Dear Reader,

Ten years have passed since the adoption of the Constitution of the Republic of Estonia on 28 June 2002. The Constitution is both a symbol and the legal foundation of independent statehood. It is also the ultimate form of expression of a society's political and legal thought. Each legal system is unique and this uniqueness is embodied in the Constitution of the state.

Preparation of the current Constitution began together with our pursuit of independence. The drafting of a Constitution based on the principles of democracy, freedom and a state based on the rule of law began in 1991 within the committee of lawyers set up by the Supreme Council, the representative assembly of the time. The Constitutional Assembly of 60 members, uniting all political forces, was set up in the autumn of 1991. It was not easy to achieve a public consensus. Different working groups and individuals submitted six draft Constitutions; the re-establishment of the Constitution of 1938 was also seriously considered. The substance of the document on which Estonian statehood relies was agreed upon as a result of the short-term, but very intensive work of the Constitutional Assembly.

The cornerstone of our legal order has remained unchanged for ten years. The entire Estonian legal system, public administration system and system of law enforcement authorities have been built upon it. The Constitutional principle of separation of powers is successfully applied in practice. The values embodied in the Constitution serve as the basis for the new democratic order in all its forms of expression.

Having reason to be proud of the stability of our Constitution, we do not see a forever unchanged Constitution as a value in itself. The Constitution has to take account of the foreign and domestic policy priorities and realities of Estonia. Estonia's future is related to the European Union and this choice requires a real embodiment in the Constitution.

The tenth anniversary of the Constitution is celebrated extensively in Estonia by way of various events and publications. The first commented edition of the Estonian Constitution will appear this year. Several conferences and seminars will be held, including an international conference in September 2002. All upper secondary school and university graduates received the text of the Constitution with their names on it together with their graduation diplomas. This issue of *Juridica International* is also dedicated to topics relating to the Constitution. This issue contains articles on the implementation of the Constitution and its provisions so far, but also a glance at the future, the period when Estonia will become a member of the European Union. Topics related to the Constitution provide an overview of the different facets of current Estonian legal order and legal thought. The last ten years have been demanding for Estonian lawyers: they have had to retrain themselves and adapt to the principles of a democratic state based on the rule of law and the rules of the market economy. This particularly applies to the legal order of the European Communities, a great part of which has already been transposed to Estonian law.

I am glad to say that acclaimed foreign experts have also written articles about the Estonian Constitution. The support and assistance of foreign colleagues was already substantial at the time of drafting the Constitution. This has given us the opportunity to take a view of our legal system from the sidelines, through the prism of traditional European law. At the same time, the unique Constitution of Estonia and the legal order based on it makes our contribution to traditional European legal science.

Märt Rask

Minister of Justice

Contents:

Ingo von Münch

Dr. Dr. h. c., Professor (emeritiert) für Staatsrecht, Verwaltungsrecht und Völkerrecht, Hamburg

Die Freiheit der Wissenschaft als Problem des Rechts und der Ethik*

1. Einführung

Im Mittelalter glaubten die Menschen, die Erde sei das Zentrum der Welt; um die – nach jenem Glauben – nicht sich bewegende Erde kreisten danach die anderen Planeten. Aufgrund wissenschaftlicher Berechnungen gelangte der Astronom Nikolaus Kopernikus zu der Überzeugung, dass diese geozentrische Sicht ein Irrtum sei. Das damals neue kopernikanische Weltbild stieß sowohl auf Widerspruch als auch auf Zustimmung. Die berühmteste Unterstützung erhielt das kopernikanische System durch den Mathematiker und Philosophen Galileo Galilei. Sein im Jahre 1632 in Florenz erschienenes Werk „Dialogo", ein „Gespräch über das ptolemäische und das kopernikanische Weltsystem", in dem er seine Parteinahme für Kopernikus deutlich zeigte, führte zu einem Kirchengerichtsprozess gegen Galilei. Der Prozess endete damit, dass der Angeklagte seine wissenschaftliche Auffassung widerrufen musste, und dass er zu einer unbefristeten Haftstrafe verurteilt wurde. Der ihm später zugeschriebene, bei der Urteilsverkündung abgegebene Kommentar: „Und sie (die Erde) bewegt sich doch" ist zwar inhaltlich richtig, aber wohl nur eine Legende. Jedenfalls: Das Urteil gegen Galilei war, wie wir heute wissen, und wie es schon die wissenschaftlichen Erkenntnisse des 19. Jahrhunderts bewiesen, ein Fehlurteil. Aber erst 1992 erklärte Papst Johannes Paul II. die im Jahre 1633 erfolgte Verurteilung des Galilei als ungerechtfertigt. Zwischen der Verurteilung und der Rehabilitierung lagen also 359 Jahre.

Heute geht es bei der Freiheit der Forschung nicht mehr darum, ob die Erde sich bewegt, sondern vor allem um medizinische und biologische Forschung, vor allem um Gen-Forschung. Die wissenschaftliche Entwicklung ist scheinbar grenzenlos geworden. Die erste Transplantation eines lebenden Herzens durch den südafrikanischen Chirurgen Christian Barnard 1967 war noch eine medizinische Sensation; inzwischen sind Herztransplantationen schon fast Routine. Schon kann man die Frage stellen: Wann kommt die Verpflanzung eines kompletten Gehirnes? Die künstliche Befruchtung (in-vitro-Fertilisation) ist bereits so alltäglich, dass deren Kosten von den Krankenkassen erstattet wird. Diskutiert wird unter Medizinern, ob es künftig möglich sein wird, einen Embryo in einen Mann einzupflanzen, damit dieser die Schwangerschaft

* Der Text ist die Veröffentlichung eines Vortrages auf der Estnisch-Deutschen Woche (Academica V) an der Universität Tartu am 18.09.2001.

austrägt; auch von „Designer-Babys" ist bereits die Rede, bei denen die Eltern durch genetische Veränderungen vor der Geburt, das Aussehen oder andere natürliche Eigenschaften des Embryos verändern.[*1] Haarfarbe, Augenfarbe, vielleicht sogar die Hautfarbe ihres Kindes können Eltern vermutlich in Zukunft selbst bestimmen. Die neueste, aktuelle Kontroverse über die Grenzen der Freiheit der Wissenschaft betrifft die sogenannte Stammzellenforschung (Präimplantationsdiagnostik)[*2] und das Klonen von Lebewesen, das mit dem bekannten Schaf „Dolly" in Schottland bereits geschehen ist, hinsichtlich von Menschen aber in Deutschland gem. Embryonenschutzgesetz verboten ist.[*3] Eine Weltpremiere von besonderem Interesse bildet auch das estnische Gesetz über Humangenomforschung vom 13. Dezember 2000[*4] (in Kraft seit dem 8.1.2001), das großes Interesse außerhalb der Republik Estland gefunden hat.[*5]

2. Begriffe „Wissenschaft" und „Wissenschaftler"

Wer sich mit der Freiheit der Wissenschaft befasst, muss zunächst klären, was unter dem Begriff „Wissenschaft" überhaupt zu verstehen ist. Der normale Bürger, also der Laie, wird mit dem Begriff „Wissenschaft" keine Probleme haben. Er wird den Begriff „Wissenschaft" mit der „Forschung" identifizieren, die an Hochschulen (insbesondere an Universitäten) stattfindet. Für Juristen ist die Bestimmung des Begriffs der Wissenschaft dagegen nicht ganz so einfach.[*6] Der Jurist muss z. B. die Fragen stellen, ob es – juristisch gesehen – einen Unterschied gibt zwischen Grundlagenforschung und angewandter Forschung, und ob auch die Forschung in Industrieunternehmen, z. B. in der pharmazeutischen Industrie, den Begriff der wissenschaftlichen Forschung erfüllt. Andere, rechtlich relevante Fragen sind: Ist das Ingenieurwesen nur Technik oder Wissenschaft? Ist Architektur Wissenschaft oder Kunst oder keines von Beidem? Das Stichwort „Kunst" weist übrigens für unsere verfassungsrechtliche Betrachtung eine interessante Parallele zum Stichwort „Wissenschaft" auf, nämlich die Schwierigkeit der rechtlichen Definition dieser Begriffe. In Bezug auf den Begriff „Kunst" ist in der Bundesrepublik Deutschland sogar die Meinung vertreten worden, „Kunst" sei juristisch nicht definierbar.[*7] Diese Resignation erinnert paradoxerweise an den eher optimistischen Ausspruch des bekannten Künstlers *Joseph Beuys*: „Alles ist Kunst, jeder ist Künstler." Die Versuche der Rechtsprechung deutscher Gerichte den Begriff „Wissenschaft" zu definieren, enden leider meist in ziemlich vagen Formulierungen. So hat das Bundesverfassungsgericht früher wissenschaftliche Tätigkeit definiert als „alles, was nach Inhalt und Form als ernsthafter, planmäßiger Versuch zur Ermittlung der Wahrheit anzusehen ist."[*8] Diese Definition ist gewiss nicht falsch, aber sie provoziert – indem sie auf die Ermittlung der Wahrheit abstellt – die uralte, schon in der Bibel aufgeworfene Frage: Was ist Wahrheit?

Vermutlich ist es am sinnvollsten, einzelne Elemente der Wissenschaft wie Bausteine zusammenzutragen. Solche Elemente (Bausteine) sind: eine nationale, planmäßige Tätigkeit, *lege artis*, mit dem Bestreben neue Erkenntnisse zu finden oder bereits vorhandene Erkenntnisse zu präzisieren oder fortzuführen, mit Ergebnissen, die beweisbar oder jedenfalls diskutierbar sind. Kriterien der Wissenschaft sind also insbesondere Methodik, Systematik, Rationalität, Erkenntnisstreben, Recherche und Kommunikation. Das Erfordernis planmäßiger Tätigkeit schließt wissenschaftliche Zufallsfunde nicht aus. Auch ist immer zu bedenken, dass der Begriff „Wissenschaft" viele, im Einzelnen sehr unterschiedliche Wissenschaftsdisziplinen umfasst. Große Unterschiede in der Art der Gewinnung von Erkenntnissen bestehen vor allem zwischen den Naturwissenschaften einerseits und den Geisteswissenschaften andererseits. Aber auch innerhalb der Geisteswis-

[1] Nachweise dazu bei: I. von Münch. Die Würde des Menschen im deutschen Verfassungsrecht. – FS für D. Rauschning, Köln/Berlin/Bonn/München, 2001, S. 27 *ff.* [28, 34].

[2] Vgl. dazu K. Faßbender. Präimplantationsdiagnostik und Grundgesetz. – Neue Juristische Wochenschrift (NJW), 2001, S. 2745 *ff.*; E. Giwer. Rechtsfragen der Präimplantationsdiagnostik. Eine Studie zum rechtlichen Schutz des Embryos im Zusammenhang mit der Präimplantationsdiagnostik unter besonderer Berücksichtigung grundrechtlicher Schutzpflichten. Berlin, 2001.

[3] Vgl. dazu allgemein: J. C. Joerden. Wessen Rechte werden durch das Klonen möglicherweise beeinträchtigt? – Jahrbuch für Recht und Ethik, Bd. 7 (1999), S. 79 *ff.*

[4] Riigi Teataja (Staatsanzeiger) I 2000, 104, 685. Deutsche Übersetzung in: Jahrbuch für Ostrecht. Bd. 42 (2001).

[5] Vgl. dazu: T. Mullari, N. v. Redecker, T. Sild. Estlands Genbankgesetz – eine Weltneuheit. – Wirtschaft und Recht in Osteuropa (WiRO), 10. Jg. (2001), S. 201 *ff.*; E. Reimer, N. v. Redecker. Staatliche Genbanken unter dem Grundgesetz. – Estland als Vorbild für Deutschland? – JOR, Bd. 42 (2001).

[6] Vgl. dazu Entscheidungen des Bundesverfassungsgerichts (BVerfGE), 90, 1 *ff.* [11]; I. Pernice. – Dreier (Hrsg.). Grundgesetz. Bd. 1. 1996, Art. 5 III, Rn. 14 *ff.*; R. Scholz. – Maunz/Dürig/Herzog/Scholz u. a. (Hrsg.). Grundgesetz Art. 5 III, Rn. 91 *ff.*; Chr. Starck. – v. Mangoldt/Klein/Starck. Das Bonner Grundgesetz. Bd. 1. 4. Aufl. 1999, Art. 5, Abs. 3, Rn. 322 *ff.*; R. Wendt. – v. Münch/Kunig (Hrsg.). Grundgesetz – Kommentar. Bd. 1. 5. Aufl. 2000, Art. 5, Rn. 100.

[7] Entscheidungen des Bundesverwaltungsgerichts (BVerwGE), 39, 197 *ff.* [207].

[8] So in BVerfGE, 35, 79 *ff.* [113]; BVerfGE, 47, 327 *ff.* [367]. – Neuerer Versuch einer Definition des Begriffes „Wissenschaft". – BVerfGE, 90, 1 *ff.* [11].

senschaften ist die wissenschaftliche Arbeit z. B. in der Rechtswissenschaft eine andere als in der Theologie, obwohl die Interpretation als Erkenntnismethode in der Rechtswissenschaft der Exegese von biblischen Texten in der Theologie ähnelt.

Wissenschaft beruht stets auf Forschung: Die Forschung ist das Essentielle der Wissenschaft. Es gibt keine Wissenschaft ohne Forschung und keine Forschung ohne Wissenschaft. Dagegen ist Wissenschaft nicht notwendig mit der Lehre verbunden, d. h. mit der Vermittlung der Forschungsergebnisse an Studenten. Es gibt Forschungsinstitute, wie in Deutschland die Institute der Max-Planck-Gesellschaft und der Fraunhofer-Gesellschaft, in denen die meisten Mitarbeiter forschen, aber nicht zugleich lehren. Umgekehrt setzt wissenschaftliche Lehre vorangehende wissenschaftliche Forschung voraus: Während also wissenschaftliche Forschung ohne darauf aufbauende wissenschaftliche Lehre möglich ist (und praktiziert wird), ist wissenschaftliche Lehre ohne vorangegangene wissenschaftliche Forschung nicht denkbar.

Die Hochschullehrer sind die klassischen und typischen Wissenschaftler (wobei die rechtliche Organisationsform ihrer Institution – staatliche Universität oder private Universität/Hochschule – für den Begriff „Wissenschaft" keine Rolle spielt, also unbeachtlich ist), aber die Hochschullehrer sind nicht die einzigen Wissenschaftler. Der Begriff „Wissenschaftler" definiert sich nämlich nicht nach einem Status in einer Hierarchie, sondern aus seiner eigenverantwortlichen Tätigkeit. Deshalb können auch wissenschaftliche Mitarbeiter (Assistenten), Doktoranden[*9], ja sogar Studenten dann als Wissenschaftler angesehen werden, wenn sie wissenschaftlich arbeiten, was der Fall ist, wenn sie selbstständig eine wissenschaftliche Arbeit publizieren.

Für Freiheit der Wissenschaft ist schließlich auch wichtig, dass der Begriff „Wissenschaft" nicht mit Nützlichkeitserwägungen befrachtet und belastet werden darf. Die Meinung, dass schon zum Begriff der Wissenschaft eine Tätigkeit zum Nutzen der Allgemeinheit, d. h. zum allgemeinen Wohl, gehöre, ist mit Nachdruck zurückzuweisen. Wie der Begriff der Kunst („*l'art pour l'art*"), so ist auch der Begriff „Wissenschaft" nicht an Kosten/Nutzen-Analysen gebunden. Zur Freiheit der Wissenschaft gehört, dass die Wissenschaft gerade nicht staatlichen oder gesellschaftlichen Interessen zuarbeiten muss. Auf einem anderen Blatt seht allerdings, dass wissenschaftliche Forschung, die zu politisch oder ökonomisch verwertbaren, nützlichen („Dividende bringenden") Ergebnissen kommt, meist mehr Aufmerksamkeit, mehr Beifall und auch mehr finanzielle Förderung erfährt als Wissenschaft nur um der Wissenschaft willen.

3. Rechtliche Regelungen

Eine andere Frage als die nach etwaigen dem Begriff „Wissenschaft" immanenten Grenzen ist, ob wissenschaftliche Tätigkeit durch rechtliche Regelungen eingeschränkt werden kann. Als rechtliche Regelungsinstrumente kommen in Betracht: Bestimmungen in der Verfassung des Staates, in einfachen Gesetzen und in internationalen Verträgen. Die Verfassungen der Staaten garantieren traditionell die Freiheit der Wissenschaft. Die Verfassung der Bundesrepublik Deutschland (das „Grundgesetz") und die Verfassung der Republik Estland enthalten diese Garantie in einer fast identischen Formulierung. Das Grundgesetz der Bundesrepublik Deutschland formuliert in Artikel 5 Absatz 3 Satz 1: „Kunst und Wissenschaft, Forschung und Lehre sind frei." Die Verfassung der Republik Estland bestimmt in § 38 Absatz 1: „Wissen und Kunst und deren Lehre sind frei."

Die nach dem Wortlaut dieser Bestimmungen anscheinend unbegrenzte Freiheit der Wissenschaft unterliegt in Wahrheit nicht wenigen Beschränkungen. Soweit die Organisation der Universitäten betroffen ist, existieren Universitätsgesetze, welche Einzelheiten der universitären Organisation regeln. Die Verfassung der Republik Estland enthält in § 38 Absatz 2 die Bestimmung: „Universitäten und Forschungsinstitute sind innerhalb der gesetzlich festgelegten Grenzen autonom." Eine solche Bestimmung ist im Grundgesetz der Bundesrepublik Deutschland nicht vorhanden. Dennoch ist insoweit die verfassungsrechtliche Lage in Deutschland nicht anders als in Estland. Die Befugnis des Staates, die Organisation der wissenschaftlichen Forschung und der wissenschaftlichen Lehre zu regeln, ergibt sich in Deutschland daraus, dass das Grundrecht der Freiheit der Wissenschaft nicht nur als ein subjektives Recht des einzelnen Wissenschaftlers angesehen wird, sondern auch (zusätzlich) als eine Organisationsmaxime, die organisationsrechtliche Regelungen des Universitätsbetriebes nicht nur ermöglicht sondern sogar erfordert.[*10] Organisationsrechtliche Regelungen sind aber nicht nur in staatlichen Gesetzen, wie den schon erwähnten Universitätsgesetzen, zu finden, sondern auch in autonomen Regelungen der Universitäten und Fakultäten selbst. Beispiele hierfür sind die universitären Prüfungsordnungen, wie Magisterprüfungsordnungen und Promotionsordnungen. Eine Besonderheit gilt in Deutschland für das juristische Studium, dessen Abschlussexamen nicht ein Universitätsexamen ist, sondern ein Staatsexamen, das durch staatliche Rechtsvorschriften geregelt ist und das von einem staatlichen Prüfungs-

[9] Oberlandesgericht (OLG) Köln. – NJW, 1984, S. 1119 *ff.* [1120] betreffend eine von der Fakultät angenommene und zur Veröffentlichung freigegebene Dissertation.

[10] BVerfGE, 35, 79 *ff.* [115]; BVerfGE, 93, 85 *ff.* [95].

amt beim Oberlandesgericht durchgeführt wird*[11]; die Prüfungskommission besteht jeweils zur Hälfte aus Richtern oder Staatsanwälten als Praktikern und aus Professoren als Repräsentanten der Wissenschaft. Jedenfalls gilt für alle Wissenschaftsdisziplinen: Schon um ein faires Prüfungsverfahren*[12] und Rechtssicherheit im Sinne von Berechenbarkeit zu garantieren, müssen die Prüfer an rechtliche Regeln gebunden sein. Soweit die Wissenschaftler an staatlichen Universitäten forschen und lehren, sind sie in der Regel Beamte oder Angestellte im öffentlichen Dienst und unterliegen damit den für sie geltenden gesetzlichen oder dienstvertraglichen Regelungen, z. B. hinsichtlich der Pflicht zur Verschwiegenheit. Dementsprechend unterliegen die meisten Wissenschaftler (wie auch die Universitäten insgesamt) der Rechtsaufsicht durch den Staat, d. h. durch das zuständige Ministerium. Grundsätzlich gilt hochschulpolitisch: Je weniger der Staat sich in die Universitäten einmischt, umso besser ist dies für die Universitäten und für den Staat selbst. Umgekehrt gilt: Je besser die Universitäten sind, umso weniger besteht Anlass oder Vorwand für den Staat, sich in die inneren Angelegenheiten der Universitäten einzumischen.

Bei den gesetzlichen Regelungen des Staates wie auch bei den inneruniversitären (autonomen) Ordnungen spielt die Unterschiedlichkeit der verschiedenen Wissenschaftsdisziplinen eine große Rolle. Es gibt nämlich zahlreiche Gesetze, die zwar theoretisch für alle Wissenschaftler gelten, die aber in der Praxis nur für eine einzige Wissenschaftsdisziplin oder nur für einige wenige Wissenschaftsdisziplinen faktisch relevant sind. So gilt z. B. das Embryonenschutzgesetz für (oder besser gesagt: gegen) jeden Wissenschaftler; in der Praxis ist aber davon tatsächlich nur die medizinische und biologische Forschung betroffen. Gleiches gilt für ein Tierschutzgesetz und für die Bioethik-Konvention des Europarates, um ein internationales Abkommen zu nennen. Bestimmte Sicherheitsvorschriften für die Lagerung von gefährlichen Materialien sind theoretisch von jedem Staatsbürger zu beachten; in der Praxis spielen diese Vorschriften aber nur (oder jedenfalls vor allem) eine Rolle in chemischen oder physikalischen Instituten.

Die Rechtswissenschaft ist, wie jede andere Wissenschaftsdisziplin, ein buntes Mosaik mit vielen verschiedenen Facetten. Unter dem Dach der Rechtswissenschaft leben die Rechtsphilosophie, die Rechtsgeschichte, die Rechtssoziologie, die Rechtsvergleichung, die Methodenlehre, und vor allem die Erforschung und Lehre des geltenden Rechts. Die Hauptgebiete des geltenden Rechts, also das Zivilrecht, das Strafrecht und das öffentliche Recht, sind ihrerseits in spezielle Rechtsgebiete unterteilt, z. B. Familienrecht, Erbrecht, Handelsrecht, Arbeitsrecht, Medizinrecht, Verfassungsrecht, Verwaltungsrecht, Prozessrecht usw. Für alle diese Rechtsgebiete gilt, dass der Rechtswissenschaftler in seinen Forschungen und in der Lehre sich auf diesem Boden bewegen muss. Aber er kann Luftsprünge machen: Der Rechtswissenschaftler ist in einem freien Staat, wie es die Republik Estland und die Bundesrepublik Deutschland sind, frei, geltende gesetzliche Regelungen zu kritisieren. Der Rechtswissenschaftler hat geradezu die Aufgabe, auf Schwachstellen gesetzlicher Regelungen hinzuweisen und Vorschläge zur Veränderung des geltenden Rechts zu machen sowie vor problematischen Reformen des Rechts zu warnen.*[13] Sogar das geltende Verfassungsrecht darf der Rechtswissenschaftler in Frage stellen. Ich möchte dafür ein Beispiel nennen: Die Verfassung der Bundesrepublik Deutschland verbietet*[14], ebenso wie die Verfassung der Republik Estland (§ 18 Absatz 1), die Anwendung von Folter gegen Gefangene. An dieses verfassungsrechtliche Verbot sind alle staatlichen Behörden gebunden, insbesondere die Polizei. Dennoch war es zulässig, dass kürzlich ein deutscher Rechtswissenschaftler, nämlich der Professor für öffentliches Recht an der Universität Heidelberg, Professor *Wilfried Brugger*, die uneingeschränkte Geltung des Verbotes der Folter in Frage gestellt hat.*[15] Professor *Brugger* hat nämlich in einer rechtswissenschaftlichen Abhandlung die Frage aufgeworfen und bejaht (!), ob in ganz besonderen Ausnahmefällen die Anwendung von Folter – entgegen dem Wortlaut der Verfassung zulässig sein kann. Er nennt den Fall, dass der Polizei bekannt ist, dass ein schwerer terroristischer Anschlag z. B. gegen ein Atomkraftwerk geplant ist, dass die Polizei aber nicht weiß, wann und wo und wie der terroristische Anschlag stattfinden wird. Die Polizei könnte jedoch von bereits verhafteten Komplizen der Terroristen diese Informationen erhalten, aber – da eine freiwillige Information seitens der Verhafteten nicht erfolgt – nur durch Anwendung von Folter.

In diesem Diskussionsbeitrag von Professor *Brugger* liegt eine Kritik an einer einzelnen Verfassungsbestimmung. Eine solche Kritik ist zulässig. Zur Freiheit der Wissenschaft gehört unabdingbar die Freiheit zu kritischem Denken. Eine verfassungsrechtliche Grenze setzt das Grundgesetz der Bundesrepublik Deutschland nur hinsichtlich der Freiheit der Lehre: Gemäß Artikel 5 Absatz 3 Satz 2 entbindet die Freiheit der Lehre nicht von der Treue zur Verfassung. Damit ist nicht eine Kritik an einzelnen Verfassungsbestimmungen gemeint. Gemeint ist vielmehr, dass der akademische Lehrer den Universitätsunterricht nicht als politische Agitation gegen die Grundlagen der Verfassung missbrauchen darf, also insbesondere das Prinzip der Demokratie und das Prinzip des Rechtsstaates nicht aktiv in seinen Vorlesungen bekämpfen darf.

[11] Zur deutschen Juristenausbildung allgemein und zu Reformen: I. v. Münch. Juristenausbildung. – NJW, 1998, S. 2324 *ff.*

[12] Vgl. dazu I. v. Münch. Prüfungen. – NJW, 1995, S. 2016 *ff.*

[13] So haben z. B. zahlreiche deutsche Juraprofessoren vor der von der Bundesregierung initiierten Reform des zivilrechtlichen Schuldrechts im Jahre 2001 gewarnt.

[14] Artikel 104 Absatz 1 Satz 2 Grundgesetz lautet: „Festgehaltene Personen dürfen weder seelisch noch körperlich misshandelt werden."

[15] W. Brugger. Vom unbedingten Verbot der Folter zum bedingten Recht auf Folter? – Juristenzeitung (JZ), 2000, S. 165 *ff.*

4. Ethik in der Rechtswissenschaft

Ethik im Recht ist ein uraltes Thema. Erinnert sei an die Geschichte der Antigone, an das Urteil des Salomo, an die Planke des Karneades, an Fälle von Kannibalismus nach einem Schiffsunglück und an den Tyrannenmord. Beispiele für tragische und scheinbar unauflösbare Situationen gibt es in der Dichtung und im realen Leben genug.

Die Ethik des Rechts ist die Gerechtigkeit. Die Idee der Gerechtigkeit kann allerdings in der Praxis nicht immer der verpflichtende Maßstab jedes Juristen sein. Beispielsweise kommt ein Rechtsanwalt mehr als einmal in seinem beruflichen Leben in die Situation, dass er einem Mandanten in einem Strafprozess verteidigen oder in einem Zivilprozess vertreten muss, obwohl er (der Rechtsanwalt) weiß, dass er damit nicht auf der Seite der Gerechtigkeit steht. Anders ist die Lage des Richters und des Rechtsanwaltes. Der Richter ist gemäß Artikel 20 Absatz 3 Grundgesetz „an Gesetz und Recht gebunden“[*16] und damit auch an die Gerechtigkeit. Der Rechtswissenschaftler unterliegt zwar, anders als der Richter, in seiner Forschung nicht einer solchen strikten Bindung an Gesetz und Recht. Aber der Rechtswissenschaftler gibt sich selbst auf, wenn er nicht für die Gerechtigkeit forscht und lehrt.

In der Praxis des akademischen Lehrers ist für die Studenten besonders wichtig die Gerechtigkeit bei der Beurteilung von Prüfungsleistungen der Studenten und Doktoranden. Der Prüfer muss die Noten ohne Ansehen der Person des Prüflings festsetzen. Der Prüfer darf z. B. Frauen weder bevorzugen noch benachteiligen. Der Prüfer darf sich nicht durch persönliche Bekanntschaften korrumpieren lassen. In Deutschland werden die schriftlichen Arbeiten in den juristischen Staatsexamen anonym geschrieben, was ich für richtig halte. Die Arbeiten während des Studiums, z. B. Seminararbeiten, sowie Doktorarbeiten werden dagegen natürlich nicht anonym geschrieben.

Für Rechtswissenschaftler gibt es keinen allgemein verbindlichen, für alle geltenden Ethik-Kodex. Jedoch gibt es Verhaltensregeln für einige wissenschaftliche Gesellschaften, z. B. für die Deutsche Forschungsgemeinschaft und für die Max-Planck-Gesellschaft. Wenn ein Rechtswissenschaftler mit diesen Institutionen in Verbindung tritt, gelten jene Verhaltensregeln auch für ihn. Jedoch enthalten diese Verhaltensregeln eigentlich nur Selbstverständlichkeiten, z. B. das Verbot des Plagiats, das Verbot der Fälschung von Zitaten oder von Quellen *etc*. Ganz allgemein wird man feststellen können, dass Rechtswissenschaftler sicherlich keine besseren Menschen sind als die Wissenschaftler anderer Disziplinen. Aber die Versuchungen und Gefahren, ein wissenschaftliches Fehlverhalten zu begehen[*17], d. h. sich unmoralisch oder unethisch zu verhalten, sind in der Praxis des Rechtswissenschaftlers weitaus geringer als in der Medizin und in den Naturwissenschaften.[*18] Die Tätigkeit vieler Mediziner und Naturwissenschaftler, insbesondere in der modernen Biomedizin, Biochemie und Biophysik[*19], ist mit sehr viel größeren ökonomischen Anreizen und Vorteilen verbunden als die Tätigkeit des Rechtswissenschaftlers. In den Naturwissenschaften und in den Ingenieurwissenschaften spielt z. B. die Anmeldung von Erfindungen (sogenannte Patente) eine große Rolle. In der Rechtswissenschaft gibt es zwar auch gelegentlich Entdeckungen, aber keine geldwerten Erfindungen. Rechtswissenschaftliche Forschungen sind auch nicht so sensationell wie die Spaltung des Atomkernes oder die Transplantation eines Herzens.

Wo liegen – unter dem Aspekt der Ethik – Gefährdungen des Rechtswissenschaftlers? Ich sehe solche Gefährdungen nicht in Bezug auf die äußere Unabhängigkeit des Rechtswissenschaftlers, sondern in Bezug auf seine innere Unabhängigkeit: Eine zu große Nähe zur Politik, insbesondere zur Parteipolitik, kann dazu führen, dass der Rechtswissenschaftler seine wissenschaftliche Auffassung (bewusst oder unbewusst) den von den Politikern gewünschten Ergebnissen anpasst. Eine zu große Nähe des Rechtswissenschaftlers zu großen Wirtschaftsunternehmen oder zu Organisationen wie z. B. Gewerkschaften und Arbeitgeberverbänden kann dazu führen, dass der Rechtswissenschaftler (wiederum bewusst oder unbewusst) deren Interessen vertritt; dies gilt insbesondere dann, wenn der Rechtswissenschaftler bezahlte Rechtsgutachten im Auftrag eines Wirtschaftsunternehmens oder einer Organisation erstellt, was in Deutschland nicht selten der Fall ist[*20], insbesondere im Gebiet des Wirtschaftsrechts. Eine besondere Gefährdung der inneren Unabhängigkeit kann dadurch eintreten, dass der Rechtswissenschaftler Einflüssen der Massenmedien (Presse, Hörfunk, Fernsehen) unterliegt. Die Medien wollen fast immer eine bestimmte Meinung (nämlich ihre eigene) hören,

[16] Die scheinbare Tautologie „Gesetz und Recht“ erklärt sich so: „Gesetz“ ist das geschriebene Recht (also das Gesetzesrecht), „Recht“ ist das ungeschriebene Recht (also das Gewohnheitsrecht).

[17] Vgl. dazu auch E. Schmidt-Aßmann. Fehlverhalten in der Forschung. Reaktionen des Rechts. – Berlin-Brandenburgische Akademie der Wissenschaften. Berichte und Abhandlungen. Bd. 6. 1999, S. 79 *ff.*

[18] Vgl. dazu: R. Mayntz. Wissenschaftliches Fehlverhalten: Formen, Faktoren und Unterschiede zwischen Wissenschaftsgebieten. – Ethos der Forschung. Ringberg-Symposium 1999. Max-Planck-Forum 2. Herausgegeben von der Max-Planck-Gesellschaft. München, 1999, S. 57 *ff.*

[19] Zur Frage, ob die Universität oder Fakultät eine Kommission zur Überprüfung der Forschungen eines Hochschullehrers einsetzen kann: BVerfGE, 102, 304 *ff.* betr. Forschungen an Hauttumoren.

[20] Vgl. dazu *I. v.* Münch. Gutachten: Der süße Duft. – NJW, 1998, S. 1761 *ff.*

d. h. sie wollen vom Rechtswissenschaftler eine Bestätigung. Der Rechtswissenschaftler sollte in solchen Situationen die innere Unabhängigkeit besitzen, der sogenannten „*political correctness*“ oder dem „*main stream*“ der veröffentlichten Meinung (die nicht immer identisch ist mit der öffentlichen Meinung) sich gerade nicht anzuschließen.

Dies alles ist eigentlich selbstverständlich, jedenfalls in einem freiheitlichen Rechtsstaat. Ganz andere Herausforderungen stellen sich an den Rechtswissenschaftler in einem Staat unter einem totalitären Regime, wie es Deutschland in der Zeit des Nationalsozialismus und Ostdeutschland und Estland in der Zeit des Kommunismus erlebt haben. Wie kann und wie muss der Rechtswissenschaftler mit Gesetzen umgehen, die gerade nicht die Gerechtigkeit verkörpern sondern staatliches Unrecht? In totalitären Regimen ist der Rechtswissenschaftler der Gefahr der politischen Korrumpierung und damit der Gefahr des Verlustes des Ethos des unabhängigen Wissenschaftlers viel stärker ausgesetzt als z. B. der Mediziner.

Ethik ist prinzipiell immer eine Herausforderung an den Einzelnen. Totalitäre Regime wollen den Einzelnen vergesellschaften, d. h. kollektivieren. Ob der Einzelne sich in einem totalitären Regime kollektivieren lässt, hängt von ihm selbst ab. Aber vermutlich kann nur derjenige darüber gerecht urteilen, der selbst unter einem totalitären Regime gelebt hat.

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The Republic of Estonia Constitution on the Concept and Value of Law

1. Estonian legal order as a part of continental European legal culture

The re-establishment of Estonia's independence in 1991 brought along an important constitutional duty for the state of Estonia — to create a new and modern constitution. The problem is that the modern democratic organisation of society has some principal bases which aspirers for actual democracy must know and adhere to.[*1] For the state the only option is to legitimate itself with and via law. It is important to take into account that the Estonian legal system has belonged, and still belongs, to the legal culture of continental Europe. Such a legal system is founded on the idea of ancient Roman legal culture. Already in the ancient world, the legal system was built via legislative drafting of norms. The state of Estonia, taking up the restoration and building of its legal system, is doing it via creating legal norms. The result of the creation of rules must be sufficiently general (abstract) while understandable to the addressees of legal norms. This is necessary so that laymen and the appliers of law are able to adopt decisions that have a legal meaning and are in compliance with law while employing minimal efforts. The Estonian Constitution[*2] (hereinafter: Constitution) emphasises its origins in the continental European legal culture in its § 3 which sets out: "The powers of state shall be exercised solely pursuant to the Constitution and laws which are in conformity therewith." Thus the Constitution, in the formal sense, is a document concerning the formation and activities of political institutions, which provides for the legislative procedure and whose provisions are at the top of the hierarchy of legal norms. The catalogue of fundamental rights and

[1] For an overview about the history of the system of constitutional government of Estonia see: R. Narits, K. Merusk. Estonia. – International Encyclopaedia of Laws. Constitutional Law. The Hague, London, Boston: Kluwer Law International, 1998, pp. 17–42.

[2] Eesti Vabariigi põhiseadus (The Constitution of the Republic of Estonia). – Riigi Teataja (The State Gazette) 1992, 26, 349 (in Estonian). The English translation of the Constitution of the Republic of Estonia used is published in Estonian Legislation in Translation (Legal Acts of Estonia, 1996, No 1); Estonia. Text of Constitution. – R. Narits, K. Merusk (eds.). Constitutional Law – Suppl. 23 (April 1997). Kluwer Law International. H.-J. Uibopuu has provided a German translation of the Constitution: Brunner (complier). VSO, Estland, 1.1.a; reprint: C. Thiele. Selbstbestimmungsrecht und Minderheitenschutz in Estland, 1999, p. 190 *ff*.

freedoms is also naturally a part of the Constitution. Here we should stress that the previously mentioned provision can be found in Chapter I of the Constitution which provides for the basic principles and norms of Estonia's statehood and its legal structure which have a paramount importance on all the other provisions of the Constitution as well as the legal order as a whole.[*3] Obviously this provision speaks about the priority of the Constitution, about the general reservation of law and the priority of law. We should mention that a similar provision was already present in the first constitution of the Republic of Estonia adopted in 1920. Thus, the state of Estonia has, since its inception, emphasised the democratic and constitutional solution in its national legal system. Several renowned jurisprudents have regarded the Constitution very highly.[*4]

2. Applicability of rules of law

Legitimation via rules of law should be characterised via their applicability. The problem is that even the legal applicability of a constitutional provision does not guarantee other important aspects thereof — factual and social ones. In other words, the legitimacy and applicability of rules are also two qualities.

One must support the standpoint, often expressed in professional literature, that based on the hierarchy of rules, we should recognise a justifying general rule.[*5] If one does not commit to that condition, he or she must admit not being a supporter of the Western legal ideal.[*6] A great role is played by how law is understood, or what law is.

In Estonia, some members of the parliament (the *Riigikogu*) have adopted the standpoint that "unlike several other tools of social control, the authoritative nature of law is the basis of the functioning of law, a kind of commanding force: law spreads like a protective shield over society, it is above society." And: "/…/ law is the command of the highest vehicle of power (sovereign) of the country. Sovereign is a part of society who has the right to subject the rest of the society to its power and whom that rest of society is accustomed to obey. In other words: in a legally structured society, the harmony of the life and activities of its members are not achieved by their direct interrelationship but via their shared subordination to the leading political authority /.../ and the set or rules established by it — the law."[*7] Such an approach is an expression of the radical-positivist understanding of law introduced in continental Europe's legal culture already in the 17th century according to which the will of the sovereign is seen and recognised as the only source of law. Today we cannot accept the standpoint according to which law is the command. Reality is characterised by that in society order and security develop primarily as a result of the behaviour of the members of society. Modern legitimation of law is ultimately the communicative reality. According to modern jurisprudence, both law and the theory of law are primarily a normative system of information and communication.[*8] There can be as much law in society as "dictated" by the subjects of law by their behaviour. In order that legislative efforts be fertile, the requirements arising out of applicable law should be realised in the behaviour of the subjects of law. Just as naturally, contemporary understanding of law includes understanding the law in its objective sense, as the law written down by the sovereign. Just as natural is the understanding of law in its subjective meaning or the pattern of behaviour of and for the subject of law arising out of objective law. However, modern understanding of law adds the understanding of law as a normative system of information and communication to the traditional aspects. Law encompasses everything related to the part of human behaviour relevant for law. This normative correlation which exists between law and society must be seen and recognised. This must be especially emphasised in the context of constitutional provisions as their level of abstraction

[3] The meaning of rules and principles has been explained by the Supreme Court of the Republic of Estonia: "Democratic countries are guided in their legislative drafting and in applying law and, *inter alia,* in administering justice by laws and the general principles of law which have evolved over the years."– See decision of the Constitutional Review Chamber, 30 September 1994. – Riigi Teataja (The State Gazette) I 1994, 66, 1159 (in Estonian).

[4] R. Alexy. Põhiõigused Eesti põhiseaduses (Fundamental Rights in the Estonian Constitution). – Juridica eriväljaanne, 2001, p. 5.

[5] N. MacCormick introduced the concept of "underpinning reasons". Briefly, it means that if you want to avoid chaos, you must bind yourself with the basic norm which says that the constitution must be complied with. – Vt N. MacCormick, O. Weinberger. An Institutional Theory of Law: new approaches to legal positivism. Dordrecht, Reidel, 1986.

[6] A. Aarnio described the conditions which, if met, enable avoiding chaos. He calls them the social conditions of the bindingness of a legal order. See A. Aarnio. Laintulkinnan teoria. Porvoo: Werner Söderström Osakeyhtiö, 1988, p. 89.

[7] M. Maripuu. Seaduse arusaadavuse arusaadavus (Comprehensibility of the Comprehensibility of Law). – Riigikogu Toimetised, 2000, No. 2, p. 90 (in Estonian).

[8] In 1998 the journal *Rehtstheorie* published an issue dedicated to J. Habermas "The system of rights in a democratic state based on the rule of law and Habermas' discourse theory of law" in which W. Krawietz writes that in state organised systems of modern society, justice is administered in the context of (1) subjective rights, (ii) objective law, and (iii) the entire legal order, in particular the normative meaning of legislative texts. – Rechtstheorie, Bd. 27, H. 3, Duncker und Humblot, 1998, p. 272.

is, compared to the rest of the legal structure, higher and links to the social dimensions of law are more difficult to perceive.[*9]

Below I will try to epitomise the modern understanding of law using § 1 of the Constitution as an example: "Estonia is an independent and sovereign democratic republic wherein the supreme power of state is vested in the people. The independence and sovereignty of Estonia are timeless and inalienable". I will concentrate on the problem of sovereignty.

The quoted section contains the principles of the sovereign power of state, the sovereignty of people, democracy and republicanism. In the Constitutional Assembly the question about how to lay down the independence and sovereignty of Estonia in the Constitution so as to prevent a reoccurrence of the events of 1940 when Estonia was occupied by Soviet Russia. In essence they tried to find answers to the question of the legal and social relationship, the constitutional form of which would also serve as a constitutional guarantee. It was considered to insert in the Constitution a provision prohibiting the capitulation of Estonia.[*10] The guarantees of independence and sovereignty were spread over different chapters of the Constitution.[*11] At the 16th session of the Constitutional Assembly, the head of the editorial committee of the Constitution proposed to the Assembly to word the section: "The independence and sovereignty of Estonia are timeless and inalienable."[*12] The editorial committee found that such a guarantee meant that the independence and sovereignty of Estonia could be alienated only by amending the Constitution at referendum.[*13] Later it was further wished to add the following text: "No one has the right to sign an instrument surrendering the Republic of Estonia". The text was not added because the editorial committee believed that it did not add any weight to the already existing wording.[*14] Why this digression to recent past? Because formally the second sentence of § 1 does not have an independent regulative meaning. The timelessness and inalienability of Estonia's independence and sovereignty derive from the first sentence of § 1. Nevertheless, the second sentence of § 1 demonstrates vividly the great importance attached to Estonia's independence and sovereignty. The facts of actuality and social reality (including the events of 50 years ago) were carefully considered in developing the Constitution and an attempt was made to build a rational "bridge" between past and present, so that the solution offered would, as a kind of a social agreement, be the best possible one. Thus, for the Constitutional Assembly, working with the text of the Constitution did not just mean elaboration of the text in preparation for referendum. In order to cognise law, one must see and recognise the normative correlation which exists and has always existed between law and society. Therefore one must not just be able and willing to approach the social dimensions of law, but also behave accordingly. Law cannot be and is not barely the result of the decisions made by individuals or their associations. However, this is exactly what continental European legal positivism has been claiming for a long time. In the science of law, that which is understood as law has always been pivotal. The type of understanding law determines the paradigm of legal cognisance (the concept of corresponding jurisprudence), its conceptual pattern, and its scientific and legal content. Currently, the issue of Estonia's independence and sovereignty is once again a burning issue. But an attempt is being made to analyse the so-called sovereignty section of the Constitution from a qualitatively new aspect. Namely, while at the birth of the Constitution the retrospective aspect dominated, today's discussion is fuelled mainly by the future of Estonia's statehood. It is not in vain that there are debates in Estonia — in view of legal issues — about the meaning of § 1 of the Constitution in the context of acceding to the European Union. Do we need to amend the Constitution if we want to become a member of the European Union? If we amend the Constitution, then which sections should we amend, *etc.*?[*15]

[9] The Constitution contains a number of principles determining the structure of the power of state and the main bases underlying its activities: democracy and the sovereignty of people (§ 1 first paragraph); sovereignty of state (§ 1 second paragraph); unitary state (§ 2 second paragraph); republican form of government (§ 1 first paragraph); separation and balance of powers (§ 4); lawfulness (§ 3); state based on social justice, democracy and the rule of law (§ 10); economical use of the natural wealth and resources (§ 5), *etc*. The positivised norms/principles of the Constitution are of varying degree of abstraction and therefore their scale of concretisation is different. For instance, the degree of abstraction of the principle of democracy is higher than that of the separation of powers.

[10] Põhiseadus ja Põhiseaduse Assamblee. Koguteos (The Constitution and the Constitutional Assembly. Collection of Writings). Tallinn: Juura, Õigusteabe AS, 1997, pp. 202, 474 (in Estonian).

[11] *Ibid*., pp. 202, 474.

[12] *Ibid*., p. 526. Similar solutions were offered in the draft model of the Constitution of the Estonian Democratic Socialist Republic of I. Gräzin: "The sovereignty of Estonia is integral, indivisible, timeless and inalienable on Estonia's accession to any unions whatsoever". *Ibid*., p. 1117. The draft Constitution of the Republic of Estonia prepared by the working group led by J. Raidla also contained the wording known from the Constitution. *Ibid*., p. 1142.

[13] *Ibid*., p. 526.

[14] *Ibid*., p. 549.

[15] For an overview about the opinions of local and foreign experts, also about the constitutional reforms of EU member states and the main trends of the sovereignty theory, see A. Albi. Põhiseaduse muutmine Euroopa Liitu astumiseks. Ekspertarvamused, teoreetiline ja võrdlevõiguslik perspektiiv ja protseduur (Amendment of the Constitution for Accession to the European Union. Expert Opinions, a Theoretical and Comparative Legal Perspective and Procedure). – Juridica, 2001, No. 9, pp. 603–615 (in Estonian).

It seems that the debate can only be fruitful if we can avoid the so-called legist thinking and understanding of law. It is the legist position that treats law as the product of the state (its power, discretion, even arbitrariness). Law is reduced to its formal sources, the so-called positive law. Law is identified with legislative texts in their broad sense.*[16] It seems that such an approach no longer meets today's needs.

3. Constitution, modern cognisance of law and values

Modern understanding of the Constitution must be based on modern legal thinking. In the past decades, continental European legal thinking has witnessed a qualitative change and values have become one of the cornerstones of legal thinking. In Estonia there are signs that we wish to reach the level of a modern value-oriented structure of legal thinking. At the same time we should also agree with Estonia's first Chief Justice of the Supreme Court after re-establishment of independence, R. Maruste, who claims that our thinking is restrained by historical tradition, the positivist understanding of law which was prevalent in Europe, Estonia included, during the first half of the 20th century. He adds that this is not just the problem of judges, but of lawyers and legal politicians as a whole. While the rest of the world switched over to value jurisprudence in the course of decades, we are facing a situation where we have to make the transition in a relatively short time.*[17] The chairman of the Estonian professional association of judges (current Legal Chancellor) A. Jõks said in 1997 that the judges were taken aback by the discussion about the place of a just and value-oriented administration of justice and law-based management of cases in the Estonian legal system.*[18] These two manifestations demonstrate that in understanding a legal order one must be able to rely on values, and also that in the beginning the community of lawyers may be taken aback by orientation towards values. One point is clear however, we must be able to perceive the values behind the letter of the law, including the letter of the Constitution. Value jurisprudence acquires meaning through recognising and being bound by higher-standing value scales. An important aspect is added in understanding the Constitution, namely in understanding a constitution, one must be able to concretise value scales.

In view of the text of the Constitution, values are predominant in its preamble. The very universal values contained in the preamble "infiltrate" into the other provisions of the Constitution, thus moulding the spirit of the Constitution. Of course, we can find universal values in other parts of the Constitution too.*[19] Furthermore, in connection with the Constitution, we need to stress the imperative nature of the values. The values are made imperative by the fact that they belong to the Constitution. It is clear that any one of us has value experiences which can either be approved or disapproved of. It is however much more difficult to achieve a wide base of value experiences which can be built on value scales.*[20] We need to know that there is always something in society which ensures a broad harmony. The values contained in the constitution do not form a value structure which would be perfect or free of gaps. The values themselves, their essence are in constant change. Thus the issue of an "already dominant" or "no longer dominant" value is always topical. The values are not identical with the constitution from which we get information about them. It is especially important to stress this in the context of Estonia and its Constitution because the text of the Constitution is now ten years old, which is not a long period on the scale of time. Assessment of the events of that time period changes if we look at what society was like ten years ago and the developments which the state of Estonia has underwent during the past decade. Although professional literature speaks justifiably about "timeless values"*[21], according to which values can never be treated irrationally, in some cases there are problems in Estonia with cognising valid value scales in changed societal conditions.

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[16] Departure from narrowly positivist approaches can also be found in the recent works of Russian jurists. The Russian jurist V. Nersesyants notes that legistic understanding of law is often treated as legal positivism, although it would be more appropriate to treat it as legistic positivism as in reality legal positivism has always differentiated between law and justice. Legistic approach to law is characteristic of authoritarian, despotic, dictatorial, totalitarian approaches to law. – V. S. Nersesyants. Jurisprudentsiya. – Moscow: Norma, 2000, pp. 3–4 (in Russian).

[17] T. Sildam, T. Mattson. Kohtunik seaduse ja väärtuse vahel (A Judge Between Law and Value). – Luup, 1997, No. 21, pp. 10, 13 (in Estonian).

[18] T. Põld, T. Raag. Riigikohtu esimees kaalub tagasiastumist (Chief Justice of the Supreme Court Contemplates Resignation). – Sõnumileht, 8 November 1997 (in Estonian).

[19] Political scientists W. Drechsler and T. Annus from the University of Tartu have written, in characterising the basic principles of the Estonian Constitution, that the basic principles of the Republic of Estonia are largely in concord with the broadly accepted values in Europe. See W. Drechsler, T. Annus. Die Verfassungsentwicklung in Estland von 1992 bis 2001. – Jahrbuch des Öffentlichen Rechts der Gegenwart, Bd. 50, 2002, p. 476.

[20] R. Zippelius sees prevailing images of justice as trend-setting. The prevailing legal ethos of a society is written down in the constitution itself. – R. Zippelius. Wertungsprobleme in System der Grundrechte, 1962, p. 48 *ff.*

[21] See H. Coing. Grundzüge der Rechtsphilosophie. 4th ed., Berlin, 1985, p. 158.

The values contained in the Constitution have very different natures. Thus, we can differentiate between moral, social values, those of the state based on the rule of law, *etc*. Can we however pose a question about the value which in the meaning of the Constitution is the ultimate value, the value which is the basis of Estonia as a state organised on the basis of the rule of law? It seems that we can ask that question and that in principle the answer to the question is affirmative. We are speaking about the relations between the man and the state. In terms of Estonia's independent statehood, the state has been created for the man and not vice versa. The preamble of the Constitution sets out that the strengthening and development of the state purports to guarantee the preservation of the Estonian nation and culture through the ages. The priority of man over the state is not imposed by the state, but the state recognises as a status naturally inherent of man. The state regulates the behaviour of the man to the extent that the state does not groundlessly infringe man's freedom; and naturally the state guarantees public interests in that. The ultimate value is not *per se* a legal concept but rather an ethical category. But being one of the underpinning values of the Constitution, a value becomes a binding principle. It acquires a legal nature. I should add that the ultimate value must be accepted and its realisation must be guaranteed first and foremost by the state of Estonia. All three powers of the state — legislative, executive and judicial — must act in the name of ultimately guaranteeing the rights and freedoms inherent of man. Figuratively speaking, the state must subject itself to what arises out of law. Only then will the state's behaviour correspond to law, *i.e.* it becomes just power of state. The preamble of the Constitution, setting out the elements of the "foundation" of the Estonian state — liberty, justice and law — is justified in emphasising justice. And it is not important whether the legislator distributes law between the subjects of law (*ius distributiva*) or equips the subjects of law with equal rights (*ius commutativa*). What is important is the principle to the effect that the behaviour of the state must, besides honouring liberty and law, also be built on justice. Thus, in understanding the constitution, the state's assessment of the realisation of rights and freedoms cannot be based, for example, on purposefulness, but instead these rights and freedoms must always be preferred. Therefore, recognising man and his rights and freedoms as the highest value would mean that the state cannot, without a legal basis, interfere with man's freedom to act. Such a principle is realised in the work of the state's mechanism of power which involves all the bodies of the state and whose functioning requires the entire legal system.[*22] Below I will try to illustrate this thesis with the help of a decision of the Constitutional Review Chamber of the Supreme Court.[*23] There was a situation which involved a conflict in approaches to the state's right to positive action and the restriction of a fundamental right or freedom. Namely, the Aliens Act provided for a situation which did not foresee any exceptions in the issue or extension of residence permits for aliens if they were or there was good reason to believe that they had been employed by an intelligence or security service of a foreign state. The Constitution does not grant aliens the fundamental right to reside and settle in Estonia, however, if an alien has a lawful residence permit, every right, freedom and obligation listed in the Constitution extend to him or her. Therefore, not extending the residence permit of an alien with the aftermath that the alien is required to leave the country may infringe a fundamental right or freedom protected by the Constitution. The Constitution also gives courts the right to inspect compliance of the legislation issued by the *Riigikogu* — the legitimate representative assembly — with the Constitution. A court may declare unconstitutional any law, other legislation or procedure which violates the rights and freedoms provided by the Constitution or which is otherwise in conflict with the Constitution (Constitution, § 15 second paragraph). And the Supreme Court declares invalid any law or other legislation that is in conflict with the provisions **and** spirit of the Constitution (Constitution, § 152 second paragraph). The Supreme Court, however, does not have to assess the political will and expediency expressed in law, but the compliance of legislation with the provisions and spirit of the Constitution. At that the court will comply with the practice not to interfere with the sovereign activities of the legislator unless the restriction of rights and freedoms provided by law is unnecessary in a democratic society or distort the essence of the rights and freedoms restricted. Fundamental rights and freedoms would be merely declarative if the constitutional review court did not have the power to identify whether the activities of the legislator are or are not in compliance with the provisions and spirit of the Constitution. In that very same judgment the court sets out that the interpretation of the Constitution is more than just identifying the meaning of the words.[*24] Or there is another example. The Constitutional Review Chamber

[22] In analysing the principle of the legal basis of restricting fundamental rights and freedoms, H. Vallikivi has written: "The keywords of the concept of a state based on the rule of law developed in the European cultural context are the separation of powers, lawfulness and the guarantee of legal protection. These formal features of the concept of a state based on the rule of law are completed by the substantive feature, expressed mainly in adherence to human rights and fundamental freedoms and other value categories not explicitly written down in positive law". – H. Vallikivi. Põhiõiguste ja -vabaduste piiramise seadusliku aluse põhimõttest (On the Principle of the Legal Basis of Restricting Fundamental Rights and Freedoms). – Juridica, 1997, No. 5, p. 241 (in Estonian).

[23] Decision of the Constitutional Review Chamber of the Supreme Court, 5 March 2001 (3-4-1-2-01). – Riigi Teataja (The State Gazette) III 2000, 7, 75 (in Estonian).

[24] We should add that the administrative court arrived, in settling this petition, at the conclusion that as the author of the petition had received a temporary residence permit on five occasions, and as he had a family, job and property in Estonia, his expectation to have the residence permit extended unless new information is unveiled about him was grounded. The non-granting of an exception in respect of him violated the constitutional principle of legitimate expectation. See Riigikohus 2001. Lahendid ja kommentaarid (The Supreme Court 2000. Judgments

of the Supreme Court discussed, in 1995, the request of the Tallinn Administrative Court to declare a provision of § 21 (1) of the Aliens Act[*25] null and void.[*26] Namely, § 21 (1) of the Aliens Act contained a rule according to which an alien who had permanent address registration in the Estonian Soviet Socialist Republic who has no residence and work permit to stay legally in Estonia, may, in order to apply for such permits, submit an application with the Citizenship and Migration Board. The Supreme Court concluded that the provision according to which an alien with permanent address registration in the Estonian SSR may apply for a residence and work permit at the Citizenship and Migration Board is an unconstitutional restriction of rights and freedoms which is unnecessary in a democratic society and distorts the nature of the right and freedoms restricted. Namely, under § 11 of the Constitution, rights and freedoms may be restricted only in accordance with the Constitution. Such restrictions must be necessary in a democratic society and must not distort the nature of the rights and freedoms restricted.[*27] The Supreme Court stated that the provisions of § 21 (1) of the Aliens Act do not exclude that a procedure established by the Government of the Republic may allow aliens with permanent address registration in the Estonian SSR to apply for residence and work permits at the Citizenship and Migration Board. This provision does not restrict rights or freedoms and therefore there is no substantive connection between § 21 (1) of the Aliens Act and § 11 of the Constitution. It is just that the object of regulation of § 11 of the Constitution is another. We should add that it is evident from the materials of the case that the representative of the Supreme Court, the representative of the legal Chancellor and the Ministry of Justice all held the position that there is no contradiction between § 21 (1) of the Aliens Act and § 11 of the Constitution.

4. Conclusions

Understanding of law always aims to achieve adequate cognition of law. Figuratively speaking, the process involves the shaping of a special integral model of law. Such a shaping in the context of a legal system must be based, on the one hand, on the legal order as a whole and, on the other hand, on the idea of uniformity and coherence of its ultimate instrument — the constitution. Taking the cognitive achievements of the theory of law as the basis, we must take both the principles of consistency and contextuality as the basis. To understand the Constitution, these underlying principles must be used so that there would be no conflicts between the parts of the constitution (consistency) and so that there would be a clear conception of the place of a provision of the constitution within the text of the constitution (contextuality). It is clear that in this article it is not possible to follow the underlying principles in full. This is because of the limited length and the subject matter analysed in it. Nevertheless I would like to remind the already mentioned emphasis on modern cognisance of law. It is about the role of normative communication. To understand the Constitution one must therefore carefully follow and analyse the interpretations of the Constitution by courts and in particular by constitutional courts. Examples from Estonian court practice were not inserted by chance. Such an analysis of legal reality helps ultimately improve the actual linking and integration power of law. But attention should also be paid to society's hopes and expectations. It is perfectly natural that the interpretations of the constitution are acceptable in society. Of course, we could argue about the extent to which a judgement made by a judge on the basis of the constitution needs public or private acceptance. The experience of, at least, European countries shows that the objectified forms of understanding the Constitution — and especially the rulings of constitutional courts — have a substantial impact on the social life structured by the state and also on the relations between people. The problem is that sometimes constitutional courts have been in conflict with the legal awareness of the so-called silent majority. These are the people whose loyalty to the state and constitution is undisputed. Although acceptability cannot be the sole determiner of the

and Comments). Tallinn: Juura, Õigusteabe AS, 2002, pp. 33–34. The Supreme Court has recognised the principle of legitimate expectation as a general principle of the applicable (binding) law: "The principle of legitimate expectation is a general principle of Estonian law according to the spirit of the Constitution. According to this principle every one has the right to act with reasonable expectation that the applicable law remains in force. Every one must be able to exercise the rights and freedoms granted to him or her by law at least during the term set out in law. An amendment to law must not be perfidious in respect of the subjects of law." – Decision of the Constitutional Review Chamber of the Supreme Court. – Riigi Teataja (The State Gazette) I 1994, 66, 1159 (in Estonian).

[25] Riigi Teataja (The State Gazette) I 1993, 44, 637 (in Estonian).

[26] Riigikohtu lahendid (Judgments of the Supreme Court). Tallinn: Õigusteabe AS Juura, 1996, pp. 18–20 (in Estonian).

[27] Already the Constitutional Assembly treated this provision as a general rule which guides all the other rules whereas the wording "necessary in a democratic society" is derived from the European Convention on Human Rights. See Põhiseadus ja Põhiseaduse Assamblee. Koguteos (The Constitution and the Constitutional Assembly. Collection of Writings). Tallinn: Juura. Õigusteabe AS, 1997, p. 762 (in Estonian); R. Narits. Põhiõigused ja põhivabadused (Fundamental rights and Fundamental Freedoms). – K. Merusk, R. Narits. Eesti konstitutsiooniõigusest (On Estonian Constitutional Law). Tallinn: Õigusteabe AS Juura, 1998, p. 192 (in Estonian); M. Ernits. Konkreetne normikontroll *de lege lata* ja *de lege ferenda* (Specific Control of the Rules *de lege lata* and *de lege ferenda*). – Juridica, 2001, No. 8, pp. 588–599 (in Estonian).

constitutional quality, it must also not be overlooked. In an open society, the circle of interpreters of the constitution is broad, the process of cognising the constitution is open; therefore alternative options are possible and even necessary. At any rate, it should be obvious that the text of the constitution is not sufficient for cognising and that the circle of interpreters of the constitution is wide in an open society.

Rendering a rational meaning to a legal system begins and ends with the legislative process, on the one hand, and with the application of law, on the other hand. Both factual elements of rendering rational meaning to the legal system are interrelated. In daily legal practice, and also in legal theory, the question on how to achieve rationality in cognising law, in legal behaviour, in implementing law is often asked. On which premises and within which limits rationality in law and the science of law can be achieved? What is important for us is that in cognising a legal system as a whole and its ultimate instrument — the constitution — rules which we might call "the laws of the science of law" are applied. Of course I do not mean laws in the sense of objective law but the rules, procedures, principles applicable to the understanding of law knowledge and use of which helps render sense to the legal reality, to the valid constitution. Thus, it is possible to differentiate a legal understanding from a nonlegal one, that distinction between *larghissimo sensu* and *sensu stricto* is possible whereas the latter requires explanations based on the theory and practice of law. It is important that the lawyers should attempt to interpret and not to criticise. The state of Estonia purports to be a state based on the rule of law and therefore every one should be guaranteed access to information providing for their legal status as well as to everything inherent of a reality structured by law.

At the scientific conference "Five years of Estonian Constitution" (1997) the then president of Estonia L. Meri said: "I would like to universalise the public opinion and current political practices in the hope that we can find in ourselves a moral strength to assess the Constitution in a balanced way." This year comments to the Constitution will be published, written by Estonian lawyers who tackle this project as a moral obligation. The 1992 Constitution effectively fills the role of a foundation of a democratic organisation of society. What is as obvious is that the development of the constitution should be another value of the constitution, besides the tradition of the constitution or the perseverance of the constitution. The comments to the Constitution to be published aim to examine and provide comprehensive and systemic explanations of the law, taking the constitution as the basis, and interpret it critically and self-critically, substantiating their standpoints. In this article I tried to communicate to the reader how the authors of the comments understand law in the context of the Constitution and which its main values are, albeit not forgetting other constitutional values.

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Co-existence of the Estonian Constitution and European Law

The Constitution of Estonia has remained in force unaltered for ten years. During these ten years, Estonia has developed in every sense — definitely including legal policy and legislative drafting — more rapidly than stable democracies have in decades. The status of a European Union candidate state has undoubtedly affected our legal order and placed us not infrequently in situations where it is more difficult to find a legal solution than it would be if Estonia were already a full member of the EU.

How has the fundamental act of the Estonian State — the Constitution — sustained such influence? What is the co-existence of the Estonian Constitution and European law in Estonia, which is preparing for accession to the European Union, like? These questions, which may initially seem theoretical, have largely remained out of the focus, although indeed, an analysis of the possible supplementation of the Constitution/constitutional acts has become topical again recently.

This article attempts to take a wider look at the co-existence of the Estonian Constitution and European law to date, proceeding from the origins of the applicable Constitution, the theory of the general principles of law and the practice of the association process, while not disregarding the possible future of such co-existence.

1. European law upon drafting of Estonian Constitution

In developing the current Constitution of the Republic of Estonia, European law in its wider sense, embracing, above all, the legal treasury of the human rights and fundamental freedoms of the Council of Europe in the form of the European Convention on Human Rights (ECHR) and the practice of the European Court of Human Rights, was taken as the basis. This means that from the aspect of European law, the Constitution has been written in the spirit of the Council of Europe. At the beginning of the nineties, it was also a considerably closer and more tangible organisation for Estonia than the European Communities. During the activities of the Constitutional Assembly (hereinafter: CA), the European Union did not officially exist yet. Although the Maastricht Treaty was concluded four months before the adoption of the Estonian Constitution at a referendum, it entered into force only the following year. The European Communities were not discussed in detail when drafting the Constitution, not to say that they were not discussed at all. It was certainly more important for a country that had recently established its independence to emphasise the protection of human rights and honouring of the other principles of democracy than to consider a possible accession to the then

primarily economically-oriented European Communities that consisted of only 12 Western European welfare states.

Besides local experts elected from the Supreme Council and the Congress of Estonia, foreign experts also participated in the work of the CA. E. Harremoes from Denmark, H. Ragnemalm from Sweden, R. Herzog from Germany, K. Berchtold from Austria, P. Gremer from Denmark, M. Russell from Ireland, G. Carcassone from France, A. Suviranta from Finland, J. MacPherson from Canada and others provided their advice as experts of the Council of Europe. The issues related to international agreements were discussed in the fourth committee of the CA, whose other task was to discuss the institution of the President of the Republic. The latter received considerably more attention in the committee.

It is interesting to note that the combination of the president and international agreements plays an important role also today, when the draft Constitution Amendment Act has been presented to introduce the direct election of the President[*1], and constitutional amendments are topical in relation to the accession to the European Union. However, this does not mean that the performance of the fourth committee of the CA with its task had been poor in the past. These are simply sensitive areas that find it difficult to endure the changes brought about by time. Yet people do not wish to introduce the amendment proposals for political reasons, as the time-consuming and debatable nature of the general amendment of the Constitution may impede the processing of constitutional supplements that are important upon the accession to the European Union.[*2]

Nevertheless, points of contact can be found in the issue of the president and international agreements even today: the direct election of the president depends upon the president's competence, while the participation of the president in European Union issues also depends on the extent of the president's competence. In Finland, where the president has been elected through direct public election since the mid-1990s, clarification of competence and liability relations in international issues served as an important topic during the preparation of the new constitution. In Finland, the emphasis on the institution of the President, stronger than in the Estonian Constitution, now shifted notably to the *Eduskunta* (Finnish parliament).[*3]

Returning to the work of the CA, it may be concluded on the basis of the documents reflecting thereof that international agreements were discussed in very general terms. They were primarily associated with UN treaties and conventions, the boundary agreement, also issues of security. Discussing the possible neutrality of Estonia, it was contrasted with the possible accession to NATO in the future.[*4] Thus, the draft Constitution, prepared by the then royalist K. Kulbok did not include any provisions concerning foreign relations and international agreements.[*5] The draft constitution version of I. Gräzin, in contrast, contained § 103, according to which the agreements under which the republic entered union relations and the decisions to discontinue such relations were ratified by the people at a referendum.[*6] At the 17th session of the CA, I. Raig noted that the assembly had worked very little on the chapter regarding international agreements, keeping in mind, above all, the relevant UN provisions.[*7] He arrives at a similar conclusion also when looking back at the activities of the CA, "When discussing international relations, the members of the CA were often trammelled by the generalisation of past relations and could not picture the new role of the nation state in the globalising society. There were relatively few people among the members of the CA, who were ready for and interested in discussion of the topic of foreign relations and international agreements. This issue very rarely served as an object of debates at the sessions of the CA. Discussions of international relations primarily focused on the relations between Estonia and Russia."[*8]

In their opinions, foreign experts pointed out, above all, the instruments of the Council of Europe and the Conference on Security and Cooperation in Europe (CSCE). One of the few exceptions was the following proposal, made by Mr. Germer at the 10th session of the CA, "/.../ In this connection I want to mention that

[1] See draft acts 734 SE and 864 SE. Available online on the home page of the *Riigikogu* at: http://www.riigikogu.ee/ems/index.html (11.03.2002) (in Estonian). The former draft act was initiated by the members of the Centre Party faction of the Riigikogu on 9 April 2001 and the latter by the president L. Meri on 8 October 2001.

[2] For example, a plan according to which the round table of the chairmen of the factions of the *Riigikogu* or the board of chairmen has decided to establish a separate working group by the Constitutional Committee to draft the constitutional amendments to reflect the EU aspects. – L. Hänni. Jah, härra justiitsminister (Yes, Minister of Justice). – Postimees, 22 January 2002 (in Estonian).

[3] This was stated, *inter alia*, by the Finnish Legal Chancellor P. Nikula in his presentation "New Finnish Constitution", made at the Institute of Law. Background material for the presentation, 19 June 2001.

[4] See collection Põhiseadus ja Põhiseaduse Assamblee (Constitution and Constitutional Assembly). Tallinn: Õigusteabe AS Juura, EV Justiitsministeerium, 1997 (in Estonian).

[5] *Ibid*., pp. 1184–1190.

[6] *Ibid.*, p. 1127.

[7] *Ibid*., p. 543.

[8] I. Raig's presentation "Põhiseaduse Assamblee ei suutnud ette näha Eesti võimalikku ühinemist Euroopa Liiduga" (The Constitutional Assembly Could Not Foresee Estonia's Possible Accession to the European Union). Academy Nord, Research Centre Vaba Euroopa, seminar "Eesti Euroopa Liiduga ühinemise põhiseaduslikud ja poliitilised probleemid" (Constitutional and Political Problems of Estonia's Accession to the European Union). Tallinn, 22 February 2002.

the draft contains no provision concerning transferral of power to supranational organisations like the European Community. It may not happen in the near future, but some day Estonia may join the European Community, and then you might want to have — you might need — a special constitutional provision to this effect. In most countries there are special provisions to that effect, and I suggest that you take up the idea of introducing in your Constitution a special provision concerning transfer of powers to supranational organisations like the European Community."[*9] Unfortunately, the proposal was not taken into account in 1991. We will see what will be decided concerning the supplementation of the Constitution over ten years later, when accession to the European Union has become reality. Now, in this context, the speech by L. Hänni at the 16th session of the CA has been repeatedly mentioned, where she reasoned why the review committee eliminated from the draft Constitution the section, according to which the law under which the Republic of Estonia enters political, economic and military unions of states shall be adopted only by referendum. Namely, during the CA, the review committee found that if the provision "the independence and sovereignty of Estonia are timeless and inalienable" were included in the Constitution, this would mean automatically that if the Estonian State concluded agreements that restricted its sovereignty, it could be done only through the amendment of the Constitution and referendum.[*10]

This aspect of the origins of the Constitution certainly gives rise to different interpretations — what could be understood as political, economic and military unions? Would NATO also qualify as one? Does "through the amendment of the Constitution and referendum" mean amendment of the Constitution by referendum or can they also be separated from each other — to amend the Constitution without a referendum and to conduct a referendum concerning the accession to a union mentioned above?

The European Union does not prescribe to the candidate countries whether and how they should lay down their membership in their constitutions. Thus, the European Union does not "demand" that the candidate countries amend/supplement their constitutions in relation to the accession to the European Union. The European Union could not impose such conditions, as it lacks competence to have a say in the constitutional context of the member states. The constitutional order is an internal matter of each member state and candidate country, in which the European Union does not intervene. Thus, Finland could renew its Constitution, replacing four different constitutional acts by one constitution, and Estonia may, on the contrary, supplement the applicable Constitution, if necessary, by the so-called third act, so that Estonia could act as a member of the European Union, if this is acceptable for our legal culture and traditions.[*11] However, the so-called Copenhagen criteria apply to the accession to the European Union, which include, *inter alia*, the stability of institutions guaranteeing the principle of the rule of law, democracy, protection of minorities and human rights[*12] — consequently, all the issues commonly regarded also by internal constitutional provisions and the judicial practice of constitutional review. The application of these principles can be assessed from the point of view of constitutional law and judicial practice.

2. General principles of European law and the Estonian Constitution. Use of European law by the Supreme Court

According to the generally accepted classification, European law is divided into European law in a broader (the law of the EU and the other organisations related to Europe, above all, the European Convention on Human Rights) and narrower sense (EU law).[*13] I referred to European law in the broader sense above also as one of the bases for the preparation of the Estonian Constitution. The European Union member states are characterised by a three-fold legal protection — national law, the European Convention on Human Rights and European Union, including the European Community, law. European Union law should supersede ECHR, which has been adopted as a law in some countries. In order that the above-mentioned law(s) applied, a dialogue is held between the European Court of Justice and the courts of the member states, to a certain

[9] The collection Constitution and Constitutional Assembly (Note 4), p. 331.

[10] *Ibid*., p. 530.

[11] See the opinion of the Minister of Justice M. Rask about supplementation of the Constitution by the so-called third act. – M. Rask. Kas põhiseadust muuta või mitte (To Amend or not to Amend the Constitution)? – Postimees, 16 January 2002 (in Estonian).

[12] See, for example, the report prepared in the monitoring programme of accession to the European Union of the Open Society Institute: Kohtuvõimu sõltumatus Euroopa Liiduga ühinemise protsessis. Kohtute sõltumatus Eestis (Judicial Independence in the EU Accession Process. Judicial Independence in Estonia). Tartu: Iuridicum, 2001, p. 11 (in Estonian).

[13] See J. Laffranque. Euroopa Liit ja Euroopa Ühendus. Institutsioonid ja õigus (European Union and European Community. Institutions and Law). Tallinn: Sisekaitseakadeemia, 1999, pp. 65–66 (in Estonian).

extent also between the European Court of Justice and the European Court of Human Rights: however, this does not preclude a collision between the practices of the European Court of Justice and the European Court of Human Rights.

For the time being, Estonia is subject to two-fold legal protection — to national law and ECHR —, but through association law indirectly arises the requirement to also comply with the European Union standards in considering the human rights and the general principles of law, which has to a certain extent been taken into account in the Supreme Court practice described below.

The general principles of European law are expressed both in written and unwritten law. More of them are manifested as unwritten law; thus, it has been said that the general principles of law are unwritten law, not based on the Treaty establishing the European Community (EC), but on the legal orders of the EU member states. These are dogmatically collected thoughts, which are not rules of law, but achieve integrity only in combination with several principles.*[14] The general principles of law are created and derived by the European Court of Justice, relying on article 220 of the Treaty establishing the EC and using the method of comparative law. In doing so, the European Court of Justice draws inspiration, above all, from the EU member states' and international law (including ECHR). The general principles of EU law have been affected the most by German and French law. As the source of the general principles of law is the law of the member states, and the member states are the creators of the primary law of the EU, the general principles of law also occupy a position among the primary law and the member states are in principle always entitled to amend them and also to withdraw from them. The general principles of EU law have been created primarily for filling the gaps in EU law, to protect the citizens of the EU against the public authority of the EU.

The general principles of European law express particularly well the impact of EU law on Estonian law, but the converse is also true — our law could influence EU law in the future. As the European Court of Justice derives its legal principles from the law of the different member states (prohibition against retroactive effect — French law; the principle of purposefulness — German law; legal privilege — English law, regular administration — Belgian and Dutch law), using the so-called value jurisprudence and comparative law (the law of the member states that would best help achieve the EU goals serves as the basis), it would certainly have something to "derive" from Estonian law, if Estonia were a member. The European Court of Justice has frequently been criticised for such an approach, as creation of law in such a manner is unpredictable. However, nobody has offered a better solution either.*[15]

As the main general principles of EU law, we could point out the general principles, reflecting the fundamental freedoms, fundamental rights and main procedural rights. Under the fundamental rights are regarded such widely known principles as legality, equal treatment, legal certainty, the principle *ne bis in idem*, legitimate expectation, disallowance of retroactive effect, the right to good administration and the principle of proportionality. The fundamental procedural rights are considered to include guarantees of judicial proceedings, such as access to administration of justice (while the court may not refuse to administer justice), the principle of independent judiciary (so-called structured impartiality), good/efficient legal protection/ judging, hearing/deliberation of a matter during a reasonable period of time (article 6 of ECHR), accessibility of sitting and execution of sentences (if a sentence has not been executed, the principle of accessibility of sitting has not been satisfied either).*[16]

In the context of the possible amendments to the Estonian Constitution, people have discussed the relation between the legal solutions of accession to the European Union and the provisions of the Constitution concerning foreign relations and referendum, and the impact of European law on the Constitution as a whole, including the principles presented in its preamble and general provisions.*[17] European law indisput-

[14] T. Schilling. Bestand und allgemeine Lehren der bürgerschützenden allgemeinen Rechtsgrundsätze des Gemeinschaftsrechts. – Europäische Grundrechte Zeitschrift (EuGRZ), 2000, p. 30.

[15] *Ibid*., p. 8.

[16] See J.-P. Costa. Le droit au juge indépendant et impartial en matière administrative. Le principe vu par la Cour européenne des droits de l'homme. – L'Actualite juridique droit administrative (AJDA), 2001, No. 6, pp. 514–518; E. Pache. Der Grundsatz des fairen gerichtlichen Verfahrens auf europäischer Ebene. – EuGRZ, 2000, pp. 601–606; V. Schlette. Der Anspruch auf Rechtsschutz innerhalb angemessener Frist – ein neues Prozessgrundrecht auf EG-Ebene/ Zum Urteil des EuGH vom 17.12.1998, Baustahlgewebe GmbH/Kommission. – EuGRZ, 1999, p. 38, EuGRZ, 1999, pp. 369–373.

[17] See report of the Committee for the Legal Expert Analysis of the Constitution. Võimalik liitumine Euroopa Liiduga ja selle õiguslik tähendus Eesti riigiõiguse seisukohalt (Possible Accession to European Union and its Legal Meaning from Aspect of Estonian Constitutional Law), 1998. Available at: http://www.just.ee/index.php3?cath=1613 (11.03.2002) (in Estonian); J. Laffranque. Constitution of the Republic of Estonia in the Light of Accession to the European Union. – Juridica International, No. 4, 2001, pp. 207–221; T. Kerikmäe. Estonian Constitutional Problems in Accession to the EU. – A. Kellermann (ed.). EU Enlargement. The Constitutional Impact at EU and National Level. The Hague: T.M.C. Asser Press, 2001, pp. 291–300; R. Maruste. Põhiseadust tuleks siiski muuta (Constitution Should Still be Amended). – Postimees, 30 January 2002 (in Estonian); A. Albi. Euroliit ja kaasagne suveräänsus. Üks võimalikke vastukajasid Põhiseaduse ekspertkomisjoni aruandele (European Union and Contemporary Sovereignty. One Possible Response to Report of Committee for Legal Expert Analysis of Constitution). – Juridica, 2000, No. 3 (in Estonian); A. Albi. Põhiseaduse muutmine Euroopa Liitu astumiseks: ekspertarvamused, võrdlevõiguslik ja teoreetiline perspektiiv ning protseduur (Amendment of Constitution for Accession to European Union: Expert Opinions, Legal-comparative and Theoretical Perspective and Procedure). – Juridica, 2001, No. 9 (in Estonian).

ably affects many aspects provided in the Constitution and is certainly related to the treatment of the general principles of law in the Estonian constitutional order. According to § 3 of the Estonian Constitution, generally recognised principles and rules of international law are an inseparable part of the Estonian legal system. Will the generally accepted principles of European law also automatically become an integral part of the Estonian legal system according to the relevant section of the Constitution or should a supplementation arising from the special nature of European law be inserted in this section of the Constitution? Thus, already the first provisions of the Constitution give rise to a question of whether the relations deriving from European law can be identified with the so-called common foreign relations, based on international law and mentioned in the Constitution? Relying on the collection "Põhiseadus ja Põhiseaduse Assamblee (Constitution and Constitutional Assembly)", one of the drafters of the Constitution, J. Raidla regarded the following as the generally recognised principles of international law, "There are rather many criteria on the basis of which general recognition is decided, one of them is the principles decided by the Hague Court, they are generally recognised and indisputable as such. It is perfectly clear that a large part of the generally recognised provisions and principles are contained in conventions to which Estonia intends to accede in the nearest future through the relevant resolutions of the *Riigikogu*."*[18] This implied article 38 (1) (c) of the Statute of the International Court of Justice — "the general principles of law recognised by civilised nations". In the European Union context, it is comparable with article 6 of the Treaty on European Union — "principles which are common to the Member States, /…/ as they result from the constitutional traditions common to the Member States" or, in other words, the general principles of law originating from national legal systems.

This gives rise to important questions related to accession to EU and the principle of superiority of the European Union law: what is the position of the general principles in the hierarchy of the Estonian legal system, *i.e*. whether they are located between law and the Constitution or on the same level as the Constitution or higher than the Constitution and whether the general principles of law are directly applicable? How are things with the consideration of the EU common laws of nature (*e.g*. the principles of good faith and deprivation of the right to object), *etc*. in Estonian law and how is the logic known to jurists being used in EU law?*[19] Unlike the Constitutions of Germany or Greece, for example, the Estonian Constitution lacks the provision of who decides on § 3 of the Constitution and determines whether one or another rule and principle belongs to the Estonian legal order. The Supreme Court regards in § 3 of the Constitution besides the principles of international law the general principles of law derived from the national legal systems of other countries, which reach the Estonian legal system through the decisions of international courts and the Council of Europe and the institutions of the European Union. Namely, in its decision of 30 September 1994 that was fundamental from the aspect of European law, the Constitutional Review Chamber of the Supreme Court referred to the general principles of the Council of Europe and EU law as the sources of Estonian law, regardless of the fact that according to the Estonian Constitution, the courts shall administer justice in accordance with the Constitution and the laws (§ 146 of the Constitution — thus, not directly in compliance with international agreements or European law).*[20] It may be concluded from this that although the Constitution demands that the principles be generally recognised, it will apparently suffice to comply with the condition "generally recognised", if the principles are recognised in the European Union or by the Council of Europe.

As Estonia is not a full member of the EU to date, there is relatively little space in the decisions of the Estonian courts to rely on EU law — this can be done, above all, taking the general principles of EU law as the basis, since the only treaty relation — the association agreement — does not yet render EU law directly applicable in Estonia. On the basis of the decision of the Supreme Court, we may assume a position that the generally recognised principles of European law serve as an integral part of the Estonian legal system already prior to the accession. Taking into account the wording of the second sentence of § 3 (1) of the Constitution, these principles should also be directly applicable in Estonia. The Supreme Court repeated the same opinion in a later ruling of the Administrative Law Chamber, dating from 24 March 1997, where it recognised the principle of equal treatment, regarded in the practice of the European Court of Justice as one of the general principles of European Union law also as a general principle of Estonian law and found that according to the principle of equal treatment, similar situations were to be handled in the same manner.*[21]

Here we have a question of whether the 1994 decision of the Supreme Court entitles us to identify all the general principles of European law with the general principles of Estonian law or only these general principles that the Supreme Court has identified in each individual case in its decisions? The judicial practice

[18] The collection Constitution and Constitutional Assembly (Note 4), p. 59.

[19] *E.g*. *lex specialis derogat legi generali* and *lex posterior derogat legi priori* — we know that the latter applies also in EU law, but this is not entirely true about the relations between the EU and national law, for example, in the case of a conflict between earlier European law and later national law.

[20] Decision of the Constitutional Review Chamber of the Supreme Court, 30 September 1994 (III-4/A-5/94). – Riigi Teataja (The State Gazette) I 1994, 80, 1159 (in Estonian).

[21] Decision of the Administrative Law Chamber of the Supreme Court, 24 March 1997 (3-3-1-5-97). – Riigi Teataja (The State Gazette) III 1997, 12, 136 (in Estonian).

does not provide an answer to the question of what would happen, if a general principle of Estonian law, conflicting with a principle recognised in European law, already existed traditionally. Which would be superior in such a case and would it be possible to resolve the situation, interpreting the principle characteristic of Estonian law, proceeding from the European one?

A question also arises of why should the member states in their law be bound to such principles of EU law that the EU has derived/created for its legal order? Such interpretation maxims will certainly limit the independent decision-making by the member states. The requirement to take into account the criteria deriving from the decisions of the European Court of Justice exists in the decision of the Association Council between Estonia and the EU already.[*22] Is this not in conflict with the principle of legal certainty, as the interplay between the written national law and the unwritten general principles of EU law would be too difficult to perceive for the residents of Estonia who are not EU citizens yet?

The more EU law mixes with Estonian law, the more complicated but legally interesting the situation will become. Will an Estonian citizen find protection against public authority only according to the principles of the Estonian Constitution, which constitute the Estonian legal order, or may he or she rely also on the general principles of EU law, for example, in addition to the nationally recognised general principles of law when resisting the national public authority? The European Court of Justice does not consider itself as competent to exercise supervision over the implementation of nationally recognised principles of law.[*23]

The fundamental freedoms of the EU (the free movement of goods, persons, capital and services) are primarily binding on the member states, consequently, also the future member state Estonia. However, the fundamental rights of the EU and the general principles of law are binding on the member states only in exceptional cases, they are, above all, aimed at the EU institutions (see also the European Charter of Fundamental Rights[*24]) and have only a subsidiary impact on the member states, insofar as the member states apply European law in its narrower sense. It is frequently rather difficult to draw a line here. The general principles of EU law are aimed at the persons applying the law of the member states also if there is a conflict between the national and EU law and the principle of superiority of EU law is applicable. The candidate countries are expected to recognise the general principles. However, the questions of when the member/candidate states act in the area of EU law still remain unanswered. When are they subject to the "discretion" of their own legislation, when to EU law?

In Estonia, characterised by a transfer from one legal system to another and significant gaps or conflicts in law, the use of the general principles of law will definitely be very necessary.[*25] The Supreme Court has used the principles created by the Council of Europe institutions in addition to the sources of law also as a means of interpretation. For example, in its decision of 3 May 2001, the Constitutional Review Chamber of the Supreme Court commences the inspection of the compliance of § 11 of the Surnames Act with the Constitution, analysing the practice of the European Court of Human Rights, *i.e*. not even from ECHR.[*26] This gives rise to a question of whether it places the practice of the European Court of Human Rights in a superior position to the Estonian Constitution or it is still used as a foundation for interpretation, as the law created by the Council of Europe and the European Union institutions was regarded upon deriving the general principles of Estonian law?

Thus, the Supreme Court of Estonia uses the instruments of the Council of Europe and to a certain extent also EU law as a means of interpretation of Estonian law already. The practice of the Supreme Court confirms that the general principles of EU law belong among the principles recognised in Estonia. Suitable examples here include Rait Maruste's dissenting opinion concerning the decision of the Supreme Court, relying on the association agreement between the European Communities, its member states and Estonia (Europe Agreement) and finding that the principle of equal treatment is also a general principle of European law, and some other dissenting opinions of primarily the judges of the Supreme Court.[*27]

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[22] See decision of the Association Council between the European Communities and their member states and the Republic of Estonia, adopting the implementing rules of the provisions concerning the state aid indicated in article 63 (1) iii) and (2) of the Association Agreement (Europe Agreement) between the European Communities and their member states and the Republic of Estonia) according to article 63 (3), approved by Government of the Republic order No. 32 of 14 January 2002. – Riigi Teataja Lisa (Appendix to the State Gazette) 2002, 12, 162.

[23] T. Schilling (Note 14), pp. 5 and 6.

[24] Final text of the EU Charter of Fundamental Rights has been published in the Official Journal of the European Communities. – OJ 2000, 364, p. 1. Available at: http://europa.eu.int/comm/justice_home/unit/charte/index_en.html (11.03.2002).

[25] See U. Lõhmus. Rahvusvahelise õiguse üldtunnustatud põhimõtted Eesti õigussüsteemi osana (Generally Recognised Principles of International Law as Part of Estonian Legal System). – Juridica, 1999, No. 9, pp. 425–430 (in Estonian).

