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Textbook of Pandects or New Style of Legislation in Estonia?

Introduction

I would like to start with some quotations and the reader could try to guess their origin:

(1)"A servitude of footpath grants the right to walk or ride on a bicycle on a footpath through a servient immovable."

"A servitude of livestock path grants the right to drive livestock and walk on a livestock path through a servient immovable. To facilitate the driving of livestock, an entitled person may build a fence or obstacles at the edge of the path if this is possible without causing damage to the owner of the servient immovable. A servitude of livestock path does not grant the right to pasture animals on the servient immovable."

"A servitude of roadway grants the right to drive by vehicle on a road through a servient immovable. A servitude of roadway includes a servitude of footpath."

(2)"A servitude of projection grants the right to build on one's construction a balcony, shelter or other such part which projects over the immovable of a neighbour."

(3)"A servitude of stillicide grants the right to permit water from rain or snow to flow from the roof of one's construction to the immovable of another both from the eaves and by a pipe."

It suffices for examples although the list could be further supplemented. Those who thought that the extracts originate from some 19th century pandect book were wrong. All the quotations have been taken from the applicable Estonian Law of Property Act.*[1] The first excerpt quoted subsections 186 (1)–(3) (servitude of way), the second section 194 (servitude of projection) and the third section 195 (servitude of stillicide). The law defines yet other individual types of real servitudes in a similar manner. Section 188 concerns servitude of lines, section 189 servitude of aqueduct, section 190 servitude of access to water and watering of livestock, section 191 servitude of pasturage, section 192 servitude of support, section 193 servitude of wall, section 196 servitude of height, section 197 servitude of light, section 198 servitude of prospect, and section 199 servitude of protective zone. However, such causal regulation does not imply as if the Estonian Law of Property Act lacked general provisions concerning real servitudes. Sections 172–177 point out the definition of real servitude and provide the conditions for the creation and extinguishment thereof. Sections 178–185, in their turn, determine the conditions of and limitations to the exercise of real servitudes. Thus, already these general provisions contain a rather detailed regulation of the institute of real servitudes. Hence it is

[1] Asjaõigusseadus (Law of Property Act), passed 9 June 1993. – Riigi Teataja (The State Gazette) I 1993, 39, 590; last amended Riigi Teataja (The State Gazette) 1999, 44, 509 (in Estonian).

natural to ask why the law contains a separate division of the individual types of real servitudes. Such a way of posing questions is supported by the fact that the last section of that division renders the previous ones pointless in fact. Namely, section 200 states plainly: "In addition to the real servitudes provided for in this Act, other real servitudes which correspond to the definition and content of a real servitude may be established."

Consequently, sections 186–199 do not provide an extensive list of legally recognised real servitudes. Thus, the inclusion of the regulation of the individual real servitudes in the law cannot be regarded as application of the *numerus clausus* principle that is characteristic of the law of property. Also, it cannot be claimed in the case of any type as if their particular regulation was in the position of a special provision amending the general provisions of real servitudes. Therefore, it is not *lex specialis derogat legi generali* that has motivated the compilers of the Law of Property Act to include these provisions in the Act.

An answer to the question why the Estonian Law of Property Act contains such causal regulation of the individual types of servitudes cannot be found in the commentary provided by the main authors of the Act either. The commentary states plainly that it is matter that does not belong to the Act: "Sections 186–199 should have been deleted from the draft as most of the servitudes provided are no longer applicable today. Some of the types of the servitudes provided (servitude of lines, servitude of wall, servitude of support, servitude of way, servitude of aqueduct) partly repeat the immovable property ownership restrictions set out in the Law of Property Act and their practical use will continue to decrease."[*2] Thus, the theorists themselves claim that the regulation of individual real servitudes should have been excluded from the Act. The more relevant becomes the question of why this was not done. Or what has given rise to the idea of such detailed regulation, which is rather unique when compared to the civil codes of other countries? This article attempts to answers these questions by firstly providing an historical explanation and then pointing out some general trends in the Estonian legislative technique and policy.

