Dear reader,

Most of the articles published in this issue of *Juridica International* focus on the problems of public law. The ever globalising world, international and European Union law as well as the objective, including economic, processes under way in society, increasingly affect the development of public law. This inevitably also brings about problems of a constitutional nature. Hence, § 1 of the Constitution of the Republic of Estonia Amendment Act is still topical and provokes discussion. It sets out that Estonia may belong to the European Union in accordance with the fundamental principles of the Constitution of the Republic of Estonia. What are the principles that cannot be sacrificed as a member of the European Union and that have to be considered when applying European Union law? These questions are addressed by Professor Raul Narits in his article 'About the Principles of the Constitution of the Republic of Estonia from the Perspective of Independent Statehood in Estonia'.

The whirl of reforms and changes can create a danger that the legislator loses touch with the Constitution and sacrifices values that make up the core of a democratic state based on the rule of law. Over the past years, it has become more and more topical in many countries, including Estonia, to transfer public functions to persons in private law. The main arguments stem from economic considerations as the state is no longer able to perform all the functions, from the need for an improved use of the knowledge and experience of the private sector, as well as from the economy of resources. This gives rise to a question about the constitutional limits and boundaries of transferring public functions. There are several problems of this kind that have also been brought before the Supreme Court. For example, in its judgment of 18 May 2008, the Supreme Court ruled that the delegation of an offence procedure and the related penal power of the state to a person in private law were unconstitutional. The Court established that the delegation of penal power to a legal person governed by private law was not only unconstitutional because of the failure to observe the requirement of legal reservation but the delegation of penal power to a legal person governed by private law was also in conflict with the requirement arising from the first sentence of § 3 (1) of the Constitution and the requirement arising from § 10 of the Constitution that state authority shall be exercised pursuant to the Constitution, i.e., the authority of the state cannot delegate the functions that it is obliged to perform, according to the spirit of the Constitution and which therefore form the core of the functions of the authority of the state, to a legal person governed by private law.

Considering the popularity of the topic, the Faculty of Law of the University of Tartu organised an international conference *Principles of and Experience in Transfer of Public Functions to the Private Sector* in Tartu, from 17 to 18 October. The conference and the publication of the related papers were supported by the Estonian Science Foundation, within the framework of grant No. 6464. The conference was also attended by outstanding German scholars in the field. The papers of the conference will also be published in this issue of *Juridica International*. In his paper, Professor Hartmut Maurer, of the University of Konstanz, discusses the constitutional boundaries of the privatisation of public functions in Germany; the paper by Professor Friedrich Schoch, from the University of Freiburg, is dedicated to the involvement of the private sector in maintaining law and order in Germany; Professor Franz-Ludwig Knemeyer, of Würzburg University, examines privatisation and modern self-governing enterprise in his paper. Of the presenters from Estonia, you can read the papers by Nele Parrest 'Constitutional Boundaries of Transfer of Public Functions to Private Sector in Estonia', Ene Andresen 'State Tasks of the Public Office of Notary — Belonging to the Domain of National or European Union Law' as well as by Kalle Merusk and Vallo Olle 'On Assignment of Local Government Tasks to the Private Sector in Estonia'.

We are hopeful that the readers come across fascinating and though-provoking ideas in these papers, and why not also solutions to the legal problems that have developed.

Kalle Merusk

Contents:

Hartmut Maurer

Prof. Dr.
Universität Konstanz

Die verfassungsrechtlichen Grenzen der Privatisierung in Deutschland

Gliederungsübersicht[*1]

1. Einleitung

Die Privatisierung der Staatsaufgaben wird seit einigen Jahrzehnten in der Staats- und Verwaltungsrechtslehre eingehend diskutiert und in der Praxis in vielfältiger Weise aufgenommen und umgesetzt. Sie erstreckt sich auf fast alle Verwaltungsbereiche und auf alle Verwaltungsebenen, auf die Ebene des Bundes, der Länder und der Kommunen.

Die Privatisierung wird aus unterschiedlichen Gründen und mit unterschiedlichen Zielen empfohlen oder sogar gefordert. Sie soll die ständig zunehmenden Verwaltungsaufgaben des Staates, insbesondere im Bereich der Daseinsvorsorge und der Leistungsverwaltung, reduzieren, den Verwaltungsapparat entlasten, finanzielle Kosten und Belastungen ersparen, die Sachkunde und die Leistungsfähigkeit privater Unternehmer nutzen und das bürgerschaftliche Engagement stärken. Sie stößt aber auch auf Kritik. So werden der Verlust an Staatlichkeit und der damit verbundenen Objektivität und Unabhängigkeit bedauert, die immer wieder hervorgehobenen ökonomischen und finanziellen Vorteile in Zweifel gezogen und darauf hingewiesen, dass die Privatisierung ihrerseits wieder eine Vielzahl von Rechtsnormen veranlasst und produziert. Das sind jedoch nur Einzelaspekte. Im Grunde geht es um das Verhältnis von Staat und Gesellschaft, – einerseits um die Grenzen zwischen diesen beiden Bereichen und anderseits um ihre Verbindung im Sinne der Kooperation.

Die rechtspolitischen Argumente sind hier nicht weiter zu erörtern. Ich habe mich vielmehr mit den verfassungsrechtlichen Grenzen der Privatisierung in Deutschland zu befassen. Sie können freilich nur dann genauer bestimmt werden, wenn Klarheit über den Begriff der Privatisierung im rechtlichen Sinn besteht. Denn die Grenzen lassen sich nur bestimmen, wenn das, was begrenzt ist oder begrenzt werden soll, inhaltlich feststeht, ganz abgesehen davon, dass die begriffliche Abgrenzung schon Hinweise auf die Grenzen selbst gibt.

Bei näherer Betrachtung zeigt sich bald, dass es nicht *die* Privatisierung, sondern unterschiedliche Typen und Formen der Privatisierung gibt, die zwar tendenziell in die gleiche Richtung zielen und die Verlagerung von

[1] Dieser Artikel wurde mit der Unterstützung von ESF Grant Nr. 6464 veröffentlicht.

Staatsaufgaben in den privatrechtlichen oder sogar den privatwirtschaftlichen Bereich bezwecken, aber doch noch erhebliche sachliche und rechtliche Unterschiede aufweisen.[*2]

2. Begriff und Arten der Privatisierung

Die überwiegende Lehre in Deutschland unterscheidet drei Arten der Privatisierung: (1) die Organisationsprivatisierung oder formelle Privatisierung, (2) die Erfüllungsprivatisierung oder funktionale Privatisierung und (3) die Aufgabenprivatisierung oder materielle Privatisierung.

2.1. Die Organisationsprivatisierung (formelle Privatisierung)

Sie liegt vor, wenn der Staat[*3] bestimmte Verwaltungsaufgaben nicht (mehr) in den Formen des öffentlichen Rechts, sondern in den Rechts- und Organisationsformen des Privatrechts wahrnimmt. Das ist vor allem dann der Fall, wenn er eine juristische Person des Privatrechts gründet und ihr die Erledigung der jeweiligen Aufgaben zuweist. So kann z. B. eine Gemeinde den Personennahverkehr durch eine Aktiengesellschaft (AG) oder die Tourist-Information durch eine Gesellschaft mit beschränkter Haftung (GmbH) betreiben, die – wie auch sonst im Wirtschaftsleben – nach privatwirtschaftlichen Grundsätzen und privatrechtlichen Regeln handeln. Diese Gesellschaften sind zwar rechtlich selbständig, bleiben aber an die staatliche Verwaltung gebunden, da sie als Träger der Gesellschaft in der Lage ist, diese zu beherrschen und maßgebenden Einfluss auf ihre Geschäftspolitik auszuüben. Genau betrachtet handelt es sich überhaupt nicht um eine Privatisierung, da keine Verlagerung in den gesellschaftlich-privaten Bereich, sondern nur ein Wechsel der rechtlichen Organisation und Formen stattfindet, der allerdings in den Bereich des Privatrechts führt.[*4]

2.2. Die Erfüllungsprivatisierung (funktionale Privatisierung)

Sie besteht darin, dass zwar die Zuständigkeit und die Verantwortung für die Erledigung von Verwaltungsaufgaben beim Verwaltungsträger verbleiben, aber die tatsächliche Erfüllung dieser Aufgaben teilweise oder sogar ganz auf Privatunternehmer übertragen wird.[*5] Die Übertragung erfolgt durch Vertrag, der den Auftrag konkretisiert und die gegenseitigen Pflichten und Rechte festlegt. Der auf diese Weise herangezogene Privatunternehmer, der in der Literatur „Verwaltungshelfer" genannt wird, kann je nach Ausgestaltung der vertraglich geregelten Beziehungen mehr oder weniger selbständig tätig werden. Nach außen tritt er in der Regel rechtlich nicht auf. Hoheitliche Befugnisse besitzt er nur ausnahmsweise, wenn er aufgrund eines Gesetzes dazu ermächtigt worden ist.[*6] Die Erfüllungsprivatisierung kann sich im konkreten Fall auf ein einzelnes Projekt, etwa die Reparatur einer Kanalisation oder die Planungsarbeiten für ein Neubaugebiet, beschränken, aber auch auf eine längerfristige Zusammenarbeit – etwa die Planung, den Bau, die Unterhaltung und die spätere Kontrolle einer Abfallbeseitigungsanlage – erstrecken. Die Zusammenarbeit von Verwaltung und Privatunternehmer im Rahmen der Erfüllungsprivatisierung hat in der letzten Zeit erheblich zugenommen. Sie wird in der Literatur und Rechtsprechung und neuerdings auch in der Gesetzgebung unter dem Stichwort Public Private Partnership (PPP) bzw. Öffentlich Private Partnerschaft (ÖPP) näher behandelt.[*7]

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2 Vgl. aus der neueren Literatur M. Burgi. Privatisierung. – J. Isensee, P. Kirchhof. Handbuch des Staatsrechts. Bd. IV. 3. Aufl. Müller 2006, § 75; *ders*., Privatisierung öffentlicher Aufgaben – Gestaltungsmöglichkeiten, Grenzen, Regelungsbedarf. – Gutachten D zum 67. Deutschen Juristentag 2008. C. H. Beck 2008; C. Gramm. Privatisierung und notwendige Staatsaufgaben. Duncker & Humblot 2001; M. Heintzen, A. Voßkule. Beteiligung Privater an der Wahrnehmung öffentlicher Aufgaben und staatliche Verantwortung. – VVDStRL 2003 (62), S. 220 ff., 266 ff.; J. A. Kämmerer. Privatisierung. Typologie, Determinanten, Rechtspraxis, Folgen. JusPubl 2001; F. Schoch. Privatisierung von Verwaltungsaufgaben. – DVBl. 1994, S. 962 ff.; *ders*., Rechtliche Steuerung der Privatisierung staatlicher Aufgaben. Jura 2008, S. 672 ff.; R. Stober. Privatisierung öffentlicher Aufgaben. – NJW 2008, S. 2301 ff.