[26] Decision of the Constitutional Review Chamber of the Supreme Court, 3 May 2001 (3-4-1-2-01). – Riigi Teataja (The State Gazette) III, 2001, 15, 154 (in Estonian).

[27] Decision of the Constitutional Review Chamber of the Supreme Court, 27 May 1998 (3-4-1-4-98). – Riigi Teataja (The State Gazette) I 1998, 49, 752 (in Estonian).

The general impression is that the Supreme Court is still careful about EU law. For example, in its decision of 10 May 1996, the Constitutional Review Chamber of the Supreme Court does not analyse the allegations that the Act is in conflict with the European Union legal system, provided in the application of the President of the Republic to the Supreme Court for declaring the Non-profit Associations Act unconstitutional.[*28] Namely, the president found in his application that the Non-profit Associations Act was, *inter alia*, also in conflict with the Europe Agreement[*29], according to article 68 of which, Estonia shall endeavour to ensure that its legislation will be gradually made compatible with that of the Community. The Supreme Court declared that the Non-profit Associations Act was unconstitutional and in conflict with the UN Convention on the Rights of the Child, but made no mention of the Europe Agreement or European Union law. Maybe the reason is that the Europe Agreement signed in 1995 entered into force only in 1998. However, the Constitutional Court of Hungary found in its decision analysing the Europe Agreement as a political compromise that although EU law was the law of a foreign state, it was so to say indirectly applicable or affecting the interpretation of national law.[*30] The same should apply to the general principles of European Union law.

Disputes about Estonian legislation harmonising the European Union directives have rarely reached Estonian courts or if they have, it is very difficult to ascertain whether they involve interpretation of purely Estonian legislation or indirectly also of EU legislation. This can be partly blamed on the fact that the legislative drafting notes reflecting EU directives that served as the basis when drafting laws are removed from the laws adopted in the parliament. For example, the Supreme Court ruling of 5 October 1999 was indirectly related to EU law; in the ruling, the preparation of an administrative offence report and collection of fines due to the violation of the package labelling requirement was legally unfounded, as an Estonian standard had not been adopted on the basis of the Packaging Act harmonising EU law.[*31] However, as both the Europe Agreement and the future accession presume the introduction of European standards as Estonian standards and there was no European standard yet, people had to wait for the preparation of the European standard. Consequently, there was no offence, since the relevant standards had not been established and it was impossible to apply the law. The future will certainly bring more disputes where EU law and the general principles shall be applied.

As it was said, the Constitutional Review Chamber of the Supreme Court derived the validity of the general principles of law from the principle of a state based on democracy, social justice, and the rule of law provided in § 10 of the Constitution and the preamble to the Constitution, according to which the Estonian State is founded on liberty, justice and law.[*32] As the catalogue of the fundamental rights, freedoms and duties listed in the Constitution is not comprehensive and eternal, this leaves an opportunity to recognise new rights, freedoms and duties by interpretation or amendment of the Constitution on condition that they conform to the principles of human dignity and of a state based on democracy and social justice, and the rule of law. A large share of the general legal principles (*e.g*. proportionality, legal certainty, legitimate expectation) have been derived on the basis of § 10 of the Constitution and have found expression in the decisions of the Supreme Court, particularly those regarding administrative law. Will this suffice upon accession to the European Union or should Estonian constitutional law also be supplemented, inspired by the human rights developments, such as the EU Charter of Fundamental Rights? For example, some of the member states have introduced into their constitutions the principles of non-discrimination, inspired by the new initiatives of the European Commission in regulating the area of the fight against xenophobia, *etc*.

However, the mere written law is not enough to consider EU law. In a state based on the rule of law, the quality of the application of legal protection as well as the general principles always depends on courts that must offer such legal protection. "Law alone cannot offer an adequate security of legal certainty. The binding nature of judge's right is also important in guaranteeing legal certainty."[*33] So far, decisions cannot generally be regarded as sources of law in Estonia. "At first, it is unclear whether the supplementation of the Code of Criminal Procedure of 13 May 1998[*34], which recognises as sources of criminal procedural law also the decisions of the Supreme Court in issues not settled in other sources of criminal procedural law or that have arisen upon the application of a law (§ 1 4)) of the Code of Criminal Procedure), changes the former understanding of the meaning of a court precedent as a formal source of law [more precisely, of the fact that

[28] Decision of the Constitutional Review Chamber of the Supreme Court, 10 May 1996. – Riigi Teataja (The State Gazette) I 1996, 35, 737 (in Estonian).

[29] Riigi Teataja (The State Gazette) II 1995, 22–27, 120 (in Estonian).

[30] See decision of the Constitutional Court of Hungary 30/1998 (VI.25) 22 June 1998 in matter 483/B/1996/10. Published in Magyar Közlöny 55/1998, pp. 4565–4575.

[31] Decision of the Administrative Law Chamber of the Supreme Court, 5 October 1999 (3-3-1-34-99). – Riigi Teataja (The State Gazette) III 1999, 25, 240 (in Estonian).

[32] See decision of the Constitutional Review Chamber of the Supreme Court of 30 September 1994, referred to above (Note 20).

[33] See M. Sillaots. Kohtunikuõigus Euroopa õiguses (Judge's Right in European Law). – Juridica, 1998, No. 5 (in Estonian).

[34] Riigi Teataja (The State Gazette) I 1998, 51, 756 (in Estonian).

court decisions are not currently regarded as formal sources of law — J.L.].”*[35] A similar provision is contained also in § 2 of the new draft Code of Criminal Proceedings, “The sources of criminal procedural law are: /…/ 4) decisions of the Supreme Court in issues not settled in other sources of criminal procedural law, but which have arisen upon the application of a law.” It differs according to country as to what branch of law is the most closely related to case law. In Estonia, for example, recognition of decisions as sources of law commences, above all, in criminal proceedings, in France in administrative proceedings, for example. In the European Union it has developed in areas which lack the all-inclusive harmonisation competence. Under such circumstances, the European Court of Justice and the Supreme Court alike develop *de facto* case law to fill the gaps in the written law.

This gives rise to a question: if the importance of decisions increases in the European Union, where will the law created by decisions be located in the hierarchy of Estonian rules of law? Instead of law or even between law and the Constitution and how will the status of a decision be affected by written law adopted later?

3. European law and interpretation of provisions of Constitution concerning foreign relations. Some issues

In the article published in the 6th issue of Juridica International, I discussed why the integration process into the European Union until now might be considered as legitimate, which does not preclude the need to supplement the constitutional order accompanying the accession.*[36] Although it has been observed in the preparation process for the accession to the European Union that the integration process would not come in conflict with our Constitution and the superiority of the Constitution has been ensured, certain borderline situations occur, which are manifested, above all, in that the provisions of the Constitution concerning foreign relations require a somewhat different approach in the light of European law. In other words, as we could conclude, when examining the origins of the Constitution, the applicable Constitution is not as broad as to accommodate everything entailed by EU law. The relations with the European Union, which will definitely continue to be foreign relations until the accession, should be discussed in greater detail in our legal framework, as these relations are so much different from the ordinary foreign relations. I will only present some examples.

Firstly, the position of the decisions of the Association Council (hereinafter: AC), established on the basis of the Europe Agreement in the hierarchy of Estonian rules of law, which has given rise to several questions. The expansion of the role of the executive power as compared to the legislative power, resulting from the accession to the European Union, is unfortunately unavoidable; thus, consideration of and respect for the parliament are very important when making national decisions on EU accession. Yet as long as the decision-making mechanisms of the European Union lack democracy, the member states have more say. This means that the European Union faces a dilemma if it should increase democracy within the EU, which simultaneously decreases the influence of the member states, or *vice versa*. By ratifying the Europe Agreement, the *Riigikogu* has authorised the AC, the membership of which includes, in addition to the Ministers of Foreign Affairs of the EU member states and the representatives of the European Commission, the Minister of Foreign Affairs of Estonia, to adopt decisions.*[37] These decisions pass both the Council of the EU and the European Parliament to be approved by the European Union. In Estonia, they are approved as the Government of the Republic orders and published in the Appendix to the State Gazette. The decisions are binding on the parties according to the Europe Agreement and the parties undertake to implement necessary measures to execute the adopted decisions. According to the European Court of Justice, the decisions of the AC are an integral part of European law, as they are related to the association agreement, for the performance of which the decisions have been issued and the European Court of Justice is competent to decide on their interpretation. From the point of view of Estonian law, the decisions of the AC are international agreements entered into by the Government of the Republic. According to § 123 of the Estonian Constitution, on the one hand, only preventive supervision of international agreements is possible; moreover, proceeding from the Vienna Convention on the Law of Treaties*[38] and the general principles of international law, a unilateral amendment of treaties after their entry into force should be precluded, and on the other hand, the superiority

[35] U. Lõhmus (Note 25), pp. 425–430.

[36] J. Laffranque (Note 17), pp. 207–221.

[37] Article 111 of the Europe Agreement.

[38] Riigi Teataja (The State Gazette) II 1993, 13–14, 16 (in Estonian).

of application applies in the case of a conflict with national law only in treaties ratified by the *Riigikogu*. Thus, we have to note that in the case of a conflict with an Act, only treaties ratified by the *Riigikogu* shall be applied instead of the Act, such superiority arising from the Constitution does not extend to the treaties entered into by the Government of the Republic. At the same time, it has been noted in § 25 of the draft Foreign Relations Act prepared by the Ministry of Foreign Affairs, probably also largely as a result of the need to efficiently apply the decisions of the AC, that if an Act of the Republic of Estonia is in conflict with a treaty (*i.e*. any treaty), the treaty shall be applied.*[39] Such arbitrary extension of the Constitution should not be allowed, irrespective of the reasons. Yet it is here that the weakness of the wording of the provisions of the Constitution concerning treaties is manifested. Instead, in this issue, we might proceed from analogy with § 87 6) of the Constitution. If the government has no right to issue *contra legem* regulations, it has no right to enter into treaties that are in conflict with Estonian laws either. If such a treaty has been entered into and its application contested, the judge would theoretically have the right not to apply the treaty as it is in conflict with the Constitution. At the same time, the above-mentioned Vienna Convention does not distinguish between ratified and unratified treaties, as a result of which all treaties have obligatory force after their entry into force (*pacta sunt servanda*). Thus, conflicts with the Constitution can be avoided primarily through preventive supervision.

Another issue is related to § 123 of the Constitution, which has arisen in the course of the legal debates about the accession to the EU, namely: what should be understood by "enter into" referred to in § 123 (1) of the Constitution. As according to § 123 (1) of the Constitution, the Republic of Estonia shall not enter into international treaties which are in conflict with the Constitution, the representatives of the Estonian eurosceptic movement find that the government cannot sign the treaty on the accession to the European Union before the Constitution has been amended, since in their opinion, a conflict exists between the applicable Constitution and the accession to the EU. As supplementation of the Constitution is a time-consuming process, it would still be possible to sign the accession treaty first and after that supplement the Constitution by a referendum or decide the accession to the EU by a referendum. As it is known, an accession treaty does not enter into force from signing but also requires ratification by both parties. Those persons familiar with international law thus face no difficulty in interpreting "enter into", but linguistically, the forces impeding the accession to the EU may also take advantage of it, creating a legal vicious circle. Again, if we recall the origins of the applicable Constitution, it is suitable to quote J. Adams, who found the following at the 15th session of the CA, "There has been criticism about that (the chapter "Treaties"), but I think that the criticism is more on the level of terms. A precise terminology has not evolved yet in Estonian constitutional law. What we understand as entry into a treaty and what we understand as ratification of a treaty. And in addition, this involves a conflict between the special language and general language meanings. I think that we have language specialists for that, we do not necessarily have to take the terminology used before the Second World War as the basis."*[40]

When returning to the decisions of the AC, then firstly, it is my opinion that EU legislation creating subjective rights and not published in Estonian, which is simply referred to in the decisions of the AC (although the association agreement itself unfortunately also contains such references), should not be transferred to the Estonian legal system by the decisions of the AC, not to mention the practice of the European Court of Justice of certain areas to which ambiguous references have been made in a decision of the AC, which give rise to criteria that the persons applying Estonian law should consider.*[41] Such references may be in conflict with §§ 1 and 3 of the Constitution and EU law cannot be rendered a part of the Estonian legal system by references only. Referring to the practice of the Supreme Court, it may be claimed that, under certain circumstances, Estonia is also subject to international law provisions not published in the State Gazette, such as the UN Convention on the Rights of the Child*[42], but I would still not compare it with the requirements of EU law, as we had approved the accession to the Convention, and not directly to the EU rulings provided in the decision of the AC. With regard to the Constitution, it would be more acceptable to publish all the EU legislation mentioned in the decision of the AC as annexes to the same decision in Estonia and in the Estonian language, *i.e*. to integrate them into the text of the decision of the AC.

We have to find solutions to the issues related to EU rulings for some more time, as according to the principle of legal certainty, the fate of those EU rulings rewritten into Estonian law prior to the accession is questionable after the accession, when the rulings will directly apply to Estonia as a member state. Duplica-

[39] See home page of the Ministry of Foreign Affairs: http://web-static.vm.ee/static/failid/196/valissuhtlemisseadus.pdf (12.03.2002) (in Estonian).

[40] The collection Constitution and Constitutional Assembly (Note 4), p. 142.

[41] See decision of AC Riigi Teataja Lisa (The Appendix to the State Gazette) 2002, 12, 162, and also the draft decision of AC, adopting the conditions for Estonia's participation in the Community programme "Fiscalis". The draft Agreement on Accession to European Common Airspace, *etc*. (unpublished).

[42] See decision of the Constitutional Review Chamber of the Supreme Court, 10 May 1996 (3-4-1-1-96). – Riigi Teataja (The State Gazette) I 1996, 35, 737 (in Estonian).

tion would be confusing, the revocation of the duplicated provisions retroactively would render some of the Estonian Acts difficult to understand and decrease trust in the parliament.

Secondly, I do not think that merely the decisions of the AC approved by the government, under which the Estonian State assumes proprietary liabilities, are legally adequate. Here I mean accession to the European Communities programmes, which concerns various areas and where the participation fees of the programmes in the annual budgets of the ministries amount to millions of kroons despite the fact that half of the costs related to the accession to the programmes is covered by PHARE.*[43] Unfortunately, no decisions of the Supreme Court and comments of the Constitution are available regarding what is meant by the proprietary obligations referred to in § 121 4) of the Constitution as well as in §§ 104 15) and 65 10). The Legal Chancellor has also voiced the problem; he has acknowledged the need to provide by an Act a legal definition, which would describe the notion "proprietary obligations of the state".*[44] H. Vallikivi finds that although entry into almost any treaty entails proprietary obligations of the state, the phrase mentioned in § 104 (2) 15) of the Constitution should at least extend to treaties, which expressly impose the periodic or significant proprietary obligations not foreseen in the state budget (*e.g.* payment of a membership fee of an organisation).*[45] Consequently, the Acts enforcing treaties should take account of the requirements of § 104 of the Constitution. Perhaps the precise specification of this expenditure in the State Budget Act would help render the accession to the Community programmes more transparent and legitimate.

It appears from the information above that some sections of the Constitution need to be specified in relation to the pre-accession process.

Conclusions. Future of Estonian Constitution in the context of European law

In conclusion we must admit that a certain short-sightedness in preparing the Estonian Constitution, which did not consider Europe's future more globally and Estonia's role therein, can be felt in the process of Estonia's accession to the European Union and the work not done at the beginning of the 1990s must be done ten years later. At the same time, the applicable Constitution upholds the idea of respecting the fundamental rights and freedoms laid down in the European Convention on Human Rights, which can be successfully observed, with particular supplementation, also in the European Union context. Consideration of the general principles of European law entails a series of questions that cannot be answered now — the general principles are derived and used primarily by the Supreme Court, at the same time, the relationship between the general principles of European law and Estonian law in the pre-accession process is not very clear. It is also difficult to find interpretations and solutions to the legal problems of the integration process from the provisions of the Constitution concerning international relations. The Constitution does not permit using the same legal measures before the accession as it should allow in the case of membership. The premature use of such measures should not become a goal, on the contrary, all the obligations arising from the associated status must be performed considering and honouring the Constitution, not evading its provisions. The latter concerns both reference to EU legislation and accession to the EC programmes. In this respect, the membership presumes specification of the constitutional foundations and allows for simpler solutions that are suitable for a full member.

When discussing the future of the Estonian Constitution in the context of European law, the issues discussed above form a logical relation. The future of the general principles of EU law is related to the EU Charter of Fundamental Rights solemnly declared in Nice in December 2000 and its future. Whether the Charter becomes legally binding in the future or not largely depends on the view that the current Future of the EU Convention has of the development of the EU and whether a uniform constitution is prepared for the EU, of which the fundamental rights and freedoms together with the general principles of law would also constitute a part. The constitution of the European Union may entail supplementation of national constitutions, *i.e.*

[43] For example, Government of the Republic order No. 628-k of 28.05.1999, approval and granting of the powers of the draft decision of the Association Council between the European Communities and their member states and the Republic of Estonia, adopting the conditions of Estonia's participation in the research and technology development and introduction activities programmes of the European Community (1998–2000) (Riigi Teataja (The State Gazette) II 1999, 14, 89) or, for example, Government of the Republic order No. 552-k of 24.07.2001, approval of the decision of the Association Council between the European Communities and their member states and the Republic of Estonia, adopting the conditions for the participation of the Republic of Estonia in the programme "Culture 2000". – Riigi Teataja Lisa (Appendix to the State Gazette) 2001, 96, 1337 (in Estonian).

[44] Presentation of the Legal Chancellor to the Riigikogu 28 September 2000. Available at: http://www.oiguskantsler.ee/tegevus/ylevaated/28sept2000_ettekanne.rtf (12.03.2002) (in Estonian).

[45] H. Vallikivi. Välislepingud Eesti õigussüsteemis (Treaties in Estonian Legal System). Tallinn: Õiguskirjastus, 2001, p. 35 (in Estonian).

these processes are reciprocally and dynamically interrelated. The possible supplementation of the Estonian constitution in relation with the accession to the EU must be decided in the nearest future, but this is a separate topic not to be discussed in this article. Nevertheless, the creation of constitution this time should take account of the dynamic development of the European Union and look into the future more than before. The supplements made to constitutional law today may prove to be too narrow for the future scenario of the EU as early as tomorrow. Estonia may choose and supplement its constitution accordingly, to the extent that it wishes to participate in the acceding Europe and whether it wishes to amend its Constitution accordingly each time the competencies of the EU are amended.

In addition to the possible amendment of the text of the Constitution and/or constitutional acts, European Union membership also entails a new approach to constitutional review, although internally it will continue to be within the competence of Estonia. This concerns, above all, the possible subordination/non-subordination of EU law and national law affected by EU law to the constitutional review of Estonia. The European Court of Justice may exercise supervision over EU legislation, which does not, however, mean the preclusion of national judicial remedies. National courts must allow for efficient legal protection both against the arbitrary action of the national and EU public authority. The European Union provides a completely new dimension to national judicial power and facilitates the inclusion of decisions in sources of law.

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Domestic Applicability of Customary International Law in Estonia

Introduction

Customary international law becomes topical in the domestic context in areas where international treaty norms are missing, are not binding on the state or have become obsolete. Although the formation and modification of rules of customary law is generally a long process, it is often the case that customary rules are the first response to problems that need to be solved in international life. Despite codifications of customary rules, life is constantly changing and new rules of customary law take their place alongside treaties all the time. Several issues today are still under the exclusive regulation of customary law — for example state immunity, state responsibility or status of foreigners.[*1]

The domestic status of rules of customary international law differs from state to state. If a state is not a party to major multilateral treaties or for any reason such treaties are domestically not applicable, the domestic role of customary law may be significant. For example, the United States has been cautious with becoming a party to human rights agreements and there are numerous cases in the US courts where customary international law is applied.[*2] Estonia is not a party to the 1958 or 1982 sea conventions which all codify to a large extent customary law. Such rules could be invoked before domestic courts only as customary international law.

The present article is going to explore the notion of domestic application of international customary rules and important prerequisites for their application: domestic validity of a customary rule and its status with respect to other domestic norms. To this end, the article will analyse the 1992 Estonian Constitution and case law of the Estonian Supreme Court.

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[1] P. Malanczuk. Akehurst's Modern Introduction to International Law. 7th revised ed. London, New York: Routledge, 1997, p. 35; C. Economides. The elaboration of model clauses on the relationship between international and domestic law. – The relationship between international and domestic law. Proceedings. Strasbourg: Council of Europe Press, 1993, p. 105. See also, First Report: Summary of Questionnaire Responses. By ILA Committee on International Law in Municipal Courts. – Report of the 66th Conference held at Buenos Aires, Argentina, 14–20 August 1994. Buenos Aires: International Law Association, 1994, p. 356.

[2] *Cf.* B. E. Carter, P. R. Trimble. International Law. 2nd ed. Boston: Little, Brown and Company, 1995, pp. 249–261.

1. Meaning of domestic applicability of customary international law

What is meant under the domestic application of a rule of customary international law is the application of the rule in relations between individuals or individuals and the state in a way that the applied norm is used to derive the rights and obligations of the parties (direct application). Indirect application is also possible — then customary international law is used only to interpret domestic legal rules.[*3] It is also possible to apply customary international law domestically by way of constitutional review — when courts review the conformity of domestic legislation with the customary rule.[*4] The present article will focus on direct applicability of customary rules. Several issues treated here (first of all as concerns international validity and binding force of customary rules) pertain also to indirect application as well as to application in the course of constitutional review. This article does not cover one further possibility when the validity and binding force of a customary rule may come to the attention of domestic legal operators — if a customary rule regulates the relations between the state and a foreign state or state's agent or an international organisation and a dispute arising from such a relationship is being settled in a domestic court.

Although customary international law has developed for the purpose of regulating relationships between states, there has recently been an important change and obligations imposed on states or competence assigned to them sometimes keep in mind the rights and duties of individuals. First and foremost this concerns human rights. International human rights like several other fields of international law to a certain extent exist in parallel in treaties and as customary international rules.

Indeed, domestically directly applicable are primarily rules of customary international law that grant private persons rights against the state. These rights correlate to the state's international obligation the performance of which an interested private individual may demand (*e.g.* granting asylum to a refugee, equal treatment of foreigners and citizens in certain issues and guaranteeing of certain rights to foreigners, *etc.*).[*5]

The above should not be taken to mean that customary international law could not directly grant rights or impose obligations on private individuals. Direct obligations include for example: prohibition of genocide, piracy, torture or slavery.[*6] Then states are only intermediaries who (in the absence of an international court) implement the will of the "international legislator". In the case domestic courts settle an issue directly on the basis of a customary rule and do not assume rewriting of the customary rule into a domestic act of law, it would also be correct to talk about direct applicability of customary international law. Although here the principle of legal certainty arises sharply, it concerns very few rules the violation of which (*e.g.* committing of genocide), due to its extent and extraordinary character, could be clear to every individual. Primarily for the sake of clarity states tend to rewrite such rules into domestic law (transform) or at least make a reference to them in domestic penal legislation or elsewhere.[*7]

2. Preconditions for domestic applicability of customary rules

Like in the case of international treaties, in order to be applicable an international customary rule must meet certain conditions. The rule must:

– exist and be valid internationally (the latter means, among other things, that there must be no other rules of international law that prevail over the customary rule);

[3] J. J. Paust. Customary International Law in the United States: Clean and Dirty Laundry. – German Yearbook of International Law, Vol. 40, 1997, p. 85.

[4] *Cf.* A. Verdross, B. Simma. Universelles Völkerrecht. Theorie und Praxis. 3., new, fully revised ed. Berlin: Duncker & Humblot, 1984, p. 550, § 864.

[5] *Cf.* J. J. Paust (Note 3), pp. 106–114.

[6] *Ibid*., p. 90, fn. 85; D. H. Joyner. A normative model for the integration of customary international law into the United States law. – Duke Journal of Comparative and International Law, Vol. 11, 2001, No. 1, p. 134.

[7] *E.g.* § 92 of the new Estonian Penal Code (*karistusseadustik*. – Riigi Teataja (The State Gazette) I 2001, 61, 364 (in Estonian)) only refers to international law while several other crimes described in the same chapter are transcripts of the rules of international law. Nevertheless, all such penalties must be imposed in accordance with international law and it would be advisable to use customary international law for interpreting respective provisions.

- be binding on the state which seeks to apply the rule domestically (in the case of a general customary rule it means that the state is not a persistent objector with regard to the rule, and in the case of a particular custom that the state has consented to the customary rule);
- be valid as part of domestic law of the state which seeks to apply it domestically (it derives from the state's constitutional approach to the domestic status of international law and it may be, and often is, different for different sources of international law);
- prevail over all the colliding norms of national law (it means that in the case of conflict of the customary rule with a domestic rule, be it a constitutional, statutory or secondary law rule, the customary law rule must be in a position in the normative hierarchy that enables it to prevail over the conflicting domestic rule); and
- be sufficiently clear and concrete to be applied.

International validity of a customary rule, its relationship with other rules of international law and its binding force on states are beyond the scope of this article. Hence we start from the third item — domestic validity of the rules of customary international law.

3. Domestic validity of customary rules

The issue of domestic validity of customary international law is the debate among monists and dualists. Today all states themselves decide whether and which sources of international law they recognise as part of their domestic law.[*8] But even when the state's approach is strictly dualist it will be internationally liable for domestic violation of the rules of international law that are binding on it.[*9]

Different states have different approaches. In the centuries old Anglo-American tradition, customary law is considered as law of the land.[*10] In the continental European tradition generally recognised principles of international law have been mentioned in several constitutions since World War I (*e.g*. Germany, Austria, Estonia, Greece, Portugal, the Russian Federation).[*11] Very few constitutions expressly mention customary international law (*e.g*. Republic of South Africa).[*12] Still many other states recognise rules of customary international law as part of their domestic law and apply customary rules without express guidelines in their constitutions (*e.g*. France, Italy, Switzerland, the Netherlands).[*13]

As concerns international treaties, Estonia's approach is monist in a somewhat modified meaning of this term — treaties that are internationally in force and are binding on Estonia are part of the domestic law without their domestic validity or transformation to domestic law being explicitly mentioned anywhere separately.[*14] Modification means that the Estonian legal order contains the so-called rules of recognition whose effect makes international treaties entered into by Estonia as part of the domestic law. This claim is grounded on the second paragraph of § 123 of the 1992 Constitution by the effect of which international treaties ratified by the *Riigikogu* become part of the domestic law in Estonia. The practice of ratification and domestic application of treaties is a proof of it. Although there is no written rule of recognition for interna-

[8] R. Geiger. Grundgesetz und Völkerrecht. Die Bezüge des Staatsrecht zum Völkerrecht und Europarecht. Ein Studienbuch. 2., revised ed. München: Beck, 1994, pp. 158–159; L. Wildhaber, S. Breitenmoser. The Relationship between Customary International Law and Municipal Law in Western European Countries. – Zeitschrift für ausländisches öffentliches Recht und Völkerrecht, Vol. 48, 1988, pp. 164 and 169.

[9] L. Wildhaber, S. Breitenmoser (Note 8), pp. 167–169.

[10] See Blackstone's quotation in: A. Verdross, B. Simma (Note 4), p. 542, § 853. See also, J. J. Paust (Note 3), pp. 84 *ff*.

[11] Article 9 (1) of the 1920 Austrian Federal Constitution; article 25 of the 1949 German Federal Basic Law; article 28 (1) of the 1975 Greek Constitution; article 8 (1) of the 1976 Portuguese Constitution and article 15 (4) of the 1993 Constitution of the Russian Federation.

[12] Article 232 of the 1996 Constitution of the Republic of South Africa.

[13] Second Report of the Committee on International Law in National Courts. – Report of the 67th Conference held at Helsinki, Finland, 12 to 17 August 1996. London: International Law Association, 1996, p. 573; F. Ermacora. Völkerrecht und Landesrecht. – Österreichisches Handbuch des Völkerrechts. Vol. 1. H. Neuhold *et al*. (eds.), Wien: Manz, 1991, pp. 116–117, line No. 569. A. Verdross and B. Simma use in this context a term "unwritten constitutional law": A. Verdross, B. Simma (Note 4), p. 542, § 853. In some cases rather declaratory provisions of constitutions (such as paragraph 14 of the preamble of the 1946 French Constitution and Article 10 of the 1948 Italian Constitution) are considered as rules of recognition whereby customary international law is transferred into domestic legal order: I. Seidl-Hohenveldern. Transformation or adoption of international law into municipal law. – International and Comparative Law Quarterly, 1963, Vol. 12, pp. 91–92. About Switzerland, see L. Wildhaber, S. Breitenmoser (Note 8), p. 196.

[14] The author of this article has expressed his view on the topic in: H. Vallikivi. Status of International Law in the Estonian Legal System under the 1992 Constitution. – Juridica International, Vol. 6, 2001, pp. 222–232 (unfortunately, in the course of editing several remarks made by the author were omitted from the published version of the article); H. Vallikivi. Välislepingud Eesti õigussüsteemis. 1992. aasta põhiseaduse alusel jõustatud välislepingute siseriiklik kehtivus ja kohaldatavus (International Treaties in the Estonian Legal System: Domestic Validity and Applicability of Treaties Concluded under the 1992 Constitution). Tallinn: Õiguskirjastus, 2001 (in Estonian).

tional treaties approved by the Government of the Republic, the so-called executive treaties (*Verwaltungsabkommen*), the practice of application gives reason to claim that these treaties are valid as part of the domestic law of Estonia, too.

Customary international law is not explicitly mentioned in the Estonian Constitution. However, the second sentence of the first paragraph of § 3 stipulates: "Generally recognised principles and rules of international law are an inseparable part of the Estonian legal system." Similar provisions were contained in the earlier Estonian constitutions of 1920 and 1937.*[15] Two main questions arise on the basis of the quoted provision:

- to which sources of international law does the phrase "generally recognised principles and rules of international law" refer? And
- what is the meaning of the phrase "inseparable part of the Estonian legal system"?

3.1. Generally recognised principles and rules of international law

The similar provision in the previous Estonian constitutions or in the current Austrian and German constitutions does not and did not distinguish between "rules" and "principles" of international law. On the other hand, they are distinguished in article 8 (1) of the 1976 Portuguese Constitution and article 15 (4) of the 1993 Constitution of the Russian Federation. Does the first paragraph of § 3 of the Estonian Constitution have in mind other sources of international law besides international customs, for example (i) general principles of law recognised by civilised nations that article 38 (1) (c) of the Statute of the International Court of Justice refers to, or (ii) universal multilateral conventions to which most states of the world have acceded but which are not binding on Estonia? Another question arises in connection with the adjective phrase "generally recognised". Differently from the Weimar Constitution the phrase is no longer in the current German Constitution. Is it a condition limiting the range of rules of customary international law — for example by reference to *ius cogens* rules only?

The Supreme Court of Estonia has several times referred to the first paragraph of § 3 in its decisions, both in connection with treaties which are either binding or not binding on Estonia and also simply in connection with international law without specific reference to any source.*[16] The prevalent view in literature seems to be that the first paragraph of § 3 of the Constitution is meant to include both customary law rules and legal principles.*[17] As the present article focuses on (customary) rules and not on general principles, let us see what gives reason to believe that the first paragraph of § 3 is a reference to rules of customary law, and which customary rules it applies to.

Similarly to the German Federal Basic Law which contains separate rules on customary law (article 25) and treaties (though only treaties ratified by legislator) (article 59 (2)), the Estonian Constitution also contains separate rules on treaties (in this context the second paragraph of § 123). As we saw above, international treaties ratified by the *Riigikogu* become part of the domestic law in Estonia as a result of the effect of the second paragraph of § 123 of the Constitution and executive treaties as a result of the effect of the unwritten rule of recognition. Separate provisions can be considered the reason why the first paragraph of § 3 of the Constitution does not mean international treaties that have entered into effect in respect of Estonia, no matter how general they are, *i.e.* no matter how many states of the world they bind.*[18] Be it mentioned that if

[15] Subsection 4 (1) of the 1920 Estonian Constitution and § 4 (2) of the 1937 Estonian Constitution. The provision was borrowed to the Estonian constitutions from article 4 of the 1919 Weimar Constitution and article 9 (1) of the 1920 Austrian Federal Constitution. Allegedly, the latter two borrowed it from the United States court practice: I. Seidl-Hohenveldern (Note 13), p. 92.

[16] See the case-law of the Supreme Court: judgment of the Criminal Review Chamber of the Supreme Court, 21 December 1994 (III-1/1-34/95; *U. Torop's Case*). – Riigi Teataja (The State Gazette) III 1995, 7, 83 (in Estonian); judgment of the Criminal Review Chamber of the Supreme Court, 26 September 1995 (III-1/3-28/95; *M. Rein's Case*). – Riigi Teataja (The State Gazette) III 1996, 1, 3 (in Estonian); judgment of the Plenary Session of the Supreme Court, 22 January 1998 (3-1-1-123-97; *M. Mägi's Case*). – Riigi Teataja (The State Gazette) III 1998, 23, 228 (in Estonian); judgment of the Criminal Review Chamber of the Supreme Court, 7 November 1995 (III-1/3-40/95; *H. Vaibla's Case*). – Riigikohtu Lahendid 1995 (Collection of Supreme Court judgments for 1996). Tallinn: Õigusteabe AS Juura, 1996, p. 419 (in Estonian); judgment of the Criminal Review Chamber of the Supreme Court, 7 February 1995 (III-1/3-28/95; *V. Uprus' Case*). – Riigi Teataja (The State Gazette) III 1995, 2, 22 (in Estonian).

[17] U. Lõhmus. Rahvusvahelise õiguse üldtunnustatud põhimõtted Eesti õigussüsteemi osana (Generally Recognised Principles of International Law as the Part of Estonian Legal System). – Juridica, 1999, No. 9, pp. 425 *ff*. (in Estonian); K. Merusk, R. Narits. Eesti konstitutsiooniõigusest (On Estonian Constitutional Law). Tallinn: Juura, 1998, pp. 28–29 (in Estonian); L. Madise. Rahvusvahelise õiguse käsitlusest 1992. aasta Eesti põhiseaduses (Treatment of International Law in the Estonian 1992 Constitution). – Juridica, 1998, No. 7, pp. 364–365 (in Estonian); H.-J. Uibopuu. Eesti põhiseadus, rahvusvahelised suhted ja rahvusvaheline õigus (Estonian Constitution, International Relations and International Law). – Juridica, 1998, No. 4, p. 191 (in Estonian); *Cf.* F. Ermacora (Note 13), p. 118, line No. 578.

[18] *Cf.* R. Geiger (Note 8), p. 164.

a state is in parallel bound by a customary law rule and similar rule contained in a treaty then both rules can be valid domestically. Such double validity has importance when it comes to application — if for example the degree of validity of a treaty rule is lower than that of a national law and in the case of conflict with the legislative rule the treaty rule cannot be applied, the customary rule may turn out to be applicable if it prevails over the legislative rule. For a discussion of normative hierarchical position of customs see below.

"Generally recognised rules of international law" could also be contained in international treaties to which Estonia is not a party but which are important by substance and/or which have a large number of contracting parties. It could be claimed that if rules of such treaty are simultaneously not rules of customary law then they are not applicable as part of the domestic law in Estonia. A claim to the contrary would presume that the first paragraph of § 3 of the Constitution is a reference rule that is used to transfer to domestic law any rules of international law which are non-binding for the state internationally. What makes a treaty as source of international law particular by nature is that it allows states to decide whether they wish to participate in the treaty or not. Thus it would be correct to read the first paragraph of § 3 of the Constitution as only applying to customary law and not international treaties.

The term "generally recognised" refers to the consensualist approach which does not conform to today's concept of customary law. Therefore the extension "generally recognised" does not presume that Estonia should have recognised the rule (either explicitly or tacitly). Formerly the German constitutional law used to attribute such meaning to the term and the view was also supported in Estonian specialist literature.[*19] The exclusion of the word "recognised" (*anerkannten*) from the Bonn Constitution was allegedly meant to emphasise that the state's own recognition is not necessarily needed.[*20] Estonia's more liberal approach, despite the term "generally recognised", was already noted when the previous 1937 Constitution was drafted.[*21]

The term "generally recognised" does not mean either that absolutely all states of the world should be bound by the relevant rules of customary law. If we presume that all states should be bound then only *ius cogens* rules would remain under this category, but this approach would probably be too restrictive. What is meant here is rather the differentiation between general rules of customary law and regional or particular rules. The extension is thus referring to general but not universal customary rules.[*22] Accordingly there could be occasional persistent objectors among the states bound by the customary rules mentioned in the first paragraph of § 3 of the Estonian Constitution.[*23]

3.2. Inseparable part of Estonian legal system

Like in the case of international treaties, the ways of transferring customary international law to domestic law can be different. When brought to the domestic sphere the rule of international law may change its character or may remain valid as international law. In the first case the state's approach is monist and an international rule is adopted (or incorporated) into domestic law. In the second case the approach is called dualist and a rule of international law is transformed into domestic law.[*24] The consequences of using the two methods are somewhat different.

The adopted customary rule changes and terminates in accordance with its international modification and termination, and it has to be interpreted in conformity with international interpretation.[*25] Automatic synchronicity helps to avoid potential infringement of international law by the state. When a transformed customary rule changes internationally domestic legislation has to be brought in line with the changes; in the case of failure to do so or in the case of arbitrarily interpreting a customary rule transformed into domestic law the state is liable for an infringement of its international obligation.[*26]

Some authors have based the differences of the two approaches on extreme subtleties. For example, I. Seidl-Hohenveldern has distinguished between the adoption and transformation of customary rules on the basis of the wording of a relevant constitutional rule: if according to the constitutional rule the rule of

[19] L. Wildhaber, S. Breitenmoser (Note 8), p. 179; A. Piip. Rahvusvaheline õigus (International Law). Tartu, 1936, pp. 33–34 (in Estonian).

[20] R. Geiger (Note 8), pp. 164–165; K. J. Partsch. International Law and Municipal Law. – Encyclopedia of Public International Law. R. Bernhardt (eds.). Vol. II, 1995, p. 1198; R. Streinz. Sachs, Grundgesetz. 2th ed. München: Beck, 1999, art. 25, paragraph No. 25.

[21] A speech explaining the draft constitution given by J. Uluots before the National Assembly in 1937: Põhiseadus ja Rahvuskogu. Koguteos (The Constitution and the National Assembly. A Collection). Tallinn, 1937, p. 132 (in Estonian).

[22] *Cf.* R. Streinz (Note 20), art. 25, paragraph No. 24.

[23] *Cf.* R. Geiger (Note 8), p. 164.

[24] See, *e.g.*, A. Verdross, B. Simma (Note 4), pp. 545–546, § 858; K. J. Partsch (Note 20), pp. 1190–1192; F. Ermacora (Note 13), pp. 117–118. It should be noted that essentially the same techniques are called with different names in the literature.

[25] K. J. Partsch (Note 20), p. 1198; I. Seidl-Hohenveldern (Note 13), pp. 93 and 98.

[26] Differences of the two approaches and advantages of one and another have been described, *e.g.* in: I. Seidl-Hohenveldern (Note 13), pp. 93–94; K. J. Partsch (Note 20), pp. 1191–1192.

international law "is valid as part of the domestic law" (*gelten als*) it is considered as statement reflecting that the rule has been adopted into domestic law. If the constitutional rule stipulates that the rule of international law "is part of the domestic law" (*sind*) it is an expression of the legislator's wish to transform the relevant rule to domestic law.[*27] Many authors find that in states where domestic validity of customary international law is recognised the rules transfer to domestic law directly without any additional national procedures.[*28]

Unlike the previous Estonian constitutions the current Constitution seems to use the wording that refers to transformation. However, such differentiation seems artificial, at least in the case of the Estonian language. There is also no unanimity among German and Austrian authors concerning the meaning of the provisions that Seidl-Hohenveldern considers as adoption rules.[*29] Of primary importance is national practice — whether courts apply rules of customary international law without requiring that they be transformed to domestic legislation. In addition, it is also important whether national courts take into account the international changes of validity and interpretations of the rule.

The Estonian Supreme Court by way of constitutional review has applied customary international law at least on one occasion. In a decision of 21 December 1994 the Constitutional Review Chamber of the Supreme Court had to consider the legality of the transactions that the former Soviet troops in Estonia had carried out with real estate situated in Estonia.[*30] The Supreme Court came to the conclusion that foreign troops illegally occupying Estonia could not become owners of the real estate and were thus not entitled to dispose of the property. The court summarised its decision: "The property of the military belongs to the state. The real estate — land, buildings and installations — in possession and in use of the former Soviet Union armed forces belonged and continue to belong to the Estonian state. /…/ Arising from international law and the continuity of the Republic of Estonia, the armed forces of the Soviet Union and its structural units were not legal subjects of the transactions made with the lands, buildings and objects situated in the territory of the Republic of Estonia."

The Constitutional Review Chamber concluded that upon occupying Estonia the troops of the Soviet Union became only users of the real estate situated in the occupied territory. The chamber referred to customary international law as expressed in article 55 of the annex to the 1907 Hague Convention IV. Article 55 stipulates: "The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct." Thus even if the property that was possessed by the Soviet Union armed forces was in private ownership at the moment occupation started, the Republic of Estonia nationalised the property in the process of regaining independence in 1991.[*31]

Estonia has never been a party to the Hague conventions concerning the laws of war. The Hague conventions are indeed considered as an expression of customary international law.[*32] As such, the above provision of the Hague Convention IV is binding both on the Republic of Estonia as well as the Soviet Union and its legal successor, the Russian Federation. Although the Estonian Supreme Court has only briefly discussed the substance and validity of the customary rule in its decision, it is clearly an instance of domestic application of customary international law.

Another example of domestic application of customary international law dates from 1995. In its judgment of 23 May 1995 the Supreme Court Criminal Review Chamber noted that "in accordance with the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 which, pursuant to § 3 of the Constitution of the Republic of Estonia, is an inseparable part of the Estonian legal system, everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law (§ 6 (2))."[*33] The Supreme Court narrowed down the scope of charges in the part that was not proved. If we take into account that the European Convention of Human Rights (ECHR) became binding on Estonia as an international treaty only on 16 April 1996, the Supreme Court in the above case had to apply the rule of presumption of innocence as a rule of customary international law — in the way as it is codified in the ECHR (and several other instruments preceding or subsequent to the ECHR).

[27] I. Seidl-Hohenveldern (Note 13), p. 92. See also R. Geiger (Note 8), pp. 165–166.

[28] L. Wildhaber, S. Breitenmoser (Note 8), pp. 176–177; C. Economides (Note 1), pp. 104–105.

[29] *Cf.* M. Schweitzer. Staatsrecht III. Staatsrecht, Völkerrecht, Europarecht. 7., revised ed. Heidelberg: Müller, 2000, p. 163, paragraph No. 476; R. Geiger (Note 8), pp. 165–166.

[30] Constitutional Review Chamber of the Supreme Court, 21 December 1994 (III-4/A-10/94). – Riigi Teataja (State Gazette) I 1995, 2, 34. See unofficial translation into English thereof – http://www.nc.ee/english/const/94/4a9410i.html (05.06.2002).

[31] Decisions of the Supreme Council of Estonia dated 29 August 1991 and 23 January 1992.

[32] Documents on the Laws of War. 2nd ed. A. Roberts, R. Guelff (eds.). Oxford: Clarendon Press, 1989, pp. 3–4, 44.

[33] *U. Torop's Case* (Note 16).

In addition to the above, legal scholars have also treated § 3 (1) of the Estonian Constitution as a rule by which rules of customary international law are adopted into Estonian law.*[34] Hence due to the effect of this provision all rules of general customary international law binding on Estonia are adopted to the Estonian legal system and are valid as part of the domestic law. Accordingly, if Estonia is a persistent objector to any of the general customary rules those rules have no domestic validity. The adopted rules continue to live their international life, *i.e*. they change and terminate in the domestic sphere simultaneously with their modification and termination on the international plane.

3.3. Particular customary rules

It was explained above, that § 3 (1) of the Estonian Constitution has in mind rules of general customary international law. The Constitution lacks any references to particular customary rules. The author of this article is also not aware of any court practice in Estonia that would recognise or apply such customary rules. However, considering the generally favourable attitude towards international law (*Völkerrechtsfreundlichkeit*) in the Estonian Constitution, one cannot exclude that also particular customary rules could have domestic effect.*[35]

Particular customary rules transfer to the domestic law in a similar way as general rules — becoming internationally binding on Estonia; and they leave the domestic legal system upon their international termination. However, considering the nature of particular rules their existence has to be proved by reference to explicit or tacit recognition of the states bound by the custom.

4. Position of customary rules in domestic hierarchy of norms

Monism that gives priority to international law would assume that rules of customary international law prevail over all rules of domestic law, including constitutional rules.*[36] The so-called modified monism that takes reality into account is forced to recognise the right of states to determine for themselves what hierarchical status customary international law has in domestic law.

The position of a customary rule depends certainly on whether we are dealing with a general or particular rule. In some states general customary rules have been ensured the status to prevail over laws but the status of particular customary rules is unclear or in any case inferior to laws.*[37] A customary rule containing *ius cogens* may enjoy a special position. For example, in Switzerland a doctrine has developed lately according to which customary rules containing *ius cogens* prevail over all rules of domestic law, including constitutional rules.*[38] On the other hand, the position of customary rules in the hierarchy of norms can be different for different domestic legislation issued by the same body or the body of the same branch of power (*e.g*. for constitutional or ordinary laws or acts of the head of state and government).

As both the rules of domestic law as well as rules of customary international law are legal norms, in the case of conflict one of them has to surrender. Which rule prevails is determined by the maxims of *lex superior*, *lex posterior*, *lex specialis*, and others. As it was said, every state decides for itself what the status of customary rules is. But while doing so, it will have to take into account that the state will be internationally liable for an infringement of a customary rule that was left unapplied because of a status inferior to a conflicting domestic rule.

The status of customary international law may be determined *expressis verbis* by the constitution but in most cases the constitution does not provide an answer to this question. In that case the status is determined by national courts applying (or refusing to apply) customary rules. The status may be derived first of all from the status of the adoption or transformation act, *i.e*. in the absence of a different regulation the interna-

[34] H.-J. Uibopuu (Note 17), p. 192; K. Merusk, R. Narits (Note 17), pp. 28–29; L. Madise (Note 17), p. 366; R. Streinz (Note 20), art. 25, paragraph No. 38; R. Geiger (Note 8), pp. 165–166; F. Ermacora (Note 13), p. 118, line No. 578.

[35] *Cf*. M. Schweitzer (Note 29), pp. 165–166, paragraph No. 481. See also, A. Verdross, B. Simma (Note 4), p. 544, § 855; B. Simma. Das Völkergewohnheitsrecht. – Österreichisches Handbuch des Völkerrechts. Vol. 1. H. Neuhold *et al.* (eds.). Wien: Manz, 1991, pp. 53–54, line No. 267.

[36] I. Seidl-Hohenveldern (Note 13), p. 94.

[37] M. Schweitzer (Note 29), pp. 165–166, paragraph No. 480–481.

[38] Second Report … (Note 13), p. 573. See also, C. Economides (Note 1), p. 106.

tional customary rule that has transferred to domestic law acquires legal force equal to the rule by which it found its way to the domestic law.[*39] The situation is unclear when there is no written adoption norm.

There are many different possibilities to set the hierarchy. The most widespread in practice are the situations where the customary rule:

- is ranking below constitutional rules but prevails over acts of legislation (*e.g.* Germany, Greece, Italy, Russian Federation, Switzerland)[*40];
- is equal with laws (Austria)[*41]; or
- is inferior to laws but superior to acts of executive bodies (*e.g.* the UK, the USA, Sweden, Finland, Luxembourg, Republic of South Africa).[*42]

The first paragraph of § 3 of the Estonian Constitution, unlike the third paragraph of § 123 that regards international treaties, does not refer to the status of generally recognised rules of international law. For determining the status of general rules of customary law binding on Estonia we could look for guidance in the status of their adoption rule. Accordingly, such customary rules could have equal status with the constitutional rules.

Having a rank higher than laws does not yet mean that domestic legal acts conflicting with a customary rule are invalid. In the case of conflict, if it is indeed a real and not imaginary conflict — the latter can be avoided by interpreting domestic law in conformity with the customary rule — the customary rule will be applied instead of a domestic rule.[*43]

As concerns particular customary rules, because of the absence of written adoption norm there is no similar basis for determining the status of a rule. There is apparently also no court practice regarding this issue. Particular customary rules could be considered as occupying a position not higher than that equal to the laws. Then the legislative power can decide whether to allow domestic applicability of such rules or to establish different regulations. It is also quite conceivable to grant particular customary rules even lower status that would be equal to acts of the executive. The executive power plays an important role — through its activities and statements — in binding the state with customary law and especially with particular customary rules where states' consent is necessary. Therefore the executive power may claim to have a competence to decide whether to allow domestic applicability of such rules or whether to establish regulations overruling adopted customary rules.

The collision of international customary rules and treaty rules should also be addressed. It may well be that both rules are internationally binding on the state and are also valid domestically. This is the situation in Estonia. What is their domestic validity or applicability in the case when they enjoy different positions in the domestic hierarchy of norms?[*44] It should first be noted that the range of addressees of these rules may be different (indirect addressees of a treaty rule are usually persons connected with or subordinate to the contracting party). In relations with some states the state is bound by a treaty rule and in relations with others by a customary rule.[*45] Which one to apply depends on the object of regulation of an individual rule and its scope of validity. Let us bring a hypothetical example to illustrate the relationship. If Estonia enters into a treaty with Lithuania to treat the Lithuanian minority in Estonia in a certain way, then for Lithuanians the provisions of the treaty will replace the minimum requirements for the treatment of aliens contained in customary international law. This does not mean, that other minorities, for example Finns, living in Estonia could benefit from the treaty and demand its application to them, or that this treaty would in any way affect the rights and duties of Finns as arising from international customary law. Thus the treaty rules entered into to regulate the same issue do not necessarily dislodge customary rules from the domestic sphere. With

[39] See also, M. Schweitzer (Note 29), p. 165, paragraph No. 479a.

[40] C. Economides (Note 1), p. 106. About Germany, see article 25 of the 1949 German Federal Basic Law; R. Geiger (Note 8), pp. 168–169; K. J. Partsch (Note 20), p. 1199; R. Streinz (Note 20), art. 25, paragraph No. 88; M. Schweitzer (Note 29), pp. 164–165, paragraph No. 479. At the same time, no equal rank with the constitution or even primacy over the constitution is fully excluded: M. Schweitzer (Note 29), p. 165, paragraph No. 479a; R. Streinz (Note 20), art. 25, paragraph No. 86. See also, K. J. Partsch (Note 20), p. 1199. About Italy, see L. Wildhaber, S. Breitenmoser (Note 8), p. 184. About Greece, see article 28 (1) of the 1975 Greek Constitution. About the Russian Federation, see I. T. Lukashuk. Mezhdunarodnoye pravo. Obshchaya chast (International Law. General Part). Moscow: BEK, 1999, p. 238 (in Russian). About Switzerland, see L. Wildhaber, S. Breitenmoser (Note 8), pp. 198–199.

[41] A. Verdross, B. Simma (Note 4), p. 547, § 861; F. Ermacora (Note 13), p. 118, line No. 578; I. Seidl-Hohenveldern (Note 13), pp. 94–95; L. Wildhaber, S. Breitenmoser (Note 8), pp. 186–187.

[42] See generally, C. Economides (Note 1), p. 106. For the UK, see I. Brownlie. Principles of Public International Law. 5th ed. Oxford: Oxford University Press, 1998, pp. 42–43. For the USA, see F. L. Kirgis. Federal Statutes, Executive Orders and "Self-Executing Custom". – American Journal of International Law, Vol. 81, 1987, p. 373. Article 232 of the 1996 Constitution of the Republic of South Africa.

[43] *Cf.* R. Streinz (Note 20), art. 25, paragraph No. 93.

[44] *Cf.* I. Seidl-Hohenveldern (Note 13), pp. 96–98.

[45] *Cf.* R. Streinz (Note 20), art. 25, paragraph No. 93.

respect to certain persons customary rules may be applicable while with respect to others treaty rules will be applied. However, when the addressees of a treaty rule are identical to those of the customary rule and there is a conflict between the two rules, the domestic applicability of one or another may depend on the rank of colliding rules in the domestic sphere.

5. Some further issues related to domestic applicability of customary international law

Different possibilities of domestic applicability of international law were described in the first section above. Any kind of application aside from indirect application would definitely assume domestic validity of a customary rule. It would not be possible to apply a rule that is non-binding on the parties to the legal relationship, nor is it possible to check the conformity of a domestic act to a customary rule if the latter is not valid domestically or does not prevail over the rule that will be reviewed. Indirect application of an international customary rule is not as strict. Nevertheless, it would be equally unconceivable to use for interpretative purpose a customary rule that is not valid or that is not binding on the state (although it is less important to consider the domestic validity and domestic status of such customary rule).

Above, some examples were given to illustrate the domestic application of customary rules in Estonia. In addition we could mention the Supreme Court Criminal Review Chamber judgment of 21 March 2000 as an interesting example.[*46] Karl-Leonhard Paulov had been prosecuted under § 61^1 (1) of the Estonian Criminal Code for having killed, as an NKVD agent, three "forest brothers" (persons hiding in the forest and offering armed resistance to the Soviet occupying regime in Estonia) in October 1945 and October 1946. The relevant section of the Criminal Code has complex wording: "Committing crimes against humanity, including genocide, as those crimes are defined in the rules of international law, that is wilful acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, a group offering resistance to the occupying regime or other group, killing or causing serious or permanent or life threatening bodily or mental harm or torturing members of such group, forcibly taking away children, armed attack, deportation or banishment of native population in the time of occupation or annexation, depriving or limiting economic, political and social rights — is punishable by eight to fifteen years' imprisonment or by life imprisonment." The three instances of domestic courts debated about the characteristics of the objective side of the elements of the crime (*corpus delicti*) contained in this provision.

The Supreme Court found that there are two main sets of elements in this provision: the one of the crime against humanity (this is referred to by the wording "Committing crimes against humanity /…/ as those crimes are defined in the rules of international law /…/") and the other of the crime of genocide (this is referred to by the rest of the wording). The Supreme Court determined the substance of the crime against humanity by using the characteristics in article 6 (c) of the Charter of the Nuremberg Tribunal and article 5 of the Statute of the Yugoslavian Tribunal (ICTY). The Court thereby mentioned that the list of characteristics of the crime against humanity in these statutes is not exhaustive. It should be noted that these instruments by themselves are not binding on Estonia today nor were they binding at the time of commission of the crimes by K.-L. Paulov. But nevertheless they are an expression of customary international law. The chamber stated that depriving people of the right to life and fair trial could be considered as a crime against humanity.

Assumably for the sake of clarity, the criminal chamber also opened up the notion of the crime of genocide, and to do this article II of the 1948 Genocide Convention was used. The court emphasised the importance of the group motive in defining the substance of this crime and found that also a group offering resistance to an occupying regime falls under the characteristics of the crime of genocide. However, somehow the court failed to pay attention to the fact that both in the Genocide Convention and in the ICTY Statute the list of characteristics of the crime of genocide is exhaustive.[*47] Therefore attributing of the whole description of acts in § 61^1 (1) of the Criminal Code to the crime of genocide is questionable. It would have been less questionable to include some objects (*e.g.* group offering resistance to the occupying regime) and types of assault (*e.g.* deportation or deprivation of human rights) to the list of characteristics of the crime against humanity. It should also be taken into account that although no statutory limitations are applicable to such crimes, when punishing for them today it should be checked that they were also punishable at the time of the commission of the acts. The court did not expressly address those issues.

[46] Judgment of Criminal Review Chamber of the Supreme Court, 21 March 2000 (3-1-1-31-00). – Riigi Teataja (The State Gazette) III 2000, 11, 118 (in Estonian).

[47] The language in both provisions is identical likewise article 6 of the Statute of International Criminal Court contains identical language.

Although the Supreme Court itself did not finally solve the matter, Paulov's case could be considered as another instance of direct application of a rule of customary international law — the characteristics of the objective side of the crime (crime against humanity) which is a precondition for punishment derive directly from international law. The use of rules of international law for defining the crime of genocide can be considered indirect application (assistance in interpreting). However, the Supreme Court's decision in the Paulov case can be criticised for certain laconism and limited explanation of the substance of these crimes (elements of the crime, time of formation of the rule, *etc*.). Clarity in those questions would be that more important that there are several further trials expected to be held on active collaborators of the Soviet occupation regime.[*48]

Domestic application of rules of customary international law is not an easy task for legal operators. It may happen that the courts or administrative bodies take the line of least resistance and fail to pay any attention to a customary rule, or they misinterpret it and apply it wrongly.[*49] To avoid it, in some states trial courts may refer to the constitutional court for preliminary ruling regarding interpretation of international law rules. The 1949 German Federal Basic Law, for instance, contains a special provision to encourage the courts and ensure uniform application of generally recognised rules of international law. According to article 100 (2), where, in the course of litigation, doubt arises whether a rule of public international law is an integral part of the federal law and whether such rule directly creates rights and duties for individuals (article 25), the court will obtain a decision from the Federal Constitutional Court.[*50]

In Estonia there is no such possibility. The Supreme Court that in practice provides guidelines to lower level courts for the application of law has itself made decisions in which reasons for applying or not applying customary international law could and even should have been motivated in more detail. For instance, in its order of 30 October 1998 the Supreme Court Administrative Review Chamber failed to pay any attention to the cassator's references to several acts of international law which might reflect customary law.[*51] Juri Bozhko, an elected member of a local government council was discharged from the council because of his non-understanding of the Estonian language. The first two instances of administrative court upheld the discharge. In his application Juri Bozhko's counsel referred to article 21 (1) of the Universal Declaration of Human Rights, and some provisions of the CSCE Helsinki Document of 1992: The Challenges of Change, and the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE (1990). The chamber dismissed the application without responding how the allegedly applying rules expressed in those instruments are irrelevant or non-applicable.

There are several other cases where the Estonian Supreme Court has simply referred to international law without mentioning where the applied rules derive from and what their substance is.[*52] Although it is evident that what is meant in those cases are rules of customary law. One must point out such lapses but should not forget that equally important with the courts' ability to know and understand international law is the counsels' capability to handle rules of international law.

Conclusions

Rules of customary international law are valid as part of domestic law in Estonia. The first paragraph of § 3 of the 1992 Constitution contains the so-called rule of recognition by which general customary rules are adopted into domestic law. The transfer of particular customary rules to domestic law can be derived from the general "international law friendly" approach in the Constitution. This means that rules of customary law binding on Estonia are valid simultaneously as part of the domestic law, beginning from their formation until their termination.

[48] M. Püüa. Raugaeas Harjumaa küüditaja Karpov läheb kohtu alla (Aged Karpov, Deporter from Harjumaa to be Tried). – Postimees, 2 March 2002 (in Estonian).

[49] K. J. Partsch (Note 20), p. 1198.

[50] The same is in Greece: article 100 (1) (iv) of the 1975 Greek Constitution. See also, L. Wildhaber, S. Breitenmoser (Note 8), pp. 180–182; R. Streinz (Note 20), art. 25, paragraph No. 94–96; K. J. Partsch (Note 20), p. 1200; First Report … (Note 1), p. 329; Third Report of the Committee on International Law in National Courts. – Report of the 68th Conference held at Taipei, Taiwan, Republic of China, 24 to 30 May 1998. London: International Law Association, 1998, p. 666.

[51] Judgment of Administrative Review Chamber of the Supreme Court, 30 October 1998 (3-3-1-33-98; *J. Bozhko's Case*). – Riigi Teataja (The State Gazette) III 1998, 29, 294 (in Estonian).

[52] See, for instance, judgment of the Criminal Review Chamber of the Supreme Court, 22 March 1994 (III-1/3-22/94; *E. Mäelde's Case*). – Riigikohtu lahendid 1994–1995 (Collection of Supreme Court judgments for 1993 and 1994). Tallinn: AS Juura (in Estonian); judgment of the Civil Review Chamber of Supreme Court, 21 November 2001 (3-2-1-140-01; *K. Kuusik Case*). – Riigi Teataja (The State Gazette) III 2001, 32, 341 (in Estonian); judgment of the Administrative Review Chamber of the Supreme Court, 4 May 2001 (3-3-1-21-00; *I. Popov and N. Popova Case*). – Riigi Teataja (The State Gazette) III 2001, 16, 170 (in Estonian).

Rules of customary law which are valid as part of the domestic law, depending on their object of regulation, are applicable in different ways. Firstly, they may be directly applied on relations between individuals or on relations between individuals and the state. Secondly, they may be applied as support for interpreting domestic rules, and thirdly, they may be applied in the course of constitutional review. For application one should still keep in mind their self-executing nature, *i.e*. at least customary rules that justify states (and thereby indirectly obligate individuals) cannot be directly applied. Likewise, customary rules that are too ambiguous cannot be applied for deriving rights of individuals (which normally correlate to the obligations of the state). In addition, the applied rule of customary law must have sufficient status in the hierarchy of norms. The customary rule over which domestic rules prevail cannot be applied.

Rules of general customary international law could have equal legal force with the Estonian Constitution as they are adopted into the domestic sphere by provisions of the Constitution itself. The status of particular customary rules is less clear and probably not tested in practice. They could be attributed the status either equal to laws or inferior to laws but equal to executive acts.

In applying rules of customary law the main problem lies in the difficulty of finding out the existence of a customary rule and identifying its substance. Despite that, Estonian courts have applied customary rules on various occasions. However, there seems to be room for improvement in explaining the substance of customary rules to meet the high standards of legal reasoning.

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Estonia's Constitution and the EU: How and to What Extent to Amend It?

The issue of amending Estonia's Constitution for joining the EU has led to a delicate conflict between the rigid amendment procedures of a highly sovereignty-protectionist constitution and the changing (geo)political needs of the country. The positions divide broadly into two groups. The politicians and civil servants have preferred not to amend the Constitution and have recently initiated a motion for "complementing" the Constitution with an independent Third Constitutional Act. Legal scholars, on the other hand, tend to emphasise the need for a legitimate and legally correct entrance into the EU. This article subscribes to the latter view and proposes three amendment possibilities.[*1]

1. Opinions on amending Constitution for EU accession

The effects of EU membership upon the Constitution of the Republic of Estonia have been extensively analysed by foreign and domestic experts; the potential amendments have been discussed in a number of seminars and conferences. Until early 2002, the discussion proceeded mainly from the draft amendments submitted by the Constitutional Expert Commission in its 1998 report "Potential accession to the European Union and its Consequences to Estonian Constitutional Law".[*2] The Expert Commission has used in its work foreign expert opinions, delivered by the SIGMA experts G. Carcassonne and J. Gardner, Venice Commission experts M. Niemivuo and L. Lopez Guerra, PHARE expert group McKenna & Co., and

[1] The article is based on a longer research paper written in the framework of the Estonian Legal Centre's project "Constitutional Law Institute", where the author has studied in detail the existing expert opinions on the constitutional impact of EU accession, the Member State's constitutional reforms and the main trends in sovereignty theory. See A. Albi. Põhiseaduse muutmine Euroopa Liitu astumiseks: ekspertarvamused, võrdlevõiguslik ja teoreetiline perspektiiv ning protseduur (Amending the Constitution for Joining the EU: Expert Opinions, Comparative and Theoretical Perspectives and the Procedure). – Juridica, 2001, No. 9, pp. 603–615 (in Estonian).

[2] Võimalik liitumine Euroopa Liiduga ja selle õiguslik tähendus Eesti riigiõiguse seisukohalt (Potential Accession to the European Union and its Consequences to Estonian Constitutional Law). 1998. Available at: www.just.ee/juridica2.html (in Estonian). The Expert Commission, composed of lawyers and academics, was established by the Government in May 1996 in order to carry out a thorough analysis of the potential problems of the Estonian Constitution, including the impact of EU accession.

H. Beemelmans, an expert of the German Legal Cooperation Foundation.[*3] Several foreign experts have recommended an amendment model adopted in their own countries; the most extensive amendment version has been put forward by McKenna & Co., whereas M. Niemivuo has recommended a minimum amendment so as to preserve the national character of the Constitution. The Legal Chancellor has submitted his opinions on amending the Constitution to the Parliament's Commission of European Affairs[*4] and to the Commission of Constitutional Affairs.[*5]

In media and legal literature, the issues of amending the Constitution have been analysed by J. Laffranque, Director of the EU Law Department of the Ministry of Justice[*6]; R. Maruste, Judge of the European Court of Human Rights and former President of the Supreme Court[*7]; T. Kerikmäe, Vice Dean of the Concordia University[*8]; and the author of this article.[*9] In addition, representatives of the legal scholarship, civil service and Parliament have expressed their opinions on the issue in the following events: conference "Analysis of the Constitution of the Republic of Estonia: the emerged problems and potential solutions", organised by the *Riigikogu* (Parliament) on 26–27 December 1999 in Haapsalu; Constitutional Amendment Roundtable organised by the Ministry of Justice and the EU Information Secretariat on 4 December 2000 in Tallinn; seminar "Does the Constitution need to be amended for joining the EU?", organised by the University of Tartu Eurocollege and Eurosceptic Movement on 12 October 2001 in Tartu; conference on EU's constitutional impact, organised by the European Studies Association on 27 November 2001 in Tallinn; Estonian Legal Centre's seminar "A legal dialogue concerning the issues of sovereignty and constitutional amendment" on 14 January 2002; and Academy Nord seminar "The Political and Constitutional Problems of Estonia's accession to the EU" on 22 February 2002 in Tallinn.

Although the opinions concerning the issues and extent of the constitutional amendments vary greatly, all foreign experts and most domestic scholars have deemed it necessary to amend the Constitution for joining the EU. A minimum common denominator could be distinguished with regard to the need for four amendments, which have also led to constitutional amendments in several EU Member States:

- delegating sovereignty to the EU;
- participation of the *Riigikogu* in the EU decision-making process;
- the EU citizens' right to stand for and vote in local elections and their rights concerning the EU four freedoms;
- the Bank of Estonia's exclusive right to emit the Estonian currency with a view to joining the Monetary Union.

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[3] L. Lopez Guerra. Euroopa Liitu kuulumine ja Eesti põhiseadus (EU Membership and Estonian Constitution); M. Niemivuo. Euroopa liikmelisus ja Eesti põhiseadus (EU Membership and Estonian Constitution); J. Gardner. Constitution of the Republic of Estonia. Review of Issues of Compatibility Arising From Membership of the European Union; G. Carcassone. Kommentaarid Euroopa Liiduga ühinemisega seotud uue paragrahvi kohta Eesti põhiseaduses (Comments on the New Paragraph concerning Accession to the European Union in the Estonian Constitution); McKenna & Co. Seadusandluse ühtlustamine: konstitutsioonilised parandused (Harmonisation of the Legislation: Constitutional Amendments); H. Beemelmans. Ekspertiis Euroopa Liitu kuulumise ja Eesti põhiseaduse kohta (Expert Opinion on EU Membership and the Estonian Constitution). The opinions are available in the collection "Põhiseaduse Juriidilise Ekspertiisi Komisjoni Tegevuse Aruande Lisa 'Välisekspertiisid'" (Appendix "Foreign Expert Opinions" of the Report on the Activity of the Constitutional Expert Commission). Tallinn: Justiitsministeerium, 1998 (in Estonian).

[4] Available in annotated form in the *Riigikogu* Press announcement of 12 October 2001, www.riigikogu.ee (in Estonian). On the request of the Legal Chancellor, the author has submitted an expert opinion "Põhiseadus ja Eesti ühinemine Euroopa Liiduga" (The Constitution and Estonia's Accession to the European Union). Florence, 4 October 2001 (in Estonian). This opinion also contains the main positions and proposals of the present paper.

[5] Õiguskantsleri arvamus Justiitsministeeriumis välja töötatud eelnõu "Põhiseaduse rakendamine Euroopa Liidu liikmeks oleku tingimustes" kohta (Legal Chancellor's Opinion on the Ministry of Justice draft law "Implementation of the Constitution in the Conditions of European Union membership"), 16 April 2002 (in Estonian).

[6] J. Laffranque. Constitution of the Republic of Estonia in the Light of Accession to the European Union. – Juridica International, No. 6, 2001, pp. 207–221.

[7] R. Maruste. Eesti enne euro-otsustust (Estonia before the Euro-decision). – Postimees, 12 June 2001 (in Estonian); Põhiseadust tuleks siiski muuta (The Constitution Should Still be Amended). – Postimees, 30 January 2002 (in Estonian).

[8] T. Kerikmäe. Estonian Constitutional Problems in Accession to the EU. – A. Kellermann *et al.* (eds.). EU Enlargement. The Constitutional Impact at EU and National Level. The Hague: T.M.C. Asser Press, 2001, pp. 291–300.

[9] A. Albi. Post-modern versus Retrospective Sovereignty: Two Different Sovereignty Discourses in the EU and Candidate Countries? – N. Walker (ed.). Sovereignty in Transition. Oxford: Hart Publishing, forthcoming 2002; A. Albi. The Central and Eastern European Constitutional Amendment Process in light of the Post-Maastricht Conceptual Discourse: Estonia and the Baltic States. – European Public Law, 2001, No. 3, pp. 433–454; A. Albi. The "Souverainist" Constitutions of the Eastern European Applicant Countries with a View to EU Membership. – M. Aziz (ed.). Sovereignty and the Constitutional Dimension of Enlargement. Palgrave, forthcoming 2002; A. Albi. The Baltic Constitutions and the EU Accession. P. Cramer (ed.). Stockholm: SNS Publishing House, forthcoming 2002; A. Albi (Note 1); A. Albi. Euroliit ja kaasaegne suveräänsus. Üks võimalikke vastukajasid põhiseaduse ekspertkomisjoni üleskutsele aruteluks (European Union and Contemporary Sovereignty. One Possible Response to the Constitutional Expert Commission's Call for a Debate). – Juridica, 2000, No. 3, pp. 160–171 (in Estonian).

However, on the political level, the fears for a potential negative result of the constitutional amendment referendum, with a view to the eurosceptic public opinion[*10], have led to voices that the Constitution does not need to be amended for EU accession. Former President Meri has recommended to organise a referendum after a few years of EU membership on whether Estonia wants to withdraw from the Union[*11]; former Prime Minister Laar has expressed uncertainty about the need for amendment considering the diversity of the expert opinions[*12]; the professors of Concordia University, T. Kerikmäe and F. Emmert, have advocated an integration-friendly interpretation of the Constitution through the prism of international law.[*13]

In early 2002, the Ministry of Justice, insisting on pressure of time and the difficulty of finding a consensus in the parliament, started to promote the idea of not amending the Constitution, but "complementing" it with the so-called Third Constitutional Act. This Act would exist independently beside the Constitution and the Implementation Act of the Constitution and it would be adopted in accordance with the constitutional amendment procedure in a referendum. After a fast and relatively closed deliberation within an *ad hoc* commission, composed of representatives of the party factions, civil service and academia, the Act on Complementing the Constitution of Estonia was initiated in the Parliament on 16 May 2002. It provides the following: "Estonia may join with the European Union" (§ 1); "[i]n case of Estonia's membership in the European Union, the Constitution will be applied, taking into consideration the rights and obligations arising from the Accession Treaty" (§ 2); and "[t]his Act may only be amended by referendum". According to the explanatory part of an earlier draft, the Third Act would form "a legally correct, simple and honest" constitutional path for joining the European Union and it would have "the value of Estonia's sign in the eyes of the legal scholars of other countries and politicians".[*14] Its procedural and substantive shortcomings with a view to Estonia's constitutional law have, however, led to serious criticism, which will be discussed in more detail in part 4.

In order to evaluate the disputes over amending the Estonian Constitution for EU accession, the following sections emphasise two factors: (a) the EU's extensive effects on sovereignty; and (b) the "souverainist" character of the Estonian Constitution.

2. EU's main effects on traditional sovereign nation state

It is important to understand that amongst contemporary international organisations, the European Union is the most restrictive towards national autonomy and it has gradually been acquiring elements of statehood. Its most far-reaching effects on the traditional sovereign nation-state could be summarised as follows.

Government — approximately two thirds of the Member States' legislation derives in a varying degree from the EU institutions.

State's tasks — EU also has competences in the core fields of state sovereignty such as monetary, internal security, defence and foreign policy.

Legal order — EC law is supreme and directly applicable with regard to the national legal orders, including over the national constitutions.

State's veto — is limited by the extensive use of the qualified majority voting.

National currency — has been replaced in twelve Member States by the common currency, the euro.

People — the Member States' citizens have EU citizenship.

Constitution — the Treaties go much further than the traditional international treaties, so that the ECJ and academia call the body of functionally constitutional texts "the constitutional charter". In addition, the Charter on Fundamental Rights has been adopted.

[10] In May 2001, the percentage of anti-EU voters would have amounted to 59% (Postimees, 19 May 2001); however, Estonia's victorious performance in the Eurovision song contest increased the amount of EU-supporters to 54% by August 2001 (Postimees, 25 August 2001).

[11] H. Roonemaa. Meri: rahvas võiks aastate pärast hääletada euroliidust välja astumist (Meri: the People Could Vote on Secession from the EU after a Few Years). – Eesti Päevaleht, 5 May 2001 (in Estonian).

[12] Presentation of the Prime Minister Mr. Laar, unedited transcript of the *Riigikogu* Session on Estonia's preparations for EU accession, 18 January 2001. Available at: www.riigikogu.ee (in Estonian).

[13] Joint written opinion of T. Kerikmäe and F. Emmert to the questions submitted for seminar "Does the Constitution need to be amended for joining the EU", organised by the University of Tartu Eurocollege and Eurosceptic Movement on 12 October 2001 in Tartu.

[14] Explanatory letter of the draft bill of 14 March 2002.

Popular sovereignty — the European Parliament is elected directly and has important powers due to the co-decision procedure. The EU's democratic legitimacy derives thus both from the national and European level.

Legal personality — belongs to the Communities, but the EU has treaty-making powers in the Third Pillar, which altogether leaves the state's international acting capacity rather limited.

Secession — according to the predominant view, it is not possible to withdraw from the Union.

Territorial borders — are becoming blurred due to the free movement of EU citizens and the regime of free movement of goods, services, labour and capital. Also, the territorial competences are being replaced by the functional competence boundaries of international organisations.

The forthcoming enlargement is further likely to deepen these tendencies, in order to avoid a paralysis of the decision-making mechanisms with 25–30 Member States. The Convention on the Union's Future, which convened as a result of the Laeken Declaration, is discussing amongst fundamental reforms also issues such as the adoption of the EU constitution, introduction of a bicameral European Parliament, abolition of unanimity in most areas, direct elections of the European President and endowing the EU with a legal personality.

3. Estonia's Constitution as one of the most "souverainist" in Europe

These effects upon sovereignty are in particular contrast with the Estonian Constitution, because it protects sovereignty exceptionally strictly. It stands out as one of the most "souverainist" constitutions in Europe, because of the following reasons.

- The Constitution distinguishes between sovereignty and independence (the first paragraph of § 1).
- Independence and sovereignty have been declared timeless and inalienable (the second paragraph of § 1).
- There are no explicit provisions authorising the delegation of powers to international organisations. Although § 121 provides that the *Riigikogu* ratifies, *inter alia*, treaties by which Estonia joins international organisations, the *travaux preparatoires* of the Constitution in the Constitutional Assembly show that on the basis of § 1, Estonia's entrance into the political, economic and military associations of states requires a prior constitutional amendment and referendum.*[15]
- The sovereignty provisions may be amended only by a referendum, requiring broad political and social consensus (§ 162).
- The Constitution prohibits the conclusion of unconstitutional treaties (§ 123).
- The Estonian legal theory has interpreted the sovereignty provisions rather conservatively, based on the writings of the legal scholarship of the first Republic of Estonia of the 1930s. This interpretation has also been applied by the Constitutional Expert Commission with regard to the EU's meaning of sovereignty.*[16]

In comparison, amongst the fourteen written constitutions of the EU Member States, six do not mention sovereignty at all, declaring simply that the people form the source of power.*[17] Four use a one-sentence formula that sovereignty belongs to the people.*[18] Only the constitutions of Ireland, Portugal and Luxemburg contain more provisions on sovereignty and distinguish it from independence. All Member States' constitutions contain provisions on delegating powers to international organisations and six of them also to the European Union. The constitutions of the other Central and Eastern European candidate countries share a "souverainist" character similar to Estonia, although in a less resolute language.*[19]

[15] Põhiseadus ja Põhiseaduse Assamblee (Constitution and Constitutional Assembly). Tallinn: Õigusteabe AS Juura, 1996, p. 530 (in Estonian).

[16] See Note 2.

[17] Germany, Belgium, Sweden, Austria, the Netherlands and Denmark.

[18] Italy, France, Spain and Greece. The Finnish Constitution has two separate sentences in this respect.

[19] See in more detail A. Albi. Post-modern versus Retrospective Sovereignty (Note 9).

4. A critical appraisal of Third Constitutional Act

Considering that Estonia's Constitution protects sovereignty exceptionally strongly and that EU membership entails far-reaching effects on national sovereignty, it is important that the accession would take place by legally correct and legitimate means. The procedural and substantive shortcomings of the Third Constitutional Act have been publicly criticised by A. Jõks, the Legal Chancellor[*20], R. Maruste, the Judge of the European Court of Human Rights and former president of the Supreme Court[*21], by lawyers of constitutional and international law in a joint opinion[*22], and others.[*23] The main constitutional problems raised with relation to the Third Act are the following.

Firstly, the Third Constitutional Act does not fit into the Estonian legal order. In some countries (*e.g.* Austria, Sweden, the Czech Republic), the constitutional laws possess a status equal to the constitution and the constitution prescribes for their adoption the same quorum as for constitutional amendment. A comparison with these countries is not, however, adequate for Estonia, because the Estonian Constitution does not provide for these kinds of constitutional acts. The legal position of the Implementation Act of the Constitution is not equal to the Constitution or the above-mentioned constitutional laws, because it regulated the transition period a decade ago and it has predominantly expired. Only two sections — § 2 and partly § 3 — are still applicable; however, these are not material legal norms, but legal sentences explaining the definition of the majorities required for voting according to the Constitution. Conversely, the Third Act and the Constitution regulate the mechanisms of exercising power. Altogether, Estonia's legislative principles and traditions provide that laws are amended by introducing amendments directly into the laws themselves instead of existing in parallel.

Secondly, the Estonian Constitution belongs to the category of constitutions which have a rigid amendment procedure. Chapter XV of the Constitution establishes three concrete amendment procedures, which do not include an act which would exist independently besides the Constitution instead of amending it. The Constitution may only be amended by the constitutional amendment laws (§ 163). According to § 3, the powers of state are exercised solely pursuant to the Constitution and laws which are in conformity therewith, and § 123 prohibits the conclusion of treaties which are in conflict with the Constitution. A circumvention of such explicit procedures would be incompatible with the principles of the rule-of-law-based state and may create a dangerous precedent for the future.

Thirdly, constitutional amendment should also be preferred for the reason that the Eastern European constitutions form legal rather than political documents, considering our 50-year experience with the declaratory communist pseudo-constitutions. The Third Act would obscure and devalue Estonia's clear and directly applicable Constitution, which, differently from many old Western constitutions, is not a mere declaration or a historic text.

Fourthly, the content of the Third Act does not effectively reflect the exercise of power after the entrance into the EU and thus fails to live up to the rationale, essence and justification of the Constitution, which is to regulate the distribution and exercise of the state power. R. Maruste has expressed a strong position that the Third Act would constitute in this respect a "rape of the Basic Law and nihilism towards the constitutional state"[*24]; this position has been supported in a press release by the participants of the Academy Nord conference.[*25]

Fifthly, the Third Act would provide unlimited interpretation possibilities and therefore no legal certainty. There would be two documents with an equal legal force, of which one would stand outside the current system of the Constitution. According to the legal traditions of Continental Europe, an interpreter does not possess such extensive freedom and the absolute application of principles is an exception. The situation

[20] See Note 5; A. Jõks. Põhiseadus muutuste künnisel (Constitution on the Doorstep of Changes). – Postimees, 17 April 2002 (in Estonian).

[21] R. Maruste (Note 7).

[22] Ühispöördumine seoses nn Põhiseaduse Kolmanda akti riigiõiguslike probleemidega (Joint Statement concerning the Constitutional Problems of the Third Constitutional Act), by A. Albi, M. Gallagher, I. Koolmeister, R. Maruste, L. Mälksoo and P. Roosma. – Juridica, 2002, No. 5 (in Estonian). In fact, almost all scholars who have replied to the call for this public statement have informally stated that they find the Third Act constitutionally problematic, but they declined to officially join due to the political sensitivity of the issue.

[23] L. Mälksoo. Kuidas muuta põhiseadust? (How to Change the Constitution?). – Postimees, 13 May 2002 (in Estonian); the Third Act has also been criticised by the participants of the Academy Nord constitutional amendment seminar in the press release Kokkuvõte seminarist "Eesti Euroopa Liiduga ühinemise põhiseaduslikud ja poliitilised probleemid" (Conclusions of the seminar "The constitutional and political problems of Estonia's EU accession"). – News list of the Estonian Legal Center, 25 February 2002. Available at: www.lc.ee (in Estonian).

[24] R. Maruste (Note 7).

[25] Conclusions of the seminar "The constitutional and political problems of Estonia's EU accession" (Note 23).

would become particularly complicated when it would come to applying the principles of the Third Act to the constitutional norms which are in manifest conflict with EU law, raising the question of the limits of interpretation. The Third Act leaves the Constitution in conflict with real life and simply postpones the legal disputes instead of solving them.

Finally, considering that the Third Act would be adopted in accordance with the procedure of constitutional amendment in a referendum, it would not be considerably more difficult to introduce an EU chapter into the Constitution, whereas the solution would be considerably more legally correct, simple and honest. The fear that two referendums would have to be organised can be avoided by formulating the referendum question so that it would authorise the constitutional amendment as well as the conclusion of the EU Accession Treaty. The Third Act creates unnecessary legal chaos and destroys the clear and coherent constitutional basis of Estonia's statehood. The Third Act may also become counterproductive to its aim of facilitating the accession, since the people who support the EU may vote against this suspect way of devaluing the Constitution.

5. Amendments in the light of expert opinions, comparative experience and theoretical perspectives

Considering the foreign and domestic expert opinions, comparative experience and theoretical perspectives, which will be discussed in the subsequent sections, three amendment options could be put forward.

The first option is to introduce into the Constitution, as in France and Austria, a special EU chapter bringing neatly together all the EU-related issues and potential amendments in future. The EU chapter could be inserted after Chapter IX on international relations. In accordance with Estonia's traditions of legal technique, the Chapter should be numbered Chapter IX[1] and the provisions accordingly 123[1], 123[2], *etc*.

The second possibility is to amend the individual problematic provisions, as has been suggested by most experts.

Thirdly, in case primary importance would be given to the principles of sovereign nation state and minimal harm to them, it is possible to introduce into the Constitution only one amendment paragraph, which would regulate the two most important issues: delegation of sovereignty and democratic legitimisation via the national parliament. Other potential conflicts could be solved by a clause recommended by G. Carcassonne — "according to the conditions provided in the European Union treaties". The amendment proposals, which have also been recommended by the Legal Chancellor to the *Riigikogu*'s Constitutional Affairs Commission, could read as follows.

5.1. Options I and II

Section 123[1] or the third paragraph of § 1.

> "[With a view to economic and social welfare and security,] Estonia may delegate to the European Union the state competences deriving from the Constitution for their common exercise by the European Union Member States to the extent necessary for the application of the Treaties."

Section 123[2] or the second paragraph of § 59.

> "In the legislative activity of the European Union, the Government proceeds from the *Riigikogu* positions, [which may be disregarded in case of an important integrational reason, reporting about it in the *Riigikogu* session]. The detailed rules are established by law."

Section 123[3] or the third paragraph of § 9.

> "The citizens of the European Union Member States enjoy the rights deriving from the European Union law to the extent equal to the Estonian citizens, [including the right to vote and stand for the elections of the local governments and European Parliament]."

Section 123[4] or the second paragraph of § 111.

> "When joining the Monetary Union, the competences of the Bank of Estonia may be delegated to the European Central Bank."

Section 123[5] or the third paragraph of § 123.

> "The European Community law is directly applicable and, in case of conflict with Estonia's laws or other acts, the European Community law is applied. [The President submits each new European Union treaty before its ratification to the Supreme Court, which will make a reasoned decision about its conformity with the Constitution]."

5.2. Option III — minimum amendment

The third paragraph of § 1 or § 123[1].

> "Estonia may delegate to the European Union bodies the state competences deriving from the Constitution for their common exercise by the European Union Member States, according to the conditions provided and to the extent necessary for applying the Treaties.

In the European Union legislation, the Government proceeds from the *Riigikogu* positions [and may disregard these only in case of an important integrational reason, reporting about it in the *Riigikogu* session]. The detailed rules are established by law."

5.3. Content of draft provision on delegating sovereignty

5.3.1. Main conceptual approaches to sovereignty in EU — which to prefer?

The proposed draft provision on delegating sovereignty stands out conceptually against the Constitutional Expert Commission's proposals (1998), which have proceeded from the "paradigm of sovereign nation-state".*[26] I will explain this alongside with a closer look into the four main conceptual approaches to the EU's meaning of a sovereign nation state, the validity of which should be appraised in the perspective of the above-described EU's effects on sovereignty and probable post-enlargement integration scenarios.

The first group regards the European Union as a **confederation or an association of states**, which, contrary to a federation, does not substantially harm national sovereignty. Advocated mainly by the Member States' constitutional lawyers, it found its major expression in the German and Danish Maastricht decisions, the ideology of which has strong roots in C. Schmitt state theory. As a result of the influential post-Maastricht conceptual discourse, which has called for revising the 19th century sovereignty concepts in the EU context, the traditional nation-state centred approach has been gradually declining into mere political rhetoric. It remains popular in Eastern Europe*[27], including Estonia; the Constitutional Expert Commission has described the EU as an association of states or a confederation. Its draft amendments permit the delegation of **sovereignty**, in the meaning of state powers, but prohibit giving up Estonia's **independence** to a federal European Union, which would emerge if the EU would adopt a constitution or equate the European Parliament's powers with those of the national parliaments.

The problem with this approach is that it would remain short-sighted towards the reforms prepared by the Convention on the Union's Future and, in addition, it does not sufficiently take into account the Union's current effects on a sovereign nation-state (chapter 2). Therefore, the author has, in the proposed draft amendments, proceeded from the second approach, which regards the EU as **a supranational organisation**, where sovereignty is divided, shared or commonly exercised. It is the politically, academically and judicially the most well-established concept and most foreign experts have in their opinions also proceeded from this approach. In addition, the author suggests that the expression "supranational organisation" should not be regarded as a transitory concept before the EU's eventual development into a federation, but, considering the untraditional multi-dimensional structure of the EU, it would remain explanatory also in the case of adopting the EU constitution or introducing a bicameral European Parliament. As concerns the distinction between sovereignty and independence, it is rare in Western Europe and it is losing its substantial discursive value, considering the EU's multifaceted effects on sovereign statehood. However, if the constitutionally embedded distinction between sovereignty and independence is to be retained, the interpretation of independence should be modernised. The concept of "open statehood"*[28], which has been used in the German legal theory, has proved to be a feasible alternative, as it has been adopted on the author's recom-

[26] The draft amendments of the Estonian Constitutional Expert Commission read as follows:
The third paragraph of § 1: Estonia may, on the basis of referendum, participate in the European Union, which is an association of states created by its Member States on the basis of the Treaties.
Section 123[1]: Estonia may, under the principles of reciprocity and equality, delegate to the European Union bodies the competences deriving from the Constitution, in order to exercise them jointly with the European Union Member States, to the extent necessary for the implementation of the Treaties the Union is based upon and on the condition that this does not violate the basic principles and functions of the Estonian statehood, manifested in the Preamble of the Constitution.