19th-century legacy

The Law of Property Act, adopted in 1993, was the first part completed of the planned new Civil Code.[*3] The curt words of P. Varul actually perfectly convey the drama and decisiveness accompanying the completion of the draft: "1992–1993: period of decisions and choices. This was the most important period in choosing the private law system and model — legal policy decisions could be taken independently without potential interference by Moscow. The main choices were made in this period. The passing of the Law of Property Act and its entry into force on 1 December 1993 was the cornerstone."[*4] The choices mentioned concerned, above all, the possible standards and models for developing reform laws. Alongside with considering foreign solutions, the earlier history of Estonian private law was also examined. What concerns the legal regulation of the individual types of real servitudes observed here, we can seek no encouragement for such approach from any modern foreign code. At this point, it seems that the earlier civil law legislation of Estonia came to be the choice.

For the first time in the history of Estonian private law, a detailed regulation of the individual types of real servitudes has been namely presented in the private law codification of the Baltic provinces, in the Baltic Private Law Code (BPLC), approved in 1864 and entered into force in 1865.[*5] It was a codification of the rights of the higher estates of the local provinces (Germ. *Estland, Livland, Kurland*). The indigenous people of the Baltic provinces Estonians, Livonians and Latvians, constituted the peasantry in the 19th century and their private law was either common-law based or regulated by means of the agrarian reform laws. The BPLC was one of the codes completed in the course of

2 P. Pärna, V. Kõve. Asjaõigus: Kommenteeritud väljaanne (Law of Property: Commented Edition). Tallinn, 1996, lk. 301 (in Estonian).

3 About the general course and points of departure of the Estonian private law reform: P. Varul. Legal Policy Decisions and Choices in the Creation of New Private Law in Estonia. – Juridica International. Law Review. University of Tartu, V, 2000, pp. 104–118.

4 *Ibid*., p. 104.

5 The original version of the code was prepared in German: Provincialrecht der Ostseegouvernements. Dritter Theil. Privatrecht: Liv-, Est- und Curlaendisches Privatrecht. Zusammengestellt auf Befehl des Herrn und Kaisers Alexander II. St. Petersburg, 1864. The Russian version was also compiled and published immediately: Svod mestnyh uzakonenij gubernij ostzejskih. Cast' tretja. Zakony grazdanskie. St. Petersburg, 1864. The references below are made to the German original of 1864.

the general codification movement in Russia in the 19th century.*[6] After the establishment of the independence of the Republics of Estonia and Latvia during the First World War, the estate differences were abolished in both countries and the BPLC was proclaimed applicable to the entire population. In Latvia, the BPLC became invalid in 1937 when a new Civil Code was adopted. The BPLC still served as the major model therefor. In Estonia, a new draft Civil Code was completed in 1936, it was elaborated and processed until 1940.*[7] The Soviet occupation discontinued the work and the new code was not adopted. Thus, the BPLC was in force in Estonia until 1940. The BPLC was naturally among the models that were observed when compiling the 1936/40 draft. Consequently, it is historically justified that this code serves as a point of departure for opening the historical background of the current private law reform.*[8]

The draft BPLC was drawn up by the former professor of provincial law of the University of Tartu Friedrich Georg von Bunge (1802–1897). His general conceptual views on the analysis of local provincial rights on the scholarly and legislative level may be summed up as follows. The main postulate was that only the existing law was to be codified. Thus, the BPLC intended in no manner to reform the private law of the Baltic provinces. Originally, it was not Bunge who set up the task in this manner. The entire Russian codification movement of the 19th century proceeded from the same principle. The problem was simply more acute with regard to provinces entitled to special rights. These provinces had been annexed to Russia under a clause that the historically developed local law was to continue to remain valid. Thus, the task to assemble the already existing private law and avoid innovation was already provided for Bunge so to say from outside. Moreover, he adopted it also as his internal belief and attempted to implement it in his scholarly work and codification in as detailed manner as possible.*[9] This has given rise to the extremely causal provisions and regulations in the BPLC. The BPLC provisions concerning real servitudes generally originate from Roman law and thus this part provides less drastic examples than family law or law of succession.*[10] Here one may, however, find regulations drawn primarily from the local common law, which serve as a good example of Bunge's regulatory method. An example of the regulation of servitude of cutting:

"*Von der Hölzungsgerechtigkeit.*

1156. Die Hölzungsgerechtigkeit besteht in dem Rechte, für den wirtschaftlichen Bedarf des herrschenden Grundstücks – nicht auch zum Verkaufe – aus einem fremden Walde Holz beziehen zu dürfen.

1157. Der Berechtigte ist nicht auf Brenn- und Nutzholz zum Bedarf seines Grundstückes beschränkt, sondern darf auch Bauholz fällen, sofern letzteres nicht ausdrücklich ausgeschlossen ist.

1158. Der Berechtigte, überhaupt zu möglicher Schonung des dienstbaren Waldes verpflichtet, darf seinen Bedarf nicht auf mehrere Jahre voraus, sondern nur für jedes Wirtschaftsjahr

6 A. E. Nolde provides a detailed overview of the codification procedure of the private law of the Baltic provinces: A. E. Nolde. Ocerki po istorii kodifikatsii mestnykh grazhdanskikh zakonov pri grafe Speranskom. Vypusk II: Kodifikatsiya mestnogo prava pribaltiiskikh gubernii. St-Petersburg, 1914. For the Baltic Private Law Code, see also B. Dölemeyer. Das Privatrecht Liv-, Est- und Kurlands von 1864. – Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte. Vol. 3. Part 2. H. Coing (Ed.). Munich, 1982, pp. 2076–2098.

7 In 1992, A. Traat published the draft Civil Code as of 1940 in facsimile print. Thereby, the unique and source the access to which had been limited was reintroduced into circulation for scholars.

8 See *e.g.* the brief historical introduction "Balti Eraseadusest Asjaõigusseaduseni" (From Baltic Private Law Code to Law of Property Act) by P. Pärna, V. Kõve (Note 2), pp. 9–11 or P. Varul (Note 3), p. 108. However, when determining the nature of the BPLC system, Varul is a little mislead. The BPLC does contain the four last books of the pandect system (in German: *Pandektensystem*) but it lacks the general part. The introduction to the BPLC concerning the territorial and estate particularism of the private law in the Baltic provinces and the implementation and interpretation of the provisions of the code cannot be regarded as a general part in respect of the five-book pandect system.

9 About some more important points of Bunge's method of treating provincial private law: M. Luts. Private Law of the Baltic Provinces as a Patriotic Act. – Juridica International. Law Review. University of Tartu, V, 2000, pp. 157–167. Bunge's juridical concept has been analysed in detail in Estonian in the thesis by M. Luts. Juhuslik ja isamaaline: F. G. v. Bunge provintsiaalõigusteadus (Casual and Patriotic: the Jurisprudence of Local Law by F. G. v. Bunge). Tartu, 2000, pp. 133–214 (in Estonian); the findings have been presented in German in the summary: Zufällig und vaterländisch: die Provinzialrechtswissenschaft von F. G. v. Bunge, pp. 264–273.

