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Supreme Court Judgement as Source of Estonian Criminal Procedural Law

A law was adopted in Estonia on 13 May 1998 according to which certain judgements of the Supreme Court of Estonia were included in sources of criminal procedural law by an amendment to § 1 of the Code of Criminal Procedure (hereinafter: CCP). By this law, the Estonian legislator took a step that is perhaps not the most ordinary in the context of continental European legal tradition. The use of court precedent as a source of law is mainly attributable to the Anglo-American legal system*[1], while the Estonian legal order has belonged and does belong to the legal system of continental Europe.*[2]

It should also be pointed out that the Estonian legislator has never before expressly recognised the judgements of the Supreme Court as a source of law in any area of law, although court precedent as a potential source of law has been a topic for discussion in Estonia for many years.*[3]

There is still no reason to claim that the Estonian legal order lacked any preconditions for the creation and factual functioning of *Richterrecht*.*[4] No Estonian law prohibits the legislative activities of courts. On the contrary, many laws have provided relatively good preconditions for this.

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1 For more details, see R. Narits. Õiguse entsüklopeedia (Encyclopaedia of Law). Tallinn, 1995, pp. 32–34.

2 See R. Narits. Õigusteaduse metodoloogia I (Methodology of Law I). Tallinn, 1997, p. 5.

3 See R. Maruste. Kohtureform – kas lõpu algus või alguse lõpp? (Court Reform – Beginning of the End or End of the Beginning?). – Juridica, 1994, No. 5, p. 104; R. Maruste. Kohtupretsedendist (On Court Precedent). – Juridica, 1994, No. 5, pp. 116–117; R. Narits. Kohtupretsedendist (On Court Precedent). – Juridica, 1995, No. 9, pp. 380–382; M. Sillaots. Kohtunikuõiguse võimalikkusest ja vajalikkusest kontinentaal-euroopalikus õiguskorras (On the Possibility and Necessity of *Richterrecht* in the Continental European Legal Order). Tartu, 1997; M. Sillaots. Kohtunikuõigus (*Richterrecht*). – Juridica, 1998, No. 5, pp. 238–241. The issues of court precedent are more or less touched on in the discussion on the formation of legal methods teaching in Estonia, see E. Kergandberg. Kohtunikuõigusest Saksamaal (On *Richterrecht* in Germany). – Juridica, 1993, No. 3, pp. 58–59; R. Narits. Tõlgendamine: teadus või seadus? (Interpretation: Science or Law?). – Juridica, 1994, No. 9, pp. 228–230; R. Narits. Jurisprudentsi põhijoontest (On the Main Features of Jurisprudence). – Juridica, 1995, No. 9, pp. 378–380; M. Luts. Õiget õigust otsimas (In Search of the Right Law). – Juridica, 1996, No. 1, pp. 41–43; M. Luts. Lünga vastu tõlgendamise või analoogiaga? (Diskussioonist juriidilises meetodiõpetuses) (Interpretation or Analogy Against the Gap? (On the Discussion on Legal Methods Teaching)). – Juridica, 1996, No. 7, pp. 348–352; R. Narits (Note 2); R. Narits. Eesti õiguskord ja väärtusjurisprudents (Estonian Legal Order and Value Jurisprudence). – Juridica, 1998, No. 1, pp. 2–6; M. Luts. Õigusnormide tõlgendamise meetoditest ja teooriatest (On the Methods and Theories of Interpretation of Legal Norms). – Juridica, 1998, No. 3, pp. 111–114.

4 *Richterrecht* here implies legal rules created by interpretation that complements law in the course of solving a specific case by a judge or as the result of legislative activities by filling the gaps in legal regulation. For different definitions of *Richterrecht* see H. W. Kruse. Das Richterrecht als Rechtsquelle des innerstaatlichen Rechts. J. C. B. Mohr (Paul Siebeck). Tübingen, 1971, p. 10; F. Müller. Richterrecht. Berlin: D&H, 1986, pp. 9, 26, 43; R. Christensen. Richterrecht – rechtsstaatlich oder pragmatisch?. – Neue Juristische Wochenschrift, 1989, No. 50, p. 3197; B. Rüthers. Die unbegrenzte Auslegung. 4. Aufl., Heidelberg: C. F. Müller Juristischer Verlag, 1991, p. 458.

For example, § 9 (2) of the Code of Civil Procedure of Estonia provides that in the absence of a provision of law regulating a procedural relationship, the court shall apply a provision which regulates a relationship similar to the relationship under dispute. In the absence of such provision, the court shall take guidance from the general principles of law.