3 Die Bezeichnung „Staat" wird hier im weiteren Sinne verstanden; er erfasst nicht nur den Staat im engeren Sinne (Bund und Länder), sondern auch die Gemeinden und die sonstigen öffentlich-rechtlichen Verwaltungsträger, soweit nichts anderes vermerkt ist.

4 Vgl. dazu etwa C. Gramm (FN 2), S. 110.

5 Grundlegend dazu M. Burgi. Funktionale Privatisierung und Verwaltungshilfe. Mohr Siebeck 1999.

6 Vgl. dazu unten 2.4 zur Beleihung.

7 Vgl. etwa H. Bauer. Verwaltungsrechtliche und verwaltungswissenschaftliche Aspekte der Gestaltung von Kooperationsverträgen bei Public Private Partnership. – DÖV 1998, S. 89 ff.; H. J. Bonk. Fortentwicklung des öffentlich-rechtlichen Vertrags unter besonderer Berücksichtigung der Public Private Partnerships. – DVBl. 2004, S. 141 ff.; P. Tettinger. Public Private Partnership, Möglichkeiten und Grenzen – ein Sachstandsbericht. – NWVBl. 2005, S. 1 ff.; H. Maurer. Fortentwicklung des Verwaltungsverfahrensrechts. – Festschrift für Püttner 2006, S. 49 ff.

2.3. Die Aufgabenprivatisierung (materielle Privatisierung)

Sie ist dann anzunehmen, wenn der Staat ganz auf eine bislang von ihm wahrgenommene Verwaltungsaufgabe verzichtet. Die Gründe können unterschiedlich sein. So ist es möglich, dass der Staat diese Aufgabe nunmehr für entbehrlich hält, dass er das öffentliche Interesse verneint oder dass er die Aufgabe bewusst dem gesellschaftlich-privatrechtlichen Bereich überlassen oder sogar zuschieben will in der Erwartung, dass die Aufgabe im freien wirtschaftlichen Wettbewerb besser, effektiver und kostengünstiger erledigt wird.

2.4. Sonderformen und Zwischengebilde

Die drei genannten Privatisierungsarten bilden eher idealtypische Grundmodelle. In der Praxis treten sie in zahlreichen Variationen und Verknüpfungen auf. Daher werden in der Literatur gelegentlich eine Reihe weiterer Privatisierungsformen genannt, die sich aber in Wirklichkeit meistens nur als Unterarten oder Zwischengebilde erweisen. So ist z.B. die sog. Verfahrensprivatisierung, die (nur) Teile des Verwaltungsverfahrens Privaten zuweist, etwa bestimmte Planungsabschnitte vor oder Qualitätskontrollen nach der behördlichen Genehmigung einer Anlage, der Erfüllungsprivatisierung zuzuordnen.[*8] Entsprechendes gilt für die sog. Finanzierungsprivatisierung, die die Finanzierung eines Vorhabens durch Private betrifft.[*9]

Eine Weiterentwicklung der Organisationsprivatisierung bildet die sog. *gemischt-wirtschaftliche Gesellschaft*. Sie liegt vor, wenn der Staat nicht alle Gesellschaftsanteile in der Hand hat (Eigengesellschaft), sondern weitere Gesellschafter beteiligt sind (Beteiligungsgesellschaft), und zwar entweder Verwaltungsträger (gemischt-öffentliche Gesellschaft) oder Private (gemischt-wirtschaftliche Gesellschaft). Die Einbeziehung Privater kann für beide Seiten attraktiv sein. Der Private erhält über seine Geschäftsanteile Mitsprache- oder sogar Mitentscheidungsrechte, der Staat kann die Sachkunde und die Erfahrungen der privaten Mitgesellschafter nutzen und durch deren Kapitaleinsatz die finanzielle Basis verbreitern. Insoweit nähert sich diese Alternative der funktionalen Privatisierung. Strukturell kann im Staatsanteil eine Organisationsprivatisierung und im Privatanteil eine materielle Privatisierung gesehen werden. Innerhalb der gemischt-wirtschaftlichen Gesellschaft kann es zwischen dem Staat und dem Privatunternehmer zu Spannungen kommen, da der Staat am Gemeinwohl orientiert ist, während die Privatunternehmer eher am Gewinn interessiert sind. Diese Spannungen sind im Wege der partnerschaftlichen Kooperation, erforderlichenfalls unter Ausnutzung der rechtlichen Einflussmöglichkeiten zu lösen. Die Gemeindeordnungen verlangen, dass die Gemeinden in den gemischt-wirtschaftlichen Gesellschaften, die öffentliche Einrichtungen betreiben (etwa Abfallbeseitigung, Verkehrsbetriebe usw.), einen beherrschenden Einfluss erhalten, sei es über die Mehrheit der Geschäftsanteile, sei es über gesellschaftsrechtliche Verträge.[*10] Ist das nicht (mehr) der Fall, besitzen sie nur noch eine Sperrminorität, mit der sie zwar gesellschaftliche Grundentscheidungen verhindern, aber nicht die laufende Geschäftsführung wirksam beeinflussen können.

Ein eigenständiger Typ stellt die sog. *Vermögens- oder Eigentumsprivatisierung* dar.[*11] Durch sie werden nicht Verwaltungsaufgaben, sondern Vermögensgegenstände an Private abgegeben. Sie erfolgt durch Übereignung von Grundstücken, Anlagen, Aktien, Kunstgegenstände usw. nach den Vorschriften des Zivilrechts, führt also zu einem Eigentumswechsel. Dementsprechend hat sie auch mehr haushaltsrechtliche als verwaltungsrechtliche Bedeutung. Ist die Übereignung erfolgt, dann ist die „Privatisierung" abgeschlossen. Sie kann aber auch in einem größeren privatisierungsrechtlichen Zusammenhang stehen, nämlich dann, wenn die Privatisierung in einer Stufenfolge verläuft, wenn z. B. ein Staatsunternehmen zunächst im Wege der Organisationsprivatisierung in eine Aktiengesellschaft umgewandelt wird und später im Wege der Aufgabenprivatisierung die Aktien am freien Markt veräußert werden. Beispiele bieten das Volkswagenwerk und die Telekom. Der Staat kann übrigens einen Teil der Aktien behalten und sich auf diese Weise einen gewissen Einfluss auf das Unternehmen sichern.[*12]

Schließlich ist in diesem Zusammenhang noch die sog. *Beleihung* zu erwähnen. In der Literatur wird sie zuweilen der Privatisierung zugerechnet. In Wirklichkeit ist sie jedoch grade umgekehrt das Gegenstück. Der Beliehene ist eine Privatperson (eine natürliche oder juristische Person des Privatrechts), der die Befugnis zur hoheitlichen Wahrnehmung bestimmter Verwaltungsaufgaben im eigenen Namen übertragen worden

[8] Richtig ist allerdings, dass die „Verfahrensprivatisierung" inzwischen sehr unterschiedliche Konstellationen erfasst, so dass eine Sammelbezeichnung nahe liegt, vgl. dazu näher J. Appel, Privatverfahren. – W. Hoffmann-Riem, E. Schmidt-Aßmann, A. Voßkuhle (Hrsg.). Grundlagen des Verwaltungsrechts. Bd. II. C. H. Beck 2008, § 32 Rn. 1 ff.

[9] Vgl. dazu J. A. Kämmerer (FN 2), S. 25, der auf weitere, in der Literatur genannte Grundtypen hinweist.

[10] Vgl. M. Burgi. Kommunalrecht. 2. Aufl. C. H. Beck 2008, § 17 Rn. 82 ff.; M.-E. Geis. Kommunalrecht. C. H. Beck 2008, § 16 Rn. 64.

[11] Vgl. dazu die Nachweise oben FN 2.

[12] So besitzt das Land Niedersachsen etwas mehr als 20 % am VW-Werk.

ist.*[13] Er wird also – im Rahmen der Beleihung – nicht privatrechtlich, sondern öffentlich-rechtlich tätig und hat insoweit die Stellung einer Behörde. Allerdings kann die Beleihung auch im Rahmen der (funktionalen) Privatisierung bedeutsam werden. Es kommt nämlich immer wieder vor, dass einem an sich nur intern und privatrechtlich tätig werdenden Verwaltungshelfer*[14] in beschränktem Umfang auch hoheitliche Aufgaben übertragen werden und er insoweit als „Beliehener" tätig wird. Das kann leicht zu einem Zirkelschluss führen: Der Privatisierung folgt in Teilbereichen die Beleihung und damit die Rückkehr zur hoheitlichen Tätigkeit!*[15]

3. Allgemeinen Bemerkungen zu den verfassungsrechtlichen Grenzen

3.1. Differenzierung nach Privatisierungsformen

Die Frage nach den Grenzen stellt sich bei den verschiedenen Formen der Privatisierung in unterschiedlicher Weise.