10 See *e.g.* in the part of family law the mutual proprietary rights of spouses according to the county law of *Livland* and *Estland* and according to the town law and land law of *Kurland* (in separate divisions, the same is further divided: about country clergy who do not belong to hereditary nobility; according to the town law of *Livland*; according to the town law of *Estland*; according to the town law of Narva) section 44: "In Liv- und Estland ist der Ehemann keinesweges befugt, auf den Namen der Ehefrau oder ihrer Erblasser stehende Schuldforderungen, ohne ausdrückliche Genehmigung der Frau, zu erheben, zu cediren oder zu verpfänden. Alle Verfügungen dieser Art sind nichtig. Wohl aber hat er das Recht, dergleichen ausstehende Forderungen, wenn deren Sicherheit bedroht ist, oder das Interesse der Ehefrau es aus andern Gründen erheischt, vorläufig zu kündigen und auszuklagen. In Curland dagegen bedarf der Ehemann sowohl zur Kündigung und zur Cession von schuldverschreibungen, als auch zur Erhebung von Capitalien, gar keiner besondern Legitimation, namentlich auch keiner Cession derselben von Seiten der Ehefrau."

besonders, nehmen. Auch ist er verbunden, das Holz, welches er gefällt hat, in demselben Wirtschaftsjahre abzuführen, damit der Nachwuchs nicht leide.

1159. In Estland darf in einem der Hölzungsgerechtigkeit unterliegenden Walde von beiden seiten nur mit eigener Kraft das Holz gefällt und abgeführt werden.

1160. Der Hölzungsberechtigte darf, in Ermangelung entgegengesetzten Bestimmung oder Gewohnheit, das aufgehauene Holz in dem dienstbaren Walde bis zur Abfuhr aufstapeln lassen. In Estland darf das Stapelrecht nur ausgeübt werden, wenn es ausdrücklich ausbedungen worden.

1161. Der Berechtigte darf seinen Bedarf nur aus den von dem Eigenthümer des dienenden Waldes ihm angewiesenen Stellen des letzteren nehmen, und ist der Eigenthümer zu betreffender Aufsicht berechtigt. Ausnahmen von dieser Regel gelten nur im Falle besondern Vorbehalts.

1162. Ist in Estland die Hölzungsgerechtigkeit "bis auf den letzten Stamm" bestellt, so ist der Eigenthümer des dienenden Grundstücks dadurch nicht gehindert, den ganzen Wald umzuhauen und zu Feld oder Wiese zu machen. An den wieder nachwachsenden Bäumen kann aber auch in diesem Falle das herrschende Grundstück die Dienstbarkeit wieder ausüben."*[11]

Judging by the references, all these provisions are of common law origin. Just as his teacher Dabelow, Bunge treated the law of people or custom as well as court practice as common law. According to the *ius commune* doctrine prevailing earlier, it meant the compulsoriness of the common and continuing adjudication practice of higher courts on the lower courts.*[12] Bunge granted to such practice an even stronger position than the earlier common law tradition. It was to be binding not only on lower courts but also on legal doctrine.*[13] This way, the 19th-century local practice, in its turn, became the rich source wherefrom the codification was to derive provisions according to Bunge. As the servitudes as legal institutions originated from Roman law, the courts of the Baltic provinces applied the principles of *ius commune* in this respect. This is also the reason why one may encounter in Bunge's summary of law that otherwise carefully focused on local origin, primarily in the books on the law of property and the law of obligations, paragraphs of Roman law provisions.*[14]

Numerous references, above all, to Digests but also to the other parts of *Corpus iuris civilis* have given ground to claims as if Bunge had guided Roman law to its triumph in the Baltic provinces*[15] or carried out a new wave in the reception of Roman law.*[16] In fact, Bunge did not need to make any efforts for the sake of the reception of Roman law or to encourage it. The court practice of the Baltic provinces took a good care of it at the beginning of the 19th century. The majority of the practitioners yet in business had received their legal training in German universities*[17] primarily in the course of Roman law studies. Although the University of Tartu, reopened in 1802, accommodated as many as three provincial law chairs during the first decades, the systematic teaching of local laws was not particularly successful at first.*[18] Also in the 1830s when Bunge himself taught provincial law, the standard of teaching ran highest in Roman law in the faculty. Thus, it is not surprising that Bunge's colleague, the Romanist Carl Otto von Madai observed Roman law as a rather dangerous rival to the provincial law:

"*Gerade da wo, namentlich das Römische Recht, als ein recipirtes, ein Bestandteil des geltenden Rechts geworden, ist es dringend notwendig, möglichst scharf und genau den Umfang seiner Anwendbarkeit zu bestimmen. Die innere Durchbildung, die das Römische Recht auszeichnet, die*

11 The passage continues with some provisions of Roman law origin concerning cutting servitude, followed by a separate subsection "Besondere Bestimmungen über die Hölzungsgerechtigkeit in den Kronforsten Curlands" (sections 1165–1175).

12 See *e.g.* and for detailes C. C. Dabelow. Die Praxis sowohl überhaupt, als in den Russischen Ostsee-Provinzen besonders, kritisch beleuchtet. – Jahrbuch für Rechtsgelehrte in Russland. Vol. 2. G. E. Bröcker (Ed.). Riga, 1824, pp. 230–234.

13 More precisely M. Luts. Private Law (Note 9), p. 163–166; M. Luts. Zufällig (Note 9), pp. 265–266.

14 As the sections of the BPLC have been supplied with references to the sources, it is relatively easy to identify the origins of particular rules. The trustworthiness of these references, however, is another question. To date, nobody has studied it and compared the regulations of the BPLC with the references.

15 A. Ylander. Die Rolle des römischen Rechts im Privatrecht der Ostseeprovinzen Liv-, Est- und Kurland. – Zeitschrift für vergleichende Rechtswissenschaft, 1918, Vol. 35, S. 441.

16 See *e.g.* J. Jegorov. Retseptsija prava v istorii Estonii (XIII–XIX vv.). – Studia iuridica 2. Acta et commentationes universitatis Tartuensis, 1989, Vol. 847, p. 104.

17 In 1710, the University of Tartu, established by Gustav Adolf, King of Sweden, in 1632 ceased to operate due to the Great Northern War. The university was reopened in Tartu only in 1802.

18 For details, see M. Luts. Integration as Reception: University of Tartu Faculty of Law Case in 19th Century. – Juridica International. Law Review. University of Tartu, III, 1998, pp. 130–133; closer details in M. Luts. "Eine Universität für Unser Reich, und insbesondere für die Provinzen Liv-, Ehst- und Kurland": Die Aufgaben der Juristenfakultät zu Dorpat in der ersten Hälfte des 19. Jahrhunderts. – Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Germanistische Abteilung, 2000, Vol. 117, pp. 608–620.

Bestimmtheit seiner Prinzipien, die nicht zu verkennende Consequenz die überall wohlthätig hervorleuchtet, machen dasselbe stets zu einem gefährlichen Nebenbuhler einheimisch provincieller Rechte. Unwillkürlich wendet der Richter /.../ gerade dieses vorzugsweise an, mit Hintansetzung einheimischer Rechtsbestimmungen. /.../ Während das Römische Recht nur ein subsidiäres und Hülfsrecht sein sollte, wird es meist umgekehrt zur Hauptgrundlage, so dass das einheimisch provincielle Recht den Character eines subsidiären und ergänzenden gewinnt. Solchem Misstande und Unrecht kann aber nur dadurch vorgebeugt werden, wenn die Darstellung der provinciellen Rechte dasjenige, was von dem Römischen Recht ein integrirender Theil des ganzen Rechtszustandes geworden, mit aufgenommen, und so durch die Verwebung zu einem gemeinsamen Ganzen in seine festen Grenzen gewiesen wird."*[19]

By a careful selection and rewriting of Roman law provisions in his provincial law codification, Bunge did thus no more than determined very clearly the borders as to when and to what extent Roman law could be applied in courts from that time onwards. In that sense, it was not a new wave of reception. Rather, Bunge's activities were aimed at limiting the actual reception.