Subsection 4 (1) of the General Part of the Civil Code of Estonia provides that in the absence of a provision regulating a legal relationship, a provision which regulates relationships similar to the legal relationship applies. In the absence of such provision, the general purpose of the Act shall be the basis. Subsection 4 (2) contains the provision that in the absence of an Act regulating a legal relationship, the general purpose of law shall be the basis.

Subsection 5 (1) of the Code of Administrative Procedure of Estonia provides that in matters not regulated by the Code of Administrative Procedure, the administrative court shall take guidance from the provisions of civil procedure. By this provision, the legislator has given administrative courts the possibility to apply analogy of law.

The Estonian legislator has thus given courts the chance to develop law in various areas of law, without specifying the implication of judgements that contain the results of the legislative activities of the courts for future court judgements. It can be said though that judgements of the Supreme Court of Estonia that contain *Richterrecht* are a factual example and carry regulative meaning for lower courts in practice.

On the Implications of Including Supreme Court Judgements in Sources of Criminal Procedural Law

CCP § 1 (4) prescribes that judgements of the Supreme Court in issues which have not been settled by other sources of criminal procedural law, or which arise in the application of law, are a source of criminal procedure.

The implication of this provision is that, firstly, it basically gives the Supreme Court a formal authorisation to resolve matters that are not settled by other sources of criminal procedural law or have arisen in the application of law. Secondly, the law specifies the implication of such Supreme Court judgements for future court judgements.

It has been stated in special literature that court precedent will have a peripheral role in the methodological works of continental European law, although at least legal practitioners have no doubt in their importance and the simple subsumption models of court judgement have increasingly fewer supporters.[*7]

The Estonian legislator included judgements of the Supreme Court in sources of criminal procedural law most likely in view of the legal reality and the needs of practical administration of justice. The practice of administration of justice has convincingly shown that the existing legal regulation has no answers to many essential criminal procedural questions, or if it does, the answers are incomplete, ambiguous or controversial. For a smooth administration of justice, these shortcomings have to be eliminated in the course of resolving specific cases. The judge cannot wait until the legislator corrects the shortcoming. The legislative activities of judges have to be regarded as unavoidable in the practical administration of justice. The inclusion of judgements of the Supreme Court in the sources of criminal procedural law should encourage judges of the Supreme Court in their legislative activities. It can also mean an additional guarantee to the unification of court practice and the avoidance of hasty changes in the present court practice.

On the Limits of Competence of the Supreme Court Concerning Legislative Activities

To define the limits of competence of the Supreme Court concerning its legislative activities, we should first try to gain a better insight into the meaning of the provision of CCP § 1 (4).

[7] R. Wagner-Döbler. Rechtsprechung und Präjudizien im deutschen Körperschaftssteuerrecht 1950 bis 1992. – Rechtstheorie 24 (1993), Berlin: D&H, p. 331.

According to the wording of CCP § 1 (4), the sources of criminal procedural law include judgements of the Supreme Court in issues which have not been settled by other sources of criminal procedural law, or which arise in the application of law.

Let us ask first what the issues that have not been settled by other sources of criminal procedural law are. These would include the legal issues for which no legal norms exist in other sources of criminal procedural law. In other words, there is a gap in legal regulation that needs to be filled.

Let us ask then what the issues that arise in the application of law are. Apparently, these are issues that may arise where the law contains a norm that should probably regulate the particular legal issue, but is incomplete, ambiguous in its wording, unclear, or controversial. It may also be that the text of an existing norm contains concepts (*e.g. Generalklausel*) whose specific meaning is revealed only in the definition of the judge. These are, thus, mainly the issues related to interpretation of law.

It should be noted that the provision of CCP § 1 (4) should not be construed so as to imply the permissibility of any legal policy activities of the Supreme Court. The provision does not grant the Supreme Court the competence of the legislator. Arising from the principle of separation of powers, the competence to take legal policy decisions is vested in the legislator. This *inter alia* implies that no additional restrictions on fundamental rights or no additional procedural coercive measures may be imposed through judgements of the Supreme Court. An important measuring stick in determining the gap in the regulation of criminal procedural law should be all laws providing for criminal procedure, as well as the Constitution of the Republic of Estonia, the generally accepted principles and norms of international law, and the international agreements binding for Estonia. One should proceed from the understanding that the task of the court is not to free legislative drafting, but the drafting of norms related to legal acts and law.[*8]

The principle of separation of powers also limits the authority of the Supreme Court in its legislative activities in the sense that a Supreme Court judge must, in his or her legislative activities, be limited to that which is necessary for resolving a particular case. The legislative activities of judges are permissible only in relation to the application of law in the resolving of specific cases. The application of law should be understood here in a broad meaning so as to include the interpretation and further development of law (making additions to legal provisions and filling gaps).[*9]

The Bindingness of Supreme Court Judgements

Let us ask if the provisions of CCP § 1 (4) imply the legal policy intention of the legislator to somehow come closer to the legalisation of precedent law or even the *stare decisis*[*10] principle known in the Anglo-American legal tradition. May one presume that through the provisions of CCP § 1 (4), the Supreme Court has been authorised to create binding norms of *Richterrecht*?

