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Systematisation of Objective Law: From Codification to Reformation of Law

1. Context

On account of its historical development, the Estonian legal order belongs to the continental European legal tradition. Continental European legal culture knows three broad areas of law: private law, public law, and penal law. A legal provision is the fundamental unit of each of these areas of law. It is through the creation of provisions that the continental European legal culture has developed. Certain areas of reality are regulated by the rules contained in legal provisions. Life shows that the increasingly complicated nature of reality and the accompanying regulations creates a need for more and more new legal provisions. The apparent satisfaction of this need indeed brings about a positive result, the desired pattern of human behaviour at a certain level of quality. On the other hand, the drafting of legal provisions has its problems. Contradictions and repetition can occur in the building blocks of the legal order. The set of applicable provisions has a formal hierarchy that enables the creator of an upper-level provision not to look down, while the creator of a provision at a lower level of priority might not know or even consider looking upward at the higher provisions, and so on. In this way, even signs of disorder can appear instead of order.

2. What Estonia has to reckon with

What should be on the agenda in Estonia today when we speak about systematising the legal order? The idea of systematisation of legal provisions has deep roots in legal thinking. Simply said, the problem lies in finding the most adequate place for the various legal provisions in the sources of law. The point of departure should be knowing that we should not, and actually cannot, step outside the cultural arena to which we are accustomed. However, we do need to be able to perceive and take into account the qualitative developments that have taken place as legal culture as a whole develops, as well as the quantitative and qualitative changes specific to the Estonian legal order. The tasks of legal scientific research are to clarify the content of legal provisions on one hand and to systematise them on the other. Systematising objective law is not merely a technical task. Systematisation of legal provisions creates and develops the system of concepts that frames all legal thinking — including clarification of the content of legal provisions. In its final stage, systematisation

of objective law is an essential tool in implementing the rule of law as an idea in applied form. It is therefore not correct to reduce codification as a traditional element of systematising legal provisions to merely compiling a code from the different parts of a legal order or set of laws.

In considering the history of system teaching, it is impossible not to overlook the approach of F.C. von Savigny. According to von Savigny, a real scientific system is characterised by unity created by its inner harmony. It must contain general content and answer the common task of legal science and all legislation.*¹ Systematisation issues thus even have a philosophical nature.

Historically speaking, the key for systematisation of the current Estonian legal order — legal consistency — should be sought at the beginning of the second independence. It is related to the birth of the Constitution of the Republic of Estonia, of which the President of the Republic of Estonia said: ‘This principle was a directing and thought-organising companion both in the restoration of independence and in the creation of the legislation that came before the Constitution, as well as in the drafts submitted to the Constitutional Assembly. Legal consistency means not simply treating two separate legal systems as one whole [meaning the legal systems of different time periods and situations: that of 1918–1940 and that created since 1991] but also the lawful development of the legitimate legal order. Therefore, it is important to point out that the Constitutional Assembly did not have to start drafting the Constitution from scratch. Legal consistency requires theoretical consistency also. This conclusion becomes especially topical as we begin to give legal content to the organisation of the state as a member state of the European Union.’² In this context, it should also be clear that the legal consistency required for systematising legal provisions is not related merely to developments in the Estonian legal order. The sources of continental European legal culture can be found in ancient Roman law. In antiquity, the legal order was developed through and with the help of legislative drafting, and it holds examples and principles to which we can usefully refer today.

Systematisation is often formally arranged such that the necessary set of basic concepts is organised hierarchically.*³ Although this is a common picture of systematisation, it is one-sided, if not misleading. One has to distinguish between a legal order and a legal system. Order has always been and shall remain a phenomenon of the social exercise of power. Legislative power establishes legal provisions, which taken as a whole constitute the legal order. A system is something more than merely a legal organisation of power. Where a certain sphere of life is organised by legal provisions, this is achieved, ideally, through a rational articulation or systematisation of things. Figuratively speaking, things that essentially belong together are gathered under common titles, and an attempt is made to separate them from each other through attention to clear characteristics. And this is done for each area of life that is organised by law. Now we have not just separate organisations of power as such but groups of provisions organised by close intrinsic relationships. Systematisation is thus the tool or method of building a system from essentially uneven and irregularly linked provisions.

