



Dear reader,

A large proportion of the articles in *Juridica International* this year is dedicated to criminal law. A paper that truly addresses the issues of legal dogmatics in this field in depth with regard to delict of negligence was contributed by Laura Feldmanis. Raimo Lahti's article on the criminal liability of a legal person is written from the standpoint of criminal and comparative law, while Frieder Dünkel's approach to German sanction law should provide plenty of interest and joy of discovery for legal scientists and practitioners alike. Thomas Weigend's submission, in turn, takes a rather unique look at the material element in criminal law and criminal procedure. He focuses his attention on truth and values. Andres Parmas has considered Estonian criminal law in relation to the dogmatics of international criminal law. All of these articles are an outgrowth of presentations made at a jubilee conference that took place at the University of Tartu. I would like to take the opportunity here to thank everyone who participated in the conference – especially, of course, the speakers.

In addition, two articles on medical law had their beginnings in presentations at the conference. One of them, by Henning Rosenau, is squarely in the domain of classic medical law, bringing together discussion of human rights and of issues connected with reproductive medicine. The other medical-law article, by Henning Lorenz, draws particular attention to an addition to German criminal law that has made waves (and met a lot of criticism) in the fields of criminal law, medical law, and legal policy in general: criminalising assisted suicide. This topic has been subject to intense discussion also in the media of Estonia and other countries.

I can happily say on behalf of both myself and the editorial board that, at the same time, the new issue offers plenty to read also for those less interested in criminal and medical law. Self-driving cars are a matter of interest not only to engineers but also for lawyers. Taivo Liivak's 'What Safety are We Entitled to Expect of Self-driving Vehicles?' considers some of the issues that we will soon face on the streets on a daily basis. Private law is represented in the article 'A Half-built House? The New Consumer Sales Directive Assessed as Contract Law'. This piece on consumer protection and contract law was submitted by Kåre Lilleholt, who holds the title Doctor Honoris Causa from the University of Tartu. A paper jointly authored by Ilya Ilin and Aleksei Kelli, 'The Use of Human Voice and Speech in Language Technologies: The EU and Russian Intellectual Property Law Perspectives', examines the legal protection of intellectual property. The field of constitutional law is represented too, by Ivo Pilving's presentation of an approach to fundamental rights in the context of European Union law in 'Parallele Anwendbarkeit von Grundrechtecharta der EU und nationalen Grundrechten'. Still more colours are added to the legal palette by Märt Maarand, with his article 'The Concept of Recovery of Credit Institutions in the Bank Recovery and Resolution Directive', and by the paper 'Is Full Preference for a Secured Claim in Insolvency Proceedings Justified?', by Anto Kasak.

A handwritten signature in dark ink, reading 'Jaan Sootak'. The script is cursive and fluid, with the first name 'Jaan' and last name 'Sootak' clearly distinguishable.

Jaan Sootak
Professor of Criminal Law
Member of the Editorial Board

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Kåre Lilleholt
Professor
University of Oslo

A Half-built House? The New Consumer Sales Directive Assessed as Contract Law

1. Introduction

The article discusses some aspects of the total harmonisation objective of the new consumer sales directive (hereinafter SGD).^{*1} The purpose of the directive is to ‘contribute to the functioning of the internal market’ (Article 1). As cross-border consumer contracts are usually governed by the law of the country where the consumer has his or her habitual residence,^{*2} sellers offering goods to consumers in other countries than their own must be prepared to deal under different contract law regimes. This may lead to additional costs, something that may make cross-border contracting less attractive.^{*3} The SGD is therefore a total harmonisation directive, meaning that, as a rule, consumers may not be given either stronger or weaker protection under national law regarding the issues regulated by the directive.^{*4} The 1999 consumer sales directive – which will be repealed by the SGD – is a minimum harmonisation directive; member states are free to maintain or introduce more consumer-friendly rules but not less protective rules.^{*5} The total harmonisation principle of the new directive can necessarily not give the consumers stronger protection than a minimum harmonisation directive would have done. The effect of the total harmonisation principle must therefore be measured by the extent to which more legal certainty for sellers has been achieved.

Not surprisingly, the new directive bears the mark of many compromises, several of them resulting from the legislative process in the Parliament. On some issues, member states today have more stringent rules on consumer protection than the ones proposed by the Commission, and reduction of consumer protection will naturally lead to political discussions. The final text of the SGD allows for national laws *varying* the rules of the directive (for example, the time limit for the seller’s liability), as well as national laws *deviating* from the rules of the directive (for example, specific remedies for certain hidden effects and a remedy in the form of rejecting the goods). In addition, the directive explicitly allows for national rules on *issues not covered or only partly covered* by the directive (for example, formation and invalidity of contracts, effects of termination). Not explicitly mentioned is the obvious gap that must be filled by national laws because

¹ Directive (EU) 2019/771 of the European Parliament and of the Council on certain aspects concerning contracts for the sale of goods.

² Regulation (EC) 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I); see, in particular, Article 6.

³ SGD, Recital 7.

⁴ Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, Article 8, para 2.

⁵ SGD, Article 4.

the directive offers no rules on the *consumer's obligations* or remedies for non-performance of such obligations. A cross-border seller must be prepared for varying regimes concerning, for example, late payment of the agreed price. Some of the compromises and regulatory gaps mentioned here will be illustrated in a little more detail below.

The fact that regulation of a contractual relationship is incomplete is, of course, nothing new in EU legislation on consumer contracts, but this trait becomes more visible in a directive with the objective of total harmonisation – albeit a ‘targeted’ total harmonisation. The intended foreseeability for sellers venturing into cross-border sales is undermined by the incompleteness of the rules.

The proposal for a regulation on a common European sales law (hereinafter CESL) had a much wider scope, including, *inter alia*, rules on formation and validity of contracts and on the obligations of the buyer.^{*6} Even that proposal was incomplete, assessed as contract law, and would have had to be supplemented by national laws; only national legal systems can have the quality of being in principle exhaustive. The CESL turned out to be politically unacceptable and was withdrawn by the Commission. The many amendments to the SGD in the legislative process in the Parliament illustrate that even this more modest harmonisation is controversial.

2. Rules that may be varied by national law

Perhaps the most important example of the directive allowing for national legislation that varies the rule of the directive is related to the time limits for the seller's liability for lack of conformity. According to the SGD's Article 10, para 1, the seller shall be liable for ‘any lack of conformity which exists at the time when the goods were delivered and which becomes apparent within two years of that time’.

This two-year limit was a firm rule in the Commission's proposal and would have meant that longer limits for the seller's liability were not allowed.^{*7} This was politically controversial, as it would lead to reduced consumer protection in some member states. Among these were Sweden, where the time limit is three years, and the EEA states Iceland and Norway, where it is five years for goods that are meant to last considerably longer than two years.^{*8} Apart from this, such time limits may be inapplicable in several states in cases of fraud or violation of duties of good faith and fair dealing. In the Parliament, the provision in Article 10 was amended to the effect that member states may ‘maintain or introduce’ longer time limits (para 3). Member states are also allowed to rely only on general limitation periods (para 5) and, further, to allow contract terms reducing liability periods or limitation periods to one year for second-hand goods (para 6).

This means that the seller must be prepared to be liable for lack of conformity for a longer period than two years, depending on national legislation in each country. Such legislation is normally mandatory, and the seller should adjust his or her general contract conditions accordingly.

3. Where national law may deviate from the model of the directive

The SGD allows for national rules on ‘specific remedies’ in certain cases. These are remedies that are not included in the directive (a right to reject) or remedies that may be chosen outside the ‘hierarchy’ of remedies prescribed by the directive (specific remedies for certain ‘hidden defects’).

Article 3, para 7 of the SGD states that the directive ‘shall not affect the freedom of the Member States to allow consumers to choose a specific remedy, if the lack of conformity becomes apparent within a period after delivery, not exceeding 30 days’. This opening for deviating national rules is obviously inspired by the

⁶ COM(2011) 635 final, Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law.

⁷ COM(2015) 635 final, Proposal for a Directive of the European Parliament and of the Council on certain aspects concerning contracts for the online and other distance sales of goods, Article 14.

⁸ Sweden: *konsumentköplag 1990:352* (Consumer Sales Act), Section 23; Iceland: *lög um neytendakaup 2003 nr. 48* 20. mars (Consumer Sales Act), Section 27; Norway: *lov 13. mai 1987 nr. 27 om kjøp* (Sale of Goods Act), Section 27.

common law rules on the right to reject the goods,^{*9} and it was added as a result of the legislative process in the Parliament.

This right in English law to reject non-conforming goods without further requirements is a powerful remedy that in real terms implies a termination of the contract at an early stage. The right 'entitles the consumer to reject the goods and treat the contract as at an end'.^{*10} This means that the consumer makes the goods available for the seller and that the seller must give the consumer a refund.^{*11} The remedy was kept in the Consumer Rights Act 2015 even though it is not part of the 1999 directive on consumer sales.^{*12} Such a deviation from the directive was, of course, unproblematic under a minimum harmonisation regime, but it could not have been upheld under the new directive without a basis for derogation.

The other exception in Article 3, para 7 of the SGD makes it clear that the directive 'shall not affect national rules not specific to consumer contracts providing for specific remedies for certain types of defects that were not apparent at the time of conclusion of the sales contract'. This exception is obviously inspired by rules on legal guarantees against hidden defects that have their roots in Roman law, and that are still to be found, for example, in the French civil code.^{*13} This basis for derogation, too, was added during the parliamentary process.

Under French law, a hidden defect that gravely affects the intended use of the goods may, on certain conditions, give the buyer a right to choose between two remedies, which largely correspond to the directive's termination and price reduction. In addition, the buyer may claim damages. These remedies are today regarded as alternatives to the remedies laid down in the legislation transposing the 1999 consumer sales directive.^{*14} The point of this right to choose seems to be that the buyer does not have to accept cure by the seller in the form of repair or replacement.

These openings for deviating rules mean that a seller must be prepared to face a model of remedies different from the one of the SGD. The wording of Article 3, para 7 is broad enough to allow even specialities *beyond* the rules mentioned here, which inspired the exceptions.

4. National rules of general contract law supplementing the directive

The SGD 'shall not affect the freedom of Member States to regulate aspects of general contract law, such as rules on the formation, validity, nullity or effects of contracts, including the consequences of the termination of a contract, in so far as they are not regulated in this Directive, or the right to damages' (Article 3, para 6). This provision points to a vast range of rules that are not covered by the directive or are only partially covered by it. That is so even if one thinks only of sale of goods contracts, leaving aside all other contracts. The directive has a narrow scope, mainly limited to lack of conformity and remedies for such lack of conformity. Other rules regarding the contractual relationship in a contract for the sale of goods are mostly *not* harmonised by EU law. A few rules on delay and on passing of risk are harmonised in the consumer rights directive, in addition to the right of withdrawal.^{*15} General rules on unfair terms in non-negotiated consumer contracts are laid down in the unfair contract terms directive.^{*16} Some rules of the consumer credit directive can affect the contractual relationship in consumer credit sales of goods.^{*17} Apart from this, there is legislation regarding marketing, e-commerce, and information duties indirectly affecting consumer contracts for the sale of goods, but contractual effects, if any, of contravention of such legislation have mostly

⁹ In this connection, see the Consumer Rights Act 2015, sections 19(3), 20, and 22.

¹⁰ Consumer Rights Act 2015, Section 20(4).

¹¹ Consumer Rights Act, Section 20(7).

¹² For discussion, see P. Giliker, 'The Consumer Rights Act 2015 – a Bastion of European Consumer Rights?', *Legal Studies*, vol. 37, no. 1 2017, pp. 78–102 on pp. 86–88. – DOI: <https://doi.org/10.1111/lest.12139>.

¹³ French civil code, articles 1641–1649.

¹⁴ O. Barret, 'Vente (3° effets)', *Répertoire de droit civil (Dalloz online)*, Paris 2007 (2019) (<http://www.dalloz.fr/>), no. 535.

¹⁵ Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights.

¹⁶ Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts.

¹⁷ Directive 2008/48/EC of the European Parliament and of the Council of 23 April 2008 on credit agreements for consumers.

been left to national regulation. In sum, this means that the seller's rights and obligations may vary to a great extent, depending on general national law on contracts.

In most cases, questions of the binding effects of the contract are governed by the law of the country where the consumer has his or her habitual residence.^{*18} Here, only one example will be discussed in order to illustrate the close connection between rules on conformity and rules on the binding effect of contracts, namely invalidity because of the seller withholding information on the quality of the goods.

In Denmark, Finland, Iceland, Norway, and Sweden, the sale of goods acts have provisions to the effect that withholding of information may constitute non-conformity of the goods. This is the case if the seller has not disclosed to the buyer circumstances that the seller is expected to have known of and that the buyer had reason to expect to be informed about. In Denmark, the rule applies in consumer sales only, while it applies to all sale of goods contracts and even to some other contracts in the other countries.^{*19} There is no such provision in the SGD. Under the directive, incorrect information may lead to non-conformity, but withheld information does not.

Under some national laws, withholding information – including information related to the quality of the goods – may lead to invalidity of a contract for mistake. However, such rules are not the same from country to country,^{*20} and there is no EU harmonisation at this point (under the proposal for a common European sales law, withholding information that good faith and fair dealing would have required a party to disclose could make the contract avoidable, per Article 48). Hence, the seller must be prepared to incur information duties with contractual consequences in some countries but not necessarily in all. Whether or not the Nordic countries – under a total harmonisation directive – can keep their rules on withholding of information as a lack of conformity remains to be seen.

Member states are, as already mentioned, free to regulate the 'effects' of contracts. This rather vague expression can be found in national legislation, seemingly without any generally accepted meaning.^{*21} For our purpose, one example suffices: the new provision on change of circumstances in the French civil code (*imprévision*, Article 1195) belongs to the chapter on the effects of contracts. Such rules, as well as – for example – the German rules on *Störung der Geschäftsgrundlage* and on termination for a compelling reason, and the 'general clause' of contract law found in the Nordic countries,^{*22} obviously may be maintained or introduced in national laws, quite independent of the SGD. The rules vary from country to country and the seller must be prepared for different outcomes. What happens, say, with the contract for the sale of an expensive car if there is an extraordinary rise in market prices for such cars between conclusion of the contract and delivery? And what if it turns out after conclusion of the contract that the car does not meet the environment standards in the consumer's home country? The proposal for a common European law was meant to harmonise even rules on such issues (CESL, Article 89).^{*23}

Closely connected with the rules on change of circumstances are rules on the consumer's right to damages, not least regarding the seller's possible excuses for a lack of conformity. The consumer's right to damages is mentioned in the recitals of the SGD as an 'essential element of sales contract', and it is stated that

¹⁸ Rome I Regulation (fn. 2), articles 10 and 6.

¹⁹ References regarding consumer sales: (Denmark) *lov om køb LBK nr. 140 af 17/02/2014* (Sale of Goods Act, originally from 1906), Section 76(3); (Finland) *konsumentskyddslag 20.1.1978/38* (Consumer Protection Act), Section 4:14; (Iceland) *lög um neytendakaup 2003 nr. 48 20. mars* (Consumer Sales Act), Section 17 (cf. Section 16(1)(b)); (Norway) *lov 21. juni 2002 nr. 34 om forbrukerkjøp* (Consumer Sales Act), Section 16(1)(b) (cf. Section 17); (Sweden) *konsumentköplag 1990:352* (Consumer Sales Act), Section 16(3)(2) (cf. Section 17). See also K. Lilleholt, 'Application of General Principles in Private Law in the Nordic Countries', *Juridica International* 2013, pp. 12–19. – DOI: <http://dx.doi.org/10.12697/issn1406-1082>.

²⁰ See, for example, H. Beale, 'Pre-Contractual Obligations: The General Contract Law Background', *Juridica International*, vol. XIV, no. I 2008, pp. 42–50. – DOI: <http://dx.doi.org/10.12697/issn1406-1082>; see also comparative notes in C. von Bar and E. Clive eds., *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR). Full Edition*, 6 vols., Munich 2009, pp. 469–471. – DOI: <https://doi.org/10.1515/9783866537279>.

²¹ See, for example, the French civil code (*livre III, titre III, sous-titre I, chapitre IV*); the Italian civil code (*libro quarto, titolo II, capo V*). In the Draft Common Frame of Reference, there is Chapter 9 in Book II, on 'contents and effects of contracts'.

²² Germany: civil code §§ 313 and 314; Denmark: *lov nr. 242 af 8. maj 1917 om aftaler og andre retshandler på aftalerettens område*, most recently published as "LBK nr. 193 af 02/03/2016"; Finland: *lag om rättshandlingar på förmögenhetsrättens område 13.6.1929/228*; Iceland: *lög 1936 nr. 71. febrúar 1926 um samningsgerð, umboð og ógilda löggjörninga*; Norway: *lov 31. mai 1918 nr. 4 om avslutning av avtaler, om fuldmagt og om ugyldige viljeserklæringer*; Sweden: *lag (1915:218) om avtal och andra rättshandlingar på förmögenhetsrättens område* (Section 36 in each of these acts). See also comments in Lilleholt, 'Application of General Principles in Private Law in the Nordic Countries'.

²³ See also the discussion in N. Jansen and R. Zimmermann, *Commentaries on European Contract Laws*, Oxford University Press: Oxford 2018, pp. 899–918.

the consumer should be 'entitled to claim compensation to any detriment caused by an infringement by the seller of this Directive' (Recital 61). Still, the rules on damages are left to national laws, with the rather over-optimistic justification that 'the existence of such a right to damages is already ensured in all Member States' (Recital 61). It is well known that the rules vary throughout Europe with regard to damages as a remedy for non-performance of contractual obligations, and a seller must be prepared to deal with different regimes in different countries also in this respect.^{*24} In comparison, the proposal for a common European sales law had rules also on this subject (CESL, Chapter 16).

Member states are free to regulate 'the consequences of the termination of a contract, in so far as they are not regulated in this Directive' (SGD, Article 3, para 6). The main consequences of a termination are regulated in the SGD's Article 16, para 3: the buyer must return the goods to the seller, and the seller must reimburse the consumer for the price paid. The provision then states that '[f]or the purposes of this paragraph, Member States may determine the modalities for return and reimbursement'. The combined effect of Article 3, para 6 and Article 6, para 3 is not quite clear. Does the latter provision restrict national rules on return and reimbursement to 'modalities', and – in that case – what does the word 'modalities' mean? A practical issue is the extent to which the seller must pay interest on the money received and the buyer pay for the use made of the goods (see, for comparison, Article 174 CESL). Is this a 'modality' of return and reimbursement, and – if not – are the rules of the directive exhaustive on this matter, restricting the freedom laid down in Article 3, para 6 to regulate this issue as 'consequences of the termination of a contract'? Arguably, the best answer is that interest on money and payment for use can be regulated in national laws. If this is correct, the seller must be prepared to find different rules in each country.

5. National rules on the consumer's obligations under the contract

The SGD does not regulate the buyer's obligations under a sale of goods contract or the remedies for non-performance of such obligations. This is the case also for the 1999 consumer sales directive. However, the effect of leaving out rules on this half of the contractual relationship becomes more conspicuous with a total harmonisation directive like the SGD. The balance of a contractual relationship always depends on the reciprocity of the parties' obligations. Again, the party risking surprises because of foreign rules is the seller – in most cases, the law of the consumer's home country governs the entire contract.

One example only will be highlighted in this article, namely the seller's right to require performance of the buyer's obligation to pay the price. In some countries, the seller cannot require performance of paying the price if the consumer terminates ('cancels') the contract prior to delivery. The seller is left with a claim for damages.^{*25} In some other countries, the seller can require performance, in principle.^{*26} The CESL had an exception for situations where the seller could reasonably have made a substitute transaction (Article 132). Admittedly, making a substitute transaction and claiming damages will in most cases be the practical reaction anyway – independent of the seller's formal rights – if the consumer is unwilling to receive the goods. It is still useful for the seller to be aware of the relevant rules and to take them into account when formulating the general sales conditions offered to customers.

²⁴ See, for example, Jansen and Zimmermann, Commentaries on European Contract Laws (fn. 23), pp. 1435–1442.

²⁵ See, for example, Finland: *konsumentskyddslag* 20.1.1978/38 (Consumer Protection Act), Section 5:25; Iceland: *lög um neytendakaup* 2003 nr. 48 20. mars (Consumer Sales Act), Section 41; Norway: *lov 21. juni 2002 nr. 34 om forbrukerkjøp* (Consumer Sales Act), Section 41; Sweden: *konsumentsköplag* 1990:352 (Consumer Sales Act), Section 37. See also K. Lilleholt, 'The Draft Common Frame of Reference and "Cancellation" of Contracts', *Juridica International*, vol. XIV, no. 1 2008, pp. 111–117. – DOI: <http://dx.doi.org/10.12697/issn1406-1082>.

²⁶ See the comparative notes in von Bar and Clive, eds., *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR). Full Edition* (fn. 20), pp. 826–828; see also Jansen and Zimmermann, Commentaries on European Contract Laws (fn. 23), pp. 1189–1202.

6. Concluding remarks

The examples given in this article show that the new consumer sales directive assessed as contract law legislation is incomplete, and that total harmonisation has not been possible even for the selected matters regulated by the directive. The legislative process in the Parliament resulted in several amendments that allow for national fine-tuning of the rules, for supplementary rules, and even for rules that deviate from the directive. Total harmonisation has thus not been achieved even for these selected topics for regulation. The broad harmonisation of the CESL – in the form of an optional instrument – turned out to be politically unattainable. The SGD illustrates that harmonisation is challenging enough also for the quite limited scope of a consumer sales directive. It seems that the idea of strong Europeanisation of contract law is on hold.



Ivo Pilving

Vorsitzender der Verwaltungskammer, Staatsgericht
Dozent für Verwaltungsrecht, Universität Tartu^{*1}

Parallele Anwendbarkeit von Grundrechtecharta der EU und nationalen Grundrechten

1. Vorbemerkung

Estland trat der EU im Jahre 2004 bei. Ein Jahr davor wurde durch die Volksabstimmung das Gesetz zur Ergänzung der Verfassung (GEV) genehmigt.^{*2} Die §§ 1 und 2 GEV legen fest, dass Estland ausgehend von den Grundprinzipien ihrer Verfassung der Europäischen Union angehören kann und dass die Verfassung unter Berücksichtigung der sich aus dem Beitrittsvertrags ergebenden Rechte und Pflichten angewandt wird. Nach dem Inkrafttreten der Charta der Grundrechte der Europäischen Union (GRCh) am 01.12.2009 hat sich in mehreren Mitgliedstaaten der EU die Frage der Anwendbarkeit von nationalen Grundrechten im Geltungsbereich des Unionsrechts aktualisiert.^{*3} Auch der EuGH hat vor kurzem in einigen Fällen seine Stellungnahme zu diesem Thema geäußert. Ziel dieses Beitrags ist zuerst einen Überblick über die Entwicklung der relevanten Rechtsprechung des Staatsgerichtshofs Estlands (StGH) zu gewähren (2), danach aber die Details des sog. parallelen Anwendungsmodells der Grundrechte, darunter dessen Europarechtskonformität zu erörtern (3).

2. Die verfassungsrechtliche Rechtsprechung des Staatsgerichtshofs im Geltungsbereich des EU-Rechts

Für die Prüfung der Verfassungsmäßigkeit der Gesetze in Estland ist der Staatsgerichtshof mit seinen 19 Richtern zuständig, der gleichzeitig als höchste Instanz in Zivil-, Straf- und Verwaltungssachen fungiert. Einen Antrag auf die Prüfung der Verfassungsmäßigkeit einer Rechtsnorm können der Präsident der Republik und der Justizkanzler stellen. Die konkrete Normenkontrolle ist von ordentlichen Gerichten und den Verwaltungsgerichten einzuleiten, soweit sie der Ansicht sind, dass ein einschlägiges Gesetz verfassungswidrig ist

¹ Der Beitrag beruht auf einem Vortrag im Rahmen der 12. Luxemburger Expertenforum zur Entwicklung des Unionsrechts im EuGH im September 2018. Neben Teilnehmer des Forums danke ich für fruchtbare Gespräche Priit Pikamäe und Ene Andresen.

² RT I 2003, 64, 429 – <https://www.riigiteataja.ee/en/eli/530102013005/consolide> (auf Englisch). Siehe R. Narits, in: D. Merten, H.-J. Papier (Hrsg.), *Handbuch der Grundrechte in Deutschland und Europa*. Bd. X. Heidelberg: C. F. Müller 2018, S. 393 f; J. Laffranque, A Glance at the Estonian Legal Landscape in View of the Constitution Amendment Act. – *Juridica International* 2007/1, S. 55. – DOI: <http://dx.doi.org/10.12697/issn1406-1082>.

³ Z.B. BVerfG 2 BvR 424/17. – *Neue Juristische Wochenschrift* (NJW) 2018, S. 689.

(§§ 15 Abs. 2, 107 Abs. 2 S. 2, 142 S. 2 der Verfassung der Republik Estland⁴). Es ist bis heute einmal vorgekommen, dass der Staatsgerichtshof durch die direkte Anwendung des verfassungsgemäßen Klagerechts die Verfassungsbeschwerde einer Privatperson direkt an Staatsgerichtshof für zulässig erkannt hat.⁵

2.1. Rechtsprechung des Staatsgerichtshofs bis 2015

Die Rechtsprechung des StGH in Fragen des Verhältnisses zwischen der estnischen Verfassung und dem EU-Recht war bisher recht integrationsfreundlich und ließ sich von folgenden Grundprinzipien leiten:

- Verfassungsänderungsgesetz hat eine durchgehende Änderung der Verfassung mit sich gebracht, nur der Teil der Verfassung, der im Einklang mit dem EU-Recht steht, kann angewendet werden (Verdrängung der Verfassung);⁶
- ein Verstoß gegen das EU-Recht bedeutet nicht unbedingt gleich einen Verstoß gegen die Verfassung, somit kann die Prüfung der Verfassungsmäßigkeit nicht allein aufgrund des EU-Rechts eingeleitet werden (Separation des Kontrollmaßstabs);⁷
- eine Prüfung der Verfassungsmäßigkeit kann nicht bezüglich des EU-Sekundärrechts und im Regelfall auch nicht bezüglich des nationalen Umsetzungsgesetzes eingeleitet werden. Eine Ausnahme bilden nur die formelle Verfassungsmäßigkeit des Gesetzes, die Situationen außerhalb des Geltungsbereichs des EU-Rechts und die Nutzung der durch das EU-Recht überlassenen Umsetzungsspielräume (Separation des Kontrollgegenstandes);⁸
- vor der Prüfung der Verfassungsmäßigkeit hat das Fachgericht den Einklang des Gesetzes mit dem EU-Recht zu prüfen.⁹ Im Falle eines Verstoßes gegen EU-Recht ist das Gesetz im Rechtsstreit nicht anzuwenden, ohne dass eine Prüfung der Verfassungsmäßigkeit eingeleitet wird (Beschränkung der Entscheidungserheblichkeit des Gesetzes).¹⁰

Die Parallelen mit der Trennungsthese und der Solange-Rechtsprechung des deutschen Bundesverfassungsgerichts (BVerfG)¹¹ sind hier deutlich. Zudem war der Staatsgerichtshof immer bemüht, die Verfassung im maximalen Einklang sowohl mit der Europäischen Menschenrechtskonvention (EMRK) als auch mit der Grundrechtecharta auszulegen und das auch in Streitigkeiten außerhalb jeglichen Geltungsbereichs des EU-Rechts und sogar schon vor dem Beitritt Estlands zur EU.¹² Nach einem früheren *obiter dictum*¹³ des StGH funktionieren die im § 1 VEG genannten Grundprinzipien der Verfassung als Integrationsschranke nur gegenüber des primären Unionsrechts, nicht hinsichtlich des Sekundärrechts.

2.2. Der Fall der Energiegebühren

In einem Rechtsstreit über Sondergebühren zur Unterstützung der Erzeugung der erneuerbaren Energie korrigierte das Plenum des Staatsgerichtshofs im Jahre 2015 die referierten Stellungnahmen der Senate. Das Plenum führte jetzt aus, dass die Betroffenheit einer Rechtsvorschrift mit dem EU-Recht an und für sich die Prüfung der Verfassungsmäßigkeit einer Rechtsnorm nicht hindern kann. „Das Recht der Europäischen

⁴ RT 1992, 26, 349 – <https://www.riigiteataja.ee/en/eli/521052015001/consolide>.

⁵ StGH 3-1-3-10-02 (siehe englischsprachige Übersetzungen der verfassungsrechtlichen Urteile - <https://www.riigikohus.ee/en/judgements/constitutional-judgments>).

⁶ StGH 3-4-1-3-06, Rn. 16. Dazu auch J. Laffranque (FN 1), S. 62 ff.

⁷ StGH 3-4-1-33-09, Rn.; 3-4-1-1-05, Rn. 49. Vgl. D. Paris. Constitutional courts as European Union courts: The current and potential use of EU law as a yardstick for constitutional review. - *Maastricht Journal of European and Comparative Law* 24 (2017), S. 792, 796. – DOI: <https://doi.org/10.1177/1023263x17747232>.

⁸ StGH 3-4-1-5-08, Rn. 33–37; 3-3-1-85-07, Rn. 39.

⁹ StGH 3-4-1-5-08, Rn. 31, 38–43; StGH 3-3-1-85-07, Rn. 38; J. Laffranque. Who Has the Last Word on the Protection of Human Rights in Europe? – *Juridica International* 2012, S. 119, 126. – DOI: <http://dx.doi.org/10.12697/issn1406-1082>. So auch in Italien, F. Fontanelli. National Measures and the Application of the EU Charter of Fundamental Rights – Does curia.eu Know iuria.eu. *Human Rights Law Review* 14 (2014), S. 231, 244. – DOI: <https://doi.org/10.1093/hrlr/ngu009>.

¹⁰ StGH 3-4-1-5-08, Rn. 32; 3-3-1-33-06, Rn. 35. Vgl. D. Paris (FN 6), S. 802-804.

¹¹ Vgl. BVerfGE 37, S. 271: „Solange I“; 73, S. 339: „Solange II“.

¹² StGH 3-4-1-12-10, Rn. 33; 3-2-1-73-04, Rn. 17; 3-1-3-10-02, Rn. 21; 3-4-1-1-03, Rn. 15; 3-3-1-85-09, Rn. 19. Siehe auch J. Laffranque (FN 8), S. 131.

¹³ StGH 3-3-1-85-07, Rn. 39.

Union verbietet keinesfalls den Mitgliedstaaten die nationalen Grundrechte in dem Maße zu gewährleisten, in dem die Umsetzung dieser Grundrechte den Vorrang, die Einheit und die Wirksamkeit des Unionsrechts nicht beeinträchtigt.“¹⁴ Daher geht der estnische Staatsgerichtshof von der parallelen Anwendung (Doppelgeltung) der Grundrechte aus und dies scheint der Auffassung des Europäischen Gerichtshofs in Sachen *Åkerberg Fransson*¹⁵ und *Melloni*¹⁶ wohl zu entsprechen (dazu näher unten).

Die Frage der Anwendbarkeit der Grundrechte war nicht die Hauptfrage des Energiegebühren-Urteils des StGH. Auch hätte die frühere Trennungsthese die Anwendung der estnischen Grundrechte im gegebenen Fall nicht verhindert, da die Mitgliedstaaten im relevanten Fachbereich über einen weiten Anwendungsspielraum verfügen. Obwohl die Änderung der Position im konkreten Rechtsstreit nicht ergebnisrelevant war, ist die neue Position des Staatsgerichtshofs deutlich. Andererseits gab es später noch einen Fall bezüglich des Wahlrechts der Gefangenen, in welcher der Verwaltungssenat des StGH zwar die estnische Verfassung anwandte, dies aber wieder mit der Rhetorik der alten Trennungsthese begründete.¹⁷

3. Die Einzelheiten der parallelen Anwendung von Grundrechten

Bei der Auslegung von Art. 51 Abs. 1 GRCh gehe ich von der These aus, dass die Charta im Anwendungsbereich des EU-Rechts gilt.¹⁸ Die Charta muss nicht nur da angewandt werden, wo die Mitgliedstaaten zwingende Befehle des Sekundärrechts vollstrecken, sondern auch bei Richtlinien, die den Mitgliedstaaten breite Entscheidungsfreiräume gewähren,¹⁹ sogar in den Fällen, in denen die Tätigkeit nur mittelbar die Belange der Union, etwa Finanzinteressen berühren kann.²⁰ BVerfG reagierte auf solche breite Auslegung des Art. 51 Abs. 1 GRCh mit Sorge und drohte den Mechanismen der ultra-vires-Kontrolle und Identitätsverletzung zu aktivieren.²¹ In seiner jüngeren Rechtsprechung hat der EuGH einen vorsichtigeren Weg gesucht und betont, dass die Durchführung des Unionsrechts im Sinne von Art. 51 GRCh „einen hinreichenden Zusammenhang von einem gewissen Grad“ verlangt.²²

Das Anwendungsbereich des GRCh in Rechtsprechung des EuGH bleibt jedoch eher weit und dies bedeutet zwingend, dass die Chartagrundrechte in mehreren Bereichen neben der nationalen gelten, es sei denn, der Mitgliedstaat beschränkt die Anwendbarkeit seines eigenen Grundrechtskatalogs freiwillig. Das Unionsrecht selbst kennt kein allgemeines Verbot zur zusätzlichen Anwendung der innerstaatlichen Grundrechte im Anwendungsbereich der Charta,²³ sondern regelt ihre Konkurrenz mit dem Unionsrecht im Art. 53 GRCh.²⁴ Diese Doppelgeltung der Grundrechte wird zusätzlich von ERMK ergänzt. Estnische Richterin in Straßburg *J. Laffranque* ist der Meinung, dass die gleichzeitige Verwendung verschiedener Grundrechtsdokumente nur die Legitimität des Gerichtsurteils stärken würde, obwohl die nationalen Gerichte nicht immer neben der Verfassung die Charta und die Konvention erwähnen brauchen.²⁵ Bundesverfassungsrichter *J. Masing* beschreibt diese Situation dagegen mit dem Wort „Grundrechtsüberdruck“ und warnt vor ernststen Schwierigkeiten.²⁶ Gerade diese Schwierigkeiten werden folgend näher erörtert, darunter

¹⁴ StGH 3-2-1-71-14, Rn. 81–83.

¹⁵ EuGH C-617/10, Rn. 29.

¹⁶ EuGH C-399/11, Rn. 60.

¹⁷ StGH 3-3-1-48-15, Rn. 15.

¹⁸ Insbesondere EuGH C-617/10: *Åkerberg Fransson*, Rn. 21.

¹⁹ EuGH C-578/08: *Chakroun*, Rn. 44.

²⁰ EuGH C-617/10: *Åkerberg Fransson*, Rn. 27 f. Zum Strafverfahren gegen Steuerbetrüger auch z.B. EuGH C-310/16: *Dzivev*, Rn. 33, 36.

²¹ NJW 2013, S. 1499, Rn. 91.

²² In einem Fall über Landschaftsschutz, EuGH C-206/13: *Siragusa*, Rn. 24. Siehe auch J. Masing, Einheit und Vielfalt des Europäischen Grundrechtsschutzes – *Juristenzeitung* 2015, S. 477, 483 m.w.N. – DOI: <https://doi.org/10.1628/002268815x14279641521178>.

²³ C. D. Classen, Schwierigkeiten eines harmonischen Miteinanders von nationalem und europäischem Grundrechtsschutz, *Europarecht* (EuR) 2017, S. 347, 358. – DOI: <https://doi.org/10.5771/0531-2485-2017-3-347>.

²⁴ Vgl. C. Franzius, Zwischen Selbstbehauptungen und Selbstbeschränkungen der Rechtsordnungen und ihrer Gerichte. – *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 2015, S. 383, 396.

²⁵ FN 8, S. 127.

²⁶ FN 21, S. 481 ff.

die Fragen, wie die Determiniertheit des Unionsrechts die Prüfung der Verfassungsmäßigkeit eines nationalen Gesetzes beeinflusst (3.1), welches Grundrecht wann genauer – nationales oder europäisches – den Vorrang hat (3.2.), ob die Verfassungsgrundrechte im Falle der Unionsrechtswidrigkeit eines Gesetzes als ergänzender Kontrollmaßstab fungieren könnten und sollten (3.3), ob das Sekundärrecht doch in extremen Kollisionsfällen vor einem Verfassungsgrundrecht zurücktreten könnte (3.4) und wie die Grundrechte unterschiedlicher Niveaus in multipolaren Beziehungen anzuwenden sind (3.5).

3.1. Doppelprüfung trotz Determiniertheit

Nach herrschender Meinung ist die kumulative Anwendung von Grundrechten nur im Falle des mitgliedstaatlichen Umsetzungsspielraums möglich.^{*27} Statt der Verdrängung der nationalen Grundrechte könnte im unionsrechtlich determinierten Bereich jedoch eine Europäisierung des nationalen Grundrechtsschutzes^{*28} stattfinden. Nichts verbietet dem mitgliedstaatlichen Gericht zuerst den bloßen Eingriff in das Verfassungsgrundrecht in einem von der EU vollständig harmonisierten Bereich festzustellen.^{*29} Falls das Unionsrecht einen solchen Eingriff zwingend und rechtmäßig fordert, ist es auch eben nur ein Eingriff, nicht eine Verletzung des Grundrechts. In Extremfällen könnte eine derartige unionsrechtlich determinierte Beschränkung der nationalen Grundrechte nach dem § 32 Abs. 1 S. 1 der estnischen Verfassung und dem § 16 des estnischen Staatshaftungsgesetzes^{*30} sogar einen Aufopferungsanspruch begründen, z.B. im Falle der Festlegung eines Natura-Schutzgebietes.^{*31}

Generalanwalt M. Bobek hat in seiner jüngsten Stellungnahme mehrere Konstellationen vorgeführt, in denen abhängig von der Harmonisierungsdichte der unionsrechtlichen Bestimmung und von der „Entfernung“ zwischen dem Sachverhalt und der Norm entweder gar kein Umsetzungsspielraum des Mitgliedstaats vorliegt oder aber ein kleiner oder ein großer vorliegt.^{*32} Seine Argumentation überzeugt, dass abstrakt die Abgrenzung des mitgliedstaatlichen Spielraums eine sehr komplizierte Aufgabe ist. Anstatt dessen sollte man prüfen, ob die sich aus der nationalen Verfassung im konkreten Fall ergebende Gerichtssentscheidung als Endergebnis in den Rahmen des EU-Rechts passe oder ob sie es beeinträchtigt.^{*33} Bei einer solchen Gefahr gibt es keinen Unterschied, ob das Unionsrecht dem Mitgliedstaat überhaupt keinen Gestaltungsspielraum überlässt oder ob die Anwendung der Verfassung die Grenzen des größeren oder des kleineren Anwendungsspielraums überschreiten würde. Die Folge ist in allen solchen Fällen gleich – eine Kollision, bei der das nationale Recht, sogar die Verfassung in dem zu lösenden Fall dem EU-Recht ausweichen muss.^{*34} Ohne irgendeine Kollision mit dem Unionsrecht gibt es zumindest keinen unionsrechtlichen Grund das nationale Recht auszuschalten.^{*35}

Dabei kann das Fehlen des Anwendungsspielraums auch nur scheinbar sein. Die den Entscheidungsraum einschränkende Richtlinie selbst kann im Widerspruch zur Charta oder zum sonstigen Primärrecht stehen, so wie dies bei der Speicherung der Antiterrordatei passiert ist. Bei einem solchen Verdacht ist das Problem im Vorabentscheidungsverfahren zu lösen.^{*36} Dabei müsste sich der EuGH seinerseits bemühen, der Charta im Geiste des Grundrechteverbundes und des Verfassungspluralismus, d.h. auch unter Berücksichtigung von mitgliedstaatlichen Grundrechten^{*37} zu interpretieren (Art. 52 Abs. 4

²⁷ Vgl. M. Klein, *Friedensgrüße aus Luxemburg: Neue Entwicklungen im europäischen Grundrechteverbund*. – *Die Öffentliche Verwaltung* (DÖV) 2018, S. 605, 609; J. Masing (FN 21), S. 483; C. D. Classen (FN 22), S. 347.

²⁸ G. Buchholtz, *Grundrechte und Datenschutz im Dialog zwischen Karlsruhe und Luxemburg*. – *DÖV* 2017, S. 844.

²⁹ C. D. Classen (FN 22), S. 361.

³⁰ Dazu näher C. Schmidt, in: O. Dörr (Hrsg.), *Staatshaftung in Europa. Nationales und Unionsrecht*, Hamburg: De Gruyter 2013, S. 171 ff. – DOI: <https://doi.org/10.1515/9783110246018>.

³¹ StGH 3-16-812, Rn. 13.

³² C-310/16: Dzivev, Rn. 79 f.

³³ Früher auch K. Merusk, I. Pilving (Hrsg.), *Halduskohtumenetluse seadustik. Kommentaaritud väljaanne (Verwaltungsgerichtsordnung. Kommentar)*. Tallinn: Juura 2013, § 158 E.III.5; so auch H. Kalmo, *Põhiseaduse põkkumine Euroopa Liidu põhiõiguste hartaga (Kopplung der Verfassung mit der Grundrechtecharta der EU)*. – *Juridica* 2016/3, S. 147, 160. –

³⁴ EuGH C-399/11: Melloni, Rn. 57 ff. Vgl. M. Bäcker, *Das Grundgesetz als Implementationsgarant der Unionsgrundrechte*. – *EuR* 2015, S. 395. – DOI: <https://doi.org/10.5771/0531-2485-2015-4-389>.

³⁵ C. D. Classen (FN 22), S. 358. Vgl. GA Szpunar C-476/17: Pelham, Rn. 73, 78.

³⁶ GA Bobek C-310/16: Dzivev, Rn. 87. Vgl. C. D. Classen (FN 22), S. 360 f.

³⁷ Im Lichte der gemeinsamen Verfassungstradition, Art. 51 Abs. 4 und 6 GRCh.

und 6 GRCh).^{*38} Dies wiederum setzt voraus, dass jeweiliges Verfassungs- oder Fachgericht^{*39} des Mitgliedsstaates zum Zeitpunkt des Vorabentscheidungsersuchens den Rechtsstreit im Lichte seiner eigenen Verfassung schon beurteilt hat.^{*40}

Es ist zu warten, ob der EuGH den Generalanwalt in der Sache *Pelham*, die der deutsche Bundesgerichtshof (BGH) nach einem Verfassungsbeschwerdeverfahren im BVerfG vorgelegt hat, folgen wird. Die Parteien im Revisionsverfahren vor dem BGH streiten über die Komposition eines Musikstücks durch Sampling. Der Generalanwalt ist in seinen Schlussanträgen der Meinung, dass die Urheberrechtsrichtlinie der EU die Revisionsklägerin Pelham GmbH die freie Nutzung des Werks „Metall auf Metall“ des Revisionsbeklagten – der Gruppe Kraftwerk – verbietet. Seiner Meinung nach hat der EU-Gesetzgeber die kollidierenden Rechte der Parteien im Lichte der Grundrechtecharta abgewogen und dabei ein angemessenes Gleichgewicht gefunden.^{*41} Ein freies Nutzungsrecht für Sampling besteht nach der Meinung der deutschen Gerichte aber nach dem nationalen Urheberrecht. Dieses Recht widerspricht nach der Auffassung des BVerfG nicht das deutsche Grundgesetz. Nach der Trennungsthese wäre die Verfassung in diesem Streit mangels Umsetzungsspielraums aber unanwendbar.^{*42} Nach dem Parallelmodell des estnischen StGH wäre die nationale Verfassung zwar anwendbar, der Eingriff in die Kunstfreiheit des Phonogrammnutzers jedoch wegen der Urheberrechtsrichtlinie gerechtfertigt, falls die freie Sampling durch sie tatsächlich ausgeschlossen ist.

Dies bedeutet nicht, dass die nationalen Gerichte ihre Prüfungen immer mit der Verfassung beginnen müssen. Es ist wohl möglich, die Verfassung unberührt zu lassen, in Situationen, in denen der Entscheidungsraum des Mitgliedsstaates durch die Richtlinie eindeutig auf Null reduziert ist und kein Zweifel besteht, dass die Richtlinie mit der Charta übereinstimmt.^{*43} Die richtige Antwort hängt eher nicht von der Reihenfolge der Operationen ab (ob die Prüfung der Verfassungsmäßigkeit oder der Europarechtskonformität zuerst kommt). Welcher Weg kürzer und effizienter im Sinne der Verfahrensökonomie ist, hängt von den Umständen des Falles und den normativen Regelungen des Fachbereichs ab.

Außerdem, wegen des Auslegungszusammenhangs (Art. 52 Abs. 4 und 6 GRCh) kann in der Regel von einem gleichwertigen Schutzniveau von Verfassung und Charta ausgegangen werden,^{*44} solange wichtige Gegenargumente wie z.B. die wesentlich unterschiedliche Struktur und der wesentlich unterschiedliche Wortlaut der Artikel, die Gestaltungsgeschichte der Bestimmungen oder die bisherigen Positionen des EuGH nicht das Gegenteil nachweisen. Beispiel: Die Vorratsdatenspeicherungs-Richtlinie hat der EuGH im Lichte der Grundrechtecharta als unverhältnismäßig aufgehoben. Nach Einschätzung der estnischen Justizkanzlerin verstößt deren Umsetzungsgesetz aber nicht gegen die Verfassung.^{*45} Bei der Auslegung der Verfassung im Geiste der Charta ist auch umgekehrt Vorsicht geboten, dies darf nicht zur generellen Absenkung des in der Verfassung vorgeschriebenen Schutzniveaus führen.^{*46}

³⁸ Vgl. J. Laffranque (FN 8), S. 129; J. Masing (FN 21), S. 486; A. Voßkuhle, T. Wischmeyer. Grundwissen – Öffentliches Recht: Grundrechte im Unionsrecht. – *Juristische Schulung* 2017, S. 1171–1172. Zur Anwendbarkeit der Doktrin von „margin of appreciation“ für Kollisionen zwischen dem Sekundärrecht und der mitgliedstaatlichen Verfassung A. Edenharter. Auflösung von Jurisdiktionskonflikten durch eine Variierung der Richterlichen Prüfungsdichte: Übertragung der Spielraumkonzepte des EGMR und des Schweizer Bundesgerichts auf die Rechtsprechung des EuGH. – *Der Staat* 57 (2018), S. 227. – DOI: <https://doi.org/10.3790/staa.57.2.227>; G. Buchholz (FN 27), S. 845 m.w.N. auf der Rechtsprechung des EuGH.

³⁹ Zur wichtigen Rolle der Fachgerichte M. Dani. National constitutional courts in the European constitutional democracy: A reply to Jan Komárek. – *International Journal of Constitutional Law* 15 (2017), S. 799 f. – DOI: <https://doi.org/10.1093/icon/mox057>.

⁴⁰ C. D. Classen (FN 22), S. 364 f. In diese Richtung auch z.B. A. Albi. Erosion of Constitutional Rights in EU Law: A Call for 'Substantive Co-operative Constitutionalism'. Part 2. – *Vienna Journal on International Constitutional Law* 9 (2015), S. 330. Skeptisch T. Tuominen. Aspects of Constitutional Pluralism in Light of the Gauweiler Saga. – *European Law Review* 43 (2018), S. 186. Zur Bedeutung des Verhältnismäßigkeitsgrundsatzes bei der Auslegung und der Gültigkeitskontrolle des Unionsrechts M. Dani (FN 38), S. 785, 795, 798.

⁴¹ GA Szpunar C-476/17: *Pelham*, Rn. 90 ff.

⁴² BVerfG NJW 2016, S. 2247, Rn. 115.

⁴³ C. D. Classen (FN 22), S. 361.

⁴⁴ J. Masing (FN 21), S. 486.

⁴⁵ H. Kalmo (FN 32), S. 147.

⁴⁶ Vgl. auch M. Bäcker, der auf die Gefahr eines umgekehrten Ankereffekts hinweist (FN 33), S. 398.

3.2. Meistbegünstigungsklausel

Keine Bestimmung der Charta ist als eine Einschränkung oder Verletzung der Menschenrechte und Grundfreiheiten auszulegen, die u.a durch die Verfassungen der Mitgliedstaaten anerkannt werden (Art. 53 GRCh). Laut der Åkerberg-Formel^{*47} darf ein Mitgliedstaat im Anwendungsbereich des EU-Rechts keinen niedrigeren Schutz im Vergleich zur Charta anbieten. Der Mitgliedsstaat kann einen höheren Standard im Vergleich zur Charta anbieten, soweit infolge dessen der Vorrang, die Einheit oder die Wirksamkeit des Unionsrechts nicht beeinträchtigt werden.^{*48} Diese Kriterien hängen von Grad des Ermessens der Mitgliedstaaten ab und sollten nicht immer wörtlich genommen werden.^{*49}

Die Schutzniveaus verschiedener Grundrechtsquellen sollten aufgrund des Art. 53 GRCh nicht abstrakt verglichen werden.^{*50} Vor der konkretisierten Anwendung der Rechte verschiedener Ebenen in einem relevanten Fall ist nicht bekannt, in welchem Umfang diese den Verfahrensbeteiligten tatsächlich Schutz bieten würden.^{*51} Zum Beispiel kann das nationale Grundrecht einen umfangreicheren sachlichen Schutzbereich haben, dabei aber breitere Eingriffsvorbehalte im Vergleich zur Charta vorsehen. Das Fachgericht eines Mitgliedsstaates sollte^{*52} jeden konkreten Fall eben parallel im Lichte der Grundrechtecharta und der Verfassung bewerten und so die für den Grundrechtsträger im Ergebnis die günstigste Garantie feststellen. Ist das günstigste Regime die nationale Verfassung, muss zusätzlich die Vereinbarkeit ihrer Anwendung mit den Unionsrechtsakten geprüft werden. Verlangt das Unionsrecht die Maßnahme– z.B. den Vollzug des europäischen Haftbefehls, muss der Grundrechtsträger es trotz der Verfassung dulden. Dabei können die Mitgliedstaaten bei der Durchführung des Unionsrechts „unionsrechtlich verpflichtet sein, die Beachtung der Grundrechte durch die übrigen Mitgliedstaaten zu unterstellen, so dass sie [nicht] die Möglichkeit haben, von einem anderen Mitgliedstaat ein höheres nationales Schutzniveau der Grundrechte zu verlangen als das durch das Unionsrecht gewährleistete“.^{*53}

Die gemeinsame Verfassungstradition ist nicht eine Voraussetzung der Anwendung der mitgliedstaatlichen Verfassung nach der Meistbegünstigungsklausel. Nach Art 52. Abs. 4 GRCh ist es nur bei der Auslegung der Charta wichtig.

3.3. Anlehnung an das nationale Grundrecht beim Verstoß gegen das EU-Recht

Das Fehlen eines Spielraums bedeutet nicht unbedingt den Konflikt zwischen dem EU-Recht und der Verfassung. Im Falle eines Verstoßes gegen das EU-Recht, insbesondere gegen die Charta, kann das Umsetzungsgesetz – wegen des Auslegungszusammenhangs – wohl auch mit der nationalen Verfassung im Widerspruch stehen.^{*54} Durch die Prüfung der Verfassungsmäßigkeit könnten die Gesetze, die gleichzeitig eine Richtlinie und die Verfassung verletzen, für unwirksam erklärt werden.^{*55} Ohne eine verfassungsgerichtliche Prüfung besteht Gefahr, dass solche Gesetze außerhalb des konkreten Rechtsstreits ihre Gültigkeit behalten. Laut Simmenthal-Urteil muss der Instanzrichter die Möglichkeit haben, das vom EU-Recht abweichende Gesetz nicht anzuwenden, ohne dass eine Prüfung der Verfassungsmäßigkeit eingeleitet wird.^{*56} Nach dem Urteil „A. versus B.“ von 2014 darf eine solche Prüfung jedoch unter bestimmten Voraussetzungen eingeleitet werden.^{*57}

⁴⁷ EuGH C-617/10, Rn. 29.

⁴⁸ M. Klein (FN 26), S. 608.

⁴⁹ GA Bobek C-310/16: Dzivev, Rn. 90 f.

⁵⁰ Am Beispiel des Wahlrechts (Art. 39 GRCh) der Gefangenen StGH 3-3-1-49-15, Rn. 13.

⁵¹ G. Buchholz (FN 27), S. 843 f., m.w.N.

⁵² Falls die Grundsätze, die die ex officio Anwendung des Unionsrechts regeln, eine solche Pflicht nicht ausschließen, dazu T. von Danwitz, K. Paraschas. A Fresh Start for the Charter: Fundamental Questions on the Application of the European Charter of Fundamental Rights. - *Frodham Int. Law Journal* 53 (2017), S. 1396, 1421.

⁵³ EuGH Gutachten 2/13, Rn. 192.

⁵⁴ Am Beispiel des europäischen Haftbefehls C. D. Classen (FN 22), S. 359.

⁵⁵ Zur kontroversen Entscheidungserheblichkeit der innerstaatlichen Rechtsnorm in der konkreten Normenkontrolle ebd., S. 358 f.

⁵⁶ Dazu in Estland H. Kalmo (FN 32), S. 161, 163. Vgl. EuGH C-112/13: A versus B., Rn. 38; C-188/10 ja C-189/10: Melki ja Abdeli, Rn. 43; C-314/08: Krzysztof Filipiak, Rn. 82.

⁵⁷ EuGH C-112/13, Rn. 41 ff. Kritisch dazu D. Paris (FN 6), S. 217 f.

3.4. Vorrang der Verfassung in Ausnahmefällen

Zudem ermöglicht die kumulative Anwendung von Grundrechten, die im Rechtsstreit M. A. S. und M. B. in 2017 genannten Ausnahmesituationen zu ermitteln. In diesen ermögliche die Nichtanwendung des nationalen Gesetzes zwar den Verstoß des EU-Rechts zu beseitigen, dies aber wiederum führe zu einem Verstoß gegen den Grundsatz der Gesetzmäßigkeit im Zusammenhang mit Straftaten und Strafen. In solchen Situationen steht es den nationalen Behörden und Gerichten frei, unter den im Åkerberg-Urteil aufgestellten Voraussetzungen nationale Schutzstandards für die Grundrechte anzuwenden, wenn der Sachverhalt nicht durch unionsrechtlichen Vorschriften harmonisiert ist.^{*58} Heute ist es wahrscheinlich noch zu früh zu behaupten, dass es in den nationalen Verfassungen neben dem Grundsatz *nulla poena sine lege* keine weiteren fundamentalen Grundsätze^{*59} gibt, die schutzwürdig sein können, auch wenn der Preis in der gewissen Beeinträchtigung der Wirksamkeit des EU-Rechts besteht.

3.5. Multipolare Konflikte

Auch ein multipolarer Grundrechtskonflikt im Geltungsbereich des EU-Rechts schließt an sich die Anwendung des nationalen Grundrechts mit höherem Schutzniveau nicht aus.^{*60} Richtig ist zwar, dass beispielsweise „mehr“ für den Datensubjekt beim Schutz seiner Privatsphäre „weniger“ für die Freiheiten des Datenverarbeiters bedeutet.^{*61} Mehr Schutz für Phonogrammhersteller würde weniger Schutz für Künstler bedeuten, die das Phonogramm in ihrer Schöpfung benutzen wollen.^{*62} Dies schaltet aber die nationale Verfassung bei der Beurteilung des nationalen Umsetzungsgesetzes noch nicht aus. So würde die nationale Verfassung nicht nur deswegen mit der Charta im Widerspruch stehen, weil die Verfassung für Datensubjekt grundsätzlich einen höheren Schutz als Art. 8 GRCh (Schutz von personenbezogenen Daten) gegen den Datenverarbeiter sichern könnte. Der Widerspruch würde erst dann entstehen, wenn die Charta den Mitgliedstaat zwingt die Veröffentlichung der Daten durch den Datenverarbeiter wegen seiner Meinungsfreiheit (Art. 11 GRCh) zu erlauben, obwohl die nationale Verfassung eine solche Veröffentlichung zum Schutz des Privatlebens des Datensubjekts klar verbietet.

In der Regel müssten multipolare Konflikte der Rechte unterschiedlicher Ebenen dadurch gelöst werden, dass das Verfassungsgrundrecht der Person X. und das Chartagrundrecht der Person Y. gegeneinander unter Berücksichtigung der EU-Interessen und natürlich auch der harmonisierenden sekundärrechtlichen Normen erwogen werden. Den Eingriff in die Grundrechte der Charta können verschiedene legitime öffentliche und private Interessen rechtfertigen.^{*63} Die Chartarechte sind nicht per se vorrangig vor den Verfassungsgrundrechten. Dabei werden unter den Rechten und Freiheiten Anderer im Artikel 52 Abs. 1 Satz 2 GRCh nicht nur die in der Charta festgesetzten, sondern auch nationale Rechte und Freiheiten berücksichtigt.^{*64} Eben auf die multipolaren Beziehungen hat man als die Situationen hingewiesen, in denen die Mitgliedsstaaten einen relativ breiten *margin of appreciation* behalten sollten.^{*65} Der Vorrang der Charta gegenüber der Verfassung kommt erst dann ins Spiel, wenn es klar ist, dass das Chartagrundrecht einer Person die Gewährleistung des Verfassungsgrundrechts einer anderen Person tatsächlich nicht zulässt. Dies könnte eher eine Ausnahmesituation darstellen, weil bei den kollidierenden Grundrechten selten strikte verfassungsrechtliche Regeln vorliegen. Damit sollte der vom Richtliniengeber gefundene Gleichgewicht^{*66} stets im Lichte der nationalen Verfassung zulässig sein.

Im Unterschied zu Österreich stellt die Charta in Estland und in Deutschland heute keinen direkten Kontrollmaßstab für die Prüfung der Verfassungsmäßigkeit dar.^{*67} Als EU-Recht ist es tatsächlich nicht Teil

⁵⁸ EuGH C-42/17: M.A.S. und M.B., Rn. 46 ff.; C-310/16: Dzivev, Rn. 35. Vgl. EuGH C-105/14: Taricco, Rn. 53 ff; GA Bobek C-310/16: Dzivev, Rn. 47 ff. m.w.N.

⁵⁹ Zum Art. 1 GEV in Estland J. Laffranque (FN 8), S. 119, 131 f.

⁶⁰ So aber G. Buchholz (FN 27), S. 841; M. Bäcker (FN 33), S. 397 f.

⁶¹ J. Masing (FN 21), S. 484.

⁶² So in Rechtsache C-476/17: Pelham.

⁶³ Siehe z.B. C-338/04, C-359/04 und C-360/04: Placanica, Palazzese und Sorricchio, Rn. 47.

⁶⁴ H. D. Jarass. *Charta der Grundrechte der EU. Kommentar*. München: Beck 2016, Art 52 Rn. 31.

⁶⁵ A. Edenharter (FN 37), S. 227, 238 f.; C. D. Classen (FN 22), S. 363.

⁶⁶ Vgl. auch EuGH C-149/17: Bastei Lübbe, Rn. 47.

⁶⁷ A. Edenharter (FN 37), S. 233 ff.

der Verfassung geworden. Davon abgesehen scheint es unvermeidlich, dass bei multipolaren Beziehungen die Charta auch im Verfassungsgericht indirekt berücksichtigt wird. Es ist klar, dass das Verfassungsgericht ein Gesetz nicht für ungültig erklären darf, soweit die Aufhebung in der Verletzung von aus der Charta ergebenden Rechten der betroffenen Dritten resultieren würde.⁶⁸ Es wäre aber zweifelhaft, die sich aus der Charta ergebenden Rechte eines Klägers oder eines Antragsstellers, z.B. eines Datenverarbeiters, vor dem Verfassungsgericht unberücksichtigt zu lassen, soweit diese den Eingriff in die Chartarechte Dritter, etwa eines Datensubjekts stärker rechtfertigen könnten als die nationale Verfassung.

4. Zusammenfassung

Der Raum für die parallele Anwendung von Grundrechten ist eher weit als eng. Die determinierende Wirkung des Unionsrechts muss nicht die Prüfung der Verfassungsmäßigkeit beschränken, sondern nur den Erlass von Urteilen, die das Unionsrecht beeinträchtigen. Vielleicht wäre es einfacher, im EU-Geltungsbereich nur mit der Charta zu operieren, dies ist aber in der heutigen Integrationsphase sicherlich noch nicht realistisch. Soweit die Abgrenzung des Umsetzungsspielraums und die Anwendung der Meistbegünstigungsklausel nicht abstrakt erfolgen, sondern in den Rahmen eines konkreten Falles bleiben, bereitet auch die parallele Anwendung der Grundrechte den Gerichten keine unüberwindbaren Schwierigkeiten und führt uns nicht zu einem exponentiellen Zuwachs von Vorabentscheidungsersuchen. Sowohl die Verfassungsgerichte als auch das EuGH könnten die Möglichkeit ausnutzen, voneinander zu lernen und die Argumente Anderer ernsthaft zu erwägen.

⁶⁸ Zur Bindungswirkung des Unionsrechts für die Verfassungsgerichte C. D. Classen (FN 22), S. 360.



Ilya Ilin
Doctoral student
University of Tartu



Aleksei Kelli
Professor of Intellectual Property Law
University of Tartu

The Use of Human Voice and Speech in Language Technologies:

The EU and Russian Intellectual Property Law Perspectives

1. Introduction

Language technologies (LTs) have become an integral part of our everyday lives.^{*1} This article focuses on the legal aspects of these technologies. Several legal challenges related to LTs have already been extensively addressed (e.g., issues related to personal data, dissemination models, constitutional bases).^{*2} The authors draw on previous research and extend it. In this paper, the authors concentrate on the legal status of voice and speech from an intellectual property^{*3} (IP) perspective and on compatibility of the respective EU and Russian legal regimes. Because of this different focus of the article, it does not cover issues related to the protection of voice and speech in terms of personal data rights in the EU and Russia. These issues are analysed in a separate paper.^{*4}

¹ Examples of such technologies are automatic text translation, various services that provide language checks for writing, and applications that vocalise text with an integrated speech-to-speech translation function. In October 2017, Google demonstrated its brand-new headphones (Pixel Buds), which have an integrated speech-to-speech translation function.