To find an answer to this question, we should begin from the fact that it is probably impossible to change legal culture merely by the adoption of a law that would include the principle of the bindingness of court judgements. In view of the legal culture of continental Europe, such an act would be a direct obstacle to legislative development.[*11]

The use of *Richterrecht* as a mandatory and binding source of law would not correspond to the continental European legal traditions. It is interesting to note here that for example Germany has in many cases been reluctant to recognise *Richterrecht* as an independent formal source of law. The allegedly common opinion in Germany does not attribute the quality of a source of law to *Richterrecht*.[*12] It has been claimed that *Richterrecht* may become a source of law only when *Richterrecht* becomes common law.[*13] However, this

8 B. Rüthers. Rechtstheorie: Begriff, Geltung und Anwendung des Rechts. München: Beck, 1999, p. 487.

9 See M. R. Deckert. Effizienz als Kriterium der Rechtsanwendung. – Rechtstheorie 26 (1995), Berlin: D&H, p. 117.

10 About the *stare decisis* doctrine, see D. Blumenwitz. Einführung in das anglo-amerikanische Recht, 3. Aufl., München, 1987, pp. 22–23; J. Burke. Kohtuniku roll Ameerika õigussüsteemis (Role of Judge in American Legal System). – Juridica, 1993, No. 3, p. 60.

11 See R. Narits. Kohtupretsedendist (On Court Precedence) (Note 3), p. 382.

12 G. Robbers. Einführung in das deutsche Recht. 1. Aufl., Baden-Baden: Nomos Verl.-Ges., 1994, p. 23; B. Rüthers (Note 6), p. 133.

13 See R. Vossen. Tarifdispositives Richterrecht. Berlin: D&H, 1974, p. 25; D. Olzen. Die Rechtswirkungen geänderter höchstrichterlicher Rechtsprechung in Zivilsachen. – Juristenzeitung, 1985, No. 4, p. 159; R. Weber. Richterrecht als Rechtsquelle. – Zeitschrift für Rechtspolitik 1990, No. 9, September, p. 358.

is not the only approach common in Germany. According to the second approach, *Richterrecht* is a special kind of a source of law.*[14] The quality of *Richterrecht* as a source of law in Germany is thus arguable. But the legal practical importance of the dispute is allegedly small, as even opponents to the source of law of *Richterrecht* proceed from the factually binding nature of the judgements of the court of last instance.*[15]

In Estonia, the legislator has concluded discussions over whether Supreme Court judgements are a source of law, at least as concerns criminal procedural law. This, however, does not solve the issue of the nature of the new source of law, the Supreme Court judgements.

The wording of the legal provision suggests that in certain cases, judgements of the Supreme Court are an "additional" source besides the Constitution, laws, the generally accepted principles and norms of international law and the international agreements binding for Estonia. This means that a judgement of the Supreme Court as a source of criminal procedural law can be considered only after no other sources listed in the Act have provided an answer to the matter to be resolved. At the same time, the law includes Supreme Court judgements as sources of criminal procedural law in issues that arise in the application of law. The wording of the provision does not contain any hints as to the bindingness of the Supreme Court judgements that serve as a source of criminal procedural law.

Apparently, the fact that certain judgements of the Supreme Court have been included in the sources of law *per se* is not a reason to assume the mandatory bindingness of these Supreme Court judgements.*[16]

The Supreme Court itself in its interpretation of CCP § 1 (4) does not regard its judgements as a binding source of criminal procedural law.*[17]

However, this does not imply that Supreme Court judgements as a source of law should be disregarded or the positions contained in them easily deviated from. If we admit that administration of justice is not related to the legal rules created by the Supreme Court and expressed in its judgements, we also have to accept that a judge who develops law in the course of resolving a specific case need basically not even examine the legal rules created as the result of the legislative activities of the Supreme Court. The result of this might be that the judge will not have regard to an important argument in the resolving of a case or he or she might make a judgement that without justification differs from an earlier judgement. Hence the danger of damaging the unity of administration of justice. Considering the above and with a view to unity and the stability of legal order, it is important that legal rules created in the interpretation of law in the course of resolving cases or filling gaps in law have regulative meaning also for the future.

