



Dear reader,

It is not uncommon to encounter a situation in which one must admit that understandings of many legal situations are varied. On the one hand, everything might appear simple and clear; however, when one delves a bit further into the specifics of a particular legal regulation, the landscape may turn out to be much more complex, and perceptions change. Legal regulation leaves room for different understandings and interpretations. Although the legislator's goal is to ensure legal regulation that is as precise as possible, there are always some gaps that need to be filled through either analogy or interpretation. Also, case law and the positions of legal professionals have an important role to play in the understanding of legal regulation and in application of the law. Alongside analysis of the bottlenecks found in the current law, historical experience should not be overlooked either. The dissection of a legal situation in the past, one long forgotten, may offer us an unexpected and necessary solution for applicable legislation. Accordingly, studying and analysing historical experiences is necessary and justified in every way.

This issue offers broad-based analysis of various modern legal problems and their solutions, from a wealth of perspectives. It should be noted here that non-lawyers too can be of great help in interpreting legal issues. One good example can be seen in the article 'Interpretation of Undefined Legal Concepts and Fulfilling of Legal Gaps, in Jüri Lotman's Semiotic Framework', on the potential impact of this globally esteemed semiotics luminary's legacy with regard to legal interpretation.

Legal issues are present in all facets of life. Generalised approaches to various legal issues are addressed in the following papers, among others: '(Just) Give Me a Reason', 'The General Data Protection Regulation and its Violation of EU Treaties', and 'Current Challenges of the Labour Law of Ukraine: On the Way to European Integration'.

The journal's content is enriched further with approaches to specific legal issues that are relevant for understanding various legal fields and when one is generalising. Some pieces that make this contribution are 'Shareholders' Draft Resolutions in Estonian Company Law: An Example of Unreasonable Transposition of the Shareholder Rights Directive', 'Which Adverse Environmental Impacts of an Economic Activity Are Legally Acceptable and on What Conditions', and 'Digital Inheritance: Heirs' Right to Claim Access to Online Accounts under Estonian Law'. These analyses demonstrate the role of lawyers in explaining and interpreting various legislative gaps for the purpose of establishing legal clarity.

We have commented on the vital role of historical experience in legal analysis. In this regard, the following articles offer further insight: 'Limitation of Freedom of Speech and of the Press by Penal Law in the Final Decades of the Russian Empire' and 'Land Reform and the Principle of Legal Certainty: The Practice of the Supreme Court of Estonia in 1918–1933'.

In addition to the works highlighted above, the reader will find several other topical, intriguing, and discussion-sparking articles. For example, one addresses a topic that is rarely discussed – dignity at the end of life and analysis of the related ethical, legal, and social arguments. All this only goes to show the diversity of opinions in the legal world.

We wish you pleasant reading and thinking along!

A handwritten signature in black ink, appearing to read 'G. Tavits'. The signature is stylized with a large, sweeping initial 'G' and a final flourish.

Gaabriel Tavits
Professor of Social Law

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Interpretation of Undefined Legal Concepts and Fulfilling of Legal Gaps, in Juri Lotman's Semiotic Framework^{*1}

1. Introduction

Lines of relation between semiotics and law have been drawn from several perspectives for more than half a century now. These areas of research demonstrate definite overlap. For example, the problem of interpretation of law features in both realms. Whereas semiotics is interested in the question of how the norm gains a meaning and what the structure of a meaning is, the question from a legal point of view is how to achieve conditions wherein a meaning of a norm is as constant as possible between interpreters and over different periods of time. The aim for this article is to examine whether the structure of meaning proposed in cultural semiotics by the Tartu–Moscow School of Semiotics (TMS) is applicable for the interpretation of undefined legal concepts and to the fulfilling of legal gaps. To accomplish this end, one must

- 1) introduce the chosen semiotic basis;
- 2) legitimately conclude that the TMS ideas should be applied to interpretation of law; and
- 3) from examples of case law, ascertain whether the semiotic findings identified truly appear in legal practice.

This article focuses on the implementation of the TMS semiotic programme for undefined legal concepts and for legal gaps. Research on this specific question has not been carried out before.

¹ I am very thankful to Elin Sütiste and Taras Boyko for the inspiring seminars presented at the Department of Semiotics of the University of Tartu and for their kind help in relation to this article.

2. The theoretical framework of the Tartu–Moscow School of Semiotics as an input to legal interpretation

Interpreting law is in its essence a semiotic process – i.e., a process in which meaning is created, a **sign process**. Although the word ‘semiotic’ is rarely used in description of legal interpretation, postmodern theory of law dissects the exchange of information between the legal system and its surrounding environment.^{*2} It is evident that the process of legal interpretation as a communication process is analysable through semiotic methods and models. According to legal semiotician S. Tiefenbrun, a better understanding of the elements of semiotics provides the legal practitioner with the key to the communication and discovery of meanings hidden under the weight of coded language and convention.^{*3}

There are many, quite different approaches to the semiotics of law, and the field is quite fragmented. Taking this into account, one must decide which authors to follow.^{*4} It should be noted that, along with the works of legal semioticians, the contribution of general semiotics can be used in the analysis of legal processes. The author whose work is most directly considered in this article has been chosen from Estonia – namely, Juri Lotman (1922–1993), a central figure of the TMS. Lotman did not concentrate on problems of law or on the relationships between juridical models, although aspects of juridical processes are nonetheless cited as examples in some of the TMS's publications.^{*5}

The TMS of the 1960s to 1980s, which played a vital role in the larger European intellectual-historical context,^{*6} proposed a research programme while also positing certain principles of the functioning of culture and cultural phenomena. It should be noted at this juncture that the presentation of the TMS in this paper is not a historical endeavour, for not only do contemporary semioticians utilise the TMS contributions^{*7} but the semiotics school of Tartu is a ‘living’ entity, developing the approach of cultural semiotics further. While the core ideas were formulated in the 20th century, they have not lost their central position in Tartu's semiotics and remain of value today.

Forming the beginnings of a brief introduction, the central concepts of the TMS, among them **text**, **utterance**, and **primary and secondary modelling system**, should be introduced.^{*8} Culture in its totality of meanings and processes was long a central topic of academic enquiry among TMS scholars.^{*9} For Lotman, the operational basis of culture is the **text**. Lotman wrote that the text itself, ‘being semiotically heterogeneous, interferes with the codes decoding it and has deforming effect on them. This results in shift and accumulation of meanings in the process of transferring the text from the sender to the receiver.’^{*10}

In defining culture as a kind of secondary language, scholars subscribing to the TMS introduced the concept of the culture text, a text in this **secondary language**.^{*11} Hence, the TMS concept of cultural semiotics

² Thomas Vesting. *Rechtstheorie* [‘Theory of Law’]. Munich, Germany: Verlag C.H. Beck 2007, p. 121, no. 232.

³ Susan Tiefenbrun. Legal semiotics. – *Cardozo Arts & Entertainment Law Journal* 5 (1986/1989), pp. 91–156 (on p. 156).

⁴ Bernard S. Jackson. Legal semiotics and semiotic aspects of jurisprudence. – Anne Wagner, Jan M. Broekman (eds). *Perspectives of Legal Semiotics*. 1990, pp. 3–36 (on p. 3).

⁵ For example, Juri Lotman, Aleksandr Pjatigorski. Tekst ja funktsioon [‘Text and function’]. – Juri Lotman (ed.). *Kultuuri-tüpoloogiast*. Tartu Ülikooli kirjastus 2010 [1970, 1973] (in Estonian), pp. 86–99, on p. 99, no. 0.1.3.

⁶ Igor Pilshchikov, Mikhail Trunin. The Tartu–Moscow School of Semiotics: A transnational perspective. – *Sign Systems Studies* 44 (2016) / 3, pp. 368–401 (in particular the abstract). – DOI: <https://doi.org/10.12697/sss.2016.44.3.04>.

⁷ See, for example, Remo Gramigna. The place of language among sign systems: Juri Lotman and Émile Benveniste. – *Sign Systems Studies* 41 (2013) / 2–3, pp. 339–354. – DOI: <https://doi.org/10.12697/sss.2013.41.2-3.10>.

⁸ Again, these are only some of the main concepts – there are several others. The concepts selected for discussion here were chosen for the assistance they provide in analysing a binary structure of legal concepts and legal gaps.

⁹ Taras Boyko. Describing the past: Tartu–Moscow School ideas on history, historiography, and the historian's craft. – *Sign Systems Studies* 43 (2015) / 2–3, pp. 269–280 (on p. 270). – DOI: <https://doi.org/10.12697/sss.2015.43.2-3.08>.

¹⁰ Juri Lotman. Text and cultural polyglotism (Tanel Pern, trans.). – *Abstracts: International Congress ‘Cultural Polyglotism’, to the Anniversary of Juri Lotman's 90th Birthday*. Tartu 2012, pp. 9–14 (on p. 12). Conference held in Tartu on 28 February – 2 March 2012.

¹¹ Juri Lotman et al. *Theses on the Semiotic Study of Cultures (As Applied to Slavic Texts)*. Tartu Semiotics Library 13: Beginnings of the Semiotics of Culture (series editors: Kalevi Kull, Silvi Salupere, Peeter Torop). Tartu University Press 2013 [1973], p. 43, no. 4.0.0. In comparison, Julia Kristeva cites a parallel with her concept of intertextuality, pointing out that ‘based on natural language[,] art is of another, “superstructural”, order: it redistributes the primary logic of language according to new logical rules, conferring on humanity new mental (or, as one would say today, new cognitive) possibilities, different principles of logic for the reconstruction of the self and the world’. See Julia Kristeva et al. On Yury Lotman. – *Modern Language Association PMLA* 109 (1994) / 3 (May), pp. 375–376 (on p. 376). – DOI: <https://doi.org/10.2307/463073>.

implies that a semiotics of text (in particular, a semiotics of artistic text) is an indispensable constituent part.^{*12} For the Tartu–Moscow semioticians, **secondary modelling systems** became the fundamental object of study.^{*13} Particularly in later years, Lotman's secondary modelling system method did not, however, get in the way of his message.^{*14} Nevertheless, it is important, and discussion of the question of secondary modelling systems continues in contemporary semiotics.^{*15}

Lotman's first definition of a secondary system came in the article 'The Issue of Meaning in Secondary Modelling Systems' (1965), later republished as a chapter in *The Structure of the Artistic Text*. A secondary modelling system is described there as 'a structure based on a natural language. Later the system takes on an additional secondary structure[,] which may be ideological, ethical, artistic, etc. Meanings in this secondary system can be formed according to the means inherent to natural languages or through means employed in other semiotic systems'.^{*16}

In a seminal collective work on the semiotics of culture first published in 1973, *Theses on the Semiotic Study of Cultures* (hereinafter, '*Theses*'), Lotman et al. state that

[a]s a system of systems based in the final analysis on a natural language (this is implied in the term 'secondary modelling systems', which are contrasted with the 'primary system', that is to say, the natural language), culture may be regarded as a hierarchy of semiotic systems correlated in pairs, the correlation between them being to a considerable extent realized through correlation with the system of natural language.^{*17}

In *Theses*, the problem of one text existing at the same time in both modelling systems was pointed out: so long as some natural language is a part of language of culture, there exists the question of the relationship between the text in the natural language and the verbal text of culture.^{*18} The authors of the TMS solved the problem via distinguishing among three distinct relationships that are possible between text and culture:

- a) text in the natural language is not a text of a given culture;
- b) the text in given secondary language is simultaneously a text in the natural language;
- c) the verbal text of a culture is not a text in the given natural language.^{*19}

This leads to another important distinction with regard to **texts** and **non-texts**. The latter are called **utterances**.^{*20} Not every linguistic utterance is a text from the point of view of culture, and controversially, not every text from the point of view of culture is a correct utterance in natural language.^{*21} Lotman claims that for a culture text the initial point is the moment in time when the act of linguistic expression is not sufficient for transformation from **utterance** into **text**.^{*22} According to Lotman, what makes a text (as distinct from an utterance) is a certain order. For an example of this relationship, TMS scholars point to a poem by Pushkin that is at the same time a text in Russian.^{*23}

¹² Igor Pilshchikov, Mikhail Trunin (see Note 6), pp. 387–388.

¹³ Daniele Monticelli. Critique of ideology or/and analysis of culture? Barthes and Lotman on secondary semiotic systems. – *Sign Systems Studies* 44 (2016) / 3, pp. 432–451 (on p. 443). – DOI: <https://doi.org/10.12697/sss.2016.44.3.07>.

¹⁴ David Bethea. Whose mind is this anyway?: Influence, intertextuality, and the boundaries of legitimate scholarship. – *The Slavic and East European Journal* 49 (2005) / 1 (Spring), pp. 2–17 (on p. 3). – DOI: <https://doi.org/10.2307/20058218>.

¹⁵ See, for example, Remo Gramigna (see Note 7).

¹⁶ As cited by Daniele Monticelli (see Note 13), p. 440.

¹⁷ Juri Lotman et al. (see Note 11), p. 53, no. 6.1.3.

¹⁸ *Ibid.*, p. 62, no. 4.0.0.

¹⁹ *Ibid.*, p. 62, no. 4.0.0, b.

²⁰ Sometimes translated also as 'messages'. The TMS scholars' concept of an utterance is not the same as a speech act in the speech acts theory proposed by J.L. Austin.

²¹ Juri Lotman et al. (see Note 11), p. 63, no. 4.0.1.

²² Juri Lotman, Aleksandr Pjatigorski (see Note 5), p. 87.

²³ *Ibid.* Another example provided by TMS scholars involves the literature of Old Russia. If the number of sources here is relatively stable, the list of texts varies significantly from one scholarly school to another and from one investigator to another. The sources which do not satisfy the concept of Old Russian Culture, are transferred to the category on "nontexts". Juri Lotman et al. (see Note 11), p. 64, no. 5.0.1.

3. Application to law

At the very first glance, it may seem that these semiotic statements about cultural phenomena have less to do with law. According to Lotman, however, practically all meaningful elements – from the vocabulary of natural language to the most complex artistic texts – act according to the same regularities.^{*24} As Continental European law is mainly a textual phenomenon, the interpretation of legal terms, when examined from the standpoint of sign process, follows the same regularities as other cultural phenomena. This is a fascinating point of view and is worthy of elaboration in the context of legal interpretation.

Tiefenbrun points out that, irrespective of all efforts at achieving objectivity in legal language through general use of referential terms, there is no doubt that the language of law is a distinct sub-language, a special case of ordinary language that can and often does baffle non-lawyers.^{*25} In other words, Tiefenbrun makes it explicit that legal language is secondary to natural language in a way similar to that in which the TMS sees artistic text as secondary to natural language.

A juridical text is without doubt a part of culture – it belongs to the legal tradition, and it is a part of the legal system in states, carrying the symbols and the ideology of those states. For illustration, one can point out that Continental law has a Roman-law background and contains many Latin concepts, such as *culpa in contrahendo*, *in dubio pro reo*, *de iure*, *de facto*, and *ius commune*. Latin terms are used frequently in German-speaking countries, and the transition in Estonian legal terminology from the Soviet era to the time of EU membership found one of its manifestations in the Estonian scholars' usage of Latin terms in juridical journals.^{*26} It is evident that the law, given as a written text – most importantly in the Constitution and in acts of law issued by Parliament – constitutes both language and cultural text at the same time. This makes the question of primary and secondary modelling in a piece of law relevant in its own right. In the case of legal texts, the text in the given secondary language is simultaneously a text in the natural language (see item b above). Additionally, their relationship determines more than the meaning of the Latin terms when used in a contemporary social context. This can be expressed in another way too: the circulation between natural language as primary modelling system and legal language as secondary modelling system encompasses not only the words that seem alien but all terms used in a law's text. In the following subsections of the paper, this binary structure is presented as a translative process in law and as a structural principle of legal concepts.

3.1. Drafting and interpreting of legal concepts as two, opposite semiotic processes

First of all, the very distinction between legal and natural language in a legal text attests to a legislative process being a translative activity at its core. What distinguishes a piece of law as a text rather than an utterance is a certain order that characterises law. Every legal text is a formalised text (with complicated language that is aimed at precision and with division into specific parts such as chapters, sections and subsections, paragraphs, and points and sub-points) that possesses a margin of truth, which a non-text does not.^{*27} As referred to above, at the level of a primary modelling system legal terms are part of natural language, utterances, while at the level of a secondary modelling system they are part of culture text, more precisely juridical culture text. Therefore, in the legislative process, in the drafting or composing of a law, the words of the natural language (utterances – for example, 'post box') are transformed into legal language (in the same example, into the text 'post box' as defined in accordance with the Postal Act^{*28}'s §8 (1) as 'a facility for the delivery of postal items which is in the possession of the addressee'). The words of the natural language gain specific meaning that they did not have outside the culture text.

²⁴ Juri Lotman. Kultuurimälu ['Cultural memory']. – *Akadeemia* 25 (2013) / 10, pp. 1736–1746 (on p. 1379).

²⁵ Susan Tiefenbrun (see Note 3), p. 119.

²⁶ Merike Ristikivi. Terminological turn as a turn of legal culture. – *Juridica International* 2008/XV, pp. 175–182 (on p. 175).

²⁷ *Ibid.*, p. 89.

²⁸ *Postiseadus* (Postal Act). – RT I 2006, 18, 142 (in Estonian; English text available at <https://www.riigiteataja.ee/en/eli/520062017019/consolide#para8>, most recently accessed on 1.4.2018).

With another process, interpretation of a law, one sees a counter-process that entails the operation of transforming the legal concept back into the concept from natural language. This can be presented graphically as follows:^{*29}

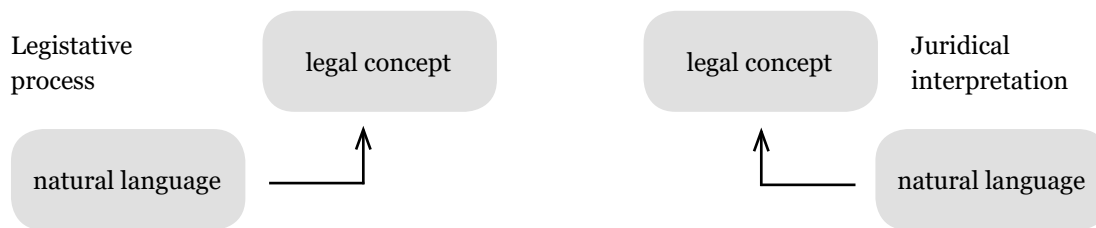


Figure 1. The legislative process (the concept from natural language becoming part of a legal text) and the process of interpretation of legal concepts (finding of a meaning in natural language).

We can find another parallel with Lotman's ideas in relation to our question of what constitutes good legal language. Namely, Lotman identifies how the moment at which a text turns back into its meaning in natural language corresponds to the moment wherein culture begins to crumble.^{*30} In parallel, if a legal text loses all of its specific terms and is completely open to free interpretation, it loses its binding nature; it stops being a text in a culture and becomes a non-text, general language. Or, in a counter process, if there is an increase in textual meaning, there is also a decrease in the meaning at the level of general utterance. By means of cultural semiotics, it can be explained that there is a tendency for texts seeking to express utmost high become hardly understandable for the addressees.^{*31} We can put these two semiotic tendencies into words thus: it appears that the legislature has to find a way to make the legal text as easily translatable into utterances as possible while retaining utility of the law. This conclusion, drawn by analogy from cultural studies, is not new, however. Legal theory, although not using the term 'transforming utterances into text', touches on the question by referring to 'the margin of discretion',^{*32} which in the language of semiotics would be 'the number of utterances in law'. To sum up, we can state that Lotman's idea of two separate modelling systems helps us to discover that there is a hidden binary structure not solely in legal language in general but to each legal term too.

3.2. A semiotic model of the binary structure of undefined legal concepts and legal gaps

3.2.1. Undefined legal concepts

The margin of discretion in law is granted through the use of undefined legal concepts. As has been noted above, legal concepts articulated in the legal language function with a dual role. They circulate between legal and natural language. Through this, legal terms are, on the one hand, parts of the legal system that surrounds them, but at the same time they refer to the factual circumstances and values of the society and cultural space. Every legal concept has a binary nature – it is part of the legal space and of the extra-legal space. As Thomas Vesting describes it, this duality manifests itself in a) legal reproducibility (restoring the legal system) and b) legal change as a dialogue within a legal system. He writes that the interpretation of law has to tackle two issues with particular attentiveness: consistency in terms of repeatability of decisions (self-reference) and consideration of the structure of each particular case (external reference).^{*33} To my mind, this structural functionality has its foundations on the double-structured language: the self-reference of a particular legal concept refers to the meaning in the legal language, whereas the external reference of a

²⁹ In their scholarship, Lotman and the other Tartu–Moscow semioticians did not give a graphic illustration of the relationship between primary and secondary systems that would make explicit the modalities of the construction of second-order meanings on the basis of first-order ones. Daniele Monticelli (see Note 13), p. 442.

³⁰ Juri Lotman, Aleksandr Pjatigorski (see Note 5), p. 90.

³¹ *Ibid.*, p. 92.

³² Richard Haase, Rolf Keller. *Grundlagen und Grundformen des Rechts. 11., vollkommen neubearbeitete Auflage* ['Fundamentals and Main Forms of Law: 11th, New Edition']. Stuttgart, Germany: Verlag W. Kohlhamer 2003, p. 36, no. 84.

³³ Thomas Vesting (see Note 2), p. 121, no. 232.

particular concept refers to the meaning in the natural language. The binary structure is especially clearly evident in the domain of **undefined** legal concepts.^{*34}

The idea of an undefined legal concept (also called a blank concept) has its origins in German legal theory from shortly after the Second World War and, according to some sources, is not universally recognised in the systems of Continental Europe.^{*35} An undefined legal concept is set in opposition to defined legal concepts. It needs to be interpreted. According to the case law of the Federal Constitutional Court (Bundesverfassungsgericht), the room for interpretation should be determined in line with the aims for the law and it should be possible to control the outcome of the interpretation carried out by courts.^{*36} A defined legal concept, in contrast, is one that has a legal definition provided by law; therefore, according to Haase and Keller, a defined legal concept leaves no room for interpretation.^{*37}

For example, §8 (6) of the Postal Act states requirements as to the location of post boxes in a village:

In a village, according to the agreement between the owner of a post box and a universal postal service provider, the post box shall be located at a place which is at a reasonable distance from the residence or seat of the person and in a place which is accessible by means of transport throughout the year.^{*38}

'Post box' in this case is a defined legal concept as described above, because it is defined in §8 (1) of the Postal Act. All the other words in this extract, in contrast, are not defined by law. What can be understood as the content of 'agreement', 'reasonable distance', or 'accessible by means of transport' is, therefore, a task for the interpreter, the person who reads and applies the law – probably a judge. The undefined legal concepts that govern the application of law can be very broad, as in the cases of 'public weal', 'public interest', 'road safety', 'danger', 'reliability', and 'the ability of the people'.^{*39}

In the interest of legal certainty, it must be required of the legislator that each norm be formulated clearly and unambiguously. At the same time, when finding a balance between flexibility of the law and legal certainty, the legislator may leave a certain margin of discretion to the law in order to afford reacting fairly in a particular situation. If a legislator uses an undefined legal concept to apply an element of discretion, a margin of discretion is granted to the authorities. Undefined legal concepts are fully verifiable by the court. Their interpretation falls under court authority.^{*40} Therefore, the use of undefined legal concepts is, on the one hand, an intentional method of the legislator for granting the power of interpreting a law to judges while, on the other hand, it is an unavoidable attribute of language.

3.2.2. Gaps

The same kind of duality characterises legal gaps. Each law inevitably has gaps^{*41}, and therefore it has long been recognised that the courts have the authority to fill these gaps. For example, pursuant to the Swiss Civil Code's Article 1 (2) there is a court duty to fulfill the gap in the way a legislator would have done if there is no

³⁴ The concept is *Unbestimmte Rechtsbegriffe* in German.

³⁵ Marina Künneke. *Tradition and Change in Administrative Law: An Anglo-German Comparison*. Berlin: Springer-Verlag 2007, p. 79. – DOI: <https://doi.org/10.1007/978-3-540-48689-3>.

³⁶ Hans D. Jarass, Bodo Pieroth. *Grundgesetz für die Bundesrepublik Deutschland. Kommentar. 9. Auflage* ['Constitution for Federal Republic of Germany. Commentary: Ninth Edition']. Munich, Germany: Verlag C.H. Beck 2007, Art. 20, para. 488, no. 61.

³⁷ Richard Haase, Rolf Keller (see Note 32), p. 38, no. 92. In another position taken by lawyers on the interpretation of undefined legal concepts, when one proceeds from the assumption that every term in a legal norm is automatically a **legal** term, the character of these terms is undefined if their application is not possible with reference to a legally binding text (for example, a legal definition therein), and therefore they must be interpreted under their ordinary meaning and systematic, historical and teleological context. For discussion, see Kathrin Limbach. *Uniformity of Customs Administration in the European Union*. United Kingdom: Hart Publishing 2015, p. 55). – DOI: <https://doi.org/10.5040/9781782256755>.

³⁸ All terms found in the Postal Act (see Note 28).

³⁹ Marina Künneke (see Note 35), p. 79.

⁴⁰ Franz Reimer. *Juristische Methodenlehre* ['Handbook of Legal Methods']. Baden-Baden, Germany: Nomos Verlagsgesellschaft 2016, p. 220, no. 478. – DOI: <https://doi.org/10.5771/9783845259819>.

⁴¹ I have written in more depth about this: L. Reisberg. Gaps in the law fulfilled with meaning: A semiotic approach for decoding gaps in law. – *International Journal for the Semiotics of Law – Revue internationale de Sémiotique juridique* 30 (2017) / 4 (December), pp. 697–709. – DOI: <https://doi.org/10.1007/s11196-017-9521-1>.

common law.^{*42} This process, judicial development of law, is considered a continuation of interpretation, where the two are seen as interconnected and as part of a gradual operation.^{*43} In the strict sense, interpretation is finding the meanings of the words of a law; in the broad sense, every time the judicial process settles the detail of any matter in solving a particular case constitutes a development of law, one that also serves the methodology of interpretation. Interpretation and filling of legal gaps go hand in hand; therefore, the same criteria that play a role in interpretation – in particular, the regulatory objective and the objective teleological criteria – apply to the overcoming of legal gaps.^{*44} A gap always exists as part of a legal system (self-reference); it should be filled with new material driven from society in a way that promotes the stability of the legal system (external reference).

Claus-Wilhelm Canaris defines a legal gap by stating that a gap occurs when, in interpretation of possible meanings of the words of the law, there is no corresponding rule in the law even though the legal order as a whole requires one. In other words, a gap is an unplanned deficiency (*Unvollständigkeit*) of positive law.^{*45} The decisive question is whether the gap as a deficiency of valid law is obvious and, therefore, its elimination *de lege lata* by the applier (judge) is possible or, rather, it is a deficiency of the legal policy and legal system – i.e., a legal gap that must be removed by the legislator. This question must be answered on a case-by-case basis.^{*46} It is very important to emphasise that a gap in the law does not mean the presence of a ‘nothing’ but rather a “definite something”, which, according to the regulatory plan or the whole law, should form a certain rule.^{*47} When the gap is represented graphically, it can be seen as gaining its meaning from its context.

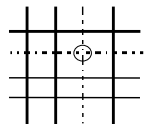


Figure 2. Legal gap as an absence of something certain.

From the moment of discovery of the legal gap, it is part of the legal text: semiotisation of the gap takes place. In decoding the gap as a semiotic phenomenon, we have the means to analyse it. Just as Lotman says when stating that the text can appear as a condensed programme of the entire culture,^{*48} we can conclude that every legal concept, and in the same way every legal gap, contains a model of the legal system. Filling a gap extends the law from its general idea to its lower levels because it requires an analysis of what is inherent in the legal order as a whole and what arrangement is most suitable for the legal system. In the process, the gap detected in the law renders the law more coherent with the society.

4. The binary nature of the undefined legal concepts in relation to examples from case law

From comparison between defined and undefined legal concepts with regard to the tension between self-reference and external reference, it appears that in the case of defined legal concepts (as in ‘post box’ example) the balance in the tension between self-reference and external reference favours self-reference. This is so because defined concepts are autonomous and must always be interpreted in the same way within a given legal system. These elements of a system remain as they are and keep the stability of the system secure. In the case of undefined legal concepts, on the contrary (for instance, the reference to ‘reasonable distance’),

⁴² *SR 210 Schweizerisches Zivilgesetzbuch vom 10. Dezember 1907* (Swiss Civil Code), Redaction 1. Januar 2018), AS 24 233. Available online at <https://www.admin.ch/opc/de/classified-compilation/19070042/index.html#a1> (most recently accessed on 30.6.2018).

⁴³ Karl Larenz, Claus-Wilhelm Canaris. *Methodenlehre der Rechtswissenschaft. Dritte, neu bearbeitete Auflage* [‘Study of Legal Method: New Third Edition’]. Berlin: Springer-Verlag 1995, p. 187. – DOI: <https://doi.org/10.1007/978-3-662-08709-1>.

⁴⁴ *Ibid.*, p. 188.

⁴⁵ Ernst Krämer. *Juristische Methodenlehre. Fünfte Auflage* [‘Juridical Method: Fifth Edition’]. Munich, Germany: Verlag C.H. Beck 2016, p. 199.

⁴⁶ *Ibid.*, p. 202.

⁴⁷ Karl Larenz, Claus-Wilhelm Canaris (see Note 43), p. 196.

⁴⁸ Juri Lotman et al. (see Note 11), p. 68, no. 6.0.1.

there is more tension between self-reference and external reference: through undefined legal concepts, a significant amount of 'foreign' material 'soaks in', and this external material shapes the law as a whole. For that reason, one could conclude that the balance in the case of undefined legal concepts lies closer to external reference than self-reference. Illustrative examples can be found in case law.

In consequence of European court and Estonian Supreme Court practice, interpretation of undefined legal concepts is not entirely free. Rather, it is based on the law in which the legal concept features. When looking into practice, the Constitutional Review Chamber of the Supreme Court of Estonia stated in 2005:

A blank concept is a legislative tool the legislator uses when it withdraws from issuing detailed instructions in the text of law and delegates the authority to specify a norm to those who implement the law. As blank concepts are created by the legislator, these have to be defined with the help of the guidelines and aims expressed by the legislator.^{*49}

The Supreme Court has repeated the position expressed above – i.e., that the interpreter shall not be guided only by common usage or the usage of a term in other acts but must take into consideration also the wording and purpose of the act itself (in this particular case the Packaging Excise Duty Act).^{*50} In another judgement, a very recent one, the Administrative Chamber of the Supreme Court of Estonia stated that giving meaning to and interpreting a legal norm has to proceed from the entire legal system and use terms in their ordinary meanings, unless the provision in question stipulates the contrary.^{*51} Therefore, using undefined legal concepts (i.e., using natural language in a law) is acknowledged to be as inevitable as the need to interpret these concepts afterwards.

The Constitutional Review Chamber of the Supreme Court has asked that, in the process of interpretation, the interpreters turn their gaze to societal issues. If we transform the idea such that it meshes with the vocabulary used by the Tartu–Moscow semioticians, cultural issues come into play in finding of a meaning of a norm from aims expressed by the legislator – i.e., through the social as well as cultural context of a norm (that is, external reference).

The European Court of Justice too is ready to report on the common usage of words (natural language) and hence uphold the attribute of foreign reference. In accordance with said court's settled case law, the meaning and scope of terms for which European Union law provides no definition must be determined by considering the usual meaning of the terms in everyday language, while also taking into account the context in which they occur and the purposes of the rules of which they form a part.^{*52}

In conclusion, legal terms are always applied with an effort to maintain the core of the concept as accurately and to as great an extent as possible. At the same time, each case, in its new form, comprises legal terms with a new context of usage. In particular, the cases associated with changes in society that have never been considered in this connection in the past form the core of the norms (e-solutions, 'digisociety', various issues of minorities, refugee issues, etc.).

5. Conclusions

From one perspective, the idea of law as a secondary modelling system is in accordance with the conclusions drawn by TMS scholars with regard to other cultural texts. At the same time, it leads to conclusions similar to those articulated in theory of law.

If we look for a practical solution as output, for the interpretation of undefined legal concepts, a two-level test has to be passed: firstly, the meaning in natural language has to be found, and, after that, correction

⁴⁹ Judgement of the Constitutional Review Chamber of the Supreme Court of Estonia no. 3-4-1-5-05, of 13.6.2005, p. 16.

⁵⁰ Judgement of the Constitutional Review Chamber of the Supreme Court no. 3-4-1-18-07, of 26.11.2007, p. 29.

⁵¹ Judgement of the Administrative Chamber of the Supreme Court no. 3-3-1-1-17, of 19.4.2017, p. 21.

⁵² Case C-336/03, *easyCar* [2005] ECR I-1947, paragraph 21; Case C-549/07, *Wallentin-Hermann* [2008] ECR I-11061, paragraph 17; Case C-151/09, *UGT-FSP* [2010] ECR I-0000, paragraph 39.

In comparison, in common-law countries, the same question arises by statutory interpretation. Thus, in countries using the system of common law, the 'plain meaning rule', also known as the literal rule, is used. That rule dictates that statutes are, *prima facie*, to be presumed to use words in their popular sense. Words that are not applied in connection with any particular science or art are to be construed as they are understood in common language. Is it, indeed, a sound rule of construction to give the same meaning to the same words occurring in different parts of an Act of Parliament? For discussion, see Alan M. Schwartz, Catherine Rosebrugh. The interpretation of legal terms undefined in tax legislation: Guarantee and novation. 2017. Available online at http://www.fasken.com/files//CTF_PAPER_SEPT02_AMS.PDF (most recently accessed on 1.12.2017), p. 4.

should be applied in accordance with the concept's place in the legal system at hand, such that the law remains as constant as possible. From a broader angle, the place of undefined legal concepts in law under Lotman's schema is important. Here, undefined legal concepts in legal systems are akin to elements of a language that ensure the deep memory of the system – these are, firstly, liable to **change** but, secondly, able to **survive** in the system, both in their invariance and in their variability. Undefined legal concepts have both of these characteristics: they possess certain autonomy, because they are not defined by law (surviving via connections to the surrounding law). At the same time, this is a distinctive feature, which leads to judges having the creative task of finding a fair solution (changing via shifts in meaning in natural language). According to Lotman, if we consider a series of synchronous contexts (in our case, many court cases), then not only can the stability of the element – the undefined concept – be made evident but so can the constant change due to the reading of the various dynamic codes.^{*53} The undefined legal concepts therefore function to bind the constantly modernising society and the law so that the latter does not fossilise.

In the context of language and words, Lotman concludes that one result of an attribute of liability to change is that one and the same element, penetrating the various levels of the system, interconnects these levels.^{*54} Undefined legal concepts interconnect elements of law in that their interpretation always leads to the question of what the legal system is like. As determined by case law, the interpretation has to follow the aims of the acts with which it forms a whole and be aligned with the broader context (the general principles of law etc.). This leads to a systematic approach to interpreting undefined legal concepts, through which the rule of law is ensured.

With the assistance of Lotman's cultural semiotics, it is possible to formulate the regularities that operate in legal interpretation in the same way as in culture. These regularities, which have never before been pointed out in works of legal semiotics or legal theory, can be summarised thus:

- 1) **In the legal domain, the relationship between the legal language and the natural language determines the degree of validity and comprehensibility of the law for the society.** The further the legal language is from natural language, the greater the respect it engenders but also the less clear it is. Conversely, if the legal language is equivalent to the natural language, the law is going to be ineffective – the existence of extensive freedom for interpretation reduces the potency of the law.
- 2) **Legislation and interpretation of law are opposite processes** that together exist in a state of continual tension and mutual translation.^{*55} The interpreter of law must look for natural language (utterances) in the law, while the legislator must strive for legal language (text) from within natural language – that is, the language that best suits the existing legal system.
- 3) **Every legal concept and, moreover, every legal gap is a reflection of the legal system, encompassing its condensed programme on the one hand (self-reference) and a reflection of the society on the other (external reference).** The tension between the two is most evident in the interpretation of undefined legal concepts, in connection with which Estonian and European case law alike confirm that both need to be taken into consideration. On the one hand, undefined legal concepts and the legal gaps detected increase the coherence of society and law through legal elaboration; on the other hand, however, total openness to new material in the law leads to the law losing its validity for the society (see conclusion 1).

These three conclusions contribute to a well-functioning framework for interpreting legal concepts and overcoming legal gaps. In each case, it is necessary to define the 'utterance' and the 'text', clarify the 'self reference' and the 'external reference' in law, and bear in mind throughout the process that interpretation always occurs in relation to this binary structure.

Lotman's interest in the effect of secondary modelling systems on the general system of culture clearly has its analogue in the field of legal studies. Just as much as a work of art is a secondary modelling system, so too is a carefully drafted contract or a curiously decided case of law, which, when studied in detail from the perspective of its linguistic elements, can reveal the worldview behind and suffusing it.^{*56}

⁵³ *Ibid.*

⁵⁴ Juri Lotman (see Note 24), p. 1378.

⁵⁵ Compare: Juri Lotman. Primary and secondary communication-modelling systems. – Daniel P. Lucid (ed.). *Soviet Semiotics: An Anthology*. Baltimore: The Johns Hopkins University Press 1974, pp. 95–98 (on p. 98).

⁵⁶ Susan Tiefenbrun (see Note 3), p. 124.



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(Just) Give Me a Reason ...^{*1}

The incentive for this paper was a recent judgment of the European Court of Human Rights (ECtHR, Strasbourg Court): *Baydar v. the Netherlands*.^{*2} In this judgment, the Strasbourg Court addressed at length the interaction between its case law pertaining to, firstly, the requirement to give reasons for a refusal to refer a question to the Court of Justice of the European Union (CJEU, Luxembourg Court) and, secondly, the ECtHR's acceptance that a superior court may dismiss an appeal on the basis of summary reasoning.

This issue has bothered me for some time, in particular in relation to the legal system of my country of origin – Estonia. In Estonia, on the one hand, questions for a possible preliminary reference occasionally arise in complicated legal disputes before all levels of domestic courts, and, on the other hand, the Supreme Court can refuse leave to appeal (including in cases where the lower courts have decided not to refer a question to the Luxembourg Court), without real reasoning, using only one very laconic sentence. So far, the ECtHR has not yet dealt with the Estonian circumstances.^{*3} This paper will, of course, avoid predictions of what the possible outcome of a respective case involving Estonia would be. However, the topic deserves, to my mind, general reflection, because it is not rare for a judicial system to face the dilemma of whether to prefer thorough expression of judicial reasoning always or to sacrifice the reasoning in order to have an effective leave-to-appeal system, which would allow the jurisdiction to concentrate on important matters with precedential value. In the present context, one should also not neglect the aspect of interplay between European Union (EU) law and the European Convention on Human Rights (ECHR), as well as the role of national courts finding their way in complex legal surroundings. Above all, it is about the parties of domestic litigation and their representatives who desire an answer as to why their national court has decided not to seek help from the CJEU and who also deserve their application being given due consideration within reasonable time.

¹ 'Just Give Me a Reason' is a song recorded by American singer and songwriter Pink. Judge Laffranque has previously too been inspired in the headings of her articles by famous song titles. See, for example, Julia Laffranque. Can't get just satisfaction. – Anja Seibert-Fohr, Mark Villiger (eds). *Judgments of the European Court of Human Rights – Effects and Implementation* (Studies of the Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law). Nomos 2014, pp. 75–114. – DOI: https://doi.org/10.5771/9783845259345_75. The current paper reflects only personal opinions of the author.

² *Baydar v. the Netherlands*, No. 55385/14, 28.4.2018 (not yet final).

³ It is not excluded that the ECtHR will need to deal with the issue; see the piece 'Tallinn water provider heads to human rights court in tariff dispute', by ERR, Estonia, 15.5.2018. Available at <https://news.err.ee/831589/tallinn-water-provider-heads-to-human-rights-court-in-tariff-dispute> (most recently accessed on 29.6.2018).

1. Judicial reasoning and the interplay between European Union law and the European Convention on Human Rights

Judicial reasoning refers both to the process by which a judge reaches a conclusion as to the appropriate result in a case and to the written explanation of that process in a published judgment. This paper uses and explores the latter of the meanings of judicial reasoning and concentrates on the issue of giving reasons in judicial decisions.

1.1. The overall importance of giving judicial reasons

Reason to give reasons: The purpose of giving reasons

For the judiciary, the modern state has always accepted that its judgments have to be underpinned by a proper and full justification: this principle is enshrined in most constitutions and is enforced by the highest courts.^{*4}

It goes without saying that it is important to give reasons for a judicial decision. Thanks to a presentation of reasoning, it is possible to understand why the judicial decision was made one way or another and, if available, seek appeal.^{*5} Good reasoning helps also for acceptance of the judgment by the parties and by the society as a whole. According to the Strasbourg Court's case law, '[t]he accused's understanding of his conviction stems primarily from the reasons given in judicial decisions, [which is why] in such cases, the national courts must indicate with sufficient clarity the grounds on which they base their decisions. [...] Reasoned decisions also serve the purpose of demonstrating to the parties that they have been truly heard, thereby contributing to a more willing acceptance of the decision on their part'.^{*6}

The principle of giving judicial reasons is also linked to the proper administration of justice:^{*7} it obliges judges to base their reasoning on objective arguments, preserves the rights of the defence, and prevents arbitrariness by allowing possible bias on the part of the judge to be discerned.^{*8}

Furthermore, the reasons are an important aid for implementing a judgment, since a fair trial has been fully respected only if the judgment is enforceable and will indeed be implemented.

The duty to give reasons in the Strasbourg and Luxembourg courts and in their case law

As far as the ECtHR is concerned, Article 45 ECHR states that reasons shall be given for judgments as well as for decisions declaring applications admissible or inadmissible. The Rules of the Court specify this requirement in detail.^{*9}

In the EU, Article 36 of Protocol No. 3 to the Treaty on the Functioning of the European Union (TFEU), on the Statute of the Court of Justice of the European Union, provides that the CJEU's judgments shall state the reasons on which they are based. This is supported by the Rules of Procedure of the Luxembourg

⁴ See Ingrid Opdebeek, Stéphane De Somer. The duty to give reasons in the European legal area: A mechanism for transparent and accountable administrative decision-making? A comparison of Belgian, Dutch, French and EU administrative law. – *Rocznik Administracji Publicznej* 2 (2016), pp. 97–148, on p. 97.

⁵ The reasons given must be such as to enable the parties to make effective use of any existing right of appeal (ECtHR, *Hirvisaari v. Finland*, No. 49684/99, 27.9.2001). National courts should indicate with sufficient clarity the grounds on which they base their decision, so as to allow a litigant usefully to exercise any available right of appeal (*Hadjianastassiou v. Greece*, No. 12945/87, 16.12.1992).

⁶ *Taxquet v. Belgium*, No. 926/05, 16.11.2010.

⁷ *Papon v. France* (dec.), No. 54210/00, 25.7.2002.

⁸ *Cerovšek and Božičnik v. Slovenia*, Nos 68939/12 and 68949/12, 7.3.2017. As the Strasbourg Court has often noted, the rule of law and the avoidance of arbitrary power are principles underlying the ECHR. In the judicial sphere, those principles serve to foster public confidence in an objective and transparent justice system, one of the foundations of a democratic society. See, among many other authorities, *mutatis mutandis*, *Roche v. the United Kingdom* [GC], No. 32555/96, ECHR 2005-X, 19.10.2005.

⁹ See Rules of the ECtHR: Rule 56², 74¹, 87⁴.

Court.^{*10} Provisions similar to those requiring the CJEU to give reasons are enshrined in the laws of Member States.

Both the ECtHR and the CJEU have interpreted Article 6 ECHR (on the right to a fair trial), as well as, respectively, Article 47 of the Charter of Fundamental Rights of the European Union (the Charter), on the right to an effective remedy and to a fair trial, to include the duty to give reasons. This is an important requirement in order to guarantee procedural justice. The case law of the ECtHR regarding the duty to give reasons will be elaborated upon below (in Subsection 2.1). In EU law, it is related mostly to the decisions of the institutions of the EU, as well as to the administrative decisions of the Member States. According to the explanations related to the Charter: Article 47 of the Charter applies to the institutions of the EU and to the Member States when they are implementing EU law and does so for all rights guaranteed by EU law. For example, according to the case law of the CJEU, Article 47 of the Charter requires that the person concerned be able to ascertain the reasons upon which the decision taken in relation to him is based, either by reading the decision itself or by requesting and obtaining disclosure of those reasons.^{*11}

Judicial reasoning and authority of courts

Judicial reasoning is also important for creating and maintaining the authority of courts. The formal invocation of the duty to give reasons both stems from and reinforces the perception that judicial authority and judicial reasons are interdependent.^{*12}

Even though the guarantee of reasoned judgments is taken for granted by many nowadays, it is remarkable that the topic is still regularly debated.^{*13}

1.2. Don't want to be all by myself: Reasoning when asking for judicial help

The different roles of domestic and European courts

The national courts can be regarded as the 'guardians of specialised national law',^{*14} who rule on issues of breaches of domestic law. The CJEU, in turn, can be seen as the 'guardian of EU law', who ensures legal unity within the EU and autonomy of the EU law, and the ECtHR as 'conscience of Europe', who guarantees the respect, application, and interpretation of human rights invested in the ECHR. Each of them act in their sphere of competence. Yet none of them can live all by themselves. The Strasbourg Court and the Luxembourg Court, despite their fundamental differences^{*15}, shall not adjudicate in isolation from each other and definitely must not do so separated from the national jurisdictions, which form an epicentre for this European interaction. National judges apply more and more ECHR and, of course, EU law, which has become an essential part of the Member States' national law. This interaction makes a dialogue between national courts and the CJEU/ECtHR vital. A brilliant institution of preliminary references anchors this dialogue on EU level. In EU law (via preliminary references; Article 267 TFEU) and also within the legal space of the ECHR (via advisory opinions; Protocol No 16, due to enter into force in August 2018)^{*16}, the

¹⁰ See also Article 87 of the Rules of Procedure of the CJEU, according to which the judgment shall contain the grounds for the decision.

¹¹ *Kadi II*, C-584/10 P, C-593/10 P, and C-595/10 P, EU:C:2013:518, paragraphs 97–100.

¹² Vlad Perju. Reason and authority in the European Court of Justice. – *Virginia Journal of International Law* 49 (2009) / 2, pp. 308–377 (Boston College Law School Legal Studies Research Paper No. 170), on p. 322. Available also from SSRN, via <https://ssrn.com/abstract=1324333> (most recently accessed on 5.5.2018).

¹³ E.g., Maurice Adams. De argumentatieve en motiveringspraktijk van hoogste gerechtshoven: rechtsvergelijkende beschouwingen [‘Argumentation and reasoning practice of the Supreme Court: Comparative law considerations’]. – *Rechtskundig Weekblad* 72 (2009) / 36, pp. 1498–1511; Vlad E. Perju (see Note 11).

¹⁴ See Katherina Paraschas. The role of the national judge and the preliminary ruling procedure. Available at http://www.era-comm.eu/oldoku/adiskri/12_jurisdictions/2011_03_paraschas_en.pdf (most recently accessed on 5.5.2018).

¹⁵ See Dean Spielmann, Panayotis Voyatzis. L'étendue du contrôle du respect des droits fondamentaux à l'aune de l'expérience judiciaire comparée [‘The extent of the control over respect for fundamental rights featured in comparative judicial practice’]. – *Revue Trimestrielle Des Droits de l'Homme* 2017/112, pp. 897–951, on p. 898.

¹⁶ Protocol No. 16 to the ECHR (STCE no. 214) enters into force on 1 August 2018 in respect of Albania, Armenia, Estonia, Finland, France, Georgia, Lithuania, San Marino, Slovenia, and Ukraine.

national judge can ask for help from the European courts in order to have clarification about the EU law and, correspondingly, the ECHR.

The duty to refer questions to the CJEU and exemptions from it

In cases that involve EU law, the national courts, when they consider a decision by the CJEU necessary to enable them to pass judgment in the pending national case, seek, either on their own initiative or because of a duty, preliminary rulings from the CJEU. All national courts or tribunals against whose decisions there is no judicial remedy shall bring the matter before the CJEU (Article 267(3) TFEU). Exceptions to this duty can be made if the question is not relevant, in the sense that the answer to the question, regardless of what it might be, could in no way affect the outcome of the case; the question raised is materially identical to a question that has already been the subject of a preliminary ruling, in a similar case; or decisions of the CJEU have already dealt with the point of law in question, even though the questions at issue are not strictly identical. Exemption from the obligation to refer a matter to the CJEU can be made also if the correct application of EU law is so obvious as to 'leave no scope for any reasonable doubt as to the manner in which the question raised is to be resolved'.^{*17} However, before it comes to the conclusion that such is the case, the national court or tribunal must be convinced that the matter is equally obvious to the courts of the other Member States and to the CJEU.

Most of the cases leading to a preliminary reference pertain to the proper interpretation of EU law. In addition, any national court that believes that a legal instrument adopted by the EU is invalid and does not want to apply this legal instrument is obliged to refer the matter to the CJEU, because the Luxembourg Court has an exclusive power to reject illegal provisions of EU law.^{*18}

Moreover, pursuant to interesting recent further developments in the case law of the CJEU, a national court of last instance is under an Article 267 TFEU obligation to refer a question to the CJEU for a preliminary ruling even if the constitutional court of its Member State has already assessed the constitutionality of national rules in light of regulatory parameters with content similar to rules under EU law.^{*19} The CJEU considers the effectiveness of EU law to be in jeopardy otherwise. If the denial of leave to appeal by the first-instance court is challenged, only the court that will rule on the appeal against denial of leave to appeal will be obliged to refer the case to the CJEU.^{*20}

Although there is at times an obligation to refer, one condition is that the case must be pending before a domestic court and the national court must believe that the referral is necessary to solve the case at hand. In this respect, the national court has its own margin of discretion, which is generally not subject to review. Namely, the CJEU usually does not scrutinise the need for referring questions to the CJEU, except where the question is not related to EU law or is of a hypothetical nature.

The CJEU has published Recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings.^{*21}

The duty to give reasons when deciding upon referral

The duty to give reasons, as far as the referral for preliminary ruling is concerned, comes into play from different angles. Habitually the national court is the master in the decision on whether to make a reference or not; however, it is not seldom that the parties of the domestic litigation make such a request. The CJEU has repeatedly stressed both in its Recommendations to national courts and in its case law that it is for the national court, not the parties to the main proceedings, to bring a matter before the CJEU. The right to determine the questions to be put to the CJEU in order to enable rendering judgment and the relevance of the questions it submits to the CJEU thus devolves on the national court alone, and the parties may not

¹⁷ *C.I.L.F.I.T.*, C-283/81, E.C.R., 1982, 3415, para. 16 – the so-called *acte clair* doctrine.

¹⁸ *Foto-Frost*, Case 314/85, E.C.R., 1987, 4199.

¹⁹ *Global Starnet*, C-322/16, 20.12.2017, paras 21, 23–25. The case pertained to, among others, the principles of legal certainty and protection of legitimate expectations, which are common to EU law and to the constitutional frameworks of the Member States (in this case, Italy).

²⁰ See *Lyckeskog*, C-99/00, 2002, 4.6.2002.

²¹ See the updated version of the Recommendations to national courts and tribunals in relation to the initiation of preliminary-ruling proceedings, 2016/C-439/01, 25.11.2016.

change their tenor.^{*22} This is so because according to the CJEU the preliminary references institute direct co-operation between the CJEU and the national courts in order to ensure uniform interpretation of EU law and hence must be completely independent of any initiative by the parties.^{*23}

Although the national court is not bound by requests of the parties, it should nevertheless articulate why it concludes that it will accept the request or not, and thus why it opts to refer or not to refer a case to the CJEU. In cases where the national court has a duty to refer but omits to do so, it should also state reasons for which it feels exempted from this duty. Finally, in cases where the national court decides to request the CJEU to interpret EU law, the requesting court in its reference for a preliminary ruling has to state why the interpretation is necessary to enable it to give judgment. In cases where the CJEU is requested to review the validity of EU law, the requesting court has to state why the legal instrument in question might be invalid.

Usually it is considered impossible to restrict the court's entitlement to refer cases to the CJEU by appealing the decision to refer a case to the CJEU if the case remains pending before the referring court. However, an appeal might be / should be possible if the court has failed to refer the case to the CJEU; EU law leaves this issue to be settled by national procedural law. The final courts avoiding making of a reference can lead to errors in application of EU law.^{*24}

Consequences of non-referral in EU law

Furthermore, infringement proceedings on EU level can be initiated against the Member State of the court concerned if the court had a duty to refer.^{*25}

Failure to refer can in turn lead also to state liability claims for judicial wrongs:^{*26} in its decision in *Köbler*^{*27}, the CJEU applied the principle of state liability (first laid down in *Francovich*^{*28}) and declared the possibility of an EU member state being held liable for decisions of its national courts adjudicating at last instance. The CJEU has further clarified the relevant principles in subsequent judgments.^{*29}

The volume and importance of preliminary references and rulings

According to the case law of the CJEU, the preliminary reference mechanism is based on the principle of sincere co-operation, established with a view to ensuring the proper application and uniform interpretation of EU law in all the Member States between national courts, in their capacity as courts responsible for the application of EU law, and the CJEU and to guaranteeing that individuals' rights under EU law are judicially protected.^{*30} The obligation of final courts and of all courts with regard to validity issues to make

²² See the Recommendations to national courts and tribunals in relation to the initiation of preliminary-ruling proceedings, 2016/C-439/01, 25.11.2016, para. 3; *György Katz v. István Roland Sós*, C-404/07, CLI:EU:C:2008:553, 9.10.2008, para. 37.

²³ *VB Pénzügyi Lízing Zrt. v. Ference Schneider*, C-137/08, ECLI:EU:C:2010:659, 9.11.2010, para. 28.

²⁴ See, for example, *Ferreira da Silva*, C-160/14, 9.9.2015.

²⁵ I will elaborate in detail on neither the requirements to present reasoning for the refusal to make a reference for a preliminary ruling as reflected in the case law of the Luxembourg Court nor the problematic of whether the mere non-refusal to refer by a final court and thus non-obedience to the duty to refer as such will constitute grounds for state liability or whether there has to be damage from this non-referral and a causal link between the non-referral and damages, with the ensuing problem of whether the applicants should domestically seek damages for failure to ask for a reference before turning to the Strasbourg Court (as it is not directly linked with the duty to give reasons, it is only to be noted that this is an issue that still requires development in ECtHR case law). For example, in the case *Baydar v. the Netherlands*, the Government of the Netherlands argued that the applicant had failed to exhaust all available domestic remedies by not bringing an action in tort against the state before the civil courts on the grounds that the Supreme Court's judgment was unlawful. According to the Government, since the alleged violation of Article 6 ECHR occurred at the very last stage of the criminal proceedings, no domestic court had had the opportunity to consider the applicant's claim that his rights under Article 6 ECHR had been violated by the Supreme Court's summary reasoning, which should, therefore, have been argued before the civil courts. The ECtHR, however, rejected this argument because the Government did not satisfy the Strasbourg Court – it did not refer to any domestic case law showing that the remedy was an effective one, available in theory and in practice at the relevant time (*Baydar v. the Netherlands*, No. 55385/14, 28.4.2018, para. 33).

²⁶ See Rose D'Sa. Limits on suing an EU Member State for non-contractual damages for judicial errors made by a national court of last instance. – *European Current Law* 15 (2006) / November, pp. XI–XVI.

²⁷ *Köbler*, C-224/01, E.C.R., 2003, I-10239.

²⁸ *Francovich, Bonifaci and Others*, C-6 & 9/90, E.C.R. 1991, I-5357.

²⁹ See, for example, *Traghetti del Mediterraneo SpA*, C-173/03 [2006], 3 C.M.L.R.19.

³⁰ *C.I.L.F.I.T.*, C-283/81, E.C.R., 1982, 3415, para. 7.

a referral before the CJEU is intended to prevent occurrence within the EU of divergences in judicial decisions on questions of EU law. The preliminary ruling given by the CJEU is binding on the referring national court as to the interpretation of the provision of EU law in question. But it often has an even wider impact, indirectly, on other cases.^{*31} According to the annual report of the CJEU^{*32} in 2017, out of 739 new cases introduced to the Court, 533 were references for preliminary rulings, with courts from Germany, Italy, the Netherlands, Austria, and France in leading position. Out of 699 cases that were decided in that year, 447 were preliminary rulings. The average time for proceeding a case was 16.4 months and for urgent preliminary references 2.9 months. The tendency seems to be that also the constitutional courts of the Member States use more and more inter-judicial dialogue per preliminary reference (competitors collaborate) in order to smoothen what is described as ‘interpretive competition’.^{*33} It is also true that flexibility seems to be necessary in order to ensure healthy, lively judicial dialogue.^{*34}

It is a fact also that the preliminary rulings continue not only to be in quantity the main occupation of the CJEU but also to contribute actively to the further development of EU law.

The role of the Strasbourg Court in the dialogue between national courts and the CJEU

The duty to refer to the CJEU for a preliminary reference has relevance not only under EU law. It can also be regarded in light of the right to a fair trial (Article 6 ECHR). It has been correctly noted that the duty of last-instance national courts to submit preliminary references to the CJEU is analysed by academics almost exclusively in light of the Luxembourg Court’s case law; however, the case law of the Strasbourg Court also appears to be relevant in this context.^{*35} In several instances, the ECtHR was asked whether non-referral of preliminary questions to the CJEU constituted a breach of Article 6 ECHR, guaranteeing the right to a fair trial. One of the few existing analyses in this respect includes an attempt to demonstrate that the possibility of referring to the CJEU a preliminary reference is not interpreted in the same way by the CJEU, the ECtHR, and the national constitutional jurisdictions.^{*36} The assumed differences in attitude open up interesting perspectives both for academics and for practitioners.

Let us now have a closer look at this interplay as seen from the Strasbourg Court’s optic.

2. The extent of judicial reasoning as interpreted and applied by the European Court of Human Rights and its effects on preliminary references in European Union law

2.1. The duty to give judicial reasons and its limits

The scope of the duty to give reasons

The ECtHR imposes strict standards upon the Member States as regards the motivation of judgments in both civil and criminal cases. The guarantees enshrined in Article 6 §1 ECHR include the obligation for domestic courts ‘to indicate with sufficient clarity the grounds on which they base their decision’.^{*37} It must be clear

³¹ This has also been acknowledged by the Strasbourg Court; see *Laurus Invest Hungary KFT and Continental Holding Corporation v. Hungary and 5 other applications* (dec.), No. 23265/13, 8.9.2015.

³² Rapport annuel: Panorama de l’Année, CJEU, 2017; 2017 Rapport Annuel. Activité Judiciaire, CJEU, 2017, pp. 108–109.

³³ See Filippo Fontanelli, Giuseppe Martinico. Cooperative antagonists – the Italian Constitutional Court and the preliminary reference: Are we dealing with a turning point? (Eric Stein Working Paper No. 5/2008), pp. 21–22.

³⁴ See Xavier Groussot. Spirit, are you there? – Reinforced judicial dialogue and the preliminary ruling procedure (Eric Stein Working Paper No. 4/2008), p. 24.

³⁵ Agne Limante. Refusal to refer for a preliminary ruling and a right to a fair trial: Strasbourg court’s position. Available at <https://blogs.kcl.ac.uk/ksleuropeanlawblog/?p=1098#.Wu3My5cuCUk> (most recently accessed on 5.5.2018).

³⁶ See Jiri Malenovský. Le renvoi préjudiciel perçu par trois Cours «souveraines» [‘The preliminary references as perceived by the three sovereign jurisdictions’]. – *Journal de droit européen* 2013, pp. 214–224.

³⁷ *H. v. Belgium*, No. 8950/80, 30.11.1987; *Karyagin, Matveyev and Korolev v. Russia*, Nos 72839/01, 74124/01, and 15625/02, 28.5.2009; *Hirvisaari v. Finland*, No. 49684/99, 27.9.2001.

from the decision that the essential issues of the case have been addressed.^{*38} The duty to give reasons applies not only for judgments but also for major procedural decisions issued in the course of the proceedings, such as decision not to admit certain evidence or not to exempt the applicant from payment of a court fee.^{*39}

Limits of the duty to give reasons

As far as the limits of the requirement to give reasons is concerned, then the domestic courts have a certain margin of appreciation when choosing arguments and admitting evidence, although they are obliged to justify their activities by giving reasons for their decisions.^{*40} According to the interpretation of the ECtHR, Article 6 §1 ECHR does not require a detailed answer to every argument.^{*41} The extent of the duty to give reasons varies according to the nature of the decision and is determined in light of the circumstances of the case, depending upon the diversity of submissions and differences existing in the Member States with regard to statutory provisions, customary rules, legal opinion, and the presentation and drafting of judgments.^{*42} However, the courts must examine litigants' main arguments, and, where a party's submission is decisive for the outcome of the case, they must give an express reply to these arguments.^{*43} This extends also in particular to the rights and freedoms guaranteed by the ECHR and its Protocols, which the national courts are required to examine with particular care.^{*44}

The Strasbourg Court considered that the judge's retirement, which was allegedly the reason for her failure to provide written grounds, did not give rise to exceptional circumstances as would justify a departure from the standard reasoning: since the date of the retirement of the judge had to have been known to her in advance, it should have been possible to take measures either for her to finish the applicants' case alone or to involve another judge at an earlier stage in the proceedings.^{*45}

When dismissing an appeal, an appellate court may simply endorse the reasons for the lower court's decision.^{*46} Nevertheless, it has to address, whether itself or by endorsing the reasons of the lower court, the essential issues that were submitted to it, particularly in cases where the litigant has not been able to present his or her arguments orally.^{*47} Appellate courts on second-instance level, which filter out unfounded appeals and have jurisdiction to deal with both facts and law, must give reasons for refusal to accept an appeal.^{*48} It must be admitted, however, that the approach adopted at the national level differs considerably between Member States. Specific reasoning may be required in some systems, and more stereotyped reasoning may be permissible in others.^{*49}

Acceptance of summary reasoning of supreme courts

In the context of the current problematic it is important to note that, according to the case law of the ECtHR, Article 6 §1 ECHR does not require a supreme court to give more detailed reasoning when it simply applies a specific legal provision to dismiss an appeal on points of law as having no prospects of success without further explanation.^{*50} In the case of an application for leave to appeal, the ECHR does not require that the rejection of leave be itself subject to a requirement to give detailed reasons.^{*51}

³⁸ *Boldea v. Romania*, No. 19997/02, 15.2.2007.

³⁹ Among others, see *Suominen v. Finland*, No. 37801/97, 1.7.2003; *Múčková v. Slovakia*, No. 21302/02, 13.6.2006.

⁴⁰ *Suominen v. Finland*, No. 37801/97, 1.7.2003; *Carmel Saliba v. Malta*, No. 24221/13, 29.11.2016.

⁴¹ *Van de Hurk v. the Netherlands*, No. 16034/90, 19.4.1994; *García Ruiz v. Spain* [GC], No. 30544/96, 21.1.1999; *Jahnke and Lenoble v. France* (déc.), No. 40490/98, 29.8.2000; *Perez v. France* [GC], No. 47287/99, 12.2.2004.

⁴² *Ruiz Torija v. Spain*, No. 18390/91, 9.12.1994; *Hiro Balani v. Spain*, No. 18064/91, 9.12.1994.

⁴³ *Ruiz Torija v. Spain*, No. 18390/91, 9.12.1994; *Hiro Balani v. Spain*, No. 18064/91, 9.12.1994; *Buzescu v. Romania*, No. 61302/002, 4.5.2005; *Donadze v. Georgia*, No. 74644/01, 7.3.2006.

⁴⁴ *Fabris v. France* [GC], No. 16574/08, 7.2.2013; *Wagner and J.M.W.L. v. Luxembourg*, No. 76240/01, 28.6.2007.

⁴⁵ *Cerovšek and Božičnik v. Slovenia*, Nos 68939/12 and 68949/12, 7.3.2017.

⁴⁶ *García Ruiz v. Spain* [GC], No. 30544/96, 21.1.1999.

⁴⁷ *Helle v. Finland*, No. 157/1996/776/977, 19.12.1997.

⁴⁸ *Hansen v. Norway*, No. 15319/09, 2.10.2014.

⁴⁹ See also in that respect the dissenting opinion of Judge Møse to the ECtHR judgment *Hansen v. Norway*, No. 15319/09, 2.10.2014.

⁵⁰ *Burg and Others v. France* (dec.), No. 34763/02, 28.1.2003.

⁵¹ *Kukkonen v. Finland* no. 2, No. 47628/06, 13.1.2009; *Bufferne v. France* (dec.), No. 54367/00, 11.2.2003.

The Strasbourg Court has accepted that a superior court may dismiss an application for appeal on the basis of summary reasoning.^{*52} The same approach is used with regard to constitutional court practice.^{*53}

Reasoning and the jury

Juries in criminal cases rarely give reasoned verdicts, and the relevance of this to fairness of a trial has been touched upon in a number of cases in front of the ECtHR. The Strasbourg Court has found that Article 6 §1 ECHR does not require jurors to give reasons for their decisions;^{*54} nevertheless, the accused, and indeed the public, must be able to understand the verdict,^{*55} and it is also important that appeal rights be available to remedy any improper verdict by the jury.^{*56} Since this question has not yet arisen in relation to EU law, it will not be further elaborated on in the current paper.

2.2. Interaction between the duty to give reasons and acceptance of dismissing appeals with summary reasoning in the context of preliminary references

The ECtHR and EU law

In general, as the EU is not (yet) a member of the ECHR, the current position of the Strasbourg Court with regard to EU law is based on cautious application of the principle of presumption of equivalent protection, which is reflected in already well-established case law.^{*57} In *Avotiņš v. Latvia*^{*58}, the Strasbourg Court has reiterated that, when applying EU law, the Contracting States remained bound by the obligations they had entered into on acceding to the ECHR and that those obligations were to be assessed in light of the presumption of equivalent protection established by the Court in *'Bosphorus Airways' v. Ireland*^{*59} and developed in the *Michaud v. France* judgment.^{*60} According to the *Bosphorus* case law, the states remain responsible under the ECHR for the measures they take to comply with obligations stemming from their membership of an international organisation to which they have transferred part of their sovereignty. However, the ECtHR also held in *Bosphorus* that action taken in compliance with such obligations is justified where the relevant organisation protects fundamental rights, as regards both the substantive guarantees and the mechanisms controlling their observance, in a manner that can be considered at least equivalent – 'comparable' – to that for which the ECHR provides. If such equivalent protection is provided by the organisation, the presumption is that a state has not departed from the requirements of the ECHR when it has implemented legal obligations flowing from its membership of the organisation. The equivalence may be subjected to review in light of any relevant change in fundamental rights' protection. In a recent judgment, *O'Sullivan McCarthy Mussel Development Ltd v. Ireland*^{*61}, the ECtHR found that, as the respondent state had not been wholly

⁵² See *Wnuk v. Poland* (dec.), No. 38308/05, 1.9.2009; *Gorou v. Greece* (no. 2) [GC], No. 12686/03, 20.3.2009; *Talmane v. Latvia*, No. 47938/07, 13.10.2016. See also *Sale v. France*, No. 39765/04, 21.3.2006; *Burg and Others v. France* (dec.), No. 34763/02, ECHR 2003 II.

⁵³ See *Wildgruber v. Germany* (dec.), No. 32817/02, 16.10.2006.

⁵⁴ *Saric v. Denmark* (dec.), No. 31913/96, 2.2.1999.

⁵⁵ *Taxquet v. Belgium* [GC], No. 926/05, 16.10.2010; *Legillon v. France*, No. 53406/10, 10.1.2013.

⁵⁶ *Judge v. the United Kingdom* (dec.), No. 35863/10, 8.2.2011.

⁵⁷ Just to mention the most important of them: the *Confédération Française Démocratique du Travail v. the European Communities, alternatively: their Member States a) jointly and b) severally* decision of the European Commission of Human Rights of 10 July 1978; *Etienne Tête v. France* (dec.), No. 11123/84, 9.12.1987; *Cantoni v. France*, No. 17862/91, 15.11.1996; *Matthews v. the United Kingdom*, No. 24833/94, 18.2.1999; *'Bosphorus Airways' v. Ireland*, No. 45036/98, 30.6.2005; *Malik v. the United Kingdom*, No. 23780/08, 13.3.2012. As to the admissibility of a case where infringement proceedings were introduced on EU level, see *Karoussiotis v. Portugal*, No. 23205/08, 1.2.2011. As to asylum-seekers (Dublin regulation), see *M.S.S. v. Belgium and Greece*, No. 30696/09, 21.1.2011; *Tarakhel v. Switzerland* [GC], No. 29217/12, 4.11.2014; *A.M.E. v. the Netherlands* (dec.), No. 51428/10, 13.1.2015. See also, with regard to child-abduction (Brussels II a regulation) and equivalent protection, *Povse v. Austria* (dec.), No. 3890/11, 18.6.2013, and, as to the European arrest warrant, *Pianese v. Italy and the Netherlands* (dec.), No. 14929/08, 27.9.2011; *Pirozzi v. Belgium*, No. 21055/11, 17.4.2018.

⁵⁸ *Avotiņš v. Latvia* [GC], No. 17502/07, 23.5.2016.

⁵⁹ *'Bosphorus Airways' v. Ireland*, No. 45036/98, 30.6.2005.

⁶⁰ *Michaud v. France*, No. 12323/11, 6.12.2012.

⁶¹ *O'Sullivan McCarthy Mussel Development Ltd v. Ireland*, No. 44460/16, 7.6.2018.

deprived of a margin for manoeuvring with regard to how to achieve compliance with the relevant EU directive and the CJEU judgment; the *Bosphorus* presumption of equivalent protection did not apply.

The ECtHR and preliminary references to the CJEU

Just as did the CJEU in its famous judgment in the case *Van Gend en Loos*⁶², the ECtHR has stressed, in its judgment in the *Bosphorus*⁶³ case, the importance of preliminary references as a cornerstone to guarantee the rights of individuals stemming from EU law.

The ECtHR's case law suggests that the CJEU should consider also Article 6 ECHR when interpreting the duty to refer a preliminary ruling request provided by Article 267(3) TFEU.

At the present stage, the Strasbourg Court does not deliberate on EU law when resolving questions related to the preliminary reference procedure and abstains from commenting on the EU rules or the CJEU's case law. In *Lechouritou and Others v. Germany and other 26 Member States of the EU*⁶⁴, the applicants were not satisfied with how the Luxembourg Court interpreted the Brussels Convention on civil matters. However, according to the Strasbourg Court, the EU institutions are experts in interpreting the EU law; the Luxembourg Court's reasoning was not arbitrary; and, therefore, the application was manifestly ill-founded. By principle, the Strasbourg Court does not find it necessary to examine the accordance of the national law with the EU law: it is primarily for the national authorities, notably the courts, to resolve issues of interpretation and application of domestic law including EU law aspects⁶⁵, with the Strasbourg Court's role being confined to ascertaining whether the effects of such adjudication are compatible with the ECHR.

The ECtHR seems to fully acknowledge the exceptions to the obligatory preliminary references as developed by the CJEU. Nevertheless, the ECtHR emphasises the duty of last-instance national courts to provide justifications for refusal to refer a preliminary question to the CJEU. The ECtHR has observed that a domestic court's refusal to grant a referral may, in certain circumstances, infringe the fairness of proceedings where the refusal proves to have been arbitrary. Such a refusal may be deemed arbitrary in cases where the applicable rules allow no exception to the granting of a referral, where the refusal is based on reasons other than those provided for by the rules, or where the refusal was not duly explained.⁶⁶

Rationale of the Ullens de Schooten judgment

The most famous judgment of the ECtHR pertaining to the final court's duty to give reasons for refusing a request for a preliminary ruling from the CJEU was made in the case *Ullens de Schooten and Rezabek v. Belgium*.⁶⁷ In this case the applicants complained about refusal to uphold their request for a question to be referred to the CJEU for a preliminary ruling by the highest courts (the Court of Cassation and *Conseil d'État*) in Belgium. The Strasbourg Court found no violation of Article 6 §1 ECHR. The ECtHR stated that the ECHR does not guarantee as such a right for a case to be referred by a domestic judge to another jurisdiction, be it national or supranational jurisdiction. Therefore, while the ECtHR did not rule out a non-referral, it is possible only if it is well-reasoned, if it is not arbitrary and if it does not constitute a violation of the ECHR. According to the Strasbourg Court, Article 6 §1 ECHR imposes, in this context, an obligation for domestic courts to give reasons, in light of the applicable law, for any decisions in which they refuse to refer a preliminary question, especially where the applicable law allows for such a refusal only on an exceptional basis. The Strasbourg Court fully acknowledged the *C.I.L.F.I.T.* case law of the CJEU and indirectly supported the CJEU's interpretation of the EU Treaties, thereby enforcing the obligation of final courts to ask for preliminary references from the CJEU.

Ullens de Schooten can be considered a balanced approach in favour of co-operation between the Strasbourg and Luxembourg courts. In applying the strict minimum of Article 6 §1 ECHR requirements, the

⁶² *Van Gen den Loos*, ECJ, Case 26/62, 5.2.1963, E.C.R. English special edition 1963, p. 3.

⁶³ *'Bosphorus Airways' v. Ireland*, No. 45036/98, 30.6.2005.

⁶⁴ *Lechouritou and Others v. Germany and other 26 Member States of the EU*, No. 37937/07, 3.4.2012.

⁶⁵ See, for example, *Ullens de Schooten and Rezabek v. Belgium*, Nos 3989/07 and 38353/07, 20.9.2011, restated in *Soros v. France*, No. 50425/06, 6.10.2011 and more recently *Delfi v. Estonia* [GC], No. 64569/09, 16.6.2015.

⁶⁶ *Baydar v. the Netherlands*, No. 55385/14, 28.4.2018, para. 39.

⁶⁷ *Ullens de Schooten and Rezabek v. Belgium*, Nos 3989/07 and 38353/07, 20.9.2011.

ECtHR, however, viewed the duty to give reasons as something not only reserved for the courts of last instance, thus going beyond its decision in the case *John v. Germany*.^{*68}

Developments in the wake of *Ullens de Schooten* case law

In its further decisions and judgments, the Strasbourg Court has followed its *Ullens de Schooten et Rezabek* case law and has found no violation of Article 6 §1 ECHR because the decision not to refer has been sufficiently reasoned.^{*69}

In two decisions involving France, the ECtHR rejected the application because the applicants had not explicitly requested national administrative jurisdictions to refer questions to the CJEU.^{*70}

The case law of the Strasbourg Court emphasising the need for parties to have requested a referral has prompted an interesting debate. The critics of this reasoning have pointed out that two dangers emerge with the ECtHR approach: firstly, that it is contrary to the spirit of the preliminary references to bind the need to refer and the need to present reasons for a non-referral with the request of a party to refer and, secondly, that the ECtHR has introduced an additional condition to the *Köbler* case law.^{*71} However, one should keep in mind that the Strasbourg Court has a subsidiary role and adjudicates only after the domestic remedies have been exhausted; it can, as a guardian of fair trial, sanction in cases where the domestic courts have failed to respond to the request of the applicant for referral or where this response has been manifestly arbitrary. Otherwise the ECtHR would risk itself interpreting the EU law, if it were to judge whether the domestic court on its own initiative rightly refused to refer the case to the Luxembourg Court. It is not, however, the competence of the Strasbourg Court to judge the application of EU law on national level; the Strasbourg Court is there to remedy a violation of the ECHR, not of EU law. An application filed before the Strasbourg Court does not replace the mechanism that has been introduced by the Luxembourg Court with the *Köbler* case law. In this respect, one should also emphasise that there is no individual right to ask for referral of questions to the CJEU and that, according to EU law, the preliminary reference is not a subjective right but rather an effective instrument for dialogue between national courts and the CJEU, which of course serves to protect the rights of individuals.

The Strasbourg Court has held that where a request to obtain a preliminary ruling was insufficiently pleaded or where such a request was only formulated in broad or general terms, it is acceptable under Article 6 ECHR for national superior courts to dismiss the complaint by mere reference to the relevant legal provisions governing such complaints if the matter raises no fundamentally important legal issue or for lack of prospects of success without dealing explicitly with the request.^{*72}

Furthermore, in the case *Stichting Mothers of Srebrenica and Others v. the Netherlands*^{*73}, the Strasbourg Court found that the summary reasoning used by the Supreme Court to refuse a request for a preliminary ruling was sufficient, pointing out that it followed from a conclusion already reached with another part of the Supreme Court's judgment that a request to the CJEU for a preliminary ruling was redundant. In another case, the Court observed that the preliminary ruling requested by the applicant in that case would not have changed the conclusion reached by the Council of State of Greece, since his appeal had been declared inadmissible for reason of non-compliance with statutory requirements for the admissibility of appeal.^{*74}

In yet another case, *Sindicatul Pro Asistentă Socială v. Romania*,^{*75} the ECtHR did not find a violation of Article 6 §1 ECHR, because the questions the applicants requested the national court to refer to the CJEU were not pertinent, such that the national court sufficiently motivated its refusal.

⁶⁸ *John v. Germany*, No. 15073/03, 13.2.2007.

⁶⁹ *Vergauwen v. Belgium* (dec.), No. 4832/04, 10.4.2012; *Ferreira Santos v. Portugal* (dec.), No. 30123/10, 4.9.2012.

⁷⁰ *Greneche and Others v. France* (dec.), No. 34538/08, 15.10.2013; *Ryon and Others v. France*, No. 33014/08, 15.10.2013.

⁷¹ Jirí Malenovský (see Note 35).

⁷² See *Wallishauser v. Austria* (No. 2), No. 14497/06, 20.6.2013; see also *Rutar Marketing D.O.O. v. Slovenia* (dec.), No. 62020/11, 15.4.2014 and, already earlier, *Moosbrugger v. Austria*, No. 44861/98, 25.1.2000.

⁷³ *Stichting Mothers of Srebrenica and Others v. the Netherlands*, No. 65542/12, 11.6.2013.

⁷⁴ *Astikos Kai Paratheristikos Oikodomikos Synetairismos Axiomatikon and Karagiorgos v. Greece* (dec.), Nos 29382/16 and 489/17, 9.5.2017.

⁷⁵ *Sindicatul Pro Asistentă Socială v. Romania* (dec.), No. 24456/13, 6.3.2014.

Finding a violation of Article 6 §1 ECHR for non-reasoning for non-referral

However, in *Dhahbi v. Italy*^{*76}, the Strasbourg Court found a breach of Article 6 §1 ECHR on account of a domestic court's unexplained rejection of a request to refer a matter to the Luxembourg Court for a preliminary ruling. The Strasbourg Court pointed out that when examining the judgment of the Italian Court of Cassation, the ECtHR found no reference to the applicant's request for a preliminary ruling to be sought or to the reasons the court considered the question raised to not warrant referral to the CJEU: 'It is therefore not clear from the reasoning of the impugned judgment whether that question was considered not to be relevant or to relate to a provision which was clear or had already been interpreted by the CJEU, or whether it was simply ignored.'^{*77} The ECtHR also observed that the reasoning of the Italian Court of Cassation contained no reference to the case law of the CJEU.

Later on, the ECtHR also found violation of Article 6 §1 in another Italian case^{*78}, and it has declared a further case inadmissible because, for one thing, the applicant had exceeded the six-month limit for turning to the Strasbourg Court and, also, that, although the Italian Court of Cassation did not pronounce on the question of referral, it did not have to do so, because, pursuant to its own case law, appeal to the Court of Cassation was not an effective remedy in this case.^{*79} Nevertheless, the ECtHR deemed it necessary to underline that it would have been preferable if the Court of Cassation had explicitly pointed out the rejection of the request for referral.

Appreciating the division of competencies

In *Laurus Invest Hungary KFT and Others*, the Strasbourg Court noted that the national court had referred questions to the Luxembourg Court and simply stated that it is for the national courts to examine the impugned measures also from the perspective of the Charter of Fundamental Rights.^{*80} The Strasbourg Court explained in rather great detail the functioning of the preliminary ruling and refrained from deciding the case itself, as that was premature while it was still pending before the CJEU and national court. The ECtHR stated that the method of scrutiny by the CJEU bears close resemblance to that applied by the ECtHR and that the assessment required by the CJEU explicitly relies, at least partly, on the case law of the ECtHR.

ECtHR case law related to the duty of reasoning for non-referral to the CJEU in a nutshell

In a nutshell, the ECtHR has so far decided that the ECHR does not guarantee as such a right for a case to be referred by a domestic judge to the CJEU; it has examined the cases pertaining to preliminary references from the standpoint of procedural equity and fair trial and whether the answer to a referral request has been sufficiently clear and precise; and it has restrained itself, however, from going into the substantial motivation of the refusal to refer and thus renounced interpreting EU law. This is in itself positive: the ECtHR shows respect for the division of competencies between the European courts, as well as expressing esteem while communicating with the national courts. The case law analysed stresses the complementary role of the ECtHR in respect of issues of preliminary references and demonstrates the ECtHR's willingness to support the dialogue between national courts and the CJEU. Another sign of good will and a spirit of co-operation is that the ECtHR has invited the European Commission to intervene in such cases as a third party.^{*81}

⁷⁶ *Dhahbi v. Italy*, No. 17120/09, 8.4.2014.

⁷⁷ *Dhahbi v. Italy*, No. 17120/09, 8.4.2014, para. 33.

⁷⁸ *Schipani v. Italy*, No. 38369/09, 21.7.2015.

⁷⁹ *Wind Telecomunicazioni S.P.A. v. Italy* (dec.), No. 5159/14, 1.10.2015.

⁸⁰ *Laurus Invest Hungary KFT and Continental Holding Corporation v. Hungary and 5 other applications* (dec.), No. 23265/13, 8.9.2015.

⁸¹ This is done in accordance with Article 36 §2 of the ECHR and Rule 44 of the Rules of Court. For example, it did so in the *Baydar v. the Netherlands* case; however, in the latter case the European Commission in its reply informed the Strasbourg Court that it did not intend to submit written observations (*Baydar v. the Netherlands*, No. 55385/14, 28.4.2018, para. 6).

Scope of the final court's obligation to give its reasons for refusing
a request for a preliminary ruling from the CJEU as seen
in the ECtHR's judgment in *Baydar v. the Netherlands*

The case of *Baydar v. the Netherlands*⁸² involved an accelerated procedure for the disposal of appeals in cassation in the interests of efficiency that enabled the Supreme Court of the Netherlands (*Hoge Raad*) to reject an appeal and declare it inadmissible as having no prospect of success if it does not constitute grounds to overturn the judgment appealed against and does not give rise to the need for a determination of legal issues. The applicant in *Baydar* lodged a cassation appeal with the Supreme Court, contesting his conviction for, among other things, human trafficking. Not in his appeal itself but rather in his reply to the observations of the Advocate General (*advocaat-generaal*) of the Supreme Court on his grounds for appeal, he requested the Supreme Court to seek a preliminary ruling from the CJEU on the interpretation of a matter of EU law. The Supreme Court rejected the applicant's appeal (with the exception of the grounds related to the length of the proceedings). Referring to Section 81 (1) of the Judiciary (Organisation) Act, the Supreme Court stated that its decision required no further reasoning 'as the grievances do not give rise to the need for a determination of legal issues in the interest of legal uniformity or legal development'. The applicant complained in the proceedings before the ECtHR that the unexplained refusal of his request for a preliminary ruling breached Article 6 §1 ECHR. The Strasbourg Court found that there had been no violation of Article 6 §1 ECHR.

The ECtHR addressed, for the first time at length, the interaction between its case law on the scope of the requirement to give reasons for a refusal to refer a question to the CJEU for a preliminary ruling and the acceptance that a superior court may dismiss an application for appeal on the basis of summary reasoning. The ECtHR reminded, relying on *Dhahbi v. Italy*, that Article 6 §1 ECHR requires the domestic courts to give reasons, in light of the applicable law, for any decision including refusal to refer a question for a preliminary ruling. This is even more pertinent for the national courts against whose decisions there is no judicial remedy (Article 267 (3) TFEU). They must indicate why they have found that the question is irrelevant, that the EU law provision in question has already been interpreted by the CJEU, or that the correct application of EU law is so obvious as to leave no scope for any reasonable doubt. The Strasbourg Court added that the CJEU itself has ruled that the final domestic courts are not obliged to refer a question regarding the interpretation of EU law if the question is not relevant and if the answer to that question could not have any effect on the outcome of the case. The ECtHR has to verify whether the reasoning for not referring has been handled thoroughly. However, it is not for the ECtHR to examine any errors that might have been committed by the domestic courts in interpreting or applying the relevant law.

Regarding the dismissal of an appeal by a superior court using summary reasoning, the ECtHR recalled its case law and reiterated that the courts of cassation comply with their obligation to provide sufficient reasoning when they take as their basis a specific legal provision, without further reasoning, in dismissing cassation appeals that do not have any prospects of success. The ECtHR confirmed that this line of case law also applied in situations involving national courts against whose decisions there is no judicial remedy under national law (such as the Supreme Court in the instant case).

Finally, the ECtHR took into account the Supreme Court's explanation that it is inherent to a judgment in which the appeal in cassation is declared inadmissible or dismissed by application of and with reference to Section 80a or 81 of the Judiciary (Organisation) Act that there is no need to seek a preliminary ruling since the matter did not raise a legal issue that needed to be determined. The Strasbourg Court accepted that the summary reasoning contained in such a judgment implies an acknowledgement that a referral to the CJEU could not lead to a different outcome in the case. The ECtHR concluded that no issue of principle arises under Article 6 §1 ECHR when an appeal in cassation that includes a request for referral is declared inadmissible or dismissed with summary reasoning where it is clear from the circumstances of the case – as in the instant case – that the decision is neither arbitrary nor otherwise manifestly unreasonable. One can, however, debate whether the ECtHR was entirely in line with the requirements set in *Dhahbi v. Italy*.

⁸² *Baydar v. the Netherlands*, No. 55385/14, 28.4.2018.

Deductions to be drawn from the Baydar judgment

This compromise between, on the one hand, the obligation to give reasons and, on the other hand, rejecting an appeal with summary reasoning in the interests of efficiency seems reasonable. The Strasbourg Court has not jeopardised its strict rules about the need for judicial reasoning, nor has it made the practice of summary judgments void. Rather, it has set certain conditions wherein it is acceptable to omit a thorough presentation of reasoning by taking into account the domestic legislation and practice. Also important is that the ECtHR reiterated the case law of the CJEU confirming that the final domestic courts are not obliged to refer a question of the interpretation of EU law raised before them if the question is not relevant – that is to say, if the answer to that question, whatever it may be, could not have any effect on the outcome of the case.^{*83} This has to be decided and reasoned by the respective domestic court.

Since there are further cases pending before the Strasbourg Court that pertain to refusal of supreme and even constitutional courts to refer a case to the CJEU for a preliminary ruling,^{*84} it remains to be seen whether the *Baydar* case law will be further developed and whether the Strasbourg Court can manage to maintain balance between the obligation to give reasons for a referral and acceptance that superior courts can dismiss an application on the basis of laconic reasoning.

It is to be added that the situation might become more nuanced once Protocol No. 16 of the ECHR is made of effective use and the national courts can refer also questions of interpretation to the Strasbourg Court, although there is no obligation for the superior courts to make use of this possibility.

2.3. The ECtHR itself and reasoning: Good or bad example now and in the future?

In the context of importance for judicial reasoning, one could ask how the ECtHR can require the Member States to provide reasons while at the same time not living up to the same standards.^{*85}

This question may arise also as to some other aspects of the rights (to a fair trial) guaranteed by Article 6 ECHR. An example is the duty to render justice within reasonable time: the Strasbourg Court regularly request that domestic courts honour this requirement, whereas it is not rare for proceedings in front of the Strasbourg Court not to meet the standard of reasonable time set by the same court for other jurisdictions.

It has been suggested that the ECtHR, the most visible human rights actor in Europe, should be a champion of procedural justice in its own proceedings and judgments and deliver procedural justice in order to improve applicants' satisfaction and self-worth and to gain compliance and strengthen the legitimacy of the ECtHR, which is inextricably linked to the legitimacy of human rights in Europe.^{*86}

As demonstrated above, scholars have argued that a court's authority 'ultimately rests on giving persuasive legal reasons in support of [...] [its] holdings'.^{*87} The same should indeed apply to the CJEU as well as to the ECtHR.