² See, e.g., J. Klavan, A. Tavast, A. Kelli (2018). The Legal Aspects of Using Data from Linguistic Experiments for Creating Language Resources. – *Frontiers in Artificial Intelligence and Applications* (307), pp. 71–78. Abstract available at <http://ebooks.iospress.nl/volumearticle/50306> (18.5.2019); S. Calamai, C. Kolletzek, A. Kelli (2018). Towards a Protocol for the Curation and Dissemination of Vulnerable People Archives. In: Inguna Skadin, Maria Eskevich (eds.). *CLARIN Annual Conference 2018 Proceedings* (CLARIN Annual Conference 2018, 8–10 October 2018, in Pisa, Italy). CLARIN (pp. 77–81). Available at https://office.clarin.eu/v/CE-2018-1292-CLARIN2018_ConferenceProceedings.pdf (18.5.2019); A. Kelli, K. Lindén, K. Vider, P. Labropoulou, E. Ketzan, P. Kamocki, P. Straňák (2018). Implementation of an Open Science Policy in the Context of Management of CLARIN Language Resources: A Need for Changes? In: *Selected Papers from the CLARIN Annual Conference 2017* (pp. 102–111). Linköping, Sweden: Linköping University Electronic Press. Available at <https://www.ep.liu.se/ecp/147/009/ecp17147009.pdf> (18.5.2019); A. Kelli, K. Vider, H. Pisuke, T. Siil (2017). Constitutional Values As a Basis for the Limitation of Copyright within the Context of Digitalization of the Estonian Language. In: Kalvis Torgans (ed.). *Constitutional Values in Contemporary Legal Space II, 16–17 November 2016: Collection of Research Papers in Conjunction with the 6th International Scientific Conference of the Faculty of Law of the University of Latvia* (pp. 126–139). Riga, Latvia: University of Latvia Press. – DOI: <https://doi.org/10.22364/cvcls.2.2016>.

³ Intellectual property (IP) is defined as rights resulting from intellectual activity in industrial, scientific, literary, or artistic fields. Convention Establishing the World Intellectual Property Organization (signed in Stockholm on 14 July 1967 and as amended on 28 September 1979). Available at <https://wipolex.wipo.int/en/text/283854> (10.5.2019). IP is traditionally divided into three main categories: 1) copyright, 2) related rights, and 3) industrial property. The article addresses copyright and related rights.

⁴ See I. Ilin, A. Kelli (2019). The Use of Human Voice and Speech for the Development of Language Technologies: The EU and Russian Data Protection Law Perspectives (forthcoming).

The article discusses the features of the regulatory framework regarding voice and speech in the EU and Russia from a copyright and related rights perspective.^{*5} Russia and the EU have been chosen to explore the possibilities of co-operation in the field of LTs. Because the authors have an in-depth understanding of the Estonian copyright system, the Estonian Copyright Act^{*6} (CA) is used as an example of implementation of the EU copyright directives.

Both the EU member states and Russia are parties to the majority of international conventions dealing with intellectual property regulation, including the Berne Convention on Literary and Artistic Works^{*7} (Berne Convention), and the World Intellectual Property Organization (WIPO) Copyright Treaty^{*8}, which ensures common ground for intellectual property regulation.

The authors evaluate whether the EU and Russian IP laws are compatible with treating voice and speech as an input to the development of language technologies. This is relevant since co-operation between EU and Russian language-technology developers (firms, research institutions, etc.) is inevitable. The Russian language cannot be ignored in the development of contemporary and competitive LTs. Therefore, it is crucial to identify potential barriers to co-operation and map legal risks. The authors argue that the differences between the EU and Russian IP regulatory frameworks do not constitute major obstacles in joint activities to develop LTs.

The human voice and speech are legally complex phenomena in both jurisdictions. While a plethora of scholars have engaged in discussion of the legal nature of multimedia works^{*9} that frequently assumes use of voice and speech, very little attention in academic literature is paid to the issues of voice and speech application particularly in the rapidly developing language technologies.

Voice and speech should be differentiated in terms of their origin. The voice refers to sound creation and speech to phoneme creation.^{*10} Hence, a problem of delineating how these objects tie in with the intellectual property concept arises. Should they be considered a single object or two different objects? Speech without an oral component becomes written language (text) that in most cases is subject to copyright protection as a literary work.^{*11} Voice without speech becomes a personality characteristic that involves a unique combination of voice patterns (vocal qualities, volume, speed, and so forth).

Without relation to speech, voice is not a result of creation by the human mind, and, therefore, it usually cannot be regarded as an object of intellectual property. There are some cases wherein voice is protected as intellectual property (e.g., the voice of a fictional character is protected by copyright^{*12} or by trademark^{*13} law). Most frequently, voice is treated as a personality characteristic, which is not covered as intellectual property.^{*14} In this paper, voice is considered as a vocal element of the speech and is examined alongside it.

⁵ Within the context of the article, the reference to copyright should be interpreted as encompassing copyright and related rights both.

⁶ The Estonian Copyright Act (Autoriõiguse seadus). Entry into force: 12.12.1992. English translation available at <https://www.riigiteataja.ee/en/eli/504042019001/consolide> (18.5.2019).

⁷ Berne Convention for the Protection of Literary and Artistic Works (as amended on 28 September 1979). Available at <https://wipolex.wipo.int/en/text/283698> (18.5.2019).

⁸ WIPO Copyright Treaty (adopted in Geneva on 20 December 1996). Available at <https://wipolex.wipo.int/en/text/295166> (18.5.2019).

⁹ See, e.g., A.M. Eskicioglu (2003). Protecting Intellectual Property in Digital Multimedia Networks. – *Computer* 36 (7), pp. 39–45. – DOI: <https://doi.org/10.1109/mc.2003.1212689>; T. Aplin (2005). *Copyright Law in the Digital Society: The Challenges of Multimedia*. Bloomsbury Publishing; A.L. Moorthy, C.R. Karisiddappa (2005). The Relevance of Intellectual Property Rights in the Digital Millennium (International Conference on Information Management in Knowledge Society). Available at <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.614.8596&rep=rep1&type=pdf> (6.5.2019); S. Hideyasu, Y. Kiyoki (2008). Frameworks for Intellectual Property Protection on Multimedia Database Systems. – *Frontiers in Artificial Intelligence and Applications* 166, p. 181; E. Dementieva, E. Деметтьева (2016). Проблемы правового регулирования цифровой формы произведения. Интеллектуальная собственность [“Problems of Legal Regulation of the Digital Form of the Product: Intellectual Property”]. – *Авторское право и смежные права [Copyright and Related Rights]* 8, pp. 35–44; A. Nazarenko, A. Назаренко (2016). Проблемы правовой квалификации мультимедийных продуктов [“Problems of Legal Qualification of Multimedia Products”]. – *Интеллектуальная собственность. Авторское право и смежные права [Intellectual Property: Copyright and Related Rights]* 9, pp. 27–34.

¹⁰ A. Behrman (2017). *Speech and Voice Science* (3rd edn., Plural Publishing), p. 4.

¹¹ Article 2(1) of the Berne Convention.

¹² Kamina Pascal (2016). Film Copyright in the European Union. – *Cambridge Intellectual Property and Information Law* 33, pp. 111–113.

¹³ K. Foley (2009). Protecting Fictional Characters: Defining the Elusive Trademark–Copyright Divide. – *Connecticut Law Review* 41(3), pp. 923–960.

¹⁴ The voice as personality characteristic in some countries may refer to the image rights (e.g., Germany, Spain, France) and to the data protection legislation.

As objects of intellectual property, voice and speech have a dual meaning. On one hand, voice and speech might be used to create works or make works available to the public (e.g., interpretations, translations, performances). Then they mainly bring in the copyright and related rights concepts. When one speaks about the use of voice and speech in LTs, in this scenario they are processed by LT applications. In other words, voice and speech are considered to be input to the LT applications and, hence, become subject to copyright or related rights protection.

On the other hand, the samples of the human voice and speech are used for the creation of language resources^{*15} (language datasets), and they constitute an element of the database. Language resources (LRs) are used to create LTs.

For reasons of space and different focus, the article does not address the entire process of the development of language technologies (from raw data to LT products) and the impact of the legal regime associated with the material used to create LT products. These issues are covered in other publications.^{*16}

2. Protectability of voice and speech via copyright and related rights

To foster co-operation in the field of language technology between Russia and the EU, the treatment of voice and of speech from the perspective of copyright and related rights has to be similar between the two jurisdictions. This section comparatively analyses these regulations to identify potential incompatibilities.

The authors' aim is not to provide a comparison of all legal norms regulating copyright and related rights protection in the EU and Russia. The similarity of the legal grounds for such protection allows presuming that the regulations are similar to each other. For instance, a brief comparison of the legislation of Estonia (an example of an EU member state) and Russian regulation exemplifies that in both countries copyright does not require any official registration^{*17}, software and databases are protectable^{*18}, and the duration of copyright is the author's life plus seventy years after his or her death (70 years *post mortem auctoris*).^{*19}

In this section, the authors concentrate on the material used to develop language technologies. The legal basis for the use of the material is analysed and compared in the next section.

2.1. Copyright protection

The key concept behind copyright protection is the originality of the work. Under the Berne Convention, the work may be protected by copyright if it fulfils the requirement of originality.^{*20} The level of originality required is sometimes debated.^{*21} The EU and Russian copyright legislation do not define originality.

¹⁵ For further discussion of the nature of language resources, see A. Kelli, K. Vider, K. Lindén (2015). The Regulatory and Contractual Framework As an Integral Part of the CLARIN Infrastructure. In: Koenraad de Smedt (ed.). *Selected Papers from the CLARIN Annual Conference 2015* (14–16 October 2015, Wrocław, Poland). Linköping, Sweden: Linköping University Electronic Press (pp. 13–24). Available at <https://www.ep.liu.se/ecp/article.asp?issue=123&article=002> (6.5.2019).

¹⁶ A. Kelli, A. Tavast, K. Lindén, K. Vider, R. Birštonas, P. Labropoulou, I. Kull, G. Tavits, A. Värvi (2019). The Extent of Legal Control over Language Data: The Case of Language Technologies. In: CLARIN conference proceedings (forthcoming); A. Kelli, A. Tavast, K. Lindén, K. Vider, I. Kull, G. Tavits, A. Värvi, V. Mantrov, R. Birštonas (2019). Impact of Legal Status of Data on the Development of Data-Intensive Products: The Example of Language Technologies. In: *Latvian University Conference "Legal Science: Functions, Significance and Future in Legal Systems"* (forthcoming).

¹⁷ The Estonian Copyright Act, §7 (3); Article 1259 (4) of the Civil Code of the Russian Federation. – *The Civil Code of the Russian Federation* (Part I of IV) (Гражданский кодекс Российской Федерации (часть первая)) N 51-FZ, dated 30.11.1994. Adopted by the State Duma on 21 October 1994, signed by the President of the Russian Federation on 30 November 1994. Entry into force: 1.1.1995. Unofficial English translation available at <http://www.wipo.int/edocs/lexdocs/laws/en/ru/ru083en.pdf>> (6.5.2019).

¹⁸ The Estonian Copyright Act, §4 (3); Article 1259 of the Civil Code of the Russian Federation.

¹⁹ The Estonian Copyright Act, §38 (1); Article 1281 of the Civil Code of the Russian Federation.

²⁰ WIPO Intellectual Property Handbook: Policy, Law and Use 2 (2004), paragraph 5.171.

²¹ See E. Rosati (2013). Originality in EU Copyright: Full Harmonization through Case Law. Edward Elgar Publishing; J. Street, K. Negus, A. Behr (2018). Copy Rights: The Politics of Copying and Creativity. – *Political Studies* 66 (1), pp. 63–80. – DOI: <https://doi.org/10.1117/0032321717706012>; A. Lukoseviciene (2017). On Author, Copyright and Originality: Does the Unified EU Originality Standard Correspond to the Digital Reality in Wikipedia. – *Masaryk UJL & Tech.* (11), pp. 215–242. –

The EU copyright rules are harmonised by the CJEU case law, where originality is mainly conceptualised with reference to the author's creativity. The concept of the author's creativity^{*22} is also used in the Russian copyright rules, which presume the work should be a manifestation of the author's intellect and personality. Under this concept, the work should be new, original, unique, and creative. Therefore, voice and speech can be copyright protected if they are a part of the creative work. The quality of the work and its cultural and artistic merits do not create valid grounds for the exclusion of copyright protection in either of the jurisdictions. However, these works should express an idea or be a derivative work^{*23} (e.g., translation, a work's adaptation).

The author's creativity – and, therefore, the originality requirement – is connected to the author's personality. In this regard, the question of the authorship of the work created by or with the help of language technology needs to be resolved. There are three scenarios for how the work can be created: language technology applications are used as a tool to create a work (e.g., usage of speech-to-text applications to dictate a novel), a language technology application creates a work with a human contribution (e.g., the human analyses the outcomes or selects the valuable results), and the language application creates a work by itself (e.g., sound and music creation^{*24}, automatic paper generators^{*25}, painting generation^{*26}, machine translation without human interaction).^{*27}

In the first scenario, the author of the work is a person who used a language technology application to create a work. In this scenario, the creativity of the author and, therefore, the originality of the work can be easily identified; that makes the created work in most cases copyright protected. In the case of a work created by a technology application with a human contribution or on its own, the question of authorship becomes more complicated. The following example can be provided to illustrate the problem. The combination of speech synthesis, speech analysis, and speech recognition may create a situation wherein the voice from a video (e.g., a lecture, a movie, a performance) is captured, transformed into subtitles, translated, and then vocalised by a synthesised voice without any human interaction in this process. The process described involves three stages, with different results at the end. The first stage is transforming voice into text; the result is the initial text in a written form. The second stage is text translation; the result is translated text. The last stage is transforming the text into a voice; the result is vocalised text.

To be copyright protected, the result of every stage needs to be related to the author's creativity and be original. Human interaction needs to be evaluated for identification of the author. The majority of national jurisdictions in the EU rely on the concept under which the work might be protected by copyright only if it was created with a connection to the author's mind and personality (see the Estonian Copyright Act's §4 (2)), and some jurisdictions state that only humans can be the authors of a copyright-protected work (e.g., France, Germany, Spain, Estonia). The Russian copyright legislation too clearly identifies the author of the copyrighted work as a human.^{*28} In this regard, the current EU and Russian copyright regulation do not deem computer-generated works copyright protected.^{*29} If the minimum effort is put in, the person who

DOI: <https://doi.org/10.5817/mujlt2017-2-2>; K. Peifer (2014). "Individualität" [individuality] or Originality? Core Concepts in German Copyright Law. – *GRUR Int.* 63 (12).

²² For further discussion, see J. Street, K. Negus, A. Behr (2018). Copy Rights: The Politics of Copying and Creativity. – *Political Studies* 66 (1), pp. 63–80. – DOI: <https://doi.org/10.1177/0032321717706012>; G. Adomaitytė, V. Žilinskaitė, Ž Sederevičiūtė-Pačiauskienė, I. Valantinaitė, V. Navickienė (2018). Shift of Creativity Concepts: From Mysticism to Modern Approach. – *Filosofija. Sociologija* 29 (3). – DOI: <https://doi.org/10.6001/fil-soc.v29i3.3777>; N. Kawashima (2010). The Rise of "User Creativity" – Web 2.0 and a New Challenge for Copyright Law and Cultural Policy. – *International Journal of Cultural Policy* 16(3). – DOI: <https://doi.org/10.1080/10286630903111613>.

²³ Article 2 of the Berne Convention.

²⁴ E.g., Google research project Magenta, details available at <https://opensource.google.com/projects/magenta> (6.5.2019); Sony CSL music research project, details available at <https://www.sonycsll.co.jp/tag/music/> (6.5.2019).

²⁵ SCIGen – an Automatic CS Paper Generator. Available at <https://pdos.csail.mit.edu/archive/scigen/> (6.5.2019).

²⁶ M. Brown (2016). "New Rembrandt" to Be Unveiled in Amsterdam. Available at <https://www.theguardian.com/artand-design/2016/apr/05/new-rembrandt-to-be-unveiled-in-amsterdam> (13.5.2019).

²⁷ H.M. Böhler (2017). EU Copyright Protection of Works Created by Artificial Intelligence Systems. University of Bergen, pp. 1–37. Available at http://bora.uib.no/bitstream/handle/1956/16479/JUS399_V17_183.pdf?sequence=1&isAllowed=y (6.5.2019).

²⁸ Article 1257 of the Civil Code of the Russian Federation.

²⁹ See H.M. Böhler (2017). EU Copyright Protection of Works Created by Artificial Intelligence Systems. University of Bergen, pp. 1–37. Available at http://bora.uib.no/bitstream/handle/1956/16479/JUS399_V17_183.pdf?sequence=1&isAllowed=y (6.5.2019).

made this effort is deemed the author and the work may be copyright protected.^{*30} Although there are also other legal issues related to works created by computers (liability for infringement, identification of the person liable, and so forth), they are not addressed here, on account of the focus of the article being elsewhere.

Moral rights constitute a legal challenge in the field of language technology in both jurisdictions. In Russia and the majority of the EU countries, copyright rights are divided into two separate groups: moral rights and economic rights.^{*31} According to the Berne Convention,

independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honour or reputation.^{*32}

In other words, moral rights have a strong connection with the personality of an author.^{*33} The scope of moral rights protected by copyright depends on the approach of the national legislation. It is possible to distinguish between Anglo-American (common law) copyright and the Continental-European *droit d'auteur* approach. The Anglo-American copyright tradition applies very limited protection of moral rights in comparison to the Continental-European approach.

The majority of EU countries and Russia belong to the Continental copyright tradition. This means the author's moral rights are integral to the author's person and non-transferable in both jurisdictions.^{*34}

The strong connection to the author's person and the absence of a legal mechanism for the transfer of the moral rights creates the problem of how the moral rights might be exercised by the author in the case of the development of language technologies. Under the Russian national legislation, the law protects the following moral rights of an author: the right of attribution, the right to one's own name, a right to the integrity of the work, and a right to publish the work.^{*35} That means that there is always the risk that authors (e.g., employees of the company, individuals who contributed to the product development) can claim the infringement of moral rights. This is related mainly to the integrity right, because there is a need to modify copyright-protected works (e.g., add annotations, metadata, and so forth) while developing language resources used to create language technologies. The exercise of moral rights by third parties can be identified as one of the main challenges connected with the development of language technologies.^{*36}

The strategy for dealing with potential legal risks depends on the specific situation. If a company is developing the technology itself, then one way forward to address challenges in both jurisdictions is to obtain the author's prior agreement not to exercise his or her moral rights. This is not a clear-cut solution, but it could still mitigate some risks. European copyright scholars have even suggested a model addressing the consent connected with moral rights in the European Copyright Code (ECC).^{*37} The European Copyright Code suggests regulating the exercise of moral rights as follows: 'The author can consent not to exercise his moral rights. Such consent must be limited in scope, unequivocal and informed' (Art. 3.5). The model provisions can be relied on as guidelines for drafting.

In the case of language resources acquired to develop LTs, due diligence is required, to clarify the legal situation with regard to moral rights (amendments/adaptations to the original works or agreements on the exercise of moral rights by third parties).

³⁰ H.M. Böhler (2017). EU Copyright Protection of Works Created by Artificial Intelligence Systems. University of Bergen, pp. 1–37. Available at http://bora.uib.no/bitstream/handle/1956/16479/JUS399_V17_183.pdf?sequence=1&isAllowed=y (6.5.2019). For instance, according to the UK copyright law, '[i]n the case of a literary, dramatic, musical or artistic work which is computer-generated, the author shall be taken to be the person by whom the arrangements necessary for the creation of the work are undertaken' (Art. 9 (3)). Copyright, Designs and Patents Act 1988. Available at <https://www.legislation.gov.uk/ukpga/1988/48/section/9> (10.6.2019).

³¹ Some of the EU countries in their copyright regulations apply another approach, which presumes that the moral and economics rights are integral (e.g., Germany).

³² Article 6bis of the Berne Convention.

³³ For further discussion on moral rights, see E. Adeney (2006). *The Moral Rights of Authors and Performers*. Oxford University Press; M.M. Walter, S. von Lewinski (2010). *European Copyright Law: A Commentary*. Oxford University Press; S. von Lewinski (2008). *International Copyright Law and Policy*. Oxford University Press.

³⁴ The Estonian Copyright Act, §11 (2); Article 1265 of the Civil Code of the Russian Federation.

³⁵ Article 1255 of the Civil Code of the Russian Federation.

³⁶ For further discussion, see A. Kelli, T. Hoffmann, H. Pisuke, I. Kull, L. Jents, C. Ginter (2014). *The Exercise of Moral Rights by Non-Authors*. – *Journal of the University of Latvia* 6, pp. 108–125.

³⁷ European Copyright Code. Available at <https://www.ivir.nl/copyrightcode/european-copyright-code/> (14.5.2019).

2.2. Related rights protection

Voice and speech can be protected as objects of related (neighbouring) rights. While copyright protection has a strong connection to the author's personality, which results in the acknowledgement of moral rights, related rights are often connected to the beneficiary of these rights. Related rights mainly constitute economic rights. However, it should be mentioned that performers have moral rights, as well.

There are three groups of beneficiaries of related rights: performers, producers, and broadcasting organisations. The application of the protection of the related rights to the voice and speech in the field of language technology depends on how the voice and speech are treated within the technology. Two distinct scenarios can be outlined. The first scenario involves the voice and speech being used in the process of making works available to the public (e.g., in a situation in which the performance was recorded, the rights of the phonogram producers are protected by the related rights). In the second scenario, voice and speech are considered to be input to a digital language resource (an element of the database), and, therefore, *sui generis* databases^{*38} fall within the field of related rights.^{*39}

Language technologies (inclusive of those relying on voice and speech) are often used in the process of making works available to the public. Therefore, voice and speech are a part of this process. For instance, in cases of voice and speech that are part of a performance, recording, or broadcasting of an audiovisual work, the identification of legal risks depends on the particular scope of the related rights. This is connected with unlawful usage of the work itself (a publicly available work) and unlawful usage of the recording or broadcasting of the audiovisual work.

In the case of performer's rights, the situation is different, since it is crucial to consider the performer's moral rights as well. The question here is similar to problems of the author's identification as described above for copyright protection.

Voice and speech can also be viewed from the perspective of digital language resources (databases containing language data). The European copyright framework protects databases as copyright-protected works and by *sui generis* database rights. The *sui generis* protection relies on related rights.^{*40} The latter options require that 'qualitatively and quantitatively a substantial investment' has been made in regard of the databases created.^{*41} The Russian database regulation also presumes two options for database protection, by means of the copyright^{*42} and by related rights protection, which refers to the concept of 'substantial investments' here also.^{*43}

Samples of voice and speech may constitute content of databases. The EU database directive and the Russian regulation^{*44} on databases define a database as a 'collection of independent works, data or other materials arranged in a systematic or methodical way and individually accessible by electronic or other means'.^{*45} The definition presents three main characteristics of a database: 1) independence, 2) systematic order, and 3) individual-level accessibility. The independence of the elements means that every element can be removed from the base without damage to other elements of the database^{*46} (this distinguishes databases, for instance, from novels and films, as they too are composed of separate elements, such as chapters and soundtracks).^{*47} The systematic order involves the elements being put into and classified in a specific order that allows searching the separate elements. At the same time, the European database directive, CJEU court practice^{*48}, and Russian database regulation do not define the character of the accessibility by electronic means.

³⁸ Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases.

³⁹ As a matter of fact, language resources can cumulatively be protected as copyrighted and *sui generis* database.

⁴⁰ Databases can be protected also by trade secret, competition, and contract law.

⁴¹ Article 7 of Directive 96/9/EC.

⁴² Article 1260 of the Civil Code of the Russian Federation.

⁴³ Article 1334 of the Civil Code of the Russian Federation.

⁴⁴ Part 4 of the Civil Code of the Russian Federation.

⁴⁵ Article 2(1) of Directive 96/9/EC refers to Article 1260 of the Civil Code of the Russian Federation.

⁴⁶ Case C-444/02, *Fixtures Marketing Ltd v. Organismos Prognostikon Agonon Podosfairou* [2004] ECLI:EU:C:2004:697; Case C-46/02, *Fixtures Marketing Ltd v. Oy Veikkaus AB* [2004] ECLI:EU:C:2004:694; Case C-338/02, *Fixtures Marketing Ltd v. Svenska Spel AB* [2004] ECLI:EU:C:2004:696; Case C-203/02, *The British Horseracing Board Ltd v. William Hill Organisation Ltd* [2004] ECLI:EU:C:2004:695.

⁴⁷ E. Derclaye (2007). Intellectual Property Rights on Information and Market Power: Comparing the European and American Protection of Databases. – *International Review of Intellectual Property and Competition Law* 38 (3), pp. 275–298.

⁴⁸ E. Derclaye (2002). What Is a Database? A Critical Analysis of the Definition of a Database in the European Database Directive and Suggestions for an International Definition. – *The Journal of World Intellectual Property* 5 (6), pp. 981–1011. – DOI: <https://doi.org/10.1111/j.1747-1796.2002.tb00189.x>.

There are two points that need to be examined from the perspective of language technology: the first one is how these databases are formed and the second is how the technologies that are built on these databases are further distributed to other language technology companies and users. These problems are addressed in part in the following section. However, the entrepreneurial aspects of such distribution fall outside the scope of the article and are investigated in further research.

3. The creation of digital language resources

The development of language technologies relies on the use of language resources. Language resources constitute a database consisting of text in written and oral form further used for the machine learning process. From the IP perspective, LRs may contain copyright-protected works, performances protected as objects of related rights, and personal data. Language resources are covered with two tiers of rights. The first tier of rights covers material containing language data (text, videos, voice samples, and so forth). The second tier of rights is related to the database itself. It is visualised with the following figure:^{*49}

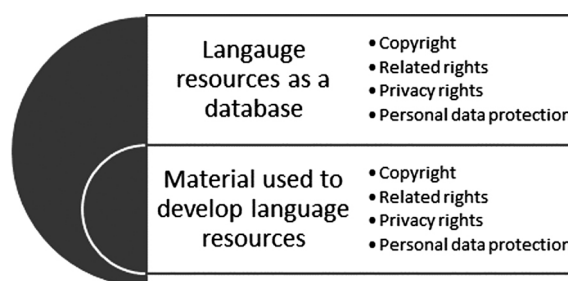


Figure 1: Two tiers of rights covering language resources

It should be emphasised that, to avoid legal risks, it is crucial to address legal issues pertaining to LRs themselves (the database) and the material used to develop LRs. When it comes to LRs as a database, the IP issues could easily be contractually regulated with individuals involved in their development. IP rights can be transferred or extensive licences acquired.

The situation is more challenging with the material used to create language resources. It involves copying of copyright-protected works. Since the focus of this article is on voice and speech, the performer's rights and phonogram producer's rights are relevant as well.

The copyright does not protect all works as such, and to be copyright protected, the work needs to constitute original results in the literary, artistic, or scientific domain (e.g., the Estonian Copyright Act, §4 (2)). In this regard, it is possible to specify three categories of works that can be used for the creation of the digital resources: the non-protected works (e.g., legal acts, official documents), 'safe' texts (manuals, technical documents, medical reports, etc.), and copyright-protected works.^{*50}

From the technical perspective, on account of the vast volume of works in a language resource, it is a challenging task to identify the particular category of the works that are used for data mining. Even if it were possible, creation of a language resource based only on the non-protected and safe texts would be not sufficient to create a sizeable database of good quality. The development of language technologies requires language samples from everyday language usage, which most likely are copyright protected.

Language technology products (e.g., user interfaces, translation tools) do not necessarily contain copyright-protected content.^{*51} However, if one is to create LT products, there is a need to use language resources having IP-protected material for text and data mining.

⁴⁹ A. Kelli, K. Vider, K. Lindén (2015). The Regulatory and Contractual Framework As an Integral Part of the CLARIN Infrastructure. In: Koenraad de Smedt (ed.). *Selected Papers from the CLARIN Annual Conference 2015* (14–16 October 2015, Wrocław, Poland). Linköping, Sweden: Linköping University Electronic Press, pp. 13–24. Available at <http://www.ep.liu.se/ecp/article.asp?issue=123&article=002> (6.5.2019).

⁵⁰ M. Truyens, P. Van Eecke (2014). Legal Aspects of Text Mining. – *Computer Law & Security Review* 30 (2), pp. 153–170. – DOI: <https://doi.org/10.1016/j.clsr.2014.01.009>.

⁵¹ A. Kelli, A. Tavast, K. Lindén, K. Vider, R. Birštonas, P. Labropoulou, I. Kull, G. Tavits, A. Värvi (2019). The Extent of Legal Control over Language Data: The Case of Language Technologies. In: CLARIN conference proceedings (forthcoming).

The Directive on Copyright in the Digital Single Market^{*52} (Digital Copyright Directive) introduces the concept of text and data mining (TDM) at the EU level.^{*53} The directive defines text and data mining as ‘any automated analytical technique aimed at analysing text and data in digital form in order to generate information which includes but is not limited to patterns, trends and correlations’ (Art. 2 (2)).^{*54}

Before looking at specific copyright exceptions used for TDM, it is necessary to evaluate the nature of text and data mining from a copyright perspective. Max Planck Institute experts have correctly pointed out that TDM is not copyright-relevant activity. They suggest that ‘the automated analysis of these contents must be permitted, just as reading by the human being does not require any separate consent by the rightholder’.^{*55} The main issue here is the right to make copies of copyright-protected works and objects of related rights (performances and phonograms).^{*56} It should be mentioned that text and data mining could also interfere with the adaptation right (an economic right) and the integrity right (a moral right). The reason is that the material used for TDM should sometimes be annotated.

In a very general way, it can be said that the development of language resources can be based on the exception or consent model.

The Digital Copyright Directive set the following framework for text and data mining for research purposes (Art. 3.7):

- 1) the exception allows reproductions and extractions to be made by research organisations and cultural heritage institutions in order to carry out, for the purposes of scientific research^{*57}, text and data mining of works or other subject matter to which they have lawful access;
- 2) copies of works or other subject matter are stored with an appropriate level of security and may be retained for the purposes of scientific research, including for the verification of research results;
- 3) rightholders are allowed to apply measures to ensure the security and integrity of the networks and databases where the works or other subject matter are hosted;
- 4) any contractual provision contrary to the exceptions is unenforceable.

The Russian national legislation has general exceptions allowing free use of copyright-protected works if this usage is not commercial (e.g., use for private, scientific, or cultural purposes).^{*58} There is no specific text and data mining exception in Russian copyright law. This does not mean, however, that TDM is not allowed under Russian law, since text and data mining as such is not copyright-relevant activity. Basically, TDM means that certain patterns and information are derived from language data (often protected by copy-

⁵² Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (text with EEA relevance). OJ L 130, 17.5.2019, pp. 92–125. Available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1558383919270&uri=CELEX:32019L0790> (20.5.2019).

⁵³ Some EU member states (e.g., Estonia) have already introduced a provision on text and data mining (Estonian Copyright Act, §19, clause 3¹). These provisions need to be revisited in light of the Digital Copyright Directive.

⁵⁴ The experts have pointed out that the concept ‘text and data mining’ is too narrow. Instead, ‘data analysis’ should be preferred. J.-P. Triaille, J. de Meeûs d’Argenteuil, A. de Francquen (2014). Study on the Legal Framework of Text and Data Mining, p. 8. Available at <https://docplayer.net/16673528-Study-on-the-legal-framework-of-text-and-data-mining-tdm.html> (6.5.2019). Although their argument is valid, the situation is that official documents use the term ‘text and data mining’. Therefore, the latter term should be used.

⁵⁵ R.M. Hilty, H. Richter (2017). Position Statement of the Max Planck Institute for Innovation and Competition on the Proposed Modernisation of European Copyright Rules. PART B. Exceptions and Limitations. Max Planck Institute for Innovation and Competition, p. 3. Available at http://www.ip.mpg.de/fileadmin/ipmpg/content/stellungnahmen/MPI-Position-Paper_TDM_2017-01-14-corr_def.pdf (6.5.2019).

⁵⁶ The Digital Copyright Directive follows the same line of argument: “Text and data mining can also be carried out in relation to mere facts or data that are not protected by copyright, and in such instances no authorisation is required under copyright law. There can also be instances of text and data mining that do not involve acts of reproduction or where the reproductions made fall under the mandatory exception for temporary acts of reproduction provided for in Article 5(1) of Directive 2001/29/EC, which should continue to apply to text and data mining techniques that do not involve the making of copies beyond the scope of that exception” (Recital 9).

⁵⁷ The Digital Copyright Directive specifies scientific research as follows: “The term ‘scientific research’ within the meaning of this Directive should be understood to cover both the natural sciences and the human sciences. Due to the diversity of such entities, it is important to have a common understanding of research organisations. They should for example cover, in addition to universities or other higher education institutions and their libraries, also entities such as research institutes and hospitals that carry out research. Despite different legal forms and structures, research organisations in the Member States generally have in common that they act either on a not-for-profit basis or in the context of a public-interest mission recognised by the State. Such a public-interest mission could, for example, be reflected through public funding or through provisions in national laws or public contracts” (Recital 12).

⁵⁸ Article 1229, Article 1273, Article 1274, and Article 1306 of the Civil Code of the Russian Federation.

right or related rights). The key issue here is the legality of making copies of copyright-protected works and objects of related rights (e.g., performances). The Russian law allows scientific use of works, which also covers making copies for research purposes. For instance, the situation was similar in Estonia up until 2016 when a specific TDM exception was enacted.^{*59} Prior to the introduction of the exception, copies for TDM were made under the research exception^{*60} in the Estonian Copyright Act.^{*61}

Although the EU and Russian approaches to research use (incl. text and data mining) of content protected by copyright and related rights are not identical, they are more or less compatible.

The creation of digital language resources can also be based on the consent of the holder of rights to the works and objects of related rights (licence). When language resources (a database) are created for commercial purposes, the contract model should be applied, since the creation cannot be based on the research exception. For example, in the case of Alisa (Yandex voice assistance), the assistant uses samples of voice taken not only from the app but also from other Yandex services, such as the Yandex navigation system and Yandex taxi service.

Individual consent does not always have to be negotiated. A report on a study of TDM points out that permissive Creative Commons (CC) licences facilitate the use of copyright-protected material without a need to rely on statutory exceptions.^{*62} Since the focus of this article is on the comparison of the relevant EU and Russian law, contractual models to support TDM are not further explored.

In conclusion, it could be emphasised that the way in which language resources (databases) were created plays an essential role in the further distribution of language technologies. For instance, the speech recognition system developed by Yandex (SpeechKit) is distributed in three ways: as an API, a cloud service, and a program built on the client servers. If language resources are created unlawfully (protected material is used without proper legal basis), the further usage or resale of the products built on the language resources may constitute copyright infringement. Therefore, it is crucial to consider all intellectual property issues when developing language technologies.

4. Managing legal risks related to the creation and use of language technologies

There is no uniform model for how to manage legal risks arising from the use of material protected by copyright and related rights in the development of language technologies. Each case requires an individual assessment and analysis of the protectability of the material used, the legal grounds for use, and so forth. Despite the limitations cited, the authors still offer a model (in Figure 2) applicable in Russia and at the EU level to assess legal risks connected with the use of voice and speech for the development of language technologies:

⁵⁹ The amendment was enacted with the passing of the Legal Deposit Copy Act (Säilituseksemplari seadus) on 15.6.2016. Available at <https://www.riigiteataja.ee/en/eli/514092016001/consolide> (10.5.2019).

⁶⁰ Estonian Copyright Act, §19, clauses 2 and 3.

⁶¹ For further discussion, see A. Kelli, A. Tavast, H. Pisuke (2012). Copyright and Constitutional Aspects of Digital Language Resources: The Estonian Approach. – *Juridica International* XIX, pp. 40–48. – DOI: <http://dx.doi.org/10.12697/issn1406-1082>.

⁶² J.-P. Triaille, J. de Meeûs d'Argenteuil, A. de Francquen (2014). Study on the Legal Framework of Text and Data Mining, p. 27. Available at <https://docplayer.net/16673528-Study-on-the-legal-framework-of-text-and-data-mining-tdm.html> (6.5.2019).

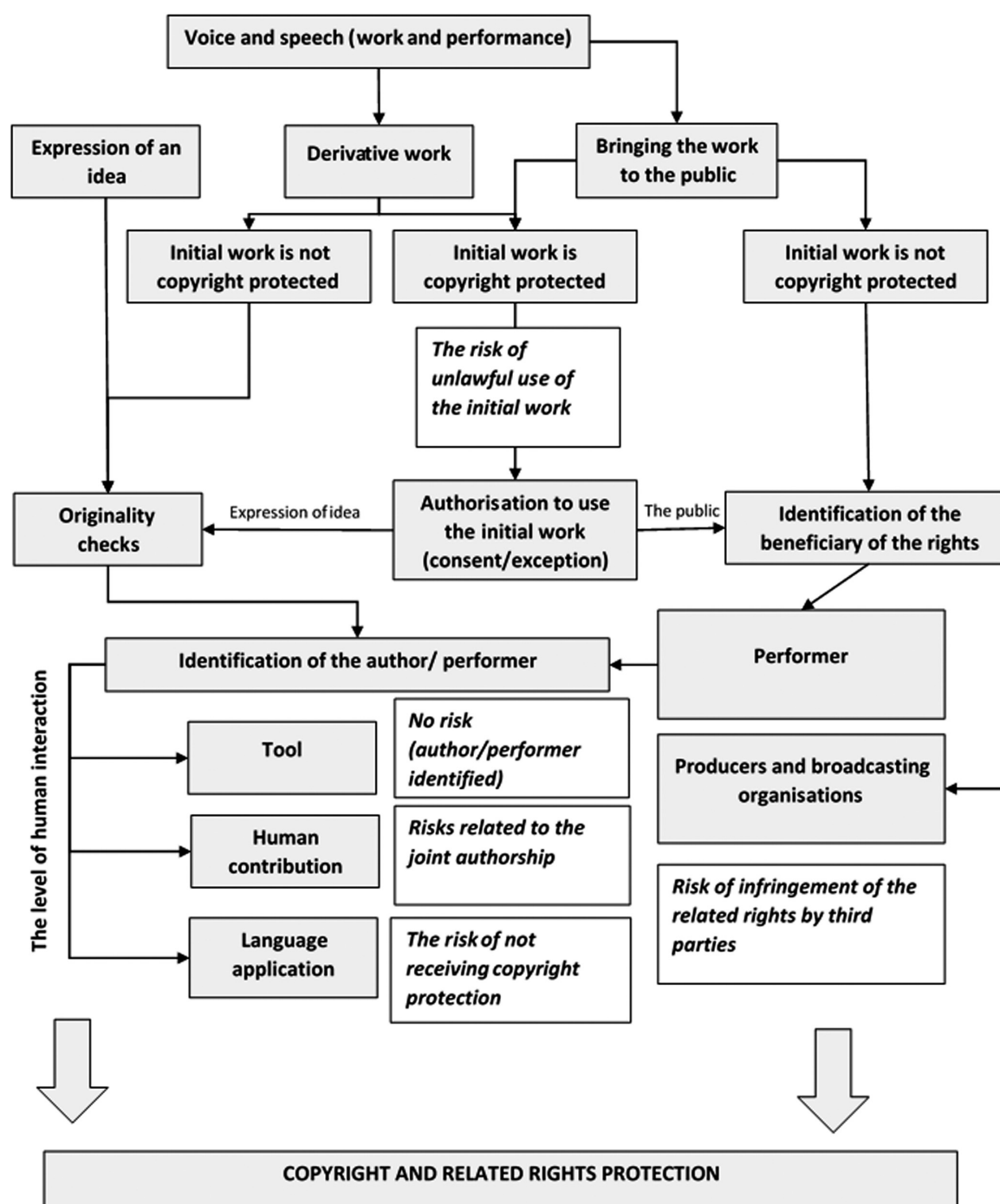


Figure 2: The process of assessing the protectability of the material used

The assessment starts with the identification of works containing voice and speech. Then the main characteristics of such a work are mapped: does it express an idea, or should the work be deemed a derivative work for which voice and speech are used in the process of making the work available to the public? After this, the following steps should be taken:

- 1) if the work expresses ideas, the originality test should be performed;
- 2) if the work is a derivative work, the authorisation for the use of the initial work should be checked;
- 3) if the voice and speech are used in the process of making the work available to the public, (a) the beneficiary of the related rights should be identified and (b) the authorisation for usage of the initial work should be checked.

These steps lead to the possibility of outlining and systemising the taxonomy in Table 1, presenting the groups of legal risks.

Table 1: Mapping of legal risks

Step:	Risk:	Solution:
Originality test	Risk of not acknowledging the copyright protection	(a) Identification of the author (b) Assessment of the level of the human original contribution
Derivative work	Risk of unlawful use of the work	Checking of authorisation
Bringing the work to the public	(a) Risk of not acknowledging the related rights (b) Risk of unlawful use of the work	(a) Identification of the author (b) Assessment of the level of the human original contribution (c) Checking of the authorisation

5. Conclusions

The authors have focused on the legal nature of voice and speech from the perspective of IP law in the EU and Russia. The article was aimed at determining whether there are incompatibilities of legal frameworks that have an adverse impact on the potential for co-operation between language technology developers from the two jurisdictions. Since voice and speech are intertwined with each other, they should be treated as one object. To be IP protected, the voice and speech need to be a part of a work or a database.

The comparison of the EU and Russian regulatory framework for copyright and related rights protection showed that these jurisdictions define the protectable subject matter similarly, and they both vest moral rights in the author. Therefore, the challenge in the development of language technologies covering European and Russian languages does not lie in the differences between the systems analysed but lies, rather, in the international foundation of the copyright system itself.

The authors have also compared the legal grounds applied for the creation of language technologies. The article has not conceptualised the entire process of development of LTs, which starts from collection of raw data (often containing text, speech samples, and so forth) and leads to specific products based on LTs. However, for identifying potential legal challenges, the concept of language resources (LRs) had to be introduced. LRs are database cumulatively protected by copyright (copyright-protected database) and by related rights (*sui generis* database). In a simplified way, it can be said that language resources are used to create language technologies.

LRs contain systematically arranged material protected by copyright and related rights. This means that LRs are covered with two tiers of rights: 1) database rights covering LRs themselves and 2) rights covering material used as input to LRs. Rights covering LRs themselves have to be managed contractually in both jurisdictions analysed (e.g., by means of transfer or licensing of IP rights). The issues related to materials (e.g., speech samples, videos, and so forth) are more complex and problematic.

Two possible legal grounds for the use of protected material in LRs that may be applicable can be distinguished in both jurisdictions: 1) exception and 2) consent. The EU and Russia both allow the use of objects protected by copyright and related rights for research purposes (exception model for the creation of LRs). The Digital Copyright Directive even introduced a specific exception for text and data mining. TDM is a core process for the creation of language technologies. Even though Russia does not have a specific TDM exception, the activities related to copying protected content for TDM are covered with a general research exception. The framework for consent to use material protected by IP is also similar between the jurisdictions.

The acknowledgement of protectability of voice and speech leads to identification of the common legal risks in the field of language technology relevant to both jurisdictions. The main risk is the use of copyright-protected works and objects of related rights without proper legal grounds. The regulatory framework of Russia and of the EU have an exception allowing the use of IP protected material for research purposes. The problem is that language technologies themselves are often used for commercial purposes. This, however, is not an issue of incompatibility of two different legal regimes.

The comparison of the intellectual property frameworks of the EU and Russia exemplifies that the basic understanding of copyright and the related rights concept is the same between these jurisdictions. Therefore, it can be concluded that regulatory incompatibilities in the field of copyright and related rights are not hampering the joint initiatives to develop LTs involving European languages and Russian.



Thomas Weigend

Professor, Dr.

*Institute for Foreign and International Criminal Law
University of Cologne*

Truth in Criminal Law and Procedure:

The Erosion of a Fundamental Value

1. Introductory remarks

Writing or talking about ‘truth’ is walking through a minefield. For thousands of years, philosophers have debated the question of what truth is, as well as the related question of whether man can know the truth or can otherwise approach it, or whether he simply creates truth in his mind. It would be presumptuous of me to try to add anything of substance to this debate. I therefore take a very naive layman’s perspective and make a few basic everyday assumptions:

- Reality exists. But we cannot be certain that we can recognise it, because man can conceive of the world around him only within the capacity and limits of his mind. It is only within these limits that a person can make sense of reality and can make statements about it, but, on the other hand, this limited view of reality is sufficient for inter-human communication.
- People sometimes make statements that, with great probability, do *not* reflect reality and that we can therefore call ‘false’. Such statements may be consciously false (we then call them lies) or may be made in good faith – that is, the person wrongly believes that his or her words do reflect reality. The truth of a statement can thus be distinguished from the honesty of the person who makes it.^{*1}

In what follows, I will address the relevance of truth (and its protection) in criminal procedure and criminal law. Although these two areas are obviously interconnected in many ways, the significance of truth differs greatly between them. The justification (or, perhaps, excuse) for treating them jointly lies in the fact that the importance of truth seems to be receding in both areas, and there may be good reason for discussing whether the relevance of protecting the truth and searching for it was overrated in the past, and what changes may be necessary.

¹ Although this distinction is clear in theory, one may ask whether criminal law should prohibit the spreading of ‘objective’ falsehood, or whether only those who act dishonestly should be subject to criminal punishment; for discussion of the concept of ‘false testimony’ in German law, see H.E. Müller, in: K. Mießbach (ed.), *Münchener Kommentar zum Strafgesetzbuch*, Vol. 3, 3rd ed. 2017, §153, notes 41-53.

2. The relevance of truth in the criminal process

The purpose of the criminal process, it is often said, is to discover the truth about the crime committed and possibly about the offender's personality.^{*2} And a search for the truth is indeed indispensable for the criminal process. The law has assigned to the criminal justice system the task of re-establishing social peace after it has been disturbed by the raising of suspicion that a crime may have been committed. In order to carry out that task, the system of criminal justice must make an honest effort to find plausible answers to the basic questions about the offence and the offender: what happened, who committed the crime, and why did the perpetrator do so?^{*3} Against this background, the purpose of the criminal process is to determine whether the person suspected of having committed an offence is indeed guilty. Judgements based on assumptions unrelated to reality would be unable to fulfil that purpose and would thus frustrate the expectations of the public. It is, hence, not surprising that in the Anglo-American tradition, the end product of a trial is the 'verdict' – which, in its original Latin meaning, signifies 'telling the truth'.

On the other hand, even historians, disposing of generous amounts of time and having access to knowledgeable witnesses and a host of documents, sometimes have difficulty finding out what actually happened at a given time and place. In the criminal process, the means available to the judges are much more restricted: they have only limited time for the search for the truth, and rules of evidence strictly circumscribe what tools they may use for gathering information. Hence, if we take a realistic look at the criminal process and its limitations, it becomes clear that the trier of fact (judge or jury) will often be unable to draw a comprehensive picture of the crime with its causes and consequences, and even less so of the offender and his personal history.

Nor is it necessary that a criminal trial live up to the rigorous methodological standards of scientific historical research. The function of a trial is not to make a definitive statement about what happened on a particular day in a certain place, and on the life stories of the individuals involved. The purpose of a trial is much more limited. The trier of fact need only be able to determine those facts that are necessary for a verdict on the defendant's guilt or innocence and, if there is a finding of guilt, for the imposition of a fair sentence. In fact, the court can pass judgement even if it is unable to arrive at a firm conclusion as to certain relevant factual issues; for such a case, the law provides specific decision rules, most importantly the presumption of innocence and the (related) rule that the defendant shall be acquitted unless the court is convinced of his guilt beyond a reasonable doubt (*in dubio pro reo*).

If we acknowledge the fact that a criminal court cannot and need not grasp the totality of facts that together form the 'reality' of a crime and an offender, the issue is limited to the question of whether (and, if so, to what extent) the court must undertake an honest *effort* to determine the relevant facts before it may pass judgement. For the reason cited above, all legal systems oblige criminal courts to make a *bona fide* effort to find the facts that are relevant, under the applicable substantive law, with regard to the issues of guilt and sentencing.

Procedural systems differ, however, with regard to the method they regard as appropriate for searching for the truth.^{*4} The traditional *inquisitorial* system, which in principle still guides German criminal procedural law, relies on the serious effort of a powerful judge, who may – within the limits of the law – collect at the trial any evidence he or she deems necessary for investigating the matter before the court.^{*5} The judge's professionally dedicated but detached investigation is deemed to be the optimal method for determining

² E.g., see Bundesverfassungsgericht (Federal Constitutional Court), Judgment of 9 March 2013, Entscheidungen des Bundesverfassungsgerichts 133, pp. 168, 199; T. Weigend, Rechtsvergleichende Bemerkungen zur Wahrheitssuche im Strafverfahren, in: K. Bernsmann and T. Fischer (eds), Festschrift für Ruth Rissing-van Saan, 2011, pp. 749, 751-755. – DOI: <https://doi.org/10.1515/9783899498288.749>; C. Roxin and B. Schünemann, Strafverfahrensrecht, 28th ed. 2014, p. 87.

³ For a more detailed account of this theory, see C. Trentmann, Wirklichkeitsstabilisierung als Funktion des Strafprozesses, Rechtswissenschaft 9 (2018), 332. – DOI: <https://doi.org/10.5771/1868-8098-2018-3-332>.

⁴ For overviews, see G. Trüg, Lösungskonvergenzen trotz Systemdivergenzen im deutschen und US-amerikanischen Strafverfahren, 2003, p. 25 et seq.; J. Hodgson, Conceptions of the Trial in Inquisitorial and Adversarial Procedure, in: A. Duff, S. Farmer, S. Marshall, and V. Tadros (eds), The Trial on Trial, Vol. 2, 2006, p. 223. – DOI: <https://doi.org/10.5040/9781472559852.ch-013>; T. Weigend, Modelle des Strafverfahrens: Deutschland und USA, in: T. Fischer (ed.), Wahrheit, 2019, p. 31.

⁵ See §244, Sec. 2 of the German Code of Criminal Procedure (CCP): 'For the investigation of the truth, the court shall *ex officio* extend the taking of evidence to all facts and items of evidence that are relevant for the decision.'

the relevant facts, especially since the judge not only pronounces the verdict and the sentence but also is obliged to give extensive reasoning for his or her decision in writing.^{*6}

By contrast, the *adversarial* system relies on the assumption that it is the dialectical competition between opposing parties that best serves the interest of finding the truth: if the accuser and the accused both invest their best efforts in presenting the facts favourable to their respective side, and if they may question their opponent's evidence, then the full picture of the truth will emerge in the end. At least that is the somewhat optimistic expectation of adversarial theory.

However different their psychological assumptions may be, the two systems have in common that 'searching for the truth' takes a lot of time, effort, and often financial expenditure. With the general increase in population and a concomitant increase in criminal cases in the course of the 20th century, pressure mounted to devise procedural modes that avoid the expensive search for the truth. On a worldwide scale, we can observe the advance of procedural arrangements that purport to replace the time-consuming and onerous search for the truth at a public trial by other forms of disposing of cases, relying on consensus (that is, the defendant's full or partial acceptance of the accusation) rather than thorough fact-finding as the basis for the disposition of the case.

The first and most prominent such mode was invented in the United States and has become known by the name of 'plea bargaining'.^{*7} Anglo-American jurisdictions offer the defendant the choice between pleading guilty and not guilty. If he pleads guilty, he acknowledges that the accusation represents the 'truth', so a trial is deemed unnecessary. Of course, the defendant's guilty plea does not provide any actual proof that the prosecutor's charges accurately reflect the facts. The court, in accepting a plea of guilty, formally examines whether the plea has been made voluntarily and has a factual basis but, in fact, takes the defendant's word as the truth.

Most defendants see no good reason to plead guilty and thereby forgo the chance – however slim – that the jury may find them not guilty. That is where the widespread practice of plea bargaining comes in: the defendant waives the right to a complete trial in exchange for a case disposition that is more lenient than would be expected after a trial. In many cases, plea bargaining implies a reduction of the original charges by the prosecutor. With regard to the 'truth' basis of the eventual case disposition, a reduction of charges means that the original accusation was too serious, the charges in adapted form fail to reflect the true facts of the crime, or both. In plea bargaining, the question of whether the accusation to which the defendant pleads guilty reflects the 'true' facts of the offence is never seriously posed, much less examined. It is the defendant's submission that is regarded as a sufficient foundation for conviction.

Similar modes of disposing of criminal cases have in recent decades spread to other systems, not only of the common law world but also to supposedly inquisitorial systems such as those of France and Germany. In 2009, the German legislature adopted a proceeding called *Verständigung* (agreement),^{*8} thereby legalising a practice that had developed behind closed doors of judges' chambers.^{*9} In the German version of plea bargaining, the presiding judge of the trial court offers the defendant, who has heretofore remained silent or has denied his guilt, a sentence within a particular range (say, between 18 and 24 months' imprisonment) if the defendant makes a full confession at the trial. If the defence agrees and the prosecutor does not veto the deal, the agreement becomes binding and the court must impose the sentence within that range as promised. The court's search for the truth at the trial, which officially is the cornerstone of the German criminal process, is reduced to listening to the defendant making a confession as to facts that mirror the legal elements of the relevant offence.

This type of procedure poses a host of problems. For example, the court may retract its sentencing offer if there is a relevant change of circumstances, in particular if the defendant does not provide a satisfactory confession. In that case, a full trial on the charges takes place before the same judges who heard the confession, but the confession cannot be used as evidence against the defendant.^{*10} There are also doubts as to the

⁶ See §267 CCP.

⁷ From the vast literature, see the recent overview by M. Vogel, Common Law Plea Bargaining, in: D. Brown, J.I. Turner, and B. Weissner (eds), *Oxford Handbook on the Criminal Process*, 2019, p. 729. – DOI: <https://doi.org/10.1093/oxfordhb/9780190659837.013.38>.

⁸ §257c CCP.

⁹ For an overview of the development, see T. Weigend, The Decay of the Inquisitorial Ideal: Plea Bargaining Invades German Criminal Procedure, in: J. Jackson, M. Langer, and P. Tillers (eds), *Crime, Procedure and Evidence in a Comparative and International Context*, 2008, p. 39. – DOI: <https://doi.org/10.5040/9781472564528.ch-003>.

¹⁰ §257c, Sec. 4 CCP.

voluntariness of the defendant's co-operation, which may well be induced by the (explicit or implicit) threat of a considerably more severe sentence in the event that he refuses the court's offer.^{*11} For our purposes, the relevant feature of the German version of plea bargaining is the replacement of the court's independent investigation by the unilateral declaration of the defendant that he committed the offence with which he has been charged. The judgement, in turn, is based on what the defendant said, not on the truth as discovered by the court.

But why should we object to the use of such abbreviated proceedings if the defendant really is guilty? Why waste time on presenting evidence in court if the outcome – that is, the sentence – will be the same? Isn't the same type of consensual disposition available in the civil process, in which the court adjudicates the plaintiff's claim without taking evidence to the extent that the defendant declares that he does not oppose the version of the facts alleged by the plaintiff^{*12}?

Upon closer inspection, however, there exist crucial differences between civil and criminal justice. Firstly, the suspicion that a serious crime has been committed will often raise alarm among the local population, who have a legitimate interest in learning what happened and who is the culprit. If the case is disposed of on the basis of a bargain, and the court takes no evidence beyond the defendant's declaration, this interest of the public is not satisfied. Further, negotiations on criminal matters differ from those on civil matters in that the agents of the state (i.e., judges and prosecutors) hold incomparably more power over the defendant than vice versa. The defendant and his lawyer may, by making extensive use of their rights, put some strain on the time and patience of the court, but the state can deprive the defendant of years of life in freedom, by imposing a heavy prison sentence. Hence, there exists in criminal cases a severe structural imbalance between the participants in any bargaining situation. It is therefore unlikely that a defendant's decision to accept a 'deal' offered by the prosecutor or the judge is truly voluntary in a strict sense; in many cases, his submission may be prompted by fear of a much worse outcome arising if he refuses to admit guilt.

Finally, the character of a criminal judgement, being an expression of moral reprobation, strongly suggests the need for a careful investigation of the matter before a judgement is pronounced, and so does the severity of the consequences of a criminal conviction.

For these reasons, a thorough search for the truth should remain an indispensable feature of any criminal process. It does not matter that a criminal court can never be certain of having found the whole truth. What counts is the judges' honest, visible effort to establish the facts that are necessary to arrive at a plausible verdict.

This effort need not necessarily be made at a traditional trial conducted in the inquisitorial or adversarial mode. It is conceivable, and in some cases perhaps even preferable, to conduct the main part of the search for the truth in a partly written, consecutive proceeding, as is now typical for the pretrial investigation.^{*13} However, such a proceeding can be a reliable basis for any judgement only if certain preconditions are met. First, the defence must have a broad and practicable right to actively participate in the investigation: leads offered by the defence must be followed up, and witnesses must be subject to questioning by the defence lawyer. Ideally, the investigation should, moreover, be conducted not by the prosecutor but by a neutral judge, or at least under the general supervision of a judge.

Only if these preconditions are met can the results of an investigation be regarded as sufficiently reliable that a judge can base the judgement on them, limiting himself to a review of the written record produced in the course of the investigation. If, however, serious contradictions or disputes as to the evidence or as to the law remain, an entirely or partially new process of evidence-taking will be necessary.

It is debatable whether the choice should be for the defendant to make, and, if so, whether waiver of an oral trial should be rewarded by sentencing concessions. A number of other issues remain to be resolved. But the general idea of a flexible system that abandons the ancient notion of finding the truth in one day of trial may be worthwhile to pursue, as an alternative to shortcuts to justice that rely exclusively on the defendant's acceptance of an offer he cannot well refuse.

¹¹ For a critical assessment of the constitutionality of the law on *Verständigung*, see the decision of the Federal Constitutional Court of 19 March 2013, 2 BvR 2628/10 (133 *Entscheidungen des Bundesverfassungsgerichts* 168).

¹² Cf. § 288 German Code of Civil Procedure.

¹³ For an example of the such a procedure (judgement based on results of pretrial investigation), see Art. 438 et seq. of the Italian Code of Criminal Procedure (*Giudizio abbreviato*). See also F. Bommer et al., *Alternativ-Entwurf Abgekürzte Strafverfahren im Rechtsstaat*, *Goltdammer's Archiv für Strafrecht* 2019, 1, 66 et seq. (*Abgekürzte Verhandlung*).

3. Truth in criminal law

Turning now to the protection of the truth by means of criminal law, we should initially take note of the fact that public debate is more and more affected by the spreading of false information meant to influence the opinion of many people, especially potential voters. Should criminal law react to this phenomenon and, if so, how?

Criminal codes do not generally prohibit people from telling lies. Philosophers, such as Immanuel Kant,^{*14} have long debated whether there exists an unconditional duty to tell the truth.^{*15} But even if such a duty should exist, it belongs to the realm of morality^{*16} and is not reflected in criminal law. German criminal law, for example, does not generally punish a person for telling lies, but it does provide for criminal punishment for telling lies in any of several specific contexts.

Let me cite just a few instances from the German Penal Code (PC). It is punishable, for example, to commit perjury or to testify untruthfully in any judicial proceeding (§§ 153, 154 of the PC); to make a factually false statement in a public document or to bring about such a false statement (§§ 348, 271 of the PC); to convey false news to a foreign power, thereby endangering Germany's foreign relations or security (§ 100a of the PC); to make false statements, even if only by omission, to tax authorities (§ 370 *Abgabenordnung* – Tax Code) or to agencies in charge of granting subsidies (§ 264 of the PC); to falsely alert the police that a criminal offence has been committed or is about to be committed (§ 145d of the PC); to create a false suspicion that another person has committed a criminal offence (§164 of the PC); to falsely pretend to have an academic or other honorary title or to have the right to practise a protected profession (§132a, Sec. 1 of the PC); to publicly deny that the Holocaust happened, if that claim is apt to disturb the public peace (§130, Sec. 3 of the PC); to commit fraud (§263 of the PC), that is, to mislead another person about facts with the consequence of causing financial harm to another person; and to commit libel, that is, to disseminate falsehoods with regard to another person, having the potential of damaging that person's honour or credit (§ 187 of the StGB).^{*17}

Through the first six of these ten provisions, the Penal Code seeks to protect certain particularly sensitive aspects of public administration, the judicial process, and the state's fiscal interests against harm caused by lies. Similar protected interests are the trust of the public in honours and titles conferred by the state or state-controlled institutions and the 'public peace', which in Germany can be disturbed by debates about the question of whether the killing of millions of Jews in the 1940s actually occurred.

The rationale for prohibiting untruthful statements in these areas is mostly to make certain that decisions of courts and state agencies are based on 'true' facts. Yet a person is subject to punishment only if he or she *dishonestly* makes a false statement – that is, if the actor knows or at least accepts the possibility that his or her statement is untrue.^{*18} Honesty is required only with regard to factual statements (as opposed to expressions of opinion) and in relation to past or present facts, including the speaker's present intentions (as opposed to general prognoses).^{*19} It is only with regard to such facts, to which the relevant individual has exclusive or primary cognitive access, that the state and its agencies need to rely on citizens' honest co-operation.

The state's interest in basing its agencies' decisions on true facts, as protected by criminal law, corresponds with the truth orientation of the criminal process. As we have seen from Part II, criminal judgments should reflect the truth to the extent that it can be discovered within a reasonable time and with the available evidence. If judges disposed of criminal cases on the basis of fictitious or 'bargained' facts, they would not only abandon the general obligation to base their decisions on true facts but also disavow the obligation of witnesses to tell the truth, for why should a witness be punished for perjury if it is generally irrelevant whether the verdict is based on the truth?