It should be mentioned that a popular argument for the necessity of the bindingness of *Richterrecht* (court precedent) in the continental European legal order is the alleged necessity to ensure legal certainty.*[18] Legal certainty is undoubtedly a valuable benefit.*[19] But it must be said that legal certainty is not the absolute, highest principle of law, but only one among many.*[20]

Without challenging the importance of the principle of legal certainty in the Estonian society, the principle cannot be regarded as important enough to consider Supreme Court judgements mandatorily binding in order to ensure this principle.

But what would the bindingness of *Richterrecht* be in the Estonian legal order?

It should be noted first that in the Estonian legal order, similarly to the continental legal order, courts are strictly bound by law, not court precedent. Pursuant to § 146 of the Constitution of the Republic of Estonia, courts shall administer justice in accordance with the Constitution and the laws.

Therefore, in accordance with the continental legal tradition, a judge should consider a legal rule contained in an earlier court judgement (*Richterrecht*) not so much due to the formal aspect but rather the material

14 See H. W. Kruse; H. Coing. Zur Ermittlung von Sätzen des Richterrechts. – Juristische Schulung 1975, H. 5, pp. 277 and 278; D. Olzen, p. 159.

15 B. Rüthers (Note 6), p. 133.

16 However, pursuant to § 66 of the Code of Criminal Court Appeal and Cassation Procedure, the positions set out in a judgement of the Supreme Court on the application of the law are obligatory for the court conducting a new hearing of the matter. The provision was effective already before Supreme Court judgements were included in sources of law by law.

17 See Judgement of the Criminal Law Chamber of the Supreme Court of 27 April 1999 (3-1-1-42-99) in the charges of V.V. – Riigi Teataja (the State Gazette) III 1999, 16, 161.

18 See F. Bydlinski. Hauptpositionen zum Richterrecht. – Juristenzeitung, 1985, H. 4, p. 152; G. Orrù. Das Problem des Richterrechts als Rechtsquelle. – Zeitschrift für Rechtspolitik, 1989, H. 12, p. 443.

19 E. Picker. Richterrecht oder Rechtsdogmatik – Alternativen der Rechtsgewinnung. – Juristenzeitung, 1988, No. 2, p. 73.

20 R. Weber (zu Orrù ZRP 1989, 44 ff), p. 358.

aspect of bindingness. This means that the bindingness of *Richterrecht* should not be based on the fact that the Estonian legislator has attributed the meaning of a source of law to positions presented as Supreme Court judgements, but rather due to the convincingness of the justified legal rule contained in this form, based on the acceptability of the legal principle behind this legal rule and the accordance of the rule with the applicable legal order in Estonia.

Thus, although certain Supreme Court judgements are the source of criminal procedural law in Estonia, we cannot speak of legalisation of the Anglo-American principle of *stare decisis*. As the Estonian legal order is a continental one, we should rather speak of the presumptive bindingness (*präsumtive Verbindlichkeit*)[*21] or subsidiary bindingness (*subsidiäre Verbindlichkeit*)[*22] of Supreme Court judgements.

According to the approach of M. Kriele, presumptive bindingness of court judgements means that the court may not deny a court precedent, but may discuss it in detail and deviate from it where this is justified. At the same time, the court bears the load of argumentation (*Argumentationslast*).[*23] Deviation from a court precedent would require detailed explanation and indication of the reasons of deviation. In case of doubt, court precedent should be adhered to.[*24]

According to the approach of F. Bydlinski, subsidiary bindingness of court precedent means that a court precedent is binding unless another judgement that does not adhere to the existing precedent can be proved to be in better accordance with the legal order, or if another solution would be "similarly justified" ("*gleich vertretbar*").[*25]

By summarising the above, Estonian Supreme Court judgements as sources of law can be said to lack strict bindingness. However, the fact that the legislator has established certain Supreme Court judgements as a source of law suggests that lower courts (as well as the Supreme Court itself) should not disregard Supreme Court judgements as sources of law in the resolving of similar cases in future. This does not imply that those judgements as sources of law (or rather, the legal rules fixed in these) may not be deviated from where this is justified.

The bindingness of Supreme Court judgements is relevant only insofar that a judge should not disregard the positions expressed in those judgements. A judge subjects to law. Consequently, when the law establishes Supreme Court judgements as a source of law, a judge should not disregard the positions expressed in a Supreme Court judgement even if he or she desires to deviate from it on justified grounds. This means that a judgement deviating from an existing court precedent should contain a counterargument to the existing court precedent.