Equally, as seen above, the ECHR imposes a general obligation on the Strasbourg Court to give reasons for its judgments, as well as decisions. Yet there are some important judicial steps that the Strasbourg Court takes that are not reasoned. Practitioners and academics alike have criticised this practice. Within scholarly circles in addressing the level of international human rights protection, as well as at intergovernmental conferences, it has been voiced that the practice of the ECtHR not to reason the decisions of the Grand Chamber panel and the limited reasoning for dismissing an application by the single judge can be seen as problematic.^{*88}

^{*83} *Lucio Cesare Aquino v. Belgische Staat*, C-3/16, ECLI:EU:C:2017:209, 15.3.2017.

^{*84} Examples: *Repcevirág Szövetkezet v. Hungary*, No. 70750/14, application communicated to the Hungarian Government on 1.9.2015; *Harisch v. Germany*, No. 50053/16, application communicated to the German Government on 6.2.2017.

^{*85} See Helena De Vylder. *Stensholt v. Norway*: Why single judge decisions undermine the Court's legitimacy. – *Strasbourg Observers* blog, 28.5.2014. Available at <https://strasbourgobservers.com/2014/05/28/stensholt-v-norway-why-single-judge-decisions-undermine-the-courts-legitimacy-2/> (most recently accessed on 7.5.2018).

^{*86} Eva Brems, Laurens Lavrysen. Procedural justice in human rights adjudication: The European Court of Human Rights. – *Human Rights Quarterly* 35 (2013) / 1 (February), pp. 176–200. – DOI: <https://doi.org/10.1353/hrq.2013.0000>.

^{*87} Vlad Perju. Reason and authority in the European Court of Justice. – *Virginia Journal of International Law* 49 (2009) / 2, pp. 308–377 (Boston College Law School Legal Studies Research Paper No. 170), on p. 322. Available also from SSRN, via <https://ssrn.com/abstract=1324333> (most recently accessed on 5.5.2018).

^{*88} For example, in the Izmir Declaration, about the future of the ECtHR. Under point 2 (e) of the section entitled 'The Court', states expressed the wish to have 'decisions of the panels of five judges to reject requests for referral of cases to the Grand

Even though there are currently over 55,000 applications pending in front of the Strasbourg Court^{*89}, an individual's rights should not be jeopardised for the sake of efficiency.

In this respect, the dissenting judges in the case *Burmych and Others v. Ukraine* draw attention to the following: 'We agree that the Court is called upon to find appropriate judicial ways to ease the backlog problem that is causing serious delays in providing remedy to individual human rights violations. However, the Convention grants individuals the right of access to this Court (Article 34), which means that a properly submitted application must be the subject of a judicial decision.'^{*90}

As to the practice of the panel of the Grand Chamber of not giving reasons for its decisions to accept or reject requests that cases be referred to the Grand Chamber, this practice is based on Article 45 ECHR, with provisions added by Protocol No. 11 to the ECHR, by which giving reasons is required only for judgments and for decisions declaring applications admissible or inadmissible. Paragraph 105 of the explanatory report on Protocol No. 11 states that Article 45 ECHR 'does not concern decisions taken by the panel of five judges of the Grand Chamber in accordance with Article 43'. It should also be noted that Rule 73 §2, *in fine*, of the Rules of Court states that '[r]easons need not be given for a refusal of the request [for referral]'. Since its creation with the entry into force, in November 1998, of Protocol No. 11 to the ECHR, the panel has examined thousands of referral requests and has therefore developed a series of guiding principles that have come to be accepted by it over the years.^{*91} Nevertheless, for some time now, the composition of the five-judge panel for each decision that has been made regarding requests for referral is made public.

The Court has created more efficiency thanks to the filtering capacity of the single judges, which was introduced in 2010 through Protocol No. 14 to the ECHR. Over the years, around 75–90% of pending applications have been decided by single judges, but this number has diminished lately in favour of other formations as the single-judge filtering mechanism has offered a very efficient 'one in, one out' system of processing of incoming applications. This should not, however, in its own right justify lack of reasoning in individual decisions. From the introduction of the single-judge procedure, the ECtHR had been applying an increasingly summary procedure to deal with the large backlog of tens of thousands of cases. Applicants have received a decision letter rejecting complaints in a global manner. Unmotivated decisions can, however, easily create a feeling of arbitrariness even when there is no arbitrariness behind it. People whose applications are rejected by single-judge decisions expect clarity and reasoning. Therefore, after having eliminated the backlog, the ECtHR adopted, as of June 2017, a new procedure that allows more detailed reasoning to be given in single-judge decisions. This was done also in order to respond to the suggestion made in 2015 by the State Parties at the High Level Conference in Brussels on the ECHR, which welcomed the ECtHR's intention to provide brief reasons for the inadmissibility decisions of a single judge and invited it to do so as of January 2016.^{*92} Instead of a decision letter, applicants now receive a decision of the Strasbourg Court sitting in single-judge formation in one of the Court's official languages and signed by a single judge, accompanied by a letter in the relevant national language. The decision includes, in many cases, reference to specific grounds for inadmissibility. However, the ECtHR continues to issue global rejections in some cases – for example, where applications contain numerous ill-founded, misconceived, or vexatious complaints. Although this still may not satisfy everyone, it is an important step forward. The Strasbourg Court has admitted that it needs to 'strike a balance between addressing a legitimate concern about the lack of individualized reasoning and maintaining an efficient process for handling inadmissible cases so as not to divert too many resources from examining potentially well-founded cases'.^{*93}

Chamber [...] clearly reasoned', as they considered such a development to contribute to 'avoiding repetitive [referral] requests and ensuring better understanding of Chamber judgments'.

⁸⁹ From statistics for pending applications as of 31.5.2018, available on the Web site of the ECtHR, at https://www.echr.coe.int/Documents/Stats_pending_month_2018_BIL.pdf (most recently accessed on 29.6.2018).

⁹⁰ Joint dissenting opinion of judges Yudkivska, Sajó, Bianku, Karakas, De Gaetano, Laffranque, and Motoc. *Burmych and Others v. Ukraine* [GC], No. 46852/13 et al., 12.10.2017, para. 8.

⁹¹ For further details, see the following Note of the Strasbourg Court: The general practice followed by the Panel of the Grand Chamber when deciding on requests for referral in accordance with Article 43 of the Convention, 2011. Available on the Web site of the ECtHR at https://www.echr.coe.int/Documents/Note_GC_ENG.pdf (most recently accessed on 7.5.2018).

⁹² High-level conference on the 'implementation of the European Convention on Human Rights, our shared responsibility'. Brussels Declaration, 27 March 2015, Action Plan: A. Interpretation and application of the Convention by the Court, 1 c). Available at https://www.echr.coe.int/Documents/Brussels_Declaration_ENG.pdf (most recently accessed on 7.5.2018).

⁹³ Press release of the Strasbourg Court: Launch of new system for single judge decisions with more detailed reasoning, ECHR 180 (2017), 1.6.2017. Available at <https://www.penalcontemporaneo.it/upload/CeduENG010617.pdf> (most recently accessed on 7.5.2018).

With Protocol No. 16 ECHR, which enables superior national jurisdictions to seek from the ECtHR an advisory opinion on the interpretation of the ECHR, entering full application soon, the Strasbourg Court has adopted new rules to supplement its Rules. According to Rule 87⁴, para. 2, if the Grand Chamber, while considering the requests for advisory opinion, decides that a request is not within its competence, it shall so declare in a reasoned decision.

3. Lessons to learn for the Estonian legal system

3.1. Reasoning versus leave to appeal in the Supreme Court of Estonia

A constitutional right to a reasoned judgment?

According to §15 of the Estonian Constitution^{*94}, everyone whose rights and freedoms have been violated has the right of recourse to the courts. Everyone is entitled to petition the court that hears his or her case to declare unconstitutional any law, other legislative instrument, administrative decision, or measure that is relevant in the case.

It is no secret that the ECHR has been a source of inspiration and a useful example for the 'Fundamental Rights' chapter of the Estonian Constitution.^{*95} Therefore, also the commentary to §15 of the Constitution applies the ECtHR case law and stresses that the reasoning of a judgment is determined through the nature and circumstances of the case.^{*96} According to Estonian constitutional doctrine, which speaks of a right to reasoned judgment, the judicial reasoning depends upon what the parties have stated during the proceedings, whether the court is the first-instance one or a jurisdiction of higher instance, and how detailed are the applicable norms.^{*97}

The reasoning of a judgment is important for guaranteeing the right to appeal, maintaining judicial peace, convincing parties who have no understanding of legal issues, and guaranteeing the unity and continuity of judicial decision-making.

The duty to give reasons as reflected in Estonian codes of procedure

The need to present reasoning and the components that make up the reasoning for a judgment are often listed in procedural codes. According to §157 of the Code of Administrative Court Procedure^{*98}, a judgment must be in conformity with the law and state its reasons. A judgment is composed of an introduction, an operative part, explanations, a descriptive part, and reasons. Reasons for the judgment must state facts, the evidentiary items that the court relies on in declaring those facts proved, reasons for which the court considers certain evidence to be unreliable or irrelevant, reasons the court has declared some facts generally known, why the court does not agree with the assertions of the participants in the proceedings, the law applied by the court, and conclusions of the court.^{*99} If the application is dismissed and the reasons have already been provided in the contested administrative act or the decision made upon challenge in respect of this act and the court follows those reasons, the court does not need to repeat the reasons in its judgment and may state that it agrees with said reasons. Rulings are in principle subject to the provisions regarding judgments.^{*100} If the circuit court annuls the judgment of an administrative court and does not return the matter, it must state its opinion on each submission.^{*101} If the circuit court adopts an opinion that differs from that of the administrative court, it must state its reasons. If the circuit court upholds the judgment of

⁹⁴ Adopted by referendum on 28.6.1992, RT 1992, 26, 349, with entry into force on 3.7.1992.

⁹⁵ For discussion in detail, see Julia Laffranque. *Euroopa Inimõiguste Kohus ja Eesti õigus* [The European Court of Human Rights and Estonian Law]. Tallinn: Juura 2017, p. 17.

⁹⁶ Madis Ernits et al. (eds). *Eesti Vabariigi Põhiseadus, Kommenteeritud väljaanne* [The Constitution of the Republic of Estonia: A Commentary], Chapter II, §15. Tallinn: Juura 2017, para. 34.

⁹⁷ *Ibid.*, para. 34.

⁹⁸ Code of Administrative Court Procedure, adopted 27.1.2011, RT I, 23.2.2011, entry into force 1.1.2012.

⁹⁹ *Ibid.*, para. 165.

¹⁰⁰ Subsection 178 (3) of the Code of Administrative Court Procedure.

¹⁰¹ About the circuit court judgment, see §201 Code of Administrative Court Procedure.

the administrative court without divergence from it, the circuit court is not required to state reasons for its judgment. In such a case, the circuit court must state that it agrees with the reasons given by the administrative court. The circuit court may also add the reasoning, if necessary. The circuit court may also enter a judgment in simplified proceedings.

Similarly, the Code of Criminal Procedure^{*102} states specific requirements for reasoning, with regard to conclusions of a judgment of conviction and of acquittal, and it also speaks about reasoned orders and procedural decisions of a court in criminal matters.^{*103} Likewise, the Code of Misdemeanour Procedure^{*104} sets requirements for a reasoned ruling, on issues to be adjudicated upon in making of a court judgment, and on contents of court judgments, also addressing the circuit court judgment.

In the Code of Civil Procedure^{*105}, dealing with civil court procedure, the requirements for a judicial decision are set by §§ 434–444. The code also regulates some exceptions: when the court can omit reasoning from its judgment during the simplified proceedings.

All codes of procedure include a description of the structure of the judgment of the supreme court (which in Estonia is at the same time supreme administrative court, constitutional court, and court of cassation for civil and criminal matters).^{*106} The Code of Criminal Procedure, as well as the Code of Misdemeanour Procedure, sets particular requirements for the introduction and also reasoning of the Supreme Court judgment.^{*107} In general, the same rules applied for the county court / respective administrative court (court of first instance) judgment are pertinent, with some additional information in the introductory part of the judgment (e.g., naming the person who has lodged the appeal in cassation). If the Supreme Court changes the judgment of lower courts, integral text for the operative part has to be produced. The descriptive part is followed by reasons, which need to include conclusions and laws that the Supreme Court has applied, as well as the issues that the Supreme Court finds were wrongly addressed by the lower courts. In the case of the Supreme Court annulling the judgment of a lower court, the Supreme Court must state its position on all assertions, objections, and points of procedure in relation to which the circuit court would have to express its position. If the Supreme Court does not alter the judgment of a lower court and concurs with it, it does not have to restate the reasoning of the lower court and does not need to state the reasons for its own judgment. In such a case, the Supreme Court must state that it agrees with the reasons given in the judgment of the circuit court. If necessary, it may, however, add its own motives. Where a valid reason for this exists, particularly in simplified proceedings, the Supreme Court may, when it dismisses the appeal in cassation, enter a judgment that consists solely of the operative part. The Supreme Court does not establish facts.

The Constitutional Review Court Procedure Act, which provides for the competence of the Supreme Court as the court of constitutional review, states that a judgment shall be reasoned.^{*108} The Supreme Court can also give opinions, which also must be reasoned.^{*109}

Judgments of the Supreme Court enter into force as of the date they are made public and are not subject to appeal.

The Supreme Court's interpretation of the scope of lower courts' duty to give reasons

The Supreme Court of Estonia has in its turn interpreted the obligation to give reasons as an obligation of a court to give in the reasoning part of the judgment clear and exhaustive explanations about the operative part.^{*110} These explanations need to be non-contradictory^{*111} and convincing so that the reader can follow the proceeding of judicial reasoning based on the inner belief of a judge. The judgment should reveal how and on the basis of which evidence the court came to its conclusions (this applies to both civil and criminal

¹⁰² Code of Criminal Procedure, adopted 12.2.2003, RT I 2003, 27, 166, entry into force 1.7.2004.

¹⁰³ Code of Criminal Procedure §305¹ and §§ 306, 311–314, 342.

¹⁰⁴ Code of Misdemeanour Procedure, passed 22.5.2002, RT I 2002, 50, 313, entry into force 1.9.2002. See, in particular, §§ 48, 108–112, 153.

¹⁰⁵ Code of Civil Procedure, adopted 20.4.2005, RT I 2005, 26, 197, entry into force 1.1.2006.

¹⁰⁶ Section 689 of the Code of Civil Procedure; Section 231 of the Code of Administrative Court Procedure.

¹⁰⁷ Section 363 of the Code of Criminal Procedure; Section 176 of the Code of Misdemeanour Procedure.

¹⁰⁸ Constitutional Review Court Procedure Act, adopted 13.3.2002, RT I 2002, 29, 174, entry into force 1.7.2002, §57 (3).

¹⁰⁹ Constitutional Review Court Procedure Act, §59¹ (3) (as added in RT I 2005, 68, 524, with entry into force on 23.12.2005).

¹¹⁰ Supreme Court of Estonia judgments in case No. 3-1-1-10-11, 1.7.2011 and case No. 3-3-1-14-15, 27.5.2015.

¹¹¹ Supreme Court of Estonia. Judgment in case No. 2-15-18582/47, 22.11.2017.

cases).^{*112} The operative part and the reasoning must not be mutually contradictory. In criminal cases in a situation of 'word against word', the reasoning must be particularly thorough.^{*113} The Supreme Court of Estonia has added also that copying the observations of the opposing party as the reasoning for the judgment is not presenting grounds to annul the judgment. Nevertheless, for the sake of an objective and fair trial, one has to avoid such reasoning. When the court agrees with the submissions by a party and uses them as part of its reasoning, it has to say so.^{*114} Likewise, the Supreme Court does not forbid an administrative court to use the reasoning of the administrative body that first ruled on the dispute. Nevertheless, if the applicant has contested the evidence, the court has to examine the evidence itself and give answer to the new arguments of the parties.^{*115} This applies also to the arguments that have already been used in administrative proceedings but have not been answered by the administrative body. The court needs to explain why it does not agree with the party's submissions.

As to the court of appeal, the Supreme Court has stated that the appellate court has to explain the arguments in its judgment that differ from the first-instance court judgment.^{*116} Furthermore, the appellate court has to explain why it does not accept the evidence provided by the parties^{*117} and state the evidence on which it has based its reasoning.^{*118}

However, in addressing civil matters the Supreme Court has said that an operative part of a judgment has to be understandable and enforceable even without the rest of the text of the judgment.^{*119}

The Supreme Court has stressed that the legal arguments of the reasoning of a court should not be a surprise to the parties and has to be reasonably foreseeable by them.^{*120} The Supreme Court has also emphasised that if a circuit court decides on the basis of the same evidence to make a judgment completely opposite the first-instance court's, it has to apply higher standards of reasoning.^{*121} This has also been reflected in the ECtHR case law concerning Estonia.^{*122} There are a few other cases that have been decided by the Strasbourg Court too that are related directly or indirectly to the obligation of Estonian courts to give reasons.

The duty of Estonian courts to give reasons as seen by the Strasbourg Court

The ECtHR has criticised an Estonian county court for not giving sufficient reasons for its decision to use simplified proceedings and not hear the applicant.^{*123} The Strasbourg Court, while accepting the need for simplified proceedings in certain circumstances and cases, emphasised, however, that the obligation under Article 6 §1 ECHR for the domestic courts to give reasons applied not only for judgments but also for major procedural decisions issued in the course of the proceedings. In another case, the ECtHR found a violation of Article 6 ECHR for, among other reasons, the circuit court having not been able to correct the reasoning-lacking first-instance court judgment.^{*124} Considering the adjudication about legal fees in a plea-bargain settlement procedure, the ECtHR was not satisfied with the Estonian court having made no decision on the applicants' claim for legal costs; therefore, Article 6 ECHR was deemed breached.^{*125}

¹¹² Supreme Court of Estonia. Judgment in case No. 2-10-4395/107, 13.11.2017; Supreme Court of Estonia. Judgment in case No. 3-1-1-75-14, 26.11.2014.

¹¹³ Supreme Court of Estonia. Judgment in case No. 3-1-1-26-13, 20.3.2013.

¹¹⁴ Supreme Court of Estonia. Judgment in case No. 3-3-1-76-24, 17.3.2015.

¹¹⁵ Supreme Court of Estonia. Judgment in case No. 3-3-1-27-14, 2.6.2014.

¹¹⁶ Supreme Court of Estonia. Judgment in case No. 3-3-1-71-14, 12.3.2015.

¹¹⁷ Supreme Court of Estonia. Judgment in case No. 3-3-1-12-98, 10.4.1998; Supreme Court of Estonia. Judgment in case No. III-3/1-3/95, 17.2.1995.

¹¹⁸ Supreme Court of Estonia. Judgment in case No. 3-3-1-4-99, 19.2.1999.

¹¹⁹ Supreme Court of Estonia. Judgment in case No. 2-15-12837/48, 25.10.2017.

¹²⁰ Supreme Court of Estonia judgment in case No. 3-3-1-58-13, 8.11.2013 and in case No. 3-3-1-25-14, 12.6.2014.

¹²¹ Supreme Court of Estonia judgment in case No. 3-1-1-14-14, 30.6.2014.

¹²² *Kashlev v. Estonia*, No. 22574/08, 26.4.2016.

¹²³ *Pönka v. Estonia*, No. 64160/11, 8.11.2016.

¹²⁴ *Rummi v. Estonia*, No. 63362/09, 15.1.2015.

¹²⁵ *Leuska and Others v. Estonia*, No. 6473/11, 7.11.2017.

The mechanism of leave to appeal in the Estonian Supreme Court

As far as access to the Supreme Court is concerned, then in civil, criminal, and administrative cases there exists a leave-to-appeal system in a sense.^{*126} It is not classical leave to appeal in *stricto sensu*, in which a court has to give prior permission before a legal remedy can be used. The freedom of parties to lodge cassation appeals remains untouched. However, the Supreme Court can refuse to open proceedings on appeal. This leave-to-appeal system does not exist for constitutional review matters, which are anyway mostly initiated by the regular courts, as there is no individual constitutionality claim possible except in exceptional circumstances wherein no other remedy exists to protect the fundamental rights at issue. According to the Courts Act, acceptance of matters that fall within the jurisdiction of the Supreme Court for proceedings shall be decided on by a panel of at least three members of the Supreme Court on the basis provided for by law regulating judicial procedure.^{*127} A matter is accepted for proceedings if the hearing thereof is demanded by at least one justice of the Supreme Court. This leave to appeal is also called opening of proceedings on an appeal in cassation or acceptance/refusal of an appeal in cassation by a ruling. It is in a nutshell characterised by the various codes of procedure as follows^{*128}: the Supreme Court, acting as a panel of three members, decides, without summoning the participants of the proceedings. The Supreme Court opens proceedings on an appeal in cassation if (at least one justice of) the Supreme Court^{*129} thinks that 1) the positions stated in the appeal warrant the conclusion that the circuit court has incorrectly applied a rule of substantive law or has significantly infringed the rules of court procedure, which has resulted or could have resulted in an incorrect judgment being entered, and, 2) regardless of the first condition, if a decision on the appeal is of considerable importance from the point of view of ensuring legal certainty or elaboration and uniformity of the approach in the case law of the courts. The leave to appeal in cassation is refused if the Supreme Court is convinced that none of the above-mentioned grounds exists for the opening of proceedings on the appeal. The Code of Civil Procedure lists the grounds for determining that the circuit court has significantly infringed the rules of procedure.^{*130} In civil cases, the Supreme Court need not accept an appeal in cassation filed in a matter of a proprietary claim if the appellant in cassation contests the judgment of the circuit court to an extent less than ten times the minimum monthly wage established by the Government of the Republic. In administrative cases, proceedings are not required to be opened on the appeal also in the event that the Supreme Court is convinced that it will be impossible to achieve the aim of the appeal by conducting the proceedings. As of rather recently, a new condition has been added – namely, if the impingement on the

¹²⁶ The possibility to decide whether to adjudicate a case exists in Estonian law under certain rules also for the courts of lower instance – for example, as far as the examination of whether the application has prospects of succeeding or whether the objective sought by the plaintiff could not be achieved by the action is concerned. See §§ 371 (2) and 423 (2) of the Code of Civil Procedure. For detailed discussion, see the following two analyses of legal practice of Estonian courts carried out by the Supreme Court research department: Margit Vutt. *Hagi menetlusse võtmisest keeldumine või läbi vaatamata jätmise õigusliku perspektiivituse tõttu, Kohtupraktika analüüs* [‘Refusing to accept an action or not taking cognisance of an action since it lacks a legal perspective: Case law analysis’]. Tartu: Riigikohus 2012; for administrative law, Liina Kangur. *Kaebuse ilmselge põhjendamatus* [‘Clear unfoundedness of an appeal’]. Tartu: Riigikohus. These issues will not be examined in the current paper, as these decisions, under the law, including case law, mostly an elevated requirement of particularly solid reasoning, are mostly appealable, are not related to the duty of the final court to refer an EU law interpretation question to the CJEU, and would most likely not involve the issues of validity of EU law either (when all courts have the duty to refer).

¹²⁷ Courts Act, adopted 19.6.2002, RT I 2002, 64, 390, entry into force 29.7.2002, §26 (2).

¹²⁸ Code of Civil Procedure, adopted 20.4.2005, RT I 2005, 26, 197, entry into force 1.1.2006. Section 679 of the Code of Civil Procedure; Section 219 of the Code of Administrative Court Procedure; Section 349 of the Code of Criminal Procedure; Section 160 of the Code of Misdemeanour Procedure.

¹²⁹ This requirement is *expressis verbis* added to §349 of the Code of Criminal Procedure and is also stipulated in general terms in §26 of the Courts Act and in detail in the Rules of the Supreme Court – Riigikohtu kodukord, from 21.2.2006, as amended in 2008, 2009, and 2012, RT III, 19.6.2012, 4.

¹³⁰ Section 669 of the Code of Civil Procedure states:

A circuit court has materially violated a provision of procedural law in making a judgment, if at least one of the following circumstances become evident:

- 1) the principle of legal hearing or the public nature of proceedings has been violated;
- 2) the court judgment concerns a person who was not summoned to court pursuant to law;
- 3) the matter was adjudicated by an unlawful court panel, including a court panel containing a judge who should have removed himself or herself;
- 4) a party was not represented in the proceeding pursuant to law and the party had not approved such representation in the proceeding;
- 5) the judgement is not reasoned to a significant extent.

The Supreme Court may also deem a violation not specified in Subsection (1) of this Section to be a material violation of a provision of procedural law if the violation could affect the result of adjudication of the matter in the circuit court.

right that the appeal is intended to protect is a minor one and the law would permit the matter to be heard by way of simplified proceedings, the Supreme Court opens proceedings on the appeal only if the decision of the Supreme Court holds fundamental importance from the point of view of uniform application of the law or of development of law.^{*131} If an appeal in cassation is clearly justified or clearly unjustified, the decision on acceptance of the appeal in cassation or rejection of the appeal may be made without sending the appeal in cassation to the other persons. The opening of proceedings on an appeal in cassation, or refusal to open such proceedings, is formalised as a ruling of the Supreme Court. The ruling to give or refuse leave to appeal sets out the legal basis for the granting or refusal of leave to appeal. This usually consists of one sentence with reference to a relevant article of a respective procedural code. The following is an example: 'On the basis of §344 (5) of the Code of Criminal Procedure, not opening proceedings on appeal in cassation of X.Y.' No further reasoning is present. A copy of the ruling is sent to all participants in the proceedings either by the Supreme Court or, since 1.9.2011 in criminal cases wherein the file is sent back to the county court, by the county court. The ruling is final. In cases of refusal, the file is returned to the relevant court. The outcome is published on the website of the Supreme Court without delay.

Polemics and numbers surrounding the leave-to-appeal system

I will not elaborate on the reasons for which the leave-to-appeal system was created historically for the Supreme Court. It goes without saying that one of the aims was (and is) to optimise the work of the Supreme Court and to concentrate on important cases and, if need be, on remedying serious errors of other courts. In general, the leave-to-appeal system at the Supreme Court level has now become more or less accepted by the parties and legal community in Estonia, although some concerns have been voiced now and then as to the possible arbitrariness of such a mechanism.^{*132} It has to be noted that initially the three-member panel that decided on the leave to appeal was composed of one member each of three different chambers (civil, criminal, and administrative) of the Supreme Court, with a six-month rotating basis. Nowadays the panel is composed of three judges within a single chamber for at least three months, while the president of the Supreme Court and a member of another chamber to be appointed by the president of the Supreme Court can have the right to participate in deciding on the leave to appeal. The law clerks and assistants also are involved in the process.^{*133} In 2017, during the Court en banc sitting,^{*134} one judge questioned the transparency of this system in comparison with the old leave-to-appeal panel, with the three-member panel composed of members of different chambers, and asked whether the system creates frustration among the applicants. The president of the administrative law chamber of the Supreme Court answered that a three-level court system does not mean that all cases have to be decided in three levels, that even nowadays the judges from other chambers of the Supreme Court can be involved in decision-making, although this is rare at the leave-to-appeal stage and more frequent at the decision-making stage. He added that for the general public it does not matter much whether the leave to appeal is decided upon within the chamber or by a panel with members from different chambers; what matters is that the litigants would like to see reasons for refusal of leave to appeal. The president of the administrative law chamber revealed that in fact the judges do write down reasons, but only for themselves, which can be used in order to remember why in one

¹³¹ See Amendments to the Code of Administrative Court Procedure, RT I, 28.11.2017, 1 – entry into force 1.1.2018.

¹³² See, for example, Peeter Ploompuu. Kas riigikohus kuritarvitab suvaõigust? ['Is the Supreme Court abusing its discretion?']. – *Eesti Päevaleht*, 30.11.1999, about the leave to appeal in ownership reform cases involving unlawfully expropriated property. About leave to appeal and reasoning, see also Virgo Saarmets. Individuaalne konstitutsiooniline kaebus põhiseaduslikkuse järelevalve kohtus ['Individual constitutional actions before the constitutional review court']. – *Juridica* 2001/6, pp. 376–392, among others, with regard to plans to reform constitutional review and create a separate constitutional court with a leave-to-appeal system whereas the decisions to give or to refuse leave to appeal should be explained; Jaak Kirikal. Mitu kõrgemat kohut on Riigikohtus? ['How many supreme courts does the Supreme Court include?']. – *Juridica* 1998/10, pp. 527–531, about the legitimacy of the panel that used to decide on leave to appeal before it was handed over to each chamber of the Supreme Court; Julia Vahing. Euroopa ühenduste kohtu ja Euroopa Liidu liikmesriikide kohtute ning Eesti kui võimaliku liikmesriigi kohtute vaheline koostöö ['Co-operation between the Court of Justice of the European Communities, courts of the Member States of the European Union, and the courts of Estonia as a candidate state']. – *Juridica* 1998/5, pp. 250–255, about the problematic of no reasoning in a leave-to-appeal system in connection with referrals to the Luxembourg Court.

¹³³ See Rules of the Supreme Court, paras 35–38.

¹³⁴ The Court en banc comprises all Estonian judges and is convened every year on the second Friday of February. The Court en banc discusses the problems of administration of justice and other issues concerning courts and the work of judges and elects members to the governing, administrative, disciplinary, and training bodies of judges; see §38 of the Courts Act.

or another case leave to appeal was not granted. However, when these reasons should also be made public, then the leave-to-appeal system as a filter would lose its sense, and, regrettably, there are at the moment no alternative solutions in sight that are better than the current system.^{*135}

As for statistics, in 2017 the Supreme Court granted leave to appeal in civil cases for 196 out of 993 claims that were examined. The corresponding numbers for the same year are for criminal cases 72 out of 693 and for administrative cases 80 out of 921.^{*136}

Leave to appeal to the Estonian Supreme Court as seen by the Strasbourg Court's predecessor

In the case *Aadu Oll v. Estonia*,^{*137} the applicant claimed that his right to a fair trial (Article 6 ECHR) was violated because the Supreme Court of Estonia did not give any reasons when rejecting his appeal. The European Commission of Human Rights (the Commission) recalled that the right to appeal in civil cases does not feature among the rights and freedoms guaranteed by the ECHR. No provision of the ECHR requires an appeal to a supreme court; if a state makes provision for such an appeal, it is entitled to prescribe the rules by which this appeal shall be governed and fix the conditions under which it may be brought. The Commission concluded that an examination of whether leave to appeal shall be granted is only an examination addressing whether the conditions in the Code of Civil Procedure are satisfied. It does not amount to an examination of the merits of the appeal. When a supreme court determines, in a preliminary examination of a case, whether or not the conditions required for granting leave to appeal have been fulfilled, it is not making a decision related to 'civil rights and obligations'. The Commission hence found Article 6 ECHR not applicable.

The ECtHR has not come back to this issue; it has considered the refusal of leave to appeal to the Supreme Court to be a final decision of domestic remedy that has to be exhausted before application to the Strasbourg Court. Likewise, the CJEU has in a Swedish case decided that a national court whose decisions can be appealed only if the supreme court declares their appeal admissible is not a court against whose decision there is no judicial remedy.^{*138}

3.2. Leave to appeal in the Supreme Court of Estonia and preliminary references to the Luxembourg Court

Practice of Estonian courts asking for preliminary references from the CJEU in general

According to the official statistics, as of the end of 2017, Estonian courts have since Estonia's accession to the European Union (in 2004) made, in all, 25 references for preliminary rulings; 10 of them have been made by the Supreme Court and 15 by other courts^{*139}, with both first- and second-instance courts having made referrals.^{*140} The first questions for a preliminary ruling by the CJEU were referred by the Supreme Court of Estonia in an administrative law case (on agricultural subsidies) in 2007.^{*141} The Supreme Court – in particular, the administrative chamber of the Supreme Court – had already, as it has continued to do, explained in detail on which occasions an Estonian court should request a reference for a preliminary ruling

¹³⁵ See Andrus Miilaste, Ivo Pilving in the Minutes of the Court en banc of 9–10.2.2017. Available at https://www.riigikohus.ee/sites/default/files/Kohtunike_XVI_korralise_t%C3%A4iskogu_protokoll_10-02-2017.pdf (in Estonian) (most recently accessed on 8.5.2018).

¹³⁶ Statistics of the Supreme Court for 2017, available on their Web site in the Estonian language at <https://www.riigikohus.ee/et/riigikohus/riigikohtu-tegevust-iseloomustav-statistika> (most recently accessed on 8.5.2018).

¹³⁷ *Aadu Oll v. Estonia*, European Commission of Human Rights, No. 35541/97, 1.7.1998.

¹³⁸ *Lyckeskog*, C-99/00, 2002, 4.6.2002.

¹³⁹ Rapport Annuel. Activité Judiciaire, CJEU, 2017, p. 127.

¹⁴⁰ See the updated list of all referrals made by the Estonian courts on the Web site of the Supreme Court of Estonia, available in Estonian at <https://www.riigikohus.ee/et/eesti-kohtute-eelotsusetaotlused> (most recently accessed on 8.5.2018). In fact, as of May 2018 there have been, all told, 26 referrals, 10 from the Supreme Court and 16 from lower jurisdictions.

¹⁴¹ Ruling of the Supreme Court No. 3-3-1-95-06 (JK Otsa Talu OÜ), 14.5.2007. See also Julia Laffranque, *Riigikohtu halduskolleegiumi Euroopa Kohtult eelotsuse küsimise kogemus* ['Experience of the Supreme Court in asking for a preliminary ruling']. – *Kohtute aastaraamat* ['The Courts Yearbook'], 2007, pp. 113–122.

from the CJEU.^{*142} The Supreme Court has had a leading role in giving guidance to the other Estonian courts on when and how to ask for preliminary references, as well as explained the *acte clair* doctrine. On the website of the Supreme Court, one can find all the referrals from Estonian courts and their answers that are available thus far. There also have been useful materials^{*143} written in Estonia about preliminary references, and continuous training of judges has been helpful in instructing Estonian judges in how to communicate with the Luxembourg Court. The topics of the Estonian references for preliminary rulings have covered mostly agriculture and customs issues. The Supreme Court has itself suggested a possible solution in a referral^{*144}, and the Luxembourg Court has reformulated the questions in order to better understand the aim of the referral made by the Tallinn administrative court.^{*145} Although in many cases, such as that of the first Estonian referral, the courts have themselves *ex officio* initiated the preliminary rulings procedure, more and more often the representatives of the parties urge the courts to refer questions to the CJEU.

Answering the request of the parties to refer the case to the CJEU in the Estonian Supreme Court as compared to the conditions of the *Baydar* judgment

Already in 2006, the Supreme Court (civil law chamber) had to decide whether an application of a party to the court to request that court to ask for a preliminary ruling from the CJEU is an independent procedural request or instead part of a legal position of a party and part of interpretation and application of substantial law.^{*146} The Supreme Court favoured the latter approach.

Now a situation can occur wherein a lawyer asks the court to refer questions to the Luxembourg Court but the court in its judgment refuses to do so and the Supreme Court, with one laconic sentence, does not give leave to appeal. How will this situation mesh with the requirement of the Strasbourg Court that the refusal to refer be reasoned?

Can one deduce in these cases that the Supreme Court accepts the reasoning for non-referral given by the circuit court and that it is implicit from its well-developed case law addressing leave to appeal, such that no further reasoning is needed? As stressed above, under both EU law and ECtHR case law, the Supreme Court has no duty to refer if the question is irrelevant to the outcome of the case or if other *C.I.L.F.I.T.* criteria are met. In other words, if the circuit court has explained why it is irrelevant, the refusal of leave to appeal can easily be seen as a confirmation of the circuit court standpoint by the Supreme Court.

However, it gets more complicated if the circuit court has not dealt with the issue at all, if the issue is being raised for the first time on cassation level, as in *Baydar*, where the applicant came up with the request for referral not even in his appeal before the Supreme Court but rather in his answers about his appeal in response to the advocate-general of the Supreme Court of the Netherlands – although the appeal court had addressed the EU law issues as such but not the specific request to refer to the CJEU. Then again, both the CJEU and the ECtHR have stressed that it is for the national court only and not for the parties to determine whether to refer or not. Can it hence be deduced that even if the appellate court has not examined the request and/or the concrete questions posed by the party in order to ask for a preliminary reference from

¹⁴² See for example, the Supreme Court of Estonia judgment in case No. 3-3-1-74-05, 25.4.2006, and, more recently, the Supreme Court of Estonia judgment in case No. 3-15-118/21, 27.9.2017.

¹⁴³ See Julia Laffranque. Eelotsuse küsimine Euroopa Kohtult [‘References to the European Court of Justice’]. Tartu: Eesti Õiguskeskus 2005. See also Julia Laffranque. Euroopa Kohtu eelotsus Eesti kohtupraktika mõjutajana [‘Influence of the preliminary ruling of the CJEU on Estonian case law’]. – *Riigikogu Toimetised* 2006/14, pp. 83–90; Uno Lõhmus, Liina Teras. Euroopa Kohtust ja eelotsusemenetlusest [‘On the CJEU and preliminary references’]. – *Riigikogu Toimetised* 2006/14, p. 82.

¹⁴⁴ Ruling of the Supreme Court No. 3-3-1-95-06 (*JK Otsa Talu OÜ*), 14.5.2007. However, the CJEU did not follow the suggestion made by the Supreme Court. See *JK Otsa Talu*, C-241/07, 4.6.2009; see also Lembit Uibo. Euroopa Kohus ja Eesti tegemised [‘The European Court and Estonian activities’]. – *Yearbook of the Ministry of Foreign Affairs*, 2010, report available online in Estonian from the Ministry of Foreign Affairs of Estonia, at: <http://vm.ee/et/euroopa-kohus-ja-eesti-tegemised> (most recently accessed on 9.5.2018).

¹⁴⁵ *Balbiino*, C-560/07, 4.6.2009; see also Tiina Pappel. Käänuline tee minu esimese eelotsuse taotluseni [‘The cumbersome road to my first reference for a preliminary ruling’]. – *Kohtute aastaraamat* [‘The Courts Yearbook’], 2007, pp. 123–125; Uno Lõhmus. Eesti kohtute esimesed eelotsusetaotlused said lahenduse: Euroopa Kohtu 4. juuni 2009. a otsused asjades C-241/07 (*JK Otsa Talu*) ja C-560/07 (*Balbiino*) [‘The first requests by the Estonian courts for a preliminary ruling have been answered: The judgment of the European Court of Justice in Case C-241/07 (*JK Otsa Talu*) and C-560/07 (*Balbiino*)’]. – *Juridica* 2009/5, pp. 321–327.

¹⁴⁶ Supreme Court of Estonia, judgment in case No. 3-2-1-4-06, RT III, 2006, 12, 118, 30.3.2006.

the CJEU, the appellate court has taken notice of the EU law aspects and has, although not stating it *expressis verbis*, obviously not found it necessary to refer? Is it enough to accept there being no further reasoning by the Supreme Court either and understand the Supreme Court's dismissal as agreement with the appellate court? As seen above, the ECtHR has even in that case found no violation of Article 6 §1 ECHR. One has to note that under Estonian law, unlike in the *Baydar* case, in some obvious cases the Supreme Court does not need to send the appeal in cassation to other parties for their comments.

But what if the circuit/appellate court has not at all dealt with the EU law, not even in substance, let alone talked about formulating questions to the CJEU? Can the applicant be allowed to raise EU law aspects at this late stage, in his or her appeal to cassation, and is the Supreme Court obliged to respond? What if in the meantime there have been developments in the EU law that were not there when the appellate court made its decision?

The Strasbourg Court has in its judgment in the case *Baydar v. the Netherlands* stated that in the context of accelerated procedures within the meaning of Section 80a or 81 of the Judiciary (Organisation) Act of the Netherlands, no issue of principle arises under Article 6 §1 ECHR when an appeal in cassation that includes a request for referral is declared inadmissible or dismissed with summary reasoning where it is clear from the circumstances of the case that the decision is not arbitrary or otherwise manifestly unreasonable.^{*147} Could this be understood as accepting also a laconic reference to a relevant legal base in the refusal of leave to appeal by the Estonian Supreme Court? Similarly to the Supreme Court of the Netherlands in the *Baydar* case, the Estonian Supreme Court can dismiss an application for appeal if this does not lead to a need for a determination of legal issues in the interests of legal uniformity and legal development.

Or in these cases, which involve problematics of non-referral to the CJEU, should the Estonian Supreme Court make an exception and either add separate reasoning to the refusal of leave to appeal or grant the leave to appeal and confirm with its own reasoning the non-referral to the CJEU? The first solution would mean unequal treatment between applications, depending upon whether there is any EU law context, particularly demand for a referral to the CJEU, or not; the other applications for which leave to appeal is refused would remain with summary reasoning. It does not make sense to take EU law out of the regular context; EU law should be seen as part of the Estonian legal system. The second option would not be rational from the point of view of procedural economy and would mean loss of time. On the other hand, for the applicant both solutions would definitely provide much clearer solutions to the relevant problems than the current situation does.

However, in another case before the Supreme Court, quite the opposite happened: the lawyer of a party did not want the circuit court to refer a question to the Luxembourg Court and in front of the Supreme Court contested the ruling of the circuit court, which had postponed the case and requested a preliminary ruling from the CJEU.^{*148} According to the applicant, the circuit court was wrong in asking for a preliminary reference. One reason for the objection could have been the length of the preliminary ruling procedure before the CJEU, which delays the overall time to adjudicate the case. The Supreme Court found that the ruling on suspending the proceedings and asking for a preliminary ruling was contestable under national law. However, in the case at hand it found also that the circuit court had rightly referred a question to the CJEU and even added its own questions to be referred in addition to the list of questions prepared by the circuit court.

In this context, it is to be welcomed that there is real substantial discussion among Estonian judges and litigants about the preliminary reference procedure, and that the Estonian courts consider explanation to the parties with regard to a need to refer the questions to the CJEU to be an obligation, so that referral would be reasonably predictable to the parties and not come as a surprise.^{*149} The parties should have an opportunity to comment on the decision to refer.

Proceeding from the *Baydar* judgment, one could perhaps suggest and envisage that the Supreme Court of Estonia, if such an occasion prevails, explains exceptionally in one decision of refusal of leave to appeal that involves a case entailing a reference to the CJEU, similarly to that of the Supreme Court of the

¹⁴⁷ See *Baydar v. the Netherlands*, No. 55385/14, 28.4.2018, para. 50.

¹⁴⁸ Supreme Court of Estonia, judgment in case No. 3-3-1-2-13, 21.3.2013; *Lüvimaa Lihaveis*, C-175/13, 10.2.2015.

¹⁴⁹ See Priit Pikamäe. Mõningatest Euroopa Kohtult eelotsuse taotlemise praktilistest aspektidest Eesti kogemuse näitel ["Thoughts on some of the practical aspects of an order for a preliminary ruling by the Court of Justice of the European Union, based on an Estonian example"]. Speech at the round-table meeting of the Presidents of the Supreme Judicial Courts of the European Union, Luxembourg, 17.3.2014. Available at https://www.riigikohus.ee/sites/default/files/elfinder/dokumendid/ettekanne_luxembourg_17_03_eelotsused.pdf (in Estonian) (most recently accessed on 9.5.2018), with further references to the Supreme Court of Estonia, judgment in case No. 3-3-1-56-13, 16.12.2013.

Netherlands, that the requirements of the codes of procedure with regard to leave to appeal are related also to the EU law issues. The Supreme Court has occasionally explained in decisions refusing leave to appeal as *obiter dicta* some legal situations, as, for example, with the case that ended up as *Leuska v. Estonia* in front of the Strasbourg Court.^{*150} For instance, according to *Baydar v. the Netherlands*, the Supreme Court of the Netherlands in its judgment of 26 May 2015 (ECLI:NL:HR:2015:1332) explained its practice as regards the application of sections 80a and 81 of the Judiciary (Organisation) Act in relation to a request for referral to the CJEU made in that case.^{*151}

As seen above, the Estonian Supreme Court has also considered the question of referral to be a part of issues of law.

The Strasbourg Court took into account the explanation by the Supreme Court of the Netherlands and accepted that the summary reasoning contained in such a judgment implies an acknowledgement that a referral to the CJEU could not lead to a different outcome in the case.^{*152}

4. Conclusions

As seen from the above, there are very good reasons to give reasons: the duty to give reasons is in the interest of those seeking justice and is of paramount importance both in European law – including the case law of the Strasbourg and Luxembourg courts – and in national law as well, as demonstrated in line with the example of Estonian law, including the case law of the Supreme Court of Estonia. The duty to give judicial reasons is a fundamental/constitutional right that is part of the right to a fair trial.

There should be strong reasons for not giving reasons. Exceptions to the duty to give reasons are rare and strict. However, they are tolerated more on appeal, particularly on cassation level. Contrary to that in criminal cases, the right to appeal in civil cases does not feature among the rights and freedoms guaranteed by the ECHR, and, according to the ECtHR, the states are free to determine their procedural laws pertaining to admission to cassation.

Preliminary rulings are an important tool in protection of the rights of individuals in the EU and in enhancing the dialogue between national courts and the Luxembourg Court. The Strasbourg Court with its case law has supported the adherence of the national courts to the requirement of fulfilling the duty in certain cases or for certain courts to refer a question to the Luxembourg Court. It has duly articulated again the *C.I.L.L.F.I.T.* criteria and the case law of the CJEU that has followed. By doing so, the Strasbourg Court has respected the division of competencies between different European and national courts and limited its supervision to the procedural aspects – namely, whether a non-referral has been duly reasoned or not. It has indeed pointed out procedural deficiencies if need be. At the same time the Strasbourg Court has emphasised that there is no right for a case to be referred by a domestic judge to the Luxembourg Court. According to the case law of the Luxembourg Court, it is the national court only and not the parties who decide to bring the matter to the Luxembourg Court. The Strasbourg Court has with talent found a balance between the duty to give reasons and the acceptance of certain judgments with summary reasoning.

¹⁵⁰ In that case, the Estonian Supreme Court refused to examine the appeal on points of law because the Court of Appeal's decision had been final and not amenable to appeal. It nevertheless stated that, according to the established case law, in settlement proceedings the court should not limit itself to merely analysing the settlement reached but must also verify whether there were still questions that should be addressed in the subsequent judgment yet had not been included in the settlement agreement. See *Leuska v. Estonia*, No. 64734/11, 7.11.2017, para. 22.

¹⁵¹ It found that the complaints raised in that case did not justify an examination in cassation proceedings and, in a statement based on Section 80a of the Judiciary (Organisation) Act, declared the appeal in cassation inadmissible. Nevertheless, it stated in addition that it is inherent therein that the request contained in the written grounds of appeal to put a preliminary question to the CJEU must not be granted. The Supreme Court went on to give reasons for that in saying that such a judgment as the one at hand, with abridged reasoning, contains the conclusion that no issues arise that justify an examination in cassation proceedings or give rise to the need for a determination of issues in the interests of legal uniformity, legal development, or legal protection. According to the Supreme Court of the Netherlands, since preliminary questions within the meaning of Article 267 of the TFEU involve the interpretation of EU law and are issues of law, it is inherent in such a judgment that there is no need to set forth preliminary questions. The Supreme Court added that this judgment also implies that the case in question encompasses one of the situations wherein there is no need for such referral of preliminary questions and cited the grounds listed in the *C.I.L.L.F.I.T.* case law of the CJEU. See *Baydar v. the Netherlands*, No. 55385/14, 28.4.2018, para. 20.

¹⁵² See *Baydar v. the Netherlands*, No. 55385/14, 28.4.2018, para. 48.

As seen in the ECtHR judgment in *Baydar v. the Netherlands*, the bill that introduced summary judgments in cases of accelerated-procedure inadmissibility was intended to enable the Supreme Court of the Netherlands to concentrate on its core tasks as a court of cassation. According to the explanatory memorandum on this bill, the adequate execution of the core tasks of the Supreme Court is under pressure as a result of cassation appeals being lodged in cases that do not lend themselves to a review in cassation, and because certain issues about which it would be desirable for the Supreme Court itself to pronounce do not reach the Supreme Court in time, or at all. The Strasbourg Court in its judgment in *Baydar v. the Netherlands* accepted that, in line with the aim of the legislature, the relevant Dutch laws are aimed at keeping the length of proceedings reasonable and also allow courts of cassation or similar judicial bodies to concentrate efficiently on their core tasks, such as ensuring the uniform application and correct interpretation of the law.

The need for efficiency of the court should not outweigh the need to give reasons. However, the overall efficiency of a court in handling the cases is also of importance from the point of view of those seeking justice: their cases will be decided more quickly if there is no benefit of a detailed judgment; they receive an answer quickly and can go on with their lives. It is important that they understand the reasons for there being limited reasons for certain decisions that the courts make, and they need to know and acknowledge that the superior courts with their summary judgments have in a sense agreed with the reasoning of lower courts. The supreme courts in turn can concentrate on important problematics if they are after all courts of cassation, not revision.

In relation to the Luxembourg Court there could easily be discussions about creating a certain filtering system as well. In the Strasbourg Court it exists to a certain extent in examining of the so-called single-judge cases: the single judge effectuates a filter. Nevertheless this is not comparable to the so-called leave-to-appeal system of the Supreme Court of Estonia, as in the Strasbourg Court the criteria for filtering are limited mostly to filtering out the cases that have failed to meet the criteria necessary for turning to the Strasbourg Court, such as applications out of *ratione materiae*, *temporis*, or *personae*; cases that are premature and still pending before domestic courts; and applications that do not comply with the six-month time limit or terms on exhaustion of domestic remedies. The Strasbourg Court can also declare an application inadmissible if it would otherwise (by deciding the case) act as a fourth-instance court. Instead, the Supreme Court of Estonia has a well-developed leave-to-appeal system. The European Commission of Human Rights has found inadmissible an application that asked for reasoning for the Estonian Supreme Court's refusal to grant leave to appeal; the ECtHR has implicitly accepted the leave-to-appeal system in the Estonian Supreme Court. What is important is that the summary judgment should not be arbitrary or otherwise manifestly unreasonable. The *Baydar* case law of the ECtHR could be seen as an answer to the Estonian dilemma – it does not at first sight necessarily mean a need for a change in the leave-to-appeal system in the Estonian Supreme Court, although it is always preferable to give reasons, at least stating agreement with a lower court's reasoning. One perhaps wise piece of advice to the Estonian Supreme Court would be to explain, similarly to the Supreme Court of the Netherlands, exceptionally in one refusal of leave to appeal, that the general requirements for granting leave to appeal also cover the situation of preliminary questions to the CJEU and *C.I.L.F.I.T.* arguments of the CJEU.

However, the further developments of Strasbourg case law should not be neglected and must be followed. It is also to be noted that the cases have dealt with preliminary references related to the interpretation of EU law and not the issues of validity of EU law.

So far, the Estonian courts have made reasonable use of the preliminary reference procedure before the Luxembourg Court. They should continue to be active also in explaining to litigants the need / lack of need and the meaning of a possible reference to the CJEU and should show well the reasoning for a decision of non-referral, so that the Supreme Court can, if need be and if applicable, make a final decision in its habitual summary judgment.



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The General Data Protection Regulation and its Violation of EU Treaties

The EU General Data Protection Regulation (GDPR) entered into force on 25 May, two weeks after Europe Day. Quite a lot has been said about the objectives for it, its requirements, and the steps of preparation both on a practical and on a jurisprudential level.^{*1} In brief, one can state that the GDPR is generally good and necessary: it will vigorously protect the fundamental rights of self-determination and identity of European people.^{*2}

In all of this data-protection bustle, one rather fundamental issue has gone unnoticed, though: **the General Data Protection Regulation violates EU treaties!** In other words, in essence it runs counter to the ‘constitutional organisation’ of the EU, formed in line with the establishing treaties. How so? The conflict arises from the interaction of two elements. Firstly, the GDPR is, at base, a ‘European law’. Secondly, European laws are banned by European treaties.

I will begin with the second of these elements. If we are to understand this, we need to go back in time about 15 years.

In February 2002, at the instigation of France, the Convention on the Future of Europe became enforceable, with the aim of developing the constitutional agreement or constitution for the EU. By June 2003, the draft constitution was ready, and in October of the following year it was sent to the EU member states for ratification. Whether regrettably or not, the most ambitious plan to reform the European Union crashed at the hurdle of the very first referenda: on 29 May 2005, 55% of those voting in France cast their vote against the project, and two days later, on 1 June, 61.6% of voters in the Netherlands did the same. Although earlier ‘repeat referenda’ in Denmark and Ireland had proved able to save the treaties of Maastricht and Nice and while some countries, Germany and Austria among them, did attempt to continue the process of creating the EU constitution, the opposition scared the leaders enough for the plan to be dropped.

The draft treaty establishing a constitution for Europe^{*3} envisaged an important innovation – two legal instruments directly applicable in the Member States and superior to them: the European law and

¹ For a lengthier analysis, see, for instance, Paul Voigt, Axel von dem Bussche. *The EU General Data Protection Regulation (GDPR): A Practical Guide*. Springer 2017. – DOI: <https://doi.org/10.1007/978-3-319-57959-7>; Paul B. Lambert. *Understanding the New European Data Protection Rules*. CRC Press – Taylor & Francis Group 2018. – DOI: <https://doi.org/10.1201/9781138069848>.

² Incidentally, the UK plans to enforce more or less similar rules in the domestic law after Brexit. See *A New Data Protection Bill: Our Planned Reforms*. Statement of Intent of the Department for Digital, Culture, Media & Sport, 7 August 2017, available online at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/635900/2017-08-07_DP_Bill_-_Statement_of_Intent.pdf (most recently accessed on 2 July 2018)

³ Draft Treaty Establishing a Constitution for Europe, CONV 850/03, submitted 18 July 2003.

European framework law (see CONV 850/03, articles 10, 32, and 33). The legislators of the Member States would have had no say about European laws once these had been adopted by the European Parliament and Council; however, the institution of European framework laws was designed to allow some issues to be delegated to parliaments. Furthermore, now the **directives** would have been renamed **regulations** and the current regulations would have been abolished as unnecessary next to European laws.

But there would be no European laws – they were rejected by the draft. If one were to be asked what was federalist in the draft European constitution, among other things the list would undoubtedly feature these very European laws and framework laws.^{*4}

Some words about the current legislative organisation of the EU are necessary at this juncture. The EU ‘constitution’ is made up of two so-called foundational treaties: the Treaty on the European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU).^{*5} Pursuant to the treaties, the legislative acts of the EU consist of the directives, regulations, and decisions of the European Parliament and the Council (under the TFEU’s Article 288, among other terms). It should be mentioned that acts going by the same name may be adopted by the Parliament or the Council alone as well as by other EU institutions, but without a legislative procedure they are not ‘legislative’.^{*6}

Thus far, legislative directives have been the main shapers of European law.^{*7} The specific character of a directive as compared to national law is that it is not directly applicable. The EU directives are compulsory for EU member states’ legislators; that is, a similar regulation (it cannot be identical to the directive) needs to be enforced in national law so as to harmonise law and the legal system across Europe. This process is called the **implementation of the directive**. A directive never enters into force directly: in a Member State, the act to which the rules of the directive are transposed remains the superior and directly applicable law. However, the directive retains its nature as a compulsory **source of interpretation of law** in cases wherein national laws address the scope of the directive in an incomprehensible, incomplete, or incorrect manner.^{*8} Directives are intended to harmonise EU law, where the objective for the harmonisation of EU law is to be noble, beneficial, and acceptable, at least as long as conformance with the commonalities and values of Europe as occidental culture and morality is maintained.^{*9}

Regulations are mandatory and directly applicable in all EU member states. In this sense, they are similar to laws. That said, the EU’s mandate to impose European law directly through regulations is significantly more limited relative to the scope for national laws. The constitutions of Member States do not normally dictate which themes or sectors should be regulated by laws and which should not: the right and freedom of the state to legislate is the main attribute of sovereignty under democratic rule of law (restrictions rooted in such important values as human rights are not sector-specific, for the most part). However, in terms of the themes and sectors addressed, the treaties of the EU do stipulate the procedures and legislative acts that should be used to regulate such areas. Legislative regulations may or must be used to regulate around 20–30 themes and sectors. These include, for example, competition rules and other general principles for the economy, the principles for services of general economic interest, principles and restrictions governing publication of or access to EU documents, procedures and conditions for submitting citizens’ initiatives, rules governing

⁴ The question about the depth of EU integration, including but not limited to choice of arrangement among a federation, confederation, and ‘third way’, was a focal one among a set of many primary-level and not just technical questions. In my publications, I personally supported the third option – i.e., a new kind of union.

⁵ See the consolidated versions of the Treaty on the European Union and the Treaty on the Functioning of the European Union: 2016/C 202/01.

⁶ The legislative approach is divided into an **ordinary procedure** (see the TFEU’s Article 289(1) and Article 294) and a **specific procedure** (see its Article 289(2)). Under the latter legislative procedure, the Council may adopt directives, regulations, and other legislative acts. In cases foreseen by the treaties, the Council must **consult** *ex ante* the European Parliament (under the TFEU’s Article 81(3) or another EU institution, while the **consent** of the European Parliament is required in other cases (see Article 86). In certain cases, a specific procedure is required of the Parliament too (addressed in, for example, the TFEU’s Article 223(2)), while some situations require that the Parliament obtain consent from both the Council and the Commission before making a decision (under Article 226).

⁷ The general preference for directives over regulations is further confirmed by relatively recent European Commission recommendations to EU regulators: *Better Law-making for Better Results*, EU Action Plan COM(2015) 215 final.

⁸ EC case C-101/01, 6.11.2003, para. 98.

⁹ In the jurisprudence of values, morality forms the basis for law. The fundamental standards of morality – that one shall not kill, shall not steal, shall not defraud, etc. – are the **primary norms** of law. Typically, we do not find such prohibitions in the text of the law. Instead, laws establish **secondary norms**, the so-called reaction norms that are addressed to officials. For instance, criminal law specifies what officials should do if someone has engaged in deception, thereby causing another’s loss for his own gain.

the financing of pan-European political parties, and frameworks for the implementation of such elements as common commercial policy. Regulations must be applied also to organise administrative co-operation between EU institutions (e.g., Europol and the Court of Justice) and EU member states. Some regulations address very narrow and sector-specific issues (such as the distribution of mobile-communication frequency bands or food safety); others deal with more general procedures for cross-border operations and enforcement issues (e.g., Regulation (EC) No 44/2001, 'on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters', and Regulation (EC) No 593/2008, 'on the law applicable to contractual obligations (Rome I)').^{*10} Although several EU regulations have effects on numerous persons, both legal and natural, none has ever affected, in principle, all European citizens, residents, and legal entities – a feature in common with national laws in relation to their subjects. Regulations that are in such restricted use do not infringe the fundamental rights and freedoms of EU citizens and residents or impinge on their legitimate interests. On the contrary, the regulations usually force professional actors to act in a way that protects people's fundamental rights and freedoms. Likewise, EU regulations in the past have not infringed or violated the sovereignty of Member States, be it 'shared with the Union' or 'kept to themselves'.

The above-mentioned thematic and sector-linked precept is, in principle, restrictive and exhaustive, since the structure of the EU (its 'constitution') is based on several inter-linked fundamental principles. According to these, the EU shall not impose obligations or restrictions on the Member States and their subjects beyond the frameworks of the treaties. Some of these fundamental principles are that:

- a) competencies are conferred on the Union by the treaties (TEU Article 5(1–2));
- b) all competencies that are not conferred on the Union by the treaties remain with the Member States (TEU Article 4(1) and Article 5(2)), a principle that, for purposes of legal certainty, has been articulated twice in the treaty language; and
- c) the above-mentioned principles are complemented by the principles of **subsidiarity** (see TEU Article 5 (1) and (3) and **proportionality** (*viz.*, eligibility, restraint, and necessity of the relevant measure) (see TEU Article 5 (1) and (4)).

Hence, the first constituent element of conflict between the GDPR and EU treaties that I have posited has been substantiated: European laws are not permitted, since they were rejected in 2005 and the current treaties do not foresee any law-like European legislation.

Now, let us investigate why the GDPR is by nature a (European) law. To this end, let us look at to whom the GDPR is addressed, what the spatial scope of its applicability is, and what impacts (legal consequences especially) it has.

Firstly, the GDPR potentially concerns all residents of Europe, albeit by adding to the rights of individuals and protecting their freedoms. This is good, and any future general regulations of the EU should be allowed only if they follow the same path. Secondly, the GDPR addresses virtually all legal entities and undertakings acting, physically or through a network, in the European judicial area. This includes those having established that they could opt out of the processing of personal data or that other grounds exist for them not needing to fulfil the additional obligations imposed by the general regulation. They can comply with the GDPR by opting out of the processing of personal data. Data processors whose operations are going to necessitate seeking of individuals' consent to process their personal data will thereby incur significant and legal and technical costs. Thirdly, the GDPR addresses the Member States: among other requirements, there is a demand that they interface their data-protection supervisory authorities for integration into a mechanism of single points of contact. Furthermore, the GDPR is addressed to the Union itself: the European Data Protection Board and the office of a European Data Protection Supervisor are to be set up, and additional obligations are imposed on the European Commission and the European Court of Justice.

The GDPR has cross-border applicability and covers the whole Union. Furthermore, its reach extends to service providers outside the EU: if their service targets EU data subjects, they too need to fulfil all the obligations prescribed by the GDPR, with the EU committing to observe their online behaviour.

The GDPR's impacts on subjects on whom it imposes obligations are substantial. First of all, their fulfilment entails significant financial costs or making other investments – both in the preparatory stages

¹⁰ The difference between directives and regulations is once again striking in connection with Brexit: Upon secession, all EU regulations will cease to apply. To prevent a resultant legal void from obtaining, the UK then must reinstate the content of these regulations in its national legislation – probably by means of the Great Repeal Bill. See Michael Emerson. Which model for Brexit? – N. da Costa Cabral et al. (eds). *After Brexit: Consequences for the European Union*. Palgrave Macmillan 2017. – DOI: <https://doi.org/10.1007/978-3-319-66670-9>.

and in the form of ongoing costs. Such investment is not inappropriate *per se*, but the Union's competence to impose costs of this nature is debatable. Also, the legal consequences of infringements are significant: taking the form of progressive fines of up to 10 or even 20 million euros or, in the case of an undertaking, 2% or 4% of the **total worldwide annual turnover** (under Article 83 of the GDPR). The GDPR thereby prescribes liability that is significantly higher than, for instance, the criminal liability of a legal entity for any act under the Estonian Penal Code.

Thus, the scope, depth, and impacts of the GDPR exceed all the limits that the treaties permit regulations to have. On top of this, the treaties do not even know the term 'general regulation'. Although the designation 'General Data Protection Regulation' is 'hidden' in brackets in the headings, it is precisely this term that, perhaps intentionally, has entered general use.

Accordingly, the General Data Protection Regulation possesses the characteristics of a 'European law' (insofar as the resolution of some issues has been delegated to the legislators of the EU member states, the GDPR fulfils the criteria for being a 'European framework law' too, but this does not make a difference). It may be worth noting that this has been acknowledged at least at some levels: former member of the European Parliament Marju Lauristin explicitly stated at a webinar that the GDPR is 'like a (general) law'.^{*11} Another interesting fact worth noting is that the draft EU constitution stated that future rules for data protection need to be imposed by means of a European law^{*12} (CONV 850/03, Article 50(2)) – this provision is almost identical to Article 16 of the TFEU, on which the GDPR is explicitly based (see the first sentence of the preamble). Consequently, the general regulation is 'seamlessly' positioned in a place reserved by the draft EU constitution for the 'European law on data protection'.

So what? The issue here is this: how deep an EU-level political integration and relinquishment of the sovereignty of the Member States do the European nations that have joined the Union actually want? For instance, most analyses of the causes of Brexit cite loss of sovereignty of a Member State as one of the factors contributing to the decision. It does not matter whether this loss is perceived rather than real.^{*13}

The contradiction between the GDPR and the treaties can be illustrated via the following thought experiment. Sooner or later, Estonia probably will begin writing its 'e-state' (*e-riik*) into the Constitution. Let us imagine that, with respect to the e-state, the Estonian legislator would like to stipulate principles for the protection of personal data in the Constitution, while experience of the Estonian e-state indicates that some of the regulations established by the GDPR should be reconsidered or changed. Does the Estonian Parliament have the right to provide for the protection of personal data in the Estonian Constitution otherwise as provided by the GDPR? By the GDPR's "logic" it does not. According to the "logic of the treaties, however, it does. In consequence, the two "logics" – the dogmatic of the GDPR and the treaties – are at odds. Which was to be proved.

This is even more germane because the GDPR is not the end of the matter. There is another EU regulation on the horizon – the so-called ePrivacy Regulation^{*14} – which will replace an earlier (outdated) directive. If the trend of replacing directives with directly applicable regulations were to continue, such legislation would be 'stealthily federal'.

¹¹ Webinar of the Institute of Social Studies, University of Tartu, 19 December 2017 (min 4:30-5:45, in Estonian, incl: "An EU regulation is like a [European] general law..."), available online at <https://www.youtube.com/watch?v=4Ao2nRLdHZU> (most recently accessed on 27 July 2018)

¹² In its currently valid form, the Treaty on the Functioning of the European Union prescribes the 'ordinary legislative procedure' – i.e., any legislative act for the same purpose (see its Article 16 (2)).

¹³ See, for instance, the following pieces in N. da Costa Cabral et al. (eds). *After Brexit: Consequences for the European Union*. Palgrave Macmillan 2017: Nuno Cunha Rodrigues. Brexit and the future of the EU: Move back or move forward? (pp. 65–82, on pp. 66, 73, 76). – DOI: https://doi.org/10.1007/978-3-319-66670-9_4; Pauline Schnapper. Brexit and the risk of European disintegration (pp. 83–99, on pp. 85–87). – DOI: https://doi.org/10.1007/978-3-319-66670-9_5; Annette Bongardt, Francisco Torres. A qualitative change in the process of European integration (pp. 101–127, on pp. 112, 114–115, *passim*). – DOI: https://doi.org/10.1007/978-3-319-66670-9_6; Ioanna Ntampoudi. Post-Brexit models and migration policies: Possible citizenship and welfare implications for EU nationals in the UK (pp. 245–270, on pp. 246, *passim*). – DOI: https://doi.org/10.1007/978-3-319-66670-9_12. Other examples are provided by Andrew Glencross. *Why the UK Voted for Brexit: David Cameron's Great Miscalculation*. Palgrave Studies in European Union Politics 2016, pp. 61–70, *passim*. – DOI: <https://doi.org/10.1057/978-1-137-59001-5>; Lee McGowan. *Preparing for Brexit: Actors, Negotiations and Consequences*. Palgrave Studies in European Union Politics 2018, pp. 8, 12, 20, *passim*. – DOI: <https://doi.org/10.1007/978-3-319-64260-4>; Roger Liddle. *The Risk of Brexit: The Politics of a Referendum*. Policy Network / Rowman & Littlefield International 2016, pp. 37, 57, 66, 116–118; Giles Merritt. *Slippery Slope: Europe's Troubled Future*. Oxford University Press 2016, pp. 11, 14, 164, *passim*; Paul J.J. Welfens. *An Accidental Brexit: New EU and Transatlantic Economic Perspectives*. Palgrave Macmillan 2017, pp. 14, 35, 49, 214, 271–272, *passim*. – DOI: <https://doi.org/10.1007/978-3-319-58271-9>.

¹⁴ SWD(2017) 6 final.

The foregoing discussion points to two parallel tendencies that can be observed in the European legislation: regulations replacing directives and such regulations expanding into laws. In this process, the Member States are relinquishing their sovereignty to a greater extent than agreed upon in the treaties. Is that good or bad? Is this a way to better integrate Europe or a hidden path to federalising it? I leave it to everyone to form his or her own opinion. One thing is certain, though: the legislative process of the Union needs to be transparent and based on European treaties.

One solution would be to introduce the term ‘general regulation’ in the treaties. Doing so would make their use – in addition to the specification of possible sectors and themes – subject to the condition that general regulations are to be established solely for the protection of the fundamental rights and freedoms of people (individuals) and of their security. Via an additional condition, it should be made clear that such fundamental rights and freedoms must not be restricted, either directly or indirectly, under the pretext of protective measures of any sort – for instance, in the fight against terrorism. Restricting people’s fundamental rights and freedoms should remain exclusively within the purview of the EU member states.

The GDPR is with us to stay. In principle, two ways of avoiding violation of the treaties existed. One of them was to establish data-protection rules in the form of a directive. True, this would have meant time-consuming and probably arduous implementation of the directive in the laws of the Member States, but it would have been the right way. The second appropriate option would have been to amend the treaties beforehand. With this multiplication of the time, effort, and political will needed, a GDPR-like result would have likely been virtually impossible. However, amendment of the treaties cannot be avoided anymore, because noble objectives cannot justify infringements of the ‘European constitution’ and the constitutions of the Member States. And we all know where roads paved with good intentions lead.



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Limitation of Freedom of Speech and of the Press by Penal Law in the Final Decades of the Russian Empire

1. Introduction

At what point does open criticism of governmental power become a crime instead of exercise of freedom of speech and a display of the citizen's courage? Is criticism a crime only when it is followed by a call to do something to change the current political situation? These questions may seem out of place or even weird in the 21st century, but just a hundred years ago, expressing one's convictions in either oral or written form was relatively restricted, not only in autocratic Russia but elsewhere too. In the case of several Scandinavian countries, for example, a situation in which criticism levied against the government remained criminalised even in a situation of overall freedom of speech and the press has been identified in connection with monarchist regimes and with the state's near embodiment in a specific ruler.^{*1} Patterns manifested in such cases and beyond may be of relevance for many parts of the world where these issues are relevant today – even, to some extent, in societies where they may seem far removed from day-to-day life..

The territory of modern-day Estonia belonged to the Russian Empire in the early years of the 20th century and was subject to regulation by tsarist Russia's law. Although Russia had already begun a project of modernisation and attempted perfection of its penal law in the first half of the 19th century,^{*2} this process

¹ The research for this article has been supported by Estonian Research Council (IUT20-50).

This is addressed in the work of Lars Björne, who is about to complete his extensive review of the history of the freedoms of speech and the press in the Nordic countries, 'Ytringsfrihet i Norden 1815–1914 – en oversikt'. His undertaking is part of a larger project, titled 'Offentlighet og ytringsfrihet i Norden, 1815–1900', under the leadership of Oslo University's Professor of Legal History Dag Michalsen and the same institution's history research fellow Ruth Hemstad (see <http://www.uio.no/forskning/satsinger/norden/forskning/forskergrupper/offentlighet-og-ytringsfrihet-i-norden-1815-1900>, most recently accessed on 24.4.2018). The initial results of the project, including the positions taken by Björne, have already been introduced. T. Nickelsen, M.S. Smedsrud. *Diamanten i frihetens diadem* ['The Diamonds in the Diadem of Freedom']. – *Apollon. Forskningsmagasinet* 2017; online: http://www.apollon.uio.no/artikler/2017/3_diamanten-i-diademmet-introsaken.html (most recently accessed on 24.4.2018).

² S.V. Poznyshev. *Osnovnye nachala nauki ugovnogo prava: Obshchaja chast' ugovnogo prava* ['The Fundamental Principles of the Science of Criminal Law: General Criminal Law']. Moscow 1912; Rossiiskoe zakonodatel'stvo X-XX vekov. V devjati tomah. T. 1–4 ['Russian Legislation of the 10th to 20th Centuries, in Nine Volumes: Parts 1–4']. Moscow 1985; R. Pipes. *Russia under the Old Regime*. New York 1974, pp. 287 ff. For discussion focused primarily on the penal law in force in the Baltic provinces, see M. Luts-Sootak, M. Sedman. Ambivalences of the legality principle in penal law of the Baltic provinces

turned out to be too laborious for the tsarist state. Numerous parallel laws and even entire legal codes regulating penal law were in force simultaneously, and penal law was characterised by extreme disunity even in the final years of the imperial state.^{*3}

This article addresses the legal situation that prevailed in the Estonian territory of the Russian Empire until 1918, when instigating a mutiny and insubordination to state authority remained punishable as offences. On 17 April 1905, Tsar Nicholas II brought into force his so-called Freedom Manifesto^{*4}, which, among other freedoms, granted the subjects of the Russian autocracy a freedom of speech. On 23 April of the following year, the Fundamental Laws of the Russian Empire were established, the second chapter of which outlined fundamental rights.^{*5} Among the other fundamental rights declared (the right to private property, choice of one's occupation and residence, a right to a fair hearing, a right to hold meetings, etc.), Article 37 established a right of all persons to 'express their convictions orally and in writing, as well as to distribute such convictions in press or any other way'. This was a step forward from the 1905 manifesto, Article 1 of which 'gave [the Russian concept, *даровать*, covers also conferring, granting, and bestowing upon] the population irrefutable bases for civil liberties in personal integrity and freedom of conscience, speech, association, and alliances'. At the same time, even the 1906 Fundamental Laws did not provide for absolute freedom of speech and the press; rather, these were set within the 'boundaries provided by law'.^{*6} Those boundaries were still very narrow and at times extremely strict in the tsarist empire. One example of the actions that were not permitted is calling the tsar a 'plumber', which was considered an offence against the state as an insult to His Majesty and, accordingly, could see the offender sent to perform hard labour for a term as long as 12 years. Nevertheless, such strict sentences were usually rare in practice. Imposing punishments more lenient than the average established extent was quite common practice for the courts. This can be asserted with certainty, verified on the basis of cases heard by the Tallinn County Court^{*7}, though the practice of local courts-martial may have been different.^{*8}

A new court system had been established with the 1864 Russian court reform^{*9}, which was extended to the Baltic governorates in November 1889.^{*10} In the post-reform system, the courts of first instance were peace courts that did not deal with serious offences. In the event of crimes, the court of first instance was a county court. There was one county court for the entire Governorate of Estonia, and it was the

in the Russian Empire (1710–1917). – G. Martyn et al. (eds). *From the Judge's Arbitrium to the Legality Principle: Legislation As a Source of Law in Criminal Trials*. Berlin 2013, pp. 317–349. Although there were several fields in which the Baltic provinces had legislation of their own that differed from that of the so-called internal governorates of Russia, penal law was a judicial realm in which they remained in line with all the developments in Russian penal law, from the adoption of the 1845 code all the way through to the fall of the tsarist state.

³ For more on the multiplicity of acts in penal law, see M. Sedman. The historical experience of Estonia with the plurality of penal law acts. – *Juridica International* 2010/17, pp. 227–235.

⁴ Vysochaishii Manifest ob usovershenstvovanii gosudarstvennogo poriadka ['The manifesto on the improvement of state order']. – *Полное собрание законов российской империи* / *Polnoe sobranie zakonov rossiiskoi imperii* (hereinafter 'PSZ'), 26803, 17 October 1905.

⁵ Vysochaishie utverzhennye Osnovnye Gosudarstvennye Zakony ['The fundamental laws passed by the highest power of the Empire']. – PSZ, 27805, 23.4.1906. For discussion of fundamental rights in the Russian Empire and its Baltic governorates, see H. Siimets-Gross, M. Leppik. Estonia: First landmarks of fundamental rights. – M. Suksi et al. (eds). *First Fundamental Rights Documents in Europe*. Cambridge 2015, pp. 295–308. – DOI: <https://doi.org/10.1017/9781780685281.024>. There are researchers who want to see existence of fundamental rights already in the 1864 justice laws, which entered into force in the Baltic governorates in 1889. T. Anepaio. Justice Laws of 1889 – a step in Estonia's Constitutional development. – *Juridica International* 2005/10, pp. 150–160.

⁶ In Russia, fundamental rights have been treated in a unique way, which deviates from the traditional Western understanding even today. For more discussion, consult the work of L. Mälksoo. *Russian Approaches to International Law*. Oxford 2015. – DOI: <https://doi.org/10.1093/acprof:oso/9780198723042.001.0001>.

⁷ O. Kivistik. 'I know! This is the plumber I know!' Crimes of *lèse-majesté* in Imperial Russian criminal codes and in the practice of Tallinn County Court, 1906–1916. – M. Luts-Sootak, I. Kull, K. Sein, H. Siimets-Gross (eds). *Legal Pluralism – cui bono?* Tartu University Press 2018, pp. 76–93.

⁸ For a general historical perspective on courts-martial, see N.N. Polianskiĭ. *Tsarskie voennye sydy v borb'e s revoljutsiei* ['Tsarist Military Courts in the Anti-Revolution Struggle of 1905–1907']. Moscow 1958.

⁹ On the Russian court system in general, see S. Kucherov. *Courts, Lawyers and Trials under the Last Three Tsars*. Westport, Connecticut, 1953.

¹⁰ T. Anepaio (see Note 5); *idem*, Die Justizreform in der zweiten Hälfte des 19. Jahrhunderts in den Ostseeprovinzen – Russifizierung oder Modernisierung? ['The judicial reform in second part of 19th century in Baltic provinces – Russification or modernization?']. – *Acta Baltica: Liber Annalis Instituti Baltici* 1997/XXXV, pp. 257–272; *idem*, Kriminaalõiguse muutmisest 1889. aasta reformi käigus ['Changing of criminal law during the reforms of 1889']. – *Tractatus Terribiles*. Tallinn 2009, pp. 139–158.

above-mentioned one located in Tallinn.^{*11} Whilst crimes against the state were handled via the courts-martial, these were special courts that had jurisdiction only over servicemen, although in exceptional circumstances their purview encompassed civilians also.^{*12}

The situation that developed in these circumstances is an intriguing one. For a good understanding of it, the article provides an overview of the penal legislation that was valid in the Estonian territory in the early 20th century and imposed boundaries to freedom of speech and the press. Since these boundaries existed mainly in cases of so-called instigation of mutiny, these are the provisions that are analysed more thoroughly in the sections that follow. Separate attention is turned to the case law of the Tallinn County Court with regard to charges of instigation of mutiny, for examination of how these provisions were implemented in practice and to pinpoint the life situations in which the embryonic attempts of the tsarist regime to ensure modern fundamental rights may have fallen victim to the repressive penal legislation and policy of the same regime. We have deliberately left aside the case law of courts-martial and considered only the cases before general courts. The latter should be especially clear indicators of whether and how a state may execute various (legal) policies beyond the special conditions of exceptional circumstances addressed via various particular branches of law.

2. The legislative basis formed by diverse penal-law acts and codes

There were attempts at compiling a uniform criminal code even in the days of Tsar Alexander I, but, just as the codification attempts of that time remained unfinished^{*13}, so too did compilation of a coherent criminal code. The next step toward codification of criminal law was taken by Tsar Nicholas I. During his rule, compilation of the Digest of Laws of the Russian Empire (*Свод законов Российской империи*/Svod zakonov Rossiiskoi imperii) began. This collection consisted of 15 volumes, with penal-law provisions mostly drawn together in its last, 15th volume. In a pattern continuing from the earlier legislation of Russia, penal provisions were present also in other laws. It should be stressed in this connection that the Digest of Laws was aimed not at establishing new law but at collecting and organising what already existed.^{*14} In fact, substantial legal reforms and law-related innovations had been unambiguously forbidden by the conservative Tsar Nicholas. The sources, therefore, of the penal-law provisions in the 15th volume was the Conciliar Law Code of 1649 (*Sobornoe Ulozhenie*),^{*15} the ukases of Peter I^{*16}, and numerous individual statutes. Crimes against the state were collated into a chapter in Volume 15 of the Digest of Laws denoted as dealing with crimes against the state in line with 'the first two clauses'.^{*17} The Digest of Laws of the Russian Empire was ratified in 1832, and it entered into force on 1 January 1835. Only a decade later, however, it was joined by

¹¹ H. Schneider. *Kohtud Eestis: minevikus ja tänapäeval* ['Courts in Estonia: Past and Present']. Tartu 1994, p. 22.

¹² M. Sedman. Military penal law – not only for military personnel: Developments in Estonian penal law after the First World War. – M. Luts-Sootak, F. L. Schäfer, S. Osipova (eds). *Unity and Plurality of Law in the Legal History of the Baltic Sea Area* (Rechtshistorische Reihe 428). Frankfurt am Main 2010, pp. 262 ff.

¹³ On the codification attempts during the rule of Alexander, see M. V. Andreeva. U istokov kodifikatsionnykh rabot M. M. Speranskogo ['On the origins of the codification work of M. M. Speranskii']. – *Pravovedenie* 1983/1, pp. 64–71; S. V. Kodan. K istorii issledovaniia ugolovnogo zakonodatel'stva v doreformennoi Rossii. Istoriko-iuridicheskie issledovaniia pravovykh institutov i gosudarstvennykh uchrezhdenii SSSR ['On the History of the Codification of Criminal Law in Pre-reform Russia: Historical and Legal Studies of Legal and State Institutions of the USSR']. Sverdlovsk 1986, on pp. 102–116; A. I. Kolesnikov. Sistematizatsiia zakonodatel'stva v Rossii v nachale XIX v., provedennaia M. M. Speranskim ['Systematisation of legislation in the early 19th century as implemented by M. M. Speranskii']. – *Uchenye zapiski VNIISZ* 1966/8, pp. 29–41. Also see T. Borisova. Legislation as a source of law in late Imperial Russia. – G. Martyn et al. (eds) (see Note 2), pp. 295–315.

¹⁴ T. Borisova. Emergence of Russian national legal tradition: *Svod* versus *Ulozheniye* in nineteenth century Russia. – *Diritto @ Storia* 2009/8, online available at <http://www.dirittoestoria.it/8/Contributi/Borisova-Russian-National-Legal-Tradition.htm> (most recently accessed on 3.4.2018).

¹⁵ For more detailed discussion, with references to the earlier literature, see F. S. Kollmann. *Crime and Punishment in Early Modern Russia*. Cambridge 2012, pp. 10 ff. and *passim*. – DOI: <https://doi.org/10.1017/CBO9781139177535>.

¹⁶ On these, see P. S. Romashkin. *Osnovnye nachala ugolovnogo zakonodatel'stva Petra I* ['The Basic Principles of Criminal Law under Peter I']. Moscow 1942.

¹⁷ This was a direct reference to the statutes of Peter I. On 25 January 1715, Peter established penalties for crimes against the state on the basis of two clauses, dealing with 1) 'all ill-natured actions against the tsar or treason' and 2) 'rebellion'. See O nechinenii donosov, o podmetnykh pis'mah i o szhiganiu onykh pri svidetel'jah na meste ['On incoherence of denunciatory works, on anonymous letters, and on burning these in the presence of witnesses']. – PSZ, 2877, 25 January 1715.

the Penal Code, officially known as the Code of Criminal and Correctional Penalties (hereinafter ‘CCCP’), which can be considered the first systemised penal code of Russia.

The next real development came on 15 August 1845, when Tsar Nicholas I signed an ukase^{*18} for enforcement of the CCCP throughout almost the entire Russian Empire^{*19} from 1 May 1846. This included the three Baltic provinces: Estonia, Livonia, and Courland.^{*20} When the court reform of 1864 later established a separate penal code for courts of peace,^{*21} the associated provisions were removed from the CCCP, which was issued again in 1866 accordingly, in a new redaction.^{*22} The special committee acting on the orders of Tsar Alexander II concluded not long after this, in 1867, that, in fact, an entirely new penal code would be necessary.^{*23}

In 1881, Alexander III formed a commission^{*24} to modernise the norms of the CCCP pertaining to crimes against the state.^{*25} By 1895, that commission had managed to create a draft that covered the whole penal code, not just crimes against the state. Tsar Nicholas II approved the draft on 22 March 1903.^{*26} The resulting New Penal Code (hereinafter also ‘NPC’) did not take effect immediately; instead, the tsar promised to inform everyone at a future date as to when the New Penal Code would enter into effect.^{*27}

The heightened felt need to reform regulations on offences against the state remained topical even for Alexander III. To understand why, we must take a look at what the NPC contained. Its Chapter 3, on crimes against the state (titled ‘Бунт против верховной власти и преступные деяния против священной особы императора и членов императорского дома’/‘Bunt protiv verhovnoï vlasti i prestupnye deianiiia protiv sviashchennoï osoby imperatora i chlenov imperatorskogo doma’, for ‘mutiny against the highest power and criminal actions against His Imperial Highness and the members of the imperial house’), was the first part of the entire code to be enforced, entering into partial force on 7 June 1904.^{*28} By the relevant ukase, its articles 99–119, 121, 123, 126–132, and 134 became enforceable. Enforcement of the other articles of this chapter was to be implemented at an undetermined point in the future. These articles were followed in implementation by the parts on crimes against religion, with changes to the provisions of the CCCP, though not all of these parts actually contradicted the provisions of the NPC, on 14 March 1906.^{*29} Not long after

¹⁸ Ulozhenie o nakazaniiah ugovolnyh i ispravitel’nyh [‘The code of criminal punishment and corrections’]. – PSZ, 19283, 15 August 1845.

¹⁹ The CCCP did not enter into force then in Finland and Poland, which belonged to the Russian Empire. In Finland, the Swedish law book *Sveriges Rikes Lag*, from 1734, was valid until adoption of the Finnish penal code, in 1889, and in the Polish territories belonging to Russia, a separate penal code did not enter force until 1847, when it replaced the Polish code from 1818. The Russian CCCP did gain force, in parallel, in Poland, but this began only in 1876 and already in the redaction of 1866. For discussion of the status of special penal law in the Finnish and Polish territories, see N. S. Tagantsev. *Russkoe ugovolnoe pravo. Chast’ obshchaia. Tom I* [‘Lectures in Russian Criminal Law. General Part, Vol. 1’]. St Petersburg 1902, pp. 246–252. Under different conditions and with certain restrictions, the CCCP applied also in Siberia, Central Asia, and Caucasia.

²⁰ Since the official and court language of the Baltic provinces was German, an official German translation was published straight away: *Gesetzbuch der Kriminal- und Korrekstionsstrafen: nach dem russischen Originale übersetzt in der zweiten Abtheilung Seiner Kaiserlichen Majestät Eigener Kanzlei*. St Petersburg 1846.

²¹ Ustav o nakazaniiah nalagaemyh Mirovymi Sud’iami [‘Charter of punishments imposed by justices of peace’]. – PSZ, 41478, 20 November 1864.

²² *Svod zakonov Rossiiskoi imperii* [‘Digest of Laws of the Russian Empire’], Vol. XV (Svod zakonov ugovolnyh) [‘Collection of Penal Laws’], Book I: Ulozhenie o nakazaniiah ugovolnyh i ispravitel’nyh [‘Code of Criminal and Correctional Penalties’]. St Petersburg 1866. An official German translation of this was published also: *Gesetzbuch der Criminal- und Correctionsstrafen, nach dem russischen Originale des ersten Buches des fünfzehnten Bandes (Ausgabe vom Jahre 1866) des Allgemeinen Reichs-Gesetzbuchs, übersetzt in der Zweiten Abtheilung Seiner Kaiserlichen Majestät Eigener Canzellei*. St Petersburg 1866.

²³ N. S. Tagantsev. Ulovnoe ulozhenie 22 marta 1903 [‘Penal Code of 22 March 1903’]. St Petersburg 1904, pp. XIII f.

²⁴ On the commission and its functions, see S. A. Tul’skaia. *Moskovskoe iuridicheskoe obshchestvo (1865.–1899. G.). Iz istorii rasvitiia prava i pravovoi nauki Rosii vtoroi poloviny XIX veka* [‘Moscow Legal Society (1865–1899). About the History of the Development of Russia’s Law and Legal Science in the Latter Half of the 19th Century’]. Moscow 2011, p. 158 f.

²⁵ V. M. Kleandrova et al. *Razvitie russkogo prava vo vtoroi polovine XIX – nachale XX veka* [‘The Development of Russian Law in the Second Half of the 19th and Early 20th Century’]. Moscow 1997, p. 177.

²⁶ Vysochaishie utverzhdennoe Ulovnoe Ulozhenie [‘The Penal Code approved by the Highest Power of Empire’]. – PSZ, 22704, 22 March 1903.

²⁷ Ob otverzhenii Ulovnogo Ulozheniia [‘On the terms of the Penal Code’]. – PSZ, 22703, 22 March 1903.

²⁸ O nekotorykh izmeneniiah v poriadke proizvodstva po delam prestupnykh deianiiakh gosudarstvennykh i o primeneniikh k onym postanovlenii novogo Ulovnogo Ulozheniia [‘On certain changes to the procedure for development of acts on criminal law and on the application of these provisions to the New Penal Code’]. – PSZ, 24732, 7 June 1904.