Bei der *formellen Privatisierung* geht es darum, ob sich der Staat (insbesondere die Kommunen) durch die Wahl privatrechtlicher Rechtsformen den an sich bestehenden öffentlich-rechtlichen Bindungen entziehen darf. Die Problematik wird dadurch gelöst oder zumindest entschärft, dass der Staat dann, wenn er Verwaltungsaufgaben – direkt oder über eine rechtlich selbständige Organisation – in der Form des Privatrechts wahrnimmt, an die Grundrechte, die sonstigen Verfassungsnormen, die allgemeinen Verwaltungsgrundsätze und die Kompetenzvorschriften gebunden ist. Ihm stehen zwar die privatrechtlichen Rechtsformen zur Verfügung, aber nur überlagert und modifiziert durch die vorrangig geltenden Vorschriften des öffentlichen Rechts.*[16] Er ist auch insoweit grundrechtsverpflichtet, nicht grundrechtsberechtigt. Daher kann er sich auch nicht auf die grundrechtlich gewährleistete Privatautonomie berufen.

Im Übrigen ist zu beachten, dass in den Bereichen, in denen die Verwaltung auf die Anwendung einseitiger hoheitlicher Zwangsmittel zur Durchsetzung ihrer Forderungen angewiesen ist, etwa im Bereich der Polizei oder der Steuerverwaltung, die privatrechtlichen Rechtsformen ohnehin nicht weiterführen.

Bei der *funktionalen Privatisierung* geht es um die Frage, ob und unter welchen Voraussetzungen die Verwaltung private Unternehmer in den tatsächlichen Vollzug der ihr obliegenden Verwaltungsaufgaben einbeziehen darf. Grundsätzlich bestehen keine rechtlichen Bedenken, wenn sie bestimmte Tatbeiträge, etwa das Abschleppen verkehrswidrig parkender Kraftfahrzeuge, die Errichtung einer Abwasseranlage usw., nicht selbst erbringt, sondern privaten Unternehmern als sog. Verwaltungshelfer überträgt. Erforderlich ist nur, dass sie die ordnungsgemäße Erledigung der Verwaltungshilfe sicherstellt, indem sie nicht nur fachkundige, leistungsfähige und zuverlässige Unternehmer auswählt, sondern dann auch ihre Tätigkeit überwacht und ggf. eingreift.*[17] Da in der Regel mehrere Bewerber auftreten, spielt die Auswahl eine erhebliche Rolle, nicht nur für die Verwaltung, die einen qualifizierten Unternehmer sucht, sondern auch für die Bewerber, die an einem solchen Auftrag aus wirtschaftlichen Gründen interessiert sind. Das führt in den Bereich des Vergaberechts, der sich aufgrund europarechtlicher Vorgaben als neues Rechtsgebiet herausgebildet hat. Es wird für größerer Projekte verfahrensrechtlich und materiell-rechtlich durch das Kartellvergaberecht (§§ 97 ff. GWB) ausreichend geregelt, während für die übrigen Projekte nach wie vor nur haushaltsrechtliche Vorschriften bestehen, die insoweit noch erhebliche Lücken und Defizite aufweisen, über den Gleichheitssatz (Art. 3 I GG) aber doch noch gewisse Konturen erlangen.*[18]

Die *materielle Privatisierung*, die Verlagerung von Verwaltungsaufgaben auf den wirtschaftlich-gesellschaftlichen Bereich, ist die eigentliche Form der Privatisierung und auch meistens gemeint, wenn allgemein und undifferenziert von der „Privatisierung" gesprochen wird. Sie führt zu der Frage, ob und inwieweit der Staat

[13] Vgl. dazu etwa M. Burgi. Der Beliehene – Ein Klassiker im modernen Verwaltungsrecht. – Festschrift für Maurer. C. H. Beck 2001, S. 581 ff.; U. Steiner. Neues vom Beliehenen. – Festschrift für R. Schmidt 2006, S. 293 ff.; B. Schmidt am Busch. Die Beleihung: Ein Rechtsinstitut im Wandel. – DÖV 2007, S. 533 ff.; F. Kirchhof. Die Rechtsinstitute von Verwaltungshilfe und Beleihung im Sog zunehmender funktionaler Privatisierung. – Festschrift für Rengeling 2008, S. 127 ff.

[14] Vgl. zum Verwaltungshelfer oben 2.3.

[15] Die Deutsche Post ist zwar privatisiert und seitdem eine Aktiengesellschaft, aber gem. § 33 I PostG als „beliehener Unternehmer" zur förmlichen Zustellung amtlicher Schriftstücke verpflichtet.

[16] Vgl. dazu K. Stern. Staatsrecht. Bd. III 1. C. H. Beck 1988, S. 1394 ff.; K. Hesse. Grundzüge des Verfassungsrechts. 20. Aufl. Müller 1995, Rn. 346 ff.; H. Dreier. Grundgesetz. Bd. I. 2. Aufl. Mohr 2004, Art. 1 III Rn. 65 ff.; ferner aus der Rechtsprechung BGHZ 52, 325, 328; 91, 84, 96 f.; 155, 166, 175 f.

[17] Vgl. dazu H. Maurer (FN 7), S. 49 ff. unter Hinweis auf einen Entwurf zur Ergänzung des Verwaltungsverfahrensgesetzes.

[18] Vgl. zum Vergaberecht J. Pietzcker. Die Zweiteilung des Vergaberechts. Nomos 2001; R. Pitschas, J. Ziekow (Hrsg.). Vergaberecht im Wandel. Dunckler & Humblot 2006; J. Lux. Einführung in das Vergaberecht. – JuS 2006, S. 969 ff.

befugt ist, bislang wahrgenommene Aufgaben oder Aufgabenfelder dem privatrechtlichen Bereich zu übertragen oder zu überlassen. Diese Frage soll im Folgenden eingehender behandelt werden.*[19]

3.2. Weitere Differenzierungen

Vorweg ist noch zu bemerken, dass die Privatisierung in allen diesen Fällen, insbesondere im dritten Fall, nicht isoliert und eindimensional gesehen werden darf, sondern in ihren größeren Zusammenhängen mit ihren Alternativen betrachtet und beurteilt werden muss.

Zunächst ist zu unterscheiden zwischen der Privatisierung als Vorgang und Verfahrensakt und der Privatisierung als Rechtsänderung, die die zu einer neuen Rechtslage führt. Beide bedingen sich gegenseitig, unterscheiden sich aber durch Form und Inhalt, nach Weg und Ziel. Bei der rechtlichen Beurteilung sind beide zunächst für sich zu betrachten. Erweist sich einer der beiden Akte, der Privatisierungsakt oder das Privatisierungsergebnis, als rechtswidrig, so dürfte in der Regel die Gesamtprivatisierung gescheitert sein.

Ferner ist zu unterscheiden zwischen dem Privatisierungsrecht und dem Privatisierungsfolgenrecht.*[20] Während das Privatisierungsrecht die Privatisierung selbst als Maßnahme und Ergebnis betrifft, befasst sich das Privatisierungsfolgenrecht mit den weiteren Konsequenzen der Privatisierung. Grundsätzlich gelten nach der erfolgten Privatisierung die rechtlichen Vorschriften, die für die neue Rechtslage maßgebend sind, etwa im Falle der materiellen Privatisierung das zwischen den Privatunternehmer und seinen Kunden maßgebliche Privatrecht. Indessen zeigt sich immer wieder, dass durch die Privatisierung neue und besondere Probleme entstehen, die einer spezifischen Regelung bedürfen. Darauf beruht auch die Gewährleistungsverwaltung.*[21] Wenn der Staat die Wahrnehmung bestimmter Aufgaben, insbesondere die Erbringung bestimmter Leistungen zur Versorgung der Bevölkerung privaten Unternehmern überträgt oder überlässt, dann muss er erforderlichenfalls gewährleisten, dass der privatwirtschaftliche Bereich diese Leistungen in ausreichendem Maß und zu vertretbaren Preisen bereitstellt.

Von erheblicher Bedeutung ist schließlich noch, dass die Privatisierung im konkreten Fall ex ante oder ex post betrachtet werden kann. Im ersten Fall geht es darum, ob und unter welchen rechtlichen Voraussetzungen eine geplante Privatisierung durchgeführt werden kann. Die privatisierungswillige Verwaltung hat also die Möglichkeit, unter Beachtung der rechtlichen Vorgaben und unter Ausnutzung der bestehenden Spielräume die oder zumindest eine erwünschte Privatisierung zu erreichen. Im zweiten Fall geht es darum, ob die erfolgte Privatisierung mit dem geltenden Recht im Einklang steht und daher zulässig ist. Ist das nicht der Fall, dann kann die Verwaltung allenfalls noch nachbessern oder die Defizite im Wege des Privatisierungsfolgenrechts auffangen.*[22]

4. Die Grenzen der materiellen Privatisierung insbesondere

4.1. Begriff und Abgrenzung der Staatsaufgaben

Während sich bei der formellen Privatisierung lediglich die Formen staatlichen Handelns ändern und bei der funktionalen Privatisierung lediglich Privatunternehmer in den tatsächlichen Vollzug staatlichen Handelns einbezogen werden, geht es bei der materiellen Privatisierung, wie dargelegt wurde, um die Verlagerung bislang vom Staat wahrgenommener Aufgaben in den gesellschaftlich-wirtschaftlichen Bereich. Damit rückt der Begriff der Staatsaufgaben in den Vordergrund. Es geht um die Frage, welche Aufgaben der Staat selbst wahrnehmen muss und welche er unter welchen Voraussetzungen dem gesellschaftlich-wirtschaftlichen Bereich überlassen darf oder sogar überlassen muss.