For the purposes of legal science, the main task of systematisation may be seen as involving a further organisation of a basic system of express illegal provisions. Organisation of the basic system does not arise from nothing. It is always based on some already established set of provisions, which of course need not be merely legal in nature. The new thus amends, supplements, or elaborates on the old. The aspects of reality so far unregulated by legal provisions form a totality, but changing some of them in whole or in part does not change the totality.*⁴ Systematisation also has its technical side: systematisation is a certain activity (consisting also of a set of activities) the rational core of which lies in seeing the links of certain things with other things. Where a need has been detected for further differentiation of the original provisions or an interest in so doing is evidenced, an attempt is made to this end, even to the point of changing the basic system.

¹ F.C. von Savigny. *Juristische Methodenlehre nach der Ausarbeitung des Jacob Grimms*. G. Wesenberg (Hrsg.). Stuttgart 1951, p. 15.

² A. Rüütel. *Mõned tagasisaadud põhiseaduse tulekule* (The birth of the Constitution in retrospect). – *Põhiseaduse tulek. Kogumik* (Birth of the Constitution. Compilation). Tallinn: Ministry of Justice 2002, pp. 9, 13 (in Estonian).

³ A. Aarnio. *Õiguse tõlgendamise teooria* (Theory of interpretation of law). Tallinn 2002, p. 224 (in Estonian).

⁴ The Finnish jurist A. Aarnio cites the example of the renewal of succession legislation in Finland in 1965. Several single institutions, such as the statutory share, initial tax withholding, and the will, were renewed then. Also, new institutions such as the successor’s right to support were introduced to the legislation. But many principles of the succession structure were maintained despite the changes. See A. Aarnio (Note 3), p. 225. This and other, similar examples suggest that the main task of systematisation in legal science is to further organise the basic system that is expressed in laws. It may happen that even new and previously alien concepts are introduced and associated in a way that the law itself does not know. The ongoing process of legal scientific systematisation continues the systematisation carried out by legislators. The level of systematisation is higher in the legal scientific system than in the ‘original system’ of law, which must precede it.

2.1. About systematisation work in Estonia

The development plan of the Ministry of Justice of the Republic of Estonia extending to 2005 cited as one of the main functions of the ministry the correspondence of laws to society's expectations. To that end, the development plan provided for preparations for co-ordinated codification plans.⁵ The document contained observations of the idea of, need for, and methods of codification, and recommendations on how to codify Estonian law. It was stressed that the main purpose of codification was to create legal certainty and clarity, by making it simpler for those applying the law to find the necessary regulation and providing a more general view of the applicable law. The purpose of codification was seen in the development plan as harmonisation of legal regulations, leading to a harmonised development of law as a whole. It is especially important to note that the context of codification was unambiguously tied to the continental European legal tradition. As noted above, the Estonian legal order is part of the continental European legal family, which is closely related to the most deeply rooted traditions of codification. While the document expressed the import of codification, it was admitted that at the time (2003), the main reform in different areas of law had already been or would soon be finalised and that creation of systematic bases of written law had been completed. In this undertaking, the focus has to be on the stability, clarity, and unambiguously of the legal order. At the same time, this does not mean that the functionality and system of the laws not yet systematised should be questioned. In view of the fact that many important legal acts have been adopted within a notably short span of time and have been in force for only a few years, codification work should concentrate on analysing the practical application of legal acts and the impact of regulation. In parallel with analytical work, a codification method should be found that suits Estonia's circumstances — provided that the need for codification as the systematisation of legislation is identified and relevant political decision is initiated. It seems that there is indeed a need for developing and applying a codification method that suits the Estonian situation.