²⁹ O soglasovanii nekotorykh postanovlenii ulovnogo zakonodatel’sstva s ukazom 17 apreliia 1905g ob ukreplenii nachal veroterpimosti i o vvedenii v deistvie vtoroi glavy novogo Ulovnogo ulozheniia [‘On the coordination of certain decisions

that, amendments (brought into force with the same law) related to smuggling were made, on 27 March 1906.^{*30} There were then seven modified articles issued that dealt with solicitation of prostitution and trafficking in women, released on 25 December 1909,^{*31} and two modified articles on copyright infringement, issued on the 20 March 1911^{*32}. Things never went much further than this, though: the NPC was never fully implemented. Even when the new provisions from the special part of the code were supposed to be in force in the areas of law decreed as now established, the general part of the NPC was not in force. Hence, the provisions of the general part of the CCCP had to remain valid. At the same time, some of the provisions of the general part of the NPC were to be implemented nonetheless, because the types of punishments and the system established in NPC differed from those under the CCCP.

The implementation act did not set out the precise relationship between the CCCP and NPC provisions or indicate which, if any, provisions of the CCCP should be considered cancelled. The ukase stated only that proceedings for crimes against the state must be based on the valid legislation on judicial hearings. Although the intent behind the preparation of the new code was to harmonise penal provisions, the code's piecemeal entry into force and the accompanying lack of clear prescriptions caused even more confusion in cases that involved conflict of laws. This situation has been described succinctly and accurately by Jaan Sootak: 'In a sense, the new code had taken Russia from bad to worse.'^{*33} According to Estonian lawyer Karl Grau, however, the New Penal Code was still a huge step forward from the CCCP, in the sense of both legal technical solutions and harmonisation of the penal legislation. Grau concluded that the New Penal Code was clearer, eliminated many of the archaisms, was less strict, and was relatively short.^{*34} We will next consider whether his assessment could be agreed with in the case of the provisions pertaining to incitement to mutiny.

3. Regulations on inciting to mutiny in the Russian Empire's penal codes

The target of a crime against the state was considered to be the security of the state as a whole. For an act to be deemed a crime against the state, this was a compulsory element. Offences committed against a single part of the system of state power or a specific state body without being aimed at damaging the state as a whole were not considered crimes against the state.^{*35} Therefore, to be punishable as incitement to mutiny, an act had to be directed, first and foremost, at the national integrity and security of the Russian Empire.

Incitement to mutiny could take place in various ways and for any of various purposes, and the offence had to be qualified on that basis. In the CCCP, incitement to mutiny was dealt with in Article 251. Under Article 251 (1) of the CCCP, there were punishments in place for people who disseminated written or printed advertisements, pictures or other works when the aim of said activity was to incite a mutiny or insubordination to state power. The sentence was stripping the person of all class rights and sending him for 8–10 years of hard labour in a stockade. Article 251 (2) of the CCCP laid down the same punishment for people who maliciously spread works inciting to mutiny or insubordination to state power, took part in that crime, or gave ill-intentioned public speeches inciting to mutiny or insubordination. Then, Article 251 (3) specified punishments for people compiling, showing, or advertising the works referred to in Article 251 (1) in the absence of ill intent. A case of this nature was defined as still expressing intention to incite a mutiny but

of the criminal legislation with the decree of 17th April, 1905 on strengthening the beginnings of religious tolerance and on the enactment of the second chapter of the New Penal Code']. – PSZ, 27560, 14 March 1906.

³⁰ Po proekty pravil o nakazaniiah i vsyskaniiah za kontrabandu i o poriadke proizvodstva del o kontrabande ['Activities under the draft terms on penalties, including penalties for smuggling and handling of smuggling cases']. – PSZ, 27616, 27 March 1906.

³¹ O merah k presecheniiu torga zhenshzhinami v tseliah razvrata ['On measures against bargaining of woman for purposes of debauchery']. – PSZ, 32855, 25 December 1909.

³² Ob avtorskom prave ['About copyright']. – PSZ, 34935, 20 March 1911.

³³ J. Sootak. *Veritasust kriminaalteraapiani. Käsitlusi kriminaalõiguse ajaloost* ['From Vendetta to Criminal Therapy. Treatises on History of Criminal Law']. Tallinn 1998, p. 209.

³⁴ K. Grau. Tarvidus Uue Nuhtlusseaduse maksmapanemiseks Eesti Vabariigis ['The need to assert the New Penal Code in the Republic of Estonia']. – *Õigus* 1921/5-6, pp. 97–101, on p. 98.

³⁵ Ugolovnoe ulozhenie. Ob ' 'iasneniia k proektu redaktsionnoi kommissii ['The New Penal Code. Explanation to the draft of Editorial Commission']. St Petersburg 1895, p. 7.

was to be punished instead by imprisonment in a stockade for anywhere from a year and four months to two years and eight months, together with deprivation of certain class rights under the terms of Article 50 of the CCCP³⁶. The specifications continued with Article 251 (4), on sentencing of a person in possession of anti-state advertisements, works, or pictures whose activity did not indicate malicious dissemination when it was not proved that the materials were possessed by consent of the government. In situations of this sort, a court could impose a sentence of detention for seven days to three months. After the sentence was served, the person remained under police surveillance for 1–3 years. Similar provisions were made in articles 129 and 130 of the NPC, with the former establishing a sentence for people who, in a public act of speech, read or performed works (including presenting or making drawings), distributed them, or submitted them for public display when the aim was incitement to actions, of various types, against the state. This article of the NPC listed six conditions under which the deed could be qualified:

- 1) incitement to mutiny or treason;
- 2) incitement to overthrowing the regime;
- 3) incitement to subordination to the law, regulation system, or legal power;
- 4) incitement to commit a serious crime, except in the cases specified in items 1–3, above;
- 5) inciting an official to violate his military duties; and
- 6) incitement of hostility between social classes or between superiors and subordinates.

The punishment for violations of types 1 and 2 was deportation, that for violations of types 3 and 4 was a sentence of up to three years in a reformatory, violators under item 5 were to be sent to a reformatory, and violations of type 6 earned the person committing them a prison sentence.

In addition, Article 129 of the NPC articulated two aggravating circumstances: 1) incitement to use a method potentially dangerous to many people and 2) commission of a serious crime as a result of the incitement. When one of these conditions was met in cases covered by item 1 or 2 above, the sentence changed: the offender was sentenced to up to eight years' hard labour. In contrast, when one of the aggravating conditions existed in cases falling under item 3, 4, or 6, the offender was to remain at a reformatory indefinitely.

The elements necessary for an act to be deemed incitement to mutiny under Article 129 were considered present even when the person intended to commit the act but had no specific objective therein. First and foremost, this meant that the person distributing the material had to have understood that this material was prohibited by law, even if not necessarily planning or wishing for particular consequences. The Governing Senate³⁷ stated that material inciting to anti-state offences was criminal propaganda.³⁸ On 16 October 1906, the Governing Senate concluded that works referred to in Article 129 of the NPC need not have been actually created by the offender. The elements necessary for existence of the crime were deemed present also when the problematic text was rewritten from somewhere else and later published. In all cases, however, it was important to ascertain whether the person was aware of the unlawfulness of the text's content.³⁹

Article 130 of the NPC, in turn, set out penalties for acts committed non-publicly. According to Article 130 (1), it was possible to charge a person who non-publicly disseminated teachings or views that instigated:

- 1) mutiny or treasonous activity;
- 2) overthrow of the regime;
- 3) insubordination to the law, regulations, or legal power; or
- 4) commission of a serious crime, except with regard to the deeds specified in items 1–3.

³⁶ In the case of noblemen, one was forbidden to enter into the service of the state or society, vote, or be elected to an official position (even as a trustee appointed by the Assembly of Noblemen). A non-clergyman was prohibited from being ordained as a cleric, while a clergyman was to be expelled from the clergy. For those classed as citizens and merchants, there was a prohibition from taking part in city council elections or being elected to an official position. Citizens of all other classes were prohibited from participating in city council elections and from being elected to an official position.

³⁷ The Governing Senate of the Russian Empire, 'Правительствующий сенат'/Pravitel'stviushchii senat), established in 1711, was the highest administrative body and also became the highest court. The Governing Senate served at the pleasure of the tsar. From 1864, it held the role of highest cassation body over the reformed courts. See A. N. Filippov. *Istoriia Pravitel'stviushchego senata za dvesti let. 1711–1911* ['The History of the Governing Senate over 200 Years, 1711–1911'], Vol. 1. St Petersburg 1911.

³⁸ Po delu deistvitel'nogo statskogo sovetnika Leonida Hadskego i kollezhskogo assessora Artemiia Kotelnikova. 14. marta 1906. goda. – Reshenii ugolovnogo kassatsionnogo departamenta Pravitel'stviushchago Senata ['The case of the state council Leonid Hadske and college assessor Artemi Kotelnikov. March, 14th 1906. The decision of the criminal cassation department of the Senate']. St Petersburg 1906, p. 17.

³⁹ Po delu Valentina Kozhevnikova. 16. oktiabrya 1906. goda – Reshenii ugolovnogago kassatsionnogo departamenta Pravitel'stviushchago Senata ['The case of Valentin Kozhevnikov, October, 14th 1906. – The decision of the criminal cassation department of the Senate']. St Petersburg 1906, p. 48.

For someone to be charged with dissemination of these teachings and views, it was important that it have taken place among farmers, servicemen, workers, or people who did not mentally resist such opinions and whose incitement might have been dangerous to the state. Although at first sight the list above is a closed and exhaustive one, the provision leaves enough room for interpretation that one could consider it to encompass parts of society not directly mentioned. In further terms, the article's Section 2 provided for two aggravating circumstances:

- 1) the instigation encouraged use of a method that posed a threat to many people and
- 2) a serious crime was committed as a result thereof.

The NPC also established the elements for existence of an offence in circumstances wherein the act was not carried out in full. By Article 132 (1) of the NPC, a person could be sent to a stockade for up to three years when having prepared the works or pictures referred to in Article 128 or 129 with the intention of distributing or publicly displaying them but not having carried through on the latter. The same sentence applied, under Article 132 (2) of the NPC, when the works and pictures referred to in Article 132 (1) were copied, stored, and transported to a foreign country yet did not end up getting disseminated or publicly displayed. In principle, Article 132 could be seen as laying out the defining elements of an attempted offence.

In comparison to the CCCP, the NPC contained more legal provisions regulating crimes against the state. This may have been due to the historical context: the NPC came at a tense time in the history of the Russian Empire, when the revolutionary movement was gaining momentum^{*40} and a need was found for updating and supplementing legal terms that address crimes against the state. Accordingly, the NPC contained numerous new legal provisions that had not been present in the CCCP; in addition to the provisions on incitement to mutiny already presented, it specified punishments for organising and participating in various illegal public gatherings (addressed in articles 120–125). Thus, the penal law also set in place extremely narrow and strict limits to the constitutionally declared right of assembly. On the other hand, the descriptions of elements constituting an offence were more detailed in the NPC than in the CCCP and hence contributed to ensuring legal certainty. Also, the sentences listed in the NPC were more lenient than the ones in the CCCP.

Regardless of the confusion and multiplicity of the sources of penal law, judges needed to do their everyday work and administer justice. This paper is not the first one to address how the Tallinn County Court handled the legislative situation described above that obtained after the partial entry into force of the NPC. Previous studies have indicated that the judges handling cases of crimes against religion looked to both the CCCP and the NPC, opting for whichever provision entailed a stricter sentence.^{*41} In respect of offences related to insults to His Majesty, however, the courts found sources only in the provisions of the NPC, and the sentences were relatively lenient.^{*42}

4. Judgements of the Tallinn County Court in cases related to incitement to mutiny

We will now examine the decisions of the Tallinn County Court in cases related to incitement to mutiny in more detail. In the time of the validity of the NPC, from 1904 until the tsarist empire came to an end in 1917^{*43}, the Tallinn County Court made six decisions on cases related to incitement to mutiny. In addition, the records of two minors accused of such crimes reached this court.

⁴⁰ For material on the immediate socio-political context of the time of the NPC's enforcement, see E.H. Judge. *Plehve: Repression and Reform in Imperial Russia, 1902–1904*. Syracuse, New York, 1983.

⁴¹ O. Kivistik. 'A judge is faced by two gods, two justices, and a bitter need to serve one or another, or maybe even both at the same time.' – *Juridica* 2012/III, pp. 169–175. In analysis of the case law regarding offences against religion, it appeared that, although the aim for the NPC was to regulate offences against Church property as regular criminal offences against property, it did not work that way in practice, and in four judgements analysed, the judge implemented terms related to qualified elements of stealing Church property that had been established in the CCCP and provided for a stricter sentence.

⁴² O. Kivistik (see Note 7).

⁴³ Although penal laws from tsarist times remained in force in the Republic of Estonia declared in 1918, the courts and the court system were already new. Also the regime and the constitution of the new state principally differed from the earlier one.

The revolutionary events of 1905^{*44} awakened the political masses and stirred populist movements. In Estonia, the weakening of the empire was utilised by local political figures who used the ideologically oriented newspapers of people who had political mainstream leanings – *Teataja*, *Postimees*, and *Uudised*.^{*45} Konstantin Päts, editor-in-chief of the Tallinn-based paper *Teataja*, initiated a campaign of memoranda with his editorial board to demand autonomy for Estonia of a similar nature to what Finland already enjoyed as a part of the Russian Empire. Regrettably, the aspirations for local autonomy did not spark something greater, and in December 1905 the central authorities launched an attack. Päts's newspaper was closed down, and Estonian leading political figures were in danger of being arrested.^{*46} Päts and other central figures of local politics found out about the arrest plan and hence had a chance to escape, heading abroad.^{*47} While in exile in Switzerland, they happened to find out by way of a Russian newspaper that a court-martial had sentenced Päts to death for his rebellious activities. This decision had been taken by Major-General Vladimir Bezobrazov in a court-martial of the punitive troop, but no official documents on the events have been preserved. They were lost, fell victim to accidental fire, or were deliberately destroyed.^{*48} As alluded to above, in addition to the NPC and still partially valid CCCP, the 1868 Military Penal Code was still in force.^{*49} As a rule, courts-martial had the jurisdiction to settle cases under the Military Penal Code when the accused was a serviceman. However, by way of exception, also a private person could end up subject to trial by court-martial if having committed the alleged offence in a territory affected by a state of war or state of emergency. Indeed, a state of war or of emergency was not an unusual situation in the tsarist empire or, for that matter, in the Republic of Estonia that followed, as a legal heritage of empire.^{*50} Undermining the national integrity of the Russian Empire by demands for autonomy of provinces had to be deemed a crime serious enough to be heard in court-martial without the presence of the accused. The above-mentioned court-martial decision meant that Päts needed to hide longer from the Russian police authorities, and in 1907 he left Switzerland not for Estonia but for the Grand Duchy of Finland, which had the advantage for him of being near Estonia and close to the capital of the empire. He spent the next three years there. During that time, utter confusion arose around the death sentence – it turned out that the court-martial had exceeded its authority and that many documents had been either lost or destroyed in fire. The only remaining document in evidence against Päts was a letter and appeal by Tallinn workers' representatives that had been published in *Teataja*^{*51}, which the prosecutor's office had concluded contained expressions inciting to mutiny. However, publishing such writings was grounds for not a death sentence but a significantly more lenient punishment, in fact.^{*52} Under the NPC^{*53}, incitement to mutiny could have led to exile or a prison sentence. Since there was no longer so significant a sentence keeping Päts away from Estonia, he voluntarily went to Tallinn to stand before an investigator in 1909.^{*54} The Tallinn County Court took up the case of

⁴⁴ See, for instance, A. Ascher. *The Revolution of 1905: Russia in Disarray*. Stanford, California 1988; R. Weinberg, L. Bernstein. *Revolutionary Russia: A History in Documents*. New York 2011. About revolutionary events and movements in the Baltic provinces, see T.U. Raun. *Estonia and the Estonians*, updated 2nd ed. Stanford, California 2001, pp. 82 ff.; *idem*, *The Revolution of 1905 in the Baltic provinces and Finland*. – *Slavic Review* 1984/43, pp. 453–467. – DOI: <https://doi.org/10.2307/2499401>; E. Benz. Die Revolution von 1905 in Livland, Estland und Kurland [‘The Revolution of 1905 in Livland, Estonia, and Courland’]. – *Acta Baltica* 1990/XXVIII, pp. 19–167, 1991/XXIX–XXX, pp. 117–196; T. Karjahärm. *1905. aasta Eestis: massiliikumine ja vägivald maal* [‘The Year 1905 in Estonia: Mass Movement and Violence in the Countryside’]. Tallinn 2013.

⁴⁵ S. T.U. Raun. Violence and activism in the Baltic provinces during the Revolution of 1905. – *Acta Historica Tallinnensia* 2006/10, pp. 48–59.

⁴⁶ T. Karjahärm (see Note 44); *idem*, *Ida ja lääne vahel. Eesti-Vene suhted 1850–1917* [‘Between East and West. Relationships between Estonia and Russia 1850–1917’]. Tallinn 1998.

⁴⁷ K. Päts. *Minu elu. Mälestusi ja kilde eluloost* [‘My Life: Memories and Pieces of Life’], edited by H. Runnel. Tartu 1999, p. 51.

⁴⁸ T. Karjahärm. *Vabameelne opositsionäär Konstantin Päts* [‘Liberal Opposition Konstantin Päts’]. Tartu 2018, p. 208.

⁴⁹ Voinskiĭ ustav o nakasaniiah [‘Military Charter of Penalties’]. – ПСЗ, 1st ed., Vol. 43, Part 1 – 45811, 5 May 1868.

⁵⁰ For the years 1918–24, see M. Sedman (see Note 12), pp. 268 ff.

⁵¹ Töökomiteede manifest [‘Manifesto of works committee’]. – *Teataja*, No. 263 / 5 December 1905.

⁵² For further discussion, consult E. Laaman. *Konstantin Päts. Poliitika- ja riigimees* [‘Konstantin Päts: Politician and Statesman’]. Stockholm 1949, p. 62.

⁵³ On the constituent elements of crimes against the state and the sentences for such offences in the NPC, see §3 of the same article.

⁵⁴ H. Walter. *Ausalt & avameelselt. Eesti suurmeestest: Johan Laidonerist, Jaan Poskast, Konstantin Pätsist, Jaan Tõnissonist* [‘Honestly and Frankly about Estonia's Great Men: Johan Laidoner, Jaan Poska, Konstantin Päts, Jaan Tõnisson’]. Tallinn 1990, p. 41.

Päts and *Teataja*, wherein Päts as editor-in-chief of the newspaper was accused of enabling publishing of articles, poems, and advertisements related to the ‘Estonia meeting’^{*55} and a description^{*56} of the bloodbath of 16 October 1905.^{*57} The most serious accusation was a censor’s complaint regarding a call for a strike by representatives of workers in Tallinn^{*58}. On 10 December 1905, the Court of Appeal of St Petersburg had decided to seize issue 263 of *Teataja* and stop the publication of the newspaper until the court could pass judgement in consideration of ‘the extraordinary relevance of the criminal activity’.^{*59}

On 4 February 1910, Päts was interrogated.^{*60} He was accused of enabling distribution of materials inciting to mutiny and insubordination to the legislative authority. He as the editor was accused also for publishing issue 263 of *Teataja* on 5 December 1905, which included a letter of the workers’ representatives to the editorial board. According to the accusation, the letter called for overthrow of the government, extraordinary summoning of the Parliament (State Duma), and not paying state taxes. According to the statement of charges, the case involved two distinct offences: incitement to overthrowing of the government and incitement to non-payment of state taxes. In addition, Päts was accused of publishing *Teataja*’s issue 257, with an article that featured workers’ demands for calling of an extraordinary meeting of Tallinn workers’ representatives and, in connection with that, turning Russia into a democratic republic.^{*61} The article contained, in addition, a threat that the proletariat of Tallinn, in solidarity with the proletariat of the entirety of Russia, would take ‘all possible measures’ until all traitors and others acting against the interests of the people ‘are overthrown, together with the autocracy that has reached its natural end’.^{*62}

Hence, Päts was accused firstly of public distribution of materials inciting to overthrow of the regime under Article 129 (1) 1) of the NPC. Under that article, Päts was accused of distributing or publicly displaying drawings or other works that incite rebellious or treasonous activity that was punishable by exile. The description of the elements necessary for this offence was the same as what was valid under Article 251 (1) of the CCCP, but the punishment dictated by the CCCP would have been stripping of all class rights and 8–10 years of hard labour in a stockade. On a normative level, the NPC had brought more lenient sentences.

For that offence, the court sentenced Päts to indefinite exile under Article 17^{*63} of the NPC. Since the court found mitigating circumstances connected with Päts’s activities, this was replaced with one year of imprisonment.^{*64} Regrettably, the court did not specify the nature of the mitigating circumstances. It is possible that some role was played by Päts’s own proactive steps and voluntarily surrendering himself to the investigator.

The judgement specified the second offence of Päts also: incitement to non-compliance with the law under Article 129 (1) 3) of the NPC. The relevant terms were set out in Article 129 (1) 3) of the NPC, which established a sentence of up to three years at a reformatory. The exact meaning of such a sentence was specified in Article 18 of the NPC.^{*65} Since the court identified mitigating circumstances in Päts’s activities in connection with this offence too, the sentence was replaced by three months of imprisonment.

⁵⁵ A meeting was supposed to be held on 11 December 1905 in the rooms of the Estonia Society, but it was decided to move this to the Volta factory. In addition to workers, representatives of rural municipalities arrived. On the night after the meeting, squads of workers left Tallinn and went on to loot and burn down manors.

⁵⁶ Tallinna sündmused [‘Events in Tallinn’]. – *Teataja*, No. 226 / 18 October 1905, p. 1.

⁵⁷ On 16 October 1905, a bloodbath took place on the New Market of Tallinn, where soldiers opened fire at a peaceful rally, killing 94 people and injuring 200 (8,000–10,000 people had come to the rally).

⁵⁸ Tallinna uudised [‘News of Tallinn’]. – *Teataja*, No. 257 / 28 November 1905, p. 2.

⁵⁹ Peterburi kohtupalati otsus Teataja sulgemise kohta [‘Decision of the St Petersburg Appeal Court on the closing of *Teataja*’]. Estonian National Archives (hereinafter ‘ENA’) EAA.52.1.556, p. 3. See T. Karjahärm (see Note 48), pp. 197 ff.

⁶⁰ Delo po ovbineniju redaktora gazety “Teataja” K. Pjats v opublikovanii vozzvanija Revel’skogo Komiteta sotsial-demokratičeskoj rabočej partii s prizyvom k političeskoj abastovke [‘The case on the accusation of the editor of newspaper *Teataja* K. Päts in the publication of the appeal of the Revel Committee of the Social Democratic Labor Party with an appeal for a political strike’]. ENA EAA.105.1.7974, p. 41.

⁶¹ Kirjad toimetusele. Kaaskodanikkudele! [‘Letters to the Editor: To fellow citizens!’]. – *Teataja*, No. 257 / 30 November 1905, p. 3.

⁶² *Ibid.*, pp. 4–5.

⁶³ Article 17 of the NPC stated: ‘The exile is indefinite. Convicted offenders shall be sent for exile to a designated territory that is determined every three years by the Minister of Justice and the Interior’.

⁶⁴ Delo po ovbineniju redaktora gazety “Teataja” K. Pjats v opublikovanii vozzvanija Revel’skogo Komiteta sotsial-demokratičeskoj rabočej partii s prizyvom k političeskoj abastovke [‘The case on the accusation of the editor of newspaper *Teataja* K. Päts in the publication of the appeal of the Revel Committee of the Social Democratic Labor Party with an appeal for a political strike’]. ENA EAA.105.1.7974, pp. 59–60.

⁶⁵ Article 18 of the NPC stated that a sentence in a reformatory shall last up to 1,5–6 years. Firstly, the convicted offenders are held in solitary confinement for 3–6 months, after which they are transferred to the general section of the prison. All

As to the extraordinary call for a meeting of workers' representatives that had been published in 1905 in issue 257 of *Teataja*, the court found no evidence supporting the contention that Päts was responsible for publishing the material, and he was acquitted under Article 5^{*66} of the CCCP. In this case, there was not an arbitrary choice between two penal codes. The general part of the NPC was not in force. Therefore, the judges needed to refer to the general provisions of the CCCP when sentencing offenders and to the special provisions of the NPC that articulated the elements constituting the relevant offences.

The court based its determination of the sentence on Article 5 of the CCCP and Article 60 of the NPC^{*67}, thereby concluding that the punishment should be an aggregate one and that the stricter sentence shall prevail. In this case, a one-year term in a stockade became nine months of solitary confinement. When the sentence was imprisonment in the stockade, the offenders did not have to work while imprisoned, while labour was among the additional obligations in cases of solitary confinement.

The judgement in the case of Päts and the reasoning laid out for the court's decision were relatively thorough, which may have been due to the fact that the accused was highly active politically and formerly editor of the newspaper *Teataja*. It is worth mentioning explicitly that the Tallinn County Court did not take into consideration the decision of the court-martial, on account of the paucity of evidence in its decision, and issued a significantly more lenient decision than had the court-martial.

A crime against the state was considered to exist also in a situation in which someone publicly distributed a work that incited hostility between social classes or between superiors and subordinates. One of the cases heard by the Tallinn County Court started with a notice^{*68} published by one of the mouthpieces of the working-class labour movement,^{*69} the newspaper *Kiir*. There was no author stated in the text, and the editor of the newspaper, A. Hanson, was held liable. On 30 January 1914, the Tallinn County Court issued a decision^{*70} that the text incited hostility between superiors and subordinates. The following statements were deemed to have indicated the above: 'The Waldorf factory found a way of improving conditions for the workers, thanks to which the work day is now 18–36 hours long'; 'The Waldorf factory is known for its occupational accidents that generally take place during overtime'; that 'the more cultured and aware workers are trying to find a way to get rid of the overtime work, while the management hold on to it tightly because this is a matter of life and death' and that said managers 'want to complete all the tasks during overtime, regardless of the blood and sweat, as long as the percentages produced by the capital would not go down'; that 'such torturing of human beings is in the flesh and blood [i.e., the very marrow] of the management'; that those 'who found out the names of the workers who refused overtime [...] imposed on them illegal fines in the amount of 50 kopecks for going home at the right time'; and that 'hopes and prayers have let the workers down, so they are forced to seek other possibilities for defending their rights'. The accusation stated that pointing out the workers' rights or directing attention to the inhumane treatment of the employees incites hostility and could bring about a mutiny among the workers. The court agreed; it considered publication of these statements sufficient to constitute the elements of the offence in question and sentenced Hanson, as the editor of *Kiir*, to five months in prison under Article 129 (1) 6) of the NPC.

The court did not, however, just punish Hanson. By its decision of 14 August of the same year^{*71}, publishing of the newspaper *Kiir* was forbidden under Article 129 (1) 2) and 6) of the NPC. The Tallinn County Court justified this mainly with the argument that the newspaper had repeatedly violated Russian legislation,^{*72} it had displayed an anti-government attitude, and the continuous dissemination of that paper

offenders must carry out the tasks appointed to them. For male offenders, also the option existed of being sent to perform tasks outside the prison.

⁶⁶ Article 5 of the CCCP stated: 'A person shall be acquitted of an offence committed without intention'.

⁶⁷ The NPC's Article 60 stated that a person, when having committed several offences, shall be sentenced on the basis of the article of law that provides for the stricter/strictest punishment.

⁶⁸ Töörhaliikumine. Streigid. Töökohtades: ... Pärnu ['Working class movement. Strikes. Workplaces: ...Pärnu']. – *Kiir*, No. 80 / 20 July 1913, p. 3.

⁶⁹ For the masthead of the newspaper, this was expressed by the title 'Töörhwa ajaleht', meaning 'Newspaper of the Working People'.

⁷⁰ Delo po obvineniiu redaktora gazety "Kiir" A. Ganson v pomeshchenii stat'i revoliutsionnogo soderzhaniia ['The case on accusation of the editor of the newspaper Kiir A. Hanson in the premises of the article of revolutionary content']. ENA EAA.139.1.4075, non-paginated file.

⁷¹ Delo po obvineniiu redaktora gazety "Kiir" A. Ganson v pomeshchenii statej revoliucionnogo soderzhaniia i narushenii cenzurnogo ustava ['The case on accusation of the editor of newspaper „Kiir“ A. Hanson in the premises of articles of the revolutionary content and violation of the censorship statute']. ENA EAA.139.1.4138, p. 17.

⁷² The court, however, did not specify the specific laws the newspaper had broken.

could dispose the people against the state. In addition, the activity of the newspaper was geared toward inciting hostility between classes or between superiors and subordinates. While Article 251 of the CCCP had already presented a similar offence, it did not separately refer to incitement of hostility between national groups or between superiors and subordinates. Certain social developments had taken place in the Russian Empire between 1845 and 1903 that allowed for emergence of stratification into classes, nations, etc. on new bases in addition to the societal order solely based on estate. The compilers of the NPC took these developments into account.

After *Kiir* was shut down, a new newspaper emerged that was similar to it, *Narva Kiir: Marxistic Newspaper of Working People*. That too would not remain untouched by the state's penal power. On 13 March 1914, the Tallinn County Court made a decision^{*73} by which the editor of the newspaper, Aleksander Puusepp, was found guilty in publishing the article on hard conditions for workers at Vladivostok in issue 4 on 25 September 1913.^{*74} The court found that the article incited hostility because it contained comments that 'the superiors keep moving the last hairs from the workers' backs', 'the superiors used lies to lure people to work', and 'the workers afterwards had to thank the tsar for the crumbs falling from the table'. The court found that this possessed the defining elements of incitement to mutiny and, accordingly, sentenced the editor to four months in prison under Article 129 (1) 6) of the NPC.

The next editor of *Narva Kiir*, Jakob Friedrichsmann, too was found guilty of incitement to mutiny, on 28 May 1914.^{*75} The court decided that the article 'Proletariaadi piiri tähendusest' ['On the Meaning of Limits to the Proletariat'] incited workers to resist their superiors. Friedrichsmann himself, in contrast, considered the text not to be unlawful; he held that it simply pointed out the hardships related to overtime work and the fact that superiors were unable to understand the difficult situation of the workers. In addition, the text mentioned unjustifiably low salaries of workmen and suggested that they could join together in a common organisation so as to resolve these issues. The court qualified this offence as incitement of hostility between superiors and subordinates under Article 129 (6) of the NPC and sentenced Friedrichsmann to a prison term of two months.

It is worth mentioning, however, that not all accusations of crimes against the state or incitement to mutiny ended in a guilty verdict. On 28 January 1909, the Tallinn County Court found that^{*76} printing 1,000 copies of a pamphlet titled 'Rahwa poliitika' ['Policy of the People'] in Estonian did not automatically constitute an offence against the state, although the accuser contended that the pamphlet contained a call for insubordination to the state power. In addition, it was claimed to have contained incitement to overthrow the Russian regime and violent seizing of power. The pamphlet was never published, because the police were able to seize it first. Having familiarised itself with the pamphlet, the court found the accuser's interpretation to be incorrect and concluded that the content of the material was not in actuality anti-state. According to the court, the message of the pamphlet was that workers need to take action not only for freedom but also for political power.

Cases of incitement to mutiny by minors were quite similar in their content. On 27 October 1904, the Tallinn County Court discussed the criminal matter of 16-year-old N. Deškin, who had distributed pamphlets criticising the state power and Tsar Alexander III.^{*77} The summary of charges mentioned, in addition, two other young men: M. Kalinin and V. Alekseejev. These two men whom Deškin had met were mentioned as people with whom the witness for the prosecutor's office had met but on whom there were no procedural documents on record. Deškin's record included an analysis of his comprehension abilities. This stated that the young man had a vocational education, he had worked for three years as a writer at a

⁷³ Delo po obvineniiu redaktora gazety "Narva kiir" A. Pusep v pomeschenii stat'i revoliucionnogo soderzhaniia ['The case on the accusation of the editor of the newspaper "Narva Kiir" A. Puusepp in the premises of the article of revolutionary content']. ENA EAA.139.1.4117.

⁷⁴ S. a., Vladivostoki tööorjad ['Labour Slaves at Vladivostok']. – *Narva Kiir. Marksistline töörahva ajaleht*, No. 4 / 25 September 1903, p. 4.

⁷⁵ Delo po obvineniiu redaktora gazety "Narva Kiir" J. Vinrigsman v napechatanii stat'i devoliucionnogo soderzhaniia ['The case on accusation of the editor of newspaper "Narva Kiir" J. Friedrichsmann in publishing article 'On the Meaning of Limits to the Proletariat' that has revolutionary content']. ENA EAA.139.1.4154, p. 26.

⁷⁶ Delo po obvineniiu redaktora-izdatelia gazety "Õigus" P. Ollak v izdaniis broshiury revoliucionnogo soderzhaniia "Narodnaia politika" ['The case on accusation of the editor-publisher of the newspaper "Õigus" P. Ollak in publishing pamphlet "Policy of the People" that has revolutionary content']. ENA EAA.139.1. 2538, pp. 15–16.

⁷⁷ Delo o revoliucionnoi agitacii i o rasprostranenii nelegal'noi literatury Mihailom Ivanovich Kalininym, N. A. Deshkinym i V. Alekseevym ['The case of revolutionary agitation and the dissemination of illegal literature by Mihail Ivanovich Kalinin, N.A. Deškin and V. Alekseev']. ENA EAA.105.1.11507, pp. 1–3.

correctional institution, and his relatives had stated that he is quite educated and mature for his age. Deškin was sent for a medical examination, but, regrettably, the records contain no documentation of the experts' findings or of the court's decision.

A prosecutor's statement of charges from 15 February 1907 reveals that 16-year-old Julius Davidov Grüntal was accused of possessing illegal literature that had been found in a search of his flat in Tallinn.^{*78} The young man claimed that the literature was not his. For some reason, the decision made mention of the fact that the father of the accused was 53 years old when the youngster was born, mentally unstable, and inclined to alcoholism. It was also deemed necessary to characterise the young man's state of health – he had nephritis and jaundice. The prosecution found that the accused had the necessary mental capacity and accused him of creating materials with the aim of inciting to mutiny, though without having a chance to spread them, relying in its arguments on Article 132 (1) of the NPC. The young man was sent for expert evaluation, but in this case too there are no documents attesting to the results of the evaluation or to the court's decision.

5. Conclusions

Fundamental rights enshrined in the Constitution or similar acts of legislation do not have much value if they cannot be enforced by the courts or if they simultaneously are considerably restricted by other legislation. The sword of penal power is especially sharp and may decisively slice through the protection of fundamental rights. This is precisely the example provided by the Russian Empire in its final decades: on the one hand, the freedom of speech and of the press had been established in Fundamental Laws (1906) as being in force, yet the penal law valid at the same time specified strict punishments for incitement to mutiny. Although the New Penal Code (1903) was more lenient than the old code had been, it contained new sets of constituent elements for an offence, based on the structure of an industrialising society under modernising influences. Hence, the putative guarantees notwithstanding, it was possible to deem actions not directed against the monarch or the regime to be incitement to mutiny.

In addition to the circumstances described above, this article has addressed cases before the Tallinn County Court of the Estonian governorate. Incitement to mutiny was exactly what editors of newspapers were charged with, yet in no case had their actions been aimed directly against the monarch or the monarchy. All of the court cases examined in this article had to do with workers' movement propaganda and demands for better work conditions and rights for workers. Although plants and factories were not state institutions, the workers' class struggle was still considered a crime against the state. The case law of the Tallinn County Court is a perfect example of how penal law enabled forcing the constitutionally declared freedom of speech and press into extremely tight boundaries by punishing the ones who actually dared to exercise these freedoms. While this piece has analysed the case law of only the Tallinn County Court, it should be remembered that in a state of emergency the court-martial too had a right to make decisions on freedom of speech and the press. Therefore, it cannot be ruled out that even more people than might be suggested by the foregoing discussion were found guilty in the Estonian governorate for asserting their fundamental rights during the era considered here.

Remarkably, there was not a single case in the body of Tallinn County Court case law in which the accusation was based on, for instance, Estonia's strivings for autonomy. This may be considered unsurprising, though, since the contemporary approach to penal law necessitated attacking the state as a whole or its integrity if one was to be considered guilty of a crime against the state, and the idea of Estonian autonomy was already widely discussed in those times. However, the jurisdiction of courts-martial cannot be ruled out in this connection either.

With the scope we selected – restricted to analysis of only the case law of a general court – the phenomena described above are clearly evident. Although studying the penal-law practice of the Russian Empire necessitates examining the court-martial case law also if one is to get the full picture, it is beyond doubt that said field paid even less attention to fundamental rights.

⁷⁸ Delo ob obnaruzhenii tiuka nelegal'noy literatory pri obyske doma na Sadovoi ulice v Revele ["The case of finding a bale of illegal literature while a house search in Sadovaya Street I Revel"]. ENA EAA.105.1.11508, pp. 5–6.



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Land Reform and the Principle of Legal Certainty:

The Practice of the Supreme Court of Estonia
in 1918–1933^{*1}

1. Introduction

Before gaining its independence on 24 February 1918, Estonia was part of the Russian Empire. The legal acts that were in force in Estonia before the gaining of independence were not democratic – for instance, in the Russian Empire’s legal system, people were separated into categories on the basis of their class and titles. Nonetheless, it would have been unrealistic to declare blanket annulment of all laws that were in place prior to gaining of independence. Because of this practical factor, the Estonian legislator had to deal with intensive legislative work not only in the first years of independence but throughout it. In addition to amending the laws valid under the Russian scheme or otherwise adapting them to the new democratic state, it was necessary to create a foundation for this new modern state and society. The foundation had to be created before particularities could be coherently tackled. That is why the most important task of this newly created republic was to build and ensure the persistence of a democratic state based on the rule of law. Accordingly, the number-one priority of the Estonian Constituent Assembly (the forerunner to the Estonian Parliament, or Riigikogu) was to develop the Constitution of Estonia. However, in Article 7 of the Estonian declaration of independence^{*2} it was stated that the Estonian Provisional Government had to instantly develop a draft for a law designed to resolve the ‘land question’ (this is dealt with in greater detail in Section 2 of the present article).

The first Constitution of Estonia was adopted in 1920.^{*3} The principle of rule of law was not written into it *expressis verbis*, but the elements of it were specified therein.^{*4} Also, contemporary legal literature referred to Estonia as a state where the rule of law prevails.^{*5} Nowadays, the principle of legal certainty is an obvious component of the rule of law. Legal clarity and legitimate expectation are the two main principles

¹ The research for this article was supported by the Estonian Research Council (IUT20-50).

² *Manifest kõigile Eestimaa rahvastele*. – RT 1918, 1 (in Estonian).

³ *Eesti Vabariigi põhiseadus*. – RT 1920, 113/114 (in Estonian).

⁴ E.g., the principle of legality was set forth in §3. Also the Constitution carried forth the idea of separation of powers.

⁵ ‘Free Estonia is a legal state. At least it has a great will to be one,’ wrote F. Karlson. Õigusteaduse oskussõnad [‘Terms of jurisprudence’]. – *Õigus* 1920/1, pp. 6–7 (in Estonian), on p. 6. ‘The most positive moment of the Constitution of 1920 is that there was a great impact of lawyers in its development. All life in Estonia was based on law, and rule of law was created with juridical rationalising of life,’ wrote E. Laaman. Isik ja riik Eesti põhiseadustes [‘Individual and state in the Constitutions of Estonia’]. – *Õigus* 1937/3, pp. 97–120 (in Estonian), on p. 104.

that form the substance of the principle of legal certainty. Even though the principle of legal certainty was not, in fact, provided for directly in any of the first three Constitution of Estonia documents (or in any other legal acts that were in force during the first era of Estonian independence), it bears repeating that contemporary lawyers did reference the principle of legal certainty as general guidance and the principles of legal clarity and legitimate expectation. For example, Stefan Csekey, a Hungarian lawyer but also with more local relevance as a professor at the University of Tartu, stated that there cannot be any room left for uncertainty of legal sources in a state that follows the principle of rule of law.^{*6}

The purpose of this article is to describe the legal basis for the historically praised but also criticised land reform of that era and how the nation's highest court, the Supreme Court of Estonia^{*7}, conducted its judicial review of the reform carried out over the time for which the first Constitution of Estonia was valid. Since Estonia stated from the very first day of its statehood that it follows the principle of rule of law, this paper constitutes an attempt to answer the question of how the rule of law was ensured in conditions of legal plurality, as it was questionable whether the principles of legal clarity and legal certainty were followed correctly.

How these two principles were applied in practice, which problems arose in connection with them, and how those problems were solved are examined through the lens of the example of the practice of the Supreme Court with regard to land reform. The cases discussed in this article are merely examples, and their selection was based on three considerations. Firstly, during the first era of independence, the judgements of the Supreme Court were rather short and displayed a laconic feel, whereas cases in which the court issued a longer judgement and presented fuller grounds for the decision made are analysed in this article. These give us more material to work with, and we can assume them to address pivotal matters. Secondly, in this set of cases, the Supreme Court expressed the same opinions several times; hence, it can be stated that the Supreme Court had developed a body of case law, which we can examine as such. Finally, these judgements all were made while the first Estonian Constitution remained in force unchanged^{*8}.

2. Land reform in Estonia

The agrarian structure of societies in Western Europe and in the Scandinavian states at the beginning of the 20th century can be considered modern and to be formed mainly of small estates owned by peasants. On the other hand, equivalent structures in Eastern Europe and to some extent in Central Europe still showed feudalistic elements. Irrespective of the agricultural reforms of the 19th century, signs of feudalism remained even in the Russian Empire's more central administrative regions. They were also evident in the empire's more westerly Baltic governorates, where the distribution of land was dominated by large estates owned by feudal lords. Although separation of farmsteads from manor lands had begun in the middle of the 19th century, with the farmland being disposed of accordingly, the manors still accounted for more than 50% of Estonian land at the turn of the century.^{*9}

With Estonia having declared itself to be a democratic state, land reform was inevitable. There are also some political factors that rendered this reform necessary. Firstly, the fledgling Estonian government needed to rally a loyal citizenry, and the only thing that the state had to offer at the time was land. Secondly, since the Estonian War of Independence was still in progress, it was necessary to attract men to fight for the new state. Giving soldiers a piece of land was quite good motivation for military service.

⁶ S. Csekey. *Seaduste väljakuulutamine Eestis* ['The announcement of laws in Estonia']. – *Õigus* 1926/7, pp. 177–200 (in Estonian), on p. 179.

⁷ In addition to numerous other elements, a new state would require its own court system. In Article 1 of the Estonian declaration of independence, it was stated that all citizens of the independent entity would receive protection from the courts in Estonia. Article 4 specified that among the tasks of the Estonian Provisional Government would be to create court-related institutions. The Supreme Court of Estonia, which was to be the highest court in the hierarchy, was created in 1919 by means of a law dealing specifically with the Supreme Court (*Riigikohtu seadus*. – RT 1919, 3). Even though the first members of the Supreme Court were appointed in October 1919, this institution started its work in reality on 14th January 1920, when the first meeting of the General Department of the Supreme Court was held at Tartu's city hall. The Supreme Court of Estonia was composed of the Civil Department, Criminal Department, Administrative Department, and General Department.

⁸ *Eesti Vabariigi põhiseaduse muutmise seadus*. – RT 1933, 86; *Eesti Vabariigi põhiseadus*. – RT 1938, 71.

⁹ T. Pool. *Maauuendus Eestis ja selle tulemusi* ['Land renewal in Estonia and its results']. – *Fenno-Ugrica* (proceedings of the Finno-Ugric cultural congress, *Soome-Ugri kultuurkongress*) Tallinn 1936, pp. 1–41 (in Estonian), on p. 5.

There are many examples of Eastern European states carrying out land reforms in the years following World War I.^{*10} The general purpose was the same across all these reforms: to bring an end to large estates, divide the land into smaller estates, and give those pieces to peasants. The way of carrying out these reforms, however, was unique to each state. One example can be seen in the degree of radicalism in expropriating lands: this could differ greatly between states, and different means of redistribution followed.

In 1919, the Constituent Assembly adopted the Land Law Act.^{*11} With this act, all the manor lands were expropriated to state ownership.

The land reform itself and the acts of law that regulated it were considered to be of a public-law nature. At the same time, this reform was a radical intervention in one of the core institutions of private law, private property. With the Land Law Act of Estonia, 96.6% of the land of large estates held by manors were expropriated. In consequence, the Estonian land reform is considered to be one of the most radical land reforms of its time in comparison with other young Eastern European countries that conducted land reforms then.^{*12}

Even though Estonian literature usually considers the passage of the Land Reform Act in 1919 to mark the starting point for the Estonian land reform, one can look further.^{*13} In fact, one of the main authors of the Land Reform Act, Theodor Pool,^{*14} stated that the first legal basis for talking about the Estonian land reform dates from 1917, when the Russian Provisional Government issued a regulation by which all further transactions involving land were suspended. At first, this regulation applied to Estonia as a part of the Russian Empire, but the Estonian Provisional Government soon declared it to be valid also in independent Estonia.^{*15} While the Land Law Act was not adopted until 1919, preparatory actions had been carried out before this.

Even if one considers only legal acts that were passed during Estonia's actual statehood, the first legal act that regulated land reform came before the Land Law Act. This was the 1918 regulation on bringing the manors under the state's control.^{*16} With this act of law, all the lands that were part of manors, including forests, were placed under the control of the respective local authority and ownership of all the state manors was transferred to the Estonian state. Manors were taken into state control even before the Constituent Assembly had made the decision as to how land reform should be carried out.^{*17} Just before passage of the Land Law Act, knights' manors were admitted to state property.^{*18}

Another reason the Estonian land reform is considered to be among the most radical of its kind is that the manors and manorial lands were expropriated all at once and without any compensation.^{*19} Whether the land reform in Estonia was necessary and the procedure applied for it were even discussed in the international arena, with former landowners filing complaints of various sorts with the League of Nations. These complainants emphasised the illegitimacy of the Land Law Act at first and later stressed that there had not been any compensation for the expropriation. They supported their arguments by referring to the

¹⁰ In addition to Estonia, land reforms were carried out in Latvia, Finland, Lithuania, Poland, Hungary, Romania, Greece, Bulgaria, Czechoslovakia, and Yugoslavia. W. Roszkowski. *Land Reforms in East Central Europe after World War One*. Warsaw: Polish Academy of Sciences Institute of Political Studies 1995, p. 5.

¹¹ *Maaseadus*. – RT 1919, 79/80 (in Estonian).

¹² J. Janusson. Maareformi teostamine 1919–26 [‘Conducting the land reform of 1919–26’]. – *Eesti statistika* 1928 / 76 (3), pp. 171–195 (in Estonian), on p. 171.

¹³ E.g., F. Virma. *Maasuhted, maakasutus ja maakorraldus Eestis* [‘Land Relationships, Land Usage, and Land Disposition in Estonia’]. Tartu 2004 (in Estonian), p. 122, *passim*; A.M. Köll. *Peasants on the World Market: Agricultural Experience of Independent Estonia 1919–1939*. Stockholm 1994, p. 36, *passim*; T. Rosenberg. Eesti 1919. aasta maareform: võrdlus-jooni Ida- ja Kesk-Euroopa maadega [‘The land reform in Estonia in 1919: Comparison with Eastern and Central European countries’]. – T. Rosenberg (ed.). *Künnivaod. Uurimusi Eesti 18.-20. sajandi agaraajaloost. (Õpetatud Eesti Seltsi Kirjad IX)* [‘Plowing furrows. Researches about the history of Estonian agriculture in 18th-20th century (Letters of the Learned Estonian Society)’]. Tartu 2013, pp. 401–417 (in Estonian).

¹⁴ Theodor Pool had a great impact on the implementation of the Estonian land reform, because he was the author of the draft for the Land Reform Act. As minister of agriculture at the time, he served as the principal guide for carrying out the land reform and as an adviser of peasants and tenants. See also M. Karelson. Theodor Pool–riigimees ja ühiskonnategelane [‘Theodor Pool – politician and public figure’]. – *Agraarteadus* 2000/13, pp. 17–19 (in Estonian).

¹⁵ *Ajutised administratiivseadused* (Temporary Administrative Laws). – RT 1918, 1 (in Estonian).

¹⁶ *Määrused mõisamaade kontrolli alla võtmise ja maaolude esialgse korraldamise kohta*. – RT 1918, 5 (in Estonian).

¹⁷ *Määrus mõisate korratu majapidamise ja laastamise asjus* (Regulation on Disorderly Manors and Pillaging). – RT 1918, 10 (in Estonian).

¹⁸ *Ajutise Valitsuse poolt vastuvõetud seadus rüütelkonna mõisate Eesti Vabariigi omanduseks tunnistamise kohta*. – RT 1919, 11 (in Estonian). The law was enacted by the Estonian Provisional Government for purposes of admitting the knights' manors to state property.

¹⁹ At least for the first five years of Estonian independence. This is considered further in Section 3 of the paper.

right to private property, which was provided for in the Constitution of Estonia itself.^{*20} With most of the previous landowners being of (Baltic) German heritage, they claimed furthermore that the state of Estonia had bullied them and discriminated against minorities. While the reactions of the various states belonging to the League of Nations differed, the final result was acceptance that, even though there were some conflicts between the principle of the right to private property and the Estonian land reform as carried out, the reform was inevitable and necessary in this form. It was concluded also that, because Baltic German were not the only ones whose land was expropriated, the action could not have been one of discrimination against minorities by the Estonian state.^{*21} Meanwhile, these problems were not addressed in the practice of the Supreme Court of Estonia. The Supreme Court focused instead on solving specific practical problems.

Since the people whose land was expropriated were not of Estonian heritage but mainly Baltic Germans, the land reform had become an international question quite quickly. Contributing to this attention is the fact that it was one of the most radical reforms of its day. It is clear that Estonia's land reform was not purely a domestic matter. At the same time, the land reform in practice started before the main questions surrounding it had even been sorted out within the national government. This shows how high a priority was given to dealing with this matter from the very dawn of Estonian independence.

3. Legal clarity and land reform

In total, the interwar years saw the implementation of 160 legal acts that regulated land reform in Estonia (about 140 of them were passed during the era in which the first Constitution of Estonia remained valid without any changes). Legislative efforts in this sphere were still in progress in 1939, which means that even 20 years after the beginning of the land reform, there were still issues that needed resolving. At the root of the problem is that these various amendments were made in practice over a rather short span of time.

Especially in the first years of the land reform, the legal acts were enacted rather hastily. Perhaps unsurprisingly therefore, they were not legally correct. For instance, regulations pertaining to taking manors into state control were passed in 1918, but the next issue of the *State Gazette* saw the same exact regulation published once more, with an accompanying note stating that the previously published text was an unedited version.

Attention was drawn to the problem even in contemporary journalism. It was opined that the essential legal acts were enacted too slowly (focus was on the not so essential and important acts) and that the cause of the problem was a lack of lawyers with legislative commissions.^{*22} The same unidentified author stated that, because there were no explanatory notes added to the legal acts, legal practitioners and courts had too large a workload since all the gaps needed to be overcome by interpretation.^{*23} Further complicating matters was the comparatively rapid passage of legal acts that, while necessary, addressed only minor problems or more technical questions (e.g., regulations that dealt with selling forest land to long-term tenants even though in 1921 it was impossible to be a long-term tenant)^{*24}.

Alongside the numerous legal acts that regulated the process of land reform, general acts were in force with parallel effect. The acts dealing with the land reform were *lex specialis*; hence, if these special acts set forth rules that were not in compliance with the general principles and regulations, then the special rules had to be followed, and *vice versa*.^{*25} If the Next, we consider a case from the year

²⁰ The Constitution of the Estonian Republic's §24 states: 'The right of private property is guaranteed in Estonia to every citizen. Without the owner's consent it can be expropriated only in the common interest in accordance with the corresponding laws and in the ways foreseen in the laws.' *Eesti Vabariigi põhiseadus*. – RT 1920, 113/114, 243.

²¹ See also V. Made. *Külastajena maailmapoliitikas. Eesti ja Rahvasteliit 1919-1940* [As a Guest in World Politics: Estonia and the League of Nations, 1919-1940]. Tartu: Tartu Ülikooli kirjastus 1999 (in Estonian), pp. 145-172; A. Loit. *Baltisaksa rüütelkondade seisukohad ja tegevus Eesti iseseisvumisel 1918-1920* [Baltic German knights' opinions and activities in relation to Estonian independence]. – *Tuna* 2006/4, pp. 50-74 (in Estonian).

²² X+Y. *Küsimused tulevad kiiremas korras lahendada* [Questions need to be resolved quickly]. – *Tallinna Teataja* 1920/77, pp. 2-2 (in Estonian), on p. 2.

²³ X + Y. *Seadusandmine lonkab* [Legislation limps along]. – *Tallinna Teataja* 1920/83, pp. 2-2 (in Estonian), on p. 2.

²⁴ *Põllutööministri määrus planeeritud kohtadelt maareformi teostamise määruste §§ 96-99 põhjal pikaaja rentnikkudele metsa müügi kohta* (the regulation issued by the agricultural minister about selling forest to long-term tenants in accordance with §§ 96-99 of the implementation acts for the Land Law Act). – RT 1921, 9 (in Estonian).

²⁵ For instance, in the private-law field, the Baltic Private Law Act was still in force. Among its underlying principles there remained an assumption that people differ in status. For further details, see M. Luts. *Private law of the Baltic provinces as a patriotic act*. – *Juridica International* 2000/1, pp. 157-167.

1924.^{*26} In this case, a former landowner tried to appeal to Section 868^{*27} of the Baltic Private Law Act, which stated that in cases of expropriation, the ownership of the relevant property is not to be transferred before the initial owner is fully compensated. Since the compensation question was not resolved in the Land Law Act and there were no other special laws that could have regulated this situation, the former landowner sought application of the principle that when something is not regulated with a special law, the case at hand must be resolved in accordance with all other valid laws. The Supreme Court explained in its decision that the Baltic Private Law norm was not applicable in this case. Because something was, in fact, written about compensation in the special law (under the Land Law Act's Section 10, the decision process was postponed), it could not be said that this situation was not regulated at all. The Supreme Court added that the situation that otherwise would have prevailed would be counter to the purpose of the land reform.

The foregoing reasoning of the Supreme Court was not legally strong, but the court had to offer some sort of opinion to resolve the case while also not becoming, in effect, a legislator itself. Unimaginable would have been a situation wherein all previous landowners could have claimed compensation on the basis of the Baltic Private Law Act. In addition, it is possible that with the Land Law Act the legislator had attempted to foresee situations of a type in which former landowners would try to refer to the Baltic Private Law Act and that the wording of Section 10 of the Land Law Act was chosen in consideration of this. The argument pointing to the purpose of the Land Law Act and of the land reform itself was quite extensively used by the Supreme Court, since the acts of law that regulated the land reform were incomplete and this body of law hence could have been interpreted in several ways. At the same time, the Supreme Court had to rule on such cases: not doing so would have been in conflict with the principle of rule of law.

The next judgement we turn to, from the Civil Department of the Supreme Court in 1921, is a quite good example of the previous landowners' attempts to use many kinds of arguments, including emotional arguments, in their efforts to emphasise that the Estonian land reform was illegal. One former manor owner tried to sell a piece of land from his manor after the passage of the Land Law Act. While the sales contract had been concluded, the transaction was not, since it was impossible to confirm it in a national register. The land that this person had tried to sell belonged to the state, and the permission of an owner would have been required for confirming a transaction in a national register. The former landowner stated before the Supreme Court that, with the expropriation, the state had violated §6 (on equality among Estonia's citizens) and §24 (on the right of private property) of the Constitution, the law on loss of legal status^{*28}, and the Land Law Act itself. Since all the manors were expropriated, without regard for the status of the owner, the act could not have been a breach of the Constitution, according to the Supreme Court. Added to this opinion was that it is permissible to expropriate property against the owner's will when this is in general interests and in accordance with the law. The Supreme Court stated additionally in the judgement that it is irrelevant for the appellant to criticise the purposefulness of the Land Law Act or speak to its goodness or badness. From this it can be concluded that the appellant had indeed somehow criticised the Land Law Act. It is regrettable that the Supreme Court did not point out in its judgement the specific arguments made in this regard.^{*29}

In the case described above, the former owner of the manor had tried to sell the property even though he was not the owner anymore. In addition, he had probably tried to take advantage of the legal confusion surrounding Section 28 of the Land Law Act. In the latter norm, it was stated that the real enactment of the Land Law Act, with the right to enact regulations accordingly, actually lay within the competence of the Estonian government. The wording of this provision could be grammatically interpreted in such a way that the Land Law Act did not come into force on 10th October 1919 but entered effect on 28 January 1920, when the implementation acts for the Land Law Act were passed. The idea here is that the enactment itself was something yet to be done by the government, through implementation terms.^{*30} Since the problem was relevant and caused problems in practice (because the procedure of a law taking effect was articulated in a very

²⁶ CCSCd 1483, 20.11.1924, *Georg Stackelberg v. Põllutööstusministeerium*. Estonian National Archives (ERA), 1356.3.64 (in Estonian).

²⁷ The Baltic Private Law Act's §868 regulated when ownership by a person could end without the consent of the owner. One of these situations existed when the expropriation was considered necessary for the state or community under the terms of a respective special legal act. In this connection, the previous owner had to receive full compensation before ownership could be transferred to the state or community.

²⁸ *Seisuste kaotamise seadus*. – RT 1920, 129/130 (in Estonian).

²⁹ CCSCd 237, 3.11.1921, *Morits Kruedener v. Viljandi-Pärnu Rahukogu*. ERA, 1356.3.58 (in Estonian).

³⁰ *Määrused maareformi teostamiseks*. – RT 1920, 28.1.1920, 16/17 (in Estonian).

unclear way), this legally confusing situation had to be dealt with by the Civil Department of the Supreme Court of Estonia. The Supreme Court interpreted the Land Law Act in such a way that Section 1 of the Land Law Act, which stated that the ownership of the land would be transferred to the state, was deemed to have come into force on 10th October while the rest of the Land Law Act was considered to have come into force upon passing of the implementation acts. People already considered the state to have been the owner of all the manor lands in Estonian territory since 10th October 1919. Hence, there was a question of legitimate expectation, in that everyone had already concluded that the land belongs to the state. The only group of people who tried to argue with this supposition was, of course, composed of the previous landowners. They tried to emphasise and prove, through every argument they could conceive of, that either the Estonian land reform was illegitimate or the land's ownership was not transferred to the state (at all or until after a particular date, which depended on when they had tried to sell the land that had belonged to them).

The Land Law Act did not regulate all legal aspects of the land reform. The land was expropriated, and its ownership was transferred to the state, but such matters as how the peasants would have used the land were not regulated. Estonian politician and agronomist August Kerem pointed out that it seemed as if the legislator had 'played Blind Man's Buff' and that this intentional legal uncertainty had put an unjustifiably high workload on the shoulders of the courts.^{*31}

Another example of the insufficiency of the Land Law Act can be identified from its Section 10. According to said section, the question about compensation to the previous landowners was left to be resolved by corresponding special law. That legislation, the law on compensation for expropriated land, was not enacted until 1926. In the interim, a situation of legal uncertainty prevailed.^{*32} In addition to creating this issue, its wording meant that Section 10 could have been interpreted in alternative ways: it hinted that the previous landowners had a right to be compensated.^{*33} Since it had been emphasised since the beginning of the creation of Estonian statehood that Estonia follows the principle of rule of law, the former landowners had a legitimate expectation of getting compensated for the expropriated lands. On the other hand, the provision could have been interpreted strictly in line with the language used: it stated that the decision process was in progress; hence, it remained possible for the final decision to go either way. Both among legal practitioners and in the halls of the Constituent Assembly, the debates on whether to pay compensation or not continued.

The thorny matter of compensation for expropriation was discussed by the Supreme Court too. In 1924, the Civil Department of the Supreme Court addressed a case in which a former tenant farmer demanded compensation from the land's previous owner for expenses he had incurred in relation to the manor's agricultural inventory (the aggrieved party had built a barbed-wire fence).^{*34} According to the Land Law Act, all the inventory of a manor was expropriated, irrespective of whether that property belonged in actuality to the tenant farmer rather than the landowner. The Supreme Court explained that only if and when the above-mentioned special law on compensation for expropriated land is finally enacted and compensation is to be paid under it could such claims be satisfied, in turn, by the former landowners.

As this case aptly illustrates, people's claims remained in limbo until the legislator enacted respective legal acts. In this climate of legal uncertainty, not only were the rights of the previous landowners put on hold but the rights of peasants too were kept on ice. This points to an additional question also: if the final decision had been that no compensation was to be paid to former landowners and, hence, they did not have to pay compensation to former tenants from their personal property, then what? How would the former tenants have satisfied their claims then?

The main problems related to legal clarity were caused in part by incomplete legislative work: the legislator did not provide any explanations in connection with the most important legal acts. At the same time, too many amendments were made over a very short time. The main problem was a multiplicity of legal acts regulating land reform, alongside which all other, general acts were in force with parallel application (among them the Baltic Private Law Act). This sometimes led even to clashes between norms. Of course, there cannot be a universal law, but if important aspects are not being regulated and there are gaps in laws,

³¹ A. Kerem. Riigikogu ja maaueendus [The Riigikogu and land renewal]. – *Tallinna Teataja* 1920/294, pp. 2–2, on p. 2 (in Estonian).

³² *Riikliku maatastavara loomiseks võõrandatud maade eest tasumaksmise seadus*. – RT 1926, 26 (in Estonian).

³³ In §10 of the Land Law Act, it is stated that the question about compensation referred to in §1 of said act and the amount of that compensation, along with the types of land that may be expropriated without any compensation, shall be resolved by means of a corresponding special law.

³⁴ CCSCd 726, 4.12.1924, *Jaan Sarapuu v. Ministry of Agriculture*. ERA, 1356.3.64 (in Estonian).

a problem has arisen. Furthermore, in the early years of Estonian independence, there was a paucity of professional Estonian lawyers, so the practitioners' workload was huge. The only way for people to protect their rights was via the courts. The Supreme Court as final-instance court had the obligation to handle all of the cases, since a situation in which the courts avoid rendering a judgement and thereby leave a legal question unanswered is untenable. It would have meant a breach of the principle of rule of law, since the Constitution set forth a guarantee that people would get protection from the courts.

4. Legitimate expectation and land reform

In cases of legal plurality, the administrative authorities were often too formal in focus and forgot to follow the principle of legitimate expectation. This is, of course, understandable, since the workload of the legislative and executive power was so great in the years of early statehood. In these cases, it fell to the Supreme Court to overcome this problem.

In one case in 1923, someone wanted to confirm a land-sales contract in the relevant national register.^{*35} The contract was concluded between a natural person and a former landowner, and the minister of agriculture had granted the permission that was needed if a landowner wished to sell a piece of land before the Land Law Act entered force. The administrative organ denied registration of this transaction, for reason that, since the Land Law Act had been enacted and the landowner was now the state, the application for registration should have been made by the state, not the previous landowner. The administrative organ did not do anything wrong in this, since the law *expressis verbis* stated that the contract may be registered by the parties to that contract; however, the Supreme Court stated that this contract should have been registered in order to ensure justice. All other conditions were fulfilled, and there was only the formal issue of the contract bearing the wrong seller's name and the state not having signed the application for registration itself. The Supreme Court stated that in a situation of this nature, registration should have been completed.

It was explained that it would have been a waste of time if a new registration application were required merely because the ownership changed in the meantime. The Supreme Court used the legal methodology known as fiction. In the absence of an application by the state, it was presumed that one existed since the state agreed that the contract was valid and since the intention of registering was there. Besides that, the competent government minister had already given his permission, so the legitimate expectation of the parties to this transaction was that the sales contract was concluded and the transaction had been finished.

As mentioned earlier in the paper, one of the political rationales for conducting the Estonian land reform was to give land to soldiers who fought in the Estonian war for independence. There was even a regulation issued in 1918 that stated that all Estonian citizens fighting in that war and showing special courage or getting injured therein and the families of fallen soldiers would receive land; this was issued even before the Estonian Constituent Assembly decided on how to carry out the land reform.^{*36} According to the Land Law Act's Section 21, the people who would be first to get land were veterans of the Estonian War of Independence. In contrast, a few years later, the Estonian government enacted a regulation in which it was stated that the previous tenant farmers on manor lands would be the first people to get land.^{*37} Of course, this entailed a collision between a law and a regulation, but the problem needs more specific and in-depth analysis. A second important factor is that men went to war to fight for their home country, and in return they expected to receive land, which had been promised to them by law. This represented a legitimate expectation, for this right was provided for by a regulation and later in a law.

In a court case from 1922, litigation took place between a soldier who had fought in the Estonian War of Independence and a former tenant farmer.^{*38} The veteran applied for a piece of land, which over the course of the land reform had ended up being given to a person who had been renting that land before the land reform even started. The Administrative Department of the Supreme Court stated that, though veterans had the right to receive land (according to §16 of the Land Law Act and §11 of the implementation acts for the land reform), if a particular piece of land desired by a veteran had already been given to a former

³⁵ CCSCd 202, 22.3.1923, *Friederich Vernecke v. Viljandi-Pärnu Rahukogu*. ERA, 1356.3.60 (in Estonian).

³⁶ *Ajutise Valitsuse määrus*. – RT 1918, 9 (in Estonian).

³⁷ *Määrus maareformi teostamise määruste §§ 9, 74, 75, 77, 78 muutmise ja täiendamise kohta*. – RT 1921, 17 (in Estonian).

³⁸ ACSCd 517, 25.4.1922, *Jaan Hirjel v. Tartu-Võru Rahukogu*. ERA, 1356.2.81 (in Estonian).

tenant farmer (or could be considered so given), the veteran was not to receive said piece of land. Former tenant farmers held a privileged position with regard to the land they had previously rented and cultivated. Veterans' rights to the land were not annulled completely, though; they simply did not have the privilege of obtaining specific lands that were already in use by previous tenants.

In this case, the Supreme Court interpreted the various legal acts on the basis of the wider purpose behind the land reform. The promise to grant land to veterans represented a political decision made at the beginning of Estonian independence. Later on, the politics changed since the war was now over. At this point, the executive (and at times the legislative) power started to think more about the general purpose and aims behind the Estonian land reform. Accordingly, it was considered necessary for the people who had in practice actually cultivated and used the land would receive that land. Otherwise, the land would suffer, or it might get sold, with such transactions bringing a danger of the system of large estates reasserting itself.

A breach of the principle of legitimate expectation with regard to the veterans did exist, since, even though they did ultimately get land, an illusion could be deemed to have been created that they would be the first ones to receive land – that is, if several people wanted the same piece of land, they would be the first ones in the queue. It is regrettable that the Supreme Court did not draw attention to the principle of legitimate expectation specifically in this connection.

While some things have changed, opinions about the courts were the same in 1918 as they are today. To wit, Kaarel Einbund rightly wrote that the main task of the courts is to apply law in every individual case and not to create new law. This is why courts had to be wholly impartial and still must be. Most important is that the courts had to ensure the protection of impartiality in the face of the demands of the executive power.^{*39}

5. Conclusions

Rapid carrying out of land reforms was essential, and it was inevitable that many mistakes would be made as the reforms were conducted. Young Estonia had to start creating a state nearly from scratch, which is precisely why the process could not have happened in a legally perfect manner. Since the land reform was not a one-time event – it continued throughout the first era of independence – this reform was characterised by constant endeavours to conduct it in a legally correct manner, with improvements along the way and correction of the mistakes or deficiencies wrought over its course. Even though it brought various problems and misunderstandings in practice, nearly all of these problems were solved by the Supreme Court with its practice. In its judgements, the Supreme Court had to explain the content and the scope of application of the legal acts that regulated land-related matters. From the examples examined in this paper, it seems that at least in the practice of the Supreme Court of Estonia, the principle of legal certainty was honoured. The implementation of the principle of legitimate expectation was more problematic. On the one hand, the Supreme Court tried to follow it (and also common sense). For instance, if something was promised to people by law, then there could not be withdrawal of that promise. On the other hand, in the example case of the veterans, where these apparent promises were not in line with the purpose of the land reform as a whole, the promises could not have been fully kept.

Since Estonia was still developing as a state and honing its legal system, these mistakes were inevitable. Not all promises (even when made in a law) can be considered to give people a legitimate expectation that is protected by the rule of law. In addition, the principle of rule of law itself was still in development in those times.

³⁹ K. Einbund. *Õiguslik riik* ['Legal State']. Tartu 1918, p. 105 (in Estonian).



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Which Adverse Environmental Impacts of an Economic Activity Are Legally Acceptable and on What Conditions

1. Introduction

A fairly clear differentiation between environmental risks and hazards, in combination with the corresponding legal principles, is characteristic of Estonian law. This differentiation is not as clear in many other jurisdictions, including that of EU law. Additionally, relevant literature presents diverging perspectives on the relationship between the precautionary principle and the prevention principle. For instance, L. Krämer does not differentiate between these two principles and considers them to be interchangeable.^{*1} E. Reh-binder and N. de Sadeleer, in contrast, see distinct differences between these concepts, a stance that is characteristic of the German legal tradition. In German law, the prevention principle (*Prävention*) is applied to situations in which there is a known hazard (*Gefahr*) and the precautionary principle to situations that involve a possible hazard (*Risiko*)^{*2}. In addition to making this distinction, German law specifies the class of risks that need to be tolerated (*Restrisiko*) – that is, risks against which it is not justified to take measures. Estonian environmental law implements principles similar to those found in German law.

The internationally recognised principles of environmental policy are based on ecosystem services theory, which emphasises the economic benefits related to the ecosystems crucial to human existence. Focusing on ecosystem services provides a way to evaluate the importance and benefits of natural systems and the reasons for protecting natural resources from an economic point of view while also considering the possible economic consequences of not protecting the environment.^{*3}

This article is motivated by current public discussions in Estonia about several plans for building and development with significant environmental consequences. It appears that the understanding of the economic value of nature is rather one-sided in these discussions. A specific example would be the plan to build a large pulp mill near the river Emajõgi, which has provoked a number of – highly varied – responses, including several scientific interpretations.

¹ See L. Krämer. *EC Environmental Law*. London: Sweet and Maxwell 2003, on p. 23.

² See E. Reh-binder. The precautionary principle in an environmental perspective. – E.M. Basse (ed.). *Miljørettens grundspørgsmål*. 1994, pp. 91–105, on p. 92; N. de Sadeleer. *Environmental Principles: From Political Slogans to Legal Rules*. Oxford University Press 2002, on p. 125; K. Pape, K. Schillhorn. *Environmental law in the Federal Republic of Germany*. – N. Koeman (ed.). *Environmental Law in Europe*. Kluwer Law International 1999, on p. 275.

³ See G.C. Daily, P.A. Matson. Ecosystem services: From theory to implementation. – *PNAS* 105 (2008) / 28 (15 July). Available at <http://www.pnas.org/content/105/28/9455.full> (most recently accessed on 25 June 2018).

The analysis proffered in relation to the economic profitability of the proposed pulp mill emphasises the great social and economic benefits of the project. On the other hand, many are very worried about the consequences of the project. The local authorities seem to number among these. For example, Tartu County has cited as a matter of concern the increased consumption of water to be created by the mill's operations. Another concern is whether supplying the mill with large amounts of raw materials could result in exhausting our natural resources (principally forests) or, framed in another way, a decrease in the ecosystem services of the forests.^{*4}

It is important to mention also that the developers of the mill do not seem to be irresponsible and, in fact, have expressed a strong interest in cultivating meaningful, well-founded, and fact-based discussions of the possibility of constructing the mill in Estonia throughout the research and analysis phase. According to the developers, the mill cannot be built until a thorough and transparent process of applying for a planning and environmental permit has been completed and the environmental effects of the mill have been ascertained to be acceptable.

The case of the pulp mill is quite typical of a type of situation that arises frequently in various countries, in which economic interests clash with interests related to protection of the environment and the environmental rights of individuals. Very often, there is direct conflict between these sets of values. In the case of the pulp mill and other, similar projects, the key question that arises is which of the resulting environmental impacts are acceptable and which are not. It must be noted that the probability of an environmental impact and the importance of the consequences of that impact are separate concepts: There are adverse impacts with serious and highly probable consequences but also adverse impacts with equally serious improbable consequences. Additionally, some impacts entail possible consequences that, while very likely to arise, are not very serious. In connection with this distinction, it is important also that the environmental field encompasses many situations for which the level of scientific uncertainty involved must be taken into account. It is evident that these various situations must be considered differently and that the respective legal consequences need to be differentiated.

In evaluation of an environmental impact's acceptability, it must be remembered that the aim behind environmental regulations is not only the preservation of the physical, chemical, biological, and aesthetic qualities of the natural environment but also the protection of the physical, mental, and material rights and interests of individuals. The latter is perhaps even more important than the former, since these interests are often dependent on the environmental conditions,^{*5} and impact on human interests is another way in which environmental impacts are manifested.^{*6} Regrettably, this recognition is often forgotten in practice, with the realm of environmental law frequently seeing the issue mistakenly reduced to one of mere nature conservation law.

This article focuses on the most important economic, social, and environmental considerations affecting legal criteria and mechanisms from the standpoint of environmental law. In the following analysis, issues have been analysed particularly in the context of Estonian environmental law – namely, the General Part of the Environmental Code Act.

Since environmental regulations are very extensive and, at times, very particular, this paper does not delve into the details. It gives a more general overview, focusing mainly on analysing the most important concepts and highlighting the practical aspects of the central environmental principles. This discussion begins with an overview of the general background, the aims of environmental law, and examination of what role environmental factors could play in deciding on cases such as that of the above-mentioned pulp mill. While this particular case has been taken as a starting point for the article and is used as an example here, the paper is not intended to offer a thorough analysis of the matter of the pulp mill, especially since the circumstances of the case are still largely unclear.

⁴ See <http://arileht.delfi.ee/news/uudised/liiga-janune-miljarditehas-pole-sugugi-ahvatlev-pruut?id=78093738>, in Estonian (most recently accessed on 25 June 2018).

⁵ R. Desgagne. Integrating environmental values into the European Convention on Human Rights. – *American Journal of International Law* 89 (1995) / 2, pp. 263–294, on p. 267. – DOI: <https://doi.org/10.2307/2204204>; J. Lee. The underlying legal theory to support a well-defined human right to a healthy environment as a principle of customary international law. – *Columbia Journal of Environmental Law* 25 (2000), pp. 283–340.

⁶ See H. Veinla, S. Vahtrus. Substantive environmental right in Estonia – basis for citizens' enforcement. – *Nordic Environmental Law Journal* 2016/3, pp. 7–21.

2. The aims of legal regulation in the environmental field

It is worth starting the analysis of cases such as the proposed pulp mill's from the perspective of the aims behind environmental law, since environmental law is concerned not only with the legal benefits offered by the environment but also with finding optimal solutions.

The aims of environmental law in Estonia are stipulated in the General Part of the Environmental Code Act⁷ (hereinafter GPECA). It has to be taken into account that the aims stated in this law are not only declarations but legally binding for the parties implementing the law. Therefore, a legal measure should facilitate the process of reaching these goals or at the very least not hinder it.⁸ There is broad scope for discretion in this case, since the statement of aims does not dictate specific measures; however, if a certain legal measure is clearly necessary for reaching a certain goal, this measure needs to be implemented – for example, refusing to issue a permit for projects that cause significant environmental nuisances, particularly if the planned activities are not justified by any other imperative interests or by there not being any other alternatives.

The first item in §1 of the GPECA states that the aim of this act of law is reduction of environmental nuisances to the greatest extent possible, so as to protect the environment and human health, well-being, property, and cultural heritage. Therefore, the Estonian environmental law is not radically 'green': the aim is not to fully and unconditionally avoid environmental nuisances, since, regrettably, functional human society and increasing our prosperity are not possible without certain negative impacts on the environment. The existence of individuals and the society they form always entails some level of negative effects on the environment – it is not possible to avoid these utterly. At the same time, the principle of a high level of environmental protection must not be forgotten. This principle does not entail automatically giving priority to the economic and social interests that exist in competition with environmental interests. In the context of the example case considered here, this means that, irrespective of the great economic and social gains associated with the pulp mill, environmental considerations (including those related to ecosystem services) must not be disregarded, let alone ignored. When one is assessing environmental impacts, the various characteristics, probability levels, and possible consequences need to be taken into account. Therefore, in the discussion below, we must expand upon the concept of environmental nuisance – which is central in the domain of environmental law – along with the other structural elements of environmental law associated with this concept.

3. The ways in which an environmental impact can manifest itself

With the entry into force of the GPECA, the concept of environmental nuisance and its consequences first appeared in Estonian environmental law.⁹ Since environmental law is aimed mainly at protecting basic rights related to the environment and because one of its core goals is the preservation of humans' health, along with their mental and physical well-being, it is to be emphasised that the concept of environmental nuisance also encompasses the effects on human health, welfare, and property that present themselves in relation to the environment. An adverse impact can be understood also as an effect that, while not in itself harming human health, causes significant direct or indirect physical or mental discomfort. One example would be loud noise or foul odours emanating from the pulp mill that impinge on people enjoying their homes. An adverse environmental impact could have a direct or indirect influence on, among other elements, an individual's property. For example, property might become polluted by dangerous substances

⁷ Adopted on 16.2.2011. RT I, 28.2.2011, 1.

⁸ A. Epiney. Environmental principles. – R. Macrory (ed.). *Reflections on 30 Years of EU Environmental Law: A High Level of Protection?* Groningen, Netherlands: Europa Law Publishing 2006, pp. 5–6.

⁹ Subsection 3(1) of the GPECA states: "Environmental nuisance" means a human-induced direct or indirect adverse impact on the environment, including impact on human health, well-being, property or cultural heritage via the environment. "Environmental nuisance" also [encompasses] an adverse impact on the environment [that] does not exceed a numerical limit or that has not been regulated by a numerical limit."

(waste and others), or the market value of land could decrease in consequence of noisy surroundings. In the case of the pulp mill and many similar projects, all of these impacts are likely.

While the key concept connected with environmental nuisances includes the evaluative term ‘adverse’, the law does not actually elucidate which environmental nuisances may unconditionally be inflicted, which need to be reduced, and which are to be prevented. As is alluded to above, many environmental nuisances are necessary for society’s functioning and hence have to be tolerated. Any kind of production entails adverse effects on the environment to some extent – this is inevitable. And it is impossible to achieve human well-being without production. This does not, however, mean that we should refrain from trying to implement reasonable measures to reduce and limit the adverse impacts of these necessary activities. As is noted above, to some extent environmental nuisances need to be tolerated **if** their reduction cannot be accomplished by reasonable measures, the impact of the nuisance on the environment and the individual is insignificant, or the nuisance needs to be tolerated because of some overriding interest that cannot be addressed by any other reasonable means.

It is worth keeping in mind the principle set forth in the GPECA’s Section 11 (2) by which in the course of making decisions related to activities entailing environmental risk, the impact of said activities on the environment shall be determined. It is necessary to conduct environmental impact assessment proceedings in the cases specified in the law, with these proceedings being handled in the manner stipulated by law. The principle of economical use of natural resources, which is recognised in international, EU, and Estonian environmental policy and law, means in its classical interpretation that deliberations over all actions shall take environmental factors into consideration in addition to economic and social elements. Ignoring environment-related requirements when dealing with plans and activities that entail significant environmental impact can be a serious error. That error may have legal consequences, and in extreme cases the relevant administrative act may even be declared void. Accordingly, economic aspects manifestly do not automatically have unconditional superiority.

4. Differentiating between environmental risks and environmental hazards and between the precautionary and the preventive principle

One of the main concerns with respect to plans and activities with a supposed adverse environmental impact is whether the planned activity could cause environmental hazards in addition to environmental risks and, consequently, whether the precautionary principle or instead the preventive principle should be applied.

4.1. Environmental risks and the precautionary principle

Section 4 of the GPECA defines the concept of an environmental risk. The meaning of this concept in environmental law differs from the general understanding of the term. Risk usually means undesired consequence (including harm) that has some likelihood of arising from a given decision or activity. The legal sense expands upon this. In the GPECA, there are two dimensions to an environmental risk: the consequence’s seriousness and the probability of its realisation.’ This could, however, be seen as a non-law-specific distinction, since, for instance, risk-analysis matrices address both dimensions. According to the GPECA, an environmental risk exemplifies a situation in which, firstly, it is possible for an adverse impact to occur and, secondly, this consequence needs to be reduced. Determining which environmental risks need to be reduced is largely a value judgement, which is to be made by the legislator. Since environmental law is greatly influenced by EU law, this obligation may arise as a result of transposition of EU law.

For a better understanding of the concept of an environmental risk, comparison to the concept of an environmental hazard (discussed explicitly below) is worthwhile. The notion of environmental risk, outlined above, is applicable in situations wherein at least one of these fundamental characteristics of an environmental hazard is not present: meeting a threshold of probability of the consequence occurring and the environmental nuisance exceeding a certain level of significance. In other words, the concept of an

environmental risk is applied for situations in which there is not a **great enough possibility** of a **significant enough** environmental nuisance occurring – i.e., in which the two criteria for an environmental hazard are not both met. Accordingly, a situation in which the consequence is not highly significant (or there is a less substantial environmental nuisance) can be described as involving an environmental risk rather than hazard even if its occurrence is likely.^{*10}

For appropriate identification of an environmental risk, it is important, as a rule, to follow what is stipulated by acts of law. However, this is not enough. With regard to case-by-case application, it is necessary to take into consideration also the objective evaluation of the circumstances of each individual case, along with the various interests and rights. This process should be based additionally on prior experience and practice related to the possible consequences and their likelihood. Ignoring even the less intense nuisances or not making a reasonable attempt to reduce the adverse effects of a nuisance is not justified. At this point in the discussion, it is relevant to refer to the GPECA's §14, which deals with the general obligation of diligence, stipulating in this connection that everyone has to take measures to reduce the environmental nuisances caused by his or her actions or inaction, as far as can reasonably be expected.

It follows from the GPECA's §11 that in cases of environmental risk, one is to apply the precautionary principle, which has now become one of the foundations of environmental law internationally, in the EU, and within many individual countries. Historically, the main reason for the emergence of the precautionary principle is disappointment in the so-called assimilative capacity approach, a theory that was based on the assumption that contemporary science is capable of ascertaining and actively predicting the 'safe' level of use of the relevant elements of the environment, accurately ascertaining the negative environmental impact of a given activity, and developing technical solutions for preventing negative impacts. It became clear in practice that science cannot, in fact, unequivocally predict the consequences of human activity. The classical legal approach does not justify taking measures to limit the rights and freedoms of individuals in such situations of uncertainty. The ushering in of the precautionary principle, in contrast, represents a dramatic change in approach, allowing (or even demanding) that measures be taken to reduce environmental risks even in uncertain situations^{*11}. In conclusion, notwithstanding the fact that in cases such as the pulp mill's not all adverse impacts are obvious and many remain shrouded in scientific uncertainty, it is necessary to apply reasonable measures for purposes of reducing environmental risks.

The GPECA adds a new dimension to the classical interpretation of the precautionary principle by which the principle is tied in with scientific uncertainty. The GPECA stipulates that, in addition to cases of scientific uncertainty, the precautionary principle applies in situations in which either of the two criteria for an environmental hazard is not met. In these cases, it is necessary to take reasonable measures to reduce adverse environmental nuisances. When one is determining the appropriate precautionary measures to choose, it is crucial to consider the principle of proportionality and to ensure that the measures are legitimate, suitable for achieving the aim, and necessary for fulfilling that aim, while at the same time those measures are reasonable in light of the competing interests of the various groups in the case at hand.

The more important the negatively affected legal interest in question and the more probable the impact, the more economically and socially burdensome the measures to reduce adverse impacts are permitted to be.

An approach characteristic of this interpretation of the precautionary principle can be seen in GPECA in the paragraph (§ 16) stipulating an installation operator's general obligations, which assigns the operator the duty to acquire knowledge for the prevention of environmental hazards that may occur in consequence of the functioning of the installation, along with the duty to evaluate these risks and to take appropriate precautionary measures.^{*12}

¹⁰ H. Veinla. Basic structures of the Draft General Part of the Environmental Code Act. – *Juridica International* 2010/10. pp. 135–136.

¹¹ See E. Fisher. Precaution, precaution everywhere: Developing a 'common understanding' of the precautionary principle in the European Community. – *Maastricht Journal of European and Comparative Law* 9 (2002) / 1, pp. 7–28, on p. 9. – DOI: <https://doi.org/10.1177/1023263x0200900102>.

¹² H. Veinla, S. Vahtrus. Operators' general obligations as an environmental duty of care. – *Juridica International* 2013/1, pp. 169–178.

4.2. The concepts of significant environmental nuisance, environmental hazard, and the principle of prevention

As mentioned above, the threshold associated with so-called unacceptable environmental nuisances is the posing of an environmental hazard, which, in turn, is associated with the idea of significant environmental nuisances.

The GPECA defines a significant environmental nuisance as a significant adverse impact on the environment, where the impact may be on human health, well-being, property, or cultural heritage (§2 (2)). In the event of sufficient likelihood of the occurrence of a significant environmental nuisance, the local authorities must follow the prevention principle as stipulated in the GPECA's §10, and under GPECA §16 operators are obliged to take measures actively to prevent significant environmental nuisances. Therefore, if it appears that in cases similar to the pulp mill's the occurrence of not only environmental nuisances but also significant environmental nuisances is likely, decisions must be taken on a completely different basis. Whether significant environmental nuisances actually might occur and the probability of their occurrences must be clarified through environmental impact assessment procedures.

Sufficient likelihood of a significant environmental nuisance occurring is characteristic of situations involving an environmental hazard. Here, 'sufficient likelihood' refers to sufficient certainty of occurrence of the impact. For instance, in the example of exceeding the limit values set in relation to the quality of outside air, it should be presumed that failing to fall within these limits may (i.e., is sufficiently likely to) result in a health hazard. Likewise, there is sufficient likelihood of environmental nuisances occurring in consequence of the production of fossil fuels with current technology, which is one of Estonia's most important industries and also the biggest source of Estonia's environmental burden – producing most of the country's waste, water consumption, and air pollution. In specification of the 'sufficient likelihood' threshold, the principle of integral protection of the environment coupled with a high level of protection needs to be considered. In cases of doubt, this consideration sways the decision towards there being deemed sufficient likelihood of the impact occurring. When the level of certainty in respect of occurrence of the impact is lower, higher priority is given to the protected legal interest, and *vice versa* – the greater the priority given to the legal interest, the lower the level of certainty.

Thus, the concept of an environmental hazard is applicable to situations in which the environmental nuisance is too intense to be tolerated. According to the prevention principle, explained below, actualisation of an environmental hazard needs to be prevented. One of the main instruments for bringing about the prevention of environmental hazards is environmental protection permits, which specify the conditions for the use of the environment and entail supervision and monitoring. Prevention of an environmental hazard can be regarded as taking place also when measures that reduce the significance and the likelihood of occurrence of the environmental nuisance are taken to such an extent that the environmental hazard is reduced into an environmental risk. That risk, in turn, needs to be reduced by means of further, precautionary measures.

The prevention measures that need to be taken in specific cases are often stipulated from the outset at the level of legislation, but legal acts do not always stipulate the full catalogue of practical applications of the prevention principle. Various cases can be pointed out in respect of concrete prohibitions with their origins in legal norms. For example, it is normally forbidden to convey wastewater into groundwater or convey sewage or wastewater onto frozen soil. Additionally, waste law generally forbids mixing one kind of dangerous waste with other kinds of dangerous waste, regular waste, or any other substance or material. The Estonian outdoor-air protection law emphasises that if the environmental protection permit requires abatement of pollution or it has been specified in the materials for the proposed building project, working without the accordant abatement equipment or with non-functioning abatement equipment is forbidden. Also, the Estonian Conservation Act prohibits all human activity in a nature reserve, including human presence in said territory (§29 (2)). Ignoring these prohibitions could indeed have sufficient likelihood of bringing about the occurrence of significant environmental nuisances that it must be addressed.

The prevention principle, as a general principle of environmental law, has to be applied case-specifically, in addition to compliance with detailed legal prohibitions. An example of application of the prevention principle, as it is dependent on discretion, can be found in the regulations in water-related law that constitute the basis for refusal to issue a permit for special use of water in cases wherein the water supply is insufficient, the special use of water directly endangers human health or the environment, or the

groundwater level or the condition of the groundwater for those fed by it deteriorates to such an extent that the groundwater supply is rendered defunct. Another example of the case-by-case application of the prevention principle would be a situation in which entrepreneurs plan to 'reconstruct' a hog farm (i.e., replace it with a much larger complex) in the immediate vicinity of a settlement and, in so doing, greatly increase the number of pigs there. In the example, people whose home is in the direct vicinity of the farm claim that the planned considerable increase in the number of animals would greatly increase the amount of manure and thereby intensify the odour nuisance, owing to the fact that more manure will be transported and spread over fields. What is more, an odour nuisance is likely to be caused also by the new complex itself. The local authority, on whose approval the construction of the new complex is contingent, might in this case come to the conclusion that, since there are no effective technological solutions for reduction of the odour nuisance, which would clearly and significantly affect the well-being of numerous people, this case can be identified as involving an environmental hazard.