Dependence of the Source of Law Status of Supreme Court Judgements on the Will of the Supreme Court

When discussing the issues of Supreme Court judgements as a source of law, we have to ask if the Supreme Court could have or should have the right to state, through its judgements, that certain Supreme Court judgements will be a source of law for other courts in future, while others will not, although the latter may contain the results of the legislative activities of the Supreme Court.

The above question is mainly triggered by a specific example from the Estonian court practice. The example is related to the right of the Supreme Court laid down in § 39 (4) of the Code of Criminal Court Appeal and Cassation Procedure (hereinafter: CCCACP) to regard other violations of the rights of the participants in a proceeding or violations of other rules of criminal procedure which hindered or could have hindered the comprehensive, thorough and objective investigation of a criminal matter and the making of a lawful and reasoned court judgement.

21 See M. Kriele. Theorie der Rechtsgewinnung. Berlin: D&H, 1967, pp. 248 and 254.

22 See F. Bydlinski, p. 155.

23 M. Kriele (Note 19), p. 253.

24 See M. Kriele. Recht, Vernunft, Wirklichkeit. Berlin: D&H, 1990, p. 529.

25 See F. Bydlinski, p. 154.

Through this provision, the legislator essentially expressly gives the Supreme Court the power to develop law, including creating *Richterrecht*. Of course, the Supreme Court can only create *Richterrecht* under CCCACP § 39 (4) through resolving particular cases.

Before the entry into force of CCP § 1 (4), by which Supreme Court judgements were specified as a source of law, the legal rule created by the Supreme Court under CCCACP § 39 (4) did not have the meaning of a source of law for other courts in court practice. Earlier, only the Supreme Court could, in the resolving of a particular case, regard violations other than those listed in CCCACP § 39 (3) as material violations of the law of criminal procedure for that particular case. In several judgements, the Criminal Law Chamber of the Supreme Court had expressed the position that only the Supreme Court has the right to regard violations other than those listed in CCCACP § 39 (3) as material violations of the Code of Criminal Procedure, while circuit courts did not.

The principle according to which circuit courts were not authorised to regard some violations of the law of criminal procedure as material violations or to regard as material violations in a particular criminal case the violations that the Supreme Court had already stated to be material violations in another criminal case, was actually derived by the Supreme Court in its legislative activities (creation of *Richterrecht*). The law did not prohibit circuit courts from regarding violations other than those listed in CCCACP § 39 (3) as material violations of the law of criminal procedure based on a judgement of the Supreme Court as a subsidiary source of law. Essentially, the Criminal Law Chamber of the Supreme Court stated through *Richterrecht* that certain rules of *Richterrecht* (particularly, the legal rules created by the Criminal Law Chamber of the Supreme Court under CCCACP § 39 (4)) may not be applied by circuit courts with recourse to the respective judgements of the Criminal Law Chamber of the Supreme Court as subsidiary sources of law. By establishing such a restriction, the Criminal Law Chamber of the Supreme Court may have tried to limit the powers of circuit courts to refer criminal cases to a court of first instance for a new hearing. Namely, under CCCACP § 33, a circuit court may refer criminal matters to a court of first instance for a new hearing if material violation of the law of criminal procedure is established which unavoidably brings about the annulment of a court judgement. According to the position of the Criminal Law Chamber of the Supreme Court, a circuit court could refer a criminal case for a new hearing only if any of the material violations of the law of criminal procedure specified in CCCACP § 39 (3) were established.

Whether or not such restriction of the powers of circuit courts by the Supreme Court is necessary, the relevant question here is whether, and on what bases, the Supreme Court should have the right to restrict the possibilities of lower courts to recourse to Supreme Court judgements as sources of law in which positions in certain issues of law have been expressed that are not laid down in other sources of criminal procedural law. The question is particularly relevant in the context of CCP § 1 (4). It is true that with the establishment of CCP § 1 (4) the situation has changed so that circuit courts can now annul the judgements of courts of first instance by reference to CCCACP § 39 (4) and a Supreme Court judgement. Regardless of this, let us ask in a broader sense (not only in the context of CCCACP § 39) if the Supreme Court could take the position that a particular judgement of the Supreme Court is a source of law in the meaning of CCP § 1 (4) while another judgement of the Supreme Court is not.