3. About some bottlenecks

Estonian legal literature provides sufficient examples of bottlenecks, largely caused by the inadequacy of systematics. Supreme Court Justice V. Kõve sees the problem of extrajudicial settlement of civil disputes in Estonia as such an example. He concludes that there are several problems concerning the competence of the bodies that settle civil disputes extrajudicially. On the one hand, he sees the cause in the power of habit, but he also finds that the cause lies in the legislative's unwillingness to think more broadly about the prospect of administering justice in civil matters. He further admits that there is a radical difference between the relevant Estonian practice and the general practice of other European countries in introducing mediation proceedings.⁶ The problems are not eliminated by the solutions proposed in two relatively new pieces of legislation, the Court Code of Civil Procedure and the draft Code of Enforcement Procedure Application Act.⁷ On the approach of the fourth anniversary of the adoption of the Penal Code, P. Pikamäe analyses the issues of its birth and effectiveness. He writes: 'Based only on the text of the Penal Code, it must be admitted today, when four years will soon have passed from its adoption, that the two large parts of the Penal Code — the general part and the special part — are, unfortunately, unequal in their level of elaboration and quality. If we can say without exaggeration that the general part of the Penal Code was drafted with a high-level international team and that the extensive experience of Western European penal law (mainly German penal law) was available to the working group in setting out the institutions of the general part, the drafting of the special part of the Penal Code did not measure up to anything like this... In retrospect, some organisational mistakes have to be admitted in the preparation of the draft special part of the Penal Code. One of the shortcomings is the drafting of the special part on a chapter basis wherein a separate working group was set up to draft each chapter. Although common source principles were established before the chapters were drafted, the criminal policy approaches and general world views of the authors, as well as the selection of source texts, were sometimes so different that it became difficult due to a shortage of time to compose a coherent special part from the single chapters and conduct a thorough analysis of the submissions of the

⁵ It should be noted that the ministry is currently working on the basis of a development plan prepared at the end of 2003, which extends to 2007 and does not provide for codification and systematisation of legislative drafting as expressly as did what had been stated in the Ministry of Justice development plan for up to 2005. The change of the government coalition in 2005 brought about work on a new development plan. The author of this article was informed by the Minister of Justice's adviser H. Pevkur that ensuring the systematisation of the Estonian legal order is certainly among the ministry's priorities and that relevant guidelines will be included in the ministry's development plan.

⁶ V. Kõve. Tsiviilvaidluste kohtuväline lahendamine Eestis (Extrajudicial settlement of civil matters in Estonia). – *Juridica* 2005/3, pp. 152–166 (in Estonian).

⁷ *Ibid.*, p. 165.

working groups.”⁸ The Supreme Court of the Republic of Estonia has heard cases that, in my opinion, indicate that our legal order has systematisation errors. In one case, a solution was sought to a situation where objective law contained different legal consequences for essentially similar situations. Namely, § 81 (3) of the Penal Code provides that the statute of limitations for a misdemeanour is two years from the commission thereof before the entry into force of the corresponding judgement or decision. Section 160 of the Taxation Act, however, provides that a misdemeanour addressed in this chapter ‘expires’ after three years have passed between the commission thereof and the entry into force of the corresponding judgement or decision. The general part of the Penal Code apparently presumes its inherent provisions being concentrated in one place. Exceptions to the general part by way of other laws blur the regulation provided by the general part. Exceptions are possible, but an appropriate place has to be found for them. In this case, that place would be the General Part of the Penal Code Act. An example of this may be found in the case of competition offences: the exception was provided properly in the General Part of the Penal Code Act (while the general financial penalty applicable to a legal person is up to 50,000 krooni, the penalty for competition offences is up to 500,000 krooni). Another example concerns prohibition of driving a motor vehicle.⁹ In earlier law, the suspension of the right to drive (called ‘deprivation of the right to drive’) was a supplementary punishment applied for administrative offences. The Penal Code no longer provided for such supplementary punishment for misdemeanours. Still, clauses 41³ (1)–(8) of the Traffic Act provide for suspension of the right to drive pursuant to a decision on a misdemeanour matter that has entered into force. The Motor Vehicle Registration Centre implements the suspension within three days, and the suspension is obligatory. The system was rendered stricter by this change. Although the Supreme Court found that suspension of the right to drive on the grounds set forth in § 41 (3) 5) of the Traffic Act is not contrary to the *ne bis in idem* principle, this does not mean that all problems regarding suspension of the right to drive on such grounds were solved.¹⁰ Several issues have arisen in recent years’ judicial practice¹¹ that concern the mutual relationship between administrative proceedings and the potential administrative court procedure that follows, on one hand, and the infringement proceedings (criminal and misdemeanour proceedings), on the other. Supreme Court adviser J. Sarv writes: ‘For example, peculiar problems arise in a situation where the same circumstances of life come within the sphere of interest of administrative (court) procedure and criminal or misdemeanour proceedings.’¹² He further admits: ‘The possibility of a conflict of procedures is naturally characteristic not just of the mutual relations between administrative (court) proceedings and misdemeanour proceedings. Conflicts may also arise between the results of criminal and civil court proceedings or between those of civil and administrative court proceedings.’¹³ The author of this article agrees in part with Sarv, who believes the reason for the current situation to be that the ‘interpretation conflict between parallel proceedings is explained by the simple and inevitable fact that bodies carrying out proceedings independently from each other (courts in the final instance) may give different content to one legal provision or another’.¹⁴ It is true that bodies conducting proceedings independently from each other may give different content to legal provisions. But it is certainly an exaggeration to consider this situation inevitable. After all, before development of a real legal system, agreement has to be reached on the content of the concepts to be contained in it. Concepts have decisive meaning for each system. Recalling the teaching of von Savigny, we remember that it is important to know that each concept needs to have ‘legal reality’ and legal provisions can be organised into a single system only after the concepts have been clarified.¹⁵ Estonia’s membership in the EU also requires a co-ordinated codification plan. Namely, the judicial practice of the European Court of Justice is essentially case law, while analysis of the impact of legislation is crucial in the European Union context. And, naturally, the task of analysing the impact of legislation would be partly unfulfilled if it were not followed by specific activities to enhance the quality of legislation by various methods (such as simplification and/or codification). I would like to address the example of the Republic of Estonia’s golden share in AS Eesti Raudtee (the Estonian Railway Company). Given the practice of the European Court of Justice, there may be a problem of compliance with EC law in the case of the Republic of Estonia’s special rights in AS Eesti Raudtee.¹⁶ If the Republic of Estonia is not represented at the general meeting of the company, the