Das Grundgesetz enthält – wie fast alle Verfassungen – keinen Katalog von Staatsaufgaben. Auch die allgemeine Staatslehre, die sich schon seit langem bemüht, unabhängig von konkreten Verfassungen typische Staatsaufgaben herauszustellen, ist zu keinem allgemein anerkannten Ergebnis gekommen. Das ist auch verständlich; denn die Aufgaben des Staates hängen von den jeweils maßgeblichen Verhältnissen und Bedingungen ab und lassen sich daher nicht ein für allemal festlegen. Die Bemühungen der Staatslehre sind damit

[19] Vgl. unten 4.

[20] Vgl. dazu J. A. Kämmerer (FN 2), S. 423 ff.; M. Burgi (FN 2), § 75 Rn. 28; F. Schoch. Rechtliche... (FN 2), S. 682 ff.

[21] Vgl. dazu die Nachweise in FN 20, ferner neuerdings F. Schoch. Gewährleistungsverwaltung: Stärkung der Privatrechtsgesellschaft? – NVwZ 2008, S. 241 ff.

[22] Gerade das ist eine wesentliche Funktion des Privatisierungsfolgenrechts.

aber gleichwohl icht nutzlos. Sie können durch ihre Systematisierung Orientierungshilfen geben und damit zum Verständnis beitragen.

Danach ist zwischen den Staatsaufgaben, den öffentlichen Aufgaben und den privaten Angelegenheiten zu unterschieden.*[23] Zu den öffentlichen Aufgaben gehören die Angelegenheiten, die einen Gemeinwohlbezug aufweisen und daher im öffentlichen Interesse liegen.

Die Staatsaufgaben bilden einen Teil der öffentlichen Aufgaben; es sind die vom Staat wahrgenommenen Aufgaben, wobei weiter danach zu unterscheiden ist, ob sie dem Staat vorbehalten sind (ausschließliche Staatsaufgaben) oder ob sie – auch – von Personen und Organisationen des gesellschaftlichen Bereichs übernommen werden können (konkurrierende Staatsaufgaben).*[24] Die Grenzen der Staatsaufgaben sind dort erreicht, wo das öffentliche Interesse als Legitimationsgrundlage staatlichen Handelns fehlt und nur noch Partikularinteressen verfolgt werden. Öffentliche Aufgaben, d.h. im öffentlichen Interesse liegenden Aufgaben, können aber auch im gesellschaftlich-privatwirtschaftlichen Bereich wahrgenommen werden, sei es gezielt und unmittelbar, sei es mittelbar im Rahmen ihrer eigennützigen Tätigkeit. Die Grenze liegt dort, wo der Bereich der staatsvorbehaltenen Aufgaben beginnt. Bildlich betrachtet stellen die staatliche Tätigkeit und die gesellschaftliche Tätigkeit zwei sich überschneidende Kreise dar. Die gemeinsame Schnittfläche ist der Bereich, der der materiellen Privatisierung offen steht.

Diese noch sehr theoretischen Überlegungen führen nun zur entscheidenden Frage, was zu den staatlichen Aufgaben, insbesondere den dem Staat vorbehaltenen Aufgaben gehört. Geht man davon aus, dass im freiheitlich-demokratischen Verfassungsstaat die Staatsgewalt nicht vorgegeben ist, sondern durch die Verfassung konstituiert wird, jedenfalls die Kompetenzen und Befugnisse der staatlichen Organe durch die Verfassung bestimmt werden, dann müssen sich auch die dem Staat zustehenden und vorbehaltenen Aufgaben aus der Verfassung selbst ergeben.*[25] Die Hinweise auf die Tradition, den Kernbereich staatlicher Aufgaben, die Natur der Sache, die Eigenheiten der jeweiligen Aufgabe usw. genügt somit nicht, wenngleich – hier wie auch sonst – die Verfassungsauslegung nicht rein abstrakt, sondern im Blick auf die Wirklichkeit und die Gegebenheiten ausgelegt werden muss.

Es ist somit zu prüfen, welche Gemeinwohlaufgaben nach der Verfassung dem Staat zugewiesen werden und damit privatisierungsresistent sind und welche auch dem gesellschaftlichen Bereich überlassen werden dürfen und daher privatisierbar sind. Die verfassungsrechtliche Prüfung erstreckt sich – in drei Schritten – zunächst auf die verfassungsrechtlichen Regelungen, die ausdrücklich oder konkludent eine Privatisierung zulassen oder ausschließen, dann auf die verfassungsrechtlichen Regelungen, die die Privatisierung nicht eigens regeln, aber Rückschlüsse auf die Privatisierung zulassen, und schließlich auf die allgemeinen Verfassungsgrundsätze und die sich aus ihnen für die Privatisierung ergebenden Grenzen.

4.2. Privatisierungsvorschriften im Grundgesetz

Das Grundgesetz, die Verfassung der Bundesrepublik Deutschland, enthielt in seiner ursprünglichen Fassung von 1949 keine ausdrücklichen Regelungen über die Privatisierung. Das war damals noch kein Thema. Im Gegenteil, damals wurde noch über die die Sozialisierung diskutiert und in Art. 15 GG – allerdings bewusst zurückhaltend – bestimmt, dass der Gesetzgeber Grund und Boden, Naturschätze und Produktionsmittel zum Zwecke der Vergesellschaftung gegen Entschädigung in Gemeineigentum überführen könne. Diese Bestimmung erlangte indessen keine praktische Bedeutung und konnte sie im Rahmen der grundrechtlich gewährleisteten freien Wirtschaftsordnung auch nicht erlangen.*[26]

Erst in den 1990er Jahren wurden Privatisierungsregelungen in das Grundgesetz aufgenommen, die jedoch keine allgemeinen Aussagen zu Privatisierung brachten, sondern nur die Privatisierung bestimmter Bundesunternehmen festlegten.*[27] Ihre verfassungsrechtliche Regelung war schon deshalb erforderlich, weil die ursprüngliche Fassung des Grundgesetzes bestimmte, dass diese Bundsunternehmen „in bundeseigener Verwaltung mit eige-

[23] Vgl. dazu H. Peters. Öffentliche und staatliche Aufgaben. – Festschrift für Nipperdey. Bd II. München 1965, S. 877 ff.; H. Klein. Zum Begriff der öffentlichen Aufgabe. – DÖV 1965, S. 755 ff.; H. P. Bull. Die Staatsaufgaben nach dem Grundgesetz. 2. Aufl. Athenäum Verlag 1977; J. Isensee. Staatsaufgaben. – J. Isensee, P. Kirchhof (FN 2), § 73 Rn. 1 ff.; kritisch U. Di Fabio. Privatisierung und Staatsvorbehalt. – JZ 1999, S. 585 ff.

[24] Davon zu unterscheiden sind wiederum die obligatorischen oder fakultativen Staatsaufgaben, je nachdem ob der Staat (der Bund oder die Länder) zu deren Erledigung verpflichtet oder nur berechtigt ist. Vgl. zu diesen und zu weiteren Differenzierungen J. Isensee (FN 23), § 73 Rn. 27 ff.

[25] J. Isensee (FN 23), § 73 Rn. 42 f.; H. Butzer. – J. Isensee, P. Kirchhof (FN 2), § 74 Rn. 7.

[26] Vgl. zu Art. 15 GG K. Stern, J. Dietlein. Staatsrecht. Bd. IV 1. C. H. Beck 2006, S. 2301 ff. mit weiteren Nachw. Die Frage, ob diese Vorschrift später einmal zur Bekämpfung wirtschaftlicher Krisen verfassungskonform aktiviert werden kann, erscheint mehr als zweifelhaft, muss aber hier dahingestellt bleiben.

[27] Vgl. Art. 87 e und Art. 143 a GG zu den Eisenbahnen des Bundes, Art. 87 f und Art. 143 b GG zum Postwesen und zur Telekommunikation.

nem Verwaltungsunterbau“ geführt werden[*28], und deshalb eine entsprechende Verfassungsänderung geboten war. Bemerkenswert ist, dass sich das Grundgesetz in diesen Fällen nicht auf die Privatisierung als solche beschränkte, sondern wesentliche Vorgaben für die zu privatisierenden Unternehmen machte. Interessant ist auch Art. 87 d I 2 GG in der Fassung vom 22.07.1992, der für die Luftverkehrsverwaltung zwar eine formelle Privatisierung, aber keine materielle Privatisierung zulässt und letztere damit ausschließt.[*29]

Im Übrigen enthält das Grundgesetz weder ein Privatisierungsgebot noch ein Privatisierungsverbot.[*30] Daher ist die einfach-gesetzliche Privatisierung zulässig, sofern im Einzelfall die weiteren, noch zu erörternden Voraussetzungen vorliegen. Ob eine spezielle gesetzliche Grundlage erforderlich ist, ist fraglich. Meistens ergibt sie sich dies schon aus der Notwendigkeit die bislang bestehenden gesetzlichen Vorschriften entsprechend zu ändern. Ansonsten bestimmt sich diese Frage nach den allgemeinen Regelungen über den Gesetzesvorbehalt und der vom BVerfG entwickelten Wesentlichkeitstheorie.[*31] Tatsächlich bestehen auch solche gesetzliche Bestimmungen. Es sei nur beispielhaft auf die funktionale und materielle Privatisierung im Bereich der Abfallentsorgung verwiesen.[*32] Bemerkenswert ist ferner § 7 I BHO, der die zuständigen Organe verpflichtet, bei der Aufstellung und Ausführung des Haushaltsplanes die Grundsätze der Wirtschaftlichkeit und Sparsamkeit zu beachten und dann fortfährt: „diese Grundsätze verpflichten zur Prüfung, inwieweit staatliche Aufgaben oder öffentlichen Zwecken dienende wirtschaftliche Tätigkeiten durch Ausgliederung und Entstaatlichung oder Privatisierung erfüllt werden können“.[*33] Damit wird zwar keine Privatisierungspflicht, aber doch eine Privatisierungsprüfungspflicht begründet, die zugleich eine entsprechende Ermächtigung enthält.[*34] Im Kommunalrecht finden sich entsprechende Vorschriften für die Gemeinden.[*35]

4.3. Mittelbare Privatisierungsfragen

Im Grundgesetz gibt es weiterhin Vorschriften, die zwar die Privatisierung nicht ausdrücklich benennen und regeln, aber doch Rückschlüsse für die Zulässigkeit bzw. Unzulässigkeit der materiellen Privatisierung ermöglichen. Dazu gehören zum einen die Vorschriften über die Kompetenzen und die Organisation der Bundesverwaltung, die im 8. Abschnitt des Grundgesetzes (Art. 83 ff. GG) enthalten sind, und zum anderen der sog. Funktionsvorbehalt des Art. 33 IV GG.

