to present a signed application "containing declarations that upon obtaining housing under this programme, the officer and his family would vacate their present dwelling(s) in the Baltic countries and would not seek permanent residency in any of the Baltic Republics, and from then on would enter the Baltic Republics only as foreign guests", according to the court.<sup>\*20</sup> The applicants indeed were able to obtain living space in Russia, but when in the early 2000s they wished to renew their temporary residence permits for

<sup>13</sup> In the case of Latvia, at the time of writing of this article there had been 10 judgments made on the merits of the case (excluding one of the cases on the HUDOC list as detailed in the body of this work). Out of these 10 cases, the ECHR established occurrence of a convention violation in nine. In the case of Lithuania, there is available on the HUDOC site information on 19 cases that have been decided on their merits. Out of these 19 cases, the ECHR has established a convention violation in 16 instances.

<sup>14</sup> The total number of cases filed against Estonia, Latvia, and Lithuania by May 2006 that were decided on their merits is 39, and in 33 instances a convention violation was established.

<sup>15</sup> It is interesting to note that even in a country with long 'Strasbourg' traditions like the United Kingdom, for January 2005 through May 2006 there were 20 judgments on the merits. Of these, in 14 the ECHR established a convention violation; this is 70% of the cases and, if indicative of anything, confirms the general trend of the Strasbourg judiciary and perhaps the possibility for the British government to allocate more attention to presenting its arguments in Strasbourg.

<sup>16</sup> For an analysis about Protocol No. 14, see Tilmann Laubner, *Relieving the Court of its Success? – Protocol No. 14 to the European Convention on Human Rights*. – German Yearbook of International Law 2004 (47), pp. 691–721.

<sup>17</sup> See European Court of Human Rights, *Survey of Activities 2005*, available at [www.echr.coe](http://www.echr.coe). According to the survey, only in 1,000 decisions on the admissibility out of 28,581 the application was declared admissible. 2,842 applications were communicated to the national governments. This statistical data shows, that once the application is communicated to the government for observations, there is around 1/3 chance that the case will be admitted and judgments on the merits delivered.

<sup>18</sup> ECHR, *Nagula v. Estonia*, decision (inadmissible) of 25.10.2005, application No. 39203/02; *Vladimir and Nina Dorochenko v. Estonia*, decision (inadmissible) of 5.01.2006, application No. 10507/03; *Nikolai, Ljubov and Oleg Mikolenko v. Estonia*, decision (inadmissible) of 5.01.2006, application No. 16944/03.

<sup>19</sup> The value of a housing certificate was usually 25,000 USD.

<sup>20</sup> *Dorochenko v. Estonia* (see Note 18), p. 7.

Estonia, these requests were denied. Domestic courts upheld the respective decisions of the authorities. The applicants (the former officers and their wives) were forced to leave Estonia. The applicants complained to the ECHR of various violations of the convention, of which the most comprehensive was the violation of article 8 of the convention — the claim being that the refusal to extend the residence permits violated their right to respect for their private and family life. It also deserves attention that they complained of violation of article 14; in the view expressed by the applicants in the Dorochenko and Mikolenko cases, many other individuals in comparable situations had received extension of their residence permits, the applicants thus receiving discriminatory treatment and, secondly, the wives of the applicants believed that their residence permits were not extended due to their marriage to the former Soviet Army officers.

Although the Strasbourg court had not ruled on comparable complaints from Estonia before 2005, it had made a major decision in a case from Latvia. On 9 October 2003, the Grand Chamber of the ECHR, by a vote of 11 to six, established that a violation of the convention's article 8 had occurred in the case of *Slivenko v. Latvia*.<sup>21</sup> Here, the ECHR relied on analysis of the circumstances of the case from the perspective of the well-known principle of the margin of appreciation doctrine.<sup>22</sup> The *Slivenko* case may be considered among the most significant ones decided by the Strasbourg court towards Latvia and addressing the somewhat sensitive question of 'Russian minorities' in the former Soviet bloc countries. As Michael Hutchinson has pointed out, the ECHR has often relied on the principle of the margin of appreciation in its more important and controversial judgments<sup>23</sup> — this was confirmed in the *Slivenko* case. According to the case law of the ECHR, three questions need to be asked in determining whether the state has violated the convention rights of individuals under its jurisdiction and overstepped its responsibilities under the margin of appreciation doctrine: whether the interference with the convention right has been "in accordance with the law", whether it pursued a legitimate aim, and whether the interference was "necessary in a democratic society".<sup>24</sup> The Strasbourg court decided that, although in the case of *Slivenko* the Latvian state acted in accordance with the law and pursued a legitimate aim when removing the applicants from the country, these actions were not necessary in a democratic society.<sup>25</sup>

The Strasbourg never got to those questions in the Estonian cases.<sup>26</sup> The ECHR simply declared all of the applications concerning the alleged convention violations manifestly ill-founded. The reasoning of the Strasbourg court was substantially different from that applied in the *Slivenko* case — according to the ECHR, the applicants had 'waived' their rights to the protection extended by article 8 of the convention to their staying in Estonia.<sup>27</sup>

The Strasbourg court does not mention even with one word the margin of appreciation doctrine in these three decisions. This cannot be an oversight<sup>28</sup> towards cases from Estonia; it must be indicative of a substantive and new approach of the ECHR in addressing matters where an individual can be claimed to have

<sup>21</sup> ECHR, *Slivenko v. Latvia*, judgment of 9.10.2003, Reports of Judgments and Decisions 2003 – X.

<sup>22</sup> For discussion of the concept of the margin of appreciation, see J. Schokkenbroek. The basis, nature, and application of the margin-of-appreciation doctrine in the case-law of the European Court of Human Rights. – Human Rights Law Journal 1998 (19) 1, pp. 30–36 and Y. Arai-Takashi. The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR. Antwerp: Intersentia 2002, pp. xiii, 300.

<sup>23</sup> See M. R. Hutchinson. The Margin of Appreciation Doctrine in the European Court of Human Rights. – International and Comparative Law Quarterly, July 1999 (48), pp. 638–639.

<sup>24</sup> These questions are used to determine the existence of the conditions set forth in article 8 (2) of the convention.

<sup>25</sup> See judgment cited in Note 21 *supra*, paragraphs 113–129.

<sup>26</sup> It is noteworthy that the Estonian Supreme Court considered a similar case concerning the removal of an individual from Estonia in 2004. Referring to *Slivenko v. Latvia*, the Supreme Court declared certain parts of Estonia's Aliens Act unconstitutional, thus eliminating the potential of an appeal to Strasbourg. Perhaps such exhibition of the spirit of 'subsidiarity' had been noted by Strasbourg. See Supreme Court of Estonia, Judgments of the Constitutional Review Chamber of the Supreme court of 21.06.2004, case No. 3-4-1-9-04, available — also in English — at <http://www.nc.ee>.

<sup>27</sup> The formulations used by the ECHR are: "The Court finds, on the evidence before it, in particular the applicant's express declarations and the steps he took to honour his part of the resettlement agreement, that he must be considered to have unequivocally waived any rights he may have had under article 8 to remain in Estonia." See the citation in Note 18, of the case of *Nagula v. Estonia*, p. 10. The same reasoning in another formulation is: "The Court considers the applicants' waiver of rights to be established irrespective of the fact that they failed subsequently to fulfill all their undertakings under the resettlement agreement, which could not reasonably found any legitimate expectation on their part to remain in Estonia permanently. It finds that that the respondent State cannot be held responsible for the applicants' subsequent change of mind." See the citation in Note 18 *supra*, for the case of *Dorochenko v. Estonia*, p. 13, and *Mikolenko v. Estonia*, pp. 14–15.

<sup>28</sup> To verify this, let us mention that in another case decided during the period under review here — the case of *Davydov v. Estonia* — the ECHR had to decide whether the refusal to grant a residence permit to an individual who had served long prison sentences in Estonia and was a Russian national violated article 8 of the convention. In its arguments when declaring the case inadmissible, the ECHR relied on the concepts of national security and public safety, and it examined whether the measure in question was "necessary in a democratic society". The court applied the three-level questioning process established in its case law. See ECHR, *Davydov v. Estonia*, decision (inadmissible) of 31.05.2005, application No. 16387/03, p. 5.

waived a convention right. This approach seems to suggest that, before one may consider the usual three questions related to the bounds of the state's margin of appreciation, it needs to be answered whether the applicant him- or herself has 'waived' the convention right in question. If the latter is deemed to be the case and the applicant may have waived the right, no further analysis is necessary and no violation has occurred.

The concept of the waiver of a convention right is not frequently encountered in the case law of the ECHR. The court has not used this concept, as far as is known to the author of this article, when deciding cases that impose upon states an obligation to refrain from interfering with the convention rights of individuals under their jurisdiction. It needs to be noted that in the articles and monographs analysing the concept of the margin of appreciation it is not mentioned that an individual could waive his or her rights and in this way step out from under the protective 'umbrella' of the convention.<sup>\*29</sup> One of the most popular handbooks for practitioners in Strasbourg proceedings suggests that according to Strasbourg case law it may be possible for an individual to waive his or her right to the impartiality of the court, to his or her own presence in court, and to a public hearing.<sup>\*30</sup> It is not theoretically clear whether an individual may waive his or her rights under the convention at all, nor to what extent or exactly which convention rights may be waived.<sup>\*31</sup> Where the instances mentioned by Karen Reid — all of which are related to article 6 (1) of the convention as to the fairness of the proceedings — are concerned, the author of this article wishes to refer to the principle whereby the ECHR looks at the fairness of the proceedings as a whole. It follows hence that the waiver of a procedural or fair trial right does not necessarily mean that the individual 'waives' the right under the convention to a fair trial in its entirety.

The ECHR uses the following formulation of the 'waiver of a convention right': "Admittedly neither the letter nor the spirit of this provision prevents a person from waiving from his own free will, either expressly or tacitly, the entitlement to have his case heard in public."<sup>\*32</sup> In addition to the principal question discussed above, here are presented two additional issues. The first is related to the timing of the 'waiver'. The applicants decided to participate in the aid programme in 1995. This was one year before Estonia ratified the convention. It is hard to disagree with the view that an individual cannot waive a right that he or she does not yet possess.<sup>\*33</sup> The second issue is related to the question of whether the wives of the applicants in the Dorochenko and Mikolenko cases indeed fully knew what obligations their husbands had accepted when signing their applications to participate in the aid programme. The ECHR paid attention to this matter and stated that it was not convinced that the wives of the main applicants never consented to participate in the aid programme, even though they never signed the petitions. The ECHR also noted that this issue had never been raised during the domestic proceedings.<sup>\*34</sup>

Finally, both applicants argued that the Estonian authorities had granted "a huge number" of residence permits to persons in situations similar to those of the applicants. It is interesting to note that the ECHR does not comment on this statement at all. This is despite the fact that, for example, the counsel of Mr and Mrs Dorochenko in the letter of 10 February 2005 again directed the attention of the ECHR to the differential treatment of the applicants — however, by referring to only one particular case.<sup>\*35</sup> Failure to present concrete factual evidence as to this violation may have prevented the Estonian courts likewise from taking a stance in relation to this complaint.<sup>\*36</sup>

In summary of these three cases there can also be three different explanations answering the question of why the ECHR decided against admitting the applications.<sup>\*37</sup> First, it is possible that by introducing the concept

<sup>29</sup> See, for example, references in Note 20. Note also that one of the most popular textbooks on the European Convention on Human Rights — J. G. Merrills, A. H. Robertson. *Human Rights in Europe: A Study of the ECHR*. 4<sup>th</sup> ed. Juris Publishing, Manchester University Press 2001, pp. xxi — does not mention that it is possible to waive the convention rights protected under articles 8 to 11.

<sup>30</sup> K. Reid. *A Practitioner's Guide to the European Convention on Human Rights*. 2<sup>nd</sup> ed. 2004, p. 648.

<sup>31</sup> The possibility of the waiver of a convention right also seems to contradict the obligations taken up by Member States of the Council of Europe under article 1 of the convention — to guarantee to everyone under their jurisdiction the rights and freedoms specified in article 1 of the convention.

<sup>32</sup> ECHR, *Hakansson and Stureson v. Sweden*, judgment of 21.02.1990, Series A, No. 171-A, paragraph 66.

<sup>33</sup> Professor Bill Bowring of London Metropolitan University, who was listed in both the Dorochenko and the Mikolenko decision as among those representing the applicants, endorsed this view when approached by the author of this article — namely that the approach in which the ECHR considers the applicants to have waived their convention rights prior to Estonia joining the convention is problematic.

<sup>34</sup> See *Dorochenko v. Estonia* (Note 18), pp. 12–13, and *Mikolenko v. Estonia* (Note 18), p. 14.

<sup>35</sup> This letter has been made available to the author of this article.

<sup>36</sup> The author of this article had an informal discussion with an Estonian judge who was involved in deciding the case within the domestic judicial system. The judge mentioned that the courts were not presented with any proof of other individuals in a comparable situation receiving different treatment.

<sup>37</sup> The author of this article is almost convinced that, had the ECHR not rejected the applications through using the somewhat questionable convention right waiver concept, it would have probably had to rule in favour of the applicants. It would be difficult to consider necessary in a democratic society events such as these reported by the applicants in the Dorochenko case: "The applicants submitted that the first applicant's mother had suffered a heart attack on 4 October 2004 in Estonia, having been deprived of the support of the applicants. The first applicant's father of an advanced age also had serious health problems." See *Dorochenko v. Estonia* (Note 18), p. 11.



of the waiver of a convention right the Strasbourg court introduced a major novelty in its case law. This would be almost akin to establishing a prior ‘threshold test’<sup>\*38</sup> that needs to be passed by an applicant (by demonstrating that he or she has not waived the convention right in question) before the ECHR or domestic courts start to analyse the case from the perspective of the margin of appreciation doctrine. The second explanation can emerge from a more general question of international law in relation to the practices of states in protecting refugees. As Ryszard Piotrowicz and Carina van Eik have asked, “the question remains, to what extent is that practice based on obligation rather than goodwill alone?”<sup>\*39</sup> Can it be the case that the good will of the Strasbourg court toward the former Soviet Army officers and their families had simply withered away? The third possible explanation cannot be overlooked either. In all cases that are decided on their merits, a High Contracting Party of the Convention one of whose nationals is an applicant shall have the right to submit written comments and take part in hearings.<sup>\*40</sup> The Russian government exercised this right in the Slivenko case. The three cases from Estonia never passed the admissibility phase, and thus no question related to the intervention of the Russian government emerged.

### 3. Decisions about inadmissibility in cases of crimes against humanity

Two cases falling into the category of cases concerning crimes against humanity were decided upon during the 13-month period reviewed in this article: the cases of *Penart v. Estonia*<sup>\*41</sup> and *Kolk and Kislyiy v. Estonia*.<sup>\*42</sup> The applicant in the first case had been involved in planning and directing the killing of several civilians hiding in the woods, whereas the applicants in the second case had been involved in the deportation of civilian citizens. The acts of the first applicant took place in the years 1953 to 1954 and of the second and third applicant in 1949. All of them were convicted by the Estonian courts for crimes against humanity. Their complaint to Strasbourg stated that their conviction had been based on the retroactive application of criminal law.<sup>\*43</sup>

Both applications were declared inadmissible as manifestly ill-founded. The Strasbourg court simply stated that it was satisfied that the Estonian courts had found that the acts of the applicants constituted crimes against humanity under international law at the time of their commission.<sup>\*44</sup> By doing this, the Strasbourg court continued the approach it had taken in similar cases before — not to interfere in the judgments of the domestic courts on matters related to crimes against humanity at times when the convention had not yet been adopted and not to provide a comprehensive analysis of the exception provided in article 7 (2) of the convention.<sup>\*45</sup>

The ECHR devotes some attention to the question of whether the applicants should have been aware that their acts constituted crimes against humanity. This question is one of the central issues in the application of article 7 (1) of the convention in situations where the applicants have made an argument that the law was not clear enough for them to understand which conduct can bring about criminal liability.<sup>\*46</sup> The ECHR had avoided addressing this question of foreseeability in previous, French cases and did not change its course in the Estonian cases.<sup>\*47</sup> It did, however, point out that from the formal point of view the crimes of which the

<sup>38</sup> The term ‘threshold test’ in relation to the case law of the ECHR has been analysed in the following article: T. R. Hickman. The “Uncertain Shadow”: Throwing Light on the Right to a Court under Article 6 (1) ECHR. Public Law 2004, pp. 122–145.

<sup>39</sup> R. Piotrowicz, C. van Eik. Subsidiary Protection and Primary Rights. – International and Comparative Law Quarterly 2004 (53), p. 112.

<sup>40</sup> This right is provided by article 36 (1) of the convention and Rule 61 (2).

<sup>41</sup> ECHR, *Penart v. Estonia*, decision (inadmissible) of 24.01.2006, application No. 14685/04.

<sup>42</sup> ECHR, *Kolk and Kislyiy v. Estonia*, decision (inadmissible) of 17.01.2006, application No. 23052/04.

<sup>43</sup> In both applications, the complaint relied on article 7 of the convention.

<sup>44</sup> See *Penart v. Estonia* (Note 41), p. 10, and *Kolk and Kislyiy v. Estonia* (Note 42), p. 9.

<sup>45</sup> Article 7 (2) provides the following exception to the general prohibition of retrospective application of criminal law, contained in article 7 (1): “This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by civilized nations.” So far, this exception has been relied on only in some French cases (see ECHR, *Papon v. France* (No. 2), decision of 15.11.2001, ECHR 2001 – XII).

<sup>46</sup> The ECHR uses this formulation regarding the clarity of criminal legislation: “A norm cannot be regarded as law, unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able — if need be with appropriate advice — to foresee, to a degree that is reasonable under the circumstances, the consequences which a given action may entail.” See ECHR, *The Sunday Times v. the United Kingdom*, judgment of 26.05.1979, Series A, No. 30 (1979–80), 2 E.H.R.R. 245, paragraph 49, and ECHR, *Rekvenyi v. Hungary*, judgment of 20.05.1999, Reports of Judgments and Decisions 1999 – III, paragraph 49.

<sup>47</sup> The question referred to in the previous Note would become ironic in the context of a totalitarian regime. Imagine an official, before carrying out a deportation order, seeking appropriate advice from the courts, lawyers, or representatives of the state on the question of whether his action might make him criminally liable.

applicants were convicted were described in relevant provisions of international documents. It referred to the Charter of the International Military Tribunal, adopted in 1945; to Resolution 95 of the General Assembly of the United Nations Organisation, adopted in 1946; and to the Principles of the Nuremberg Trial, formulated by the International Law Commission of the United Nations Organisation in 1950.<sup>\*48</sup> With these referrals the ECHR wished to demonstrate that the idea of the actions of the applicants as offences was grounded in earlier law. An oversight in the ECHR decisions is referral to the Principles of the Nuremberg Trial, which were adopted in 1950. These principles had been passed by the time Penart committed his acts in 1953 and 1954, but in 1949 — when Kolk and Kislyiy participated in the deportations — they had not yet been passed and accusation of the applicants could not in any court be based on this international document.<sup>\*49</sup>

The matter of accessibility of criminal legislation<sup>\*50</sup> also has certain aspects that remain unaddressed in the decisions under review here. The question is whether the international documents referred to above were adequately accessible to individuals under Soviet jurisdiction. The ECHR has this answer: “As the Soviet Union was a member state of the United Nations Organization, it cannot be claimed that these principles were unknown to the Soviet authorities. Thus, the Court considers groundless the applicant’s allegations [...] that he could not reasonably be expected to have been aware of that.”<sup>\*51</sup> In a way, the Strasbourg court is right: certainly these principles were known to Soviet authorities — at least to some of them. Whether this awareness was limited to a small number of high-level authorities and whether this awareness also meant the possibility of being introduced to the text of these international documents remains unanswered.

## 4. Estonian court judgments in violation of article 6 (3) d): Conviction without the questioning of witnesses at a public trial

There were two cases from Estonia before the Strasbourg court between January 2005 and January 2006 that dealt with the issue of questioning of witnesses in a public trial. One of them — the case of *Taal v. Estonia* — was decided on its merits, and the ECHR unanimously established that violations of article 6 (1) and 6 (3) d) had taken place.<sup>\*52</sup> Another case was declared admissible.<sup>\*53</sup>

The *Taal v. Estonia* case received a great deal of publicity when the offences took place and subsequently when Mr. Taal was convicted in the Estonian courts. According to the charge, Taal had made, on several occasions, phone calls with bomb threats to a supermarket in one of the seaside living districts of Tallinn (Pirita). His conviction was based on witnesses supposedly recognising his voice from the tape recordings. All of the witnesses failed to appear at the first-instance court hearing, despite the requests of the defence. The court judgment relied on the statements that the witnesses had given during the pre-trial investigation. The Court of Appeal dismissed the appeal, and the Supreme court refused to grant the applicant leave to appeal.<sup>\*54</sup>

Usually, cases decided by the ECHR with reference to violation of article 6 (3) d) are not so black and white.<sup>\*55</sup> It was easy for the Strasbourg court to conclude that “the applicant’s conviction was based to a

<sup>\*48</sup> See *Penart v. Estonia* (Note 41), pp. 6–7, and *Kolk and Kislyiy v. Estonia* (Note 42), pp. 6–7.

<sup>\*49</sup> It is interesting to note that the ECHR here made the same mistake as it highlighted in relation to the conduct of the Estonian government in the well-known *Veeber No. 2 v. Estonia* and *Puhk v. Estonia* cases. In backing up its position, the Estonian government referred to judgments of the Supreme court that were passed in 1997 and 1998. The omissions of *Veeber* and *Puhk* took place in 1993 and 1994. The ECHR mentioned that the applicants could in 1993 and 1994 not anticipate and foresee the position of the Supreme court five years later. See ECHR, *Veeber v. Estonia* (No. 2), judgment of 21.01.2003, Reports of Judgments and Decisions 2003 – I, paragraph 37, and ECHR, *Puhk v. Estonia*, judgment of 10.02.2004, paragraph 32.

<sup>\*50</sup> For an individual to be criminally liable for his conduct, he or she should be able to have adequate access to laws that stipulate such liability. See ECHR, *G. v. France*, judgment of 27.09.1995, Series A, No. 325 – B, 21 E.H.R.R. 288, paragraph 25.

<sup>\*51</sup> See *Penart v. Estonia* (Note 41), p. 10, and *Kolk and Kislyiy v. Estonia* (Note 42), p. 9.

<sup>\*52</sup> ECHR, *Taal v. Estonia*, judgment of 22.11.2006.

<sup>\*53</sup> ECHR, *Pello v. Estonia*, decision of 5.01.2006, application No. 11423/03.

<sup>\*54</sup> The argument of the Estonian government during the Strasbourg proceedings was that the case was primarily about the issue of the admissibility of evidence. See *Taal v. Estonia* (Note 52), paragraph 30. This is a defence usually raised by governments in such circumstances.

<sup>\*55</sup> Most of the problem areas are related to the reasons for which the courts decided not to summon some of the witnesses to the hearing: whether the court should admit statements of anonymous witnesses, whether the witnesses had disappeared, and whether the courts had refused to call the witnesses (as suggested by the defence).

decisive extent on the statements of witnesses he had been unable to question”.<sup>56</sup> To the inability of the applicant and his lawyer to question the witnesses was added the fact that even the court did not question the witnesses directly.<sup>57</sup>

The facts in the case of *Pello v. Estonia* are not so clear-cut. Here the domestic court questioned some of the witnesses at the public hearing. However, the applicant claimed that he had been unable to question two witnesses whose statements might have been decisive for his defence.<sup>58</sup> The developments in this case and the final position of the ECHR are interesting not only from the perspective of the individual applicant. It is noteworthy that the Supreme court, when analysing the appeal, considered in depth the Strasbourg case law. It referred to 10 Strasbourg cases, in total.<sup>59</sup> On the basis of its analysis of the facts and the case law of the ECHR, the Supreme court concluded that the conviction of the applicant had not been based entirely or to a decisive extent on the statements of the witnesses not questioned at the public court hearing.<sup>60</sup> Thus the judgment on merits by the Strasbourg court in this case is going to be also, in a way, an assessment of the Estonian Supreme court’s interpretation of the Strasbourg case law.

## 5. Estonia’s prison conditions

Until recently, there were no judgments or decisions from Strasbourg related to the prison conditions in Estonia. There is one now — in the case of *Alver v. Estonia*.<sup>61</sup> It was established that for several periods during the detention of the applicant after he was sentenced to imprisonment by the domestic court the conditions of the imprisonment violated article 3 of the convention. The judgment lists in detail the apparent facts of the prison conditions from June 1996 to March 2000 — evidently, the applicant had kept good records of conditions. The Estonian government did not respond at all to some allegations, which led the ECHR to conclude: “The Court considers that it can legitimately draw inferences from the Government’s failure to provide more specific information on this point.”<sup>62</sup>

There is nothing surprising in this judgment, as the prison conditions were to some degree a legacy of the socialist regime. However, what about the other individuals who stayed in the same conditions as Alver and whose prison conditions probably also violated convention requirements? If they wished to receive comparable monetary satisfaction to that enjoyed by Alver (the ECHR awarded him 3,000 EUR), would they have to turn to Strasbourg, or would there be a national remedy available for them? The issue of whether member states of the convention need to provide a national remedy for systematic convention violations is of great importance for the functioning of the principle of subsidiarity between the international court and domestic judicial systems. For example, the ECHR requires the member states to provide an effective remedy in their legal system in cases of complaints of unreasonable delay. The court has made the following observation and request of the member states: “If article 13 is, as the Government has argued, to be interpreted as having no application to the right to a hearing within a reasonable time as safeguarded by article 6 § 1, individuals will systematically be forced to refer to the Court in Strasbourg complaints that would otherwise, and in the Court’s opinion more appropriately, have to be addressed in the first place within the national legal system. In the long term the effective functioning, on both the national and international level, of the scheme of human rights protection set up by the Convention is liable to be weakened.”<sup>63</sup> Following this same reasoning, we find it only justified to suggest that the Estonian judicial system would also need to provide a remedy for individuals who can legitimately claim to be victims of human rights abuses due to their detention conditions. Until now, such cases have not proceeded in Estonia and the Supreme court has not had the opportunity to rule on this matter.

<sup>56</sup> See *Taal v. Estonia* (Note 52), paragraph 33.

<sup>57</sup> It is interesting to note that, although the ECHR judgment was made on 22.10.2005, the information reached the Estonian media almost five months later — in April 2006.

<sup>58</sup> See *Pello v. Estonia* (Note 53), p. 5.

<sup>59</sup> Estonian Supreme court, judgment of 16.10.2002, registration No. 3-1-1-98-02, available in Estonian at the homepage of the Supreme court <http://www.nc.ee/>.

<sup>60</sup> See *Pello v. Estonia* (Note 53), p. 5.

<sup>61</sup> ECHR, *Alver v. Estonia*, judgment of 8.11.2005.

<sup>62</sup> *Ibid.*, paragraph 52.

<sup>63</sup> ECHR, *Kudla v. Poland*, judgment of 26.10.2000, Reports of Judgments and Decisions 2000 – XI, paragraph 155.

## 6. Conclusions

The period of January 2005 through January 2006 has signified new developments in the Strasbourg case law towards Estonia.

First, the number of decisions and judgments is on the increase.

Second, the concept of the waiver of a convention right (used in the cases of former officers of the Soviet Army who wished to extend their residence permits) with reference to article 8 of the convention is a novel approach in the context of general Strasbourg case law. It raises the question of whether the court wishes to introduce a new judicial paradigm to complement the concept of the margin of appreciation or whether it relied on the concept of a waiver for practical reasons — on account of the need to find a reason for declaring the applications inadmissible.

Third, with the decisions in the cases related to offences in the late 1940s and early 1950s the ECHR reinforced its position that it will not intervene in the judgments of the domestic courts with respect to crimes against humanity.

Fourth, the violation of article 6 (3) d) in the failure of the Estonian courts to provide opportunities for the accused and his counsel to question the witnesses in a public court hearing may appear to be a newly emerging area of systematic convention violations by the Estonian courts. One anticipates with great interest the judgment of the ECHR on a case<sup>64</sup> related to the violation of this article that was declared admissible and where the Estonian Supreme court provided a comprehensive analysis of the Strasbourg case law.

Fifth and finally, although there is nothing surprising in the fact that Estonian prison conditions in the 1990s were not in accordance with the convention's requirements, there emerges a question as to whether the national judicial system provides remedy at a national level for potential complaints about the prison conditions.

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<sup>64</sup> See *Pello v. Estonia* (Note 53).





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# Applicability of the Census Case in Estonian Personal Data Protection Law

Estonian personal data protection law tends to adopt the German doctrine of informational self-determination as delivered by the *Bundesverfassungsgericht* (BVerfG) in its 1983 census ruling. While the new fundamental right deriving from this landmark case has influenced personal data protection law widely all over Europe, the authors take a critical look at national prerequisites for applying the principles deriving from the 1983 case. The elements of the census case are of a dynamic nature and cannot be applied without deeper analysis of the facts and context of the case, thereby calling for a systematic interpretation of its outcome.

The aim of this article is to provide an analytical structure for determining the correspondence of the principles and conclusions of the census case to Estonian information law. The proposed structure of the analysis can be used also as a basis for relevant analysis in other countries within the EU data protection law framework.\*<sup>1</sup>

## 1. Reasons for questioning the Estonian doctrine

One modern way to achieve a better democracy is to establish additional guarantees to free movement of information. Today, virtually all Member States of The European Union (EU) have adopted laws on access to public-sector information.

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<sup>1</sup> The basis for national regulation of personal data protection in the member states, and thereby another important source of interpretation in the field, is Directive 95/46/EC (i.e. Directive 95/46/EC of the European Parliament and of the Council of 24.10.1995, on the protection of individuals with regard to the processing of personal data and the free movement of such data (OJ L 281, 23.11.1995, p. 31). Still, the solutions provided to problems of protection of private life differ by country. While Hungary has balanced the two fundamental rights in a single act, in the Czech Republic the subject of the data is entitled to the widest of powers in relation to the data processors and Sweden has preserved a remarkable margin of publication.

Estonia, in enacting its Public Information Act<sup>2</sup> (PIA), was among the first countries in Europe to offer a general instrument granting access to public-sector information. The act sets forth decisive steps toward securing the transparency of public-sector activities — by, e.g., requiring all Estonian state and local authorities to maintain a Web site and make accessible to the public any information that has been received or created in the course of carrying out public activities.

In its more than five years of application, the PIA has shown several practical problems and occasioned theoretical quandaries, most of these related to the issue of coherent application of the PIA concurrently with the Personal Data Protection Act<sup>3</sup> (PDPA).<sup>4</sup> The conflict of the two acts is fundamental: while the PDPA is aimed at securing the privacy of individuals, the PIA sees as its main goal the transparency of the exercising authority. Against the background of the different direction of these laws, the ideal of a transparent society made up of non-transparent individuals is difficult to achieve.

No official commentaries and best practice have yet been issued by Estonian authorities regarding the mutual application of the conflicting rights contained in the PDPA and PIA. Therefore, the comments to the Constitution, relevant court rulings, and decisions of supervisory authorities are a very valuable asset in determining the nature of the country's personal data protection regime and the basic approaches necessary for advising clients and proposing new regulatory steps in this environment.<sup>5</sup>

The first commentary to the Constitution of the Republic of Estonia, published 10 years after its enactment in 1992, takes the view that the right of a person to informational self-determination should be established upon the foundation of the German archetype expressed in the *Volkszählungsurteil*<sup>6</sup> of the German Constitutional Court.<sup>7</sup> The same view has gradually been taken up by the Estonian legal chancellor<sup>8</sup>, the Data Protection Inspectorate<sup>9</sup>, and several Estonian legal scientists.

In view of the fact that the PDPA was drafted on the basis of German and Finnish legislation<sup>10</sup>, the use and application of German court practice to prepare and interpret Estonian legal acts in the field deserves independent analysis and reasoning.

## 2. The census case

The key elements of the census case may be summarised as follows:

- under the conditions of modern data processing shall be guaranteed the right of every person to decide how much information is to be disclosed about him or her, and when, and
- limitations to this right are tolerable only in cases of clear and overwhelming public interest and with the legal basis of a well-defined purpose.

<sup>2</sup> Avaliku teabe seadus. – Riigi Teataja (State Gazette) I 2000, 92, 597 (in Estonian). English text available at <http://www.legaltext.ee/> (1.05.2006).

<sup>3</sup> Isikuandmete kaitse seadus. – Riigi Teataja (State Gazette) I 1996, 48, 944 (in Estonian). Reformed in 2003, Riigi Teataja (State Gazette) 2003, 26, 158. English text available at <http://www.legaltext.ee/> (1.06.2006).

<sup>4</sup> For more detail, see E. Tikk, M. Mikiver. Informatsioonilise enesemääramise õigusetagamise diskretsioonotsused haldusmenetluses (Discretionary Decisions of Guaranteeing the Right of Informational Self-determination). – *Juridica* 2005/4, pp. 250–258 (in Estonian).

<sup>5</sup> Recently, the Estonian Ministry of Social Affairs commenced a public procurement proceeding for creating the legal environment for the launch of the Estonian electronic health information system in 2008. The initial analysis conducted by the offerents shows that varying modifications to personal data protection acts have been adopted in EU member states. For further information, see <http://www.sm.ee/> (1.06.2006).

<sup>6</sup> BVerfG 15.12.1983. In BVerfGE 65, 1 et seq., EuGRZ 1983, 577; Urteil des Ersten Senats vom 15. Dezember 1983 auf die mündliche Verhandlung vom 18. und 19. Oktober 1983 – 1 BvR 209, 269, 362, 420, 440, 484/83.

<sup>7</sup> M. Ernits. – Eesti Vabariigi põhiseadus. Kommenteeritud väljaanne (Constitution of the Republic of Estonia. Commented Edition). Tallinn: Juura 2002, p. 213 et seq. (in Estonian).

<sup>8</sup> Õiguskantsleri 2004. a tegevuse ülevaade (Overview of the Activities of the Chancellor of Justice in 2004), pp. 183–195, text available (in Estonian) at <http://www.oiguskantsler.ee/files/12.pdf> (1.06.2006); Õiguskantsleri 2003–2004. a tegevuse ülevaade (Overview of the Activities of the Chancellor of Justice in 2003–2004), pp. 41–43, 159–168, text available (in Estonian) at <http://www.oiguskantsler.ee/files/11.pdf> (1.06.2006); Õiguskantsleri 2002. a tegevuse ülevaade (Overview of the Activities of the Chancellor of Justice in 2002), pp. 65–66 (in Estonian), available at <http://www.oiguskantsler.ee/files/2002.pdf> (1.06.2006).

<sup>9</sup> See the reports published at <http://www.dp.gov.ee/> (1.06.2006).

<sup>10</sup> Explanatory letter to the PDPA. Available at <http://web.riigikogu.ee/ems/saros-bin/mgetdoc?itemid=022900017&login=proov&password=&system=ems&server=ragne11> (1.06.2006) (in Estonian).

## 2.1. Facts and background on the case

In 1982, the West-German Bundestag unanimously enacted a census law (*Volkszählungsgesetz*<sup>\*11</sup>) whereby personal data (given name and surname, phone number, sex, birthday, marital status, citizenship, and fact of having or not having a religious affiliation) gathered during the census may be compared to data included in national registries (*Melderegistern*), with the latter to be corrected on the basis of such data.<sup>\*12</sup> Anonymous data referred to above, as well as a significant quantity of other data (including income, participation in acquisitions, data about domicile, etc.), were allowed to be transmitted to competent public and local authorities for purposes of their carrying out their mandates.<sup>\*13</sup>

The main aims of the law on the census were to enable updating of the information from that of the previous census, carried out in 1970, about the population in the federation and at state and local administrative division level and to guarantee the quality of decision-making related to, e.g., space planning and the labour market, as well as social, education, and traffic policy.<sup>\*14</sup> After the law was enacted, many complaints were filed with the BVerfG. The reason for anxiety among these people was the fear of potential threats likely to be caused by computerised processing of their data.<sup>\*15</sup>

Proceedings on constitutional supervision were initiated, and on 15 December 1983 the BVerfG declared § 9 (1)–(3) of the act null and void, thereby evidencing great concern about individuals' **privacy in relation to the position of a person in the feared autocratic state**.<sup>\*16</sup> The ruling stated that the guarantees of human dignity<sup>\*17</sup> and the right to free self-actualisation<sup>\*18</sup> create the basis for protection of a person against unconstrained processing of personal data, stating also that limitations to such protection are tolerable only in cases of **prevailing public interest**.<sup>\*19</sup>

## 2.2. The right to informational self-determination

### 2.2.1. The basis of articles 2 (1) and 1 (1) of the German Constitution

The BVerfG sets forth the principle that the individual has the right to know what information is being processed that pertains to him or her and to make decisions on the basis thereof.<sup>\*20</sup> The court argued that “the freedom of an individual to decide for himself is at stake when the individual is uncertain about what is known about him, particularly where what society might view as deviant behaviour is at stake. The individual therefore has the right to know and make decisions on the information being processed about him”.<sup>\*21</sup>

<sup>\*11</sup> Das Gesetz über eine Volkszählung, Berufszählung, Wohnungszählung und Arbeitsstättenzählung vom 25. März 1982. – BGBl I p. 369.

<sup>\*12</sup> Section 2 of the German Census Act: “Die Volkszählung und Berufszählung erfaßt: 1. Vornamen und Familiennamen, Anschrift, Telefonanschluß, Geschlecht, Geburtstag, Familienstand, rechtliche Zugehörigkeit oder Nichtzugehörigkeit zu einer Religionsgesellschaft, Staatsangehörigkeit; 2. Nutzung der Wohnung als alleinige Wohnung, Hauptwohnung oder Nebenwohnung (§ 12 Abs. 2 des Melderechtsrahmengesetzes). § 9 (1): Angaben der Volkszählung nach § 2 Nr. 1 und 2 können mit den Melderegistern verglichen und zu deren Berichtigung verwendet werden. Aus diesen Angaben gewonnene Erkenntnisse dürfen nicht zu Maßnahmen gegen den einzelnen Auskunftspflichtigen verwendet werden.”

<sup>\*13</sup> See § 9 (2) of the German Census Act: “Einzelangaben ohne Namen über die nach den §§ 2 bis 4 erfassten Tatbestände dürfen nach § 11 Abs. 3 des Bundesstatistikgesetzes vom 14. März 1980 (BGBl I S 289) von den Statistischen Ämtern des Bundes und der Länder an die fachlich zuständigen obersten Bundesbehörden und Landesbehörden übermittelt werden, soweit sie zur rechtmäßigen Erfüllung der in ihrer Zuständigkeit liegenden Aufgaben erforderlich sind. § 9 (3): Für Zwecke der Regionalplanung, des Vermessungswesens, der gemeindlichen Planung und des Umweltschutzes dürfen den Gemeinden und Gemeindeverbänden die erforderlichen Einzelangaben ohne Namen über die nach den §§ 2 bis 4 mit Ausnahme des Merkmals rechtliche Zugehörigkeit oder Nichtzugehörigkeit zu einer Religionsgesellschaft in § 2 Nr. 1 sowie der nach § 4 Nr. 1 Buchstabe c und § 4 Nr. 3 Buchstabe c erfassten Tatbestände der Auskunftspflichtigen ihres Zuständigkeitsbereiches von den Statistischen Ämtern der Länder übermittelt werden.”

<sup>\*14</sup> BVerfG as in Note 6 *supra*, p. 13.

<sup>\*15</sup> “Die Möglichkeiten der modernen Datenverarbeitung sind weithin nur noch für Fachleute durchschaubar und können beim Staatsbürger die Furcht vor einer unkontrollierbaren Persönlichkeitsfassung selbst dann auflösen, wenn der Gesetzgeber lediglich solche Angaben verlangt, die erforderlich und zumutbar sind,” in BVerfG as cited in Note 6, p. 2.

<sup>\*16</sup> See, e.g., L. Young. *Among the Giants*. New York 1966.

<sup>\*17</sup> GG § 1 (2): “Die Würde des Menschen ist unantastbar. Sie zu achten und zu schützen ist Verpflichtung aller staatlichen Gewalt.”

<sup>\*18</sup> GG § 2 (2): “Jeder hat das Recht auf die freie Entfaltung seiner Persönlichkeit, soweit er nicht die Rechte anderer verletzt und nicht gegen die verfassungsmäßige Ordnung oder das Sittengesetz verstößt.”

<sup>\*19</sup> BVerfG as in Note 6 *supra*, remark 156.

<sup>\*20</sup> *Ibid.*, remark 155: “Das Grundrecht gewährleistet insoweit die Befugnis des Einzelnen, grundsätzlich selbst über die Preisgabe und Verwendung seiner persönlichen Daten zu bestimmen.”

<sup>\*21</sup> *Ibid.*, remark 23.

The ruling derived the right of informational self-determination — the right of a person to decide how much information to allow to be disclosed about him or her, and when<sup>\*22</sup> — from the **principle of human dignity** enshrined in articles 2 (1) and 1 (1) of the German Constitution. The court has ruled that the guarantees to human dignity<sup>\*23</sup> and the right to free development of one's personality<sup>\*24</sup> create the basis for protection of a person against unconstrained processing of personal data.

However, the right to informational self-determination shall not be granted without limits. The court has stated that limitations to such protection are tolerable, although only where there is a prevailing public interest.<sup>\*25</sup>

### 2.2.2. The basis of the Estonian Constitution

Ernits is of the opinion that the general right to development of one's personality derives from § 19<sup>\*26</sup> of the Estonian Constitution, covering the right to self-determination (which also comprises the right to informational self-determination).<sup>\*27</sup> The latter, in Ernits's view, is the right of the individual to decide whether, and to what extent, data pertaining to him or her may be gathered and saved.<sup>\*28</sup>

The Estonian legal chancellor predicates that the data processing can refer mainly to the right of privacy set forth in § 26 of the Estonian Constitution but that in some situations the right of informational self-determination devolves from § 19.<sup>\*29</sup>

Pursuant to § 19 (2), everyone is obliged to honour and consider the rights and freedoms of others, as well as to observe the law both in exercising his or her rights and freedoms and in carrying out his or her duties.

## 2.3. The reasoning of the court

According to the BVerfG, an important prerequisite to individual self-determination is the opportunity of an individual to first freely decide upon a behaviour, and then the guarantee of the chosen behaviour to be effected.<sup>\*30</sup>

The BVerfG analysis reflects the concern about individual **privacy in relation to the person in relationship to the feared autocratic state**.<sup>\*31</sup> Unlike before, there are now new threats in the form of possibilities of using the personal data in database in short order every time and from everywhere without regard for remoteness. By combining the information with that in order databases, it can be possible to create a full profile of a person, without the individual concerned having a chance to control the use and appropriateness of the information.<sup>\*32</sup>

The above-mentioned analysis states: "It is [...] relevant that the doctrine of informational self-determination when developed under national law takes into account the social, economic, legal, and other realities and secures an individual's right to act in his or her best interests and best determine his or her **informational situation** in a society. Through correct positioning in a society, one can with sufficient certainty rely on the action chosen and thereby gain the greatest benefit from the right to informational self-determination as thereby going beyond the pure right to privacy. Therefore, relevant is not only that the person's right to determine when processing is allowed should be guaranteed but also that the conditions of interference with such rights should be clearly determined."<sup>\*33</sup>

If one cannot with sufficient certainty be aware of what personal information about him or her is known in a certain part of his social environment, (s)he can be seriously inhibited in his or her freedom of self-deter-

<sup>22</sup> BVerfG II 1) a: "aus dem Gedanken der Selbstbestimmung folgende Befugnis des Einzelnen, grundsätzlich selbst zu entscheiden, wann und innerhalb welcher Grenzen persönliche Lebenssachverhalte offenbart werden."

<sup>23</sup> GG § 1 (1): "Die Würde des Menschen ist unantastbar. Sie zu achten und zu schützen ist Verpflichtung aller staatlichen Gewalt."

<sup>24</sup> GG § 2 (2): "Jeder hat das Recht auf die freie Entfaltung seiner Persönlichkeit, soweit er nicht die Rechte anderer verletzt und nicht gegen die verfassungsmäßige Ordnung oder das Sittengesetz verstößt."

<sup>25</sup> BVerfG as in Note 6 *supra*, remark 156.

<sup>26</sup> Subsection 19 (1) of the Estonian Constitution provides the right to free self-determination.

<sup>27</sup> M. Ernits (Note 7), pp. 160–161.

<sup>28</sup> *Ibid.*, p. 161.

<sup>29</sup> Õiguskantsleri 2004. a tegevuse ülevaade (Note 8), p. 46.

<sup>30</sup> See reports cited in Note 9 *supra*, remark 1.

<sup>31</sup> See, e.g., L. Young (Note 16).

<sup>32</sup> BVerfG as cited in Note 6 *supra*, p. 22.

<sup>33</sup> H. Liskén, E. Denninger (eds.). Handbuch des Polizeirechts. Munich: C. H. Beck 1996, p. 610, marginal note 8.



mined planning and decision. A society in which individual citizens could not find out who knows what and when about them would not be reconcilable with the right of self-determination over personal data. Those who are unsure whether differing attitudes and actions are ubiquitously noted and permanently stored, processed, or distributed will try not to stand out in their behaviour. This would not only limit the opportunities for individual development but also affect the public welfare, since self-determination is an essential requirement for a democratic society that is built on the participatory powers of its citizens.<sup>\*34</sup>

However, the right to informational self-determination has its limits. As noted above, the court stated that limitations to protection of the right to personal self-determination are tolerable in cases of prevailing public interest.<sup>\*35</sup>

## 2.4. Transformation of the case

The influences of *Volkszählungsurteil* are phenomenal: the case has influenced legal doctrines broadly and been cited by the Italians<sup>\*36</sup>, Swiss<sup>\*37</sup>, Hungarians<sup>\*38</sup>, Australians<sup>\*39</sup>, Americans<sup>\*40</sup>, and many others<sup>\*41</sup>. According to Roßnagel, the ruling about legal bases with defined purpose as a necessary condition for limitations of the right of self-determination was misunderstood. The BVerfG wanted to guarantee a higher lever of protection of personal data through the obligation of preventive control by legislative acts. A. Roßnagel wrote: “The consequence was a deluge of very fine and specific regulations in almost every branch, which are comprehensible only by data protection experts.”<sup>\*\*42</sup>

## 3. Obstacles to direct application of the census case under Estonian law

We next analyse the key elements of the census case in the Estonian context by arguing that:

- the relations involved in processing of personal data are increasingly private in nature, such that the applicability of the state–individual context needs to be assessed;
- the nature of the right of a person to informational self-determination in the information society has a different character; and
- there are less burdensome methods for achieving the control of the data subject over the processing of personal data than deciding about each and every event of processing.

<sup>34</sup> BVerfGE Volkszählungsurteil, p. 22.

<sup>35</sup> BVerfGE Volkszählungsurteil, p. 23: “Der Einzelne hat nicht ein Recht im Sinne einer absoluten, uneinschränkbarer Herrschaft über “seine” Daten; er ist vielmehr eine sich innerhalb der sozialen Gemeinschaft entfaltende, auf Kommunikation angewiesene Persönlichkeit. [...] Das Grundgesetz hat, wie in der Rechtsprechung der Bundesverfassungsgerichts mehrfach hervorgehoben ist, die Spannung Individuum – Gemeinschaft im Sinne der Gemeinschaftsbezogenheit und Gemeinschaftsgebundenheit der Person entschieden [...]”

<sup>36</sup> G. Sartor. Privacy, Reputation, and Trust: Some Implications for Data Protection. Information on this working paper is available at <http://www.google.com/search?q=informational+self-determination+census&hl=et&lr=&start=30&sa=N> (1.01.2006).

<sup>37</sup> M. Langheinrich. The Success of E-commerce May Hinge on a Fundamental Human Right .... Available at <http://www.ipc.on.ca/docs/04-11-08-COASTSoftware.ppt> (1.01.2006).

<sup>38</sup> C. D. Raab. Information Rights in Hungary: Observations on Experience. The Door onto the Other Side 2001.

<sup>39</sup> D. Lindsay. Misunderstanding “Personal Information”: *Durant v Financial Services Authority*. – Privacy Law and Policy Reporter 2004 (13).

<sup>40</sup> C. H. Manny. Personal Privacy — Transatlantic Perspectives: European and American Privacy. Commerce, Rights and Justice. Part 1. – Computer Law and Security Report 2003 (19) 1.

<sup>41</sup> Available at [http://en.wikipedia.org/wiki/Informational\\_Self-Determination](http://en.wikipedia.org/wiki/Informational_Self-Determination) (1.01.2006).

<sup>42</sup> “Das inhaltliche Ziel, die Verarbeitung personenbezogener Daten auf die wirklich unabdingbaren Fälle einzuschränken, wurde weitgehend verfehlt. Der Gesetzgeber hat dem politischen Druck der jeweiligen Verarbeitungswünsche nicht zu widerstehen vermocht – wenn er dies überhaupt wollte. Das Programm des Volkszählungsurteils wurde in einer Weise “erfüllt”, die geradezu das Gegenteil von dem hervorbrachte, was beabsichtigt war. Statt normenklarer, auch für den Bürger verständlicher Gesetze, haben wir heute ein Datenschutzrecht, das insgesamt überreguliert, zersplittert und unübersichtlich ist,” according to A. Roßnagel. ‘20 Jahre Volkszählungsurteil’. – MultiMediaRecht (MMR) 2003, Heft 11, p. 694.

### 3.1. Scope of application of the reasoning in private and public processing

#### 3.1.1. Undefined area of privacy

There are different dimensions of privacy recognised and protected in legal terms: Most authors distinguish among physical, psychological, social, and informational dimensions of privacy. The latter is often referred to as the ‘umbrella term’ for data protection and informational self-determination.

In an earlier German case, often cited as ‘Microcensus’<sup>\*43</sup>, the German court had stressed that the guarantee to an inviolable sphere of privacy beyond the reach of public authority is rooted in article 1 of the *Grundgesetz*. In the Microcensus case, the court established that there are three spheres of human personality, only two of which are to be protected under the right to privacy:

- a social sphere containing information concerning open social interaction with other persons (*Sozialsphäre*),
- a private sphere related to information concerning private life without being usually accessible to the public (*Privatsphäre*), and
- a personal sphere concerning private life and relating to information that is confidential and secret from the individual’s point of view (*Intimsphäre*).

The distinction among the different spheres of personality was not addressed specifically in the census case. In essence, the court abandoned the distinction between the spheres and delineated the scope of the right.

It is, therefore, open to question whether the conclusions of the census case are to be applied to all spheres of privacy or only the social one.

#### 3.1.2. Undefined area of processing

According to the prevailing point of view, the right to privacy was first established as a right of an individual to protection against the state.<sup>\*44</sup> The ruling also outlawed the non-proportional interest of the state where personal data are concerned.

Nowadays, a great danger to informational self-determination arises from private-sector processing — for purposes of banking, insurance, medical and other supply services, communication, etc., thousands of pieces of personal data are processed daily. Often these data are combined by undertakings to better serve their customers’ interests.