[27] See more A. Albi. Post-modern versus Retrospective Sovereignty (Note 9) and A. Albi. The Central and Eastern European Constitutional Amendment Process in light of the Post-Maastricht Conceptual Discourse (Note 9).

[28] See S. Hobe. The German State in Europe After the Maastricht Decision of the German Constitutional Court. – GYIL, 1994, Vol. 37, p. 113; S. Hobe. Statehood at the End of the 20th Century — The Model of the "Open State": A German Perspective. – Austrian Journal of International and European Law, 1997, No. 2, p. 127 *ff.*; also K. M. Meessen. Hedging European Integration: the Maastricht Judgement of the Federal Constitutional Court of Germany. – Fordham International Law Journal, 1994, Vol. 17, p. 524 *ff.*; M. Zuleeg. The European Constitution under Constitutional Constraints. The German Scenario. – European Law Review, 1997, p. 22.

mendation by the Latvian Constitutional Amendment Working Group.*[29] According to this concept, the internationalisation of most spheres of life has shifted the fulfilment of the state's tasks to the transnational level on the basis of efficiency; the openness to international cooperation has become the fourth element of state, besides the government, people and territory.

In formulating the draft provision, I have used the Expert Commission's expression "delegation of state competences", which would include the delegation of parliamentary, governmental, presidential and judicial powers and avoid thus the amendment of pertinent provisions in other chapters. However, differently from the Expert Commission's interpretation that delegation signifies the right of secession (the majority of the legal literature does not deem it possible to withdraw from the Union), I have proceeded from the fact that most Member States' constitutions seem to use different formulations rather interchangeably and delegation is more conventional to the Estonian legal language.*[30] The draft provision would be addressed, as in the Expert Commission's draft, expressly to the European Union, considering that the constitutions of those Member States, which accommodate the EU integration under the provisions of ordinary international organisations, have been criticised for not effectively reflecting the distribution and exercise of powers. However, Estonia's Constitution would also need a clause for legitimising the membership in other international organisations which restrict sovereignty, such as WTO, NATO, UN and COE.

The third conceptual approach finds that the EU's structure already resembles the principle of **federalism**, or qualifies it as a new form of federalism. The Debate on the Future of the Union is increasingly speaking about the "European federation of the nation-states".

The fourth group — mainly scholars of European law — are searching for a **new notion** which would clearly distance itself from the federation-confederation scale and correspond to the EU's unconventional character, comprising of international, supranational, federal and nation-statist elements. Amongst the alternatives are concepts such as multi-level constitutionalism, European Commonwealth; and, in political science, the system of multi-level governance. The traditional concept of sovereignty is being revised by most legal, political science and economic treatises and they even doubt its explanatory value, considering the contemporary globalising and multi-authority world. The scale of alternatives is broad — post-sovereignty, late sovereignty, open statehood, sovereignty belonging to member states jointly through the intergovernmental conference, *etc*.*[31]; the most viable amongst them are yet to be seen.

5.3.2. Clauses for delegating sovereignty and the question of amending § 1

The proposed provision on delegating sovereignty would adopt from the Expert Commission's draft the clause **necessary for the application of the treaties**, as a symbolic warning against too extensive interpretation of the EU competences. However, account should be taken of the dangers to the uniform application of the EC law, which may result from the judicial review of the EU competences by the increasing number of powerful and active Constitutional Courts after the enlargement. The proposed amendments would not include the Expert Commission's **referendum clause** for ratifying the successive EU treaties, with a view to the internal dangers to participation in the EU policies (in case of a negative result, a referendum may not be reinitiated within one year and the *Riigikogu* has to be dissolved) and to avoid further pressure on the EU's cumbersome and fragile treaty amendment procedures. Amongst other safeguard clauses, the Expert Commission has acknowledged that the clauses "equality" and "reciprocity" would disregard the facts that the obligations deriving from the EU membership do not depend on reciprocity, and the division of votes in the Council does not follow the principle of states' equality.*[32] Finally, it would be advisable to refer to the objectives of the accession such as **security and economic and social welfare**, similar to several Member States' constitutions.

The question of whether the amendment on delegating sovereignty should be inserted into § 1, which declares that Estonia's sovereignty and independence are timeless and inalienable and can be amended only by referendum (§ 162), has proved rather sensitive. The amendment of § 1 has been deemed necessary by the Constitutional Expert Commission, R. Maruste, McKenna & Co. and the Eurosceptic Movement. The amendments should be made in the other chapters of the constitution according to J. Laffranque, foreign experts

[29] The Theoretical Foundation of the Amendments to Satversme proposed by the Working Group. Riga: Ministry of Justice, November 2001. According to the Legal Secretary of the Working Group, Arnis Buka from Latvia's Ministry of Justice, the Working Group used in its work the author's earlier paper A. Albi. Estonia's Sovereignty in Perspective of EU Accession: Rethinking traditional constitutional concepts. – Bachelor Thesis of the University of Tartu, 1999, which pointed out the need to modernise the sovereignty approach and recommended the "open statehood" concept at p. 23.

[30] For instance, the German constitution uses four expressions — participate, delegate, transfer and limit sovereignty; the French Constitution speaks about participation, delegation, transfer and common exercise.

[31] See for references A. Albi. Post-modern versus Retrospective Sovereignty (Note 9).

[32] Presentation of L. Madise in the public discussion on amending the Estonian Constitution, organised by the Ministry of Justice and EU Information Secretariat, 4 December 2000, Tallinn, National Library.

G. Carcassonne and M. Niemivuo, the Legal Chancellor, and, in a joint opinion, E.-J. Truuväli, H. Lindpere, M. Vunder and R. Laffranque, the professors of the Law Institute.[*33] G. Carcassonne and J. Laffranque have recommended the introduction of a special EU chapter. M. Niemivuo, on the other hand, has not found changes in Estonia's sovereignty, proceeding from the traditional sovereign state centred approach. The professors of the Law Institute have not deemed it necessary to amend § 1 for the reason that the principle of sovereignty is contained in the constitutions of all the Member States[*34], and the amendment would further be unadvisable due to the impression of restricting sovereignty. Presently, Estonian political and legal opinion predominantly prefers not to amend § 1, which is indeed understandable in the light of the fear for the consequences of a potential negative referendum result, considering Estonia's tragic history and sensitive geopolitical situation.

5.4. Amendment of other conflicting provisions

Besides delegating sovereignty, most experts deem it necessary to amend the Constitution with regard to three further issues, which have also led to constitutional amendments in several Member States.

Riigikogu's **participation in the EU decision-making process.** Considering the weak democratic legitimacy of the EU decision-making procedures, many experts have recommended introducing a provision on the national parliament's right of information and its mechanisms of participation in the EU affairs.[*35] Amongst the Member States, a pertinent amendment exists in the constitutions of Germany, Finland, Portugal, Austria, Sweden, France and Belgium. The proposed provision, which could be inserted into § 123^2 or the second paragraph of § 59, has advocated the Austrian model, where Government may disregard the parliament's positions only in case of an important integrational reason, reporting about it in a parliamentary session. This restrictive approach would avoid the democratic problems of the accession negotiations, where the members of the Estonian Parliament's Commission of European Affairs have seen themselves as having only a "statistical" role, not to mention the rest of the parliament.[*36] It is equally important that this restrictive regulation would promote social discussion and the development of the positions of the interest groups, which, in turn, would pressure the government to take in its positions greater account of the country's social and economic conditions.

The EU citizens' rights to vote and stand for election in the elections of local municipalities and the European Parliament are issues, which experts have almost unanimously found to be in contradiction with the Constitution. These rights would be restricted by § 57 (the voting right belongs to the Estonian citizens), § 156 (election of the local municipalities) and § 48 (only the Estonian citizens may belong to the political parties). Amongst the Member States, the active and passive voting right in the local elections (in Austria and Portugal also in the European Parliament elections) has been introduced in Germany, France, Portugal, Austria, Spain and Belgium. In addition, the experts have pointed out that the **prohibition to discriminate against the EU citizens with regard to the free movement of workers, services and capital** could contradict §§ 28, 29, 30, 31, 32, 34, 36 and 44 of the Constitution, which permit limiting certain rights exclusively to the Estonian citizens.[*37] I have recommended McKenna & Co.'s proposal to solve the problem of the EU citizens' rights with a single amendment, which could be introduced into § 123^3 or the third paragraph of § 9.

The third manifest constitutional conflict concerns the **Bank of Estonia's exclusive right to emit the national currency** with a view to the euro[*38]; a reference to the European Central Bank could be introduced into § 123^4 or the second paragraph of § 111. France, Germany and Portugal have introduced constitutional amendments in this regard.

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[33] In joint written opinion submitted for the seminar mentioned in note 13.

[34] The author would however refer to part 3 of this paper, according to which none of the Member States' constitutions contain an analogous categorical declaration on timelessness and inalienability of sovereignty and independence, while six constitutions do not mention sovereignty at all. In addition, differently from the Estonian Constitution, these constitutions contain provisions on delegating powers to international organisations and the EU.

[35] Experts G. Carcassonne, H. Beemelmans, L. Lopez Guerra, Expert Commission, the Legal Chancellor and K. Ahi. Rahvuslik parlament Euroopa Ühenduse õiguse kontekstis (National Parliament in the Context of European Community Law). – Juridica, 1999, No. 6, p. 297 *ff.* (in Estonian).

[36] Presentations at the *Riigikogu* Session of 23 February 2001 on Estonia's preparations for joining the European Union. Unedited transcript available at: www.riigikogu.ee/ems/stenograms/2001/01/m01012303.html (in Estonian).

[37] In a varying degree experts Carcassonne, McKenna & Co., Gardner, Maruste and the Constitutional Expert Commission.

[38] Niemivuo, Lopez Guerra, Beemelmans, Gardner, Expert Commission, Legal Chancellor, Maruste and V. Kraft, the President of the Bank of Estonia (V. Kraft's presentation at the conference "Analysis of the Constitution of the Republic of Estonia: the emerged problems and potential solutions", organised by the *Riigikogu* on 26–27 December 1999 in Haapsalu, transcript available at: http://euroskepsis.ee/laine/laine1.htm (in Estonian).

Besides the above three amendments, the author has also recommended, for reasons of transparency and clarity, a provision on **supremacy and direct applicability of the EU law**, which has been advocated by several experts, although amongst the Member States it has been constitutionally incorporated only in Ireland. Section 123 would be insufficient, as it would secure the applicability of the ratified treaties, but not of the EU secondary law. In order to avoid a constitutional conflict, it is worth considering G. Carcassonne's proposal to subject the new EU treaties on the French model to a prior constitutional review. Namely, EC law requires supremacy with regard to the national constitutions, while in Estonia, supremacy would explicitly belong to the Constitution under § 15 (right to resort to courts and the obligation of the courts to declare unconstitutional the acts which are in conflict with the Constitution), the first paragraph of § 123 (Estonia does not conclude treaties which are in conflict with the Constitution) and § 152 (the courts do not apply any laws that are in conflict with the Constitution and the courts have to initiate the constitutional review proceedings).[*39]

[39] Cases 11/70 *Internationale Handelsgesellshaft*, [1970] ECR 1125 at 1134; 106/78 *Simmenthal*, [1978] ECR 4199 and 314/85 *Foto-Frost*, [1987] ECR 629.

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Building a Just Society: the Role of the Constitutional Judge

Idea of Justice in the Contemporary Value Jurisprudence and the Process of Argumentation

Introduction

The role of values has been growing in legal thinking and works of legal theorists — during the past century we have passed from the conception of "law as rules" to an understanding of "law as values and principles".[*1] On the one hand, values form a basis of norm creation; on the other hand, they constitute a tool for the judge in making right and just decisions in individual cases. Judges should use the flexibility of law to maximise the possibility of reaching a just decision in a concrete case.

Written norms form an important part of the legal order, yet they are not self-sufficient. As set forth below, there are ambiguities, gaps and controversies in the *ius scriptum*, which cannot be overcome only in the context of written norms. Taking this as the overall context, I will argue that the latter can be viewed as stones in the construction of the legal system, the foundation of which consists of values and principles that have emerged from the broader social context and provide for the coherence of the legal system.

On the background of value pluralism characteristic to modern democracies, this analysis will concentrate on justice, one of the most fundamental values in the legal system. In order to ease the achievement of the aim of this article — providing an insight into the ways in which values are taken into account in judicial decisions — I will concentrate on the role of the idea of justice. Taking some cases as examples, I will view the importance of the idea of justice in decision-making by judges. For reasons of legitimacy, it is important that the reasons for the decisions would be reflected in the motivations.

Firstly, the role of the idea of justice will be considered in the process of argumentation in general, whereas the second part of the article will view making 'value decisions' by the constitutional courts.

[1] M. L. F. Esteban. The Rule of Law in the European Constitution. The Hague, 1999, p. 38.

Drawing parallels from the case law of French and German constitutional courts and the European Court of Justice, the analysis will concentrate on the new possibilities and challenges for the decision-makers posed by the value-centred approach for the Constitutional Review Chamber of the Estonian Supreme Court.

1. The idea of justice and value jurisprudence

1.1. Meaning of the idea of justice

Social justice, justice as fairness, material justice, procedural justice, intergenerational equity, just punishment and justice as part of the rule of law — these are a few examples of different aspects of the idea of justice. The dynamic progress in modern societies has brought up new perspectives, *e.g*. correlation between justice and fundamental rights.

The issues of material or substantive justice have not directly been on the programme of the Continental European legal thinkers in the (post)modern era, who have concentrated mainly on the procedural aspect: how to establish the meaning of justice in a concrete society, time and space and, more specifically, in a particular case. On the other hand, some Anglo-American philosophers, like J. Rawls and R. Nozick, have created theories that are at the core of the discussions on justice, elaborating also on its content.[*2]

1.2. Different forms and criteria of justice

Though there may be no universal definition or understanding of justice, certain **common features** are present in all theories of justice. The core problem that most of the theories address is the criteria for the allocation of goods in the society. This is referred to as *ius distributiva* or **distributive justice**. Among different principles of the latter, the following are of a greater impact in modern societies:

- to everyone according to their work (liberal individualist approach); and
- to everyone according to their needs (social democratic approach of a social state).[*3]

In each society, equilibrium between these aspects has to be found according to the needs, values and possibilities of the society. In the Estonian context, adherence to the value of social justice has been put forth in § 10 of the Constitution.[*4] However, the success of the transition and fast progress of the past decade, belongs to the liberalist approach taken by the government, aiming at building up the economy.

Equalising justice or *ius commutativa* would demand that all be equal, and is realised *e.g*. through the constitutional clause according to which everyone is equal before the law.[*5] The action taken to bring about just distribution in individual circumstances is referred to as **corrective justice**.

Among the widely acceptable **criteria of justice**, principles of fairness, equality and proportionality can be brought out. I. Tammelo, the most well-known Estonian legal philosopher, has defined justice as "a positive ethical social value, according to which everyone should be given what is "his or hers in a normatively bilateral situation". He has also brought out the Golden Rule from the Bible, the categorical imperative of Kant and principles of impartial court process as repeated criteria of justice.[*6]

Many different theories, admitting the relative subjectivity of the idea of justice, stress that rational thinking is the tool, which can help us in the search for justice and just decision-making. Reason can make us "impartial spectators"[*7] who define the existing prevalent value hierarchy in the society and reach a just decision.

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[2] The theory of justice of John Rawls places people behind a "veil of ignorance" for deciding the organisation of society is also a good example of procedural justice. The model proposed by Rawls also takes into account the interests of the disadvantaged members of the society. Opposed to his tentatively socialist theory is R. Nozick, committed to the individualist libertarian approach.

[3] Ch. Perelman has also brought out the distribution principles of "to everyone according to their inner assets", "to everyone according to their position in the society" and "to everyone according to what is legally his due". Ch. Perelman. Justice, Law and Argument. Concerning Justice. Holland, 1980, p. 2.

[4] Section 10 of the Estonian Constitution (published in Riigi Teataja (The State Gazette) 1992, 26, 349 (in Estonian)): "The rights, freedoms and duties set out in this Chapter shall not preclude other rights, freedoms and duties which arise from the spirit of the Constitution or are in accordance therewith, and conform to the principles of human dignity and of a state based on social justice, democracy, and the rule of law."

[5] Expressed in § 12 in the Estonian Constitution: "Everyone is equal before the law. No one shall be discriminated against on the basis of /…/ sex, /…/ or on other grounds."

[6] P. Jõgi. Õiglus ja eetika. Ilmar Tammelo (Justice and Ethic. Ilmar Tammelo). Tallinn: Õigusteabe AS Juura, 1997, p. 160 (in Estonian).

[7] *Ibid.*, p. 162.

Most authors of theories of justice also agree that the result should 'render to everyone what is theirs', reflecting the principle of *cuique suum*.

1.3. Pluralism of values

The pluralism of modern democracies is reflected also in the constitutions that contain several, potentially conflicting, values. Taking a simple example from the Estonian Constitution: in order to guarantee equality of treatment, the state must restrain liberty of action of possible discriminators. Balancing between different values and principles is an integral part of the work of the judge in the process of argumentation, which is especially reflected in the case of constitutional interpretation. In order to enhance the legitimacy of decision-making, their reasoning should contain convincing arguments addressing "law as integrity"[*8] — embracing both written law as well as the underlying values and principles.

1.3.1. Justice and legal certainty

Besides the lack of universal understanding of justice, it is the pluralism of values that also contributes to the moderate use of the idea of justice. The law is at the same time *ars boni et aequi* and *ars stabilis et securi*.[*9] Ch. Perelman claims that it is finding the equilibrium between these demands, which guides judges in decision-making.[*10] As both justice and legal security are fundamental values, neither can be entirely sacrificed. This has taken German legal theorist B. Rüthers to suggest that the idea of justice in itself demands offering minimal legal security as a formal additional element.[*11]

In each concrete case a thorough value-weighing process should be carried out in order to reach a result that responds to the actual societal needs and values. The weighing rule is relevant in conflicting relations between justice and legal certainty as well as freedom and justice (especially egalitarian justice). The search for balance of these notions has to guide the decision-maker through the process of application of legal norms to a concrete factual setting, in order to reach a value judgement. I. Tammelo has called the process of achieving harmony between values "paraduction"[*12] that is to be reached in rational decision-making.

The result of the described process should be motivated with arguments from values, including arguments from justice and its criteria, in order to convince the auditorium that the decisions comply to and reflect the value order of the present society.

There are voices claiming that as long as there is no clear formulation of justice, it can only hold the position of a so-called additional value, as otherwise it would endanger the stability of the legal order which is one of the conditions for maintaining social order.[*13] From another point of view, without justice as one of the fundamental values we cannot speak of value jurisprudence. One of the tasks of legal reasoning is still to interpret the rules in the light of the just weighing of values.[*14]

1.3.2. Justice and equality

There is a special relation between justice and equality. Dworkin has said that for us equal treatment of people is the most fundamental principle of political morality.[*15] So far we have referred to it as a feature of justice, because justice can be expressed through equality, at least through equal distribution of goods between equals.[*16] On the other hand, equal distribution does not always contribute to justice, and a situation of inequality is not always inherently unjust. It is the unjust inequalities that should be brought to a minimum. This applies to discrimination in many cases — there are norms for prohibition of discrimination on grounds of sex, race, political dispositions, social status, *etc*. in constitutions of modern democratic states.

Equality can be invoked in different ways, *e.g*. in terms of welfare, resources or possibilities. Looking at people around us we can see that we have not been created according to the same formulas. Only as possess-

[8] The notion of "law as integrity" has been used in the works of R. Dworkin, *e.g*. in Taking Rights Seriously. London, 1981.

[9] *Ars boni et aequi* (Latin): art of the good and the just; *ars stabilis et securi* (Latin): art of stability and security.

[10] Ch. Perelman. La motivation des décisions de justice. Bruxelles, 1978, p. 422.

[11] B. Rüthers. Rechtstheorie. München, 1999, p 221.

[12] P. Jõgi (Note 6), p 162.

[13] H. Page. L' Équité en face de droit. Bruxelles, 1931, p. 158.

[14] A. Aarnio, A. Peczenik. Suum cuique tribuere. – Ratio Juris, 1995, Vol. 8, No. 2, p. 171.

[15] R. Dworkin (Note 8), pp. 179–183.

[16] H. Page (Note 13), p. 167.

ing the right to human dignity, on the basic level of human beings, are we all equal. Thus absolute equality would not necessarily enhance justice; equality in the relative sense should be attained with the help of conceptions of justice that prevail in the given social context.

2. Values in the process of argumentation

2.1. Interpretation and reasoning in 'hard cases'

The notion of 'hard' cases is usually invoked when it concerns a gap in the law, antinomies of *sensu largo* (conflict between potentially applicable norms) or *strictu sensu* (contradiction between different applicable norms), or difficulties in determining the meaning of a legal norm (ambiguity, vagueness, generality, polysemy *etc*).[*17] The case can even be called 'harder', if the best solution, just and morally acceptable, seems not to fit into the legal framework or contradicts some existing norms. This would be a case of ideological antinomy.

As a result of these shortcomings that to some extent are present in any legal order, it is often not possible to limit the task of deciding a concrete case to following the deductive-logical process of subsumption when applying legal norms. The argument from justice has a special role especially in these 'hard cases', when in addition to the literal interpretation and subsumption of the norms, the teleological and systematic arguments and broader legal principles have to be taken into account.

Teleological interpretation, addressing the aims and purposes of norms, is the most relevant from the point of view of using arguments from values. In the preamble of the Estonian Constitution, justice has been recognised as one of the fundamental values and aims of the legal order: Estonia is a state "founded on liberty, justice and law."[*18] Taking into account the contemporary understanding of justice of the society should be an integral part of making legal value judgements.

The judicial decision is justified when it is logically deduced from correctly selected premisses and if the rules of reasoning with such premisses are accepted as correct.[*19] If in 'easy' cases the analytical deductive reasoning is sufficient via syllogistic justification, then in 'hard cases' one has to turn to broader rules of reasoning and interpretation. In decision-making, the simple facts, motives as well as the norms have to be evaluated in the light of values. Although this has to be kept in mind in all cases, especially in 'hard case' circumstances the role of axiology is paramount.

It has to be highlighted that in the period of transition and rapid reforms that Estonia is now passing, the broader concept of interpretation of legal norms becomes especially necessary, as the legislation cannot always keep up with the pace of real changes. In a new democracy like Estonia there are also unfortunately more gaps in the laws that cannot also be filled with analogy and need an alternative approach. The judges have to make decisions also in these circumstances, and one guarantee of a value judgement in this setting would be teleological interpretation that takes into account the objectives of legal acts and the legal system as a whole of which the idea of justice forms an immanent part.

2.2. Judicial discretion

As we saw above, achievement of the equilibrium of values in decision-making resembles balancing on a tight rope. In an ideal situation, resolving upon which values belong to the foundation of a particular society and determining their content should be the result of a discourse comprising the whole society. In reality, this burden is often left to judges to be exercising in the course of decision-making in individual cases, especially in 'hard cases'.

The discretion of judges to decide on the meaning of justice in a concrete case can raise fears of too wide judicial activism in those who prefer judicial restraint to the letter of law. An often-arising question is whether we are not putting the judges into the shoes of a democratically elected legislator? Taking into account that laws are abstract in nature, their application and concretion has to take place in concrete cases. It would not be possible to put every individual 'hard' case to the Parliament — the application of laws remains in the competence of courts, and the legislator can object or repeal these decisions via stronger regulation of the issues in question.

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[17] J. Bengoetxea. The Legal Reasoning of the European Court of Justice. Oxford, 1993, p. 218.

[18] Preamble of the Constitution of the Republic of Estonia. – Riigi Teataja (The State Gazette) 1992, 26, 349 (in Estonian).

[19] J. Bengoetxea (Note 17), pp. 168–169.

A good example of the interdependence of the supreme court and the legislator is the recent *Perruche* case of the French Supreme Court.[*20] Nicolas Perruche was born with a serious handicap, which his mother was not able to foresee due to medical faults, being thus deprived of the possibility of terminating the pregnancy. The court recognised the right of the parents and the child to damages for this prejudice. The decision arouse a large-scale debate in the society, in which it was also claimed that this decision could be interpreted as declaring birth of a handicapped child itself as a prejudice and grounds for indemnification. The Parliament, in immediate reaction, adopted a law, stipulating clearly that the fact of birth of a handicapped child could not be seen as a prejudice in itself.

This could also be regarded as an example of judicial activism, which the legislator found necessary to restrain. Apart from the possible reactions of the parliament, the legitimacy of decision-making by judges is controlled in two different ways: on the one hand, there is their own morality and consciousness, and on the other hand, the external control that takes place through their obligation to motivate the decisions. This reasoning can in its turn give rise to further and wider deliberations within the society, which is common practice in many European countries and also in the European Union, which brings reflections of the living spirit of the society in certain time and space into the process of decision-making.

One of the difficulties arising in 'hard cases' is the seeming plurality of right decisions — the existence of several answers to the question, when only taken from a different perspective. In this case it ought to be decided, which perspective is the most important in this case. For example, there could be a choice between the 'common good' and an individual right.

R. Dworkin has argued against the 'no right answer' thesis in his Taking Rights Seriously. He contends that there are cases where controversial outcomes in favour of either party are equally possible and equally right, meaning that the judge cannot decide.[*21] He defends the existence of right answers in 'hard cases', meaning that it is not a hopeless aim to let the judges seek this answer. I would like to join in his optimism that there must be an argument that is the soundest, when balanced with others.

The decision has to be based upon the weighing of these different options, taking into account not only the questions of law, in the strict sense, but also issues of philosophy and ethics. In case of a gap or other shortcomings in the legislation, the process of decision-making should be conducted in light of the Constitution. In order to provide for the legitimacy of the decision, the motivation should convince the audience that the result is consistent with the spirit of the Constitution that is the spine of the legal order.

3. Value decisions in practice

3.1. The German *Bundesverfassungsgericht*

Valuable contemplation on the idea of justice can be found from the decisions of the German *Bundesverfassungsgericht*, where the question of justice is brought up in several contexts, from the matters of just compensation to broader issues concerning justice and welfare state. For example, the idea of material justice is underlined as one of the fundamental elements of the rule of law (*Rechtsstaat*) that has to be protected as such.[*22] The *Bundesverfassungsgericht* has stated that the rule of law is one of the elementary principles of the German Constitution and it embraces not only legal security (*Rechtssicherheit*), but also the concept of material or substantive justice.[*23]

According to the *Bundesverfassungsgericht*, the lawgiver cannot give unequal treatment to cases that are the same in the essential elements. It is up to the legislator to decide which elements are to be deemed important enough to give grounds for differentiation. But the length of slack afforded the lawgiver is fully taken up where the unequal treatment is no longer in accordance with the demands for the existence of an objective reason for differential treatment.

The principle of equality is often referred to in the motivations of the *Bundesverfassungsgericht*, though it is rarely invoked separately. In spite of the purpose of "treating the like cases alike and different cases in proper accordance with their nature, referring to the idea of justice"[*24], as people looking through different

[20] Decision of the French Supreme Court (Cour de Cassation) of 17th of November 2000, confirmed in similar cases of 13th of July 2001 and 28th of November 2001.

[21] R. Dworkin (Note 18), pp. 280–281.

[22] BVerfGE, 102, 254 (2000), referring also to BVerfGE 21, 378 (1967); BVerfGE 33, 367 (1972); BVerfGE 52, 131 (1979).

[23] BVerfGE, 20, 323 (1966).

[24] L. Favoreu. Les Cours Constitutionnelles. Paris: Presses Universitaires de France, 1986, p. 67.

prisms see the likeliness of cases in different colours, it is feared that giving too wide discretion to the judges would enable them to take up the role of the legislators. The profound motivations of decisions, distinctive when compared to the French, European or Estonian counterparts of the *Bundesverfassungsgericht* contribute to legitimacy, by rendering the decision-making more transparent.

The demand of social justice (*Gebot sozialer Gerechtigkeit*) is referred to in several cases as an important aspect of the principle of social state, which has evolved significantly due to the jurisprudence of the Court. Also the demand for justice in concrete cases (*Einzelfallgerechtigkeit*) has been mentioned, and the terms like value justice and system justice also appear in the motivations. If in general we can speak of the art of argumentation rather than the science of argumentation, the sixteen-member German Constitutional Court has succeeded in developing the art into a science.

In conclusion, the decisions of the German *Bundesverfassungsgericht* contain several arguments of justice in several forms, as well as the principle of equality and arguments concerning other fundamental rights. The well-articulated decisions are academic in character and provide valuable analysis on the meaning of the idea of justice.

3.2. The French *Conseil Constitutionnel*

The central role in establishing the meaning of texts in the French Constitution is exercised by the *Conseil Constitutionnel* (the *Conseil*). The body that comprises nine members also serves as an instrument that assures including new perspectives in the legal discussion in France. Since the eighties (from the nomination of D. Mayer to the post of president of the *Conseil*, and after him R. Badinter — the presidents have had a strong impact on the jurisprudence), emphasis has been laid on human rights protection.[*25] Another analyst of the decision-making of the *Conseil* has pointed out that there are two finalities or aims that guide the *Conseil* in its practice of interpretation: just balance of public powers and protection of human rights, the latter being the main source of inspiration of constitutional interpretation.[*26]

The French method of argumentation is rather minimalist compared to the example of the German Constitutional Court, which shows a clear touch of academic reflection. A councillor of the French *Cour de Cassation* has interpreted the obligation to motivate decisions as a duty to motivate in fact and in law. This means that the judge has to indicate clearly and completely the path of reflection and the intellectual stages of decision-making, or in other words, the legal reasoning.[*27] Still, he points out the extreme shortness of the motivation, though with respect to the decisions of the Supreme Court (*Cour de Cassation*): "only eight lines dedicated to announcing the legal rule and its application in the respective case."[*28] The same applies equally to the practice to other jurisdictions in France, including the *Conseil*.

Still, although the literal and systematic traditions of interpretation generally prevail in the practice of the *Conseil*, there is also a place for teleological interpretation that takes into account the aims of a legal norm and, more broadly, the aims of the social order as a whole.[*29] The latter is still least dominating, as instead of taking into account what is implicit in the social order, the *Conseil Constitutionnel* regards what is implicit in the Constitution. In several decisions the *Conseil* has referred to "the spirit of the Constitution", *e.g.* in 1962, when it refused to examine the constitutionality of laws adopted by referendum.[*30]

As to the principle of equality, it has been invoked in different forms: concerning equality before the law and justice, in elections, in access to posts in public service *etc*.[*31] The argument from equality is usually based on section 2 of the Constitution or the Declaration of 1789, or without any mentioning of its legal source.

In conclusion, a judge of the *Conseil* has far-reaching powers in interpreting the French Constitution. Although it is rather short-spoken and laconic in motivating its decisions, it still proves to be engaged in what could sometimes be called "creative interpretation", not just mechanical application of law.

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[25] See further: D. Rousseau. Sur le Conseil Constitutionnel: La doctrine Badinter et la démocratie. Paris: Descartes & Cie, 1997, p. 194.

[26] Y. Aguila. Le Conseil Constitutionnel et la Philosophie du Droit. France: Louis-Jean, 1994, p. 73.

[27] J. Ancel. Rédaction de décision en France. – Revue internationale de droit comparé, 1998, No. 3, p. 848.

[28] *Ibid*., p. 848.

[29] Y. Aguila (Note 26), p. 63–72.

[30] Case No. 62-20, 6 November 1962. – Journal GD, No. 14, p. 27.

[31] Cases No. 75-56 DC, 23 July 1975, p. 22; No. 86-208 DC, 1 July 1986. – GD No. 42, p. 78; No. 82-153 DC, 14 January 1983, p. 35; No. 80-125 DC, 19 December 1980, p. 51.

3.3. The European Court of Justice

In argumentation in the jurisprudence of the Court of Justice of the European Communities (below referred to as the ECJ or the Court) there are aspects which differ from practice of the national courts. The understanding of these particularities is of a special importance for the legal thinking in Estonia, keenly pursuing the road map of negotiations for accession to the European Union. There are also interesting features in practice of ECJ that the Estonian judges could consider learning from.

The ECJ uses most frequently dynamic teleo-systemic modes of interpretation, combining systemic and functional as well as teleological or consequentialist criteria. The Court itself has stated that in establishing the meaning of a legal text, "one has to go back to its spirit, general scheme and wording".*[32] General goals of the Community should also be mentioned as key directives in the Court's practice of interpretation and motivation.

As to the finalities that the ECJ takes account of in its interpretation, it has stated that the Community is a *Rechtsgemeinschaft**[33], and this notion is used by the Court as an inspiring idea and motivating argument in several of its decisions. The principle of *rechtsgemeinschaft* means interpretation in accordance with law, the written norms as well as their spirit that contain also the values as objectives of the legal order. Heterogeneity of the value systems in the different societies joined into the Community account for difficulties for the Court in determining the content and meaning of values. But the ECJ has taken itself rather broad liberties in filling out the blanks in the Communities' peculiar legal system.

The ECJ has referred to justice in many of its decisions, bringing out arguments from natural justice, fairness and equity.*[34] As an example, in the *Walt Wilhelm**[35] case that concerned applying competition protection measures to the same case by different Member States, the court based the justification of its decision upon natural justice, although the relevant party had referred to the *non bis in idem* principle. In several cases the ECJ has directly referred to the objective of fairness as an underlying value of the legal norm in question and the basis for interpretation.*[36]

The principle of proportionality, as one criteria of justice, also holds an important place in the jurisprudence of the ECJ. The latter has combined it with the principle of fairness.*[37] The principle of equality has also been developed mainly by the Court. In times, when there were only fragmentary references to the prohibition of discrimination in the Community law, the Court that derived a general prohibition of discrimination from these provisions.*[38] The ECJ has applied this principle in the fields of discrimination on the basis of religion and nationality, as well as gender.

Case Defrenne II*[39], a landmark case in the Court's equal treatment jurisprudence, sets forth the principle of equal pay for equal work that is closely connected to one possible formulation of distributive justice — whose contributions are equal, are entitled to equal benefits. The case *Commission v. UK**[40] also concerns equal remuneration. Here the court has grounded its motivation on the general structure and objectives of the equal pay directive, finding that leaving classification of jobs to be established by the employers would violate the principle of equal pay for equal work.

In conclusion, the ECJ utilizes a combination of teleological and systematic criteria of interpretation, taking into account the general objectives of the Community as well as the coherence and need for further development of its legal system. The argument of justice has been essential to several of its decisions, in close connection to principles of equality and proportionality. The ECJ has taken itself a rather wide margin of discretion, being inspired in its argumentation of the general purposes and values of the Communities' legal system.

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[32] For example, case 6/72 *Continental Can v. Commission* (1973) ECR 215 at 243.

[33] Case 294/83 *Les Verts v. European Parliament* (1986) ECR 1339.

[34] M. L. F. Esteban (Note 1), pp. 162–163.

[35] Case 14/68 *Walt Wilhelm and others v. Bundeskartellamt*, [1969] ECR I concerned competition law. The court found it unjust if authorities of different member states would independently conduct procedures for controlling actions to guarantee competition, as it could result in subsequent sanctions for the same violation.

[36] Case 61/98 *De Haan Beheer BV v. Inspecteur der Invoerrechten en Accijnzen te Rotterdam*, [1999] ECR I-5003, interpretation of section 905 of the regulation no. 2454/93 of the EC; also case 86/97 *Reiner Woltmann v. Hauptzollamt Potsdam*, [1999] ECR I-1041, interpretation of section 239 of the Customs Code of the EC.

[37] Case 297/98 *SCA Holding Ltd v. Commission of the EC*, [2000] ECR 0000.

[38] Cases 1/72 *Frilli v. Belgium*, [1972] ECR 457; 168/82 *ECSC v. Ferriere Sant'Anna*, [1983] ECR 1681.

[39] Case 43/75 *Defrenne v. Sabena*, [1976] ECR 455.

[40] Case 61/81 *Commission v. UK*, [1982] ECR 260.

3.4. The Constitutional Review Chamber of the Estonian Supreme Court

In Estonia there is no separate constitutional court. The Constitutional Review Chamber of the Supreme Court (CRC), composed of five judges, functions as the highest authority in norm interpretation.

3.4.1. Examples of references to justice in argumentation of the Constitutional Review Chamber

In the following paragraphs, some models of argumentation relating to the idea of justice in the practice of the Estonian Supreme Court will be outlined.

Firstly, in a decision from September 1994, the applicability of general principles of law has been based upon the statement in the preamble of the Estonian Constitution, which sets forth that "freedom, justice and law are the underlying values of our state order".*[41] This statement has been of a fundamental importance for the development of the Estonian legal culture, being referred to in many subsequent decisions.

The requirement of justice has also been referred to in connection to the principle of equal treatment. For example, this has been invoked in relation to returning of the unlawfully alienated property*[42] and equal treatment of the foreigners in comparison with the Estonian citizens.*[43]

Secondly, there are decisions on just compensation that could be viewed as applications of corrective justice, which aim at establishing justice in the concrete circumstances. In a case from 8 November 1996, the CRC noted that "it is not possible to evaluate in the course of general legal norm control whether the compensation would be just in a concrete case". At the same time, the judges have not specified according to which criteria it would be possible to evaluate in individual cases whether the compensation does comply with the requirements from justice.

Thirdly, the requirement of social justice has been brought out as an underlying objective of the property law reform.*[44] The Legal Chancellor had submitted a petition, seeking to declare "Supplementary budget for 1999" partially null and void. The case dealt with implementation of requirements from the Housing Act. In the opinion of the Supreme Court *en banc*, it was put forth that "Section 2 of the Principles of Ownership Reform Act stipulates the purpose of ownership reform to be, *inter alia*, to undo the injustices caused by violation of the right to ownership /…/. The provision pursuant to which return of property to or compensation of former owners or their legal successors for property in the course of ownership reform shall not prejudice the interests protected by law of other persons or cause new injustices, is to guarantee balancing of different interests and social justice."

3.4.2. More emphasis on teleological argumentation

The importance of teleological arguments in general, including arguments from justice, ought to be extended in the practice of the Supreme Court. As cited above, the preamble of the Estonian Constitution sets justice as one of the notions that our state is founded upon. Also provisions of the Constitution as well as different legal acts have set the different components or criteria of justice, *e.g*. equality or proportionality as under-lying aims of legal regulation. Still, none of these acts says when or how the idea of justice should be used in practice.

In some cases the court has used reference to the spirit of the Constitution in accordance with the second paragraph of § 152 of the Constitution*[45], that could open up more dynamic dimensions of constitutional interpretation.*[46] In a decision from December 2000, the CRC has stated that "The Supreme Court can and must evaluate the lawfulness of a norm, taking into account the coherence and conception of the Constitution as a whole".*[47] Respecting the coherence of the legal system requires an integrative approach that would take into account the aims of the Constitution and legal order. The preamble of the Constitution thus becomes an important part of the argumentation process, serving as the key for understanding the legal system.

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[41] The decision of the Constitutional Review Chamber of the Supreme Court, 30 September 1994 (III-4/A-5/94).

[42] The decision of the Constitutional Review Chamber of the Supreme Court, 30 September 1998 (3-4-1-6-1998); 8 November 1996 (3-4-1-2-96); and 12 April 1995 (III-4/A-1/95).

[43] The decision of the Constitutional Review Chamber of the Supreme Court, 27 May 1998 (3-4-1-4-98).

[44] The decision of the Estonian Supreme Court *en banc*, 17 March 2000 (3-4-1-1-2000).

[45] The second paragraph of 152 of the Estonian Constitution: "The Supreme Court shall declare invalid any law or other legislation that is in conflict with the provisions and spirit of the Constitution."

[46] M. Suksi. On the Constitutional Features of Estonia. Åbo: Åbo Academis, 1999, p. 32.

[47] The decision of the Constitutional Review Chamber of the Supreme Court, 22 December 2000 (3-4-1-10-2000).

3.4.3. Need for greater consideration of values

The Chief Justice of the Supreme Court U. Lõhmus has pointed out that "importance of the use of general principles of law especially arises in time of great changes in the legal system, when the gaps and contradictions in norms are more extensive".*[48] Estonia has witnessed the building up of a new legal system and legal culture during the past decade. In spite of successful reforms, many questions are left unanswered. The discourse on values has been treated in a few academic works and articles, yet it has not been developed in court decisions. In several decisions, the importance of legal certainty has been stressed, yet arguments from justice have generally not been drawn. Comparing the practice of CRC to the decisions of the previously viewed constitutional courts, references to the idea of justice are not common and when the notion of justice is used, its meaning and content in the given context are not clarified.

In the same article U. Lõhmus also finds that "use of general principles of law could help solving the conflict between law and justice". The Supreme Court has created a link between the idea of justice and general principles of law, using this as the basis of deriving the validity of several fundamental rights in the Estonian legal system. On the other hand, solving the conflict between law and justice deserves to be treated directly and argumentation would benefit from using arguments from justice itself. There is a need for clarification of which content of justice is prevalent in Estonia in the minds of the Supreme Court judges and how does it guide them in decision-making.

Conclusions

In order to ensure the legitimacy of judicial decision-making, the power of discretion left to the judges has to be limited, especially by the obligation to motivate decisions. Judges are not only 'the mouth that repeats words of the laws', but their role and responsibility in the society reaches further: they have an important part in building up a just society. To attain this, they should take values, including the idea of justice, into account in concrete cases. This value-oriented method should be integrated into the legal reasoning, aiming to make the decision acceptable for the audience, comprising not only parties to the case, but also the legal community as well as the whole society.

Compared to the practice of the ECJ and German and French Constitutional Courts, the idea of justice has been less brought out in the Estonian practice of motivation. In spite of references in some decisions of the Constitutional Review Chamber of the Estonian Supreme Court, there are almost no indications as to the relevance of justice in the reasoning or its meaning for our judges. There is a need for a more intensive discourse on the content and criteria of justice, to which the contribution of the Constitutional Review Chamber would be essential in future.

[48] U. Lõhmus. Rahvusvahelise õiguse üldtunnustatud põhimõtted Eesti õigussüsteemi osana (Generally Recognised Principles of International Law as Part of the Estonian Legal System). – Juridica, 1999, No. 9, p. 426 (in Estonian).

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The Role of Ideology in Adjudication

Introduction

This article will seek to map out the methodological and theoretical problems of some contemporary theories of adjudication in the context of the process of European integration. I submit that the openness of the interpretive process of the European courts poses problems for the theoretical claims of ideological neutrality of the process of adjudication. My approach will be critical in the sense that I will to some extent bother with the dismantling of the normative distinctions between law and politics.

1. Europeanisation of national law

Throughout the member states of the European Union one can discern a strand of thought which claims that EU membership and the influx of international law in day-to-day legal practice has led to a reinforcement of the role of law in the national polities.

The conventional claim goes as follows: the areas where political decision-making has been the prime tool for solving societal problems and settling public and private disputes has significantly narrowed. The political domain has shrunk because an ever-increasing number of policy areas are now subject to the EU system of enforcement of Community law rights where no subject can be labelled a purely political question.

Simultaneously more and more policy areas are subject to the jurisdiction of the European Court of Human Rights. This development is mainly due to a consistent strategy of making the European Convention of Human Rights a more effective vehicle for reviewing the legality of national measures. The method chosen has been incorporation, transformation and the establishment of new legal remedies to make the rights justicible.

This broad account for present changes in the landscape of national law has been characterised with the fuzzy concept of Europeanisation of national law.

The concept of Europeanisation could be used for both empirical and normative purposes. In the different fields of social sciences there is no agreement on whether this is a true account of contemporary changes in the power structures of the European nation-states. But the use of the concept for normative purposes reveals perhaps even more controversies.

Either one finds aggressive neo-liberals suggesting that Europeanisation and the withering of the power of national sovereigns is a good thing since it transfer powers from the political democracy to the market or one will hear cries for social justice and increased protection of human rights on global or supra-national level executed and enforced on the basis of transnational constitutional documents.

To put it briefly, the forces that trigger the ongoing transformation of the European polities are hard to pin down and academic enterprises launched to unveil these forces are tainted by conscious or unconscious agendas of ideology.

The tale told by most lawyers of European law departs from mainstream social science in a significant way. While the social scientist approaches the law head on and treats it as an instrument of implementing political programs, lawyers still epistemologically remain convinced of the inherent qualities of authority and normativity of the law. It is not surprising that the majority of the college of European lawyers applaud the Europeanisation of national law and the judicialisation of politics. Lawyers are in this respect no less interest-oriented than politicians are. The process of Europeanisation of law strikes a new power balance between lawyers and politicians for the benefit of the former.

I believe that there is evidence for the claim that national law has undergone a process of Europeanisation and that the political life of the nation-state thereby has been transformed. Something significant has occurred as a consequence of judicial enforcement of European constitutional documents. The EU membership and the enhanced effectiveness of the law of the European Convention of Human Rights have led to transformations in governance and discourse of the member states.

Theoretically the consequences of the ECJ's structuring of EC law and its supremacy doctrine are great. In the judiciaries of the member states doubts have been expressed about the ECJ's doctrine of absolute supremacy of EC law as possessing the prerequisites to constitute the basis of a common European constitution. It has been pointed out that the question as to what extent the member states have transferred powers to the EC/EU both theoretically and practically is an issue for the constitutional law of the member states. The interest of uniform application of EC law must be set against the interest of member states asserting their constitutional integrity.

How shall we deal with the principal question of competing principles? How shall we reconcile the concept of sovereignty and competing sources of principles with the requirement of coherence of the legal system. We claim that we have to avoid the "all or nothing" choice, and seek to describe the relationship between competing legal principles from the starting point where several applicable principles co-exist and overlap each other. The main point is that classical legal positivism cannot serve as a starting-point for proposals to solve conflicts of principles. The problematic interdependence between law and politics reflected by the openness of the interpretive process forces legal positivism to refer conflicts of constitutional principles to the political arena.

The normative hierarchy of national constitutional rights in relation to European law, international and European conventions of human rights and national statutory rights has become confused and ambiguous. Normative statements in judgments or other legal decisions aiming to resolve legal disputes are no longer to be regarded as logical conclusions derived from formulation of legal norms presupposed to be valid taken together with statements of fact which are assumed to be proven or true. Thus, the link between indeterminate principles of constitutional law and legal interpretation unveils what can be described as a crisis of formal reasoning.

Against this background it seems natural to raise the problem of normative distinctions in the process of adjudication. The following question seems crucial: Does the acknowledged openness of the European Courts and national courts interpretive process pose a problem for the claim of ideological neutrality in adjudication?

In other words, is it possible, in spite of the theoretical and methodological problems linked to the interpretation and application of law, to extract a normative criterion from the legal materials that with acceptable precision limits the area of determinacy (or indeterminacy) of the ECJ (or any court)?

Can we assess the limits of judicial discretion with reference to the legal system?

I will treat these queries through a discussion of the role of ideology in adjudication. I will do this by exploring legal theories operating in the continuum between rule application and rule making from a fairly critical perspective.

The justification for my categorisations turns on both epistemological and normative assumptions. One either believes that it is possible to assess the "true" content of normative meaning to a legal norm with reference to a normative criteria external to the norm through principled legal reasoning, or one believes that the normativity of the legal norm always is subject to an interpretative operation where constraining external legal criteria is missing.

From the latter perspective rule application cannot be objective or no rule can determine the scope of its own application, meaning that applying say **equal pay** for **equal work** will require judgements about whether

factual circumstances in the order of events correspond or do not correspond to the concepts. As a logical matter, the basis for these judgements cannot be found in the concepts themselves. But there are no objective tests of correspondence outside the text of the rule, once one agrees that language is not the mirror of nature.

The presented lines of thought also differ with regard to ideas of the end or objective of legal decisions. One could roughly distinguish between ideas that picture the court as a **court of law** or as a **court of justice**.

The court of law idea puts emphasis on the mechanical application of law, rule of law not of men, within a *Rechtstaat* where legality and predictability are the primary ideals of adjudication. The judge here appears as a civil servant loyal to the will of the legislator.

The court of justice idea puts emphasis on the fairness or just application of the law. The end of the process could be evaluated with reference to substantive values of justice and reasonableness inherent in the legal system.

The different lines of thought reveal different approaches to the rationality problem of adjudication that could be phrased as follows: A judge is to interpret and apply a contingently emergent and more or less indeterminate body of law. This activity has to be performed with both internal consistency and rational external justification, so as to guarantee simultaneously **the certainty of law** and its **rightness**.[*1]

2. Traditional view

A traditional definition of judicial discretion could be spelled out as the authority vested in the courts to make a choice between two or more conceivable lawful alternatives. The legal element of the concept appears in the form of a requirement that the choice must be found within the realm of the law.[*2] The choice has to be based on a valid legal norm. The emphasis here is on legal validity. This requirement raises a number of problems. Will this mean that two conflicting outcomes of a dispute would lie within the discretion of the judge? Could the judge convict or acquit in a criminal case and still remain within the boundaries of legitimate discretion?

But the focus on outcomes is of limited importance if we try to launch an investigation into the constraining force of the legal system. In the foreword of Takis Tridimas' "The General Principles of EC Law" Advocate General Jacobs claims that "/.../ the role of general principles cannot be assessed in the abstract but only by reference to results reached in concrete cases: to be of any use, the study of such principles has to be the study of outcomes."[*3] This proposition reflects a traditional pragmatic approach applied by legal scholarship.

It is maybe true that we can learn something about general principles of EC law merely by studying court cases and their outcomes or results. But if we are to assess the constraining force of principles in the interpretive process of the ECJ we need a broader approach. We must try to assess the constraining force of rules and principles with regard to their "normative quality" and operation in the legal reasoning of litigants, courts and academics. We may learn more from the discourse about rules and principles than from the judicial outcomes.

Another version of the traditional view contends that the judge has no discretion in the process of fact finding. The judge has no discretion in his rulings on the law. But when, having made any necessary finding of fact and any necessary ruling of law, he has to choose between different courses of action, orders, penalties or remedies he then exercises discretion. It is only when he reaches this stage of asking himself what is the fair and just thing to do or order in the instant case that he embarks on the exercise of discretion.[*4]

This suggests that there exist two completely different stages in the process of decision: one in which the judge first finds that the existing law fails to dictate a decision either way; and the other in which he turns away from the existing law to make law for the parties ***de novo*** and ***ex post facto*** according to his idea of what is best.

A typical form of critique of the ECJ from the traditional corner relies heavily on legal validity and the premise that the meaning of the Treaty text could be objectively ascertained and puts significant constraints on the judge. Professor T.C. Hartley criticises the judgement in **Chernobyl** and claims that the ECJ:

> "/.../ does not consider itself bound by the Treaties if they conflict with what it regards as desirable in the interests of the constitutional development of the Community."[*5]

[1] J. Habermas. Between Facts and Norms. Cambridge Mass, 1996, p. 198.

[2] A. Barak. Judicial Discretion. New Haven, 1989, p.7.

[3] T. Tridimas. The General Principles of EC Law, Oxford 1999, p. X.

[4] T. Bingham. The Discretion of the Judge. The Denning Law Journal 1990, p. 28.

[5] T. Hartley. The European Court. – Judicial Objectivity and the Constitution of the European Union, Law Quarterly Review, 1996, p. 101.

Hartley submits that this judgement contravenes the wording of article 173 EC (now 230). It cannot be justified with reference to any legitimate methods of interpretation. The judgement can according to him only be justified, on the basis of considerations specific to the European Court.[*6] His attempt to found the critique theoretically goes as follows:

> "/.../ the Court prefers to interpret texts on the basis of what it thinks they should be trying to achieve; it moulds the law according to what it regards as the needs of the Community. This is sometimes called the 'teleological method of interpretation', but it really goes beyond interpretation properly so-called: it is decision-making on the basis of judicial policy."[*7]

> "/.../ what the Court did was to say that the acts of the Parliament **ought** to be reviewable; therefore, they **were** reviewable. This logic /.../ ignores the distinction between what the law ought to be and what law is, a distinction which is fundamental to the Western concept of law."[*8]

The normative distinction introduced here is rather dogmatic in character. Even though legal positivists like H. L. A. Hart acknowledge the centrality of interpretation to the understanding of law they deny or at least ignore the possibility of a middle term, arguing that what is not law application is for all intents and purposes judicial legislation.

A basic problem with this approach is that there are a large number of cases in which the judge at least reformulates the existing rule of law. But is he or she then behaving as a legislator? Hardly, the institutional contexts of adjudication and legislation are so different that identical ideological motives are likely to produce very different substantive rule-making outcomes. The crucial question for our purposes is instead, different in what way?

The traditionalist theory of dogmatic normative distinctions and ideas of "intuitive constraints" or natural meaning downplay both the epistemological and contextual preconditions of discretion in adjudication.

Primarily one has to ask how can law be understood in isolation from politics and social values when so much of it is a matter of judicial interpretation (of constitutional and legislative provisions, and of earlier judge-made law) and of interpretation of what judges say?[*9]

Secondly, whether or not judges legislate, they are significant actors in managing the process of legal development.[*10] A judgement is not a segment of being, but, like the anecdote, a process of becoming.[*11] Judges do not simply respond to demands generated by social relationships. They authoritatively adapt the abstract legal rules to the concrete exigencies of those individuals engaged in social interactions.

Hence, at the heart of the traditional view on discretion lies one of the great dichotomies of political theory in general and legal theory in particular, that between is and ought or adjudication and legislation. The distinction between adjudication and legislation is relevant for an analysis of the anatomy of judicial discretion since it focuses on the ideological element in adjudication.

One could take the initial distinction head on from a descriptive point of view and simply assert the adjudication is what judges and courts do and legislation is what the legislature does. Now the distinction appears sharp and unproblematic. One could also view the couple as modes of decision making. Adjudication is simply applying law to the facts of a case and legislation is to make new law.

The distinction is closely related to a number of other distinctions: court and legislature; applying and making law: law and politics; between professional and elected officials; between objective and subjective questions.

These distinctions lie at the heart of a larger normative theory of Liberalism. By Liberalism I mean Belief in individual rights, majority rule, and the rule of law. Liberal theories of the rule of law contain an idea of separation of judicial and legislative powers. Legislatures should legislate and the judiciary should adjudicate even though they often stand the risk of violating these constraints.

The development of liberal theories of adjudication is part of a broader political project. As soon as we shift from understanding adjudication as rule application to understanding it as interpretation, we threaten to destabilize the larger Liberal conceptual structure that distinguishes courts from legislatures, law from politics and the Rule of Law from tyranny. The question of the role of ideology in adjudication is therefore an ideological question.

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[6] *Ibid.,* p. 103.

[7] T. Hartley. The Foundations of European Community Law. Oxford, 1994, p. 85.

[8] *Ibid.*, p. 87.

[9] R. Cotterrell. The Politics of Jurisprudence 1989, p. 150.

[10] *Ibid.*

[11] L. Fuller. The Law in Quest of Itself. Chicago, 1940, p. 9. See also L. Fuller. American Legal Philosophy at Mid-Century. – Journal of Legal Education, 1954, Vol. 6, p. 457.

In this normative view, the law-making process requires value judgements, which are inescapably subjective, and therefore political. I use **subjective** as referring to the more general personal convictions and beliefs of the judge. The judges' ideological orientation in this sense is not something merely personal.

It is here important to make a distinction between on the one hand a judicial decision that complies with the value judgements set out by the legislator and on the other values judgements that depart from the legislators normative preferences. It is in the latter situation we may use the concept of **judicial legislation**.

Adjudication traditionally need not be political because it involves questions of meaning and questions of fact that are independent of value judgements and therefore objective. The judge just mechanically applies a rule to a special set of facts and makes the will of the legislator alive and concrete. In this view "judicial legislation" has a negative normative meaning.

The underlying theoretical underpinnings of this view reads as follows: the rule of law means that the exercise of power and coercion against citizens must be justified in two ways; first, by appeal to a norm enacted by the democratic decision-making process; second, by the application of the norm to the facts in a process that is independent of the process that generated it.

According to this theory, judicial legislation is problematic since it violates the first requirement of the exercise of power in a democratic society. Judicial legislation means that the judge does something more than just creating a norm for the solution of the case at hand, he or she creates a new rule with general application which is based on value judgements that are more or less foreign to the legislator.

The familiar rhetoric of the judicial process in some quarters seems to encourage the idea that there are in a developed legal system no legally unregulated cases. At the faculty in Stockholm law students are given the impression that the legal system is a self-referential, autonomous and comprehensive system of rules within which a judge or a scholar will solve any legal problem by reference to established argumentative techniques and accepted methods of interpretation.

If we are to take this rhetoric seriously we have to distinguish between the ritual language used by the judges and lawyers in deciding and arguing cases in their courts and theoretical assessment and more reflective statements about the judicial process.[*12]

As legal scholars we must ultimately refer not to a law but to a jurisprudential criterion. Ultimately one must refer to a general statement that does not describe a law but a general truth about law.[*13]

On the latter level of discourse, it seems like an accepted wisdom that judges do something else than just merely apply the law to a special set of factual circumstances. Judges often have to resolve gaps, conflicts and ambiguities in the legal system. When there is a gap or a conflict there is agreement that the judge makes a new rule and applies it to the facts rather than merely applying a pre-existing rule.

In most cases the singular normative statement which expresses a judgement resolving a legal dispute does not qualify as a logical conclusion derived from formulation of legal norms presupposed to be valid taken together with statements of fact which are assumed to be proven or true." The obvious reasons for this are: "(1) the vagueness of legal language, (2) the possibility of conflict between norms, (3) the fact that there are cases requiring a legal statement which do not fall under an existing valid legal norm, and finally (4) the possibility, in special cases, of a decision which is contrary to the wording of the statute."[*14]

Hence, if we identify the contrast between law application and law making with the adjudication/legislation dichotomy we are trapped since the dichotomy does not seem to permit a middle way.

But as soon as we shift focus to a broader account of legal interpretation it suggests that adjudication involve references to the broader normative structure of the legal system.

3. Coherence or fit

The link between interpretation and the principled normative structure is reflected in the justification of the judge-made constitutional principles governing the relationship between EC law and national law. In *Francovich* the ECJ stated that the principle of non-contractual liability of the member states has to be viewed "/.../ in the light of the general system of the Treaty and its fundamental principles."

In *CILFIT* the ECJ stated that "/.../ every provision of Community law must be placed in its context and interpreted in the light of the provisions of Community law as a whole, regard being had to the objec-

[12] H. L. A. Hart. The Concept of Law. Oxford, 1994, p. 274.

[13] J. Raz. The Concept of a Legal System. Oxford, 1970, p. 200.

[14] R. Alexy. A Theory of Legal Argumentation. Oxford: Clarendon Press, 1989, p. 1 (footnotes omitted).

tives thereof and to its state of evolution at the date on which the provision in question is to be applied."

The ECJ's interpretative strategy seems to be based on the idea of EC law as a system where ***lacunae*** do exist. Thus, many situations are not governed by a rule of law. In such cases the ECJ will resolve the case by deducing from the existing rules a rule or principle which is in conformity with underlying substantive as well as structural premises on which the legal system is based.

The conventional picture implies that ***lacunae*** are more likely to arise in EC law since it is a new legal order in constant flux. In this context the ECJ (and legal scholarship) emphasises the ideal of coherence. The existence of ***lacunae*** and the quest for coherence seem to be the primary justification for the authority of the ECJ exercising extensive judicial discretion.

Hence, the judicial discretion of the ECJ raises theoretical questions stemming from the continuum between strict rule application and judicial legislation. A middle term found here could be labelled "the method of coherence". This is a method through which judges can make new rules of law without drawing upon their own legislative preferences.

Coherent rule-making is more or less distinct from the method of developing the definitions of the words in legal rules as an aid to applying them. The method focuses on the choice among different rules proposed to fill a gap, a conflict or ambiguity of a legal system seen as an ensemble of rules. The coherence method is elaborated by Dworkin who defines judicial interpretation as follows: "/.../ constructive interpretation is a matter of imposing purpose on an object or practice in order to make of it the best possible example of the form or genre to which it is taken to belong."

The Community judge is making law by treating the whole corpus of rules as a product of an ideology of integration. By employing the method of coherence or integrity with recourse to general principles of law as gap-fillers or interpretative influence, the Community courts can carry out ideological work when they further a particular regime by developing it in the case of a gap, conflict or ambiguity. Integration thus becomes the *leitmotif* of integrity or coherence.

Despite the conquests of the post-modern critique of the authority of law and legal reasoning, most academics and practitioners of European law conduct their work within the epistemological framework of coherence and fit. Their point of departure is based on the assumption that the judicial interpretation by the ECJ is subject to constraints posed by the EC legal system and its underlying principles.

Jurisprudentially this can be expressed as follows: Firstly, the European judge should act conformably with the principle of formal justice ('treat like cases alike') and base the instant decision on some **ruling** which settles the **type** of case to which the instant case belongs and the proposed decision for that type of case.

Secondly, he ought to **evaluate** that ruling and any possible rival rulings in the light of the **consequences** which would follow from adopting it as a ruling in general application. That evaluation should be made by reference to legally appropriate values, including justice, common sense, public policy and legal convenience, as the judge sees those.

Thirdly, the ruling must be shown to be **coherent** with the rest of the legal system or the relevant branch of it. This depends upon its being either an analogical extrapolation from already settled rules of law or precedents of binding or persuasive character, or a particular application of some general principle already at least implicit in the pre-established law in the sense that it does not conflict with any previously established legal rule.*[15]

But also coherence is a fuzzy criterion. Its meaning seem closely related to the guiding principles of the legal order and the legal order as a whole*[16] and stresses the need for discretionary decisions to absorb the distinctive features of the system such as normative structure, sources of law and methods of interpretation.

A coherent interpretation is one that most intelligently and creatively 'fits' into the complex web of social and legal practices. A coherent interpretation could press beyond or criticise existing conventions and traditions. For if law's legitimacy is not mechanically established by a rules pedigree or its process formulation, the interpreter has a grave responsibility to re-establish the productivity or normativity of law every time he or she construes a statute.*[17]

The method of coherence permits the judge to do ideological work when he furthers a particular legal regime by developing it in the face of a gap, conflict or ambiguity. But maybe this is as far as we have to go. The position that there is a middle methodology between law application and judicial legislation admits that there are rules that constrain the scope of judicial law making and thereby serve to limit the impact of ideology on adjudication.

[15] R. Dworkin. Law's Empire. Cambridge Mass, 1986, p. 52.

[16] N. MacCormick. Legal Reasoning and Legal Theory. Oxford, 1978, pp. 250–55.

[17] W. N. Eskridge. Dynamic Statutory Interpretation. Cambridge Mass, 1994, p. 201.

But coherence advocates moves in the direction of blurring the difference between the middle term of coherence and judicial legislation. They concede or even affirm the political character of adjudication. They affirm the possibility of rightness in even the hardest cases while abandoning any claim that this rightness is objective or demonstrable in the sense that any rational practitioner of legal reasoning would accept it.

Nevertheless, the method of coherence provides a response to the fear that such rules only push the problem of judicial legislation back from the interpretation of substantive rules to the interpretation of the constraining rules. The Community judge who interprets his political theory of integration through the requirement of coherence with prior cases and other rules and principles of the system could be said to enact the system's ideology of judicial constraint or judicial activism rather than his personal subjective view.

But what are these political theories? If we are coherence theorists we have to believe that the Community legal regime taken as a whole only expresses a particular combination of political theoretical conceptions. Hence, we have to exclude other political conceptions from the interpretative process.

Thus, for the coherence theorist a hard case may require judgements of political theory because there may be more than one solution that meets the requirement of coherence or fit. But the investigation whether a proposed solution passes the coherence-test or not will be influenced by the same political theories that the judge appeals to when he or she at the end of the day has to choose between outcomes that are equally coherent.

Finally, we end up asking ourselves whether there is a metacriterion for choosing between political theories or between versions of coherence influenced by those theories other than the judge's conviction that a given theory is the best.

So perhaps academics and judges, when accused of engaging in ideological work or judicial legislation, should refrain from using the rhetoric of legal necessity. Maybe it is fairer to claim that we are only constrained by the legal materials to a certain extent and that we reach results to which our ideology is relevant.

The openness of the interpretive process of the European Courts calls for a broader account of the role of the judiciary in the law-making process. A major task for legal scholarship is to endeavour to analyse the reciprocal or non-reciprocal relationship between the European courts and the political sphere.

But in doing so we need to keep in mind that these relationships are radically indeterminate: Comparable social conditions, both within the same and across different societies continuously generate contrary legal responses and comparable legal forms have produced contrary social effects. So, if a society's law cannot be understood as an objective response to objective historical processes, neither can it be understood as a neutral technology adapted to the needs of that particular society.

4. Critical view

A group of jurists and legal theorist claim that legal reasoning and justifications of courts are **only** argumentative techniques. There is never a 'correct legal solution' that is other than the correct ethical and political solution to a legal problem. The critical movement claims that legal text does not constrain the judge's interpretation in any significant way.[*18] This position collapses the distinction between rule-making and rule application by showing that rule application cannot be isolated from subjective or ideological influence.

Critical investigations of the ECJ's case law aimed at empirically determining reactions to the rulings, in order then to endeavour to establish a connection between reaction and determination, involve a methodological tension. These studies are orientated at determining the **causes** of why judges adopting a choice consciously distance themselves from the legal **foundation** of the choice. It appears that the sources of law are significant as factors that actually exist as **causes** of the judge's choice in hard cases. This is a **descriptive** starting-point in the sense that the answer may be sought through socio-psychological investigations of the judge's reasons for deciding the case. This starting-point should not be confused with the issue of the normative function of the sources of law as limiting judicial discretion.

It is virtually obvious that courts do not have unlimited power to pursue their political goals. Even if it is fruitful for the understanding of judicial decision-making to endeavour to determine the political limits of judicial discretion, there nevertheless remains the question of whether there are any actual limits on what a court is legally obliged to do and what a court can — from the political viewpoint — avoid doing. The problem with empirical investigations is that while they in principle consider it impossible to conduct a legally normative orientated examination — which with legal norms as a basis endeavours to establish the limits on legitimate judicial discretion — they abstain from introducing a normative element in their sociological yardsticks.

[18] D. Kennedy. Freedom and Constraint in Adjudication: A Critical Phenomenology. – Journal of Legal Educ, 1986, p. 518.

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Constitutional Activism and Deference Through Judicial Reasoning: Confirming an Indeterminacy Thesis

Introduction

One of the major problems a theory of constitutional adjudication is supposed to handle is identifying those techniques of reasoning and arguments, which are appropriate in constitutional cases. Determining what is permissible for a constitutional judge to do in the course of interpretation within procedural limits of constitutional adjudication (*i.e.* legal rules on jurisdiction, standing, deadline, evidence, *etc.*) promotes foreseeability and legal certainty considerations. On a micro level, the participants of an actual review procedure are informed as to what type of arguments may hold sway and, thus, they may formulate their case for or against the constitutionality of the challenged norm in terms accepted by the court. On a larger scale, it might make constitutional adjudication more predictable for other participants of the public discourse.

Furthermore, identifying those techniques of reasoning which are appropriate in constitutional adjudication is instrumental for identifying the scope of the legitimate exercise of the constitutional review power. It is important to see that judicial activism and deference are not encountered only when review fora trespass the procedural limits prescribing the jurisdiction of the courts and further confines of the review power. Another important domain of a study of activism and deference is an analysis of activism and deference via constitutional interpretation.[*1] The major threat stemming from activism is that of undue interference with the powers of other branches, and, thus, with the institutional guarantees established in a constitution securing the proper functioning of the government and the protection of constitutional rights. On the other hand, judicial deference has the potential to undermine the demand for reasoned judgment, and, in extreme cases, to

[1] N. Dorsen. How American Judges Interpret the Bill of Rights. – Constitutional Commentary, 1994, Vol. 11, No. 2, p. 383.

endanger the meaningful exercise of the review power. Like activism, deference also may result in an unsolicited interference of courts with the powers of other branches, a consequence that is often overlooked. Theories of constitutional interpretation, as well as theories of judicial review, represent a continuing intellectual struggle to establish a concept of constitutional interpretation which is capable of responding to even hard cases under the constitution without transgressing the limits of the legitimate exercise of the review powers.

Theories of constitutional interpretation which offer aids that might be relied on in order to define the proper interpretation of constitutional provisions promise more than certainty in defining the meaning of constitutional provisions once and for all. Such theories also suggest that it is possible to curb indeterminacy and judicial discretion in constitutional interpretation. Although, in principle, there is an infinite number of arguments and reasons which may be invoked in constitutional argument, theories of constitutional interpretation and judgments of constitutional review fora tend to refer to relatively few types of arguments when resolving constitutional issues. References to the (plain) text of constitutional provisions, previous judicial decisions on the subject (precedent) and scholarly arguments are often invoked. In addition to "legal arguments" in a narrow sense, constitutional review fora and theories of interpretation tend to rely on "extra-legal arguments", such as value arguments, consequential reasoning and on references to history and traditions.

Marika Lintamm's paper rests on the premise that constitutional interpretation is a process where values enframed in the text of a written constitution come to life. Theories of constitutional interpretation which hold that it is appropriate for constitutional justices to invoke value arguments and rely on judge-made principles are often criticised as the strongholds of unsolicited judicial activism. Critics usually mention the uncontrolled discretion of judges in identifying and defining the values and principles used as aids of interpretation, and the arbitrariness in prescribing consequences on the basis of such values and principles. Furthermore, such an approach might easily amount to judicial lawmaking, and it is also likely to undermine the protection and exercise of constitutional rights.

In contrast, however, another type of extra-legal arguments which are herein referred to as historical arguments have a flair of objectivity, neutrality and predictability. At the outset, historical narratives seem to bear all the characteristics that make an argument suitable to restrain judicial review and thus to keep the judicial power at bay. It is, therefore, worth examining whether references to history and traditions of the polity ("historical narratives") do indeed fulfil this promise. On the one hand, such an analysis would reveal whether this claim is correct. If so, it might be possible to conclude that theories which extensively rely on references to history and traditions may be capable of guiding constitutional interpretation. In contrast, however, in case the analysis reveals that references to history and traditions are not capable of delimiting the indeterminacy in constitutional reasoning, the analysis may still reveal some factors which contribute to or trigger indeterminacy in constitutional interpretation. This approach is believed to shed light on such problems of constitutional interpretation which might contribute to further critical analysis.

1. Historical narratives as means of limiting indeterminacy in constitutional reasoning

1.1. Qualities of historical narratives

As Justice Oliver Wendell Holmes of the US Supreme Court duly observed once, "[h]istoric continuity with the past is not a duty, it is only a necessity".[*2] Nonetheless, most lawyers attribute special weight to historical narratives in constitutional reasoning. Counsels and courts often rely on references to the past, history and traditions: parties introduce evidence on the historical background of a case, justices inquire into past injustice or past experiences, and courts establish tests in order to make references to the past manageable for the purposes of judicial reasoning. References to history are not always meant to set a positive example. The historical record may be invoked to consult the wisdom of the ancestors, and also, to remind about the evils of past times.

[2] O. W. Holmes. Learning and Science. – Collected Papers. New York: Harcourt, Brace, 1920, p. 139. For a detailed exposition of the problem see R. Posner. Past-dependency, Pragmatism, and Critique of History in Adjudication and Legal Scholarship. – University of Chicago Law Review, 2000, Vol. 67, No. 3, pp. 588–592. In the essay Posner 'rediscovered' Nietzsche's essay "On the Uses and Disadvantages of History for Life" (1874) for the purposes of legal and constitutional reasoning.

References to historical facts and data are attractive for a number of reasons. They suggest clear-cut, black-and-white answers that can be established on the basis of objective data.[*3] If viewed so, references to history are descriptive and historical evidence is a non-interpretive tool of reasoning (facts speak for themselves). Thus, historical evidence suggests that the constitutionality of the challenged norm is going to be determined on an objective basis. Also, references to historical evidence imply that the interpreter is neutral (impartial) as the standard along which the issue was decided is an objective one. According to Owen Fiss, "Objectivity in the law connotes standards. It implies that an interpretation can be measured against a set of norms that transcend the particular vantage point of the person offering the interpretation. Objectivity implies that the interpretation can be judged by something other than one's own notions of correctness. It imparts a notion of impersonality. The idea of an objective interpretation does not require that the interpretation be wholly determined by some source external to the judge, but only that it be constrained".[*4]

Historical arguments hint that every observer would have arrived at the same conclusion, and thus they suggest the neutrality (impartiality) of the decision-maker and of the decision.[*5] In addition, arguments in history suggest that the decision rests on well-set, firmly established grounds. In other words, judgments based on historical narratives seem to preserve the *status quo*; they create an impression of stability and continuity.[*6] An analysis of judicial decisions invoking historical narratives, however, does not seem to support the above findings.

Constitutional review fora are often criticised for writing bad history. Numerous scholars argue that in certain cases the justices misunderstood or misinterpreted historical data.[*7] The debate continues on the bench: justices often condemn each other for applying mistaken conclusions drawn on history in the case before the court. Sometimes these disputes on proper or tainted use of historical sources and data might go well beyond the legal issues that gave rise to the dispute.[*8] At this point a question presents itself in fairly clear terms: are these disagreements attributable to the fact that judges tend not to be professional historians, or else, do these disagreements follow from the characteristics of historical narratives?

Indeed, modern studies of historiography reveal that arguments in history and traditions of the polity are normative claims, implying value judgments. As a result, any historical analysis provides a 'history of today'. Thus, historical narratives are not descriptive but they are in essence normative.[*9] When resorting to historical narratives the interpreter has a privileged position at the end of the past; the observer identifies herself with the problem and with the assertion that a solution to that problem is within reach. Thus, instead of providing an objective, neutral justification, references to history and traditions of the polity are about construing the past for the purposes of present and future legal and constitutional reasoning. Historical examples are invoked to reinforce norms of behaviour in accordance with past examples, or to deter from a certain conduct using past analogies to model possible (undesired) outcomes.[*10]

As references to history and traditions of the polity are forward-looking, they might appear convenient for supporting future-oriented reasoning which is insensitive to the outcome (to the decision in the case). Arguments in history and references to traditions in particular offer themselves as suitable bases for principled judgment. This is one of the many reasons why they are so well-taken in legal and constitutional argument. However, historical narratives are invented, thus, they are *per se* context-sensitive and result-oriented. This is why they cannot fulfil their initial promise of objectivity and neutrality. As historical narratives are teleological and normative, they cannot give rise to principled legal and judicial decisions. These findings might form the framework of understanding arguments in history and traditions in constitutional adjudication.

Arguments in history and traditions may be formulated to preserve a certain institutional arrangement, and also to change it; that the very same references may foster as well as limit individual liberty; that the same

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[3] R. Gordon. Foreword: The Arrival of Historicism. – Stanford Law Review, 1997, Vol. 49, No. 5, p. 1025; I. Crosby. Worlds in Stone: Gadamer, Heidegger, and Originalism. – Texas Law Review, 1998, Vol. 76, No. 4, p. 849. For an argument that objectivity is a component of the rule of law (along with stability and neutrality) see P. Schlag. Authorizing Interpretation. – Connecticut Law Review, 1998, Vol. 30, No. 3, Note 11 at p. 1069.

[4] O. Fiss. Objectivity and Interpretation. – Stanford Law Review, 1982, Vol. 34, No. 3, p. 744.

[5] Neutrality in the judicial context may refer to the outcome of a judgment but also to a technique of decisions. Classic texts on the requirement of neutrality in judicial decision-making are H. Wechsler. Toward Neutral Principles of Constitutional Law. – Harvard Law Review, 1959, Vol. 73, No. 1, p. 1; R. Bork. Neutral Principles and Some First Amendment Problems. – Indiana Law Journal, 1971, Vol. 47, No. 1, p. 1.

[6] Historical narratives create discontinuity when the historical example refers to the "disliked past". R. Gordon (Note 3), p. 1028.

[7] J. P. Reid. Law and History. – Loyola of Los Angeles Law Review, 1993, Vol. 27, No. 1, pp. 197–203.

[8] In the U.S. see *e.g*. R. Brown. Tradition and Insight. – Yale Law Journal, 1993, Vol. 103, No. 1, pp. 210–211. In Canada see F. Vaughan. The Use of History in Canadian Constitutional Adjudication. – Dalhousie Law Journal, 1989, Vol. 12, No. 1, p. 61.

[9] R. Aron. The Forms of Historical Intelligibility. – R. Aron. Politics and History. New Brunswick-London: Transaction Books, 1984, p. 60.

[10] For a typology of the functions of historical narrative see H. White. Metahistory. The Historical Imagination in Nineteenth-Century Europe. Baltimore: Johns Hopkins University Press, 1993, p. 7 *et seq.*

set of references is capable of delineating as well as increasing the legitimate choices of the interpreter, and thus the scope of judicial review. Also, legal reasoning, or at least common law reasoning, has methodological features which may call for references to the past.*[11] In the context of constitutional adjudication, this means that arguments invoking the past may be devices for activism as well as for deference. Thus, arguments invoking the past should be analysed in a more comprehensive framework that also responds to teleological aspirations, claims of normativeness and continuity raised or masked by these references. A final caveat: the past does not bind the present unless the present chooses to be bound.*[12] According to Reid "[h]istory's great attractiveness for judges occurs when they are indulging in judicial activism. History lets them be activists 'in the name of constitutional continuity'."*[13]

1.2. History as facts

As a point of departure, it might be interesting to focus on the application of historical narratives in a context where the text of a constitution expressly called for reliance on history. In this respect the jurisprudence of the Canadian Supreme Court concerning aboriginal rights claims presents an appropriate illustration. Subsection 35 (1) of the Canadian Constitution Act (1982) provides constitutional protection for existing aboriginal rights.*[14]

The underlying dilemma encountered by the Canadian Supreme Court in aboriginal rights cases in the following terms: do aboriginal rights have an independent origin in a strictly legal sense, or do they follow from any legal act of the colonists or their heirs?*[15] The legal regulations in force did not exclude any of these interpretations. Indeed, responding to the above question is more than a symbolic gesture or a technical matter. Indeed, this question has been posed and answered in different ways during the years of European presence in Canada, and the response has had profound implications on the constitutional and legal status of aboriginal peoples in the Canadian polity. A position according to which the rights of aboriginal peoples were created by the colonists implies that the colonists occupied uninhabited lands (*terra nullius*) and that whatever happened to the inhabitants of North America for thousands of years prior to European occupation shall have no legal relevance in determining the legal status of aboriginal peoples. Indeed, this used to be the baseline of the legal position in all lands once occupied by the Imperial Crown (*i.e*. Canada, Australia or the United States).*[16]

In Canada a departure from this position was indicated in a decision of the Supreme Court in 1973 in the *Calder* case*[17] and was reaffirmed by the Court in the *Guerin* case*[18]: in these cases the justices held that aboriginal rights were not created by the colonists. The inclusion of § 35 in the Canadian constitution in 1982 recorded the affirmation of this position. Nonetheless, ever since 1982 political actors failed to agree on a conclusive, detailed regulation as to what constitutes aboriginal rights. It was left for the Supreme Court to determine "existing aboriginal rights" under § 35 of the Canadian Constitution Act (1982). In Canada, a typical claim for aboriginal rights is formulated as a constitutional challenge to a statutory provision with reference to an aboriginal right protected under § 35 (1) of the Constitution. In case a court finds that a law of general application is in conflict with an aboriginal right, it does not result in the overall invalidity of the challenged rule. Rather, the challenged rule is not applicable to the extent the aboriginal right was established.*[19]

When the Canadian Supreme Court established the standards of review guiding the application of § 35, the justices intended to find a technique of interpretation which is able to reveal already existing aboriginal

[11] As the essence of legal reasoning is to support a present position with examples and analogies drawn from sources of the institutionalised past, this finding might be true for any form of legal reasoning. M. Krygier. Law as Tradition. – Law & Philosophy, 1984, Vol. 5, No. 2, pp. 257–258.

[12] J. G. Wofford. The Uses of History in Constitutional Interpretation. – University of Chicago Law Review, 1964, Vol. 37, No. 3, p. 523.

[13] J. P. Reid (Note 7), p. 204.

[14] In the Canadian context the term aboriginal refers to 'Indians', 'Inuit' and 'Metis' peoples in accordance with § 35 (2), Constitution Act (1982).

[15] This dilemma is phrased and described in terms of the "contingent" and "inherent" approaches to aboriginal rights in M. Asch, P. Macklem. Aboriginal Rights and Canadian Sovereignty. An Essay on R. v. Sparrow. – Alberta Law Review, 1991, Vol. 29, No. 3, pp. 501–503.

[16] For a summary of the imperial doctrine of aboriginal rights see B. Slattery. The Organic Constitution, Aboriginal Peoples and the Evolution of Canada. – Osgoode Hall Law Journal, 1995, Vol. 34, No. 1, pp. 103–108. The foundations of the doctrine were defined by Justice Marshall of the U.S. Supreme Court in the trilogy of 'Indian jurisprudence'. – *J. v. M'Intosh*, 21 U.S. (8 Wheat.) 543 [1823], *Nation v. State of Georgia*, 30 U.S. (5 Pet.) 1 [1831] and *Worcester v. State of Georgia*, 31 U.S. (6 Pet.) 515 [1832].

[17] *Calder v. A-G of British Columbia*, [1973] S.C.R. 313, dissenting opinion of Justice Hall.

[18] *Guerin v. The Queen*, [1984] 2 S.C.R. 335. The Australian High Court made this leap in 1992 in *Mabo v. Queensland* [No. 2.], [1992] 175 C.L.R. 1.

[19] *R. v. Sparrow*, [1990] 1 S.C.R. 1075, 1110; also *R. v. Adams*, [1996] 3 S.C.R. 101, paragraph No. 61.

rights and distinguish them from newly asserted ones. Requiring evidence on the origins of the aboriginal rights asserted seems to be a reasonable approach to the application of § 35 (1) and it is even possible to argue that this approach is invited by the text of the provision. In cases involving aboriginal rights the Canadian Supreme Court systematically examines arguments invoking the past.[*20]

The Canadian Supreme Court gave the first comprehensive account of § 35 (1) in *R. v. Sparrow*.[*21] The issue in the case concerned the reach of constitutionally permissible limitations on aboriginal rights.[*22] In *Sparrow* the Supreme Court held that in order to invoke § 35 (1) successfully the court shall find that (1) the applicant exercised an aboriginal right, that (2) the said right was not extinguished (*i.e.* it is existing)[*23], that (3) the challenged regulation infringed the said right, and that (4) the infringement of the said right cannot be justified (*the Sparrow-test*).[*24] The interpretive framework outlined in Sparrow is based on a purposive interpretation of § 35 (1): it shall be interpreted in a generous, liberal manner, and, it shall be construed in the light of history, traditions and treaties. In addition, the Court included another reason for the examination of the past in § 35 (1) analysis. This approach is necessitated by the longstanding trust relationship of the Crown and aboriginal peoples. Thus, in defining existing aboriginal rights under § 35 (1) the Canadian Supreme Court attributed special significance to the analysis of history.

The Canadian Supreme Court dealt with elaborating the criteria of ascertaining aboriginal rights (the first step of the Sparrow test) in detail in *R v. van der Peet*.[*25] In order to decide on the constitutionality of the fishery regulation the Supreme Court had to ascertain whether there exists an aboriginal right to fish under § 35 (1) of the Constitution. In *van der Peet*, the Canadian Supreme Court established a test which requires the right's claimant to show that the practice, custom or tradition is of central significance to the aboriginal community in question ("distinctive culture"), that the practice, custom or tradition "made the society what it was", and that the right claimed stems from a practice, custom or tradition prior to contact with Europeans ("continuity"). The justices of the Canadian Supreme Court disagreed about the outcome of the application of this test on the case at hand. The justices clashed about the proper phrasing of the claim, as well as about the level of prevision required for fulfilling the *van der Peet* test.

Following *van der Peet*, the Supreme Court encountered the issue of establishing aboriginal title in land for the purposes of § 35 (1) in the *Delgamuukw* case.[*26] The crucial difference between the *van der Peet* test (aboriginal rights) and the *Delgamuukw* test (aboriginal title) is that, while in *van der Peet* the Supreme Court pointed to first contact with Europeans for the purposes of establishing continuity, in *Delgamuukw* the justices said that the relevant point in time was the Crown's assertion of sovereignty.[*27] The pragmatic consideration behind this shift is that the assertion of sovereignty is easier to establish. In *Delgamuukw* the Supreme Court also seems to have relaxed the standards applicable to establishing continuity. The justices reaffirmed their position on allowing post-sovereignty evidence to show continuity with pre-sovereignty possession of the lands.[*28] This way, the array of potentially acceptable evidence was considerably broadened by the Supreme Court.

The practical application of any test requiring evidence on the past of aboriginal peoples results in special challenges concerning the availability, admissibility and assessment of evidence. As for the evidence itself, it is crucial to note that before the arrival of the Europeans the aboriginal people had no written history: "their history was recorded in their oral traditions".[*29] The application of the tests prescribed by the Cana-

[20] F. Vaughan (Note 8), p. 78.

[21] *R. v. Sparrow* (Note 19). Chief Justice Dickson and Justice LaForest wrote for a unanimous court.

[22] The standard of justification was refined in Gladstone. See *e.g. R. v. Adams* (Note 19), paragraph No. 34. The four-step "Sparrow test" is the standard approach in § 35 (1) cases applied by lower courts.

[23] In order to successfully argue extinguishment the Crown has to show that the regulation of the aboriginal right reflected a 'clear and plain' intent to extinguish the right. See *R. v. Sparrow* (Note 19), 1099. This standard of extinguishment was relaxed subsequently. The Australian High Court relied on the Sparrow decision when establishing the test for extinguishment *Wik Peoples v. Queensland*, [1996] 187 C.L.R. 1. In the U.S. the Supreme Court of Vermont introduced a new test for extinguishment in *State v. Elliott*, 159. See 102, 616 A.2d 210 [1992], cert. denied 507 U.S. 911 [1993].

[24] The burden of justification is on the government. *R. v. Sparrow* (Note 19), 1110.

[25] *R v. van der Peet,* [1996] 2 S.C.R. 507. Chief Justice Lamer wrote for a majority of 7, associate justices McLachlin and L'Heureux-Dube filed separate dissenting opinions.

[26] *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, the majority judgment was authored by Chief Justice Lamer.

[27] D. Elliott. Delgamuukw. Back to Court? – Manitoba Law Journal, 1998, Vol. 98, pp. 112–114.

[28] *Delgamuukw v. British Columbia* (Note 26), paragraph No. 142. *Cf.* with the position of the Australian High Court in Mabo holding that "[n]ative title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs." *Mabo v. Queensland* (Note 18), paragraph No. 64. The High Court continued by adding that the "ascertainment may present a problem of considerable difficulty".