Die Kompetenz- und Organisationsregelungen der Art. 83 ff GG ergeben sich aus dem föderalistischem Aufbau der Bundesrepublik Deutschland, die auch eine Abgrenzung der Verwaltungsbereiche des Bundes und der Länder erfordern. Nach der allgemeinen Verteilungsregelung des Art. 30, 83 GG sind die Länder zuständig, sofern das Grundgesetz nichts anderes bestimmt oder zulässt. Die anderweitigen Bestimmungen finden sich vor allem in den Art. 86 ff. GG. Das Grundgesetz beschränkt sich dabei aber nicht auf einzelnen Bundeszuweisungen, sondern bringt bei dieser Gelegenheit auch Vorschriften über die Organisation der Bundesverwaltung und die Art des Bundesvollzuges. Dadurch entsteht ein komplexes Gebilde von Zuständigkeits-, Organisations- und Verfahrensregelungen, die hier nicht weiter entfaltet werden können. Immerhin lässt sich im Blick auf die Privatisierung folgendes sagen[*36]: Soweit dem Bund oder den Ländern bestimmte Verwaltungsaufgaben zugewiesen werden, handelt es sich um Staatsaufgaben, die von den jeweiligen Verwaltungsträgern wahrgenommen werden können oder sogar müssen. Denn es wäre widersinnig, Kompetenzen zu begründen, die mangels Inhalt leer laufen. Ferner ist aus der Bestimmung, dass gewisse Verwaltungsaufgaben „in bundeseigener Verwaltung“ oder sogar „in bundeseigener Verwaltung mit eigenem Verwaltungsunterbau“ geführt werden[*37], zu folgern, dass eine Verlagerung der Verwaltungsaufgabe in den privatwirtschaftlichen Bereich ausgeschlossen ist. Des weiteren ist noch darauf hinzuweisen, dass dann, wenn der Bund eine sog. fakultative Bundeszuständigkeit[*38] nicht übernimmt, die Angelegenheit nicht in den gesellschaftlichen Bereich, sondern nach der allgemeinen

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[28] Art. 87 I GG a. F.

[29] Der Bundespräsident hatte deshalb im Jahre 2006 die Unterzeichnung eines Bundesgesetzes, das eine materielle Privatisierung der Flugsicherung vorsah, wegen dessen Verfassungswidrigkeit abgelehnt. Die Frage war und ist umstritten, vgl. dazu F. Schoch. Vereinbarkeit des Gesetzes zur Neuregelung der Flugsicherung mit Art. 87 d GG. Duncker & Humblot 2006.

[30] Vgl. etwa J. A. Kämmerer (FN 2), S. 174 ff.; M. Burgi (FN 2), S. 52 ff.; W. Rüfner. – J. Isensee, P. Kirchhof (FN 2), § 96 Rn. 38; F. Schoch. – DVBl. 1994, S. 969; R. Stober (FN 2), S. 2304.

[31] Vgl. dazu C. Sellmann. Privatisierung mit oder ohne gesetzliche Ermächtigung. – NVwZ 2008, S. 817 ff.; allgemein H. Maurer. Allgemeines Verwaltungsrecht. 17. Aufl. C. H. Beck 2009, § 6 Rn. 3 ff.

[32] Vgl. § 16 I und II Kreislaufwirtschafts- und Abfallgesetz vom 27.09.1994 (BGBl. I S. 2705).

[33] Vgl. § 7 I Bundeshaushaltsordnung i. d. F. vom 21.12.1993 (BGBl. S. 2353).

[34] Vgl. J. Sanden. Die Privatisierungsprüfpflicht als Einstieg in die Verwaltungsprivatisierung. – Die Verwaltung 2005 (38), S. 367 ff.

[35] Vgl. M. Burgi (FN 10), § 18 Rn. 21.

[36] Vgl. dazu M. Ibler. – T. Maunz, G. Dürig. Grundgesetz. C. H. Beck 2008, Art. 86 Rn. 80 ff., insbes. 110 ff.; B. Pieroth. – H. D. Jarass, B. Pieroth. Grundgesetz. 10. Aufl. C. H. Beck 2008, Art. 83 Rn. 11, Art. 86 Rn. 5, Art. 87 Rn. 2, 15 f.; H. Gersdorf. Privatisierung öffentlicher Aufgaben – Gestaltungsmöglichkeiten, Grenzen, Regelungsbedarf. – JZ 2008, S. 831, 838 ff.

[37] So etwa Art. 87 I, Art. 87 b GG.

[38] D. h. eine Zuständigkeit, zu deren Wahrnehmung er berechtigt aber nicht verpflichtet ist, vgl. dazu bereits oben FN 24.

Regelung in den Landesbereich fällt; nur wenn auch die Länder nicht tätig werden und tätig werden müssen, liegt ein Fall der (stillschweigenden) materiellen Privatisierung vor.[*39]

Die durch die Kompetenz- und Organisationsregelungen des Grundgesetzes gezogenen Grenzen für die materielle Privatisierung sind danach ziemlich eng. Wesentlich weitergehende Spielräume bestehen für die formelle und die funktionale Privatisierung, jedenfalls dann, wenn die erforderlichen Einflussmöglichkeiten gewährleistet sind.[*40] Insgesamt ist aber zu beachten, dass das System der Art. 83 ff. GG zu einer Zeit konzipiert worden ist, als die Privatisierung noch kein Thema war.[*41] Das legitimiert zu Weiterentwicklungen, ohne die verfassungsrechtlichen Grundlagen zu verlassen.

Der Funktionsvorbehalt des Art. 33 IV GG, der eine Besonderheit des deutschen Verfassungsrechts darstellt[*42], besagt, dass die Ausübung hoheitsrechtlicher Befugnisse als ständige Aufgabe in der Regel Berufsbeamten zu übertragen ist. Er stellt eine institutionelle Garantie des Beamtentums im Interesse einer fachlich qualifizierten, unparteiischen, zuverlässigen und rechtgebundenen Erledigung hoheitlicher Aufgaben dar. Im Einzelnen ist die Auslegung und Anwendung dieser Vorschrift noch umstritten. Hier stellt sich nur die Frage, ob Art. 33 IV GG eine „Privatisierungsschranke" bildet, wie in der Literatur verschiedentlich angenommen wird.[*43] Das ist zu verneinen. Art. 33 IVGG geht von der Unterscheidung zwischen den in einem öffentlich-rechtlichen Dienstverhältnis stehenden Beamten einerseits und den in einem privatrechtlichen Dienstverhältnis stehenden Angestellten und Arbeiter des Staates andererseits aus und bestimmt, dass die hoheitsrechtlichen Aufgaben in der Regel von Beamten wahrgenommen werden müssen. Die Frage der Privatisierung liegt im Vorfeld. Wird sie nach den allgemeinen Regeln abgelehnt, dann greift Art. 33 IV GG, der sich auf die Wahrnehmung hoheitsrechtlicher Befugnisse bezieht, nicht ein. Wenn überhaupt, dann käme nur eine Beleihung in Betracht, die aber gerade keine Privatisierung darstellt.[*44]

4.4. Folgerungen aus allgemeinen Verfassungsprinzipien

Da das Grundgesetz expressis verbis relativ wenig zur Privatisierung aussagt, ist nun auf die allgemeinen Verfassungsgrundsätze zurückzugreifen.

4.4.1. Rechtsstaatsprinzip

Das Rechtsstaatsprinzip findet nicht nur in zahlreichen Einzelbestimmungen des Grundgesetzes seinen positiv-rechtlichen Niederschlag, sondern stellt auch einen tragenden und übergreifenden Grundsatz der Verfassungsordnung dar.[*45] Er verwirklicht sich in zahlreichen Ausprägungen. Eine wesentliche rechtsstaatliche Forderung bildet die Pflicht des Staates zur Aufrechterhaltung und Sicherung der Rechts- und Friedensordnung im Innern.[*46] Der neuzeitliche Staat, der sich im 16./17. Jahrhundert herausgebildet hat, wird vor allem durch diese Funktion konstituiert und immer wieder neu herausgefordert. Entsprechend seinem Auftrag zur Friedenssicherung verpflichtet der Staat die Bürger, auf Gewaltanwendung und Selbsthilfe zu verzichten, kann dies aber nur überzeugend tun, wenn und weil er den in ihren Rechten bedrohten oder verletzen Bürgern seinen Schutz anbietet und gewährt. Das oft zitierte „Gewaltmonopol des Staates" ist kein Selbstzweck, sondern Mittel zur Durchsetzung der Rechts- und Friedensordnung, die ihrerseits selbst rechtsstaatlich gebunden sind. Daraus folgt, dass der Staat stets in der Lage und bereit sein muss, die entsprechenden Vorkehrungen und Einrichtungen für seine friedenssichernden Aufgaben zu treffen und zu erhalten. Das Polizeiwesen, die Gerichtsbarkeit, der Strafvollzug, die Verwaltungsstrukturen und das Finanzwesen sind dementsprechend ausschließliche Staatsaufgaben und daher nicht privatisierbar. Das gilt umso mehr, als die Erledigung dieser Aufgaben häufig den Einsatz hoheitlicher, erforderlichenfalls auch zwangsweise durchsetzbarer Mittel, eben die Anwendung des Gewaltmonopols, fordert. Der Staatsvorbehalt besteht jedenfalls für den Kernbestand dieser Aufgabenbereiche. Dagegen können Randbereiche und Serviceleistungen, etwa die Unterhaltung von Gebäuden, privaten Unternehmern überlassen bleiben.