According to Steven Hetcher, the norms that have emerged in private processing are more efficient and respectful to personal privacy than the existing public-law concept is.<sup>\*45</sup> Hetcher has also concluded that respect for privacy does not require minimising the amount of personal data processing, his view providing a contrast against the perception evident in much national legislation.<sup>\*46</sup> In practical relations concerning data protection in the private sector, data subjects have often stressed that the more data the processor has about them, the more qualified services and products are offered to them, which is regarded as a benefit by many consumers.<sup>\*47</sup>

As the fundamental rights primarily concern the relationship between the individual and the state<sup>\*48</sup>, one should ask, in the context of private data processing taking over a role that was that of the state, how, if at all, the doctrine is to be applied to processing of personal data by private entities.

Shortly after the ruling was made by the BVerfG, Costas Simitis noted that the principles established in the case of the census are to be applied to processing of personal data under private law.<sup>\*49</sup> Articles 2 I i. V and

<sup>43</sup> BVerfG 27, 1, 16.07.1969.

<sup>44</sup> As to the background, see, e.g., S. Singleton. Privacy and Human Rights: Comparing the United States to Europe, at [http://www.cato.org/pub\\_display.php?pub\\_id=5082](http://www.cato.org/pub_display.php?pub_id=5082) (1.01.2006). The horrors of the Holocaust inspired many Europeans to give renewed attention to the problem of privacy in the years following World War II. National-Socialist-style governments in several countries used national census data to identify households of certain ethnic, religious, or other targeted groups. In the United States, at around the same time, census information was used to identify Japanese-Americans for relocation.

<sup>45</sup> S. A. Hetcher. The Emergence of Website Privacy Norms. – Michigan Telecommunications Law Review 2001 (7) 1, pp. 12–29.

<sup>46</sup> Data protection principles may be characterised by the key word ‘rationality’. However, customer surveys indicate that customers are satisfied with offers actually fulfilling their expectations.

<sup>47</sup> Seen the final conclusions of the Seminar on Data Protection in the Private Sector, held in Tallinn, 23.11.2003.

<sup>48</sup> M. Ernits (Note 7), p. 162.

<sup>49</sup> S. Simitis. Revisiting Sensitive Data. – Neue Juristische Wochenschrift (NJW) 1984, p. 401.

1 I of the *Grundgesetz* are the basis for *Drittwirkung* theory under German law, and Simitis derives an overall obligation from the census ruling.<sup>\*50</sup>

Hence, shortly thereafter, J. Wente refers to the *herrschende Lehre* and state law by concluding that no absolute *Drittwirkung* can be applied to fundamental rights. The dominant school bases its reasoning on that of Ernst Dürig.<sup>\*51</sup>

Using the doctrine of horizontal effects, one may come to the conclusion that the right to informational privacy<sup>\*52</sup> no longer exists only in public law but has been extended also to private relations. Yet legal scholars support the view that it is too narrow to regard privacy as a relationship between the individual and the state.<sup>\*53</sup>

The application of absolute *Drittwirkung* theory would lead to a situation where also relationships in private law depend on the margin of the entitlement of the state. To avoid such a situation, the content of *Drittwirkung* is to be interpreted and modified, which in turn can lead to arbitrary conclusions.<sup>\*54</sup>

Therefore, it is important to differentiate between private and public events of personal data processing, as the census case addresses only the latter.

### 3.2. Alternative solutions to modern problems

“Restricting information about himself and his emotions is a crucial way of protecting the individual in the stresses and strains of [...] social interaction”, Alan Westin says, supporting the reasoning of BVerfG.<sup>\*55</sup> Informational privacy is lost when information about a person is obtained against his or her will, be it because there is an obligation to disclose it or because it concerns an area of intimacy over which the individual wishes to retain control.

Yet, if privacy depends only on personal control over it, one has no significant privacy and never will in a computerised world.<sup>\*56</sup> Several authors have argued that the factor of control has a different meaning and scope in the modern data processing context. Indeed, today control on the part of the individual is guaranteed by means of consent, the right to access and correct the data, and the right to withdraw consent and be informed about processing of data gathered from third parties.

Also, exercising constant informed control about all uses of personal data may be burdensome, given that most personal data are processed by automatic means. Several events of processing are necessary solely for purposes of enabling individuals to use services that they have requested. In this situation, the rigid concept of control often overrides interests such as comfort of activities or speed of transactions.

### 3.3. Different public and different interest

To illustrate the fundamental differences of the concepts of ‘public’ and ‘interest’ as referred to by the court from those obtaining in Estonia 23 years later, we next take a look at some public services successfully implemented by the Estonian authorities.

Since 2001, Estonians have had the opportunity to declare their taxes online. One third of the Estonian population carry out their banking activities online, and around 50% use the Internet in the course of their daily activities. In the census ruling, the court expressed a fear of unfamiliar technical opportunities allowing the uncontrollable spread of personal data to different databases.<sup>\*57</sup>

<sup>50</sup> Stated thus: “Die informationelle Selbstbestimmung überall dort zu respektieren, wo personenbezogene Daten verarbeitet werden.”

<sup>51</sup> J. Wente. Informationelles Selbstbestimmungsrecht und absolute Drittwirkung der Grundrechte. – Neue Juristische Wochenschrift 1984, Part 25, p. 1446: Danach enthalten Grundrechte in ihren objektiv-rechtlichen Gewährleistungen Wertentscheidungen, die über Art. 1 III GG auf die gesamte Rechtsordnung ausstrahlen und Gesetzgebung, Rechtsprechung und Verwaltung binden.

<sup>52</sup> The term ‘informational privacy’ as used by A. F. Westin, J. Gafo, and others can be regarded as, in essence, synonymous to ‘informational self-determination’. This is seen in, e.g., Westin’s “informational privacy relates to an individual’s right to determine how, when and to what extent data about the self will be released to another person”. See works such as his *Privacy and Freedom*. London: Bodley Head 1967, with the quoted text appearing on p. 25.

<sup>53</sup> P. Blume. *Nordic Data Protection*. Helsinki: Kauppakaari Oyj 2001, p. 6.

<sup>54</sup> See Westin’s *Privacy and Freedom* as cited in Note 52 *supra*.

<sup>55</sup> *Ibid.*, p. 13.

<sup>56</sup> H. T. Tavani, J. H. Moor. Privacy Protection, Control of Information and Privacy-enhancing Technologies. – *Computers and Society* 2001 (31) 1, pp. 7–11.

<sup>57</sup> See reports cited in Note 9 *supra*, remark 22.

The pilot project of the ‘e-police’ uses the feature of checking the identity, driver’s licence details, and validity of the automotive insurance policy of Estonian drivers online. All Estonian insurance companies therefore provide the police with information about the motor insurance.

In assessing whether it is necessary to apply the double standard of control that derives from the census case, one should first determine whether other interests — such as economy of activities, general freedom of information, and freedom of expression — must be considered.

### 3.4. Leads for interpretation in the census case

In its argumentation in the census case the court stressed that the scope of protection and the concept of human dignity are to be considered in the context of **modern** developments and **new** threats to one’s personality<sup>58</sup>, stating that “this right requires a special level of protection under contemporary and future circumstances of automated data processing”.

The need for legal protection of the autonomy of an individual in deciding whether, when, and under what circumstances to reveal facts about him- or herself was stressed by Westin a decade and a half earlier, and by Warren and Brandeis almost a hundred years before. The threats addressed by the high court, jurists in academia, and privacy advocates always have been related to ‘contemporary’ challenges, which in Warren and Brandeis’s case was the spread of information via photography in the media, for Westin the opportunity to tap telephone conversations and track human activities with surveillance cameras, and for the BVerfG automated data processing in its rather trivial form.<sup>59</sup>

After two decades, the reality of data processing has dramatically changed in terms of both quality and quantity: information is processed mainly through automated processes, and the quantity of data readily accessible to anyone has increased dramatically.

It is unsurprising that, in an application of common sense, the development of information technology can be, and has been, put into the service of better protection of personal data — e.g., in the introduction of regulations allowing officials to access information systems only in a traceable and controllable manner. Various preventive measures and means of control create a reason to reassess the fears addressed by the court. The PDPA *expressis verbis* states the principle of data security and specifies the measures to be taken by processors to ensure it.

Today, most EU member states differentiate between sensitive and non-sensitive personal data.

## 4. Conclusions and proposed structure of analysis

Though data protection laws traditionally form the core of the legal area of informational self-determination<sup>60</sup>, there are significant areas of developments in the scope of informational privacy, among them the freedom of expression and information.

In order to decide whether the reasoning of the census case may be applied under national law, one must address the following questions:

- Is the legal relationship in question public (as opposed to private) in nature?
- Is the case directed at the dignity and personality of the individual concerned?
- Is it possible to achieve the aims of personal data protection in a manner less restrictive than prohibition of data processing?
- Is there a public interest involved that is likely to outweigh the privacy of the individual concerned, and how is the concept of public interest defined under national law?

<sup>58</sup> *Ibid.*, remark 1.

<sup>59</sup> *Ibid.*, II 1) a: Diese Befugnis bedarf unter den heutigen und künftigen Bedingungen der automatischen Datenverarbeitung in besonderem Maße des Schutzes. Sie ist vor allem deshalb gefährdet, weil bei Entscheidungsprozessen nicht mehr wie früher auf manuell zusammengetragene Karteien und Akten zurückgegriffen werden muß, vielmehr heute mit Hilfe der automatischen Datenverarbeitung Einzelangaben über persönliche oder sachliche Verhältnisse einer bestimmten oder bestimmbar Person (personenbezogene Daten (vgl § 2 Abs. 1 BDSG)) technisch gesehen unbegrenzt speicherbar und jederzeit ohne Rücksicht auf Entfernungen in Sekundenschnelle abrufbar sind.

<sup>60</sup> G. Robbers. Informationelle Selbstbestimmung und allgemeine Informationsfreiheit in Deutschland. – *Juridica International* 2002 (VII), pp. 98–105.



It is difficult to overestimate the valuable input of the German Constitutional Court for the development of privacy law. Yet, applying the reasoning of the high court in a transforming and non-selective manner leads to the development of personal data protection law into a mutated entity that is something wholly different.

According to Marie-Theres Tinnefeld, the original aim of the court can be achieved only through simplifying the law on data protection and making it more understandable.<sup>\*61</sup> In order for this to be done, changes in society and technology must be taken into account.

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<sup>61</sup> M.-T. Tinnefeld. Die Novellierung des BDSG im Zeichen des Gemeinschaftsrechts. – NJW 2001, p. 3079; A. Roßnagel. 20 Jahre Volkszählungsurteil. – MMR 2003, 11, p. 694.



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# Transformation of Legal Capital Rules in Estonia — Inevitability or Permanent Misunderstanding?

## 1. Introduction

On 1 January 2006, extensive amendments to the Commercial Code (CC)<sup>1</sup> entered into force with the aim of regulating some as yet unsolved problems, and elaborating on some as yet ambiguous regulations.<sup>2</sup> Such aims are undoubtedly right and noble, and it would be unfair to doubt the intentions behind the attempts to improve legal regulations. Then again, a well intentioned aim does not in itself guarantee that the correct result is attained. This article studies some legal capital rules amendments, which corroborate the question whether we have understood the message of the EU and other Member States correctly, and what do we want to say with our laws to Estonian, as well as foreign, undertakings. This article is also concerned with the issue of whether our rules are objectively justified or not.

The following amendments to the CC were studied:

- an obligation came into force that a public limited company and a private limited company must use generally recognised experts for the valuation of assets upon a valuation of a contribution in kind, if they are available in that field (§ 143 (1), § 249 (1));
- a private limited company is prohibited to acquire or take as security own shares in an amount that exceeds 10% of share capital (§ 162 (2) 1<sup>1</sup>)).

It is beyond doubt that both of the above amendments made the situation stricter than before. A valuation method for contribution in kind was not provided for by law before; it was regulated by way of articles of

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<sup>1</sup> Äriseadustik. – Riigi Teataja (State Gazette) I 1995, 26–28, 355, 2006, 7, 42 (in Estonian).

<sup>2</sup> V. Kõve. 10-aastane äriseadustik – tagasivaade senisele arengule (Ten Years of the Commercial Code – Reflections of Developments). – *Juridica* 2005/9, p. 603 (in Estonian).

association. It has always been provided in the Act, though, that an auditor must audit the valuation of the contribution in kind, whereas for a private limited company such a requirement has been in force only if all contributions, other than in cash, collectively form more than one-half of the share capital or if the value of a contribution in kind exceeds 40,000 kroons (i.e. minimum capital of a private limited company). The reason for the last derogation is to allow faster and simpler incorporation of a company.<sup>3</sup> The nominal limitation on the acquisition of own shares of limited liability company was not earlier prescribed by law.

## 2. Legal capital rules in the EU, Estonia and other Member States

Legal capital rules are enforced in Estonia in accordance with the 2nd Company Law Directive.<sup>4</sup> That directive has repeatedly been criticised by academics, whereas the position that the directive is too regulative, unreasonably strict and also ineffective, is quite unanimous.<sup>5</sup> Recent steps in the EU, with regard to that directive, also clearly show that at the EU level there is agreement with the criticism, and several conceptual amendments are being planned. The first of these will take place in the near future, since the European Parliament has already approved simplification amendments<sup>6</sup> to the 2nd directive based on the SLIM plan.<sup>7</sup> Those amendments do not concern the concept of the directive, only individual issues, including the payment for shares by contribution in kind. In addition, the Commission Company Law Action Plan<sup>8</sup>, prepared on the basis of the report<sup>9</sup> by group of company law experts, sets forth that the possibility of enforcing alternative capital protection rules and preparation of the directive amendments based thereon should be studied. Since no clear position has been taken on future developments in this issue, then no amendments can be expected before 2009.

The abovementioned EU future amendments apparently show a clear message to the Member States — the current legal capital rules are not justified and must be significantly modified. Although the EU has neither amended the current rules, nor expressed any clearly unambiguous positions regarding the future, the general message should nevertheless be understandable: the current formality-based rules will change in the near future.

Valuation of application of the 2nd directive in Estonia shows that Estonia has transposed the directive to national law almost exactly, and, considering the very regulative nature of the directive, this is not surprising. Since the directive was already transposed before Estonia joined the European Union, then the Estonian message to the EU at that time was very clear — we will follow EU requirements and are thus an exemplary European country. This declaration was actually made without much of a sacrifice, as the provisions meeting the EU requirements were transposed to Estonian law with the Commercial Code that came into force in 1995, which for the first time in Estonian history enforced contemporary company law, and since it was a fresh start, the choice of sources was relatively free (at least there was no reason to exclude the transposition of EU requirements). This approach was fine with the EU, as there has never been a problem with Estonia in this regard.

<sup>3</sup> A. Vutt. *Osühing ja aktsiaselts* (A Private Limited Company and a Public Limited Company). — *Juridica* 1995/4, p. 151 (in Estonian).

<sup>4</sup> Second Council Directive of 13 December 1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent (77/91/EEC). — *OJ L* 26, 31.01.1977, pp. 1–13.

<sup>5</sup> Ch. Villiers. *European Company Law – Towards Democracy?* Aldershot: Dartmouth 1998, pp. 28–29; J. Armour. *Share Capital and Creditor Protection: Efficient Rules for a Modern Company Law*. — *Modern Law Review* 2000 (63) 3, p. 355 et seq.; L. Enriques, J. R. Macey. *Creditors versus Capital Formation: The Case Against the European Legal Capital Rules*. — *Cornell Law Review* 2001 (86) 6, p. 1165 et seq.; F. Kübler. *The Rules On Capital Under The Pressure Of The Securities Markets*. — K. J. Hopt, E. Wymeersch (eds.). *Capital Markets and Company Law*. Oxford: OUP 2003, p. 95 et seq.; E. Ferran. *Legal Capital Rules and Modern Securities Markets — the Case For Reform, as Illustrated by the UK Equity Markets*. — K. J. Hopt, E. Wymeersch (eds.). *Capital Markets and Company Law*. Oxford: OUP 2003, p. 115 et seq.; W. Schön. *The Future of Legal Capital*. — *European Business Organization Law Review* 2004 (5) 3, p. 429 et seq.

<sup>6</sup> Proposal for a Directive of the European Parliament and of the Council amending Council Directive 77/91/EEC, as regards the formation of public limited liability companies and the maintenance and alteration of their capital (presented by the Commission). Brussels, 21.09.2004, COM(2004)final. Available at [http://ec.europa.eu/internal\\_market/company/docs/capital/2004-proposal/proposal\\_en.pdf](http://ec.europa.eu/internal_market/company/docs/capital/2004-proposal/proposal_en.pdf).

<sup>7</sup> Company Law SLIM Working Group on the Simplification of the First and Second Company Law Directives. Proposals Submitted to the European Commission. Brussels, October 1999. Available at <http://www.law.ugent.be/fli/WP/SLIM.pdf>.

<sup>8</sup> Commission of the European Communities. *Communication from the Commission to the Council and the European Parliament. Modernising Company Law and Enhancing Corporate Governance in the European Union — a Plan to Move Forward*. Brussels, 21.05.2003, COM (2003) 284 final. Available at [http://europa.eu.int/eur-lex/en/com/cnc/2003/com2003\\_0284en01.pdf](http://europa.eu.int/eur-lex/en/com/cnc/2003/com2003_0284en01.pdf).

<sup>9</sup> Report of the High Level Group of Company Law Experts on a Modern Regulatory Framework for Company Law in Europe. Brussels, 4.11.2002. Available at [http://europa.eu.int/comm/internal\\_market/en/company/company/modern/consult/report\\_en.pdf](http://europa.eu.int/comm/internal_market/en/company/company/modern/consult/report_en.pdf).

Complying with the EU rules is in itself a positive thing, but raises the conceptual question whether Estonia has not been too eager to adhere to those rules. Such a question is relevant especially due to the fact that in Estonian law the 2nd directive requirements are applied equally to public limited companies as well as to private limited companies.

Pursuant to article 1 of the 2nd directive, it is mandatory for the Member States to apply the directive to public limited companies only. Since a public limited company and a private limited company are similar companies by nature, then the Member States face a question whether and to what extent should the directive be applied to private limited companies. Whereas practice varies from one Member State to another — some have provided altogether different rules to private limited companies in comparison with public limited companies, others apply the principles of the directive to all companies. The difference is especially striking in Germany where practically no provisions of the directive are applied to a *GmbH* — this is especially noteworthy, since the directive was largely based on German law.

German choices clearly show that making the choice has depended greatly on whether the Member State has chosen the system of one or two limited liability companies. A fine example of the first is Great Britain, where the transposition of the requirements of the 2nd Company Law Directive did not mean formation of two independent legal forms; instead the existence of two types of companies was achieved by enforcing special rules.<sup>\*10</sup> The same solution was used in the Nordic Countries.<sup>\*11</sup> Yet, similar technical solution has not entailed the same result, as a private limited company in Great Britain is known as an especially liberal type of company, whereas the same cannot be claimed about a Swedish *privata aktiebolag*. The main difference here is the fact that Great Britain has not provided a minimum capital requirement for the private limited company and, above all else, this clearly evident, yet substantively irrelevant circumstance, has brought about a situation where a private limited company in Great Britain has become extremely popular in all of Europe.<sup>\*12</sup>

Estonian private limited company rules are created on the basis of the traditional continental European two companies system, but the actual difference in the rules of those companies, at least with regard to capital rules, is not remarkable. There are several reasons for that, one of the most important being the need to establish a structured legal environment in the place of the earlier lack of regulation, a part of which was the enforcement of very clear and strict rules on private limited companies.

Two types of trends are evident in European countries today. On one hand, there are the Nordic Countries, where Sweden, as a typical example, has, regardless of the Public Limited Company Act<sup>\*13</sup> coming into force from 2006, not changed the current situation, where mostly the same rules are applied to all companies. On the other hand, several other Member States have amended their laws to try to liberalise rules on private limited companies or establish alternative types of companies to enable undertakings to use limited liability with less formalities.<sup>\*14</sup>

With regard to applying the 2nd directive to private limited companies, a noteworthy change has also occurred in the EU. As the 1993 Commission study on the application of the 2nd Company Law Directive's requirements for limited liability companies<sup>\*15</sup> gave a recommendation to apply the requirements of the directive also to those companies, then today no more such recommendations are given. If to analyse the recent developments, then it is evident that the EU has not concentrated even to all public limited companies but to listed companies only, which in turn gives a reason to doubt whether the application of the 2nd directive requirements for private limited companies, as carried out in Estonia, is still reasonable.

<sup>10</sup> P. L. Davies. *Gower and Davies' Principles of Modern Company Law*. London: Sweet & Maxwell 2003, p. 14.

<sup>11</sup> Aktiebolagslagen och EG: Statens offentliga utredningar (Companies Act and EU: State's Public Inquiry) 1992:83. Juristdepartment. Stockholm: Delbetänkade av Aktiebolagskommittén 1992, pp. 21–22.

<sup>12</sup> M. Becht, C. Mayer, H. F. Wagner. *Corporate Mobility and the Costs of Regulation*. ECGI Law Working Paper N° 70/2006. Available at <http://www.ecgi.org/wp/wp.php?series=Law>, p. 30.

<sup>13</sup> *Aktiebolagslag* (2005:551). Available at <http://lagen.nu/2005:551#K2> (in Swedish).

<sup>14</sup> France is a fine example, where as of 1.08.2003 the minimum capital requirement for limited liability companies was abolished, whereas previous years witnessed a discussion only about whether the 7500 Euros requirement valid then was too low. See W. Schön (Note 4), p. 436. Another example is Italy, where after the last reform considerations are allowed in private limited companies also in the form of services. See P. Montalenti. *The New Italian Corporate Law: an Outline*. – *European Company and Financial Law Review* 2004 (1) 3, pp. 370–371.

<sup>15</sup> Commission of the European Communities. *Study on Second Directive's Extension to Other Types of Companies (Summary)*. Brussels 1993, p. 23.



### 3. Valuation of contribution in kind

Coming back to the amendments viewed in this article, it is necessary to clear up the reasons of these amendments. The motivation for the amendments to § 143 (1) and § 249 (1) of the CC that regulate the valuation method of contribution in kind is given in the explanatory memorandum: it is not reasonable to value contribution in kind “pursuant to the procedure prescribed by the articles of association” in a situation where generally recognised experts are available.<sup>16</sup> Unfortunately, it remains unclear in that motivation what the actual problem is, since the reference to the alleged inadequacy is not accompanied by grounded motives. Had major problems arisen in that regard, it would have shown in case law, but the author is aware of no such judgements. Hence, the reason for the amendment could not have been the need to solve practical problems, but since the explanatory memorandum includes no other motives, then it must be concluded that there is no actual reason.

Valuation of contribution in kind is regulated by article 10 of the 2nd directive, which sets forth the general rule that a report on any contribution in kind must be drawn up before a public limited company is incorporated or is authorized to commence business, by one or more independent experts, who may be legal persons as well as natural persons. The experts’ report must contain at least a description of the assets, the methods of valuation and an opinion that the value of the assets corresponds at least to the par value and, where appropriate, to the premium on the shares to be issued for them. The expert’s report must be disclosed in the manner laid down by the laws of each Member State.

Estonian law is in compliance with the above requirements of the 2nd directive, and since the directive establishes minimum requirements only, then it is formally irrelevant to refer to any inconsistency or deficiency in Estonian law here. A substantial problem exists, though, in the directive requirement, that only an independent third person (an expert) can be used to value a contribution in kind — this means that Estonian law provides, in certain cases, for the double use of a third person (expert valuation and audit control). It is justified to ask, here, whether such a double requirement is reasonable in the European context. Even a single general assessment of the requirements of the 2nd directive — they make the incorporation of a company and increasing of share capital too costly<sup>17</sup> — shows that the requirements applied in Estonia must be considered too burdensome.

In the evaluation of our law in comparison with the 2nd directive, it cannot be ignored that amendments to the directive are planned. The amendments are based on the Company Law SLIM Working Group report that found that the requirements in the directive are not always useful or necessary, and a proposal was made *inter alia* to decrease the number of cases that require valuation of contribution in kind. A specific proposal was made to exclude the requirement of the valuation of contributions in kind, all together, in case the object of the contribution are transferable shares traded on the securities market, as well as if the asset had recently been valued and its value had not suffered any substantial changes.<sup>18</sup> The same suggestion was given in the Company Law Winter Working Group report.<sup>19</sup> The proposal of amendments to the 2nd directive has taken these suggestions into account; it is emphasised, however, that the current situation is “expensive but not necessarily always offering a total guarantee for establishing the precise value of the asset concerned”<sup>20</sup>. The draft directive gives the right to the Member States to decide not to apply article 10 where transferable securities<sup>21</sup>, as defined in article 4 (1) 18) of directive 2004/39/EC<sup>22</sup>, are valued at the weighted average price at which they have been traded in the three months preceding the effectuation of the respective contri-

<sup>16</sup> Äriseadustiku muutmise seaduse eelnõu seletuskiri 14.12.2004 (Explanatory Memorandum to the Draft Amendments of the Commercial Code. 14.12.2004). Available at <http://web.riigikogu.ee/ems> (in Estonian).

<sup>17</sup> F. Kübler (Note 5), p. 101.

<sup>18</sup> Recommendations by the Company Law SLIM Working Group on The Simplification of The First And Second Company Law Directives. – Company Law SLIM Working Group on the Simplification of the First and Second Company Law Directives. Proposals Submitted to the European Commission. Brussels, October 1999. Available at <http://www.law.ugent.be/fli/WP/SLIM.pdf>, p. 3.

<sup>19</sup> Winter Report (Note 8), p. 91.

<sup>20</sup> Commission Working Document: Detailed explanation (by article) of Proposal COM (2004).....final of ..... October 2004 (2004/....(COD)) for a Directive of the European Parliament and of the Council amending Council Directive 77/91/EEC, as regards the formation and public limited liability companies and the maintenance of their capital, paragraph 1. Available at [http://ec.europa.eu/internal\\_market/company/docs/capital/2004-proposal/explanation\\_en.pdf](http://ec.europa.eu/internal_market/company/docs/capital/2004-proposal/explanation_en.pdf).

<sup>21</sup> Pursuant to that article transferable securities mean shares and other equivalent securities and depositary receipts in respect of shares, bonds or other forms of securitised debt and depositary receipts in respect of such securities and other securities giving the right to acquire or sell any such transferable securities or giving rise to a cash settlement determined by reference to transferable securities, currencies, interest rates or yields, commodities or other indices or measures.

<sup>22</sup> Pursuant to that article transferable securities mean shares and other equivalent securities and depositary receipts in respect of shares, bonds or other forms of securitised debt and depositary receipts in respect of such securities and other securities giving the right to acquire or sell any such transferable securities or giving rise to a cash settlement determined by reference to transferable securities, currencies, interest rates or yields, commodities or other indices or measures.

bution in kind. The draft directive also allows the Member States to apply simplified valuation procedures where assets contributed as contribution in kind have already been subject to a fair value opinion by a recognized independent expert who is sufficiently trained and experienced; the fair value is determined for a date not more than three months before the effective date of the asset's contribution and the valuation has been made in accordance with the pertinent valuation standards and principles. Another option of simplified valuation is to derive the value of an individual asset from the published and audited accounts of the previous financial year. A limitation of the described conditions must be taken into consideration — they are not applicable if the value of the valued asset has significantly changed due to new circumstances, and minority shareholders, whose shares represent at least 5% of the company's share capital, may require a re-valuation of the asset. In itself these rules express no unknown principle, as the current directive also excludes the valuation of assets in case of post-incorporation, if the asset is a stock exchange acquisition (article 11 (2)).

Estonia will not have a formal conflict with the 2nd directive, even after adoption of the amendments, since they do not require the Member States to simplify the procedure already in force, but simply give the option to do so. Considering the fact that other Member States (or at least the majority) will definitely use that option, then there is no real choice for us in deciding whether to go along with the changes. Thus, the issue does not come down to whether to comply with the requirements of the directive, but, when taking the legal competition of states into consideration, it is necessary to establish as favourable an environment for undertakings as possible. It is technically possible to implement the amendments to the directive by providing individual derogations, which would mean a partial return to the CC version in force prior to 1.01.2006. That would abolish the need for any valuation upon payment with transferable securities. That would also abolish the obligation to control the valuation in a case where the asset was valued by an expert or the asset's value was derived from disclosed reports. It must be emphasised that the idea behind the amendment to the directive is to abolish additional valuation in case the valuation of contribution in kind is based on objective circumstances, which is definitely reasonable.

The next question in assessing the reasonability of the rules valid in Estonia is what kind of rules are applied in similar situations in other countries. The comparison of the valuation rules of a contribution in kind with the rules in force in other countries is not in our favour here either. In Germany, for example, the data about a contribution in kind and the valuation thereof must be shown in the incorporation report. Members of the first elected management board and supervisory board must give their opinion upon the incorporation of the company, which must include data on contribution in kind (§ 33 II 4 of the AktG<sup>23</sup>). Additionally, the valuation of assets must be carried out by independent experts (*Gründungsprüfer*), who are chosen by the court, from among of auditors. Since assets must be valued several times and by different people, then it is only natural that opinions in reports may be different. Consequently, the final check is effected by the commercial register, whose opinion is based on the documents submitted thereto or a new valuation, if deemed necessary (§ 38 of the AktG). If it is found that the contribution in kind has been overvalued, then the court may refuse to register the public limited company in the commercial register.<sup>24</sup>

In France, valuation of contribution in kind of a public limited company must also be carried out by an auditor, whereas the foundation meeting may reduce the value of the contribution in kind by a unanimous vote (*Code de Commerce*<sup>25</sup> articles L225-8 and L225-14). Similarly, Swedish law provides that an auditor must give an opinion about a contribution in kind (*Aktiebolagslag* 2:19). And in Holland there is also an obligation to use an auditor, but it is not mandatory in case all founders agree otherwise, the contribution in kind is transferred by a company whose reports are disclosed, the founding company has non-distributable reserves at its disposal in the amount of the contribution in kind or the founding company issues a warranty in the amount of the contribution valid for at least one year (BW article 94a). The latter requirements may even be more complicated than using an auditor, but at least there is a possibility of not using an auditor and thereby avoiding the extra cost.

If to compare the requirements for private limited companies of the same countries, it can be seen that differences between Estonia and other countries are even significant. Germany has no external valuation requirements for contribution in kind. France has a requirement that valuation of contribution in kind have to be effected by an auditor, but only if the value of the contribution in kind exceeds 7500 Euros or more than half the share capital has to be paid by contribution in kind (*Code de Commerce* article L223-9). Holland requires a report about contribution in kind, and it must be prepared by an auditor only in case the contribution in kind is given to a company with an audit obligation or if the value of the contribution exceeds 3,600,000 Euros. Founders can decide not to use an auditor or other expert by their decision in case the

<sup>23</sup> Aktiengesetz, 6 September 1965. – BGBl I 1965, 1089. Zuletzt geändert durch Art. 5 G v. 15.12.2004 I 3408. Available at <http://bundesrecht.juris.de/bundesrecht/aktg>.

<sup>24</sup> P. van Ommeslaghe. Capital. – International Encyclopaedia of Comparative Law. Vol. XIII: Business and Private Organizations. Chapter 5: Capital and Securities of Marketable Share Companies, p. 18.

<sup>25</sup> Code de Commerce: Partie Legislative. Loi 2003-775 du 21/08/03 (JO 22/08/03). Commercial Code: The Legislative Part. Available at [http://www.legifrance.gouv.fr/html/codes\\_traduits/commercetextA.htm](http://www.legifrance.gouv.fr/html/codes_traduits/commercetextA.htm).

contribution in kind is transferred by a company who submits a confirmation to the commercial register that it assumes sole responsibility for the recipient's debts, its report is disclosed, and its own equity exceeds the nominal value of the shares issued for the contribution in kind (BW article 204a). The approach of Swedish law is different: the same requirements are applied to both type of companies and the use of an auditor in a *privata aktiebolag* cannot thus be excluded.

It can be concluded from the above that Estonia has higher requirements for valuation of contribution in kind than the other above-mentioned countries. Whereas the requirements applied to private limited companies in Estonia are significantly different from those applicable in other countries.

Coming back to the alleged inadequacy of the earlier rules stated in the explanatory memorandum of the draft amendments to the CC, one cannot but ask whether such an inadequacy is indeed possible in a situation where similar or more liberal legal frameworks have been in force in other countries for years. We might have found, in principle, be a significant problem in our legal order, which has for some reason not been noticed in other countries, and in such a situation it should be our duty to inform others that such a problem exists. However, such a conclusion sounds absurd and there is a more reasonable explanation — we have managed to create a pseudo problem and enthusiastically solved it.

Besides sending the signal with this amendment that private limited companies have very rigid requirements in Estonia, we also have problems on the practical side. Since a “recognised expert” is an undefined legal term, and the explanatory memorandum refers only to real estate experts as an example, then there have already been cases where commercial registers also require the use of an expert in situations where objects of the contribution in kind are cars, office equipment, production facilities and such. A striking example was a company used as a contribution in kind, where an opinion was expressed that its value should be valued by an expert who is an auditor and another auditor should control the valuation. The first question to be asked here is whether an auditor is qualified as a recognised expert. And second, the auditor's independence requirement and his or her liability<sup>\*26</sup> alone should ensure a correct result if the valuation was only controlled by an auditor. Additionally, it would require choosing one auditor from outside the company, which is not necessary from the point of view of the auditor's independence or the assurance of controlling the valuation.<sup>\*27</sup> Thus, we can ask whether using two auditors in such situations has really been the aim of the regulator. Evidently what we have here is an incorrect interpretation of the law, but we cannot state that the text of the act excludes such an interpretation. Based on the same logic, it could also be concluded that a contribution of transferable securities should be valued by an expert, which is especially absurd in the view of the draft 2nd directive, which not only intends to allow an option to abolish the control of the valuation requirement of a relevant contribution in kind, but even rule out the valuation all together.

## 4. Acquisition of own shares

The first question regarding the limitations on the acquisition of own shares is whether and what are they useful for at all. Taking the acquisition of own shares from the capital protection point of view means that any such acquisition should be forbidden, since that would be the way of returning the contribution to the shareholder. This limitation is mostly needed, though, because acquisition of own shares means conflict of interests between shareholders and other interest groups (mainly creditors), although a similar conflict also occurs upon payment of dividends or the taking of new loans.<sup>\*28</sup> However, the acquisition of own shares may be necessary in certain cases — in a private limited company, which is a closed company, it may be necessary to enable a shareholder to exit the company, solve disputes between shareholders, as well as making the company more attractive to external investors.<sup>\*29</sup> Although there are several objections to allowing the acquisition of own shares, especially from the point of view of the maintenance of capital, the given examples should be sufficiently clear to demonstrate the need for allowing the procedure.

The 2nd directive regulates the acquisition of own shares by public limited company (article 19) only and any requirements for private limited companies are left for the Member States to decide. Consequently, it is important to ensure for our companies at least an equal legal environment with the other Member States. In this regard the situation in other Member States is different, and it can be generalised that Sweden, for example, has provided for quite strict rules, whereas in Germany and Holland the rules are liberal.

The need for § 162 (2) 1<sup>1</sup>) of the CC is justified in the explanatory memorandum with the fact that without such a regulation a situation could occur where all shares of a private limited company belong to that private

<sup>26</sup> Section 37 and § 40 (1) of the Authorised Public Accountants Act (Audiitortegevuse seadus). – Riigi Teataja (State Gazette) I 1999, 24, 360; 2003, 23, 133 (in Estonian).

<sup>27</sup> A. McGee. Share Capital. London: Butterworths 1999, p. 49.

<sup>28</sup> B. Cheffins. Company Law: Theory, Structure and Operation. Oxford: Clarendon Press 1997, pp. 79–80.

<sup>29</sup> E. Ferran. Company Law and Corporate Finance. New York: Oxford University Press Inc 1999, pp. 430–431.

limited company, and not providing similar limitations for private limited companies, as are in force for public limited companies in the acquisition or taking as security of own shares, would most likely be a mistake on the regulator's part. Such an allegation may even be justified, but on different grounds. The initial texts of the draft CC included nominal limitations in the amount of acquisition of own shares regarding up to half of the share capital.<sup>\*30</sup> That principle was based on Dutch law (at BW2 article 207<sup>\*31</sup>). Just before the adoption of the law a proposal was submitted to decrease the limit to 1/3 of share capital.<sup>\*32</sup> The final vote left the nominal limitation completely out, based on the reasoning that such limitations in the amount of acquisition may be unreasonable and not appropriate to the nature of a private limited company. For example, the fact that a private limited company has, as a rule, few shareholders and an acquisition of own shares could concern a relatively big shareholding, which would make it impossible to buy back shares from a partner whose interest is bigger than that percentage (which is quite common in a private limited company), was indicated as a problem. It is preferable to limit instances where a private limited company acquires all of its shares or majority shareholding, since that could lead to a situation when the company loses its power to express its will through its management bodies, which is, in the long term, unacceptable.<sup>\*33</sup> Such a situation would undoubtedly mean ambiguity in the company's management; it is also doubtful whether the aims of such acquisitions can be in the best interests of the company. Therefore it might be claimed that the parliament made a mistake providing the earlier set of rules without the nominal limitation, but now the question is whether the provision for extremely restrictive nominal limitations was not even a substantial mistake.

## 5. Conclusions

The amendments to the CC that came into force on 1.01.2006, and were discussed in this article, are clearly aimed to make the legal capital rules more rigid. In the situation where the EU has aimed to liberalise the legal capital rules, the increase of normative capital rules in Estonia is a clear sign of the legal environment being made less favourable for undertakings. Considering the developments in the EU, such changes are clearly contradictory to overall trends — i.e. liberalisation of small company rules and the creation of a more favourable environment for undertakings. If the reason for the EU's more liberal trends is primarily the need to be legally competitive with the USA, then similar competition is also present between EU Member States. Unfortunately, it must be admitted that the above-mentioned processes have not been perceived here and the discussed amendments to the CC give reason to state that we have made serious efforts to be the losers in this competition. It is impossible to state that those developments, especially the rigid capital rules, are inevitable. Instead, it is the question of our misinterpretation of what is happening in the world, and such mistaken perception has brought along incorrect solutions.

The liberalisation of company law is on the agenda in Estonia, as the plan "Entrepreneurial Law: Action Plan for Improving the International Competitiveness of the Corporate Legal Environment"<sup>\*34</sup> published by the ministry of Justice in February 2006, also includes *inter alia* provisions to amend the current company law, the most important of which is declared to be the need to control the substantive reasonability of the current rules, whereas the need to establish flexible rules for small and medium size enterprises is underlined. Such an aim is completely justified and there is hope that these issues will actually be dealt with. What can definitely be considered positive with the amendments to the CC, viewed in this article, is the fact that those extremely rigid and limiting amendments have established a good platform for liberalisation, since only the repealing thereof (which is inevitably necessary for the most part) allows to speak about making the law considerably more flexible and entrepreneur-friendly.

<sup>30</sup> Section 174 of the Draft Companies and Registration of Companies Act (SE 733 II) 30.01.1995. (The author has a hold of the draft.)

<sup>31</sup> Burgerlijk Wetboek. Boek 2 1976. Available at <http://www.burgerlijk-wetboek.nl/BW2.html>.

<sup>32</sup> Table of amendments of the Draft Companies and Registration of Companies (733 SE III) 8.02.1995, § 174. (The author has a hold of the draft.)

<sup>33</sup> A. Baumbach, A. Hueck. GmbH-Gesetz: Beckliche Kurzkommmentare. Bd. 20. 18. Aufl. München: Beck 2004, § 33:19.

<sup>34</sup> Available at <http://www.just.ee/19426>.





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# Legal Regulation of the Board Structure of Public Limited Companies in the light of Regulatory Communication between the European Union and Member States

Communication denotes a link, connection, movement, announcement and also at the same time interaction, as well as the sending and receipt of information.<sup>\*1</sup> It has been noted in literature that communication as a term is so frequently used that it has become ambiguous and carries too many different meanings for people. The most general is considered to be the definition of communication as a certain dissemination of experiences, and one of the possible definitions of communication could be the process of creation of meaning between two or more subjects, one of the important features of which is that the delivery of a message by the sender changes, to a certain degree, not only the addressee of the message but also its sender.<sup>\*2</sup>

The law also plays a big factor in the role of creating meanings and delivering a message in society, since one of the possible approaches towards the law is to regard it as a system of regulations; as an intermediary of behavioural models.<sup>\*3</sup> On the one hand, according to the general model of communication, the state may serve as the sender of the message in the law, while the persons whose behaviour is regulated serve as the addressees. However, in the contemporary world, communication exceeds the boundaries of communication between the creator of the regulation and its addressees — messages are exchanged between the regulatory systems of different countries and even different legal systems. Due to Estonia's position as a European Union member state, that part of regulatory communication which is manifested in the interaction

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<sup>1</sup> R. Kleis, J. Silvet, E. Vääri. *Võõrsõnade Leksikon* (Lexicon of Foreign Words). 2<sup>nd</sup> ed. Tallinn 1978 (in Estonian).

<sup>2</sup> S. L. Tubbs, S. Moss. *Human Communication*. 6<sup>th</sup> ed. New York 1991, pp. 6–7.

<sup>3</sup> A. Aarnio. *Õiguse tõlgendamise teooria* (The Theory of Interpretation of Law). Tallinn 1996, p. 21 (in Estonian).

between a member state and supra member state regulations, carries significant weight. In this way, both the Community and its members signal each other as to which mechanisms of legal regulation are mutually desirable and efficient, in order to ensure the compliance of the content of law with its objective. The same mechanisms also apply in company law — on the one hand, the European Union provides guidelines for member states, aimed at guaranteeing freedom of establishment and the organised architecture of the common economic environment; on the other hand, there is also interaction between the legal environments of different member states. It has even been noted in legal literature, recently, that the competition between legal environments need not be a negative phenomenon, since it compels national legal systems to adjust themselves to the demands of investors and thus contributes to their development.<sup>\*4</sup> Harmonisation has been less painful and faster in several areas of law than in the issues concerning the structure of the boards of large public limited companies.<sup>\*5</sup> The objective of this article is to analyse the differences found in the legal regulations of the board structure of the public limited company in European Union member states, what kind of interactions operate between the law and implementation practices of different states, what relevant development trends can be identified in the European Union, and what message such trends could deliver to Estonian statutory company law. The article also discusses what the message is that the board structure rules, contained in Estonian law, carry for the other member states. Because of the manner of setting the theme above, the possible development of Estonian company law in legal regulation of the board structure of the public limited company has also been discussed.

## 1. One or two-tier board structure?

It is well known in comparative company law that some countries have maintained the one-tier board structure in the public limited company, while other countries have just as consistently legalised the two-tier structure. The United States of America and the United Kingdom, above all, have been referred to in literature as the representatives of the monistic model, whereas Germany is designated as being the representative of the dualist model.<sup>\*6</sup> The border separating the area of application of one-tier and two-tier governance models cannot be drawn in the same place as the boundary between the Anglo-American and continental European legal systems. In addition to England and Ireland, according to the classification developed by Klaus Hopt at the end of the 1990s<sup>\*7</sup>, the representatives of the monistic model also include Southern European countries such as Spain, Italy, Portugal and Greece; whereas the representatives of the two-tier model comprise, in addition to Germany, Switzerland, Austria, the Netherlands and the Scandinavian countries. France and Belgium, in turn, represent a model in which it is possible to choose between a one and two-tier structure.<sup>\*8</sup> Since German company law has also served as an example for the development of national legal systems in several Eastern European countries, the representatives of the two-tier model also include countries like Poland, the Czech Republic, Slovakia, Bulgaria and Latvia.<sup>\*9</sup>

It is a characteristic of the one-tier model that the board structure of the company, as a rule, comprises one body that is entrusted with the task of both organising the everyday economic activities, strategic management and supervision in a wider sense. Within one body, competence may be divided between different persons; however, this does not mean that the board structure has two tiers. Further to that, the board structure comprising several directing bodies need not represent purely two-tier management. Udo Brändle and Jürgen Noll have pinpointed as the main distinguishing criterion, the fact that the management and monitoring functions are separated on the level of the organisation and individual.<sup>\*10</sup> A similar principle has also been used for distinguishing between one and two-tier management in the comparative study of the company governance codes of the member states, prepared by the Commission of the European Communities in 2002.<sup>\*11</sup> It must be considered determinative to what extent the principle of separation of powers within the

<sup>\*4</sup> S. Mock. Harmonization, Regulation and Legislative Competition in European Corporate Law. – German Law Journal. European and International Law 1.12.2002 (3) 12. Available at <http://www.germanlawjournal.com/article.php?id=216>.

<sup>\*5</sup> For example, in the United Kingdom this type of company is called a public limited company, in Germany *Aktiengesellschaft*, in France *société anonyme*, in Sweden *publikt aktiebolag*, in the Netherlands *naamloze vennootschap*, in Denmark *aktieselskabet*.

<sup>\*6</sup> B. Grossfeld. Management and Control of Marketable Share Companies. – International Encyclopedia of Comparative Law. Vol. XIII. Business and Private Organizations. Chapter 4, *S.a.*, p. 7.

<sup>\*7</sup> To date, the opportunities arising from law have become wider in scope in several countries. See details below.

<sup>\*8</sup> K. J. Hopt. The German Two-Tier Board: Experiences, Theories, Reforms. – K. J. Hopt, H. Kanda, et al. (eds.). Comparative Corporate Governance – The State of the Art and Emerging Research. Oxford 1998, p. 228.

<sup>\*9</sup> V. Kõve. Äriseadustiku põhialused (Foundations of Commercial Code). – Juridica 1995/4, p. 134 (in Estonian).

<sup>\*10</sup> U. C. Brändle, J. Noll. The Power of Monitoring. – German Law Journal. Private Law 1.02.2003 (4) 2, p. 1353.

<sup>\*11</sup> Comparative Study of Corporate Governance Codes relevant to the European Union and its Member States. European Commission Internal Market Directorate General. 27.03.2002. Available at [http://www.ecgi.org/codes/documents/comparative\\_study\\_eu\\_i\\_to\\_v\\_en.pdf](http://www.ecgi.org/codes/documents/comparative_study_eu_i_to_v_en.pdf), p. 44.

company has been developed, while above all it must be assessed to what degree the management of everyday economic activities has been separated from the monitoring exercised over that and how the formation of bodies has been regulated from the aspect of independence of supervision. Proceeding from this criterion of assessment, the board structure of British listed companies may sooner be considered to be a two-tier one, while the management of Swedish public limited companies is carried out on one tier. The contrasting of the one-tier board structure of the public limited company with the two-tier one became topical in law, above all, within the framework of the European Union because articles 44 of the consolidated version of the Treaty establishing the European Community<sup>\*12</sup> *inter alia* sets the goal to ensure freedom of establishment in the Community by harmonising the company law of the member states to the greatest extent possible.<sup>\*13</sup> At the time it was found that, ideally, the creditors of the companies of all member states should be legally in the same position so that economic, not legal, environments could compete among themselves.<sup>\*14</sup> Since the board structure of public limited companies differs both in the European Union and on the world scale, it has been important for scientists and practitioners planning harmonisation to identify the reasons behind such differences.

The main reason for the different development of board structures of public companies in different states has been, as mentioned in literature, the capital market differences between the states. For example, in Germany, a considerably higher number of companies are under the influence of majority shareholders as compared to those in the United Kingdom.

Thus, in 1996, 85.4% of the biggest listed public companies in Germany had one majority shareholder who held over 25% of the shares, and 57.3% had a shareholder holding the absolute majority (i.e. a shareholder holding over 50% of the votes).<sup>\*15</sup> A similar situation also prevailed in France and Belgium, according to literature.

The concentration of participation is somewhat smaller in the remainder of continental Europe; however, it is still significantly higher than in the United Kingdom, where the interest in public companies is extremely fragmented.<sup>\*16</sup> The structure of the shareholders in Anglo-American and continental European public limited companies also differs — it is much more common to invest via institutional investors<sup>\*17</sup> in the United Kingdom, where the latter control over 50% of the large companies<sup>\*18</sup> and the proportion of non-professionals among investors is consequently much lower (only about 20–30%). Companies which are not professional investors also hold 20–30% of the shares of comparable companies in Germany, France and Italy, whereas institutional investors only hold 10–30%, and private persons 15–35% of the shares. The third difference is that the public limited companies of the countries that represent the Anglo-American model are, as a rule, larger companies than their counterparts in continental Europe; a significantly higher number of them have been listed, and consequently their shares are more liquid.<sup>\*19</sup> The establishment of different board structures has also been attributed to the different political as well as socioeconomic trends of the countries.<sup>\*20</sup>

It has been noted in legal literature that the establishment of different goals for corporate governance can be identified in European countries; for example, the United Kingdom and the Netherlands are still trying to maximise the investments of shareholders, whereas for instance Germany and France pay less attention to this objective.<sup>\*21</sup> This, however, implies a different setting of goals even within the groups of states representing the monistic or dualist model, respectively. It has also been found in literature that the main cause between differences does not lie so much in different financing as in the different methods used for solving the conflict between ownership and control — Anglo-American solutions are more focused on shareholders, while continental European ones are more geared towards stakeholders.<sup>\*22</sup> The term ‘stakeholders’ is

<sup>12</sup> OJ C 325, 24.12.2002.

<sup>13</sup> C. Timmermans. Harmonization in the Future of Company Law in Europe. — K. J. Hopt, H. Kanda, et al. (eds.). *Comparative Corporate Governance – The State of the Art and Emerging Research*. Oxford 1998, p. 624.

<sup>14</sup> S. Mock (Note 4).

<sup>15</sup> K. J. Hopt (Note 8), p. 232.

<sup>16</sup> C. Van der Elst. *Economic Analysis of Corporate Law in Europe: an Introduction*. — Financial Law Institute Working Paper Series. WP 2002-01. Available at <http://www.law.ugent.be/fli/WP/WP2002-pdf/WP2002-01.pdf>, p. 13.

<sup>17</sup> Institutional investors include, for example, banks, investment funds, insurance companies, pension funds and other organisations for whom collection and investment of resources in listed companies is their everyday economic activity.

<sup>18</sup> The share of institutional investors was as high as 60% in the United Kingdom according to some sources. See U. C. Brändle, J. Noll (Note 10), p. 1367.

<sup>19</sup> H. Ooghe, V. Van de Vuyst. *The Anglo-Saxon versus the Continental European Corporate Governance Model: Empirical Evidence of Board Composition in Belgium*. Available at <http://www.vlerick.be/research/workingpapers/vlgms-wp-2001-06.pdf>, pp. 3 and 5.

<sup>20</sup> A. Dorresteyn, I. Kuiper, G. Morse. *European Corporate Law*. Stockholm 1995, p. 101.

<sup>21</sup> D. Brounen, A. de Jong, K. Koedijk. *Corporate Finance in Europe: Confronting Theory with Practice*. — *Financial Management*, Winter 2004, p. 99.

<sup>22</sup> H. Ooghe, V. van de Vuyst (Note 19), pp. 3–4.

intended to cover both shareholders and other investors, and also suppliers, consumers of products or services, employees, the state, and society as a whole.<sup>\*23</sup>

As appears from the above, many potential reasons have been highlighted in literature for the establishment of diverse board structures, and one way or another the majority of them are related to the economic environment of the relevant country. When the main problem in high shareholding concentration is the protection of minority shareholders, the control of the board serves as one in dispersed ownership. Thus, the multitude of management models is the result of the different economic and social developments of the countries.