[29] C. McLeod. The Oral Histories of Canada's Northern People, Anglo-Canadian Evidence Law, and Canada's Fiduciary Duty to the First Nations. Breaking down the Barriers of the Past. – Alberta Law Review, 1992, Vol. 30, No. 4, p. 1279.

dian Supreme Court requires evidence on past events which are at best documented in the notes, reports and diaries of the conquerors, missionaries, military personnel and administrators. These written sources were once prepared to demonstrate the success of the measures of assimilation. Beyond the written sources in aboriginal cases the evidence is supplied by oral history, tales of origin, sacred rituals on origins and traditions, and oral submissions on long held, shared customs by group chiefs, elders and group members.*[30] In addition, aboriginal oral histories have an approach to the past significantly different from the approach of the Western tradition: aboriginal accounts of the past are not linear, not truth oriented and not human-centred.*[31] When submitted as evidence in a case, the truth or falsity of such oral histories and rituals is very difficult to assess via standard means of examining and assessing evidence. Courts of law are not accustomed to dealing with such sources of information. However, when such evidence is intended to establish an existing aboriginal right, a cultural gap*[32] of this sort may be fatal to the success of the claim.*[33]

Keeping in mind the *per se* interpretive nature of historical narratives, the Canadian cases highlight that an approach which does not acknowledge the particular features of historical evidence in the context of aboriginal rights is more likely to be inadequate to handle and analyse evidence on the past with regard to these rights. The lack of sensitivity towards history in the application of § 35 (1) and the test determining aboriginal rights may mean that judicial intervention cannot preserve the *status quo* as far as the status of aboriginal rights is concerned. Note that in the U.S. Frickey warned about the application of aboriginal history submitting that "unless injected with a heavy dose of historical perspective and legal realism, formal lawyerly analysis not only often fails to illuminate the issues in federal Indian law, but can also result in deceiving conclusions."*[34]

In the Canadian aboriginal cases the primary purpose of historical reasoning is not the limitation of the discretion of the courts in defining the scope of aboriginal rights. Aboriginal rights defined by the courts under § 35 (1) are very limited and cannot be generalised: the courts are deciding about rights exercised by a particular group on a particular territory. This characteristic distinguishes the existing aboriginal rights ascertained by Canadian courts from the constitutional rights derived from penumbras in the U.S., from the "fundamental principles recognised by the laws of the republic" in France. Although aboriginal rights when established are placed at the level of constitutional norms, their scope is limited to aboriginal peoples*[35], and in the case of land-related rights, to the aboriginal territory. In contrast penumbra rights and fundamental principles are constitutional rights of general application. Certainly, from the perspective of an analysis of judicial activism, the specificity of aboriginal rights is indeed a strong, internal limit on the powers of the courts.

The above examples also suggest that historical reasoning in the context of aboriginal rights in Canada did not make the operation of § 35 (1) more predictable. Historical analysis in a test does not automatically limit the discretion of the decision-maker under a constitutional provision. The more complex the test, the higher the standard of review and the more evidence is required, the more decisional freedom the courts may exercise. The reason why the decisional freedom (loosely guided discretion) of the courts is not so apparent with regard to aboriginal rights is that when the courts ascertain a new aboriginal right, it does not affect the entire legal system at once. Note, however, that the effects of ascertaining aboriginal rights are not merely quantitative. Constitutionally entrenched aboriginal rights increase the plurality of the Canadian legal system as they alter the applicability of legal norms of general application to relatively small aboriginal communities.

In addition, presuming that aboriginal rights existed before the entry into force of § 35 (1) of the Constitution, the status of those aboriginal rights which are not certified by the Canadian Supreme Court in actual cases is questionable. Even if such rights exist below the level of constitution protection, they cannot be relied on in order to prevent the application of general laws which infringe the culture, lives, customs and traditions of aboriginal peoples. In this regard it is important to note that § 35 (1) has a temporal dimension which is not so apparent, since the provision is a recent one. Constitutional rights, the existence of which are not acknowledged today, may be established over time. However, it is at least doubtful whether an aboriginal right which is found to be not existing today can be entrenched at a later time. This consideration further elucidates the significance of court decisions under § 35 (1).

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[30] See the Western and aboriginal notions of truth contrasted in C. McLeod (Note 29), pp. 1280–1281.

[31] Report of the Royal Commission on Aboriginal Peoples (1996), Vol. 1 (Looking Forward, Looking Back), p. 33.

[32] Note that as of today the Canadian Supreme Court does not have an aboriginal member. This fact is noteworthy in the light of § 6 of the Supreme Court Act requiring that at least three of the justices of the Supreme Court shall be from Quebec.

[33] See G. Stohr. The Repercussions of Orality in Federal Indian Law. – Arizona State Law Journal, 1999, Vol. 31, No. 2, p. 687 pointing to the same problem in the U.S.

[34] P. Frickey. Adjudication and its Discontents, Coherence and Conciliation in Federal Indian Law. – Harvard Law Review, 1997, Vol. 110, No. 8, p. 1757.

[35] Aboriginal rights are collective rights, and can be exercised only by the members of a specific group of aboriginal peoples.

When ascertaining existing aboriginal rights under § 35 (1) of the Canadian Constitution, the Supreme Court is undertaking a task that the political process could not handle. While the decisions of the Supreme Court ascertain certain rights, they also discard many claims. Although the Supreme Court encourages negotiations concerning the scope and reach of aboriginal rights, especially in aboriginal title cases, it remains to be seen whether the political discourse will be able to reach an agreement on aboriginal rights via negotiations against this constitutional background.*[36]

The above analysis shows that even an uncontested constitutional authorisation offers very little guidance as to the practical application of historical narratives. In the actual cases, this indeterminacy is transformed into a lack of constitutional protection and, consequently, into limitations on the aboriginal way of life. In addition, the examination of case law reveals the extent to which the interpreter's self determines the construction of history from the past, an aspect which is relevant to the overall examination of historical narratives in constitutional adjudication.

1.3. History as a source of constitutional rights and obligations

The opposite of the problem discussed appears in cases where the constitution does not provide guidance to the resolution of a constitutional problem and the judicial review forum substitutes the text of the constitution with historical narratives. In the account of the Canadian Supreme Court's decision regarding the constitutionality of the unilateral secession of Quebec in the *Quebec secession reference*[*37] the justices held that although the Canadian constitution does not have a specific provision on unilateral secession, it is possible to ascertain four constitutional principles which are instrumental to the judicial determination of the issue. In the case the Canadian Supreme Court held that federalism, democracy, rule of law and constitutionalism, and the protection of minorities are such constitutional principles which have always marked the application and operation of the Canadian constitution ever since the making of the first constitution act in 1867. The justices inferred these constitutional provisions from the constitutional history and the past of the federation, referring to numerous examples. Thus, the reasoning of the Supreme Court is based on a robust narrative of continuity. On the basis of these constitutional principles the Supreme Court concluded that while unilateral separation of provinces is prohibited, secession is possible if the population of the province clearly decides for it in a referendum, and if — on the basis of such a referendum — the terms of the secession are negotiated. On the basis of unwritten constitutional principles derived from history, the Canadian Supreme Court established an obligation to negotiate secession. It is important to point out that the obligation to negotiate secession amounts to a new manner of constitutional amendment.

The Canadian Supreme Court's reliance on historical narratives in the case points to intricacies in understanding judicial deference and various problems pertaining to constitutional continuity and the status of unwritten constitutional norms.

1.3.1. Judicial deference

In the decision the Supreme Court stressed the non-enforceable nature of the obligation to negotiate. When holding that the obligation to negotiate secession is not enforceable in court, the justices emphasise that the decision on secession pertains to the political branches. Thus, as the decision of the Supreme Court leaves the resolution of the issue of secession to the political process, the decision is deferential as far as judicial involvement in the enforcement of the obligations prescribed is concerned. Note, however, that the Canadian Supreme Court derived the obligation to negotiate from four newly identified, unwritten constitutional principles. These aspects and potential implications of the decision of the Supreme Court are not the signature traits of judicial deference.

1.3.2. Continuity

In the *Quebec secession reference* the Canadian Supreme Court heavily relied on confederation history as a source of constitutional obligations. In order to turn past events into constitutional rules for the present, the Court used a strong narrative of continuity. Although so far the Supreme Court did not derive new constitu-

[36] See *Delgamuukw v. British Columbia* (Note 26), paragraph No. 195. For an argument that aboriginal title claims shall be negotiated rather than litigated see G. R. Schiveley. Negotiation and Native Title. Why Common Law Courts are Not the Proper Fora for Determining Native Land Title Issues. – Vanderbilt Journal of Transnational Law, 2000, Vol. 33, No. 2, p. 427.

[37] *Reference re Secession of Quebec*, [1998] 2 S.C.R. 217 (hereinafter: Quebec secession reference. The reference was an attempt to clarify the constitutional relevance and potential consequences of Quebec's long-voiced demands to secede from the rest of Canada.

tional principles and did barely use the ones created in the *Quebec secession reference*, the justices nonetheless created an interpretive device which has the potential to give rise to new constitutional norms and constitutional obligations any time in the future.

In this respect it is important to add that the Canadian Supreme Court is not the only constitutional review forum which attributes special significance to constitutional continuity. Since its decision in the freedom of association case in 1971[*38] the French Constitutional Council has confirmed numerous "fundamental principles recognised by the laws of the republic". "Fundamental principles" are mentioned in the preamble of the 1946 French Constitution, a document which — along with the 1789 Declaration of Rights of Man and Citizen — is invoked by the preamble of the French Constitution (1958) in force.[*39] The 1946 preamble does not specify "fundamental principles". The Constitutional Council ascertains these fundamental principles from legislation passed by republican governments in a self-restrained fashion.[*40] According to Favoreu the fundamental principles are the expression of the continuity of republican constitutionalism.[*41]

Certainly, in certain respects the French approach towards "fundamental principles" resembles the concept of interpretation followed by the Canadian Supreme Court in the *Quebec secession reference*. When deriving principles with normative consequences both judicial review fora constructed the past through the screen of a dominant rhetoric. The French Constitutional Council relied on the conceptual framework of the republican tradition of France; in the Canadian case the Supreme Court relied on the success of the federal structure of government (confederation). There is, however, a major difference: the power of the French Constitutional Council to establish fundamental principles may be based on the text of the preamble of the constitution. In the Canadian context such a textual support is not available in the written constitution. Furthermore, the French Constitutional Council derives the "fundamental principles" from legal rules which were in force or are still in force at the time of the decision. Thus, the normativity of the fundamental principles is well founded. In contrast, the Canadian Supreme Court established the constitutional principles on the basis of conclusions drawn from the history of the confederation.

1.3.3. Situating constitutional principles

In addition, when establishing the constitutional principles the Supreme Court did simply place them among the already existing constitutional norms, and did not describe their status in the system of written and unwritten constitutional norms (such as constitutional conventions). This failure might be partly due to the fact that constitutional principles were derived from a source external to the text of the Canadian constitution, from the history of the confederation along a sweeping narrative of constitutional continuity. Some may argue that as a result, it is highly unlikely that such principles may be in conflict with the constitution.

In this respect note, on the one hand, that the Canadian Supreme Court's reading of the message of constitutional continuity is only one interpretation. The secessionist politicians in Quebec draw different conclusions from the past of the confederation. What is a story of accommodation for one party is a story of abuse for the other. This finding may have especially serious consequences in the Canadian context as the obligation to negotiate established by the Supreme Court on the basis of the constitutional principles is not enforceable in court. As a result, the constitutional obligation to negotiate is a duty which may be breached without recourse or remedy. Those who do not agree with the Supreme Court's interpretation of confederation history and its constitutional consequences may share their disagreement with fellow actors of the political process but not with the Supreme Court. If the justices' interpretation of confederation history is contested, it results in a violation of a constitutional norm which cannot be remedied.

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[38] DC 71-44 of July 16, 1971 on the freedom of association. See especially '*Considerant 2*'.

[39] Note that the 1958 French Constitution does not have a 'bill of rights'. The preamble of the 1958 French Constitution refers to the solemn attachment of the French people to human rights and the principles of national sovereignty as defined in the 1789 Declaration of Rights of Men and Citizen, reaffirmed and complemented by the preamble of the 1946 French Constitution.

[40] The Constitutional Council ascertained about a dozen fundamental principles so far. L. Favoreu, L. Philip. Les grandes decisions du Conseil constitutionnel. 7th ed. Paris: Dalloz/Sirey, 1993, p. 265; also M. Lascombe. Droit constitutionnel de la Veme Republic. Paris: Hartmann, 1995, p. 248. Some of these 'fundamental principles' were established in the jurisprudence of the Conseil d'Etat before. P. Avril, J. Gicquel. Le Conseil constitutionnel. Paris: Monthchrestien, 1995, p. 41; C. Emeri, Ch. Bidegaray. La Constitution en France de 1789 a nos jours, Etudes de droit politique et constitionnel. Paris: Armand Colin, 1997, p. 174.

[41] L. Favoreu. Les principes fondamentaux reconnus par les lois de la republique. – La Republique en droit francais. B. Mathieu, M. Verpeaux (eds.). Paris: Economica, 1992, pp. 237–240. In this respect, it shall be noted that although the discretion of the Constitutional Council may be limited in confirming "fundamental principles" under the preamble, there are other unwritten constitutional principles recognised and applied in French constitutional jurisprudence, such as the 'principles particularly necessary in our times', the 'objectives of constitutional value or principles of constitutional value', the 'general principles of law', and the 'republican tradition'.

1.3.4. Amending the constitution

While the Supreme Court emphasised the legality of secession and a negotiated constitutional amendment, the justices did not specify which amendment procedure shall apply as a means to achieve that secession. To be more precise, the Supreme Court did not specify whether any of the procedures prescribed for constitutional amendment in the Canadian Constitution are applicable to secession[*42], or, should the requirement of negotiated secession prescribed by the Supreme Court replace all other procedures of constitutional amendment in the secession context.[*43] This way the Canadian Supreme Court placed itself into the delicate position of possibly altering the amending formula of the very constitution it is supposed to enforce.

Amending formulas of constitutions are usually regarded to be exclusive: they prescribe the only means of amending the constitution. Most constitutional review fora do not have the power to review the constitutionality of constitutional amendments. Express authorisation to do so is granted to the South African Constitutional Court[*44] and the Supreme Court of Nepal[*45] in their respective constitutions. Also, the Romanian Constitutional Court may review initiatives of constitutional amendment, *ex officio*, in a preliminary review procedure.[*46] Note, however, that the decision of the Constitutional Court may be overruled by a 2/3 majority obtained in both houses of parliament.[*47]

On the other hand, a number of judicial review fora asserted jurisdiction to review constitutional amendments indirectly or directly. In the second Maastricht decision[*48] the French Constitutional Council held that although the constitution-making power is sovereign and, as a result, it may abolish, alter or supplement norms of constitutional status in a manner it finds proper, and may also enact new constitutional provisions which violate constitutional norms in force, the power to amend the constitution may be exercised only within the substantive limits imposed by the constitution.[*49] According to Rousseau this finding is a clear indication that the French Constitutional Council finds itself competent to review the constitutionality of constitutional amendments.[*50]

In contrast, the German Constitutional Court held in express terms that the Constitutional Court has the power to annul unconstitutional constitutional provisions.[*51] While the jurisdiction of the German Constitutional Court to review unconstitutional constitutional amendments is not mentioned expressly in written norms, the reasoning of the Constitutional Court has a profound textual support in article 79 (3) of the *Grundgesetz* prohibiting certain categories of constitutional amendments, such as amendments intending to alter the federal structure, the protection of basic rights and human dignity. In the words of the Constitutional Court, the "purpose of article 79 (3) is to prevent both abolition of the substance or the basis of the existing constitutional order, by the formal legal means of amendment /…/ and abuse of the constitution to legalize a totalitarian regime".[*52]

The above cases in which constitutional review fora asserted their jurisdiction to review the constitutionality of constitutional amendment may be regarded as court-invented measures to limit the application of an already existing amending formula.[*53] The decision of the Canadian Supreme Court in the *Quebec secession reference*, however, does not necessarily command such a reading. The obligation to negotiate may be read as a limitation on the application of the amending formula of the Canadian constitution. Nonetheless, it is also possible to see the obligation to negotiate as a new means of constitutional amendment.

The tension between these two equally plausible interpretations was not resolved by the act providing for the rules on negotiating secession (Clarity Act of 2000). Thus, indeed it is possible that in the *Quebec*

[42] Note that before the 1982 constitutional revision the Canadian Constitution did not contain an amendment clause. See P. Hogg. Formal Amendment of the Constitution of Canada. – Law & Contemporary Problems, 1992, Vol. 55, No.1, pp. 255.

[43] P. J. Monahan. Doing the Rules. An Assessment of the Federal Clarity Act in Light of the Quebec Secession Reference. C.D. Howe Institute Commentary, 2000.

[44] Section 71 (2), interim Constitution, and §§ 144 and 167 (4) (d), final Constitution of South Africa.

[45] Article 116 (1), Nepalese Constitution of 1990. For an analysis see R. Stith. Unconstitutional Constitutional Amendments, The Extraordinary Power of Nepal's Supreme Court. – American University Journal of International Law & Policy, 1996, Vol. 11, No. 1, p. 47.

[46] Article 144 (a), Romanian Constitution.

[47] Article 145 (1), Romanian Constitution.

[48] DC 92-312, 2 September 1992.

[49] DC 92-312, 2 September 1992, 'Considerant 19' (referring to articles 7, 16 and 89 (4) and 89 (5) of the French Constitution of 1958).

[50] D. Rousseau. La revision de la Constitution sous la Veme Republique, Apres quarante ans, la Constitution de 1958 se reconnait-elle? Available at: http://www.conseil-constitutionnel.fr/ referendum/40q20.htm. Also P. Favoreu. Grandes decisions. 7th ed. p. 825, paragraph No. 74.

[51] BVerfGE, 1, 14 (1951) (*Southwest State* case).

[52] BVerfGE, 30, 1 (1970) (*Klass* (privacy of communications) case), reaffirming the Constitutional Court's jurisdiction to review unconstitutional constitutional amendments.

[53] To the extent such a power was not awarded to a court in the constitution or in subsequent legislation, the assertion of such a power is an instance of judicial activism.

secession reference the justices altered the rules on amending the constitution. This step is bothersome, not only because according to many the amending formula contains and preserves the *raison d'etre* of Canadian constitutionalism[*54], but also because the rules on formal constitutional amendment protect the integrity of the constitution from the passions of the majorities of the day. If so, the duty to negotiate secession derived from the constitutional principles might incidentally endanger the subject they were established to protect.

To conclude, the *Quebec secession reference* is a telling example of a constitutional argument where a historical narrative followed by a constitutional review forum resulted in ongoing political negotiations which affect the fate of numerous governments and individuals and might substantially alter the existing framework of governing. The decision demonstrates not only the flexibility of historical narratives, but also the side effects of a constitutional review forum's reliance on the interpretation of history as a source of constitutional obligations.

Conclusions

The analysis of historical narratives in the jurisprudence of various constitutional review fora from the perspective of the capacity of these references to curb judicial discretion in constitutional adjudication revealed that while the past and history may appear as very sound points of reference, historical narratives are interpretive and normative, and they depend not on objective foundations but on the discretion of the interpreter. These characteristics of historical narratives are especially bothersome in the context of constitutional adjudication. Exactly because of their reputation as objective and non-interpretive, judicial review fora have a tendency to rely on historical narratives in order to clarify or supplement constitutional provisions, to determine their proper scope of application, and sometimes even to substitute constitutional provisions. *Prima facie*, historical narratives look like the ultimate tools of mastering the virtue of judicial deference.

The perils of the application of historical narratives in constitutional adjudication are numerous. Due to the clash between the reputation of historical narratives and their actual characteristics, historical narratives may easily become the facade for asserting undisclosed value and policy preferences. As a result, reliance on historical narratives may undermine the very concept upon which the demand for reasoned opinions is based. References to the past have the potential to sidetrack constitutional reasoning: after all, courts are rarely ever petitioned to provide a proper historical account of a subject, but are rather asked to resolve a constitutional issue. Lengthy elaborations on the proper account of the past lose sight of the actual constitutional issue. In addition, historical narratives have the potential of freezing rights and obligations, and while being commanded to return to a long outgrown *status quo* is already problematic, knowing that there are numerous *status quo*s available for the courts to choose from makes adherence to a past state of affairs even more bothersome.

The analysis revealed that there are as many accounts of the past as there are interpreters. This aspect of historical narratives is especially disturbing when judicial review fora get to choose an account for the polity. In this sense historical narratives are means of inclusion and exclusion. Moreover, not all accounts of the past are intelligible for all interpreters. Unless the various narratives on the past are translated into a format accessible for judicial review fora, these accounts may go unnoticed or may be discarded. In the context of constitutional adjudication such failures tend to result in restrictions on constitutional rights. Furthermore, a restriction which results from such a clash of perspectives is not easy to restore, so missing one chance of being heard might perpetuate the injustice based on the inclusion of the rejected perspective.

Furthermore, because of their indeterminacy, historical narratives may easily deter judicial review fora to the farthest edges of legitimate exercise of the review power. After all, what the flexibility of historical narratives makes possible may not always be within the limits of the review power. The commands of the past might not be prescribed in the constitution — not even in a case where the history of the constitution is argued to give rise to certain obligations. History, indeed, may become a substitute replacing a written constitution, a source of norms to which only the constitutional review forum has access.

Indeed, despite the initial promise of forceful restraint, historical narratives are capable of increasing the indeterminacy of constitutional norms to a dangerous extent. On the one hand, some cases suggest this indeterminacy surrounding historical narratives may also result in the denial of constitutional rights. On the other hand, on the basis of these arguments constitutional review fora may, and do, establish new constitu-

[54] D. Greschner. The Quebec Secession Reference. Good-bye to Part V? – Constitutional Forum, 1998, Vol. 10, No. 1. p. 23. Also, A. C. Cairns. The Quebec Secession Reference. The Constitutional Obligation to Negotiate. – Constitutional Forum, 1998, Vol. 10, No. 1, p. 27; B. Slattery. First Nations and the Constitution. A Question of Trust. – Canadian Bar Review, 1992, Vol. 72, No. 2, p. 261.

tional rights and obligations which were not contained in the constitution. Via such devices judicial review fora redefine the contents of the constitution and command the cooperation of the political branches.

It is crucial to pay attention to serious dangers which call for caution regarding the application of historical narratives in constitutional adjudication. Despite the profound problems which have surfaced, it would be very unrealistic to demand that historical narratives be discarded from the theory or practice of judicial review. The most serious peril of the application of historical narratives is not that they perpetuate indeterminacy in constitutional reasoning, but that this potential is not accounted for. References to history are regarded as the least harmful arguments used in constitutional adjudication, and this premise often shields contestable judicial approaches from critical consideration. This caveat applies not only to specific theories of constitutional interpretation, but on a larger scale, independent of the theoretical framework in which historical narratives are invoked.

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Presumptions of Law for Ensuring Fundamental Rights in Administrative Proceeding

Introduction

The issue of legislation and performance of acts by an administrative authority and the administrative proceeding organically related thereto are, above all, aimed at the efficient implementation of laws, guided by the principles of the rule of law.

One of the main objectives of the administrative proceeding is thus to ensure expedient and legitimate activities of an administrative authority in finding and making administrative rulings. At the same time, this objective cannot be separated from the other main objective of the administrative proceeding — ensuring and implementation of the fundamental rights and freedoms of individuals by administrative rulings.

Until recently, Estonia lacked a law on administrative procedure and a modern regulation of the rights of participants in a proceeding. At the same time, a number of laws applied, governing specific types of administrative proceeding, which, apart from a limited number of exceptions, failed to secure the procedural rights of participants in a proceeding arising from the Constitution (the right to be heard, the right to examine documents, *etc*.). On 6 June 2001, the parliament adopted the Administrative Procedure Act that entered into force on 1 January this year. This Act proceeds from the text and spirit of the Constitution and the rights of participants in a proceeding have been placed in the foreground. According to § 1 of the Act, the purpose of the Act is to ensure the protection of the rights of persons by creation of a uniform procedure which allows participation of persons and judicial control.[*1]

[1] Riigi Teataja (The State Gazette) I 2001, 58, 355.

1. Fundamental rights and administrative proceeding

The administrative proceeding is related to fundamental rights in various manners. This applies both to substantive and procedural fundamental rights. Here § 14 of the Constitution plays an important role, according to which the guarantee of rights and freedoms is the duty of the legislative, executive and judicial powers, and of local governments. The section concerned firstly involves both an organisational and procedural dimension and secondly draws attention to the fact that public authority is, above all, related to what is demanded by the fundamental rights. The obligation to guarantee rights and freedoms does not merely consist in the obligation to adhere to the fundamental rights by the legislative, executive and judicial powers and local governments, but also entails their active development. This is primarily a task of legislation.[*2] Proceeding from this, § 14 of the Constitution guarantees subjective right and shall be implemented together with the other fundamental rights, as it lacks independent substantial constituent elements.

Due to § 14 of the Constitution, the protection of fundamental rights and freedoms in administrative proceeding has been provided rather conspicuously in the Administrative Procedure Act. One of the important principles of the administrative procedure is the protection of rights according to § 3 of the Act. According to subsection (1) of the provision, in administrative procedure, the fundamental rights and freedoms or other subjective rights of a person may be restricted only pursuant to law. The wording "pursuant to law" cannot be regarded as if the fundamental rights and freedoms could be restricted by, for example, only regulations or administrative legislation on the basis of the general delegation of the legislator. The possibility to restrict the fundamental rights and freedoms must be provided by law. This conceptually derives from the first sentence of § 3 (1) of the Constitution — the state authority shall be exercised solely pursuant to the Constitution and laws which are in conformity therewith. This means, above all, that the state authority may be exercised only when the Constitution and laws which are in conformity therewith grant a right to do that. This has also been pointed out by the Constitutional Review Chamber of the Supreme Court. In its decision of 12 January 1994 (Revocation of subsection (4) of Part II of the Republic of Estonia Police Act Amendment and Supplementation Act), the Supreme Court notes that according to §§ 11, 26, 33 and 43 of the Constitution, the rights and freedoms may be restricted only in accordance with the Constitution and in the cases and according to the procedure provided by law. The Supreme Court found that the *Riigikogu* should have established by itself the specific cases of and detailed procedure for the implementation of operational and technical special measures and the possible restrictions of rights related thereto, and not have delegated them to the officials of the Security Police and justices of the Supreme Court. The activities which the legislator is entitled or obliged to perform according to the Constitution cannot be delegated to the executive power, even not temporarily and provided that the judicial power has an opportunity of supervision.[*3]

Attention is drawn to this principle once again in another decision made on the same day — the possible restrictions of the fundamental rights and freedoms may be established only by legislation having the force of law.[*4] Here it is important to note that the fundamental rights are not limited only to the specific fundamental rights provided in the Constitution, but their range is considerably wider. This assertion is based on § 19 (1) of the Constitution that establishes a general freedom right, the object of which is general freedom of activity, but which also involves a status. This grants an individual the right to the protection against unconstitutional interference. The interference itself is only possible on the basis of law. This directly derives from the principle of legality of the state authority (§ 3 (1) of the Constitution).

Subsection 3 (2) of the Administrative Procedure Act provides the principle of proportionality of administrative acts and measures — administrative acts and measures shall be appropriate, necessary and proportionate to the stated objectives. The provision is directly based on § 11 of the Constitution, which gives rise to the principle of proportionality.

Subsection 3 (2) of the Administrative Procedure Act provides for a three-part test upon the implementation of the principle of proportionality. It is worth noting that the court practice has adopted the same position.[*5] Firstly, it must be identified whether the relevant measure is appropriate (suitable) for achieving the legal

[2] See R. Alexy. Põhiõigused Eesti põhiseaduses (Fundamental Rights in Estonian Constitution). – Juridica eriväljaanne, 2001, p. 73 (in Estonian).

[3] Decision of the Constitutional Review Chamber of the Supreme Court, 12 January 1994 (III-4/A-1/94). – Riigi Teataja (The State Gazette) I 1994, 8, 129 (in Estonian).

[4] Decision of the Constitutional Review Chamber of the Supreme Court, 12 January 1994 (III-4/A-2/94). – Riigi Teataja (The State Gazette) I 1994, 8, 130 (in Estonian).

[5] Regulation of the Administrative Law Chamber of the Supreme Court, 23 May 2000 (3-3-12-00). – Riigi Teataja (The State Gazette) III 2000, 14, 152 (in Estonian).

goal. The measure must contribute to and be aimed at achieving the goal set. Based on the context of restriction of the fundamental rights and freedoms, this constituent part of the principle of proportionality can be interpreted as follows: interference with fundamental rights is in conflict with § 11 of the Constitution and § 3 (2) of the Administrative Procedure Act, if this is not appropriate (suitable) for achieving the goal set by public authority. A measure is appropriate, if the goal set can be achieved both legally and factually. Secondly, the measure must be necessary for achieving the goal. When planning the measure, it must be clarified whether this is necessary for achieving the goal and whether the measure minimally restricts the rights of an individual and also secures the achievement of the goal. This has also been called a principle of minimum interference (milder measure) in legal literature.[*6] Here we also have to take into account that the necessity must arise from a pressing social need, *i.e*. from the weightiness of the goal. The third constituent part of the principle of proportionality is proportionality in its narrower sense. Here the correct relation between the goal and the measure is important. A measure is proportional, if it does not go beyond the framework of the goal and it lacks excessive impact (proportionality *stricto sensu*). The weightiness of the goal must comply with the intensity of the interference with the rights, or in other words, the more intensive the interference, the weightier must be the goal in order to implement relevant measures.

An administrative procedure may involve interference with these substantive fundamental rights, which are not directly related to the outcome of the administrative procedure, *i.e*. the decision that interferes with the fundamental rights this way or another. Here belong the so-called general personal rights of participants in a proceeding, which may be violated by procedural acts and indiscreet activities of officials.[*7] Thus, for example, according to § 18 of the Constitution, no one shall be subjected to torture or to cruel or degrading treatment or punishment. From the aspect of the administrative procedure, the protection of the dignity of a participant in a proceeding is topical above all. Here we may point out § 17 of the Constitution — no one's honour or good name shall be defamed.

An administrative procedure also comes into contact with the so-called procedural fundamental rights. Here § 14 of the Constitution — the guarantee of rights and freedoms is the duty of the legislative, executive and judicial powers, and of local governments — which was already discussed above, is of importance. Based on this, the legislative power has a duty to guarantee the fundamental rights of an individual also by regulating the procedure. This means, above all, that an individual has a right to efficient protection of his or her rights by a fair and just procedure.

Apart from this section, several other sections of the Constitution also contain a clear procedural dimension. Thus, § 44 of the Constitution, according to which, for example, all state agencies, local governments, and their officials have a duty to provide information about their activities, pursuant to procedure provided by law, to an Estonian citizen at his or her request, except information the disclosure of which is prohibited by law, and information intended exclusively for internal use, also performs a procedural function. The same may be claimed about § 46 of the Constitution, which guarantees everyone the right to address state agencies, local governments, and their officials with memoranda and petitions. Besides these provisions, procedural regulation is also contained in many other provisions of the Constitution, securing substantive fundamental rights. Here the Constitution uses a typical wording, "/…/ in the cases and pursuant to procedure provided by law". The word "procedure" presumes a procedural regulation of the restriction of a relevant fundamental right. Consequently, the interference with the fundamental rights must be restricted and monitored not only through substantive elements, but also procedurally. Here § 33 of the Constitution, which provides the inviolability of the home, may serve as an example. The substantive presumptions of the restriction of this right are public order, health or the protection of the rights and freedoms of others, combating of a criminal offence or apprehension of a criminal offender or ascertaining of the truth in a criminal procedure. At the same time, the section also contains the wording "in the cases and pursuant to procedure provided by law", which demands procedural regulation.

Upon the establishment of procedural regulations, § 10 of the Constitution, which provides the principle of a democratic state based on the rule of law, is of importance as well. Proceeding from that, a procedure demands clear and unambiguous rules, precise determination of the legal status of participants in a proceeding, guarantee of their rights, adherence to the principles of legal certainty and protection of trust, as well as determination of the competence of the administrative authority conducting the procedure and guarantees of impartiality.[*8]

Here it is also important to point out § 12 (1) of the Constitution, which guarantees the right of equality — everyone is equal before the law. No one shall be discriminated against on the basis of nationality, race, colour, sex, language, origin, religion, political or other opinion, property or social status, or on other grounds.

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[6] See C. Degenhart. Staatsrecht I. 11th, revised ed. Heidelberg, 1995, p. 123.

[7] See D. Berger. Grundrechtsschutz durch Verfahren. Eine rechtsvergleichende Untersuchung des deutschen und britischen Verwaltungsverfahrensrecht. München, 1998, p. 109.

[8] See H. P. Bull. Allgemeines Verwaltungsrecht. 6th, revised edition. Heidelberg, 2000, p. 194; H.-U. Erichsen (ed.). Allgemeines Verwaltungsrecht. 11th, revised ed. Berlin, New York, 1998, p. 351.

The first sentence of the provision concerned "everyone is equal before the law" means for the administrative procedure that participants in a proceeding are treated on equal grounds in the procedure and laws are implemented in respect of all the persons in the same manner, *i.e*. the law has to be applied uniformly to all the persons. This requirement also involves a prohibition against arbitrary action. The second sentence of the provision establishes a prohibition against discrimination, which involves restriction of any interests of an individual, which are based on the characteristics mentioned in the sentence.

The regulations of the administrative procedure must proceed from the requirements laid down in the Constitution and specify them and furnish them with a content. We will now proceed to discuss the most important rights of participants in a proceeding provided in the Administrative Procedure Act and derived from the Constitution.

2. Right to be heard

Although the right to be heard has not been clearly laid down in the Constitution, it can be derived from the principle of a democratic state based on the rule of law (§ 10 of the Constitution). The right to be heard is a generally recognised principle in the administrative procedures of democratic states. It has been emphasised in legal literature that the main idea of the requirement to be heard is the protection of human dignity in a procedure and it also serves as an instrument for implementing thereof.[*9] It is worth noting that the Administrative Chamber of the Supreme Court has paid attention to guaranteeing the right to be heard in administrative procedure; the Chamber has noted in its decision of 14 May 2002 that it follows from the principle of the democratic state based on the rule of law (§ 10 of the Constitution) and the duty to protect the rights and freedoms (§ 14 of the Constitution) that before issuing an administrative act interfering with the rights of an individual, the individual must be notified of the procedure in progress and given an opportunity to express his or her opinion about the planned administrative act.[*10]

Generally, this important principle had not been laid down in the specific laws governing the administrative procedure in Estonia until now. Few exceptions may be pointed out. For example, according to § 31 of the Social Welfare Act, in the resolution of issues pertaining to social welfare, the opinion of the person shall be considered.[*11] This right has been guaranteed, to a certain extent, also in the Juvenile Sanctions Act, Refugees Act, Immovables Expropriation Act and in some more specific laws. The right concerned has been constituted in detail in § 40 of the new Administrative Procedure Act. The first subsection of this section provides the right to be heard upon the issue of an administrative act, the second subsection upon taking any measures. According to the first subsection, an administrative authority shall, before issue of an administrative act, grant a participant in a proceeding a possibility to provide his or her opinion and objections in a written, oral or any other suitable form. On the one hand, such regulation guarantees a participant in a proceeding the right to be heard, and on the other hand, imposes on the administrative authority the obligation to ensure the implementation of that right. The administrative act issued by the administrative authority is protected only insofar as the participant in the proceeding has an opportunity to express his or her opinion. This does not mean that the right has to be implemented, it is important that such an opportunity was granted to the participant in the proceeding.

The right to be heard is not a strictly personal type of right. This means that the right also extends to a representative of a participant in a proceeding. According to § 13 (1) of the Act, a participant in a proceeding has the right to use a representative who may represent a participant in a proceeding in all procedural acts which, arising from law, need not be performed personally by the participant in the proceeding.

The Administrative Procedure Act of Estonia uses a wider approach to the right to be heard than, for example, § 28 (1) of the Administrative Act of the Federal Republic of Germany (*Verwaltungsverfahrensgesetz*). The right to be heard must be guaranteed here only in the cases when, firstly, the administrative act interferes with the rights of a participant in a proceeding and secondly, if the circumstances are essential to the making of a decision.[*12] Subsection 40 (1) of the Administrative Procedure Act of Estonia does not establish such restrictions. This means that upon the refusal to issue an alleviating administrative act, including on the basis of the right of discretion, the right to be heard is implemented.

[9] See M. Albertini. Der verfassungsmässige Anspruch auf rechtliches Gehör im Verwaltungsverfahren des modernen Staates. – H. Hausheer (ed.). Abhandlungen zum schweitzerischen Recht. Bern, 2000, p. 71.

[10] Decision of the Administrative Chamber of the Supreme Court, 14 May 2002 (3-3-1-25-02). – Riigi Teataja (The State Gazette) III 2002, 15, 172 (in Estonian).

[11] Riigi Teataja (The State Gazette) I 1995, 21, 323; 2001, 85, 509 (in Estonian).

[12] See F. O. Kopp, U. Ramsauer. Verwaltungsverfahrensgesetz. 7th, revised ed. München, 2000, p. 455.

The second subsection of the provision concerned establishes the right to be heard upon the taking of measures — before taking any measures which may damage the rights of a participant in a proceeding, the administrative authority shall grant him or her a possibility to provide his or her opinion and objections. This means that in the case of a possible interference with a subjective right, the administrative authority must guarantee an individual the right to be heard. In other cases, the administrative authority may, but need not hear the participant in the proceeding. For example, if a health protection supervisory official informs media that a product of a particular company does not comply with the health requirements, he or she must guarantee a representative of the company the right to be heard. Such public announcement is, firstly, a measure, and secondly, it may damage the good name of the company and also have a negative impact on its financial status.

The right to be heard extends to participants in a proceeding according to the Administrative Procedure Act. The participants in a proceeding are:

1) a person applying for the issue of an administrative act or the taking of a measure, or a person who makes a proposal for entry into a contract under public law (§ 11 (1) 1));
2) a person at whom an administrative act or measure is directed or to whom an administrative authority makes a proposal for entry into a contract under public law (§ 11 (1) 2));
3) a person whose rights or obligations the administrative act, contract under public law or measure may affect (third person) (§ 11 (1) 3)).

The extension of the right to be heard to third persons particularly deserves to be noted. An administrative act, a contract under public law and a measure may interfere with the legal and economic interests of third persons. The provision of an opportunity to express an opinion and objections serves as a preventive judicial remedy.

According to the Act, a participant in a proceeding is also an administrative authority which, according to an Act or regulation, is required to submit to an administrative authority which hears the matter its opinion on or approval for issue of a legal act or for taking of a measure (§ 11 (1) 4)). Granting of the right to be heard to such participants in a proceeding is problematic. It is an administrative authority to which procedural fundamental rights should not be extended. In addition to those mentioned above, participants in a proceeding may include other persons that an administrative authority has involved as participants in the proceeding and whose interests may be affected by an administrative act, contract under public law or administrative measure (§ 11 (2)).

In order to guarantee a participant in a proceeding the right to be heard, an administrative authority must provide the participant in the proceeding with necessary information before issuing an administrative act. This involves notification of the participant in the proceeding of the commencement of a proceeding (in a proceeding commenced on the initiative of an administrative authority), presentation of factual circumstances and results of proof, as well as the making public of the content of the planned decision in such a form as it would be clear for the participant in the proceeding concerning which he or she should present his or her opinion or objections. The authority is not obliged to present to the participant in the proceeding evidence and to interpret them. The participant in the proceeding may examine evidence on the basis of § 37 of the Administrative Procedure Act (the right to examine documents). It is important here that the participant in the proceeding receive a summary of the factual circumstances and evidence serving as the basis for decision-making that he or she had an opportunity to present his or her opinion and objections with regard thereto. The same also applies to measures. Before taking a measure, an administrative authority must present the results of proof concerning the factual circumstances that serve as the basis for taking a measure. It is a prevalent opinion in the German legal doctrine that an administrative authority is not obliged to provide a legal discussion of the matter to give the participant in the proceeding an opportunity to present his or her opinion and objections with regard thereto.[*13]

In order to enable a participant in a proceeding to express his or her opinion and present objections, a reasonable period of time must be provided, during which the participant in the proceeding can analyse the factual circumstances and the results of proof, check them and present his or her opinion and objections. The term naturally depends on the particular administrative matter. The more complicated the matter, the longer should also be the term for presenting an opinion and objections. A participant in the proceeding may present his or her opinion and objections in a written, oral or other suitable form. Oral form is more preferable in more complicated administrative matters, where it may be presumed that the participant in the proceeding may be unable to present his or her opinion and objections sufficiently clearly and understandably. The right to be heard may also be implemented in the hearing of an administrative matter at a session (§ 45). The right to be heard means, *inter alia*, a function of exchanging information. Administrative matters become increasingly complicated in the contemporary state and the identification of factual circumstances

[13] See C. H. Ule, H.-W. Laubinger. Verwaltungsverfahrensrecht. 4th, revised ed. Köln, Berlin, Bonn, München, 1998, p. 237.

also becomes increasingly complicated. An administrative authority is not omniscient. In order to make a correct and just decision, the authority frequently requires additional information. This has also been emphasised by the Administrative Chamber of the Supreme Court. In its above-mentioned decision of 14 May 2002, the Administrative Chamber has stressed that hearing of an individual enables an administrative authority to identify to what extent the planned administrative act will interfere with the rights and interests of the individual and to seek opportunities for achieving a solution that satisfies all the persons concerned.*[14]

After a participant in a proceeding has presented his or her opinion and objections to an administrative authority, the authority must take notice thereof and consider them when making the decision and also be guided by them when reasoning the decision.

The special regulation of the right to be heard in open proceedings has been laid down in § 49 of the Administrative Procedure Act. In the case of open proceedings it is natural that besides participants in a proceeding the right also extends to interested persons. The range of interests may be very wide, and this actually means that anyone may have access to open proceedings.

Proceeding from the principle of lawfulness of administration, an administrative authority must guarantee participants in a proceeding the right to be heard. Exceptions thereto may be made only in the cases prescribed by law. Such exceptions have been provided in § 40 (3) of the Administrative Procedure Act. Provided that the prerequisites indicated in the provision concerned exist, deciding on the guarantee of the right to be heard belongs to the right of discretion of an administrative authority. An administrative proceeding may be conducted without hearing the opinions and objections of a participant in the proceeding in the following cases (§ 40 (3)):

1) if prompt action is required for prevention of damage arising from delay or for the protection of public interests. In this case, the legislator has granted an administrative authority two benefits to be considered — the right to be heard and efficiency of administration. If an administrative authority finds that a delay in issuing an administrative act or taking a measure results in damage or it damages public interests, the administrative authority may, proceeding from the need to ensure the efficiency of administration, decide on the administrative matter without hearing the opinion and objections of a participant in the proceeding. In doing so, the administrative authority must interpret the unspecified legal notions of "prevention of damage" and "protection of public interests" and apply them to specific circumstances. If the specific circumstances "furnish the unspecified legal notions with a content", the right of discretion has been granted to the administrative authority to decide on whether to guarantee the participant in the proceeding the right to be heard or not. If there are no relevant circumstances, there are no necessary elements and the right of discretion of the administrative authority is precluded;
2) if there is no deviation from the information provided in the application or explanation of the participant in the proceeding and there is no need for additional information. This concerns a case where an administrative authority takes as the basis for making a decision the factual circumstances presented by the participant in the proceeding and there is no deviation therefrom. Therefore, there is no additional need to clarify the circumstances. The right to be heard may be relevant here, if the refusal to issue an administrative act is based on legal grounds;
3) if the resolution is not made against the participant in the proceeding. Here the making of an exception is related to the fact that both the factual circumstances and legal basis allow for the making of a decision in favour of the participant in the proceeding. For example, the participant in the proceeding applies for a leave to appeal and it is clear for the administrative authority before issuing an administrative act (before granting the leave) that it will satisfy the application;
4) if notification of the administrative act or measure, which is necessary to allow submission of opinions or objections, does not enable achievement of the purpose of the administrative act or measure. The legislator has granted the administrative authority also here the right to consider two benefits, consisting in the right to be heard and the efficiency of administration. If the efficiency of administration outweighs the right to be heard, the administrative authority has a clear means to exercise the right of discretion;
5) if the participant in the proceeding in not known or if the measure taken affects an infinite number of persons and identification of the persons is impossible within a reasonable period of time. Here we have two prerequisites for the exercise of the right of discretion. Firstly, it concerns a matter where a participant in the proceeding is not known. This prerequisite is topical, above all, in administrative action. The other prerequisite is a matter where the measure taken concerns an infinite number of people and they cannot be identified within a reasonable period of time. "A reasonable period of time" is an unspecified legal notion here, which an administrative authority

[14] Decision of the Administrative Chamber of the Supreme Court, 14 May 2002 (Note 10).

must furnish with a content and apply it to specific circumstances. The existence of necessary elements grants the administrative authority the right to exercise discretion;

6) if an administrative act is issued as a general order or the number of participants in the proceeding exceeds 50. General orders are administrative act, which are addressed to people determined on the basis of general characteristics. This means that at the time of issuing the act, the addressees are not individualised and there are many of them, therefore it is not purposeful to hear them. The same also applies to cases where the number of the participants in the proceeding exceeds 50;
7) in other cases provided by law. Here the legislator has provided for an opportunity to establish additional restrictions by specific laws.

3. Right to examine documents

The right to examine documents has been laid down in § 37 of the Administrative Procedure Act.

It is worth noting that in Estonia[*15], as well as in Sweden, the United States of America, France and Holland[*16], in addition to this, the general right of access to public information has also been laid down; its purpose is to guarantee the democratic supervision exercised by individuals over administration.

The right to examine documents is founded on the Constitution and it has several points of contact with the Constitution. The right to examine documents can be derived from the principle of the democratic state based on the rule of law (§ 10 of the Constitution). The information gathered in the course of a proceeding by an administrative authority cannot be the object of classification in a democratic state based on the rule of law, it must be accessible to a participant in the proceeding, so that he or she could protect his or her interests. The law concerned also supports human dignity (§ 18 (1) of the Constitution). The right to examine documents arises directly from § 44 (2) of the Constitution, according to which all state agencies, local governments, and their officials have a duty to provide information about their activities, pursuant to procedure provided by law, to an Estonian citizen at his or her request, except information the disclosure of which is prohibited by law, and information intended exclusively for internal use. As it is not otherwise provided by law, according to the Constitution, the right also extends to foreign citizens and stateless persons who are in Estonia.

The right to examine documents enables a participant in a proceeding to obtain an overview of the factual circumstances serving as the basis for decision-making and to take measures to protect his or her interests, if necessary. This closely correlates with the right to be heard, as the knowledge of the documents assembled during the proceeding provides a basis for presenting an opinion and objections. The guarantee of the right to examine documents is not solely in the interests of a participant in the proceeding but also in the interests of an administrative authority. This ensures the transparency, comprehensibility and soundness of the administrative procedure and decisions and consequently the authority of administration. According to § 37 (1) of the Administrative Procedure Act, everyone has the right, in all stages of administrative proceedings, to examine documents and files, if such exist, which are relevant in the proceedings and which are preserved with an administrative authority. The provision concerned does not extend only to a participant in the proceeding, but establishes a general right to examine documents, *i.e*. this establishes everyone's right to examine documents and files. Everyone may use the right in any stage of a proceeding. Here the restrictive condition is "documents, which are relevant in the proceedings". The legislator has provided the restrictive condition by an unspecified legal notion (relevant in the proceedings), the furnishing of which with the content and implementation thereof has been placed within the competence of an administrative authority. The documents, which are relevant in the proceedings include, above all, evidence — an explanation of the participant in the proceeding, documentary evidence, physical evidence, on-the-spot visit of inspection, statement of witness and expert opinion. As such documents, also minutes of procedural acts, opinions of the other administrative authorities, opinions and objections of participants in the proceeding, requests, applications, *etc*. may be mentioned. An administrative authority shall preserve the documents relevant to the administrative proceedings, and create a file if necessary, according to § 19 (1) of the Act. This duty also allows for the actual implementation of the right to examine documents.

Subsection (2) of the section concerned provides exceptions in the case of which the right to examine documents is prohibited. An administrative authority shall prohibit examination of a file, document or a part thereof if disclosure of information contained therein is prohibited by an Act or on the basis of an Act. The restrictions of the right to examine documents have been provided, for example, in the Personal Data Pro-

[15] The Public Information Act. – Riigi Teataja (The State Gazette) I 2000, 92, 597.

[16] See C. H. Ule, H.-W. Laubinger (Note 13), p. 249.

tection Act, Databases Act, Archives Act, State Secrets Act and in the Public Information Act. Here it is important to note that the Administrative Procedure Act and the Public Information Act do not synchronise to a certain extent. Subsection 37 (1) of the Administrative Procedure Act lays down a general right to examine documents and according to subsection (2), the right may be prohibited by an Act or on the basis of an Act. According to § 35 (2) 2) of the Public Information Act, the head of a state or local government agency or a legal person in public law may classify draft administrative legislation of specific application and its accompanying documents before passage or signature of the administrative legislation as information intended for internal use. Here an administrative authority has been granted the right to exercise discretion, but it is very unfortunate that the legislator has not laid down the legal boundaries of exercising the discretion. This means that an administrative authority may, at its own discretion, classify as information intended for internal use (information to which access is limited) the documents of any administrative procedure, which are related to the issue of an administrative act. In this manner, § 37 (1) of the Administrative Procedure Act may become an "empty" provision, a mere declaration. Such regulation is in conflict with the principles of a democratic state based on the rule of law and lawfulness of administration. In an administrative procedure, the relevant provisions of the Administrative Procedure Act should be applied, which are in conformity with the Constitution.

The special regulation of examination of documents has been provided in § 48 of the Administrative Procedure Act and concerns open proceedings. On the basis of the comparison of §§ 37 and 48, it may be said that there are no substantial differences between them. Both provisions grant everyone access to the documents of the proceedings. In the first case, the Act refers to "documents, which are relevant in the proceedings", in the second case "other relevant and important documents". The main difference is that the public is notified of open proceedings (§ 47 (3)), whereas, as a rule, only participants in the proceeding are notified of the ordinary proceedings (§ 35).

4. Right to receive explanations

Already for a long time, the court practice of democratic states has accepted the principle, according to which officials are not only servants of the state but also helpers of citizens. This means that officials are also obliged to counsel, inform, instruct and service individuals in administrative matters.[*17] The Administrative Procedure Act only includes the right of a participant in a proceeding to receive explanations (information). According to § 36 (1) (duty of an administrative authority to give explanations), an administrative authority shall explain to a participant in a proceeding or to a person who considers submission of an application, at the request of the person, the rights and duties of the participant in the proceeding in administrative procedure; within which term the administrative proceeding is presumably conducted and which are the possibilities to expedite the administrative proceeding; which applications, evidence and other documents must be submitted in the administrative proceeding; which procedural acts must be performed by participants in the proceedings. Subsection (2) of the section concerns a case where it is necessary, in order to issue an administrative act or take a measure which is applied for, to issue another administrative act beforehand. In such a case, the administrative authority shall promptly explain the procedure for application for the necessary administrative act and for review of the application, and other conditions for issue of the other administrative act

The Administrative Procedure Act does not directly provide for, for example, the right of a participant in a proceeding to receive advice from the administrative authority for eliminating deficiencies in an application, explanation, *etc*., which involve an apparent mistake or which are caused by ignorance. The importance of the assisting role of the administrative authority could have been higher in the Act.

When interpreting the provision concerned, a problem may arise concerning whether the administrative authority is obliged to explain to a participant in a proceeding at his or her request only procedural rights or also substantive rights. Taking the interpretation conforming to the constitution as the basis, it may be said that the administrative authority is obliged to explain to the participant in the proceeding also substantive rights, since § 14 of the Constitution imposes on the executive power and local governments the duty to guarantee rights and freedoms.

[17] H. Maurer. Allgemeines Verwaltungsrecht. 12th revised ed. München, 1999, p. 455.

5. Right to confidentiality of business and personal data

The right to the confidentiality of business and personal data derives from the Constitution. Subsection 19 (1) of the Constitution is important, containing a general personality right — everyone has the right to free self-realisation. This provision protects the conditions that are essential to the free self-realisation of personality and express human dignity. This covers the areas of private life and private personal data, which remain outside the sphere of protection of the other provisions of the Constitution. The provision concerned also constitutes the right to informational self-determination, which involves the right of an individual to decide himself or herself when and to what extent his or her personal data are published.[*18] Different areas of personal data are protected by § 17 of the Constitution, which protects honour and good name, § 26, which ensures the inviolability of family and private life, and § 42, which protects the beliefs of an individual. For administrative procedure, also § 45 is important, which provides, on the one hand, a general freedom of information, and on the other hand, also relevant restrictions — this right may be restricted by law for state and local government public servants, to protect a state or business secret or information received in confidence, which has become known to them by reason of their office, and the family and private life of others, as well as in the interests of justice.

Subsection 7 (3) of the Administrative Procedure Act lays down protection of data as an objective duty of an administrative authority — an administrative authority is required to maintain state and business secrets and the confidentiality of information intended for internal use of an agency, including private personal data. Here also a subjective public right arises with regard to a participant in a proceeding. The regulation of the protection of private personal data has been provided in greater detail in the Personal Data Protection Act and in the Public Information Act, § 37 of which lays down a restriction on access to private personal data intended for internal use. Access to such information by persons outside the agency is not permitted (§ 38 (4)).[*19] According to the Personal Data Protection Act, such duty terminates with the consent of the person or in the cases prescribed by law (§ 9).[*20]

6. Right to representation

The right to representation is based on the principle of a democratic state based on the rule of law (§ 10 of the Constitution), according to which all-round and wide-ranging protection of the rights and freedoms shall be guaranteed to a person, including in administrative procedure. Currently, administrative matters become increasingly complicated and deciding thereon often requires qualified legal or professional knowledge, which cannot be demanded of an ordinary citizen. In order that an individual be able to protect and implement his or her rights in complicated administrative matters, he or she frequently requires the assistance of a professional specialist as a representative.

The right to representation has been laid down in § 13 of the Administrative Procedure Act. On the basis of subsection (1) of the provision concerned, in an administrative procedure, a participant in a proceeding has the right to use a representative, who may represent a participant in a proceeding in all procedural acts which, arising from law, need not be performed personally by the participant in the proceeding. For example, the representative may submit on behalf of the participant in the proceeding applications, requests, opinions, objections, examine documents, receive information and explanations from the administrative authority, if requested, represent the participant in the proceeding at the hearing of the matter at a session, *etc*. However, there are particular acts that the participant in the proceeding must perform personally and this requirement may arise only from law. For example, upon applying for a weapons permit, before receiving the permit, the individual shall, according to the Weapons Act, pass an examination in police authorities on his or her knowledge regarding the Weapons Act and other legislation and a practical test on handling the weapon that he or she wishes to acquire (§ 35 (5)).[*21] It is clear that only the participant in the proceeding himself or herself can perform such acts.

In administrative procedure, the provisions of the General Part of the Civil Code Act apply to representation (§ 13 (3) of the Administrative Procedure Act).[*22] The types of representation are legal representation, in

[18] See R. Alexy (Note 2), p. 50.

[19] Riigi Teataja (The State Gazette) I 2000, 92, 597 (in Estonian).

[20] Riigi Teataja (The State Gazette) I 1996, 48, 944; 2000, 104, 685 (in Estonian).

[21] Riigi Teataja (The State Gazette) I 2001, 65, 377; 102, 673 (in Estonian).

[22] Riigi Teataja (The State Gazette) I 1994, 53, 889; 89, 1516; 1996, 40, 773 (in Estonian).

which the powers of the representative are determined on the basis of law, and representation by transaction or contract, where the principal determines the powers of the representative. Thus, an authorisation is a collection of rights, within the limits of which the representative may act on behalf of the participant in the proceeding. A representative shall certify his or her authorisation in an administrative proceeding by an unattested proxy (§ 13 (2)). This may be, for example, full powers, in which the representative represents the participant in the proceeding in all the acts of the relevant administrative procedure, which the participant in the proceeding is not required to perform personally on the basis of law. The authorisation may also include particular acts, which the representative of the participant in the proceeding may perform on behalf of the participant in the proceeding. In the case of representation a problem may arise from whether the participant in the proceeding may, besides the representative who performs acts on behalf of the participant in the proceeding, use also an advisor, for example, when hearing the matter at a session. For instance, § 45 (3) of the Administrative Procedure Act does not preclude the participation of other persons in a session, if no participants in the proceeding objects thereto. The Act makes no mention of other cases. The author of the article is of the opinion that such opportunity should not be precluded, regardless of the fact that it has not been directly provided by law. The participant in the proceeding performs an act or acts independently, but he or she has an opportunity to obtain qualified advice and assistance to protect his or her rights. The Administrative Procedure Act as a whole serves this purpose.

Conclusions

The laws governing the specific types of administrative procedure have paid very little attention to ensuring the rights of participants in a proceeding. The existing regulations are unsystematic and contain gaps. The Administrative Procedure Act that entered into force on 1 January 2002 eliminated these regrettable gaps in our legislation. It may be said that the Act guarantees the protection of the rights arising from the Constitution and fully complies with the principles of a democratic state based on the rule of law. It is also in conformity and complies with the principles of European administrative procedure law. We may hope that the purpose of the Act will be implemented in practice, since an Act is one thing and the implementation thereof another thing.

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Rule of Law and Information Society: Constitutional Limits to Active Information Provision by Government

1. Introduction

Estonia today is in euphoria over information technology and publicity. Openness and introduction of new technologies is certainly welcome and necessary but we should not forget that information is also a very powerful weapon. The more that is known about a person, the easier it is to control him or her. Administrative law as a branch of law regulating the use of public power also has to control the new threats to the freedom of individuals caused by the information society, including dangers related to disclosure of governmental information. Uncontrolled use and unequal distribution of information, disclosure of data to a wrong person, at the wrong time or in the wrong form, as well as the publishing of incorrect or dubious messages may be just as damaging to individuals, companies and interest groups as an incorrect precept issued by the tax authorities or an illegal search by police. The author of the article aims to explain the possibilities of reconciling the aims of information society and principles of rule of law in today's Estonia, taking a closer look at the active information provision by agencies on the Internet.

In the first, introductory, part of the article I will briefly explore some examples of government information and the legal framework imposed on it in Estonia. In the second part I will examine more closely the relationship between fundamental freedoms and public information, and in the third part the constitutional requirements for information operations in cases where fundamental freedoms are restricted.

1.1. Government information

Surely states have never managed to do without the forwarding and gathering of information: agencies need to gather the relevant data to make appropriate decisions, and it is also necessary to learn from the mistakes that have been made. The opposite to the gathering of information is informing of a particular person or the public. Even in a totalitarian police state it is necessary to ensure that orders and prohibitions are communicated to the addressee. In the information society communication between the state and the citizen becomes more intense.[*1] The principle of confidentiality of official information is being replaced by freedom of information: the citizen needs to be informed both at his or her request and on the agency's own initiative. The latter type of information operations is called active information provision. Today's information and communication technology opens up significantly more practical possibilities for communication with citizens than was available before.[*2] Currently the Internet still plays, first of all, an informing function in public administration but in the near future it has to become a channel of exercising public functions The breakthrough should come with the newly launched electronic ID and digital signature.[*3]

The state also increasingly uses information, including active information provision, as a specific means of exercising public functions apart from communication arising from other services. Depending on the situation, informing of people, especially as concerns their active persuasion, counselling or warning may be a much more efficient measure to direct behaviour than legal orders or prohibitions.[*4] Health and consumer protection authorities warn people of dangerous products, services or firms (*e.g.* poor sanitary situation in a restaurant), dangerous modes of behaviour (*e.g.* smoking, consumption of beef due to the threat of BSE). The tax authorities publish data about tax debtors[*5] and the Ministry of Finance about student loan debtors.[*6] On the other hand agencies also give advice on certain products, *e.g.* preference of certain medicines, or counsel people in certain situations or fields of activity (in agriculture and in small-scale entrepreneurship in rural areas).[*7]

[1] Society has always been an information society. Today it is only characterised by the wider scope of gathering and processing of information. See P. Birkinshaw. Freedom of Information: The Law, the Practice and the Ideal. London: Butterworths, 1996, p. 6. The development of technology is also not only a modern phenomenon. Just like computers and the Internet today, the spreading of printed media and photography presented a challenge to privacy a century ago. *Cf.* E. J. Eberle. Dignity and Liberty: Constitutional Visions in Germany and the United States. Westport: Praeger, 2002, p. 82 *f*. The German Constitutional Court used the threat caused by today's technology as an argument in its population census case, BVerfGE, 65, 42.

[2] Electronic administrative information can be divided into the following groups according to its levels of development: (1) information — publishing information in the Internet with the agency's contact data, opening hours, procedures, possibility of printing out forms of applications; (2) communication — recognition of electronic mail as informal means of communication, publishing of official notices and registers in the Internet; (3) interaction — possibility of making individual enquiries in the state's databases; giving legal force to mutual electronic communication between the citizen and the agency, use of multimedia in administrative procedures, electronic administrative decision. Administration in Estonia has by now mostly achieved the first level and is making successful efforts in the second phase (agencies normally reply to e-mails, there is information on the web at least about the state institutions and larger local governments, several information portals and discussion forums have been opened. See first of all the portal of government: www.riik.ee. Only occasional examples can be brought to demonstrate the "third generation": electronic forwarding of income tax returns; or mobile parking. *Cf.* this with D. Liiv. Uued tehnoloogiad avalikus halduses (New Technologies in Public Administration). – Riigikogu Toimetised (RiTo), No. 4, 2001, p. 51 (in Estonian). About the development of information society in Estonia in general, M. Meriste. – IT haldusjuhtimises. Aastaraamat 2000. Available at: www.eik.ee/it2000/o91.htm (in Estonian).

[3] See for example initiative "eEurope". Available at: http://europa.eu.int/information_society/eeurope/news_library/pdf_files/initiative_en.pdf. The preparation of widespread use of government databases and information systems takes place in the framework of the project "x-tee". Available at: www.riik.ee/ristmik/ (in Estonian). The demands to establish interactive communication are known also in the presently applicable law, *e.g.* § 7 (6^1) of the Estonian Central Register of Securities Act (Riigi Teataja (The State Gazette) I 2000, 57, 373) requires that the registrar should allow inquiries regarding persons for whom a pension account has been opened. The English translations of most of the statutes cited here are available on the web page of the Estonian Legal Translation Centre: www.legaltext.ee.

[4] See for example U. Di Fabio. Information als hoheitliches Gestaltungsmittel. – Juristische Schulung (JuS), 1997, No. 1; C. Gusy. Verwaltung durch Information. – Neue Juristische Wochenschrift (NJW), 2000, p. 977.

[5] See the home page of the Tax Board www.ma.ee/statistika/volg/veeb02.xls, 23.02.2002 (in Estonian), also the web page maintained by private institutions www.tasuja.ee (in Estonian). Debtors of the Tax Board make up a significant part of the Tasuja database. *Cf.* V. Korpan. Ekspankur Aare Kilp paljastab maksuvõlglased (Ex-banker Aare Kilp Reveals Persons who Owe Arrears). – Äripäev, 31 October 2000 (in Estonian).

[6] See the Ministry of Finance web page: http://www.fin.ee/pages.php/01070601. List of debtors of the Estonian Traffic Insurance Fund (legal person in public law) together with the debtor's address and indebted sum: http://www.lkf.ee/fond/fond.html (in Estonian).

[7] See K. Kuusikko. Neuvonta hallinnossa. Lakimiesliiton Kustannus: Helsinki, 2000; K. Kuusikko. Advice, Good Administration and Legitimate Expectations: Some Comparative Aspects. – Eur. Publ. Law, No. 7, 2001, p. 455; T. Leidinger. Hoheitliche Warnungen, Empfehlungen und Hinweise in spektrum staalichen Informationshandelns. – DÖV, 1993, p. 925; J. Oebbecke. Beratung durch Behörden. – DVBl, 1994, p. 147.

1.2. Legal framework in Estonia

The central law handling government information in Estonia is certainly the Public Information Act[*8] (PIA), entered into force on 1 January 2001. It regulates forwarding of information to citizens and the public both on the basis of requests and on the agency's own initiative. Publication of data is preceded by their collection, storing and exchange which should be regulated by the Databases Act and the agency's internal rules of procedure.[*9]

Concerning information requests the presumption of publicity of information is applied, *i.e.* disclosure of information can be denied only in the cases provided by law. The requester should not prove the existence of any particular interest. But the PIA only requires access to the already existing data. However, some information that requires additional research can be requested pursuant to the Response to Petitions Act[*10] from the year 1994. Thus, the requirement to give information already existed before the PIA. Also in practice the PIA did not bring along an avalanche of requests for information, as it was first feared.[*11] However, the PIA was indispensable in order to regulate in more detail the possibilities of receiving information and the basis for restricting access to information. What is also notable about the PIA is the wide requirement of publishing documents on the web page, which became fully effective on 1 March 2002. In addition to information directly concerning only the agency (opening hours, contact data, budget) also a number of documents concerning individuals have to be published: *e.g.* all precepts of state supervision authorities, court decisions and the agency's document register that should contain information about all documents prepared in or received by the agency. In addition, the PIA and several specific acts oblige agencies to advise and warn citizens, also stipulating the use of information as a means of exerting "social pressure".[*12]

In replying to information requests and active disclosure of information the same PIA provisions restricting access are applicable; they are elaborated in more detail in the Personal Data Protection Act[*13] (PDPA) and the State Secrets Act.[*14] But there is no general provision of the PIA or any special statute restricting the disclosure of trade secrets, although some special provisions are binding only for the tax and competition authorities.[*15] Subsection 34 (2) of the PIA gives the right to the head of an agency to classify information as internal in the cases provided by the PIA.

Legal protection from administrative action, including disclosure or withholding of information operations, is carried out in administrative courts.[*16] In connection with the remarkable intensification of information disclosure it has become clear that disclosure of data connected with a person's name or other personalised data can easily infringe the interests of individuals and companies — even when it does not concern data on a person's private life in the strictest sense of the word. The Data Protection Inspectorate, for example, complains that:

> "[they] are approached also with the problem that concerns disclosure of data about the economic activities of legal persons in private law, that is data which in essence can be interesting for competitors in the same field, and having command of this information it is possible to damage the subject of that informa-

[8] Riigi Teataja (The State Gazette) I 2002, 26, 150 (in Estonian).

[9] See first of all the Government of the Republic regulation No. 80 "The Foundations of Uniform Procedural Principles" of 26 February 2001 (in Estonian).

[10] Riigi Teataja (The State Gazette) I 1994, 51, 857 (in Estonian).

[11] Government of the Republic, explanatory letter to the draft Public Information Act, 2000, www.riigikogu.ee/ems/; Data Protection Inspectorate, Report on the implementation of the Public Information Act, 2001, http://www.dp.gov.ee/?js=1. According to the questionnaire conducted by the Data Protection Inspectorate more than half of the data holders had registered only 10 information requests from 1 January until 1 October 2001. Only less than 10% of the data holders who responded to the questionnaire had received over a hundred information requests. See Data Protection Inspectorate, Report 2001.

[12] PIA § 28 (1), 7), 13), 14), 32), § 36 (1), 7); Consumer Protection Act (Riigi Teataja (The State Gazette) I 1994, 2, 13) § 12 (1), 8) and § 3; Food Act (Riigi Teataja (The State Gazette) I 1999, 30, 415; 2002, 13, 81; 79) § 48 (5) and § 51 (1); Product Safety Act (Riigi Teataja (The State Gazette) I 1998, 40, 613) § 11 (1) (all in Estonian).

[13] Riigi Teataja (The State Gazette) I 1996, 48, 944 (in Estonian).

[14] Riigi Teataja (The State Gazette) I 1999, 16, 271. See also Population Registers Act (Riigi Teataja (The State Gazette) I 2000, 50, 317), Databases Act (Riigi Teataja (The State Gazette) I 1997, 28, 423), Population and Houses Census Act (Riigi Teataja (The State Gazette) I 1998, 52/53, 772), Agricultural Census Act (Riigi Teataja (The State Gazette) I 2000, 35, 217), Human Genes Research Act (Riigi Teataja (The State Gazette) I 2000, 104, 685), *etc.* (all in Estonian).

[15] New version of the Taxation Organisation Act (Riigi Teataja (The State Gazette) I 2002, 26, 150) section 26; Competition Act (Riigi Teataja (The State Gazette) I 2001, 56, 332) §§ 10 (4), 26 (9), 63 (all in Estonian).

[16] In practice there are few disputes concerning the government information provision activities. Only occasional cases on the basis of the Public Information Act have reached the courts (*e.g.* Tallinn Court of Appeal II-3/455/01; II-3/265/01). In 2001 the Data Protection Inspectorate reviewed 43 complaints relating to the PIA (some of them against private individuals). The majority of the complaints concerned refusal to disclose information or delay with disclosure. Altogether six precepts were issued, Data Protection Inspectorate, Report, 2002.

tion or to achieve a certain competitive advantage. The Data Protection Inspectorate has taken the stand that arising from the Public Information Act it is, in general, impossible to impose restrictions on access to such data if there are no other reasons for refusing to grant the request for information. We can only contemplate restrictions arising from a special law.'"[*17]

Also in countries with longer traditions of freedom of information there have been debates concerning the issue of to what extent agencies, when ensuring access to documents, have to enable one private individual to "snoop" after another individual.[*18] In the following parts of the article we will try to see whether this problem of contrary interests has, in the light of constitutional rights, been solved efficiently in the Estonian data regulation acts and in current practice. To illustrate it let us examine two examples of active information provision:

- disclosure of information that exerts "social pressure" (information on debtors, warnings regarding products and services);
- electronic access to document register.

2. Fundamental rights and public information

2.1. The impact of information on fundamental rights

Apparently there is no need at this point for a lengthy justification of the claim that, depending on the situation, both the disclosure of as well as failure to disclose governmental information may result in infringement of fundamental rights. In the catalogue of fundamental rights in Estonia, what first captures attention in the context of governmental information is obviously the article on the freedom of information (Constitution § 44). However, in the case of more concrete issues governmental information may entail serious problems of interpretation. Dissimilarities also crop up when comparing different legal systems with each other. In the Constitution of the Federal Republic of Germany, for example, the highest value — human dignity — sets much narrower limits to the disclosure of governmental information than the American constitutional tradition where freedom of expression is considered almost as an absolute right.[*19]

In German court practice the principle of human dignity has been used to derive the right of informational self-determination, *i.e.* the right of a person to decide when and how much information he or she allows to disclose about himself or herself. The Estonian Constitution (§§ 10 and 18) lends itself to a similar interpretation, although in the conditions of information society such interpretation can also raise doubts. Information is a social phenomenon and data are usually important for more persons than just the particular individual who is directly concerned.[*20] The German Constitutional Court also emphasises that individuals do not have an absolute authority, comparable to property rights, to decide on the information concerning them, but they only have limited rights in shaping the communication process.[*21] In the United States, on the other hand, the privacy argument is invoked in restricting access to information. Privacy is certainly protected also in Estonia (Constitution § 26 and of the European Convention on Human Rights article 8 (1)) although its scope of protection is narrower than in the case of the right to self-determination.[*22] The area of protec-

[17] Data Protection Inspectorate, Report, 2002.

[18] For example, the original purpose of the FOIA of the United States was only to guarantee the public monitoring of the activities of governmental authorities, not other private persons. According to this, the courts denied any right of access to records concerning private persons only. However, with the amendments to the FOIA in 1996 an "egoistic" right of access to records concerning another citizen or company was recognised. See J. T. O'Reilly. Expanding the Purpose of Federal Records Access: New Private Entitlement or New Threat to Privacy? – Adm. Law Review, No. 50, 1998, p. 371.

[19] E. J. Eberle (Note 1), p. 96.

[20] About informational self-determination in Germany see first of all the Population Census case (BVerfGE, 65, 1) of the Federal Constitutional Court. In Estonia the right of self-determination is recognised, for example, by the Data Protection Inspectorate, Report on the Implementation of the Data Protection Act, 2002. Available at: www.dp.gov.ee/uus/files/Ettekanne_AvTS_täitmisest_2001.rtf (in Estonian). Of the same opinion is R. Alexy. Põhiõigused Eesti Vabariigi põhiseaduses (Fundamental Rights in the Constitution of the Republic of Estonia). – Juridica eriväljaanne, 2000, p. 50; T. Annus. Riigiõigus (Constitutional Law). Tallinn: Juura, 2001, p. 192 (in Estonian). See generally about human dignity R. Maruste. Põhiseadus ja selle järelevalve (The Constitution and its Review). Tallinn: Juura, 1997, p. 112 *ff.* (in Estonian) (referring also briefly to the need to protect human dignity in the framework of data protection); E. Kergandberg. Fundamental Rights, Right of Recourse to the Courts and Problems Connected with the Guaranteeing of the Right of Recourse to the Courts in Estonian Criminal Procedure. – Juridica International, Vol. 4, 1999, pp. 122, 124 *ff.*

[21] About the opposition between the essence of the right of self-determination and the right to property see W. Hoffmann-Riem. Selbstbestimmung in der Informationsgesellschaft. – Archiv des Öffentlichen Rechts (AöR), No. 123, 1998, pp. 513, 521.

[22] Comparison of Germany and the United States: Eberle. Dignity and Liberty, 2002, pp. 94 *ff.* About the Convention, for example M. W. Janis, R. S. Kay, A. W. Bradley. European Human rights Law. 2000, p. 300 *ff.*

tion of privacy in Estonia includes only personal data belonging to the sphere of private and intimate life, not any type of information relating to a particular identifiable person.

Both the right of informational self-determination and the inviolability of privacy, in addition to restricting the disclosure of information, also restrict its collection. As an aspect of the right to self-determination also the person's right of access to information that agencies have about him or her is protected (Constitution § 44 (3)).

2.2. Constitutional obligations to disclose information

Apart from the restrictions that fundamental rights impose on gathering, processing and disclosure of information, fundamental rights may also require disclosure of information (in exceptional cases also gathering and analysis of information to protect people from dangers). The first paragraph of § 44 (1) of the Constitution prohibits the state to hamper exchange of information between individuals, protecting also the receiver of information in the social communication process, in addition to protecting the freedom of expression (Constitution § 45 paragraph 1). The right to receive information is also contained in article 10 paragraph 1 of the European Convention on Human Rights. The European Court of Human Rights has refused to derive from this provision the general right of access to unpublished documents at the disposal of the state[*23]; however, this right has been stipulated in the second paragraph of § 44 of the Constitution which imposes on the agencies the obligation to provide an Estonian citizen, upon his or her request, information *concerning the agency's activities*. The requirement to disclose information concerning the activities of state agencies also derives from the principle of democracy because neither the participation of the public in the decision-making process nor exercising of control over administration are possible in the case of insufficient information.[*24] The European Court of Human Rights has recognised the right arising from article 6 of the Human Rights Convention for access to documents at the disposal of an agency (including data concerning private individuals) if it is necessary for effective protection of a person's rights, for example in court proceedings.[*25] In light of the duty to protect rights and freedoms (Constitution § 14), the second paragraph of § 44 of the Constitution should also be interpreted in a similar manner (although this provision only mentions information concerning the "agencies' activities").[*26]

2.3. Conflicts of interests

If for the protection of life, health or property the state may have an obligation to guarantee access to information at its disposal, the question may also be reversed: whether government information, especially disclosure of facts about a person, warnings, recommendations, and appeals could be considered as infringement of those fundamental rights of a third party which are not directly related to information? More specifically: could it be considered an restriction of the freedom to choose one's employment when the police publish in a newspaper a list of "drunken drivers", as a result of which some of the people lose their job? Or when the Consumer Protection Inspectorate makes an announcement about unsanitary conditions in a restaurant, as a result of which the number of visitors in the restaurant declines, could it be said to have a connection to the freedom of enterprise? Let us review the issue on the example of two somewhat opposing legal orders — Germany and the United States.

In Germany, according to the classical concept of violation, factual and indirect effect were originally not considered as violation of fundamental rights.[*27] In recent decades, however, this idea has been shattered in

[23] See *Leander v. Sweden*, ECHR 10/1985/96/144. Grammatical interpretation of the Convention article could also lead to a different position, H. H. Perritt, C. J. Lhulier. Focus on Cyberlaw: Information Access Rights Based on International Human Rights Law. – Buffalo L. Rew, Vol. 45, 1997, pp. 899, 914 *f.* See also article 19 of the International Covenant on Civil and Political Rights. – Riigi Teataja (The State Gazette) II 1993, 10/11, 11.

[24] I. Harden. Citizenship and Information. – European Public Law, No. 7, 2001, pp. 165, 184 *ff.*; M. Lauristin. Kas oskame ja tahame kasutada uue meedia võimalusi demokraatia edendamiseks? (Can and Would We Use the Facilities of the New Media to Further Democracy?) – RiTo, Vol. 3, 2001, p. 21 (in Estonian).

[25] In the case *McGinley and Egan v. United Kingdom*, ECHR 10/1997/794/995-996, right of access was recognised in the case of a person who had fears that he had been radiated as a result of nuclear testing during service in the military. Arising from the principle of rule of law in Estonia the right of access of the concerned persons to documents relating to administrative procedure is derived. See K. Merusk. Menetlusosaliste õigused haldusmenetluse seaduses (The Rights of the Parties to a Proceeding under the Administrative Procedure Act). – Juridica, 2001, No. 8, p. 519 (in Estonian).

[26] *Guerra v. Italy*, ECHR 116/1996/735/932. See also article 16 of the Prevention of Major Industrial Accidents Convention (Riigi Teataja (The State Gazette) II 2000, 17, 105); Convention on the Transboundary Effects of Industrial Accidents (Riigi Teataja (The State Gazette) II 2000, 6, 34) article 9 and annex VIII.

[27] R. Alexy (Note 21), p. 34; K. Stern. Das Staatsrecht der Bundesrepublik Deutschland. Köide III/2. München: Beck, 1994, p. 82; H. Dreier (ed.). Grundgesetz: Kommentar. Vol. 1. Tübingen: Mohr, 1996, Vorb. nr. 81. About the contemporary concept of restrictions of fundamental

court practice and commentaries, and in addition to the relatively wide right of informational self-determination, in Germany also the impact of information provision to other fundamental rights is reviewed. In addition to the right to informational self-determination, the German Constitutional Court considered the impacts of disclosure of data to other freedoms in the cases *Drunkard* and *Lebach*. In the first case, the authority had disclosed data concerning persons who had been legally incapacitated due to their alcoholism. In the second case, a public broadcasting company had transmitted a story about the private life of a bank robber (including his homosexual relations). In both cases the court stressed that the disclosure of such data hinders the return of the person into the society.[*28] In the *Birkel* case concerning the compensation of damages, a health protection authority had warned the population through the media against the products of a well-known noodle company that was supposedly using "egg mass contaminated with microbes" to make its products. The claim proved to be scientifically truthful. The raw material used to produce the noodles did contain microbes, though not in a quantity that would be hazardous to health. But the public had interpreted the Inspectorate's warning as a dangerous and "particularly nauseating" case. The company was suffering tens of millions of marks worth of damage because of losing their market. The court said that it was a case of an indirect violation of the freedom of enterprise.[*29] The publication of information is handled as an infringement of rights, if the aim of the authority is to restrict the persons's factual freedom or such restriction is an obvious result of the publication.[*30]

The US Supreme Court does not support such wide treatment of freedom. The issue of interfering with a freedom can only arise when "the aim of a measure is to restrict the freedom of choice of an individual or group of individuals to realise themselves in an *essential* field of human activity."'[*31] In the American constitutional tradition, when solving such cases, the crucial issue is whether the state's activities infringe life, freedom, or property right.[*32] The US Supreme Court, however, has not been particularly consistent in the issue of indirect effects. Infringement of freedom was upheld in the case *Wisconsin v. Constantineau*[*33] but was denied in the case *Paul v. Davis*.[*34] The first case involved a prohibition issued by the city police chief to sell alcoholic beverages to the complainant as a problematic person. The prohibition was posted in public places and it contained the complainant's name and photo. The Court considered it elementary that if because of an administrative action a person's good name, reputation or honour is at stake, it is required that the person be heard (due process). The *Paul* case started with a warning that the police sent to store owners, where among other persons also the complainant had been mentioned as an "active shoplifter" and his photo had been enclosed. In this case the Supreme Court did not see it as an infringement of the person's constitutional rights, even regardless of the fact that the complainant had been incriminated with an offence that had actually never been heard by the court. By warning against thieves the complainant had been "stigmatised", but merely the damaging of reputation without interfering with more important interests cannot be considered sufficient to declare the police action as unconstitutional. The authorities would be excessively bound if due process rules should be applied to such consequences.[*35]

However, the Court indicated in *Paul v. Davis* that instead of the federal courts the complainant could have had recourse to state courts and demanded the rectification of defamation according to common law, and not by invoking constitutional rights. Narrow interpretation of fundamental rights in the United States does not mean, however, that the public interest for disclosure of the information always weighs up the interest to conceal the information. Based on the "core purpose"[*36] of the FOIA the Supreme Court in the case *U.S.*

rights in Germany see, in particular, the presentations of the annual meeting of scholars of constitutional law: H. Bedthge. Der Grundrechtseingriff. – Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer (VVDStRL), Vol. 57, 1998, p. 7; B. Weber-Dürler, *ibid*., 57.

[28] BVerfGE, 78, 77; 35, 202.

[29] *Birkel*, LG Stuttgart. – NJW, 1989, p. 2257; OLG Stuttgart. – NJW, 1990, 2690.

[30] Similar cases were *Trasparenzlisten*, *Osho* and *Clycol* (BVerwGE 71, 183; 90, 112; 87, 37), where authorities suggested to doctors and their patients to use specific medicines, warned parents against religious sects that try to manipulate young people and published a list of wines containing diethylenglycol (a substance that is used in some plant protection agents).

[31] About the boundaries of freedom see M. Galligan. Due Process and Fair Procedures: A Study of Administrative Procedures. Oxford: Oxford University Press 1996, p. 194; E. J. Eberle (Note 1), p. 73.

[32] In particular, the applicability of the due process clause of the Fourteenth Amendment depends on it, which in turn results in the obligation to hear the person, but also imposes substantive requirements. M. Galligan (Note 32), p. 191 *ff*.

[33] 400 U.S. 433 (1971).

[34] 424 U.S. 693 (1976).

[35] Also no restriction of freedom was seen in a case where the management of an army hospital sent a negative reference to the new employer of a person who had previously been employed as a psychiatrist in the hospital, although again the Court did not rule out filing a claim for defamation. *Siegert v. Gielley*, 500 U.S. 226 (1991).

[36] The original aim of the US Freedom of Information Act (FOIA) was to guarantee access to *information concerning agencies*, and not access to personal information that has come at the disposal of agencies. S. G. Breyer, R. B. Stewart. Administrative Law and Regulatory Policy. Boston: Little 1985, p. 1230.

Dept of Justice v. Reporters Committee[*37] considered it justified to restrict access to the register of offences maintained by the FBI, although the data had to a large extent been collected from decisions proclaimed at public court hearings, and with some effort the same data could have been collected also later. From the point of view of privacy of a person, there is, however, considerable difference whether through one entry the public gains access to the whole list of offences of the person or whether in order to gain that information all the archives of the US justice authorities would have to be searched, where theoretically the same information is available although in a dispersed manner. Thus, privacy includes not only the protection of sensitive personal data (health, sexual life, *etc*.) but also the "right to control the disclosure of any information about a particular individual"[*38], for example information about offences. Disclosure of such information could indeed be of interest to a person's potential employers, creditors, *etc*. But the aim to shed light on the actions of officials cannot be extended to cover any public or private interest towards a person's earlier activities.[*39]

The amendment of the Freedom of Information Act in 1996 abolished the restriction that the disclosure of information has to be induced by the aim of exercising democratic control over the activities of an agency.[*40] The request for information no longer has to indicate the aim of gaining access to the data. The new version of the law also enables access to the materials at the disposal of an agency concerning private individuals, unless the materials are subject to the exceptions for restrictions of access, which also protect privacy and economic interests.[*41] This is an important change in the development of the principles of freedom of information and in understanding the aims of the freedom of information.

2.4. Scope of constitutional protection

To what extent should fundamental rights limit the disclosure of government information in Estonia? The Estonian catalogue of fundamental rights and theory, due to partial reception, are similar to those of Germany rather than the United States. However, the neutral or positive attitude of people to the publicity of information in Estonia is closer to the American freedom of expression and openness than the widespread concerns in Germany about the loss of human dignity in the information age.[*42] Let us take a look at some of the arguments for or against either of the solutions. The aim of these arguments is not to prove that disclosure of information in the case of serious consequences should always be prohibited, but to show that in assessing the legitimacy of disclosing information fundamental rights are decisive even when the effect of the information on fundamental rights is indirect.

Fundamental rights cannot protect a person from truth, inevitability or facts, like for example the hazardous nature of the goods produced by a person or the fact that a person has failed to pay a debt to the tax office. Declining of market share due to the hazardous nature of a product or avoiding entering into transactions with a tax debtor is a reaction of other members of society, their choice. Does obstructing the access of consumers or business partners to such information not impose a restriction to their freedom of choice? Why should a producer of dangerous products or a taxpayer who has evaded his obligations be able to enjoy the benefits arising from information or have an unjustifiably good image? On the contrary, in the information society the state must reduce inequality arising from uneven distribution of information. In particular the creators of new risks must tolerate criticism and hesitant value judgements about their activities.[*43] As a

[37] *Department of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989). See also *U.S. Department of Defence v. Federal Labor Relations Autohority*, 510 U.S. 487 (1994).

[38] 489 U.S. 749, 763 (1989). *Cf.* with continental right of informational self-determination. See also *Department of the Air Force v. Rose*, 425 U.S. 352 (1976); *Whalen v. Roe*, 429 U.S. 589 (1977); for commentaries about them F. H. Cate, D. A. Fields, J. K. McBain. The Right to Privacy and the Public's Right to Know: The "Central Purpose" of The Freedom of Information Act. – Administrative Law Review, Vol. 46, 1994, No. 41, pp. 52 *ff*.

[39] Courts have considered it as self-evident that mentioning of a person's name in an investigation file invites comments and speculations and has a stigmatising effect. *Halloran v. Veterans Administration*, 874 F.2d 315, 322 (5th Cir. 1989); *Branch v. FBI*, 658 F. Supp. 204, 209 (D.D.C. 1987).

[40] Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104–231, 110 Stat–3048.

[41] 424 U.S. 693 (1976).

[42] See about Germany and the United States E. J. Eberle (Note 1), p. 260 *f*. Transfer of the German dogmatics on human dignity to Estonia is considered questionable by T. Annus (Note 21), p. 190. General attitude towards the publicity of information in Estonia is noticeably favourable as compared to western European welfare states. Scandinavians have always been shocked by the publication of court judgements in Estonia together with persons' names, as well as showing of video recordings of court hearings on television. The German media has repeatedly made ironic comments about the readiness of Estonians to commercialise their genetic code, see for example Der Spiegel 2000/38, 184.