Regulation of the individual types of real servitudes apparently served the same purpose (sections 1118–1198) after presenting the general principles (sections 1089–1102 on servitudes in general and sections 1103–1116 on real servitudes in general). Moreover, the part of servitudes of cutting quoted above indicates that such detailed regulation enabled Bunge to include all local peculiarities in the code. However, such move in the case of the BPLC does not mean as if the presentation of the individual types of servitudes provided an exhaustive list of real servitudes permitted by law. Sections 1117 and 1181 clearly demonstrate that the BPLC allows to establish other real servitudes according to the general principles:

"*1117. Diejenigen Felddienstbarkeiten, für welche noch besondere Bestimmungen gelten, sind: 1. die Wegegerechtigkeit; 2. das Hut- und Weidegerechtigkeit; 3. die Heuschlagservitut; 4. die Wassergerechtigkeit; 5. die Hölzungsgerechtigkeit; 6. die Bienengerechtigkeit. Andere Felddienstbarkeiten, wie z. B. das Recht auf dem dienenden Grundstücke Kalk zu brennen, Steine zu brechen, Sand und Lehm zu graben, Kohlen zu brennen, Theer zu schwelen, Rohr zu schneiden, Früchte zu sammeln, auf fremden Gewässer zu fahren und Holz zu flössen, darin zu fischen u. s. w., haben den gemeinschaftlichen Charakter aller Dienstbarkeiten.*

1181. Die gewöhnlichen Hausdienstbarkeiten sind: 1. das Trag- und Lastrecht; 2. das Tramrecht; 3. das Recht zu überragendem Bau; 4. das Traufrecht; 5. das Recht des Aufgusses; 6. die Baugerechtigkeit; 7. das Lichtrecht und 8. das Recht der Aussicht. – Alle diese Servituten werden, wo nicht besondere Bestimmungen für sie gesetzlich festgestellt oder bei der Bestellung angeordnet sind, nach dem allgemeinen Regeln über Dienstbarkeiten beurtheilt. Auch noch andere Dienstbarkeiten, als die genannten können durch Verzicht auf die beschränkenden Befugnisse entstehen, welche die Beziehung auf Bauten einem Nachbarn gegen den andern zustehen."

Thus, *numerus clausus* is not applicable to the regulation of the real servitudes in the BPLC. However, the presentation of the local peculiarities indicates that Bunge used this step to implement the rule *lex specialis derogat legi generali*. The same principle was yet observed by the compilers of the 1936/40 draft Civil Code. When the draft preparation committee undertook the second reading of the part of the law of property in September 1927*[20], it proceeded from the Estonian translation of the BPLC with regard to real servitudes. Moreover, the explanatory memorandum, drawn up by professor Jüri Uluots in 1936 says that "the specific rules to characterise the particular type of individual real servitudes (sections 1022–1032*[21]) rely on the applicable law (*i.e*. on the BPLC — M.L.)."*[22] However, the BPLC regulation was not included in the draft verbatim and in all its details. The minutes of the committee reveal the principles from which the compilers of the draft proceeded at that point. The relationship between the general and specific provision continued to play an important part. The committee discarded the BPLC rules that did not contain rules diverging from

19 C. O. Madai (Rezension). F. G. Bunge, Das Liv- und Esthländisches Privatrecht. – Kritische Jahrhbücher für deutsche Rechtswissenschaft. Hrsg. von A. L. Richter u. R. Schneider, 1841, Vol. 5, S. 845.

20 Tsiviilkomisjoni protokollid nr 151–350 (Civil Committee minutes No. 151–350). 21. mai 1926 – 4. aprill 1929. – TÜ Raamatukogu, Käsikirjade ja harulduste osakond, fond 164, säilik 8, leht 335 (University of Tartu Library, Section of Manuscripts and Rara), Stock 164, Item 8, p. 335 (in Estonian).