Whilst persons in private law are not the addressees of the prevention principle, an approach in accordance with it can indirectly be carried over to them, chiefly through decisions of local authorities that are based on the prevention principle. An example of this kind of activity would be the procedure related to granting of environmental impact permits, in which the conditions for permits are based on the goal of preventing environmental hazards that could occur as a result of the relevant activity.

An approach incorporating the prevention principle is reflected also in the GPECA's paragraphs on operator obligations, by which everyone, especially the operator, is obliged to obtain knowledge of the environmental hazards related to the planned activity; to evaluate these hazards; and, to a reasonable extent, to take appropriate measures to prevent the realisation of the hazards.

The foregoing notwithstanding, the duty to prevent an adverse environmental impact that exceeds the thresholds for probability and significance is not absolute. Furthermore, the duty of tolerance applies with regard to hazards that have already been realised – that is, significant environmental nuisances that have already arisen. As is stated in the GPECA's §10, an environmental hazard or a significant environmental nuisance must be tolerated under the following three conditions:

- the activity being necessary for reason of a dominant interest
- there being no reasonable alternatives to secure this interest
- the necessary measures having been taken to reduce the environmental hazard or significant environmental nuisance

In cases such as that of the proposed pulp mill, the first and second condition above seem to be, at least theoretically, fulfilled. The assumed large economic gain from the activity and creation of a considerable number of jobs give reason to think that an interest outweighing the negative environmental impact could exist. However, a closer look reveals that the fulfilment of the second condition is problematic. It is difficult to find convincing arguments supporting the claim that the additional economic and social gain could be achieved only through construction of the proposed pulp mill, in this particular location and with this particular capacity. Surely there are reasonable alternatives. Furthermore, it should be noted that in the process of considering alternatives the greatest emphasis should be on public interests instead of the capacity and interests of the developers. On account of such considerations, in a situation in which activity brings about environmental hazards, the conditions for making exceptions are to be interpreted narrowly.

5. Conclusions

It is obvious that almost all human activity, not to mention large-scale economic production in particular, causes environmental impacts to some extent. The impact can vary greatly in its intensity, consequences, and probability. Accordingly, such variability needs to be taken into account in the process of finding legal solutions to economic, social, and environmental conflicts. Environmental legislation does not rule out production and development activities but can significantly limit these and, through its restrictions, guide towards socio-ecological sustainability¹³.

Controlling environmental nuisances is central to regulations in environmental law. The first step articulated in regulation of environmental nuisances is to research and evaluate the impacts that the proposed

¹³ See C. Azar et al. Socio-ecological indicators for sustainability. – *Ecological Economics* 18 (1996) / 2 (August), pp. 89–112. – DOI: [https://doi.org/10.1016/0921-8009\(96\)00028-6](https://doi.org/10.1016/0921-8009(96)00028-6).

activity or plan may have on the environment and human health, well-being, and property. In most cases, this is done through formal proceedings based on the terms of an environmental assessment law. In Estonia, even where conducting these proceedings is not mandatory, according to GPECA (§11 (2)), when one is making decisions about activities with a possibility of causing environmental risks, it is necessary to employ some other, non-formalised way of obtaining knowledge about what kind of environmental impact the activity is going to have.

Proven or assumed environmental nuisances caused by the activity in question do not necessarily need to be reduced or prevented; this duty applies only when a higher threshold is crossed – that is, when the environmental risk and/or hazard limit is exceeded. Hence, in cases such as that of the pulp mill, it has to be established whether the proposed activity will actually cause environmental risks and/or hazards. In the case of environmental risks (i.e., in situations in which it is possible for an environmental nuisance that needs to be reduced to occur), the goal is not *a priori* prohibition of the activity but the application of measures that reduce the risk proportionally, where those measures might be carried out by such means as attaching additional conditions to environmental permits. Once the measures are set forth, it is up to the operator to decide whether meeting the prescribed conditions is feasible or, instead, the planned activity would be economically unreasonable under those conditions. The occurrence of environmental risks is highly likely in the case of the pulp mill, which means that the need for application of the precautionary principle is highly probable.

Also, the likelihood of significant environmental nuisances (environmental hazards) occurring in relation to the planned activity is potentially great in the example case of the pulp mill. Reference has been made to possible pollution: the direct or indirect discharge or disposal, as a result of human activity, of substances or energy into the air, water, or soil to such an extent that harm to human health, living resources, and ecosystems occurs. When the probability of pollution occurring is deemed to be great enough, there is deemed to be an environmental hazard, which must be prevented. Whether a hazard exists or not must be revealed in the course of further (scientific) research. That said, an environmental hazard or a significant environmental nuisance needs to be tolerated in cases wherein all three of the following conditions are fulfilled: the activity is rendered necessary by a dominant interest, there are no reasonable alternatives to safeguard this interest, and the necessary measures have been taken to reduce the environmental hazard or significant environmental nuisance. The fulfilment of the first and the second condition is possible in the case of the pulp mill. However, the second condition, in fact, seems not to have been met after all, since there may exist alternatives. That said, the issue of the existence of alternatives is a complex and separate topic, one that is not within the scope of this article. For example, when one is assessing alternatives, the following are among the main problems encountered: what role similarity of socio-economic and technical characteristics plays and how cost–benefit analyses for various possible alternatives (variant designs etc.) can be handled.

As has been noted, the construction of the pulp mill is possible on the condition that the occurrence of an environmental hazard is prevented. If this cannot be done, issuing a permit for the mill does not seem possible under the law in force. The permit would have to be granted exceptionally; however, the conditions for making an exception are not fulfilled.



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Shareholders' Draft Resolutions in Estonian Company Law:

An Example of Unreasonable Transposition
of the Shareholder Rights Directive

1. Introduction

For decades, the European Union has been focusing on the question of how to involve shareholders of public limited companies in corporate governance. Shareholders' right to participate in corporate governance has always been one of the most general conceptual issues in the development of company law provisions.^{*1} Already in 2002, the High Level Group of Company Law Experts emphasised that, among other issues, the processes related to shareholders' information, communication, and decision-taking should be modernised.^{*2}

The action plan for modernising company law and enhancing corporate governance in the European Union^{*3} also pointed out that one of the most important areas for attention in the Member States is to ensure the rights of shareholders of public limited-liability companies. Subsection 3.1.2 of the action plan pointed out that it is necessary to enhance the exercise of a series of shareholders' rights in listed companies (the right to ask questions, table resolutions, vote in absentia, participate in general meetings via electronic means, etc.). There has been a need to offer all those facilities to shareholders across the EU.

For fulfilment of the above-mentioned intentions, the Shareholder Rights Directive^{*4} was adopted in 2007, and the date for complying with the requirements of the directive set out for Member States was 3 August 2009. It has been pointed out in legal literature that the directive was intended to facilitate the exercise of voting rights across borders and that it includes a number of other provisions intended to facilitate

¹ See also: M. Vutt. Shareholder's Derivative Claim - Does Estonian Company Law Require Modernisation? – *Juridica International* 2008 II, p 76.

² Report of the High Level Group of Company Law Experts on a Modern Framework for Company Law in Europe. Brussels, 4 November 2002. Available at http://www.ecgi.org/publications/documents/report_en.pdf. See, for example, p. 7.

³ 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 May 2003. COM (2003) 284 final. Available at http://www.europarl.europa.eu/RegData/docs_autres_institutions/commission_europeenne/com/2003/0284/COM_COM%282003%290284_EN.pdf.

⁴ Directive 2007/36/EC of the European Parliament and of the Council of 11 July 2007 on the exercise of certain rights of shareholders in listed companies. – OJ L 184, 14.7.2007, pp. 17–24.

voting in other jurisdictions.^{*5} It has been argued in addition that the main aim for the directive was to set up certain minimum standards for protecting investors and promoting the free exercise of voting.^{*6}

The European Model Company Act Group also shares the view that company law rules on general meetings should encourage the shareholders to be active and improve their possibilities for acting as the company's highest decision-making body.^{*7}

One can conclude that European initiatives highlight several measures for purposes of ensuring that shareholders can have an active role in the company's decision-making process. One of the measures foreseen in the directive for enhancement of the rights of shareholders is the regulation of shareholders' right to submit draft resolutions. This article addresses the central question of whether the extent of the implementation of the requirements regulating draft resolutions and their disclosure in Estonian company law has been justified. The purpose of the research is to analyse whether the transposition of the rules on draft resolutions derived from the directive has contributed to the attainment of the objectives set out in the directive and in other European initiatives. The authors therefore compare the respective Estonian legal regulation with the legislation of some other Member States to examine whether the approach has been similar therein. The relevant Estonian case law that has developed since the adoption of the new rules will also be studied.

2. The aims in transposition of the Shareholder Rights Directive and the discretion of the Member States

According to the preamble of the Shareholder Rights Directive, the main aims for the directive were:

- 1) to enable shareholders to cast informed votes at the general meeting, as well as before the meeting, no matter where they reside;
- 2) to give shareholders 'sufficient time to consider the documents intended to be submitted to the general meeting and determine how they will vote their shares'^{*8};
- 3) to enable shareholders to 'put items on the agenda of the general meeting and to table draft resolutions for items on the agenda';
- 4) to ensure that 'shareholders should in every case receive the final version of the agenda in sufficient time to prepare for the discussion and voting on each item on the agenda'^{*9}; and
- 5) to enable shareholders' electronic participation in the general meeting.^{*10}

Article 1 (1) states that the directive establishes requirements in relation to the exercise of specific shareholder rights with regard to general meetings of companies that have their registered office in a Member State and whose shares are admitted to trading in a regulated market situated or operating within an EU member state. This means that the measures foreseen in the directive are mandatory for Member States only with regard to listed companies.

Shareholders' right to receive information about draft resolutions is regulated in Article 5 of the directive. According to Article 5 (3) d), the convocation notice shall, *inter alia*, indicate where and how the full, unabridged text of the draft resolutions and other documents' submitted to the general meeting may be obtained. Article 5 (4) d) foresees that, among other relevant information, the draft resolutions should be made available (either on the company's website or otherwise) for a continuous period beginning not later than on the 21st day before the day of the general meeting including the day of the meeting.^{*11} In case no

⁵ M. Gelter. EU Company Law Harmonization between Convergence and Varieties of Capitalism. ECGI Working Paper Series in Law. Working Paper No. 355/2017, June 2017. Available at http://www.ecgi.global/sites/default/files/working_papers/documents/3552017.pdf, p. 32.

⁶ A. R. Pinto. The European Union's Shareholder Voting Rights Directive from an American Perspective: Some Comparisons and Observations. – *Fordham International Law Journal* 32 (2009), p. 607.

⁷ P. K. Andersen et al. European Model Companies Act. First edition, 2017. – Nordic & European Company Law LSN Research Paper Series, No. 16–26. Available at <https://ssrn.com/abstract=2929348>, p. 244.

⁸ Shareholder Rights Directive, preamble, para. 6.

⁹ *Ibid.*, para. 7.

¹⁰ *Ibid.*, para. 9.

¹¹ In cases wherein the convocation notice for the general meeting is issued later than on the 21st day before the meeting, the period specified in this paragraph shall be shortened accordingly (Article 5 (4) (e) of the directive).

resolution is proposed to be adopted, a comment from a competent body within the company must be available for each item on the proposed agenda of the general meeting. Draft resolutions tabled by shareholders shall be added to the Internet site as soon as practicable after the company has received them.

Article 6 regulates shareholders' right to put items on the agenda of the general meeting and to table draft resolutions. According to paragraph 1 p a and b, shareholders must be granted the right to put items on the agenda of the general meeting, provided that each such item is accompanied by a justification or a draft resolution, along with the right to table draft resolutions for items included or to be included on the agenda of the general meeting. Paragraph 3 of Article 6 stipulates that each Member State shall set a single deadline, with reference to a specified number of days prior to the general meeting or the convocation, by which shareholders may put items on the agenda. In the same manner, each EU member state may set a deadline for exercising the right to table draft resolutions for items included or to be included on the agenda of a general meeting. The revised agenda must be made available to all shareholders in the same manner as the previous agenda in advance of the applicable record date. The directive thus gives the Member States the opportunity to distinguish, on the one hand, between supplementing the agenda and the draft resolutions submitted with supplementary proposals, and on the other hand, so-called counter draft proposals in case the draft is submitted with regard to an item already on the agenda.

The directive was amended and largely extended by a new directive, 2017/828/EU, of 17 May 2017, for the encouragement of long-term shareholder engagement,^{*12} but the main principles in respect of the convocation of a general meeting, drafting of resolutions, and making them available to shareholders have remained the same.^{*13}

One can conclude that the main aims for the above-mentioned rules were to ensure that all the shareholders get informed about the items (and drafts) to be voted upon at the general meeting and to grant them the possibility of putting items on the agenda and/or proposing their own draft resolutions. The purpose with those rules was to enable the shareholders of large listed companies with thousands of shareholders, residing in different Member States and having only loose connections to the company, to have more information and to be more involved in corporate governance. As has been stressed in German legal literature, the directive focuses mainly on shareholders' information rights and on participation in general meetings by means of electronic communication.^{*14} The authors of this article are of the opinion that the main aim behind the strongly formalised rules on draft resolutions has been to enable those shareholders not physically present at the general meeting to submit their votes before the meeting.

3. Estonian statutory law on draft resolutions since November 2009

Estonia introduced the Shareholder Rights Directive rules when the Commercial Code's and Other Acts' Amendment Act^{*15} was adopted, on the 21 of October 2009. The above-mentioned law entered into force on 5 November 2009.

Firstly, §293¹ of the Commercial Code^{*16} (hereinafter 'CC') was added to the code so as to regulate the draft resolutions submitted to the general meeting. Subsection 293¹ (1) of the CC provides that if the management board convokes the general meeting, the management board shall prepare a draft of the resolution in respect of each item on the agenda. According to §293¹ (2) of the CC, if the general meeting is convoked by the shareholders, they also have an obligation to prepare a draft of the resolution. The drafts shall be

¹² Directive (EU) 2017/828 of the European Parliament and of the Council of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement (text with EEA relevance). – OJ L 132, 20.5.2017, pp. 1–25.

¹³ The new directive deals mainly with such issues as the identification of shareholders (as shares in listed companies are often held through complex chains of intermediaries), institutional-investor engagement, institutional-investor investment strategy, transparency of asset managers and proxy advisers, shareholders' right to vote on the policy for remuneration of the management, and the transparency and approval of related-party transactions.

¹⁴ D. Zetsche, Die neue Aktionärsrechte-Richtlinie: Auf dem Weg zur Virtuellen Hauptversammlung. – *Neue Zeitschrift für Gesellschaftsrecht* 2007, p. 687.

¹⁵ Äriseadustiku ja teiste seaduste muutmise seadus (Commercial Code's and Other Acts' Amendment Act). – RT I 2009, 51, 349 (in Estonian).

¹⁶ Äriseadustik (Commercial Code). – RT I 1995, 26, 355; RT I, 17.11.2017, 22 (in Estonian).

submitted to the management board before issuing of the convocation notice for the general meeting, and the drafts may be additionally included in the convocation notice.

Subsection 293¹ (3) of the CC regulates shareholders' right to demand the modification of the agenda, and Subsection 4 foresees the threshold required for the exercise of those rights (1/10 for non-listed public companies and 1/20 for listed companies).^{*17} Subsection (4) also provides that the right to submit a draft of the resolution may not be exercised later than three days before the general meeting.

According to §293¹ (5) of the CC, a public limited company shall make the drafts and their substantiations (either prepared by the management board or submitted by the shareholders) available to the shareholders in the location determined by the public limited company. Subsection 5 points out that if the general meeting is convoked by the shareholders and they fail to make drafts available, this shall not constitute a material violation of the procedure of calling a general meeting.

Subsection 293¹ (6) of the CC stipulates the company's obligation to make the shareholders' drafts and substantiations, together with the drafts prepared by the management board with respect to additional items on the agenda, available to the shareholders immediately after their submission if these are submitted after the convocation notification.

Although the directive provides that the above-mentioned rules should be applicable only to listed companies, Estonia expanded the same regulation to all public companies and to a certain extent even to private limited companies. As of 22 April 2018, Estonia has 17 listed companies.^{*18} The number has remained more or less the same for several years now, and it is therefore clear that the above-mentioned changes in EU legislation were actually targeted at quite a few Estonian companies.

Estonian draft-resolution rules for private limited companies are mostly the same as for public limited companies.^{*19} The main difference is that the regulations pertaining to drafting and disclosure of resolutions consist of an opt-out set that can be excluded by the articles of association of a private company. As for the content of the regulations foreseen in the CC, the shareholders of a private limited company have the right to submit draft resolutions only when they request the amendment of the agenda.

According to the explanatory memorandum^{*20} on the law on the amendments, such an expansive introduction was justified by the need to offer electronic participation to all shareholders of Estonian companies, to give shareholders the opportunity to exercise their rights better, to simplify companies' management, and to allow shareholders to access the necessary information through the Internet.^{*21} The explanatory memorandum neither justifies the choice of implementing detailed regulations for shareholders' meetings for private limited companies nor explains why the opt-out regulation was chosen. When one takes into account that freedom of contract should apply to Estonian private limited companies in general,^{*22} a clear justification should have been presented in the explanatory memorandum, to clarify why such intensive intervention in a company's internal affairs was necessary.

The authors of this paper are of the opinion that the opt-out rules cannot be considered a reasonable choice for private limited companies. In practice, it has produced a number of problems. Among others, it meant that for all private limited companies already in existence, these rules came into force by the adoption of the new law. This meant, for example, that if a private limited company wanted to exclude the formalised rules for draft resolutions via its articles of association, the meeting of shareholders in order to change the articles of association had to be convened in compliance with the same unwanted rules foreseen in the law. There was another problem with regard to the online formation of companies. In cases of online registration, founders can use only a template form^{*23} for the articles of association, but for a long time that template form did not allow for the possibility of excluding the rigid rules for draft resolutions. Therefore, if the company was established online, it had, in order to exclude the above-mentioned rules, to change the articles of association after the company was entered in the commercial register.

¹⁷ The threshold of 1/20 for listed companies is derived directly from the requirements of the directive.

¹⁸ This includes the Baltic Main List and Baltic Secondary List (see <http://www.nasdaqbaltic.com/market/?pg=issuers&lang=en>).

¹⁹ See Article 171² of the CC, respectively.

²⁰ Draft Law on Amendments to the Commercial Code and Other Acts (466 SE). Explanatory memorandum. Available at <https://www.riigikogu.ee/tegevus/eelnoud/eelnou/041369ed-82db-4840-cb2a-28eb744989d2/%C3%84riseadustiku%20ja%20teiste%20seaduste%20muutmise%20seadus> (in Estonian).

²¹ *Ibid.*, para. 2.

²² K. Saare, U. Volens, A. Vutt, M. Vutt. *Ühinguõigus I. Kapitaliühingud* ['Company Law I: Limited Companies']. Tallinn: Juura 2015, pp. 110–111.

²³ The template form has been set up by Appendix 15 to Regulation of the Ministry of Justice 59, from 28.12.2005, titled 'Procedure for Submitting Documents to Court' (Kohtule dokumentide esitamise kord). – RT I, 23.02.2018, 3 (in Estonian).

Before the introduction of the rules on draft resolutions and their disclosure derived from the directive, the CC already included rules for providing shareholders with information about the items put on the agenda of a general meeting. According to §294 (4) ((5)) (in force before 5 November 2009), the supervisory board had an obligation to submit its proposal for each item on the agenda. The proposal had to be included in the convocation notice. The above-mentioned section also provided that if the agenda of a general meeting includes the approval of the annual report, amendments to the articles of association, or consent to a contract, the place where it is possible to examine those documents (the annual report, the draft of the articles of association, and/or the contract) should be indicated in the notice.

One must admit as a conclusion that the legal regulation of draft resolutions in Estonian company law has been rather arbitrary. It does not take into account the difference between the legal form of a private and a public limited company. As the private limited company should be considered a legal form for small and medium-sized companies, it should not be overregulated. On the other hand, most Estonian public limited companies are rather small entities with small shareholdings as well, and therefore the overregulation of the procedural aspects of their general meeting is likewise not reasonable.

4. Regulation of draft resolutions in other European countries

Estonian law (including company law) is representative of the continental legal system and the German legal family. Therefore, it would systematically be relevant firstly to compare rules in respect of drafting resolutions and making them available to shareholders that are foreseen in the CC with those applicable under German company law.

In German legal literature, it has been pointed out that the law regulating public companies is strict and mostly mandatory in its nature. The law on private companies, on the other hand, is much more liberal and allows flexibility. It has been argued that the starting point and an initial model for a limited-liability company was the public company but that it soon became evident that the strict rules foreseen for public companies were not suitable for smaller companies and that overregulation can hence become a serious obstacle to business. Therefore, the main principle for a German private limited company is contractual freedom in inner relations (meaning in relations between the shareholders and in the internal constitution of the company).^{*24} Among German public limited companies, there is a distinction between listed and not-listed companies.^{*25} The distinction between listed and non-listed companies was introduced to German law with adoption of the Control and Transparency Act,^{*26} which came into force on 1 May 1998.^{*27} The legal literature has strongly expressed the view that, in fact, the legislation should be liberalised with regard to non-listed public companies as well.^{*28}

However, many regulations pertaining to shareholders' right to submit draft proposals, as well as the right to receive information about the drafts of either other shareholders or the management board, are expanded to all German public companies. It has been explained in German legal literature that the law regulating public companies has been designed for large listed companies and that, therefore, these strict rules might not always be suitable for smaller and non-listed public companies.^{*29}

The requirements arising from the Shareholder Rights Directive were introduced into the *Aktiengesetz*^{*30} (hereinafter 'AktG') with an adoption law implementing the Shareholder Rights Directive.^{*31}

²⁴ T. Drygala, M. Staake, S. Szalai. *Kapitalgesellschaftsrecht. Mit Grundzügen des Konzern- und Umwandlungsrechts*. Heidelberg: Springer 2012, pp. 16–17.

²⁵ The distinction is derived already from Subsection 3 (2) of the *Aktiengesetz* (AktG), which foresees that the companies listed on the stock exchange are those public limited companies whose shares have been admitted to a market that is regulated and supervised by state-recognised authorities and that is active regularly and is directly or indirectly accessible to the public.

²⁶ Gesetz zur Kontrolle und Transparenz im Unternehmensbereich (KonTraG) vom 27. April 1998.

²⁷ W. Goette, M. Habersack, S. Kalss. *Münchener Kommentar zum AktG, 4. Auflage*. Munich: Verlag C.H. Beck 2016. – Heider, AktG §3, Rn 41.

²⁸ T. Drygala, M. Staake, S. Szalai (Note 24), pp. 16–17.

²⁹ *Ibid.*, pp. 262–263.

³⁰ *Aktiengesetz* vom 6. September 1965 – BGBl. I S. 1089; BGBl. I S. 2446.

³¹ Gesetz zur Umsetzung der Aktionärsrechterichtlinie vom 30. Juli 2009. – BGBl. I S. 2479.

The disclosure of shareholders' proposals to amend the agenda and also of draft resolutions submitted by shareholders are regulated in Section 124 of the AktG. Subsection 124 (1) of the AktG stipulates that if a minority have requested that a new item be added to the agenda, this item shall be disclosed either upon calling the meeting or immediately after the request is received. If the shareholders' meeting is required to adopt a decision on an amendment of the articles of association or on an agreement that becomes effective only with the consent of the shareholders' meeting, the text of the proposed amendment of the articles or the essential content of the agreement shall be published as well (Subsection 124 (2) of the AktG).

With respect to each item on the agenda that is to be decided on by the shareholders' meeting, the management board and the supervisory board – but in the case of the election of members of the supervisory board and auditors, only the supervisory board – shall compose drafts for the respective resolutions. The proposal for the election of members of the supervisory board or auditors shall state the name, profession, and place of residence of the proposed candidates (Subsection 124 (3) of the AktG). According to Subsection 124 (4) of the AktG, no resolution may be adopted in respect of items that have been put on the agenda but have not been duly disclosed.^{*32}

Section 126 of the AktG regulates the obligation to disclose the drafts submitted by oppositional shareholders in opposition to the drafts drawn up by the management board and thereby is aimed at informing shareholders of intended opposition.^{*33} Subsection 126 (1) of the AktG stipulates that draft proposals submitted by shareholders (together with the shareholder's name, the grounds, and the position taken by the management) should be made available. Prerequisite to the disclosure is the shareholder sending (to the address indicated in the convocation notice), at least 14 days before the meeting, a counter-proposal to a draft of the management board as regards an item on the agenda. Listed companies must provide access to this information via the company's Internet site.

Thus German law, as well as German legal literature, distinguishes between the shareholders' draft proposals and the so-called counter-proposals. If a shareholder wishes to put an additional issue on the agenda, he must submit his draft proposal before the general meeting within the time period prescribed by law. However, if a shareholder wishes to submit his proposal as an alternative to a draft of the management board on an item already included on the agenda, it is considered a counter-proposal that may also be submitted at a general meeting.^{*34} In comparison of Estonian and German company law, the main difference is that German law distinguishes between drafts and counter-drafts in the same way the directive does. German rules are aimed at informing shareholders without imposing restrictions as to when proposals should be submitted. Estonian law, on the other hand, focuses on the deadline for submitting any draft, and such rules do not guarantee better information for shareholders; in consequence, the opportunity to submit counter-drafts at a meeting is excluded.

It is important to note that Germany has not expanded the complicated regulation of draft resolutions, counter-drafts, and their publication derived from the directive to private limited companies. It has been expressed in German legal literature that a private limited company is an entity that will be set up with the entry into of a contract. Even though this contract does not establish an exchange of services (rights and obligations of individuals with regard to each other) in the sense of an ordinary contract, something new, a 'superindividual community of persons', is established. However, the articles of association are nonetheless of a contractual nature.^{*35} It has been pointed out also that German private limited companies can be characterised as companies with few shareholders, all of whom have a strong relationship with the company: they usually either participate in the day-to-day management of the company or are employees of it.^{*36}

German company law does not foresee any specific rules on draft resolutions for private limited companies. Subsection 51 (1) of the GmbHG^{*37} foresees only that a shareholder meeting shall be convened by

³² However, publication shall not be required for the adoption of a resolution to call another shareholders' meeting or for proposals made in respect of items on the agenda, and for deliberations without adoption of a resolution.

³³ U. Hüffer, J. Koch. Aktiengesetz. 12. Auflage 2016. - Koch, AktG §118, Rn 1.

³⁴ T. Drygala, M. Staake, S. Szalai (Note 24), pp. 483–484.

³⁵ H. Gummert, L. Weipert (Herausg.). *Münchener Handbuch des Gesellschaftsrechts Bd. 14. Auflage 2014 1. Teil Die BGB-Gesellschaft* 2. Kapitel. Rechtliche Grundlagen § 6 Verpflichtung auf den gemeinsamen Zweck. Rn. 4.

³⁶ F. Wedemann. *Gesellschafterkonflikte in geschlossenen Kapitalgesellschaften*. Beiträge zum ausländischen und internationalen Privatrecht 99. Tübingen: Mohr Siebeck 2013, p. 11.

³⁷ Gesetz betreffend die Gesellschaften mit beschränkter Haftung in der im Bundesgesetzblatt Teil III, Gliederungsnummer 4123-1, veröffentlichten bereinigten Fassung, das zuletzt durch Artikel 10 des Gesetzes vom 17. Juli 2017 (BGBl. I S. 2446) geändert worden ist.

an invitation sent to the shareholders by registered letter, which must be sent at least one week in advance. General minority rights in respect of the meeting are regulated in Subsection 50 of the GmbHG, which foresees that shareholders whose shares together constitute at least one tenth of the share capital shall be entitled to request that a meeting be convened, stating the purpose and the grounds therefor (Subsection 50 (1) of the GmbHG). The same applies for shareholders' right to request that matters on which resolutions are to be adopted at the meeting be disclosed (Subsection 50 (2) of the GmbHG). These are the same general rules that were already present in the Estonian CC before harmonisation for the Shareholder Rights Directive.

The United Kingdom has implemented the rules on draft resolutions in its company law only for listed companies. The Companies Act 2006^{*38}'s Section 311A was added with the Shareholders' Rights Regulations, which came into force on 3 August 2009.^{*39} As for the drafts submitted by shareholders, the only legal requirement is that they be made available on the website of the company after the first date on which notice of the meeting is given (Subsection 311A (1) (d)). There are no specific procedural or material limitations foreseen by the law.

It is relevant to analyse in addition the rules recommended in the European Model Company Act (hereinafter 'EMCA'), so as to find out whether the model act includes guidelines foreseen for shareholders' right to submit draft resolutions alternative to those presented by the management board or supervisory board and, if so, to what extent.

The EMCA points out that in large companies with many shareholders there is the risk of opportunistic behaviour by the board. Increased internationalisation of ownership means that shareholders would rather not be physically present at the general meetings and, therefore, incentives are needed to ensure and facilitate shareholders' active participation in general meetings. Therefore, the law has to ensure that shareholders have and take the opportunity to attend and vote in the meetings by electronic means.^{*40}

With regard to the core topic of this article, the EMCA does not foresee any recommended rules. It only regulates electronic participation, proxy voting, etc. Section 11.13 stipulates that a shareholder shall be entitled to propose specific issues for inclusion on the agenda of the general meeting, but this is a common rule that was applicable in Estonia already before the directive was even adopted.

Section 11.19 (1) foresees that in public companies, the agenda, the full text of any proposal, and all documents are to be submitted to the general meeting and that all those documents shall be available for shareholders inspection at least three weeks prior to the date of the meeting. In companies with shares traded on a regulated market, all documents shall be available on the company's website. Section 11.19 (3) stipulates that a public company shall make available to its shareholders the draft resolution or, when no resolution is proposed to be adopted, a comment from the competent body of the company, for each item on the proposed agenda.

According to Section 11.18 (1 b), a convocation notice shall, among other matters, specify the agenda. If a proposal to amend the articles of association has been submitted, the text of the proposed alteration shall be specified too. In the same subsection, 1 d provides that a convocation notice shall also include information about where and how documents submitted to the general meeting and draft resolutions may be obtained or are available.

The comparison above shows that the Member States covered by the article have not extended the complex and technical rules on shareholder draft proposals to small companies and in most cases have not even extended them to non-listed public companies. Although Germany has introduced corresponding rules for all public companies, this has been criticised in the associated legal literature.

5. Estonian case law and the results of the expansive application of the draft-resolution rules to small companies

Since the introduction of the regulations pertaining to draft proposals and counter-proposals by shareholders, the Estonian Supreme Court has made three decisions on this matter. Two of them addressed shareholders' right to propose new candidates of the members of the supervisory board at the general meeting

³⁸ Companies Act 2006. Available at <https://www.legislation.gov.uk/ukpga/2006/46/data.pdf>.

³⁹ The Companies (Shareholders' Rights) Regulations 2009. – Statutory Instruments 2009, No. 1632, 'Companies'. Available at http://www.legislation.gov.uk/uksi/2009/1632/pdfs/ukxi_20091632_en.pdf.

⁴⁰ P.K. Andersen et al. (Note 7), p. 235.

of a public (but not listed) company. One case involved drafting and disclosure of resolutions in a private limited company.

The first of the decisions was made on 28 April 2014.^{*41} The plaintiff was the largest shareholder of the public (but not listed) company in question, owning approx. 44% of the company's shares. The management board sent the convocation notice to the shareholders, and, according to the notice, one of the items on the agenda was the election of the supervisory board members. The general meeting took place, and the shareholders had the possibility of voting for five candidates, proposed by the management board, to fill five vacant places. The proposal received approx. 56% of the votes represented at the meeting, and the chairman of the meeting declared that the decision was adopted.

The plaintiff argued the above-mentioned decision to be unlawful because, although the plaintiff proposed his own candidates for the voting, alongside the candidates nominated by the management board, the chairman did not allow them in the voting, claiming that the plaintiff should have submitted his alternate draft decision (i.e., candidates) at least three days before the meeting.^{*42} The plaintiff was of the opinion that the decision of the general meeting should be declared null and void since the shareholders were not allowed to vote for his candidates.

So the parties argued about a simple legal question: may a shareholder just arrive at the general meeting and propose alternate candidates for the supervisory board there, or must he compose a formal draft resolution before the meeting and submit it to the management at least three days before the meeting?

The county court ruled that the decision of the general meeting should not be declared null and void, because a shareholder who wants to suggest alternate candidates has to follow the rules in the CC about drafting the proposal and submitting it prior to the meeting. The district court was of the opposite opinion and stated that the rules about draft resolutions derived from §293¹ (4) of the CC are not applicable in cases of election of persons and that alternate candidates may also be suggested directly at a general meeting. The district court pointed out that it is not in the interest of shareholders if the list of candidates were to be closed already before the meeting.

The Supreme Court of Estonia, however, agreed with the county court and ruled that the questionable resolution passed at the meeting was not null and void. The Supreme Court was of the opinion that the purpose behind the rules on shareholders' draft resolutions was to ensure that the draft is made available to all shareholders before the general meeting and thus enables them to prepare themselves better for the meeting.

The civil chamber of the Supreme Court considered that the legislator had not separately regulated the issues of draft resolutions in the case of personal elections and concluded, therefore, that the same rules apply as for other decisions. The Supreme Court admitted that the extension of the rules on draft resolutions foreseen in the Shareholder Rights Directive to all public limited companies might not have been reasonable in light of the specifics of Estonian public limited companies (small numbers of shareholders and large shareholdings) but explained that the rules established in the CC still apply to all public companies.^{*43}

This interpretation by the Supreme Court means that the election of supervisory board members of a public limited company has become rigid and shareholders must take into account that if they fail to submit their candidate proposals in time, they have no right to demand that their candidates be admitted to be voted for at the meeting.

The fundamental mistake in the position taken by the Supreme Court is the same that derives from Estonian statutory law – it does not distinguish between supplementing the agenda and submitting a draft proposal on an item that is already on the agenda as an alternative to the draft prepared by the management board. In the case analysed above, the question was about submitting a counter-proposal, and therefore the Supreme Court's approach whereby no candidates other than those proposed before the meeting could be voted on at the general meeting is not justified. In consequence of such an interpretation, the general meeting is no longer a forum where a substantive discussion takes place but simply a place where the votes are cast. Such an approach is in conflict with the fundamental principles of company law and the nature of a general meeting.^{*44} According to the point of view of the Supreme Court, the general meeting can now be considered

⁴¹ CCSCd 3-2-1-23-14, *Bank of Moscow v. Aktsiaselts Eesti Krediidipank*.

⁴² As has already been mentioned, §293¹ (4) of the CC provides that shareholders may submit to the public limited company a draft of the resolution in respect of each item on the agenda, but the right specified may not be exercised later than three days before holding of a general meeting.

⁴³ CCSCd 3-2-1-23-14, para. 20.

⁴⁴ See, for example, U. Hüffer, J. Koch (Note 33). – Koch, AktG § 118, Rn 1.

a mere formality. It has been noted in legal literature that general meetings of companies must be conducted in accordance with good practice.^{*45} Procedures wherein shareholders are not allowed to make any substantive proposals during the meeting and only the proposals made available before the meeting can be voted on (according to the 'take it or leave it' principle) cannot be considered good practice. The aim with the directive was to ensure greater involvement of shareholders, but the outcome of the Supreme Court's judgement is exactly the opposite. The authors of this article are of the opinion that the approach taken by the Supreme Court is therefore not justified, as it does not correspond to the original aims for the directive.

On 29 November 2017, the Supreme Court made another decision regarding the election of the supervisory board of a public limited company and submitting one's candidates via draft resolutions.^{*46} The circumstances of the case were the following. In a public limited (but, again, not listed) company, a general meeting of shareholders was to be held, for which the election of members of the supervisory board was on the agenda. The company's management board had submitted its proposals for the candidates for the members of the supervisory board at the calling of the general meeting. The convocation notice included a remark that in all circumstances connected with the meeting, a shareholder should contact the designated member of the management board. Also, the telephone number of that person was included in the notice.

The plaintiff (a shareholder of the company) sent his draft decision via e-mail to the management board and proposed his candidates for voting at the general meeting. At the meeting, it then turned out that another shareholder had proposed candidates for the vacant places on the supervisory board as well. At the general meeting, both the candidates proposed by the management board and the candidates of the other shareholder were put to the vote. All candidates received the same number of votes. The chairman of the meeting refused to admit the plaintiff's nominees to be voted upon, arguing that the draft decision was submitted too late.

After the meeting, the plaintiff claimed that the decisions of the general meeting should be declared null and void as:

- 1) he was not properly informed of the other shareholder's candidates before the general meeting and
- 2) the company (the defendant) refused to put the plaintiff's candidates to a vote and this is a material breach of the procedure for the convocation of a general meeting, which makes the decisions adopted at the general meeting null and void.

The county and district court agreed with the plaintiff and satisfied the claim. The courts pointed out that a public limited company has an obligation to make the draft resolutions submitted to it available to shareholders at a place designated by the public limited company. If they are not made available, this violation constitutes a material breach of the procedure for convening a general meeting, which leads to the nullity of the decisions adopted at the meeting.

Both courts were of the opinion that the fact that the plaintiff could have received information by ringing the telephone number included in the convocation notice was not relevant. The possibility given to the plaintiff to call and ask for information does not preclude the board's obligation to disclose drafts to shareholders, and the notification of the telephone number of the member of the management board indicated in the convocation notice was not enough for fulfilling of the obligation to make the drafts available to shareholders. The courts pointed out that the failure to disclose the information about the resolution drafts in the notice of the general meeting is a significant violation, which prevents shareholders exercising their voting rights, and, therefore, the decision is void for reason of a material breach of the procedure for convening a general meeting.

The Supreme Court agreed with the courts of the first and second instance and noted that, indeed, the notice of the disputed general meeting should have included information on where a shareholder could receive information about the drafts submitted by shareholders.^{*47} So one can conclude that with the second case the Supreme Court repeated its previous arbitrary interpretation that if a shareholder fails to submit its candidates for the supervisory board in time, it forfeits the possibility to submit its candidates at the general meeting.

On 24 May 2017, the Supreme Court made a decision on draft resolutions, concerning a private limited company.^{*48} The plaintiff (a shareholder of the company) alleged that a material violation of the procedure

⁴⁵ See, for example, K. Eklund, D. Stattin. *Aktiebolagsrätt och aktiemarknadsrätt*. Uppsala: Iustus förlag 2013, p. 170.

⁴⁶ CCSCd 2-16-8010, *Bütfering and Bütfering v. LOGiT Eesti AS*.

⁴⁷ CCSCd 2-16-8010, para. 10.

⁴⁸ CCSCd 3-2-1-44-17, *Sarapuu v. Vedelgaas OÜ*.

took place when the meeting of the shareholders was convened. The shareholder was of the opinion that the requirements for drawing up draft decisions and making them available were not met and that this rendered the decisions of the meeting null and void. The plaintiff pointed out that, according to the law^{*49}, draft decisions composed by the management must be accessible at least from the notification of the meeting to the day the meeting is held. Also, the convocation notice did not indicate the place where shareholders could acquaint themselves with the draft decisions.

The defendant argued that the procedure for convening the meeting was not violated to such an extent that the decisions should be considered null and void. Both before the meeting and at the time of the meeting, the plaintiff himself was a member of the defendant's management board, and he participated in the preparations for the meeting. Therefore, the applicant was well aware of the issues to be discussed at the meeting and, equally, of the draft decisions. The applicant also participated in the meeting.

Both the county court and the district court agreed with the defendant that, although draft decisions must be made available to shareholders, there is no obligation to send drafts to shareholders with a notice of the meeting. The district court pointed out that the plaintiff, being himself a member of the management board of the company, could not rely on the fact that drafts had not been made available. The Supreme Court annulled the decision of the district court partially, but the reason for doing so was not related to the draft-resolution rules.^{*50}

The authors are of the opinion that, in light of the arguments of the defendant, the above-mentioned case shows how unnecessary the rules on draft resolutions are for a simple private limited company, where the shareholders usually are also the members of the management board. Small companies do not need the same kind of legal remedies as large companies, and rules regulating draft resolutions simply provide an opportunity to file an action against the company for formal reasons.

6. Conclusions

The main aims for the Shareholder Rights Directive were to enhance the shareholder participation in corporate governance, to give shareholders better opportunities to be informed about the matters concerning the general meeting, and to enable them to put items on the agenda.

One can conclude that the result of the transposition of the Shareholder Rights Directive is that many Estonian private limited companies and also public but not listed companies have the rather burdensome obligation to follow the formalised rules on draft resolutions and their disclosure. It seems that Estonia has, in its position as one of the Member States, regrettably, forgotten the real objectives behind the directive, for the rules now in place have instead increased unnecessary bureaucracy in smaller companies without yielding better information and involvement of shareholders in the management. It is obvious from analysis of the rules on draft resolutions derived from the directive that those rules originally were strongly related to the opportunity given to shareholders to cast their votes before the meeting (by mail or electronically), but in drafting and implementation of the respective rules in Estonia, this aim has been forgotten.

Although the Supreme Court of Estonia had an opportunity to interpret the respective regulations reasonably, it has chosen a rather formal approach instead and applied the law in quite possibly the most burdensome way for Estonian companies and contrary to the aims for the directive as the source of those regulations.

Proceeding from the above, the authors of this article take the stance that there is a need to change the rigid rules on draft resolutions that have been forced on Estonian small companies. The present mandatory rules on draft resolutions should be applicable to listed companies only. All other public limited companies should be given an opt-in option. As for private companies, the law should clearly set out the possibility of stipulating the appropriate rules in the articles of association of the company.

⁴⁹ See Subsection 171² (4) of the CC.

⁵⁰ See CCSCd 3-2-1-44-17, paragraphs 20–26. The main reason the Supreme Court annulled the decision was mostly procedural, as the courts of first and second instance did not analyse the alternate claim of the plaintiff.



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Tasks and Responsibilities of an Employer in a Digital Age:

How to Comply with the Applicable Requirements
for Work Conditions

1. Introduction

The general meaning of labour law is intimately tied to the understanding that an employee is a party in a weaker position in the employment relationship and that the employer has to follow all possible rules that have been established by labour law so as to protect the employee.

There are several classes of rule that an employer has to honour:

- 1) specific rules on occupational health and safety
- 2) rules connected with the individual employment contract at issue (addressing working and rest time, annual holiday, night work (along with overtime work etc.), and protection for specific categories of employees – (minors, pregnant workers, etc.)

Using new forms of employment and new technologies renders it impossible for the employer to follow both sets of rules without problematic issues arising. For instances, in cases of ‘online jobs’ (e.g., telework or platform-based employment), it is not possible for the employer to measure the working time unilaterally. Furthermore, the employer is interested more in the result. In cases involving shift work handled online, it is not possible to measure how many hours of work will be done in a shift or know in advance how the work is going to be done.

It is obvious that the principles of labour law developed in the 19th century do not function adequately for today’s environment. Although the protection of the employee must remain at the core of labour law, it is time to rethink the position of the employee in labour relations. One important requirement in this connection is that the employee takes more responsibility in labour relations. This extends to determination of the appropriate limitations on working and rest time and to observing the occupational health and safety rules. The protection of the employee is not only the task of the employer; this responsibility has to be shifted more toward the employee.

Another important question emerges also, one connected with how to assess the quality of the work performed by the employee. Until recently, it was possible to verify the quality of work done by employees rather directly in the workplace, but now, in the era of digitalisation, the term ‘workplace’ does not denote anything definite and concrete. Hence, a vital question for the employer inevitably rears its head: how can such control be performed most efficiently?

This article’s discussion of the attendant issues is divided into four chapters. The first chapter (2) examines the issue of the employment relationship and its legal regulation. The main problem to be solved is

that of determining the existence of a subordination relationship in the context of employment and further define it to the extent necessary.*¹

Then, in the second chapter (3), matters related to working hours and rest time are considered. Providing the employee with work and rest time is both a key obligation for the employer and one of the most important guarantees to be provided for every employee.

In the third chapter (4), the discussion turns to issues connected with the workplace. The workplace is an important connecting point for guaranteeing the necessary protection in the employment relationship and for ensuring compliance with occupational health and safety rules. The current system of occupational health and safety regulations imposes on the employer both employee-specific and general responsibility for compliance with the requirements associated with work and rest time. However, in modern conditions that involve changes in forms of employment, the employer lacks the opportunity to ensure the protection of health and safety at work in every work situation. These circumstances lead us to the question of whether in the field of occupational health and safety some share of the responsibility should be left to be borne by the employee.

After the discussion described above, we are positioned to address the general legal issues connected with work-quality assessment, which are dealt with in last chapter (5).

2. The employer's control over employees' work

2.1. Typical employment or atypical employment

When someone talks about an employment relationship, the reference usually is to a situation in which the employer checks the employee's work. The employer oversees where, when, and how the work is performed by the employee. One assumption underlying the formation of the labour legislation now in force and a precondition for its application still today is that an employer can unilaterally prescribe to the employee the conditions for the performance of work. For this reason, we must consider the relationship of subordination that is involved. What matters here is not the economic subordination but personal subordination (dependence). Subordination to the employer's orders means, among other things, that the employee places some of his or her time at the employer's disposal.*²

An ordinary employment relationship is connected with a certain employer, a given workplace, and fixed working time. These criteria for an employment relationship have been applied in the case law of the European Court of Justice*³. The above-mentioned criteria for an employment relationship are clearly highlighted also in the case law of the Supreme Court of Estonia*⁴.

Inasmuch as subordination is clearly observed in an employment relationship, there is a possibility for the employer to check the assignments performed by the employee and the quality of completion of the above-mentioned tasks. If an employee has performed his or her assignments in the wrong way (i.e., not in accordance with the requirements set), the employee may be legitimately held responsible for this, to an extent up to and including termination of his or her employment contract by the employer for reason of non-compliance with work obligations.

Checking of the assignments performed by the employee is possible mainly on account of the fact that in cases of an ordinary employment relationship the employee has a certain workplace and there is a certain period of time for performing the work. The employer has more proximate contact with the employee. However, the change in structure of employment relationships and expansion to new possibilities for work

¹ See also M. Risak, T. Dullinger. The concept of 'worker' in the EU law: Status quo and potential for change. ETUI, Report 140, 2018. – DOI: <https://doi.org/10.2139/ssrn.3190912>.

² G. Tavits. "Individuaalse tööõiguse põhimõisted" ['Basic concepts of individual employment law']. – *Juridica* 2003/9, pp. 634–642 (in Estonian).

³ In the *Laurie–Blum* case, the European Court of Justice stated: 'That concept must be defined in accordance with objective criteria which distinguish the employment relationship by reference to the rights and duties of the persons concerned. The essential feature of an employment relationship, however, is that for a certain period of time a person performs services for and under the direction of another person in return for which he receives remuneration.' C-66/85, *Laurie–Blum v. Land Baden-Württemberg*, [1986] ECR 2121.

⁴ See, for example, the Estonian Supreme Court's case no. 3-4-1-53-14, with materials available at <https://www.riigikohus.ee/et/laheidid?asjaNr=3-4-1-53-14> (in Estonian) (most recently accessed on 28.4.2018).

arrangements have brought a situation in which it is possible to state that control over the work performance on the employer's part has become more indirect. The literature has not articulated unambiguously what has changed in employment relationships or what precisely constitutes or is characteristic of non-typical employment relationships. That said, work organisation that entails flexible working time, the sharing of an employee between employers, and also the fact that an employee need not even have a workplace are often discussed.^{*5}

When one is discussing new forms of employment and the subordination relations possible between an employee and employer, it is obvious that there is need for a new understanding of 'employee'. Some European countries have introduced the concept of 'employee-like workers'.^{*6} In Estonia, no such new, parallel notion exists yet, although a recent study of the new forms of employment present in Estonia has prompted the suggestion that a new category of employees has to be introduced. The main element connecting the categories involves economic dependence. It is not necessary that there exist personal dependence; more important is that the employee or employee-like worker is financially dependent on the employer or employer-like entity. The report on the study itself does not make any further suggestions as to what kinds of right have to be guaranteed for those workers and whether and in what extent such terms as those of the occupational health and safety rules should be applied.^{*7}

2.2. The employer's right to control work performed by the employee

The employer's right to control the work performed by the employee is derived, on the one hand, from the nature of the employment relationship following from the employment contract. For example, according to the Employment Contracts Act of Estonia, the defining feature of an employment relationship is that an employee undertakes to perform some work in subordination to the employer while the employer for his or her part undertakes to pay remuneration for this^{*8}.

Labour law is described as a field of law that is intended mainly for protection of employees' rights. Although the employer too has an important role to play in labour relations, there is not much legal regulation pertaining to employers' position or addressing the rights of an employer. For the most part, we are left to consider the employers' obligations, in relation to the employee.

In light of this gap, one important question, among others, can be found in relation to the position of the employer. We can look to the nation's supreme law for answers. Does the Constitution contain any rules pertaining to employers, does the Constitution limit the freedom of activity of an employer, etc.? Usually the nation's supreme law does not itself refer to the notion of an employer. There is more discussion about entrepreneurs and surrounding freedom of entrepreneurship.

Where, then, can legal sources be found? The employer's right to manage the labour and control the work performed by employees can be connected with freedom of contract; i.e., the employer is free to decide when and with whom an employment contract is to be concluded. According to Section 19 of the Estonian Constitution^{*9}, this is connected to the right of free self-realisation. The Constitution of Estonia states that everyone has the right to free self-realisation. When exercising his or her rights and freedoms and fulfilling his or her duties, everyone must respect and observe the rights and freedoms of others and obey the law.

⁵ Atypical work. European Observatory of Working Life (EurWORK). Available at <https://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/atypical-work> (most recently accessed on 15.6.2018).

⁶ See, in the example case of Germany, Arbeitnehmerähnliche Person ['Employee-like people']. – *JuraForum*. Available at <https://www.juraforum.de/lexikon/arbeitnehmeraehnliche-person> (most recently accessed on 26.6.2018).

⁷ Analüüs "Tulevikutöö – uued suunad ja lahendused" ['Analysis: The work of the future – new trends and solutions']. Estonia: Technopolis Group / Rake 2017, pp. 154–156 (in Estonian), available at http://www.sm.ee/sites/default/files/content-editors/Ministeerium_kontaktid/Uuringu_ja_analuusid/Toovaldkond/tuleviku_too_-_uued_suunad_ja_lahendused_l6pparuanne.pdf (most recently accessed on 22.6.2018). With regard to economically dependent workers, see also R. Haljasmäe. "Majanduslikult sõltuva töötajaja õiguslik kaitse" ['Legal protection of the economically dependent worker']. – *Juridica* 2007/4, pp. 274–280 (in Estonian). See also: R. Haljasmäe. "Töötajale ettenähtud tagatiste laiendamine majanduslikult sõltuval töötajajale" ['Extension of guarantees for economically dependent workers']. – *Juridica* 2009/4, pp. 217–223 (in Estonian).

⁸ Section 1 of the Employment Contracts Act (*Töölepingu seadus*). – RT I 2009, 5, 35, English translation available at <https://www.riigiteataja.ee/en/eli/506022018003/consolide> (most recently accessed on 22.6.2018).

⁹ The Constitution of the Republic of Estonia (RT I, 21.5.2015), with English translation available at <https://www.riigiteataja.ee/en/eli/521052015001/consolide> (most recently accessed on 15.6.2018).

Also according to the Estonian Constitution, everyone has the right to be engaged in entrepreneurship.^{*10} Freedom of entrepreneurship encompasses an assumption that the entrepreneur may choose the necessary employees. An employer's freedom to deal with entrepreneurship has been dealt with also in the European Union's Charter of Fundamental Rights, according to which an employer has the right to deal with his or her own entrepreneurship.^{*11} These rights entail the employer having the right to manage the relevant labour (the language refers to the employer's right to manage his or her labour). The principle is simple – the employer must receive the legal opportunities necessary for reaching the goal of being successful and effective in his or her activity. The employer's right to manage the relevant labour and to have control over an employee's performance has its foundations in the terms of the Constitution and is supported by various other legal acts existing at national and international level.

3. Adherence to requirements related to working time

3.1. The importance of working time

Specified working time is an important component of an employment relationship for the employee. What we may refer to as the traditional employment relationship presumes full-time employment. With regard to working time, attention has been directed largely to the interests of the employee in employment relationships, particularly in connection with concerns about excessive work. Accordingly, the International Labour Organization (ILO) has adopted conventions that regulate various aspects of working time.^{*12} In addition, the European Union has adopted directives pertaining to working time^{*13}, and the recent European Pillar of Social Rights draws attention to ensuring the adequate regulation of working time.^{*14}

In the European Union directive dealing with notification of the work conditions by the employer, it is foreseen that one of the mandatory conditions to be communicated to the employee is the time of the work.^{*15} In consequence, at the European Union level, work time has been recognised as a fundamental aspect of employment – it is a fundamental condition of the relationship. In addition to the above-mentioned factors, attention is drawn to equality of treatment between part-time and full-time employees.^{*16}

According to Section 5 (1) of the Estonian Employment Contracts Act (hereinafter also 'ECA'), the employee must be informed about the working time particular to his or her case. Under Section 5 (2) of the ECA, terms of employment must be presented clearly, comprehensively, and in accordance with the principle of good faith. If, for example, the agreement on working time has been formulated unclearly or equivocally, the presumption is imposed via the Employment Contracts Act that the employee's working

¹⁰ Section 31 of the Constitution of the Republic of Estonia (*ibid.*).

¹¹ Article 16 of the Charter of Fundamental Rights of the European Union, 'Freedom to conduct a business'. Available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012P/TXT&from=EN> (most recently accessed on 15.6.2018).

¹² E.g., the Forty-Hour Week Convention, ILO convention no. 47, available at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C047 (most recently accessed on 15.6.2018), and the Hours of Work Convention, ILO convention no. 30, available at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100::NO:12100:P12100_ILO_CODE:C030:NO (most recently accessed on 15.6.2018).

¹³ Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time. *Official Journal* L 299, 18.11.2003, pp. 9–19, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32003L0088> (most recently accessed on 15.6.2018).

¹⁴ The European Pillar of Social Rights in 20 principles. Available via https://ec.europa.eu/commission/priorities/deeper-and-fairer-economic-and-monetary-union/european-pillar-social-rights_en (most recently accessed on 15.6.2018).

¹⁵ Article 2 (2) (i) of Directive 91/533/EEC states that the information given to the employee must include information about the length of employees' normal working day or week. Council Directive of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship (91/533/EEC), available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31991L0533:EN:HTML> (most recently accessed on 17.6.2018).

¹⁶ Some authors mention that there are three EU directives – on part-time work, fixed-term employment contracts, and temporary-agency work – that have been designed to support flexibility of employment relationships. However, there are critics who argue that, more fundamentally, these directives all are grounded in three assumptions that can prove limiting: 1) part-time, fixed-term, and temporary-agency work are beneficial to the worker; 2) these forms of work act as stepping-stones and 3) the main problem in this domain is unequal treatment of non-permanent workers relative to 'standard' workers. See A. Davies. *Regulating atypical work: Beyond equality.* – N. Countouris, M. Freedland (eds). *Resocialising Europe in a Time of Crisis.* Cambridge: Cambridge University Press 2013, pp. 230–246. – DOI: <https://doi.org/10.1017/cbo9781107300736.015>.

time is 40 hours per seven-day period and eight hours a day. According to §43 of the ECA, an arrangement of this nature constitutes full-time work.

The issue of working time is important not only because it represents efforts to establish limits between time at work and one's family life but also because it ties in with occupational health and work-safety problems: in cases wherein the employer and/or employee does not heed the requirements related to amounts of working time or does not respect the necessity of rest time, implications may arise for employees' health situation. Workplace accidents and occupational illness are among the possible consequences.

When new forms of employment are applied, it should be borne in mind that not all fields of economic activity are influenced greatly by the development of information technology, possibilities for flexibility, and opportunities for exercise of new forms of employment. For this reason, the division of employees into categories between so-called white- and blue-collar workers may gain added relevance. Though such dichotomies can be problematic in some cases, the activity of white-collar workers (i.e., workers performing various service tasks, doing office-related work, engaged in public service, etc.) permits us to speak in more general terms about arrangement of flexible working time and, in connection with that, about possible obstacles found in the legal regulation.

3.2. Who ensures compliance related to working and rest time

Considering the balance of responsibility with regard to compliance questions may seem strange since there appear to be quite explicit statements that the employer is obliged to ensure honouring both of the statutory hours of work and of the rest requirements. On the other hand, if one looks more closely at the European Union Working Time Directive^{*17}'s description of arrangements for working time, one finds that the directive does not directly refer to the employer in this regard. Rather, it sets out for the Member States the aspects to be attended to in the organisation of working time. Consequently, it cannot be ruled out that the employee too is at least partly responsible for organising his or her working time and rest periods.

According to the Employment Contracts Act, the organisation of working time falls within the scope of the employer's responsibility. The ECA's §47^{*18} specifies that the employer must keep records of the employee's working time especially with regard to night work and overtime work. It is up to the employer how those records and keeping a record of the working time more generally are managed. The main problem is connected with the fact that it is not possible to define unambiguously what constitutes working time, especially in relation to when and with what time limits the employee must be available to the employer if the employer so desires (e.g., in cases of being 'on call'). In today's environment, organisation of flexible working time leads to a situation in which the employer's options for regulating someone's working time and monitoring the fulfilment of requirements related to working time are becoming limited, both in principle and in practice.

For example, practical arrangements for an employment relationship in Estonia sometimes involve taking into account working-time tables (i.e., timesheets) compiled by the employee, and the case law available in this respect recognises this approach as legitimate. Where it is not possible to give the employer verification of having worked at night or having worked overtime, Estonian court practice takes into account what the employee has stated in this regard.^{*19} Thereby, current case law in Estonia already has brought change related to the employer's commitment to following the time used for work: if the employer has not tracked compliance with the rules on working time or has not duly imposed fixed working hours for an employee, this can be done on the employee's side – the requirements can be met on the employee's side through completion of working-time tables.

Where there is an opportunity to perform work in a location desired by the employee and at times that are suitable for him or her, we find a situation in which what matters is less when the work is performed than what the quality of the work and the final result of the work done are. In general, one can characterise

¹⁷ Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time (see Note 13).

¹⁸ Section 47 of the Employment Contracts Act (*Töölepingu seadus*). – RT I 2009, 5, 35, with English translation available at <https://www.riigiteataja.ee/en/eli/506022018003/consolide> (most recently accessed on 15.6.2018).

¹⁹ E.g., the Harju County Court judgement of 31.1.2012 in case no. 2-10-2667; Harju County Court case 2-14-56647, 20.11.2015; Pärnu County Court case 2-15-18247, 13.5.2016.

employment relationships in certain spheres as having previously been focused on the process but now, in reality, having become more oriented to the result.

To the extent that the employment relationship is oriented toward the result, there is no need to control the working time and the circumstances wherein the assignments were performed. What matters is whether and how they were completed.^{*20} However, the working-time and occupational safety directives of the European Union do not currently support an option for the employee to control the working time him- or herself and keep records of the volume and time of the work.^{*21} For this reason, the employer retains full responsibility for monitoring the working time and fulfilling related requirements. This very real obligation creates a situation in which flexibility is not always possible even where there is a clear wish on both sides to ensure such flexibility and a good combination of working and family life. Insofar as the arrangements for working time are to a significant extent no longer a unilateral decision of the employer, the employer can no longer assume full responsibility with regard to organising the employee's working time. The legal framework should reflect this. Observing the existence and amount of overtime work in particular is becoming more and more complicated, as is ascertaining whether and when each employee gets his or her scheduled rest.

In a study carried out in Estonia on the forms of future work and the possibility of their implementation, the researchers proposed amendment of the Employment Contracts Act and the introduction of working-time rules that afford substantial flexibility in the time arrangements. Thus, it is foreseen that the employment contract may provide an opportunity to agree on a working-time period (with a specified minimum and maximum working time, a range to the number of hours of work) or to leave no specific agreement as to working time. In line with this recommendation, it was proposed that the Estonian legislator consider to be viable what is, in essence, the establishment of zero-hour contracts.^{*22} On the other hand, there is no clear indication of how and under what conditions other guarantees related to work and rest periods (night work, time for rest between stretches of work, and weekly amounts of rest) should be guaranteed. Furthermore, no answer has been proposed as to whether and to what extent the employer should ensure that restrictions (on night work, overtime work, etc.) are complied with in situations of such a flexible work-time arrangement.

4. The workplace

4.1. The meaning of the workplace

The traditional employment relationship is characterised by the work being performed at a fixed place (referred to as the place of employment). The employee's duties are fulfilled at a fixed location and during the scheduled working hours. Before the contract of employment is signed, the employer must let the employee know where the place of performance of the work is located. This obligation to provide information related to the workplace is explicitly articulated in Directive 91/533/EEC, which addresses terms and conditions of employment.^{*23} This directive has been implemented in Estonia's law: Estonia's Employment Contracts Act, in §5, states that the employee has to be informed of the place of performance of work. In addition to this, the ECA contains language setting forth an assumption in this regard – when agreement pertaining to the workplace is unclear or absent, it is presumed that the workplace lies within / is

²⁰ In the context of changed work relations, customer feedback has increased, as has its consideration in the performance of work duties. In the literature of various professions, it has been noted that such customer feedback may at the same time constitute a potential source of discrimination. See R. Ducato et al. Customer ratings as a vector for discrimination in employment relations? Pathways and pitfalls for legal remedies. Presentation at the Marco Biagi Foundation conference held on 19.3–20.3.2018.

²¹ Article 5 of the EU's directive on work environment specifies the general responsibilities of the employer. See Article 5 of Council Directive 89/391/EEC of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31989L0391&from=EN> (most recently accessed on 15.6.2018). The Working Time Directive does not make any reference to the employer. It does create more obligations for the Member States. See, for example, Article 6 of Directive 2003/88/EC of the European Parliament and of the Council of 4 November 2003 concerning certain aspects of the organisation of working time (see Note 13).

²² Analüüs "Tulevikutöö – uued suunad ja lahendused" (see Note 7).

²³ Article 2 of the Council Directive 91/533/EEC of 14 October 1991 on an employer's obligation to inform employees of the conditions applicable to the contract or employment relationship (see Note 15).

bounded by the jurisdiction of the local government.^{*24} The current understanding of labour relations is closely related to the notion of a concrete workplace, and, accordingly, all the protective measures that are mandated for work/workers should be applied in the workplace.

4.2. The employer's obligations connected with the workplace

The place of work is an essential component of the employment relationship as a whole. We can define the term 'workplace' as denoting a place where the employee performs the work and also constituting a place where the employer must ensure that the occupational health and safety rules are followed. According to the Rome I regulation, the determination of the applicable law is tied to the location where the employee is carrying out the duties.^{*25} Therefore, at the moment, there are diverse clauses providing for safeguards for employees, which vary greatly, connected with the notion of the workplace or with descriptions thereof.

The Estonian Occupational Health and Safety Act contains two definitions in relation to this: of 'working environment' and of 'workplace'. The working environment is described as the setting in which people work. The workplace, in turn, is a place of work and its surroundings on the premises of an enterprise of a sole proprietor or company, a state or local government agency, a not-for-profit association, or a foundation (hereinafter 'enterprise') and, in addition, extends to any other places of work to which an employee has access in the course of his or her employment or where he or she works with the permission of the employer or on the employer's orders. An employer shall design and compose its workplace such that it is possible to avoid occupational accidents and harm to the health and to maintain the employee's work ability and well-being.^{*26}

Although recent academic literature often highlights sharing economy, digitalisation, and aspects of developments that accompany these, the employment regulations that are currently in force, centred as they are on the concept of the workplace, do not make it any easier to address the process of digitalisation and the emergence of new forms of employment in tandem with this. One consequence of this focus is that the employer maintains a duty of carrying out analyses for prevention of occupational risks.^{*27} This analysis is an essential component of designing a secure work environment.

There are several ways to assess whether persons who offer ride-sharing are employees or not. This alone illustrates well that analysis of the subject is far from finished.^{*28} While recognition of what constitutes the status of employee is still causing problems in Estonia, there is not much attention given to relevant consequences arising therefrom and, in particular, to employer status. There is seldom further discussion of how the occupational health and safety rules are to be applied in the new forms of employment relationship or where exactly the employee's working environment is.

The modern forms of employment do not require a fixed workplace to which the employee comes every working day. This situation has been rendered possible by the fact that in many cases the employees do not have to be physically present and that much work can be done by means of dedicated secure platforms, databases, etc. It must be emphasised in connection with this that, as is alluded to above with regard to the blue- and white-collar delineation, for some types of work the place of work remains important (e.g., construction work, railway jobs, and shipping).

One of the changes that can be made to the labour law now in force would involve replacing the notion of workplace with that of work environment. Under this proposal, an employer and employee would no longer be seen as connected to one concrete workplace; instead of that, a much broader notion could be used,

²⁴ See §20 of the ECA.

²⁵ See Article 8 (2) of Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32008R0593&from=EN> (most recently accessed on 15.6.2018).

²⁶ Sections 4 and 5 of the Estonian Occupational Health and Safety Act (*Töötervishoiu- ja tööohutuse seadus*). RT I 1999, 60, 616, with English translation available at <https://www.riigiteataja.ee/en/eli/505052017007/consolide> (most recently accessed on 15.6.2018).

²⁷ See Article 6 (3) of the Council Directive of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work (89/391/EEC) (see Note 21). See also §13 (1) 3) of the Occupational Health and Safety Act (*ibid.*).

²⁸ See the materials on the recent European Court of Justice case *Asociación Profesional Élite Taxi*, C-434/15, available at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=198047&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1085694> (most recently accessed on 15.6.2018).

with the language of ‘work environment’ being applied. This amendment would not fundamentally change the nature of the key problem as a whole. A central issue remains: if the place of employment is not actually verifiable by the employer and the employer is not in a position of technical or physical control over the elements that are needed for completion of the work, the employer cannot be held liable therefor.

For someone wishing to take into account the changes in the workplace, it is obvious that there exists a need to reduce the responsibility of the employer for guaranteeing compliance with the occupational health and safety rules. There should be more responsibility on the employee’s side for guaranteeing a safe and healthy working environment. The above-mentioned study conducted in Estonia on the prevalence of new forms of work echoes this, suggesting as one possible outcome of these developments that the employee’s responsibility with regard to occupational health and safety requirements should be increased.

The authors of that analysis have also arrived at the understanding that the national-level introduction of such a change would contradict the law of the European Union as currently in force.^{*29}

5. Assessment of work quality

The use of new forms of remote work has ushered in a situation wherein the employee’s working time can be unlimited and wherein the work need not be confined to a specific place of work. That forces the employer to face several important questions. In addition to the regulation-related ones above, there is one at the core of the employer’s interests: how to measure the quality of the work.

If quality criteria have not been agreed upon, the employer cannot assess whether the work done by the employee was of high quality or not. New forms and means of carrying out work-related duties have not brought changes in that regard.

Sharing-economy work and platform-based employment are proliferating today.^{*30} At the same time, remote work (telework) is increasingly applied for completing work-related tasks, yet the conditions laid out in the law for control and evaluation of the quality of the employee’s work have remained the same^{*31}: the employer prescribes the expected results that the employer must achieve, and then the parties agree upon the quality criteria that may be applied. If the corresponding quality criteria are met, it is possible to consider the work done to be of high quality. That said, for better ensuring the quality of the work performed, it is being found important to negotiate separately with each employee on the terms related to quality. When it is not possible to negotiate employee-specifically in this manner, agreements may be reached at least at the level of groups composed of employees with, for example, a certain class of duties. The only aspect of the quality assessment that is truly important here is who will make the final decision as to whether the work submitted meets the quality criteria (i.e., whether it is in line with the results expected).

The new forms of employment will restrict the employers’ position to assess the quality of work done by the employee. Therefore, more responsibilities about the quality of work has to be beard by the employees.

6. Conclusions

If we are to reflect fruitfully on the opportunities that digitalisation has brought with it and if we wish to support those opportunities and enhance positive digital developments, we must be as precise as possible in our discussion and with the resulting legal praxis and legislation.

Digitalisation has not wrought rapid changes in all professions and areas of employment, and traditional contractual employment encompassing a subordination relationship will continue to exist. The legal regulations now in place are clearly focused on such work, with a fixed workplace and fixed working time. Under those regulations, the employer has significant responsibility for compliance with the associated requirements. However, the other part of the picture – non-traditional employment relationships – should not be neglected. Although legal regulation at EU level does provide for the possibility of the employee

²⁹ Analüüs “Tulevikutöö – uued suunad ja lahendused” (see Note 7).

³⁰ M. Risak, J. Prassl. Uber, TaskRabbit, & Co: Platforms as employers? Rethinking the legal analysis of crowdwork. – *Oxford Legal Studies Research Paper Series* 2016/8.

³¹ K. Künnapas. Kaugtöö aktuaalseid probleeme [“Topical problems of telework”]. – *Juridica* 2014/4, pp. 279–290 (in Estonian).

having some responsibility for compliance with occupational health and safety rules, this has not entered full application yet: at the end of the day, the employer is still responsible for developing healthy and safe work conditions. Therefore, the workability of the new forms of employment within this framework remains highly questionable.

With regard to the assessment of the quality of the work performed by the employee, digitalisation does not entail any substantive changes. As before, the essential principle is that the work must be done within the prescribed time and to the prescribed quality. The level of quality must be agreed upon with the employee – though sometimes at the level of the individual employee in the new conditions – and it must be ensured that the employer and the employee are able to apply a shared understanding of the agreed level of quality.



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Current Challenges of the Labour Law of Ukraine:

On the Way to European Integration

1. Introduction

Ever since the declaration of independence in 1991, reforms to the legal system and various associated codification processes have been under way in Ukraine. In most branches of Ukrainian law, we now have modern codified acts, and in some spheres the acts of law have already been updated several times.

At the same time, in the field of regulating labour relations, the situation surrounding adoption of the new Labor Code has remained unclear for a long time. In particular, political, economic, and scientific-legal discussions are still in progress with regard to the various possible ways of reforming labour legislation.

The current labour law in force in Ukraine is a kind of 'hybrid' between a proclamation of market-based principles and a somewhat modernised form of the old framework 'inherited from' Soviet times but providing better guarantees of labour rights. This has led to an imbalance between the norms of labour law inscribed on paper and the real-world relations between workers and employers. Piecemeal efforts by the state to increase liability for violating the norms and guarantees provided for employees under the current labour legislation tend to have the opposite effect, and the corresponding reaction from employers is to avoid – in every way possible – applying 'inconvenient' norms, to utilise the gaps in the legislation, or to simply ignore the law. This has led to a situation wherein the proportion of illegal or undeclared work in Ukraine, according to the State Statistics Committee of Ukraine in 2017, is over 23%, which means that for 3.7 million Ukrainians, or every third working citizen, there is no formal registration of labour relations^{*1}.

These circumstances render it all the more regrettable that the process of improving the legal regulation of labour relations is not systemic but chaotic, generating numerous inconsistencies of legal norms. Against this backdrop, there is a visible tendency to put greater weight instead on judicial practice in cases of labour disputes, particularly the legal positions taken by the Supreme Court of Ukraine, in which the legislation is not interpreted as actually having been modified.

One of the significant problems with the labour legislation in Ukraine is the lag it displays in accounting for the forms of social relations that exist and the practical needs arising from the rapid development of information technologies and innovations in tandem with advances of modern post-industrial society – in particular, the spread of the virtual labour market and the entry into of non-standard labour contracts.

In summary, the necessity for recodifying Ukrainian labour law is rooted in several factors: 1) that most of the labour-law norms do not truly function in practice; 2) the large amount of undeclared and illegal

¹ Демографічна та соціальна статистика. Ринок праці. Зайнятість та безробіття. Available online in Ukrainian at http://www.ukrstat.gov.ua/operativ/menu/menu_u/rp.htm (most recently accessed on 11 June 2018).

work; 3) the existence of new forms of employment, which remain beyond the scope of legal regulation; and 4) lack of flexibility of Ukrainian labour law. Alongside these reasons there exists the inescapable conclusion that Ukraine has no other way open to it than integration into the European Union. Therefore, the need to adapt national labour legislation to EU standards is not in doubt.

2. Labour contracts: The need to revise traditional approaches

The draft of the Labor Code of Ukraine (bill 1658), approved on its first reading in 2015, is designed to establish the rights and obligations of the subjects of labour relations. This is aimed at ensuring implementation of the employee labour rights and guarantees provided for by the Constitution of Ukraine, the creation of adequate work conditions, the provision of workers' and employers' rights, and protection of their interests (Part 1, Article 1)². All this is in one way or another enshrined in the current Labor Code of Ukraine, but the question of a qualitative, meaningful updating of labour legislation, rather more than a formal change of name and structure coming about via the codified act, holds particular relevance in modern conditions.

In light of the latest trends in the development of labour legislation in other countries, as well as active legislative work on the draft of the new Labor Code in Ukraine, the question of the necessity and advisability of revisions to the classical view of the signs of an employment contract and its legal definition is still subject to vigorous discussion and is the stuff of lively debate.

The theoretical material on what constitutes an employment contract has, apart from some terminological clarifications, been transposed virtually unchanged from what is found in Article 21 of the currently valid instrument, the Socialist Labor Code of 1971, to the draft for the new Labor Code of Ukraine. The contract is formally presented as an agreement between an employee and an employer in which the employee undertakes to personally perform work (a labour function), specified by said agreement, in compliance with labour laws, collective agreements and contracts, and internal labour rules under the direction and control of the employer, and in which the employer undertakes to provide the employee with work under the agreement; proper, safe, and healthy work conditions; proper sanitary conditions; and wages paid in full and on time³.

On the one hand, the consistency thus shown by lawmakers has attracted approval, because the socio-economic essence of hired labour, in the era of socialism and the time of the market economy alike, remains fundamentally unchanged, and, therefore, according to some scholars, the inviolability of the basic legal structures in the field of labour law is thereby articulated⁴.

On the other hand, given the emergence of new forms of employment, there have arisen among legal scientists many supporters of modernisation of the main institutions of labour law; of implementation of the flexicurity (that is, flexibility of labour relations for employers while workers are provided with a stable situation in the labour market); and of granting the parties greater contractual freedom in terms of establishing the work conditions, particularly the work times, the workplace, and related elements.

In this regard, it would not be superfluous to mention innovation that is interesting from the perspective of 'classical labour law'. This innovation connected with the adoption of the law of Ukraine titled 'On Scientific and Technical Activities', of 26 November 2015 addresses elements that do not quite 'fit' the design of an employment contract that is stipulated in the draft Labor Code. These are, in particular, remote work of scientists and specialists with scientific institutes and institutions of higher education, stipulated in Article 6, and the concept of longer scientific trips and internships in scientific fields (addressed in Articles 33 and 34 of the law)⁵.

² Draft Labor Code of Ukraine, bill 1658, dated 27 December 2014, adopted on first reading on 5.11.2015. Available online in the Ukrainian language at http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=53221 (most recently accessed on 11 June 2018).

³ Labor Code of Ukraine, ratified on 10 December 1971 as a set of labour laws for Ukraine, no. 322-VIII. Available in Ukrainian at <http://zakon3.rada.gov.ua/laws/show/322-08> (most recently accessed on 11 June 2018).

⁴ A.F. Nurtidina / Нуртдинова А. Ф. Трудовой договор в современных условиях [The labour contract in modern conditions]. *Государство и право* [State and Law] 1994/2, p. 40.

⁵ Law of Ukraine No. 848-VIII of November 26, 2015, on Scientific and Technical Activities. Available in Ukrainian at <http://zakon3.rada.gov.ua/laws/show/848-19> (most recently accessed on 11 June 2018).

It appears that, as the need for a more flexible approach to the regulation of labour relations becomes clearer and with the spread of new forms of employment (remote work, outsourcing, outstaffing, etc.), some of the classic signs of an employment contract that were readily applicable 20 years ago are gradually losing their fundamental importance. This applies especially to the criterion of the employee being subject to organisation-internal labour rules. It is obvious that considering such a feature as the employee being required to follow internal rules regulating the labour to be fundamental to the concept of an employment contract should be abandoned. Especially in today's circumstances, it is not a tenable position that such elements must be present if an employment contract is to be deemed to exist.

Also questionable is the need to set forth in the formal employment contract the obligation of the employer to provide, in addition to proper, safe, and healthy work conditions, 'appropriate sanitary conditions'. This can be addressed instead by a special article that directly establishes obligations of the employer; there is no need to 'clutter up' the definition with a detailed list of those obligations. Consequently, the notion of an employment contract enshrined in the current legislation needs to be changed in light of the emergence in practice of new types of employment.

Equally relevant today remains the problem of the actual empowering of the participants in labour relations with contractual freedom, which should exist at all stages of the existence of labour relations. In this regard, it should be considered a positive development that the the draft Labor Code of Ukraine introduces the requirement that an employment contract take purely written form, with a separate article in the draft law setting forth the requirements related to the content of the employment contract – in particular, with a list of its main and additional conditions, which should allow avoiding many controversial issues in the process of labour activities. The requirement of a written contract extends to any changes of the terms of the employment contract as well (see Article 34 of the draft)*⁶.

The general procedure for the entry into of an employment contract is currently regulated by Article 24 of the Labor Code of Ukraine. Until recently, part 4 of this article contained a provision according to which an employment contract is considered concluded even if, while no corresponding order was issued by the employer, the employee was actually admitted to work. A national law was passed to combat 'hidden' labour relations, 'On Amendments to Certain Legislative Acts of Ukraine Regarding the Reform of Mandatory State Social Insurance and Legalization of the Labour Fund', of 28 December 2014 (no. 77-VIII). Under this law, in effect since 1 January 2015*⁷, Article 24 of the Labor Code of Ukraine has been changed such that an employee no longer may be admitted to work without there having been an employment contract concluded and the employee having been appointed by order of an employer, who must report the admission of said employee to work to the central executive body that oversees issues of ensuring the creation and implementation of state policies for administering a single-point contribution to compulsory state social insurance.

As practice has shown, this step by the legislator was not an effective way of addressing the new forms of labour relations in the law, because this 'makes life more complicated' for employers, forcing them to move over to civil contracts for the performance of work. Actually, it is hard to answer now, if the laws should treat the various forms of employment differently with excess specificity or just provide the possibility of them. In terms of global social and economic changes the second option seems to be more efficient. Therefore, it is our opinion that the procedure specified in the new Labor Code of Ukraine for concluding labour contracts should be as clear and simple as possible for the parties to the contract. At the same time, for purposes of ensuring protection of the interests of the employee within the social assignation of labour law, in the sphere of application of individual labour relations, the presumption of the fact of labour relations should be legislatively fixed by law. Herein, we find that it should be incumbent on the employer, rather than the employee, to prove the nature of the relationship that arose between the two in relation to the application of labour. In connection with this, it is necessary for the new Labor Code to consolidate the norm with the following content: 'In the event of a dispute over the legal nature of an agreement entered into by the parties under which a person performs work for remuneration for another person, a labour contract is considered concluded between the parties if the employer does not prove the contrary.'

⁶ Draft Labor Code of Ukraine, bill 1658 (see Note 2).

⁷ Law of Ukraine No. 848-VIII of November 26, 2015, on Scientific and Technical Activities (see Note 5).

3. Atypical work in Ukraine

In the mid-1990s, the International Labour Organization (ILO) recognised the advisability of a differentiated approach to the settlement of non-standard employment, adopting its convention on part-time jobs (no. 175)^{*8} in 1994, its convention on home work (no. 177)^{*9} in 1996, and the Private Employment Agencies Convention (no. 181)^{*10} in 1997. None of these has been ratified by Ukraine so far.

Since then, European labour law has seen the issuing of several directives dedicated to certain forms of non-standard employment, among them Council Directive 97/81/EC (of 15 December 1997), on part-time work^{*11}; Council Directive 1999/70/EU (of 28 June 1999), on fixed-term work^{*12}; and Council Directive 2008/104/EC (of 19 November 2008), on temporary employment agencies^{*13}.

It is obvious that at the current stage in post-industrial society's development, with the rapid spread of information technology, processes of globalisation, and European integration, the Ukrainian legislator soon or later will be forced to seek appropriate ways to increase the flexibility of the labour market, one of which entails the legal regulation of new forms of work organisation.

It is worth noting that in most Western and post-Soviet countries, these issues have already been resolved at the level of codes or laws. For example, in August 2007, a legal definition of telework and other relevant regulation on the subject were incorporated into the Polish Labour Code, triggering a crucial shift in public policy on telework. The new rules came into force in October of the same year. Thereby, one of the major obstacles that stood in the way of development of telework in Poland for many years was eliminated^{*14}.

In Bulgaria, amendments to the Labour Code of 2011 explicitly provide for home work, telework, and temporary-agency work as being work performed under an employment relationship. The Labour Code specifies that workers in these relationships possess the same rights as other workers employed under an employment contract, thereby ensuring their rights to payment, health and safety, social and health insurance, training and retraining, work times in line with labour law, and use of social benefits. They have a right to join a trade union in the relevant enterprise or be covered by a suitable collective agreement, along with the right to information and consultation^{*15}.

The Labour Code of the Russian Federation dating from 5 April 2013 includes a separate chapter that regulates the features of distance work, and since 1 January 2016 the code has included rules in force to govern the work carried out by the employee on the employer's orders for the benefit of and under the management and control of natural or legal persons that are not the employer (see Chapter 53-1 of the Labour Code of the Russian Federation)^{*16}.

⁸ ILO. C175 – Part-Time Work Convention, 1994 (No. 175), of 24.6.1994. Available at https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C175 (in Ukrainian at http://zakon3.rada.gov.ua/laws/show/993_040) (most recently accessed on 11 June 2018).

⁹ ILO. C177 – Home Work Convention, 1996 (No. 177), of 20.6.1996. Available at https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C177 (in Ukrainian at http://zakon4.rada.gov.ua/laws/show/993_327) (most recently accessed on 11 June 2018).

¹⁰ ILO. C181 – Private Employment Agencies Convention, 1997 (No. 181), of 19.6.1997. Available at https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C181 (in Ukrainian at http://zakon3.rada.gov.ua/laws/show/993_046) (most recently accessed on 11 June 2018).

¹¹ Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on part-time work concluded by UNICE, CEEP and the ETUC [Union of Industrial and Employers' Confederations of Europe, European Centre of Enterprises with Public Participation, and European Trade Union Confederation]. Available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A31997L0081> (in Ukrainian at <http://www.minjust.gov.ua/file/32380>) (most recently accessed on 11 June 2018).

¹² Council Directive 1999/70/EC of 28 June 1999 concerning the framework agreement on fixed-term work concluded by ETUC, UNICE and CEEP. Available at <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A31999L0070> (in Ukrainian at <http://old.minjust.gov.ua/45891>) (most recently accessed on 11 June 2018).

¹³ Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on temporary agency work. Available at <http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1459618662174&uri=CELEX:32008L0104> (most recently accessed on 11 June 2018).

¹⁴ Jan Czarzasty. Telework in Poland. Published by Eurofound at <https://www.eurofound.europa.eu/observatories/eurwork/articles/telework-in-poland> (most recently accessed on 15 June 2018).

¹⁵ Tatiana Mihailova, Nadezhda Daskalova. Bulgaria: Annual review 2011. Published by Eurofound at <https://www.eurofound.europa.eu/observatories/eurwork/comparative-information/national-contributions/bulgaria/bulgaria-annual-review-2011> (most recently accessed on 15 June 2018).

¹⁶ The Labour Code of the Russian Federation of 30 December 2001, as of 1 January 2016. Available in Russian at <http://logos-pravo.ru/page.php?id=6086> (most recently accessed on 11 June 2018).

In contrast, the draft Labor Code of Ukraine, which is positioned by its developers as a modern legal-normative act that meets the needs of the modern day, does not even mention the possible existence of atypical employment contracts. The only article in the draft that regulates home working, Article 43, is not sufficiently reflective of the relationships that have developed in practice. At the same time, the prevailing approach in European law and research on the subject is reasoning that draws a distinction between the concept of 'home working', as mostly manual labour with low skill requirements that involves using simple equipment, and that of 'telework', as intellectual work by highly qualified professionals that is aimed at functional duties and involves modern information and telecommunication technologies. The ILO views home working as clearly distinct from telework: home workers are sometimes called 'outworkers' and are generally poorly paid people with poor job security or working on a piecework basis with no contract of employment. In contrast, a teleworker may be a manager, a senior professional, or another relatively highly paid employee who finds it more convenient to work at or near home some of the time^{*17}. Hence, there is an objective need for legal regulation of the peculiarities of telework in the new Labor Code of Ukraine.

Equally important is articulation of a clear position of the Ukrainian legislator on such phenomena as 'labour lending' (also known as outsourcing or outstaffing), another phenomenon not mentioned in the draft Labor Code. This shortcoming exists even though the currently valid Ukrainian law titled 'On Employment of the Population', from 5 July 2012, represents some legal regulation that does address the activities of business entities that hire employees to further perform work in Ukraine for another employer, through its Article 39^{*18}.

In foreign practice, the phenomenon called 'secondment' – referring to temporary attachment with a second organisation, elsewhere – is gaining popularity. Depending on the purpose, secondment can be considered to be variously a technique for training of personnel, a form of mobility of labour resources, or one of the forms of labour lending. In essence, it is a temporary referral to work for another employer (with suspension of the employment contract but with preservation of labour relations with the main (initial) employer), which implies an obligation for the employee to return to the original employer at the end of the term agreed by the parties. Among the positive aspects of such a 'business trip' for an employee may be the development of a career, the opportunity to acquire new skills and experience (which also benefit the employer), and corresponding professional development of the employee (training etc.).^{*19} In our opinion, in the process of adaptation of the labour legislation of Ukraine to EU legislation, the legal regulation of the institution of secondment should be given due attention.

It would seem expedient for the code, as a comprehensive legal act in the field of labour relations, to be the instrument determining the main provisions that address the peculiarities of non-standard forms of engagement, to outline the scope and procedure for the entry into of special 'atypical' labour contracts, and to clearly establish the rights and guarantees for employees who work under such labour contracts.

4. Conclusions

Adjusting the legal regulation of labour relations in Ukraine in line with the legislation of the European Union cannot be done without taking into account the main tendencies in the development of labour law in European countries, among which we should note these: 1) ensuring decent work, efficient employment, and higher-quality human life; 2) facilitating the creation of labour-market conditions that should combine flexibility and security; 3) reducing illegal employment; 4) and eliminating discrimination in all its forms and manifestations.

With the signing of the Association Agreement with the European Union, the process of harmonising national labour legislation with the European legal space requires of Ukraine not only the development of documents certifying such intentions but, first of all, carrying out concrete reforms to improve the current normative-legal acts and adopting radically new ones.

¹⁷ Eurofound. Homeworking. Published at <https://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/homeworking> (most recently accessed on 11 June 2018).

¹⁸ On Employment of the Population, Law of Ukraine no. 5067-VI, of 5 July 2012. Available online in Ukrainian at <http://zakon3.rada.gov.ua/laws/show/5067-17/page2> (most recently accessed on 11 June 2018).

¹⁹ Net Lawman Limited. Arranging a secondment: Practical and legal considerations. Available at <http://www.netlawman.co.uk/ia/secondment-agreements> (most recently accessed on 11 June 2018).

The overhaul to Ukraine's labour legislation should take into consideration the current state of social relations in the field of labour, the practice of law enforcement, the positive experience of the European Union countries with regard to regulation of labour relations, and the need to ensure that the level of rights and guarantees for hired employees does not fall.

Accordingly, we can identify certain key directions for reforming the Ukrainian national labour legislation on the way to European integration. Firstly, the legislative definition of the concept of an employment contract can be revised in terms of the mandatory subjection of an employee to rules of internal labour regulations, as well as the employer's provision of adequate sanitary and other domestic work conditions, alongside commensurate introduction of new types of employment contracts. Second is, by eliminating excessive 'over-regulation' of labour relations, granting the parties to employment contracts greater contractual freedom for determining the conditions of work, the workplace, the work times, etc., hence making labour legislation more flexible. Thirdly, we can deepen the differentiation in legal regulation of labour relations and legalisation of non-standard types of employment with the purpose of bringing labour rights and guarantees to employees involved in such activities.