¹⁴ See, especially, *I. Kant*, Über ein vermeintes Recht aus Menschenliebe zu lügen, in: W. Weischedel (ed.), *Kant Werke*, Vol. 7, 5th ed. 1968, p. 637.

¹⁵ See the philosophers cited in E. Hoven, Zur Strafbarkeit von Fake News – de lege lata und de lege ferenda, *Zeitschrift für die gesamte Strafrechtswissenschaft* 129 (2017), 718, 739-740. – DOI: <https://doi.org/10.1515/zstw-2017-0036>.

¹⁶ See F. Rostalski, "Fake News" und die "Lügenpresse" – ein (neuer) Fall für das Straf- und Ordnungswidrigkeitenrecht? *Rechtswissenschaft* 2017, 436, 445. – DOI: <https://doi.org/10.5771/1868-8098-2017-4-436>.

¹⁷ For a discussion of the applicability of § 187 and § 145d Penal Code to the spreading of fake news, see E. Hoven, Zur Strafbarkeit von Fake News – de lege lata und de lege ferenda, *Zeitschrift für die gesamte Strafrechtswissenschaft* 129 (2017), 718, 719-727, 735-737. – DOI: <https://doi.org/10.1515/zstw-2017-0036>.

¹⁸ With the exception of negligent false swearing, § 161 PC.

¹⁹ See, for example, N. Bosch and U. Schittenhelm, vor §153, note 7, in: A. Schönke and H. Schröder (eds), *Strafgesetzbuch*, 30th ed. 2019.

It is the exception rather than the rule that criminal law protects *private* interests against false claims. Most penal codes cover the crimes of fraud^{*20} and libel, protecting, respectively, a person's financial interests and his or her honour and credit. This anomaly may be explained by the fact that property and honour were supreme values in European societies of the second half of the 19th century, when the present German Penal Code and many other penal codes were originally devised.

In today's world, one may well ask whether a person has a legitimate claim to another person's honesty in financial matters and, if so, why.^{*21} We have seen, after all, that telling lies as such is not a criminal offence. The reason for the special treatment of lies related to facts relevant for financial matters is not ethical but pragmatic: economic transactions would be burdened with additional costs if the truth of each business partner's representations had to be checked in each particular instance. The threat of criminal punishment for *fraud* therefore lowers transaction costs by curbing the natural tendency of agents in commerce to pursue, by all available means, their selfish goals to the detriment of their business partners.

The threat of criminal liability may, on the other hand, sometimes do more harm than good: German scholars have long debated whether criminal liability for fraud should be limited to cases in which the victim is unable to protect himself by reasonable circumspection.^{*22} Just think of ads promising the loss of 40 pounds of body weight within a few weeks if only you buy the compound the seller offers you at a bargain price. The proposed restriction of the criminal law against fraud would mean that misrepresentations whose falsehood is very easy to detect are exempted from criminal liability. On the other hand, fraudsters who seek to profit from the intellectual deficiencies of their fellow citizens deserve and receive little sympathy.

Turning to the crime of libel, German penal law is quite extensive in its coverage of the endangerment of another person's honour and reputation.^{*23} According to §187 of the PC, it is a criminal offence to knowingly (*wider besseres Wissen*) assert or disseminate, with relation to another person, an untrue fact apt to harm his credit, to make him appear despicable, or to harm his reputation in the domain of public opinion. But even a person who in good faith communicates information detrimental to another person's reputation can be guilty of a crime: According to §186 of the PC, he can be convicted of calumny (*üble Nachrede*) if the truth of the alleged fact cannot be proved in court. The law thus shifts the risk of proof to the declarant. Today, many scholars claim that this provision over-extends the protection of personal honour and disproportionately limits the freedom of speech.^{*24}

Recently, a new form of fraud has been discussed in several countries, including Germany: sexual fraud. Since 2016, German law has defined the crime of sexual abuse as performing sexual acts with or in front of a person against that person's recognisable will. It is not clear whether this definition is met when a person has given his or her consent to sexual acts on the basis of a fraudulent representation. Section 76 (2) of the Sexual Offences Act (2003) for England and Wales provides that consent is invalid if '(a) the defendant intentionally deceived the complainant as to the nature or purpose of the relevant act; or (b) the defendant intentionally induced the complainant to consent to the relevant act by impersonating a person known personally to the complainant'. The Penal Code of Israel goes even further, negating consent if the defendant misled the complainant about a significant characteristic of his or her person (Art. 345 of the Penal Code).

German law does not have any such definition of consent and its limits. One may well argue, however, that true consent is missing if A's consent to sexual acts was induced by B's misrepresentation of facts that were determinative for A's decision. However, not every mistaken assumption on B's part can in fairness lead to A's criminal responsibility for sexual abuse. Otherwise, any false claim about one's financial

²⁰ See § 209, Sec. 1 of the Estonian Penal Code, defining fraud as causing proprietary damage to another person 'by knowingly causing a misconception of the existing facts'.

²¹ For an explanation of the relevance of a 'right to truth' for the crime of fraud, see I. Puppe, *Das Recht auf Wahrheit im Strafrecht*, *Zeitschrift für die gesamte Strafrechtswissenschaft* (ZStW) 130 (2018), 649, 669-671. – DOI: <https://doi.org/10.1515/zstw-2018-0026>.

²² For differing positions in this debate, see V. Erb, *Gängige Formen suggestiver Irrtuserregungen als betrugsrelevante Täuschungen*, *Zeitschrift für internationale Strafrechtsdogmatik* (ZIS) 2011, 368, 372-375; T. Hillenkamp, *Was macht eigentlich die Viktimodogmatik?* *Zeitschrift für die gesamte Strafrechtswissenschaft* (ZStW) 129 (2017), 596. – DOI: <https://doi.org/10.1515/zstw-2017-0032>; R. Hefendehl, §263, notes 27-30, in: R. Hefendehl and O. Hohmann (eds), *Münchener Kommentar zum Strafgesetzbuch*, Vol. 5, 3rd ed. 2019.

²³ Several other jurisdictions treat libel not as a criminal offence but only as a civil tort.

²⁴ E.g., see R. Maurach, F.-C. Schroeder, and M. Maiwald, *Strafrecht Besonderer Teil, Teilband 1*, 9th ed. 2003, § 25, notes 20-21; E. Hilgendorf, § 186, note 4, in: H.W. Laufhütte, R. Rissing-van Saan, and K. Tiedemann (eds), *Strafgesetzbuch. Leipziger Kommentar*, Vol. 6, 12th ed. 2010; I. Puppe, *Das Recht auf Wahrheit im Strafrecht*, ZStW 130 (2018), 649, 659. – DOI: <https://doi.org/10.1515/zstw-2018-0026>.

situation or emotional involvement ('I am madly in love with you') could make the declarant criminally liable for rape. The risk of believing any such claim and building one's consent to sexual acts on it fairly lies with the consenting partner – life is full of potential disappointments, and it is not the task of the law to prevent them by imposing criminal punishment. But English law correctly delineates two exceptions to this rule: if, for example, a doctor pretends that manipulation of his patient's sexual organ is part of a necessary therapy, or an actor falsely claims to a woman to be her regular sexual partner, consent should be regarded as invalid.^{*25} That said, at least the second situation probably is not a frequent occurrence.

4. Criminal laws against 'fake news'?

Until the last part of the 20th century, whoever wished to harm others by spreading lies had to overcome significant obstacles: He needed to orally tell these lies to a large number of people or to circulate them by a series of letters. If the person wished to disseminate the false information by using print media or the radio, he needed to persuade the relevant editors to include the false information in their newspapers or programmes – which was not easy, because editors feared civil liability for libel. Because the means of spreading false information were so limited, there was only a low risk that someone could do harm simultaneously to many people's honour and dignity, or to their financial interests.

The advent of the internet all of a sudden changed this state of affairs. The internet provides every person with the opportunity to convey information, with a few clicks, to literally billions of users, without any external control as to the contents of the information. And a growing number of people worldwide rely on internet sources for information, some even trusting the internet more than conventional media. In consequence, the potential for doing harm by spreading false information has increased exponentially.

This leads to the question of whether criminal law can and should do something about it. There can be no doubt that the dissemination of false information that is apt to incite people to hatred or to violate a person's dignity has reached a new dimension since the internet has assumed a dominant role in many people's lives. And it is easy to imagine the great potential harm emanating from disinformation campaigns conducted over the internet, even to world peace and foreign relations. This consideration primarily indicates that the existing laws against spreading lies that affect the public domain – and, to some extent, the private domain as well – should be fully enforced even if the relevant offences are committed by using the internet. The anonymity of the Net, however, decreases the chances of successfully prosecuting such offences. More importantly, the existing criminal laws are, as we have seen, limited to a few particular instances of 'fake news'. They by no means cover all such misinformation, which may nevertheless cause confusion or serious conflict among users, or have potential of influencing their voting in political elections.^{*26} It is therefore a tempting idea to create a comprehensive criminal law provision against spreading fake news via the internet.

In some countries, there have been longstanding laws against the spreading of false news. For example, under Article 656 of the Italian Penal Code it is a criminal offence to publish or spread false, exaggerated, or tendentious information if that information may have the effect of disturbing the public peace.^{*27} In a similar vein, Article 27 of the French Law on the Press, originally dating from 1881, declares punishable by a fine of up to 45,000 euros the publication, distribution, or reproduction, by any means, of false news and of articles that are fabricated, falsified, or wrongly attributed to another person, if the act was carried out in bad faith and disturbed the public peace or had potential to do so. Undeniably, such broad criminal provisions significantly restrict public debate.

Austria has passed a much narrower law, focused on the risk of elections being influenced by fake news. Article 264 of the Austrian Penal Code makes it a crime to publish false news about a circumstance that has potential of influencing voters' decisions to take part in elections or to vote in a certain way, if the

²⁵ See E. Hoven and T. Weigend, *Zur Strafbarkeit von Täuschungen im Sexualstrafrecht*, *Kriminalpolitische Zeitschrift (KriPoZ)* 2018, 156 at 160-161.

²⁶ F. Rostalski, "Fake News" und die "Lügenpresse" – ein (neuer) Fall für das Straf- und Ordnungswidrigkeitenrecht? *Rechtswissenschaft* 2017, 436, 449-453. – DOI: <https://doi.org/10.5771/1868-8098-2017-4-436>. Plausibly recommends the introduction of a new provision criminalising the spreading of false information that has potential of causing severe harm to internal security.

²⁷ A draft law from 2017 (Senato della Repubblica, Disegno di Legge no. 2688, of 7 Feb. 2017) intended to introduce a new Art. 656-bis to the Penal Code, which would have rendered criminal spreading false, exaggerated, or tendentious information through electronic media, even in the absence of any disturbance of the public peace.

information is published so late that it cannot effectively be responded to by contrary information. France has long had a similar clause in its election code. Article 97 of the French *Code électoral* makes it a crime punishable by up to one year of imprisonment to divert a vote or to cause a voter to abstain from voting with the help of false information, slanderous rumours, or other fraudulent manoeuvres. In 2018, the French legislature passed a controversial law specifically directed against the influencing of political voting through the use of electronic media. Since the authors of fake news on the internet are difficult to identify and punish, the new legislation addresses the owners of internet platforms. For a period of three months in advance of any national or regional election, they must disclose to the public any significant amount paid by a third party in exchange for the promotion of certain content with relevance to the election (Art. 163-1 of the *Code électoral*), and omitting to do so is punishable by imprisonment of up to one year or a fine (Art. 112 of the *Code électoral*). More importantly, any candidate, party, or political group can request a judge to take all measures necessary to make the platform provider remove any manifestly erroneous or incorrect factual allegations that may impair the integrity of the impending election (Art. 163-2 of the *Code électoral*). The French legislature has taken this path in spite of allegations that it would undermine freedom of opinion and of the press and introduce state censorship.

Given the undeniable dangerousness of fake news for democratic elections, criminal laws drafted narrowly to cover bad-faith spreading of relevant false information are certainly worth considering, especially since the accuracy of news is often not easy to determine for an ordinary internet user.^{*28} Such laws could supplement the longstanding criminal provisions protecting public interests against false information.^{*29} However, it is questionable whether voters need (and can expect) the state to filter the available information for them; in a democratic state, the better course may be to rely on the sound judgement and healthy skepticism of internet users when they are called upon to make up their minds about candidates and parties.^{*30}

It is another question, however, whether it is the task of criminal law to *generally* prevent or at least restrict the (intentional or negligent) spreading of false information over the internet. Three arguments militate against introducing criminal laws aimed at comprehensively combating the spreading of fake news.^{*31}

First, if we go beyond the existing laws covering false information that endangers important interests of the state and of individuals, we enter an immensely large field of potentially false information tying in with all areas of life and knowledge. This field extends from clearly ridiculous pretensions far removed from any semblance of reality to claims that can seriously be debated, and further to statements of fact that have a realistic core but may be exaggerated or formulated in a one-sided or misleading way. At least with regard to the last two instances, courts are likely to face great difficulties if they attempt to establish the ‘true’ truth – consider how difficult it is for courts to find the truth even about simple occurrences in daily life. It may well overtax the capacity of criminal courts if they were to be the arbiters of what is truth in all areas of life and science.

Secondly, criminal laws against telling lies on the internet, enforced by heavy sanctions, would certainly have a deterrent effect. But that may be precisely the problem. Such laws would have a severe chilling effect on free speech and the exchange of views in cyberspace. The content and style of communication in some social media is certainly far removed from the high level to be desired (and not always attained) in parliamentary debate and often offends good taste to the extent of causing nausea. But even new criminal laws will not turn participants in cyber-discourse into more civilised and more empathic human beings. Besides, it would be the serious and well-intentioned debates on politically relevant questions that would suffer most from the threat of anti-‘fake news’ legislation.^{*32}

²⁸ The German Penal Code contains a long list of provisions criminalising certain acts intended to manipulate political elections or to falsify their results (§§ 107-108b PC). But these provisions do not cover the spreading of false information before an election takes place; see F. Rostalski, “Fake News” und die “Lügenpresse” – ein (neuer) Fall für das Straf- und Ordnungswidrigkeitenrecht? *Rechtswissenschaft* 2017, 436, 443-444. – DOI: <https://doi.org/10.5771/1868-8098-2017-4-436>.

²⁹ E. Hoven, Zur Strafbarkeit von Fake News – de lege lata und de lege ferenda, *Zeitschrift für die gesamte Strafrechtswissenschaft* 129 (2017), 718, 719-727, 741. – DOI: <https://doi.org/10.1515/zstw-2017-0036>.

³⁰ See F. Rostalski, “Fake News” und die “Lügenpresse” – ein (neuer) Fall für das Straf- und Ordnungswidrigkeitenrecht? *Rechtswissenschaft* 2017, 436, 446-447. – DOI: <https://doi.org/10.5771/1868-8098-2017-4-436>; B. Valerius, Wahlstrafrecht und soziale Medien, in: M. Böse (ed.), *Festschrift für Urs Kindhäuser*, 2019, pp. 825, 835.

³¹ For similar argument against overall prohibition of spreading untruth, see E. Hoven, Zur Strafbarkeit von Fake News – de lege lata und de lege ferenda, *Zeitschrift für die gesamte Strafrechtswissenschaft* 129 (2017), 718, 739-740. – DOI: <https://doi.org/10.1515/zstw-2017-0036>.

³² For a similar argument, see B. Valerius, Wahlstrafrecht und soziale Medien, in: M. Böse (ed.), *Festschrift für Urs Kindhäuser*, 2019, pp. 825, 836.

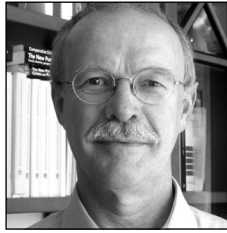
Thirdly, truthfulness and honesty still are important values in ‘analogous’ human relations, especially among people who have come to know each other personally and intend to pursue their relations in the future. There certainly exist areas of online communication where the mutual trust existing in the analogous world is carried over into digitalised communication – for example, online banking and online trade. In these instances, the internet provides a means of communication among institutions and individuals who have recourse to other forms of communication with ‘real’ persons if misunderstandings or problems arise. But for these areas of the internet world there is no need for new laws to curb the intentional spreading of untruths.

Many other, genuinely virtual channels of communication, however, hardly can claim truthfulness and honesty as their hallmark. In internet social media, many users intentionally remain anonymous by using fake identities; hence, there are no ‘real’ human beings to back up any claims that are made online. Whoever reads statements disseminated via social media or in private blogs is well aware that there is no tangible person who vouches for the truthfulness of these statements. Users therefore cannot have any reasonable expectation that the posts reflect the honest belief of any living person, much less that they represent reality. A person who relies on such information for important personal decisions only has himself to blame. The internet is a virtual and anonymous space that offers neither certainties nor relationships built on personal trust. One may well regret the decay of the open communication network that the internet was once meant to be. But criminal laws are not able to turn back the clock and establish the kind of trust in the internet that is typical of long-term human relations.

5. Conclusions

1. The subjectively honest search for truth still is an indispensable basis for the legitimisation of certain decisions. This applies to many areas of public administration and to judicial decisions, including the criminal process. Economic and business decisions likewise need to be built on an approximation of the true facts; hence, criminal law must and does lend its help, in encouraging market participants to remain honest through anti-fraud laws.

2. The anonymous, virtual world of cyberspace, by contrast, is largely not characterised by honesty and a search for truth. This leads to undeniable dangers, especially if users – unreasonably – trust in what the internet tells them. But criminal law will not be able to change, single-handedly, the un-real character of communication in cyberspace, and hence it should not attempt to do so.



Frieder Dünkel

*Professor emeritus, dr. jur.
University of Greifswald*

Reforms of the Criminal Sanctions System in Germany –

Achievements and Unresolved Problems^{*1}

1. Preliminary remarks

Jaan Sootak is celebrating his 70th birthday, and I am happy to offer him my cordial congratulations at this birthday ceremony personally. We first met in the late 1980s, when I organised a conference on comparing prison systems worldwide.^{*2} While primarily a penal lawyer, he has remained in our network of co-operation in penology and youth justice for 30 years.^{*3} His achievements as a penal law reformer in Estonia are considerable, and he has always maintained a connection with German penal law jurisprudence as well as practice. I have therefore chosen as my subject the reform of criminal law sanctions in Germany. It was 17 years ago that I presented a paper at the law reform conference here in Tartu on the same issue, and I have to admit that the reform debate surrounding the criminal sanctions system in Germany continues to focus on the same problems as at the beginning of the century, and that no real will for change is visible. However, many aspects of the sanctioning practice could be seen as successes, and sometimes standstill might in fact be progress, when ideas are refused that would worsen the penal law system. I will come back to that when talking about electronic monitoring.

¹ The present paper deals with some of the recent debates on reform of the German criminal sanctions system, which are more comprehensively summarised in the research of Nicholas Mohr presented in his Ph.D. thesis; see Mohr, *Die Entwicklung des Sanktionenrechts im deutschen Strafrecht – Bestandsaufnahme und Reformvorschläge*, 2019.

² See the first results in van Zyl Smit/Dünkel, Eds., *Imprisonment Today and Tomorrow – International Perspectives on Prisoners' Rights and Prison Conditions*, 2nd ed., 2001 (1st ed., 1991), with a chapter on Estonia by Jaan Sootak, Rando Antsmäe, and Olavi Israel (238–252).

³ See, for example, his contributions on Estonia in Dünkel/Lappi-Seppälä/Morgenstern/van Zyl Smit, Eds., *Kriminalität, Kriminalpolitik, strafrechtliche Sanktionspraxis und Gefangeneneraten im europäischen Vergleich*, 2010 (together with Anna Markina, 289–324) and in Dünkel/Grzywa//Horsfield/Pruin, Eds., *Juvenile Justice Systems in Europe: Current Situation and Reform Developments*, 2nd ed., 2011 (together with Jaan Ginter, 399–421). – DOI: <http://dx.doi.org/10.12697/issn1406-1082>.

2. Remarks on the recent history of reforms to the criminal sanctions system in Germany

From an international comparative perspective, the German criminal sanctions system may be characterised as ‘poor’, making only a few sanctioning options available.^{*4} The criminal sanctions system – *grosso modo* – consists of fines (*die Geldstrafe*); suspended sentences (*Freiheitsstrafe zur Bewährung*), the continental European form of probation; and unconditional prison sentences (*unbedingte Freiheitsstrafe*). Community service (*gemeinnützige Arbeit*) is – contrary to most other European countries’ approach^{*5} – provided only as a substitute sanction in the case of non-payment of a fine (i.e., for fine defaulters). Conditional (suspended) fines are only exceptionally applicable, under highly restrictive conditions (see §59 of the StGB, Criminal Code, cited as “CC”). The name of this sanction is *Verwarnung mit Strafvorbehalt* (meaning ‘warning combined with deferment of sentence’), and its content is a conditional fine of up to 180 day-fine units, which can be combined with directives and obligations, including supervision by the Probation Service. Other sanctions involving restriction of liberty, such as withdrawal of one’s driver’s licence, a professional disqualification, or electronic monitoring (EM; see Section V) are provided as measures for rehabilitation and security (independent of guilt but based on an assessment of dangerousness) for dangerous offenders. EM is restricted to the very few cases of dangerous offenders who have served a prison sentence in full or who are released from psychiatric hospitals. There exists also a form of suspending the driver’s licence (*Fahrverbot*) for up to 6 months, which is a supplementary sentence in combination with (usually) a fine. This sentence is a real penalty.^{*6}

Reforms promoting wider use of fines date back to the 1920s (see the so-called Law on Fines of 1923), practically the only successful law reform of the many discussed in the era of the Weimar Republic under then Minister of Justice *Gustav Radbruch*. The aim was to restrict the use of short-term imprisonment, which – since *Franz von Liszt*’s famous inaugural lecture in 1882 – had been judged detrimental to the rehabilitation of offenders.^{*7} The decisive change – replacing short-term imprisonment with fines – was implemented by the ‘major criminal law reform’ (*Große Strafrechtsreform*) of the years 1969–75. The application of prison sentences of less than 6 months was legally defined as exceptional (see §47 of the CC). In addition, the system of fines moved over from a lump sum to the day-fine system. This allowed rightful punishment by considering the income of individual offenders, which resulted in just and equal sentencing.^{*8}

It was only in 1953 that the system of suspended prison sentences was introduced. The enforcement of a prison sentence could be suspended for a probationary period ‘if there are reasons to believe that the sentence will serve as sufficient warning to the convicted person and that he will commit no further offences without having to serve the sentence’ (§56 of the CC). For the first time, a suspended prison sentence could be combined with supervision by the newly established Probation Service (via a probation order; see §56d of the CC). In the beginning, only prison sentences of up to 9 months could be suspended. In 1969, the scope was widened to up to one year, and even to two years in exceptional cases.^{*9} Court sentencing practice and the jurisprudence of the high courts and the Supreme Court (*Bundesgerichtshof*) have interpreted the exceptional nature of suspended prison sentences of between one and two years more and more as a regular option for the majority of cases: In 2015, 76% of these sentences were suspended (comparable to

⁴ See Dünkler/Morgenstern, Aktuelle Probleme und Reformfragen des Sanktionenrechts in Deutschland. *Juridica International* (Estonia), 2003, 24 ff. – DOI: <http://dx.doi.org/10.12697/issn1406-1082>.

⁵ See Dünkler/Lappi-Seppälä, Community Service in Europe, in Bruinsma/Weisburd, Eds., *Encyclopedia of Criminology and Criminal Justice*, 2013, 426 ff.; Dünkler, Gemeinnützige Arbeit – What Works? In: Kuhn, A., et al. (Hrsg.): *Kriminologie, Kriminalpolitik und Strafrecht aus internationaler Perspektive. Festschrift für Martin Killias zum 65. Geburtstag*, 2013, 839 ff. with further references.

⁶ Because of lack of space, the extensive debate on the sanction of suspending of the driver’s licence cannot be discussed here. However, the author shares the critique of the recent reform law of 2017, which expanded the application of this sanction to also other than traffic offences – see Mohr, *Entwicklung des Sanktionenrechts*, 2019, chapter 5.2 – and favours, on the other hand, the proposal to introduce this sanction as an independent (not only supplementary) sanction (*Hauptstrafe*) in cases of traffic offences.

⁷ See Mohr, *Entwicklung des Sanktionenrechts*, 2019, chapter 4.1.

⁸ Heinz, *Kriminalität und Kriminalitätskontrolle in Deutschland*, 2017, 100 (Internet publication at <http://www.ki.uni-konstanz.de/kis/>); see Subsection 3.2 for discussion of deficiencies of the sentencing practice that still exist today.

⁹ BGBl. I, 645; for the history of law reforms in this area, see Dünkler, *Rechtliche, rechtsvergleichende und kriminologische Probleme der Strafaussetzung zur Bewährung*, *Zeitschrift für die Gesamten Strafrechtswissenschaften* (ZStW), 1983, 1039 ff.; Hubach, in *Leipziger Kommentar-StGB*, 11th ed., 2013, §56, note 1 ff.

probation).^{*10} The law reform of 1986 (23rd StÄndG) adjusted the legal conditions to the criteria developed by the jurisprudence. In addition, the legislator expanded early release (parole) cautiously by allowing release after one had served half of the sentence for offenders serving a first prison sentence or on the basis of the offence or the offender's personality in exceptional cases.

More far-reaching reform proposals, which were presented in the year 2000 by a commission of the Federal Ministry of Justice and which were in parts incorporated into several draft bills of a government led by the Social Democratic Party (SPD) in the early 2000s,^{*11} were dropped in 2006 with a reform law (*2nd Justizmodernisierungsgesetz*) that paid no heed to any of the reform proposals of the earlier bills. Since then, the reform debate has been paralysed by coalition governments composed of the SPD and the Conservative Party (Christian Democrats, CDU). Because of a strong decline in the prison population since about 2005, the urgency of law reforms aimed at decreasing the prison population by expanding alternative sanctions is somewhat limited, although the problem of an increasing number of fine defaulters (see Subsection 4.1) is a big challenge for the criminal sanctions system.

3. Success stories

3.1. Diversion

Diversion, or the discharge of proceedings for reason of opportunity (expediency), was considerably expanded in adult criminal procedure by the law reform of 1975.^{*12} The introduction of §153a of the Strafprozessordnung (Criminal Procedure Act, CPA) has not always been judged positively by penal law academics.^{*13} However, a pragmatic view on this cost- and time-saving procedural way of dealing with an increasing influx of offenders into the criminal justice system has been accepted in practice, particularly in complex economic and tax law cases.^{*14}

Juvenile justice law and practice have paved the way insofar as 76% of cases were dismissed in 2015 (compared to 41% in 1981), normally without informal sanctions such as community service or other minor sanctions being imposed.^{*15} In adult criminal procedure, the proportion of dismissals increased to 60% in 2015 (from 34% in 1981), which means an increase by almost 100%.^{*16} Diversion is inevitable on account of the limited capacity of the justice system. However, it is not only a pragmatic solution but also an empirically

¹⁰ Heinz, *Kriminalität und Kriminalitätskontrolle*, 2017, 120; the percentage of suspended prison sentences of more than one to two years, which legally should be suspended only under special (extraordinary) circumstances (see §56 (2) StGB), increased from 10% in 1975 to 76% in 2015.

¹¹ See the most progressive draft law bill, presented by the Federal Ministry of Justice in 2000, and the draft bills of the then federal government from 2002 (BT-Drs. 14/9358; see, for a summary, Dünkel/Morgenstern, *Aktuelle Probleme und Reformfragen des Sanktionenrechts in Deutschland*, *Juridica International* 2003, 24 ff. – DOI: <http://dx.doi.org/10.12697/issn1406-1082>; Dünkel, *Reform des Sanktionenrechts – neuer Anlauf*, *Neue Kriminalpolitik* 2003, 2 ff. – DOI: <https://doi.org/10.5771/0934-9200-2003-4-123-1> and 2004 (Bundestagsdrucksache 15/2725).

¹² The scope of application was widened by the reform law (*Rechtspflegeentlastungsgesetz*) of 1993 by emphasising that a discharge of proceedings is not only possible if the guilt is of minor importance (*geringe Schuld*) but instead may apply also if the seriousness of the guilt does not exclude a discharge (rather sophisticated dogmatic terminology emphasising that *Schwere der Schuld nicht entgegensteht*), by thus including also cases of average seriousness of guilt and not only petty cases. See Pfeiffer, StPO-Kommentar, §153a, note 2. A further widening of its scope of application was given to §153a Criminal Procedure Act (StPO) by the law reform intended to incorporate the idea of restorative justice into the Criminal Procedure Act in 1999. The offender's efforts in mediation or victim–offender reconciliation were explicitly enumerated as special grounds to discharge proceedings in §153a, No. 5 StPO, and other, not explicitly named directives or obligations were admitted also, in order to give the prosecutors and judges a wider range of appropriate measures that could justify a discharge (see the word 'insbesondere' in the enumeration of §153a (1), sent. 2 StPO).

¹³ The aspersions cast, such as 'whisper proceedings' (*Tuschelverfahren*) or 'millionaire-protecting rules' (*Millionärsschutzparagraph*), clearly demonstrate the reservations in portions of the academic literature, see Kaiser/Meinberg, "Tuschelverfahren" und "Millionärsschutzparagraph"? *Neue Zeitschrift für Strafrecht*, 1984, 343 ff. with further references.

¹⁴ For reason of lack of space, this problem area cannot be dealt with in detail. See, amongst many others, Sauer/Münkel, *Abprachen im Strafprozess*, 2014 as well as Joecks, *Studienkommentar StPO*, 4th ed., 2015, §257c.

¹⁵ See Heinz, *Kriminalität und Kriminalitätskontrolle in Deutschland – Berichtsstand 2015*, *Konstanzer Inventar zum Sanktionenrecht*, 2017, 90, <http://www.ki.uni-konstanz.de/kis/>. The recent increase by more than 200,000 cases of discharges per year without any obligations or directives may be explained by minor offences against the Immigration Law (*Aufenthalts-, Asylverfahrens-, Freizügigkeitsgesetz*) by migrants; see Heinz, *ibid.*, 75 ff.

¹⁶ See Heinz, *Kriminalität und Kriminalitätskontrolle*, 2017, 92.

validated strategy to avoid further delinquency. The recidivism rate is significantly lower for cases of diversion as compared to equivalent cases in which the court issues formal sanctions.^{*17}

One consequence of such expansive diversion practices is that the remaining 40% of chargeable cases represent a high selection of offenders with more serious delinquent behaviour.^{*18}

In fact, there is no need for further reform of the legal regulations pertaining to diversion. No doubt, the consistently visible disparities in regional diversion rates are annoying and of constitutional concern,^{*19} but evidently releases from the General Prosecutor's office or from the Ministers of Justice as well as critiques from academics have not been helping to overcome these disparities.^{*20} Therefore, the legislator should take up the challenge to give clear advice for decriminalising certain drug-related – in particular, cannabis-related – offences, shoplifting, and similar petty offences.

3.2. Fines

One of the most important and successful reforms to the German criminal sanctions system was the expansion of fines and the subsequent reduction in short prison sentences (sentences of up to 6 months). Since the beginning of keeping criminal court statistics (*Strafverfolgungsstatistik*), in 1882, fines have developed into the most important alternative to imprisonment. The share of fines among all court convictions rose from 22% in 1882 to 84% in 2015.^{*21} With the introduction of the day-fine system, fines have become more fairly balanced and proportionate to the income of the convicted offender. However, in practice, some unjustified sentencing still occurs, because most fines are issued through a written procedure and estimation of the income of the offender. This is one of the possible reasons for fine default in many cases.^{*22}

In 2009, the legislator increased the maximum amount of one day-fine unit from 5,000 to 30,000 euros in response to the reality of very rich convicts (e.g., football players or managers of banking or other such enterprises).^{*23} Further reform needs cannot be identified. However, the execution of fines and the system for dealing with fine defaulters is in serious need of reform, particularly with regard to reducing imprisonment for failure to pay the fine. I return to this issue in Subsection 4.1).

3.3. Suspended sentences and supervision by the Probation Service

As mentioned above, the scope of suspended sentences and that of supervision by the Probation Service were expanded considerably in the 1970s and 1980s. The Probation Service has successfully learnt to work with more serious and recidivist offenders. This has been recognised by the courts and thereby resulted in an increase of the rate of suspended prison sentences involving probation from 30% in 1954 to 70% of all prison sentences in 2015.^{*24} In 2015, 77% of all prison sentences of up to two years were suspended. The legislative changes to ease the legal prerequisites for suspending prison sentences of between one and two

¹⁷ See Storz, *Jugendstrafrechtliche Reaktionen und Legalbewährung. Ergebnisse einer Untersuchung zur erneuten justitiellen Registrierung nach formeller und informeller jugendstrafrechtlicher Sanktionierung von Jugendlichen des Geburtsjahrgangs 1961 anhand von Daten des Bundeszentralregisters*, in Heinz/Storz, *Diversion im Jugendstrafverfahren der Bundesrepublik Deutschland*, 3rd ed., 1994, 131 ff. (197 ff.); in summary, Dünkler, *Youth Justice in Germany*, in: *Oxford Handbook on Juvenile Justice*, 2016. – DOI: <https://doi.org/10.1093/oxfordhb/9780199935383.013.68>.

¹⁸ In the area of juveniles (14–17) and young adults (18–20 years of age), the formal sanctioning by the youth courts therefore is restricted to about only one fourth of all chargeable cases (2015: 24%). Questions of reforming the sanctions system of the Juvenile Justice Act (JGG) cannot be discussed in this paper, but see, in summary, Dünkler, *Reformen des Jugendkriminalrechts als Aufgabe rationaler Kriminalpolitik*, in *Recht der Jugend und des Bildungswesens*, 2014, 294 ff. – DOI: <https://doi.org/10.5771/0034-1312-2014-3-294>.

¹⁹ The German Federal Constitutional Court (Bundesverfassungsgericht, BVerfG) emphasised in its so-called Cannabis decision that the federal states have to ensure an 'essentially uniform practice of discharging cases by the prosecutorial offices'; see BVerfGE 90, 145 (190).

²⁰ For empirical evidence, see Heinz, *Das strafrechtliche Sanktionensystem und die strafrechtliche Sanktionierungspraxis in Deutschland 1882-2012*, 2014, 67 ff., who emphasises that in the wake of the decision of the Federal Constitutional Court (BVerfG) the regional disparities have even increased rather than diminish.

²¹ See Heinz, *Kriminalität und Kriminalitätskontrolle*, 2017, 101, 112.

²² See Heinz, *Kriminalität und Kriminalitätskontrolle*, 2017, 107 ff.

²³ Bundestagsdrucksache 16/11606, 6.

²⁴ See Heinz, *Kriminalität und Kriminalitätskontrolle*, 2017, 118.

years were a major success: the ratio of suspended prison sentences for terms of that length increased from 10% in 1975 to 74% in 2015.^{*25}

Statistics for the practice of granting early release (see the Prison Statistics data) after half or two thirds of the sentence has been served are less clear, but, from individual studies, we can assume that the practice has become applied with more reluctance in recent years.^{*26}

The ‘natural experiment’ to increase the rate of suspended sentences is one of the most successful reform projects for the German sanctions system. Although more and more serious and recidivist offenders have been put under the supervision of the Probation Service, the rate of reconviction or revocation of the suspension of sentence has declined. Astonishingly, the revocation rates for probationers with a history of prior convictions and probationary supervision reveals the greatest increase in successful completion of the probation term.^{*27}

Therefore, it is understandable that more far-reaching reform proposals in Germany go beyond the two-year limit – in fact, demanding that the scope of suspended sentences be expanded to up to three years. There is, however, the danger that judges would impose longer sentences only to subsequently suspend them (up-tariffing). On the other hand, such a reform would enable the courts to suspend sentences that – for reason of the high minimum sentences required by law (e.g., for certain violent and sexual crimes) – currently can only be suspended by applying questionable constructions of declaring cases to be of ‘minor importance’ (*minder-schwerer Fall*). The potential danger that more offenders with long sentences will enter the prison system in consequence of revocations seems to be very limited, as the revocation rates for the longer sentences in current practice (that is, for sentences of more than one year up to two years) are particularly low.^{*28}

Another matter worthy of reform-related thought is the role that deterrence plays in the assessment of whether there is eligibility for a suspended sentence in a particular case. Restrictions on suspending a sentence that are based on interests of protecting public safety and order (“*Verteidigung der Rechtsordnung*”; see §56 (3) CC) should be abolished, as they are not justifiable by empirical arguments.^{*29}

4. Problem areas

Talking about problem areas, one first has to clarify that, in Germany, we do not (yet) have real deficits in the sense of pitfalls or aberrations in a strict sense. The expansion of alternative sanctions has been successfully implemented in a remarkable way. However, there nonetheless appears to be some potential for reform to further reduce imprisonment. On account of the space restrictions of the present paper, some promising reform proposals must be left aside: the decriminalisation of certain minor crimes such as shop-lifting^{*30} or using a public transport system without a ticket, on one hand, and the lowering or abolition of

²⁵ See Heinz, *Kriminalität und Kriminalitätskontrolle*, 2017, 120.

²⁶ The percentage of prisoners released early shown in the Federal Prison Statistics (*Strafvollzugsstatistik*) is unclear, as the total number released includes many prisoners serving a substitute fine-default prison sentence, where, according to prevailing criminal law doctrine and jurisprudence, an early release is excluded. Individual studies have revealed, however, that, with regard to longer prison sentences, those of more than two years, an early conditional release is the rule (again with large regional disparities). See Dünkel, in *Nomos-Kommentar-StGB*, 5th ed., 2017, §57, note 104; a lower percentage of early releases can be computed from the federal recidivism statistics, but these statistics include all the sometimes rather short prison sentences that entail a low chance of getting a positive conditional release decision in due time. The overall percentage of early releases for prisoners serving prison sentences in relation to the general criminal law (StGB) in 2007 was 36%, and that for prisoners serving youth prison sentences under the Juvenile Justice Act (14 to 20 years old at the sentencing stage) was 49%, as computed in accordance with the work of Jehle *et al.*, *Legalbewährung nach strafrechtlichen Sanktionen*, 2013, 57, 61, 78; there seems to be a trend of decline in granting early release – see Dünkel, in *Nomos Kommentar-StGB*, 5th ed., 2017, §57, note 104 with further references.

²⁷ See Dünkel/Spieß, *Perspektiven der Strafaussetzung zur Bewährung und Bewährungshilfe im zukünftigen deutschen Strafrecht*, in *Bewährungshilfe*, 1992, 118 ff.; Dünkel, *Rechtliche, rechtspolitische und programmatische Entwicklungen einer Sozialen Strafrechtspflege in Deutschland*, in *DBH-Fachverband für Soziale Arbeit, Strafrecht und Kriminalpolitik/Justizministerium Mecklenburg-Vorpommern*, Eds., *Kriminalpolitische Herausforderungen. Bewährungs- und Straffälligenhilfe auf neuen Wegen*. Zinnowitz 2008, 2009, 20 ff.; Heinz, *Das strafrechtliche Sanktionensystem*, 2014, 85 f.

²⁸ Mohr, *Entwicklung des Sanktionenrechts*, 2019, chapter 6.2.1.

²⁹ Dünkel/Spieß, *Perspektiven der Strafaussetzung zur Bewährung und Bewährungshilfe im zukünftigen deutschen Strafrecht*, in *Bewährungshilfe*, 1992, 133; in agreement, Horn, in *Systematischer Kommentar-StGB*, 9th ed., 2016, §56, note 24; Jescheck/Weigend, *Lehrbuch des Strafrechts*, AT, 1996, 839.

³⁰ See, for details, Harrendorf, *Absolute und relative Bagatellen: Grenzen des Strafrechts bei geringfügiger Delinquenz*, 2019 (in press); Mohr, *Entwicklung des Sanktionenrechts*, 2019, chapter 5.6 with further references; see also, on proposals to

extended minimum sentences (for example, for serious robbery or drug crimes), on the other, where we find strong discrepancies and inconsistencies with regard to proportionate sentencing.^{*31} In addition, the decriminalisation of cannabis products seems to be a realistic target, in light of developments in the USA, the Netherlands, Portugal, Uruguay, etc. Such reform could serve to counteract penal hypertrophies and to reduce the use of penal law by reflecting its *ultima ratio* function in the regulation of societal conflicts related to norm conformity.^{*32}

4.1. Community service / imprisonment for fine defaulters

The German Criminal Law does not provide for community service orders (CS) as originary, primary, or main sentences; these are only to be a substitute sanction for fine defaulters. The traditional argument was based on constitutional concerns about the prohibition of forced labour, which is allowed only in the context of the execution of prison sentences (Art. 12 (3) Basic Law, GG). From the standpoint of crime policy, it is likely that CS as a primary or main sanction, rather than as a substitute sanction, would replace not (short-term) prison sentences but fines and other community-linked sanctions instead. Therefore, the German legislator introduced CS only as a substitute sanction for fine defaulters in order to avoid imprisonment for not paying a fine.^{*33}

The great success of the German fines system (see Subsection 3.2, above) is contested by the fact that Germany, in European comparison, has the highest proportion of prisoners serving a term of imprisonment for being fine defaulters. On 1 September 2015, 7.0% of the total prison population were fine defaulters, as opposed to 4.4% in Switzerland, 3.6% in the Netherlands, and under 2% in all remaining countries in Europe.^{*34} When one looks only at the sentenced adult prison population, the German statistics become even less favourable: the proportion was no less than 10.4% on 31 August 2017.^{*35}

From taking this substantial (10%!) inappropriate occupation of prison capacity into consideration, the need for reforms becomes evident. All German federal states have introduced community service schemes to avert imprisonment for fine defaulters, but apparently they are not being implemented sufficiently (in terms of staff, organisational structure, administrative barriers, etc.). The proposal – as already made under the Social Democratic and Green Party coalition in the early 2000s (with the drafts of 2002–2004) – is to provide for community service as a primary substitute (or surrogate) sanction for a fine that cannot be paid. The present system only provides for community service as a substitute sanction after a prison term has been imposed on the person in default, a rather bureaucratic and complicated way of executing fines (see Art. 293 EGStGB and the decrees of the federal states on organising community service as a substitute

decriminalise travelling without a ticket, Harrendorf, Zur Adäquität von Strafe bei der Beförderungerschleichung, in Dünkel et al., Eds., *Strafrecht, Wirtschaftsstrafrecht, Steuerrecht – Gedächtnisschrift für Wolfgang Joecks*, 2019, 97 ff.

³¹ See detailed discussion by Mohr, *Entwicklung des Sanktionenrechts*, 2019, chapter 6.1.

³² In Germany, more than 120 criminal law professors already in 2014 had pointed to the failures of the crime policy pertaining to cannabis and called for a reversal of the general drug policy; see <http://www.dw.com/de/juraprofessoren-fordern-cannabis-legalisierung/a-17553293>. More recently, also the association of German CID officers requested decriminalisation of minor drugs offences (possession for personal use); see <https://www.rbb24.de/politik/beitrag/2018/02/bund-deutscher-kriminalbeamter-gegen-cannabis-verbot.html> (public statement of 5 February 2018).

³³ On account of the restricted space, the manifold problems of community service as an independent criminal law sanction cannot be discussed here; see the comprehensive discussion by Mohr, *Entwicklung des Sanktionenrechts*, 2019, chapter 5.3.2.

³⁴ Finland, with a comparable high percentage of fines, reaches a proportion of fine defaulters in prison of only 1.5%, with England and Wales having 0.1%; see Aebi/Tiago/Burghardt, Council of Europe Annual Penal Statistics. SPACE I. Survey 2015, 2016, 74; Mohr, *Entwicklung des Sanktionenrechts*, 2019, chapter 3.3.5. The example of the Netherlands demonstrates that successfully reducing fine-default imprisonment can be a realistic policy option. In the Netherlands, the proportion of fine defaulters among the total prison population has been reduced to one third of the 9.4% figure recorded in 2009; see Dünkel, *Ersatzfreiheitsstrafen und ihre Vermeidung. Aktuelle statistische Entwicklung, gute Praxismodelle und rechtspolitische Überlegungen*, in *Forum Strafvollzug* 2011, 144 f. Sweden does not provide for fine-default imprisonment and instead prefers the enforcement of fines by civil law. Finnish crime policy achieved a reduction by adjusting the conversion rate between day fines and time served in prison to 1:3 (i.e., one day in prison counts as three day fines; Estonia has the same conversion rate) and by excluding fine-default prison sentences for fine amounts below 20 day fines; see, in summary, also from a European comparative perspective, Drápal, *Day Fines: A European Comparison and Czech Malpractice*, *European Journal of Criminology*, 2018, 461 ff., 470 ff. – in particular, Table 4 on p. 471 ff. – DOI: <https://doi.org/10.1177/1477370817749178>.

³⁵ The proportion of prisoners serving a term for defaulting on fines increased in absolute terms from 3,625 in 2004 (or 6.7%) to 4,700 in 2017; see *Statistisches Bundesamt*, Ed., *Bestand der Gefangenen und Verwahrten*, at the site www.destatis.de (author's own calculations).

sanction). This would imply a change in the organisational structure of executing fines, probably resulting in a great decline in use of substitute prison terms.^{*36} This change is a promising strategy that has been evaluated in some pilot projects, such as the Mecklenburg – Western Pomerania project called ‘Exit’ (*Ausweg*), as demonstrating that, in a lot of cases, it is foreseeable that fines will not be paid^{*37} but the offenders would be willing to work instead. However, the research has revealed also that supervision and support by the probation and aftercare services is recommendable, as the majority of fine defaulters represent a highly problematic population with deficits in many respects (related to socio-economic problems, long-term unemployment, poor housing, alcohol and drug problems, etc.). The draft bills of 2002–2004 were designed to enhance the standing of community service as a primary substitute to fines and referred to the positive findings of the Mecklenburg – Western Pomerania project:

This requires intensified efforts of the justice agencies and the co-operation of the third-sector aftercare services, to offer fine defaulters the possibility of carrying out community service. The results of the Mecklenburg – Western Pomerania project “Ausweg” revealed that a considerable quantity of substitute prison terms can be avoided through optimising the organisational structure of rendering work facilities suitable for community service – in case involving the support and care of the aftercare services, while the fine defaulter is working.

Further, the research reveals also

that even particularly difficult offenders who have accumulated personal problems are able to successfully complete community service if the work facilities are carefully selected according to the capabilities of the clients and if intensive mentoring is provided. The reduction of inappropriate use of prison capacities and saving of social costs are positive results in this regard.^{*38}

The introduction of community service as a primary substitute for fines should lead to shortening of the execution procedure. A well-grounded reform proposal in this context is that one day-fine unit should be equal to 2–3 hours of community work (instead of the 6 currently witnessed in the practice of the German federal states).^{*39}

If the substitute sanction of community service fails because of offender non-compliance, the further substitute prison term for fine defaulters should also be considered for reform. In Germany, at present, one day-fine unit corresponds to one day in prison. In future, one day in prison should correspond to at least two day-fine units, as is the case in Austria, Liechtenstein, Poland, Slovenia, and Spain. In Finland and Estonia – as mentioned above – one day in prison even counts for three day-fine units.^{*40} The Austrian model would immediately reduce the population of fine defaulters in prison (4,700 on 31 August 2017) by half, the Finnish one by two thirds. A conversion rate of 2 or 3 to 1 is in line with justice considerations ‘that a day in prison is a much heavier burden than the loss of a day’s net income’.^{*41}

In accordance with the draft bill of 2004, community service should – beyond substituting for fines – serve as a substitute for prison sentences of up to 6 months.^{*42}

^{*36} See Bundesratsdrucksache 15/2725, 18 f., 21 f.

^{*37} For a summary, see Dünkel/Scheel, Vermeidung von Ersatzfreiheitsstrafen durch gemeinnützige Arbeit: das Projekt „Ausweg“ in Mecklenburg-Vorpommern, 2006.

^{*38} See *Bundesministerium der Justiz*, Referentenentwurf eines Gesetzes zur Reform des Sanktionenrechts (Stand: Juni 2003), 2003, 42; Bundestagsdrucksache 15/2725, 21.

^{*39} This proposal goes back to the expertise of Schöch and the predominant opinion among penal sentencing law experts, who refer to the so-called net-cash principle characterising the German day-fine system: the amount of a day fine shall correspond to the net income after taxes, maintenance obligations, etc. have been subtracted out. This part of the income is earned by 3–4 working hours per day. The substitute community service therefore should not come to more than about 3 hours; see Schöch, Gutachten C zum 59. Deutschen Juristentag, 1992, C 86 ff., 98; see, in summary, Mohr, Entwicklung des Sanktionenrechts, 2019, chapter 5.3.1, who proposes, with good arguments, two hours of community service as equivalent to one day fine. The proposal for a conversion rate of 2–3 hours for one day fine also refers to the fact “that community service implies a much stronger restriction of liberty than the paying of the fine”; see Bundestagsdrucksache 15/2725, 21.

^{*40} See Drápal, European Journal of Criminology, 2018, 470 ff.

^{*41} See the draft bill proposal of the then government in Bundestagsdrucksache 15/2725, 19.

^{*42} See Dünkel/Morgenstern, Aktuelle Probleme und Reformfragen des Sanktionenrechts in Deutschland, in *Juridica International*, 2003. – DOI: <http://dx.doi.org/10.12697/issn1406-1082>; the proposal goes back to the final reasoning report of the penal sentences reform commission (Kommission zur Reform des strafrechtlichen Sanktionensystems), 2000 (in a 6–3 vote). The subsequent draft bill of the Federal Ministry of Justice (Referentenentwurf des Bundesjustizministeriums) of December 2000 provided for a further form of community service as a substitute for suspended prison sentences (probation) of up to

4.2. Warning with deferment of sentence

The warning with a deferment of sentence (WDS, *Verwarnung mit Strafvorbehalt*), introduced in 1975 (see §59 CC), has the function of a suspended fine with a maximum of 180 day-fine units. Irrespective of some cosmetic reform to increase its applicability for judges (see the last reform law of 2006, *2nd JustizmodernisierungsgG*), the sanction still holds a shadow existence, accounting for only 1% of all convictions in 2015 ('insignificant practice').^{*43} The WDS was introduced as a sentence in exceptional cases ('special circumstances of the offender's personality or the delinquent act') and – in spite of legislative efforts to enhance its importance (see Section 2) – has never gained statistical significance. The reason might be that 1975 also saw the introduction of discharging cases in combination with minor informal sanctions (§153a of the CPA), which has 'skimmed the market' for warnings in line with §59 of the CC.

Many academics, however, saw a chance to expand the use of the warnings in the early 1990s by approximating its content to a kind of probation including the possibility of supervision by the Probation Service.^{*44} The decisive motive for this proposal was that in the general criminal code (apart from in the Juvenile Justice Act; see §10 JGG) the support of the Probation Service is provided only to offenders sentenced to a suspended prison term and that a need for social work support was often evident also in cases that did not reach the threshold for a prison sentence.^{*45} One could replace many suspended prison sentences of up to one year with such a probation sentence, which in the event of a recall would result only in a maximum of 60 day-fine units or 240 hours of community service. The proposal would also result in relief of some work of the Probation Service as, instead of two to five years of supervision as in the present system of suspended sentences, the new probation sentence would be combined with a maximum of one year's supervision. Regrettably, these reform proposals have not reached the level of a governmental draft bill yet, but they remain on the agenda at least in the academic world.

4.3. Early release

A significant reform deficit can be observed in the regulations on early release from prison. Since the cautious expansion in 1986 (23rd StÄndG), mentioned above, no further action has been considered by the legislator. International comparative research and empirical evidence reveal the positive impact early release can have on the desistance process of offenders. Therefore, even release of offenders after they have served half of their sentence seems to be a realistic option.^{*46} No other country providing early release after half the sentence restricts this to first-time offenders with sentences of two years or less, as is the case in Germany.^{*47} Another desideratum pertains to the prognostic requirements in the so-called midrange cases, in which predictions are unreliable or neutral. This refers to the fact that the majority of offenders, at the stage when predictions are made about their future behaviour, fall into a range where the likelihood of recidivism is around 50%, precisely what the probability would be if it were simply left to chance.^{*48} The answer to the

one year (see §55a, (2) Referentenentwurf in *Bundesministerium der Justiz*, Referentenentwurf eines Gesetzes zur Reform des Sanktionenrechts vom 8.12.2000, 2000, 8 f., explanatory statement, 6 f.

⁴³ Albrecht, in *Nomos-Kommentar-StGB*, 5th ed., 2017, §59, note 1.

⁴⁴ See, in particular, Schöch, Gutachten C zum 59. Deutschen Juristentag 1992, C 90 ff., who proposed the possibility of combining the WDS with obligations and directives as well as with temporary withdrawal of the driver's licence. Going even further, to establishing the WDS as a form of independent probation sanction (similar to the educational measure of a supervisory directive in accordance with §10 of the Juvenile Justice Act), were Dünkel/Spieß, *Perspektiven der Strafaussetzung zur Bewährung und Bewährungshilfe im zukünftigen deutschen Strafrecht*, in *Bewährungshilfe*, 1992, 127 f., 132. In their view, the new warning sentence should consist of a conviction by the court combined with a suspended fine in combination with directives and/or obligations (e.g., reparation to the victim, paying maintenance to the family or children, etc.), including a probationary term, with the supervision of the Probation Service, of up to one year. The legislator considered all these proposals at only a rudimentary level, by introducing very marginal changes, with the result that the practice related to the WDS remained statistically unimportant and highly exceptional.

⁴⁵ Dünkel/Spieß, *Perspektiven der Strafaussetzung zur Bewährung und Bewährungshilfe im zukünftigen deutschen Strafrecht*, in *Bewährungshilfe*, 1992, 125 with further references.

⁴⁶ This was also the proposal made by the reform commission mentioned above (Kommission zur Reform des strafrechtlichen Sanktionensystems), 2000, and of the Federal Ministry of Justice, on 8 December 2000.

⁴⁷ See, for a summary, Dünkel, in *Nomos-Kommentar-StGB*, 5th ed., 2017, §57, notes 90 ff., 92.

⁴⁸ For the criminological basic research on prognostic decisions, Dünkel, in *Nomos-Kommentar-StGB*, 5th ed., 2017, §57 Rn. 107 ff., 113 f.; Streng, *Strafrechtliche Sanktionen*, 3rd ed., 2012, notes 770 ff., 823 ff.; in general, one can state that, in practice, at least half of individual prognoses lie in the so-called middle field of uncertain decision-making (i.e., the prognosis based

question of whether release can be justified, therefore, cannot be yielded by empirical arguments but must be based on normative regulations. Should uncertain prognoses be handled conservatively at the expense of the offender, or should the principle be *in dubio pro libertate*? The present German solution demands a positive prognosis – i.e., that cases of uncertainty be decided against the favour of the offender. The jurisprudence of the Supreme Court (BGH) has lowered this requirement by granting release if it can be ‘justified’: there must be realistic hopes of a crime-free life after release, and the risk of minor relapses into crime may not lead to a negative decision on early release. However, in light of comparative research, this does not seem to be enough. In accordance with a proposal made in 1966 (the so-called Alternative Draft Bill, AE-StGB), early release should be made the rule and denial thereof the exception, the latter to be based on facts that demonstrate a concrete risk of serious crimes after such a release.^{*49} Accordingly, in cases of offenders serving a sentence for serious violent or sexual crimes, a special examination of the risks of committing similar serious offences should take place. In all other cases, the rule of an early release without individual-specific diagnostics would apply. Such rather automatic early release in the large majority of cases may be justified on the basis of positive experiences in other European countries – for example, in Belgium, in Finland (after the individual has already served half of the sentence), or in Sweden.^{*50} Possible high-risk cases can be identified best if the prison administration is ready to regularly and widely use prison leaves (day leaves or long-term leaves of absence of several days), transfer to open or less secure prison facilities, and other relaxations as a kind of ‘endurance test’, which makes predictions more reliable. The experiences with such prison relaxations can also contribute to finding the appropriate interventions and directives for the time after release. Psychiatric experts deal with that problem under the term ‘social reception room’ (*sozialer Empfangsraum*), where this space has to be designed in a favourable way in order to further desistance processes.

A remarkable reform associated with prognostic criteria was passed in Austria: §46 (1) of the Austrian Penal Code provides for a comparative prognosis. The judge shall grant early release if the risk of recidivism after early release is not less than if the offender were to serve out the full sentence. In other words, it must be proved that serving the sentence in full would diminish the risk of recidivism. This regulation, when taken seriously, normally justifies an early release, as, in general, prisoners who are released early show a lower propensity to recidivate than prisoners serving their full sentence.^{*51} This can be explained by the better transition management, supervision, and control parolees receive.

A reform of early release regulations in Germany (§57 CC) should take up the idea of reversing the places of rule and exception by making early release the rule and fully serving the sentence the exception. This reflects the impossibility of reliable prognoses in the so-called midrange cases and follows the principle *in dubio pro libertate*. One should be granted early release after having served half (for first-time incarcerated offenders) or two thirds of the sentence (§57 (1) and (2) CC) ‘unless, because of concrete facts, a high risk of further serious crimes becomes evident’.^{*52}

5. (Possible) aberrations, meanders, or pitfalls: Electronic monitoring in European comparison

Electronic monitoring (EM) is practised in Europe in two distinct forms. The first is the form of radio-frequency-based devices (electronically monitored house arrest), and the more recent is use of the GPS surveillance technique, which allows one to identify where the surveilled person is at any moment of time.

on scientific prognostic instruments is no better than throwing a coin, with a 50% probability of false or of right decisions). In consequence, parole decisions in that range of probability cannot be justified by empirically based prognoses but only by a normative decision of the legislator providing a presumption in favour of or against release on parole in cases without a clear evidence-based prognosis. With regard to the principle of proportionality and the least restrictive use of state intervention, a decision-making rule of “*in dubio pro libertate*” seems to be preferable.

⁴⁹ See Baumann *et al.*, Alternativentwurf eines StGB, 1966, §48; see also Böhm/Erhard, Strafrechtsaussetzung und Legalbewährung, 1988, 219.

⁵⁰ In Finland, 99% of prisoners are released early (typically after having served half or two thirds of the prison sentence; a similar practice can be found in the other Scandinavian countries and in Belgium; see Dünkler, in Nomos-Kommentar-StGB, 5th ed., 2017, §57, note 105.

⁵¹ See, for a summary, Dünkler, in Nomos-Kommentar-StGB, 5th ed., 2017, §57, note 129 *ff.*

⁵² For details, see Dünkler, in Nomos-Kommentar-StGB, 5th ed., 2017, §57, note 136.

The latter technique allows zones to be defined that the offender is not allowed to enter (for example, the area of a kindergarten in the case of paedophile offenders). In Germany, in contrast against most of the other European countries, the use of EM has been met with strong reservations, or even criticism. Only the federal state of Hesse developed a pilot project, in the year 2000, and even that received only marginal numbers of cases (mainly in the form of radio-frequency-controlled house arrests).^{*53} The GPS-based form of EM was introduced nationwide in 2011 in the context of supervision of conduct orders (*Führungsaufsicht*), a measure of supervision after the release of offenders from psychiatric hospitals, after release from the measure of preventive detention, or upon the person having served the full prison sentence (§ 68b (1), sent. 1, No. 12 CC). It only applies in cases where the offender is seen as a high risk for future serious violent or sexual crimes and if other forms of supervision do not seem to be sufficient.^{*54} EM in Germany is therefore an exceptional form of supervision for high-risk ('dangerous') offenders and covers around 100 cases at the moment, which number is quantitatively negligible relative to the roughly 35,000 offenders under a supervision of conduct order. This very reluctant use of EM in Germany reflects the intrusive nature of EM and the constitutional principle of proportionality as it is interpreted in Germany (see also below).

In other European countries, an amazingly dynamic rise in EM has taken place, particularly in England and Wales, Scotland, Belgium, and the Netherlands. This may be explained by commercial interests that are evident from looking at the activities of private companies selling the technique and technology, insofar as a new quality in the penal law has emerged (similar to the rise of the US prison industry from privatising imprisonment there), which endangers the role of the state. The driving forces in crime policy – apart from a fascination with new techniques^{*55} – were problems of prison overcrowding, the crisis of the traditional probation services (in England and Wales), and a naïve belief in technical instead of human-interaction-based solutions for preventing further crimes. This resulted in countries such as Belgium, England/Wales, or Scotland introducing EM as a stand-alone measure of control without the classic support the probation service used to offer. The target groups are low-risk offenders, and the period of supervision in most cases does not exceed 6 months. The comparative European study of Dünkel, Thiele, and Treig came to the overall conclusions:

- that the introduction of EM in Europe had no significant impact on prison population rates and to solve the problem of prison overcrowding (see, for example, England/Wales, France, Italy, Poland, and at least until recently Belgium; a possible exception – however, with limited impact – might be Estonia);^{*56}
- that in most cases EM represents an additional and intensified form of social control (net-widening);
- that in some countries it has contributed to reducing the importance of the traditional social support schemes for offenders (as usually provided by the probation and aftercare services) by introducing EM as a stand-alone measure (for example, in England/Wales, Belgium, or Scotland [...]); and
- that, on the other hand, in some countries EM was integrated into the rehabilitative system of community sanctions under the leading role of the probation services and/or the prison administration – for example, in Austria, the Netherlands, Sweden, Switzerland, and increasingly Scotland again, as well as in a few cases in Germany.^{*57}

⁵³ For a very limited evaluation of the pilot project of the first few years of the practice in the Federal State of Hesse, see Mayer, *Modellprojekt elektronische Fußfessel*, 2004.

⁵⁴ On the legal development and practice and for a crime policy assessment focused on Germany, see Dünkel/Thiele/Treig, *Bestandsaufnahme der elektronischen Überwachung in Deutschland*, in Dünkel/Thiele/Treig, Eds., *Elektronische Überwachung von Straffälligen im europäischen Vergleich*, 2017, 11 ff.

