

Dear reader,

These days, changes in the law are the rule rather than an exception. This is particularly true when it comes to countries in transition, of which Estonia is one. Social reality in Estonia has been characterised by major and extensive changes for a little more than a decade. In fact, the entire social system has changed. Law has naturally taken on an entirely new quality as part of this process. The change in the political, economic, and social environment in Estonia brought about changes in law as the authority of the state and a regulatory mechanism protected under state authority. The national legal reality has reached such a degree of maturity that as of 1 May 2004, Estonia belongs to the family of European Union member states. This means, among other things, that the Estonian state has grown up.

Thus, it is probably the right time to ask how legislative drafting has developed in Estonia. What have we taken as our role models here? It is most essential to address the question addressed in this issue of the journal: does Estonia already have something that could serve as an example for the EU legal order or the national legal orders of European countries? The European Union is a judicial area that has gone beyond interstate relations and is now seeking an institutional form consistent with its legal and political reality. Several possible solutions can be found in the Treaty establishing a Constitution for Europe. At the same time, the Treaty establishing a Constitution for Europe must still be furnished with actual content. In Estonia, we say that our capital, Tallinn, will never be complete. The legal order of a country or a union of countries can never be complete either. Therefore, all the steps taken to introduce the achievements of European national legal orders are important not merely from the point of view of dissemination of information; they can also serve as a bridge to implementing both precedented and rationally developed forms elsewhere.

Different authors tackle different areas that are of interest to them. However, besides examining past developments in the shaping of the legal order, all approaches here focus on the potential *de lege ferenda* meanings of *de lege lata* solutions. To be more specific, is there anything in the Estonian national legal order that could serve as a broader legal regulatory information and communication medium than it already is in the Estonian context today?

Thus, Prof. Raul Narits analyses the conformity of Estonian legislative drafting with good law-making practice in his article, *Dr. iur.* Julia Laffranque suggests that the institution of presenting a judge's dissenting opinion be introduced in the European Court of Justice similarly to its application in the Estonian legal order, Docent Irene Kull investigates the issue of transposition of law or mutual influence as exemplified by the law of obligations applicable in the European Union and that of Estonia, the article by Prof. Kalle Merusk examines one of the underpinnings of good regulatory practice — increasing of political decisiveness — in the implementation of administrative law reform in Estonia, Research Fellow Rodolphe Laffranque discusses the options for the Estonian parliament as regards parliamentary supervision of the government's EU policy, internationally distinguished author Prof. Peter Schlechtriem writes about the Europeanisation of private law, Prof. Paul Varul deals with the topic of restriction of active legal capacity in the development of civil law, and *Mag. iur.* Meris Sillaots focuses on the important aspects of settlement proceedings — admission and confession of guilt.

As usual, the journal includes articles in several languages. The articles have been written in English, German, and French. This is no coincidence. One of the major public figures of the Estonian Enlightenment era, C. R. Jakobson, has said that language and reason go hand in hand, because language is reason that has become public. Thus, it is natural for the journal to contain rational observations concerning various aspects of law, written in three languages.

From the point of view of contemporary jurisprudence, besides serving as objective and subjective law, law also has a clear role as a regulatory information and communication system. This means that in the end, societies organised as states have no more formal law than there is law 'formulated' by the behaviour of the subjects of law. The contributors to this issue hope that in addition to participation in communication through reading the articles in the journal, the reader will develop an interest in active participation in such communication.



Raul Narits

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Good Law Making Practice and Legislative Drafting Conforming to It in the Republic of Estonia

1. Regulatory practice and new legislation

Legislation is not conducted, nor laws created, merely for providing legislative institutions with work. Neither can legislation be aimed at a relatively narrow circle of society. Legislative work and the law have been and are almost the only means available to states through which the conduct of the major part of society can be regulated.^{*1} Such perception and recognition of the role of legislation in society requires that due regard be paid to several factors in legislative drafting in order to ensure quality. Most broadly, these factors can be divided into the technical (related to regulatory practice) and substantive (*ius est ars boni et aequi*).

The regulatory rules of legislative drafting comprise a set of measures and methods, justified on the basis of theory, used in preparing drafts of legislative acts. Regarded as such, regulatory measures form an inseparable part of the procedure of legislative drafting and help ensure the validity and effect of the legislative act adopted.^{*2} In the Estonian legal order, the regulatory issues have been considered so important that on 28

¹ R. Narits, K. Merusk. Õiguse olemusest ja seaduse võimalustest (Nature of law and possibilities of legislation). – Riigikogu Toimetised 2000 (2), p. 100 (in Estonian).

² K. Tamm. Õigusloome, normitehnika olemus, probleemid (Legislative drafting, nature and problems of regulatory practice). – Riigikogu Toimetised 2000 (2), p. 148 (in Estonian). In legal writing, the teaching focusing on the manners of presentation of legal provisions is generally referred to by different terms: *seadustehnika* (technique of law); *normitehnika* (regulatory practice), *legislatiivtehnika* (legislative technique). See, e.g., H. Hill. Einführung in die Gesetzgebungslehre. Heidelberg 1981, p. 96; A.-T. Kliimann. Normitehnikast administratiivprotsessiõiguses. Kriitika ja interpretatsiooniküsimusi maksvast õigusest (Legislative drafting in administrative procedural law: Criticism and interpretation issues of applicable law). Tartu 1930, p. 3 (in Estonian); H. Schäffer. Gesetzgebungstechnik aus der Sicht und aus der praktischen Erfahrung westlicher Demokratien. – Gesetzgebung in Ost- und Südeuropa. J. Slavinski, M. Geistlinger (Hrsg.). Wien, München 1991, p. 19. For further information about the notion, objective, and general principles of legislative drafting, see K. Merusk *et al.* Õigusriigi printsiip ja normitehnika (Principle of State Based on Rule of Law and Regulatory Practice). Tallinn 1999, pp. 9–19 (in Estonian).

September 1999, the government adopted Regulation 279, 'Regulatory rules of draft legislative acts'³, which entered into force on 1 January 2000.⁴ The objective of the regulation was to guarantee a certain uniformity and quality of draft legislative acts through establishing the principal regulatory rules. The regulation was amended on 20 November 2001. The regulation has not been amended further thereafter, and hence to date, we may speak about a certain developed practice as regards preparation of legislative acts. This concerns the main requirements for draft legislation, the main requirements for amending or repealing legislation, and requirements for the explanatory memoranda to be appended to drafts. In addition, the rules provide requirements for the regulations of the Government of the Republic and the various ministries.

Yet it is clear that a legislative act can be used for providing general requirements. The author of the foreword to the recently published 'Handbook of Regulatory Practice', the present Minister of Justice, correctly says: 'Real life is much more varied, and while implementing general provisions we may still face the fact that problems cannot be solved merely by legislative acts.'⁵

2. Good law making practice

Here we have to ask whether, besides the obviously necessary but general regulatory provisions and rules of practice, more detailed regulations that thus have a more substantive and concrete effect on drafting are required. Or would it be more reasonable to establish general rules for the substantive aspect of regulatory practice to accompany the general rules for legislative drafting? The logic behind the latter idea is that legislative drafting would be organised by a set of general rules covering both general regulatory and substantive elements.

More precisely, the question concerns good law making practice or rules characterised by a certain level of quality.⁶ Rules for good law making practice are aimed at obtaining the maximum benefit from legal regulations. Almost all rules of good law making practice are related to various aspects of analysis of the impact of a legislative act.⁷ As regards terminology, this may also be implied through 'analysis of the impact accompanying regulation' or 'analysis of the impacts of regulation'. The latter primarily derives from English sources, which use 'regulatory impact analysis'. The paper by OECD understands regulation as highly varied legal instruments from constitutions to guidelines and instructions.⁸

At the same time, the problem lies in the fact that at times, the constitutive aspect of the Continental European legal culture — legal positivism — restricts comprehension of the set of rules of good law making practice or the use thereof. However, we must agree with the present-day position: 'The number of cultural, social, legal, economic, communicative, and other subdisciplines that are associated with law is constantly increasing, and a postmodern approach has been frequently applied to interdisciplinary treatments. (In Estonia, the trends of social and legal studies have developed only recently, and several areas have not been covered yet) [...] [T]he formal and legal positivist approach to law and legislative drafting is starting to wane as a result of the influence of widespread social research, development of interdisciplinary approaches,

³ Õigustloovate aktide eelnõude normitehniline eeskiri (Regulatory rules of draft legislative acts). – RT I 1999, 73, 695; 2004, 10, 61 (in Estonian). Available in English at: <http://www.legaltext.ee/et/andmebaas/ava.asp?m=022> (28.05.2004).

⁴ Before the Republic of Estonia was occupied by the Soviet Union in 1940, an act titled 'Seaduste kokkuseadmise juhtnõõrid' (Instructions for compiling legislative acts) was applied in Estonia, approved by a decision of the Government of the Republic on 26 November 1928. The act stipulated that legislative acts were divided into sections, sections could be combined into chapters, chapters into parts, etc. The act also provided for the means of and procedure for repealing legislative acts. After Estonia re-established its independence (1991), the issues of legislative drafting were governed by the regulatory rules approved by the Board of the Riigikogu in 1993. The Board of the Riigikogu approved these rules on the basis of the provision delegating authority, contained in the Riigikogu rules of procedure. These rules set out the substantive and formal requirements for draft legislative acts submitted to the Riigikogu. They also provide for the existence of instructions concerning the wording of legislative acts and presentation of references as well as provisions delegating authority. The regulatory rules established the principles for structuring legislative acts.

⁵ Normitehnika käsiraamat (Handbook of Regulatory Practice). Koost. R. Sõlg jt. Tallinn 2003, p. 3 (in Estonian).

⁶ The rules of good law making practice derive from the decision of the Council of the OECD of 1995. The OECD has invested much energy in consideration of regulatory methods in order to improve the quality of regulations and increase their efficiency.

⁷ Estonia does not have an appropriate tradition and system for performing regulatory impact analyses. However, since 1995, which perhaps accidentally coincides with the year from which the rules of good law making practice date, the Economic and Social Information Department (ESID) of the Chancellery of the Riigikogu has performed social and economic surveys of legislative drafting on both the theoretical and practical level. This also includes a survey of the explanatory memoranda of draft acts, initiated by the Chancellery of the Riigikogu; a study conducted by the ESID and the Tartu Society of Legal Psychologists and Sociologists on the use of social information in law-making; surveys by the social and market survey company SaarPoll; the relevant work performed in the Ministry of Justice; and also the works of the Institute of Law of the University of Tartu and the Faculty of Law of the University of Tartu.

⁸ K. Liiva. Seadusandlusega kaasnevate mõjude analüüsimisest (On Analysis of Impacts Arising from Legislation). Õigusinstituut 1998, p. 5 (in Estonian).

and new media networks as well as networks in civil society, and hence the legal systems and constitutional institutions based on modernist values are searching for new theoretical points of equilibrium in the globalising world.⁹

3. Increase of political decisiveness in the context of regulatory impact analysis

The conventions of good law making practice as a set of rules include an increase of political decisiveness and a more extensive use of regulatory impact analysis in policy planning, discussion, and evaluation; sharing of liability for the implementation of the regulatory impact analysis programmes; provision of training to experts; a systematised and flexible use of the methods of regulatory impact analysis; development and implementation of data collection strategies; guiding of the regulatory impact analysis in the right direction; integration of the regulatory impact analysis into the process of policy-making at the earliest stage possible; notification of stakeholders concerning the results of the regulatory impact analysis, which also serves as a precondition for a dialogue; a consistent and appropriate approach to the public; determined and timely consulting with the interest groups; and the use of regulatory impact analysis methods for assessing the impact of both already applicable (*ex post*) and new (*ex ante*) legislation.

The space available does not allow for discussion of all the rules related to good law making practice. Therefore, we will focus in greater detail on the requirement for increased political decisiveness, the rule that demands broader use of regulatory impact analysis. This is caused, above all, by the fact that Estonia's membership in the European Union poses new challenges for legislative drafting, which require a broader vision of legislative drafting and a systematised perception of its new dimensions.

The requirement to **increase political decisiveness** and make more extensive use of regulatory impact analysis for that purpose is the first rule of good law making practice. Regulatory impact analysis must be used more widely than before in planning, discussing, and evaluating matters of politics. In the spring of 2001, the editorial board of the *Journal of the Estonian Parliament*¹⁰ developed the idea of investigating whether and to what extent Estonian governmental authorities engage in ordering draft legislative acts and applied research, including the proportion of the surveys that are related to legislative drafting. The initial issues were as follows:

1. Estonian legislation reveals problems related to the concordance between the European Union and Estonian national legal order and related to the analysis of the social, economic, and budgetary impact of legislation.
2. The political choices provided in draft legislative acts are not based on the analysis of Estonian society.
3. Information on budgetary surveys is not communicated between state agencies and is not available on the Internet either.
4. The theoretical point of departure of a parliamentary survey is the concept of moral and responsible politics, which presume an analysis of the social impacts and risks of draft legislation.

Unless the social facts (including public opinion, state budget, etc.) support the legal provisions of a new legislative act, this may entail political, legal, and economic problems. The better the legislators are able to analyse and consider the budgetary, economic, social, and administrative impacts accompanying the implementation of a legislative act, the better the act fulfils the social objectives inherent therein.¹¹ Of the results of the survey, in the context of good law making practice, of considerable interest are those characterising political choices, the implementation of which presumes a sufficient political will to improve public law and administration.

1. In order to regulate the institutional system of Estonian government agencies and orders for applied research, first of all, a detailed inventory should be conducted concerning previous practice

⁹ A. Kasemets. Sotsiaalteaduste rakendusvõimalusi Eesti seadusloomes: teoreetilisi ja empiirilisi aspekte. Väitekirja magistrikraadi taotlemiseks (Opportunities for incorporating the social sciences into Estonian legislative drafting: theoretical and empirical issues. MA thesis). Tartu 2001, p. 80 (in Estonian).

¹⁰ *Riigikogu Toimetised* is a periodical publication of the Chancellery of the Riigikogu. The aims of the *Riigikogu Toimetised* (in English the *Journal of the Estonian Parliament*) arise from the constitutional tasks of the Riigikogu creating a forum for politicians, teachers at universities, civil servants, and representatives of business and non-profit organisations (<http://www.riigikogu.ee/rva/toimetised.html>).

¹¹ A. Kasemets. Rakendusuurigute ja analüüside tellimine valitsusasutustes 1999–2001: teel teadmispõhise poliitika, õigusloome ja avaliku halduse poole (Ordering of applied research and analyses in government agencies in 1999–2001: toward more knowledge-based politics, legislation, and public administration). – *Riigikogu Toimetised* 2002 (6), pp. 107–108 (in Estonian).

regarding survey orders and the existing intellectual and other means that could serve as the basis for improving the procedure for preserving and systematising relevant information and improving the procedure for ordering and evaluating surveys.

2. Estonia needs a government programme for promoting the principles of knowledge-based legislative drafting and public administration. In the case of a political agreement, the task of initiating the government programme may also be negotiated in the committees of the Estonian parliament (Riigikogu) and be formalised as a decision of the Riigikogu.
3. The alteration of the role of the national parliaments in the context of the globalising political landscape and economy and the information society requires firm establishment of mechanisms for notifying the representatives of the people and for parliamentary supervision. It is necessary to critically review and revise the submission of survey reports to the Riigikogu and compliance with the internal requirements imposed on legislative drafting by the Board of the Riigikogu, if development of informed representation of the public is considered one of the goals to be achieved.
4. Once every two years, the Ministry of Education and Research, which directs research on the level of the executive power together with the Research and Development Council, could provide the Riigikogu cultural committee responsible for research and educational affairs with an overview of the basic and applied research ordered using the state budget in order to discuss the problems and priorities of research as a national issue in the context of the changing needs of the state, society, and market.
5. The annual legislative drafting plans of the Government of the Republic of Estonia should include a list of prioritised research areas, accompanied by a relevant budget. The overall responsibility for the organisation and quality of legislative drafting lies with the Ministry of Justice. Both centralised and decentralised management models can be applied in organising the provision of surveys required for national legislative drafting and administration. Considering Estonia's limited human, time, and monetary resources; modest experience in interdisciplinary studies; etc., it would seem to be more expedient to organise national surveys and evaluate the level of research centrally in the coming years.*¹²

4. Increase of political decisiveness and the European Union

If we presume that the OECD committee of ministers has not accidentally pointed out increased political decisiveness as the first feature characterising good law making practice and specified the principle by the requirement to integrate the process of shaping the politics of regulatory impact analysis in its earliest stage (including alternatives), how could such an important requirement for good law making practice be furnished with content under the conditions where Estonia is not only a sovereign republic but also a member state of the European Union as of 1 May 2004? It is generally known that the freedom of political will of a nation-state is already by definition a result of exercising the national right of self-determination. It is the nation-state that serves as the subject of will. At the same time, besides the right of self-determination, the political will of a nation-state also includes political decisions of lesser importance. Hence, if freedom is lost in small things, none of the bigger ones are left either. Thus, the freedom of political will of a nation-state serves as a security and indicator of national self-determination.*¹³ Consequently, it is a logical conclusion that Estonia's membership of the European Union and the EU constitution dialogue demand that the nation-states protect two interests at the same time, one of which is directly related to good law making practice. Namely, the cumulative effects of European integration should be used to increase the role of the particular state, and secondly — which is important with regard to the topic of this article — in order to preserve national self-determination, it is necessary to retain the freedom of political will of each member state of the European Union.*¹⁴

However, there are problems, of which I will mostly discuss the legal one. As is widely known, the European Union is a judicial area that has gone beyond interstate relations, searching for an adequate institutional form for its political, economic, and legal reality. The European Union governs many not insignifi-

¹² *Ibid.*, pp. 112–114.

¹³ M. Rosentau. Suveräänsus Euroopa Liidus (Sovereignty in the European Union). – Riigikogu Toimetised 2003 (8), p. 13 (in Estonian).

¹⁴ '[T]he rationale for the need involves the substantive fact that Europe is a multinational and multicultural union of democratic nation-states and that this status is considered to be worthy of preservation. This substantive reasoning is supported by a technical rationale asserting that integration need not necessarily mean the prevalence of common (integrated) units over the specific (differentiated) units constituting them.' *Ibid.*, p. 18.

cant aspects of the economic affairs of European countries and nations, where the European Union has replaced or is replacing nation-states. In legal terms, this implies the supranational nature of legislation issued by the European Union institutions in relation to the national law of the member states and is manifested in the direct applicability of such legislation to the territories of the European Union member states. It may be said that ‘The administrative space regulated by the numerous legislative acts of the European Union institutions leaves far behind the concept of a member state as a country subject only to international common law and contractual obligations assumed by itself. This gives rise to justified suspicion about the smooth coexistence of European Union law with the constitutional order of Estonia’.¹⁵ How could we fulfil the requirement inherent in good law making practice to increase political decisiveness in a situation whose development we can objectively describe in such a fashion? It seems to me that in a European Union member state, the problem of the simultaneous application of the constitution of the country and European Union law is not related to the substantive content of these legal orders but to the goal, characteristic of both of them, of serving as the determining foundations of the organised operation of the important relationships of a society, where it is the uniformity of the goals that alleviates the conflict between the principles of the primacy of national and of European Union law. The principle of direct applicability of Community law was first stated in the *Van Gend en Loos case*¹⁶ heard by the Court of Justice of the European Union: ‘The Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only Member States but also their nationals. Independently of the legislation of the Member States, Community law therefore imposes obligations on individuals but is also intended to confer on them rights that become part of their legal heritage.’¹⁷ The European Court of Justice has declared that the validity or effect of a European Union measure in a member state cannot be affected by allegations as if it were in conflict with the fundamental rights provided for in the constitution of the state or the principles of the constitutional structure of the country. ‘The Community legal system constitutes a new legal order of international law, the subjects of which comprise not only the Member States but also their nationals; it is a legal system in its own right which forms part of the legal system of the Member States and must be recognized by their courts. Community law is mandatory and absolute; this means that the competent national authorities are automatically forbidden to apply a national provision found to be incompatible with the Treaty, and must, where necessary, take all appropriate steps which help to ensure that Community law is given full force and effect. The rules of Community law must be automatically applied, at the same time and with identical effect throughout the entire territory of the Community. They must be accorded absolute precedence over the domestic law of Member States, even over a subsequent legislative measure; the Member States cannot argue that there are derogations from Community law which derive from their legislature or judicial systems, even if a constitutional system or provisions are concerned.’¹⁸ In another case, the European Court of Justice declared: ‘The transfer by the states from their domestic legal system to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail.’¹⁹

This way or another, when interpreting existing national objective law, one should rather try to determine its level of compliance with European Union law in the situation that has developed.²⁰ In the case of a conflict between national and EU law, the persons implementing the law in a country are obliged not to apply national law but rather to apply European Union law. The member states of the European Union (including Estonia) must remove from national law the provisions that are in conflict with the directly applicable law.²¹

However, what creates special certainty about meeting an important requirement for good law making practice — to increase political decisiveness — as a member state of the European Union is the fact that member states issue the primary legislation in the European Union. Both the European Communities and the European Union have been established by treaties concluded between their member states. These treaties can be amended only by agreement of the member states at the intergovernmental conference level.²²

¹⁵ R. Narits. Eesti põhiseadus kestab ka uues Euroopas (Estonian Constitution will be preserved in new Europe). – Riigikogu Toimetised 2003 (7), p. 49 (in Estonian).

¹⁶ The case of *Van Gend en Loos* rendered directly applicable only the provisions and acts of the primary law of the European Union; later, the Court of Justice extended such applicability to regulations and to a certain extent also to directives and decisions.

¹⁷ Kohtuasi 26/62, *Van Gend & Loos* (Case 26/62, *Van Gend & Loos*). – Euroopa Kohtu lahendid (Rulings by the European Court of Justice). Koost. J. Laffranque. Tallinn 2001, p. 100 (in Estonian).

¹⁸ Kohtuasi 106/77, *Simmenthal* (Case 106/77, *Simmenthal*). – Euroopa Kohtu lahendid (Note 17), p. 279.

¹⁹ Kohtuasi 6/64, *Costa v. ENEL* (Case 6/64, *Costa v. ENEL*). – Euroopa Kohtu lahendid (Note 17), p. 111.

²⁰ The Finnish legal expert A. Aarnio has made a good point, comparing legislative provisions to a rubber band. The interpreter pulls or releases it depending on the situation. Only when a legislative act cannot be pulled any further — *i.e.*, when it has been extended to its very limits — is it time to solve the problem by issuing new legislative acts. – A. Aarnio. *Laintulkinnan teoria*. Porvoo, Helsinki, Juva 1988, p. 19.

²¹ In order to put this requirement into practice, the Republic of Estonia’s Riigikogu adopted the Enforcement, Revocation, and Amendment of Acts and Their Provisions in Relation to the Accession of the Republic of Estonia to the European Union Act on 14.04.2004.

5. The Estonian government's position on the main values in European Union policy and the objectives set

By its cabinet decision of 4 March 2004, the national government released the draft 'Government's European Union Policy for 2004–2006' for public discussion.^{*23} Being a small country with limited resources, Estonia must make choices and select the areas in which our active participation is important for achieving our goals. By developing the main foundations for it, the government addressed one of its primary wishes, to initiate in Estonia a discussion about Estonia's objectives as a member of the European Union. Hence, this article also offers an opportunity to do this.

It seems highly relevant that the government feels that our participation in the European Union's decision-making process must be as active and broad as possible in order to achieve our objectives. The government will base participation in European Union decision-making processes on particular values.^{*24} Such values include equal opportunities, clarity and citizen-friendliness, welfare and initiative, and exactingness.

The equal opportunities concept means, among other things, that the European Union must ensure equal opportunities also for the new member states and guarantee equal treatment. To achieve this, it is necessary for the new member states to become integrated in all the policy areas and into the decision-making process of the European Union as quickly as possible, while the decision-making process should take account of the individual circumstances of the member states and not hinder the competitiveness of the countries. Equal opportunities as values should definitely include promotion of the free movement of the citizens of the new member states and the new member states' prompt joining of the Schengen area. **Clarity and citizen-friendliness** means for Estonia that the European Union is a union of countries that is open and democratic. The European Union must deserve the trust of citizens in the common European ideas and values. The new Europe will mean a union of countries where extensive consultations are carried out with citizens and their associations. The problem is that involvement of interest groups that stand outside state agencies in legislative drafting is increasingly recommended for updating legislation^{*25}, and this would be founded on the dialogue between various interest groups in society. A dialogue between citizens and the state, in any state, is made possible by law, an inherent feature of which is communication (as law functions in part as a communication system).^{*26} 'The only regulations and measures that may appeal to legitimacy are those to which everyone affected could consent during a rational discourse', says Habermas.^{*27} Democracy is based on a method seeking solutions through open and involving debate, as there is no absolute truth or opinion and the central features of democracy are hence intersubjectness and process.^{*28} There is some way to go yet, at least in Estonia. This concerns increasing of citizens' trust in the administration of the state and development of the decision-makers' understanding of liability — that it is impossible to mimic participatory democracy: it either exists or it does not.^{*29} **Welfare and initiative** are such values in the government's vision, which serve as a key to European success. For improving welfare, the European Union must create possibilities above all for small and medium-sized enterprises to increase their competitiveness and pay considerably more attention to the promotion of education, research and innovation, and introduction of scientific achievements in practical economics. The development of Europe must be sustainable and take account of

²² All the institutions of the Union, as necessary, participate in creating the secondary Community legislation. Secondary law is created only in the cases prescribed by primary law. The main decision-maker and body adopting legislation is the Council. According to the core rule of legislative drafting, the Commission makes a proposal, whilst the Council regulates or enacts. The Council may deviate from the Commission's proposal only by a unanimous decision.

²³ In the minutes of sessions of the government, the item has been worded as 'Prime Minister's presentation in discussing a matter of significant national importance, the Government's European Union Policy 2004–2006', in the Riigikogu. Available at: www.riik.ee/brf?id=1152 (26.03.2004) (in Estonian).

²⁴ However, it is true that when making a presentation during discussion of this matter of significant national importance, entitled 'The Government's European Union Policy 2004–2006', in the Riigikogu on 6 April 2004, Prime Minister Parts referred to the values specified in the document as regards principles: "When acting in the European Union, the government will proceed from four principles". Available at: www.riigikogu.ee/ems/stenogramm/2004/04/t04040 (30.03.2004) (in Estonian).

²⁵ M. Lagerspitz jt. Olelemisest osalemiseni? Eesti kodanikulagatuse hetkeseis ja arenguvõimalused (From existence to participation? Current situation concerning civil initiative in Estonia and its development potential). – Akadeemia 2000/2, p. 271 (in Estonian).

²⁶ R. Narits, K. Merusk (Note 1), p. 101.

²⁷ J. Habermas. Postscript to Faktizität und Geltung, 20 Philosophy and Social Criticism. 1994, p. 137 (reference in A.-K. Lindblom. The Legal Status of Non-Governmental Organisations in International Law. Uppsala 2001, p. 28).

²⁸ *Ibid.*

²⁹ K. Mänd. Mittetulundusühingute kommentaarid koostöömemorandumile (Comments of non-profit associations on co-operation memorandum). – Riigikogu Toimetised 2000 (2), p. 239 (in Estonian).

the needs of both the weaker members of society and the environment. **Exactingness** as a value means that Estonia's European policy places high demands on both ourselves and our partners. The achievement of goals based on common European interests presumes that all the member states fulfil the obligations assumed exactly and in due course. Only exactingness in pursuing the established goals can lead to success. Estonia promises to perform the tasks assumed and expects the same of others.

Considering the values described above and shaping its policy in line with them, Estonia hopes to make a positive and constructive contribution to the development of Europe. Just as each nation-state can act and operate in a legal environment, so can the European Union as an association of states function on the basis of legal rules. By setting out its main values in the document describing the Estonian government's policy concerning the European Union in the near future, Estonia specifies the guiding principles from which it proceeds in increasing political decisiveness as a European Union member state.

The Estonian government's policy in the European Union, which has been founded on certain underlying values, attempts to promote the common interest through pursuing five objectives. These are: Europe must be competitive and open; Europe must follow efficient economic and budgetary policy; European development must be economical and sustainable and ensure balanced and coherent development in the economic, social, and environmental realms; Europe must come closer to its citizens and ensure their safety and security; in order to safeguard the interests of its member states, Europe must contribute to ensuring democracy, human rights, security, and well-being throughout the world; a broader Europe must be a stronger Europe.

6. Analysis as an essential predecessor to legal policy choices

Legal policy choices cannot be made, nor political decisiveness characteristic of good law making practice increased, figuratively speaking, in a vacuum. Such choices can be made only based on extensive background knowledge. In 2001, the Chancellery of the Riigikogu organised an ECPRD³⁰ seminar titled 'Regulatory Impact Assessment in Legislation' in Estonia. It should be noted that participants arrived from 26 European countries. Co-operation with the ECPRD network is highly important, as the main goal of the co-operation network is to supply the members of both the European Parliament and other parliaments with the necessary data, comparative surveys, and documents necessary for our/their increasingly international work. The first seminar, dedicated specifically to the problems related to the analysis of legal policy choices, was held in 2002 and was titled 'How to Make Good Laws?'. Its aim was to notify the members of the Riigikogu of the arrangements concerning the regulatory impact analysis of the European Union and OECD countries in shaping knowledge-based regulatory legal policy and to initiate the relevant discussion in Estonia. The committees of the 10th composition of the Riigikogu, which co-ordinate the Estonian legal order (Constitutional and Legal Affairs Committees), decided to organise a parliamentary hearing in November 2003. The circle of people preparing the issues to be discussed was expanded in January 2004, and letters were sent to the Prime Minister and other ministers of the Estonian government as well as the Legal Chancellor, Auditor General, Chief Justice of the Supreme Court; the rectors of four public universities; and the directors of five research centres.³¹ Although the parliamentary hearing had not yet taken place at the time the article was written (May 2004), some general conclusions can nonetheless be drawn on the material collected.

Below, we would like to discuss the replies submitted by the ministries. The first reason for this is that the length of the article does not allow for the examination of the responses of all the institutions, and the second is that the bulk of the regulatory work is carried out by the ministries. Thus, the replies submitted by the ministries specify the areas in which and the research units from which surveys, analyses, and expert assessments have been ordered over the last few years. The variation in the different legal, social, humanitarian, natural, and technical sciences and in the connections between these disciplines give some sense of the complicated nature of compilation of the rules for regulatory impact analysis — to which we have already referred — even though the compilation process itself is determined by the regulatory methods and is relatively universal.³² It was heartening to learn that units engaged in addressing the social and economic

³⁰ European Centre for Parliamentary Research and Documentation. For further information about the information and analysis services of the parliaments, see A. Kasemets. *Parlamentide info- ja koostöövõrgud* (Information and co-operation networks of parliaments). – Riigikogu Toimetised 2003 (7), pp. 181–188 (in Estonian).

³¹ The working papers related to the preparation for the parliamentary hearing have been published on the Riigikogu Web site. Available at: <http://www.riigikogu.ee/?id=10986> (28.04.2004) (in Estonian).

³² For example, most ministries do not have a structure for co-ordinating the *ex ante* and *ex post* regulatory impact analysis and monitoring the trends in European Union issues. Nevertheless, all the ministries employ officials responsible for compliance with the rules for drafting legislation of general application.

impact of policies/legislation exist in the Ministry of Social Affairs, of Economic Affairs and Communications, of Finance, of Agriculture, and of Education and Research, which are best prepared for conducting the *ad hoc* regulatory impact assessment and ordering of surveys.^{*33}

In relation to the preparation for the hearing to be arranged in the Riigikogu, all the ministries were requested to present an example, of their choosing, of the process used for preparation, processing, and implementation of a legislative act of significant social and economic impact that was adopted in the Riigikogu. On the basis of an example of one legal act, it was possible to obtain a brief but key overview of the situation of the analytical support system of regulatory analysis and the methods of regulatory impact analysis that are applied. The example regulatory descriptions selected by the ministries may be examined in the context of good law making practice as relevant examples or experience. The letters sent to the ministries included six questions: 1. Were any institutional or international guidelines used for the analysis of the social and economic, budgetary, demographic, environmental, and other impact of the legislative act? 2. What were the composition and qualification of the working group preparing the legislative act? 3. What kind of databases, preliminary surveys, expert assessment, and other tools were used? 4. What regulatory impact analysis methods were applied? 5. What kind of agencies, research centres, and citizens' associations were notified and involved? 6. How will the *ex post* regulatory impact analysis be carried out, and what is the method for providing feedback?^{*34}

If we try to form generalisations about the most important answers to the first question, we may note that depending on the legislative acts analysed by the ministries, the list of regulatory documentation and methodological instructions indicated in the responses was impressively lengthy. Thus, we may find from among the instructions the 'Regulatory rules of draft legislative acts' document issued by the Estonian government as well as questionnaires used in the OECD, NATO, and European Union institutions. The proposal received from the Ministry of Justice to add instructions for regulatory impact analysis to the regulations in the 'Regulatory rules of draft legislative acts' was highly relevant.

The practical reason for asking the second question lies in the interdisciplinary nature of regulatory impact analysis, which cannot be adequately covered by working groups consisting solely of lawyers or experts in the field in question.^{*35} On the basis of the replies, it may be said that the minimum ideal has been achieved as regards lawyers and experts. Future prospects allow for optimism here, as the replies of several public universities reveal that they have started to teach assessment of policy/regulatory impact.

The significance of the third question is rooted in the fact that the quality of both the *ex ante* impact analysis in preparing legislative acts and the *ex post* impact analysis of legislation depends on the relevant surveys or the use of surveys already completed. The summary survey conducted on the basis of the enquiries of members of the previous (9th) Riigikogu A. Liiv and I. Tallo indicated that about a third of the surveys and analyses ordered by the ministries in 1999–2001 were in some manner related to legislative drafting and only 3% were spent on behavioural surveys.^{*36}

The feedback to the fourth question revealed that the ministries' descriptions of the legislative examples rather seldom included references to the classical methods of regulatory impact analysis^{*37}. However, it must be added that according to the current coalition agreement, government priorities in the area of regulatory impact analysis include the formation of an integrated analysis system for determining the enterprise impact (objective: economic growth) and social and demographic impact (objective: increase in population growth and decrease of the average age) of legislation.

³³ Proceeding from the provisions of the current coalition agreement (*Res Publica*, Reform Party, People's Union) concerning the revision of the system for surveys ordered by the state, the possibilities for combining the information needs of state surveys and regulatory impact analysis should be considered. As we noted above, the human and financial resources of Estonia tend to be rather limited.

³⁴ For example, the Ministry of Social Affairs chose to analyse the State Pension Insurance Act Amendment Act, the Ministry of Economic Affairs and Communications examined the Register of Economic Activities Act, the Ministry of Finance chose the Income Tax Act Amendment Act, the Ministry of Internal Affairs used the Security Service Act as an example, the Ministry of Education and Research chose the Study Allowances and Study Loans Act, the Ministry of the Environment examined the Waste Act, the Ministry of Foreign Affairs used the Consular Act, the Ministry of Defence examined the Wartime National Defence Act, the Ministry of Agriculture chose the Multiannual Financing Agreement of the Special Accession Programme for Agriculture and Rural Development in the Republic of Estonia Ratification Act (the agreement being concluded between the Commission of the European Communities and the Republic of Estonia), and the Ministry of Justice examined the Bankruptcy Act.

³⁵ The relevant minimum ideal would be as follows: each working group preparing a legislative act should include a lawyer, expert in the field, and linguist. – R. Narits. Seadusloome õigusliku ja regulatiivse mõju hindamine (Legal and regulatory impact analysis for legislative drafting). – Riigikogu Toimetised 2001 (4), pp. 97–101 (in Estonian).

³⁶ A. Kasemets (Note 11), pp. 107–117.

³⁷ The main methods of regulatory impact analysis are cost-benefit analysis, cost-effectiveness analysis, implementation cost analysis, business impact assessment, fiscal or budgetary analysis, risk assessment and risk-risk analysis, environmental impact analysis, social impact analysis, and multi-criterion analysis methods.

The replies to the fifth question indicated that most of the working groups on legislative drafting working in conjunction with the ministries have notified and involved various stakeholders.^{*38} The steps taken by the Ministry of Justice in preparing the Bankruptcy Act are useful. Namely, they consulted professional, informed stakeholders (the Chamber of Notaries, Chamber of Commerce and Industry, etc.), which was a rather practical and affordable option for spotting the interests of the target groups. The consulting principle works well provided that the target group has a sufficient amount of objective information about the possible gains and losses of various target groups and also sufficient resources for preliminary assessment of the regulatory impact.

The feedback to the sixth question proved the clear existence of a plan for *ex post* impact analysis or ordering of a survey following the implementation of the legislation.^{*39}

7. Problems to be solved

Finally, let us examine the proposals of the ministries for organising the system of regulatory impact analysis, intended to ensure the quality of legislative drafting, parliamentary discussion of draft legislative acts, and implementation of law.^{*40} In general, the essence of regulatory impact analysis has not been yet fully acknowledged in Estonia. Such an observation was made in the replies of as many as seven ministries. As long as this situation prevails, it is impossible for good law making practice to be applied in its modern sense. We can see from the table included in the footnotes what specific proposals the ministries have made. I would like to highlight some observations I consider fundamental.

The Ministry of Justice, of Social Affairs, and of Education and Research consider it necessary to establish a centre for co-ordinating regulatory impact assessment. The role of such an institution would be to harmonise the existing regulatory impact analysis practice, provision of guidance, and supervision of the development of regulatory impact analysis. It is their firm position that it would not be expedient on the state level for

³⁸ An analysis of the explanatory memoranda of draft legislative acts with a significant social impact that were submitted to the Riigikogu for consideration indicates that the rate of compliance with clause 53 of the regulatory rules of the Riigikogu, which sets forth the requirements for information and involvement of the target groups appropriate for the scope of application of the legislative act and for the presentation of the processing results is only 23%.

³⁹ The Ministry of Social Affairs uses a survey by Praxis, the Ministry of Finance employs monthly state budget revenue monitoring, the Ministry of Education and Research uses a survey by the Federation of Estonian Student Unions, the Ministry of Agriculture complies with the obligation to assess results as laid out in the European Union SAPARD programme, and the Ministry of Justice performs analysis of judicial practice and monitoring of registers.

⁴⁰ Main categories of proposals and intersection of the replies of the ministries.

Ministry/minister of	Justice	Social Affairs	Econ. Affairs and Comm.	Finance	Internal Affairs	Education and Research	the Environment	Culture	Foreign Affairs	Agriculture	Defence	Population
Proposal												
1. The need and requirements for regulatory impact analysis (RIA) need further clarification and specification	+	+	+			+			+	+	+	
2. It is necessary to establish a unit co-ordinating RIA training and counselling	+	+				+						
3. Co-ordination by the State Chancellery		+										
4. Co-ordination by the Ministry of Justice			+	+								
5. The need for standardising RIA, including the processing of national and EU legislation	+	+	+			+				+		
6. Inclusion of instructions on RIA in the annex to the regulatory rules	+											
7. Joint training sessions on RIA	+								+		+	
8. Co-operation with other EU and OECD countries in RIA training etc.	+		+			+						
9. Each ministry may have its own RIA system, suitable for its field		+	+							+	+	
10. A more RIA-centred approach is required in legislative drafting						+						
11. Association between orders for state surveys and RIA needs						+						
13. Other proposals	+	+				+						

each ministry to handle the issues of regulatory impact analysis separately.^{*41} The Ministry of Economic Affairs and Communications noted that the regulatory drafting tasks of recent years have been mainly related to harmonisation of European Union legislation. This situation has meant that the provisions to be transposed have been ‘prescribed’ and there is either no opportunity or no need for conducting surveys and analyses. However, we have to note that in comparison to national legal orders, the European Union aims in its legislation at unifying legal systems, harmonising legal systems, or co-ordinating legal systems.^{*42} We can speak about prescription only in relation to the regulations that unify legal systems — that is, in the cases where European Union law replaces national legislation. The Ministry of Education and Research considers it necessary to agree on the common methods of regulatory impact analysis and to map the agencies and institutions that are competent in such impact analyses. It is implied that, to date, Estonia has lacked a clear and uniform practice for involving research potential in preparation of legislation and the ordering of relevant surveys. The Ministry of Justice points out that impact analysis is necessary in the context of European Union law at two moments: in participating in the decision-making procedure and upon harmonisation of Estonian law with European Union directives. Such impact analysis is above all in Estonia’s interests. If we respond in due course and in a justified manner, we may be able to affect the development of European Union law. When harmonising the European Union directives with Estonian law, we have to look beyond the text of the directives. It is important to analyse the background of adoption of the legislative acts, and also why and how the other European Union member states have harmonised these acts. We have to take into account that each member state of the European Union has to assess for itself the consequences of one or another legislative act for the state and draw attention to this, if necessary — as a rule, no other member state assesses the impact from an Estonian perspective. The Ministry of Justice also finds that the regulatory impact analysis system should be applied to both national and European Union legislation.

In summary, we may say that it is highly necessary to know the rules of good law making practice today. As legislative drafting as a process is initiated through policy choices and the first rule of good law making practice demands increasing of political decisiveness, taking regulatory impact analysis as the basis for political decisions, Estonian regulatory impact analysis should be revised. We obviously need a central and at the same time balancing institution that would ensue a uniformly high quality of analysis. Methods of regulatory impact analysis should receive more attention.^{*43} The regulatory impact analysis preceding the preparation of a draft legislative act helps improve the quality of legislative drafting and its outcome — the legislative act. It is no coincidence that regulatory problems can be solved mainly through lawyers’ efforts. However, the substantive part of legislative drafting and particularly what concerns modern good regulatory practice as a set of measures and methods definitely requires that the circle of subjects engaging in legislative drafting be expanded. Lawyers alone are not competent to conduct the regulatory impact analysis that is such an integral and increasingly important factor in good regulatory practice.

⁴¹ The Ministry of Justice has attempted to fill the gap to a certain extent by organising roundtable discussions: ‘Regulatory Impact Analysis — How to Continue’ on 4.11.2003; a roundtable discussion dedicated to issues of better regulation on 8.01.2004. The aim of the discussions was to discuss the necessity of regulatory impact analysis, to point out relevant problems, and to determine how to develop the area of regulatory impact analysis in Estonia in the future.

⁴² N. Jääskinen. *Kohanemine Euroopaliku seadusandlusega. Üldisi tähelepanekuid ja Soome kogemusi* (Adaptation to European legislation. General observations and Finnish experience). Helsinki 1996, pp. 11-13 (in Estonian).

⁴³ The Ministry of Justice draws attention to one of the recent excellent regulatory documents: ‘Interinstitutional agreement on better law-making’. — Official Journal of the European Union. — 2003/c 321/01.



Julia Laffranque

Doctor iuris, Justice of the Supreme Court

Dissenting Opinion in the European Court of Justice — Estonia's Possible Contribution to the Democratisation of the European Union Judicial System

1. Introduction. Dissenting opinions in the Supreme Court of Estonia

Estonia has become a member of the European Union. In relation to this, two Estonian judges work in the European Union court system and participate in supranational administration of justice in the European Court of Justice (ECJ) and the Court of First Instance of the European Communities. The judicial practice of the ECJ will definitely benefit from the experience that these judges have gained during their careers in the courts of Estonia, a country that restored democracy not long ago and has, among other things, built up a state based on the rule of law, characterised by ample reform legislation. But there is yet another link between the administration of justice in Estonia and that in the European Union — Estonian courts and judges have become a part of the judicial power of the European Union. Time will tell what the dialogue between the Estonian courts and the ECJ will be like; it is too early to predict how active the Estonian courts will be in seeking preliminary rulings from the ECJ. The co-operation will no doubt be mutually enriching; not only will administration of justice in Estonia become more 'European', but the European Union is in turn likely to find something worth transposing from Estonia.

I would like to focus on one such possible aspect of the Estonian legal system — the opportunity for a judge to present a dissenting opinion. The disclosure of a judge's dissent from the majority opinion is permitted in Estonian court judgements, but this is not allowed in judgements of the ECJ. The European Union as a whole has been criticised for lacking democracy in its judgement procedure, and the criticism is likely justified, considering how decisions are made in the ECJ. A smooth integration of the new member states

into the body of the established members may come under threat when democracy is lacking. The admissibility of dissenting opinions in the ECJ is an issue that has remained intriguing as nobody dares to attempt to change the *status quo* of the ECJ, and thus it has become a taboo area for experts in European law. This article attempts to take pioneering strides in this field and serves as a dissenting opinion on the disallowance of dissenting opinions in the ECJ.

A dissenting opinion is an opinion expressed in a case where a judge who maintains the minority position does not subscribe to the justifications and/or conclusion of the judgement of the majority. As a rule, in Estonia, which belongs to the Continental European legal tradition, judges may maintain a dissenting opinion in administering justice, and the dissenting opinions of judges of the Estonian Supreme Court are published along with the judgements. This is nothing new for Estonian justice, as dissenting opinions were permissible to a certain extent before the Second World War and the concept of dissenting opinions was used even in the procedural codes applicable during the Soviet era. Dissenting opinions have been provided for in the Constitutional Review Proceedings Act¹, Code of Civil Procedure², and Code of Criminal Procedure³, the first being the most precise in its regulation thereof. A judge's expression of a dissenting opinion is common practice in all the chambers of the Supreme Court, especially in the Supreme Court *en banc*. During the period from the first decision of the Supreme Court, in 1993, until 2003, the judges of the Supreme Court have presented a total of 75 dissenting opinions concerning 58 decisions.⁴ The presentation of dissenting opinions shows an increasing rather than a decreasing trend. If there is little precedent or it is contradictory on some points or even backed by poor reasoning, the dissenting opinion of a judge may add to uncertainty. On the one hand, presentation of dissenting opinions may render it difficult for the Supreme Court to direct the other courts, and thus the decision of the Supreme Court may serve as merely one of the arguments in the further development of law. On the other hand, in a new state, a thorough consideration of different positions may only contribute to the interpretation of the Constitution and legislation, filling of the gaps, and establishing of the general principles of law. Not rarely has the Supreme Court had to identify its role in relation with the other Estonian courts and state authorities, especially in its early years. Here the dissenting opinions of the judges of the Supreme Court concerning the nature and functions of the court and the methods of interpretation of constitutional and procedural law, which have facilitated the dynamic interpretation of the Constitution, among other things, serve as an invaluable asset. Dissenting opinions of Supreme Court judges have promoted the internationalisation of justice, relying on the law of other countries as well as on international and European law, among other legal traditions, in their arguments. When some opinions have been too progressive for their day (such as the dissenting opinion supporting abolition of the death penalty and those referring to European Union law)⁵ and considerably more liberal and far-reaching than the majority opinion, the dissenting opinions have also served not just to aid development of the law but also to provide limits to the role of the court and warn the majority against indirect, publicly undeclared

¹ Põhiseaduslikkuse järelevalve kohtumenetluse seadus (Constitutional Review Proceedings Act). – RT I 2002, 29, 174; 2003, 24, 148 (in Estonian).

² Tsiviilkohtumenetluse seadustik (Code of Civil Procedure). – RT I 1998, 43–45, 666; 2003, 23, 140 (in Estonian). An English translation is available at: http://www.legaltext.ee/et/andmebaas/ava.asp?tyyp=SITE_ALL&ptyyp=I&m=000&query=p%F5hiseaduslikkuse (5.07.2004).

³ Kriminaalmenetluse seadustik (Code of Criminal Procedure). – RT I 2003, 27, 166; 83, 558 (in Estonian). An English translation is available at: http://www.legaltext.ee/et/andmebaas/ava.asp?tyyp=SITE_ALL&ptyyp=I&m=000&query=p%F5hiseaduslikkuse (5.07.2004).

⁴ The practice of dissenting opinion in the Supreme Court

Year	Decisions	Dissents	%
1993	8	0	–
1994	305	7	2.23
1995	383	2	0.52
1996	480	8	1.67
1997	472	5	1.06
1998	406	7	1.72
1999	367	1	0.27
2000	425	10	2.35
2001	458	14	3.06

The practice of dissenting opinion in the Supreme Court (as of October 2003)

Procedure	Decisions	Dissents	%
Constitutional review	80	11	13.75
Civil law	1408	26	1.85
Administrative law	473	4	0.85
Criminal law	1848	11	0.60

⁵ R. Maruste eriarvamus (dissenting opinion of R. Maruste), SCEbd 3-1-1-97-96 (RT III 1996, 28, 369); R. Maruste eriarvamus (dissenting opinions of R. Maruste): CRCSCd (3-4-1-3-97 (RT I 1997, 74, 1268), SCEbd 3-1-1-97-96 (RT III 1996, 28, 369) and CRCSCd 3-4-1-4-98 (RT I 1998, 49, 752); U. Lõhmuse eriarvamus (dissenting opinion of U. Lõhmus) CRCSCd 3-4-1-8-00 (RT III 2000, 21, 232) (all in Estonian).

alteration of earlier practice. In this respect, dissenting opinions can be compared to litmus paper and serve as the internal control of the Supreme Court itself in delimiting its competencies.

The dissenting opinion of a Supreme Court judge may, in a sense, have a proactive legislative function, which is manifested both in its influence on future judicial practice, as the dissenting opinion renders it demonstrably easier to alter earlier approaches, and in its legislative force, which is manifested in the consideration by the legislator of the proposal provided in the dissenting opinion. For example, an explanatory memorandum concerning a draft act relied on the dissenting opinion of judges of the Supreme Court.⁶ To sum up, in Estonian law, the dissenting opinion of a judge of the Supreme Court may be viewed as between a decision of the Supreme Court and legal doctrine.

2. The current situation in the European Court of Justice — absence of dissenting opinion, and the reasons for it

Unlike many international and regional courts, such as the International Court of Justice in the Hague, the European Court of Human Rights, the International Tribunal for the Law of the Sea, and the International Criminal Court, the European Court of Justice does not allow for a judge to issue a dissenting opinion. The EFTA Court also excludes dissenting opinions.

The reasons the publication of a dissenting opinion was not desired when the ECJ was founded may be divided into:

- historical reasons,
- organisational reasons and those related to the selection of judges, and
- fundamental and substantial (almost ideological) reasons stemming from the legal policy of the European Union.

The reason related to the establishment of the European Communities/Union, historical development, and the legal orders of the member states influencing it is the absence of the institution of the dissenting opinion in the internal court systems of the founding member states. The founding member states of the European Communities — France, Germany, Italy, Belgium, the Netherlands, and Luxembourg — come from the Continental European legal tradition; even Germany was not familiar with the concept of dissenting opinions at the time, as the judges of the Federal Constitutional Court of Germany were permitted to present dissenting opinions no more recently than nearly 20 years after the establishment of the Court of the European Coal and Steel Community (ECSC). The founding member states had a conservative attitude with respect to the confidentiality of deliberations of the court, and exceptions to it (a judge's issuance of a dissenting opinion was considered one of these) were extremely limited. According to several authors, even today it is self-evident that dissenting opinions are not allowed in the ECJ because of the confidentiality of deliberations.⁷

Interestingly enough, even the later enlargements of the European Union, especially the accession of Great Britain, the home of the dissenting opinion, and Ireland in 1973 (the states acceding later, with the sole exception of Austria, allow for presentation of a dissenting opinion at least in part — in the highest courts, the constitutional courts⁸), were unable to alter the negative attitude assumed to the notion of dissenting opinions in the ECJ. There were attempts to discuss the topic of permitting judges to express dissenting opinions, part of the preparation for the reforms of the ECJ; *e.g.*, at the intergovernmental conference of 1992, the European Parliament proposed that the practice of dissenting opinions be introduced to the system of legal protection of the European Communities.⁹ These attempts have usually failed or been outweighed

⁶ See the explanatory memorandum, prepared in the Ministry of Justice, appended to the Code of Enforcement Procedure, Local Taxes Act, Public Transport Act, Traffic Act, and Code of Misdemeanour Procedure Act Amendment Act, adopted on 11.12.2002 (RT I 2002, 110, 654) in its draft stage, which relied on dissenting opinion appended to the decision of the Supreme Court *en banc* of 7.12.2001 (RT III 2002, 2, 8) and is available from the Public Law Division of the Ministry of Justice, Tõnismägi 5a, Tallinn (in Estonian).

⁷ See J. Boulouis, M. Darmon, J.-G. Huglo. *Contentieux communautaire*. 2^e éd. Paris: Dalloz 2001, p. 155; C. van Reepinghen, P. Orianne. *La Procédure devant la Cour de Justice des Communautés européennes*. Bruxelles: Maison Ferd. Larcier; Paris: Librairie Dalloz, 1961, pp. 56, 57; W. Hackenberg, Ch. Stix-Hackl. *Handbuch zum Verfahren vor dem Europäischen Gerichtshof*. Wien: Verlag Österreich; Baden-Baden: Nomos Verlagsgesellschaft, 1996, p. 148; H. G. Schermers, D. F. Waelbroeck. *Judicial protection in the European Union*. 6th ed. The Hague, London, New York: Kluwer Law International 2001, pp. 736–737.

⁸ See J. Laffranque's thesis 'Kohtuniku eriavamus. Selle võimalikkus ja vajalikkus Eesti Vabariigi Riigikohtus ja Euroopa Kohtus' (The possibility and necessity of judicial dissent (dissenting opinion) in the Supreme Court of the Republic of Estonia and in the European Court of Justice). Tartu: Tartu Ülikooli kirjastus 2003, pp. 208–210 (in Estonian).

⁹ Resolution on the Intergovernmental Conferences in the context of the European Parliament's strategy for the European Union. — OJ No. C 324, 1990, p. 219 ff., particularly 231.

by negative final reports.^{*10} The reasons for this are, above all, rooted in the fact that the judicial power of the European Union is still in its structure — the main model being the highest administrative court in France, the Council of State (*Conseil d'Etat*) — and in its proceedings, but also in the style of its judgements as well as other aspects, very strongly influenced by French law. When following the examples of the member states' law, the ECJ has proceeded from the best possible choice, which would be most efficient in contributing to the development of European Union law. For example, *de facto* case law based on precedents was introduced to the ECJ long before the accession of the common law countries while the issuance of dissenting opinions that is also characteristic of the common law countries was not accepted, and thus the Roman legal tradition was followed.

The reasons for the absence of dissenting opinions that relate to organisation depend on the appointment of judges, the guarantee of the independence of judges, the term of office of the judges, and the structure of the judgements of the court. The judges of the ECJ are appointed by common accord of the governments of the member states. The theoretical double legitimisation from the home state and the European Union is purely formal and is not effected in practice, as the member states always approve of the candidates put forth by the other member states and thus each country in fact selects its own candidate. Hence, the appointment of judges is not democratic enough from the standpoint of the European Union as a whole.

A judge may not represent his or her country in the ECJ but rather must be an independent 'European judge', who is obliged to administer justice according to his or her best knowledge and conscience in accordance with the treaties serving as the basis for the European Union and the spirit of the law of the European Union. The judges of the ECJ are bound by an oath, according to which the judge shall perform his or her duties impartially and conscientiously and preserve the secrecy of the deliberations of the court.^{*11}

As judges are appointed for a term of six years and may be re-elected an unlimited number of times (article 223 of the Treaty establishing the European Community (EC))^{*12}, there is a danger that a judge may depend on the member state appointing him or her, regardless of the requirement for judges to remain independent. It is theoretically possible that judges who desire to be re-elected will attempt to please their governments, which, if dissenting opinions were allowed, could be manifested both in issuance of a dissenting opinion for the protection of the judge's member state and *vice versa*, in avoiding issuance of a dissenting opinion unfavourable to the member state. For example, when former German Chancellor Kohl publicly criticised the stance of the ECJ on social security, this clearly exerted pressure, whether deliberate or not, on the German judge of the ECJ.^{*13}

As regards the style of the judgements of the ECJ, their structure represents a synthesis: the judgements are relatively short, which would not always provide sufficient information for counter-arguments to be raised in a dissenting opinion.

The reasons for the absence of dissenting opinions that relate to the principles and legal policy of the European Union, or even ideological reasons, as they might be termed, arise from the fact that the ECJ as a supra-national body above states and nations differs from the ordinary international courts because of its special tasks. According to article 220 EC, the main task of the ECJ is to review the activities of the institutions and member states of the European Union in their application of European Union law in cases of disputes and thereby to interpret and develop European Union law. Hence, the ECJ always has the last say in interpreting the European Union law and deciding on its validity, which ensures legal integration within the European Union. However, according to some authors, dissenting opinions could jeopardise the uniform interpretation of law.^{*14} It would be very difficult for the ECJ to perform its tasks if it were distracted by various national solutions offered in the dissenting opinions of individual judges. Therefore, since the establishment of the ECJ, the publication of a judge's dissenting opinion was sacrificed for the sake of upholding the authority of the new legal order, and the intention also was to avoid internal conflicts within the institutions concerned. At the same time, the ECJ, in contrast to international courts, did not have a problem with its formal authority, as its judgements have been binding on and enforceable for the member states from the very start.

¹⁰ See Délégation des barreaux de France, Conférence intergouvernementale 1996. Suggestion dans les domaines juridictionnel et quasi-juridictionnel. La question des opinions dissidentes dans les arrêts. (Parlement européen: 1997) Available at: http://www.europarl.eu.int/hearings/igc2/doc75dfr_fr.htm (20.05.2004).

¹¹ Statute of the European Court of Justice (applicable version: Official Journal of the European Communities (OJ) No. C 325, 24.12.2002, p. 167) art. 2; Rules of Procedure of the European Court of Justice 19.06.1991 (OJ No. L 176, 04.07.1991, p. 7; L 176, 04.07.1991, p. 7; L 383, 29.12.1992; L 44, 28.02.1995, p. 61; L 103, 19.04.1997, p. 1; L 351, 23.12.1997, p. 72; L 122, 24.05.2000, p. 43; L 122, 19.12.2000, p. 1; L 119, 27.04.2001, p. 1; L 272, 10.10.2002, p. 24; L 147, 14.06.2003, p. 17) art. 3.

¹² The references are made to the Nice version of the Treaty establishing the European Community; henceforward, the articles have been cited according to the method of citation introduced by the Court of Justice and the Court of First Instance with effect from 1 May 1999.

¹³ R. Dehousse. La Cour de Justice des Communautés européennes. Paris: Montchrestien 1994, p. 15.

¹⁴ See, e.g., A. P. Sereni. Les opinions individuelles et dissidents des juges des tribunaux internationaux. — Revue Générale de Droit International Public 1964, p. 844; F. G. Jacobs. Advocates-General and Judges in the European Court of Justice: some personal reflections. *Liber Amicorum* in Honour of Lord Slynn of Hadley. — Judicial Review in European Union Law. D. O'Keeffe (ed.). The Hague-London-Boston: Kluwer Law International 2000, p. 25.

Of the reasons that dissenting opinions are absent, the organisational reasons are related to the permissibility of presenting dissenting opinions in the ECJ, while the principal reasons are related to uncertainty as to the necessity of presenting dissenting opinions in the ECJ.

2.1. Opinion of the advocate-general as a replacement for the dissenting opinion

In order to compensate for the lack of a dissenting opinion, the institution of the advocate-general (*Generalanwalt* in German, *avocat général* in French) was established in the ECJ, which is unknown to the majority of the members of the European Union, including Estonia, and the direct model of which may be considered to be the *commissaire du gouvernement*, the office instituted by the French *Conseil d'Etat* in the middle of the 19th century. The institution of the advocate-general was introduced to the future European Community's law on the initiative of France. The French delegation participating in drafting the Treaty establishing the European Coal and Steel Community argued for the need to establish the role of advocate-general in view of his or her possible contribution to the development of judicial practice and legal doctrine.^{*15} One of the two first advocates-general of the ECJ, Mr. Lagrange, who himself participated in the drafting of the Treaty establishing the European Coal and Steel Community, points out French opposition to permission of dissenting opinions in the ECSC Court as an additional (or the real) motive for the establishment of the advocate-general in the judicial system of the European Communities.^{*16}

According to article 222 EC, it shall be the duty of the advocate-general, acting with complete impartiality and independence, to make, in open court, reasoned submissions on cases brought before the ECJ, in order to assist the court in the performance of the tasks assigned to it.

At first, two advocates-general worked for the ECJ; with the enlargement of the European Communities and later of the Union, the number of advocates-general has increased to eight. The enlargement of 2004 did not automatically increase the number of advocates-general. Rather, the new member states adopted a joint declaration annexed to the Final Act of Accession according to which should the European Court of Justice so request, the Council, acting unanimously, may increase the number of advocates-general in accordance with article 222 EC and article 138 EA and otherwise the new member states will be integrated into the existing system for their appointment.^{*17} Both that it has not been indicated how large the number of advocates-general may be and that their number was not increased at the most recent opportunity are regrettable. The new member states should at least have been granted a certain number of advocate-general positions to share amongst them; now, the new member states have to wait for years before they can appoint their own advocate-general. To date, the five large member states (Germany, France, Italy, the United Kingdom, and Spain) have always had one advocate-general's post each, with the remaining advocates-general appointed alternately from the small member states. Henceforth, unless the total number of advocates-general is increased, a general system of rotation should be applied at least to these eight positions, one under which the smaller member states would receive equal treatment with the large member states and the representation of the large member states would not be automatic. This would be a significantly more democratic solution than the current one.

Although advocates-general are elected in the same way as judges and have a similar position to the judges, the opinion of an advocate-general does not replace the dissenting opinion of a judge and does not sufficiently clarify the background for the judgement, as advocates-general do not participate in deliberations. Unlike the dissenting opinion of a judge, the opinion of an advocate-general is an obligation, not a right, and this is presented before the judgement is made. While a dissenting opinion depends on a ruling as the basis for a response, the advocate-general cannot see the ruling of the ECJ at the time of preparing his or her opinion. Unlike the dissenting opinion of a judge, the proposals of the advocate-general can be taken into consideration by the court, and, although the opinion is not binding, it usually has a significant effect on the deliberations. This creates an interesting dilemma — an advocate-general cannot see the judgement but can affect it, whereas a judge maintaining a dissenting opinion can see the ruling but cannot affect it beyond perhaps influencing the disposition of future cases. Coming prior to the ruling as it does, the opinion of an advocate-general is hardly more efficient than the dissenting opinion of a judge, which comes after the judgement, just as it is unlikely that, instead of exporting the practice of dissenting opinions to the ECJ, Estonia should import the institution of the advocate-general into the Supreme Court.

¹⁵ Rapport de la délégation française sur le traité instituant la Communauté Européennes. — *Revue International de droit Compare* 1974, see also A. Barav. Le commissaire du gouvernement près le Conseil d'Etat français et l'avocat général près la Cour de justice des Communautés européennes. — *Revue International de droit Compare* 1974 (26), p. 819.

¹⁶ M. Lagrange. L'organisation, le fonctionnement et le rôle de la Cour de Justice des Communautés européennes. — *Bulletin de l'Association des juristes européennes* 1963 (13–14), pp. 12–13.

¹⁷ Declaration annexed to the Final Act of Accession. — RT II 2004, 3, 8 (p. 1072) (in Estonian).

The advocate-general is not supposed to discuss the case with the judges sitting on the same case and especially not with the judge rapporteur assigned to the case. However, according to Rasmussen it is no secret that such consultations do take place in practice from time to time, and thus the advocate-general and judge rapporteur may agree to the ECJ making a specifically different judgement from that of the advocate-general, in order to determine which is more conducive to the development of law and solicit legal experts' comments.^{*18} Nothing prevents an advocate-general from criticising earlier practice and recommending more daring solutions. For example, in the case *Café Hag II*, when advocate-general Jacobs found that the ECJ should not adhere to the precedent set in the first *Café Hag* case, the court took account of Jacobs's opinion and altered its stance.^{*19}

Of course, opinions of advocates-general only have the connotation of a dissenting opinion when the reasons and/or outcome do not match the majority's view as expressed in the judgement. About 15% of the court's judgements are made contrary to the opinion of the advocates-general, which is not much.^{*20} Tridimas points out the areas where there is consensus between the positions of the advocates-general and those of the court — a notable area of consensus is for example in the case law concerning state liability in damages for breach of Community law, whereas in recent years there has been diversity of views between the ECJ and advocates general in the free movement of goods but also in the questions about the horizontal legal effect of directives and the general principles of European Union law.^{*21} When the first advocates-general held office, the ECJ decided to publish the opinions of advocates-general by means of a decision of the Registrar according to the Instructions to the Registrar and now they are published before the text of the judgement in the European Court Reports.^{*22} Just like a judge offering a dissenting opinion, an advocate general is more independent in his or her opinion than a collegial court: he or she may boldly compare the law of different member states and use the positions of various lawyers with attribution. Thus, similarly to the dissenting opinion of a judge, the opinion of an advocate-general may also serve as a comment and topic for further academic discussions regarding the various specific issues of European law. For example, the opinions of advocate-general Lagrange have been cited more often than the judgements of the court itself during his tenure.^{*23}

In the literature, two important functions have been ascribed to the opinion of advocates-general — to serve in a way as the first instance (this approach mostly applied until the Court of First Instance came into existence) and to replace dissenting opinions.^{*24} One cannot fully agree with respect to either of the functions. The entry into force of the Treaty of Nice creates the possibility that where the ECJ considers that the case raises no new point of law, the Court may decide, after hearing the advocate-general, that the case shall be determined without a submission from the advocate-general.^{*25} Therefore, the opinion of the advocate-general can be compared to permission of dissenting opinions only in higher and/or constitutional courts and only on issues concerning the interpretation of important constitutional acts.

Nevertheless, one need not take such an extreme view as to doubt the necessity of advocates-generals' opinions as a whole. If advocates-general are involved in adjudication of only more important matters, and, in addition, the parties to the dispute are provided with an opportunity to decide whether they want the opinion of an advocate-general or would rather waive that right (as is not currently the case)^{*26}, the system of the ECJ could reasonably accommodate both the opinion of an advocate-general and the dissenting opinion of a judge, since they do not overlap.

¹⁸ Rasmussen claims that this was done in ruling 238/81 of the European Court of Justice (*C.I.L.F.I.T.*). – ECR 1982, 3415. See H. Rasmussen. *The European Court of Justice*. Copenhagen: Gad Jura, Thomson Information 1998, p. 69.

¹⁹ Judgement C-10/89 (*SA CNL-SUCAL NV v. HAG GF AG*) of the European Court of Justice. – ECR 1990, I-3752.

²⁰ See R. Streinz. *Europarecht*. 6. Aufl. Heidelberg: C.F. Müller 2003, p. 127 (Randnummer 328).

²¹ T. Tridimas. *The role of the advocate general in the development of community law: some reflections*. – *Common Market Law Review* 1997 (34), pp. 1371–1380.

²² Article 24 of the Instructions to the Registrar. – OJ No. L 350, 28.12.1974, 33, as amended by OJ No. C 286, 13.11.1986, 4.

²³ See Funeral Oration for Maurice Lagrange, a former Member of the Court, delivered by the (former) President of the Court Lord Mackenzie Stuart, on 3 October 1986. Synopsis of the work of the Court of Justice of the European Communities in 1986 and 1987 and record of formal sittings in 1986 and 1987. Luxembourg 1990, p. 202.

²⁴ Regarding advocates-general as the first instance of the court, see K.-D. Borchardt. *Der Europäische Gerichtshof: Besetzung, Anrufung, Zuständigkeiten, Vorabentscheidungen und einstweiliger Rechtsschutz*. Kommentar zu den Art 220–245 EGV mit Textanhang; aktualisierter Auszug aus den EG-Kommentar. 2. Aufl. C. O. Lenz, K.-D. Borchardt (Hrsg.). Köln: Bundesanzeiger 2000, p. 59; O. Riese. *Erfahrungen aus der Praxis des Gerichtshofs der Europäischen Gemeinschaft für Kohle und Stahl*. – *Deutsche Richterzeitung* 1958, p. 271. Regarding opinions of advocates-general as dissenting opinions, see G. Grementieri. *Il processo comunitario, principi e garanzie fondamentali*. Milano 1973, p. 71; W. Feld. *The Court of the European Communities: A New Dimension in International Adjudication*. The Hague: Martinus Nijhoff 1964, p. 100; U. Klink. *Der Gerichtshof der Europäischen Gemeinschaften – Aufbau und Arbeitsweise*. 1. Aufl. Baden-Baden: Nomos 1989, p. 62.

²⁵ Statute of the European Court of Justice, article 20, section 5.

²⁶ See ruling C-17/89 of the European Court of Justice (*Ermesa Sugar v. Aruba*). – ECR 2000, I-665.

3. The possibility and necessity of dissenting opinions in the European Court of Justice

Presentation of dissenting opinions is not directly prohibited in the ECJ; *i.e.*, it has not been stated *expressis verbis* in any of the legal acts concerned that the judges of the ECJ must not express dissenting opinions. Articles 35–37 of the Statute of the ECJ, generally applicable with regard to EURATOM and the EC, the newest version of which was adopted and entered into force together with the Treaty of Nice, which prescribe that deliberations of the court shall be and shall remain secret, judgements shall state the reasoning on which they are based, contain the names of the judges who took part in the deliberations, and be signed by the President and the Registrar, may be viewed as one of the potential sources of law for the disallowance of dissenting opinions. Article 64 (2) of the Rules of Procedure of the ECJ specifies, further, that the original of the judgement shall be signed by all the judges who took part in the deliberations — *i.e.*, also those who voted against. The strictest evidence of the impossibility of a dissenting opinion is article 27 of the Rules of Procedure of the ECJ, which regulates deliberations. According to this provision, the court shall conduct deliberations in closed session by majority of votes. Although every judge taking part in the deliberations shall state his or her opinion and the reasons for it, differences of view on the substance, wording, or order of questions or on the interpretation of the voting shall be settled by decision of the court or a relevant chamber.

What would have happened if in the 1970s, after the enlargement of the European Communities to include the common law countries, all the English judges to join the ECJ practised the presentation of dissenting opinions in the ECJ? Would this have been regarded as contrary to European law, or would their dissenting opinions have been published? Now that a judge offering a dissenting opinion is considered generally impossible in the ECJ, it would probably not suffice if the judges of the new member states would start to issue dissenting opinions without legal foundation for doing so. Consequently, the question arises of whether legal bases — the treaties establishing the European Communities, the Statute of the ECJ, the Rules of Procedure of the ECJ, *etc.* — should be supplemented/amended to permit dissenting opinions in the ECJ.

Obviously, there would be no need to provide for the dissenting opinion of a judge in the EC Treaty (to be replaced by the Treaty establishing a Constitution for Europe), as these documents do not specify rules for judgement and secrecy of deliberations. The possibility of permitting dissenting opinions explicitly in the founding treaties could be considered if the intent is to validate this institution with the force of constitutional law in order to ensure the independence of judges; however, the European Union is unlikely to be ready for that yet. Nevertheless, the possibility of publishing the dissenting opinion of a judge could be specified through an addition to article 2 of the Statute of the ECJ, near the text specifying the oath of office of a judge as an exception to the secrecy of the deliberations, or in article 36 where regulation concerning judgement is set forth, and the concept could be addressed as well in articles 27 and 63 of the Rules of Procedure of the court. Would this suffice, or should the rules governing the work of the judges and the court be changed as well, after the introduction of dissenting opinions in the ECJ?