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Identification of Provoked State in Estonian County Court Rulings of 2006–2016

1. Introduction

One of the main questions in forensic psychiatry and psychology related to the legal system is that of issues surrounding assessment of a defendant's mental state during commission of the crime.^{*1} In Estonian legal literature, there has been debate on engagement of forensic psychology and psychiatry experts in identification of provoked state.^{*2} However, the literature has not yet examined how that state is identified in the courts – i.e., to what extent experts are involved. Therefore, this paper has been prepared^{*3} to investigate more closely how provoked state is identified in the judicial proceedings.

1.1. Provoked state

Sometimes a person cannot sufficiently control his or her behaviour because emotion regulation is inhibited. Affect in a very broad sense can be defined as any emotional reaction to external stimuli.^{*4} In a narrower sense, affect is an emotional reaction to stimuli that is so extreme that the person's self-control is diminished or completely inhibited.^{*5} From a legal perspective, this may lead to a question of whether the above has an effect on liability in the context of penal law.^{*6}

¹ A. Adamsoo. Süüdimatuse meditsiinilised tunnused ['Medical features of incapability of guilt']. – *Juridica* 2002/II, pp. 100–102 (in Estonian).

² T. Kompus. Emotsionaalsete seisundite hindamine kohtupsühholoogilisel ekspertiisil ['Evaluating emotional statuses in forensic-psychology expert assessment']. – *Juridica* 2002/II, pp. 96–99 (in Estonian); P. Randma. Afekt kui hingelise erutuse seisund ja ajutine raske psüühikahäire ['Affect as highly provoked state and temporary severe mental disorder']. – *Juridica* 2005/V, pp. 321–331 (in Estonian); J. Saar, P. Pikamäe. Hingelise erutuse seisund. Probleemidest Eesti karistusõiguses ja kohtupraktikas ['Highly provoked state: Problems in Estonian penal law and practice']. – *Juridica* 2006/IX, pp. 591–600 (in Estonian).

³ The authors thank Lawrence T. White and Josephine Hirsch from the USA's Beloit College for their valuable comments during preparation of the paper and Sandra Kaasik of Tallinn University for assistance in coding the data.

⁴ For example, see J. Saar, P. Pikamäe (see Note 2).

⁵ T. Bachmann. *Psühholoogia – raamat juristile* ['Psychology – a Book for the Lawyer']. Tallinn: Juura 2015, especially pp. 176–184.

⁶ P. Randma (see Note 2).

Under mitigating circumstances, homicide as dealt with under §113 of the Estonian Penal Code (PC) can be classified as manslaughter committed in a provoked state (PC §115).^{*7} The PC defines manslaughter in a provoked state as an act ‘committed in a state of sudden extreme emotional disturbance caused by violence or insult inflicted on the killer or a person close to him or her by the victim’. This distinction is important from the standpoint of penal law because the crime in the absence of these circumstances is punishable by 6–15 years’ imprisonment (under §113) while the sentence under §115 is instead one to five years’ imprisonment, thus making the difference in maximum sanctions 10 years.

In Germany^{*8}, provoked state is defined in a similar manner, with the German Penal Code^{*9} identifying murder under mitigating circumstances (§213) as follows: when the murderer ‘was provoked to rage by maltreatment inflicted on him or a relative, or was seriously insulted by the victim and immediately lost self-control and committed the offence, or in the event of an otherwise less serious case’.

In common-law countries, in contrast, the term ‘heat of passion’ or ‘loss of control’ is more commonly used. In the United States^{*10}, a homicide committed in the heat of passion may be qualified as manslaughter in the presence of several particular characteristics (i.e., when provocation occurred in which conditions a reasonable person, if exposed to said provocation, would have lost control; the defendant was indeed provoked and experienced, as a direct result, uncontrollable rage or other extreme emotional disturbance; the time that elapsed between the provocation and the homicide was not enough for a reasonable person to have ‘cooled off’; and the defendant indeed did not cool off before killing the victim).^{*11} For England and Wales, the Coroners and Justice Act^{*12} defines loss of control in the following terms (in §54):

- Where a person (‘D’) kills or is a party to the killing of another (‘V’), D is not to be convicted of murder if —
- (a) D’s acts and omissions in doing or being a party to the killing resulted from D’s loss of self-control,
 - (b) the loss of self-control had a qualifying trigger,
 - (c) and a person of D’s sex and age [...] might have reacted in the same or in a similar way^{*13}

1.2. Identification of provoked state

The provoked state is initiated by the behaviour of the victim.^{*14} Provoking behaviour can obtain in the form of non-verbal and/or verbal violence or insult directed toward the defendant and/or the defendant’s relatives, and its existence is interpreted subjectively (still, the behaviour constituting the insult should be considered generally unlawful in the relevant society). It is known from cognitive psychology that the context does influence whether something said or done is interpreted as an insult.^{*15} Accordingly, a person already in a provoked state may not be able to perceive the situation objectively, and, therefore, reactions can vary.^{*16} Although a person should be able to control him- or herself, it is easier to understand an

⁷ Penal Code (Karistusseadustik). – RT I, 23.12.2014, 16 (in Estonian).

⁸ For comparison of terminology in Estonian, German, and US law, see J. Saar. Kriminaalkorras karistatavate ja õiguspärase surmamiste regulatsioon Eestis võrrelduna Ameerika Ühendriikide ja Saksamaa õigusega [‘The regulation of homicide in Estonian, US, and German law’]. – *Juridica* 2000/I, pp. 14–26 (in Estonian).

⁹ See the German Criminal Code, in the version promulgated on 13 November 1998 in the *Bundesgesetzblatt* (Federal Law Gazette) I, from para. 3322, last amended by Article 1 of the Law of 24 September 2013 (see *Bundesgesetzblatt* I, from para. 3671), and with the text of Section 6(18) of the Law of 10 October 2013 (see *Bundesgesetzblatt* I, from para. 3799), §1809. Available at http://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p1809 (most recently accessed on 15.1.2018). See also P. Randma (see Note 2).

¹⁰ American Law Institute. *Model Penal Code Official Draft and Explanatory Notes (complete text of the model penal code as adopted at the 1962 annual meeting of the American Law Institute in Washington, DC, on 24 May 1962)*. American Law Institute: Philadelphia 1985.

¹¹ R.G. Fontaine. Reactive cognition, reactive emotion: Toward a more psychologically informed understanding of reactive homicide. – *Psychology, Public Policy, and Law* 14 (2008), pp. 243–261. However, see also American Law Institute (*ibid.*). – DOI: <https://doi.org/10.1037/a0013768>.

¹² Coroners and Justice Act 2009, Chapter 25. Available at http://www.legislation.gov.uk/ukpga/2009/25/pdfs/ukpga_20090025_en.pdf (most recently accessed on 15.1.2018).

¹³ See also T. Bachmann (see Note 5) for a discussion of loss of control.

¹⁴ J. Saar, P. Pikamäe (see Note 2).

¹⁵ R.G. Fontaine, K.A. Dodge. Real-time decision making and aggressive behavior in youth: A heuristic model of responsive evaluation and decision (RED). – *Aggressive Behavior* 32 (2006) / 6, pp. 604–624. – DOI: <https://doi.org/10.1002/ab.20150>.

¹⁶ R.G. Fontaine (see Note 11).

extreme reaction in these cases than in others, since provoking situations can initiate immediate and strong emotional responses that affect our ability to reason and thereby can lead to unlawful actions.^{*17}

Historically, the term 'affect' can refer to either of two distinct states: 'physiological affect' (i.e., overwhelming emotions and behavioural responses that are not classified as a characteristic of a mental disorder *per se*, where this state is identified by a clinical psychologist who determines that the state is non-pathological) and 'pathological affect' (i.e., a mental state that can be classified as indicative of a mental disorder and thereby could indicate that the capability of guilt is absent, where this state is identified by a psychiatrist since the person assessing the state should be able to judge it pathological).^{*18} Through such distinctions, affect can differ in its legal consequences in judicial settings on the basis of whether it is in line with the defining elements of an offence (PC §115), is indicative of mitigating circumstances (PC §57 (1) 6)), constitutes a feature diminishing one's capability of understanding and guiding one's behaviour (PC §35), or is a factor excluding the consideration of guilt (PC §34).^{*19} This creates a situation wherein, on the one hand, the act may have been committed in a provoked state but, on the other, the person's behaviour could have been disturbed in such a way that the person was rendered partially or completely incapable of guilt.

Hence, to cover all the above, the experts are often asked three questions: i) whether the person was acting in a provoked state; ii) whether the person was acting in a state of physiological affect, and iii) whether the person while committing the crime was able to understand the meaning of the act and guide his or her behaviour accordingly?^{*20} Saar and Pikamäe^{*21} discuss the most comprehensive answers related to provoked state as being provided via 'complex' expert assessment (that is, assessment in both psychological and psychiatric terms), since the person may be incapable of guilt.

Although provoked state is a concept used in legal terminology, no equivalent state is described in diagnostic manuals of mental disorders; one cannot be identified either in the 10th version of the International Statistical Classification of Diseases and Related Health Problems (ICD-10)^{*22} or in the 5th edition of the *Diagnostic and Statistical Manual of Mental Disorders* (DSM-5)^{*23}.

It is suggested that in identifying provoked state, experts assess firstly whether the defendant at the time of the offence displayed a neurotic disorder such as an acute stress reaction (which may manifest itself in various degrees of intensity and thereby create different content and duration of dysfunction in human behaviour).^{*24} According to ICD-10, an acute stress reaction can be a response to 'an exceptionally stressful life event'.^{*25} In the DSM-5 diagnostic system, an acute stress disorder (308.3) is defined in a similar way.^{*26} After this stage in the assessment, the effects of the reactions are evaluated, in terms of whether at the time of commission of the act the person was capable of understanding the unlawfulness of that act and of acting

¹⁷ S.J. Sherman, J.L. Hoffmann. The psychology and law of voluntary manslaughter: What can psychology research teach us about the 'heat of passion' defence? – *Journal of Behavioral Decision Making* 20 (2007) / 5, pp. 499–519. – DOI: <https://doi.org/10.1002/bdm.573>.

¹⁸ J. Saar, P. Pikamäe (see Note 2). Read more of the identification issues of physiological affect also from T. Kompus (see Note 2).

¹⁹ See also J. Saar, P. Pikamäe (see Note 2); P. Randma (see Note 2).

²⁰ P. Randma (see Note 2).

²¹ See also J. Saar, P. Pikamäe (see Note 2).

²² World Health Organization. The ICD-10 Classification of Mental and Behavioural Disorders: Clinical descriptions and diagnostic guidelines, 1992. Available at <http://www.who.int/classifications/icd/en/bluebook.pdf> (most recently accessed on 15.1.2018).

²³ American Psychiatric Association. *Diagnostic and Statistical Manual of Mental Disorders (5th Ed.)*. Washington, DC, 2013. – DOI: <https://doi.org/10.1176/appi.books.9780890425596.893619>.

²⁴ T. Kompus (see Note 2).

²⁵ According to ICD-10, an acute stress reaction is a transient disorder that develops in an individual without any other apparent mental disorder in response to exceptional physical and mental stress and that usually subsides within hours or days. The symptoms show a typically mixed and changing picture and include an initial state of 'daze' with some constriction of the field of consciousness and narrowing of attention, inability to comprehend stimuli, and disorientation. This state may be followed either by further withdrawal from the surrounding situation or by agitation and over-activity. The symptoms usually appear within minutes of the impact of the stressful stimulus or event and typically disappear within two to three days (often within hours). Partial or complete amnesia for the duration of the episode may be present.

²⁶ The DSM-5 defines an acute stress disorder as arising from exposure to actual or threatened death, serious injury, or sexual violation manifested in one or more ways. In cases of actual or threatened death of a family member or friend, the event(s) must have been violent or accidental; symptoms from any of the categories of intrusion, negative mood, dissociation, avoidance, and arousal are present; and symptoms typically begin immediately after the trauma. The DSM-5 definition also includes the disturbance causing clinically significant distress or impairment in social, occupational, or other important areas of functioning.

accordingly. This expert evaluation is important if one is to understand whether the person's state entailed ability to guide his or her actions (and, through this, to identify whether that person was capable of guilt or not).^{*27}

Kompus^{*28} emphasises that other characteristics too should be considered in examination of the defendant (e.g., a combination of cognition and behaviour that may have affected the person's thinking and behaving in the situation in question). She notes that, although emotional reactions are not controlled by volition, we can still control the behaviours we exhibit in response to emotional reactions. This notwithstanding, one's emotional reactions and their regulating effect on behaviour can still be disturbed (a fact that has been taken into consideration by legislation).

The identification of provoked state is rendered even more complicated in light of the acute-stress-related descriptions above by the fact that it cannot be considered a mental disorder, in the case of which there may be a question of mental capacity instead.^{*29} Ulväng^{*30} has noted also that manslaughter in a provoked state with a disturbed state of mind caused by sudden rage or anger cannot be considered a symptom of a mental disorder. The state impairs the person's ability to foresee long-term consequences of the behaviour; however, it should not be seen as influencing one's ability to understand the act and guide his or behaviour.

Kask and Salumäe^{*31} have concluded that experts find it difficult to answer the questions specified in the expert-assessment regulations with regard to provoked state because the wording of the questions differs (the language may refer variously to identifying the presence of provoked state, physiological affect, or an acute stress disorder) and also since experts respond differently (either identifying a provoked state or noting circumstances that **imply the presence of** a provoked state, as the final ruling on this matter is made by the court).

Presenting related conclusions, Saar and Pikamäe note that three conditions should be met if one is to decide that there exists manslaughter committed in a provoked state (addressed in PC §115). Firstly, during the crime, the person must have been in a certain emotional state that can be described as a physiological affect. Secondly, this state has to have been provoked by the victim through his or her non-legitimate behaviour. Finally, this condition must have appeared sudden and unexpected for the defendant. Sometimes it may also be considered to have formed cumulatively: It is known that provoked state can arise over the course of a lengthy process, as in the case of repeated insults in a span of time that ends with the aggressive act of the defendant.^{*32} Constant affective pressure can result in a situation wherein conflict 'takes over' the person and hence that person acts accordingly, in what has been referred to as a cumulative affect.^{*33} In consideration of such factors, temporal proximity between particular provocation and the act is not as important as the fact that the act is conducted **under the influence of** violence or insult.^{*34} Also, being in a state of alcohol intoxication cannot be deemed a factor overriding that of provoked state.^{*35}

An Estonian Supreme Court ruling^{*36} has emphasised that provoked state is open to legal evaluation and that this state's presence can be identified by means of facts in the criminal case. The court stated that impulsiveness and unstable mood do not imply that the person in question has a diminished capability to understand his or her behaviours and to guide them. The ruling noted also that, whether or not an expert assessment is conducted, the final determination is formed as decided by the court and that there hence may be cases wherein experts are not engaged or consulted and the court makes the decision by analysing only the mitigating circumstances. The causal relationship between the provocative behaviour of the victim

²⁷ T. Kompus (see Note 2).

²⁸ *Ibid.*

²⁹ J. Sootak, P. Pikamäe. *Karistusseadustiku kommenteeritud väljaanne 4.trükk* ['Commentaries to the Penal Code, 4th Edition']. Juura 2015 (in Estonian). See also P. Randma (see Note 2).

³⁰ M. Ulväng. Rethinking 'in affect' – disturbed states of mind and criminal responsibility. – *Scandinavian Studies in Law* 54 (2009), pp. 165–190.

³¹ K. Kask, S. Salumäe. The analysis of complex forensic psychiatry and psychology expert assessments in Estonia. – *Juridica International* 2015/23, pp. 133–141. – DOI: <https://doi.org/10.12697/ji.2015.23.14>.

³² T. Kompus (see Note 2).

³³ See J. Saar, P. Pikamäe (see Note 2).

³⁴ P. Randma (see Note 2).

³⁵ J. Saar, P. Pikamäe (see Note 2).

³⁶ Estonian Supreme Court judgement 3-1-1-86-04, of 7 October 2004. See also Tartu Circuit Court ruling 1-14-9226, of 15 October 2015.

and the provoked state should be established (and proved), in awareness that provocation can be long-term and systematic; therefore, separate acts should be taken into consideration as parts of a whole, and that whole should be evaluated thoroughly. In sum, the Supreme Court implied that provoked state is not a medical state identified through expert assessment but a matter for the court to ascertain. For example, an emotional reaction might arise from an erroneous interpretation. Sootak and Pikamäe³⁷ indicate along similar lines that provoked state should be subject to judicial evaluation and identified on the basis of the facts of the case, with any evidence being admissible to prove the presence of that state. They conclude that, while experts may be consulted for identifying the circumstances, the findings from the assessment are not binding for the court.

1.3. The aim for the study

The aim behind our study was to examine how provoked state is identified in first-instance (county court) rulings in Estonia. The extent to which Estonian county courts use expert assessments from forensic psychiatry and psychology in identifying provoked state was examined for exploring whether regional differences exist in identification of provoked state. Also, we investigated whether certain factors characterising the defendant and his or her interaction with the victim(s) are associated with the determination that a provoked state is present, among them the defendant's intoxication by alcohol, the duration of the provocation, the defendant's prior convictions for criminal acts, and the defendant's relationship to the victim. Of particular interest is whether specific factors or circumstances can predict the presence of a provoked state.

2. Methods

2.1. The study sample

The sample for the study consisted of 84 county court rulings, from four court districts (Harju, Pärnu, Viru, and Tartu), rendered between 2006 and 2016. The total number of defendants in these rulings was 89, with the following breakdown: 49 before Harju County Court, eight from Pärnu County, 28 in Viru County, and four before Tartu County Court. Of the defendants, 81 (91%) were men and eight (9%) were women. The native language of the defendants was Estonian in 34 cases (38%) and Russian in 55 (62%) of them. Defendants' mean age at the time of the ruling on their case was 39.14 years (SD: 13.16, range: 15–73). The defendant had received at least some basic education in 27 cases, vocationally oriented secondary education in 20 cases, other secondary education in 13 cases, and higher education in three cases (for 26 cases, no data pertaining to education were available).

There were 55 defendants accused of one crime, 24 accused of two crimes, and 10 accused of committing three to five crimes. The defendant was primarily convicted of homicide in 48 cases, murder in 15 cases, manslaughter in a provoked state and causing serious harm to health in seven cases each, physical abuse in five of the cases, and negligent homicide in two, with one case each of conviction for abuse of authority, torture, threat, aggravated breach of public order, and non-disclosure of a criminal offence. In 81 cases, there was one victim of the crime, in six cases there were two victims, and in two cases there were three. As for the type of proceedings, 78 defendants were tried in general, four in compromise, five in alternative, and two in summary procedure. The rulings were made by 36 judges in all: 12 with Harju, five with Pärnu, 15 with Viru, and four with Tartu County Court.

³⁷ J. Sootak, P. Pikamäe (see Note 29).

2.2. Procedure and statistical analyses

The rulings were retrieved from the State Gazette between 2006 and 2016 via the keywords ‘state of affect’, ‘affect’, ‘provoked state’, and ‘stress’. The numbers of registered offences with regard to PC §113 and §115 are presented in Table 1.^{*38} Characteristics referred to in the rulings were registered and, as necessary, categorised and coded. The differences between the two groups were analysed by means of chi-squared analysis^{*39} and *t*-tests for independent samples.^{*40} Loglinear analysis was used to analyse predicting factors for the presence of provoked state. For all tests, *p*-values < .05 (two-tailed) were regarded as statistically significant.

Table 1: Numbers of registered offences under §113 and §115 between 2006 and 2016

	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016
§113	107	90	88	64	62	81	59	50	42	38	35
§115	1	2	–	–	–	–	–	1	1	–	–

Source: Kuritegevus Eestis 2016 [‘Crime in Estonia 2016’], by the Estonian Ministry of Justice.

3. Results

In one case, the defendant was found not guilty. In all other cases, the defendants were convicted – in three defendants’ cases, the penalty was pecuniary punishment; in three, it was a life sentence; and in 82 it was imprisonment for a fixed term (for, on average, 7.46 years, *SD* = 3.73, with a range of one month to 20 years).

Provoked state was identified in 15 cases, or 17% (in 13 men and two women). In 32 cases (36%), the court evaluated the claim of a provoked state existing without resorting to expert assessments and used expert assessments for 57 defendants (64%). The court identified a provoked state as present by means of expert assessments in eight cases (53%) and without using expert assessments in seven cases (47%). The absence of a provoked state, in turn, was identified by the court without expert assessments in 25 cases (34%) and via expert assessments in 49 (66%) of the defendants’ cases. Chi-squared analysis in Fisher’s exact test found no statistical difference: $\chi^2(1) = .90$, $p = .34$, Cramer’s *V* = .100.

When provoked state was identified, in 12 cases the defendant’s penalty was imprisonment and in three cases it was pecuniary punishment; when provoked state was not identified, in 74 cases the defendant was imprisoned (receiving a life sentence in three cases). In cases of imprisonment, the sentence differed in line with the presence or absence of provoked state, with $t(80) = 3.85$, $p = .001$ (in years, presence $M = 3.73$, $SD = 2.43$; absence $M = 8.04$, $SD = 3.57$).

3.1. Differences by region

As both Tartu and Pärnu County Court had relatively few cases (four and eight, respectively), differences only between Harju and Viru County Court were compared by means of chi-squared analysis in Fisher’s exact method. Firstly, differences between county courts in whether provoked state was identified in court procedures involving expert assessments or instead by the court on its own were examined (see Table 2). The results demonstrate that Harju County Court requested expert assessments more often than did Viru County Court, with $\chi^2(1) = 17.09$, $p = .001$, Cramer’s *V* = .471. Next, the differences in identifying the presence of a provoked state were compared at county court level (these results too are shown in Table 2). Harju and Viru County Court did not differ significantly: $\chi^2(1) = 1.38$, $p = .24$, Cramer’s *V* = .134.

³⁸ Ministry of Justice. Kuritegevus Eestis 2016 [‘Crime in Estonia 2016’]. Available at http://www.kriminaalpoliitika.ee/sites/krimipoliitika/files/elfinder/dokumendid/kuritegevus_eestis_est_web_0.pdf, in Estonian (most recently accessed on 2.6.2018).

³⁹ To analyse the differences between proportions.

⁴⁰ To analyse the differences between groups.

In Harju County Court, the defendants who were identified to have been in a provoked state were convicted of manslaughter in a provoked state (under PC §115) in five cases (two in general, two in compromise, and one in alternative procedure) and of attempted manslaughter (PC §113 in connection with §25 (2)) in two cases (both applying general procedure). In Viru County, one defendant was convicted in compromise procedure of manslaughter in a provoked state under §115, one of causing serious harm to health under §118 (in general procedure), three of physical abuse under §121 (two in general and one in summary procedure), and one of torture under §290 (in general procedure), while one was found not guilty of abuse of authority under §291 (in general procedure).

Table 2: Absolute and percentage figures for presence of expert assessments and of provoked state, by county court

County	EA	N (%)	PS	N (%)
Harju	Yes	39 (80%)	Yes	7 (14%)
	No	10 (20%)	No	42 (86%)
Viru	Yes	9 (32%)	Yes	7 (25%)
	No	19 (68%)	No	21 (75%)
Pärnu	Yes	6 (75%)	Yes	0 (0%)
	No	2 (25%)	No	8 (100%)
Tartu	Yes	3 (75%)	Yes	1 (25%)
	No	1 (25%)	No	3 (75%)

Note. 'EA' = presence of expert assessment; 'PS' = presence of provoked state.

In further analysis, the differences in identification of the presence of provoked state and in commissioning of expert assessments were compared between county courts (see Table 3). For cases wherein a provoked state was identified, a statistically significant difference emerged. Namely, expert assessments were ordered in all the cases before Harju County Court, whereas the corresponding cases heard by Viru County Court involved no expert assessments being sought, with $\chi^2(1) = 14.00$, $p = .001$, Cramer's $V = 1.000$. Also when a provoked state was not identified, a statistically significant difference was found: in 76% of these cases before Harju County Court, expert assessments were obtained, whereas for nearly half of the Viru County Court cases there were no expert assessments commissioned, $\chi^2(1) = 6.85$, $p = .01$, Cramer's $V = .33$.

Table 3: The total case counts and percentages for presence and absence of provoked state, by county court

	EA	Harju	Tartu	Viru	Pärnu
Provoked state present	Yes	7 (100%)	1 (100%)	–	–
	No	–	–	7 (100%)	–
Provoked state absent	Yes	32 (76%)	2 (34%)	9 (43%)	6 (75%)
	No	10 (24%)	1 (67%)	12 (57%)	2 (25%)

Note. 'EA' = presence of expert assessment.

It was also of interest whether differences in use of expert assessments existed between judges. The level of usage of expert opinions was coded into five categories on the basis of the distribution of the cases for the given judge: always referring to experts ($n = 16$, 44%), using expert assessments in most cases ($n = 5$, 14%), showing rough equality between use and non-use of experts ($n = 5$, 14%), mostly not using experts ($n = 1$, 3%), and never engaging experts ($n = 9$, 25%).

There were more judges who resorted to experts in all or most cases than judges who did not, with $\chi^2(4) = 17.89$, $p = .001$, Cramer's $V = .329$. When the Harju and Viru county court were compared (see

Table 4), almost 83% of judges in the former jurisdiction were found to have always or in most cases used experts, whereas the equivalent proportion in Viru County Court was only 34% (52% of judges never used experts), with $\chi^2(4) = 11.34$, $p = .01$, Cramer's $V = .648$.

Table 4: Judges' total case counts and percentages for engaging expert assessments, by county court

	Harju	Tartu	Viru	Pärnu
	<i>N</i> (%)	<i>N</i> (%)	<i>N</i> (%)	<i>N</i> (%)
All cases	6 (50%)	3 (75%)	4 (27%)	3 (60%)
Most cases	4 (33%)	–	1 (7%)	–
Half of cases	2 (17%)	–	1 (7%)	2 (40%)
Under half of cases	–	–	1 (7%)	–
No cases	–	1 (25%)	8 (52%)	–

3.2. The defendant–victim relationship

The relationship between the defendant and the victim(s) was coded into three categories on the basis of the information in the rulings: family members, acquaintances, and strangers. Where a provoked state was found to be present, the victim was a family member of the defendant in three (20%) of the cases, his or her acquaintance in seven cases (53%), and a stranger to the defendant in four (27%) cases; when a provoked state was deemed absent, the victim was a family member in 15 cases (19%), an acquaintance in 45 (56%), and a stranger in 14 (25%). There were no differences in the relationship between the defendant and the victim(s) between cases with the presence *versus* absence of a provoked state, $\chi^2(2) = .78$, $p = .78$, Cramer's $V = .049$.

3.3. Duration of the conflict

From the rulings, the duration of the conflict between the victim(s) and the defendant was coded into two categories on the basis of whether it involved a one-off episode or instead two or more episodes. A non-significant difference emerged: $\chi^2(1) = .25$, $p = .70$, Cramer's $V = .053$. When a provoked state was present, in 12 (75% of) cases the conflict involved a single episode, whereas when a provoked state was not considered present a one-off incident had occurred in 63 (83% of) cases; the comparative figures for two or more episodes are three (25%) and 11 (13%) cases, respectively.

3.4. Intoxication by alcohol

In 70 cases, the defendant was intoxicated by alcohol, in 17 cases he or she was sober, and in two cases the ruling did not state whether the person was intoxicated or not. There was a significant difference with regard to intoxication by alcohol and provoked state, with $\chi^2(1) = 5.77$, $p = .027$, Cramer's $V = .258$; namely, in four of the 14 cases in which a provoked state was identified (or 29%), the defendant was intoxicated, whereas when a provoked state was not found to be present, 62 out of 73 defendants (or 85%) were intoxicated.

3.5. Previous criminal convictions

There were previous criminal convictions present in 45 cases (range: 1–14 convictions) and not present in 38 cases. There were no data for six defendants. A significant difference emerged: out of 14 defendants in a provoked state, four (29%) had prior convictions, whilst of the 69 defendants for whom a provoked state was not deemed present, 41 (59%) had prior convictions, with $\chi^2(1) = 4.46$, $p = .043$, Cramer's $V = .232$.

3.6. Predicting the presence of a provoked state

In addition, five-way loglinear analysis was performed (presence of provoked state \times relationship between the defendant and the victim(s) \times duration of the conflict \times intoxication by alcohol \times previous criminal convictions) to test whether the presence of a provoked state can be predicted by any of these factors. This loglinear analysis produced a final model that retained all effects, but no factors proved significantly able to predict the presence of a provoked state.

4. Discussion

Our research was conducted to examine how provoked state is identified from the perspective of county court rulings in Estonia. When looking at whether it is identified solely by the court or by the court engaging expert assessments in the fields of forensic psychiatry and psychology, we found that provoked state was concluded to exist in 15 out of the 89 cases identified and that expert assessments were used in two thirds of these cases. There were no significant differences in whether expert assessments were used between when said state was identified and when it was not – in half of the cases wherein provoked state was identified, expert assessments were used, whereas two thirds of the cases in which a provoked state was found to be absent involved expert assessments.

Although Harju County Court requested expert assessments more often than Viru County Court did, the level of presence of provoked state found did not differ. When provoked state was identified, all seven of the relevant cases before Harju County Court referred to expert assessments, whereas there were seven Viru County Court cases in which no expert assessments were used for its identification. A similar trend was present, albeit of lesser magnitude, for cases wherein a provoked state was not identified by the court. The cause of this difference remains unclear and should be examined more closely in future work.

Also, our study investigated whether some factors pointed out in court rulings were associated with the presence of a provoked state. It was found that there was no evident association between the presence of provoked state and the duration of the conflict, nor an association with the relationship between the defendant and the victim(s). This may indicate that provoked state can emerge in very different situations and circumstances.^{*41} That said, there **were** differences in intoxication by alcohol (when provoked state was found, the defendants were intoxicated in fewer cases) and related to previous criminal-court convictions (those defendants found to be in a provoked state had fewer previous criminal convictions). It must be stated that the presence of provoked state is individual- and situation-dependent; therefore, it is not justifiable to reason that if a defendant has a prior conviction for criminal offences and is intoxicated by alcohol then the probability of the presence of provoked state is low. This conclusion is supported by the results of our loglinear analysis wherein no factors were predictive of the presence of a provoked state. The findings indicate that human behaviour can vary over a broad spectrum by situation and circumstances.^{*42} Hence, an expert assessment can add useful non-legal knowledge to the court's picture for in forming just rulings.

A large proportion of judges used expert assessments. However, almost four fifths of Harju County judges did so in all or most cases whereas nearly half of the ones in Viru County never did. It is difficult to say why these differences occur – whether the difference is due to specific cases in the county, lack of experts to engage, or other factors. Whatever the reasons, it must be acknowledged that, by decision of the Estonian Supreme Court, the court is independent in taking into consideration violence or insult directed at the defendant or one or more persons close to him or her, and also that provoked state is not only a medical notion identifiable in corresponding terms during the course of expert assessment but also something that can be identified by evaluation of the actions of the victim(s) toward the defendant.^{*43} Provoked state is a state whose identification necessitates not merely a sudden change in human behaviour having appeared. One must establish in addition that the victim(s) insulted the defendant and/or his or her relatives.^{*44} Hence, it may be that these circumstances are clear enough for the court in certain cases. Nonetheless,

⁴¹ See R.G. Fontaine (see Note 11).

⁴² T. Kompus (see Note 2).

⁴³ CLCSCd 3-1-1-86-04 – RT III 2004, 25,273.

⁴⁴ See J. Saar, P. Pikamäe (see Note 2).

it would still be of interest to examine more closely the motivation behind the decision to not use expert assessments in these cases.

In Harju County Court proceedings, the seven defendants identified as having been in a provoked state were convicted in most cases either of homicide or of manslaughter in a provoked state, under various procedural forms (general, compromise, and alternative procedure). In Viru County Court, however, only one of the seven corresponding defendants was convicted of manslaughter in a provoked state. The factors behind the differences between county courts in identifying the presence of provoked state are worthy of further study. As can be seen, there is a slight difference in types of crimes between those two county courts, so one cannot readily determine whether the two county courts do their work differently or, rather, the differences stem from processing of different crimes. Therefore, this issue should be examined more closely in the future if we are to ensure that criminal proceedings are carried out in a similar manner from one court district to the next.

One limitation to be pointed out is that only a few court rulings involving issues of provoked state were issued by the Pärnu and Tartu county courts. This made examination of region-linked differences possible only between the Harju and Viru county courts.

The findings can be summarised thus: In two thirds of cases, forensic psychiatry and psychology experts were used in assessing the presence of provoked state. Region-linked differences were seen in identification of this state. As for predictive factors, alcohol intoxication and previous criminal convictions were correlated with the presence of a provoked state, whereas the duration of the conflict and the relationship between the defendant and the victim(s) were not.



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Towards a Single Government Approach via Further Consolidation of Law and Order in Estonia, with Domestic Violence as an Example

1. The necessity of including domestic violence in the project for developing better legislative drafting

The purpose of this article is to advance suitable near-future-oriented solutions for combating and preventing domestic violence (DV) as an acute social problem^{*1} in Estonia. In the authors' opinion, a suitable approach might consist of an integrated legislative drafting solution in the form of a corresponding legislative act. Accordingly, the article addresses the methodological basis for the consolidation of law and order in present-day Estonia, the local value of sociological empiria, and comparative examination of findings from DV-related surveys carried out by legal practitioners in Estonia. All of these aspects of DV are important for comprehending the activity of consolidation of legal acts that is necessary for Estonia from the standpoint of DV.

One of the most important standards of approach should be found in the Organization for Economic Co-operation and Development (OECD report 'Estonia: Towards a Single Government Approach', which states that Estonia, for reason of its small size, cannot afford fragmentation. Increasing the flexibility of structures, improving communication, overcoming barriers between institutions, and developing supra-departmental strategies must be present on the agenda.^{*2}

The key to the solution in the rule-of-law context may lie in systematising of the legal norms.^{*3} The state can operate only when resting on a sound legal base or a corresponding collection of legal norms, whose

¹ It is important to emphasise from the perspective of legal policy that the President of the Republic of Estonia considered it necessary to emphasise that DV is a highly negative element constituting a social problem in Estonian society in her two latest addresses given on the anniversary of the Republic of Estonia. The text of the speeches is available in English at <http://www.president.ee/en/official-duties/speeches/13091-president-of-the-republic-at-the-estonia-theatre-and-concert-hall-on-24-february-2017/index.html> and <http://www.president.ee/en/official-duties/speeches/14154-the-president-of-the-republic-at-the-estonian-national-museum/index.html> (most recently accessed on 6.4.2018).

² OECD. Estonia: Towards a single government approach. OECD Public Governance Reviews. OECD Publishing 2011. – DOI: <https://doi.org/10.1787/9789264104860-en>.

³ Fundamental progress can occur only in the form of work *de lege ferenda*, since the state must possess a legal foundation for every activity.

interaction in the ideal case should form a single, coherent system. Frequently, formal systematisation is undertaken as an endeavour of arranging the necessary set of basic terms hierarchically, yet it has been correctly pointed out that, while this represents the usual image of systematisation, it is unilateral or even misleading.⁴ When regulating some aspect of life via legal norms, one has to differentiate between the legal order and the legal system. Order has always been, as it will remain, a phenomenon of societal use of power. The legislative power approves legal provisions and implements them (in objective law). A system, in contrast, is something much more than the organisation of rule. Since the restoration of Estonia's independence (in 1991), a modern legal order has been developed in most spheres, thanks to organisation of rule. The field of prevention of DV is no exception in this regard. However, with further improvement of the legal order in Estonia it has become evident that the outputs of the efforts toward this organisation of rule require further regulation to give them a more systemic nature. In the case of preventing and combating DV, there is much room for progress in this respect, irrespective of relatively efficient regulative activities in the drafting and implementation of the corresponding legal provisions. What, then, is the problem? When some sphere is regulated by legal provisions, this is done in the ideal case by classifying matters rationally – i.e., by systematising. Figuratively speaking, one can consider matters belonging together on account of their essence to be able to be grouped under the same designations. Hence, attempts can be made to differentiate among them on the basis of obvious features. This process is carried out for every part of life regulated by law, more or less successfully. In consequence, these are drawn together: they are no longer separate elements of organisation of rule but form regulated complexes of legal provisions bound by close internal ties.

This method of systematising the legal order has been used in Estonia for some time already, and important results have been achieved. The Ministry of Justice of the Republic of Estonia is carrying out work of this sort in projects titled 'Revision of Law' and 'Developing Better Lawmaking' in accordance with the Secretary of State's directive 42 of 19 December 2014, on providing support to the implementing institutions' activities for achieving results in relation to Action 12.2, 'Development of Quality of Policy-making', on priority axis no. 12, 'Administrative Capacity'. In general terms, the objective in this connection is rational legislative drafting in those spheres subject to revision, coupled with the development of higher-quality legislative drafting. The main problem faced involves fragmentation into field-specific legal acts and provisions that is wrought through a sector-oriented approach. This restricts comprehending them as a body of law and also obstructs to some degree the realisation of the full potential of the law. Such fragmentation is present in a several spheres, with the set of legal acts and provisions pertaining to DV being no exception. The causes are well-known and characteristic of so-called young legal orders. Among them are the need for rapid reforms, incompatibility between earlier and later acts, differences and even conflicts of interest between departments, and concessions with regard to law's systemic nature that stem from the need to make amendments required by EU law.

To achieve clearer and more systemic legislation, countries belonging to the Continental European law family – including Estonia – have employed codification. The idea of codification is in creating of legal certainty and clarity not merely by streamlining the finding of regulations but also by making use of the full potential of law for organising and protecting. The position of the Ministry of Justice reads: 'Codification also involves the thorough, substantial, and systemic analysis, harmonisation, and updating or revision of already existing codes or laws.'⁵ The Ministry of Justice is still in the process of updating and regularising the law, continuing efforts that started within the Developing Better Lawmaking⁶ programme and have not yet been completed in all spheres. It should be added that if the field of DV is to be included in the revision process, the already approved specifics for organisation of the codification and revision work, stages of work, and methods for it should be used, just as they have been in the revisions performed for the spheres brought in previously. This framework encompasses various activities characteristic of intelligent lawmaking – simplification, considering of alternatives, analysis of impacts, involvement of stakeholders, etc.

The Developing Better Lawmaking programme has so far extended to the spheres of social law, economic administrative law, environmental law, intellectual property law, and some other fields. The experience

⁴ A. Aarnio, *Õiguse tõlgendamise teooria* ["Theory of Interpretation of Law"]. Tallinn: Juura 1996, pp. 224 ff.

⁵ See the materials on both projects, for revision of lawmaking and the development of better lawmaking, that are available at <http://www.just.ee/et/eesmargid-tegevused/oiguspoliitka/oiguse-revisjon> (most recently accessed on 6.4.2018) (in Estonian).

⁶ See <http://www.just.ee/et/eesmargid-tegevused/oiguspoliitka/parem-oigusloome> (most recently accessed on 6.4.2018) (in Estonian).

from systematising these spheres should be used as an example in any further systematisation relevant for the sphere of DV. Prerequisite to complete revision (reform and systematising) of the legal acts regulating this field would be an analysis assessing, on the one hand, whether codification for this field is theoretically possible and, on the other, whether it is practically necessary. This entails analysis of the legal acts regulating the field, to enable mapping of the relevant regulations and attempting to find common elements. In turn, for the purpose of ascertaining the practical necessity and performing related analysis, corresponding sociological studies are of inestimable importance. Therefore, this article presents an analysis of surveys carried out among Estonia's legal experts with regard to DV. Furthermore, there can be no doubt of the necessity of applying comparative analysis at the level of the law of the various European Union member countries at least, so as to uncover information about the intent behind corresponding codification, the laws in place, and the extent of the regulation contained in these laws: the information thereby produced can greatly inform our efforts to find the most appropriate solution for Estonia.^{*7}

The section of this article addressing the sociological approach and the analysis provided in the empirically oriented part of the paper should aid in finding answers to various questions related to a possible revision of legal regulations addressing DV. The most important general issue is whether it is necessary in Estonia or even possible to codify the legal acts covering the sphere of DV. However, there is at the same time a set of questions that are easier to answer than this, thanks to empirical studies already carried out^{*8}: is it possible to draft a general act regulating DV, one that would contain all the general provisions pertaining to the subject; have other countries carried out codification for the sphere of DV, and what has their experience of codification in this arena been (this can afford assessing whether the various aspects of DV being distributed across the domains of separate ministries has resulted in unsystematic regulation of the sphere of DV, examining whether centralising the co-ordination related to DV under one ministry could improve the quality of legal regulation of this subject, and determining the need for compiling a code (a DV act) and the importance of such a code for practice); and how, and to what extent, would the codification (revision) require the amendment of existing acts and the drafting of new regulations?

The Developing Better Lawmaking project achieved its first success in the drafting of the general provisions of the environmental law. This output, among others, shows that seeking systemic solutions should start with an agreement on the essential basic concepts for the relevant sphere.^{*9} Concepts are of decisive importance for any system. It is quite appropriate at this point to recall the teaching of F.C. von Savigny that every concept must have its 'juridical reality' and that only after agreement on the reality is reached – i.e., once clarity as to the concepts has been achieved – can legal provisions be arranged into an integrated system.^{*10} The success in the revision of the environmental law and, for example, the revisiting of penal law came largely as a result of reaching agreement on the set of concepts foundational to the respective sphere.

The more developed a society is and the greater the extent of the institutional underpinnings and mutual co-operation, the more effective that society can be in the prevention of DV and in combating its

⁷ For example, the drafting of the preparatory analysis for revising the intellectual property law drew on materials dealing with intellectual property that were published in Estonia and Germany, but alongside these were corresponding legal acts and drafts from Italy, France, Germany, Poland, Portugal, Sweden, and Russia. Reaching the goal for the analysis, especially in respect of assessing interdepartmental co-operation, involved interviews of specialists in intellectual property law and solicitation of their written remarks, with attempts being made to involve a wider circle of individuals, not forgetting individuals whose involvement or views are mainly future-oriented. Officials with the Ministry of Culture, of Economic Affairs and Communications, of Rural Affairs, and of Justice; Patent Office and Competition Authority officials; representatives of the Estonian association of patent attorneys; barristers; and lecturers in jurisprudence at the University of Tartu have contributed to the completion of the analysis. The initial assessments of these respondents were consistently represented in this analysis. The review of other countries' experience is based on international law publications, responses to questionnaires sent to various entities in European Union member countries, and correspondence with responsible officials. The analysis results are available at http://www.just.ee/sites/www.just.ee/files/elfinder/article_files/intellektuaalse_omandi_oiguse_kodifitseerimine_uldosa_voimalikkusest_2011_1.pdf (most recently accessed on 6.4.2018) (in Estonian).

⁸ Alongside the empirical studies already carried out, there are several further surveys that should be undertaken, since learning the positions of the lawyer community and analysing them cannot provide sufficient grounding for revising the legal order with regard to DV.

⁹ The Ministry of Justice report whose title translates to 'The First Stage of Codification of the Environmental Law is Complete' points out the following: the part of the law setting forth general provisions regulates for the first time the principles of environment protection at the legislative level and defines the system of concepts of the Estonian environmental code. Report available at <http://www.just.ee/et/uudised/keskkonnaoiguse-kodifitseerimise-esimene-etapp-loppenud> (most recently accessed on 6.4.2018) (in Estonian).

¹⁰ F.C. von Savigny, G. Wesenberg (eds). *Juristische Methodenlehre: Nach der Ausarbeitung des Jacob Grimm*. Stuttgart: K.F. Koehler 1951, p. 37.

manifestations. Accordingly, one can conclude with regard to the situation in Estonia that work to develop an integrated juridical solution should exhibit more vigorous strivings to include regulative provisions, in addition to law-enforcement provisions, that would orient the various institutions toward co-operation and co-ordination of mutual activities.^{*11} Thereby, the requirement of a single, coherent approach to government could be met, in line with the above-mentioned OECD report.

It should be mentioned, however, that not everyone agrees on many aspects of what has already occurred in Estonia and what is currently being done under the Developing Better Lawmaking programme. For example, the Chancellor of Justice has been critical of the developments:

Two lawmaking campaigns, with opposite directions, have been underway in Estonia for years. One of them has the purpose of **revising** most laws (also known as ‘developing better lawmaking’, ‘codification’, etc.), while the purpose of the other is **not to make** new laws if possible (‘less lawmaking’). Keeping this lawmaking machine in operation has taken more than two and a half million euros over the years and will take more money in the coming years – regrettably, often without any useful and necessary results. The so-called revision has been beneficial in some cases (e.g., that of the penal code), but most examples are either contradictory or even negative (e.g., the economic administrative and social codes and the intellectual property and misdemeanour codes). If a law is revised where there is no real necessity, this causes harm. Officials and judges, as well as members of the society concerned with the law, will have to learn the new language and new articles. This means money and expending work hours on training, mistakes, and court debates.^{*12}

While it is difficult to agree with the Chancellor of Justice’s view on the necessity of revision since the creation of a systemic structure necessary for legal order is at stake, the ‘less lawmaking’ initiative referred to requires an explanation. Indeed, at the initiative of the Ministry of Justice, a plan for reducing the volume of lawmaking has been drafted. That plan does not, however, contradict in any way the views of the authors of this article about improving the systematicity of lawmaking.^{*13} The purpose in reducing the volume of lawmaking is to avoid excessive regulation and surplus production of laws. A precondition for drafting a new normative act is application of the principle of *ultima ratio*, or convincing argumentation as to its necessity and an analysis of its practical implementation. The ‘less lawmaking’ programme should initiate a comprehensive parliamentary process for developing a legal culture directed toward the reduction of bureaucracy.

Better lawmaking is a global priority. The European Commission emphasises as well that all member countries of the EU should participate in the process of striving towards improved legislation. It seems that accordant efforts are taking Estonia in the right direction, yet it is always possible to do better. Therefore, there is much still to be learnt from the criticism presented by the Chancellor of Justice.

In having ratified the Istanbul Convention,^{*14} Estonia clearly indicates that violence is a problem in our society too; that its causes need to be determined; that prevention of violence requires systemic and legal-provisions-based co-ordinated activity; that the victims of violence need comprehensive aid, including support from the state; and that an effective prevention mechanism should be developed to counter the perpetration of violence.^{*15} While some strides have been taken in this direction, the discussion of DV in Estonia began only in 2001, after the first survey of the problem. In the years since, several thorough studies of DV have been carried out in Estonia. This article considers in particular the nationwide survey of expert

¹¹ The final report from the project Developing a Joint System for the Prevention of DV in Estonia, which was written by those authors of this article who participated in the project, recommends using the ‘guidelines for development of legislative policy until 2018’ output as a starting point for seeking an integrated solution to a legal code pertaining to DV. We are hopeful that a corresponding policymaking decision will be taken, since increasing political resoluteness is the first requirement for good lawmaking. The following moves should express, hone, and articulate the intent to draft a bill on DV (these steps should be to define the problem, set the objective, describe possible solutions, assess the compatibility of those prospective solutions with the national legislation, present a comparative analysis looking at the solution(s) in countries with a social organisation and legal system similar to Estonia’s, and present good description of the planned regulation). See R. Narits et al. The significance of recognising domestic violence, in light of Estonian legal experts’ opinion and the prospects for systematising the relevant legislation. – *Juridica International* 2016/24, pp. 128–138. – DOI: <https://doi.org/10.12697/ji.2016.24.13>.

¹² See the annual review of the Chancellor of Justice for 2016–2017, available at <http://www.oiguskantsler.ee/ylevaade2017/oigusloome> (most recently accessed on 6.4.2018) (in Estonian).

¹³ See <https://www.just.ee/et/oigusloome-mahu-vahendamise-kava> (most recently accessed on 6.4.2018) (in Estonian).

¹⁴ See the 2017 act of law ratifying the Council of Europe convention on preventing and combating violence against women and domestic violence: RT II, 26.9.2017, 1.

¹⁵ For discussion of the penal-law aspects of combating DV, see R. Narits et al. (see Note 11), pp. 132–135.

legal practitioners within the framework of the 2014 project titled ‘Developing a Joint System for the Prevention of DV in Estonia’, supported by the Norwegian financial mechanism and the Estonian Ministry of Social Affairs^{*16}, and, secondly, the follow-up survey carried out in 2017.

2. Legal practitioners’ views on the causes of DV as a social problem and on factors obstructing its prevention and combating (with comparison between the 2014 and 2017 studies)

2.1. DV plays an important role in the work of practising legal specialists

In 2017, a large majority of legal practitioners (71–85%) indicated that they were handling cases of DV on a day-to-day basis, with the equivalent profession-specific figures from 2014 being 77–92% (see Table 1, below). Police detectives and prosecutors were the most heavily involved in dealing with DV, which was cited as occupying a significant proportion of their work time, nearly one third of the hours of prosecutors (29%) and more than a third in the case of detectives (38%), the 2014 comparative percentages being 33% and 42%, respectively. A smaller share of working time was noted as spent on DV cases among judges (14%, up slightly from 2014’s 12%) and attorneys (11%).

Table 1: Percentages of respondents handling DV cases in their day-to-day work, as found in the surveys of expert opinions

	Prosecutors		Judges		Attorneys*		Police detectives	
	2014	2017	2014	2017	2014	2017	2014	2017
Respondents handling cases of intimate-partner violence	86	74	77	85	...	71	92	84
Share of overall work time, average	33	29	12	14	...	11	42	38

Sources: An Estonian Institute for Open Society Research project from 2014 and a research project of the Estonian Institute for Open Society Research and the University of Tartu Faculty of Law, titled ‘Domestic Violence in Estonia’, from 2017.

* No data available for attorneys for 2014.

Every fourth prosecutor, 29% of attorneys, 15% of judges, and 16% of police detectives stated that they did not handle DV cases when surveyed in 2017.

Since the number of reported DV cases has shown a trend of rapid growth in recent years, we asked in 2017 whether this development had resulted in changes. Changes had been observed by 45–82% of respondents, prosecutors (82%) and police detectives (75%) above all. Most respondents had observed ‘some changes’ (42–66%), while the perception of there having been ‘major changes’ was less extensive, at 3–16%. The work of prosecutors (82%) and police detectives (75%) has apparently changed the most in this respect (see Table 2).

¹⁶ The methodology of the 2014 survey was developed by the Estonian Institute for Open Society Research (with the leadership of Ivi Proos and Iris Pettai) in co-operation with the University of Tartu Institute of Public Law (under Silvia Kaugia, Raul Narits, and Jüri Saar). Kati Arumäe of the Police and Border Guard Board supported it as a consultant. The methodology of the 2017 survey too was developed by the Estonian Institute for Open Society Research (in work led by Iris Pettai) in co-operation with the University of Tartu Faculty of Law (under S. Kaugia and R. Narits). The online questionnaires for both surveys were designed for prosecutors, judges, barristers, and other law specialists, along with police detectives, all over Estonia, who encounter victims of domestic violence to some extent. Participation in the survey was voluntary and anonymous. In all, 203 specialists took part in the 2014 survey and 158 in the 2017 survey.

Table 2: Experts' opinions on the item 'The number of DV cases is increasing rapidly. Has this resulted in changes in your daily work?', as percentages

Speciality	Yes, major changes	Yes, some changes	No changes	Total
Prosecutors	16	66	18	100
Judges	—	60	40	100
Attorneys	3	42	55	100
Police detectives	16	59	25	100

Source: A research project of the Estonian Institute for Open Society Research and the University of Tartu Faculty of Law, titled 'Domestic Violence in Estonia', from 2017.

2.2. Stereotype-based and prejudicial attitudes are misleading

Estonia's legal practitioners, who clearly do encounter DV in their day-to-day work, perceive it as a quite serious problem.

In both surveys, mental and physical violence were considered a greater problem than sexual abuse is. The follow-up survey from 2017 shows that the respondents nonetheless considered all of the above-mentioned forms of violence to be rather serious problems; on the other hand, the opinion that the violence is a very serious problem has declined with regard to all forms of violence. On both occasions, respondents expressed the opinion that the most serious form is mental violence, which was profession-specifically considered a rather serious problem by 37–42% in the 2014 survey and by 54–55% in the 2017 survey. The problem following it in perceived severity was physical violence, judged a rather serious problem by 52–53% of respondents in 2014 and by 50–61% in the follow-up survey. A significant shift has occurred in the assessment of sexual violence: while it was considered rather serious by 32–33% in 2014, the percentage rose to 33–39% in 2017. On the other hand, it is noteworthy also that the follow-up study reveals an increase in the number of respondents who did not consider physical or sexual violence a serious problem. A feature in common between the two studies is that a significant percentage of the respondents expressed no opinion on the seriousness of various forms of violence. In fact, the follow-up study revealed a growing tendency in this regard: while 8% of legal experts took no position in relation to the seriousness of mental violence in 2014, that percentage increased to 12% with the 2017 study. The corresponding figures for physical violence are 7% and 12%, respectively, while the percentage of experts not sharing an opinion with regard to sexual violence declined somewhat – among both lawyers and police detectives (the figures are presented in Table 3).

Table 3: Percentage breakdown for 'To what extent do you consider violence against women a problem in Estonia?'

Severity indicated	Mental violence				Physical violence				Sexual violence			
	Lawyers		Police detectives		Lawyers		Police detectives		Lawyers		Police detectives	
	2014	2017	2014	2017	2014	2017	2014	2017	2014	2017	2014	2017
Very serious	44	32	49	41	39	38	42	32	19	14	20	16
Rather serious	42	54	37	55	53	50	52	61	32	33	33	39
Not so serious	6	2	5	4	1	0	2	7	2	7	7	11
Unable to answer	8	12	9	0	7	12	4	0	47	46	40	34

Sources: An Estonian Institute for Open Society Research project from 2014 and a research project of the Estonian Institute for Open Society Research and the University of Tartu Faculty of Law, titled 'Domestic Violence in Estonia', from 2017.

While we have cited the positive finding that the percentage of law-enforcement personnel considering sexual violence a rather serious problem has increased, it is noteworthy also that the tendency not to consider sexual violence so serious a problem is growing (the figure for lawyers was 2% in 2014 and 7% in 2017, and that for police personnel was 7% in 2014 and 11% in 2017). The cause of this development might be that legal practitioners encounter such incidents less frequently and that sexual violence is a less obvious form of violence, of which the specialists are not adequately aware.

In addition, the surveys examined perceptions as to why women become victims of physical or sexual violence and to what extent the perpetrators *versus* the victims were considered responsible for it. Also considered was the extent of explaining a background of violent behaviour in terms of the influence of environment. To ascertain how much women might be considered the cause, we presented for evaluation three statements blaming the female victims of violence, assuming that women cause the use of violence with their behaviour, in one way or another:

- Women provoke men to act violently by incessantly nagging, grumbling, arguing, making negative remarks, complaining, or making demands.
- Violence could be caused by women's provocative clothing or conduct.
- Women can act irresponsibly – hitchhike, get drunk, seek the company of strange men.

All three statements were supported by the respondents. Most of the respondents blamed the female victim for violence and considered her irresponsible or provocative behaviour a cause. (see Table 4). The statement supported most was the third one, about women irresponsibly hitching a ride, getting drunk, seeking the company of strange men, and provoking violence by thoughtless and stupid behaviour in general. This statement was predominantly agreed with, with 67–71% of respondents supporting it in 2017 and 61–63% in 2014. The second-place quite widespread opinion that involves blaming women is linked with the claim that women keep nagging until the man loses self-control and becomes violent. This statement was supported by 58% of lawyers and 75% of police detectives; the 2014 figures were 63% and 77%, respectively. Third most supported was the statement on provocative manner of dress and behaviour of women. This found significantly less support: only 28% of lawyers and 42% of police detectives agreed with it; the equivalent figures from 2014 were 26% and 39%.

Table 4: 'Why do women become victims of physical or sexual violence?':

Expert opinions of lawyers and police detectives, with percentages for 'Primarily' + 'Also'

	Lawyers		Police detectives	
	2014	2017	2014	2017
I. THE CAUSE IS WOMEN, WHO...				
act irresponsibly – hitchhike, get drunk, seek the company of strange men	63	67	61	71
provoke men by incessant nagging	63	58	77	75
provoke men with revealing dress and provocative conduct	26	28	39	42
II. THE CAUSE IS MEN, WHO...				
cannot control their aggressiveness, are irascible, and easily become violent when angry	92	99	91	97
are overly controlling, to establish their authority and 'put women in their place'	90	92	91	97
III. VIOLENCE IS CAUSED BY...				
alcohol and narcotics	91	90	91	96
unemployment	57	58	68	79
poverty	58	60	61	70

Sources: An Estonian Institute for Open Society Research project from 2014 and a research project of the Estonian Institute for Open Society Research and the University of Tartu Faculty of Law, titled 'Domestic Violence in Estonia', from 2017

This is a case of stereotyping attitudes, according to which the woman is guilty of violence even when she is the victim. According to a 2014 study, more than half (54%) of Estonia's residents considered the victim partially responsible for domestic violence and approximately half (47%) believed that women become rape victims because of their way of dressing.^{*17}

Supporters of the views described above presume that the victim could have avoided violence if she had not provoked the man with her irresponsible behaviour, nagging, etc., but the victim's 'incorrect conduct', long-time nagging, etc. are not actually the causes of the violence. Numerous studies have proved that the cause is the man establishing his position in intimate relationships through violence. It is typical of violent personalities to seek domination, with the individuals viewing their own desires and needs as priorities. They believe that other members of the family are 'possessions' and must be completely subordinated accordingly. Domestic violence is a serious crime, and a person using violence consistently does not do so accidentally. It is exercised deliberately, with purpose, to achieve the goal of complete authority and control over one's partner.

The two surveys of the experts show that the stereotype-based and prejudicial attitudes of blaming the victim are established and consistent; no significant changes can be observed between 2014 and 2017. Stereotypic attitudes and positions, wherein victims are blamed for violence, can obstruct the work of law-enforcement agencies. Uncertainty and fear of being blamed are among the reasons for which women suffering from violence only rarely approach law enforcement for recourse. A survey of violence against women carried out by the European Union Agency for Fundamental Rights showed that only 14% of women approach the police even after the most serious violence (the figure for Estonia is 10%). Only every third woman seeks medical assistance after an incident of violence, while 4–6% seek out a women's shelter or victim-support service.^{*18}

We asked the respondents to judge also two typical statements blaming a violent man. In these, the causes of violence are presented as men's inability to control their aggression (lack of anger-management skills) and excessive need for control. These statements were supported by 88–99% of respondents. On the basis of the survey results, we can state that Estonia needs programmes targeting violent persons, (compulsory) psychological counselling, anger-management training, etc.

When comparing the respondents' evaluation of according blame for violence to either women (the victims) or men (the perpetrators), we notice that the lawyers and police detectives tend somewhat to blame men rather than women.

The effect of unemployment and poverty was considered to be among the important causes of DV, at least for 58–79% of respondents in 2017 (57–68% in 2014). For the vast majority of respondents (90–96% in 2017 and 92% in 2014), causes of violence could be found in the use of alcohol and narcotics. The close relationship between the use of alcohol and DV has been verified in numerous countries. Alcohol provokes aggression and encourages violent behaviour. Furthermore, the use of alcohol is also often cited as an excuse for violent action.

The use of alcohol increases the frequency of DV and its severity. Consumption of alcohol has a direct influence on cognitive and physical functions, reduces self-control, and diminishes a person's ability to negotiate in pursuit of non-violent solutions to a conflict.^{*19} Alcohol is connected with most of the incidents of violence reported, with the 2000 Scottish Crime Survey showing that 62% of perpetrators had consumed alcohol and that in 32% of cases they had used narcotic substances. Most cases involving the consumption of alcohol (83% of them) also involved the use of narcotics.^{*20} According to police statistics for western Estonia, as many as 80% of perpetrators of violence had consumed alcohol in the time leading up to that

¹⁷ TNS Emor. Eesti elanikkonna teadlikkuse uuring soopõhise vägivalda ja inimkaubanduse valdkonnas ['Survey of Estonia's public awareness of gender-based violence and human-trafficking']. Ministry of Social Affairs of Estonia 2014. Available at https://www.sm.ee/sites/default/files/content-editors/eesmargid_ja_tegevused/Norra_toetused/Koduse_ja_soopohise_vagivalla_vahendamise_programm/elanike_hoiakud_soopohise_vagivalla_ja_inimkaubanduse_valdkonnas2014_aruanne_tns_emor_loplik.pdf (most recently accessed on 23.7.2015) (in Estonian).

¹⁸ According to an FRA survey from 2013, in which 4,200 women in the EU were interviewed. A fact sheet on the survey is available at http://fra.europa.eu/sites/default/files/fra-2014-vaw-survey-factsheet_et.pdf (most recently accessed on 24.7.2015) (in Estonian).

¹⁹ A. Finney. Alcohol and intimate partner violence: Key findings from the research. Findings 216. UK Home Office, March 2004. Available at <http://webarchive.nationalarchives.gov.uk/20110314171826/http://rds.homeoffice.gov.uk/rds/pdfs04/r216.pdf> (most recently accessed on 4.7.2018). – DOI: <https://doi.org/10.1037/e422112008-001>.

²⁰ S. MacPherson. Domestic violence: Findings from [the] 2000 Scottish Crime Survey. Scottish Executive Central Research Unit 2002. Available at <http://www.scotland.gov.uk/Publications/2002/05/14413/1564> (most recently accessed on 24.7.2015).

violence.^{*21} Irrespective of the foregoing relations, alcohol is not the cause of DV. The roots of using violence are deeper than the consumption of alcohol or narcotics. Both drunken and sober men, even teetotalers, can be violent. Many men who are violent when drunk continue abusing their partners or children after sobering up. Violence need not end if/when a man gives up alcohol.

The true cause of a man's violence against his wife is his felt need to prove his power and superiority and to control her. A man with an alcohol or drugs problem who is violent hence faces **two** problems: the alcohol or narcotics problem and violent behaviour. The link is not always clear-cut. For instance, alcohol does not cause violent behaviour but promotes it. That said, consumption of alcohol may often be premeditated. Perpetrators of violence can cite the consumption of alcohol as an excuse for their action, claiming to have been drunk at the time. Drinking can provide socially accepted grounds for using violence. Violence accompanying drunkenness is considered quite natural in Estonia, and this readily finds acceptance within the society.

3. The opinions of legal practitioners about legal regulation of preventing and combating DV, the corresponding institutional co-operation, and the need for consolidated law (with comparison of the 2014 and 2017 studies)

The key issue in ensuring the victim's security and in preventing and combating violence is the ability of the state to handle the cases of DV. Several parameters are available for assessing that ability. The most important of them were included in the questionnaire for the surveys of experts. Table 5 outlines the responses. Opinions on the capability of the state varied. The greatest satisfaction, according to both surveys, is connected with the treatment of victims by law-enforcement agencies. The work done to ensure the security of the victims' children is deemed satisfactory too. The follow-up survey shows an increase (from 2% to 4%) in the percentage of respondents believing that the state can efficiently combat DV and prevent serious cases of it. Nevertheless, respondents in both surveys indicated that the state is still facing considerable problems related to the organisation of this activity: it was seen as unsatisfactory by 65% of respondents in 2014 and by 46% in 2017. Respondents also criticised the state for lacking control over perpetrators of violence (73% did so in 2014 and 56% in 2017) and over the situation in violent households (70% in 2014, 68% in 2017). According to the experts, the state displays an utter lack of effectiveness in providing the victims with material resources for an independent existence, even at merely subsistence level. This support was judged to be inadequate by 79% of respondents in the 2014 survey and by 61% in the 2017 one.

The experts' responses lead us to the conclusion that the state's effectiveness is less advanced in the field of prevention of DV and greater in cases that involve handling the consequences of violence. Estonia has no specific law on DV and, this could be one of the reasons for which we mainly handle the consequences of DV rather than engage in preventing it.

Just as in the 2014 survey, we asked in the follow-up whether the current legal framework allows for adequate addressing of DV (see Table 6) and whether a special act of law on domestic violence would improve the efficiency of handling of DV cases in Estonia. The respondents' opinions are presented in Table 7. Comparison between the two sets of responses shows a decline (from 15% to 10%) in the percentage of experts believing that the current legal framework provides for adequate handling of DV. At the same time, the number of respondents stating that it generally does **not** enable adequate handling has declined too (from 22 to 16%). In both sets of survey results, a view predominates that the legal framework already in place generally allows for adequate handling of DV. It may be noteworthy that the number of respondents indicating inability to answer has increased significantly (from 4% to 12%).

²¹ I. Pettai, J. Kaasik. *Perevägivald politseistatistika andmetel*. – Eesti edu hind. Eesti sotsiaalne julgeolek ja rahva turvalisus. Eesti Entsüklopeediakirjastus ['Domestic violence according to police statistics – the cost of Estonia's success: Estonia's social security and public safety']. 2005.

Table 5: Percentage figures for ‘How do you rate the ability of the Estonian state to handle DV cases?’

Ability to...		2014	2017
1. Combat domestic violence and prevent serious cases of it	Good	2	4
	Satisfactory	27	36
	Inadequate	64	46
	No opinion	7	13
2. Control the situation in violent households	Good	2	2
	Satisfactory	21	21
	Inadequate	70	68
	No opinion	7	9
3. Gather and maintain information about violent individuals and monitor them	Good	1	2
	Satisfactory	20	27
	Inadequate	73	56
	No opinion	7	15
4. Ensure the security of the victims’ children	Good	4	10
	Satisfactory	49	39
	Inadequate	38	39
	No opinion	8	12
5. Provide the victims with subsistence-level material resources for an independent existence	Good	2	3
	Satisfactory	7	22
	Inadequate	79	61
	No opinion	12	14
6. Ensure safe and respectful treatment of victims by law-enforcement agencies	Good	24	32
	Satisfactory	52	42
	Inadequate	16	15
	No opinion	8	10

Sources: An Estonian Institute for Open Society Research project from 2014 and a research project of the Estonian Institute for Open Society Research and the University of Tartu Faculty of Law, titled ‘Domestic Violence in Estonia’, from 2017.

Table 6: Percentages for ‘Do the existing legal provisions allow for adequate handling of DV cases?’

		2014	2017
Do the existing legal provisions allow for adequate handling of domestic-violence cases?	They definitely do	15	10
	They do in general	58	61
	They generally do not	22	16
	They definitely do not	1	1
	Unable to answer	4	12

Sources: An Estonian Institute for Open Society Research project from 2014 and a research project of the Estonian Institute for Open Society Research and the University of Tartu Faculty of Law, titled ‘Domestic Violence in Estonia’, from 2017.

3.1. A law on DV could achieve significant results

As is noted above, Estonia has no separate law on DV, and this may be among the reasons for the focus being put primarily on dealing with the consequences of violence rather than preventing it. In consideration of this, in the survey we solicited opinions on this matter in particular: the need, if any, for a law on DV.

Table 7: ‘What is your opinion on whether a separate law on DV would improve efficiency in handling of DV cases in Estonia?’: Expert opinions of lawyers and police detectives, expressed as percentages

Efficiency would...	Lawyers		Police detectives	
	2017	2014	2017	2014
Certainly improve	4	9	7	25
Probably improve	42	25	30	27
Probably not improve	31	38	34	33
Certainly not improve	11	19	2	7
Cannot answer	12	9	27	8
Total	100	100	100	100

Sources: An Estonian Institute for Open Society Research project from 2014 and a research project of the Estonian Institute for Open Society Research and the University of Tartu Faculty of Law, titled ‘Domestic Violence in Estonia’, from 2017.

The respondents can be divided into supporters and sceptics with regard to their attitude towards the need for a special law on DV (see Table 7, above). The share of supporters among lawyers increased in 2014–2017, from 34% to 46%, and declined among police detectives, from 52% to 37%. The share of sceptics has declined among lawyers correspondingly, from 57% to 42%, and that among police detectives has fallen from 40% to 36%. Only every tenth lawyer and 2% of police detectives showed high negativity with regard to the idea of a special law in the follow-up survey.

Several countries have successfully implemented laws on DV and have achieved remarkable results.^{*22} We asked the respondents to judge the statements that have been used in these countries as a basis for recommending the introduction of a special law on DV.

We found that the respondents supported all the arguments employed in favour of a law specific to DV (see Table 8). The primary argument involves the organisation of co-operation among institutions. This found support among 77–86% of respondents. Taking a proactive stance and preventing serious incidents from occurring was also viewed as highly important – the corresponding statement was backed by 68–84%. Two thirds of respondents emphasised the import of considering the repetitive nature of DV and of under-scoring the elements specific to DV by means of the law.

Lawyers were slightly more supportive of the various arguments than police detectives were. The survey results allow us to argue that eagerness for a law on DV is considerably high among Estonia’s practising legal specialists. In particular, the legal practitioners surveyed perceived numerous bottlenecks and unsolved problems in the existing legal regulation and practice, hindrances that a special law on DV would, it is hoped, overcome.

²² While a law on DV had been approved in only a single country in 1976, one has now been introduced in 140 nations. See <http://www.unwomen.org/en/what-we-do/ending-violence-against-women/facts-and-figures> (most recently accessed on 12.4.2018). The countries that have approved a special act in this domain (among them Austria, the UK, the USA, Australia, Germany, Spain, the Czech Republic, Slovenia, the Netherlands, Switzerland, Bulgaria, and Lithuania) have, in essence, opted for the path of consolidation for their legislation in the corresponding sphere.

Table 8: ‘How do you rate these statements supporting the implementation of a special law on DV?’: Expert opinions of lawyers, with percentages for ‘Completely agree’ + ‘Agree in general’

	Lawyers	Police detectives
Organisation of co-operation: the law would establish legal provisions and rules for inter-institution co-operation	86	77
Prevention of serious cases: the general criminal code comes into play only after physical violence has already occurred.	84	68
Ensuring a proactive approach: the law obliges institutions encountering victims to report the relevant incidents immediately	82	82
Considering the recurrent nature of domestic violence: in general, crimes are viewed by non-special law as single acts	64	61
Underscoring of the elements specific to domestic violence: general criminal-law acts (on assault, battery, etc.) do not consider characteristics of domestic violence such as sexual abuse, damage to property, intimidation, and stalking	64	60

Source: A research project of the Estonian Institute for Open Society Research and the University of Tartu Faculty of Law, titled ‘Domestic Violence in Estonia’, from 2017

Responding to DV entails tackling two fundamental issues: how to protect the victim and how to convince the perpetrator to abandon violence. International legal practice implements two main approaches in cases of DV – punitive and conciliatory. The goal with the former is to separate the victim from the perpetrator and to punish the perpetrator, while the latter class of measures is aimed at preserving the family via conciliation of the parties, psychological counselling, anger management, etc. In clause 23 of Estonia’s guidelines for development of criminal policy through to 2018, it is stipulated that when the circumstances in cases of DV so allow, the prosecutors should, working alongside the victim-support workers, implement conciliation between the victim and the perpetrator.^{*23} Termination of criminal-law proceedings for reason of conciliation is allowed for in Estonia by §203 of the Code of Criminal Procedure.^{*24} In 2017, the conciliation procedure provided for thereby was used in connection with 7,122 crimes in Estonia. In a continuation of a pattern from the year before, the largest proportion of crimes addressed in this way consisted of cases of physical maltreatment (77%).^{*25} These statistics include DV crimes, which constitute a special case, in which the use of the conciliation procedure should pay particular attention to the specifics of this type of crime and on no account should involve putting any pressure on the victim to accept the conciliation approach^{*26}. In addition, the effectiveness of this procedure should be assessed case-specifically.

The questionnaires addressed the conciliation procedure directly, and comparison of the results of the two surveys, as presented in Table 9, shows that the problems cited by experts are still there. The following questions remain: is there any supervision and feedback, was the agreement effective, was adequate security for the victim ensured, and has the perpetrator actually changed behaviour? The experts indicated that the content of the agreements may be too general and vague, that there can be failure to discipline the perpetrator of violence, and that half a year is too short a time for the perpetrator to mend his ways.

²³ Approval of the resolution of Parliament (the Riigikogu) was given on 9 June 2010 (see 757 OE I): Guidelines for development of criminal policy until 2018, annex. See http://www.just.ee/sites/www.just.ee/files/elfinder/article_files/kriminaalpoliitika_arengusuunad_aastani_2018.pdf (most recently accessed on 3.4.2018) (in Estonian).

²⁴ *Kriminaalmenetluse seadustik* (Code of Criminal Procedure). – RT I, 5.12.2017, 8.

²⁵ *Kuritegevus Eestis 2017* [‘Crime in Estonia 2017’]. Tallinn: Ministry of Justice 2017, p. 22. Available at http://www.kriminaalpoliitika.ee/sites/krimipoliitika/files/elfinder/dokumendid/kuritegevuseestis_2017_veebi01.pdf (most recently accessed on 3.4.2018) (in Estonian).

²⁶ See the stipulation based on the Istanbul Convention’s Article 48: ‘Prohibition of mandatory alternative dispute resolution processes or sentencing. Parties shall take the necessary legislative or other measures to prohibit mandatory alternative dispute resolution processes, including mediation and conciliation, in relation to all forms of violence covered by the scope of this Convention.’ Applying a conciliation procedure in cases of violence against women is, in principle, prohibited by the UNO guidelines as well: *Handbook for Legislation on Violence against Women*. Available at <http://www.un.org/women-watch/daw/vaw/handbook/Handbook%20for%20legislation%20on%20violence%20against%20women.pdf> (most recently accessed on 3.4.2018). – DOI: <https://doi.org/10.18356/5e37558d-en>.

Table 9: ‘How do you rate the efficiency of the conciliation procedure in DV cases?’:
Answer percentages for the options ‘Yes, definitely’ + ‘Maybe’

	2014	2017
1. It is efficient, since the perpetrator is served with the injunction he has to comply with for six months	64	63
2. The content of the agreements is often general and vague, failing to impose discipline on the perpetrator	58	52
3. Six months is too short a period for a change in the perpetrator’s behaviour	71	67
4. Supervision of compliance with the conciliation terms is weak, and the victim has insufficient security to demand that the perpetrator comply with the terms	69	62
5. The initiators of the conciliation procedure (the prosecutor’s office and the court) lack sufficient feedback on compliance with the agreements and any changes in the perpetrator’s ways	65	52
6. Social workers and child-protection specialists with the municipality have no information about the conciliation procedure and cannot help the victim locally	50	51
7. The police receive no information about the conciliation procedure	46	41

Sources: An Estonian Institute for Open Society Research project from 2014 and a research project of the Estonian Institute for Open Society Research and the University of Tartu Faculty of Law, titled ‘Domestic Violence in Estonia’, from 2017.

Dealing appropriately with the perpetrators and victims of violence requires collaboration among specialists of various types. Comparisons between the two surveys with regard to respondents’ opinion of their past co-operation with all specialists in this connection shows that the respondents saw an increasing need for co-operation involving law-enforcement agencies: while 7% of all respondents in the 2014 survey stated that they perceived no need for co-operation with police detectives, 5% made this claim in the 2017 follow-up survey; the corresponding opinion on co-operation with the prosecutor’s office was held by 4% and 2%, respectively; and the equivalent figures for judges were 14% and 9%. The opposite pattern can be seen with regard to a felt need for co-operation with victim-support services, women’s shelters, and municipal social workers: 5% of all respondents indicated that no need existed for co-operation that involves victim-support workers in 2014 and 9% in the follow-up survey, the corresponding figures for co-operation with women’s shelters’ staff were 7% and 11%, and those for joint work with municipal social workers were 4% and 6%. This finding seems fairly problematic when one considers who was surveyed: the results reflect a belief among personnel at law-enforcement agencies that they can handle DV cases without the involvement and assistance of specialists in this field (this speciality obviously encompasses victim-support workers, staff at women’s shelters, and municipal social workers). It is noteworthy also that the follow-up survey reveals an increase in the number of respondents who consider the co-operation inadequate across the board. The perceived deficiency extends to all specialists apart from victim-support services and women’s shelters. The breakdown for the respondents rating the co-operation inadequate is as follows: for co-operation with police detectives, 4% in 2014 and 5% in 2017; for that with staff of the prosecutor’s office, 2% in 2014 and 3% more recently; for co-operation with judges, 6% and 6%, respectively; and for work involving municipal social workers, 15% in both years. On the other hand, the majority of respondents in the follow-up survey judged their co-operation with specialists to be good. Relative to the figures from the 2014 survey, the experts reported better levels of co-operation with prosecutor’s office staff (49% of all respondents rated it good in 2014, 56% in 2017), with judges (26% and 33%, respectively), and with municipal social workers (10% and 19%, respectively). Co-operation with other specialists was assessed to be somewhat more modest in quality in the follow-up survey as compared with the 2014 one.



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Digital Inheritance: Heirs' Right to Claim Access to Online Accounts under Estonian Law

1. Introduction

We have moved more and more of our lives onto the Internet. Digital services, smart devices, and constant connection to the Internet are reality and increasingly important both for society and for individuals. This has brought about the all the more topical issue of digital inheritance^{*1}: When a member of the digital society dies, diverse digital objects are left in addition to various smart devices (such as a mobile phone, car, and laptop). As only a few countries have regulated this issue by law^{*2}, the question is whether and how an heir could claim access to digital assets of the deceased, such as files saved 'in the cloud' or e-tickets saved to an online ticket portal account.

Hardly anyone would challenge inheritance of a car or a house on grounds that there could be letters or photos in the glove box or the attic that, for reason of personal or intimate content related to the deceased or his or her communication partners, the heir should not see. Yet many providers of online services, mainly for these particular reasons, deny heirs access to the e-mail, Facebook account, etc. of the deceased.^{*3} The European legal literature analyses the problems of digital inheritance mainly with regard to the relationship between inheritance law and protection of personality rights, secrecy of telecommunications, the obligation of secrecy, and data protection law. On the other hand, the question about access to a person's digital possessions is of a practical nature for the heirs: how to use assets in the estate and meet obligations to creditors if the assets are not entirely known and there is no access to them. In Estonia, known as a pioneer of the digital society, most people could not imagine life without e-services and online invoicing. This article

¹ The research leading to this article was supported by the Estonian Research Council's Grant PUT PRG 124. This expression is used as a collective term for legal questions that arise after the death of a person with regard to his or her digital assets. See M.-O. Mackenrodt. Digital inheritance in Germany. – *Journal of European Consumer and Market Law* (EuCML) 2018/1, pp. 41–48, on p. 41.

² For instance, in some U.S. states. See H. Ludyga. „Digitales Update“ für das Erbrecht im BGB? – *Zeitschrift für Erbrecht und Vermögensnachfolge* (ZEV) 2018/1, pp. 1–6, on p. 1.

³ E.g., the Oath Terms of Service state in clause 3a that 'all Oath accounts are non-transferable, and any rights to them terminate upon the account holder's death'. Available at <https://policies.oath.com/us/en/oath/terms/otos/index.html> (most recently accessed on 15.4.2018). In Germany, a landmark ruling was issued by the Federal Court of Justice, the *Bundesgerichtshof* (BGH), in a case brought by heirs requesting access to the Facebook account of a minor (the deceased): III ZR 183/17, BeckRS 2018, 16463, of 12.7.2018. The lower-level rulings were from the Highest State Court of Berlin (*Kammergericht* (KG) Berlin) on 31.5.2017, 21 U 9/16, BeckRS 2017, 111509, and the Regional Court of Berlin (*Landgericht* (LG) Berlin) on 17.12.2015, 20 O 172/15, BeckRS 2015, 20953.

examines whether and to what extent the rules of Estonian applicable inheritance and data protection law enable heirs to exercise their rights with respect to the inheritability of these particular objects and exercising the rights arising therefrom. More precisely, we consider whether an heir is entitled to claim access to digital accounts of the deceased and download content therefrom, looking into two examples of online services – arved.ee and piletilevi.ee. Both of these environments exclude, in principle, access by heirs, considering them third persons, who are entitled to request neither the deceased's password nor handing over of the content (e.g., unused tickets)⁴.

2. The principle of universal succession

The entirety of the academic discussion surrounding digital inheritance – being at its liveliest probably in Germany⁵ – relies on the principle of universal succession, originating in Roman law⁶. Broadly speaking, this means that each dead person (the deceased) is to have a universal successor, an heir to whom the estate is passed in its entirety⁷. The principle of universal succession is also part of Estonian inheritance law⁸, which can be regarded as having been influenced most heavily by German law as a model and driver of its development. For that reason, the authors of this article use comparative law arguments drawn from German case law and legal literature⁹.

2.1. The purpose of the principle of universal succession

The principle of universal succession ensures that objects belonging to a person do not become ownerless at his or her death, and that claims and liabilities do not lapse – there is another person who will recover the claims and be responsible for the liabilities, and there is property out of which to settle the liabilities. At the same time it is also set out which rights and obligations are extinguished upon death¹⁰. This ensures continuity in legal transactions and clarity in legal relations that are transferred because of death¹¹. The purpose for the principle of universal succession is to maintain the integrity of the inheritable estate in the interests of heirs, creditors having claims in respect of the estate, recipients of a compulsory portion¹², and the public.¹³

⁴ E-mail of 1.2.2018 from the representative of arved.ee (FITEK AS) and e-mail of 17.4.2018 from the representative of piletilevi.ee (AS Piletilevi), in the possession of the authors. Arved.ee is a portal to order, edit, or cancel e-invoices. Piletilevi.ee is a server-based online ticket sales and marketing portal.

⁵ Cf., for example, B. Maeschaelck. Digital inheritance in Belgium. – EuCML 2018/1, pp. 37–41, on p. 37.

⁶ K. Muscheler. *Erbrecht*. Vol. I. Tübingen, Germany: Mohr Siebeck 2010, sidenote (hereinafter 'sn.') 737.

⁷ T. Kipp, H. Coing. *Erbrecht: ein Lehrbuch*. 14th ed. Tübingen, Germany: Mohr 1990, p. 4. Nevertheless, it does not prescribe when. This is derived from the principle of automatic succession (*Vonselbsterwerb*). K. Muscheler (Note 6), sn. 816.

⁸ E. Silvet. *Pärimisseaduse eelnõu põhihoontest* ['About the main features of the bill on the Law of Succession Act']. – *Juridica* 1995/7, pp. 282–288, on p. 283 (in Estonian); U. Liin. *Pärimisõigus* ['Inheritance Law']. Tallinn: Ilo 2005, p. 22 (in Estonian); T. Mikk. *Annak pärandvarast eseme omandamise alusena* ['Legacy as a legal basis for transfer of ownership by way of succession']. Master's thesis. University of Tartu 2010 (in Estonian), pp. 7–16; K. Kullerkupp, re. §6, 3.1.1.a and 3.2.2, in: P. Varul et al. (eds). *Tsiviilseadustiku üldosa seadus. Kommenteeritud väljaanne* ['General Part of the Civil Code Act: Commented Edition']. Tallinn: Juura 2010 (in Estonian); V. Kõve, re. §186, 6, in: P. Varul et al. (eds). *Võlaõigusseadus I. Üldosa. Kommenteeritud väljaanne* ['Law of Obligations Act I, General Part: Commented Edition']. 2nd ed. Tallinn: Juura 2016 (in Estonian).

⁹ The Supreme Court of Estonia, the *Riigikohus*, has explained that in a situation wherein established case law is absent, case law of other jurisdictions, as well as views expressed in legal literature, can be used for reference in determining the rationale and purpose of civil law acts, provided that the rules are essentially comparable. See CCSCd 3-2-1-145-04, paras 29 and 39; CCSCd 3-2-1-123-11, para. 15; CCSCd 3-2-1-165-12, para. 48.

¹⁰ L. Kunz, re. BGB §1922, sidenotes 9 and 10, in: J. von Staudinger (founding ed.) / O. Gerhard (ed.). *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch (BGB) mit Einführungsgesetz und Nebengesetzen: Erbrecht. Neubearbeitung 2017*. Online (via juris.de), hereinafter 'Staudinger/Kunz' (most recently accessed on 13.12.2016).

¹¹ *Ibid.*, sn. 10; BGH judgement III ZR 183/17, of 12.7.2018 (Note 3), sn. 30. In the context of Estonian law, see also K. Kullerkupp (Note 8), §6, 3.1.1.

¹² T. Kipp, H. Coing (Note 7), p. 6.

¹³ D. Leipold, re. BGB §1922, sn. 3, in: *Münchener Kommentar zum Bürgerlichen Gesetzbuch (BGB): Erbrecht*. 7th ed., 2017. Online (via Beck-online), hereinafter 'MüKoBGB/Leipold'; in the context of Estonian inheritance law, see also T. Mikk. *Pärimisõigus* ['Inheritance Law']. Tallinn: Sisekaitseakadeemia 2012 (in Estonian), pp. 10–11, 16–19, and 128.

2.2. The nature of the principle of universal succession and the presumption of inheritability of all assets

The importance of the principle of universal succession in the eyes of the German legislator is reflected already in where the corresponding rule can be found, in the very first section of the part of the civil code setting out law on succession (§1922^{*14} of the Bürgerliches Gesetzbuch, BGB)^{*15}. In the Estonian Law of Succession Act (LSA)^{*16}, the principle of universal succession has been expressed in several provisions^{*17}. In addition, in the General Part of the Civil Code Act (GPCCA)^{*18}, legal succession^{*19} and the concept of property^{*20} have been regulated. It follows from these provisions that, in principle, upon a person's death all the rights and obligations belonging to him or her at the moment of death are transferred to an heir, inclusive of ownership of material things as well as rights and obligations arising from, for instance, a sale contract. In a difference from succession based on the transaction, whereby each right and obligation has to be transferred separately in line with the provisions for the transfer of that specific object,^{*21} the object of transfer in universal succession by inheritance is the set of objects being transferred by force of law^{*22}. Also, none of the limitations apply that are inevitable for singular succession^{*23}. The property can be passed to only one subject, which may be either one heir or several heirs jointly,^{*24} but it cannot be passed, for instance, to different recipients of legacies with direct material effect (legacy by vindication)^{*25}.

As a universal successor, an heir automatically obtains the position of the legal predecessor as if no legal succession had occurred at all^{*26}, simply replacing his or her predecessor in an existing legal relationship^{*27}. With regard to contracts, the heir will assume the same contractual position held by the deceased, including accessory claims (the right to request information or reporting^{*28}) and formative rights (the right to declare avoidance and a statutory or contractual right to withdraw or cancel).^{*29} In other words, the heir is entitled not only to require or accept performance of a contractual obligation but also to claim damages, if doing so would have been justified for the predecessor were he or she still alive, or, eventually, terminate the contract. In the case of universal succession, the successor simultaneously enters into all the inheritable legal relations in which his or her legal predecessor participated before the transfer^{*30}, whether or not the (special) law or a will contains a rule confirming such a transfer. It has been pointed out in legal

¹⁴ The BGB states in its §1922 (1) that upon the death of a person, 'that person's property passes as a whole to one or more than one other persons [sic] (heirs)'. English text available at https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p6585 (most recently accessed on 28.4.2018).

¹⁵ K. Muscheler (Note 6), sn. 733.

¹⁶ Law of Succession Act, *pärimisseadus*. RT I 2008, 7, 52; RT I, 10.3.2016, 16 (in Estonian; English text available at <https://www.riigiteataja.ee/en/eli/528032016001/consolide>, most recently accessed on 28.4.2018).

¹⁷ In one way or another, the same principle is expressed in §1, §2, §4, §130 and §147.

¹⁸ General Part of the Civil Code Act (GPCCA), *tsiviilseadustiku üldosa seadus*. RT 2002, 35, 216; RT I, 20.4.2017, 21 (in Estonian; English text available at <https://www.riigiteataja.ee/en/eli/509012018002/consolide>, most recently accessed on 28.4.2018).

¹⁹ See the GPCCA, whose §6 (2) states that legal succession shall be based on a transaction or the law.

²⁰ See §66 of the GPCCA (Note 18). However, it is possible under §2 of the LSA (Note 16) for an estate to comprise objects that are not (or not anymore) 'monetarily appraisable', as can be seen also from §130 (1) of the LSA. See also Subsection 3.1 of this article.

²¹ See §6 (3) of the GPCCA (Note 18). See also K. Kullerkupp (Note 8), §6, 3.2.1.

²² ALCSd 3-3-1-97-13, para. 11 and para. 13; K. Kullerkupp (Note 8), §6, 3.2.2; T. Mikk (Note 13), p. 10 and pp. 16–17; U. Liin (Note 8), p. 15. In the context of German law, see K. Muscheler (Note 6), sn. 804.

²³ K. Muscheler (Note 6), sn. 806. For example, in the context of Estonian law, the rights and obligations pass on to the heir without the consent of the creditor, as foreseen for succession based on a transaction under §175 (2) of the Law of Obligations Act (LOA), *võlaõigusseadus*. RT I 2001, 81, 487; RT I, 31.12.2017, 8 (in Estonian; English text available at <https://www.riigiteataja.ee/en/eli/510012018003/consolide>, most recently accessed on 28.4.2018).