## 2. Member state experiences: convergence of board structures

A harmonisation trend can be detected in the development of the legal environments of the member states concerning the board structure of public limited companies. This is firstly manifested in the fact that in addition to the original one, that is the traditional board structure, an opportunity to choose a different model has also been provided for public limited companies in many countries. One such example is France where, as early as 1966, public limited companies got an opportunity to use a two-tier board structure as an alternative to the original or one-tier model, whereby the German model served as the basis.<sup>\*24</sup> On 1 January 2004, a law that reformed contract law also entered into force in Italy, for instance, and according to the amendments Italian public limited companies could choose between three different management models (so-called traditional, German and British models).<sup>\*25</sup>

Besides the above, several board structures of public limited companies have historically developed in European countries, which are hard to classify as one or two-tier models. One of the examples here can be the board structure of Danish public limited companies, which has been prescribed as two-tier by law. Danish law stipulates that the public limited company must have two boards — the everyday management is handled by the management board (*direktion*) and supervision is carried out by the supervisory board (*bestyrelse*); however, unlike the states that prescribe a two-tier structure, strictly founded on the separation of powers, the members of the management board are permitted to serve simultaneously as members of the supervisory board, on the precondition that not more than one-half of the positions of the supervisory board members are filled this way. As a consequence, the board structure of Danish public limited companies has also been described as ‘semi-two-tier’.<sup>\*26</sup> According to the comments on Swedish company governance code<sup>\*27</sup>, the Swedish company governance model lies somewhere between the one-tier Anglo-American and two-tier continental European model (comm. 2 (8)).

Secondly, when regarding practice in addition to laws, it appears that the differences between the monistic and dualist models are much less significant in the European Union member states than it seems at first. Similarities are particularly great in the management of listed companies because the same principles have been largely taken as the basis when developing company governance practices. The United Kingdom does not recognise the supervisory board as an independent supervisory body, yet in practice, a unit with such competence exists, one way or another. The non-executive members of a British listed company are comparable to the members of the supervisory board in their duties.<sup>\*28</sup> However, the non-executive members differ from the members of the supervisory board in the fact that they can participate in the adoption of management decisions concerning everyday activities, as the directing competence of the management board is rather homogeneous. German legal practice has, in turn, converged with the Anglo-American model to a certain extent, and although the immediate participation of the supervisory board in the direction of everyday economic activities has been ruled out, according to law, the supervisory board still has important points in common with the management board’s competence. For example, the meetings of an acting supervisory board carry great significance with regard to governance in its wider meaning and it is common that the members of the management board also participate in the supervisory board meetings (while naturally not

<sup>23</sup> M. M. Blair. *Ownership and Control: Rethinking Corporate Governance for the Twenty-First Century*. – T. Clarke (ed.). *Theories of Corporate Governance: The Philosophical Foundations of Corporate Governance*. Oxon 2004, pp. 174–178.

<sup>24</sup> B. Grossfeld (Note 6), p. 8.

<sup>25</sup> P. Montalenti. *The New Italian Company Law: an Outline*. – *European Company and Financial Law Review* 2004 (1) 3, October, pp. 368–370.

<sup>26</sup> C. Rose. *The Composition of Semi-Two-Tier Corporate Boards and Firm Performance*. – *Corporate Governance: An International Review*, 2005 (13) 5, September, p. 692.

<sup>27</sup> Swedish Code of Corporate Governance. Report of the Code Group. Swedish Government Official Reports. SOU 2004: 130. 16.12.2004. Available at [http://www.ecgi.org/codes/documents/swe\\_codes\\_group\\_en\\_mar2005.pdf](http://www.ecgi.org/codes/documents/swe_codes_group_en_mar2005.pdf).

<sup>28</sup> B. Grossfeld (Note 6), p. 9.



entitled to vote). It has also been emphasised in literature that the supervisory board plays an increasingly important role as the advisor to the management board.<sup>\*29</sup> Such practice is perhaps common in Estonian public limited companies, where the supervisory board has a substantive but not nominal role.

As the choice between one and two-tier board structures is largely motivated by economic distinctions, it is not correct to ask which system is more efficient in the abstract sense. The one-tier model focuses more on counterbalancing the authorised powers of the management board, whereas the two-tier model centres on the restriction of influence of a majority shareholder. The protection of the general interests of the company is concerned in both cases.<sup>\*30</sup>

It has been opined in literature that the general trend of convergence expresses movement towards two-tier management, as implied, for example, by several British company governance principles.<sup>\*31</sup> The reduction in substantive differences between the one and two-tier structure has also been pointed out as a general development trend, for instance, in the German Corporate Governance Code<sup>\*32</sup> and its comments.<sup>\*33</sup>

Nevertheless, both models have been criticised in legal literature. Several critics of the supervision theory are of the opinion that the appropriate level of supervision should not be set by the state through imperative regulations, but instead by the market, and that investors should have the right to choose both the form of supervision and its intensity. According to the critics of the two-tier board structure, the management system should be homogeneous and protected from external interference. It is claimed that, in reality, it is difficult to maintain a clear distinction between management (in the narrower sense) and supervision as a function of management (in a wider sense)<sup>\*34</sup> The heaviness of the mechanisms designed for actualisation of the responsibility of the supervisory board members has also been an object of criticism.<sup>\*35</sup> A deficiency characteristic of the common law system — a particular uncertainty arising from the fact that case law serving as law based on cases evolves over a longer period — has been pointed out as a weakness of the one-tier management model. Thus, it is not possible to say how far practice can go and from what point onwards the law will restrict its implementation. Uncertainty is increased by the fact that the objectives, customs, practices and protected values of business are in the process of continuing change, and the changes occur so rapidly that they are not immediately reflected in case law.<sup>\*36</sup>

It appears from the above that communication, as an exchange of meanings concerning the legal regulation of the board structure of the public limited company, is in progress in the member states, both on the level of provisions and legal practice, while convergence of legal regulation and practice can be detected in the relevant area. A flexible approach and availability of choice in board structure can be considered to be the general trend.

<sup>29</sup> U. C. Brändle, J. Noll (Note 10), p. 1356.

<sup>30</sup> H. Ooghe, V. van de Vuyst (Note 19), p. 8.

<sup>31</sup> Already since 1.12.1992, it has been advisable in the United Kingdom that listed companies comply with a collection of company governance practices called Cadbury Report, the objective of which is to ensure balance of powers in the management board of listed companies. The Report directly prescribes that the board of every public company must consist of a combination of executive directors, with their intimate knowledge of the business, and of non-executive directors, who can bring a broader view to the company's activities, under a chairman who accepts the duties and responsibilities which the post entails (clauses 4.1 and 4.2). See Report of the Committee on the Financial Aspects of Corporate Governance. 01.12.1992. Available at <http://www.ecgi.org/codes/documents/cadbury.pdf>.

<sup>32</sup> Regierungskommission Deutscher Corporate Governance Kodex in der Fassung vom 21.05.2003. Available at [http://www.ecgi.org/codes/documents/code\\_200305\\_d.pdf](http://www.ecgi.org/codes/documents/code_200305_d.pdf).

<sup>33</sup> H. M. Ringleb, T. Kremer, et al. Kommentar zum Deutschen Corporate Governance Kodex. 2. Aufl. München 2005, Präambel, paragraph 111.

<sup>34</sup> B. Grossfeld (Note 6), p. 9.

<sup>35</sup> Michel Tison has comparatively studied the issues of liability of supervisory board members and he describes different forms of liability of supervisory board members as exemplified by credit institutions and the resulting dilemma of the supervisory, manifested above during economic hardship of the company. In doing so, Tison finds that part of the arguments certainly speak for reserving the majority of risks for creditors and shareholders as well as a solidary guarantee foundation established for such purpose to bear. However, this should not replace the internal liability of the company, or otherwise, the entire regulatory framework covering the management would become pointless. Nevertheless, the guarantee system as a special feature of credit institutions aside, the issue of the liability of supervisory board members becomes more acute. See M. Tison. Challenging the Prudential Supervisor Liability: Liability versus (Regulatory) Immunity. Financial Law Institute Working Paper Series. WP 2003-04. Available at <http://www.law.ugent.be/fli/WP/WP2003-pdf/WP2003-04.pdf>, pp. 4–6.

<sup>36</sup> J. Rickford. Fundamentals, Developments and Trends in British Company Law — Some Wider Reflections. First Part: Overview and the British Approach. — European Company and Financial Law Review 2004 (1) 4, December, p. 407.

### 3. European Union message to member states: freedom of choice and differentiated regulation

Against a background of diverse legal regulations applicable in the member states, and practice that increasingly approximates rules to each other; we must ask how the European Union perceives such developments. The harmonisation of issues related to the management of the public limited liability company has received attention in the European Union for quite a while. Differences in corporate governance in various member states are also likely to have a certain influence on the process of development of international companies.<sup>\*37</sup> It was initially planned to adopt a relevant Council directive to regulate the structure of the company, the competence and functions of its bodies. The original draft of the Fifth or Structure Directive<sup>\*38</sup> was prepared in 1972. It was changed several times and the last text originates from 1991.<sup>\*39</sup> In its original shape, the draft Structure Directive encapsulated the spirit of the era — the directives developed and adopted at the time were in fact not aimed at harmonising the law of the member states but rather at their immediate legal regulation, hence one could not speak about harmonisation *ad minimo*.<sup>\*40</sup> The issues concerning the themes related to the board structure of limited liability companies have generated numerous disputes and this has been considered to have been caused by the fact that if in other cases the governing area of directives has largely comprised the relations between a company and third parties<sup>\*41</sup>, then the board structure has been more related to the internal organisation of the company. Disputes were caused by the initial contrasting of the one and two-tier structures as well as the idea stemming from German law, and its historical and social background, to involve employees in the management of public limited companies.<sup>\*42</sup> The disputes led to the submission of a supplemented version of the Structure Directive by the European Commission in 1990, which offered the ample selection of different management models (including different possibilities of employee participation) so that, all in all, the draft lost the potential regulatory function that it would have had when enforced.<sup>\*43</sup> Since various jurisprudents and specialists expressed the opinion that there was no need for adopting the Structure Directive in such a form, the efforts aimed at its enforcement also gradually faded.

In 2002, the High Level Group of Company Law Experts prepared the so-called Winter Report<sup>\*44</sup>, the third chapter of which also discussed issues related to corporate governance. The Group of Experts focused on four main aspects in the area — firstly, on the improvement of disclosure requirements (including the remuneration of directors), secondly, on the protection of the interests of shareholders (and above all minority shareholders), thirdly, on the obligations of the boards (particularly in the case of the bankruptcy of the company) and fourthly, on the necessity of the European corporate governance code. From the point of view of the theme analysed in this article, the issues concerning the members of the board are the most important in the document. The experts' approach to companies having either a one or two-tier board structure is, in principle, similar. It should be considered of importance that, although the report acknowledges the continuing academic discussion of the differences, strengths and weaknesses of the one and two-tier board structure, it concludes that in fact there is a lack of evidence clearly proving the advantage of one system over the

<sup>37</sup> I. De Voldere, L. Sleuwaegen, A. van Pelt, R. Veugelers. Corporate Structure of Leading Firms in Europe: Does Country of Origin Still Matter? Vlerick Leuven Gent Management School. – Vlerick Leuven Gent Working Paper Series 2004/12. D/2004/6482/13, p. 4.

<sup>38</sup> Proposal for a Fifth Directive on co-ordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of article 59 (2) of the Treaty, with respect to company structure and to the power and responsibilities of company boards. – OJ C 131, 13.12.1972, p. 0049.

<sup>39</sup> Second amendment to the proposal for a Fifth Council Directive based on article 54 of the EEC treaty concerning the structure of public limited companies and the powers and obligations of their organs. – OJ C 007, 11.01.1991, p. 0004.

<sup>40</sup> S. Mock (Note 4).

<sup>41</sup> For example, the First Council Directive of 9.03.1968 on co-ordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of article 58 of the Treaty, with a view to making such safeguards equivalent through the Community (68/151/EEC. – OJ L 65, 16.03.1968, pp. 8–12) discusses the issues related to the register and the nullity of companies, the Second Council Directive of 13.12.1976 on coordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent (77/91/EEC. – OJ L 26, 31.01.1977, pp. 1–13) discusses the issues related to capital protection.

<sup>42</sup> The involvement of employees in the management of public limited companies has gradually established its position in German company law, where the relevant management model contributed to rebuilding the state both after World War I and II. See P. C. Leyens. German Company Law: Recent Developments and Future Challenges. – German Law Journal. Private Law 1.10.2005 (6) 10, p. 1413; A. F. Conard. The Supervision of Corporate Management: A Comparison of Developments in European Community and United States Law. – Michigan Law Review 1984 (82), pp. 1483–1487.

<sup>43</sup> A. Dorresteyn, I. Kuiper, G. Morse (Note 20), pp. 51–52.

<sup>44</sup> Report of the High Level Group of Company Law Experts on a Modern Regulatory Framework for Company Law in Europe. Brussels, 4.11.2002. Available at [http://ec.europa.eu/internal\\_market/company/docs/modern/report\\_en.pdf](http://ec.europa.eu/internal_market/company/docs/modern/report_en.pdf).

other. According to the report, both models have developed in parallel and via a different path, and Good Corporate Governance, in its contemporary sense, is possible within the framework of both board structures. The experts clearly express the opinion that neither of the models should be made compulsory as a whole in Europe; rather, both listed companies and other public limited liability companies should have the opportunity to choose a management model.

It appears, from the above, that in converging Europe, it is entirely possible to regulate the important issues of corporate governance so that various governance models are viewed as different possibilities for achieving the same goal. Speaking about the members of the board responsible for monitoring, both the supervisory directors of the dualist model and the non-executive directors of the monistic model are meant. The Group of Experts emphasises that it is not necessary to provide rules on how the board should be composed as a whole on the European level; however, it is important to ensure that the executive directors, their remuneration and issues related to the audits of listed companies in all member states be decided by the monitoring members of the board, the majority of whom should be independent. In such issues, the Group of Experts considered it necessary for the Commission of the European Communities to develop the relevant recommendations for the member states. The experts also found that the efforts of the member states, both in improving their national company law and codifying the corresponding practices, should be coordinated.

In 2003, the Commission of the European Communities prepared the action plan for Modernising Company Law and Enhancing Corporate Governance<sup>\*45</sup>, consolidating the development trends of the relevant area for the near future. The action plan also includes perspectives related to corporate governance, focusing, above all, on disclosure requirements, measures for strengthening shareholders' rights, modernising the board as a directing body, and coordinating the corporate governance efforts of member states in legal regulation.

The mentioned action plan was followed by the recommendations of the Commission of the European Communities to the member states — on 14 December 2004, the Commission issued recommendations fostering an appropriate regime for the remuneration of directors of listed companies<sup>\*46</sup> and on 15 February 2005, on the role of non-executive or supervisory directors of listed companies and the committees.<sup>\*47</sup>

Hence, to date, the European Union has abandoned the idea of enforcing the Structure Directive and is focusing instead on the regulators of governance, such as disclosure, financial reporting and internal audits, and the independence of the board members, their remuneration, rights, duties and liability. Yet, it is not entirely correct to say that the above-mentioned plans and recommendations do not discuss the board structure at all because, for example, as regards the formation of the boards, both the Winter Report and the recommendations issued by the Commission to the member states suggest that a committee or committees for the appointment of board members, their remuneration and monitoring be established for handling the areas that are most likely to cause conflicts, while their number and structure are determined by the board (by the executive directors in the one-tier structure and by supervisory directors in the two-tier structure). At the same time, it is advisable, according to Commission recommendations that the committees consist mainly of independent members.<sup>\*48</sup> The principal areas that are recommended for delegation to committees are the appointment of executive board members, their remuneration and issues related to auditing (including the selection of auditor candidates). In clause 14 of the recommendation on the role of non-executive or supervisory directors of listed companies and committees, it is noted that in audit issues, a transfer of the relevant competence to corporate bodies external to the (supervisory) board or structure may be taken into consideration, in order to ensure the impartiality and objectivity of the procedure. The task of the committee responsible for the preliminary selection of board members should be *inter alia* to periodically assess the board structure, composition of the board, its size and architecture, and to make the necessary proposals for changes.<sup>\*49</sup> The recommendations also naturally emphasise that such committees cannot, in principle, replace the body itself or change its competence and above all liability; however, their tasks should be to prepare the decisions to be adopted by the board or supervisory directors, and the delegation of certain decisions to the committee should be permitted on the precondition that such an opportunity is in compliance with national law (preamble, § 9). Nevertheless, such guidelines generate suspicion about whether such structuring ultimately fosters better organisation of management and protection of the interests of shareholders, and the company as a whole, since in such a situation many issues that are of importance for

<sup>45</sup> Commission of the European Communities. Communication from the Commission to the Council and the European Parliament. Modernising Company Law and Enhancing Corporate Governance in the European Union — A Plan to Move Forward. Brussels, 21.05.2003. COM (2003) 284 Final. Available at [http://europa.eu.int/eur-lex/pri/en/dpi/cnc/doc/2003/com2003\\_0284en01.doc](http://europa.eu.int/eur-lex/pri/en/dpi/cnc/doc/2003/com2003_0284en01.doc).

<sup>46</sup> Commission recommendation fostering an appropriate regime for the remuneration of directors of listed companies (2004/913/EC). 14.12.2004. — OJ L 385, 29.12.2005, pp. 55–59.

<sup>47</sup> Commission recommendation on the role of non-executive or supervisory directors of listed companies and on the committees of the (supervisory) board (2005/162/ EC). 15.02.2005. — OJ L 52, 25.02.2005, pp. 51–63.

<sup>48</sup> A. Koulouridas, J. v. Lackum. Recent Developments of Corporate Governance in the European Union and their Impact on the German Legal System. — German Law Journal. European and International Law 1.10.2004 (5) 10, pp. 1286–1288.

<sup>49</sup> *Ibid.*, p. 1286.

the company may be decided by a substantially smaller body than the board, and the importance of the board may thus become a mere formality.

As a result of the above, the message to be communicated to the member states by the European Union supports as little legal regulation as possible on the level of the European Union, and member states should be granted the maximum freedom to decide whether to enable national limited liability companies to use the one or two-tier board structure, as well as the legalisation of alternative management models.

## 4. Estonia's message to other member states: rigid legal regulation

The Commercial Code (CC) that entered into force on 1 September 1995<sup>\*50</sup> provided for the two-tier board structure compulsory for Estonian public limited companies. The introduction of the dualist model can be attributed to the example of German law comprising the principles of independent supervision<sup>\*51</sup> — it was considered necessary to establish a system ensuring strong internal supervision for the public limited company that is presumably a legal form of a large enterprise.<sup>\*52</sup> When developing the CC, a proposal was first made to also provide, in addition to the public and private limited company, a third type of a limited liability company, the so-called closed public limited company, which could have also led to differentiation of management models, yet the idea was abandoned.<sup>\*53</sup> The low differentiation of the management models was also caused by the fact that there was no regulated securities market in Estonia at the time when the CC entered into force.

In addition to the CC, the management of Estonian listed companies is also governed by the Corporate Governance Code<sup>\*54</sup> (CGC). As to the structure of the directing bodies, the CGC repeats the requirements of the CC: the two-tier board structure is also compulsory for listed companies.

According to CC § 306 (1), the management board is the directing body of a public limited company, which represents and directs the public limited company. The supervisory board shall plan the activities of the public limited company, organise the management of the public limited company and supervise the activities of the management board (CC § 316). A member of the supervisory board shall not be a member of the management board (CC § 308 (3)) or *vice versa* (CC § 318 (4)). The supervisory board shall give orders to the management board for organisation of the management of the public limited company, and on the precondition that it has not been provided otherwise in the articles of association of the public limited company, the consent of the supervisory board is required for the management board for conclusion of transactions which are beyond the scope of everyday economic activities (CC § 317 (1)–(3)). Being a classical supervisory body, the supervisory board has the right to examine all documents of the public limited company and to audit the accuracy of accounting, the existence of assets, and the conformity of the activities of the public limited company with the law, the articles of association and resolutions of the general meeting (CC § 317 (6)). The duty to exercise supervision of the management board has also been expressed in CC § 317 (8), pursuant to which the supervisory board shall decide on conclusion and terms and conditions of transactions with members of the management board and, for that purpose, shall appoint a representative of the public limited company. The supervisory board shall also decide on the conduct of legal disputes with a member of the management board, appointing a representative of the public limited company for that purpose. The supervisory board is competent to elect and remove the members of the management board (CC § 309 (1) and (3)). As to the supervision concerning the annual report, the supervisory board shall review the annual report and shall prepare a written report concerning the annual report, which shall be presented to the general meeting together with the annual report. The supervisory board shall indicate in the report whether it approves the annual report prepared by the management board; in addition, the report shall indicate how the supervisory board has organised and directed the activities of the public limited company (CC § 333 (1)). The supervisory board has the right to make amendments to the profit distribution proposal before its presentation to the general meeting (CC § 333 (2)). Thus, the structure of the directing bodies of Estonian public limited companies comprises all the features, according to which it can be classified as two-tier, with the greatest similarity to the German model.

<sup>50</sup> Riigi Teataja (State Gazette) I 1995, 26–28, 355; 2006, 7, 42 (in Estonian).

<sup>51</sup> V. Kõve. 10-aastane äriseadustik – tagasivaade senisele arengule (Ten Years of Commercial Code — Retrospect of Development). – Juridica 2005/9, p. 598 (in Estonian).

<sup>52</sup> V. Kõve (Note 9), p. 134.

<sup>53</sup> A. Vutt. Osaühing ja aktsiaselts (A Private and a Public Limited Company). – Juridica 1995/4, p. 149 (in Estonian).

<sup>54</sup> Available at <http://files.ee.omxgroup.com/bors/press/HYT.pdf>.



Whereas, in many member states, large companies may also choose their board structure, this is not possible even in smaller public limited companies in Estonia.<sup>55</sup> As a result, the message delivered by Estonia to other member states clearly implies the rigidity of the local legal environment in this area. We can always ask the question of whether it would not be possible to evade that requirement, knowing the rigidity of the management model of the public limited company, by selecting for action the parallel form of the public limited company, the private limited company. But due to its closed nature, the private limited company cannot compete with the public limited company intended for investment firms. In addition, Estonian law also contains rather rigid board structure requirements for larger private limited companies. According to CC § 189 (1), if the share capital is greater than 400,000 kroons, the management board of the private limited company must have at least three members, and if the number of the members of the management board is lower, a supervisory board must be elected in addition to the management board. Hence, the Estonian regulator has assumed a principal position that in the case of fixed capital exceeding 400,000 kroons<sup>56</sup> it is by all means necessary to replace sole management with a collegial one. At the same time, it is still questionable whether 400,000 kroons is currently the amount beyond which share capital would definitely require collegial management and a more complicated board structure with stricter supervision requirements, and it is also questionable whether the form of the public limited company and the amount of share capital should serve as the sole indicators on the basis of which precepts should be issued to entrepreneurs concerning the number of the members of the directing body and its structure. The author of the article does not believe this to be so. Perhaps it would be reasonable to prescribe, with a certain amount of share capital (but why not also turnover, number of employees, balance sheet total or other economic indicators characterising the activities of the company), imperative management regulations that would better help protect both the investment of shareholders and the interests of the creditors; nevertheless, at the moment, the creditors' interests are in a position of advantage, as the possibilities of the shareholders of the company, the share capital of which only slightly exceeds 400,000 kroons, to determine the board structure and the number of the board members are relatively limited, while the amount of fixed capital, at 400,000 or slightly below it, provides an opportunity to use sole management. According to the author, the main reproach to applicable law can be considered to be the fact that the enforcement of disproportionate legal regulations may lead to the formalisation of the board's composition — to a situation in which the actual board structure and the formal structure do not coincide. This, however, cannot be considered right, since the aim of legal regulation is not the establishment of formal provisions but the regulation of actual social relationships. Pursuant to the theory of law, the idea of law consists of three elements — justice, legal guarantees and the purposefulness of law<sup>57</sup> and it is doubtful whether this case involves purposeful regulation. The message delivered to other member states in the course of regulatory communication embodied in the strict regulations concerning the board structure of the Estonian public limited company (and also of the private limited company having a larger share capital) hardly contributes to the making of larger investments in Estonia through the fixed capital of this type of company.

## 5. Development trend of Estonian company law: need for change

Due to the message delivered by Estonia to other member states concerning the rigid board structure of small public limited companies and taking into account both the developments in the European Union and the overall convergence of management models in the member states, Estonian company law should head for the liberalisation of the management of small companies.

In order to determine the suitability of a model for a particular type of company, due regard should be given to different criteria. The first could be the size of the public limited company, while different features can be taken as the basis for determining the size, such as the amount of share capital, other economic indicators (balance sheet total, turnover), number of employees or other features. The criterion for the size of the public limited company is similar, for instance, to the particular significance of the company (undertaking dominating market or other), which may necessitate imposition of imperative board structure rules. All of the above expresses the scale of the public limited company and also through that its significance to society. The other criterion, on the basis of which one can choose between one and another management model for the particular public limited company, is the structure of shareholders and the interrelations between shareholders and

<sup>55</sup> Only a *Societas Europaea* registered in Estonia may choose between organising the management of the company on one or two tiers. See Council Regulation (EC) No 2157/2001 on the Statute for a European company (SE) Implementation Act, 10.11.2004. – Riigi Teataja (State Gazette) I 2004, 81, 543 (in Estonian).

<sup>56</sup> This makes about 25,565 euros.

<sup>57</sup> R. Narits. *Õiguse entsüklopeedia* (Encyclopaedia of Law). Tallinn 2004, p. 33 (in Estonian).

the directing bodies of the company (self-management *versus* external management). It is clear that, for example, the public limited company, the shareholding of which is divided between many different shareholders, needs management rules that differ from those of a public limited company that has a controlling shareholder. In the face of the information contained in the share registers of Estonian listed companies<sup>58</sup>, it may be inferred that the companies listed on the Tallinn Stock Exchange have, as a rule, shareholders who control the company or, at least in eight cases out of fifteen, a shareholder whose holding exceeds 50%. The share of institutional investors remains between 10–30%.<sup>59</sup> There are also controlling shareholders in public limited companies not listed on the stock exchange. The shareholder structure of Estonian listed companies is largely similar to the economic model that has evolved in continental Europe and it should be taken into account when planning for changes.

As within a legal order, the needs of different public limited companies for different management models vary, it should be considered justified to give freedom of choice to the companies with regard to which the interest in legal management regulation on the level of society is not very high (small public limited companies), whereas the structure of the directing bodies of larger companies should be regulated more strictly. The need to distinguish between various types of companies from the aspect of legal regulation was also emphasised by the High Level Group of Company Law Experts in the Winter Report (recommendation II.4).

It is also worth noting that on 6 May 2003, the European Commission adopted recommendations concerning small and medium-sized companies<sup>60</sup>, the objective of which was to cover the companies conforming to certain characteristics (regardless of their legal form) with the same definition. Although the objectives of adopting these recommendations can be considered economic rather than legal, *per se*, it has been mentioned in literature that small and medium-sized companies constitute a significant majority of all the enterprises in the European Community and they can be regarded as transferring to an international sphere of influence, so the law must help them transgress strictly national limits.<sup>61</sup> Hence, it is necessary to legalise, in Estonia, the possibility to shape the board structure of the public limited company so that the Estonian legal environment would be in conformity with the differentiated approach, and help to liberalise the management of smaller companies. The recommendations for delimiting very small (micro), small and medium-sized companies include — as with large companies in the Netherlands, with the potential to adjust the structural regime<sup>62</sup> — the number of employees, balance sheet total and turnover for the financial year.<sup>63</sup> Although the recommendations do not specifically state that the indicators should be used for determining the differences in the board structure, consideration should be given to such a possibility.

Thus, from the point of view of the legal regulation of the board structure, a distinction should be made between large and small public limited companies. The criteria for making the distinction could include the amount of share capital, the balance sheet total, and the turnover during the financial year, while the number of employees and the dominant position of the undertaking on the market should also be taken into account. The legal regime of the ‘large public limited company’ should also extend to listed companies, and two-tier management should remain compulsory for all of the public limited companies conforming to such criteria. Small and medium-sized public limited companies should be allowed to choose between a one and two-tier board structure. The preservation of more rigid rules is not justified, according to the author of the article, and it would damage the competitiveness of the Estonian legal environment in terms of the founding of smaller companies, considering the general liberal tendencies in the European Union. Yet, when asking whether all Estonian public limited companies should be allowed to choose the one-tier management model, the answer should be no. Naturally, the substitution of internal supervision for some external form of supervision is not precluded; however, this would presume a rather important reform of company law. Perhaps, the state is not interested in assuming such supervisory obligation because it would bring about high costs.

<sup>58</sup> See [http://statistics.e-register.ee/shlist/?lang=et%20\\_blank](http://statistics.e-register.ee/shlist/?lang=et%20_blank).

<sup>59</sup> The size of the holding of shareholders does not involve assessment of the possible actual situation since the formally different shareholders may in fact be under the influence of the same persons. In relation to that, the cases in which a controlling shareholder exists are currently the ones where a particular person holds over 50% of the shares. In reality, it is very likely that other listed companies also have shareholders having significant control.

<sup>60</sup> Commission Recommendation of 6.05.2003 concerning the definition of micro, small and medium-sized enterprises (notified under document number C(2003) 1422) (2003/361/EC). – OJ L 124, 20.05.2003, pp. 0036–0041.

<sup>61</sup> W. F. Ebke. Kleine und mittlere Unternehmen im Aufwind der Globalisierung. – Zeitschrift für Vergleichende Rechtswissenschaft. Archiv für Internationales Wirtschaftsrecht. Bd. 104. Februar 2005, pp. 1–3.

<sup>62</sup> In the Netherlands, the two-tier structure is obligatory only for large companies that have been subjected to the so-called structural regime, while the size is determined by the simultaneous presence of several features. The criteria comprise: firstly, the number of employees in the company and its subsidiaries; secondly, the existence of a works council; and thirdly, the amount of equity capital after the balance sheet date. For details, see A. Dorrestijn, I. Kuiper, G. Morse (Note 20), p. 125; T. J. B. M. Postma, H. van Ees, E. Sterken. Board Composition and Firm Performance in Netherlands. Available at <http://som.eldoc.ub.rug.nl/FILES/reports/themeE/2001/01E01/01E01.pdf>, pp. 6–9.

<sup>63</sup> W. F. Ebke. Kleine und mittlere Unternehmen im Aufwind der Globalisierung. – Zeitschrift für Vergleichende Rechtswissenschaft. Archiv für Internationales Wirtschaftsrecht. Bd. 104. Februar 2005, pp. 1–3.

The existence of the supervisory board as an independent monitoring body cannot prevent all potential abuses by the management board; yet the activities of the management board can be more easily monitored than by a large number of shareholders. Conflicts of interests cannot be ruled out in one or two-tier structures, but independent monitoring would provide a certain advantage in a company subjected to external management in which shareholding is dispersed.<sup>\*64</sup>

An unbalanced one-tier board structure could not be introduced without reforming Estonian company law, because the supervisory elements on the different levels of the company are interrelated.<sup>\*65</sup> Regardless of the fact that the legal traditions of the implementation environment possess certain significance for the development of a legal framework, according to the author, the full preservation of the already existing system cannot be justified merely by the fact that it has existed already for ten years. The aim of the state should be not the establishment of any legal framework but instead the creation of rules that would enable the state to achieve its main goal in legislation — to furnish law with just content.<sup>\*66</sup>

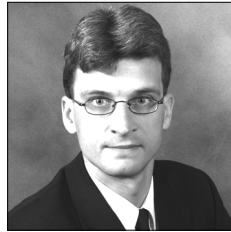
When planning for amendments to Estonian laws, one argument is the flexible attitude of the European Union and member states to the regulation of the directing bodies when justifying the legalisation of alternative management models. It is inevitable to give a choice, above all, to smaller public limited companies for Estonia's message to other member states and Europe as a whole to signal clearly the flexible regulation of the relevant area.

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<sup>64</sup> J. Rickford (Note 36), p. 407.

<sup>65</sup> For example, according to Estonian law, exercise of supervision by shareholders over the activities of the management board is currently limited to submission of a request for information at a general meeting according to CC § 287 (1), to proceedings on petition according to CC § 287 (3) and to the request of a special audit on the basis of CC § 330.

<sup>66</sup> R. Narits. Eesti omariiklus ja õigus (Estonian Independent Statehood and Law). – *Juridica* 2000/2, p. 72 (in Estonian).



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# Development of Contemporary Means of Communication and Their Efficiency of Use in Labour Relations

The development of means of communications, in general, has created a situation where interpersonal communication has become easier and faster. E-mails, different messengers, mobile phones and other such means are used more and more often in everyday communication.

With such a development there is no call to send different bureaucratic documents by regular mail any more. It is now sufficient if the necessary documents are only sent electronically or with a digital signature.

The development of means of communication and the consequent changes in interpersonal relations also effect changes in labour relations. Labour relations have become more flexible. Employees can decide on their actual working time; working at home is also made possible through the use of contemporary means of communication.

Modern society is significantly influenced by the development of different means of communication and their new areas of use. Therefore, developments over the last decade have significantly changed people's needs for, and the possibilities of, communication. Interpersonal relations have become faster and more versatile. There are more and more colleagues who are known only by a messenger emotion sign or a nickname, or as a small green icon in the lower right hand corner of the computer screen.

Sending necessary documents by different electronic means of communication has taken international and intercontinental communication to such a level that making decisions is now only a question of a matter of minutes or seconds.

All such developments in interpersonal communication are a challenge to the legal regulation of interpersonal relations, especially because the communication environment itself has changed significantly. This development also concerns labour relations and the legal regulation thereof. Although the legal regulation of labour relations is essentially a product of the 19<sup>th</sup> century industrial revolution, real life has now forced some corrections to be made. For example, people's understanding of what an employment contract relationship is, needs to be significantly corrected — is it still a master and a subordinate relationship or can parties agree on flexible work conditions?



The development of communication also significantly influences understanding of employees' representation in companies and the rights of the employees' representatives to use the employer's electronic means of communication for their representative duties.

Although this topic has enjoyed much attention in literature<sup>\*1</sup>, in the Estonian legal order, the influence of modern means of communication on labour relations has not been paid sufficient attention. This article studies general changes in labour relations with regard to the development of means of communication, and analyses the possibilities in that development and influence on collective employment relationships in the Estonian legal context.

# 1. Typical and atypical labour relations

## 1.1. Individual employment relationships

Modern means of communication influence the development of labour relations. Labour relations in general become more flexible. This means that an employee no longer needs to perform work on company premises, there are also possibilities outside.<sup>\*2</sup> This in turn makes the so-called traditional "Ford production process type employment relationship" history. If today we still have people who are used to personal communication or land line phones, then the younger generation prefers to use mobile phones and Internet communication sites.<sup>\*3</sup> Since the exchange of communication has become faster, then the employee, as well as the employer, must be able to work through an increased amount of information. It is thus possible to argue that economic development in general, as well as the development of means of communication, has created something we can call atypical labour relations.

What is a typical labour relation? Typical labour relations are mostly considered to be labour relations with the following attributes: (a) an employee is employed full-time (b) on the basis of an employment contract concluded for an unspecified amount of time; (c) the employee's position is stable; (d) he or she need not worry about his or her social protection after the end of the labour relation; and (e) there is a clear subordination relationship with regard to orders given by the employer about the content, the location as well as the manner of the work performed.<sup>\*4</sup>

Such traditional labour relations are starting to retreat and the so-called project-based jobs are becoming more frequent; instead of stable labour relations we find more temporary jobs. Neither is an employee subordinated to the employer's will any longer, with some forms of work such control is no longer even possible (e.g., employees who are teleworking and working mostly from home). Similarly, in the case of part-time jobs, such organisation of work time gives employees a chance to better combine their work and family life and thus flexibly decide on how they do their job.

Atypical labour relations are usually such labour relations where an employee needs not work at the location and in the manner designated by the employer. This in turn means that the traditional dependency relations, as we know them from the 19<sup>th</sup> century, no longer work, and new labour protection regulations are needed. Such atypical labour relations are emerging mostly because the available means of communication facilitate interpersonal relations and also job-related communications. Employees can thus perform their jobs by using different forms of teleworking. Different mobile options and electronic communication channels enable an employee to work from another country or continent and still be available to colleagues and the employer.

Thus, new types of subordination relations appear as well as a new understanding of job organisation options. One such flexible job possibility is set forth in the Estonian Working and Rest Time Act, which attempts to define a person with independent decision-making powers, who is not subordinated to employer's orders and has the right to decide when to perform his or her duties.<sup>\*5</sup> The definition in § 1 (3) 1) of the Working and Rest Time Act is not the best possible, as it does not provide clearly to what extent and under which conditions employees can determine their working time.

<sup>1</sup> See, e.g., W. Däubler. *Internet und Arbeitsrecht*. 2. Aufl. 2002; M. Colucci, R. Blanpain. *The Impact of the Internet and New Technologies on the Workplace: A Legal Analysis from a Comparative Point of View*. Kluwer 2002.

<sup>2</sup> Especially, e.g., working from home or teleworking see, e.g., G. Schaub. *Arbeitsrechts-Handbuch*. 9. Aufl., pp. 1612–1629.

<sup>3</sup> In Estonia such a communication portal is, e.g., [www.rate.ee](http://www.rate.ee).

<sup>4</sup> See A. Junker. *Grundkurs Arbeitsrecht*. 3. Aufl. Beck 2004, p. 71 et seq.

<sup>5</sup> Töö- ja puhkeaja seadus (The Working and Rest Time Act) § 1 (3) 1). – Riigi Teataja (State Gazette) I 2001, 17, 78; 2006, 14, 112 (in Estonian). Pursuant to the named definition implementation of work-time related limitations (e.g., overtime) are not mandatory with regard to employees who have independent decision-making powers and determine their working time themselves pursuant to their employment contracts or the statutes of the administrative agency, and their working time is not directly or indirectly determined by a unilateral decision of the employers or agreement between the parties.

Flexible jobs are most used in the tertiary sector where development of such labour relations is inevitable. It is nevertheless understandable that flexible jobs do not have a place in the processing industry, since line workers cannot realistically demand flexible organisation of work, it is simply not plausible and cannot be accomplished.

Such flexible jobs or atypical labour relations also bring new aspects to collective employment relationships, which have thus far not been known or demanded.

## 1.2. Collective employment relationships

All of the above-described also concerns collective employment relationships. One of the main aims of collective employment relationships is to develop social dialogue between the employees and the employer on the company level. Social dialogue has only one aim — to achieve as flexible as possible work conditions, which on the one hand considers the employer's as well as the contractor's interests and on the other hand offers sufficient protection to employees. The development of modern means of communication poses several new questions to the parties of collective employment relationships, which thus far have been irrelevant. Suddenly the problem of how to organise collective negotiations in a company where 70% of employees are teleworkers or how to solve collective labour disputes in a so-called virtual company have become important. Problems of how to inform and consult employees arise also in traditional (non-virtual) companies, since the current regulation does not, as a rule, provide how the informing and consulting be carried out — should it be done orally or in writing, if it is done in writing, then do the internal e-mails and the Intranet count?

The development of modern means of communication significantly influences the balance of rights and responsibilities between employers and employees. A question that needs to be answered is whether and to what extent can a trade union use the employer's server for posting its website and whether the employer can check the trade unions' correspondence to make sure that mails are clean of viruses. All such problems are still without a clear legal solution in Estonia, since the development of relations in society has been faster than the development of legislation.

## 2. Employees' representatives and their competency in Estonian companies

### 2.1. Employees' representatives

A dual system on employee representation is used in Estonian collective employment relationships (the so-called dual channel system).<sup>6</sup> On the one hand, the employees can elect an employees' representative, on the other hand the employees are also represented by a trade union. The Employees' Representatives Act<sup>7</sup> (ERA) in force in Estonia provides for two types of representatives. The first type of employee representative is elected by the general meeting. The opportunity to elect is given to employees who have not joined a trade union. Whereas the procedure for their authorization, as well as the conditions for their recalling, remain unspecified. This should be decided by the general meeting of employees, who has elected the employee representative.

The second type of a representative is elected by employees who are trade union members. The procedure of their election is prescribed in the union's articles of association.

The powers of the employees' representative in the representation of employees are quite modest. Pursuant to § 6 of the ERA, a representative can mainly be the mediator in disputes arising between the parties and he or she has the right to make proposals to the employer to end the violations of requirements provided by law, should such a need arise. Yet, representatives have no real power to force employers to comply with their requests/demands. Proposals made by the representative to disputing parties are not binding, and the parties may use their legal right to turn to either a court or a labour dispute committee. Although the ERA might leave an impression that employees' representatives do not have much real power, they do have additional powers arising from other labour laws. Employees' representatives negotiate collective agreements<sup>8</sup> and

<sup>6</sup> Although from the legal perspective Estonia uses the dual system of representation of employees, in fact the representation of employees has concentrated to trade unions.

<sup>7</sup> Section 3 of the Employees' Representatives Act (Töötajate usaldusisiku seadus). – Riigi Teataja (State Gazette) I 1993, 40, 595; 2002, 111, 663 (in Estonian).

<sup>8</sup> Section 3 of the Collective Agreements Act (Kollektiivlepingu seadus). – Riigi Teataja (State Gazette) I 1993, 20, 353; 2002, 61, 375 (in Estonian).

they have a right to organise strikes.<sup>9</sup> Since the organisation of strikes and the conclusion of collective agreements is not an exclusive right of trade unions, then employees' representatives can also assume the functions of employee representation. In addition to the above, the representative also has additional representation functions pursuant to the Republic of Estonia Employment Contracts Act (ECA). An employees' representative must be notified in case of a transfer of the company<sup>\*10</sup>, as well as of part-time and full-time vacancies and vacancies for contracts with an indefinite term.<sup>\*11</sup> Hence, although the Employees' Representatives Act does not give many powers to represent employees, then other laws do provide for the obligation of informing and consulting the representative. Yet, such an obligation of informing and consulting is not universal, it only guarantees the rights of representatives in specific employment contract related issues.

## 2.2. Trade unions

Employees are also represented by trade unions, in addition to employees' representatives. Activities of trade unions are based on § 29 (5) of the Constitution. Pursuant to § 29 (5) of the Constitution, employees may unite in unions and federations to uphold their interests. Pursuant to § 29 (5) of the Constitution, the conditions and procedure for the exercise of the right to strike are provided by law. That right, stipulated by the Constitution, is expressed in the Trade Unions Act<sup>\*12</sup> (TUA), which establishes specific guarantees for activities of trade unions in companies and for representation of employees in labour relations.

Pursuant to § 2 of the Trade Unions Act, a trade union is an independent and voluntary association of persons, which is founded on the initiative of the persons and the objective of which is to represent and protect the employment, service-related, professional, economic and social rights and interests of employees. In the Estonian system of labour relations, trade unions may operate at the company, industry or state level. Formation of trade unions at the company level has been made as easy as possible for employees. In order to form a trade union, a company must have at least five employees. If employees decide to form a trade union then the union must be registered in the register of trade unions. Trade unions are by nature non-profit organisations. If a company has a trade union, then, pursuant to the TUA, it gives the trade union a universal competence to represent all employees of that company in collective employment relationships. Trade unions do not have such powers in individual employment relationships. Here, a separate authorisation is needed for a trade union to represent an employee. An important right given to trade unions in current Estonian law is the universal right of being informed and consulted.<sup>\*13</sup> That right belongs without exception to trade unions, and any non-compliance or partial compliance with the obligation to inform and consult results in the violation of trade unions' rights, and the payment of the fine prescribed by public law. Compliance with the obligation to inform and consult requires a clear and unambiguously understandable agreement on which channels should be used for informing and which channels are at all possible for forwarding the necessary information to employees. If there is no such agreement, then misunderstandings between parties are bound to occur and disputes arising from non-performance of the obligation to inform and consult are quick to take place.<sup>\*14</sup>

An important aspect in the obligation to inform and consult, placed on trade unions, is the fact that, above all else, the consulting obligation covers all major changes in the company, which may affect all employees' labour relations. The difference between informing and consulting lies in the fact that upon informing, a trade union merely acknowledges certain information presented to it by the employer. Consulting, on the other hand, means a situation where the employer, before making any decisions, is obliged to hear the trade union's position and only then can implement its decision. Therefore, the employer is not obliged to take the opinion of the trade union representatives into account. An object of consulting may also be an employer's decision to use, for example, the Intranet to better inform employees, change the current electronic mail rules, impose rules on Internet use for private purposes, etc. Although the TUA does not specifically prescribe that trade unions should be consulted in such matters, such a conclusion may be drawn from § 22 of the TUA, since such rules or changes may affect a large number of employees working in that company.

<sup>9</sup> Section 3 of the Collective Labour Dispute Resolution Act (Kollektiivse töötüli lahendamise seadus). – Riigi Teataja (State Gazette) I 1993, 26, 442; 2002, 63, 387 (in Estonian).

<sup>10</sup> Section 6 of the Republic of Estonia Employment Contracts Act (Eesti Vabariigi töölepingu seadus). – Riigi Teataja (State Gazette) 1992, 15/16, 241; 2006, 10, 64 (in Estonian).

<sup>11</sup> Sections 13<sup>1</sup> and 13<sup>2</sup> of the ECA.

<sup>12</sup> Ametiühingute seadus. – Riigi Teataja (State Gazette) I 2000, 57, 372; 2002, 63, 387 (in Estonian).

<sup>13</sup> Section 22 of the TUA.

<sup>14</sup> It has to be noted here that there have been no significant disputes with regard to non-compliance of that obligation.

### 3. Problems in the use of modern means of communication

#### 3.1. How to choose the employees' representative?

Participation of employees in decision-making in the company has been and will continue to be a very difficult and somewhat political issue. Employees always retain the right to choose their representatives. Although Estonian law prescribes that employees' representatives are elected by employees who are trade union members as well as those who are not, the question remains how can, for example, those employees who have decided to work part time or full time from home participate in the election of the representative. And there is still the question of whether an employees' representative can be elected electronically.

It is possible to organise on-line voting and elect an employees' representative that way, but the formalisation of the results of that on-line voting, and the legality thereof, would be an issue. Elections can be electronic, since the ERA does not prescribe the type of election procedure. The ERA makes no restrictions in that regard. Such elections are more an issue of technical means or lack thereof.

Pursuant to the Employees' Representatives Act, the employer has the right to know who the elected representative with the company is, and the employer also has the right to control whether voting (or the election of an employees' representative) was carried out pursuant to the agreed upon procedure. Control of the named procedure is necessary for the employer, in order to make sure that the position of an employees' representative is created. If minutes are usually taken at an employees meeting then, in the case of on-line voting, taking minutes is more complicated and additional legal regulation is needed regarding how to prepare on-line minutes, which rules must be complied with and how should such on-line minutes be signed. It can be complicated to determine the procedure of elections and powers of the representative, even based on the ERA, and organising on-line voting is as complicated, and from the legal point of view, yet unregulated.\*<sup>15</sup> The need for an electronic voting system is emerging also in labour relations.

#### 3.2. Trade union's right to use employer's electronic channels

Regardless of who the elected employees' representatives are and whether they belong to a trade union or not, the employer is obligated to allow the trade union or the employees' representative to use its means of communication and premises for the performance of their duties. Pursuant to § 6 (1) 5) and 6) of the ERA, the employees' representative has the right to disseminate information to employees and use the employer's telecommunications systems for the performance of the representative's duties. Since the ERA was adopted in 1993, changes in the means of communication have created new problems: (1) can the employees' representative use the employer's websites, network and servers for dissemination of its corresponding information? (2) If so, can it be done without limits or only to a certain extent?

To answer the first question, it must be ascertained whether it is an employer's obligation to make contemporary means of communication available or not, and whether such right to use the employer's e-mails, servers, and the Intranet is covered by the constitutional right to unite in unions and federations to uphold one's interests, as well as the function of employee representation in general. The opinion has been published in professional literature that the right to unite is connected with the right to disseminate trade-union related information among union members and thus the employer must allow, for that purpose, the use of all necessary communication channels which it allows other employees to use.\*<sup>16</sup>

It cannot be univocally concluded from the Estonian ERA or the TUA, though, that a trade union or a representative has the right to demand that the employer allow the use of its e-mails, servers etc. for the promotion of trade union work. The listed possibilities are primarily possible through a mutual agreement between the trade union and the employer. Today, the labour law in force does not guarantee the actual right to use the employer's electronic means of communication, which could be enforced in court.

The answer to the second question above assumes that the parties have concluded an agreement on the trade union's guaranteed right to use the employer's electronic means of communication for the promotion of union work and the informing of employees. That agreement must determine not only the right to use the employer's electronic means of communication, but also the procedure of control of server work and to what extent can the employer control the correspondence between trade unions, as well as between the board of a trade union and its members. These issues require a detailed agreement, because two principles collide here:

<sup>15</sup> It has to be admitted, though, that e-voting has already been tried in political elections, but not in labour relations yet.

<sup>16</sup> W. Däubler. *Internet und Arbeitsrecht*. 2. Auf. 2002, p. 212 et seq.



the employer's right to inviolable property, guaranteed by the Constitution<sup>\*17</sup>, and the opportunity guaranteed to trade unions to unite and uphold the interests of their members with means that are not against the law.<sup>\*18</sup>

This also raises issues related to data protection. The question to what extent an employer may control the movement of an employee's e-mails is not clearly resolved in Estonian legislation today. Thus far, the theoretical approach in Estonia has reached the conclusion that an employer cannot control those electronic letters which concern the employee's private life, but the employer has the right to control work-related letters.<sup>\*19</sup> Yet, the question of how to determine whether an electronic letter is work-related remains. In order for an employer to determine that a letter is not personal, the letter has to be opened and the confidentiality of messages, established in the Constitution, thus remains unguaranteed.

Since the employees' representative has been given the authority to transfer information in connection with the representation of the employees to the employees who have elected him or her, then this raises an issue of whether such information can be transferred over the employer's Intranet, or is it possible that an employees' representative or even a trade union posts a web site on the employer's server. Since relevant Estonian legislation dates back to a period when such questions were not as important, they need to be resolved today. The easiest way to solve that issue is by an agreement or by the employer's internal rules.<sup>\*20</sup> The problem that will thus arise concerns the limitation of the trade union's or the employees' representative's rights. If the ERA provides for the possibility to transfer information over the employer's communication channels, then this also gives the right to use all of the employer's electronic channels, which are necessary for the performance of the representation job. If the employees' correspondence, and the information sent by employees, can in certain instances be controlled, then messages sent by trade unions are covered by double protection — on the one hand, the confidentiality of messages provided for in the Constitution, and on the other hand the right which forbids the employer to interfere with trade unions' freedom of activity. Current legislation in Estonia does not clearly regulate how and to what extent trade unions can the employer's electronic means for better organisation of their work. A basis for disagreements thus exists.

An important issue to be discussed here concerns the employer's right to control the correctness and regularity of the use of different communication channels. There is a quite serious collision of two sets of interests here: on one hand the employer's, as the owner of the work equipment, and on the other hand the interests of the trade unions, as the representative of employees.

With regard to regular mail sent to the company, the confidentiality of a personal message is guaranteed when the letter is addressed to the employee personally. If the letter is addressed impersonally, for example to a head of a department or a director, then opening the letter by third persons cannot be considered invasion of confidentiality of a personal message, as it was not clearly stated to be a personal message and employees who are responsible for checking mail must have the right to check mail.<sup>\*21</sup>

With regard to letters sent to a representative — an employees' representative or a trade union — the opening issue of those letters has not been legally solved. The position should nevertheless be taken here that those letters may only be opened by an employees' representative or a representative of a trade union, since an employer might otherwise be accused of excessive invasion with the employees' representative's work. The situation is different when the employer and the employees' representatives have agreed that those letters may be opened.