Although the dissenting opinion of a judge is permitted in, *e.g.*, the European Court of Human Rights, whose judges may be re-elected, the provisions concerning the appointment of the judges of the ECJ, particularly those concerning their term of office and re-election, should be amended and supplemented. The judges of the European Court of Human Rights are elected by the Parliamentary Assembly of the Council of Europe, while selection of the judges of the ECJ depends almost fully on the candidates' 'home' member state. The discussion circle of the Convention on the Future of Europe concerning the Court of Justice found in its final report of 25.03.2003 that the *status quo* could be maintained as regards the term of office; however, the discussion circle indicated openness to the introduction of a non-renewable 12-year term for the judges.²⁷ The Treaty establishing a Constitution for Europe does not provide for the alteration of the term of office of judges.²⁸ If the change were made and the judges of the ECJ were appointed for, *e.g.*, a non-renewable nine year-term (the optimum), there would be no impediments to permission of dissenting opinions. However, according to article III-262 of the new Treaty establishing a Constitution for Europe a panel shall be set up in order to give an opinion on candidates' suitability to perform the duties of judge and advocate-general of the ECJ and the Court of First Instance (will be re-named as the High Court) before the

²⁷ CONV 636/03 Circle I 13, p. 3. Available at: http://european-convention.eu.int/doc_register.asp?lang=EN&Content=CERCLEI (18.06.2003).

²⁸ Draft Treaty establishing a Constitution for Europe as of 18.07.2003 (later on agreed at the Meeting of Heads of State or Government, in Brussels, 17/18 June 2004), Chapter 4 of Title I, the European Union's institutions, art. I–28. Available at: <http://european-convention.eu.int/docs/Treaty/cv00850.en03.pdf> (19.04.2004). The draft Treaty establishing a Constitution for Europe still stipulates (art. III-262) that judges are appointed by agreement between the member states only after the Council of the European Union consults a special panel, whose members are chosen from among the former members of the European Court of Justice and the Court of First Instance, representatives of the higher courts of the member states, and lawyers of recognised competence and persons selected on the basis of a proposal of the European Parliament.

governments of the member states make the appointments. The panel shall comprise seven persons chosen from among former members of the ECJ and the High Court, members of national supreme courts and lawyers of recognised competence, one of whom shall be proposed by the European Parliament. Hopefully this system which will be applied in the future, as the Treaty establishing a Constitution for Europe will enter into force, will make the appointment of the judges of the ECJ more transparent and democratic.

The permissibility of dissenting opinions and, equally, the actual practice of issuing dissenting opinions may be restricted by the fact that the working language of the ECJ, in which the rulings are first formalised, is French and that thus the judge maintaining a dissenting opinion must formalise it on the basis of the French ruling. Neither is it certain whether the judge could prepare a dissenting opinion in the language of his or her own country or should do it in French; the latter would serve as an impediment to dissenting opinions by judges who are less proficient in French, whereas Francophone judges are not accustomed to the tradition of preparing dissenting opinions. Translation of dissenting opinions into all the official languages of the European Union would require additional time.

Even before the 2004 enlargement, the ratio between those supporting and opposing the institution of dissenting opinions of European Union judges, proceeding from the law and practice of the member states, was 9:6 in favour of the countries permitting dissenting opinions.^{*29} In all of the ten new member states except to a certain extent Latvia^{*30} and Lithuania, the dissenting opinion of a judge is recognised mainly in constitutional courts and/or supreme courts. Further to this, candidate countries Bulgaria and, to some extent, even Romania hold a relatively favourable attitude to dissenting opinions, which are also allowed in the constitutional courts of Turkey and Croatia.^{*31} Consequently, taking into account that the idea of a judge publishing a dissenting opinion is not entirely unfamiliar to the majority of the member states, and if legal bases are provided for the practice by additional provisions and by changing the terms of office to ensure that dissenting opinions do not jeopardise the independence of the judge, and if the dissenting opinion can actually be matched with the current form and style of judgements, dissenting opinions can be permitted in the ECJ. But are they necessary in the ECJ?

The European Union is a union guided by the rule of law and founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law (article 6 EU). Democracy is also characterised by an open discourse and public debate between the courts and the society; unfortunately, the ECJ is too entangled in its own procedures, captured in its own case law and traditions, sometimes unable to notice how poorly reasoned or contradictory its judgements are. Perhaps the pursuit of artificial unanimity is to be blamed, among other things. Healthy self-criticism in the form of dissenting opinions would help to maintain the institutional balance in the European Union. Sir Slynn, a former advocate-general and judge of the ECJ, speculated, when leaving the ECJ in 1992, that the time would come when dissenting opinions of judges would be permitted in the ECJ as the European legal order matures.^{*32} So far, contrary to the claim that the 'embryonic' nature of the European Union law requires that the judgements of the ECJ be consistent and based on consensus^{*33}, the ECJ, known as the *motor* of European integration, has achieved sufficient authority, and with the accession of new countries, the European Union has a unique opportunity to prove the democratisation of the Union in the ECJ as well. The new member states, particularly Estonia, where the concept of a judge presenting a dissenting opinion is widely recognised, could directly contribute to the democratisation of the ECJ, which would not simultaneously erode but rather reinforce the position of small countries (such as Estonia). The judges who have maintained dissenting opinions often analyse more thoroughly the law of the other member countries, favouring comparative legal treatment in the ECJ. It would be an overreaction to fear that the dissenting opinion of a judge would jeopardise successful adaptation to the judicial system of Europe on the part of the countries that have newly acceded to the European Union. The dissenting opinion of a judge is hardly likely to jeopardise the uniform interpretation and application of European Union law or undermine the principle of legal certainty, for the judgements of the majority, not dissenting opinions, would be decisive and binding.

²⁹ For: Germany, Finland, Sweden, Denmark, Spain, the United Kingdom, Ireland, Greece, Portugal; against: France, Italy, the Netherlands, Belgium, Luxembourg, Austria. This relation holds if partial permissibility of dissenting opinions (permissibility only in higher or constitutional courts) and the somewhat marginal position of Denmark are taken into account.

³⁰ Indeed, dissenting opinions are allowed in the Latvian Constitutional Court, but according to § 33 (2) of the Constitutional Court Act, dissenting opinions are published only in the collection of judgements, published once a year, not with the judgement after the issuing thereof.

³¹ See J. Laffranque's thesis 'The possibility and necessity of judicial dissent...' (Note 8), pp. 208–210.

³² See Sir Slynn. European Court of Justice, formal hearing 10.03.1992. Court of the European Communities. Report of Proceedings 1992–1994. Synopsis of the work of the Court of Justice and of the Court of First Instance of the European Communities. Luxembourg 1995, pp. 92–93.

³³ See, e.g., for 1978: A. Bredimas. *Methods of Interpretation and Community Law*. Amsterdam, New York, Oxford: North-Holland Publishing Company 1978, pp. 14–15 and even for 2002: F. G. Jacobs. *Advocates General and Judges in the European Court of Justice: some personal reflections. Liber Amicorum in Honour of Lord Slynn of Hadley. – Judicial Review in European Union Law*. D. O'Keeffe (ed.). The Hague, London, Boston: Kluwer Law International 2000, p. 25.

Through the analytical effect of the dissenting opinion of a judge, each judge could make his or her own contribution to the construction of the European Union and ensure respect for the freedom of opinion of judges. Lord Mackenzie Stuart, a former president of the European Court of Justice, did not say in vain upon his retirement from office that '[the European] Court of Justice, at least as far as the judges are concerned, is collegiate one. It speaks with a single voice. It is perhaps ironic that only at the moment of departure is a judge permitted to express an individual view.'³⁴

The dissenting opinion of a judge yields a positive effect only when it is not abused and if its objective is not to foreground the judge as a person. In order to avoid such and other possible abuses of dissenting opinions in the ECJ, a thorough analysis must be conducted to determine the extent to which the protection of the principles — democracy, accessibility, efficient administration of justice, the personal dignity of a judge, and other benefits — is proportional in the European Union court system. Should a judge be allowed to offer a dissenting opinion in all types of proceedings in the ECJ?

In the case of proceedings to establish whether a member state has failed to fulfil an obligation under the EU law (article 226 EC), there is a danger that the judge from the accused member state may always maintain a dissenting opinion. This would, on the one hand, undermine the independence of the judges, but on the other hand, if judges from the member state concerned were deprived of the right to maintain a dissenting opinion, the equality of judges would come under threat. Such a situation could be avoided, at least partially, by amending the provisions concerning the term of office of the judges of the ECJ and their re-election; also, the cases could be divided up so as to avoid the involvement of a judge in proceedings concerning failure to fulfil an obligation on the part of his or her home state. At the intergovernmental conference of 1996, the delegation of French lawyers, who generally maintained a negative attitude toward dissenting opinions, considered dissenting opinions permissible only in cases concerning compensation for damages caused by the institutions of the European Union and its servants in the performance of their duties arising from non-contractual liability, justifying this with the paucity of written European Union law in this area.³⁵ Dissenting opinions would definitely be suitable in the light of the opinion of the court issued on the basis of article 300 (6) EC, just as it is permissible to maintain a dissenting opinion with regard to the advisory opinions of the International Court of Justice in the Hague. Thus, certain types of proceedings may be more suitable and involve fewer risks where dissenting opinions are concerned, yet the fewer dangers accompanying dissenting opinions, the less useful they are. Consequently, dissenting opinions should be preferred in principled disputes, where dissenting opinions may influence future judicial practice and the general principles of law. Thus, perhaps it is not reasonable to permit a judge to offer a dissenting opinion in the Court of First Instance, or, all the more so, in the specialised judicial panels created by the Treaty of Nice, where appending a dissenting opinion to the judgement could delay the proceedings. It would certainly be unreasonable to permit a mere declaration of a dissenting opinion in the ECJ without reasoning being provided in said opinion, although this is permitted in some international courts.

Naturally, it is more difficult to establish dissenting opinions in the ECJ than it is to maintain the already existing tradition; however, the transfer could be carried out smoothly. There are several options for that:

- publicly, there are no dissenting opinions, but the judge of the ECJ who maintains a dissent can write down his or her disagreeing opinion, and it is included in the judicial records that can be accessed only by the members of the court when adjudicating similar matters;
- the results of the voting on the judgement are made public but without indicating the names of the judges (including the dissenters); or
- the content of the dissenting opinion is indicated in the text of the judgement.

In fact, such an option as the last is not unknown to the judicial system of the European Union. In settling disputes falling within the jurisdiction of the Enlarged Board of Appeal related to issues concerning the competence of the European Patent Office and granting of patents, according to article 12a of the Rules of Procedure of the board, the opinions of the minority may also be indicated in the decision of the board, provided that the majority agrees.³⁶ At the same time, the reasons or conclusions of the Enlarged Board of Appeal may not set out the number or names of the minority judges. Finally,

- the most radical but the most efficient way would be to publish the dissenting opinions of the minority judges anonymously during the transfer period, providing them separately at the end of the judgement.

³⁴ Address by Lord Mackenzie Stuart, (former) President of the Court of Justice of the European Communities, on the occasion of his retirement from office. Synopsis of the work of the Court of Justice and the Court of First Instance of the European Communities in 1988 and 1989 and record of formal sittings in 1988 and 1989. Luxembourg 1990, p. 201.

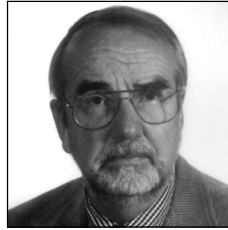
³⁵ See Délégation des barreaux de France (Note 10).

³⁶ Official Journal of the European Patent Office (EPO OJ) 1983, 3; 1989, 362; 1994, 443.

Thereafter, a partial introduction of dissenting opinions into the judicial system of the European Union could be considered, at least for constitutional disputes, as this is permitted by the constitutional courts of the member states. In addition to the political will of the member states, this also presumes finding a solution to the heavy workload of the ECJ, which will certainly be relieved by specialised judicial panels, and the clear evolution of the structure of the European court system, according to which the ECJ in its narrower sense would focus only on adjudication of important fundamental matters concerning constitutional issues and general principles of law. The developments accompanying the Treaty of Nice and the Treaty establishing a Constitution for Europe let us predict that henceforth, the ECJ could develop into a body properly resembling a constitutional court of the European Union. Also, the question of the necessity of dissenting opinions may arise in relation to its possible effect on the relationship between the ECJ and the constitutional courts of the member states, such as in relation to communication concerning the Treaty establishing a Constitution for Europe.

In addition to the above-mentioned points, there is yet one more reason that partial permissibility of dissenting opinions should be considered in the ECJ. Namely, after the possible accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms (as set for in the article I-7 section 2 of the Treaty establishing a Constitution for Europe), the European Union may become a state party to the convention, and the European Union would then be subject to the jurisdiction of the European Court of Human Rights in issues concerning the convention. As is widely known, dissenting opinions are allowed in the European Court of Human Rights. Although the European system for legal protection of human rights, established on the basis of the European Convention on Human Rights, signed in 1950 and entering into force in 1953, and the European Court of Human Rights, which acquired permanent status later on (1.11.1998) by replacing the existing part-time court and commission by a single full-time court, were created almost in parallel to the ECJ, founded by the Treaty establishing the European Coal and Steel Community, signed in 1951 and entering into force in 1952, the courts are not fully comparable with each other. Among other bodies, the International Court of Justice in the Hague may be considered to be a model for the European Court of Human Rights, whereas in the case of the ECJ, the *Conseil d'Etat*, mentioned above, played a similar role. There were more founding states involved with the European Court of Human Rights than there were for the ECJ, including several from the common law countries; the similarities and differences in the appointment of judges had already been discussed; and, additionally, unlike the ECJ, the European Court of Human rights lacks the position of advocate-general. However, certain differences between the international/regional court of human rights and the ECJ do not excuse the impermissibility of dissenting opinions in the latter. On the contrary, the European Court of Human Rights could serve as an example to the ECJ here, for would it not be incomprehensible and contradictory if dissenting opinions were permitted in one court and not in another within the same mechanism for the protection of human rights in Europe?

In conclusion, when used in moderation, the option of offering dissenting opinions may not only be permissible in the ECJ but also necessary in certain circumstances. Estonia could consider taking an initiative in introducing the publication of the dissenting opinions of the judges of the European Court of Justice. Estonia as a new member state of the European Union would thus have an extraordinary opportunity to succeed in importing the institution of an open judicial dissent to the European Union and to contribute thereby to the process of democratisation of the European Union.



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Europäisierung des Privatrechts – vom Beruf unserer Zeit für ein Europäisches Privatrecht^{*1}

Einführung

Gustav Boehmer, einer der großen Gelehrten der vormaligen Rechts- und Staatswissenschaftlichen Fakultät der Universität Freiburg in Deutschland, pflegte seiner Vorlesung „Einführung in das Bürgerliche Recht“ eine persönliche Erinnerung voranzustellen: Er habe mit einer Gruppe Kommilitonen aus Greifswald (Deutschland) in der Nacht vom 31.12.1899 zum 1.1.1900 ein Freudenfeuer entzündet und, um dieses Feuer tanzend und singend, das zum 1.1.1900 in Kraft getretene neue Bürgerliche Gesetzbuch für das Deutsche Reich begrüßt.

Werden wir in der voraussehbaren Zukunft Freudenfeuer entzünden, um ein neues Europäisches Zivilgesetzbuch zu begrüßen? Wird sich damit der Traum eines Eurocode erfüllen, den Juristen wie Raymond Saleilles und Edouard Lambert schon im Jahre 1900 auf dem 1. Kongreß für Rechtsvergleichung anlässlich der Weltausstellung in Paris vorgestellt haben?^{*2} Wohl eher nicht, obwohl es auffällige Parallelen zwischen der Entwicklung in Deutschland im 19. Jahrhundert und der Entwicklung Europas in der zweiten Hälfte des 20. und im angebrochenen 21. Jahrhundert gibt. Ihnen möchte ich hier nachgehen, freilich zuweilen in recht groben Strichen skizzierend und juristische Details so vereinfachend, daß sie auch für den nichtjuristischen Leser von Interesse sein könnten.

¹ Leicht veränderte Fassung eines Vortrags, den der Verfasser am 21. November 2003 vor der Wissenschaftlichen Gesellschaft der Universität Freiburg/Deutschland gehalten hat. Der Titel spielt an auf die berühmte Streitschrift Friedrich Carls von Savignys, *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft*, aus dem Jahre 1814.

² Vgl. hierzu und zur weiteren Entwicklung dieses Traums C. Witz, *La longue gestation d'un code européen des contrats*. – *Revue trimestrielle de droit civil* 2003, S. 447–454.

I. Vereinheitlichung des Privatrechts in Deutschland im 19. Jahrhundert

Wenn wir uns die Situation des Zivilrechts in Deutschland im 19. Jahrhundert, das heißt in dem 1815 entstandenen Deutschen Bund, diesem mit bundesstaatlichen Elementen durchgesetzten Staatenbund, vergegenwärtigen, dann ist die Rechtszersplitterung in viele Partikularrechte³, die zunächst auch nach der Reichsgründung 1871 fortbestand und erst mit dem Bürgerlichen Gesetzbuch am 1.1.1900 endete, für den Rechtszustand im Deutschland des 19. Jahrhunderts kennzeichnend. Aber „der Kampf für nationale Rechtseinheit gehört(e) zu den beherrschenden Themen deutscher Geschichte im 19. Jahrhundert“⁴, und er hatte schon 1814 mit Anton Friedrich Justus Thibauts Streitschrift „Über die Nothwendigkeit eines allgemeinen bürgerlichen Rechts für Deutschland“ begonnen. Ich bin weder berufen noch kompetent, die Frontstellungen nachzuzeichnen, die sich in diesem Kampf im 19. Jahrhundert gebildet hatten, etwa zwischen Thibaut und Friedrich Carl von Savigny über die Frage eines Gesetzbuches oder eines weitgehend der Wissenschaft überantworteten Rechts in Fortentwicklung historischer Grundlagen, zwischen Romanisten und Germanisten, usw., doch ist ein Argument Thibauts erinnerenswert, das auch am Ende des 20. und Beginn des 21. Jahrhunderts von Befürwortern einer europäischen Rechtsvereinheitlichung zitiert wird⁵: Die Vielfalt von Rechtsordnungen verursacht und erhöht Rechtsfindungskosten und andere Transaktionskosten, muß doch bei einem Fall, der Grenzen eines Rechtsgebiets überschreitet, zunächst einmal das sog. Kollisionsrecht oder internationale Privatrecht befragt werden, also Rechtsregeln, die uns sagen sollen, welches Recht im Falle einer Grenzüberschreitung anwendbar ist. Das war zu Beginn des 19. Jahrhunderts von Land zu Land verschieden, zumeist ungeschrieben und eine Geheimwissenschaft weniger Spezialisten, und wenn man nach diesem unsicheren Regelwerk schließlich das anwendbare materielle Recht ermittelt hatte, war – dies der zweite Schritt der Rechtsfindung – auch dieses materielle Recht oft fremd und erklärungsbedürftig. Das – so Thibaut – „[störte] die friedliche Sicherheit des Bürgers tausendfältig und [füllte] nur den Juristen die Taschen“. Thibaut fuhr fort: „Die Einheit des Rechts würde dagegen den Weg des Bürgers von dem einen Lande in das andere ebnen und sicher machen und schlechte Anwälde würden nicht mehr Gelegenheit finden, bey dem Verkauf ihrer Rechtsgeheimnisse die armen Ausländer schändlich auszusaugen und zu mißhandeln.“⁶

Vermutlich wäre der Streit der Gelehrten um das Ob und Wie einer Vereinheitlichung des deutschen Privatrechts ein solcher geblieben, wenn nicht zwei Entwicklungen als Treibsätze für die Ausbildung eines einheitlichen Bürgerlichen Rechts gewirkt hätten: Zum einen fielen aufgrund des Deutschen Zollvereins 1833, insoweit vergleichbar der Gründung der Europäischen Wirtschaftsgemeinschaft im Jahre 1957, die wichtigsten tarifären Hindernisse für den Handelsverkehr in Deutschland, zum anderen führte die Erfindung der Eisenbahn und der Bau eines Eisenbahnnetzes in Deutschland, für den der Name Friedrich Liszt steht, aber auch die Einführung des Morsetelegraphen ab 1836 zu einer enormen technischen Erleichterung für den Warenverkehr und der dafür erforderlichen Kommunikation der Akteure des Waren- und Rechtsverkehrs, vergleichbar den technischen Entwicklungen des Transport- und Kommunikationswesens in Europa nach dem 2. Weltkrieg. Die erwähnten Reibungsverluste durch Rechtsverschiedenheit wirkten sich deshalb zunehmend stärker aus und ließen den Ruf nach Reformen, nach Rechtsangleichung oder -vereinheitlichung, zu einer Forderung der „bürgerlichen Unternehmerklasse“ werden⁷, die sich natürlich auch schon damals besser Gehör verschaffen konnte als Rechtsprofessoren. Aber gerade auch die Wissenschaft machte mit vielfältigen Initiativen auf die Notwendigkeit einer Rechtsvereinheitlichung aufmerksam und unterbreitete Vorschläge, wie diese zu erreichen sei.

Ob die Organe des Deutschen Bundes die legislative Kompetenz zum Erlass eines Zivilgesetzbuches hatten, war unsicher; jedenfalls ging nach 1848 die überwiegende Meinung wohl dahin, daß der Bund als solcher nicht zur Beschlußfassung über Fragen des Zivilrechts zuständig war.⁸ Die sog. Paulskirchenverfassung von 1848 hatte freilich in ihrem Art. 64 eine Kompetenz der „Reichsgewalt“ u.a. auch für das „bürgerliche,

³ Ausweislich der Angaben in der 1896 von Th. G. Fischer & Co. publizierten Rechts- und Gerichts-Karte und dem zugehörigen Orientierungsheft (Neubearbeitung D. Klippel (Hrsg.), Goldbach 1996) gab es außer den 9 „großen“ Rechtsordnungen Allgemeines Preußisches Landrecht, Gemeines Recht, Französisches Recht, Sächsisches Recht, Dänisches Low, Jütisch Low, Friesisches Recht, Badisches Landrecht und Württembergisches Landrecht noch 315 weitere kleine Partikularrechte, insgesamt also 324 Rechte, die sich freilich zuweilen nur wenig und nur in einzelnen Rechtsgebieten unterschieden.

Der Verfasser dankt Frau Gianna Burret, Institut für Rechtsgeschichte und geschichtliche Rechtsvergleichung – Germanistische Abteilung – der Freiburger Albert-Ludwigs-Universität für die verdienstvolle Ermittlung dieser Zahlen.

⁴ Laufs. Rechtsentwicklungen in Deutschland. 1973, S. 165.

⁵ O. Lando. Braucht die Europäische Union ein Zivilgesetzbuch? – RIW 2003, S. 1 ff.

⁶ S. A. Fr. J. Thibaut. Ueber die Nothwendigkeit eines allgemeinen bürgerlichen Rechts für Deutschland. Heidelberg 1814, S. 22 ff., S. 32 ff.

⁷ Vgl. für die Rolle der „bürgerlichen Unternehmerklasse“ in der Vereinheitlichung des Verkehrsrechts Wieacker. Privatrechtsgeschichte der Neuzeit. S. 462 ff.; Laufs (Fn. 2), S. 166.

⁸ Laufs (Fn. 2), S. 167; Mitteis, Lieberich. Deutsche Rechtsgeschichte. 14. Aufl. S. 305.

Handels- und Wechselrecht“ vorgesehen, und tatsächlich hatte die Nationalversammlung 1848 auf der Grundlage entsprechender Vorarbeiten zwischenstaatlicher Kommissionen bereits eine „Allgemeine Deutsche Wechselordnung“ (WO) zur Vereinheitlichung des Wechselrechts erlassen – ein wirtschaftspolitisch wichtiges Gesetz, waren doch Wechsel damals die einzigen Instrumente des bargeldlosen Zahlungsverkehrs, und es bedarf keiner weiteren Ausführungen um zu erkennen, daß bei einem von einem Kaufmann in Karlsruhe ausgestellten, auf eine Berliner Bank gezogenen und an einen Stuttgarter Gläubiger begebenen Wechsel die Notwendigkeit, zunächst einmal zu prüfen, ob und inwieweit badisches, württembergisches oder preußisches Wechselrecht anwendbar war, und was diese Rechte jeweils beinhalteten, eine erhebliche Erschwerung des bargeldlosen Zahlungsverkehrs bedeutete.

Ob diese Wechselordnung als Reichsgesetz in Kraft treten konnte, ob also die Nationalversammlung eine entsprechende Gesetzgebungskompetenz hatte, ist streitig, wird heute aber wohl überwiegend verneint. Aber diese WO der Nationalversammlung war mit dem Scheitern dieses ersten gesamtdeutschen Parlaments nicht tot, sondern sie wurde in der Folge von allen deutschen Ländern sowie von Österreich und Liechtenstein aufgrund der jeweiligen eigenen Gesetzgebungskompetenz der Länder in einem Verfahren eingeführt, für das wir heute den Begriff der Parallelgesetzgebung verwenden. Gleiches geschah mit dem Handelsrecht: Auf der Grundlage von Arbeiten einer Kommission, eingesetzt von der Bundesversammlung, wurde ein Allgemeines Deutsches Handelsgesetzbuch verfaßt und 1861 vom Bundestag „gutgeheißen“⁹, implementiert als Gesetz aber wurde es von den Einzelstaaten einschließlich Österreichs im Wege der Parallelgesetzgebung.

Noch weitergehend waren die Bemühungen um eine Vereinheitlichung des Obligationenrechts insgesamt, also des Regelwerks, das vertragliche Transaktionen über Güter im weitesten Sinne steuern und ihren Schutz gegen Beeinträchtigung oder Verlust erreichen soll. Diese Bemühungen hatten im sog. „Dresdener Entwurf“ von 1866 ihren Niederschlag gefunden, der dann von den Gesetzgebungsarbeiten für ein deutsches Bürgerliches Gesetzbuch überholt wurde, diese aber stark beeinflusste. Denn mit der Reichsgründung und der Reichsverfassung war der Prozeß der Rechtsvereinheitlichung in eine neue Phase getreten, insbesondere, als im Jahre 1873 durch zwei Novellen zur Reichsverfassung, die zunächst nur eine Kompetenz für das Obligationenrecht enthalten hatte, eine Reichskompetenz für das gesamte Bürgerliche Recht geschaffen worden war, auf deren Grundlage dann das BGB als reichseinheitliches Gesetz erlassen werden konnte.¹⁰

II. Internationale Vereinheitlichung des Privatrechts im 20. Jahrhundert

Das deutsche Bürgerliche Gesetzbuch ist also ein Einheitsrecht, und in Deutschland wurde damit nachvollzogen, was andere europäische Nationalstaaten schon früher erreicht hatten, Frankreich etwa mit dem Code Civil von 1804, Österreich mit Allgemeinen Bürgerlichen Gesetzbuch von 1811, und was in der Schweiz zeitlich in etwa parallel verwirklicht wurde. Die Entwicklung auf nationaler Ebene wiederholte sich im 20. Jahrhundert auf der internationalen Ebene: Wieder war es zunächst das Wechselrecht, um dessen internationale Vereinheitlichung man sich schon 1906 bemüht hatte und die man mit den Genfer Wechsel- und Scheckrechtsübereinkommen 1930/31 erreichte. Natürlich gab und gibt es keinen internationalen Gesetzgeber, der solch vereinheitlichtes Recht hätte in Kraft setzen können, sodaß auch hier der Weg der Parallelgesetzgebung zu gehen war, d.h. die Staaten setzten die Genfer Wechsel- und Scheckgesetze als nationales Recht in Kraft, wozu sie sich freilich durch Unterzeichnung der völkerrechtlichen Konventionen, die diese Einheitsgesetze „trugen“, verpflichtet hatten. Auch die grenzüberschreitende Beförderung von Personen und Gütern wurde in einer Reihe von internationalen Abkommen vorallem in der ersten Hälfte des vergangenen Jahrhunderts auf einheitsrechtliche Grundlagen gestellt – die Notwendigkeit, bei grenzüberschreitenden, viele Rechtsgebiete berührenden Beförderungen mit Eisenbahnen, Schiffen, Flugzeugen und Kraftfahrzeugen einheitliche Rechtsnormen anwenden zu können, liegt auf der Hand. Aus den 20er Jahren stammen auch die ersten Bemühungen um eine internationale Vereinheitlichung des Rechts des grenzüberschreitenden Warenverkehrs, die zunächst im Jahre 1964 zu ersten einheitsrechtlichen Abkommen, den sog. Haager Kaufgesetzen geführt haben, und die schließlich 1980 in ein auf einer Vollversammlung der Vereinten Nationen verabschiedetes Einheitskaufrecht mündeten, das heute in 62 Staaten der Welt gilt. Für solche Rechtsvereinheitlichungsprojekte auf internationaler Ebene gibt es sogar ein Beispiel für Berechnungen zur Höhe von Transaktionskosten, die durch Rechtsvereinheitlichung eingespart werden können, also sozusagen die mögliche Rechtsvereinheitlichungsdividende: Die – noch nicht in Kraft getretene – sog. Cape Town Convention aus dem Jahre 2001¹¹ soll die Besicherung, d.h. die Verwendung als Kreditsicherheit, von Flugzeugen, Eisenbahn-

⁹ S. Laufs (Fn. 2), S. 170.

¹⁰ Hierzu statt aller Laufs (Fn. 2), S. 226 ff.

¹¹ Convention on International Interests in Mobile Equipment (Cape Town, 2001), www.unidroit.org, UNIDROIT conventions.

zügen und Weltraumfahrzeugen vereinheitlichen – eine auf der Hand liegende Notwendigkeit, da bei solchen Objekten national begrenzte und von Land zu Land unterschiedlich geregelte Sicherheiten im juristischen Sinne wenig Sicherheit im wirtschaftlichen Sinn bieten, was Kredite entsprechend verteuert. Zwei Ökonomen der INSEAD haben ausgerechnet, was eine weltweite Vereinheitlichung der Sicherheiten an Ersparnis bringen könnte, und sollen einen Betrag von 4 Milliarden \$ pro Jahr errechnet haben, und die Export-Import Bank der Vereinigten Staaten soll kürzlich eine Herabsetzung ihrer Risikoprämien um ein Drittel für die Finanzierung von Flugzeugen für Käufer aus solchen Ländern in Aussicht gestellt haben, die die erwähnte Cape Town Convention in Kraft setzen.^{*12}

III. Rechtsangleichung und -vereinheitlichung in der Europäischen Gemeinschaft

Die Rechtsvereinheitlichung auf internationaler Ebene ist bisher nur sektoral erfolgt und wird wohl in der überschaubaren Zukunft sektoral bleiben, also durch Parallelgesetzgebung auf bestimmte Rechtsgebiete und Transaktionen wie Beförderung, Warenkauf, Factoring, Sicherungsgeschäfte u.ä. in völkerrechtlichen Verträgen vereinbart oder durch Modellgesetze veranlaßt, beschränkt bleiben. Für den durch die Europäische Wirtschaftsgemeinschaft, später Europäische Gemeinschaft geschaffenen und immer enger zusammen wachsenden Wirtschaftsraum könnte freilich anderes gelten, und ich habe ja bereits auf die Ähnlichkeit bestimmter Rahmenbedingungen hingewiesen: Wegfall tarifärer und nichttarifärer Handelshemmnisse im gemeinsamen Markt und Ausbau der Verkehrs- und Kommunikationsnetze haben in der zweiten Hälfte des 20. Jahrhunderts in Europa eine enorme Steigerung und enge Verflechtung des Wirtschaftsverkehrs bewirkt, für die Unterschiede der Rechtsordnungen zunehmend hinderlich wurden und noch sind. Dabei sind nicht nur die eingangs erwähnten Transaktionskosten, die als Hemmschuh wirken können, zu erinnern – auch hier gibt es schon Beispiele für die Berechnung einer Rechtsvereinheitlichungsdividende^{*13} –, sondern auch die volkswirtschaftlichen Kosten, die dadurch entstehen, daß von Transaktionen über die Grenze hinweg überhaupt abgesehen wird, weil die Rechtslage zu unsicher ist.

Für die Entwicklung in Europa muß man ähnlich wie in Deutschland im 19. Jahrhundert unterscheiden zwischen dem, was völkerrechtlich oder aufgrund der Kompetenz der Organe der Europäischen Gemeinschaften möglich ist – sicher oder umstritten –, und was bisher schon aufgrund mehr oder weniger privater Engagements, vorallem durch Initiativen von Rechtswissenschaftlern aus allen Ländern Europas geschieht, und ob bzw. wo sich diese Entwicklungslinien berühren oder gar konvergieren.

Die europäischen Staaten können natürlich Einheitsrecht in völkerrechtlichen Konventionen entweder nur zwischen EU-Staaten oder über den Kreis europäischer Staaten hinaus mit Drittstaaten vereinbaren und in Vollzug der daraus entstehenden völkerrechtlichen Verpflichtungen im Wege der Parallelgesetzgebung so einführen, wie im 19. Jahrhundert in den deutschen Ländern und Österreich das Allgemeine Handelsgesetzbuch oder die Wechselordnung eingeführt worden sind. Das ist vielfach geschehen, international und auf der Ebene der jetzigen EU-Staaten, doch handelte es sich stets um sektorale Vereinheitlichungen, etwa auf dem Gebiet der Gastwirtschaft durch ein Abkommen der Staaten des Europarats aus dem Jahre 1962 oder auf dem Gebiet der Anerkennung und Vollstreckung von gerichtlichen Entscheidungen, das in der Praxis eng mit materiellrechtlichem Zivilrecht verzahnt ist, durch das sog. Brüsseler Abkommen von 1968 zwischen den damaligen EWG-Staaten, dem sich später im sog. Lugano-Abkommen andere Europäische Staaten angeschlossen hatten und das jetzt durch eine EG-Verordnung abgelöst worden ist. Schritte in Richtung auf ein europäisches Zivilgesetzbuch waren das aber nicht und sollten es auch nicht sein.

Die Organe der Europäischen Gemeinschaften können aufgrund des Vertrages zur Gründung der Europäischen Gemeinschaft vom 24. März 1957 in der Fassung des Vertrages von Amsterdam vom 2.10.1997 Rechtsakte erlassen, die Rechtsangleichung oder –vereinheitlichung bewirken. Solche Rechtsakte sind z.Zt. vorallem Richtlinien – künftig sollten sie nach der vorläufig gescheiterten Europäischen Verfassung „Europäische Rahmengesetze“ heißen – und Verordnungen – künftig „Europäische Gesetze“ –, die in einem hier nicht darstellbaren Verfahren von der Kommission im Zusammenwirken mit Ministerrat und Europäischem Parlament erarbeitet und erlassen werden. Verordnungen, die direkt geltendes Recht setzen (Art. 249 II EGV), sind auf zivilrechtlichem Gebiet noch seltene Ausnahme^{*14} und können hier vernachlässigt werden. Große

¹² Berichtet von Sir R. Goode. Contract und Commercial Law: The Logic and Limits of Harmonisation. – Electronic Journal of Comparative Law (November 2003), vol. 7.4, S. 6, der freilich an dem genannten Betrag von 4 Milliarden \$ Einsparungen Zweifel zu erkennen gibt.

¹³ Die mit der am 8. Oktober 2003 in Kraft getretenen EG-Verordnung über das Statut einer Europäischen Gesellschaft (SE) geschaffene europaeinheitliche Kapitalgesellschaft Societas Europaea soll Kosteneinsparungen für in der EG operierende Unternehmen in Höhe von 30 Milliarden \$ (!) erbringen, s. Thoma, Leuring. Die Europäische Aktiengesellschaft – Societas Euroaea. – NJW 2002, S. 1449, 1450 m.w.N.

¹⁴ Eine wichtige Ausnahme ist die oben Fn.13 bereits erwähnte VO zur Einführung einer Europäischen Aktiengesellschaft SE (Societas Europaea).

Bedeutung haben dagegen Richtlinien, die freilich „umgesetzt“, d.h. vom nationalen Gesetzgeber in Kraft gesetzt werden müssen, um zwischen Privaten Rechtswirkung entfalten zu können, Art. 249 III EGV. Solche Richtlinien gibt es inzwischen in großer Zahl¹⁵, und sie haben erheblichen Einfluß auf die nationalen Zivilrechte gehabt, etwa die Produkthaftungsrichtlinie von 1985, insbesondere aber die in großer Zahl verkündeten Verbraucherschutzrichtlinien, die zu erheblichen Veränderungen im deutschen Zivilrecht geführt haben.

IV. Rechtsangleichung durch Richtlinien?

1. Schwächen der Rechtsangleichung durch Richtlinien

Wird aus diesen Richtlinien ein einheitliches Europäisches Zivilrecht entstehen, werden sie sich, wie manchmal bildlich beschrieben, wie Ölflecken ausbreiten und ineinanderfließen und eines Tages das europäische Rechtsmeer mit einer alles bedeckenden, wenn auch in vielen Farben schillernden Oberfläche überziehen? Sind Richtlinien überhaupt ein geeignetes Instrument für eine weitgehende Vereinheitlichung oder jedenfalls Angleichung des Zivilrechts in Europa? Wenn etwa in Erwägungsgründen für die sog. Verbrauchsgüterkaufrichtlinie ausgeführt wird, daß sie durch Rechtsangleichung des Kaufrechts grenzüberschreitende Käufe von Verbrauchern erleichtern soll, dann wird man an die oben zitierten Worte Thibauts erinnert und möchte diese Frage gern bejahen. Ich glaube aber, daß man sie mit Nein beantworten muß, und dieses Nein muß leider sehr entschieden ausfallen. Man mag schon zweifeln, ob – um ein Beispiel meines englischen Kollegen Sir Roy Goode aufzugreifen – seine Frau sich bei einem Besuch in Rom wirklich vom Kauf eines eleganten Kleides in der Via Condotti abgehalten wird, weil der Kaufvertrag italienischem und nicht englischem Kaufrecht untersteht, daß sie sich aber schneller verleiten läßt, seit das Kaufrecht angeglichen worden ist.¹⁶ Jedenfalls sind Richtlinien als solche nach meinem Urteil ungeeignet, eine funktionsfähige Rechtsangleichung zu erreichen, u.z. aus den folgenden Gründen:

- a) Die Kompetenzen für den Erlass von Richtlinien sind nur punktuell; bei aller Unsicherheit über die Reichweite der Kompetenzen in einzelnen Bestimmungen des EGV fehlt es jedenfalls wohl an einer eindeutigen umfassenden Kompetenz für Rechtsangleichung durch Richtlinien auf dem Gebiet des Zivilrechts. Ob das künftig aufgrund einer Europäischen Verfassung anders sein wird, steht noch dahin.
- b) Aus der punktuellen Natur der Richtlinien folgt ihr entscheidender Nachteil: Sie sind nicht aufeinander abgestimmt, deshalb inkohärent und oft sogar inkonsistent. Selbst Schlüsselbegriffe wie der des Verbrauchers sind zunächst unterschiedlich definiert worden. Richtlinien sind – m.a.W. – handwerklich schlecht, was auch damit zusammenhängt, daß es keine einem Gesetzgebungsministerium wie in Deutschland das Bundesministerium der Justiz, das auf Konsistenz der Gesetzgebung zu achten hat, vergleichbare Einrichtung gibt; der juristische Dienst der Kommission ist viel zu schwach besetzt, um diese Aufgabe effektiv zu leisten. Inkonsistenz wird nicht nur durch unterschiedliche Zielsetzungen einzelner Richtlinien bewirkt, sondern auch dadurch, daß die für die Ausarbeitung von Entwürfen zuständigen Referenten aus verschiedenen Rechtskreisen kommen und zumeist die vertrauten Strukturen und Zentralbegriffe des eigenen Heimatrechts bewußt oder unbewußt bevorzugen, was dann später im Rechtsetzungsverfahren oft nicht oder jedenfalls nicht mehr vollständig korrigiert werden kann, zumal es ja auch an europäeinheitlichen Grundstrukturen und Zentralbegriffen für ein Zivilrecht, auf die man zurückgreifen könnte, fehlt.
- c) Schließlich werden Richtlinien bei ihrer Umsetzung in nationales Recht oft, ja fast immer den jeweiligen nationalen juristischen Begriffen und Konzeptionen angepaßt und können dabei ihre Bedeutung verändern; die nicht seltenen Verfahren, die die Kommission gegen Mitgliedsländer wegen inkorrektur Umsetzung von Richtlinien anstrengt, sind ein Beleg hierfür. Auch weichen die nationalen Gesetzgeber bei Richtlinien, die nur Mindestvorgaben machen, oft voneinander ab, so daß etwa ein Verbraucher im Ergebnis in Portugal, England oder Frankreich doch wieder ganz andere Rechte, etwa im Falle einer mangelhaften Kaufsache, hat als in Deutschland.¹⁷

¹⁵ Für eine Auflistung der zivilrechtlichen Richtlinien und Verordnungen s. Entschließungsantrag des Europäischen Parlaments über die Annäherung des Zivil- und Handelsrechts der Mitgliedsstaaten (KOM(2001)398-C5-0471/2001-2001/2187 (COS)) Abschnitt I.

¹⁶ S. R. Goode, Contract and Commercial Law: the Logic and Limits of Harmonization. – Electronic Journal for Comparative Law (November 2003), vol. 7.4, sub II. 3. S. 9.

¹⁷ Während etwa in Portugal der Endverbraucher einen direkten Anspruch gegen den Hersteller der mangelhaften Ware hat, muß er sich in Deutschland stets an seinen (End)verkäufer halten, der seinerseits dann bei seinem Lieferanten Regreß nehmen kann.

2. Schaffung eines Referenzrahmens

Die Nachteile der inkohärenten Entwicklung des Europäischen Gemeinschaftsprivatrechts sind bekannt. So hatte das Europäische Parlament bereits in einem Bericht vom 6.11.2001 ganz im Geiste Thibauts beklagt: „Die gegenwärtige Topographie, die die Wirtschaftsteilnehmer vorfinden, wenn sie grenzüberschreitend tätig werden wollen, ist gekennzeichnet durch das große Meer des Internationalen Privatrechts, in dem sich einige größere oder kleinere Inseln des europäischen Gemeinschaftsrechts befinden. Sobald die Rechtswender die sicheren Häfen verlassen, drohen ihnen entweder die Untiefen der ungelösten Konflikte der einzelnen Privatrechtsordnungen oder die mangelnde Abstimmung von Europarecht und Internationalem Privatrecht. An manchen Stellen wiederum droht die offene See völlig zu verlanden, denn das nur an einzelnen Konfliktsituationen ausgerichtete Richtlinienrecht zerstört langfristig die innere Ausgewogenheit der nationalen Zivilrechtssysteme“.^{*18} Die Organe der EG wollen diesen erkannten Mangel jetzt beheben: Die Kommission hat, ausgelöst durch die vom Europäischen Rat, d.h. den vereinigten Staats- und Regierungschefs der Mitgliedstaaten 1999 in Tampere an die Kommission gerichteten Aufforderung zur Schaffung eines europäischen Rechtsraums, und als Ergebnis eines mit einer „Mitteilung zum Europäischen Privatrecht“ vom 11.7.2001 begonnen Konsultationsprozesses am 12. Februar 2003 eine Mitteilung an den Rat und das Europäische Parlament versandt über einen Aktionsplan für „Ein kohärentes Europäisches Vertragsrecht“.^{*19} Dabei geht es vor allem darum, die berichteten Unstimmigkeiten im Gemeinschaftsprivatrecht, also im vor allem durch Richtlinien geschaffenen *acquis communautaire*, zu beseitigen, freilich (noch) nicht durch die Schaffung eines Europäischen Zivilgesetzbuchs, sondern durch Ausarbeitung eines Referenzrahmens einheitlicher Grundsätze und Zentralbegriffe im Vertragsrecht. Der Beschränkung auf das Vertragsrecht hat das Europäische Parlament in seiner Stellungnahme vom 9. Juli 2003^{*20} widersprochen und, seine früheren weitergehenden Forderungen zur Schaffung eines Europäischen Zivilgesetzbuches aufnehmend^{*21}, eine Ausweitung des Referenzrahmens auf weitere Gebiete des Zivilrechts, gefordert. Vereinfacht möchte das Parlament Grundstrukturen und Kernbegriffe eines gemeineuropäischen Obligationenrechts einschließlich bestimmter Gebiete des Sachenrechts geschaffen und bereits ab 2006 durch „Europäische Gesetzgebung zur Anwendung der gemeinsamen Rechtsgrundsätze und -terminologie“ in Kraft gesetzt sehen.

Freilich ist noch nicht geklärt, ob und wie dieser „Referenzrahmen“, wie weit auch immer er gespannt sein wird, verbindlich werden soll.^{*22}

V. Der Beitrag der Rechtswissenschaft

Neben und parallel zu diesen Entwicklungen auf der Ebene der für europäische Rechtsetzung zuständigen Organe gab und gibt es aber eine Vielzahl von privaten, teilweise auch von Organen der EG, insbesondere dem Parlament vor allem moralisch unterstützten Gruppen von Rechtswissenschaftlern, die Entwürfe für ein Europäisches Schuldrecht, ein Europäisches Vertragsrecht, ein Europäisches Deliktsrecht, kurz für weite Bereiche eines zu vereinheitlichenden Zivilrecht erarbeiten oder schon vorgelegt haben.^{*23} Besondere Bedeutung haben die von einer Gruppe um den Kopenhagener Professor für Handelsrecht Ole Lando erarbeiteten Prinzipien eines Europäischen Vertragsrechts, die „European Principles of Contract Law“, die gleichsam einen allgemeinen Teil eines europäischen Vertragsrechts in gesetzesförmige Regeln fassen und – mit Einschränkungen – mit dem erwähnten „Dresdener Entwurf“ aus dem Jahre 1866 vergleichbar sind. Zu nennen sind ferner Secola, die Society of European Contract Law, von dem Erlanger Kollegen Grundmann gegründet, und vor allem die von Christian von Bar, Osnabrück, initiierte Study Group for a European Civil Code, der etwa 60 Wissenschaftler aus allen EG-Mitgliedsstaaten und einigen Beitrittsstaaten angehören – aus Estland wirkt der bekannte Rechtswissenschaftler Professor Paul Varul von der Universität Tartu mit –, und deren Arbeit durch Zuwendungen vieler Sponsoren, insbesondere nationaler Stiftungen, ermöglicht worden ist.

Zwischen dem erwähnten Aktionsplan der Europäischen Kommission und diesen Gruppen gibt es nun einen z.Zt. sehr aktuellen Zusammenhang: Der Aktionsplan sieht vor, daß der erwähnte Referenzrahmen bis 2008 geschaffen werden soll, und daß die Grundlage dafür durch privat erarbeitete Entwürfe zu legen und diese Arbeiten und aus dem sog. 6th Research Framework Programme – kurz FP6 – zu finanzieren sind. Die

¹⁸ Bericht über die Annäherung des Zivil- und Handelsrechts der Mitgliedsstaaten v. 6.11.2001, A5-0384/2001 (Begründung).

¹⁹ Einzelheiten zur Vorgeschichte dieses Aktionsplans und seinem Inhalt s. Schmidt-Kessel. Auf dem Weg zu einem Europäischen Vertragsrecht. – RIW 2003, S. 481–487, zu den Möglichkeiten seiner legislativen Umsetzung s. Najork, Schmidt-Kessel. – GPR 2003, S. 5–11.

²⁰ A5-0256/2003.

²¹ S. Resolution A2-157/89, OJ C 158 v. 26.6.1989, S. 400, und resolution A3-0329/94, OJ C 205 v. 25.7.1994, S. 518; Resolution C5-0471/2001-2001/2187 (COS), OJ C 140E v. 13.6.2000, S. 538.

²² Hierzu Najork/Schmidt-Kessel (Fn. 19).

²³ Nachweise i.E. bei Schmidt-Kessel (Fn. 19). – RIW 2003, S. 483 f.

interessierten Gruppen hatten dafür in einer Art Ausschreibungsverfahren ihre Vorschläge bis Mitte Dezember einzureichen, und 2004 soll entschieden werden, wer den Zuschlag bekommt – und dann entsprechend viel Geld aus dem erwähnten Programm erwarten kann, sodaß das Kürzel FP6 inzwischen eine die Arbeiten dieser Gruppen beflügelnde, aber leider auch übermäßig bestimmende Zauberformel geworden ist.

VII. Auf dem Weg zu einem Eurocode?

Ist damit der Weg zu einem europäischen wenn schon nicht umfassenden Zivilrecht so doch Obligationenrecht oder – noch enger – jedenfalls Europäischem Vertragsrecht und damit jedenfalls zu kleinen Freudenfeuern etwa im Jahre 2008 vorgezeichnet? Ich wage zu prophezeien – für manche als Befürchtung, für viele als Erleichterung –, daß dies wenig wahrscheinlich ist. Der Vergleich mit der skizzierten Geschichte der Rechtsvereinheitlichung in Deutschland im 19. Jahrhundert und ihren Entstehungsbedingungen soll meine Skepsis erklären:

1. Die Kompetenzfrage

Zunächst ist – wie in Deutschland bis zur Bismarck'schen Reichsverfassung – die Kompetenzfrage noch unsicher. Ob die angestrebte Europäische Verfassung wirklich eine zureichende Kompetenz enthalten wird oder ob andere Wege begangen werden müssen, um das Ergebnis des Aktionsplans zu einem Europäischen Zivilrecht werden zu lassen, steht noch dahin. Freilich gilt auch hier, daß dort, wo ein Wille ist, auch ein Weg zu einer Kompetenzgrundlage gefunden wird.

2. Vom Beruf unserer Zeit für eine europäische Kodifikation

Größere Bedenken habe ich, ob wir wirklich schon in der Lage sind, ein Europäisches Zivilrecht oder jedenfalls Teile davon, etwa ein Europäisches Vertragsrecht zu kodifizieren. Meine Bedenken speisen sich nicht zuletzt aus den Erfahrungen der Mitarbeit in einigen der erwähnten Gruppen, obwohl diese Unternehmungen vergleichsweise einfach, weil allein wissenschaftlichen Idealen verpflichtet und noch frei von Einflüssen von Interessenten- und Lobbyistengruppen sind, die sicher dann auf den Plan treten werden, wenn konkrete Vorarbeiten für eine Europäische Kodifikation beginnen würden.

Bedenken bestehen zunächst gegen die Idee einer Kodifizierung des Rechts überhaupt, und vieles von dem, was von Savigny in seiner Entgegnung auf Thibaut an Skepsis und Einwendungen gegen den „Beruf unsrer Zeit für Gesetzgebung“ formuliert hatte²⁴, hat auf europäischer Ebene heute eher noch mehr Gültigkeit und Überzeugungskraft: Haben wir überhaupt die Fähigkeit, „ein löbliches Gesetzbuch hervorzubringen“, wo doch unsere Auffassungen in vielen Fragen weit auseinandergehen? Ist nicht das Fehlen einer gemeinsamen Sprache, insbesondere einer gemeinsamen Rechtssprache, ein unüberwindbares Hindernis?²⁵ Und bedeutet Kodifikation nicht immer ein Einfrieren geschichtlich bedingter Lösungen, die sich sehr schnell – wie die Geschichte unseres BGB zeigt – als falsch oder lückenhaft erweisen können, und ein Festschreiben von Überzeugungen, die sich ändern können? Jedenfalls unseren angelsächsischen Freunden wird die Idee einer Europäischen Kodifikation als solcher nur schwer nahezubringen sein, und es nicht verwunderlich, daß in der erwähnten Study Group unsere englischen Kollegen darauf dringen, das für sie anstößige Wort „European Civil Code“ zu ersetzen durch „Restatement of Principles“ oder ähnliches.

Bedenken, ja leidenschaftlicher Widerstand aber sind – anders als bei der Rechtsvereinheitlichung im Deutschen Reich – gegen die Aussicht zu erwarten, das eigene nationale Recht zugunsten eines europäischen Rechts aufgeben zu müssen. Dieser Widerstand ist zunächst ein wenig eigennützig und vorallem – wie bei jeder Rechtsreform – von den Berufsgruppen zu erwarten, die einen Verlust an Herrschaftswissen befürchten; die jüngst in Deutschland verabschiedete Schuldrechtsreform ist ein Beispiel für solche Widerstände. Sir Roy Goode hat diese Motivlage wie folgt formuliert: „*Every scholar, every practitioner, every judge would have to be retrained [...], and would have to be prepared to surrender a substantial slice of hard-won knowledge and experience and return to the law schools; good luck for the law schools, of course, but at what cost to national legal systems [...]*“.²⁶ Oft geht es den juristischen Fachgelehrten auch um Bewahrung

²⁴ F. C. v. Savigny. Vom Beruf unsrer Zeit für Gesetzgebung und Rechtswissenschaft. Heidelberg 1814.

²⁵ Ähnliche Bedenken bei R. Goode (Fn. 16), S. 10.

²⁶ Dagegen ist freilich darauf hinzuweisen, daß uns dieses ständige „Nach-lernen“ ohnehin nicht erspart wird, daß es aber viel schwerer ist, den Inhalt der vielen inkonsistenten Richtlinien und ihrer Umsetzung in nationale Rechte lernend zu verfolgen als den Inhalt einer geschlossenen neuen Kodifikation.

bestimmter dogmatischer Grundsätze des je eigenen Rechts, die zunächst nur bestimmte Sachlösungen verschlüsseln sollten, im Laufe ihrer Geltungszeit aber den Charakter von Glaubenssätzen angenommen haben und nun mit fast religiösem Eifer so verteidigt werden wie vor 500 Jahren die Ansicht, daß die Sonne sich um die Erde drehe; ein Beispiel dafür ist die in unserer Study Group im Dezember zur Entscheidung anstehende Frage, ob die Übereignung kausal mit dem Grundgeschäft oder getrennt, vielleicht sogar unabhängig (abstrakt) vom Grundgeschäft erfolgen soll.

Aber das Beharren auf dem eigenen Recht hat auch tiefere, irrationale Gründe nicht nur für Fachjuristen, sehen doch viele Menschen ihr Recht, ihre Kodifikation als Teil ihrer nationalen Identität, besonders in Ländern mit alten Gesetzbüchern, die in einer bürgernahen Sprache geschrieben sind wie in Frankreich der Code civile in der eleganten Prosa des Portalis. Von Stendahl wird bekanntlich berichtet, er habe oft im Code civil gelesen *pour prendre le ton*; man wird sich zwar schwer vorstellen können, daß Gerhard Hauptmann oder Thomas Mann sich durch Lektüre des BGB auf ihr dichterisches Schaffen eingestimmt haben könnten, aber ich glaube gleichwohl annehmen zu dürfen, daß auch das in einer eher kalten und abweisenden Fachsprache geschriebene deutsche BGB inzwischen als Teil unseres kulturellen Erbes gesehen wird, den man nicht leichthin aufgeben möchte. Und wenn ein französischer Autor die Rechtsvereinheitlicher (in Brüssel) als *uprooted civil servants*, also „vaterlandslose Gesellen“ beschimpft, die nicht einmal ihr eigenes Recht richtig verstünden, und die Idee eines Europäischen Zivilgesetzbuches schlicht als *non-sense* bezeichnet^{*27}, dann ist zu erahnen, welche Formen die Ablehnung eines europäischen Zivilgesetzbuches annehmen könnte, wenn es denn konkrete Gestalt gewinnen und damit erst von vielen Menschen richtig wahrgenommen werden sollte.^{*28} Ein wenig gleicht diese ablehnende Einstellung zur Rechtsvereinheitlichung den zwischen Skepsis und Befürwortung schwankenden Ansichten zur Währungsunion, also den Diskussionen über die Aufgabe des vertrauten Geldes zugunsten einer Währung, von der schwer abzuschätzen war – und ist –, wohin die Reise gehen wird. Andere Autoren haben in einer oft gebrauchten Metapher darauf hingewiesen, daß das eigene Recht wie ein altes Haus sei, in dem man sich einigermaßen kommod eingerichtet habe, obwohl es reparaturbedürftig und schwer zu unterhalten ist, das seinen Bewohnern aber vertraut sei und das man deshalb eher unter Denkmalschutz gestellt als durch ein modernes, aber fremdes Gebäude ersetzt sehen möchte.^{*29}

Entscheidend aber – und damit komme ich zum Schluß – scheint mir heute noch gegen den Erfolg einer umfassenden Rechtsvereinheitlichung in Gesetzesform das bereits genannte Argument zu sprechen, daß wir in Europa noch keine gemeinsame Rechtssprache haben, wobei die Betonung auf Recht liegt. Darin ist ein entscheidender Unterschied zur deutschen Situation im 19. Jahrhundert zu sehen, wo die Verschiedenheiten in den Partikularrechten doch zu überbrücken waren durch die allen deutschen Juristen gemeinsame Ausbildung im römischen Recht und auch in der deutschen Privatrechtsgeschichte, eine Ausbildung, die gleichsam einen allen gemeinsamen Kanon von Schlüsselbegriffen und Grundstrukturen vermittelt hatte, der Verständigung über Grenzen der Partikularrechtsordnungen hinweg ermöglichte und erleichterte: Man wußte, worüber man redete, auch wenn die Regelungen im einzelnen verschieden waren, so wie Juristen in England und Schottland trotz Unterschieden in ihren Rechtsordnungen – oder Juristen in den USA mit seinen 50 verschiedenen Zivilrechtsordnungen, darunter einem Abkömmling des Code Civile – aufgrund einer durch gleiche Ausbildungsinhalte geschaffenen gemeinsamen Rechtssprache ohne Verständnisverluste so kommunizieren können, als hätten sie ein einheitliches Recht. M.a.W.: Die Schulung im römischen Recht hatte den Referenzrahmen geschaffen, den die Kommission mit ihrem Aktionsplan erarbeiten will. Noch fehlt er uns aber in Europa, und es ist dringend zu hoffen, daß dieses Projekt gelingt. Freilich darf dieser Referenzrahmen nicht Papier bleiben, und so wie in der Ausbildung im Römischen Recht im 19. Jahrhundert in Deutschland muß er im Rechtsunterricht zugrunde gelegt werden, möglichst schon vor seiner endgültigen Verabschiedung und „Umsetzung“ in welcher Form auch immer. Ich sehe es deshalb als vordringliches Anliegen, zunächst im Unterricht in den Rechtsfakultäten Europas und im Diskurs mit den für die Schaffung des erwähnten Referenzrahmens zuständigen Gruppen und Organen der Gemeinschaft eine gemeinsame Rechtssprache auf der Grundlage der Rechtsvergleichung und ihrer bisherigen Ergebnisse auszubilden. Tartu und die Kompetenz seiner weltoffenen Rechtswissenschaftlichen Fakultät, aber auch die breite rechtsvergleichende Grundlage des neuen estnischen Privatrechts, insbesondere des Obligationenrechts, bieten dazu die besten Voraussetzungen.

²⁷ Legrand. Against a European Civil Code. – Mod. L. Rev. 1997, S. 44 ff., 51: *Uprooted civil servants*; ders., Sens et non-sense d'un Code civil européen. – R.I.D.C. 1996, S. 779 ff.

²⁸ Weitere Nachweise des sich in Frankreich besonders heftig artikulierenden Widerstandes gegen eine Aufgabe des Code Civil bei C. Witz (Fn. 2).

²⁹ Vgl. zu dieser oft gebrauchten Metapher Snijders. Building a European Contract Law: Five Fallacies and Two Castles in Spain. – Electronic Journal of Comparative Law (November 2003), vol 7.4, Lecture 9, S. 4



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European and Estonian Law of Obligations — Transposition of Law or Mutual Influence?

1. Estonian Law of Obligations Act in the context of unification of European law

Changes in the legal system do not always result from the countries' free choice but from international competition and political coercion countereffects.¹ Besides the export of culture and goods, globalisation has brought about also the transformation of law. The success of transformation of society largely depends on how effectively the existing legal system can be reformed, the role that transplants from other legal orders and systems acquire in the existing legal framework, and how they are understood in the context of generally recognised legal traditions and the developed legal culture.² Mapping of the existing traditions has sometimes been regarded as a crucial prerequisite for harmonisation of law³, but in a situation where globalisation has transformed the legal culture into a very rapidly changing and dynamic phenomenon, this task seems unfeasible and difficult to follow. Today, it is not only the methods and scope of transposition of rules that are of interest but also the substance of the rules or the meaning that a particular provision has acquired in a specific cultural environment. The following discussion covers some of the most important legal transplants in the Law of Obligations Act (LOA), their sources, and the issues that have arisen and may arise in the future in giving substance to these provisions. Estonia has an intriguing chance of influencing the formation of common European civil law by introducing its experience in the transformation of unified civil law principles and rules into the national legal system.

¹ A. Jettinghoff. State Formation and Legal Change. – Adapting Legal Cultures. D. Nelken, J. Feest (eds.). Oxford: Hart Publ. 2001, p. 107.

² See P. Legrand. What 'Legal Transplants'? – Adapting Legal Cultures. D. Nelken, J. Feest (eds.). Oxford: Hart Publ. 2001, p. 59; P. de Cruz. Comparative Law in a Changing World. London, Sydney 1999, p. 31; P. Legrand. Against a European Civil Code. – The Modern Law Review 1997 (60), Jan., pp. 425–428.

³ S. Paasiliehto. Challenges for Legal Cultural Change: Innovations and Traditions. From Dissonance to Sense. International Conference in Porvoo, Finland. August 28–31, 1997, p. 10 (unpublished material).

The Estonian Civil Code comprises, according to the pandect system, five basic acts, which, though not codified, make up a systematised set of rules consisting of single legislative acts⁴. The choice for the Continental legal system had already been made in 1988, when preparations started for Estonia's own civil law system and when it was found that historical consistency should be restored also in legal drafting.⁵ Historical consistency primarily meant the decision to prepare the new Civil Code on the basis of the draft Civil Code of 1940, which was never passed as time ran short at the end of Estonia's first period of independence. But in contrast to the portions of the draft Civil Code of 1940 dealing with property law and law of succession, the regulation concerning the law of obligations had become hopelessly outdated and its provisions were unsuitable for a modern act on the law of obligations, due to their inefficient regulatory methods and issues of substance.

The Baltic Private Law, on the example of which the Civil Code of 1940 was drafted, was prepared so as to provide regulation as detailed as the law and legal dogmatics of the time allowed. A peculiarity of the Estonian legal drafting culture, associated with the Baltic Private Law and persisting to this day, lies in the idea that if we write down in law everything that is covered in the developed countries by the laws and the legal dogmatics outside written law, we will avoid disputes over the application and substance of law.⁶ The Law of Obligations Act that entered into force on 1 July 2002 is thus also characterised by very detailed regulation and a great number of sections.⁷ The number of sections in the Law of Obligations Act may be chiefly justified by Estonia's unique opportunity to draft a single law covering consumer contracts, obligations arising in economic or professional activities, and obligations arising between 'ordinary subjects'. Unfortunately, there is still no answer to the question about the efficiency of civil law reform in a situation where laws are casuistic and superfluous and leave little room for legal theory and the general principles of law.⁸

A great advantage in the creation of the civil law system of Estonia as a groundbreaking form contrasted against systems in states with an established legal system and historical traditions was the possibility to create a system of rules free of the forced solutions and outdated, inflexible dogmatics that do not satisfy the needs of today. In a transformation society where prior legislation and legal dogmatics are almost non-existent or carry the ideology of a different political and social system, it is possible to write the entirety of civil law from scratch, to create one's own system and avoid the mistakes that other countries have made in the development or reformation of their law. Throughout history, the transplantation of laws and legal institutes from one legal system to another has been the most efficient and simplest approach, because legal transplants usually do not concern the interests of individuals.⁹

The activities of proponents and implementers of model laws¹⁰ and the convergence of rules for the harmonisation of law and the idea of a European Civil Code¹¹ have had a very direct and strong influence on the reformulation of the member states' national law. Besides the work of study centres addressing the uniformity of European civil law, the newer legislation of European countries has had its impact on the development of the legal systems of transformation societies. The German reform to the law of obligations, largely resulting from the need for harmonisation with the relevant European Union legislation¹², and the new Civil Code of the Netherlands¹³ should be given primary mention. The US Restatements system and the US Commercial Code, particularly the part dealing with sales contracts, have served as good examples for Europe. The model laws prepared for the harmonisation of contract law, such as the UNIDROIT Principles of International Commercial Contracts (PICC) and the Principles of European Contract Law (PECL)

⁴ Tsiviilseadustiku üldosa seadus (General Part of the Civil Code Act), passed 27.03.2002; asjaõigusseadus (Law of Property Act), passed 9.06.1993; võlaõigusseadus (Law of Obligations Act), passed 28.09.2001; perekonnaseadus (Family Law Act), passed 12.10.1994; pärimisseadus (Law of Succession Act), passed 15.05.1996.

⁵ P. Varul. Legal Policy Decisions and Choices in the Creation of Estonian Private Law System. – *Juridica International* 2000 (5), p. 104.

⁶ M. Luts. Textbook of Pandects or New Style of Legislation in Estonia? – *Juridica International* 2001 (6), pp. 152–158.

⁷ The Law of Obligations Act contains 1068 sections.

⁸ M. Luts (Note 6), p. 158.

⁹ A. Watson. *Legal Transplants: An Approach to Comparative Law*. Athens, Georgia: University of Georgia Press 1993, p. 96.

¹⁰ O. Lando, H. Beale (eds.). *The Principles of European Contract Law. Parts I and II*. Prepared by the Commission on European Contract Law. The Hague: Kluwer Law International, 1999; Commission on European Contract Law, 1997; UNIDROIT Principles of International Commercial Contracts. International Institute for the Unification of Private Law. Rome: Unidroit, 1994.

¹¹ Namely, supranational study groups of researchers engaged in the harmonisation and unification of European civil law, such as the Study Group on a European Civil Code, led by Christian von Bar; the European Centre of Tort and Insurance Law (ECTIL) in Vienna; the Research Unit for European Tort Law (ETL) at the Austrian Academy of Sciences; and various other research centres.

¹² P. Huber, F. Faust. *Schuldrechtsmodernisierung. Einführung in das neue Recht*. München: C.H. Beck 2002, p. 1.

¹³ *Burgerlijk Wetboek (Civil Code of Netherlands)*. Book 6. *Algemeen Gedeelte van het verbintenissenrecht*. Book 6. General Part of the Law of Obligations. Beck: München 1992. For information about the contribution of the Dutch Civil Code to the unification of European civil law, see: *The Genesis of the Principles of European Contract Law and Modern Dutch Private Law. The Principles of European Contract Law and Dutch Law: A Commentary*. D. Busch, E. H. Hondius (eds.). The Hague: Ars Aequi Libri, Nijmegen&Kluwer Law International 2002, pp. 13–27.

prepared by the Lando Commission, reflect the current discussions about contract law to a very large extent. By transposing and systematising, to some extent in a unique way, the results of the work done in the harmonisation of civil law, Estonia has the opportunity to participate in these discussions and also offer new solutions itself.

Since the time of Cicero, differences between legal systems have been considered an inconvenience that should be overcome. The differences between the systems of common law and civil law are clearly distinguishable not only as regards historical heritage and developments but also as regards the issues of the structure of the legal profession, legal education, classification of the areas of law, the judicial system, and fundamental positions on law and legal philosophy. But we can also see a number of similarities between these two legal systems in areas such as sales contracts, contracts in general, non-contractual liability, and business organisation. The understanding that these two legal systems, different in their historical development and nature, are coming closer to each other stirs up less and less emotion these days. Such a tendency toward convergence has been observed in attitudes to both written laws and court decisions as precedents, which themselves may serve as a source of law. While the number of areas regulated by law has increased in common law, the role of judicial practice as a source of law in the legal system has substantially changed in countries applying civil law.^{*14} Besides that, European countries have started to rely more on case law, which is especially noticeable in the activities of the German Constitutional Court and the French administrative courts. Gaps in law have forced courts to extend law and assume the role of lawmakers. But whether these are signs of convergence is not always so clear.^{*15}

After regaining independence, Estonia has mainly relied on Western European models for its development. Estonia's wish to accede to the European Union and hence develop as a democratic state based on the rule of law and social market economy has greatly influenced the development of law. The unification of legal systems through special programmes and projects (e.g., the activities of the Lando Commission and UNIDROIT) as a result of transposition or natural convergence of law is effective only when the structures, institutes, and procedures of the national legal systems are able to ensure unity in both the application and interpretation of the rules.^{*16} The first task is to word the provisions in a uniform manner; then, the rules can be interpreted and applied in a uniform manner.

According to Alan Watson, legal transplants have been known in the form of legal loans since Roman times.^{*17} As in Ancient Rome, so in the newly independent Estonia, which aimed at reforming its legal system. The most prominent lawyers were sent to foreign countries to study what was good and transplantable from the other legal orders, what their relevant judicial practice was, and what the law of a specific state presented in the widest sense. Legal transplants have a long history. The reception of Roman law in Europe even extended to the USA via the English colonies. History also knows the extensive impact of the French Civil Code on the legal codes of the European countries. Much of US law has spread to Europe, particularly Switzerland. There are still mixed jurisdictions, which vividly exemplify the effect of transplants on common law, civil law, and local common law.^{*18}

The following discussion describes certain areas where the provisions of the Estonian Law of Obligations Act contain solutions that are generally recognised yet not expressly provided in the legislative acts of European countries, and solutions that are essentially exceptional and hence of interest as alternative solutions alongside those widely known.

2. General principles of law

Harmonisation of European private law, including contract law, poses various complicated and less complicated problems for the legal systems. One of the main issues that have been raised is the question of the level on which private law needs to be unified for efficient functioning of the common market. It may be said that the unification and harmonisation of both provisions and general principles is generally considered to be necessary; another question is the scope in which this should be done.^{*19}

¹⁴ P. de Cruz. *Comparative Law in a Changing World*. Cavendish Publishing Limited 1999, 14.3.

¹⁵ *Ibid.*, 14.3.

¹⁶ *Ibid.*, 14.5. Unification of law normally makes use of international instruments that are created for that purpose and whose activity is aimed at only that, such as UNIDROIT, the Hague Private International Law Conference, and UNCITRAL. The aim of these organisations is to formulate common rules and shape common practice in a certain territory (the PECL in the European Union, CISG in countries that have joined the convention, etc.). The list could also include the International Labour Organisation (ILO), the European Commission of Human Rights, and the Organization of American States.

¹⁷ A. Watson (Note 9), p. 95.

¹⁸ P. de Cruz (Note 14), 14.5.1.

¹⁹ P. Varul (Note 5), p. 112.