⁸ P. Pikamäe. Karistusseadustiku eriosa probleeme: õiguspoliitilised lahendused ja edasine areng (Issues of the Special Part of the Penal Code: legal policy solutions and further development). – *Juridica* 2005/2, p. 85 (in Estonian). The author of the article proposes potential further legal policy developments, while focusing on the content rather than the mode of action.

⁹ SCebd 3-3-1-69-03; ALCSd 3-4-1-10-04; SCebd 3-3-1-29-04. Available at: <http://www.nc.ee/> (in Estonian).

¹⁰ S. Lind. Mootorisõiduki juhtimise keelud Eesti õiguses (Prohibitions on driving a motor vehicle in Estonian law). – *Juridica* 2005/1, p. 50 (in Estonian).

¹¹ See, e.g., SCebd 3-1-1120-03; SCEbr 3-3-1-69-03; SPSCr 3-3-4-2-04. Available at: <http://www.nc.ee/> (in Estonian).

¹² J. Sarv. Mõningatest haldus(kohtu)menetluse ja süütoemenetluse paralleelsusega seotud probleemidest (About some problems of the parallel nature of administrative (court) proceedings and infringement proceedings). – *Juridica* 2005/5, p. 308 (in Estonian).

¹³ *Ibid.*, p. 310. See, e.g., CCSCd 3-21-41-05; CCSCd 3-2-1-14-04. Available at: <http://www.nc.ee/> (in Estonian).

¹⁴ *Ibid.*, p. 310.

¹⁵ F.C. von Savigny (Note 1), p. 37.

¹⁶ See I. Kuznetsov. Euroopa Ühenduse õiguse mõju kuldaktsiale Eestis (Impact of European Community law on the golden share in Estonia). – *Juridica* 2005/6, pp. 396–404 (in Estonian).

general meeting is not quorate in cases of certain issues. The Republic of Estonia holds a share of 34%, and according to articles 5.2.6 and 5.2.8 of the company's articles of association, certain decisions of the general meeting may be adopted only if all shareholders are represented. The articles of association do not specify any criteria or room for discretion for application of the state's veto. Therefore, it may be said that the golden share held by the Estonian state is discretionary and violates the principle of proportionality. The European Court of Justice has assessed such a situation in its decision in the *Commission v. France* case, said decision stating that this may inspire uncertainty in investors and convince potential stakeholders not to make an investment.^{*17} It is apparently good that codification results in a certain stability of the legal order as a whole. However, legal literature warns of the hidden dangers of codification. One of the dangers is a stoppage of the development of law (stagnation). I believe that codification or the related different methods of systematisation of the massive body of law cannot themselves prevent anything from being amended, added, or revoked in the future. Rather, the important question is what content should be given in Estonia today to the codification idea, which inherently belongs to continental European legal culture.^{*18}