The same principle must be applied to facsimile messages. If the personal nature of the fax is evident, then that fax is subordinate to the protection of transfer of personal messages and any control activities by the employer may lead to the violation of the confidentiality of messages.

The situation with regard to the use of electronic means of communication is somewhat more complicated, since the employer's possibility and need to control is much more intensive, and thus the employee's and employers' rights to control electronic correspondence must be regulated more precisely and correctly. With regard to electronic letters, three different types of situations exist: 1) the company uses one address, e.g., *university@ab.ee*, and it has not been determined who reads and forwards those letters. In such a case, a quite view has been expressed in professional literature that these letters can be viewed as the company's letters and the employer has the right to check them even if they are private in nature.<sup>\*22</sup> The second option

<sup>17</sup> Section 32 of the Constitution of the Republic of Estonia.

<sup>18</sup> See also W. Däubler (Note 16), p. 216 et seq.

<sup>19</sup> A. Henberg. Isikuandmete töötlemine töösuhetes (Personal Data Processing in Labour Relations). – *Juridica* 2005/8, pp. 566–568 (in Estonian). It is important to note here that the checking of employees' personal letters concerns not only privacy of an employee's confidential messages, but also the protection of e-mail sender's privacy. See, e.g., S. Ernst. Der Arbeitgeber, die E-Mail und das Internet. – *Neue Zeitschrift für Arbeitsrecht* 2002/11, p. 589.

<sup>20</sup> It has to be taken into account that laying down such rules may require asking an opinion from the trade union.

<sup>21</sup> See S. Ernst (Note 19), pp. 588–590.

<sup>22</sup> *Ibid.*

is that the electronic address specifies the person's position, e.g., a secretary's address secretary@ab.ee. Since this address does not specify the employee personally, then letters also received at this address are the company's letters, and the employer or its authorised representative has the right to check them.<sup>\*23</sup>

More complicated is the situation where the employee's e-mail address is denoted by the person's first and last name, e.g., peter.pan@ab.ee. In such a case it is difficult for the employer to differentiate between work related and personal letters. This puts the employer in the position where it is forced to invade the employee's right of confidentiality of messages in order to check the security and working-order of the electronic systems given to their use.

### 3.3. Right to strike and striking in the virtual world

The issue of representation of employees and participation of employees in decision-making entails one important question, namely how their demands can be enforced? The problem is not so much legal but economic. The main means for employees to impose their demands is a strike. Different kinds of strikes exist, but developments in the means of communication offer new possibilities, which might not fall under the traditional definition of a strike.<sup>\*24</sup>

Today, a situation where employees prevent the use of the employer's Internet resources or jam the employer's servers with so-called junk mail and meaningless letters to overload the existing channels of electronic communication, can be treated as a strike. In both cases the main aim of the employees is achieved — work has been interrupted, the employer's subscribers or customers are affected by such an action, and it is now up to the employer to decide how and in what manner it will meet the employees' demands. The situation is in essence similar to a regular strike, where employees disrupt their work to gain concessions from the employer in their work related demands. At the same time organisation of such a strike falls under the scope of penal law, under which such employee activities might not only be their lawful activity in realisation of their rights, but may also entail computer crime concerning damage to the employer's electronic networks.<sup>\*25</sup> Thus, a clear line is needed between allowed types of strike by the use of electronic channels and computer crimes punishable pursuant to criminal procedure.

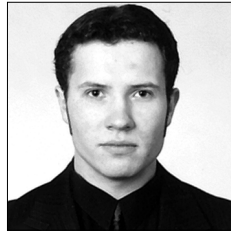
## 4. Conclusions

The development of new means of communication is bound to involve changes in interpersonal relations. Labour relations are no exception. Several new problems arise, which have not been paid attention to and need legal regulation. Especially in collective employment relationships, contemporary means of communication offer new possibilities for employee involvement, but also entail new problems, and are as yet unhandled by legislation in different countries. In order to avoid possible deeper problems, the legislator must pre-emptively regulate the right of use of new means of communication both in individual and collective employment relationships.

<sup>23</sup> *Ibid.*, pp. 588–590 et seq.

<sup>24</sup> Pursuant to § 2 of the Collective Labour Dispute Resolution Act, a strike is an interruption of work on the initiative of employees or a union or federation of employees in order to achieve concessions from an employer or an association or federation of employers to lawful demands in labour matters.

<sup>25</sup> Pursuant to the Estonian Penal Code damaging or obstructing a connection to a computer network or computer system is punishable by a pecuniary punishment. See §§ 206, 207, 208, 217 of the Penal Code (Karistusseadustik). – Riigi Teataja (State Gazette) I 2001, 61, 364; 2006, 31, 234 (in Estonian).



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# Meaning of Fault with regard to Liability for Damage Caused by the Unlawful Action of Another Person

It should be a self-evident, seemingly natural rule that everyone is liable only for the damage they themselves have caused. However, there are situations in which society considers it just and necessary to place the burden of liability for the damage caused by one person on another person. Such solutions are justifiable when the person causing the damage and the person held liable are, on some level, closely interrelated. As regards liability for delicts committed by other persons, four types of cases in particular can be pointed out: the other person exempted from liability can be a minor without delictual capacity, a person without delictual capacity due to a disability, a minor with delictual capacity, or a service provider.<sup>\*1</sup>

This article is aimed at analysing the requisites for one person's liability for the delict of another. The main attention is still directed to the element of fault as one of the primary requisites for liability in the law of delict. In other words, this article studies the question of whether one person's liability for a delict committed by another person will require culpability of the tortfeasor, culpability of the person responsible for the damage or a possibility of blaming them both. Naturally, an assessment is also provided with regard to the question of which solution is justified in view of the subjective element of liability.

The problems raised here are equally interesting to jurists of all countries regardless of the legal system or the law family. In order to provide answers to the questions, the author will analyse and compare, above all else, the respective provisions in the Estonian Law of Obligations Act<sup>\*2</sup> (LOA), the German Civil Code<sup>\*3</sup>

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<sup>1</sup> There are other cases that can be considered similar to those mentioned: in the event of compulsory liability insurance, the insurer's direct liability for a delict of a policy-holding tortfeasor; the liability of a legal person for a delict committed by a member of its managing body; and the liability of a public authority for unlawful activities of an official. These cases are not analysed in this article due to the size restrictions. It must be noted additionally that liability for the activities of another person was not known in, e.g., Roman law. See K. Zweigert, H. Kötz. *Introduction to Comparative Law*. 3<sup>rd</sup> ed. Oxford: Clarendon Press 1998, p. 630.

<sup>2</sup> *Võlaõigusseadus*, 26.09.2001. – Riigi Teataja (State Gazette) I 2001, 81, 487; 2005, 61, 473 (in Estonian).

<sup>3</sup> The Civil Code of the Federal Republic of Germany. Text with commentaries in O. Jauernig. *Eläutert von C. Berger und andere. Bürgerliches Gesetzbuch*. 10. Aufl. München: Verlag C. H. Beck 2003.

(BGB) and the draft European Civil Code<sup>\*4</sup> (ECC). At present, analysis and evaluation of the above mentioned project should, in particular, be one of the (most important) tasks of jurists in EU Member States.

This article is composed of four chapters: according to the above-mentioned cases, in which one person is liable for the delict of another, the meaning of the subjective element in the case of liability for delicts committed by minors without delictual capacity is addressed in the first part, liability for delicts committed by persons who do not have delictual capacity due to disability is detailed in the second part, liability for delicts of minors with delictual capacity is discussed in the third part and the element of fault in the event of the service user's liability for a delict of the service provider is analysed in the fourth part of the article.

# 1. Fault in case of liability for delicts committed by minors without delictual capacity

## 1.1. General

It can be regarded as a generally recognised principle that until a certain age, persons are not liable for damage caused by them. In accordance with LOA § 1052 (1), a person under 14 years of age does not have delictual capacity.<sup>\*5</sup> Although a minor without delictual capacity may be obliged to compensate for damage, under the so-called equitable liability (see, e.g., LOA § 1052 (3) and ECC article 3:103 (3)), we must nevertheless take into account the fact that liability for damage caused by a minor without delictual capacity is borne, first of all, by other persons: usually the parents or the guardian.<sup>\*6</sup> There is still the question whether the liability for acts by a person who does not have delictual capacity due to age should be incumbent on other persons on the basis of fault or independently of fault.

## 1.2. So-called parental liability depending on fault

In § 454 (1) of the former Civil Code of the Estonian Soviet Socialist Republic<sup>\*7</sup> (CCESSR), liability for delicts committed by minors (of up to 15 years of age) without delictual capacity was made dependent upon culpability of the parents (adopters) or the guardian. In accordance with CCESSR § 454 (2), liability for damage caused by a minor without delictual capacity could also be borne by an educational, child care or medical institution if the minor caused the damage while being under the supervision of such institution. Those institutions were exempted from liability if they proved that the damage had not been caused due to their fault. The Soviet legal theory held the prevalent position that parental fault (primarily in the form of negligence) was constituted by a failure to fulfil, or a negligent fulfilment of, the parental duty of supervision.<sup>\*8</sup> As a rule, the question of fault of the legal representatives of a minor without delictual capacity has not been at issue in judicial practice.<sup>\*9</sup> Thus we can assume that it was virtually impossible for the parents to prove that they were not at fault. Rules similar to those of CCESSR § 454 have been established by § 1073 (1) to (3) of the Civil Code of the Russian Federation<sup>\*10</sup> (CCRF).<sup>\*11</sup>

In accordance with BGB § 832 (1), liability for damage caused by a minor without delictual capacity will be borne by the persons who have the duty of supervision.<sup>\*12</sup> The parents must exercise the supervision under BGB § 1626, and poor performance of supervision is also an expression of the parents' fault. In accordance

<sup>4</sup> The draft European Civil Code. Available at [http://www.sgecc.net/index.php?subsite=subsite\\_4](http://www.sgecc.net/index.php?subsite=subsite_4) (15.05.2006).

<sup>5</sup> On absence of delictual capacity, see J. Lahe. *Deliktivõimetus süülist vastutust välistava asjaoluna* (Absence of Delictual Capacity as a Circumstance Precluding Culpability). – *Juridica* 2002/6, pp. 391-400 (in Estonian).

<sup>6</sup> On rights and duties of parents and guardians, see *Perekonnaseadus* (Family Law Act, FLA), 12.10.1994. – *Riigi Teataja* (State Gazette) I 1994, 75, 1326; 2006, 14, 111 (in Estonian).

<sup>7</sup> The Civil Code of the Estonian SSR was passed by the ESSR Supreme Soviet on 12.06.1964. – *Ülemnõukogu Teataja* (Supreme Soviet Gazette) 1964, 25, 115; *Riigi Teataja* (State Gazette) I 1997, 48, 775 (in Estonian).

<sup>8</sup> E. Laasik. *Nõukogude tsiviilõigus. Eriosa* (Soviet Civil Law. Special Part). Tallinn: Valgus 1975, p. 343 (in Estonian).

<sup>9</sup> See, e.g., Decision of 23.12.1998 of the Civil Chamber of Tartu Circuit Court in Case II-2-246/98 (in Estonian).

<sup>10</sup> The General Part of CCRF was passed by the State Duma of Russia on 21.10.1994 and the Special Part of CCRF was passed on 22.12.1995.

<sup>11</sup> On respective analyses by Russian jurists, see A. P. Sergeev, U. K. Tolstoy. *Гражданское право* (Civil Law). Moscow 1997, p. 725 (in Russian); and O. N. Sadikov. *Комментарии к гражданскому кодексу Российской Федерации* (Commentaries to the Civil Code of the Russian Federation). Moscow: Kontrakt, Infra M-norma 1996, p. 669 (in Russian).

<sup>12</sup> The persons who have the duty of supervision are, in particular, the parents or the guardian (BGB § 1793); by a contract, the responsibility may be borne by foster-parents, step-parents or, in a kindergarten or boarding institution, supervisors. See H. Brox. *Besonderes Schuldrecht*. München: C.H. Beck'sche Verlagsbuchhandlung 1987, p. 351.



with the second sentence of BGB § 832 (1), the obligation to compensate for damage will not be applicable if the parents can prove that the supervision was sufficient or that the damage would have been caused even in the case of due supervision. The degree of due supervision is determined according to the age and characteristics of the minor.<sup>\*13</sup> Well-recognised scientists in Germany are speaking of the need to decrease parental liability. They are of the opinion that generally, parents are unable to exempt themselves from what has, *de facto*, become strict liability. Another argument in favour of restricting parental liability would be the modern pedagogic notion that children must acquire their life experiences and excessive supervision would be an obstruction to this.<sup>\*14</sup>

In France, persons with supervisory duty can be exempted from liability if they prove that they have exercised sufficient care in carrying out their duty of supervision and raising the child. It is clear that the younger the child, the more difficult it will be for the parents to be exempted from liability.<sup>\*15</sup> In Japan, so-called parental liability is also based on fault (§ 714 of the Japanese Civil Code (JCC)). Parental liability, in its traditional meaning, is not applicable in English law, where parents may be liable for damage caused by a minor as their own delict, which can be constituted, e.g., by the fact that they failed to fulfil their duty of supervision.<sup>\*16</sup>

### 1.3. Liability independent of parent's fault

In accordance with ECC, minors under seven years of age do not have any delictual capacity (article 3:103 (2)). Minors from seven to eighteen years of age will have a restricted delictual capacity, i.e. they will be liable for damage only if they do not exercise such care as could be expected from a reasonably careful person of the same age in the circumstances of the case (article 3:103 (1)). In accordance with ECC article 3:104 (1), parents or other persons obliged by law to provide parental care for a person under fourteen years of age, are accountable for the causation of legally relevant damage where that under age person caused the damage through conduct that would constitute negligence if it were the conduct of an adult. Responsibility for a minor without delictual capacity can also be incumbent on an institution or other body which has the task of supervision over the person who caused the damage. The liability of a supervising institution or other body will arise if the following preconditions are fulfilled: (a) the damage must be constituted by personal injury, by damage caused to a third person by death of, or injury to, a person, or by damage to property; (b) the person whom the institution or other body is obliged to supervise, caused that damage intentionally or negligently or, in the case of a person under eighteen, by conduct that would constitute intention or negligence if it were the conduct of an adult; and (c) the person under supervision is a person likely to cause damage of that type (ECC article 3:104 (2)). However, the liability of a supervising institution or other body is mitigated by ECC article 3:104 (3), whereunder such body will be exempted from liability if it shows that the supervision over the person who caused the damage was not defective (i.e. was sufficient).

Thus, one of the requisites for the so-called parental liability under ECC is (at least) objectively negligent conduct by a minor under 14 years of age. The liability of an institution with a supervision duty is less stringent: on the one hand, its liability is based on (at least) the objective negligence of the person who caused the damage, and on the other hand, the exercise of nondefective supervision over the person in question will also serve as a means for exemption from liability.

In accordance with LOA § 1053 (1), the parents or guardian of a person under 14 years of age will be liable for damage unlawfully caused to another person by the person under 14 years of age, regardless of the culpability of the parents or guardian (in accordance with LOA § 1053 (3), the liability will also be incumbent on a person who has, via a contract, assumed the obligation to exercise supervision over a minor without delictual capacity).<sup>\*17</sup> This provision is incredibly stringent in comparison with parental liability

<sup>13</sup> H. Köhler. BGB. Recht der Schuldverhältnisse II. Einzelne Schuldverhältnisse. 13. Aufl. München: C.H. Beck'sche Verlagsbuchhandlung 1993, p. 261.

<sup>14</sup> At the same time, there are also supporters of the opposite position, who find that as children are generally exempted from liability, the liability of parents should, rather, be made more stringent. See B. Dauner-Lieb. Schuldrecht. Erläuterungen der Neuregelungen zum Verjährungsrecht, Schuldrecht, Schadenersatzrecht und Mietrecht. Bonn: Deutscher Anwalt Verlag 2002, p. 851.

<sup>15</sup> C. von Bar, P. Cotthard. Deliktsrecht in Europa. Systematische Einführungen, Gesetztexte, Übersetzungen. Landberichte Frankreich, Griechenland. Köln, Berlin, Bonn, München: Carl Heymanns Verlag KG 1993, pp. 33–34.

<sup>16</sup> M. A. Jones. Textbook on Torts. 4<sup>th</sup> ed. London: Blackstone Press Limited 1993, p. 129. See also J. F. Clere, W. H. B. Lindsell. Torts. The Common Law Library No. 3. 16<sup>th</sup> ed. London: Sweet and Maxwell 1989, p. 165; and D. Howarth. Textbook on Tort. London, Dublin, Edinburgh: Bottenworths 1995, p. 70. As regards the same subject in the United States of America, see J. L. Skaare. The Development and Current Status of Parental Liability for the Torts of Minors. – North Dakota Law Review 2000, 76, 89, p. 5.

<sup>17</sup> LOA § 1053 (1) and (3) (and, in the opinion of the author of this article, also other categories of liability for the activities of another person) cannot be applied in the case of strict liability. (See also T. Tampuu. Deliktioiguslik vastutus teise isiku tekitatud kahju eest (Liability in the Law of Delict for Damage Caused by Another Person). – Juridica 2003/7, p. 467 (in Estonian). T. Tampuu has explained this by the argument that in the event of strict liability or liabilities composed of special sets of elements, no assessment is provided at all with regard to whether an act is unlawful or not. *Ibid.*

established in other countries as well as in ECC. For example, if a fire is caused by a four-year-old playing with matches, the parents must be liable for the child's activity under the LOA, regardless of whether or not they can be blamed, in any aspect, for what happened. The author holds the opinion that in order to prevent results from leading to extreme injustice, the law should enable the parents to be exempted from their liability in exceptional cases.<sup>\*18</sup>

One option is to consider making the liability of the other persons described in LOA § 1053 (1) dependent on fault, but this will naturally require clear delimitation of fault of other persons. According to the generally accepted principles, fault of other persons is constituted by the exercise of defective supervision over a minor without delictual capacity. This is also the only acceptable solution because there would not be much left of the fault-based liability of the persons with a supervision duty if their culpability is also seen in the unsatisfactory upbringing of the minor. The judicial practice is left with the task of specifying the extent of supervision required for each specific age group. The author finds that the determination of the extent of the supervision duty should be based, above all, on the age and the mental stage of development of the minor and also whether any prior delicts have been committed by the minor. Additionally, such a solution would not leave the aggrieved party in an unsatisfactory situation: the absence of fault must be proved by the person with supervision duty and, as a rule, this should be possible only in a relatively small number of cases.

Another solution to mitigate the so-called parental liability could be an interpretation of LOA § 1053 (1) in a manner similar to what is provided by ECC: the parents or the guardian could be liable for damage caused by a minor without delictual capacity only if the minor can be objectively blamed for his or her conduct. The liability of other persons could thus depend on the conventional criterion of the objective fault of the person without delictual capacity, and reasonable conduct of persons with delictual capacity could be considered as a standard of conduct in this situation.

## 2. Fault in case of liability for delicts committed by persons without delictual capacity due to disability

As in the case of responsibility for a minor without delictual capacity, the main questions relating to the culpability of a person who will bear delictual liability for acts of a person without delictual capacity due to a disability also lie in matters concerning the requirement of fault of the delictually liable person in order that the liability could arise, and the fulfilment thereof. Responsibility for a person without delictual capacity due to a disability is, as a rule, incumbent on the guardian.<sup>\*19</sup>

On the basis of CCESSR, this category may include persons who were liable for damage caused by a person divested of active legal capacity. In accordance with CCESSR § 456, the obligation arising from an infliction of damage was incumbent on the guardians or the supervising organisations unless they proved that the damage was not caused by their fault. In CCRF § 1076 (1), this matter is regulated similarly to CCESSR § 456.<sup>\*20</sup>

In accordance with BGB § 832 (1) and (2), if damage has been caused by an adult without delictual capacity, the liability will be borne by the person who has the duty of supervision arising out of the law or a contract. If an adult is completely or partially incapable of taking care of his or her affairs due to mental illness or physical, mental or psychological disability, a court of guardianship will, at his or her request or *ex officio*, appoint a guardian for that person.<sup>\*21</sup> It is of no relevance whether the person under guardianship has active

<sup>18</sup> The situation is, however, alleviated by LOA § 140 which allows the extent of compensation to be reduced. It must be noted additionally that the application of LOA § 1053 (1) would result in a peculiar situation if the parent himself or herself is not an adult either. The parent will become the legal representative of the child but it is questionable whether he or she will have to compensate for the damage caused by his or her child. This question must be answered in the affirmative and hence, this may lead to a situation in which liability for damage caused by a minor child will be borne by a minor parent, and liability for damage caused by the minor parent will, in turn, be borne by the legal representative of the minor parent in the event of realisation of the elements provided for in LOA § 1053 (2).

<sup>19</sup> On the concept of guardianship and related issues, see FLA § 92 et seq.

<sup>20</sup> The rules in question are supplemented by CCRF § 1078 (3), which provides that if damage was caused by a person who was not able to understand the meaning of his or her actions or control them due to a psychic disorder, the obligation to compensate for the damage may be transferred to persons living together with the person causing the damage: a spouse capable of working, the parents or adult children, who were aware of the psychic disorder but did not raise the question of divesting the person of active legal capacity.

<sup>21</sup> A guardian whose consent is required for a transaction to be conducted by the ward must be equal to a legal representative within the meaning of BGB § 278. See P. Schlechtriem. *Võlaõigus. Üldosa* (Law of Obligations. General Part). 2<sup>nd</sup> ed. Tallinn: Õigusteabe AS Juura 1994, p. 112 (in Estonian).

legal capacity or not.<sup>\*22</sup> The second sentence of BGB § 832 (1) additionally provides that the obligation to compensate for the damage will not be applicable if the supervision was sufficient or if the damage would also have been caused in the case of a higher degree of supervision. The supervisory duties depend, in that respect, on the circumstances of the specific case, particularly on the extent of the guarded person's ability to understand and control his or her activities.<sup>\*23</sup>

In accordance with ECC, an institution or other body obliged to supervise a person may be accountable for delicts caused by the person under supervision when the person has caused damage intentionally or negligently (article 3:104 (2)(b)).<sup>\*24</sup> As mentioned above, the supervising institution or other body will be exempted from liability if it shows that there was no defective supervision (article 3:104 (3)).

This brings us to the question of how one can unconditionally speak of the intentional or negligent conduct of a person who is under supervision. Presumably, supervision needs to be exercised over such persons who are incapable of fully understanding their own conduct. Therefore, the author of this article is of the opinion that in ECC article 3:104 (2)(b), it would be correct to provide for the possibility of objectively blaming the person under supervision as a precondition for liability.

In LOA, rules for the guardian's liability for damage caused by persons with restricted legal capacity are contained in § 1053, subsection (5) of which provides that the guardian of a person with restricted active legal capacity who has been placed under guardianship due to mental disability will be liable for damage unlawfully caused by that person to another person, unless the guardian proves that he or she has done everything which could be reasonably expected in order to prevent the ward from causing damage.<sup>\*25</sup> In the opinion of the author of this article, conventional or objective blaming of the ward for his or her conduct should be one of the preconditions for the guardian's liability (in order to ensure that liability will not arise from conduct that could not be regarded as culpable even in the case of a person with delictual capacity). With that interpretation, the guardian's liability under LOA would not be stricter than the liability of a person with the supervision duty, as provided by ECC.

One could ask why fault-based liability is provided for in LOA § 1053 (5), while § 1053 (1) provides for liability without fault. As mentioned previously, even in ECC the so-called parental liability is significantly stricter than the liability of a person with supervisory duty. Justifications for such differentiation are not completely obvious. It is possible to present the argument that the relationship between a child and his or her legal representative is closer and less selfish than that between an adult with restricted legal capacity and his or her legal representative, yet this justification seems to be artificial. Nevertheless we must take into account that the legal representative of a child has the duty of raising the child while the guardian of a person with restricted legal capacity has no such duty.

It is also inevitable in this case, as in the case of problems relating to the culpability of persons responsible for minors without delictual capacity, to emphasise the role of judicial practice in delimiting the extent of supervision. Obviously, abilities differ even among persons with restricted legal capacity, and the extent of the guardian's duties in the exercise of supervision should specifically depend on the ability to understand and to control one's actions.

### 3. Fault in case of liability for delicts committed by minors with delictual capacity

The third case in which one person will be responsible for damage caused by another can be parents' or guardians' liability for delicts committed by minors with delictual capacity. Although minors with delictual capacity (i.e., under LOA, minors of 14 to 18 years of age) will be held liable for unlawfully caused damage pursuant to general principles, it is evident that such persons often do not have the property needed to compensate for damage, and in order to protect the aggrieved party, it is reasonable to establish the option of

<sup>22</sup> H. Köhler. *Tsiviilseadustik. Üldosa. Õpik*. Heinrich Lange poolt alustatud teose 23. täielikult ümbertöötatud trükk (Civil Code. General Part. Textbook. The 23<sup>rd</sup>, completely rewritten edition of the work started by Heinrich Lange). Tallinn: Õigusteabe AS Juura 1998, p. 157 (in Estonian).

<sup>23</sup> P. Schlechtriem. *Võlaõigus. Eriosa* (Law of Obligations. Special Part). 4<sup>th</sup> ed. Tallinn: Õigusteabe AS Juura 2000, p. 275 (in Estonian).

<sup>24</sup> In this respect, other preconditions for liability as provided in the above-mentioned ECC article 3:104 (2) are also important.

<sup>25</sup> This provision must be interpreted in light of § 8 (2) of the General Part of the Civil Code Act (GPCCA, passed on 27 March 2002. – Riigi Teataja (State Gazette) I 2002, 35, 216; 2005, 39, 308), whereunder, besides persons who are under 18 years of age, persons who due to mental illness, mental disability or other mental disorder are permanently unable to understand or direct their actions, also have restricted active legal capacity. Divestment of a person of his or her active legal capacity or restriction of a person's active legal capacity by a court is not mentioned in GPCCA.

liability of the parents or guardian of a minor with delictual capacity. There is the problem of whether or not such liability should depend on fault of the parent or guardian.

In CCESSR § 455 (2), the liability of the parents (adopters) or guardians for delicts committed by minors of 15 to 18 years of age was provided for only in those cases in which the minor did not have property or salary sufficient to compensate for the damage. The liability of the parents (adopters) or guardian depended upon their fault, which could be manifested in insufficient supervision or upbringing. The obligation created between the parents or the guardian and the aggrieved party was subsidiary, not solidary. In CCRF § 1074 (1), responsibility for minors with delictual capacity is regulated similarly to CCESSR § 455. In accordance with CCRF § 1074 (2), the liability may also be incumbent on an educational or medical institution, an institution of social protection or a similar institution acting as the minor's guardian by law. Their liability is also fault-based.

In the Federal Republic of Germany, BGB § 832 (1) and (2) also extend to responsibility for minors with delictual capacity. As in the case of responsibility for a person without delictual capacity, the liability of persons with a supervision duty in this case is fault-based and they are liable in so far as compensation for damage cannot be taken from the minor's own property.

As noted above, in accordance with ECC, liability for delicts committed by persons under 14 years of age is incumbent on the parents or other persons if the person under age caused the damage through conduct that would constitute negligence if it were the conduct of an adult (article 3:104 (1)). On the basis of this regulation, the parents or other persons will not be liable for damage caused by a person between 14 and 18 years of age. This solution is difficult to justify: although, under ECC article 3:103 (1), persons between 14 and 18 years of age may be liable for damage with their own property, in most cases, such minors inevitably lack the means needed to compensate for damage.

It is interesting to note that the 14-year age limit does not apply to the liability of an institution or other body obliged to supervise a person. The liability of such bodies is triggered by the condition that a person under 18 years of age has caused damage by conduct which can be regarded as intentional or negligent if it were the conduct of an adult (see article 3:104 (2)(b)).<sup>\*26</sup>

According to ECC, the delictual liability of minors themselves does not always serve as a basis for liability for delicts committed by minors with restricted delictual capacity: e.g., a 13-year-old need not be liable for damage, the reason being that a person of such age could not be blamed for such conduct. At the same time, similar conduct may be charged in the case of an adult; that, however, is sufficient to create the liability of a parent or a supervisory institution.

LOA § 1053 (2) provides that the parents<sup>\*27</sup> or the guardian will also be liable for damage caused to another person by a person of 14 to 18 years of age **regardless of the culpability** of the parents or guardian, unless they prove that they have done everything which could be reasonably expected in order to prevent the damage.<sup>\*28</sup> Since LOA also establishes the so-called parental liability for delicts committed by minors between 14 and 18 years of age, the rules offered by LOA are, in this respect, more justified than those in ECC article 3:104 (1).

In the opinion of the author of this article, LOA § 1053 (2) may be prone to disputes: namely, in that provision, fault-based liability as well as liability without fault are both, at the same time, established for the parents or the curator. The legislator should reach a decision on reformulating this provision since in its present form, it may lead to misunderstandings. The author of this article is of the position that it would be reasonable to establish liability on the basis of culpability of the person with the supervision duty, since supervision over a minor between 14 and 18 years of age is more difficult than during the child's earlier life, and the parents must have the option to prove that they exercised supervision to a reasonable extent, as otherwise, consequences may turn out to be unacceptably unjust for the legal representatives. It must be mentioned that LOA § 1053 (2) does not preclude the interpretation whereby the parents' or the guardian's liability is fault-based. The author of this article still finds that it would be reasonable to delete the words 'regardless of the culpability of the parents or guardians' from the provision in question.

T. Tampuu has justifiably noted that in the absence of unlawful conduct and fault of a person between 14 and 18 years of age, the application of LOA § 1053 (2) and (3) will be precluded, since in that case, one could not reasonably expect those persons to prevent the damage in any manner.<sup>\*29</sup> Hence, the primary precondition for a parent's or guardian's liability is the minor's own liability.

<sup>\*26</sup> The existence of liability will also require the fulfilment of other preconditions for liability provided in ECC article 3:104 (2) and (3).

<sup>\*27</sup> In accordance with Decision No. 3-1-1-113-01 of 22.11.2001 of the Civil Chamber of the Estonian Supreme Court, a parent's duties in respect of a child will not terminate even if they live separately and the parent does not participate in raising the child.

<sup>\*28</sup> Although LOA § 1053 (2) does not mention that liability for damage caused by a person between 14 and 18 years of age may also be borne by a guardianship institution, the Civil Chamber of the Estonian Supreme Court has justifiably found that in certain cases, the said provision would also be applicable to guardianship institutions. See Decision No. 3-2-1-101-05 of the Civil Chamber of the Supreme Court.

<sup>\*29</sup> T. Tampuu (Note 17), p. 469.



In addition, there may be the question of whom, and on what grounds, will be liable for damage caused by a person who would have delictual capacity by virtue of age but still does not have such capacity due to a disability. One must take the position that such a person will not be liable pursuant to general principles (LOA § 1052 (2)). Responsibility for that person will be incumbent on the parents or the guardian. At the same time, there is no principal difference in whether the persons with the supervision duty will be liable under subsection (2) or (3) of LOA § 1053 as in either case, they will have the option to prove that they have done all that could be expected from them in order to prevent unlawful damage and, hence, be exempted from the liability. Additionally, the liability of a minor without delictual capacity due to a disability will be possible under LOA § 1052 (3).

In summary, it can be concluded that for damage caused by a minor with delictual capacity, fault-based liability of the persons with the duty of supervision and upbringing is prevalent. Fault is constituted by breach of the supervisory duty, which must be determined on a case-by-case basis. Additionally, the author would like to stress that it would also be reasonable to establish the parents' fault-based liability for delicts committed by persons between 14 and 18 years of age in ECC.

## 4. Fault in case of liability for delicts committed by service providers

### 4.1. Fault-based liability of service user

Lastly, this article discusses the service user's liability for damage caused by the service provider.<sup>\*30</sup> This matter is regulated by LOA § 1054 but that section does not expressly specify whether the service user's liability is fault-based or not.

In accordance with BGB § 831 (1), a person entrusting another person with a task must compensate for damage inflicted unlawfully by the second person to a third party during the performance of the task. In the law of the Federal Republic of Germany, a service user's responsibility for the service provider is not related to fault of the service provider<sup>\*31</sup> but, rather, with the presumable fault of the service user itself.<sup>\*32</sup>

In accordance with sentence 2 of BGB § 831 (1), the service user's fault is primarily constituted by breach of the duty of due care in selecting the vicarious agent and exercising supervision.<sup>\*33</sup> In order to be exempted from liability, the service user must prove that it has not violated the respective duty of due care.<sup>\*34</sup> This constitutes a separate claim against the service user, where the burden of proof as regards fault has been reversed for the benefit of the aggrieved party.<sup>\*35</sup>

One may ask the question of whether the service user's liability should also be recognised if, although it violated the duty of care in selection and supervision, damage would also have been inflicted in the case of careful selection and supervision. According to the second sentence of BGB § 831 (1), this question must be answered in the negative. K.-H. Gursky has correctly pointed out that if a service user could prove the latter case, then that service user would not be liable since there would be no causal link between its fault and the damage inflicted.<sup>\*36</sup>

In light of BGB § 831 (1), there is also room for dispute in the question of whether the service user should be liable even when it failed to exercise due care in selecting the vicarious agent but subsequently controlled

<sup>30</sup> In this article, a 'service user' means a person who engages another person in the person's economic or professional activities or engages another person in the performance of the person's duties or engages another person to perform an act at the person's request, as specified in LOA § 1054. That 'another person' is the service provider.

<sup>31</sup> A person may be regarded, at one and the same time, as a performing agent (*Erfüllungsgehilfe*, BGB § 278) and a vicarious agent (*Verrichtungsgehilfe*, BGB § 831).

<sup>32</sup> Hence the liability of a service user will not require fault of the service provider as a precondition: in order to give rise to liability of the service user, the conduct of the service provider must, besides the objective presence of the required elements, include only unlawfulness. Therefore, liability of the service user may also arise if the service provider does not have any delictual capacity: this further increases the required degree of efficiency of supervision to be exercised by the service user. A higher-than-average degree of control must also be applied if the service provider is, e.g., an older person and is therefore subject to less stringent requirements of due care.

<sup>33</sup> Dogmatically, the service user's respective duties can be logically classified as part of the general obligation of safe organisation of its own sphere of control. See P. Schlechtriem (Note 23), pp. 272–273.

<sup>34</sup> R. Arnoldi. *Die Haftung der juristischen Person für ihre Organe nach deutschem und kanarischem Recht*. Berlin: Duncker&Humblot 1997, p. 189.

<sup>35</sup> O. Jauernig (Note 3), p. 1063.

<sup>36</sup> K.-H. Gursky. *Schuldrecht. Besonderer Teil*. 3. Aufl. Heidelberg: C. F. Müller Verlag 1999, p. 229.

the agent completely as required. In that case, fault of the service user should, nonetheless, be negated because discovery and elimination of defects in selecting an agent could be regarded as one of the objectives of carrying out due control: any blame for careless selection as a basis for fault will be rendered void of meaning and merely formal by virtue of careful supervision. Hence, service users should not be blamed for inappropriate selection if they subsequently exercise due supervision.

Rules similar to BGB § 831 have been established to provide for the service user's liability for delicts of the service provider in Switzerland (§ 55 (1) of the Swiss Civil Code)<sup>\*37</sup> and Japan (JCC § 715 (1)) and also, e.g., in Turkey (§ 55 of the Turkish Civil Code).<sup>\*38</sup>

## 4.2. Liability depending on the fault of service provider

Differently from the legal orders discussed in the previous subchapter, service users cannot exempt themselves from liability pursuant to § 1384 of the French *Code civil*. The liability cannot be precluded because the service user exercised due care in selecting the agent or exercising supervision.<sup>\*39</sup> The service user's liability is based on the assumption that the service user itself is responsible for the inflicted damage.<sup>\*40</sup> Responsibility for the service provider is also independent of the service user's own fault in, e.g., Italy (§ 2049 of the Italian Civil Code), Spain<sup>\*41</sup>, Finland<sup>\*42</sup> and Austria (ABGB § 1313a).<sup>\*43</sup>

In English law, the service user's liability for torts committed by the service provider (vicarious liability) is, in essence, strict liability.<sup>\*44</sup> Decisive importance can be attributed to the question of whether the service user had, at the appropriate time, the right to direct and control the actions of the service provider. If the 'principal' did not have the right of direction and control, the 'principal' will not be liable for the consequences of the service provider's tortious conduct.<sup>\*45</sup> Potential liability (independent of fault) should motivate the service user to arrange the work in such a manner as to minimise the potential for damage.<sup>\*46</sup>

The question under analysis was not directly regulated by CCESSR, and no respective analyses could be found within Soviet professional literature, either. However, § 449 of CCESSR can be understood as being a rule on the service user's liability for delicts of the service provider, whereby an organisation was obliged to compensate for damage inflicted due to the fault of employees of that organisation during the performance of their work or service duties. This provision has been applied as a basis for strict liability of the employer.<sup>\*47</sup> According to Decision No. 3-2-1-122-03 of 4 November 2003 of the Civil Chamber of the Estonian Supreme Court, liability under CCESSR § 449 required unlawful action towards the aggrieved party. The Chamber has substantiatedly noted that if an employee was in breach of the contract of employment, this could give rise to the employee's liability to the employer but not to the aggrieved party, who was not part of the contract of employment.

The service user's own liability without fault has also been established in ECC: a person who employs or similarly engages another, is accountable for the causation of legally relevant damage suffered by a third person when the person employed or engaged caused the damage in the course of employment or engagement, and caused the damage intentionally or negligently, or is otherwise accountable for the causation of the damage (article 3:201 (1)).

<sup>37</sup> Schweizerisches Obligationrecht (30.03.1911). 37. Aufl. Zürich: Schulthess Polygraphisches Verlag 1988, pp. 12–13.

<sup>38</sup> T. Ansay, D. Wallace Jr. Introduction to Turkish Law. 3<sup>rd</sup> ed. Deventer, Antwerp, London, Frankfurt, Boston, New York: Kluwer Law and Taxation publishers 1987, p. 200.

<sup>39</sup> H. J. Sonnenberger, C. Autexier. Einführung in das französische Recht. 3. Aufl. Heidelberg: Verlag Recht und Wirtschaft GmbH 2000, p. 139.

<sup>40</sup> C. von Bar, P. Cotthard (Note 15), p. 32.

<sup>41</sup> See E. Lobedanz. Schadenausgleich bei Straftaten in Spanien und Lateinamerika. Frankfurt am Main: Alfred Metzner Verlag 1972, p. 28.

<sup>42</sup> J. Pöyhönen. An Introduction to Finnish Law. Helsinki: Finnish Lawyers Publishing 1993, p. 84.

<sup>43</sup> R. Ditttrich. Das Allgemeine Bürgerliche Gesetzbuch. 18. Aufl. Wien: Manzsche Verlags- und Universitätsbuchhandlung 1997.

<sup>44</sup> C. von Bar, J. Shaw. Deliktsrecht in Europa. Systematische Einführungen, Gesetztexte, Übersetzungen. Landberichte Dänemark, England, Wales. Köln, Berlin, Bonn, München: Carl Heymanns Verlag KG 1993, pp. 12, 44; and C. D. Baker. Tort. 5<sup>th</sup> ed. London: Sweet & Maxwell 1991, pp. 307–308.

<sup>45</sup> P. Keeton, R. E. Keeton, L. D. Sargentich, H. J. Steiner. Tort and Accident Law. American Casebook Series 1984, p. 536.

<sup>46</sup> G. Williams, B. A. Hepple. Foundation of the Law of Tort. 2<sup>nd</sup> ed. London: Butterworths 1984, p. 134.

<sup>47</sup> See, e.g., Decision of 26.02.1998 of the Civil Chamber of the Estonian Supreme Court in Case 3-2-1-24-98, and Decision of 28 December 2000 of the Civil Chamber of Tartu Circuit Court in Case II-2-2/2000 (in Estonian).

In LOA § 1054, rules provided for the service user's liability for a service provider's delict are independent of fault of the service user.<sup>\*48</sup> Hence similarities can be found between the liability arising under LOA § 1054 and strict liability. The above-mentioned provision only establishes that the damage must have been caused unlawfully by the service provider but makes no mention of the element of fault of the service provider. According to G. Hager, if the service user's liability would depend only on unlawfulness of the service provider's conduct, this would constitute a special, extreme case.<sup>\*49</sup>

The author of this article is of the position that although fault of the service provider is not mentioned *expressis verbis* in LOA § 1054, the service user's liability should, as in the provisions of ECC article 3:201 (1), be regarded as requiring the service provider's liability, i.e. the service provider's conduct must, in addition to other preconditions of the liability, include fault of the service provider. Hence, the service provider's conduct should be at least objectively negligent in order to give rise to the service user's liability.<sup>\*50</sup> Such a case may lead to a situation in which the service provider does not have any delictual capacity, or to a situation in which it can be exempted from liability due to its subjective characteristics. In the above-described case, the service user will not be liable pursuant to LOA § 1054 but the problem can be resolved through the service user's liability on the basis of culpability of the organisation (LOA § 1043 et al.). In that case, the service user can be blamed for careless selection of the service provider and then the service user will already be liable on the basis of its own fault.

The author of this article finds it unjustified to resort to the resolution of attributing only the factual conduct of the service provider to the service user and then asking the question of whether such conduct on its part would be wrongful.<sup>\*51</sup> Recognition of the last-mentioned position would base the service user's liability on fault under a scheme yet unknown in professional literature. Moreover, such attribution of the, so-to-say, factual conduct may lead to a wrong situation in which the service provider could be blamed for its conduct while the service user could not, and thereby the latter would be unjustifiably exempted from liability. Thus, in the opinion of the author of this article, the application of LOA § 1054 and the service user's liability should, as in the provisions of ECC article 3:201 (1), require wrongful conduct of the service provider.

## 5. Conclusions

In summary, it can be stated that in many countries the so-called parental liability for damage caused by a minor without delictual capacity depends on the parent's culpability. In LOA, the so-called parental liability has been established independently of culpability. A just result could be achieved by understanding LOA § 1053 (1) similarly to the provisions of ECC, whereby the parents or the guardian will be liable for damage

<sup>48</sup> In accordance with LOA § 1054 (1), a person engaging another person in the person's economic or professional activities on a regular basis, the person shall be liable for any damage unlawfully caused by the other person on the same basis as for damage caused by the person, if the causing of damage is related to the person's economic or professional activities. Thus, in order to apply LOA § 1054 (1), it is necessary to determine that one person engages another person in the person's economic activities on a regular basis. The engagement of another person in one's economic or professional activities as a precondition for the application of LOA § 1054 (1) means that one person is using the services of another. On this, see Decision No. 3-2-1-75-05 of 5.10.2005 of the Civil Chamber of the Estonian Supreme Court. In accordance with LOA § 1054 (2), if one person engages another person in the performance of the person's duties, the person will be liable for any damage unlawfully caused by the other person on the same basis as for damage caused by the person if the damage is caused or the occurrence thereof is made possible through the performance of such duties. According to LOA § 1054 (3), if a person performs an act at the request of another person, the person at whose request the act is performed will be liable for any damage caused in the course of the performance thereof on the same basis as for damage caused by the person if the damage is caused or the occurrence thereof is made possible through the performance of the act and if, due to the relationship between the person at whose request the act is performed and the person who causes the damage, the person at whose request the act is performed has control over the behaviour of the person who causes the damage. It must be added that liability for another person's activities is also regulated by GPCCA § 132 (1) and (2). In accordance with those provisions, liability of a service user will not require, as a precondition, that the service provider must have committed an unlawful act within the meaning of clauses 1) to 8) of LOA § 1054 (1). Thus, the scopes of GPCCA § 132 and LOA § 1054 do not overlap since LOA § 1054 provides rules for the service user's liability for extracontractual damage caused by the service provider while GPCCA § 132 regulates primarily the service user's liability for damage caused by the service provider during the performance of the contract. However, the Civil Chamber of the Estonian Supreme Court has, in its Decision No. 3-2-1-92-05 of 13.10.2005, stated that the application of GPCCA § 132 (1) would, inter alia, require that the conduct of the person engaged in economic or professional activities must have been such for which the other person engaging that person in economic or professional activities could be blamed.

<sup>49</sup> G. Hager. *Õigusvastaselt kahju tekitamine. Eraõigus. I osa. Abimaterjal kohtunike ja prokuröride twinning-koolituse eraõiguse õppegrupile* (Infliction of Damage by Unlawful Action. Private Law. Part I. Supplementary Material for the Private-law Study Group at the Twinning Course for Judges and Prosecutors). Tallinn: Ministry of Justice 2001, p. 311 (in Estonian).

<sup>50</sup> This position is also supported by Decision of 5.10.2005 of the Civil Chamber of the Estonian Supreme Court in Case 3-2-1-75-05, in which the Chamber has justifiably found that the application of LOA § 1054 (1) would require, in addition to the condition of unlawfulness, the ascertainment of fault. If a person has not engaged another person in the person's economic activities on a regular basis, the person receiving a service from the other person may be liable for an unlawful and wrongful act of the other person under LOA § 1045 (2) and (3).

<sup>51</sup> This position was published as an editorial note. G. Hager (Note 49), p. 312.

caused by a minor without delictual capacity only if the minor can be objectively blamed for his or her conduct. The author of this article is of the opinion that the guardian's liability should also include a precondition that the ward can be conventionally or objectively blamed for his or her conduct. With such an approach, the guardian's liability as provided for by LOA would not be stricter than the liability of a person with a supervision duty as provided for in ECC.

Liability for delicts committed by minors with delictual capacity is, in most countries, based on the culpability of persons with a duty of supervision or upbringing. It would be reasonable to provide for the parents' liability for delicts committed by persons between 14 and 18 years of age in ECC, similarly to LOA. Under LOA, the liability of a service user should, as in the provisions of ECC 3:201 (1), nevertheless be regarded as requiring the service provider's liability, i.e. wrongful conduct.

Hence it can be concluded that fault as a precondition for general delictual liability, has a steady role even where a person is liable for a delict committed by another person. Differences can be found particularly as regards the question of whether fault of the tortfeasor or the person responsible for damage or both is required to hold another person liable. The respective rules in ECC are a common part of the positive law of the Member States, a compromise between different methods of resolution. In the improvement and amendment of the analysed provisions of ECC, an approach based on the respective rules in LOA is one of the viable alternatives.





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# State Liability without the Liability of State

## Constitutional Problems related to Individual Professional Liability of Estonian Notaries, Bailiffs and Sworn Translators

In Estonia, notaries, bailiffs and sworn translators are independent public authorities who are individually liable for any damage occurring due to their fault when performing their official duties.

The obligation to protect the rights of individuals and the principle of lawful exercise of state authority are the central elements of a state based on the rule of law. The state liability law must implement those principles and give them practical significance. If a public servant has acted unlawfully, the state is required to compensate the injured person for the damage caused by the act. Just like public servants, notaries, bailiffs and sworn translators perform public law functions, but the state is not liable for the damage caused by them. However, a natural person is often not able to perform the obligation to compensate for damage solely with his or her assets. It was said in the past that where nothing can be taken, the emperor has lost his right. In a state based on the rule of law, an injured person cannot be satisfied by knowing that his or her right to compensation has proven valid only on paper. The right to compensation for damage is applicable in Estonia as a fundamental right and such a right must be secured by all public authorities. The peculiarities of an administrative body should not affect the rights of the injured person.

In order to ensure the protection of the rights of individuals, the obligation to enter into a compulsory professional indemnity insurance contract has been imposed on notaries and bailiffs in Estonia; however, the indemnity insurance contracts of neither official suffice to cover the entire professional liability. The requirement for insurance contracts imposed on sworn translators was abolished recently — hence, they are only liable with their personal assets.

Although the number of liability cases is increasing, there is so far no information about any of the injured persons not receiving compensation.<sup>\*1</sup> It is still a matter of time before some injured person incurs damage

<sup>1</sup> The number of professional liability cases is not known precisely but several disputes concerning the liability of notaries have reached the Supreme Court during the past years. See Civil Chamber of the Supreme Court decision 3-2-1-77-01. — Riigi Teataja (State Gazette) III 2001, 22, 240; Civil Chamber of the Supreme Court decision 3-2-1-81-02. — Riigi Teataja (State Gazette) III 2002, 20, 238; Civil Chamber of the Supreme Court decision 3-2-1-129-02. — Riigi Teataja (State Gazette) III 2002, 35, 386; Civil Chamber of the Supreme Court decision 3-2-1-125-03. — Riigi Teataja (State Gazette) III 2004, 1, 9; Civil Chamber of the Supreme Court ruling 3-2-1-149-03. — Riigi Teataja (State Gazette) III 2004, 4, 43; Civil Chamber of the Supreme Court decision 3-2-1-74-04. — Riigi Teataja (State Gazette) III 2004, 19, 221; Special Panel of the Supreme Court decision 3-2-4-1-05. — Riigi Teataja (State Gazette) III 2005, 15, 145 (in Estonian).

not covered by the insurance contract and that the independent public authority is unable to compensate for. Such instances would be unacceptable in a state based on the rule of law and would deliver a very heavy blow to the reliability of the entire office in the eyes of public.

This article will examine whether, and on what conditions, the state may substitute its liability for the liability of a public authority that is a natural person and to what extent it is actually justified in the case of notaries, bailiffs and sworn translators. The article will draw attention towards the inadequacies of the mechanisms ensuring the liability of these independent public authorities and make proposals for improving the current regulation. Similar questions arise in the administrative law of all countries where a natural person is liable for the damage caused in the course of performance of administrative duties instead of the state.

## 1. Legal status of notaries, bailiffs and sworn translators

The first natural persons serving as a public authority, who were subjected to individual professional liability, were notaries. The Notaries Act (NA) entered into force in 1993<sup>2</sup> and its new version in 2002.<sup>3</sup> Before that, notaries had been public servants. The duties of bailiffs were also performed by the officials of the enforcement departments of the county and city courts before the establishment of the Bailiffs Act (BA) in 2001.<sup>4</sup> The office of sworn translators appeared in Estonia in 2002, when the Sworn Translators Act (STA) entered into force.<sup>5</sup> Due to the small size of Estonia, the number of people holding these offices is rather limited. As of 1 June 2006, there were 86 notaries<sup>6</sup>, 50 bailiffs<sup>7</sup> and 23 sworn translators in Estonia.<sup>8</sup> Naturally, this does not undermine in any way the most important function of these offices in organising the legal relationships between individuals.

The legal status of notaries, bailiffs and sworn translators is very similar in Estonia. They are self-employed public authorities who perform public law functions imposed on them personally and in their own name, remaining impartial to the participants in the official acts, and subject to an extensive duty to maintain confidentiality. Notaries, bailiffs and also sworn translators are independent of other state authorities when performing their official acts.<sup>9</sup> They are not public servants remunerated by the state, but instead charge fees in the amount and according to the procedure prescribed by law. The amount retained by the independent public authority after the deductions from the amount received for fees and the expenditure made on the performance of official duties as well as taxes constitutes professional revenue.<sup>10</sup> Notaries and bailiffs must have higher education in law, while any academic degree suffices for sworn translators. To assume office, each candidate must pass an examination which is preceded by preparatory service for notaries and bailiffs.