The law does not provide a direct answer to this question. The law of criminal procedure does not set out any dependence of the source of law status of Supreme Court judgements on whether the Supreme Court desires to see its particular judgements as sources of law or not. Even if the Supreme Court makes a judgement in a matter that has not been settled by other sources of criminal procedural law or that has arisen in the application of law, without referring to CCP § 1 (4), such a judgement of the Supreme Court should be a source of criminal procedural law within the meaning of the law. If CCP § 1 (4) were interpreted otherwise, distinction should be made between those Supreme Court judgements that are a source of criminal procedural law in the formal sense (*i.e.* in the meaning of CCP § 1 (4)) and in the factual sense (*i.e.* their factual applicability in court practice) and those that are a source of criminal procedural law only in the factual sense. Sources of law in the factual sense should be mentioned mainly because other courts are not prohibited from taking guidance in their judgements from the Supreme Court judgements as a subsidiary source of law even if the Supreme Court judgements do not refer to CCP § 1 (4).

It might be asked here, why should those Supreme Court judgements that are not referred by the Supreme Court to CCP § 1 (4) to be a source of criminal procedural law be regarded as a source of criminal procedural law?

The problem is that there is apparently no reasonable or convincing justification why the source of law status of Supreme Court judgements should depend on the will of the Supreme Court. It is rather difficult to find legal criteria by which the Supreme Court could only regard some of its judgements as sources of criminal procedural law in the meaning of CCP § 1 (4). Each judgement of the Supreme Court through

which *Richterrecht* is created should be so comprehensively and substantially reasoned that it may serve as a source of law in the meaning of CCP § 1 (4) for other courts.

Moment of Making Supreme Court Judgement as the Factor Determining Its Recognition as a Source of Law

In its judgement of 27 April 1999 (3-1-1-42-99) in the charges of V.V.[*7] the Criminal Law Chamber of the Supreme Court has *inter alia* stated: "The above judgement of the Criminal Law Chamber of the Supreme Court was made after entry into force of the law[*8] and regards failure to prosecute as material violation of procedural norms not as a single case in the charges of H.L. and P.P.[*9], but as a general material violation in criminal procedure."

The fact that the Criminal Law Chamber of the Supreme Court in its judgement of 27 April 1999 considered it necessary to mention that the judgement of the Chamber of Criminal Law of the Supreme Court was made after entry into force of the law (*i.e.* the law pursuant to which judgements of the Supreme Court are a source of criminal procedural law in certain cases), raises the question of whether only the Supreme Court judgements made after entry into force of the above law can be a source of law in the meaning of CCP § 1 (4).

The wording of the judgement of the Criminal Law Chamber of the Supreme Court of 27 April 1999 suggests that according to the position of the Criminal Law Chamber of the Supreme Court, the moment of making a Supreme Court judgement has an important role for the moment of entry into force of the law with respect to whether the judgement of the Criminal Law Chamber of the Supreme Court regards the material violation of procedural norms as a single case or as a general material violation in criminal procedure. If we assume that a Supreme Court judgement as a source of law has a general meaning, we can conclude from the position expressed in the judgement of the Criminal Law Chamber of the Supreme Court of 27 April 1999 that a source of law in the meaning of CCP § 1 (4) can be viewed in the context of whether the judgement of the Criminal Law Chamber of the Supreme Court was made before or after entry into force of the law by which Supreme Court judgements are included in the sources of law.

It seems though that the provision of CCP § 1 (4) should be interpreted so as to regard as a source of law all judgements of the Supreme Court in matters not settled by other sources of criminal procedural law or arising in the application of law. This includes Supreme Court judgements made before entry into force of the law that includes Supreme Court judgements in sources of law on 13 May 1998. Therefore, all Supreme Court judgements in which the Supreme Court has expressed its position in matters not settled by other sources of criminal procedural law or arising in the application of law should become sources of law in the meaning of CCP § 1 (4). But naturally, Supreme Court judgements should be used as sources of law only in the making of the judgements made after entry into force of the law.

One should not forget that factually, Supreme Court judgements have been a subsidiary source of law earlier too (before amendment of the law in question). References have been made to Supreme Court judgements and the positions contained in them earlier, and judgements have been reasoned by them.

If we regard as sources of law in the meaning of CCP § 1 (4) only the Supreme Court judgements made after entry into force of the law by which Supreme Court judgements were included in the formal sources of criminal procedural law, then Supreme Court judgements should be divided into two categories depending on the time they were made. Such distinction seems to have no reasonable explanation. It is difficult to find essential and convincing criteria for making such distinction. It can hardly be considered

7 Riigi Teataja (the State Gazette) III 1999, 16, 161.

8 The law by which the wording of § 1 of the Code of Criminal Procedure was amended by adding certain judgements of the Supreme Court to sources of criminal procedural law. See Riigi Teataja (the State Gazette) I 1998, 51, 756.