The trend of legal formalism and the sociological trend can be distinguished in the approach to private law in the context of harmonisation. Under the legal formalist approach, a legal system is a set of integrated principles, concepts, and rules, which together determine the mutual rights and obligations of subjects in private law. Legal discussions boil down to consideration of the rights and obligations of the subjects in a specific legal system.^{*20} Estonia has so far taken the legal formalist approach to harmonisation, seeing the main task as ensuring uniform rights for all citizens of European Community member states. This task in Estonian law was formally completed by the adoption of the new Law of Obligations Act.

In the harmonisation process, legal formalists find themselves in a situation where the principles and concepts applicable in a legal system may obstruct the harmonisation of the legal system. Optimists find that, as terminology in the national and supranational systems is largely equivalent, it is not difficult to recognise single concepts. Pessimists find that, as the concepts are interrelated, their actual substance is only revealed in a specific context that could be dealt with quite differently in the legal practice of another member state.^{*21} For example, the transplant of directives to a legal system cannot be successful if specific provisions are transposed without transposition of new concepts to the national legal systems or if the existing provisions are not adjusted to account for the new ones. Estonia implemented the directive on unfair contractual conditions in the Law of Obligations Act, defining unfair harm not by using the principle of good faith as the directive does but through the institute of voidness of transactions that are contrary to good morals. The aim was to ensure the integrity of the existing legal system and avoid unnecessary problems in delimiting the application of the two institutes of law and the relevant general principles of law.^{*22} The Law of Obligations Act also discarded the concept of the right of a consumer to withdraw from his or her declaration of intention as prescribed in the EU directives, choosing instead to regulate the consumer's right to step out a contract by way of withdrawal or cancellation of the contract (see, *e.g.*, LOA §§ 49, 56 ff.). The principle of the binding force of a declaration of intention was thus not touched upon, while the consumer's right to withdraw from a contract during the 'cooling off' period was still ensured.

Unification of law is a process rather than a record of ready-made teachings and legal solutions. Unification may have a negative impact on the uniqueness of a legal system and its attachment to the cultural context. However, innovative provisions may lead members of society to establish and follow acceptable rules of behaviour before they are formed in formal legal practice, and thus influence the development of the legal culture.

Estonian law, like the law of other Eastern European countries, has been reproached mainly for its ignorance or incorrect application of the general principles of law.^{*23} Principles are characterised by their deliberation value, or the possibility to deliberate which principle is applicable in the given circumstances. Principles as commands aimed at an ideal status require compliance as far as possible. Thus, principles may be applied only in part, in order of importance, and content may be provided in specific rules of conduct via the judicial practice that develops. In a transitional society, principles are constantly reassessed and their content is further specified. The formulation of a general principle from single cases, however, requires stable and long-term judicial practice.

The impact of principles is bidirectional, meaning that a principles recognised in a member state may be adopted in EU legal practice and legal drafting. As soon as a general principle is adopted, formulation of the rules for application of the principle becomes especially important. Rules can be applied only on a voluntary basis and they make it possible to arrive at uniform implementation of EU law and eliminate the differences in implementation of the general principles of contract law in the national law of the member states.

When analysing the effect of the Principles of European Contract Law and the UNIDROIT Principles of International Commercial Contracts on the formation of the content of the Estonian Law of Obligations Act and the effect of legal transplants in society, one should not forget that both these model laws, referred to as 'Principles', are actually sets of rules that also contain important principles of contract law.^{*24} Uniform recognition of the general principles of contract law ensures the legal certainty needed by the contracting partners that the conditions formulated for the contract are uniformly recognised throughout the legal area

²⁰ C. von Bar, M. Barendrecht, J. Basedow *et al.* The Private Law Systems in the EU. Discrimination on Grounds of Nationality and the Need for a European Civil Code. Luxembourg: European Parliament, L-2929, Legal Affairs Series, JURI-EN 13, 1999.

²¹ *Ibid.*

²² LOA § 42, 'Invalidity of standard terms':

(1) A standard term is void if, taking into account the nature, contents, and manner of entry into the contract; the interests of the parties; and other fundamental circumstances, the term causes unfair harm to the other party, particularly if it causes a significant imbalance in the parties' rights and obligations arising from the contract to the detriment of the other party or if the standard term is contrary to good morals.

²³ See F. Emmert. Editorial: The Independence of Judges — a Concept Often Misunderstood in Central and Eastern Europe. — European Journal of Law Reform 2001, Vol. 3, No. 4, pp. 405–409.

²⁴ H. M. Flechtner. The CISG-S Impact on International Unification Efforts: The UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law. — The 1980 Uniform Sales Law. Old Issues Revisited in the Light of Recent Experiences. F. Ferrari (ed.). Verona Conference, European Law Publishers 2003, p. 171.

in which the parties act. In a transitional society, often lacking the tradition and judicial practice needed for solving specific disputes, it is inevitable for the general principles of law to be applied in solving legal disputes. Uniformly recognised general principles of law help the courts of the member states to understand the nature and aims of regulations when applying the laws of other countries and to take these into account when new legislation is being drafted.

3. Principle of freedom of contract

The most important principle of private law is the principle of private autonomy, expressed in contract law as the **principle of freedom of contract**. Freedom of contract mainly means the freedom to decide on the entry into and content of the contract and to choose the other party to the contract. The Law of Obligations Act applies the idea of contractual fidelity in its classical sense, setting out as its guarantee the general principle that a contract is binding on the parties (LOA § 8 (2)). As is typical in modern-day contract law, contracts are binding according to the Law of Obligations Act only if the conditions of the contract are understandable by the parties and the parties can actually choose whether or not to enter into the contract. The goal of ensuring the substantive and procedural fairness of contracts as a restriction on freedom of contract allows a legislature to choose whether to interfere with contractual relations by the institute of voidness of contract or, instead, pay the most attention to regulation of negotiations and the contracting process or procedural freedom of contract.^{*25} A contract is thus deemed to be binding and mandatory for the parties only if it is concluded on the basis of free will and informed consent.^{*26} Unless these requirements are fulfilled, a party to the contract may seek the remedies prescribed by law for stepping out of the contract. The prevailing trend in Estonian law is for the law to ensure the procedural fairness of contracts and interfere with the substantive fairness of a contract only under special circumstances.

The general principles of law, just like freedom of contract, are not applicable to a specific case directly but, rather, only via rules giving content to the principle. The resolution of a specific case often requires weighing of different general principles. The application of one principle to a specific case, however, does not mean that other principles are fully abandoned, for the conditions and scope of application of the general principles of law are not restricted by law.^{*27}

Common recognition of certain ethical rules of conduct — in part supported by non-legal arguments such as ethics, good morals, and justice — serves as the basis for the efficient functioning of the principle of freedom of contract in contractual relations. The issue of consideration for the principle of freedom of contract has arisen in Estonian judicial practice in connection with usurious interests in contracts. The Supreme Court has assumed the position that excessively high interest in comparison to the average interest rate agreed upon does not provide reason to hold the relevant transactions to be contrary to good morals on account of elements of usury. The Supreme Court has considered it necessary since 2002 to test the usurious nature of a transaction not only on the basis of the disproportional nature of the obligations but also taking into account other circumstances, such as one party's inexperience, a forced situation, lack of decisive power, substantial weakness of will, and other difficult circumstances. In such circumstances, it has interpreted usurious contracts not as contrary to good morals but as contracts voidable by one of the parties, concluded under extremely unfavourable conditions, taking advantage of the coincidence of difficult circumstances. The liberal attitude to the autonomy of contractual partners has thus been maintained, because the Supreme Court has considered interference with contractual relations merely on grounds of disproportionateness of obligations as contrary to the intent of the law. However, condemnation has been expressed for contracts concluded by one party contrary to the requirements of morals, taking advantage of the difficult situation of the other party. When analysing the practice of the Supreme Court in cases where parties have based their claims on the disproportionateness of obligations, one could say that the decisive concept is that of fairness, according to which a party may step out of a contract only if it has been established that advantage was taken of the poorer position of the weaker party for unfair purposes.^{*28} As regards extremely high interest, the Supreme Court has not considered it necessary to impose social liability for the difficult economic situation on institutions under private law, as is often done in need-oriented contract law, which is characterised by greater attention to consumer protection and the social aspects of performance of contracts.^{*29}

²⁵ P. Atiyah. *An Introduction to the Law of Contract*. Oxford: Clarendon Press 1989, p. 36.

²⁶ R. Brownsword. *Freedom of Contract, Human Rights and Human Dignity*. – *Human Rights in Private Law*. D. Friedmann, D. Barak-Erez (eds.). Oxford, Portland, Oregon: Hart Publ. 2002, p. 186.

²⁷ Schmitthoff's *Export Trade*. *The Law and Practice of International Trade*. 10th ed. L. D'Arcy, C. Murray, B. Cleave (eds.). London: Sweet & Maxwell 2000, p. 164.

²⁸ CCSCd 3-2-1-80-02. – RT III 2002, 27, 302.

²⁹ C. Sandgren. *A Social Law of Contract?* – *Scandinavian Studies in Law* 1993 (37), p. 167.

The Supreme Court has regarded contracts that subject one party to full control via restrictions on economic activity or rendering economic activities impossible as immoral and condemnable according to the general opinion of society. For example, the Supreme Court has considered it to be against good morals to enter into a contract in a situation where the management of a company was aware of upcoming bankruptcy (a warning concerning bankruptcy had been issued)^{*30} and a contract bound a party to a lease relationship for 99 years without the right of reviewing the rental terms.^{*31}

The legal order has to follow the developments of society, and the court has to consider society's changing opinions in its judgements and shape its position on the meaning of good morals accordingly.^{*32} Today, contracts are declared to be contrary to good morals in order to protect public interests, one of the parties to the contract, or the rights of third parties. As the complexity of social processes and pluralism in society renders it increasingly difficult to formulate any dominant moral or standard usage, the protection of individuals' interests, not of the whole society's interests, has become the main objective of legal practice when it comes to voiding a contract on grounds of good morals.^{*33}

Although freedom of form is not considered to be an element of freedom of contract, freedom of form can still be viewed as an attribute of modern contract law. In the law of obligations, formal requirements are established only in cases where they are necessary for protecting a party or for another purpose accepted by society. For example, formal requirements have been established for the declaration of intention of a consumer before (*e.g.*, informing a passenger of the circumstances listed in LOA § 870) or during (*e.g.*, a statement by a consumer by which the consumer agrees to assume the obligations of surety under LOA § 144 (2)) entry into a contract. Contracts may be concluded in any form in economic or professional activities, except for contracts involving immovables. An important change was made by the Law of Obligations Act Implementation Act to the CISG Ratification Act of 16 June 1993, repealing § 2^{*34} of the Ratification Act, which prohibited the conclusion of sales contracts and the making of offers or other declarations of intention in oral form. Estonia has thus taken an important step toward the generally accepted view of freedom of form in international transactions as well.

4. Principle of good faith

While the recognition of most general principles of law, such as contractual fidelity, freedom of contract, reliance liability, and the principle of party autonomy, are no longer the subject of contract law discourse, the recognition of the principle of good faith and its transfer to European private law as a unified open provision is still topical today. The transposition of any principle of law raises the question of the essence of the legal system and of the suitability of that principle of law for the given legal culture, legal practice, and legal dogmatics. The principle of good faith is the most important principle of private law, the consensual recognition of which makes it possible to account for different understandings in the creation of institutes relevant to common European contract law and in the shaping of legal practice.

Despite the general recognition of the principle of good faith in international commercial law and the contract law of EU member states, the approaches to the principle are not identical.^{*35} These differences are due to the different legal traditions and cultures, and the varied methods of application of principles of law.^{*36} In common law, in contracts made in the course of economic activities, a contextual approach to good faith, based on the reasonable expectation of the parties that the generally accepted rules of the economic area are complied with, may ensure adherence to the rules and thus increase the predictability of contractual behaviour.

³⁰ CCSCd 3-2-1-102-02. – RT III 2002, 27, 301.

³¹ CCSCd 3-2-1-29-02. – RT III 2002, 14, 164; CCSCd 3-2-1-76-01. – RT III 2001, 19, 204.

³² B. Rüthers. *Die unbegrenzte Auslegung. Zum Wandel der Privatrechtsordnung im Nationalsozialismus*. Heidelberg 1997, pp. 216–217.

³³ B. Markesinis. *The German Law of Obligations. Vol. I. The Law of Contracts and Restitution: A Comparative Introduction*. Oxford: Clarendon Press 1997, p. 182.

³⁴ Võlaõigusseaduse, tsiviilseadustiku üldosa seaduse ja rahvusvahelise eraõiguse seaduse rakendamise seadus (Law of Obligations Act, General Part of the Civil Code Act and Private International Law Act Implementation Act). Passed 5.06.2002. – RT I 2002, 53, 336 (in Estonian).

³⁵ CISG Art. 7 (1) sets out the obligation to consider the principle of good faith in the interpretation of the convention. However, it is found that the wording of the article does not prevent the attribution of a wider meaning to the principle of good faith. See P. Schlechtriem. *Einheitliches UN Kaufrecht*. Tübingen: Mohr 1981, p. 25; P.J. Powers. *Defining the Undefinable: Good Faith and the United Nations Convention on Contracts for the International Sale of Goods*. – JLC 1999 (18), p. 348. PECL Art. 1:201 and PICC Art. 1.7 set out the direct duty to act in accordance with good faith and fair dealing.

³⁶ See also Art. 3:12 of the Dutch Civil Code, according to which a court, when deciding on what reasonableness and justice demand under the given circumstances, has to refer to generally accepted principles of law; to the contemporary theoretical positions in Dutch law; and, depending on the circumstances, to weighty social and private interests.

However, regulatory good faith must remain outside the realm of economic activities so as to avoid the application of contractual fairness concepts not appropriate for economic activities. The principle of good faith is accepted in common law countries via the mutual approximation of the regulatory and contextual concepts of good faith.^{*37}

Application of the principle of good faith to a contractual relationship makes it possible in decision-making to take account of the important values of society and determine the objectives of applying positive law in each specific case.^{*38} Acting in good faith is the highest regulatory obligation and also a principle of law in Estonian law. The regulatory nature of a principle of law means acting within the existing legal order and in compliance with other principles of law and the types of values on which the legal order is based. At the same time, the applicable law is not a limit to the application of the principle of good faith, because the principle of good faith is considered to be superior to other provisions of positive law.

Acting in good faith is understood as honesty, keeping one's word, loyalty to the other party as avoidance of unreasonable or unjustified behaviour and of damaging the other party, co-operation with the other party, reliability, readiness to withdraw from a contractual agreement whose content has become unreasonable, and due performance of one's obligations.^{*39}

In comparing the role and functions of the principle of good faith in the law of European countries, it may be said that the differences in legal method have influenced the attitude to recognition of the principle of good faith as a general principle of law. German law, most similar to Estonian law in its method, has been the main model for the transposition of the doctrine of good faith into the Estonian legal system. Although the Estonian general clause setting out the mandatory nature of the principle of good faith is similar to German BGB § 242, the second part of the clause, or LOA § 6 (2), is based on the example of article 6:248 of the Dutch Civil Code.

Various specific institutes deriving from the doctrine of the principle of good faith have been transposed from German law in full (such as changing the proportion of contractual obligations in LOA § 94 and contracts with a protective effect for a third party in LOA § 81) or in part by the provision of relevant rules of conduct in specific sections (e.g., the provisions in LOA § 108 (3) concerning an impermissible delay in the enforcement of a right). The similarity in legal regulation between the Estonian and German law of obligations allows uniform application in practice of the principle of good faith and the comparative systematisation concerning those types of cases to which the principle of good faith applies with its various functions.

Estonian law sets forth the obligation to act in good faith as a regulatory general principle. It allows the courts to react to the changes in society and the gaps or shortcomings in the law by developing the law. Estonian law gives the principle of good faith a wider meaning than the German, French, and English law do, as, pursuant to LOA § 6 (2), 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.^{*40}

The role of the principle of good faith in international commercial law has grown in connection with the globalisation of the economy and the emergence of transnational commercial law. Various institutes have been provided for in the Estonian Law of Obligations Act based on the provisions of the UN Convention on Contracts for the International Sale of Goods (CISG), containing rules derived from the principle of good faith. This allows for an assessment of the conduct of the parties to a contract, taking into account international practice based on the principles of good faith and fair dealing^{*41}.

The great volume of contractual obligations expressly stipulated by law, the rules of interpretation of contracts and the right to infer obligations based on the nature and objective of the contract, the practice developed between the parties, the usage common in the profession or trade, and the principles of good faith and reasonableness should give enough possibilities for shaping the substance of a contract without the need to refer to the general principle of good faith (LOA § 6 (1)). Application of the general principle of good faith, however, may be necessary in the determination of the content and method of performance of the obligations, unless this is directly provided by law and agreed between the parties. Protection obligations are

³⁷ For example, understanding the use of a more favourable position in the conclusion of a contract as duress. See the case *Williams v. Roffey Bros & Nicholls Contractors*, [1991] 1 QB 1; J. Wightman. Good Faith and Pluralism in the Law of Contract. – Good Faith in Contract: Concept and Context. R. Brownsword, N.J. Hird, G. Howells (eds.). Dartmouth: Ashgate Publishing Company 1998, p. 450.

³⁸ M. Hesselink. Good Faith. – Towards a European Civil Code. 2nd ed. A. Hartkamp (eds.). Nijmegen: Ars Aequi Libri 1998, p. 287.

³⁹ S. Litvinoff. Good Faith. – Tul.L.Rev., 1997 (71), p. 1663. A mere description of situations in the explanation of the principle of good faith has been regarded as too narrow, since in such a case the idea of the principle of good faith would remain too one-sided. J. Stapleton. Good Faith in Private Law. – Current Legal Problems 1999 (52), pp. 5–6.

⁴⁰ The Dutch Civil Code also allows not applying the law if application would result in a consequence that is contrary to the principle of good faith. A. S. Hartkamp, M. M. Tillema. Contract Law in the Netherlands. The Hague: Kluwer Law International 1995, pp. 48–49.

⁴¹ J. O. Honnold, W. A. Schnader. Uniform Words and Uniform Application. The 1980 Sales Convention and International Juridical Practice. – Einheitsliches Kaufrecht und nationales Obligationenrecht. P. Schlechtriem (Hrsg.). Baden-Baden: Nomos 1987, p. 144.

inferred from the principle of good faith even with respect to persons who are not parties to the contract themselves.^{*42}

One of the main functions of the principle of good faith is to prevent the abuse of rights.^{*43} In Estonian law, the principle of good faith has so far been applied mainly for this purpose.^{*44} The right to waive the application of legal provisions, usage, and transaction (LOA § 6 (2)) gives the court wide opportunities to exercise their right of discretion in the selection of the provisions to be applied.

In the recognition of the principle of good faith in international commercial law, European contract law, and Estonian law, it is not the manner or method of recognition that is important but the rules of conduct supplying content to the principle of good faith, which coincide with the general understanding of honest and fair conduct. The principle of good faith may be viewed as the common element of different legal systems and legal orders, on the one hand, while the close connection of the principle of good faith with legal traditions, morals, and culture, on the other hand, may prevent the recognition of unified European contract law as a source of law by all member states of the European Union. Modern-day (or post-modern) contract law, which is based on the plurality of opinions and positions, should not endeavour to do away with the differences in the approach to the principle of good faith; rather, they should see the goal of unification mainly as in creation of a conceptual basis for the discourse of European law.^{*45}

5. Binding force of contractual promises

The binding force of contractual promises is an important premise for the efficient functioning of the economy, since only trust in the binding force of the promises of the other party can ensure that the interests and goals of the market participants are achieved. The principle of the binding force of contracts is prescribed in article 1.3 of the UNIDROIT Principles: 'a contract validly entered into is binding on the parties'. The Estonian Law of Obligations Act codifies the binding force of contracts similarly to the UNIDROIT Principles in LOA § 8 (2). The PECL does not contain an article directly setting forth the principle of the binding force of contracts, but the principle can be derived from article 1:102, which sets out the principle of freedom of contract, and article 6:111, which regulates the legal consequences of a change in the balance of obligations (hardship). Contracts are binding only if the declarations of intention of the parties indicate their willingness to be legally bound. Declarations of intention are regulated in Estonian law by the General Part of the Civil Code Act (GPCCA)^{*46}, according to § 67 (1) of which a contract is binding on the parties only if it contains a declaration of intention directed at bringing about a certain legal consequence. The binding force of a contract is not conditional on the existence of a *causa*; neither is the offer of consideration necessary. The Law of Obligations Act (LOA § 9 (1)) has remained true, when it comes to regarding contracts as concluded, to the classical offer and acceptance system, but, similarly to PECL article 2:101 and PICC article 1.2, the act supplements the system by the principle that a contract is deemed concluded by the mutual exchange of declarations of intention in any other manner if it is clear that the parties have reached sufficient agreement.^{*47}

Flexible regulation concerning regarding a contract as concluded allows taking into account the nature of the contract and its subjects when interpreting the declarations of intention of the parties. According to LOA § 25, in the case of contracts entered into with respect to the economic or professional activities of the parties, the parties are bound by any usage they have agreed to apply and by any practice they have established between themselves, and also any usage that persons who enter into contracts in the same field of

⁴² The Estonian law, similarly to BGB § 311 (3), provides for protection obligations with respect to persons who are not parties to a contract (LOA § 81).

⁴³ See, e.g., regarding the development of the doctrine of prohibition of abuse of rights in European law: M. Schmidt-Kessel. *Rechtsmißbrauch im Gemeinschaftsprivatrecht – Folgerungen aus den Rechtssachen Kefalas und Diamantis*. – *Jahrbuch Junger Zivilrechtswissenschaftler* 2000 pp. 61–83.

⁴⁴ A claim for compensation of expenses by a lessee within too short a period has been regarded as an abuse of rights (CCSCd 3-2-1-101-02). A party to a contract in breach of contractual obligations must not make use of the advantages arising from the non-performance. For example, a lessee could not rely on the failure to submit invoices where a circumstance depending on the lessee prevented the lessee's receipt of the invoices (CCSCd 3-2-1-33-00); a customer could not rely on a builder's non-performance if the non-performance was due to the customer's failure to obtain a building permit (CCSCd 3-2-1-43-03). The use of procedural rights in such a context has also been regarded as abuse of rights (CCSCd 3-2-1-31-03).

⁴⁵ T. Wilhelmsson. *Good Faith and the Duty of Disclosure in Commercial Contracting*. – *Good Faith in Contract: Concept and Context*. R. Brownsword, N. J. Hird, G. Howells (eds.). Dartmouth, Aldershot: Ashgate Publishing Company 1998.

⁴⁶ *Tsiviilseadustiku üldosa seadus* (General Part of the Civil Code Act). – RT I 2002, 35, 216 (in Estonian).

⁴⁷ As opposed to CISG Art. 14 (1), under which a contract is deemed concluded when the parties have reached an agreement on all fundamental conditions by an exchange of offer and acceptance.

activity or profession generally consider applicable and take into account, except where application of such a usage would be contrary to law or would be unreasonable under the circumstances. The Law of Obligations Act also regulates the conclusion of contracts by written confirmation as commonly known in business, similarly to PICC article 2.12 and PECL article 2:210.

The validity of a contract is not affected by the fact that, at the time of entry into the contract, performance of the contract was impossible or one of the parties did not have the right to dispose of the thing or right that is the object of the contract (LOA § 12). The impossibility of performance does not render a contract void even if it emerged after the conclusion of the contract.

6. Binding force of contractual declarations of intention

Estonian law, like German law, considers an offer to be binding as of its receipt (GPCCA § 69 (1)). A declaration of intention is received when it has been communicated to the recipient personally, or, if a declaration of intention is directed at a party not present, it is deemed to be received when it has arrived at the residence or seat of the recipient and the recipient has had a reasonable opportunity to review the declaration. An offer as a proposal for a contract is binding if it contains sufficiently definite terms to form a contract if accepted. One must respond to an offer made to a person present without delay, unless the offer prescribes a deadline for responding (LOA § 18 (1)). An offer that is not made in person and does not have a fixed term for acceptance is effective in the time that is ordinarily necessary for an acceptance to reach the offeror (LOA § 18 (2)). In contrast to what follows from PECL article 2:202, an offer can be withdrawn without exception under Estonian law. This means that even if the offer prescribes a deadline for replying, the offeror may withdraw the offer if the declaration of intention containing the withdrawal reaches the addressee of the offer before or at the same time as the offer. The trust of the addressee of the offer in the binding force of the offer is not damaged under such regulation, because withdrawal is allowed only at the time of or before the receipt of the offer. Although PECL article 2:202 generally follows the rules set out in CISG article 16 and PICC article 2.4, according to which an offer must not be revoked if it prescribes a deadline for replying or otherwise indicates that the offer is irrevocable, the Principles of European Contract Law provide that revocation of an offer is invalid if this rule is violated. Also in Estonian law, the withdrawal of a declaration of intention is void if the withdrawal declaration was made after the receipt of the declaration of intention, and the offer remains effective (GPCCA § 72).

7. Third parties in a contractual relationship

A contract may be concluded for the benefit of third parties for various reasons. Such an agreement may result from the wish to give a third party benefits from the performance of a contract to which the third party itself is not a party, a wish to support said third party, or the creditor itself owing performance to the third party. The conclusion of a contract for the benefit of third parties as a modification of an agreement for performance of contractual obligations for achieving various goals is not a new institute of law for Estonian law.^{*48} If performance for the benefit of a third party was agreed on, the third party may require performance of a contractual obligation only if the contract or the law so prescribes. PECL article 6:110 (1) entitles a third party to a right of claim also if this has been expressly agreed upon between the promisor and the promisee, or when such agreement is to be inferred from the purpose or the circumstances of conclusion of the contract. The general principle according to which a third party acquires the right of claim from contracts concluded for the benefit of the third party is limited in Estonian law to only two cases: contractual agreement and a relevant provision of law (LOA § 80 (2)). Thus, a relevant agreement between the debtor and creditor is the precondition for the creation of a right of claim of a third party under Estonian law. It is questionable whether the right of claim of a third party could also be inferred from the conditions of the contract or other circumstances.^{*49} The provisions on the interpretation of a contract, which apply to disputes over the meaning of the contractual conditions, oblige the parties to proceed from the common intention of the parties in the first instance; only if the common intent cannot be established shall the contract be

⁴⁸ Contracts in favour of third parties are known in all the European legal systems, but the rules for application of this modification of a contractual obligation have not been unified in European contract law to a satisfactory extent. See V. V. Palmer. *First Steps Toward Tomorrow's Harmonization*. – *European Review of Private Law* 2003 (11) 1, p. 8.

⁴⁹ According to PECL Art. 6:110 (1), the right of claim of a third party may be inferred from the purpose of the contract or the circumstances of the case.

interpreted according to the meaning that reasonable persons who are peers of the parties would give to it in the same circumstances (LOA § 29 (4)). In interpretation of a contract, regard shall be paid to the circumstances in which the particular contract was entered into, such as the pre-contractual negotiations, previous interpretation of the same term or condition of the contract, the conduct of the parties before and subsequent to entry into the contract, the meaning commonly given to terms and expressions in the field of activity or profession concerned, and the usages and practices established between the parties (LOA § 29 (5)). Thus, in the application of narrowly formulated grounds for the creation of a right of claim of a third party, if a dispute is settled under the provisions concerning the interpretation of the contract, the right of claim may be inferred from the purpose and the circumstances of conclusion of the contract similarly to what is seen with PECL article 6:110 (1).

If the parties to the contract have not provided for the right of claim of a third party upon the conclusion of the contract and such a right does not arise from the interpretation of the contract, a party not participating in the contract may file a claim for compensation of damage under, *e.g.*, LOA § 81.

Besides the general protection obligation (LOA § 2 (2)), the Law of Obligations Act provides for the specific duty of considering the interests or rights of third parties to an extent equal to the interests or rights of the creditor (LOA § 81). Protection obligations in respect of third parties are mainly created in the case of experts.⁵⁰ The Law of Obligations Act provides for the liability of an expert both if the expert's activity is based on a contractual relationship, from which protection obligations with respect to third parties can be inferred, and if the situation is one in which a third party may have trusted an expert's opinion and therefore suffered loss without the expert being aware, when expressing the opinion, of its impact on the proprietary or other interests and rights of the third party. The obligation to take into account the interests and rights of a third party gives the third party who has suffered damage the right to claim compensation for the damage from the person thus obliged. The granting of this right today, when professional assistance has become extremely important in the conclusion of transactions, is especially important. Knowledge of different areas of life has become increasingly specific; hence, trust in professional advice should be justified and also legally protected. The liability of experts in today's legal systems has become more and more specific (doctors' liability, lawyers' liability for their professional activities, auditors' liability, etc.). As opposed to adopting the general wording of the German BGB § 311 III 2, Estonian law has attempted to formulate the prerequisites for liability in contracts as specifically as possible with respect to the obligation to protect third parties. According to LOA § 81 (1), a protection obligation with respect to a third party is presumed if, in the course of performance of the contract, the interests and rights of the third party are at risk to the same extent as the interests and rights of the obligee; the intent of the obligee to protect the interests and rights of the third party can be presumed; and the third party and the intent of the obligee to protect the interests and rights of the third party are identifiable by the obligor. Judicial practice has to provide more exact answers to the questions that may arise in practice when checking the requirements and conditions provided by law — *e.g.*, whether the intent of the creditor and the third party have to be personally identifiable by an expert or whether it may also be inferred if these circumstances were foreseeable, since the damage subject to compensation in the event of non-performance of contractual obligations has to be foreseeable by the person causing the damage. It is questionable whether an expert him- or herself could preclude or limit liability by agreement with a party to a contract under LOA § 106. Such an agreement would in any case be void as unreasonably precluding or restricting liability.

Knowledge has become increasingly more available in today's information society, which is why persons participating in ordinary social intercourse often rely on expert opinions without the latter being aware of it or having given their opinion on that particular relationship.⁵¹ The Law of Obligations Act provides for an expert's opinion not only on the basis of contract law but also on the basis of the provisions of tort law (LOA § 1048).⁵² One may thus say that a person should be protected under Estonian law if the person relies on an expert opinion given under or outside a contractual relationship. In contrast to German law, where the provisions of tort law restrict the right of a third party who has suffered damages to claim compensation for purely economic loss⁵³, there are no restrictions in Estonian law that would preclude such a claim in the case of tort.

⁵⁰ See P. Huber, F. Faust. *Schuldrechtsmodernisierung. Einführung in das neue Recht*. München: C.H. Beck 2002, p. 72.

⁵¹ M. Coester, B. Markesinis. *Liability of Financial Experts*. – *The AJCL* 2003 (51), p. 275.

⁵² The inclusion of these grounds for liability in the Law of Obligations Act could be questioned, as damage caused by reliance on an expert's opinion as liability based on an expert's position of trust is not merely a specific problem of the law of obligations. See T. Uusen-Nacke. *Kolmandat isikut kaitsev leping. Asjatundja vastutus kolmandate isikute ees* (A contract protecting a third party. Liability of an expert to third parties). – *Juridica* 2003/8, p. 541 (in Estonian). As the Law of Obligations Act is applicable to any transactions provided for by law as well as transactions that are not covered by law but are not contrary to the content and meaning of law, claims arising from the reliance liability of an expert may also arise from other legal relationships.

⁵³ M. Coester, B. Markesinis (Note 51), p. 278.

8. Liability for non-performance of obligations

If a debtor does not perform its obligations or meets them in a manner not in accordance with the requirements, the legal order has to regulate whether the creditor may receive remedies, which ones, and in which cases the debtor in breach is released from liability.

There are many ways to regulate non-performance of obligations and liability — based on the kind of non-performance, the legal remedies, or the kind of obligation not properly performed.^{*54} Estonian law regulates liability for non-performance based on the type of legal remedy applied. A debtor is released from liability in a contractual relationship only if there are circumstances of *force majeure* (LOA § 103 (1)). The LOA has thus transposed the principle of so-called control liability^{*55} prescribed in CISG article 79, PECL article 8:108, and PICC article 7.1.7, according to which a party to a contract is released from liability for non-performance if he proves that it is due to an impediment of *force majeure* — *i.e.*, circumstances that are beyond the control of the obligor and which, at the time of the conclusion of the contract or the non-contractual obligation arose, the obligor could not reasonably have been expected to take into account, avoid, or overcome the impediment or the consequences thereof which the obligor could not reasonably have been expected to overcome.^{*56}

According to LOA § 100, non-performance is failure to perform or defective performance of an obligation, including a delay in performance. Estonian law thus recognises the unitary concept of non-performance of obligation^{*57} similarly to PICC article 7.1.1, which is why it is generally irrelevant from the viewpoint of application of legal remedies which obligation was not performed or how, although the right of application of a legal remedy may depend on the nature of the non-performance (*e.g.*, the right to legal remedy may depend on whether the breach was fundamental or not; see LOA § 222 (2)). The definition of a non-performance as formulated in LOA § 100 covers both excusable and inexcusable non-performance. Non-performance is an objective fact and has to be assessed only on the basis of whether the contract has been duly fulfilled or not. The reasons for which a contract was not duly performed, whether objective or subjective, are irrelevant. The central concept of the legal regulation of breach of contract is fundamental breach, which basically corresponds to what is stated in CISG article 25.^{*58}

In the event of a non-performance, the creditor may be granted legal remedies, whose application may depend on other prerequisites besides the non-performance. In contracts where the creditor has obligations to the other party, the creditor may exercise the right to refuse to fulfil the contract (LOA §§ 110, 111). The main legal remedies granted to a creditor by law are requiring specific performance and claiming compensation for damage, the right to withdraw from the contract, and the right to reduce the price. In certain contracts, a party may make a new and conforming tender to cure the non-performance itself, or causing others to do this, and claim from the party in breach compensation for reasonable expenses.^{*59}

The importance of requiring specific performance in the field of contractual obligations arises from LOA § 8 (2), according to which a contract is binding on the parties. Besides what is stated in the aforementioned provisions, LOA § 76 (1) also obliges the debtor to performance. LOA § 108 sets out the prerequisites for requiring specific performance as a legal remedy. According to LOA § 108 (1), a party may require specific performance without limitation in the case of non-performance of a monetary obligation, but the debtor may require the performance of a non-monetary obligation only if there are no circumstances precluding it. LOA § 108 (2) specifies the cases when a claim for performance of a non-monetary obligation must not be filed — *i.e.*, the debtor's arguments, which the debtor may submit also extrajudicially.

Requiring specific performance is balanced in Estonian law with other legal remedies, from among which the party to the obligation who has suffered damage may choose the one best suited to the circumstances. Requiring specific performance also covers a request for remedying the non-performance and substitution, which may be allowed in the case of certain contracts only in the event of a fundamental breach (*e.g.*, non-performance of a sales contract if the purchaser is not a consumer, LOA § 222 (1)). The performance of

⁵⁴ See, *e.g.*, The Principles of European Contract Law and Dutch Law. A Commentary. D. Busch, E. Hondius (eds.). The Hague: Ars Aequi Libri, Nijmegen&Kluwer Law International 2002, p. 325 ff.

⁵⁵ T. Wilhelmsson. Towards a (Post) modern European Contract Law. – *Juridica International* 2001 (6), pp. 26; P. Schlechtriem. Commentary on the UN Convention on the International Sale of Goods (CISG). Oxford: University Press 1998, p. 600 ff.; The Principles of European Contract Law and Dutch Law (Note 54), pp. 341 ff.

⁵⁶ See P. Schlechtriem (Note 55), p. 600 ff.

⁵⁷ The unitary concept of non-performance is also recognised by the PECL (Art. 8:101 (1)), PICC (Art. 7.1.1.), and the new Dutch Civil Code (Art. 6:74).

⁵⁸ The CISG has played a decisive role in the development of the concept of fundamental breach in European law. L. Graffi. Divergences in the Interpretation of the CISG: The Concept of 'Fundamental Breach'. – The 1980 Uniform Sales Law. Old Issues Revisited in the Light of Recent Experiences. Verona Conference 2003. F. Ferrari (ed.). Sellier: European Law Publishers 2003, p. 310.

⁵⁹ For instance, a customer's right to improve the work under LOA § 646 (5) or have the work improved.

monetary obligations may be required in the case of non-performance of obligations without the debtor having the right to object (LOA § 108 (1)). In the case of mutual contracts, the party in breach may demand performance by the other party even if the party in breach cannot be required to perform its obligations because of the objections described in LOA § 108 (2). The most important change from the stipulations of the pre-reform law, however, lies in the debtor's objections prescribed using the example of PICC article 7.2.2 and PECL article 9:102, upon the making of which the debtor is no longer entitled to require specific performance (LOA § 108 (2)). The Civil Code that regulated obligation until 1 July 2002 provided that an obligation ended upon impossibility of performance. The Law of Obligations Act has created a situation where the impossibility of performance, regardless of the time of its emergence, does not terminate the obligation but entitles the creditor to choose the legal remedy suited to him or her under the particular circumstances. Distinction between the impossibility of performance of an obligation (LOA § 108 (2) 1)) from the prohibition on requiring specific performance where performance is unreasonably burdensome or expensive for the debtor as prescribed in LOA § 108 (2) 2) may prove to be complicated in practice. When should it be decided whether performance is impossible for some objective reasons — *i.e.*, circumstances beyond the control of the debtor — or whether the impossibility is subjective and relates to the unreasonably great expense of potential performance? Where impossibility is of a temporary nature and the creditor has not exercised the right to terminate the contract, the requirement of specific performance may be submitted to the debtor when the impossibility ceases to be. Impossibility of performance under LOA § 108 (2) 1) should cover instances of objective impossibility, which do not fall under LOA § 108 (2) 2)–4).

Withdrawal from a contract as a legal remedy entitles a party to unilaterally step out of a contract if the other party is in breach of the contract so that there is no interest in continuing the performance of contractual obligations. This is an important contractual legal remedy. Estonian law provides for two kinds of termination of contracts: termination with retroactive power or *ab initio* (*Rücktritt*) and termination aimed at the future (*Kündigung*). The latter is possible in long-term contracts on general preconditions, which are set out in the general part of the Law of Obligations Act for all types of contracts, and the prerequisites set out in the special part of the act that relate to particular types of contracts. A contract may be cancelled, as a rule, only by granting an additional period for performance, except in the case of a fundamental breach. The right to cancel a contract for good reason has caused problems in practice. Courts have admitted as good reason the duties of a local government in ensuring school attendance in situations where it is compulsory, which has served as justification for extraordinary cancellation of a lease contract, as well as any personal interest in using the leased premises for reasons other than leasing.

Most problematic, however, is the definition of fundamental breach set out in the Law of Obligations Act, whose wording is based on PICC article 7.3.1.⁶⁰ This particularly concerns LOA § 116 (2) 1), according to which a breach of contract is fundamental if a party is substantially deprived of what the party was entitled to expect under the contract, except in cases where the other party did not foresee such consequences and a reasonable person could not have foreseen such consequences under the same circumstances, and LOA § 116 (2) 2), according to which a breach is fundamental if, pursuant to the contract, strict compliance with the obligation that has not been performed is the precondition for the other party's continued interest in the performance of the contract. LOA § 116 (2) 2) should be interpreted as restricting here, by limiting the fundamental nature of a breach by the condition that a party may have foreseen a loss of interest in performance upon non-performance of the obligation. Despite strict regulation limiting the right to withdraw from a contract only to fundamental breaches, it is possible under Estonian law to interpret the provisions so that withdrawal from the contract is possible in the case of practically any violation. This would expose the party in breach of the contract to an indefinite risk when performing the contractual obligation. The example of BGB § 323 (2) 2) should be considered, under which the right of withdrawal is limited to only a breach of the terms for the time of performance.

Another problem is considering a breach fundamental when it is due to intentional and gross negligence (LOA § 116 (2) 3)). The introduction of a subjective criterion to the assessment of a non-performance of a contractual obligation is not in line with the doctrine of fundamental breach and would substantially reduce the opportunity of a debtor to improve his or her situation during an additional period for performance. Neither the German nor the Dutch Civil Code, nor the CISG, contains a regulation similar to the Law of Obligations Act. The PICC is closest to the regulation of the LOA, but the PICC provides for an additional period for performance only in the event of delay in performance, and it also presumes the non-performance of a fundamental obligation. Thus, the situation has not been regulated anywhere in the same way as in Estonian law.

The law of obligations prescribes the general obligation to provide an additional period for performance upon withdrawal from a contract. However, the broad regulation of cases of fundamental breach substantially reduces the role of the additional period among the debtor's objections. An addition to LOA § 116 should be considered, based on the example of the second sentence of BGB § 323 (5), and the possibility to

⁶⁰ See the concept of fundamental breach in CISG Art. 25. P. Schlechtriem (Note 55), p. 174 ff. The CISG had great influence on the wording of the PICC regulation.

terminate a contract by granting an additional period even in the case of a non-fundamental breach should be precluded.^{*61} For example, the CISG ties the grant of an additional period to only failure to perform an obligation by the prescribed time, not any other non-performance of a contractual obligation.^{*62} The PICC and PECL also stipulate a delay in performance as the only prerequisite for granting of an additional period.^{*63}

The issues of unilateral termination of a contract should be elaborated upon where sales contracts and contracts for services are concerned, particularly based on the EU directive regulating consumer sale. Although the requirements should be met formally, the relation between the general part and special provisions requires elaboration. An addition should be considered based on article 401 (2) and article 404 (2) and (3) of the draft contract for the regulation of the sale of goods in the European Union by the Study Group on the European Civil Code, which limit the application of the general grounds for withdrawal to sales contracts. Similar principles are contained in a draft pertaining to many other types of contract.

The LOA regulates termination of contract as a legal remedy in a non-mandatory capacity. Judicial practice has to draw the line here as to the kinds of contracts for which and the extent to which agreements on the limitation of liability are allowed.

The draft European Civil Code, which should cover the entirety of private law through uniform rules, allows for the development of the common part of different legal orders so that the competition between fora would lose its special topicality. Unification on the level of provisions is probably attainable in the near future. Application of the content of the provisions and of rules under specific circumstances, however, will continue to depend largely on the legal culture and legal methods of the particular state. Estonia's contribution to the development of a unified civil law should lie not so much in extensive legal practice as in the proposal of a system of well-formulated rules and efficient regulation.

⁶¹ See P. Huber, F. Faust. *Schuldrechtsmodernisierung. Einführung in das neue Recht*. München: C.H. Beck 2002, p. 188.

⁶² P. Schlechtriem (Note 55), pp. 395–398.

⁶³ A. Hartkamp. *The UNIDROIT Principles for International Commercial Contracts and the Principles of European Contract Law*. – *European Review of Private Law* 1994/2, p. 351; *Principles of European Contract Law: Parts I and II*. Prepared by the Commission on European Contract Law. O. Lando, H. Beale (eds.). The Hague, London, Boston: Kluwer Law International 2000, pp. 123 ff., 359 ff.



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Cultural Dimension in Estonian Copyright Law

The objective of this article is to discuss some national and global issues of copyright law. The subject of the analysis is the relationship of Estonian copyright law today with culture and economic activities.

1. Estonian copyright (*autoriõigus*) — the right of an author or of an undertaking?

Estonia belongs to those Continental European countries where the terminology itself reveals the bases of legal regulation. The counterparts of the Estonian term *autoriõigus* in other civil law legal systems are *droit d'auteur*, *Urheberrecht*, *diritto di autore*, *upphovsrätt*, *tekijänoikeus*, *avtorskoje pravo*, etc. And although according to international practice *autoriõigus* is translated into English as 'copyright', the Estonian term expresses the content of the notion correctly.

Section 39 of the Constitution of the Republic of Estonia sets out: 'An author has the inalienable right to his or her work. The state shall protect the rights of the author'. The entire copyright regulation is based on the premise that the author is the creator of the work. Such a conclusion may be drawn even from § 1 of the Copyright Act², titled 'Purpose of Copyright Act'. Subsection 1 of this provision reads as follows: 'The purpose of the Copyright Act is to ensure the consistent development of culture and protection of cultural achievements and 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.'³

Upon the adoption of the Copyright Act in 1992, the provision setting forth the main objectives of the Act was worded with solely the cultural dimension in mind. Only by the amendments to the Copyright Act, which entered into force on 6.01.2000⁴, was a reference to the cultural industry and commercial acti-

¹ Copyright H. Pisuke 2004.

² The Copyright Act was passed on 11 November 1992 and entered into force on 12 December 1992 (RT 1992, 49, 615, in Estonian). By June 2004, it had been amended 16 times. See the English translation on the Web site of the Estonian Legal Language Centre www.legaltext.ee.

³ In fact, the Estonian legislative act should be titled the Copyright and Related Rights Act.

⁴ The Copyright Act and Associated Acts Amendment Act was adopted on 9 December 1999, and it entered into force on 6 January 2000 (RT I 1999, 97, 859, in Estonian). This act harmonised all of the five European Union directives adopted at the time.

vities introduced using the expression ‘the development of copyright-based industries and international trade’.

On what grounds can we decide that the underlying element of the Estonian copyright law is the author as a creator of cultural achievements? Above all, by the regulation of protected works and the rights guaranteed in the Copyright Act to authors and the exercise of such rights.

The legal definition of a work protected by copyright has been set out in § 4 of the Copyright Act. The criteria for the protection of a work are traditional. Works mean any original results in the literary, artistic, or scientific domain that are expressed in an objective form and can be perceived and reproduced in this form either directly or by means of technical devices. The criterion of originality of a work as applied to all types of works is that a work is considered to be original if it is the author’s own intellectual creation.⁵

The Estonian law clearly expresses the presumption of protection of a work.⁶ The burden of proof lies on the person who contests the protection of a work by copyright.

Such a concept proceeding from the author’s interests allows for the protection of oral works, photographs, designs, buildings and landscape architecture, *etc.* Such a broad range of protected subject matter manifests one of the functions set out in § 1 of the Copyright Act: to provide authors with favourable conditions for the creation of mental and material culture.

The Copyright Act grants to the author an extensive catalogue of rights that is much broader than provided for in any international standards established by intellectual property agreements and the majority of the copyright laws in the world. The list of personal or moral rights is especially extensive, comprising nine independent rights.⁷ For example, the two rights of article 6*bis* of the Berne Convention for the Protection of Literary and Artistic Works have been detailed as five independent rights in the Estonian Copyright Act; for the violation of each, the application of a separate remedy may be sought. These rights are the right of authorship, the right to the author’s name, the right of integrity of the work, the right of additions to the work, and the right of protection of the author’s honour and reputation. In addition to these five, the principles of article 6*bis* of the Berne Convention have been developed further in the form of the independent right of disclosure of the work, the right of supplementation of the work, the right to withdraw the work, and the right to request that the author’s name be removed from the work that is being used.⁸

Copyright, both moral and economic rights, in a created work belong to the author in all cases, according to the Estonian law.⁹ This is an important legal and political starting point, which once again emphasises that copyright derives from the creator and belongs to the creator at the moment the work is created. The use of a work as a cultural phenomenon or an object of the economic activities of society derives from the author. Consequently, the whole system of economic exercise of copyright has been structured proceeding from the author and starts with nobody else but the author.

According to the Estonian law, the author may dispose of his or her proprietary rights in any manner and form. The economic rights can be assigned individually or as a set of rights, or they can be licensed. In such cases, an author is entitled to remuneration. The law does not impose any limits on the terms of authors’ contracts. This means that by a contract, an author may assign all his or her economic rights until the copyright expires (70 years after the author’s death). Permitting conclusion of authors’ contracts without any time limits is not characteristic of the legal systems of several countries, which impose, for example, a maximum term of validity for authors’ contracts or do not allow for the assignment of all the author’s economic rights. In this respect, the applicable Estonian copyright law involves a certain contradiction between the granting of legal guarantees in the author’s interests and the extremely liberal policy concerning conclusion of contracts. On the basis of complete freedom of contract, the author has the absolute right to decide on the use of the fruit of his or her creation. As demonstrated by practice, this provides an opportunity to take advantage of the ignorance of authors and to conclude contracts that are extremely unfavourable for authors. The Copyright Act does not provide any guarantees to authors regarding contracts already concluded. However, the interests of authors can still be protected under the provisions of the new Law of Obligations Act¹⁰, which govern withdrawal from or cancellation of a contract.

⁵ See § 4 (2) of the Copyright Act.

⁶ The protection of a work by copyright is presumed: § 4 (6) of the Copyright Act.

⁷ See also H. Pisuke. Moral Rights of Author in Estonian Copyright Law. – *Juridica International* 2002 (7), pp. 166–175.

⁸ See § 12 of the Copyright Act.

⁹ In § 11 of the Copyright Act, Content of copyright, ‘(1) Copyright of the author arises upon the creation of the work by the author. Moral rights and economic rights constitute the content of copyright.’ In § 28, Author of work, ‘(1) The moral and economic rights of an author shall initially belong to the author of a work unless otherwise prescribed by this Act with regard to the economic rights of the author.’

¹⁰ The Law of Obligations Act, passed on 26 September 2001, came into force on 1 July 2002 (RT I 2001, 81, 487), as amended (RT I 2002, 60, 374; 2003, 78, 523; 2004, 13, 86; 37, 255) (in Estonian).

In the case of moral rights, the Estonian law does not expressly permit their assignment.^{*11} However, a licence may be granted with respect to all personal rights.^{*12} Such a licence may, analogously to economic rights, be an exclusive licence or a non-exclusive licence. In practice, this is a very important provision that is seldom found in the laws of other countries. Namely, the licensing of personal rights allows for solving the ‘ghost authorship’ issue. If a political speech is written by one person (who is the actual author) and is presented to the public by another person under his or her name (for example, a minister), then from the copyright perspective the situation is undetermined and even risky. The granting of an exclusive licence to moral rights is close in essence to the assignment of all these rights, and this can also be done with regard to the right of authorship. Thus, the provision is extremely important, for example, in relation to designs of trademarks, banknotes, official insignia, *etc.* created by an artist. From the point of view of the certainty of transactions, such a solution is a positive one. The hidden activity that has so far operated on the basis of custom has come to a clear legal solution. At the same time, it must be noted that in practice such contracts are seldom found. As a rule, this is caused by the fact that neither the user of the work nor the author is familiar with matters of law.

In practice, moral rights are violated rather frequently, and relevant judicial practice is developing in Estonia. The Supreme Court has rendered several decisions in the area.^{*13}

According to the Estonian law, only a natural person may be an author. A legal person cannot be an author as a creator of a work. A legal person as a subject of derived rights may naturally have copyrights on the basis of law or a contract.^{*14}

Following consistently the Continental European tradition based on the author, the Estonian Copyright Act still makes three reservations in relation to the ownership of economic rights that are typical of the Anglo-American copyright tradition. Namely, the copyright in works created under an employment contract or in public service in the execution of a person’s direct duties and in audiovisual works shall be transferred to the employer, state, and producer of the audiovisual work, respectively.^{*15} Yet we have to emphasise one very important aspect that characterises Estonian law in the transfer of such rights. The legal-political and legal-philosophical consistency in the Estonian copyright law is manifested in the fact that in these three cases copyright as a complex of moral and economic rights is first created for the author (or authors) of the work and only from him or her (or them) are the economic rights transferred to the employer, state, or producer. For example, § 32 (1) of the Copyright Act is worded as follows: ‘The author of a work created under an employment contract or in the public service in the execution of his or her direct duties shall enjoy copyright in the work, but the economic rights of the author to use the work for the purpose and to the extent prescribed by the author’s duties shall be transferred to the employer unless otherwise prescribed by contract’, and § 33 (2) of the Copyright Act, dealing with audiovisual works, is analogous in its principle.^{*16} In theory, a question arises how long economic rights belong to the author and from what moment they are transferred to the employer or state. There is obviously no answer to this question in real time. And consequently, §§ 32 and 33 of the Estonian Copyright Act must be interpreted both as a legal provision and as a provision containing a general principle of law.

Moral rights are not automatically transferred to the employer or producer under the Estonian law. Yet the employer or producer may obtain from the author also an exclusive licence for exercising moral rights as well.

A question arises as to where such an author-centred approach is rooted in Estonian legal thought and practice. These historical roots must be sought in the years of Estonia’s first era of independence. Until 1940, the Copyright Act of tsarist Russia, dating from 1911, applied in Estonia. And although in the 1930s, a draft was developed on the basis of German theoretical examples, it never came to be processed as legislation. The Russian law of 1911 continued to apply without amendments after Estonia’s accession to the Berne Convention in 1927.^{*17}

^{*11} According to § 11 (2) of the Copyright Act, the moral rights of an author are inseparable from the author’s person and non-transferable.

^{*12} This solution was introduced by the amendment that entered into force on 6 January 2000. See Note 4.

^{*13} The Web site of the Supreme Court, located at www.nc.ee, contains a database of the judgments of the Supreme Court (in Estonian).

^{*14} See § 28 of the Copyright Act.

^{*15} Namely § 32, ‘Copyright in works created in execution of duties of employment’, and § 33, ‘Copyright in audiovisual works’, of the Copyright Act.

^{*16} ‘Copyright in an audiovisual work shall belong to its author or joint authors — the director, the scriptwriter, the author of dialogue, the author of the musical work specifically created for use in the audiovisual work, the cameraman, and the designer. The economic rights of the director, the scriptwriter, the author of dialogue, the cameraman, and the designer shall transfer to the producer of the work unless otherwise prescribed by contract. The economic rights of the author of the musical work used in the audiovisual work shall not transfer to the producer, whether or not the work was specifically created for use in the audiovisual work’.

^{*17} RT 1927, 78, p. 980. The official notice on the Republic of Estonia’s accession was published in official publication *Le Droit d’Auteur* 1927/8 of the International Bureau of the Berne Union, p. 89. See also *L’entrée de l’Estonie dans l’Union de Berne. – Le Droit d’Auteur* 1927/9, pp. 102–103. Estonia was the 29th member state of the Berne Union. See also H. Pisuke. *Berni konventsioon ja Eesti: minevikust tulevikku* (Berne Convention and Estonia: from past to future). – *Eesti Jurist* (Estonian Lawyer) 1993/11, pp. 16–26 (in Estonian); H. Pisuke. *Eesti on taas Berni konventsiooni liige!* (Estonia is state party to Berne convention again!) – *Eesti Jurist* (Estonian Lawyer) 1994/11, pp. 47–52 (in Estonian).

During that period, copyright was regarded as part of legal regulation of culture. At the same time, an institute — the national Cultural Endowment — was established by the Act of 1925^{*18}, which competed with copyright. This Act established a special national foundation from appropriations from alcohol and tobacco excise duty, gambling tax, *etc.* Representatives of all creative professions could apply for support; these regular allowances to authors were reminiscent of salaries for being authors. The doctrine of the era favoured such a support system for national authors, with the reasoning that Estonia's limited market and modest competitiveness in an international cultural market were not sufficient for the subsistence of Estonian authors. Copyright thus played a secondary role next to the Cultural Endowment. The Cultural Endowment system was restored in the Republic of Estonia after the re-establishment of its independence, principally on the basis of the same model.^{*19} However, it does not endanger the situation of copyright in any manner today.

Nevertheless, in legal theory, copyright was still treated as part of commercial law.^{*20} Copyright was not taught separately at the university level, and almost no research was done in the area.

The currently applicable Estonian copyright law and doctrine manifest some influences dating back to Soviet legal thought, which is strongly related to the cultural realm for historical reasons.^{*21} This is understandable and can be explained. The draft Act was developed in 1991–1992, when there was still insufficient knowledge of either the market economy or copyright based on a market economy. This, however, did not prevent the WIPO from giving high marks to the Estonian Copyright Act of 1992 and recommending it as a model legislative act to the other Central and Eastern European countries and former Soviet republics.

The Copyright Act has enjoyed an exceptional status in the Estonian legal order. This is one of the few legislative acts dating from the beginning of the 1990s that have continued to apply in their original wording to this day. And although the Copyright Act has been amended more than a dozen times^{*22}, this has not affected its legal-political and philosophical foundation, which proceeds from the author and is strongly related to culture.

2. International dimension

The first section of the Estonian Copyright Act follows the foundations of the preamble to the Berne Convention for the Protection of Literary and Artistic Works, entered into in 1886^{*23}, which states that the objective of the convention is to protect the rights of authors in a manner that is characteristic of the Continental European tradition.

The preamble to the Universal Copyright Convention (UCC) of 1952^{*24} has somewhat different foundations. The cultural dimension can also be inferred here^{*25}, but it is not a clearly worded goal. It has been regarded

¹⁸ RT I 1925, 27/28.

¹⁹ Eesti Kultuurkapitali seadus (Cultural Endowment of Estonia Act). Passed 1.06.1994. – RT I 1994, 46, 772; 2002, 87, 506 (in Estonian).

²⁰ A. Piip. Kaubandusõigus ja -protsess. "Kaubandusõiguse" kolmas trükk (Commercial law and process. Third edition of 'Commercial law'). Tallinn: Justiitsministeerium (Ministry of Justice) 1995, p. 166 (in Estonian).

²¹ The legal-political foundation of the preamble to the Civil Code of the Estonian Soviet Socialist Republic of 1964 was 'the protection of the material and cultural interests of citizens; the correct concordance of these interests with the interests of the entire society; development of creative initiative in the areas of science and technology, literature, and art'. – ENSV ÜVT (ESSR Supreme Council and Government Gazette) 1985, 27, 451 (in Estonian). The Soviet Union did not have a market economy or private ownership; the term 'intellectual property' was not used.

²² See H. Pisuke. Autoriõiguse seadus (Copyright Act). – Intellektuaalse omandi infokiri (Intellectual Property Newsletter). TÜ Õigusinstituut (Institute of Law, University of Tartu) 2003/1, pp. 6–7 (in Estonian).

²³ 'The countries of the Union, being equally animated by the desire to protect, in as effective and uniform a manner as possible, the rights of authors in their literary and artistic works'. Berne Convention for the Protection of Literary and Artistic Works of 9 September 1886. Paris Act of 24 July 1971, as amended on 28 September 1979. WIPO, Geneva.

²⁴ Universal Copyright Convention of 6 September 1952, as revised in Paris, 24 July 1971. See www.unesco.org/culture/laws/copyright/html_eng/page1.shtml.

²⁵ 'The Contracting States, / Moved by the desire to ensure in all countries copyright protection of literary, scientific and artistic works, / Convinced that a system of copyright protection appropriate to all nations of the world and expressed in a universal convention, [...], will ensure respect for the rights of the individual and encourage the development of literature, the sciences and the arts. Persuaded that such a universal copyright system will facilitate a wider dissemination of works of the human mind and increase international understanding [...]'

²⁶ W. Bappert. Internationales Urheberrecht. Munich and Berlin: Beck 1956, Note 2. Cited in W. Nordemann, K. Vinck, P. W. Hertin, G. Meyer. International Copyright and Neighboring Rights Law. Commentary with special emphasis on the European Community. VCH 1990, p. 215.

²⁷ Article I (Paris Text 1971) reads: 'Each Contracting State undertakes to provide for the adequate and effective protection of the rights of authors and other copyright proprietors in literary, scientific and artistic works [...]'.

as a social aspect of copyright in literature, as a 'social bond of copyright law'.^{*26} Article 1 of the UCC clearly includes the proprietor^{*27} among the subjects protected by copyright, which was not there in the Berne Convention.

The WIPO Copyright Treaty 1996^{*28}, which is a special agreement to the Berne Convention, relies on the view that the author is the sole subject of protection^{*29} in the first section of its preamble, and from copyright as an incentive for creation.^{*30} At the same time, the preamble sets out as the objective of the convention 'to introduce new international rules and clarify the interpretation of certain existing rules in order to provide adequate solutions to the questions raised by new economic, social, cultural, and technological developments'.

The preamble to the Agreement on the Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement)^{*31} makes no use of the words 'culture' and 'author'. The general objective of the agreement, which also fully includes copyright, is to achieve global economic and trade goals.^{*32} Moreover, article 9 of the TRIPS Agreement precludes the application of article 6*bis* of the Berne Convention, which imposes minimum standards concerning the moral rights of authors.

We have to agree with the statement that 'The Preamble, as a preface and declaration of intention of the Contracting States, does not constitute contractually binding subject matter. Therefore, it [...] can, at most, contribute to shedding light on the particular provisions set forth in the actual text of the Convention or to the elucidation of the motivations behind these provisions'.^{*33} However, the role of the preamble is not limited to that. The preamble to the international agreement and the general provision containing the objectives of a national law have a fundamental meaning as a legal-political and legal-philosophical basis for law.

In the European Union, questions concerning the possible harmonisation of copyright law were raised in the 1970s, and particularly in the cultural context and social context as proceeding from authors. The primary goal of the European Commission was to provide the Commission with competence in the area of culture. The Commission published two papers, in 1977 and 1982. At the request of the Commission, Dr. Adolf Dietz prepared the study 'Copyright in the European Community' together with specific proposals for harmonisation.^{*34} And although extensive preparations were made to this end, copyright was actually harmonised in the European Union on bases completely different from cultural affairs.

Starting from the 1988 Green Paper on Copyright and the Challenge of Technology, the Directorate responsible for the internal market (DG Internal Market) of the European Commission took a lead in the harmonisation and implementation activities in the areas of copyright and rights related to copyright. Goals such as 'establishment of a common market', 'functioning of the internal market', 'an area without internal frontiers', 'abolition of obstacles to the free movement of goods and services', and 'ensuring that competition in the common market is not distorted' served as economic and legal-political goals in the directives adopted in 1991 and later.^{*35} The first-generation directives of the 1990s very clearly applied copyright as falling within the economic and trade realm. The approach related to the author and culture was clearly in the background only. This approach was challenged by the culture ministers of the EU member states, voicing their concern that the completion of the single market should not constitute a threat to cultural identities and to the rich diversity of Europe. The ministers noted that 'taking into account the cultural dimension of copyright, internal harmonisation at Community level in this area should be implemented only in areas affecting the establishment or functioning of the common market' and 'the cultural content of copyright and neighbouring rights should be taken into account'.^{*36}

^{*28} Adopted by the WIPO Diplomatic Conference on 20 December 1996. Estonia has signed the treaty but not ratified it by June 2004. See www.wipo.int/documents/en/.

^{*29} 'The Contracting Parties, / Desiring to develop and maintain the protection of the rights of authors in their literary and artistic works in a manner as effective and uniform as possible [...]'

^{*30} 'The Contracting Parties, [...] Emphasizing the outstanding significance of copyright protection as an incentive for literary and artistic creation [...]'.
^{*31} Annex 1C of the Agreement Establishing the World Trade Organisation (Marrakesh Agreement). See www.wto.org/english/docs_e/legal_e/27-trips.doc. Estonia has been a party to the WTO and TRIPS agreements since 13 November 1999.

^{*32} 'Members, / Desiring to reduce distortions and impediments to international trade, and taking into account the need to promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade [...]'

^{*33} W. Nordemann, K. Vinck, P.W. Hertin, G. Meyer (Note 26), p. 215.
^{*34} G. Schricker. Harmonisation of Copyright in the European Economic Community. NIR – Nordic Intellectual Property Law Review 1989, pp. 494–495.

^{*35} See Recital 2 of Council Directive 93/83/EEC of 27 September 1993 on the co-ordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission (OJ No. L 248, 6.10.93, p. 15); Recital 3 of Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases (OJ No. L 77, 27.3.1996, p. 20).

^{*36} Conclusions of the Ministers for Culture Meeting Within the Council of 7 June 1991 on copyright and neighbouring rights (91/C 188/04). – OJ No. C 188, 19.07.1991, p. 4.

The objective of harmonisation of copyright in the European Union in the 21st century has been set out in the preamble to the flagship of harmonisation of the area, the Infosociety Directive.³⁷ Recital 1 of the directive has been worded as follows: 'The Treaty [establishing the European Community] provides for the establishment of an internal market and the institution of a system ensuring that competition in the internal market is not distorted. Harmonisation of laws of the Member States on copyright and related rights contributes to the achievement of these objectives'. A significant change when compared to the five previous EU directives is the introduction of the dimensions regarding the author and culture as a legal-political basis for harmonising law. It is true that these dimensions are introduced only starting from Recital 8 (up to Recital 12), which implies their order of importance, but they are there. For example, the following principle is found in recital 12: 'Adequate protection of copyright works and subject matter of related rights is also of great importance from a cultural standpoint. Article 151 of the Treaty requires the Community to take cultural aspects into account in its action'. It may be predicted that the issues related to the author as a creator of culture and initial subject of rights will continue to be highlighted in the EU documents to come. Estonia as a full member of the EU will participate in drafting these documents.

Similar developments can be detected also on the global level in the 21st century, marked by a knowledge-based society. The WIPO has established as one of the branches of its international political activities 'a vision of creating global intellectual property culture'. When explaining this concept, WIPO Director General Dr. Kamil Idris has noted that 'WIPO considers that the IP culture promotes a productive, well-functioning IP system that extracts the maximum economic, social, and cultural benefits from national creativity and invention; encourages partnerships that facilitate the innovation cycle; and generates an understanding and appreciation among the general public of the important place of intellectual property in the construction of a better future'.³⁸

The WIPO global intellectual property culture doctrine can be easily associated with the global intellectual property society doctrine, established in Estonian jurisprudence.³⁹ The presupposition of both doctrines is the perception of a strong relationship between the legal regulation of copyright and culture in the modern world. It is not correct to include copyright only among the institutes of law governing economy and trade today. Copyright has a strong social objective as a tool developing culture and the means of social protection of creative professions. The subjective rights granted to the author under the Copyright Act belong to private law by nature and are included in civil law in the Estonian legal system. At the same time, this is not a traditional institute of civil law, and its inclusion in the common civil law system in Estonia is precluded.⁴⁰

The mission of copyright law in Estonia is to regulate two types of relationships proceeding from the author, in which the creator of a work appears in different roles: author as the creator of culture and author as the subject of economic activities. The old, traditional framework of copyright is suitable for that, as there is no contradiction in the division of the roles of these two 'authors'. Such an approach may be called a cultural copyright doctrine. Another paradigm is characteristic of the Anglo-American legal tradition and draws on the category of 'work'. Such an approach is not part of the Estonian legal tradition. At the same time, a new paradigm can be established, combining both the cultural background regulation based on the author (cultural copyright law) and the economic approach that takes account of modern global economic realities (economic copyright law).

This article does not consider the social aspect of copyright, which definitely has an independent meaning and specific features. It is not clear yet what basis will be provided for the possible new Estonian Copyright Act or a new wording of the Act to be developed in the years to come.

3. Conclusions

Today's Estonian copyright is clearly the author's right. Taking that into account, we may claim that by its historical tradition and foundations, the Estonian copyright law is a cultural copyright law. Proceeding from the author and serving the author's interests, private law provides copyright law with the leverage enabling the author to actualise his or her economic interests. Consequently, the Estonian copyright law is also economic copyright law.

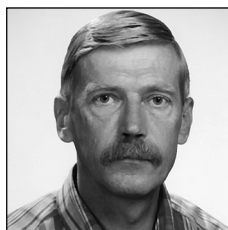
³⁷ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ No. L 167, 22.6.2001, p. 10).

³⁸ Speech of Dr. K. Idris at the International Symposium in Commemoration of the 100th Anniversary of the Japan Institute of Invention and Innovation. WIPO update 226/2004, Geneva, 28 May 2004. www.wipo.int.

³⁹ H. Pisuke. Building a National Intellectual Property Protection System: Some Issues Concerning Copyright and Related Rights in Estonia. – *Scandinavian Studies in Law* 2002 (42). Intellectual Property, pp. 140–144.

⁴⁰ The sub-institute of copyright belonged to the ESSR Civil Code of 1964 as Part IV. In the Russian Federation, a debate on whether copyright should be part of the civil code continues to this day.

The Copyright Act, which continues to apply in Estonia for the 12th year, signals to a certain extent the 'romantic concept of authorship'. But in its foundation, structured to clearly proceed from the concept of author as creator, it has survived all harmonisations with international conventions and EU directives. These conventions and directives are primarily a result of the globalisation of the world economy, development of international and Community trade, and development of technology. Hence, copyright law that is based on a view of the author as a creator and is strongly related to the cultural paradigm allows for meeting the challenges presented by the global economy and development of technology in the 21st century, too. Moreover, the doctrines of global intellectual property society and global intellectual property culture cannot exist without reliance on the view of the author as the immediate creator of the work and the cultural category of copyright. The new Estonian Copyright Act to be drafted in the years to come attempts to find a basis suitable both for the 21st-century author and cultural industries.



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Administrative Law Reform in Estonia: Legal Policy Choices and Their Implementation

The years that have passed since the reestablishment of Estonia's independence are characterised by reforms of the legal system, preparation for them, and their implementation. All these activities have stemmed from a single underlying idea — to develop a legal order appropriate to a democratic state based on the rule of law. Reforms in public and private law as well as in penal law were finalised ten years after the entry into force of the Constitution of the Republic of Estonia. The same applies to administrative law. The Riigikogu has prepared and passed important legislation relating to the general part of administrative law, such as the Administrative Procedure Act, State Liability Act, Substitutive Enforcement and Penalty Payment Act, and Administrative Co-operation Act. The preparation of the administrative law reform was accompanied by the drafting of a new Code of Administrative Court Procedure, which has now entered into force and has a significant role in protecting the rights and freedoms of individuals and ensuring lawful administration.

These Acts have been in force for over two years, and we may already draw the first conclusions, assess their quality, and predict possible future developments. In order to grasp the essence of the administrative law reform, it would be appropriate to recall the ideas and sources of the reform, which have several lessons to teach for both today and tomorrow.

1. Legal policy choices

After the entry into force of the Constitution, which provided a framework for the development of the legal system but a relatively high degree of freedom of choice, it was necessary to make principled legal policy choices as regards the direction in which to move. In making these choices, an important role was played by a decision on consistency in the drafting of legislation, made by the Riigikogu on 1 December 1992, according to which the acts in force before 1940 have to be taken into account in the preparation of new draft acts.¹ The legislature thus formally acknowledged the fact that Estonia has been and continues to be a part of Continental European legal culture. Nevertheless, this decision too allowed a relatively high degree of freedom and, in some cases, was even disregarded. In drafting legislation for the special part of administra-

¹ Riigikogu 1. detsembri 1992. aasta otsus seadusloome järjepidevusest (Decision of the Riigikogu of 1 December 1992 on the consistency of legislative drafting). – RT 1992, 52, 651 (in Estonian).

tive law, the relevant laws of countries with the same general legal system were taken as the starting point, and these were incompatible with the Estonian legal system. When attempting to form generalisations, we may say that the first half of the nineties was characterised by an orientational and conceptual confusion in administrative law. One group of legislative drafters drew ideas from Germany, another from England, and yet another from the Scandinavian countries. As a result, the systematic structure of administrative law suffered considerably. In 1992, the Ministry of Justice ordered a study, 'Analysis and Prospects', conducted by a group of legal experts comprising Raul Narits, Eerik-Juhan Truuväli, Jüri Pöld, and Kalle Merusk, which was submitted to the ministry at the end of 1993. The study, aimed at identifying the trends in the development of public law in the period following the entry into force of the Constitution, suggested that public law be modelled on the German and Austrian legal systems because of the similar legal culture. At the same time, the study emphasised that mechanical copying of the legal acts of other countries should be avoided. A legislative act that is efficient in one country need not be efficient in another — and in practice is indeed usually not, as the experience of other countries has demonstrated — because it fails to take due account of historical, economic, and cultural differences; traditions; etc. It is much more important to examine conceptual solutions and transpose them into a new milieu.