²⁴ K. Muscheler (Note 6), sn. 764.

²⁵ *Ibid.*, sn. 771. In the context of Estonian law, see T. Mikk (Note 8), p. 28.

²⁶ M. Käerdi, re. §209, 3.1.a, in: V. Kõve et al. (eds). *Tsiviilkohtumenetluse seadustik I. Kommenteeritud väljaanne* ['Code of Civil Procedure I: Commented Edition']. Tallinn: Juura 2017 (in Estonian); T. Mikk (Note 13), p. 10. In the context of German law, see Staudinger/Kunz (Note 10), BGB §1922, sn. 14.

²⁷ ALCSd 3-3-1-97-13, para. 13.

²⁸ E.g., §624 of the LOA (Note 23).

²⁹ *MüKoBGB/Leipold* (Note 13), §1922, sn. 20.

³⁰ K. Kullerkupp (Note 8), §6, 3.1.1.a.

literature that the transfer does not depend on the intent of an heir to inherit individual objects. Nor is it contingent on his or her awareness of their existence^{*31}. The principle of universal succession ensures that the property of the deceased in its entirety will be transferred, including objects that may not even come to mind.^{*32}

In essence, an heir not only becomes the owner of the objects that belonged to the deceased but also continues to carry all the legal positions that can be transferred by way of succession^{*33}. Yet the legal regime provides also for legal positions that are extinguished upon death. These are, however, a few, limited exceptions^{*34} and can often be justified by the argument that the succession can occur only in property, not in personality of the deceased^{*35}.

There is no sound reason for digital objects not to be covered by the principle of universal succession. Not encompassing digital objects would entail letters and diaries of a deceased person being inheritable while e-mail and private 'instant messaging' – perhaps even carrying the same message – are not. There is only one inherited estate, which consists of different types of components: digital and non-digital^{*36}. Differential treatment has not been considered justified in German case law either: the inheritability or non-inheritability of a particular object should depend not on the data-carrier medium but on the nature of the legal position^{*37}. Thus, for the purposes of inheritance law, digital objects should be treated in the same way as physical documents or content stored on a hard drive or USB stick^{*38}.

2.3. The legal position of the deceased during his or her lifetime

To give an answer to the question of whether an heir is entitled to claim access to e-invoices or e-tickets, we have to ask firstly what the legal position of the deceased was, and then we may proceed to analyse whether it is transferred by inheritance. It should be borne in mind that it is not the objects as such that are transferred but the legal position with regard to these objects^{*39}. As e-tickets, e-invoices, or the e-account itself are not material objects and have not been saved to such objects either^{*40}, there can be no question of the right to ownership or possession^{*41}. Rather, the legal relationship between the deceased and the service providers might have been regulated by a contract. In cases wherein the data storage is in the cloud, the contract instead of the ownership is considered to be the 'carrier medium'.^{*42} Although qualification of the contract depends upon the particular service – that is, the obligation of the service provider – a characteristic common to all these types of agreements is the obligation of the service provider to allow the user access to the online account and the data therein^{*43}. For e-tickets, the main object of the contract may be the service of a ticket agency, and for the mailbox service of arved.ee it could be the service of invoice management. In both situations, it is important to be able to access and maintain data and also to download these at any time

³¹ K. Muscheler (Note 6), sn. 800. In the context of Estonian law, see T. Mikk (Note 13), p. 103.

³² K. Muscheler (Note 6), sn. 801.

³³ B. Klas, C. Möhrke-Sobolewski. Digitaler Nachlass – Erbenschutz trotz Datenschutz. – *Neue Juristische Wochenschrift* 2015, pp. 3473–3478, on pp. 3473–3474.

³⁴ M. Bock. Juristische Implikationen des digitalen Nachlasses. – *Archiv für die civilistische Praxis* 217/3 (June 2017), pp. 371–417, on p. 397; S. Herzog, M. Pruns. *Der digitale Nachlass in der Vorsorge- und Erbrechtspraxis*. Zerb Verlag 2018, §2, IV. In Estonian law, the principle of presumption of inheritability can be deduced from §2 and §130 of the LSA (Note 16), and from §6 (1) of the GPCCA (Note 18): 'all rights and obligations except...'. For discussion of exceptions, see Section 3 of this article.

³⁵ See also Staudinger/Kunz (Note 10), BGB §1922, sn. 11.

³⁶ S. Herzog, M. Pruns (Note 34), §2, sn. 26.

³⁷ Judgement of the LG Berlin of 17.12.2015, 20 O 172/15 (Note 3), B, II, 1; BGH judgement III ZR 183/17, of 12.7.2018 (Note 3), sn. 49 and sn. 50.

³⁸ In principle, this is the position held in the context of German law. See Staudinger/Kunz (Note 10), BGB §1922, sn. 600.

³⁹ If the bequeather owned a book, the object of the transfer by inheritance is the ownership of the book, not the book itself. See S. Herzog, M. Pruns (Note 34), §2, sn. 27 ff.

⁴⁰ K. Paal, re. §49, 3.1.3, in: General Part of the Civil Code Act: Commented Edition (Note 8).

⁴¹ See §32 ff. and also §38 of the Law of Property Act (LPA), *asjaõigusseadus*. RT I 1993, 39, 590; RT I, 25.1.2017, 5 (in Estonian; English text available at <https://www.riigiteataja.ee/en/eli/504012018002/consolide>, most recently accessed on 28.4.2018).

⁴² See S. Herzog, M. Pruns (Note 34), §4, sidenotes 5 and 9.

⁴³ M. Bock (Note 34), pp. 376 ff.

suitable for the customer. A user ID and password are necessary as well⁴⁴. Considering the purpose of the agreement and the non-material nature of the objects, provisions regarding contracts for services, contracts of mandate (under §619 of the Law of Obligations Act, LOA), or contracts of brokerage (under §658 of the LOA) could be applied in principle. According to Estonian law, provisions pertaining to a contract of mandate are most likely to apply both to a contract for ticket brokerage and to one for invoice management. In the context of this article, the important conclusion is that, with respect to e-accounts, it is the contractual position in its entirety that is included in the estate.

3. Legal positions that are not passed to heirs under the principle of universal succession

3.1. Non-inheritability based on legal position

We will proceed to analyse whether inheritability of the contractual positions in question could be excluded by way of exception – for instance, for the reason that using a service requires entering a user ID and password while these may not be transferred to third persons. Estonian law is unlike German law in containing legal provisions for non-inheritability whereby rights and obligations that by their nature are inseparably bound to the person of the deceased or that by law do not transfer from one person to another⁴⁵ are not transferred by succession⁴⁶. However, the determination of non-inheritability might prove to be a serious legal challenge in both legal systems. As explained in Estonian legal literature, an inseparable bond needs to be ascertained with regard to the circumstances of the specific case, the rationale for the legal act, and the nature of the rights and obligations⁴⁷. In one simple example, an obligation is non-inheritable if that obligation cannot be performed without the personal participation of the deceased. Consider an obligation involving personal performance that requires use of intellectual capacity, such as a service of an artist or a singer⁴⁸. Such services of a personal nature cannot be taken over by the heir, since the heir lacks capacity to fulfil the contractual obligations.⁴⁹ As a rule, death of the obligee does not end a legal relationship, since fulfilling the contractual obligation does not depend on the person of the obligee. But there can be exceptions, such as in the case of ordering a made-to-measure suit from a tailor⁵⁰. In some cases the presumption of inheritability is provided by law – e.g., a contract of mandate does not expire upon the death of the mandator as regulated in §632 (1) of the LOA. In those cases, the Estonian legislator has deemed the interests of the heirs important. For instance, where a service served the patrimonial interests of the deceased, the heirs of the principal are presumed to be interested in the same patrimonial advantage. If they are not, the heirs can terminate the contract⁵¹.

Although being non-transferable within one's lifetime does not necessarily mean non-inheritability⁵², estimation of inheritability can be based on provisions pertaining to assignment of claim and assessing whether an obligation can be fulfilled for the benefit of a new obligee without the content of the obligation

⁴⁴ A user of arved.ee who is a natural person can provide information to businesses associated with the portal on how he or she wishes to receive invoices – sent to an Internet bank system, to a specified e-mail address, or to the arved.ee mailbox (the only place in the portal where the user can view the content of invoices) – and get (limited) information on his or her creditors. See the terms and conditions for using arved.ee at https://www.arved.ee/public/e_bill.html (in Estonian) (most recently accessed on 18.4.2018). Users of piletilevi.ee can buy tickets and choose seats online. The piletilevi.ee ticket-office terms of use can be found at https://www.piletilevi.ee/eng/generalinfo/howtobuy/Ticket-Office_terms_of_use/ (most recently accessed on 27.4.2018).

⁴⁵ On that occasion, non-inheritability clearly follows from a provision of the law; e.g., the obligation to provide maintenance terminates upon the death of the entitled or obligated person according to §110 (1) of the Family Law Act, *perekonnaseadus*. RT I 2009, 60, 395; RT I, 9.5.2017, 29 (in Estonian; English text available at <https://www.riigiteataja.ee/en/eli/507022018005/consolide>, most recently accessed on 30.4.2018).

⁴⁶ Under §2 and §130 (1) of the LSA (Note 16). Although not explicitly stipulated by law, in Germany the same principle is recognised. See *MüKoBGB/Leipold* (Note 13), §1922, sn. 21.

⁴⁷ K. Kullerkupp (Note 8), §6, 3.1.1.b; T. Mikk (Note 13), p. 18.

⁴⁸ V. Kõve, re. §186, 6.a, in: *Law of Obligations Act I: Commented Edition* (Note 8). See §186 (7) and §186 (8) of the LOA (Note 23).

⁴⁹ P. Kalamees et al. (eds). *Lepinguõigus* ['Contract Law']. Tallinn: Juura 2017, sn. 1133 (in Estonian).

⁵⁰ V. Kõve, re. §186, 7, in: *Law of Obligations Act I: Commented Edition* (Note 8).

⁵¹ P. Kalamees et al. (Note 49), sn. 1134.

⁵² Section 130 (2) of the LSA (Note 16) provides that in the cases provided for by law, rights inseparably bound to the person may transfer to a successor. For example, the moral rights of an author are inseparable from the author's person and non-

being altered^{*53}. German scholars argue equally that there is nothing tailored to the testator, as it were, in Facebook's obligation to allow use of the infrastructure of its social-media environment^{*54}. The Federal Court of Justice, or *Bundesgerichtshof* (BGH), has explained that the obligation to provide a communication platform, and, at the request of the user, that to publish content and to deliver messages to another account, as well as that to allow unfettered access to the messages delivered or content shared, have the same design for each and every user. The court held that such obligations are not personally bound to the person but of a technical nature and can be fulfilled for the benefit of the heir without the content of the obligation being altered^{*55}. Moreover, the court argued that the contractual obligation of Facebook is bound not to the person but to the account: Facebook is obliged to deliver the message to the account not to the person and it is not in its power to prevent the user ID and password being passed on to third parties nor to establish the identity of the recipient^{*56}. The court admitted that the contractual relationship is bound to the person of the user to the extent that only he or she is entitled to send messages and post content, but this, in the court's view, does not exclude the inheritability of the contractual relationship. It may, however, lead to the conclusion that a right of actively continuing to use the account is not included in the heir's right of inheritance^{*57}.

There is Estonian case law in which courts have declared inheritable a tax benefit by which the bequeather was entitled to the right to deduct the acquisition cost of the property from the gains derived from the sale of that property^{*58}, had an obligation to pay compensation for non-patrimonial damage^{*59}, and bore an obligation to pay compensation for damage that had been caused by breach of an obligation that is inseparably bound to a bequeather and cannot be transferred within one's lifetime^{*60}. On the other hand, an example of non-inheritability is to be found in an income tax exemption based on the use of the dwelling as the taxpayer's residence^{*61}. The European Court of Justice has held that even a worker's right to receive an allowance in lieu of paid annual leave not taken by the date of death is passed to an heir.^{*62} In the German legal literature, inheritability is considered not to be deemed ruled out by dint of the strictly personal content of a digital object,^{*63} nor is it excluded even by the fact that a legal position does not (any longer) have monetarily appraisable value^{*64}. The German authors are critical of the criterion of patrimonial value, which is said to be overly restrictive and to entail vast delimitation problems – e.g., that e-mail messages may have but do not necessarily have patrimonial value and may be both personal and professional^{*65}. At this point, it has already been established in case law also that drawing such a distinction is neither legally justified nor practically feasible^{*66}.

It can be concluded from the above that the rights and obligations arising from the *arved.ee* and *pileti.ee* contracts are not inseparably bound to a person in the meaning of Estonian inheritance law: the contracts clearly are aimed at protection of patrimonial interests; the contractual relationships lack the component of being personalised and individualised, meeting the needs of a particular client in specific; there is no special trust relationship created, whereas the existence of one might suggest a secrecy obligation of

transferable (under §11 (2) of the Copyright Act, *autoriõiguse seadus*. RT I 1992, 49, 615; RT I, 16.6.2017, 1), being still inheritable to a certain extent (see §36 (2) of the same act).

⁵³ Per the second sentence of §164 (1) of the LOA (Note 23). In the context of German law, see MüKoBGB/Leipold (Note 13), §1922, sn. 21.

⁵⁴ M.-O. Mackenrodt (Note 1), p. 43.

⁵⁵ Judgement of the BGH of 12.7.2018, III ZR 183/17 (Note 3), sn. 35.

⁵⁶ *Ibid.*, sidenotes 40–44.

⁵⁷ *Ibid.*, sn. 36.

⁵⁸ ALCSCd 3-3-1-97-13, 12.2.2014, para. 10 and para. 13 (in Estonian). However, see §38 (1) of the Income Tax Act, *tulumaksuseadus*. RT I 1999, 101, 903; RT I, 20.4.2018, 8 (in Estonian; English text available at <https://www.riigiteataja.ee/en/eli/ee/525042018001/consolide/current>, most recently accessed on 1.5.2018, as amended after the judgement).

⁵⁹ CCSCd 3-2-1-19-08, 9.4.2008, para. 15 (in Estonian). On the same position, see K. Sein, re. §134, 4.3, in: Law of Obligations Act I: Commented Edition (Note 8).

⁶⁰ CCSCd 3-2-1-191-12, 8.5.2013, para. 13 (in Estonian).

⁶¹ ALCSCd 3-3-1-97-13, 12.2.2014, para. 12 (in Estonian).

⁶² See the judgement of the European Court of Justice of 12.6.2014 in Case C-118/13.

⁶³ B. Klas, C. Möhrke-Sobolewski (Note 33), p. 3474; S. Herzog, M. Pruns (Note 34), §2, sn. 38 ff., §4, sidenotes 8 and 41.

⁶⁴ S. Herzog, M. Pruns (Note 34), §2, sn. 32 ff., §4, sn. 8; Staudinger/Kunz (Note 10), BGB §1922, sidenotes 9, 70, and 72. See also Note 20.

⁶⁵ E.g., B. Klas, C. Möhrke-Sobolewski (Note 33), p. 3474. See also MüKoBGB/Leipold (Note 13), §1922, sn. 26; S. Herzog, M. Pruns (Note 34), §4, sn. 40.

⁶⁶ Judgement of the BGH of 12.7.2018, III ZR 183/17 (Note 3), sidenotes 21, 47–49 and 51.

the parties. Accordingly, the contract clearly gives rise to obligations that can, in principle, be fulfilled by the service provider for the benefit of any obligee without the content of the obligation being altered. The user ID and password requirement alone does not make the obligation relationship inseparably bound to a person. It is not in the power of the service provider to prevent the user ID and password or the ticket being passed on to third parties nor to establish the identity of the user, as indeed can be concluded from the terms of use of piletilevi.ee^{*67}. Moreover, the transfer of digital assets is in the interests of an heir. In addition, the heir has a justified interest in getting an overview of the assets the estate encompasses and meeting the – inherited – obligations towards obligees, on whom arved.ee may give additional information.

3.2. Non-inheritability based on intention of the deceased

Finally, a question might arise as to whether the transfer of contractual claim in question could be excluded on the basis of the intention of the deceased. This is, in itself, supported by the German legal literature and case law by reference to the principle of contractual freedom.^{*68} Thereby, in principle, a person can agree with the service provider on what will happen to the account after the account-holder's death (e.g., that the account must be deleted)^{*69}. Scholars disagree as to whether the exclusion of inheritability may be regulated via standard terms. This question has even been left open by Germany's highest court^{*70}. However, under German (and Estonian) law, standard terms are subject to an unfairness review regarding the circumstances of the specific case^{*71}.

It can be presumed that neither the arved.ee nor the piletilevi.ee contract includes an individually negotiated agreement addressing the question of inheritability. Nor is the topic explicitly regulated in their terms of service. With regard to contracts of mandate, which regulation is to apply most likely in connection with both, Estonian law provides a statutory presumption that a contract of mandate does not expire automatically upon the death of the mandator (the user).^{*72} This means that other agreements are possible; i.e., the user and service provider can agree in their contract that the service contract terminates upon the person's death. Such an agreement cannot, however, be deduced from the relevant service providers' clauses on user conditions, which require personal participation under the user's real name^{*73}, prohibit disclosing one's password, and forbid granting access to third parties. However, it is mainly by the latter argument that piletilevi.ee and arved.ee exclude inheritability^{*74}. In the authors' view, these are mostly agreements setting out obligations in a person's lifetime^{*75}. Heirs are not third persons in this context but universal successors of the deceased who by force of law assume the place of the deceased in a legal relationship. Rather, the purpose of such rules is to guarantee security of the e-environment, which would not be compromised by heirs' access to an account for management of inherited assets^{*76}.

3.3. Legal consequences of non-inheritability

Where a right is not exceptionally transferred by succession, it generally is extinguished^{*77}. This does not, however, mean that the heir is automatically denied access to the objects in question. For instance, extinction of usufruct by death is provided by law, but the law provides also that the heirs as legal successors of

⁶⁷ See clauses 4.1.4, 4.2., 5.5, and 5.10.

⁶⁸ MüKoBGB/Leipold (Note 13), §1922's sn. 21 and sn. 28; BGH judgement III ZR 183/17, of 12.7.2018 (Note 3), sn. 24.

⁶⁹ MüKoBGB/Leipold (Note 13), §1922, sn. 28.

⁷⁰ Judgement of the BGH III ZR 183/17, of 12.7.2018 (Note 3), sn. 25.

⁷¹ MüKoBGB/Leipold (Note 13), §1922, sn. 29; S. Herzog, M. Pruns (Note 34), §5, sn. 10 ff. See also 12.7.2018 BGH judgement III ZR 183/17 (Note 3), sn. 29.

⁷² Section 632 (1) of the LOA (Note 23).

⁷³ See, for example, clause 4.2 of the terms of use of piletilevi.ee (Note 44).

⁷⁴ E-mail of 1.2.2018 from the representative of arved.ee and e-mail of 17.4.2018 from the representative of piletilevi.ee, in the possession of the authors.

⁷⁵ On the same position in the context of German law, see the 12.7.2018 BGH judgement III ZR 183/17 (Note 3), sn. 25.

⁷⁶ On essentially the same position in the context of German law, see S. Herzog, M. Pruns (Note 34), §5, sn. 13; see also judgement 20 O 172/15 of the LG Berlin, of 17.12.2015 (Note 3), B, II, 2, b.

⁷⁷ By the provisions of the LOA, in conjunction with §130 (1) of the LSA (i.e., when the object is personally bound to the person of the deceased), the death of a natural person is a basis for autonomous termination of contract. See V. Köve, re. §186, 6.a, in: Law of Obligations Act I: Commented Edition (Note 8). See §186 (7) and §186 (8) of the LOA (Note 23).

the usufructuary still are required to return the object of the usufruct to the owner in the state specified by the law.^{*78} With regard to non-inheritability of a contractual position, the legal relationship is terminated only with *ex nunc* effect. In the case of long-term contracts, the consequences of extinction of obligation can, by analogy, benefit from the cancellation provisions of the general part of the LOA (on return of that which has been delivered in advance) and on certain occasions also from the withdrawal provisions (on return of that which was delivered)^{*79}. In cases wherein the post-mortem regulation is not explicitly provided by law, restitution obligations may also arise from legal provisions on the respective type of agreement, as with §626 (1) of the LOA, which imposes an obligation on the mandatary to hand over to the mandator (and at his or her death to the heirs) anything received or created in connection with performance of the mandate, along with anything that he or she received and did not use to perform the mandate. Handing over can include both things and rights^{*80}, such as a bearer security (ticket). The German scholars argue that even if the contractual relationship were to end for reason of death (e.g., a special cancellation right has been granted), the cloud-storage service provider would still be required to make the data saved so far (pictures and e-mail content) accessible to an heir and delete those in its possession. On no occasion is the service provider allowed unauthorised erasure of data or use of said data for its own benefit.^{*81}

Consequently, if, hypothetically, the contract with Piletilevi provided specifically for the contract to terminate upon death, this would mean that an heir would not be able to buy new tickets under this contract. Yet this should not cause the tickets bought by the deceased, which cannot be used by him or her anymore, to remain at the disposal of the service provider. There is no justified reason for digital tickets to be subjected to different inheritance rules than tickets printed on paper. If the deceased had ordered paper tickets from a ticket office, the agency would have to deliver tickets to the heir. Moreover, the principle set out in §626 (1) of the LOA should be regarded as an essential principle of law in the sense of §42 (1) of the LOA, meaning that standard terms derogating from such a principle would be unfair to the consumer and hence void. Accordingly, where a contract of mandate provides for its termination by the death of the mandator, the heirs should preserve the right to demand transfer of tickets or, for instance, recovery of advance payment on account.

3.4. Solution under law of succession

It is confirmed by the above that in the circumstances of the given examples the estate of the deceased includes a contractual position with e-services providers. As in these cases non-inheritability does not follow from statutory provisions, nor does it follow from the nature of the contractual relationship or is non-inheritability agreed on in the contract itself, contracts are passed to heirs along with other assets upon the person's death. As an heir 'steps into' a contractual relationship, replacing the deceased as a universal successor, the heir will assume the same contractual position held by the deceased, including primary and accessory claims. Transfer of the contractual position in its entirety means that an heir is, at least for the purpose of managing the estate, entitled to access the account of the deceased and to use and manage the content of the account. Also, an accessory contractual claim for receiving information related to user ID and password is included, as is one for contract details. In other words, if the person him- or herself had the right to access the account and obtain a new password, the same right (claim) should belong to the heir. An heir assumes this position by force of law and is not a third person, who should be denied access to e-accounts by the service providers. German legal literature expresses the same opinion: contractual relationships with e-services providers, characterised by existence of a user account, are inheritable. As a party to a contractual relationship, an heir has substantive justification for being granted access to the data of the deceased stored on an account^{*82}. An heir is entitled to request information on passwords^{*83} and in

⁷⁸ Section 216 of the LPA (Note 41).

⁷⁹ V. Kõve, re. §186's 6.a and 7, in: Law of Obligations Act I: Commented Edition (Note 8).

⁸⁰ P. Kalamees et al. (Note 49), sn. 1108.

⁸¹ S. Herzog, M. Pruns (Note 34), §4's sidenotes 36 and 41 and footnote 79 and §5's sn. 33. See also judgement of the LG Berlin 20 O 172/15, of 17.12.2015 (Note 3), B, II, 2, a.

⁸² This position has been confirmed also by case law. See BGH judgement III ZR 183/17, of 12.7.2018 (Note 3).

⁸³ Staudinger/Kunz (Note 10), BGB §1922, sn. 619; S. Herzog, M. Pruns (Note 34), §4, sidenotes 33 and 40; M. Bock (Note 34), p. 378.

conjunction with §1922 of the BGB also on whether the deceased had entered into a contract with a specific service provider^{*84}.

All in all, Estonian law allows relying on succession law for purposes of enforcing claims under law of obligations, arising from contracts with e-services providers. For proving one's rights, it is practical to provide a succession certificate^{*85}, which should list all the heirs who have not renounced succession and are officially declared to be the universal successors^{*86}. In addition, succession law grants the heir a special right to information: Section 121 of the LSA provides that even before the end of the term for renunciation of succession, a person entitled to inherit has the right to receive information pertaining to the composition of the estate from a court, a notary, or another person who possesses the estate.

In summary, the heir is entitled to access the account, download the tickets bought by his or her predecessor, and enjoy the concert just as much as he or she is entitled to use and manage the rest of the estate. One of the purposes of universal succession is to ensure that the objects do not become ownerless. Denying inheritability of the Piletilevi contract would result in exactly that.

4. Post-mortem data protection as a possible solution?

It may be asked whether heirs could request access to e-accounts of the deceased under data protection rules. For the data protection framework to apply, the invoices transferred through the billing environment arved.ee or the tickets bought through the ticket brokerage system of Piletilevi (or, more precisely, the information disclosed therein) should qualify as personal data. Although the invoice amount in itself cannot be linked back to a certain person, invoices usually contain the obligor's or data subject's name, often accompanied by contact details that make the person identifiable either directly or at least indirectly.^{*87} Therefore, as a rule, data contained in e-accounts are personal data of the obligor and consequently covered by the EU data protection rules. The payer's name is indicated also on the tickets bought and printed out through the system of piletilevi.ee. However, as a rule, data protection law governs only the right of living persons (or data subjects) to the protection of personal data. Therefore, post-mortem data protection was not covered by the EU data protection directive adopted in 1995^{*88}, and most Member States did not provide for protection of personal data of deceased persons in their national law^{*89}. Likewise, the new General Data Protection Regulation (GDPR)^{*90}, which has applied since 25 May 2018, governs only the rights of living persons (data subjects^{*91}), leaving the post-mortem data protection within the competence of the Member States. Recital 27 of the GDPR states expressly: 'This Regulation does not apply to the personal data of deceased persons. Member States may provide for rules regarding the processing of personal data of deceased persons.'

At least to date, data protection rules have not been applied to the personal data of deceased persons in most EU member states.^{*92} In Estonia, in contrast, the post-mortem protection of personal data has been

^{*84} B. Klas, C. Möhrke-Sobolewski (Note 33), pp. 3474–3475.

^{*85} See §171 (1) and §171 (1¹) of the LSA (Note 16).

^{*86} An object belonging to the estate may be disposed of only by the agreement of all co-heirs, under §147 and §148 (2) of the LSA (Note 16).

^{*87} See the definition of personal data in Art. 4 (1) of the GDPR whereby "personal data" means any information relating to an identified or identifiable natural person ("data subject"); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, [or] an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person'. For more on the concept of personal data, see, for instance, H.A. Wolff, S. Brink (eds). *Beck-sche Online-Kommentar Datenschutzrecht*. 23rd ed.; GDPR, Art. 4, paras 14–21.

^{*88} Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications). OJ L 201, 31.7.2002, pp. 37–47.

^{*89} E. Harbinja. Does the EU data protection regime protect post-mortem privacy and what could be the potential alternatives? – *SCRIPTed* 10 (2013), pp. 19–38, on pp. 26–27.

^{*90} Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation). OJ L 119, 4.5.2016, pp. 1–88.

^{*91} A data subject is defined to be a natural person. See Art. 4(1) of the GDPR. Only a living person can be a natural person – i.e., a person possessing legal capacity.

^{*92} E. Harbinja. Post-mortem privacy 2.0: Theory, law, and technology. – *International Review of Law, Computers & Technology* 31 (2017) / 1, pp. 26–42, on p. 33.

statutorily provided for since 2003. Also, the Personal Data Protection Act of 2008⁹³, which has since been repealed, provided as follows in its §13: 'After the death of a data subject, processing of personal data relating to the data subject is permitted only with the written consent of the successor, spouse, descendant or ascendant, [or] brother or sister of the data subject, except if consent is not required for processing of the personal data or if thirty years have passed from the death of the data subject.' This provision has not proved relevant in practice, though, nor has it attracted attention in Estonian legal literature until now.

The same principle is maintained in §9 of the new Personal Data Protection Act (PDPA)⁹⁴, with the exception of the right to decide upon giving consent, which now belongs to heirs and no longer to members of the immediate family. Hence, Estonia will continue its earlier approach, in belonging to the minority of EU member states in which personal data protection is applied at least in some respects after a person's death. Therefore, it might be asked firstly whether heirs could have the right to request access to the invoices of the deceased under Article 20 (1) of the GDPR (i.e., in line with the so-called right to data portability). According to said provision, the data subject has the right, on certain conditions, to receive the personal data concerning him or her that he or she has provided to a controller, in a structured, commonly used, and machine-readable format, and the right to transmit those data to another controller without hindrance by the controller to which the personal data were provided. This provision does not, however, give the heirs the right to request access to invoices stored in the mailbox of a deceased person, for the sole reason that, according to §9 of the new Personal Data Protection Act, it is not all the rights of the data subject (including the right to data transfer) that pass to heirs but only the right to give consent to the use of the personal data of the deceased or, where the deceased person has given the consent himself or herself, to alter that consent.⁹⁵ Secondly, Article 20 (1) of the GDPR gives the data subject the right to receive the personal data he or she has provided to a controller, but invoices, such as power and water bills, do not constitute personal data that the data subject had provided to the data controller.

Next it is appropriate to ask whether an heir's right provided for in §9 of the Personal Data Protection Act to decide upon giving consent for the use of the personal data of a deceased person should also cover the right provided in Article 15 of the GDPR to access the personal data of a deceased person. In other words, does Article 15 of the GDPR permit heirs to request access to e-invoices or to a Piletilevi account? Article 15 (1) of the GDPR provides that the data subject shall have the right to obtain from the controller confirmation as to whether or not personal data concerning him or her are being processed, and, where that is the case, access to the personal data and certain information. The data subject is entitled to receive information, *inter alia*, about the categories of personal data involved, the existence of the right to request from the controller rectification or erasure of personal data or restriction of processing of personal data on the data subject or to object to such processing, and – where possible – the envisaged period for which the personal data will be stored. Article 15 (3) of the GDPR gives the data subject the right to request a copy of the personal data undergoing processing or transfer of information in a commonly used electronic form.

Neither the Personal Data Protection Act nor its explanatory memorandum provides an answer to the question of whether an heir has, in addition to the rights related to consent, the right to demand access to the deceased's personal data. Heirs were provided with such a right under §19 (4) of the previous version of the Personal Data Protection Act, whereby all of the data subject's rights were passed to heirs. That the new act does not contain such a provision might indicate the legislator's intention to restrict the transfer of a data subject's rights to only that related to consent. It can be argued, however, that an heir has also a legitimate interest in demanding access to data for purposes of being able to make a decision about withdrawal or alteration of consent. But even such an interpretation of §9 of the PDPA would not confer upon heirs the right to demand access to electronic accounts, as neither arved.ee nor piletilevi.ee collected the deceased person's personal data with the consent of that person; that is, consent did not form the legal grounds for the data processing. They utilised the data only to perform the contract to which the deceased person was a party – that is, on other grounds within the meaning of §9 (2) 4) of the PDPA. Namely, it is

⁹³ Personal Data Protection Act (PDPA), *isikuandmete kaitse seadus*. RT I 2007, 24, 127; RT I, 6.1.2016, 10 (in Estonian; English text available at <https://www.riigiteataja.ee/en/eli/507032016001/consolide>, most recently accessed on 18.4.2018).

⁹⁴ The draft of the new Personal Data Protection Act is pending in the Estonian Parliament. Text available at https://www.riigikogu.ee/tegevus/eelnoud/eelnou/5c9f8086-b465-4067-841e-41e7df3b95af/Isikuandmete_kaitse_seadus (in Estonian) (most recently accessed on 23.8.2018).

⁹⁵ For more on this, see the explanatory memorandum on the Personal Data Protection Act, pp. 17–18, available at https://www.riigikogu.ee/tegevus/eelnoud/eelnou/5c9f8086-b465-4067-841e-41e7df3b95af/Isikuandmete_kaitse_seadus (in Estonian) (most recently accessed on 23.8.2018).

stated in §9 (2) 4) of the PDPA that the consent of the deceased person is not required for processing of his or her personal data if the processing of personal data is performed on other legal ground. This other legal grounding is articulated in Article 6 (1) (b) of the GDPR, according to which data processing is lawful if the processing is necessary for the performance of a contract to which the data subject is party.^{*96} It follows that in cases such as those at issue in our examples, an heir would not be entitled to withdraw consent or alter it under §9 of the PDPA and that therefore the heir lacks a legitimate interest in gaining access to the personal data of the deceased.

This conclusion is consistent with the purposes of data protection law. The purposes of data protection law are protection of a natural person from the commercial use of his or her personal data by third persons^{*97} and, more broadly, respect for a person's private sphere^{*98}, not simplification of the inheritance procedure for heirs or safeguarding of their economic interests. For this reason, data protection rules are not suitable for solving the problem described in this article.^{*99} Nevertheless, they do not pose obstacles to solving that problem either, as the data protection rights of the deceased terminate upon his or her death. This means that the obligor cannot appeal to the data protection rules for justifying denial of access to the online accounts of the deceased.

5. Conclusions

Estonian inheritance law enables an heir to access digital assets of the deceased. In Estonia, the principle of universal succession applies. This means that the inheritance of digital objects follows the same rules as transfer of ownership to material objects and, for instance, rights and obligations arising from a sale contract. In the case of e-accounts, it is the set of rights and obligations arising from a contract concluded between a deceased person and an Internet services provider that is included in the estate. The contractual positions analysed in the article – involving *piletilevi.ee* and *arved.ee* – are not excluded from succession by an agreement. Nor are they inseparably bound to the deceased person, mainly because they lack the component of being personalised and can, in principle, be fulfilled for the benefit of any obligee without alteration to the content of the obligation. Hence, upon death these contractual relationships, among other objects in the estate, are transferred to the heir. As the deceased has trusted the heir with the position of being his or her legal successor, the heir is to be considered the person most suited to deciding what shall happen to the digital assets – not to mention that digital objects, such as an online billing environment or e-mail account, may include information on obligations, which unquestionably have been transferred to the heir by way of succession.

As a universal successor, an heir obtains the same legal position of the deceased as if no transfer had occurred at all. An heir replaces the deceased in a legal relationship by force of law and should not, in this context, be considered a third person, who should be denied access to e-accounts. Consequently, the heirs have the same contractual claims against the e-services provider that the deceased would have had him- or herself. In other words, the heir has the right to request information pertaining to the existence of the contracts, access the e-accounts and download data therefrom, request information on passwords, and (alternatively) exercise the right to terminate the contract. This follows from the universal succession principle of the inheritance law.

Data protection law does not provide heirs with additional rights, since the purpose of data protection law is to protect a person's personal data against the activity of third persons, not to simplify the inheritance procedure for heirs or to safeguard their economic interests. On the other hand, data protection law does not entitle the service providers to refuse to give heirs access to the accounts either, as data protection rights end with the data subject's death.

⁹⁶ The explanatory memorandum on the PDPA too refers to articles 6 and 9 of the GDPR, emphasising that processing personal data on the other grounds regulated in those articles should remain permitted. See the explanatory memorandum's p. 17.

⁹⁷ H. Ludyga (Note 2), p. 5.

⁹⁸ Or the well-known 'right to be let alone'. S.D. Warren, L.D. Brandeis. The right to privacy. – *Harvard Law Review* IV (1890) / 5, pp. 193–220.

⁹⁹ On the same position in the context of German law, see K. Raude. Rechtsprobleme des digitalen Nachlasses: Der Anspruch der Erben auf Zugang zum Account des Erblassers in sozialen Netzwerken. – *ZEV* 2017/8, pp. 431–439, on p. 437, and B. Klas, C. Möhrke-Sobolewski (Note 33), pp. 3475–3476.

The purpose of the principle of universal succession is to guarantee continuity of and clarity in legal relations and to ensure that no object, be it digital or not, becomes ownerless, and that the property as a whole is managed in the best interest of all interested persons. Where a person wishes to exclude heirs' access to a certain object, it is best to make arrangements to that end already within his or her lifetime, by such means as establishing a testamentary obligation and/or appointing an executor of will.



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Restraining at Care Institutions, Evaluated from the Standpoint of Penal Law

1. Introduction

The title of this article needs some explanation. Although the focus of the article is on providing an assessment of restraining that takes place both in health-care institutions and in social-welfare institutions, we will use a term that encompasses both of these, ‘care institutions’, to simplify reading. Although several positions expressed in this article may be applicable to other fields also (e.g., in provision of health-care services in accordance with Chapter 41 of Estonia’s Law of Obligations Act^{*1}), the article uses the general term ‘care institutions’ to refer to general care homes (retirement homes in the meaning of §20 of the Social Welfare Act^{*2}, or SWA), special care homes (see the SWA’s §100), psychiatric hospitals providing inpatient psychiatric care under the Mental Health Act^{*3} (MHA), and nursing hospitals providing inpatient nursing services (as addressed in §24 of the Health Services Organisation Act and elsewhere^{*4}). The main elements connecting these institutions are that they usually accommodate relatively helpless people and, secondly, there may often be a need to perform acts described in some of the provisions of the special part of the Penal Code directed at these people.

The article also repeatedly uses the word ‘caretakers’. This refers to all employees at care institutions: doctors, nurses, caregivers, and activity instructors. ‘Care patients’, in turn, are the people who receive any kind of service at care institutions as defined above.

Finally, restraining (or implementing forms of restraint) within the meaning of this article is carrying out acts that comprise elements necessary for a criminal offence towards care patients, where those acts are performed by caretakers so as to eliminate or reduce a threat to legal rights that arises from said care patients. First of all, this definition means that the article does not address those means of restraint that feature no legally defining elements of a criminal offence. For instance, it does not address whether a certain means of restraint could bring about any consequences in disciplinary proceedings or an obligation to compensate for the damages incurred, nor does it address the instances in which a caretaker’s acts entail the necessary elements for a criminal offence under other consideration than minimising threat – for instance,

¹ RT I 2001, 81, 487; RT I, 31.12.2016, 7.

² RT I, 30.12.2015, 5; 21.12.2016, 21.

³ RT I 1997, 16, 260; RT I, 30.12.2015, 88.

⁴ RT I 2001, 50, 284; RT I, 21.2.2017, 5.

illegal appropriation of jewellery of a care patient (see §199 of the Penal Code^{*5} (PC), on larceny) or torture of a care patient for sadistic reasons (see the PC's §121, on physical abuse). Neither is medical treatment of the person in care a topic of the discussion here.^{*6} Lastly, acts of people who are not caretakers are not considered, with examples being the care patients themselves and visitors to the institutions (although largely the same considerations apply to the punishments for such actions as to the liability of caretakers).

Since there is very little legal literature (and case law) on this matter, the analysis in the article is based in large part on German law as an important model for Estonian law.

2. Restraint in connection with the elements necessary for a criminal offence

The connection of means of restraint to the necessary elements of a criminal offence can be two-sided. Firstly, the measures of restraint may correspond to a description established in some of the provisions of the Penal Code. This means that a restrainer may be criminally liable for restraining. Secondly, it should be noted that sometimes criminal liability can follow when caretakers do **not** resort to restraining measures: they could be held responsible for offence through omission. Therefore, a caretaker's job is full of responsibilities and dangerous in the sense of criminal law: a punishment can follow from either act or omission. In Germany, caretakers share a grim joke that they always have one foot in a prison.^{*7}

In cases of implementation of means of restraint, several sets of conditions in the special part of the Penal Code may apply. The main provision to be examined in this connection, however, is found in §136 of the PC (on unlawful deprivation of liberty). That is why the article addresses this provision thoroughly before proceeding to analysis of some other provisions of the special part of the Penal Code that may become relevant.

2.1. Deprivation of liberty

Subsection 136 (1) of the PC stipulates pecuniary punishment or up to five years' imprisonment for unlawful deprivation of the liberty of another person. Freedom in this context means freedom of movement. Section 136 of the PC is a delict with arbitrary description; i.e., any kind of action can be considered to have the constituent elements of an offence if it results in rendering it impossible for the victim to change location.^{*8}

Among classic examples of deprivation of liberty are tying a person up and locking someone in a room. Hence, for instance, deprivation of liberty within the meaning of §136 of the PC can be considered in the context of this topic if a patient is being forcibly restrained within the sense of §14 (2) 1) of the MHA, is strapped to a bed within the meaning of §14 (2) 3) of the MHA, or is placed in an isolation room in the meaning of §14 (2) 4) of the MHA or §107 of the SWA. In contrast, there are no grounds for discussing deprivation of liberty in a case wherein the person is not locked inside a room but one or more particular rooms are closed to that person, for instance, to prevent the patient from accessing other patients, his or her possessions, or the television set. Such infringement of freedom of movement in relation to a specific matter does

⁵ RT I 2001, 61, 364; RT I, 31,12,2016, 14.

⁶ However, it should be noted here that it is questionable whether treating a person even is consistent with the necessary elements of a criminal offence. For instance, German case law and some legal literature find that also influencing bodily functions for the purpose of treatment (e.g., a scalpel incision or a syringe prick) should be deemed damage to health (the unlawfulness of which can be precluded through patient consent); see the overview given by T. Fischer. *Strafgesetzbuch. Kommentar*. 63. Aufl. ['Penal Code: 63rd, Commented Edition']. Munich, Germany, 2016 (in German), Art. 223, references 16–20. However, a large part of German legal literature has expressed an opposite view and indicated that steps taken to improve a person's health cannot be deemed causing of health damage. Estonian legal literature shares this opinion; see A. Nõmper, J. Sootak. *Meditsiiniõigus* ['Medical Law']. Tallinn 2007 (in Estonian), pp. 122–123.

⁷ F. Henke. *Fixierungen in der Pflege. Rechtliche Aspekte und praktische Umsetzung*. 1. Aufl. ['Restrains in Care: Legal Aspects and Practical Implementation']. Stuttgart, Germany, 2006 (in German), p. 5.

⁸ J. Sootak, P. Pikamäe. *Karistusseadustik. Kommenteeritud väljaanne* ['Penal Code: Commented Edition']. 4th, updated and revised ed. Tallinn: Juura 2015 (in Estonian), §136, Comment 3.2.1 (M. Kurm); T. Fischer (see Note 6), §239, Comment 6; W. Joecks. *Strafgesetzbuch. Studienkommentar*. 10. Aufl. ['Penal Code: 10th, Commented Study Edition']. Munich, Germany, 2012 (in German), Art. 239, Comment 8.

not deprive the person of freedom of movement to any location apart from the one(s) at issue^{*9} – e.g., other rooms at the care institution, outdoors, or the whole wide world.

At the same time, there are other ways of depriving someone of liberty.

One of these is by means of threatening, but not just any threatening. In light of the *ultima ratio* principle of penal law, only those threats exceeding a certain level of intensity may be considered. When a person places a gun at another person's temple and forbids that other person to move, this may constitute deprivation of liberty in the meaning of §136 of the PC.^{*10} Namely, the person holding the gun implies (concludently) to the person held at gunpoint that, in the event of any movements, the victim will be killed. Threatening someone's life is undoubtedly of sufficient intensity to imbue an act with the necessary elements of a criminal offence under §136 of the PC, as life is the most important legal right under penal law. Generally, in cases of the necessary elements articulated in §136, the main aspects addressed could be threats within the meaning of §120 of the PC – i.e., threatening to kill, cause harm to health, or cause significant damage to or destroy property. But there may be other potential sufficiency provisions among them: for a threat to cause pain (the second of the three options in §121 (1) of the PC); in the context of sexual offences, forcing a person who is not capable of comprehending the situation (see §141 (1) of the PC) to remain still by a threat that if the victim attempts to leave, the person doing the threatening will engage in sexual intercourse with the victim; and implying that if trying to leave, the person threatened will be locked in a cage (see §136 of the PC, with regard to depriving another person of liberty by threatening to deprive that person of liberty). Also, it has been found in Germany that the anticipated threat must be direct – referring to some action far in the future is not sufficient.^{*11}

In the context of a care institution, the above-mentioned understanding means the following. If the caretaker tells a confused care patient trying to leave the territory of the institution that if the patient does not immediately give up on what he or she is doing and return to the building, the caretaker will be forced to lock the patient up in a room, this constitutes deprivation of liberty within the meaning of §136 of the PC – the caretaker has threatened to interfere with a rather significant legal right protected by penal law. However, if the caretaker states that in a case of attempted escape, he or she is forced to take action, there is no deprivation of liberty involved. Firstly, this is because the caretaker does not imply directly or concludently that a new escape attempt would bring about intervention in respect of a (significant) legal right protected by penal law: taking action could mean anything – contacting the patient's relatives, discussing the matter with other doctors, etc. Secondly, because the action referred to would take place in an unspecified future according to the caretaker, sufficient grounds for identifying an offence do not exist. Also, there is no deprivation of liberty within the meaning of §136 of the PC when, for instance, a caretaker who has caught a care patient trying to leave the institution says that if the patient fails to voluntarily and immediately return to the building, the patient will get no dessert (knowing that the person in question is a sweet tooth). The latter is threatening merely with unpleasant consequences and is not significant from the standpoint of penal law.

Deprivation of liberty can come about also by administering certain substances, such as medicinal ones, to a person. When a person is unable to move on account of the medication (e.g., falling asleep because of sleeping pills or losing consciousness through effects of anaesthetic), that person has been deprived of liberty within the meaning of §136 of the PC. With regard to the means, such deprivation of liberty may take place within the meaning of the second alternative of §21 (1) of the PC. This is the case when a caretaker administers a medication restricting the movements of the care patient while the patient is unaware of such effect of the medication when consuming (e.g., swallowing) it (e.g., the caretaker has not explained it) or when the fact of administering the medication is altogether hidden from the care patient (e.g., it is concealed in food).^{*12} In such cases, care patients directly deprive themselves of freedom on their own; however, the caretaker controls the action of the care patient (who is the means in the sense of execution), thereby bringing

⁹ G. Arzt et al. *Strafrecht. Besonderer Teil. 2. Aufl.* ['Criminal Law: Special Part, Second Edition']. Bielefeld, Germany (in German), Art. 9. Ref. 17; M. Heghmanns. *Strafrecht für alle Semester. Besonderer Teil* ['Criminal Law for All Academic Terms: Special Part']. Heidelberg, Germany, 2009 (in German), Ref. 663.

¹⁰ J. Sootak, P. Pikamäe (see Note 8), §136, Comment 3.2.2 (M. Kurm).

¹¹ K. Lackner et al. (eds). *Strafgesetzbuch. Kommentar. 28. Aufl.* ['Penal Code: 28th, Commented Edition']. Munich, Germany, 2014 (in German), Art. 239, Comment 2 (K. Kühl); A. Schönke, H. Schröder (eds). *Strafgesetzbuch. Kommentar. 29. Aufl.* ['Penal Code: 29th, Commented Edition']. Munich, Germany, 2014 (in German), Art. 239, Comment 6 (A. Eser, J. Eisele).

¹² For example, the Chancellor of Justice has referred to the fact that in a certain care institution, the care patients were secretly given sedatives in their evening tea. See the summary of the Chancellor of Justice's 1.10.2014 inspection visit, titled 'Kontrollkäik AS Hoolekandeteenused Erastvere Kodusse' (or 'Visit to the Erastvere Home, of AS Hoolekandeteenused'), p. 7

about the necessary elements for an offence under §136 of the PC, with predominant knowledge: the person giving the medicine is unlike the means (the care patient) in being aware of its mobility-restricting effect. When, in contrast, the person taking the medication does so knowingly and understands its effect, there are no grounds for claiming deprivation of liberty within the meaning of §136 of the PC. Since the act of deprivation of liberty is committed by the care patients themselves (they voluntarily swallow the medicine), direct performance of the act by the caretaker in the meaning of the first option in §21 (1) of the PC cannot be considered relevant. At the same time, instrumental execution is ruled out by the fact that the caretaker has no control over the action – there is no predominant knowledge, because the care patient is aware of the effects of the medication. There is, however, a possibility of considering the caretaker's control of the action (i.e., instrumental execution) when the care patient does not comprehend the effects of the medication (e.g., for reason of a mental disorder): in such a case, the caretaker controls the means (the care patient) through no fault of the latter.^{*13} On the other hand, in a situation in which the care patient receives medication via a perfusor (syringe pump), the caretaker switching on the perfusor and/or adding the medication to it is directly depriving the care patient of liberty: mobility restriction occurs with the action of the caretaker (switching on the perfusor and/or adding medication to it) directly, without intervention by someone else (whether the care patient or a third person). The same is true of injecting the medication. Deprivation of liberty is direct also when the caretakers force a care patient to swallow the medication – for instance, two people might hold the person still while a third one opens the patient's mouth and a fourth forces the pill down the patient's throat. In such a case, the swallowing reflex of the care patient cannot be considered an action – if it could be, we could talk about instrumental execution – in a penal-law sense because the care patient was unable to command that movement (i.e., swallowing) by will.

It is debatable whether deprivation of liberty presumes that the victim was able to change location at the moment of deprivation of liberty (e.g., one is unable to do so while unconscious or asleep) or is aware of losing liberty (as when a teacher marking exam papers in the teachers' lounge does not notice that some naughty students locked the door of the lounge, left it locked for a while, and later unlocked it). In Germany, both positions are represented: that deprivation of liberty presumes the victim's awareness of losing liberty and the opposite.^{*14} Those who support the latter contention find deprivation of liberty to encompass cases in which freedom of movement is taken from an unconscious person – the person may regain consciousness and wish to move. The same argument applies to people who are unaware of being deprived of their liberty. For instance, the teacher in the parenthetical example above may develop a need to visit the toilet. Even if the first position (i.e., that there can be no deprivation of liberty if the person is unaware of it) is supported, it does not follow that such cases cannot bring liability under penal law. If the person depriving someone else of liberty at least accepts within the sense of §16 (4) of the PC that the person deprived of liberty might want to exercise his or her freedom of movement, there are grounds for viewing the action as attempted deprivation of liberty within the meaning of §§ 136 (1) and 25 (2) of the PC. An example case would arise when a caretaker installs a grate on a care patient's bed that prevents him or her from leaving at night because the caretaker considers it possible and accepts that the patient may wake up and go wandering; another is a situation wherein a caretaker locks the door of the care patient's room for the night so that the patient could not start roaming around the hallways in the event of waking during the night.

It is generally agreed that a person's liberty can be taken away also by misleading that person – for example, by lying to the person with the statement that he or she is unable to leave the flat because the door is locked or by falsely claiming to the person that he or she cannot leave the vehicle because opening the door would cause a bomb placed in the car to detonate.^{*15} Therefore, deprivation of liberty within the

and Annex 1 (photo 1). Available, in Estonian, at http://www.oiguskantsler.ee/sites/default/files/field_document2/kontrollkaigu_kokkuvote_as_hoolekandeteenused_erastvere_kodu_0.pdf (in Estonian) (most recently accessed on 26.5.2017).

¹³ See, for example, R. Rengier. *Strafrecht. Allgemeiner Teil. 4. Aufl.* ['Criminal Law: General Part, 4th Ed.']. Munich, Germany, 2012 (in German), Art. 43, refs 27–37.

¹⁴ See, for example, G. Arzt et al. (see Note 9), Art. 9, refs 13–16; T. Fischer (see Note 6), Art. 239, Comment 5; W. Joecks (see Note 8), Art. 239, Comment 10 ff.; M. Heghmanns (see Note 9), Ch. 19, Ref. 657.

¹⁵ T. Fischer (see Note 6), Art. 239, Comment 8; W. Joecks (see Note 8), Art. 239, Comment 17; G. Arzt et al. (see Note 9), Art. 9, Ref. 26; M. Heghmanns (see Note 9), Ch. 19, refs 661 and 665; W. Joecks, K. Miebach (eds). *Strafgesetzbuch. Münchener Kommentar* ['Munich Commentary on the Penal Code'], Vol. 4. 2nd ed. (volume editor: G.M. Sander). Munich, Germany, 2012 (in German), Art. 239, Comment 27 (B. Wieck-Noodt); A. Schönke, H. Schröder (see Note 11), Art. 239, Comment 6; K. Lackner et al. (see Note 11), Art. 239, Comment 2. It has also been found in Estonian legal literature that deprivation of liberty by deceit is possible; see J. Sootak, P. Pikamäe (see Note 8), §136, Comment 3.2.2 (M. Kurm). A decision of the

meaning of §136 of the PC also covers a caretaker lying to a care patient in a manner plausible to the latter that the front door of the care institution is locked or electrified or that there are aggressive dogs in the yard outside. Deprivation of liberty might also consist in, for instance, having ‘tricky’ door handles that need to be pulled up instead of pushed down to open.^{*16}

The conditions for deprivation of liberty do not necessarily presume that the obstacle on the way to freedom is absolutely insurmountable (e.g., strong bonds or a windowless concrete cage with a heavy locked iron door). If access to freedom is in some way possible, the existence of the elements of deprivation of liberty depends on the particulars of the circumstances. For instance, the opinion has been expressed in Germany that if the possibility of using an emergency exit can be presumed, there can be no deprivation of liberty.^{*17} First and foremost, the person inside cannot make well-grounded assumptions as to whether using it is dangerous.^{*18} For instance, it is generally not dangerous to leave through an evacuation door instead of the locked main door. The same can be said about exiting via a low window.^{*19} It has been generally found that a person walking around nude can be presumed as a response, with regard to the question of whether taking the clothes of a person who has gone for a swim constitutes deprivation of that person’s liberty.^{*20} However, deprivation of liberty should be affirmed as occurring when the escape attempt would entail jumping from a high window or moving car or if opening the exit itself could cause bodily injury.^{*21} Similarly, it could be said that, while taking the care patient’s clothes does not constitute deprivation of liberty – after all, the person could leave the institution either clothed or while naked – the situation might be completely different in a harsh winter when going outside without (proper) clothing on could lead to serious physical harm or even death. Finally, a serious obstacle to freedom of movement (i.e., deprivation of liberty) has been deemed not to exist when that physical obstacle could be removed by pressing a button – for instance, when a care patient locked in a room or lying in a bed with raised rails can call for a caretaker by pressing a button, who will then arrive almost immediately and remove the obstacle. However, if the call is not responded to, deprivation of liberty can obviously be affirmed as present.^{*22}

Whether an action can be viewed as deprivation of liberty may depend greatly also on the person in question. For example, raising bed rails does not constitute deprivation of liberty for a person who is physically and mentally healthy, but it does for an ailing care patient who is unable to independently climb over or past the railing to get out of bed. When someone needs a wheelchair to move about, taking that wheelchair from him or her constitutes deprivation of liberty.^{*23} In contrast, when a person in a wheelchair is unable to leave the chair on his or her own, strapping him or her into the wheelchair (e.g., to avoid falling) is not deprivation of liberty^{*24}, because moving by leaving the wheelchair is impossible for the person in any case and strapping in cannot increase the impossibility.

In the context of this article, it is important to note that liberty can be taken further from a person who is already deprived of it; that is, the person’s mobility options can be additionally restricted.^{*25} For instance, a person held in a building with several rooms (i.e., a person already deprived of liberty) can be additionally deprived of it by being locked in a single room or being tied up. Accordingly, an order by a court or doctor under §105 (4) of the SWA or §11 (2) or §11 (3) of the MHA for placement of a person in a closed institution

Supreme Court that does not seem relevant with regard to the matter is referred to (*ibid.*): the Supreme Court analysed a situation in which, although a person was lured into a car by deceit, no tricks were used to keep that person there.

¹⁶ C.W. Schmidt. *Freiheitsberaubung aus Fürsorge* [‘False Imprisonment from Care’]. Giessen, Germany 2010 (in German), p. 110. Available at http://geb.uni-giessen.de/geb/volltexte/2011/8036/pdf/SchmidtChristian_2011_02_16.pdf (most recently accessed on 27.5.2017).

¹⁷ W. Joecks, K. Miebach (see Note 15), Art. 239, Comment 28.

¹⁸ A. Schönke, H. Schröder (see Note 11), Art. 239, Comment 6a.

¹⁹ W. Joecks, K. Miebach (see Note 15), Art. 239, Comment 29.

²⁰ *Ibid.*; A. Schönke, H. Schröder (see Note 11), Art. 239, Comment 6a; G. Arzt et al. (see Note 9), Art. 9, sidenotes 21–22.

²¹ W. Joecks, K. Miebach (see Note 15), Art. 239, Comment 30.

²² There have been such cases in Estonian care institutions. See the 11.3.2015 circular letter of the Chancellor of Justice to providers of nursing care services, para. 6 on p. 4. Available, in Estonian, at http://www.oiguskantsler.ee/sites/default/files/field_document2/6iguskantsleri_soovitus_pohioiguste_ja_-_vabaduste_paremaks_tagamiseks_tahlepanekud_statsionaarse_oendusabiteenuse_osutajatele.pdf (most recently accessed on 25.5.2017).

²³ C.W. Schmidt (see Note 16), p. 37.

²⁴ C. Fuchs. Die Zulässigkeit von Patientenfixierungen [‘The admissibility of restraints on patients’], p. 5. Available at http://www.aerztenetz-bad-berleburg.de/images/zulaessigkeit_von_patientenfixierungen.pdf (in German) (most recently accessed on 27.5.2017).

²⁵ G. Arzt et al. (see Note 9), Art. 9, Ref. 18.

or involuntary psychiatric care may legitimise only keeping that person in the respective institution (i.e., in the building or in the relevant territory), while any additional restrictions to freedom of movement require separate justification. The above conclusion is clearly confirmed also by the existence of §§ 106 and 107 of the SWA and §14 of the MHA: if a detention decision of a court or a doctor permitted every kind of restriction to freedom of movement, such provisions would not be necessary.^{*26}

2.2. Other compositions of the special part of the Penal Code

In cases of restraint, addressed in §121 of the PC, ‘physical abuse’ is often possible also. In the course of restricting a person’s mobility, that person’s body may be affected in a way that comprises the necessary elements presented in §121 of the Penal Code. Even if it may not be, persons restricting liberty without corresponding training and suitable means may consider this outcome possible and acceptable, thereby fulfilling the necessary elements for attempted physical abuse within the meaning of §121 and §25 (2) of the Penal Code.

Section 121 of the PC specifies two alternatives in its terms: firstly, causing of damage to the health of another person and, secondly, physical abuse that causes pain. Health damage may consist of any kind of pathological condition^{*27} – for instance, a fracture, bleeding, bruising, or influenza (caused by, for instance, being pushed into cold water). Since the legislation does not specify the manner of causing the health damage, this is a composition with unspecified description of action; that is, causing health damage in any way constitutes the offence. For instance, the action might be a punch or a kick, stabbing with a knife, throwing something at the person, or pushing the person down from somewhere. At the same time, health damage could come about from inserting a syringe needle into a person’s body – it causes a wound. If a substance is administered to a person (e.g., orally in the form of pills or by injection), affecting his or her bodily functions – e.g., causing drowsiness (as with sleeping pills) or loss of consciousness (as with anaesthesia) – it is considered to cause a pathological condition (i.e., health damage).

Pain is an unpleasant sensory or perceived sensation occurring with actual or potential damage to tissue.^{*28} However, in recent years, the case law of the Supreme Court of Estonia has started to incline in the direction that causing pain does not itself possess the necessary elements in §121 of the PC. Namely, a sensation of pain may arise very easily, so the Court has taken the position that not just any abuse that causes pain possesses the elements necessary for the offence. For instance, a requirement has been specified of the pain being a typical consequence of a certain action^{*29}; it has been found also that a certain degree of pain caused in penal intervention does not cross the line, since to some extent it is socially acceptable.^{*30} In this, Estonia has followed the same direction as Germany – to be considered physical abuse in the event of no health damage, the infringement of physical integrity must exceed some sort of social acceptability threshold.^{*31} Said interpretation is supported by the wording of the legislation: it is not causing pain *per se* that is deemed punishable but physical abuse that causes pain. In interpretation of the provision, emphasis should be put on the word ‘abuse’: it enables normatively furnishing the second alternative found in §121 (1) of the PC. Thus, it could be found that, for instance, stepping on someone’s toe on a crowded bus with indirect intent and causing pain or lightly smacking a child for didactic purposes (causing some pain to the child) when done by a parent of the child does not objectively match the elements specified in §121 (1) of the PC.

Interpreting the second alternative in §121 (1) of the PC in the way described above, one can conclude that caretakers causing pain to care patients in some of their actions or at least accepting the possibility of

²⁶ True, it was later concluded that these grounds are largely unnecessary in the meaning of penal law (see Subsection 3.5 of this article), yet in the case of their absence, it would not be possible to state that additional deprivation of liberty would be possible on the grounds of a detention decision alone. In the absence of §§ 106 and 107 of the SWA and §14 of the MHA, the reasoning should proceed from the nature of the deprivation: imposing an additional movement restriction limits the person’s ability to change location or move the body, and that is the deciding factor.

²⁷ J. Sootak, P. Pikamäe (see Note 8), §121, Comment 3.1 (M. Kurm); M. Heghmanns (see Note 9), Ch. 9, Ref. 376.

²⁸ CCSCd 3-1-1-60-10, para. 16.

²⁹ CCSCd 3-1-1-50-13, para. 12.

³⁰ CCSCd 3-1-1-76-16, para. 12.

³¹ It is easier to do that in Germany, since the corresponding provision in German legislation (Section 223 of the German Penal Code, or (*Strafgesetzbuch*) does not mention pain – the position is that causing pain in itself does not constitute physical abuse; see M. Heghmanns (see Note 9), Ch. 9, Ref. 375.

causing them pain does not satisfy the objective elements of an offence. For example, the quality of physical abuse might not exist in a situation in which caretakers take down a patient who presents an acute danger to his or her health or that of others so as to mitigate that danger while accepting that the care patient struggling in their arms may feel a certain amount of pain.

However, provisions related to threat or even damage to life (i.e., causing death) may be relevant in addition.

Let us begin by considering the PC's §§ 123 (on placing in danger) and 124 (on refusal to provide assistance). These provisions could be relevant when someone's life is at risk, and §123 may apply also when there is serious risk to health. Among classic cases of life-threatening situations is lying unconscious on a road or outside in the cold during winter. In the case of a care institution, a life-threatening situation could exist also when a person tied to a bed is kept in the same room as people with mental disorders who move about freely. For instance, such a situation ended a couple of years ago with the death of the person lying in bed, suffocated by a mentally ill fellow patient.^{*32} Another instance that could be considered here is that in which a care patient with suicidal tendencies and incapable of relevant comprehension (see Subsection 3.1, below, on incapacity to comprehend) is left alone in a room where he or she could commit suicide.^{*33} It is clear that not all situations involving a theoretical risk of death could be considered life-threatening – the threat must be specific. As for when the threat is sufficiently specific, that must be assessed by taking all the circumstances into consideration (which people are left in the room with the person being restrained, how often the person left alone has made suicide attempts, and when the last time was). It is important to note that §§ 123 and 124 of the PC are action delicts and do not presume arrival of a consequence (death or, in the case of §123, 'only' damage to health) – it is sufficient for a situation fulfilling these conditions to exist (e.g., threat to life). While for §123 of the PC the offender's acceptance of the danger is sufficient for holding the offender liable under §15 (1) and 16 (4), §124 requires being fully aware of the life-threatening situation (its use of 'knowing' is important).

Sections 123 and 124 of the PC as delicts for everyone are applicable only when they do not get absorbed by a provision of higher relevance. First and foremost among these would be manslaughter by omission within the meaning of §113 (1) and 13 (1) of the PC.^{*34} Admittedly, manslaughter by action could be considered too, but in this case it is even less likely than manslaughter by omission.

A person can be held liable for manslaughter by omission only when under an obligation to prevent death – that is, when legally obliged to act within the meaning of §13 (1) of the PC (i.e., when a guarantor). A caretaker has a (protection) guarantor obligation^{*35} only when actually being the person providing the care. This means that the person in question must have taken on the obligation to care for the person in danger.^{*36} That applies, for instance, to a doctor providing treatment or a caretaker providing care to a certain person. It means that a doctor or caretaker is no-one's guarantor solely by dint of profession. For instance, a doctor or a caretaker who fails to provide assistance to a person in a life-threatening situation on a street or while visiting a medical care institution where he or she does not work shall not be liable for completed or attempted manslaughter. In such cases, only liability under §124 (1) of the PC can apply. Since the formation of guarantor status requires adoption of a duty of care, an employee of a care institution cannot be deemed a guarantor for the care patients at that institution merely on account of the fact of working there.^{*37} Failure to take restraint measures may thus lead to liability of a caretaker acting as a guarantor for manslaughter by omission – for example, when a care patient incapable of comprehending cuts his or her

³² T. Kaukvere. Tapmine Wismari haiglas tõi ilmsiks puudused terviseameti töös ['Murder at Wismari hospital revealed shortcomings in the work of the Health Board']. – Postimees, 10.11.2015 (in Estonian). Available at <http://www.postimees.ee/3393299/tapmine-wismari-haiglas-toi-ilmsiks-puudused-terviseameti-toos> (most recently accessed on 25.5.2017).

³³ With regard to one suicide case of this nature, see the Chancellor of Justice's memorandum of 9.11.2015 on deaths at special care homes, para. 8. Available, in Estonian, at http://www.oiguskantsler.ee/sites/default/files/field_document2/6iguskantsleri_ettepanek_rikkumiste_korvaldamiseks_surmajuhtumid_erihooldekodudes.pdf (most recently accessed on 25.5.2017).

³⁴ Leaving in danger and failure to provide assistance are absorbed into manslaughter; see, respectively, A. Schönke, H. Schröder (see Note 11), Art. 221, Comment 18 (A. Eser, D. Sternberg-Lieben) and the memorandum: *ibid.* See also Stuff Missing Here, Art. 323c, Comment 30 (D. Sternberg-Lieben, B. Hecker).

³⁵ On the division of the guarantor obligation into protection and guarding guarantor obligation, see, for instance, J. Sootak. *Karistusõigus. Üldosa* ['Penal Law: General Part']. Tallinn 2010 (in Estonian), Ch. XI, refs 39–40.

³⁶ R. Rengier (see Note 13), Art. 50, refs 28–31; T. Fischer (see Note 6), Art. 13, Comment 14; J. Sootak, P. Pikamäe (see Note 8), §13, Comment 7.2.2 (J. Sootak).

³⁷ At the same time, a position has been expressed in Germany that care staff act as protection guarantors with respect to the care patients; see R. Rengier (see Note 13), Art. 50, Ref. 31.

veins and the caretaker fails to stop that act or the ensuing events in any way (whereupon the patient dies) or when one of the care patients beats another and the caretaker fails to intervene (whereupon the patient who was beaten dies). However, liability for manslaughter by omission is probably out of the question in cases in which a caretaker has left a bound care patient alone with other patients or left unattended a care patient who has suicidal tendencies. That is because, even if the caretaker had intention with regard to the dangerousness of the situation (which is disputable), he or she probably had no intention as to the arrival of death.

Heads of care institutions (e.g., board members of a legal entity) cannot be considered caretakers, because they are not directly involved in taking care of specific patients and are responsible instead for ensuring the proper functioning of the institution. That said, a duty to act is not entirely ruled out. However, in their case, the status of guarding guarantor may be considered rather than that of protection guarantor – their duty is not to protect the specific care patient but to ensure the source of threat under their responsibility not causing any damage (i.e., they have to guard the source of threat). The care institution as such might be such a threat. Just as organisers of a racing competition must ensure the safety of the spectators^{*38}, the equivalent must be done by heads of care institutions for the people cared for in such institutions. Therefore, if an institution head sees a care patient lying in the yard in the cold and at least accepts the possibility of the latter freezing to death yet fails to take action, he or she is liable for the manslaughter of the patient by omission. If the care patient indeed dies, liability for the completed act follows under §§ 113 (1) and 13 (1) of the PC; however, if the patient survives for whatever reason, the head of the institution shall be held liable for attempted manslaughter by omission under §§ 113 (1), 13 (1), and 25 (5) of the PC.

The foregoing notwithstanding, liability of caretakers for causing death through negligence (omission) is still more likely. It needs to be considered that liability under negligence terms can follow only when a person violates some sort of duty of care – i.e., does not show the care required of him or her. The arrival of the consequence constituting the offence must be foreseeable.^{*39}

Therefore, in a situation in which a caretaker leaves a care patient without supervision and something negative happens (e.g., the patient dies), the caretaker can be held liable in having violated the duty of care by leaving the person without supervision. When discussing the supervision duty of caretakers, we can agree with the position repeatedly expressed in German (civil) case law that the requirements set for care institutions cannot be so strict that they would render financially affordable dignified care impossible.^{*40} Financial considerations render it impossible to ensure constant monitoring of the care patients; hence, failure to supervise is not in itself a violation of the duty of care. The required minimum level (below which there is a violation of the duty of care in cases of relevant damage under penal law) probably changes over time – the further a society evolves and the richer it gets, the higher are the requirements set for care institutions.

Failure to monitor can be deemed violation of the duty of care firstly when there are specific references to the possibility of a negative consequence. This occurs, for instance, when a care patient unable to comprehend and left alone has (repeatedly) attempted suicide before and kills him- or herself. Violation of the duty of care can be affirmed also in a situation wherein a caretaker leaves care patient A in a room with care patient B who has a history of (repeated) violence, whereupon B kills A. However, if B in his or her many years with the institution has not been violent before, the caretaker could not have foreseen the act of violence by B and did not violate the duty of care by leaving A in the same room as B.

Nonetheless, a duty of care may arise otherwise too, from the special provisions^{*41}: provisions on how to perform a certain action as safely as possible.^{*42} For example, the second sentence of §107 (2) of the SWA provides that the person in question shall be constantly under the supervision of the provider of 24-hour special care services during that person's stay in an isolation room, and the second sentence of §14¹ (1) of the MHA establishes that upon the use of mechanical restraint, the person restrained shall be under constant

³⁸ R. Rengier (see Note 13), Art. 50, Ref. 50 (Rengier still considers it possible to deem an organiser of a race also a protection guarantor for spectators).

³⁹ On the concept of duty of care, see, for example, J. Sootak, P. Pikamäe (see Note 8), §18, Comment 9 (P. Pikamäe).

⁴⁰ For references to judicial decisions, see F. Henke (see Note 7), pp. 35, 63, 65; C.W. Schmidt (see Note 16), p. 165, Footnote 778.

⁴¹ The term 'special duty to care' has been used in the legal literature; see J. Sootak, P. Pikamäe (see Note 8), §18, Comment 9.2 (P. Pikamäe).

⁴² The most well-known example is the Traffic Code – it consists almost entirely of special provisions in the meaning of negligence delicts (that is, it explains the duty to care in traffic).

supervision by a health-care professional. There are solid grounds for presuming^{*43} that if the caretaker fails to comply with these provisions and the care patient dies, the case in question constitutes a violation of the duty of care by the caretaker, which should bring about the caretaker's liability for causing a death of another person through omission under §§ 117 (1) and 13 (1) of the PC. In addition, under the rules of a perfect aggregate (see §63 (1) of the PC), caretaker liability under Section 124 or 123 of the PC may be considered, because causing death through negligence does not constitute intentionally leaving another person in a dangerous situation.

According to §§ 117 (1) and 13 (1) of the PC, the head of the care institution too may be held liable for a care patient's death, for reason of having failed to organise the work of the institution in a sufficiently secure manner, thereby violating his or her duty of care. For instance, in the above-mentioned case of a care patient freezing to death, the head of the care institution could be accused of having used so-called non-foolproof front doors to save money. Another accusation that could arise is that of not having been sufficiently diligent in selecting the staff, with this having led to a) the negligent caretaker not keeping an eye on the care patient as he or she was supposed to, instead allowing the patient to go out in the cold, or b) the caretaker leaving the suicidal care patient alone because of not having received sufficient training or there not being enough staff available.^{*44}

Finally, a self-evident aspect with regard to the general part of the Penal Code should be reiterated: several persons could be held liable for causing a single consequence, and only some of them might have participated. Hence, for unlawfully depriving a care patient of liberty, not only the caretaker who locked the person in a closed room should be held liable but so too shall the supervisor who gave the order to do so: the caretaker shall be liable under §136 (1) of the PC as a principal offender and the supervisor under §§ 136 (1) and 22 (2) of the PC as an abettor.

3. Preclusion of unlawfulness of means of restraint

When someone commits an act that possesses all the necessary elements of an offence, it can be presumed to be an offence because the presence of the necessary elements indicates unlawfulness. However, in exceptional cases, an act can possess these elements without actually being unlawful. This occurs when certain circumstances of the case preclude unlawfulness. Unlawfulness can be precluded by grounds stemming from several sources, some specified in the Penal Code, many of them addressed in other laws, and some not articulated in legislation.

The admissibility of means of restraint as bringing about the necessary elements in the above connection may depend on various circumstances. This section of the article firstly addresses the general circumstances that preclude unlawfulness – that is, the ones that arise not only in care institutions but nearly everywhere else too. After that, specific circumstances that preclude unlawfulness are analysed, the ones relevant only in the context of our topic.

3.1. Compliance: Consent and permission

We begin this section of the article by discussing the person's compliance with being restrained. Namely, penal-law theory holds that when the holder of the legal right does not deem that legal right worth protecting, the state is not to protect it forcibly.^{*45} That said, compliance generally can justify only such restraining as is in the interests of the care patient – in rather exceptional cases it can be said that the patient accepts being restrained because of posing a threat to someone else (e.g., a care patient in a moment of clarity tells

⁴³ In (extremely) exceptional situations, however, violation of the special provision and failure to comply with the duty to care may not coincide. See R. Rengier (see Note 13), Art. 52, Ref. 17; J. Wessels, W. Beulke. *Strafrecht. Allgemeiner Teil. 37. Aufl.* ['Criminal Law: General Part, 37th Ed.']. Heidelberg, Germany, 2007 (in German), Art. 15, Ref. 672.

⁴⁴ See the 27.2.2014 summary of the Chancellor of Justice's inspection visit, 'Kontrollkäik AS-i Hoolekandeteenused Valkla Kodu' (or 'Visit to AS Hoolekandeteenused Valkla Kodu'), section 4.1. Available, in Estonian, at http://www.oiguskantsler.ee/sites/default/files/field_document2/kontrollkaigu_kokkuvote_as_hoolekandeteenused_valkla_kodu.pdf (most recently accessed on 26.5.2017).

⁴⁵ W. Gropp. *Strafrecht. Allgemeiner Teil. 4. Aufl.* ['Criminal Law: General Part, 4th Ed.']. Berlin 2015 (in German), Art. 5, Ref. 74.

a caretaker that if he or she should ever lose the ability to comprehend, he or she should be bound with restraint straps in the event of posing a threat to other people).

Although Estonian law generally refers to consent in connection with compliance, equating the two is not suitable for our discussion, since the theoretical grounding of this article lies largely in German law. The reason is that German jurisprudence differentiates between two types of compliance – firstly, one called *Einverständnis* in German and glossed in the Estonian environment as consent and, secondly, *Einwilligung*, which is referred to in Estonian via the concept of permission^{*46}. In German law, it has been found that in some cases compliance in the sense of consent inherently excludes appealing to the necessary elements for an offence and that in other cases compliance in terms of permission excludes the unlawfulness of the act.^{*47} The constituent elements of an offence are excluded by dint of compliance (consent) when the unlawfulness linked with the constituent elements lies in the fact that the act is committed against the will of the person or without the person's consent. On the other hand, generally, forbidden attacks damaging another person's legal rights (e.g., attacks on physical integrity) represent at least *prima facie* abstract unjustness, the elimination of which must take place on the level of the attacks themselves being unlawful.^{*48} Among the most relevant special-part compositions in the context of this article, deprivation of liberty and physical abuse are seen quite differently by the German scholars when they are addressing compliance – in cases of deprivation of liberty, compliance (consent) excludes constituency^{*49}; in cases of physical abuse, unlawfulness is excluded for reason of permission on the basis of an explicit legal provision, Section 228 of the German Penal Code (*Strafgesetzbuch*, or StGB). Differentiating between the two is important because consent is associated with more lenient requirements than permission is. Accordingly, when a person meets the conditions both for having been deprived of liberty and for his or her physical integrity having been breached, deprivation of liberty may be non-punishable for reason of consent while the breach of physical integrity may still be punishable as physical abuse if the potential permission does not comply with the requirements in question. Within the space of this article, it is not possible to analyse whether following this theory (i.e., differentiation between consent and permission) would be justified in Estonia. Nevertheless, the distinction will be maintained below.

A person can comply with something only when truly capable of compliance. In Germany, there are significantly stricter requirements for showing capacity for compliance in cases of permission than in cases of consent. In the latter, the person's natural will^{*50} is sufficient; i.e., if the 'victim' complies in fact with the act, the constituent elements do not obtain.^{*51} For instance, theft is excluded when a toddler or a mentally ill person voluntarily gives away his or her belongings, even if that act was completely irrational in objective terms.^{*52} When we take as part of the basis the fact that §136 (1) of the PC indicates the sufficiency of consent based on natural will (see the preceding paragraph), one consequence in our case is that the constituent elements of deprivation of liberty are not present in any case if the care patient consents to it.^{*53} Therefore, caretakers would need to seek other legitimisation for deprivation of a care patient's liberty in the interests of the latter only if the care patient does not consent to being deprivation of liberty (as when a patient who is locked inside a room cries or expresses a wish not to be locked in to the person who closes the door). However, in a case of permission precluding unlawfulness, natural will alone is insufficient – the permission is valid only if the person has the capability to express that permission (the German *Einwilligungsfähig*). Nevertheless, excessively high-threshold prerequisites cannot be set for this capability. The capability does

⁴⁶ J. Sootak (see Note 35), Ch. VII, Ref. 306.

⁴⁷ See the overview in Estonian by J. Sootak (see Note 35), Ch. VII, refs 301–339.

⁴⁸ E. Hirsnik. Mõningatest karistusõiguslikest inimese surma põhjustamise, vabaduse võtmise ja kuriteo varjamisega seotud probleemidest [‘On some issues pertaining to causing death of a person, deprivation of liberty, and non-disclosure of criminal offence under penal law’]. – *Juridica* 2011/2, pp. 153–161 (in Estonian), on pp. 158–159 (with succeeding references), addressing the decision of the Criminal Chamber of the Supreme Court in case no. 3-1-1-57-10.

⁴⁹ W. Gropp (see Note 45), Art. 5, Ref. 113; J. Wessels, W. Beulke (see Note 43), Art. 9, Ref. 366.

⁵⁰ The concept of natural will was relatively recently used by the Supreme Court for the first time as well; see CCSCr 3-1-1-108-15, para. 16.2.

⁵¹ J. Wessels, W. Beulke (see Note 43), Art. 9, Ref. 367; R. Rengier (see Note 13), Art. 23, Ref. 45.

⁵² *Ibid.*

⁵³ This is the logic on which German civil law too is based. Subsection 1906 (3) of the German Civil Code (*Bürgerliches Gesetzbuch*, BGB) states that employing means of restraint in the interests of the person being restrained is, first and foremost, justified when it is in compliance with the natural will of the person. Only when it is not is there a need to search for other legitimisation (permission of the guardian).

not depend on the person's age or on having (full) active legal capacity under civil law. The deciding factor is whether the person can actually understand (i.e., possesses the capacity of understanding) the meaning of the permission.^{*54} Whether that permission is reasonable in the eyes of a third party is not important.^{*55}

Often, people at care institutions are not capable of giving legally relevant permission from the standpoint of precluding unlawfulness, since they do not comprehend the substantial meaning of their permission in a sufficient manner.^{*56} Importantly, though, this is not always the case. For instance, a care patient may be capable of comprehending the meaning of some simple measures (e.g., understanding that he or she needs to take a certain medicine for avoiding the danger of falling out of bed at night) but nothing more complex. Therefore, the care patient may not be incapable of providing permission as such: it is possible to be able to give permission for some measures but not for others. The foregoing discussion makes it clear that people under guardianship too can be capable of giving permission.^{*57}

In the case of a composition in which compliance rules out unlawfulness of the act (e.g., §121 of the PC) where a care patient who is capable of supplying permission does not do so, the caretaker shall not perform the act encompassing the necessary elements of an offence (in the interests of the care patient), such as force-administer a sedative to the person. If the caretaker does this nonetheless, it is an offence (provided that the caretaker is at fault). The caretaker is, for instance, unable to rely on necessity (§29 of the PC) and justify the act with the statement that he or she has prevented significant damage (even death in extreme cases) by medicating the patient, because a person's free will must be respected. The latter cannot be evaded on grounds of the principle of proportionality.^{*58} Since there is no actual permission, it cannot be claimed that there is presumed permission, because refusal to provide explicit permission excludes application of the institution of the presumption of permission. Hence, a capable person who refuses a cannula may not be cannulised (the tube causes damage to health) even if not inserting the cannula would mean that the patient would die, not to mention lose consciousness.

While the prevailing opinion in Germany with regard to permission precluding existence of the constituent elements of an offence is that compliance in practice is sufficient, the position related to permission precluding **unlawfulness** is that the person must express the permission with an act, either directly or conclusively.^{*59}

Finally, it needs to be stressed that only the persons themselves can express their conclusion – the position of loved ones (e.g., relatives) is legally irrelevant (even when it is sometimes seen otherwise in the practice of care institutions).^{*60}

3.2. Presumed permission

German law includes the institution of presumed permission also. Presumed permission is, in fact, a surrogate for permission proper – it can be considered to be justification for an act comprising the necessary elements for an offence when determining the will of the holder of the legal rights is impossible. When one can ascertain the actual state of permission and either doing so or delay associated with trying to do so does

⁵⁴ W. Gropp (see Note 45), Art. 5, Ref. 80; R. Rengier (see Note 13), Art. 23, Ref. 15; J. Sootak (see Note 35), Ch. VII, Ref. 322.

⁵⁵ W. Gropp (see Note 45), Art. 5, Ref. 80; C. Fuchs (see Note 24), p. 9; V. Thiel. *Freiheitseinschränkende Maßnahmen gegenüber Pflegebedürftigen* [Measures restricting freedom within care]. 2003 (in German), p. 5. Available at http://volkerthiel.de/wp-content/uploads/2014/10/FreiheitseinschrMassn_12.pdf (most recently accessed on 27.5.2017).

⁵⁶ F. Henke (see Note 7), p. 24. Nevertheless, it should be noted that Henke does not differentiate between compliance that has the constituent elements of an offence and compliance for which unlawfulness is precluded. This may be related to the fact that the author is not a jurist but a care practitioner and a scientist.

⁵⁷ F. Henke (see Note 7), p. 24.

⁵⁸ R. Rengier (see Note 13), Art. 23, Ref. 5; C.W. Schmidt (see Note 16), p. 154; also see Subsection 3.4 of this article.

⁵⁹ J. Wessels, W. Beulke (see Note 43), Art. 9, Ref. 368, 378; R. Rengier (see Note 13), Art. 23, refs 21 and 46. When discussing consent in the context of physical abuse, the Supreme Court of Estonia too has found that the consent must be given directly or conclusively; see CCSCd 3-1-1-60-10, para. 17.2.

⁶⁰ With regard to Germany, see such sources as C. Fuchs (see Note 24), p. 7; V. Thiel (see Note 55), p. 3; F. Henke (see Note 7), p. 27. For discussion related to Estonia, see the summary of the Chancellor of Justice's 10.10.2013 inspection visit titled 'Kontrollkäik SA-sse PJV Hooldusravi' (or 'Visit to the foundation PJV Hooldusravi'), p. 3. Available, in Estonian, at http://www.oiguskantsler.ee/sites/default/files/field_document2/kontrollkaigu_kokkuvote_sa_pjv_hooldusravi.pdf (most recently accessed on 26.5.2017).

not cause (more) damage, the person wishing to perform the act entailing the necessary elements for an offence has to find out the will of the person holding the legal right, exercising due diligence.^{*61}

Classic examples of presumed permission are operating on an unconscious person on the brink of death and breaking into the house of a neighbour who is on holiday to determine whether the smoke emanating from beneath the front door may indicate fire. In situations of this sort, it can be presumed (expected) that the surgery patient and home-owner would have given permission to operate and to enter the house, respectively, if they had been asked. The existence of presumed permission – which is highly relevant in respect of the topic at hand – also is actualised when the person is in no condition to give permission. Accordingly, for example, depriving a person with a mental disorder of liberty for his or her own protection may be in contradiction with that person's natural will, which is why it is not possible to take permission for granted in this connection. However, presumed permission can be taken as a basis (e.g., the person bangs his or her head against the wall and, to stop that, the person is strapped to a bed without regard for his or her protests). Thus, not providing permission does not eliminate the possibility of applying the institution of presumed permission, unlike refusal to give permission (see Subsection 3.1, above). That is because refusal of a person not capable of giving permission to provide such permission is not based on weighing all the relevant circumstances, while these are precisely what are weighed in cases of presumed permission. In conditions involving restraint, it is probably difficult to imagine situations in which physical distance renders it impossible to seek the permission of the holder of the legal right (as in the example above of the possible fire). The main situations (but not the only ones) that could be considered relevant in this regard are those in which the care patient has no capacity to provide permission.

The less information the caretaker has on a given care patient with no such capacity, the more certain the caretaker can be in basing the related decisions on the assumption that the presumed will of the patient coincides with what is normal and reasonable.^{*62} In cases of normal and reasonable conduct, the conceptions developed on the basis of necessity can be used as a basis (see Subsection 3.4 of this article).

Firstly, this means that, to eliminate a threat, suitable means should be used that are as conservative in nature (sparing of force etc.) as possible. For instance, if the person has (repeatedly) fallen out of bed while sleeping, both strapping the person to the bed and putting safety rails in place are suitable means for eliminating the threat of falling, but the latter is undoubtedly more cautious. An even more conservative approach would probably be to place the mattress on the floor. Another question is whether the last method mentioned (putting the mattress on the floor) is suitable in the sense of avoiding threats to health in general. A person sleeping on the floor could be tripped over by fellow patients, with injuries resulting, or could roll off the mattress onto the bare floor and catch cold.

The principle of proportionality should be taken into account also. When the threat is low and the potential damage irrelevant, the person's rights should not be restricted in an excessive manner on grounds of preventing the threat. Honouring of the principle of proportionality and the presumed permission of the care patient could probably be affirmed in the following example cases: caretakers immobilise the patient with restraint straps to prevent said patient from removing a cannula and caretakers inject a sedative into a care patient who is banging his or her head against the wall. In both of these cases, caretakers deprive the patient of liberty to protect extremely important legal rights of the patient – to health or even life. The situation would be different, however, if the sedative were to be injected to stop the care patient ripping his or her clothes, because a possession of such low value as clothes certainly does not surpass a person's liberty in value, and it can be presumed that such a care patient would agree if having the capacity to comprehend.

In contrast, in a situation wherein a caretaker is able to proceed from the knowledge available and presumes that the patient would not wish to be restrained, restraint must be avoided even if doing so seems unreasonable. Just as it is necessary to determine the actual will of the holder of the legal right when possible (i.e., obtain permission; see above), one must undertake the efforts necessary to determine his or her presumed will, so as to find out whether that presumed will is indeed in line with a normal and reasonable understanding. Whether such presumed will differs from the average (or what is normal) can be determined in several ways. One of the possibilities is to talk to people who know the care patient, such as relatives, and find out whether the person discussed the details of his or her care (and situations in which the person's

⁶¹ W. Mitsch. Die mutmaßliche Einwilligung ['The presumption of consent']. – *Zeitschrift für das Juristische Studium* 2012/1, pp. 38–43 (in German), on p. 41.

⁶² BGHSt 45, p. 221 (ref. to R. Rengier (see Note 13), Art. 23, refs 58–59); BGHSt 35, p. 246 (ref. to J. Wessels, W. Beulke (see Note 43), Art. 9, Footnote 46).

rights should not be interfered with) when still capable of comprehension. Here, it is important to note that the care patient's own opinions at the time of comprehension ability (if available), not the opinion of the relatives at the time of questioning, must be found out. Again, the position of the relatives themselves is irrelevant. In Germany, a so-called patient order (*Patientenverfügung*) or autographic guardianship authorisation (*Vorsorgevollmacht*) may be used, in which a person of capacity to comprehend describes what may and may not be done to him or her in the event of illness, in the first case, or, in the second, who should care for him or her if care becomes necessary and what said carer(s) may do. In both cases, the person attesting considers the situations in which he or she is no longer able to express his or her will or form a clear understanding. At least generally, the wishes written down in this document can be equated with the presumed will of the care patient, making it binding for the caretakers. The presumed will of the patient can be deemed to diverge from this only in exceptional circumstances – for instance, when the person expressed a different will to caretakers upon first arriving at the care institution in a condition in which he or she still was capable of expressing the relevant permission. In addition, caretakers may ask a person who still has comprehension capacity about the conduct that person would expect from caretakers in various sets of circumstances, before the situation becomes critical^{*63}. In such a case, when a situation of the type discussed arises, it can be presumed that the person's wish is the one expressed to the caretaker.