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[39] Vgl. dazu M. Ibler (FN 36), S. 114.

[40] Vgl. dazu M. Ibler (FN 36), Rn. 116 ff.

[41] Vgl. oben 4.2.

[42] Rechtsvergleichend findet sich nur noch in Griechenland eine etwa entsprechende Vorschrift, vgl. J. Masing. – H. Dreier. Grundgesetz. Bd. 2. Mohr Siebeck 2006, Art. 33 Rn. 60 ff.

[43] Vgl. W. Brohm. Strukturen der Wirtschaftsverwaltung. W. Kohlhammer 1969, S. 284; U. Steiner. Öffentliche Verwaltung durch Private. Hansischer Gildenverlag Heitmann 1975, S. 260; J. Isensee. – E. Benda, W. Maihofer, H.-J. Vogel (Hrsg.). Handbuch des Verfassungsrechts. 2. Aufl. Gruyter 1994, § 32 Rn. 59.

[44] Vgl. bereits oben 2.4 d.

[45] Vgl. dazu näher H. Maurer. Staatsrecht I. 5. Aufl. Beck Juristischer Verlag 2007, § 8 Rn. 1 ff.

[46] D. Merten. Rechtsstaat und Gewaltmonopol. Mohr 1975, S. 35 ff.; M. Burgi (FN 2), § 75 Rn. 19 f.

4.4.2. Sozialstaatsprinzip

In der modernen Industrie- und Massengesellschaft sind die Bürger in erheblichem Umfang auf Leistungen und Güter existentieller, wirtschaftlicher, sozialer und kultureller Art angewiesen. Sie werden weitgehend durch Privatunternehmer des gesellschaftlich-wirtschaftlichen Bereichs nach den Regeln des Marktes und des Wettbewerbes erbracht. Der Staat kann die Bürger darauf verweisen, zumal er seinen Bedarf ebenfalls am Markt deckt. Der Staat kann sich aber darauf nicht beschränken. Die gesellschaftlichen und technischen Entwicklungen der letzen 100 Jahre und die verfassungsrechtlich festgelegte Verpflichtung zur Sozialstaatlichkeit fordern ihn immer mehr heraus.*[47] Aus dem formellen Rechtsstaat des 19. Jahrhunderts ist der soziale Rechtsstaat des 20. Jahrhunderts geworden, der Rechtsstaat und Sozialstaat miteinander verbindet. Der Sozialstaat wird zum Leistungsstaat; er hat – zumal im Bereich der Daseinsvorsorge – finanzielle Leistungen zu gewähren (Fürsorgeleistungen, Ausbildungsbeihilfen, Subventionen) sowie Einrichtungen zu schaffen und zu betreiben (Wasserversorgung, Personennahverkehr, Schulen, Universitäten, Krankenhäuser, Theater, usw.). Aber auch die Leistungsfähigkeit des Staates stößt auf Grenzen. Es liegt deshalb nahe, auf die Privatisierung auszuweichen. Sie muss jedoch sozialstaatlich verträglich sein. Der Staat darf sich nicht ganz zurückziehen. Er muss reagieren, wenn die immanenten Regeln des Marktes und des Wettbewerbs verzerrt oder ignoriert werden, wenn notwendige Leistungen für den Bürger nicht unter angemessenen Bedingungen dargeboten werden, wenn die Grundversorgung der Bevölkerung mangelhaft ist, wenn also die (geplante oder erfolgte) Privatisierung nicht dem Sozialstaatsgebot entspricht. Das kann dadurch geschehen, dass der Staat auf die Privatisierung eines bestimmten Vorhabens oder eines bestimmten Bereichs ganz verzichtet, oder aber dadurch, dass er zwar die Privatisierung hinnimmt, zugleich aber durch entsprechende gesetzliche Regelungen oder verwaltungsrechtliche Maßnahmen die Sozialverträglichkeit der Privatisierung gewährleistet.

Die Privatisierung der Post und der Telekommunikation bietet dafür ein – sogar verfassungsrechtlich fundiertes – Beispiel. Nach Art. 87 f I GG muss der Bundesgesetzgeber im Bereich des Postwesens und der Telekommunikation „flächendeckend angemessene und ausreichende Dienstleistungen" gewährleisten.*[48] Die Bezeichnung „angemessen" bezieht sich auf die Qualität, die Bezeichnung „ausreichend" bezieht sich auf die Quantität und die Bezeichnung „flächendeckend" bezieht sich territorial auf das gesamte Gebiet. Das Grundgesetz gewährleistet also eine qualitativ angemessene, quantitativ ausreichende und das gesamte Bundesgebiet abdeckende Post und Telekommunikation.

Der Staat übernimmt damit die Gewährleistungsverantwortung. Die staatliche Leistungsverwaltung mutiert durch die Privatisierung zur staatlichen Gewährleistungsverwaltung. Zusammenfassend lässt sich feststellen, dass es beim Staat liegt, ob er die sozialstaatlich bedingten Leistungen selbst erbringt oder durch Private erbringen lässt; er muss aber jedenfalls in Reserve stehen und dann, wenn die Leistungen nicht mehr dem gebotenen Niveau entsprechen, subsidiär eingreifen.

4.4.3. Grundrechte

Die Grundrechte sind vor allem Abwehrrechte. Insofern werden sie allenfalls aktuell, wenn sich Privatunternehmer gegen die wirtschaftliche Tätigkeit des Staates zur Wehr setzen möchte. Das scheitert indessen in der Regel daran, dass Art. 12 I GG, der die Berufs- und Gewerbefreiheit garantiert, keinen Konkurrenzschutz gewährt, solange sich der Staat an die Funktionsbedingungen des Wettbewerbs hält.*[49] Nach der Rechtsprechung des BVerfG und der h. L. begründen die Grundrechte jedoch nicht nur Abwehransprüche, sondern auch Schutz- und Fürsorgeansprüche.*[50] Sie führen zwar selten zum Ergebnis, können aber durchaus praktisch relevant werden. Das zeigt z. B. die Wasserversorgung. Da das Wasser nicht nur ein Wirtschaftsgut ist, sondern für das Leben und die Gesundheit der Menschen elementare Bedeutung besitzt, muss der Staat aufgrund des Art. 2 II GG (Recht auf Leben und körperliche Unversehrtheit) in Verbindung mit dem Sozialstaatsprinzip eine angemessene, ausreichende und flächendeckende Wasserversorgung, die auch den hygienischen und ökonomischen Voraussetzungen entspricht, gewährleisten.*[51] Daraus dürfte auch folgen, dass die materielle Privatisierung der Wasserversorgung unzulässig ist.

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[47] Vgl. dazu näher H. Maurer (FN 45), § 8 Rn. 59 ff., 72 ff.

[48] Vgl. dazu näher §§ 11 ff PostG vom 22.12.1997 (BGBl. I S. 3294); §§ 87 ff., §§ 116 ff Telekommunikationsgesetz vom 22.06.2004 (BGBl. I S. 1190).

[49] Vgl. H. D. Jarass. – H. D. Jarass, B. Pieroth (FN 36), Art. 12 Rn. 16; ferner zu den kommunalrechtlichen Grenzen der Wirtschaftstätigkeit der Gemeinden M. Burgi (FN 10), § 17 Rn. 57 ff.; M.-E. Geis (FN 10), § 12 Rn. 96.

[50] Vgl. dazu F. Hufen. Staatsrecht II. Grundrechte. 2. Aufl. C. H. Beck 2009, § 5 Rn. 5 ff.; H. Maurer (FN 45), § 9 Rn. 24 ff mit weiteren Nachw.

[51] Vgl. dazu W. Kahl. Die Privatisierung der Wasserversorgung. – GewArch. 2007, S. 441 ff.; A. Emmerich-Fritsche. Privatisierung der Wasserversorgung in Bayern und kommunale Aufgabenverantwortung. – BayVBl. 2007, S. 1 ff.; F. Forster. Privatisierung und Regulierung der Wasserversorgung in Deutschland und den Vereinigten Staaten von Amerika. Duncker & Humblot 2007, insbes. S. 114 ff, 181 ff.

4.4.4. Demokratieprinzip

Das Demokratieprinzip verlangt u. a., dass die Organe und Personen, die staatliche Aufgaben wahrnehmen, demokratisch legitimiert sind, d. h. dass sie einerseits ihre Berufung letztlich – vermittelt durch andere Organe – auf das unmittelbar vom Volk gewählte Parlament zurückführen können und dass sie andererseits in umgekehrter Richtung von der parlamentarischen Kontrolle erfasst werden. Diese Voraussetzung ist bei der Aufgabenprivatisierung offensichtlich nicht gegeben; sie kann auch nicht gegeben sein, weil bei ihr die organisatorische und funktionelle Einbindung in den staatlichen Bereich entfällt.*[52] Daraus folgt, dass auch in demokratisch-parlamentarischer Sicht zwar die Privatisierung öffentlicher Aufgaben, nicht aber die staatlicher Aufgaben zulässig ist.