In the mid-nineties, it was concluded that without providing legal bases for the general part of administrative law, it would be impossible to ensure the systematic structure of administrative law and shape the development of public law as a whole. Besides conceptual confusion, the situation that evolved was also characterised by the general eclecticism of the legislation drafted. The Acts addressing the special part of administrative law were prepared in different ministries, proceeded from different foundations, were not uniform, etc. The situation was further complicated by the fact that European Union directives were often translated as acts. It must be noted that in very many cases, the protection of the rights of individuals in administrative proceedings was not included in the regulations. The established practices of the courts alleviated the problem to a certain extent. It may be said without any exaggeration that the administrative courts, particularly the Administrative Law Chamber of the Estonian Supreme Court, made a significant contribution to the further development and establishment of the democratic principles of administrative law in the administrative court context.

The confusion concerning regulations pertaining to administrative law also had an inhibiting effect on administrative capacities as a whole. In many cases, legislative acts were not compatible, they did not include enforcement mechanisms, etc. Administrative capacities that were lacking were also among the things pointed out in the progress reports of the European Commission.^{*2}

The situation that had evolved left a need for radical legal policy decisions. And they were made. The Ministry of Justice adopted the position that the fastest and most efficient method would be to transpose, with some amendments, the relevant acts of the Federal Republic of Germany, which would ensure a systematised body of administrative law based on accepted theory tested by practice. For that purpose, translations of the relevant acts were ordered as well as translation books, and twinning training was planned and carried out. Foreign experts prepared the relevant drafts. The implementation of this concept would have entailed the transposition of certain political decisions and significantly affected, among other things, the judicial system and administrative organisation as a whole. Several legal experts, administrative experts, and judicial officials did not agree to such an approach. Here we may list Prof. R. Narits, Prof. K. Merusk, Prof. I. Koolmeister, Prof. W. Drechsler, Associate Prof. R. Randmaa, T. Annus, and others. The wider community of jurists also joined the discussion. On 13 March 1998, a conference titled 'Theoretical Foundations of the Estonian Legal System' was held in Tallinn, where the mechanical transposition of German law into the Estonian legal order came under criticism. The conference proceeded from the thesis that Estonia indisputably belongs to the Continental European judicial area; however, this does not mean that Estonia should and could take on the legal frameworks of other countries. Legal reforms must, above all, take account of the Estonian context. Estonian jurists developed a prevailing position that Prof. R. Narits has characterised as follows: 'The primary foundation in developing a legal order is rational, since it proceeds from an assumption that each state identifies itself through very specific features. One of the most important of these is a national legal order.'^{*3} Here we should also mention an idea expressed by Estonian legal expert Artur Taska: 'Law must be understandable to everyone who deals with it. The content of law must rely on the legal consciousness of the people; it must be in conformity with people's sense of justice and value sets. Only then can law act as an intermediary between real life and justice.'^{*4}

On 27 November 1998, at a conference dedicated to the 80th anniversary of the Ministry of Justice, entitled 'The History, Present Situation, and Prospects of the Estonian Legal System', then Minister of Justice Paul Varul noted in his presentation, 'In a model of a legal system, a distinction must be made between private

² European Commission progress report. Available at: http://europa.eu.int/comm/enlargement/report2002/ee_en.pdf.

³ R. Narits. Eesti õiguskord ja väärtusjurisprudents (Estonian legal order and jurisprudence of the value). – *Juridica* 1998/1, p. 3 (in Estonian).

⁴ A. Taska. *Õigusteaduse metodoloogia* (Methodology of Law). Lund 1978, pp. 72–73 (in Estonian).

and public law. Everything that I just said about a clear model and a fixed system mainly concerns private law, because in the case of private law we can speak about a higher degree of unification, a possibility for greater harmonisation. As regards public law, it is quite clear that we must be more careful when taking on board the examples of other states, since the so-called model for public law is still determined by our Constitution. If the Constitution does not provide the clearest foundations and limits for the development of private law, leaving a great deal of freedom of choice, then public law, and particularly administrative and constitutional law, are determined as far as possible by the Constitution. We can speak about familiarising ourselves with the experience of other countries and learning from the mistakes of other countries; however, it is clear that the need for taking account of the peculiarities of the country in question is considerably more significant in the area of public law than in private law.”⁵

The end of the nineties witnessed a change in the goals of administrative law reform. It was found that the finished draft acts did not duly reflect the actual situation of Estonia and the specifications arising from the Constitution. It was decided to re-focus on administrative law reform proceeding from an Estonian perspective and the legal order developed in Estonia. It was also decided to found the organisational structure on the classical system, which was deemed a prerequisite for successful implementation of the reform. A steering commission for administrative law reform was formed, whose members included politicians, judicial officials, legal experts, and administrative experts. This was accompanied by the formation of relevant working groups comprising legal practitioners, researchers, and officials. An agreement was concluded with the German experts Prof. Dr. U. Ramsauer and Dr. H. Schwemer, from whom additional theoretical support was sought for the implementation of an administrative law reform based on the Estonian context.

2. Bases of administrative law reform

The steering commission for administrative law reform also formulated the main objectives of the reform. They saw it as their task to ensure through legal regulation simple and modern administration that takes account of and guarantees an individual's rights. The reform had to rely on the principles arising from the Constitution and show due regard for the actual relations developed in society.

2.1. Constitution

The administrative law reform has various points of contact with the Constitution. This applies to substantive and procedural fundamental rights, as well as to constitutional principles. With respect to the law of administrative procedure, section 14 of the Constitution plays an important role, according to which guaranteeing rights and freedoms is the duty of the legislative, executive, and judicial powers, and of local government. Section 14 of the Constitution firstly carries both an organisational and a procedural dimension and secondly also implies that public authority is related to fundamental rights. The requirement to guarantee rights and freedoms does not consist only of the obligation to respect fundamental rights but also relates to their active formalisation in societal structures. Consequently, section 14 of the Constitution guarantees subjective rights, and its provisions are implemented in conjunction with other material addressing fundamental and subjective rights, as it lacks clearly defined and independent substantial elements of content.⁶

The Constitutional Review Chamber of the Supreme Court's interpretation of section 14 of the Constitution has been rather thorough. In its decision of 22 February 2001, the Review Chamber emphasised that a person's right to fair and effective process stemmed from section 14 of the Constitution.⁷ In its decision of 14 April 2003, the Supreme Court took a step forward and explained what principles an administrative procedure should follow. The court found that according to section 14 of the Constitution, the state is obliged to guarantee the rights and freedoms of individuals. The guarantee of rights and freedoms does not mean that the state must avoid interference with fundamental rights. According to section 14 of the Constitution, the state is obliged to establish appropriate procedures for protecting fundamental rights. Both judicial and administrative proceedings must be fair. This means, among other things, that the state must enforce the use of proceedings that ensure efficient protection of the rights of an individual. The court further noted that the protection of the fundamental rights of one individual could result in restriction of the fundamental rights of another. In such cases, a reasonable balance must be sought between fundamental rights. The

⁵ P. Varul. Eesti õigussüsteemi taastamine (Restoration of the Estonian legal system). – *Juridica* 1999/1, p. 3 (in Estonian).

⁶ U. Lõhmus jt. Põhiseaduse III peatükk (Chapter III of the Constitution). – Eesti Vabariigi põhiseadus. Kommenteeritud väljaanne (Constitution of the Republic of Estonia. Commented edition). Tallinn 2002, pp. 128–136 (in Estonian); R. Alexy. Põhiõigused Eesti põhiseaduses (Fundamental rights in the Estonian Constitution). – *Juridica* eriväljaanne (Special edition of *Juridica*) 2001, p. 73 (in Estonian).

⁷ CRCSCd, 22 February 2001, 3-4-1-4-01. – RT III 2001, 6, 63 (in Estonian).

procedures established for the protection of fundamental rights on the basis of section 14 of the Constitution must also aim at finding such balance.⁸ Besides section 14 of the Constitution, the organisational and procedural law dimension of fundamental rights issues is also evident from the other provisions of the Constitution. From the point of view of administrative procedure, the first sentence of section 15 of the Constitution — stating that everyone whose rights and freedoms are violated has the right of recourse to the courts — is the most significant. This provision ensures that individuals have the right of appeal. It is also important to point out section 20 of the Constitution. In respect of administration, clauses 4, 5, and 6 of subsection 2 of the section are relevant here. According to these clauses, a person may be deprived of liberty only in cases specified by law and pursuant to the appropriate legal procedure:

- 1) to place a minor under disciplinary supervision or to bring him or her before a competent state authority to determine whether to impose such supervision;
- 2) 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; and
- 3) to prevent illegal settlement in Estonia and to expel a person from Estonia or to extradite a person to a foreign state.

For administrative proceedings, the following sections also have importance: section 21 (everyone who is deprived of his or her liberty shall be informed promptly, in a language and manner that he or she understands, of the reason for the deprivation of liberty and of his or her rights, and shall be given the opportunity to notify those closest to him or her); section 44 (1), which sets forth the general right to receive public information (everyone has the right to freely obtain information disseminated for public use); and subsection 2 of this section, which deals with the duty of a public authority to provide information about its activities to an Estonian citizen at his or her request. The right to obtain such information is not unrestricted, according to the provision concerned. Information the disclosure of which is prohibited by law and information intended exclusively for internal use shall not be disclosed. According to the third subsection, an Estonian citizen has the right to access information about him- or herself held by state agencies and local governments and in state and local government archives, in accordance with the provisions of the law. The citizens' rights specified in section 44 (2) and (3) of the Constitution also extend to citizens of foreign states who are in Estonia, unless otherwise provided by law. At the moment, no such specific regulations have been provided.

Section 46 of the Constitution is also important. According to this section, everyone has the right to address state agencies, local governments, and their officials with memoranda and petitions. The second sentence of the section imposes an obligation to respond to the petitions — the procedure for responding shall be specified by law.

Section 3 establishes the principles related to administrative proceedings and administration generally; it states the principle of lawfulness, under which the state's authority shall be exercised solely pursuant to the Constitution and laws that are in conformity therewith. The provision declares both the supremacy of the law and the principle of reservation. As regards administrative proceedings, also set forth are the principles of a social and democratic state based on the rule of law (section 10), proportionality (section 11), and the principle of general equality (section 12).

2.2. Historical experience

It is worth mentioning that the preparations for the administrative law reform did not begin from scratch. For example, the legal regulation of administrative proceedings has its roots in the thirties — *i.e.*, in the first period of Estonia's independence. On 30 December 1954, the Administrative Proceedings Act was adopted by the Head of State decree, and it entered into force on 1 April 1936.⁹ The objective was to lay down general rules for settlement through adjudication of administrative matters, which was assigned among the powers of the state or local government agencies insofar as specific laws did not provide otherwise. The importance of this Act has been emphasised from two angles. Firstly, it played an important role in developing Estonian administrative law terminology. It introduced into use such terms as 'participants' (*asjaosalised*), 'occupational commitment' (*ametikoolestuslikkus*), 'practicality' (*otstarbekohasus*), and 'public documents' (*avalikud dokumendid*). Secondly, it was relatively modern for its time, and certain regulations have retained their topicality. Above all, this concerns procedural principles and the protection of the rights of participants in the proceedings. The Act set out the bases for removal of officials (§ 5), the right to examine documents (§ 31), the principle of investigation (§ 51), the requirement for substantiating administrative acts (§ 77), challenge proceedings (§ 81), the principles for amending and repealing administrative acts

⁸ CRCSCd, 14 April 2003, 3-4-1-4-03. – RT III 2003, 13, 125 (in Estonian).

⁹ Administratiivmenetluse seadus (Administrative Procedure Act). – RT 1936, 4, 25 (in Estonian).

(§ 86), substitutive enforcement provisions (§ 113), etc. The adoption of the Administrative Procedure Act also testifies to the fact that Estonia had managed to develop uniform administrative law theory and practice by the 1930s, which was discontinued when Estonia was occupied by the Soviet Union starting in 1940 but whose influence definitely extends to the present day. At this point, it is important to note that Estonian legal experts published a number of serious works on the problems of administrative law theory during the period. For example, the monographs by Prof. A.-T. Kliimann, the Department of Law, University of Tartu – *Theory of Administrative Acts*^{*10}, *Administrative Procedure*^{*11}, and *Legal Order*^{*12} – may be mentioned, as well as his article on the right of discretion, published in the legal journal *Õigus (Law)*^{*13} and other works. It may be said without doubt that historical experience has contributed its share to the development of the general part of modern administrative law in Estonia.

2.3. Judicial practice

Administrative law reform was significantly affected also by the practice of the courts, and particularly that of the highest court in Estonia — *i.e.*, the Supreme Court. The principles established in the Constitution and fundamental procedural rights were developed further in several decisions issued by the Supreme Court. For example, the Supreme Court has elaborated on the following important principles of administration in its decisions:

- 1) lawfulness. Relying on the provisions of the Constitution, the Supreme Court has emphasised in its decisions that a public authority is entitled to act only when authorised by law to do so. The court has also found that a public authority may interfere with the sphere of the rights of private individuals only under conditions and to the extent provided by law, and, according to the principle of lawfulness, all legal acts adopted by administrative authorities must be in conformity with the Constitution and the legislation in force^{*14};
- 2) the requirement for substantiating an administrative act. This has been considered extremely important in judicial practice since the establishment of administrative courts in Estonia after the restoration of independence. Court decisions have elaborated upon the principle that an administrative act must have both a factual and legal basis^{*15};
- 3) proportionality. In several of its decisions, the Supreme Court has indicated that an administrative act must be in proper proportion to the matters it addresses and has elaborated on the mechanism for implementation of the principle of proportionality and supervision thereof^{*16};
- 4) legal certainty. The Supreme Court has emphasised that the adoption of administrative acts and administration must take account of the principle of legal certainty, which protects a person's legitimate expectation and trust that one cannot be deprived of rights, granted by the state, that a person has started to exercise.^{*17}

2.4. European Union law and experiences of other countries

In relation to Estonia's accession to the European Union, much attention was paid to the analysis of the principles of European Community law and their introduction to the relevant draft legislation. The regulations belonging to the general part of the administrative law of other countries were also examined, and the examiners familiarised themselves with the experience of their implementation as much as possible. The greatest attention was paid to the legislation and experience of the Federal Republic of Germany, as German law has had the greatest effect on the Estonian legal system.

¹⁰ A.-T. Kliimann. *Administratiivakti teooria* (Administrative act theory). Tartu 1932 (in Estonian).

¹¹ A.-T. Kliimann. *Haldusprotsess* (Administrative procedure). Tartu 1937 (in Estonian).

¹² A.-T. Kliimann. *Õiguskord* (Legal order). Tartu 1939 (in Estonian).

¹³ A.-T. Kliimann. "Vaba kaalutus" ja selle kohtulik kontrollimine ('Free discretion' and its judicial verification). – *Õigus (Law)* 1928/3 (in Estonian).

¹⁴ CRCSCd, 12 January 1994, III-4/A-2/94. – *Riigikohtu lahendid* (Decisions of the Supreme Court) 1993/1994. Tallinn 1995 (in Estonian).

¹⁵ ALCSCd, 6 October 1995, III-3/1-26/95. – RT III 1995, 14, 176 (in Estonian).

¹⁶ CRCSCd, 30 September 1998, 3-4-1-6-98. – RT I 1998, 86/87, 1434 (in Estonian).

¹⁷ CRCSCd, 30 September 1994, III-4/1-5/94. – RT I 1994, 66, 1159 (in Estonian); ALCSCd, 4 May 2001, 3-3-1-21-01. – RT III 2001, 16, 170.

2.5. Administrative practice

In preparing the draft legislation, it was considered very important to collect the opinions of those involved in public administration as well. So, in the autumn of 2000, the members of the working group for the draft Administrative Procedure Act^{*18} arranged for introduction to the draft in state agencies and inspectorates, county governments, and local government units. The proposals and opinions obtained were of great help for the completion of the final version of the draft. The draft proceeded from the thesis that the objective of legal regulation can be achieved only when it is based on real life, real relationships. Otherwise, law fails to perform its function; it will simply not be observed. Law that is not acknowledged and approved by the addressees of legislative provisions does not function.

3. Results of administrative law reform and principles adopted

Proceeding from the above principles, the already mentioned Administrative Procedure Act, State Liability Act^{*19}, Substitutive Enforcement and Penalty Payment Act^{*20}, and Administrative Co-operation Act^{*21}, as well as the Code of Administrative Court Procedure, were prepared and adopted by the Riigikogu.^{*22}

In order to ensure coherence between the general part and special part of administrative acts, the Administrative Procedure Act Amendment and Implementation Act^{*23} was prepared and adopted by the Riigikogu, amending a total of over 130 specific laws, accompanied by five specific laws that amended acts proceeding from the Constitution.

How could we briefly characterise the results of the administrative law reform? We cannot but fully agree with the position of Ülle Madise, who worked as Head of the Public Law Division of the Ministry of Justice in 1998–2002: ‘Both in Estonia and in Germany, public administration is related to law, and the principle of a state based on the rule of law is understood in the same way. That is why the Administrative Procedure, Substitutive Enforcement and Penalty Payment Act, and State Liability Act are similar to the corresponding German acts. However, there are still differences between the Estonian system of administrative law and the German administrative law system. The field of administrative law did not experience the transposition of German law; the general part of Estonian administrative law contains solutions based on Estonian life and comprehensively experienced by Estonian legal experts.’^{*24}

3.1. Administrative Procedure Act

The Administrative Procedure Act contains two equal and important goals. These include the guarantee of appropriate and lawful activity in reaching and taking administrative decisions and the guarantee of and respect for individuals’ rights in administrative decisions.

One of the important principles underlying the Administrative Procedure Act is the **protection of a person’s rights**, which derives from section 14 of the Constitution. Already in section 1, the purpose of the Act expresses is stated clearly: ‘the purpose of this Act is to ensure the protection of the rights of persons by creation of a uniform procedure that allows judicial control and individuals’ participation’. This is also supported by § 3 (1) of the Act, according to which in administrative procedures, the fundamental rights and freedoms or other subjective rights of a person may be restricted only pursuant to the law. This provision also corresponds to the first sentence found in section 11 of the Constitution, which requires that any activities of public authority restricting fundamental rights be in accordance with the provisions of the Constitution. Such activities must thus be both formally and substantively in compliance with the Constitution.

Another important principle underlying the Administrative Procedure Act is **lawfulness**. This idea is upheld already by § 3 (1) of the Act, mentioned above, as well as § 4, which sets out both the internal and external

¹⁸ Administrative Procedure Act. – RT I 2001, 1, 58, 354; 2003, 20, 117 (in Estonian).

¹⁹ State Liability Act. – RT I 2001, 47, 260 (in Estonian).

²⁰ Substitutive Enforcement and Penalty Payment Act. – RT I 2001, 50, 28 (in Estonian).

²¹ Administrative Co-operation Act. – RT I 2003, 20, 117 (in Estonian).

²² Code of Administrative Court Procedure. – R I 1999, 31, 425; 2003, 13, 67 (in Estonian).

²³ Administrative Procedure Act Amendment and Implementation Act. – RT I 2002, 61, 375 (in Estonian).

²⁴ Ü. Madise. Eesti haldusõiguse reformi kandvatest ideedest (Underlying ideas of Estonian administrative law reform). – Juridica 2003/1, p. 44 (in Estonian).

limits for exercising the right of discretion. According to this provision, the right of discretion shall be exercised in accordance with the limits of authorisation, the purpose of discretion, and the general principles of justice, taking into account relevant facts and considering legitimate interests (§ 4 (2)). The right of discretion has been one of the most frequently discussed problems in administrative law, as its exercise entails a rather high degree of threat that an administrative authority may act arbitrarily. Hence, it is important to lay down these principles in law, so as to ensure that discretion is exercised lawfully. The principle of lawfulness also derives from § 54 of the Act, which sets out the prerequisites for an administrative act to be considered lawful — both formal and substantive ones. The same applies to measures taken and contracts under public law. For example, according to § 107 (1) of the Act, any measures taken shall be in accordance with legislation. They may restrict rights and freedoms only if there is a legal basis for such restriction. The principle of lawfulness also underlies many other provisions of the Administrative Procedure Act.

The third principle that may be pointed out is the **principle of proportionality**. The principle of proportionality is stated in the second sentence of section 11 of the Constitution, according to which some restriction of rights and freedoms is necessary in a democratic society and shall not distort the nature of the rights and freedoms restricted. Relying on judicial practice as well as on interpretation provided by the European Court of Human Rights, in § 3 (2) of the Administrative Procedure Act, the principle of proportionality has been elaborated upon with its three sub-principles — administrative acts and measures shall be appropriate, necessary, and proportionate to the stated objectives.

The fourth important principle is that of **good administration**. As the Supreme Court has put it, the principle of good administration also derives from § 14 of the Constitution. Moreover, the Supreme Court has found that the right to good administration is one of the fundamental rights.^{*25} The right to good administration underlies many provisions in the Administrative Procedure Act. In its most general representation, it manifests itself in § 5 (2) of the Administrative Procedure Act — administrative procedure shall be purposeful, efficient and straightforward, and conducted without undue delay, avoiding superfluous costs and inconvenience to persons. Thus, the provision demands that an administrative procedure be carried out in such a way that it burdens an individual as little as possible. The Administrative Law Chamber of the Supreme Court has emphasised that on grounds of human dignity, in a state based on the rule of law, efficient legal protection, and the principle of good administration, each individual must be involved in an administrative procedure even if in the case of a conscientious performance of administrative duties, the administrative act may be foreseen to limit his or her rights.^{*26} The right to participate in an administrative proceeding is ensured by § 11 (1) 3), according to which a person whose rights or obligations the administrative act, contract under public law, or measure may affect, or a third party, is a participant in the proceedings. The principle of good administration also presumes that administrative proceedings are conducted in a fair and impartial manner. One of the guarantees of the latter is § 10 of the Act, which sets out the bases for removing a person acting on behalf of an administrative authority and grants the participants in the proceedings the right to submit a petition for the removal of an official. According to the principle of good administration, proceedings must be completed in a reasonable amount of time. As a rule, the terms for issuing an administrative act or taking action have been set out in specific laws. According to § 5 (4) of the Administrative Procedure Act, procedural acts shall be performed promptly but not later than within the term provided by law or a regulation. If an administrative act cannot be issued or a measure cannot be taken or implemented within a prescribed term, § 41 of the Act requires that the administrative authority promptly give notice of the probable time of issue of the administrative act or taking of the measure and indicate the reasons for failure to adhere to the prescribed term. The right to good administration includes, among other things, the right to examine documents, the right to be heard, the right to receive explanations, and the obligation of the public authority to reason its decisions. These aspects of good administration are to a greater or lesser extent related to procedural fundamental rights, which have also been dealt with in the Administrative Procedure Act. The most important rights of participants in administrative proceedings are the following.

- 1) The right to be heard (§ 40). The first subsection specifies the right to be heard upon issue of an administrative act, the second upon the taking of measures. An administrative authority shall, upon issue of an administrative act, grant a participant in a proceeding the opportunity to provide his or her opinion and objections in written, oral, or any other suitable form. Said regulation guarantees the participant in the proceeding the right to be heard on the one hand and on the other hand imposes on an administrative authority the obligation to ensure the exercising of this right. Here it is also important to note that, for example, upon refusal to issue an alleviating administrative act on the basis of the right of discretion, the right to be heard shall be exercised. In the case of administrative measures, the right to be heard shall be applied only with regard to such measures as may be detrimental to the rights of the participant in a proceeding. The Act also provides for exceptional cases in which an administrative proceeding may be conducted without hearing

²⁵ CRCSCd, 17 February 2003, 3-4-1-1-03. — RT III 2003, 5, 48 (in Estonian).

²⁶ ALCSCr, 8 October 2002, 3-3-1-56-02. — RT III 2002, 25, 283 (in Estonian).

the opinions and objections of a participant in the proceeding (§ 40 (3)). Exceptions may be made if prompt action is required for prevention of damage arising from delay or for the protection of public interests, and also 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, or if a resolution is not made against the participant in the proceeding. Further to that, exceptions may be made 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; if the identity of the participant in the proceeding is not known; or if the measure taken affects an unlimited number of persons and identification of the persons within a reasonable period of time is impossible. The exception also concerns the so-called mass procedure (where the number of participants in the proceeding exceeds 50) and situations where an administrative act is issued as a general order.

- 2) The right to examine documents (§ 37). Here it is important to note that this right extends not only to participants in the proceeding but to everybody — this is everyone's right. An administrative authority may prohibit examination of a file, a document, or a part thereof if disclosure of information contained therein is prohibited by a legislative act or on the basis of one.
- 3) The right to receive explanations (§ 36). The right to receive explanations does not generally derive from the objective duty of an administrative authority to give explanations. An administrative authority shall explain to a participant in a proceeding **at his or her request** the rights and duties of a participant in the proceeding as concern administrative procedure, the amount of time terms under which the administrative proceeding will under unexceptional circumstances be conducted and which allows further possibilities for expediting the administrative proceeding, which materials (applications, evidence, and other documents) must be submitted in the administrative proceeding, and which procedural acts must be performed by participants. As required by the provision, the consultation must be substantial — *i.e.*, provide an overview of the information related to the proceedings. Although according to § 36 (1) of the Act, an administrative authority is obliged to provide such information to a participant only at his or her request, the Supreme Court has interpreted the duty of explanation to be more far-reaching. The Administrative Law Chamber of the Supreme Court has noted that it is contrary to good administrative practice if an administrative authority implies when dealing with an individual that it intends to make a decision at the end of an administrative proceeding that complies with the individual's wishes but instead makes a decision that is not in accordance with them. Such activities may also violate a person's legitimate expectations. If an administrative authority sees that the conduct of the individuals concerned does not lead to the desired results, it is obliged to notify the individuals thereof and enable them to adjust their conduct.²⁷ According to § 36 (2) of the Act, the administrative authority shall inform the participant in proceedings on its own initiative if it is necessary, in order to issue an administrative act or take a measure which is applied for, to issue another administrative act beforehand.
- 4) The right to maintain business and personal data (§ 7 (3)). The Act specifies data protection as an objective duty of the administrative authority — an administrative authority is required to maintain state and business secrets and the confidentiality of information intended for internal use by an agency, including private personal data.
- 5) The right to representation (§ 13). A participant in a proceeding has the right to representation in all procedural acts that, in accordance with the law, need not be performed personally by the participant in the proceeding.
- 6) Right to appeal (§ 71). A person who finds that his or her rights have been violated or his or her freedoms restricted by an administrative act or in the course of administrative proceedings may generally file an appeal, through the administrative authority that issued the administrative act or took the measure in question, with an administrative authority that exercises supervisory control over the authority that issued the administrative act or took the measure being challenged (§ 73 (1)). Unless otherwise provided by law, an appeal concerning an administrative act or measure shall be filed within 30 days from the day on which a person became or should become aware of the administrative act or measure in question (§ 75). A challenge serves as an alternative to filing an appeal with the administrative court. Thus, it is for the individual to decide whether to file an appeal with an administrative court or file a challenge petition in accordance with administrative procedure. An individual who is not satisfied with the decision on the challenge may appeal to an administrative court.

²⁷ ALCSCd, 27 February 2002, 3-3-1-17-02. — RT III 2002, 11, 110 (in Estonian).

3.2. Substitutive Enforcement and Penalty Payment Act

The Substitutive Enforcement and Penalty Payment Act has had a significant influence on the increase of administrative capacities and the efficiency of administration. Until the adoption of this Act, administration was regulated by dozens of specific laws. There was no general law governing the principles and means of applying administrative enforcement. Adherence to the provisions of administrative legislation was mainly ensured through penal means provided for in the Code of Administrative Offences.²⁸ This brought about at least two negative consequences. Firstly, penal sanctions grew out of proportion in administrative enforcement. Secondly, it had a negative impact on the efficiency of administration. After the imposition of administrative penalties by officials, the procedure for which is relatively complicated, the person affected has the right of recourse to the courts, where he or she may pass through all three levels, which could take a year or even more. In addition, when the appeal was processed in court, the court could suspend the implementation of the administrative act at the person's request.

The Substitutive Enforcement and Penalty Payment Act introduced into the Estonian legal system a non-penal system of penalty payments and substitutive enforcement, which ensure faster compliance with precepts and thus also the efficiency of administration. According to law, the coercive measure used in administrative enforcement is to be a penalty payment, a set amount, payable by the individual concerned if he or she fails to perform the obligation imposed by a precept during the time indicated (§ 10 (1)), and substitutive enforcement, applied also if during the term prescribed a person addressed by an administrative act fails to perform an obligation imposed therein. Substitutive enforcement may be carried out by the competent administrative authority or by a third party under an enforcement order, and this is performed at the expense of the person sanctioned (§ 11 (1)).

At this point, it is important to note that the Administrative Procedure Act applies to legislative acts issued and measures taken upon the application of a coercive measure, taking into account the specific provisions of the Substitutive Enforcement and Penalty Payment Act (§ 3 (1)). Hence, the procedure for applying administrative enforcement is also subject to the principles and the rights of a participant in a proceeding that have been set out in the Administrative Procedure Act. As an important principle, the Act also stipulates the requirement to apply the mildest coercive measures — in order to ensure performance of an obligation, the mildest coercive measures and the minimum degree of coercion expected to be sufficiently effective are applied. An administrative authority shall choose a coercive action that forces a person to meet the obligation imposed by administrative action while causing the person minimal harm (§ 3 (3)).

3.3. State Liability Act

The adoption of the State Liability Act was a breakthrough in the development of Estonian administrative law. The Act provides the bases of and procedure for the protection and restoration of rights violated upon the exercise of powers of a public authority and performance of other public duties and deals with compensation for damage caused. It is worth noting that until the adoption of the Act, public law did not govern compensation for damage caused by public authorities. Compensation for damage caused by the state was provided on the basis of the provisions of civil law, and the disputes arising were settled not by administrative courts but by the county and city judiciary. The measures prescribed by the Act for the protection of an individual's violated rights may be conditionally divided into two categories — administrative and substantive ones. Firstly, a person may request that a public authority annul an administrative act, terminate continuing measures, refrain from issuing an administrative act or taking a measure, or issue an administrative act or take an action. Secondly, if damage could not be prevented and cannot be eliminated by administrative measures, a person may request that a public authority compensate for the damage caused to him or her (§ 7 (1)). Direct proprietary damage and loss of income are compensated according to the provisions of the Act (§ 7 (3)). According to the Act, only a natural person may claim financial compensation for non-material (moral) damage upon wrongful loss of dignity; damage to health; deprivation of liberty; violation of the inviolability of the home, private life, or the confidentiality of messages; or defamation of the honour or good name of the person (§ 9 (1)). In order to ensure that a person receives compensation for the damage caused, the Act provides that if damage is caused by a public authority who is a natural person or private law legal person, the state, local government or other public law legal person who authorised the natural person or private law legal person to perform public duties is liable for the damage unless otherwise provided by law (§ 12 (3)). The Act also includes the principle that any damage caused directly by a natural person performing the functions of a public authority, regardless of whether the functions are performed on the basis of a service relationship, contract, or single order or on another basis, is deemed to be damage caused by the public authority (§ 12 (2)). Unless prescribed otherwise by specific laws, natural persons performing

²⁸ The Code of Administrative Offences became invalid on 1 September 2002, as the Penal Code and the Code of Misdemeanour Procedure entered into force.

the functions of a public authority are not liable to the injured party. By law, damage may be caused by both action and failure to act. In the latter case, damage shall be compensated if the public authority failed to issue an administrative act or take appropriate measures in due course (§ 12 (1)).

As a special case of liability, the Act provides for compensation for damage caused by legislation of general application (acts and regulations). According to § 14 (1) of the Act, a person may claim compensation for damage caused by legislation of general application only if the rights of the person were materially violated by the legislation of general application and the Supreme Court has repealed the corresponding provision of law or declared it unconstitutional. According to the second subsection of the provision concerned, loss of income as a result of legislation of general application or non-proprietary damage caused thereby and damage caused by a legislative act or failure to issue legislation of general application are only compensated for in cases provided for by a separate law. The regulation concerning compensation for damage caused by legislation of general application or failure to issue legislation of general application is not in accordance with European Community law. In several of its decisions, the European Court of Justice has emphasised that the liability of the state for damage caused by violation of European Community law is independent of the body that caused the damage by its activities or failure to act.²⁹ The Riigikogu is currently processing a draft State Liability Act Amendment Act to bring Estonian regulations concerning this matter into conformity with European Community law.

3.4. Administrative Co-operation Act

The story behind the preparation of the Administrative Co-operation Act is unique. The Act concerns two relatively independent objects of regulation, namely professional assistance and granting of authority to perform public administration duties. According to the initial plan, these regulations were to be included in the Administrative Organisation Act. The relevant draft was prepared, but to date it has not been adopted because no political decision is available about the further development of regional administration in counties. At the moment, regional administration for the counties is performed at the national level. Several attempts have been made to carry out a regional administration reform in order to organise national administration, which is currently scattered, and introduce a delegated local government dimension at the regional level. Unfortunately, the reforms have been suspended because of political disagreement, as the political parties lack a uniform vision of the further development of regional administration. Since both the granting of authority to perform public administration duties and professional assistance are closely related to administrative procedure, it was decided to separate them from the draft Administrative Organisation Act for the sake of the integrity of regulation and address them in a separate act.

The Act establishes the conditions and procedure for granting authority to natural and legal persons to perform public administration duties of the state and local government independently, and it specifies the procedure for different administrative authorities to provide each other with professional assistance as well as the bases for such assistance. Thus, for example, a person may be authorised to perform an administrative duty of the state by law, by an administrative act issued on the basis of legislation, or by a contract under public law entered into on the basis of law (§ 3 (1)). The same applies to local government units when they delegate the authority to perform administrative duties assigned to them by law or pursuant to relevant law (§ 3 (2)). The Act has significantly extended the opportunities to delegate the performance of administrative duties to persons under private law.

The professional assistance regulations allow for improvement of co-operation between various administrative authorities and thereby increase the efficiency of administration.

4. Conclusions

The discussions about the conceptual foundations of the administrative law reform led to optimal political decisions, which proceeded from the situation that has developed in Estonia and the provisions, idea, and spirit of the Constitution and which also relied on historical experience. They also took considerable account of the principles of European Community law and the experience of other democracies. The Federal Republic of Germany may be singled out here, as many points of contact between the German and Estonian legal systems already exist, for historical reasons. The fact that the Constitution of the Federal Republic of Germany served as a model for preparing the Constitution of the Republic of Estonia is not insignificant either.

²⁹ Andrea Francovich and others v. Italian Republic. Joined Cases C-6/90. – ECR 1991, 5357; The Queen v. Secretary of State for Transport, *ex parte*: Factortame LTD and Others. Case C-213/89. – ECR 1990, 2433.

The reform yielded the following acts now in force concerning the general part of administrative law: the Administrative Procedure Act, Substitutive Enforcement and Penalty Payment Act, State Liability Act, and Administrative Co-operation Act. The underlying principle of these is the value of efficiency, speed, and simplicity of administration, which is organically related to the principles of protection of persons' rights and good administration.

The Acts addressing the general part of administrative law and the principles provided therein have a significant impact on those dealing with the special part of administrative law. Firstly, this is manifested by the fact that the provisions of the acts comprising the special part can be interpreted on the basis of the provisions of the Acts comprising the general part — and, in particular, on the basis of the principles provided therein. This has been emphasised by the Supreme Court, which has noted that if a specific law does not provide for the application of the Administrative Procedure Act to a special procedure, the procedure must nevertheless comply with the principles of administrative law, which derive, *inter alia*, from the right to good administration as guaranteed by section 14 of the Constitution, the general principles of law, and the other principles of constitutional law.³⁰ Secondly, the Acts addressing the general part of administrative law have developed a framework and provided a general direction to the regulations contained in the Acts comprising the special part of administrative law, which are undergoing dynamic development and change.

³⁰ CRCSCd, 17 February 2003, 3-4-1-1-03. – RT III 2003, 5, 48 (in Estonian).



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Estonia's Integration into International Organisations — from the Viewpoint of Security

The Republic of Estonia has been a full member state of the North Atlantic Treaty Organisation since 29 March 2004, Estonia is the full member state of the European Union since 1 May 2004. These developments are in testimony of a huge step towards a free, whole and peaceful Europe.^{*1} For the acceding states, accession to both these organisations means supranational integration in security issues, as has also meant the accession to other security organisations, such as the Western European Union (WEU), the Organisation for Security and Co-operation in Europe (OSCE) and the United Nations (UN).

From historical viewpoint — as a small state that has been occupied many times — security guarantees are essential to Estonia. The pursuit of independence, territorial integrity and cultural identity has accompanied the development of the Estonian nation. Although the author sees neither military nor political threats aiming to change Estonia's internal or external policies today or in the near future, she is aware of and understands that the state must be ready to combat such threats as economic, social and environmental risks, international crime, and terrorism.

Considering the previous, the purpose of this article is to estimate whether the accession of the Republic of Estonia to supranational organisations guarantees higher security in the region. Considering this purpose, the author has divided the article into three main sections.

The first section gives an overview about the interrelationship of those security organisations in which Estonia participates. More precisely, about the position of the common foreign and security policy (CFSP) of the European Union within the global security area. Here it is demonstrated that the enlarged European Union embraces the WEU. Such development strengthens the position of the European Union in the global security structures. The author demonstrates the close ties of the CFSP of the European Union with the NATO under the UN umbrella. In the second section, the author discusses why participation in security organisations is important to Estonia and tries to define the main threats to Estonia's security. In the third section, the author addresses the legal implications of Estonia's security-related integration into the NATO and the European Union. With that aim, the author firstly analyses the implications of the European Union

¹ Remarks made by Kristiina Ojuland, Minister of Foreign Affairs of Estonia, at the signing ceremony of the accession protocols to the NATO, in Prague, on 26 March 2003. Available at: http://www.vm.ee/est/nato/kat_341/3543.html (28.03.2003).

membership to the Estonian defence system through the main, consequent to enlargement changes in the CFSP of the European Union, and highlights the three important points related to the new European Union member states: unanimity, sovereignty and participation in the NATO. The author tries to determine the implications of the accession of Estonia to the European Union and the NATO to the state's security system and sovereignty. At the end of the article, the author assesses the balance of powers between the post-enlargement European Union and the NATO as regards the maintenance of security.

1. The interrelationship between security organisations

In order to understand Estonia's position and reasons to accede to security organisations, the interrelationship of the security organisations in which Estonia participates is examined below. Although the European Union cannot be considered a purely security organisation, it is developing from an economic union towards also a political one and it is re-examining its CFSP in order to better achieve its political aims. Therefore, especially in the light of the latest developments in the European Union concerning the growing interrelatedness and the proposed merger of its three pillars, in the article the author deals with the elements of the European Union as a security organisation.

As the activities of the security organisations discussed are based on the Charter of the UN², the author considered that the most logical way to examine the relations between the security organisations could be in the light of the Charter of the UN. The UN is the supreme world organisation in security matters. Despite the idea, which arose at the time of the League of Nations, that international order could best be served not only by centralised decision-making in a global organisation, but also by regional bodies, most of the League of Nations leaders favoured a supreme world organisation in security matters.³ This preference may be explained by the concept that the centralised control over regional activities avoids too large extension of the limits of enforcement action by regional organisations in third countries and guarantees the objectivity of enforcement action.

On the other hand, considering that regional organisations are better informed about the regional conditions and the resources that the UN would need for regional enforcement action, decentralisation was supported in order to solve practical regional problems, but also with regard to external threats. For that reason, regional elements were and are strengthened in the composition of the UN⁴, as well as concerning the organisations, whose work was based on the UN Charter. In the context of this article, such regional organisations as the WEU and the NATO serve as examples alongside the European Union which has even described itself as a regional arrangement under Chapter VIII of the UN Charter.⁵ The European Union has strong security relations with the WEU and the NATO, which are mentioned in article 17 of the Treaty on European Union. Namely, the European Union depends on the WEU and the NATO in realising its two primary CFSP goals: to strengthen its own security, and to preserve peace and strengthen international security. Quoting Wessel, the European Union, the WEU and NATO 'today form an institutional triangle with tied security policies under the UN umbrella'.⁶ Recognising the need of international organisations to co-operate in order to promote security, these security organisations co-operate under the UN umbrella also with the OSCE, as well as with other regional organisations.

² Charter of the UN. 26 June 1945. T.S. 993. Preamble, article 1. The North Atlantic Treaty, 4 April 1949. Washington, D.C., articles 11 and 19. The Treaty on European Union. — OJ [2002] C325/5, Preamble, articles V and VI. The Treaty of Economic, Social, and Cultural Collaboration and Collective Self-Defence (1948 Brussels Treaty). Washington, DC.

³ About regionalism and universalism see N. D. White. *The Law of International Organizations*. Manchester: Manchester University Press 1996, pp. 157–158, C. Schreuer. *Regionalism v. Universalism*. — *European Journal of International Law* 1995 (6) 3.

⁴ The idea of regionalism was proposed by Sir Winston Churchill as early as in 1943. In his concept, the World Council should have rested on three regional councils. He emphasised that 'the last word would remain with the Supreme World Council'. See N. D. White (Note 3), p. 156.

⁵ Although it is discussable in the legal theory, whether the European Union can be viewed as a regional arrangement, because the Treaty on EU does not stipulate the status of the European Union as that of a regional arrangement. Because of that, the choice whether or not the European Union should declare itself as a regional arrangement, has been left open. See R. A. Wessel. *The European Union Foreign and Security Policy. A Legal Institutional Perspective*. The Hague, Boston, London: Kluwer Law International 1999, pp. 282–292.

⁶ *Ibid.*, p. 325.

2. The viewpoint of Estonia — the importance of joining security organisations and the concept of security

In the author's opinion, the primary reason why states belong to international security organisations is the achievement of higher security in the region. For that reason, the full membership of the European Union and the NATO have been Estonia's primary foreign policy goals since regaining independence in 1991. However, when trying to determine the meaning of the concept 'security', one finds that the concept is very broad and has military and civil aspects.

Opening the meaning of the concept 'national security', the former president of the Republic, Lennart Meri, indicated that this did not only mean military or economic security, but should have also been construed as involving 'culture, demographics, linguistics, and education as issues deemed vital to the survival of the Estonian nation'.^{*7}

Accordingly, it has been determined in the Estonian Republic Basic Security Policy Act that security embraces military and political activities, activities in the economic and social spheres, as well as combating environmental risks, illegal immigration, international organised crime and terrorism.^{*8} The same Act accordingly determines Estonia's state interests and security policy goals: maintenance of independence and territorial integrity, protection of Estonia's stability and her democratic development, promotion of peoples' welfare and maintenance of cultural heritage, continuity of Estonian nation, language, culture and identity through international globalising co-operation.^{*9}

Based on the preceding, one may say that Estonia's security can today be threatened by political and economic domination and instability, by international crimes and terrorism, by environmental risks, but also by the high number of non-Estonian national minorities in Estonia, consisting mostly of ethnic Russians. Besides the presumption that this part of the population may, due to its origin, be friendly towards Russia^{*10} and support Russia in the case of an attack, this part of population also threatens Estonia's identity through cultural influence. As such thinking has been relatively widespread among Estonians, ethnic integration in Estonia has been a major foreign policy issue^{*11} and was addressed by foreign observers as a necessary condition for Estonia's integration into international security organisations.^{*12} Therefore, one may say that Estonia's will to preserve her security, part of which forms identity, accompanies her integration into the European Union and the NATO.

3. The legal implications of Estonia's security-related international integration

3.1. The implications of the membership of the European Union to the Estonian defence system

The membership in the European Union entails membership of the CFSP of the European Union. The CFSP of the European Union was established by the 1992 Treaty on European Union^{*13}, according to which the aims of the European Union besides economical and social also include political and social co-operation, general regional development and mutual security and defence.^{*14} The security objectives of the European

⁷ As cited in M. Kuus. European Integration in Identity Narratives in Estonia: A Quest for Security. — *Journal of Peace Research* 2002 (39) 1, p. 95.

⁸ Eesti Vabariigi Julgeolekupoliitika alused (The Estonian Republic Basic Security Policy Act). — RT I 2001, 24, 134 (in Estonian).

⁹ Estonian Republic Basic Security Policy Act, section 1.2. Unofficial translation.

¹⁰ M. Kuus (Note 7), pp. 97–102.

¹¹ The Estonian Republic has been monitored by the OSCE since 1993, has received suggestions from NATO and the European Commission, and financial aid from the European Union, Nordic countries, Canada, the United Kingdom and the Open Estonia Foundation, with the aim of liberalising its citizenship and language laws to better integrate non-Estonians into Estonian society. The data has been taken from M. Kuus (Note 7), p. 96.

¹² The President's Academic Council accordingly recommended in 1998 that Estonia should liberalise its citizenship and minority rights laws. M. Kuus (Note 7), pp. 97–102.

¹³ Treaty on EU. — OJ [1997] C 340.

¹⁴ Treaty on EU, article 2.

Union are defined in the Treaty on European Union, including the objective to safeguard the common values, fundamental interests, independence and integrity of the Union, and to preserve peace and strengthen international security in conformity with the principles of the UN Charter.^{*15} The foundations for the common European security and defence policy (ESDP) were created at the 1991 Helsinki European Summit^{*16} and revised by the Treaty of Amsterdam. During the further summit meetings, at Cologne in June 1999 and at Helsinki in December 1999, the concept of the ESDP was developed and the guidelines required for strengthening European security and defence policy were set out, which means preparation of the European Union to act in response to international crises without prejudice to actions by the NATO.^{*17} By that, the Helsinki European Council officially recognised the capability of the European Union to conduct crisis management operations. The Council conclusions also allowed participation of the acceding states in the military operations of the European Union. Since the year 2000, the European Union has held regular dialogues with third states on ESDP issues, which means meetings with ministers, high officials and experts with the Political and Security Committee and the Military Committee, to which Estonia appointed representatives. Consequently, the Estonian National Military Defence Strategy stresses integration of Estonian defence forces into the crisis management forces of the European Union.^{*18}

A declaration on the operational capability of the ESDP was adopted by the European Council at Laeken on 14–15 December 2001.^{*19} The legal bases of the ESDP lie in 17 of the Treaty on EU, which indicates that the ESDP constitutes an integral part of the CFSP, including all questions relating to the security of the Union, and indicating that the ESDP could lead to a common defence in case the European Council so decides. Further, this article states an important fact — that the ESDP of the European Union respects the constitutional requirements of the member states of the European Union concerning the specific character of the security and defence policy^{*20}, which means that the European Union respects national independence in security and defence issues. Therefore, the author supports the opinion expressed by the representatives of the Estonian Government in the European Convention that Estonia supports the intergovernmental method of decision-making in the area of the CFSP, as the foreign policy aims and interests of the different states differ greatly^{*21}, and considering the sensitive nature of the defence policy, which means that it may directly affect the lives of a sovereign state's soldiers and citizens. As amendments have been planned to article 17 of the Treaty on EU, the CFSP of the European Union is now one of the most discussed issues in the European Union.

3.2. The legal implications of the membership of the NATO

As a full member of the NATO, Estonia has entered into a new security environment. Since the accession, Estonia is subject to the rights, as well as the duties arising from the North Atlantic Treaty. At the same time, the constitutional basis of Estonian security policy lies in the Preamble to the Constitution of the Republic of Estonia, which sets out the unwavering faith and a steadfast will to strengthen and develop the state^{*22}, and in chapter X of the Constitution, on 'National Defence', which states the duty of Estonian citizens to participate in national defence^{*23} and the rules of such participation^{*24}, the legal basis of the organisation of national defence and of the Estonian Defence Forces and national defence organisations within that framework.^{*25}

As stipulated in the Constitution of the Republic of Estonia, the legal bases of Estonia's defence are the Peacetime National Defence Act and the Wartime National Defence Act, which regulate defence in peacetime^{*26} and defence in wartime^{*27}, respectively.

¹⁵ Treaty on EU, article 11.

¹⁶ European Council Helsinki Summit: <http://presidency.finland.fi/doc/summit/index.asp> (21.03.2003).

¹⁷ The Headline Goal was to create the rapid crisis reaction force of the European Union, in order to provide the Union with the capacity for autonomous action. See also Council Regulation (EC) No. 381/2001 of 26 February 2001 (OJ [2001] L57/5) and The European Convention. Final report of Working Group VIII – Defence.

¹⁸ Eesti sõjalise kaitse strateegia (The National Military Defence Strategy). – RTL 2001, 33, 442 (in Estonian).

¹⁹ The Laeken Declaration: http://europa.eu.int/futurum/documents/offtext/doc151201_en.htm (21.03.2004).

²⁰ Treaty on EU, article 17.

²¹ Positions of the Estonian Government on the Future of Europe. Approved by the Government of the Republic of Estonia on 19 November 2002. Available at: http://european-convention.eu.int/sessplan_all.asp?lang=en (29.04.2003).

²² Eesti Vabariigi põhiseadus (The Constitution of the Republic of Estonia). – RT 1992, 26, 349 (in Estonian). An English translation is available at: http://www.legaltext.ee/et/andmebaas/ava.asp?tyyp=SITE_ALL&ptyyp=I&m=000&query=p%F5hiseadus (29.06.2004).

²³ The Constitution of the Republic of Estonia, section 124.

²⁴ The Constitution of the Republic of Estonia, section 125.

²⁵ The Constitution of the Republic of Estonia, section 126.

²⁶ Rahuaja riigikaitse seadus (The Peace-Time National Defence Act). – RT I 2002, 57, 354 (in Estonian).

²⁷ Sõjaaja riigikaitse seadus (The War-Time National Defence Act). – RT I 1994, 69, 1194 (in Estonian).

Although the NATO membership involves implications to national sovereignty, such as the collective defence clause in article 5 of the North Atlantic Treaty, the use of domestic military forces in another country, the military defence of Estonia as part of the military structure of the NATO, as well as the obligation concerning the expenditure of two per cent of the state budget, which led to constitutional amendments in some other Central and Eastern European states (*e.g.* Hungary, the Czech Republic, Slovakia) or to referenda (Slovenia, Slovakia, Hungary), such implications did not lead to constitutional amendments in the Republic of Estonia. However, amendments to constitutional acts are not always necessary if sovereignty is shared or to some extent abandoned, as the states are not isolated from each other and may not exist independently of the international community. Therefore, today it is impossible to talk about the absolute sovereignty of a state. Probably for that reason the implications of the NATO membership did not lead to constitutional amendments in Estonia, but to the national defence reform, which generally resulted in adoption of the Peace-Time National Defence Act, the Act Concerning the Use of the Defence Force in Complying with the Estonian State's International Obligations, the amendments to the draft Defence Forces Service Act and other acts, and the elaboration of the National Defence Force Development Plan until the year 2010.^{*28}

Examining these acts more closely, one sees that the Peace-Time National Defence Act sets as defence goals the maintenance of Estonian independence, its territorial integrity, constitutional order and national security, stressing the importance of international co-operation for achievement of security aims^{*29} and makes reference to the principal national defence development strategies, such as the Estonian Republic Basic Security Policy Act, the Basic Guidelines of Estonian State Defence Policy, as well as the National Military Defence Strategy.

The Estonian Republic Basic Security Policy Act contains the concept of Estonian security, as well as the state security goals such as the accession to the NATO and the European Union.^{*30} The Basic Guidelines of Estonian State Defence Policy determine the principles on which Estonian defence policy is based, as well as the structure of defence policy, the working principles and tasks of the National Defence League, mobilisation and demobilisation, as well as the basis of military training.^{*31}

The National Military Defence Strategy presents the security risks and the defence concepts forming Estonia's defence policy, the starting points of Estonia's defence planning that include repulsion of armed aggression, and focuses on the country's geopolitical position, its proximity to Russia, and the security policy goals of joining the NATO and the European Union, constituting in structuring and training of the National League with the aim to act with the forces of the NATO and its member states.^{*32}

The International Military Co-operation Act, adopted in 2003, regulates the basis of Estonia's participation in international military co-operation.^{*33} The entry into force of this act rendered invalid the Act Concerning the Use of the Defence Force in Complying with the Estonian State's International Obligations.^{*34}

The documents referred to above formed the basis for Estonia's accession to the NATO, but also indicate the pursuit of effective co-operation with the NATO. Generally, legislative analysis of Estonia's defence-related integration allows for the conclusion that all the previously referred security aspects have been taken into account in the legal acts and the developments that form the basis for Estonia's accession to supranational security organisations.

3.3. Debate in the European Union concerning the division of powers between the security policy of the European Union and the North Atlantic Treaty Organisation

As the European Union does not yet play an international role corresponding to its ambitions in foreign affairs, the Union relies on its ESDP growing stronger through enlargement, which means the stronger international military role of the European Union after enlargement. The meaning of the stronger international military role of the European Union could be explained through demonstrating the division of powers between the world's major security organisations.

^{*28} The list of the acts under amendment is available at: <http://www.mod.gov.ee/?op=body&id=37> (26.03.2004).

^{*29} The Peace-Time National Defence Act, § 2.

^{*30} The Estonian Republic Basic Security Policy Act, § 1.2.

^{*31} Eesti riigi kaitsepoliitika põhisuunad (The Basic Guidelines of Estonian State Defence Policy). – RT I 1996, 33, 684 (in Estonian).

^{*32} The National Military Defence Strategy, § 1.

^{*33} Rahvusvahelise sõjalise koostöö seadus (The International Military Co-operation Act). – RT I 2003, 23, 138 (in Estonian).

^{*34} Eesti riigi rahvusvaheliste kohustuste täitmisel kaitseväge kasutamise seadus (The Act Concerning the Use of the Defence Force in Complying with the Estonian State's International Obligations). – RT I 1995, 20, 299 (in Estonian).

At first, one could say that although the European Union CFSP and the NATO act under the guidance of the UN and have similar aims, an internal tension exists between them, which was notably brought out by the recent Iraq conflict, concerning which the world saw the differences between the major security organisations with regard to the question of whether to use military force in Iraq or not. In order to balance the unilateralism enhanced by the NATO in the world's security decision-making, one military aim of the enlarged European Union is to gain more military independence from the NATO. Nevertheless, and this was the main reason for the acceding states to the European Union to also join the NATO, during the recent years, the NATO has been the sole structure to act effectively during crises in Europe. Therefore, one could say that the CFSP of the European Union has in actuality always depended on the NATO in realising its goals. Additionally, there has existed a problem of almost overlapping membership of the member states of the European Union to the regional defence organisations: the WEU and NATO. For these reasons, discussions are currently under way as to whether the integration of the WEU into the European Union means duplicating the NATO, the zero sum solution in favour of the WEU, or the European Union forces being concurrently answerable to all the three organisations: the NATO, the European Union and the United Nations. In this context, the growing threat of terrorism in the world indicates the importance of co-operation and dialogue between security organisations.^{*35} Therefore, the Republic of Estonia has also expressed her view that the developments concerning the CFSP of the European Union should not lead to the weakening of transatlantic co-operation, but to raise the capacity of European participation in the NATO.^{*36}

Therefore, in the context of growing insecurity in the world, and also considering other security threats, is important to note that the European Union has in the Treaty on European Union confirmed its respect towards the obligations of certain member states, which see their common defence realised through both the ESDP and the NATO.^{*37}

4. Conclusions

Conclusively, one could say that the main reasons of the Republic of Estonia to accede to supranational security organisations are similar to those of the other member states of such organisations, *i.e.* to strengthen security, maintain peace, promote international co-operation and develop democracy, one of the primary aims being to strengthen security. Besides achievement of global security, the acceding states wish to achieve higher regional security. The author indicated that today the main threats to Estonia's security besides modern security threats and military and economic threats are the threats against Estonian identity: cultural heritage, nation and language. This allows for the conclusion that the strengthened security in the new millennium, besides military and economic security, implies the creation of good relations with neighbour countries, mutual trust and co-operation. Such are the aims of Estonia's internal and external policies, included in the integration into supranational security organisations.

Concerning the European Union, its enlargement considerably increases its military effectiveness. It was indicated in the article that after the European Union embraces the WEU, its member states would be able to also solve those crises, in which the NATO decides not to participate. In addition, the enlargement of the European Union means respect towards international obligations and national identities, good neighbourly relations and mutual trust. Therefore, one may say that the enlargement of the European Union increases regional as well as external security co-operation. Perhaps keeping that in mind, the previous Estonian foreign minister, Toomas Hendrik Ilves, said about Estonia's participation in the CFSP of the European Union: 'Our perspective on international events will change, our policy will become more global. I believe that the full participation in the CFSP of the European Union will make our national foreign policy stronger.'^{*38}

This does not mean weakening of transatlantic cooperation and consequently Estonia has also acceded to the NATO. Before accession, the Estonian politicians voiced that the developments concerning the European Union CFSP should raise the capacity of European participation in the NATO.

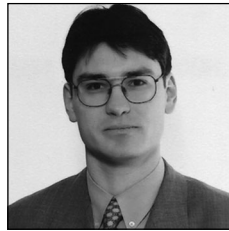
Consequently, one may generalise that Estonia's internal as well as external security will become stronger through her accession to security organisations, but that accession in itself cannot solve all security problems.

³⁵ The importance of coordinating the efforts of the European Union with the efforts of other international organisations, as concerns the civil and military aspects of crisis management is handled in Rapport de la Présidence, Annex II: Renforcement des capacités de l'Union Européenne dans le domaine des aspects civils de la gestion des crises. The report is important, because by that report the European Union acknowledges the primary responsibility of the UN Security Council for the maintenance of international peace and security.

³⁶ The official statements of the Republic of Estonia about the security organisations may be seen from the web site of the Ministry of Foreign Affairs of Estonia: <http://www.vm.ee> (26.03.2003).

³⁷ Treaty on EU, article 17.

³⁸ Speech of Toomas Hendrik Ilves. Available at the web site of the Foreign Ministry of Estonia: <http://www.vm.ee> (28.03.2003) (in Estonian).



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Le contrôle parlementaire de la politique européenne du Gouvernement en République d'Estonie au regard des nouvelles dispositions du règlement intérieur du *Riigikogu*

Le 14 septembre 2003, les citoyens estoniens ont décidé, par référendum, que l'Estonie pouvait devenir membre de l'Union européenne. A la question générale sur l'adhésion était jointe celle concernant la loi sensée non pas modifier mais, selon la terminologie employée, compléter la Constitution^{*1}. Cette loi constitutionnelle^{*2}, aussi appelée «troisième acte de la Constitution», en vigueur depuis le 6 janvier 2004, prévoit de manière brève que l'Estonie peut appartenir à l'Union européenne en se basant sur les principes fondamentaux de la Constitution de la République d'Estonie^{*3} et que du fait de cette appartenance, la Constitution est appliquée en tenant compte des droits et obligations découlant du traité d'adhésion.^{*4}

Cependant, l'adhésion à l'Union européenne a pour conséquence l'attribution d'un certain nombre de compétences aux institutions de l'Union européenne ce qui signifie logiquement que les organes nationaux sont privés d'exercer ces mêmes compétences. Tout aussi naturel que soit cet état de fait, il n'en est pas pour autant sans danger au regard de la démocratie dans la mesure où le Parlement estonien (*Riigikogu*) comme tous les autres parlements nationaux de l'Union européenne se voient littéralement dépouiller de leurs compétences traditionnelles, notamment de leur compétence législative, pour devenir de simples chambres

¹ La Constitution de la République d'Estonie a été adoptée par référendum le 28 juin 1992. – Journal officiel (RT) 1992, 26, 349.

² RT I 2004, 64, 429.

³ Article premier.

⁴ Article 2.

d'enregistrements des décisions bruxelloises. Sauf peut-être pour les actes juridiques communautaires les plus fondamentaux, formant ce que l'on appelle le droit communautaire originaire⁵, la grande majorité des actes communautaires (le droit communautaire dérivé) va s'imposer au *Riigikogu* pour s'intégrer dans l'ordre juridique national soit tels quels, c'est-à-dire sans le concours direct du parlement national dans le cas des règlements, soit sous la forme de lois après avoir été obligatoirement transposés dans le cas des directives.

En plus du risque de mettre la représentation populaire à l'écart en tant que source nationale de droit positif, en accentuant ainsi encore plus l'affaiblissement si ce n'est le déclin de l'institution parlementaire déjà amorcé dans tous les Etats membres, le processus décisionnel communautaire accroît considérablement les compétences des Gouvernements des Etats membres, certes au sein du Conseil des ministres de l'Union européenne, dans un domaine relevant traditionnellement des Parlements, à savoir la production de normes juridiques. Ceci cause, au niveau national, un déséquilibre entre pouvoir législatif et pouvoir exécutif au profit de ce dernier.

L'Europe communautaire prit conscience des dangers que pouvait comporter cette situation et consacra finalement le rôle des parlements nationaux par le Traité d'Amsterdam en 1999, dont le neuvième protocole en annexe reconnaît l'existence de la Conférence des organes spécialisés dans les affaires communautaires (COSAC).⁶

Mais il revient essentiellement aux Etats membres de prendre leurs responsabilités pour maintenir à l'échelon national un équilibre entre pouvoir exécutif et pouvoir législatif et préserver la place occupée par ce dernier dans le cadre institutionnel interne propre à chaque Etat membre.

C'est dans cette perspective que le *Riigikogu* a modifié son règlement intérieur⁷ en se dotant de moyens de contrôle spécifiques sur l'action du Gouvernement dans les affaires relatives à l'Union européenne. Mais pour tenir compte du rôle central que joue traditionnellement le Parlement estonien monocratique dans la détermination de la vie de la Nation, ce qui place la République d'Estonie au rang des démocraties parlementaires de type moniste, le *Riigikogu* s'attribue bien plus qu'un simple droit de regard. Il a également la possibilité de contraindre les membres du Gouvernement siégeant au Conseil à se conformer à ses directives un peu selon le modèle danois.

Ces réformes qui tendent à renforcer les prérogatives du *Riigikogu* par le biais de la fonction de contrôle, essentielle en régime parlementaire, permettent en fin de compte de compenser l'impossibilité pour les Parlements nationaux d'intervenir directement dans le processus décisionnel de l'Union.

Le système très contraignant, mis en place en Estonie, d'un véritable « contrôle-influence » du Gouvernement sur les affaires européennes, dont nous allons en présenter les caractéristiques, contribue indubitablement à combler un peu plus le « déficit démocratique » dont souffre l'Union européenne en consolidant l'une des deux légitimités sur lesquelles repose l'Union, à savoir la légitimité des Etats s'exprimant dans et par les Parlements nationaux à côté de celle s'exprimant dans et par le Parlement européen.⁸

L'étude du contrôle parlementaire de la politique européenne du Gouvernement en République d'Estonie nous donnera l'occasion d'observer de quelle manière les nouvelles dispositions du règlement intérieur parviennent à encadrer l'activité du Gouvernement en matière européenne (1) et d'analyser en quoi consiste, selon ces mêmes dispositions, l'information du *Riigikogu* comme condition à un contrôle parlementaire efficace (2).

1. L'encadrement de l'activité du Gouvernement en matière européenne

Au terme de l'article 18 alinéa 3 du règlement intérieur, « la commission des affaires de l'Union européenne et, pour les questions concernant la politique étrangère et de sécurité commune, la commission des affaires étrangères du *Riigikogu* établissent, en collaboration avec les autres commissions permanentes, la position du *Riigikogu* en ce qui concerne les propositions d'actes juridiques de l'Union européenne. Elles donnent leur avis s'agissant d'autres questions sur l'Union européenne et contrôlent l'activité du Gouvernement de la République dans l'exécution de la politique de l'Union européenne ».

⁵ Le parlement national garde la maîtrise du droit communautaire originaire grâce à la procédure de ratification des traités internationaux, qui lui donne le droit soit de les rejeter soit de les accepter, la négociation étant réservée au Gouvernement.

⁶ Créée en 1989, la COSAC permet, lors de conférences bisannuelles, aux représentants des Parlements des Etats-membres et du Parlement européen de même que ceux des pays candidats en tant qu'observateurs, d'échanger leurs points de vue sur des questions européennes.

⁷ Loi entrée en vigueur le 15 mars 2004. – RT I 2004, 12, 77.

⁸ Sur la double légitimité de l'Union européenne, cf. R. Badinter. Une constitution européenne, Paris: Fayard 2002.

Il ressort de cette disposition que l'encadrement de l'activité européenne du Gouvernement se caractérise par une organisation institutionnelle du *Riigikogu* spécifique à la mission à accomplir et par le rôle actif du *Riigikogu* dans la politique que le Gouvernement doit mettre en œuvre au niveau européen.

1.1. Le cadre institutionnel du contrôle parlementaire

Afin d'assurer un contrôle optimal de l'activité gouvernementale sur les questions européennes, le *Riigikogu* a été amené à restructurer ses commissions parlementaires. Nous savons que les commissions parlementaires permettent au Parlement, du fait d'un accroissement de sa charge de travail qui plus est de plus en plus spécifique, de délibérer en séance plénière de façon utile et efficace. Ces organes restreints du Parlement ont en effet pour rôle de permettre à ce dernier d'exécuter convenablement ses deux fonctions principales que sont la fonction législative et la fonction de contrôle. Cependant, eu égard au caractère autonome du processus décisionnel communautaire vis-à-vis de la procédure législative nationale, les commissions chargées de suivre les questions européennes vont alors se concentrer principalement sur le contrôle de l'activité du Gouvernement en tant que représentant de l'Etat, et par-là même représentant du Parlement national, auprès du Conseil des ministres de l'Union.

Le règlement intérieur prévoit ainsi la création d'une nouvelle commission permanente pour les affaires de l'Union européenne qui s'ajoute aux 10 autres commissions permanentes existant préalablement, lesquelles sont chargées des questions européennes spécifiques à leur domaine de compétence.

1.1.1. La commission des affaires de l'Union européenne : nouvelle commission permanente chargée des questions générales relatives à l'Union européenne

La commission des affaires de l'Union européenne succède aux commissions spéciales, dites « commissions des affaires européennes », créées conformément au règlement intérieur du *Riigikogu* par arrêtés.⁹

La commission des affaires européennes, composée de 13 parlementaires issus de différentes commissions permanentes, avait pour mission, selon les termes des arrêtés parlementaires cités ci-dessus, de contribuer à atteindre les objectifs de l'association créée par l'accord européen du 12 juin 1995, de coopérer régulièrement avec le Gouvernement pour atteindre ces objectifs, d'établir des liens avec le Parlement européen et tenir constamment informer le *Riigikogu* de ses travaux au sein du comité parlementaire et des problèmes qui y étaient soulevés.

La commission devait également entendre les membres du Gouvernement ou tout autre agent de l'administration gouvernementale au sujet de l'évolution de l'intégration à l'Union européenne et pouvait adresser des recommandations au Gouvernement concernant l'adoption de projets de loi liés à l'intégration européenne. L'ancien président de la commission des affaires européennes, M. Tunne Kelam, a souligné que l'un des objectifs de cette commission était de fonctionner comme un forum de discussions entre d'un côté, les organisations non gouvernementales et les groupes d'intérêts et de l'autre, les ministères et les commissions parlementaires^{*10}.

En pratique, la commission des affaires européennes a joué un rôle essentiel dans la phase de préparation à l'adhésion à l'Union européenne. En sus de sa fonction de représentation du *Riigikogu* auprès des institutions de l'Union européenne, la commission avait la lourde tâche de coordonner le travail entre le Parlement et le Gouvernement pour permettre l'adoption de lois visant l'harmonisation de la législation estonienne avec les textes communautaires.

Le travail de la commission des affaires européennes n'a pas été facilité par le fait qu'il s'agissait d'une commission spéciale ne pouvant donc pas, selon le règlement intérieur du *Riigikogu*, préparer elle-même les projets et propositions de lois liés à l'intégration européenne pour en débattre en assemblée plénière. Elle dépendait, dans sa mission avant tout de coordination, des commissions permanentes (dites « commissions de direction ») seules compétentes dans la préparation des débats pléniers du *Riigikogu*.

C'est pour remédier à ce problème que la nouvelle commission parlementaire en charge des questions sur l'Union européenne devient une commission permanente. Malgré son appartenance à la catégorie des commissions permanentes du *Riigikogu*, la commission des affaires de l'Union européenne se distingue de celles-ci de par sa composition et sa mission, qui est la cause de ce particularisme et que nous aborderons en détail ultérieurement.

⁹ La première commission (spéciale) des affaires européennes fut créée le 23 janvier 1997 (RT I 1997, 11, 97) et la seconde le 18 mai 1999 (RT I 1999, 47, 536).

¹⁰ T. Kelam. *Riigikogu roll Eesti ühinemisel Euroopa Liiduga. – Riigikogu Toimetised (RiTo) 2001/3*, p. 16.

En tant que commission permanente, la composition de la commission des affaires de l'Union européenne obéit à la procédure du règlement intérieur du *Riigikogu*^{*11} selon laquelle ses membres sont désignés par les groupes politiques, proportionnellement à l'importance numérique de chacun de ces groupes, de façon à garder l'équilibre politique du *Riigikogu*. Mais pour mieux exécuter, c'est-à-dire pour rendre plus acceptable, sa mission notamment de prendre position au nom du *Riigikogu* sur les propositions de textes européens, il a fallu regrouper au sein de la commission des affaires de l'Union européenne un nombre plus élevé de parlementaires, d'où le nombre de membres fixé au minimum à 15, ce qui correspond à un peu moins de 15% du total des membres du *Riigikogu*. Ces membres doivent aussi représenter l'ensemble des commissions permanentes. Ainsi, les membres de la commission des affaires de l'Union européenne appartiennent également à au moins une autre commission permanente.^{*12} Par ailleurs, le président et les vice-présidents du *Riigikogu* sont exceptionnellement autorisés à être membres de la commission des affaires de l'Union européenne.^{*13}

1.1.2. Les commissions permanentes chargées des questions spécifiques liées à l'Union européenne

La commission des affaires de l'Union européenne n'est pas seule à remplir ses différentes missions de contrôle de la politique européenne du Gouvernement. Elle est assistée pour cela par les autres commissions permanentes. Cependant, le règlement intérieur du *Riigikogu* fait une distinction parmi ces 10 autres commissions permanentes, mettant à part la commission des affaires étrangères.

En effet, la commission des affaires étrangères est placée sur un pied d'égalité avec la commission des affaires de l'Union européenne dans la mesure où elle bénéficie des mêmes compétences que celle-ci. Mais dans ce cas là et contrairement à la commission des affaires de l'Union européenne, la commission des affaires étrangères ne traite que des questions relatives à la politique étrangère et de sécurité commune. Ainsi, l'article 18 alinéa 3 du règlement intérieur du *Riigikogu* doit être compris en ce sens que la commission des affaires étrangères peut prendre position pour le compte du *Riigikogu* sur une proposition de texte communautaire, donner un avis sur d'autres questions liées à l'Union européenne et contrôler l'activité du Gouvernement dans l'exécution de sa politique communautaire uniquement en ce qui concerne la politique étrangère et de sécurité commune.