When a caretaker commits an act that possesses the necessary elements of an offence on the basis of presumed permission (e.g., holds down a person who was beating his or her head against the wall; see §136 (1) of the PC), it is lawful. Later protests of the care patient do not make it unlawful. If later opposition to the methods used is expressed by a person with no capacity to comprehend, that in itself is irrelevant. At the same time, however, even a later protest expressed by a person able to comprehend has no relevance. For instance, a person with such capacity may have agreed to being injected with a sedative to prevent an anxiety attack he or she fears, then, for whatever reason, states on the following day that the injection should not have been performed. The protest does not change the presumed permission at the time of performing the act.^{*64} However, when a caretaker commits the act while aware of (or accepting, under §16 (4) of the PC) there being no presumed permission, the act is unlawful. In the case of a caretaker holding down a person who is banging his or her head against the wall, when that is not what the person presumably prefers, these actions of the caretaker constitute an offence (in a case of fault) under §136 (1) of the PC. Furthermore, the caretaker may not use the excuse of possibly being held liable in the event of failure to act as the guarantor of the care patient, for offence through omission (e.g., under §§ 121 (1) and 13 (1) of the PC). The reason is that if the holder of the legal right does not (presumably) wish that right to be protected, the caretaker incurs no obligation to act as a guarantor, irrespective of possessing guarantor status – i.e., having a legal obligation to act within the meaning of §13 (1) of the PC.^{*65}

3.3. Self-defence

The unlawfulness of an act comprising the necessary elements of an offence can be excluded also for reason of self-defence. According to §28 (1) of the PC, the act (when the necessary elements of an offence are present) is not unlawful if the person in carrying it out is combating a direct or immediate unlawful attack on the legal rights of the person or of another person by violating the legal rights of the attacker and without exceeding the limits of self-defence. Therefore, the permission of the care patient or presumption of permission is not relevant in cases of self-defence because the care patient has acted counter to another person's legal rights and, naturally, cannot give permission for this infringement of rights even if/when at full capacity to comprehend.

⁶³ F. Henke (see Note 7), p. 25; V. Thiel (see Note 55), p. 4.

⁶⁴ R. Rengier (see Note 13), Art. 23, Ref. 51.

⁶⁵ Nevertheless, it should be noted that there have been some heated arguments in German legal circles as to whether a person acting as a guarantor (e.g., a doctor or a spouse) should exceptionally be obliged to act as a guarantor when a person who attempted suicide has become unconscious. The Federal Court affirmed the incurring of such an obligation (BGHSt 2, p. 150; 32, p. 367, available, in German, at <http://www.servat.unibe.ch/dfr/bs032367.html>, most recently accessed on 27.5.2017), but the legal literature maintains a firm position that said obligation cannot arise. See the summary by K.E. Hemmer, A. Wüst. *Strafrecht BT II* ['Criminal Law: BT II'], Chapter I ('Tötungsdelikte. Fall 1: Die lebensmüde Patientin', or 'Case 1: The suicidal patient'). 2015 (in German), p. 3. Available at https://www.hemmer-shop.de/produkt_pdf/44_wichtigsten_faelle_StrafR_BT_II.pdf (most recently accessed on 16.7.2018).

The verification of self-defence takes place in two stages. Firstly, it needs to be determined whether there was a direct (including immediate) unlawful attack against some individual-level legal right (whether of the person doing the defending or of another person). If there was, one must consider whether protecting the self or the other person against that attack remained within the limits established by the law.

An attack is any kind of endangerment of or damage to a legal right of a person by another person^{*66}. This might involve a beating or stabbing but also covers insulting someone. An attack is unlawful when it is not legally allowed. For instance, when a police officer arrests a thief caught in the act (depriving the thief of his or her liberty within the meaning of §136 of the PC), this constitutes an attack, but such attacks are legitimate according to §217 (2) 1) of the Code of Criminal Procedure (CCP)^{*67} (on detention of someone as a suspect); that is, they are not unlawful. Therefore, the thief cannot legitimately defend him- or herself against the police officer in reliance on claims of self-defence. Only an attack by which the attacker threatens or damages someone else's legal right intentionally or at least by violating some sort of duty of care is unlawful. When a driver is complying with the Traffic Code but hits someone with the vehicle nevertheless (e.g., children at play who run into the road from behind some trees just for fun), the conduct of the driver (i.e., the driving) is not an unlawful attack against the children's legal rights (to life and health).^{*68} The unlawfulness of an attack is not ruled out by the attacker's no-fault conduct (i.e., the attacker being unable to comprehend that the act is prohibited or being unable to direct his or her actions even if understanding that those actions are not allowed). Example cases might involve an attacker who is a child or has a mental disorder: self-defence is allowed against attacks by such people. Therefore, caretakers can assert self-defence even when the care patient who threatens or has already impinged on the legal rights of other people is incapable of understanding the meaning of his or her action in consequence of, for instance, a mental disorder. The caretakers are allowed to defend not just themselves but also other people, such as other care patients – as guarantors, they may even be obliged to defend them, in line with the discussion above – or visitors to the institution. Also, they may defend items not belonging to the attacker (e.g., property of the institution). For this, the attack has to be direct. There are no grounds for claims of self-defence in the case of a caretaker binding a care patient with restraining straps or locking the patient in a separate room when the patient, although having attacked someone, stopped the attack.

It then needs to be determined what is allowed under self-defence grounds, along with the extent to which it is permitted. In relation to this, we need to draw attention firstly to a certain banality related to self-defence that is taught to university students from the first lectures on penal law onward but that, in the authors' estimation, is not understood by most lawyers until late in their career: there is no principle of proportionality in self-defence law. In this, there is a difference from necessity, in the case of which committing an act that involves the necessary elements of an offence is justified only when 'the interest protected is evidently of higher importance than the interest subject to damage' in the words of §29 of the PC. Self-defence differs from situations of necessity principally because no legal rights are weighed. There is a principle that law shall not back down to unlawfulness^{*69}. This is behind the theoretical permissibility under §28 of the PC of someone severely injuring or even killing a person who has insulted him or her or who attempts to run away with a wallet stolen from that person. No importance is accorded to the fact that a human life is fundamentally of incomparably greater importance than property of low value (a wallet, whatever the contents) or honour (damaged by an insult).

Subsection 28 (1) of the PC confers on a person the right to combat an attack. According to legal dogmatics and case law, an attack may be combated in a manner that is appropriate and cautious/conservative. Appropriateness entails combating that brings the attack to an end completely and immediately or at least reduces the damage caused to the legal right by the attack.^{*70} Such a criterion can be derived from the very concept of combating: if the act does not at least make the attack harder in some way, it cannot be deemed combating. Caution involves a requirement of selecting whichever of the suitable defensive actions (means of defence) is the least damaging to the legal rights of the attacker, which may be referred to as the most sparing one.^{*71} Finding content in the law for the sparingness requirement is more complicated than the

⁶⁶ R. Rengier (see Note 13), Art. 18, Ref. 6; J. Sootak, P. Pikamäe (see Note 8), §28, Comment 7 (J. Sootak).

⁶⁷ RT I 2003, 27, 166; RT I, 31.12.2016, 46.

⁶⁸ R. Rengier (see Note 13), Art. 18, Ref. 29; J. Wessels, W. Beulke (see Note 43), Art. 8, Ref. 331.

⁶⁹ CCSCd 3-1-1-17-04, para. 11.3; CCSCd 3-1-1-111-04, para. 15.

⁷⁰ CCSCd 3-1-1-17-04, para. 11.

⁷¹ *Ibid.*, para. 11.1.

equivalent for the appropriateness criterion. The definition of combating says nothing about the fact that the defender shall not select the most intense means available – in figurative terms, opt for an antitank weapon instead of punching the attacker. Finding a basis for the criterion of sparingness is easier under German law (Subsection 32 of the StGB), because it refers to necessary defensive actions: if the attack can be stopped with a simple punch, there is no need for an antitank defence weapon.^{*72} The Supreme Court of Estonia has attempted to justify a requirement of sparingness in case no. 3-1-1-17-04 by using two arguments. Our highest court has referred to §28 (2) of the PC (in para. 11.2 of the judgement), which establishes that a person is deemed to have exceeded the limits of self-defence if, with deliberate or direct intent, having carried out the defence by means that are clearly incongruous with the danger arising from the attack or if having, again with deliberate or direct intent, caused clearly excessive damage to the attacker. Nevertheless, it needs to be noted that §28 (2) of the PC itself says nothing about the objective elements of self-defence. It regulates only the subjective elements. The second argument, found in the statement (in paragraph 11.1 of the judgement) that the attacker must not place him- or herself outside the law (i.e., must not become an outlaw), is more convincing. In addition, there may be some grounds for relying on the constitutional principles of human dignity and general proportionality: if the attack can be combated with a mild measure, use of an intense means cannot be justified under the principles of the rule of law.

In the context of care institutions, the above means that caretakers are allowed to stop an attack by a care patient but need to do it in a way that is the least damaging to the legal rights of the care patient. If the problematic activity of a raging care patient can be ended by wrestling the patient to the ground, it should be done. What shall not be done is, for example, hitting the care patient in the head with a chair. This action with a chair, however, is justified if forcing the patient to the ground would not stop the attack and, hence, would not be appropriate – for instance, when the attacker is a big, strong man and the defender a petite female caretaker. Locking a care patient inside a room also can be considered a defensive action. In extreme cases, the requirement of sparingness could be in accord even with killing the care patient. The patient may, for example, have gained possession of a knife and either have started stabbing someone or be about to do so.

Legal scholars have found that, in exceptional cases, the extremely wide and powerful (with its lack of proportionality requirement!) self-defence right should be restricted for socio-ethical reasons.^{*73} Also, the Supreme Court has found that the principle of solidarity that holds a society together requires some withdrawal of a person's right to self-defence if its exercise to the full would bring about violation of rights and unbearable socio-ethical conflict.^{*74} For instance, in cases of low-risk unlawful attacks, it is required that the defender avoid the attack regardless of §28 (3) of the PC or confine him- or herself to only moderate (sparing of the attacker) means of defence.^{*75} Where such possibilities are lacking, the person being attacked is even under obligation to tolerate the damaging of a low-value right in some cases, when the only means of defence would bring about exceptionally disproportionate damage to the rights of the attacker as compared to the rights being defended (e.g., the owner may not shoot an apple thief who is escaping with the loot, even if this is the only way of getting back the stolen fruit).^{*76} Even in this connection, it is complicated to state in Estonia (as in case of the sparingness requirement) that these socio-ethical limitations can be derived from a norm regulating the right to self-defence, because §28 of the PC refers to no such thing. It is different in Germany: Section 32 (1) of the StGB states that the self-defence actions must be necessary.^{*77} The Supreme Court of Estonia has derived its corresponding restrictions from §19 (2) of the Constitution, establishing that when exercising his or her rights and freedoms and fulfilling his or her duties, everyone must respect and honour the rights and freedoms of others.^{*78}

The authors of this article are not aware of any case law in Estonia that addresses the socio-ethical boundaries of self-defence. That is why it is suitable to look to German law (and the Estonian legal literature referring to it). German law differentiates among four groups of cases in which defence activities are

^{*72} It should be noted that Estonian legal dogmatics has taken over the German definitions; see J. Sootak, P. Pikamäe (see Note 8), §28, Comment 15 (J. Sootak); J. Sootak (see Note 35), Ch. VII, Ref. 155 ff.

^{*73} J. Sootak, P. Pikamäe (see Note 8), §28, comments 21–25 (J. Sootak); J. Sootak (see Note 35), Ch. VII, Sidenote 172 ff.

^{*74} CCSCd 3-1-1-111-04, para. 15.

^{*75} *Ibid.*

^{*76} *Ibid.*

^{*77} This concept has been transposed into Estonian legal dogmatics; see J. Sootak, P. Pikamäe (see Note 8), §28, comments 21–25 (J. Sootak); J. Sootak (see Note 35), Ch. VII, Ref. 172 ff.

^{*78} CCSCd 3-1-1-111-04, para. 15.

restricted on socio-ethical grounds. These are bagatelle attacks, attacks in close relationships (such as those within a family), provoked attacks, and no-fault attacks.^{*79} In some instances, the associated grounds may overlap.

The German Federal Court has developed a theory that involves three stages for situations such as these.^{*80} The first stage to consider is that in which one can run away or call for help, the Estonian *kutsumine*. The law must bow in the face of the unlawful act committed because when assistance can be summoned, the extent of the unlawfulness is not as great as is usual in cases of unlawful attacks. When escaping or calling for help is impossible – i.e., in the second stage – a weapon of defence should be used. For instance, the blows from the attacker should be blocked with an arm or an object, such as a chair. Use of such a weapon could be required also when the outcome is uncertain and may entail risks.^{*81} In a concrete example, it may be necessary to hold the attacker down by force, risking the attacker breaking free and attacking again, instead of neutralise the attacker right away (e.g., hitting this person in the head with a bat, stabbing the attacker, or shooting him or her). Active defence (that is, harming the attacker) is allowed only as the last resort. In some cases, however, defence should be abandoned altogether.^{*82}

Let us consider the bagatelle case. When a legal right of low value is attacked and defending that right would require damaging an important legal right (e.g., A grabs B's wallet and runs away with it, where A is a faster runner and the only way for B to get the wallet back is to shoot A with a pistol, so B does so with indirect intent to kill), application of the principle by which the proportionality principle does not apply with regard to self-defence law is restricted. With regard to situations in which there is great inequality in the weight of the legal rights at issue, it has been found in Estonia that defensive actions are not required – law has to retreat from unlawfulness. At the same time, this is a highly exceptional case that does not refute the understanding that (normally) the proportionality principle is not recognised with regard to the right of self-defence. In Germany, it has been found that the cost of a human life is closer to 100–200 euros than around 500 euros in situations of this nature.^{*83} In the above example, this means that if B's wallet contains less than 100 euros, B has to accept losing the wallet, while with an amount close to 200 euros, not to mention 500 euros, B is allowed to shoot.

In cases of care institutions, the following could be deduced in relation to attacks of various sorts. When an attack by a care patient poses a threat to someone's health (e.g., fellow patients' or caretakers'), let alone someone's life, depriving the care patient of liberty is allowed without any problems arising. Liberty as a legal right definitely does not have more weight than health. Damaging the attacker's health or even taking his or her life is justified for bringing an end to attacks that harm health because it is a highly important legal right. Only in quite specifically delineated cases must the defender abandon the option of killing the attacker or causing serious damage to the attacker's health, therein tolerating the damaging of his or her own health (or somebody else's). One of these is a situation in which the person attacked is faced with only relatively mild health damage. In contrast, a case of (intense) beating cannot be deemed one of a bagatelle attack that should be tolerated. Also when a care patient is breaking items stocked by the care institution, depriving the patient of liberty and causing that patient mild (or moderate) health damage is generally deemed lawful. Nevertheless, it might be unlawful if the material broken had very low value.

In the context of the topic considered here, an important factor is that the right to self-defence is restricted also in cases of no-fault attacks – i.e., in situations in which the attacker is a child or a person with a mental disorder. The three-stage theory should be taken as a foundation in this connection as well. It has to be noted that if we were to proceed only from the bagatelle dogmatics, damaging the attacker's legal right would be acceptable in the third stage. However, the no-fault nature of the attack may mean in reality that the defender has to accept the damage to the legal right that is under attack. Namely, there is a significant difference in assessment of the act's unlawfulness between a case wherein a 200-euro item is broken by a person who has capacity to comprehend and one in which the person lacks this capacity. Accordingly, a position can be taken that when the care patient is mentally incompetent, the caretaker may not cause him or her serious harm, let alone fatal harm, even when the patient destroys items worth more than 200 euros

⁷⁹ R. Rengier (see Note 13), Art. 18, Ref. 57 ff.; J. Wessels, W. Beulke (see Note 43), Art. 8, Ref. 343 ff.

⁸⁰ See, for example, H. Otto. *Grundkurs Strafrecht – Allgemeine Strafrechtslehre*. 7. Aufl. ['Basic Course in Criminal Law: General Criminal Law, 7th Ed.']. Berlin 2004 (in German), Art. 8, Ref. 79.

⁸¹ R. Rengier (see Note 13), Art. 18, Ref. 56.

⁸² *Ibid.*

⁸³ *Ibid.*, Art. 18, Ref. 59.

that do not belong to him or her. Under the three-stage theory, a caretaker may also not start physically defending self or others from insults by a mentally ill care patient – the caretaker has to take the insults, leave the patient, or remove the person who has become a target of the first patient's insults.^{*84}

In Estonian legal literature, an opinion has been expressed that requiring police officers or paramedics to follow the three-stage theory would mean placing an excessive legal burden on them.^{*85} Such a position cannot be agreed with. Were it to be found that the three-stage theory applies under Estonian law too, the addressees of legal provisions (both regular people and, for instance, police officers and caretakers) would have to follow it. If they are unfamiliar with the theory (which could probably be said of almost everyone) and act in a manner contrary to it (e.g., not running away from an attack by a mentally ill person but combating it by causing harm to the attacker) under an assumption that they are allowed to combat the attacker, they do act unlawfully but in error of law within the meaning of §39 (1) of the PC. Error in law relieves a person from liability only when the error was inevitable. Generally, it is not considered inevitable, and the rule of thumb is that ignorance of the law does not exempt one from liability. In one instance, it took the Supreme Court 23 years (or 15 years from the entry into force of the Penal Code) to affirm the inevitability of the error of law.^{*86} That said, a relatively convincing criticism has been published in German legal literature, making the argument that courts rule out the inevitability of error of law too easily.^{*87} Nevertheless, it should be noted also that the persons who need to be specifically acquainted with the legal provisions that could become important in relation to a certain aspect of life are precisely those who are active in that part of life every day (for example, caretakers at care institutions should know the provisions for restraining).

3.4. Necessity

The last circumstance that rules out unlawfulness is necessity. According to the first sentence of §29 of the PC, an act is not unlawful if the person commits that act in order to avert a direct or immediate danger to his or her legal rights or those of another person and if both the means chosen by the person are necessary for the aversion of the danger and the interest protected is evidently of greater importance than the interest subject to damage. The second sentence of the same section states that in the considering of interests, the importance of the legal rights, the degree of the danger by which they are threatened, and the danger arising from the act shall be taken into account.^{*88}

⁸⁴ Also V. Thiel (see Note 55), p. 5.

⁸⁵ A. Soo, J. Sootak. Õiguslik analüüs karistusõigusliku hädakaitse ja hädaseisundi rollist põhiõiguste piiramise alusena lasteasutustes ning hoolekande- ja tervishoiuasutustes [‘Legal analysis of the factors of in-home care and emergency situations as grounds for limiting fundamental rights in child-care, welfare, and health-care institutions’]. Tartu 2015 (in Estonian), p. 18. Available at http://www.oiguskantsler.ee/sites/default/files/IMCE/oiguslik_analuus_karistusoigusliku_hadakaitse_ja_hadaseisundi_rollist_pohioiguste_piiramise_alusena_lasteasutustes_ning_hoolekande-_ja_tervishoiuasutustes_2015.pdf (most recently accessed on 27.5.2017).

⁸⁶ CCSCd 3-1-1-33-16, para. 22.

⁸⁷ W. Gropp (see Note 45), Art. 13, Ref. 75.

⁸⁸ In this article, we will not go into detail on what the implications may be of the institution of necessity established in §141 (1) of the General Part of the Civil Code Act (GPCCA) for penal law. According to that provision, a person who causes damage in order to prevent danger to him- or herself or another person or to property does not act unlawfully if said damage is necessary to prevent the danger and the damage is not unreasonably extensive when compared to the danger. For now, let us just mention briefly that these issues do exist. Namely, §141 (1) of the GPCCA admits more damage than does §29 of the PC: ‘if the damage is necessary to prevent the danger and the damage is not unreasonably extensive [when] compared to the danger’ rather than the latter’s condition of ‘the interest protected is evidently of higher importance than the interest subject to damage’. By that, §141 of the GPCCA is reminiscent of ideas of attack necessity within the meaning of §904 of the German Civil Code: greater damage may be caused to an object threatening a right than the value of the right threatened (e.g., an owner of a mongrel may kill someone’s expensive pedigree dog that attacks the mongrel). The first issue with §141 (1) of the GPCCA is that the provision does not state that this involves an attack necessity. In accordance with the wording of the law, the mongrel’s owner may protect that dog also by, for instance, throwing a neighbour’s cat that is completely irrelevant to the situation into the jaws of the attacking dog. That result is unfair, however: why should the mongrel-owner have a right to sacrifice someone else’s cat that had nothing to do with the situation? Section 29 of the PC, in contrast, would not allow that, since the mongrel is clearly not more valuable than the cat. German legal practitioners face no such issue, because their legislation differentiates the state of attack from the state of necessity – as already noted, the more extensive state-of-attack necessity is regulated in §904 of the BGB and the attack necessity, similar to what is addressed in §29 of the PC, which allows for less liberty, is established in §228 of the BGB. The other issue lies in the fact that, while §§ 228 and 904 of the BGB clearly apply only to objects, §141 (1) of the GPCCA is somewhat wider in scope, allowing action for combating a threat to oneself, another person, or property. Therefore, in a purely grammatical sense, §29 of the PC could be considered irrelevant and the considerably more favourable §141 (1) of the GPCCA could be taken as a basis also in cases of weighing

In speaking about necessity, it needs to be kept in mind that one may appeal to these ‘catch-all’ circumstances excluding unlawfulness (i.e., this general, extremely wide set of circumstances precluding unlawfulness) only when the terms on other conditions excluding unlawfulness do not apply.^{*89} Therefore, it can be stated that in the system of circumstances excluding unlawfulness, necessity is *lex generalis* that is actualised as a secondary option when *lex specialis* is inapplicable. This means that necessity can rarely be taken as the basis for restraining of patients at care institutions. When restraining takes place in the interests of the care patient, the lawfulness of that restraint should be analysed in terms of the consent of the care patient, permission from the patient (explicit or presumed), or permission of a guardian (see below). If these conditions are not present, restraining is not permissible. For instance, the principle of proportionality shall not be referred to (see Subsection 3.1, above). Therefore, in a situation wherein the action involving the necessary elements of an offence is carried out for the protection of a person who is a source of danger to self, the state of necessity cannot be considered.^{*90}

However, when a care patient threatens someone else’s legal rights, the lawfulness of restraining the first person should generally be analysed on the basis of the provisions related to necessity. That said, only when the danger emanating from the care patient does not constitute direct unlawful attack may necessity be considered. Situations of this type are rare.^{*91} Among them might be cases in which a care patient poses a direct threat to someone but is not an attacker within the meaning of §28 (1) of the PC or is an attacker but does not act unlawfully. To illustrate the first situation (the care patient not carrying out an actual attack), one could cite a case of a sleepwalking patient who starts to bump into fellow patients who happen to be in his or her way. Since sleepwalking is not intentional, it cannot be considered an action within the meaning of the penal code, and non-action cannot be an attack.^{*92} As for the second class of circumstances, an attack that is lawful may exist in a situation in which a care patient with bad eyesight walks (with full consciousness of walking) toward a patient who has collapsed on a landing without noticing that person on the floor – the person walking poses an objective threat to the other patient because he or she could trip over the patient on the floor and thereby send him or her down the stairs.

Although the foregoing illustration shows that a state of necessity may be considered only under extremely exceptional circumstances in cases of restraint, addressing this topic is still justified. The first reason for this is that understanding the institution of self-defence aids in better understanding the most relevant circumstances that rule out unlawfulness with regard to restraint. Secondly, the definition of immediateness in the sense of §29 of the PC needs to be analysed: if it were very wide, the state of necessity could probably be used as grounds for restraint quite often.

In comparison of necessity with self-defence, it needs to be kept in mind that necessity is significantly broader than self-defence in one respect while being much narrower in another. Necessity can be taken as a basis in more situations than self-defence can: immediate danger (or emergency) as intended under §29 of the PC occurs somewhat more often than immediate attack within the meaning of §28 (1) of the PC (even if one leaves aside the fact that immediate danger encompasses all instances of immediate attack^{*93}). In a contrast against the terms of §28 (1) of the PC, dangers to legal rights may be combated in the narrower class of conditions. On the other hand, slightly more leeway may be permitted with regard to self-defence rights than the state of necessity allows, because the latter is greatly restricted by application of the principle of proportionality.

Danger within the meaning of §29 of the PC is a situation in which there is strong reason to believe that in the event of countermeasures not being taken, damage is going to occur or the damage is going to increase from what already exists.^{*94} The existence of a threat needs to be assessed *ex ante*: it is not impor-

legal rights in the event of, for instance, causing bodily injury in the course of combating an attack, instead of §28 of the PC. Therefore, there can be no other conclusion than to find that §141 (1) of the GPCCA is a legal refuge. It should be stated further to lay to rest discussion of this topic that the Supreme Court of Estonia has only recently had a chance to deal with these issues but decided not to. The unlawfulness of the action of a man who caused different damage to other dogs to protect his own dog from them was analysed under §29, whereby the person combating the threat was deduced to have (to some extent) greater rights than the text of the provision actually allows. See CCSCd 3-1-1-60-16.

⁸⁹ R. Rengier (see Note 13), Art. 19, Ref. 3.

⁹⁰ C.W. Schmidt (see Note 16), p. 154 (along with subsequent references).

⁹¹ See also the definition of a constant threat (in the discussion that follows).

⁹² J. Wessels, W. Beulke (see Note 43), Art. 8, Ref. 325.

⁹³ R. Rengier (see Note 13), Art. 19, Ref. 4.

⁹⁴ J. Wessels, W. Beulke (see Note 43), Art. 8, Ref. 303.

tant what is known to a later assessor (e.g., a judge); what matters is how the situation could be understood at the moment the act (of taking countermeasures) was committed. In this connection, not only the understanding of the person who performed the act should be taken into consideration; so should that of an imaginable objective bystander.^{*95} At the same time, when the person carrying out the act was in possession of some special knowledge, that too needs to be taken into account.^{*96} In the context of our topic, this means that when assessing the danger, one must proceed from an assumption of the average caretaker yet also consider the special knowledge of the person who carried out the specific act in question (e.g., knowledge of a rare disease affecting the care patient that contraindicates certain measures on account of the excessive danger they therefore present).

The concept of imminent threat is highly important with regard to our topic. First and foremost, a threat is imminent when the damage can be expected to arrive immediately (soon).^{*97} In German law and also in Estonia's scanty legal literature in this domain^{*98}, it has been found, however, that, alongside acute threat, permanent threat (*Dauergefahr*) should be considered imminent. This is represented by a situation wherein the damage could arise at any time while it cannot be ruled out that the damage will not arise anytime soon.^{*99} An example could involve a building that might collapse at any moment, a head of household who could become violent again at any time, or a case of a mentally ill person. However, the Supreme Court has found that imaginary or potential future threat does not bring about a state of necessity.^{*100} Regrettably, the Court did not provide any additional explanations when making this statement. Because there exists a lasting-danger institution, the question arises of whether residents of care institutions represent immediate danger within the meaning of lasting threat under §29 of the PC. Could it be said that a care patient with a history of violence poses an immediate danger to the other patients and the staff? It is clear that direct attack by the care patient cannot be affirmed in the sense connected with the right of self-defence (see §28 (1) of the PC). At the same time, if one could rely on an understanding that the care patient is a direct threat within the meaning of §29 of the PC, such patients could be restrained even when they are not currently aggressive (provided that the other prerequisites for appealing to necessity are met). In any case, one should still agree with the position that lasting danger cannot be talked about in respect of necessity when means restricting liberty are applied as a rule for preventive purposes.^{*101} Were any other position to be taken, the concept of immediate danger would be stretched so far that it would no longer have any (credible) meaning. Therefore, care patients with a history of aggression who at the moment are non-aggressive can never be deemed an immediate danger within the meaning of §29 of the PC. This is why they may not be routinely locked into their bedrooms/wards for the night in reliance on that provision.^{*102}

In the event of immediate danger (i.e., an emergency situation), the danger may be combated, but this is to be permitted only in cases wherein the particular means of combating employed is necessary and the principle of proportionality is observed.

With regard to necessity, the need has to be furnished in a manner similar to that for self-defence – the means of combating has to be appropriate and sparing. As in self-defence, the criterion of suitability is, in general, probably not problematic. The requirement of sparing application needs careful attention here too. In care literature^{*103}, it has been concluded that the first plan of action should be to attempt de-escalation

⁹⁵ *Ibid.*, Art. 8, Ref. 304; J. Sootak, P. Pikamäe (see Note 8), §29, Comment 4.1 (J. Sootak).

⁹⁶ J. Wessels, W. Beulke (see Note 43), Art. 8, Ref. 304.

⁹⁷ W. Gropp (see Note 45), Art. 5, Ref. 223.

⁹⁸ J. Sootak, P. Pikamäe (see Note 8), §29, Comment 4.1 (J. Sootak); J. Sootak (see Note 35), Ch. VII, Ref. 236.

⁹⁹ J. Wessels, W. Beulke (see Note 43), Art. 8, Ref. 306; R. Rengier (see Note 13), Art. 19, Ref. 12; W. Gropp (see Note 45), Art. 5, Ref. 224 (the last reference cited draws a parallel with the Sword of Damocles, which could strike the person beneath it at any moment).

¹⁰⁰ CCSCd 3-1-1-1-01.

¹⁰¹ C.W. Schmidt (see Note 16), p. 162.

¹⁰² See, for example, the 14.6.2016 letter of the Chancellor of Justice, no. 7-9/151298/1602606: 'Kontrollkäik SA Viljandi Haigla psühhiaatriakliiniku sundravi osakonda' (or 'Visit to the coercive treatment ward of the psychiatric clinic of SA Viljandi Haigla'), p. 2. Available, in Estonian, at http://www.oiguskantsler.ee/sites/default/files/field_document2/kontrollkaik_sa_viljandi_haigla_psuhhiaatriakliiniku_sundravi_osakond.pdf (most recently accessed on 26.5.2017).

¹⁰³ It should still be noted, however, that in non-legal (or semi-legal) literature, the institution of necessity is recommended as a basis even when the restraining takes place in the interests of the care patient. As stated above, this cannot be done in a formal sense, but, in essence, there may be situations in which the principles related to necessity can often be appealed to (see subsections 3.1 and 3.3 of this article).

of the situation, for instance, through speaking calmly to the care patient.^{*104} Naturally, this is not always a possibility, and talking may often be an inappropriate means for combating the danger. At the same time, there are situations in which it could prove fruitful. In such situations, this mechanism must be tried instead of resorting to use of force straight away. In the case of restraining straps, the principle of sparingness requires that the person not be strapped to a bed by any more points than necessary for fending off the danger. The principle of providing as much mobility as possible and as little restraining as necessary applies.^{*105} When a danger can be eliminated via simple use of a waist strap, that is what should be done; when the danger does not stop until the person is tied down by all four limbs, he or she still should not be strapped down additionally from any other parts of the body. Full strapping down (i.e., at 11 points, including the head) is permitted only in highly exceptional circumstances.^{*106} At this point in the discussion, it should be noted also that restraint straps may not create a new danger, especially one that is greater than the danger being combated (results that represent lesser danger are in compliance with the principle of proportionality). Using only a waist strap creates a danger of the patient falling from the bed and dying by suffocation, which is why use of this method is seldom allowed. When it is employed nonetheless, bed rails have to be raised at all times.^{*107} The principle of sparingness requires also that the straps not be too tight – a hand must fit between the body of the care patient and the strap.^{*108} The same principle has to be applied when medication is administered. Hence, patients may not be given more or stronger medication than what is necessary to eliminate the danger.

In addition, the interest protected must be evidently of greater importance than the interest subject to impair. Whether the criterion ‘evidently of higher importance’ refers to clearly more substantial weight of the interest protected or, rather, it is sufficient that the interest protected be only slightly more important than the one subject to damage may be debated, as is the case also in, for instance, German law.^{*109} Since it is impossible to weigh these interests in a clearly measurable manner as might a practitioner of the natural sciences, the answer to this question is probably not so decisive, though. While all the relevant factors must be taken into consideration in the weighing process, the law has emphasised as examples the importance of the legal rights, the degree of the danger by which they are threatened, and the danger arising from the action taken against that danger (see the second sentence of §29 of the PC).

3.5. The relationship between general and specific circumstances precluding unlawfulness

As already stated, the circumstances characterised above and the terms for ruling out unlawfulness are general – they may apply in almost any part of life, and anyone can rely on them. Simultaneously, our legal order features a list of circumstances excluding unlawfulness that are realised only in specific situations and for a limited range of subjects. First and foremost among these circumstances excluding unlawfulness are ones that involve the behaviour of representatives of public state authority in their performance under such authority. For instance, the Code of Criminal Procedure allows various people protecting the legal order (police officers, prosecutors, and judges among them) to carry out acts that possess elements of an offence, such as detaining a suspect under §217 of the CCP (the terms of §136 of the PC with regard to necessary elements are met, and so are those in §121 of the PC if pain is inflicted on the suspect upon detention), taking someone into custody under §130 (2) of the CCP, or punishing someone with imprisonment under §309 of the CCP (in conjunction with §45 of the CCP) (the last two decisions listed fulfil the elements in §136 of the PC also). Police officers are entitled to perform acts with the necessary elements of offence also under the Law Enforcement Act^{*110} (LEA) (for instance, direct coercion

¹⁰⁴ D. Fogel, T. Steinert. Aggressive und gewalttätige Patienten: Fixierung [‘Aggressive and violent patients: Restraints’]. – *Lege artis – Das Magazin zur ärztlichen Weiterbildung* 2012/2, pp. 28–33 (in German), on p. 29. Available to registered users at <https://www.thieme-connect.com/products/ejournals/pdf/10.1055/s-0032-1302472.pdf> (most recently accessed on 27.5.2017).

¹⁰⁵ F. Henke (see Note 7), p. 96.

¹⁰⁶ *Ibid.*

¹⁰⁷ *Ibid.*, pp. 95–96.

¹⁰⁸ *Ibid.*, p. 95.

¹⁰⁹ R. Rengier (see Note 13), Art. 19, Ref. 43.

¹¹⁰ RT I, 22.3.2011, 4; RT I, 2.12.2016, 6.

is regulated in Chapter 5 of the LEA), and prison officials receive such rights through the Imprisonment Act^{*111} (e.g., §71).

In analysis of the relationship between general and specific circumstances excluding unlawfulness, three situations need to be kept in mind. First is the one in which the act is encompassed both by a circumstance excluding unlawfulness under some of the special laws and by a general circumstance excluding unlawfulness. For instance, if a police officer is attacked by a person with a knife and hits the attacker in self-defence by painfully striking the knife hand with a telescopic baton, the officer's liability can be excluded under §121 (1) of the PC (or, rather, its §291 (1)) both in accordance with a specific provision (§76 (1) of the LEA) and under §28 (1) of the PC. However, there are situations in which only the special provision applies and the general provision does not cover the situation. For instance, a police officer might venture onto certain premises against the will of their possessor so as to carry out surveillance activities (to plant a 'bug') or might gain access to another person's computer by removing a security safeguard or circumventing it (to install spyware). In such cases, the police officer commits a crime under §266 (2) 1) and §217 (1) of the PC: the action is not justified by any general circumstance precluding unlawfulness, inclusive of §29 of the PC, because the police officer is acting only on suspicion of a crime. No immediate danger is combated. The police officer's action can be justified, however, under §126³ (5) of the CCP. It is possible also to identify a situation in which a police officer (or anyone; see §217 (4) of the CCP) catches a criminal fleeing a crime scene. While escaping, the criminal is no longer committing the unlawful attack within the meaning of §28 (1) of the PC and poses no immediate danger in the sense of §29 of the PC. This is why §217 of the CCP should be the basis. Thirdly, situations arise in which the actions of a person operating in a specific field are not covered by any specific circumstance precluding unlawfulness while a general provision is relevant. For instance, a prison guard could be attacked by a prisoner with a knife, whereupon the guard hits the prisoner in the head with a telescopic baton. With that action, the guard breaches the laws on imprisonment (which do not allow hitting people in the head with a baton) but does act in compliance with §28 (1) of the PC.^{*112} Additionally, use of a firearm can be referred to in this connection. Special legislation imposes extremely strict restrictions on such actions, but use of a firearm out of necessity does often afford significantly more leeway.

These two situations are not problematic with regard to penal law. In the first example (the act permitted by dint of both a general and a specific circumstance precluding unlawfulness), it is clear that no liability arises. It should be precluded on the specific-provision basis because *lex specialis derogat legi generali*. The situation is clear also in the next set of cases referred to: liability is precluded by the specific provision. In the third situation, however, things are not so clear. This issue has been wrestled with for decades in Germany without reaching of consensus, in which time several theories have been developed, of which the three main ones have been highlighted in brief in the Estonian legal literature^{*113}: Proponents of public-law theory find that only the special law can be applied, because, otherwise, setting more restrictive provisions in place for special subjects under special law would be rendered meaningless. Supporters of penal-law theory (which is adhered to by the German courts) argue that in a case of a general circumstance precluding unlawfulness, no accusations can be made against a person who commits the act in question as a special subject operating in a special field, either under penal law or on any other grounds (e.g., in disciplinary proceedings). A person's position as a special subject may not lead to that person losing recourse to some of the circumstances precluding unlawfulness that are applicable to him or her. The overriding perspective in this regard seems to be one that represents a compromise – from the third perspective, in the event that a general circumstance precludes unlawfulness, criminal liability is ruled out but disciplinary liability remains.^{*114}

¹¹¹ RT I 2000, 58, 376; RT I, 1.3.2017, 4.

¹¹² A. Soo, K. Tarros. Enesekaitse situatsioonides vahetu sunni kasutamine vanglas. Karistusõiguslik ja haldusõiguslik analüüs ['The user of direct coercion in prisons in situations of self-defence: A criminal- and administrative-law analysis']. – *Juridica* 2015/10, pp. 707–719 (in Estonian), on p. 713.

¹¹³ *Ibid.*, p. 712; J. Sootak. Kriisi lahendamise karistusõiguslikud lähtekohad Eesti õigussüsteemis ['Crisis resolution under criminal law in the Estonian justice system']. – *Juridica* 2007/2, pp. 305–328 (in Estonian), on p. 85.

¹¹⁴ For an outline of various theories, see B. Heinrich. Gelten die allgemeinen Rechtfertigungsgründe auch für sich im Dienst befindende Hoheitsträger? ['Do the grounds under general law apply also in public service?']. 2014 (in German). Available at https://www.jura.uni-tuebingen.de/professoren_und_dozenten/heinrich/materialien/arbeitsblaetter-zum-examinatorium-strafrecht-pdf-dateien/strafrecht-allgemeiner-teil/11-rechtswidrigkeit04.pdf/view (most recently accessed on 27.5.2017).

There seems to be no support for public-law theory in this regard is Estonia's scanty legal literature on our topic. Scholars' views seem inclined toward penal-law theory and the compromise theory.^{*115} Also, the authors of this article hold that public-law theory cannot be applied here because if an action is allowed and fair for everyone under penal law, the same is necessarily true for a person operating in a specific part of life. This position does not render the special provisions meaningless *per se*. From the perspective of penal-law legitimisation of an action, they would not be necessary, but they remain useful for several other reasons. Firstly, the educational function of these provisions for the people operating in the relevant field could be addressed – it is likely that employees at a psychiatric hospital find the relatively casuistic §14 of the MHA (on means of restraint) more understandable than the highly abstract §28 of the PC, not to mention the institutions related to consent, permission, and presumptions of permission, which are not even included in the legislation. On the other hand, there is a related danger that people operating in specific fields may develop an erroneous belief that their behaviour is regulated by special provisions alone. For instance, employees at a psychiatric hospital may act on the invalid assumption that only §14 of the MHA should be observed when one is restraining a care patient, not understanding that this provision does not take priority over consent or permission (presumed or actual) of the patient; at the same time, they may not recognise that restraining care patients may be allowed in some situations not covered by §14 of the MHA. Hence, the existence of such provisions may be considered legitimised by the fact that they ensure observance of certain norms more effectively than do provisions related to general circumstances precluding unlawfulness. For instance, the latter do not require that the lawfully restrained person be spoken with after the restraining or informed of being restrained or that the fact of restraining be documented; however, these **are** required by §§ 14³, 14⁴, and 14² of the MHA (violation of which could lead to, among other things, fines being due for the care institution^{*116}). Finally, the implications of these special provisions for penal law cannot be fully denied either. As is indicated above, they may help to furnish violation of a duty of care in cases of negligence delicts (see Subsection 2.2 of this article).

3.6. Section 14 of the Mental Health Act

Section 14 of the MHA allows using means of restraint for persons receiving involuntary emergency psychiatric care in some circumstances. In the meaning of the penal-law terms, this provision grants the right to deprive a care patient of liberty in the sense of §136 of the PC. This may be done if there is an immediate danger of bodily harm to the patient or of violence toward other persons (see §14 (1) of the MHA). In order to combat that danger in cases wherein other means, such as talking, are ineffective, the care patient may be restrained by means of physical strength applied by caretakers or by auxiliary means, placed in an isolation room, or medicated accordingly. This must be done only on the basis of decisions by physicians and in line with the principle of proportionality (see §14 (1)–(4) of the MHA).

The authors of this article find reason for concluding that if there were no §14 of the MHA, little would change with regard to penal law, because the admissibility of the means of restraint described in §14 of the MHA should be analysed on the basis of general circumstances precluding unlawfulness.

Without §14 of the MHA, a situation featuring 'an immediate danger of bodily harm' should be resolved through the institution of consent, permission, or presumed permission; another option that could be considered is reliance on the opinion of a guardian (see Subsection 3.7 of this article, just below). If any of the circumstances precluding unlawfulness obtains, liability of the caretakers would not be applicable. For instance, it would usually be possible to proceed from presumed permission and thereby exclude the liability of the caretakers restraining (under §136 of the PC) a person incapable of comprehension who is banging his or her head against the wall and protests against being restrained. However, if it could be presumed that the

¹¹⁵ A. Soo, K. Tarros (see Note 112), pp. 712, 713; A. Soo. Karistusõiguslik hädakaitse ja hädaseisund põhiõiguste piiramise alusena koolides ning nende suhestumine 1. jaanuaril 2016 jõustuva lastekaitseseaduse § 24 lõikega 3 ['Emergency protection and state of emergency as bases under criminal law for restriction of fundamental rights in schools and their relationship to the Child Protection Act's §24 (3), effective from 1 Jan. 2016']. – *Juridica* 2015/6, pp. 418–426 (in Estonian), on p. 421; L. Madise et al. *Vangistusseadus. Kommenteeritud väljaanne* ['Imprisonment Act: Commented Edition']. 2nd ed. Tallinn 2014 (in Estonian), §71, Comment 8; J. Sootak (see Note 113), pp. 84–86.

¹¹⁶ According to §19¹ of the MHA, supervision of provision of psychiatric care under said act shall be exercised by the Health Board on the grounds and pursuant to the procedure provided for in §6 of the Health Care Services Organisation Act, enabling both issuing precepts and setting penalty payments.

person does not want to be restrained (e.g., before becoming incapable of comprehension, the person stated that the use of restraint straps should be avoided at all times), the caretakers should not use the straps on the person and should allow the patient to cause self-harm. Since a person's will prevails over other circumstances precluding unlawfulness (see Subsection 3.3, above) and not even special provisions refute that (see Subsection 3.5 of this article), the same considerations must be applied as things actually stand – i.e., with the existence of §14 of the MHA. If there is a reason to believe that a person who is unable to understand does not wish to be restrained, that person shall not be restrained in the event of a threat of self-harm under §14 of the MHA. The question of whether the judge making a decision or student solving a case in the presence of consent or permission (presumed or otherwise) should rely on this consent, permission, or presumption for preclusion of the act's unlawfulness or instead on §14 of the MHA has no relevance in practice. It would probably be more correct to take §14 of the MHA – that is, the special provision – as the basis, in which case, a reference to consent, permission, or presumption of permission is unavoidable. When caretakers restrain a care patient against his or her presumed or actual will, they are liable (in cases of culpable conduct) under §136 (1) of the PC.

An immediate danger of bodily harm to other people within the meaning of §14 (1) of the MHA constitutes immediate unlawful attack as intended under §28 (1) of the PC. This means that in the absence of §14 (1) of the MHA, the foundations could rest on grounds of self-defence in a situation of restraining a patient who employs violence toward another person. Since the presence of special provisions does not render general circumstances precluding unlawfulness inapplicable (see Subsection 3.5 of this article), restraining a patient who displays aggression against someone else's legal rights may be lawful also when it is not possible to rely on §14 (1) of the MHA, on the basis of §28 (1) of the PC. Let us imagine a situation in which a mentally ill patient starts laying waste to a car parked in a hospital car park and the medics hold the patient physically in place to prevent this from continuing. The medics cannot be spared conviction under §136 (1) of the PC via a reference to §14 (1) of the MHA, because the latter provision allows for the use of means of restraint only for protection of rights associated with the human body^{*117}, not property. Restraint of the latter sort may, however, be protected under §28 (1) of the PC. If one follows the three-stage theory, the liability of the medics depends on the particular circumstances of the case. If it was possible to drive the car away (e.g., the medics had its door and ignition keys, since the car belonged to one of them or to his or her partner), that should have been done and any additional damage to the vehicle should have been prevented through escaping. For a scholar who does not adhere to the three-stage theory, escaping should not have been required.

The foregoing also means that it makes no difference from the perspective of penal law whether the person being restrained is in care voluntarily or instead involuntarily. While in the first instance sometimes the general circumstances precluding unlawfulness (presumed permission and self-defence chief among them) can be replaced with §14 of the MHA, in the second case the basis must always be general circumstances precluding unlawfulness (even though this does not change the outcome).

3.7. Sections 106 and 107 of the Social Welfare Act

Subsection 106 (1) of the SWA allows restricting the free movement of some persons who receive social services. Firstly, this may be done in the case of a person who is placed in a social-welfare institution for care without his or her consent (under §106 (1) 1) of the SWA). Secondly, this restriction is permissible in the case of a person who receives 24-hour special care services, if this is necessary for the protection of the rights and freedoms of said person and other persons (see §106 (1) 2) of the SWA). The freedom of movement of persons belonging to these two groups may be restricted under §106 (2) of the SWA only to the extent necessary for the purpose behind the restriction. In cases of people receiving 24-hour special care, the only option permitted for restriction of movement is placement in an isolation room (under §107 of the SWA).

¹¹⁷ Although the legislator has used the bureaucratic jargon 'person', it is not possible to exert violence against a **legal** person (see §24 of the GPCCA). Hence, it can be deduced with certainty that the persons referred to are natural persons, people (see §7 (1) of the GPCCA). Also, it can be concluded from the wording of the provision that violence needs to be directed directly against the person (i.e., the person's body). This means that protection of the person's life, health, and freedom may be considered relevant but not, for instance, protection of proprietary rights.

It is the opinion of the authors of this article that §§ 106 and 107 of the SWA are unlike §14 of the MHA in that their terms are, in part, broader than the set of general circumstances precluding unlawfulness, thereby allowing room for more.

Let us firstly discuss restriction of the freedom of movement of people whose 24-hour special care service has not been ordered by a court ruling – i.e., is voluntary (under §106 (1) 2) of the SWA). The situation here is largely the same as that in cases falling under §14 of the MHA; that is, special provisions do not provide for greater authorisation than what could be concluded from the general norms – except in one respect.

When a person receiving 24-hour special care services is deprived of liberty to protect that person from him- or herself, the deprivation is lawful only when there is consent, permission (unlikely), or a presumption of permission from that person. When the person's consent, permission, or presumed permission exists and that person is placed in an isolation room, the unlawfulness of depriving him or her of liberty is precluded by §106 (1) 2), §106 (2), and §107 of the SWA. Although the first sentence of §107 (1) does not allow restriction of freedom of movement in any other way than by placement in an isolation room, it may nevertheless be lawful under penal law^{*118} to deprive the care patient of liberty in some other way. For instance, it might be necessary to physically restrain a person before he or she can be placed in an isolation room (in fact, this is probably more like a rule in cases of placement into an isolation room). Such acts are not justified (at least not directly) by §106 (1) 2), §106 (2), or §107 of the SWA but may still be lawful, for instance, on account of presumed permission from the care patient. On grounds of presumed permission, justification cannot be ruled out *a priori* also in cases of deprivation of liberty by such means as medication or restraining straps.

The statements above on §14 of the MHA are largely valid also when a recipient of 24-hour special care is deprived of liberty for protection of someone else's legal rights. In several types of instances, it is possible to rely on special provisions in §§ 106 (1) 2), 106 (2), and 107 of the SWA that presume immediate danger to the life, physical integrity, or physical freedom of another person^{*119}, but if those provisions are still too limited for the case at hand (e.g., one wherein the care patient attacks someone else's property), the institution of self-defence also might be considered.

However, §107 (6) of the SWA seems to allow more than the general circumstances precluding unlawfulness. It establishes that a person may be isolated from other persons receiving the service until the arrival of a provider of emergency medical care or the police, though for no longer than a span of three hours. This norm could be interpreted, at least in the grammatical sense, in such a way that a person may be held in an isolation room for three hours in any case, even when the immediate danger arising from said person (see §107 (4) 1)) has passed. Therefore, the situation is different from that in cases of, for instance, detention under criminal law. With the latter measure, although the law provides the right to detain a person for 48 hours (under §217 (1) 1)), it also establishes that if the basis for the detention of a suspect ceases to exist during pre-trial proceedings, the suspect shall be released immediately (under §217 (9) of the CCP). When §107 (6) of the SWA is genuinely understood as indicating that a person may be detained for three hours even when the immediate danger arising from the person no longer exists, the understanding still needs to be adjusted for situations in which the person is placed into an isolation room on account of a danger of self-harm. Once again, we cannot stress the importance of human autonomy enough – even if the caretakers had presumed permission of the person to place him or her in an isolation room, it is almost impossible to imagine that the presumed permission would also cover the time after the direct danger of self-harm has passed. When, in turn, there is no presumed permission, the caretakers have to release the person from the isolation room; otherwise, they as protection guarantors will be liable for depriving the care patient of liberty through omission under §§ 136 (1) and 13 (1) of the PC. Therefore, a person who poses no immediate danger could be held in an isolation room only if having been placed there under the second alternative in §107 (4) 1) of the SWA (which addresses immediate danger arising from the person to the life, physical integrity, or physical freedom of the same person). If, however, the Social Welfare Act contained a provision similar to §217 (9) of the CCP, this would not be possible. In that case, this provision would create a legal obligation within the meaning of §13 (1) of the PC to release the person held in the isolation room.

However, §106 (1) 1) of the SWA is slightly more generous to caretakers than §106 (1) 2). Firstly, unlike §106 (1) 2) (in conjunction with §107 of the SWA), it does not restrict the set of permitted ways of restricting liberty. Rather, it addresses any kind of deprivation of freedom of movement. Nevertheless, it offers no

¹¹⁸ However, implementation of administrative measures cannot be excluded from the start; see Subsection 3.5 of this article.

¹¹⁹ This probably is intended to refer to freedom of movement.

additional value under penal law, since the general circumstances precluding unlawfulness would allow imposing various restrictions on freedom of movement anyway, if the other prerequisites are fulfilled (see the recent analysis of §106 (1) 2) of the SWA).

That said, the SWA's §106 (1) 1) differs from §28 (1) and §29 of the PC and also from §14 (1) of the MHA and §106 (1) 2) of the SWA in that it is possible to rely on §106 (1) 1) even when the danger to other people's life and health is not **immediate**. Subsection 28 (1) of the PC requires immediate danger in the form of unlawful attack, the PC's §29 anticipates immediate danger, §14 (1) of the MHA requires immediate danger of violence toward other persons, and §106 (1) 2) of the SWA in conjunction with the same act's §107 (4) 1) requires direct danger to the life or physical integrity/freedom of another person, while §106 (1) 1) of the SWA sets in place no such prerequisites and it is sufficient if the liberty is withdrawn for protection of the rights and freedoms of other persons (under §106 (2) of the SWA). The latter provision does not require immediate danger to life and health. Posing even a merely abstract threat to these legal rights is sufficient. This means that a person's liberty may be withdrawn for reason of a danger that said person may start damaging the life and health of other people. Such prediction must be based on certain specific circumstances, though. After all, from a purely theoretical point of view, every person poses a threat to the life or health of another person yet it is not 'necessary' to restrict the freedom of these people within the meaning of §106 (2) of the SWA under these theoretical considerations. The prognosis should be based mainly on the prior history of the person. For instance, has this person (repeatedly) attacked fellow patients or at least attempted to do so? In that case, locking the person's door for a night may be a justified measure. If, however, the person only poses an abstract danger to property (e.g., having destroyed property of the institution on more than one occasion), even the liberty of a person receiving 24-hour special care services by court order may not be taken away, because the SWA's §106 (1) 1) (in conjunction with its §106 (2)) does not provide for protection of property (§28 (1) and §29 of the PC, however, cannot be considered to be grounds, because the attack and danger in this scenario are not immediate).

When the deprivation of liberty is in the person's own best interests, for such purposes as protecting the patient from him- or herself (these are probably the most commonplace grounds in practice), differentiation between immediate and non-immediate (abstract) danger is not relevant. That is because such cases demand taking the actual or presumed will of the patient as a basis anyway, with analysis of whether that will is in agreement or presumed agreement with the deprivation of liberty. In the absence of information that proves the contrary, it can probably be presumed that a person who has fallen out of bed on prior occasions, is weak, and is unable to comprehend agrees to having rails on his or her bed at night or to receiving a reasonable amount of medication so as to sleep better at night. It can often be presumed also that a person who has a history of wandering around the institution at night (falling or at least placing him- or herself at serious risk of falling) would probably consent to having his or her door locked at night.

On the other hand, the perennial conflict between safety and freedom must be taken into consideration in both cases – in protection of the legal rights of both other people and the persons themselves from abstract danger arising from said persons. Even when someone poses an abstract danger to someone else's legal rights, that person is not to be 'locked up forever'. In cases involving protection of the life and health of other people, this conclusion can be reached via the criterion of need established in §106 (2) of the SWA. For instance, it should probably be found that a person should not be locked in a room during the daytime because the danger posed by that person to other patients should be neutralised through supervision by caretakers. It can be convincingly argued that one should proceed from the principle of sparingness here as well – if actualisation of a danger can be avoided by any of several methods, the one that infringes least on the right of freedom of the person should be used. The same conclusion can be reached in cases wherein danger is posed to a person who is unable to comprehend. A person can be presumed to consent to only those restrictions on his or her liberty that are of reasonable extent, not to being constantly kept in a cage, as it were. Hence, he or she would most likely prefer the method that applies restrictions most sparingly.

3.8. Subsection 206 (1) of the Family Law Act

It may seem surprising at first that a circumstance precluding unlawfulness could be dealt with by a provision set out in the Family Law Act^{*120} (FLA). Yet one is to be found in the first sentence of §206 (1) of the FLA, establishing that a guardian shall protect the proprietary and personal rights and interests of the relevant ward. Accordingly, restraining a care patient could, in some cases, be justified also by consent of a guardian. This position is represented in German law too. The latter relies on Section 1902 of the German Civil Code (*Bürgerliches Gesetzbuch*, BGB), similar to the first sentence of §206 (1) of the FLA.^{*121} However, in respect of Estonian law, the Chancellor of Justice has expressed the position that a guardian's consent shall not be relied upon in depriving a care patient of liberty.^{*122} At the same time, the Chancellor of Justice accepted that a guardian may provide consent for treatment of a ward on condition that a competent court authorised the guardian to take such decisions for the patient.^{*123}

Consent of a guardian may be admissible as justification for restraint when the following preconditions are met. It is probably implicit that, first of all, the person needs to have a guardian and the relevant authorisation must be valid. For the numerous people in care institutions who have no guardian, being subjected to acts that involve the necessary elements of an offence cannot be justified via §206 (1) of the FLA in any case. The most important element in connection with this provision is that the guardian must be formally competent to allow restraint. When the guardianship is in place only for protection of proprietary rights and interests, the guardian cannot provide valid consent to restrict the liberty of the ward.^{*124} Hence, a caretaker wishing to rely on the consent of a guardian in a case of restraint needs to check, firstly, whether the court has authorised the guardian to make such decisions for the ward. When the ward is able to comprehend^{*125}, the consent of the guardian is not important; the person's own will must be considered definitive. This means that caretakers must verify whether the ward has capacity to comprehend even if there is a guardian's consent.^{*126} This is probably done only in exceptional cases. In contrast, C.W. Schmidt concludes that caretakers do not need to weigh whether the consent of a guardian contradicts the presumed will of the ward – they may rely on the consent of the guardian and need not worry about any sanctions when acting in accordance with it.^{*127} On exceptional cases, however, caretakers probably should not follow the guardian's instructions. For instance, this may be true in situations wherein a long-term-care patient with capacity to comprehend repeatedly articulated to caretakers a wish not to be restrained in a specific way in the future, no matter the consequences, although a guardian appointed after the patient lost the capacity to comprehend has requested the implementation of that very measure by caretakers.

Since the entry into force of the Convention on the Rights of Persons with Disabilities^{*128}, one of the main purposes of which is gradual replacement of the decisions made by a guardian for a ward with a decision-support system^{*129}, consent of a guardian as ruling out unlawfulness should be taken with even greater reservations.

¹²⁰ RT I 2009, 60, 395; RT I, 21.12.2016, 12.

¹²¹ C.W. Schmidt (see Note 16), p. 137.

¹²² See the summary of the Chancellor of Justice's 10.10.2013 inspection visit titled 'Kontrollkäik SA-sse PJV Hooldusravi' (see Note 60), p. 3. In a situation such as this, guardians and family members are placed in the same position and their consent is analysed together.

¹²³ *Ibid.*, p. 5.

¹²⁴ Theoretically, however, there are some possible situations in which liberty is restricted for avoidance of a certain kind of proprietary damage – e.g., a ward breaks valuable items that he or she owns or a ward's act of violence toward someone else may lead to claims for compensation for damages being levied against the ward. Whether such dangers provide a guardian taking care of property with any right to allow restricting the liberty of the ward is highly debatable.

¹²⁵ There is an almost unanimous position in Germany that a ward may be able to make certain decisions and be able to provide valid consent or refuse it. See C.W. Schmidt (see Note 16), p. 138 (along with subsequent references). See also the similar position expressed in Subsection 3.1 of this article. In an analogous manner, the case law of the European Court of Human Rights concludes that there should be a distinction between *de jure* and *de facto* legal capacity and that if the person is actually capable of deciding on the matters concerning him or her, that person's will should not be ignored, irrespective of the restricted legal capacity. See, for instance, EIKo 22.01.2013, *Mihailovs vs. Latvia*, para. 134.

¹²⁶ C.W. Schmidt (see Note 16), p. 138.

¹²⁷ *Ibid.*

¹²⁸ RT II, 4.4.2012, 6.

¹²⁹ General Comment 1 (2014), CRPD/C/GC/1, paragraphs 3 and 40–42, of the UN Committee on the Rights of Persons with Disabilities. Available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/031/20/PDF/G1403120.pdf?OpenElement> (most recently accessed on 26.5.2017).

3.9. Court permission as a justification for restraint

The legislation in force in Estonia does not allow implementation of means of restraint that is based on a judicial decision. In addressing this, one must note firstly that automatic permissibility of restraining cannot be derived from case law on placing people in closed institutions (e.g., §105 of the SWA); see Subsection 2.1 of this article. It is true that an explanatory memorandum on a certain Estonian draft act of law states that, since the court places a person in 24-hour special care without his or her consent, it also accepts that restrictions to the right of freedom may be applied to this person.^{*130} However, it has been added that, irrespective of court orders, a person's freedom of movement should be restricted as little as possible relative to that person's dangerousness to self and others. Therefore, not even the authors of the draft act in question have found that an order for placement in a closed institution is a 'blank cheque' enabling deprivation of the care patient's liberty in an arbitrary situation. Deprivation of liberty (and other restraining) presumes a circumstance precluding unlawfulness as described above in this article.

Secondly, it may be possible for the court to allow the person to be restrained in connection with the placement in the closed institution – e.g., by adding to the resolution of the order that the caretakers have a right to restrict the patient's freedom and restrain him or her. To the best of the authors' knowledge, however, courts generally do not grant such authorisations to caretakers in their orders. If, however, it is done, such an order should not be interpreted as conferring on caretakers the right to start restricting their patient's rights as they wish. The principles laid out above should be taken as a basis (i.e., those on circumstances precluding unlawfulness). Hence, it is completely justified that courts provide no general right of restraining in their placement orders.

De lege ferenda it is fitting to refer to the situation related to court permission in Germany. Subsection 1906 (4) of the BGB establishes that when the freedom of a resident of a care institution who is under guardianship needs to be restricted by mechanical or medical means or in some other way for a longer time or regularly, there needs to be a court's permission for this. This permission must be obtained from the court before implementation of the measure or, if direct danger dictates that its implementation cannot be delayed, immediately after the measure is applied. The relevant provision of law entered into force in 1992 when the German legislator decided to formalise case law that had been applied for years. Namely, for some years before the entry into force of Subsection 1906 (4) of the BGB, German courts had been requesting that representatives of care institutions be able to request court permission to hold a patient in place with restraining straps, use bed rails, etc.^{*131} It is important to note that the court in these cases does not issue a blank cheque but analyses the particular situation, taking into consideration the specific person involved, the means of restraint applied, and other relevant matters. The definition of the provision's language 'longer period of time' is disputable – some requests are for as much as a week, while others indicate a need for three days and still others just 48 hours.^{*132} However, the prevailing understanding seems to be that deprivation of liberty for 24 hours or more requires a court's permission.^{*133} Deprivation of liberty is considered to be 'regular' when it takes place at the same time or in consequence of a recurrent factor (e.g., closing off the exit routes each night). In cases of regular physical restraint, the duration of the deprivation of liberty is of no consequence; when regular, even short-term restriction necessitates permission.^{*134} In making the decision on granting permission, the court needs to consider provisions regulating guardianship^{*135}, turning the most attention to the principle established in Subsection 1901 (2) of the BGB whereby guardianship is in the interests of the ward.

¹³⁰ Sotsiaalhoolekande seaduse, puuetega inimeste sotsiaaltoetuste seaduse ja nendega seonduvate seaduste muutmise seaduse seletuskiri, 370 SE (the explanatory memorandum on the Social Welfare Act, the Social Benefits for Disabled Persons Act, and the law related to Associated Acts), p. 65. Available, in Estonian, at <https://www.riigikogu.ee/tegevus/eelnoud/eelnou/13f8b46d-2f09-9470-40a3-31e3c10bf788/Sotsiaalhoolekande%20seaduse,%20puuetega%20inimeste%20sotsiaaltoetuste%20seaduse%20ja%20nendega%20seonduvate%20seaduste%20muutmise%20seadus> (most recently accessed on 26.5.2017).

¹³¹ C.W. Schmidt (see Note 16), pp. 128–129.

¹³² See C.W. Schmidt's overview: *ibid.*, p. 131.

¹³³ F. Henke (see Note 7), pp. 25, 42, 159; C.W. Schmidt (see Note 16), p. 120; C. Fuchs (see Note 24), p. 10.

¹³⁴ H.G. Bamberger, H. Roth (eds). *Bürgerliches Gesetzbuch. Beck'scher Online-Kommentar* ['The Civil Code: Beck's Online Commentary']. 42nd ed. Munich, Germany, 2017 (in German), §1906, Comment 32 (G. Müller).

¹³⁵ *Ibid.*, Art. 1906, Comment 26 (G. Müller).

In the assessment of the authors of this article, it would be reasonable to analyse whether a provision similar to Subsection 1904 (6) of the BGB should be added to Estonian law. It is possible that were such a provision to exist, it would prevent arbitrary restrictions to the freedoms of care patients. Also, it would provide certainty to the caretakers that the restraining they are applying is lawful – they would be able to rely on a clear judicial decision. In addition, legal circles in Estonia should consider whether a court's permission should be tied in with guardianship (as is done in Germany). It has to be acknowledged that such regulation would be quite resource-intensive, mainly in terms of the workload for courts. However, concerns surrounding resource-intensiveness should not prevent at least bringing these topics into discussion.

3.10. Error related to circumstances that preclude unlawfulness, under the Penal Code's §31 (1)

The first sentence of the Penal Code's §31 (1) states that an intentional act is not unlawful if, at the time of commission of the act, the person erroneously assumes the existence of circumstances that would preclude the unlawfulness of the act. The second sentence of the same section of law establishes the conditions under which a person is liable for an offence committed out of negligence.

Therefore, according to Estonian law, an act involving the necessary elements of an offence is not necessarily unlawful even when its execution is not prevented for reason of any substantial circumstance precluding unlawfulness. This is due to the fact that, in a formal sense, an error pertaining to circumstance that preclude unlawfulness may make an action lawful.^{*136} That means that if a caretaker has deprived the care patient of liberty within the meaning of §136 (1) of the PC because the care patient's action constituted an immediate unlawful attack on the health of another person – i.e., the foundation that should have existed for justifying restraint in line with whichever of §14 (1) of the CCP, §106 (1) 1) or 106 (1) 2) of the SWA, or §28 (1) of the PC is applicable to the relevant situation – the caretaker's liability is not established under the first sentence of §31 (1) of the PC. Neither is liability established under the second sentence of §31 (1) of the PC, because negligent deprivation of liberty is not criminalised. The same is true when a caretaker wrongfully proceeds on the basis that the action is justified by presumed permission of a patient with no capacity to comprehend. For instance, a doctor may administer an injection of a calming medicine to a care patient who has no ability to comprehend and who is harming him- or herself but who when still having comprehension capacity had expressed a wish not to be injected with medicines in the future.

It should be noted that in cases falling under the first sentence of §31 (1) of the PC, the offender's actual understanding of the situation is the relevant element. Whether the error could have been avoided in a case of more diligent conduct is of no importance. Thereby, Estonian legislators have opted for regulation that is friendly toward resolving various errors of circumstances at the level of unlawfulness. This stands in contrast to §39 (1) of the PC, according to which a person is deemed to have acted without guilt if he or she is incapable of understanding the unlawfulness of his or her act and cannot avoid the error.^{*137}

4. Conclusions

In summary, it can be concluded that performance of the various compositions of the special part of the Estonian Penal Code is relatively easy in respect of implementing the means of restraint employed at care institutions. This is mainly in the context of §136 of the PC, which presumes depriving a person of liberty in almost any way – tying the person up, locking him or her in a room, administering sedatives, etc. In addition to penal-law provisions addressing deprivation of liberty, there are relevant provisions under criminal

¹³⁶ From a legal dogmatics perspective, this situation is problematic. How could it be said that a certain unlawful action is not objectively (!) unlawful for reason of the person who committed the act having deliberately miscalculated the existence of some circumstances? In the case of Germany, for example, the situation is different – such an error would not make the act legal, although it could bring about non-liability. See R. Rengier (see Note 13), Art. 30, refs 7–9.

¹³⁷ CCSCd 3-1-1-108-13, para. 14. It should be added for comparison that in Germany, for instance, such situations are not regulated by the law and huge disputes arise on how to resolve cases of this nature. See, for example, J. Wessels, W. Beulke (see Note 43), §11, refs 467–480. Subsection 31 (1) of the PC is a partially failed attempt by the Estonian legislator to add the predominant opinion among the nation's people to the Penal Code, similarly to the attempt at writing an option on this into the German penal code.

law – for instance, found in the PC's §§ 121, 123, and 124. Furthermore, holding a caretaker liable for causing death due to negligence is not excluded (see §117 of the PC). The general and specific circumstances precluding unlawfulness that have been analysed in this article may, in some cases, exclude the liability of the person doing the restraining at least under penal law; however, mainly in the interests of care patients, legal experts should examine whether Estonian law should take the same road as its German counterpart – giving courts the jurisdiction to decide on whether restraining measures should be applied in the specific case at hand, along with what kinds of measures may be suitable. It should be noted that in several of the situations presented in the article, neither general nor specific circumstances precluding legal rights do not exclude the liability of the offender. Therefore, restraining that is done under court permission would provide a sense of safety both for caretakers and for the care patients.



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The Patient's Will – Why and for Whom?

Forms, Formalisation, and Implementation Issues

1. Introduction

Approaches to death and dying vary quite a bit. On one extreme of the scale is the view that the ending of a life is something unnatural and undesirable and that anything postponing it should be promoted. In contrast, there is the belief that death is natural, which is strongly supported today through arguments emphasising a decent standard of living, a dignified death, and personal autonomy.^{*1} Depending on the approach that people subscribe to, attitudes towards dying may be radically different. Some would do anything to prolong life, no matter how much pain and suffering it causes, while others prefer to die and refuse even the simplest remedies that could keep them alive, such as antibiotics for bacterial inflammation of the lungs.^{*2}

In the past, prolongation or non-prolongation of someone's life at the individual's request was not a topic of much importance, since the level of medicine did not allow such prolongation anyway. However, the high speed of medical advancement has significantly widened the spectrum of possibilities for postponing death. In intensive care, technological replacement of the functioning of organs and organ systems with respiratory devices, circulation pumps, and dialysis-based artificial kidney apparatuses, *inter alia*, has become possible.^{*3} Likewise, life can be prolonged by drugs, resuscitation, and radiation-therapy procedures.^{*4} On the other hand, medical intervention may sometimes make the end of life or even one's life itself very miserable and painful and, accordingly, not desirable for the person concerned.^{*5}

If a patient does decide that he or she does not wish to receive health-care services and would prefer to die, the health-care service provider is not allowed to provide health-care services to that patient, under the principle of personal autonomy. In this case, the patient's wishes need to be respected even at such time as the patient is unable to express them – for instance, when he or she is unconscious.

For situations wherein a patient is incapable of expressing his or her intentions, many countries employ an instrument called a patient's will, also known as a living will or, more generally, a patient's directive (the German concept is *Patientenverfügung*) or an advance directive (health-care directive). The term 'patient's will' will be used throughout this article. A patient's will is a declaration (usually in writing) on what kind

¹ A. Soosaar. *Meditisiinietika* ['Medical Ethics']. 2nd, revised and supplemented edition. Tartu Ülikooli Kirjastus 2016 (in Estonian), p. 203.

² J.R. Williams. *Medical Ethics Manual*. 3rd ed. World Medical Association 2015, pp. 60, 61.

³ A. Soosaar (see Note 1), p. 205.

⁴ J.R. Williams (see Note 2), p. 60.

⁵ A. Soosaar (see Note 1), p. 204.

of treatment a person wishes to receive or not to receive in a situation wherein he or she is unable to make decisions independently – for instance, in the event of unconsciousness or dementia.*⁶ In addition to preparing a patient's will, people may provide health-care directives for the future by assigning a substitute decision-maker (a health-care proxy) who can express the assigner's presumed intentions in a case in which he or she is unable to express the relevant decision.

The most effective means for ensuring one's personal autonomy is using a patient's will, since this document is prepared by the person him- or herself. Although patient's wills are not commonplace in Estonia, the country's legislation imposes no obstacles to their use. Also, the people of Estonia are becoming increasingly aware of their rights. People have already turned to notaries with a wish of providing notarial directives for the future that address the provision of health-care services or maintenance of their property in the event that they no longer have the capacity to exercise their will themselves.

This article discusses the role of a patient's will near the end of life and also examines the issues related to its formation and implementation.*⁷ The last part of the article briefly addresses instructions related to maintenance of the patient's assets in the case of incapacity to exercise the will.

2. The patient's will in the context of Estonian law

In some countries, the patient's will is regulated as a separate legal institution. This is the case, for instance, in the United States of America, Germany, Austria, and France*⁸, but it is not in Estonia. Moreover, use of patient's wills is not common practice in Estonia, most likely on account of lack of awareness about the possibilities for their use. Although Estonian law does not specifically regulate the institution of the patient's will, the legislation currently in force does allow its use. Specifically, the legal rules on the patient's will can be derived from the requirements set for contracts for provision of health-care services under the Law of Obligations Act*⁹ (LOA).

Subsection 766 (3) of the LOA prescribes that a patient may be examined and health-care services provided to him or her only with his or her consent. Hence, if a patient does not consent to a health-care service, such services must generally not be provided. In a situation wherein a patient has the capacity to exercise his or her will, it is normally not difficult to clarify whether the patient wants to receive health-care services or not. However, the patient's right of self-determination means that there must be a possibility of refusing health-care services in future, even when one no longer has capacity to exercise one's will – when one is unconscious, suffering from dementia, or otherwise prevented from expressing personal intentions in this regard. Situations of this type are regulated by §767 (1) of the LOA.

That section of law sets forth that if a patient is unconscious or is incapable of exercising his or her will for any other reason and if either he or she does not have a legal representative or his or her legal representative cannot be reached, the provision of health-care services is permitted without the consent of the patient, where this is in the interests of the patient and corresponds to the intentions expressed by him or her earlier or to his or her presumed intentions and where failure to provide health-care services promptly would put the life of the patient at risk or significantly damage his or her health.

The two above-mentioned provisions, §766 (3) and §767 (1) of the LOA, *inter alia*, regulate the patient's will in Estonian law. While the LOA's §767 (1) allows, in certain cases, providing health-care services to a patient in a situation wherein that patient is incapable of exercising his or her will, the patient's will may preclude any health-care services in such situations. By invoking these provisions, a patient's will can prohibit provision of any health-care services if the following criteria are met:

- a) the provision of health-care services would per se be in the patient's interests (i.e., indicated);
- b) the patient is unconscious or is incapable of exercising his or her will for any other reason;
- c) a decision on the provision of health-care services cannot be postponed (since the absence of prompt provision of the services would endanger the patient's life or substantially damage his

⁶ J.R. Williams (see Note 2), p. 120.

⁷ The authors would like to thank Dr Alar Irs and Dr Raul Adlas for their invaluable contribution to this article.

⁸ R. Frimston et al. (eds). *The International Protection of Adults*. Oxford University Press 2015, pp. 335, 373, 381–382, 415–419.

⁹ RT I 2001, 81, 487; RT I, 31.12.2016, 7.

or her health) or postponement is impossible because the patient is permanently without the capacity to exercise his or her will;

- d) a legal representative does not make decisions on behalf of the patient; and,
- e) while having the capacity to exercise his or her will, the patient expressed in a patient's will that he or she wishes no health-care services to be provided.

Below, we provide a detailed examination of all the conditions on which application of a patient's will is predicated.

According to the first criterion, the patient's will applies only if provision of **health-care services would, in itself, be in the patient's interests**. Where a health-care service is already being provided, it must be reassessed at all times whether provision of that service serves the patient's interest. Provision of a health-care service is in the patient's interests if it is indicated for the patient and is of good quality^{*10}; i.e., it must not be a pointless therapy. If the service is not in the patient's interests, that health-care service must not be provided to the patient concerned or its provision must be discontinued. In such cases, the patient's will does not affect the provision of health-care services.

Where a health-care service is in the interests of the patient in its own right, the patient's will applies only **if the patient is in a condition wherein he or she is incapable of exercising his or her will**. The patient's incapacity should be assessed under §767 (1) of the LOA, the substance of which does not overlap with the definition of a person's incapacity to exercise will with regard to transactions regulated^{*11} by §13 of the General Part of the Civil Code Act.^{*12} Under §767 (1) of the LOA, patients have no capacity to exercise their will in any situation wherein they are incapable of expressing their intentions. Consequently, a patient is without the capacity to exercise his or her will when suffering from a mental disorder but also when physically or for any other reason incapable of expressing his or her intentions. If a patient has capacity to exercise his or her will – i.e., is capable of expressing his or her intentions – a patient's will would not be resorted to (even if one already exists); instead, one must proceed from the intentions directly expressed by the patient in the present. Such intentions may be contrary to those expressed in the patient's will instrument. In many cases, it may be quite easy to ascertain the patient's capacity to exercise will. Let us consider the case of a patient who is unconscious. There can be no doubt that an unconscious patient has no capacity to express will. However, there may exist borderline cases wherein determination of capacity can be quite complicated. Determination of medical decision-making capacity may be especially challenging with minors or those whose judgement has been impaired by acute or chronic illness. In addition, a patient may be able to make decisions regarding some aspects of life but not others. Also, such capacity may be volatile: in one moment, a person may be of sound mind and able to make sense of the surroundings while at other times not.^{*13} In borderline situations, the attending physician is in the best position to decide on the patient's capacity to express will. To date, there have been no known cases in Estonia in which a court has contradicted a doctor's decision.

The next precondition for the applicability of a patient's will involves the interest of **non-postponement of the decision to provide health-care services**. It means that the situation must be such that the health-care service provider needs to decide whether or not to provide the service. Such a situation exists in two cases. Firstly, the patient may have temporary or permanent incapacity to exercise will while failure to promptly provide health-care services would present a risk to the patient's life or substantially harm his or her health. This article focuses on the role of a patient's will in a situation wherein failure to promptly provide health-care services would endanger the patient's life, i.e., the question here is of prolongation or non-prolongation of the patient's life with the aid of a patient's will. Another situation in which a health-care service provider shall not postpone a treatment decision is that in which the patient has permanent incapacity to exercise will and a decision needs to be taken about a medically prescribed treatment. In the latter case, neither the life nor the health of the patient need be endangered for the patient's will to apply, because for a permanently incapacitated patient the decision cannot be postponed anyway since the health-care service provider is never going to have an opportunity to ask for the patient's consent. In

¹⁰ *Võlaõigusseadus III. Kommenteeritud väljaanne* ['Law of Obligations III: Commented Edition'] (compiled by P. Varul et al.). Juura 2009 (in Estonian), parts 8 and 10, §767 (1) Comment 3.2; A. Nõmper, J. Sootak. *Meditsiiniõigus* ['Medical Law']. Juura 2007 (in Estonian), p. 70.

¹¹ RT I 2002, 35, 216; RT I, 12.3.2015, 106.

¹² *Võlaõigusseadus III* (see Note 10), §767 (1), Comment 3.1.

¹³ J.R. Williams (see Note 2), pp. 49–50.

contrast, where both the patient's incapacity is temporary and non-provision of medically prescribed treatment would not endanger the patient's life or substantially damage the patient's health, such treatment should not be provided, since a temporarily incapacitated patient's consent for a health-care service can be sought later, once capacity to exercise will has been restored. The health-care service provider must always be guided by the most recently expressed intentions of the patient and must determine those intentions whenever this is possible. The Estonian Supreme Court noted in its judgement 3-1-1-63-00 that the '[o]bligation to ask the patient's consent for a surgery arises from the inviolability of the physical integrity of a person'. In the case in question, a physician had been mistakenly guided by earlier consent of the patient to receive health-care services; the doctor subsequently provided a service without asking the patient for consent although she had the opportunity to do so.^{*14}

The next consideration is that applicability of a patient's will can be precluded in some cases **if the patient has an existing, available legal representative** who, under §766 (4) of the LOA, has the right to decide about the provision of health-care services to the patient. In this context, 'legal representative' refers to the legal representative of a patient with restricted active legal capacity (i.e., either a minor patient or an adult of restricted active legal capacity), with said representative normally being a parent or guardian of the patient. Since most adults have full active legal capacity, there is usually no need to determine the legal representative in cases of adult patients.^{*15} However, legal representation status does need to be determined in cases of minors and adults with restricted active legal capacity **if the patient is**, for reason of that restricted capacity, presumably unable to consider the pros and cons of a health-care service responsibly.^{*16} If treatment-related decisions would be made for the patient by the legal representative even if the patient were conscious, a patient's will would not be applicable. It is instead the decision of the legal representative that is to be taken into account when the health-care service provider is making sure that the decision is in the interests of the patient, as specified in §766 (4) of the LOA.

If all the above-mentioned criteria have been met, the patient's will is applicable. The patient's will expresses the patient's intentions with regard to the receipt or non-receipt of health-care services, even in a situation wherein the provision of these services would postpone death. Although, under §767 (1) of the LOA, the intentions expressed earlier by a patient or his or her presumed intentions should be ascertained (with the assistance of his or her immediate family), if there exists a patient's will, the provisions of that patient's will – as the intentions expressed earlier directly by the patient – should prevail over the explanations of family. The instrument of the patient's will is presumed to be a better expression of the patient's actual intentions, since it was prepared by that person himself or herself and hence does not depend on subjective interpretation by the patient's immediate family.

It is important to note that under Estonian law, a patient's will does not allow euthanasia, defined as termination of the life of a suffering patient in terminal condition who wishes for death by a doctor or by way of a doctor's intervention.^{*17} Under §113 of the Penal Code^{*18}, euthanasia is qualified as manslaughter and is punishable as a criminal offence. This means that a patient's will shall not prescribe that it is the wish of the patient that a health-care provider hasten the patient's death by taking active steps for this purpose. Even if a person so instructs in his or her patient's will, the doctor has no right to cater to this request. The patient's will may, however, instruct that health-care services be relinquished, in which case the doctor has the right and, indeed, obligation to comply with this wish even if it leaves the patient without the possibility of postponing death. This is not considered euthanasia.

With the groundwork laid as to prerequisites for application, we can now embark on more detailed analysis of the patient's will.

¹⁴ CLCSCd 3-1-1-63-00, 30.5.2000, para. 7.2.

¹⁵ *Võlaõigusseadus III* (see Note 10), §766, Comment 3.6.

¹⁶ *Ibid.*

¹⁷ A. Soosaar (see Note 1), p. 220.

¹⁸ RT I 2001, 61, 364; RT I, 26.6.2017, 8.

3. Why a patient's will, and for whom

People of all ages with capacity to exercise will may be interested in a patient's will, whether ill or in full health. We all might find ourselves in a situation wherein we cannot express our intentions, in consequence of disease or accident. At the same time, we would want our wishes to receive or not receive particular health-care services to be respected. Since such incapacitation entails no longer being able to express our intentions, it would be beneficial for a patient's will to be available that discloses in advance our wishes related to the receipt or non-receipt of those services.

To get some idea about the benefits of a patient's will, we should attempt to reconstruct a typical situation wherein the patient has no patient's will instrument. In a situation in which the patient is without capacity to exercise will and a doctor needs to decide on the provision or non-provision of particular health-care services, the intentions expressed earlier by the patient or his or her presumed intentions should be ascertained with the assistance of the immediate family if there is no patient's will, as is set forth in §767 (1) of the LOA. According to the law, immediate family means the spouse, parents, children, sisters and brothers of the patient, but other persons who are close to the patient may also be deemed to be immediate family if this can be concluded from the way of life of the patient. However, family members or other persons close to the patient do not necessarily know about the patient's intentions or even have the patient's best interests at heart. Also, studies have demonstrated that the family of a patient cannot accurately envisage the wishes of the patient with regard to future treatment.^{*19} Hence, the family may present a view of the will of the patient that deviates from the patient's real intentions, mistakenly if not actually intentionally. Likewise, it is extremely difficult to make decisions when, on the one hand, being driven by a desire to maintain the sanctity of life but, on the other hand, wanting to relieve the suffering of a loved one.^{*20} Moreover, the family members consulted may differ in their views in regard of the patient's wish to receive health-care services and prolong his or her life. This may lead to bitter feuds among the family, which the incapacitated patient would never want to happen.

In light of all the foregoing, a patient's will may prove extremely helpful in ascertaining the actual intentions of the patient. The very existence of a patient's will might prevent friction amongst the family. Likewise, a patient's will may bring peace of mind to the family because there then is no need to have second thoughts about whether they were able to gauge the presumed intentions of the patient accurately. Additionally, the existence of a patient's will may make the doctors' job easier as, if nothing else, they do not have to consider the opinions of the immediate family, which, again, may diverge, and give preference to one person's views above all the others'.

The role of a patient's will is illustrated well by a case that was heavily covered by the media at the time: that of Terri Schiavo, in the United States. In 1990, a medical incident caused this woman to enter a persistent vegetative state. She remained in that state for a little more than 15 years. Her husband believed that she would not have wanted to continue living in that state and argued for the removal of the tube that was being used to feed her and provide her with water. In contrast, Schiavo's parents hoped for their daughter's recovery – they favoured keeping her alive and were against the tube's removal. Schiavo did not have a patient's will, which would have revealed her intents in this respect. On account of the opposition from her parents, the tube kept the woman alive for 15 years.^{*21}

Under Estonian law, it would have been possible for such a situation to be catered for by expressing in a patient's will the intent to prohibit use of health-care services – use of a feeding tube. Since the use of a tube for food and water is a form of health-care provision, the physician does not have the obligation or the right to keep the patient alive with a tube unless the patient so wishes. In his or her actions, the physician who is aware of the patient's wish to discontinue with the health care service, has the right and obligation to discontinue using a tube of this sort even when its use has already begun.

¹⁹ I. Bruus et al. Ravi ja hoolduse planeerimine nn patsienditestamendi koostamise teel ['Planning treatment and maintenance by preparing a patient's will']. – *Eesti Arst* 94 (2015) / 2 (in Estonian), p. 93; C. Westphal, T. Wavra. Acute and critical care choices guide to advance directives. American Association of Critical-Care Nurses 2005. Available online via <https://www.scribd.com/document/159374461/Acute-and-Critical-Care-Choices-to-Advance-Directives> (most recently accessed on 24.7.2017).

²⁰ K. Elmet. Eutanaasia. Arsti pilk ['Euthanasia: A doctor's perspective']. 2010. Available, in Estonian, at <http://www.eetika.ee/sites/default/files/eetika/files/Eutanaasia.%20Arsti%20pilk.pdf> (most recently accessed on 1.8.2018).

²¹ A. Soosaar (see Note 1), pp. 218–219.

Schiavo was only 26 years old when she went into a persistent vegetative state. This illustrates that accidents may occur with young and healthy people; for example, they can unexpectedly be struck by illness or by a vehicle in a traffic accident. Therefore, although in practice the patient's will is particularly important for elderly and severely ill people, it can play a role in deciding over the lives of young and apparently healthy people too.

Unlike young and healthy people, older people and those who are seriously ill are more likely to perceive the ending of life more acutely. They are forced to think about what is going to happen to them, what kind of treatment they want, and in what state they want to continue to live. For doctors also, when treating severely ill patients, a question arises early about the patient's wishes related to further treatment, since they are aware of the possible outcomes. In such a case, it is in the interest of the attending physician to clarify the will of the patient when that person is still capable of making independent decisions. Otherwise, the expected will of the patient will have to be guessed at a later stage, in consultation with the family and others close to the patient – which, as explained above, can be a daunting task.

Although everybody may benefit from a patient's will, no-one should feel pressured to prepare one. No person is obliged to know in advance whether he or she wants to receive health care in the future when suffering from a difficult health condition. Everyone has the right to leave the burden of identifying his or her will to his or her loved ones as occurs, in accordance with the law, in the absence of a patient's will. Some people probably find that at such time as they become a patient incapable of making decisions, it would be more their loved ones who are concerned about their condition and further treatment, and they may conclude therefore that those loved ones should be given an opportunity to present the patient's expected will.

A question may arise as to whether a patient's will can be legitimately prepared by minors. According to the Declaration of Lisbon on the Rights of the Patient, a minor must be included in the decision to the extent that this is possible in his or her case.^{*22} If the opinion of a minor is meaningful in conditions wherein he or she can express it directly, his or her right to self-determination should be no less in a situation in which he or she no longer has the ability to express his or her will. However, in practice, it is not possible for a doctor to determine whether a minor who for reason of state of health is unable to express his or her will would be able to reasonably consider the pros and cons in the absence of health disorders. Therefore, a minor's patient's will may not be applicable in practice, and the health-care provider may take into account the decision of the legal representative of the minor and assess that decision in light of the patient's interests under §766 (4) of the LOA. Accordingly, the health-care provider must be guided by the interests of the minor patient.

Alongside bringing the benefits to the individual that are described above, the widespread use of patient's wills may have a wider impact on the distribution of health-care resources. In situations wherein patients who are incapable of exercising will do not want to receive treatment that prolongs life, their wishes expressed in a patient's will would enable redistribution of the resources for health care in a manner allowing their use by patients who do wish to receive treatment.

Although, for the reasons outlined above, what is to the patient's benefit can be beneficial both to the individual and to the health sector in general, the patient's will is, regrettably, not the solution to all situations. It has been compared with a seat belt, which alleviates some risks but does not guarantee prevention of undesirable consequences in all eventualities. The problems encountered in implementing the patient's will and their possible solutions are described in more detail in the sixth section of this article.

4. What to include in a patient's will

Although a person may have some idea of the situations he or she would like to avoid by means of a patient's will, expressing those wishes may seem complicated. The intent of each person and hence each patient's will is unique. Below, we will explain what to account for when compiling a patient's will and what we consider good to include in it.