In order to ensure the correct and high-level performance of official duties, the law also provides for several interference mechanisms on the part of the state. All three authorities are subject to the state supervision exercised by the Minister of Justice in issues related to the organisation of their duties. The Minister of Justice is also competent to carry out disciplinary proceedings. Besides that, the law imposes restrictions on holding office, which are most extensive regarding notaries and most lenient regarding sworn translators.<sup>11</sup>

<sup>2</sup> The text of the Notaries Act of 1993 is available in English at [http://www.legaltext.ee/et/andmebaas/ava.asp?tyyp=SITE\\_ALL&ptyyp=I&m=000&query=notariaadiseadus&nups.x=0&nups.y=0](http://www.legaltext.ee/et/andmebaas/ava.asp?tyyp=SITE_ALL&ptyyp=I&m=000&query=notariaadiseadus&nups.x=0&nups.y=0) (31.05.2006).

<sup>3</sup> The text of the Notaries Act of 2002 is available in English at [http://www.legaltext.ee/et/andmebaas/ava.asp?tyyp=SITE\\_ALL&ptyyp=I&m=000&query=notariaadiseadus&nups.x=0&nups.y=0](http://www.legaltext.ee/et/andmebaas/ava.asp?tyyp=SITE_ALL&ptyyp=I&m=000&query=notariaadiseadus&nups.x=0&nups.y=0) (31.05.2006).

<sup>4</sup> The text of the Bailiffs Act is available in English at [www.legaltext.ee/et/andmebaas/ava.asp?tyyp=SITE\\_ALL&ptyyp=I&m=000&query=kohtut%E4ituri+seadus&nups.x=0&nups.y=0](http://www.legaltext.ee/et/andmebaas/ava.asp?tyyp=SITE_ALL&ptyyp=I&m=000&query=kohtut%E4ituri+seadus&nups.x=0&nups.y=0) (31.05.2006).

<sup>5</sup> The text of the Sworn Translators Act is available in English at [www.legaltext.ee/et/andmebaas/ava.asp?tyyp=SITE\\_ALL&ptyyp=I&m=000&query=vandet%F5lgi+seadus&nups.x=0&nups.y=0](http://www.legaltext.ee/et/andmebaas/ava.asp?tyyp=SITE_ALL&ptyyp=I&m=000&query=vandet%F5lgi+seadus&nups.x=0&nups.y=0) (31.05.2006).

<sup>6</sup> List on notaries. Available at [www.notar.ee/260](http://www.notar.ee/260) (31.05.2006) (in Estonian).

<sup>7</sup> Whereas the number of notaries has continually increased, that of bailiffs has decreased. For various reasons, as many as 42 bailiffs have been released from office over five years. The list of bailiffs is available at [www.just.ee/4263](http://www.just.ee/4263) and the list of bailiffs released from office at [www.just.ee/4265](http://www.just.ee/4265) (31.05.2006).

<sup>8</sup> List of sworn translators. Available at [www.just.ee/10489](http://www.just.ee/10489) (31.05.2006).

<sup>9</sup> See for details E. Andresen. Status and Role of Notary in Legal System of Estonia. – 10th Anniversary of the Estonian Chamber of Notaries. Tallinn 2003, pp. 53–62.

<sup>10</sup> A separate Notary Fees Act applies to notaries (available at [www.legaltext.ee/et/andmebaas/ava.asp?tyyp=SITE\\_ALL&ptyyp=I&m=000&query=notari+tasu+seadus&nups.x=0&nups.y=0](http://www.legaltext.ee/et/andmebaas/ava.asp?tyyp=SITE_ALL&ptyyp=I&m=000&query=notari+tasu+seadus&nups.x=0&nups.y=0)) (31.05.2006), for bailiff fees see BA §§ 21–29, for sworn translator fees STA § 8.

<sup>11</sup> For example, a notary shall not engage in enterprise or be a trustee in bankruptcy, or a member of the management or supervisory board of a company (NA § 12 (2)). A bailiff, however, may act as a trustee in bankruptcy, if he or she has passed the relevant examination (§ 5 (1) 3)) and a sworn translator may engage in enterprise or perform salaried work if such activity involves frequent use of foreign language (STA § 9 (1)).

## 2. Person responsible in Estonian state liability law

As notaries, bailiffs and sworn translators carry out public law functions when performing official acts, there are public relations between them and the participants in official acts. The compensation for damage caused in public relationships is governed by state liability law; hence, the professional liability of notaries, bailiffs and sworn translators forms part of state liability law. It would consequently be erroneous to consider the liability of these public authorities as civil liability.

In Estonia, the restoration of the rights violated in the course of performance of public law functions, and compensation for damage, is governed by the State Liability Act (SLA) that entered into force as an Act of general application in 2002.<sup>\*12</sup> Estonian state liability law applies the model of direct state liability, according to which the unlawful act of public servant or any other natural person performing a public law function is attributed to the state or another public authority that had assigned the duty to the natural person. As a rule, a public servant or other natural person is not liable to the injured person (SLA § 12 (1) and (2)). Even if damage is caused by a public authority who is a natural person or private law legal person, the state or other public law legal person who authorised the private law person to perform public duties is generally liable for the damage (SLA § 12 (3)). The state may file a claim of recourse against the public servant or the private law person after compensating the injured person for the damage (SLA § 19 (1)). A claim of recourse may be filed against a natural person, only if damage occurred due to his or her fault (SLA § 19 (3)).

Such regulation is, above all, aimed at protecting the rights and interests of the injured person. State resources allow for satisfying even the largest claims for which private law persons may not have sufficient means. The model of direct state liability also gives the injured person an opportunity to request that the state take much more wide-ranging measures, if this could be demanded from private law persons whose competence is limited.

Nevertheless, § 12 (3) of the SLA provides for a possibility that in cases prescribed by law, the state need not be liable for damage caused by a independent public authority who is a private law person. Such authorities include notaries, bailiffs and sworn translators. All three authorities are liable first of all according to the provisions of the Act governing their official activities, while the State Liability Act is applied additionally. When the claims for compensation for damage caused by notaries, bailiffs or sworn translators were previously examined by the administrative court<sup>\*13</sup>, then as of 2006, such disputes in public law are, as an exception, settled by way of proceedings of action in county courts.<sup>\*14</sup>

## 3. Main differences in the liability of notaries, bailiffs and sworn translators compared to the liability of public servants

As it was said, notaries, bailiffs and sworn translators are — unlike public servants<sup>\*15</sup> — personally liable for the damage caused as the result of a breach of their official duties. All three Acts prescribe that the state is not liable for the damage caused by notaries, bailiffs or sworn translators (NA § 14 (4), BA § 6 (2) and STA § 10 (2)).

The liability of these three independent public authorities also differs from the regulation prescribed by the SLA in the fact that notaries, bailiffs and sworn translators are liable only for damage occurring due to the fault when performing their official duties (NA § 14 (1), BA § 6 (1) and STA § 10 (1)). The SLA, however, provides that the liability of the state to the injured person depends on the fault of the public authority only upon compensation for loss of income and non-proprietary damage (SLA § 13 (2) and § 9 (1)). Thus, according to the SLA, the fault is not a precondition for liability in the claim for compensation of direct proprietary liability.

<sup>12</sup> The text of the State Liability Act is in English available at [www.legaltext.ee/et/andmebaas/ava.asp?tyyp=SITE\\_ALL&ptyyp=I&m=000&query=riigivastutuse&nups.x=0&nups.y=0](http://www.legaltext.ee/et/andmebaas/ava.asp?tyyp=SITE_ALL&ptyyp=I&m=000&query=riigivastutuse&nups.x=0&nups.y=0) (31.05.2006). See an overview of Estonian state liability law E. Andresen. The Claim for Elimination of Unlawful Consequences and the Claim for Compensation for Damage under Estonian State Liability Law. – *Juridica International* 2005 (X), pp. 169–170.

<sup>13</sup> In practice, such claims were often filed with civil courts. See Civil Chamber of the Supreme Court ruling 3-2-1-149-03 (Note 1), paragraph 13 and Special Panel of the Supreme Court decision 3-2-4-1-05 (Note 1), paragraph 9.

<sup>14</sup> See NA § 14 (1), BA § 6 (3) and STA § 10 (2').

<sup>15</sup> The term 'public servant' includes here all other natural persons acting on behalf of the state or local government.

The third important difference concerns only the liability of notaries. Namely, NA § 14 (2) prescribes the principle of subsidiary liability of notaries, according to which a notary shall be liable for damage occurring due to his or her fault only to the extent which remains uncompensated by other persons who also caused the damage. Consequently, in the cases in which the injured person can demand compensation for damage also from other persons, not only the notary but the administration as a whole is released from liability. Such a clause precluding the liability of the public authority is not contained in the SLA, BA or STA.

## 4. Why are notaries, bailiffs and sworn translators personally liable?

The personal liability of these officials may be put down to arguments related to both history and the course of their development. For example, Estonian notaries were personally liable also before the Second World War, but the suretyship obligation had been established to secure the claim.<sup>\*16</sup> In the course of reforming the notaries' offices after restoring Estonia's independence, the national notaries' offices were replaced by those adhering to the model of Latin notaries' offices<sup>\*17</sup>, one of the common characteristics of which is also the personal liability of a notary.<sup>\*18</sup> The office of a notary also served as an example when developing the offices of bailiffs and sworn translators<sup>\*19</sup> and in draft legislative acts, the personal liability of all three public authorities has been explained as being characteristic to so-called liberal professions. However, it is questionable whether it is correct to call the profession of a notary a liberal profession at all.<sup>\*20</sup>

The principle of personal liability of notaries, bailiffs and sworn translators is to a significant degree related to the other principles shaping these offices, above all to the principles of the independence of such authorities and their remuneration.

All the three officials are subject to the principle of independence which, serving as one of the most important characteristics of these offices, grants notaries and bailiffs the right to interpret and implement law — to sworn translators the right to decide on the translation issues related to the performance of his or her official acts — according to their best judgment.<sup>\*21</sup> If those public authorities were bound by the instructions of the governmental executive power when performing the official acts and the executive power decided about the correctness of the official acts, these public authorities would no longer be liable to the persons related to their official acts but the state. However, if the state were liable for the damage caused by notaries, bailiffs and sworn translators, this would damage their independence as the governmental executive power would have a chance to decide about the lawfulness of their professional activity. In such case, it would be impos-

<sup>16</sup> J. Hargi, A. Harujõe, G. Savisaar, M. Saar. Eesti notariaat 1918–1998 (Estonian notaries' offices 1918–1998). – Konverents "Notari rollist tänapäeva ühiskonnas" (Conference "Role of notaries in contemporary society"). Valik ettekandeid ja artikleid. Eesti Vabariigi Notarite Koda (Selection of Articles. Republic of Estonia Chamber of Notaries). 1999, pp. 92–97 (in Estonian). For the English summary of the organisation of notaries' offices in Estonia in 1918–1944, see [www.notar.ee/852](http://www.notar.ee/852) (31.05.2006).

<sup>17</sup> The Estonian Chamber of Notaries is a member of the International Union of Latin Notaries (U.I.N.L., *Union Internationale du Notariat Latin*), uniting Latin notaries in the world and the Council of the Notariats of the European Union (CNUE, *Conseil des Notariats de L'Union Européenne*) that represents the interests of Latin notaries of the European Union member states.

<sup>18</sup> For instance, the personal liability of notaries has been established in Austria, France, in a large part of Germany and Switzerland.

<sup>19</sup> See Chapter 3 of the draft Bailiffs Act. Available at [web.riigikogu.ee/ems/saros-bin/mgetdoc?itemid=003673930&login=proov&password=&system=ems&server=ragne11](http://web.riigikogu.ee/ems/saros-bin/mgetdoc?itemid=003673930&login=proov&password=&system=ems&server=ragne11) (31.05.2006) (in Estonian). The Sworn Translators Act only governs the issues differing from those of the office of a notary. In other parts, sworn translators are subject to Acts concerning notaries' offices (STA § 1 (2)).

<sup>20</sup> The notion 'representative of a liberal profession' is used for denoting these officials also in legislative acts but it should be rather avoided to use this ambiguous term in legal texts. Although the term *freiberuflicher Notar* is very common in literature, it only serves to signal that a notary is not a public servant and the activities of a notary can be compared to liberal professions only to the extent that the income earned by a notary belongs to him or her after the costs and taxes have been paid. H. Schippel. Stellung und Aufgabe der Notare. – K. Seybold (Begr.), H. Schippel (Hrsg.). Bundesnotarordnung: Dienstordnung für Notare; allgemeine Richtlinien für die Berufsausübung der Notare. Kommentar. 6. Aufl. München 1995, § 1, paragraph 14 (p. 50). Several other authors are also of the opinion that a notary cannot be considered as a representative of a liberal profession. See, e.g. W. Baumann. Das Amt des Notars – Seine öffentlichen und sozialen Funktionen. – Mitteilungen der Rheinischen Notarkammer, January/February 1996, p. 6; B. Stürer. Notare als Solidargemeinschaft. – DVBl. 1989, p. 1141; P. Lichtenberger. Gesellschaftliche Funktion und Stellung des Notars heute und morgen. – Festschrift 125 Jahre bayerisches Notariat. Bayerische Notariatsverein e.V. (Hrsg.). München: 1987, p. 117; H. Hoffmann. Die Verstaatlichung von Berufen. Deutsches Verwaltungsblatt 1964, p. 457.

<sup>21</sup> The importance of the principle of independence of notaries has been also emphasised in the decisions of the Administrative Law Chamber of the Supreme Court. See Administrative Law Chamber of the Supreme Court decision 3-3-1-35-00, paragraph 1. – Riigi Teataja (State Gazette) III 2000, 21, 234; Administrative Law Chamber of the Supreme Court decision 3-3-1-70-04, paragraphs 10–13. – Riigi Teataja (State Gazette) III 2004, 36, 369 and Administrative Law Chamber of the Supreme Court decision 3-3-1-24-06, paragraph 21. – Riigi Teataja (State Gazette) III 2006, 14, 135 (in Estonian).



sible to exclude cases in which the independent public authority does not admit to damaging his or her official duty but the executive power satisfies the claim for damage and files a recourse action against the official.

The personal liability of an official is also related to the arrangement of his or her remuneration. Notaries, bailiffs and sworn translators do not receive a salary from the state but charge fees for their official acts to the extent and according to the procedure prescribed by law. The income that remains after deducting the expenditure made for performing the official acts belongs to the independent public authority. The fee also covers the risk arising from potential liability. If the beneficiary did not have to bear the risks related to earning the income, lower income would be justified. If the authorities could retain the income accompanying the professional activity but should not be liable for violating their duties, it would be unjust and in conflict with public interests. Thus, the substitution of the personal liability of notaries, bailiffs and sworn translators for state liability would also introduce changes to the remuneration of those authorities.<sup>\*22</sup>

Still, the regulation of the personal liability of those officials cannot be justified merely by the above arguments. The personal liability of a public authority must be above all acceptable in constitutional terms and in compliance with the requirements arising from the European Community law.

## 5. Constitutional requirements for personal liability of officials

Pursuant to the Constitution of the Republic of Estonia, the state authority must act lawfully (§ 3 (1) of the Constitution) and all state bodies must guarantee the protection of people's rights and freedoms (§ 14 of the Constitution). If the state is unable to meet those requirements, the state as based on the rule of law is obliged to ensure compensation for the damage caused by the unlawful activities of the state authority. The right to compensation for damage is a fundamental right in Estonian legal order (§ 25 of the Constitution).<sup>\*23</sup> The Constitution does not regulate this right exhaustively and does not preclude the provision of limitations of the liability and factors excluding the liability by law. However, the provisions in conjunction with each other imply that the liability for the lawful performance of public law functions lies above all with the state. Exceptions to the state liability are permitted only in exceptional cases and on the bases provided by law. In addition, the making of an exception must be substantively justified.<sup>\*24</sup>

Delegation of the state authority can only be permitted when the public authority created by the state is able to protect the rights of individuals at least to the same extent as the state. The Administrative Cooperation Act that entered into force in 2003 and specified the conditions of and procedure for authorising natural and legal persons to independently perform administrative duties prescribes as one condition that a legal person or a natural person may be granted the authority to perform an administrative duty if the grant of authority to perform the administrative duty will not harm the rights of persons in respect of whom the administrative duty is to be performed.<sup>\*25</sup> The main objective of state liability is to ensure the protection of the rights of an injured person. An injured person must have an opportunity to file the claim for compensation for damage against the person who is capable of satisfying the claim.<sup>\*26</sup> Exclusion of state liability may not jeopardise the exercise of the fundamental right provided in § 25 of the Constitution. It would be the case if the possibilities of a person who has suffered damage as a result of the acts of a public authority who is a natural person to obtain compensation for damage from this public authority are less secured than they would be if the state were liable for the same damage.<sup>\*27</sup> Hence, the personal liability of the official is acceptable in terms of constitutional law only if the liability of the state is substituted for a comparable liability system that is capable of offering protection equivalent to that of the state.<sup>\*28</sup>

Pursuant to § 12 (3) of the SLA, the state, as a rule, remains liable to citizens upon authorisation of a natural person or private law legal person to perform public duties by the state unless otherwise provided by a

<sup>22</sup> The same conclusion was also reached when processing the German draft State Liability Act, in which it was considered to substitute the personal liability of notaries for the state liability but the idea was abandoned in the interests of retaining the principles of office. See S. Zimmermann, *Erstes Gesetz zur Änderung der Bundesnotarordnung und Staatshaftungsgesetz*. – DNotZ 1982, p. 13.

<sup>23</sup> E. Andresen (Note 12), p. 169.

<sup>24</sup> F. Ossenbühl, *Staatshaftungsrecht*, 5. Aufl. München 1998, pp. 50–51.

<sup>25</sup> Subsection 5 (1) 3) of the Administrative Cooperation Act. An English text of the Act is available at [www.legaltext.ee/et/andmebaas/ava.asp?tyyp=SITE\\_ALL&ptyyp=I&m=000&query=halduskoost%F6%F6+seadus&nups.x=0&nups.y=0](http://www.legaltext.ee/et/andmebaas/ava.asp?tyyp=SITE_ALL&ptyyp=I&m=000&query=halduskoost%F6%F6+seadus&nups.x=0&nups.y=0) (31.05.2006).

<sup>26</sup> H.-J. Papier, Article 34. – T. Maunz, G. Dürig, *Grundgesetz. Kommentar*. München 1998, § 34, paragraph 12; K. A. Bettermann, F. L. Neumann, U. Scheuner, *Die Grundrechte. Handbuch der Theorie und Praxis der Grundrechte*. Berlin 1972, p. 831.

<sup>27</sup> A. Schäfer, H. J. Bonk, *Staatshaftungsgesetz*. München 1982, § 16, paragraph 34.

<sup>28</sup> B. Stürer (Note 20), p. 1142.

specific law. The principles of professional law of notaries, bailiffs and sworn translators and their mutual relations discussed above may be considered sufficient substantive reasons justifying exceptional regulation.<sup>\*29</sup> To what extent the system of personal liability of these officials is able to offer the injured person protection equivalent to that of the state needs yet to be clarified below.<sup>\*30</sup>

## 6. European Community requirements for the personal liability of official

An official need not violate only the national official duty but also European law, which may entail a claim for compensation for damage filed on the basis of European law. This may happen, for example, when the official makes a mistake in an area harmonised by European law. However, when the activities of an official who is a natural person are in conflict with the European Community law, a question arises whether the member state should be liable for the mistake of the official or the national legislator may provide that the official is personally liable for causing the damage.

It is common to refer only to the liability of the member state. Conflicting opinions concerning this issue prevailed for a long time in the federal republics of Germany and Austria where the same question primarily arises in relation to the independent liability of the federal states (*Bundesländer*).<sup>\*31</sup> The European Court of Justice answered the question in the judgment *Konle v. Austria* dated 1999, adopting the position that the member state may determine by its legislation what public authority is liable to the injured person.<sup>\*32</sup> In this and in the subsequent judgment *Haim v. Kassenzahnärztliche Vereinigung Nordrhein*<sup>\*33</sup>, the European Court of Justice still additionally emphasised that the ultimate liability rested with the member state. Namely, the member state is obliged to ensure that it is possible for the person to obtain compensation for the damage caused by violating European Community law. This obligation is imposed on the member state regardless of which public authority is liable for the violation and regardless of which public authority should compensate for the damage pursuant to the law of the member state. The member state may not release itself from the liability, relying on the liability between public authorities as determined on the basis of national law or on the division of the state authority. Neither can the member state protect itself by arguing that the public authority causing the damage did not have the necessary competence, knowledge, means or resources.<sup>\*34</sup>

Starting from its first judgments concerning the liability of the member states, the Court of Justice has also stressed that the national substantive and procedural law provisions relating to compensation for damage may not lead to a situation in which it is excessively difficult or downright impossible for the injured person to obtain compensation in practice.<sup>\*35</sup> Neither may the prerequisites for a claim for compensation for damage arising from the EC law be less favourable or discriminating, compared to the prerequisites for a national claim for compensation for damage.<sup>\*36</sup> The member states may thus decide on the division of state authority and the liability between public authorities independently, but only on condition that national law ensures efficient protection of the rights granted to individuals by the EC legal order and the exercise of those rights is not more difficult than the use of similar rights deriving from national law.<sup>\*37</sup>

Although the federal state (*Bundesland*) was the person liable in the case *Konle v. Austria* and a public legal person in the case *Haim v. Kassenzahnärztliche Vereinigung Nordrhein*, the Court of Justice reassured in the latter judgment that any public authority separate from the state could serve as the person liable.<sup>\*38</sup>

<sup>29</sup> See H.-J. Papier. Article 34 (Note 26), § 34, paragraph 279, who finds that the personal liability of notaries is justified by their independence, the fact that the injured person is not obliged to use the services of a particular notary but may choose a notary suitable for him or her as well as by the obligation of indemnity insurance that covers the risks related to the office to the required extent.

<sup>30</sup> See Chapter 7 of the article.

<sup>31</sup> See for references to sources J. Gundel. Die Bestimmung des richtigen Anspruchsgegner der Staatshaftung für Verstöße gegen Gemeinschaftsrecht. – DVBl. 2001, p. 96, footnotes 7–8.

<sup>32</sup> See case C-302/97, *Konle v. Austria*. – ECR 1999, p. I-3099, paragraph 62; see also A. Lengauer's comment on the case *Konle v. Austria*. – CMLR 2000 (37), pp. 181–190.

<sup>33</sup> Case C-424/97, *Haim v. Kassenzahnärztliche Vereinigung Nordrhein*. – ECR 2000, p. I-05123, paragraph 27 et seq.

<sup>34</sup> *Ibid.*, paragraph 28.

<sup>35</sup> Joined cases C-6/90 and C-9/90, *Francovich and Others v. Italian Republic*. – ECR 1990, p. I-5357, paragraph 43; joined cases C-46/93 and C-48/93, *Brasserie du Pêcheur SA v. Federal Republic of Germany and the Queen v Secretary of State for Transport, ex parte Factortame and Others*. – ECR 1996, p. I-1029, paragraph 90.

<sup>36</sup> *Ibid.*

<sup>37</sup> Case C-302/97 (Note 32), paragraph 63.

<sup>38</sup> Case C-424/97 (Note 33), paragraph 31.

Consequently, the Estonian legislator may independently determine a public authority that is liable to the injured person for violation of European Community law<sup>39</sup> and also a public authority who is a natural person may serve as such a person. However, the state must develop regulatory provisions that enable the injured person to obtain compensation.

The Court of Justice has also expressed its opinion concerning the amount of compensation. In the judgment concerning *Von Colson v. Land Nordrhein-Westfalen* dated 1984, which is better known as the request made by the Court of Justice to member state courts to interpret national acts in compliance with the European law acts, the Court also emphasised that national courts had to ensure the protection of the rights granted to individuals by EC directives and the compensation had to have a deterrent effect. To that end, the compensation must be proportional to the damage caused and not limited to purely nominal compensation.<sup>40</sup>

Hence, the national legislator does not have to guarantee for the injured person only legal mechanisms for obtaining compensation but the compensation ordered by the court must also be proportional to the damage caused to the injured person. If the member state fails to comply with these obligations phrased by the Court of Justice, the liability of the member state may be considered. Also in the case *Haim v. Kassenzahnärztliche Vereinigung Nordrhein*, the Court of Justice retained in the operative part of the judgment a reference to the liability of the member state:

Community law does not preclude a public-law body, in addition to the Member State itself, from being liable to make reparation for loss and damage caused to individuals as a result of measures which it took in breach of Community law.

## 7. Mechanisms to ensure liability of notaries, bailiffs and sworn translators in current law

It will be examined below to what extent the current regulation of the personal liability of notaries, bailiffs and sworn translators can guarantee to the injured person the right to receive compensation.

### 7.1. Conclusion of professional indemnity insurance contract: compulsory for notaries and voluntary for Chamber of Notaries

According to § 15 of the NA, each notary is required to enter into a professional indemnity insurance contract to compensate for the damage caused due to the fault.<sup>41</sup> The existence of a indemnity insurance contract is a precondition for assuming the office of a notary (NA § 10 (2)) and its continuing validity while the office is held is monitored both by the Minister of Justice within the framework of national supervision (NA § 5 (3)) and the internal audit committee appointed by the Board of the Chamber of Notaries (§ 24 (2) of the statutes of the Chamber of Notaries). The Act does not specify the sanction imposed for the absence of the indemnity insurance contract; however, as the existence of the contract is a precondition for assuming the office, its absence should serve as a cause for removal from office.<sup>42</sup>

It suffices to take a quick look at NA § 15 to notice that the indemnity insurance contract of a notary need not cover all the damage that may be caused to the injured person by violation of the official duties of the notary. Although § 15 (1) 2) prescribes the condition that the insurance contract of a notary shall fully cover the liability arising from § 14, the next clause sets the maximum amount of insurance indemnities payable during an insurance year, which is at least three million kroons (NA § 15 (1) 3)). The minimum amount of insurance coverage for one insured event shall be at least one million kroons (NA § 15 (1) 3)). Further to that, NA § 15 (2) establishes that the notary need not insure liability for intentional violation of official duties. In practice, however, it is not possible for the notary to insure himself or herself against intentional

<sup>39</sup> For example, according to the case law of the Court of Justice, German *Bundesgerichtshof* has assumed the position that the federal power, being obliged to ensure compensation for damage resulting from the violation of the EC law, is liable to the injured person in a state liability claim arising from the EC law on the national level only when the same arises from GG § 34 (1). BGH, Urteil vom 2.12.2004, III ZR 358/03. – DVBl. 2005, pp. 371–373.

<sup>40</sup> Case 14/83, *Von Colson v. Land Nordrhein-Westfalen*. – ECR 1984, p. 1891, paragraph 28.

<sup>41</sup> Laws on notary, bailiff and sworn translators use in Estonian the term ‘professional insurance contract’ and in English the term ‘professional liability insurance contract’, the Law of Obligations Act the term ‘liability insurance contract’.

<sup>42</sup> NA § 17 (2) 4) sees as one of the reasons for removing a notary from his or her office, the appearance of other circumstances which make it impossible for a person to practise as a notary.

violation of official duties because according to § 452 (1) of the Law of Obligations Act, an insurer shall be released from the performance obligation if the policyholder, the insured person or the beneficiary intentionally caused the occurrence of the insured event. Any agreement which derogates therefrom is void. Hence, the notary cannot perform the obligation arising from § 15 (1) 2) and protect himself or herself fully against the liability arising from § 14. A situation in which the injured person can use insurance cover in the case of the negligent violation of notary's duties but not in the case of intentional violation cannot be substantially justified.

The risks not managed by the compulsory indemnity insurance contract entered into by the notary should be borne either by the Chamber of Notaries or the state. The legislator has been very clear in NA § 14 (4) that the state shall not be liable for damage caused by a notary. It also appeared above that the introduction of the liability of the state would significantly change the underlying foundations of the professional law of notaries.<sup>\*43</sup> At the same time, the legislator has not imposed the obligation to enter into an additional indemnity insurance contract to ensure notary's liability on the Chamber of Notaries either. According to the wording of NA § 15 (3), the Chamber of Notaries only 'may enter' into additional insurance contracts to secure the compensation for damage caused by a notary.

We must still ask whether the Chamber of Notaries should — regardless of the fact that the current law only provides for competence, not for obligation — nevertheless enter into an additional insurance contract based on other provisions and spirit of the Act.

One of the main tasks of the Chamber of Notaries is to stand for the good reputation of the office of the notary. Thus, NA § 44 (1) 1) sets out as the objective of the Chamber of Notaries to monitor that notaries execute their professional activities in a conscientious and correct manner, comply with professional ethics and act in a dignified manner. For example, in 1969, when the federal Notaries Act (*Bundesnotarordnung*) of Germany — unlike the amendments introduced in 1982<sup>\*44</sup> — did not stipulate yet the obligation of the Chamber of Notaries to enter into an insurance contract, the German *Bundesgerichtshof* assumed the position that the task of the Chamber of Notaries to monitor the conduct of notaries and the reputation of the office of a notary also encompassed the obligation of the Chamber of Notaries to see that compensation is secured for the damage caused by a notary.<sup>\*45</sup> It should be emphasised here that just like the state and notaries, the Chamber of Notaries is also, on the basis of § 14 of the Constitution, obliged to protect the rights and freedoms of individuals. Hence, as to the tasks of the Chamber of Notaries, we cannot speak about the need to protect the reputation of the office of a notary but, above all, the obligation to protect the rights of individuals.

The Chamber of Notaries can naturally act only within the framework provided by the state. The legislator need not regulate all the issues that relate to holding the office of a notary but it must make decisions on the most important principles affecting the office of a notary. The state must see to the operation of the notaries' offices as a system. This includes the obligation of the state to ensure that the protection of the rights of individuals is not undermined as a result of delegation of state authority. In the remaining part, the Chamber of Notaries as a public corporation can act pursuant to the guidelines given by the state based on the principles of self-government. The Chamber of Notaries is guided in its activities by law and its statute.<sup>\*46</sup> In addition to the areas listed in the NA, the statute of the Chamber of Notaries governs other issues falling within the sphere of competence of the Chamber of Notaries' (NA § 43 (3)). The current statute does not concern the topic of indemnity insurance. As the entry into additional indemnity insurance would affect the amount of the obligatory payments made by notaries to the Chamber of Notaries, only a meeting of the Chamber of Notaries could decide on the issue of entry into an indemnity insurance contract due to the requirements contained in the statute.<sup>\*47</sup> The Chamber of Notaries thus has no procedural impediment to conclude an additional insurance contract. A problem occurs, however, when notaries do not agree to the increase of compulsory payments and vote against the entry into indemnity insurance contract. As this is not solely an internal issue of the office of notaries, but above all a constitutional problem concerning the protection of the rights of individuals, the legislator cannot leave it for the Chamber of Notaries to decide but must resolve this as an issue relating to the protection of the fundamental rights of individuals by law.

<sup>43</sup> See Chapter 4 of the article.

<sup>44</sup> Erstes Gesetz zur Änderung der Bundesnotarordnung vom 7.8.1981. — BGBl. 1981 I, p. 803.

<sup>45</sup> BGH, DNotZ 1969, 637; Allgemeinen Richtlinien der Bundesnotarkammer für die Berufsausübung der Notare, § 11. — DNotZ 1963, p. 130.

<sup>46</sup> Statute of the Chamber of Notaries. Approved by Minister of Justice regulation No. 44 of 4.06.2003. — Riigi Teataja Lisa (Appendix to the State Gazette) 2003, 71, 1030. The statute is adopted by a meeting of all the notaries of the Chamber of Notaries and the statute is approved by the Minister of Justice.

<sup>47</sup> Subsection 7 (2) 5) of the statute of the Chamber of Notaries. Yet on the basis of § 7 (1) of the statute, a meeting of the Chamber of Notaries may include in its agenda and decide on any issue falling within the sphere of competence of the Chamber of Notaries.



## 7.2. Obligation of bailiffs to enter into professional indemnity insurance contract

The BA also imposes on bailiffs the obligation to enter into professional indemnity insurance contracts, the performance of which shall be monitored by the Minister of Justice (BA § 31 (1) 4)). Unlike the NA, the existence of a indemnity insurance contract is not a precondition for assuming the office of a bailiff and its absence does not serve as grounds for removal from office either.<sup>\*48</sup>

The indemnity insurance contract for a bailiff must cover the damage occurring due to the fault when performing the official duties, with the condition that the minimum amount of insurance coverage for an insured event is at least one million kroons, and the maximum amount of insurance indemnities paid during an insurance year is at least one million kroons. Bailiffs need not insure liability for intentional breach of official duties (BA § 7 (1) 3)). Unlike insurance of notaries' liability, BA § 7 (1) 4) provides for the possibility of bailiff's own liability on the condition that excess for one insured event shall not exceed 10,000 kroons.

Bailiffs do not have a self-governed professional organisation. Decisions on the arrangements relating to the office of bailiffs are made by the plenary assembly of bailiffs comprising all bailiffs, which is not a person with legal capacity.<sup>\*49</sup> As a consequence, there is no person who could enter into an additional professional indemnity insurance contract to secure the liability of bailiffs. As § 452 (1) of the Law of Obligations Act inhibits insurance of liability arising from intentionally caused damage, the bailiffs are liable for that only with their personal assets. The same applies to claims exceeding the insurance cover.

## 7.3. Personal liability of sworn translators without professional indemnity insurance contract

Until February 2006, sworn translators were also subject to the requirement for obligatory indemnity insurance, pursuant to which sworn translators had to enter into liability insurance contracts covering all of their liability; yet the required minimum amount of insurance coverage for one insured event was not less than 100,000 kroons and the maximum amount of insurance indemnities payable during an insurance year was not less than 500,000 kroons (§ 10 (3) 2) and 3) of the earlier STA). The existence of a indemnity insurance contract was a precondition for assuming the office of a sworn translator (§ 1 (2) 1) of the earlier STA and NA § 10 (2)) and its continuing validity while holding the office was monitored by the Minister of Justice within the framework of state supervision (STA § 1 (2) 1) and NA § 5 (3)).

To date, the requirement for indemnity insurance has been abandoned. The Ministry of Justice explained the amendment, stating that the income of sworn translators was not comparable to the income of notaries and bailiffs, that is why the requirement for entry into professional liability insurance contracts was too burdensome for sworn translators and did not spark interest in holding that office.<sup>\*50</sup> The explanatory memorandum to the draft Act unfortunately arrives at an erroneous conclusion that as the intentional violation of official duties cannot be insured, the abolition of the requirement for obligatory indemnity insurance theoretically only endangers the individuals to whom a sworn translator has caused damage by violation of his or her official duties as a result of negligence, and only when the sworn translator lacks means to compensate for the damage caused.<sup>\*51</sup> As already emphasised above, the injured person may not be deprived of compensation in any cases in which the official must be held liable.

<sup>48</sup> BA § 16 (1) 5) grants the right to remove a bailiff from office if removal from office is imposed on a bailiff as a disciplinary penalty. According to BA § 39 (1) 1), a bailiff may be removed from office for an intentionally committed serious disciplinary offence, for an offence committed while a disciplinary penalty has not expired or is not cancelled, or for an indecent act which renders it impossible for the person to act as a bailiff.

<sup>49</sup> According to the explanatory memorandum of the Act, the foundation of the Chamber of Bailiffs as a public legal person was not supported because the number of bailiffs was too small for that. See Chapter 3, § 4 of the explanatory memorandum to the draft Bailiffs Act, Code of Enforcement Procedure and State Fees Act Amendment Act. Available at [web.riigikogu.ee/ems/saros-bin/mgetdoc?itemid=023530008&login=proov&password=&system=ems&server=ragne11](http://web.riigikogu.ee/ems/saros-bin/mgetdoc?itemid=023530008&login=proov&password=&system=ems&server=ragne11) (31.05.2006) (in Estonian).

<sup>50</sup> See clause 3.9.2 of the Marital Property Register Act, Bailiffs Act, Law of Maritime Property Act and other Acts Amendment Act. Available at [web.riigikogu.ee/ems/saros-bin/mgetdoc?itemid=053210006&login=proov&password=&system=ems&server=ragne11](http://web.riigikogu.ee/ems/saros-bin/mgetdoc?itemid=053210006&login=proov&password=&system=ems&server=ragne11) (31.05.2006) (in Estonian).

<sup>51</sup> *Ibid.*

## 8. Possibilities of improving the system of personal liability of independent public officials

There are undoubtedly several practical reasons for such a clearly poor situation. One of such circumstances may be the shortage of suitable insurers. Intentional violation of official duties gives rise to a legal impediment in the form of § 452 (1) of the Law of Obligations Act. However, these arguments do not alleviate the constitutional problem. The amount of income of the independent public official or the difficulties of the state in finding those officials are not relevant for the person suffering damage as a consequence of violation of official duties. The problems of insufficient supply of insurers offering favourable conditions and the failure of insurers to insure the damage caused by intentional violation of official duties do not limit to any extent the fundamental right of a person to compensation for damage. Therefore, we must find a solution that takes account of the problems evident in practice but would afford the injured person protection equivalent to state liability, unlike in the present situation.

The suggestions presented below do not represent ready-made solutions. Rather, they are aimed at creating a discussion to find suitable measures for ensuring the required liability of each official. The ultimate solutions depend on the actual acuteness of the situation and the options available. Unfortunately, neither the public nor the author of the article are aware of the number of claims filed against these three officials during their practice to date and to what extent they have been satisfied, nor are they aware of the amount of an average income of such officials. Starting from 2006, the information concerning claims should be communicated to the Ministry of Justice.<sup>\*52</sup>

### 8.1. Expansion of obligation to enter into professional indemnity insurance contracts

Subsection 452 (1) of the Law of Obligations Act does not enable an independent public official to insure the liability arising from the intentional violation of his or her official duties.<sup>\*53</sup> Hence, it is not possible to cover by indemnity insurance contracts of notaries and bailiffs the whole of the liability risk arising from their office. As regards notaries, the Chamber of Notaries could insure the liability related to the intentional violation of notaries' official duties. In such a case, the insured person would not be a notary but the injured person (§ 463 of the Law of Obligations Act). For example, in Germany, the Chambers of Notaries are also required by law to enter into so-called fidelity insurance contracts (*Vertrauensschadenversicherungsverträge*), the object of which is insurance of the intentional violations of the official duties of notaries.<sup>\*54</sup> The Chamber of Notaries is regarded as a policyholder and the injured person as an insured person<sup>\*55</sup> and there are no problems with provisions similar to the German Insurance Contracts Act.<sup>\*56</sup>

The conclusion of the indemnity insurance contract provided for in NA § 15 (3) should be made obligatory for the Chamber of Notaries. The Act should also specify the more precise objective of such a contract. An indemnity insurance contract to be concluded by the Chamber of Notaries should not copy in vain the insurance contract to be entered into by the notary but must protect the injured persons against risks not covered by the insurance contract of a notary. In addition to the cases of intentional violation of the official duties of a notary, the indemnity insurance contract to be concluded by the Chamber of Notaries should offer the injured person protection also when the amount of damage exceeds the maximum amount prescribed for insurance indemnities in the insurance contract of the notary.

Thus, in order to secure the liability of a notary, an obligatory two-pillar liability insurance system should be created in which the indemnity insurance contract to be concluded by the notary serves as one pillar and the indemnity insurance contract to be entered into by the Chamber of Notaries serves as another pillar.

<sup>52</sup> On the basis of the amendment that entered into force in February 2006, notaries and bailiffs must inform the Ministry of Justice about any circumstances that may give rise to the obligation to compensate for damage, as well as about the submission of a claim for compensation for damage and about payment of indemnity to the injured person (NA § 15 (4) and BA § 7 (4)). A sworn translator must inform the Ministry of Justice about the commencement of judicial proceedings related to the alleged violation of his or her official duties (STA § 10 (3)).

<sup>53</sup> Subsection 452 (1) of the Law of Obligations Act: "An insurer shall be released from the performance obligation if the policyholder, the insured person or the beneficiary intentionally caused the occurrence of the insured event. Any agreement which derogates therefrom is void."

<sup>54</sup> Clause 3 of subsection 67 (2) of the German Federal Notaries Act (*Bundesnotarordnung*, BNotO).

<sup>55</sup> H. Weingärtner, H. Schöttler. *Dienstordnung für Notare. Kommentar*. 6. Aufl. 1993, paragraph 559a; S. Zimmermann. *Erstes Gesetz zur Änderung der Bundesnotarordnung und Staatshaftungsgesetz*. 2. Teil. – DNotZ 1982, p. 94; L.-C. Wolff. *Notarhaftung: Die sogenannte Vertrauensschadenversicherung und der Vertrauensschadensfonds der Notarkammern*. – VersR 1993, p. 275.

<sup>56</sup> Cf. §§ 61 and 79 of the German Insurance Contracts Act (*Versicherungsvertragsgesetz*, VVG).

## 8.2. Other possible measures

The situation is more complicated when it comes to bailiffs and sworn translators. The number of these officials is smaller compared to notaries. As they are new institutions founded only a couple of years ago, they are also less stable. Bailiffs and sworn translators do not have representative organisations for entering into indemnity insurance contracts and only officials themselves personally can enter into insurance contracts. Such contracts do not cover the liability arising from intentional violations or the damage exceeding the rates prescribed by personal indemnity insurance contracts.

The limited number of those independent public officials and the absence of the public law person uniting them render the identification of supplementary measures difficult. In the case of a public law corporation it would be feasible to establish a indemnity insurance foundation by that legal person, into which the officials would make mandatory payments that would be used solely for paying indemnities. The objective of the foundation could be to compensate the injured persons above all for the damage caused by the intentional act of an official and ensure credibility in the eyes of public. This would cover an important risk that is not included in the personal insurance contract of officials. For example, in Germany, a so-called fidelity insurance foundation (*Vertrauensschadensfond*) has been founded by the Federal Chamber of Notaries (*Bundesnotarkammer*) to secure the liability of notaries.<sup>57</sup> As the number of both bailiffs and sworn translators is small in Estonia, payments into the foundation would probably prove disproportionately burdensome for each individual official. If the obligation to enter into the insurance contract proved economically too burdensome for sworn translators, they would be unable to establish the insurance foundation even if they wished to do that very much.

However, it must be re-emphasised that the state cannot disregard such problems. Even if the officials cannot insure the damage caused by them either for legal or economic reasons, the state continues to have the obligation to protect the fundamental rights of persons. In such cases, the state must assume the obligations that the independent public officials cannot or are unable to perform. One option would be to substitute the personal liability of those officials for the state liability. The introduction of only one such change would affect the entire model of those professional laws and would inhibit the implementation of other principles of the office — above all, the mandatory independence of the official. This would, *inter alia*, raise the question of whether the present procedure for remuneration of officials would remain justified. A more lenient measure would be the assumption by the state of the obligation to enter into indemnity insurance contracts of bailiffs in part and the obligation to enter into indemnity insurance contracts of sworn translators in part or in full. Here we could also consider insurance of the insured risk of the injured person as a third party. If the state takes the role of a policy holder, this may also bring about infringement of the principle of independence of the official; however, no principle of holding the office can be absolute and the need to protect the fundamental rights of individuals would definitely justify the imposition of limitations on that principle. It should be possible to prevent by legislation the state from achieving other goals through the insurance relationship and from unjustified interference with the official duties.

## 9. Conclusions

Above all, the state must be liable to the injured person for the damage caused by unlawful performance of public duties. Although the Constitution of Estonia and the law of the European Communities enable the state to appoint other public authorities to be liable to the injured person, the state retains the right to ensure that it is possible for the injured person to exercise the right to be compensated for damage.

Estonian notaries, bailiffs and sworn translators are personally liable for the damage caused by violation of their official duties. However, the liability insurance contracts of notaries and bailiffs do not cover the risks associated with these offices as much as required, whereas sworn translators lack mechanisms for securing personal liability altogether. Such a legislative situation does not grant the persons who have relations with

<sup>57</sup> The objective of the foundation is to ensure that it is possible for the injured person to receive a fair compensation ultimately after the indemnities payable by the insurer have been paid. For instance, if the notary violated his or her official duty out of negligence, the injured person may first be indemnified in the maximum amount determined by the indemnity insurance contract of the notary and if this does not cover the damage caused, the injured person will also receive indemnity on the basis of the indemnity insurance contract to be entered into by the Chamber of Notaries. However, when the official duties of the notary are violated intentionally, the injured person can receive the indemnity only on the basis of the indemnity insurance contract of the Chamber of Notaries, which may not cover all of the damage. Therefore, the objective of the foundation is to provide for additional means to compensate for the damage caused by the intentional act of the notary. B. Stürer (Note 20), p. 1142. When responding to the objections made by the notaries, the German Federal Constitutional Court assumed the position that the obligatory participation in such a foundation was in compliance with the Constitution. See BVerfG, Urteil vom 21.4.1983. – DNotZ 1983, pp. 502–503; the same conclusion has been reached also in literature. See B. Stürer (Note 20), p. 1141 et seq.

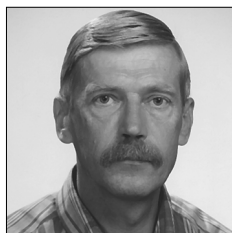
such officials enough security and do not allow for the protection of the rights of individuals. Hence, the constitutional requirements for the personal liability of the relevant independent public officials are not met in law and the legislator should fill the gaps found in the liability system of these officials. If the state releases itself from the liability when delegating state authority, yet fails to secure the liability of public officials, the state may find itself being liable on new grounds.<sup>\*58</sup>

The enhancement of the system of personal liability of notaries, bailiffs and sworn translators is not only an important issue for the state but for the officials themselves. The mechanisms managing the risks related to the office also provide a sense of security to the officials that they have been protected against their mistakes. This also serves to protect the reputation of the offices as some unfortunate case may bring about distrust for all independent public officials. An alternative to the enhancement of the personal liability of those officials would be substitution of such liability for state liability but this may give rise to the need to change the entire organisation of the office.

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<sup>58</sup> This may concern compensation for damage caused by the failure to issue legislation of general application. According to § 14 (1) of the SLA, a person may claim compensation for damage caused by legislation of general application or the failure to issue it, only if damage was caused by the sufficiently serious violation of the duties of the public authority, the provision serving as the basis for the obligation violated is directly applicable, and the person belongs to the group of individuals suffering special loss as a consequence of the legislation of general application or the failure to issue it.





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# Discretion of Interests in Planning Procedure:

## Legal Protection and Abuse of Discretion

### 1. General

Plans are part of the definition of administrative discretion and form a special type of discretion called planning discretion.<sup>\*1</sup> This is characterised by the great amount of freedom enjoyed by an administration in the preparation and adoption of relevant plans. In general it is not based on conditionally formulated laws, regulations or administrative provisions, but instead upon planning law, where relevant objectives and principles of balancing various interests are laid down with a view of reaching the final goal. In order to ensure the attainment of relevant objectives, an administrative body can use its discretion with regard to a whole catalogue of choices. That specific character of planning discretion was also underlined by the Chamber of the Supreme Court, which has pointed out that planning procedure is characterised by a wide discretion space.<sup>\*2</sup>

Preparation and adoption of spatial plans is regulated in Estonia by the Planning Act<sup>\*3</sup> (PA), which entered into force on 1 January 2003. The Act lays down the types of plans as follows:

- 1) a national spatial plan, which is prepared with the aim of defining the prospective development of the territory of the state and the settlement systems located therein in a generalised and strategic manner;
- 2) a county plan, which is prepared with the aim of defining the prospective development of the territory of a county in a generalised manner and determining the conditions for the development of settlement systems and the location of the principal infrastructure facilities;
- 3) a comprehensive plan, which is prepared with the aim of determining the general directions of, and conditions for, the development of the territory of a rural municipality or city, and of setting out the bases for the preparation of detailed plans for areas and in the cases where detailed plan-

<sup>1</sup> K. Merusk. *Administratsiooni diskretsioon ja selle kohtulik kontroll* (Discretion of an Administration and Judicial Control). Tallinn 1997, p. 95 (in Estonian).

<sup>2</sup> Administrative Law Chamber of the Supreme Court decision 3-3-1-54-03. – *Riigi Teataja* (State Gazette) III 2003, 31, 317 (in Estonian).

<sup>3</sup> *Planeerimisseadus*. – *Riigi Teataja* (State Gazette) I 2002, 99, 579; 2006, 14, 112 (in Estonian).

ning is mandatory, and for the establishment of land use provisions and building provisions for areas where detailed planning is not mandatory;

- 4) a detailed plan, which is prepared with the aim of establishing land use provisions and building provisions for cities and towns and for other areas and in other cases where detailed planning is mandatory.

People have the most direct contact with detailed plans; hence the following discussion is mainly about detailed planning.

## 2. Constitutional basis of local government's planning rights

Pursuant to § 154 (1) of the Constitution, all local issues are resolved and managed by local governments, which operate independently pursuant to law. This provision endows local governments with universal powers ("all local issues"), independence, and the sole responsibility for the resolution and management of issues ("resolved and managed [...] independently"), as well as the legal basis for operations ("operate [...] pursuant to law").<sup>4</sup> Establishment of land use provisions and building provisions on the territory of a local government is certainly a local issue. Hence, the Constitution has endowed local governments with the freedom to design plans, which, however, cannot be absolute, as a local government can operate only within the law. At the same time, the limitations placed on local governments cannot reduce the freedom to design plans to zero. The relevant limitations must be proportional, leaving sufficient discretion space for the local government.

## 3. Limitations under substantive law

The restrictions under substantive law lie first and foremost in the Constitution. The discretionary space is opened here for the administration by the limitation clauses of different fundamental rights, also laying down at the same time its legal restrictions and relevance to substantive law. Section 11 of the Constitution allows restriction, i.e. invasion, of fundamental rights under three conditions:

- 1) rights and freedoms may be restricted only "in accordance with the Constitution";
- 2) restrictions must be "necessary in a democratic society";
- 3) restrictions shall not "distort the nature of the rights and freedoms restricted".<sup>5</sup>

The following fundamental rights are especially relevant to the planning procedure: the right to free self-realisation (Constitution § 19), the right to the protection of health (Constitution § 28), the right to engage in enterprise (Constitution § 31) and the right of ownership (Constitution § 32). For example § 31 of the PA allows for the expropriation of an immovable in order to implement an adopted comprehensive or detailed plan. Pursuant to § 30 of the same Act, at the request of the owner of an immovable or a part thereof located in an existing built-up area, the local government is required to purchase the immovable for immediate and fair compensation, if an adopted detailed plan or comprehensive plan prescribes use of the immovable or a part thereof for public purposes, or significantly restricts the current use of the immovable, or renders its current use impossible.

Relevant also is § 5 (the natural wealth and resources of Estonia are national riches which must be used economically) and § 53 (everyone has a duty to preserve the human and natural environment) of the Constitution.

Restrictions pursuant to substantive law also arise from the PA and specific laws. In preparation and adoption of plans, the local governments must be guided by the objectives and discretion principles provided in the PA. The PA sets forth the general aim of a detailed plan — land use provisions and building provisions for cities and towns (§ 2 (4)) and gives the list of specific objectives, which includes 16 positions (§ 9 (2)). The issue of how legally binding the objectives are has also been pointed out by the Chamber of the Supreme Court, who has taken the position that if the aim of initiation of the plan is unlawful, then this serves as a basis for contesting that initiation. The court doubted that the objective of the initiation of the plan — the

<sup>4</sup> R. Narits, H. Schneider, L. Madise, K. Merusk et al. *Eesti Vabariigi põhiseadus. Kommenteeritud väljaanne* (Republic of Estonia Constitution. Commented Edition). Tallinn 2002, p. 642 (in Estonian).