[43] *Cf.* D. Murswiek. Staatliche Warnungen, Wertungen, Kritik als Grundrechtseingriffe. – DVBl, 1997, pp. 1021, 1027; M. Böhm. Information, Empfehlungen und Warnung als Instrumente des Umweltrechts. – Juristische Arbeitsblätter, 1997, pp. 794, 796; G. Lübbe-Wolff. Rechtsprobleme der behördlichen Umweltberatung. – NJW, 1987, pp. 2705, 2711. About *Gesetzesvorbehalt* in cases of risk information R. Pitschas. Öffentlichrechtliche Risikokommunikation. – Jahrbuch des Umwelt- und Technikrechts (UTR), Vol. 36, 1996, pp. 175, 212.

counter-argument, it should be specified that we are not talking here about the relationship between fundamental rights and facts, but about the issue whether *the state in disclosing facts* has to consider the possible indirect effects that the disclosure may have on fundamental rights. By removing information which is damaging, although correct, from constitutional guarantees, an individual can easily become a victim of an official's whims. Even merely by collecting information, for example about a person's hobbies, the person's freedom of self-realisation can be restricted or obstacles can be created in exercising other rights because in fear of government supervision the person may rather abandon his or her hobby or an idea of seeing a doctor.[*44] A similar situation should also be feared for example when publishing an agency's document index on the Internet together with the names of persons who have made requests to the agency. This can make people consider, when writing a letter or an e-mail to an agency about an important issue, whether it is worth risking that their name may be disclosed.[*45]

The question of whether factual obstacles to a person's freedom of behaviour due to the actions of the state restrict fundamental rights or not, should first of all be solved by providing the right substance to concrete fundamental rights.[*46] In today's conflict-filled society the scope of protection of either property rights, freedom to engage in enterprise, freedom of religion or freedom of self-realisation cannot include an unlimited discretion of an individual to behave in whatever way he or she likes.[*47] If the information disclosed by the state can help to obstruct certain strange or capricious behaviour it is not necessarily a restriction because the state cannot reckon with unforeseen wishes or interests. Otherwise, the causal chain of indirect and factual consequences of the state's activities would become endless.[*48] Thus, one important aspect is definitely foreseeability of a consequence.[*49] In the case of information and communication, making of forecasts is complicated. By disclosing seemingly innocent information the officials might not anticipate what consequences it may bring. The state's activities relating to information must not be hampered at every step by the risk that damaging consequences are not completely ruled out. It is important to find the right limits to what extent the state must be able to foresee the possible developments and when caution should be exercised and when action is needed despite the risk, in order not to freeze the discharge of public functions. In an information society the rights of third persons of access to information force the curbing of fundamental rights prohibiting disclosure of information.[*50] The German Federal Administrative Court has emphasised that in the case of indirect and non-intentional effects the consequences have to be serious. In the case of intentional influence the intensity is unimportant.[*51] The definition of the restriction of freedom used by the US Supreme Court in the *Paul* case assumed that the restricted behaviour must take place in an important area of human activity — in other words, a person's interest to behave in a certain way must be essential. When proceeding either from the importance of interference, interest to behave, or from both, the limit in a particular case is definitely approximate and requiring of a value judgement.

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[44] *Cf. Wisconsin v. Constantineau*, 400 U.S. 433 (1971), 437; A. Scherzberg. Die öffentliche Verwaltung als informationelle Organisation. – W. Hoffmann-Riem, E. Schmidt-Aßmann (eds.). Verwaltungsrecht in der Informationsgesellschaft. 2000, p. 218. About restrictions of freedoms in cases of gathering of client information A. C. Aman. Information, Privacy, and Technology: Citizens, Clients, or Consumers? – J. Beatson, Y. Cripps (eds.). Freedom of Expression and Freedom of Information, 2000, p. 340. About the USA see also *Whalen v. Roe,* 429 U.S. 589 (1977).

[45] But having recourse to an agency may be necessary for the protection of various fundamental rights (life, health, *etc*.), and the right of recourse has been separately provided for in § 46 of the Constitution.

[46] *Cf.* M. Albers. Faktische Grundrechtsbeeinträchtigungen als Schutzbereichsproblem. – DVBl, 1996, pp. 233, 236; J. Widman. Abgrenzung zwischen Verwaltungsakt und eingreifendem Realakt. München, 1996, p. 60 *ff*.

[47] This is the basis for traditional treatment of self-realisation in Germany, which naturally does not mean that the freedom could not be restricted. The question is whether it is a restriction of freedom at all. A short survey of the debate, R. Alexy (Note 21), p. 51 *ff*. About the need for objective value judgement also in Germany see M. Albers (Note 47), pp. 233, 238 *f*; B. Weber-Dürler. Grundrechtseingriff. – VVDStRL, Vol. 57, 1998, pp. 57, 83. In objective valuation both the constitutional values will have to be taken into account: T. Würtenberger. Rechtliche Optimierungsgebote oder Rehmensetzungen für das Verwaltungshandeln? – VVDStRL, Vol. 59, 1999, pp. 139, 143, as well as law on the level of ordinary legislation: M. Schulte. Schlichtes Verwaltungshandeln: Verfassungs- und verwaltungsdogmatische Strukturüberlegungen am Beispiel des Umweltrechts. Tübingen: Mohr, 1995, p. 96.

[48] See T. Annus (Note 21), pp. 178 *ff*. This problem has been treated in Germany after abandoning the classical notion of restriction. Alexy writes that "the modern notion of restriction is characterised by its complete limitless", considering it a right solution in the case of restriction *with small intensity* to return to the criterion of finality (aim). This would mean that in order to qualify a government measure as an infringement the aim of the measure has to be to affect a benefit that is protected as a fundamental value. R. Alexy (Note 21), p. 34. About forseeability as an element of the concept of the restrictions of the fundamental rights T. Haussühl. Die Produktwarnung im System des Öffentlichen Rechts. Neuried: Ars Una, 1999, p. 40 *f*.

[49] Even with the best of intentions an agency cannot consider an unforeseeable consequence when weighing the proportionality of an intended measure. In connection with application of art 3 of the European Convention on Human Rights, foreseeability of consequences is also the basis for dissenting opinion of Justice Jambrek in the case *Guerra et al v Italy*, ECHR 116/1996/735/932. Foreseeability as a criterion of infringement in the delict law and state liability relates to the essential institute of **adequate causal link** as an important element of liability.

[50] If at all to recognise the right of informational self-determination in Estonia, its scope of protection cannot include just any information concerning a person, but only information regarding which the subject of information has sufficient interest (*i.e*. protected by some other rights) for imposing restrictions on use. *Cf.* about Germany W. Hoffmann-Riem (Note 22), pp. 513, 527 *f*.

[51] *Ibid*., p. 530; *Transparenzliste*, BVerfGE, 71, 183, 192.

But can fundamental rights protect a person also against informing about an offence? At first sight, it might seem unjust but taking a closer look it seems rather logical. We do not claim, however, that failure to comply with sanitary requirements, tax evasion or drunken driving are protected by the constitution. Disclosure of such information can exert legally and politically desirable influence for avoiding an offence or dangerous behaviour, but it can also damage the person's other interests that deserve protection (actually it is often the aim of such information to damage certain benefits in order to influence a person's behaviour). The fact that a person has committed an offence cannot reduce the scope of fundamental rights of the offender, although the delict can naturally be a basis for restricting the rights in accordance with the law.

Regardless of the absence of unanimity concerning the concept of fundamental rights, it cannot be denied that indirect, but foreseeable, obstacles created by government information to the exercise of fundamental rights can, depending on the situation, constitute a restriction of fundamental rights in the meaning of § 11 of the Constitution. This is ruled out neither by the truthfulness of data or the fact that the public is notified of the offence. Disclosure of both the information of a document register as well as "information exerting social pressure" can result in a restriction of fundamental rights.

3. Legitimacy of limitations

Seeing an act of provision of information as a restriction of a fundamental right does not yet mean that the act would be prohibited, however it does impose in Estonia additional requirements on the activities of the state:

- a restriction of fundamental rights has to be provided by law;
- a restriction has to be, both in general terms and in a particular case, necessary in democratic society (proportionality).*[52]

3.1. "Provided by law"

Unlike citizens, when disclosing information the state cannot base itself on the freedom of expression of an agency or officials.*[53] The cases and preconditions of disclosing information concerning a person's rights must be established by law adopted by the Parliament. Without authority, information can only be disclosed where it cannot be foreseen to infringe anyone's rights. Interference in a person's rights can only take place in exceptional cases when it is inevitably necessary for an urgent protection of another high-level value, for example another person's fundamental rights.*[54] For the functioning of democracy, the rule of law and the information society it is necessary that agencies provide general information about the discharge of their functions. In Germany such notification has been considered a supplementary duty that accompanies every public function and that does not require a separate authorising norm.*[55] It is another issue as to what extent the duty of informing about one's activities can be used to justify organisation of image-building campaigns by the state and local governments with the aim to influence the attitude of the population.*[56]

The enactment of the Public Information Act in general satisfied the need for legal bases of disclosing information, providing for quite extensive possibilities both for allowing access at the request of a person as well as publication on one's own initiative.*[57] The bases for active provision of information are contained first of all in the relatively chaotic Public Information Act, in § 28. In many respects they are also covered by other laws (*e.g.* warnings about dangerous products are required in the Food Act, §§ 48 (5) and 51^1 (1), in the Consumer Protection Act, §§ 12 (1) 8) and 12 (3), in the Product Safety Act, § 11 (1) as well as in PIA § 28

[52] Both requirements derive from the principle of rule of law and have been fixed in the Constitution in § 11.

[53] An exception is public broadcasting which is protected by the freedom of the press, as well as the freedom of a scientist working in a public university to disseminate his or her views. But the state itself is an obligated subject and not the addressee of fundamental rights.

[54] In the case of hazard or risk information relating to consumer protection or environment such collisions are highly probable because the development of technology raises ever new dangers which need to be relieved much earlier than when the legislator is able to take action.

[55] However, collisions between private and public interests occur also in the implementation of this task and they would need regulation on the level of law. A. Roßnagel. Möglichkeiten für Transparenz und Öffentlichkeit im Verwaltungshandeln – unter besonderer Berücksihtigung des Internet als Instrument der Staatskommunikation. – W. Hoffmann-Riem, E. Schmidt-Aßmann (Note 45), p. 274.

[56] We are not talking here about huge sums the authorities have spent on PR experts that have caused debate in Estonia, but about the effect of advertising and propaganda on democracy and the rights of individuals. Many of the campaigns do not have a burdening influence on third persons (*e.g.* calls to wear reflectors in traffic), but for example the appeals for preference of domestic or environmentally friendly products clearly infringe the interests of producers of alternative goods.

[57] But *e.g.* there is no legal base for the publication of debtors.

(1) 7). For the publication of tax debts the legal base is currently provided for in the Taxation Organisation Act, in § 11 (4) 1). There is no clear authorising norm for disclosing other debts, first of all as concerns contractual debts.

A question may arise, though, in connection with sufficiency of preciseness of one or another norm.[*58] In providing the scope of discretion it has to be guaranteed that the officials understand the aims for which the discretionary powers have been given to them.[*59] There is considerable doubt concerning the constitutionality of the second alternative in § 28 (1) 32) of the PIA. According to this provision the holder of information is required (thus also entitled) to disclose other information "that the holder of information deems necessary to disclose". In principle this is a *carte blanche* authority for disclosing any information that is not directly prohibited by law. Such general authority cannot be a sufficient for information that restricts fundamental rights. This provision can be understood to be constitutional only if we give a narrow interpretation to the words "deems necessary", considering only the need to protect interests that are more important than the infringed fundamental rights.

3.2. Proportionality

Proportionality is the main criterion for assessing the rationality of an administrative measure. It is necessary to assess whether the state is not going too far in interfering with people's rights; or in the context of this article: whether publication is always appropriate, necessary and moderate to achieve a certain aim.[*60]

First, using the example of product warnings, let us take a look at the aims that can be used to justify the publication of information concerning individuals. Undoubtedly, the protection of people's life, health and property is a public function on the basis of § 14 of the Constitution and it serves legitimate purposes. As a rule, by nature a warning is an appropriate means for protecting people from the realisation of potential dangers if the addressees of warnings with their own behaviour can avoid the danger. If the actual danger has ceased to exist or it can be eliminated by using less stringent means, there has to be some other aim in order to inform about the violation retrospectively (*e.g.* according to § 51 (1) of the Food Act). Could it be the interest of consumers to also avoid in the future the use of the goods or services of the undertaking that had caused the danger?[*61] The trend, however, is towards the expansion of the aims of freedom of information.[*62] A wider approach to the freedom of information is also used in the PIA, the purpose of which is also to promote an open society, not only to provide control over the activities of agencies (§ 1). In addition to the protection of democracy, public information must also fulfil the "library" function, offering a possibility to study information that concerns private individuals and companies.[*63] Members of an open society are often interested in the activities of others, so that because of lack of knowledge people would not have to make wrong choices (*e.g.* which goods to consume, where it is healthy to live, *etc*.). The consumers may

[58] To illustrate: The European Court of Human Rights has considered sufficiently exact the rule contained in the Finnish Criminal Procedure Code, according to which a doctor can be required to disclose medical data about his or her patient in a criminal case where the potential punishment is at least six years' imprisonment, *Z v. Finland,* ECHR 9/1996/627/811.

[59] The law must not necessarily provide for the form in which the information should be published. Also publishing of information on the Internet does not have to be specifically provided for if in principle there exists a legal base for publication. A. Roßnagel. NVwZ 2000, 624.

[60] The principle of proportionality has been fixed in the second sentence of § 11 of the Constitution. About the principle of proportionality S. Kaljumäe. Proportsionaalsuse põhimõte ning selle rakendamine Riigikohtus põhiseaduslikkuse järelevalve ja haldusasjade lahendamisel (The Principle of Proportionality and its Application by the Supreme Court in Reviewing Constitutionality and in Settling Administrative Matters). – Riigikohtu lahendid ja kommentaarid, 2000, p. 897 (in Estonian).

[61] The interest of the consumer in having access to records concerning a danger that has already been eliminated can also lie in the necessity to gather evidence in court proceedings relating to damages caused by a product. See D. P. Graham, J. M. Moen. Discovery of Regulatory Information for Use in Private Products Liability Litigation: Getting Past the Road Blocks. – William Mitchell L. Rev., Vol. 27, 2000, p. 653. In Estonia, on the basis of the Code of Civil Procedure § 119 (1) the court may demand documentary evidence from third parties if the evidence is relevant to the case.

[62] According to the 1996 amendment of the United States FOIA, information has to be made available for any public or private purpose. The EU public access regulation emphasises repeatedly (in point 10 of the preamble, in article 2 paragraph 3) that access must be guaranteed to documents drawn up by the EU institutions as well as documents that have come at their disposal. The European Parliament and Council regulation no. 1049/2001 of 30 May 2001 on public access to the documents of the European Parliament, Council and Commission. – OJ L 2001, 145, 43.

[63] For example The US FOIA 1996 amendments (Electronic Freedom of Information Act Amendments of 1996, § 2, Pub. L. No. 104–231, 110 Stat. 3048) enable access also to information on private individuals, regardless of the purpose of an information request. See J. T. O'Reilly (Note 19), pp. 371, 372 *ff*. But see P. J. Cooper, C. A. Newland. Handbook of Public Law and Administration. San Francisco: Jossey-Bass, 1997, pp. 393, 396, according to which the opinion of the Supreme Court in the case "*Dept. Justice*" concerning the purposes of the FOIA was criticised in the Senate discussions of the FOIA amendments but no express amendment in the law was made to revoke it. About the purposes of freedom of information in Great Britain which still focus first of all on guaranteeing democracy and exercising supervision over the executive, as well as on the protection of the citizen as a consumer, S. Palmer. Freedom of Information: The New Proposals. – J. Beatson, Y. Cripps (eds.) (Note 45), p. 253 *ff*.

have a considerable interest to avoid using the services of undertakings that have broken the rules and caused a danger, because violation or negligence may reoccur.*[64]

However, issuing of warnings and posting the "lists of sins" have their drawbacks. If an undertaking is not trustworthy, why does the supervisory authority allow it to continue operating? Isn't the agency simply trying to pass on to consumers the responsibility for guaranteeing safety? In prohibiting the further activities of a negligent or criminal undertaking the agency should consider all the circumstances, especially assess the danger of its activities and the possibility of repeating the violations. By issuing a warning or disclosing the undertaking's name in a database, its fate is left in the hands of the consumers and the media, whereas there is nobody whom to complain to about the reaction of the public. Though, I think that social self-regulation with the help of warnings should be allowed where it is difficult for the state to exercise control and regulation. For example, the fact that someone has sold low-quality fuel once or even several times cannot always in itself be a basis for revoking his licence. At the same time the trader's credibility is tainted and the consumer should have the right to know it. Instead of prohibiting the operations the undertaking is given a possibility to restore its credibility.*[65]

Next, it should be considered whether the publication of information that damages a person's reputation will actually help to achieve the desired aims. Tartu City Government, for example, has given the following justification for its new policy of publishing the list of debtors:

> "Tartu City Government decided on 6 April 2000 to publish the names of companies, establishments and people who are indebted to the city. We wish to discipline our contractual partners who have failed to perform their financial obligations to the city. At the same time we consider it important to inform the inhabitants of the city about the companies and people who are indebted to the city."*[66]

We can distinguish three aims in this message: (1) to exert pressure on the debtors who are delaying with the payment, (2) to discipline future contractual partners or current partners who have so far been acting correctly, and finally, (3) to inform citizens about the names of persons who are indebted to the city (and thus indirectly also to its inhabitants). The publication can only serve the first aim if the debtor is able to pay the debt should he wish to do so. But in many cases (*e.g.* in the case of tenants who are in a difficult economic situation, companies on the verge of bankruptcy) it is not so. In such situations publication is disproportionate because it does not help to achieve the desired aim. Damaging of reputation can even have a reverse effect on restoring the solvency of the debtor. The legitimacy of the second aim — preventive effect through stigmatising — is doubtful because of its penal nature. The legislator has not considered the violations of contractual obligations as punishable: instead, the contracting parties with their agreement can themselves establish such consequences in the form of penalties for non-performance of the contract. Besides, the actual severity of the punishment would depend on accidental circumstances: on the intensity of the public reaction, not on the guilt of the punished person.*[67] As concerns the third argument, the same principle applies as in the case of product warnings: if the state has discovered an untrustworthy person, should it inform the public about it, so that the citizens and undertakings could avoid entering into transactions with the debtor?

In reviewing the necessity of a measure it has to be considered that it may be possible to achieve the desired aim by using other means that would be less damaging on the person causing the danger. The PIA, § 28 (31), requires that agencies disclose their document register on the Internet.*[68] Document registers are necessary for ensuring access to the data that the citizen is interested in. The precondition for usability of public information is the availability of meta-level information about the types of documents at the disposal of an agency.*[69] But, the document register, as a rule, can mostly fulfil its purpose also without disclosing the

[64] S. Palmer (Note 63), p. 255. In addition, in favour of access to information concerning private persons an argument has been brought that a citizen must be able to use in his or her interests the information collected with the means obtained from the citizen as a taxpayer. J. T. O'Reilly (Note 19), pp. 371, 382.

[65] A practical example of this in Estonia are numerous cases of selling low-quality motor fuel in 2001. Information about fuel traders on the web page of the Energy Market Inspectorate: http://www.eti.gov.ee/index.php?page=kasulik&cat=Kontrollreidid (in Estonian).

[66] Available at: http://info.raad.tartu.ee/debitores.nsf.

[67] *Cf.* German case "*Schuldnerspiegel*", OLG Rostock. – ZIP 2001, 796, where the use of an "innocent" debtor for generally preventive purposes was condemned.

[68] The document register is a database maintained by an agency about the documents received by the agency and prepared in the agency, and it also contains information about the sender or addressee of a document, or the document's type (PIA §§ 11 and 12). An example: the register of incoming documents of the Ministry of Justice at its web page http://www.just.ee/jdocs/sissetulevad.php. At the beginning of March 2002, 17 out of 81 documents (*e.g.* complaints and petitions against the Prisons' Administration) derived from private individuals. Among other information, the title of each document and the name of its sender is available on the Internet. Also through the document register of the Ministry of Transport and Communications (http://www.tsm.ee/index.html?id=127&t_id=46&asutus_id=10&dok_id=744) it is possible to have access to letters (with the sender's name) which contain replies to passengers' complaints against transport companies.

[69] I. Harden (Note 25), pp. 165, 176; W. F. Fox. Understanding Administrative Law. New York: Bender, 1997, p. 447. In the United States the obligation of publication of registers began with the case *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973). Regulation no. 2001/1049/EC requires that EU institutions also maintain document registers. Thereby a document register is only one of the necessary means for guarantee-

identity of the person connected with confidential information.[*70] Revealing the name of the addressee or the sender must be justified with additional public interest towards the person concerned: *e.g.* the interest of consumers towards documents that have been collected or drawn up in the course of exercising supervision over a producer. In the case of complaints by consumers, the disclosure of the complainant's personal data is rather questionable. Again, it is necessary to make a balanced decision separately in each individual case. This sets limits to the possibilities of automatic disclosure of information.[*71] Adopting an in bulk approach to the publication of information, especially as concerns publication on the Internet, is undoubtedly cheaper and quicker. Economy can be one of the arguments for publication of information on the basis of general criteria, but it could not be used to justify causing of substantial damage to a person. Even when an automatic publication system is used, we should consider the possibilities of enabling the person to find out about the possibility of publication and, prior to it, submit his or her objections (except, of course, in the case of risk situations requiring urgent reaction).[*72]

3.3. Form of disclosure

An important role in disclosing personal data is played by the form, intensity and level of detail of the message. Apart from the justification of the substance of the disclosed data, arising from the principle of proportionality it is also necessary to have justification for value judgements (comments that something is bad or good) associated with the data, and for more aggressive methods of influencing the audience (*e.g.* agitation against environmentally dangerous or foreign products). A certain degree of aggressiveness is also needed in a public debate between an agency and a journalist, politician or representative of an interest group.[*73] In assessing the legitimacy of information provision, not only the truthfulness of the facts is important but also the proper understanding of the message by the audience. In the "list of offences" published by the Energy Market Inspectorate, for example, it is impossible for an average citizen to understand whether the fuel that had been declared as not complying with quality requirements is actually dangerous or not.[*74]

Conclusions

The basic rights do not exclude the disclosure of information "exerting social pressure" or other information that may damage the reputation of a person, although the disclosure cannot be automatic — every case of disclosure must be preceded by an individual analysis of positive and negative effects. The framework for interference in the informational freedom of private individuals has to be developed by the legislator. The Public Information Act seeks to establish only a minimum of exceptions to the freedom of information in particular cases, but to apply the principle of proportionality, the PIA should introduce an express right (and duty) of consideration for officials, and the officials should be made aware of the need to consider the possible consequences of damaging someone's reputation.

ing actual access. Also necessary are the description of the web page of an agency, search engines, help programs, *etc*. P. J. Cooper, C. A. Newland (Note 64), p. 391.

[70] Regulation 1049/2001 art 11 paragraph 2 second sentence: references to documents shall be made in a manner which does not undermine protection of the interests in § 4 (§ 4 establishes exceptions relating to public interest, privacy and commercial interests).

[71] D. Kugelmann. Grundlagen und verwaltungsrechtliche Grundstrukturen individueller Rechte auf Zugang zu Informationen der Verwaltung. Tübingen: Mohr, 2001, p. 282.

[72] The obligation to hear derives from the Administrative Procedure Act (Riigi Teataja (The State Gazette) I 2001, 58, 354), § 40 (2) (in Estonian).

[73] The structure of all public sector web pages should be subject to similar principles, so that the citizen who finds himself or herself on the web page of another agency should not always start identifying where to find the information that he or she needs. For the same reason pages should not be reorganised without sufficient need. At the beginning of 2002 establishing of technical standards for electronic documents of administrative agencies was not yet completed www.riik.ee/dh/. See also public web pages of Estonian government agencies. Recommendations, p. 1.3, http://www.riik.ee/kord/wwwjuhend.html (15.08.2001).

[74] A. Roßnagel. – E. Schmidt-Aßmann, W. Hoffmann-Riem (eds.) (Note 45), pp. 266, 269, 274 *f.* Also an avalanche of information does not yet mean freedom of information or clarity. See A. Schezberg (Note 45), p. 195.

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Informationelle Selbstbestimmung und allgemeine Informationsfreiheit in Deutschland

1. Grundlagen der informationellen Selbstbestimmung

Informationelle Selbstbestimmung ist in Deutschland als Teil des grundrechtlich gewährleisteten allgemeinen Persönlichkeitsrechts durch Art. 2 Abs. 1 i.V.m. Art. 1 Abs. 1 GG geschützt. Die etwas holprige Wortschöpfung bezeichnet die aus den Gedanken der Selbstbestimmung folgende Befugnis des Einzelnen, grundsätzlich selbst zu entscheiden, wann und innerhalb welcher Grenzen seine persönlichen Lebenssachverhalte offenbart werden.[*1] Das Recht auf informationelle Selbstbestimmung gilt als Zusammenfassung aller Aspekte des Persönlichkeitsschutzes, die sich auf Informationen über die Persönlichkeit und die Privatsphäre des Einzelnen beziehen.[*2] Unter den modernen Bedingungen der Datenverarbeitung setzt die freie Entfaltung der Persönlichkeit den Schutz des Einzelnen gegen unbegrenzte Erhebung, Speicherung, Verwendung und Weitergabe seiner persönlichen Daten voraus. Das Grundgesetz gewährleistet insoweit die Befugnis des Einzelnen, grundsätzlich selbst über die Preisgabe und Verwendung seiner persönlichen Daten zu bestimmen.[*3] Diese nicht unumstrittene Rechtsprechung des Bundesverfassungsgerichts betont den besonderen Wert der Privatsphäre des Einzelnen und die daraus folgende individuelle Bestimmungsbefugnis über die Rolle der

[1] BVerfGE 65, 1/41 *f.*; 80, 367/373; zum neueren Schrifttum vgl. insbesondere: P. Gola, R. Schomerus. Bundesdatenschutzgesetz. 6. Aufl. München, 1997.

[2] Vgl. W. Schmitt Glaeser. Schutz der Privatsphäre. – Handbuch des Staatsrechts, VI, § 129, Rn. 76 *ff.*

[3] Vgl. BVerfGE 65, 1/41 *ff.*; D. Murswiek. – Sachs, Grundgesetz. 2. Aufl. 1999, Art. 2, Rn. 72.

eigenen Persönlichkeit im sozialen Umfeld. Die Bedeutung dieses Rechtes folgt schon daraus, dass das Bundesverfassungsgericht sich nicht damit begnügt, es aus Art. 2 Abs. 1 GG zu folgern[*4], sondern es zusätzlich unmittelbar aus der Gewährleistung der Menschenwürde durch Art. 1 Abs. 1 GG begründet.[*5]

Auf der Grundlage dieser Rechtsprechung des Bundesverfassungsgerichts hat der Gesetzgeber eine Vielzahl von Einzelgesetzen und Spezialnormen zum Schutz der informationellen Selbstbestimmung erlassen. Sie stehen ihrerseits in der Tradition zahlreicher herkömmlicher Schutzbestimmungen für die Privatsphäre, die sich in Auskunfts- und Zeugnisverweigerungsrechten manifestieren und die Geheimhaltungspflichten besonders für bestimmte Berufe wie Ärzte, Rechtsanwälte und Geistliche begründen.

Die Kernmaterie des so entstandenen Rechtsgebietes bilden das Bundesdatenschutzgesetz und die Datenschutzgesetze der Länder. Soweit Spezialnormen – wie etwa in den Polizeigesetzen oder in den Gesetzen zu den Geheimdiensten – bestehen, gehen diese den allgemeinen Datenschutzgesetzen vor. Die Datenschutzgesetze der Länder und das Bundesdatenschutzgesetz stimmen in Struktur und vielen Einzelbestimmungen weithin überein; es besteht ein gemeindeutsches Datenschutzrecht. Während die Landesdatenschutzgesetze vorbehaltlich bestehender Spezialgesetze für die Erhebung, Verarbeitung und Nutzung personenbezogenen Daten durch öffentliche Stellen gelten, die den Länderkompetenzen unterliegen, erfasst das Bundesdatenschutzgesetz sowohl öffentliche als auch nichtöffentliche Stellen. Der Zweck des Bundesdatenschutzgesetzes – und für ihren Bereich der Datenschutzgesetze der Länder – ist es, den Einzelnen davor zu schützen, dass er durch den Umgang mit seinen personenbezogenen Daten in seinem Persönlichkeitsrecht beeinträchtigt wird.[*6] Detaillierte Bestimmungen regeln das Erheben, Speichern, Verändern, Nutzen und Weitergeben personenbezogener Daten. Der Betroffene hat grundsätzlich ein Auskunftsrecht und ein Recht auf Benachrichtigung über die zu seiner Person gespeicherten Daten. Dazu bestehen Ansprüche auf Berichtigung, Löschung und Sperrung von Daten. Zur Kontrolle ordnungsgemäßen Datenschutzes bei den öffentlichen Stellen des Bundes besteht das Amt des Bundesbeauftragten für den Datenschutz, der auf Vorschlag der Bundesregierung vom Deutschen Bundestag gewählt wird. Entsprechende Datenschutzbeauftragte gibt es in den Ländern. Für die Beaufsichtigung privater Datenverarbeitung bestehen von den Ländern eingerichtete Aufsichtsbehörden.

2. Informationsfreiheit

Gemäß Art. 5 Abs. 1 GG hat jeder das Recht, sich aus allgemein zugänglichen Quellen ungehindert zu unterrichten. Damit ist das Informationsfreiheitsrecht verfassungsrechtlich gewährleistet. Allerdings ist in der Verfassung nicht definiert, wann eine Quelle allgemein zugänglich sein muss. Dies bedeutet, dass es den Behörden von Verfassungs wegen grundsätzlich freigestellt ist, ihrerseits über die Allgemeinzugänglichkeit einer Information zu entscheiden. Allgemein zugänglich ist eine Informationsquelle dann, wenn sie technisch geeignet und bestimmt ist, der Allgemeinheit, d. h. einem individuell nicht bestimmbaren Personenkreis, Informationen zu verschaffen.[*7] Damit legt derjenige, der über die Allgemeinzugänglichkeit entscheidet, auch den Umfang der Informationsfreiheit fest.

Seit langem setzt sich allerdings die Auffassung durch, dass der Bürger erst mit zunehmender Informiertheit Wechselwirkungen in der Politik und ihre Bedeutung für seine Existenz erkennt, so dass seine Freiheit zur Mitverantwortung und zur Kritik in dem Maße wächst, in dem er über staatliche und politische Vorgänge informiert ist[*8], und dass dies eben ein umfassendes Recht auf Information erfordert. Auch wenn Art. 5 Abs. 1 S. 1 GG den konkreten Umfang der Informationsfreiheit in die Hände derjenigen legt, die über den Zugang zu einer Information entscheiden, zeigt die Norm doch, dass prinzipiell möglichst weitgehende Informationsfreiheit herrschen soll. Das muss auf die Bestimmung der Allgemeinzugänglichkeit durchschlagen. Dies folgt auch aus der Funktion der Grundrechte als Teilhaberechte am demokratischen politischen Prozess. Grundrechte tragen vielfältige Funktionen, eine wichtige davon ist die Funktion der Gewährleistung zur Teilhabe am demokratischen öffentlichen Prozess. Dies ist nur möglich, wenn der Bürger angemessen informiert ist. Die Transparenz behördlicher Entscheidungen ist Voraussetzung für die effektive Wahrnehmung von Bürgerrechten. Den Gefährdungen, die sich durch die Entwicklung der modernen Informationstechniken für den Einzelnen und für die Demokratie ergeben, muss entgegengewirkt werden mit Datenschutzrechten auf der einen und Informationszugangsrechten auf der anderen Seite.[*9] Beides ergänzt sich in notwendiger

[4] Art. 2 Abs. 1 GG lautet: „Jeder hat das Recht auf die freie Entfaltung seiner Persönlichkeit, soweit er nicht die Rechte anderer verletzt und nicht gegen die verfassungsmäßige Ordnung oder das Sittengesetz verstößt."

[5] Art. 1 Abs. 1 GG lautet: „Die Würde des Menschen ist unantastbar. Sie zu achten und zu schützen ist Verpflichtung aller staatlichen Gewalt."

[6] Vgl. § 1 Abs. 1 Bundesdatenschutzgesetz vom 20.12.1990 (BGBl. I S. 2954), zuletzt geändert am 26.6.2001 (BGBl. I S. 1254).

[7] Vgl. BVerfGE 27, 71/83; 27, 104/108; 33, 52/65.

[8] Vgl. BVerfGE 27, 71/82.

[9] Vgl. Gesetzentwurf der SPD-Fraktion vom 01.12.1993 BT-Drs. 12/6323, S. 8.

Weise, gerade weil der Datenschutz nicht als Vorwand für eine Informationsverweigerung dienen darf. Entsprechend hat sich auch die Konferenz der Datenschutzbeauftragten von Bund und Ländern dafür ausgesprochen, ein „Recht auf Zugang zu den Daten der Verwaltung (Aktenöffentlichkeit, Informationsfreiheit)“ in das Grundgesetz aufzunehmen.*[10]

3. Die neuere Entwicklung

3.1. Das geplante Informationsfreiheitsgesetz

Entsprechend bestehen Bestrebungen für den Bund, ein Informationsfreiheitsgesetz zu schaffen*[11], wie es dies in den USA*[12] sowie in vielen anderen Staaten gibt – klassisches Beispiel und Vorbild ist auch für die deutsche Entwicklung die schwedische *Treckfrihetsförordning* von 1766. In Deutschland bestehen auf Landesebene seit neuerem Informationszugangsgesetze in Brandenburg, Berlin und Schleswig-Holstein.

Einzelne, in ihrem Umfang jeweils unterschiedliche Rechte auf Informationszugang sind für besondere Bereiche vorgesehen, etwa auf Grund des Stasi-Unterlagengesetzes und des Umweltinformationsgesetzes sowie für öffentliche Register wie die Handels-, Vereins- und Güterrechtsregister. Im Übrigen besteht ein Anspruch auf Akteneinsicht generell nur innerhalb eines Verwaltungsverfahrens und nur dann, wenn die Aktenkenntnis zur Geltendmachung oder Verteidigung rechtlicher Interessen erforderlich ist.*[13] Darüber hinaus muss eine Behörde über Anträge auf Informationszugang dann nach pflichtgemäßem Ermessen entscheiden, wenn der Antragsteller ein berechtigtes Interesse am Informationszugang geltend macht.*[14] Damit ist das bisher bestehende Recht des Informationszuganges in Deutschland gekennzeichnet durch das Prinzip des Aktengeheimnisses und der Vertraulichkeit der Verwaltung.*[15] Demgegenüber sollen in der neueren Entwicklung die demokratischen Beteiligungsrechte gestärkt und ein partnerschaftliches Verständnis vom Verhältnis zwischen Staat und Bürger gefördert werden, wenn Informationsfreiheitsgesetze in Deutschland verstärkt propagiert werden.

Zu dieser Tendenz tragen nicht zuletzt internationale Entwicklungen und die Rechtslage im Bereich der Europäischen Union bei. So ist durch Art. 255 EG ein allgemeines Zugangsrecht zu den Dokumenten des Europäischen Parlaments, des Rates und der Kommission gewährleistet. Hierzu ist die Transparenzverordnung (EG) Nr. 1049/2001 ergangen, die den „Verhaltenscodex für den Zugang der Öffentlichkeit zu Kommissions- und Ratsdokumenten“ vom 06. Dezember 1993*[16] und den „Verhaltenscodex betreffend den Zugang der Öffentlichkeit zu den Protokollen und Protokollerklärungen des Rates in seiner Rolle als Gastgeber“ vom 2. Oktober 1995 ablöst. Für manche Bereiche ist die Umweltinformationsrichtlinie wesentlich.*[17]

Bereits 1981 hat das Ministerkomitee des Europarats eine Empfehlung zum freien Zugang zu amtlichen Information verabschiedet.*[18] Wichtig für die internationale Entwicklung sind auch die Bemühungen um Zugang zu Informationen im Umweltbereich geworden. Beispielhaft hierfür mag das Übereinkommen der Wirtschaftskommission der Vereinten Nationen für Europa über den Zugang zu Informationen, die Beteiligung der Öffentlichkeit an Entscheidungsverfahren und den Zugang zu Gerichten in Umweltangelegenheiten gelten. Deutschland hat dieses Übereinkommen im Dezember 1998 unterzeichnet.

Der Grundsatz, der der Entwicklung zu Informationsfreiheitsgesetzen in Deutschland zugrunde liegt, ist: „Soviel Information wie möglich, soviel Geheimnisschutz wie nötig“. Geheimnistatbestände sollen im Wesentlichen weiterhin in den Spezialgesetzen geregelt sein, weil Art und Umfang des Geheimnisschutzes vom jeweiligen Rechtsgebiet abhängig sind. Ausnahmetatbestände, die in den Informationsfreiheitsgesetzen enthalten sind, betreffen vor allem Bereiche absoluter Geheimhaltung wie Staatsschutz und Landesverteidigung, zum anderen Bereiche wie das Datenschutzrecht und die behördliche interne Meinungs- und Willensbildung. Wesentlich für die Ausweitung des Informationsanspruches ist, dass im Zuge dieser neuen Entwicklung nicht mehr der informationssuchende Bürger ein besonderes Interesse an der Information geltend

[10] Entwurf eines Informationsfreiheitsgesetzes (IFG), Begründung, A. Allgemeiner Teil. I. Zielsetzung, www.bmj.bund.de. (24.5.2002).

[11] Vgl. ebenda.

[12] *Freedom of Information Act* von 1966.

[13] Vgl. § 29 Verwaltungsverfahrensgesetz (VwVfG).

[14] BVerwGE 30, 154/160; 61, 15/22; 69, 278/279 *f.*

[15] Vgl. zum Gesamtzusammenhang Entwurf eines Informationsfreiheitsgesetzes (IFG), Begründung, A. Allgemeiner Teil, II. Informationszugang im geltenden Recht, www.bmj.bund.de (24.5.2002)

[16] Vgl. Ausführungsbeschluss des Rates 73/731/EG.

[17] Richtlinie 90/313/EWG des Rates vom 7. Juni 1990, ABl. EG Nr. L 158 S. 56.

[18] Empfehlung Nr. R (81) 19.

machen muss, vielmehr wird der Zugang zu Informationen der Regelfall und die Versagung die Ausnahme. Deshalb trägt die öffentliche Stelle, die über die Informationserteilung entscheidet, die materielle Beweislast für das Vorliegen von Versagungsgründen.

Datenschutzrechtliche Belange müssen weiterhin geschützt bleiben. Dies folgt schon aus dem Recht auf informationelle Selbstbestimmung gemäß Art. 2 Abs. 1 i.V.m. Art. 1 Abs. 1 GG, aber auch aus den zahlreichen weiteren verfassungsrechtlichen Bestimmungen mit Relevanz etwa in Bezug auf Geschäftsgeheimnisse, insbesondere aus dem Recht auf den eingerichteten und ausgeübten Gewerbebetrieb im Sinne der Berufs und Eigentumsfreiheit, wie es in Art. 12 Abs. 1 und 14 Abs. 1 GG gewährleistet ist. Gleichwohl sind Informationszugang und Datenschutz unmittelbar verbunden in Spannungsverhältnis wie in gegenseitiger Ergänzung. Schon um das Recht auf informationelle Selbstbestimmung geltend machen zu können, muss der Bürger informiert sein. Informationelle Selbstbestimmung hat deshalb nicht nur die Funktion der Abwehr des Staates, sondern sie dient auch der Kommunikations- und Handlungsfähigkeit.

3.2. Das Verbraucherinformationsgesetz des Bundes

Im förmlichen Gesetzgebungsverfahren befindet sich das Verbraucherinformationsgesetz, dem das Bundeskabinett am 13. März 2002 zugestimmt hat. Das Gesetz gibt Verbraucherinnen und Verbrauchern einen Anspruch auf Zugang zu Informationen über Lebensmittel und Bedarfsgegenstände, die bei Behörden vorhanden sind und die sich auf den Schutz der Verbraucher beziehen. Einen entsprechenden Anspruch enthält der am selben Tag vom Kabinett verabschiedete Gesetzentwurf zur Neuorganisation des gesundheitlichen Verbraucherschutzes – über diesen Informationsanspruch hinaus wird für Behörden eine Rechtsgrundlage geschaffen, damit sie von sich aus bei Verstößen gegen verbraucherschützende Normen und einem gewichtigen Informationsinteresse der Öffentlichkeit Informationen verbreiten können. Sie dürfen dabei Hersteller und Erzeuger konkret benennen. Solche Warnungen waren bisher in einem erheblich eingeschränkten Maße gemäß § 8 Produktionssicherheitsgesetz möglich.

Kern der Neuregelung im Verbraucherinformationsgesetz ist der Anspruch auf Informationen bei Behörden gemäß § 4. Danach hat jeder Anspruch auf freien Zugang zu Informationen im Sinne diese Gesetzes, die bei einer Behörde oder bei einer Person des Privatrechts vorhanden sind, die öffentlichrechtliche Aufgaben im Bereich des Verbraucherschutzes wahrnimmt und die der Aufsicht von Behörden unterstellt sind. Die Daten sind, soweit dies mit vertretbarem Aufwand möglich ist, in einer allgemein verständlichen Form aufzubereiten; sie können mit einer Erläuterung versehen werden. Die Behörde kann den Zugang insbesondere über das Internet gewähren. Sie kann auf Antrag auch Auskunft erteilen, Akteneinsicht gewähren oder die Informationen in sonstiger Weise zur Verfügung stellen.

Wesentlich sind die Einschränkungen des Anspruches aus Gründen des Datenschutzes. Zugang zu personenbezogenen Daten darf nur gewährt werden, soweit das Informationsinteresse der Verbraucherin oder des Verbrauchers das schutzwürdige Interesse der oder des Dritten am Ausschluss des Informationszugangs überwiegt oder die oder der Dritte zustimmt. Der Anspruch besteht nicht, soweit das Bekanntwerden der Informationen die internationalen Beziehungen, die Landesverteidigung oder die Vertraulichkeit der Beratung von Behörden berührt oder eine erhebliche Gefahr für die öffentliche Sicherheit verursachen kann. Der Anspruch besteht auch nicht während der Dauer eines Gerichtsverfahrens, eines strafrechtlichen Ermittlungsverfahrens, eines Disziplinarverfahrens oder eines ordnungswidrigkeitenrechtlichen Verfahrens hinsichtlich der Daten, die Gegenstand des Verfahrens sind. Endlich ist der Anspruch nicht gegeben, wenn durch das Bekanntwerden der Informationen fiskalische Interessen der um Auskunft ersuchten Behörden beeinträchtigt oder Dienstgeheimnisse verletzt werden könnten. Der Anspruch ist zudem ausgeschlossen, soweit der Schutz geistigen Eigentums, insbesondere Urheberrechte, dem Informationsanspruch entgegensteht oder soweit durch die begehrten Informationen Betriebs- oder Geschäftsgeheimnisse oder wettbewerbsrelevante Informationen, die ihrem Wesen nach Betriebsgeheimnissen gleichkommen, offenbart würden. Soweit rechtlich geschützte Interessen Dritter betroffen sind, müssen diese vor Erteilung der Information angehört werden.

§ 6 des Gesetzentwurfes regelt die Information der Öffentlichkeit auf Initiative der Behörden. Die Behörde kann die Öffentlichkeit unter Nennung des Erzeugnisses sowie derjenigen, die das Erzeugnis hergestellt oder in Verkehr gebracht haben, über die bedeutsamen Sachverhalte informieren, die im Interesse des Verbraucherschutzes liegen. Voraussetzung ist, dass hieran ein besonderes Interesse der Öffentlichkeit besteht und dieses Interesse gegenüber den Belangen der Betroffenen überwiegt. Ein solches besonderes Interesse der Öffentlichkeit ist unter anderem dann gegeben, wenn hinreichende Anhaltpunkte dafür vorliegen, dass von einem Erzeugnis eine Gefährdung für die Sicherheit oder Gesundheit ausgehen und auf Grund unzureichender wissenschaftlicher Erkenntnis oder aus sonstigen Gründen die Unsicherheit nicht innerhalb der gebotenen Zeit behoben werden kann. Ein besonderes Interesse der Öffentlichkeit liegt in der Regel auch vor, wenn ein nicht gesundheitsschädliches, aber nicht zum Verzehr geeignetes, insbesondere ekelerregendes Lebensmittel in nicht unerheblicher Menge in den Verkehr gelangt.

Der Gesetzentwurf sieht zudem die Einrichtung eines Bundesbeauftragten für den Zugang zu Verbraucherinformationen vor.*[19] Die Aufgaben dieses Bundesbeauftragten werden vom Bundesbeauftragten für den Datenschutz wahrgenommen. Jeder kann den Bundesbeauftragten anrufen, soweit Bundesbehörden betroffen sind, wenn er sich in seinem Recht auf freien Zugang zu Informationen nach dem Verbraucherinformationsgesetz verletzt fühlt. Endlich ist vorgesehen, dass die Bundesregierung alle zwei Jahre einen verbraucherpolitischen Bericht veröffentlicht.

3.3. Informationsfreiheitsgesetze der Länder

Beispielhaft für die Entwicklung des Rechts auf Informationsfreiheit im Zusammenspiel mit dem informationellen Selbstbestimmungsrecht in Deutschland ist das Gesetz zur Förderung der Informationsfreiheit im Land Berlin vom 15. Oktober 1999*[20]. Entsprechende Gesetze bestehen in Brandenburg*[21] und in Schleswig-Holstein.*[22] Der Zweck des Berliner Landesgesetzes ist es, durch ein umfassendes Informationsrecht das in Akten festgehaltene Wissen und Handeln öffentlicher Stellen unter Wahrung des Schutzes personenbezogener Daten unmittelbar der Allgemeinheit zugänglich zu machen, um über die bestehenden Informationsmöglichkeiten hinaus die demokratische Meinungs- und Willensbildung zu fördern und eine Kontrolle des staatlichen Handelns zu ermöglichen. Das Gesetz regelt die Informationsrechte gegenüber den Behörden und den sonstigen öffentlichen Stellen des Landes Berlin, den landesunmittelbaren Körperschaften, Anstalten und Stiftungen des öffentlichen Rechts und gegenüber Privaten, die mit der Ausübung hoheitlicher Befugnisse betraut sind. Für die Gerichte und die Behörden der Staatsanwaltschaft gilt dieses Gesetz nur, soweit sie Verwaltungsaufgaben erledigen. Nach Maßgabe dieses Gesetzes hat jeder Mensch gegenüber den öffentlichen Stellen nach seiner Wahl ein Recht auf Einsicht in die oder Auskunft über den Inhalt der von der öffentlichen Stelle geführten Akten. Die Rechte können auch von juristischen Personen geltend gemacht werden.

Bemerkenswert sind die Einschränkungen dieses Informationsrechts. Zunächst setzt die Informationserteilung eine Aussagegenehmigung für die informationserteilende Stelle voraus, die aber bei Bestehen des Informationsanspruches im Übrigen erteilt werden muss. Das Recht auf Akteneinsicht oder Aktenauskunft besteht nicht, soweit durch die Akteneinsicht oder Aktenauskunft personenbezogene Daten veröffentlicht werden und tatsächliche Anhaltspunkte dafür vorhanden sind, dass überwiegend Privatinteressen verfolgt werden oder der Offenbarung schutzwürdige Belange der Betroffenen entgegenstehen und das Informationsinteresse das Interesse der Betroffenen an der Geheimhaltung nicht überwiegt. Der Offenbarung personenbezogener Daten stehen schutzwürdige Belange der Betroffenen in der Regel dann nicht entgegen, wenn die Betroffenen zustimmen oder soweit sich aus einer Akte ergibt, dass unter anderem die Betroffenen an einem Verwaltungsverfahren oder einem sonstigen Verfahren beteiligt sind oder wenn gegenüber den Betroffenen überwachende oder vergleichbare Verwaltungstätigkeiten erfolgt sind. Zusätzlich entsprechende Voraussetzungen enthält § 6 berl. IFG. Das Recht auf Akteneinsicht oder Aktenauskunft besteht weiterhin nicht, soweit dadurch ein Betriebs- oder Geschäftsgeheimnis offenbart wird oder dem Betroffenen durch die Offenbarung ein nicht nur unwesentlicher wirtschaftlicher Schaden entstehen kann, es sei denn, das Informationsinteresse überwiegt das schutzwürdige Interesse der Betroffenen an der Geheimhaltung. Auf diese Ausnahme können sich Betroffene und öffentliche Stellen nicht berufen gegenüber der Offenbarung tatsächlicher Anhaltspunkte für das Vorliegen einer strafbaren Handlung. Schutzwürdige Belange stehen der Offenbarung von personenbezogenen Daten oder von Betriebs- und Geschäftsgeheimnissen in der Regel nicht entgegen, soweit diese Angaben im Zusammenhang mit Angaben über Gesundheitsgefährdungen sowie im Zusammenhang mit den von den Betroffenen dagegen eingesetzten Schutzvorkehrungen stehen. Das Recht auf Akteneinsicht oder Aktenauskunft besteht nicht, soweit und solange durch das vorzeitige Bekanntwerden des Akteninhalts der Erfolg bevorstehender behördlicher Maßnahmen, insbesondere von Überwachungs- und Aufsichtsmaßnahmen, ordnungsbehördlichen Anordnungen und Maßnahmen der Verwaltungsvollstreckung, vereitelt wird oder ein vorzeitiges Bekanntwerden des Akteninhalts nach der besonderen Art der Verwaltungstätigkeit mit einer ordnungsgemäßen Aufgabenerfüllung unvereinbar ist. Das gleiche gilt, soweit und solange durch das vorzeitige Bekanntwerden des Akteninhalts der Erfolg eines Ermittlungsverfahrens wegen einer Straftat oder einer Ordnungswidrigkeit gefährdet werden kann. Die öffentliche Stelle kann die Akteneinsicht oder Aktenauskunft insoweit nur für die Dauer von drei Monaten verweigern. Eine weitere Vorenthaltung ist nur zulässig, wenn die Voraussetzungen weiterhin vorliegen. Darüber muss neu entscheiden werden. Das Informationsrecht besteht zudem nicht bis zum Abschluss eines Verwaltungsverfahrens für Entwürfe zu Ent-

[19] Vgl. § 8 Entwurf Verbraucherinformationsgesetz (VerbIG), in http://text.bundesregierung.de/frameset/ixnavitext.jsp?nodeID=8331 (24.5.2002).

[20] DVBl. 1999, Nr. 45 S. 561, zuletzt geändert durch Gesetz vom 30. Juli 2001 (GVBl. 2001, Nr. 32, S. 305), auch in: http://www.Datenschutz-Berlin.de/recht/bln/ifg/ifg.htm (24.5.2002).

[21] Brandenburgisches Akteneinsichts- und Informationszugangsgesetz (AIG) vom 10. März 1998 (GVBl. I S. 46).

[22] Gesetz über die Freiheit des Zugangs zu Informationen für das Land Schleswig-Holstein vom 9. Februar 2000 (GVOBl. Schl.-H. 2000 S. 166).

scheidungen sowie für Arbeiten zu ihrer unmittelbaren Vorbereitung. Auch hierfür gibt es einzelne Ausnahmen. Im Übrigen darf die Information nur versagt werden, wenn das Bekanntwerden des Akteninhalts dem Wohle des Bundes oder eines deutschen Landes schwerwiegende Nachteile bereiten oder zu einer schwerwiegenden Gefährdung des Gemeinwohls führen würde.

Die Akteneinsicht oder Aktenauskunft sind gebührenpflichtig. Für die Gewährung von Akteneinsicht oder Aktenauskunft wird eine Gebühr zwischen 20 und 1000 DM erhoben.[*23] Zur Wahrung des Informationsrechts ist ein Beauftragter für das Recht auf Akteneinsicht bestellt. Diese Aufgabe wird vom Berliner Datenschutzbeauftragten wahrgenommen. Jeder Mensch hat das Recht, den Beauftragten für Datenschutz und Informationsfreiheit anzurufen.

3.4. Das Umweltinformationsgesetz des Bundes

Auch auf Bundesebene bestehen Informationsnormen, die den Weg zu allgemeinen Informationsansprüchen vorbereitet haben, freilich beschränkt auf bereichsspezifische Zusammenhänge.

Zu diesen modernen Gesetzen gehört das Umweltinformationsgesetz.[*24] Zweck dieses Gesetzes ist es, den freien Zugang zu den bei den Behörden vorhandenen Informationen über die Umwelt sowie die Verbreitung dieser Informationen zu gewährleisten und die grundlegenden Voraussetzungen festzulegen, unter denen derartige Informationen zugänglich gemacht werden sollen. Jeder hat Anspruch auf freien Zugang zu Informationen über die Umwelt, die bei einer Behörde oder sonstigen öffentlichen Stelle vorhanden sind. Die Behörde kann auf Antrag Auskunft erteilen, Akteneinsicht gewähren oder Informationsträger in sonstiger Weise zur Verfügung stellen. Begehrt der Antragsteller eine bestimmte Art des Informationszugangs, so darf die Behörde diesen nur dann durch ein anderes geeignetes Informationsmittel gewähren, wenn hierfür gewichtige, von ihr darzulegende Gründe bestehen. Der Antrag muss hinreichend bestimmt sein und insbesondere erkennen lassen, auf welche Informationen er gerichtet ist. Bei Bestehen eines Anspruchs ist die Information innerhalb einer Frist von zwei Monaten zugänglich zu machen; bei fehlendem Anspruch ist innerhalb dieser Frist ein Ablehnungsbescheid zu erteilen.

Der Anspruch besteht nicht, soweit das Bekanntwerden der Information die internationalen Beziehungen, die Landesverteilung oder die Vertraulichkeit der Beratungen von Behörden berührt oder eine erhebliche Gefahr für die öffentliche Sicherheit verursachen kann. Er besteht auch nicht während der Dauer eines Gerichtsverfahrens, eines strafrechtlichen Ermittlungsverfahrens, eines Disziplinarverfahrens oder eines ordnungswidrigkeitenrechtlichen Verfahrens hinsichtlich derjenigen Daten, die Gegenstand des jeweiligen Verfahrens sind. Endlich ist der Anspruch ausgeschlossen, wenn zu besorgen ist, dass durch das Bekanntwerden der Informationen bestimmte Umweltgüter erheblich oder nachhaltig beeinträchtigt werden oder der Erfolg bestimmter behördlicher Maßnahmen gefährdet wird. Der Antrag soll abgelehnt werden, wenn er sich auf die Übermittlung noch nicht abgeschlossener Schriftstücke oder noch nicht aufbereiteter Daten oder verwaltungsinterner Mitteilungen bezieht. Dies bedeutet, dass der Antrag unter diesen Umständen im Normalfall abgelehnt werden muß, bei Vorliegen besonderer Ausnahmegründe im Einzelfall die Information aber doch erteilt werden kann. Offensichtlich missbräuchlich gestellte Anträge sind abzulehnen. Dies ist insbesondere der Fall, wenn der Antragsteller über die begehrten Daten bereits verfügt. Informationen über die Umwelt, die ein privater Dritter der Behörde ohne rechtliche Verpflichtung übermittelt hat, dürfen ohne Einwilligung des Dritten nicht zugänglich gemacht werden. Das gilt grundsätzlich nicht für Informationen, die der Dritte der Behörde als Unterlage für einen Antrag oder eine Anzeige übermitteln musste.

Wichtig ist auch der Ausschluss oder die Beschränkung des Anspruchs zum Schutz privater Belange. Der Anspruch besteht insofern nicht, soweit durch das Bekanntwerden der Informationen personenbezogene Daten offenbart und dadurch schutzwürdige Interessen der Betroffenen beeinträchtigt würden. Der Anspruch besteht auch dann nicht, wenn der Schutz geistigen Eigentums, insbesondere Urheberrechte, der Auskunftserteilung oder der Zurverfügungstellung von Informationsträgern entgegenstehen. Betriebs- und Geschäftsgeheimnisse dürfen nicht unbefugt zugänglich gemacht werden. Der Anspruch besteht insbesondere dann nicht, wenn die begehrten Informationen dem Steuergeheimnis oder dem Statistikgeheimnis unterliegen. Vor der Entscheidung über die Offenbarung solcher geschützter Informationen sind die Betroffenen anzuhören.

Für die Übermittlung von Informationen werden Kosten erhoben. Die Gebühren sind auch unter Berücksichtigung des Verwaltungsaufwandes so zu bemessen, dass der Informationszugang wirksam in Anspruch genommen werden kann. Die Bundesregierung ist ermächtigt, für Amtshandlungen der Behörden des Bundes die Höhe der Kosten durch Rechtsverordnung zu bestimmen.

[23] Vgl. 22. Verordnung zur Änderung der Verwaltungsgebührenordnung (Berlin) vom 30. Mai 2000 (GVBl. Nr. 19 S. 349, Tarifstelle 1004); (die Angaben in Deutsche Mark werden auf Euro umgestellt). Nähere Kriterien für die Höhe der Gebühren sind noch nicht einwickelt. Jedenfalls dürfen die Gebühren eine angemessene Höhe nicht überschreiten und nicht prohibitiv wirken.

[24] Umweltinformationsgesetz (UIG) in der Fassung der Bekanntmachung vom 23.8.2001 (BGBl. I S. 2218), Neubekanntmachung des UIG vom 8.7.1994 (BGBl. I S. 1490) in der seit 3.8.2001 geltenden Fassung.

3.5. Einzelgesetzliche Auskunftsansprüche

Nach einer großen Zahl von Einzelgesetzen bestehen Auskunftsansprüche der Betroffenen. Sie beziehen sich, abgesehen von Ansprüchen auf Auskunft aus amtlichen Registern, zumeist auf Auskünfte über die eigenen personenbezogenen Daten, die bei der Behörde vorhanden sind. Insoweit dient der Auskunftsanspruch der Kontrolle der Rechtmäßigkeit des behördlichen Umganges mit personenbezogenen Daten. So erteilt nach § 15 Bundesverfassungsschutzgesetz das Bundesamt für Verfassungsschutz dem Betroffenen auf Antrag unentgeltlich Auskunft über zu seiner Person gespeicherte Daten, soweit er hierzu auf einen konkreten Sachverhalt hinweist und ein besonderes Interesse an einer Auskunft darlegt. Die Auskunftserteilung unterbleibt, soweit eine Gefährdung der Aufgabenerfüllung durch die Auskunftserteilung zu besorgen ist, durch die Auskunftserteilung Quellen gefährdet sein können oder die Ausforschung des Erkenntnisstandes oder der Arbeitsweise des Bundesamtes für Verfassungsschutz zu befürchten ist. Dasselbe gilt, wenn die Auskunft die öffentliche Sicherheit gefährden oder sonst dem Wohl des Bundes oder eines Landes Nachteile bereiten würde. Endlich unterbleibt die Auskunftserteilung dann, wenn die Daten oder die Tatsache der Speicherung nach einer Rechtsvorschrift oder ihrem Wesen nach, insbesondere wegen der überwiegenden berechtigten Interessen eines Dritten, geheimgehalten werden müssen.

Die Auskunftsverpflichtung erstreckt sich nicht auf die Herkunft der Daten und die Empfänger von Übermittlungen. Die Ablehnung der Auskunftserteilung bedarf keiner Begründung, soweit dadurch der Zweck der Auskunftsverweigerung gefährdet würde. Die Gründe der Auskunftsverweigerung sind aktenkundig zu machen. Wird die Auskunftserteilung abgelehnt, ist der Betroffene auf die Rechtsgrundlage für das Fehlen der Begründung und darauf hinzuweisen, dass er sich an den Bundesbeauftragten für den Datenschutz wenden kann.

Auskunftsansprüche enthalten seit langem die Verfahrensgesetze des Bundes und der Länder. Diese Auskunftsansprüche sind freilich auf die im Rechtssinne Beteiligten von Verwaltungsverfahren beschränkt. So erteilt gemäß § 25 Bundesverwaltungsverfahrensgesetz die Behörde soweit erforderlich Auskunft über die den Beteiligten im Verwaltungsverfahren zustehenden Rechte und die ihnen obliegenden Pflichten. Gemäß § 29 Bundesverwaltungsverfahrensgesetz hat die Behörde den Beteiligten Einsicht in die das Verfahren betreffenden Akten zu gestatten, soweit deren Kenntnis zur Geltendmachung oder Verteidigung ihrer rechtlichen Interessen erforderlich ist. Das gilt bis zum Abschluss des Verwaltungsverfahrens nicht für Entwürfe zu Entscheidungen sowie die Arbeiten zu ihrer unmittelbaren Vorbereitung. Die Behörde ist zu Gestattung der Akteneinsicht nicht verpflichtet, soweit durch sie die ordnungsgemäße Erfüllung der Aufgaben der Behörde beeinträchtigt, das Bekanntwerden des Inhalts der Akten dem Wohle des Bundes oder eines Landes Nachteile bereiten würde oder soweit die Vorgänge nach einem Gesetz oder ihrem Wesen nach, namentlich wegen der berechtigten Interessen der Beteiligten oder dritter Personen, geheimgehalten werden müssen. Die Beteiligten haben Anspruch darauf, dass ihre Geheimnisse, insbesondere die zum persönlichen Lebensbereich gehörenden Geheimnisse sowie die Betriebs- und Geschäftsgeheimnisse, von der Behörde nicht unbefugt offenbart werden.

4. Informationsrechte der Medien

Von erheblicher Bedeutung sind auch die Auskunftsansprüche der Presse und Medien. Sie sind überwiegend in Landesgesetzen geregelt. Die Presse hat insofern eine Mittlerfunktion zwischen den Behörden und dem allgemeinen Informationsinteresse der Öffentlichkeit und ihrem Recht auf Teilhabe am demokratischen öffentlichen Prozess. Stellvertretend für zahlreiche landesrechtliche und einige bundesrechtliche Bestimmungen soll im folgenden auf das Landespressegesetz von Rheinland-Pfalz abgestellt werden.*[25]

Die Presse erfüllt nach gemeindeutschem Presserecht eine öffentliche Aufgabe, wenn sie in Angelegenheiten von öffentlichem Interesse Nachrichten beschafft und verbreitet, Stellung nimmt, Kritik übt oder auf andere Weise an der Meinungsbildung mitwirkt. Die Behörden sind verpflichtet, den Vertretern der Presse die der Erfüllung ihrer öffentlichen Aufgabe dienenden Auskünfte zu erteilen. Nach ganz herrschender Meinung ist dies freilich ein Auskunftsrecht aufgrund konkreter, spezifizierter Anfragen. Eine allgemeine, aktive Informationspflicht der Behörden besteht hieraus nicht. Auskünfte können verweigert werden, soweit durch sie die sachgemäße Durchführung eines schwebenden Verfahrens vereitelt, erschwert, verzögert oder gefährdet werden könnte oder Vorschriften über Geheimhaltung entgegenstehen oder ein überwiegend öffentliches oder schutzwürdiges privates Interesse verletzt würde oder ihr Umfang das zumutbare Maß überschreitet. Allgemeine Anordnungen, die einer Behörde Auskünfte an die Presse verbieten, sind unzulässig. Der Verleger einer Zeitung oder Zeitschrift kann von den Behörden verlangen, dass ihm deren amtliche Bekanntmachungen nicht später als seinen Mitbewerbern zur Verwendung zugeleitet werden.

[25] Rheinland-Pfälzisches Landesgesetz über die Presse vom 14.6.1965 (GVBl. S.107), zuletzt geändert durch Gesetz vom 12.10.1999 (GVBl. S. 325).

5. Das Stasiunterlagengesetz und der Fall Kohl

In besonders öffentlichkeitswirksamer Weise hat sich der Gegensatz zwischen allgemeinem Informationsinteresse der Öffentlichkeit und den Geheimhaltungsinteressen von Betroffenen in der Frage der Veröffentlichung von Geheimdienstmaterial über den früheren Bundeskanzler Kohl dargestellt, das vom früheren Staatssicherheitsdienst der DDR gesammelt worden waren. Einschlägiges Gesetz über den Umgang mit solchem Material ist das Gesetz über die Unterlagen des Staatssicherheitsdienstes der ehemaligen Deutschen Demokratischen Republik vom 20. Dezember 1991.[*26] Dieses Gesetz regelt die Erfassung, Erschließung, Verwaltung und Verwendung der Unterlagen des Ministeriums für Staatssicherheit und entsprechender Stellen, um dem Einzelnen Zugang zu den vom Staatssicherheitsdienst zu seiner Person gespeicherten Informationen zu ermöglichen, damit er die Einflussnahme des Staatssicherheitsdienstes auf sein persönliches Schicksal aufklären kann. Das Gesetz dient zudem dazu, den Einzelnen davor zu schützen, dass er durch den Umgang mit den vom Staatssicherheitsdienst zu seiner Person gespeicherten Informationen in seinem Persönlichkeitsrecht beeinträchtigt wird. Darüber hinaus dient es dazu, die historische, politische und juristische Aufarbeitung der Tätigkeit des Staatssicherheitsdienstes zu gewährleisten und zu fördern und endlich auch dazu, öffentlichen und nichtöffentlichen Stellen die erforderlichen Informationen für die in diesem Gesetz genannten weiteren Zwecke zur Verfügung zu stellen. Für die Erfüllung dieser Aufgaben ist ein Bundesbeauftragter für die Unterlagen des Staatssicherheitsdienstes bestellt, der vom Deutschen Bundestag gewählt wird.

Der Staatssicherheitsdienst hatte über den früheren Bundeskanzler Dr. Helmut Kohl insgesamt 7000 Blatt Akten gesammelt. Die Bundesbeauftragte für die Unterlagen des Staatssicherheitsdienstes hatte angekündigt, insgesamt 2500 Blatt dieser Akten Dritten ohne Einwilligung des früheren Bundeskanzlers zugänglich zu machen. Dies sollte der Forschung zum Zwecke der politischen und historischen Aufarbeitung der Tätigkeit des Staatssicherheitsdienstes der ehemaligen Deutschen Demokratischen Republik dienen sowie Zwecken der politischen Bildung. Auch Presse, Rundfunk, Film und ähnlichen Stellen sollten Einsicht in die Unterlagen mit personenbezogenen Informationen gewährt werden. Das Stasiunterlagengesetz lässt in der Tat in seinem § 32 zu, dass der Bundesbeauftragte Unterlagen für die Forschung zum Zwecke der politischen und historischen Aufarbeitung der Tätigkeit des Staatssicherheitsdienstes sowie für Zwecke der politischen Bildung zur Verfügung stellt. Zu diesen Unterlagen gehören auch solche mit personenbezogenen Informationen über Personen der Zeitgeschichte, über Inhaber politischer Funktionen oder über Amtsträger in Ausübung ihres Amtes. Dies gilt freilich unter anderem dann nicht, wenn diese Personen selbst Betroffene sind. Die entsprechenden Voraussetzungen gelten für die Verwendung von Unterlagen durch Presse, Rundfunk, Film und ähnlichen Stellen.

In dem Rechtsstreit hat das Bundesverwaltungsgericht zu Gunsten des Klägers Dr. Helmut Kohl entschieden.[*27] Das Bundesverwaltungsgericht hat festgestellt, dass das Stasiunterlagengesetz die Herausgabe der von der Stasi gesammelten Erkenntnisse über den früheren Bundeskanzler insgesamt verbietet. Auch die im Stasiunterlagengesetz erwähnte Personen der Zeitgeschichte und Amtsträger in Ausübung ihres Amtes, zu denen der Kläger zweifellos gehöre, seien gegen die Herausgabe ihrer Stasiunterlagen geschützt, wenn sie Betroffene oder Dritte und damit Opfer der Stasi seien. Das sei im Gesetz ausdrücklich und eindeutig festgelegt und entspreche der im Gesetzgebungsverfahren unmissverständlich zum Ausdruck gekommenen Absicht des Gesetzgebers. Der Kläger sei Betroffener im Sinne des Gesetzes, weil über ihn systematisch von der Stasi Informationen gesammelt worden seien. Dem Argument der Bundesbeauftragten, bei diesem Verständnis mache die Erwähnung der Personen der Zeitgeschichte und der Amtsträger im Gesetz keinen Sinn, misst das Bundesverwaltungsgericht keine entscheidende Bedeutung bei. Dieser Gesichtspunkt könne es nicht rechtfertigen, den Gesetzeswortlaut zu ignorieren und in offenkundigem Widerspruch zu ihm zu entscheiden. Es sei auch nicht zu befürchten, dass durch die Gleichstellung der Personen der Zeitgeschichte mit anderen Stasiopfern die vom Stasiunterlagengesetz unter anderem bezweckte Erforschung der Stasitätigkeit ernsthaft gefährdet werde. Hierfür stünden genügend andere Unterlagen zur Verfügung. Entscheidend sei im Übrigen, dass der Gesetzgeber bei der Frage der Freigabe personenbezogener Daten dem Opferschutz eindeutig den Vorzug eingeräumt habe.[*28]

Insgesamt zeigt so dieses Urteil exemplarisch für die Gesetzeslage im Allgemeinen, dass das deutsche Recht dem Informationsinteresse der Öffentlichkeit und des einzelnen Bürgers zunehmend erhebliches Gewicht beimisst, dass aber im Konfliktfall das legitime Geheimhaltungsinteresse des betroffenen Privaten den Vorzug erhält.

[26] BGBl. I 1991, 2272, zuletzt geändert durch Art. 3 Nr. 3 Gesetz vom20.12.2001, BGBl. I S. 3926.

[27] BVerwG Urteil vom 8.3.2002 –3C 46/01.

[28] Vgl. zum Ganzen Pressemitteilung Nr. 12/2002 des Bundesverwaltungsgerichts. – NVwZ, 2002, S. 448.

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Regulation of Gender Equality as a Fundamental Right in Estonia

Introduction

One of the most important parts of the Constitution of the Republic of Estonia as well as of the other countries is the catalogue of fundamental rights and freedoms, which contains both freedoms protected from intervention by the state and several rights that can be implemented only through the positive activities of the state. The fundamental rights of individuals provided in the Constitution have traditionally been the rights of a citizen in respect of the state.[*1] "If a person violates another person's rights and this also constitutes a violation of human rights, then according to the currently prevailing opinions, it is not an issue of human rights law but it is an issue of criminal law, family law, procedural law or other specific branch of law depending on the content of the violation".[*2]

At the same time, the fundamental rights and freedoms of individuals cannot be regarded as solely the rights of the state in respect of an individual. According to § 19 of the Estonian Constitution[*3], everyone shall honour and consider the rights and freedoms of others, and shall observe the law, in exercising his or her rights and freedoms and in fulfilling his or her duties. We must acknowledge the opinion that the question about being the addressee of the fundamental rights of private persons cannot be disregarded only because a particular tradition exists. Fundamental rights are not exclusively about an absolute relationship between the state and the citizen but also about relations between citizens. Such a case involves the extension of the impact of the fundamental rights and their impact on private persons. Fundamental rights are, by nature, not simply a part of positive law but also principles that are valid in law as such.[*4] As a result, the private person is not subjected to the correlative duties arising from fundamental rights but as a member of society, he or she is

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[1] K. Merusk, R. Narits. Eesti konstitutsiooniõigusest (On Estonian Constitutional Law). Tallinn: Õigusteabe AS Juura, 1998, p. 177 (in Estonian).

[2] R. Maruste. Inimõigused ja ausa õigusemõistmise põhimõtted. Euroopa Inimõiguste Konventsioon. Euroopa Sotsiaalharta (Human Rights and Principles of Fair Judgment. European Convention of Human Rights. European Social Charter). Tallinn: Õigusteabe AS Juura, 1993, p. 11 (in Estonian).

[3] Riigi Teataja (The State Gazette) 1992, 26, 349 (in Estonian).

[4] K. Merusk, R. Narits (Note 1), p. 177.

obliged to honour the rights and freedoms of other persons. Thus, the private person is not the direct addressee of fundamental right and freedoms; but still his or her rights and freedoms are influenced only by the third-party application (*i.e.* by another private person) of fundamental rights that is mediated by the state.[*5]

Section 12 of the Constitution of Estonia provides for the principle of equal treatment as a fundamental right. According to § 12 (1) of the Constitution, no one shall be discriminated against on the basis of nationality, race, colour, sex, language, origin, religion, political or other opinion, property or social status, or on other grounds. Estonia as many other countries faces an important problem of ensuring equal treatment for women and men or the abolition of discrimination on grounds of sex. Just like the other human rights, the right not to be discriminated against on the grounds of sex involves a horizontal (legal relations between a natural person and a legal person in private law or between a natural person and a natural person) dimension.[*6]

Unlike other developed countries, Estonian society is still making its first steps in introducing the principle of gender equality. The opinion of the head of the Equality Bureau[*7], operating under the Republic of Estonia Ministry of Social Affairs, Ülle-Marike Papp, is that in Estonian legal culture, gender equality must be recognised as a fundamental human right, the main principle of democracy and a main prerequisite for social development is justified. Men and women must be assured equal rights and equal opportunities, accompanied by equal duties and liability. The constitutional prohibitions against discrimination and equal rights *de jure* are essential but not sufficient measures for ensuring equality for men and women. The necessary and sufficient prerequisites will be met only when women, in addition to rights, also have equal opportunities with men to participate in societal activities.[*8] In order to achieve this goal, among other things, the draft Gender Equality Act (GEA)[*9] has been prepared, which has been submitted to the legislative proceeding of the *Riigikogu* (Parliament) and which was intended to be adopted in 2002. In addition to GEA, prepared in the Ministry of Social Affairs, the Ministry of Justice submitted for approval the draft Equality and Equal Treatment Act[*10] in April 2002, which has a wider approach to those issues of equality, prohibiting discrimination on grounds of sex, race, nationality, age, disability, sexual orientation and religious or political opinion. As both drafts provide for similar rules regarding gender equality and it is not clear which one of them will be adopted, only GEA, that was prepared first, was taken as the basis for writing this article. The article will examine the international obligations imposed on Estonia that have influenced the preparation of the act and analyse the impact of the act on the actual implementation of the principle of gender equality.

1. Obligations arising from international legislation

1.1. International regulation

On the international level, numerous acts have been adopted that have to contribute to the implementation of the fundamental rights of people. The principles set out in these documents are most often reflected in the constitutions of the states, in many cases also in secondary legislation. According to § 3 (1) of the Constitution of Estonia, generally recognised principles and rules of international law are an inseparable part of the Estonian legal system. The second paragraph of § 123 of the Constitution provides that if laws or other legislation of Estonia are in conflict with international treaties ratified by the *Riigikogu*, the provisions of the international treaty shall apply.

Several acts issued by international organisations, prohibiting discrimination on grounds of sex are binding on Estonia. As the first act in this field, the *Riigikogu* ratified the United Nations (UN) Convention on the Elimination of All Forms of Discrimination Against Women (1979)[*11] (entered into force in Estonia in

[5] See M. Ernits. Holders and Addressees of Basic Rights in the Constitution of the Republic of Estonia. – Juridica International, Vol. 4, 1999, pp. 24; 27–29.

[6] The explanatory memorandum accompanying the draft Gender Equality Act. Available at: http://www.riigikogu.ee/ems/index.html (1.04.2002) (in Estonian).

[7] The main purpose of the Equality Bureau is to arrange for the introduction of the principle of equality into social and political development.

[8] Ü.-M. Papp. National Gender Equality Policy. Towards a Balanced Society. Women and Men in Estonia. Tallinn: Ministry of Social Affairs. United Nations Development Programme, 2000, pp. 73–74.

[9] Soolise võrdõiguslikkuse seadus. Eelnõu, 4.12.2001 (The Gender Equality Act. Draft. 4 December 2001). Available at: http://www.riigikogu.ee/ems/index.html (1.04.2002) (in Estonian).

[10] Võrdõiguslikkuse ja võrdse kohtlemise seadus. Eelnõu, 24.04.2002 (The Equality and Equal Treatment Act. Draft, 24 April 2002). Available at: http://www.just.ee/index.php3?cath=4963 (5.06.2002) (in Estonian).

[11] Riigi Teataja (The State Gazette) II 1995, 5, 31.

1991). The obligation to implement the principle of gender equality arises, among other acts, also from the UN International Covenant on Economic, Social and Cultural Rights (1966)[*12] (entered into force in Estonia in 1992) and the European Social Charter, adopted by the Council of Europe (1961)[*13] (entered into force in Estonia in 2000), as well as convention No. 100 of the International Labour Organisation concerning Equal Remuneration for Men and Women Workers for Work of Equal Value (1951)[*14] (entered into force in Estonia in 1996).[*15]

The UN Convention on the Elimination of All Forms of Discrimination Against Women prohibits any discrimination on grounds of sex. Guided by the convention, Estonia has assumed an obligation to take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men (article 3). Articles 4–16 of the convention elaborate on the content of the prohibition against discrimination — women must be ensured equal rights with men and equal treatment in participation in politics and decision-making, in acquiring education, employment, in family duties, *etc*.

The UN International Covenant on Economic, Social and Cultural Rights, ILO convention No. 100 and European Social Charter provide the implementation of the principle of equal treatment in labour relations. According to article 7 of the UN International Covenant on Economic, Social and Cultural Rights, the states recognise the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular remuneration which provides all workers, as a minimum, with fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work (clause (a) (i)).

According to article 2 (1) of the ILO convention No. 100, each member shall ensure the application to all workers of the principle of equal remuneration for men and women workers for work of equal value.

In article 20 of the European Social Charter, the following principle has been established: in order to implement the right to equal opportunities and equal treatment effectively in employment and vocational issues irrespective of sex, the parties undertake to recognise the right and take measures to ensure or promote its implementation in the following fields:

a) finding of work, protection against lay-off and vocational reintegration;

b) vocational guidance, vocational training, retraining and rehabilitation;

c) labour relations and labour conditions, including remuneration;

d) career, including promotion.

Thus, according to the previously mentioned international acts, Estonia must ensure equal opportunities and equal treatment for men and women in any field, but above all, in the area of labour relations.

In addition to the international provisions binding on Estonia, account must also be taken of the European Union (EU) acts prohibiting discrimination on grounds of sex, since the Europe Agreement[*16] obliges to approximate and harmonise Estonia's legislation to EU law (articles 68–69 of the Europe Agreement). Consequently, the legislation concerning gender equality applicable in Estonia must be in accordance with the EU provisions, which is also a prerequisite for the accession to the EU. Estonia as a candidate country is obliged to show its readiness to adapt to the EU *acquis* already before the accession in order to be on the same legislative level with the other candidate countries.[*17]

The White Paper on preparation of the associated countries of Central and Eastern Europe for integration into the EU internal market also considers the equal treatment of men and women in the field of social policy a priority[*18], pointing out primarily directives 76/207/EEC (on the implementation of the principle of

[12] Riigi Teataja (The State Gazette) II 1993, 10, 13 .

[13] Riigi Teataja (The State Gazette) II 2000, 15, 93.

[14] Riigi Teataja (The State Gazette) II 1996, 9/10, 31.

[15] In addition to the listed acts, the principle of equal treatment has also been provided in the UN Declaration of Human Rights (1948), International Covenant on Civil and Political Rights (1966), (entered into force in Estonia in 1992; Riigi Teataja (The State Gazette) II 1993, 10, 11) and in the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), adopted by the Council of Europe (entered into force in Estonia in 1996; Riigi Teataja (The State Gazette) II 1996, 11/12, 34).

[16] The Association Agreement between the European Communities and its member states and the Republic of Estonia (Europe Agreement). – Riigi Teataja (the State Gazette) II 1995, 22–27, 120.

[17] See T. Kerikmäe. Euroopa Liit ja õigus (European Union and Law). – Rahvusvahelise Õiguse Assotsiatsiooni Eesti Osakonna Toimetised I. Tallinn: Õiguskirjastus, 2000, p. 37 (in Estonian).

[18] Valge raamat. Assotsieerunud Kesk- ja Ida-Euroopa riikide ettevalmistamine integreerumiseks Euroopa Liidu siseturgu (White Paper. Preparation of the Associated Central and Eastern European Countries for Integration into European Union Internal Market). Tallinn: Eesti Õigustõlke Keskus, 1996, pp. 82–85 (in Estonian).

equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions)[*19] and 75/117/EEC (on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women)[*20] as the most important legally binding acts. Directive 97/80/EC on the burden of proof in cases of discrimination based on sex[*21] also plays a very significant role in contributing to the implementation of the principle of equal treatment.[*22] Here it is important to note that increasingly more attention is paid to the equal treatment of men and women workers in the EU — the competence of the EU in this area was considerably increased by the Treaty of Amsterdam (1997). This act was used to supplement article 2 of the Treaty establishing the European Community (EC), according to which the promotion of equality between men and women is one of the tasks of the Community.[*23] Also, the importance of the implementation of the principle of gender equality in labour relations was increased, by rendering adherence thereto obligatory both in remuneration and in matters of employment and occupation and recognising so-called positive discrimination (article 141 of the Treaty establishing EC).[*24]

1.2. Situation in Estonia

It has to be admitted that although several international acts prohibiting discrimination on the grounds of sex are binding on Estonia, and in relation to the accession to the EU, Estonia must also introduce into its legislation the requirements established in the relevant EU acts, the implementation of the principle of equal treatment is not ensured in practice. In Estonia, as in many other countries:

- the remuneration of women is lower than that of men and the difference in wages shows a growing trend;
- the labour market has been segregated both horizontally and vertically, which, on the one hand, is related to different valuation of the work of men and women, and on the other hand, impedes the purposeful use of the potential of both sexes;
- mainly women bear the burden of household work;
- the share of women on the level of decision-making is small;
- unreasonable stereotypes and division of roles both in working and family life have taken root in society;
- the gap between the average lifespan of men and women is too wide.[*25]

Although in addition to the Constitution the application of the principle of gender equality has been set out in the Employment Contracts Act (ECA § 10)[*26], the Wages Act (WA §§ 5 and 5[1])[*27] and the Advertising Act (§ 5)[*28], the regulation of the issues related to the prohibition against discrimination is relatively insufficient, the relevant provisions are limited and declarative and do not guarantee sufficient protection for people.[*29]

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[19] OJ L 39, 14.02.1976, p. 40.

[20] OJ L 45, 19.02.1975, p. 19.

[21] OJ L 14, 20.01.1998, p. 6.

[22] In addition to the above-mentioned legislation, the area is also governed by directives 79/7/EEC on progressive implementation of the principle of equal treatment for men and women in matters of social security (OJ L 6, 10.01.1979, p. 24), 86/378/EEC on the implementation of the principle of equal treatment for men and women in occupational social security schemes (OJ L 225, 12.08.1986, p. 40), 86/613/EEC on the application of the principle of equal treatment between men and women engaged in an activity, including agriculture, in a self-employed capacity, and on the protection of self-employed women during pregnancy and motherhood (OJ L 359, 19.12.1986, p. 56), 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC) (OJ L 348, 19.10.1992, p. 11) and 96/34/EC on the framework agreement on parental leave concluded by Union of Industrial and Employer's Conferederations of Europe, European Centre for Public Enterprise and the European Trade Union Confederation (OJ L 145, 19.06.1996, p. 4).

[23] Amsterdami leping. Konsolideeritud lepingud (Amsterdam Treaty. Consolidated Treaties). Tallinn: Eesti Õigustõlke Keskus, 1998, pp. 160 (in Estonian).

[24] *Ibid*., p. 217.

[25] Ü.-M. Papp (Note 8), p. 74. See also about the same issue A. Narusk. Men and Women: Opportunities, Rights and Obligations. Human Rights in Estonia. Tallinn: United Nations Development Programme, 1998, pp. 41–51; R. Vöörman. Men and Women on the Labour Market: Wage Ratios. National Gender Equality Policy. Towards a Balanced Society. Women and Men in Estonia. Tallinn: Ministry of Social Affairs, United Nations Development Programme, 2000, pp. 46–53.

[26] Riigi Teataja (The State Gazette) 1992, 15/16, 241; 2001, 53, 311 (in Estonian).

[27] Riigi Teataja (The State Gazette) I 1994, 11, 154; 2001, 50, 287 (in Estonian).

[28] Riigi Teataja (The State Gazette) I 1997, 52, 835; 2001, 50, 284 (in Estonian).

[29] See also M. Muda. Prohibition of Discrimination in Labour Relations. – Juridica International, Vol. 4, 1999, pp. 189–199.

It is also difficult to ensure compliance with the laws providing the principle of equal treatment. Although according to § 15 (1) of the Constitution, everyone whose rights and freedoms are violated has the right of recourse to the courts, this may remain a merely theoretical option upon the application of the principles of equal treatment. It is very difficult to prove that discrimination occurred in these issues. This gives rise to a question of how informed the Estonian courts are when deciding on these problems. No relevant decisions are available. No mechanism providing the criteria on the basis of which equal treatment and equal opportunities should be evaluated has been prepared either.

The application of the principles of gender equality is problematic in Estonia, above all, due to the fact that very many people are not aware of the problems accompanying equal treatment and creation of equal opportunities. The problems related to discrimination may arise only after several years, when particular stability has been achieved in the economy and on the labour market and people start to consider the ensuring of an increasingly better quality of life. The adoption of the GEA will certainly contribute to achieving this goal.

2. Gender Equality Act

2.1. General principles

In 2000–2001, the draft GEA was prepared in the Republic of Estonia Ministry of Social Affairs, based on both the above-mentioned international acts and the relevant laws of the other countries.[*30]

The purpose of the GEA is to promote the equality of men and women as one of the fundamental human rights[*31], by prohibiting discrimination on grounds of sex and by obliging the state and local government agencies, educational and science institutions and employers to act in economic, social, educational and cultural areas and the other areas of community life to promote gender equality[*32] (§ 1). Thus, the GEA provides for two measures in the implementation of the principle of gender equality as a fundamental right:

1) prohibition against discrimination on grounds of sex;
2) promotion of gender equality.

The particular feature of the Estonian GEA is that while in the majority of the countries the regulation of the relevant specific law only concerns labour relations[*33], the methods referred to in § 1 of the GEA shall be applied in all areas of community life in Estonia. As an exception, the principles provided in the GEA need not be followed in religious associations in professing and practicing faith, including when working as a minister of religion. Application of the act will not involve intervention in family relations and private life either (§ 2 (2)). The establishment of such exceptions is justified and necessary, in order to honour historically developed religious traditions and the inviolability of the family and private life of an individual.

[30] In order to prepare the draft, the equality acts of Germany, Austria, Australia, Switzerland, Ireland, Norway, Sweden, Finland and Lithuania were analysed. The draft has been influenced the most by the latter two acts, as they were the newest and most modern laws. See explanatory note accompanying the draft Gender Equality Act (Note 6).

[31] Section 1 of the GEA refers to the equality for women and men as one of the **primary** human rights. The right not to be discriminated against on grounds of sex is undoubtedly one of the main rights of an individual, but its position in the catalogue of fundamental rights and freedoms is approximate. The equality for men and women may be considered as a main human right in the developed welfare states, the social policy of which is aimed at the improvement of the existing benefits. The situation is different in the developing countries, for example, where attempts are made, above all, to ensure the satisfaction of the people's primary needs and the promotion of gender equality does not belong to the state's priorities.

[32] According to § 3 (1) 1), gender equality or the equality for women and men is the equal rights, duties, opportunities and liability of women and men in working life, in the acquisition of education and in participating in the other areas of community life.

[33] See R. Ben-Israel. Equality and Prohibition of Discrimination in Employment. Comparative Labour Law and Industrial Relations in Industrialized Market Economies. – R. Blanpain and C. Engels (eds.). VII[th] and revised ed. The Hague-London-Boston: Kluwer Law International, 2001, p. 389.

2.2. Prohibition against discrimination on grounds of sex

2.2.1. General rule

Subsection 4 (1) of the GEA prohibits direct[*34] and indirect[*35] discrimination on grounds of sex. According to this rule, any discrimination on grounds of sex in any area of life is not allowed. The establishment of such a general rule is necessary as the act cannot provide a comprehensive list of all possible situations of discrimination and consequently, the general rule against discrimination may be implemented in very different areas and in numerous situations. The act may also be implemented in those cases when discrimination on grounds of sex is not aimed against a specific individual.[*36] The provision of the general prohibition against discrimination on grounds of sex is also necessary for the performance of the obligations set out in international acts.[*37]

However, the GEA as similar laws of other countries sets out particular exceptions the implementation of which is not considered a discriminating activity. These include:

1) special protection of women in relation to pregnancy and maternity;
2) imposition of compulsory military service only on men;
3) acceptance of only women or only men as members of a non-profit association, if this derives from the articles of the association;
4) employment of or permission to training of a person of a particular gender, if this derives from the type of the activity or other circumstances;
5) implementation of special measures promoting gender equality, which give preference to the gender that is under-represented or in a worse position or decrease the existing inequality (so-called positive action) (GEA § 4 (2)).