La raison pour laquelle les questions relatives à la politique étrangère et de sécurité commune font l'objet d'un traitement séparé et monopolisé par la commission des affaires étrangères tient au fait, selon l'explication avancée dans l'exposé des motifs, qu'il s'agit d'un domaine spécifique exigeant une réaction rapide.^{*14}

Dans les domaines ne faisant pas partie de la politique étrangère et de sécurité commune, la commission des affaires étrangères peut également intervenir. Cette compétence est alors analogue, non pas comme précédemment à celle de la commission des affaires de l'Union européenne, mais plutôt à celle des 9 autres commissions permanentes.^{*15}

Ces commissions permanentes, concernant les questions européennes générales, assistent la commission des affaires de l'Union européenne dans la mesure où cette dernière prend position, au nom du *Riigikogu*, sur les propositions d'actes communautaires, en collaboration avec les commissions permanentes.

Une commission permanente est désignée par le bureau du *Riigikogu* pour examiner au préalable la proposition d'acte communautaire en question et remettre un avis à la commission des affaires de l'Union européenne ou, le cas échéant, à la commission des affaires étrangères. Dans sa mission d'établir une position commune du *Riigikogu*, la commission se basera alors sur cet avis.

Ce système de coordination, proche du modèle finlandais, permet une répartition équilibrée des compétences entre la commission des affaires de l'Union européenne (ou la commission des affaires étrangères) et les autres commissions permanentes préservant ainsi le rôle spécifique de celles-ci tout en garantissant une vision globale du *Riigikogu*.^{*16} Une réunion conjointe des différentes commissions permanentes étant toujours possible en cas de désaccord.

¹¹ Article 26.

¹² Article 25 alinéa 2.

¹³ Article 24 alinéa 2.

¹⁴ Exposé des motifs du projet de loi relatif à la modification du règlement intérieur du *Riigikogu*.

¹⁵ La commission de l'environnement, des affaires culturelles, des affaires rurales, de l'économie, des affaires constitutionnelles, des finances, de la défense nationale, des affaires sociales et des lois.

¹⁶ Sur ce point voir l'exposé des motifs.

1.2. Le rôle actif du *Riigikogu* dans la politique européenne du Gouvernement

Afin de respecter la logique du régime parlementaire selon laquelle le Gouvernement agit en accord avec le Parlement, et celle de la démocratie parlementaire estonienne caractérisée par la position dominante du *Riigikogu*, le choix a été d'attribuer à ce dernier des moyens de contrôle de la politique gouvernementale en matière européenne suffisamment puissants selon le modèle des pays de l'Europe du nord. Ainsi le *Riigikogu* joue un rôle actif dans la politique européenne du Gouvernement, par un contrôle a priori de ce dernier et un suivi de ses activités.

1.2.1. Le contrôle a priori du Gouvernement

Lorsque le règlement intérieur du *Riigikogu* prévoit que la commission des affaires de l'Union européenne et, pour les questions concernant la politique étrangère et de sécurité commune, la commission des affaires étrangères établissent la position du *Riigikogu* au sujet des propositions d'actes juridiques de l'Union européenne et donnent leur avis sur d'autres questions liées à l'Union européenne, il faut bien constater qu'il ne s'agit là d'aucune compétence traditionnelle du Parlement. Cela ne relève effectivement ni du domaine législatif puisque le *Riigikogu* n'est pas en mesure de voter les propositions qui lui sont présentées (ce qui est du ressort du Conseil des ministres de l'Union européenne avec ou sans le Parlement européen) ni non plus, du domaine du contrôle puisque le Gouvernement n'a pas encore agit.

Le fait pour le *Riigikogu* de déterminer sa position en ce qui concerne les propositions d'actes communautaires à destination du Gouvernement s'apparente à une forme de contrôle a priori dans la mesure où le Parlement intervient avant l'adoption des textes européens à laquelle le Gouvernement participe en tant que membre du Conseil des ministres.

Il faut tout de même souligner que cette position du *Riigikogu* n'est pas prise à la suite d'un débat en assemblée plénière mais au sein de ses deux organes restreints chargés de cette mission, lesquels sont tenus d'en informer le Gouvernement et non le *Riigikogu* (sic). Par conséquent, la mission des commissions des affaires de l'Union européenne et des affaires étrangères n'est pas limitée à coordonner les travaux d'examen des propositions d'actes européens par les différentes commissions permanentes. Elle consiste aussi à prendre position au nom et pour le compte du Parlement tout entier sur un point qui engagera la responsabilité du Gouvernement. La disposition législative^{*17} qui donne ainsi les pleins pouvoirs à une commission permanente de se substituer à l'organe représentatif de la Nation n'est pas, à nos yeux, sans poser de problèmes quant à sa conformité à la Constitution et concrètement au principe du parlementarisme, qu'elle sous-tend, selon lequel le Gouvernement n'a de compte à rendre qu'au Parlement et non à une composante de celui-ci. Il est vrai que la composition des deux commissions parlementaires en cause permet une représentation de l'ensemble du *Riigikogu*, par ailleurs, rien n'empêche le *Riigikogu* de prendre lui-même position sur ces questions par voie d'arrêté, ni les commissions permanentes de prendre position après un débat en séance plénière du Parlement dans le cadre de sa compétence générale, en vertu de l'article 65 point 16 de la Constitution, de traiter de tout problème essentiel de la vie de la Nation.^{*18}

Le contrôle a priori du Gouvernement par l'intermédiaire des prises de position du *Riigikogu* ne concerne cependant pas n'importe quelle proposition d'acte européen. Selon l'article 152¹ du règlement intérieur, il doit s'agir soit de propositions dont le domaine de régulation exige conformément à la Constitution estonienne l'adoption, la modification ou l'annulation d'une loi ou d'un arrêté du *Riigikogu*, soit de propositions dont l'adoption aurait parallèlement des effets économiques ou sociaux très importants.

Par ailleurs, le *Riigikogu* n'est pas obligé de prendre position sur les propositions d'actes européens qui lui sont présentées par le Gouvernement. Le règlement intérieur du *Riigikogu* donne en effet la possibilité à la commission des affaires de l'Union européenne ou à la commission des affaires étrangères de renoncer à prendre position. Quelles que soient les raisons qui conduisent à un tel renoncement, le Parlement n'a pas à se justifier (cela fait partie du pouvoir discrétionnaire du Parlement), par contre, la commission en question est tenue d'en informer le Gouvernement pour ne pas retarder la procédure. Si de cette façon, le *Riigikogu* peut ne pas exercer son droit de contrôler a priori, rien ne l'empêche d'avoir recours à un contrôle a posteriori qui s'inscrit alors dans le suivi de l'activité européenne du Gouvernement.

1.2.2. Le suivi de l'activité gouvernementale

La participation du *Riigikogu* à la politique gouvernementale en matière européenne se veut active dans la mesure où elle est également génératrice d'obligations à la charge du Gouvernement, ce qui permet au

¹⁷ Article 152⁴ alinéa 2 du règlement intérieur du *Riigikogu*.

¹⁸ Remarque faite dans l'exposé des motifs.

Parlement d'effectuer un véritable suivi de l'activité du Gouvernement. Ce dernier se doit en amont de suivre les positions éventuelles du *Riigikogu* concernant les propositions d'actes européens et en aval de présenter un rapport d'activité. Ce suivi se caractérise par un droit de regard contraignant du *Riigikogu* sur la politique européenne du Gouvernement qui, en fin de compte, devrait pouvoir compenser le fait que le *Riigikogu* ne puisse pas participer directement au processus décisionnel communautaire.

Arrêtons-nous un instant sur la force juridique de la position que prend le *Riigikogu* à l'égard du Gouvernement, sachant que cette question est véritablement au cœur de notre étude.

Le règlement intérieur du *Riigikogu* prévoit très clairement que le Gouvernement est obligé de s'en tenir à la position du Parlement.^{*19} Ainsi sur ce point précis, l'Estonie se rapproche du modèle danois selon lequel le Parlement a la possibilité de délivrer un mandat de négociation au Gouvernement à suivre lors des débats au Conseil sur l'adoption des textes européens. Les deux commissions parlementaires, compétentes pour formuler la position du *Riigikogu*, sont donc plus que de simples organes consultatifs à la disposition du Gouvernement pour les questions européennes. En cela, l'Estonie se démarque fondamentalement de la Finlande et de la Suède – deux des trois modèles pris en compte par les parlementaires estoniens – qui avaient rejeté l'idée d'attribuer à leur commission parlementaire respective la possibilité de formuler des lignes directrices impératives pour l'action de leur Gouvernement.^{*20}

La force juridique obligatoire de la position du *Riigikogu* s'explique par la volonté des auteurs de la loi de ne pas réduire à néant les compétences du Parlement, de ne pas cantonner le rôle du *Riigikogu* à ne faire que des observations mais au contraire, de lui donner la possibilité d'influencer la politique du Gouvernement une fois au Conseil. L'idée du Gouvernement « porte-voix^{*21} » du *Riigikogu* au Conseil des ministres répond par ailleurs à la nécessité de légitimer l'action gouvernementale en matière européenne, ce qui est essentielle au niveau national pour maintenir la place du *Riigikogu* dans les institutions constitutionnelles estoniennes mais aussi au niveau européen pour réduire le déficit démocratique dont souffre le processus décisionnel communautaire.

Cependant, il ne faut pas se leurrer. Le « contrôle-influence » institué en Estonie ne peut obliger le Gouvernement à parvenir à un résultat conforme aux exigences du *Riigikogu*. Le mandat de négociation du Gouvernement est ainsi limité tout d'abord par des impératifs d'efficacité propres au processus décisionnel européen que le Parlement ne peut ignorer et qui constituent véritablement le pendant aux impératifs de légitimité. Rappelons que le fonctionnement de ce processus décisionnel répond davantage aux règles de la négociation diplomatique qu'à celles du domaine parlementaire^{*22} et qu'il laisse une place de plus en plus grande à la prise de décision à la majorité qualifiée. Vouloir imposer au Gouvernement de suivre la position du *Riigikogu* bloquerait la recherche d'un compromis dans le cadre du vote à l'unanimité ou serait inefficace dans le cadre du vote à la majorité qualifiée. Un mandat impératif serait ensuite illusoire ne serait-ce que par le développement de la procédure de codécision et le rôle croissant du Parlement européen en tant que seconde source de légitimité démocratique de l'Union européenne. La dispersion des « lieux de pouvoir » à contrôler a pour effet de minimiser le caractère obligatoire des prises de position du *Riigikogu*.

Les parlementaires estoniens ont été conscients des aspects négatifs que comporte le mandat de négociation impératif. Ainsi, à l'obligation pour le Gouvernement de s'en tenir aux positions du *Riigikogu* fait suite la possibilité pour celui-ci de se délier de cette contrainte. Le règlement intérieur prévoit malgré tout, dans ce cas de figure, que le Gouvernement doit, à la première occasion, donner les raisons de ses agissements non conformes à la position du *Riigikogu* soit à la commission des affaires de l'Union européenne, soit à la commission des affaires étrangères.^{*23} La possibilité offerte au Gouvernement de s'écarter des prises de positions du *Riigikogu* permet de cerner la portée réelle de ces dernières. Il s'agit au bout du compte plus d'une obligation de moyen que de résultat, puisqu'elles obligent le Gouvernement, si ce n'est à prendre en compte le point de vue du *Riigikogu* au moment des débats au Conseil sur l'adoption d'actes juridiques de nature législative, du moins à rendre ce processus décisionnel transparent aux yeux de la représentation nationale. Le Gouvernement peut donc échapper à l'obligation de suivre la position du *Riigikogu*, mais quoi qu'il en soit, il ne peut échapper à celle de se justifier.

Ces obligations ne valent cependant que pour les positions du *Riigikogu* à l'exception donc des avis que le *Riigikogu* peut adresser au Gouvernement s'agissant de toute autre question « de grande importance^{*24} » sur l'Union européenne.

¹⁹ Article 152⁴ alinéa 3.

²⁰ Pour la Suède voir Textes constitutionnels suédois – Lois fondamentales et règlement du *Riksdag*. Sveriges Riksdag, 2001. p. 42.

²¹ Expression tirée de l'ouvrage de Jean-Dominique Nuttens. Le Parlement français et l'Europe: L'article 88-4 de la constitution, Paris : LGDJ Bibliothèque constitutionnelle et de science politique – Tome 100, 2001.

²² J.-L. Sauron. Le contrôle parlementaire de l'activité gouvernementale en matière communautaire en France. – RTDE 1999, p. 197.

²³ Article 152⁴ alinéa 3 *in fine*.

²⁴ Article 152¹ alinéa 2.

Malgré tout et bien que cela ne soit pas mentionné dans le règlement intérieur, rien n'empêche le *Riigikogu* de sanctionner le Gouvernement si la politique de ce dernier ne convient pas/plus au Parlement. Le *Riigikogu* peut toujours déposer une motion de censure conformément aux dispositions de l'article 97 de la Constitution. En effet, selon la logique du parlementarisme qui doit ici être maintenue, le pouvoir de contrôle du Parlement sur la politique européenne du Gouvernement doit pouvoir, le cas échéant, se transformer en pouvoir de sanction lorsque cette politique n'a plus le soutien d'une majorité de parlementaires.

Nous le voyons, la véritable force des parlements réside réellement dans les moyens de contrôle, dont ils disposent, sur la politique gouvernementale, mais encore faut-il leur donner les moyens d'être utile et efficace. L'information des parlements en est indubitablement le premier de ces moyens.

2. L'information du *Riigikogu* comme moyen nécessaire au contrôle parlementaire

L'encadrement de la politique européenne du Gouvernement, qui, comme nous l'avons vu, a nécessité une architecture institutionnelle adaptée et des moyens de contrôle conformes aux exigences du système parlementaire estonien, ne saurait porter ses fruits sans une information adéquate du *Riigikogu*.

La procédure d'information du *Riigikogu*, mise en place par son règlement intérieur concernant les matières européennes, établit au bénéfice du *Riigikogu* un véritable droit à l'information tout en posant les conditions permettant à cette information et, plus globalement, à la procédure toute entière, d'être la plus efficace possible.

2.1. Le droit du *Riigikogu* à l'information

Au regard de l'article 152¹ du règlement intérieur du *Riigikogu*, il apparaît que le droit de ce dernier d'être informé des questions européennes implique une obligation à la charge du Gouvernement de lui présenter des documents. Cependant cette obligation d'informer le *Riigikogu* a une portée variable en fonction de ce que le Gouvernement est en droit d'attendre du Parlement. Ainsi, il y a des cas dans lesquels l'information se fait systématiquement et d'autres dans lesquels elle n'est qu'occasionnelle.

2.1.1. L'information systématique

Le Gouvernement est tenu d'informer systématiquement le *Riigikogu* des propositions d'actes de l'Union européenne en lui présentant les textes en question traduit obligatoirement en estonien^{*25} afin que le Parlement puisse accomplir correctement sa mission et s'il le juge opportun, adresser au Gouvernement sa position.

Cette information systématique doit permettre au *Riigikogu* d'effectuer un contrôle régulier de ce qui relève traditionnellement de sa compétence au niveau nationale, à savoir l'activité, nous dirions ici, « normative » du Gouvernement au sein du Conseil ou du moins créatrice de droits et d'obligations juridiques à l'égard des Etats membres et/ou des citoyens de l'Union européenne. Il est donc tout naturel de voir figurer parmi les propositions d'actes européens, que le Gouvernement doit présenter au *Riigikogu*, celles dont le domaine de régulation exige conformément à la Constitution estonienne l'adoption, la modification ou l'annulation d'une loi ou d'un arrêté du *Riigikogu*.^{*26}

Concrètement, il s'agit tout d'abord de toutes les propositions de textes communautaires ayant une valeur juridique obligatoire, c'est-à-dire selon la nomenclature jusqu'à maintenant officielle^{*27}, les règlements, les directives et les décisions. Mais ce peut être également des propositions du Conseil européen ou du Conseil des ministres tendant à définir ou à mettre en œuvre une politique étrangère et de sécurité commune^{*28}, ou bien celles du Conseil des ministres visant à élaborer une action en commun entre les Etats membres dans le domaine de la coopération policière et judiciaire en matière pénale.^{*29}

²⁵ La condition de transmettre les propositions d'actes européens uniquement en langue estonienne n'apparaît que dans l'exposé des motifs mais se conçoit logiquement puisque, en vertu de l'article 6 de la Constitution, la langue officielle de l'Estonie est l'estonien.

²⁶ Article 152¹ alinéa 1 point 1.

²⁷ Article 249 du Traité instituant la Communauté européenne.

²⁸ Selon l'article 12 du Traité sur l'Union européenne, il s'agit des principes et orientations générales, des stratégies communes, des actions communes et des positions communes.

²⁹ Selon l'article 34 du Traité sur l'Union européenne, il s'agit des positions communes, des décisions-cadres, des décisions et des conventions.

Le règlement intérieur du *Riigikogu* prévoit en outre que cette obligation de présentation des propositions d'actes européens concerne aussi celles dont l'adoption aurait des incidences économiques ou sociales très importantes.^{*30} L'idée des auteurs de cette disposition consiste à garantir une information et donc un contrôle systématique du *Riigikogu* sur des propositions de textes européens qui, en dépit du fait que leur matière ne relève pas, selon la Constitution, du domaine de compétence du *Riigikogu*, ont une portée fondamentale au plan économique et/ou social du pays.

La critique que nous pourrions faire de cette disposition concerne son caractère flou. Rien n'indique selon quel critère il pourra être décidé que telle ou telle proposition d'acte européen aura des conséquences économiques et/ou sociales majeures, ni même l'autorité compétente pour en décider ainsi. Le résultat est que tout dépendra de considérations politiques ce qui nous fait dire que la signification de l'article 152¹ alinéa 1 point 1, contrairement à celle de l'article 152¹ alinéa 1 point 1, est loin d'être purement juridique.

Quoi qu'il en soit, il est bon de conclure sur ce point en remarquant que le droit du *Riigikogu* à l'information, en ce qui concerne l'information systématique, se caractérise aussi à l'inverse par une obligation ou du moins un devoir pour le Parlement de s'intéresser aux questions les plus fondamentales de l'Union européenne, aux travaux « législatifs » de celle-ci et donc plus largement à la construction européenne. Certes les Parlements nationaux ne participent pas directement au processus décisionnel de l'Union européenne, mais les procédures d'information sur les questions européennes sont là pour nous montrer qu'ils sont invités à s'y intégrer.

2.1.2. L'information occasionnelle

L'information du *Riigikogu* concerne également toute autre question de grande importance relative à l'Union européenne. Ceci afin de lui permettre de donner un avis (non obligatoire) au Gouvernement sur de telles questions.^{*31}

Dans ce cas là, le droit du *Riigikogu* à l'information signifie qu'il peut demander au Gouvernement de lui présenter toute question fondamentale sur l'Union européenne même si elle ne fait pas l'objet d'une proposition d'acte juridique communautaire. Par ailleurs, le Gouvernement peut, sur ces mêmes questions, en faire de même de sa propre initiative pour avoir l'avis du *Riigikogu*.

2.2. Les conditions d'une information efficace

Il a été dit plus haut que le contrôle parlementaire de la politique européenne du Gouvernement doit répondre aux exigences de légitimité et d'efficacité. Mais l'efficacité de ce contrôle passe nécessairement par une information du *Riigikogu* qui doit à son tour être efficace. Or, pour que l'information se fasse efficacement, elle doit, elle aussi, répondre à deux impératifs aux forces contradictoires mais complémentaires, à savoir la qualité et la rapidité. Les conditions d'une information efficace prévues dans le règlement intérieur du *Riigikogu* ne concernent cependant que les propositions d'actes européens. Le règlement intérieur tente donc de garantir la qualité de l'information au moyen d'une transmission de documents annexes aux propositions d'actes européens et la rapidité de circulation de l'information et du déroulement de la procédure en générale par un impératif de célérité.

2.2.1. La transmission de documents annexes

Conformément à l'article 152² alinéa 1 du règlement intérieur, le Gouvernement se voit tenu de joindre systématiquement à toute proposition de textes européens un exposé des motifs.

Cette obligation n'a rien de particulier ni de nouveau pour le Gouvernement dans la mesure où elle correspond à la pratique du travail législatif en Estonie. Cependant, en l'espèce, il revient au Gouvernement et plus précisément au ministère concerné, de préparer lui-même l'exposé des motifs d'une proposition d'acte juridique, dont il n'est pas l'auteur. Par conséquent, le parallélisme avec la procédure estonienne, même si elle se justifie par une prise en compte des considérations nationales, apparaît en décalage par rapport à la réalité plus générale dans laquelle se place la procédure qui est celle du processus décisionnel européen. Pour avoir une vue la plus exacte qui soit de la proposition d'acte déposée au Conseil et pour ne pas la déconnecter totalement de son contexte européen, il serait logique de demander également au Gouvernement de transmettre au *Riigikogu* l'exposé des motifs (les études d'impact) réalisé par le véritable auteur de la proposition, à savoir la Commission européenne.

La différence entre les exposés des motifs des projets et propositions législatifs nationaux et ceux des textes européens tient plutôt au contenu. Le Gouvernement doit obligatoirement y faire figurer les objectifs que la

³⁰ Article 152¹ alinéa 1 point 2.

³¹ Article 152¹ alinéa 2.

proposition cherche à atteindre, le mode de procédure et son calendrier au sein des institutions de l'Union européenne, un aperçu des effets que le texte pourrait avoir une fois adopté ainsi que sa position sur la proposition en question.

Par ailleurs, l'exposé des motifs, contrairement à ceux des projets et propositions législatifs nationaux, doit être bref. Il doit traiter de façon condensée le contenu de la proposition pour se focaliser principalement sur ses points essentiels, faire une analyse restreinte de ses implications politiques, juridiques et économiques et enfin donner une première appréciation sur les effets que pourrait avoir la proposition examinée en Estonie.^{*32}

Le Gouvernement pourra toujours ultérieurement en cas de besoin donner au Parlement des informations plus précises avec des exposés des motifs allant plus dans les détails.

Si les documents annexes que le Gouvernement doit préparer et transmettre au *Riigikogu* doivent être concis, c'est que la procédure obéit à un impératif légitime de célérité.

2.2.2. L'impératif de célérité de la procédure

Dans l'intérêt du *Riigikogu* et pour ne pas vider le contrôle parlementaire de sa signification, toute la procédure parlementaire nationale de participation au processus décisionnel européen – qui englobe pour l'Estonie, l'examen des propositions par les commissions permanentes, la coordination de leurs avis par la commission des affaires de l'Union européenne ou la commission des affaires étrangères et la prise de position du *Riigikogu* – doit se faire le plus rapidement possible.

Le règlement intérieur du *Riigikogu* exige ainsi du Gouvernement qu'il transmette au bureau du Parlement les propositions d'actes européens « à la première occasion » après les avoir reçues^{*33}. Cette occasion se présente après que la proposition en question ait été traduite en estonien et après que l'exposé des motifs de cette proposition ait été rédigé par le Gouvernement.

Pour ce qui est du *Riigikogu* ou plus exactement de la commission chargée de prendre position au nom du *Riigikogu*, le règlement intérieur n'exige pas qu'il se prononce rapidement. En effet, selon l'article 152⁴ alinéa 3 *in fine*, « la commission [des affaires de l'Union européenne ou des affaires étrangères] informe le Gouvernement de la République de sa prise de position ou de son renoncement à prendre position ». Le Gouvernement ne peut donc pas juridiquement exiger de la commission des affaires de l'Union européenne ou celle des affaires étrangères une réponse rapide. Mais cela reste du domaine théorique. Il n'est pas utile d'exiger du Parlement de se prononcer rapidement. On peut supposer qu'il prendra lui-même ses responsabilités pour faire en sorte de présenter le plus tôt possible sa position afin qu'elle puisse avoir une quelconque influence sur le processus de décision de l'Union européenne. La seule condition qui est demandée au *Riigikogu* de respecter au plan de la rapidité d'exécution concerne son bureau, lequel doit « sans délai » remettre à la commission des affaires de l'Union européenne ou à la commission des affaires étrangères la proposition d'acte européen que le Gouvernement lui transmet.^{*34}

Nous concluons en soulignant que cette étude se base sur les dispositions d'un texte légal qui vient juste d'entrer en vigueur. Dans ce contexte, l'analyse des modalités du contrôle parlementaire de la politique européenne du Gouvernement en République d'Estonie ne peut rester que théorique. A ce stade, il y a un point de la procédure qui attire tout particulièrement notre attention. Il s'agit du rôle central, voire prépondérant, que la commission parlementaire des affaires de l'Union européenne va avoir au sein du *Riigikogu* étant donné sa composition, sa mission et les effets qui en découlent à l'égard du Gouvernement. En ce qui la concerne, il peut y avoir deux avis partagés. On peut considérer, d'un point de vue technique, que cette commission permet un contrôle parlementaire le plus efficace qui soit, exécuté par des spécialistes des questions européennes garantissant un travail rapide et de qualité. On peut tout aussi bien considérer à l'inverse, en se plaçant du point de vue de la légitimité, que la commission des affaires de l'Union européenne mine la compétence du *Riigikogu* et qu'ainsi il faut craindre, malgré les précautions prises, de voir se constituer une sorte de « Parlement dans le Parlement ».

Un premier bilan permettra dans les mois qui viennent de définir la place réelle de la commission des affaires de l'Union européenne au *Riigikogu* mais aussi d'évaluer concrètement les moyens de contrôle mis à la disposition du Parlement sur la politique du Gouvernement en matière européenne et leurs difficultés d'application éventuelles. Nous verrons surtout si, sur le plan européen, le *Riigikogu* adopte une logique d'affrontement et d'opposition avec les acteurs du processus décisionnel de l'Union, dont le Gouvernement estonien fait partie, ou bien une logique de collaboration et de recherche du compromis. De la réponse à cette interrogation dépend le véritable apport de l'Estonie à la construction européenne.

³² Point développé dans l'exposé des motifs du projet de loi relatif à la modification du règlement intérieur du *Riigikogu*.

³³ Article 152² alinéa 2.

³⁴ Article 152² alinéa 3.



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Cross-Border Crime and Estonia's Accession to the European Union^{*1}

1. Introduction

The issues of cross-border crime^{*2} related to Eastern Europe were already topical before the current enlargement of the European Union. The majority of foreign criminologists and experts claim that crimes between the East and the West have increased considerably, diversified, and become more 'organised' over the decades, with radical social change and broadening crime opportunities.^{*3} What will happen in cross-border crime after the accession of the ten countries, including Estonia and other former Soviet republics, is a question to which various answers have been given.

Cross-border crime related to Estonia and the other Baltic states has mainly been examined in the context of the movement of offenders from these countries to the European Union and the resulting worsening of the crime situation in the old member states.^{*4} Such stereotypical assessment is rather prevalent both in Western European public opinion and among law enforcement professionals.^{*5} Here we can perceive the transfer of similar views to new circumstances, or unwillingness to alter earlier attitudes. This is illustrated by an organised crime report for 2002 prepared by Europol, which concludes among other things that Estonian

¹ The article is based on the results of the survey 'Cooperation of Estonian Legal Protection Agencies with European Union Member States in Combating Cross-Border Crime (Situation before and after Accession to the European Union)', conducted within the framework of public contract 03-175 in the Institute of International and Social Studies of the Tallinn Pedagogical University and the Faculty of Law of the University of Tartu.

² Cross-border crime is considered to cover crimes the commission or the offenders of which involve more than one country.

³ P. Van Duyne. Cross-Border Crime: A Relative Concept and Broad Phenomenon. – P. van Duyne, V. Ruggiero, M. Scheinhorst, W. Valkenberg. Cross-Border Crime in a Changing Europe. Huntington, New York: Nova Science Publishers, Inc. 2001, pp. 1–14.

⁴ M. Junninen, K. Aromaa. Crime across the Border: Finnish Professional Criminals and Estonian Crime Opportunities. National Research Institute of Legal Policy, Research Communications 45. Helsinki 1999.

⁵ Such an attitude is not directed solely at Estonia but rather characterises a general attitude by which poor newcomers from the East are seen as jeopardising the former idyll of Europe and bringing their problems with them.

organised crime groups have fully taken over the role of drug traffickers to Finland.⁶ Such an attitude is also manifested in the image of the (Russian) mafia, which has been created to emphasise the extreme danger accompanying the offenders from the 'new' states.⁷

This is likely to be a subjective assessment of danger, which mainly derives from the superficial knowledge of the situation in these states and the low precision of objective assessment methods. The main point is that such one-sided interpretation of a still developing situation definitely does not constitute sufficient preconditions for creating an adequate overview of the actual cross-border crime and the establishment of better co-operation between the law enforcement authorities of different countries. For example, pressure exerted on Estonia from the West where criminal activities are concerned need not be smaller than that exerted from here toward the West concerning any type of criminal offence. This is evidenced by the repeated attempts of suspicious persons from Western European countries to participate in the privatisation of Estonia's major infrastructure objects at the beginning and in the middle of the 1990s. The most important shortcoming involves sticking to the framework of the old stereotypes; failure to see the actual developments in international (cross-border) crime and its dangers; and, as a result, the lack of preparedness to combat them.

From the point of view of Estonia and the other new member states of the European Union, an attempt should be made to, after establishing the necessary foundations, make an original contribution to handling cross-border crime. That refers to participation in defining and interpreting the phenomenon and in various stages of the development of control measures.

The general objective of this survey was to analyse the status of cross-border crime and its possible developments upon Estonia's accession to the European Union. Further to that, there was examination of changes accompanying the accession in international co-operation on legal protection, in order to plan the resources of agencies dealing with prevention of criminal offences and to map the national and international co-operation network in the field.

2. Methodology

The study included interviews with the leading officials of Estonian law enforcement authorities. The DELPHI method was applied, which involves questioning a group of top experts in an area. The advantage of the method is that the group as a whole yields a better result than the most competent expert belonging to the group.⁸

During the survey, information on the problem examined was first gathered separately from each expert. The information obtained was summarised, and an overview of the group perception of the problem was prepared. This included highlighting areas on which the experts agreed and those where dissenting opinions were expressed. The dissenting opinions were taken down and sent to the experts as feedback so that they could express their opinions about the causes of the dissenting opinions and argue their case.

The experts were selected from the institutions that the authors knew as addressing issues of cross-border crime control. The expert group comprised the leading officials of the relevant departments of the Police Board, the Security Police Board, the Border Guard Administration, customs, the court system, the Prosecutor's Office, the Ministry of Internal Affairs, the Ministry of Justice, and the Ministry of Finance. Taking into account the hierarchy of the ministries and agencies, the management of each institution was also notified of the study.

At first, 64 questionnaires were distributed electronically. By questioning the experts individually instead of finding out the official position of the institution, we appealed to the intuition and knowledge of individual experts. It could be presumed that such individual opinions were not included in those questionnaires completed collectively in the agencies. The experts from the Ministry of Finance either did not reply or announced their insufficient competence in issues of cross-border crime, as they did not consider handling crime to fall within their area of competence. It was relatively difficult to select experts from the Security Police (KAPO), the Tax Fraud Investigation Centre of the Tax Board (MUK), and the Border Guard Administration. Finally, some answers could be obtained from the MUK and KAPO; however, the opinions of the experts of the Border Guard Administration were never received. The number of completed questionnaires sent back was 24.

The objective of the questionnaire distributed in the first stage was to collect information on how cross-border crime was defined by the experts working in the field.

⁶ Europol 2002 EU Organised Crime Report. Available at: <http://www.europol.eu.int/index.asp?page=EUOrganisedCrimeSitRep2002>.

⁷ M. Joutsen. Cross-border crime patterns between Eastern Europe and the European Union. 2001. – P. van Duyne, V. Ruggiero, M. Scheinhorst, W. Valkenberg. Cross-Border Crime in a Changing Europe. Huntington, New York: Nova Science Publishers, Inc. 2001, pp. 15–32.

⁸ C. Powell. The Delphi technique: myths and realities. – Journal for Advanced Nursing 2003 (41) 4, pp. 376–382.

The second stage summarised the information collected during the first stage. This was used to prepare three survey instruments. One questionnaire focussed on changes in cross-border crime upon accession to the European Union, another handled co-operation with other countries and the European Union structures, and the third examined the efficiency of various measures in controlling cross-border crime in different agencies. This way, the members of the DELPHI panel received generalised feedback about how the other experts in the field assessed the situation. The final answers were obtained from 19 experts. In the third stage, the information gathered in the second stage was summarised and a consolidated report prepared. The consolidated report was made available to the members of the DELPHI panel in order to receive comments and clarification.

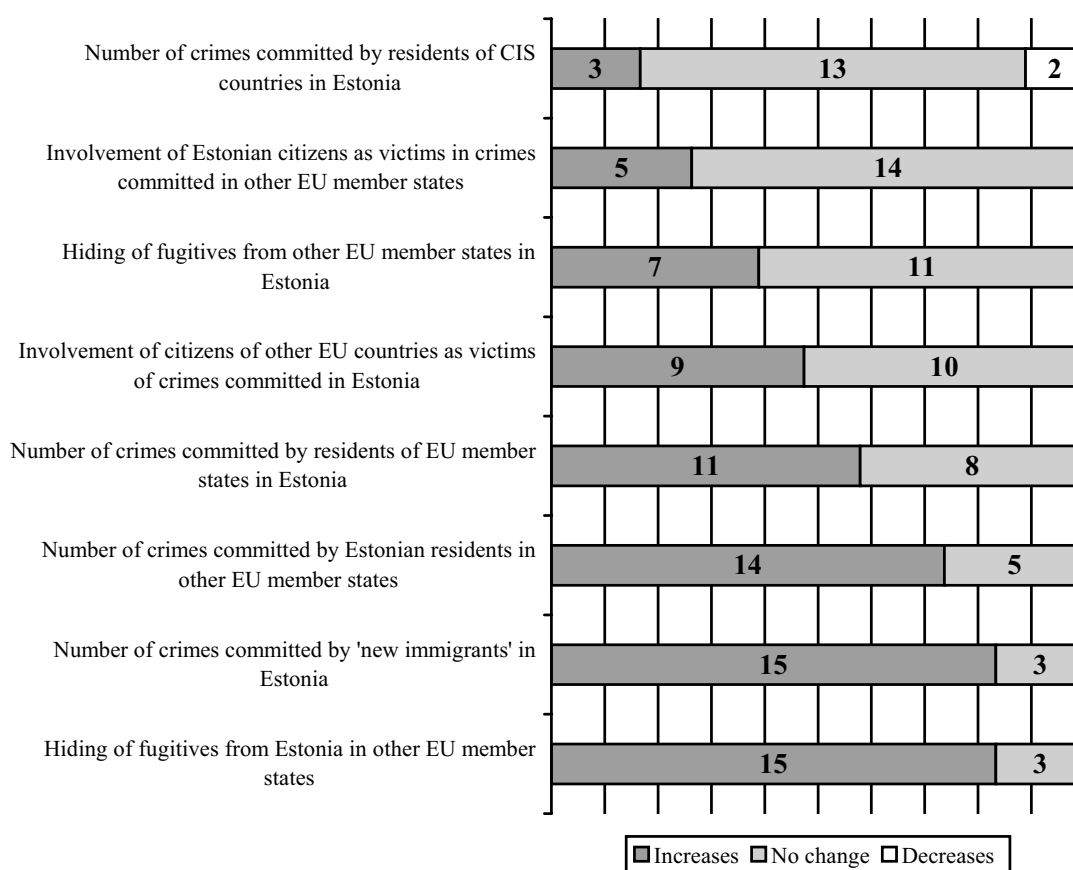
3. Changes in cross-border crime

In order to delimit the phenomena falling into the category of cross-border crime, the experts were first requested to freely list forms of cross-border crime. The outcome was a list of (criminal) types of behaviour and structures, which were divided into eight subgroups. After this, the experts assessed what would happen in the particular fields after Estonia acceded to the European Union.

3.1. Migration of crime

The experts assessed the migration of crime in great detail, and the majority of them predicted an increase in the migration of crime upon Estonia's accession to the European Union. The experts expected the greatest increase in the hiding of Estonian fugitives in other countries and the commission of crimes by 'new immigrants' to Estonia. The immigrants cited include persons from countries that are far afield (such as China and other Asian countries). The opinion was that the number of crimes committed by Estonian residents in other European countries ranked third and commission of crimes in Estonia by residents of European Union countries came fourth.

Figure 1. Assessment of migration of crime (N=19).

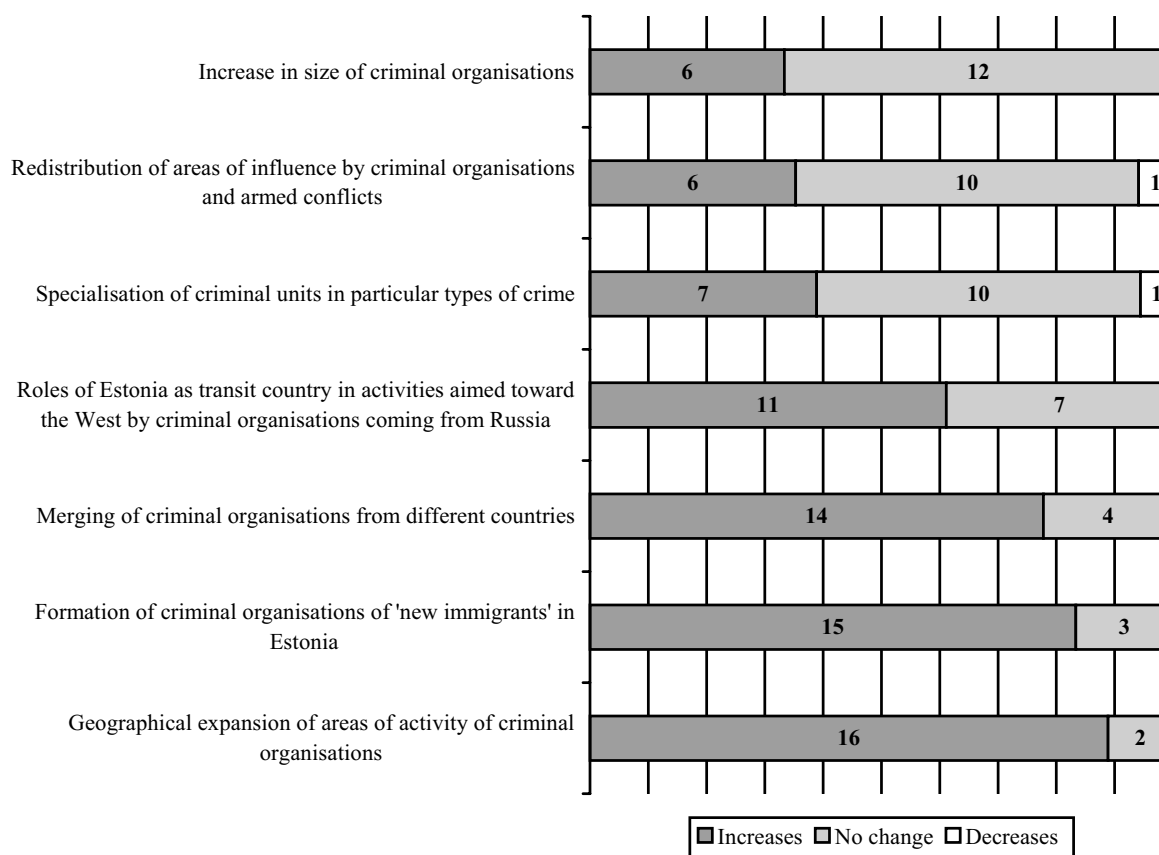


An increase in the number of crimes committed by residents of the CIS in Estonia was considered least likely, due to the role of the Estonian/Russian border as a well-protected external frontier of the European Union upon EU accession. Neither was more frequent involvement of Estonian citizens as victims of crimes in the other European Union countries predicted.

3.2. Criminal organisations

In the responses provided by the experts, cross-border crime was often associated with criminal organisations. The experts were most in agreement about the geographical expansion of the area of activity of criminal organisations, which could easily accompany the increase in the free movement of persons. The problems of 'new immigrants' were specified as related to criminal organisations that were about to be formed in Estonia; also, it was predicted that such organisations from various countries would merge. According to the experts, the role of Estonia as a transit country would increase in the activities of criminal organisations on the Western axis. An increase in the size of criminal organisations and specialisation in certain types of crimes as well as the creation of armed conflicts related to the redistribution of areas of impact were considered most unlikely.

Figure 2. Assessment of criminal organisations (N=18).



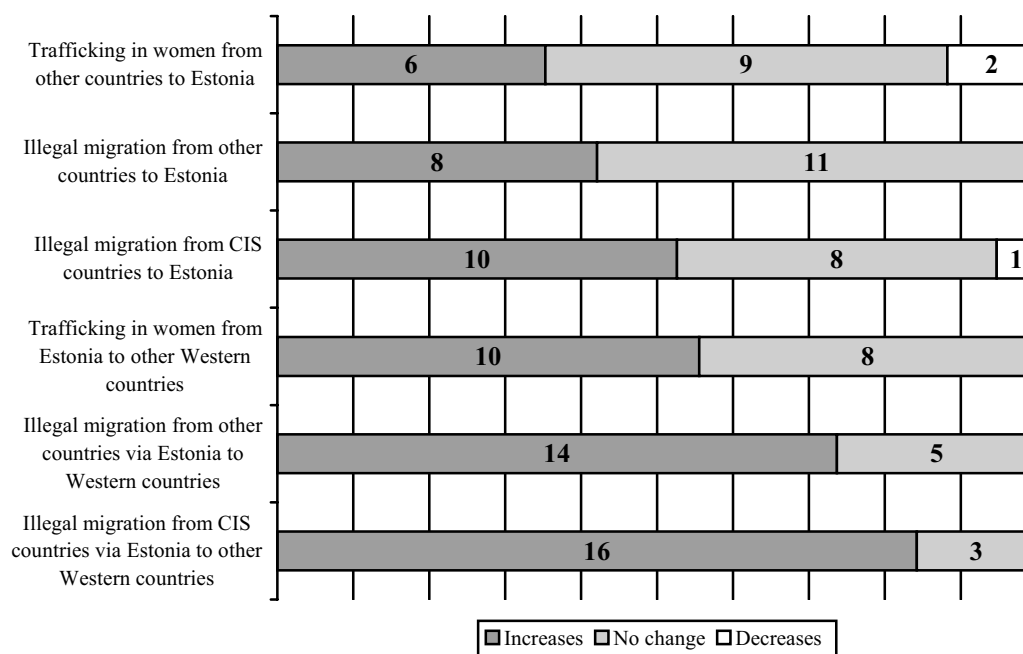
The replies revealed that in Estonia, the prevailing opinion is that organised crime is, above all, a problem of 'strangers', with less attention paid to the existence of a type of environment conducive to organised crime. All the areas of activity of criminal organisations that were expected to grow were related to people coming from outside Estonia. One should resist the temptation to define cross-border crime as the turf of (foreign) criminal organisations. World experience also demonstrates that attempts to control organised (cross-border) crime by channelling forces to neutralisation of the leaders of criminal groups have not yielded the expected results, as a rule.⁹

⁹ D. Nelken. The Globalization of Crime and Criminal Justice: Prospects and Problems. – S. Einstein, M. Amir (eds.). Organized Crime: Uncertainties and Dilemmas. Chicago: Office of International Criminal Justice 1999, pp. 439–461.

3.3. Illegal migration and trafficking in women

The experts' forecasts mostly included the illegal inflow of immigrants and labour into the European Union. Estonia was predominantly viewed as a transit country, and illegal migration from the CIS countries occupied first position. This was followed by illegal migration from other countries via Estonia into other Western countries, and an increase in the trafficking of women from Estonia into Western countries was ranked third. Increased trafficking in women from other countries in which they are brought into Estonia and illegal migration from other countries into Estonia were considered the least likely. As reasons why Estonia was not regarded as a very attractive destination for illegal immigrants in the near future, the relatively low standard of living and underdeveloped social benefits system compared to the other member states of the European Union were pointed out.

Figure 3. Assessment of illegal migration and trafficking in women (N=19).



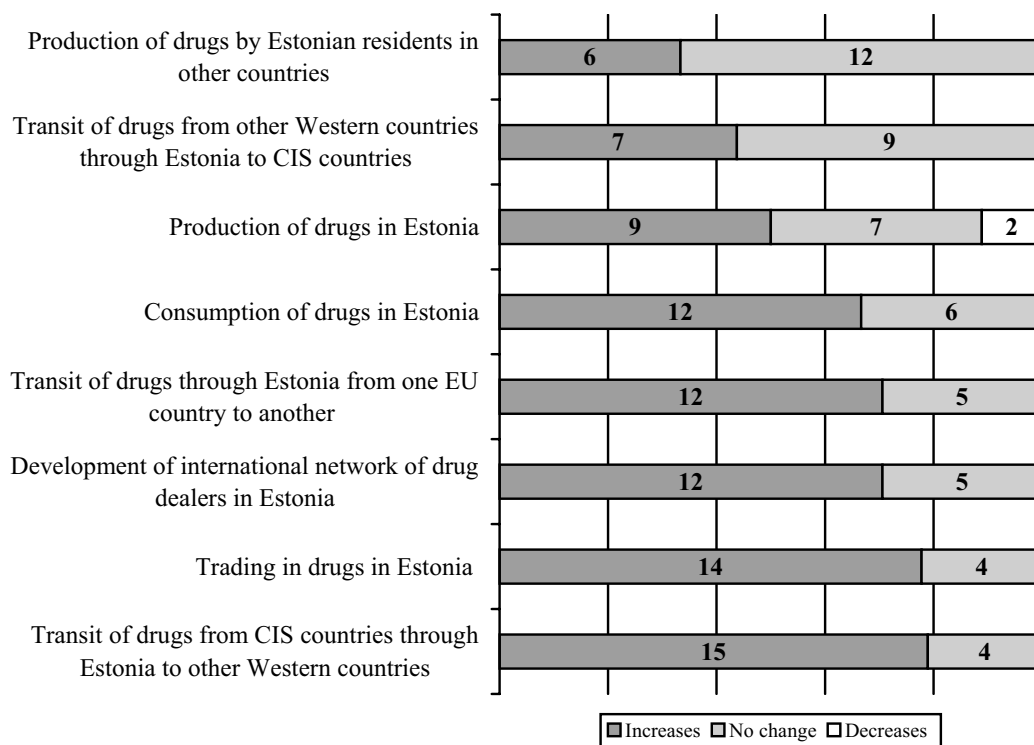
The experts obviously considered the dangers related to trafficking in women in Estonia less significant than could be assumed on the basis of the international attention paid to this matter in recent years. The objective of the campaign aimed against trafficking in women in the Northern countries and the Baltic states was 'to map the readiness for recognition of trafficking in persons as a social problem and combating it, as well as notification of strategically important social groups of the reasons for the phenomenon and other accompanying problems'.^{*10} The report on the campaign notes, among other things, that general informedness concerning the nature of the trafficking in persons in Estonia is rather low and the understanding of the negative effect of trafficking in persons and prostitution on society is insufficient or nonexistent. Yet it could be inferred that state officials were not considerably better informed than ordinary citizens, they could not perceive their roles in combating the problem, and there was no national action plan for combating trafficking in persons.^{*11}

3.4. Drug related crimes

The experts clearly distinguished among consumption, transit, and production of drugs. The largest growth was predicted in the transit of drugs from the CIS countries through Estonia to other Western countries and in trade in drugs. The experts also unanimously predicted the development of an international network of drug traders in Estonia and a growth in drug consumption. The production of drugs by Estonian people in other countries and their transit through Estonia to the CIS countries were predicted to increase to a lesser extent.

¹⁰ Nordic Council of Ministers. Nordic-Baltic Campaign against Trafficking in Women in Estonia 2002. Available at: <http://www.nordicbalticcampaing.org/estonian/index.html#nr6>.

¹¹ *Ibid.*

Figure 4. Assessment of drug related crimes (N=19).

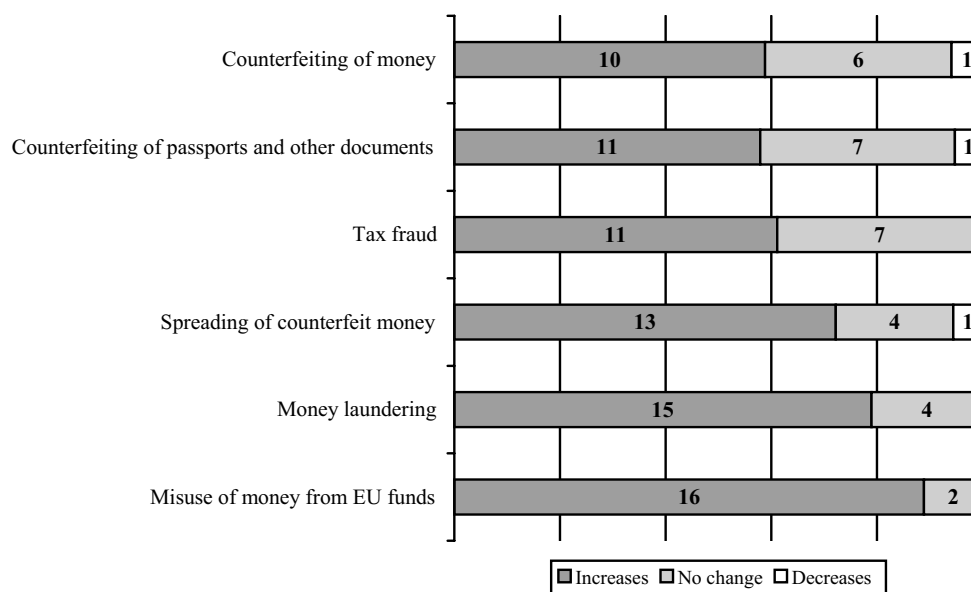
The assessment of production of drugs in Estonia yielded controversial results. Most of the experts thought that production would significantly increase or remain the same. Two experts, however, were convinced that such activities would decrease in the future. The lack of consensus among the experts may boil down to the varying degree of informedness about the problem and the fact that the directions of drug transit and the production and consumption of drugs vary by substance.

3.5. Economic crimes and counterfeiting

Two types of economic crimes were highlighted in the responses of the experts, these being misappropriation of money from European Union funds and money laundering. The former was expected to increase significantly. According to the Director General of the European Anti-Fraud Office (OLAF), Estonia will experience a considerable increase in the risk of fraud upon accession to the European Union, as attempts could be made to import goods from Russia via Estonia into the European Union, using counterfeit declarations. Estonian agricultural producers will receive subsidies, which could be used by swindlers hoping that administrative agencies cannot penetrate such schemes.^{*12} According to the data available to the Ministry of Finance, money has not been misappropriated from European Union funds in Estonia yet. Regardless, the Agricultural Registers and Information Board has rejected 20 project applications and submitted them for investigation to the Security Police. After the EU Structural Funds are opened to Estonia later in 2004, the amount of attempted misuse is expected to increase.^{*13}

¹² T. Tänavsuu. Finantspettuste uurija Euroopa Komisjonis: Eestis läheb huvitavaks. Intervjuu OLAFi juhiga Franz-Hermann Brüneriga (Investigator of financial fraud in European Commission: It is going to be interesting in Estonia. Interview with Director General of OLAF Franz-Hermann Brüner). – Eesti Päevaleht, 6.10.2003 (in Estonian).

¹³ T. Tänavsuu. Leedu Sapardi projekte üritavad petturid tüssata (Misusers try to fool in Lithuanian Sapard projects). – Eesti Päevaleht 14.10.2003 (in Estonian).

Figure 5. Assessment of economic crimes and counterfeiting (N=19).

The assessments according to which money laundering in Estonia is, above all, affected by local relations with the former Soviet Union republics are in line with the fact that all the cases of international money laundering that have reached the stage of investigative activities have been related to Russia or other states created upon the disintegration of the Soviet Union.^{*14} Although the local situation is seen as positive on an international scale with respect to money laundering, some areas remain insufficiently regulated. The progress report completed in July 2003 states that Estonia's situation concerning money laundering generally meets the criteria established in the relevant chapter of the European Union negotiations. At the same time, attention was paid to the need for supplementing legislation on supervision of gambling.^{*15} Estonia does not have an official system for ensuring that financial institutions comply with the notification obligation, and the Financial Intelligence Unit lacks the authorisation to request additional information from banks.^{*16}

The experts predicted an increase in the spread and, to a lesser extent, production of counterfeit money. After Estonia's accession to the European Union, counterfeiting of passports and other documents may become more frequent in Estonia, as residents of the CIS will make more intensive use of these counterfeit documents in order to reach Western European countries through Estonia.

3.6. Smuggling

One type of criminal offence that is expected to undergo a significant increase is smuggling, which concerns the avoidance of excise duties on tobacco, alcohol, and fuel and illicit traffic arising from different rates of excise rates. The area that is expected to develop the least intensely is smuggling of arms. At the moment, trafficking in arms is insignificant in Estonia, which is also indicated by the information of the Customs Board. For example, in 2002, customs officials seized two firearms and 21 cut-and-thrust weapons. The experts predicted a slight growth in fuel smuggling. The period 1999–2001 saw a considerable increase in illicit fuel trade, while the volume of fuel seized by customs officials in 2002 decreased again.

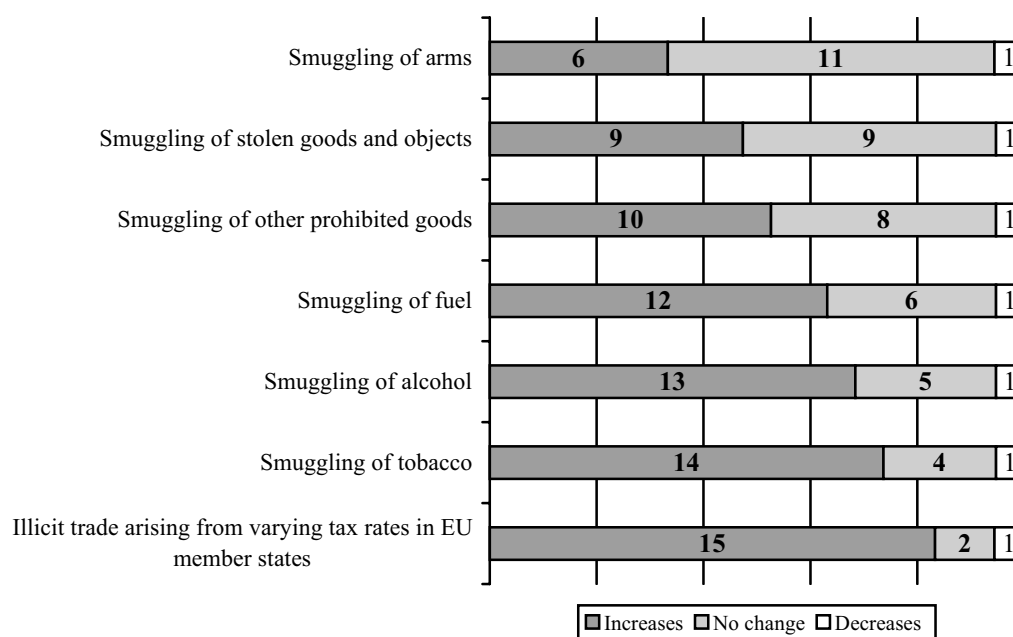
According to the Europol report for 2000, commodity smuggling has grown exponentially throughout the European Union since the abolition of intra-Community borders in 1993.^{*17} The Estonian experts expect an intensification of alcohol and tobacco smuggling after accession to the European Union.

¹⁴ J. Saar, A. Markina, A. Ahven, A. Annist, J. Ginter. *Kuritegevus Eestis 1991–2001*. 2. trükk (Crime in Estonia 1991–2001. 2nd edition). TPÜ Rahvusvaheliste ja Sotsiaaluuringute Instituut, EV Justiitsministeerium. Kirjastus Juura 2003, pp. 98–100 (in Estonian).

¹⁵ European Union Secretariat of State Chancellery. Monitoring Report for the Commission Review – Estonia, June 2003. Available at: <http://www.eib.ee/files/EE-ch04-commented.pdf>.

¹⁶ A. Tenusaar. Tegevuskava rahapesu tõkestamise meetmete tõhustamiseks Eestis. Kavand seisuga aprill 2002 (Action plan for increasing efficiency of money laundering prevention measures in Estonia. April 2002 draft). (The manuscript is available from the Internal Security Policy Department of the Ministry of Internal Affairs) (in Estonian).

¹⁷ 2000 EU Organised Crime Report. Available at: <http://www.europol.eu.int/index.asp?page=EUOrganisedCrimeSitRep2000#DRUG%20TRAFFICKING> (10.09.2003).

Figure 6. Assessment of smuggling (N=19).

According to the Estonian Institute of Economic Research, 37% of smokers in Estonia buy illegal tobacco products and the proportion of illegal tobacco products in domestic consumption amounted to approximately 26–27% in 2002.^{*18} The excise rates for cigarettes and smoking tobacco will be harmonised with the European Union requirements by 31 December 2009, on cigars and cigarillos from the time of accession. The excise rates for cigarettes are being gradually increased in 2001–2009. The Ministry of Finance has prepared a schedule for harmonising excise duties, while the excise rates presented in the schedule may be subject to change depending on consumer demand in the cigarettes market.^{*19} According to the information of the Customs Board, smuggling of tobacco products has increased over the last few years.

The above survey conducted by the Estonian Institute of Economic Research indicated that illegal cigarettes occupied a stable market share in Estonia. Proceeding from that, one may claim that at least some illicit tobacco remains in Estonia. According to the information of the Finnish researchers Junninen and Aromaa, cigarettes are smuggled from Estonia into Finland. Larger amounts of illicit tobacco are transported from Estonia via Finland to Sweden. The scope of smuggling and the professionalism of these activities have increased in the past few years.^{*20}

Van Duyne notes that within the borders of the European Union, cigarettes are transported in transit from countries applying a lower rate of excise duty to countries where higher taxes are imposed on tobacco products.^{*21} The excise rates for tobacco will remain relatively low here after Estonia's accession to the European Union. Therefore, attention must be paid to the established network of tobacco smugglers, including the possible corruptive relations with officials. All this allows for predicting a growth in illicit trade in tobacco products upon Estonia's accession to the European Union.

The market share of illegal alcohol is currently estimated to amount to 25–30%, and the state loses about 200 million kroons in uncollected taxes each year.^{*22} Smuggling of alcohol, however, has been decreasing.

¹⁸ E. Aherma jt. (2002). Tubakaaktiisi harmoneerimisega kaasnevad muutused Eesti majanduses (Changes in the Estonian economy accompanying harmonisation of excise duties on tobacco). Research paper — public procurement (004569VT), <http://www.eib.ee/files/tubakas.pdf> (in Estonian).

¹⁹ Kaubanduskoda (Chamber of Commerce). Mis muutub peale ühinemist maksude valdkonnas? (What will happen with taxes after accession?) 4.11.2003. Available at: http://www.koda.ee/e_uudised.html?reziim2=&reziim=uudis_naita&uudis_id=437&gallup_id=20.11.2003 (in Estonian).

²⁰ M. Junninen, K. Aromaa (Note 4).

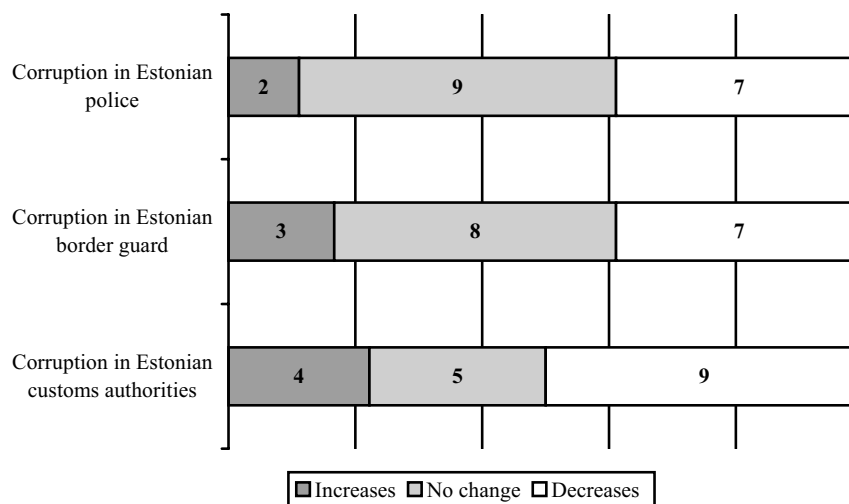
²¹ P. Van Duyne. Organizing Cigarette Smuggling and Policy Making, Ending up in Smoke. — Crime, Law and Social Change 2003 (39), pp. 285–317.

²² M. Josing. Alcohol Consumption and Illegal Alcohol Market in Estonia. Estonian Institute of Economic Research. December 2003, unpublished material.

3.7. Corruption

Corruption is a very intricate phenomenon, where not only legal regulation, which is often emphasised in the context of anti-corruption activities, but also social phenomena such as people's perception of corruption, conventions, patterns of behaviour, and level of trust in state officials have their role. The experts' assessments of corruption in relation to cross-border crime were contradictory. The opinions included those of people expecting an increase in corruption, while a number of opinions represented the view that the situation would remain unchanged or improve. It was interesting to learn that there were no major variations in predictions concerning the level of corruption in the customs, border guard, and police forces.

Figure 7. Assessment of corruption (N=18).



As background information, we would like to note that according to various data (police statistics, corruption perception index, public-opinion polls, GRECO (Group of States Against Corruption) report^{*23}), the level of corruption in Estonia is one of the lowest in the acceding countries. According to the public-opinion polls, the level of corruption is the highest among politicians and police officers. However, the Estonian authorities find that the largest number of corruption-related problems occur in local government, the Customs Board, and the Border Guard Administration.^{*24} The European Commission has paid attention to the need for combating corruption in the police and customs offices.^{*25} The GRECO report also expresses concerns about the vulnerability of customs officers to corruption and organised crime.^{*26}

After Estonia's accession to the European Union, certain causes of corruption will disappear (e.g., privatisation has been completed, the local bureaucracy is becoming more transparent and easily controllable as a result of training and the EU requirements the public service standards may change). At the same time, new opportunities for corruption will spring up. The state bureaucracy will be complemented by the European Union bureaucracy with its transport flows and free movement of persons, and with increasing European Union subsidies the opportunities for corruption will expand. It is important that, as a result of target-oriented 'enlightenment' in the area of corruption, people will be more sensitive to it. This may be reflected in a less favourable assessment of Estonia's situation later on (e.g., the corruption perception index may decline).

²³ Saar jt. 2003, *op. cit.*, pp. 100–106.

²⁴ Open Society Institute (2002). Korruptsioon ja korruptsioonivastane poliitika Euroopa Liiduga ühinemise protsessis (Corruption and anti-corruption policy in the process of accession to the European Union). Available at: <http://www.jti.ee/et/tie/korruptsioon/osi-korr-final.pdf> (in Estonian).

²⁵ European Union Secretariat of State Chancellery. Monitoring Report for the Commission Review—Estonia, June 2003. Available at: <http://www.eib.ee/files/EE-ch25-commented.pdf>.

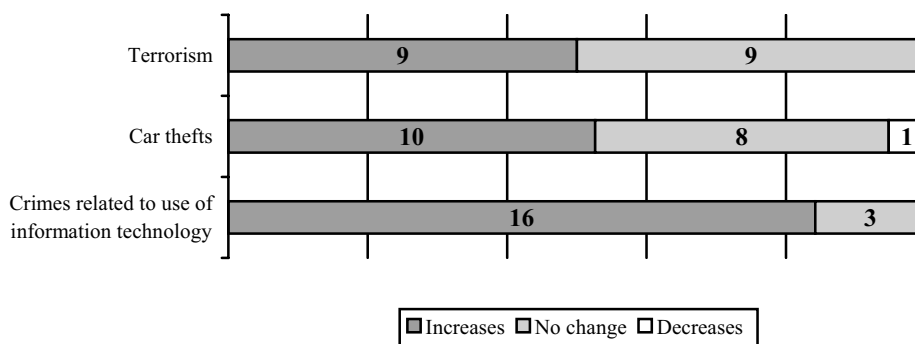
²⁶ GRECO, available at: <http://www.greco.coe.int/>.

3.8. Other crimes

In addition to the above crimes, the experts also pointed out specific crimes in their answers. Crimes related to the use of information technology were expected to increase most. Here it may be presumed that the predicted increase in crimes in the field of virtual space with no boundaries was related to the general development of technology rather than the enlargement of the European Union.

For a long time, car thefts have been the speciality of several criminal groups active in Estonia. In 2001, the courts for the first time applied the legal tests for organised criminal activity to cases involving the transport of stolen cars from Europe into Estonia according to rubrics for addressing organised criminal organisations. With the lack of border control between European Union countries, it will be technically easier to transport stolen cars into Estonia.

Figure 8. Forecast of changes in crime related to car thefts, terrorism, and use of information technology (N=19).



According to some experts, the threat of terrorism could increase in Estonia after accession to the European Union; according to others, the level of danger will not change. Terrorism as a relatively minor type of cross-border crime was associated with lack of earlier experience of terrorism and Estonia's relative distance and isolation from the major areas of terrorist activity.

4. Conclusions

It can be concluded in general that, according to the majority of experts, Estonia's accession to the European Union will not be accompanied by abrupt changes in cross-border crime. Accession has been a continuous process, which occurred by way of smaller changes over many years, and Estonia's official accession to the European Union was largely considered a formal step. Estonia's expected accession to the Schengen border agreement in 2007 was considered most important, and this will entail major changes. Abolition of control on internal frontiers facilitates the migration of ordinary crime within the European Union, so we have to be prepared for the migration of crime from Estonia elsewhere and into Estonia from the other member states. The opportunities for organised criminal groups to act will expand.

Estonia was seen as an important transit country for cross-border crime between Russia and the European Union. Just as the Western European countries perceive threat in the 'strangers' coming above all from Eastern Europe, the attitude of the Estonian experts implies fear of influences from other countries (such as Russia and the Asian countries). The fact that the Estonian/Russian border is becoming the external border of the European Union is causing a growing threat of illegal migration and illicit traffic through Estonia, which imposes great demands on the work efficiency of the boarder guard and customs. The element most clearly conducive to Estonia's development into a transit state for cross-border crime would be an increasing corruptive pressure on the employees of the local legal protection authorities.

When handling cross-border crime, the experts primarily proceeded from the paradigm that most attention would be focused on the organised crime community. It was predicted that the 'new immigrants' might form criminal communities and that such organisations from several countries might merge. According to the foreign experts, cross-border crime should be regarded as involving semi-professional groups whose activity is not centrally co-ordinated and whose action is based on market developments.

Misappropriation of money from EU-related funds will be the most acute type of economic crime, according to both the local and foreign experts. Economic crimes are often based on complicated financial schemes the resolution of which requires more voluminous analytical research and a higher level of it. The specialists at the Ministry of Finance will play an increasingly important role in solving such crimes, which are not felt to be addressed adequately enough at present.

In handling cross-border crime, more emphasis should be placed on an illegal activities paradigm, which would allow for more adequate assessment of the types of such crimes, and for more efficient prediction and control in particular. The formerly dominant Mafia paradigm is too centred on the structural aspects of criminal organisations and the elimination of certain persons. In the case of economic crime, we must focus our attention on crime prevention strategies related to situations; however, the application of control must be as broad as possible (*i.e.*, not rely solely and above all on police measures). To that end, it is necessary to increase the transparency of business activities and decrease the possibilities of committing economic criminal offences. The relevant legal protection authorities must be continually ready to identify and combat the activities of terrorist associations or networks in Estonia.

The main recommendation for control and prevention of cross-border crime is to develop crime analysis, focusing on the methods and mechanisms of commission of such crimes. Continual analysis of earlier crimes would allow for the better use of experience and prediction of the possibilities of committing new crimes through either legislative amendments or creation of favourable conditions for committing crimes.

The other important part of controlling cross-border crime is to ensure movement of information between the legal protection structures concerned in the relevant countries of the European Union, as well as within Estonia. The Estonian legal protection authorities should be more active in two areas that are not directly related to crime control. Firstly, they should work harder to shape information aimed at an international audience, on the basis of which an image is created concerning the level and danger of local crime. Secondly, there should be a focus on activities aimed at increasing the security of the public, which is related to the role of legal protection structures as the servers and helpers of residents and not to their role as punishers and supervisors.



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Determination of the Level of Environmental Protection and the Proportionality of Environmental Measures in Community Law

1. Formulation of problem

Under international law, every state has the freedom to choose such level of protection of its citizens and environment as is deemed appropriate. The desired level of protection may differ widely from country to country. This can also be clearly seen in the European Union, where, in respect of a high level of environmental measures, more environment-friendly member states have often had to overcome the opposition of those member states which care less about environmental protection. The latter have often been able to block or at least ‘cushion’ or postpone the adoption of such measures. While priorities regarding the environment are different even among European states, the situation is far more serious throughout the rest of the world, where the attention of developing countries often does not reach environmental problems at all because they have to focus their efforts too much on economic and social issues.^{*1} Within the framework of the WTO, developing countries have continuously expressed their concern of being discriminated by the pressure to adopt the high level of environmental protection applied in the developed countries. In my opinion, Estonia, too, tends to belong to the group of those countries where economic and social considerations are clearly prioritised, at least in practice.

In many candidate states of the European Union, the pre-referendum debates have involved the question of to what extent the state would, as a member of the European Union, retain its right to determine the level of

¹ In my opinion, Estonia also tends to belong to the group of those states where economic and social considerations are clearly prioritised at least in practice.

protection of its citizens and environment. In other words, there is the problem of whether a European Union member state can enact and apply environmental measures which are stricter or softer than those laid down in Community directives.

The research question of this article is to find out the extent of freedom of European Union member states in determining the level of protection. In connection with the above-mentioned principal question, I shall also explore what is a high level of environmental protection and how to evaluate the proportionality of environmental protection measures.

2. Determination of the level of protection

2.1. High level of protection

Article 2 of the Treaty establishing the European Community provides that the Community shall have as its task, to promote a high level of protection and of the quality of the environment.² Almost the same formulation has been used in article 3 (3) of the Draft Treaty establishing a Constitution for Europe³: the Union shall work for the sustainable development of Europe and aiming at a high level of protection and improvement of the quality of the environment. The same is also repeated in article 174 (2) of the Treaty establishing the European Community: Community policy on the environment shall aim at a high level of protection. Hence, the European Union has an aim of not only protecting the environment but achieving a high level of that.