<sup>5</sup> R. Alexy. *Põhiõigused Eesti põhiseaduses* (Fundamental Rights in the Republic of Estonia Constitution). – *Juridica* eriväljaanne 2001, p. 35 (in Estonian).

municipalisation of the land — could be unlawful, since the land in question cannot, in principle, be municipalized.<sup>6</sup> The given example is rather an exception than a rule, since aims of plans are provided quite loosely in the Act, and as a rule local governments do not deviate therefrom.

The PA deals with the principles of planning quite tersely. Planning activities are public, pursuant to § 3 (1) of the Act (principles of planning). Public disclosure is mandatory in order to ensure the involvement of all interested persons and the timely provision of information to such persons, and to enable such persons to defend their interests in the process of planning. It is not so much a principle of discretion, as a principle of procedure. Certain very general principles of discretion can be found in § 1 (3) of the Act, where the definition of spatial planning is given — spatial planning (hereinafter planning) is democratic and functional long-term planning for spatial development, which co-ordinates and integrates the development plans of various fields and which, in a balanced manner, takes into account the long-term directions in, and needs for, the development of the economic, social, cultural and natural environments.

Since the PA does not expressly make a provision for discretion of interests, then the Supreme Court has pointed out in its decisions the need to apply the discretion principles provided in the Administrative Procedure Act to the discretion of interests, even if the PA, as a specific law, contains no relevant reference to the Administrative Procedure Act.<sup>7</sup> Pursuant to § 4 (2) of the Administrative Procedure Act<sup>8</sup>, discretion shall be exercised in accordance within the limits of authorisation, the purpose of discretion and the general principles of justice, taking into account relevant facts and considering legitimate interests.

Under substantive law, special laws and higher level plans with which the detailed plans must comply with, are also relevant. Limits under substantive law leave sufficient discretionary space to the local municipality.

## 4. Limits under procedural law

Planning procedure is an open procedure where disclosure is mandatory for an administration in order to ensure the participation of interested parties, timely information, and the possibility to protect one's interests in the course of the preparation of a plan.

Anyone may make a proposal for initiation of the preparation of a plan (PA § 10 (1)), the local government initiates and prepares a detailed plan. The PA allows for the transfer of the preparation of the plan, on a basis of a contract, to a person interested in the preparation thereof, except for areas under nature conservation or heritage conservation or in cases where the detailed plan is not prepared in compliance with the adopted comprehensive plan, or in cities divided into city districts, with the comprehensive plan adopted for the respective city district (PA § 10 (6)). Transferring the preparation of the plan to an interested person in private law allows, on one hand, to significantly conserve the local government's financial resources and thereby decrease the burden on the budget. On the other hand, the real estate developer's cogent personal interest is thereby already coded into the aim of the preparation of the detailed plan, which does not necessarily coincide with the interest of others or the public. In addition to the right to make a proposal for initiation of the preparation of a detailed plan, the PA also provides for several other rights of the interested persons, which are legally binding for a local government. The following are the most important:

- 1) The right to be informed. Which includes the local government's obligation to inform the public of any proposed comprehensive planning and detailed planning at least once a year in a relevant newspaper (PA § 11 (1)). The same is also applicable in regard to the initiation of the plan, where the public must be informed in a newspaper about the initiation of the plan, as well as provided information on the size and location of the planning area, and communicated the objectives of the initiated planning (PA § 12 (1)). Persons whose subjective rights the proposed detailed plan may prejudice are under special protection. For example, if it is known upon the initiation of the detailed planning that the initiated detailed planning may bring about a need to transfer immovables or parts thereof, the local government shall, by way of registered letter, inform the owners of the relevant immovables of the initiation of the preparation of a detailed plan, within two weeks, as of the date on which the decision to initiate planning is made (PA § 12 (4)). The local government must also inform the residents of the public display of the plan (PA § 18 (6) and (7)) and of the public discussion regarding the detailed plan, if written proposals or objections concerning the detailed plan were received during the public display thereof (PA § 21 (1) and 2)).
- 2) The right to participate. Residents and owners of immovables located in the area, as well as other interested persons, must be involved in the preparation of comprehensive and detailed plans (PA

<sup>6</sup> Administrative Law Chamber of the Supreme Court decision 3-3-1-44-05. — Riigi Teataja (State Gazette) III 2005, 33, 332 (in Estonian).

<sup>7</sup> Administrative Law Chamber of the Supreme Court decision 3-3-1-54-03 (Note 2).

<sup>8</sup> Haldusmenetluse seadus. — Riigi Teataja (State Gazette) I 2001, 58, 354; 2005, 39, 308 (in Estonian).

§ 16 (1)). The need to organise public discussions to publicise the initial detailed planning outline and the draft plans must be determined by the local government. At least one public discussion must be organised if the detailed plan is prepared for an area under heritage or nature conservation, a region of significant urban development potential, or an area concerning which a corresponding proposal was made in the course of processing the plan (PA § 16 (3)).

- 3) The right to be heard. The Supreme Court has expressed its position in this regard that due to the peculiarity — the wide discretionary space — of planning decisions, the timely participation and hearing of a person has a bigger role in the planning procedure in comparison with regular administrative procedure.<sup>9</sup> After the decision to adopt the plan, the local government must organise a public display of the plan, in the course of which everyone has the right to present proposals and objections concerning the plan (PA § 20 (1)). If written proposals and objections concerning the detailed plan have been received during the course of the public display, then the local government must organise a public discussion regarding a detailed plan within one month after the end of the public display (PA § 21 (1)). Information about the outcome of the public display and public discussion must be published in a relevant newspaper (PA § 21 (4)).
- 4) The right to review documents. During the time the plan is on public display, all interested persons must have access to all material and information related to the plan in the possession of the local government administering preparation of the plan (PA § 18 (8)).
- 5) Justification of the adoption of the plan. The PA does not expressly provide for the obligation to justify the decision. The relevant obligation arises from the Administrative Procedure Act, which sets forth that an administrative act must be justified in writing (APA § 56 (1)) and the reasoning for the issue of an administrative act issued on the basis of the right of discretion must set out the considerations from which the administrative authority has proceeded upon issue of the administrative act (APA § 56 (3)). The Supreme Court has provided in this regard that lack of motivation makes it impossible for the interested parties who participate in the planning procedure, to check the rationality behind the refusal to take the proposals into consideration and contest the motives thereof.<sup>10</sup> The Supreme Court has, *inter alia*, found that the justification of an administrative act must convince the court that the administrative authority has taken all significant facts and interests into consideration when realising its discretion, and that the discretion has been rational.<sup>11</sup>

The Supreme Court has repeatedly underlined the special significance of procedural and formal requirements in planning procedure.<sup>12</sup>

## 5. Discretion of interests

According to the nature of planning discretion, the discretion of interests is an obligation of the administration; this has also been underlined by the Supreme Court<sup>13</sup>, who pointed out that in case of a conflict of interests, the interests of all parties must be weighed in the course of the procedure in order to reach the most optimal solution and, if possible, take them into account.<sup>14</sup> Very different and contradicting interests compete in the planning procedure; both private interests as well as public. Among private interests not only do subjective public rights have to be weighed, but also all those interests, which are not objectively of little importance and worth protecting.

### 5.1. Discretion of interests as a communication problem

The aim of a planning procedure is to ensure that all interested parties are involved in the proceedings and their interests are taken into account. This, in turn, requires substantial communication with the aim of convincing the different parties and to reach mutual understanding. This ensures, first, the detection of interests and facts worth weighing and, second, enables the reaching of optimal interests acceptable to all parties, which considerably facilitates the making of discretionary decisions and enables the preclusion of future litigation.

<sup>9</sup> Administrative Law Chamber of the Supreme Court decision 3-3-1-8-02. – Riigi Teataja (State Gazette) III 2002, 7, 61 (in Estonian).

<sup>10</sup> Administrative Law Chamber of the Supreme Court decision 3-3-1-54-03 (Note 2).

<sup>11</sup> Administrative Law Chamber of the Supreme Court decision 3-3-1-42-02. – Riigi Teataja (State Gazette) III 2002, 25, 284 (in Estonian).

<sup>12</sup> Administrative Law Chamber of the Supreme Court decision 3-3-1-8-02 (Note 9); Administrative Law Chamber of the Supreme Court decision 3-3-1-54-03 (Note 2).

<sup>13</sup> Administrative Law Chamber of the Supreme Court decision 3-3-1-62-02. – Riigi Teataja (State Gazette) III 2002, 30, 330 (in Estonian).

<sup>14</sup> Administrative Law Chamber of the Supreme Court decision 3-3-1-8-02 (Note 9).



An administration can consider relevant interests, if those are known to it or made known to it by interested parties. In this regard the Supreme Court has pointed out that if the existing information is not sufficient to make a lawful and just discretionary decision, then the local government must gather more information to make a decision by involving the preparer of the plan and also, if need be, other relevant persons. This problem is especially relevant in connection with environmental impact. When environmental interests have been weighed, then the Supreme Court has, regardless of whether the law has explicitly required the initiation of an environmental impact assessment, taken the position that if insufficient information is available about environmental impact, then it is feasible to initiate an environmental impact assessment.<sup>\*15</sup>

In order for the administration to take the persons' interests into consideration, weigh them and thereby find optimal solutions, the person must motivate its interests, i.e. present arguments to protect his or her position, showing, if possible, the negative outcome of the invasion of interests. In this connection the Supreme Court has explicitly noted that **all justified interests** must be taken into consideration in the course of planning.<sup>\*16</sup> The readiness of a person for flexible solutions is also important here. Mere objections and lack of willingness to communicate do not ensure that the person's interests are taken into account. The Supreme Court has pointed out in this regard that in the course of hearing a plan, for example, unwillingness or failure of any party in the procedure to reach an agreement should not be decisive in finding a positive solution.<sup>\*17</sup>

On the other hand, effective communication also presupposes that the answers given by the administration in response to the proposals made by the persons in the course of the planning procedure must also be motivated. Only then is a discussion possible and a rational solution can be found. Case law shows that in many cases court proceedings have been initiated namely because local governments do not give motivated responses to proposals made or motivate the decisions of adopting plans. The Supreme Court has thus found in several decisions that lack of motivation impedes interested parties from participating in the planning procedure to control the rationality of not considering a proposal, arguing with the motivation of not considering a proposal or working up public discussion about the solution for the plan.<sup>\*18</sup>

It is also important to note in this regard that the proposals and objections arising from different interests need not be in accordance with the objective of the initiated plan. Also, the Supreme Court has noted that the idea of the right to make proposals lies primarily in the fact that persons should have the possibility to defend their private or public interests, which may contradict the objectives of the initiators of the plan.<sup>\*19</sup>

## 5.2. Discretion of interests as a value judgement problem

In discretion, one of the key issues is to determine the weight of one or another interest. The planning procedure gives no preference to any one interest, this has also been underlined by the Supreme Court, who has pointed out that one aim of a planning procedure is to solve disputes related to plans and reach a balanced solution, taking into account persons' interests as well as public interest<sup>\*20</sup>; and a local government must take all material circumstances and interests into account and weigh them rationally.<sup>\*21</sup> The request for discretion arising from the planning procedure does not include substantial elements and assumes value judgements, which are not connected with the request for discretion.<sup>\*22</sup> Above all, it is important to establish the weight of a relevant interest in comparison with competing protection worthy interests, the possible negative outcome of the invasion of the relevant interests could have, and the reasons of justification. Value judgements are the basis of determination of the weight of one or another interest, as well as of the relative weight of the reasons justifying the invasion.<sup>\*23</sup> Making a lawful discretion decision presupposes such optimisation of different interests that would ensure attainment of the objective of the plan. The possibility of a situation where the protection worthy interests contradicting the objective of the plan have, by value judgement, more weight than the interests arising out of the aim of the plan (private or public interests) and the weight of the reasons justifying their invasion is relatively small, then the plan may remain unadopted as a result of the relevant discretion. The Supreme Court has found that a local municipality has no obligation

<sup>15</sup> Administrative Law Chamber of the Supreme Court decision 3-3-1-42-02 (Note 11); Administrative Law Chamber of the Supreme Court decision 3-3-1-62-02 (Note 13).

<sup>16</sup> Administrative Law Chamber of the Supreme Court decision 3-3-1-54-03 (Note 2).

<sup>17</sup> Administrative Law Chamber of the Supreme Court decision 3-3-1-62-02 (Note 13).

<sup>18</sup> Administrative Law Chamber of the Supreme Court decision 3-3-1-54-03 (Note 2); Administrative Law Chamber of the Supreme Court decision 3-3-1-42-02 (Note 11).

<sup>19</sup> Administrative Law Chamber of the Supreme Court decision 3-3-1-54-03 (Note 2).

<sup>20</sup> Administrative Law Chamber of the Supreme Court decision 3-3-1-62-02 (Note 13).

<sup>21</sup> Administrative Law Chamber of the Supreme Court decision 3-3-1-54-03 (Note 2).

<sup>22</sup> R. Alexy (Note 5), p. 40.

<sup>23</sup> R. Zippelius. *Juristische Methodenlehre*. 5. Aufl. München: 1990, pp. 54–55.

to adopt initiated and prepared plans at any cost, the detailed plan stage may result in failure to adopt the plan.<sup>\*24</sup> This may primarily occur when the negative outcome of accompanying the adoption of the plan may outweigh its possible positive results (the principle of proportionality).

Society and public opinion have started to value pristine living environments to a greater extent, which means that the protection and sustainable use of built-up areas, parks, green areas, landscapes, individual elements thereof, and natural biotic communities, has to be ensured. This does not always coincide with the local and pragmatic interests of local governments, though. Case law shows that local governments sometimes base their decisions on such interests as the development of entrepreneurship, creation of new jobs, cost saving etc., overlooking, at the same time, environmental protection and heritage protection interests. A vivid example is the so-called Jämejala case, where a rural municipality council preferred the construction of a prison facility, partly at the expense of an old park rich in species, presuming that such a solution would bring about the creation of new jobs and business to local companies. In court, the rural municipality took the position that the area covered by the detailed plan included only 20% of the forest stand, which was in fact called a park, and that the park would not be destroyed and the effects of construction could be compensated for. In weighing that case, the Supreme Court added another value, i.e. the value of the environment as is. Namely, the court found that in addition to the number of trees that would be cut down or preserved, the change of environment as a whole after the construction of the prison in the park had to be taken into account. A prison means walls, a security zone, monitoring devices, and the constant risk of emergency situations. Those phenomena cannot possibly be harmonised with the environment of a park — a natural environment that allows for peace and relaxation.<sup>\*25</sup> In several of its decisions, the Supreme Court has placed more emphasis on environmental protection interests than on other interests.<sup>\*26</sup> The Supreme Court has also considered the protection of historically environmentally valuable objects to be a prevalent interest.<sup>\*27</sup>

Yet, the Supreme Court has not taken the said value judgements as absolute, but as related to specific circumstances. The Supreme Court took, in one of its decisions, the position that the public interest in ensuring the operation of a district heating system may be more important, and outweighs the efficiency and environmental sustainability of single gas boiler plants.<sup>\*28</sup>

The European Union dimension has influenced, and will continue to influence, the shaping of value judgements, especially with regard to environmental protection related interests. It may be forecasted that developments in the European Union will add security policy and common energy policy related interests.

## 6. Protection of interests in court

### 6.1. Scope of court protection and judicial control

To also ensure the protection of one's rights and interests when the local government has not taken his or her interests into account, the PA provides the possibility to file an action with a court. It is worth mentioning here that § 26 (1) of the PA provides that every person, who finds that decision to adopt the plan was unlawful, has the right to file an action with the court, regardless of whether that decision violates his or her subjective public rights or restricts his or her freedoms. The person may, thus, also file an action with the court in the case of public interests, for example in the interests of environmental protection. This is an exceptional regulation in the Estonian legal order; as a rule, the right to complain presumes presence of subjective public right.

Judicial control over administrative discretion decisions, especially with regard to plans, is limited. The Supreme Court has thus emphasized that the court does not reevaluate the political expediency of discretion decisions, but merely controls whether the making of discretion decisions did not involve procedural or formal mistakes, which might have substantially influenced the decision, whether the discretion decision is in accordance with laws, regulations or administrative provisions and general principles of the law, whether the decision is lawfully justified and not beyond the limits of discretion, and that no other abuse of discretion is present.<sup>\*29</sup>

<sup>24</sup> Administrative Law Chamber of the Supreme Court decision 3-3-1-8-02 (Note 9); Administrative Law Chamber of the Supreme Court decision 3-3-1-42-02 (Note 11).

<sup>25</sup> Administrative Law Chamber of the Supreme Court decision 3-3-1-54-03 (Note 2).

<sup>26</sup> Administrative Law Chamber of the Supreme Court decision 3-3-1-31-03. – Riigi Teataja (State Gazette) III 2003, 18, 167; Administrative Law Chamber of the Supreme Court decision 3-3-1-13-04. – Riigi Teataja (State Gazette) III 2004, 11, 30; Administrative Law Chamber of the Supreme Court decision 3-3-1-88-04. – Riigi Teataja (State Gazette) III 2005, 10, 90 (in Estonian).

<sup>27</sup> Administrative Law Chamber of the Supreme Court decision 3-3-1-42-03 (Note 11).

<sup>28</sup> Administrative Law Chamber of the Supreme Court decision 3-3-1-84-04. – Riigi Teataja (State Gazette) III 2005, 8, 75 (in Estonian).

<sup>29</sup> Administrative Law Chamber of the Supreme Court decision 3-3-1-8-02 (Note 9).

The Supreme Court has also pointed out the fact that the court must control the lawfulness of discretion based on the motivation of an administrative act (decision to adopt a plan). The motivation of an administrative act must also convince the court that the administrative authority has, in the course of discretion, taken into consideration all important circumstances and interests, and that discretion has been rational.<sup>\*30</sup> The Supreme Court has presumed that a decision to adopt a plan should at least include a summary analysis regarding positive and negative influences arising from implementation of the plan.<sup>\*31</sup> Regarding the scope of court intervention in discretion decisions — the Supreme Court has taken the position that the court may also intervene in exercising discretion when the decision falls within the limits of discretion, but the rationality of the decision is questionable<sup>\*32</sup>, and the complainant has the right to request, above all else, the control of fair discretion of lawful benefits.<sup>\*33</sup> It can thus be said that according to the right to complain, persons have the right to ask the court to control the rationale behind discretion of different interests, and the court also controls the lawfulness of discretion based on its value judgements.

The significant difference between complaints submitted in protection of subjective public rights and the so-called populist complaints lies in the fact that in case of the first the person may also request provisional legal protection (e.g., suspend implementation of the plan), and in case of the latter this is not possible. Pursuant to § 12<sup>1</sup> (2) of the Code of Administrative Court Procedure<sup>\*34</sup>, an administrative court may issue a ruling on the provisional protection of **the rights** of a person filing an action in all stages of proceedings at the reasoned request **of the person filing the action** or on its own initiative, if the execution otherwise of a court judgment is impracticable or impossible.

## 6.2. Discretionary errors

The following discretionary errors may be identified pursuant to case law:

- 1) Failure to use discretion. That discretionary error has been pointed out in several Supreme Court decisions. The court has thus noted that violation of discretion rules may also consist of the failure to use discretion. For example, in the case of apartment association Tiiru Tosin v. Keila city council, the city council refused to adopt the detailed plan on the grounds of it being in contradiction with good morals and practices. The court found in the case that the violation of good morals and practices for the local government had been the lack of neighbours' approval.<sup>\*35</sup>
- 2) Certain interests and circumstances have not been considered in discretion which should have been considered in the preparation and discretion of the plan. If a local government has not considered, and has completely ignored the proposals or objections submitted in the course of the planning procedure, then that is a discretionary error or a so-called discretion deficit. The Supreme Court has pointed out in that regard that a discretion error is present especially when an administrative authority has overlooked an important aspect.<sup>\*36</sup>
- 3) Interests of certain people are undervalued in discretion. For example, if the council of a local municipality refuses to adopt a prepared detailed plan, which has been financed by a person governed by private law, and in the adoption of which that person has an interest, with the reason being that other persons categorically disagree with it, then that is a **valuation error**. The interests of the person who prepared the plan have, in that case, been disregarded. The Supreme Court has pointed out, in this regard, that in the decision of adoption of a plan, the expenses that the public authority itself has made with regard to the legislative proceeding of the plan, as well as those made by the source of financing, also have to be considered, and for example one party's unwillingness or inability to reach an agreement should not hinder reaching a positive outcome in the proceedings of the plan. Yet, the Supreme Court has pointed out that preparation of a plan, incurring expenses in the course of a planning procedure and adoption of an initial detailed plan do not unequivocally mean that the plan would be adopted in the form it in which it was initiated. What is important here is that contradicting interests be fairly weighed.<sup>\*37</sup>

<sup>30</sup> Administrative Law Chamber of the Supreme Court decision 3-3-1-42-02 (Note 11); Administrative Law Chamber of the Supreme Court decision 3-3-1-62-02 (Note 13).

<sup>31</sup> Administrative Law Chamber of the Supreme Court decision 3-3-1-28-04. – Riigi Teataja (State Gazette) III 2004, 17, 204 (in Estonian).

<sup>32</sup> Administrative Law Chamber of the Supreme Court decision 3-3-1-54-03 (Note 2).

<sup>33</sup> Administrative Law Chamber of the Supreme Court decision 3-3-1-8-02 (Note 9).

<sup>34</sup> Halduskohtumenetluse seadustik. – Riigi Teataja (State Gazette) I 1999, 96, 846; 2005, 39, 308 (in Estonian).

<sup>35</sup> Administrative Law Chamber of the Supreme Court decision 3-3-1-62-02 (Note 13).

<sup>36</sup> Administrative Law Chamber of the Supreme Court decision 3-3-1-42-02 (Note 11).

<sup>37</sup> Administrative Law Chamber of the Supreme Court decision 3-3-1-62-02 (Note 13).

- 4) Balancing of public interests has incurred in the manner that, without an objective basis, certain interests outweigh others by an disproportionately large margin. Discretion has been disproportionate. The Supreme Court found, in the case of a complaint against the decision of the Pärsti rural municipality council, with regard to the repealing of a detailed plan, that the council had attached too much weight to the social and economic influences accompanying the construction of a prison in comparison with the environmental impact. The Supreme Court has pointed out that it sees no grounds, based on the given material, why it should be namely the rural municipality who benefits from the damage to the environment, which is a public legal right, when it is feasible to build the prison complex somewhere else in Estonia, without damaging the environment to such an extent.<sup>\*38</sup>
- 5) Irrelevant interests and circumstances have been weighed. The Supreme Court has, for example, found that no relevance can be attached regarding the expenses incurred in preparation of the building design of the planned building. The initiator of the plan can reduce unnecessary expenses, if it first studies the actual chances of adoption of the plan and does not take unjust risks in connection with damages to important legal benefits.<sup>\*39</sup>

## 7. Conclusions

Planning discretion is characterised by an administration's great degree of freedom in the preparation and adoption of relevant plans. It is based on planning laws programmed on final outcome, which provide relevant objectives and principles for weighing different principles.

The starting point for determining the limits of planning discretion under substantive law is the Constitution. Limitation clauses for different fundamental rights open discretion space for administrations here, simultaneously determining its legal limits and how binding it is under substantive law.

Planning procedure is an open procedure where disclosure is mandatory for an administration in order to ensure the participation of interested parties, their timely informing and the possibility to protect one's interests in the course of preparing the plan.

Based on the nature of planning discretion, the discretion of interests is an obligation of an administration; it is a so-called request for discretion. Rational discretion of interests requires effective communication with the aim of convincing different parties and reaching common understanding. Effective communication ensures first the detection of interests and facts worth weighing, and enables the reaching of an optimisation of interests acceptable to all parties, which considerably facilitates the discretionary decision and enables the preclusion of future litigation.

Discretion of interests is primarily a value judgement problem. The request for discretion arising from planning procedure does not contain substantial elements and presumes value judgements with regard to the weight of interests, invasion of possible negative outcome, as well as an invasion in terms of justified reasons.

Court protection of persons concerned with the planning procedure is comparatively wide. Subsection 26 (1) of the PA gives the right to file an action with the court to every person who finds that the decision to adopt a plan has been unlawful, regardless of whether that decision violates his or her subjective public rights, or restricts his or her freedoms. This is an exceptional regulation in the Estonian legal order.

Judicial control over planning discretion is limited. Courts do not reevaluate political expediency of discretion decisions, but merely control whether making discretion decisions did not include procedural or formal errors, which might have substantially influenced the decision, whether the discretion decision is in accordance with laws, regulations or administrative provisions and general principles of law, and general principles of justice, whether the decision is lawfully justified and not beyond the limits of discretion, and no other abuse of discretion is present. The court has also intervened in discretion when the rationality of the decision has been questionable, which primarily means that the court also controls lawfulness of discretion based on its own value judgements.

Based on case law, the main discretionary errors are failure to use discretion, a lack of discretion, valuation errors, disproportionate discretion and discretion of irrelevant interests.

<sup>38</sup> Administrative Law Chamber of the Supreme Court decision 3-3-1-54-03 (Note 2).

<sup>39</sup> *Ibid.*





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# Standing of NGOs in Relation to Environmental Matters in Estonia\*

## 1. Introduction

It has become increasingly evident that basic rights depend on the quality of our environment. This, in turn, has resulted in an understanding that everyone may have a personal interest in the state of the environment. It also has become clear that the implementation of environmental law by the state is not always flawless.<sup>1</sup> For these reasons, environmental protection based on private initiative has gained prominence in Europe. Non-governmental organisations have a special role in this form of environmental protection, as they are often considered to be the best candidates to further collective environmental interests. One of the prerequisites for fulfilment of this role is access to justice in respect of environmental matters.

Recently, a number of studies have been carried out on access to justice in relation to environmental matters in Europe. These reveal a great diversity among the regimes studied.<sup>2</sup> However, the studies are focused on Western European countries, leaving the picture of access to justice in the EU incomplete. The motive for writing the present article is a desire to contribute to filling this gap with respect to Estonia. The aim of the article is to examine access of NGOs to review procedures where environmental matters are concerned. The article focuses on the extent of standing in administrative court review because the administrative courts play a central role in adjudication of environment-related disputes in Estonia. For this purpose, firstly, the general framework for environmental standing in the European context is briefly examined; secondly, the basic criteria for environmental NGO action in Estonia are analysed; and, finally, the various developments that have expanded the standing of NGOs before the administrative court system are scrutinised.

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<sup>1</sup> See, e.g., the explanatory letter to the proposal on the Directive on Access to Justice in Environmental Matters. Available at <http://europa.eu.int/comm/environment/aarhus/index.htm>, p. 2 (31.05.2006).

<sup>2</sup> For instance, J. Ebbesson (ed.). *Access to Justice in Environmental Matters in the EU / Accès à la justice en matière d'environnement dans l'UE*. The Hague: Kluwer Law International 2002; N. Sadeleer, G. Roller, M. Dross, et al. *Access to Justice in Environmental Matters and the Role of NGOs*. Groningen: Europa Law Publishing 2005.

## 2. Theoretical framework for standing of NGOs

### 2.1. The distinction of private and public interest

The ideology of liberalism calls for the distinction of private and public interest. The first consists of the various personal interests of individuals and the latter collective interests that cannot be meaningfully attributed to any one specific individual. Interest in the good quality of the environment is generally considered to fall into the category of public interest. It is the task of state authorities to promote and protect public interests. The role of NGOs in protecting the public interest is limited. In liberal thinking, private associations are often regarded as peculiar individuals, no more suitable for a role in promoting public interests than any of their members are. The approach is well illustrated in an English court case concerning the protection of the site of the Elizabethan Rose Theatre. A pressure group was formed for the purpose of defending the theatre. Some of the members were locals, including a local member of the British Parliament, and many others had undoubted expertise and distinction in archaeology and historical preservation, as well as knowledge of the theatre, the literature, and other relevant matters. However, the court stated: "The fact that some thousands of people join together and assert that they have an interest does not create an interest if the individuals did not have an interest. [...] The fact that those without an interest incorporate themselves and give the company in its memorandum power to pursue a particular object does not give the company an interest." Obviously, the group was denied standing in the case.<sup>3</sup>

The decision has been much criticised<sup>4</sup>, as has the liberal approach to interests in general.<sup>5</sup> Nonetheless, as a basic concept the approach still seems to have force. The predominance of administrative court review in relation to environmental matters is, at least partly, a result of the liberal approach. Since protection of the environment is primarily the task and the privilege of public authorities, environmental disputes tend to focus on the adequacy of government actions. For instance, when a nature conservation society is not satisfied with construction by a private real estate developer, the focus of the dispute is, in most countries, on the consent of the authority to the building activity instead of the activity itself. Due to the role of public authorities in environmental protection, the extent of environmental standing largely depends on the access to the institutions that review government actions.

### 2.2. The models of standing

The requirements for standing before these reviewing institutions vary considerably. The actual approaches can be accommodated between two theoretical models: (1) the model that allows *actio popularis*, under which everyone has standing when it can be demonstrated that a certain public interest has been violated, and (2) the model of protection of subjective rights, under which the prerequisite for standing is violation of a norm that specifically protects the rights of a person who filed an action. Under the first system, the complaint is simply a means for commencing investigation of the misuse of power; in the other, the infringement of a person's subjective rights has central importance. Abuse of power by the government often encroaches on personal rights but not always: under the second model, the review procedure is terminated if and when it is established that the person's rights have not been infringed.

The choice of a model for standing is a legal-political question. Accordingly, the various rules on standing reflect the traditions and history of the country in question.<sup>6</sup> For instance, the manner of administrative court control in France has evolved from self-control of the administration and therefore is oriented toward objective control of actions involving administrative entities.<sup>7</sup> On the other hand, control of administration in the German court system focuses on the protection of subjective rights, as a reaction to the state fascism of the Nazi regime.<sup>8</sup> As a third example, Denmark has relatively restrictive requirements concerning stand-

<sup>3</sup> R. v. Secretary of State for the Environment ex parte Rose Theatre Trust, 1990. Referred to in J. Alder. Access to the Courts: A Conflict of Ideologies. – Journal of Environmental Law 1998 (10) 1, pp. 164–165.

<sup>4</sup> *Ibid.*, p. 184.

<sup>5</sup> For example, Mauro Cappelletti argued in the 1970s discourse on access to justice: "Today's reality [...] is much more complex and pluralistic than abstract dichotomy: between the individual and the state there are a numerous groups, communities, and collectives which forcefully claim the enjoyment and judicial protection of certain rights which are classified neither as 'public' nor 'private' in the traditional sense." M. Cappelletti. Vindicating the Public Interest through the Courts: A Comparativist's Contribution. M. Cappelletti, B. Grath (eds.). Access to Justice. Vol. III: Emerging Issues and Perspectives. Alphen aan den Rijn: Sijthoff and Noordhoff 1979, p. 513.

<sup>6</sup> J. Ebbesson. The Notion of Public Participation in International Environmental Law. – Yearbook of International Environmental Law 1997 (8). Oxford: Clarendon Press 1998, p. 63.

<sup>7</sup> G. Winter (ed.). German Environmental Law: Basic Texts and Introduction. Dordrecht: Martinus Nijhoff / Graham & Trotman 1994, p. 49.

<sup>8</sup> R. Steinberg. Judicial Review of Environmentally-related Administrative Decision-making sine loca, sine anno, p. 61 (Reprint from Tel Aviv University Studies in Law. Vol. 11, Gega Institute for Comparative and Private International Law, Faculty of Law, Tel Aviv University 1992).

ing before the courts but rather lenient requirements for standing before quasi-judicial administrative appellate bodies, due to the context being a consensus-oriented society that does not offer an incentive for initiating court disputes.<sup>\*9</sup> It should be noted as well that, in most countries, the standing requirements vary significantly depending on the object of the dispute. For instance, despite the country's generally restrictive standing criteria, most German federal states enable certain NGOs to file actions with administrative courts concerning matters of nature conservation — i.e., in the public interest.<sup>\*10</sup>

### 3. Basic criteria for standing of NGOs before Estonian administrative courts

#### 3.1. Centrality of administrative court review

Administrative court review is practically the only type of effective review proceedings available to NGOs in relation to environmental matters in Estonia. Unlike in a number of other European countries<sup>\*11</sup>, access to civil courts in Estonia is limited to cases of interference with a set of narrowly construed personal rights. Access to criminal courts for environmental protection is also barred. Although an association can draw the attention of a public authority to a violation, the authorities have a wide margin of discretion in deciding whether to start criminal proceedings.<sup>\*12</sup> There are some non-judicial procedures accessible to NGOs. An NGO can ask for review by the legal chancellor (the ombudsman); however, the number of cases the legal chancellor can take is limited and the final decision not binding. Finally, internal review by the administration, the so-called challenge procedure, is in theory a powerful tool for reviewing environmental decisions. In practice, the usefulness of such proceedings is limited due to the fact that in typical environmental cases the same authority that made the original decision is the reviewing body.

#### 3.2. Protection of subjective public rights

The administrative court system was implemented in Estonia in 1993. In the same year, the Code of Administrative Court Procedure was adopted. The code was amended significantly in 1999. In similarity with many other areas of Estonian law, the administrative court procedure has been strongly influenced by the German model.<sup>\*13</sup> The reliance on the model of protection of subjective rights is evident in the Code of Administrative Court Procedure<sup>\*14</sup> (CACP), which sets out the basic criteria for standing. Subsection 7 (1) of the CACP stipulates that only a person who finds that his or her rights have been violated or his or her freedoms have been restricted by an administrative act or measure has the right to file an action with an administrative court.<sup>\*15</sup>

The theoretical point of departure is the classical one: only certain public authorities can bring actions for the protection of public interest; individuals and NGOs have standing only where their subjective rights under public law have been violated. The notion of the 'subjective public right' is understood in the context of the protective norm theory. According to this theory, violation of a provision of public law results in a violation of a person's subjective right(s) only when the violated provision aims to, besides protecting the public interest, protect the person's interest.<sup>\*16</sup>

<sup>9</sup> N. Sadeleer, G. Roller, M. Dross, et al. (Note 2), p. 167.

<sup>10</sup> E. Rehinder. Germany/Allemangne. J. Ebbesson (ed.). Access to Justice in Environmental Matters in the EU / Accès à la justice en matière d'environnement dans l'UE. The Hague: Kluwer Law International 2002, p. 250.

<sup>11</sup> Direct access to civil courts is granted, e.g., in the Netherlands, Portugal, and France. See N. Sadeleer, G. Roller, M. Dross, et al. (Note 2), p. 180.

<sup>12</sup> In comparison, associations are regularly party to criminal proceedings in France. In Portugal, an association may become a private prosecutor, assisting or even contradicting the public prosecutor. *Ibid.*, p. 182.

<sup>13</sup> For instance, in the initial phase of the administrative law reform, the best course of action was considered to be a literal reception of German administrative law — i.e., translation of key pieces of legislation, with some modifications. This approach was abandoned in 1999, but Estonian administrative law still bears a strong resemblance to German administrative law. See Ü. Madise. Eesti haldusõiguse reformi kandvatest ideedest (About Underlying Ideas of Estonian Administrative Law Reform). — *Juridica* 2003/1, p. 39 (in Estonian).

<sup>14</sup> Halduskohtumenetluse seadustik. — Riigi Teataja (State Gazette) I 1999, 31, 425; 2005, 39, 308 (in Estonian).

<sup>15</sup> Under certain circumstances, standing can be based on legitimate interest. While the concept of legitimate interest appears to be wider than that of violation of subjective rights, the court's authority is more limited in adjudicating the case on the former basis: it may issue only declaratory judgements. For this reason, violation of subjective rights is the preferred basis for action.

<sup>16</sup> See, e.g., decision of the Special Panel of the Supreme Court 3-3-1-15-01. Available at <http://www.riigikohus.ee/> (in Estonian).

### 3.3. Interest of an association in filing an action

The third paragraph of § 7 of the CACP stipulates a specific norm for the standing of associations. An association does not have the right to file an action in the interests of its members or other persons unless such a right is granted by law. While the norm does not formally restrict filing an action in the interests of the association, it appears that the norm calls for a restrictive interpretation of the notion of 'association interests'. The wording seems to imply that an association cannot file an action in its interest when the interest is in essence the shared interests of its members. It is likely that listing the interest as one of the objectives of the association in its key documents does not change this fact.<sup>\*17</sup>

The hypothesis of restrictive interpretation appears to be confirmed by a decision of the Supreme Court in 2001. In the case in question, the association of local municipalities had filed an action on the basis of the Local Government Organisation Act<sup>\*18</sup>, which stipulates that local governments may establish associations for articulation, representation, and protection of common interests and for filling common functions. The court ruled that the act did not grant the association standing. In the court's opinion, such a right would not contradict the nature of the association but neither is it an inevitable precondition for its functioning.<sup>\*19</sup>

To the knowledge of the author, there is no court practice as regards the application of this norm to standing of environmentally concerned NGOs. A court of first instance has, however, ruled on the extent of environmental NGOs' standing, in 2000 in the so-called *Undva Deep Harbour* case. The case concerned a proposal that had been made to build a deep harbour on the west coast of Estonia's largest island — Saaremaa. The proposed site was in close proximity to existing and potential avian sanctuary areas of international importance. The local municipality made a planning decision allowing the construction of the harbour. The Estonian Ornithological Society challenged the decision. The society, founded in 1921 and with a membership of several hundreds, is one of the oldest and largest Estonian environmental groups. It is among the society's purposes to promote the conservation, study, and propagation of Estonian birds, and the group has been very active in this field. Yet the court of first instance ruled that the society did not have standing in the case.<sup>\*20</sup> The society lodged an appeal but later withdrew it because the municipality concerned annulled the controversial planning decision on its own initiative.

It appears from the foregoing considerations that the basic criteria for standing of associations are stipulated and interpreted in a restrictive manner. However, in recent years, standing in relation to environmental matters has been expanded considerably through legislative action and court practice. In the following sections of this paper, these extensions are examined in detail.

## 4. Broadening of NGOs' standing concerning environmental matters

### 4.1. Extension of the competence of administrative courts

Due to the central role of the administrative court system, the extent of the competence of administrative courts is of crucial importance. Administrative courts may review administrative acts and measures taken by administrative entities — that is, by agencies, officials, or other persons who perform administrative functions under public law. Administrative acts are legal acts that regulate individual cases in public law relationships; measures are activities, omissions, and delays in public law relationships.<sup>\*21</sup> The courts can review the procedural and substantive aspects of discretionary decisions; however, the extent of the review is inherently limited, due to the separation of powers.<sup>\*22</sup> Administrative courts may not review legislation of

<sup>17</sup> There are considerable differences within Europe as regards the concept of an association's interest. In some countries, such as Belgium and Germany, the restrictive approach is predominant. Only interests that are specific to the association (e.g., those that are 'personal and direct' in Belgium) are considered a valid basis for standing. On the other hand, in the Netherlands, the interests of a legal person are deemed to include the general and collective interests that it specially represents in accordance with its objectives and as evidenced by its actual activities. These criteria are, in general, applied in a rather lenient way. J. E. Bonine. *The Public's Right to Enforce Environmental Law* in S. Stec (ed.). *Handbook on Access to Justice under the Aarhus Convention*. Available at <http://www.unece.org/env/pp/publications.htm> (30.05.2006), p. 33; E. Reh binder (Note 10), p. 247; J. Verschuuren. Netherlands. See N. Sadeleer, G. Roller, M. Dross, et al. (Note 2), p. 103.

<sup>18</sup> Kohaliku omavalitsuse korralduse seadus. — Riigi Teataja (State Gazette) I 1993, 37, 558; 2005, 32, 235 (in Estonian).

<sup>19</sup> Administrative Law Chamber of the Supreme Court ruling 3-3-1-16-01. Available at <http://www.riigikohus.ee/> (in Estonian).

<sup>20</sup> Administrative Court of Pärnu (22.12.2000).

<sup>21</sup> CACP, § 4.

<sup>22</sup> K. Pikamäe. *Kaalutusvigadest* (About of Abuses of Discretion). — *Juridica* 2006/2, p. 82 (in Estonian).



general application issued by administrative entities, although they may refuse to apply such legislation in adjusting a case, on the grounds that it is in conflict with the Constitution. This refusal leads to commencement of constitutional review proceedings by the Supreme Court.<sup>\*23</sup>

When one considers the restriction of the competence to administrative acts and measures, it is important to distinguish between an administrative act regulating an individual case and an act that is generally applicable. In 2003, a dispute arose concerning whether a governmental regulation setting out rules for a landscape protection area may be challenged before the administrative courts. The rules had been amended in regard to a relatively small part of the protected area in question: the area situated within a city. Prior to the amendment, only buildings for business and social purposes were allowed in the protected area, but the amendment changed this to residential and social buildings. The amendment also abolished the maximum height restriction of eight meters for buildings. The decision on whether the act was reviewable was not based on the form of the act — a governmental regulation — because the Supreme Court has consistently held that the legal form is not a decisive criterion. Instead, the reviewability of an act has to be determined on the basis of its contents.<sup>\*24</sup> However, no clear line can be drawn on the basis of the contents of an act, given that the notion of ‘act regulating an individual case’ encompasses so-called general orders, which are directed at persons on the basis of general characteristics or at changing the status of things under public law. In the case, the Supreme Court took the view that the protection rules could be considered a general order directed at changing the public law status of things, at least insofar as the rules regulating building rights are concerned. In the opinion of the court, the possibility of review was desirable in order to better protect the rights of individuals and to ensure legal certainty.<sup>\*25</sup> While this extension of environmental standing may appear minor compared to other developments, it is illustrative of the court’s readiness to redefine the criteria for standing.

## 4.2. *Actio popularis* in spatial planning

Planning decisions are frequently relevant to environmental protection. Often the relationship is direct, such as in the case of planning of a new motorway. In other cases, the relation is indirect. For instance, the planning decisions may determine what is permissible in the air and thus influence the content of pollution permits. Spatial plans of all levels can be reviewed by the courts in Estonia. This encompasses the very abstract national plan covering the entire territory of the state and very concrete detailed plans that are the basis for building activities and other land use in the short term.

On 1 January 2003, a new Planning Act<sup>\*26</sup> came into force. Subsection 26 (1) of the act stipulates:

Every person who finds that a decision to adopt a plan is in conflict with an Act or other legislation or that his or her rights have been violated or freedoms restricted by the decision has the right to contest the decision in court within one month as of the day on which he or she became or should have become aware of the adoption of the plan.

Literal reading of the section appears to allow action in the public interest to every person. However, for some time, opinions differed as to whether the literal interpretation should be followed. Some argued for it<sup>\*27</sup>, while others were of the opinion that the wording is misleading and that the basic standard of the CACP — violation of a subjective right — also is applicable in planning cases.<sup>\*28</sup> Some courts took the latter position.<sup>\*29</sup> In 2004, the Supreme Court decided in favour of a literal reading of the section, thus affirming the possibility of *actio popularis* and significantly expanding environmental standing.<sup>\*30</sup>

<sup>23</sup> CACP, § 25 (5–6).

<sup>24</sup> See, e.g., Constitutional Review Chamber of the Supreme Court decision 3-4-1-4-02. Available at <http://www.riigikohus.ee/> (in Estonian).

<sup>25</sup> Administrative Law Chamber of the Supreme Court ruling 3-3-1-31-03. Available at <http://www.riigikohus.ee/> (in Estonian).

<sup>26</sup> Planeerimiseadus. – Riigi Teataja (State Gazette) I 2002, 99, 579; 2006, 14, 111 (in Estonian).

<sup>27</sup> K. Relve. Füüsiliste isikute subjektiivne avalik õigus ja põhjendatud huvi keskkonnaasjades (Subjective Public Law of Physical Persons and Grounded Interest in Environmental Matters). – Juridica 2004/1, p. 25 (in Estonian).

<sup>28</sup> H. Veinla. Artikkel 9 lg 2. – H. Veinla, K. Relve. Juurdepääs õigusemõistmisele keskkonnaasjus. Diskussioonimaterjal (teine seminar) (Access to Administration of Justice in Environmental Matters. Material for Discussion (Second Seminar). Available at <http://www.envir.ee/orb.aw/class=file/action=preview/id=3615/Diskussioonimaterjal+teine+seminar%3A+Juurdep%E4%E4s+%F5igum%F5istmisele+keskkonnaasjus.pdf>, p. 28 (30.05.2006) (in Estonian).

<sup>29</sup> Circuit Court of Tartu 2-3-8/2004 (30.01.2004) (in Estonian).

<sup>30</sup> Administrative Law Chamber of the Supreme Court decision 3-3-1-28-04. Available at <http://www.riigikohus.ee/> (in Estonian).

### 4.3. Standing on the basis of article 9 (2) of the Aarhus Convention

The Convention on Access to Information, Public Participation In Decision-Making, and Access to Justice in Environmental Matters (the Aarhus Convention) was signed in Aarhus, Denmark, on 25 June 1998.<sup>\*31</sup> Estonia ratified the convention on 6 June 2001.<sup>\*32</sup> The convention came into force on 30 October of the same year. As its title suggests, the convention entitles the public to certain procedural rights where environmental matters are concerned.

Article 9 (2) is the key provision for standing of NGOs under the convention and has had vast effect on the extent of standing concerning environmental matters.<sup>\*33</sup> The provision provides access to justice to challenge any decision, act, or omission subject to the provisions of article 6. The latter article regulates participation in decision-making relating to activities that may have a significant impact on the environment — e.g., construction of large industrial facilities. The article does not cover preparation of plans, programmes, policies, executive regulations, and generally applicable legally binding normative instruments, which are regulated instead in articles 7 and 8 of the convention. Although the requirements under article 6 are procedural in nature, both substantive and procedural legality of the decision, act, or omission may be challenged.<sup>\*34</sup> Standing under article 9 (2) is differentiated as follows. For the general public, standing is based on traditional criteria — i.e., sufficient interests or impairment of a right. By contrast, NGOs enjoy a special status under article 9 (2): their interest is deemed sufficient, and they are deemed to have rights capable of being abridged. It should be noted, however, that parties to the convention may establish requirements that an NGO must satisfy in order to have recourse to article 9 (2).<sup>\*35</sup>

Although Estonia has ratified the convention, no special effort has been made by the legislature to implement the requirements under article 9 (2). This has not been an obstacle to the application of article 9 (2). Sufficiently precise provisions of ratified international agreements are directly applicable in Estonia, and these provisions prevail when in conflict with national laws.<sup>\*36</sup> In practice, NGOs have used the opportunity and have frequently relied directly on article 9 (2).

Article 9 (2) would in itself result in broadening of standing of NGOs in relation to environmental matters by requiring re-evaluation of the concept of an association's interests and rights under the CACP. However, practice in the application of the article has resulted in much broader standing: the practice seems to have gone far beyond the minimum required by the article. First, the scope of the standing has been indirectly expanded by the legislature. Secondly, the scope has been considerably expanded in the court practice of its application. Finally, the courts have been very generous in recognising associations as environmental NGOs.

#### 4.3.1. The scope of article 9 (2) in law

Article 9 (2) applies, in principle, to the activities listed in Annex I to the convention.<sup>\*37</sup> The annex largely mirrors the respective lists under the Espoo Convention<sup>\*38</sup>, EIA Directive<sup>\*39</sup>, and IPPC Directive.<sup>\*40</sup> How-

<sup>31</sup> UN/ECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus, Denmark; 23–25 June 1998). Available at <http://www.unece.org/env/pp/documents/cep43e.pdf> (31.05.2006).

<sup>32</sup> Keskkonnainfo kättesaadavuse ja keskkonnanäajade otsustamises üldsuse osalemise ning neis asjus kohtu poole pöördumise konventsiooni ratifitseerimise seadus (Act Ratifying the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters). – Riigi Teataja (State Gazette) II 2001, 18, 89 (in Estonian).

<sup>33</sup> Article 2 (3) is the other section with a potentially large impact on the standing of associations. It regulates the enforcement of national environmental law by the public. However, the significance of the article is not clear. Also, the provision seems to have had no impact on Estonian practice: the author is not aware of any action based on it.

<sup>34</sup> M. Lee, C. Abbot. The Usual Suspects? Public Participation under the Aarhus Convention. – The Modern Law Review, January 2003 (66), p. 103.

<sup>35</sup> Article 2 (5) of the convention.

<sup>36</sup> Section 123 of the Constitution of the Republic of Estonia.

<sup>37</sup> In addition, article 6 is applicable to procedures for deciding on proposed activities not listed in Annex I but that may, nevertheless, have a significant effect on the environment. Also, each party must, within the framework of its national law, apply, to the extent feasible and appropriate, the provisions of article 6 to decisions on whether to permit the deliberate release of genetically modified organisms into the environment (paragraphs 1 (b) and 11 of article 6 of the convention).

<sup>38</sup> UN/ECE Convention on Environmental Impact Assessment in a Transboundary Context (Espoo, Finland; 25 February 1991). Available at <http://www.unece.org/env/eia/documents/conventiontextenglish.pdf> (31.05.2006).

<sup>39</sup> Council Directive 85/337/EEC of 27 June 1985, on the assessment of the effects of certain public and private projects on the environment. Consolidated version published on the Internet available at <http://eur-lex.europa.eu/LexUriServ/site/en/consleg/1985/L/01985L0337-19970403-en.pdf> (31.05.2006).

<sup>40</sup> Council Directive 96/61/EC of 24 September 1996, concerning integrated pollution prevention and control. Consolidated version published on the Internet available at <http://eur-lex.europa.eu/LexUriServ/site/en/consleg/1996/L/01996L0061-20031120-en.pdf> (31.05.2006).

ever, according to paragraph 20 of Annex I, the list is open-ended: in addition to the activities listed, it covers all other activities where public participation is provided for under an environmental impact assessment (EIA) procedure in accordance with national legislation.

On 3 April 2005, a new national environmental impact assessment act entered into force.<sup>\*41</sup> In addition to activities covered by the convention, the act made mandatory use of an EIA when activities are proposed that alone or in conjunction with other activities may potentially have significant effect on a Natura 2000 site.<sup>\*42</sup> The provision of national law is designed to transpose article 6 of the Habitats Directive<sup>\*43</sup>, which requires ‘appropriate assessment’. The latter is not necessarily the same as the general EIA procedure, although the assessment can be carried out in the framework of the EIA procedure. In view of the narrow discretion under article 6 of the Habitats Directive<sup>\*44</sup> and the number of Natura sites<sup>\*45</sup>, it is clear that by requiring the assessment to be carried out through the EIA procedure, the national law has a much wider scope than is set forth in the convention. Consequently, the extent of NGOs’ standing under article 9 (2) is much wider as well.

#### 4.3.2. The scope of article 9 (2) in court practice

The Supreme Court has insisted on particularly broad interpretation of standing under article 9 (2). According to the convention, it is possible to challenge decisions other than those subject to the provisions of article 6, “where so provided for under national law”. The wording seems to imply that it is within the competence of national authorities to decide whether to extend standing further under article 9 (2).<sup>\*46</sup> However, in January 2004, the Supreme Court took a different view. The court stated that standing beyond article 6 decisions does not depend on special regulation enabling more extensive standing. In the court’s opinion, the phrasing ‘where so provided for under national law’ means that every decision can be challenged when the decision has characteristics that make court review possible. For example, once it is established that an energy policy document may result in specific implementing actions (i.e., the programme has an ‘external effect’), the policy can be challenged on the basis of article 9 (2) regardless of the fact that the preparation of the programme is subject to article 7 of the convention. In the court’s view, any decision, action, or omission covered by the convention can be challenged on the basis of article 9 (2).<sup>\*47</sup>

The court extended the scope of article 9 (2) even further. The court has ruled that standing under article 9 (2) is available regardless of whether the unlawfulness of the decision stems from the convention or from a national provision. In other words, standing is limited to decisions, acts, and omissions falling within the scope of the convention but is not limited to violation of the provisions of the convention.<sup>\*48</sup>

#### 4.3.3. Subjects of article 9 (2) — the criteria for environmental NGOs

The convention does not specify precisely which associations should have broader standing under article 9 (2). It only sets out three general criteria:

<sup>\*41</sup> Keskkonnamõju hindamise ja keskkonna juhtimissüsteemi seadus (Environmental Impact Assessment and Environmental Management System Act). – Riigi Teataja (State Gazette) I 2005, 15, 87.