4. Codification and legal literature

The problems of codifying legislation reached contemporary Estonian legal literature as an independent topic powerfully in the year 2001 when *Gesetzgebung und Rechtspolitik*, a special issue of the journal *Rechtstheorie*, was issued, mainly dedicated to the developments in the Estonian legal order after the country regained its independence in 1991. The foreword of the special issue, written by one of the publishers, Professor W. Krawietz was: 'Codierung und Kodifikation neuer Regelsysteme des Rechts — Zum Verhältnis von Gesetzgebung und Rechtspolitik Estland'.^{*19} But Estonian legal literature had tackled the issue before.^{*20} The current aspects of codifications were focused upon in the issue's articles by J. Laffranque, former secretary general for legislative drafting of the Ministry of Justice and now Supreme Court Justice, and E. Catta, technical advisor to the French higher codification committee.^{*21} The need for systematising the legal order is expressed differently depending on the phase of development of the state in question. The need is greater when the legal order has been developed over a great length of time and the body of law is large and even partly contradictory. Yet need may be great also when the legal order has not been developed over quite some time but, rather, emerged over a relatively short span of time, in an extensive burst of activity. Major qualitative and at the same time quantitative changes have taken place in the Estonian legal order over the past 15 years. If the issues of systematisation of law are not tackled in this situation in a serious and co-ordinated fashion, the consequences could be quite severe. Difficulties may arise in finding the necessary provision, but what is most important — the realisation of law in its immediate forms, as well as the mediated form of realisation of law (that is, application of law) — become much more complicated and problematic.^{*22} The author believes that such a situation now exists in Estonia.

¹⁷ C-483/99, *Commission v. France*, pp. 50–51, 53.

¹⁸ I am glad to note that at the XXVIII Estonian Jurists' Days, which took place on 22–23 October 2004 in Tartu, codification issues in the Estonian legal order were among the main issues discussed at the plenary meeting. Presentations were made by Jérôme Richard, head of the legal department of the local governments directorate of the French Ministry of the Interior, and the author of this article. The content of systematisation of Estonian law was discussed also at the legal chancellor's scientific conference on data protection on 13 May 2005 in Tallinn. One of the moderators of the conference was Minister of Justice of the Republic of Estonia R. Lang, who voiced his opinion, regarding data protection, that Estonia's problem lies in the discrepancy between three Estonian laws: the State Secrets Act, the Personal Data Protection Act, and the Public Information Act. These acts were analysed by different authorities. In an interview with the newspaper *Eesti Ekspress*, the minister answered the question: 'You want to also tackle personal data protection?' by saying that the problem existed and he needed to consult the minister of the interior on this matter. He added that the Constitutional Committee of the Riigikogu had to understand that dissemination of information is one of the most important issues of fundamental rights and freedoms. See Mina võitlen suure venna vastu (I Fight Big Brother). – *Eesti Ekspress*, 12 May 2005. The fact that Estonian lawyers' recent devotion of discussion to codification issues marked practically the first time practitioners have paid concerted attention to the matter since Estonia regained independence shows clearly that the Estonian legal order needs a systematising view and adequate models of action for further organisation.

¹⁹ See *Rechtstheorie. Sonderheft Estland. Gesetzgebung und Rechtspolitik*. Vol. 31. 2000. Book 3/4. Berlin: Duncker&Humblot VII–XII.

²⁰ See, e.g., M. Luts. Kodifikatsioon ja õigusreform (teoses Eesti kriminaalõiguse arenguteedest (Codification and legal report (in: On developments in Estonian criminal law). Tartu 1997, pp. 58–71 (in Estonian)), which treated codification in the traditional sense of the word and in a largely historical vein; H. Veinla. Codification of Environmental Law. Major Challenges and Options. – *Juridica International* 2000/5, pp. 58–68.

²¹ J. Laffranque. Õigusaktide kodifitseerimise tähendusest ja vajadusest (On the implications of and need for codification of legislation). – *Juridica* 2002/9, pp. 586–587 (in Estonian); E. Catta. Kodifitseerimise ja süstematiseerimise tähtsus õige seaduse leidmise lihtsustamisel (Implications of codification and systematisation for simplifying the finding of the right act). – *Juridica* 2002/9, pp. 588–592 (in Estonian).