This raises the question of whether and how the member states are and will be affected by the provisions of the EC Treaty and the future Constitution which regulate the high level of protection. L. Krämer states categorically that the high level of protection must be accomplished by the Community as a whole, and not through national measures.⁴ That statement cannot be agreed to. In order to resolve the problem, we must once more take a look at the provisions of the EC Treaty. Article 10 lays down the so-called principle of loyalty: 'Member States shall [...] facilitate the achievement of the Community's tasks. They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty.'⁵ Thus a member state must actively contribute to the achievement of a high level of environmental protection and select and apply the necessary and appropriate means to that end. In the author's opinion, that principle applies not only to the implementation of the European Union environmental harmonisation measures (directives) but also to that sector of environmental protection which is uninfluenced by European Union law.

It is not easy to answer the question of what is a high level of environmental protection. In literature, it has been stated that this probably means the level of the 'environment-friendly' member states like Sweden, Denmark, Finland, Austria and Germany.⁶ In general, the author agrees to that position and considers it necessary to add that under article 95 (7) of the EC Treaty, such member states can also contribute to improving the 'level' of harmonisation measures. Namely, article 95 of the EC Treaty provides for those derogations when a member state may introduce and apply environmental requirements which are higher than the harmonisation measures. The above-mentioned article 95 (7) provides that when 'pursuant to paragraph 6, a member state is authorised to maintain or introduce national provisions derogating from a harmonisation measure, the Commission shall immediately examine whether to propose an adaptation to that measure'. In explanation, this means that the Commission must consider whether to raise the level of harmonisation measures and establish environmental requirements which are stricter than the existing ones.

The author is of the opinion that there are still even more indicators of a high level of environmental protection. I consider these to be primarily the application of the precautionary principle and the principle of integration.

The fact that a high level of protection requires the application of the precautionary principle has also been found by the Court of First Instance in *Artegodan v. Commission*.⁷ The company Artegodan had a licence to manufacture medicinal products containing amfepramone. On 9 March 2000, the European Commission

² High level is characteristic not only of environmental protection but also of other spheres of policies like health protection, food safety and consumer protection. See B. Harris. Food Safety in the United States and the European Union: Sequel to a Case Study. – Risk, Health, Safety & Environment 2000/11, Fall, pp. 334–335.

³ Available at: <http://european-convention.eu.int/docs/Treaty/cv00850.en03.pdf>.

⁴ L. Krämer. EC Environmental Law. London: Sweet and Maxwell 2003, p. 11.

⁵ Article 5 (2) of the Draft Treaty establishing a Constitution for Europe repeats, almost word by word, the text of the Treaty establishing the European Community.

⁶ L. Krämer (Note 4), p. 11.

⁷ *Artegodan GmbH v. Commission*, Case T-74/00, paragraph 183. Available at: <http://curia.eu.int/jurisp/cgi-bin/form.pl?lang=en&Submit=Submit&docrequire=all&nomusuel=Artegodan&resmax=100>.

adopted three Decisions to prohibit that substance on the basis of the opinion of a number of scientists and doctors that under certain circumstances, medicinal products containing that substance could pose a potential risk to health. The company contested those Decisions, relying on the principle of proportionality. In this point, I would like to highlight the following sections of the court's judgment. First, the court pointed out that the precautionary principle should be applied not only to achieve a high level of environmental protection but also to ensure a high level of health and consumer safety. Thus the court pointed out that in order to achieve a high level of protection, the precautionary principle must be applied and, also, uncertain risks must be prevented.^{*8}

The principle of integration has been laid down in article 6 of the Treaty establishing the European Community^{*9}:

'Environmental protection requirements must be integrated into the definition and implementation of the Community policies and activities [...], in particular with a view to promoting sustainable development.'

Article 37^{*10} of the Charter of Fundamental Rights of the European Union also contains the requirement that:

'A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.'^{*11}

The requirement to integrate environmental considerations has been regarded by many as the most important environmental provision in the EC Treaty.^{*12} I cannot agree more and in my opinion, article 6 of the EC Treaty together with article 37 of the Charter of Fundamental Rights provide an absolutely new meaning to the protection of the environment in the European Union. This means that there are now no more spheres of politics (and, hence, law) where environmental requirements could be disregarded. For all such spheres, protection of the environment will become an essential goal, not as earlier, when caring for the environment was considered to be the duty of only the institutions directly responsible for environmental matters.^{*13} By means of the principle of integration, environmental considerations are making their way into almost all fields of human activity. Such a tendency has been sometimes referred to as 'ecological modernisation', based on the idea that economic and social development must not and need not be a cause of environmental damage. Rather, economic and social development can, under certain circumstances, improve the quality of the environment.^{*14}

Thus it can be stated in summary that a high level of environmental protection is indicated by the adoption of control measures against not only the well-determined risks but also against those concealed by uncertainty and that considerations of environmental protection are taken into account for all activities and decisions that may have a substantial impact on the environment.

2.2. Determination of the level of protection in the European Union

In several cases, the European Court of Justice has had to examine the level of protection chosen by member states. The so-called *Case of Danish Bottles*^{*15} is probably the most important one in that field. In that case, there was the problem of whether environmental protection measures applied by Denmark were in accordance with the EC Treaty. Under Danish national law, soft drinks and beer could be sold only in reusable containers. There was also an additional requirement that the containers used must be approved by the Danish National Agency for the Protection of the Environment. Thirty types of containers were acceptable. Volume restrictions had been imposed on the sale of drinks in unapproved containers. The Court of Justice

⁸ *Ibid.*

⁹ The principle of integration was introduced into the Treaty in 1987 by the Single European Act. See also L. Krämer. E.C. Treaty and Environmental Law. Sweet & Maxwell 1998, p. 71.

¹⁰ About that article, see also F. Ermacora. The Right to a Clean Environment in the Constitution of the European Union. – The European Convention and the Future of European Environmental Law. J. Jans (ed.). Groningen: Europa Law Publishing 2003, pp. 29–42.

¹¹ Exactly the same formulation is repeated in article II-37 of the Draft Treaty establishing a Constitution for Europe.

¹² See J. Jans. European Environmental Law. Kluwer Law International 1999, p. 25.

¹³ See M. Faure. The Harmonisation, Codification and Integration of Environmental Law: A Search for Definitions. – European Environmental Law Review, June 2000, p. 178.

¹⁴ See J. Hertin, F. Berkhout. Ecological Modernisation and EU Environmental Policy Integration. pp. 2–3. Available at: <http://www.au.dk/da/sam/cesam/Ecolo.HertinBerkhout.pdf>.

¹⁵ Case 302/86 Commission v. Denmark. – European Court Review 1988, 4607.

found that such regulation served, in all aspects, a legitimate aim — to ensure an efficient protection of the environment — but the excessive limiting of the permitted container types and volumes was disproportionate. The Court of Justice was of the opinion that the environment could be sufficiently protected without establishing such restrictions.

There have been many comments on the Case of Danish Bottles, and there has been reference to its controversial aspects. G. van Calster has pointed out the court's position that in principle, the Court of Justice cannot evaluate the level of protection chosen by a member state.^{*16} On the other hand, the same author refers to the position of Advocate-General Slynn with regard to the Case of Danish Bottles that a member state cannot choose an excessive and unreasonable level of protection.^{*17} It seems that also the Court of Justice agreed to the Advocate-General's position. The author does not agree with J. Langer, who finds that the Court of Justice did not assess the level of protection but, rather, only the means applied to achieve that level.^{*18} In my opinion, the European Court of Justice actually stated that the ambitious level of environmental protection (full avoidance of beverage container waste by means of reusing the containers) chosen by Denmark was excessive. It is still true that, in the author's opinion, the Court of Justice disguised such evaluation beneath an assessment of proportionality.

In the Case of Danish Bottles, there was a situation in which there were (at that time) no harmonisation measures on the Community level, and Danish law had to be evaluated on the basis of article 30 of the EC Treaty, which provides for derogations from the restrictions on exports and imports laid down in articles 28 and 29. According to article 30, '[t]he provisions of Articles 28 and 29 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of [...] the protection of health and life of humans, animals or plants; [...]. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States'.

Let me leave aside other conditions and restrictions regarding the application of article 30 and touch only on the aspects relating to the application of the precautionary principle, as this is one of the main characteristics of a high level of environmental protection. Since, in the opinion of the European Court of Justice, the precautionary principle has become a fundamental principle in the entire Community law, that principle must also be applied to the establishment of restrictions on trade under article 30 of the EC Treaty. If no harmonisation measures exist, a member state has the right to choose a higher level of protection and to rely on the precautionary principle in that respect. Reference to conclusive evidence is no longer required to prove that the measures are justified for the protection of health and life of humans, animals or plants. At the same time, certain evidence is still necessary to justify protective measures because the member state has the burden to prove the necessity of the measures.^{*19}

At this point, I would like to mention two potential problems that may arise in this context.

First, in the Case of Danish Bottles, the Court of Justice pointed out that the level of protection applied by a member state may not be too high. The danger of that is still not a particularly serious one and may occur only if the level of protection chosen by a member state is drastically different from that used by the other member states. This is also alleviated by the fact that the importance of environmental protection among the objectives of the European Union has been increasing continuously and restrictions on free movement of goods, motivated by a high level of protection, can be justified more easily than before.

The other problem is related to the fact that the Court of Justice has provided a quite typical restrictive interpretation of the derogations laid down in article 30. This means that the measures must be aimed directly and immediately at the protection of health and life of humans, animals and plants.^{*20} However, very many environmental protection measures provide indirect protection of humans, plants and animals. This includes economic means, various permission procedures, regulations relating to environmental impact assessment and many others. Those measures are aimed at protecting the environment in general and they have an indirect influence on humans, plants and animals. Such measures affecting the trade do hence not fit under article 30. Consequently, the application of article 30 is limited to the direct protection of the benefits specified, *expressis verbis*, in that article.^{*21} However, it is important that such protection also covers the hazards concealed by scientific uncertainty.

Another event in which a member state maintains an option to determine the level of protection is related to the rule of reason. The birth of that doctrine was contributed to by the restrictions of the application of

¹⁶ See G. van Calster. International and EU Trade Law. The Environmental Challenge. Cameron May 2001, p. 404.

¹⁷ *Ibid.*

¹⁸ See J. Langer. Danish Bottles and Austrian Animal Transport: The Continuing Story of Free Movement, Environmental Protection and Proportionality. — Review of EC and International Environmental Law 2000 (9) 2, p. 188.

¹⁹ See J. Jans. European Environmental Law. — Europa Law Publishing 2000, p. 242.

²⁰ See L. Krämer. EC Environmental Law. Sweet & Maxwell 2000, p. 76.

²¹ See also L. Coleman. The European Union: An Appropriate Model for a Precautionary Approach? — Seattle University Law Review 2002, pp. 621–622.

article 30. The doctrine in question means that a member state may impose restrictions on trade if this is necessary to implement certain obligatory requirements. Undoubtedly, protection of the environment is among such requirements. In that event, the measures need not be limited to the direct protection of humans, animals and plants but they may also be aimed at complex protection of the entire environment.

If harmonisation measures exist in the field of environmental protection, the situation of choosing a level of protection is different from that of applying article 30 of the EC Treaty and the rule of reason. Such situations are regulated by articles 176 and 95 of the Treaty.

Article 176 addresses the relation between Community law and national law in the case of the environmental quality directives, which are not aimed at determining the environmental parameters of products (and hence, ensuring their free movement) but, rather, at the establishment of harmonised objectives relating to the quality of the environment within the Community. Under that article, a member state may apply only more stringent measures in comparison with the harmonisation measures. Thus the nature of the measure must remain the same; only the extent of the measure can be changed with a view to achieving higher stringency.^{*22} For example, this can result in a situation in which harmonisation measures are introduced to control the emission of certain substances and for that purpose, an emission limit is established permitting the emission of the substance only in small quantities. In such situation, a member state may fully prohibit the emission of that substance but it would not be possible to prohibit the use of such substance in industrial production. The latter would no longer be a more stringent but, rather, essentially another measure. I am of the opinion that as regards the environmental quality directives, member states are quite free to establish a high level of protection. At the same time it is obvious that the introduction of stricter measures must be in accordance with the provisions of the Treaty and, in particular, those concerning free movement of goods and undistorted competition. Stricter measures applied by a member state may not be disproportionate or discriminatory. Stricter measures must also be in accordance with the secondary legislation, *i.e.* directives and regulations, of the European Community. Hence, a member state may not apply more stringent measures if this is contrary to the objective and meaning of a directive, particularly if the harmonisation measures serve to fully harmonise the laws of the member states.

Article 95 provides for a member state's options to apply more stringent measures motivated by environmental protection in the case of harmonisation measures which ensure the functioning of the common market (*i.e.* the so-called environmental product directives). This problem is a very delicate one because those measures are primarily aimed at creating conditions for free movement of goods rather than protecting the environment. It is therefore natural that in this respect, a member state is significantly more restricted in its capacity to enact its own provisions. That article was substantially modified by the Treaty of Amsterdam, allowing the member states not only to maintain their national regulation but also to establish new provisions.

The following paragraphs are not focused on all conditions of maintaining or introducing national provisions but only on those relating to the application of the precautionary principle to ensure a high level of environmental protection.

As regards the maintenance of applicable national provisions, the basis is provided by article 95 (4) of the EC Treaty: '[i]f, after the adoption by the Council or by the Commission of a harmonisation measure, a member state deems it necessary to maintain national provisions on grounds of major needs referred to in Article 30, or relating to the protection of the environment or the working environment, it shall notify the Commission of these provisions as well as the grounds for maintaining them.' For permitting the maintenance of national provisions, the member state's obligation to prove the necessity of maintaining such provisions is the most important criterion. I agree with L. Krämer, who finds that even in this point, we can only talk about stricter and not softer measures.^{*23} As for this case, I find that the member state can successfully refer to the precautionary principle in order to maintain a level of protection higher than the harmonisation measures. Thus, in order to prove the above-mentioned necessity, the use of conclusive scientific evidence is not required. At the same time, account must be taken of the general obligations of the member states under the Treaty, which preclude any unreasonable, discriminatory and disproportionate measures.

The introduction of new national provisions is regulated by article 95 (5) of the EC Treaty: 'if, after the adoption by the Council or by the Commission of a harmonisation measure, a Member State deems it necessary to introduce national provisions based on new scientific evidence relating to the protection of the environment or the working environment on grounds of a problem specific to that Member State arising after the adoption of the harmonisation measure, it shall notify the Commission of the envisaged provisions as well as the grounds for introducing them.'

It is important to note that the right to introduce national provisions after the adoption of harmonisation measures is applicable only in fields relating to the protection of the environment or the working environment. There was no such restriction in article 95 (4), which also referred to other major needs referred to in

²² See L. Krämer (Note 4), pp. 117–118.

²³ *Ibid.*, pp. 124–125.

article 30 which, in addition to the protection of health and life of humans, animals or plants, may also be related to the protection of morality, public order or security or even national treasures of artistic, historical or archaeological value or industrial or commercial property. A full range of problems arises with regard to interpretation of article 95 (5). For example, it would be logical to ask whether the protection of human health is included in the sphere of the protection of the environment within the meaning of article 95 (5). In article 174 (1), which provides the objectives of the environmental law of the European Community, reference has been made to protecting human health. Unfortunately, an explicit position of Community institutions (including the Court of Justice) in this matter has not yet been expressed. The author of this article is, anyhow, in favour of the interpretation whereby health protection is included in the sphere of environmental protection under article 95 (5).

In addition to the above, the following principles are also relevant to the application of article 95 (5). New national provisions must be based on new scientific information. Thus theories or facts proving the existence of a previously unknown risk must be demonstrated. At the same time, presentation of conclusive evidence about the existence of a certain hazard and its source mechanisms is not required pursuant to the precautionary principle. In my opinion, observance of the precautionary principle means in this case that controversial and incomplete information referring to the possibility of a substantial risk does not preclude but — on the contrary — serves as a basis for the adoption of additional measures.

However, choosing a higher level of protection under article 95 (5) of the EC Treaty will not be as simple as it may seem at first sight. Namely, in order to introduce new national provisions (which are more stringent than the harmonisation measures), this must result from a problem specific to that member state. Such criterion is quite incomprehensible: how can one product (and this is specifically a case of product regulation) or technology cause problems specific to one member state and not to others. This could probably mean a situation in which the level of pollution is already high in one member state, or a certain peculiarity in natural or climatic conditions. As a matter of fact, this is just a mistake in the Estonian translation of the Treaty establishing the European Community. The Estonian translation uses the word *ainuomane* (literally meaning 'exclusive to', 'specific only to' — translator's note) while the word 'specific' is used in the English text. The question is whether this should really involve a problem occurring exclusively in one member state. In view of the cross-border impacts accompanying environmental pollution and the global nature of the environment, such interpretation would obviously be unjustified. That opinion is supported by the aspect that it would not be correct to equalise the English word 'specific' with the word exclusive and then translate it to the Estonian language as *ainuomane*. The position that this is not the case of a problem exclusive to but, rather, particularly specific to one state is also held by J. Jans.^{*24}

The palliation achieved by reference to a translation mistake will still not resolve the entire problem. In the author's opinion, even the fulfilment of the criterion 'specific' will remain problematic in the case of the product directives.

In summary, it has to be stated that a member state can seek a higher level of environmental protection by reference to the precautionary principle even if harmonisation measures exist. At the same time, that option is restricted by the general principles of EC law, which do not permit any unreasonable, disproportionate and discriminatory environmental measures even if such measures are justified by the possibility of potentially substantial damage concealed beneath scientific uncertainty. There are also more specific restrictions like that of 'specific to' with regard to the introduction of new national provisions if environmental product directives exist.

3. Proportionality of environmental measures

3.1. General

The proportionality of measures is one of the major problems as regards environmental and health risks. According to K. von Moltke, the main dispute in the discussion held in Germany with regard to the precautionary principle is also related specifically to the proportionality of measures.^{*25}

In Community law, the principle of proportionality has become a fundamental principle which cannot be disregarded even in the choice of precautionary measures.^{*26} In this point, the logic of applying the principle

²⁴ See J. Jans. *European Environmental Law*. Groningen: Europa Law Publishing 2000, p. 125.

²⁵ See K. von Moltke. *The Relationship Between Policy, Science, Technology and Law in the Implementation of the Precautionary Principle. — The Precautionary Principle and International Law. The Challenge of Implementation*. D. Freestone, E. Hey (eds.). Kluwer Law International 1996, p. 102.

²⁶ For more about the principle of proportionality in EC law, see T. Tridimas. *The General Principles of EC Law*. Oxford University Press 1999, pp. 89–162.

of proportionality, which is of European origin, must be taken into consideration. Indeed, the author of this article has noticed that the European Court of Justice has imbibed the principle of proportionality mainly from German law. That opinion is shared by other authors.^{*27}

According to the interpretation of both the European Court of Justice and the Estonian Supreme Court, a three-stage test must be passed in assessing the proportionality of a measure:

- the measure must be suitable for achieving the objective;
- the measure must be necessary in the sense that no other, less burdensome measures exist;
- the measure may not be disproportionate in the narrower sense.^{*28}

The application of the above-described tests is problematic in environment-related cases, which are framed by uncertainty. The assessment of proportionality is always connected with weighing. But how can one weigh such potential (although not clearly predictable) damage to human health or environment which is disguised by a larger or smaller degree of uncertainty? The following paragraphs are focused on the analysis of specifically those problems.

3.2. Approach to the proportionality of precautionary environmental protection measures in the European Union

It has been stated in the Communication from the European Commission on the precautionary principle that ‘measures based on the precautionary principle must not be disproportionate to the desired level of protection and must not aim at zero risk’.^{*29}

In the author’s opinion, one of the most important messages of that Communication is that the proportionality of precautionary environmental measures means a comparison with the desired level of protection. Measures cannot be used to accomplish anything more or less than is necessary to achieve such a level.^{*30}

It has also been pointed out in the Commission’s Communication that the cost-benefit analysis related to the adoption of precautionary measures cannot be reduced to only an economic analysis; non-economic considerations must also be taken into account. One of those considerations is the reaction of the society. The Communication points out that the society may be ready to pay a disproportionately high cost to protect such prioritised values like the environment and human health.^{*31}

Thus, in order to assess the proportionality of precautionary measures, not only the benefits and costs but also values must be weighed. The Commission’s Communication refers to appropriate case law of the European Court of Justice and affirms that in all those cases when human health is at stake, health is of undoubtedly greater weight than economic considerations.^{*32} It is very significant that health has been prioritised so clearly and categorically. In environmental protection, this means that in all those spheres related to the protection of health, the same hierarchy of priorities will apply. Most spheres of environmental protection — protection of ambient air, protection of water environment, control of dangerous chemicals, nuclear safety, control of risks relating to waste (and, in particular, hazardous waste), noise regulation, etc. — are directly or indirectly related to the protection of human health. Therefore, rather radical application of environmental measures should be expected in those spheres. Even the strictest measure — the prohibition of a substance or an activity — should not be precluded.

As regards the proportionality of environmental measures, there have been two important interrelated cases: *Alpharma* (T-70/99)^{*33} and *Pfizer* (T-13/99).^{*34} Both were about the prohibition of certain antibiotics in

²⁷ See R. Thomas. *Legitimate Expectations and Proportionality in Administrative Law*. Hart Publishing 2000, p. 78.

²⁸ In Judgment on Case No. III-4/1-1/02 of the Constitutional Review Chamber of the Estonian Supreme Court, the court has held that: ‘Conformity with the principle of proportionality is examined by the Review Chamber in three stages: first the suitability of the measure, then the necessity of the measure and, if necessary, proportionality in the narrower sense, *i.e.* the reasonableness.’ – RT III 2002, 8, 74 (in Estonian).

²⁹ Communication from the Commission on the precautionary principle. – COM (2000) 1 final, p. 4. Available at: http://europa.eu.int/comm/dgs/health_consumer/library/pub/pub07_en.pdf.

³⁰ See also N. McNelis. *EU Communication on the Precautionary Principle*. – *Journal of International Economic Law* 2000, p. 547.

³¹ See the Communication from the Commission on the precautionary principle (Note 29), pp. 19–20.

³² *Ibid.*, p. 20.

³³ Case T-70/99 *Alpharma Inc. v. Council*. Available at: <http://curia.eu.int/jurisp/cgi-bin/form.pl?lang=en&Submit=Submit&docrequire=alldocs&nomusuel=Alpharma&resmax=100>.

³⁴ Case T-13/99 *Pfizer Animal Health SA v. Council*, paragraph 471. Available at: <http://curia.eu.int/jurisp/cgi-bin/form.pl?lang=en&Submit=Submit&docrequire=alldocs&nomusuel=Pfizer&resmax=100>.

treatment of animals.^{*35} In resolving the application of Alpharma, a manufacturer of antibiotics, Alpharma's assertions about the disproportionateness of the regulation prohibiting the antibiotics were dismissed by the Court of First Instance specifically on the basis of the argument that the protection of health is an overwhelmingly important objective and value. The court was of the position that 'the protection of human health, may justify adverse consequences, and even substantial adverse consequences, for certain traders [...]. The protection of public health, which the contested regulation is intended to guarantee, must take precedence over economic considerations'.^{*36}

The same was repeated by the court in the case of another pharmaceutical manufacturer, Pfizer.^{*37} In addition to those cases, the court has held to the same hierarchy of priorities in *Artegodan v. Commission*.^{*38} In that case, the court noted that:

'It follows that the precautionary principle can be defined as a general principle of Community law [*sic!*] requiring the competent authorities to take appropriate measures to prevent specific potential risks to public health, safety and the environment, by giving **precedence** to the requirements related to the protection of those interests over economic interests [*sic!*].'^{*39}

That cannot be said any more explicitly. The court considers precaution to be a fundamental principle of EC law, and the application of this principle is not an option but an obligation of the competent authorities. The application of that principle means clear preference for the environment, health and safety over economic considerations. At the same time, it should be kept in mind that competent authorities will retain their right to choose appropriate precautionary measures. The greater are the potential risk and the related uncertainty and concern of the population, the more radical measures should be expected from the competent authorities.

On the basis of all discussed above, I am making the conclusion that the priority of the protection of health and life over economic considerations applies not only to obvious hazards but also to risks disguised by scientific uncertainty. At the same time it must be kept in mind that the precautionary principle is not absolutely extrascientific. In the event of risks concealed by uncertainty, believable (although not conclusive) evidence about the possibility of damage must also be available. This evidence will not have to be specific; usually (at least in cases relating to human health), general scientific theories referring to the possibility of damage will be sufficient.

The following paragraphs are focused on the so-called pure environmental protection, which is not directly related to human health or life. As a rule, that sector refers to the classic nature protection or, in modern terms, the protection of biological diversity. In the rule of law, nature protection is carried out by means of restrictions on the 'holiest' — the real property. The protection of biological diversity usually means that certain territories are placed under protection, establishing prohibitions and restrictions on property and economic activities there. This makes nature protection the most complicated sector of environmental protection in legal context. Practice has shown that often, territories placed under protection are a ground for competition between different interests. Most often, the interests of environmental protection conflict with economic interests.

What kind of arguments (interests, values) relating to nature protection could be such as to successfully compete with economic arguments and social arguments, which are often connected with economic ones? In principle, the aspect that damage to the environment is not absolutely certain and the extent of potential damage is uncertain should not by itself be a reason to give precedence to economic interests. On the contrary, environmental interests should be given even more substantiality because of the uncertainty. As regards the assessment of the proportionality of nature-protection measures and the related weighing, the following arguments should be pointed out.

First of all, I think that the most important argument is irreversibility, which often accompanies damage to biological diversity. Naturally, we cannot take that argument to the height of absurdity and state that any environmental impact will have irreversible consequences. Felling a tree is irreversible and the release of even a minute quantity of a bioaccumulating substance into the environment is irreversible. In the author's opinion, we should begin primarily from the potential consequences that such irreversible intervention in the nature may bring about and on the impact that this may have on the condition and survival of habitats, species and the ecosystem. It goes without saying that such assessment is, again, related to uncertainty. If different interests are weighed in a situation of uncertainty, environmental interests should be given preference over economic interests.

³⁵ About the circumstances of the case, see also: H. Veinla. Inimõigused ja ettevaatusprintsipiil põhinev keskkonnakaitse (Human Rights and Environmental Protection based on the Precautionary Principle). – *Juridica* 2003/9, p. 605.

³⁶ Case T-70/99 (Note 33).

³⁷ Case T- 13/99 (Note 34).

³⁸ Case T-74/00 *Artegodan GmbH v. Council*, paragraph 183. Available at: <http://curia.eu.int/jurisp/cgi-bin/form.pl?lang=en&Submit=Submit&docrequire=alldocs&nomusuel=Artegodan&resmax=100>.

³⁹ *Ibid.*, paragraph 184.

It must be emphasised that taking uncertainty into consideration in favour of the environment (*in dubio pro natura*) is also reasonable in economic terms. For example, the French economist N. Treich has expressed the opinion that in the event of potentially irreversible consequences disguised by scientific uncertainty, a way back must always be left open. If there is uncertainty, natural areas may even be left undeveloped, waiting for new knowledge regarding the consequences. Hence non-development has its value, called the 'option value' by N. Treich.^{*40} I would call it the value accumulated in the options that are still left. This value has most definitely a significant weight.

At this point, it is quite appropriate to move to the next argument, namely the interests of future generations.

The concept of sustainable development is based on the consideration of the interests of future generations (regarded by some as 'the rights of future generations') in making decisions today. The selection of environmental protection measures and assessment of their proportionality must be based on the long perspective. Changes going on in ecosystems are often of a long-term nature and may take an unpredictable course. At the same time it is known that such factors affecting biological diversity as forest cutting, drainage of swamps and wetlands or decreases in the diversity of species may have an impact on the habitability of the entire planet. That impact is often disguised by uncertainty. Due to the long-term nature of the impacts on biological diversity, nature protection is often underrated and economic exploitation of natural areas is preferred because of the obviousness of the benefits related thereto. N. Treich has asserted justifiedly that today's decisions and actions will influence the well-being of future generations not only by potentially narrowing their freedom of choice but also by leaving the burden of potential negative changes on their shoulders.^{*41} I think that respect for future generations will certainly add much weight to the interests related with the protection of the environment.

Another aspect adding weight to nature protection is the great deal of attention paid to that sector of environmental protection in the European Union. Community nature protection directives have also attempted to solve the question of the relation between nature protection and the economic and social spheres.

The most important case of the European Court of Justice regarding the relation between biological diversity and the development of the economic (and social) sphere is the so-called *Lappel Bank Case*.^{*42} The Port of Sheerness in the County of Kent is an economically successful undertaking and an important employer. The port is adjacent to Lappel Bank, which, according to ornithological criteria, is an important bird area. Under the Natura 2000 (92/43) directive, that area should have been given the status of a special protection area. At the same time, the Port of Sheerness was planning its extension and the only possible direction for that was Lappel Bank. On the basis of economic and social (employment) considerations, the United Kingdom did not establish a special protection area there. The aspect that development of the port was important from the viewpoint of the entire region and thus an important component of regional development served as an additional argument. The European Court of Justice sharply rejected all arguments of the United Kingdom and held that non-establishment of a special protection area in an important bird area can be justified only on exceptional grounds, being grounds corresponding to a general interest superior to the general interest represented by the ecological objective of the directive.^{*43} At the same time the court held that economic requirements could not on any view (*sic!*) be superior to ecological interests that must be taken into account in designating special protection areas.^{*44}

Such position of the Court of Justice is absolutely explicit, unambiguous and categorical, and further comments on that are therefore not needed. Hence, special protection areas can be delimited only on the basis of ecological criteria. Economic considerations must be left aside for good.^{*45}

4. Conclusions

The environmental policy of the European Union is aimed at achieving a high level of protecting and improving the quality of the environment. According to the principle of loyalty, a European Union member state must actively contribute to the achievement of that objective. In the opinion of the author of this article, a high level of environmental protection means, in addition to orientation towards the level of the

^{*40} N. Treich. What is the Economic Meaning of the Precautionary Principle? – The Geneva Papers on Risk and Insurance 2001 (26) 3, p. 337.

^{*41} *Ibid.*

^{*42} Case C-44/95 Regina v. Secretary of State for the Environment. Available at: http://europa.eu.int/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=61995J0044.

^{*43} *Ibid.*, paragraph 29.

^{*44} *Ibid.*, paragraph 30.

^{*45} See also L. Krämer. Casebook on EU Environmental Law. Hart Publishing 2002, pp. 314–320.

more 'environment-friendly' member states, the application of the precautionary principle and the principle of integration.

The author also reached the conclusion that on the basis of the Treaty establishing the European Community and the positions repeatedly stated by the European Court of Justice, each member state has the right to determine the level of the protection of health and the environment. At the same time, member states must not disregard certain restrictive aspects. The most general framework for determining the level of environmental protection in a member state is provided by the European Union objective to ensure a high level of protection. Besides that general instruction, more specific conditions must also be taken into account by member states. In the event of a sector with no harmonisation measures, the member state must observe the restrictive requirements of article 30 of the EC Treaty as well as the doctrine of the rule of reason. Even if there are no harmonisation measures, a member state must, as a general rule, be able to justify the chosen level of protection. At the same time, on the basis of the precautionary principle, even initial and incomplete scientific evidence referring to the possibility of a hazard will be sufficient. However, the *Case of Danish Bottles* demonstrated that a member state cannot choose a too ambitious level of protection creating unreasonable and disproportionate barriers to the free movement of goods.

If harmonisation measures exist, the options of a member state to pursue a level of protection which is higher than that provided in those measures is clearly more limited, particularly in the case of environmental product directives. With this regard, the member state must be capable of proving that stricter environmental requirements are justified and, in certain cases, based on new scientific evidence, or even justified because of a problem specific to that member state. Indeed, I am of the position that the precautionary principle will also apply to the proving of such circumstances and even incomplete evidence will be sufficient.

However, in no case may the measures be a disguised restriction on trade or a vehicle of arbitrary discrimination. There have been cases in which environmental protection was used only as a cover for the achievement of other, mainly economic goals.

Precautionary measures accordant to the level of environmental and health protection chosen on the basis of the above criteria must be proportional. The assessment of the proportionality of the measures is mainly based on the (high) level of protection. The position of the Community institutions and, in particular, the Court of Justice has been explicit enough: the protection of health and, in certain cases, the so-called pure environmental protection (protection without a direct impact on human health) will take, in the event of a conflict, precedence over economic considerations and the related social considerations. Adaptation to such system of values is a big challenge for Estonia, requiring substantial changes in the habitual way of thinking, which, as a rule, puts social and economic considerations first.



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Restrictions on Active Legal Capacity

1. Introduction

In connection with the strengthening and enlargement of the European Union, the development of EU law and its harmonisation with the national law of the member states becomes increasingly important and topical. Harmonised regulation is particularly necessary in areas relevant to communication between persons from different states. Contract law, for which many model laws have been drafted¹ and which also has a central role in the European Civil Code currently being prepared, has been in the foreground for good reason. In relation to contract law, consumer protection law has been the focus of European Union law, so as to ensure the equal and fair treatment of consumers. Estonia's new civil law was drafted in great consideration of these developments in European law, particularly as regards the General Part of the Civil Code Act² (GPCCA) and the Law of Obligations Act³ (LOA), which entered into force on 1 July 2002. The active legal capacity of natural persons is an area to which adequate attention has not yet been paid from the standpoint of harmonisation of the law of the various EU member states. In connection with the principle of free movement of persons, capital, goods, and services in the EU, more attention should be paid to the issues concerning the active legal capacity of natural persons and ways to harmonise the relevant regulation. In particular, this concerns protection of the rights of persons with restricted active legal capacity, but it also relates to protection of the rights of any party who enters into a transaction with such a person. Major development has occurred in Estonia in this area. The GPCCA effective since 1 July 2002 replaced the former GPCCA, which entered into force on 1 September 1994⁴ (referred to below as the former GPCCA), whereas one of the main changes introduced in the new act of Parliament, which is a supplemented version of the former GPCCA, is the amended regulation of the active legal capacity of natural persons.

¹ See the Principles of International Commercial Contracts (UNIDROIT Principles). Rome, 1994; Principles of European Contract Law. Parts I and II. O. Lando, H. Beale (eds.). Kluwer Law International 2000; Part III. O. Lando, E. Clive, A. Prüm, R. Zimmermann (eds.). Kluwer Law International, 2003.

² Tsiviilseadustiku üldosa seadus (General Part of the Civil Code Act). Passed 27 March 2002. – RT I 2002, 35, 216 (in Estonian).

³ Võlaõigusseadus (Law of Obligations Act). Passed 26 September 2001. – RT I 2001, 81, 487 (in Estonian).

⁴ Tsiviilseadustiku üldosa seadus (General Part of the Civil Code Act). Passed 28 June 1994. – RT I 1994, 53, 889 (in Estonian). An English translation is available at: http://www.legaltext.ee/et/andmebaas/ava.asp?tyyp=SITE_ALL&ptyyp=I&m=000&query=v%F5la%F5igus (1.07.2004).

The purpose of this article is to analyse regulation concerning the restricted active legal capacity of natural persons in Estonia, based on the major legal amendments of 2002; the article also compares the Estonian law in this area with that of other European Union states and makes proposals for harmonisation of the regulation within the European Union. The relevant regulation of any particular state cannot be analysed in greater detail in this article. Therefore, the examples of particular states are discussed only insofar as necessary for general conclusions. The legal systems compared are: the Germanic family of law, the Roman family of law and common law, as well as Scandinavian law. The aim of the authors is to develop discussion in this area, which could contribute to the prospective harmonisation of regulation related to restricted active legal capacity in the European Union.

2. Persons with restricted active legal capacity and persons without active legal capacity

2.1. Bases for definition of active legal capacity

The concept of active legal capacity pertains to the ability to carry out transactions. GPCCA § 8 (1) provides the following definition of active legal capacity: 'Active legal capacity of a natural person is the capacity to enter independently into valid transactions'. As a transaction is an act of will, it is important that a person understand what he or she is doing and what the consequences of the act are. The ability to understand the meaning of one's actions depends on the mental status of the person, his or her intellectual capacity. It is therefore important for a person who enters into a transaction to have reached a certain minimum level of intelligence and mental maturity.⁵ The wilful act of a person who has reached such a level is recognised by the legal order, and the person is regarded as having active legal capacity. Primarily, the establishment of active legal capacity serves the purpose of protecting mentally immature or undeveloped persons. Mental maturity mainly correlates with age. The generally recognised rule in all the legal systems considered in this article is the prescription of a certain age at which the person acquires full active legal capacity. All people acquire active legal capacity by virtue of age, although their individual capacity to conduct transactions is different. There is also a generally recognised exception to this general rule — persons who are mentally inadequate for certain transactions, particularly due to mental illness or mental disability, and who are permanently in such a state, do not have full active legal capacity. There are thus two generally recognised reasons for a person not having full active legal capacity: minority and a permanent mental disorder. Persons with full active legal capacity and persons without full active legal capacity can thus be distinguished in terms of active legal capacity. The latter in turn may be divided into persons without active legal capacity and persons with restricted active legal capacity, depending on the legal system.

2.2. Restrictions on active legal capacity due to age

As mentioned above, the active legal capacity of a person is related to the achievement of a certain physical and mental maturity. An adult person has active legal capacity. There are differences between the various legal systems considered here only as to the age from which a person is considered adult and having active legal capacity. According to GPCCA § 8 (2), this age is 18 years. This seems to be the most common age, as the same has been established in Germany (BGB § 2), France (*Code Civil* art. 388), Italy (*Codice Civile* art. 2), and the Netherlands (BW art. 1:234), as well as Sweden, Finland, and Denmark.⁶ However, there are other age limits; for example, in Austria, adulthood is deemed to start at 19 years of age (ABGB § 21), and it starts at 20 years of age (ZGB art. 14) in Switzerland. However, the general trend has been a lowering of the age limit in countries where it has been over 18 years. For example, the age of majority was lowered from 21 to 18 years of age in England in the course of the family law reform (Family Law Reform Act, 1969). The English Law Commission has recommended lowering it even further, to 16 years, but the proposal was declined on the recommendation of experts.⁷

Until the end of 1974, a person acquired full active legal capacity in Germany at the age of 21. It has been opined that the limit of 18 is too low for some transactions, such as purchasing expensive but quickly consumed things with a hire purchase obligation of several years or providing surety for a large amount of money.⁸ There is a general minimum limit for adulthood. It is clear that 18-year-olds and older persons

⁵ K. Zweigert, H. Kötz. Introduction to Comparative Law. 3rd ed. Oxford 1998, p. 348.

⁶ R. Nielsen. Contract Law in Denmark. The Hague 1997, sec. 343; M. H. Whincup. Contract Law and Practice. The English System and Continental Comparisons. 4th ed. The Hague, London, Boston 2001, p. 110.

⁷ H. Kötz. European Contract Law. Vol. I. Oxford 1997, p. 98.

⁸ D. Medicus. Allgemeiner Teil des BGB: ein Lehrbuch. 6. Aufl. Heidelberg: Müller Verlag 1994, § 38, sec. 538.

differ in intellectual capacity. Other grounds for the voidness and cancellation of transactions offer certain protection, but differentiation by age for performance of different kinds of transactions by those older than 18 would not be justified, as the basis in such a case would more appropriately be the criterion of individual development.

Setting of the age of majority is largely a legal policy issue. Based on the limit established in most European countries, it would be reasonable to consider the age of 18 as the beginning of adulthood and acquisition of active legal capacity in the EU states.

While in a majority of the countries considered a minor has restricted active legal capacity until adulthood, minors have no active legal capacity in states belonging to the Germanic family of law. In Germany (BGB § 104 (1)) and Austria (ABGB § 865), a child has no active legal capacity until the age of seven. In Greece (Civil Code § 128), the age is 10. Also, in Estonia, according to § 11 of the former GPCCA, a child did not have active legal capacity until the age of seven; the provisions was amended with effect from 2002, and according to GPCCA § 8 (2), persons who are under 18 years of age have restricted active legal capacity. The amendment was based on the conclusion that drawing a line for an age limit under which a minor has no active legal capacity whatsoever is arbitrary and subjective; neither is there any special practical need for such a limit. Whether a child has no active legal capacity or restricted active legal capacity is irrelevant at a very young age. If a child has a restricted active legal capacity from birth, this does not damage his or her rights; the interests of a child who has no active legal capacity are no better protected. The protection of a minor with restricted active legal capacity should be sufficient also for children under the age of seven — as a rule, such a child may conduct transactions with the consent of his or her lawful representative, while the legal representative may carry out transactions on behalf of the minor. Rather, there is a danger that for example, a 12-year-old boy who is capable of conducting a transaction damages himself more by the transaction than does a six-year-old, who is not capable of carrying out any serious transactions anyway. Similar protection would suffice in both cases. The problem is not so much that children under seven should be protected more but that supplementary active legal capacity should be given by way of exceptions to older minors who are nearly adults. General regulation of transactions of minors with a restricted active legal capacity should be formulated so that there is no need to distinguish minors without active legal capacity from the general class of minors. Unfortunately, Estonia has not applied this principle consistently. As has been mentioned, minors without active legal capacity are not set apart among all minors, yet GPCCA § 12 specifies much narrower possibilities for children under seven to enter into transactions compared to the provisions of §§ 10 and 11 covering other minors. For example, a minor younger than seven has no right to enter into transactions even with the consent of the legal representative and may perform transactions only by means granted by his or her legal representative or a third party with the consent of the legal representative for such purpose or for free use — in essence, the ‘pocket money’ principle similar to what is outlined in BGB § 110. We hold that GPCCA § 12 is inappropriate and should be repealed. Regulation applicable to other persons with a restricted active legal capacity should be extended also to minors under the age of seven.⁹ We also find that the EU states should discard the notion of persons without active legal capacity and designate all persons under the age of 18 as persons with restricted active legal capacity subject to uniform rules of transaction.

If we define all minors up to the age of 18 as persons with restricted active legal capacity, there is still the problem that it may be in the interests of a minor for certain reasons to have a greater active legal capacity than provided for by the general rule before the age of 18. BGB §§ 112 and 113 thus provide for the possibility to grant full active legal capacity to a person with restricted active legal capacity in a certain area (‘business and working capacity’). In order for the minor to obtain full active legal capacity for business transactions, the consent of both the legal representative and the guardianship court are necessary, and only the consent of the legal representative is required for working in a certain job. It should be kept in mind that full active legal capacity is granted only for the transactions prescribed in BGB §§ 112 and 113; minors still have a restricted active legal capacity for all other transactions. The active legal capacity of a minor can be extended in France also (*Code Civil* art. 476–482, 487). The active legal capacity of a minor may be extended with the consent of his or her legal representative, or by virtue of the law if the minor enters into marriage. A minor has to be at least 16 years old for an extension of his or her active legal capacity. A minor with extended active legal capacity may independently enter into transactions in the same way as an adult (*Code Civil* art. 481) but has not right to be a merchant (*Code Civil* art. 487).

According to § 10 (3) of the former GPCCA, a supervisory guardian could grant a minor of at least 15 years of age, with the consent of his or her legal representative, the right to be a trader and the minor thus acquire full active legal capacity to enter into transactions necessary for this work. The new GPCCA does not contain such a rule but provides a much broader possibility for extending the active legal capacity of a minor. According to GPCCA § 9, a court may extend the restricted active legal capacity of a minor of at least 15 years of age if this is in the interests of the minor and the level of development of the minor so permits. In such a case, the court shall determine the transactions into which the minor is independently permitted to

⁹ Rules concerning the transactions of persons with restricted active legal capacity are discussed in section 3.1 below.

enter. A court may extend active legal capacity up to granting a minor full active legal capacity. The consent of the legal representative of the minor is required for extending his or her active legal capacity. If refusal to grant consent is clearly contrary to the interests of the minor, the court may extend the active legal capacity of the minor without the consent of the legal representative. We find this general rule to be more flexible and thus preferable to providing for single situations in which restricted active legal capacity may be extended. Deciding on the extension of active legal capacity should not fall within the competence of the legal representative — the legal representative may grant his or her consent for single transactions anyway. The court is more competent to decide on the issue of extension of active legal capacity, as the decision requires an objective and professional assessment of the level of development and the actual interests of the minor. Whether the active legal capacity of a minor could be extended before the age of 15 is disputable. The possibility should be discussed. There is no such possibility in Estonia; the drafters of the Act believed that a minor younger than 15 may enter into single transactions with the consent of the legal representative, but the level of development of persons younger than 15 presumably does not allow for the extension of their active legal capacity.

According to § 9 (2) of the former GPCCA, a minor acquired full active legal capacity if he or she married before the age of 18. According to § 3 (2) of the Estonian Family Law Act¹⁰ (FLA), a minor between 15 and 18 years of age may marry with the written consent of his or her legal representative. The current GPCCA no longer contains such a provision. The amendment is fully justified. Acquisition of active legal capacity depends on mental maturity, the minimum level of which is presumed to be attained by the age of 18. Mental maturity does not necessarily increase by virtue of marriage and might not be attained prior to marriage, and thus the automatic acquisition of full active legal capacity on marriage is not justified. However, marriage is an event for which it may be said that the extension of the minor's active legal capacity to full active legal capacity is in his or her interests. The reasons for this may in particular lie in the need to be independent, as part of a new family, from one's parents as legal representatives; if one spouse is an adult, it is advisable that the other spouse be equal in this respect. It is up to the court to assess whether the level of development of the minor enables an extension of his or her active legal capacity according to GPCCA § 9 and to what extent. It should be mentioned that also under BGB § 1633, a minor does not acquire full active legal capacity when marrying.

2.3. Restrictions on active legal capacity in connection with a permanent mental disorder

According to § 13 of the former GPCCA, a court could, at the request of an interested person, declare a person to be without active legal capacity if due to mental illness or mental disability the person were persistently unable to understand the meaning of or to direct his or her actions. Such persons were placed under guardianship and transactions carried out in his or her name by the guardian. Transactions of a person without active legal capacity were void, except for transactions which a court allowed him or her to carry out. It is a generally recognised principle in all countries that mentally ill and mentally disabled persons have no active legal capacity. However, two questions have arisen on account of differing regulations: (1) whether a mentally ill or disabled person should have no active legal capacity or restricted active legal capacity and (2) whether such a person should be declared without active legal capacity or with restricted active legal capacity by a court or rather by default, due to his or her objective status. While, according to § 13 of the former GPCCA a court declared a mentally ill or disabled person to be without active legal capacity, the new GPCCA contains major changes in this respect. According to GPCCA § 8 (2), persons who due to mental illness, mental disability, or other mental disorder are permanently unable to understand or direct their actions have restricted active legal capacity. The court thus no longer declares anybody to be without active legal capacity but instead identifies a person as having restricted active legal capacity where necessary. Restricted active legal capacity is thus an objective status. Unlike the Estonian regulations, German law specifies that persons who are in a state of pathological mental disorder that precludes the free formation of will, if such condition is not temporary by nature, have no active legal capacity. The same principle also arises from the Austrian (ABGB § 21) and Swiss law (ZGB § 16). Whether a mentally disturbed person has no active legal capacity or has restricted active legal capacity is largely a legal policy decision on the part of the legislative body. Estonia has proceeded from the principle that it is not democratic to regard or declare anyone as having no active legal capacity whatsoever. Even a person who is mentally disturbed should be granted certain rights that he or she can exercise independently. The person's ability to do so depends on the specific circumstances. One may ask why a mentally ill adult should be restricted more than a minor. The Estonian legislature has proceeded from the idea that both a mentally immature minor and a mentally ill adult have restricted active legal capacity; such a position makes the legal

¹⁰ Perekonnaseadus (Family Law Act). Passed 12 October 1994. – RT I 1994, 75, 1326 (in Estonian). An English translation is available at: http://www.legaltext.ee/et/andmebaas/ava.asp?tyyp=SITE_ALL&ptyyp=I&m=000&query=perekonnaseadus (1.07.2004).

regulation of the transactions performed by such persons much simpler — it is similar in both cases. The only difference is that the active legal capacity of adults with restricted active legal capacity cannot be extended in the manner done in the case of minors with restricted active legal capacity. It should be noted that Germany has basically abandoned the concept of mentally ill persons having no active legal capacity whatsoever. In 2002, the BGB was supplemented by § 105a, addressing transactions of daily life, aimed at improving the legal position of adult persons without active legal capacity by enabling them to participate in legal transactions to a limited extent.^{*11} These are the transactions of daily life that can be conducted with few funds, in which performance by the person without active legal capacity and counterperformance are still required for the validity of the transaction. Transactions of daily life are the transactions required to satisfy the basic needs of a person; it must be possible to carry out such transactions with limited funds, and the financial status of the person is not to be considered.^{*12} Transactions that represent a major risk for the person without active legal capacity or his or her property are excluded.^{*13}

It may thus be said that persons without active legal capacity under BGB § 104 2) actually have restricted active legal capacity pursuant to BGB § 105a. The next question is why the provisions of BGB §§ 107–111 should not apply to these persons.

The practice of declaring a person to have restricted active legal capacity or no active legal capacity is used neither in Estonia nor Germany anymore. According to BGB § 1896, a guardianship court appoints a guardian for a person who cannot take care of his or her affairs in full or in part, due to mental illness or a physical, mental, or emotional disorder. Section 256 of the Estonian Code of Civil Procedure (CCP)^{*14} provides the same; the only difference is that BGB § 1896 allows appointing a guardian also for a person with active legal capacity, which the CCP does not. Declaration of a person to be without active legal capacity is still accepted in, for example, Denmark and Finland.^{*15} In Denmark, a court may declare without active legal capacity a person who cannot manage and direct his or her affairs due to mental disability or mental illness, as well as a person who by dissipation threatens the welfare of his or her family, and a person who cannot manage and direct his or her affairs by reason of alcohol abuse or other similar habits.^{*16} We prefer regulation that regards a person's active legal capacity or lack thereof to be an objective status rather than the legal consequence of a court judgement. This is mainly justified in terms of better protection of the rights of mentally ill persons. If we consider the restricted active legal capacity or lack of active legal capacity of an adult as an objective status, this status can be relied on in transactions involving such a person, regardless of whether or not a court has made a decision on the person's active legal capacity. Where restriction of active legal capacity or declaration of a person to be without active legal capacity arises from a court judgement, the transactions performed by mentally ill persons would remain in force until the court has made a decision on their active legal capacity. There are people who are mentally ill but concerning whom no petitions have ever been filed with a court. The counterargument is the need to protect the other party to the transaction, as, due to the objective status of the person, the other party cannot be expected to know whether the person with whom he or she is entering into a transaction has active legal capacity or not. This is a valid and serious argument, but in weighing of the different interests, those of a mentally ill person should have priority, as in the opposite case, his or her interests would be protected to a much lesser extent and are much more likely to be harmed than the interests of the other party to the transaction.

Restriction of a person's active legal capacity on grounds other than permanent mental disorder cannot be regarded as justified. According to § 12 of the former GPCCA, Estonia had a rule similar to that of Denmark that a court could restrict, at the request of an interested person, the active legal capacity of a person who placed his or her family in a difficult economic situation by dissipation or abuse of alcohol or another drug. This provision has now been revoked. Restriction of active legal capacity is an extreme measure, justified only in extreme situations. A permanent mental disorder is an extreme situation where a person cannot understand the meaning of his or her actions; in all other cases, including dissipation and harmful drinking, restriction of active legal capacity is not justified — it is a disproportionately strict restriction of the person's rights. Other legal remedies should be used where necessary.

However, one has to admit that different families of law define the legal status of a mentally ill adult rather differently. The regulation of the Roman family of law and the English law differs from that of the Germanic family of law, described above, and from the Scandinavian system. In France, judicial protection, tutorship, or curatorship may be established with respect to persons with a mental disorder.^{*17} Those subject to tutor-

^{*11} H. Dörner. *Bürgerliches Gesetzbuch. Handkommentar*. 3. Aufl. 2003, § 105a, Rn 1.

^{*12} BT – Drucksache 14/9266, p. 43.

^{*13} O. Palandt, H. Heinrichs. *Bürgerliches Gesetzbuch*. 62. Aufl. München 2003, § 105a, sec. 5; H. Dörner (Note 11), § 105a Rn 4.

^{*14} *Tsiviilkohtumenetluse seadustik* (Code of Civil Procedure). Passed 22 April 1998. – RT I 1998, 43–44, 666 (in Estonian). An English translation is available at: http://www.legaltext.ee/et/andmebaas/ava.asp?tyyp=SITE_ALL&ptyyp=I&m=000&query=tsiviilkohtumenetluse (1.07.2004).

^{*15} L. Gustafsson. *Business Laws in the Nordic Countries. Legal and Tax Aspects*. Stockholm 1998, p. 389; R. Nielsen (Note 6), sec. 343.

^{*16} R. Nielsen (Note 6), sec. 343.

^{*17} K. Zweigert, H. Kötz (Note 5), p. 351. The transactions of these persons are discussed below in item 3.2.

ship should be regarded as having no active legal capacity; other persons with a mental disorder may provisionally be called persons with restricted active legal capacity. In English law, mentally ill persons are divided into two categories depending on their mental state. Persons who are not able to manage their affairs and govern their property due to their mental state are certified insane by a court. Such certification requires the identical opinion of two practising physicians. The activities and property of such persons are subject to judicial control under the Mental Health Act of 1983. The other category comprises mentally ill persons not certified as insane.^{*18} Persons who have been certified insane may provisionally be said to have no active legal capacity, and those not certified as insane may be said to have restricted active legal capacity.

While in the case of minors it could be concluded that restriction of active legal capacity due to age should be made uniform in the European Union because the differences between the states are not very large or fundamental, it is difficult to draw such a conclusion in the case of mentally ill persons. The differences between countries are too large for bridging of the gap. The main difference lies in whether those with a mental disorder are treated as one group in terms of their active legal capacity (Germanic family of law, Scandinavian countries, Estonia) or divided into various categories (France, England); another major difference is whether mentally ill persons are regarded due to their condition as having restricted active legal capacity (Estonia, also France and England in part) or as having no active legal capacity (Germanic family of law) or whether they should be declared as such by a court (Scandinavian countries, also France and England in part). Other essential divisions relate to whether people with mental disorders have no active legal capacity (Germanic family of law, Scandinavian countries, France and England in part) or whether they have restricted active legal capacity (Estonia, also France and England in part). If we aim at unification of law, these differences should be overcome first.

3. Transactions of persons with restricted active legal capacity and persons without active legal capacity

3.1. Transactions of minors

A principle applies in Estonia according to which the consent of the legal representative is required for a transaction involving a minor with restricted active legal capacity. According to GPCCA § 10, unilateral transactions conducted by a person with restricted active legal capacity without the prior consent of his or her legal representative are void. Pursuant to GPCCA § 11 (1), a multilateral transaction entered into by a person with restricted active legal capacity without the prior consent of his or her legal representative is void unless the legal representative subsequently ratifies the transaction. If the person acquires full active legal capacity after entry into the transaction, he or she may ratify the transaction him- or herself. A person with restricted active legal capacity may independently perform certain transactions, specified in GPCCA § 11 (3), for which the consent of the legal representative is not required. For example, such a person may take part in a transaction from which no direct civil obligations arise for him or her. The person may also enter into a transaction using means granted for that purpose, or for free use, by his or her legal representative or a third party with the consent of the legal representative. The Estonian body of regulation has been greatly influenced by the relevant regulation characteristic of the Germanic family of law; similar provisions are contained in, e.g., BGB §§ 107–108 and 110–111. A transaction conducted by a person with restricted active legal capacity is provisionally void until approved by the legal representative. According to BGB § 107, a minor with restricted active legal capacity may independently enter into transactions that result in only a legal advantage for him or her. Similar provisions are contained in ZGB § 19 and GPCCA § 11 (3) 1). A legal advantage is granted by transactions that do not reduce the person's rights or increase his or her obligations. Minors need not be protected where such transactions are concerned, which is why their full active legal capacity in such situations is recognised.^{*19} A legal advantage can be given to a minor only by unilaterally obligatory agreements and only if the person with restricted active legal capacity is not the party who assumes an obligation. Assessment is based on the effect of the relevant expressions of will according to the prevailing opinion and its legal consequences, not the economic advantage a minor may receive from the transaction.^{*20} For example, if a minor has purchased something at a favourable price and the money was not his or her pocket money (BGB § 110), he or she still incurs obligations and the transaction is provisionally void. The legal representative should then decide whether the transaction was advantageous for the

¹⁸ P. Richards. *Law of Contract*. 2nd ed. London 1995, p. 82; K. Zweigert, H. Kötz (Note 5), p. 353.

¹⁹ H. Dörner (Note 11), § 107 sec. 1.

²⁰ U. Kulke. *Probleme der beschränkten Geschäftsfähigkeit*. – JuS 2000, L 82; D. Medicus (Note 8), § 39 sec. 560.

minor, and if the legal representative consents, the transaction is ultimately valid. Still, it should be concluded that BGB §§ 107 and 110 (the ‘pocket money clause’) and GPCCA § 13 (3) do not give enough consideration to the minor’s interests and the entire regulation is too centred on the minor’s legal representative.

In this respect, Austria’s law is more flexible among systems in the Germanic family — according to ABGB § 151 (3), transactions carried out by minors as everyday transactions of little significance are valid.^{*21} The law of the Nordic countries also offers more flexibility: the independent transactions of minors are valid if they are usual and of little significance. The level of development of the minor is taken into account, as well as the nature of the transaction and other circumstances, such as what was purchased, where, and under what conditions.^{*22} In Denmark, a person who is at least 15 years old is allowed to dispose of the money earned by his or her own work.^{*23}

As a rule, the consent of the legal representative is also required for the transactions of minors with restricted active legal capacity in France. According to *Code Civil* art. 389 (3) and 450, the consent of the legal representative is not required for transactions to which the minor is entitled according to law or custom. This includes transactions of daily life not involving serious risks; courts also regard as valid those transactions of minors as are made for preserving and ensuring a proprietary right of small value that the minor already has. A major difference from, e.g., Estonia, Germany, Switzerland, and Austria is that transactions lacking the consent of the legal representative can be voided only by a court. According to *Code Civil* art. 1125, a minor or his or her legal representative may request the voiding of a transaction. It has to be proved that the transaction caused economic loss to the minor (*Code Civil* art. 1305). A transaction of a minor is thus valid unless economically disadvantageous to the minor. The disadvantage of a transaction is indicated by a disproportion between the performance and counterperformance but also by the fact that a transaction that is usually just can be unreasonable given the financial situation of a minor.^{*24}

Transactions performed by minors as persons with restricted active legal capacity are usually regarded as void (not binding) also in English law.^{*25} However, transactions involving the necessities of a minor are valid. The concept of necessities is typical of this area of English law. Necessaries are understood in the present context as goods that are suitable for and needed by a minor at the time of the sale and delivery. Such acquired things must be proved to be necessary for a minor in order for the transaction to be considered valid. For the validity of the transaction, it is also important to keep in mind that the conditions of the transaction must not be excessively strict or burdensome for the minor.^{*26} Deciding over necessity is a question of fact, and the substance of the concept depends on the social situation (a station in the life of the minor).^{*27} Necessaries also include services such as medical aid, education, counselling, and accommodation.

The doctrine of necessities may be juxtaposed with the *lésion* theory used in French law. While the French law examines whether a minor has suffered damage (*lésion*) due to the transaction, under English law it is important that the goods that a minor purchases be necessities or that the service agreement be on the whole to the minor’s benefit.^{*28} The aspects considered are thus essentially similar.

Compared to the rules established for persons with restricted active legal capacity according to the above approach, there is a certain similarity in the Roman law and common law countries as well as Scandinavia, but the provisions of the civil codes of the Germanic family of law stand apart in this area.

As a rule, ‘beneficial transactions’ are recognised similarly in statutory law countries and legal systems following the Roman tradition. Consideration for the interest and benefit of minors in English law is related to the doctrine of necessities. The French *lésion* theory is comparable to that. But there is no such principle of considering the minor’s benefit and interests in the Germanic family of law. Furthermore, the legal systems of the Germanic family of law designate persons under the age of seven as having no active legal capacity, and no provisions are made for their participation in legal transactions. The abolishment of the legal category of persons having no active legal capacity would help protect minors and provide balance for legal transactions in this context.

The role of legal representative may be regarded as a common feature of different families of law in the regulation of transactions of persons with restricted active legal capacity. In the Germanic family of law, the

²¹ H. Kötz (Note 7), p. 101.

²² J. Pöyhönen. *An Introduction to Finnish Law*. Helsinki 2001, p. 81.

²³ R. Nielsen (Note 6), sec. 345.

²⁴ H. Kötz (Note 7), pp. 99–102; K. Zweigert, H. Kötz (Note 5), pp. 349–350.

²⁵ The active legal capacity of minors is regulated in the English law by the Minors’ Contract Act, 1987. See J. C. Smith. *The Law of Contract*. 2nd ed. London 1993, p. 225.

²⁶ P. Richards (Note 18), pp. 83–84.

²⁷ J. S. Smith (Note 25), p. 227.

²⁸ H. Kötz (Note 7), p. 100.

consent of the legal representative is usually a prerequisite for the validity of transactions conducted by persons with restricted active legal capacity. The position of legal representative is also known in the Roman family of law and in the Scandinavian countries, but the interest and benefit of minors is taken into account to a much greater extent in the Germanic legal tradition in deciding on the validity of a transaction. Legal transactions are protected here for good reason: it is difficult for a party to a contract who has active legal capacity to predict the evaluation by the legal representative of a transaction with a minor; it is much easier to assess whether the transaction is beneficial for and in the interest of the minor. The protection of the minor and of legal transactions is much more balanced here than in the legal order of the Germanic family of law. The concept of a legal representative is foreign to English law. The validity of a transaction performed by a minor is thus independent of the consent of such a person, and the only aspects considered are the interest and benefit of the minor. However, the position of legal representative bears similarity to the role of a trustee that is specific to English law. The legal consequence of transactions entered into by persons with restricted active legal capacity in the Roman family of law and in English law is the disputability of such transactions. Under the French *Code Civil*, a minor or his or her legal representative has to refer to a court in order to void a transaction. In statutory law countries, transactions are disputed extrajudicially and the minor is entitled to disputation. The transaction is thus valid until disputed and hence binding on the party to the transaction having active legal capacity. The provisions of the codes of the Germanic family of law differ in this respect: the legal consequence of the transactions of persons without active legal capacity is their voidness, and transactions performed by persons with restricted active legal capacity are 'provisionally' void. Having entered into a transaction with a minor, the adult party is in a much less safe position. However, he or she may withdraw from the transaction (GPCCA § 11 (6); BGB § 109) at any point until the minor's legal representative has formally withheld approval of it. There is no regulation of withdrawal in systems in the Roman family of law or in statutory law countries. All the legal systems allow a minor who has become an adult to confirm the validity of a transaction.

If we ask about the area and scope in which the regulation of transactions carried out by persons with restricted active legal capacity could be unified in the European Union, the central problem is the transactions that minors could take part in independently. Unification could be based on French and English law, as well as Scandinavian law. It is advisable to set out the general criteria for such transactions, based on their necessity and benefit for the minor, not just limiting regulation to transactions that give a minor a legal advantage and the language concerning pocket money. As regards the validity of transactions that minors must not enter into independently, the regulation could be based on the principle characteristic of Germanic law, which has been adopted also in Estonia, by which multilateral transactions are provisionally invalid until the legal representative approves them. For purposes of legal certainty, the other party to the transaction should have the right to ask the approval of the minor's legal representative, and if approval is not given within a reasonable or specified time, the transaction could be regarded as ultimately void.

3.2. Transactions of persons with a persistent mental disorder

Persons with persistent mental disorders are regarded as having restricted active legal capacity in Estonia, and their transactions are subject to exactly the same rules in GPCCA §§ 10 and 11 as transactions of minors who have restricted active legal capacity. Adults with a restricted active legal capacity may independently carry out the transactions listed in GPCCA § 11 (3) — transactions from which no direct civil obligations arise for the person, as well as transactions conducted by means which his or her legal representative or a third party with the consent of the legal representative had granted to him or her for such purpose or for free use (as described in the 'pocket money clause'). In other cases, the consent of the person representing the individual with restricted active legal capacity is required for a transaction (these transactions are provisionally invalid). We find it a major positive development in Estonian law that the transactions of all persons with restricted active legal capacity are treated in the same way — this makes the regulation much clearer, simpler, and easier to understand.

In the Germanic family of law, the transactions of persons with mental disorders are void (BGB § 105 (1)). In France, persons with mental disorders are protected by a system distinguishing among judicial protection (*Code Civil* art. 491: adults under the Protection of Law), tutorship (*Code Civil* art. 492–507: adults in Guardianship), and curatorship (*Code Civil* art. 508–514: adults in Partial Guardianship). A court may void those transactions of judicially protected people that are economically damaging; in the case of tutorship, the tutored person usually has no active legal capacity and his or her transactions are void, but a court may grant him or her permission to conduct certain transactions. In the case of curatorship, a person may enter into transactions of daily life on his or her own behalf but requires the curator's consent for other transactions.

In English law, the transactions of persons who have been certified as insane are void. Where the person is not certified as insane, the contract will be voidable if the other party is aware of the person's disorder and the mentally disordered person did not understand the transaction in question. Such transactions are thus

disputable. Such a person may approve the transaction later if his or her health condition improves. The transaction then becomes binding on said person.^{*29} The doctrine of necessities as described above is applied to mentally ill persons as well as minors. According to the Sale of Goods Act (1979), when necessities are sold and delivered to a person who by reason of mental incapacity is incompetent to be party to a contract, he or she must pay a reasonable price for them. This rule is not applied if the seller of the goods was not aware of the mental condition of the person. Rather, in such cases, the actual price of the goods must be paid to the seller.^{*30}

Unification of the regulation of transactions conducted by mentally ill persons mainly depends on the extent to which the legal status of such persons can be dealt with uniformly — whether they are treated as a single group having no active legal capacity or as persons with restricted active legal capacity, and whether the active legal capacity should be restricted by a court or instead constitutes an independent status first and foremost. We believe that mentally ill people should be treated by reason of their condition as persons with restricted active legal capacity. Their transactions could be provisionally invalid; this would suit the interests of such persons the best. The validity would depend on the approval of the guardian. This proposal mostly arises from the Germanic system, with the exception that mentally ill persons should, as a rule, have restricted active legal capacity in the same scope as minors. The validity of their transactions should be based on examination of how much the persons benefit and on the doctrine of necessities in a similar manner to that applied under Roman and English law.

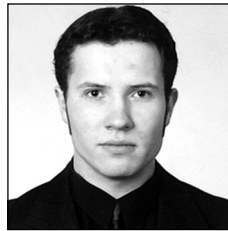
4. Conclusions

Differences in the regulation of different states and families of law as regards restrictions of the active legal capacity of persons are rather great. Yet the Germanic, Roman, and Scandinavian families of law as well as English regulation have many similarities; even approaches that are very different at first glance yield results that are not so different. Potential unification could therefore combine the different systems in a common regulation. All the systems agree that adults with permanent mental disorders and minors cannot have full active legal capacity. Regulation concerning minors is probably an easier area to address than regulation of mentally ill adults is. Adulthood starts at the age of 18 in most countries, which could also serve as the basis for unification. There are two main issues that pose problems: (1) which transactions can be performed by minors independently and (2) how to handle transactions conducted by minors who lack the relevant right. Transactions that may be performed independently should be specified on the basis of English law but also considering the Scandinavian and French law; the decisive elements should be the benefit and needs of a minor. Determination of the validity of transactions carried out by minors without the relevant rights should be based on the Germanic family of law, which treats such transactions as provisionally invalid. It is much more difficult to unify regulation concerning mentally ill adults, as differences in the legal status of these persons between states are greater than they are in the case of minors. Unification could proceed from regarding these persons as having restricted active legal capacity. Their right to enter into transactions could be regulated similarly to that of minors.

The problem remains of whether the states where mentally ill persons may be given one of several legal statuses would accept a single regulation system based on one category. It is feasible for another category to be distinguished besides mentally ill persons with restricted active legal capacity, like in France and England. This sets apart those who do not have restricted active legal capacity but are still protected by the court in that their transactions can be declared void. Transactions performed by mentally ill persons with restricted active legal capacity who are not competent to perform them independently would be provisionally invalid. Transactions of those mentally ill persons whose active legal capacity is not restricted could be valid but still voidable by a court if the transactions are damaging to said person. Mentally ill persons should have restricted active legal capacity by virtue of their objective status without having their active legal capacity declared by a court to be restricted. If necessary, it has to be identified whether a mentally ill person has restricted active legal capacity or not, so as to then decide on a particular transaction involving this person — whether it is provisionally invalid (the person has restricted active legal capacity), disputable and hence voidable by a court if the transaction is damaging to the person (the person has a mental disorder and should be protected but his or her active legal capacity is not restricted), or valid (the person's mental disorder does not indicate a restricted active legal capacity and warrants no additional protection).

²⁹ R. Stone. *Contract Law*. 2nd ed. London 1996, p. 10; P. Richards (Note 18), p. 82.

³⁰ D. W. Greig, J. L. Davis. *The Law of Contract*. Setton 1987, p. 794.



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The Concept of General Duties of Care in the Law of Delict

1. Introduction

The general composition of the traditional three-level delict distinguishes among the objective elements of an act (the act, consequence, and causal relationship between the act and the consequence), its unlawfulness, and fault. Unlawfulness as a prerequisite for delictual liability can often be derived from damage to the absolutely protected legal rights. In certain cases (to be detailed below), however, this is not possible. Therefore, the judicial practice of the Federal Republic of Germany has developed the concept of general duties of care for testing delictual liability. Other countries that have adopted the German delictual liability model (*e.g.*, Switzerland, Austria) apply the same concept, and the judicial practice of the Republic of Estonia also must adopt its principles.¹ The subject of this article thus mainly concerns the countries belonging to the Germanic family of law.²

The purpose of this article is to explain and analyse the main problems relating to general duties of care. The following issues are therefore discussed. The first part of the article focuses on why the concept of general

¹ Recognition of the concept of general duties of care is essential for the functioning of the delictual liability system. However, the concept is still unfamiliar to many Estonian lawyers, as the establishment of delictual liability under the Civil Code of the Estonian Soviet Socialist Republic (adopted on 12 June 1964 — ÜNT 1964, 25, 115; RT I 1997, 48, 775) did not require consideration for general duties of care.

² This is why the law of tort of countries in the Roman family of law or of common law is not the focus of this paper. The structure of tort liability as applied in these countries differs greatly from the German and Estonian model, and many of the problems discussed in the article do not exist outside the Germanic family of law; a broader comparative analysis would be a subject for a longer article. It should be briefly mentioned that in, *e.g.*, French law, tort liability rests on the concept of *faute*. Where the tortfeasor has acted in self-defence or in an emergency, his or her liability may be precluded because of the lack of *faute*. Neither French courts nor jurists make a distinction between unlawfulness and fault (see K. Zweigert, H. Kötz. Introduction to Comparative Law. 3rd ed. Oxford: Clarendon Press 1998, p. 619). The tort law of common law countries recognises three main elements — duty, violation of duty, and damage or injury — as the prerequisites for negligence liability (*ibid.*, p. 609). Thus, the tort law of all common law countries, in contrast to that of Continental Europe, is built on the duties that people have toward each other. In assessing whether a duty has been violated, it should be assessed whether the person has acted reasonably. See also C. von Bar. The Common European Law of Torts. Vol. 2. Oxford: Clarendon Press 2000, p. 249.

duties of care should be recognised at all — what its meaning in the law of delict is. The second part discusses the nature and substance of general duties of care. In the third part of the paper, the author tries to answer the question of how the derivation of unlawfulness from a violation of general duties of care affects the general structure and relationship of elements of delict.