The exceptions listed above are, to a large extent, based on the international regulation. Prohibition, differentiation and preference related to the nature of occupation, guaranteeing the security of the state or application of special measure of protection are generally not considered to be contrary to the principle of equal treatment.[*38] According to EU directive 76/207/EEC, differentiation resulting from the nature of occupation, protection of women as regards pregnancy and maternity and implementation of positive action are not considered to be discriminatory (article 2). A similar option to make differences is also provided by the UN Convention on the Elimination of All Forms of Discrimination Against Women (article 4). Thus, according to the GEA, it is not discrimination on grounds of sex, if a performer is chosen in a theatre from among the representatives of only one sex, if night work is prohibited only to pregnant women or if preference is given to applicants of the under-represented sex upon employment.

Although the Defence Forces Service Act[*39] imposes the duty to serve in the Defence Forces only on male Estonian citizens (§ 3 (1)), it does not preclude the voluntary entry into service of female persons. The possibility to make an exception to the members of a non-profit association should also be considered as justified, if this derives from the articles of the association (*e.g.* student organisations, women's associations, *etc*.). According to § 7 (1) 4) of the Non-profit Associations Act[*40], the articles of an association shall set out the conditions and procedure for membership in the non-profit association and for leaving and exclusion from the non-profit association.

[34] According to § 3 (1) 3) of the GEA, direct discrimination on grounds of sex is a more unfavourable treatment of an individual due to his or her sex, particularly in relation to pregnancy and maternity, parenthood, performance of family duties or other circumstances related to gender, and sexual harassment.

[35] According to § 3 (1) 4) of the GEA, indirect discrimination on grounds of sex is a neutral condition, circumstance or activity that appears or is by nature neutral, which places a considerably majority of persons of one gender into a more unfavourable situation when compared to the other gender.

[36] The explanatory memorandum accompanying the draft Gender Equality Act (Note 6).

[37] This concerns, above all, the UN Convention on the Elimination of All Forms of Discrimination Against Women, which prohibits any discrimination on grounds of sex; as well as the EU rules that make the principle of gender equality increasingly widespread.

[38] See R. Ben-Israel (Note 33), pp. 385–387.

[39] Riigi Teataja (The State Gazette) I 2000, 28, 167; 2001, 100, 648 (in Estonian).

[40] Riigi Teataja (The State Gazette) I 1996, 42, 811; 2001, 93, 565 (in Estonian).

2.2.2. Prohibition against discrimination on grounds of sex in labour relations[*41]

The GEA regulates, in the greatest detail, the prohibition against discrimination in labour relations. This is also justified as in this field instances of discrimination are more numerous[*42] than in any other areas and it is very difficult to prove discrimination.

According to § 5 (1) of the GEA, the following cases shall be considered as discriminating in working life: if the employer employs, promotes, selects for a position, training or performance of a task or sends to training a person of one sex, leaving aside a more highly qualified person of the opposite sex, except when there are substantial reasons for his or her doing so or this derives from those circumstances not related to gender. This provision does not limit the employer's right to select for the job the most competent and suitable person. The purpose of this is to prevent selection of a person according to his or her gender.[*43] Establishment of different working conditions, including remuneration[*44], division of duties and changes in and termination of the employment relationship on grounds of sex as well as sexual harassment[*45] shall also be considered discriminating (§ 5 (2)).

The prohibition against discrimination on grounds of sex has been provided both in the applicable ECA (§ 10) and the new draft ECA[*46] (§ 8). While the applicable act may be criticised for its excessively declarative nature and absence of sanctions against a violation of the principle of equal treatment, the relevant regulation has been considerably supplemented in the draft ECA. This concerns, above all, an employer's burden of proof and liability for disregarding the prohibition against discrimination. The regulation of the WA concerning equal treatment was also supplemented in 2001 — § 5^1 that prohibits the establishment of different wage conditions for the same or equal work to employees of different sex[*47] (subsection (1)) and specifies the obligations and liability of an employer (subsections (2)–(4)) was inserted in the act.[*48]

Both upon the adoption and entry into force of the ECA and upon the implementation of the WA, in addition to the rules provided in them, account must be taken of the provisions of the GEA. Section 7 of the GEA obliges the employer to provide an employee with written explanations about the skills and knowledge of the employed person (a person applying for the post has the same right), and about the bases for calculating the wages. The representative of the trade union and the employee's representative are also entitled to receive information about the remuneration of an employee or a group of employees. The employer's obligation to provide information is necessary, above all, for identifying discrimination; nevertheless, the preventive nature of the obligation is not of any lesser importance.

As it was mentioned above, according to § 5 (1) of the GEA, an instance in which the employer has substantial reasons for his or her activity or this derives from those circumstances not related to gender shall not be considered as discrimination. It has to be admitted that the legislator cannot provide more specific instructions for making exceptions to the prohibition against discrimination. At the same time, the above-mentioned rule is a very general one, rendering it very difficult for an employee to prove discrimination. In any cases of discrimination, the situation of the employee is further deteriorated by the fact that he or she usually lacks access to the necessary information. Therefore, the GEA establishes, based on EU directive 97/80/EC, a principle that when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority[*49], facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove

[41] In the GEA, labour relations refer to both working under an employment contract and in public service (§ 3 (2)).

[42] See also R. Ben-Israel (Note 33), pp. 382–383.

[43] The explanatory memorandum accompanying the draft Gender Equality Act (Note 6).

[44] The objective of the GEA is to eradicate discrimination arising from different wage systems, classification of positions or professional evaluation criteria (*Ibid.*).

[45] According to § 3 (1) 5) of the GEA, sexual harassment is a sexual activity that is undesirable or degrading for an individual who is in a subordinate or dependent relationship, which creates a disturbing, frightening, hostile or degrading atmosphere and which the individual averts or sustains because it serves, in its direct or indirect manifestation, as a prerequisite for employment, preservation of an employment relationship, permission to training, payment of remuneration or other advantages or benefits.

[46] Töölepingu seadus. Eelnõu, 06.06.2001 (The Employment Contracts Act. Draft, 6 June 2001). Available at: http://www.riigikogu.ee/ems/index.html (1.04.2002) (in Estonian).

[47] According to § 3 (1) of the WA, In this Act, wage conditions include wage rates, additional remuneration and additional payments payable to employees, methods of calculation and procedures for payment of wages.

[48] According to the WA, at the request of an employee, the employer is required to prove that the employer has adhered to the principle of gender equality and any preferences given were based on objective circumstances not connected to sex. Employees have the right to request explanations concerning the bases for calculation of wages, and also equal payment for the same or equal work and the compensation of damages caused by violation of the principle of equal remuneration. Upon hiring, employers are required to inform employees of the regulation of equal remuneration by law.

[49] Pursuant to § 4 (1) of the Individual Labour Dispute Resolution Act (Riigi Teataja (The State Gazette) I 1996, 3, 57; 2000, 25, 144), individual labour disputes are resolved by labour dispute committees and the courts. Under § 21 of the GEA, an instance of discrimination may also be identified by the Gender Equality Committee (see more precisely chapter 2.4).

that there has been no breach of the principle of equal treatment.[*50] Consequently, it will suffice, if the employee describes in his or her application why he or she finds that he or she has been discriminated against in employment and the employer as the main possessor of information must prove that different treatment did not result from the employee's gender. Thus, the burden of proof transfers to the employer after the suspicion of discrimination has been created. The imposition of the burden of proof on the employer significantly contributes to the identification of discrimination and reduces the number of cases when recourse to a competent body for assistance is not sought solely because it appears to be impossible to prove the instance of discrimination.

In addition to the above-mentioned circumstances, the establishment of a limitation period the duration of which exceeds the usual one also fosters recourse to a body settling disputes. When the limitation period for filing claims concerning the recognition of rights or protection of violated rights arising from employment relations is four months according to § 6 (1) of the Individual Labour Dispute Resolution Act[*51], § 39 (1) of the GEA provides for a limitation period of two years from the instance of discrimination.[*52] The establishment of a limitation period exceeding that provided by the general rule is justified as employees often delay the initiation of legal proceedings to avoid disagreement with the employer. It cannot be precluded that the employee will take recourse to a competent body only after the expiry of the employment relationship. A sufficiently long limitation period also allows to obtain an opinion of the Gender Equality Committee about the same point of dispute before the initiation of the legal proceedings.[*53]

Imposition of sanctions against the violation of the prohibition against discrimination also significantly contributes to the application of the principle of gender equality to employment relations. According to § 38 of the GEA, the employer who has ignored the prohibition against discrimination shall be obliged to compensate the discriminated person for the proprietary and moral damage at least five-fold in minimum monthly wage.[*54] The compensation is determined on the basis of the principles of efficiency and proportionality, taking into account the extent, duration and type of discrimination. The minimum compensation for damage provided in the GEA may be considered to be relatively optimum. At the same time, further to the provisions of the GEA, the employee may rely on the provisions of the labour laws in an instance of discrimination.[*55] This is due to the fact that, under the GEA, an individual may demand compensation for discrimination as a fact (for the violation of the individual's right not to be discriminated against), under the other laws for receiving less wages than the person should have received or for any other violation by the employer of a prohibition set out in some other law. In such a case, the court may, in addition to the compensation arising from the Gender Equality Act, order the payment of a compensation provided for in a specific law.[*56]

2.2.3. Prohibition against discriminating advertisements and training and employment offers

In addition to the prohibition against discrimination in working life, the GEA also separately provides for a prohibition against the publication of discriminating advertisements and training and employment offers, since these areas are also the most problematic with regard to the application of the principle of gender equality. According to § 8 (1) of the GEA, it is prohibited to publish advertisements that depict or reinforce stereotypical gender roles manifesting inequality between women and men as well as advertisements that disparage one gender or are degrading to one gender. Employment and training offers aimed at people of one gender only, if this does not derive from the nature of work or the need to apply positive actions[*57] shall also be prohibited (subsection (3)).

In Estonian practice, both publication of discriminating employment offers and advertisements depicting discriminating gender roles are relatively common. The public has not reacted to it in any manner and no relevant decisions are available either. The prohibition against discrimination set out in the GEA will obvi-

[50] A similar rule has been also established in § 5[1] (2) of WA and § 8 (3) of the draft ECA.

[51] Riigi Teataja (The State Gazette) I 1996, 3, 57; 2000, 25, 144 (in Estonian).

[52] In addition to employment relations, this limitation period also applies to instances of discrimination occurring in other areas.

[53] See more precisely chapter 2.4.

[54] In 2002, the minimum monthly wage in Estonia is 1,850 kroons, that is, 118 euros (Vabariigi Valitsuse määrus "Palga alammäära kehtestamine" (Government of the Republic regulation "Establishment of minimum wage"). – Riigi Teataja (The State Gazette) I 2001, 98, 619 (in Estonian)). Thus, if a violation of the prohibition against discrimination is identified, the body settling the dispute shall order the payment of at least 9,250 kroons, that is, 590 euros to the employee.

[55] Unfortunately, the regulations of the WA and the draft ECA are rather general in this respect — pursuant to § 51 (3) of WA, an employee has the right to demand the compensation of damages caused by violation of the principle of equal remuneration. According to § 8 of the draft ECA, upon a violation of the prohibition against discrimination, an individual whose rights were violated may demand of the employee a reasonable compensation for the proprietary and non-proprietary damage caused by the violation.

[56] See the explanatory memorandum accompanying the draft Gender Equality Act (Note 6).

[57] See more precisely chapter 2.2.1.

ously discipline publishers of announcements and advertisers more and numerous court actions are not likely to emerge in this area. Prohibition against advertising that is discriminating on grounds of sex also allows for cooperation between the GEA supervision bodies and institutions provided by the Advertising Act (police) and thus also for more efficient action in those cases in which individuals do not initiate legal proceedings.[*58]

2.3. Promotion of equality for women and men

Another important step in achieving gender equality is the promotion of equality for women and men. This obligation has been provided in several international acts.[*59] If the prohibition against discrimination on grounds of sex is contained in several already existing acts, then the issues related to the promotion of equality have been regulated in the GEA for the first time; the GEA imposes this obligation on three groups of persons:

1) the state and local government;
2) educational, science and training institutions;
3) employers.

Such regulation must ensure application of equal treatment in all areas of community life. The task of the agencies of the state and local government units is to change the conditions and circumstances that impede the achievement of equality for women and men. When planning, implementing and evaluating national, regional and institutional strategies, policies and plans of action, they must be guided by the different needs and social status of women and men and take into account how the measures implemented and to be implemented will affect the situation of women and men in society (§ 9). It is important that officials gather gender-based data on their respective areas. This would help see the processes in society and analyse how the drafted plan of action, programme or legislation will affect women and men as the two largest social groups in society.[*60] Equal opportunities to participate in decision-making should also be guaranteed to women and men both on the state and local level.

According to § 10 of the GEA, educational, science and training institutions shall ensure equal treatment for women and men upon the acquisition of education and upon professional and vocational development (§ 10). This obligation covers a very wide range of activities starting from the compilation of curricula (training materials) to the selection of a profession.

According to § 11 (1) of the GEA, in order to promote gender equality, an employer shall be obliged to fill vacant positions with persons of both genders and different positions as equally as possible with women and men and to ensure them equal treatment upon promotion; to provide suitable working conditions for both women and men and to encourage the efficiency of unifying working and family life; and also to see that the employee is protected from sexual harassment, *etc*. The general purpose of the entire section is to reduce the horizontal and vertical segregation in the labour market.[*61] The obligation of the employer to collect gender-based statistical labour data provided in the GEA (§ 11 (2)) (*e.g*. the gender composition of employees according to posts, average wages of employees, gender structure of promoted employees, *etc*.) is also very important. These data are primarily necessary for monitoring the adherence to the requirements arising from the GEA, but the employer can also use then when shaping the personnel policy.

2.4. Gender Equality Committee

The EU directives on gender equality[*62] provide for extra-judicial competent bodies concerning the issues of discrimination on grounds of sex. Special bodies to implement the principle of gender equality have been established in most of the states.[*63] These are institutions that have the right to consult both employers and employees in matters of equal treatment, to commence proceedings at their own initiative, conciliate parties, *etc*. Such institutions have to be independent of the political changes in society.[*64]

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[58] See the explanatory memorandum accompanying the draft Gender Equality Act (Note 6).

[59] See, *e.g*., article 2 of the EC Treaty and articles 3 and 5 of the UN Convention on the Elimination of All Forms of Discrimination Against Women.

[60] The explanatory memorandum accompanying the draft Gender Equality Act (Note 6).

[61] *Ibid.*

[62] See, *e.g*., article 2 of directive 75/117/EEC; article 6 of directive 76/207/EEC.

[63] *E.g*. in Sweden, Finland, Norway, Germany, *etc*. See International Encyclopaedia for Labour Law and Industrial Relations. – R. Blanpain, C. Engels (eds.). The Hague: Kluwer Law International, 1977.

[64] The explanatory memorandum accompanying the draft Gender Equality Act (Note 6).

The GEA also sets out a special body — the Gender Equality Committee (the Committee) — to supervise over the compliance with law. The activities of the Committee are directed by a head elected for a term of five years, who shall have high morals, preliminary knowledge of human rights and academic education in law (§§ 15 and 16).

According to § 13 of the GEA, the main functions of the Committee are:

- supervision over the compliance with GEA[*65];
- receipt of applications from individuals and provision of expert opinions about whether discrimination occurred;
- monitoring of the efficiency of the legislation for gender equality and making of amendment proposals;
- counselling of interested persons;
- international cooperation, *etc*.

One of the important functions of the GEA is the detailed regulation of the processing of discrimination cases in the Committee. The Committee may commence the relevant proceedings at its own initiative or on the basis of an application submitted to it (§ 21). When conducting this procedure, the Committee has the right to demand of the persons concerned information and unrestricted access to documents, materials and positions; to take written explanations and oral testimonies (§ 22 *ff*.). If a written application concerning discrimination was submitted to the Committee[*66], it shall be processed within two months of its receipt (§ 29 (1)). Processing shall be carried out in writing and in the course of that, the Committee shall identify the existence of the alleged instance of discrimination on the basis of evidence (§ 30). Subsection 32 (3) of the GEA sets out that after the termination of the procedure the Committee shall:

1) provide an opinion about the possible discrimination on grounds of sex[*67];
2) make a proposal to settle the case by conciliation of the parties without the court;
3) make a proposal to discontinue the discriminating activities or to perform particular acts.[*68]

Consequently, the GEA creates a fast and simple procedure for processing complaints about discrimination. Yet the Committee is not a body settling disputes, its task is to provide an opinion about the matter, while this does not deprive an individual of the right to have recourse to court in the same matter.

2.5. Gender Equality Council

In addition to the body supervising over the compliance of the principle of gender equality, many states[*69] have also established a body directing national equality policy. The establishment of the relevant special body — the Gender Equality Council (the Council) — has also been provided for by the GEA. The Council shall be an advisory body by the Ministry of Social Affairs, which shall coordinate national gender equality policy (§ 36). The Gender Equality Council shall consist of 15 members and its composition shall be approved by the Government of the Republic for three years. As the issues related to gender equality concern all areas of community life, according to the GEA, the Council comprises the representatives of the *Riigikogu*, the Government, employees, employers and the representatives of other spheres of life. The chairman of the Council shall be the Minister of Social Affairs (§ 37). The existence of the permanent Council ensures consistent cooperation of those persons having the necessary knowledge and skills in achieving the goals of the act and a more efficient counselling of the Government upon the implementation of the equality development plans, taking primarily into account the need to integrate into EU.[*70]

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[65] In order to perform this function, the Committee has the right to obtain necessary information, inspect the situation at workplaces, make a proposal to discontinue the discriminating activities, *etc*. (§ 17 (1)).

[66] According to § 26 (1) of the GEA, everyone has a right, in the case of a suspected instance of discrimination, to file with the Committee an application that shall specify the name and contact information of the applicant, the data on the agency or persons, whose activities the applicant considers as discriminating in respect of himself or herself, and a description of the activities serving as the content of the application and the reasons for submitting the application (§ 27). The application shall be filed within two years of the occurrence of the alleged instance of discrimination (§ 28 2)).

[67] The system is favourable for individuals since the Committee's opinion about the occurrence of the instance of discrimination provides the applicant with a moral assurance when referring to the court when it is difficult to assess the likelihood of winning. See the explanatory memorandum accompanying the draft Gender Equality Act (Note 6).

[68] *E.g*. to amend the bases for remuneration that are in conflict with the principle of gender equality, the provisions of an employment contract or collective agreement, *etc*.

[69] Above all, in the Nordic Countries. See Gender Equality — the Nordic Model. Copenhagen: Nordic Council of Ministers, 1995, pp. 12–21.

[70] The explanatory memorandum accompanying the draft Gender Equality Act (Note 6).

Conclusions

The Constitution of the Republic of Estonia sets out as one of the fundamental rights the right not to be discriminated against on grounds of sex. As any other fundamental right, this right must also be exercisable both in the relationship between the state and an individual and in the relationships between individuals. Although several acts of international legislation are binding on Estonia, imposing an obligation to comply with the principle of gender equality, the performance of this obligation is not ensured in practice. This is partly caused by inadequate legislation, but to a greater extent the failure to perform the obligation derives from the habits and stereotypes evolved in society and from lacking awareness and a relatively low quality of life.

In order to comply with the requirements of international legislation and to contribute to the implementation of the fundamental right set out in the Constitution and to introduce the mentalities and rules of conduct of the contemporary society, the draft GEA has been prepared in Estonia, which is likely to be adopted as a law in 2002. According to the draft act, the principle of equality of women and men must be implemented in two ways — firstly, by prohibiting discrimination on grounds of sex, and secondly, by promoting gender equality.

GEA prohibits discrimination on grounds of sex in three areas, by providing, first of all, a general prohibition against discrimination on grounds of sex, and by then providing precise rules for preventing discrimination in working life and in publishing advertisements and announcements. The regulation of the prohibition against discrimination is most detailed in employment relations since discrimination is most specific and widespread in this area. The employer's obligation to provide information and evidence as well as the establishment of a limitation period the duration of which exceeds that of a usual limitation period and the minimum rate of compensation payable to the person who was discriminated against set out in GEA significantly contribute to the identification of discrimination in working life.

The obligation to promote gender equality has been imposed on the national and local governments and science, educational and training institutions as well as on employers who shall take all appropriate measures for the implementation of the principle of equality of women and men. It has to be admitted that the promotion of gender equality is a very important measure for increasing people's awareness of issues relating to equal treatment and equal opportunities.

According to GEA, the national gender equality policy shall be coordinated by a specific body — the Gender Equality Council. In order to ensure the compliance with the principle of equal treatment, a special body — the Gender Equality Committee — will be established on the basis of GEA, while the Committee will, among other things, also process applications of individuals concerning possible instances of discrimination. Although the Committee can only provide opinions about such issues and make conciliation proposals, the establishment of such an independent institution will allow for the settlement of problems outside the court, by way of a simplified procedure.

Although the response expressed by the public concerning the drafting of GEA has also been negative (e.g. such a specific act is unnecessary; GEA imposes too great obligations on employers, *etc*.), the preparation of the act deserves recognition. Although initially, the primary function of GEA may be to draw people's attention to the issues related to gender equality, it may, if necessary, also provide them with sufficiently efficient protection in the case of discrimination on grounds of sex as a violation of their fundamental right.

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The Right to Health Protection in the Estonian Constitution[*1]

Introduction

In April 2002, the headlines in the Estonian newspapers were dominated by a story about a woman suffering from a rare form of leukaemia. There was a medicine which had good, although not guaranteed, prospects for curing her. The problem, however, was that she could not afford the medicine, and the Estonian Health Insurance Fund refused to compensate for the expensive medicine. This case stirred considerable debate. During this debate, also the constitutionality of the refusal was raised as an issue.[*2]

The right to "health"[*3], the right to "health protection"[*4], or the right to "health care"[*5] has been included in the human rights discussion already for a considerable time. The possibility of a person to live a healthy life is a necessary precondition for a dignified life and for enjoying many other fundamental rights. It is no wonder that the fight for a healthy life is one of the most important activities of human rights organisations —

[1] The authors would like to thank Ms. Berit Aaviksoo for her helpful comments on an earlier draft of the article. The research was partly funded by the Estonian Science Foundation grant No. 4532.

[2] *E.g.* T. Koch. Verevähi juhtum näitab ebaõiglust raviraha jagamisel (The Case of Leukaemia Demonstrates the Injustice in Distributing Health Care Finances). – Eesti Päevaleht, 10 April 2002. Available at: http://www.epl.ee/leht/artikkel.php?ID=201161 (15.04.2002) (in Estonian).

[3] B. Toebes. The Right to Health. – A. Eide, C. Krause, A. Rosas (eds.). Economic, Social and Cultural Rights: A Textbook. 2nd ed. Dordrecht/Boston/London: Martinus Nijhoff Publishers, 2001, pp. 169–190; B. Toebes. The Right to Health as a Human Right in International Law. Antwerpen *et al.*: Intersentia, 1999; S. D. Jamar. The International Human Right to Health. – S.U. L. Rev., 1994, p. 1; V. Leary. The Right to Health in International Human Rights Law. – Health and Human Rights, 1994, Vol. 1, No. 1, p. 24.

[4] *E.g.* The Revised European Social Charter (hereinafter: ESC), article 11 is entitled "The right to protection of health."

[5] A. Exter, H. Hermans (eds.). The Right to Health Care in Several European Countries. The Hague, London, Boston: Kluwer, 1999; T. J. Bole III, W. B. Bondeson (eds.). Rights to Health Care. Dordrecht *et al.*: Kluwer Academic Publishers, 1990.

one cannot enjoy political liberties if one is critically ill.*[6] The right to health protection is tightly connected to many other rights, such as the right to food, shelter, healthy working conditions, healthy environment and access to health information.

The right to health protection has found its way into the Estonian Constitution — § 28 provides that "everyone has the right to health protection". At the same time, the right to health protection and social rights in general have so far drawn little attention in the Estonian legal literature. For instance the most comprehensive legal analysis of the Constitution prepared under the auspices of the Ministry of Justice*[7] does not contain guidelines on furnishing the scope of the right to health protection.

We base our discussion on two main sources. Firstly, we show how the social rights in the Constitution have been applied by the Estonian courts and interpreted by the Estonian scholars in general. The interpretation of the right to the protection of health should fit into the general understanding of the nature and importance, and especially the justiciability of social rights. Secondly, we discuss how the international obligations Estonia has entered into influence the understanding of the social rights in general and specifically the right to the protection of health.*[8]

As the Constitutional right to health has not been an object of legal battles, we show how the courts should interpret this provision and whether and to what extent rights in the field of health protection actually do exist.

1. Historical and international background of the right to health protection

1.1. Constitutional history

The Constitutions of 1920 and of 1938 contained several provisions related to social rights*[9], although their general application and enforceability in the courts was doubtful. In this respect, the provisions of the Constitution of the Soviet Union were radically different, providing for the maintenance of a net of health care facilities (article 24) and for the right to health care (article 42). This right was assured in practice in several ways, including the provision of qualified health care services for free in state-owned health care facilities, implementation of comprehensive disease prevention programs, *etc*. The ability to provide services for free had to do with the communist economy system, which kept salaries of doctors low, set forth fixed prices for infrastructure services rendered to health care facilities and allowed to use mainly only low-priced domestic pharmaceuticals and medical equipment.*[10]

In contrast, the inclusion of social rights in the post-Soviet constitutions has not been easy in any Eastern European country. The need to abandon the socialist system has also meant the tendency to neglect anything "social." Civil and political rights that people were deprived of under the previous regime seemed to claim priority.*[11]

However, some social rights do exist in the current Estonian Constitution. Besides the most important section, namely § 28 (guaranteeing also the right to health protection), several other rights such as the right to education and several work-related rights are ensured. Section 10 of the Constitution enshrines the principle of the social state and one may easily say that the specific social rights give clear content to the general principle. As the Constitution also determines that the Estonian State is founded on justice and human

[6] Among the most important international organisations, the World Health Organisation is devoted to the single issue of health. In recent years, however, even Amnesty International, known for its struggle for civil and political rights, has broadened its sphere of activity and promotes the protection of health, see http://web.amnesty.org/rmp/hponline.nsf (15.04.2002).

[7] Eesti Vabariigi Põhiseaduse Ekspertiisikomisjoni lõpparuanne (The Final Report of the Constitutional Expert Commission). Available at: http://www.just.ee/index.php3?cath=1581 (15.04.2002) (in Estonian).

[8] There are a couple of bibliographies available on the topic of health and human rights. At the UC, Berkeley, Molly Ryan has compiled a bibliography as of fall 1997, see http://globetrotter.berkeley.edu/humanrights/bibliographies (15.04.2002). Amnesty International provides a bibliography also as of 1997. Available at: http://www.web.amnesty.org/ai.nsf/index/ACT750031997 (15.04.2002).

[9] For example, § 25 of the Constitution of 1920 provided that the regulation of economic life should be based on the principle of justice, which aims to secure decent maintenance in case of youth, old age, incapacity for work and accident.

[10] I. Sheiman. Excessive State Commitments to Free Health Care in the Russian Federation: Outcomes and Health Policy Implications. – A. Exter, H. Hermans (eds.) (Note 5), p. 103.

[11] C. Taube. Constitutionalism in Estonia, Latvia and Lithuania: A Study in Comparative Constitutional Law. Uppsala: Iustus Förlag, 2001, p. 230 *ff*.; W. Drechsler, T. Annus. Die Verfassungsentwicklung in Estland von 1992 bis 2001. – Jahrbuch des öffentlichen Rechts, N.F. Vol. 50, 2002, p. 481.

dignity[*12], the Constitution receives a certain social accent besides the generally liberal tone.[*13] However, a clear-cut choice between liberal, conservative or social democratic welfare models[*14] has not been made in Estonia, with all three models being prominent in the political discussions.

The Constitution provides for a dignified life for everyone. According to § 14, "guaranteeing rights and liberties shall be the responsibility of the legislative, executive, and judicial powers, as well as of local government". The Estonian Constitution deliberately does not distinguish between "positive" and "negative" obligations, or civil/political rights and social rights. These rights are universal, indivisible, interdependent and interrelated.[*15]

1.2. Impact of international law on the right to health protection

An important source of interpretation of the right to health protection derives from the international law. Its role in interpreting the Estonian constitutional provisions, especially the human rights provisions, has been considerable.[*16] Most often, the Constitutional Court has used the European Convention on Human Rights[*17], some references to the ICCPR[*18] and the Convention on the Rights of Child[*19] have been made as well. Besides the fact that the international human rights law has direct domestic applicability in the Estonian courts, the treaty had often been used for interpretation of the Estonian Constitution and other legal provisions. Considering the "friendliness" of the court towards international law, the use of social rights treaties is highly probable.

Estonia has recently ratified several international documents regulating more or less directly the right to health protection. Such provisions are included in the 1948 Universal Declaration of Human Rights (article 25 (1))[*20], the International Covenant on Economic, Social and Cultural Rights (article 12 (2) d)[*21] and the European Social Charter (articles 11, 12 and 13), as well as in more specific human rights treaties such as the Convention on the Elimination of All Forms of Discrimination against Women (article 12), Convention on the Rights of the Child (article 24) and the Convention on Human Rights and Biomedicine (article 3).[*22] Estonia is also a member of the World Health Organisation, whose Constitution states that the "enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being".[*23] The most recent human rights instrument, the Charter of Fundamental Rights of the European Union, also provides for the right to health care (article 35).[*24]

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[12] According to the preamble, the Estonian State is founded on "liberty, justice and law" and shall "protect internal and external peace, and is a pledge to present and future generations for their social progress and welfare." Human dignity as a value is protected by § 10.

[13] For the liberal interpretation of the basic rights see R. Alexy. Põhiõigused Eesti Põhiseaduses (Basic Rights in the Estonian Constitution). – Juridica 2001 eriväljaanne, 2001 (in Estonian).

[14] G. Esping-Andersen. The Three Worlds of Welfare Capitalism. Cambridge: Polity Press, 1990.

[15] For the inseparability of civil/political and social rights see United Nations, World Conference on Human Rights: Vienna Declaration and Programme of Action, UN doc. A/CONF.157/23, Part I, paragraph No. 5.

[16] Generally on the role of international law in the Estonian domestic system. See H. Vallikivi. Domestic Applicability of Customary International Law in Estonia. – In the present issue, pp. 28–38; H. Vallikivi. Välislepingud Eesti õigussüsteemis: 1992. aasta põhiseaduse alusel jõustatud välislepingute siseriiklik kehtivus ja kohaldatavus (Treaties in the Estonian Legal System: The Domestic Validity and Applicability of Treaties Concluded under the Constitution of 1992). Tallinn: Õiguskirjastuse OÜ, 2001.

[17] H. Vallikivi. Euroopa inimõiguste konventsiooni kasutamine Riigikohtu praktikas (Use of the European Convention on Human Rights in the Practice of the Supreme Court). – Juridica, 2001, No. 6, p. 399 (in Estonian).

[18] For example, the decision of the Criminal Chamber of the Supreme Court, 24 September 2001 (3-1-3-11-01). – Riigi Teataja (The State Gazette) I 2002, 2, 12 (concerning the right to be present during the court proceedings) (in Estonian).

[19] The decision of the Constitutional Review Chamber of the Supreme Court, 10 May 1996 (3-4-1-1-96). – Riigi Teataja (The State Gazette) I 1996, 35, 737 (concerning the right of minors to form unions) (in Estonian).

[20] "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control."

[21] "States shall take steps, including the creation of conditions which would assure to all medical service and medical attention in the event of sickness, to achieve the full realisation of everyone's right to the enjoyment of the highest attainable standard of physical and mental health."

[22] "Parties, taking into account health needs and available resources, shall take appropriate measures with a view to providing, within their jurisdiction, equitable access to health care of appropriate quality."

[23] WHO Constitution. Preamble. Available at: http://www.who.int/ism/mis/WHO-policy/index.en.html (15.04.2002).

[24] "Everyone has the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices. A high level of human health protection shall be ensured in the definition and implementation of all Union policies and activities."

These international provisions have been interpreted by the relevant treaty enforcing institutions. Two important institutions should be mentioned here. Firstly, in May 2000 the UN Committee on Economic, Social and Cultural Rights issued General Comment No. 14, interpreting the right to the highest attainable standard of health. Secondly, the European Committee of Social Rights has developed a considerable case-law on the health protection rights.

The Estonian Supreme Court has not yet referred to a treaty guaranteeing social rights, including the ESC. Part III of the Appendix to the ESC contains the clause that it "is understood that the Charter contains legal obligations of an international character, the application of which is submitted solely to the supervision provided for in Part IV thereof". However, the court is by no means prevented from interpreting the domestic constitutional provisions by including the ESC case-law in its considerations.[*25]

2. Justiciability of the right to health protection

The enforceability of social rights in the courts (justiciability) is clearly controversial.[*26] The court system and court procedures are usually designed to protect the interests represented before it. Health care financing decisions are called "polycentric", which means that they involve a number of different competitive and antagonistic interests and in a common legal procedure, where a single plaintiff faces a single defendant it would be difficult to ensure that all these interests were adequately represented before the court.[*27] It is accepted that the legislator has considerable margin of appreciation in determining the adequate measures for protecting social rights and that the courts must not excessively interfere with social policy making.[*28] This is especially important in the transition process from a socialist to a market-based economic system.[*29] At the same time, the justiciability is not *a priori* impossible. Whenever the social rights provisions are clear enough and enable the courts to apply them to concrete cases, they are fully entitled to do so.[*30] The European Committee of Social Rights has taken a similar position and demanded that states provide for a justiciable right to health protection.[*31]

The Estonian Supreme Court has rarely considered social rights in its decisions so far. However, it has clearly obliged the state to engage in positive action to protect family life.[*32] The Civil Chamber of the Supreme Court has gone quite far and demanded that a municipality must not evict insolvent and indebted tenants from municipal buildings even when they have not paid rent for a considerable time period. If the tenants are qualified for social assistance because of unsatisfactory income, the municipality must provide for housing.[*33] From these few decisions we see that the court is willing to enforce at least some social rights. Therefore, the rights to health protection should also be justiciable in principle.

The most important consideration behind not recognising justiciability of the right to health protection is the financial one.[*34] The level of protection might depend on the availability of resources. For example, the CESCR provides for "progressive realisation" of social rights, accepting that full realisation of all eco-

[25] In fact, several courts have applied the charter in the domestic practice. See D. Harris, J. Darcy. The European Social Charter. Ardsley: Transnational Publishers, 2001, pp. 395–396.

[26] R. Maruste. Põhiseadus ja selle järelevalve (Constitution and Its Review). Tallinn: Juura, 1997, p. 100 (in Estonian). Generally see T. Annus. Riigiõigus (Constitutional Law). Tallinn: Juura, 2001, p. 92 (in Estonian).

[27] See *e.g*. N. W. Barber. Prelude to the Separation of Powers. – Cambridge Law Journal, 2001, Vol. 60, No. 1, p. 75.

[28] Decision of the German Constitutional Court Bundesverfassungsgericht. – Neue Juristische Wochenschrift, 1971, p. 366 (in German).

[29] A. Sajo. How the Rule of Law Killed Hungarian Welfare Reform. – East European Constitutional Review, 1996, Vol. 5, No. 1, p. 31; generally in Eastern Europe after transition see H. Schwartz. The Struggle for Constitutional Justice in Post-Communist Europe. Chicago and London: University of Chicago Press, pp. 63–65, 91–94, 154–156, 232–233; B. Bugaric. Courts as Policy-Makers: Lessons from Transition. – Harvard International Law Journal, 2001, Vol. 42, p. 247.

[30] Among many authors, see G. J. H. van Hoof. The Legal Nature of Economic, Social and Cultural Rights: a Rebuttal of Some Traditional Views. – P. Alston, K. Tomaševski (eds.). The Right to Food. Dordrecht: Martinus Nijhoff Publishers, 1984, pp. 97–110.

[31] M. Scheinin. Economic and Social Rights as Legal Rights. – A. Eide *et al.* (eds.) (Note 3), p. 43.

[32] Decision of the Constitutional Review Chamber of the Supreme Court, 5 May 2001 (3-4-2-1-01). – Riigi Teataja (The State Gazette) III 2001, 7, 75 (in Estonian).

[33] Decision of the Civil Chamber of the Supreme Court, 18 October 2000 (3-2-1-104-00). – Riigi Teataja (The State Gazette) III 2000, 25, 278 (in Estonian).

[34] Of course, civil and political rights cost as well. Therefore, the specificity of social rights is not as great as often claimed. See S. Holmes, C. Sunstein. The Cost of Rights: Why Liberty Depends on Taxes. New York *et al.*: Norton, 1999.

nomic, social and cultural rights is not possible immediately or even in short term.[*35] To this corresponds the "dynamic" interpretation of certain provisions of the ESC, where "dynamic" represents the idea that the level of protection is dependent on the level of resources available.[*36]

The Estonian Constitution does not explicitly provide for the dynamic or progressive character of social rights, but it allows for restrictions in the fundamental rights as long as they are necessary in the democratic society (§ 11). Long-term economic stability and the balance of economic development might certainly be goals that justify the limitations for providing free health care to everyone. Also, the social rights must not mean that some groups in the society become privileged at the expense of others by demanding certain free services from the state. Under limited resources, all public welfare services need sufficient attention.[*37]

The dynamic nature of the social rights does not mean, of course, that the rights exist only at the will of the state. Certain "core rights" should be guaranteed immediately.[*38] The inactivity of the state must not mean that no constitutional objections could be presented. International law demands that the state has to move as expeditiously as possible towards the full realisation of the rights. The state has to have at least a "plan of action" to achieve higher standards of health protection.[*39]

3. Elements of the right to health protection

The obligations of the state with respect to the right to health protection can be divided into the obligation to respect, to protect and to fulfil. The obligation to respect prevents the state from damaging one's health; the obligation to protect demands action from the state to prevent interference from third parties. The obligation to fulfil forces the state to adopt various measures to protect the health of the individuals.[*40] We do not follow this widely used distinction, but discuss three types of the most common rights concerning the health protection: the liberal right to non-interference by the state, the right to "underlying conditions"[*41] for healthy life and the right to health care.

It is inevitable that no state can guarantee a healthy life for everyone.[*42] As health "is a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity"[*43], reasons for lacking health can be various. Socio-economic reasons such as unhealthy nutrition, unsanitary living conditions and unhealthy working practices certainly play a role. For many diseases, the unhealthy person is responsible himself or herself, for example due to smoking or too little exercise. It is obvious that the state cannot be responsible for each and every health-related problem. Also, the state cannot be held responsible for curing all health-related problems. Therefore, it is not necessary and from the economic point of view also impossible to interpret and furnish the right to health protection and its elements as comprehensively as possible.

3.1. Right to be free from invasion of health

The right to health protection includes traditional liberal self-determination rights. R. Alexy points out that the Constitution does not explicitly include the obligation of the state to abstain from causing hazards to the health of people calling this a serious gap within the catalogue of the basic rights under the Constitution.[*44] However, the obligation of the state to refrain from interfering with health and bodily integrity has never

[35] M. Craven. The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development. Oxford: Clarendon Press, 1995, pp. 128–134. See also CESCR General Comment No. 3, UN Doc. E/1991/23, 1990.

[36] D. Harris, J. Darcy (Note 25), p. 27.

[37] On the example of higher education, see BVerfGE 33, 303, 334 *f.* (Numerus Clausus I).

[38] B. Toebes 2001 (Note 3), pp. 175–177; UN CESCR. The Right to the Highest Attainable Standard of Health. General Comment No. 14 (Note 39), pp. 43–45. Such core rights include maternal and child health care, immunization, provision of essential drugs, education concerning health prevention and adequate supply of water and sanitation.

[39] UN CESCR General Comment 14 (Note 38), p. 43 (f).

[40] On these categories, see A. Eide. Economic, Social and Cultural Rights as Human Rights. – A. Eide *et al.* (eds.) (Note 3), p. 13 *ff*. In the field of health protection, see UN CESCR. The Right to the Highest Attainable Standard of Health. General Comment No. 14. Un. Doc. E/C.12/2000/4, pp. 34–37; and B. Toebes 2001 (Note 3), pp. 178–180.

[41] Either "underlying determinants" or "underlying preconditions" is used. For former, see UN CESCR General Comment No. 14 (Note 38), p. 4; for the latter, see B. Toebes 2001 (Note 3), p. 174.

[42] UN CESCR General Comment No. 14 (Note 38), p. 8.

[43] WHO Constitution (Note 23), preamble.

[44] R. Alexy (Note 13), p. 77.

been set in doubt by the courts[*45] and R. Alexy adheres to the point of view that it would be inconsequent to argue that the state has an obligation to finance the protection of health but has no obligation to abstain from invading the health of its inhabitants.[*46]

Additionally, the state is obliged to secure proper protection of different aspects of self-determination rights such as right to informational or bodily self-determination in case of providing health care services by third parties. The principle *voluntas aegroti suprema lex est* (patient's will is supreme) is somewhat controversially protected under Estonian law.[*47]

The state has duties to protect people from the invasion of health by third parties also when medical treatment is not involved. Probably the most well-known situation when the state has neglected such duties involves direct environmental risk. For example, the European Court of Human Rights saw the violation of the right to privacy in the fact that the government failed to protect inhabitants from the high night noise level of Heathrow Airport, operated by a private enterprise. The court was clearly motivated also by health considerations, accusing the government of conducting too little research on the "impact of the increased night flights on the applicants", especially in the areas of "the nature of sleep disturbance and prevention".[*48] As to the access to health information, the ECHR has found that the state has to provide advice to people if they are under risk to their health. This obligation arises for example when the risk has been created by the state in weapons testing[*49] or by private enterprise through pollution.[*50]

Closely connected to the liberal right to bodily integrity is the principle of non-discrimination in provision of health services. The ECHR has additionally declared that depriving a person of medical care by expelling him or her while the person is suffering from a terminal and incurable illness, might violate article 3 of the Convention, protecting from inhuman and degrading treatment.[*51]

3.2. Rights to "underlying determinants for health"

The "underlying determinants" for health are conditions such as "access to safe and potable water and adequate sanitation, an adequate supply of safe food, nutrition and housing, healthy occupational and environmental conditions, and access to health-related education and information, including on sexual and reproductive health".[*52] The interpretation of the ESC article 11[*53] has shown that vaccination and epidemic control[*54], AIDS prevention[*55] and environmental protection[*56] all play a role. Such measures are more or less protected by the Public Health Act[*57] and the Health Care Services Organisation Act.[*58] These rights are rather general, and it is quite hard to find individually guaranteed subjective rights for a specific individual in a specific case, especially as regards to treatment on demand.

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[45] The Criminal Chamber of the Constitutional Court has explicitly stated that the right to bodily integrity is protected by the Constitution, Decision of 30 May 2000 (3-1-1-63-00). – Riigi Teataja (The State Gazette) III 2000, 19, 202 (in Estonian).

[46] R. Alexy (Note 13), p. 77.

[47] This principle has been recognised in the Law of Obligations Act (Võlaõigusseadus. – Riigi Teataja (The State Gazette) I 2001, 81, 487 (in Estonian)). This is a contractual obligation of a service provider. Medical treatment without informed consent is, however, not considered as a criminal offence according to the new Penal Code (Karistusseadustik. – Riigi Teataja (The State Gazette) I 2001, 61, 364 (in Estonian)).

[48] *Hatton and Others v. the United Kingdom*, 2 October 2001, application 36022/97, at paragraph No. 103.

[49] *L.C.B. v. The United Kingdom*, 9 June 1998, application 23413/94. In this case, the court did not find a violation, as it was not foreseeable during the nuclear testing that the health of the daughter of the person tested might have been endangered. Under similar circumstances, the state has to provide access to available information about the radiation levels, see *McGinley and Egan v. The United Kingdom*, 9 June 1998, applications 21825/93; 23414/94.

[50] *Guerra and Others v. Italy*, 19 February 1998, application 14967/89. The State did not inform inhabitants for several years before advising them of risks associated with a chemical factory.

[51] *D. v. The United Kingdom*, 2 May 1997, Application No. 30240/96.

[52] UN CESCR General Comment No. 14 (Note 38), p. 11. See also B. Toebes 2001 (Note 3), p. 174.

[53] "With a view to ensuring the effective exercise of the right to protection of health, the Parties undertake, either directly or in co-operation with public or private organisations, to take appropriate measures designed *inter alia*:
1. to remove as far as possible the causes of ill-health;
2. to provide advisory and educational facilities for the promotion of health and the encouragement of individual responsibility in matters of health;
3. to prevent as far as possible epidemic, endemic and other diseases, as well as accidents."

[54] C I, p. 60.

[55] C X-1, p 109.

[56] C IX-2, p 13; C X-1, p. 110 (air pollution in Italy).

[57] Rahvatervise seadus (Public Health Act). – Riigi Teataja (The State Gazette) I 1995, 57, 978; 2002, 32, 187 (in Estonian).

[58] Tervishoiuteenuste korraldamise seadus (Health Care Services Organisation Act). – Riigi Teataja (The State Gazette) I 2001, 50, 284 (in Estonian).

3.3. Rights to health care

The rights to health care are the most controversial area[*59], as considerably more resources are needed and spent in this area of health protection.[*60] At the same time, they are the most important ones to the people. It is in human nature not to think so much on protecting of underlying determinants of health, but worrying about getting help in case of illness. Considering the opportunities and costs of modern medicine it is clear that the state cannot provide for free all health care services anyone wants or needs. It would therefore be more appropriate to speak about the responsibility of the state to guarantee the availability of health care services. This includes the question of financial availability, concerning both regular health care as well as treatment in extraordinary or emergency situations, where the right to life plays an important role in interpreting the constitutional guarantees.[*61]

3.3.1. Availability of health care services

The Constitution does not oblige the state to provide health care services by itself. Privatisation of hospitals is not prohibited in principle, as is similarly not prohibited the organisation of the medical profession based on the liberal professions tradition. As a result of a recent major reform Estonia has established a system of private general practitioners for primary health care, with hospitals which major shareholder is in most cases the state or local government on the second and third level. All health care providers in Estonia are independent legal persons in private law, enjoying considerable independence from the state and local governments.

The state still has the obligation to ensure that an adequate number of hospitals and other health-related buildings exist.[*62] This means that the state has to ensure that necessary legislation to carry out control over health care providers is enacted and that the hospitals comply with it. Such legislation should regulate establishing of hospitals, borrowing limits, certificates of need, state's step-in rights in case of failure to operate a hospital or on bankruptcy of a hospital, pre-emptive rights on transfer of hospitals, *etc*. Currently, these issues are not regulated in Estonia and the situation does clearly not correspond to the state duties in ensuring the availability of health care.

Besides hospitals and other buildings, the number of qualified doctors receiving a competitive salary must be sufficient. This includes a need for a sound education and training system for the medical staff, when no private universities provide these services.[*63] Another unsolved issue is the remuneration of medical students working in hospitals during their last stage of studies.

The right to health protection does not require only the availability of any kind of health care services, but services of reasonable quality.[*64] This can be secured by setting forth certain requirements for professional competence of doctors, medical equipment, medicines, hospital buildings, *etc*. Additionally, there has to be a mechanism for supervising and monitoring the quality. Both sides of the quality of health care services are well regulated under Estonian law.[*65] There is a special agency being founded under the Health Care Services Organisation Act which has the purpose licensing hospitals. Receiving a licence depends on the quality of rendered services and adherence of quality management guidelines. Recently a Bill on Patient's Rights was submitted to the Estonian Parliament. This Bill sets up a mechanism for how patients can submit their complaints about the quality of health care services to a patients' ombudsman. Protection of patients' rights is one important instrument in assuring the quality of health care services.

Probably the more important aspect of availability of health care is the financial availability. The Constitution does not explicitly oblige the state to introduce a universal health protection system. However, under article 12 of the ESC the state is obliged "to establish or maintain a system of social security". This

[59] For example, see R. Epstein. Mortal Peril: Our Inalienable Right to Health Care? Reading: Addison-Wesley, 1997 and the reports of the symposium on this book published in University of Illinois Law Review, 1998, pp. 683 *ff*.

[60] For example, the 2002 health insurance budget was 4.85 billion kroons. At the same time, funds for disease prevention and health promotion programs were only 63.5 million kroons.

[61] On different dimensions of the right to health care see H. Leenen. The Right to Health Care and its realisation in the Netherlands. – A. Exter, H. Hermans (eds.) (Note 5), p. 34.

[62] UN CESCR General Comment (Note 38), p. 12 (a). From the case law of ESC, see C XIII-3, p. 343 (Portugal). Access to services has to be guaranteed without losing excessive amount of time. A hospital master-plan approved by the Estonian government sets forth that specialised medical care should be available from every place in Estonia within 60 minutes, *i.e*. a hospital shall not be farther away than 70 kilometres. Available at: http://www.tervishoiuprojekt.ee/index.php?page=2,9 (15.04.2002).

[63] UN CESCR General Comment (Note 38), p. 12 (a).

[64] See UN CESCR General Comment No. 14 (Note 38), p. 12 (d).

[65] There is a number of regulations adopted under the Health Care Services Organisation Act regulating the quality of services.

includes the obligation to establish or maintain a health insurance system.[*66] Moreover, the system has to be maintained at a level "at least equal to that necessary for the ratification of the European Code of Social Security" and even more importantly, the states have "to endeavour to raise progressively the system of social security to a higher level". The health insurance system has to be based on the solidarity principle, meaning that it must include people who are not able to contribute themselves, *e.g.* minors and retired persons.[*67]

Similar demands are also part of the constitutional principle of the social state. This principle demands that the state must protect people from risks, in case they are unable to do that themselves. This protection is effective only if there is some security for everybody that in case of need they will receive assistance. This is possible only through a public health insurance system that is based on the solidarity principle.[*68] Such a national compulsory tax financed system based on solidarity of insured people already exists in Estonia, with more than 90% of the people having insurance cover. This, however, does not determine to what extent the payments to the insured are guaranteed.

3.3.2. Reducing the availability of health care services

It has been argued that the constitutional right to health protection does not allow for co-payments by the insured patients. Such payments could put a heavy burden on those people with a lower income. There are several arguments why this practice is necessary and constitutional, however. First of all, there is a systematic argument that contrary to the first paragraph of § 37 of the Constitution, which sets forth the right to education for juveniles free of charge, the first paragraph of § 28 of the Constitution does not state that health protection has to be completely free of charge to inhabitants. Secondly, the complete responsibility of the state does not motivate people to protect their own health by abandoning unhealthy practices, for example. Patients' contributions may be considered as a kind of self-liability. Thirdly, the financial burden might be unbearable for the state and prevent the state from engaging in other necessary policies.[*69]

The adoption of legislation introducing self-liability and responsibility to contribute towards the payment of health care services can be set under question also in the light of the obligation to raise the health insurance system progressively to a higher level. This means that reducing benefits, increasing the contributions of the patients for the services and restricting financing for certain services demands clear justification. However, there is no absolute prohibition of such measures. The European Committee of Social Rights has in principle accepted such practice, as far as it is "necessary to ensure the maintenance of the social security system and provided that any restrictions still allow members of society to be effectively protected against social and economic risks and do not tend to gradually reduce the social security system to one of minimum assistance".[*70] The need to consolidate public finances and the goal of preserving balanced health insurance budgets therefore allow to restrict payments from the Health Insurance Funds.

Another mechanism for reducing availability of health care are waiting lists, which are commonly used to reduce the financial burden on the Estonian Health Insurance Fund's budget. The maximum waiting periods are not set forth by any legislative document. Moreover, criteria providing for preconditions to be fulfilled in order to be entered into the list or moved upwards on the list are not regulated. This causes a clear constitutional problem — the availability of health care services is not guaranteed sufficiently well as the procedures for decision-making are not well elaborated. However, this problem shall be solved by the new Act on Health Insurance, which shall enter into force on 1 October 2002.

3.3.3. Provision of emergency and extraordinary care

In case a person has no resources to bear his or her burden of the services, or if the person is not insured, the state still has to provide social assistance as guaranteed by the second paragraph of § 28 of the Constitution. Article 13 of the ESC provides that the state has to undertake "to ensure that any person who is without adequate resources and who is unable to secure such resources either by his own efforts or from other sources, in particular by benefits under a social security scheme, be granted adequate assistance, and, in

[66] C XIV-1, p. 160 (Cyprus), p. 222 (Finland), p. 534 (Malta).

[67] C XIV-1, p. 308 (Germany), pp. 561–562 (the Netherlands).

[68] Certainly, this can also be achieved by the national health service model as in the United Kingdom. However, when the insurance model is already introduced, those unable to pay for insurance must also be entitled to health care services.

[69] The introduction of co-payments has been one of the main methods of cost-containment in the health care sector in all democracies, see *e.g.* M. Harrop. Health Policy. – M. Harrop (ed.). Power and Policy in Liberal Democracies. Cambridge: Cambridge University Press, 1992, p. 162.

[70] *E.g.* as regards to France, Conclusions XIV-I, pp. 260–265; Germany XIV-I, pp. 305–312. Reference omitted. See also general observation on article 12 (3), C XIII-4, p. 143.

case of sickness, the care necessitated by his condition".[71] For those not covered by compulsory or voluntary insurance in Estonia, the right to receive emergency care for free is granted by the Health Care Services Organisation Act. Against that background it might be argued that the state has created a system which guarantees financial availability of health care services for all.

The controversial issue here is however, to what extent must the state provide for the services for the poor or uninsured; and to what extent must the state provide for care involving extraordinary costs for treatment, such as in the case mentioned in the beginning of this section. The Health Care Services Organisation Act understands under emergency care such services "which are provided by health care professionals in situations where postponement of care or failure to provide care may cause the death or permanent damage to the health of the person requiring care".

Such measures start from a simple injection of insulin and end with a hearth-lung transplantation and gene therapy. Considering the life-preserving nature of the essential services, the rights seem to be protected by the right to life instead of the right to health protection. The human life has a very high value in the Estonian society, and it does not seem to be justified simply to refer to tight resources when refusing potentially life-saving care. It seems unavoidable that a rational decision-making procedure has to exist, together with rules for making the decision.[72] The right to life must be given enough attention and reasons for refusing treatment have to be well founded, *e.g.* the probability of the treatment to cure the disease might not be high enough to justify the costs (so called principle of cost-effectiveness).

However, in this issue it is very hard for the courts to interfere with the professional judgement of the doctors and health care organisations in a concrete case. In some cases, it is justified to refuse potentially life-prolonging treatment.[73] Cost considerations also play a role. The long-term provision of health care services is possible only if the short-term health budgets correspond to the general economic situation in the country.[74] Therefore, the court should exercise considerable self-restraint in deciding on the issue whether the care must be provided for or not.

Comparative law demonstrates that the rights to high-cost health care in specific cases are in fact rarely enforceable in the courts. Under the English or Scottish law the patients do not have a legal right to receive treatment or any particular standard of health care services. The health care rights are not justiciable.[75] In Canada and the United States the right to receive health care services has not been approved as a constitutional right at all.[76] Despite the fact that the Russian Constitution of 1993 states that health care is provided free-of-charge in public and municipal health care facilities, the state is *de facto* giving up its commitments.[77] Also the provision of the German Basic Law guaranteeing the right to life has been interpreted as giving no right to free medical treatment.

Conclusions

The right to health protection as guaranteed by the Estonian Constitution is a big step towards the realisation of dignified life for everyone. The obligation of the state to take measures in this respect must not be neglected. Also, the state might be under its constitutional duty to provide treatment in order to protect the lives of people. At the same time the level of health protection, especially the provision of health care services, depends on the availability of resources. The debate in the newspapers in connection with the

[71] Similarly, the state has to take care of the health deprived of liberty. See, *e.g. Hurtado v. Switzerland*, *Hurtado v. Switzerland*, Comm. Report 8 July 1993, Series A no. 280, p. 16, § 79; *Ilhan v. Turkey* [GC] no. 22277/93, ECHR 2000-VII, § 87; *Keenan v. The United Kingdom*, 3 April 2001, Application No. 27229/95.

[72] For the British practice, also considering the Human Rights Act 1998, see D. Feldman. Civil Liberties and Human Rights in England and Wales. 2nd ed. Oxford University Press, 2002, pp. 228–233.

[73] Here, the decision of the South African Constitutional Court in the case *Soobramoney v. Minister of Health*, Kwa-Zulu Natal is often referred to, *e.g.* in Toebes 2001 (Note 3), p. 188. Generally see also D. O'Sullivan. The Allocation of Scarce Resources and the Right to Life under the European Convention on Human Rights. – Public Law, 1998, pp. 389–395.

[74] For instance the prevailing philosophy of courts of Italy in the 1980s was that all services, which were technologically possible should be provided to citizens. By the beginning of the 1990s the courts were basically forced to alter their point of view, since public health expenditure started to increase dramatically. G. France. The Changing Nature of the Right to Health Care in Italy. – A. Exter, H. Hermans (eds.) (Note 5), p. 43. For a similar change in mind in Germany see H Genzel. Die Aufgaben der Krankenhäuser im gesundheitlichen Versorgungssystem. – A. Laufs u.a. (ed.). Handbuch des Arztrechts. München: Beck, 1999, p. 606.

[75] D. Feldman (Note 72), p. 229. It has been speculated that the adoption of the Human Rights Act might change this situation, see D. O'Sullivan (Note 73), p. 391.

[76] D. Sprumont. The Right to Health Care in Swiss, Canadian and American Law. – A. Exter, H. Hermans (eds.) (Note 5), p. 70.

[77] I. Sheiman. Excessive State Commitments to Free Health Care in the Russian Federation: Outcomes and Health Policy Implications. – A. Exter, H. Hermans (eds.) (Note 5), p 104–105.

above mentioned leukaemia case clearly showed that the newspapers and members of society are not capable to see the scarcity of resources as an argument to refuse treatment when someone is seriously ill. Even though the courts will face considerable social pressure in making their decisions in such cases, they have to be careful in interfering in these questions having a high impact on health policy. In order to secure a just judgement while allocating resources available for health protection clear guidelines for making such judgements must be adopted by the Parliament.

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Einheit der verfassungsmäßigen Rechtsordnung: Entscheidungen und Lösungen im Strafrecht

1. Rechtsreform als politische und rechtspolitische Wahl

Eine der wichtigsten Aufgaben eines selbständig gewordenen Staates ist die Gestaltung einer einheitlichen Rechtsordnung. Nach der klassischen Gliederung besteht die Rechtsordnung aus drei Hauptzweigen: öffentliches Recht, Strafrecht und Privatrecht. Nach der Wiederherstellung der Selbständigkeit Estlands im Jahre 1991 wurde bei der Umgestaltung des estnischen Rechtssystems zuerst mit der Reformierung des Privatrechts begonnen, die Reformierung des Strafrechts sollte die Aufgabe der weiteren Jahren sein. So eine Auffassung war deutlich dadurch begründet, dass zusätlich dem Aufbau einer für einen selbständigen Staat geeigneten Staatsstruktur eine der ersten Aufgaben des wieder selbständig gewordenen Estlands die Umgestaltung der Wirtschaft entsprechend den Grundsätzen der freien Marktwirtschaft war, dies konnte aber im Rahmen der Regelung des sowjetischen Zivilrechts nicht geschehen. Das letztere bedeutet aber nicht, dass im estnischen Strafrecht bis zur Verabschiedung des neuen Strafgesetzbuches am 6. Juni 2001 keine größere Reform durchgeführt wurde. Eine Diskussion über das neue Strafrecht hat in den Baltischen Staaten, darunter auch in Estland, eigentlich schon vor Zerfall der Sowjetunion und Wiederherstellung der Selbständigkeit begonnen. So zum Beispiel wurden die Fragen der Strafrechtsreform in den Seminaren erörtet, die 1989 in Tartu und 1990 in Riga stattgefunden haben. In diese Periode fällt auch die Bildung der ersten Kommissionen für die Ausarbeitung der Entwürfe zu neuen Starfgesetzbüchern. In Estland wurde beim Präsidium des Obersten Rats (Parlament der Estnischen SSR) die entsprechende Kommission im Frühling des Jahres 1990 unter Leitung des damaligen Professors für Strafrecht an der Universität Tartu I. Rebane (1912–1995) gebildet. Bald stellte es sich doch heraus, dass die gebildete Kommission nicht imstande war, ein neues, den europäischen Grundsätzen entsprechendes Strafgesetz ohne längere Vorbereitungen aus-

zuarbeiten. Der fertig gewordene Entwurf ging hauptsächlich von dem bisherigen sowjetischen Strafrecht aus und stellte eine Modifikation der neulich erschienenen "Grundlagen der strafrechtlichen Gesetzgebung der UdSSR und der Sowjetrepubliken" dar. Es wurde langsam klar, dass für die Durchführung einer gründlichen Strafrechtsreform eine umfangreichere Vorbereitungsarbeit und Ausarbeitung neuer theoretischer und rechtspolitischer Konzeptionen notwendig ist. Aus diesem Grund hat das Justizministerium Estlands im Herbst 1991 die Entscheidung getroffen, auf die Teilnahme an der Arbeit dieser Kommission zu verzichten und hat seine eigene Kommission gebildet, um im geltenden Strafgesetzbuch der ESSR von 1961 notwendige Änderungen einzuführen, die sich aus der Wiederherstellung der Selbständigkeit Estlands im August 1991 ergaben, und die Ausarbeitung eines neuen Strafgesetzbuches auf die nächsten Jahre zu verschieben.[*1] Die Neufassung des Strafgesetzbuches der ESSR wurde am. 7. Mai 1992 verabschiedet und trat am 1. Juni 1992 in Kraft.[*2]

Es war ganz offensichtlich, dass im Jahre 1992 im Strafgesetzbuch nur durchaus notwendige Änderungen gemacht wurden, indem aus dem Gesetz die für einen sowjetischen Totalstaat eigenen Vorschriften ausgelassen wurden und eine gründliche Strafrechtsreform noch bevorstand. 1995 hat das Justizministerium die Arbeit des Professors I. Rebane an der Ausarbeitung des Entwurfs zu einem neuen Starfgesetzbuch als völlig gescheitert eingeschätzt, weil in dem fertig gewordenen Entwurf viele grundsätzliche Fragen inhaltlich ungelöst blieben oder nach den Auffassungen des sowjetischen Strafrechts gelöst wurden. Zugleich war der besondere Teil des im Laufe von 4 Jahren entstandenen Entwurfs mit der dazwischen durchgeführten Privatrechtsreform nicht mehr im Einklang. Es wurde eine grundsätzliche Entscheidung getroffen, die bisher geleistete Arbeit an der Ausarbeitung des neuen Entwurfs zum Strafgesetzbuch beiseite zu lassen und die Durchführung der Strafrechtsreform vom Beginn neu anzufangen. Diesmal wurde für die Durchführung der Reform ein klares Ziel gesetzt: Ausarbeitung eines den Prinzipien des Rechtsstaates und den Auffassungen über liberales Strafrecht entsprechenden Entwurfs, welcher dem zeitgenössischen Niveau der kontinentaleuropäischen Strafrechtswissenschaft entsprechen würde. Diese Zielsetzung entsprach zugleich dem von Riigikogu (estnisches Parlament) für die Durchführung von Rechtsreformen gesetzten allgemeinen rechtspolitischen Ziel, aus dem bisherigen sowjetischen Rechtsraum herauszutreten und sich wieder mit dem kontinentaleuropäischen Rechtssystem zu vereinigen.[*3] Für die Durchführung der Strafrechtsreform hat das Justizministerium grundsätzliche Ausgangspunkte für eine neues Strafrecht ausgearbeitet und eine Arbeitsgruppe für die Ausarbeitung des Entwurfs zu einem neuen Strafgesetzbuch gebildet.

Obwohl zu der Arbeitsgruppe alle besten Strafrechtskenner Estlands gehörten, wurde ziemlich schnell klar, dass die Arbeitsgruppe ohne Mithilfe von ausländischen Experten das gesetzte Ziel nicht erreichen kann. Es stellte sich heraus, dass die bisher in Estland geltenden rechtsdogmatischen Schemata des sowjetischen Strafrechts im allgemeinen vom Stand des deutschen Strafrechts gegen Ende des 19. Jahrhunderts ausgegangen sind, wodurch das in Estland geltende Strafrecht hinter dem Niveau des zeitgenössischen kontinentaleuropäischen Strafrechts etwa 100 Jahre zurückblieben ist.[*4] Dabei reichte in der estnischen Rechtswissenschaft aber die kritische Masse nicht aus, um die Zurückgebliebenheit, die geschichtlich überwiegend aus ideologischen Gründen entstanden war, aus eigener Kraft zu überwinden. Den entstandenen Engpaß gelang es hauptsächlich mit Hilfe deutscher Rechtswissenschaftler als Experten zu überwinden (Professor für Strafrecht an der Universität Kiel E. Samson), die sich unmittelbar an der Vorbereitung des Textes des Entwurfs als auch an der Abfassung der für das Verfahren des Entwurfs erforderlichen Begründungen beteilgt haben.[*5] Der neue einheitliche Entwurf des Strafgesetzbuches (sowohl der Allgemeine als auch der Besondere Teil) wurden von der Regierung der Estnischen Republik gebilligt und im Frühling des Jahres 1999 dem Riigikogu vorgelegt.

Wenn die internationalen Gutachten den Entwurf des Strafgesetzbuches hoch eingeschätzt haben[*6], dann unter den estnischen Juristen hat der Entwurf gegensätzliche Meinungen hervorgerufen. Meistens wurde dem Entwurf vorgeworfen, dass estnische Verhältnisse nicht berücksichtigt werden und dass eine so kardinale

[1] Karistusseadustiku eelnõu seletuskiri (Begründung zum Entwurf des Strafgesetzbuches), S. 1–2. Handschriftliches Material. Liegt bei der Abteilung für Strafrecht des Justizministeriums.

[2] Riigi Teataja (Staatsanzeiger) 1992, 20, 288.

[3] Riigikogu otsus seadusloome järjepidevusest (Beschluss von *Riigikogu* (estnisches Parlament) über die Folgerichtigkeit der Rechtsetzung). – Riigi Teataja (Staatsanzeiger) 1992, 52, 651.

[4] J. Sootak. Kuriteomõiste ja kuriteokoosseis. Eesti kehtiva kriminaalõiguse tegelikest allikatest (Verbrechensbegriff und Tatbestand. Über wirkliche Quellen des geltenden estnischen Strafrechts). – Juridica, 1997, Nr. 5, S. 222 *ff.*

[5] z. B. E. Samson. Eesti karistusseadustiku üldosa eelnõust (Zum Entwurf des Allgemeinen Teils des estnischen Strafgesetzbuches). – Juridica, 1998, Nr. 2, S. 58 *ff.*; M. Ernits, P. Pikamäe, E. Samson, J. Sootak. Karistusseadustiku üldosa eelnõu. Eelnõu lähtealused ja põhjendus (Entwurf des Allgemeinen Teils des Strafgesetzbuches). Ansätze und Begründung. Tallinn–Tartu–Kiel, 1999.

[6] z. B. A. v. Kalmthout. Ekspertarvamus Eesti karistusseadustiku üldosa seaduse eelnõu kohta (Expertengutachten über den Entwurf zum Allgemeinen Teil des estnischen Strafgesetzbuches). – Juridica, 1998, Nr. 3, S. 129 *ff.*; D. von Bülow. Eesti karistusseadustiku üldosa eelnõu ekspertiis (Expertise über den Allgemeinen Teil des estnischen Strafgesetzbuches). Handschriftliches Material. Liegt bei der Abteilung für Strafrecht des Justizministeriums.

Reform in der Lage durchgeführt wird, wo die Kriminalität äußerst hoch ist.[*7] Besonders scharf wurde der Entwurf von Praktikern kritisiert, die konsequent gesichert haben, dass die Geltendmachung eines neuen, sich überwiegend auf dem deutschen Strafrecht stützenden Strafgesetzbuches, eine totale Umschulung aller Richter, Staatsanwälte und Polizeibeamten, die sich mit dem Strafrecht beschäftigen, voraussetzt und unvorhersehbare Folgen im Kampf gegen die Kriminalität mit sich bringen kann. Dabei wurde auch die Frage über die Notwendigkeit und Begründetheit einer so tiefen Reform überhaupt aufgeworfen. Wenn für Personen, die sich mit Strafrechtswissenschaft beschäftigten ohne weiteres klar war, dass die Basis des sowjetischen Strafrechts erneuert und mit Grundsätzen eines Rechtsstaates in Einklang gebracht werden muss, dann vom Standpunkt einer Amtsperson aus, die das Strafrecht täglich anwendete, ermöglichte auch das bisherige sowjetische Strafrecht erfolgreich gegen die Kriminalität zu kämpfen, weswegen auch das Bedürfnis nach einem kardinal neuen Strafrecht fehlte. Diese Kritik war natürlich einerseits durch die traditionelle Konservativität der Juristen veranlasst, andererseits aber offenbarten sich in dieser Diskussion vollständig unterschiedliche Auffassungen estnischer Juristen über die allgemeinen Ziele der Strafrechtsreform im ganzen. Ungeachtet des inzwischen ziemlich scharf gewordenen Gedankenaustausches über die Notwendigkeit der Strafrechtsreform überhaupt gelang es dem Justizministerium doch bis zum Zeitpunkt der Vorlegung des Entwurfs dem Parlament einen Konsens zwischen der Arbeitsgruppe, die den Entwurf vorbereitet hat, und den praktizierenden Juristen zu erreichen. Das Verfahren über den Entwurf des Strafgesetzbuches in Riigikogu dauerte 2 Jahre (1999–2001), wobei sich im Laufe des Verfahrens im Parlament eine im allgemeinen unterstützende Einstellung der Juristen zum Entwurf entwickelt hat. Die Verabschiedung des Entwurfs des Strafgesetzbuches vom estnischen Parlament am 6. Juni 2001 hat die etwa 10 Jahre gedauerte Strafrechtreform in Estland zu Ende geführt.[*8]

2. Allgemeine strafrechtliche Entscheidungen

Das jetzige estnische Rechtssystem macht den Unterschied zwischen dem Strafrecht im engeren Sinne oder Kriminalrecht und dem Ordnungswidrigkeitenrecht. Das erste von den beiden ist in dem jetzt noch geltenden Strafgesetzbuch, genauer gesagt, im Kriminalkodex enthalten, das zweite im Gesetzbuch über Ordnungswidrigkeiten. Eine der wesentlichsten durch diese Reform eingeführten Änderungen besteht daher darin, dass das bisherige System von zwei Kodex aufhört zu existieren und dass Kern- und Nebenstrafrecht entstehen. Gemäß § 1 des StGB bildet sich das Kernstrafrecht aus den Normen des Strafgesetzbuches, die in den Allgemeinen Teil und Besonderen Teil eingeteilt werden. Der Besondere Teil seinerseits setzt sich aus den Tatbeständen von Straftaten und Ordnungswidrigkeiten zusammen. Die letzteren sind in geringem Maße im Gesetzbuch enthalten, die meisten Tatbestände der Ordnungswidrigkeiten finden ihren Platz in den entsprechenden Nebengesetzen (z.B. das Verkehrsgesetz, das Betäubungsmittelgesetz usw). Die Vorschriften des Allgemeinen Teils des Strafgesetzbuches finden sowohl auf die Tatbestände des Kern- als auch Nebenstrafrechts Anwendung. Für die Einbeziehung der Tatbestände der Ordnungswidrigkeiten in das Strafgesetzbuch sprach einigermaßen auch die Tradition. Nämlich hatte auch das Strafgesetzbuch der Estnischen Republik von 1929 einen solchen Aufbau. Im Laufe der Reform hat sich auch die Frage über den Einschluss der Tatbestände von Verbrechen in die Nebengesetze aufgeworfen, aber dieser Schritt wurde für zu radikal gehalten.

Eine gründliche Reform des Jugendstrafrechts hat nicht stattgefunden. Das Strafgesetzbuch enthält Sondervorschriften über Jugendliche, indem z. B. das Höchstmaß der über einen Jugendlichen verhängten Freiheitsstrafe bis auf 10 Jahre bechränkt wird (§ 45 Abs. 2) und dem Gericht gemäß § 87 das Recht auf die Aussetzung der Jugendstrafe eingeräumt wird, indem gegen den Jugendlichen Erziehungsmaßregeln getroffen werden. In anderen Fällen können Zuchtmittel gegen den Jugendlichen entsprechend den Vorschriften des Gesetzes über Zuchtmittel gegen Jugendliche angewendet werden.[*9]

Als eine grundsätzliche Änderung muss auch die Geltendmachung der Strafbarkeit einer juristischen Person erwähnt werden (§ 14 StGB). Eine Tat der juristischen Person ist in den durch den Besonderen Teil bestimmten Fällen strafbar, wenn die Tat von ihrem Organ oder führenden Mitarbeitern zugunsten dieser juristischen Person begangen wurde. Getrennt ist hervorgehoben, dass die Strafbarkeit der Tat einer juristischen Person die Bestrafung der natürlichen Person, die die Schuldtat begangenen hat, nicht ausschließt (Abs. 2). Der

[7] U. Lõhmus. Mõtteid kriminaalõiguse reformi hetkeseisust (Gedanken über die Augenblickslage der Strafrechtsreform). – Juridica, 1997, Nr. 9, S. 445-447; K. Kimmel, U.-P. Rahi. Mõtteid karistusseadustiku eelnõust (Gedanken über den Entwurf des Strafgesetzbuches). – Juridica, 1997, Nr. 9, S. 447–450; K. Kimmel. Kas Carolina II? (Carolina II?) – Juridica, 1999, Nr. 2, S. 87 *ff.*

[8] Riigi Teataja (Staatsanzeiger) 2001, 61, 364. Der Text in englischer Sprache (Penal Code) ist zu erreichen: www.legaltext.ee/et/.

[9] Alaealiste mõjutusvahendite seadus (Gesetz über Zuchtmittel gegen Jugendliche, verabschiedet am 28.01.1997). – Riigi Teataja I 1998, 17, 264, s. auch: J. Sootak. Juvenile Criminal Law. – Juridica International, Nr. 2, 1997, S. 71; J. Ginter. Teenage Criminality in Estonia. – Ebenda, S. 74.

Staat, die örtliche Selbstverwaltung und eine öffentlich-rechtliche Person werden aber strafrechtlich nicht zur Verantwortung gezogen (Abs. 3). Es ist aber wahr, dass auch im geltenden Recht die Strafbarkeit der von einer juristischen Person begangenen Ordnungswidrigkeit besteht. Daher ist das geltende estnische Recht in diesem Sinne dem deutschen Recht ähnlich, nach welchem die strafrechtliche Verantwortlichkeit juristischer Personen ausgeschlossen ist, es aber möglich ist, juristische Personen für Ordnungswidrigkeiten zur Verantwortung zu ziehen (vgl. deutsches OWiG § 30). Wegen Verbindung des Gesetzbuches über Ordnungswidrigkeiten mit dem Strafgesetzbuch entstand das Bedürfnis, im Entwurf des neuen Strafgesetzbuches die Grundlagen der Verantwortlichkeit einer juristischen Person genau darzustellen. Hier ist das Strafgesetzbuch von dem neuen französischen *Code pénal* ausgegangen, indem dessen Artikel 121-2 in einigermaßen geänderter Form für das neue estnische Strafgesetzbuch übernommen wurde.

Man hat auf mehrere dem sowjetischen Strafrecht eigenen Institute verzichtet - die Vorbereitung einer Straftat ist nicht mehr strafbar. Ebenso kennt das neue estnische Strafrecht so einen Teilnehmer wie der Organisator nicht meht. Gleichzeitig hat das Strafgesetzbuch die Einführung des Begriffs des sg. Einheitstäters nicht für notwendig gehalten. Nach der jetzigen Dogmatik ist die untaugliche Teilnahme (Teilnahmeversuch) als Vorbereitung einer Straftat, die Bedingungen für Begehung einer Straftat schafft, strafbar, nach dem neuen Strafgesetzbuch ist so eine Tat dekriminalisiert worden.

Bis jetzt ist dem estnischen Strafrecht auch die sich aus dem Straftatsbegriff ergebende Strafmilderung fremd (deutsches StGB § 49). Das Strafgesetzbuch gibt dem Gericht die Möglichkeit, die Strafe im Falle der Unterlassung (§ 13 Abs. 2), der Beihilfe (§ 22. Abs. 5), des untauglichen Teilnahmeversuchs (§ 26 Abs. 2), der beschränkten Zurechnungsfähigkeit (§ 35) und in anderen Fällen zu mildern.

3. Begriff einer Straftat im Strafgesetzbuch

3.1. Ausgangspunkte

Ohne Zweifel ist bei der Strafrechtsreform die komplizierteste Aufgabe die Reformierung des Begriffs einer Straftat. In dem bis jetzt in Estland geltenden Strafrecht wird als Erbe des sowjetischen Strafrechts der Begriff des allgemeinen Tatbestands verwendet, indem als selbständige Elemente des allgemeinen Tatbestands eines Verbrechens das Objekt, die objektive Seite, das Subjekt und die subjektive Seite des Verbrechens behandelt werden. Daher kann man behaupten, dass das in Estland geltende, inhaltlich das sowjetische Strafrecht, mit solchen Schemata auf dem Niveau des deutschen Strafrechts um die Wende vom 19. Jahrhundert zum 20. Jahrhundert bleibt und in seiner heutigen Gestalt von der sowjetischen Strafrechtstheorie herrührt, welche sich in den Jahren 1930–1950 entwickelt hat.[*10]

Schema 1. Allgemeiner Tatbestand des Verbrechens im sowjetischen Strafrecht.

Objekt des Verbrechens gesellschaftliche Beziehungen die durch die Straftat geschädigt werden	**Objektive Seite des Verbrechens** 1) Tat 2) Erfolg 3) kausaler Zusammenhang zwischen Handlung und Erfolg
Subjekt des Verbrechens 1) allgemeiner Subjekt a) Alter (13 oder 15 Jahre) b) Zurechnungsfähigkeit 2) Sondersubjekt	**Subjektive Seite des Verbrechens** 1) Schuld (die psychische Einstellung der Person zu seiner Tat und zum Erfolg) a) Vorsatz b) Fahrlässigkeit 2) Beweggrund und Ziel

[10] Näher: J. Sootak. Verbrechensbegriff und Tatbestand (Fn 4); J. Sootak. The Concept of Crime and Estonian Criminal Law Reform. – Juridica International, Nr. 1, 1996 S. 55.

Der auf dem Schema dargestellte allgemeine Tatbestand besteht daher aus vier gleichwertigen Elementen, indem beim Fehlen des einen von diesen der ganze Tatbestand und daher auch die Verantwortlichkeit der Person wegfällt. Es ist ganz offensichtlich, dass so ein Straftatsbegriff, der in seiner Entwicklung hinter dem Strafrecht anderer europäischen Länder erheblich zurückgeblieben war, nicht die beste Grundlage zur Gestaltung eines neuen europäischen Strafrechts sein konnte. Zur Gestalung einer neuen Strafrechtsdogmatik hat die Veröffentlichung des Allgemeinen Teils des Entwurfs des Strafgesetzbuches im Laufe dessen Vorbereitung einen wesentlichen Beitrag geleistet.*[11]

3.2. Formeller Straftatsbegriff

Zuerst schreibt § 1 des Strafgesetzbuches vor, dass nur eine durch Gesetz als eine Straftat bestimmte Tat strafbar ist. Daher bleibt man bei der Bestimmung eines formellen Straftatsbegriffs, der schon 1992 mit der Reform des Strafrechts im geltenden Strafgesetzbuch eingeführt wurde. Im StGB werden die Strafbarkeitsvoraussetzungen einer Tat gegeben, wonach eine Tat dann strafbar ist, wenn diese den Tatbestand einer Straftat erfüllt, deren Rechtswidrigkeit nicht ausgeschlossen ist und die Tat schuldhaft begangen worden ist (§ 2 Abs. 2). Daher geht StGB von dem dreistufigen Straftatsbegriff aus, zu dem sich das Strafrecht der meisten europäischen Ländern bekannt hat, indem auf die dem sowjetischen Strafrecht eigenen Grundlagen der Verantwortlichkeit: auf den allgemeinen Tatbestand der Straftat und auf die aus vier Elementen bestehenden Deliktstruktur, radikal verzichtet wird. Daraus ergibt sich, dass der 2. Abschnitt des Strafgesetzbuches – Straftat – in drei Titel eingeteilt wird, von denen unter dem ersten Titel der Tatbestand einer Straftat, unter dem zweiten Titel die Rechtswidrigkeit und unter dem dritten die Schuld behandelt wird. Auf diese Weise hebt das Gesetz besonders hervor, dass beim Straftatsbegriff die Ebenen des Tatbestands der Straftat, der Rechtswidrigkeit und der Schuld genau unterschieden werden müssen. Das Bedürfnis, die Deliktstruktur direkt durch Gesetz vorzuschreiben und deren Gestaltung nicht der Dogmatik zu überlassen ist dadurch bedingt, dass zu einer grundsätzlich neuen Delikstruktur übergangen wird, die für die Praxis unbekannt ist und für deren allmälichen Verwurzelung keine Zeit mehr bleibt.

3.3. Finale Deliktstruktur

Bei der Gestaltung des Begriffs einer Straftat geht das Strafgesetzbuch von der finalen Deliktstruktur aus, welche auf dem Schema 2 dargestellt wird.

Schema 2. Deliktstruktur im Strafgesetzbuch

1. Tatbestand (§ 12)
1) Objektiver Tatbestand (Abs. 2)
   a) Tun oder Unterlassen
   b) Erfolg und Kausalzusammenhang
2) Subjektiver Tatbestand (Abs. 3)
   a) Vorsatz
   b) Fahrlässigkeit
   c) Beweggrund oder Ziel
3) Irrtum über den Tatbestandsumstand (§ 17)

2. Rechtswidrigkeit
1) Notwehr (§ 28), Notstand (§ 29), Pflichtenkollision (§ 30)
2) In einem anderen Gesetz oder in einer internationalen Konvention oder in einer Gewohnheit bestimmte Rechtfertigungsgrund (§ 27 Alt. 2 und 3)
3) Irrtum über den Rechtfertigungsgrund (§ 31)
   a) Irrige Annahme des Vorliegens des rechtfertigender Umstands (Abs. 1)
   b) Irrige Annahme des Fehlens des rechtfertigender Umstands (Abs. 2)

[11] M. Ernits, P. Pikamäe , E. Samson, J. Sootak. Karistusseadustiku üldosa eelnõu. Eelnõu lähtealused ja põhjendus (Entwurf des Allgemeinen Teils des Strafgesetzbuches) (Fn 5).

3. Schuld

1) Schuldgrundsatz (§ 32): die Person handelt schuldhaft, wenn sie schuldfähig ist und ein Schuldausschließungsgrund fehlt
2) Schuldfähigkeit (§ 33)
   a) Zurechnungsfähigkeit und beschränkte Zurechnungsfähigkeit (§ 35)
   b) das Alter: mindestens 14 Jahre
3) Schuldfähigkeit einer juristischen Person (§ 37)
4) Fehlen der Schuld bei Fahrlässigkeit (§ 38)
5) Verbotsirrtum (§ 39)
6) Rücktritt vom Versuch (§§ 40–43)

3.4. Tatbestand

Im Zusammenhang des Verzichts auf den Begriff des allgemeinen Tatbestands der sowjetischen Strafrechtsdogmatik hält das Gesetz für notwendig, die Legaldefinition des Tatbestands einer Straftat zu geben: als Tatbestand einer Straftat gilt die im Besonderen Teil des Strafgesetzbuches oder in einem anderen Gesetz bestimmte Schilderung einer strafbaren Tat (§ 12 Abs. 1). Aus demselben Grund sind im Gesetz auch die Begriffe des objektiven und subjektiven Tatbestands eröffnet. Diese lehrbuchartigen Bestimmungen haben nicht insofern definitorische Bedeutung (z. B. bei objektiven Tatbestandsmerkmalen werden Tatmodalitäten und das Sondersubjekt nicht genannt) als systematische Bedeutung – der Gesetzgeber hält es für notwendig die Stellung der Begriffsmerkmale einer Straftat in der Deliktstruktur hervorzuheben.

Eine wesentliche Änderung in bezug auf den Straftatsbegriff behandelt das Strafgesetzbuch den Vorsatz nicht als eine Schuldform, die sich aus dem psychologischen Schuldbegriff, sondern entsprechend dem finalen Straftatsbegriff als ein Element des subjektiven Tatbestands. Anstatt der bisherigen zwei Formen ist das Strafgesetzbuch von drei in der deutschen Rechtswissenschaft allgemein anerkannten Formen des Vorsatzes ausgegangen.[*12] Gemäß § 16 wird der Vorsatz in Absicht, direkten Vorsatz und Eventualvorsatz eingeteilt. Als Ergebnis scharfer Diskussionen, die im Laufe der ganzen Reform stattgefunden haben, beinhaltet die erwähnte Vorschrift die Legaldefinitionen dieser drei Formen. Bei Absicht strebt die Person die Verwirklichung der Tatumstände an und weiß, dass diese verwirklicht werden, oder hält deren Verwirklichung für möglich. Es handelt sich auch dann um Absicht, wenn die Person sich vorstellt, dass ein Tatumstand eine notwendige Bedingung für den Erfolg ist. Daher ist die Absicht vor allem durch ein voluntatives Element bestimmt. Bei direkten Vorsatz kennt die Person den Tatumstand und will ihn verwirklichen oder findet sich damit mindestens ab. Hier ist das intelektuelle Element bestimmend. Bei Eventualvorsatz hält die Person das Vorliegen oder den Eintritt des Umstands für möglich und findet sich damit ab. Nach der Auffassung der Arbeitsgruppe, die den Entwurf vorbereitet hat, ist eine solche Bestimmung der Arten des Vorsatzes, vor allem das Unterscheiden von Absicht und direkten Vorsatz wegen des weitläufigen Inhalts der bisherigen Behandlung des direkten Vorsatzes notwendig. Die Bestimmung der 1. und 2. Stufe von *dolus directus* durch voluntatives und intelektuelles Element sollte der Praxis ermöglichen, dem Vorsatz einen genaueren Inhalt zu geben und daher auch die dem Täter zuzurechnende Tat zu konkretisieren.

Im Gesetz werden die zwei bisherigen Formen der Fahrlässigkeit aufrechterhalten – bewusste Fahrlässigkeit (§ 18 Abs. 2) und unbewusste Fahrlässigkeit (Abs. 3), indem der Wortlaut doch ein wenig geändert worden ist. Eigentlich ist die Regelung der Fahrlässigkeit einigermaßen unbestimmt geblieben. Dadurch, dass die Fahrlässigkeit als subjektives Tatbestandsmerkmal bezeichnet wird, zollt das Strafgesetzbuch in mancher Hinsicht dem bisherigen Strafrecht Tribut, weil dort Vorsatz und Fahrlässigkeit ebenso als Elemente des subjektiven Tatbestands behandlet wurden. Zugleich zeigt § 38, welcher seine Stellung in dem Titel hat, wo die Schuld behandelt wird (fehlen der Schuld bei Fahrlässigkeit), dass die Frage nicht nur auf der Tatbestandsebene gelöst worden ist, und die Fahrlässigkeit eine selbständige Erscheinungsform der Straftat von sich darstellt.