21 Sections 1054–1064 in the final draft of 1940.

22 Seletuskiri tsiviilseadustiku 1936. aasta eelnõu juurde (Explanatory memorandum accompanying draft Civil Code of 1936). Koost. J. Uluots. – TÜ Raamatukogu, Käsikirjade ja harulduste osakond, fond 164, säilik 17, leht 61 University of Tartu Library, Section of Manuscripts and Rara), Stock 164, Item 17, p. 61 (in Estonian).

the general principles.*[23] Bunge had included them in the code only in the interests of integrity and outlining the applicability of Roman law.*[24]

As of 1927, the relevant sections of the draft Civil Code were largely nothing but the translation of the BPLC. The wording of the final version of 1940 differs significantly from that draft although the content is basically the same. Many of the real servitudes regulated separately in the BPLC have been excluded from the draft of 1940 (servitude of mowing, right to keep bees, *etc*.). Although the precepts in conformity with sections 1117 and 1181 of the BPLC*[25] have not been included, it may be presumed that general rules apply to the individual types not included in detailed regulation. However, several types of servitudes excluded from detailed regulation (servitude of cutting, servitude of projection, servitude of higher building, servitudes of light and prospect) have been, once again, regulated as separate types in the draft of 1940. At the same time, we cannot say that they contained specific provisions that modified or abolished the general rules in any manner. Thus, the regulation of the individual types of real servitudes in the Civil Code was to serve some other purpose. This is also directly expressed in the explanatory memorandum accompanying the draft. These specific rules were necessary for "characterising*[26]" the individual types of real servitudes. Consequently, these provisions were not used to pursue any regulatory goal. Rather, they served to exemplify the general rules of real servitudes.

For the same purpose, these provisions have been included in the applicable Law of Property Act of Estonia. The admission that these sections should have been excluded from the Act is followed by a reservation: "However, the individual types of servitudes help to clarify the notion of the servitude."*[27] The same sentence continues with a smart observation that should have been taken into account at the time of drafting the Act: "/…/ but it should have been the task of theoretical writing." This bitter confession points out a general trend in the modern Estonian legislative technique and style.

Didactic legislation

The textbook-like presentation of individual types of real servitudes in the Law of Property Act, as observed in greater detail here is only one example of a general trend in Estonian legislation. After the re-establishment of independence in 1991, significant changes have occurred in the Estonian social and legal order. It is obvious that a decisive transfer to market economy, building of the rule of law, *etc*. also necessitates a decisive legal reform. At least legislation appears to be the means to elicit a rapid change in the existing order. However, at this point we will not examine in detail the extent to which this idea conforms to reality. The author's certain scepticism concerning this issue has obviously become apparent already. In this context, it suffices to say that transitional societies attempt to carry out a legal reform primarily through legislation.

The Estonian reform laws generally stand out by their unusual textbook-like style. Firstly, it is evident in numerous legal definitions. The attempt to formulate legal definitions becomes apparent in all areas of law, not in private law only. Secondly, Estonian legislation stands out by the detailed nature of regulation. I do not intend to claim as if the 19th century Baltic-German casuistic approach, such as represented by the BPLC, was still continued in Estonia to date. However, the current style of legislation in Estonia is distinguishable by its detailed nature.*[28] To a certain extent, it is caused by the pursuit of change of the transitional society. The history of Estonia and naturally also the history of law have seen several turns of tide during the 20th century, so that it is difficult to speak about a

23 Civil Committee minutes (Note 20), pp. 214, 217, 220.

24 At the same time, the BPLC contains several systematisation errors that arise from inadequate knowledge of Roman law. In the case of the servitudes of height and light, they have been pointed out by C. Erdmann. System des Privatrechts der Ostseeprovinzen Liv-, Est- und Curland. Vol. 2. Riga, 1891, pp. 297–299.