The author considers the distinction between violation of general duties of care and neglect in the form of failure to exercise the care required in ordinary social intercourse, tackled in the last part of the article, to be the most intriguing issue discussed in this article. As a violation of general duties of care results in unlawful behaviour, the question of a distinction between carelessness and the violation of general duties of care can also be regarded as one of distinction between fault and unlawfulness.

In legal literature, unlawfulness and fault are often dealt with in the same chapter. This is so because these prerequisites for liability are often not clearly distinguishable. It is a question that has provoked discussion among the jurists of the Federal Republic of Germany for some time now. E. Deutsch has found that the relationship between rules of behaviour and care has not yet been fundamentally defined.^{*3} It has been questioned whether the violation of a duty of care, which duty is specified in each particular case, and fault can be distinguished from each other at all.^{*4} However, it has also been found that since § 823 of the German Civil Code (BGB) clearly distinguishes between unlawfulness on the one hand and intent or carelessness on the other, the law still understands carelessness as something different from unlawfulness.^{*5} K. Zweigert also finds that although unlawfulness and fault are dogmatically clearly distinguished, discussion about the meaning and scope of the concepts of fault and unlawfulness has arisen lately.^{*6}

2. The concept of general duties of care in the law of delict

To offer insight into the meaning of general duties of care in the context of delictual liability, it should be noted at the outset that the literature on the tort law of the countries belonging to the Germanic family of law recognises two approaches to establishment of unlawfulness: the wrongful consequence theory and the wrongful act theory.

As mentioned in the introduction to the article, unlawfulness as a prerequisite for delictual liability can be established under the theory of wrongful consequence if damage has been done to the absolutely protected legal rights; to be more exact, damage to a legal right also indicates unlawfulness. According to BGB § 823 (1), such absolutely protected legal rights are those to life, the body, health, freedom, and property (*e.g.*, if A shoots B and B dies, the unlawfulness of the act can be derived by applying the theory of wrongful consequence because the life of B is an absolutely protected legal right and his death indicates unlawfulness). Similar legal rights are also protected under § 1045 (1) 1) – 3) and 5) of the Law of Obligations Act^{*7} (LOA).^{*8} The unlawfulness of a behaviour is indicated only if the consequence of the behaviour was the intent of the tortfeasor or if it is part of the course of the act, hence forming the direct consequence of the behaviour.^{*9}

Therefore, the legal theory and policy of the Federal Republic of Germany reached a common understanding some time ago that unlawfulness cannot always be established by reliance on the existence of a harmful consequence alone. It has been found that in the event of passive behaviour or acts of omission involving indirect damage to a legal right, where the harmful consequence is a more distant result of the behaviour in question (we may speak of indirect damage when the liability arises from a positive act that leads to the consequence not directly but via further circumstances, such as the behaviour of other persons or the victim

³ E. Deutsch. *Fahrlässigkeit und erforderliche Sorgfalt. Eine privatrechtliche Untersuchung*. 2. Aufl. Köln, Berlin, Bonn, München: Carl Heymanns 1995, p. 478.

⁴ F. G. v. Westphalen und andere. *Produkthaftungshandbuch*. B 1: Vertragliche und deliktische Haftung, Strafrecht und Produkt-Haftpflichtversicherung. München: C.H. Beck'sche 1989, p. 482.

⁵ D. Howarth. *Textbook on Tort*. Buttenworths, London, Dublin, Edinburgh 1995, p. 267.

⁶ K. Zweigert (Note 2), p. 599.

⁷ *Võlaõigusseadus* (Law of Obligations Act). Passed on 26 September 2001. – RT I 2001, 81, 487; 2003, 78, 523 (in Estonian).

⁸ Besides damaging the absolute legal rights, unlawfulness may also arise from violation of a personality right of the victim (LOA § 1045 (1) 4)), interference with the economic or professional activities of a person (LOA § 1045 (1) 6)), behaviour that violates a duty arising from law (LOA § 1045 (1) 7)), and intentional behaviour contrary to good morals (LOA § 1045 (1) 8)). In these cases, unlawfulness cannot be established only by the harmful consequence; rather, these are expressions of the wrongful act theory. In assessing the unlawfulness of an act, one should also take into account LOA §§ 1046–1049.

⁹ K.-H. Gursky. *Schuldrecht. Besonderer Teil*. Heidelberg: Decker & Müller 1990, p. 216.

him- or herself)^{*10}, the behaviour may be regarded as impermissible, and hence unlawful, only if there was a duty to avoid or divert the particular danger.^{*11} We can therefore speak in terms of a legally relevant omission only if the person had a duty to act. In order to recognise unlawfulness and hence the liability of the tortfeasor in such cases, judicial practice has developed the relevant legally binding duties of conduct, or the general duties of care.^{*12} The establishment of unlawfulness in such a manner is based on the wrongful act theory.^{*13}

To characterise the differences between direct and indirect damaging of a legal right (including omission), it should be noted that while indirect damaging of a legal right may also be possible through lawful and permitted behaviour, where direct damaging of a legal right is involved, the consequence is always contrary to the legal order (unless there are circumstances precluding unlawfulness).^{*14} In other words, the existence of a causal relationship between the act and the harmful consequence is sufficient for the creation of liability in a case of direct damage, but in a case of indirect damage, liability for causing a harmful consequence arises only if the behaviour was contrary to duty.^{*15}

The difference between the wrongful consequence and wrongful act approaches, according to B. S. Markesinis, lies in the fact that only the former treats unlawfulness and fault separately.^{*16} In essence, if the theory of wrongful consequence is applied, carelessness has to be evidenced on the level of fault. Where a legal right is damaged by socially adequate behaviour (e.g., a doctor administers a poison instead of a medicine to a patient because the packages have been switched), this constitutes unlawful behaviour according to the theory of wrongful consequence but not according to the proponents of the wrongful act theory.^{*17} In any case, there is no great difference in the final result, as in the former case, the tortfeasor may be released of liability due to lack of fault and in the latter case, this may happen in an earlier test of unlawfulness.

Prof. T. Raab also states that the dispute between the proponents of the two theories is systematic and theoretical, or, rather, that the question lies in the meaning of carelessness in the tort law system. Raab finds that the application of a different theoretical approach is irrelevant to the resultant disposition of a claim. Even where a person has exercised the care required in ordinary social intercourse, the question of whether his or her liability has to be denied because the person acted lawfully or instead because there is no fault is irrelevant to the end result.^{*18}

3. Nature of general duties of care

The recognition of general duties of care and the further development of the concept has had (and still has) an important meaning in the law of delict of the Federal Republic of Germany: it leads to a significant extension of delictual liability. Duties of care are judicial requirements and prohibitions, established by judge-made law through the establishment of duties of conduct.^{*19} The content of a duty of care may be described as follows: when a person creates or controls a danger, the person must take all possible and

¹⁰ T. Raab. Bedeutung der Verkehrspflichten und ihre systematische Stellung im Deliktsrecht. – Juristische Schulung. Zeitschrift für Studium und praktische Ausbildung. 42. Jahrgang. Heft 11. München, Frankfurt am Main: C.H. Beck 2002, p. 1042.

¹¹ Extreme proponents of the wrongful act theory (who are in the minority) find that unlawfulness cannot be simply derived from the causing of a consequence that is not allowed by the legal order, even in cases of direct damage to the absolute legal rights set forth in BGB § 823 (1). They believe that unlawfulness can arise only from the behaviour of a person and can thus result only from a violation of a duty of conduct. However, even these extreme proponents make an exception for intentional causing of damage (J. Kropholler. Bürgerliches Gesetzbuch. Studienkommentar. 6. Aufl. München: C.H. Beck 2003, p. 582). Unintentional causing of damage is thus, according to the wrongful act theory, unlawful only if the behaviour was contrary to the care required in ordinary social intercourse (T. Raab (Note 10), p. 1045), cf. also K. Zweigert (Note 2), p. 599.

¹² T. Raab (Note 10), p. 1042.

¹³ The question of the establishment of unlawfulness may also be approached from another angle. Namely, the elements of liability may be exactly defined or drafted as a framework, with the establishment of unlawfulness depending on that. A defined or closed set of elements, such as damage to the body or property, leads to the establishment of unlawfulness where the presence of the composition or elements of an act is what implies unlawful behaviour. The case of a framework of open sets of elements is different (see LOA § 1045 (1), 4), and 6)), as a violation of these ‘framework rights’ is not evidence of unlawful behaviour. For example, giving a pupil bad marks may violate his or her personality right, but such a violation is adequate and tolerable in ordinary social intercourse (E. Deutsch, H.-J. Ahrens. Deliktsrecht. Unerlaubte Handlungen. Schadenersatz. Schmerzensgeld. 4. Aufl. Köln, Berlin, Bonn, München: Carl Heymanns 2002, pp. 12–13).

¹⁴ T. Raab (Note 10), p. 1046.

¹⁵ *Ibid.*, p. 1048.

¹⁶ B. S. Markesinis. A Comparative Introduction to the German Law of Tort. Oxford: Clarendon Press 1986, p. 42.

¹⁷ J. Kropholler (Note 11), p. 582.

¹⁸ T. Raab (Note 10), p. 1045.

¹⁹ W. Fikentscher. Schuldrecht. 9. Aufl. Berlin, New York: Walter de Gruyter 1997, p. 760.

reasonable precautions to maintain control of the danger and prevent its actualisation as damage. Such a danger may be created by, *e.g.*, opening traffic (streets, roads, passages), a shop, a sports facility, etc.^{*20} As a rule, duties of care rest with the owners of the things in question, but the creation of a duty of care does not depend on ownership: it is the creation, maintenance, and control of the danger that is decisive.^{*21} It should be noted that the violation of a duty of care indicates unlawfulness.

It may be said on the basis of the above that duties of care are similar in character to a general clause.^{*22} A duty of care is automatically created within and by virtue of the law of delict.^{*23} It could be said that duties of care have created duties of conduct, which the legislator could also formulate as statutory duties.^{*24} In any event, duties of care could be specified by a legal provision^{*25}; *i.e.*, a duty of care may be prescribed by law (BGB § 823 (2) and LOA § 1045 (1) 7)), although it is usually not.^{*26} The legislature cannot be expected to set out all the duties of care by law. It could thus be said that duties of care are related more to BGB § 823 (2) than to § 823 (1).^{*27} It should be kept in mind that a duty of care may be both more lenient^{*28} and stricter than a statutory duty. In the former case, a person has to follow the duty set out in the legal provision in order to avoid liability; in the latter case, the person has to abide by duties of care, as the performance of a duty set out in the given provision might be insufficient for avoidance of liability. For example, if A falls into a ditch that B dug in compliance with all the public rules for digging operations, and A is injured, the liability of B is not precluded just because he followed the legal provisions. Only if the public law provides for a strict duty of conduct, from which deviations are not allowed, can B be released from liability, as any other manner of behaviour would in that case have resulted in sanctions under public law.

A person's awareness of a relevant danger is not a prerequisite for there to be a violation of a duty of care. Therefore, a person may be liable if he or she is aware of the source of the danger and does not eliminate it, but the liability can hold if the person is not aware of the source of the danger, because his or her behaviour may be unlawful since he or she did not duly fulfil his or her duty to check the thing in question to determine whether it entailed danger. For example, the owner of an immovable has a duty to check said immovable.^{*29}

The question of when a person's duty of care actually arises cannot be answered in a single way. One has to agree with Raab, who has suggested the following rule for finding an answer to the above question: the larger the potential damage, the greater the likelihood of damage, and the lower the costs of preventing damage, the more certainly one may say that a person has the duty of care to take the relevant precautions to prevent the danger from becoming actualised.^{*30} It should be noted that according to general recognition, a person has no duty of care with respect to unauthorised participants in ordinary social intercourse, such as thieves.^{*31}

The protection of another person has its limits; *i.e.*, duties of care do not require anything impossible. The precautions taken must be subjectively and economically reasonable.^{*32} Besides, it has to be established when testing the existence of a duty of care whether and to what extent the endangered person or later victim could recognise the danger and avoid its actualisation by acting cautiously.^{*33}

One could also ask whether the violation of a duty of care always consists of an omission or whether a duty of care can be violated also by active conduct. As a rule, duties of care are violated by omission, but this can also occur through active conduct; for instance, the creation of uncontrollable danger can be contrary to a duty of care.^{*34} The question has no great importance in practice because the consequence in terms of liability does not depend on whether the particular violation was a commission or an omission. Also, omissions can often be reduced to a prior positive act.

²⁰ E. Deutsch, H.-J. Ahrens (Note 13), p. 124; *cf.* P. Schlechtriem. *Völaõigus. Eriosa. 4. trükk.* (Law of Obligations. Special Part. 4th ed.). Tallinn: Juura 2000, lk 260 (in Estonian).

²¹ E. Deutsch, H.-J. Ahrens (Note 13), pp. 124–125.

²² *Cf.* V. Emmerich. *BGB – Schuldrecht Besonderer Teil. 8., neuarbeitete Aufl.* Heidelberg: C.F. Müller 1996, p. 282.

²³ E. Deutsch, H.-J. Ahrens (Note 13), p. 124.

²⁴ W. Fikentscher (Note 19), p. 760.

²⁵ E. Deutsch, H.-J. Ahrens (Note 13), p. 124.

²⁶ T. Raab (Note 10), p. 1046.

²⁷ W. Fikentscher (Note 19), p. 760.

²⁸ T. Raab (Note 10), p. 1046.

²⁹ *Ibid.*, p. 1042.

³⁰ *Ibid.*, p. 1044.

³¹ J. Kropholler (Note 11), p. 581.

³² E. Deutsch, H.-J. Ahrens (Note 13), pp. 124–125.

³³ T. Raab (Note 10), p. 1045. Even if the duty of care is recognised in a situation where the victim played a role in causing the damage, the compensation for damage can be reduced under both LOA § 139 and BGB § 254.

³⁴ E. Deutsch, H.-J. Ahrens (Note 13), pp. 124–125.

Lastly, it should be asked which legal rights the duties of care protect. Naturally, they protect absolute legal rights first (see BGB § 823 (1) and LOA § 1045 (1) 1) – 3) and 5)), for the wider protection of which duties of care were first developed as a concept in legal practice. However, the scope of protection of duties of care is no longer limited to absolute legal rights, and these duties may also protect other interests declared to be worthy of protection under the law of delict by precedent. It is disputable whether the avoidance of mere property damage could serve as a purpose of a duty of care.^{*35} The question is whether A, the owner of an immovable, is required to compensate for damage if a tree from his property falls onto the road and obstructs traffic such that B, who cannot use the road, is late for a business meeting and suffers economic loss (without his absolutely protected legal right being damaged). The author of this article believes that as a rule, this question should be answered in the negative in order to keep compensation claims within reasonable limits.

4. Position of violation of general duties of care in general composition of delict

When speaking about the violation of a duty of care, it is inevitable that we should define its position in among the general elements of a delict. As the violation of a duty of care indicates unlawfulness^{*36}, we may feel compelled to test the violation of duties of care by examining the level of unlawfulness. But this will not lead to a logical result. It may be concluded from the professional literature of the Federal Republic of Germany that the level of conduct or the causality that creates liability is the primary yardstick for establishing the level of violation of duties of care. The dominant opinion is that violation of a duty of care should be judged on the basis of the level of conduct.^{*37}

Raab also finds that if the question concerns indirect causing of damage or an omission, the violation of a duty of care has to be established at a logically prior stage, on the level of the objective elements of the act and not, as has been argued in some cases, on the level of unlawfulness.^{*38} He adds that a duty of care and its protective purpose form an inseparable unity with the causality that creates liability, which is why they have to be tested together on the level of the objective elements of the act. Only the assessment of the presence of circumstances that may preclude unlawfulness is thus left to the unlawfulness level.^{*39}

As a result of the above, it may be said that if the liability of the tortfeasor arises from a violation of a duty of care, the classical three-level general composition of a delict cannot be relied on in examining the prerequisites for delictual liability. One has to agree with Raab, who has offered the following logical order concerning the general composition or elements of delictual liability for cases of violation of duties of care: firstly, examination of the consequence of the violation of a duty or the violation of a legal right and, secondly, establishment of the presence of conduct contrary to the duty — *i.e.*, whether the person was under a duty of care and whether he or she has violated it. An affirmative answer to this question suggests that the person has also violated an extrinsic care obligation and his or her behaviour is unlawful. Here, the tortfeasor can also give evidence for the existence of circumstances precluding unlawfulness. The third level according to Raab is the level of causality creating liability, where an answer is sought to the question of whether there is a causal relationship between the violation of a duty of care and damaging of a legal right. The next step is to check whether the purpose of the duty of care was to prevent the particular kind of damage that the victim suffered in the case in question, and, finally, the tortfeasor has an opportunity to prove his or her lack of fault, particularly his or her inculpability or observation of intrinsic care.^{*40}

The author of this article finds that where one is dealing with the general composition of a delict as presented, there are essentially only two levels: the objective composition of the act and, second, fault. Still, the aforementioned prerequisites can be positioned in the general composition of a three-level delict; where this is done, the presence of circumstances precluding unlawfulness should be checked on a separate level pre-

³⁵ *Ibid.* The same question was asked by W. Fikentscher (Note 19), p. 760.

³⁶ It should be noted that besides unlawfulness, violation of a duty of care indicates fault in a similar manner to the violation of a protective provision (BGB § 823 (2) and LOA § 1045 (1) 7)). See also E. Deutsch, H.-J. Ahrens (Note 13), p. 14.

³⁷ W. Fikentscher (Note 19), p. 761. It should be noted also that causality creating liability lies in the realm of establishment of the causal relationship, where an answer is sought to the question of whether there is a causal relationship between the tortfeasor's conduct and the damage to the victim's legal right.

³⁸ It should be noted that even the 'finalist' teaching on behaviour does not distinguish between the elements of an act and unlawfulness. See G. Niebaum. *Die deliktische Haftung für fremde Willensbetätigungen*. Berlin: Duncker & Humblot 1977, p. 31.

³⁹ T. Raab (Note 10), p. 1047.

⁴⁰ *Ibid.*, p. 1048.

ceding fault. After these prerequisites have been established, the question of the scope of damage subject to compensation has to be decided, of course. Here we speak about causality completing the requirements for liability.^{*41}

5. Distinction between fault and violation of general duties of care

5.1. Formulation of the issue

In the case of damage to absolute legal rights, where unlawfulness can be derived on the basis of the theory of wrongful consequence, the prerequisites for delictual liability can be tested proceeding from the traditional three-level general composition of delict, in which unlawfulness and fault are clearly distinguishable. When the tortfeasor acts carelessly, both extrinsic and intrinsic care have to be established at the level of fault and not that of unlawfulness.^{*42}

In cases where the unlawfulness of an act arises from a violation of general duties of care, the question arises of the relationship between a violation of a duty of care and carelessness as a form of fault. Based on the above definition of violation of a duty of care and considering the definition of carelessness as provided in BGB § 276 (1), according to which a person who does not exercise the care required in ordinary social intercourse is acting carelessly, and LOA § 104 (3), according to which carelessness is failure to exercise necessary care, it is not difficult to conclude that the definition of violation of a duty of care and that of carelessness are remarkably similar.

Raab also finds that if we define a duty of care so that everyone has to behave as may be expected from a foresighted person within the framework of objective and subjective probability, it cannot be said that a duty of care is anything other than the care required in ordinary social intercourse.^{*43} It is clear that distinguishing between carelessness and the violation of a duty of care or the identification of the relationship between the two has relevance to the theory of tort law. However, the issue is also of practical relevance — *e.g.*, for just distribution of the burden of proof.

For example, if landowner A does not clean the pavement on his property and person B who legitimately walks on the pavement therefore falls and is injured, the unlawfulness of the conduct of A cannot be established (and even if it can, this would not be just or reasonable) on the basis of the theory of wrongful consequence. At the same time, we can surely say that A had the general duty of care of keeping the pavement clean, and if A violated this duty, his conduct is still unlawful on the basis of the wrongful act theory.

A problem arises when we ask whether the fact that A did not, *e.g.*, pick up a banana peel thrown on the pavement is evidence only of the unlawful conduct (or rather, omission) of A or whether it allows one to say that A acted carelessly. To put it another way, it is debatable whether B, who proves that A did not observe his duty of care, thus also proves the unlawfulness of the act or the fault of A, let alone both. We may also ask whether there is any room left for establishing carelessness as an element of fault, if the unlawfulness of a person's conduct arises from the violation of a general duty of care.^{*44}

Proceeding from the above, the question raised has two principal solutions. On the one hand, if we regard violation of the duty of care as identical to carelessness, we may say that general duties of care are formalised on the basis of, in essence, what kind of care a person has to exercise in ordinary social intercourse. In such a case, we cannot speak about unlawful conduct if the person has exercised the care required in ordinary social intercourse. On the other hand, if we regard the violation of the duty of care and carelessness as separate, we should identify the difference between them.

It should be mentioned that neither approach is quite correct. The solution lies in giving substance to the concept of carelessness or, to be more exact, making a distinction between failure to exercise extrinsic and intrinsic care.

⁴¹ In the event of the applicability of the traditional three-level composition of a delict, applicable if the unlawfulness of an act can be established on the basis of the theory of wrongful consequence, the prerequisites for liability are examined in the following order. First, the damage to the legal right or the harmful consequence, conduct, or act and the causal relationship (causality resulting in liability) have to be established on the level of the objective elements of the act. In such a case, unlawfulness is indicated, and only the existence of circumstances that preclude unlawfulness has to be established where unlawfulness is concerned. The culpability and fault of the tortfeasor are examined on the third, subjective level of the general composition, whereas under the BGB, fault has to be proved by the victim, while fault is presumed under the LOA (LOA § 1050 (1)).

⁴² T. Raab (Note 10), p. 1048.

⁴³ *Ibid.*, p. 1045.

⁴⁴ T. Raab has raised a similar question (Note 10), p. 1045.

5.2. Extrinsic and intrinsic care

As mentioned above, we have to distinguish between extrinsic and intrinsic care when speaking about carelessness. Extrinsic care is understood as consisting of the care requirements imposed on the average careful person by the legal order for the protection of third parties' legal rights in a specific situation.^{*45} Intrinsic care means the endeavours and efforts that a person has to make to recognise and follow the requirements of extrinsic care. Only a person who does not observe intrinsic care in addition to extrinsic care behaves in a reproachable and faultful manner.^{*46} It is largely held as true that mere failure to observe intrinsic care does not threaten a legal right and is therefore not a problem in terms of the law of liability, and is not unlawful.^{*47} Like extrinsic care, the intrinsic care requirements may be formulated in an abstract manner — *i.e.*, proceeding from the conduct expected of a similar person in a similar situation^{*48} — but we may also approach the issue from the absolutely individual angle.^{*49}

As intrinsic care is a subjective category, the question of a distinction between general duties of care and carelessness boils down to the distinction between duties of care and extrinsic care. One has to agree with Raab, who says that extrinsic care requirements are what make up duties of care. Therefore, behaviour that violates extrinsic care always constitutes a violation of duties of care and is hence unlawful.^{*50} The same conclusion was worded differently by Deutsch, who finds that if a general duty of care has been objectively violated, this constitutes failure to exercise extrinsic care.^{*51} Also, P. Schlechtriem states that as the duty of extrinsic care is taken to be objective and hence separate from the person who caused the damage, it largely overlaps with the so-called duties of care.^{*52}

It is thus not possible for a person to violate the duty of care required in ordinary social intercourse or extrinsic care without violating the duty of care, as the relevant care is not required in ordinary social intercourse in such a case. The question of whether extrinsic care requirements form duties of care or *vice versa* is practically irrelevant; *i.e.*, the care required in ordinary social intercourse becomes evident and established on the basis of duties of care.

5.3. Conclusions

It may be concluded from the above that a duty of care overlaps with only one element involved in carelessness, namely extrinsic care. Therefore, it may be said that a violation of duties of care and fault are not fully overlapping elements and that observation of intrinsic care has to be examined on the level of the general composition of a delict — *i.e.*, the level of fault. Fault as a prerequisite for the obligation to compensate for damage thus still has a meaning in the event of violation of duties of care.

Deutsch has also found that in the case of unlawfulness arising from the violation of duties of care, testing of the fault of the tortfeasor consists only of the assessment of the exercise of intrinsic care by the person^{*53}; *i.e.*, an answer is sought to the question of whether the person had to have recognised the relevant standard of behaviour and whether he or she was able to follow it.^{*54} This view is supplemented by Raab, who finds that if a person was not able to recognise in a specific situation which efforts the legal order required of him or her for avoidance of danger, or if the person could not exercise the duty of care for subjective reasons, the person is not guilty of behaviour involving fault.^{*55} If the damage is done to the absolutely protected legal

^{*45} The definitions of carelessness contained in, *e.g.*, BGB § 276 (1) and LOA § 104 (3) are based on violation of extrinsic care.

^{*46} T. Raab (Note 10), p. 1047. It should be noted that German authors who speak about intrinsic care, implying that individual abilities of a person exist in all cases, are currently in a minority. This means that many authors do not distinguish between extrinsic and intrinsic care in their writings, and many of those who do understand intrinsic care to refer to a person's culpability.

^{*47} E. Deutsch opposes this view, stating that as failure to exercise intrinsic care may still directly endanger the legal right of another person, such should be considered unlawful — *e.g.*, where an exhausted or intoxicated surgeon performs surgery. See E. Deutsch (Note 3), p. 465.

^{*48} See, *e.g.*, LOA § 1050 (2).

^{*49} E. Deutsch (Note 3), p. 468.

^{*50} T. Raab (Note 10), p. 1047.

^{*51} E. Deutsch, H.-J. Ahrens (Note 13), p. 126.

^{*52} P. Schlechtriem (Note 20), p. 261.

^{*53} Naturally, the individual limitations of liability — *e.g.*, the person's culpability — have to be examined on the level of fault. It may also turn out on the level of fault that the liability of the tortfeasor is limited — *e.g.*, by a contract — to only gross negligence.

^{*54} E. Deutsch, H.-J. Ahrens (Note 13), p. 126.

^{*55} It should be noted that where the tortfeasor acts in his or her professional capacity, he or she has to follow the standard of care of the relevant economic or professional group; *i.e.*, professional care is applied in this case, and exercise of intrinsic care does not release the person from liability. See, *e.g.*, P. Schlechtriem. *Võlaõigus. Üldosa. 2. trükk.* (Law of Obligations. General Part. 2nd ed.) Tallinn: Juura 1994, p. 107 (in Estonian); A. M. Dugalale; K. M. Stanton. *Professional Carelessness*. London, Butterworths 1982, p. 9.

rights listed in BGB § 823 (1), the fact that the person had to have recognised the specific duty of conduct does not suffice to establish the failure to exercise intrinsic care.^{*56} Intrinsic care has not been exercised if an average person had to realise that failure to follow the rule might lead to damage to an absolutely protected legal right.^{*57}

Failure to exercise extrinsic care also presumes failure to exercise intrinsic care, but the tortfeasor may prove the opposite.^{*58} This pertains to exceptional circumstances that may exempt a person from liability despite failure to exercise extrinsic care.

If we return to the case described in the posing of the problem, the facts of the case have the following implication. The fact that the banana peel was lying on the pavement is proof of the violation of a duty of care, and hence also of unlawfulness and the failure to exercise extrinsic care. Landowner A can still prove that he exercised the care required in ordinary social intercourse — *e.g.*, he cleaned the pavement three times a day — and this is all that can be expected of him. Therefore, the fact that the banana peel was lying on the pavement does not constitute a violation of a duty of care or failure to exercise the care required in ordinary social intercourse. However, if it is established that A did not exercise the care required in ordinary social intercourse — *e.g.*, he cleaned the pavement only once a week — the landowner can still prove that he was not careless because he exercised intrinsic care. For example, he could have fallen ill and was not able to arrange for the cleaning of the pavement — *e.g.*, by contracting with a third party to perform this duty — as he had no means of communication.

Where unlawfulness arises from a violation of a duty of care, the victim proves failure to exercise extrinsic care — an element of carelessness — by virtue of the violation of the duty of care. This raises the question of whether placing the relevant burden of proof on the victim is in line with LOA § 1050 (1), according to which the tortfeasor is the one who has to prove that he or she is not culpable for causing the damage. However, the author of this article sees no contradiction here, because proving the unlawfulness of an act is still the duty of the victim. In this case, the victim just proves the relevant element of fault together with the unlawfulness.^{*59} The tortfeasor has to prove that he or she exercised intrinsic care (see LOA § 1050 (2)). There is no problem in this aspect of the question according to the German BGB, since the victim has to prove the meeting of all the prerequisites for delictual liability one way or another.

According to the position of representatives of one branch of German tort law theory, the tortfeasor may be released from liability because of exercise of intrinsic care, so we could say that the difference at first glance between the BGB and LOA as regards the legal liability for violation of duties of care is largely illusory. As according to LOA § 1050 (1), the tortfeasor bears the burden of proving his or her lack of fault and under the BGB, the victim has to prove the fault, the victim actually has to prove the violation of extrinsic care in either case, while the exercise of intrinsic care has to be proved in either case by the tortfeasor. As LOA § 1050 (2) allows the tortfeasor to rely on subjective circumstances for being released from liability and BGB § 276 (1) makes it clear that carelessness is objective, the actual meaning of the term ‘intrinsic care’, often used in the legal literature of the Federal Republic of Germany, frequently includes the circumstances referred to in LOA § 1050 (2) amongst other things.

6. Conclusions

It may be said by way of summary that the issues of general duties of care and their violation, as dealt with in this article, have been a topic of discussion for many tort law specialists for years. The main subjects of dispute in the Federal Republic of Germany and the states that have adopted the German delictual liability model are the position of general duties of care among the elements of delictual liability, as well as the issues of distinction between general duties of care and the care required in ordinary social intercourse.

Despite the opinions presented in the article, the author admits that many of the issues discussed here have not been clarified yet in the course of disputes. The author looks forward to a continuing discussion on this subject. If this article makes any contribution to such discussions, the author considers this short piece to have accomplished its goal.^{*60}

⁵⁶ It should be noted that in the event of a violation of, *e.g.*, a protective norm (BGB § 823 (2), LOA § 1045 (1) 7)), intrinsic care is not exercised if the person recognised the duty of conduct but, while able to follow it, did not do so.

⁵⁷ T. Raab (Note 10), p. 1048.

⁵⁸ E. Deutsch, H.-J. Ahrens (Note 13), p. 126.

⁵⁹ In principle, one could also ask why the burden of proof of non-violation of a duty of care should not be placed on the tortfeasor, if this is essentially the same as proving lack of culpability.

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Admission and Confession of Guilt in Settlement Proceedings under Estonian Criminal Procedure

The new Code of Criminal Procedure^{*1} (CCP), which provides for settlement proceedings^{*2} as an alternative form of simplified proceedings^{*3} to judicial proceedings in accordance with the general procedure, entered into force in Estonia on 1 July 2004.

This article discusses some of the issues relating to settlement proceedings. The focus is on issues of admission and confession of guilt in settlement proceedings.

1. Application conditions and course of settlement proceedings under the new CCP

According to the provisions of CCP § 239 (1), a court may adjudicate a criminal matter by way of settlement proceedings at the request of the accused or the Prosecutor's Office. CCP § 239 (2) 1) provides that settlement proceedings shall not be applied in the case of criminal offences in the first degree, for which the Penal

¹ Kriminaalmenetluse seadustik (Code of Criminal Procedure). – RT I 2003, 27, 166; 2004, 46, 329 (in Estonian). An English translation is available at: <http://www.legaltext.ee/et/andmebaas/ava.asp?m=022> (28.05.2004).

² It should be noted that settlement proceedings (under the name of simplified proceedings) have been available as part of the Estonian criminal justice procedure since 1996 and the scope of application of this form of proceedings has increased so much that in 2002, more than half of judgments were already being made through settlement between the prosecutor and the accused. See the summary report on the activities of the Prosecutor's Office's for 2002. Available at: <http://www.just.ee/files/statistika/prokuratuur/proxstats2002.pdf> (in Estonian). Simplified proceedings already accounted for 59.8% in 2003. See the summary report on the activities of the Prosecutor's Office's for 2003. Available at: <http://www.just.ee/prokuratuur/2003koondaruanne.pdf> (in Estonian).

³ The CCP provides for two forms of simplified proceedings besides settlement proceedings. These are: alternative proceedings and summary proceedings.

Code prescribes at least four years' imprisonment or life imprisonment as the minimum and maximum punishment, respectively.

Settlement proceedings may be initiated by the Prosecutor's Office (CCP § 223 (4), § 240) or by the suspect or the accused (CCP § 242 (1)). Before the judicial proceedings commence as part of settlement proceedings, the Prosecutor's Office explains to the suspect or the accused his or her rights in the settlement proceedings and the consequences of opting for settlement proceedings (CCP § 240 1)), and if the suspect or the accused and his or her counsel consent to the settlement proceedings, the Prosecutor's Office prepares an appropriate report on this consent (CCP § 240 4), § 241). The Prosecutor's Office also explains to the victim or the civil defendant the rights of the victim or civil defendant in settlement proceedings and the consequences of the application of settlement proceedings (CCP § 240 2), § 241), and if the victim or civil defendant consents, the Prosecutor's Office draws up a report on the consent (CCP § 240 3), § 243).

After drawing up consent reports, the Prosecutor's Office commences negotiations with the suspect or the accused and his or her counsel in order to conclude a settlement (CCP § 244 (1)). The objects of the settlement negotiations are the legal assessment of the criminal offence, the nature and extent of the damage caused by the criminal offence, and the type and the category or term of the punishment (CCP § 244 (2)). As a result of the negotiations, a settlement complying with the requirements of the law is reached (CCP § 245). Judicial proceedings are then conducted in connection with the settlement proceedings. The prosecutor, the accused, and his or her counsel are summoned for a court session (CCP § 246). The main substance of the hearing is the ascertainment of whether the accused understands what the settlement entails and whether arriving at the settlement was the actual intention of the accused (CCP § 247 (2)). In the judgement of conviction, the court proceeds exactly from the settlement (CCP § 249). If the court does not agree to the settlement, the court returns the file with the ruling to the Prosecutor's Office (CCP § 248 (1) 1) and 2)).

2. Settlement proceedings as a further step in providing simplified proceedings in Estonian criminal procedure

The settlement proceedings provided for in the new CCP are one step further, in the footsteps of the simplified proceedings⁴ set out in the 1961 Code of Criminal Procedure (1961 CCP). Compared to the simplified proceedings provided for in the 1961 CCP, settlement proceedings under the CCP are probably conducted somewhat more quickly. Settlement proceedings under the new CCP no longer require prosecution; the prosecutor need not prepare a separate statement of charges, as the relevant information is contained in the settlement. One of the major essential changes is that in contrast to simplified proceedings, application of the new settlement proceedings does not require a confession of guilt by the accused. It should be stated by way of comparison that according to the provisions of § 364 (1) of the 1961 CCP, the evidence — *i.e.*, the testimony of the accused — was a prerequisite for the use of simplified proceedings. Another condition was that the testimony had to contain a confession by the accused to all the charges brought against him or her. Thus, in simplified proceedings, the confession has not only the usual meaning of evidence but also a procedural meaning, implying that simplified proceedings cannot be applied unless there is a confession. The 1961 CCP does not actually preclude the lack of confession preceding the negotiations of simplified proceedings; rather, confession is a result of (informal) negotiations to meet the prerequisite for applying simplified proceedings and commencing formal negotiations.

The fact that confession of guilt is not a precondition for applying settlement procedures under the new CCP implies a positive development toward broadening the possibilities for application of settlement proceedings. However, it should be critically noted that the regulations pertaining to settlement proceedings do not govern the issues surrounding confession of guilt. It is probably incorrect to presume, though, that confession has no particular meaning in settlement proceedings at all anymore.

⁴ For more about simplified proceedings, see E. Kergandberg. Expedience of Arrangement E. German and Estonian Criminal Care. — *Juridica International* 1997 (1), pp. 76–89.

3. Admission and confession of guilt in Estonian settlement proceedings under the CCP

As it has been argued in the professional literature that the settlement proceedings provided for in the Estonian CCP are a Continental modification of the plea bargaining established in the Anglo-American legal system⁵, it should be noted by way of comparison that admission of guilt has no such meaning in Estonian settlement proceedings under the criminal procedure as the guilty plea does in, *e.g.*, US settlement proceedings.⁶ It should be stressed that the guilty plea is not part of the Estonian criminal procedure.

A comparison of the provisions of the 1961 CCP concerning simplified proceedings and the new CCP addressing settlement proceedings shows that while at the court hearing involved in simplified proceedings under the 1961 CCP a judge has to ask whether the accused confesses to the charges (§ 383 (2) of the 1961 CCP), the judge does not have to ask such a question of the accused in the court hearing for settlement proceedings under the CCP. According to the provisions of the CCP, it is possible to apply settlement proceedings and also make a judgement of conviction without the accused making a confession to the charges in the form of testimony and without the accused admitting his or her guilt in a manner similar to the guilty plea. According to CCP § 244 (2) and § 245 (1), it is sufficient in settlement proceedings if the Prosecutor's Office and the suspect or the accused and his or her counsel reach an agreement on the legal assessment of the criminal offence, the nature and extent of the damage caused by the criminal offence, and the type and the category or term of the punishment. For making a judgement of conviction in settlement proceedings, it is also important that the court ascertain that the settlement was the actual intention of the accused (CCP § 247 (2)) and that the court has no doubts about the issues settled by the court judgement (CCP § 248 (1) 2)).

The procedural document that contains the agreement on the legal assessment of the criminal offence and other issues subject to the settlement is the settlement under the criminal procedure (CCP § 245). According to CCP § 245 (1) 5), the settlement sets out the facts relating to the criminal offence, amongst other things. It may thus be said that if the accused signs the settlement, the accused essentially states that he or she does not contest the charges contained in the settlement (more specifically, the facts relating to the criminal offence, the nature and extent of the damage caused by the offence, and the legal assessment of the offence). The settlement thus contains a substantive admission of guilt. However, non-contestation of the charges (admission of guilt) in itself should not be regarded as substantive confession of guilt. To be more exact, such admission of guilt should not be regarded as evidence in the form of a piece of testimony. Admission of guilt by the accused, in the form of statements in the settlement, is not evidence concerning the facts relating to the offence but rather part of the dispensational procedural act of conduct. The other part of this dispensational procedural act is the consent of the other party, the prosecutor, to the content of the settlement. In other words, the admission of guilt by the accused as expressed in the settlement constitutes procedural conduct as a means of influencing the course of the proceedings. By signing the settlement, the accused and his or her counsel and the prosecutor mainly state that they request the continuance of the criminal proceedings by way of settlement proceedings under the conditions set out in the settlement.

As confession of guilt in the form of testimony is not required as a precondition for the application of settlement proceedings or a particular resolution of the relevant negotiations, the accused should basically have the opportunity of not contesting the charges yet signing the settlement without making a confession of guilt that could be regarded as evidence.

In the case of settlement proceedings, substantive confession of guilt as evidence and formal admission of guilt as a procedural statement should be distinguished.

In view of this distinction, there are three main situations in which settlement proceedings are applied.

In the first case, the suspect or the accused essentially admits guilt when giving testimony and admits his or her guilt in the form of a procedural statement expressed in the settlement.

In the second case, the suspect or the accused essentially states no opinion about the charges (does not give testimony concerning the charges) and admits guilt in the form of a procedural statement expressed in the settlement.

⁵ See E. Kergandberg, P. Pikamäe. Eesti uue kriminaalmenetluse seadustiku eelnõu lähtekohad (Starting points of the new Estonian draft Code of Criminal Procedure). – *Juridica* 2000/9, p. 561 (in Estonian).

⁶ For more about the guilty plea in American criminal proceedings, see, *e.g.*, J. Bickel. Das förmliche Geständnis im US-amerikanischen Strafprozeß als Beispiel der Verfahrenserledigung. Berlin: Duncker und Humblot 2001, p. 53; M. Dohr. Die Berücksichtigung freiwillig geleisteter Wiedergutmachung des Täters bei der Durchführung des Strafverfahrens durch den amerikanischen Staatsanwalt unter besonderer Berücksichtigung des Rechts des Bundes, Kaliforniens und Michigans. Inaugural-Dissertation. Köln 1997, p. 157; T. Weigend. Absprachen in ausländischen Strafverfahren: eine rechtsvergleichende Untersuchung zu konsensualen Elementen im Strafprozess. Freiburg: Max-Planck-Institut 1990, p. 35.

In the third case, the suspect or the accused essentially denies his or her guilt when giving testimony, while admitting to guilt in the form of a procedural statement expressed in the settlement.

Naturally, there are combinations of these scenarios, where the suspect or the accused admits guilt in the form of a procedural statement expressed in the settlement but admits to some of the charges or aspects thereof while denying another aspect of the charges or other charges, and/or essentially states no opinion about the charges when giving testimony.

Perhaps the first of the above three cases raises the fewest questions, especially if the confession and admission of guilt, which are regarded as evidence, are essentially similar. This means that the circumstances stated in the settlement signed by the suspect or the accused are also addressed in the confession he or she has signed. Even explication of a certain difference between confession and admission of guilt does not prevent the application of settlement proceedings. Confession of guilt is simply a piece of evidence in the file, and the result depends on the evaluation of the entire body of evidence. Acceptance of the settlement by the court depends on whether the result of the evaluation causes doubts to form in the mind of the court about the circumstances and legal assessment of the criminal offence, and the nature and extent of the damage caused by the offence as described in the settlement.

The second case should not raise any problems either. In this case, the suspect or the accused essentially states no opinion about the charges (does not give testimony about the issue of the charges) and formally admits guilt in the form of a procedural statement made in the settlement. Namely, the suspect or the accused has the right to refuse to give testimony (CCP § 34 (1) 1) and § 35 (2)). It should be once again mentioned that confession of guilt in the form of testimony is not required as a precondition for the application of settlement proceedings or as a result of the negotiations of settlement proceedings. Hence, the refusal of the suspect or the accused to give testimony does not prevent the application of settlement proceedings. It is sufficient if the suspect or the accused admits guilt by placing his or her signature on the settlement and if, on the basis of the evidence contained in the file, the court has no doubts about the circumstances or legal assessment of the criminal offence or about the nature or extent of the damage caused by the offence.

If we proceed from the understanding that it is sufficient in settlement proceedings if the suspect or the accused admits guilt by his or her signature on the settlement and if, on the basis of the evidence contained in the file, the court has no doubts about the circumstances or legal assessment of the criminal offence or about the nature or extent of the damage caused by the offence, the court should basically be able to accept the settlement even in the third of the cases listed above. This is the case when the suspect or the accused has essentially denied his or her guilt when giving testimony but admits guilt in the form of a procedural statement made as part of the settlement. Also, in such a case, the court should not be obliged to ascertain whether the accused actually admits his or her guilt or not. If the accused has consented to the undertaking of settlement proceedings and a settlement has been reached, the accused has essentially made a statement waiving his or her right to dispute the charges stated in the settlement, does not wish to contest these charges, and waives the right to the judicial procedure of examination of evidence. If the accused consents to the settlement, this also implies acknowledgement of and giving consent for the court proceeding from the evidence contained in the criminal file in making the decision. Thus, if the criminal file contains the interrogation record of the accused, containing testimony denying the charges, the court may take such testimony of the accused into account when assessing the evidence contained in the criminal file.

In connection with the denial of guilt, problems may seem to arise in the situation where the accused has reached an agreement in the course of settlement proceedings and confirms his or her understanding of and consent to the settlement in the court hearing for the settlement proceedings but while giving explanations about the circumstances of concluding the settlement states that he or she is actually not guilty. In a sense, this resembles the American Alford plea⁷, where the accused admits guilt in order to conclude the proceedings but at the same time states that he or she is not guilty.

The question is: how should the court act in such a situation? Let us first ask whether the court could, in such an event, accept the settlement and make a judgement for conviction in the settlement proceedings despite the accused's denial of guilt. An affirmative answer to this question is supported by the fact that according to the provisions of the CCP, confession of guilt is not a prerequisite for applying settlement proceedings or making a judgement of conviction as part of the settlement proceedings. According to the provisions of CCP § 247, at the court hearing for settlement proceedings, the judge has to ascertain whether the accused has understood the settlement and consents to it and whether conclusion of the settlement was the actual intention of the accused. The CCP does not oblige the judge to ascertain whether the accused actually admits his

⁷ North Carolina v. Alford, 400 U.S. 25 (1970). For more about the decision of the US Supreme Court in the case of *North Carolina v. Alford*, see K. F. Schumann. Der Handel mit Gerechtigkeit: Funktionsprobleme der Strafjustiz und ihre Lösungen – am Beispiel des amerikanischen plea bargaining. Frankfurt am Main: Suhrkamp 1977, p. 169; T. Weigend. Absprachen in ausländischen Strafverfahren: eine rechtsvergleichende Untersuchung zu konsensualen Elementen im Strafprozess. Max-Planck-Institut für Ausländisches und Internationales Strafrecht. Freiburg 1990, p. 70; J. Bickel. Das förmliche Geständnis im US-amerikanischen Strafprozeß als Beispiel der Verfahrenserledigung. Berlin: Duncker und Humblot 2001, p. 170.

or her guilt. However, one should not disregard the requirement arising from CCP § 248 according to which the court may make a decision on the conviction of the accused and on imposition of the punishment of the accused agreed upon in the settlement if the court has no doubts regarding the circumstances of the subject of proof (the criminal offence). In this connection, one should consider the possibility that the accused, when giving explanations about the circumstances surrounding conclusion of the settlement, may say something about the circumstances of the criminal offence or even deny or admit his or her guilt. The next question is whether the statements of the accused about the facts relating to the criminal offence that are given in the course of explaining the circumstances of the settlement could serve as a source for doubt on the part of the court about the circumstances of the subject of proof. The answer to this question depends somewhat on how the replies of the accused to the judge's questions at the court hearing for the settlement proceedings are regarded and how the explanations of the accused are regarded.

At first glance, it may seem that the reply of the accused to the judge's question of whether the accused has understood the settlement could be regarded as an explanation by the accused, because it is a statement of the accused's own opinion about his or her understanding of the settlement. But as the law in principle provides that a court hearing in settlement proceedings should ascertain whether the accused has understood the settlement and whether the settlement was the actual intention of the accused, the replies of the accused to the relevant questions of the judge must have evidential meaning. The court, while ascertaining whether the accused has understood the settlement, should consider both the accused's own opinion about his or her understanding concerning the settlement and the explanations of the accused about the circumstances of concluding the settlement. The explanations of the accused concerning the circumstances should also be regarded as evidence. It is also important to keep in mind that, unlike testimony, the explanations of the accused are elicited not with a view to the ascertainment of the circumstances of the subject of proof (the criminal offence) (CCP § 62) but rather only for the ascertainment of the circumstances surrounding the criminal procedure. Explanations should help to determine whether the accused has understood the settlement and whether the settlement expresses the actual intention of the accused. According to CCP § 63 (2), evidence not listed in CCP § 63 (1) may be used as evidence concerning the circumstances of a criminal proceeding. The explanations of the accused as given in the settlement proceedings may also be considered to be such unlisted evidence. As these explanations cannot be regarded as testimony about the circumstances of the subject of proof (the criminal offence), it should be possible to disregard the statements of the accused about the facts relating to the offence when giving explanations upon deciding whether the circumstances of the subject of proof (criminal offence) have been adequately shown.

4. Regarding a confession of guilt as testimony in settlement proceedings

According to the provisions of the CCP, the acceptance of guilt by the suspect or the accused by virtue of the settlement is sufficient for the application of settlement proceedings. Thus, settlement proceedings may be applied without a confession of guilt made in the form of testimony. However, one probably cannot in practice preclude a confession of guilt regarded as testimony still playing an important role in the application of settlement proceedings in certain cases, especially where a confession would be necessary on account of a gap preventing the application of settlement proceedings in a situation involving proof. If we assess the regulation of settlement proceedings under the CCP from the viewpoint of procedural economics, we may say that this regulation in its present form does not offer flexible enough opportunities for the suspect or the accused and his or her counsel, or for the Prosecutor's Office to gain the potential advantages of settlement proceedings. The regulation of settlement proceedings does not cover issues of confession of guilt made by way of testimony.

In order to render the possibilities for application of settlement proceedings more flexible and thus speed up criminal proceedings and save resources⁸, the law could provide that a suspect may confess his or her guilt by way of testimony in settlement proceedings. A relevant provision of the law would enable the suspect to give testimony (or, more precisely, confess his or her guilt) within the framework of the settlement proceedings. The possibility of confession would imply that the accused could confess his or her guilt with respect to all or only some of the charges.

It should be stressed that if the law provided for an opportunity to confess guilt in settlement proceedings, it would indeed be merely an opportunity. Settlement proceedings could still be applied without a confession

⁸ One should not disregard the information contained in the summary reports on the activities of the Prosecutor's Office for 2002 and 2003. These summary reports admit that the expanding use of simplified proceedings has not improved the throughput of the system as a whole. The alleged reason is that while settlement proceedings reduce the burden of the courts, they do not decrease that of the Prosecutor's Office and investigative bodies. See the summary reports on the activities of the Prosecutor's Office for 2002 and 2003 (Note 2).

of guilt regarded as evidence. In any case, the confession of guilt in settlement proceedings should be voluntary for the suspect or the accused. The accused should not be forced to give testimony against him- or herself. Also, according to section 22 of the Constitution of the Republic of Estonia, no one shall be compelled to testify against him- or herself. One should also proceed from the premise that according to CCP § 34 (1) 1) and § 35 (2), a suspect or the accused has the right to give or refuse to give testimony.

The need for setting out the possibility of making a confession of guilt in settlement proceedings in the law can be mainly justified by the fact that in such an event, the accused could request the application of settlement proceedings and the Prosecutor's Office could in certain cases consent to the application of settlement proceedings even if the pre-trial procedure could not, as a rule, be declared concluded in light of the status of the evidence. In other words, settlement proceedings could be commenced in such a case also if there is not sufficient evidence for the application of settlement proceedings but the gap in the evidence could probably be bridged by a confession of guilt by the accused. Such regulation pertains to situations where the accused would not agree to confess his or her guilt in criminal proceedings conducted under the general procedure but would agree to confess his or her guilt in settlement proceedings on condition that the confession be used as evidence only in the settlement proceedings. Naturally, settlement proceedings in such cases could continue after the confession only if the Prosecutor's Office were convinced that the circumstances of the subject of proof were clear enough and the accused could be convicted on the basis of the evidence collected.

The possibility of making a confession of guilt as part of settlement proceedings would probably somewhat alleviate the burden of investigative bodies and the Prosecutor's Office, and speed up criminal proceedings. As a result of the opportunity to confess guilt, a more lenient punishment would probably be imposed on the accused, as the confession could be regarded as active assistance in the detection of the offence and hence a mitigating circumstance (§ 57 (1) 3) of the Penal Code⁹).

The law should also prescribe at what stage of the proceedings the confession of guilt could be made in settlement proceedings. One of the options is to prescribe by law that confession of guilt may be made after the Prosecutor's Office has drawn up the reports on consent to the application of settlement proceedings and the reports have been signed. Making a confession at this stage of the settlement proceedings would be particularly suitable because the formal preparatory acts, such as the parties' introduction to their rights and the drawing up of a report concerning consent to the settlement proceedings, have been performed by that time.

It would probably be useful also to prescribe the last stage at which a confession could be made in settlement proceedings. This stage of the proceedings should be determined on the basis of the principle that confession of guilt should be made in settlement proceedings before agreement on the legal assessment of the criminal offence and on the nature and extent of the damage caused by the offence, and the type and the category or term of the punishment. Confession of guilt may reveal circumstances on which the settlement depends. The requirement that guilt be confessed before agreement on the legal assessment of the criminal offence and on the nature and extent of the damage caused by the offence, and the type and the category or term of the punishment, does not mean that guilt could not be confessed after commencement of the negotiations involved in the settlement proceedings. It is only important that very specific and binding agreements on the above issues not be made before the confession of guilt. Thus, the Prosecutor's Office should not make binding promises about the type and the category or term of the punishment before the accused has confessed his or her guilt. The reasoning behind this is based on the fact that the Prosecutor's Office should not make binding promises about the punishment requested before all the material circumstances are clear. As confession of guilt entails certain risks for the suspect¹⁰, the accused may be interested in the type and the category or term of the prospective punishment, however hypothetical, before he or she admits guilt. Therefore, in the settlement proceedings, the Prosecutor's Office should be allowed to set a maximum punishment to be applied in the event of confession, and it should not seek to impose a more severe punishment in the settlement proceedings. Also, the Prosecutor's Office should be obliged to explain to the suspect or the accused that the maximum punishment stated by the Prosecutor's Office before a confession is only hypothetical in a sense. The Prosecutor's Office should explain that the type and the category or term of the requested punishment cannot be finally determined at this stage of the proceedings. In other words, it is important to inform the suspect or the accused of the fact that the initial estimation of the Prosecutor's Office can still change and may even be exceeded if necessary. Such an explanation is necessary because situations may occur where the Prosecutor's Office may have to exceed the stated maximum punishment after the confession. This may be the case where new important facts (*i.e.*, facts not known to the Prosecutor's Office up to the point of the confession) to the disadvantage of the accused are revealed as a result of the confession.

⁹ Karistusseadustik (Penal Code). – RT I 2001, 61, 364; 2004, 7, 40 (in Estonian). An English translation is available at: <http://www.legaltext.ee/et/andmebaas/ava.asp?m=022> (28.05.2004).

¹⁰ When giving testimony, the suspect may reveal information that restricts his or her defence in criminal proceedings under the general procedure.

Neither should the Prosecutor's Office make binding promises about the legal assessment of the criminal offence or the type or extent of damage caused by the criminal offence before the accused has confessed his or her guilt.

Confession of guilt should thus take place immediately after the Prosecutor's Office has prepared the reports on consent to the application of settlement proceedings and these reports have been signed, or after the Prosecutor's Office has commenced negotiations for settlement proceedings. But it is important that the suspect confess his or her guilt in the form of testimony before the settlement negotiations end or, more specifically, before the settlement is concluded. When negotiations over the settlement proceedings have been commenced after the preparation and signing of the reports on consent to the application of settlement proceedings and the accused expresses consent to confess his or her guilt at the negotiation stage, the Prosecutor's Office should take a recess in the negotiations so that the suspect can make a confession in the form of testimony.

5. Use of a confession made in settlement proceedings only in settlement proceedings

If the law provides that someone may confess his or her guilt as testimony given in settlement proceedings, the law should also provide certain guarantees that encourage such confession. The guarantees would be necessary in cases where the suspect or the accused is willing to make a confession of guilt, which may be regarded as evidence, so as to make the application of settlement proceedings possible but the suspect or the accused has reason to believe that in the event of failure of the settlement proceedings, his or her confession would be used as evidence against him or her in criminal proceedings under the general procedure. In order to dispel such doubts on the part of the suspect or the accused, the law could provide for a restriction according to which a confession made during settlement proceedings could be used only within the settlement proceedings. This would mean that if settlement efforts fail, the confession obtained as a result of the settlement could not be used in criminal proceedings under the general procedure without the consent of the suspect or the accused. The latter is an important point because the suspect or the accused can never be quite sure that after the confession he or she and the Prosecutor's Office will reach a settlement on all points. Neither can the suspect or the accused be sure that the Prosecutor's Office will hold to the settlement reached or that the court will not refuse to complete the settlement proceedings. The possibility of the settlement proceedings failing and the proceedings continuing according to the general procedure entails the risk that, by making a confession, the suspect or the accused may limit his or her defences in the general proceedings. Placing the suspect or the accused in a position of having to make a choice entailing such a risk is not in line with the principle of fair proceedings.

It should be specified that the restriction on the use of the confession of guilt should apply only to a confession made in the framework of settlement proceedings (as a result of the settlement). Such restriction would not apply to a confession of guilt made outside the settlement proceedings.

6. Stage of criminal procedure at which settlement proceedings commence

Following from the regulation provided in the CCP, settlement proceedings may not be commenced at just any point in the entire procedure; rather, they are to begin only at the conclusion of the pre-trial procedure (CCP § 223 (4) and § 242). Settlement proceedings may also be commenced at a court hearing (CCP § 259).

According to CCP § 223 (4), the Prosecutor's Office commences settlement proceedings upon the conclusion of the pre-trial procedure after receiving the criminal file. CCP § 223 sets out the acts to be performed by the Prosecutor's Office upon receipt of criminal files, and CCP § 223 (4) provides for acts aimed at application of settlement proceedings as one of the options.

As the provisions of the CCP state that settlement proceedings may also be commenced on the initiative of the suspect or the accused, it is important to point out the stage of the procedure at which these subjects may initiate settlement proceedings. CCP § 242 (1) provides that if the suspect or the accused wishes that settle-

ment proceedings be applied, he or she shall submit a written request pursuant to CCP § 225 to the Prosecutor's Office.*¹¹

The suspect may submit the written request for the application of settlement proceedings as specified in CCP § 242 (1) in accordance with CCP § 225 (1) within five days after the date of submission of the criminal file for examination (as an exception, if the criminal matter is especially extensive or complicated, the Prosecutor's Office may extend the term to up to ten days). In other words, it arises from these provisions that the suspect can initiate the settlement proceedings after his or her counsel has received a copy of the criminal file upon conclusion of the pre-trial procedure. The criminal file is submitted for examination when the Prosecutor's Office declares the pre-trial procedure completed (CCP § 223 (3)).

As stipulated in the CCP, all the evidence required for convicting the suspect or the accused in the settlement proceedings should be collected before the commencement of the settlement proceedings. No provision has been made for the collection of supplementary evidence concerning the subject of proof (such as the testimony of the suspect or the accused — a confession of guilt) during the settlement proceedings. Thus, according to the logic of the CCP's regulations concerning settlement proceedings, the most important point for the commencement of settlement proceedings is when the Prosecutor's Office takes the position that enough evidence has been collected to convict the suspect. Naturally, one should not forget that in the pre-trial procedure, facts speaking in favour of the innocence of the suspect or accused should be identified adequately, not just the circumstances on the basis of which he or she might be judged guilty.*¹² The Prosecutor's Office also has to take into account that in the case of application of settlement proceedings, the judge should be able to form an opinion on the basis of the evidence contained in the criminal file.

If we keep in mind that regulations concerning settlement proceedings may in the future allow for the possibility of confessing guilt through testimony during the settlement proceedings, the Prosecutor's Office should accordingly be allowed to — *e.g.*, on the suspect's initiative — commence settlement proceedings when the evidence collected is not yet sufficient for conclusion of the pre-trial procedure but the suspect has voluntarily expressed willingness to confess his or her guilt in the form of testimony during settlement proceedings.

7. Conclusions

The fact that the new CCP does not require confession of guilt as a precondition for the application of settlement proceedings or as a result of the negotiations of settlement proceedings constitutes a positive development toward broadening the opportunities for application of settlement proceedings. However, it should be critically noted that current regulation of settlement proceedings does not cover the issues of confession of guilt at all.

Non-contesting of the charges, expressed as a settlement reached in settlement proceedings (admission of guilt) cannot be regarded as a substantive confession of guilt. The admission of guilt expressed in the settlement is procedural conduct as a means of affecting the course of the procedure. By signing the settlement, the accused and his or her counsel and the prosecutor mainly express their wish to continue the criminal procedure in the form of settlement proceedings under the conditions specified in the settlement.

In order to render the possibilities for applying settlement proceedings more flexible and hence the criminal procedure quicker and less resource-consuming, the law should provide for the possibility of the suspect confessing his or her guilt in the form of testimony given in the course of settlement proceedings. Such a provision would make it possible for the suspect to give testimony (more specifically, to confess his or her guilt) as part of the settlement proceedings. If the law were to provide for the possibility to confess one's guilt in settlement proceedings, the Prosecutor's Office should accordingly be allowed to — for example, on the initiative of the suspect — commence settlement proceedings before the proof is sufficient for conclusion of the pre-trial procedure but when the suspect has voluntarily expressed willingness to confess his or her guilt in settlement proceedings. It should be stressed that if the law did provide for the option of confess-

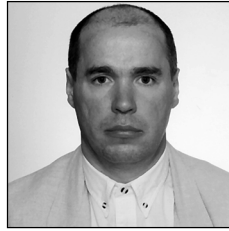
¹¹ The reference to CCP § 225 that is contained in CCP § 242 (1) could have been more specific as regards the subsections, as apparently § 225 (4) and (5) are not relevant in this case and even subsection 3 is only partly applicable to the issues of requesting settlement proceedings. The submission of the request is regulated by CCP § 225 (1) and (3). In § 1, it is provided that the participants in a proceeding may submit requests to the Prosecutor's Office within five days from the date of submission of the criminal file to the participants for examination. If a criminal matter is especially extensive or complicated, the Prosecutor's Office may extend this term to up to ten days. However, subsection 3 of the same section provides that dismissal of a request in the pre-trial procedure shall not prevent re-submission of the request in judicial proceedings. One should admit that the provisions of CCP § 225 (3), as well as the provisions of the other subsections of this section, are not adequate enough in their present form to cover requesting settlement proceedings at a court hearing.

¹² According to CCP § 211 (2), in the pre-trial procedure, an investigative body and the Prosecutor's Office shall ascertain the facts that could vindicate or condemn the suspect or the accused.

ing one's guilt in settlement proceedings, it would be just that: merely a possibility. Settlement proceedings could still be applied without a confession of guilt treatable as evidence. In any case, confession of guilt in settlement proceedings should be voluntary for the suspect or the accused.

The law should also specify the stage of the procedure at which the confession of guilt may be made in the settlement proceedings. For example, the law could provide that the confession of guilt may be made only after the Prosecutor's Office has prepared the reports on consent to the application of settlement proceedings and these reports have been signed, or after the Prosecutor's Office has commenced negotiations for the settlement proceedings. Another important point that the law should specify is that the confession of guilt must be made before the settlement is concluded.

If the law provided that a suspect could confess his or her guilt by way of testimony in the course of settlement proceedings, the law should also provide for a restriction according to which a confession made as a result of settlement could not be used in criminal proceedings following the general procedure unless there is the consent of the suspect or the accused in the event that the settlement proceedings fail.



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Custodial Punishment: An Effective Tool for Crime Prevention?

Criminologists have been wondering about the effects of making sentencing policies stricter or more lenient, of using custodial punishments more or less often for decades and decades. Traditionally, the rationales for sentencing an offender to imprisonment include retribution, rehabilitation, deterrence, and incapacitation. Retribution refers to the use of imprisonment as a form of punishment of the offender, a way of 'doing justice'. It is, strictly speaking, not a crime control strategy. Rehabilitation, on the other hand, aims at controlling crime through the treatment of offenders, while deterrence uses sanctions as a way of inhibiting the criminal activities of the offender ('special deterrence') or other potential offenders ('general deterrence'). Finally, incapacitation uses imprisonment as a way of isolating offenders from the rest of society so that they are unable to commit offences during their confinement.^{*1}

The effects of custodial punishments have been examined in a substantial body of empirical research, the best known examples of which are: Clarke (1974)^{*2}, Greenberg (1975)^{*3}, Shinnar and Shinnar (1975)^{*4}, Cohen (1982, 1983)^{*5}, Bernard and Ritti (1991)^{*6}, and Marvell and Moody, Jr. (1994).^{*7} But the research evidence suggests that estimates of the impact of collective incapacitation vary considerably from one study to another and depending on the severity of the policy. However, even a modest reduction in crime involves paying a heavy price in terms of increases in the prison population: a ten per cent decrease in crime typically requires a doubling of the prison population. Selective incapacitation promises a better tradeoff by targeting offenders who have high rates of offending. Such policies, however, punish offenders on the basis of prediction, an exercise heavily criticised on both technical and ethical grounds. The attractions of such policies are considerably diluted in light of the fact that the crime reduction benefits have been found to be much more modest than initially claimed and the rate of 'false positives' unacceptably high.^{*8}

¹ J. Chan. The Limits of Incapacitation As a Crime Control Strategy. – Crime and Justice 1995 (25), September, p. 1. Available at: [http://www.lawlink.nsw.gov.au/bocsar1.nsf/files/cjb25.pdf/\\$file/cjb25.pdf](http://www.lawlink.nsw.gov.au/bocsar1.nsf/files/cjb25.pdf/$file/cjb25.pdf) (20.03.2004).

² S. H. Clarke. Getting 'Em Out of Circulation: Does Incarceration of Juvenile Offenders Reduce Crime? – Journal of Criminal Law and Criminology 1974 (65), pp. 528–535 (Quoted in Cohen 1983.)

³ D. F. Greenberg. The Incapacitative Effect of Imprisonment: Some Estimates. – Law and Society Review 1975/9, pp. 541–80.

⁴ R. Shinnar, S. Shinnar. The Effect of the Criminal Justice System on the Control of Crime: A Quantitative Approach. – Law and Society Review 1975/9, pp. 581–611.

⁵ J. Cohen. Patterns of Adult Offending. PhD dissertation, Carnegie-Mellon University, 1982. (Quoted in Cohen 1983.). J. Cohen. Incapacitation As a Strategy for Crime Control: Possibilities and Pitfalls. – M. Tonry, N. Morris (eds.). Crime and Justice: An Annual Review of Research. Vol. 5. Chicago, University of Chicago Press 1983, pp. 1–84.

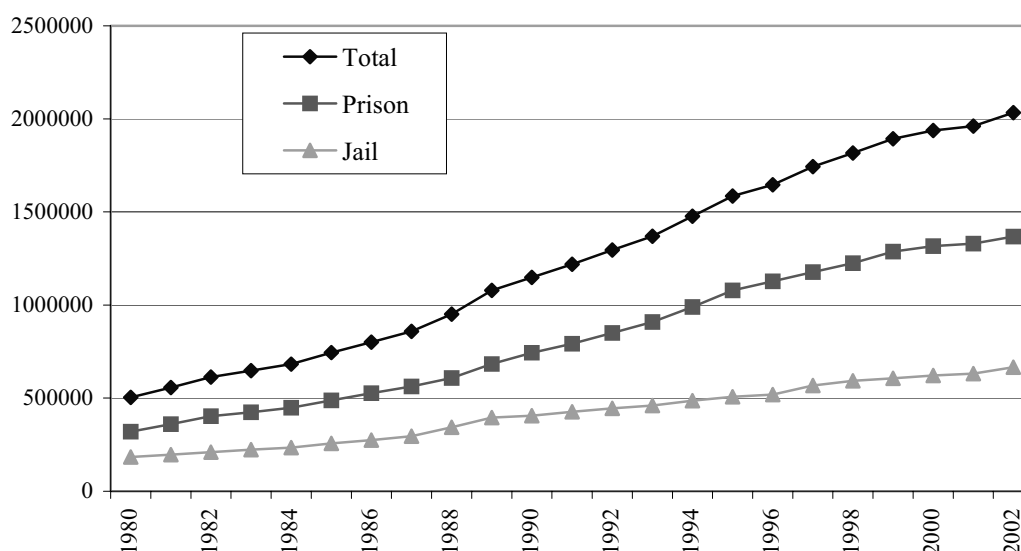
⁶ T. J. Bernard, R. R. Ritti. The Philadelphia Birth Cohort and Selective Incapacitation. – Journal of Research in Crime and Delinquency 1991 (28) 1, pp. 33–54.

⁷ T. B. Marvell, C. E. Moody, Jr. Prison Population Growth and Crime Reduction. – Journal of Quantitative Criminology 1994 (10) 2, pp. 109–140.

⁸ J. Chan (Note 1), p. 10.

Despite the already ample research on the topic, the ever-broadening use of imprisonment in the United States (see Chart 1) brings the issue to the forefront again and again. In Estonia, the issue has become especially attractive because of discussions about a trend in sentencing policies toward harsher punishments.^{*9}

Chart 1. Number of persons in custody in the USA.^{*10}



Concurrently with the increase in the number of persons in custody, the rate of property crime victimisation has been decreasing, and since the early 1990s, the rate of violent crime victimisation and the number of recorded violent and property crimes have been decreasing as well.^{*11} Of course, the correlation between the increasing imprisonment and decreasing crime rate in the USA has been used to advance the idea that increasing the severity of custodial punishment can be an effective crime prevention measure.

As we can see from Table 1, a decrease in crime rate is not as rare a phenomenon as could be expected from the daily news, which is more and more often full of reports about crimes. Table 1 shows that crime victimisation surveys have revealed that at the end of the 1990s, decreasing criminal victimisation rates were characteristic not only in the USA but for many other countries as well, among them Australia, Canada, Finland, France, the Netherlands, and Switzerland. The list of countries includes several countries with a prison population that is not increasing or is even decreasing (see Table 2).

In spite of the fact that there have been several arguments put forth to demonstrate that this concurrence of trends does not prove any causal relation between them, the idea that increasing the severity of custodial punishment can be an effective means of crime prevention has found new adherents in many countries, including Estonia.

Now let us take a look at the situation in Estonia to find out whether we can find in Estonia peculiarities that could suggest that increasing the severity of custodial punishment in Estonia could be more effective in crime prevention than the experience of other countries has been suggesting. We should try to analyse how repressive today's Estonian sentencing policy and practice are, and to figure out whether a further increase in repressiveness could have a great enough positive effect to overcome the negative consequences of the increase.

As of the end of 2003, there were 4352 persons in custody in Estonia, among them 219 women and 146 younger than 18 years old. Of these, 70.5% were serving their sentences and 29.5% were in pre-trial custody.^{*12} There are 340 prisoners per 100,000 inhabitants — the figure is six times higher than the corresponding figure for the Nordic countries.

⁹ See discussion *infra*.

¹⁰ Data from US Department of Justice, Office of Justice Programs, Bureau of Justice Statistics. Available at: <http://www.ojp.usdoj.gov/bjs/glance/corr2.htm> (25.02.2004).

¹¹ Data from US Department of Justice, Office of Justice Programs, Bureau of Justice Statistics Available at: <http://www.ojp.usdoj.gov/bjs/glance/viort.htm> and <http://www.ojp.usdoj.gov/bjs/glance/house2.htm> (25.02.2004); and from the Uniform Crime Reports 1983–2002. Available at: http://www.fbi.gov/ucr/cius_02/xl/02tbl01.xls (10.03.2004).