²² Russian lawyers note with good reason that 'in circumstances of major change, during revolutionary reformation of the legal system when changes are undertaken in whole blocks of provisions regulating relations that have exhausted their function and need reformation, when a qualitatively new socio-economic system is created that objectively requires laws of a new quality, systematisation is pushed into the background. – A.S. Pigolkin. Seadusandluse süstematiseerimine (Systematisation of legislation). – *Obstaya teoria gosudarstva i prava. Akademitsseskii kurs*. Tom 2. Moskva: Teoria prava 1988, pp. 197–198.

It should be clear to us in Estonia that we have reached a stage of development in legal drafting where laws covering all essential areas of life have been adopted; some important laws are already ‘on the second round’. I support the idea of J. Laffranque: ‘Legal drafting should remain and, more than previously, become creation in both the Estonian and European Union context. Interest groups and researchers should be more involved, and more attention should be paid to the analysis of the potential effects of adopting a law; the implementation practice of the existing legal acts needs more analysis, and skills in clear and understandable legal writing need improvement.’ She adds: ‘Legal drafting stabilises as society stabilises. At the same time, constant developments occur in society, which the legal framework has to reckon with. Still, these additions and changes are not so cardinal as the drafting of new extensive laws is. There is thus an opportunity to take one’s time and review the work already done, **systematise**, and think about a unified approach’^{*23} (emphasis mine).

5. About codification methods

Systematisation of legislation is traditionally understood as four relatively independent activities, each with its own legal implications:

- 1) the activities of state agencies, enterprises, and other agencies and organisations in collecting sources of law and filing them according to a system — this form could be called ‘accounting for’ the sources of law;
- 2) preparation and publication of sets and bodies of different types of sources of law — this activity could be called ‘incorporation’;
- 3) gathering of different provisions and sets of provisions of the same quality into a single compilation — this activity could be called the ‘consolidation of law’; and
- 4) preparation and adoption of new sources of law — this is the codification of legislation.

Directly related to ‘accounting for’ sources of law are many important considerations accompanying the systematisation of law. These include the efficiency of the pre-project stage of legal drafting, the effectiveness of implementation of law, and why not also the legal educational element? It would be reasonable to follow certain principles when organising these activities. These are those of, firstly, the completeness of the body of information; secondly, the reliability of the information; and, thirdly, the convenience of use. It is clear that the most modern way of collecting sources of law pertains to computers and relevant computer programs. Incorporation is a constant activity of state agencies and other organisations for the purpose of supporting a ‘controlled status’ of the legal *corpus*, to supply the broadest range of subjects of law with the necessary information on objective (i.e., applicable) law.^{*24} The need for consolidation of law is related to the fact that, over time, a large quantity of regulatory documentation accumulates in the legal order, which is a similar object of legal regulation. The massive body of law thus developed often contains contradictions. Consolidation can be used to remove these contradictions. The source of law obtained by consolidation is usually approved by the legislative body of the state. It should be stated here that there is a wealth of practice in consolidation of law in the world. For example, in the UK dozens of acts are issued that combine pieces of legislation adopted by the parliament that are of the same kind. The British parliament even adopted a special law on the consolidation of statutory law at the end of the 19th century. The adoption of ‘codes’ each containing the existing regulatory provisions for a particular topic is also common practice in France.^{*25} The ‘French doctrine’ knows four ways of carrying out codification.^{*26} The first of these is reformatory codification (innovative codification); the second option is constant law codification; the third option is consolidation; and the fourth is compilation. Recasting of law is another option, used in the context of systematisation of European Union law. I believe that none of these methods of systematisation of the legal

²³ J. Laffranque (Note 21), p. 586.

²⁴ As a historical digression, probably the most remarkable act of codification in the history of law was the *Corpus Iuris Civilis* (528–534), the codification of Roman law by the emperor Justinian, which is not a code in the traditional sense of the word. Justinian did not intend to create a completely new set of laws. The code was a collection incorporating provisions of earlier imperial laws, including codes. It should be added that Digests were also only a summary of the work of the lawyers of the classical period of Roman law.