25 As of 1927, they were to be included. In section "Other field servitudes", the sample list of section 1117 of the BPLC has been supplemented with servitudes of mowing and cutting and the right to keep bees. Of urban servitudes, only servitude of support, servitude of stillicide ("servitude of eavesdroppings") and "servitude of pouring out slops" had been included as individual types of servitudes. Servitudes of projection, higher building, light and prospect, on the contrary, were mentioned only in section "Other house servitudes". The general rules of servitudes were to be applicable to all of them. Civil Committee minutes (Note 20), pp. 215, 218.

26 Explanatory memorandum (Note 22), p. 61.

27 P. Pärna, V. Kõve (Note 2), p. 301.

28 For a closer look, the Estonian draft Penal Code could serve as an example: E. Samson. Eesti karistusseadustiku üldosa eelnõust (On the Estonian Draft General Part of Penal Code Act). – Juridica, 1998, No. 2, pp. 61–62 (in Estonian), who also emphasises the positive features of such detailed regulation style.

developed tradition in jurisprudence and practice. Consequently, upon developing reform laws, a particular didactic function has been assigned thereto. Thus, the Estonian reform law legislator has shouldered much of what belongs to the tradition of legal dogmatics elsewhere. The authors of the Law of Property Act also claim that the presentation of individual types of real servitudes in the Act serves a didactic purpose as it is an unknown phenomenon to jurists with the Soviet legal order background. It appears that the theorists have forgotten that as all jurists, their first year curriculum included a mandatory subject the Foundations of Roman Private Law. So all Soviet jurists were provided with an overview of the nature of servitudes and their various types at the university.

The use of law in its didactic function is facilitated by yet another phenomenon that has gradually established itself in Estonian legal practice. Namely, we lack the publishing tradition when it comes to legislative materials and therefore or irrespective thereof we also lack the tradition of using thereof. Although the Law of Property Act has been in force already from 1993, the explanatory memorandum and working materials of the committee have not been published to date.*[29] Only the materials produced with regard to the preparation of the Constitution (1992)*[30] and the initial alternative drafts*[31] have been published. The publication of the reasons of the draft Penal Code*[32] before the adoption of the Code by the Parliament*[33] may be regarded as a landmark in itself. However, these are but a few examples that emphasise the general trend even more strongly. Thus, it is not surprising that attempts are made to include in the laws all this that would be left to the realm of explanatory memorandums, *etc*. in a different tradition. Here we disregard the question of whether obstructed access to legislative materials hinders the operation of law, not to mention the application of the principles of study of legal methodology.

To date, it has not been studied in Estonia if and in what manner these circumstances influence the actual performance of the legal reform in the end. The legal-historical experience tends to show that a casuistic and textbook-like legislative style need not yield the best and expected results. The need of a transitional society for rapid and decisive reform should not overshadow the other essential conditions that ensure the functioning of a modern legal system. One of them is the principle of efficiency of the legislative style that the Law of Property Act, abandoning the servitude of cutting but retaining, for example, the servitude of watering of livestock, violates.

29 The situation has improved with later drafts as the explanatory memorandums are usually available on the Internet.

30 Põhiseadus ja põhiseaduse assamblee. Koguteos (Constitution and Constitutional Assembly. Collected Articles). Tallinn, 1997, 1296 lk (in Estonian).

31 Taasvabanenud Eesti põhiseaduse eellugu (Pre-Story of Constitution of Reindependent Estonia). Tartu, 1997 (in Estonian). This publication also contains the so-called pre-constitutional acts.

32 M. Ernits, P. Pikamäe, E. Samson, J. Sootak. Karistusseadustiku üldosa eelnõu: Eelnõu lähtealused ja põhjendus (Draft General Part of Penal Code Act: Bases and Reasons). Tallinn, 1999 (in Estonian).

33 Karistusseadustik (Penal Code), passed 6June 2001. – Riigi Teataja (The State Gazette) I 2001, 61, 364 (in Estonian).