⁵⁵ See, on this aspect in particular, Nellis, *Die elektronische Überwachung von Straftätern: Standards, ethische Grundlagen und Kriminalpolitik im digitalen Zeitalter*, in Dünkel/Thiele/Treig, Eds., *Elektronische Überwachung*, 2017, 275 ff.

⁵⁶ In contrast, the summarising chapter on the EU-funded project with Belgium, England and Wales, Germany, the Netherlands, and Scotland as project partners expressed the paradoxical conclusion that 'a less often application [*sic*] of EM was associated with long-term reduced prison population rates and [a] smaller number of prison entries'. At the same time, 'high prison population rates are associated with a more frequent use of EM'; i.e., the net-widening hypothesis is supported by these findings. See Hucklesby *et al.*, *Abschließender Vergleich des EU-Projekts*, in Dünkel/Thiele/Treig, Eds., *Elektronische Überwachung*, 2017, 272.

⁵⁷ Dünkel/Thiele/Treig, *Elektronische Überwachung von Straffälligen und Beschuldigten in Europa – Zusammenfassender Vergleich und Perspektiven für die Kriminalpolitik*, in Dünkel/Thiele/Treig, *Elektronische Überwachung*, 2017, 521 f.

The use of EM in cases of pre-trial detention as practised in several countries (which includes the pilot project in Hesse) has to face serious criticism. If there is a risk of absconding and not standing trial (which is the reason for a warrant in 90% of cases in Germany^{*58}), EM cannot prevent an escape. If there is only a low risk of not standing trial, then there is no justification for a warrant to pre-trial detention. Therefore, the number of appropriate cases must *per definitionem* tend toward zero. In addition, research has revealed that EM does not fit the typical clients of pre-trial detention, as they may not have stable living conditions and a telephone connection.

The legal basis for EM in Germany – apart from the regulation of §68b of the CC for high-risk offenders – is not clear, and the legal constructions are possibly in violation of constitutional law, although the Frankfurt on Main district court has recognised the possible application of probation law.^{*59} However, in my opinion, there must be an explicit legal authorisation for EM also in the context of regular probation (§56c of the CC).^{*60} In any case, the principle of proportionality requires a restrictive practice for EM and a double check of the principle of proportionality: first, EM must be proved legitimate as a sanction that really replaces imprisonment rather than just other community sanctions; second – and this is often overlooked – it must be legitimised by other, less intrusive community sanctions, such as traditional supervision by the Probation Service (§56d of the CC), having been excluded as being inappropriate.^{*61} EM therefore can be justified as an intermediate sanction only in the rare cases where supervision by the Probation Service is not sufficient and imprisonment can be avoided only through a combination of probation with intensified control via electronic devices. No wonder, therefore, that in Hesse only about 100 out of the 16,000 probationers in 2011 were under EM.

The way in which some European countries have implemented EM to replace short-term imprisonment or to employ EM as an additional form of controlling prisoners on prison leave etc. must – with only a few exceptions (e.g., Finland, Austria, and in parts in the Netherlands) – be seen as a meander or failure.^{*62} Accordingly, the law introducing EM for fine defaulters serving their prison term in the community and for prisoners on prison leave in Baden-Württemberg was repealed in 2013, as no appropriate cases involving a need for EM could be identified.^{*63}

Altogether, German crime policy was well advised to restrict EM to very serious cases of high-risk offenders and to rely for the rest on the traditional forms of probationary supervision, which, without going into details, one can characterise as corresponding to the evidence from empirical research on offender treatment and from desistance research – i.e., the evidence on how and under which conditions offenders abandon their criminal lifestyle.^{*64}

6. Outlook

In general, the criminal sanctions system in Germany has proved to be of value. Fines and suspended prison sentences represent remarkable success stories of German penal law and have contributed to imprisonment really becoming a last resort. Germany with its prison population rate of 76 per 100,000 inhabitants belongs

⁵⁸ See Jehle, *Strafrechtspflege in Deutschland*, 6th ed., 2015, 22 (2013: 92.7%).

⁵⁹ See LG (Regional Court) Frankfurt Neue Juristische Wochenschrift 2001, 697 ff. (the decision was issued before the reform of §68b StGB in 2011 was due to come into force).

⁶⁰ See the detailed discussion by Dünkel/Thiele/Treig, *Bestandsaufnahme der elektronischen Überwachung in Deutschland*, in Dünkel/Thiele/Treig, Eds., *Elektronische Überwachung*, 2017, 68 ff.

⁶¹ In this context one should consider that some federal states (e.g., Mecklenburg – Western Pomerania) have introduced intensive probationary supervision projects, which include a reduced case load for probation officers, who will take care of and control so-called high-risk offenders (sexual and violent offenders with a high risk of serious re-offending). The check of proportionality mentioned above must also consider this intensive probationary supervision measure as a less intrusive form of state intervention, which in cases of its applicability should exclude the use of EM.

⁶² On the not-promising results for the effects on deterrence and similar repressive goals of EM, see Dünkel, *Electronic Monitoring – Some Critical Issues*, in Bijleveld/van der Laan, In *Liber Amicorum for Gerben Bruinsma*, 2017, 108 ff.

⁶³ See, in summary, Schwedler/Wößner, *Elektronische Aufsicht bei vollzugsöffnenden Maßnahmen*, 2015. Whether, from the standpoint of police-based interventions against ‘dangerous’ citizens (not yet registered as offenders; *Gefährder*), a reasonable scope of application of EM can be found, seems to be doubtful as well; see the critical comments on the Police Law draft bill provided by Dünkel/Thiele/Treig, *Bestandsaufnahme der elektronischen Überwachung in Deutschland*, in Dünkel/Thiele/Treig, Eds., *Elektronische Überwachung*, 2017, 71 ff.

⁶⁴ See the summary discussion by Pruin, “What Works” and What Else Do We Know? – Kriminologische Erkenntnisse zum Übergangsmanagement, in Dünkel et al., Eds., *Die Wiedereingliederung von Hochrisikotätern in Europa*, 2016, 251 ff.; Pruin, *Die Entlassung aus dem Strafvollzug: Strukturen für einen gelungenen Übergang in ein straffreies Leben im europäischen Vergleich*, 2019 (in preparation).

to the low-level imprisonment countries and has joined the ‘Scandinavian exceptionalism’. Deficiencies can be seen in some boundary areas of the execution of fines, with too many prison terms as substitute sanctions applied to fine defaulters. Furthermore, suspended sentences and early release deserve wider and – in the case of early release – earlier application. Further reducing prison population rates depends on the sentencing practice and inmate structure of a country. Whereas in Germany short-term imprisonment prevails (on 1 September 2014, 45% were serving a sentence of only up to one year; compare to Estonia’s 11%), in other countries, such as Estonia, long-term prison sentences, of 5 years or more, are the problem (Estonia: 2014: 40%; Germany: 12%). In Germany, therefore, promising strategies to reduce the prison population entail expanding alternatives to prison sentences; in Estonia, it would be preferable to focus on reducing the length of the prison sentences imposed or the stay in prison by expanding early release.

Moderate penal law, which further reduces the imposition of prison sentences, is to be seen not as a beneficence for offenders, who should – according to populist thinking – be treated with harsh punishment, but as a rational evidence-based strategy, which at the same time serves to prevent crime and protect (future) victims. Especially in times of populist political currents in society and crime policy, one has to warn against a hypertrophy of penal law. Moreover, I think that one of the things to Jaan Sootak’s credit is having done so in his writings in favour of moderate penal law and sentencing practice. In this context, it is right to confront possible negative developments, such as electronic monitoring, and other manifestations of a ‘New Punitiveness’ (more and longer prison sentences), as they can be observed in many European countries (see Section 5).⁶⁵ Estonia – thanks to Jaan Sootak’s foresightfulness and knowledge of foreign penal systems and developments – has made great progress in overcoming the old Soviet approach to penal law and has successfully integrated into the EU family of human-rights-based penal law. We thank him for his efforts and wish him lots of energy for many more years to advocate for humane penal law.

⁶⁵ See, with particular consideration of the USA, Pratt *et al.*, *The New Punitiveness: Trends, Theories, Perspectives*, 2005; Travis/Western/Redburn, *The Growth of Incarceration in the United States: Exploring Causes and Consequences*, 2015. – DOI: <https://doi.org/10.17226/18613>. It seems that Europe displays more resistant power against ‘punitive’ crime policy tendencies, which Snacken and Dumortier explain by a stronger orientation to human rights and constitutionally based reservations against disproportionate sentencing; see Snacken/Dumortier, *Resisting Punitiveness in Europe? Welfare, Human Rights and Democracy*, 2012. – DOI: <https://doi.org/10.4324/9780203806654>.



Henning Rosenau

Professor, Dr.

Martin Luther University of Halle-Wittenberg

The Human Right of Reproduction: Ovum Donation and Surrogacy

1. Introduction

In Germany, reproductive medicine is also a topic of discussion in the jurisprudential field. Debates rage about issues from the legal status of embryos to detailed questions such as whether the German Embryo Protection Act (ESchG) allows more than only three ova (human eggs) to be fertilised *in vitro*. However, the central questions about bioethics^{*1} were not brought before the attention of the judiciary until 2010. The Fifth Criminal Panel found that pre-implantation genetic diagnostics (PGD) are consistent with Section 1(1), no. 2 of the Embryo Protection Act and are therefore not punishable.^{*2} The Chamber of the European Court of Human Rights (ECtHR) found against Austria because the intended prohibition of heterologous embryo transfer following ovum donation and the prohibition of sperm donation under Austrian law would constitute discriminatory treatment^{*3}; this ruling was overturned by the Grand Chamber of the European Court of Human Rights in a subsequent judgment.^{*4} Even though the case turned out to be a lot of fuss about nothing, both the prohibition on ovum donation and that on surrogacy were thrown into question.^{*5}

However, the judgment came as a surprise to many, since the medical community had not been offering pre-implantation genetic diagnostics, on account of great uncertainty about the interpretation of the Embryo Protection Act and the associated risk of criminal prosecution. Some considered it to have been excluded entirely. This was probably also the view taken by the legislature, since Section 15 of the new

¹ On bioethics as a part of medical and health law, see Rosenau, *Reproduktives und therapeutisches Klonen*, in: Amelung et al. (Publ.), *Festschrift Schreiber*, Heidelberg 2003, p. 761; Albers, *Bioethik, Biopolitik, Biorecht: Grundlagen und Schlüsselprobleme*, in: Albers (Publ.), *Bioethik, Biorecht, Biopolitik*, 2016, p. 9 (17 ff.). – DOI: <https://doi.org/10.5771/9783845275734-9>. For a more sceptical view, see Schreiber, *Biomedizin und Biorecht*, in: Lilie/Bernat/Rosenau (Publ.), *Standardisierung in der Medizin als Rechtsproblem*, Baden-Baden 2009, p. 11 ff. – DOI: <https://doi.org/10.5771/9783845215020-9>.

² German Federal Court of Justice (BGH), judgment dated 6 July 2010 – 5 StR 386/09, NJW 2010, 2672 ff. On the same issue, see Schroth, *Forschung mit embryonalen Stammzellen und Präimplantationsdiagnostik im Lichte des Rechts*, JZ 2002 170 (174); Günther, in: Günther et al., *Embryonenschutzgesetz*, Stuttgart 2008, Section 1(1), no. 2, marginal no. 21 for more detail; on the judgment itself, see Merkel, *Lebensrecht und Gentest schließen sich aus*, Die Zeit, 3rd of August 2010; Dederer, *Zur Straflosigkeit der Präimplantationsdiagnostik*, MedR 2010, 819 ff. – DOI: <https://doi.org/10.1007/s00350-010-2800-4>; Schumann, *Präimplantationsdiagnostik auf der Grundlage von Richterrecht?*, MedR 2010, 848 ff. – DOI: <https://doi.org/10.1007/s00350-010-2806-y>.

³ European Court of Human Rights (ECtHR), judgment dated 1 April 2010 – *S.H. and Others v. Austria* – no. 57813/2000, RdM 2010, 85 ff. See also the comment by Bernat, RdM 2010, 88 ff.

⁴ ECtHR (GC), judgment of 3 November 2011 – *S.H. and Others v. Austria* – no. 57813/2000.

⁵ Bernat (note 3), 90. For Switzerland, see Rütsche/Wildhaber, note on judgment of the ECtHR (note 3), AJP 2010, 803 (806 f.).

Genetic Diagnosis Act (GenDG) of 31 July 2009^{*6} addressed only prenatal diagnosis, as PGD had evidently been dealt with adequately in the Embryo Protection Act. In any case, public debate ensued that resulted in the new Section 3a of the Embryo Protection Act restricting application of pre-implantation genetic diagnostics also in Germany.^{*7}

This showed that the German Embryo Protection Act, dating from 1990^{*8}, is no longer up-to-date and is in need of reform, and that this need for reform extends far beyond just individual-level ethics questions.^{*9} Reference has already been made to the impulses provoked by the decisions of the European Court of Human Rights. The need for reform is due to the rapid rate of developments in reproductive medicine, which have gone far beyond the terminology and rules contained in the Embryo Protection Act. The latter is also technological law, which carries an obligation to be updated to keep up with developments. It should be recognised that the Embryo Protection Act is also subject to the strict prohibition, pursuant to Article 103(2) of the Basic Law for the Federal Republic of Germany (GG), of an act being punished without it having previously been defined as a criminal offence (*nulla poena sine lege*). At the time the Embryo Protection Act was passed, in 1990, there was no federal legislative competence for reproductive medicine within the German Federal System,^{*10} and said act had to be based on general legislative powers governing criminal law (Article 74(1), no. 1 of the Basic Law) and drawn up as a purely criminal statute.

Germany needs to have a modern and up-to-date law covering reproductive medicine,^{*11} in order to keep pace with the legislative reforms in neighbouring countries such as Austria and Switzerland. It is time for the German legislature to overcome its reservations about reforming the law in the area of bioethics.^{*12} In the words of the great medical ethics lawyer *Adolf Laufs*: "We have been waiting for a law on reproductive medicine for a long time."^{*13}

A working group of medical ethics lawyers from Augsburg and Munich has taken up this challenge. Its proposal for a law on reproductive medicine (AME-FMedG) constitutes a comprehensive and up-to-date set of rules governing the whole field of reproductive medicine.^{*14}

The draft law also covers ovum donation and surrogacy. We consider both ovum donation and surrogacy to be permissible, provided that certain conditions are met. The provision governing ovum donation is formulated as follows, but please note that subsection 5, which is printed in italics, is not supported by all members of the working group.

Section 6 Ovum donation^{*15}

(1) The ova of a third person may be used for medically supported fertility treatment where a woman is infertile, or where the use of the woman's own ovum carries a risk of the child to be conceived having a severe genetic illness.

⁶ Federal Law Gazette (BGBl.) 2009 I, 2529 ff.

⁷ On the basis of the Pre-Implantation Genetic Diagnosis Act (PräimpG) of 21 November 2011, BGBl. I, 2228 f.

⁸ Federal Law Gazette (BGBl.) 1990 I, 2746 ff.

⁹ For this, see also the wide-ranging dissertation of Dorneck, *Das Recht der Reproduktionsmedizin de lege lata und de lege ferenda*, Baden-Baden 2018. – DOI: <https://doi.org/10.5771/9783845291246>. In the same direction now also argues the Nationale Akademie der Wissenschaften Leopoldina (Publ.), *Fortpflanzungsmedizin in Deutschland – für eine zeitgemäße Gesetzgebung*, 2019.

¹⁰ By statute dated 27 October 1994 (BGBl. I, 3146), the competence powers under Art. 74 I GG were extended in no. 26 to include a specific federal legislative competence for rules governing reproductive medicine, genetic technology, and organ transplantation.

¹¹ See Rosenau (Publ.), *Ein zeitgemäßes Fortpflanzungsmedizingesetz für Deutschland*, Baden-Baden 2012. – DOI: <https://doi.org/10.5771/9783845244488>; Dorneck, *Das Recht der Reproduktionsmedizin de lege lata und de lege ferenda*, Baden-Baden 2018, pp. 390 f., 393 f. – DOI: <https://doi.org/10.5771/9783845291246>; now in the same vein, also a paper of the Leopoldina: Beier et al., *Ein Fortpflanzungsmedizingesetz für Deutschland*, 2017.

¹² Wahl, *Das Öffentliche Recht als Fundament und dritte Säule des Medizinrechts*, in: Arnold (Publ.), *Festschrift Eser*, Munich 2005, p. 1243 (1253); Rosenau, *Vom Beruf unserer Zeit einer biomedizinischen Gesetzgebung*, RdM 2014, 290.

¹³ Laufs, *Ein Spiegeldbild der Ärzteschaft*, MedR 2011, 568 (569). – DOI: <https://doi.org/10.1007/s00350-011-2983-3>.

¹⁴ The working group comprises professors Ivo Appel, Ulrich M. Gassner, Jens Kersten, Matthias Krüger, Josef Franz Lindner, Jörg Neuner, Henning Rosenau, and Ulrich Schroth. The main findings of this group are summarised in this paper, and the draft law has been published as follows: Gassner/Kersten/Krüger/Lindner/Rosenau/Schroth, *Fortpflanzungsmedizingesetz, Augsburg-Münchner-Entwurf*, Tübingen 2013. A critical evaluation of this proposal is given by Dorneck (note 11).

¹⁵ Gassner/Kersten/Krüger/Lindner/Rosenau/Schroth, *Fortpflanzungsmedizingesetz, Augsburg-Münchner-Entwurf*, Tübingen 2013, p. 5 and (with reasons) p. 57 f. Please note that the text shown is a translation of the original German text of the draft law that is provided for informational purposes.

(2) Medically supported fertility treatment using the ova of a third person may only be carried out at a registered centre for fertility treatment.

(3) Before donated ova may be used for medically supported fertility treatment, the third person and the ova she has donated must be examined. This examination must ascertain whether, as indicated by current scientific knowledge, the donated ova are viable for use in reproductive medicine and their use would not entail any recognisable health risk for either the recipient of the ova or the child to be conceived.

(4) Only ova all of the same donor may be used during a round of medically supported fertility treatment.

(5) A third person may only donate ova for the purposes of medically supported fertility treatment to one registered fertility centre, and these ova may only be used for fertility treatment for a maximum of three donees.

(6) The donation of ova for medically supported fertility treatment may not be made on the basis of a legal agreement involving remuneration. The registered fertility centre may reimburse the donor for expenses.

Surrogacy is covered by Section 8 of the draft law (AME-FMedG):

Section 8 Surrogacy^{*16}

(1) Surrogacy may only take place where there is a notarised agreement confirming the unconditional and irrevocable acceptance of the child by the third party, and where the notary has previously instructed the parties on the civil law consequences of a surrogacy agreement, particularly with respect to family and inheritance law. Sections 18 and 21 remain unaffected.

(2) Medically supported fertility treatment by way of surrogacy may only be carried out at a registered centre for fertility treatment.

(3) Surrogacy may not be carried out on the basis of a remuneration-entailing legal agreement. Reimbursement for expenses and a fee for medically supported fertility treatment are permitted.

What has happened to cause us to embrace these modern procedures and include them in our concept of a model law on reproductive medicine? For this, I need to address issues of human rights and constitutional law. Is there a constitutional right to reproduction that overrides the individual decisions made by the national legislature, and what would be the extent of such a right? I address this issue in the first part of the paper. We must also bear in mind the issue of whether constitutionally anchored protections in the Basic Law of Germany (GG) can restrict certain techniques developed by reproductive medicine. The wish to have children is addressed in this context.

Finally, the legal and political reasons for and arguments against the permissibility of ovum donation and surrogacy presuppose that there is a constitutional requirement for a process to be either allowed or prohibited. It is to be expected that the national legislature will seek to retain some discretion or margin of appreciation with respect to biomedical ethics issues.^{*17} Legislating in the area of biomedical ethics is not mere constitutional enforcement. Where the legislature regulates individuals' fertility treatments, it needs to balance conflicting and constitutionally relevant interests.

¹⁶ Gassner/Kersten/Krüger/Lindner/Rosenau/Schroth, Fortpflanzungsmedizingesetz, Augsburg-Münchener-Entwurf, Tübingen 2013, p. 6 f. and (with reasons) p. 61 f. Please note that the text shown is a translation of the original German text of the draft law that is provided for informational purposes.

¹⁷ See Rosenau (note 1), Festschrift Hans-Ludwig Schreiber, Heidelberg, 761 (781); Heun, Embryonenforschung und Verfassung – Lebensrecht und Menschenwürde des Embryos, JZ 2002, 517 (523 f.).

2. Constitutional law and reproductive medicine

2.1. The constitutional legal position

The constitutional analysis follows a rule-exception method.

The basic assumption starts with the freedom of choice. Normative realisation of an interest is the rule; non-realisation is the exception. In principle, all interests derived from basic constitutional rights, special personal freedoms, or general freedoms (Article 2(1) of the Basic Law) are constitutionally protected.

However, the provisions of the Basic Law do not afford absolute protection to a substantive self-determined interest or realisation of that interest – such as a specific biomedical process – and instead they are subject to the reservation of the principle of constitutional restriction. But restriction of constitutionality as an exception to a rule requires justification, and such justification can itself only be valid if it is constitutional. This assessment, which is directly binding for the legislature pursuant to Article 1(3) of the Basic Law, must be considered by the legislature before it passes any law that restricts constitutional rights. The legislature bears the normative burden of reasoning.

2.2. European law

In addition to the Basic Law, before formulating its own laws the German legislature must take account of relevant bioethics laws passed within the European framework. Different regulations have been passed by the European Union (EU) and under the European Convention on Human Rights (ECHR).

a) EU law

The EU treaties (Treaty on the European Union, or TEU, and Treaty on the Functioning of the European Union, TFEU) do not themselves contain any direct policies on bioethics. The EU also does not have exclusive legislative competence for biomedicine (Article 2(1) of the TFEU in conjunction with Article 3), so there are no restrictions on the competence of the German legislature to pass national regulations on such matters. As it has no competence in this area, the EU does not have competence to regulate medical law by way of EU secondary legislation. Article 168 of the TFEU does give the EU competence in the area of public health, but this does not include biomedicine. Article 168(5) of the TFEU also excludes ‘any harmonisation of the laws and regulations of the Member States’. For this reason, there is almost no EU secondary legislation pertaining to biomedicine that needs to be taken into account and followed by national legislatures when they are determining regulations on ovum donation or surrogacy.

Nor is the Charter of Fundamental Rights of the EU binding for legislatures of the Member States in the area of biomedicine. Article 3(2) of the Charter does refer to basic rights in the areas of ‘medicine’ and ‘biology’: for *informed consent*, the prohibition of eugenics practices, prohibition of making the human body a source of financial gain, and prohibition of the reproductive cloning of human beings. But, pursuant to Article 51(1), sentence 1 of the Charter of Fundamental Rights of the EU, this applies to Member States ‘only when they are implementing Union law’. So specifications in German laws on biomedicine are not merely an implementation of EU law, because EU law does not contain any specific provisions in this regard.

This is not the case with EU fundamental rights. As must every other law passed by Member States, the provisions of national biomedical laws must be in line with EU fundamental rights. The first right is the freedom to provide services (Article 56 TFEU), which may be infringed by restrictive rules applying to the operators of biomedical facilities (such as fertility centres).

b) The European Convention on Human Rights (ECHR)

In the Federal Republic of Germany, as a convention under international law the European Convention on Human Rights has the same internal status as a law promulgated by the Federal Republic (under Article 59(2) of the Basic Law). The federal legislature is not directly bound by the Convention. However, the fundamental rights under the Convention must be taken into consideration when one is interpreting constitutional rights under the Basic Law. Also, the Federal Republic of Germany is bound to observe the

Convention under international law, and each national law is to be measured against the provisions of the Convention. However, the directive effect of the Convention for the national legislature in the area of biomedical ethics is limited. It is subject to neither a restrictive nor a liberal approach.

Compatibility of national regulations with the European Convention on Human Rights does not mean these will necessarily also be compatible with the corresponding constitutions of the Member States – in the case of Germany, with the Basic Law. This is because the Convention affords only a minimal level of protection of fundamental rights, which may be exceeded by the constitutions of the individual High Contracting Parties (Article 53 of the ECHR). This means that, even if it meets the requirements of the European Convention, a German law on biomedical ethics will not necessarily be constitutional under German law. Moreover, with the multi-level system of fundamental rights in Europe, it may be that a rule is compatible with the European Convention on Human Rights but simultaneously unconstitutional from a national perspective.

c) The Convention on Human Rights and Biomedicine of the Council of Europe

The Convention on Human Rights and Biomedicine of the Council of Europe, which also contains provisions relevant for biomedicine (e.g., on intervention in the human genome (Article 13) and research on embryos *in vitro* (Article 18)), has not been ratified by Germany. Therefore, it has no force in Germany under international law.

2.3. Consequences for reproductive medicine

The *rule* says that the interests of the prospective parents in having children by using their own or donated cells, of the sperm or ovum donors, and the interests of the helpers (fertility centres and surrogate mothers) – i.e., of all interested parties that are or may become relevant in the area of reproductive medicine – all proceed from the presumption that the interests will be *permissible*. This presumption in favour of freedom plays an important role in the debate about reproductive medicine: It allows all relevant interests to be considered in assessment of the constitutional arguments – and does not allow them to be prematurely excluded on ethical or religious grounds or in regard of other preferences.

The *exception* says that the restriction of realisability of an interest – such as prohibition of ovum donation or surrogacy under applicable law – is only permissible if it can be justified on constitutional grounds. This justification must satisfy strict standards of rationality.

a) The right to have children (reproductive self-determination)

Parents who wish to have children are supported by general human rights when reproduction rights are being formulated. The general personal human right incorporated via Article 1(1) in conjunction with Article 2(1) of the Basic Law has been developed by the Federal Constitutional Court in Germany (BVerfG) and expanded upon in many, quite different cases to include a broad spectrum of personal integrity and development of human interests. Today, differentiation is made among rights of self-determination, self-preservation, and self-projection. The right to decide positively or negatively over your own reproduction, as well as the possibility and method of reproduction, is regarded as a right of self-determination. One may refer to a ‘fundamental human right of reproductive self-determination’. The right to have a child of one’s own is one of the core components of personal identity and identity-building. It is an integral component of general personal human rights protected under Article 1(1) in conjunction with Article 2(1) of the Basic Law, and it may be restricted only so as to protect outstandingly important legal interests. Also, it would be worth debating whether a basic human right to reproduction or reproductive self-determination would not be better anchored in Article 6(1) of the Basic Law (on protection of marriage and children) than under Article 1(1) in conjunction with Article 2(1). However, it is not necessary to develop this argument further, as in the end it is not relevant which underlying fundamental right is used to protect the norm. That said, the proximity to human dignity however, would suggest that the fundamental human right to reproduction is better anchored in Article 1(1) in conjunction with Article 2(1).

b) The scope of protection

The basic human right to reproduction or reproductive self-determination is of both a personal and a factual nature. From a personal perspective, all people have a fundamental human right to reproduction, whether they be married or unmarried couples, same-sex couples, or individuals who wish to have a child but not within the scope of a partnership. From a factual perspective, the protection covers not only natural procreation but also medically assisted reproduction. This includes all methods possible under current scientific knowledge: artificial insemination, gamete transfer, ovum and semen donation, *in vitro* fertilisation (IVF), and intracytoplasmic sperm injection (ICSI). This list is by no means complete. The fundamental human right to reproductive self-determination is open to development: any possible or future measure that will be medically supported is subject to the presumption of permissibility. This includes morphologic examination of the *in vitro* embryos to determine the viability of said embryos, and the transplantation of only those embryos that are viable. *Single or double embryo transfers* as part of IVF are also protected in principle – meaning the transplantation of the embryo that seems most viable. This allows for avoidance of potentially dangerous multifetus pregnancies.

The use of semen and ovum donations or surrogacy is also covered by the fundamental human right of reproductive self-determination. However, the potential donee has no right to receive a semen or ovum donation from a third party, because the fundamental human right to reproductive self-determination does not have an indirect third-party effect between subjects in private law. Nonetheless, the fundamental rights can be used as a defensive mechanism against the State to ensure use of the donated cells *if* the donation has been made voluntarily by a third person. The current state ban on ovum donation therefore constitutes an (unjustified) breach of the fundamental human rights of couples who wish to have a child but wherein the woman is infertile.

As with all fundamental human rights, the negative side of reproductive self-determination too is protected – this means the right not to use reproductive fertility assistance. The legislature must introduce protective measures to ensure the provision of information and consent, and the prohibition of the use of gametes without the permission of the donor, or reproduction determined by a third party.

c) Restrictability

As is every fundamental right, the fundamental human right to reproductive self-determination does not include any unrestricted or unrestrictable protection of interests. The legislature may envisage restrictions to protect constitutionally protected legal interests but must adhere to strict rationality requirements. In particular, this includes an assessment of proportionality. (1) Any restriction on the fundamental human right to reproduction must have a constitutionally legitimate purpose, (2) there must be a need to meet a specified purpose, (3) the intervention must be suitable for realising the purpose, (4) it must be necessary, and (5) the purpose and intervention must be proportionate to each other. The more onerous the intervention – in particular, with respect to criminal liability – the higher the requirements for justification. This results in the following situation with respect to reproductive medicine:

The fundamental human right to reproduction is a right of human dignity, because reproduction affects on personal integrity and continuance of dignity over and above one's own existence. Therefore, there must be special requirements with regard to any legal interests that need to be protected by potential restrictions on the fundamental human right to reproductive self-determination. Reasonable consideration of the common good will not suffice in this respect. Any such legal interests should also have constitutional weight and include an element of human dignity; among these are the life and health of the mother, the health of the child to be conceived, and the interests of the child in being aware of its heritage.

Even if a weighty protection interest can be invoked, there should also be special requirements related to proportionality, especially concerning the balancing of interests. Such balancing should not be just of an abstract nature: it should be a thought-specific balancing. We need to address also whether a general and absolute prohibition (such as that of ovum donation or surrogacy) is also justified in special individual circumstances. Generalised consideration of a legal interest, such as the wellbeing of the child, is not sufficient here. Particular attention must be paid also to there being a need to fulfil a purpose. The legislature must consider the following: Is the wellbeing of the child at all affected by a certain technical reproductive measure?

The balancing of interests^{*18} should also indicate a balanced outcome. This means that neither the interests of the parties nor the legal interests to be protected should be fully repressed. Under the legal doctrine of fundamental rights, this is denoted as the principle of practical concordance. It creates a balance between conflicting rights and legal interests by which the norms are to be seen in the context of other provisions and limits are imposed on conflicting interests such that both can achieve optimal effectiveness.^{*19}

d) Discussion at the level of European human rights:
the European Convention on Human Rights

There has been debate as to whether a prohibition of ovum donation has a human rights dimension, and this debate has even reached the European Court of Human Rights (ECtHR). In the case of *S.H. and Others v. Austria*, the Chamber of the Court found against Austria, which had prohibited the use of donated sperm in IVF and heterologous embryo transfer after ovum donation (Section 3(1) and (3) of the Austrian Artificial Procreation Act – öFMedG). The Austrian Constitutional Court (VfGH) had previously recognised that the decision to conceive a child, and to use modern reproductive medicine methods in order to achieve that goal, falls under the right to respect for one's private life pursuant to Article 8 of the European Convention on Human Rights. Moreover, prohibition by way of citing the limitations set out under Article 8(2) of the Convention was legitimate and also proportionate.^{*20}

However, the Chamber of the European Court of Human Rights found that there had been a violation of the prohibition on discrimination with respect to one's private life (Article 14 in conjunction with Article 8 of the European Convention on Human Rights). The Chamber found no reasonable justification for the unequal treatment of couples who required donated ova in order for their fertility treatment to be successful, as compared to couples who also made use of fertility treatment in order to fulfil their desire to conceive a child but who were able to use their own ovum.^{*21} The same applies for the prohibition of IVF where the sperm were donated.

This judgment did not stand for long, as the Austrian government applied for the matter to be referred to the Grand Chamber of the European Court of Human Rights and was supported in the application by Germany. The 17 judges in the Grand Chamber reversed the judgment of the lower court.^{*22} The Grand Chamber made reference to the substantial margin of appreciation given to individual states when they consider whether interference in the right to a private life pursuant to Article 8(2) of the European Convention on Human Rights is necessary – in effect, whether the reasons to protect health or morals or to protect the rights and freedoms of others appear to be justified. This margin of appreciation becomes wider as the societal and legal evaluation of the issue diverges among the 47 Member States of the Council of Europe. This is certainly the case with respect to the issues of ovum donation and surrogacy. The Grand Chamber even stated that Austria had tried not to prohibit heterologous embryo transfer or ovum donation, but it then admitted that the decision is in effect a political decision that could go either way as it does not exceed the margin of appreciation granted to individual states.^{*23}

In its judgment, the Grand Chamber accepted the Austrian legal position but restricted the applicability of the judgment by saying that it only addressed the legal position in 1999 and was an effective retrospective assessment of the legal position at that time. The Court did not address whether the legal position would be regarded as justifiable today under Article 8 of the European Convention on Human Rights.^{*24} In the meantime, after all, something has changed in Austria as well. There is talk of a far-reaching change.^{*25} The

¹⁸ BVerfGE 35, 202 (225).

¹⁹ Hesse, *Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland*, 20th Ed. 1995, p. 28.

²⁰ VfGH, MedR 2000, 389 with comment by Bernat.

²¹ EGMR, RdM 2010, 85 with comment by Bernat.

²² EGMR, Familien- und Erbrecht (EF-Z) 2012, 24 with comment by Bernat. See also Bernat, *Österreichischen Fortpflanzungsmedizinengesetz auf dem Prüfstand des Europäischen Gerichtshofs für Menschenrechte*, *Der Gynäkologe* 2012, 331 ff. – DOI: <https://doi.org/10.1007/s00129-012-2949-1>.

²³ EGMR, Familien- und Erbrecht (EF-Z) 2012, 24 (25).

²⁴ Bernat, in: Rosenau (Publ.), *Ein zeitgemäßes Fortpflanzungsmedizinengesetz für Deutschland*, 2012, p. 203 (212). – DOI: <https://doi.org/10.5771/9783845244488-203>.

²⁵ Bernat, *Das österreichische Abstammungsrecht im Kontext der medizinisch unterstützten Fortpflanzung. Eine Bestandsaufnahme nach Inkrafttreten des Fortpflanzungsmedizin-Änderungsgesetzes 2015*, in: Schurr/Umlauf (Publ.), *Festschrift für Bernhard Eccer*, Wien 2017, p. 43 (50).

Supreme Court of Justice in Austria (OGH) has considered a similar issue in two further judgments. It has referred the prohibition of reproductive medicine methods in surrogacy for two women^{*26} and of artificial insemination in same-sex partnerships^{*27} to the Austrian Constitutional Court, because the Supreme Court considers these prohibitions to violate human rights under Article 8 of the European Convention on Human Rights. And, not ten years later, the Austrian Constitutional Court agreed with the Supreme Court, and, among other provisions, on 10 December 2013 it declared Section 3(1) and (2) of the Artificial Procreation Act (öFMedG) to be unconstitutional.^{*28} There has been liberalisation with regard to same-sex partnerships, now also in the law.^{*29} Surrogate motherhood continues to be banned in Austria,^{*30} but here too the courts raise the question of whether foreign decisions are to be recognised, decisions according to which the child born of the surrogate mother is to be assigned to the Austrian wish parents.^{*31}

For the purposes of our discussion, it should be noted that the modern methods of reproductive medicine fall under the right to a private life, which is protected by Article 8 of the European Convention on Human Rights. Notwithstanding some fluctuation in arguments, this approach has in essence not been questioned in any of the decisions.

But what does this mean in concrete terms for ovum donation and surrogacy?

2.4. Ovum donation and surrogacy

a) Prohibition of ovum donation

The current position under German law is that ovum donation – unlike semen donation – is prohibited for fertility treatment purposes. The current prohibition is derived from Section 1(1), no. 1 of the Embryo Protection Act (ESchG). The Embryo Protection Act presumes a general prohibition of divided maternal rights, and it avoids any potential conflict between the biological donor and the woman carrying the child. This constitutes an intervention in the rights of parents to conceive a child by means of a donated ovum. The wellbeing of the child is taken as overall legal justification for this approach. A child, upon having discovered that the mother who carried him or her to term was not the biological mother, could suffer psychological problems or problems in finding his or her own identity.^{*32} This is an assumption that thus far has not been proved empirically. Instead, perhaps the assessment should consider that without the ovum donation there would have been no child, by which one enters into an existential circular argument. Another matter to be considered is that the child was desired by the parents and receives their love and attention, and that this should be assessed in a positive way with respect to the psychological wellbeing of the child. Reference to the wellbeing of the child should not be employed as justification for prohibiting ovum donation.^{*33}

It cannot be seriously argued, at least in a convincing manner, that an ovum donation by a woman violates the human rights of the donor while a semen donation by a man does not. The difference cannot be put down to the higher costs of the former procedure and more invasive intervention. There can be no discussion of a violation of dignity when the woman decides to make a donation after full consultation, voluntarily and without any infringement of her autonomy. Full legal information obligations are certainly necessary, but not complete prohibition of the ovum donation. Commercialisation of the process, however, should be avoided, and markets must not be allowed to develop,^{*34} as it would then be all too easy for the voluntary nature of the donation to be called into question. In light of all this, from a constitutional point of view the

²⁶ OGH, judgment dated 22 March 2011 – 3 Ob 147/10 d, GesR 2012, 216 (guiding principle).

²⁷ OGH, judgment dated 19 December 2012 – 3 Ob 224/2 f, RdM 2013, 113.

²⁸ VfGH, findings of 10 December 2013, G 16/2013-16, G 44/2013-14.

²⁹ Fortpflanzungsmedizinänderungsgesetz 2015, BGBl. I 2015/35.

³⁰ Bernat, Das österreichische Abstammungsrecht im Kontext der medizinisch unterstützten Fortpflanzung. Eine Bestandsaufnahme nach Inkrafttreten des Fortpflanzungsmedizin-Änderungsgesetzes 2015, in: Schurr/Umlauf (eds.), Festschrift für Bernhard Eccer, Wien 2017, p. 43 (51).

³¹ VfGH 11.10.2012, B 99/12, RdM 2013, 38 and VfGH 14.12.2011, B 13/11, RdM 2012, 104.

³² Bundestag printed paper 11/5460, p. 7.

³³ Along these lines, also Dorneck, Das Recht der Reproduktionsmedizin de lege lata und de lege ferenda, Baden-Baden 2018, p. 139 ff. – DOI: <https://doi.org/10.5771/9783845291246>.

³⁴ Jofer, Regulierung der Reproduktionsmedizin, Baden-Baden 2014, p. 321. – DOI: <https://doi.org/10.5771/9783845259468>; Dorneck, Das Recht der Reproduktionsmedizin de lege lata und de lege ferenda, Baden-Baden 2018, p. 324. – DOI: <https://doi.org/10.5771/9783845291246>.

prohibition of ovum donation is not sustainable. However, partial restrictions on ovum donation – such as ones to protect ovum donors from health dangers or exploitation – could be considered. These could be supported by examination and information obligations, and by restrictions on performing ovum donation for a fee.

b) Prohibiting surrogacy

(1) Debate about surrogacy

What applies to ovum donation also applies to surrogacy. A surrogate mother is a woman who is prepared to undergo a medically supported reproduction procedure in order for her to hand over the child, after birth, to be raised by a third party. This definition is based on Section 13a of the German Adoption Placement Act (AdVermiG). That statute uses the term ‘Ersatzmutter’ (replacement mother), whereas the term ‘Leihmutter’ (surrogate mother) has become accepted in common usage.

Surrogacy is also penalised under the current state of the law by Section 1(1), no. 7 of the Embryo Protection Act (ESchG). Once again, the justification for this position is connected with the protection of various legal interests.^{*35} In the interest of the wellbeing of the child, there should be no division of maternal rights, as this would make it more difficult for the child to find a personal identity, it could cause psychological conflicts, and the child would be reduced to the status of a traded product. Possible legal disputes between various parents could also affect the wellbeing of the child. The following problems are conceivable: the genetic parents may decide during the course of the pregnancy that they no longer wish to have the child, because a prenatal diagnosis (which cannot even be demanded from the surrogate mother) determines that the child has a disability. Or the genetic parents might die, separate, or merely withdraw from the agreement without giving a reason. In a reverse situation, the surrogate mother could decide to keep the child for herself.

Reference is made also to the human rights of the surrogate mother, who is reduced to the status of a brood mare or birth machine (the right of dignity as against oneself). Another argument is that surrogacy should be non-permitted to protect the institution of marriage and the family of the surrogate mother.

But these arguments are speculative. There are no significant empirical studies that demonstrate a burden on children who grow up in circumstances where maternal rights are divided.^{*36} Quite the contrary: numerous studies show no alarming results with respect to damage to the wellbeing of children in such situations.^{*37} If – as is currently asserted sometimes – a secure prenatal relationship and bonding with the child in the womb and corresponding prenatal experiences are necessary for strong subsequent development, then there is no valid scientific evidence to back up this assertion.^{*38} Statements by individual doctors cannot be sufficient to justify intervention in the right to reproduction.^{*39} Significantly, in this debate a division of paternal rights is seen as less problematic with respect to the wellbeing of the child than a division of maternal rights. That is an implausible differentiation that throws a critical light on the validity of this argument.

It may be that these considerations apply in some circumstances but not in all circumstances without exception. Everything depends on the individual circumstances: for example, it may be that a married couple are only unable to conceive a child by natural methods or by using reproductive medical methods because the woman (who has healthy ova of her own) is unable to carry a child to term. A good friend who lives in a stable social environment and has an emotional connection to the parents could declare herself prepared to carry the child for the parents. To prohibit this form of surrogacy would not be justifiable from a constitutional perspective with regard to the weight given to the fundamental human right of reproductive self-determination for couples, and the fact that the parents of the child in this case would be the same

³⁵ Bundestag printed paper 11/5460, p. 8.

³⁶ Schumann, in: Rosenau (eds.), *Ein zeitgemäßes Fortpflanzungsmedizingesetz für Deutschland*, 2012, p. 155 (186). – DOI: <https://doi.org/10.5771/9783845244488-153>; Jofer, *Regulierung der Reproduktionsmedizin*, Baden-Baden 2014, p. 315. – DOI: <https://doi.org/10.5771/9783845259468>; Dorneck, *Das Recht der Reproduktionsmedizin de lege lata und de lege ferenda*, Baden-Baden 2018, p. 162. – DOI: <https://doi.org/10.5771/9783845291246>.

³⁷ Constitutional Court (VfGH), findings of 10 December 2013, G 16/2013-16, G 44/2013-14, marginal note 46.

³⁸ Doubts raised by Jofer, *Regulierung der Reproduktionsmedizin*, Baden-Baden 2014, p. 318 f. – DOI: <https://doi.org/10.5771/9783845259468>.

³⁹ For another view, see Jofer, *Regulierung der Reproduktionsmedizin*, Baden-Baden 2014, p. 318 f. – DOI: <https://doi.org/10.5771/9783845259468>.

people as the genetic parents (who provide the ovum and sperm). Such a prohibition would not be proportionate. A parent–child relationship that is derived not from nature but from legal agreement has long been accepted in the form of adoption.^{*40}

As adoption does, surrogate motherhood brings in a wide range of complex family law questions. However, these problems have been around for hundreds of years with respect to adopted children, fostered children, and stepchildren, and solutions have always been found for such problems.^{*41}

(2) Limits of surrogacy

In order to take proper account of the constitutionally relevant wellbeing of the child within the meaning of the principle of practical concordance, limits should be set out within which surrogacy may take place: it must be ensured that the child does not become a ping pong ball bouncing between the mothers in the event of any dispute or conflict. One limiting precondition could be that there be a close relationship between the parents and the proposed surrogate mother. On the other hand, it may be that such relationship situations are more likely to cause conflicts to arise than would otherwise be the case.^{*42}

Such potential conflict, which would cause the child to suffer, must therefore be dealt with in advance of the surrogacy arrangement, by the parents assuming absolute and irrevocable responsibility for the child. This would exclude the possibility of surrogacy that has a ‘right of return’. This is important, above all, in situations where the child does not meet the parents’ expectations, such as when the child suffers from an congenital defect. Such a legal position would also make it clear to the surrogate mother from the outset that she is not the legal mother of the child. Of course, even a clear irrevocable agreement prior to the surrogacy cannot exclude the possibility of parties to the agreement changing their minds, and the irrevocability with its substantive legal effect cannot prevent parties from seeking assistance from the courts. However, it makes the likely decision of the court quite clear.^{*43}

Additionally, a comprehensive statement of the legal consequences of surrogacy is necessary. This is justified because the personal, the emotional, the social, and therefore also the legal consequences of surrogacy extend much further than a mere gamete donation or embryo transfer. There are strong arguments not just in favour of medical information being provided but also for the agreement being notarised after the legal consequences have been explained to the parties.

⁴⁰ EGMR, RdM 2010, 85 with comment by Bernat.

⁴¹ Schumann, in: Rosenau (eds.), *Ein zeitgemäßes Fortpflanzungsmedizingesetz für Deutschland*, 2012, p. 155 (195; 201). – DOI: <https://doi.org/10.5771/9783845244488>; Dorneck, *Das Recht der Reproduktionsmedizin de lege lata und de lege ferenda*, Baden-Baden 2018, p. 163 f. – DOI: <https://doi.org/10.5771/9783845291246>.

⁴² Cf. Dorneck, *Das Recht der Reproduktionsmedizin de lege lata und de lege ferenda*, Baden-Baden 2018, p. 342 f. – DOI: <https://doi.org/10.5771/9783845291246>.

⁴³ Critical view: Dorneck, *Das Recht der Reproduktionsmedizin de lege lata und de lege ferenda*, Baden-Baden 2018, p. 338 ff. – DOI: <https://doi.org/10.5771/9783845291246>.



Raimo Lahti

*Professor emeritus
Universität Helsinki*

Die strafrechtliche Verantwortung der juristischen Person:

Rechtsvergleichende Überlegungen
zwischen Finnland und Estland

1. Einleitung

Der Jubilar Jaan Sootak hat das Thema über die strafrechtliche Verantwortung der juristischen Person oftmals in seiner wissenschaftlichen Produktion behandelt.^{*1} Weil diese Form der strafrechtlichen Verantwortung sowohl in Finnland als auch in Estland relativ neu ist, ist es nützlich rechtsvergleichende Gesichtspunkte darüber darzulegen, in welchen Hinsichten die Gesetzgebungslösungen und Gerichtspraxis in diesen zwei Ländern Ähnlichkeiten und Verschiedenheiten aufweisen. Ich werde in der vergleichenden Darstellung meine neuen Artikel betreffend die einschlägige finnische Regelung benutzen.^{*2}

Der Aufsatz von Priit Pikamäe und Jaan Sootak „Die schuldhafte strafrechtliche Verantwortung der juristischen Person“ wird als ein Referenztext in solcher Weise gebraucht, dass die wichtigsten prinzipiellen und praktischen Fragen der Thematik in entsprechender Weise wie in ihrem Aufsatz aus komparativem Gesichtswinkel erörtert werden. Die Hinweise auf die Strafgesetze Finnlands und Estlands und die Zitierungen der Gesetze stützen sich auf die Übersetzungen dieser Strafgesetze.^{*3}

¹ Siehe insbesondere J. Sootak, E. Elkind, The concept of corporate criminal responsibility and its further developments in the Estonian case law. – Rikosoikeudellisia kirjoituksia VIII Raimo Lahtelle 12.1.2006 omistettu. Helsinki: Suomalainen Lakimiesyhdistys 2006, S. 421–435; P. Pikamäe, J. Sootak, Die schuldhafte strafrechtliche Verantwortung der juristischen Person. Theoretische Grundlagen und estnisches Gerichtspraxis. – Juridica International 2012 (XIX), S. 154–160. – DOI: <https://doi.org/10.12697/issn1406-1082>.

² R. Lahti, Über die strafrechtliche Verantwortung der juristischen Person und die Organ- und Vertreterhaftung in Finnland. – Rechtsstaatliches Strafen. Festschrift für Keiichi Yamanaka. Berlin: Duncker & Humblot, Berlin 2017, 131–152. – DOI: <https://doi.org/10.3790/978-3-428-54629-9> (auch im Aufsatzsammlung R. Lahti, Zur Kriminal- und Strafrechtspolitik des 21. Jahrhunderts. Berlin: de Gruyter 2019, S. 223–248. – DOI: <https://doi.org/10.1515/9783110647990>); R. Lahti, Finnish Report on Individual Liability for Business Involvement in International Crimes. Revue Internationale de Droit Pénal 2017 (88:1), p. 257–266.

Betreffend die finnische Regelung siehe auch D. Frände, Strafbarkeit juristischer Personen aus finnischer Sicht. – H.-J. Hirsch (Hrsg.), Krise des Strafrechts und der Kriminalwissenschaften? Berlin: Duncker & Humblot 2001, S. 228–233; M. Tolvanen, Trust, Business Ethics and Crime Prevention – Corporate Criminal Liability in Finland, – Fudan Law Journal 2009/4, S. 99–112; A. Alvesalo-Kuusi, L. Lähteenmäki, Legislating for corporate criminal liability in Finland: 22-year long debate revisited. – Journal of Scandinavian Studies in Criminology and Crime Prevention 2016 (17:1), S. 53–69. – DOI: <https://doi.org/10.1080/14043858.2015.1120059>.

³ Die englischsprachigen Übersetzungen sind zugänglich im Internet: betreffend das finnische Strafgesetz (fStGB; mit Änderungen bis 2015) siehe: www.finlex.fi/laki/kaannokset/1889/en18890039_20150766.pdf und betreffend das estnische

2. Über die Entstehungsgeschichte

In Finnland wurde in den Jahren 1972–2003 eine Gesamtreform des Strafrechtes verwirklicht, bei der das Wirtschaftsstrafrecht einen zentralen Teil gebildet hat. Von der Gesamtreform steht die Überprüfung einiger Vorschriften des Besonderen Teils des Strafgesetzes sowie die gesamte Kapitelsystematik des Besonderen Teils noch aus, aber ansonsten konnte die Rekodifizierung des aus dem Jahre 1889 stammenden Strafgesetzes im Jahre 2003 zu einem faktischen Abschluss gebracht werden. Die Wirtschaftsstrafvorschriften wurden in den Jahren 1990, 1995 und 2003 in drei Gesetzgebungspaketen reformiert. Die grundlegenden Vorschriften über die strafrechtliche Verantwortung in der Form der echten Kriminalstrafbarkeit juristischer Personen finden sich im 9. Kapitel vom reformierten fStGB (GBL 743/1995). Die wichtigsten den Allgemeinen Teil des Strafrechts betreffenden Vorschriften wurden in 2003 novelliert.

Die Ziele, Wirkungen und Grenzen des Wirtschaftsstrafrechts haben auch die Regelung der strafrechtlichen Verantwortung juristischer Personen beeinflusst. Die Ziele des reformierten Wirtschaftsstrafrechtes sind vor dem Hintergrund der allgemeinen Ziele der Gesamtreform des Strafrechtes zu sehen. Die wichtigste Aufgabe, die der Reformarbeit des Strafrechtskomitees gestellt worden war, hat darin bestanden, Überlegungen darüber anzustellen, was strafbar sein sollte und wie streng die einzelnen Delikte zu bestrafen sind. Für die Bestimmung der Strafbarkeit der Taten und der festzusetzenden Strafdrohungen wurde ein Modell vorgebracht, nach dem zuerst die Nachteiligkeit und Vorwerfbarkeit der Tattypen zu beurteilen und dann die Vor- und Nachteile einer eventuellen Kriminalisierung im Vergleich zu den übrigen Regulierungsalternativen abzuwägen sind. Das Komitee betonte die das strafrechtliche System kennzeichnende Wirkung: die mittelbare Wirkung und die symbolische Bedeutung der Strafdrohungen. Mit den Strafvorschriften wird aufgezeigt, welche die für die Gesellschaft zentralen Verbote und Gebote seien. Durch die Existenz der Strafdrohungen und ihre Anwendung in der Praxis wird die autoritative Missbilligung der Gesellschaft ausgedrückt und somit Einfluss auf die Herausbildung der Rechts- und Moralvorstellungen der Bürger genommen.^{*4}

Es gab kein besonderes Land, dessen Regelung als Vorbild für die Einführung der echten Kriminalstrafbarkeit juristischer Personen in Finnland gewesen wäre. Dagegen wurde ein punitives administratives Bußgeld – die Buße für Wettbewerbsverstöße – gemäß dem Vorbild des Wettbewerbsrechts der Europäischen Gemeinschaft in einem Gesetz über die Wettbewerbseinschränkungen (GBL 480/1992) in Gebrauch genommen. Jedoch war es ein großer Mangel in Finnland, dass diejenigen punitiven administrativen Sanktionen, die besonders im Wettbewerbs- und Wertpapiermarktrecht wegen der Vorbildwirkung der EU in Gebrauch genommen worden sind, bei der Gesamtreform des Strafrechts keine reale Beachtung fanden und darum die Vor- und Nachteile der punitiven administrativen Sanktionen im Verhältnis zu Kriminalstrafen im Gebiete des Wirtschaftsstrafrechts nicht systematisch erörtert wurden.^{*5}

Die estnische Regelung in der Strafrechtsreform 2002 – die Kriminalstrafbarkeit juristischer Personen – beruht auf der Lösung des französischen *Code pénal*. Schon in der Gesetzesänderung im 1992 wurde nach dem Muster des deutschen Strafrechts die entsprechende Verantwortlichkeit in den Rahmen des Ordnungswidrigkeitsrechts eingeführt.^{*6}

Strafgesetz (eStGB): <https://wipo.lex.wipo.int/en/text/432563> (consolidated text of Jan. 10/2017). Die deutsche Übersetzung vom fStGB ist auch publiziert: Das finnische Strafgesetz. Deutsche Übersetzung und Einführung von K. Cornils, D. Frände und J. Matikkala. Max-Planck-Institut für ausländisches und internationales Strafrecht. Berlin: Duncker & Humblot 2006.

⁴ Siehe Komiteebericht 1976:72. Helsinki 1977, Kapitel II–IV. Siehe auch im allgemeinen R. Lahti / K. Nuotio (Hrsg.), *Criminal Law Theory in Transition / Strafrechtstheorie im Umbruch*. Helsinki: Finnish Lawyers' Publishing Company 1992; R. Lahti, *Das Wirtschaftsstrafrecht in der Gesamtreform des Strafrechts*. – *Wirtschaftsstrafrecht – Dogmatik, Rechtsvergleich, Rechtstatsachen*. Festschrift für Klaus Tiedemann. Köln: Carl Heymanns Verlag 2008, S. 61–77 (auch im Aufsatzsammlung R. Lahti, *Zur Kriminal- und Strafrechtspolitik des 21. Jahrhunderts*. Berlin: de Gruyter 2019, S. 201–221. – DOI: <https://doi.org/10.1515/9783110647990>).

⁵ Siehe näher R. Lahti, *Das moderne Strafrecht und das ultima-ratio-Prinzip*. – Festschrift für Winfried Hassemer. Heidelberg: C. F. Müller Verlag 2010, S. 439–448 (auch im Aufsatzsammlung R. Lahti, *Zur Kriminal- und Strafrechtspolitik des 21. Jahrhunderts*. Berlin: de Gruyter 2019, S. 107–118. – DOI: <https://doi.org/10.1515/9783110647990>).

⁶ Siehe eStGB § 14; Pikamäe, Sootak (Fn. 1), S. 154–155. Zur internationalen Entwicklung vgl. insbesondere M. Engelhart, *Corporate Criminal Liability from a Comparative Perspective*. – D. Brodowski et al. (eds.), *Regulating Corporate Criminal Liability*. Switzerland: Springer International Publishing 2014, S. 53–76. – DOI: https://doi.org/10.1007/978-3-319-05993-8_6.

3. Bereich der Verantwortlichkeit: Spezialitäts- oder Universalitätsprinzip?

Über die in Frage kommenden, bei der Tätigkeit der juristischen Person begangenen Delikte wurden separate Vorschriften erlassen (fStGB 9:1.1). Zu solchen Delikten wurden in der Anfangsphase die Bestechungsdelikte (fStGB 16:18; 563/1998), die Beihilfedelikte (fStGB 29:10), die meisten von den Gewerbedelikten im Kapitel 30 vom StGB (fStGB 30:13), die Geldwäsche und die sonstigen schweren Hehlereidelikte (fStGB 33:8), die Rationierungsdelikte und der Schmuggel (fStGB 46:14) sowie die Umweltdelikte (fStGB 48:9) bestimmt. Man erachtete den Bedarf dieser neuen Verantwortungsform für am offenbarsten bei der im weiten Sinne definierten Wirtschaftskriminalität, aber nicht alle Deliktstypen dieser Kriminalität – zum Beispiel Steuer-, Buchhaltungs-, Schuldner- oder Arbeitsdelikte – wurden in den Kreis der neuen strafrechtlichen Verantwortlichkeit mit einbezogen. In den Begründungen zur Gesetzesänderung wurde die Bedeutung der Erwägung der kriminalpolitischen Notwendigkeit und des Behutsamkeitsprinzips betont.

Seitdem ist der Bereich der strafrechtlichen Verantwortlichkeit der juristischen Person insbesondere aufgrund der Vorschriften der Europäischen Union wesentlich erweitert; der Anwendungsbereich enthält nun nach der Geltungsdauer über 20 Jahre mehr als 80 Straftattypen, und diese Verantwortungsform ist auch auf Arbeitsschutzdelikte (fStGB 47:9) ausgedehnt worden. Die in den Gesetzesbegründungen geäußerte Annahme, dass man nur selten Körperschaftsgeldstrafen verhängen würde, traf besonders in den Anfangsjahren zu. Damals wurden vor den Gerichten nur einige wenige Fälle der kollektiven Verantwortung gemäß dem Kapitel 9 vom fStGB verhandelt. Zum Teil hatte darauf der Umstand einen Einfluss, dass der Staatsanwalt bis zur Gesetzesänderung des Jahres 2003 reichlich Ermessensspielraum hinsichtlich einer sanktionsartigen Verfolgung hatte. Danach ist es häufiger geworden, dass juristische Personen strafrechtlich verantwortlich gemacht werden, und u. a. die Präjudizien OGH (KKO) 2008:33 und 2009:1 des Obersten Gerichtshofs haben diesbezüglich eine steuernde Wirkung ausgeübt. Bis Ende des Jahres 2017 hatte man 411 Male zur Körperschaftsgeldstrafe verurteilt, und in meisten Fällen für Arbeitsschutzdelikte.^{*7}

Auch in Estland ist das Spezialitätsprinzip gültig, weil laut des § 14 Abs. 1 eStGB die juristische Person nur in den im Gesetz direkt vorgeschriebenen Fällen bestraft wird. Die finnische Regelung ist seit dem Beginn dem Universalitätsprinzip näher gekommen, wenn die Anzahl der Straftattypen auf welche die Kriminalstrafbarkeit der juristischen Person sich anpassen lässt, wesentlich erweitert worden ist.^{*8}

4. Anknüpfungstat und Zurechnungsstruktur der Verantwortlichkeit

Die Zurechnungsstruktur der echten Kriminalstrafbarkeit ist im Kapitel 9 vom fStGB nicht ganz klar. In erster Linie denkt man, dass die juristische Person aufgrund der Tat eines individuellen (in Ausnahmefällen auch anonymen) Täters bestraft wird, aber andererseits ist in der Regelung eine gewisse kollektive, „gemeinschaftliche“ Schuld oder Zurechenbarkeit erkennbar.

Als eine Grundvoraussetzung für die gemeinschaftliche Verantwortung gilt, dass eine Straftat im Rahmen der Tätigkeit der juristischen Person begangen wurde (fStGB 9:1.1). Das Delikt gilt als im Rahmen der Tätigkeit der juristischen Person begangen, wenn der Täter im Namen der juristischen Person oder zu ihren Vorteil gehandelt hat und er zur Leitung der juristischen Person gehört oder in einem Dienst- oder Arbeitsverhältnis zu ihr steht oder im Auftrag eines Vertreters der juristischen Person gehandelt hat (fStGB 9:3.1). Es ist jedoch nicht unbedingt notwendig, dass ein solcher individueller Täter ermittelt oder bestraft wird (fStGB 9:2.2).

Dazu setzt die gemeinschaftliche Verantwortung die oben genannte gemeinschaftliche Schuld (durch Identifizierung oder Geschäftsherrnhafung) voraus. Eine zu einem gesetzmäßigen Organ oder zur sonstigen Leitung der juristischen Person gehörende Person muss an der Straftat beteiligt sein oder die Tat zugelassen haben, es sei denn, dass im Rahmen der Tätigkeit der juristischen Person nicht die gegebene Sorgfalt und Vorsicht zur Verhütung der Straftat gewahrt wurde (fStGB 9:2.1). Bei einem Ölraffineriefall

⁷ Siehe näher Alvesalo-Kuusi, Lähteenmäki (Fn. 2).

⁸ Vgl. Pikamäe, Sootak (Fn. 1), S. 155.

(OGH 2008:33) war die Streitfrage, ob die Angeklagten einer solchen Leitung angehörten, d.h. ob sie eine ausreichende selbständige und bedeutende Beschlussfassung in der Aktiengesellschaft ausübten oder nicht.