Zusammenfassend ist als Leitlinie festzuhalten:

- Die Aufgaben der Ordnungs- und Abgabenverwaltung und damit der Eingriffsverwaltung sind grundsätzlich nicht privatisierbar. Ausnahmen bestehen lediglich für Randbereiche und Serviceleitungen.
- Die Aufgaben der Leistungsverwaltung sind dagegen privatisierbar. Der Staat wird dadurch aber nicht ganz von seiner Verantwortung entlastet. Er hat vielmehr die angemessene, ausreichende und flächendeckende Erledigung der zuvor von ihm wahrgenommen Aufgaben zu gewährleisten, wenn dies im öffentlichen Interesse geboten ist. Aus der Leistungsverwaltung wird die Gewährleistungsverwaltung.
- Die eingangs dargestellten Privatisierungsformen stellen vornehmlich theoretische Denkmodelle dar. In der Praxis finden sich zahlreiche Modifikationen und Verknüpfungen, die letztlich doch wieder auf die Grundformen zurückgeführt werden können. Grundtenor ist die arbeitsteilige und kooperative Zusammenarbeit von Staat und Privaten, die den jeweiligen Situationen unter Beachtung der rechtlichen Vorgaben angepasst werden müssen.

[52] Anders liegt es bei der formellen Privatisierung, da mit der Bildung einer selbständigen juristischen Person des Privatrechts die parlamentarische Kontrolle reduziert oder sogar beseitigt wird.

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Die staatliche Einbeziehung Privater in die Wahrnehmung von Sicherheitsaufgaben[*1]

1. Privatisierung staatlicher Aufgaben als Politikziel

1.1. Realbefund

In den 1990er Jahren hat in der Bundesrepublik Deutschland eine „Privatisierungswelle" eingesetzt, die in manchen Bereichen immer noch anhält, in anderen Sektoren aber bereits abgeebbt ist und auf bestimmten Gebieten sogar durch Gegenbewegungen gestoppt worden ist. Privatisierungsmaßnahmen wurden in Deutschland auf allen Verwaltungsebenen ergriffen: Bund, Länder und Gemeinden/Gemeindeverbände. Erfasst waren und sind umfangreiche Aufgabenfelder der öffentlichen Hand: Post, Telekommunikation und Bahn, Versorgung (mit Wasser) und Entsorgung (Abfall, Abwasser), Umwelt- und Planungsrecht (z.B. Einsatz externer Projektmanager); sogar sicherheitsempfindliche Bereiche sind betroffen (z.B. Strafvollzug, Bundeswehrverwaltung). Ein Ende der Entwicklung ist nicht abzusehen.[*2]

Die Gründe für die Privatisierung staatlicher Aufgaben sind zahlreich. Als wesentliche Impulse sind die Liberalisierungsmaßnahmen der Europäischen Union im Bereich der Daseinsvorsorge und das Leitbild vom „schlanken Staat" zu nennen. Ordnungspolitisch werden in der privaten Leistungserstellung und Leistungserbringung die Vorzüge des Wettbewerbs in der Marktwirtschaft gepriesen. Zur Erreichung eines Bürokratieabbaus wird die Staatsentlastung durch Privatisierung staatlicher Aufgaben als unverzichtbar erachtet. Zur Bewältigung des Wissensproblems in der Informationsgesellschaft schließlich wird die Nutzung der Fachkompetenz Privater durch Einbeziehung in die Aufgabenerledigung als unabweisbar angesehen.[*3]

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[1] Dieser Artikel wurde mit der Unterstützung von ESF Grant Nr. 6464 veröffentlicht.

[2] Überblick zu Privatisierungsfeldern und Privatisierungsmaßnahmen in Deutschland bei F. Schoch. Rechtliche Steuerung der Privatisierung staatlicher Aufgaben. Jura 2008, S. 672 ff.; beispiele ferner bei M. Burgi. Privatisierung öffentlicher Aufgaben – Gestaltungsmöglichkeiten, Grenzen, Regelungsbedarf. – Gutachten D zum 67. Deutschen Juristentag. C. H. Beck 2008, S. 9 und S. 15 f.; vgl. auch den Sammelband von J. H. Seok, J. Ziekow (Hrsg.). Die Einbeziehung Privater in die Erfüllung öffentlicher Aufgaben. Duncker & Humblot 2008; speziell zum kommunalen Bereich W. Kahl, C. Weißenberger. Die Privatisierung kommunaler öffentlicher Einrichtungen: Formen – Grenzen – Probleme. Jura 2009, S. 194 ff.

[3] Zusammenfassend zu den Privatisierungsgründen H. Schulze-Fielitz. Grundmodi der Aufgabenwahrnehmung. – W. Hoffmann-Riem, E. Schmidt-Aßmann, A. Voßkuhle (Hrsg.). Grundlagen des Verwaltungsrechts. Band I. C. H. Beck 2006, § 12 Rn. 93 f.

1.2. Innere Sicherheit und Aktivitäten Privater

Juristisch heikel ist in Deutschland die Einbeziehung Privater zur Gewährleistung der Inneren Sicherheit. Befürworter von Privatisierungsmaßnahmen auch in diesem Bereich verweisen zunächst auf den Realbefund. Auf der einen Seite kennt die deutsche Rechtsordnung etliche Vorschriften zur obligatorischen Eigensicherung von Privatrechtssubjekten (vgl. unten 2.2.); auf der anderen Seite hat das private Sicherheitsgewerbe eine ausdrückliche Regelung im Wirtschaftsverwaltungsrecht erfahren (§ 34a GewO), private Sicherheitsdienstleister sind aus der Gefahrenabwehr tatsächlich nicht mehr hinwegzudenken.[*4]

Das im Allgemeinen Verwaltungsrecht bekannte Modell von „Public Private Partnership" (PPP) wird auf den Sektor der Inneren Sicherheit übertragen und zu „**Police Private Partnership**" fortentwickelt. Als Beispiele für die Praktizierung von PPP werden z.B. genannt: die Verkehrsüberwachung, die Beobachtung im öffentlichen Raum, die Sicherheitsgewährleistung des U-Bahnverkehrs und auch der Vollzug des Ordnungswidrigkeitenrechts.[*5] Speziell auf örtlicher Ebene wird für den Einsatz privater Sicherheitskräfte ein breites Betätigungsfeld gesehen.[*6] Zur reibungslosen Organisation der Fußballweltmeisterschaft 2006 in Deutschland ist vermerkt worden, dass die Aufgabe nur auf Grund der Kooperation zwischen Polizei und privaten Sicherheitsdiensten zu bewältigen gewesen sei.[*7]

Seitens der Bevölkerung wird die Einbeziehung Privater zur Gewährleistung der Inneren Sicherheit als normal empfunden.[*8] Unter rechtlichen und staatspolitischen Vorzeichen wird die Einbeziehung Privater in die Wahrnehmung von Sicherheitsaufgaben als Paradigmenwechsel propagiert; es vollziehe sich eine Ablösung des klassischen staatlichen Gewaltmonopols durch eine **neue Arbeitsteilung zwischen Staat und Privaten** im Sinne einer verstärkten privaten Eigen- und Mitverantwortung für die Gefahrenabwehr.[*9]

2. Formen und Typen von Privatisierungsmaßnahmen

Die genaue juristische Analyse der skizzierten tatsächlichen Phänomene verlangt zunächst Klarheit über den hier verwendeten Privatisierungsbegriff (1.) und fordert außerdem eine wichtige Abgrenzung der eigentlichen Privatisierungsmaßnahmen (3.) von verwandten Phänomenen (2.).

2.1. Begriff der „Privatisierung"

Im Ausgangspunkt muss Klarheit darüber herrschen, dass „Privatisierung" **keinen Gesetzesbegriff** mit einem bestimmten, für die gesamte Rechtsordnung geltenden Inhalt darstellt. Es handelt sich vielmehr um einen rechtswissenschaftlichen und auch von der Rechtsprechung verwendeten Sammelbegriff, der unterschiedliche Phänomene erfasst und bündelt. Normativen Gehalt erlangt der Terminus „Privatisierung" aus dem jeweiligen Regelungszusammenhang; eine gewisse Abgrenzungsschärfe ergibt sich aus der sogleich darzustellenden Typologie (s. u. 2.3.).

„**Privatisierung**" meint die Verlagerung staatlicher, bislang von der öffentlichen Verwaltung wahrgenommener Aufgaben bzw. deren Durchführung auf ein Privatrechtssubjekt, das dem Rechtsregime des Zivilrechts untersteht.[*10] „Privatisierung" ist mehr als bloße Entstaatlichung, weil neben der *kompletten Verlagerung* einer bisherigen Verwaltungsaufgabe in den privaten Sektor auch die bloße Aufgaben*erledigung* durch Private und

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4 R. Stober. Privatisierung öffentlicher Aufgaben. – NJW 2008, S. 2301 ff.

5 Einzelheiten bei F. Schnekenburger. Rechtsstellung und Aufgaben des Privaten Sicherheitsgewerbes. Heymanns 1999, S. 99 ff.; F. Huber. Wahrnehmung von Aufgaben im Bereich der Gefahrenabwehr durch das Sicherheits- und Bewachungsgewerbe. Duncker & Humblot 2000, S. 51 ff.; G. Nitz. Private und öffentliche Sicherheit. Duncker & Humblot 2000, S. 57 ff.; B. Weiner. Privatisierung von staatlichen Sicherheitsaufgaben. Peter Lang 2001, S. 200 ff.; F. Jungk. Police Private Partnership. Heymanns 2002, S. 10 ff.; M. Lange. Privates Sicherheitsgewerbe in Europa. Heymanns 2002, S. 19 ff.; M. Kleespies. Police Private Partnership. Herbert Utz 2003, S. 14 ff.

6 F.-L. Knemeyer. Sicherheitsgestaltung vor Ort. – DVBl 2007, S. 785 ff.

7 T. Feltes. Zusammenarbeit zwischen privater und staatlicher Polizei bei der FIFA WM 2006. – ZRP 2007, S. 243.

8 Empirische Untersuchung hierzu von A. Wohlnick. Tätigkeit, Auswirkungen und Wahrnehmung privater Sicherheitsdienste im öffentlichen Raum. Heymanns 2007, S. 3 ff.