Der Tatbestandsirrtum ist von sich aus auch der jetzigen Dogmatik bekannt, doch trägt dieser den Namen des *faktischen Irrtums*. Irrtum über einen Umstand des Tatbestands hat den Vorsatz ausgeschlossen und die Person haftete für die Begehung einer Straftat wegen Fahrlässigkeit, falls der Irrtum nicht vermeidbar war.[*13] Es muss erwähnt werden, dass unter dem faktischen Irrtum nicht nur der Irrtum über den Gegenstand (*error in obiecto*), sondern auch der Versuch mit einem untauglichen Mittel verstanden wurde. Ebenda wird betont,

[12] vgl. z. B. H.-H. Jescheck, T. Weigend. Lehrbuch des Strafrechts. Allgemeiner Teil. Berlin, 1996, S. 297.

[13] vgl. z. B. I. Rebane. Kuriteo subjektiivne külg (Subjektive Seite des Verbrechens). Tartu, 1981, S. 90–91.

dass bei *aberratio ictus* es sich nicht um einen faktischen Irrtum handelt.*[14] Paragraph 17 des neuen Strafgesetzbuches löst diese Frage auf der Ebene des Tatbestandes und schreibt vor, dass im Falle eines Irrtums der Vorsatz ausgeschlossen ist (analog dem deutschen Strafgesetzbuch § 16).

3.5. Rechtswidrigkeit

Bei Rechtswidrigkeit geht das Strafgesetzbuch davon aus, dass eine Tat, die den Tatbestand einer Straftat erfüllt, schon von sich aus rechtswidrig ist. Daher muss bei Rechtswidrigkeit lediglich geprüft werden, ob nicht Rechtfertigungsgründe vorliegen. Bei Rechtferigungsgründen wird vom Grundsatz ausgegangen, dass durch das Strafgesetzbuch nur die klassischen und erheblichsten Rechtfertigungsgründe bestimmt werden, deshalb müssen die durch andere Gesetze vorgeschriebenen Rechtfertigungsgründe auch für das Strafrecht bindend sein. Von allgemeinen Rechtfertigungsgründen werden nur drei Gründe behandlet: Notwehr, Notstand und Pflichtenkollision. Auf dieser Ebene der Deliktstruktur besteht das Problem der Reform nicht insofern in konkreten Umständen, als in der Tatsache, welche von der Praxis oft vergessen wird, dass die Rechtfertigungsgründe in der ganzen Rechtsordnung enthalten sind und nicht durch Strafrecht positiviert werden müssen. Dadurch lässt sich auch das Vorliegen des lehrbuchmäßigen § 27 im Gesetz erklären (s. Schema 2 Nr. 2.2).

Das Gesetzbuch hält auch für notwendig, die Frage des mit der Rechtswidrigkeit der Tat verbundenen Irrtums zu lösen (§ 31). Dieser Irrtum „gehört zu den umstrittensten, aber auch interessantesten Kapiteln der Irrtumsdogmatik."*[15] Das Strafgesetzbuch geht grundsätzlich von den Vorschriften über den Tatbestandsirrtum aus, indem der Dogmatik und der Rechtsprechung die Lösung der Frage überlassen wird, ob es sich hierbei um die eingeschränkte Schuldtheorie, um die rechtsfolgenverweisende Schuldtheorie oder um etwas anderes handelt.*[16] Weiß die Person aber nicht, dass ein Rechtfertigungsgrund objektiv vorliegt, so kann er wegen Versuchs bestraft werden, wobei die Strafe nach § 60 gemildert werden kann.*[17]

3.6. Schuld

3.6.1. Schuldgrundsatz

Eine der wesentlichsten Änderungen ist die Änderung des Schuldbegriffs. Nach dem sowjetischen Strafrecht reicht für die Zurechnung der Tat einer Person schon das aus, dass die Tat von der Person vorsätzlich oder fahrlässig begangen wurde (estnischer Strafgesetzbuch § 3 Abs. 1). Daher gebraucht das sowjetische Strafrecht einen psychologischen Schuldbegriff, nach dem die Schuld im Vorsatz oder in der Fahrlässigkeit besteht. Das neue Strafgesetzbuch verzichtet darauf und nimmt einen normativen Schuldbegriff in Gebrauch (Schuld als Vorwerfbarkeit der Tat). § 32 des Strafgesetzbuches präsumiert, dass eine Tat schuldhaft begangen worden ist, wenn der Begeher schuldfähig ist und Schuldausschließungsgründe fehlen. Eine natürliche Person gilt als schuldfähig, wenn sie das vierzehnte Lebensjahr überschritten hat. Bei der Bestimmung der Zurechnungsfähigkeit wird auf die bisherige Formulierung "war nicht fähig sich über seine Tat Rechenschaft abzulegen noch diese zu lenken" verzichtet und die Zurechnungsfähigkeit als Unfähigkeit der Person, das Unrecht ihrer Tat einzusehen bestimmt. Dabei wird durch das Gesetz als eine erhebliche Erneuerung im estnischen Strafrecht die beschränkte Zurechnungsfähigkeit eingeführt, welche die Person von der Verantwortlichkeit wohl nicht befreit, aber das Gericht kann in diesem Fall die Strafe mildern.

In bezug auf die Schuldfähigkeit einer juristischen Person hat sich das estnische Strafgesetzbuch für eine ganz selbständige Lösung entschieden. Nämlich wird durch § 37 bestimmt, dass eine juristische Person ab Entstehen ihrer Rechtsfähigkeit schuldfähig ist. Daher hängt der Zeitpunkt des Entstehens der Schuldfähigkeit der juristischen Person unmittelbar davon ab, um welche Art juristische Person es sich handelt: nach dem estnischen Recht erlangen eine privatrechtliche juristische Person in der Regel die Rechtsfähigkeit mit ihrer Eintragung im entsprechenden Register und öffentlich-rechtliche juristische Personen ab dem Zeitpunkt, der durch dieses Gesetz vorgesehen ist, aufgrund dessen sie geschaffen werden. Für so eine selbständige Lösung wurde aus dem Grund entschieden, dass man den aus dem deutschen Recht stammenden Begriff einer Straftat und die aus dem französichen Recht übernommenen Grundlagen der Verantwortlichkeit einer juristischen Person in Einklang zu bringen wünschte.

[14] Ebenda, S. 92–93.

[15] W. Gropp. Strafrecht. Allgemeiner Teil. 2. Aufl. Berlin, 2001, S. 479

[16] vgl. z. B. W. Gropp (Fn. 15), S. 444; H.-H. Jescheck, T. Weigend (Fn. 12), S. 462.

[17] vgl. z. B. W. Gropp (Fn. 15), S. 443–444 a.a.O.

3.6.2. Verbotsirrtum

Die bisherige Dogmatik des Strafrechts kennt den Begriff des *juristischen Irrtums*, wobei die sowjetische Rechtsprechung von den Vorschriften über den faktischen oder Tatbestandsirrtum ausgegangen ist, daher aus der Vorsatztheorie. Die heutige Rechtsprechung hat darauf verzichtet, aber hat zugleich die Schuldtheorie nicht übernommen. Ebenso hält die Praxis nicht für notwendig, den Irrtum selbst und die Vermeidbarkeit des Irrtums zu unterscheiden. Die Frage über den Verbotsirrtum wird in der Weise gelöst, dass beim Vorliegen eines Irrtums nicht nur der Vorsatz, sondern überhaupt die subjektive Seite der Straftat und dadurch auch der ganze Tatbestand ausgeschlossen werden[*18] (s. auch Schema 1).

Paragraph 39 des Strafgesetzbuches bestimmt als Lösung des Verbotsirrtums eindeutig den Schuldgrundsatz – die Schuld ist ausgeschlossen, wenn die Person das Unrecht seiner Tat nicht eingesehen hat und der Irrtum für sie unvermeidbar war (analog dem deutschen Strafgesetzbuch § 17). Bei einem vermeidbaren Irrtum bleibt der Vorsatz bestehen und man kann nur über Milderung der Strafe gemäß § 60 reden.

3.6.3. Freiwilliger Rücktritt

Auch gemäß § 16 des geltenden Strafgesetzbuches schließt freiwilliger Rücktritt die Strafbarkeit der Tat aus. Rechtsdogmatisch bedeutet dies, dass die Person von der strafrechtlichen Verantwortlichkeit befreit wird, weil als Versuch nur so eine Tat gilt, die aus den vom Willen des Täters unabhändigen Gründen nicht vollendet wurde. Daher handelt es sich beim freiwilligen Rücktritt überhaupt weder um die Vorbereitung einer Straftat noch um den Versuch. Die Befreiung der Person von strafrechtlicher Verantwortlichkeit ist hier damit zu erklären, dass sie die Tat nicht vollendet hat. Natürlich umfasst die Befreiung in diesem Fall zwei Stadien der kriminellen Vorbereitungshandlungen – sowohl die Vorbereitung als auch den Versuch.[*19]

Das neue Strafgesetzbuch behandelt die Vorbereitung als überhaupt nicht mehr strafbar. Der Begriff des Versuchs ist in § 25 gegeben, wobei das Vorliegen eines Versuchs nicht davon abhängt, aus welchen Gründen die Tat nicht vollendet wurde. Also handelt es sich beim Versuch immer um eine strafbare Tat und die Befreiung der Person im Falle des freiwilligen Rücktritts braucht einen zusätzlichen Grund. Das Institut des freiwilligen Rücktritts hat im Strafgesetzbuch seinen Platz im Titel über die Schuld gefunden (s. Schema 2 Nr. 3. 6). Folglich ist die Unstrafbarkeit der Tat im Falle des Rücktritts nach dem Grundsatz der materiellen Schuldtheorie gelöst – wenn die Tat das Versuchsstadium erreicht hat, hat die Person zugleich eine strafbare Tat begangen, indem sie aber auf die Vollendung der Tat verzichtet, tilgt sie ihre Schuld.[*20] Das Strafgesetzbuch bringt eine gründliche Regelung des Rücktritts vom Versuch, wobei diese Frage insgesamt in vier Paragraphen gelöst wird. Außer der allgemeinen Vorschrift über den Rücktritt (§ 40) gibt es Sondervorschriften für den Fall des Rücktritts beim unbeendigten und beendigten Versuch und für den Fall mehrerer Beteiligten (§§ 41–43).

4. Sanktionensystem und Grundlagen der Strafzumessung im Strafgesetzbuch

4.1. Sanktionensystem im allgemeinen

Als der wesentlichste Mangel des geltenden Strafgesetzbuches kann die äußerste Einseitigkeit des Sanktionensystems angesehen werden, weshalb in den letzten zehn Jahren in der Gerichtspraxis die am meisten angewendete Strafe die reale Freiheitsstrafe war oder die Strafe zur Bewährung ausgesetzt wurde, seit 1998 kann das letztere nur unter obligatorischer Unterwerfung des Täters der Führungsaufsicht eines Bewährungshelfers geschehen. Obwohl das geltende Strafgesetzbuch als eine getrennte Art der Strafe eine Geldstrafe in Tagessätzen vorsieht, wird das in der Praxis nicht viel angewendet, weil viele Täter keine Mittel zur Bezahlung einer Geldstrafe haben. Daher gibt das Sanktionensystem des geltenden Strafgesetzbuches den Gerichten keine großen Möglichkeiten zur Wahl der Strafart. So eine Lage ist hauptsächlich durch die im Jahre 1992 durchgeführten Strafrechtsreform bedingt, in deren Laufe alle dem sowjetischen Strafrecht eigenen Strafarten (z. B. die Einweisung in das Arbeitsprophylaktorium usw), die nicht mehr zu der neuen verfassungsmäßigen Ordnung passten, aus dem bisherigen Sanktionensystem ausgelassen wurden, aber anstatt dieser auch keine neuen Strafarten angeboten wurden. Inhaltlich blieb die Reformierung des Sanktionensystems des geltenden

[18] vgl. z. B. Riigikohtu lahendid (Sammlung der Entscheidungen des Staatsgerichts) 1997, S. 361; 1998, S. 260, S. 379; 1999, S. 351.

[19] I. Rebane. Eesti NSV kriminaalkoodeks. Kommenteeritud väljaanne (Estnisches Strafgesetzbuch. Kommentierte Ausgabe). Tallinn, 1972, § 15 komm 1e; I. Rebane. Kuriteo toimepanemise staadiumid (Stufen der Begehung des Verbrechens). Tartu, 1984, S. 37–38.

[20] Näher H.-H. Jescheck, T. Weigend (Fn. 12), S. 540.

Strafgesetzbuches im Jahre 1992 auf der Strecke liegen und das geltende Strafgesetzbuch hat den sich auf die Strafen beziehenden Teil, der auf dem sowjetischen Strafrecht beruhte, in abgekürzter Form aufrechterhalten.

Für die Änderung der sich im Laufe der letzten zehn Jahre entstandenen strafpolitischen Lage wurde die Gestaltung eines gefügigen Sanktionensystems zum Ziel gesetzt, welches die Berücksichtigung des bunten Kontingents der Verurteilten sichern würde. In der verabschiedeten Gestalt widerspiegelt das Sanktionensystem des Strafgesetzbuches doch nicht alle ursprünglich bei der Vorbereitung des Entwurfs beabsichtigten Änderungen, weil der Teil des Entwurfs, der die Strafen behandelt, im Laufe des zweijährigen Paralmentsverfahrens am meisten geändert wurde. Der hauptsächliche Motor zur Änderung des Entwurfs war der durch die hohe Kriminalität in Estland bedingte Wunsch der Politiker zur Verschärfung der Strafen, den auch nicht die wiederholten Erklärungen der Spezialisten, dass die schärferen Strafen die Verminderung der Kriminalität nicht mit sich bringen, biegen konnten.

Den Hauptteil im neuen Sanktionensystem bilden die Strafen, aber neben diesen sieht das Strafgesetzbuch auch mehrere nicht bestrafende Maßnahmen vor. So wie es in Kontinentaleuropa zur Gewohnheit geworden ist, bestand auch bei der Vorbereitung des Strafgesetzbuches das Hauptproblem des Sanktionensystems in der Konkurenz zwischen dem Vergeltungsgedanken und dem Behandlungsgedanken. Gleich allen anderen zeitgenössischen Strafgesetzen versucht auch das estnische Strafgesetzbuch die klare Bevorzugung einer Richtung zu vermeiden und beruht auf dem Grundsatz der Vereinigung von Strafzwecken.[*21]

Im weiteren Sinne kann das Sanktionensystem des Strafgesetzbuches als Dreieck Geldstrafe – Freiheitsstrafe – Alternativen zu der Freiheitsstrafe charakterisiert werden. Im Falle der Verhängung einer Geldstrafe bleibt das Strafgesetzbuch bei dem im estnischen Strafrecht seit 1992 in Gebrauch genommenen Tagessäztensystem, wonach die Höhe der Geldstrafe aufgrund des durchschnittlichen Tageseinkommens des Beschuldigten errechnet wird (§ 44). Unter Berücksichtigung außergewöhnlicher Verhältnisse oder des Lebensstandards des Verurteilten kann das Gericht vom durchschnittlichen Tageseinkommen des Verurteilten abrechnen oder dem Tageseinkommen zurechnen. Dagegen ist nach dem Strafgesetzbuch für Ordnungswidrigkeiten die sg. klassische Geldbuße vorgeschrieben, in diesem Fall wird die Person zur Zahlung einer bestimmten Summe verurteilt (§ 47). Um die Unabhängigkeit des Strafgesetzes von den Geldwertschwankungen zu sichern, wird durch das Strafgesetzbuch das Mindest- und Höchstmaß der wegen einer Ordnungswidrigkeit verhängten Gelbuße nicht in Geldwert, sondern in sg. Strafeinheiten bestimmt, die mit dem gesetzlich vorgeschriebenen Geldwertindex multipliziert werden.

Wegen Begehung einer Straftrat oder einer Ordnungswidrigkeit ist durch das Strafgesetzbuch als Freiheitsentzug eine Freiheitsstrafe oder entsprechend ein Arrest vorgesehen. Als Folge der hohen Kriminalität wurde aufgrund politischer Vereinbarungen das Strafmaß bei Freiheitsstrafen im Vergleich zu dem geltenden Recht durch Strafgesetzbuch erheblich erhöht. So beträgt nach dem Strafgesetzbuch die zeitige Freiheitsstrafe von dreißig Tagen bis zu zwanzig Jahren (nach dem geltenden Strafgesetzbuch von drei Monaten bis zu fünfzehn Jahren), wobei die schon nach dem geltenden Recht bei Verhängung von Strafen wegen Begehung mehrerer Straftaten erlaubte Möglichkeit zur Zusammenrechnung von Strafen bis zu dreißig Jahren aufrechterhalten wurde, falls eine der Strafen für das Verbrechen erster Stufe verhängt wurde (§§ 45 und 64). Außer zeitiger Freiheitsstrafe sieht das Strafgesetzbuch auch eine lebenslängliche Freiheitsstrafe vor. Der für eine Ordnungswidrigkeit verhängte Arrest stellt einen kurzfristigen, d.h. einen Freiheitsentzug bis zu dreißig Tagen dar (§ 48).

Die wichtigsten Änderungen im Strafgesetzbuch in bezug auf das Sanktionensystem ergeben sich aus der Ingebrauchnahme von neuen Alternativen zum Freiheitsentzug. Bei diesen Vorschriften des Strafgesetzbuches wurde von der Auffassung ausgegangen, dass ungeachtet dessen, dass im Strafrecht viele verschiedene Alternativen ausgearbeitet worden sind, nur diejenigen Alternativen ausgewählt werden müssen, die in der Praxis anderer Staaten schon ihre Lebenskraft bewiesen haben. Als eine dieser Alternativen zum Freiheitsentzug, die heute im europäischen Strafrecht sehr verbreitet ist[*22], wird durch das Strafgesetzbuch die gemeinnützige Arbeit zum ersten Mal im estnischen Strafrecht bestimmt (§ 69). Eine Eigenart der durch das Strafgesetzbuch bestimmten gemeinnützigen Arbeit im Vergleich zu den anderen Staaten bilden höhere Ausmaße der gemeinnützigen Arbeit: so ist nach dem Strafgesetzbuch mit der Zustimmung des Verurteilten erlaubt, die Freiheitsstrafe bis zu zwei Jahre durch die gemeinnützige Arbeit zu ersetzen, wobei einem Tag der Freiheitsstrafe vier Stunden der gemeinnützigen Arbeit entsprechen. So eine unter dem Zwang des politischen Willens gefasste äußerst strenge Ersatzformel kann in Zukunft recht bald die Änderung des Strafgesetzbuches mit sich bringen, wenn deutlich wird, dass die gemeinnützige Arbeit in der vorgeschriebenen Gestalt in der Rechtsprechung keine Anwendung findet.

Als Alternativen zur Freiheitsstrafe werden im Strafgesetzbuch auch zwei Arten des Absehens von der Strafe behandelt: Strafaussetzung zur Bewährung in der französich-belgischer *sursis* Form (§ 73) und in

[21] M. Ernits, P. Pikamäe, E. Samson, J. Sootak (Fn. 5), 3. Kapitel, Einleitung Nr 2.1.

[22] A. v. Kalmthout, P. J. P. Tak. Sanctions-systems in the member-states of the Council of Europe. Part I, p. 10 *ff*.

Gestalt der anglo-amerikanischen *probation* (§ 74). Die erste von den beiden kann gemäß dem Gesetzbuch sowohl als Strafe anstatt der verhängten Freiheitsstrafe als auch anstatt einer Geldstrafe angewendet werden, die zweite wird aber nur in bezug auf eine Freiheitsstrafe angewendet. Bei beiden Formen der Strafaussetzung zur Bewährung ermöglicht das Gesetzbuch den Verurteilten von der verhängten Strafe teilweise zu befreien, d. h. in der Weise, dass ein Teil der verhängten Strafe gleich vollstreckt wird, aber der übrige Teil zur Bewährung ausgesetzt wird.

4.2. Allgemeine Grundlagen der Strafzumessung

Im Vergleich zu dem ehemaligen sowjetischen Strafrecht sind durch das Strafgesetzbuch auch die Grundlagen der Strafzumessung erheblich geändert worden. Nach dem Strafgesetzbuch gilt als Grundlage für die Zumessung einer Strafe die Schuld der Person, indem bei der Festsetzung der Strafe mildernde und erschwerende Umstände, die Art des Vorsatzes und der Fahrlässigkeit und die Möglichkeit, den Verurteilten künftig von der Begehung der Straftaten abzuhalten, sowie die Interessen des Schutzes der Rechtsordnung berücksichtigt werden (§ 56). Damit werden durch das Strafgesetzbuch die Grundlagen der Strafzumessung nach dem Beispiel des deutschen Rechts in ein bestimmtes hierarchisches System geordnet, an dessen Spitze die Schuld als Ausgangspunkt zur Begründung der Bestrafung einer Person in einem Rechtsstaat liegt. Das System bedeutet auch, dass das Gericht gemäß dem Strafgesetzbuch die Grundlagen der Strafzumessung in der gesetzlich bestimmten Reihenfolge festzustellen hat und diese nach eigenem Ermessen nicht ändern kann. Zugleich werden durch das Strafgesetzbuch keine festen Modelle für die bei der Strafzumessung zu berücksichtigenden Umstände bestimmt. Diese müssen sich erst im Gange der Rechtsprechung entwickeln.[*23]

Die Schuld wird im Rahmen der allgemeinen Grundlagen der Strafzumessung als eine quantifizierende Erscheinung verstanden. Das Maß der Schuld wird durch Gericht aufgrund mildernder und erschwerender Umstände und der Art des Vorsatzes und der Fahrlässigkeit festgestellt. Bei strafmildernden (§ 57) und –erschwerenden (§ 58) Umständen wird das bisherige System im Strafgesetzbuch aufrechterhalten, indem die Umstände beider Art im Gesetz aufgezählt sind. Dabei sind erschwerende Umstände im Gesetz als erschöpfende Aufzählung, mildernde Umstände zugleich aber als ein beispielhafter Katalog gebracht, daher wird dem Gericht die Möglichkeit gegeben, als mildernde Umstände auch andere, im Gesetz nicht bezeichnete Umstände zu berücksichtigen. Durch die Miteinbeziehung der Art des Vorsatzes und der Fahrlässigkeit in die Grundlagen der Strafzumessung deutet das Strafgesetzbuch an, dass obwohl der Vorsatz und die Fahrlässigkeit sich in der Deliktstruktur auf der Ebene des Tatbestandes der Straftat befinden, spielen sie auch bei der Bestimmung der Schuld eine große Rolle. Man kann ja nicht davon sprechen, dass der Beschluss gefasst wurde, gegen die Norm oder schuldhaft zu handeln, wenn der Ausgangspunkt dieses Beschlusses – Vorsatz oder Fahrlässigkeit – nicht festgestellt wird. Unter der Einflussnahme auf den Verurteilten und den Interessen des Schutzes der Rechtsordnung werden die bei der Strafzumessung zu berücksichtigenden Präventionen verstanden. Die Möglichkeit, den Verurteilten künftig von der Begehung der Straftaten abzuhalten, stellt eine spezialpräventive Prognose dar, die das Gericht bei der Wahl jeglicher Art von Strafe oder Strafmaß berücksichtigen kann. Das Strafgesetzbuch hat auf die aus dem sowjetischen Strafrecht stammende Berücksichtigung der Person des Verurteilten als eine selbständuge Grundlage der Strafzumessung verzichtet, indem man von dem ehemaligen soziologischen Strafrecht weg in Richtung des klassischen, auf dem Schuldprinzip beruhenden Strafrechts schreitet.[*24] Unter den Interessen des Schutzes der Rechtsordnung versteht das Strafgesetzbuch die Generalprävention. Nach dem Beispiel des deutschen Rechts hat das Strafgesetzbuch auf die dem sowjetischen Strafrecht eigene Generalprävention, die in der Bestrafung einer konkreten Person besteht, deren Zweck die Ausübung eines abschreckeckenden Einflusses über andere Personen ist, verzichtet, statt dieser wurde die Theorie der positiven Generalprävention zum Grund gelegt.

4.3. Sonstige nicht bestrafende Maßnahmen

Den zeitgenössischen Strafgesetzen ähnlich macht das Strafgesetzbuch den Unterschied zwischen Strafen und nicht bestrafenden Maßnahmen. Unter den letzteren zieht das Strafgesetzbuch die Maßregeln der Besserung und Sicherung in Betracht, deren Ziel nicht die Bestrafung einer Person, sondern die Vorbeugung neuer rechtswidriger Taten ist. Daraus ergibt sich, dass die Anwendung von Maßnahmen nach dem Strafgesetzbuch nicht dem Schuldgrundsatz unterworfen ist und diese Maßnahmen auch im Falle einer rechtswidrigen Tat angeordnet werden können. Nicht bestrafende Maßnahmen kann man nach dem Strafgesetzbuch in zwei Arten einteilen: persönliche und reale Maßnahmen. Als persönliche oder mit der Person verbundene Maßnahmen sieht das Strafgesetzbuch die gerichtspsychiatrische Zwangsbehandlung und Maßnahmen gegen Jugendliche (Warnung, Unterwerfung der Führungsaufsicht des Bewährungshelfers,

[23] L. Kivi, J. Sootak. Karistuse kohaldamise alused karistusseadustikus (Grundlagen der Strafzumessung im Strafgesetzbuch). – Juridica, 2001, Nr. 7, S. 476 und 478.

[24] Ebenda, S. 477.

Unterbringung in einem Jugendheim, Internatschule oder in einer gesonderten Lehr- und Erziehunganstalt) vor (§§ 86–87). Als reale oder mit der Sache verbundene Maßnahme wird durch das Strafgesetzbuch die Einziehung bestimmt (§§ 83–85).

Zusammenfassung

Das Strafgesetzbuch wird am 1. September 2002 in Kraft treten. Im Laufe dieses über ein Jahr dauernden *vacatio legis* wurde die Hauptaufmerksamkeit auf die Schulung der Juristen gelenkt. Vom Justizministerium wird die Schulung von Richtern und Staatsanwälten koordiniert, vom Innenministerium wird die Schulung von Ermittlungs- und sonstigen Polizeibeamten organisiert. Den estnischen Juristen steht eine schwere, aber interessante Zeit bevor.

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Compatibility of the Estonian Rules of Evidence in Criminal Procedure to the Needs for Protection of the Financial Interests of the European Community

The question to be examined here may be looked at from two completely different angles:

1) are the Estonian rules tough enough on fraudsters to enable effective protection of the financial interests of the European Communities by the means of criminal procedure? or
2) do they provide sufficient guarantees for suspects and defendants?

If both angles should be considered simultaneously the standard would be the following: do the rules provide a sensible balance between the need to catch financial criminals and the need to protect civil liberties?

As far as the rules of evidence are concerned, the *acquis communautaire* is not extensive. In the first place there are two Council Regulations. These are article 8 (3) of Council Regulation (Euratom, EC) No. 2185/96 of 11 November 1996 concerning the spot checks and inspections carried out by the Commission in order to protect the European Communities' financial interests against fraud and other irregularities[*1] and article 9 (2) of Regulation (EC) 1073/99 of 25 May 1999 concerning investigations conducted by the European Anti-fraud Office (OLAF).[*2] Secondly, there is the Second Protocol to the Convention on the Protection of the European Communities' financial interests (1997)[*3] and the new EU Convention on Mutual Legal

[1] OJ L 292, 15.11.1996, pp. 0002–0005.

[2] OJ L 136, 31.05.1999, pp. 0001–0007.

[3] O C 221, 19.07.1997, p. 11.

Assistance in Criminal Matters between the Member States of the European Union, Brussels, 29 May 2000.[*4]

These provisions require reports made under the Regulations to be given the same effect in judicial proceedings in Member States as reports drawn up by national inspectors. The Estonian law appears to be in line with these provisions as the reports can, in both cases, be employed in evidence as documents and neither of them would have predetermined higher evidenciary value.

The current paper has the objective to analyse not only compliance of the Estonian rules to the *acqui*, but to scrutinise compliance with the rules of *Corpus Juris*.[*5] *Corpus Juris* contains several specific rules concerning evidence: admissible evidence (article 32), powers of public officials in collecting evidence (article 20) and exclusion of illegally obtained evidence (article 33).

Both *acqui* and *Corpus Juris* acknowledge basic restrictions agreed on in the European Convention for Protection of Human Rights and Fundamental Freedoms for procedural acts like search, seizure and surveillance.

The European Public Prosecutor (EPP), designed in *Corpus Juris*, has different functions as compared to Estonian prosecutors. All evidence would be gathered under the directions of the EPP.

The *Corpus Juris* article 20 lists the powers of the EPP in evidence gathering:

- questioning of the accused;
- collection of documents and/or computer-held information and visits to the scene of the offence;
- request addressed to the judge to order an expert enquiry;
- search, seizure and telephone tapping; *etc*.

The Estonian Code of Criminal Procedure[*6] (ECCP) and the draft Estonian Code of Criminal Procedure[*7] (DECCP) do not contain provisions inhibiting those actions, but nevertheless in regards of several of them there are certain difficulties that are analysed in the following sections.

1. Access to computers

According to *Corpus Juris* article 20 (3) b) the European Public Prosecutor should have the power to collect computer-held information and in implementing provisions to this article it has been indicated that "the EPP may demand that /.../ computer data be produced by a person holding them".[*8] Neither the ECCP nor DECCP address the issue. There is no doubt that in future the computer-held information may be treated as documents in evidence and so long as the information will be on the same information carrier may be as physical evidence. But considering the ever-growing importance of digital information and the need for access to it in prosecuting economic crime (and other different kinds of crime) it cannot be regarded as reasonable to ignore completely the specific character of digital information.

One of the problems emerging for criminal justice in the digital age is the proliferation of means of cryptography. There may be no use of digital information even if the needed information will be accessible for criminal investigation because more and more often wrongdoers encrypt all the information regarding their illicit activities and the information is stored in encrypted mode. Without gaining access to encryption keys use of the encrypted information is not possible via accessible means. In several countries (most actively in the USA) the problem has caused authorities to design regulations requiring deposition of encryption keys and guaranteeing the law enforcement and security authorities access to all encryption keys. In Estonia such a rule has not even been proposed and has been considered inappropriate for a rule of law democratic state (maybe there are enough reasons for this). But as all democratic countries allow certain exceptions to the rules protecting privacy, and allow quite extensive intrusions in the private sphere, like search of private property and even persons, there should be no major opposition to a rule requiring surrender of encryption

[4] OJ C 197, 12.07.2000, p. 1.

[5] The *Corpus Juris* was drafted in 1997 and revised in 2000 after an in-depth study of its compatibility with the legal systems in the 15 member states. See, M. Delmas-Marty (ed.). Corpus introducing penal provisions for the purpose of the financial interests of the European Union. Economica, 1997; M. Delmas-Marty, J. Vervaele (eds.). The implementation of the Corpus Juris in the member states. Intersentia, 2000.

[6] Riigi Teataja (The State Gazette) I 2000, 56, 369; 2001, 102, 676 (in Estonian).

[7] Bill No. 594 SE I. Available at: http://www.riigikogu.ee/ems/saros-bin/mgetdoc?itemid=003674542&login=proov&password=&system=ems&server=ragne1 (in Estonian).

[8] M. Delmas-Marty, J. Vervaele. The Implementation of the Corpus Juris in the Member States (Note 5), p. 200.

keys if there are reasonable grounds to believe that the encrypted information may be helpful for a criminal investigation. The order should be given by a judge or other authority empowered to authorise search of private property. As the access to encrypted information is not possible forcefully (as it is possible if the search of property faces non-cooperation) the denial of cooperation in these cases should be punishable and the punishment should be proportionate to the punishment for the crime under the investigation.

2. Admissibility of surveillance data in evidence

Corpus Juris refers to only one surveillance activity — wire-tapping. And it is not clear whether the results of wire-tapping would be admissible as evidence according to the *Corpus Juris* rules.

The ECCP and Surveillance Act[*9] allow use of surveillance data as evidence. The DECCP § 107 (1), will change the situation radically. The surveillance data will be admissible as evidence only if the defendant is prosecuted for:

1) a crime against the country;
2) a crime involving drugs;
3) a crime involving arms on explosives;
4) contraband;
5) a crime involving threats.

The change would make surveillance data inadmissible as evidence in a majority of prosecutions against those crimes violating financial interests of the European Union and listed in *Corpus Juris.*

The amendment to the rule was proposed because it is difficult to find arguments against the statement that the ECCP and Surveillance Act allow too extensive utilisation of surveillance data in evidence by not placing almost any restrictions on the admissibility of surveillance data. The only substantial challenge to the statement could be reference to § 12 (6) of the Surveillance Act declaring that "special and exceptional surveillance activities are permitted only if it is impossible to collect information necessary for a surveillance proceeding through other surveillance activities or procedural acts established by the acts providing for criminal procedure". Rigid interpretation of the rule would make special and exceptional surveillance activities close to impossible because it is extremely difficult to prove that it is **really impossible** to collect necessary information through alternative procedural activities. But in practice the rule has been interpreted more liberally, quite close to the rule as it is in the DECCP § 107 (1) permitting surveillance activities already if the collection of necessary information through alternative procedural activities would be **substantially complicated** and the use of surveillance data has faced almost no considerable limitations.

But the limitations proposed in the Draft ECCP are too restrictive and, as the crimes concerning financial and economic activities would be for surveillance activities out of reach, major difficulties would arise for prosecution of these crimes.

3. Testimony

Testimony (of witnesses, victims, suspects and defendants) is admissible in evidence according to the rules of *Corpus Juris*, the ECCP and DECCP. The problem is that the ECCP and DECCP require the testimony to be given in trial.[*10]

Of course, this rule is understandable as an instrument for protection of defence rights, but after the foundation of the rule the world has became much more complex, involving activities in different countries, and criminal activities have become more and more complex as well. For crimes against the financial interests of

[9] Surveillance Act. – Riigi Teataja (The State Gazette) I 1994, 16, 290; 2000, 40, 251 (in Estonian).

[10] The ECCP § 246 (1) permits a testimony given by a witness in pre-trial investigation to be disclosed and an audio recording of his or her testimony annexed to the minutes of the hearing to be presented for hearing in the following cases:
1) if the testimony given by the witness in pre-trial investigation contradicts the testimony given by him or her in examination by the court;
2) if the witness cannot appear in a court session or refuses to give testimony in a court session;
3) if the whereabouts of the witness is unknown;
4) if anonymity has been applied with regard to the witness;
5) if the testimony contains numerical data, names or other data which are difficult to memorise, whereas such testimony may be disclosed only after the oral hearing of the witness.

the European Union it is typical that different elements of the crimes are committed in different countries and witnesses to the crimes are scattered all over the different countries of the European Union. The only opportunity for use in evidence of testimony given by a witness in pre-trial investigation in these cases would be to declare that the witness could not appear in a court session. Strict interpretation of this rule would cause severe difficulties for prosecution in cases involving witnesses from abroad. The practice has applied much more liberal interpretations, quite close to the wording of the DECCP permitting disclosure of the testimony given in pre-trial investigation if there were substantial reasons for the witness not to appear at trial.

The defence's right to confront witnesses is much more protected by alternatives offered for these situations in *Corpus Juris*:

a) testimony via audio-visual link;

b) deposition of witness testimony.

Testimony via audio-visual link complicates to a certain extent confrontation of witnesses by the defence, but this complication is certainly much less than the complication caused by disclosure of witness testimony given in pre-trial investigation (where no cross-examination is practicable) or testimony of anonymous witnesses by phone or other audio-link (cross-examination more complicated than over audio-visual link).

Testimony via audio-visual link obviously needs a secure link, but a secure link is needed for a phone (or audio) link as well and technical problems to ensure secure links are not insurmountable. Different countries have experimented in utilization of audio-visual links for taking testimony from remote witnesses and from witnesses under a witness-protection program (unidirectional link).

In case of deposition of witness testimony the testimony is given to a judge (not necessarily to the same judge who will eventually be at trial) in the presence of the defence and the defence would be entitled to cross-examination. The testimony and cross-examination is recorded (both video and audio) and presented at trial.

The problems concerning defence rights are, in this case, quite similar to the problems emerging from use of an audio-visual link. The security of the link problem will be substituted for a security of recording problem — a somewhat less acute problem.

We should not overlook setbacks caused by use of deposition for defence cross-examination (it is much more complicated to travel to have effective cross-examination than to cross-examine the witness at trial) and for evaluation of evidence by the trial judge. Use of the audio-visual link would appear to cause fewer difficulties, but we should not expect it to be absolutely trouble free as well. Nevertheless, as it is impracticable (due to insurmountable financial burden and time consumption) to have all witnesses at one place for a trial, the use of an audio-visual link or witness testimony deposition would be a welcome alternative to the ever-broadening use of — further threatening defence rights — disclosure of testimony given in pre-trial investigation.

To the need for alternative means for taking testimony from distant witnesses and the possibilities of guaranteeing defence rights while utilizing these alternatives refer the provisions for audio-visual and audio links in taking testimony in the EU Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union[*11] ("video-conference" and "phone-conference" according to the convention terminology).

[11] EU Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union, Brussels, 29 May 2000. – OJ C 197, 12.07.2000, p. 1.

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Principle of Good Faith and Constitutional Values in Contract Law[*1]

1. Principle of good faith and protection of constitutional values

The fundamental rights and freedoms guaranteed by the Constitution, and constitutional principles form the objective values applicable in all areas of law. The constitutional values also determine the principles and general aims of private law and the bases for shaping value beliefs. Therefore, fundamental rights and freedoms and constitutional principles have to be taken into account in the interpretation and application of private law provisions. Courts often have to consider very specific individual and conflicting interests when settling civil disputes, and the attainment of a just settlement can be extremely difficult. For the sake of a just settlement of a dispute, an interpretation of private law provisions through the fundamental rights and freedoms, or the direct application of the Constitution, may be inevitable in such a case. The obligation to act in good faith in the exercise of civil rights and performance of civil obligations and the general clause on good morals are considered the most important private law provisions through which constitutional values appear in private law.[*2]

The principle of good faith is also a constitutional principle. It requires that participants in social relationships behave in goodwill, fairly and justly toward each other. Equity and estoppel, which are also considered principles of the Estonian Constitution, are regarded as derivatives of the principle of good faith. According to the preamble of the Constitution, justice is a basic value of the Estonian statehood.[*3] Thus, the principle of justice also needs to be treated as an element of the constitutional values.

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[2] See Münchener Kommentar zum Bürgerliches Gesetzbuch/ Roth. Vol. II. 3th ed. 1994, § 242, paragraph No. 38 *ff*.

[3] See R. Maruste. Põhiseadus ja selle järelevalve (Constitution and Constitutional Review). Tallinn, 1997, pp. 68–69; 60–61 (in Estonian).

The purpose of setting out the principle of good faith in civil law is to bring into economic relations fairness, justice, order and reasonableness — everything required by the Constitution. It is possible to identify which constitutional values are appraised and protected in private relations through how substance is given to the principle of good faith and how this principle is applied in settling civil disputes.*[4]

In the Estonian legal order, the principle of good faith has been in force as a general principle of civil law since 1 September 1994, when the General Part of the Civil Code Act (hereinafter GPCCA) entered into force. Section 108 of this Act set out the general obligation of persons to act in good faith when exercising civil rights and performing civil obligations, and prohibited the exercise of a right for the purpose of causing damage to another person. The principle of good faith is also contained in the new General Part of the Civil Code Act passed on 27 March 2002 (§ 138). Pursuant to § 6 (1) of the Law of Obligations Act (LOA) passed on 26 September 2001, obligees and obligors shall act in good faith in their relations with one another. As the principle of good faith is also a constitutional principle and hence superior to civil laws, LOA § 6 (2) provides that nothing arising from law, a usage or a transaction shall be applied to an obligation if it is contrary to the principle of good faith.

As a rule, contractual acts only affect the parties to a legal relationship. However, in certain cases the contractual acts of the parties may damage the interests or violate the rights of third parties, which is why the needs to protect the constitutional rights, freedoms and interests of third parties may also impose limits to the freedom of determining the content of a contract. The value beliefs and prevalent perceptions of society can be so sharply contrary to the content of a contract that society cannot tolerate the binding nature of such contract and provide legal protection to it.*[5] Contracts, the content of which is contrary to good morals, must be regarded as null and void. This means that such contracts will not be given protection by the courts. Therefore, the general clause of good morals serves the same purpose as the principle of good faith — a fair settlement of a single case, the attainment of "fair justice".*[6]

The application of the principle of good faith in legal practice and its role in law development by courts largely depends on the gaps present in the law or in a disputed contract. If the legal order of a contract contains provisions that enable the dispute to be settled fairly, there is essentially no need to resort to the principle of good faith.*[7] However, undefined legal concepts will always be present in civil law; neither will all laws and contracts ever be perfect or free from gaps. This causes the need for general principles of law, through which legal provisions or contracts can be rendered more specific.

The role of the principle of good faith in the legal order is treated through the functions and values.*[8] Through the principle of good faith, obligations can be extended, *i.e.* new obligations can be created further to those agreed upon in a contract or provided by law; the exercise of rights can be restricted and amendments can be allowed to contractual provisions if changed or unforeseeable circumstances appear.*[9] When the principle of good faith is applied, its content has to be specified in accordance with the constitutional values, the values of ordinary laws and the standards of collective value beliefs.*[10]

All institutions of modern society, such as the market, associations of persons, state authorities, the health care system, social security, the family, culture, religion, *etc*. pose certain demands and expectations on private relations, which depend on a vast range of different social factors. This also causes the instability of the principle of good faith and a constant development of its content.*[11] The practice of application of the principle of good faith in the settlement of civil disputes is also affected by interpretations of fundamental rights and freedoms and the possibilities for their protection in other areas of law.

Violation of the fundamental freedoms of a person is a defence by which the principles of party autonomy and private autonomy inherent in civil law can be restricted. In Estonian law, such a defence is made pos-

[4] Principles of European Contract Law. Part I: Performance, Non-performance and Remedies. Prepared by The Commission on European Contract Law. O. Lando, H. Beale (eds.). Dordrecht, Boston, London: Martinus Nijhoff Publishers, 1995, p. 53.

[5] P. Schlechtriem. Võlaõigus. Üldosa (Law of Obligations. General Part). Tallinn: Juura, Õigusteabe AS, 1999, p. 18 (in Estonian).

[6] H. Köhler. Tsiviilseadustik. Üldosa (Civil Code. General Part). Tallinn: Juura, Õigusteabe AS, 1998, p. 13 (in Estonian).

[7] P. Schlectriem. Good Faith in German Law and in International Uniform Laws, 1997. Available at: http://www.cnr.it/CRDCS/frames24.htm.

[8] See Münchener kommentar zum Bürgerlichen Gesetzbuch/Roth. Vol. 2. Schuldrecht Allgemeiner Teil. 4th ed. München: C.H.Beck, 2001, § 242, paragraph No. 13. A major source for theoretical discussion on the principle of good faith: F. Wieacker. Zur rechtstheoretische Präzisierung des § 242. Tübingen: J.C.Mohr, 1956, particularly pp. 20–44.

[9] H. P. Westermann. Handkommentar zum Bürgerlichen Gesetzbuch. Münster, 1989, p. 514. A similar classification of functions has been followed by P. Schlechtriem. See P. Schlechtriem (Note 5), pp. 37–44; P. Schlectriem (Note 7). Setting the provisional basis for law development, objections and a reallocation of contractual risks are also distinguished between as functions of the principle of good faith. W. F. Ebke, B. M. Steinhauer. The Doctrine of Good Faith in German Contract Law. – J. Beatson, D. Friedman (eds.). Good Faith and Fault in Contract Law. Oxford: Clarendon Press, 1995, p. 171.

[10] See P. Schlechtriem (Note 5), pp. 32–34.

[11] G. Teubner. Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences. – The Modern Law Review, Vol. 61, 1998, p. 21.

sible by LOA § 5, pursuant to which derogation from the provisions of law is allowed upon agreement between the parties, unless derogation is contrary to public order or good morals or violates the fundamental rights of a person. The law thus expressly provides for the obligation to take account of constitutional values in relationships under the law of obligations.

Development of the mechanisms of protection of fundamental rights and freedoms and the activity of constitutional courts has significantly increased the importance of constitutional values in the settlement of private law disputes.*[12] However, certain negative aspects are apparent in the settlement of civil disputes by relying on constitutional values. Namely, in certain cases this can result in a deviation from the balance of interests of the contracting parties, which is contrary to the principles of contract law, and cause social problems unforeseeable at first sight.*[13]

In summary, the private law principle of good faith may be regarded as a means of protection of fundamental rights and freedoms. Application of this principle is aimed at securing constitutional values in private relations.

2. Constitutional values and freedom of contract

In the application of the general clauses or principles of private law, the constitutional values that simultaneously guarantee and restrict the freedom of contract are the highest standard.

A democratic state based on the rule of law must guarantee the freedom and opportunity of people to organise their lives themselves.*[14] An independent organisation of one's life is guaranteed by fundamental rights and freedoms. The listing of fundamental rights provided in the Estonian Constitution corresponds to the internationally recognised listing of human rights and freedoms.*[15]

Fundamental rights must ensure everyone's protection in respect of the state, as well as in respect of other persons. The state protects fundamental rights by laws, prohibiting activities that violate fundamental rights. Courts in turn perform their protection functions through applying such general interpretable principles as the obligation to act in good faith and in accordance with public order and good morals.

When weighing values, it is important to consider which subjective rights of other persons could be violated. The relevance of fundamental rights and freedoms when compared to other benefits that are subject to protection is decisive in such weighing. The values of major relevance are particularly human dignity (Constitution § 10), equality (§ 12), the right to life (§ 16), protection of honour and good name (§ 17), inviolability of private and family life (§ 26), and inviolability of dwelling (§ 33).

The freedom of contract is usually understood as private autonomy and its securing in the state regulation of economic and social affairs. The freedom of contract means that a person is free to decide whether and with whom and under which conditions he or she enters into a contract. In contracts, personal liberty and the right of self-determination are expressed the most directly. In a free organisation of their lives, people enter into contracts to establish employment relationships, and the freedom of contract makes free enterprise and a responsible formation of economic relations possible.*[16]

In the Constitution, the freedom of contract as the most important principle of private law is chiefly secured by § 19 which sets out the right to free self-realisation, § 31 which entitles people to engage in enterprise, and § 32 which entitles people to freely possess, use and dispose of their property. At the same time, these provisions also contain restrictions on the freedom of contract.

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[12] S. Ofter. Fundamental Rights and Their Impact on Private Law — Doctrine and Practice under German Constitution. – Tel Aviv University Studies in Law, Vol. 12, 1994, p. 13.

[13] For example, the number of leased apartments sharply decreased because the interests of lessees arising from constitutional values were largely given preference in the settlement of dwelling disputes. To solve the situation, the German constitutional court has tried to balance different constitutional interests and regarded the lessor's wish to establish a second bedroom as an interest worthy of protection, entitling the lessor to premature termination of a lease contract. See S. Ofter (Note 11), p. 14. An opportunity to resort to the need to protect one's constitutional rights is provided in Estonia, for example, by LOA § 313 (1), pursuant to which the parties may cancel a contract for good reason. A reason is good if, upon the occurrence thereof, a party who wishes to cancel cannot be presumed to continue performing the contract taking into account all the circumstances and considering the interests of both parties.

[14] R. Maruste (Note 3), p. 75.

[15] K. Merusk, R. Narits. Eesti konstitutsiooniõigusest (On Estonian Constitutional Law). Tallinn: Juura, Õigusteabe AS, 1998, p. 167 (in Estonian).

[16] A. Barak. Constitutional Human Rights and Private Law. – A. M. Rebello, P. Sarcevic (eds.). Freedom of Contract and Constitutional Law. Israel: Hamaccabi Press, 1998, p. 44.

Constitutional values restrict private autonomy both directly and indirectly. Pursuant to § 31 (1) of the Constitution, conditions and procedure for the exercise of the right to engage in enterprise may be provided by law. Pursuant to § 32 (2), restrictions on the free possession, use and disposal of property may be established by law. The same section provides for the constitutional restriction on using one's property contrary to the public interest. Section 19 secures everyone's right to free self-realisation only on the condition that the rights and freedoms of other persons are honoured and considered. The freedom of contract is also restricted by the right of equality (§ 12), pursuant to which everyone is equal before the law. The constitutional right of equality can be violated by the unequal treatment of private subjects upon entry into or negotiations for a contract. The aim of restrictions on private autonomy can be the securing of individual rights or general well-being (*e.g.* § 19 (2) and § 32 (2) of the Constitution).

When certain subjects of law are prohibited from entering into contracts under the law of obligations or when the content of contracts is provided imperatively, this constitutes a public law restriction on the freedom of contract, which is allowed only in accordance with § 11 of the Constitution. This section provides that restrictions on rights and freedoms must be necessary in a democratic society and shall not distort the nature of the rights and freedoms restricted. Restrictions not provided for by law may be derived from the principle of good faith, taking into account constitutional limitations, if these are necessary for protecting fundamental rights in contractual relationships.

According to § 11 of the Constitution, it is necessary to decide in order to protect constitutional values whether the restriction on the right of contract established by law is necessary in a democratic society and suitable for attaining the desired aim. The Estonian judicial practice is poor as regards the assessment of the compliance of contract law restrictions with the Constitution. No constitutional review cases have been instituted in contract disputes, although the Civil Chamber of the Supreme Court has stated the contrariness of a provision of law that restricts the freedom of contract to the constitutional values in one case. The dispute concerned the prohibition from charging interest on loan contracts in which one of the subjects is not a person listed by law, as provided by § 274 of the Civil Code. The court found that the application of restrictions on charging interests and thus a restriction on the rights of one subject when compared to the others is not in compliance with the constitutional right to freely possess, use and dispose of property (§ 32 (2) of the Constitution) and the principle set out in § 11 of the Constitution. It was also found that although the law does not impose restrictions on the amount of interest and the parties may freely agree upon it when entering into a contract, interest may be restricted on the basis of the public interest criterion set out in § 32 (2) of the Constitution, and also due to contrariness to good morals as provided in GPCCA § 66.*[17]

Contestation of the compliance of legal provisions restricting the freedom of contract is not common practise. For example, the compliance of provisions restricting compensation for damage with the Constitution has not been questioned so far. Section 25 of the Constitution secures everyone's right to compensation for moral and material damage caused by the unlawful action of any person. The section does not provide for any reservation of law. At the same time, compensation for damage is restricted in certain cases according to the applicable law (*e.g.* the restriction on the depositary's liability in a deposit contract pursuant to § 426 of the Civil Code). The Law of Obligations Act also establishes restrictions on compensation for damage caused by a violation of different contracts (§ 795 sets limits to compensation for the value of goods in a contract of carriage, § 913 restricts the liability of a keeper of an accommodation establishment in the case of loss of or damage to things brought to the premises of the enterprise by visitors, *etc.*). The basis for interference with the freedom of contract as regards agreements on compensation for damage is provided to courts by LOA § 140. Pursuant to subsection 1 of this section, the court may reduce the amount of compensation for damage if compensation in full would be grossly unfair with regard to the obligated person or not reasonably acceptable for any other reason. The constitutional value that restricts the amount of compensation may be, according to the circumstances, even the right to human dignity of the person who caused damage.

Sometimes the ideas of constitutional values are directly transferred to provisions restricting the freedom of contract. For example, pursuant to LOA § 106 (2), agreements under which liability is precluded or restricted in the case of intentional non-performance or which allow the obligor to perform an obligation in a manner materially different from that which could be reasonably expected by the obligee or which unreasonably exclude or restrict liability in some other manner are void.

A general restriction on the freedom of forming the content of a contract is provided in § 86 of the new General Part of the Civil Code Act, setting out the obligation to follow good morals and public order in contracts. This is a general clause that judicial practice needs to specify. The sense of propriety of all persons who think fairly and justly is regarded as the measure of good morals. Contractual provisions are assessed relying on the perceived general sense of propriety as has been required by courts earlier under similar circumstances. For example, contractual provisions restricting personal rights and freedoms (oblig-

[17] Judgment of Civil Chamber of Supreme Court, 23 October 1997 (3-2-1-116-97). – Riigi Teataja (The State Gazette) III, 1997, 31/32, 332 (in Estonian).

ing persons to renounce religion, restricting the freedom of movement, *etc*.), requiring that one creditor be preferred to others, excessively restricting the economic activities of one of the parties or are of a usurious nature, *etc*., are regarded as contrary to good morals.*[18]

Constitutional values are also considered when the freedom of contract is restricted not by legal provisions, but by agreement of the contracting parties who are in a private relationship. Such restrictions include, for example, agreements on prohibitions on contractual activities or acts. Whether such agreements can be regarded as binding and provided legal protection should be decided in consideration of constitutional values. Assessment of the restriction on the freedom of contract can rely on the principle of good faith when the restriction is not generally impermissible or contrary to good morals or public order, but, under the given circumstances, violates someone's fundamental rights and freedoms.

By relying on the principle of good faith, lack of consent to a contract is expressed by taking account of the general traditions and standards of acting, and a just solution is attempted to be reached, for example, by adding obligations, by not satisfying claims, by creating new judicial remedies, compensation for damage, *etc*., without declaring the transaction void. But when protection of all the values that are important to society is considered relevant, reference is made to contrariness to good morals, resulting in the voidness of the transaction. As the contrariness of a contract to good morals is established by the provision of an overall assessment, taking into account not only the objective content of the contract but also other relevant circumstances, the consequences of the contract, the understandings, motives and aims of the parties, *i.e*. everything that a decision on the acting of the parties in good faith is based on, the positions assumed in delimiting the events of application of the principles of good morals and good faith are not very strict.*[19] Neither are courts very consistent in applying these general principles: they sometimes apply the principle of good faith, sometimes the general clause on good morals, and sometimes both under similar circumstances.

The case of surety provided by family members from the German judicial practice illustrates the simultaneous application of the principle of good faith and the general clause on good morals well. Surety was provided by a family member of the debtor who, under objective circumstances and as known to the creditor, was actually not able to perform the assumed obligations himself, as he had not yet obtained an education and had no income. The constitutional court found that under the described circumstances, the claim against the surety was immoral and declared the contract of suretyship void. The surety's liability under such circumstances constitutes a violation of personal freedoms within the meaning of the Constitution (article 2 of the German Constitution). Fundamental freedoms guarantee private autonomy in determining one's social, economic and legal activity. When the negotiating parties are unequal and, as a result, the contract is excessively burdening for the weaker party, the private autonomy of the person is not adequately guaranteed. Civil courts have the constitutional duty of assessing, when declaring the voidness of contracts upon settling claims, whether the contracts are not entered into on immoral grounds and in bad faith. The voidness of a contract as a legal consequence is proportionate to the desired aim of restoring the violated freedom of contract.*[20]

At the same time, the choice between whether to apply the principle of good morals or that of good faith, can be highly important. When a dispute is settled, the importance of constitutional values and their meaning under the given circumstances have to be considered separately for each of these general principles. The choice of the general clause to be applied is most broadly determined by the aim of the just settlement of the dispute. Under certain circumstances, the declaration of the voidness of a transaction made contrary to good morals may be so unbearably unjust in respect of one of the contracting parties that, instead, the principle of good faith has to be applied in order to protect constitutional values.*[21]

3. On the application of the principle of good faith

In private relationships, constitutional values are protected by judicial remedies of civil law. It is found that when the effective protection of a person's fundamental right or freedom cannot be achieved by the application of a remedy directly provided for in private law, the court itself has to engage in law development and create a suitable remedy. When a subjective right of a person is recognised, the protection of the right also

[18] See H. Köhler (Note 6), pp. 199–203.

[19] B. S. Markesinis. The German Law of Obligations. Vol. I. – B. S. Markesinis, W. Lorenz, G. Dannemann. The Law of Contracts and Restitution: A Comparative Introduction. Oxford, 1997, p. 182.

[20] See NJW, 36, 1994, 19 October 1993; A. Flessner. Freedom of Contract and Constitutional Law in Germany. 1998, pp. 97–99.

[21] See H. Köhler (Note 6), pp. 13–14.

has to be secured. New judicial remedies can be created either by filling gaps and applying the analogy of law, or on the basis of the general principles of law. The principle of good faith has to be followed both in the application of the remedies provided by civil law and in the creation of new ones.*[22]

The civil law remedies available are the recognition of a right (including recognition of the right to withdraw from or cancel a contract), prohibition of the violation of rights, restoration of the situation preceding violation, compensation for damage, compulsory performance of obligations, release from performance, reduction of price, application of interest, *etc*. In order to protect fundamental rights, the court may also apply other legal remedies not expressly provided by law as such.

The principle of good faith is a provision restricting the application of judicial remedies in the settlement of contractual disputes. European civil codes, including the General Part of the Civil Code Act of Estonia, contain a prohibition against the unlawful exercise of rights and the exercise of rights in order to cause damage to another person. This prohibition expresses the function of the principle of good faith to prevent the exercise of the rights arising from the law or a contract in certain cases.*[23]

In Estonian judicial practice, lawful claims in dwelling disputes have been dismissed with reference to constitutional values. The court found that the right provided by the Dwelling Act to contest a lessee's preemptive right to enter into a new lease contract when the lease contract was concluded for a term of not more than one year and provided for the lessee's obligation to vacate the dwelling after the expiration of the term, may not be exercised when the lease relationship has lasted for more than one year. The court established that the lease contract was concluded for a term shorter than a year in order for the lessees to lose the preemptive right to renew the contract, and assumed the position that the described behaviour was contrary to the meaning of the Dwelling Act. The court also found that the Dwelling Act protects the lessee as the weaker party to the legal relationship, whose constitutional right to a home the legal relationship concerns.*[24] Although the court did not mention the application of the general clause on good faith in the judgment, the dispute was essentially settled on the basis of the principle of good faith.

Another provision that has been used in the settlement of a dwelling dispute is § 28 (4) of the Constitution, which provides that families with many children and persons with disabilities shall be under the special care of the state and local governments. The local government which acted as the lessor filed an action for the premature termination of the lease contract and the eviction of the lessee and the persons living together with him from the dwelling due to a three months' debt of rent and public utility charges. Had the action been satisfied, a family with five minor children and one adult child, a mother on a parental leave and a disabled father would have been left without shelter. The court dismissed the action of the local government, reasoning the judgment chiefly by the argument that the bases for the premature termination of the lease contract had resulted from the omissions of the lessor. The economic situation of the defendants was difficult and they needed social assistance. The local government as the lessor had not organised social welfare in accordance with requirements. Therefore, the court regarded the reasons for failure to pay rent and public utility charges as good reasons.*[25] Essentially, the reasons of the Supreme Court judgment state that the claim of the local government was not granted legal protection because the local government had acted in bad faith.

Section 15 of the Constitution provides that everyone whose rights and freedoms are violated has the right of recourse to the courts. At the same time, § 19 requires that everyone honour and consider the rights and freedoms of others when exercising their rights. The right of recourse to the courts can sometimes be exercised for a vexatious purpose, such as for damaging a competitor's reputation. In such case, the plaintiff exercises his or her right of recourse to the courts in bad faith and the honour and good name of the defen-

[22] A. Barak (Note 18), p. 147. As known to the author, Estonian courts have only applied the judicial remedies provided by law.

[23] The respective provisions of the Civil Code of the Netherlands are the following. Article 248, Book 6 (6:248): 1. A contract has not only the juridical effects agreed to by the parties, but also those which, according to the nature of the contract, result from the law, usage or the requirements of reasonableness and equity. 2. A rule binding upon the parties as a result of the contract does not apply to the extent that, in the given circumstances, this would be unacceptable according to criteria of reasonableness and equity. Article 3, Book 3 (3:13): 1. A person having a right may not exercise it to an extent that this would damage others. 2. The exercise of a right for the purpose of damaging another person or for a purpose other than for which the right was granted, or the exercise of a right which, according to criteria of reasonableness and equity, should not have been exercised, but nevertheless was and subsequently caused damage, is regarded as a violation of rights. 3. A right may also be inviolable by nature. Article 258, Book 6 (6:258): 1. Upon the demand of one of the parties, the judge may modify the effects of a contract or he may set it aside in whole or in part on the basis of unforeseen circumstances which are of such a nature that the contracting party, according to criteria of reasonableness and equity, may not expect that the contract be maintained in an unmodified form. In the judicial practice of the Netherlands, Article 13 (3:13) is used less in contract law and more in civil proceedings, family law and law of property. E. Hondius. Freedom of Contract and Constitutional Law in the Netherlands (Note 18), p. 218.

[24] Judgment of Civil Chamber of Supreme Court, 6 October 1999 (3-2-1-83-99). – Riigi Teataja (The State Gazette) III 1990, 28,265 (in Estonian).

[25] Judgment of Civil Chamber of Supreme Court, 18 October 2000 (3-2-1-104-00). – Riigi Teataja (The State Gazette) III 2000, 25, 278 (in Estonian).

dant may need protection, which is secured by § 17 of the Constitution. Subsection 60 (4) of the Code of Civil Procedure allows the court to refuse to order payment of the plaintiff's legal costs by the defendant if a vexatious action is filed. However, this in itself does not ensure the protection of constitutional values.

Based on § 17 of the Constitution, the plaintiff referred to the court, requesting that the defendant be prohibited from filing a bankruptcy caution and bankruptcy petition on the basis of a disputed claim for late interest. The court of appeal terminated the proceeding by a ruling, finding that the plaintiff's claims could not be regarded as claims for the removal of a civil law violation and prevention of further violation. The court of appeal also found that the claim was contrary to § 15 of the Constitution. The Supreme Court annulled the ruling of the court of appeal and assumed the position that it was essentially possible to violate a person's civil rights by filing an ungrounded bankruptcy caution and bankruptcy petition arising from a civil law relationship, and that claims filed for the removal of violation of rights and prevention of further violation were to be reviewed by way of civil proceedings. The court was to assess whether the subjective rights of the claimant had been violated by a vexatious filing of claims.[*26] The Supreme Court thus assumed the position that the exercise of constitutional rights by a person may entail an abuse of the right and a violation of another persons' right, which is why the state must perform its obligation to protect, and the court must, in the case of establishment of a violation, find a judicial remedy to terminate the violation.

Application of the principle of good faith is not common in the Estonian judicial practice. Besides dwelling disputes, the general clause on good faith has been applied to the settlement of labour disputes and disputes arising from a loan contract.[*27] The relative importance of the principle of good faith in settling disputes arising from private law relationships will probably increase already in the near future. This is due to the increasing authority of the Constitution and the development of the institution of constitutional review and the mechanisms of protection of fundamental rights and freedoms, on the one hand, and the final stages of private law reform and the entry into force of new legal provisions corresponding to European private law traditions, on the other hand. For example, the principle of good faith is remarkably frequently applied in the judicial practice of European countries in settling disputes arising from precontractual negotiations.[*28] As precontractual negotiations were not regulated in Estonia before the entry into force of the Law of Obligations Act, the courts have not been addressed for the settlement of the related disputes. As the Law of Obligations Act entered into force on 1 July 2002, the situation will probably change. Section 14 of this Act obliges the parties to take reasonable account of one another's interests and rights, to submit to each other accurate information in the course of preparation for entering into the contract, to inform the other party of all circumstances with regard to which the other party has, based on the purpose of the contract, an identifiable essential interest, not to engage in negotiations if the person has no real intention of entering into a contract, nor break off negotiations in bad faith, not to disclose information obtained in the course of negotiations to other persons or use it in bad faith in the person's own interests. The granting of regulative power to the obligations of parties to precontractual negotiations, following the principle of good faith, will surely help to improve the efficiency with which constitutional values are protected in private relationships.

Conclusions

Establishment of the principle of good faith as a general principle of civil law has created preconditions for a better protection of constitutional values in contractual relationships. Through this principle, respect for fundamental rights and freedoms, justice, fairness, order, good faith, reasonableness and other values set out in the Constitution and arising from its substance can be introduced to economic relationships.

Constitutional values both secure the freedom of contract and restrict it.

The restrictions on the freedom of contract as established by law must comply with the Constitution, *i.e*. the restrictions must be necessary in a democratic society and suitable for attaining the desired aim, and shall not distort the nature of the rights and freedoms restricted.

Restrictions on the freedom of contract in private relationships as agreed between the parties must also comply with the constitutional values. When deciding upon the grant of legal protection to contractual restrictions, the application of both the general clauses on the principle of good faith and on good morals have to be considered and it has to be decided, having regard to all the relevant circumstances, which principle needs to be applied in the given case in order to protect constitutional values.

[26] Judgment of Civil Chamber of Supreme Court, 20 June 2000 (3-2-1-85-00). – Riigi Teataja (The State Gazette) III 2000, 18, 197.

[27] See *e.g.* Judgments of the Civil Chamber of the Supreme Court, 2 October 1997 (3-2-1-106-97). – Riigi Teataja (The State Gazette) III 1997, 33 349 (in Estonian); 22 June 2001 (3-2-1-55-01). – Riigi Teataja (The State Gazette) III 2001, 23, 257; and 29 January 1998 (3-4-1-6-98). – Riigi Teataja (The State Gazette) III 1998, 5, 48 (in Estonian).

[28] See O. Palandt. Bürgeliches Gesetzbuch. 60th ed. München: C.H. Beck, 2001, paragraph No. 55 *ff*.

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The principle of good faith is a provision restricting the application of civil law judicial remedies in the settlement of contract disputes in order to justly settle an individual case. The principle of good faith has been little applied in the Estonian judicial practice so far. It has chiefly been applied in disputes arising from lease contracts to secure the rights of the lessee. The development of the mechanisms of protection of fundamental rights and freedoms, as well as the entry into force of the Law of Obligations Act suggest that the relative importance of the principle of good faith in settling private law disputes will increase.

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On Effect of Constitution on Bankruptcy Law

Pursuant to § 3 of the Constitution of the Republic of Estonia, the state authority is exercised solely pursuant to the Constitution and laws which are in conformity therewith. Pursuant to § 11 of the Constitution, rights and freedoms may be restricted only in accordance with the Constitution; such restrictions must be necessary in a democratic society and shall not distort the nature of the rights and freedoms restricted. Pursuant to § 13 of the Constitution, everyone has the right to the protection of the state and of the law. These provisions are an important point of departure for legislative drafting and the practical of application of law in all areas of law.

One of the most complicated areas of law is bankruptcy law, what with the extreme situation of both the debtor and the creditors — the debtor is threatened by loss of property, and also liquidation if the debtor is a legal person, while creditors are threatened by the possibility of unsatisfied claims or a small proportion of satisfaction. A bankruptcy proceeding by nature requires that the rights and freedoms of debtors be restricted, while the rights and freedoms of creditors are also restricted when compared to a situation outside of the bankruptcy proceeding. For example, after bankruptcy is declared, creditors cannot file an action against the debtor or apply for an execution proceeding to secure compulsory execution.

The rights and freedoms of the debtor in a bankruptcy proceeding are, of course, much more restricted than those of creditors. Therefore, the purpose of this article is to address the main restrictions on the debtor's rights and freedoms in the bankruptcy proceeding so as to answer the question of whether these restrictions comply with the Constitution and whether they are necessary in a democratic society. The analysis also helps to clarify whether the laws establishing such restrictions are in conformity with the Constitution. A majority of restrictions on the rights and freedoms of a debtor arise from the Bankruptcy Act[*1], but can also be found in various other laws.[*2] Therefore, the article mainly focuses on the Bankruptcy Act and the restrictions on the rights and freedoms of a debtor arising therefrom, as well as the restrictions on the rights and freedoms of creditors to a certain extent. As the Estonian Bankruptcy Act will be renewed in the near future[*3], the problems are discussed in view of the currently applicable law and the planned amendments.

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[1] Pankrotiseadus (Bankruptcy Act). Riigi Teataja (The State Gazette) 1992, 31, 403 (in Estonian); consolidated text – Riigi Teataja (The State Gazette) 1997, 18, 302 (in Estonian).

[2] *E.g.* Karistusseadustik (Penal Code). – Riigi Teataja (The State Gazette) I 2001, 61, 364 (in Estonian).

[3] In connection with material renewal of the Estonian legal system, a new wording of the Bankruptcy Act has been prepared, which is based on the Bankruptcy Act of 1992 but contains a number of amendments. The draft is in the legislative proceeding of the *Riigikogu* and should be passed as a law at the end of 2002 or the beginning of 2003. The Bankruptcy Act is hereinafter referred to as BA and the new draft as DBA.

1. Debtor's rights to participate in court and to complain

Pursuant to § 15 of the Constitution, everyone whose rights and freedoms are violated has the right of recourse to the courts, and pursuant to § 24, everyone has the right to be tried in his or her presence and the right of appeal to a higher court against the judgment in his or her case pursuant to the procedure provided by law.

When bankruptcy has been declared, the trustee becomes a legal representative of the debtor. However, the debtor is in a different situation when compared to other principals who have legal representatives. A debtor is basically able to act without a trustee as a legal representative, but the debtor's rights are restricted in the interests of creditors.

If, in a court proceeding commenced before the declaration of bankruptcy, the debtor has a claim against the property of another person which can be included in the bankruptcy estate, the trustee may enter the proceeding as the legal representative of the debtor (BA § 20 (1); § 43 (1)). The rule is justified because the trustee is liable for increasing the bankruptcy estate and has to be able to have control over actions filed by the debtor before the bankruptcy proceeding if the bankruptcy estate is concerned. The trustee is also obliged under the law to ensure the protection of the debtor's rights.

At the same time, the trustee must comply with the interests of creditors, but the interests of creditors in a bankruptcy proceeding can be different and also contrary. Where the debtor has filed an action against a creditor, the creditor may influence the trustee to discontinue the action. If discontinuance of the action is not justified, but the trustee still does so, the trustee violates his or her obligation to pursue the common interests of all creditors. An application can be filed for the release of the trustee and a claim for compensation for damage can be filed against the trustee, but this is not common practice, as in the case of discontinuance of an action, it may be difficult to decide in retrospect whether or not the action would have been satisfied. Unjustified discontinuance of an action can, for example, be caused by the fact that the defendant is a creditor with a large number of votes, a conflict with whom may imply for the trustee the approval of lower wages by the general meeting of creditors or even failure of the general meeting to appoint him or her as the trustee.[*4]

Besides damage to the interests of other creditors, discontinuance of the debtor's action against a creditor may also imply damage to the debtor's interests, because the debtor's insolvency could perhaps be remedied namely by the satisfaction of the claim in question.

In the case under observation, the debtor should be secured the right to participate in the proceeding as a party thereto in any case. This has not been done as of now and the debtor's participation in the proceeding entirely depends on the trustee's will. The Code of Civil Procedure[*5] should be improved in the first place by setting out the right of the debtor to always participate in the proceeding in the case described above, either together with the trustee or alone if the trustee abandons participation.[*6]

The debtor's rights arising from §§ 15 and 24 of the Constitution cannot be restricted merely because the trustee is the legal representative of the debtor. A legal representative (such as a guardian) can exercise the rights of a principal arising from §§ 15 and 24 of the Constitution regardless of the principal's wishes, for example, when the principal is a person with a restricted active legal capacity who is not able to adequately comprehend his or her acts and the consequences thereof. Such a restriction is justified in respect of the debtor in accordance with § 11 of the Constitution only in a form and to an extent that does not enable the debtor to solely decide upon the discontinuance of the action or the waiver of appeal. Discontinuance of action should always require the trustee's consent so that the debtor could not damage the rights of creditors without justification, and, the other way round — the trustee should not be able to discontinue an action without the consent of the debtor.

A similar problem arises when a proprietary claim against the debtor is already being processed by the court and a judgement has been made before the declaration of bankruptcy, but no decision has been made yet about the appeal or appeal in cassation of such claim. Pursuant to BA § 20 (2) and DBA § 43 (5), the trustee

[4] Pursuant to BA § 30, approval of the trustee appointed by the bankruptcy order shall be decided by the first general meeting of creditors. The resolution is adopted by a simple majority of votes of the creditors present, whereas the number of votes of a creditor depends on the amount of the claim. If the trustee appointed by the bankruptcy order is not approved, the creditors shall elect a new trustee, who shall be appointed by the court. If the court does not approve the trustee elected at the general meeting, it shall by a ruling appoint a new trustee who need not be approved by a general meeting of creditors, but it may not be the same person whom the general meeting of creditors did not approve as a trustee.

[5] A new draft Code of Civil Procedure is currently in preparation and can still be improved.

[6] The latter is allowed by BA § 20 (1) also now.

or, with the consent of the trustee, the debtor may appeal the judgment. The author finds that the right of the debtor arising from § 20 of the Constitution has been restricted here more than § 11 of the Constitution allows. If the action is filed by a creditor who has a larger number of votes against the debtor in another claim and although the action has been satisfied, the trustee can discontinue appeal due to the above reasons. In such case, the creditor receives an advantage in the form of such a claim of the creditor, because a claim satisfied by a court judgment that has entered into force must not be defended in the bankruptcy proceeding pursuant to the established procedure at the general meeting of creditors, but the claim is regarded as accepted without defence (BA § 72 (5), DBA § 103 (4)). Hence, other creditors can no longer contest such a claim, neither can the debtor raise any objections. In this case, too, it would be justified to allow the debtor to file an appeal or appeal in cassation regardless of the trustee's permission. But if the trustee has filed a complaint, the debtor should be secured the right to participate in the proceeding as a party thereto either together with the trustee or alone if the trustee abandons participation. If these amendments were made to the Bankruptcy Act and the Code of Civil Procedure, this would ensure the correct application of §§ 15 and 24 of the Constitution to the debtor, taking into account the criteria set out in § 11.

As a counterargument, one could ask: if the debtor were allowed to file appeals and appeals in cassation and to participate in the action, would this not pose the risk of unjustified expenses on the bankruptcy estate, as the debtor's property has become the bankruptcy estate upon the declaration of bankruptcy. Indeed, the risk exists, and a trustee must observe and restrict such expenses. It should be considered in line with § 11 of the Constitution which is less permissible — a restriction of the debtor's rights that is not necessary in a democratic society and distorts the nature of the rights and freedoms restricted, or the making of further expenses on account of the bankruptcy estate, resulting in a smaller extent of satisfaction of the creditors' claims.

It should first be assessed whether the restriction on the debtor to participate as a party to the proceeding in the hearing of an action filed by or against the debtor, and the restriction on deciding on the discontinuance of a filed claim or on an appeal to the court judgment without the trustee's consent are restrictions contrary to §§ 11, 15 and 20 of the Constitution. It depends on the answer to this question in what manner the rights of the debtor have to be secured in the Bankruptcy Act and in the Code of Civil Procedure. The author finds that in their present form, the restrictions provided in the Estonian Bankruptcy Act do not conform to the requirements of § 11 of the Constitution and that the above-mentioned amendments are necessary.

2. Debtor's right to raise objections

Pursuant to the Bankruptcy Act, creditors are required to file their claims to the trustee after the debtor is declared bankrupt. The claims are defended at a general meeting of creditors called the meeting for the defence of claims. A claim is considered defended if neither the trustee not the creditors have raised objections to it (DBA § 74 (2)). Once a claim is accepted at the meeting for the defence of claims, it cannot be contested later, unless the procedure for calling or conducting the meeting has been violated or falsified data have been submitted.

But if a creditor's claim is not accepted because of an objection, the creditor may file an action for the acceptance of the claim in a court. If the debtor has objections to the claim, the debtor may lodge these with the trustee or inform the creditors thereof. The debtor has the right to examine all the claims filed, but the debtor's objection is not sufficient grounds for not accepting a claim. A debtor can only solicit the trustee to raise an objection. If the trustee fails to do so, the debtor cannot prevent the acceptance of the claim. It may happen that the debtor is against a claim filed by a creditor, but the claim is still accepted and the debtor has no possibility or right to object to the claim during the bankruptcy proceeding or after it. The Bankruptcy Act thus restricts the right of the debtor to raise objections to the claims filed against the debtor, since the trustee as the legal representative is the person who can decide upon the raising of an objection for the debtor. Granting the debtor the right to raise an objection could significantly impede a quick performance of the bankruptcy proceeding and cause unjustified expenses on the bankruptcy estate, if the debtor objected all or most of the claims and if actions followed such objections. As concerns the bankruptcy proceeding and protection of the rights of creditors, the above regulation seems to be justified.

However, there is the question of the conformity of such a regulation to § 15 of the Constitution, according to which everyone has the right of recourse to the courts if his or her rights and freedoms are violated. For example, if the debtor has an objection against a claim filed against the debtor, but the trustee and none of the creditors raises an objection and the claim is defended, the claim will be satisfied on account of the bankruptcy estate, and the debtor will have to satisfy the unsatisfied part of the claim after the end of the bankruptcy proceeding.[*7]

[7] Pursuant to DBA § 95 (4), such a claim is fulfilled until fully satisfied, but not for a longer period than within 10 years after the end of the bankruptcy proceeding. The new draft Bankruptcy Act provides for the opportunity to relieve a debtor who is a natural person of debts within five years after the end of the bankruptcy proceeding.

This particularly concerns debtors who are natural persons, because many debtors who are legal persons are liquidated in the course of the bankruptcy proceeding.

A debtor cannot raise an objection before the claims are defended, nor can the debtor contest any accepted claims after the end of the bankruptcy proceeding. Hence, a debtor cannot refer to a court to protect their rights even when the debtor finds that their rights have been violated by the filing of an unjustified claim and the claim is being satisfied on account of the debtor's property. The new draft Bankruptcy Act attempts to solve this problem. Pursuant to DBA § 104, the debtor may also raise an objection against a claim at the meeting for the defence of claims. The debtor's objection will not prevent the acceptance of the claim, but insofar as the debtor objected to the claim, it cannot be satisfied in respect of the debtor after the end of the bankruptcy proceeding under the list of accepted claims. If the creditor wishes that the claim could be satisfied, the creditor has to file an action against the debtor for the acceptance of the claim. This rule secures the debtor's right of defence better — if the creditor wishes to enforce a claim objected by the debtor after the end of the bankruptcy proceeding, the creditor has to refer to a court, which in turn gives the debtor the opportunity to protect their rights in court. In this part, the right of recourse to the courts as set out in § 15 of the Constitution is essentially secured — the creditor is forced to refer to a court due to the debtor's objection, and through this, the exercise of a fundamental right of the debtor is secured and the debtor's violations are judged by the court. However, the problem that remains is that in the bankruptcy proceeding, it is possible to satisfy a claim on account of the debtor's property without the debtor being able to demand that the matter be heard in court, because the debtor's objection does not prevent the acceptance of the claim even under DBA § 104.

Such a restriction should be agreed to because of the reasons stated above; within the framework of a bankruptcy proceeding, the restriction should be regarded as a restriction necessary in a democratic society within the meaning of § 11 of the Constitution. The restriction is necessary in a bankruptcy proceeding to protect the interests of creditors, while the extension of the restriction outside of the bankruptcy proceeding is not justified or necessary. Section 104 of the DBA enables a debtor to prevent such extension; this is particularly important in the case of debtors who are natural persons, because as said, legal persons are usually liquidated in the course of the bankruptcy proceeding and the opportunity set out in § 104 has no meaning to them. However, besides debtors who are natural persons, those debtors who are legal persons and remain to exist after the end of the bankruptcy proceeding may count on this provision.

3. Is deprivation of liberty of the debtor contrary to § 20 of the Constitution?

The Estonian legal system proceeds from the firm principle that punishments involving deprivation of liberty are set out in the Penal Code and not in any other laws. Section 20 of the Constitution sets out the bases on which a person may be deprived of liberty. Particularly this may be done in order to execute a judgment of conviction, but also in other cases, an exhaustive list of which is provided in § 20 of the Constitution (such as to prevent offences during preliminary investigation; to detain a person suffering from an infectious disease, a person of unsound mind, an alcoholic or a drug addict, if such person is dangerous to himself or herself or to others; to ensure the fulfilment of a duty provided by law, *etc*.). Section 20 of the Constitution also provides that no one shall be deprived of his or her liberty merely on the ground of inability to fulfil a contractual obligation.

Pursuant to BA § 39, upon non-compliance with a direction of the court or in order to ensure performance of duties provided by law, the court may apply compelled attendance or custody on the debtor. The first Estonian Bankruptcy Act[*8] only provided for the compelled attendance of the debtor if the debtor failed to perform the duty to attend a general meeting of creditors or a court session when ordered by the court or trustee, or to participate in an act of the bankruptcy proceeding if this was necessary. In 1996 the Bankruptcy Act was complemented by the possibility of holding the debtor in custody for up to three months, particularly if the debtor fails to perform the duty to provide information and to attend, refuses to take an oath, violates the prohibition from departing from his or her residence or the prohibition from disposal of the bankruptcy estate (BA § 39).

It is important to stress that the failure of the debtor to perform their proprietary obligations to creditors cannot serve as the reason for taking the debtor into custody under BA § 39. If the debtor has voluntarily

[8] The first Estonian Bankruptcy Act entered into force on 1 September 1992; there were no bankruptcy proceedings during the Soviet period. The former laws of Tsarist Russia were applied to bankruptcy proceedings before 1940. On the development of bankruptcy law in Estonia see: P. Varul. On the Development of Bankruptcy Law in Estonia. – Juridica International, No. 4, 1999, pp. 172–173.

caused their insolvency, the debtor may be brought to justice and a custodial sentence may be applied under § 384 of the Penal Code which sets out the necessary elements of and punishment for a bankruptcy offence. But the debtor cannot be taken into custody for this under BA § 39 (DBA § 89).

The possibility to take the debtor into custody provided in BA § 39 is in conformity with § 24 of the Constitution insofar as this takes place in the cases and pursuant to the procedure provided by law in order to secure the fulfilment of a duty set out by law.

Taking the debtor into custody primarily serves a practical purpose — if the debtor fulfils the duty for the non-fulfilment of which the debtor was taken into custody, the debtor will be released after the obligation is fulfilled. This particularly relates to the duty to provide information and take an oath. But if the debtor is taken into custody because of violation of the duty to attend or the prohibition from departing from his or her residence or the prohibition from disposing of the bankruptcy estate, the court will release the debtor only if there is reason to believe that release of the debtor will not impede the further bankruptcy proceeding.

4. Prohibition on debtor from departing from his or her residence

Pursuant to § 34 of the Constitution, everyone who is legally in Estonia has the right to freedom of movement. This right may be restricted in the cases and pursuant to the procedure provided by law to protect the rights and freedoms of other persons. Pursuant to § 35 of the Constitution, everyone has the right to leave Estonia. This right may be restricted by law to ensure the administration of court or pre-trial procedure and to execute a court judgment.

The Bankruptcy Act provides for the possibility to restrict the debtor's freedom of movement and departure from Estonia. The debtor shall not travel abroad without the permission of the court after the declaration of bankruptcy of the debtor and before taking an oath (BA § 38 (1). If there is reason to believe that the debtor is avoiding the fulfilment of their duties, the court may, on the proposal of the trustee or on its own initiative, prohibit the debtor from departing from his or her residence against the signature of the debtor (BA § 38 (2). The same principles will remain in force in the new Bankruptcy Act.

The purpose of the prohibition from departure from the debtor's residence is to secure the availability of the debtor and his or her necessary attendance at the bankruptcy proceeding — at court sessions, general meetings of creditors, meetings of the bankruptcy committee or acts of the bankruptcy proceeding in which the debtor's participation is necessary. The prohibition from departing from residence may be applied immediately after the commencement of the bankruptcy proceeding when bankruptcy has not yet been declared.[*9] Repeated attention has been drawn in judicial practice to the fact that the prohibition from departing from residence may be applied only when there is reason to believe that the debtor would otherwise not perform the duty of attendance (particularly when the debtor has previously violated this duty). As the personal presence of the debtor is vital to the successful and quick conduct of the bankruptcy proceeding in many cases because the debtor is often the sole person in possession of certain information, the provision for the restriction on the debtor's right of movement arising from § 34 of the Constitution in the Bankruptcy Act is justified. The restriction is provided to protect the rights of creditors, as the bankruptcy proceeding takes place in their interests in the first place. As stated above, it is important that the restriction be applied only when there is reason to believe that the debtor will not perform his or her duty of attendance in the required manner.

Matters are more complicated in respect of § 35 of the Constitution, which allows for the restriction of the right to leave Estonia only to ensure the administration of court or pre-trial procedure or to execute a court judgment. Section 38 of the Bankruptcy Act, which provides for the debtor's prohibition from leaving for abroad without the permission of the court, is in conformity with the Constitution, because the prohibition arising from law applies from the declaration of bankruptcy until the taking of an oath. The purpose of this prohibition is to secure the presence of the debtor in order to take an oath, but the oath is taken in court. The restriction has thus been established in accordance with § 35 of the Constitution to ensure the administration of court procedure. The implication of § 34 in conjunction with § 35 of the Constitution has to be taken into account. If there is reason to restrict the debtor's freedom of movement under § 34 of the Constitution, this

[9] Pursuant to the Bankruptcy Act of Estonia, a court shall institute a bankruptcy proceeding on the basis of the bankruptcy petition of the debtor or of a creditor without having decided the matter of declaration of bankruptcy. Only after the proprietary situation of the debtor has been established with the assistance of the interim trustee, the court will decide on whether or not to declare bankruptcy.

also implies a restriction on leaving Estonia. Section 35 of the Constitution will be applied when the bases provided for in § 34 are missing.*[10]

5. Confidentiality of correspondence

Pursuant to § 43 of the Constitution, everyone has the right to confidentiality of messages sent or received by him or her by post, telegraph, telephone or other commonly used means. Exceptions may be made by court authorisation to combat a criminal offence, or to ascertain the truth in a criminal procedure, in the cases and pursuant to the procedure provided by law.

It was thoroughly considered upon preparation of the new wording of the Bankruptcy Act whether or not to provide further rules as exemplified by other states*[11], under which a court could entitle the trustee to examine the correspondence addressed to the debtor. The goal would be to identify and prevent any damaging activities of the debtor. With a view to the protection of creditors' rights, as well as to a successful conduct of the bankruptcy proceeding, such a restriction on the debtor's rights might be reasonable, and it could also contribute to the establishment of the reasons for the debtor's insolvency. If one proceeded solely from § 11 of the Constitution, one could argue that these restrictions would be necessary. While pursuant to § 11, fundamental rights may be restricted only in accordance with the Constitution, § 43 of the Constitution suggests that restriction of the debtor's confidentiality of correspondence in a bankruptcy proceeding would be contrary to the Constitution. As mentioned, restrictions may be imposed with the court's permission only in order to prevent an offence or to establish the truth. Hence, this may not be done in a bankruptcy proceeding. However, this conclusion only regards debtors who are natural persons. If the debtor is a legal person, the rights of a board member which are not contrary to the objective of the bankruptcy proceeding are transferred to the trustee (BA § 55 (2)).The trustee will thus be able to examine the correspondence of the legal person anyway as a member of the management board, while the personal correspondence of members of the management board of a legal person is protected by the Constitution.

6. Prohibition on business

Pursuant to § 31 of the Constitution, persons have the right to engage in enterprise and to form commercial undertakings and unions.

Section 35 of the Bankruptcy Act provides for a prohibition on business, pursuant to which a person prohibited from business may not be a sole proprietor or a member of the management board of a legal person. The prohibition on business applies to debtors who are natural persons automatically upon the declaration of bankruptcy; the court may decide when and to what extent the prohibition on business is not to be applied. In the case of a debtor who is a legal person the court will decide on which members of the management or supervisory body the prohibition on business is to be applied. The prohibition on business is applied during the bankruptcy proceeding. As an exception and at the proposal of the trustee, the court may apply the prohibition on business also within three years after the end of the bankruptcy proceeding, but only when the person to whom the prohibition is applied has deliberately caused insolvency (committed a bankruptcy offence), as well as when the person has destroyed, concealed or squandered his or her property, made grave errors in management or performed other acts resulting in his or her insolvency.