Auch im estnischen Strafrecht ist die Anknüpfungstat der natürlichen Person als die primäre Voraussetzung der gemeinschaftlichen Verantwortung. Diese Anknüpfungstat muss – wie im finnischen Strafrecht – im Interesse der Korporation begangen sein, aber dieser Begriff sollte ausweitend ausgelegt werden^{*9}. Dazu fordert man, dass die natürliche Person ein Leitungsfunktionär oder – nach der Gesetzesänderung vom 2008 – zuständiger Vertreter ist^{*10}. Pikamäe und Sootak haben jene Gesetzesänderung kritisiert, weil der Begriff zuständiger Vertreter eine Abweichung von dem Prinzip bedeutet, wonach „der Anknüpfungstäter eine von den Personen sein muss, die den Willen der juristischen Person äußern und ihre Tätigkeit gestalten“^{*11}.

Die Regelungen im finnischen und estnischen Strafrecht sind darin ähnlich, dass eine Doppelbestrafung möglich ist und dass die individuelle Organ- und Vertreterhaftung in der Praxis den Vorrang hat. Gleichzeitig mit der Einführung der strafrechtlichen Verantwortlichkeit der juristischen Person wurden bei der Reformierung des Strafgesetzes in die neuen Kapitel über Arbeits- und Umweltdelikte (fStGB 47:7 und 48:7) Regelungen über die Zuweisung der individuellen strafrechtlichen Verantwortlichkeit eingeführt. Dazu wurde im Jahre 2003 im Zusammenhang des Allgemeinen Teils des Strafgesetzes (fStGB 5:8) eine Bestimmung über „Handeln für eine juristische Person“ nach dem Modell des deutschen Strafgesetzes (§ 14) aufgenommen.^{*12}

Die Regelungen im finnischen und estnischen Strafrecht sind auch darin ähnlich, dass die Kriminalstrafbarkeit der juristischen Person nicht auf die Ausübung öffentlicher Gewalt angewandt wird (fStGB 9:1.2; eStGB § 14.3).

5. Schuldprinzip und sein Verhältnis zur Zurechnungsstruktur

Wie oben (4) gesagt, die Zurechnungsstruktur der Kriminalstrafbarkeit der juristischen Person ist im finnischen Strafrecht nicht ganz klar, und dasselbe gilt auch im Verhältnis zum Schuldprinzip. Die finnische Regelung bedeutet, dass die juristische Person nicht selbst als Straftäter angesehen wird^{*13}. Jedoch ist das Schuldprinzip nicht nur höchstpersönlich, sondern die Regelung spiegelt Züge der gemeinschaftlichen Schuld wider: eine individuelle Straftat muss nicht nur im Rahmen der Tätigkeit der juristischen Person begangen worden sein, sondern dazu hat man innerhalb der Organisation der juristischen Person nicht genügend getan, um die Begehung der fraglichen Straftat zu verhindern.^{*14}

Kapitel 9 vom fStGB ist *lex specialis*, wenn es die Voraussetzungen der Kriminalstrafbarkeit in diesen Paragraphen 2 und 3 bestimmt. Die estnische Regelung ist verschieden. Das Schuldprinzip gehört in Estland zu den grundgesetzlichen Prinzipien, und die Deliktsstruktur vom eStGB macht keinen Unterschied zwischen natürlichen und juristischen Personen. Die Schuldfähigkeit ausschließenden Umstände im Kapitel 2 Abschnitt 3 eStGB gelten folglich formell sowohl für die natürliche als auch für die juristische Person.^{*15} Nach § 37 eStGB *e contrario* ist eine juristische Person schuldfähig, wenn sie rechtsfähig ist.

In der estnischen Strafrechtsdoktrin hat man den doppelgeschichteten Charakter des Tatbestandes sowie des Schuldprinzips erörtert. Das Prinzip der derivativen Verantwortung (die Anknüpfungstat der

⁹ Sootak, Elkind (Fn. 1), S. 431–433.

¹⁰ Siehe eStGB § 14.1: „...by its [legal person's] body, a member thereof or by a senior official or competent representative“; Sootak, Elkind (Fn. 1), S. 425–430.

¹¹ Pikamäe, Sootak (Fn. 1), S. 157.

¹² Näher über das Verhältnis zwischen der strafrechtlichen Verantwortung der juristischen Person und der Organ- und Vertreterhaftung in Finnland, siehe Lahti, Festschrift für Keiichi Yamanaka (Fn. 2); R. Lahti, Finland National Report. – K. Ligeti, A. Marletta (eds.), *Punitive Liability of Heads of Business in the EU: A Comparative Study*. Italia: Wolters Kluwer 2019, S 5–36.

¹³ Tolvanen 2009 (Fn. 2) drückt das wesentliche Zurechnungsprinzip in folgender Weise aus: „the acts of the individual offender are under certain conditions attributed to the legal person, not as acts of the legal person but as acts of the individual for the company“. Siehe auch im allgemeinen Engelhart 2014 (Fn. 6), S. 58.

¹⁴ So die Formulierung von Frände 2001 (Fn. 2), S. 229.

¹⁵ Pikamäe, Sootak (Fn. 1), S. 158.

natürlichen Person) ist nicht genug: Einerseits sind auf der Ebene der objektiven Tatbestandsmäßigkeit die Voraussetzungen des Interesses der juristischen Person sowie die besondere Stellung des Täters (am meisten die Stellung eines Leitungsfunktionärs). Andererseits fordert man auf der Ebene des Schuldprinzips die Vermeidbarkeit der Anknüpfungstat (aktives Tun oder Unterlassen), aber in Einzelheiten ist der Inhalt dieser Forderung mehrdeutig.^{*16}

Ein unterschiedliches Detail in der estnischen Doktrin im Verhältnis zur finnischen Doktrin betrifft die theoretische Konstruktion der Verantwortung, wenn die Anknüpfungstat von einem Durchschnittsarbeiter gemacht worden ist. Im estnischen Strafrecht ist die Verantwortung der juristischen Person mit der Rechtsfigur der mittelbaren Täterschaft – durch eine Tatherrschaft mittels organisatorischer Machtapparate – begründbar, weil im finnischen Strafrecht eine extensive (Mit)Täterschaft befürwortet wird. Nach der neuen, engen gesetzlichen Formulierung von der mittelbaren Täterschaft (fStGB 5:4) gibt es einen besonderen Bedarf für diese weite Auslegung der Täterschaft im Verhältnis zu Straftaten, die im Rahmen der Tätigkeit von juristischen Personen begangen werden (siehe dazu fStGB 3:3.2, 5:8 und 9:2.1).^{*17}

6. Sanktionen

Kapitel 9 vom fStGB enthält Bestimmungen mit folgenden Titeln: Körperschaftsgeldstrafe (§ 5), Grundlagen für die Bemessung der Körperschaftsgeldstrafe (§ 6), Absehen von einem Strafantrag (§ 7), Gemeinsame Körperschaftsgeldstrafe (§ 8) und Vollstreckung der Körperschaftsgeldstrafe (§ 10). Die Körperschaftsgeldstrafe ist die einzige Strafe, die für die juristische Person im Gebrauch ist. Die Einziehung lässt sich auch auf die juristische Person anwenden, aber diejenige gehört zu den strafrechtlichen Sicherungswahrnahmen und nicht zu den Strafen.

Der Mindestbetrag der Körperschaftsgeldstrafe beträgt 850 Euro und ihr Höchstbetrag 850 000 Euro. Diese Beträge sind unverändert seit dem Erlassen des Kapitels (1995) gewesen. Darum besteht jetzt eine Rechtslage, die vom Gesichtspunkt des Verhältnismäßigkeitsprinzips der Kritik ausgesetzt ist, weil die strengsten punitiven administrativen Bußgelder u.a. für Wettbewerbsverstöße viel höher sein können.

Im estnischen Strafrecht betragen nach der Gesetzesänderung in 2014 die Mindest- und Höchstbeträge der Körperschaftsgeldstrafe 4 000 Euro und 16 000 000 Euro (eStGB § 44.8). Es besteht also ein großer Unterschied zwischen Finnland und Estland. Man bemisst die Geldstrafe des gehörigen Unternehmens im Verhältnis zu seinem Umsatz (eStGB § 44.9), was auch sich von der finnischen Regelung unterscheidet.^{*18} Gewisse Nebenstrafen sind auch für die juristische Person im Gebrauch (eStGB § 55¹).

7. Zusammenfassung

Die gesetztechnischen Lösungen zur Einführung der Kriminalstrafbarkeit der juristischen Person sind in Finnland (1995) und Estland (2001) verschieden gewesen. Ähnlichkeiten zeigen sich u.a. darin, dass in beiden Ländern diese Regelung im Zusammenhang der Gesamtreform des Strafgesetzes verwirklicht wurde. Auch in prinzipiellen Hinsichten – betreffend die Zurechnungsstruktur und das Schuldprinzip – sind die Regelungen *de facto* einander nah. Unterschiede bemerkt man u.a. darin, dass in Finnland die Regelung der individuellen Organ- und Vertreterhaftung in der Gesamtreform revidiert wurde und dass die Beteiligungsdoktrin zwischen diesen Ländern sich voneinander unterscheidet. Andererseits ist das Strafmaß der Körperschaftsgeldstrafe in Estland in zeitgemäßer Weise erhöht worden. Für diese beiden Länder der Europäischen Union ist es eine Zukunftsfrage, ob man eher punitive administrative Sanktionen statt der Körperschaftsstrafen einführen und verwirklichen sollte^{*19}.

¹⁶ Siehe näher Pikamäe, Sootak (Fn. 1), S. 156–160; Sootak, Elkind (Fn. 1), S. 425–431. Nach der Gesetzesergänzung in 2014 (eStGB § 37¹) ist ein solcher Grund für den Ausschluss der Schuld der juristischen Person *expressis verbis* in Kraft.

¹⁷ Vgl. einerseits Pikamäe, Sootak (Fn. 1), S. 156, 160 mit Hinweis auf die Dissertation von P. Randma; und andererseits R. Lahti, Festschrift für Yamanaka (Fn. 2), S. 143–146.

¹⁸ Vgl. mit der ursprünglichen Regelung in Sootak, Elkind (Fn. 1), S. 433.

¹⁹ In Finnland hat eine Arbeitsgruppe des Ministeriums für Justiz in einem neuen Bericht geklärt, wie die Regelung der punitiven administrativen Sanktionen entwickelt werden sollte. Siehe Reihe der Berichte des Ministeriums für Justiz, 52/2018.



Andres Parmas

*Judge, Tallinn Circuit Court
Assistant of Criminal Law
University of Tartu*

Superior Responsibility in Estonian Criminal Law and its Compliance with International Law^{*1}

1. Introduction

The concept of superior responsibility, or command responsibility, is an original creation of international law that has no exact counterpart in domestic legal systems.^{*2} As superior responsibility has been regulated in detail in Art. 28 of the Rome Statute, it is crucial to analyse the accordance of domestic rules with this, because states parties to the Rome Statute have a strong incentive to bring their domestic law into compliance with that statute so as to effectuate the complementarity principle under which the International Criminal Court is acting.^{*3}

In this article, I will firstly give an overview of the state of international law on the responsibility of the superior (both in customary international law and in respect of the Rome Statute). With this grounding, the respective regulation of the Estonian Penal Code is outlined. Further discussion assesses whether and in what respect the Estonian regulation differs from international law and what legal consequences such difference would bring about. On the basis of this assessment, I will propose some amendments to Estonian regulation of the responsibility of the superior.

2. The responsibility of the superior in international law

The doctrine of superior responsibility crystallised in customary international criminal law soon after the Second World War.^{*4} Although neither the statute for International Military Tribunal use nor that of the International Military Tribunal for the Far East (IMTFE) contained a specific provision on superior

¹ The research for this article was conducted in the Law Faculty of Georg-August-University of Göttingen and supported through partnership agreement between University of Tartu and Georg-August-University of Göttingen.

² R. Cryer *et al.*, *An Introduction to International Criminal Law and Procedure* (3rd ed., Cambridge University Press 2014), p. 384. – DOI: <https://doi.org/10.1017/CBO9781107588707>.

³ Holding this view are, for instance, R. Cryer *et al.* (*ibid.*), p. 81.

⁴ A. Cassese, *Cassese's International Criminal Law* (3rd ed., OUP 2013), p. 186. – DOI: <https://doi.org/10.1093/he/9780199694921.001.0001>.

responsibility, the concept already was being utilised during the criminal proceedings against war criminals in the immediate aftermath of World War II. The first judgment based on the superior responsibility doctrine was the conviction of Japanese general Yamashita by the US military tribunal in Manila.^{*5} Later, the doctrine was invoked in several trials before the US military courts in Nuremberg^{*6} but also in the IMTFE in Tokyo and in a number of British, Canadian, Australian, and Chinese war crimes trials as documented by the United Nations War Crimes Commission (UNWCC).^{*7} The first international agreement to regulate the criminal responsibility of superiors was Additional Protocol I to the 1949 Geneva Conventions, Art. 86 (2).^{*8} The statute both of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and of the International Criminal Tribunal for Rwanda (ICTR) contained a provision on the responsibility of superiors^{*9}, and both *ad hoc* tribunals have applied the elements of the doctrine and explained the scope of these in numerous cases.^{*10}

The ICTY and ICTR jurisprudence have established that three elements must be satisfied if a superior is to be held responsible under the doctrine of superior responsibility: 1) the existence of a superior–subordinate relationship must have been established, 2) the superior knew or had reason to know that the criminal act was about to be or had been committed, and 3) the superior failed to take the measures necessary and reasonable to prevent the criminal act or punish the perpetrator thereof.^{*11}

Still, before adoption of the Rome Statute several aspects of superior responsibility remained hazy. As K. Ambos has put it, notwithstanding the increasing application of the doctrine since the Second World War, its elements have not been defined precisely enough to be indubitably in accordance with the *nullum crimen* principle as laid down in the Rome Statute, especially with its requirement of legal exactness and strictness.^{*12} With Art. 28 of the Rome Statute, the doctrine has been refined considerably in an effort to overcome these issues.

As articulated by the language of Art. 28, the *actus reus* of superior responsibility is composed of five elements: 1) The perpetrator is either a *de iure* or *de facto* military or civilian **superior** who has forces or subordinates subject to his or her command; any kind of superior and subordinate relationship would seem to be sufficient. 2) The military commander has command or, alternatively, authority and has control, whereas the civilian superior has authority and control over the subordinates, and this command or authority and this control must be effective. The civilian superior must, in addition, have effective responsibility for the activities that led to the crimes committed, along with control over those activities. 3) The crimes committed by the subordinates are a **result** of the superior's failure to exercise proper control over them.

⁵ Consider the case *Yamashita*, US Military Commission, Manila (8 October – 7 December 1945), and the Supreme Court of the United States (judgments delivered on 4th February 1946). Available at: UNWCC, *Law Reports of Trials of War Criminals*, Vol. IV, p. 1 *et seq.*

⁶ See discussion of *US v. Brandt et al.* in 'Nürnberg Military Tribunals under Control Council Law No. 10', in *Trials of War Criminals*, Vol. II, p. 171, at pp. 212, 213; *US v. von List et al.* in 'Nürnberg Military Tribunals under Control Council Law No. 10', in *Trials of War Criminals*, Vol. XI, p. 1230, at pp. 1256–1257; *US v. von Leeb et al.* in 'Nürnberg Military Tribunals under Control Council Law No. 10', in *Trials of War Criminals*, Vol. XI, pp. 462–697, at p. 489.

⁷ See the more thorough discussion by K. Ambos: 'Superior Responsibility', in A. Cassese, P. Gaeta, J.R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. 1 (OUP 2002), pp. 810–813. – DOI: <https://doi.org/10.1093/law/9780198298625.001.0001>. Cf. W.H. Parks, 'Command Responsibility for War Crimes', *Military Law Review* 62 (1973), p. 2, at p. 69 *et seq.*; G. Werle, F. Jessberger, *Völkerstrafrecht* (4th ed., Mohr Siebeck 2016), para 606.

⁸ Art. 86 (2) stipulates criminal responsibility for the superior's failure to act: 'The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.' Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977. Available at <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=043A5B6666FA92E6C12563CD0051E1E7>, last visited on 23.3.2019.

⁹ See Art. 7(3) of the ICTY Statute and Art. 6(3) of the ICTR Statute.

¹⁰ See, especially, the judgment in *Prosecutor v. Delalić et al.*, IT-96-21-T, T.Ch., 16.11.1998, para 330 *et seq.*; judgment in *Prosecutor v. Aleksovski*, IT-95-14/1, T.Ch., 25.6.1999, para 66 *et seq.*; judgment in *Prosecutor v. Orić*, IT-03-68-T, T.Ch., 30.6.2006, para 289 *et seq.*; judgment in *Prosecutor v. Halilović*, IT-01-48, T.Ch., 16.11.2005, para 38 *et seq.*; judgment in *Prosecutor v. Perišić*, IT-04-81-T, T.Ch., 6.9.2011, para 1651 *et seq.*; judgment in *Prosecutor v. Kayishema and Ruzindana*, ICTR-95-1, T.Ch., 21.5.1999, paras 208 *et seq.*, 473 *et seq.*; judgment in *Prosecutor v. Nahimana et al.*, ICTR-99-52-T, T.Ch., 3.12.2003, para 970 *et seq.*

¹¹ See, with extensive reference to older case-law, *Halilović* (*ibid.*), para 56.

¹² K. Ambos, 'Superior Responsibility' (see Note 6), p. 829.

4) The superior fails to take the **necessary** and **reasonable** measures within his or her power against the crimes committed. 5) The countermeasures are taken with an aim of preventing or repressing the commission of the crimes, or the superior has to submit the matter to the competent authorities for investigation and prosecution.^{*13}

According to Art. 28 of the Rome Statute, the objective elements of superior responsibility have to be accompanied by sufficient *mens rea* with respect to the circumstances of the *actus reus*, which may come about in the following forms: either 1) both military commander and civilian superior had knowledge or 2) the military commander had to know, 3) or the civilian superior consciously disregarded information clearly indicating that the subordinates were committing or about to commit such crimes. Hence, the Rome Statute expressly lowers the *mens rea* standard below the one generally set by Art. 30 for superiors. There is ambiguity as to what concrete mental standard is to be applied to civilian superiors, while with regard to military superiors the standard seems to be negligence.^{*14}

With the above borne in mind, we can now proceed to outline the elements of the superior responsibility concept as addressed by the Estonian Penal Code.

3. Superior responsibility under the Estonian Penal Code

In the Estonian Penal Code (PC), the concept of superior responsibility has been regulated in a manner considerably different from that articulated by the corresponding rules of international law.^{*15} According to Art. 88 (1) of the PC, for a criminal offence covered by Chapter 8 (offences against humanity and international security), the representative of state power or military commander who issued the order to commit the criminal offence, who consented to commission of the criminal offence or failed to prevent the commission of the criminal offence although it was in his or her power to do so, or who failed to submit a report of a criminal offence while being aware of the commission of the criminal offence by his or her subordinates shall be punished in addition to the principal offender. From the above it can be concluded that Art. 88 (1) encompasses the core elements presented below.

3.1. The language ‘for the criminal offence provided for in this chapter’

Whilst the concept of superior responsibility in the Rome Statute only covers the four so-called core crimes^{*16}, Estonian regulation goes further. Chapter 8 of the PC provides for definition of other than ‘core’ crimes also, additional crimes possessing an international element. With Art. 92, propaganda for war and with Art. 93¹ failure to apply international sanctions are criminalised. The same applies for piracy, via Art. 110; hijacking of aircraft, under Art. 111; and attacks against flight safety, with Art. 112.

3.2. The element ‘shall also be punished in addition to the principal’

It is noteworthy that for the whole palette of criminal offences covered by Chapter 8 of the PC and also for the entire spectrum of criminal omissions attributable to the superior, the superior shall be punished in line with the same norm as the principal offender. This is a very broad foundation for responsibility, far

¹³ K. Ambos, *Der Allgemeine Teil des Völkerstrafrechts. Ansätze einer Dogmatisierung* (Duncker & Humblot 2002), pp. 705–706; K. Ambos, *Treatise on International Criminal Law, Vol. I: Foundations and General Part* (OUP 2013), p. 207. – DOI: <https://doi.org/10.1093/law/9780199657926.001.0001>.

¹⁴ G. Werle, F. Jessberger, *Völkerstrafrecht* (see Note 6), paras 622–623.

¹⁵ For a similar assessment, see H. B’, in A. Eser, H. Kreicker, U. Sieber (eds), *Nationale Strafverfolgung völkerrechtlicher Verbrechen. Band 7* (Duncker & Humblot 2006), p. 236.

¹⁶ R. Arnold, O. Triffterer, ‘Article 28: Responsibility of Commanders and Other Superiors’, in O. Triffterer, K. Ambos, *Rome Statute of the International Criminal Court: A Commentary* (C.H. Beck, Hart, Nomos 2016), para 81; G. Werle, F. Jessberger, *Völkerstrafrecht* (see Note 6), para 603.

surpassing the general rules on an accomplice's responsibility as foreseen in Art. 22 or 22¹ of the PC. Even in cases wherein the role of the superior would not even suffice for said person being punishable as an accomplice under Art. 22 of the PC, the superior is still liable through Art. 88 (1), without there even being a chance of mitigation of punishment as provided for in Art. 22 (5) and Art. 60 of the PC. This means also that a superior might be liable for a subordinate's act where a certain minimum standard must be met for *mens rea* on his or her subordinate's part (deliberate intent, *dolus directus* of the first degree, or direct intent, *dolus directus* of the second degree) while said superior does not actually share the same level of *mens rea* and acts only with indirect intent (*dolus indirectus*).

3.3. The 'military commander' reference

The language used in Art. 88 (1) of the PC is perplexing in the manner in which it specifies which types of superiors are encompassed by this regulation. From the text it is obvious that the definition covers military commanders. It is also clear that the authority of the military commander does not have to be official – the wording 'the representative of state powers or the military commander' is sufficient to cover persons who have *de iure* military authority in any armed forces representing a government but also extends to persons commanding armed groups that do not owe allegiance to any government – e.g., forces of mutineers beyond government control or even non-governmental armed groups (militias etc.). It is noteworthy also that the term 'military commander' is broad enough to cover not only persons belonging to a fixed pre-determined military hierarchy and formally occupying a position of superiority in such a hierarchy; the concept of military commander must be considered to extend also to someone exercising *de facto* military authority over others, without any formal commanding position.^{*17} This is especially important to bear in mind in conjunction with the options of guerrilla warfare (of which Estonia already has historical experience, from the 1940s–1950s) and spontaneous armed resistance addressed in Art. 54 (2) of the Estonian Constitution.^{*18} What matters is that the person concerned has people actually effectively perceiving themselves as subordinate to him or her.

3.4. Application to a non-military representative of state power

As for non-military superiors, it appears that only a very limited set of formal superior–subordinate relationships is covered by Art. 88 (1) of the PC. This is obvious from the wording 'representative of state powers'. It cannot be imagined that someone who acts as a representative of state authority (i.e., has a formal position and is vested with formal functions and authority stemming from the position he or she occupies) could at the same time function also as a representative of state power outside this position and hence in relationship with persons not formally subject to him or her by dint of that formal position.^{*19} Likewise, it can be ruled out that anyone could function as a representative of state power outside formal state structures. Hence, people such as influential businessmen, politicians, clergymen, or representatives of NGOs, who might be able to effectively control and direct others but who do not occupy any formal position in the state structure, clearly fall outside the regulation of Art. 88 (1). Another conclusion one has to draw from the text of Art. 88 (1) is that people representing public authority on behalf of anything that is not strictly of a state nature cannot be held responsible through application of the concept of a superior's orders, at least according to Art. 88 (1). This means that, amongst other things, actions of municipal officers too are excluded from the regulation's ambit.^{*20}

¹⁷ J. Tehver, '§ 88', in J. Sootak, P. Pikamäe (eds), *Karistusseadustik. Kommenteeritud väljaanne* (Penal Code. Commented Edition) (4th ed., Juura 2015), para 3.

¹⁸ According to Art. 54 (2) of the Estonian Constitution, in the absence of other means, every citizen of Estonia has the right to resist, of his or her own initiative, a forcible attempt to change the constitutional order of Estonia. This entitlement could bring about spontaneously organised groups that operate under the informal authority and control of a *de facto* superior without any formal position.

¹⁹ Imagine, for instance, a member of government who also owns a factory where prisoners of war are treated inhumanely by the management with his or her acquiescence.

²⁰ See a similar conclusion by J. Tehver, '§ 88' (see Note 16), para 2.

3.5. The phrasing ‘issued the order to commit the criminal offence’

In Art. 88 (1), the concept of superior responsibility has been intermingled with the direct responsibility of principal offenders and criminal responsibility of accomplices: in this article of law, active and passive behaviour are dealt with together. In Estonian criminal-law doctrine, issuing an order to commit a criminal offence might refer to any of the following, depending on the facts of the case: 1) joint commission of an offence, 2) commission of an offence by taking advantage of another person, and 3) inducement to commit an offence.^{*21} Hence, it seems that with regard to superiors’ participation in criminal offences as addressed in Chapter 8 of the Penal Code, the legislator has made an exception to the principle of maintaining this distinction, otherwise followed in Estonian criminal-law doctrine.

3.6. The element ‘failed to prevent the commission of the criminal offence although it was in his or her power to do so or who failed to submit a report of a criminal offence while being aware of the commission of the criminal offence by his or her subordinates’

In contrast against the alternatives of issuing an order or consenting, for the alternative of failing to prevent there is an additional element foreseen by Art. 88 (1) of the PC: actual control by the superior. The superior is deemed responsible for his or her failure to prevent commission of a criminal offence by subordinates only when it was in his or her power to do so. At the same time, no proof of the superior’s power to act is required in connection with criminalisation of failure to submit a report on a criminal offence committed by one’s subordinates. For neither of these alternatives, however, is it requisite by law that the superior have had the ability to act or that the superior have been in breach of his or her duties. Neither does the PC make provision for the enhanced risk of subordinates’ commission of a criminal offence that emerges from the superior’s omission of his or her duty of control.

3.7. Restriction to intentional behaviour – ‘fails to prevent when in his power’ and ‘failed to submit when aware’

With regard to *mens rea*, only intentional conduct seems to be covered by Art. 88 (1) of the PC. According to Art. 15 (1), only an intentional act is punishable unless the Penal Code dictates punishment for an act of negligence. This means that, for an act to be punishable if committed negligently, the legislator has to express said intent explicitly. This has not been done in Art. 88 (1) of the PC. Moreover, for the last alternative, the scenario of non-reporting of a crime already committed, there is punishability only if the non-reporting occurs while the superior is aware of the commission of a crime. Such a standard implies *dolus directus* of the second degree.

4. Conflict between the Estonian Penal Code and international criminal law

Comparing international criminal law on superior responsibility with Estonia’s corresponding domestic norms, it appears that in several important respects Estonian law either directly contradicts international law or at least remains very unclear and ambiguous.

Of course, how far to stretch criminal responsibility is always a legal-policy choice – whether to extend it beyond what is necessary for fulfilling the international obligations of the country or, instead, domestically

²¹ If a superior gives an order to a subordinate to commit an international crime and that subordinate does not have a realistic opportunity to refuse to follow it or at least to challenge or question such an order and therefore obeys the order, it would be correct to consider the superior to be the perpetrator, who commits the offence by taking advantage of the other person. If, however, a superior orders a subordinate to commit an international crime and that subordinate does have a realistic opportunity to refuse execution or at least to challenge or question such an order but obeys the order nevertheless, the act of the superior might be considered inducement. If the execution of the order in such a case is dependent on real-time guidance or instructions by the superior, the superior might as well be regarded as a co-perpetrator along with the subordinates actually executing the order.

restrict that responsibility relative to international rules.^{*22} In any case, the decision to deviate from the international standard – whether in expanding or restricting criminal responsibility – should at least be consciously made. As far as the many deviations from international law that are found in Art. 88 (1) of the PC are concerned, it seems, however, that this is not a result of conscious choice but more a misinterpretation of international obligations. This could be concluded, *inter alia*, already from the fact that the commentary on the PC refers to the Rome Statute (RS) as the legislator's role model.^{*23}

The present state of Estonian law regarding superior responsibility is problematic, because our current regulation addressing this doctrine does not enable Estonia to adhere to the respective international regulations, especially the requirements of Art. 28 of the Rome Statute. Hence, Estonia's ability to honour the complementarity principle set forth by the International Criminal Court (ICC) is at stake. More specifically, the problems with Art. 88 (1) lie in the following issues.

4.1. Reference to not only state representatives but all persons with authority (both *de iure* and *de facto*)

Firstly, it appears that Art. 88 (1) of the PC deviates considerably from international law, in establishing the categories of superiors who may be held responsible for the criminal offences committed by subordinates of theirs. According to Art. 28 of the RS, military and non-military superiors alike carry responsibility for their subordinates' crimes if, acting with the requisite *mens rea*, they fail to exercise control properly over their subordinates and, because of that, fail to take measures in order to prevent, repress, or report the crimes of those subordinates.^{*24} For neither military nor non-military superiors does Art. 28 of the RS impose the restriction that the superior must occupy a formal position of authority.^{*25} As affirmed also in the practice of the *ad hoc* tribunals and the ICC, what matters is the actual authority and control of the superior over persons who are subject to him or her.^{*26}

In regard of military commanders, it can be said that Art. 88 (1) of the PC recognises the approach by which what counts is the actual authority and control over subordinates and not the formal position of the commander. The narrowing by which the responsibility of non-military superiors is restricted only to representatives of state power, however, finds no parallel in international law.^{*27} On the contrary, there is a considerable body of case-law from the ICTY and ICTR whereby the concept of superior responsibility has been applied for non-military superiors.^{*28} It has been found repeatedly that civilian persons not holding any formal public office can be held responsible as superiors.^{*29} In fact, already in the Nuremberg follow-up

^{*22} See, for example, H. Kreicker, H. Gropengiesser, 'Deutschland', in A. Eser, H. Kreicker (eds), *Nationale Strafverfolgung völkerrechtlicher Verbrechen, Band I* (Edition-Iuscrim 2003), pp. 298–299, where the author admits that abstinence of the German legislator from criminalising non-reporting of subordinates' crimes when committed negligently could be justified because of the minor legal significance of such violation. See also M. Neuner, 'General Principles of International Criminal Law in Germany', in M. Neuner (ed.), *National Legislation Incorporating International Crimes: Approaches of Civil and Common Law Countries* (Berliner Wissenschafts-Verlag 2003), p. 130; T. Weigend, 'Zur Frage eines „internationalen“ Allgemeinen Teils', in B. Schünemann et al. (eds), *Festschrift für Claus Roxin zum 70. Geburtstag am 15. Mai 2001* (Walter de Gruyter 2001), p. 1375, at p. 1396.- DOI: <https://doi.org/10.1515/9783110877021.1375>.

^{*23} J. Tehver, '§ 88' (see Note 16), para 1.

^{*24} See R. Arnold, O. Triffterer, 'Responsibility of Commanders' (see Note 15), para 85.

^{*25} G.R. Vetter, 'Command Responsibility of Non-military Superiors in the International Criminal Court (ICC)', *Yale Journal of International Law* 25 (2000), p. 89, at pp. 117–118 (fn. 171); I. Bantekas, 'The Contemporary Law of Superior Responsibility', *AJIL* 93 (1999), p. 573, at p. 580. – DOI: <https://doi.org/10.2307/2555261>; C. Meloni, *Command Responsibility in International Criminal Law* (T.M.C. Asser Press 2010), p. 159. – DOI: <https://doi.org/10.1007/978-90-6704-605-3>.

^{*26} I. Bantekas, *ibid.*, p. 582. See also the prosecution's final written submissions on the confirmation-of-charges proceedings, *Prosecutor v. Gbagbo*, ICC-02/11-01/11-642-Conf, 1.5.2014, paras 26–29 with a further reference to the Decision on Confirmation of Charges, *Prosecutor v. Bemba*, ICC-01/05-01/08-424, P.T.Ch., 15.6.2009, para 354.

^{*27} See G. Mettraux, *The Law of Command Responsibility* (OUP 2009), pp. 122–123. – DOI: <https://doi.org/10.1093/acprof:oso/9780199559329.001.0001>; also W.A. Schabas, *The International Criminal Court: A Commentary on the Rome Statute* (OUP 2010), pp. 459–460. – DOI: <https://doi.org/10.1093/law/9780199560738.001.0001>. See also H. Kreicker, H. Gropengiesser, 'Deutschland' (see Note 21), p. 293 ('*Vorgesetztenverantwortlichkeit ist nicht nur auf von Befehl und Gehorsam geprägte militärische Dienstverhältnisse beschränkt, sondern schließt auch sonstige Abhängigkeitsverhältnisse ziviler und faktischer Natur mit ein*').

^{*28} On the practice of the ICTY, refer to, for instance, *Delalic* (see Note 9), para 356; *Orić* (see Note 9), paras 308–310. For the practice of the ICTR, see the judgment in *Prosecutor v. Bagilishema*, ICTR-95-1A-A, A.Ch., 3.7.2002, para 51; the judgment in *Prosecutor v. Musema*, ICTR-96-13-T, T.Ch., 27.1.2000, para 135.

^{*29} For example, see *Delalic* (see Note 9), para 750; *Musema* (*ibid.*), para 880.

cases, non-military superiors not belonging to a state hierarchy of power (managing physicians and industrialists) were found guilty for reason of superior responsibility.^{*30} Clearly, a formal position in state structures is not the only criterion for a non-military person holding authority over others. Such authority may stem also from a person's position in a municipal power hierarchy and from status in any other hierarchically constructed system but also from informal circumstances.^{*31} The civilian settings wherein superior-subordinate relationships might give rise to application of the doctrine of superior responsibility could encompass, for instance, organisations with a military-like structure, wherein those in higher positions have effective power to employ physical sanctions against those under them; situations in which a person could be threatened with immediate loss of income or livelihood; and even some religious groups, whose leader may possess strong means of psychological control.^{*32} Hence, confining the responsibility of civilian superiors under criminal law only to representatives of state power carelessly excludes a whole array of possible string-pullers from responsibility.

That said, a need to limit the set of non-military superiors who shall bear responsibility for their subordinates' crimes is still relevant. Unlike military lines of command, the civilian relationships of subordination are of an extremely varied nature, and there is potential for the according of superior responsibility to become intolerably extensive.^{*33} One option is for civilian superiors to be held responsible for the acts of their subordinates only if they have a guarantor position – i.e., if the acts of the subordinates fall within the sphere of competence of the superior.^{*34} Therefore, some kind of restriction to the responsibility of civilian superiors is necessary, but this has to be achieved by other means than narrowing the scope of civilian superior-subordinate relationships under Art. 88 (1) to only those within formal state power hierarchies. In Art. 28 of the Rome Statute, the restriction is handled through an additional requirement, for effective responsibility and control on the superior's part. One of Estonia's options would be to add a similar criterion to Art. 88 (1) of the PC, although domestically the extent of the guarantor responsibility could, alternatively, be constructed without addition of any further elements to the text of the law while this element is left open to judicial assessment.^{*35}

³⁰ See S. Boelaert-Suominen, 'Prosecuting Superiors for Crimes Committed by Subordinates: A Discussion of the First Significant Case Law Since the Second World War', *Virginia Journal of International Law* 41 (2001), p. 747, at p. 575; also K. Ambos, *Der Allgemeine Teil* (see Note 12), p. 101. See the respective case-law also: that of the Military Tribunal for the Far East, Judgment of 12 November 1948 (in J. Pritchard and S.M. Zaide (eds), *The Tokyo War Crimes Trial*, Vol. 22, 49.791); the Government Commissioner of the Judgment on Appeal to the Superior Military Government Court of the French Occupation Zone in Germany, *General Tribunal of the Military Government for the French Zone of Occupation in Germany v. Roehling* (in *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10*, Vol. XIV, p. 1097, at p. 1136); *United States of America v. Friedrich Flick et al.*, of 22 December 1947 (in *Trials of War Criminals before the Nuremberg Military Tribunal under Control Council Law No. 10*, Vol. VI, p. 1187, at p. 1202); *United States of America v. Karl Brandt et al.* (in *Trials of War Criminals before the Nuremberg Military Tribunal under Control Council Law No. 10*, Vol. II, p. 171, at pp. 193, 198, 207, 212–213).

³¹ Judgment in *Prosecutor v. Akayesu*, ICTR-96-4-T, T.Ch., 2.9.1998, para 691 (with the communal bourgmestre as a superior); *Musema* (see Note 28), para 133 *et seq.* (with the director of a tea factory as a superior, having effective control over his workers); *Flick* (see Note 25), para 1202 (with an industrialist as a superior); the judgment in *Prosecutor v. Nahimana*, ICTR-99-52-A, A.Ch., 28.11.2007, paras 798–822 (with a radio station's *de facto* boss who did not hold an official position at the station as a superior to the journalists at the station).

³² For instance, see T. Weigend, '§ 4', in W. Joecks *et al.* (eds), *Münchener Kommentar zum Strafgesetzbuch: StGB Band 8: Nebenstrafrecht III, Völkerstrafgesetzbuch* (3rd ed., C.H. Beck 2018), para 38.

³³ T. Weigend, 'Bemerkungen zur Vorgesetztenverantwortlichkeit im Völkerstrafrecht', *ZStW* 116 (2004), p. 999, at p. 1011. – DOI: <https://doi.org/10.1515/zstw.2004.116.4.999>.

³⁴ J. Bülte, *Vorgesetztenverantwortlichkeit im Strafrecht* (Nomos 2015), p. 483. – DOI: <https://doi.org/10.5771/9783845257969>. See also T. Wu, Y. Kang, 'Criminal Liability for the Actions of Subordinates: The Doctrine of Command Responsibility and Its Analogues in United States Law', *Harvard International Law Journal* 38 (1997), p. 272, at p. 295; also R. Arnold, 'Article 28: Responsibility of Commanders and Other Superiors', in O. Triffterer (ed.), *Rome Statute of the International Criminal Court – Observers' Notes, Article by Article* (2nd ed., C.H. Beck, Hart, Nomos 2008), para 129. – DOI: <https://doi.org/10.5771/9783845263571-1057>.

³⁵ There exists no rule in Estonian Law regulating specifically in which instances the person in an official position would be liable for omissions in office (with regard to the guarantor position of the person holding that office). This has to be assessed on a case-by-case basis by the judiciary in accordance with the general rule on omissions (in Art. 13 of the Penal Code). See also the judgment of the Criminal Chamber of the Supreme Court in case 3-1-189-11, para 20.7.3, where the chamber states: 'Karistusõigus ei võimalda omistada ühe füüsilise isiku tegu teisele füüsilisele isikule pelgalt nende isikute ametiseisundi alusel', in translation 'It is not possible in penal law to attribute an act of one physical person to another physical person on the basis merely of the official position of such persons'. Available at <https://www.riigikohus.ee/et/laheidid?asjaNr=3-1-1-89-11>, last visited on 12.2.2019. By way of analogy, the domestic court could also assess the relationship between a civilian superior and his or her subordinate.

4.2. The order to commit a crime (direct responsibility) vs. consent: Non-prevention and non-repression (superior's responsibility)

By the doctrine, having superior responsibility is, in essence, *sui generis*^{*36} grounds for liability in addition to ordinary grounds for liability – those applied to principal offenders or to accomplices. The superior is answerable as a guarantor for not having taken any – or at least not having taken the necessary and reasonable – measures to avoid criminal offences on his or her subordinates' part. Hence, this is a responsibility for omission (a real omission).^{*37} In one line of jurisprudence, it has been treated as responsibility of the superior for the crimes committed by subordinates, whereas another approach has been to treat the offence separately as an instance of the superior's dereliction of his or her duty to supervise the relevant subordinates properly.^{*38} Recent legal thought has shown clear support for the latter approach.^{*39} Either way, it is clear from both the law and jurisprudence that there exists a clear distinction between the personal liability for the criminal offences committed by the person or at least aided and abetted by that person and, on the other hand, the extended liability accorded to the superior because of what has, in fact, been done by another person or because of dereliction of duty by the superior.^{*40} This distinction has been lost with Art. 88 (1) of the PC. Issuing an order to commit a crime is not an omission; rather, it constitutes an active behaviour aimed at achieving the criminal end.^{*41} As stated above (in Subsection 3.5 of this paper), in Estonian criminal law ordering a criminal offence could, under certain conditions, constitute joint commission of a criminal offence or commission of a criminal offence while one is taking advantage of another person.

Similar criticism can be levelled at the handling of the second alternative of the *actus reus* of superior responsibility in Art. 88 (1) of the PC – consent to a criminal offence. If consent in a specific case would bring about a situation wherein the superior is not aware of the criminal offence of the subordinate in advance of it or at least wherein the superior does not have specific knowledge of the criminal offence, applying the concept of consent is misplaced, because such behaviour would already be encompassed by the alternative either of failure to prevent the criminal offence or of failure to repress it.

It seems from the above that behaviours of very different nature and of quite different gravity have been muddled together under the umbrella of superior responsibility in Art. 88 (1) of the PC. Overlap between the doctrine of superior responsibility and other grounds for personal criminal responsibility creates a serious question, on which basis one must decide which dogmatic figure to prefer when prosecuting a superior who has issued an order to commit a criminal offence. As responsibility for an active behaviour should, in principle, always have priority over responsibility for an omission, such a normative construction is perplexing at best.^{*42}

³⁶ Halilović (see Note 9), para 78; also G. Werle, F. Jessberger, *Völkerstrafrecht* (see Note 6), paras 603, 607.

³⁷ H. Kreicker, H. Gropengiesser, 'Deutschland' (see Note 21), pp. 295–296; also K. Ambos, *Internationales Strafrecht* (5th ed., C.H. Beck 2018), §7, para 55.

³⁸ Y. Ronen, 'Superior Responsibility of Civilians for International Crimes Committed in Civilian Settings', *Vanderbilt Journal of Transnational Law* 43 (2010), p. 313, at p. 315. For older case-law, upholding the first approach, see, for instance, Akayesu (see Note 30), para 471: 'Article 6(3), by contrast, constitutes something of an exception to the principles articulated in Article 6(1), as it derives from military law, namely the principle of the liability of a commander for the acts of his subordinates or "command responsibility"', whereas the second approach has been preferred in more recent case-law, with the *Halilović* ruling providing an illustration (see Note 9), in para 54: 'The commander is responsible for the failure to perform an act required by international law. This omission is culpable because international law imposes an affirmative duty on superiors to prevent and punish crimes committed by their subordinates. Thus "for the acts of his subordinates" as generally referred to in the jurisprudence of the Tribunal does not mean that the commander shares the same responsibility as the subordinates who committed the crimes, but rather that because of the crimes committed by his subordinates, the commander should bear responsibility for his failure to act.'

³⁹ See, for example, R. Värk, 'Superior Responsibility' ENDC Proceedings 15 (2012), p. 143, at pp. 143–144; but also relevant jurisprudence in: *Orić* (see Note 9), para 293; also *Bemba* (see Note 25), para 405. Available at https://www.ksk.edu.ee/wp-content/uploads/2012/12/KVUOA_Toimetised_15_7_Vark.pdf, last visited on 12.2.2019.

⁴⁰ For a thorough explanation of this, see K. Ambos, *Der Allgemeine Teil* (see Note 12), pp. 670–672. See also H. Kreicker, H. Gropengiesser, 'Deutschland' (see Note 21), pp. 292–293.

⁴¹ K. Ambos, 'Article 25: Individual Criminal Responsibility', in O. Triffterer, K. Ambos, *Rome Statute of the International Criminal Court: A Commentary* (C.H. Beck, Hart, Nomos 2016), para 18, with a reference to relevant case-law of the UN SC *ad hoc* tribunals (fn. 124) and to the ICC (fn. 128). – DOI: <https://doi.org/10.5771/9783845263571>.

⁴² H. Kreicker, H. Gropengiesser, 'Deutschland' (see Note 21), p. 294.

4.3. The dubious element of effective control

Another aspect of Estonian regulation that calls for criticism of its handling of superior responsibility is Art. 88 (1)'s inadequate formulation of the condition of effective command (or authority) and control. The idea of military commander and of representative of state power are not enough on their own for determining whether any particular superior had actual power over his or her subordinates.^{*43} For that, the further elements of command (or authority) and control are necessary. Forces subject to effective command and control are those that are, according to an objective assessment, subordinate to the commander in either a *de iure* or a *de facto* chain of command and to which the superior may give orders.^{*44} The concept of authority may refer to the modality, manner, or nature according to which a military or military-like commander exercise 'control' over the forces or subordinates.^{*45} Effective control means the material ability to prevent the commission of the offence or to punish the principal offenders.^{*46}

It has been stressed in the case-law that this requirement is not satisfied by simple demonstration of the accused individual's general influence.^{*47} Therefore, considering both the elements of a superior-subordinate relationship as such and effective control is inevitable. Without effective control or even when it is just too remote, responsibility is excluded.^{*48} Otherwise, we would speak of strict vicarious liability – it is precisely the element of effective control that enables censuring the superior for not having acted. Only the superior position *per se* in combination with effective power over people subject to one is sufficient for justifying the extension of responsibility to a given superior.^{*49} In regard of civilian superiors, the requirement of effective control plays a particular role. As a rule, control in civilian hierarchies is less strict than its equivalent in military hierarchies.^{*50} Therefore, the duty of a civilian superior to control his or her subordinates has to be limited to what 'is part of their relationship'.^{*51} This is the reason there exists even further specification of the requirement set in Art. 28 (b) (ii) of the RS for cases of civilian superiors: the crimes had to pertain to activities under the effective responsibility and control of the superior. This specification refers to actual fulfilment of the non-military superior's professional or other relevant functions in relation to his or her subordinates, and it works as a safety clause against presumptions of excessively expansive expectations for the exercise of authority by a non-military superior.

With Art. 88 (1) of the PC, an attempt has been made to formulate the element of effective command (or authority) and control by means of the language 'was in his or her power'. However well-intentioned, this phrasing is not capable of conveying everything that is necessarily encompassed by the concept of effective command/authority and control. Firstly, it remains unclear whether the mention of someone's 'power' is intended to refer to that person's status as a superior. If so, the criticism is obvious – merely the fact that someone has a position of authority (either *de iure* or *de facto*) does not necessarily mean that this person is also in any given situation able to actually exercise said authority. The superior might be hindered in this by the subordinates having gone out of control.^{*52} The same is true for a military adviser who has neither operational nor administrative control: advisers are to advise, not 'replace' the commander.^{*53} If, on the

⁴³ E. v. Slidregt, *Individual Criminal Responsibility in International Law* (OUP 2012), pp. 197–198. – DOI: <https://doi.org/10.1093/acprof:oso/9780199560363.001.0001>. See also K. Ambos, *Treatise* (see Note 12), pp. 211–212.

⁴⁴ See R. Arnold, O. Triffterer, 'Responsibility of Commanders' (see Note 15), para 102.

⁴⁵ See *Bemba* (see Note 25), paras 414–415.

⁴⁶ See the *Halilović* decision (see Note 9), paras 57–59, and also the appeals of the judgment in the same case, IT-01-48-A, A.Ch., 16.10.2007, paras 59, 66. See, with reference to extensive previous case-law of the ICTY and ICTR, *Orić* (see Note 9), para 311.

⁴⁷ Judgment in *Prosecutor v. Ntagerura*, ICTR-99-46-A, A.Ch., 7.7.2006, paras 341–342; judgment in *Prosecutor v. Karera*, ICTR-01-74-T, T.Ch., 7.12.2007, para 564.

⁴⁸ *Delalić* (see Note 9), paras 377, 378; see also I. Bantekas, *Principles of Direct and Superior Responsibility in International Humanitarian Law* (Manchester University Press 2002), p. 82.

⁴⁹ R. Cryer *et al.*, *Introduction to International Criminal Law* (see Note 1), pp. 386–387.

⁵⁰ W.J. Fenrick, 'Some International Law Problems Related to Prosecutions before the International Criminal Tribunal for the Former Yugoslavia', *Duke Journal of Comparative and International Law* 6 (1995), p. 103, at p. 117: 'Military commanders do exercise command. They have control over subordinates in a rigid hierarchical system with disciplinary powers and the authority to order subordinates. The scope of this military authority includes the power to order subordinates to risk their own lives. Most bureaucratic leaders do not wield the same type of life and death authority.'

⁵¹ T. Wu, Y. Kang, 'Criminal Liability' (see Note 35), p. 295.

⁵² See K. Ambos, 'Superior Responsibility' (see Note 6), p. 839.

⁵³ J. de Preux, 'Commentary on Articles 86 and 87 of Protocol Additional I', in Y. Sandoz, C. Swinarski, B. Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1988 to the Geneva Conventions of 12 August 1949* (Martinus Nijhoff

other hand, the reference to ‘power’ is intended to bring into the picture the actual capability of the superior to take measures against the subordinates, the problem is that a person’s practical ability to act says little, if anything, about his or her obligation to act.^{*54} A person in a superior position cannot be expected to, as it were, carry the burden of the whole world and be wary of each and every violation that people in subordinate position might commit. Factors such as the division of the work and responsibilities among several superiors, delegation of rights and obligations, and rotation of command become important in this connection and have to be evaluated.^{*55}

Hence, a proper reference to effective command (or authority) and control in the text of the law would be vital.

4.4. Inability to explain why not preventing an offence has to be in the power of the superior while non-reporting need not be – strict liability

It is likewise inexplicable why a different standard has been chosen for the superior’s duty to report a criminal offence as compared to his or her duty to prevent a criminal offence.^{*56} Mere awareness of the criminal offence does not imply that the superior had a chance to submit the relevant report: he or she may not have had the actual material ability to do so, or there may have been nobody to report to.^{*57} Rather, gaining knowledge of the criminal offence committed or about to be committed is only the first step in several toward meeting the conditions required. The criterion of actual ability to act still must be addressed if one is to decide on extension of liability to the superior. This might be an insignificant problem in most cases, but it is a problem nevertheless. In the international-law doctrine of superior responsibility, all three duties of superiors in respect of crimes of their subordinates – to prevent, to suppress, and to report – are bound to the superior’s actual ability to fulfil these duties.^{*58}

4.5. The absent element of ‘failure to exercise control properly over subordinates’ and the ambiguity of ‘failure to take necessary and reasonable measures’

It is important to keep in mind that superior responsibility is not a form of strict liability.^{*59} Nor are the accusations to the superior to be determined from only an *ex post* perspective during investigation and prosecution; one must assess *ex ante* – in light of the circumstances as they unfolded – what means and measures and what information were available to the superior. What could the superior have been reasonably expected to do in the situation in which he or she was embedded?^{*60} Therefore, the not-prevented

1987), para 3557, with its statement that legal advisers are there to ‘advise the military commanders’ in this field, not to replace them.

⁵⁴ This issue arises especially with non-military superiors, because the referral to such power does not say anything about their competence as a superior – their professional relationship with the subordinate, which must be the bottom line when one is attributing responsibility to such superiors for the acts of their subordinates. As is pointed out above (see the first part of Section IV), a non-military superior can be made responsible for only that omission that is ‘within the effective responsibility and control’ of this superior. See R. Arnold, O. Triffterer, ‘Responsibility of Commanders’ (see Note 15), para 128. See also M.L. Nybondas, *Command Responsibility and Its Applicability to Civilian Superiors* (T.M.C. Asser Press 2010), p. 86. – DOI: <https://doi.org/10.1007/978-90-6704-443-1>.

⁵⁵ See R. Arnold, O. Triffterer, ‘Responsibility of Commanders’ (see Note 15), para 111; K. Ambos, ‘Superior Responsibility’ (see Note 6), pp. 840–841.

⁵⁶ According to Art. 88 (1) of the PC, a superior is responsible for failing to prevent the commission of the criminal offence **although it was in his or her power** to do so, but failing to submit a report of a criminal offence **while being aware of** the commission of the criminal offence by his or her subordinates.

⁵⁷ In this connection, see, for instance, the judgment in *Prosecutor v. Krnojelac*, IT-97-25-T, T.Ch., 15.3.2002, para 127; the judgment in *Prosecutor v. Krstić*, IT-98-33-A, A.Ch., 19.4.2004, para 143, fn. 250.

⁵⁸ See R. Arnold, O. Triffterer, ‘Responsibility of Commanders’ (see Note 15), paras 118, 119.

⁵⁹ See, for example, *Akayesu* (see Note 30), paras 488–489.

⁶⁰ C. Meloni, *Command Responsibility* (see Note 24), pp. 121–122, 171; see also the judgment in *Prosecutor v. Blaškić*, IT-95-14, A.Ch., 29.7.2004, para 72; the judgment in *Prosecutor v. Halilović*, IT-01-48-T, A.Ch., 16.10.2007, para 63; the judgment in *Prosecutor v. Orić*, IT-03-68-A, A.Ch., 3.7.2008, para 177; the judgment in *Prosecutor v. Bemba*, ICC-01/05-01/08 A, A.Ch., 8.6.2018, paras 167–170.

criminal offences of the subordinates have to be in a causal relationship with the omission by the superior.^{*61} However, in cases of criminal offences currently being committed or of criminal offences already carried out, the relevance lies not in assessing causality but in enquiring as to whether his or her failure to exercise control properly over subordinate persons increased the risk of commission of the crimes.^{*62} In effect, the Pre-Trial Chamber in the *Bemba* case has followed the *Risikoerhöhungstheorie*, according to which sufficient conditions are met when the superior's non-intervention has increased the risk of commission of the subordinates' crimes.^{*63} Although the Pre-Trial Chamber has considered the risk approach to be something completely different from applying the causality theory, this is not actually the case, because the risk approach also constitutes a causality test, in the sense that there is the implication that the increased risk is at least one of the causes of the harmful result.^{*64}

The requirement of properly exercising control over one's subordinates is something that can and must be objectively assessed against the standard behaviour of a similar superior in a similar situation. Hence, a breach of this requirement can only constitute a deviation from such standard behaviour. The requirement of necessary and reasonable measures therefore entails completing an objective assessment of what a reasonable superior would have been expected to do in a situation similar to that represented by the facts of the case. Again, failure to take such measures can only be a deviation from the standard of reasonable actor.^{*65}

Regrettably, in Art. 88 (1) of the PC these requirements have been completely overlooked. The practical implications that this might have for prosecution of superiors under Art. 88 (1) are huge. Consider, for example, circumstances wherein one commanding officer has been replaced by another. Estonia's current regulation does not offer credible protection for the new superior with regard to criminal offences committed by the subordinates in the time preceding the latter superior taking over the relevant duties or ongoing offences that continue on from that time.^{*66} Even when things are not stretched to such extremes, the absence of the condition that there have been failure to exercise control properly over subordinates allows censuring a superior for any failure to act, whether or not that failure carries real significance in relation to criminal offences committed by the subordinates and even when the superior has, in fact, been fulfilling his or her duties with due diligence and the crimes of the subordinates have taken place notwithstanding the reasonable and necessary measures taken by the superior.^{*67}

4.6. Addressing non-suppression and non-reporting yet not covering non-prevention

Art. 88 (1) of the PC foresees only two obligations of the superior: to repress a crime and to report on a crime already committed.^{*68} According to international law, however, the duties of the superior comprise three distinct acts: to prevent, to repress, and to report.^{*69} Prevention in that context involves the superior being expected to behave proactively and set in place mechanisms to avoid the possibility of offending

⁶¹ For a closer look at the causality involved, see also K. Ambos, 'Critical Issues in the Bemba Confirmation Decision', LJIL 22 (2009), p. 715, at pp. 721–722. – DOI: <https://doi.org/10.1017/s0922156509990185>. See also the *Bemba* decision (see Note 25), para 424.

⁶² *Bemba* (see Note 25), para 424.

⁶³ *Ibid.*, para 425.

⁶⁴ K. Ambos, 'Critical Issues' (see Note 60), p. 722.

⁶⁵ G. Mettraux, *The Law of Command Responsibility* (OUP 2009), p. 243. – DOI: <https://doi.org/10.1093/acprof:oso/9780199559329.001.0001>; R. Arnold, O. Triffterer, 'Responsibility of Commanders' (see Note 15), para 120.

⁶⁶ Example: the decision on interlocutory appeal challenging jurisdiction in relation to command responsibility in the case *Prosecutor v. Hadžihasanović*, IT-01-47-AR72, A.Ch., 16.7.2003, para 45; see also discussion of that case, especially the dissenting opinions (relative to the majority finding), in the work of C. Greenwood, 'Command Responsibility and the Hadžihasanović Decision', JICJ 2 (2004), p. 598, at pp. 603–605. – DOI: <https://doi.org/10.1093/jicj2.2.598>.

⁶⁷ G. Mettraux, *The Law of Command Responsibility* (see Note 64), pp. 244–245; C. Meloni, *Command Responsibility* (see Note 24), pp. 171–172.

⁶⁸ One of the failures of the superior stipulated in Art. 88 (1) was originally formulated as 'ei ole takistanud kuriteo toimepanemist', where the English translation provided for this is 'failed to prevent the commission of the criminal offence'. I would contend that the above translation is incorrect. The original language of the norm refers not to a duty to prevent a criminal offence but to a duty to repress a commission of a crime that is already in progress.

⁶⁹ R. Arnold, O. Triffterer, 'Responsibility of Commanders' (see Note 15), para 119; see also the *Bemba* judgment's (see Note 25) paragraphs 438 (on preventing), 439 (on repressing), and 440 (on punishing).

– among others, a reporting obligation, monitoring, direct supervision, and a proper chain of command.^{*70} This should be the ‘first line of defence’, and already dereliction of this duty, whereby it becomes possible for the subordinates to have a free hand to commit the crimes in the first place, has to be punishable. It has, therefore, been stressed in the literature, and rightly so, that later acts of repression or of simply submitting reports of the crimes to the appropriate authorities cannot exempt the superior from responsibility for having left his or her obligations unmet at a previous stage.^{*71} This lacuna in the text of Art. 88 (1) of the PC means that both disorderly behaviour of superiors and deliberate ignorance of – or even indifference to – predicted offences by the subordinates are currently rewarded by the Estonian legislator, as these fall outside the ambit of the domestic superior responsibility doctrine.

4.7. The need to criminalise both reckless and intentional behaviour (along with negligent behaviour of military commanders)

Yet another misconception has found its way into Art. 88 (1) of the Penal Code, relates to the *mens rea* required for there to be superior responsibility. According to Estonian law, it is necessary that the superior (in either a military or a non-military context) act with indirect intent (*dolus eventualis*) when failing in the duty to repress the crime of the subordinates or that the superior act with awareness (‘olles teadlik’ in Estonian parlance, hence *dolus directus* of the second degree) when failing to fulfil the duty to report a crime already committed. This is not the *mens rea* standard required for superior responsibility under international law. According to Art. 28 of the Rome Statute, the mental element required for military commanders is that these persons ‘either knew or, owing to the circumstances at the time, should have known’, while the standard for non-military superiors is ‘either knew, or consciously disregarded information which clearly indicated [...]’. Although there is some debate in academic literature as to how exactly to interpret these standards, it is clear that at least for military superiors the standard is below the threshold of intention and should be understood as that of negligent behaviour.^{*72} There is good reason to regard the standard required of a non-military superior as covering also non-intentional behaviour.^{*73}

Here too, the issue is further complicated by the fact that, at base, all forms of liability have been packed together into Art. 88 (1) of the PC, because forms of conduct differ in their mental requirements. The non-punishability of reckless and negligent dereliction of a superior’s duties opens another avenue for opting out of responsibility to a superior who has arranged his or her relations with subordinates in a disorderly manner and who just does not care what is going on under his or her command.^{*74} This lack of accountability also would facilitate a manner of action whereby it is useful for the superior to ignore even information that might point directly to misdeeds of his or her subordinates. When already acquainted with such information, the superior has obtained knowledge that could render him or her responsible as a superior, but not paying any attention to such information would eliminate the risk of legal liability.

⁷⁰ W.J. Fenrick, ‘Article 28: Responsibility of Commanders and Other Superiors’, in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court – Observers’ Notes, Article by Article* (Nomos 1999), para 9; see also the judgment in *Prosecutor v. Bemba*, ICC-01/05-01/08, T.Ch., 21.3.2016, paras 203–204.

⁷¹ In *Blaškić*, the trial chamber of the ICTY emphasised that the lack of preventing the commission of the crimes *ex ante* cannot be compensated for by punishing for them *ex post*; i.e., the superior is obliged to do both. Judgment in *Prosecutor v. Blaškić*, IT-95-14-T, T.Ch., 3.03.2000, para 336; see also *Bemba* (see Note 25), paras 436, 405.

⁷² See the further discussion of this by K. Ambos, *Treatise* (see Note 12), pp. 220–227, esp. p. 224 (dealing with military commanders) and pp. 227–228 (on non-military superiors).

⁷³ According to K. Ambos (*Treatise* (see Note 12), p. 227), the *mens rea* standard for non-military superiors is conscious negligence. See also the following concurring opinions: G.R. Vetter, ‘Non-military Superiors’ (see Note 24) at p. 124; G. Fletcher, J.D. Ohlin, ‘Reclaiming Fundamental Principles of Criminal Law in the Darfur Case’, *JICJ* 3 (2005), p. 539, at p. 554. – DOI: <https://doi.org/10.1093/jicj/mqi049>. Objecting are A. Cassese, ‘International Criminal Law’ (2nd ed., OUP 2008), p. 66 et seq.; R. Cryer, *Prosecuting International Crimes* (Cambridge University Press 2005), pp. 324–325 (the latter nonetheless calling it, ‘a clear and highly unfortunate retreat from the requirements of customary international law’). – DOI: <https://doi.org/10.1017/CBO9780511494161>.

⁷⁴ C. Meloni, *Command Responsibility* (see Note 24), p. 185.