A patient's will can be approached in any of various ways. For people who want to rule out prolonging their life through the provision of health care, the option most easily understandable by doctors and, hence, the most practicable approach would be to rule out the actions that the patient does not want to be

²² WMA Declaration of Lisbon on the Rights of the Patient, p. 5. Available at <https://www.wma.net/policies-post/wma-declaration-of-lisbon-on-the-rights-of-the-patient/> (most recently accessed on 1.8.2018); J.R. Williams (see Note 2), p. 50.

performed. Thus, the patient's will could state what is desirable as a life-supporting treatment and what is not (e.g., resuscitation, artificial ventilation, dialysis, and/or a nutrition-providing probe).²³ In such a case, the person clearly expresses lack of consent to obtaining a specific form of health care within the meaning of §767 (1) of the LOA. Palliative (that is, pain-reducing) therapy should remain acceptable, in line with the goal under the patient's will's of reducing the patient's suffering. A sample of a patient's will based on this recommendation is included further on in this section of the paper.

In an alternative, it is possible to indicate in a patient's will the condition in which the person prefers to die. For example, it may be possible to exclude treatment that would result in the patient losing his or her limbs or render the patient blind. However, one must take into account that it is more difficult to implement such a solution. As a general rule, it is not clear what consequences the health-care provision might entail for the patient, except in cases such as those involving amputation. More importantly, the doctor does not know whether the patient is going to die in the absence of a particular health-care service or whether the patient is going to end up in a situation worse than what the patient wanted to achieve via the patient's will and accordant health care.

We will now explain which concrete steps should be taken to create a patient's will. Firstly, it should be made clear what the wishes of the person preparing the will are and the situations in which that person wishes his or her life not to be prolonged. Here, one must imagine the fullest possible range of situations that may arise. For example, one should think about what kind of health care would be desired after a traffic accident or in the event of illness (or exacerbation thereof) and consider what the consequences would be of health-care provision and of failure to provide health care. For this, one needs to consult a health-care professional. If the person preparing the will already has a serious illness, it is important to be aware of the prognosis and the disease's progression. Failure to take these into account could result in the patient's will being rendered useless because, most likely, the doctor will then have to decide about the treatment for the existing serious illness in the future. Although a patient's will may be drawn up without a health-care professional being consulted, this increases the likelihood that a large proportion of the probable situations are not going to be considered and that the patient's will instrument will not serve its purpose. An additional important step is for the intentions to be discussed with loved ones. Firstly, this helps people to figure out what they want, and, secondly, this consultation gives the loved ones knowledge of the patient's wishes. When the patient's will does not come as a surprise to the patient's loved ones later, there is a lower probability of them trying to interpret the will of the patient in a different manner.

When all possible situations and scenarios have been discussed with help from health-care professionals and relatives, correct wording needs to be found to express the person's wishes. In some countries, there are standard forms for a patient's will. These do make it easier to prepare from the patient's standpoint, but at the same time they do not provide flexibility, and they increase the risk of the true intentions not getting expressed. In Estonia, such standard forms are not used. The benefit of the patient's will and the chances of respecting the actual wishes of the patient are likely to be greater if the paper is prepared for the specific person concerned.

Just as finding out the person's wishes is important, so is doctors' assistance in compiling the patient's will. Although consultation on patient's wills has not been common practice for doctors in Estonia thus far, they are the ones who are most able to describe the procedures the patient wishes to avoid in the most accurate medical terms. However, it must be borne in mind that the patient's will is a document of legal significance whose formulation is new and unfamiliar to doctors. Therefore, it would be understandable if doctors wish to confine themselves to merely consultation that involves thinking through various scenarios and finding the correct medical terminology. In any case, legal assistance in preparing a patient's will is available by forwarding to the relevant legal practitioner one's wishes and a description of the possible scenarios and situations discussed with one's attending physician. It is advisable also for the person, after finalising of the patient's will, to discuss it again with his or her primary doctor to ensure that it is consistent with possible scenarios.

Another important consideration is that updating the patient's will may be necessary, given that both the wishes of the subject and the medical treatment options may change. Therefore, the patient's will should be

²³ I. Bruus et al. (see Note 19), p. 91; Communicate your health care wishes. California Advance Health Care Directive Kit. Permanente Medical Group, Kaiser Permanente 2005. Available at <https://shcs.ucdavis.edu/sites/default/files/documents/advance-directives-kp.pdf> ((most recently accessed on 24.7.2017)).

reviewed regularly (once a year or even more often), also in light of any disease prognosis and the treatment options. Ideally, the relevant doctor could check whether the patient has a patient's will in place whenever the prognosis and treatment options change and initiate discussion of whether the change in circumstances could lead to a change in the wishes expressed in the patient's will.

The following is a sample of a patient's will. The option presented rules out certain treatments that the patient does not want to receive. The model below is definitely not a standard form suitable for all people. Again, each patient's will is individual-specific, and the instrument must be prepared in accordance with the intent and health of the particular individual in question.

EXPRESSION OF WILL IN RELATION TO PROVISION OF HEALTH-CARE SERVICES

*This declaration of intention has been made by _____, day, month, year
personal identification code _____.*

Pursuant to §766 (3) of the Law of Obligations Act, a patient may be examined and health care provided to him only with his consent. If the patient is unconscious or for any other reason is unable to express his will and does not have a legal representative, under §767 (1) of the Law of Obligations Act the provision of health-care services is permitted without the consent of the patient if their provision corresponds to his previously expressed will.

I hereby inform that, in a situation where I am not able to express my will, I allow only palliative care to be provided to me, for improvement of the quality of life of a patient who is facing a life-threatening illness and of the patient's family. The purpose of palliative care is to identify, assess, and treat pain and other physical symptoms of the disease and alleviate psychosocial and mental suffering as early as possible.

Because there is not a well-defined list of health care provided in the context of palliative care, I will specify that I do not give consent to any of the following:

- surgical treatment;*
- resuscitation from clinical death;*
- blood transfusion;*
- mechanical ventilation, whether provided through intubation or via a hermetic mask;*
- a probe or a tube inserted into the stomach through the stomach or into the venous system for administration of water and nutrients;*
- kidney replacement treatment and kidney dialysis; and*
- administration of drugs that have a purpose other than pain relief (such as antiviral or antibiotic therapy).*

If the above-mentioned treatments or other non-palliative treatments are applied to me in a situation in which I have not been able to express my will (for example, in a situation wherein the health-care provider is not aware of this declaration of intention), I would like to see an immediate end to these therapies – i.e., the discontinuation of treatment that is against my intent.

I am aware that this declaration of intention will leave me without medical service that meets the general medical standard and may end with my premature death. I want to avoid hospitalisation if possible, and I want to die in my home.

For health-care professionals to be confident in respecting this declaration of intent, I have asked my notary to verify my active legal capacity and my capacity to exercise will, and I will proactively forward this document to the following health-care providers: [names of the health care providers to be inserted]. I have also made my wishes known to loved ones, and they have promised to respect these.

5. How to establish a patient's will

Estonian legislation does not imply that the patient's will should be in a certain form. Nor does Estonian legislation specify its validity. In contrast, in some countries there are certain procedural requirements in place for the patient's will, to protect the interests of both the maker and the implementer. A patient's will is an important – in fact, actually vital – document. Therefore, it must be taken into account too that the

patient's will, which determines the life of a person, may be falsified. Also, people may be compelled to sign the document under the pressure of a threat. In addition, someone may personally write a patient's will while having no capacity to exercise will and that is not in accordance with his or her actual intentions. In order to protect patients and give the health-care provider the necessary assurance, it is important to set formal requirements for the patient's will.

In consideration of the fact that there are no formal requirements for a patient's will in Estonia, we will present the formal requirements and related problems of patients in other countries.

Firstly, in the United States, nearly all states require at least two witnesses to be present when instructions for the future are being approved. Also, several states have strict guidelines in place as to who is qualified to witness at all.^{*24}

In France, the patient's will is to be documented in writing and must feature the date of its making and the signature of the maker.^{*25} Last year, the law introduced a model for a patient's will, allowing individuals to express their wishes. The existence of sample forms notwithstanding, the use of standard forms is not compulsory for the patient's will in France. If a person is able to declare his or her wishes but is unable to write and sign the document, witnesses must be involved. In this case, a third party may sign the document, provided that two witnesses certify that the document is a free and informed declaration of will by the maker of the patient's will. The testimony of witnesses must be attached to the patient's will, and the names of these witnesses and their legal capacity must be indicated. Since last year, patient's wills in France have been deemed entered into for an indefinite term, and they no longer need to be renewed, unless the maker wants to make changes.

Austria too has written requirements pertaining to binding patient's wills (the 'Patientsenführung'). In Austria, a binding patient's will must clearly indicate its date, and a lawyer, a notary, or a representative of the institute representing patients' interests must be present at its compilation. As a general rule, the document must be updated every five years.^{*26} A patient's will must be prepared in writing also in Germany.^{*27} Dutch legislation does not regulate patient's wills, but, in practice, notaries prepare them as notarial deeds and the general set of rules for a letter of authorisation has been taken as a basis, from the Civil Code^{*28}.

The foregoing discussion illustrates the fact that the patient's will's formal requirement fulfils two objectives. Firstly, the formal requirement reduces the risk that, instead of the subject named, someone else prepares the patient's will, doing so against the subject's intent. Secondly, the formal requirement reduces the risk of a person preparing a patient's will while in a condition in which he or she is unable to express his or her true intentions. The fact that a person formulates a patient's will in complete consciousness in line with his or her will is important, given that the patient's will is intended to protect the patient's personal autonomy. To hedge against the risks associated with the patient's will, it is advisable to impose a formal requirement in Estonia. In this connection, the notarial authentication requirement should be preferred, in consideration of the fact that it addresses both of these risks.

The purpose of involving a notary in drawing up a patient's will is to clearly, unambiguously, and definitively determine the content of the statement of intention. The role of a notary is to increase the rights and confidence of individuals in resolving legal issues, ensure the stability of relations between individuals, and thereby prevent legal disputes that are burdensome to the courts.^{*29} In this context, it would be necessary to clarify what the most important functions of notarial certification are. In its judgement of 28 January 2015, the Supreme Court highlighted several 'key functions embodied in the notarial deed of the transaction, stating:

²⁴ I. Bruus et al. (see Note 19), pp. 91–95; D. Hinders. Advance directives: Limitations to completion. – *The American Journal of Hospice & Palliative Care* 29 (2012) / 4, pp. 286–289. – DOI: <https://doi.org/10.1177/1049909111419293>.

²⁵ Code de la santé publique [The Public Health Code], Art. L1111-11. Available, in French, at https://www.legifrance.gouv.fr/affichCode.do;jsessionid=BD10B9E5366ADCF78CFF5C7DBE1EA1E3.tplgfr22s_2?cidTexte=LEGITEXT000006072665&dateTexte=20180807 (most recently accessed on 7.8.2018).

²⁶ Patientenverfügungs-Gesetz – PatVG [The Living Will Act]. Available, in German, at https://www.ris.bka.gv.at/Dokumente/BgblAuth/BGBLA_2006_I_55/BGBLA_2006_I_55.html (most recently accessed on 1.8.2018).

²⁷ According to the first sentence of Section 1901 (1) of the German Civil Code (see the Bürgerliches Gesetzbuch, BGB).

²⁸ Dutch Civil Code, Book 3: Property law in general. Available at <http://www.dutchcivillaw.com/civilcodebook033.htm> (most recently accessed on 1.8.2018).

²⁹ E. Andresen. Notari koht ja roll Eesti õigussüsteemis [The place and role of a notary in the Estonian legal system]. – *Eesti Notariaadi X aastapäev*. Notarite Koda 2003 (in Estonian), p. 10.

- the notary shall elucidate the validity of the relevant facts for the performance of the current transaction, including the identity of the parties to the notarial act;
- the notary warns parties of the risks arising from the applicable law;
- the notary explains to the participants, impartially, ways to achieve the best result that corresponds to the intention of the transaction and the consequences of the transaction requested;
- the notary formulates a notarial deed containing the statement of intention and its explanations, ensuring that they are unambiguous;
- the content of the declaration of intention and the verified facts are verified by the notary as a competent official;
- the notary archives the original of the notarial deed in his office and allows access to it and obtaining copies of it^{*30}.

Thus, the purpose of a notarised authentication requirement for the declaration of intention can be a dual one: to protect both parties from ill-considered actions and to provide them with consultation. The notarised authentication requirement also serves as proof. Nowadays, inclusion of a notary is not justified in terms of taking evidence alone. A significantly more important task of verification is the warning or discretionary function in case of risky expressions of will.^{*31} A patient's will is undoubtedly one of the important transactions in this sense. Subjecting this to compulsory notarial authentication protects the person from 'rushing things' and supports careful consideration. Of all the formal requirements, notarial authentication is the one that best serves the function of warning. In the sense of legal certainty for the document, a notary's obligation to identify the subject (see §10 of the Notarisation Act) and to establish the subject's active legal capacity and capacity to exercise will (see §11 of the same act) is equally important.

On account of the above-mentioned factors, notarial formalisation of a patient's will should be preferred also in respect of the current laws, although the legislation currently foresees no such requirement. If the patient's will is not in a form that involves notarial assurances, health-care professionals do not truly dare rely on it, principally because they have no certainty that it is a will made by a particular person and that said person also was resolute in making that declaration.

6. Issues pertaining to implementation of a patient's will

Although a patient's will has an important role in relation to a person's right of self-determination and simplifying the life of the patient's loved ones, it may not always lead to expected outcomes.

As already mentioned, preparation of a patient's will is a relatively unknown process in Estonia. Therefore, the effective functioning of a particular patient's will may be hamstrung by the fact of the instrument, if it is compiled at all, having been prepared in a manner that does not enable its implementation or does not express the true will of the subject. Also, a person may disregard the fact that having a patient's will may leave him or her without medical care even in a situation wherein he or she would not incur any lasting harmful consequences or prolonged suffering after receiving medical care. With regard to expressing one's true will, mistakes may arise equally from the way in which consulting in preparation of a patient's will is handled. Research shows that people's desire to receive treatment depends, for example, on whether the outcomes of the treatment in question are presented in a positive or a negative manner, alongside how detailed the information is and whether short- or long-term effects are described.^{*32} For instance, in one study, with 201 elderly subjects, the participant requested medical intervention in 12% of cases when the intervention had been presented in a negative manner, in 18% of cases when it had been presented in terms of a guideline already in use, and in 30% of cases when the description had been phrased in a positive manner. Furthermore, 77% of the test subjects changed their mind at least once when presented with the same scenario but described differently.^{*33}

In order to reduce the risk that the patient's will does not represent the person's true will, several descriptions of the various scenarios should be used, to make sure that the person really intends to refuse

³⁰ RKTko 3-2-1-141-14, 28.1.2015, para. 32.

³¹ W. Waldner. *Tõestamisõigus notariaalpraktikas* ['Notarisation Law in Notaries' Practice']. Juura 2008 (in Estonian), p. 19.

³² A. Fagerlin, C.E. Schneider. *Enough: The Failure of the Living Will*. Hastings Center Report, March–April 2004, p. 33.

³³ B.B. Ott. *Advance Directives*, pp. 514, 517; *ibid.*, p. 33.

particular health-care services. Since consulting patients in preparation of patient's wills is unfamiliar territory for Estonian health-care workers, training on this subject should be organised. Such training is necessary also so that the health-care workers know how to check whether the patient has a patient's will and how to proceed in cases wherein one exists.

If a patient's will exists and contains the true, correctly expressed intentions of the patient, it could still be ignored, if its location is unknown and the health-care professional does not receive it in time. There are no mechanisms in place in Estonia addressing how to deliver information on the presence of a patient's will and its contents to health-care workers efficiently. This means that, for example, paramedics or doctors in an emergency room might provide health care to a patient and find out only later that there is a patient's will, according to which the patient never wished to receive such treatment. Also in intensive care, paternalism – that is, decision-making at the discretion of the doctor – often is inevitable because the physicians usually need to act rapidly and since frequently they possess no background information. Therefore, there is always a possibility of a refusal of treatment being ignored and a patient being hospitalised against his or her will and placed in intensive care.^{*34} Therefore, it should be taken into consideration that in situations wherein quick action is vital, doctors will not devote precious time to determining whether the patient may have a document somewhere that articulates a refusal of treatment.

For the patient's will to reach a health-care provider to whom it is targeted, the person should make the document as widely available to health-care providers as possible. To this end, the subject needs to send a notarially authenticated patient's will at least to the family doctor, the largest hospitals in the area, ambulance-service providers, and the E-Health Foundation. The patient definitely should request verification of receipt of the letter, of understanding its contents, and of taking it into account.

Such a solution is relatively inconvenient for both the person preparing the patient's will and its potential implementers. To make the use and implementation of a patient's will easier in the future, creating better-functioning technical solutions seems to be clearly in order. For example, one of the possibilities would be to create a register of patient's wills from which information is sent to health-care professionals automatically, via the e-health system, on whether a given patient has a patient's will and, if so, on the preferences that are expressed in that document.

7. Other considerations in preparing instructions for the future

When preparing instructions for their future, people need to think through the various decisions and protective measures related to maintenance of property and organisation of other matters in scenarios wherein a person has lost his or her capacity to exercise will.

In many countries, specific long-term letters of authorisation are used for organisation of matters associated with personal belongings and property, called lasting power of attorney (in German, *Vorsorgevollmacht*). These are prepared specifically against loss of capacity to exercise will. In practice, they may also contain instructions on how the person wishes to be treated medically. Use of lasting powers of attorney is especially widespread in the common law countries. Estonian law does not regulate powers of attorney of this nature. Authorisation agreements in general are regulated by Chapter 35 of the Law of Obligations Act and the institution of representation in §8 of the General Part of the Civil Code Act. Since a power of attorney is a transactional right of representation that can be tied to specific conditions, it could be claimed that Estonian legislation would enable preparation of a lasting power of attorney. In practice, however, such powers of attorney are not commonplace.

To give some examples of pertinent regulations in other countries, we can cite Finland, where a person at least 18 years of age may grant a power of attorney for a situation in which his or her situation has rendered him or her unable to take care of his or her monetary affairs. The power of attorney must be issued in writing, with the subject signing it in the presence of two witnesses. These witnesses must be aware that they have been invited to participate in providing a power of attorney, but they do not need to know the

³⁴ A. Lehtmet, K. Elmet. *Surmast arsti pilgu läbi* ['On death through the eyes of a doctor']. Viitna 2013. Available, in Estonian, at <http://www.etag.ee/wp-content/uploads/2012/05/Andres-Lehtmet.pdf> (most recently accessed on 1.8.2018).

contents of the document. Finally, for the power of attorney to enter into force, it must be verified by a guardianship authority (local register office).^{*35}

Lasting powers of attorney are known in Germany also. According to the second sentence of Paragraph 1896 (2) of the German Civil Code (BGB), guardianship is not required if the matters at issue for the adult can be taken care of by a person so authorised as well as by the guardian. German notaries use standards of regular powers of attorney in drawing up such documents, but lasting powers of attorney are supplemented: some additional characteristics are applied in accordance with the wishes and needs of the principal.^{*36} A provision similar to the relevant terms in German law can be found in the Estonian Family Law Act^{*37}, §203 (2) of which states that a guardian shall be appointed only for the performance of the functions for which guardianship is required. Guardianship is not required when the interests of an adult can be protected by granting of powers of attorney or by other measures. The version of the Family Law Act that entered into force in 2010 views imposing guardianship as an extreme intervention and sees appointing a guardian as a last resort. Hence, it should be the task mostly of notaries to develop a practical framework for lasting powers of attorney in Estonia.

8. Conclusions

One can state as a conclusion that there are hidden within Estonian law some currently unused measures that enable patients to exercise their right to self-determination, give peace of mind to their loved ones, and facilitate the work of health-care professionals in determining the will of a patient.

At the same time, the comparison between the patient's will instrument and a seat belt could be considered fitting: although a patient's will reduces the risks of receiving unwanted health-care services, it does not provide protection in every situation. To ensure nonetheless that a patient's will may bring the outcomes desired by the subject in as many situations as possible, the patient's will should be compiled in a well-weighed and correct manner. It should be taken into account also that so long as there remain no technical solutions for delivering the document to health-care providers, it is the person preparing the patient's will who needs to ensure that the document reaches as many health-care providers as possible who if unaware of it might provide unwanted health care to the patient.

In addition to a patient's will, other instructions for the future should be contemplated. In practice, it may be important for people to provide instructions on how their assets should be managed as a contingency against a situation wherein they have lost the capacity to express their will. Another tool that should be considered is adoption of lasting powers of attorney as are commonly employed in other countries.

³⁵ Laki edunvalvontavaltuutuksesta [‘The Act on Lasting Power of Attorney’], §6. Available, in Finnish, at <http://www.finlex.fi/fi/laki/ajantasa/2007/20070648> (most recently accessed on 1.8.2018).

³⁶ C. Schall. Le portail des procurations préventives du C.N.U.E.: la voie vers un avenir plus autodéterminé en Europe [‘Title in English goes here’]. – *Mobilité et Protection des Personnes Vulnérables en Europe: Connaissance et Reconnaissance des Instruments* [‘Title of Book in English Goes Here’]. Société de Legislation Comparée 2014 (in French), p. 50.

³⁷ RT I 2009, 60, 395; RT I, 9.5.2017, 28.

The Group Discussion ‘Practical Possibilities of Taking Living Wills into Consideration’

This is a translation of a discussion held in the Estonian language on 31 May 2017. The group discussion transcribed here, with explanatory footnotes provided by Mari Lõhmus, was led by Tarvo Puri, a notary in Tallinn.

Participants:

Helgi Kolk – attending physician and lecturer at the Department of Traumatology and Orthopaedics of Tartu University Hospital, and President of the Estonian Association of Gerontology and Geriatrics

Teija Toivari – Nursing Director for the Tallinn Diaconal Hospital Hospice Department

Mari Lõhmus – oncologist with the Chemotherapy Stationary Department and consultant with the Palliative Care Service of the North Estonia Medical Centre

Liidia Meel – doctoral student with the School of Theology and Religious Studies at the University of Tartu

Rainis Int – notary in Tallinn

Tarvo Puri: Let’s talk about whether and to what extent anyone here in Estonia has had experience with the topic of taking the patient’s wishes into consideration. Have these wishes been written down, are they noted somewhere in digital medical files, and are these topics discussed with a patient – and in what cases?

Helgi Kolk: The prerequisite for any kind of medical treatment is consent: informed consent of the patient. How it is given or received is an entirely different issue. In a trauma unit, where the patients come in with emergencies, they usually have no prior wishes registered. I deal mostly with elderly patients with serious trauma, severe bone fractures. We often have to decide whether to even operate or how to proceed. In reality, there is no-one to ask, because about a third of the patients we see have either a milder or more severe form of dementia and are unable to make adequate decisions. Common practice in such cases is to look for children and caregivers. We hardly ever encounter guardianship over people with dementia. Guardianship can be implemented when serious but non-urgent decisions need to be taken in a hospital setting. In reality, we have a really hard time finding out about consent.

Mari Lõhmus: It’s everyday practice that patients and their loved ones are consulted with regard to their wishes and will. This depends on the care plan. For us in oncology, however, the dimension of time may be somewhat different: we have time to discuss and reflect on things, often discussing matters of treatment and ceasing it. Decision cases in which the patients themselves have written down their wishes are extremely rare. This information is hardly ever in health files either. In day-to-day practice, we write down patients’ decisions to voluntarily refuse treatment or to end it, so that we would have at least some sort of legal grounds or decision to refer to, should that be necessary later.

Tarvo Puri: So there have been talks with patients on ending treatment under certain circumstances?

Mari Lõhmus: There comes a point with any patient when treatment has to be stopped. It is done less in Estonia, but care plans are prepared further ahead in oncology abroad. As soon as it becomes clear that, while the cancer is not treatable, there are numerous end-of-life care options at the moment of diagnosis, we start discussing the options and talk about what to do when the options run out – what the patient’s wishes are in such a situation. I think that is done more and more these days. But we don’t have a document in which the patient’s wishes are written down or registered. There is no advance care plan^{*1} used in Estonia.

¹ Instructions for future treatment and care.

Teija Toivari: The people ending up in our hospice^{*2} are mostly cancer patients at the end of their life. Let's just say that in the 15 years we've been operating, things have improved. More recently there have been discussions with patients about stopping treatment. However, there are still people who end up in the hospice without being sure whether their treatment will continue or not. Relatives may have different expectations than patients. For instance, there is *saattohoitopäätös* in Finland – at one point, a decision is made that this is the end of active treatment^{*3} and it is replaced with palliative care^{*4} until the end of the person's life. That is a much simpler way – if the patient ends up in an ER or someplace similar, the staff know that they should not resuscitate. We would not take such aggressive medical measures to preserve a life as would, in reality, bring nothing but suffering to the patient.

The second place where we feel the lack of guidance sharply is in the case of people who still have weeks, maybe even months, to live – for instance, with a brain tumour. They can no longer express their wishes themselves or say what they want. Relatives may have disagreements. Some may completely accept the situation; others would still like to send the patient for further tests and conclude that the treatment should continue. Some would like us to introduce a sound in the event that the patient loses the ability to swallow independently. Sometimes we as employees see all this and think to ourselves that if we were in the patient's shoes we'd probably not want this. In that case, there's nothing more we can do than try to talk with the loved ones. How well that turns out is a completely different issue. There may be problems, complaints later. This issue always remains.

Liidia Meel: This is often so difficult for the loved ones – emotionally, morally, and also with regard to knowledge. Hospital workers – nurses and doctors – often lack emotional or social preparation that helps them support the family and friends in the decision-making process. For example, the Facilitated Values History has been proposed in international discussion. Narratives from the family and friends of the patient are used to gather information about the patient as a person: what was important to him or her throughout his or her life. For the patient, this means dignity at the end of life. In which this dignity is seen, varies. Such a framework would help both staff and loved ones, because decisions by family and friends may be made on the basis also of the initial emotion, in attempts to keep the person alive for as long as possible, while only later are they able to see what was important for the patient.

Tarvo Puri: Let's take a look at a scenario that is relatively uncommon in Estonia – the patient has written down how he or she should be treated or in what case treatment should be stopped. Are doctors taking this into consideration in Estonia right now?

Mari Lõhmus: If the wishes expressed in writing are clinically adequate and understandable and are in accordance with a doctor's opinion as to what might be in the best interest of the patient, then yes, I do believe that doctors will try to take these decisions into account. Where the means exist – i.e., there are financial and technical possibilities provided by the Health Insurance Fund – they are taken into consideration. On the other hand: is the information given by the patient about the treatment oral or written? There is probably greater reason to believe that the decision has been given more thought when it is written down in a document. But we nevertheless consider the verbal wishes of the patients, just the same.

Tarvo Puri: In that case, yes, if that particular doctor has an opportunity to discuss these matters with the patient. What I was referring to is the situations wherein the patient is no longer able to communicate – no contact can be made – but the patient has a paper with him or her that states a decision not to be treated.

Helgi Kolk: By the way, such papers do exist. For instance, we have Jehovah's Witnesses. When these people end up in A&E, they have a very categorical request that no blood transfusions be given. But that is often necessary, even before surgery. The other thing is that for major surgery we cannot accept a patient who has not consented to blood transfusions, because that need may arise either during or after the surgery. Although I teach second-year students in the ethics course that the patient's wish is a command and there is no place for paternalism – a situation in which doctors choose to make the decisions because they 'know better' and assume that the other party does not – I'll be honest with you: in the case of those elderly people, we really don't know what's best. When we see that the patient would definitely benefit from the surgery – that is, that the patient will likely become mobile again, while not operating would mean him or

² A hospital that is guided by hospice philosophy and follows the generally recognised values in care, among them human rights, human dignity, equality, equal rights, the right of self-determination, and freedom to decide. The focus of a hospice is on ensuring a person's holistic treatment, also at the end of life.

³ Specific treatment of illnesses.

⁴ Here, in the sense of palliative and symptom-relieving care.

her remaining immobile – I have obtained a signature from the patient, explaining that we do blood transfusions only when vitally necessary. Transfusions aren't always necessary; it's just that we need to have a guarantee because we can't let the patient bleed to death. In that case, this is what we have to do – trick them a little bit. It can be a matter of ethics if we go against the person's religious principles: how strong is that faith, and how strong is the will to survive? And when the patients survive, do they want to remain bed-ridden or start walking again – for instance, after a femur fracture? These are the choices we have to make.

Tarvo Puri: Yes, such internal conviction may be formed on religious grounds. Or a person may arrive at it through his or her personal decisions, however.

Helgi Kolk: Yes, but we as doctors talk them into things by using certain arguments, and that is not entirely medically ethical. Or we just claim that we perform a blood transfusion only if it is a matter of life or death. In general, that is, of course, true, but, on the other hand, we should accept that if a person says no, it's a no. After all, that's the way it is. If it is put down in writing and they always carry the document with them, it's a matter of accepting the person's decision.

Tarvo Puri: Here's another question stemming from that. Do they use any specific forms?

Helgi Kolk: Yes, they have special forms with all the information. It's printed text. I believe it's the same for everyone.

Tarvo Puri: What is the experience of others with handling such documents?

Teija Toivari: I can't remember having seen them. But an occasion on which it would be really good to have it is when – in hospice, such a moment is critical – the patient no longer swallows, when the patient's condition has become that severe. It's then when we need to ask whether to continue with drip infusion⁵, insert a probe, or just leave the person be. These are truly complicated moments. If we had a paper stating the patient's wish that no such things be used but it wasn't legally valid, a lot depends on the relatives in terms of whether we would dare to act on the basis of that paper or not.

Tarvo Puri: The most important decision would definitely be whose opinion matters the most. If a patient who no longer speaks expressed his or her wishes earlier, should that decision be the one to consider, or the opinion of the relatives who are sitting around the bed at the hospital?

Helgi Kolk: This is a really important issue, truly. If we were to actually start making these living wills or health wills, it would be vital for the person to decide who will be the one to make the decision, because that is the key issue. Relatives often have very different, downright diametrically opposed interests. One day, we reach a decision that further action (that is, surgery) is too risky and would not improve the person's quality of life. But the next day, the management of the clinic have received a phone call: 'Can you believe that? They didn't even operate!' There is no way of asking the patient's own opinion. And then the relatives start fighting amongst themselves and...

Teija Toivari: Exactly. That's why it would be great if the patient's wishes were official. It would also give the patients a sense of certainty that we are able to act in accordance with their wishes.

Helgi Kolk: For instance, two weeks ago I had a situation in which a man had gangrene affecting his leg and a chronic mental disorder rendered him incapable of exercising his own will. The foot needed to be amputated. Consent was requested from his estranged wife, with whom there hadn't been an official divorce. She did not give permission to amputate. The man was in unbearable pain – we had no analgesics to relieve it with – but you cannot amputate without permission. Finally, the staff managed to talk to her enough to get her to finally agree.

Mari Lõhmus: Situations like that are highly complicated emotionally. It is better to make the decisions beforehand than to start deciding in a crisis situation or at such complicated times as the death or severe illness of a loved one. Even if these topics are extremely complicated or unpleasant to discuss because the entire illness, especially death, may be a taboo topic, the experience of other countries shows that the sooner these difficult topics are discussed, the better, as opposed to handling the situation later.

Tarvo Puri: Could this discussion be held between a doctor and future patients, then? They may not even have a specific health problem just yet. In some countries, when people reach a certain age, they are told it's time to let others know about their decisions on these matters.

Helgi Kolk: It should be discussed with the family doctor. People are used to turning to doctors throughout life. Everyone has a family doctor, but probably not everyone has a personal notary.

⁵ Intravenous fluid-replacement treatment.

Liidia Meel: In a hospital, a doctor should be sufficiently informed and prepared to be able to communicate and direct attention to these matters while being able to refer the patient to other specialists. The doctor shouldn't be the only one to consult with. Maybe the topics that need more attention are in the domain of social work, having something to do with psychology or faith.

Tarvo Puri: So we have two points of choice here now. One of them is that the person expresses – the simplest way would be to do it via some sort of form – his or her desires as to what should be done to him or her and what shouldn't. In a situation in which the choice is whether to continue or to stop the treatment, the patient's personal preferences are discussed at a very early stage. The other option is to have a name written down in that document, for identifying the person who will make these decisions for the patient, to avoid disagreements among family and friends that would place doctors in a position of having to decide and judge for themselves whose opinion to consider. How do you find it easier to implement: letting people make these choices while still healthy by filling in some forms or deciding on a person who has the right to make these decisions for them in the event that they are unable to do it themselves?

Mari Lõhmus: I find that these could be combined as well.

Teija Toivari: Yes, and it would be good simply because if the person made the decisions a long time ago, thoughts may change over time. When the person also adds the name of a loved one, the person selected probably knows the patient's life at that moment and what kind of decisions he or she would make.

Liidia Meel: The loved ones named in such wills are also the keepers of the document in, for instance, England, meaning that they get a copy of the paper.

Helgi Kolk: We should definitely have it in the e-health system. While in oncology a decision doesn't need to be made in a single day, in surgery it is very common. An increase in the number of 80-year-old and older people is clearly visible in Estonia, and the absolute number of people more than 85 years of age is constantly growing. The usual number of patients in our ward is 40. Sports and work traumatology cases are not as common as they used to be. Traffic accidents have gone down as well. In the 1990s, we had 400 traffic deaths per year; now it's 60–70 (the number of people injured is pretty much the same). The elderly have offset the difference. The number of people with trauma necessitating hospitalisation is the same as 20 years ago.

Tarvo Puri: So some sorts of documents are used among Jehovah's Witnesses. In addition, I learned from what you were saying that patients in grave condition are being talked to. The options are being discussed. Is there something of these discussions or documents that can be seen in the Patient Portal?

Mari Lõhmus: All our oncological decisions are made by a consilium⁶. This is also how we try to make decisions on stopping treatment. Our technological problem is that the consilium decisions that direct a patient to symptomatic treatment⁷ never end up in the e-health system. They are visible only in our hospital system.

Helgi Kolk: Are the patients present at these onco-consilia?

Mari Lõhmus: No. The situations in which a symptomatic-treatment decision is made can vary greatly in medicine. The decision may be made in conversation between a patient and a treating physician, taking into account the patient's preferences and the recommendations of the doctor. However, it can also be a medical consiliary decision of which a treating physician notifies the patient. Patients' general condition and state of consciousness can vary from good to very bad, so discussing all the aspects with them may not always be possible.

Tarvo Puri: Has anyone from this consilium talked to the patient first?

Helgi Kolk: Yes, the treating physician.

Mari Lõhmus: There are also some rare cases in which we go and stand next to the patient's bed with the entire consilium and make the decision there.

Tarvo Puri: It seems to me as a lawyer, as a person from outside, that if one of the consilium members has spoken to the patient and communicates to everyone the patient's wishes, it makes perfect sense.

Mari Lõhmus: It might not all be patient's wishes. This is [also from] the clinical⁸ situation, those clinical data based on which the decision is made.

Tarvo Puri: But as part of that there is also the patient's own point of view.

⁶ An assembly of several types of specialists to determine a diagnosis and decide on treatment. A multidisciplinary oncological consilium consists of a surgeon, chemotherapist, radiation therapist, radiologist, and pathologist.

⁷ Treatment that relieves symptoms in a situation wherein treatment specifically to counter the illness itself has been stopped.

⁸ Health data based on analyses and the condition of the specific patient.

Helgi Kolk: It remains relatively unsubstantial.

Mari Lõhmus: It may remain completely unsubstantial. The patient may refuse to accept a decision to stop the treatment. When it is clinically impossible to treat the patient, that doesn't mean we completely end all treatment. It means that the oncospecific treatment / anti-tumour treatment stops, but we will still continue with pain relief⁹, supporting treatment^{*10}, infection treatment, etc.

Teija Toivari: Just a thought that could maybe be taken into consideration in Estonia: We were visited by a palliative-care physician from Scotland who gave a really thorough presentation about it actually being good to be able to include the patient in the decision-making process. Never mind that it might be clinically clear as day that there is no point in continuing with the treatment. But from the viewpoint of that person, it is extremely important to be included in the decisions made at the end of life.

Liidia Meel: The problem is that for patients in a crisis situation when certain events take place around them, whether pathological or something else, they may not always be able to grasp the information shared with them, because both people and situations are different. They are often unable to even record that information in their brain. There have been tests with shared decision-making that includes the patient in the consilium. In comparison with the regular situation in which the patient is consulted with before and after the consilium meeting, the patients who could take part in it were significantly better informed and understood their situation and the options lying ahead much better.

Teija Toivari: I completely agree with that. When we started with the hospice, most of the patients didn't even know they had cancer, let alone that their active treatment had been stopped. Now things have changed – in recent years, legislation has come to require informing the patients of their situation. Most of them know if they have cancer, for example. Some of them also know when the specific treatment was stopped, while for some of them it has somehow remained unclear. But the way of receiving the information has a huge impact. When it comes from somewhere above – this is it; treatment stopped, and nothing will be done – the patient loses hope. When they have months to live, we try our best to rebuild that hope again: they still need to live right now. From the perspective of the person's quality of life at the end of life, it would be very good to have him or her involved the entire time.

Liidia Meel: I would like to add from the point of view of various specialists that, when speaking of documents and forms, we cannot talk about just one document, containing the right answers – patients wish to discuss these topics on different levels. It is about not just the physical aspect or social relationships but also existential and spiritual matters.

Tarvo Puri: For a moment, let's still take an example of a patient who would like to receive no medical treatment – the patient has decided not to let the pain and suffering be protracted. Let's assume we have a consilium. Would it be asked in that consilium meeting whether any of us has talked to the patient to see what he or she thinks of continuing the treatment? Maybe the patient doesn't want to be treated.

Helgi Kolk: I take part in two consilia. In the orthopaedia consilium, many of the people among the deciders are residents who do not actually express their opinions. A patient enters the room full of people in white coats and gets to ask questions. The patients usually have someone with them. The decisions are discussed and accepted very well. But the decisions of the onco-consilium when they are not actually about stopping treatment but all about the treatment itself – whether to have radiation therapy or chemotherapy, or on what to start, when, and where – are much more difficult to deliver to patients. After the consilium meeting, the patient may have already left the hospital, so I need to call the patient or family members or the family doctor. This situation is much more complicated. When the person is right there with us, we often ask him or her to disrobe. We think that this situation is uncomfortable for the patient. In reality, however, patients accept it happily when they see the process of making the decision. Take, for instance, a decision not to operate on some sort of large bone deformation. One leg is much shorter than the other and it is very difficult to walk, but here's the decision: we can't fix this. The decision was taken by this consilium. Not just a phone call from a doctor who took part in that onco-consilium that may have had many more bright heads in it, while the patient has no idea of how the decision was reached. This is a really important aspect emotionally as well.

Tarvo Puri: These discussions held with patients should still be visible somewhere – one day, one week, or a month later. I understand from your words that there is no database that shows the patient's own decisions.

⁹ Medicinal treatment that relieves pain; in certain cases, also palliative radiation treatment or nerve-blocking medicines.

¹⁰ Making a decision together.

Helgi Kolk: There is. We have a sort of patient logbook both in the hospital and with outpatient treatment^{*11} where we can write anything we'd like. Another issue is that the visiting time is 15 minutes. You use that 15 minutes to deal with the patient. Later, when you enter these things in your own free time, you remain quite laconic, adding just the main points. And the things that are not quite so necessary or traditionally added just remain inside your head.

Tarvo Puri: Could it, as a matter of course, contain a remark that the patient does not wish to receive treatment? Would that be taken into consideration next time?

Helgi Kolk: Sure.

Mari Lõhmus: We write such things down. The time factor plays a similar role in our consilium as well. A consilium definitely means much more to a patient when the patient attends as well. But if there are 20 [patients] attending in one day, all taking their clothes off and wanting to see their pictures, plus questions from relatives... From a human point of view, it is very important to explain these things and to do it calmly, but in the consilium we often don't have time for such thorough explanations. This is why consilia in increasing numbers take the path of inviting fewer and fewer patients to the meeting, and decisions are made on the basis of data or in accordance with a physician's judgement.

Liidia Meel: How much information can patients psychologically take in and commit to memory at once? Crisis theories suggest that it would be better to have another person with them who would help them remember and would explain things later. How about involving support specialists so that each consilium would also have a psychologist, a social worker, a religious minister, or (for example) a nurse or counsellor who would later take this patient, sit down with him or her, and go through these points one more time?

Mari Lõhmus: Some people in consilia have tried that, and the results have been very positive.

Teija Toivari: This also seems like a good idea in the sense that if a patient states a wish, we would not write down something that is based on a single emotion. When something has been said that is based on the current emotion, it might change, but when it has already become recorded somewhere, everyone would think it to be the final decision and treat it accordingly.

Tarvo Puri: The possibility of amending and changing is important with living wills too. Would something that was written down for the future at the age of 58 still be valid in two or three years? If a space or register were to be made for living wills for all the doctors to see, it would have to include a timeline, because the most recent one is the one that is valid. Do you feel the same?

Helgi Kolk: Absolutely. In England, there is a version that is revised every two years or so. It may also be done at an arbitrary time – for instance, in the case of a new disease or any other problem. You can always change it; it's not written in stone.

Tarvo Puri: Does the current system of taking notes or writing down information enable seeing some sort of sequence as well, for knowing that the information I am seeing is the most recent, not what the person expressed once a long time ago?

Helgi Kolk: The current Patient Portal is slightly primitive. Many things are not visible directly when one opens it, the content, etc. You have to click through a million visits and names, and it is very hard to understand where the important stuff is. Digging through that takes a lot of time. If it had a slightly better structure, finding important things would probably be easier, but right now it's like being a coal miner.

Teija Toivari: Yes, it should contain the most up-to-date information possible, made available somehow.

Tarvo Puri: But let's move on to examples in which a person interacts with his or her legal representative and discusses these issues, whether it's a lawyer or a notary. In many countries, there are just two witnesses who sign the living will. Do you feel that in a situation wherein these decisions have been discussed but with not a doctor but a person in a completely different field, something might go differently? For instance, a physician receives this document but the information is not clear or understandable, even though it has been discussed with a lawyer or witnesses beforehand. Something gets lost in translation...

Liidia Meel: That's the difference between interdisciplinary and multidisciplinary communication. When everyone acts alone, something like this may easily happen. An interdisciplinary approach requires various specialists to communicate with each other and reach decisions together.

Tarvo Puri: There are probably some forms or models that can be found abroad. Would these help? It could avoid loss of information, delivering it incorrectly or insufficiently.

¹¹ Polyclinic visits.

Teija Toivari: I find that there should definitely be medics to consult, because they are able to tell the presumed consequences of this or that decision. Otherwise, a question may remain as to whether the patient has been sufficiently informed.

Helgi Kolk: It would be like the decision of Jehovah's Witnesses who are adamantly against something without being able to see the possible consequences.

Tarvo Puri: Rainis Int has prepared at least one living will. Maybe you could tell us the story of that person? He was of quite advanced age, and I understand that his desire was to be completely free of any medical treatment, because he considered himself ready to leave this world when his time comes.

Rainis Int: The person who made this living will was born a few years after 1940, if I'm not mistaken. So not the oldest of people. According to him, he doesn't have any illness that could take him from this world any time soon. His philosophical background was that he didn't want to live hooked up to a machine and as a burden to everyone. His children are abroad, and his wife was already over 90 years old. So his point was that if something happened to him... He was a supporter of active euthanasia and would have liked it to be legal in Estonia.

Tarvo Puri: The document expressed a wish not to be treated, under any circumstances.

Rainis Int: Yes. Besides me, a lawyer and a doctor were involved in compiling this document. It contained a whole list of medical services he was not to receive, such as blood transfusions, mechanical ventilation, and a feeding tube. It also included medical services that I as a notary would never have been able to suggest [listing]. When a person visits [...] with a wish for a living will, I as a notary can't even name the medical services to refuse. We prepared the sample in co-operation with a doctor. It listed the services he may not in any circumstances be provided with. We emphasised that in his case, only palliative treatment methods should be used and implemented.

Tarvo Puri: Did you discuss how to make this visible?

Rainis Int: We understood that the Patient Portal, e-health, and whatever these tools are certainly are looked at by doctors. That was the impression we received.

Helgi Kolk: Yes, so it is.

Rainis Int: Then we couldn't provide any solution other than to make a list of all the medical institutions where he might end up in Estonia, and send them the document.

Helgi Kolk: How does it reach the doctor on call?

Tarvo Puri: Let's assume he has gone to a doctor with some sort of health problem and the paper has reached the doctor. Would it currently be honoured that he wants no treatment?

Helgi Kolk: I guess it depends on the situation in emergency cases. As you describe it, he's in his 70s. If he had an acute myocardial infarction^{*12} in Estonia, it is completely treatable even if he has stated his wish not to be treated. So it still depends on the situation.

Teija Toivari: Maybe he should carry that paper with him as well? If he has an accident, an ambulance crew would come and rescue him, and he would remain in that state and be taken to hospital. From there on, he would remain in a vegetative state.^{*13} Actually, his wish should be known already at the moment the ambulance arrives.

Rainis Int: Yes, we talked to him about this. He has that paper at home. The question was, rather – he himself said that his wife is a devout Christian – whether this paper would be displayed at the right moment. He wasn't sure about his wife and suspected that she might try to hide his document.

Helgi Kolk: Although a doctor helped you identify the institutions and procedures during compilation of this document, there is also a need to evaluate the mental state of the person who is making such a statement. This is a medical issue as well: to find out whether he isn't, in fact, deeply depressed and preparing the document because of that.

Rainis Int: Part of the work of a notary is in considering a person's legal capacity and capability of exercising will. In that sense, he passed the test. But, of course, the issue with notarial work is that we are not psychiatrists and are unable to tell such things with 100% certainty. There are probably some nuances through which we could be tricked. The mini mental test^{*14} may not always give the right answer.

¹² A heart attack.

¹³ A condition of severe brain damage in which the person is awake and retains the ability to breathe, open his or her eyes, and maintain blood circulation independently but has no reaction to outside stimulation.

¹⁴ The Mini Mental State Assessment, a short-form test assessing a person's cognitive capabilities.

Liidia Meel: There are various levels on the basis of which it should be assessed. It's not only psychological or psychiatric. The decision may also be born of social conditions, for social reasons. It may have religious grounds. Therefore, various specialists should be involved, to enable delving deeply into these matters. I believe that the system in England requires the living will to go to the family physician firstly, then to the treating physician, and then to their electronic system similar to our e-health. It is up to the person to decide whether he or she wants it to be added there. People can also carry it with them, and there's one copy at home. Additionally, it is sent to the people the patient has specified. Not that a Christian wife at home gets to decide whether to show or not show this paper. The persons the patient him- or herself has trusted are probably more reliable and will really produce that paper in case it's needed.

Helgi Kolk: Yes, but they may not be there when he's resuscitated at home.

Tarvo Puri: I understand that in your opinion, the surest way would be for a doctor to discuss it with the person. Physicians can also describe the perspectives and assess what the modern treatment options are in certain conditions and situations.

Liidia Meel: A doctor should work with other professionals, because they probably don't have enough time to maintain competency in every field.

Teija Toivari: Regrettably, there is another issue that arises here, because our social-welfare system is still largely undeveloped in several ways – it may be too economically burdensome for children and grandchildren to take care of their elderly relatives. These may be considerations in the background. It is a painful topic and should be effectively dealt with.

Helgi Kolk: Exactly. 'There's no money for a care home; no-one can afford it. Please just give me the shot.' Who hasn't heard that?

Rainis Int: In this case, I didn't ask for anyone's bank statement.

Tarvo Puri: The next topic might be a bit more in lawyers' field of expertise. What is the current understanding or knowledge among doctors: is it necessary to make any changes and improvements to our legislation if living wills are even to gain ground in Estonia or to enable them to be taken into consideration?

Helgi Kolk: Definitely. It has to have legal power. Otherwise, it's difficult to consider accepting some kind of paper or entering something in the digital health file when it's not even legal in Estonia. In that case, a corresponding section would be added. At the moment, there is a section of the digital health file that turns red if the person carries a dangerous microbe or has an allergy. It should go red also in the case of the person having made a certain decision. It would be visible straight away if he or she is being admitted somewhere, even to the ER. Once again, chronic issues allow some time, while the most challenging situations are the ones in which a decision is made very quickly. It's just as you said before: the patient may ultimately be in a vegetative state after resuscitation, but we'd have no way of taking back what's been done.

Mari Lõhmus: Having a document is important not only for the people who are ill but also for the ones who are healthy. They should be able to take some time and think about what they would prefer, in case something happens.

Tarvo Puri: It seems that the legislation is perfectly ready to enable medical professionals and lawyers to consider living wills. Rather, it's the practice that has got stuck somehow or is waiting for the next generation. Making the information easily visible and displayed via the Patient Portal or e-health system upon logging in is what needs regulating. Perhaps there should also be a norm as to whether it may be a decision taken by the person alone or instead there should be confirmation by a doctor, two witnesses, and a notary. It is important for the person to understand the consequences of the action and the decision while deciding.

Helgi Kolk: However, what is the legal force? As a compiler, I could write anything I want in it. As a doctor, am I obliged to follow it?

Tarvo Puri: The current legislation – that is, the overall rule – states that health services are to be provided only upon the consent of the patient. There are also some specifying clauses – for instance, if consent can be found somewhere in the past, that too must be taken into consideration. Living wills would actually fall under that clause. The system of making these consent items visible at the most important moment, the time when they are necessary, is the unsatisfactory or faulty part.

Rainis Int: Speaking about the document we wrote, we didn't title it a living will. It was a statement for refusing health services. We used the Law of Obligations Act terminology that refers to the criteria for the provision of health services – that is, when a patient may be provided with such services. So yes, we didn't call it a living will, and there is no such term in the currently valid legislation. There is no such term. The document we made was titled 'Statement for Refusing Health Services'.

Helgi Kolk: In the current context, that's even easier to understand. Working in this area and seeing a document like this, you understand that it has relevance.

Mari Lõhmus: If the question is the format or who should sign the document, I would find it helpful to have some sort of blank or form that covers the most common cases, then an additional field for filling in by the patient, for what he or she would want to be done and what would be out of the question. Who should be involved in this process? I think that, in addition to the patient, there could be medical and, as emphasised several times already, psychosocial help, religious help or counselling, and lawyers. There should also be a loved one or contact person [nominated].

Liidia Meel: Just recently, I happened to read an article about the experience in the Netherlands. If a person expresses – as we said before – a death wish, this can be understood at different levels of intensity, from being suicidal and wanting to end one's life to just having an outlook associated with a serious illness, wherein abandoning life or dying in consequence of refusal of treatment would allow escape from a difficult situation. In this case, the situation is not just physical symptoms and the reason is not just reluctance to become a burden to someone; there are other levels as well. One of them is that of perceived value, dignity. That particular article made a suggestion. There may be different types of counselling, in different areas, but this article dealt with 'dignity therapy', which is a form of psychotherapy. This particular patient made an about-face on refusing treatment because of having had a chance to talk about heartfelt values, to discuss them, and to get in touch with his or her so-called core identity – who one is and why one should stay here for a little while longer. Hence, this is not just physical.

Helgi Kolk: Where has this topic come from anyway? Why wasn't it already being discussed long ago? It has been under discussion for about 50 years, maybe, but not much longer. It has arrived with huge medical progress that lets people stay alive who no longer have a mind of their own or ability to express themselves via speech. That is the source of all this.

Mari Lõhmus: In medicine, it is sometimes easier to treat than to stop treatment. It is easier to continue with endless treatment than to make the decision that it is no longer in the interests of the patient.

Helgi Kolk: At the same time, it's a huge burden on resources, especially in oncology, where treatment can be extremely expensive, but also in other ways. Palliative care long ago ceased being just for cancer patients in Europe. It is care for all terminal patients^{*15} or for people who are about to die. No doctor can tell you whether you have two weeks or two months left. Sometimes there can be surprises. In any case, palliative care is a broader concept that extends not just to oncological patients but also to elderly dementia patients, for example.

Teija Toivari: Yes, treatment can bring a lot of suffering. I see probes the most in my work.^{*16} And, in the end, there are bedsores that may last for months.

Tarvo Puri: The overarching idea of this whole conversation, of the article and with the entire topic, is that a person should have the opportunity to discuss these things while still capable of doing so. In my work and here in this discussion, I can see that the other party needs time for this. You also said that there is 15 minutes per person and many people get handled by a consilium in a day. It's the same for lawyers – we don't have a whole day or even half a day for each client. But, as you pointed out, in many cases, if we or the doctor had this time, the individual's attitude could change completely. The person finds the value or makes decisions in full awareness of their implications.

Liidia Meel: In one palliative-care concept, the care does not start in the terminal phase. Palliative care should, in a way, start already with the diagnosis and increase gradually as the proportion of active treatment decreases. Co-operation of an interdisciplinary treatment team is part of palliative care. Here's where the time factor comes in. If someone starts getting this kind of treatment at the very beginning, it is clearly more likely for the end-of-life wishes to become better known over this time. I visited a hospital in England and saw how such co-operation took place there. All these decisions and discussions, the values that are summed up and the important aspects being brought out, are somehow gathered together so that the data can be accessible later. It would take some time, but if this team would work that way here as well... North Estonian Regional Hospital is a good example with its palliative-care team, but PERH is not the only hospital in Estonia. If it were to begin like that, already in the early stages, we would have more time.

¹⁵ A person in the final stages of life, a dying patient.

¹⁶ Tubes inserted through the nose, the mouth, or skin of the stomach to feed the patient or supply/remove fluids.

Tarvo Puri: The time spent on discussion will pay off at a later stage, when it's necessary to decide whether or not to continue treatment: you would no longer need to expend this resource that could go to waste, because everything has been discussed already.

Helgi Kolk: Another important issue in Estonia is the need to place people under guardianship if they no longer have capacity to exercise will. Doctors have not diagnosed dementia very well in Estonia – various diseases are lumped together as dementia. Therefore, there are no diagnoses and is no way of placing the patient under guardianship. Then, when these unfortunate elderly people end up in the medical system, our hands are tied.

Tarvo Puri: Guardianship could be easily replaced by a document in which the patient states the name of a person authorised to make decisions for him or her, so that there would be no need to communicate with all the relatives.

Helgi Kolk: We usually call one. That's often the only contact we have. But, as I said, for example, also other contact persons appear and express their wishes and opinions, and they are often unable to reach agreement.

Tarvo Puri: But for people to even know that such a contact person can be registered requires a bit of PR activity and distributing the information through the media.

Helgi Kolk: At present, there is a compulsory section in medical records: contact person. Often it's just a phone number. I call them and let them know that their phone number is in this person's medical history. I ask who the person is to the patient. That's how I start. No name, no affinity or anything, just a phone number.

Tarvo Puri: Do ambulance workers too see this?

Helgi Kolk: Yes.

Tarvo Puri: So this is currently the most accessible information in the entire e-health and Patient Portal system – someone's phone number.

Mari Lõhmus: All cases are separate in the Patient Portal. This means that if the patient has been to a clinic, there may be one piece of contact information, and if the patient has been dealt with elsewhere, the information may be different.

Helgi Kolk: It's on the cover of every health file. For example, someone brings a neighbour to a hospital. That person's phone number is taken by the reception staff. They don't even ask who this person is to the patient. The reception-desk worker will write down the number. At the moment, there is no information as to what that number means.

Mari Lõhmus: Maybe the ambulance personnel take a phone number as well?

Helgi Kolk: Yes – for example, the person who summoned an ambulance... When a random person finds someone on the street and calls an ambulance, the ambulance will get that person's phone number.

Tarvo Puri: From a broader perspective, making patients' wishes or even their contact person, that single contact person, visible brings on a set of relatively complex technical issues.

Helgi Kolk: It probably requires some PR to make people more responsible in this regard. The information is not available to people at present. I have seen for myself how a registrar asks for a phone number and there's absolutely no difference what number you give. Often, the number isn't even in use or a completely random number is given. You make a call, and it turns out to be a wrong number. This could start functioning within the current system if it were to receive more meaning than just a number.

Tarvo Puri: What if a doctor calls that number and the person picking up the phone says that 'yes, I know this person, and they told me they don't want to be treated'? Once again, the question is what I asked in the beginning: Let's say that you as a medical professional can tell that it's highly unlikely we could make anything better for that patient. Would the reply received affect your decision?

Helgi Kolk: I think it would, but normally I have tried to handle the situation by inviting the person to the hospital so that I can see who this person really is. I can't let the words of a person on the phone determine someone's destiny when I don't even know who that person is.

Tarvo Puri: We have, more or less, covered everything we planned to discuss. The general consensus is that the legislation needs to be more specific in order to take the patient's wishes into consideration. The technical side needs perfecting and specifying, so that every doctor who has to make these decisions could see clearly in the foreground (against all the other information) whether the person has expressed his or her wishes or provided a name of someone to make that decision. Also, PR activity is needed for guiding people to think about these things and make decisions.



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Arguments and Comments Presented during the Discussion of Dina Sõritsa's Doctoral Thesis *The Health-Care Provider's Civil Liability in Cases of Prenatal Damages*

The dissertation of Dina Sõritsa^{*1} was accepted for conferring of the degree Doctor of Philosophy in the field of law on 13 March 2017 by the Council of the University of Tartu School of Law, with the defence, hosted by said faculty, having taken place on 21 June 2017. The following contribution is based on the opinions I presented in my role as designated opponent for the dissertation.

The dissertation consists of four works published earlier by the candidate and a framing discussion written in the English language. Of the four publications, two were written with Sõritsa as the sole author^{*2} and two in collaboration with Janno Lahe^{*3}.

The author defines the main legal research question addressed by the dissertation as the following:

The objective of this dissertation is to ascertain whether and to what extent the health-care provider should be liable for damages under Estonian civil law in cases of wrongful conception, wrongful birth and wrongful life, considering an outcome that seeks to balance the interests of the child, his or her parents and the health-care provider.

¹ Available at https://dspace.ut.ee/bitstream/handle/10062/55875/soritsa_dina.pdf?sequence=1&isAllowed=y (most recently accessed on 11 June 2018).

² D. Sõritsa. The health-care provider's civil liability in cases of wrongful life: An Estonian perspective. – *Juridica International* 2015/23, pp. 43–51. – DOI: <https://doi.org/10.12697/ji.2015.23.05>; D. Sõritsa. Damages subject to compensation in cases of wrongful birth: A solution to suit Estonia. – *Juridica International* 2016/24, pp. 105–115. – DOI: <https://doi.org/10.12697/ji.2016.24.11>.

³ D. Sõritsa, J. Lahe. The possibility of compensation for damages in cases of wrongful conception, wrongful birth and wrongful life: An Estonian perspective. – *European Journal of Health Law* 21 (2014) / 2, pp. 141–160. – DOI: <https://doi.org/10.1163/15718093-12341311>; D. Sõritsa, J. Lahe. The obligation of the health-care provider to compensate for damages in case of wrongful conception: A model to suit Estonian law. – *Journal of Medical Law and Ethics* 4 (2016) / 2, pp. 95–111. – DOI: <https://doi.org/10.7590/221354016x14690151940745>.

The table of contents of the dissertation indicates that this document of 115 pages deals with the following matters: The first is presentation of an 'Analytical Compendium to a Cumulative Dissertation' (page 5 to 44), in which the candidate explains the research problem, the current status of the field of research and position of the research problem therein, the methods applied, and a summary that covers the main conclusions from her research (published already in various journals). Secondly, pages 44 to 63 provide some instrumental contents: references, abbreviations, acknowledgements, summary description, and a CV. Finally, in part III we find the text of the four articles⁴ previously published: in 2014 in the *European Journal of Health Law*, in 2015 in *Juridica International*, in 2016 in *Journal of Medical Law and Ethics*, and in 2016 again in *Juridica International*. The journals that accepted the articles are peer-reviewed and highly credible in the legal field. All of them are international: the *Journal of Medical Law and Ethics* is based in England, and the *European Journal of Health Law* is based in the Netherlands. *Juridica International* is produced in Estonia, at the University of Tartu, where the candidate is developing her research.

The first observation is that the work presented by the candidate in this compendium has a well-defined issue. She has worked intensively on the same issues for several years: wrongful life, wrongful birth, and wrongful conception. However, we cannot arrive at an obvious impression that the research in 2016 shows a much greater level of development than that in 2014.

Secondly, it must be emphasised that the approach of the dissertant is legal, avoiding philosophical or sociological studies or considerations. The candidate also opted not to delve into medical details, such as which malformations allow eugenic abortion under Estonian law. Such an approach limits the study to a legal perspective but permits more detailed and thorough research into the specifics of tort and contract law.

There are several positive aspects to the dissertation that should be noted, among them the use of up-to-date and relevant literature; the ability to communicate at an international level with academic peers, as proved by the acceptance of the constituent articles for international journals; and, finally, a positive contribution to scientific knowledge coming about by bringing Estonian solutions and personal legal thoughts to the intense debate on the issues presented.

However, a number of issues and ideas remain that could still be discussed – if not in the framework of this compendium, then in future research projects.

For a starting point to the discussion pertaining to case law, it has to be noted that the candidate could have been more ambitious, since the *Yearbook on European Tort Law*, published annually by the European Centre of Tort and Insurance Law (ECTIL), provides access to relevant cases from Spain, Italy, the Netherlands, and several other European countries. That said, one should remember that comparative law has great risks and that one should use only very reliable information and should know enough about the legal systems considered. A (geographically) broader analysis would lead the candidate to apprehend that the French tort law family (encompassing France, Spain, to a certain extent Italy, and also to some extent the Netherlands) are exactly those countries where wrongful-life claims are or have been accepted in case law. Ultimately, the less dogmatic approach or the non-existence of the requisite of wrongfulness may have contributed to these cases in the above-mentioned countries.

Along the same lines, the contribution of Article 24 of the Oviedo Convention could have been considered. For example, Prof. Ewoud Hondius argues in 'The Kelly Case – Compensation for Undue Damage for Wrongful Treatment'⁵ that Kelly, a child who had been born with a severe handicap, suffered 'unfair' damage, as articulated in Article 24 of that convention⁶, which had to be compensated for. In this connection, we have to ask whether the Oviedo Convention applies in cases of this nature and, if so, how best to apply its Article 24.

In her dissertation, the candidate excludes from the scope of her research the problem of wrongful actions against the mother (or the parents). The reasons for this decision cannot to be found in the

⁴ See footnotes 2 and 3.

⁵ See the details provided in that work: E. Hondius. The Kelly case – compensation for undue damage for wrongful treatment. – Jan K.M. Gevers et al. (eds). *Health Law, Human Rights and the Biomedicine Convention: Essays in Honour of Henriëtte Roscam Abbing*. Martinus Nijhoff 2005, p. 115. See also B.A. Koch (ed.). *Medical Liability in Europe: A Comparison of Selected Jurisdictions*. Walter de Gruyter 2011, p. 398. – DOI: <https://doi.org/10.1515/9783110260168>.

⁶ The Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine (Oviedo Convention), of 4.4.1997, Article 24 states: 'The person who has suffered undue damage resulting from an intervention is entitled to fair compensation according to the conditions and procedures prescribed by law.'

compendium. For a doctoral dissertation it would not have been excessive to include such cases and dilemmas in the discussion. Moreover, these are important for their potential to give prominence or leave in the shadows the wrong actions with regard to prenatal damages against doctors and health-care providers.

Furthermore, the candidate argues that ‘although the doctor is not party to the contract between the patient and the health-care provider, the doctor is still personally liable for the performance of the contract beside the health-care provider’. In fact, Estonian law puts forth such a solution^{*7} as seems to be an exception to the rule of *inter partes* effect of the contract. On the other hand, some authors advocate the institutionalisation of medical liability, looking instead to the particular doctor or health-care professional^{*8}, and literature addressing medical error supports the conclusion that organisational fault and not individual-level blame is the main source of errors.^{*9} Therefore, the solution of putting so much legal stress on the individual professional may be of debatable merit.

The candidate refers in the 2014 article ‘The Possibility of Compensation for Damages in Cases of Wrongful Conception, Wrongful Birth and Wrongful Life: An Estonian Perspective’^{*10}, in arguing that mitigating damage by terminating the relevant pregnancy would be highly questionable since it would not be in compliance with **the principle of good faith**. The understanding of the principle of good faith with respect to these cases could be elaborated upon more deeply and in line with the research question formulated in the dissertation. Could we invoke the argument of the need to respect the physical and moral integrity of the pregnant woman? Might this be a case of ‘hypothetical consent’?

Moreover, in the section of the work about wrongful birth and compensation for deprivation of the chance to make a choice about abortion, the above-mentioned issue of hypothetical consent could be analysed. Who has the burden of proof? The author of the dissertation advocates reading statistics or sociological data related to eugenic abortion. What constitutes the legal foundation for this position is not made clear to the reader. Should we not look for the concrete hypothetical will of the mother (or couple)?

With regard to the discussion about wrongful life, a pragmatic question related to the dominant thesis whereby a wrongful-life claim can be denied might be raised: **What if parents who have received compensation for wrongful birth then abandon the child and move abroad? Could a way to avoid this situation be envisaged?** Some argue that pure compensation of the handicapped child is the task of social-security law and not of tort law. In general, the candidate presents the wrongful-life theory as being advocated by very few authors and courts. That is not an accurate picture. There are many authors, also in Germany, who argue in favour of the concept of wrongful life.^{*11}

In general, the dissertation could have debated in greater depth the influence of the development of prenatal medicine and the new trend of so-called **liberal eugenics, family eugenics, or private eugenics** (Habermas), which is being practised every day and with great social support^{*12}. This is in response to a desire to have children and the interest in having children who are not afflicted with serious diseases, after

⁷ See the Estonian Law of Obligations Act, whose §758 (2) states that qualified doctors and dentists, and nurses or midwives providing health-care services independently, who participate in the provision of health-care services and operate on the basis of an employment contract or another, similar contract entered into with a provider of health-care services shall also be liable personally alongside the provider of health-care services for performance of a contract for the provision of health-care services.

⁸ R. Cascão. *Prevention and Compensation of Treatment Injury: A Roadmap for Reform*. The Hague, Netherlands: Boom Juridische Uitgevers 2005.

⁹ T.A. Brennan et al. Relation between malpractice claims and adverse events due to negligence: Results of the Harvard Medical Practice Study III. – *New England Journal of Medicine* 325(1991), pp. 370–376 (esp. p. 324). – DOI: Relation between malpractice claims and adverse events due to negligence: Results of the Harvard Medical Practice Study III; U.S. Department of Health and Human Services Expert Group, *An Organisation with a Memory: Report of an Expert Group on Learning from Adverse Events in the NHS Chaired by the Chief Medical Officer*, 2000.

¹⁰ See Note 3.

¹¹ For a single example, see B. Losch, W.C. Radau. “Wrongful birth” und “wrongful life”. Probleme der rechtlichen Bewältigung ärztlicher Pflichtverletzung bei der menschlichen Reproduktion. – *Ethik in der Medizin* 12(2000), pp. 30–43. – DOI: <https://doi.org/10.1007/s004810050093>. With regard to a contract for protection of third parties, see E. Deutsch, A. Spickhoff. *Medizinrecht* Springer 2014. – DOI: <https://doi.org/10.1007/978-3-642-38149-2>, esp. comments on p. 220 and p. 223 ff. by G. Schiemann. – *J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch: mit Einföhrungsgesetz und Nebengesetzen* Berlin: Sellier – de Gruyter 2005, §249, no. 209 and §823, no. 51; J. Hager. Das Recht der unerlaubten Handlungen. – *J. v. Staudingers Kommentar zum bürgerlichen Gesetzbuch mit Einföhrungsgesetz und Nebengesetzen. Eckpfeiler des Zivilrechts* Berlin: Sellier – de Gruyter 2005, pp. 819–876, 827–828.

¹² Here I would like to point to the 2015 article in *Juridica International*, ‘The Health-Care Provider’s Civil Liability in Cases of Wrongful Life: An Estonian Perspective’. See Note 3.

prenatal diagnosis and abortion^{*13} or after pre-implantation genetic diagnosis and selection of embryos or even selection of an embryo that could provide material to save a relative's life.

In the *Journal of Medical Law and Ethics* article published in 2016, 'The Health Care Provider to Compensate for Damages in Case of Wrongful Conception: A Model to Suit Estonian Law', it is stated that the damage lies not in having a child as such but in the obligation to bear that child's upbringing and expenses. In relation to this issue, one could conduct further research into seeking compensation for **unwanted parenthood** (when someone becomes a parent without consenting to this'. For example, Cees van Dam argues in *European Tort Law 2012*^{*14} that there is a right to non-pecuniary damages in cases wherein the man engaged in sexual relations without the intent of conception.

In conclusion, the thesis provides us with an advancement of knowledge, since the candidate explores legal solutions for Estonian law, considering comparative law and establishing a fruitful dialogue with important sources (literature and case law). Secondly, the doctoral studies have allowed the candidate to tackle and overcome the difficulties of international publication and to enter into a scientific dialogue in the arena of international science.^{*15} The author's efforts in that domain could have gone further, though, as the scope of the research might have been more ambitious had she not avoided both the thorny bioethics-related and tricky philosophical issues of prenatal damage, along with the medico-legal details of these cases. Finally, it must be noted that the critical observations presented should be taken as inviting discussion only. There are no doubts that the quality of the work submitted proves the author's ability to provide independent academic argumentation and to apply advanced comparative methods.^{*16}

¹³ Article 142 of the Portuguese Penal Code regulates abortion. It is not punishable (or, as some authors put it, not wrongful) if i) it was envisaged as saving the life or health of the mother, at any time; ii) there is a risk to the health of the mother (up to 12 weeks); iii) the conception was caused by a crime against sexual freedom or self-determination (up to 16 weeks); iv) the embryo has a serious disease or serious genetic malformation (up to 24 weeks or, if the embryo is not viable, with no time limits); or v) the pregnant woman wants to choose it, until 10 weeks of pregnancy.

A 'right' to abortion exists 'by option of the woman, within the first ten weeks of pregnancy'. Women who seek an abortion must undergo mandatory counselling, and also a three-day mandatory waiting period has been established.

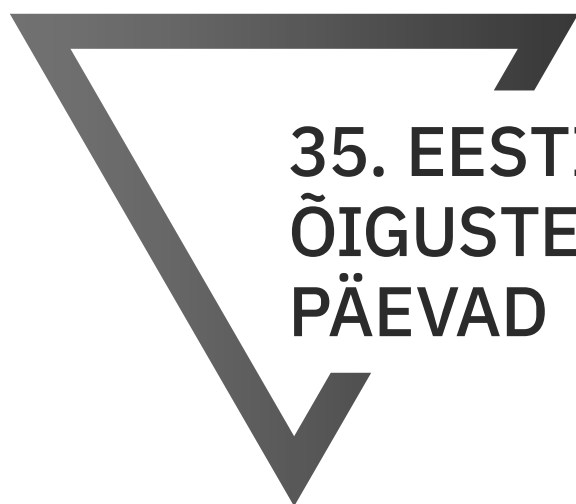
¹⁴ *European Tort Law 2013*. Oxford University Press 2014. – DOI: <https://doi.org/10.1093/acprof:oso/9780199672264.001.0001>.

¹⁵ However, four years of research could have been more expressive of the evolution in the issues and the literature used by the author, thereby itself representing evolution. This leads to the suggestion that such development should be seriously taken into account in future dissertations that are based largely on articles published over several years.

¹⁶ 'The core component of doctoral training is the advancement of knowledge through original research. At the same time it is recognised that doctoral training must increasingly meet the needs of an employment market that is wider than academia,' state the Salzburg Principles, 2005. For more information about the Salzburg Principles, see <http://www.ehea.info/cid102053/doctoral-degree-salzburg-2005.html> (most recently accessed on 11 June 2018).

Abbreviations

RT	<i>Riigi Teataja</i> ('State Gazette')
CCSC	Civil Chamber of the Supreme Court
CCSCd	Decision of the Civil Chamber of the Supreme Court
CCSCr	Regulation of the Civil Chamber of the Supreme Court
CLCSCd	Decision of the Criminal Law Chamber of the Supreme Court
ACSCd	Decision of the Administrative Law Chamber of the Supreme Court



35. EESTI
ÕIGUSTEADLASTE
PÄEVAD



REPUBLIC OF ESTONIA 100 – A MODERN STATE

Wednesday, 3 October

20:30–22:30

Welcoming evening

Estonian Academic Law Society – 30

Welcoming address by Irene Kull, Professor, Chairman of the EALS

Kärt Raud – *Studying at University, Moot Courts and Summer Schools*

Presentation – Code of Civil Procedure (I–III). Commented edition

Thursday, 4 October

9:00–10:00 Morning coffee
(Vanemuine Concert Hall, doors will open at 8:30)

Plenary meeting

(Vanemuine Concert Hall)

10:00–10:30 Play “Meeta and Justice” – author **Maimu Berg**, directed by **Piret Kuub**
The story starts in the year 1920 and ends in 2018. The characters are Meeta Janno Villecourt, Kaarel Parts, president of the Surpeme Court and Anton Palvadre, Chancellor of Justice of the Republic of Estonia before World War II. They are looking back at the hardships of establishing our own rule of law, and commenting on current life in Estonia from the viewpoint of legal science.
Actors: Raivo Adlas, Urmas Kalla, Julia Laffranque (Judge, European Court of Human Rights; Visiting professor of the University of Tartu).
Opening – **Enn Tonka**, President of the Estonian Lawyers Union
Irene Kull, Chairman of the Estonian Academic Law Society

Technology of the Constitution

Moderator: **Tarmo Jüristo**, Chairman of the Management Board of Praxis
10:30–12:00 **PhD Ülle Madise**, Chancellor of Justice of the Republic of Estonia; Visiting Professor, University of Tartu
Changes in Society Reflected in the Constitution – Historical and Comparative View
Jaan Tallinn, Visionary / Entrepreneur
Existential Risks
Vivian Loonela, Member of Cabinet of Vice-President Andrus Ansip, European Commission
Existential Possibilities
12:00–12:30 Coffee break

Technology and the Person

Moderator: **Mag. iur. Sten Andreas Ehrlich**, Deputy Secretary General on Labour and Employment Policy, Ministry of Social Affairs
12:30–14:00 **PhD (History) Margus Laidre**, Estonian Ambassador to Russia
Do New Times Always Create New People? Has Technology Caused More Harm or Good?
Dr Katrin Merike Nyman-Metcalf, Visiting Professor, Institute of Law, Tallinn University of Technology; Programme Director of Research and Legal Aspects, Estonian e-Governance Academy
Feasibility of Protecting the ‘Old’ Fundamental Rights (Privacy, Intellectual Property Protection, etc.)
Mag. iur. Karmen Turk, Attorney-at-Law, Law Firm TRINITI; Visiting Lecturer, IT Law, University of Tartu; Expert on the Council of Europe
Robots around us, with us and for us?
14:00–15:00 Lunch, participants moving into different sections

Artificial Intelligence at the Service of a Lawyer

(Vanemuine Concert Hall)

- Moderator: *Mag. iur. Hannes Vallikivi, President, Estonian Bar Association;
Attorney-at-Law and Managing Partner, Law Firm Derling*
- 15:00–16:30 Let us forget about singularity and attributing a soul to robots for a moment and discuss the ways in which artificial intelligence will impact the work of lawyers in the near future. To what extent could a lawyer's work be automated and what are the economic impacts of innovation? What needs to be done to make legislation and files machine-processable? Could it be possible that our little legal market and restricted linguistic space may prove fatal to the administration of justice in Estonian?
- Sten Luiga, Senior Partner, Law Firm COBALT, former Chairman of the Board, Estonian Bar Association*
Tõnis Saar, Secretary General, Ministry of Justice
Silver Traat, Texta, Co-Founder
- 16:30–16:45 Coffee break

Protection of Human Rights in the Digital Age

(Vanemuine Concert Hall)

- Moderator: *Dr. iur. Mart Susi, Professor of Human Rights Law, Tallinn University*
- 16:45–18:15 *PhD Tiina Pajuste, Lecturer of International Law, Tallinn University*
Theoretical and Practical Challenges of the European Data Protection Reform
*Mag. iur. Karmen Turk, Attorney-at-Law, Law Firm TRINITI; Visiting Lecturer, IT Law, University of Tartu;
Expert on the Council of Europe*
Rule of Law in Digital Society – Elementary or a Needle in a Haystack?
Dr. iur. Mart Susi, Professor of Human Rights Law, Tallinn University;
Chief Editor, East European Yearbook on Human Rights
Equation to Balance the Internet
Introduction of the study 'Protection of Freedom of Speech in the New Media Environment.
The Nordic Experience'

Medicine and Penal Law: Strict Liability vs. Better Quality

(V Spa Conference Centre)

- Moderator: *Steven-Hristo Evestus, Chief State Prosecutor, Office of the Prosecutor General*
- 15:00–16:30 *MD, PhD Raul-Allan Kiivet, Professor of Healthcare Management, University of Tartu*
Medicine Requires Encouragement of Medics, not Punishment
Dr. iur. Ants Nõmper, Attorney-at-Law and Chief Partner, Law Firm Ellex Raidla
Medical Law Does not Need Punishments for Doctors
Kadri Tammepuu, Member of the Board, Estonian Patients Union
The Patient Does not Need Punishments for Doctors
- 16:30–16:45 Coffee break

Who is to Blame? Do the Sharing Economy and Technological Possibilities Change our Understanding of (Legal) Liability?

(V Spa Conference Centre)

Moderator: *Mag. iur. Kai Härmand, Deputy Secretary General for Legislative Policy, Ministry of Justice*

16:45–18:15 *Dr. iur. Karin Sein, Professor of Civil Law, Deputy Head, Department of Private Law, University of Tartu*

Who Are the Players? Producer, Consumer, Possessor of Major Source of Danger, and Other Subjects

Dr. iur. Janno Lahe, Professor of Delict Law, University of Tartu

Who is responsible? Challenges of Tort Law based on the Example of Autonomous Vehicles

Dr. iur. Erkki Hirsnik, Judge, Tartu County Court

Who is Responsible? Challenges of Penal Law

Role of Procedure in Persuasion

(Dorpat Conference Centre)

Moderator: *Kairi Kaldoja, Chief Prosecutor, Southern District Prosecutor's Office*

15:00–16:30 *PhD Andreas Kangur, Lecturer of Criminal Procedure, University of Tartu*

Orienting Criminal Procedure to Psychology

Oliver Nääs, Attorney-at-Law and Partner, Law Firm LEXTAL

Presenting of Evidence and Shaping the Inner Conviction of the Court –

Observations from behind the Counsel Table

Mag. iur. Sten Lind, Judge, Tallinn Circuit Court

Separating Admissibility and Reliability of Evidence: a Judge's View

16:30–16:45 Coffee break

Role of the State, Local Government and the Community in Social Welfare

(Dorpat Conference Centre)

Moderators: *PhD Lauri Leppik, Senior Research Fellow, Estonian Institute for Population Studies, School of Governance, Law and Society, Tallinn University*

Aare Kruuser, Lecturer, School of Governance, Law and Society, Tallinn University

16:45–18:15 *PhD Lauri Leppik, Senior Research Fellow, Estonian Institute for Population Studies, School of Governance, Law and Society, Tallinn University*

Role of the State, Local Government and the Community in Social Welfare

Dr. iur. Vallo Olle, Senior Adviser, Office of the Chancellor of Justice

Welfare Service Issues at the Desk of the Chancellor of Justice

Aare Kruuser, Lecturer, School of Governance, Law and Society, Tallinn University

Law as a Means of Organising Social Welfare Practical issues

Legal History I. Estonia – Our Love and Worry

(V Spa Conference Centre)

- Moderator: *Dr. iur. Marju Luts-Sootak, Professor of Legal History, University of Tartu*
- 15:00–16:30 Doctor of History **Jaak Valge**, *Associate Professor of Modern and Contemporary History, University of Tartu; Senior Research Fellow, Estonian Institute for Population Studies, Institute of Social Studies, Tallinn University*
 Development of Popular Initiative and Referendum Regulations in Estonian Constitutions
PhD Ivo Juurvee, Head of Security & Resilience Programme / Research Fellow, International Centre for Defence and Security
 Legal Protection of Classified Information in the Republic of Estonia, 1918–1940
PhD Merike Ristikivi, Associate Professor of Legal History, University of Tartu
 Making the Law Estonian in the 1920s–30s
 Doctor of History **Eero Medijainen**, *Professor of Modern and Contemporary History, University of Tartu*
 Issues Regarding Recognition and Non-Recognition of Estonia as a State
- 16:30–16:45 Coffee break

Legal History II. Estonia – Our Love and Worry

(V Spa Conference Centre)

- Moderator: *Dr. iur. Marju Luts-Sootak, Professor of Legal History, University of Tartu*
- 16:45–18:15 *Mag. iur. Hannes Vallikivi, President, Estonian Bar Association; Attorney-at-Law and Managing Partner, Law Firm Derling*
 Fate of Estonian Courts and Judges, 1940–1941
 History Doctor **Meelis Maripuu**, *Member of the Board, Estonian Institute of Historical Memory*
 Employment of the Legal System into the Service of the Political Regime in Estonia in the 1950s
PhD Tõnu Tannberg, Professor of Estonian History, University of Tartu
 On the Events at the Faculty of Law of the University of Tartu in the Decades after the War
Toomas Hiio, *PhD student, Institute of History and Archaeology, University of Tartu*
 (Past) Estonian Legislation as One of the Sources of Historic Research: Timelessness of the Search for Truth and Temporalness of Agreement
- 20:00 **Festive Evening**
 (Science Centre AHHA, doors will open at 19:30)

Friday, 5 October

Legal Language I. The language of Europe is translation (*Umberto Eco*).

New Language Technologies and Legal Challenges

(V Spa Conference Centre)

Moderator: *PhD Heiki Pisuke, Head of the Estonian Language Department, Directorate General for Translation (DGT), European Commission; Visiting Professor, University of Tartu*

9:30–10:30 How Does European Union Law Become Estonian Law? Machine Translated Legislation – a New Normality?

Speakers: **Merit-Ene Ilja**, Director, Directorate General for Translation (DGT), European Commission; former Director of the Estonian Legal Translation and Legislative Support Centre;

Madis Vunder, Director, Directorate-General for Multilingualism, Court of Justice of the European Union;

Ann Stolfot, Lawyer-Linguist, Legal Service, Council of the European Union;

PhD Mark Fišel, Associate Professor in Language Technology, Institute of Computer Science, University of Tartu;

Dr. iur. Kadri Siibak, Chief Specialist, Financial Markets Policy Department, Ministry of Finance

10:30–11:00 Revolution in Language Technology or Which Legal Issues Arise in Teaching Estonian to a Fridge?
PhD Aleksei Kelli, Professor of Intellectual Property Law, University of Tartu; Head of Legal Committee, European Research Infrastructure for Language Resources and Technology, European Research Infrastructure Consortium (CLARIN ERIC);

PhD Arvi Tavast, Qlaara, Founder

11:00–11:30 Coffee break

Legal Language II. Comprehensibility and Interpretation of Legislation and Court Decisions

(V Spa Conference Centre)

Moderator: *Mag. iur. Andres Parmas*, Judge, Tallinn Circuit Court; Assistant in Criminal Law, University of Tartu

11:30–13:00 Word, Term, Concept: Language of Legislation. Who Needs to Understand Legislation and Court Decisions?

Speakers: **Allar Jõks**, Partner and Attorney-at-Law, Law Firm SORAINEN;

Katre Kasemets, Senior Terminologist, Institute of the Estonian Language;

Helen Kranich, Senior Adviser, Office of the Chancellor of Justice;

PhD Raul Narits, Professor of Comparative Jurisprudence, University of Tartu;

Virgo Saarmets, Judge, Tallinn Circuit Court;

Brit Tammiste, Adviser, Analysis Division, Ministry of Justice

Statehood and the European Union: Boundaries of Sovereignty and the Constitution

(Dorpat Conference Centre)

Moderator: *PhD Katre Luhamaa*, Lecturer of European Law and International Law, University of Tartu

9:30–11:00 *Prof Anneli Albi*, University of Kent, Canterbury, United Kingdom

Overview of the Results of the European Research Council Grant Project 'The Role of National Constitutions in European and Global Governance'

LLM Madis Ernits, Judge, Tartu Circuit Court; Doctoral Student, University of Tartu

On Constitutional Amendments of Transfer of State Powers

PhD Eve Fink, Attorney-at-Law, Law Firm FINK

Changes in the Principle of Legitimate Expectation through the Legal Order of the European Union

PhD Carri Ginter, Associate Professor of European Law, University of Tartu

Differences in Justifying Fundamental Rights in the European Union and National Laws Based on the Example of Reverse Discrimination

11:00–11:30 Coffee break

Taxation of Technology and the Technology of Taxation

(Dorpat Conference Centre)

Moderator: **Dmitri Jegorov**, *Deputy Secretary General for Tax and Customs Policy, Ministry of Finance*

11.30–13.00 **Guido Viik**, *Entrepreneur and Futurologist*

Technology Changes the World and It also Changes us: Working in the Future, People's Connection with the State and Social Security, Workforce vs. Robots, Data is the New Oil.

LLM Helen Pahapill, *Adviser, Tax Policy Department, Ministry of Finance*

Internet as a New Jurisdiction: How to be Everywhere without Being Everywhere:

Is It Time to Revise the Principles of Taxation of Profits in the World?

Evelyn Liivamägi, *Head of Tax Department, Tax and Customs Board*

The Impact of Technology on Tax Administration: Would We Even Need Tax Declarations and Tax Offices in the Future and What Does Technology Mean to Tax Auditing?

Dr. iur. Lasse Lehis, *Adviser, Administrative Law Chamber, Supreme Court*

Principles and Technology of Tax Law: What Remains and What Goes, Control via Technology – a New Big Brother, Balance between Data Protection and Ensuring Fair Competition?

Transfer of the State's Prosecution Function to the Bar Association

within the Context of the State Reform: Discussion on the Contents, Pros and Cons

(Dorpat Conference Centre)

Moderator: **PhD Eerik Kergandberg**, *Justice of the Supreme Court*

9:30–11:00 **Paul Keres**, *Attorney-at-Law and Partner, Law Firm Glikman Alvin & Partnerid*

Jaanus Tehver, *Attorney-at-Law, Law Firm Tehver & Partnerid; Vice-President, Estonian Bar Association*

Lavly Perling, *Prosecutor General*

11:00–11:30 Coffee break

Local Government Reform

(Dorpat Conference Centre)

Moderators: **Dr. iur. Igor Gräzin**, *Member of the Riigikogu*

Aare Kruuser, *Lecturer, School of Governance, Law and Society, Tallinn University*

11.30–13.00 **Airi Mikli**, *Adviser, Auditor General*

Lessons Learned from the Administrative Reform

PhD Külli Taro, *Head of Law Enforcement Affairs Department, Office of the Chancellor of Justice*

How Could Administrative and State Reform Impact Legislative Drafting?

PhD Aleksander Pulver, *Personality Psychology Lecturer, School of Natural Sciences and Health, Consultant on Experimental Psychology and Behavioural Sciences, Tallinn University*

Issues Related to Organisation of State and Local Government Operations. Viewpoint of a Psychologist.

Dr. iur. Igor Gräzin, *Member of the Riigikogu*

Law as a Means in Implementation of State and Local Government Reforms

13:00–14:15 Lunch

A Modern State. Where to Go from Here?

(Dorpat Conference Centre)

Prof. **Toomas Asser**, *Rector of the University of Tartu*

Presentation of Awards for the Wikipedia Jurisprudence Competition 'Estonian Law'

Moderator: *Dr. iur. Irene Kull, Professor of Civil Law, University of Tartu*

Chairman of the Estonian Academic Law Society

14:15–16:00 The debates of the two days are summarised in a podium discussion. Representatives of different legal professions and branches bring out the most important aspects of the discussions. What can and should be done immediately to ensure that our legal order would better support the development of technology and the society's adjustment to it? The listeners are also invited to participate via questions and remarks.

The participants in the podium discussion are:

Mati Kadak, *Chairman, Estonian Chamber of Bailiffs and Trustees in Bankruptcy;*

Ülle Madise, *Chancellor of Justice of the Republic of Estonia;*

Lavly Perling, *Prosecutor General;*

Priit Pikamäe, *Chief Justice, Supreme Court;*

Meelis Pirn,

President, Estonian Lawyers Union;

Urmas Reinsalu, *Minister of Justice;*

Merle Saar-Johanson, *Chairman, Chamber of Notaries;*

Karin Sein, *Professor of Civil Law, University of Tartu;*

Hannes Vallikivi, *President, Estonian Bar Association*