²⁵ Codification based on constant law has been in use in France since 1948, and 46 codes have been created in this manner. A higher codification committee has been in operation since 1989, headed by the French prime minister. The committee plans and co-ordinates the preparation of the codes by the ministries. The drafts are sent to the state council (*Conseil d’Etat*) before they are adopted by the parliament. As a rule, codification also means a parallelism of forms in France: he who is competent to establish a provision is competent also to codify it. – E. Catta (Note 21), p. 590.

²⁶ I am pointing out the French doctrine because the Ministry of Justice of the Republic of Estonia has pursued co-operation with French colleagues in the field of codification.

order should be disregarded. The question is that of where and to what extent any of these techniques should be used. For example, extensive use of the reformatory codification method is probably irrelevant to the Estonian situation. Although reformatory codification is attractive (because this is where new concepts are integrated, the area of law is reformulated, etc.), the formation of a qualitatively new legal order has been a separate activity from codification in Estonia, although this activity has been very extensive and naturally involved a new quality. What could be done here is that the method could be successfully used for taking into account judicial practice when amendments to objective law are introduced. I would like to add that reformatory codification is still just a vehicle of making larger or smaller changes in legal regulation, a vehicle of renewal. The scale of utilisation of the possibilities of constant law codification is much broader. Although constant or administrative codification of law does not create new law, it requires content analyses. It gives an overview of the existing situation and makes way for potential (necessary) reforms. The drawback of this method is that it disregards existing judicial practice. Perhaps reformatory and constant codification should be compared as the dynamic and static systematisation of the mass of law. The first method aspires to ideal regulation, while the second one maintains the regulations already stipulated in the sources of law. Consolidation was discussed above, and complication as a method of systematisation lies in grouping the sources of law without prior changes or proposed changes. Recasting is gaining ground in the European Union alongside codification. Recasting means that the content of pieces of legislation is changed to ensure their correspondence with the development of society, technology, and the economy. The author has information that the European Commission ordered a recasting programme for the year 2004. This method can be used both simultaneously with and after codification.

Of course, codification should not be based only on the experience of other countries, no matter how positive that experience may have been in the given country's context. But the experience still may be of use in other contexts and must be known.²⁷ It would be reasonable to create a competence centre in Estonia for systematising objective law. I made a proposal relevant to this in my presentation at the XXVIII Estonian Jurists' Days on 23 October 2004. I would like to refer again to the French case, where the higher codification committee is chaired by the prime minister. This clearly shows how highly systematisation of law is regarded in France. Perhaps a good institutional example is the situation in the Republic of Estonia's Ministry of Justice in 1940. The Ministry of Justice in 1940 consisted of a general department, a codification department including the editorial office of the *Riigi Teataja* (State Gazette), and the prison administration. Codification of law was one of the duties of the Ministry of Justice. Unfortunately, the Soviet occupation then ended the codification of Estonian laws that had started in 1935; only four volumes of the planned 15-volume set of laws had been published by June 1940. The harmonisation of Estonian, Latvian, and Lithuanian legislation was also disrupted.

6. Summary

A time has arrived in Estonia when codification work is not regarded merely as finding the right place for legal provisions. Rather, it is based on the conviction that a set of legal provisions can be subjected to common logic as regards both form and content. The systematisation of the legal order involves not only creating an order. Systematisation of the legal order has to be accompanied by a better (more adequate) image of the content of the legal order. Several methods of codification have been referred to above, each of them serving a somewhat different purpose. However, it may be said by way of generalisation that the most important task of codification in Western legal culture is the facilitation of legal reforms. Modern Estonian legal science has lacked the necessary discussion on codification work in the context of legal reform. But we are not hopelessly late yet.

²⁷ See, e.g., H.P. Glenn. *Legal Traditions of the World: Sustainable Diversity in Law*. Oxford 2000. Comparative knowledge is especially important for ensuring the dynamic development of transformation societies. For example, the Russian jurist V. Nersesiants writes: 'Different national legal systems and 'families of law' have their own specific concepts of the systematisation of the sources of applicable law, their own peculiarities and understandings of the methods and types of systematisation of various kinds of legislative acts.' – V. Nersesiants. *Obstaya teoria prava i gosudarstva*. Moskva 2001, p. 447.