4.8. The possibly misleading text of Art. 88's reference to crimes by subordinates only in conjunction with the superior's failure to submit a report on them

Finally, the text of Art. 88 (1) of the PC is perplexing in that it mentions the responsibility of the superior only in conjunction with his or her failure to submit a report on subordinates' crimes. At the same time, in regard of failure to prevent the commission of a criminal offence, it remains unspecified whose crimes have to be prevented. This is troubling, since the whole point of the superior responsibility doctrine is to extend responsibility in respect of crimes committed by subordinated persons to their superiors because those superiors have failed to control their subordinates properly and to react appropriately as their powers permitted.^{*75} Leaving this element implicit, at best, in the text, the legislator has created a remarkably vague situation. Of course, Art. 88 (1) still makes the superior's responsibility conditional to prevention of the criminal offence having been in that superior's power, but this reference alone is no substitute for specifying the superior–subordinate relationship.^{*76} Prevention of a criminal offence might easily be within the power of a person in a superior position also in his or her relation with persons who do not fall under his or her authority as a superior.^{*77} This is especially important in settings of civilian superior–subordinate relationships, because one person's position of superiority relative to another might not actually entail any real authority over the person holding the subordinate position. The responsibility of the superior must not be considered a vicarious responsibility – the link to the guilt principle has to remain clear and unquestionable also when a wrongdoing is attributed to a superior.^{*78} For realisation of this, it is unavoidable that establishing the responsibility of the superior for dereliction of any of his or her duties must be made explicitly conditional to the commission of crimes on behalf of people truly subordinated to the superior.^{*79}

5. Necessary amendments of the Estonian Penal Code

From the analysis above, it appears that Estonian legislation on superior responsibility does not comply with the corresponding international norms, in several important respects. The deficits in Art. 88 (1) of the PC are of such a nature and extent that it is not possible to overcome them merely by adjusting the interpretation of the norm. Therefore, Estonia is not able to meet its international obligations for criminalisation linked to the responsibility of superiors. Estonia is especially unable to meet the standard set by Art. 28 of the Rome Statute and to comply with its obligation as a state party to the Rome Statute to foresee in its domestic legal order criminal responsibility for those responsible for international crimes.^{*80} Hence, changes to Estonian regulation of the superior's responsibility are essential for bringing it into accordance with our international obligations and, specifically, to render the Estonian legal order able to prosecute and punish people who have committed acts punishable under the Rome Statute.

On the other hand, the way in which superior responsibility has been regulated in Art. 28 of the Rome Statute does not serve as a suitable role model for transposition into the Estonian domestic legal system

⁷⁵ S. Boelaert-Suominen, 'Prosecuting Superiors' (see Note 29), p. 757; C. Meloni, 'Command Responsibility: Mode of Liability for the Crimes of Subordinates or Separate Offence of the Superior?', JICJ 5 (2007), p. 619, at p. 628. – DOI: <https://doi.org/10.1093/jicj/mqm029>; O. Triffterer, 'Command Responsibility, Article 28 Rome Statute: An Extension of Individual Criminal Responsibility for Crimes within the Jurisdiction of the Court – Compatible with Article 22, Nullum Crimen sine Lege?', in O. Triffterer (ed.), *Gedächtnisschrift für Theo Vogler* (C.F. Müller Verlag 2004), p. 213, at p. 230; G. Mettraux, *The Law of Command Responsibility* (see Note 64), p. 81.

⁷⁶ B. Burghardt, *Die Vorgesetztenverantwortlichkeit im völkerrechtlichen Straftatsystem. Eine Untersuchung zur Rechtsprechung der internationalen Strafgerichtshöfe für das ehemalige Jugoslawien und Ruanda* (Berliner Wissenschafts-Verlag 2008), p. 169. See also J. Bülte, *Vorgesetztenverantwortlichkeit* (see Note 33), p. 772.

⁷⁷ As J. Bülte (*ibid.*) expresses it, otherwise superior responsibility could emerge whenever a person has power to give orders to someone even if only because of the short-term possibility of controlling that person, as with a hostage-taker' (p. 625).

⁷⁸ Y. Ronen, 'Civilian Settings' (see Note 37) at p. 315, especially Note 8, with reference to further discussion.

⁷⁹ O. Triffterer, 'Command Responsibility' – *Crimen sui Generis* or Participation As "Otherwise Provided" in Article 28 Rome Statute?', in J. Arnold *et al.* (eds), *Menschengerechtes Strafrecht. Festschrift für Albin Eser zum 70. Geburtstag* (C.H. Beck 2005), p. 911.

⁸⁰ See paras 4 and 6 of the preamble to the Rome Statute, affirming, respectively, that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international co-operation. Also, recall every state party's duty to exercise its criminal jurisdiction over those responsible for international crimes.

without major adjustments. The catch-all approach that the RS takes to the concept of superior responsibility has been criticised extensively by most commentators. The concept of superior responsibility has been stretched very far and wide in Art. 28 of the Rome Statute. It extends all the way from intentionally omitting to prevent or repress acts of the subordinates that one knew about in advance to merely not reporting acts of subordinates that the superior had no prior knowledge of. Also, it covers both intentional and negligent acts. Even more striking, however, is the fact that the responsibility of the superior is in no way differentiated among these – very different – sorts of omissions, and the superior is punishable for all such omissions in the same way as the actual perpetrator. The approach taken with the Rome Statute means that the superior's responsibility entails liability for negligence and intentional criminal offences alike.^{*81} However, a superior who was unaware of the pending crimes of his or her subordinate cannot be punished as a wilful perpetrator of a crime.^{*82} An opposite approach would clearly not be compatible with the guilt principle, which underlies Estonian criminal law.^{*83}

Because of similar concerns, several countries have chosen a differentiated model for prescribing superior responsibility in their respective domestic statutes, wherein there are distinctive grounds of liability for particular categories of a superior's possible omissions. In the German Code of Crimes against International Law, superior responsibility has been divided into three parts. Firstly, superiors who do not avert crimes by their subordinates of which they had prior knowledge are punished in the same way as a perpetrator of the offence committed by those subordinates. If a superior either intentionally or negligently fails to exercise proper supervision of a subordinate under his or her command or under his or her effective control, that superior shall be punished for violation of the duty of supervision in the event that said subordinate commits an offence. This is formulated as a criminal offence *sui generis*, which occasions considerably less severe sanctions than an offence related to superior responsibility proper. Finally, a superior's mere failure to report to the responsible authorities on a crime previously unknown to him or her constitutes another *sui generis* criminal offence, punishable by less extreme sanctions still than either of the first two types of offence.^{*84} A similar approach has been taken also by the Spanish^{*85}, Croatian^{*86}, Serbian^{*87}, Montenegrin^{*88}, and Canadian^{*89} legislators.

In line with the example of the legislation of the above-mentioned countries, one possible *de lege ferenda* option for the Estonian legislator would be to create three separate rules, covering the following omissions on the part of a superior: 1) intentionally not averting crimes of subordinates the imminent commission of which is known to the superior; 2) displaying intentional or negligent (reckless) disregard for the duty to supervise, where this results in crimes through the intentional failure to react; and 3) not reporting on crimes committed by subordinates.^{*90} Because each of these scenarios involves its own distinctive level

⁸¹ G. Werle, 'Konturen eines deutschen Völkerstrafrechts. Zum Arbeitsentwurf eines Völkerstrafgesetzbuchs', *Juristenzeitung* 56/18 (2001), p. 891; W.A. Schabas, *Genocide in International Law: The Crime of Crimes* (Cambridge University Press 2000), pp. 305–306; also M. Neuner, 'General Principles' (see Note 21), p. 127.

⁸² See the explanations to the Government Draft Code of Crimes against International Law, p. 39.; M. Neuner (*ibid.*), pp. 127–128, with further reference to T. Weigend, 'Zur Frage eines „internationalen“ Allgemeinen Teils' (see Note 21), p. 1397.

⁸³ See discussion on that in German context: T. Weigend (*ibid.*), p. 1397; also J. Bülte, *Vorgesetztenverantwortlichkeit* (see Note 33), p. 635. However, see the criticism described by B. Burghardt, 'Die Vorgesetztenverantwortlichkeit nach Völkerstrafrecht und deutschem Recht (§ 4 VStGB)', *ZIS* 10 (2010), p. 695, at p. 702 *et seq.*

⁸⁴ See 'Völkerstrafgesetzbuch vom 26. Juni 2002' (BGBl I 2254, BGBl I 3150), articles 4 (on the responsibility of military commanders and other superiors), 14 (on violation of the duty of supervision), and 15 (on omission of reporting a crime).

⁸⁵ See 'Ley Orgánica 10/1995, de 23 de noviembre, del Código Penal', Art. 615bis. Available at <https://www.boe.es/eli/es/lo/1995/11/23/10/con>, last visited on 10.2.2019.

⁸⁶ See the Criminal Code of the Republic of Croatia, Art. 96. Available at <http://www.mvep.hr/files/file/dokumenti/previdenje/zakoni/kazneni-zakon-nn-125-11-eng.pdf>, last visited on 7.2.2019.

⁸⁷ See the Criminal Code of the Republic of Serbia, Art. 332 (on failure to report) and Art. 384 (on the responsibility of the superior). Available at <https://www.legislationline.org/documents/section/criminal-codes/country/5/Serbia/show>, last visited on 7.2.2019.

⁸⁸ See the Criminal Code of the Republic of Montenegro, specifically Art. 386 (on failure to report) and Art. 440 (on responsibility of the superior). Available at <https://www.legislationline.org/documents/section/criminal-codes/country/57/Montenegro/show>, last visited on 7.2.2019.

⁸⁹ See the Crimes against Humanity and War Crimes Act, sections 5 and 7. Available at <https://laws-lois.justice.gc.ca/PDF/C-45.9.pdf>, last visited on 7.2.2019.

⁹⁰ The Penal Code could be amended accordingly:

1) Art. 88 Superior responsibility

A military commander or a civilian superior who omits to prevent subordinates under his or her effective command and control from committing a criminal offence pursuant to this chapter shall be punished in addition to the principal offender.

of gravity of the superior's omissions^{*91}, there should exist a sanctioning frame that is distinctive to each of them, accordingly.^{*92}

6. Conclusions

States parties to the Rome Statute have to make sure that their domestic criminal statutes enable prosecution of persons suspected of having committed crimes listed in articles 6–8*bis* of the Rome Statute. Moreover, states parties also need to be cautious with regard to the compliance of the general principles of criminal responsibility in their domestic criminal codes with the standards set in Part 3 of the Rome Statute. While, for the most part, compliance does not pose a big problem, because domestic criminal statutes and legal dogmatics are far more advanced in regulating most of the 'general part' issues than is the Rome Statute, there remain cases in which this might not be so: there are institutes of the general part of criminal law that are unique to the domain of international law and usually either not addressed at all in domestic law or given only rudimentary treatment therein. One such institute, an original creation of international law, is the concept of superior responsibility. If a domestic criminal-law system is to be equipped to operate in conformity with the underlying idea of complementarity that is among the ICC's underpinnings, it is vital that, amongst other aspects, the superior responsibility doctrine be transposed into domestic law properly.

As demonstrated above by the deconstruction of Art. 88 (1) of the Estonian Penal Code, stipulating the superior responsibility concept in the Estonian legal system, there are considerable differences between the Estonian regulation and customary international law on superior responsibility or Art. 28 of the Rome Statute. When one analyses the differences of Estonian law from international norms, it appears that there are several respects in which Estonian regulation does not meet the international standard and, hence, large lacunae are to be found in Estonian law on superior responsibility. For this reason, it is recommended that Estonian regulation of superior responsibility be complemented in such a way that it is consistent with international law – specifically, with the requirements of Art. 28 of the Rome Statute – while simultaneously taking into consideration the demands stemming from Estonian criminal-law dogmatic, especially the guilt principle.

2) Art. 88-1 Violation of the duty of supervision

(1) Intentional failure of a military commander to exercise control properly over subordinates under his or her effective command and control, if the subordinates commit a criminal offence addressed in this chapter and if that commander should have known about the imminent commission of such criminal offence and could have prevented or repressed it, is punishable by up to five years' imprisonment.

(2) Intentional failure of a civilian superior to exercise control properly over subordinates under his or her effective command and control, if the subordinates commit a criminal offence covered by this chapter and if the superior consciously disregarded information that clearly was indicative of imminent commission of such criminal offence and he or she could have prevented or repressed it, is punishable by up to five years' imprisonment.

(3) The acts described in the subsections (1 and 2) of this section are, when committed with negligence, punishable by up to three years' imprisonment.

3) Art. 88-3 A superior's failure to report a crime

Failure of a military commander or a civilian superior to submit, without undue delay, a report of a criminal offence covered by this chapter that has been committed by a subordinate under his or her effective command and control is punishable by up to five years' imprisonment.

⁹¹ T. Weigend, *Bemerkungen* (see Note 32), pp. 1025–1026.

⁹² K. Ambos, *Internationales Strafrecht* (see Note 36), §7, para 59.



Henning Lorenz

Research assistant

Doctoral student

Martin Luther University of Halle-Wittenberg

Criminal Liability of Third Parties with Regard to Free-Responsible Suicide:

New Developments in the German Jurisdiction^{*1}

1. Introduction

“There is no doubt that the sentence administered justice in the concrete case, but at the same time it opened the way for many future wrong decisions in this area.”^{*2} These were the words with which former law professor Rudolf Schmitt reviewed the judgement of the Federal Court of Justice as to the criminal liability of third parties in the context of free-responsible suicide in the *Wittig* case. His pessimistic prediction did not remain valid for long. Quite to the contrary, it seemed that the judgement remained without supporters until 2016. In that year, the regional courts of appeal of Hamburg and Berlin decided to open a trial based on it.^{*3} The district court of Hamburg and of Berlin delivered judgements in the first instance in late 2017 and early 2018, respectively. This paper is about these new developments within German jurisdiction. After a brief overview of the basics of suicide and German criminal law (in Section 2., the *Wittig* case (in Section 3.) and the two recent cases (in sections 4. and 5.) are presented. The paper ends with a conclusion and thoughts on the future (6.).

2. Basics of suicide and German criminal law

‘Whoever kills a human being without being a murderer, shall be punished for manslaughter with imprisonment for not less than five years’ states Section 212 of the German Criminal Code^{*4}. At first glance, this is irritating. Someone who commits suicide kills a human being – namely, himself. If we strictly refer to

¹ This paper is an extended version of a lecture given on 30.10.2018 at the University of Tartu in the context of the doctoral seminar titled ‘Common Problems of Medical Law and Criminal Law’. Special thanks go to Prof. Sootak and Ants Nõmper for their kind invitation to the seminar and to Estonia.

² R. Schmitt, *Der Arzt und sein lebensmüder Patient* [‘The Doctor and His Tired-of-Life Patient’]. – *Juristenzeitung* 1984/19, pp. 866–869, on p. 868.

³ Hanseatisches Oberlandesgericht (Hanseatic Regional Appeal Court), decision from 8.6.2016 – 1 Ws 13/16 = *Zeitschrift für Medizinstrafrecht* 2017/1, pp. 45–54; Kammergericht Berlin (Court of Appeal for Berlin), decision from 12.12.2016 – 3 Ws 637/16 – 161 AR 160/16 = *Zeitschrift für Medizinstrafrecht* 2017/3, pp. 180–182.

⁴ The sections referred to below are from the German Criminal Code when no other law is mentioned.

the text of the section, suicide would be a crime. This seems to be a misleading assumption, and it is with good reason that no-one in more modern German jurisprudence pleads for this.^{*5} One who ‘successfully’ commits suicide cannot be punished, since he is dead. In the event of failure, it would be possible to exact punishment for attempted suicide; however, if actual suicide cannot be punished under any imaginable circumstances, it is hard to believe that the legislator nevertheless **intentionally** formulated Section 212 so as to encompass suicide. It is more convincing that it seemed unnecessary to explicitly place the term ‘another’ in front of the object ‘human being’.^{*6} Through a systematic lens, this result is confirmed. In Section 216 of the German Criminal Code, the killing at the request of the victim is punishable with imprisonment of six months to five years and, thereby, privileged over manslaughter. The position which declares the single-handed suicide by the ‘victim’ included by Section 212 has to explain the reason for the privilege of the not single-handed, but requested killing of the victim by a third party. No-one has succeeded this challenge yet.^{*7}

Therefore, suicide is not an unlawful act by the person committing it.^{*8} This position has consequences for the criminal liability of third persons who participate in the act. The German Criminal Code differentiates between perpetration and incitement or accessoryship. For the latter, an intentional, unlawful act of another person is necessary as a link for punishability (under Sections 26 and 27). For that reason, in German criminal law the principle of **impunity for incitement and accessoryship to suicide** exists.^{*9} Accordingly, it is essential to consider whether the relevant participant acts as a perpetrator or, on the other hand, an inciter or accessory. The qualification for perpetration is control of the final killing act, so it is significant which of the two persons controls that final act.^{*10} If it is the person who is tired of life, the behaviour of the participant is not punishable as killing at the request of the victim. This could be in case of reaching the deadly medication which is ultimately taken by the person him- or herself. It is, when the further conditions are fulfilled, just **an unpunished accessoryship**. *Vice versa*, when the other person infuses the deadly medication and the further conditions are fulfilled as well, the act is **punishable** as killing at the request of the victim, per Section 216.

In both cases, however, an additional aspect is important. Even though the participant controls the final killing act, the range of his punishability depends on the mental status of the person which is tired of life. The request to kill herself has to be **expressed** and **earnest** (see Section 216). Especially the second condition can cause problems. It is necessary that the decision process is faultless.^{*11} But the will can be deficient for example as a consequence of drug abuse, depression, an age-related lack of ability to judge or when the request is evoked through fraudulent actions.^{*12} In these cases, the punishability of the participant depends on whether he acts **intentionally** with regard to the condition of being earnest. If he **assumes** that it is

⁵ Earlier voices for the opposite: G. Stratenwerth et al. (eds). *Festschrift für Hans Welzel zum 70. Geburtstag* [‘Festschrift for Hans Welzel for the 70th Birthday’]. Berlin, 1974 (in German). – DOI: [https://doi.org/10.1515/9783110909197;Selbstmord und Beteiligung am Selbstmord in strafrechtlicher Sicht](https://doi.org/10.1515/9783110909197;Selbstmord%20und%20Beteiligung%20am%20Selbstmord%20in%20strafrechtlicher%20Sicht), pp. 801–822, on pp. 810–817 (E. Schmidhäuser). – DOI: <https://doi.org/10.1515/9783110909197-043>; H. Klinkenberg. Die Rechtspflicht zum Weiterleben und ihre Grenzen [‘The Legal Duty to Live On and Its Limitations’]. – *Juristische Rundschau* 1978/11, pp. 441–445 (in German), on pp. 443–444. – DOI: <https://doi.org/10.1515/juru.1978.1978.11.441>.

⁶ U. Kindhäuser et al. (eds). *Strafgesetzbuch. Nomos Kommentar* [‘Nomos Commentary on the Penal Code’], Vol. 2, 5th ed. Baden-Baden, Germany, 2017 (in German), before Section 211, Comment 38 (U. Neumann); T. Fischer. *Strafgesetzbuch. Kommentar*. 65. Aufl. [‘Penal Code: 65th, Commented Edition’]. Munich, Germany, 2018 (in German), before sections 211–217, Comment 29.

⁷ U. Kindhäuser et al. (see note 6), before Section 211, Comment 39 (U. Neumann).

⁸ W. Joecks, K. Miebach (eds). *Strafgesetzbuch. Münchener Kommentar* [‘Munich Commentary on the Penal Code’], Vol. 4, 3rd ed. Munich, Germany, 2017 (in German), before Section 211, Comment 32 (H. Schneider); U. Kindhäuser et al. (see note 6), before Section 211, Comment 41 (U. Neumann).

⁹ C. Roxin. Tötung auf Verlangen und Suizidteilnahme – Geltendes Recht und Reformdiskussion [‘Killing on Request and Suicide Participation – Applicable Law and Reform Discussion’]. – *Goltdammers Archiv* 2013, pp. 313–327; Bundesgerichtshof (Federal Court of Justice), sentence from 12.2.1952 – 1 StR 59/50 = BGHSt 2, pp. 150–157, on p. 152; Bundesgerichtshof (Federal Court of Justice), sentence from 15.5.1959 – 4 StR 475/58 = BGHSt 16, pp. 162–169, on p. 167; Bundesgerichtshof (Federal Court of Justice), sentence from 16.5.1972 – 5 StR 56/72 = BGHSt 24, pp. 342–345, on p. 343; Bundesgerichtshof (Federal Court of Justice), sentence from 4.7.1984 – 3 StR 96/84 = BGHSt 32, pp. 367–381, on p. 371.

¹⁰ W. Joecks, K. Miebach (see note 8), Section 216, Comment 37–43 (H. Schneider).

¹¹ T. Fischer (see note 6), Section 216, Comment 9. There is an additional requirement in the jurisdiction and parts of the jurisprudence. The Federal Court of Justice requests ‘deep reflection’ by the victim and an ‘inner consistency’ of the request to be killed – see T. Fischer (see note 6), Section 216, Comment 9a; U. Kindhäuser et al. (see note 6), Section 216, Comment 14–15 (U. Neumann / F. Saliger).

¹² W. Joecks, K. Miebach (see note 8), Section 216, Comment 19–23 (H. Schneider).

about an **earnest request**, section 216 will be taken into consideration (per Section 16, Subsection 2).^{*13} Otherwise, when he is aware of the circumstances of the deficient will, he gets punished for manslaughter (per Section 212) or murder (per Section 211).^{*14}

Furthermore, this aspect is important also in the case of the final killing act being under full control of the suicidal person. The mentioned example, the reaching for the medication, is just **unpunished accessoryship** when this person commits suicide with **free responsibility**.^{*15} Therefore, the element of free responsibility is central. Insofar it is no surprise that the scale for it is disputed. The Federal Court of Justice has no clear position regarding this question.^{*16} The jurisprudence is essentially divided in two camps. The ‘exculpation theory’ denies the free responsibility when the conditions laid down in Section 19, 20, or 35 or in Section 3 of the German Youth Courts Law, which deal with absence of responsibility in case of a lack of guilt, are fulfilled.^{*17} More convincing is the ‘consent theory’, which claims the requirements of a valid consent^{*18} and is sometimes combined with the more specific requirements of Section 216^{*19}. The situation of suicide is characterised by a **damaging behaviour against oneself** as well as a consent to a damaging behaviour from another person. The ‘exculpation’ theory meanwhile reverts to sections which concern the responsibility for **damaging behaviour against someone else**. Anyway, there are three possible results, if there is no free responsibility: When the participant acts with negligence with regard to this circumstance, then he is punishable for negligent manslaughter (dealt with in Section 222).^{*20} If he intentionally causes the lack of free responsibility – for example, through fraud – or just wilfully exploits this from a position of superior knowledge, he is punishable as a perpetrator who has committed the crime, manslaughter or murder, through another person (under alternative 2 in Section 25’s Subsection 1): the victim.^{*21} Otherwise (that is, when unknowing and not negligent with regard to this circumstance), the participant is not liable for the death by suicide.^{*22}

Until today, there are various discussions about the dogmatic basics and certain details of the above-mentioned aspects of criminal liability related to suicide. In the following pages, this paper will explore another angle. In the cases discussed below, a person with free responsibility committed suicide. A third party either render aid to the final killing act, for example the intake of medication, or they do not. Afterwards, the suicidal person gets unconscious. In the following phase, the present person omits the possible and required rescue to save the life of the dying person.^{*23} Having a look at the rules already mentioned, the third person is unpunishable. Even if one renders aid, this solely constitutes **unpunished accessoryship**. At least, this was the legal status until the coming into effect of section 217, the prohibition of the commercial supplying of suicide, on 10.12.2015. When the requirements of this sections are fulfilled a person who renders aid is punishable. This dubious prohibition^{*24} and its meaning for the legal questions of the reviewed cases in this paper shall not be discussed here^{*25}, since they were settled **before** its coming into effect^{*26}. Nevertheless, in 1984 the Federal Court of Justice declared omitting life-saving acts to

¹³ W. Joecks, K. Miebach (see note 8), Section 216, Comment 55 (H. Schneider); T. Fischer (see note 6), Section 216, Comment 11.

¹⁴ W. Joecks, K. Miebach (see note 8), Section 216, Comment 54 (H. Schneider).

¹⁵ W. Joecks, K. Miebach (see note 8), before Section 211, Comment 37 (H. Schneider); T. Fischer (see note 6), before sections 211–217, Comment 26.

¹⁶ To this and with more references: W. Joecks, K. Miebach (see note 8), before Section 211, Comment 37 (H. Schneider).

¹⁷ U. Kindhäuser et al. (see note 6), before Section 211, Comment 64 (U. Neumann).

¹⁸ U. Kindhäuser et al. (see note 6), before Section 211, Comment 65 (U. Neumann).

¹⁹ T. Fischer (see note 6), before sections 211–217, Comment 28.

²⁰ W. Joecks, K. Miebach (see note 8), before Section 211, Comment 64 (H. Schneider).

²¹ T. Fischer (see note 6), before sections 211–217, Comment 20; U. Kindhäuser et al. (see note 6), before Section 211, Comment 62–63 (U. Neumann).

²² W. Joecks, K. Miebach (see note 8), before Section 211, Comment 64 (H. Schneider).

²³ On the real similarities of the cases: H. Lorenz / C. Dorneck, Die Strafbarkeit des Arztes bei freiverantwortlichem Suizid [‘The Criminal Liability of the Doctor with Regard to Free-Responsible Suicide’]. – *Zeitschrift für Lebensrecht* 2018/4, pp. 146–159 (in German), on p. 147.

²⁴ More than one hundred forty German professors and private lecturers in criminal law issued pleas against Section 217: E. Hilgendorf / H. Rosenau. Stellungnahme deutscher Strafrechtslehrerinnen und Strafrechtslehrer zur geplanten Ausweitung der Strafbarkeit der Sterbehilfe [‘Statement of German Professors and Private Lecturers in Criminal Law on the Planned Extension of the Punishability of Euthanasia’]. – *Zeitschrift für Medizinstrafrecht* 2015/3, pp. 129–131.

²⁵ To this point: H. Lorenz / C. Dorneck (see note 23), pp. 146–159 (in German), on pp. 149–151.

²⁶ The District Court of Berlin also discussed the (non-existent) importance of Section 217 in the case.

be **basically** punishable as killing at the request of the victim by omission (per Section 216 in conjunction with Section 13) when the omitting person is a **guarantor** for the life of the suicidal person.^{*27} Additionally, and for the case of a non-guarantor, it is **basically** punishable as a failure to render assistance (section 323c).^{*28} This more than 30-year-old jurisdiction of the Federal Court of Justice was established by the already mentioned case *Wittig*.

3. The Wittig case (1984)

a) The facts of the case

In the *Wittig* case, Wittig' a 76-year-old widow free responsibly decided to commit suicide by taking medication.^{*29} The defendant, a family doctor named Wittig, found her unconscious during a home visit. Previously, she told him about her suicidal intention and the reasons for those. When Wittig found her, she was holding a signed sheet of paper in her hands with the words (in translation) 'Salvation! 28.11.81'. Another note in the flat stated: 'I want to go to my Peterle' – her deceased husband. In recognition of her decision, the doctor decided not to try to rescue his patient from death. Nevertheless, he did adjudge rescue to be possible, though not without irreversible cerebral damage.

b) Legal evaluation by the court

Because the survival of the woman in case of an intervention by Wittig was unverifiable with the necessary utmost probability, a completed killing at the request of the victim by omission (again, per Section 216 in conjunction with Section 13) was not suitable for real reasons.^{*30} Furthermore, the district court abandoned a conviction for an attempt and a completed failure to render assistance (see Section 323c), for legal reasons.^{*31} The prosecution appealed to court. Finally, the Federal Court of Justice delivered a judgement.

The court confirmed the acquittal as the result of the trial. Nevertheless, it explained the omission of rescue **basically** to a forbidden behaviour. A guarantor (in this example, family doctor Wittig) is not allowed to give in to the desires of a suicidal person.^{*32} Only in extreme situations is the omitting person's behaviour unpunishable, because the rescue is **unconscionable**.^{*33} The reason and requirement for this exception is rooted in the conflict between the obligation to protect life and respect for self-determination.^{*34} This conflict can be resolved via a *de jure* not unjustifiable, medical question of conscience.^{*35} In the opinion of the Federal Court of Justice, an example of this was manifested in the *Wittig* case, because of the expressed will not to receive medical treatment and the threat of irreversible cerebral damage. Therefore, the doctors's behaviour was unpunishable. Referring to the failure to render assistance (see Section 323c), the court explained free-responsible suicide as an **accident** in terms of the law.^{*36} But it still held that, in extreme situations such as the case at hand, rescue cannot be expected, precisely for the reasons mentioned above.^{*37} This jurisdiction has remained unrevised by the Federal Court of Justice to this day.

²⁷ BGHSt 32, pp. 367–381, on pp. 371–377.

²⁸ BGHSt 32, pp. 367–381, on pp. 375–376.

²⁹ Addressing the facts of the case: BGHSt 32, pp. 367–381, on pp. 368–369.

³⁰ BGHSt 32, pp. 367–381, on pp. 369–370.

³¹ On the specific legal reasons against basically given punishability: BGHSt 32, pp. 367–381, on pp. 377–381.

³² BGHSt 32, pp. 367–381, on p. 374.

³³ Initial thoughts on this probable-seeming predominant interpretation of this sentence: R. Schmitt (see note 1), pp. 866–869, on p. 868. On voting for justification under Section 34 ('Necessity'): R. D. Herzberg. Der Fall Hackethal: Strafbare Tötung auf Verlangen? ['The Case of Hackethal: Punishable Killing by Request?']. – *Neue Juristische Wochenschrift* 1986/27, pp. 1635–1644, on pp. 1639–1641. Underlining the unclear position of the Federal Court of Justice at this point: U. Kindhäuser et al. (see note 6), before Section 211, Comment 81 (U. Neumann).

³⁴ BGHSt 32, pp. 367–381, on p. 377.

³⁵ BGHSt 32, pp. 367–381, on pp. 377–378.

³⁶ BGHSt 32, pp. 367–381, on p. 381.

³⁷ BGHSt 32, pp. 367–381, on p. 381.

4. The Spittler case (2017)

a) The facts of the case

The point of origin for a possible revision of the jurisdiction from *Wittig* came with a case from Hamburg. The circumstances can be summarised in simplified form thus: A doctor of neurology and psychiatry, named Spittler, provided an expert opinion about the free responsibility expressed in the suicide intentions of two women over 80 years of age.^{*38} These ladies obtained medication from an association for euthanasia, Sterbehilfe e.V., which was one of the examples stimulating the debate that led to Section 217's introduction in 2015. One day, the ladies free responsibly took the medication in the presence of the doctor. He omitted to attempt their rescue, out of respect for the will of the two women.

b) Legal evaluation by the court

For the same reasons cited in *Wittig*, the unverifiable probability, just an attempted killing at the request of the victim by omission (once again, per Section 216 in conjunction with Section 13) was suitable and additionally a completed failure to render assistance (Section 323c). The District Court of Hamburg abandoned a conviction on 8.11.2017, for legal reasons.^{*39} The prosecution appealed to court. A judgement by the Federal Court of Justice will be delivered on 3.7.2019.

At first, the district court discussed the role of the doctor as a guarantor. In this context, it is instructive to compare the *Spittler* case with *Wittig*. In the earlier case, the omitting individual was the family doctor, who **basically** had taken over the treatment of his patient. In contrast, Spittler only provided an expert opinion. On these grounds, the district court rightly negated the position as a guarantor. However, this question was not actually answered.^{*40}

In fact, the court ruled out the existence of a concrete duty to avoid the result that came to pass, the death of the two elderly women.^{*41} This was in explicit contradiction to the opinion of the Federal Court of Justice in *Wittig*.

The main argument for this change in view hinges on the increased significance of the right of self-determination in **jurisdiction** and **legislation**. The Federal Court of Justice communicated in other cases, wherein no suicide method was intentionally supplied by a third party (drug cases in which the consumer just recognised the hazard of the drugs), that an earnest and free-responsible decision for suicide is essential for the punishability of a participant.^{*42} Furthermore, it introduced the jurisdiction related to the *Behandlungsabbruch*, or withdrawal of treatment, in 2010, to which the District Court of Hamburg referred in *Spittler*.^{*43} It is based on the case of *Putz*, an attorney in medical law who advised his client, the daughter of an elderly lady who was ill and comatose, to cut off the mother's feeding tube, after which the older woman died.^{*44}

According to the traditional rules of euthanasia, the act of the daughter would have been forbidden as an active killing. In the *Putz* case, the Federal Court of Justice now admitted that there could be situations in which euthanasia by an active doing might be necessary and admissible. Prior to that, this possibility was only accepted for indirect euthanasia but not for the passive form.^{*45} Today, omission, limiting, and also

³⁸ To the facts of the case: Landgericht Hamburg (District Court of Hamburg), sentence from 8.11.2017 – 619 KLS 7/16 = *Zeitschrift für Lebensrecht* 2018/2, pp. 81–89, on pp. 81–85.

³⁹ Landgericht Hamburg (District Court of Hamburg). *Zeitschrift für Lebensrecht* 2018/2, pp. 81–89, on p. 85.

⁴⁰ Landgericht Hamburg (District Court of Hamburg). *Zeitschrift für Lebensrecht* 2018/2, pp. 81–89, on p. 87.

⁴¹ Landgericht Hamburg (District Court of Hamburg). *Zeitschrift für Lebensrecht* 2018/2, pp. 81–89, on pp. 87–89.

⁴² Bundesgerichtshof (Federal Court of Justice), sentence from 21.12.2011 – 2 StR 295/11 = *Neue Zeitschrift für Strafrecht* 2012/6, pp. 319–320, on p. 320; Bundesgerichtshof (Federal Court of Justice), decision from 5.8.2015 – 1 StR 328/15 = *Neue Zeitschrift für Strafrecht* 2016/7, pp. 406–407, on p. 407.

⁴³ Landgericht Hamburg (District Court of Hamburg). *Zeitschrift für Lebensrecht* 2018/2, pp. 81–89, on p. 88.

⁴⁴ To the facts of the case: Bundesgerichtshof (Federal Court of Justice), sentence from 25.6.2010 – 2 StR 454/09 = BGHS 55, pp. 191–207, on pp. 191–194.

⁴⁵ An overview of the euthanasia questions is given by: J. C. Joerden, K. Schmoller (eds). *Festschrift für Prof. Dr. Dr. h.c. mult. Keiichi Yamanaka zum 70. Geburtstag* [*Festschrift for Prof. Dr. Dr. h.c. mult. Keiichi Yamanaka, for the 70th Birthday*]. Berlin, Germany, 2017 (in German). – DOI: <https://doi.org/10.3790/978-3-428-54629-9>; *Wider die Strafbarkeit des assistierten Suizids* [*Against the Punishability of Assisted Suicide*], pp. 325–344, on pp. 326–334 (H. Rosenau). – DOI: <https://doi.org/10.3790/978-3-428-54629-9>.

(active) ceasing, under the summarising term ‘withdrawal of medical treatment’, is seen as justified when the specific requirements defined in this case have been met.^{*46} The reason for this is the increased significance of the right of self-determination, which became codified in Section 1901a *ff.* of the German Civil Code in 2009.^{*47} In the wake of this, the admissibility of life-prolonging treatment depends on the patient’s will. The principle of the unity of the legal order argues for non-punishability when the behaviour is necessary and admissible under civil law.^{*48}

Moreover, it is inconsistent for accessoryship to go unpunished while the omission that follows is punishable.^{*49} In addition, applying the *Wittig* jurisdiction would lead to a curious result in this case: on one hand, Spittler had to rescue the two old ladies, but, on the other hand, they forbade saving treatment, with obligatory effect, so it had to be cancelled.^{*50} A final dubious consequence of applying the *Wittig* jurisdiction would be that guarantors such as family doctors or relatives can get punished while non-guarantors cannot.^{*51} That means that the person wishing to commit suicide has to forgo the presence of those important persons during his or her process of dying.

Regarding the failure to render assistance (addressed by Section 323c), the district court expressed doubt as to the existence of an **accident** in terms of law. Still, it ruled out rescue assistance being required and could have been expected of Spittler.^{*52}

5. The *Turowski* case (2018)

a) The facts of the case

In this case, a family doctor by the name Turowski assisted in the free-responsible suicide of a 44-year-old woman.^{*53} She had several non-life-threatening diseases that severely limited her working and private life. The doctor provided his patient with the medication for her suicide. After the woman took this, she wrote him a text message as a farewell. A little later, the doctor visited the woman, who had fallen unconscious in the meantime, and checked her status. Over the following three days, he made repeated visits to her, and in the early morning of the third day, he recorded her death. For the entire span of time, Turowski omitted to render potentially life-saving assistance, out of respect for the will of his patient. Furthermore, he injected the medication Metoclopramid (MCP), which should prevent regurgitation and the associated danger of asphyxiation, and Buscopan, which should prevent pulmonary oedema. In addition, he spoke over the phone with her relatives, and they too omitted to render any rescue assistance. The difficult questions related to this active doing cannot be answered in the present article. A detailed analysis has been published in a paper jointly written by a colleague and me.^{*54} In any event, the active doing in the *Turowski* case was **acausal**.^{*55} Therefore, it was unpunishable, as the District Court of Berlin indeed confirmed.

b) Legal evaluation by the court

Thus far, only the omission has to be analysed. Again, and for the same reasons as in the two other cases, only attempted killing at the request of the victim by omission, subject to Section 216 in conjunction with Section 13, was suitable, with completed failure to render assistance in addition (under Section 323c). The District Court of Berlin abandoned a conviction on 8.3.2018 for legal reasons.^{*56} The prosecution appealed to court, and a decision by the Federal Court of Justice will be delivered on 3.7.2019 too.

⁴⁶ See BGHSt 55, pp. 191–207, on p. 204.

⁴⁷ BGHSt 55, pp. 191–207, on pp. 199–200.

⁴⁸ J. C. Joerden, K. Schmoller (see note 45), pp. 325–344, on p. 333 (H. Rosenau).

⁴⁹ Landgericht Hamburg (District Court of Hamburg). *Zeitschrift für Lebensrecht* 2018/2, pp. 81–89, on p. 88.

⁵⁰ Landgericht Hamburg (District Court of Hamburg). *Zeitschrift für Lebensrecht* 2018/2, pp. 81–89, on p. 89.

⁵¹ Landgericht Hamburg (District Court of Hamburg). *Zeitschrift für Lebensrecht* 2018/2, pp. 81–89, on p. 89.

⁵² Landgericht Hamburg (District Court of Hamburg). *Zeitschrift für Lebensrecht* 2018/2, pp. 81–89, on p. 88.

⁵³ To the facts of the case: Landgericht Berlin (District Court of Berlin), sentence from 8.3.2018 – (502) KLs 234 Js 339/13 (1/17) = *Zeitschrift für Lebensrecht* 2018/4, pp. 177–185.

⁵⁴ H. Lorenz / C. Dorneck (see note 23), pp. 146–159 (in German), on pp. 153–159.

⁵⁵ Landgericht Berlin (District Court of Berlin). *Zeitschrift für Lebensrecht* 2018/4, pp. 177–185, on p. 181.

⁵⁶ Landgericht Berlin (District Court of Berlin). *Zeitschrift für Lebensrecht* 2018/4, pp. 177–185, on p. 180.

In a strong contrast against the *Spittler* case, the status of Turowski as a guarantor was obvious: He was the patient's family doctor.^{*57} In fact, the court simply denied a concrete duty to avoid the death of the dying woman.^{*58} This was also in explicit contradiction with the opinion of the Federal Court of Justice in *Wittig*. The reasons were largely the same as those given in *Spittler*; the court merely added some arguments with reference to constitutional law.^{*59}

Regarding the failure to render assistance (Section 323c), the District Court of Berlin denied the existence of an **accident** in terms of law.^{*60}

6. Conclusions and the outlook

For a long time, no-one followed the path opened by the Federal Court of Justice with *Wittig*. On one hand, it is regrettable that the regional appeal courts of Hamburg and Berlin decided to follow the 30-year-old footprints on the way to paternalistic criminal law. On the other hand, the Federal Court of Justice now has an opportunity to rub out this earlier path and break away from this jurisdiction. That would be pleasing and appropriate:

The omission of any rescue help after a free-responsible suicide is non-punishable in every sense. It is no killing at the request of the victim by omission of the guarantor because there is no concrete duty to avoid the death of a person who self-responsibly commits suicide.^{*61} Indeed, more recent jurisprudence – addressing, for example the withdrawal of treatment – but also newer legislation (the creation of Section 1901a ff. of the German Civil Code) supports this interpretation.

Otherwise, there would be an insuperable contrariety of judgement: accessoryship to a free-responsible suicide is non-punishable while the following omission is punishable. The consequences of such an opinion for people who have chosen suicide would be unbearable. Their will, which **basically** gets respected in '**normal**' medical contexts (for example, in the withdrawal of treatment), would not be respected. But there is no difference in the right of self-determination between **regular patients** and **suicidal persons**: there is not a second-class right of self-determination. Furthermore, the result of this conclusion would prove unbearable for a person omitting rescue efforts, who would be obligated to medicate against the will of the patient and, thereby, without the necessary (informed) consent. The latter is usually punishable as causing bodily harm (per Section 223) and goes against all medical ethics.

For the same reasons, the requirements for failure to render assistance (see Section 323c) are not fulfilled. Moreover, it would go beyond the text if a free-responsible suicide as a result of self-determination were to be declared an **accident**.^{*62}

The Federal Court of Justice now has an opportunity to change the jurisdiction related to criminal liability of third parties with regard to free-responsible suicide. It should follow the district courts of Hamburg and Berlin on the route to greater importance of self-determination in medical and criminal law.

⁵⁷ Landgericht Berlin (District Court of Berlin). *Zeitschrift für Lebensrecht* 2018/4, pp. 177–185, on pp. 182–183.

⁵⁸ Landgericht Berlin (District Court of Berlin). *Zeitschrift für Lebensrecht* 2018/4, pp. 177–185, on pp. 183–184.

⁵⁹ Landgericht Berlin (District Court of Berlin). *Zeitschrift für Lebensrecht* 2018/4, pp. 177–185, on p. 183.

⁶⁰ Landgericht Berlin (District Court of Berlin). *Zeitschrift für Lebensrecht* 2018/4, pp. 177–185, on pp. 184–185.

⁶¹ With a large number of references for this almost indisputable position: H. Rosenau. Anmerkung zu Hanseatisches Oberlandesgericht, Beschluss vom 8.6.2016 – 1 Ws 13/16 ['Comment to the Hanseatic Regional Appeal Court, Decision from 8.6.2016 – 1 Ws 13/16']. – *Zeitschrift für Medizinstrafrecht* 2017/1, pp. 54–56, on p. 55, footnote 16.

⁶² For more arguments and details on Section 323c and suicide: H. Lorenz. Tötung auf Verlangen durch Unterlassen und unterlassene Hilfeleistung des Arztes bei freiverantwortlichem Suizid ['Killing at Request by Omission and Failure to Render Assistance by a Doctor in Relation to Free-Responsible Suicide']. – *Juris PraxisReport* 2018/11, Comment 1; H. Lorenz / C. Dorneck, Begehungs- und Unterlassungsstrafbarkeit des Hausarztes beim freiverantwortlichen Suizid ['Criminal Liability of a Family Doctor for Active Deeds and Omission Related to Free-Responsible Suicide']. – *Juris PraxisReport* 2018/18, Comment 1.



Laura Feldmanis

PhD

State Prosecutor

The Principle of Trust for Exceptions to the Non-Regression Clause in the Case of Delict of Negligence

1. Introduction

The Estonian Penal Code describes the cases in which a person is to be held responsible for the consequences of the acts committed directly by said person and the cases in which contributing to an act committed by another person is punishable. A delict of negligence and intentional delict are governed differently by the Penal Code. These are two distinct types of delict, which are subject to separate sets of rules for determining the grounds for liability. The above is based on the fact that, while the person in the case of an intentional delict has decided to commit an offence, a delict of negligence is characterised by a careless and irresponsible act that realises the elements of an offence.^{*1} Sections 21 and 22 of the Penal Code establish the commission of an offence in the form of participating, aiding, or abetting but only if the person's acts are intentional. The phrasing of the Penal Code indicates also that the commission of a joint criminal offence is possible only in the case of intentional acts. In addition, it is stated that the commission of an offence by intermediation can take place only if the person taking advantage acted intentionally, foreseeing the formation of the elements of an offence.^{*2} The answer to the associated questions appears to be simple, but the issue of the scope of the duty of care remains.

In the event of carelessness, the principle of a single offender applies, on the basis of which anyone who commits an act covered by the description of the elements of an offence of a delict of negligence by violating the duty of care is an offender.^{*3} It can also be stated that the legislator intended to apply liability only in specific, well-defined cases where the relevant person is an accomplice in the commission of an offence by another person by dint of carelessness. This is, for example, evident from Section 419 of the Penal Code, which articulates the liability for the negligent storage of a firearm if said firearm has been used to commit an offence. If there is no specific provision of the law indicating otherwise, the person is not held liable, as any liability for negligence would become indefinable otherwise and would be in conflict with the intentions of the legislator. This approach cannot be supported, as negligence is defined with reference to violation of the duty of care and this person is to be held liable if said violation leads to a consequence specified by law.

¹ J. Sootak, P. Pikamäe. *Karistusseadustik. Komm väljaanne (Penal Code. Commented Edition)*, 4th ed. Tallinn: Juura 2015, §18/ 2.

² *Ibid.*, §21/ 2.1.

³ *Ibid.*, §20/ 3.

The duty of care entails displaying the level of care required from anyone and necessary for communication in the relevant society. The standard for the duty of care may consist of the general level of care expected from all people as dictated by moral rules or set standards or may, on the other hand, manifest itself in the form of standards governing a specified profession, relationship, or aspect of life. Even though a general definition for a violation of the duty of care is specified in Estonian criminal law, there is no comprehensive list of the standards pertaining to that duty of care and foreseeable from an objective perspective.^{*4} This consideration reveals one of the issues with the delict of negligence: how to determine which acts are in conflict with the duty of care and foreseeable from an objective perspective. Next, one may ask whether a diligent and responsible person should make sure that his acts do not facilitate violation of legal rights on the part of other persons or, instead, this specific person's duty is restricted to his own acts. At first glance, it could be said that the above-mentioned question is answered by the non-regression clause, in line with which a person's intervention within a chain created by the person who caused the original threat excludes the possibility of accusing the person who caused the original threat. The answer here too is not simple, though, because there are exceptions to the non-regression clause and it is not always applicable. One should bear in mind that the principle of definition is applied in penal law, in line with which there must be clear and comprehensive delineation indicating in which cases a person's liability arising from penal law follows. However, the dogmatics of penal law offer no clear solution for how to define the duty of care; neither is this foreseeable from an objective perspective. These issues are subject to debate in legal science.^{*5} Therefore, certain principles are employed in the dogmatics of penal law that specify how the duty of care and objective predictability are substantiated. These rules involve the principle of trust, permissible risk, and the principle of division of duties. The principle of trust and the principle of division of duties specifying the former should limit the range of cases in which a person shall be held liable for delict of negligence that follows upon an offence caused by another person on the. This article addresses the meaning of the principle of trust, and then the discussion examines the effect thereof on liability if the person who originally caused the threat acts out of negligence yet the threat caused by that person is actualised in the form of an act violating legal rights by another person is realised in either delict of negligence or an intentional delict. The article does not discuss cases in which injured parties have contributed to the damage caused to them.

2. The principle of trust

The principle of trust has grown out of the Traffic Code and the principle of mutual behaviour of the persons participating in traffic – all people involved must observe said code and act carefully so that they could hope that others will behave in the same manner.^{*6} The principle of trust has been confirmed in Estonian Supreme Court practice as expressed in decision no. 3-1-1-52-16:

It can be considered to be a violation of the duty of due diligence if the offender has failed to exhibit the due diligence required in society. A person may be accused of a failure to exhibit due diligence in the case of material delict only if the consequences of the offence were foreseeable by the offender from an objective perspective. The assessment of whether the consequences were foreseeable from an objective perspective should include application of the principle of trust, on which basis the offender may presume that other persons act lawfully. This presumption is only applicable, however, if the offender has no reason to assume the opposite.

The principle of trust is applied not just in traffic but also in situations of division of duties^{*7}, as well as in general communication between people.^{*8}

⁴ R. Schmitz. *Nullum crimen sine lege und die Bestrafung fahrlässigen Handels*. – FS Für Erich Samson. C.F. Müller 2010, pp. 181–182.

⁵ *Ibid.*, p. 181.

⁶ H.W. Laufhütte, R. Rissing-van Saan, K. Tiedemann (eds). *Strafgesetzbuch. Leipziger Kommentar*, Vol. 1: 'Einleitung', §§ 1–31. Berlin: De Gruyter 2011, §15/ 224d.

⁷ W. Joecks, K. Miebach (eds). *Münchener Kommentar zum Strafgesetzbuch*, 3rd ed. Munich: C.H. Beck 2017, §15/ 143.

⁸ U. Murmann. *Grundkurs Strafrecht : Allgemeiner Teil, Tötungsdelikte, Körperverletzungsdelikte*, 4th ed. Munich: C.H. Beck 2017, p. 170.

Two significant questions to address arise from the principle of trust: firstly, in which cases is there a reason to trust, and, secondly, where is there a reason to doubt? In light of the above, the question of whether the principle to be accorded priority is the principle of trust or, instead, the principle of distrust has been raised in the professional literature.^{*9}

If a person follows the rules, he can, for the most part, also rely on others acting in accordance with those standards. For example, a driver can trust that other drivers in the flow of traffic will observe the required distance between vehicles and execute driving manoeuvres based on this trust. A surgeon performing a surgery can rely on the anaesthesiologist having performed the profession's duties properly, and the surgeon is not required to check whether the anaesthesiologist has done everything as required.

A person who fails to follow the rules cannot reasonably trust others to comply with them. For example, someone exceeding the permitted speed limit cannot offer a defence based on the argument that the ensuing traffic accident would not have occurred if others had observed the rules. That said, while this person cannot appeal to the principle of trust in this situation, it does not immediately mean that he is responsible for the outcome – it is necessary to examine whether all other criteria for accusing said person of a delict of negligence are met.^{*10}

Furthermore, the principle of trust highlights those circumstances in the case of which grounds for trust are not present even if the person follows the rules. For example, if it is clear that another person is not following the traffic rules or if there are children involved in the traffic situation, who can well be expected to behave in an unpredictable manner, such conditions should be taken into consideration and the case cannot be solved solely on the basis of the fact the person in question followed the rules himself.

A significant feature of the principle of trust emerges from the reasoning above, in line with which a person cannot view his acts in isolation from other people – the acts should be assessed in conjunction with the acts of others.^{*11} Thus, on one hand, the principle of trust limits the extent of the care expected, because it is not necessary to check every single action of another person. On the other hand, the principle of trust also establishes the obligation to assess whether attention should be paid to the actions of others and one's own behaviour should be adjusted accordingly.

As one returns to the question posed above as to whether the principle that matters is that of trust or that of distrust, the characteristics both of those situations in which there is a reason to trust and of those in which there is not are highlighted. However, it is still important to emphasise the aspect of trust *per se*, which demands not that one doubt at all times but that one do so only when there is specific reason. This indicates that it is not reasonable to proceed from general distrust; in contrast, distrust is justified only when there are grounds for doubt.

Thus, the principle of trust specifies the obligations of a person that must be considered in ascertaining the scope of responsibility.^{*12} Specifically, the principle of trust aids in identifying those situations in which it is necessary to determine the liability of all persons involved in an act.^{*13} Accordingly, the principle of trust fulfils the function of helping specify that, in addition to our own behaviour, we have an obligation to pay attention to the actions of others and to the meaning such actions give to the acts of a specific person. Next, we will analyse the extent to which people should make sure that their acts cannot be ingredients in an offence committed by another person, whether intentionally or as a result of negligence.

3. The contribution of a negligent act to another person's intentional act that causes an infringement

It was pointed out above that the core issue in such cases is the application of the non-regression clause and the extent of the effects of the principle of trust. There are three approaches in theory of penal law, each of which has implications in defining the exceptions to the non-regression clause. Under the theory of adequacy, the person who caused the original threat is responsible if the act of a third party intervening in

⁹ W. Joecks, K. Miebach (eds), §15/ 142.

¹⁰ C. Roxin. *Strafrecht. Allgemeiner Teil*, 4th ed., Vol. I. Munich: C.H. Beck 2006, p. 685.

¹¹ W. Joecks, K. Miebach (eds), §15/ 124.

¹² U. Murmann, p. 169.

¹³ *Ibid.*, p. 170.

the chain of causality can be objectively predicted on the basis of general overall experience.^{*14} Secondly, with regard to the theory of interruption of the connection for attribution, the significance of the impact on the chain of causality is decisive – intentional intervention by a third party excludes the liability of the person who started the chain if the third party has significantly changed the causality or created a new chain of causality.^{*15} Finally, the theory of limited scope of liability may be highlighted, on which basis the principle of trust is the immediate starting point.^{*16} G. Jakobs has stated that, even though we know that people occasionally make mistakes, we can, to some extent, trust others not to commit errors.^{*17} Therefore, it is not appropriate to apply an abstract suspicion that if a specific object or circumstance can, in principle, be used to commit an offence, one should question the motives behind another person's behaviour since there exists a likelihood of a criminal plan being realised. Were such suspicions to form a suitable standard, it would not be possible to sell such products as a knife or poisonous substance, since there is always a risk of these items being used to commit an offence. Likewise, criminal law cannot place people under the obligation to verify and determine the motives for another person's behaviour on each and every occasion, as this would create general distrust, complicating communication and restricting freedom to choose his or her area of activity^{*18} – which is a value protected by most countries' foundational laws.

On the other hand, neither should an atmosphere of general indifference be created, as it should be taken into consideration that, as a rule, liability for the offences committed in consequence of negligence is established only in the case of the most significant legal rights, such as the rights to human life; health; and, under certain conditions, property. The question is one of identifying the cases wherein a person can trust that his contribution will not be used to commit a crime and those in which he is required to entertain doubts in this regard. The theory providing the underpinnings of criminal law primarily specifies the following criteria. Firstly, it highlights that dangerous items, such as a knife, may not be handed over to a person who is incapable of guilt. Also, there is not reason to trust the other person if the first person is under specific obligation (a guarantor's obligation) to prevent damage from arising or if the other person's preparedness to commit a crime has been obvious from the beginning.^{*19}

The specific obligations arising from legislation that render it incumbent upon a person to prevent the realisation of damage via the outcome are related primarily to handling dangerous objects and thereby ensuring security. This encompasses poisons and weapons, for example. It is important to specify that the regulations related to the above-mentioned items are indeed designed to prevent the problems that could arise from unlawful handling of these and to guarantee safety of the life and health of other people with regard to the dangerous items. The literature describes a case from German court practice in which a person sold a weapon to an unknown party over the 'dark web', who then used it in an act of terrorism. The person selling the weapon did not know what it was going to be used for; it may have been acquired for self-defence or for purposes of collection, but there was no reason to believe that it might be used in an offence. The dispute involved the liability for causing a death through negligence on the part of the person who sold the weapon. This person was accused of causing a death through negligence as, pursuant to Germany's Weapons Act, people must prevent third parties from gaining access to the weapons at their disposal. The aim of this provision is to prevent situations in which third parties could use such a weapon to cause harm to other persons. In a situation wherein someone fails to observe the rules set forth in the legislation, there is no reason to trust that these will be obeyed by others.^{*20} It is important to stress that a person is under obligation to prevent a specific threat. This can be illustrated by citing an example in which an apartment building is set on fire and the residents are unable to exit the building because one of the residents, in disregard of the fire-safety rules, has left a bicycle in the stairwell, thereby blocking the exit to the people inside such that the residents perish. In this case, the person leaving the bicycle in the stairwell has violated rules that were designed to ensure safe exit from the building in the event of a fire. It is important to specify that the actual

¹⁴ B. Heinrich. *Strafrecht - Allgemeiner Teil II: Besondere Erscheinungsformen der Straftat, Unterlassungs- und Fahrlässigkeitsdelikt, Irrtums-, Beteiligungs- und Konkurrenzlehre*, Vol. II, p. 77.

¹⁵ *Ibid.*

¹⁶ U. Murmann, p. 174.

¹⁷ G. Jakobs. *Strafrecht, Allgemeiner Teil. Die Grundlagen und die Zurechnungslehre. Lehrbuch*. 2th wd. de Gruyter 2011, p. 174. – DOI: <https://doi.org/10.1515/9783110906424>.

¹⁸ U. Murmann, p. 174.

¹⁹ *Ibid.*

²⁰ C. Fahl. *Die Strafbarkeit des Verkaufens von Waffen im Darknet wegen fahrlässigen Tötung*. – *Jus* 2018, pp. 532–533.

situation would not be different if the fire had been a result of lightning striking the building, so long as the bicycle still obstructs the exit. The question of the liability of the resident who blocked the exit would arise in this case as well. Now, consider the example of a person leaving rubbish next to the bins, which then gets used by an arsonist as fuel. In this case, the first person has violated the requirements related to waste disposal, but these rules are not designed directly to prevent arson. The German courts have established that a person may trust that others will not take advantage of hazardous situations he has created.^{*21}

The other element highlighted is this: the commission of an offence by the other person must be recognisable. What does this entail? According to Jakobs, the fact of the contribution being usable exclusively for commission of a crime is a relevant criterion. Also, it has been suggested that the decision to commit an offence must be recognisable.^{*22} C. Roxin finds that a person can be accused if preparedness for the act can be identified. Preparedness for an act is a better distinguishing characteristic than a decision to commit an offence, in that the latter involves the processes occurring within the person, while external identifiable factors should be assessed for determination of preparedness for an act.^{*23} If proceeding from the perspective of preparedness for an act, one next needs to consider how preparedness should be identified – i.e., whether it can be determined on the basis of the behaviour of a specific person or, the specific situation at hand. In this case, recognisable clues about a potential offence must be provided by objective facts. Yet precisely which foundations should be used for ascertaining potential preparedness for a crime remains indistinct: from the most general perspective, either the specific situation or the person's behaviour may indicate this. No further criteria have been specified after all these should be determined separately in each specific situation. Even though many definitions have been proposed, there is still no consensus on when there exists sufficient indication predictive of commission of an offence.^{*24} In any case, it can be stated that if a person's act is harmless on its own, that person is not required to make further efforts to find out how that act could be taken advantage of by someone else, and it is certainly not possible to proceed from merely the general possibility of that person's contribution being used to commit an offence. A combination of numerous completely normal acts may be required before another person is able to commit an offence. By the same token, specific knowledge of potential that would be characteristic of an accomplice cannot be present in this case. At this point, we may highlight for comparison the Supreme Court's description of predictability as a feature of negligence in Subsection 11.3 of the decision in case 3-1-1-52-16. According to the decision an event can be deemed predictable if the likelihood of its occurrence, from the perspective of assessment by the person committing the act, is higher than a merely theoretical level proceeding from the specific circumstances.

Next, I would like to give an example for which it has been determined in the legal literature that the person creating particular initial conditions is responsible for causing a death through negligence.^{*25} Person A visits a bar with B, a friend who is in a bad mood, and A decides to lift that friend's spirits by secretly adding two shots of strong alcohol to B's cocktail. The two then exit the bar together, and A leaves B at a taxi rank near a park with a bad reputation at 2 o'clock in the morning. The friend falls victim to an assault and dies. In this case, there were certainly indications that B could end up falling victim to a crime, such as helplessness due to intoxication and presence at this specific location.

From the standpoint of recognition of preparedness for an offence, this is substantially similar to predictability as a characteristic of the delict of negligence. Resolutions of the Supreme Court (principally, resolution 3-1-1-79-10) show that the objective duty of care is a separate characteristic in addition to predictability and the preclusion thereof among the objective elements of the offence. In the example provided above, it may be highlighted that a person's prior negligent behaviour (administering strong alcohol to a friend without the friend's knowledge) is sufficient on its own to fulfil the requirements for negligence. In another example, one can draw such a conclusion from the fact that information communicated by a person is used to commit a murder even though communication of that information is not itself prohibited, if, in the case in question, both the other person's preparedness to commit a crime and the potential of the information in question being used to commit a crime are obvious. In these cases, there are no breaches

²¹ W. Joecks, K. Miebach (eds), §15/ 151.

²² G. Jakobs, p. 578.

²³ C. Roxin, pp. 688–689.

²⁴ U. Kindhäuser. *Strafgesetzbuch. Lehr- und Praxiskommentar*. Baden-Baden, Germany: Nomos 2017, Vorbemerkung zu 13 /170.

²⁵ *Ibid.*

of obligations other than that related to the other person's readiness for such an act and the use of the first person's contribution for this purpose being clear.

The prevailing opinion in penal-law theory in this regard is that violation of the duty of care is not confined to solely what is manifested in the form of disregarding specific rules – violation of the general obligation to act diligently and prevent damage to other persons' legal rights is sufficient. In this case, the person violates the obligation to refrain from endangering and damaging the legal rights of other people by the first action. Therefore, the duty of care stems from the possibility of determining whether a person's acts may result in impinging on the legal rights of other people.^{*26} On the basis of the above, it can be stated that a person has violated the duty of care if engaging in rapid manoeuvres with a trolley in a supermarket and thereby hitting a child, who suffers a serious injury. Quick manoeuvring of a shopping trolley is not prohibited, but if there is a reason to believe that this may result in injuring another person in a specific situation in a store, this act constitutes a violation of the duty of care. Proceeding from this reasoning, one can conclude that predictability is a significant criterion in the substantiation of a violation of the duty of care, and, in fact, the professional literature has posed the question of whether predictability alone might not be sufficient in this case.^{*27} On the other hand, it has been concluded that the requirement of identifying a violation of the duty of care separately is justified, as this shows the involvement of violation of a norm for which a person can be justly accused, while mere potential dangerous acts are not punishable. Violation of the duty of care and predictability are, however, directly connected.^{*28} With regard to the former, other criteria in addition must be taken into consideration in substantiation of a violation of the duty, such as permissible risk.