¹² Estonian Prison System Yearbook, 2002/2003. Tallinn 2003, pp. 18–21. Available at: http://www.just.ee/files/Vanglate_aastaraamat_2002-2003.pdf (10.04.2004).

Table 1. Trends in crime according to the data from four international criminal victimisation surveys: number of crimes experienced per 100 people in the sample.*¹³

	1988	1991	1995	1999
Australia	46.3	49.5	—	44↓
Belgium	27.5	27.7	—	29.7
Canada	41.7	44.8	38↓	33.9*↓
England & Wales	27.1	47.7↑	49.5	46.1
Finland ¹	20.7	28.5↑	25.5	24.1*↓
France	29.4	—	38.9↑	29.7↓
Netherlands	41.3	49.7↑	51.0	42.3↓
Sweden	—	31.2	38.1↑	39.4
Switzerland ²	21.3	—	36.3↑	18.4↓

¹ Estimates for Finland use statistics for theft from cars (2000).

² Estimates used are for crimes against property (2000).

↓ and ↑ indicate that the difference from the results of the *previous survey* is statistically significant (t-test, p<0.10).

↑ indicates an increase over the previous figure, while ↓ denotes a decrease.

* indicates, where appropriate, that the difference from the results of a survey in between is statistically significant (t-test, p<0.10).

Table 2. Total number incarcerated, rates per 100,000 population.*¹⁴

	1995	1997	1998	1999	2000
Australia	96.48	103.39	105.88	113.36	13.09
Belgium	73.31	85.37			
Canada	130.36	122.79	120.59	114.91	
England & Wales			125.37	122.47	23.14
Finland	63.59	55.18	55.27	53.73	58.74
France			92.20	90.38	87.34
Netherlands		88.49	74.90	75.14	73.96
Sweden	65.30	59.00	40.36	40.60	41.85
Switzerland	86.21	85.86	79.44	81.48	80.22

The dominant public opinion in Estonia is that sentencing has become too lenient to criminals over the course of the 90s. This opinion goes along with the belief that by making the sentencing policy harsher it is possible to achieve a significant decrease in criminal behaviour. As an example of these attitudes, the latest indicators of public opinion demonstrate that up to 85 per cent of the Estonian population support the idea that Estonia should reintroduce the death penalty.*¹⁵ These results cannot be taken as statistically relevant, because the sample was not random (it consisted of those who called in to a television discussion programme), but it still indicates that hope in harsher sentences as an effective tool for crime prevention is very high.

Becoming tougher on criminals is part of Estonia's official government policy today; the coalition agreement between the parties who support the incumbent government has a separate chapter on '[e]fficient penal policy corresponding to the public perception of justice', the main ideas are:

- stricter punishments for drug crimes (drug dealing), as well as for grave offences against the person: up to life imprisonment;
- stricter punishments for organised crime and imposition of criminal liability on the organiser of crime for the activities of the entire criminal organisation;

¹³ J. van Kesteren, P. Mayhew, P. Nieuwebeerta. Criminal Victimisation in Seventeen Industrialised Countries. Key findings from the 2000 International Crime Victims Survey. The Hague, WODC, 2001. Available at: http://www.minjust.nl:8080/b_organ/wodc/publications/08-icvs-h2.pdf (15.03.2004).

¹⁴ Data from the Seventh United Nations Survey on Crime Trends and the Operations of Criminal Justice Systems (1998–2000). Available at: http://www.unodc.org/pdf/crime/seventh_survey/567pvr.pdf (10.03.2004).

¹⁵ J. Saar, K.-M. Vaher. Kui vali olgu kord. – Eesti Päevaleht, 10.04.2004 (in Estonian). Available at: <http://www.epl.ee/artikkel.php?ID=262292> (10.04.2004).

- inclusion of an attack against persons performing legal protection duties (policemen, investigators, judges, and prosecutors) among aggravated forms of crime;
- stricter punishments for offences that substantially disturb public (illegal forest-cutting, desecration of objects of heritage conservation, sale of alcohol to minors, grave offences against public order, graffiti, etc.);
- a stricter penal policy that corresponds to public expectations in respect of drug dealing, crimes against the person, and recurrent grave offences;
- introduction of a penal practice according to which a short but effective punishment — *i.e.*, short-term imprisonment, detention, or community service — is imposed on first-time offenders; etc.^{*16}

The high attractiveness of stricter punishments among different segments of the Estonian population seems to indicate a high inertia in these attitudes, because, as indicated by Chart 2, the crime rate, which was increasing sharply in the 1990s, has been stable and even decreased since the year 2000. Therefore, it is not possible to assert that the felt need for stricter punishments arises from an increasing crime rate.

Chart 2. Number of recorded crimes in Estonia.^{*17}

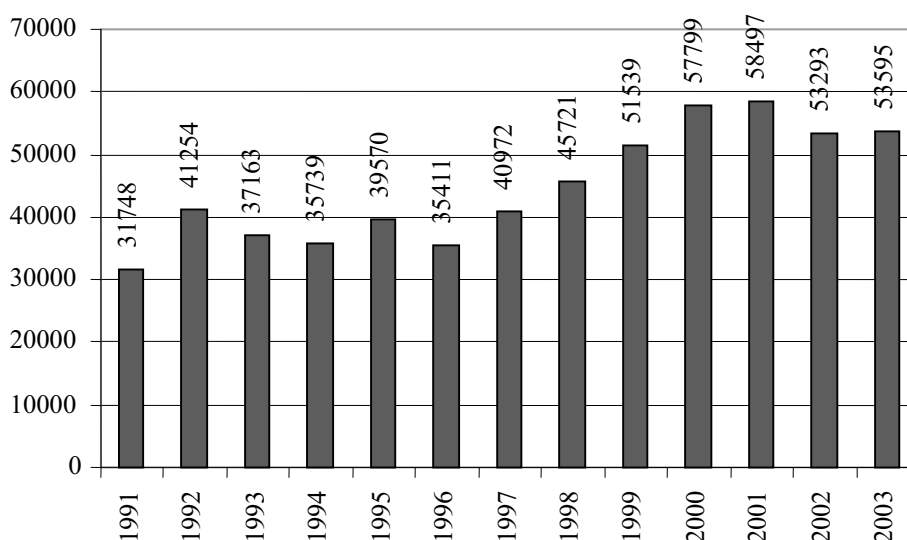


Table 3 shows us changes occurring in recent years in a commonplace indicator of the repressiveness of sentencing — namely, the number of persons in custody. As we can see, the changes have been insignificant and no clear trend of change has emerged. There is still one clear and indisputably positive tendency: the percentage of prisoners who are in pre-trial detention has dropped (from 40% in 1995 to less than 30% in 2002), and, at the same time, the percentage of prisoners who have already been convicted increased from 60% in 1995 to more than 60% in 2002.

The other statistical indicators do not give unanimous support to the idea of overly lenient sentencing either. Very much depends on which indicators to accord more authority. Supporters of the idea that sentences have become too lenient stress the importance of the proportion of persons sentenced to unconditional imprisonment among all convicted persons. And this indicator really gives a hint that the percentage of convicted persons who have been sentenced to imprisonment has been on the decrease (see Chart 3).

Compared to the proportion of unconditional imprisonment in the early 1990s (nearly 30%), the ratio has become much closer to 20 per cent. The decrease took place mostly in the early 1990s. For the years since 1993, it is impossible to confirm any clear tendency.

But the chart does not give the real picture of usage of custodial sentences. The chart does not include detention (short-term custodial sentences: before September 2002, up to three months and since 1 September 2004, up to 30 days). Detention was not widely employed in the early 1990s. Accordingly, in 1992 and 1993, there were only 67 and 122 persons sentenced to detention, respectively, but, *e.g.*, in 1999 and 2000, there were already 308 and 426 persons sentenced to detention, respectively (see the changes in percentages, Table 4).

¹⁶ Coalition Agreement between Union for the Republic — Res Publica, Estonian Reform Party and Estonian Peoples Union for the years 2003–2007. Available at: http://www.riik.ee/en/valitsus/3r_kalitsioon_eng.html (17.04.2004).

¹⁷ Data from the Estonian Police Board.

Table 3. Number of persons in Estonian prisons.*¹⁸

Number of prisoners by the end of the year (December 31)

	1995	1996	1997	1998	1999	2000	2001	2002	2003
Total number of persons in prisons	4224	4638	4790	4379	4712	4822	4783	4385	4352
In pre-trial detention	1671	1691	1540	1323	1639	1541	1505	1293	1355
Detention	8	8	20	16	13	11	0
Persons to be deported	25	50	29	21	20	8	8	2	2
Persons sentenced to death	5	13	10
Persons sentenced to life imprisonment	.	.	11	20	24	26	.	31	.
Convicted persons	2515	2876	3159	2999	3016	3236	3270	3059	3220
convicted women	54	69	101	108	113	126	138	129	133
convicted Estonians	1253	1345	1384	1289	1288	1372	1324	1231	1367
persons sentenced to imprisonment for the first time	1031	1212	1191	1008	942	857	817	702	733
persons sentenced to imprisonment for the second time	510	565	501	630	589	735	708	575	615
persons sentenced to imprisonment for third time	518	571	471	557	534	619	641	562	502
persons sentenced to imprisonment for fourth time or more	456	528	996	804	951	1025	1104	1220	1370

* In 2001, Ministry of Justice statistics included the persons serving the life sentence in the total number of persons serving prison sentence

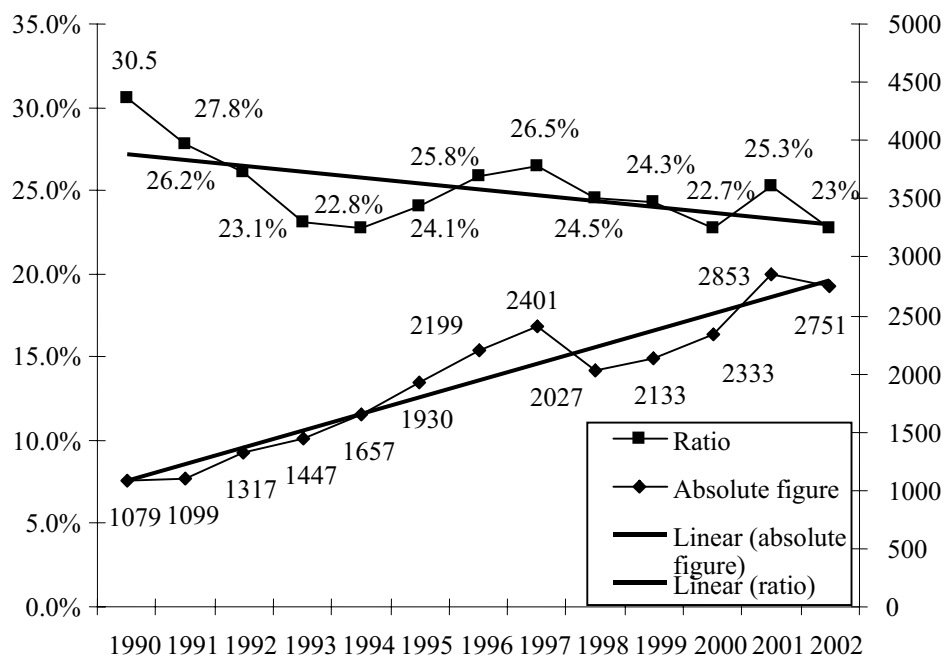
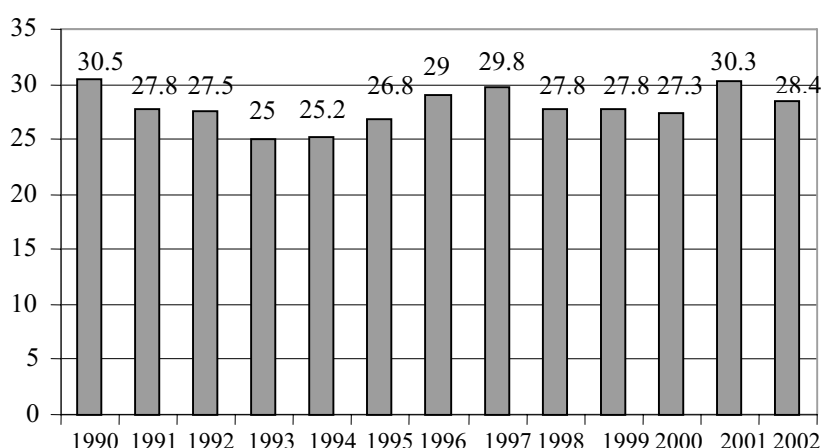
Chart 3. The percentage (the first scale) and absolute figure (the second scale) of persons sentenced to unconditional imprisonment.*¹⁹¹⁸ According to the data of the Statistical Office of Estonia. File: Social life. Activities of justice system. Persons incarcerated in penal institutions, 31 December. Available at: http://gatekeeper.stat.ee:8000/px-web.2001/I_Databas/Social_life/Social_life.asp (15.03.2004).¹⁹ According to the data of the Estonian Ministry of Justice.

Table 4. Percentages of different sentences types.^{*20}

	1990	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001	2002
Death penalty	0.00	0.03	0.02	0.06	0.03	0.00	0.05	0.04	—	—	—	—	—
Unconditional imprisonment	30.5	27.8	26.2	23.1	22.8	24.1	25.8	26.5	24.5	24.3	22.7	25.3	25.2
Detention	0.0	0.0	1.3	1.9	2.4	2.7	3.2	3.3	3.3	3.5	4.6	5.0	3.2
Fine	13.6	13.2	24.5	30.0	29.4	27.8	25.4	25.4	28.8	25.9	28.4	25.1	23.8
Conditional imprisonment	55.7	58.9	47.5	44.4	44.9	44.3	44.4	44.2	42.8	45.7	43.5	43.5	46.2

If we sum the imprisonment and detention figures, it will be clear that the changes in the ratio of custodial sentences to all sentences are statistically insignificant (see Chart 4). There was a certain amount of decline until 1994, when the proportion was only 25.2 per cent, but by 2001 it had increased and already become over 30 per cent.

Chart 4. Custodial sentences (imprisonment + detention) as a proportion of sentences.^{*21}

A very different impression can be gained if we measure repressiveness in terms of the total number of persons sentenced to unconditional imprisonment. This figure has increased by nearly three times (see Chart 3); if one takes into account detention as well, the increase is more than threefold (from 1079 cases in 1990 to 2853 imprisoned persons in 2001, with an additional 568 persons sentenced to detention).

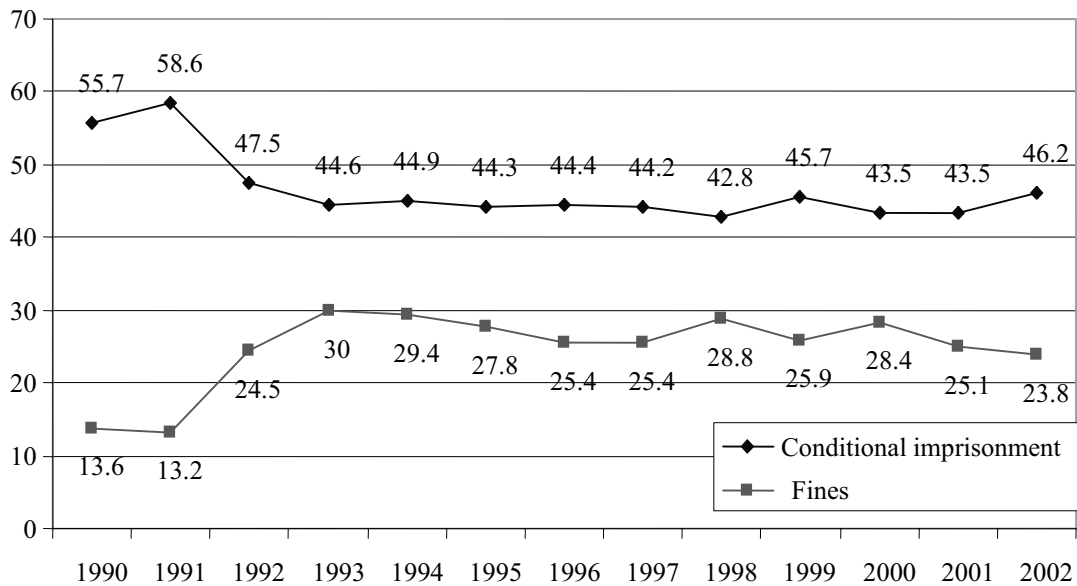
Undoubtedly, the sharp increase in the number of persons given custodial sentences disproves the assertion that it is self-evident that sentencing has become more lenient.

Here we should still not forget that the average prison sentence has become significantly shorter. The trend has quite closely followed the pattern of change of the ratio of unconditional imprisonment to all sentences. In the early 1990s, prison sentences rapidly became shorter and shorter (average term: 3.5 years in 1991 and only 2.4 as early as in 1993). Later, there was correction in a rebound toward longer sentences, and the most recent years have been characterised by a return to shorter sentences (2.1 years on average in 2002).

Looking at less repressive punishments reveals that significant changes occurred here as well in the early 1990s. The proportion of various kinds of conditional imprisonment declined from a 1991 high of 58.6 per cent to 44.6 per cent in 1993, and the proportion of fines increased in the same period, from 13.2 per cent to 30.0 per cent. After 1993, the proportions of these sentences have been reasonably stable. Only a slight decrease in the number of fines could be observed over the last few years (see Chart 5).

²⁰ According to the data of the Estonian Ministry of Justice.

²¹ According to the data of the Estonian Ministry of Justice.

Chart 5. Percentage of conditional imprisonment and fines.^{*22}

The ratio of unconditional imprisonment sentences varies significantly between different courts, from 0 in some courts in some years to 62 per cent in Järva County Court in 2002.

High volatility has characterised the sentencing practices of several courts; *e.g.*, in Võru County Court, 43.6 per cent of convicted persons were sentenced to unconditional imprisonment in 1996, but only 9.4 per cent in 2000, and the same figure for Rapla County Court was 10.6 per cent in 1995, then 31.6 in 1997 and back to 10.7 per cent in 2000.^{*23}

Generally, the Estonian trial courts can be divided into three clusters according to their sentencing practices. The first cluster consists of courts in the industrial region of North-Eastern Estonia (Ida-Viru County Court, Narva City Court, and Kohtla-Järve and Sillamäe City Courts, the latter two have now merged with the Ida-Viru County Court)^{*24} and of Harju County Court (a comparatively industrial county including the Estonian capital, Tallinn^{*25}). The courts in this group have the strictest sentencing policy: 30–40 per cent of all convicted persons are sentenced to unconditional imprisonment in these courts. The second cluster consists of the city courts, in particular Tartu and Pärnu City Court (now merged with the respective county courts), Tallinn City Court and Jõgeva County Court. The courts in the second cluster pass sentences in a relatively consistent manner, with 25 per cent of convicted persons being sentenced to unconditional imprisonment. The third cluster consists of all the other county courts (Saare, Valga, Lääne, Rapla, Pärnu, Viljandi, Tartu, Põlva, Võru, Lääne-Viru, and Järva County Courts). These counties can be characterised as predominantly agricultural counties. The courts in the third cluster are characterised by the most lenient sentencing, the percentage of convicted persons who are sentenced to unconditional imprisonment varying between 10 and 25 per cent. The sentencing of Hiiu County Court (now consolidated into Lääne County Court) was different from that of all the other courts. Hiiu County is Estonia's most agricultural county, on a secluded island with the country's lowest crime rate. In Hiiu County Court, only 10 per cent of convicted persons were sentenced to unconditional imprisonment. The differences between the sentencing policies of different courts can be given three different explanations. First, the difference may be the result of different sentencing policies of different judges. Such huge differences in sentencing policy between judges would, of course, be intolerable, and certain measures would clearly need to be taken in judicial training to address this. Most probably, this first cause is not the most important, and the sentencing policies of different judges do not differ to such an extent. The second explanation is that in the judicial districts of courts with harsher sentencing, only relatively severe cases reach the courts because the police are too busy due to the high crime rate and therefore have very little time to deal with less severe crimes, consequently allowing these to go ultimately unpunished and keeping the ratio of lesser penalties low (a less probable alternative to this expla-

²² According to the data of the Estonian Ministry of Justice.

²³ Certainly, the volatilities can be explained away in part by the peculiarities of certain atypical years, but still the peculiarities cannot justify the full scale of volatility.

²⁴ Ida-Viru County Court has become a member of this cluster mostly due to its high percentage of unconditional imprisonment sentences in recent years.

²⁵ The jurisdiction of the Harju County Court does not include the city, Tallinn.

nation is that the real structure of criminality is skewed in these judicial districts in favour of more serious crimes). The third and most likely explanation is that the social conditions in the various judicial districts are different and that therefore the probability of becoming a law-abiding citizen after being convicted of a crime differs accordingly. In the judicial districts of the courts having the harshest sentencing practices, the convicts may have, due to certain social conditions (high unemployment in certain social strata, higher profitability of criminal activities, etc.), a lower likelihood to engage in solely law-abiding behaviour after conviction, which could lead the courts to lean toward harsher sentences. The extent to which the sentencing differences can be accounted for by each of these three explanations needs additional research.

If we look at the dynamics of unconditional and conditional imprisonment sentences (see Chart 6), we can see that both types were decreasing significantly in the early 1990s (as mentioned earlier, the decrease was mostly explained by the increasing use of fines). But looking at unconditional prison sentences as a percentage of prison sentences (see Chart 7), anybody should be able to notice that the figure has been very stable. This percentage evidences one of the most stable characteristics of sentencing practice (fluctuating between 32.2 and 37.5 per cent).

Chart 6. Unconditional and conditional imprisonment as a percentage of sentences.^{*26}

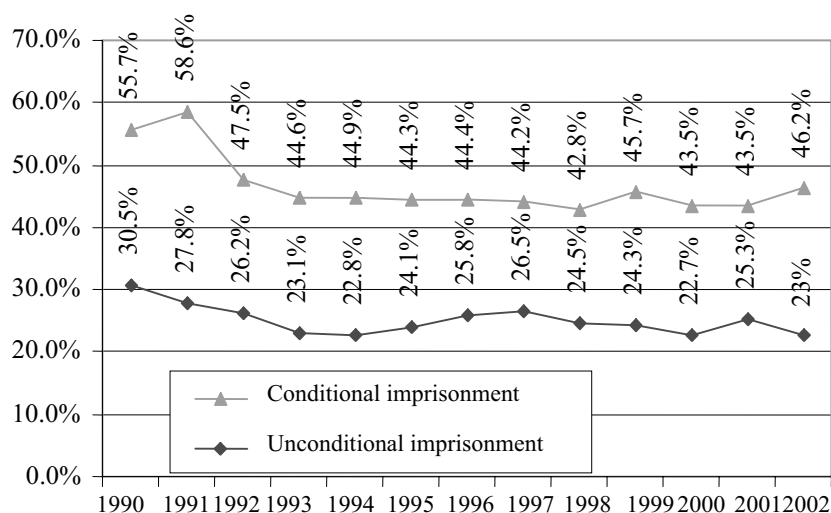
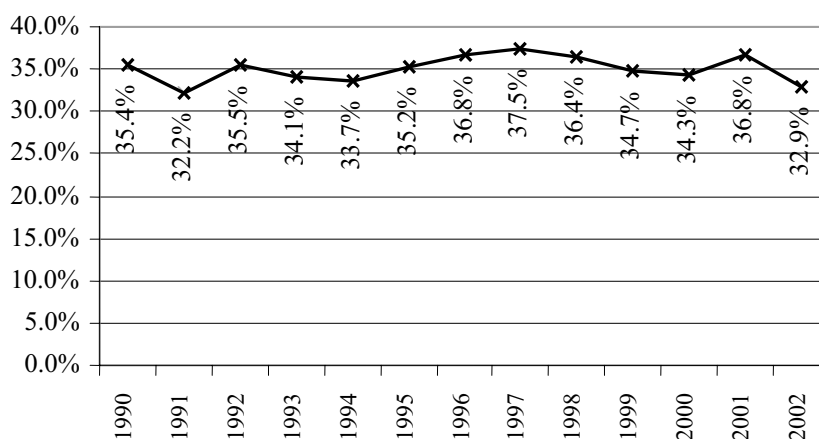


Chart 7. Unconditional imprisonment as a percentage of prison sentences.^{*27}



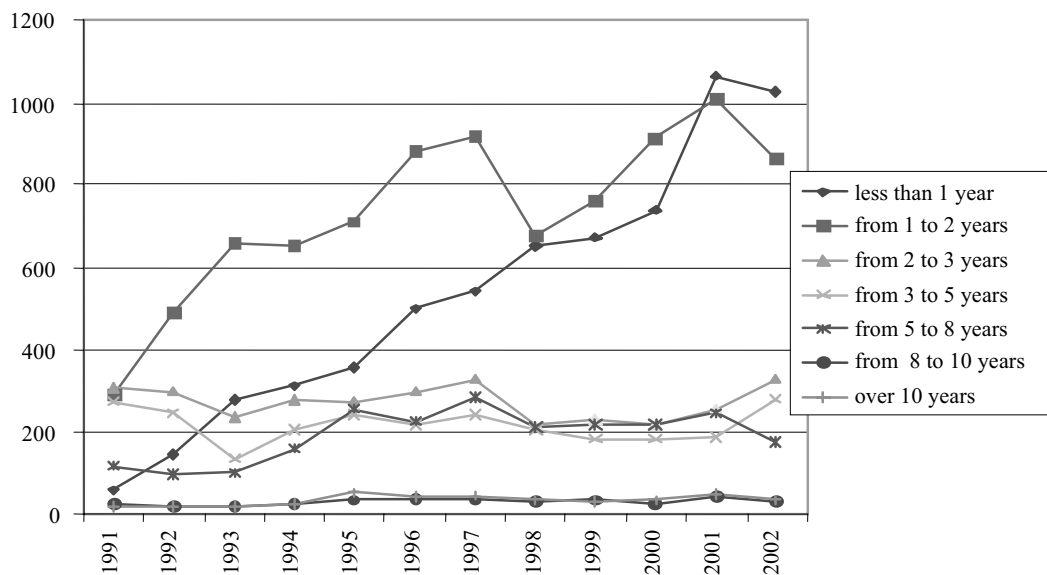
²⁶ According to the data of the Estonian Ministry of Justice.

²⁷ According to the data of the Estonian Ministry of Justice.

Detention has become a more and more common sentence; it was constantly increasing by percentage until 2001. But as 2002 saw the proportion of detention sentences to have actually decreased slightly, it may be expected that use of detention has already reached its peak and further significant increases should not be assumed.

The length of the average unconditional imprisonment sentence has shown a clear trend of becoming shorter and shorter. Especially noticeable is the increase of the absolute figure for unconditional imprisonment of less than one year: this figure has increased more than tenfold since 1991 (see Chart 8). Speaking in rough terms, one may assert that the increase in the number of unconditional prison sentences has occurred predominantly due to an increase in the total number sentenced to unconditional imprisonment for a term of less than one year.

Chart 8. Absolute figures for unconditional imprisonment for different terms.*²⁸



From Chart 9, we can see that the same tendency (a sharp increase in unconditional prison sentences for a term of less than one year) emerges if one conducts a comparative analysis of the dynamics of the percentages describing the use of unconditional prison sentences for different terms. Prison sentences for a term of less than one year have become the most frequently used form of unconditional imprisonment and have already exceeded the share of the previously dominant term, imprisonment for one to two years — in recent years, close to 40 per cent of all unconditional prison sentences have been for under a year. Large-scale use of short prison sentences is commonplace in many European countries, but it requires that the prisons in which short sentences are served be mostly free of elements of a strong criminal subculture. In Estonia, short prison sentences are served in new prisons but also in prisons with a long history of a strong criminal subculture. Therefore, the use of short prison sentences in Estonia merits further research, to establish whether short prison sentences should not be used so often until all the prisons in which short prison terms are to be served are for the most part free of strong elements of a criminal subculture.

Chart 10 clearly illustrates the trend for the average unconditional prison term to become shorter. While in the early 1990s the average unconditional prison term was *ca.* three years, by 2002 it was already only very slightly over two years. Again, this tendency is mostly explained by the increasing use of unconditional prison terms of under a year.

²⁸ According to the data of the Estonian Ministry of Justice.

Chart 9. Percentages of unconditional imprisonment for different terms.

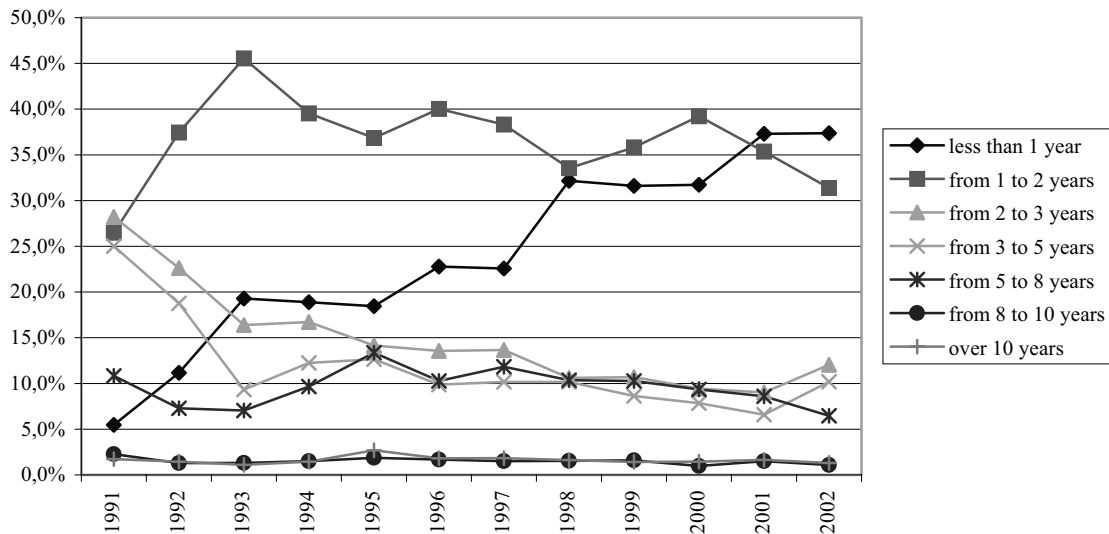
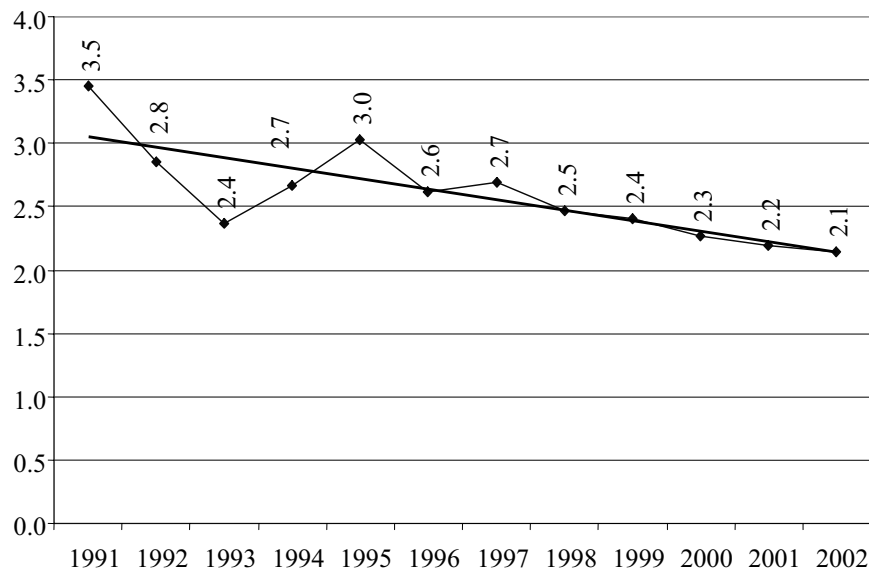


Chart 10. Average length of an unconditional prison sentence, in years.



Conclusions

Research evidence suggests that estimates of the impact of collective incapacitation vary considerably from one study to another and depend on the severity of the policy. However, even a modest reduction in crime involves paying a heavy price in terms of increases in the prison population. Selective incapacitation promises a better tradeoff by targeting offenders who have high rates of offending. Such policies, however, punish offenders on the basis of prediction and profiling, an exercise heavily criticised on both technical and ethical grounds. The attraction of such policies is considerably diluted by the fact that the crime reduction benefits were found to be much more modest than initially claimed and the rate of 'false positives' unacceptably high.

After considering these matters, we took a look at the situation in Estonia to find out whether we can find in Estonia peculiarities that could suggest that increasing the severity of custodial punishment might be a more

effective crime prevention measure than the experience of other countries has been suggesting. We also sought to determine whether further increases in repressiveness could have enough positive effects to overcome the negative consequences of such an increase.

It can be asserted that analyses of the dynamics of the sentencing practices of the years 1990–2002 indicate that the absolute figures for the use of unconditional custodial sentences have increased significantly (more than threefold). This tendency is undoubtedly partly grounded in the substantial (more than twofold) increase in the number of recorded crimes. For the most part, the increase in the absolute figures for unconditional prison sentences is accounted for by an increase in the absolute figures for unconditional imprisonment for a term of less than one year. The effects of widespread use of prison terms shorter than one year need further research.

There are significant differences between the sentencing practices of different courts. The reasons for the differences and the soundness of these need further research. The average unconditional prison sentence has become significantly shorter. In part, this can be explained by newly criminalised acts that are punished as a rule by imposition of unconditional prison terms shorter than one year (namely, repeated driving while intoxicated) and by the decreased use of long-term prison sentences.

This tendency brings our sentencing practices closer to the policies of the Nordic countries, in which the average unconditional prison term is still significantly shorter. The attempts to change Estonian sentencing policy in favour of harsher sentences may have some cause where certain crimes are concerned, but the research did not reveal substantiated grounds for a general increase in the repressiveness of sentencing policy.



Peep Pruks

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Iuridicum Database — Evaluations by Users of the Web Version of *Juridica*. On Publishing Legal Literature in Estonia (1992–2004)

A couple of years ago, we published an overview^{*1} of the Iuridicum database^{*2} to provide information about the database and its components: the *Juridica*, English summaries of the articles — *Juridica Abstract*, and the *Juridica International*, CVs of authors and the publications issued by the Iuridicum Foundation.^{*3}

The *Juridica* journal of the Faculty of Law of the University of Tartu^{*4} was started as a result of international scientific cooperation with the Faculty of Law and Financial Studies of Glasgow University in 1993. For Estonian jurists, the past decade has meant a reunion with the European legal area. The preparation of laws has extended from the translation of foreign provisions and their adaptation for Estonia to the creation, enactment and implementation of original solutions springing only from the specific situation in Estonia. Ideally, the adoption of a new Act should be followed by detailed comments in a publication. Such an undertaking, however, is limited by time and the large workload of the potential comment writers. *Juridica* has tried to fill this gap by addressing current problems in legal drafting, and it has provided the first theoretical and practical comments on issues arising in the implementation of many adopted Acts.

Issues discussed in *Juridica* are either entirely dedicated to a specific topic or cover different areas of law. Besides original articles, columns include information on events for Estonian lawyers, information on the activities of training centres and options for complementary training, information on professional associations, societies and institutions, and introduction of the most recent scientific and professional literature.

¹ P. Pruks. On the Iuridicum Database. — *Juridica International*, Vol. 7, 2002, pp. 176–180.

² The birthday of the Iuridicum database available on the Internet is 1 November 2001 when the demoversion of the database was first introduced to the public for examination and testing. See also P. Pruks. The Iuridicum Database: For Whom and Why? — *Juridica*, 2002, No. 4, pp. 268–274.

³ Besides were explained the principles and objectives of the database, and outlined the vision of the database makers. In addition, readers were provided with tips for better use of the database and first evaluations by users.

⁴ Available at: <http://www.iuridicum.ee/index.php?page=85>.

Through the years, *Juridica* has published articles introducing various aspects of the Tartu Law Faculty – scientific conferences, seminars, complementary training, competitions organised by funds, defending of Masters' and Doctors' theses, etc.

From the point of the temporal dimension of Estonian law culture, it must be admitted that *Juridica* has passed through only a brief section of time. At the same time, twelve years of the journal have brought us quite far: we have been able to build up a modern journal of legal science and reached a stable audience. At the first readers' conference of *Juridica*⁵, professor emeritus John P. Grant⁶ recollected in his Opening Address for Academic Legal Education in Estonia:

I remember vividly the heady, exciting post-communist days in Estonia. In all, I made 12 visits to Estonia between 1991 and 1994. ... The link was initially established with financial support from the British Council. That support was intended to foster academic links, involving such things as curriculum reform and teaching skills. Dean Erik Kergandberg, and later Dean Peep Pruks, and I set up a programme of exchanges of staff and teaching materials; the curriculum was reformed. Incidentally, I might say that I was summoned in 1992 to the British Council's headquarters in Manchester to be congratulated as the most successful academic link of the 24 the British Council then sponsored. I was immensely flattered until I was told that a not inconsiderable number of the links had achieved nothing at all. Some British universities had not even been able to make contact with their Eastern European partner.

The genesis of the *Juridica* represented a further development, in many senses the culmination, of the link between the law faculties. It is important for any legal profession to have a journal outlining legal developments and commenting on aspects of the law. Normally, the legal profession undertakes this task for itself, but that was not possible in 1992. To the great credit of the Tartu law faculty, it took the lead in establishing a law journal which, over the years, has done such outstanding service to all those in practice and in the academy. With the financial support of the Law Society of Scotland and the expertise of a renowned Scottish law publisher, David Fletcher, we published, ten years ago, a journal modelled roughly on the Law Society's own journal.

Juridica International, the English-language special edition of *Juridica* has been published once a year from 1996. Throughout the years, articles of *Juridica International* have provided an introduction of the Estonian legal system and its changes to the countries of the European Union, to which Estonia has acceded by now. More important topics have included the Constitution and European integration, fundamental personal rights and freedoms, the Civil Code and the Penal Code, and other key issues of the legal reform. *Juridica International* has established grounds for contacts with internationally acclaimed journals.⁷

Since 2001 special issues of *Juridica* in Estonian — Fundamental Rights in the Estonian Constitution (*Põhiõigused Eesti põhiseaduses*) by R. Alexy; 2002 Social Welfare as a Fundamental Right: Duties of the State, Local Governments, Family and Other Persons in Guaranteeing Constitutional Rights in the Sphere of Social Welfare (*Sotsiaaltoolekanne kui põhiõigus: Riigi, kohalike omavalitsuste, perekonna ja muude isikute kohustused põhiseaduslike õiguste tagamisel sotsiaaltoolekande valdkonnas*) by T. Annus and B. Aaviksoo, and 2003 *Erakonnaõigus*, are available.

In summary, the journal and its special editions have played an important role in the development of legal education and science in Estonia, offering the authors a good opportunity for discussion. Today's competitive legal education is based on science and can be established only on scientific research by lecturers. And *Juridica* has contributed much to that end. The journal has also been an important source of legal analyses and comments for Estonian jurists.

As from January 2002, the readers have had the opportunity to access the **Iuridicum database**⁸, which by today includes more than 2900 legal analyses, comments on adopted legislation and other pieces of legal information.

The database has been used more and more intensively.⁹ As of May 2002, there were 320 users of the network edition, a year later their number was 605 and **by May 2004, there were 786 registered users** (a growth of 2.45 times). Together with the paper edition, the number of registered users is presently around 1700. In fact, there are even more readers since presumably, editions subscribed to state institutions, libraries or law bureaus are read mostly by several persons.

⁵ On 7 June 2002 *Juridica* celebrated its tenth anniversary and the 90th issue of the journal appeared. *Juridica* has by now developed into a law journal for the entire Estonian community of lawyers and jurists.

⁶ Former Dean of Law, University of Glasgow, now professor of Lewis & Clark School of Law, Portland, Oregon, USA.

⁷ For instance, *Rechtstheorie* published an Estonian special edition *Gesetzgebung und Rechtspolitik* (available at: <http://www.duncker-humboldt.de/default.php?mnu=700&cmd=703&did=31348&clb=31348&ses=0&ses=0>) that was presented on 25 March 2002 in Tallinn. The special edition featured articles published in the framework of the international symposium Legislation and Legal Policy (Tartu, 2000).

⁸ Available at: <http://www.juridica.ee>.

⁹ In order to provide some background for the usage statistics, it must be pointed out that the number of active law experts in Estonia is supposedly 3500–4000.

A comparison of usage statistics over the last three years demonstrates that while the average number of accesses to the database was 3226 times daily in May 2002 and 6358 times daily in May 2003, the number had grown 2.35 times by May 2004, reaching 7567 daily accesses. The average number of database visitors was 106 persons daily in 2002; 192 persons daily in 2003 and 334 persons daily in May 2004 (a growth of 3.15 times).

Accesses to the database were made, on average per month, from 1300 computers in 2002, from 2300 computers in 2003 and 4100 computers in 2004 (a growth of 3.15 times). The volume of downloaded data per month has also grown more than three times during the previous period.

In summary, more than 2.14 million accesses to the database were made during the previous year.

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*. There are also links to the database from the webpages of the following universities:

Helsinki (<http://www.helsinki.fi/oik/kirjasto/oikeuslahteet.shtml>);

Uppsala (<http://www.ub.uu.se/>), click *Tidskrifter* (Journals);

Oslo (<http://wgate.bibsys.no/search/pub?lang=NAt>).

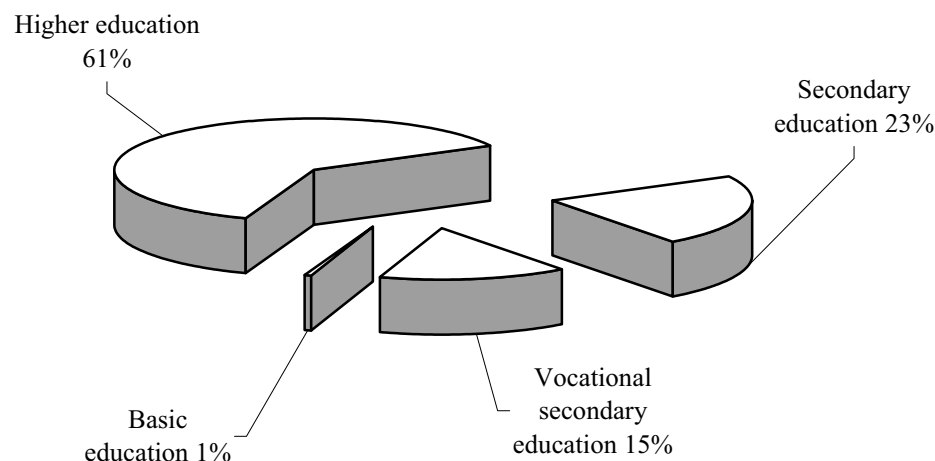
The editors of the journal have regularly analysed the readers' opinions and feedback concerning the published articles.^{*10} The information so collected is an appropriate source material for planning the future of the journal. For this overview, we were able to generalise the data of the last two years (May 2002 – May 2004). At this point, without any further focus on the numbers, let me give you a general picture of what the users of the web edition think about the journal in the year 2004.

1. Users

First, it would be interesting to provide some general information about the users of the web edition. Their education and the nature and field of their activity as well as position are some of the more important indicators pointed out here.

1.1. Education

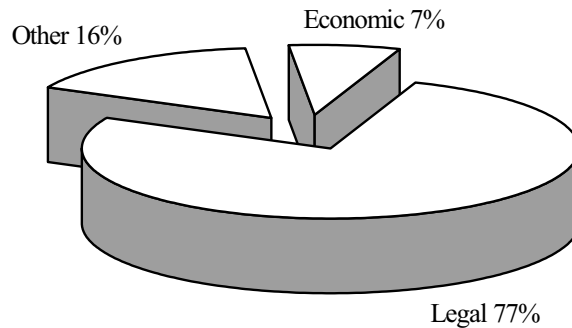
Out of the people who replied, 61 percent had a higher education, 38 percent had a secondary or secondary vocational education. The number of persons with only basic education remained marginal (1 percent). From year to year, those proportions have been more or less the same.



¹⁰ P. Pruks. Upcoming 100th Issue of *Juridica*: Evaluations by Users of the Web Version. – *Juridica*, 2003/4, pp. 281–287. The article outlined the user of the web version of *Juridica* and his or her opinions on the journal and its web version. The overview relied was compared with the results of a similar survey conducted last year.

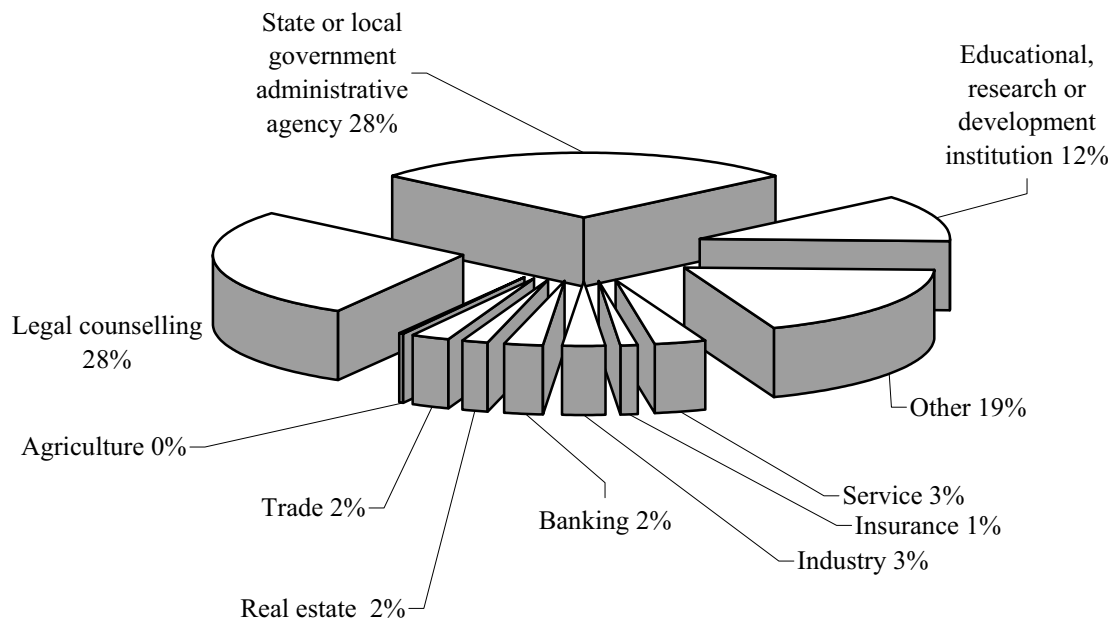
1.2. Nature of activity

In comparison with the year 2002, the number of readers whose activity was of economic character decreased two times (from 15 percent to 7 percent), and the number of readers who described their activity as 'other' increased by almost a similar amount. The number of people in the legal sphere has remained almost the same (75 percent in 2002).



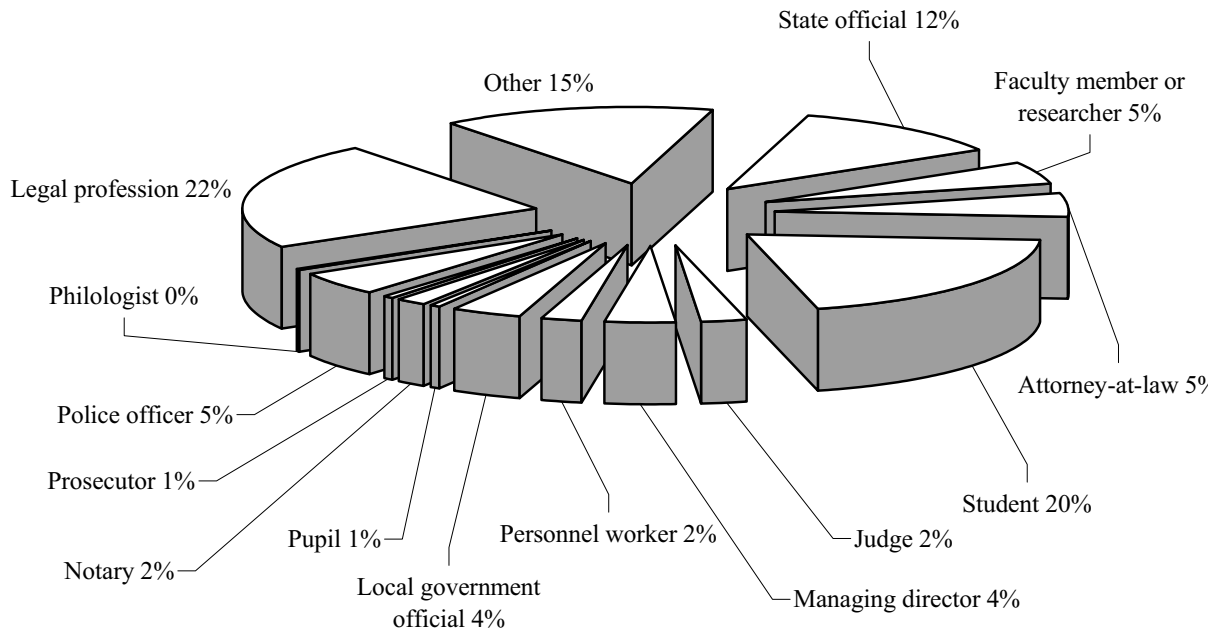
1.3. Field of activity

In comparison with other periods, the number of persons employed by state or local government institutions has increased remarkably (from 21 percent to 28 percent). The proportions of other users has remained the same since 2002. Here, an important role is played by legal advisers, who account for 28 percent of the users.



1.4. Occupation

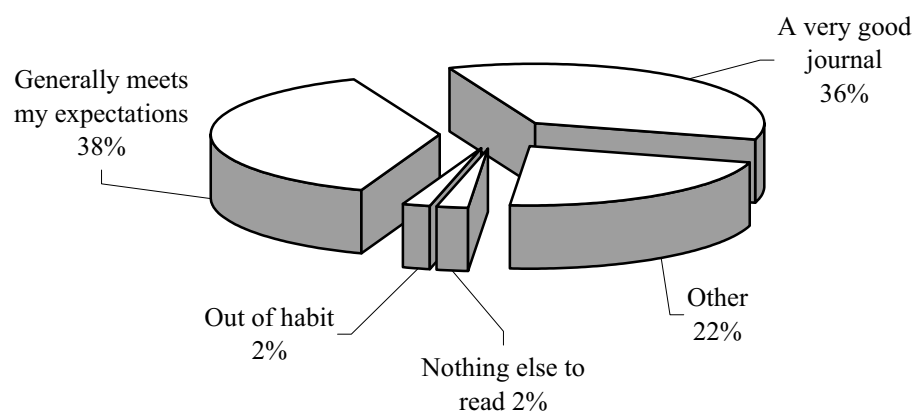
The proportion of students has increased remarkably, having grown 2.5 times since 2002 (from 8 percent to 20 percent).



2. Assessment of the *Juridica*

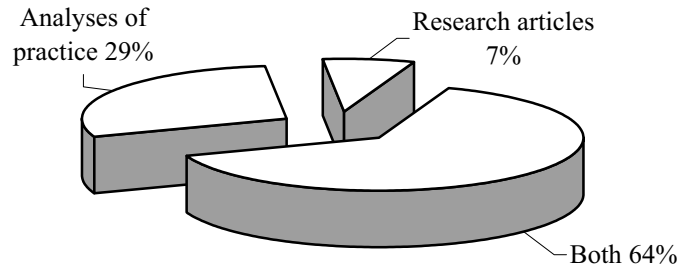
2.1. Why do I read *Juridica*?

The proportion of those readers who describe their preference of reading *Juridica* as 'other'. The proportion of all other reasons has decreased by one or two percent. Still, $\frac{3}{4}$ of the questionees are of the opinion that *Juridica* is a very good journal or at least a journal meeting their expectations.



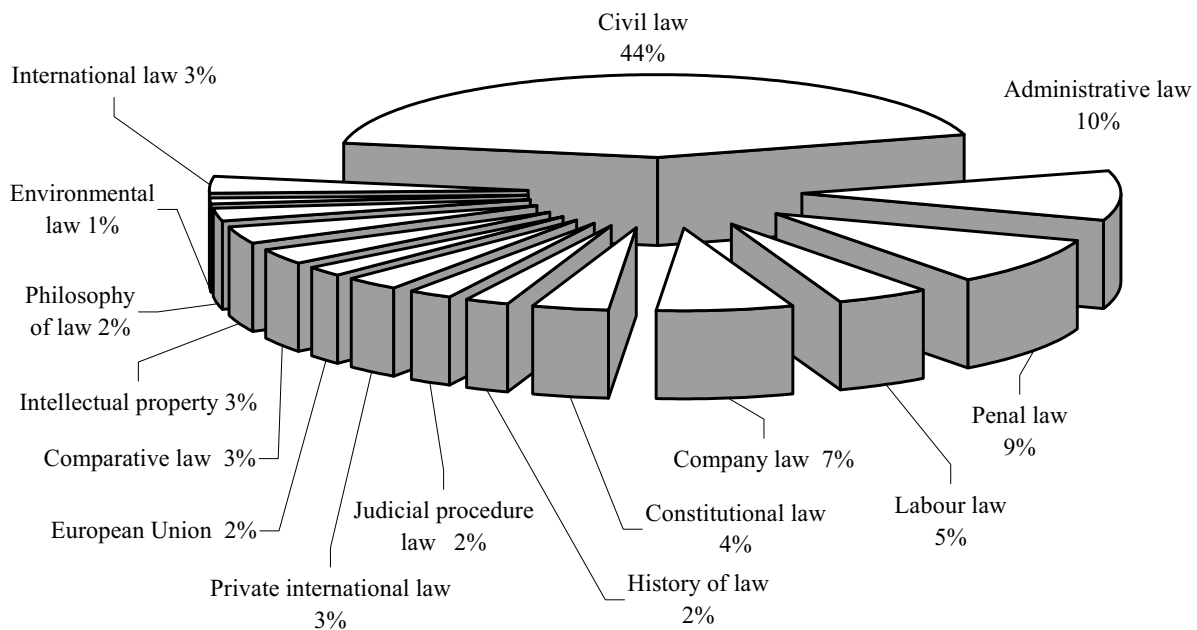
2.2. I would like to read more....

In comparison with the year 2002, the proportion of those users of the web edition who would like to read more analyses of legal practice has grown by 9 percent (from 20 percent to 29 percent). That position definitely deserves the attention of the board of editors in planning the future strategy of the journal.



2.3. Choose three main areas of law that you would like to read about in *Juridica*!

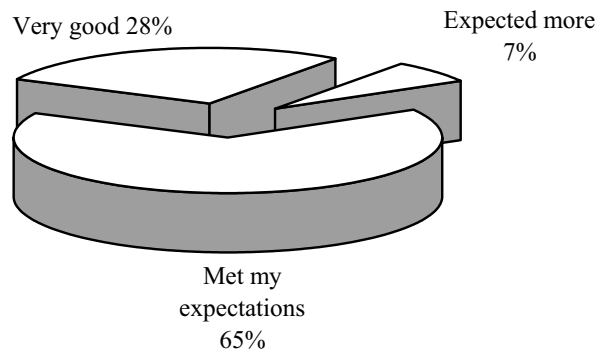
Since 2002, civil law has been by far the most preferred sector of law: such preference prevailed among 44 percent of the repliers. In 2002, civil law was also the first priority with 41-percent preference. Throughout the years, readers have also been given more preference to penal law, company law, procedure law, EU law and international law.



3. Assessment of *Juridica* electronic edition

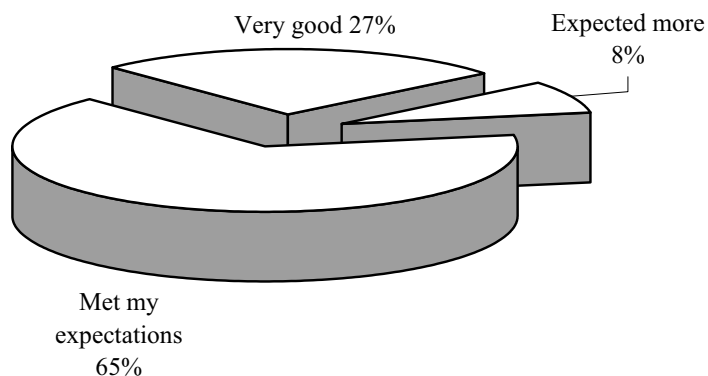
3.1. Search facility

By today, 28 percent of the repliers are of the opinion that the database search facility is very good. In that aspect, a substantial change has taken place during the past period (in 2002, only 18 percent considered the search facility to be very good). The proportion of scepticists has remained the same.



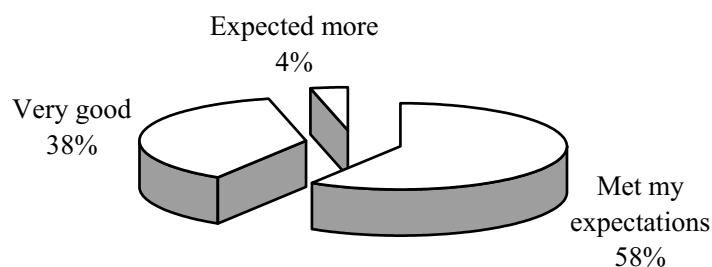
3.2. Keyword index

The proportion of those users who regard the keyword index as very good has grown by almost ten percent (in 2002, the percentage of those users was 19). At the same time, the percentage of those users who would expect more from the keyword index has decreased (that percentage was 12 in the year 2002).



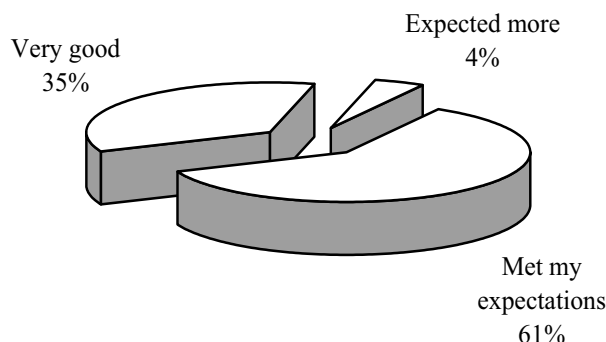
3.3. Ease of use

The number of those repliers who regarded the ease of use as very good has increased significantly (in 2002, the proportion of those users was 30 percent, thus there has been an 8-percent growth).



3.4. Overall assessment

Out of the repliers, 35 percent considered the network edition to be very good (32 percent in 2002), whereas the majority found that the database meets their expectations and only 4 percent of the repliers would expect more.



Subscriptions. Subscriptions to the paper and network editions of *Juridica* can be taken out throughout the year. The most preferred subscription option has been the paper edition with one username for the network edition, i.e. an annual subscription (10 issues) and free access to the full text of all annual volumes of *Juridica* for one calendar year. The full-text database is provided in the Estonian language^{*11}, majority of the texts are password-protected and accessible to the registered users only.^{*12} The subscription price is 1092 Estonian kroons (€ 70). In Estonia, the journal can also be subscribed via bank links (Hansapank, Eesti Ühispank). It is probably easiest to send a subscription notice to iurfond@online.ee or to

Iuridicum Foundation (Sihtasutus Iuridicum)
 Näituse 20
 50409 Tartu
 Estonia
 Fax: +372 737 5399.

All articles published in *Juridica International* are provided free of charge in the full-text database of the network edition.

Publishing Legal Literature

The re-established union between Estonian and European edifice of law has meant re-build-up (creation) of the legal system, considerable re-qualification of practicing lawyers and re-organization of legal education.

Professor John P. Grant recollects:

It became clear that academic links, excellent as they were, were not all that was needed for the Tartu Faculty of Law and for the development of Estonian law. What was needed was a law publishing programme, and British Council support was not available for publishing ventures. So, we sought, and received, financial support from other organisations: the Open Estonia Foundation, the Open University in Budapest and the Law Society of Scotland. All gave generously to initiate a publishing programme.

We began by translating standard law books into Estonian. In the early days, we translated books on business law and European Community law. A further development, in which I was personally involved, resulted in the publication of an *English/Estonian Law Glossary* and an English-Estonian student text on *English for Lawyers*. Then we realised that we would get nowhere without locally-produced law books and we encouraged law teachers and practitioners to produce books on Estonian law. The success of that is clear from the large and impressive catalogue of Estonian law books published in the last ten years.

¹¹ As from the publication of the first edition of the journal, English abstracts have been provided for all articles. Those abstracts are available in the Iuridicum database under *Juridica Abstract*.

¹² At the same time, a discount for students is available and it has been used extensively: presently, more than 300 students have been registered as users of the database.

Thus in publishing programme the Open Estonia Foundation (OEF)^{*13} has been a principal partner to the Law Faculty of the University of Tartu. To overcome the shortage of study aids for law students there have been four competitions in the framework of the OEF publication programme for getting textbooks and other educational materials. From 1994—1997 the number of projects presented to the competition was 79 all in all. The exact figures were the following: in 1994 — 26 projects; in 1995 — 19; in 1996 — 17; in 1997 — 17 projects respectively. During this period the committee has recommended to publish 44 textbooks or study aids. By the year 2000 the number of publications, most of them being the result of cooperation with the Faculty of Law, was 61, including textbooks, study aids, publications with comments, collections of articles and monographs. Some of the books have already been reprinted. The authors have also been from the Supreme Court, Ministry of Justice, Circuit Court of Tartu, other universities and higher educational institutions. The published books have mostly been meant for the students of the Faculty of Law. At the same time a considerable number of them has filled in the gap in the existing legal literature and these published materials have also been successfully used for the up-dating or supplementary courses taken by civil servants, advocates, judges, prosecutors, notaries public and other practicing lawyers.

From 1998 to 2003, the Iuridicum Foundation^{*14} published 19 items of printed material in cooperation with the Faculty of Law of the University of Tartu and with the Open Estonia Foundation.^{*15}

All the published materials have created an encouraging environment for the development of the legal thought and have established the basis for the contemporary study and scientific literature in Estonian.

Juura Publishing House^{*16}

Juura^{*17} is the best known and most recognised trademark among Estonian publishers of legal literature. The publishing house started its activities in 1992, publishing the law journal entitled *Eesti Jurist*.^{*18} In 1993, the first book — the collection entitled *Eesti Seadus* (Estonian Law) was published. Since then, the company has published almost 300 different items, including several new or revised editions.

The **mission** of the publishing house is to provide quality legal literature on the basis of Estonian market demand. Differently from other publishing houses^{*19}, which publish legal literature either randomly or in a limited range of topics or in limited form and nature, Juura is oriented only towards legal literature. The list of items is extensive: laws and codes, commented editions thereof, collections of judgments, educational literature, items on legal language (dictionaries, handbooks), the journal *Õiguskeel* ('Legal Language') and language textbooks for lawyers.

In the year 2002, the publishing house went through important changes: a new management was formed, the editorial board was created to advise the publishing house, and a new publishing programme was drawn up. A toll to the too large printing numbers during the previous years had to be paid. Extensive commented editions of the Estonian Constitution and the Penal Code were published. At the same time, the number of published items increased thanks to the re-launched programme of educational literature (50 percent of the annual published items). The sale of selected and timely published laws and codes was successful both in 2002 and 2003. The publishing of commented codes, educational literature, judgments of the Supreme Court as well as laws and codes will continue in the future.

Separate reference should be made to the publisher's long-standing cooperation with the Ministry of Justice as regards the series of translated textbooks, which have included textbooks on several private-law disciplines like the general part of civil law, the general and specific parts of the law of obligations, also property law, law of succession, civil procedure and civil enforcement proceedings. By today, translations of the following original textbooks have been published:

- Schwab, K. H., Prütting, H. Sachenrecht. Ein Studienbuch, 1995, (Verlag Beck, 1991)
- Köhler, H. BGB. Ein Studienbuch, 1998, (Verlag Beck, 1996)

¹³ OEF, founded in April 1990 with the support of Mr. George Soros, a well-known US billionaire and philanthropist, works to foster the development of an open society in Estonia. OEF helps to build the infrastructure and institutions necessary for an open society by supporting a broad array of programs in the fields of education, civil society, human rights and ethnic minorities, law, not-for-profit sector, arts and culture. As of today, the total amount of grants awarded by OEF exceeds more than 200 million Estonian kroons. See http://www.oef.org.ee/index_en.php?lang=en.

¹⁴ See a detailed information on Iuridicum at http://www.juridica.ee/introduction_en.php?intro=overview.

¹⁵ Available at: http://www.juridica.ee/introduction_en.php?intro=overview.

¹⁶ The following data originates from Lea Lumi, Director of the Juura publishing house, and the author is sincerely thankful for that information.

¹⁷ Available at: <http://www.juura.com>.

¹⁸ In 1995, the *Eesti Jurist* journal was merged with *Juridica*.

¹⁹ Of the better known names on the market of Estonian legal literature, reference should be made to Ilo and Käsiraamatute Kirjastus, whose publications are episodically complemented by those published by various private higher educational establishments.

- Schlechtriem, P. Schuldrecht. Allgemeiner Teil, 1999 (Verlag Mohr Siebeck, 1994)
- Schlechtriem, P. Schuldrecht. Besonderer Teil, 2000 (Verlag Mohr Siebeck, 1995)
- Lüderitz, Familienrecht (Beck, 1999)
- Paulus, G. Zivilprozessrecht: Erkenntnisverfahren und Zwangsvollstreckung, 2002 (Springer Verlag, 1996)
- Kühl, K. Strafrecht – Allgemeiner Teil, 2002 (Verlag Franz Vahlen – Beck, 1994)
- Oppermann, Th. Europarecht. Ein Studienbuch, 2002 (Verlag Beck, 1999)
- Brox, H. Erbrecht, 2003 (Carl Heymanns Verlag, 2001).

In the sector of public law, Hartmut Maurer's *Allgemeines Verwaltungsrecht* (Beck, 2002) will soon be published.

In 2003, the first original items in the English language were published both for the Estonian as well as foreign market: T. Kivi-Koskinen's *Industrial Property Rights as a Competitive Tool for Small and Medium-sized Enterprises. The Finnish Experience* (Tallinn, 2002) and J. Sanden's *Introduction to International Environmental Law* (Tallinn, 2003).

The printed material is distributed through a retail and wholesale network including 20–25 sale outlets and dealers all over Estonia, of which 3–5 outlets account for the major part. The wholesale network is well developed, cooperation with the dealers and sellers is smooth and operation is flexible: the shops and dealers are immediately notified of new publications, and evaluation copies are provided upon request. If sales have been below the desired volumes, the publications will not be left in the shops. An overview of the location of copies and the situation at the shops is ensured. The webpage, opened in 2002, provides information regarding the items on presale, new items and all other items.

Market demand has been as follows, listed according to priority: commented editions of legislation, textbooks, codes, judgments of the Supreme Court. Since Juura is a sector-specific publishing house, the clientele has been rather well-defined and homogeneous. A more detailed breakdown of preferences among various target groups would be as follows:

- State institutions: commented editions of legislation, textbooks, judgments of the Supreme Court, codes;
- County governments: commented editions of legislation, textbooks, codes, judgments of the Supreme Court;
- Cities and rural municipalities: commented editions of legislation, textbooks, codes;
- Courts: judgments of the Supreme Court, commented editions of legislation, textbooks;
- Higher educational establishments: textbooks, commented editions of legislation, codes;
- Libraries: commented editions of legislation, textbooks, codes, judgments of the Supreme Court
- Law bureaus: judgments of the Supreme Court, commented editions of legislation, codes, textbooks;
- Companies: commented editions of legislation, codes, textbooks, judgments of the Supreme Court;
- Bookshops: textbooks, commented editions of legislation, codes, judgments of the Supreme Court;
- Individuals: textbooks, codes, commented editions of legislation.

The proportion of non-educational libraries (the National Library of Estonia, county and city libraries) in the distribution is relatively low. Unfortunately, the same trend can be noticed even among the libraries of higher educational establishments. This is mainly due to the poor financial means of state institutions and, as regards private educational establishments, to the lecturer's passive interest in the book selection policies of the libraries, which is why collections of professional literature may be completed quite randomly, paying little regard to the actual need. Governments of rural municipalities, cities and counties keep a stable (although low) profile in purchases of legal literature.

The most diverse part is the business sector, which can be divided on the basis of purchases as follows: consultation companies 18 percent; manufacturing companies 30 percent; others 52 percent (including transport, real estate, banks, insurance companies). The sector itself is growing stably and its interests are focused on legal literature of practical value: comments as well as legislation.

Among the law sector, advocates' law offices account for 65 percent, law bureaus account for 25 percent, notaries for 8 percent and bailiffs for 2 percent of the purchases.

Students (both law students and students of other disciplines) account for 80 percent in the individuals sector. The growth among this group is apparent because of the webpage, where the number of subscriptions has increased well. For example, in the year 2002, the number of individual clients (mainly students) grew by approximately 50 percent.

All in all, the interest of all target groups in literature has increased, while the sale volumes depend largely on the price of the items published. Presales are a relatively good indicator for the publishing house, allowing the clients to acquire various items as economically as possible and allowing the publisher to have a better view of the market — to define the need as regards a specific publication.

Orientation towards specific target groups and the introduction of the system of pre-reviews (from 2003) can be regarded as values of the publishing house. The board of editors has established very high requirements on the publications in order to ensure the quality of the contents of publications.

In the coming years, the activities and market position of the publishing house will be affected by the growth of competition, a possible increase in prices of services and the need for higher royalties and salaries. Financial sources needed for investments may become scarce. It is inevitable to find various sources of support for the translation of legal literature, to develop the network of cooperation and feedback and to introduce an efficient client administration system and a new webpage.

Delays in preparing the authors' material are a serious risk factor (most of the work is left to one certain period of time, which is mostly summer). In order to reduce the risks, more attention must be paid to forming a team of appropriate competence, projects with different risk levels should be launched simultaneously, project resources should be planned with some reserve, new products, i.e. mainly legal literature intended for a wide audience, should be introduced to the market.^{*20} Whatever is done well by a publisher of quality literature will not damage but, rather, increase its reputation in the eyes of the reader.

²⁰ A good example would be U. Wesel's *Alles was Recht ist (Jura für Nicht-Juristen)*. Besides experts and students, the target group would include a wider audience, who are interested in law and who would be offered a publication presented in a manner which is well understandable to them.

Frequently used abbreviations

RT – Riigi Teataja — the State Gazette – RT

RTL – Riigi Teataja Lisa — the Appendix to the State Gazette – RTL

ÜNT – Ülemnõukogu Teataja — the Supreme Council Gazette – SCG

RKPJK – Riigikohtu põhiseaduslikkuse järelevalve kolleegium — Constitutional Review Chamber of the Supreme Court – CRCSC

RKHK – Riigikohtu halduskolleegium — Administrative Law Chamber of the Supreme Court – ALCSC

RKTK – Riigikohtu tsiviilkolleegium — Civil Chamber of the Supreme Court – CCSC

RKKK – Riigikohtu kriminaalkolleegium — Criminal Chamber of the Supreme Court – CCSC

o – otsus — decision – d

m – määrus — ruling – r