<sup>\*42</sup> Natura 2000 is a European network of protected sites representing areas of the highest value for natural habitats and species of plants and animals that are rare, endangered, or vulnerable in the European Community. The network is based on two directives: Council Directive 92/43/EEC of 21.05.1992, on the conservation of natural habitats and of wild fauna and flora, and Council Directive 79/409/EEC of 2. 04.1979, on the conservation of wild birds.

<sup>\*43</sup> Explanatory letter to the Environmental Impact Assessment and Environmental Management System Act. Available at <http://web.riigikogu.ee/ems/saros-bin/mgetdoc?itemid=042930021&login=proov&password=&system=ems&server=ragne11> (31.05.2006).

<sup>\*44</sup> The margin of discretion left to authorities in deciding whether to carry out the ‘appropriate assessment’ under the Habitats Directive is rather limited. In the Waddenzee judgement, the European Court of Justice came to the conclusion that the assessment has to be undertaken if it cannot be excluded, on the basis of objective information, that an activity is going to have a significant effect on the site, either individually or in combination with other plans or projects. Case C-127/02, 7 September 2004, Landelijke Vereniging tot Behoud van de Waddenzee and Nederlandse Vereniging tot Bescherming van Vogels (Waddenzee case), paragraph 45. Available on the Internet at the ECJ homepage <http://www.curia.eu.int/>.

<sup>\*45</sup> There are 471 sites on the pre-selection list according to the Natura Web page of the Ministry of the Environment, <http://www.envir.ee/natura2000/?nodeid=127&lang=et> (30.05.2006).

<sup>\*46</sup> See for instance, V. Rodenhoff. The Aarhus Convention and its Implications for the “Institutions” of the European Community. – RECIEL 2002 (11) 3, p. 349; UNECE. The Aarhus Convention Implementation Guide. Available at <http://www.unece.org/env/pp/publications.htm>, p. 128 (30.05.2006).

<sup>\*47</sup> Administrative Law Chamber of the Supreme Court decision 3-3-1-81-03. Available at <http://www.riigikohus.ee/> (in Estonian). Therefore, it appears that, in principle, it is possible to challenge actions of administrative entities in collection and dissemination of environmental information (article 5); preparation of plans, programmes, and policies (article 7); preparation of executive regulations and generally applicable legally binding normative instruments (article 8); and, theoretically, actions under all other articles of the convention.

<sup>\*48</sup> *Ibid.*

- 1) the association must be an NGO,
- 2) it must promote environmental protection, and
- 3) it has to meet any requirements set forth under national law.<sup>\*49</sup>

Essentially, the convention leaves it to its parties to determine what associations should have standing. No special criteria have been set forth in Estonian law. It could be argued that the existing standard criteria for standing of associations are applicable. However, it is difficult to accept this line of argument under article 9 (2). The general aim of the convention is to broaden access to participation and justice in relation to environmental matters. Environmental organisations have special participatory rights under article 6. Moreover, article 9 (2) emphasises the role of NGOs in challenging decisions relating to participation in environmental decision-making. Therefore, it seems impossible to maintain that in Estonia the general restrictive standing criteria for associations are the 'requirements under national law' envisaged by the convention.

Although the criteria have not been laid out in law, there has been some discussion on the appropriate criteria. It seems to be a matter of general understanding that the criteria should be flexible and avoid excessively formal requirements, such as a fixed minimum number of members or a minimum time of having been active. Opinions differ on the question of whether foundations should qualify. Although the majority of Estonian NGOs active in the field of environmental protection are not-for-profit associations, a few are foundations. It has been suggested that, as foundations, unlike non-profit associations, do not have open membership, it is thus not suitable for them to have standing under article 9 (2).<sup>\*50</sup> Unsurprisingly, the environmental foundations were of the opinion that they should qualify. Somewhat more surprisingly, the environmental NGOs considered it necessary to restrict standing to associations that have a legal personality.<sup>\*51</sup>

Since there are no criteria laid down in Estonian national law, the courts have been forced to decide on an *ad hoc* basis which environmental organisations have standing under article 9 (2). Given the restrictive interpretation of an association's standing, one would have expected the courts to be conservative in recognising environmental NGOs. Intriguingly, exactly the opposite has taken place. The courts have accepted the standing of several not-for-profit organisations,<sup>\*52</sup> the standing of a foundation<sup>\*53</sup>, and even that of an informal group.<sup>\*54</sup> In fact, the authors of this article do not know of any decision where an administrative court has denied standing to an association on the basis that it is not an environmental NGO within the meaning of the convention. It seems that the courts have acknowledged the widest possible standing under article 9 (2). Especially noteworthy is the decision concerning the standing of the informal group. The association (a so-called fellowship) does not have a legal personality and was formed as an *ad hoc* local protest group. Yet an administrative court of first instance did not hesitate to consider it an environmental organisation capable of relying on article 9 (2) of the Aarhus Convention.<sup>\*55</sup>

In deciding whether an association has standing, the courts have typically relied on the statutes of the association: if the statutes list environmental protection as an aim, the NGO qualifies. The exact wording of the statutes does not seem to have much relevance. Also, it appears that courts have not considered it necessary to scrutinise the activities of an organisation, even though doing so could be another basis for deciding whether said NGO promotes environmental protection. The lack of emphasis on actual activities can be explained, perhaps, by the fact that the majority of organisations that have filed actions are well-known NGOs.

<sup>49</sup> Article 2 (5) reads: "'The public concerned' means the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest."

<sup>50</sup> H. Veinla, K. Relve. A Conception on the Implementation of the Third Pillar of the Århus Convention in Estonia. Ministry of the Environment 2003. Available at <http://www.envir.ee/orb.aw/class=file/action=preview/id=3601/Arhusi+konventsiooni+III+samba+l%F5ppkontseptsiooni+t%F5lge+inglise+keelde.pdf>, p. 46 (31.05.2006).

<sup>51</sup> A letter (13.02.2003) signed by nine prominent Estonian environmental protection NGOs.

<sup>52</sup> The Estonian Ornithological Society by the Administrative Court of Pärnu (24.11.2003), No. 3-119/2003; Estonian Society for Nature Conservation by the Administrative Court of Tartu (2.12.2002), No. 3-289/2002; Estonian Green Movement by the Supreme Court (29.01.2004) Administrative Law Chamber of the Supreme Court decision 3-3-1-81-03; Fellowship of Nõmme Road by the Administrative Court of Tallinn (11.09.2003), No. 3-1207/03.

<sup>53</sup> The Estonian Fund for Nature by the Administrative Court of Pärnu (24.11.2003), No. 3-119/2003.

<sup>54</sup> The Fellowship of Green Urvaste by the Administrative Court of Tartu (4.03.2005), No. 3-596/04. It should be noted, however, that the case is currently — in May 2006 — pending before the Supreme Court.

<sup>55</sup> However, it should be pointed out that the court's willingness to accept the standing of the fellowship may have been influenced by the fact that the group had been given standing in a preceding internal administrative review procedure. It should also be noted that the case is currently — in May 2006 — pending before the Supreme Court.

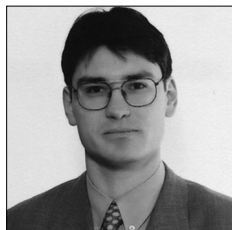


## 5. Conclusions

The basic approach to standing of environmentally concerned NGOs in Estonia is the standard one. It is based on the assumption that the protection of the environment lies within the exclusive competence of the state. Access to justice for private persons concerning environmental matters is limited. While the court practice is not extensive, it appears that standing of NGOs is, in principle, even narrower. However, the criteria for standing before administrative court have evolved rapidly in recent years. This development is in keeping with the wider trend in Europe — broadening of access to justice related to environmental matters for NGOs<sup>56</sup> — but appears to surpass it in speed and extent. Within a short time, the regime based on protection of narrowly construed subjective rights has evolved into a system wherein *actio popularis* is the norm for environmental matters. Much of the development is the result of judicial activism by the Supreme Court, although radical changes in legislation also play a role. However, the change is confined to administrative court review, and access to other branches of judicature still remains very narrow. Consequently, the NGOs can, provided that they have the resources, play the role of an effective watchdog over governmental action but lack the means to truly fulfil the function of the protectors of collective interest in environmental protection.

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<sup>56</sup> N. Sadeleer, G. Roller, M. Dross, et al. (Note 2), p. 3.



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# L'objet du référendum en Estonie

Comme toutes ses devancières, la Constitution de la République estonienne de 1992 donne la possibilité au peuple ou, pour être plus précis, aux citoyens ayant le droit de vote, de statuer directement par la voie du référendum sur une question qui intéresse l'État (art 56 et 105 Cst.). Néanmoins, la Constitution ne va pas jusqu'à lui accorder le droit d'initier lui-même le référendum, ce qu'elle réserve exclusivement au Parlement, appelé Riigikogu.\*<sup>1</sup>

Il faut bien avouer que le système constitutionnel estonien fait de ce procédé de démocratie directe, inscrit dans un cadre juridique précis protecteur d'un État de droit démocratique\*<sup>2</sup>, un simple outil au profit de la seule représentation nationale. La principale fonction du référendum étant d'apporter un supplément de légitimité à la décision que le Parlement aurait l'intention de prendre. Une façon, en quelque sorte, de rendre incontestable un choix politique fondamental. Il est vrai que, d'un point de vue démocratique, il n'y a rien de plus légitime que la volonté du peuple s'exprimant par référendum. La volonté du peuple souverain (l'article 1<sup>er</sup> Cst. reconnaissant qu'il est détenteur du pouvoir étatique suprême) ne se traduit pas seulement en terme de légitimation, mais aussi en terme d'obligation. Selon l'article 105 al. 3 Cst., la décision du référendum s'impose sans condition à tous les organes de l'État. Notons que pour qu'une décision soit prise par référendum, il suffit qu'elle recueille la majorité des suffrages exprimés, sans qu'aucune autre condition de validité soit exigée. Le référendum estonien a donc pour caractéristique de n'être jamais consultatif mais toujours décisionnel. Les obligations que devront accomplir les pouvoirs publics à l'issue du scrutin varient cependant en fonction de l'objet sur lequel porte le référendum. Parmi la multitude de questions pouvant être soumises à la votation populaire, l'article 105 Cst., aux termes duquel « le Riigikogu a le droit de soumettre au référendum un projet de loi ou d'autres questions d'intérêt national », classe ces objets en deux catégories de référendum. A partir de cette distinction et en prenant en compte la pratique référendaire que l'Estonie a connu au cours de son histoire, nous analyserons dans une première partie le référendum sur un projet de loi et dans une seconde partie le référendum sur d'autres questions d'intérêt national.

<sup>1</sup> Le référendum initié à la demande d'une fraction du corps électoral, dit encore, selon la terminologie employée en droit constitutionnel français, référendum d'initiative populaire, n'a cependant pas toujours été absent du cadre constitutionnel estonien. Il était prévu dans la première Constitution de 1920 (art. 31).

<sup>2</sup> La Constitution renvoie à la loi le soin de déterminer les conditions d'application de ses dispositions relatives au référendum (art. 106 al. 2 Cst.). Il s'agit de la loi sur le référendum adoptée le 13 mars 2002 (Riigi Teataja (Journal officiel de la République estonienne, RT) I 2002, 30, 76) qui annule et remplace la première datée du 18 mai 1994 (RT I 1994, 41, 659). Ajoutons également que cette même loi a instauré un mécanisme de contrôle a priori sur les résolutions du Riigikogu tendant à l'organisation d'un référendum. Il appartient désormais au Chancelier du droit d'exercer systématiquement un contrôle préalable de légalité et de constitutionnalité sur les questions soumises au vote populaire et si nécessaire de déposer un recours en annulation contre la résolution devant la Cour d'Etat (Cour suprême d'Estonie) sur le fondement des articles 18 al. 1<sup>er</sup> de la loi sur le Chancelier du droit (RT I 1999, 29, 406) et 6 al. 1 p. 5 de la loi sur la procédure de contrôle de constitutionnalité (RT I 2002, 29, 174).

# 1. Le référendum sur un projet de loi

Le terme « projet de loi » doit être ici entendu dans un sens large. Tout d'abord, il ne correspond pas uniquement aux textes que le Gouvernement dépose au Parlement. Peu importe celui qui est à l'origine des textes initiés, ces derniers portent tous le nom de « projet de loi ». Enfin et surtout, le terme ne se limite pas aux seuls textes de valeur législative. Le peuple peut ainsi être appelé à se prononcer sur des projets de loi qui ont une nature législative ou constitutionnelle. Ainsi, en s'appuyant sur la hiérarchie des normes, une distinction doit être également faite entre référendum constitutionnel et référendum législatif.

## 1.1. Le référendum constitutionnel

De tous les référendums dont l'objet est de soumettre au peuple un texte de loi, le référendum constitutionnel est sans conteste celui qui en Estonie occupe une place de tout premier plan. Ce n'est certes pas une caractéristique propre à l'Estonie car il est de loin le plus répandu dans de nombreux pays. Cette constatation n'a cependant rien d'une banalité. Elle tend bien plus à mettre l'accent sur l'importance que revêt pour l'Estonie la participation du peuple au processus d'adoption et de révision de la Constitution. Ceci dans la mesure où le peuple est reconnu comme étant l'origine et le seul détenteur du pouvoir souverain (art. 1<sup>er</sup> Cst.).

A la lecture de la Constitution de 1992, on s'aperçoit que le référendum constitutionnel, en tant que référendum sur un projet de loi, se présente sous les formes que sont le référendum constituant et le référendum de révision constitutionnelle. D'une part, le préambule de la Constitution énonce *in fine* que « le peuple estonien a adopté, sur la base de l'article 1<sup>er</sup> de la Constitution entrée en vigueur en 1938, par référendum du 28 juin 1992, la [présente] Constitution ». D'autre part, l'article 163 al. 1 Cst. dispose que « la Constitution peut être modifiée par une loi qui a été adoptée par référendum ».

En ce qui concerne le référendum du 28 juin sur le projet de Constitution, on peut se demander s'il s'agit réellement d'un référendum constituant, lequel « se caractérise par son effet fondateur d'un nouvel ordre constitutionnel, en rupture avec celui qui précède ce dernier ».<sup>3</sup> Or justement, la Constitution de 1992 ne semble pas être en rupture avec sa devancière, celle de 1938, dont l'article 1<sup>er</sup> a servi, a priori, de fondement au référendum de 1992. Cependant, la référence dans le préambule au premier article de la Constitution de 1938 est trompeuse car elle insinue que la Constitution de 1992 est une modification du texte de 1938 alors que ce n'est pas le cas. Pour s'en rendre compte, il suffit de lire ledit article qui ne règle pas les modalités de la révision constitutionnelle mais établit solennellement que « l'Estonie est une République autonome et indépendante, dans laquelle le pouvoir suprême de l'Etat réside dans le peuple ». On comprend dès lors que l'insertion dans la nouvelle Constitution de l'article 1<sup>er</sup> du dernier texte constitutionnel en vigueur avant l'occupation a un caractère davantage symbolique que juridique. En ce sens qu'elle permet d'évoquer la continuité de l'Etat estonien, lequel n'a, selon la Constitution, jamais cessé d'exister.<sup>4</sup> Par conséquent, le 28 juin 1992, les Estoniens se sont bien prononcés sur la création d'une nouvelle Constitution (et non d'un nouvel Etat), ce qui lève toute ambiguïté sur la nature constituante de ce référendum. Précisons pour finir que c'est le Soviet suprême de la République d'Estonie qui, après avoir confié la mission de rédiger un projet de Constitution à une « Assemblée constitutionnelle »<sup>5</sup> créée le 20 août 1991, était chargé de le soumettre à l'approbation populaire.<sup>6</sup>

Ceci étant, il convient de rappeler que l'Estonie n'a pas toujours suivi la voie référendaire pour l'adoption d'une Constitution. Disons même franchement qu'aucune des précédentes Constitutions estoniennes – celles du moins qui sont formellement désignées comme telles à savoir les Constitutions de 1920 et de 1938, n'ont

<sup>3</sup> A. Auer. Le référendum constitutionnel. – A. Auer (éd.). Les origines de la démocratie directe en Suisse. Actes du colloque organisé les 27-29 avril 1995 par la Faculté de droit de Genève et le C2D. Bâle et Francfort-sur-le-Main : Helbing & Lichtenhahn 1996, p. 80.

<sup>4</sup> La mention de l'article 1<sup>er</sup> de la Constitution de 1938 dans le préambule de la Constitution de 1992 a été décidée par l'Assemblée constitutionnelle lors de sa 5<sup>e</sup> séance, le 11 octobre 1991 dans les termes suivants : « Partant du fait que la Constitution de la République d'Estonie, établie en 1938, est toujours en vigueur mais n'est pas appliquée, il est nécessaire de soumettre au vote des électeurs de la République d'Estonie le projet d'une nouvelle Constitution conçue sur la base de la Constitution de 1938 » : Cf. Põhiseadus ja Põhiseaduse Assamblee. Koguteos (Constitution et Assemblée sur la Constitution. Recueil). Juura, Õigusteabe AS 1997, p. 167 (en estonien). Cette mention fut interprétée comme une référence au principe de la continuité étatique : cf. T. Annus. Riigiõigus (Droit constitutionnel). Tallinn : Juura, Õigusteabe AS 2001, p. 22 (en estonien) et H. Schneider. Põhiseaduse preambula : tema tähtsus ja õiguslik loomus (Le préambule de la Constitution : son importance et sa nature juridique). – Juridica 1996/9, p. 448 (en estonien).

<sup>5</sup> Même si, par la suite, elle prit de sa propre initiative le nom d' « Assemblée sur la Constitution », on peut, sans exagération eu égard à sa fonction, la désigner également sous le terme d'Assemblée constituante.

<sup>6</sup> Par décision du 3 septembre 1991, le Soviet suprême de la République d'Estonie s'engagea à soumettre le projet de Constitution au référendum, puisque juridiquement, il n'était pas obligé d'emprunter cette voie. Cf. J. Põld. Loengud Eesti riigiõigusest (Cours de droit constitutionnel estonien). Tartu : Sihtasutus Iuridicum 2001, p. 51 (en estonien).

jamais reçu l'onction populaire. Sur ce point, l'Estonie a fait preuve d'une certaine hardiesse à l'occasion de la restauration de son ordre constitutionnel par rapport à la pratique d'avant-guerre.

Si le référendum sur l'adoption d'une Constitution n'est pas une caractéristique estonienne, tout autre est celui qui a pour objet de réviser le texte constitutionnel. Toutes les Constitutions estoniennes de 1920 à 1992 s'accordent effectivement à reconnaître que le peuple puisse statuer sur des projets de loi portant modification de la Constitution conformément aux règles et procédures préalablement établies. C'est précisément sur la procédure des référendums de révision constitutionnelle que les divergences apparaissent entre ces Constitutions. Pour résumer, on peut dire que la Constitution de 1992 met en place un type de référendum constitutionnel à mi-chemin entre ceux établis en 1920 et 1938. Alors que la Constitution de 1920 fait du référendum un passage obligé avant toute révision constitutionnelle et que celle de 1938 n'en fait qu'un moyen occasionnel à disposition du chef de l'État pour résoudre un désaccord qui l'oppose au Parlement à propos d'un projet de loi constitutionnelle, la Constitution de 1992 prévoit le recours au référendum aussi bien en tant que mode alternatif de révision constitutionnelle qu'en tant que procédure obligatoire (c'est-à-dire organisé d'office). Ainsi, les lois portant révision de la Constitution peuvent, en vertu de l'article 163 a. 1 Cst., être adoptées par vote populaire selon la procédure référendaire ou par vote du Riigikogu selon soit la procédure des deux législatures successives soit la procédure d'urgence. Si toutefois, la révision porte sur le chapitre 1<sup>er</sup> ou le chapitre 15 de la Constitution, c'est-à-dire sur les dispositions générales relatives au fondement de l'État estonien et celles concernant les modalités de la révision constitutionnelle<sup>7</sup>, alors, selon l'article 162 Cst., elle ne pourra se réaliser qu'après avoir obtenu l'accord du peuple par référendum. Outre cette disposition, la révision constitutionnelle de 2003 a introduit un cas supplémentaire de référendum constitutionnel obligatoire, dans la mesure où la loi portant amendement de la Constitution, placée in-extenso à la suite du texte constitutionnel de 1992, fixe en son article 3 que sa révision doit obligatoirement suivre la voie référendaire.

Il s'agit d'ailleurs, à ce jour, de la seule révision constitutionnelle à laquelle le peuple ait eu l'occasion de participer par référendum depuis l'adoption de la Constitution en 1992. Ceci dit, il n'y a eu jusqu'à présent, que deux révisions constitutionnelles<sup>8</sup>, ce qui ne nous permet pas de porter un jugement critique sur l'usage du référendum constitutionnel en Estonie. Malgré le référendum constitutionnel de 2003, qui plus est, trouvant sa place dans un environnement foncièrement attaché à la stabilité constitutionnelle, il ne semble pas que le référendum soit, en Estonie, le mode normal de révision de la Constitution. Pour s'en convaincre, il suffit d'observer que tous les référendums estoniens portant sur un projet de loi de révision constitutionnelle ont été organisés en réponse à une obligation découlant de la Constitution et non à un libre choix des autorités compétentes, lorsque bien entendu la Constitution le permet.<sup>9</sup> Penchons nous alors plus précisément sur le référendum du 14 septembre 2003, par lequel le peuple devait répondre à la question de savoir s'il était favorable au projet de loi portant amendement de la Constitution devant ainsi permettre à l'Estonie d'adhérer à l'Union européenne « dans le respect des principes fondamentaux de la Constitution de la République d'Estonie ».<sup>10</sup> Il est intéressant de remarquer que ce référendum a été considéré comme étant obligatoire en raison de l'impact qu'avait le projet de loi constitutionnelle non seulement sur le chapitre premier<sup>11</sup> mais également sur le chapitre 15 Cst. D'où la référence dans le préambule de la loi portant amendement de la Constitution à l'article 162 Cst. comme fondement du référendum de 2003.

A peine ce référendum eut-il lieu et l'effervescence autour de celui-ci fut-elle retombée qu'à nouveau la question européenne agita l'Estonie sur l'opportunité d'un autre référendum de révision constitutionnelle. Cette fois-ci, il s'agissait de savoir si le traité établissant une Constitution pour l'Europe<sup>12</sup>, auquel la République estonienne souhaitait adhérer, était en conformité avec sa Constitution, à défaut de quoi, une

<sup>7</sup> Les dispositions générales, auxquelles le chapitre 1<sup>er</sup> de la Constitution fait référence, concernent les éléments fondamentaux de l'État estonien, à savoir la souveraineté de l'État « imprescriptible et inaliénable » et sa forme républicaine et démocratique (art. 1<sup>er</sup> Cst.) ; le principe de l'État unitaire (art. 2 Cst.) ; le principe de l'État de droit (art. 3 Cst.) ; le principe de la séparation et de l'équilibre des pouvoirs (art. 4 Cst.) ; le patrimoine naturel en tant que richesse nationale (art. 5 Cst.) et les composantes symboliques de l'identité nationale comme la langue estonienne (art. 6 Cst.) et le drapeau national (art. 7 Cst.). Le 15<sup>e</sup> et dernier chapitre de la Constitution comporte huit articles (art. 161 – 168 Cst.) relatifs aux modalités de la révision constitutionnelle.

<sup>8</sup> La première révision constitutionnelle date du 25 février 2003. Ce jour là, le Riigikogu adopta une loi portant modification de l'article 156 al. 1 Cst. en suivant pour cela la procédure d'urgence prévue à l'article 163 al. 1, point 3, Cst. Il était prévu cependant qu'elle n'entrerait en vigueur qu'à partir du 17 octobre 2005.

<sup>9</sup> Les référendums de révision de la Constitution ayant eu lieu respectivement entre le 13 et 15 août 1932, entre le 10 et 12 juin 1933 et entre le 14 et 16 octobre 1933 étaient obligatoires dans la mesure où la Constitution de 1920 ne prévoyaient que la procédure référendaire pour toute révision constitutionnelle. Le référendum du 14 septembre 2003 est, dans l'histoire de la République estonienne, le seul référendum de révision de la Constitution qui ait été organisé alors que la Constitution prévoit qu'elle peut être révisée selon d'autres modalités.

<sup>10</sup> Art. 1<sup>er</sup> de la loi portant amendement de la Constitution de la République d'Estonie (Eesti Vabariigi põhiseaduse täiendamise seadus).

<sup>11</sup> Notamment par rapport à l'article 1<sup>er</sup> Cst. qui pose le principe de la souveraineté « imprescriptible et inaliénable » de l'Estonie et à l'article 3 Cst. qui dispose que « le pouvoir étatique ne peut être exercé que sur la base de la Constitution et des lois conformes à celles-ci ».

<sup>12</sup> Traité signé à Rome, le 29 octobre 2004, par les chefs d'État et de Gouvernement des 25 États membres et ratifié par l'Estonie le 9 mai 2006.



révision de cette dernière s'imposerait.<sup>\*13</sup> En s'appuyant sur un avis juridique établi par un groupe de travail spécialement créé à cet effet et composé d'éminents juristes estoniens<sup>\*14</sup>, le Riigikogu jugea qu'il n'était pas nécessaire de réviser la Constitution et notamment la loi portant amendement de la Constitution ce qui évita du même coup l'obligation de recourir au référendum.<sup>\*15</sup> Cela montre, au demeurant, la relativité de l'obligation d'organiser un référendum du fait de la possibilité de contourner la nécessité de réviser la Constitution.

## 1.2. Le référendum législatif

Les citoyens peuvent également être appelés à participer à l'adoption d'un texte de loi dont l'objet est autre que celui de réviser la Constitution. Le référendum en matière législative ne peut être ainsi défini que négativement par opposition au référendum constitutionnel, dont il est exclusivement question au chapitre 15 Cst. D'ailleurs, à bien regarder la Constitution de 1992, on remarque que le référendum législatif n'y trouve pas une place entièrement dénuée de toute ambiguïté. Il est en effet très difficile de dire à quel endroit précisément il n'est fait mention dans la Constitution que du seul référendum législatif. C'est certainement la principale raison pour laquelle on a du mal à dissocier ce qui relève du référendum constitutionnel et du référendum législatif. D'un côté, les articles 105 et 106 Cst. fixant les différentes modalités du référendum se situent dans le chapitre constitutionnel relatif à la législation (chapitre 7), mais d'un autre côté, sans être limitées à la sphère législative, les dispositions qu'ils contiennent, traitent aussi bien du référendum dans sa généralité que des spécificités propres à tel ou tel type de référendum. On est donc loin d'un modèle comme il existe en France où une distinction est clairement faite entre ce qui est du domaine législatif (art. 11 Cst.) et ce qui est du domaine constitutionnel (art. 89 Cst.).<sup>\*16</sup> Les rédacteurs de la Constitution estonienne ont, semble-t-il, préféré poser d'une part des règles générales qui régissent l'ensemble des référendums et que l'on retrouve aux articles 105 et 106 Cst. D'autre part, ils ont établi des règles plus spécifiques s'appliquant aux référendums soit sur un projet de loi, soit sur une autre question d'intérêt national (telles qu'elles sont énoncées aux mêmes articles 105 et 106 Cst.) ou encore parmi les premiers, intéressant les seuls référendums constitutionnels (relevant des dispositions du chapitre 15 Cst.).

En matière législative, il n'est pas non plus possible de déterminer ce qui fait parti du champ référendaire. D'un point de vue formel, tout texte de loi peut être soumis au référendum. Selon la distinction établie à l'article 104 Cst., il peut aussi bien s'agir des lois ordinaires qui, pour être adoptées au Riigikogu, exigent une majorité des suffrages exprimés, que des lois mentionnées à l'article 104 al. 2 Cst., dont l'adoption nécessite une majorité absolue des membres du Riigikogu. Cependant, en considération du contenu du projet de loi, de son domaine matériel, la Constitution fixe des limites à la possibilité de recourir au référendum. Ainsi, malgré la bonne volonté de celui qui a le droit de décider de l'organisation d'un référendum, ce dernier ne peut porter, quoi qu'il en soit, sur n'importe quel texte législatif. Ceci est le cas généralement de tous les pays qui admettent ce genre de référendum. En Estonie, la délimitation du domaine du référendum repose sur une liste énumérant limitativement les matières qui en sont exclues. Aux termes de l'article 106 al. 1 Cst., « les questions relatives au budget, aux impôts, aux obligations financières de l'État, à la ratification et à la dénonciation des traités internationaux, celles tendant à décréter et à mettre fin à l'état d'urgence et celles concernant la défense nationale ne peuvent être soumises au référendum ». C'est donc uniquement par une interprétation a contrario des matières énoncées à l'article 106 al. 1 Cst. qu'il est possible de définir les projets de loi pouvant être adoptés par voie référendaire. Les discussions qui ont été engagées autour de cette question ont mis l'accent sur le fait que les matières exclues du référendum sont seulement mais aussi toutes celles qui sont énumérées à l'article 106 al. 1 Cst. Dans ces conditions, la question s'est même posée de savoir si les restrictions de l'article 106 al. 1 Cst. valaient pour tout référendum sur un projet de loi que ce soit en matière législative que constitutionnelle. Les constitutionnalistes estoniens sont d'avis cependant que les dispositions de l'article 106 al. 1 Cst. s'appliquent à tous les référendums, sauf aux référendums constitutionnels.<sup>\*17</sup>

Une telle conception maximaliste des matières exclues du référendum se comprend si l'on se replonge dans les travaux sur la Constitution. Lors des débats sur l'introduction du référendum dans la Constitution, il est

<sup>13</sup> Ceci résulte de l'article 123 al. 1 Cst. qui dispose que « la République d'Estonie ne conclut pas de traités internationaux contraires à la Constitution ».

<sup>14</sup> Ce groupe d'experts, dénommé officiellement « groupe de travail d'analyse constitutionnelle du traité établissant une Constitution pour l'Europe » (Euroopa põhiseaduse lepingu riigioigusliku analüüsi töörühm) fut créé par la commission des lois constitutionnelles du Riigikogu le 14 décembre 2004. Il était présidé par le président de la commission des lois constitutionnelles, Urmas Reinsalu, et composé de 24 membres. Il remit son avis définitif au Riigikogu le 28 octobre 2005. Disponible (en estonien) à l'adresse: [http://www.riigikogu.ee/public/Riigikogu/epsl\\_20051211\\_ee.pdf](http://www.riigikogu.ee/public/Riigikogu/epsl_20051211_ee.pdf) (10 février 2006).

<sup>15</sup> Le Riigikogu ratifia le traité instituant une Constitution pour l'Europe le 9 mai 2006.

<sup>16</sup> Même si cela a été remis en cause notamment par le référendum du 28 octobre 1962 organisé sur la base de l'article 11 pour procéder à une révision de la Constitution.

<sup>17</sup> Cf. T. Annus, *op. cit.* (note 4), p. 59 et J. Põld, *op. cit.* (note 6), p. 70.

remarquable à quel point les membres de l'Assemblée constitutionnelle ont été préoccupés par la question de la délimitation du champ référendaire.<sup>\*18</sup> L'article 106 al. 1 Cst. est bien le résultat de la volonté des rédacteurs de la Constitution d'éviter tout usage populiste du référendum pouvant affaiblir l'État et mettre en danger son bon fonctionnement. C'est aussi un moyen de dissuasion contre toute velléité d'y recourir à des fins démagogiques (notamment aux sujets des impôts). En fin de compte, de telles restrictions ont pour objectif de protéger le Parlement et, sur un plan plus spécifique à l'Estonie, de le protéger contre lui-même puisqu'il est le seul à pouvoir organiser un référendum et donc à pouvoir restreindre ses compétences de législateur.

C'est justement parce que le peuple est amené à exercer la fonction législative, laquelle est dévolue expressément par l'article 59 Cst. au seul Riigikogu, et que de cette manière il se place en concurrent de ce dernier, que des précautions sont prises dans la Constitution et dans la loi pour restreindre l'usage du référendum législatif. Précautions qui n'ont pas lieu d'être pour les référendums constitutionnels vu qu'ils font intervenir le peuple dans sa fonction « naturelle » de constituant. Alors, au-delà presque de toute attente, il en est résulté que pas le moindre référendum législatif n'a vu le jour en Estonie prêt de 15 ans après l'adoption de la Constitution.<sup>\*19</sup>

## 2. Le référendum sur « d'autres questions d'intérêt national »

Bien que l'institution référendaire soit inscrite dans la Constitution au chapitre consacré à la législation, ce n'est pas pour autant qu'elle soit réservée à un usage exclusivement normatif. « Toute autre question d'intérêt national », dit l'article 105 al. 1 Cst, peut également faire l'objet d'un référendum. Cette disposition a l'avantage d'élargir considérablement le champ d'application du référendum en permettant au peuple de s'exprimer sur des sujets autres que des projets de loi. Elle est surtout révélatrice de la volonté des constituants de mettre en place un système référendaire suffisamment souple, pour non pas renforcer le rôle de la démocratie directe en Estonie, mais plutôt donner au Riigikogu les moyens de s'en servir le plus largement possible dans les domaines de sa compétence. Le revers de la médaille, qui résulte des objectifs escomptés, est qu'il est extrêmement difficile de définir la consistance de cette catégorie de référendum. Référendum au contour flou, son double inconvénient est de présenter un contenu indéterminé et une portée juridique incertaine.

### 2.1. Un contenu indéterminé

Ni le constituant, ni le législateur se sont donnés la peine de définir ce qui, faute de mieux, est désigné sous le terme de « référendum sur d'autres questions d'intérêt national » ou, en traduisant mot à mot le terme estonien, de « référendum sur d'autres questions de la vie de l'État ». Dans ces conditions, certains auteurs n'ont pas hésité à affirmer que ces questions relèvent essentiellement de la décision politique, à laquelle il appartient au seul organe politique représentatif de la Nation – au Riigikogu – de prendre part et de déterminer leur contenu.<sup>\*20</sup> De fait, il est incontestable que ce soit l'initiateur du référendum (le Riigikogu donc) qui puisse être en mesure de dire quelles sont concrètement ces autres questions d'intérêt national. Sur ce point, son pouvoir d'appréciation est particulièrement étendu. Effectivement, la Constitution reconnaît au Parlement, outre les compétences qu'elle énumère, celle de régler « toute autre question d'intérêt national qui, selon la Constitution, ne relève pas de la compétence du Président de la République, du Gouvernement de la République, des autres organes de l'État ou des collectivités locales. » (article 65 p. 16 Cst.).

Le fait de préciser que ces questions pouvant faire l'objet d'un référendum doivent se limiter à celles qui sont du domaine de compétence du Riigikogu ou, du moins, qui n'entrent pas expressément dans le champ de compétence d'un autre organe étatique ou régional, souligne un élément fondamental de cette catégorie de référendum, auquel, du reste, son intitulé fait référence, à savoir la dimension nationale/étatique des questions soulevées. Ainsi, l'article 105 Cst. ne peut être invoqué pour organiser un référendum qu'à la condition que la question qui en est l'objet présente un intérêt pour la vie de la Nation. Inversement, toute question qui intéresse la vie de la Nation ne peut être soumise au vote populaire uniquement sur le fondement de l'article 105 Cst, c'est-à-dire a contrario qu'elle ne peut faire l'objet d'un référendum au niveau local ou

<sup>18</sup> Cf. Põhiseadus ja Põhiseaduse Assamblee. Koguteos (Constitution et Assemblée sur la Constitution. Recueil). Juura, Õigusteabe AS 1997 (en estonien).

<sup>19</sup> Dans l'histoire de la République d'Estonie, il n'y eut qu'un seul référendum législatif, à savoir celui des 17, 18 et 19 février 1923 au sujet de la loi sur l'enseignement religieux dans les écoles.

<sup>20</sup> Cf. R. Maruste. Põhiseadus ja selle järelevalve (La Constitution et son contrôle). Juura, Õigusteabe AS 1997, p. 55 (en estonien).

plus exactement communal. Sur ce point précisément, s'est produit un événement assez insolite au cours de l'été 1993 qui, finalement, donna l'occasion à la plus haute instance juridictionnelle estonienne – la Cour d'État – non seulement de se prononcer pour la première fois sur une question relative au référendum mais aussi de tracer une ligne de partage entre le référendum d'intérêt national et le référendum d'intérêt local. En réaction contre certaines lois de la République<sup>\*21</sup> qu'ils jugeaient discriminatoires vis-à-vis de la majorité de leurs habitants, les conseils municipaux des villes de Narva et Sillamäe prirent la décision d'organiser sur leur territoire un référendum et de demander à leurs administrés s'ils souhaitaient que leur ville eût le statut d'autonomie nationale territoriale au sein de la République d'Estonie. Saisie de l'affaire par le Chancelier du droit, la Cour d'État, en sa qualité de juge constitutionnel, décida de faire droit à sa demande et d'annuler les décisions litigieuses des deux conseils municipaux.<sup>\*22</sup> La chambre des recours constitutionnels de la Cour d'État retint notamment que « la tenue d'un référendum sur la question de l'autonomie nationale territoriale est en dehors de la compétence d'une collectivité locale et contraire à l'article 154 al. 1 de la Constitution » dans la mesure où « la création d'une entité autonome nationale territoriale n'est pas une question d'intérêt local mais une question nationale » qui doit être décidée selon la procédure décisionnelle de niveau étatique.

D'un point de vue formel, le seul élément qui puisse caractériser ces *autres* questions d'intérêt national apparaît en négatif par rapport à toutes les autres formes de référendum qui ont trait à un projet de loi. Il n'y a pas sur ce point de limites particulières. Pour reprendre la distinction retenue par la Commission de Venise<sup>\*23</sup>, il est possible d'admettre que, par opposition aux projets de loi rédigés, les textes soumis aux référendums puissent avoir la forme d'une question de principe ou d'une proposition concrète, dite encore « proposition non-formulée ». Précisons également que rien n'empêche, bien au contraire, à ces questions ou propositions, en dépit du fait qu'elles ne se présentent pas sous la forme de projets de loi rédigés, d'avoir un contenu normatif<sup>\*24</sup> qu'il appartiendra ultérieurement au Parlement de concrétiser dans des textes de loi.

Ainsi, les matières entrant dans le champ d'application de ce type de référendum peuvent être constitutionnelles, législatives ou autres. Cela ne veut pas dire que n'importe quelle question puisse être soumise au référendum. La seule limite matérielle qui existe à l'égard de ce type de référendum concerne celle que nous avons vue à propos des référendums législatifs. L'article 106 al. 1 Cst. trouve donc à s'appliquer au référendum sur d'autres questions d'intérêt national. Cependant, nous pensons que les matières exclues du champ référendaire n'intéressent pas tous les cas de référendums sur d'autres questions d'intérêt national. Il conviendrait ici de faire un parallèle avec le référendum sur un projet de loi et de reprendre la distinction que nous avons établie entre référendum constitutionnel et référendum législatif. De la même façon, il serait, à notre avis, juste de considérer que toute question de principe ou proposition concrète soumise au référendum ne puisse être relative au budget, aux impôts, aux obligations financières de l'État, à la défense nationale, à la ratification et à la dénonciation des traités internationaux, ou tendre à décréter et mettre fin à l'état d'urgence, à part les questions d'ordre constitutionnel. On ne voit pas pourquoi d'un côté, l'article 106 al. 1 Cst. ne ferait pas obstacle à l'organisation d'un référendum sur un projet de loi constitutionnelle alors qu'il fait référence à une matière exclue du champ référendaire et d'un autre côté, ce même article empêcherait que le peuple puisse s'exprimer sur une question qui, sans en avoir la forme, est de nature constitutionnelle, c'est-à-dire qui interpelle le Riigikogu dans sa fonction de pouvoir constituant. Lorsque la question posée au peuple tend à un réaménagement du pacte social, que ce soit par une révision des dispositions constitutionnelles (cas du référendum constitutionnel) ou par l'acceptation de principe de réviser la Constitution (cas du référendum sur d'autres questions d'intérêt national), l'article 106 al. 1 Cst. ne saurait être un motif pour s'opposer à l'organisation d'un tel référendum.

Le dernier référendum ayant eu lieu en Estonie, mais aussi le premier dans le cadre constitutionnel de 1992, à savoir celui du 14 septembre 2003 relatif à l'adhésion à l'Union européenne, n'avait pas uniquement pour objet la révision de la Constitution comme nous l'avons présenté précédemment. Il portait également sur une « autre question d'intérêt national » qui, liée à celle concernant le projet de loi constitutionnelle, formait une seule et même question. Le corps électoral devait ainsi répondre par un oui ou par un non à la question suivante : « Êtes-vous favorable à l'adhésion à l'Union européenne et à l'adoption de la loi portant amendement de la Constitution de la République d'Estonie ? ». Les deux objets sur lesquels portait ce référendum, à savoir l'adhésion à l'Union européenne et la loi portant amendement de la Constitution, se rejoignaient en fait sur plusieurs points. Ils avaient d'une part la même nature constitutionnelle (le premier en tant que

<sup>21</sup> Notamment la loi sur les étrangers, la loi sur la langue et loi sur la citoyenneté.

<sup>22</sup> Sur l'affaire du référendum de la ville de Narva : arrêt n° III-4/1-2/93 de la Cour d'État du 11 août 1993 (RT I 1993, 59, 841). Disponible en anglais à l'adresse : <http://www.nc.ee/?id=489> (mai 2006). Sur l'affaire du référendum de la ville de Sillamäe : arrêt n° III-4/1-3/93 de la Cour d'État du 6 septembre 1993 (RT I 1993, 61, 890). Disponible en anglais à l'adresse : <http://www.nc.ee/?id=488> (mai 2006) (en estonien).

<sup>23</sup> Le référendum en Europe – Analyse des règles juridiques des États européens, Rapport adopté par le Conseil des élections démocratiques lors de sa 14<sup>e</sup> réunion (Venise, 20 octobre 2005) et la Commission de Venise lors de sa 64<sup>e</sup> session plénière (Venise, 21-22 octobre 2005), Étude n° 287/2004, CDL-AD(2005)034.

<sup>24</sup> Cf. J. Pöld, *op. cit.* (note 6), p. 69.

référendum de souveraineté et le second en tant que référendum de révision constitutionnelle), et d'autre part, ils constituaient un ensemble inséparable à partir du moment où une révision de la Constitution était rendu nécessaire avant toute ratification du traité d'adhésion avec l'Union européenne.<sup>\*25</sup>

Notons qu'au départ, le Riigikogu proposait d'organiser deux référendums séparés. L'un portant sur la question de l'adhésion et l'autre sur la révision de la Constitution.<sup>\*26</sup> Le principal problème juridique soulevé à propos de la tenue d'un référendum sur la seule question de l'adhésion à l'Union européenne était de savoir si cela n'était pas en contradiction avec l'article 106 al. 1 Cst. Cela serait certainement le cas, si l'adhésion à une organisation internationale était conditionnée par la simple ratification d'un traité international, car le référendum d'adhésion équivaldrait à demander au peuple l'approbation de la loi portant ratification du traité. Toute autre est la situation dans laquelle l'adhésion à une organisation internationale implique une révision de la Constitution comme préalable à la ratification du traité d'adhésion. Le référendum d'adhésion change alors de nature pour entrer dans la catégorie des référendums constitutionnels. L'organisation d'un référendum trouve donc sa justification dans le fait que l'adhésion nécessite une révision de la Constitution. Mais, dans la mesure où cette révision touche des dispositions sur la souveraineté de l'État et plus globalement les chapitres 1 et 15 Cst., le Riigikogu a l'obligation de l'organiser.

Cela confirme bien que l'article 106 al. 1 Cst. ne pose de restrictions qu'à l'égard des référendums qui ont une nature infra-constitutionnelle. En fin de compte, pour que la question de l'adhésion à une organisation internationale<sup>\*27</sup> voire simplement de la ratification d'un traité international<sup>\*28</sup> puisse ou doive être soumise à la votation populaire, il faut qu'une révision constitutionnelle s'impose préalablement.

## 2.2. Une portée juridique incertaine

Pas plus qu'elle ne définit le contenu de ce que sont ces référendums sur « d'autres questions d'intérêt national », la Constitution n'apporte pratiquement aucune précision quant à leur portée juridique. En se limitant à l'intitulé de cette catégorie de référendum et sachant qu'elle s'oppose à celle dont l'objet est d'adopter un texte de loi, on pourrait croire qu'il s'agit d'une consultation tendant à connaître l'avis du peuple sur une question particulièrement importante. Le fait par ailleurs que le Parlement soit seul à apprécier l'opportunité de la consultation comme cela est le cas dans d'autres pays du nord de l'Europe ayant une longue tradition de souveraineté parlementaire<sup>\*29</sup>, nous invite fortement à penser qu'il est en fait question d'un référendum consultatif. Or, il n'en est rien. En vertu de l'article 105 al. 3, « la décision du référendum s'impose à tous les organes de l'État ». Sur ce point, la Constitution ne fait pas de distinction entre référendum sur un projet de loi et référendum sur d'autres questions d'intérêt national. Tous les référendums ont en Estonie la même force juridique et tous sont des référendums décisionnels. Si le principe a le mérite de la simplicité et de la clarté, il suscite des interrogations quant à son application.

Il ressort en tout cas clairement de cette disposition que si le Riigikogu peut décider en toute liberté d'en appeler au peuple pour statuer sur une question qui ne porte pas sur un projet de loi rédigé, il ne peut, ni avant, ni après la consultation, indiquer qu'il n'est pas juridiquement lié par les résultats du référendum.

Par contre, il est difficile de dire ce que doivent concrètement faire les autorités étatiques lorsqu'une réponse positive ou négative est issue des urnes. Alors que la Constitution indique explicitement quels sont les effets immédiats d'un vote approuvant ou rejetant un texte de loi soumis au référendum<sup>\*30</sup>, elle reste totalement silencieuse pour ce qui est des référendums sur d'autres questions d'intérêt national. La loi sur le référendum ne nous est pas d'un plus grand secours puisqu'elle se contente, en son article 4, de reprendre mot pour mot la formule lapidaire de la deuxième phrase de l'article 105 al. 3 Cst.

Puisque la Constitution considère, sans plus de précisions, que la décision d'un référendum sur une autre question d'intérêt national a une portée juridique contraignante, il convient d'avancer quelques suppositions sur sa signification. On peut vraisemblablement imaginer qu'il incombera en premier lieu au Riigikogu, en

<sup>25</sup> L'idée de formuler ainsi la question du référendum en associant ces deux éléments est venue d'une proposition du ministre de la Justice d'alors, Märt Rask, qui a ensuite été soutenue par le groupe de travail constitué auprès de la Commission des lois constitutionnelles du Riigikogu. Voir M. Rask. Ühinemise otsustab rahvas (Le peuple décide de l'adhésion). – Postimees, 29 avril 2002 (en estonien). Bien que critiquée par certains (notamment par Tiit Toomsalu, alors membre du Riigikogu et Ivar Raag), la formulation de la question trouvait sa justification dans le fait qu'elle devait permettre une parfaite lisibilité de la réponse du peuple et établir avec certitude le lien entre la poursuite du processus d'adhésion avec la révision de la Constitution. Voir J. Kivirähk. Rahvahääletusest mõistetav tulemus (Le résultat compréhensible du référendum). – Postimees, 4 janvier 2003 (en estonien).

<sup>26</sup> Projet de résolution n° 1214 déposé le 5 novembre 2002 par la Commission des lois constitutionnelles.

<sup>27</sup> Cas de l'adhésion à l'OTAN.

<sup>28</sup> Cas de la ratification du traité instituant une Constitution pour l'Europe.

<sup>29</sup> Cf. F. Hamon. Le référendum – Étude comparative. LGDJ coll. « Systèmes » 1995, p. 23.

<sup>30</sup> En cas de vote positif sur un texte de loi, le Président de la République a l'obligation de le promulguer sans délai (art. 105 al. 3, première phrase, Cst.). Dans le cas contraire, il a l'obligation de provoquer des élections législatives anticipées (art. 105 al. 4 Cst.).



tant qu'initiateur du référendum, non seulement de prendre en compte la décision populaire issue des urnes mais aussi de la transformer en acte concret. Si la majorité des suffrages répond favorablement à la question posée, le Riigikogu doit faire en sorte qu'un texte (ce peut être une loi constitutionnelle ou autre ou une résolution) soit adopté pour mettre en œuvre la volonté populaire qui s'est exprimée par référendum. Selon la forme du texte soumis au référendum, le champ d'action laissé au Riigikogu pour mettre à exécution la volonté du peuple est plus ou moins restreint. Cela va de la proposition concrète qui ne lui donne aucune marge de manœuvre à la question de principe très générale qui ne donne que des orientations à suivre. Si, inversement, la réponse est négative, le Riigikogu a assurément l'obligation de s'abstenir d'aller dans le sens de la question posée du moins tant que le peuple n'y a pas répondu par l'affirmative à l'occasion d'un autre référendum ou que la législature n'est pas arrivée à son terme. On s'aperçoit que le caractère contraignant de la décision du référendum portant sur une autre question d'intérêt national implique un parallélisme des formes, en ce sens que si la proposition formulée en terme de principe ou « non rédigée » est refusée par référendum, elle ne peut être introduite que par la voie référendaire. De la même façon, si une proposition est acceptée par référendum, le Riigikogu ne peut s'en détourner qu'en demandant à nouveau au peuple de s'exprimer sur le sujet.

Il reste à savoir si les obligations qui pèsent sur le Riigikogu sont d'ordre juridique ou politique. Lorsqu'il est amené à exécuter la décision du référendum, le Riigikogu doit-il rendre compte de son action devant les autorités chargées du contrôle de constitutionnalité et de légalité ou bien uniquement devant les électeurs ? Le Président de la République a-t-il la faculté ou l'obligation d'exercer son droit de veto contre une loi adoptée par le Riigikogu ne respectant pas une décision populaire prise par référendum ? Rien ne permet d'y répondre avec certitude.

Finalement, il ne semble pas que le terme de référendum décisionnel, qui implique des effets juridiques immédiats sitôt les résultats du scrutin proclamés, soit celui qui caractérise le mieux le référendum sur d'autres questions d'intérêt national. Il correspondrait plutôt à une forme de référendum « orientatif »<sup>31</sup>, que l'on pourrait aussi désigner sous le terme de référendum « directionnel » vu qu'il oblige le Riigikogu à atteindre un objectif, tout en lui laissant pour ce faire le choix des moyens et des formes.