Therefore, with regard to substantiating a violation of the duty of care on the basis of the obviousness of the preparedness of another person for an act and for putting the results of the first person's behaviour to use to that end, it can be stated that such a definition of violation of the duty of care is no different from that applied in a situation in which a person's violation of his duty of care is articulated in terms of honouring the general duty of care to refrain from acts that may damage the legal rights of others.

However, in this case it has to be taken into account that the person concerned must, in addition to the meaning of his own acts, consider their interaction with other persons' conduct and assess them accordingly. Certainly, one has a greater responsibility to analyse and assess one's own actions: there is no obligation to examine the actual meaning and purposes of each of those actions by others separately. Taking into consideration that there is already a problem in conceptualising foreseeability in addition to the more difficult-to-define criterion – that related to identification of a person's readiness to act negligently – makes it more difficult to understand, particularly when one bears in mind that the lack of identification is already blamed on negligence. From the foregoing, one concludes that this determination should be limited to the criteria that permit one to formulate what kind of behaviour on other people's part demonstrates particular diligence. It is necessary also to formulate the criteria to be applied in assessment of the cause of the deliberate consequence in cases of a third party's complaint against the initial causator.

The conclusion that an act committed for reason of negligence, when the consequence is caused by a party committing an intentional offence, is punishable raises the question of whether this fundamentally renders participation by negligence punishable. The latter outcome should be prevented by the fact that the delict of negligence is a separate type of delict, of which a person can be accused only if there are characteristics of carelessness present. When a person has contributed through negligence and all prerequisites for the delict of negligence are present, holding said person liable is justified if the consequence comes directly as a result of another person's intentional offence.^{*29} This reasoning is illustrated by the example of poor fire safety described above, in which the resident who left a bicycle in the stairwell disregarded the fire-safety rules: irrespective of the origin of the fire – an act committed by another person or a lightning strike – the act of leaving the bicycle there is of exactly the same nature.

Because the current prevailing opinion in penal-law theory is that the non-regression clause is not absolute (i.e., there are exceptions to the clause), an intentional act of a third party is found not to exclude the possibility of accusing also the person who caused the original threat, if the prerequisites for a delict of negligence are present. It is important to highlight that the characteristics of negligence, with regard to

²⁶ H.W. Laufhütte, R. Rissing-van Saan, K. Tiedemann, §15/ 171.

²⁷ V. Krey, R. Esser, *Deutsches Strafrecht Allgemeiner Teil*, 5th ed. Kohlhammer, Germany: 2012, p. 570.

²⁸ *Ibid.*

²⁹ C. Roxin, p. 686.

predictability, and the consideration of permissible risk and objective attribution should exclude excessive liability.

4. Negligent contribution to another person's negligent act

All of the discussion above addressed situations in which the third party committed the offence intentionally. There are also cases in which the third party interferes in the chain of causality negligently and the offence too is committed through negligence.

Firstly, this may occur in situations in which both parties violate the duty of care and there is a cause-and-effect relationship between their acts and the outcome. Primarily, this takes place when several persons are involved in a joint work process and the principle of division of duties, which is specified in line with the principle of trust, is applicable additionally in the situation at hand. The remainder of this section highlights how the principle of trust applies in the cases of horizontal and of vertical division of duties.

In the case of horizontal division of duties, the two persons hold equal positions in a joint work process and neither has a direct obligation to supervise the other person or inspect his actions/output.^{*30} The general principle that one person may rely on the duty of care being observed by the other person if the first person too observes it applies in this case. Thus, one cannot not fulfil one's duty and rely on this non-fulfilment being detected by the next person in the line when the next person acts properly. For example, the design and construction of a house requires teamwork, wherein the architect and the engineer must take into consideration the safety requirements and cannot count on the owner who issues the building permit detecting something that they may have not taken into consideration. On the other hand, the representative of the commercial undertaking performing the construction work must act if discovering that the building design documentation is not compliant with the safety requirements. Under the principle of trust, someone cannot count on his potential mistakes being detected by someone else. The mistakes made by the other person cannot be ignored either. The significant aspect here is that a person is not required to check the work of another person 'just in case'. Everyone is responsible, above all, for fulfilling his own duties; however, one may not be indifferent with respect to a mistake or a discovery of something else that is significant in relation to proper completion of the work process. These principles, outlining when there are grounds for inspection, can be found in Supreme Court practice as seen in Subsection 9 of judgment 4-17-1195 of the Criminal Chamber of the Supreme Court, in which it is highlighted that,

among other things, the principle of trust cannot be used if it is obvious from the moment of agreeing on the division of duties that such division of duties will not ensure the proper performance of the duties (e.g., the division of duties assigns a duty to a person who is not prepared to perform the duty in question or is unable to perform the duty). The principle of trust also cannot be used if circumstances arise in the course of implementation of the division of duties that would give a board member acting with the care of a diligent entrepreneur grounds for doubting the proper fulfilling of the duty divided. If circumstances arise that indicate the improper performance of a duty, other board members, who should be aware of that fact if they act with the care of diligent entrepreneurs, must also take further steps to ensure proper fulfilling of the duty.

Next, I would like to explain the situation of vertical distribution of duties, which entails a hierarchical relationship. The relationship of subordination may be permanent or a one-off set of circumstances, arising in a specific situation. Even though the person who holds a higher position in the hierarchy has both inspection and supervision obligations, that person may rely on the subordinates performing their duties properly. This conclusion is predicated upon the person holding the higher hierarchical position having carried out three tasks: choosing the personnel carefully and making sure that these people have the skills required to perform their duties; secondly, assigning the duties and giving the orders in such a way that they are clear and are commensurate with the abilities of said individuals; and, thirdly, honouring his organisational

³⁰ L. Eidam. Zum Ausschluss strafrechtlicher (Fahrlässigkeits-)Verantwortlichkeit anhand des Vertrauensgrundsatzes – ein Überblick. – JA 2011, pp. 914, 916.

obligation to ensure the functioning of the work process, which calls for availability of the required tools and personnel.^{*31}

To describe the manner in which the above-mentioned obligations may be violated, I offer the following example. Consider a case in which a commercial undertaking is involved in providing care to people. This care institution has a dedicated department whose director is responsible for drawing up work schedules for the care employees, selecting the personnel, and dividing the duties among those employees. The head of this department fails to take into consideration the requirements related to work hours and rest time and also tasks the employees with taking care of so many people that they have no time for responding to complaints. The employees take issue with this organisation of the work, but the head of the department claims that this has functioned before and hence will also function in the future. One day, a carer makes the mistake of administering the wrong medicinal product to a person in his care, which results in that person's death. In this case, the head of the department too can be held liable for causing a death through negligence, on account of having violated the duty of care in performing the duty assigned: organising the work of the department and ensuring the proper performance of the duties entailed. Because of having violated the duty of care, the department head had no reason to trust that his subordinate would perform their duties properly.

This example brings out the point of focus from which a particular error has arisen. Thereat, the head of the department has an important role to play with regard to the tasks not being carried out correctly. When a job is arranged in this way, mistakes become inevitable. This justifies the conclusion on root causer's responsibility.

Now, a new question arises, of how far it is possible to go in this manner in a vertical chain – at issue here is the liability of the supervisor of the head of the department, in turn, and even the board members of the commercial undertaking. The answer is rooted in the duty of diligence: were these persons responsible for organising the functioning of these processes, and were they aware of the potential deficiencies or were there clear indications pointing to the deficiencies? If the answers to these questions are in the affirmative, the respective persons are liable. All those who have violated the duty of diligence are liable for the delict of negligence. This is in accordance with what was expressed in Supreme Court decision 3-1-1-13-17: the fact that the consequence could have been caused by the actions of several people that together match the elements of the offence provides grounds for investigating all of these individuals for the offence while, at the same time, not exempting any of the violators of health or safety requirements from liability. The principle of trust cannot be relied on if the relevant person fails to show interest in the duties that he is tasked with and to give sufficient attention to them. It is important to highlight that this person must have sufficient reason to believe that the processes are functioning well: he has made his own reasonable contribution, and there are no signs that something is wrong. In addition, it is important to stress that this person shall not disregard any errors or failures, let alone justify doing so by pointing out that these fall under the immediate duties of other people. If it emerges in the process of distribution of duties that something is wrong, this must be pointed out and the principle of trust cannot be applied, as there is no longer good reason to believe that the actions of the other people involved can be relied upon.

Furthermore, the criteria for the delict of negligence and, in the event of a delict of negligent inaction, the criteria for the delict of inaction should be taken into consideration. Namely, the duty of care that characterises the delict of negligence is not equivalent to the obligation of a guarantor that is characteristic of the delict of inaction.

One might also consider the foundation on which a person is determined to be under an obligation to inspect or be attentive. Should this be specified in a specific job description or act of law, or can it be derived from how the process functions? The answer to this question can be found by looking at Supreme Court ruling no. 1-15-6223, according to which both what constitutes good medical practice and the code of ethics of medicine should be examined in addition to the therapeutic guidelines. This shows that the question is not limited to rules in written form; rather, all requirements that govern the issue are significant. Also, professional literature highlights that, alongside specific norms, the process for the work and the actual formation thereof should be examined.^{*32}

³¹ A. Schönke, H. Schröder. *Strafgesetzbuch Kommentar*, 30th ed. Munich: C.H. Beck 2019, §319/ 8.

³² W. Joecks, K. Miebach (eds), §15/ 114–116.

5. The principle of trust in the structure of the delict of a negligent offence

Finally, one could investigate which element of the structure of delict the principle of trust belongs to. Taking into consideration the fact that the rule arising from the non-regression clause is amended in consequence of that principle, one finds indication of it being an element by which the criteria related to objective attribution are defined. However, one finds that it is a means of characterisation, which defines an act that violates the duty of diligence. The above must be agreed with, as the principle of trust reveals when the duty of diligence is violated, by answering ‘what is the required extent of diligence?’ and ‘when is there a reason to pay attention to the behaviour of other people?’ both. Therefore, the non-regression clause must be assessed in light of the duty of care too. The assessment of permissible risk should be carried out in terms of the duty of care, as, even though this is assessed for objective attribution in the case of an intentional delict, one should keep in mind that the delict of negligence is a separate delict with its own structure.

6. Conclusions

It is possible that a person can be liable for the delict of negligence if the consequences are brought about by a third party. It is important to determine when non-diligent behaviour by the person whose action was the initial cause can be blamed for an offence committed by another person, in consideration of the fact that there are already issues with the delict of negligence: how to determine what acts are in conflict with the duty of care and foreseeable from an objective perspective. The principle of trust represents an attempt to ascertain the cases in which it is justified to punish an individual’s negligence that results in a contribution to an offence committed by another person. This assists in creating fairer systems, considering all persons’ roles and the chain of responsibility, because not always the act constituting the immediate cause is decisive. The contribution of the chain-launcher can be crucial.



Taivo Liivak

Doctoral student
University of Tartu

What Safety are We Entitled to Expect of Self-driving Vehicles?^{*1}

1. Introduction

Self-driving cars are seen as a solution to problems of, in particular, traffic safety^{*2} and access to transportation.^{*3} Only a few years ago, expectations of reaching full driving automation sooner rather than later were high. Even though this optimism seems to have now become moderated by a heavy dose of reality,^{*4} efforts to attain full driving automation continue throughout the world, including in Estonia.^{*5} While the level of traffic safety to be provided by fully self-driving vehicles seems to be one of their main advantages,^{*6} accidents caused by them cannot be precluded. To name a few issues, one can cite concerns about the consequences of possible hardware and software malfunctions, as well as security breaches.

Strict liability schemes seem to be the approach best suited for covering damage possibly caused by self-driving cars. However, in certain situations a manufacturer of self-driving vehicles may be faced with a claim hinging on the defectiveness of the product.^{*7} Under Article 6 (1) of the Product Liability Directive (PLD),^{*8} a product is deemed defective when it does not provide the safety that a person is entitled to expect, taking into account all the circumstances. The non-exhaustive list of circumstances set out in Article 6 (1) includes the presentation of the product, the use to which it could reasonably be expected that the product

¹ This article has been written with the support of the European Regional Development Fund.

² Reports from various countries indicate that over 90% of traffic accidents are caused by human error. See, for example, C. Grote, 'Connected Vehicles Will Enhance Traffic Safety and Efficiency' – *The European Files*, 18 February 2019. Available at <https://www.europeanfiles.eu/digital/connected-vehicles-will-enhance-traffic-safety-efficiency> (most recently accessed on 13.6.2019).

³ Self-driving cars have the potential to improve access to mobility for several disadvantaged social groups: people with disabilities; the elderly; and, in general, everyone who does not have a driving licence.

⁴ H. Fry, 'The Road to Self-driving Cars Is Full of Speed Bumps' – *Discover Magazine*, 25 October 2018. Available at <http://discovermagazine.com/2018/nov/baby-can-you-drive-my-car> (most recently accessed on 13.6.2019); T.B. Lee, 'The Hype around Driverless Cars Came Crashing Down in 2018' – *Ars Technica*, 30 December 2018. Available at <https://arstechnica.com/cars/2018/12/uber-tesla-and-waymo-all-struggled-with-self-driving-in-2018/> (most recently accessed on 13.6.2019).

⁵ For further information, see <https://avsincities.bloomberg.org> (most recently accessed on 13.6.2019).

⁶ U.S. Department of Transportation, 'Preparing for the Future of Transportation: Automated Vehicles 3.0', available at <https://www.transportation.gov/sites/dot.gov/files/docs/policy-initiatives/automated-vehicles/320711/preparing-future-transportation-automated-vehicle-30.pdf> (most recently accessed on 13.6.2019).

⁷ T. Liivak, 'Liability of a Manufacturer of Fully Autonomous and Connected Vehicles under the Product Liability Directive' – *International Comparative Jurisprudence* (2018), 4(2), p. 178.

⁸ Council Directive 85/374/EEC of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products (OJ L 210, 7.8.1985, pp. 29–33). Also, Article 11 of Directive 2010/40/EU of the European Parliament and of the Council of 7 July 2010 on the framework for the deployment of Intelligent Transport Systems in the field of road transport and for interfaces with other modes of transport (OJ L 207, 6.8.2010, pp. 1–13) makes an explicit reference to the PLD as a legal instrument that ought to be followed in the addressing of liability issues related to deployment and use of intelligent transport system applications and services.

would be put, and the time when the product was put into circulation. Recital 6 of the PLD clarifies that an assessment of the lack of safety should be carried out having regard to the reasonable expectations of the public at large.

Given that concepts such as safety, entitlement and reasonableness are open to interpretation, one is bound to wonder what kind of safety the EU public at large can expect of self-driving vehicles. That, in turn, may lead to enquiries into poor design, issues of human–machine interaction, and the role of the human in the event of damage. Thus, an answer to the safety question depends not only on safety legislation and case-law but also on the characteristics of self-driving vehicles and of human beings. Taking into account the capabilities of the self-driving vehicle and the role and expectations of the human alongside the safety legislation aimed at ensuring safety and preventing damage, this article has been written to answer the above-mentioned question in the context of product liability law, which concerns itself mainly with the consequences.

2. Driving automation

2.1. Levels of driving automation

Building on the definitions used by the NHTSA^{*9} and the BAST^{*10} and seeking to simplify communication and facilitate collaboration in the technical and policy domains worldwide, SAE International^{*11} has provided common classification and terminology frameworks for automated driving the involves ground vehicles, including six levels of driving automation, which range from no automation to full automation.^{*12} Further, SAE International has divided these levels of driving automation into two groups. In the first group (levels 0–2), the human driver monitors the driving environment, while in the second (levels 3–5) the automated driving system is entrusted with this task. At level 0 (no automation), the human driver handles all aspects of the dynamic driving task^{*13} at all times, regardless of the vehicle's warning or intervention systems. At level 1 (driver assistance), a driver assistance system performs steering or acceleration/deceleration, in a manner dependent on the driving mode, while the human driver is expected to execute all remaining aspects of the dynamic driving task. For instance, a vehicle with a cruise control feature can be considered a level-1 vehicle. At level 2 (partial automation), one or more driver assistance systems execute both steering and acceleration/deceleration, while the remainder is left to the human driver to perform. The driver assistance systems used in level-2 vehicles are more advanced than those of level-1 vehicles, in being able to, among other things, maintain a set distance from the vehicle in front or to one side, keep the vehicle in its lane, and brake automatically in the event of an emergency. In level 3 (conditional automation), an automated driving system handles all aspects of the dynamic driving task in the manner corresponding to the driving mode, but the human driver is expected to remain alert and respond to any request to intervene. At level 4 (high automation), an automated driving system performs all parts of the dynamic driving task

⁹ The National Highway Traffic Safety Administration, an agency of the U.S. Department of Transportation (<https://www.nhtsa.gov>).

¹⁰ The German Federal Highway Research Institute (*Bundesanstalt für Straßenwesen*) (see https://www.bast.de/BAST_2017/DE/Home/home_node.html, most recently accessed on 13.6.2019).

¹¹ Formerly known as the Society of Automobile Engineers. An organisation that unites more than 128,000 engineers, worldwide. For further information, see <https://www.sae.org/about/> (most recently accessed on 13.6.2019).

¹² Automation and autonomy are different concepts. As cyber-security engineer P. Toal explains, that of automation refers to there being little or no human operator involvement. It includes well-defined tasks that have predetermined (rule-based) responses in reasonably well-known and structured environments. With autonomy, on the other hand, the systems have a set of intelligence-based capabilities or learning/adaptive capabilities that allow them to respond to situations that were not pre-programmed or anticipated in the design. For further information, see his blog post '2018 – Autonomy vs Automation', at <https://blogs.oracle.com/cloudsecurity/2018---autonomy-vs-automation> (most recently accessed on 13.6.2019). According to SAE International, the definitions for the various 'levels' of driving automation are descriptive rather than normative and are of a technical rather than legal nature. The elements' specifications indicate minimum rather than maximum system capabilities for each level. See 'Summary of SAE International's Levels of Driving Automation for On-Road Vehicles', available at https://web.archive.org/web/20170903105244/https://www.sae.org/misc/pdfs/automated_driving.pdf (most recently accessed on 13.6.2019).

¹³ The dynamic driving task includes the operational aspects of the driving task (steering, braking, acceleration, and monitoring of the vehicle and roadway) and the tactical ones (responding to events and determining when to change lanes, turn, use signals, etc.) but not the strategic one (determining destinations and waypoints) (see Note 12).

even if a human driver does not respond appropriately to a request for intervention. However, certain geographical or terrain-based, weather, and speed constraints still apply to such vehicles.^{*14}

In SAE International level 5 (full automation) vehicles – the only truly self-driving vehicles and the main focus of attention in this article – an automated driving system deals with all aspects of the dynamic driving task at all times under all roadway and environmental conditions that can be managed by a human driver. The related complexity is further increased by the fact that, in reality, individual parts of the automated driving system of a self-driving vehicle may involve different levels of automation. However, it has been pointed out that the crucial issue is going to be not the level of automation the car is capable of, but how the transition between different levels of automation at various stages in the journey is managed.^{*15}

To cope with the operational and tactical aspects of the tasks, the vehicle needs to be aware of the surrounding environment (the weather, the road conditions, non-moving and moving objects, traffic signs, other road users, birds and other animals, etc.) and of events and occurrences that are relevant from the point of view of the passengers (traffic signals and other road users' behaviour). For that purpose, it has to take into account not only internally obtained information but also external information: maps, traffic rules, etc.

Should level-5 automation be reached, fully self-driving cars could provide many advantages, in reducing human errors in traffic, making navigation easier, improving access to mobility for disabled people and the elderly, and reducing traffic congestion. However, it is argued that the delegation of the driving function to an automated driving system does not come without certain disadvantages, which include, above all, software malfunctions and vulnerabilities that could cause serious damage at a far larger scale than an individual human driver ever could.^{*16}

2.2. Distinct characteristics and properties of a self-driving vehicle

Human beings' senses give them the ability to perceive what is happening around and inside them, owing to sense organs and receptors that transform physical stimuli into nerve impulses, and, with the aid of perception, the human being is able to organise, identify, and recognise that information.^{*17} This gives humans the ability to cope with the complexity of the surrounding environment, including traffic.

The full dynamic driving task imposes what computer scientists call a 'hard problem'.^{*18} Firstly, the vehicle needs to perceive what is happening around it – in particular, what is moving and what is not. To perceive the surroundings, self-driving vehicles need various sensors (e.g., radar, LIDAR, GPS components, an odometer system, vision, and an inertial measurement unit).^{*19} Researchers have pointed out that accurate and reliable perception of the surroundings necessitates the data from these various sensors being co-ordinated (in terms of data fusion and sensor fusion).^{*20}

It has been noted that perception technologies can be divided into two main categories: computer-vision approaches (traditional software programming) and machine-learning approaches (a subset of artificial intelligence, AI).^{*21} The prerequisite for computer-vision approaches is the ability to come up with

¹⁴ P. Godsmark. 'The Definitive Guide to the Levels of Automation for Driverless Cars', 4 October 2017. Available at <https://driverless.wonderhowto.com/news/definitive-guide-levels-automation-for-driverless-cars-0176009/> (most recently accessed on 13.6.2019).

¹⁵ House of Lords, Science and Technology Select Committee. 'Connected and Autonomous Vehicles: The Future? Oral and Written Evidence', available at <https://www.parliament.uk/documents/lords-committees/science-technology/autonomous-vehicles/Autonomous-vehicles-evidence.pdf> (most recently accessed on 13.6.2019), specifically the section 'Association of British Insurers (ABI) and Thatcham Research – Written Evidence (AUV0051)', p. 17.

¹⁶ See, for instance, P. Goodman. 'Advantages and Disadvantages of Driverless Cars', 24 January 2019. Available at <https://axleadict.com/safety/Advantages-and-Disadvantages-of-Driverless-Cars> (most recently accessed on 13.6.2019).

¹⁷ R. J. Gerrig, P. G. Zimbardo. *Psychology and Life*, 17th ed. (Pearson 2005), pp. 94–96.

¹⁸ The more complex a problem, the harder it is. For further information, see K. Hartnett. 'A Short Guide to Hard Problems' – *Abstractions Blog*. Available at <https://www.quantamagazine.org/a-short-guide-to-hard-problems-20180716/> (most recently accessed on 13.6.2019).

¹⁹ See, for instance, K. Shahzad. 'Cloud Robotics and Autonomous Vehicles' in A. Zak (ed.), *Autonomous Vehicle* (IntechOpen 2016). – DOI: <https://doi.org/10.5772/61898>.

²⁰ Ö. Çiftçiöğlu, S. Sariyildiz. 'Data Sensor Fusion for Autonomous Robotics' in S. Kucuk (ed.), *Serial and Parallel Robot Manipulators – Kinematics, Dynamics, Control and Optimization*, (IntechOpen 2012). – DOI: <https://doi.org/10.5772/2301>.

²¹ P. Mankikar. 'Introduction to AI' – Generation AI. 30 June 2017. Available at <http://generation-ai.com/referential-articles/introduction-to-ai/> (most recently accessed on 13.6.2019).

explicit instructions. It has been explained that, since traffic is such a complex environment, the ability to adapt to dynamic environments through learning becomes more important.^{*22} Google's decision scientist C. Kozyrkov explains that the idea of the machine-learning approach is to feed data into an algorithm that turns patterns into models.^{*23} According to her, a model is merely a recipe, which the computer uses to transform future inputs into outputs.^{*24} In machine learning, the main indicator of success is the quality of the model.^{*25} While machine learning comprises techniques that enable computers to figure things out from data, deep learning (more precisely, the use of deep neural networks) is a subset of machine learning that allows for solving more complex problems.^{*26} It has been stressed that deep learning is good for identifying objects in images and describing images, but usually requires large quantities of computing power and data, whose quality critical to achieving solid performance.^{*27} Therefore, not everyone believes that deep learning is the key to solving the problem of driving automation.^{*28} Both approaches are argued to have their advantages and disadvantages, but self-driving vehicles tend to rely on a combination of the two to understand the surrounding environment.^{*29}

Researchers have expressed the concern that certain machine-learning approaches may adversely impact the safety of a self-driving vehicle due to their non-transparency, probabilistic error rate, training-based nature, and instability.^{*30} Similar concerns are shared by legislators.^{*31} The machine-learning community is said to be coming to the realisation that in many applications domains, for AI to be trusted, it not only needs to demonstrate good performance in its decision-making but also explain these decisions and convince us that it is making them for the right reasons.^{*32} Such realisations have given rise to the new emerging research field of explainable artificial intelligence (XAI).

Various sensors and perception technologies set self-driving vehicles apart from conventional ones. Knowledge of the principles of operation of these devices and technologies enables more appropriate assessment of the kind of safety that can be reasonably expected of them.

3. Safety requirements for self-driving vehicles

3.1. Safety under product liability legislation

At this juncture, one can consider more fully Article 6 (1) of the PLD, under which a product is deemed defective when it does not provide the safety that a person is entitled to expect, taking all the circumstances into account, including the following: the presentation of the product, the use to which it could reasonably be expected that the product would be put, and the time when the product was put into circulation. Recital 6 of the PLD explains that the defectiveness of the product should be determined by reference not to its fitness for use but to the lack of the safety that the public at large is entitled to expect. In spite of the respectable age

²² A. Kirsch, 'Integration von Programmieren und Lernen in eine Steuerungssprache für autonome Roboter' – *Künstliche Intelligenz* (2012) 26, pp. 79–82. – DOI: <https://doi.org/10.1007/s13218-011-0148-1>.

²³ A. Bridgwater, 'Google Decision Scientist Splits AI Science, from Science Fiction' – *Forbes*, 7 February 2019. Available at <https://www.forbes.com/sites/adrianbridgwater/2019/02/07/google-decision-scientist-splits-ai-science-from-science-fiction/#3b7958ba2ab2> (most recently accessed on 13.6.2019).

²⁴ *Ibid.*

²⁵ T. Pungas, 'Masinõpe: mittetehniline ülevaade', 29 January 2017. Available in Estonian at <https://pungas.ee/masinope-mittetehniline-ulevaade/#more-1603> (most recently accessed on 13.6.2019).

²⁶ P. Jeffcock, 'What's the Difference between AI and Machine Learning?' – *Oracle Blogs*, 31 July 2018. Available at <https://blogs.oracle.com/whats-the-difference-between-ai-machine-learning-and-deep-learning-v2> (most recently accessed on 13.6.2019).

²⁷ See Note 25.

²⁸ C. Thompson, 'How to Teach Artificial Intelligence Some Common Sense' – *Wired*, 13 November 2018. Available at <https://www.wired.com/story/how-to-teach-artificial-intelligence-common-sense/> (most recently accessed on 13.6.2019).

²⁹ See Note 22.

³⁰ R. Salay et al. 'An Analysis of ISO 26262: Using Machine Learning Safely in Automotive Software' (2017). arXiv:1709.02435, Part II.B.

³¹ See, for instance, the European Parliament resolution of 16 February 2017 with recommendations to the Commission on Civil Law Rules on Robotics (2015/2103(INL)), para. 12.

³² R. Sheh, I. Monteath, 'Defining Explainable AI for Requirements Analysis' – *Künstliche Intelligenz* (2018) 32(4), pp. 261–266. – DOI: <https://doi.org/10.1007/s13218-018-0559-3>.

of the PLD, related case-law of the Court of Justice of the European Union (CJEU) that might elaborate on the concept of safety remains scarce.^{*33}

Some guidance for the manufacturers of self-driving cars can be derived from the CJEU judgment in Joined Cases C-503/13 and C-504/13 (*Boston Scientific*, paragraphs 36-43).^{*34} The CJEU explains that the safety which the public at large is entitled to expect, in accordance with Article 6 (1) of the PLD, must be assessed by taking into account, among other things, the intended purpose, the objective characteristics and properties of the product in question and the specific requirements of the group of users for whom the product is intended (see para. 38 of the judgment). Even though the passengers in a fully self-driving vehicle may not be in a position that renders them as vulnerable as the users of pacemakers and implantable cardioverter defibrillators who were considered in *Boston Scientific*, they still trust their health and life to the vehicle, which makes the level of safety that such persons are entitled to expect to be demanded of those vehicles particularly high as well. Furthermore, self-driving vehicles are unlike implantable medical devices in their potential to pose a greater danger not only to their direct users but also to other people (in the vehicles' case, road users) and to surrounding property. The 'group of users' in the context of self-driving vehicles is considerably larger. The element of having a broader circle of affected parties was also pointed out by the CJEU in its judgment in Case C-661/15 (para. 30)^{*35} wherein the Court noted, regarding the steering coupling of a car, that it is legitimate and reasonable to require a high degree of safety in the light of the serious risks to the physical integrity and life of drivers, passengers, and third parties connected with these products' use.

Driving automation-related parallels can be drawn with the CJEU's reasoning in para. 40 of *Boston Scientific* also. The CJEU explained that the potential lack of safety that would give rise to liability on the part of the producer under the PLD stems, for pacemakers and implantable cardioverter defibrillators, from the abnormal potential for damage that the relevant products might cause to the person concerned. While the potential for damage that fully self-driving cars could cause to a person is not necessarily always equivalent to that attended to such medical devices, it cannot be denied that a defective fully self-driving vehicle has the potential to cause the death of its passengers or other road users. Numerous incidents involving vehicles of lower levels of automation serve as a proof of this.

The high level of safety expected of vehicles is further confirmed by the CJEU in para. 30 of Case C-661/15, in which the Court points out that the safety requirement is not met where there is a manufacture-related risk of failure of a component. In the Court's opinion, this entails those goods not providing the safety that a person is entitled to expect and, accordingly, the conclusion that they must be regarded as defective.

According to Recital 8 of the General Product Safety Directive (GPSD),^{*36} safety should be assessed in consideration of all the relevant aspects. Under Article 2 (b) of the GPSD, 'safe product' means any product that poses no risk or poses only the minimum risks compatible with the product's use considered to be acceptable and consistent with a high level of protection for the safety and health of persons. It follows from this provision that, with regard to self-driving vehicles, the following factors should be taken into account, among others: the characteristics (incl. the composition) of the vehicle; its effect on other products; the presentation of the vehicle, any warnings and instructions for its use and disposal, any other indication or information regarding the vehicle; and the categories of consumers at risk when using the vehicle, in particular children and the elderly. Article 2 (c) of the GPSD explains that any product that does not meet the definition of 'safe product' is considered dangerous.^{*37} The author of this article finds that, while the

³³ See also E. Ruiz Cairó. 'The Lack of Medical Research Does Not Prevent an Injured Person from Proving the Defect of a Product and the Causal Link between the Defect and the Damage' – *European Journal of Risk Regulation* (2017) 8(4), pp. 798–803. – DOI: <https://doi.org/10.1017/err.2017.59>.

³⁴ Even though the reference for a preliminary ruling dealt with the question of whether pacemakers and implantable cardioverter defibrillators belonging to the same group or forming part of the same production series that have a potential defect could be classified as defective without there existing any need to establish that the particular product in question possesses such a defect. See ECLI:EU:C:2015:148 (*Boston Scientific*). In answering this question, the CJEU also provided guidelines that are of general value from the standpoint of the safety expected of products.

³⁵ This case pertained to the repayment of import duties, but thereby the defectiveness of vehicle components proved relevant and the CJEU elaborated on these aspects.

³⁶ Directive 2001/95/EC of the European Parliament and of the Council of 3 December 2001 on general product safety (OJ L 11, 15.1.2002, pp. 4–17).

³⁷ However, in footnote 7 of his opinion in *Boston Scientific*, Advocate General Bot draws attention to the fact that the term 'defective product' within the meaning of Article 6 (1) of the PLD should not be confused with the notion of 'dangerous

definition of safety rooted in the GPSD cannot serve as the basis for establishing the lack of safety of a self-driving car within the product liability regime, the former does assist us in understanding the objective characteristics of self-driving vehicles.

3.2. Traffic legislation governing self-driving vehicles

Some countries, most notably Germany and the United States, which both have a strong automotive industry, have already passed traffic legislation governing driving automation, including related legal definitions. Subsection (2) of §1a of the German Road Traffic Act (Straßenverkehrsgesetz or StVG)³⁸ lists the technical equipment that qualifies a vehicle as a highly or fully automated power-driven vehicle: equipment that, once switched on, is able to perform the driving task (including exercising of longitudinal and lateral control of the vehicle); during highly or fully automated driving, is capable of following the traffic rules applicable to the vehicle; can at any time be manually overridden or switched off by the driver; is able to recognise the need for the exclusive manual control by the driver; with sufficient time to spare, is able to visually, acoustically, tactily, or otherwise perceptibly alert the driver to handing over of control of the vehicle to the driver; and alerts to a use that is in conflict with the system description.

It follows from subsection (4) of §1a that the driver is the one to switch on the highly or fully automated driving function and apply it for controlling the vehicle. Such an approach to automated driving means that even a vehicle with a fully automated driving function is required to have a steering wheel and to have a licensed human driver behind it at all times. This person is required to sit in the front seat to drive, and certain controls, displays, and indicators need to be visible to the driver so that they would be able to drive the vehicle properly. This also means that even a vehicle equipped with fully automated driving functionality must not drive 'empty' – even when there are no passengers, there must be at least one occupant (the driver) while it is driving. In addition, it follows from subsection (4) of §1a of the StVG that the driver must be prepared to take over control of the vehicle at all times.

Such legislative choices strip self-driving vehicles of some of their alleged key advantages (disabled people's access to mobility³⁹, reduction of human errors, etc.), while giving rise to a plethora of new issues related to the human driver taking back control of the vehicle and, more generally, to human-machine interaction. Once the driver has transferred control of the vehicle to the system, it is difficult to get it back in an instant. Nevertheless, the driver remains responsible and is required to stay alert and ready to retake control in the blink of an eye. While the approach taken by the German legislature is acceptable for SAE levels 1–4, it practically precludes the introduction of level-5 vehicles. This might be associated with the fact that, as has the rest of the EU, Germany has ratified the 1968 Vienna Convention on Road Traffic,⁴⁰ which rules out driverless road vehicles. While such restrictions are inevitable in the case of semi-autonomous vehicles, the entire concept of a fully self-driving vehicle is based on the underlying assumption that no human driver is required, under any circumstances. Therefore, it may well be that the current solution in Germany is merely a temporary one in place until the Vienna Convention on Road Traffic can be amended and the level of full automation is truly reached.

Unlike the EU Member States, the United States is not party to the Vienna Convention. The US has ratified the 1949 Geneva Convention on Road Traffic, which does not categorically prohibit automated driving. This gives the US more flexibility in regulating driving automation.⁴¹ Although various federal bills⁴² have been put forward on highly automated vehicle technology, none have been enacted yet. The US legislators

product' within the meaning of Article 2 (b) and (c) of the GPSD. He points out that, unlike the former, the latter is independent of the expectations of the public (ECLI:EU:C:2014:2306).

³⁸ 'Straßenverkehrsgesetz in der Fassung der Bekanntmachung vom 5. März 2003 (BGBl. I S. 310, 919), das zuletzt durch Artikel 1 des Gesetzes vom 8. April 2019 (BGBl. I S. 430) geändert worden ist', available at <https://www.gesetze-im-internet.de/stvg/StVG.pdf> (most recently accessed on 13.6.2019).

³⁹ European Parliament resolution of 16 February 2017 with recommendations to the Commission on Civil Law Rules on Robotics (2015/2103(INL)), para. 29.

⁴⁰ See the Convention on Road Traffic, Vienna, 8 November 1968, with entry into force on 21.5.1977. Available at <https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20XI/XI-B-19.en.pdf> (most recently accessed on 13.6.2019).

⁴¹ B. W. Smith. 'Automated Vehicles Are Probably Legal in the United States' – *Texas A&M Law Review* (2014) 1(3), pp. 411–521, at pp. 424–457.

⁴² SAE International. 'Regulatory Framework Emerging As Autonomy Becomes Reality', 26 October 2017. Available at <http://articles.sae.org/15720/> (most recently accessed on 13.6.2019).

drafting the relevant bills have focused on addressing a high level of automation rather than full automation, thereby making references to the SAE International standard J3016. Until a federal bill has been enacted, the rules governing self-driving vehicles remain up to each state, and these have proved highly divergent. For instance, in Florida and Michigan a self-driving car is not required by law to have a driver,^{*43} while the approach taken by California seems to be more similar to that of Germany.

3.3. The safety that a person is entitled to expect of fully self-driving vehicles

According to the rules laid down in Article 6 (1) of the PLD and the guidance given by the CJEU in *Boston Scientific*, the safety that a person (the public at large) is reasonably entitled to expect of self-driving vehicles should be assessed in a manner that takes into account all the circumstances. It should be reiterated that this encompasses, among other things, the presentation of the vehicles in question; the use to which they could reasonably be expected to be put, their intended purpose; the time of putting the vehicles into circulation; the requirements specific to the group of users for whom the vehicles are intended; and, above all, the vehicles' objective characteristics and properties.

At present, it is impossible to assess the 'presentation' of fully self-driving vehicles, as no such vehicles have been put into circulation yet. The usual purpose of a road vehicle is to transport people or goods. As noted above, the requirements applicable to self-driving vehicles stem not only from their passengers but also from other road users and the surrounding environment – principally, the property that might get damaged by a self-driving vehicle. In that regard, legal entities too are affected, not merely individuals.

As for the objective characteristics and properties of self-driving vehicles, any road vehicle is, for reason of its mass and speed of movement, objectively a source of greater danger. In this respect, self-driving vehicles are not different from conventional human-driven vehicles. What makes them stand apart from the latter is the absence of a human driver, who is replaced by their sensors and software components, which draw together such elements as computer vision and machine learning. The absence of a human driver has far-reaching implications for interaction between such vehicles and other road users. Not only has the self-driving vehicle to understand the body language of humans engaged in traffic, but those humans have to understand the behaviour of self-driving vehicles. There are large amounts of visual and, to a lesser extent, audio communication between human road users. People are very good at interpreting human body language and the sounds in their environment, but this remains a hard problem for self-driving vehicles.

It has been pointed out that the computer-vision and machine-learning components of self-driving vehicles need to be attuned to the particular settlement.^{*44} The characteristics of the locale's infrastructure, its traffic flows, and all the related issues are part of the set-up of a self-driving vehicle. Hence, inhabitants of Tartu may have somewhat different expectations of self-driving vehicles than people in, for instance, London. Every area of operation is unique. The landscape, road conditions, and weather are important facets of this uniqueness.

The importance of constructing driving-automation-supporting infrastructure should not be underestimated. Manufacturers and municipalities keen on getting self-driving vehicles on the roads as soon as possible face a serious dilemma. On one hand, the manufacturers need to collect high-quality real-world data. At the same time, however, self-driving vehicles that could gather such data are not ready yet, and appropriate infrastructure for them does not exist yet. Allowing such semi-autonomous vehicles onto public roads is likely to increase the number of traffic accidents at first.

Furthermore, the general public are reasonably entitled to expect that self-driving vehicles follow traffic rules.^{*45} However, breaking traffic rules does not necessarily result in damage in the sense addressed by

⁴³ Á. B. Juhász. 'The Regulatory Framework and Models of Self-driving Cars' in *Зборник радова Правног факултета у Новом Саду*, 2018(3), p. 1378. – DOI: <https://doi.org/10.5937/zrpfns52-19047>.

⁴⁴ E. Johnson. 'Ford CTO Ken Washington Explains Why Self-driving Cars Are Such a Hard Tech Problem', 17 April 2019. Available at <https://www.recode.net/podcasts/2019/4/17/18411242/ken-washington-ford-self-driving-car-artificial-intelligence-kara-swisher-decode-podcast-interview> (most recently accessed on 13.6.2019).

⁴⁵ For extensive discussion of the issue see, for instance, H. Prakken. 'On the Problem of Making Autonomous Vehicles Conform to Traffic Law' – *Artificial Intelligence and Law* (2017) 25, pp. 341–363. – DOI: <https://doi.org/10.1007/s10506-017-9210-0>.

the PLD. Should such a situation involve any abnormal potential for damage, it may nevertheless meet the criteria for defectiveness established by the CJEU in *Boston Scientific*.

It follows from Article 9 of the PLD that among the legal rights defended thereunder are those to life, health, and property. Every individual has the right to expect their life, health, and property not to be harmed by a self-driving car, and every entity has the right to expect its property not to be harmed by one. This does not necessarily entail being entitled to expect completely flawless self-driving vehicles. A vehicle of a lower level of automation is not necessarily less safe than a vehicle of a higher level of automation. Leaving the issues of giving up and taking back control of the vehicle aside, the lower the level of automation of a vehicle, the more limited its automated functions and the greater the role and responsibility of a human driver. No software developer would be willing to give any guarantee that the software developed by it is entirely flawless, yet, as is clear from the foregoing discussion, software is a key component of any self-driving vehicle, which means that such an assurance must be obtained for the purposes of compliance with product safety legislation if the relevant vehicle is ever to be allowed to enter circulation.

Declaring a self-driving vehicle unsafe (i.e., defective) merely because it has caused damage would constitute too strict a standard of liability, which is not supported by the PLD. For ascertaining the standard for the minimum safety expected of self-driving vehicles, one needs to keep in mind that it is the human being who has been eliminated from the equation. Therefore, as long as self-driving vehicles are unlikely to cause more or worse traffic accidents than humans, they should be allowed on the roads. Whether they will cause more or worse traffic accidents than humans is, however, a matter of trial and error.

4. Conclusions

The development of self-driving vehicles continues, notwithstanding the related complexity. Their ultimate safety will be a crucial matter. Therefore, the definition of safety used in the GPSD can be of help in identifying the objective characteristics and properties of self-driving vehicles within the meaning of the PLD.

The German legislature's approach towards self-driving vehicles in the StVG is understandable and, given the current setting of international law, perhaps even inevitable, but it nevertheless precludes the introduction of truly self-driving vehicles and will need to be revised if the push towards full autonomy is to continue. This striving should continue because problems with human-machine interaction are likely to adversely affect the safety of semi-autonomous vehicles.

Under Article 6 (1) of the PLD and in accordance with the guidance given by the CJEU, the safety that the public at large is reasonably entitled to expect of self-driving vehicles should be assessed taking into account all the circumstances, among other things, their intended purpose as well as their objective characteristics and properties. For self-driving vehicles to be put into circulation, the level of safety demonstrated by self-driving vehicles should at least equal that demonstrated by human drivers.



Märt Maarand

*Doctoral student, University of Tartu
Head of risk and compliance, Pocopay AS*

The Concept of Recovery of Credit Institutions in the Bank Recovery and Resolution Directive

1. Introduction

The recovery and resolution framework created by the Bank Recovery and Resolution Directive (BRRD)^{*1} is in essence a final safety net for failing credit institutions that gives the public authorities more powers to intervene in such an institution's operations to save it and, if needed, restructure that institution by force. Correspondingly, the credit institutions themselves have been assigned further responsibilities. The name of the BRRD suggests that it covers two sets of legal activities – both recovery and resolution of credit institutions. However, while resolution is clearly defined in the BRRD's Article 2(1)(1), the directive does not define the concept of recovery. Therefore, it is not actually clear whether recovery could or should be treated as a separate concept under the BRRD; which elements it encompasses; and how these elements enhance the pre-existing prudential regulation, processes and tools.

There have not been many pieces of research aimed at delineating recovery as a concept separate from resolution and from what is addressed in prudential legislation. Therefore, this article highlights the associated aims and objectives, along with the connections among them, the system they compose, and the coherence of the relevant norms. Where suitable, it offers comparison of the provisions considered with the provisions of harmonised European Union (EU) prudential legislation.

The aim of this article is to distinguish the concept of recovery of credit institutions from resolution of credit institutions and the pre-existing prudential framework. This is done by identifying and examining the elements, as well as the powers provided to public authorities^{*2}, that can be considered constituent to the concept of recovery. The problem is that if recovery is to be deemed a differentiable concept, some or even all of the legal rules and principles applicable within the prudential or resolution framework might not be applicable in the context of recovery, and *vice versa*. There might be specific legal principles applicable only with regard to recovery, or, if not, these may be developed in the future. If powers connected with the

¹ Directive 2014/59/EU of the European Parliament and of the Council of 15 May 2014 establishing a framework for the recovery and resolution of credit institutions and investment firms [2014] OJ L 173/190.

² The legislation distinguishes between competent authorities, responsible for the prudential supervision, and resolution authorities, responsible for resolution. These may, *de facto*, be the same authority on national level. See the BRRD's Art. 2(1)(21), Art. 3(1), Art. 3(3), and Recital 15; Regulation (EU) No. 575/2013 of the European Parliament and of the Council of 26 June 2013 on prudential requirements for credit institutions [2013] OJ L 176/1 (the Capital Requirements Regulation), Art. 4(1)(40).

concept of recovery are to be exercised by the authorities, the question of following appropriate rules and principles has a direct connection with state liability. Also, it could be technically less complicated to lay down legal requirements or rules for specifically dealing with only the recovery process, while also granting the powers related to recovery as a whole to new or other authorities, should this be needed. Although these topics beyond differentiating the recovery framework from the resolution and prudential ones do not strictly belong to the scope of this article, defining the limits of recovery should lay solid groundwork for examining these topics in depth in the future.

The starting point for the article is the proposition that recovery can be distinguished as a differentiable concept in the BRRD. Recovery could be handled as a distinguishable stage and a set of actions in the regulatory structure consisting of two connected phenomena – recovery planning and early intervention measures. Accordingly, the article employs the following structure: The distinction of recovery as a concept of its own is dealt with in the first main section, and each phenomenon is then dealt with in its own section. Recovery planning and its main principles are covered in the second main section, and early intervention measures and how these broaden the powers of the authorities are examined in the final one.

2. Recovery of a credit institution as a differentiable concept

While according to Recital 7 to the Capital Requirements Regulation and Recital 34 to the Capital Requirements Directive (CRD IV)³ the main overall goal of prudential supervision is to ensure financial stability by, among other things, avoiding insolvency of credit institutions, it is nonetheless obviously inevitable that regulations, regulators, and institutions themselves cannot assure that no credit institution ever nears or reaches insolvency. The BRRD and the Single Resolution Mechanism (SRM) Regulation⁴, together with relevant EU and national law, deal with these situations beyond the ‘normal’ – preparation for upcoming crisis; early intervention; and, if needed, as it is described by the Single Resolution Board, ensuring orderly resolution of failing banks with minimal costs for taxpayers and to the real economy.⁵ The European Parliament has accurately stated that, while the BRRD sets the framework for all banks in the European Union, the SRM Regulation defines the unified resolution procedure for institutions within the euro area and constitutes the second pillar of the banking union.⁶ One can state in summary that recovery stands somewhat in between the pre-existing conventional financial supervision system, on one hand, and the resolution system, on the other – laying obligations on the relevant businesses and extending competent authorities’ powers in situations beyond the normal but immediately preceding possible resolution processes.

According to the summary of impact assessment for the proposal of a BRRD, the first objective of the bank recovery and resolution framework was to ensure that bank failures are avoided as far as possible and that the authorities and banks are prepared for adverse developments.⁷ It has been proposed that, to reduce the chances of the resolution-stage mechanisms needing to be invoked, it is important for actions in the resolution stage to be complemented by a phase of heightened supervisory involvement.⁸

³ Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms [2013] OJ L 176/338.

⁴ Regulation (EU) No 806/2014 of the European Parliament and of the Council of 15 July 2014 establishing uniform rules and a uniform procedure for the resolution of credit institutions and certain investment firms in the framework of a Single Resolution Mechanism and a Single Resolution Fund [2014] OJ L 225/1 (SRM Regulation).

⁵ This involves the Single Resolution Mechanism (SRM). See ‘The SRM: A European Solution for Ending “Too Big to Fail”’, available at <https://srb.europa.eu/en/content/single-resolution-mechanism-srm>, accessed on 30 April 2019.

⁶ See Andrej Stuchlik, ‘Amending the Bank Resolution Framework – BRRD and SRMR’, EU Legislation in Progress Briefing, First Edition, 6 June 2017, p. 2. Available at http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/603958/EPRS_BRI%282017%29603958_EN.pdf, accessed on 30 April 2019.

⁷ European Commission, ‘Summary of the Impact Assessment Accompanying the Document Proposal for a Directive of the European Parliament and of the Council Establishing a Framework for the Recovery and Resolution of Credit Institutions and Investment Firms and Amending Council Directives 77/91/EEC and 82/891/EC, Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC and 2011/35/EC and Regulation (EU) No 1093/2010’, SWD (2012) 167 final, p. 3.

⁸ See Martin Čihák, Erlend Nier, ‘Resolving Problem Banks: A Review of the Global Evidence’ in Charles Goodhart et al. (eds), *Central Banking at a Crossroads: Europe and Beyond* (Anthem Press 2014), p. 114. – DOI: https://doi.org/10.26530/oapen_626351.

Although the term is prominent in the title, it is not quite clear what is meant by ‘recovery’ for credit institutions in the BRRD. The BRRD does not clearly define what this recovery is, nor is it specified as a goal or a process or with regard to what elements it consists of. On one hand, the credit institution’s recovery may be understood to be an overall goal for the processes covered by the BRRD, not a distinct phase as such, but there might be another feasible and quite appropriate interpretation. In a situation wherein regulatory requirements and prudential supervision have failed to have the desired effect, recovery could be understood as a process and as the first phase of dealing with a credit institution faced with immediately foreseen troubles or problems that are already hampering the institution with the aim of avoiding failure.

Recitals 1 and 12 to the BRRD refer to a recovery and resolution framework; likewise, Recital 6 mentions recovery and resolution tools in the same breath. It could be argued that this indicates, perhaps even expressly, an intention to distinguish between recovery and resolution as two separate stages and processes covered by the BRRD. Also, as will be examined below, recovery plans are important elements of the framework in question. It would be against all logic to regulate a plan for something that does not exist. If recovery is indeed a stage or a process of its own, what does it consist of?

According to the impact assessment accompanying the BRRD proposal, three key stages need to be considered in the context of a bank recovery and resolution framework: (i) preparation and prevention, (ii) early intervention, and (iii) resolution.⁹ If recovery is to be considered a distinguishable phase, does this entail a recovery phase composed simply of preparation, prevention, and early intervention stages? The recitals generate even more confusion in respect of the relation between early intervention and recovery. In Recital 39 to the BRRD, recovery and early intervention are presented as separate phases. At the same time, Recital 22 states that the recovery plan should cover measures to be taken by the management of the institution where the conditions for early intervention are met and therefore indicates that early intervention could be part of the recovery phase.

Let us begin by considering the three-way split referred to above. In the European Commission’s eyes, the two aspects of the first of the three stages – preparation and prevention – are distinct elements together aiming to prevent the development of a crisis.¹⁰ Under this concept, the preparation includes a voluntary intra-group financial support agreement framework and contingency planning, while the prevention powers are intended for ensuring that banks are resolvable in the event of failure.¹¹ Indeed, Title II of the BRRD covers just such a preparation phase in its first three chapters, respectively, with that phase including recovery planning and resolution planning, questions of resolvability, and intra-group financial support. As for the second element, the crisis prevention measures are specified, in Article 2(101) of the BRRD, to be the exercise of powers to direct removal of deficiencies or impediments to recoverability under Article 6(6); the exercise of powers to address or remove impediments to resolvability under Articles 17 or 18; application of an early intervention measure under Article 27; appointment of a temporary administrator under Article 29; and exercise of the write-down or conversion powers under Article 59.

That early intervention measures are encompassed by the concept of recovery is not explicitly evident from the text of the BRRD, and different interpretations are possible. For example, in Estonian national legislation, the regulation covering recovery planning is structurally part of the prevention measures¹² while early intervention is addressed in the chapter dealing with resolution planning.¹³ It is visible from the impact assessment for the BRRD proposal that the goal behind introducing new powers of the authorities, denoted as early intervention measures, was to develop the existing framework further so that supervisors would be able to intervene at an even earlier stage and would be equipped with an expanded list of tools and powers designed to prevent the further deterioration of financial difficulties in banks.¹⁴ Crucially, however,

⁹ European Commission, ‘Impact Assessment Accompanying the Document Proposal for a Directive of the European Parliament and of the Council Establishing a Framework for the Recovery and Resolution of Credit Institutions and Investment Firms and Amending Council Directives 77/91/EEC and 82/891/EC, Directives 2001/24/EC, 2002/47/EC, 2004/25/EC, 2005/56/EC, 2007/36/EC and 2011/35/EC and Regulation (EU) No 1093/2010’, SWD (2012) 166 final (Impact Assessment), p. 12.

¹⁰ *Ibid.*, p. 60.

¹¹ *Ibid.*

¹² Finantskriisi ennetamise ja lahendamise seadus (Financial Crisis Prevention and Resolution Act). RT I, 19.03.2015, 3, 52; RT I, 13.03.2019 (in Estonian; English text available at <https://www.riigiteataja.ee/en/eli/501042019019/consolide>, accessed on 30 April 2019), Chapter 2, Division 1.

¹³ *Ibid.*, Chapter 3, Division 3.

¹⁴ Impact Assessment (see Note 9), p. 60.

the implementation of recovery plans is directly bound to the early intervention measure of right to require implementation of arrangements or measures set out in the recovery plans, as laid out in Article 27(1)(a) of the BRRD.^{*15} This clearly indicates that the early intervention stage should be considered a central part of recovery of a credit institution.

Let us return to the crisis prevention measures listed earlier in the article. While Article 6(6) of the BRRD deals with deficiencies in recovery plans, articles 17 and 18 cover powers to remove or otherwise address impediments to resolvability, and Article 59 deals with one of the resolution tools that is quite clearly part of resolution and resolution planning, articles 27 and 29 seem to have another purpose. The latter two articles of the BRRD are structured as part of the early intervention regulations, which means that the crisis prevention phase and early intervention overlap with each other at least partially. The preparation and prevention involve both the recovery and the resolution part of the framework, while early intervention measures form one component of crisis prevention measures. From this it can be concluded that the proposed three-stage division intended by the directive's authors is more a description of the order of steps, and it does not give us a satisfactory explanation of the differences among prudential supervision, recovery, and resolution. Nonetheless, early intervention could be considered to fall under the recovery concept.

On the other hand, recovery can be separated from the prudential supervision and resolution process in terms of function. The preparation and prevention were designed to be part of ongoing supervision by authorities.^{*16} On the recovery side, this design was intended to include introduction of recovery plans and supervision of these plans designed to ensure that banks have strategies in place that enable them to take early action to restore their long-term viability in the event of material deterioration of their financial situation.^{*17} With regard to resolution, the approach was meant to include the preparation of resolution plans that would set out options for resolving the institution.^{*18} As can be seen from articles 27(1) and 2(1)(21), the recovery planning and early intervention measures are placed at the disposal of competent authorities, while, according to Articles 2(1)(18), 2(1)(19), 2(1)(20), 2(1)(102) and Title IV of the BRRD, the powers and tools for dealing with crisis management and resolution are entrusted to the resolution authority. When an action beyond the usual ongoing supervision is needed, the early intervention measures come into play from the recovery side, while resolution as a separate concept is the purview of the resolution authority. Even if some elements are grouped or defined differently in some states, the functions' distinction remains intact.

It can be concluded that the recovery of a credit institution in the meaning of the BRRD can be distinguished by function as, on the institution's side, drawing up and following recovery plans and, on the authorities' part, conducting supervision over recovery planning and employing early intervention measures. From here, one can take a closer look at the two elements of the recovery system for credit institutions.

3. Recovery planning

3.1. The core principles of recovery planning

According to Article 5(1) of the BRRD, institutions not part of a group subject to consolidated supervision are required to draw up and maintain a recovery plan providing for measures to be taken by the institution to restore its financial position following a significant deterioration of its financial situation.^{*19} Article 5(2) of the BRRD sets the requirement that the institutions must update their recovery plans at least annually or after a substantial change, while competent authorities may require institutions to update their recovery plans more frequently. There is a separate requirement at group level for parent undertakings to draw up and submit to the consolidating supervisor a group recovery plan in accordance with Article 7(1) of the

¹⁵ This applies to the Estonian law also – see the Financial Crisis Prevention and Resolution Act, §36(4)(1).

¹⁶ Impact Assessment (see Note 9), p. 8.

¹⁷ *Ibid.*, p. 64.

¹⁸ *Ibid.*

¹⁹ The scope of the BRRD covers more entities than credit institutions alone, although this paper is limited to considering credit institutions only. For the list of entities covered, see the BRRD's Art. 1(1) and the corresponding points of Art. 2(1).

BRRD. At both individual-institution level and group level, the recovery plan must comprise several specific elements unless the institution has been allowed by the competent authority to exclude some of them.^{*20}

The authors of the BRRD had in mind the idea of recovery plans as a way to ensure that banks have strategies in place that enable them to take early action to restore their long-term viability in the event of a material deterioration of their financial situation, while recovery plans should make it less likely that a bank ends up requiring intervention in its affairs.^{*21} The name 'recovery plan' is self-explanatory; the main purpose is, of course, to plan the recovery. But, as there are various rules and requirements the recovery plan must comply with, it cannot be just a formal document with arbitrary content. These requirements are laid down foremost in the BRRD, national legislation, and the guidelines of the European Banking Authority (EBA).^{*22}

One can identify three important principles that must be considered in drafting and assessment of the recovery plan. The first of these, found in Recital 21 to the BRRD, is that the recovery plans should be detailed and based on realistic assumptions applicable in a range of robust and severe scenarios. Article 5(6) of the BRRD states that recovery plans have to contemplate a range of scenarios of severe macroeconomic and financial stress relevant to the institution's specific conditions including system-wide events and stress specific to individual legal persons and to groups and that these plans must include appropriate conditions and procedures to ensure the timely implementation of recovery actions as well as a wide range of recovery options. From this a presumption can be deduced that recovery plans should be realistic and precise plans of action presenting thought-through substance, realistic steps, and achievable goals. Also, a recovery plan should include provisions for real sources of additional liquidity or funds, and, therefore, institutions may be forced to make prior arrangements involving contracts to ensure availability of the resources needed in the event of applying the recovery plan. This principle is illustrated by Article 9(1) of the BRRD, dealing with the points at which the appropriate actions referred to in the plan may be taken. Further, the EBA has published guidelines on the minimal list of qualitative and quantitative recovery plan indicators.^{*23}

The second principle can be found in the same BRRD recital as the first: a recovery plan should be applied proportionately, reflecting the systemic importance of the institution or the group and its interconnectedness, including through mutual guarantee schemes. Although proportionality is regarded as a general principle of EU law^{*24} laid down in the European Union Treaties^{*25}, the language lists particular aspects to be considered when one is assessing a recovery plan. This principle has been given its strongest material form in Article 4 of the BRRD, which refers to the possibility of the authorities applying simplified obligations for certain institutions with regard to recovery planning. Specification is provided by EBA guidelines on the application of simplified obligations.^{*26} More specific emphasising of the proportionality principle is found in Article 6(7) of the BRRD, regarding measures that competent authorities are permitted to take after the assessment of recovery plans. On one hand, the more important a credit institution or a group is systemically, the more comprehensive its recovery plan should be, and more rigorous measures on the competent authority's part are foreseen accordingly. At the same time, it lays down conditions and points of discretion for relieving some institutions of certain obligations.

The meaning and limits of resolution planning can be derived from the third principle – according to BRRD Article 5(3) recovery plans shall not assume any access to or receipt of extraordinary public financial support. The logic clearly proceeds from the above-mentioned purposeful aim for the recovery and resolution system to avoid using taxpayer money as much as possible, and this distinguishes recovery phase from resolution phase, where using public funds is not out of the question.^{*27}

²⁰ For the minimal list of elements, see the BRRD's Art. 5(5), Art. 7(5), and Annex A.

²¹ Impact Assessment (see Note 9), pp. 64, 94.

²² The EBA is an independent EU body that does not supervise the subject institutions *per se* but does have important guidance, standard-setting, and legislative roles, along with some tasks related to oversight of national authorities. See Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010, establishing a European Supervisory Authority (European Banking Authority) [2010] OJ L 331/12, Art. 1(1) and articles 2, 3, 8, 9, 10, 15, 16, and 173.

²³ EBA guidelines on the minimum list of qualitative and quantitative recovery plan indicators of 23 July 2015, EBA/GL/2015/02.

²⁴ Tor-Inge Harbo, 'The Function of the Proportionality Principle in EU Law' [2010], Vol. 16, No. 2, March 2010, *European Law Journal* pp. 158, 159. – DOI: <https://doi.org/10.1111/j.1468-0386.2009.00502.x>.

²⁵ Consolidated version of the Treaty on European Union [2012] OJ C 326/13, Art. 5(1) and 5(4); Protocol (No. 2) on the application of the principles of subsidiarity and proportionality [2012] OJ C 326/206.

²⁶ EBA guidelines on the application of simplified obligations under Article 4(5) of Directive 2014/59/EU of 16 October 2016, EBA/GL/2015/16.

²⁷ See, for example, government financial stabilisation tools and public equity support tools in the BRRD's articles 56 and 57.

3.2. Supervision over obligations related to recovery plans

As mentioned, the institutions are responsible for drawing up recovery plans themselves, but these plans are made subject to assessment by the competent authority, pursuant to Article 6 of the BRRD. More specifically, according to Article 6(1), institutions are required to submit their recovery plans to the competent authorities for complete assessment. According to Article 6(2)(a) of the BRRD and the directive's Recital 21, that assessment includes evaluating whether the plan is comprehensive and is reasonably likely to maintain or restore the institution's viability, and the financial position of the institution or of the group, taking into account the preparatory measures that the institution has taken or has planned to take. Also, under Article 6(2)(b) of the BRRD, the process includes examining whether the plan and specific options within the plan are reasonably likely to be implemented quickly and effectively in situations of financial stress and avoiding to the maximum extent possible any significant adverse effect on the financial system, including in scenarios which would lead other institutions to implement recovery plans within the same period. According to Article 8(1) and 8(2) of the BRRD, the review and assessment of group recovery plans are a joint responsibility of the consolidating supervisor and competent authorities of subsidiaries, but Article 8(3) of the BRRD clarifies that in the absence of a joint decision the final responsibility lies with the consolidating supervisor.