9 Reference to the ruling of the Criminal Law Chamber of the Supreme Court of 1 December 1998 (3-1-1-118-98) in the charges of H.L. and P.P. (Riigi Teataja (the State Gazette) III 1999, 2, 23). In its ruling, the Criminal Law Chamber of the Supreme Court found that failure to make a ruling on prosecution of the accused prevents the lawful hearing of the matter in court, as pursuant to CCP § 215 (1), the court is not competent to hear criminal cases concerning persons not prosecuted. The Supreme Court declared this violation of procedural norms a material violation under CCCACP § 39 (4).

reasonable that the Criminal Law Chamber of the Supreme Court as well as lower courts cannot be guided in their judgements by the Supreme Court judgements made before 13 May 1998 in which the Criminal Law Chamber has expressed its position in matters not settled by other sources of law or arising in the application of law.

For example, it is difficult to find a reasonable justification in order to not use as a source of criminal procedural law the ruling of the Criminal Law Chamber of the Supreme Court of 28 January 1998 (3-1-1-21) in the charges of M.V.*[10] In this ruling of the Supreme Court, the Criminal Law Chamber of the Supreme Court has, through application of analogy of law, taken the position that the placement of a person in a medical institution for inpatient examination under CCP § 159 (1) or (2) can be viewed as a criminal procedural coercive measure analogous to taking into custody, the essence of which is substantial restriction of the freedom of movement of the person. Considering this, the position of the Criminal Law Chamber of the Supreme Court is that the right of a person to whom the coercive measure is applied, as well as that of the defender of such a person, to appeal against the ruling in a court must be ensured in accordance with § 15 (1) of the Constitution.

Thus, although the above example concerns a ruling of the Criminal Law Chamber of the Supreme Court made before entry into force of the law by which Supreme Court judgements are included in sources of law, the ruling and all other judgements of the Supreme Court that contain the result of legislative activities should be regarded as a source of law in the meaning of CCP § 1 (4).

Obiter dictum in the Estonian Court Practice

The notion of *obiter dictum* is known in the Estonian court practice. It is something similar to the Anglo-American *obiter dictum*.*[11] The phrase *obiter dictum* signifies the part of a judgement that is not directly necessary for the judgement.

An example is the judgement of the Criminal Law Chamber of the Supreme Court of 24 September 1996*[12], in which the Criminal Law Chamber of the Supreme Court made a remark concerning CCCACP § 36 (2) by way of *obiter dictum*.

CCCACP § 36 (2) provides that in the new hearing of a criminal matter in the court of first instance, it is permitted to aggravate the punishment or apply a provision of law which prescribes a more serious criminal offence only if, after the annulment of the court judgement, facts which prove that the accused at trial committed a more serious criminal offence are established in the court hearing of the matter, or if one of the grounds for the annulment of the judgement was the allowing of an appeal by the victim, his or her representative or the prosecutor on grounds of leniency of the punishment.

The judgement of the Criminal Law Chamber of the Supreme Court of 24 September 1996 was made in a criminal case in which the prosecutor contested the judgement of acquittal made by the court of first instance solely on grounds of material violation of the Law of Criminal Procedure, *i.e.* the judgement of acquittal as such was not contested. With a view to this situation, the Supreme Court judgement of 24 September 1996 stated that after the new hearing of a criminal case, the court of first instance is not entitled to convict a person in respect of the same charges in which he or she was earlier acquitted. When reasoning this position, the Supreme Court found that the conviction of a person in the charges in respect of which he or she was earlier acquitted cannot be regarded as conviction in a more severe offence. The above is the bearing part of the judgement in question, or the *ratio decidendi*.

At the same time, it is stated in the judgement of the Criminal Law Chamber of the Supreme Court of 24 September 1996 by way of *obiter dictum* that if the prosecutor, the victim or his or her representative had contested the essence of the judgement of acquittal made by the court of first instance, the court of first instance could have, after the second hearing concerning the case, convicted the accused in the charges with respect to which he or she was earlier acquitted. In reasoning this approach, the Supreme Court relied on the understanding that the essential contestation of a judgement of acquittal by the victim, his or her

10 Riigi Teataja (the State Gazette) III 1998, 10, 106.

11 On the relations and essence of *ratio decidendi* and *obiter dictum*, see D. Blumenwitz (Note 8), pp. 31–34; R. Narits. Kohtupretsedendist (On Court Precedence) (Note 3), pp. 381–382.