The prohibition on business has both a preventive and punishing implication. At the same time, for the person to whom prohibition on business is applied it is a substantial restriction of a fundamental right. During the bankruptcy proceeding when the debtor already has a "special status" as he or she has to fulfil the duties and observe the prohibitions arising from the Bankruptcy Act, application of the prohibition on

[10] The argument holds true for restricting the debtor's freedom of movement and right to leave Estonia in a bankruptcy proceeding, but in other situations it is possible that a person's freedom of movement in Estonia is restricted, but this does not necessarily imply a prohibition from leaving Estonia. For example, movement may be restricted in a specific area of Estonia in relation to the protection needs of the natural environment, which cannot be related to a prohibition from leaving Estonia.

[11] For example, pursuant to article 99 of the Insolvency Act of Germany, a court may order by a reasoned decision that certain or all of the correspondence received by the debtor be forwarded to the trustee. Such a decision is justified insofar as it is necessary to identify or prevent any activities that may damage the creditors. As a general rule, the debtor has to be heard before such a decision is made. The trustee may open the correspondence addressed to the debtor. Correspondence the content of which does not concern the bankruptcy estate shall be forwarded to the debtor without delay; the debtor may examine any other correspondence. Pursuant to article 101 (1) of the Insolvency Act of Germany, the same applies to members of the management and supervisory bodies of a legal person and any members of the debtor who have the right of representation and who bear personal liability.

business can be justified namely by such a status. The debtor's rights in a bankruptcy proceeding are restricted in respect of the bankruptcy estate, the causes of insolvency and whether the debtor is liable for causing insolvency are being established. In such a situation the application of the prohibition on business and hence restriction on the freedom of enterprise of the person are presumably justified. Using § 11 of the Constitution as the criterion, one may conclude that in such a case, application of the prohibition on business is presumably necessary in a democratic society in order to guarantee the security of other members of society. As long as the bankruptcy proceeding is under way, one has to be cautious in enabling the debtor to launch or continue business in other areas. The debtor has to be interested and willing to cooperate so as to quickly finalise the bankruptcy proceeding, he or she has to be focused on it. But if the debtor engages in other enterprise, the bankruptcy proceeding might not be of interest to him or her. Of course, there can always be exceptions to the above conclusion.

The question of the necessity and justification of applying the prohibition on business after the end of the bankruptcy proceeding is more complicated. The Bankruptcy Act provides further criteria for the application of the prohibition on business after the end of the bankruptcy proceeding, under which the possibility to apply the prohibition is more limited than during the proceeding. However, it is still a substantial restriction of a fundamental right, considering that a majority of the grounds for applying the prohibition on business in the bankruptcy proceeding do not exist here. If one analysed the circumstances set out in BA § 35 (3) which allow for the application of the prohibition on business after the end of the bankruptcy proceeding, one could conclude that the list is too broad. The application of the prohibition on business after the end of the bankruptcy proceeding is not in the interests of creditors, hence not needed by creditors. To avoid a potential conflict between §§ 11 and 31 of the Constitution and § 35 (3) of the Bankruptcy Act, the new wording of the Bankruptcy Act contains appropriate corrections: under § 91 of the Bankruptcy Act in its new wording, the prohibition on business can be applied after the end of the bankruptcy proceeding only when a debtor who is a natural person or a member of the management or supervisory body of a debtor who is a legal person has been convicted of a bankruptcy offence or an executive proceeding offence or a tax offence by court judgment. Therefore, the possibilities of applying a prohibition on business are much more limited and as such, conform to §§ 11 and 31 of the Constitution. If a person has been convicted of any of the said offences, a greater restriction of his or her freedom of enterprise is important to the society and hence reasonably justified. In this case, too, the basis for applying the prohibition on business in clearer and more transparent — a judgment of conviction in one of the above offences that has entered into force. It is necessary and justified to prevent a person's activities as a "bankruptcy maker" in a democratic society. The new wording of the Bankruptcy Act will thus remove the provision that may be regarded as contrary to §§ 11 and 31 of the Constitution.

7. Compensation of creditor for damage caused during bankruptcy proceeding

A creditor may file a claim in the bankruptcy proceeding that arose before the declaration of bankruptcy (BA § 64 (1)). If a claim has arisen from a transaction performed by or accepted for performance by the trustee after the declaration of bankruptcy, also in connection with the continuation of the debtor's operations, the claim will be satisfied first on account of the bankruptcy estate. Such claims are treated separately from claims existing at the moment when bankruptcy is declared. These claims correspond to the "debts of the bankruptcy estate" referred to in BA § 85 (1) 1).

A problem arises when the debtor has caused damage to a third party after the declaration of bankruptcy. To which category does the claim for compensation for damage belong? The claim did not exist before bankruptcy was declared, hence it cannot be filed according to the general procedure on the basis of BA § 64. Can the claim be regarded as a debt of the bankruptcy estate under BA § 85 (1) 1)? This is highly questionable, because BA § 85 (1) 1) deals with claims arising from transactions and payments relating to the continuation of operations. If such a claim for compensation for damage does not belong to either of these categories, it remains open how, when and against whom the claim can be filed.

To a certain extent, the situation is solved by BA § 95 (2), pursuant to which a claim arising against the debtor after the declaration of bankruptcy may be filed as an action after the end of the bankruptcy proceeding. In such case, the limitation period starts from the end of the bankruptcy proceeding. This provision is particularly applicable to debtors who are natural persons. If a debtor who is a natural person causes damage after his or her bankruptcy is declared, the injured party can file a claim for compensation for damage against the debtor under BA § 35 (2) after the end of the bankruptcy proceeding in an action. A legal person only has this opportunity when the legal person is not liquidated in the bankruptcy proceeding. However, the main problem is that debtors usually are liquidated in the course of the bankruptcy proceeding. If the legal person has caused damage after the declaration of bankruptcy, the injured party cannot file a claim

against the debtor after the end of the bankruptcy proceeding under BA § 85 (1) 1), because the legal person no longer exists. At the same time, § 25 of the Constitution provides that everyone has the right to compensation for moral and material damage caused by the unlawful action of any person. In a situation where the injured party has been damaged by a legal person who was liquidated by the end of the bankruptcy proceeding, the injured party will not be able to exercise his or her constitutional right to be compensated for damage, as the injured party cannot file a claim for compensation for damage during the bankruptcy proceeding, and after the proceeding, there will be no one left to file it against.

In reaching such a conclusion, one has to admit that in this respect, the Bankruptcy Act is not in conformity with the Constitution and a constitutional right of the injured party has been violated.

One of the possible solutions to the above problems would be to regard the obligation of a legal person arising from causing damage after the declaration of bankruptcy as a debt of the bankruptcy estate within the meaning of BA § 85 (1) 1). In such case, the contradiction with the Constitution would be removed and the injured party could file a claim which would very likely be satisfied, because payments under BA § 85 (1) 1) are made before the costs of the bankruptcy proceeding are paid and the claims of creditors are satisfied. The argument that the trustee acts in the role of a management board member of the legal person and administers the property of the debtor would justify such an approach. If an employee of a legal person causes damage to a third party upon performing his or her duties, the legal person itself will be regarded as having caused damage, and because of the role of the trustee in managing the legal person, the claim for compensation for damage could be regarded as a claim against the bankruptcy estate under BA § 85 (1) 1). Such a conclusion is undoubtedly the most favourable for the injured party.

At the same time, such a treatment is out of line with the substance and meaning of BA § 85 (1) 1), according to which the basis for the creation of a claim against the bankruptcy estate should be acts based on the trustee's expression of will, which in turn can be controlled and influenced by the general meeting of creditors and the bankruptcy committee. The likelihood of causing damage may be taken to a minimum as the result of the trustee's good management, but the trustee is not in a position to prevent any and all damage. It would not be justified if accidental loss brought about a claim against the bankruptcy estate. This would imply granting the injured party too great an advantage when compared to creditors.

A thinkable solution would be to grant the injured party the right to file a claim pursuant to the general procedure as an ordinary creditor similarly to the claims created before the declaration of bankruptcy. If damage was caused before the meeting for the defence of claims[*12], such a solution could be suitable. However, the problem is not solved if damage was caused later and the claims can no longer be defended, for example because of the distribution proposal[*13] having been approved already. The new wording of the Bankruptcy Act has also failed to provide a solution to this problem. As the new draft is currently in the legislative proceeding of the parliament, there is still time to make amendments to remove the present contrariness to § 25 of the Constitution.

[12] Pursuant to BA §§ 70 and 72, claims shall be defended at a general meeting of creditors. A claim and its priority shall be deemed to be accepted if at the meeting for the defence of claims neither any creditor nor the trustee objects thereto. If a claim or its priority is not accepted at a meeting for the defence of claims, the court shall decide on acceptance on the basis of a statement of claim of the creditor. A claim previously satisfied by the judgment of a court or court of arbitration which has entered into force shall be deemed to be accepted without defence.

[13] Pursuant to BA § 81, after the last meeting for the defence of claims, the trustee shall prepare a distribution proposal which shall set out the accepted claims and their priorities. Money shall be paid to satisfy the claims on the basis of the distribution proposal.

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Copyright in the Constitutional Spectrum

The applicable Constitution of the Republic of Estonia[*1] contains a separate provision concerning the protection of the rights of authors. A similar provision was not included in the 1920 Constitution of the Republic of Estonia[*2], in the 1933 Constitution Amendment Act[*3] and in the 1937 Constitution.[*4] Thus, the contemporary legislator emphasises the importance of the constitutional protection of the legal status of authors.

According to § 39 of the Constitution, "An author has the inalienable right to his or her work. The state shall protect the rights of the author". This provision has been subject to criticism[*5], as its wording in Estonian is ambiguous. The author of this article agrees to the above-mentioned criticism. For criticism, the Constitutional Expert Commission[*6] has proposed that this clause be amended.[*7] Regardless of the criticism, the author of this article considers it important to discuss some of the aspects related to § 39 of the Constitution.

Section 39 of the Constitution serves as the basis upon the adoption of laws protecting the rights of authors. With regard to the topic of this article, the most important of these laws is the Copyright Act.[*8] Nevertheless, § 39 of the Constitution is not the only provision that serves as the foundation of the Copyright Act. The relation of the Copyright Act to the other provisions of the Constitution arises from the purpose of the Copyright Act.

The objective of this article is to analyse § 39 of the Constitution and the purpose of the Copyright Act in relation to the other provisions of the Constitution.

The circumstances related to industrial property are pointed out in this article insofar as it is necessary.

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[1] Eesti Vabariigi põhiseadus (The Constitution of the Republic of Estonia). Adopted 28 June 1992. – Riigi Teataja toimetuse väljaanne. Tallinn, 1994. In English available at: http://www.legaltext.ee.

[2] Eesti Vabariigi põhiseadus (The Constitution of the Republic of Estonia). Adopted 15 June 1920. – Riigi Teataja (The State Gazette) 1920, 113/114 (in Estonian).

[3] Eesti Vabariigi põhiseaduse muutmise seadus (The Constitution of the Republic of Estonia Amendment Act). Adopted 14–16 October 1933. – Riigi Teataja (The State Gazette) 1933, 86, 628 (in Estonian).

[4] Eesti Vabariigi põhiseadus (The Constitution of the Republic of Estonia). Proclaimed 17 August 1937. – Riigi Teataja (The State Gazette) 1937, 71, 590 (in Estonian).

[5] See H. Pisuke. Kas autori õigusi saab võõrandada? (Are Author's Rights Alienable?) – Juridica, 1994, No. 4, pp. 89–90 (in Estonian).

[6] Set up by an order of the Estonian Government in 1996. – See H. Pisuke. Developments in Estonian Intellectual Property Law: Some Issues Concerning Copyright and Related Rights. – Juridica International, No. 4, 1999, p. 167.

[7] See H. Pisuke (Note 5), p. 167.

[8] Autoriõiguse seadus (The Copyright Act). – Riigi Teataja (The State Gazette) 1992, 49, 615, consolidated text Riigi Teataja (The State Gazette) I 2000, 16, 109, amendments Riigi Teataja (The State Gazette) I 2000, 78, 497; 2001, 50, 289; 56, 335 (in Estonian). In English available at: http://www.legaltext.ee.

1. Author's inalienable right to his or her work in Constitution

It has been noted in the final report[*9] of the Constitutional Expert Commission and professional literature[*10] that the purpose of § 39 of the Constitution is the protection of the rights of authors as *lex specialis* in respect of the provision concerning the legal protection of property provided by the Constitution (§ 32). It follows from this that in order to protect the rights of the author on the basis of § 39 of the Constitution, the rights must be economically valuable.[*11]

The author of this article cannot fully agree to the assertion that the rights of the author must be definitely valued economically to be protected. To reason the proposition, the wording of § 39 of the Constitution, its relation to § 32 and other related issues will be analysed in greater detail below. The analysis takes account of the fact that the provisions of the Constitution are of a very high level of abstraction and thus serve as descriptions of certain attempts and value decisions rather than classical legal provisions[*12], and they may be ambiguous.[*13] When analysing § 39 of the Constitution, the final report of the Constitutional Expert Commission has been taken as the basis, according to which, first of all, the elements of this section must be defined.

Section 39 of the Constitution consists of two elements: the area of protection of the fundamental right and its restriction or interference. The area of protection of the fundamental right is divided into a substantial and personal one.[*14] In the substantial area of protection of § 39 in the final report of the Constitutional Expert Commission, a very ambiguous reference is made both to the author and work. According to the theory, serving as the basis for the final report, the substantial area of protection of the right consists in the activity, characteristic or status of the bearer of the fundamental right. Proceeding from the above, the author may be present in the meaning of the status (or also the characteristic) and the work as the outcome of the activities of the bearer of the rights. In comparison, the final report of the Constitutional Expert Commission refers to the right of ownership as a general constitutional proprietary right as the substantial area of protection of § 32 (protection of property). Thus, in the final report, the substantial areas of protection of §§ 39 and 32 of the Constitution differ. Due to the marked differences of the substantial area of protection it is difficult to reason that § 39 of the Constitution is *lex specialis* in respect of § 32.

Nevertheless, proceeding from the opinion that § 39 of the Constitution is *lex specialis* in respect of § 32, it would be logical if the substantial area of protection of § 39 similarly consisted in the rights of the author as the relevant proprietary benefit. In order to identify what actually constitutes the substantial area of protection of § 39 of the Constitution, three notions — author, works and the rights of the author — require a closer analysis. Here it is taken into account that the Constitution has its own system of notions that belongs to the domain of constitutional law.[*15] Consequently, the notions set out in the Constitution may differ both from the notions set out in other laws and used in general language.

1.1. Author

It has been pointed out in literature that the term "author" used in the Constitution signifies the authors of literary, artistic and scientific works (including computer programmes), performers, and the authors of creatons works protected as industrial property (inventors, *etc*.)[*16], that is, a person engaging in intellectual creation or interpretation in any field. In addition, the Constitution includes among authors those persons who may legally hold the economic rights related to works.[*17] The latter also include representatives of the copyright industries, such as publishers, music industry, film industry, software industry, *etc*.

[9] The final report of the Constitutional Expert Commission. Available at: http://www.just.ee/: õigusloome>põhiseadus (in Estonian).

[10] T. Annus. Riigiõigus (Constitutional Law). Tallinn: Õigusteabe AS Juura, 2001, p. 253 (in Estonian).

[11] The final report of the Constitutional Expert Commission (Note 9).

[12] See R. Maruste. Põhiseadus ja selle järelevalve (Constitution and Its Supervision). Tallinn: Õigusteabe AS Juura, 1997, pp. 10–11 (in Estonian).

[13] T. Annus (Note 10), p. 43.

[14] The final report of the Constitutional Expert Commission (Note 9).

[15] See R. Maruste (Note 12), pp. 145–146.

[16] H. Pisuke (Note 5), p. 89.

[17] The final report of the Constitutional Expert Commission (Note 9).

Such treatment of the author coincides with the approach to the personal area of protection of § 39 provided in the final report of the Constitutional Expert Commission, which refers both to natural and legal persons. The extendibility of § 39 of the Constitution both to natural and legal persons is also confirmed by the fact that the rights of the author provided by the section can be regarded as everyone's rights.[*18]

Consequently, the meaning of the author in the Constitution is wider than in the copyright law of Estonia, which follows the traditions of the copyright law of Continental Europe. In the copyright law of Continental Europe (and Estonia), the author is defined as a natural person who creates a literary, artistic or scientific work. Such concept of the author has come to us on the basis of a feature of the author of the Romanticism — the author as a genius, as a person whose activities are inspired by some muse.[*19]

The author has also been regarded as a function[*20] by which certain discourses in a given society are characterized.[*21] Certain aspects of such approach to the author's influence in society have to be accepted. If we take this main idea from the approach to the author as a function and transform it into the context of the topic of this article, we may say that in society, the author has been subjected to the role of a mediator of communication, the importance of which changes in line with the changes in society. When developing some of the aspects of the approach to the author as a function further, it can be extended also to the authors of technical solutions, such as inventions. Thus, the author gathers ideas and information to perform his or her function, processes them and offers them to others for examination.

From the aspect of intermediating communication, copyright industries play a role similar to the author.

The differences between the activities of the author and the copyright industry are of an economic nature. However, in the Constitution, the economic interests of a group of individuals (authors) cannot be prioritised over that of another group (copyright industries).

The approach to the author as a function is dynamic by nature, whereas the Constitution emphasises the stationariness of the author as a status or characteristic, *i.e.* what the value of the author's status or characteristic is at the given moment.

Irrespective of the stationariness of the approach to the author, it would still be possible to bring the author to the centre of the substantial area of protection of § 39 of the Constitution. However, in such a case, as noted above, it is hard to reason that § 39 is *lex specialis* in respect of § 32. The protection of the author as a status or characteristic in the Constitution shifts the emphasis from the property to the valuation of creativity and innovation and the investments related thereto in society. Such approach is very appropriate for the modern day when humans can be replaced by computers and software in particular creative tasks (for example, in translating a letter). Nevertheless, it would be difficult to set interferences to such a status of the author in a usual manner according to the provisions of the Constitution.

1.2. Work

In § 39 of the Constitution, work signifies the products of creative activity, such as literary, artistic and scientific works, inventions, utility models, trademarks, designs, *etc*. All these products are abstract collections of information created as a result of the intellectual work of an individual. They can only be used if shaped or inserted into corporeal items. For example, a literary work as such is a particular amount of information, whereas a book is a thing or a corporeal item into which relevant information has been inserted. A literary work published on the Internet does not have a corporal form.

It seems that due to its abstract nature, work cannot be in the centre of the substantive area of protection of § 39 of the Constitution. Work still has an important role — the status of the author cannot be identified without it. To be more precise, in the sphere of private law, work and its characteristic features determine the type of specific protection (copyright, patent, trade mark law, *etc.*) to which the work of the author is subjected.

[18] M. Ernits. Holders and Addressees of Basic Rights in the Constitution of the Republic of Estonia. – Juridica International, No. 4, 1999, p. 12.

[19] See M. Woodmansee. The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the 'Author'. – Eighteenth-Century Studies, 1984, Vol. 17, No. 4, p. 427.

[20] See M. Foucault. What Is an Author? – J. V. Harari (ed.). Textual Strategies: Perspectives in Post-structuralist Criticism. Ithaca, NY, Cornell Univ. Press, 1979, pp. 141–160.

[21] J. V. Harari. Critical Factions/Critical Fictions. – J. V. Harari (ed.). Textual Strategies: Perspectives in Post-structuralist Criticism. Ithaca, NY, Cornell Univ.Press, 1979, p. 42.

1.3. Rights of author

Guided by the notion of the author provided above, it is clear that the rights of the author specified in § 39 of the Constitution encompass the entire intellectual property.[*22]

The notion of intellectual property set out in the Convention on the Establishment of the World Intellectual Property Organisation (WIPO)[*23] covers both copyright and industrial property rights.

In order to confirm the proposition that § 39 of the Constitution is *lex specialis* in respect of § 32 and to identify the substantive area of protection of § 39, the relation of intellectual property to property as defined in the law of property has to be explored. It may be said briefly that intellectual property historically emerged from property at the time when the need to protect the investments made to implement the outcome of the mental work of individuals (for example, for producing an invention or printing a literary work) arose. Originally, a distinction was made between the areas of copyright and industrial property law, while the former was related to intellectual culture and the latter to industry. At the time, the protection of investments meant the protection of proprietary benefits, which was secured by granting privileges to specific investors. With the copyright tradition of Continental Europe developing further, besides the economic rights of the author, the rights related to the personality of the author — the so-called moral rights — came to be recognised. The moral rights of the author, such as the right to paternity or the right of integrity, are related to the inner "self" of an individual, to the mental and emotional sphere of an individual. It is impossible to ascribe direct economic value to such rights; nevertheless, it is possible to assess the economic damage caused by infringement of such rights. Following the example of copyright law, the legal tradition of Continental Europe recognises some of the moral rights of the author also in the area of industrial property. The existence of these moral rights distinguishes between intellectual property and property as defined in the law of property. Thus, intellectual property is a perfect example of "abstraction": it signifies abstract rights to abstract objects[*24] (collections of ideas). In addition, a distinction is made between intellectual property and property by the territoriality and fixed term of the protection of these rights. Intellectual property and property have a similar feature as neither of them is absolute, when proceeding from public interests. Consequently, we can currently speak about intellectual property only as about a historical and very special form of property. In this sense, § 39 of the Constitution could be considered to be *lex specialis* in respect of § 32 (protection of property).

If § 39 of the Constitution is *lex specialis* in respect of § 32, the substantive areas of protection of these sections should be similar. Thus, if the substantive area of protection of § 32 consists in the right of ownership, the rights of the author are suitable to serve as the substantive area of protection of § 39. Contrary to the author as the status (or characteristic), the rights of the author may be restricted in a common manner, *i.e.* in accordance with law. Such interference, as in the case of property, has been established in the interests of the public. For example, copyright laws provide for an institute of free use of works, which enables the public to use a work without soliciting the author's consent separately when particular conditions are met. On the part of industrial property, the rights of a patent owner are restricted, for example, by the issuance of a compulsory licence applied for under law and a list of exceptions provided by law in which the use of an invention is not regarded as a infringement of the rights of patent owner. Thus, as an interim summary of the above discussion, it may be noted that § 39 of the Constitution is *lex specialis* in respect of § 32, and the substantive area of protection of § 39 consists in the rights of the author, not the author or his or her work. Although it is the rights of the author that constitute the substantive area of protection of § 39 of the Constitution, it does not follow from this that these rights must definitely be economically valuable as the rights provided in § 32.

Guided by the above fact that the moral rights contained in the substance of intellectual property does not have direct economic value, we have to assume a position that the substantive area of protection of § 39 of the Constitution is wider than only the economically valuable rights. Consequently, § 39 of the Constitution should not be interpreted narrowly, disregarding the content of intellectual property and also the notion of the author set out in the same provision.

Section 39 of the Constitution has been established on the basis of the internationally recognised human rights. The moral rights of the author are recognised besides economic rights in article 27 (2) of the Universal Declaration of Human Rights[*25] and in article 15 1c) of the International Covenant on Economic, Social

[22] See also T. Annus (Note 10), p. 253.

[23] The notion of intellectual property has been provided in the Convention on the Establishment of the World Intellectual Property Organisation (WIPO). – Riigi Teataja (The State Gazette) II 1993, 25, 55.

[24] See P. Drahos. A Philosophy of Intellectual Property. Dartmouth, 1996, p. 153 *ff.*

[25] Adopted at the UN General Assembly 10.12.1948. – Kirjatäht inimõigustest (Writing on Human Rights). Tallinn: Eesti Raamat, 1989 (in Estonian).

and Cultural Rights.[*26] The purpose of article 1 of Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)[*27] is to protect a very wide range of proprietorial interests. It embraces immoveable and moveable property and corporeal and incorporeal interests, such as shares and patents. The essential characteristic is the acquired economic value of the individual interest.[*28] Thus, article 1 of protocol No. 1 of ECHR can only be applied to the economic rights of the author. But the justification of the recognition of the moral rights with reservations may be derived from article 10 of ECHR (freedom of expression).

In addition, it is the opinion of the author of the article that the expression "the inalienable right of the author" does not allow for the interpretation of § 39 of the Constitution only as a provision setting out the protection of the economic rights of the author.[*29] In addition to the prohibition against the waiver of the economic benefits of the author, the term "inalienable" covers a prohibition against expropriation of the moral rights of the author contrary to his or her will. In relation thereto, the protection of the economic rights of the author on the basis of § 39 of the Constitution as separate from § 32 can be reasoned.

Thus, the existence of § 39 of the Constitution as *lex specialis* in respect of § 32 is reasoned by the specifications of the rights held by the author: besides the economic benefits, the author also has moral benefits, which are not directly economically valuable. Proceeding from the above, once again, the opinion that it is not the status of the author but the rights of the author, which need to be protected as a bundle of moral and economic benefits that have to be emphasised in the substantive area of protection is confirmed. The protection of authors' rights is conditioned by the special status of the author. The special position of the author as a bearer of authors' rights also relates § 39, in addition to the sphere of economic benefits, to intellectual culture and innovation. The preamble to the Constitution also refers to the relation with culture.

The analysis of § 39 of the Constitution may be summed up by providing a new wording to the objective of that provision.[*30] The objective of § 39 of the Constitution is to ensure authors a sphere of freedom upon the use of special rights — intellectual property rights — by enabling them thereby to make their contribution to the development of culture and promotion of the economic life of society.

2. Constitution and purpose of Copyright Act

Section 39 of the Constitution, which forms the constitutional basis of the Copyright Act, is not the only provision of the Constitution to be taken into account upon the enactment and application of the Copyright Act.

The professional literature also refers to § 25 of the Constitution under which authors have the right to compensation for moral or economic damage caused by the unlawful action of any other person as a constitutional basis of the Copyright Act.[*31] Sections 39 and 25 of the Constitution are thus important from the aspect of the status of the author.

From the aspect of the positive copyright law, § 123 (2) of the Constitution is important, determining the position of the treaties ratified by the *Riigikogu* (Parliament of the Republic of Estonia), including the treaties concerning the rights of authors, in the hierarchy of the legal provisions of Estonia.[*32]

Although the author is the central subject of copyright law, the purpose of copyright law is broader than ensuring authors the right to their works. According to § 1 (1) of the Copyright Act, the purpose of this Act is "to ensure the consistent development of culture and protection of cultural achievements, the development of copyright-based industries and international trade, and to create favourable conditions for authors, performers, producers of phonograms, broadcasting organisations, producers of first fixations of films, makers of databases and other persons specified in this Act for the creation and use of works and other cultural achievements".

Such wording of the purpose of the Copyright Act is indicative of the historically evolved main principle of copyright: to maintain a balance between the private interests of copyright owners and public interests of

[26] Adopted at the UN General Assembly 16 December 1966. The Covenant entered into force with regard to Estonia 21 January 1992. – Riigi Teataja (The State Gazette) II 1993, 10/11, 13.

[27] Convention for the Protection of Human Rights and Fundamental Freedoms with Protocols Nos. I, IV and VII and selected reservations and declarations. Secretariat to the European Commission of Human Rights. Strasbourg, 1994. The Convention entered into force with regard to Estonia 16 April 1996. – Riigi Teataja (The State Gazette) II 1996, 11/12, 34.

[28] See D. J. Harris, M. O'Boyle *et al*. Law of the European Convention on Human Rights. London: Butterworths, 1995, p. 517.

[29] See H. Pisuke (Note 5), p. 89.

[30] Compare with the objective provided in the final report of the Constitutional Expert Commission, in the first section of clause 1 above.

[31] See H. Pisuke (Note 6), p. 167.

[32] *Ibid*.

society. In this, public interests are related to the development of society as a whole, including, *inter alia*, the ensuring of the main human rights. Protection of public interests is founded on the provisions of the Constitution. The objective of the Copyright Act in relation to some of the provisions of the Constitution will be examined below.

2.1. Continuity of culture and guarantee of protection of cultural achievements

The Constitution imposes on our country the task to guarantee the preservation of the Estonian nation and culture through the ages. As the task idea has been provided in the preamble to the Constitution, this may give rise to a question concerning its legal impact. The legal impact of the preamble cannot be underestimated.[*33] The preamble is the core of the Constitution: the higher the generalisation of the provision of the preamble, the wider its area of control over the remaining provisions of the Constitution.[*34] Moreover, it has been opined that the provision of the preamble to the Constitution concerning the preservation of the Estonian nation and culture may have a direct legal force.[*35] The objective concerning the preservation of culture in the preamble to the Constitution obliges the state to take all the necessary measures to achieve the goal that is of interest for the public.[*36] The Copyright Act also serves as a measure for achieving the purpose of the Constitution.

The provision of the purpose of the protection of culture both in the Constitution and the Copyright Act gives rise to a question about the meaning of culture. This is a difficult task as culture has a wide variety of different meanings.[*37] However, the notion of culture has retained one characteristic of its original meaning[*38] — the sense of process, since agriculture or culture of the mind are never created instantaneously. Consequently, culture should signify a value system, which has been created in human society and develops constantly.[*39] In respect of such a notion of culture, in the modern day, it is often difficult to distinguish between what national values are and what they are not and thus we may speak about culture as a general system of values.

The state institutions mostly regard culture in its static meaning, *i.e.* through the institutionalised activities sponsored by business and government.[*40]

According to the final report of the Constitutional Expert Commission, the idea of the preamble to the Constitution is to ensure the protection of Estonian national culture primarily through the Estonian language.[*41] Such a conclusion does not mean that the representatives of other national cultures were in a position where they were discriminated against in Estonia. Their rights are guaranteed on the basis of other provisions of the Constitution[*42] and laws.

The objective of the protection of the continuity of culture and cultural achievements set out in the Copyright Act is not solely related to national culture or the cultural minorities living in Estonia. The Copyright Act values culture in its widest sense. The treaties concluded in the area of copyright law[*43] impose on Estonia the obligations to protect the rights of the authors of the foreign countries that are parties to the treaties in Estonia as those of our own authors. The purpose of copyright law to protect the so-called borderless culture and the interests of those authors who do not reside in Estonia is not contrary to the Constitution. With such purpose, the state institutions are not forced to enact any special laws or other measures to protect cultural goods or authors of non-Estonian origin. The exercise of specific rights of authors falls within the sphere of private law, not constitutional law.

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[33] See H. Schneider. Põhiseaduse preambula: tema tähtsus ja õiguslik loomus (Preamble to Constitution: Its Importance and Legal Nature). – Juridica, 1996, No. 9, pp. 442–450 (in Estonian).

[34] *Ibid*., p. 449.

[35] T. Annus (Note 10), p. 33.

[36] The final report of the Constitutional Expert Commission (Note 9).

[37] See Culture. – International Encyclopedia of Communications. Vol. 1. New York, Oxford: Oxford Univ. Press, 1989, pp. 435–438.

[38] In Latin *cultūra* – tilling, cultivation; cultivation of land; shaping, development.

[39] Culture (Note 37), p. 435; Kultuur. – R. Kleis, J. Silvet, *etc*. Võõrsõnade leksikon (Dictionary of Foreign Words), Tallinn: Valgus, 1979, p. 365.

[40] Culture (Note 37), pp. 436–437; resolution No. 22 of the *Riigikogu* "Approval of Bases of Cultural Policy of the Estonian State". – Riigi Teataja (The State Gazette) I 1998, 81, 1353.

[41] The final report of the Constitutional Expert Commission (Note 9).

[42] "The rights, freedoms and duties of each and every person, as set out in the Constitution, shall be equal for Estonian citizens and for citizens of foreign states and stateless persons in Estonia." (Section 9 of the Constitution).

[43] About the ratified treaties of Estonia in copyright law see: H. Pisuke (Note 6).

2.2. Favourable conditions for creation and use of works

Section 39 of the Constitution, which will not be analysed anew here, serves as the basis for the purpose provided by the Copyright Act — to establish favourable conditions for the creation and use of works and other cultural achievements. However, the establishment of suitable conditions to authors (and other creative persons) for creative activity is also related to the other rights of freedom set out in the Constitution.

Authors are ensured the possibility to engage in creative activity by the right to free self-realisation provided in § 19 of the Constitution.[*44] In the Constitution, the right of the author to free self-realisation is more specifically ensured by § 45 (freedom of speech[*45]) together with § 40 (freedom of conscience, religion and thought) and § 41 (the right to remain faithful to his or her opinions and beliefs) as well as § 38 (science and art and their instruction are free). To avoid the repetition of issues, the purpose of the Copyright Act will be examined in relation to §§ 19 and 45 of the Constitution below.

The free self-realisation of the author (§ 19 of the Constitution) is manifested in his or her freedom of creation. However, the authors must not damage the constitutional or any other rights of other individuals. For example, when creating works, authors shall not defame anyone's good name or honour (§ 17 of the Constitution), contravene the inviolability of private and family life (§ 26 of the Constitution), *etc.*

The exercise of the freedom of speech provided in § 45 of the Constitution gives rise to a question of whether the Copyright Act is in conformity therewith. Namely, the Constitution grants everyone the right to freely disseminate ideas, opinions, beliefs and other information by word, print, picture or other means, whereas the Copyright Act does not allow other individuals to use works that also consist of ideas, opinions, *etc.* without the consent of the author.[*46] However, there is no contradiction between the Constitution and the Copyright Act. The Copyright Act grants authors the exclusive right to use only the specific form of expression of ideas and thoughts, not the ideas and thoughts themselves.[*47]

What should be done if, for some reason, a conflict appears between the exercise of §§ 45 and 39 of the Constitution? A position has been adopted that the provisions of the Constitution are equal and a conflict between them cannot render any provision invalid. All the conflicts between the provisions of the Constitution shall be settled by way of weighting and finding the optimum final solution.[*48]

The right of the author to free self-realisation may be restricted by law in the cases provided by the Constitution. For example, according to § 45 of the Constitution, the freedom of ideas and speech may be restricted to protect public order, morals, and the rights and freedoms, health, honour and good name of others. Thus, dissemination and exhibition to minors of works, which contain pornography or promote violence or cruelty is prohibited.[*49]

2.3. Ensuring development of copyright based industries and international trade

In addition to the fact that the Copyright Act recognises the rights of legal persons in relation to the temporal, financial and other investments made by them, the purpose of the Act reflects the need to ensure the development of the industries based on copyright and international trade. As the production related to the outcome of creative activity and the dissemination of the outcome are the two largest branches of the copyright industries, it may be said that the Copyright Act shows a green light to the development of copyright industries.

Why is this so? It appears from the surveys of the economic importance of copyright in other countries in 1982–1997 that the contribution of the copyright industries to gross national product (GNP) amounts to

[44] See T. Annus (Note 10), pp. 191–192.

[45] *Ibid.*, p. 231.

[46] The "sale" of business ideas is a fascinating topic but remains outside the topic of this article.

[47] ""Works" means any original results in the literary, artistic or scientific domain which are expressed in an objective form and can be perceived and reproduced in this form either directly or by means of technical devices. A work is original if it is the author's own intellectual creation." (Copyright Act, § 4 (2)).

[48] T. Annus (Note 10), p. 33.

[49] Pornograafilise sisuga ja vägivalda või julmust propageerivate teoste leviku reguleerimise seadus (The Act to Regulate Dissemination of Works which Contain Pornography or Promote Violence or Cruelty). – Riigi Teataja (The State Gazette) I 1998, 2, 42 (in Estonian).

2.1–6.6%.*[50] However, it is astonishing that the increase in the contribution of the copyright industries to GNP is faster than the contribution of the representatives of the traditional industries as well as the fact that by its contribution to GNP, the copyright industries are outweighing the contribution of heavy industry that has prevailed in the GNP of countries so far.

These trends can be explained partly by the expansion of the existing copyright industry based on new technology and the creation and establishment of its new branches, partly by the growth in the demand of consumers for entertainment and information intensive products.

If the indicators of copyright industries are so important in the economic sense, they are also important in the social sense: a rapidly growing industry entails the creation of new jobs inside the branch through new investments.

The need to mention copyright industries separately in the Copyright Act was motivated by Estonia's accession to the World Trade Organisation in 1999*[51], where the protection of the outcome of intellectual activity and international trade are important fields.

Copyright industries, occupying an important position in the national economy, social sphere and foreign trade of a country, thus demand much attention both from the legislator in enacting laws and the government in creating political development concepts.

In the Constitution, the efficient performance of the copyright industries is ensured, in addition to § 39, by § 31 (the right to engage in enterprise and to form commercial undertakings and unions) and § 32 (protection of property).

2.4. Consideration of public interests

The purpose of the Copyright Act does not mention the protection of public interests *expressis verbis*. An attempt is made to ensure public interests in using works on the basis of § 39 of the Constitution by permitting the restriction of the rights of the author. To a certain extent, public interests are also protected by § 44 of the Constitution, according to which everyone has the right to freely obtain information disseminated for public use.

Conclusions

Section 39 of the Republic of Estonia (protection of intellectual property) is *lex specialis* in respect of the provision concerning the legal protection of property (§ 32). As a result, the substantive area of protection of § 39 of the Constitution consists in the rights ensured to the author — intellectual property rights.

Section 39 of the Constitution has been provided separately from § 32 due to the specifications of intellectual property (including the rights of authors) as compared to property as defined in the law of property. The subject matter of the rights belonging to the author involves both economic and moral rights to the outcome of creative activity. The moral rights of the author are not directly economically valuable.

Nevertheless, § 39 of the Constitution, that forms the constitutional basis of the Copyright Act, is not the only provision of the Constitution that has to be taken into account upon the enactment and application of the Copyright Act. Proceeding from the purpose of the Copyright Act, links may be found between copyright and the preamble to the Constitution, between §§ 19, 25, 38, 40, 41, 45 and § 123 (2). These provisions of the Constitution ensure, on the one hand, the author freedom of creation and the protection of copyrights, and on the other hand, they ensure the copyright industries and public an opportunity to use the work of the author.

[50] See Economic Importance of Copyright Industries in Finland: Finnish Copyright Industries in 1997. Final Report. Finnish Copyright Institute, 2000; Foreign revenues of US core copyright industries rose 11% to $67bn in 1997. – Music & Copyright, No. 176, 16.02.2000, p. 3; H. Cohen Jehoram. Kritische Überlegungen zur wirtschaftlichen Bedeutung des Urheberrechts. – GRUR Int, 1989, Book 1, pp. 23–29; A. H. Olsson. Copyright in the National Economy. Some reflections on the basis of a Swedish study on the economic impact of copyright law. – Copyright, 1982, No. 4, pp. 130–133; *etc*.

[51] Riigi Teataja (The State Gazette) II 1999, 22, 123.

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Moral Rights of Author in Estonian Copyright Law

Section 39 of the Republic of Estonia Constitution provides, "An author has the inalienable right to his or her work. The state shall protect the rights of the author." The objective of this article is to analyse the moral rights of the author and their protection in Estonian law and the international factors affecting protection.[*1]

1. Moral rights of author *quasi* human rights?

Article 27 (2) of the Universal Declaration of Human Rights (1948) provides, "Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author". The need for protecting the moral interests of the author has also been provided in article 15 of the International Covenant on Economic, Social and Cultural Rights (1966).[*2] The moral rights, as well as property rights, guaranteed under the Covenant are further strengthened by the right to non-discrimination. According to article 2 of the Covenant the states parties to the Covenant shall apply these rights to all individuals (citizens and aliens) within their territory and subject to their jurisdiction and ensure that these rights are exercised without discrimination of any kind.[*3]

The European Convention of Human Rights and Fundamental Freedoms (1950), as well as the African Charter on Human and People's Rights (1981) make no reference to the moral and economic interests of the author. The Charter of Fundamental Rights of the European Union[*4] in article 17 paragraph 2 reads without specification, "Intellectual property shall be protected".

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[1] The "personal rights" guaranteed to the author in Estonian law are denoted by the term "moral rights" in international practice. Although Estonian law does not use the term "moral rights", this article uses the terms "moral rights" and "personal rights" as synonyms. If a direct reference is made to the text of the Estonian Copyright Act or it is quoted, the term "moral rights" is used.

[2] Riigi Teataja (The State Gazette) 1991, 35, 428. Article 15 paragraph 1 (c) reads that everyone has the right, "To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author."

[3] M. Robinson. Opening Address. Intellectual Property and Human Rights. A Panel Discussion to commemorate the 50th Anniversary of the Universal Declaration of Human Rights, Geneva, 9 November 1998. WIPO, Geneva /1999/, p. 6.

[4] OJ C 364/1 18.12.2000.

In legal science, discussion is going on about the status of the right of property in international law. It is a rather widely held belief that most property rights cannot be included in the category of fundamental human rights.[*5] As intellectual property is, by nature, related to property rights and according to the generally accepted opinion in the Anglo-American legal doctrine also derived therefrom, intellectual property rights are consequently not regarded as human rights. It has been attempted to categorise intellectual property rights as "universally recognised rights", "universal rights", "natural rights", *etc.* At the same time, jurists admit especially in the countries based on the Continental European tradition that some intellectual property rights may rise to the level of human rights. In such a case, these selected rights belong to human rights as personality rights.[*6]

When assuming the latter position, the moral rights of the author are most likely to be included in human rights. Moral rights as the rights that are the most directly related to creative activity are also natural rights. As long as disputes about the relation between intellectual property rights and human rights are yet in progress, moral rights may be called *quasi* human rights.

2. Berne Convention standards

Article 6bis of the Berne Convention for the Protection of Literary and Artistic Works[*7] establishes international standards, according to which the states party to the convention shall guarantee their authors so-called moral rights. These rights have been formulated in article 6bis (1) of the Convention as follows:

1) the author shall have the right to claim authorship of the work (or the right of paternity); and
2) the author shall have the right 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 and reputation (or the right of integrity and respect).

According to article 6bis (1) of the Convention, these rights are independent rights of the author, which do not depend on the economic rights of the author and belong to the author even if economic rights have been transferred.[*8] The term of protection of moral rights in party states has to be at least as long as the term of protection of economic rights, *i.e.* the life of the author and 50 years after his or her death (article 7 (1)). However, the wording of the Convention directly implies that national law may provide for a longer term for the protection of moral rights or protect these rights without a term. The means of redress for safeguarding the moral rights are governed by the legislation of the country where protection is claimed (article 6bis (3)). Thus, the party states are free to choose what means of protection, in civil law, criminal law or other, they use.[*9]

Article 6bis of the Berne Convention was established as an international standard at the diplomatic conference held in Rome in 1928 and its wording was revised at the Brussels conference in 1948. The inclusion of moral rights in the Berne Convention was reasoned by stating that "work is a reflection of the personality of its creator".[*10]

The concept of the moral interests and moral rights of the author and its first legal regulation originates from France at the end of the 18th century and at the beginning of the 19th century.[*11] The doctrine of moral rights came to be universally recognised in the countries of Continental Europe already at the beginning of the 20th century. In common law countries, thanks to their strong historical orientation to copyright primarily as an economic right, the doctrine of moral rights has not integrated to date.

[5] See P. Drahos. The Universality of Intellectual Property Rights: Origins and Development. Intellectual Property and Human Rights. A Panel Discussion to commemorate the 50th Anniversary of the Universal Declaration of Human Rights, Geneva, 9 November 1998. WIPO, Geneva /1999/, pp. 25–26.

[6] *Ibid*., pp. 30–34.

[7] Paris Act of 24 July 24 1971, as amended on 28 September 1979. WIPO Publication No 287 (E). Look also www.wipo.org.

[8] About the history of moral rights see Z. Radojokovic. The historical development of "Moral Right". – Copyright, 1966, p. 203.

[9] For comments on article 6bis see Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971). WIPO, Geneva 1978, pp. 41–44; S. Ricketson. The Berne Convention for the Protection of Literary and Artistic Works: 1886–1986. Centre for Commercial Law Studies, Queen Mary College. Kluwer, 1987, pp. 467–476.

[10] Guide to the Berne Convention for the Protection of Literary and Artistic Works (Paris Act, 1971). WIPO, Genava, 1978, p. 41.

[11] S. Ricketson (Note 9), pp. 456–457.

3. WTO TRIPS

Since 13 November 1999, Estonia has been a member of the World Trade Organisation (WTO). The most extensive global international agreement concerning intellectual property so far — the Agreement on the Trade-Related Aspects of Intellectual Property Rights — which is Annex 1C to the Agreement Establishing the World Trade Organisation (Marrakesh Agreement) has been concluded in the framework of the WTO.*[12] According to article 9 (1) of the Agreement, members shall comply with articles 1 through 21 of the Berne Convention (Paris Act, 1971) and the Appendix to the Berne Convention. But the agreement makes an exception concerning article 6bis of the moral rights provisions of the Berne Convention, "However, Members shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6bis of that Convention or of the rights derived therefrom". The exception provided for in article 9 (1) is a step backwards with regard to the global recognition and protection of moral rights and by this, the Anglo-American traditional approach significantly outweighs the copyright doctrine of Continental Europe. At the same time, the provision indicates that the agreement regards only economic rights as intellectual property rights.

4. Personal rights in earlier Estonian law

During the whole period of the independent Republic of Estonia (1918–1940), the 1911 Copyright Act (of the Russian Empire) was in force. In the thirties, a national draft Copyright Act was prepared based on the German law model. However, it was never adopted.*[13] In 1927, Estonia became party to the Berne Convention for the Protection of Literary and Artistic Works (Berlin Act of 1908).*[14] The 1911 Act did not contain a separate provision concerning moral rights. Amendments were not made to legislation after Estonia's accession to the Berne Convention either.

After Estonia was occupied by the Soviet Union, Soviet copyright law continued to apply in Estonia for almost 50 years. During the last decades of the Soviet State, the copyright provisions were included in Part IV of the Civil Code of the Estonian SSR (CC) of 1964. Part IV of the CC was worked out in full conformity with the 1961 Fundamentals of Civil Legislation of the USSR and the Soviet Republics. The Soviet copyright legislation and doctrine were in force until the adoption of the Estonian Copyright Act in 1992. The 1992 Act was founded on bases that completely differed from the Soviet copyright doctrine. Yet the impact of the theory and evolved practice of the Soviet era on some provisions of the 1992 Act may be detected.

The Civil Code did not contain a separate regulation of the moral and economic rights of the author. All the rights of the author were set out in § 483 of the CC, supplemented by §§ 484*[15] and 485*[16] as specific provisions. The Soviet civil law doctrine distinguished between three groups of rights: economic rights, personal rights related to economic rights, and personal rights not related to economic rights. The doctrine regarded the moral rights of the author as rights not related to economic rights.*[17]

Section 483 of the CC served as the basis for the catalogue of the so-called personal non-economic rights*[18] in the Soviet copyright law:

1) the right of author's name (inalienability of author's name), *i.e.* the right to decide whether to publish, reproduce and distribute a work under the person's own name, pseudonym or anonymously;
2) the right of integrity of the work.

The content of integrity of the work was specified in § 484 of the CC as:

1) the prohibition against making any alterations in the work, in the name of the work or in designating the name of the author without the consent of the author;

[12] See www.wipo.org.

[13] About the 1911 Act see Al. Pilenko. Novyi zakon ob avtorskom prav. S.-Peterburg: Izdaniye A. S. Suvorina, 1911; P. Ambur. Märkmeid autoriõiguse kaitse seaduse projekti kohta (Notes on Draft Copyright Protection Act). – Õigus, 1939, No. 9, pp. 410–414 (in Estonian).

[14] Riigi Teataja (The State Gazette) 1927, 44, 41; Le Droit d'Auteur, 1927, No. 8, p. 89; No. 9, pp. 102–103. Estonia was the 29th country to become party to the Berne Convention.

[15] Protection of integrity of work and author's name during the life of the author.

[16] Protection of integrity of work and author's name after the death of the author.

[17] I. V Savelyeva. Pravovoye regulirovaniye otnosheni v oblasti khudozhestvennogo tvortchestva. Izdatelstvo Moskovskogo universiteta, 1986, p. 72.

[18] The Soviet doctrine did not use the term "moral right".

2) the prohibition against including illustrations, a foreword, an epilogue, comments and any explanations.

After the death of the author (§ 485 of CC), protection of the integrity of the work and author's name was provided for either by successors (until the expiry of the term of copyright) or by "organisations that have been assigned the task of protecting copyright" (for example, the Ministry of Culture, All-Union Agency of Copyrights VAAP, *etc.*).

Also a third personal non-economic right was included in the doctrine — the right of authorship.[*19]

5. Moral rights of author in applicable Estonian law

5.1. Catalogue of moral rights

Section 11 of the 1992 Copyright Act provides that copyright in a work arises upon the creation of the work by the author of the work, while moral rights and economic rights constitute the content of copyright. The legislator has always placed the moral rights of the author first in the list of the rights of the author. This evidences convincingly that Estonia belongs to those countries characterised by the so-called continental or *droit d'auteur* tradition.

The moral rights of the author are characterised by a relation to the personality of the creator. This has been set out directly in § 11 (2) of the Copyright Act, "The moral rights of an author are inseparable from the author's person." The catalogue of moral rights has been provided in § 12 of the Act. The law applicable in Estonia ensures the author the following moral rights:

1) right to authorship;
2) right to author's name;
3) right to integrity of the work;
4) right to additions to the work;
5) right to protection of author's honour and reputation;
6) right to disclosure of the work;
7) right to supplementation of the work;
8) right to withdraw the work;
9) right to request that the author's name be removed from the work which is being used.

Thus, Estonian law provides the author with considerably ampler opportunities to protect his or her personal interests than demanded by the Berne Convention. The legal definitions of all the rights specified in the catalogue have been provided in subsection 12 (1) of the Copyright Act.

5.2. Authorship and right to authorship

The Copyright Act of Estonia clearly distinguishes between the notions "authorship", "right to authorship" and "right to author's name". Authorship is a notion that expresses the relation between the creator and the result of his or her specific creative activity (work). Authorship is a link over time; as long as a work exists, we can speak about authorship. The Estonian Copyright Act explicitly provides that the relationship between the author and of a certain work (the authorship) shall be protected without a term (§ 44 (1)). The task of protecting authorship has been assigned to the Ministry of Culture (§ 88 (3) of the Copyright Act). In Estonian law, it is thus the authorship of Cicero, Mozart, Pushkin and Hegel that is protected in respect of their specific work and not their right of authorship that they have never had or that has expired long ago. If someone refers to himself or herself as the author of a work by Mozart, the Ministry of Culture is obliged to interfere. This is protection in public law. From the point of view of economy of legislative drafting, the relevant public law provisions have been included in the Copyright Act.

What is then the right of authorship? The right of authorship is defined as the right to "appear in public as the creator of the work and claim recognition of the fact of creation of the work by way of relating the authorship of the work to the author's person and name upon any use of the work" (§ 12 (1) 1)).

[19] E. P. Gavrilov. Sovetskoye avtorskoye pravo. Osnovnye polozheniya. Tendentsi razvitiya. Moskva: Nauka, 1984, p. 138–140.

The right to author's name has been described in the Estonian Copyright Act as the right secured to the creator of a work by law to decide in which manner the author's name shall be designated upon use of the work — as a real name of the author, identifying mark of the author, a fictitious name (pseudonym) or without a name (anonymously) (§ 12 (1) 2)). Only the author himself or herself may choose between these options.

The right of authorship and the right of author's name are protected under the general term of the validity of copyright, which is the life of the author and 70 years after his or her death (§ 38 (1) of the Copyright Act). In the case of joint authorship the term is the life of the last surviving author and seventy years after his or her death (§ 39 of the Copyright Act). In the case of anonymous or pseudonymous works, the term of protection shall run for seventy years after the work is lawfully made available to the public. If the author discloses his identity during this period or there is no doubt as of the authorship, the term of protection is the life of the author and seventy years *pma*.

As in the case of authorship, the selection made by the author to designate his or her name (the author's name) is also protected without a term in Estonia (§ 44 (1) of the Copyright Act) and if this is violated, protection is implemented by the Ministry of Culture (§ 88 (3) of the Copyright Act).

5.3. Rights of author in relation to integrity of work

Estonian copyright law goes beyond article 6bis of the Berne Convention also with regard to the right of integrity and respect. Three independent rights are guaranteed to the author:

1) the right of integrity of the work, which gives an author a possibility to make or permit other persons to make any changes to the work, its title (name) or designation of the author's name and the right to contest any changes made without the author's consent;
2) the right to additions to the work, *i.e.* the right to permit the addition of other authors' work to the work (illustrations, forewords, epilogues, comments, explanations, additional parts, *etc.*);
3) the right to protection of author's honour and reputation, *i.e.* the right to contest any misrepresentations of and other inaccuracies in the work, its title or the designation of the author's name and any assessments of the work which are prejudicial to the author's honour and reputation.

In practice, some problems have occurred when delimiting the rights referred to in clauses 1) and 2) above, as they formed an integrated whole both in the Berne Convention and also in earlier law.

The following moral rights of the author are also less directly related to the right of integrity of the work:

1) the right to supplementation of the work, *i.e.* to supplement and improve the author's work which has been made public;
2) the right to withdraw the work, *i.e.* request that the use of the work be terminated;
3) the right to request that the author's name be removed from the work which is being used.

The latter three rights are the exclusive rights of the author, but in practice, they are exercised at the expense of the author. According to § 12 (2), these rights shall be exercised at the expense of the author and the author is requested to compensate for damage caused to the person who used the work. These rights are relatively unlikely to be exercised in practice. Nevertheless, the fact that the author has been secured these rights is an important principle of Estonian copyright law: protection in copyright law has been structured around the creator of the work, which entitles him or her to withdraw a work that has been already made available to the public.

After the expiry of the term of protection of copyright, the author's honour and reputation shall be protected without a term according to the same procedure as the authorship and author's name (§§ 44 (1) and 88 (3) of the Copyright Act).

One more important right has been guaranteed to the author — the right to disclosure of the work. This right is manifested in the possibility that solely belongs to the creator of the work to decide when the work is ready to be made available to the public (§ 12 (1) 6)).

6. Exercise of moral rights of author

According to § 11 (2) of the Copyright Act, moral rights are not transferable. Consequently, for the purposes of Estonian law, moral rights cannot be assigned. However, it is possible to issue an exclusive licence and a non-exclusive licence for exercising any moral right. A licence to use a work is a possibility to perform acts within the limits of the author's rights (§ 47 of the Copyright Act). Thus, in Estonian law, the issues related

to the so-called "ghost authors"[*20], authors of trademark and other issues that may come up in practice have been settled. In such a case, the creator transfers his or her economic rights under an author's contract. The economic rights to a work created under an employment contract or in the public service in the execution of the author's direct duties shall be transferred to the employer or state (§ 32 of the Copyright Act). A separate agreement for the issue of an exclusive licence by the author can be concluded regarding the moral rights of the author.

The enforcement of the new Law of Obligations Act in 2002 may (but need not) entail some alterations in the procedure specified above.[*21]

In practice it is rare that licence agreements are concluded or licences are issued under an author's contract concerning the moral rights of the author. This may result in the violation of the moral rights of the author. However, a growing trend may be detected in such agreements.

There is no practice yet for the exercise of some of the rights set out in § 12 of the Copyright Act (for example, the rights specified in § 12 (1) 4) and in §§ 6–10 of the Copyright Act).

7. Means for protecting moral rights under criminal law

Criminal liability is provided for the most severe violation of the moral rights of the author in Estonia. By the 1999 amendments to the Criminal Code[*22], independent chapter 15 "Crimes against intellectual property" of the Criminal Code was established.[*23] Section 277 of the Criminal Code provides for a fine or up to two years of imprisonment for the violation of the moral rights of the author or performer. Plagiarism (making a work or performance that was not created by the person available to the public in his or her own name) and "other violation of the personal rights of the author or performer" are regarded as a violation of moral rights.

The new Penal Code adopted on 6 June 2001[*24] contains independent chapter 14 "Offences Against Intellectual Property". Liability for the violation of all the moral rights possible in Estonia in the field of intellectual property has been assembled in one provision. Section 219 of the Penal Code establishes liability "for making a work, performance, invention, industrial design or lay-out design of integrated circuit that was not created by the person available to the public in his or her name or any other violation of the personal rights of the author or performer of the work". A fine or up to three years of imprisonment is provided for as a response. The 2001 Penal Code establishes criminal liability of legal persons as a novel solution for Estonia. A pecuniary punishment may be imposed on a legal person for the same act (§ 220 (2)).

8. Means for protecting moral rights under civil law

The protection of moral rights and the general provisions applying thereto have been set out in chapter 2 of division 4 of part II "Protection of personal rights" and in chapter 8 of part IV "Exercise and protection of civil rights" of the General Principles of the Civil Code Act[*25] since the entry into force of the Act in 1994. In 2001 and 2002, a wide-ranging reform has been carried out in Estonian civil law. As a result, entire civil law has undergone both conceptual and structural changes. The new General Principles of the Civil Code Act[*26] adopted on 27 March 2002 does not contain any provisions concerning the protection of the rights.

[20] Ghost author is a person who writes, for example, works protected by the copyright for another person, which are made available to the public in the name of a person who is not the author. In practice, this is very common, above all, in writing political speeches.

[21] See chapter 8 below.

[22] Riigi Teataja (The State Gazette) I 1999, 10, 156 (in Estonian).

[23] In the 1964 version of the Criminal Code, the violations of copyright were set out in § 136, a new version of which was enacted in 1995.

[24] Riigi Teataja (The State Gazette) I 2001, 61, 364 (in Estonian). The new Penal Code will enter into force on 1 September 2002.

[25] The General Part of the Civil Code Act was adopted on 28 June 1994 (Riigi Teataja (The State Gazette) I 1994, 53, 889 (in Estonian)) and it entered into force on 1 September 1994. The Act has been repeatedly supplemented and amended later. See the English translation of the Act at the homepage of the Estonian Legal Translation Centre at www.legaltext.ee.

[26] Riigi Teataja (The State Gazette) I 2002, 35, 216 (in Estonian).

These provisions serve as a part of the Contracts and Non-contractual Obligations Act (abbreviated as the Law of Obligations Act)[*27], adopted on 26 September 2001. The Law of Obligations Act entered into force on 1 July 2002.

Chapter 53 "Causing of damage by unlawful action" of the Law of Obligations Act is a direct basis under civil law in compensating for any damage caused by violation of any moral rights.[*28] Currently, the Copyright Act also contains some provisions concerning the protection of the moral rights of the author[*29], including the right to seek recovery of material compensation for moral damage.[*30] At the time of writing this article in May 2002, the Ministry of Culture was preparing amendments to the Copyright Act, arising from the enforcement of the Law of Obligations Act. It is impossible to assess before the adoption of the Act by the *Riigikogu* whether the specific provisions of the Copyright Act concerning author's contracts and protection of rights are only reproducible principles of the Law of Obligations Act or go considerably beyond that.

9. Estonian judicial practice concerning protection of moral rights

9.1. Overview of court system and court statistics

In Estonia, justice is administered based on the three-level court system: by city and county courts, and administrative courts (1st instance), by circuit courts (courts of appeal) (2nd instance), and by the Supreme Court (3rd instance).[*31] This article only regards the practice of the Supreme Court in civil matters.[*32]

The case law of the Supreme Court in intellectual property matters is still in the stage of development after the adoption of the new legislation for intellectual property in the first half of the 1990s. Most of the intellectual property matters decided by the Supreme Court involve copyright and related rights. During the period 1994–June 2001, five civil law matters, three criminal law and four administrative law matters concerning intellectual property were decided.[*33]

Several decisions in civil law and administrative law matters regarding copyright and related rights were rendered by the Tallinn Court of Appeal, the Tallinn City Court and the Tallinn Administrative Court.

The Supreme Court has made three decisions on the violation of the economic rights of the author in criminal matters.[*34] In 2000, the Estonian courts heard 15 criminal cases and made 15 convictions in piracy of copyrighted works (§ 280 of the Criminal Code), and one criminal matter in handling of technical devices designed for removal of protective measures preventing violation of copyright or related rights (§ 281 of the Criminal Code). No criminal cases concerning violation of moral rights were heard.[*35]

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[27] Riigi Teataja (The State Gazette) I 2001, 81, 487 (in Estonian).

[28] See § 1045 (1) 4) "Unlawfulness of causing of damage" and § 1046 "Unlawfulness of violation of personal rights".

[29] Clauses 81 (2) 1) and 4) and § 81 (4); § 83.

[30] This provision is based on § 25 of the Constitution, according to which, "Everyone has the right to compensation for moral and material damage caused by the unlawful action of any person".

[31] The Internet web site of the Supreme Court is located at www.nc.ee. The web site contains a database of the judgments of the Supreme Court (in the Estonian language). The Tartu Circuit Court has a similar database: www.tarturk.just.ee. Databases of judgments of other courts of appeal and county and city courts are being developed.

[32] The Supreme Court situated in Tartu includes four chambers — the Civil Chamber, the Criminal Chamber, the Administrative Law Chamber and the Constitutional Review Chamber. In the Chambers, matters are examined by panels of three judges (five justices in the Constitutional Review Chamber) or by the Supreme Court *en banc*. Not all appeals are heard by the Supreme Court: the Appeals Selection Committee, composed of three judges, grants leave to appeal.

[33] The database of decisions of the Supreme Court on the Internet web site of the Supreme Court www.nc.ee/lahendid/ (in Estonian).

[34] A decision of the Criminal Chamber of the Supreme Court, 25 November 1997 (3-1-1-119-97), 25 August 1998 (3-1-1-86-98) and 9 March 1999 (3-1-1-15-99).

[35] The statistics were provided by the Ministry of Justice.

9.2. Decisions of Supreme Court in matters concerning violation of moral rights

The decisions of the Supreme Court concerning the violation of the moral rights of the author will be discussed below.

On the basis of a contract concluded in 1992, H.R. undertook to write a script for a 13-part cartoon not involving any text. According to the author's contract, the studio was not entitled to make alterations in the script or to involve third parties in the work with the script without the author's written consent. The studio used an announcer's text not written by the author in four parts of the cartoon. H.R. filed an action against the studio claiming that her right of integrity of the work had been violated (§ 12 (1) 3) of the Copyright Act). She demanded that the studio discontinue distribution of the cartoon and pay 125,000 kroons for the moral damage caused by the violation of the copyright.

The Tallinn City Court dismissed the action and the Tallinn Circuit Court agreed to the decision of the City Court.*[36]

H.R. filed an appeal in cassation with the Supreme Court, demanding the payment of 10,000 kroons to compensate for the moral damage caused to her and discontinuation of the distribution of the cartoon containing text. The Civil Chamber of the Supreme Court annulled the decision of the circuit court reasoning that the conditions of the contract and the author's right of integrity of the work had been violated by adding the announcer's text to the script without the author's consent. The matter was remitted to the circuit court for a new hearing.*[37]

The newspaper *Postimees* published a readers' letter criticising the Ministry of Culture in 1994. The Secretary General of the Ministry of Culture V.J. responded to the newspaper with an article, reasoning the position of the Ministry. The newspaper published about 40% of the article by V.J. and altered the title of the article.

V.J. filed a claim against the newspaper with the Tartu City Court, requesting that payment of material compensation of 5,000 kroons by the defendant be ordered for the moral damage caused by the violation of the moral right (right of integrity of the work) of the author. The Tartu City Court satisfied the action. On the basis of an appeal filed by the newspaper, the Tartu Circuit Court annulled the decision of the city court. The circuit court claimed that the article did not serve as a work subject to protection by copyright.*[38] On the basis of the appeal in cassation by V.J., the Civil Chamber of the Supreme Court annulled the decision of the circuit court. The Supreme Court claimed that the article as a deliberating piece of writing was a work protected by copyright and the article was not excluded from protection due to the fact that it had been written in response to the article published earlier. The Supreme Court reasoned that the Copyright Act did not provide for exceptions to the integrity of the work concerning the works sent to the press for publishing.*[39]

The Tartu Circuit Court made a new decision on the matter. The court found that the violation of the right of integrity of the work provided in § 12 (1) 3) of the Copyright Act by the newspaper was proven. Yet the court found that the violation of the right to protection of the author's honour and reputation provided in § 12 (1) 5) of the Copyright Act was not proven. The court claimed that although violating the right of integrity of the article, the newspaper had not inserted distortions or inaccuracies in the article and had not provided assessment of the author and the article, damaging the honour and reputation of the author. The circuit court worded the principle, "the allegation that the violation of integrity of the work in itself causes moral damage is not correct, since § 12 (1) 5) of the Copyright Act provides damaging of the honour and reputation of the author in relation to misrepresentations and inaccuracies and assessments of the author or his or her work that are prejudicial to the honour and reputation of the author." The circuit court decided that "although the violation of integrity of the work was proven (alteration of the title and failure to publish a part of the article), the action has to be dismissed as prejudicing of the honour and reputation of the author is not proven".*[40]

Such a decision on the relation between two moral rights of the author is rather disputable. This decision has no significance as a precedent since the later decisions of the Supreme Court and Circuit Courts do not follow such approach. However, the later decisions also fail to provide an explicitly different principle.

[36] The decision of the Tallinn City Court of 21.06.1994 and the decision of the Tallinn Circuit Court of 22 September 1994.

[37] The decision of the Civil Chamber of the Supreme Court, 27 December 1994 (III-2/1-60/94).

[38] It was a material mistake of the court both concerning reasoning and conclusions.

[39] The decision of the Civil Chamber of the Supreme Court, 6 December 1995 (III-2/1-91/95).

[40] The decision of the Tartu Circuit Court, 18 June 1996 (II-2-95/96).

J.E. prepared designs of clothes (costumes) "Human is not fish" for her diploma paper in the Art Institute. AS Iguaan Destudio used the designs for preparing and distributing commercial photography without the author's consent in 1993–1995. The author found that besides several economic rights, the following moral rights had been violated: the right to author's name (§ 12 (1) 2), as the author's name was not indicated in the photographs) and the right of integrity of the work (§ 12 (1) 3), as the parts of different costumes were combined without authorisation when making reproductions, the costumes were not displayed as an integral set and mass production items were added). The author demanded 25,000 kroons to compensate for the moral damage caused by the violation of her moral rights.

The Tallinn City Court found that the right of the author to author's name and integrity of the work regarding the fashion design work subject to protection had been violated and required the photographers to discontinue reproduction and distribution of the photographs. At the same time, the court did not satisfy the action filed against AS Iguaan Destudio and the photographers concerning compensation for material and moral damage.

The circuit court found that the dismissal of the claim for material and moral damage by the city court had been unfounded and that the receipt of a compensation of 25,000 kroons for moral damage was sufficiently founded. The Supreme Court did not annul the decision of the court of appeal.

In its decision, the Supreme Court proceeded from the fact that the matter also involved the violation of the right of authorship. The plaintiff's allegation that she as "the fashion designer was deprived of recognition of authorship in public" directly refers to the violation of the right of authorship. Both the Tallinn City Court and Circuit Court failed to indicate in their decisions that the dispute involved, *inter alia*, the violation of the most fundamental moral right — the right of authorship.*[41]

AS Hiiu Mets and AS Laks ja Ko concluded a contract, according to which the latter published a slide of a bulk substances collection bunker in a commercial publication *Eesti Puit 95*. AS Hiiu Mets delivered the slide together with all the information about the author of the slide. But the author's name was not indicated in the publication when published and the slide was published in a cropped form. The author of the slide T.R. filed an action against AS Laks ja Ko, claiming that his right of authorship, the right to author's name and integrity of the work had been violated. T.R. requested that the entire print run be collected and destroyed and the payment of 50,000 kroons to compensate for the moral damage caused by the violation of his moral rights be ordered. The Tallinn City Court found that all the moral rights of the author had been violated. The court requested AS Laks ja Ko to collect and destroy the print run, thus restoring the situation preceding the violation of the rights. The claim for moral damage was not satisfied.

Both parties filed appeals with the circuit court. The circuit court amended the decision of the court of the first instance, reasoning that the restoration of the former situation by way of collecting and destroying the print run was not founded and feasible.

The Supreme Court claimed that "the correct reflection of the author's information is the direct obligation of the publisher" and "the author decides on the making of alterations in the work. The user of the work who wishes to make alterations shall request the author's prior consent". The Supreme Court refers both to § 11 of the Copyright Act and article 6bis of the Berne Convention, reasoning that the moral rights belong to the author of the slide.*[42] The Supreme Court claimed that the moral rights for the protection of which the action was filed "arise from law and the publisher shall adhere to these rights". The Supreme Court found that "the moral rights of the author subject to protection by the Copyright Act could be violated only by the publisher (person publishing) of the publication, to whom the work was delivered together with the information about the author, if the work was published without the author's name and in a cropped form". The higher court referred the matter back to the circuit court with the instruction, "in the new hearing of the matter, the court of appeal shall identify whether the author's moral rights of the plaintiff guaranteed by the Copyright Act were violated and if they were violated, the court has to decide whether it is possible and necessary to restore a situation preceding the violation of the rights and to decide on the amount of the compensation to be ordered for the moral damage caused".*[43]

In all the disputes reaching the Supreme Court, matters related to the nature of the work or its protection by copyright were of significant importance. In the first matter, the defendants contested the announcer's text as a part of the script of the cartoon and an independent work protected by copyright, in the second matter, the protection of the article written in response to the article sent to the press under copyright. In the third and fourth matter, it is important that the defendants attempted to assert as if they did not know that the object (clothes and slide) were subject to protection by copyright. In settling all these disputes, the Supreme

[41] The decision of the Civil Chamber of the Supreme Court, 25 June 1998 (3-2-1-84-98).

[42] In the previous decision, the Supreme Court also referred to the Berne Convention, but not to reason moral rights, rather the issue of reproduction.

[43] The decision of the Civil Chamber of the Supreme Court, 6 May 1998 (3-2-1-60-98).

Court first had to identify the existence of the work subject to protection by copyright. This indicates that in these disputes an important relationship exists between the notion of the protected work and the moral rights arising therefrom. The Supreme Court adopted a firm position that "the rights belonging to the author do not depend on whether the work has been made available to the public or not (§ 8 of the Copyright Act), whether the work bears the author's name or not (§ 12 (1) 1) and 2) of the Copyright Act). Thus, the defendants are not exempted from liability by the fact that they were unaware of the plaintiff's authorship of the objects".[*44]

Conclusions

Estonia belongs to the countries where the entire copyright, both the doctrine and regulations, have been founded on the person of the author. Therefore, the personal or moral rights of the author constitute the backbone of copyright law. The Estonian Copyright Act goes beyond the standards of article 6bis of the Berne Convention and contains an extensive catalogue of the moral rights of the author (nine rights). The Act makes a clear distinction between authorship and the right of authorship. Authorship as the author's name and the honour and reputation of the author are protected without a term in public law. The moral rights of the author are protected by copyright under a general term — the life of the author and 70 years after his or her death.

The moral rights of the author cannot be expropriated (§ 39 of the Constitution) and transferred under a contract, although a licence may be issued concerning all the moral rights of the author by a contract. In practice, such licence agreements are concluded rarely. This may result in the violation of the moral rights of the author. There is also no practice regarding the use of some rights set out in § 12 of the Copyright Act.

The Estonian courts of all the three instances have heard several disputes about the violation of moral rights, the majority of which is constituted by disputes about the violation of the right of integrity of the work and the right of authorship. The Supreme Court has amended several obvious mistakes of the courts of the first and second instance. This indicates that the court of first instance and the circuit court lack sufficient experience and certainty for settling the disputes arising from copyright. A uniform Supreme Court practice concerning the violation of the moral rights of the author has not yet evolved due to the limited number of decisions.

It is disputable in literature whether the moral rights of the author also rise to the level of human rights. In a certain sense, we can speak about moral rights *quasi* human rights.

[44] The decision of the Civil Chamber of the Supreme Court, 25 June 1998 (Note 41).

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On the Iuridicum Database

The Iuridicum*[1] database was first presented for introduction and testing on 1 November 2001.*[2] This also finalised the process that began with changes in the design of the printed version of Juridica*[3] and in its content in 2000: an electronic version in a modern format was made available to users for assessment.

1. Background

During the last decade*[4] the Law Faculty of the University of Tartu and the Juridica editorial office have compiled and built up a law database whose availability is important to the Estonian legal profession, law students, in-service trainees and others interested in law. The data particularly include:

- the materials published in the printed version of Juridica (more than a thousand titles of articles, commentaries, reviews and legal information), including summaries of articles;
- the special English edition of Juridica — Juridica International (the annual compilation has been published since 1996);
- information on lecturers and researchers, the authors of Juridica, in the form of CVs;
- research and doctorate theses and other publications.

2. Objective, principles and execution

The objective was to create an interactive database with components such as the digital journals Juridica, Juridica Abstract and Juridica International, a users' database, CVs of lecturers and researchers, research papers and publications. It was considered important to create an up-to-date, flexible and developable, yet stable database. High priority was given to the further development prospects of the system. It should also be stressed that the up-to-date user interface and design are not merely details. These and other circumstances served as the grounds for developing the database on an outsourcing basis.

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[1] Detailed information on Iuridicum is available at http://www.juridica.ee/introduction_en.php?intro=overview

[2] P. Pruks. Austatud lugeja! (Dear Reader) – Juridica, 2001, 8, p. 517 (in Estonian).

[3] See a detailed introduction to Juridica at http://www.juridica.ee/introduction_en_jur.php?intro=times.

[4] On 7 June 2002 Juridica celebrated its tenth anniversary — the 90th issue of the journal appeared on 5 June 2002. Juridica has by now developed into a law journal for the entire Estonian community of lawyers and jurists.

The principles of the database were finalised in the course of several debates held in spring 2001. Presuming that users would be interested in a digital Juridica (Juridica Abstracts) and Juridica International, the first basic problem arose. What purpose should digital journals serve? Should they introduce the journals, replace the printed version, or only allow to search for titles of articles?

Naturally, the Internet version of the journal is a complementary method for the editorial office to communicate with its readers. It was and is important that the Internet version should not completely replace or duplicate the printed version, but introduce the legal issues addressed in the articles to as wide a circle of users as possible, to intermediate analyses and information about the authors. The database itself has to be user-friendly and well structured. Special attention was paid to different search options and the list of keywords to make the finding of material as convenient and simple as possible. It was an absolute precondition that the database should be in two languages, Estonian and English, with a possibility of adding more languages.[*5] The option of adding a comments feature to the articles of the database was discussed, but it was found to be unfeasible at the time.

Considering the scope of the work that had to be undertaken, it was important to define the sequence of the execution stages. The digital journals Juridica (including Juridica Abstract) and Juridica International were set as priorities, followed by the CVs and publications database.

The database was created and implemented in mutually independent stages during 2001–2002. MicroLink Systems Ltd. developed the software and provided the technical solution.[*6] The Law Faculty of the University of Tartu supported the database creation efforts of the Iuridicum Foundation financially.

3. Target groups

As regards the journals, the target groups of the printed and Internet versions naturally overlap. So far, we have largely aimed at academic circles (lecturers, researchers and students). Students can certainly use Juridica articles in their research work. Many original articles of recent years have been built on doctorate theses and reflect the results of the Estonian Science Foundation grants and other research projects. However, members of the Bar Association, judges, attorneys-at-law, prosecutors, state and local government officials, lawyers, notaries, police officers and others who need legal analyses and systematised legal information in their work certainly constitute the largest group of readers. The database could presumably be useful to those more deeply interested in law. One should not forget that the users of the Internet version by far outnumber the subscribers to the printed version. Users of the Internet version certainly include our colleagues from foreign countries who can acquaint themselves with Estonian legal issues through the digital Juridica International and Juridica Abstract.

4. Digital Juridica, Juridica Abstract and Juridica International

Juridica first reached the Internet in the autumn of 1999.[*7] Through the older issues of the journal, readers can follow the formation of legal thought in independent Estonia and the arguments that were used in handling different problems. Juridica Abstract, which systematises the English summaries of Juridica articles, is freely accessible to everyone.

The English Juridica International. Law Review. University of Tartu, which presently assembles more than a hundred legal articles, is aimed at foreign readers. The last years' issues are centred on specific topics[*8] and as such, have certainly contributed to the intermediation of research information and strengthening of foreign contacts. The topics of the journals are planned by the editorial board that has involved twelve

[5] The language can be toggled in the database by clicking the flag icon in the header. When languages are toggled in Juridica, the system attempts to find the same issue and volume of the journal. If it is missing, an error message is displayed.

[6] The operating system is Red Hat Linux 6.2, kernel 2.2.14-5.0; database MySQL-*Ver* 9.38 *Distrib* 3.22.32, *for pc-linux-gnu* (i686); WWW server Apache; PHP scripts 4.0.4pl1.

[7] P. Pruks, A. Raidaru. Ajakiri Juridica on võrgus! (Juridica Journal is on the Internet!) – Õigus Teada. Ajaleht juristidele, 2 (32), October 1999, pp. 5–6 (in Estonian). Available at: http://www.lc.ee/foorum/lc/template.pl?show=txt/6t/6t .

[8] For example, the latest, sixth issue entitled *Estonian Civil Code in European Private Law Context* was dedicated to the international conference "Estonian Civil Code in European Private Law Context", held in Tartu on 27–28 September 2001. Available at: http://www.konverents.ee/tsiviilseadustik/index_eng.php

Estonian jurists over ten years. From 2002 the foreign members are: Professor *dr. h.c.* P. Schlechtriem, one of Europe's most highly acclaimed professors in civil law, an author of the new German law of obligations, an author of the UN Convention on Contracts for the International Sale of Goods, a leading figure at the International Institute for the Unification of Private Law, and Honorary Doctor of the University of Tartu (2002); Professor Th. Wilhelmsson, Vice Rector of the University of Helsinki, a member of the European Commission on Contract Law. He led the development of systematic cooperation between the private law institutes of the University of Tartu and the University of Helsinki. Th. Wilhelmsson has been Honorary Doctor of the University of Tartu since 2002. The other foreign members of the editorial board are Professor E. Nerep, Stockholm School of Economics, and Professor *dr. h.c.* W. Krawietz, Professor Emeritus of the University of Münster and publisher of the journal *Rechtstheorie*.

Juridica International has established grounds for contacts with internationally acclaimed journals. *Rechtstheorie* published an Estonian special edition that was presented in Tallinn on 25 March 2002. The special edition featured articles published in the framework of the international symposium Legislation and Legal Policy (Tartu, 2000).

4.1. Users, registration and statistics

Users of the database certainly include those who are used to working with databases and search systems in their everyday work. The database is therefore structured so as to avoid burdening the reader with instructions. Primary advice is, however, available in help files; search examples offer additional information. The fact that the final result of the database can be considered a success is shown by the completed feedback forms. For example, 31% of respondents thought that the convenience of use was very good, 66% found it met their expectations and only 3% of respondents stated that their expectations were greater.

A fee is charged for registration as a user of the Estonian version and a special registration form has to be filled in. Subscribers to the Internet version have access to the full texts of the Juridica articles contained in the database, including *pdf* format texts of 2000–2002 and Juridica covers of the years 1996–1999. A user who wants to read articles has to log into the database by entering the user name and password.

4.2. Display of data[*9], file formats and printouts

The digital Juridica displays the newest published issue to the user. The current year's issues can be selected from the header, earlier volumes from the archive. When a year is selected, all issues of that year are displayed. The author or authors are indicated next to the title of the article; their CVs open by clicking on the names. When clicking on the title of the article, a summary and a link to the full text of the article are displayed. Documents accessible without a password (public documents) are displayed at once in full. An error message is displayed to unauthorised users who try to access a password-protected document.

A system was added in May 2002 that copies the references of articles to a supplementary table and, upon copying to a disk, replaces references (*1, *2, …) in the reading files with links to a file that opens a separate references window. This makes reading of the electronic articles more convenient. Users do not need to scroll to the end of the page for endnotes or remarks while reading.

In data display, the part of text that fits onto the screen at any one time is automatically taken into account. A picture of a green or red lock is displayed in front of the article link. Green signifies materials not protected by a password, *i.e.* they are accessible to all users; documents with a red lock can be viewed only by subscribers to the electronic version (they cannot be read before logging in).

The texts of articles are displayed to users in *html* format. Naturally, the texts are of primary importance and users can copy the Juridica texts or any parts thereof to their own documents. Some of the files in the database are accessible or duplicated in *pdf* file format:

- Juridica articles from 2000–2002 together with the editorials of the issues;
- Juridica Abstract — summaries of articles since 2000;
- articles of Juridica International since 1999;
- Juridica cover pages in the design concept of 1996–1999 and cover pages of Juridica International from 1996–1998.

[9] The database is accessible by the following browsers: Internet Explorer (version 4.0 or newer) and Netscape Communicator (version 4.5 or newer). The browser must be cookie and JavaScript enabled to use the system. The cookie used in the system expires within 30 minutes after the user's last click on the page and the user is automatically logged off the system.

The data download speed depends on the overall network speed. In this respect, the possibilities are improving and in forthcoming years, network speed will surely not disturb those working with the database. The peculiarity of Juridica Abstract is that only summaries of articles are displayed. The summaries of issues are also available in *pdf* format as from the 2000 volume.

The link stating "whole article in one page" displays the full article in a new window without the earlier menu and with a simpler header. The printout header contains information about the volume, issue, author, title and pages of the article.

4.3. Search function

The Iuridicum database has a single comprehensive search engine. The search engine enables full text or keyword search.*[10] The user can choose between simple and advanced search. Search can be performed by author, among publicly available materials and password protected materials, and all materials. The search function is language specific: when the user is on the Estonian page, only Estonian materials are sought. Advanced search allows the user to search from texts and keywords attached to the text. Another option enables search by exact phrases and full word search.

When using search by author, the result contains the following data: the number of articles published by the author (listed as full entries in a descending order), and the CV and the articles published by the author as hypertext. The article entry contains the details of publication: the volume, issue, and pages. This is a very convenient function for finding article references, as the user does not need to look for the page numbers in the printed version. Full information on what and when an author has published is available in a matter of moments. Besides the article containing the search word, the part of the sentence is also displayed to open the context for the user.

The keyword list allows the entering of keywords that can later be selected in the search engine. Subkeywords can be added to existing keywords when the master keyword is selected. An indices system was introduced in April 2002 to simplify search.*[11] The user can sort articles by different parameters. Search results can also be saved in the user's own computer in the form of a text file.

The available search options thus allow users to easily find what they need. Naturally, the search function can be used free of charge. It is then up to the user whether they want to receive the article at once for a small fee and use this possibility throughout the year, or whether they prefer the traditional printed version.

5. CVs and publications

There is no journal without authors and any journal has a purpose only when it has something important to say to the readers. Readers are surely interested in who have been the main authors of the journal throughout its ten years of existence. The database gives an overview of the authors through their CVs*[12]. These are useful for introducing our jurists and have also facilitated international contacts and information exchange. A user can learn in minutes what a researcher or lecturer has written/published during the last ten years. What's even more important is that we have an overview of the problems tackled by the Estonian law, and we can compare ourselves to the European legal area.

The "Publications" part of the database will be supplemented by research papers and doctorate theses in the future. The system is essentially the same as the digital journals system. The user can choose the year of entry of the publications and find the needed text in the list of contents. Newer materials are displayed first. Publications can be saved on the computer hard disk as *pdf* or *doc* files.

[10] Only Estonian keywords are available at present.

[11] Available at: http://www.juridica.ee/gen_index_en.php?search_lang=2.

[12] The database contains 390 authors. English data are currently available on 63 authors; work with translating these data is still to continue. On the Internet: http://www.juridica.ee/cv_en.php.

6. On financing and sponsors

It is clear that the publication of law journals in Estonia will not become a profit-making enterprise in the forthcoming years (if ever). It is no secret that many institutions have attempted to launch special journals, such as constitutional law and copyright law publications. Unfortunately, no stable capacity has been found on the part of writers or finances. Juridica has needed and will need support and sponsors in the near future. The fact that the journal has had thirty-two supporters throughout its ten years of existence is a sign of trust in the venture. Supporters who have not doubted the usefulness and necessity of the expenses deserve the gratitude of all of us, and their names are made known to the public through the database.*[13]

7. What about future?

A wide scope of work needs yet to be done toward the content building and development of the database. Special editions can be compiled of the existing materials by assembling articles of certain topics into a single whole. Users have made proposals to that end and it is not impossible that the proposals will be responded to after some time. As already mentioned, the CV database needs to be supplemented. These and other tasks await fulfilment. The success of the activities so far gives us motivation for this. The overall opinion of the users of our joint work illustrates it well: 33% of respondents thought of the database as excellent, 64% as meeting expectations, and only 3% had greater expectations.

[13] On the Internet: http://www.juridica.ee/introduction_en_jur.php?intro=sponsors.

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Estonian Constitutional Law Institute

Objectives

The Estonian Constitutional Law Institute is one of the projects of the Estonian Law Centre. The Institute's overall goal is to stimulate constitutional law scholarship among Estonian legal professionals, and to link this work with that of scholars from the region and abroad. To accomplish that, the Institute brings together Western and Estonian constitutional law scholars, and provides a mechanism by which they may exchange information and ideas, and develop written analysis of current Estonian Constitutional law issues.

Board Members

Currently, the Board members of the institute include the Dean of the Law Faculty of the University of Tartu Professor Kalle Merusk, the Head of the Public Law Institute Professor Raul Narits, the Senior Researcher Extraordinary *Dr. iur.* Peep Pruks, the Chief Justice of the Supreme Court Professor Uno Lõhmus, the Senior Adviser to the Legal Chancellor Mr. Enn Markvart, the Director of the EuroCollege Mr. Michael Gallagher, the Adviser to the Minister of Justice Mrs. Ülle Madise, and Judge at Tallinn District Court Lauri Madise.

Cooperation

In the framework of the Constitutional Law Institute there is established cooperation with the Human Rights Institute of Åbo Akademi University in Turku (Finland). The Institute has also reached agreements for frameworks for cooperation with institutions in Germany (Trier University), Sweden (Stockholm University), Finland (University of Helsinki), Russia (Saint Petersburg State University), Latvia (University of Latvia), Lithuania, (Vilnius University), and the United States (New York University).

Projects

Each year, the Institute selects the most important themes and solicits research in these areas. This year, research priorities were (1) Paradigms and Models for Interpretation of Constitutional Norms, (2) Relationship Between International Obligations and Constitutional Norms, (3) Connecting the People to the Constitution (Protection of Fundamental Freedoms and Rights) and (4) Independence of Courts.

Besides publishing the results of the research, the Constitutional Law Institute hosts seminars, workshops and conferences on themes in priority areas of research of the Institute.

In this issue of Juridica International eight articles are published written under the auspices of the Constitutional Law Institute:

Mag. iur. Hannes Vallikivi — Domestic Applicability of Customary International Law in Estonia

Anneli Albi — Estonia's Constitution and the EU: How and to What Extent to Amend It?

Marika Linntam — Building a Just Society: the Role of the Constitutional Judge. Idea of Justice in the Contemporary Value Jurisprudence and the Process of Argumentation

Associate Prof. *Dr. iur.* Ola Wiklund — The Role of Ideology in Adjudication

Dr. Renata Uitz — Constitutional Activism and Deference Through Judicial Reasoning: Confirming an Indeterminacy Thesis

Ivo Pilving — Rule of Law and Information Society: Constitutional Limits to Active Information Provision by Government

Prof. *Dr. iur.* Gerhard Robbers — Informationelle Selbstbestimmung und allgemeine Informationsfreiheit in Deutschland

One of the most important Constitutional Law Institute sub-projects is the project "Court Decisions Digests". With the project, the Institute commissions analyses of each of the decisions of the Supreme Court, and creates a database of the decisions. These facilitate ongoing review of the jurisprudence of the court. These digests will be available at the law centre web site in the near future. They are available also by subscription.

The other important sub-project is related to the theme of European Union accession and amendments to the Estonian constitution. This sub-project involves publication of pro and contra arguments for the constitutional amendments, seminars and workshops. The sub-project is funded by the Open Estonia Foundation.

Special thanks to supervisors of our researchers. Especially to Professor Gerhard Robbers, Professor Ola Wiklund, Dr. Renata Uitz, Dr. Eleanor Spavente and *mag. iur.* Juhani Kortteinen.

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