It is important to note that the competent authorities do not have the capacity to change the recovery plans themselves. Compelling changes to recovery plans is structured as a multi-level process, which is set out in articles 5 and 6 of the BRRD. According to the respective provisions, if a recovery plan is assessed to have deficiencies, the competent authorities have the power to require the institution to submit a revised plan. Next, if the problems persist in the revised plan, the competent authority may direct the institution to make specific changes to the plan. If this nevertheless results in absent or adequate recovery plan, the competent authority may then direct the institution to reduce the risk profile of the institution, including liquidity risk; to enable timely recapitalisation measures; to review the institution's strategy and structure; to make changes to the funding strategy so as to improve the resilience of the core business lines and critical functions; or to make appropriate changes to the governance structure of the institution. While the competent authority may not change the recovery plan, it therefore does possess levers for adjusting the institution's business and structure in response to the recovery plan submitted.

4. Early intervention measures

It is still very much possible that, irrespective of meticulous compliance with prudential requirements, the financial situation of an institution continues to deteriorate. Early intervention is the active phase after preparatory resolution planning and is tied to resolution plans being the means of activating a resolution plan. From Recital 40 to the BRRD it can be seen that the aim is to remedy the deterioration of an institution's financial and economic situation before that institution reaches a point at which the authorities have no other alternative than to resolve it. According to the impact assessment of the BRRD, the early intervention mechanism was designed for the competent authorities' use to oblige banks to undertake certain measures to avert major problems while leaving the control of the institution in the hands of its management.^{*28} This stands in stark contrast to the essence envisioned for the resolution process, wherein the authorities may take charge of the decisions on business operations.^{*29} The early intervention measures represent the competent authorities' powers to force an institution to act in various ways and are available if the financial condition of an institution is rapidly deteriorating or that institution is infringing or is likely to infringe specific requirements of prudential or investment services legislation.^{*30}

Considered in a wider context, the early intervention powers referred to in the BRRD's Recital 40 have been understood as not limited to the measures provided for by the BRRD; they are deemed to encompass also those already provided for in CRD IV for other circumstances. In this wider view, all possible actions that competent authorities direct at failing institutions before resolution actions could be considered early

²⁸ Impact Assessment (see Note 9), p. 83.

²⁹ *Ibid.*

³⁰ See BRRD, Art. 27; EBA guidelines on triggers for use of early intervention measures pursuant to Article 27(4) of Directive 2014/59/EU of 29 July 2015, EBA/GL/2015/03.

intervention measures.^{*31} The question is whether and, if so, how the measures in the BRRD broaden the powers derived from pre-existing EU prudential supervision legislation: CRD IV, the Capital Requirements Regulation, and the Single Supervisory Mechanism (SSM) Regulation^{*32} as the basis of EU prudential supervision legislation.^{*33} The EU's harmonised fundamental prudential rules are formed by CRD IV and the Capital Requirements Regulation, while Article 2(9) and Article 6 of the SSM Regulation created the SSM and that regulation's Articles 1, 4, and 5 and Chapter III gave the European Central Bank the prudential supervisory powers.

The first early intervention measure, set out in Article 27(1)(a) of the BRRD, covers the right to require that the management body of the institution shall implement one or more of the arrangements or measures set out in the recovery plan or to update such a recovery plan when the circumstances that led to the early intervention are different from the assumptions set out in the initial recovery plan. It covers also the right to require implementation of one or more of the arrangements or measures set out in the updated plan within a specific timeframe. In short, the competent authority can require an institution to activate parts of the recovery plan or require updating the plan. Given that this is explicitly provided for by neither CRD IV nor the Capital Requirements Regulation and in consideration of its nature, one can consider this measure recovery-specific.

The second measure, set out in Article 27(1)(b) of the BRRD, is much milder and more general: the management body of the institution may be compelled to examine the situation, identify measures to overcome any problems identified, and draw up an action programme to overcome those problems and a timetable for its implementation. This can be viewed as exercising a power to force an institution into action, but, as it gives free hands to the institution and to the same management who led the institution into trouble, the measure's effectiveness on its own could obviously be disputed. The measure in question greatly resembles the supervisory power provided under the prudential framework to require institutions to present a plan to restore compliance with the requirements of CRD IV or the Capital Requirements Regulation, specified in Article 104(1)(c) of CRD IV, and with other relevant supervisory requirements as set out in Article 16(2)(c) of the SSM Regulation. The measure therefore broadens the powers from those available under CRD IV in situations wherein the institution is not yet in breach of the prudential requirements.

The third early intervention measure, provided for by Article 27(1)(c) of the BRRD, is to require the management body of the institution to convene, or if the management body fails to comply with that requirement convene directly, a meeting of shareholders of the institution. The competent authority may set the agenda and require certain decisions to be considered for adoption by the shareholders. Here, the responsibility for the decision is put on the highest decision-making body of the institution while the competent authority retains the guiding role. There is no such tool provided under the above-mentioned EU prudential legislation. The recovery system seems to shift the boundaries for possible guidance and direction by the competent authority through institution's shareholders.

Set out in Article 27(1)(d) of the BRRD, the fourth measure entails requiring that one or more members of the management body or senior management be removed or replaced if found unfit to perform their duties pursuant to Article 13 of CRD IV or Article 9 of Directive 2014/65/EU. As is implied by the direct reference to the sources of the obligations, this is not a novel or a BRRD-specific measure, and indeed it is included in the toolbox of prudential supervision in the form of Article 16(2)(m) of the SSM Regulation.

Article 27(1)(e) of the BRRD sets out the fifth measure, which is a more specific one: requiring the management body of the institution to draw up a plan for negotiation on restructuring of debt with some or all of its creditors in according to the recovery plan, where applicable. The harmonised EU prudential supervision framework does not feature this specific tool for supervisors. This renders it a recovery-specific measure. However, the prudential supervision legislation does, to some degree, provide for the next two early intervention measures mentioned in Article 27(1)(f) and 27(1)(g) of the BRRD, respectively: to require

³¹ In national legislation, the national supervisor's powers can be formulated quite broadly, irrespective of the EU legislation. For example, the Estonian supervisory authority has a general right to make demands for compliance with legislation regulating the operation of a credit institution. See *Krediiasutuste seadus* (Credit Institutions Act). RT I 1999, 23, 349; RT I, 13.03.2019 98 (in Estonian; English text available at <https://www.riigiteataja.ee/en/eli/501042019006/consolide>, accessed on 30 April 2019), §104(1)(15).

³² Council Regulation (EU) No 1024/2013 of 15 October 2013 conferring specific tasks on the European Central Bank concerning policies relating to the prudential supervision of credit institutions [2013] OJ L 287/63 (the SSM Regulation).

³³ It is possible that similar powers may be derived from other EU or national legislative acts, not covered in this article.

changes to the institution's business strategy and to require changes to the legal or operational structures of the institution. CRD IV Article 104(1)(b) provides for a supervisory power to require reinforcement of the arrangements, processes, mechanisms, and strategies implemented in accordance with articles 73 and 74. The SSM Regulation's Article 16(2)(b) provides for powers to require reinforcement of these four. As Article 73 of CRD IV deals with strategies to assess and maintain internal capital and Article 74 with governance arrangements, and the SSM Regulation does not grant explicit power to require changes in legal structures, the powers conferred on the competent authorities by the recovery system could be interpreted to be somewhat broader.

The final early intervention measure, set out in 27(1)(h) of the BRRD, involves the power to acquire, including through on-site inspections and provide to the resolution authority, all the information necessary in order to update the resolution plan and prepare for the possible resolution of the institution and for valuation of the assets and liabilities of the institution in accordance with Article 36 of the BRRD. In essence, the power to obtain information from the institution reiterates the power to obtain the information needed for prudential supervision laid down in articles 4(3) and 65(3) of CRD IV and Article 10 of the SSM Regulation.

Besides explicit early intervention measures, there are two competent authority powers that are not in the same list of designated early intervention measures *per se* but are closely related to them and have the same purpose. Firstly, according to Article 28 of the BRRD, the competent authority may, if the above named measures are not sufficient to reverse the deterioration of the institution, require the removal of the senior management or management body of the institution, in its entirety or with regard to individuals. The main difference from the similar measure of Article 27(1)(d) of the BRRD, covered above, is the absence of the prerequisite of the member or management body being unfit for the duties. Secondly, if this still proves insufficient, the competent authorities may, according to Article 29 of the BRRD, appoint one or more temporary administrators for the institution themselves. A temporary administrator can be appointed either to temporarily replace the management body or to temporarily work with the management body, with the powers, role and functions, and term of the temporary administrator being determined by the competent authority. As one can clearly see, these powers entail direct involvement in the internal affairs of the institution, depriving the bodies normally entitled to appoint the managers of their right and powers to do so. On the other hand, this is not a power to interfere in the business decisions; its exercise changes only the management. These two measures are also structurally part of Title III of the BRRD, which covers early intervention, and constitute a subset of the powers available to the competent authority before the resolution authority's powers and resolution process. These go a step further than the early intervention measures, and the powers are broadened in certain situations, but they still do not cross the line between the competent authority's powers and the resolution authority's. Therefore, structurally and functionally these two tools should, more likely than not, be considered part of the recovery proceedings.

5. Conclusions

This article has explored the question of whether recovery of credit institutions could be considered a differentiable concept in the BRRD. It can be concluded that indeed, recovery in the sense applied in the BRRD can be distinguished from the pre-existing prudential framework and the concept of resolution on the basis of function and can be usefully treated as a separate concept. In its function, it stands between the pre-existing prudential framework on one hand and the resolution framework on the other. Recovery of credit institutions can be considered to consist of regulations regarding recovery planning, early intervention measures, and two measures not addressed by the starting proposition for this article: the power to remove the senior management or management body without the constraints of the similar resolution-linked measure and the power to appoint a temporary administrator. With regard to the timeline, the order of application of the relevant regulation is prudential—recovery—resolution. However, it is not out of the question that prudential and recovery actions could, to some extent, overlap – with the recovery planning taking place in parallel with application of the prudential regulations and early intervention measures getting applied in conjunction with prudential supervisory powers.

Recovery plans are directly linked to the other main element of recovery, early intervention measures, through the measures activating the plan or parts of it. This article submits that, while some early

intervention measures are recovery-specific and broaden the supervisory powers significantly, some do not. If recovery were not be meant to be considered a separate phenomenon, the overlap of powers between prudential supervision and recovery would not be needed. As indicated in the introduction, the principles and rules applicable to exercising powers that exist in parallel under prudential and recovery regulations could differ between the two sets. Various issues remain for further consideration, for example infringement of rules and principles specific to recovery could bear consequences with regard to liability of the authorities, but this is a subject for future papers.



Anto Kasak

Mag. iur.

Attorney-at-Law

Partner, Kasak & Missik Law Office

Is Full Preference for a Secured Claim in Insolvency Proceedings Justified?

1. Introduction

Credit is the cornerstone of the economy, because credit develops the economy. The more credit there is, the more an economy grows. The World Bank has supported this opinion, declaring that capital and credit are the lifeblood of the modern economy.^{*1} Security instruments raise credit and thereby develop the economy. This argument is based on the assumption that lenders will issue more credit if credit is protected by security. The World Bank found also that secured transactions are of fundamental importance in a well-functioning market economy.^{*2} The purpose of the security is to protect the investment. In other words, the interests of the security-holder are safely protected up to the value of the encumbered assets. Furthermore, if the debtor goes into bankruptcy, the claim of the security-holder is preferred to those of other, unsecured creditors. The secured creditor will receive the proceeds from the sale of the encumbered assets. As Prof. Reinhard Bork has noted, all cross-border insolvency laws respect giving preference to secured claims over unsecured ones.^{*3} Therefore, preference for secured claims protects the instrument of security, which instrument is needed for healthy development of the economy. According to § 153 (1) and (2) of the Bankruptcy Act of Estonia^{*4}, a secured claim is to be preferred over unsecured claims to the extent of the value of the encumbered assets, less the limited amount allocated to cover the payments related to the bankruptcy proceedings under § 146 (1) of the same act of law. Financing the payments related to the insolvency proceedings from the proceeds from the sale of encumbered assets is another topic and beyond the scope of this article. In any case, taking into consideration that this exception is minor (in some cases, the funds allocated for this purpose might even not cover the costs of enforcement related to the encumbered assets), one can state that secured creditors have full priority over unsecured creditors in Estonia.

Legal scholars, among them professors LoPucki, Warren, Klee, Cantlie, Ziegel, Symes, and Finch, have published several papers questioning whether the security-holder indeed should be fully preferred in

¹ World Bank. 'Principles for Effective Insolvency and Creditor/Debtor Regimes', available at <http://pubdocs.worldbank.org/en/919511468425523509/ICR-Principles-Insolvency-Creditor-Debtor-Regimes-2016.pdf> (most recently accessed on 1.5.2019), p. 3.

² *Ibid.*, p. 5.

³ R. Bork. *Principles of Cross-Border Insolvency Law*. Cambridge: Intersentia 2017, p. 173. – DOI: <https://doi.org/10.1017/9781780684659>.

⁴ Pankrotiseadus (Bankruptcy Act). – RT I 2003, 17, 95 (in Estonian).

insolvency proceedings.^{*5} The author of the present article, too, questions the justification for full preference of secured claims with regard to insolvency proceedings. Therefore, the discussion below is aimed at analysing and ascertaining whether restriction of the secured creditors' rights in the insolvency proceedings is justified and necessary for balance of the credit system and the society as a whole, when one takes into consideration public interests and the interests of unsecured creditors. While credit is important for the development of the economy and there is a link between security and credit, an argument is presented by the author against the dogma that secured creditors shall be fully preferred in insolvency proceedings. The paper presents reasons for limiting the secured creditors' rights and offers one proposal for how a secured creditor's rights could be appropriately restricted in the interests of the whole society.

2. The role of credit and securities

2.1. Credit as the circulatory system of the economy

The essence of credit may be understood in any of several ways. From among a host of definitions, the author would like to quote this one, from the Cork Committee Report:

Credit is the lifeblood of the modern industrial economy. The most significant extenders of credit are banks and other lending institutions[,] such as finance houses or building societies. Manufacturers extend credit to customers and customers to manufacturers; the trade supplier extends credit to his customer; credit is the cornerstone of the trading community.^{*6}

Finnish author Jukka Kilpi succinctly noted that the history of credit extends far back into human history. Credit represents a pattern of social behaviour.^{*7}

It is widely agreed that credit is a necessary instrument for advancing the economy, with many scientists holding this opinion. Prof. R.M. Goode has found that credit is of value for running and expanding a business: credit gives the company an opportunity to do more business than would be possible with its own funds alone.^{*8} Prof. P.R. Wood, in turn, concluded that financial institutions collect savings and borrow against this for productive enterprise, which is essential to modern economies.^{*9} In line with the Cork Committee's finding that there is a link between credit and the financial health of a society^{*10}, Dennis and Fox have concluded that enlargement of the credit pool is important for solid development of the economy.^{*11} All of these findings are consistent with the research conducted for the present article. The author agrees with these authors and finds credit to be indisputably an important instrument for healthy economic development.

Credit is used in two ways, as a loan and as an option for consuming goods or services without making payment at the same time (payment is deferred). Fiona Tolmie expressed a similar conclusion about two recognised possibilities for credit thus: there are the possibilities of sales credit and loan credit. Sales credit involves the creditor leaving the price for the goods or services outstanding but charging more to cover the risk. Loan credit, in contrast, entails lending of a sum of money with an agreement that the amount will be returned, along with the interest due.^{*12} Dennis and Fox support this view, noting that credit may take the form of a loan or credit may be extended to enable the use of goods and services upon agreement for deferred payment.^{*13} Both of these applications of credit are needed for the development of the economy.

⁵ J.E. Janger. 'Predicting When the Uniform Law Process Will Fall: Article 9, Capture and the Race to the Bottom.' – *Iowa Law Review* 83(1988), p. 619; J.S. Ziegel, S.I. Cantlie. *Current Developments in International and Comparative Corporate Insolvency Law*. Oxford: Clarendon Press 1994, p. 449; V. Finch, S. Worthington. 'The Pari Passu Principle and Ranking Restitutionary Rights' in F. Rose (ed.), *Restitution and Insolvency*. Mansfield Press 2000, p. 7; C.F. Symes. *Statutory Priorities in Corporate Insolvency Law*. Ashgate Publishing 2008, p. 134. – DOI: <https://doi.org/10.4324/9781315242415>.

⁶ K. Cork. *Insolvency Law and Practice: Report of the Review Committee*. London: Her Majesty's Stationery Office 1982, p. 10.

⁷ J. Kilpi. *The Ethics of Bankruptcy*. London: Routledge 1998, p. 9.

⁸ R.M. Goode. *Principles of Corporate Insolvency Law*. London: Sweet & Maxwell 2011, p. 2.

⁹ P.R. Wood. *Principles of International Insolvency*. London: Sweet & Maxwell 2007, p. 356.

¹⁰ K. Cork (see Note 6), p. 12.

¹¹ V. Dennis, A. Fox. *The New Law of Insolvency*. Law Society Publishing 2003, p. 3.

¹² F. Tolmie. *Introduction to Corporate and Personal Insolvency Law*. Sweet & Maxwell 1998, p. 11.

¹³ V. Dennis, A. Fox (see Note 11), p. 3.

Prof. I.F. Fletcher has discussed whether there can be any social system in which insolvency is impossible. For example, in the absence of credit, could a situation of insolvency occur? His conclusion is that credit is the root reason for insolvency.^{*14} Kilpi too has concluded that non-payment may occur whenever credit is involved.^{*15} Furthermore, Dennis and Fox have added to the discussion the point that, by having entered into a transaction for credit, the debtor and the creditor have agreed on a degree of risk by creating a debt. The risk for the lender is that of non-payment of the debt, whether caused by personal failings, market forces, unforeseen contractual or tortious liability, or just plain misfortune. The risk for the borrower meanwhile is the potential penalty incurred for failing to repay the creditor on time.^{*16} The result is a two-edged sword – on one hand, credit is necessary for the development of the economy, but, on the other, credit is also the cause of insolvency. Therefore, efficient credit develops the economy, while inefficient credit causes insolvency.

The latter issue notwithstanding, credit is still needed, because business is not possible without capital. Dilation of capital is necessary for the vitality and growth of entrepreneurship. Merchants need money to start their own business and to keep it going. For receiving the capital required, they have to apply for credit.^{*17} Taking these flows into consideration, the author concludes that, even though credit is the cause of insolvency, it remains a necessary instrument for the development of the economy.

2.2. Security, necessary for more credit

Prof. Wood noted that security increases capital and credit.^{*18} In the opinion of Prof. Goode, the primary purpose of the security instrument is the reduction of credit risk and assurance of priority relative to unsecured creditors in case of the debtor's insolvency.^{*19} Prof. A. Hudson identifies insolvency risk as the risk of the insolvent person's incapability of accounting for any of said person's obligations. He adds that the risk is that one receives nothing in return from the insolvent person^{*20}, whereas a security should protect the creditor from the risk of insolvency of the debtor.^{*21} Similarly, Prof. Wood opines that a security should fully protect the creditor against insolvency of the debtor.^{*22} Considering the reasons for utilising a security arrangement, Prof. V. Finch concluded that one major purpose is to have a privileged claim over unsecured creditors in the event of insolvency entailing distribution of the company's assets.^{*23} Furthermore, E.A. Webber concluded that security has another vital role, in borrowing in pursuit of more productive business operations. Before deciding whether to extend a loan, the rational lender seeks a reasonable perspective on whether the loan will be paid back with interest. When a loan is secured, the lender has the right to receive a dividend from the sale of the collateral in the event that the debtor does not repay the loan. This mitigates the lender's risks and the costs of providing the loan.^{*24} For that reason, a secured lender feels more certain about extending the loan than an unsecured lender, which unbalances the system as a whole.

Even the European Central Bank demands collateral before advancing funds to commercial banks.^{*25} If one is able to offer a security, the likelihood of receiving a loan increases. In this connection, Prof. Finch indicates that banks demand security in the majority of commercial loan arrangements; obtaining security is the rule in relation to most cases of borrowing. A security arrangement is attractive to lenders because

¹⁴ I.F. Fletcher. *The Law of Insolvency*. London: Sweet & Maxwell 2009, p. 4.

¹⁵ J. Kilpi (see Note 7), p. 9.

¹⁶ V. Dennis, A. Fox (see Note 11), p. 3.

¹⁷ M. Safley. *The History of Bankruptcy*. Oxon: Routledge 2013, p. 55. – DOI: <https://doi.org/10.4324/9780203066836>.

¹⁸ P.R. Wood. *Principles of International Insolvency* (see Note 9), p. 356.

¹⁹ R. Goode. *Goode on Legal Problems of Credit and Security*. London: Sweet & Maxwell 2013, p. 1.

²⁰ A. Hudson. *The Law of Finance*. London: Sweet & Maxwell 2013, p. 30.

²¹ *Ibid.*, p. 634.

²² P.R. Wood. *Principles of International Insolvency* (see Note 9), p. 356.

²³ V. Finch. *Corporate Insolvency Law: Perspectives and Principles*. Second edition. London: Cambridge University Press 2009, p. 89. – DOI: <https://doi.org/10.1017/CBO9781139175395>.

²⁴ E.A. Webber. 'The Tension between Bankruptcy and Secured Credit: A High-Level Overview of a Long-Standing Debate' in H. Peter, N. Jeandin, J. Kilbourne (eds), *The Challenges of Insolvency Law Reform in the 21st Century*. Genf 2006, p. 84.

²⁵ G. McCormack, R. Bork. *Security Rights and the European Insolvency Regulation*. Cambridge; Antwerp, Belgium; Portland, OR: Intersentia 2017, p. 12. – DOI: <https://doi.org/10.1017/9781780684987>.

it reduces their loan risk by granting them a privileged claim in the event of the debtor's insolvency.^{*26} Research has shown that the security does indeed protect the interests of the security-holder against the risk of debtor insolvency in practice. The risk is prevented in such a way that the security-holder has the assurance that, whatever happens to the debtor, even insolvency, the encumbered assets will be sold and the security-holder's claim will be satisfied in the amount received from the sale of assets. Therefore, numerous writings have discussed the necessity of security instruments in the context of development of the economy.

This paper goes further, considering whether it has actually been proved that security is needed for the development of the economy or, instead, this is just widely believed dogma. The main arguments in support of securities are, firstly, that financial institutions will not grant unsecured loans in the same amount as secured loans and, secondly, that the costs of a secured loan, including those related to the interest rate, will be less than those for an equivalent unsecured claim. At the same time, Webber found that limiting the priority for the secured rights to the proceeds from realisation of the encumbered assets affects the market in the sense that secured credit is less readily available and is more expensive.^{*27} From another angle, the author of the present piece argues that, since the purpose of a financial institution is to earn money via financing, which includes lending money, it would be rather unlikely that these institutions would not give loans without security. After all, holding the money without earning anything goes against the purpose of financial institutions. It seems clear also that interest rates will be subject to bargaining on the free market, and everyone is entitled to bargain equally for a 'fair' interest rate in the case of no security. We will not consider this topic further here, since it is a very broad one that is worthy of fuller analysis and discussion, elsewhere.

According to Prof. Wood, the advantages of security interests are the protection of creditors in regard of insolvency, availability of credit, reduced cost of credit, private rescue, and fair exchange for the credit. As for objections to security interests, one can cite the violation of bankruptcy equality, a position of excessive power held by the secured creditor, the risk of careless lending, priority risks, and that the secured creditor can disrupt a rescue.^{*28} Prof. E. Warren found that, irrespective of the disagreement in academic discourse, security interests enjoy protection and bankruptcy law protects a secured creditor such that creditors with security interests generally enjoy better protection in bankruptcy than do those without them.^{*29} Notwithstanding the large number of objections to security interests holding sway, the dominant opinion remains that the security instrument is necessary for the robust development of the economy. While general opinion holds that the security is necessary for economic development and that preference should be granted accordingly in insolvency proceedings, one can rightly express doubts as to whether the full priority typically afforded to secured claims in insolvency proceedings is justified. The arguments in support of the preference for secured creditors are analysed next, in this light.

3. Giving preference to secured credit

Prof. Bork notes that secured creditors enjoy preferential satisfaction of their claims up to the value of the collateral and that cross-border insolvency laws typically state expressly that foreign security rights are not affected by domestic insolvency proceedings.^{*30} This illustrates well that preference for secured creditors is widely acknowledged in most jurisdictions. In author's opinion, the purpose of the security is the main factor in the preference granted to secured claims: the security protects the creditor against the risk of debtor insolvency. The security must be effective in the event of insolvency by conferring preference. Without the preference for the secured claim in insolvency proceedings, the security loses its purpose – protection of secured creditors. Prof. Finch found that, through security rights having priority over unsecured claims, the problematic effects of *pari passu* distribution are avoided.^{*31} Warren and Bussel add that a secured creditor's claim enjoys top priority in the hierarchy of claims: the secured creditor's claim will be satisfied

²⁶ V. Finch, 'Security, Insolvency and Risk: Who Pays the Price?' – *The Modern Law Review* 62 (1999) / 5 (Sep.), p. 634. – DOI: <https://doi.org/10.1111/1468-2230.00230>.

²⁷ E.A. Webber (see Note 24), p. 97.

²⁸ P.R. Wood, *Principles of International Insolvency* (see Note 9), p. 356.

²⁹ E. Warren, Chapter 11: Reorganizing American Business. Aspen Publishers 2008, p. 46.

³⁰ R. Bork (see Note 3), p. 125.

³¹ V. Finch, *Corporate Insolvency Law* (see Note 23), p. 75.

by the proceeds from the collateral sold, and every unsecured creditor's claim will be satisfied from the remaining amount insofar as possible after the secured claims are fully satisfied.^{*32} Similarly, Prof. Wood characterises secured creditors as super-priority creditors who are paid in full or up to the amount of the collateral and who can take assets out of the estate without constraint by the *pari passu* rule.^{*33} The opinions that this is justified gains the support of Prof. R.J. Mokal, who has concluded that the secured creditor should have priority over other creditors and stand at the head of the queue for the pay-out from the sale of the collateral.^{*34} Much of the literature concludes that a secured claim should be preferred with regard to insolvency proceedings, where 'preference' is defined as meaning that the debtor's insolvency does not affect the security-holder's right to receive the proceeds from the sale of the encumbered property. Again, if the security-holder's claim is equal to or greater than those proceeds, the unsecured creditors receive nothing from the sale of the encumbered property. Thus, the unsecured creditors and secured creditors are not treated equally, and secured creditors are granted preference when insolvency proceedings commence.

This preference for the secured creditors over unsecured creditors constitutes an exception to the *pari passu* principle. The question is, whether it is a true or a false exception to the *pari passu* principle. According to Prof. Goode, giving preference to secured creditors is a false exception to that principle, because encumbered assets do not truly belong to the company experiencing insolvency.^{*35} The author of the present article would argue, in contrast, that whether it is, in fact, an exception to the *pari passu* principle depends on the legal system – that is, on whether or not the encumbered asset is among the insolvency assets in the relevant system. There are some systems – for example, in English insolvency law – in which encumbered assets do not belong to the debtor's company, while in other systems, such as that represented by Estonian insolvency law, encumbered assets are considered to belong to the debtor and hence are subject to enforcement by the trustee. This is the case also in Germany, but only for movables/claims, not for immovables. Prof. Wood notes that secured creditors are 'separatists' because secured creditors can pay themselves out of the collateral to the extent of its value by realising it.^{*36} He explains that, even if security rights are preferred all over the world, it does not follow from this that secured creditors are always 'separatists'. That depends also on the legal system – i.e., on whether or not the collateral is part of the insolvency estate and whether the security-holder has the right to enforcement related to the collateral without the consent of the insolvency trustee.

Preference for secured creditors over unsecured creditors is an infringement of the principle of equal treatment of creditors. Prof. Fletcher has presented the principle of equal treatment of creditors as sometimes expressed by means of the Latin maxim '*par est condicio omnium creditorum*'^{*37}; however, the preference extended to secured creditors is justified by another principle, referred to as the principle of respect for pre-insolvency rights. According to Prof. Finch, the pre-insolvency rights should be respected. One consequence of applying this principle is that proprietary claimants may assert their claims *in specie* against the defendant's estate. The remainder constitutes the pool of assets from which personal claims must be satisfied.^{*38} Prof. Goode has noted that corporate insolvency law respects the rights obtained under general law prior to liquidation^{*39}, and Prof. D. Synvet too explains that the law of insolvency does not exist in isolation. A balance must be struck between insolvency law and other branches of law. The law on securities *in rem* creates situations involving exclusive rights.^{*40} Prof. D.G. Baird concludes that the exercise of bankruptcy law should respect the secured creditors' rights established under non-bankruptcy law; in bankruptcy proceedings, secured creditors should be treated approximately the same as outside the domain

³² W.D. Warren, D.J. Bussel. *Bankruptcy*. New York: Foundation Press 2002, p. 115.

³³ P.R. Wood. 'The Bankruptcy Ladder of Priorities.' – *Business Law International* 14 (2013) / 3 (Sep.), p. 215.

³⁴ R.J. Mokal. 'The Search for Someone to Save: A Defensive Case for the Priority of Secured Credit.' – *Oxford Journal of Legal Studies* 22 (2002) / 4, p. 688. – DOI: <https://doi.org/10.1093/ojls/22.4.687>.

³⁵ R.M. Goode. *Principles of Corporate Insolvency Law* (see Note 8), p. 246.

³⁶ P.R. Wood. 'The Bankruptcy Ladder of Priorities' (see Note 33), p. 215.

³⁷ I.F. Fletcher. *Insolvency in Private International Law: National and International Approaches*. Oxford: Clarendon Press 1999, p. 9.

³⁸ V. Finch, S. Worthington (see Note 5), p. 1.

³⁹ R.M. Goode. *Principles of Corporate Insolvency Law* (see Note 8), p. 93.

⁴⁰ D. Synvet. 'The Exclusion of Certain Creditors from the Law of Collective Proceedings' in W.-G. Ringe, L. Gullifer, P. Théry (eds), *Current Issues in European Financial and Insolvency Law: Perspectives from France and the UK*. Oxford; Portland, OR 2009, p. 160. – DOI: <https://doi.org/10.5040/9781472560476.ch-011>.

of bankruptcy.^{*41} He is supported in this view by Prof. T.H. Jackson, who suggests that priority rights established outside the scope of bankruptcy should be respected by bankruptcy law.^{*42}

As alluded to above, previous work has juxtaposed two principles. The first is the principle of equal treatment of creditors, and the second is the principle of respect for pre-insolvency rights. The implementation of these principles is sometimes contradictory. On one hand, every creditor should be treated equally, which means that secured creditors should be treated on par with unsecured creditors; on the other hand, pre-insolvency valid rights *in rem* should be respected in insolvency proceedings, which means that the security should be valid in insolvency proceedings and the secured creditor should be accorded preference over other, unsecured creditors. Security is obtained for the purpose of protecting the secured claim, which means that the security-holder can have confidence that, whatever happens, said creditor's claim is protected with collateral. Even if only one avenue were to render it possible to bypass protection of the secured claim, that claim would be cast into doubt, which leads, in turn, to uncertainty of the security. Researchers have argued that uncertainty of the secured claim would reduce the use of security instruments and, therefore, the amount of credit would fall, in consequence of which the development of the economy would suffer. According to Prof. B. Wessels, enforcing the principle of recognising the pre-insolvency rights helps to increase the credit available.^{*43} In a similar vein, Prof. Fletcher found the creditors' expectation that their pre-insolvency rights *in rem* will remain valid in the event of insolvency proceedings to be an important element of the credit system on both national and international level.^{*44} In addition, Webber cited the factor that businesses can obtain credit more readily, or on less burdensome terms, if they can provide the lender with security.^{*45}

The above-mentioned arguments suggest that respecting pre-insolvency rights will increase credit. Therefore, the prevailing understanding is that secured claims should be preferred in insolvency proceedings, lest decreased importance of security arrangements cause a decrease in credit; secured claims being regarded as equal to unsecured claims in insolvency proceedings would thereby impede development of the economy. This paper, however, challenges the view that secured claims should be fully preferred in insolvency proceedings, with an argument that a link between preference for secured claims in insolvency proceedings and expansion of the credit pool is not fully proven. It is posited that not the amount but the efficiency of the credit is decisive for development of the economy. Again, **inefficient** credit causes insolvency. Fair restriction of secured creditors' rights should make credit more efficient and develop the economy more efficiently.

4. Restriction of the rights of secured creditors

4.1. Justification for the restriction of secured creditor's rights

Earlier sections of this paper have pointed to views expressed by many authors holding that a secured creditor's rights should be fully preferred in insolvency proceedings. Still, there are some contradictory findings. Firstly, the Cork Committee Report already proposed taking a little from security-holders and distributing this relatively small sum among the unsecured creditors in purpose of relieving injustice and increasing the participation of unsecured creditors in insolvency proceedings.^{*46} Professors LoPucki, Warren, and Klee are among the others who have argued against full priority of the secured creditor's claims in insolvency proceedings.^{*47} Professors Ziegel and Cantlie suggested that the claims of the government and employees should have super-priority over secured claims, so as to increase the secured creditors' incentive to engage

⁴¹ D.G. Baird. 'Loss Distribution, Forum Shopping and Bankruptcy: A Reply to Warren' in J.S. Bhandari, L.A. Weiss (eds), *Corporate Bankruptcy: Economic and Legal Perspectives*. Cambridge University Press 1996, p. 106. – DOI: <https://doi.org/10.1017/cbo9780511609435.012>.

⁴² T.H. Jackson. *The Logic and Limits of Bankruptcy Law*. Harvard University Press 1986, p. 157.

⁴³ B. Wessels. *Cross-Border Insolvency Law*. Kluwer Law International 2007, p. 609.

⁴⁴ I.F. Fletcher. *Insolvency in Private International Law* (see Note 37), p. 10.

⁴⁵ E.A. Webber (see Note 24), p. 85.

⁴⁶ K. Cork (see Note 6), p. 32.

⁴⁷ J.E. Janger (see Note 5), p. 619.

in responsible monitoring.^{*48} They added that giving super-priority to claims of government entities and employees too, should lead to more timely intervention in the actions of the potential debtor before insolvency occurs.^{*49} Finally, Prof. Finch stated that arguments of fairness and efficiency do not justify complete preference of the claims of the secured creditors in insolvency proceedings and the corresponding disproportionate loss for the unsecured creditors. She also concluded that it is not clear why unsecured creditors should be discriminated against.^{*50}

The above conclusions are consistent with the research for the present paper. Although the reasons cited in the literature for restricting secured creditors' rights may vary, the results will be the same. While Prof. Ziegel and Prof. Cantlie argued for restricting the rights of secured creditors on the basis of the better monitoring and timely intervention that should ensue, for prevention of insolvency of the debtor^{*51}, Prof. C.F. Symes suggested that in certain cases secured creditor's rights should be restricted in consideration of employees' rights. He explained that restricting the secured creditor's rights should shift some of the risk that can lead to insolvency from unsecured creditors partly to secured creditors. Again, in that case, monitoring of risks would be a task also for secured creditors, and the secured creditors have an incentive and perhaps greater opportunity to intervene earlier in the activity of the debtor and correct unsuccessful management as soon as possible.^{*52}

Prof. Finch expressed the opinion that not only is full preference for security-holders inefficient and unjustified but there are no counter-arguments to justify it.^{*53} The results cited in the relevant paper were contradicted by Prof. Mokai^{*54}, and a rather interesting debate about the matter followed between the two scholars. Their discussion focused on efficiency and justice, including arguments addressing involuntary creditors. While that debate provided a good starting point, one could rightly recommend that all possible reasons for restricting the secured creditor's rights be analysed together, not separately, and on a more general, abstract level. Hence, we now turn to some more high-level, abstract arguments in support of the restriction of a secured creditor's claim in a case of insolvency proceedings. The question of restricting the secured creditor's rights is, in fact, one with much wider implications than previously presented, where the general idea behind favouring such a restriction is an aim of forcing the security-holder to play a more serious part in the insolvency proceedings to the end of the rescue of the debtor.

Insolvency of a debtor is not merely a problem of the debtor or the creditor. It is also a problem of surrounding society. This view is consistent with findings of past studies as expressed in the Cork Committee Report and the work of Prof. Warren, Prof. Keay, and others.^{*55} The main conclusion can be summarised thus: for sustainable environmental development, the interests of the debtor, the creditors (secured and unsecured creditors alike), and society as a whole should be balanced. Full protection of the security-holder retards the security-holder's interest in the future of the debtor. While remaining completely protected, the security-holder need not be interested in how the debtor's financial affairs develop. After all, the security-holder will receive the pay-out from the sale of the encumbered property in any case. Unsecured creditors, on the other hand, go totally unprotected, because the secured creditor's preferential position cannot be changed by their will; only the will of the debtor and the secured creditor matter. Hence, in the event of the debtor's insolvency, it is the unsecured creditors who are in the worst situation, incapable of taking any action to avoid the loss, while the security-holder's claim is fully protected even in cases wherein the reason for insolvency was precisely the continuation of the debtor's business activity as enabled by the conferring of additional credit via the secured loan. The secured creditor's decision to extend credit to the debtor should be contingent upon crucial importance to that creditor of having an interest in monitoring so as to intervene in the activity of the debtor in due time if necessary for purposes of the rescue of the debtor. Accordingly, restriction to protection of the secured creditor's rights should force the security-holder to be more interested in the debtor's activity both before and after the decision to extend credit. If the security-

⁴⁸ J.S. Ziegel, S.I. Cantlie (see Note 5), p. 449.

⁴⁹ *Ibid.*, p. 445.

⁵⁰ V. Finch, S. Worthington (see Note 5), p. 7.

⁵¹ J.S. Ziegel, S.I. Cantlie (see Note 5), p. 445.

⁵² C.F. Symes (see Note 5), p. 134.

⁵³ V. Finch, 'Security, Insolvency and Risk' (see Note 26), p. 668.

⁵⁴ R.J. Mokai (see Note 34), pp. 688–728.

⁵⁵ K. Cork (see Note 6); F. Tolmie (see Note 12), pp. 3–4; A.R. Keay, P. Walton. *Insolvency Law: Corporate and Personal*. Second edition. Jordan Publishing 2008, p. 26.

holder's rights are limited, said entity will lend more responsibly and will monitor the activity of the debtor more intensively and effectively, because there is good incentive to do so: otherwise, the risk of loss is going to increase. Restriction of a secured creditor's rights should force a prospective secured creditor to consider whether to offer a loan to this entity at this time. Better-considered decisions before secured credit is extended bring about more efficient lending. The number of risky secured loans should fall when a secured creditor's rights are restricted. Simultaneously, that restriction should force the secured creditors to monitor the activity of the debtor from the moment of enabling the loan all the way to the moment of the final payment on it. Again, in the absence of such restriction, the secured creditor has no concrete reason for monitoring the activity of the debtor: after all, the loan is secured against any outcome. This bears reiterating: in contrast, a secured creditor with restricted rights is more interested in minimising loss and maximising the unsecured income and, hence, is forced to monitor the activity of the debtor and to interfere, if doing so is needed, to rescue the debtor from insolvency. This is why restriction of the secured creditor's rights means not less credit but more effective credit. Finally, it is important to stress that the secured creditor's interest in actively avoiding the debtor's insolvency decreases the risk not only for the secured creditor but for the unsecured creditor as well. This would be an honest bargain, in that the creditor is protected and at the same time the unsecured creditors' risk is lowered and the actual interests of the debtor and society are set in good balance.

4.2. Options for the restriction of secured creditor's rights

The Cork Committee suggested an alternative to the existing regulation of floating charges. In summary, the committee proposed designating ten per cent of the encumbered estate as a 'fund'. The idea behind this fund is that the claim of a floating-charge-holder is decreased by ten per cent and the difference is distributed among the unsecured creditors. The Cork Committee proposed that, while the debenture-holder himself should not participate with the unsecured creditors in the ten-per-cent fund, the unsecured creditors could be prevented from doing better than the debenture-holder through imposition of an upper limit such that the percentage that the unsecured creditors recoup from their debts does not, in any event, exceed the percentage received back by the debenture-holder.^{*56} The Cork Committee argued that such a system would ensure fair pay-out from the insolvent estate and could also encourage unsecured creditors to participate actively in governing the process of insolvency. In addition, it has been argued that increasing the pay-outs to the unsecured creditors helps them to remain in business themselves and also decreases the unfairness caused by the current^{*57} floating-charge regulation as found in English law.^{*58}

Prof. Warren proposed a change to Article 9-301 of the Uniform Commercial Code of the United States. To wit, she proposed that twenty per cent of the proceeds from the sale of collateral in insolvency proceedings be set aside by the bankruptcy trustee to pay the claims of unsecured creditors.^{*59}

One option for restricting the secured creditors' rights would be to take a certain amount from the funds generated via the sale of the secured property and distribute it to the unsecured creditors. A sensible amount for the limit to the preference of the claims by security-holders might be the above-mentioned twenty per cent. In the remaining part, such claims should be addressed in the distribution to the unsecured creditors in line with the *pari passu* principle. Under this option, twenty per cent of the funds generated via the sale of the secured property shall be taken away from the secured creditor and distributed on *pari passu* terms among the unsecured creditors and, to the extent that his claim remained unsatisfied, the secured creditor.

For example, let us consider a case in which the security-holder has a claim of 100,000 EUR and the value of the secured assets is 100,000 EUR while there are unsecured claims that together amount to 80,000 EUR (with the first unsecured creditor's claim being for 10,000 EUR, the second for 30,000 EUR, and the third for 40,000 EUR), wherein the secured assets are sold for 100,000 EUR. Under § 153 and § 154 of the Bankruptcy Act of Estonia, the amount distributed to the secured creditor is 100,000 EUR and to the unsecured creditors is 0 euros, if the payments related to the insolvency proceedings are not taken into account. Even if the payments connected with the insolvency proceedings are considered, the pay-out

⁵⁶ K. Cork (see Note 6), p. 347.

⁵⁷ Here the committee report referred to the law that was valid at the time of the report's composition.

⁵⁸ K. Cork (see Note 6), pp. 346–347.

⁵⁹ J.E. Janger (see Note 5), p. 575.

for each of the unsecured creditors is still 0 euros, while the secured creditor will receive a little less than the full amount due (paying the costs related to the insolvency proceedings from the proceeds of the sale of secured assets is another topic that would require more space than is available here, so the example is simplified for the present discussion). In contrast, if the option described above were applied in this scenario, the consequences would be the following. The secured assets are sold for 100,000 EUR, and eighty per cent of the proceeds, which comes to 80,000 EUR, will be paid directly to the secured creditor. The remaining amount from the sale, or 20,000 EUR, will be distributed under the *pari passu* principle to the unsecured creditors and to the secured creditor to the extent that his claim remains unsatisfied. In that case, there would be four unsecured claims (the first unsecured creditor's claim, for 10,000 EUR; the second unsecured creditor's claim, for 30,000 EUR; the third unsecured creditor's claim, for 40,000 EUR; and the unsecured claim amount remaining from the former security, in the amount of 20,000 EUR), which together come to 100,000 EUR. In accordance with the *pari passu* principle, from the remaining 20,000 EUR in proceeds, the first unsecured creditor will receive ten per cent (2,000 EUR), the second unsecured creditor will receive thirty per cent (6,000 EUR), the third unsecured creditor will receive forty per cent (8,000 EUR), and the former secured creditor will receive twenty per cent (4,000 EUR). Thus, the entity that had the secured credit receives, all told, 84,000 EUR (80,000 EUR + 4,000 EUR) and the other, unsecured creditors receive, in total, 16,000 EUR (again, the first unsecured creditor getting 2,000 EUR, the second getting 6,000 EUR, and the third receiving 8,000 EUR). In the latter case, the secured creditor receives sixteen per cent less and each unsecured creditor receives twenty per cent more than if full preference had been given to the secured claim.

This author is of the opinion that taking that small amount away from secured creditors and distributing it among the unsecured creditors should motivate secured creditors and unsecured creditors alike to express interest and participate more in the activities of the debtor. The greater likelihood of earlier intervention by the secured creditor in the actions of a debtor headed for insolvency increases the chances of rescue of an insolvency-bound debtor and should reduce the liquidation rate among insolvent debtors. It is vital in this connection that a secured creditor who is keenly aware that the amount of the pay-out received from the insolvent debtor's assets depends on his actions will be more motivated to behave in a manner that encourages the maximum possible amount for that pay-out. This would be in the interest of all creditors. At the same time, the secured creditor does remain protected to eighty per cent of the value of the security plus the amount under *pari passu* in the remaining part. This author contends that taking away such a small amount from the secured creditor and distributing it among the unsecured creditors would not harm secured creditors so much as it makes credit more efficient and relieves injustice. More efficient credit does more for development of the economy than does inefficient credit, which causes more cases of insolvency. One negative consequence of this option might be more expensive credit, although that is far from a foregone conclusion, because credit rates would still be subject to bargaining in the market. The benefit would lie in more effective credit, which means that, as the outcome is articulated above, a secured creditor would be more interested in the behaviour of the debtor both before and after the decision to extend credit. The other benefits emphasised above are worth remembering too: better monitoring and earlier intervention by the secured creditor in the actions of the debtor, which should increase the number of cases of rescues of debtors headed for insolvency. With more efficient rescues, everyone involved in the market wins. Therefore, one can conclude that implementing this option would not harm the interests of the secured creditor as much as it helps to render the whole system more efficient.

5. Conclusions

It seems abundantly clear that credit develops the economy, but, although credit is necessary for the development of the economy, it is also the cause of insolvency. In that efficient credit develops the economy while inefficient credit leads to cases of insolvency, the efficient development of the economy requires that credit be as efficient as possible.

Though numerous objections to the security interest have been raised, the prevailing opinion is still that the instrument of security is necessary for robust development of the economy. General opinion holds that, the security being necessary for economic development, the security-holder should be preferred in insolvency proceedings; however, the present article has outlined strong doubts as to whether according

full priority to secured claims in insolvency proceedings is justified. The challenge to the prevailing opinion is centred on an argument that a link between preference for secured claims in insolvency proceedings and expansion of the credit pool has not actually been proven. Again, the author proposes instead that it is not the amount but the efficiency of credit that develops the economy. Inefficient credit is the root of insolvency. Fair restriction of the secured creditors' rights makes credit more efficient and develops the economy more efficiently.

Full protection of the security-holder minimises that party's interest with regard to the future of the debtor. As long as the security-holder is fully protected, why does the security-holder need to be interested in the development of the debtor's financial affairs? The security-holder will be paid back from the sale of the encumbered property in any case. In contrast, the unsecured creditors are totally unprotected, because secured creditors' preferential position does not depend on their will; it is contingent only on the will of the debtor and the secured creditor. In these circumstances, the debtor's insolvency places the unsecured creditors in the worst situation, incapable of taking any action to avoid loss, yet the security-holder's claim is fully protected even in cases wherein the insolvency occurred precisely because the additional credit from the secured loan made it possible to continue the debtor's business activity. The secured creditor's decision to extend credit to the debtor is intimately bound up with finding the appropriate time for intervention in the activities of the debtor for the purpose of the debtor's rescue. Restriction of the protection extended to a secured creditor's rights should force the security-holder to be more interested in the activities of the debtor, both before and after the decision to grant credit. A security-holder whose rights are limited is going to lend more responsibly and monitor the activity of the debtor more intensively and effectively, because the risk of loss would increase otherwise. Again, the main outcome of restricting the secured creditor's rights is not actually less credit but more effective credit. A secured creditor's proactive efforts to avoid the debtor's insolvency decrease the risk not only for said creditor but also for each unsecured creditor. This would represent a true win-win scenario: the secured creditor is protected; at the same time, the unsecured creditors' risk is reduced; and the actual interests are balanced, including those of society.

The author is of the opinion that an amount of twenty per cent taken from the secured creditors and distributed over the unsecured and secured creditors' remaining claims under *pari passu* is an appropriate proportion to have the above-mentioned effect of motivating the secured creditor to take interest and participate more in the activities of the debtor. While not an overly burdensome amount, it should nonetheless create an incentive for earlier intervention of a secured creditor in the activities of a debtor headed for insolvency, thereby increasing the chances of rescue and decreasing those of liquidation of an insolvent debtor. In addition to the effect of the secured creditor, in the knowledge that the amount received from an insolvent debtor's funds is going to depend on his action, being more motivated to behave in a manner conducive to the pay-out being at its maximum (which is in the interest of all creditors), this amount ensures that the secured creditor remains protected to at least eighty per cent of the value of the security and the proceeds under *pari passu* in the remaining part. By the same token, again, removing so small an amount from the secured creditor and distributing it among the unsecured creditors is unlikely to harm the secured creditors so much as make the credit system more efficient and reduce injustice.

While more efficient credit has a more favourable effect for economic development than does inefficient credit (the latter yields insolvency), are there any possible negative consequences? This author disputes the notion that more expensive credit might result, since credit rates would be bargained for through market forces. This option should far outweigh any negatives through bringing more effective credit, via which a secured creditor would be more interested in the behaviour of the debtor (both prior to and after the decision on extending credit), and through encouraging better monitoring and earlier intervention on the part of secured creditors (such that more cases of rescue are possible and debtors' actions are subject to more appropriate scrutiny). Greater efficiency – whether at the rescue stage or before things progress that far – means that everyone engaged in the market wins. Therefore, implementation of this option clearly will not harm the interests of the secured creditor as much as it helps to change the whole system, rendering it more efficient.

Abbreviations

SGD	consumer sales directive	ECHR	European Convention on Human Rights
CESL	common European sales law	TEU	Treaty on the European Union
EEA	European Economic Area	TFEU	Treaty on the Functioning of the European Union
GEV	Gesetz zur Ergänzung der Verfassung	BverfG	Federal Constitutional Court in Germany
GRCh	Charta der Grundrechte der Europäischen Union	ICSI	intracytoplasmic sperm injection
StGH	Staatsgerichtshofs Estlands	IVF	in vitro fertilisation
BverfG	Bundesverfassungsgerichts	öFMedG	Austrian Artificial Procreation Act
EMRK	Europäischen Menschenrechtskonvention	VfGH	Austrian Constitutional Court
LTs	language technologies	OGH	Supreme Court of Justice in Austria
CA	Estonian Copyright Act	AdVermiG	German Adoption Placement Act
WIPO	World Intellectual Property Organization	IMTFE	International Military Tribunal for the Far East
ECC	European Copyright Code	UNWCC	United Nations War Crimes Commission
TDM	text and data mining	ICTY	International Criminal Tribunal for the Former Yugoslavia
API	application programming interface	ICTR	International Criminal Tribunal for Rwanda
EM	electronic monitoring	RS	Rome Statute
PC	Penal Code	ICC	International Criminal Court
CC	Criminal Code	MCP	Metoclopramid (medication)
SPD	Social Democratic Party (Germany)	PLD	Product Liability Directive
CDU	Christian Democratic Union (Germany)	NHTSA	National Highway Traffic Safety Administration (U.S.)
CPA	Criminal Procedure Act	BAST	German Federal Highway Research Institute
CS	community service order	GPSD	General Product Safety Directive
WDS	Verwarnung mit Strafvorbehalt	StVG	Straßenverkehrsgesetz, German Traffic Act
JGG	Juvenile Justice Act (Germany)	BRRD	Bank Recovery and Resolution Directive
BGH	Bundesgerichtshof, Federal Court of Justice of Germany	CRD IV	Capital Requirements Directive
AE-StGB	Alternative Draft Bill	SRM	Single Resolution Mechanism
EschG	German Embryo Protection Act	EBA	European Banking Authority
PGD	pre-implantation genetic diagnostics	SSM	Single Supervisory Mechanism
AME-FmedG	proposal for a law on reproductive medicine		
GG	Basic Law of Germany		



100 Years Later

The University of Tartu School of Law celebrates the centenary of the establishment of the Estonian national university with an academic conference.

Thursday, 3 October

Plenary session – Estonian Legal Science in 2019

(Assembly Hall of the University of Tartu, web streaming)

- Moderator: **Gaabriel Tavits**, *Director of the School of Law, Professor of Social Law*
- 11:00 Opening by the rector of the University of Tartu, Professor **Toomas Asser**
Welcoming addresses by **Villu Kõve**, Chief Justice of the Estonian Supreme Court, and **Ülle Madise**, Chancellor of Justice
- 11:20–11:40 **Gaabriel Tavits**, *Director of the School of Law, Professor of Social Law*
The School of Law of the University of Tartu at a National University – We Can Change the World!
- 11:40–12:10 **Marju Luts-Sootak**, *Assistant Director for Research, School of Law, Professor of Legal History*
The World's Best Estonian Legal Science – at the University of Tartu, of Course!
- 12:10–12:30 **Age Värvi**, *Assistant Director for Academic Affairs, School of Law, Associate Professor of the Law of Obligation*
21st-century Legal Education at a National University
- 12:30–12:50 **Ants Nõmper**, *dr.iur., Member of the Council of the University of Tartu, Attorney-at-Law, and Managing Partner, Law firm Ellex Raidla*
A Crossroads in Studies of Law
- 12:50–14:00 Lunch, with participants moving to various sessions

Panel sessions dedicated to special-interest topics

14:00–16:00

The Limits of Judicial Discretion in Private Law

Moderator: **Irene Kull**, *Professor of Civil Law*

Irene Kull, *Professor of Civil Law*

Judicial Discretion and Contracts

Janno Lahe, *Professor of Delict Law*

Limits of the Judicial Discretion in Ordering Payment of Compensation for Non-patrimonial Damage

Villu Kõve, *Associate Professor of Civil Law*

Limits of the Judicial Discretion in Ending Common Ownership and Dividing Joint Property

Tiina Mikk, *mag. iur., Assistant of Civil Law, doctoral student at the University of Tartu*

Limits of the Judicial Discretion in Interpreting Wills

International Law, a ‘Nuclear Bomb of a Small Country’ (L. Meri)?

Moderator: **Lauri Mälksoo**, *Professor of International Law*

Merilin Kiviorg, *DPhil (Oxon), Senior Research Fellow of International Law*

Disputes over the Role of Human Rights in Modern International Law

Alexander Lott, *Lecturer of Administrative Law*

The Estonian Maritime Boundaries – Known and Unknown

Lauri Mälksoo, *Professor of International Law*

Estonia as a United Nations Security Council’s Elected Member in 2020-2021

René Värk, *Associate Professor of International Law*

Contemporary Challenges for the Rules of Warfare

Addressing Unequal Counter-effects of Weak and Strong on the Example of the Criminal Law of the European Union and Estonia

Moderators: **Anneli Soo**, *Associate Professor of Penal Law*, and **Andres Parmas**, *mag. iur., Assistant of Penal Law*

Marko Kairjak, *PhD*

The Asymmetric Impact of the EU Law on the General Part of the Penal Code

Kaie Rosin, *mag. iur., doctoral student at the University of Tartu*

The Fundamental Principles of Estonian Criminal Law as Grounds for Pulling the Emergency Brake under Articles 82 and 83 of the TFEU

Anneli Soo, *Associate Professor of Penal Law*

European Law of Criminal Procedure?

Markus Kärner, *mag. iur., doctoral student at the University of Tartu*

The Impact of the Administrative Penalties of the European Union on the Estonian Penal-law System

Scientific Psychology and Practical Law

- Moderator: **Talis Bachmann**, *Professor of Cognitive Psychology and Psychology of Law*
- Talis Bachmann**, *Professor of Cognitive Psychology and Psychology of Law*
Law-relevant Studies at the Cognitive Psychology Laboratory of the Department of Penal Law
- Iiris Tuvi**, *PhD, Senior Research Fellow of Criminology and Cognitive Psychology*, and **Inga Kartton**, *PhD*
Detection of Lying and Influences on Willingness to Lie
- Jaan Tulviste**, *PhD*
Brain Mechanisms Involved in Risky Decisions
- Andreas Kangur**, *Lecturer of Criminal Procedure*
Psychology and Rules of Evidence: are Science and Law on the Same Page?

Minority Rights and Their Protection in Companies

- Moderator: **Andres Vutt**, *Associate Professor of Commercial Law*
- Andres Vutt**, *Associate Professor of Commercial Law*
Systematics of Minority Rights
- Margit Vutt**, *Lecturer in Civil Law*
Exit Rights of a Shareholder in a Private Limited Company
- Urmas Volens**, *Associate Professor of Civil Process*
Compulsory Acquisition of a Share by a Limited Liability Company
- Kalev Saare**, *Associate Professor of Civil Law*
Legal Protection for a Minority Shareholder in Cases of Transactions and Disputes between a Company and the Majority Shareholder

100 Years of Intellectual Property Law in Estonia: Where Next?

- Moderator: **Aleksei Kelli**, *Professor of Intellectual Property*
- Aleksei Kelli**, *Professor of Intellectual Property*
On Copyright and Protection of Personal Data in Digitalising the Estonian Language
- Gea Lepik**, *MJur (Oxon), Assistant in Civil Law*
Developments in the Trademark Law of the EU and Estonia in Recent Years: Requirements for Protected Trade Indications and the Essence of Legal Protection for a Mark
- Age Väriv**, *Associate Professor of the Law of Obligation*
The New Face of Protection of Business Secrets
- Karmen Turk**, *mag. iur., Visiting Lecturer of IT Law, doctoral student at the University of Tartu*
Technology and Enforcement of Intellectual Property Rights: Conflict or Opportunity?
- Heiki Pisuke**, *Visiting Professor at the University of Tartu*
Translation and Intellectual Property: Some Connections and Tendencies

Computer Practicum – Law and Technology, *Quo Vadis?*

Is advoCODE the Future of the Legal Science?

(Iuridicum, Näituse 20-203)

Moderators: **Anette Aav**, *IT Law Programme Director*, and **Liisi Adamson**, *Visiting Lecturer of IT Law*

The world of law is witnessing increasing debate over whether robots could also take over the work of legal practitioners.

- How does technology affect the law; i.e., what is the impact of technology on practising law?
- How can legal scientists themselves influence the technology; i.e., how does the technological solution function, and how can it be made to work to your advantage?

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16:00–16:30 Coffee Break

Panel sessions dedicated to special-interest topics

16:30–18:30

Is the European Union Interfering Too Much in Estonian Contract Law?

Moderator: **Karin Sein**, *Professor of Civil Law*

Piia Kalamees, *Associate Professor of Civil Law*

Does Estonia Have to Change Its Regulation on Expedited Procedure for Payment Orders in Response to the Consumer Contract Law of the European Union?

Karin Sein, *Professor of Civil Law*

My Contracts with Telia and Elisa in 2021: Does the European Union Require Too Much or Too Little for Consumer Protection?

Mari Ann Simovart, *Associate Professor of Civil Law*

Does the European Union Law Allow Contracting Authorities to Terminate Public Contracts Too Easily?

Carri Ginter, *Associate Professor of European Law*

Mari Kelve-Liivsoo, *master's student*

Symbiosis between Standard Terms and Public Procurement Law

Prevention and Law Enforcement: The End of the Rule of Law?

Moderators: **Ivo Pilving**, *Associate Professor of Administrative Law*, and **Paloma Krõõt Tupay**, *Lecturer of Constitutional Law*

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The State's Watchful Eye in the Public Space – Effective Prevention or Total Surveillance?

Mait Laaring, *Lecturer of Administrative Law*

Development of the Society and Preventive Intervention by the State

Janar Jäätma, *PhD*

Article 28 of the Law Enforcement Act as General Authorisation

Ivo Pilving, *Associate Professor of Administrative Law*

Judicial Activism and Restraint in Reviewing Law-enforcement Decisions

Minors in the Legal System

Moderators: **Anna Markina**, *Research Fellow of Criminology*, and **Jüri Saar**, *Professor of Criminology*

Anna Markina, *Research Fellow of Criminology*

The Impact of Social Context on Criminal Careers (of Minors)

Anna Markina, *MA, Research Fellow of Criminology*

Responses of Minors Who Have Been Given Criminal Penalties

Judit Strömpl, *Associate Professor of Social Work Research at the Institute of Social Studies*

Katre Luhamaa, *Lecturer of European Law and of International Law*

Involving Children in the Process of Administration of Justice

Jaan Ginter, *Professor of Criminology*

Reform to Criminal Procedure and Penal Law Pertaining to Minors and Its Potential Impacts

Lawyers and Legal Education in History

Moderator: **Marju Luts-Sootak**, *Professor of Legal History*

Hesi Siimets-Gross, *Associate Professor of Legal History and Roman Law*

Letters by David Hilchen (1561–1610) – Procedural Tool or Means of Communication?

Lea Leppik, *Associate Professor of Legal History*

Studying to Become a Lawyer at the University of Tartu of the Republic of Estonia, 1920–1940

Marju Luts-Sootak, *Professor of Legal History*

The Faculty of Law at the University of Tartu during the German Occupation, 1941–1944

Merike Ristikivi, *Associate Professor of Legal History (Roman Law and Latin)*

Colleagues, Competitors, Critics? Women Attorneys in Estonia in the Interwar Period

Challenges of a Digital Society for Labour Law

Moderator: **Merle Erikson**, *Professor of Labour Law*

Thea Treier, *mag. iur., doctoral student at the University of Tartu*

Which Workers Should Be Protected in the Changing World of Work, and How?

Seili Suder, *doctoral student at the University of Tartu*

The Employer's Right to Control an Employee in a Digital World and the Example of Microchipping

Annika Rosin, *PhD, Lecturer of Labour Law at the University of Turku*

Platform Work – a Need for Special Regulation or Reason for Smart Application of Existing Law?

Gaabriel Tavits, *Professor of Social Law*

How to Involve Employees in a Digital Society

Computer Practicum – Law and Technology, *Quo Vadis?*

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