12 Judgement of the Criminal Law Chamber of the Supreme Court of 24 September 1996 in the charges of A.J. and others pursuant to CCP § 139 (3) 1) – Riigi Teataja (the State Gazette) III 1996, 26, 346.

representative or the prosecutor can be viewed as a case of contesting the leniency of punishment in the meaning of CCCACP § 36 (2).*[13]

In this case, the Criminal Law Chamber of the Supreme Court expressed its legislative position in a matter that did not constitute a bearing rule for resolving the criminal case before the Supreme Court. Although the position had an explanatory meaning for the criminal case being resolved then, it is rather a description of a presumptive situation and a potential legal evaluation of the situation. The talk is about an explanatory note of the Supreme Court by which the Supreme Court announces how it intends to resolve eventual future cases. In a later judgement, the Supreme Court has called the presumptive explanation in question a remark made by way of *obiter dictum*.*[14]

Although the distinction of *ratio decidendi* and *obiter dictum* is not very important in the Estonian legal order from the viewpoint of the bindingness of court judgement, a certain relevance of such distinction cannot be denied now that Supreme Court judgements have been included in sources of law. Such distinction allows to determine the part of a Supreme Court judgement as a source of law (*ratio decidendi*) that the Supreme Court or others courts should not disregard in future from the part (*obiter dictum*) that need not necessarily be so important.

Naturally, the issue of *obiter dictum* concerns the issues of the scope of authorisation of the court to engage in legislative activities. Or rather, the question of whether and to what extent the Supreme Court would be authorised to use judgements on particular matters for declaring its intentions of regulation. The advance declaration of future legal principles is not a usual activity of judges. It should be stressed that the function of a judge is to adjudge specific cases and he or she is not authorised to develop law in view of potential future cases.*[15]

Supreme Court Judgements as a Source of Criminal Procedural Law: a Limitation of the Legislative Activities of Other Courts?

If we ask whether the inclusion of Supreme Court judgement in sources of law is a limitation for other, lower courts in their legislative activities, a single answer is difficult to find. The danger remains that other courts will take guidance of the positions expressed in Supreme Court judgements rather uncontrollably as these are sources of law recognised by the legislator, and will maybe give up any legislative activities themselves. Judges who take strict guidance from the positions expressed in Supreme Court judgements concerning the application of law may even move away from law as the primary source of law. But as not all Supreme Court judgements can be regarded as mandatorily binding sources of criminal procedural law, lower courts will still have the chance to deviate from the positions expressed in Supreme Court judgements where this is justified. The obligation of a judge is to adjudge at his or her own responsibility. It can be said that if the judge of a lower court has serious arguments to deviate from the positions expressed in Supreme Court judgements, he or she should be ethically obliged not to take guidance from the position of the Supreme Court. Of course, the judge would have to reason the deviation from the position of the Supreme Court in his or her judgement. This way the judge would have the possibility of examining the position of the Supreme Court.

13 See Judgement of the Criminal Law Chamber of the Supreme Court of 24 September 1996 (3-1-1-99-96) in the charges of A.J. and others on grounds of CCP § 139 (3) 1) – Riigi Teataja (the State Gazette) III 1996, 26, 346; see also Judgement of the Criminal Law Chamber of the Supreme Court of 18 January 2000 (3-1-1-7-00) in the charges of M.O. on grounds of CCP § 141^1 (3) 1) – Riigi Teataja (the State Gazette) III 2000, 5, 48.

14 See Judgement of the Criminal Law Chamber of the Supreme Court of 18 January 2000 (3-1-1-7-00) in the charges of M.O. on grounds of CCP § 141^1 (3) 1) – Riigi Teataja (the State Gazette) III 2000, 5, 48.

15 For this principle, see E. Picker. Richterrecht und Richterrechtsetzung. – Juristenzeitung, 1984, H. 4, p. 154.

Conclusions

The inclusion of certain judgements of the Supreme Court in sources of criminal procedural law should not be regarded as the legal policy step of the Estonian legislator toward legalisation of the Anglo-American precedent law or the related *stare decisis* principle. Rather, it is quite an adequate reaction of the legislator to legal reality. Several judgements of the Supreme Court have already had the meaning of a factual supplementary source of law in real court practice. The provision of law by which certain judgements of the Supreme Court are included in sources of criminal procedural law should be interpreted in the context of continental European legal culture. This means that judgements of the Supreme Court are not strictly binding. If a judge is convinced that a judgement deviating from the existing judgement of the Supreme Court as a source of law would be in better accordance with the applicable legal order he or she should make a reasoned judgement that deviates from the existing one.

Although the Supreme Court is authorised to engage in legislative activities in certain cases, it is not competent to make legal policy decisions. A judge of the Supreme Court should be limited in his or her legislative activities to that necessary for resolving a particular case.