## Conclusion

S'il est vrai que le système constitutionnel estonien, mis en place le 28 juin 1992, permet que des questions d'intérêt national très variées, tant d'un point de vue formel que matériel, puissent faire l'objet d'un référendum, il serait faux d'en déduire que l'institution référendaire y occupe une place souveraine. Le fait que le peuple soit habilité à participer directement au processus décisionnel étatique en se prononçant soit sur un projet de loi soit sur toute autre question d'intérêt national, n'a rien d'un signe de valorisation de cette technique de démocratie directe. Elle souligne avant tout l'étendu des pouvoirs du Riigikogu, seul maître du déclenchement de la procédure référendaire. Or, ce dernier est généralement peu enclin à laisser le peuple prendre des décisions à sa place, surtout que les effets contraignants qui en découlent et les risques auxquels il s'expose en recourant au référendum sont autant de facteurs pour l'en dissuader.

On conclura donc par un bref rappel de la pratique référendaire qui, même s'il ne prend pas uniquement en compte celle se situant dans le cadre constitutionnel de 1992, est révélateur de la place qu'occupe véritablement l'institution référendaire dans ce pays. Tout au long de son histoire en tant qu'État indépendant, l'Estonie a organisé au total 9 référendums, dont 1 référendum sur un projet de loi ordinaire, 5 référendums sur des projets constitutionnels et 4 référendums sur d'autres questions d'intérêt national (ayant toujours cependant une nature constitutionnelle). Sur les cinq référendums organisés dans le cadre d'une procédure constitutionnelle (référendum de 1923, de 1932, de juin et novembre 1933, et de 2003), tous l'ont été en raison du fait qu'ils résultaient d'une obligation imposée par la Constitution.

<sup>31</sup> F. Hamon, *op. cit.* (note 29), p. 16.

**Liste des référendums nationaux organisés  
en République d'Estonie de 1920 à nos jours**<sup>\*32</sup>

<b>Date</b>	<b>Objet</b>	<b>Oui (voix et % exprimés)</b>	<b>Non (voix et % exprimés)</b>
1. 17-19/02/1923	Loi sur l'enseignement religieux dans les écoles	328369 71,56%	130476 28,44%
2. 13-15/08/1932	Loi portant modification de la Constitution	333979 49,17%	345215 50,83%
3. 10-12/06/1933	Loi portant modification de la Constitution	161598 32,66%	333118 67,33%
4. 14-16/10/1933	Loi portant modification de la Constitution	416878 72,66%	156894 27,34%
5. 23-25/02/1936	Convocation de l'Assemblée nationale constituante	474218 76,11%	148824 23,89%
6. 3/03/1991	Rétablissement de l'indépendance nationale	737964 77,83%	203199 22,17%
7. 28/06/1992	Projet de Constitution	407864 91,30%	36147 8,09%
8. 28/06/1992	Autorisation accordée à ceux qui ont fait leur demande de naturalisation estonienne avant le 5 juin 1992 de participer aux premières élections législatives et présidentielles.	205980 46,13%	236819 53,04%
9. 14/09/2003	Adhésion à l'Union européenne et loi portant amendement de la Constitution	369657 66,83%	183454 33,17%

<sup>32</sup> Source : d'après les chiffres publiés au Journal officiel de la République estonienne et ceux obtenus de la Commission électorale de la République.



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# State Responsibility for Private Armed Groups in the Context of Terrorism

## 1. Introduction

In today's world, there are hundreds of informal private groups that are involved in armed activities against local and foreign governments.<sup>1</sup> Such terrorist groups use, as a rule, means and methods incompatible with international humanitarian law, and their activities can potentially endanger both domestic and international peace and security. As more than a few recent examples have shown, some terrorist groups can even perpetrate attacks comparable, in scale and gravity, to those of regular armed forces.<sup>2</sup> Therefore it is completely understandable that states, especially injured states but also potential target states, want to react decisively and to make sure that such attacks do not happen again. The fight against private armed groups — the so-called 'war on terrorism' — involves many practical and legal difficulties. However, there is one aspect of it that has a fundamental impact on such a fight as a whole: private armed groups do not exist in stateless enclaves but always operate from the territory of states.<sup>3</sup> This means, essentially, that if the injured state wants to use armed force, as a matter of self-defence, against the terrorist group responsible for its attack, it automatically acts also against the state from which that particular group operates. But in order to use force lawfully against the host state<sup>4</sup>, the injured state must first demonstrate that the terrorist attack, in at least its

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<sup>1</sup> For a list of international terrorist groups, consider, for example, the Web site of the United States Department of State; see <http://www.state.gov/s/ct/rls/fs/37191.htm> (1.06.2006).

<sup>2</sup> The most famous is Osama bin Laden, whose terrorist network designated 'al-Qaeda' has carried out several grave attacks against the United States, such as demolishing its embassies in Kenya and Tanzania (301 killed) (1998), damaging the navy warship USS Cole on the coast of Yemen (17 killed) (2000), and destroying the World Trade Center in New York (more than 3,000 killed) (2001). See F. A. Biggio. *Neutralizing the Threat: Reconsidering Existing Doctrines in the Emerging War on Terrorism*. – *Case Western Reserve Journal of International Law* 2002 (34), pp. 1–4 for detailed information.

<sup>3</sup> There is one, unlikely exception to this general statement. A private armed group would be outside the territory and jurisdiction of all states if it were to operate entirely on and from the high seas. Article 89 of the United Nations Convention on the Law of the Sea, Montego Bay, 10.12.1982, which entered into force on 16.11.1994 (1833 United Nations Treaty Series 3), declares that the high seas are not subject to, and may not validly be subjected to, the sovereignty of any state.

<sup>4</sup> The notion of 'host state' should be understood in this article to include also other non-territorial states that provide substantial support to the private armed group such as is essentially necessary for carrying out its activities.

consequences, is attributable to the former under customary or conventional international law. If this is not duly done, the injured state instead commits an internationally wrongful act and is itself liable before the host state. Although the law of state responsibility includes a number of rules that aid in determining whether a particular act is attributable to a state, their application is, unfortunately, neither uniform nor consistent. States tend to broaden the scope of these rules if and when doing so offers better protection for their national security interests or simply serves to further their political goals to a greater extent. This article analyses both actual and hypothetical situations in which a private armed group has acted forcibly against a foreign state, and it attempts to establish under which circumstances the host state can be held legally responsible for such acts.

## 2. General remarks on state responsibility

### 2.1. Principles of state responsibility

All sovereign states are equal in rights as well as in corresponding duties to respect the rights of other states. When a state violates the rights of another state and causes injury to the latter as a result, it is responsible for said injury and has to compensate fully for all damages. As the Permanent Court of International Justice has appropriately found, “it is a principle of international law, and even a greater conception of law, that any breach of an engagement involves an obligation to make reparation”.<sup>5</sup> In simpler words, the state is responsible for the breaches of its international obligations and becomes subject to whatever remedial action is legally permissible in the circumstances.

The rules covering state responsibility were recently codified into the Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001)<sup>6</sup>, which reflect customary international law binding upon all states.<sup>7</sup> These provide that “every internationally wrongful act of a State entails the international responsibility of that State”.<sup>8</sup> The responsibility arises from conduct, an action, or an omission that (1) is attributable to that state under international law and (2) constitutes a breach of an international obligation of the state.<sup>9</sup> Article 12 explains that such a breach occurs when an act of a state is not in conformity with what is required of that state by the particular obligation in question, regardless of its origin or character. For the sake of objectiveness, it is exclusively for international law to determine what constitutes an internationally wrongful act, irrespective of municipal law.<sup>10</sup> If any of these requirements is not duly satisfied, there is no internationally wrongful act and the state cannot be held legally responsible for the action in question.

The law of state responsibility is based on the concept of agency. States are political abstractions and act not as such but through persons. So, the key question is whether a person has acted as an agent of a particular state and his acts qualify as action of that state. This is particularly true in cases involving formal state organs, especially their officials, that have been authorised to exercise public functions and, as a result, represent the state in question. If it is established that an act is indeed attributable to a state, the latter is considered to have itself committed that act, without further regard to the identity of the person who actually carried it out.

The traditional rule is that the conduct of private actors, both persons and entities, is not normally attributable to the state under international law.<sup>11</sup> However, it is equally well settled that the acts of *de facto* state agents are attributable to the state; i.e., the conduct of apparently private actors may in fact be sufficiently connected with the exercise of public functions that otherwise private acts may be deemed state action instead. The rules of state responsibility have gradually developed to hold a state answerable for its own wrongdoings also in relation to private violence. Where the state has a duty to prevent private harm or to abstain from any support for it, its responsibility is engaged when it violates these obligations.<sup>12</sup> In these cases, it is often difficult to make a determination. It is, however, less likely that it is going to be possible to demonstrate that a state is responsible for the private acts itself (direct responsibility) than it is to prove that the state is responsible for its own related wrong — i.e., its inadequate efforts to prevent the private action in

<sup>5</sup> Judgement, *The Factory at Chorzów* (Germany v. Poland). – Permanent Court of International Justice Series A, No. 17 (1928) 4, p. 29.

<sup>6</sup> General Assembly Resolution 56/83, 28.01.2002, Annex (Draft Articles).

<sup>7</sup> R. Wolfrum. State responsibility for private actors: An old problem of renewed relevance. – M. Ragazzi (ed.). *International Responsibility Today*. Leiden: Brill 2005, p. 424.

<sup>8</sup> Draft Articles, article 1.

<sup>9</sup> *Ibid.*, article 2.

<sup>10</sup> *Ibid.*, article 3.

<sup>11</sup> R. Jennings, A. Watts (eds.). *Oppenheim's International Law*. 9th ed. Vol. 1. Harlow: Longman 1996, pp. 502–503.

<sup>12</sup> T. Becker. *Terrorism and the State: Rethinking the Rules of State Responsibility*. Oxford: Hart Publishing 2006, p. 3.



question (indirect responsibility). The fact of whether the state bears direct or indirect responsibility usually determines also what kind of countermeasures may be appropriate and lawful in the case in question.

## 2.2. Changing nature of state responsibility?

The legal response to the terrorist attacks of 11 September 2001 in the United States and other recent developments strongly suggest that the scope of state responsibility for private conduct has expanded. Quite a few states have indicated that they are prepared to hold other states responsible for international terrorism where there is less incriminating evidence.<sup>\*13</sup> Most famously, President Bush declared that the United States would “make no distinction between the terrorists who committed these acts and those who harbor them”.<sup>\*14</sup> This shift hints that states may hold other states directly responsible for private acts that were previously held to confer indirect responsibility and led to the possibility of taking countermeasures only of lesser degree than military operations. The United States held the Taliban regime of Afghanistan directly responsible for the 11 September 2001 terrorist attacks because it **allowed** al-Qaeda to operate in its territory, not because it **directed or controlled** the entity’s action.

Does such expansion of responsibility have the positive effect for which states are hoping? The results are most likely going to be mixed.<sup>\*15</sup> Although states have acknowledged the significant changes in circumstances that have been dominating and influencing international affairs since 11 September 2001, there has been very little progress in refashioning the ‘primary rules’ specifying the content of state obligations in the context of terrorism; states have instead relaxed the ‘secondary rules’ defining state responsibility for breaches of any such obligations.<sup>\*16</sup> States should formulate support for terror as a clear breach of primary legal obligations, which leads to liability under the traditional rules of state responsibility. Unfortunately, states cannot agree on a workable and universally accepted general definition of terrorism.<sup>\*17</sup> The last four decades have seen a number of efforts, some less serious than others, to formulate such a definition, but there is still no legally binding solution concerning the matter, except 13 special conventions on specific offences commonly described as terrorist acts.<sup>\*18</sup> Perhaps the most persistent obstacle is summed up in the infamous maxim that one man’s terrorist is another man’s freedom fighter. Geoffrey Levitt has very aptly described the situation by saying that “the search for a legal definition of terrorism in some ways resembles the quest for the Holy Grail: periodically, eager souls set out, full of purpose, energy and self-confidence, to succeed where so many others before have tried and failed”.<sup>\*19</sup> The Holy Grail remains undiscovered. Even the 11 September 2001 events, which caused unprecedented solidarity in the world, could not lead to formulation of a general definition of terrorism as was optimistically hoped. The amendments to the ‘secondary rules’ remain, so far, the lone workable solution to the problem of state responsibility for private forcible acts, although commentators have correctly expressed concern that such an “approach is unsound, because it risks a range of perverse, trans-substantive implications that could undermine the struggle against terrorism”.<sup>\*20</sup> Furthermore, there are limits to how much one can stretch the ‘secondary rules’.

<sup>13</sup> See M. E. O’Connell. Evidence of Terror. – *Journal of Conflict and Security Law* 2002 (7), pp. 19–36 for discussion of what evidence is sufficient for linking terrorist attacks to states and for supporting a case of self-defence against such states.

<sup>14</sup> Statement by the President in his Address to the Nation, 11.09.2001. Available at <http://www.whitehouse.gov/news/releases/2001/09/20010911-16.html> (1.06.2006).

<sup>15</sup> See D. Jinks. State Responsibility for the Acts of Private Armed Groups. – *Chicago Journal of International Law* 2003 (4), pp. 91–94 for detailed discussion.

<sup>16</sup> The primary rules specify the content of legal obligations, and the secondary rules set forth the conditions under which states are considered to be responsible for breaches of these obligations. See J. Crawford. *The International law Commission’s Articles on State Responsibility: Introduction, Text and Commentaries*. Cambridge University Press 2002, pp. 14–16 for further information.

<sup>17</sup> See, for example, A. R. Perera. Reviewing the UN Conventions on Terrorism: Towards a Comprehensive Terrorism Convention. – C. Fijnaut, H. Wouters, F. Naert (eds.). *Legal Instruments in the Fight against International Terrorism: A Transatlantic Dialogue*. Leiden: Martinus Nijhoff 2004, pp. 567–587; H. Duffy. *The ‘War on Terror’ and the Framework of International Law*. – Cambridge University Press 2005, pp. 18–31; M. Halberstam. The Evolution of the United Nations Position on Terrorism: From Exempting National Liberation Movements to Criminalizing Terrorism Wherever and by Whomever Committed. – *Columbia Journal of Transnational Law* 2003 (41), pp. 573–584 for more information on the question of defining terrorism.

<sup>18</sup> See P. J. van Krieken. *Terrorism and the International Legal Order: With Special Reference to the UN, the EU and Cross-Border Aspects*. The Hague: T. M. C. Asser Press 2002, pp. 22–27 for definitions adopted in these conventions.

<sup>19</sup> G. Levitt. Is ‘Terrorism’ Worth Defining? – *Ohio Northern University Law Review* 1986 (13), p. 97.

<sup>20</sup> D. Jinks (Note 15), p. 95.

### 3. State responsibility for private actors

What is the effect of the state being responsible for the forcible acts of a terrorist group? All states have an overriding obligation to refrain from the threat or use of armed force against other states.<sup>\*21</sup> If one state attacks another state, the latter has a natural and inalienable right to self-defence.<sup>\*22</sup> Terrorism is, essentially, use of violence and therefore comparable, in effect, to armed attacks by states. If the forcible acts of a private armed group are appropriately attributable to a state, it follows that the host state has violated its duty not to use armed force in its relations with other states and the injured state may have a legitimate justification to use armed force as self-defence both against the terrorist group and against its host state. It is true that self-defence has generally been associated with inter-state relations, but there is no reason that the right of states to defend themselves should be confined solely to response to attacks launched originally by states.<sup>\*23</sup> As mentioned above, the violent acts of private armed groups may be of comparable scale and gravity to those of states.

#### 3.1. Level of state involvement

The decision to use armed force as a response against another state must not be taken lightly, because such a step has potentially very serious consequences. The injured state has to take into account the level of involvement of the host state in the action of the private armed group when choosing the means and methods of retaliation.

Four general levels of state involvement can be identified<sup>\*24</sup>:

- **Direction** — the state actively controls or directs the terrorist activities. For example, there is substantial evidence that Libya directed the terrorists who bombed the Berlin discotheque (1986) and killed an American serviceman;
- **Support** — the state does not control the terrorists but does encourage their activities and provides active support such as training, equipment, money, and transport. For example, both Iran and Syria give substantial amounts of financial assistance, training, weapons, explosives, and other support to the Palestinian terrorist group Hezbollah;
- **Toleration** — the state does not actively support or direct terrorists, but it makes no effort either to arrest or suppress them. For example, the Taliban regime consistently permitted international terrorists to use Afghanistan as a training ground and base of operations and refused to co-operate in the capture of Osama bin Laden; and
- **Inaction** — the state is simply unable to deal effectively with terrorists, due to political factors or inherent weakness. For example, Lebanon lacked control over a large portion of its southern territory, where terrorists operated against Israel (although there have been many positive developments, the operation of terrorists there continues even today to some extent).

A state cannot be held responsible in an equal manner for all of the situations described. Most importantly, not every situation automatically calls for or justifies military intervention: the remedial action has to be proportionate to the threat or consequences of the terrorist attack.<sup>\*25</sup> While direction by the state of terrorist activities may indeed justify or even demand military response as self-defence, mere inaction by the state due to genuine inability to deal with the private armed groups located in its territory does not necessarily make the host state a target of lawful military operations.

<sup>21</sup> Article 2 (4) of the United Nations Charter declares that “all Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations”.

<sup>22</sup> This is also reaffirmed in the United Nations Charter, which otherwise prohibits the use of armed force. Article 51 states that “nothing in the [...] Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations”.

<sup>23</sup> See C. Greenwood, *International Law and the Pre-emptive Use of Force: Afghanistan, Al-Qaida, and Iraq*. – San Diego International Law Journal 2003 (4), pp. 16–18 for detailed discussion.

<sup>24</sup> See also R. J. Erickson, *Legitimate Use of Military Force against State-Sponsored International Terrorism*. Maxwell Air Force Base, AL: Air University Press 1989, pp. 32–34; G. M. Travalio, *Terrorism, International Law, and the Use of Military Force*. – Wisconsin International Law Journal 2000 (18), pp. 150–151 and accompanying footnotes.

<sup>25</sup> The Webster formula, which has long been regarded as a definitive statement of the conditions for exercising the right to self-defence in customary international law, prescribes that the injured state may not do anything “unreasonable or excessive; since the act, justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it” (British Foreign and State Papers 1840–1841 (29), p. 1138).

## 3.2. Grounds for state responsibility

International law foresees certain situations where the state is responsible either for private conduct itself or for consequences arising therefrom. It can be said, in advance, that legal attribution of different terrorist acts to states is not usually as easy as political condemnation. But to the extent that imputing state responsibility to those who harbour and support terrorist groups is necessary for effective self-defence, the Draft Articles are not generally inconsistent with the evolving standard recognised by the recent expressions and acts of states; although innovative interpretation is still necessary.

### 3.2.1. Conduct of *de facto* state agents or organs

States are ever more commonly using private persons or entities for performing public functions. As the state has employed these private actors to exercise, in its place, elements of the governmental authority, the former must bear responsibility for such actors.<sup>\*26</sup> When the relationship between the state and private actors is formal — for example, there is a contract or legislative act in place — no dispute concerning responsibility usually arises, provided that the person or entity acted in an official capacity in the instance in question. So, if a state hires a private armed group to carry out forcible acts against other states, the hiring state is responsible for the action of that group. However, state responsibility becomes complicated when a state is using private actors who are neither employees nor organs of that state but are still acting informally as its agents. In fact, this should not change the position of the state. It would be imprudent to deny state responsibility for private conduct in circumstances where it is clear that the state is using the private actors as its *de facto* agents.<sup>\*27</sup> To deny state responsibility merely on grounds that it is a private actor involved when, in fact, it is clear that the latter is acting on the instructions of the state would be to encourage state use of private agents to circumvent legal obligations.

The imputability to a state of the use of armed force by its agents has been established in the Definition of Aggression, which defines an act of aggression, *inter alia*, as “the sending by or on behalf of a State of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another State of such gravity as to amount to [an actual armed attack conducted by regular forces] or its substantial involvement therein”.<sup>\*28</sup> The International Court of Justice (ICJ) accepted this provision as being an expression of customary international law.<sup>\*29</sup> Therefore a non-state violent attack can trigger the right of self-defence, provided that said attack is sufficient in gravity and the involvement of a state is sufficient in degree. The terrorist attack can be referred to as a constructive armed attack or a situation equivalent to an armed attack.

The Draft Articles declare that the conduct of a private actor is considered an act of a state if that actor is, in fact, acting on the instructions of, or under the **direction** or **control** of, that state.<sup>\*30</sup> The major difficulty involves the link that must be established in order to transform acts of private actors into the acts of *de facto* state agents. The starting point for the examination of such a link is the legendary *Nicaragua* case<sup>\*31</sup>, where the ICJ had to decide whether the United States was responsible for the paramilitary *contras* operating in Nicaragua.<sup>\*32</sup> It was clear from the evidence that the *contras* were a proxy army for the United States and could not have existed without its financing and support, but the ICJ still concluded that their acts were not attributable to the United States. In this case, the ICJ formulated what has now become the classic ‘effective control’ test for determining the link between states and private actors. The ICJ took the view that

United States participation, **even if preponderant or decisive**, in the financing, organizing, training, supplying and equipping of the *contras*, the selection of [...] targets, and the planning of the whole of its operation, is still insufficient in itself [...] for the purpose of attributing to the United States the acts committed by the *contras* [...]. For this conduct to give rise to legal personality of the United States, it would in principle have to be proved that that State had **effective control** of the military or paramilitary operations in the course of which the alleged violations were committed.<sup>\*33</sup>

<sup>26</sup> Draft Articles, article 5.

<sup>27</sup> T. Becker (Note 12), p. 66.

<sup>28</sup> General Assembly Resolution 3314 (XXIX), 14.12.1974, Annex, article 3 (g).

<sup>29</sup> Merits. Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States*). – ICJ Reports (1986) 14, paragraph 195. The “merits” refers to the phase of proceedings, not an author. So no “J.”. The phase of proceedings (“provisional measures”, “jurisdiction and admissibility”, “merits”) or the nature of the ruling (“judgment”, “advisory opinion”) is traditionally shown after the title of the case (it was so also in the original manuscript), but it seems to be the style of *Juridica International* to show them as the first thing in the reference. See also Notes 54 and 66.

<sup>30</sup> Draft Articles, article 8.

<sup>31</sup> Military and Paramilitary Activities in and against Nicaragua (Note 29).

<sup>32</sup> See G. Townsend. State Responsibility for Acts of *de facto* Agents. – Arizona Journal of International and Comparative Law 1997 (14), pp. 643–644 for a summary of the court’s ruling on the matter of responsibility.

<sup>33</sup> Military and Paramilitary Activities in and against Nicaragua (Note 29), paragraph 115 (emphasis added).

If proven that the agents of a state “participated in the planning, direction, support and execution” of violent acts, the imputability to the state of such action is established.<sup>\*34</sup> In other words, terrorist groups who are not state organs but who are supported and directed by a state become *de facto* agents of that state. The ICJ envisioned the kind of support to which such responsibility would be attached as “the provision of weapons or logistical or other support”.<sup>\*35</sup>

The ‘effective control’ test has several limitations. To begin with, it imposes for the injured state a quite unrealistic obligation to provide evidence of specific instructions or directions of the host state relating to the terrorist attack. Some commentators have expressed concern that “the traditional ‘effective control’ test [...] seems insufficient to address the threats posed by global criminals and the states that harbor them”.<sup>\*36</sup> There are reasons to believe that the position of those holding to such a strict approach has weakened since the 11 September 2001 events and the international community has approved a more liberal approach. The Appeal Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) has offered another approach to the control issue, in the *Tadić* case.<sup>\*37</sup> The ICTY believed that “the **degree of control** may, however, vary according to the factual circumstances of each case” and failed “to see why in each and every circumstance international law should require a high threshold for the test of control”.<sup>\*38</sup> International law does not require that the “control should extend to the issuance of specific orders or instructions relating to single military actions” and therefore it is enough if the state has “overall control” over the private actors in question.<sup>\*39</sup> The law of state responsibility should, after all, be based on a “realistic concept of responsibility”.<sup>\*40</sup> If the state is exercising overall control over a private armed group — i.e., the state finances, arms, and trains the group as well as generally participating in planning and supervision of the group’s activities — it would be too much and unnecessary to ask the injured state to prove that the host state actually demanded or directed that specific military operation. Nevertheless, the overall control test is neither a magic solution<sup>\*41</sup> to nor a revolutionary change in the question of attribution. The essential difference between the *Nicaragua* and *Tadić* case lies merely in the degree of control, not in the kind of control. The ICTY still asserted that the state should have control “going beyond the **mere financing and equipping** of such forces and involving also participation in the planning and supervision of military operations”.<sup>\*42</sup>

Let us apply these principles to the al-Qaeda and Taliban relationship in Afghanistan before and after 11 September 2001. The situation is far from clear. It is quite difficult to argue that the Taliban regime actually directed or controlled specific acts of al-Qaeda, especially the attacks on the World Trade Center. Nor did the United States prove the existence of such a relationship before commencing Operation Freedom in October 2001. But it was certain, at the same time, that al-Qaeda had operated in the territory of Afghanistan for some time already and had established a close and mutually beneficial relationship with the Taliban regime.<sup>\*43</sup> Although the Taliban regime did not have effective control, it did, most likely, have overall control over al-Qaeda, to say the least.

There is one additional, although uncertain and more difficult in the proof, way of linking a private armed group to a state. A terrorist group could be considered to be a *de facto* state **organ** (not an **agent** as discussed above). The Draft Articles provide that the conduct of any state organ is considered an act of that state.<sup>\*44</sup> This concerns first and foremost official state organs, but it is further explained that “an organ includes any person or entity which has that status in accordance with the internal law of the state”.<sup>\*45</sup> The usual condition for such a status is a due reference in domestic law. However, in some states the status of various entities is determined not only by law but also by practice; reference exclusively to internal law would be misleading.<sup>\*46</sup> The International Law Commission (ILC) has not given any specific examples of such *de facto* organs,

<sup>34</sup> *Ibid.*, paragraph 86.

<sup>35</sup> *Ibid.*, paragraph 195.

<sup>36</sup> A.-M. Slaughter, W. Burke-White. An International Constitutional Moment. – Harvard International Law Journal 2002 (43), p. 20.

<sup>37</sup> Judgement, Prosecutor v. Duško Tadić, Case No. IT-94-I-A, International Criminal Tribunal of the Former Yugoslavia, Appeals Chamber, 15.07.1999. See G. Townsend (Note 32), pp. 640–642 for a summary of the court’s ruling on the matter of responsibility.

<sup>38</sup> Prosecutor v. Duško Tadić (Note 37), paragraph 117 (emphasis in original).

<sup>39</sup> *Ibid.*, paragraph 145.

<sup>40</sup> *Ibid.*, paragraph 121.

<sup>41</sup> On the contrary, the ‘overall control’ test may open the way for abuses, as it raises difficult issues with respect to the permissible scope of self-defence. See C. Stahn. Terrorist Acts as ‘Armed Attack’: The Right to Self-defence, Article 51 (1/2) of the UN Charter, and International Terrorism. – Fletcher Forum of World Affairs Journal 2003 (27) 2, pp. 35–54 for detailed discussion.

<sup>42</sup> *Ibid.*, paragraph 145 (emphasis added).

<sup>43</sup> British Government. Responsibility for the Terrorist Atrocities in the United States, 11.09.2001— An Updated Account. Available at <http://www.number-10.gov.uk/output/page3682.asp> (1.06.2006), paragraph 4.

<sup>44</sup> Draft Articles, article 4 (1).

<sup>45</sup> Draft Articles, article 4 (2).

<sup>46</sup> Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts. – International Law Commission, UN Doc. A/56/10 (2001), p. 90.



but there should be no reason that a private armed group exercising some functions similar to those of the government could not, in principle, be one such organ. In considering al-Qaeda again, it is difficult, but not entirely implausible, to assert that that terrorist group was, in fact, a *de facto* organ of Afghanistan. For instance, the forces under the control of Osama bin Laden fought alongside the Taliban soldiers in the Afghan civil war.<sup>\*47</sup> If fighting a war is not an exercise of state functions, then what is?

The Draft Articles speak also of the possibility of the conduct of a private actor being considered an act of a state if the actor is, in fact, exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as call for the exercise of those elements of authority.<sup>\*48</sup> This ground for state responsibility is usable in very exceptional cases, where the regular authorities have disintegrated, have been suppressed, or are simply inoperative for the time being.<sup>\*49</sup> Failed states would be the most probable examples in the context of terrorism.<sup>\*50</sup> In such a scenario, the state system has collapsed because of a revolution or similar events and the government is not able to exercise its functions in certain parts of the territory. A terrorist organisation then takes over the 'management' of that area and starts to organise cross-border violent attacks (possibly even in the belief that it is organising defensive operations). Although the central government is temporarily incapacitated, it is still responsible for the action of that private actor. The government is the organ that guards the territorial sovereignty and should ensure that there is no illegal rival to its monopolistic right to exercise public power. The Taliban regime allowed al-Qaeda to act quite independently and even somewhat like a government in connection with certain matters, but the known facts contain very little evidence to support the contention of the Taliban's responsibility on the present ground.

### 3.2.2. Conduct adopted by the state

It has been established above that the conduct of a private actor not acting, in one way or another, on behalf of the state is not considered to be an action of that state. Liability for truly private acts should remain with those who committed them. But even such conduct can "nevertheless be considered an act of that state under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own".<sup>\*51</sup> This exception is concerned not with implied state complicity arising out of the failure to prevent or prosecute the private offender but with explicit ratification and adoption of the private conduct by the state.<sup>\*52</sup> The conduct is not attributable to a state when the state merely acknowledges the factual existence of conduct or expresses its verbal approval of it. In their international controversies, states often take positions that amount to 'approval' or 'endorsement' of conduct in some general sense but do not involve any assumption of responsibility. The language of 'adoption', however, carries with it the idea that the conduct is acknowledged by the state as, in effect, its own conduct. The act of acknowledgement and adoption, whether it takes the form of words or conduct, must be clear and unequivocal.<sup>\*53</sup>

The essence of this principle is well illustrated by the *Teheran Hostages* case<sup>\*54</sup>, where the ICJ had to decide whether Iran was responsible for the capture by the student group Muslim Student Followers of the Imam's Policy, not having any official status within the Iranian government, of the United States Embassy and Consulate and the continued detention of their staff.<sup>\*55</sup> The ICJ was not able, despite Iran's failure to fulfil its international obligations<sup>\*56</sup>, to impute the attack itself to the Iranian state, because the students were neither agents nor organs of the Iranian government. However, in the days after the attack, numerous Iranian authorities expressed very clear endorsement and ratification of what the students had done. The minister for foreign affairs declared that the occupation of the United States Embassy had been "done by [Iranian] nation", and Ayatollah Khomeini not only expressed, in a series of public statements, approval for the attack but treated it as a series of actions that the state was directing.<sup>\*57</sup> The Iranian government endorsed the situation also in its action: when the Iraqi Consulate, which had been similarly occupied, was evacuated on the orders of Ayatollah Khomeini, the latter issued different instructions from those used in relation to the United States

<sup>47</sup> British Government (Note 43), paragraph 12.

<sup>48</sup> Draft Articles, article 9.

<sup>49</sup> Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts (Note 46), p. 109.

<sup>50</sup> See B. N. Dunlap, *State Failure and the Use of Force in the Age of Global Terror*. Boston College. – International and Comparative Law Review 2004 (27), pp. 453–475 for more information on failed states.

<sup>51</sup> Draft Articles, article 11.

<sup>52</sup> T. Becker (Note 12), p. 72.

<sup>53</sup> Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts (Note 46), pp. 121–122.

<sup>54</sup> Judgement, *United States Diplomatic and Consular Staff in Teheran* (United States v. Iran). – ICJ Reports (1980) 3.

<sup>55</sup> See G. Townsend (Note 32), pp. 644–647 for a summary of the court's ruling on the matter of responsibility.

<sup>56</sup> See *United States Diplomatic and Consular Staff in Teheran* (Note 54), paragraphs 14, 17, 20, and 50 for details.

<sup>57</sup> *Ibid.*, paragraph 74.

Embassy.<sup>\*58</sup> The question of whether the attribution was prospective or retroactive remains disputable. Although, in the *Teheran Hostage* case, the ICJ found that the responsibility was merely prospective<sup>\*59</sup>, this is definitely not a desirable approach, as it would leave gaps in responsibility for continuing acts. The ILC has expressed a more reasonable view, that “where the acknowledgement and adoption is unequivocal and unqualified there is good reason to give it retroactive effect”.<sup>\*60</sup> The response to this issue actually has more far-reaching consequences: if the state is responsible from the moment when an act was committed, the state may be responsible for the attack itself, not merely for its consequences, and therefore a lawful subject of armed attack in the form of self-defence.

In application of all of this to the relationship between al-Qaeda and the Taliban, the publicly available facts are insufficient for undeniably attributing the 11 September 2001 terrorist attack to Afghanistan. On the one hand, the fact that the Taliban regime did not condemn the terrorist attacks, declined to extradite Osama bin Laden with other members of al-Qaeda, and refused to stop the operation of al-Qaeda in Afghanistan can be taken as strong evidence of the silent adoption of the action of al-Qaeda as its own. However, on the other hand, this is not enough evidence, as the adoption must be **clear** and **unequivocal**. As it was in case of Iran, any anti-American or Islamic rhetoric on the part of the Taliban regime cannot be construed as a due adoption of the al-Qaeda attack. The Taliban regime actually denied that Osama bin Laden had anything to do with the attack, asserting that he “lacked the capacity to pull off large-scale attacks”<sup>\*61</sup>, and proclaiming their confidence that an investigation would find him innocent.

A state that adopts a terrorist attack as its own shall be responsible to the injured state as if the attack came from the adopting state itself. This has actually never happened in contemporary state practice, nor is it very likely to happen in future, given that treaty-based international law expressly forbids states to engage in terrorism.<sup>\*62</sup> The usability of this ground for responsibility is therefore, legally speaking, rather limited.

### 3.2.3. Harboursing and supporting terrorists?

Now the question is whether state responsibility should end with terrorist attacks that were controlled or adopted by a state or, in contrast, states should be held responsible also for terrorist activities when their involvement is limited to financing, training, or similar support. In other words, should a state be responsible for toleration of or intolerance towards terrorism? Gregory M. Travalio has put it correctly in stating that “this issue becomes more difficult when a state, which has the ability to control terrorist activity, nonetheless tolerates, and even encourages it”.<sup>\*63</sup> This grey area has become increasingly significant and murky in the years following 11 September 2001. The shift was initiated by President Bush with his above-mentioned declaration that the United States would “make no distinction between the terrorists who committed these acts and those who harbor them”.<sup>\*64</sup> The United States case against Afghanistan was based on the conviction that the 11 September 2001 terrorist attacks were “made possible by the decision of the Taliban regime to allow the parts of Afghanistan that it controls to be used by this organization as a base of operation”.<sup>\*65</sup>

This line of argument has a point and definitely should not be cast aside without being given at least some consideration. Depending on the circumstances, harboursing and support of terrorists may breach a number of a state’s international obligations under treaties, customary international law, and Security Council resolutions. To begin with, states should not knowingly allow anyone to use their territory in a way that endangers other states, including as a base for attacks.<sup>\*66</sup> The Friendly Relations Declaration proclaims that as a matter of basic principles of international law “every state has the duty to refrain from organizing, instigating, assisting or participating in [...] terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to [...] involve a threat or use of force”.<sup>\*67</sup> The Security Council equally demanded that all states “deny safe haven to those

<sup>58</sup> *Ibid.*, paragraph 71.

<sup>59</sup> *Ibid.*, paragraph 74.

<sup>60</sup> Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts (Note 46), p. 120.

<sup>61</sup> D. Brown. Use of Force against Terrorism after September 11<sup>th</sup>: State Responsibility, Self-defense and Other Responses. – Cardozo Journal of International and Comparative Law 2004 (11), p. 11.

<sup>62</sup> *Ibid.*, p. 12.

<sup>63</sup> G. M. Travalio (Note 24), p. 154.

<sup>64</sup> Statement by the President in his Address to the Nation (Note 14).

<sup>65</sup> Letter dated 7.10.2001 from the permanent representative of the United States of America to the United Nations, addressed to the president of the Security Council, United Nations Document S/2001/946 (2001).

<sup>66</sup> Merits. The Corfu Channel (United Kingdom v. Albania). – ICJ Reports (1949) 4, p. 22.

<sup>67</sup> Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations, General Assembly Resolution 2625 (XXV), 24.10.1970, Annex. The provisions of this declaration are restatements of customary international law and therefore legally binding upon all states.

who finance, plan, support, or commit terrorist acts”.<sup>\*68</sup> All of this can be read as a new attempt to revive the theory of vicarious responsibility that attaches to a state that knowingly acquiesces to the injurious acts of private actors within its territory.<sup>\*69</sup> As a result, a state that is, or should be, aware of a terrorist attack against another state; that is able to prevent the attack but neglects to do so; and that fails to warn said other state is responsible to that other state for the attack.<sup>\*70</sup> This line of reasoning would make the Taliban regime liable for al-Qaeda activities because it harboured and supported the latter despite international obligations and demands from the Security Council to cease doing so.<sup>\*71</sup>

There are also other explanations for how a state harbouring and supporting the activities of private armed groups could be held responsible for the activities of these groups. Firstly, state responsibility should be expressed in terms of complicity. Israel has repeatedly proclaimed that terrorist attacks against it from the territory of Lebanon and Syria were possible due to the complicity of the respective governments.<sup>\*72</sup> Although this relationship is not inconceivable, it is incompatible with the present rules of state responsibility covering complicity.<sup>\*73</sup> The latter becomes relevant only when **one state** is aiding or assisting **another state** in the commission of an internationally wrongful act. The structure of this rule suggests that the lower threshold suffices for imputing the conduct of another state because the public character of any such act is clear; i.e., an act of that other state is surely public, not private.<sup>\*74</sup> Secondly, the Security Council has, on numerous occasions, demanded that states “refrain from providing any form of support, active or passive, to entities or persons involved in terrorist acts” and “take the necessary steps to prevent the commission of terrorist acts”.<sup>\*75</sup> All member states of the United Nations have a legal obligation to comply with the decisions of the Security Council.<sup>\*76</sup> In speaking about support, training, and similar aid, it would be reasonable to suppose that state involvement of the manner mentioned should be of such a nature and scale that terrorists could not carry out their activities without it. If the state’s aid is, instead, of minor or insignificant importance, then the state’s responsibility is less likely. Thirdly, tolerance is often not simply the result of impotence or lack of awareness of the threats to which the state should respond; it can equally be an active form of policy.<sup>\*77</sup> If a state tolerates the presence of a private armed group and takes advantage of its activities abroad — i.e., the terrorist group is ‘doing the job’ instead of the state — that state should bear some responsibility for such activities.

If a state has taken all appropriate actions against terrorist threats emanating from its territory but terrorists there still succeed in attacking another state, the former state should not be deemed responsible. But what if a state is, for objective reasons, incapable of acting against terrorist groups? Can the state be held responsible for inability to exercise due diligence? It would be reasonable to argue that a state only bears responsibility for activities emanating from its border if it is culpable for its acts, including omissions.<sup>\*78</sup> But for the ‘privilege’ of such an exemption there has to be a balancing counter-obligation — namely, a duty to co-operate with the injured state on the scale, and in a manner, that is necessary for the removal of the terrorist group in question. In other words, if a state is not itself capable of protecting the rights of other states and eliminating threats to them, the former may not passively allow the private armed group to benefit from the shield of its sovereignty and territorial inviolability.

## 4. Conclusions

The last decade has seen various violent attacks by private armed groups of a scale and gravity that was unheard of before. States directly affected by these attacks are willing and eager to act in order to prevent future attacks on them or their allies. Any operation against a private armed actor is complicated by the factor of the actor being located in the territory of some state. As possible operations are inevitably directed also against the host state, the latter’s responsibility for the acts of the private armed group in question must

<sup>\*68</sup> Security Council Resolution 1373, 28.09.2001, paragraph 2 (c).

<sup>\*69</sup> See D. Brown (Note 61), pp. 13–15 for more information on vicarious responsibility.

<sup>\*70</sup> Cf. The Corfu Channel (Note 66), pp. 22–23.

<sup>\*71</sup> See Security Council Resolution 1214, 8.12.1998, paragraph 13; Security Council Resolution 1267, 15.10.1999, paragraphs 1–2; Security Council Resolution 1333, 19.12.2000, paragraphs 1–3.

<sup>\*72</sup> See C. Gray. *International Law and the Use of Force*. 2<sup>nd</sup> ed. Oxford University Press 2004, pp. 172–173 for details.

<sup>\*73</sup> Draft Articles, article 16.

<sup>\*74</sup> D. Jinks (Note 15), p. 90.

<sup>\*75</sup> See, for example, Security Council Resolution 1373, 28.09.2001, paragraphs 2 (a)–(b).

<sup>\*76</sup> Article 25 of the United Nations Charter.

<sup>\*77</sup> See G. A. Christenson. *Attributing Acts of Omission to the State*. – *Michigan Journal of International Law* 1991 (12), pp. 316–317.

<sup>\*78</sup> See R. J. Erickson (Note 24), pp. 100–103.

be established first. A clear dividing line has to be drawn between political-rhetorical and legal responsibility, as only the latter can maintain objectiveness and predictability in inter-state relations. Before taking any action, the injured state must show that the host state has either effective or overall control that goes beyond the mere financing and equipping of such forces and involves also participation in the planning and supervision of military operations carried out by the private armed group. An alternative way of establishing responsibility is to demonstrate that the host state has explicitly ratified the private conduct and adopted it as its own. State responsibility for 'harbouring and supporting' terrorist groups remains unsettled, although it is not precluded. A state that knowingly and intentionally allows anyone to use its territory in a way that endangers any other state bears some responsibility before that state and makes itself a potential target of armed intervention in the form of self-defence. If a state is not able to eliminate the threat emanating from a private armed group in its territory, it has a duty to co-operate with the injured state according to the scale and manner that is necessary for the removal of that terrorist group. The guiding principle in relation to matters of state responsibility should be that all states have an equal right to sovereignty and security and that injured states must have a right to act proportionally against terrorist attacks and those states that have participated in making such attacks possible.







# XXIX Days of Estonian Jurisprudents

15 Years of Legal Reforms in Estonia

Tartu, 19–20 October 2006

## Thursday, 19 October

- 9.00–10.00 Registration and morning coffee  
10.00 Opening address by **Rein Lang**, *Minister of Justice*

### Morning plenary

(Vanemuine Concert Hall)

- Chairs: Professor **Kalle Merusk**, *Dean, Faculty of Law, University of Tartu;*  
*Chairman of the Estonian Academic Law Society*  
**Ingrid Siimann**, *Acting President of the Estonian Lawyers' Union*
- 10.15–10.40 **Ph.D. Jüri Raidla** Start of Legal Reforms: from the War of Laws to the Constitution  
*Attorney-at-law, Law Office Raidla & Partners*
- 10.40–11.05 Professor **Jean-Pierre Massias** The Role of Constitutional Law in Democratic Transition  
Process  
*University of Auvergne (Clermont-Ferrand), Editor of the journal La Revue de Justice  
Constitutionnelle Est-Européenne*
- 11.05–11.30 Professor **Paul Varul** New Private Law – Why This and What will Happen Next?  
*Professor of Civil Law, University of Tartu; Editor-in-chief of the journals Juridica and  
Juridica International*

### Afternoon plenary

(Vanemuine Concert Hall)

- Chairs: **Märt Rask**, *Chief Justice of the Supreme Court*  
**Priidu Pärna**, *Member of Presidency, Estonian Lawyers' Union*
- 12.00–12.25 Professor **Valentinas Mikelenas** Civil Law and Civil Procedural Law Reforms in Lithuania  
*Professor, University of Vilnius*
- 12.25–12.50 **Dr.iur. Hannes Veinla** Environmental Impact of Development Projects: Economy *versus*  
the Environment  
*Docent of Environmental Law, University of Tartu*
- 12.50–13.15 **Martin Hirvoja** Updating Economic Crime Law in Estonia – Foundations and Emphases  
*Deputy Secretary General of Criminal Policy, Ministry of Justice*

**First private law section**  
***Interpretation and Implementation***  
***Problems Related to the Law of Obligations***

(Vanemuine Concert Hall)

- Chairs: Professor **Paul Varul**, *Professor of Civil Law, University of Tartu*  
**Aivar Pilv**, *Chairman, Estonian Bar Association*
- 15.00–15.20 *Mag.iur.* **Villu Kõve** Practical Implementation of the Law of Obligations Act – Important Development Trends and Setbacks  
*Justice of the Supreme Court, Lecturer of Civil Law, University of Tartu*

**Supplementary presentations**

- 15.20–15.30 *Dr.iur.* **Irene Kull** Acknowledgement of Obligation and Provision of Security  
*Docent of Civil Law, University of Tartu*
- 15.30–15.40 *Dr.iur.* **Martin Käerdi** General Principles of Contractual Liability in the Law of Obligations Act and their Realisation in Judicial Practice  
*Lecturer of Civil Law, University of Tartu*
- 15.40–15.50 *Dr.iur.* **Kalev Saare** Problems of Default Interest Claims  
*Docent of Civil Law, University of Tartu; Attorney-at-law, Law Office Lepik & Luhaäär*
- 15.50–16.00 *Mag.iur.* **Tambet Tampuu** Liability under the Law of Obligations for Another Individual's Delict  
*Justice of the Supreme Court; Lecturer of Civil Law, University of Tartu*
- 16.00–17.00 Discussion

**First public law section**  
***Legal Problems of Regional***  
***and Local Government Administration***

(Iuridicum II, Näituse 13A–201)

- Chairs: Professor **Kalle Merusk**, *Professor of Constitutional and Administrative Law, University of Tartu*  
**Sulev Lääne**, *Advisor to Minister of Internal Affairs*
- Presentations by: Docent **Vallo Olle**, Professor **Sulev Mäeltsemees**, Professor **Arno Almann**, Tallinn City Secretary **Toomas Sepp**, Pärnu County Governor **Toomas Kivimägi**
- 16.00–17.00 Discussion



## First penal law section *Sanction System and Punishment Practice*

(Iuridicum II, Näituse 13A–101)

- Chairs: **Norman Aas**, *Chief Public Prosecutor*  
*Ph.D. Jaan Ginter*, *Docent of Criminology, University of Tartu*
- 15.00–15.45 Professor **Raimo Lahti** The Total Reform of Finnish Criminal Law from a European Perspective  
*Professor of Criminal Law, University of Helsinki*
- 15.45–16.15 *Ph.D. Jaan Ginter* Sanction System and Punishment Practice: Recent Development Trends in Estonia  
*Docent of Criminology, University of Tartu*
- 16.15–17.00 Discussion

## Friday, 20 October

### Second private law section

(University of Tartu Hall)

- 9.00–13.30 Working session of the Section, coffee break 11.00–11.30
- Chairs: **Ants Kull**, *Chairman, Civil Chamber of the Supreme Court*  
**Tarvo Puri**, *Member, Board of the Chamber of Notaries*

### Family Law Problems

- 9.00–9.20 *LL.M. Kai Kullerkupp* Family Law – Current Situation and Future Prospects  
*Judge, Tallinn Circuit Court; Lecturer of Civil Law, University of Tartu*

### Supplementary presentations

- 9.20–9.30 **Lea Laarmaa** Proprietary Rights of Spouses (Based on the Judicial Practice of the Supreme Court)  
*Justice of the Supreme Court*
- 9.30–9.40 **Malle Seppik** Cohabitation – Legal Meaning and Prospects  
*Judge, Tallinn Circuit Court*
- 9.40–9.50 *Mag.iur. Kersti Kerstna-Vaks* Appointment of Guardian for Adults with Restricted Legal Competence: Developments and Problems  
*Judge, Tartu County Court*
- 9.50–10.00 **Piret Blankin** Maintenance Obligations in Family Law  
*Attorney-at-law, Law Office Aivar Pilt*
- 10.00–11.00 Discussion

## Law of Succession Reforms

- 11.30–11.50 **LL.M. Urmas Volens** Proposed Reform of Law of Succession  
*Deputy Secretary General for Legal Policy, Ministry of Justice*

## Supplementary presentations

- 11.50–12.00 **Anne Saaber** Strengths and Weaknesses of the New Law of Succession Act from the Perspective of a First-level Implementer  
*Notary*
- 12.00–12.10 **Ivo Mahhov** Law of Succession Act in 2006 – Is the Right of Succession Secured in Estonia?  
*Attorney-at-law, Law Office Välisõigusabi*
- 12.10–12.20 **Urve Liin** Effective Succession Procedure  
*Assistant of Civil Law, University of Tartu*
- 12.20–12.30 **Viivi Tomson** Right to Compulsory Portion in Succession  
*Judge, Tartu Circuit Court*
- 12.30–13.30 Discussion

## Second public law section *Problems of Environmental Impact: Economy versus the Environment* (Iuridicum II, Näituse 13A–201)

- 9.00–13.30 Working session of the Section, coffee break 11.00–11.30  
Chair: **Dr.iur. Hannes Veinla**, *Docent of Environmental Law, University of Tartu*

**Dr.iur. Hannes Veinla** Nature versus Economy in the Sites of Natura 2000 (European Union-wide Network of Nature Conservation Sites)  
*Docent of Environmental Law, University of Tartu*

**LL.M. Kaarel Relve** Monitoring of Development Activities by Environmental Bodies: the Right of All Bodies or the Right of the Privileged?  
*Lecturer of Environmental Law, University of Tartu*

**Pihel Sarv** Environmental Issues related to Planning  
*Master Student, University of Tartu*

**Mag.iur. Evelin Lopman** Transposition Problems of the EC Environmental Liability Directive  
*Jurisconsult, Department of Law, Ministry of the Environment*

## Second penal law section

(Iuridicum II, Näituse 13A–101)

- 9.00–13.30 Working session of the Section, coffee break 11.00–11.30
- Chairs: Professor **Jaan Sootak**, *Professor of Criminal Law, University of Tartu*  
**Hannes Kiris**, *Chairman, Criminal Chamber of the Supreme Court*
- 9.00–9.45 **Marju Agarmaa** Expanded Confiscation of Proceeds of Crime  
*Advisor to Department of Criminal Policy, Ministry of Justice*
- 9.45–10.15 **Juhan Sarv** Damage as Element of Offence in Penal Law *versus* Damage in Civil Law  
*Advisor to Criminal Chamber of the Supreme Court*
- 10.15–11.00 Discussion

## Criminal Liability of a Legal Person

- Chair: *Dr.iur. Priit Pikamäe, Justice of the Supreme Court*
- 11.30–12.15 Professor **Jean Pradel** Topical Issues of Criminal Liability of a Legal Person in European Comparison  
*Professor Emeritus Criminal Law, University of Poitiers*
- 12.15–12.45 **Elina Elkind** Topical Issues of Criminal Liability of a Legal Person in Estonian Penal Law  
*Master Student, University of Tartu*
- 12.45–13.30 Discussion

## Final session

(University of Tartu Hall)

- Chairs: **Ingrid Siimann**, *Acting President of the Estonian Lawyers' Union*  
Professor **Kalle Merusk**, *Dean, Faculty of Law, University of Tartu;*  
*Chairman of the Estonian Academic Law Society*

- 14.00 Podium discussion.  
Work results of Sections.  
End of XXIX Days of Estonian Jurisprudents

The official working language is Estonian.

Simultaneous translation into English is arranged in Vanemuine Concert Hall. The working languages in first penal law section are Estonian and English. The working languages in second penal law section are Estonian and French.