9 R. Stober. Police-Private-Partnership aus juristischer Sicht. – DÖV 2000, S. 264.

10 H. Bauer. Privatisierung von Verwaltungsaufgaben. – VVDStRL 1995 (54), S. 250; A. Voßkuhle. Neue Verwaltungsrechtswissenschaft. – W. Hoffmann-Riem, E. Schmidt-Aßmann, A. Voßkuhle (Hrsg.) (FN 3), § 1 Rn. 58; enger J. A. Kämmerer. Privatisierung. Mohr Seibeck 2001, S. 37; U. Di Fabio. Privatisierung und Staatsvorbehalt. – JZ 1999, S. 585.

der *Wechsel der Rechtsform* („privatrechtlich organisierte Verwaltung“) erfasst werden und außerdem Zwischenstufen dem Konzept der Privatisierung zugeordnet werden können.

2.2. Eigenüberwachung und Eigensicherung Privater

Abzugrenzen sind Maßnahmen der Privatisierung von gesetzlichen Anordnungen zur Eigenüberwachung und Eigensicherung Privater.*[11] Sie spielen zur Gewährleistung der Inneren Sicherheit eine erhebliche Rolle und kommen vor allem in öffentlich zugänglichen Räumen Privater und öffentlich bemerkbaren Infrastrukturanlagen Privater zur Anwendung. Eng verwandt hiermit ist die staatliche Indienstnahme Privater*[12], auf die hier aber nicht näher eingegangen werden soll.

Die **Eigenüberwachung** (Eigenkontrolle) bezieht sich auf die *von* einer (Industrie-)Anlage oder von einer Tätigkeit ausgehenden Gefahren, während die **Eigensicherung** auf die Abwehr derjenigen Gefahren gerichtet ist, die der eigenen Anlage oder Tätigkeit von *außen* drohen; das positive Recht orientiert sich an dieser idealtypischen Unterscheidung, kombiniert die Sicherheitsanordnungen jedoch vielfach und schafft Mischtatbestände.

Einige konkrete Beispiele können den Befund verdeutlichen:

- Im **Luftsicherheitsrecht** kann die zuständige Behörde geeigneten Personen als Beliehenen die Wahrnehmung bestimmter Aufgaben bei der Durchführung der Sicherheitsmaßnahmen auf Flugplätzen übertragen (§ 5 Abs. 5 LuftSiG); außerdem sind unmittelbar durch Gesetz Sicherungsvorkehrungen angeordnet, die vom Flugplatzbetreiber (§ 8 LuftSiG) und vom Luftfahrtunternehmen (§ 9 LuftSiG) zu treffen sind.*[13]
- Im **Atomrecht** hängt die Genehmigung einer Kernenergieanlage unter anderem davon ab, dass der erforderliche Schutz gegen Störmaßnahmen oder sonstige Einwirkungen Dritter gewährleistet ist (§ 7 Abs. 2 Nr. 5 AtG); danach durfte gegenüber einem Kernkraftwerksbetreiber die Einrichtung eines bewaffneten Werkschutzes angeordnet werden, um Gefahren durch unbefugtes Einwirken Dritter auf die Anlage abwehren zu können.*[14]
- Im **Immissionsschutzrecht** schreibt die Störfall-Verordnung vor, dass Anlagenbetreiber Vorkehrungen treffen müssen, um Störfälle zu verhindern (§ 3 der 12. BImSchV); interessant ist die ausdrücklich normierte Verpflichtung zum Ergreifen auch von Maßnahmen, die die sicherheitsrelevanten Teile des Betriebsbereichs vor Eingriffen Unbefugter schützen (§ 4 Nr. 4 der 12. BImSchV).

Rechtsdogmatisch ist für die Anordnung von Eigensicherungsmaßnahmen nach deutschem Recht bedeutsam, dass nicht die Exekutive dazu auf Grund des allgemeinen Polizei- und Ordnungsrechts befugt ist. Denn eine solche erweiterte Verantwortlichkeit eines Privatrechtssubjekts für Gefahren, die durch Einwirkungen Dritter z.B. auf eine Verkehrs- oder Industrieanlage verursacht werden, geht über die normale polizeiliche Zustandsstörerhaftung hinaus; deshalb ist für die Einführung von Eigensicherungspflichten eine **spezielle gesetzliche Grundlage** erforderlich.*[15]

2.3. Grundtypen der Privatisierung

Es ist bereits darauf hingewiesen worden, dass der Terminus „Privatisierung“ ein rechtswissenschaftlicher Sammelbegriff ist, der unterschiedliche Privatisierungsphänomene zusammenfasst. Für die Beantwortung konkreter Rechtsfragen bedarf die Begrifflichkeit der Präzisierung. Dieser Aufgabe nähert man sich in Deutschland mit Hilfe einer **Typisierung** vergleichbarer Privatisierungsphänomene. Vier Grundmodelle haben sich herausgebildet: Vermögensprivatisierung, Organisationsprivatisierung, Aufgabenprivatisierung, funktionale Privatisierung. Im vorliegenden Zusammenhang kann die Vermögensprivatisierung (privatrechtliche Übertragung von Vermögensgegenständen der öffentlichen Hand auf Private)*[16] außer Betracht bleiben.

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[11] Näher dazu D. Ehlers. Der Schutz wirtschaftlicher Unternehmen vor terroristischen Anschlägen, Spionage und Sabotage. – Festschrift für Rudolf Lukes. Heymanns 1989, S. 337 ff.; T. Leidinger. Die Verantwortung des Betreibers für den Schutz vor Einwirkungen Dritter. – DVBl 2004, S. 95 ff.; H.-W. Rengeling. Zur Sicherung der Seehäfen gegen terroristische Anschläge auf Grund neuer internationaler, europäischer und deutscher Regelungen. – DVBl 2004, S. 589 ff.; M. Ronellenfitsch. Der Beitrag der Eisenbahnunternehmen zur Terrorismusabwehr. – DVBl 2005, S. 65 ff.; W. Erbguth. Neues Hafensicherheitsrecht: Erstellung der Risikobewertung und des Gefahrenabwehrplans. – DVBl 2007, S. 1202 ff.

[12] Vgl. dazu H. Kube. Öffentliche Aufgaben in privater Hand – Sachverantwortung und Finanzierungslast. – Die Verwaltung 2008 (41), S. 1 ff.

[13] NdsOVG, NVwZ-RR 2006, 33 f., bemerkt: „Die Eigensicherungspflichten im Luftsicherungsrecht unterliegen zwar einem öffentlich-rechtlichen Regime, stellen aber keine Wahrnehmung staatlicher Aufgaben dar, sondern sind Bestandteil bzw. Folge der Ausübung des Berufs eines Flughafenunternehmers. Der Gesetzgeber verpflichtet diesen, seine privatrechtlichen Eingriffsmöglichkeiten – insbesondere auf Grund seines Hausrechtes – gegenüber Dritten in einer bestimmten Weise auszuüben.“

[14] BVerwGE 81, 185 = DVBl 1989, 517 (m. Anm. *Bracher*) = JZ 1989, 895 (m. Anm. *Karpen*).

[15] BVerwG, DVBl 1986, 360 (m. Anm. *Schenke*) = JZ 1986, S. 896 (m. Anm. *Karpen*).

[16] Näher dazu J. A. Kämmerer. Privatisierung und Staatsaufgaben: Versuch einer Zwischenbilanz. – DVBl 2008, S. 1005 ff.

Von Bedeutung für die Einbeziehung Privater in die Wahrnehmung von Sicherheitsaufgaben sind jedoch die anderen drei Grundmodelle. Sie stellen sich idealtypisch wie folgt dar[*17]:

- Die **Organisationsprivatisierung** bewirkt lediglich einen Wechsel der Rechtsform, in der eine Verwaltungsaufgabe wahrgenommen wird. Deshalb wird dieser Typus auch als *formelle Privatisierung* bezeichnet. Die Aufgabe als solche verbleibt im staatlichen Sektor; zu ihrer Erledigung bedient sich der Staat jedoch einer Organisationsform des Privatrechts (z.B. GmbH, AG) und lässt die Aufgabe durch das neu geschaffene Privatrechtssubjekt mit privatrechtlichen Mitteln wahrnehmen.
- Die **Aufgabenprivatisierung** ist das Gegenmodell zur Organisationsprivatisierung und stellt die weitgehendste Form der Privatisierung dar. Mit ihr wird die Aufgabe als solche privatisiert; das bedeutet, dass die Aufgabe in den privaten Sektor verlagert und dort Privatrechtssubjekten im Wettbewerb des Marktes überlassen wird. Es handelt sich also um eine *materielle Privatisierung*. Die dadurch bedingte Staatsentlastung ist aber im deutschen Recht oftmals mit der Verpflichtung des Staates zur Gewährleistung einer gemeinwohlverträglichen Aufgabenerledigung durch den Privaten verknüpft. Die bleibende staatliche Gewährleistungsverantwortung stellt sich demnach als „Privatisierungsfolgenrecht" dar.[*18]
- Die **funktionale Privatisierung**, auch als *Vollzugsprivatisierung* bezeichnet, ist systematisch zwischen der Organisationsprivatisierung und der Aufgabenprivatisierung einzuordnen. Die Aufgabenzuständigkeit und damit die Aufgabenverantwortlichkeit bleiben beim Hoheitsträger, lediglich die Wahrnehmung (Durchführung, Erledigung) der Aufgabe wird einem Privatrechtssubjekt übertragen. Rechtsdogmatisch ist der Private als Verwaltungshelfer zu qualifizieren; sollen auch Hoheitsbefugnisse ausgeübt werden, muss die Rechtsstellung eines (mit Hoheitsmacht) Beliehenen vorgesehen werden.[*19]

Die hier skizzierten Grundtypen der Privatisierung fassen modellhaft typische Privatisierungsvorgänge zusammen. Selbstverständlich gibt es **Mischformen** und weitere **Ausdifferenzierungen**.[*20] Besonders die funktionale Privatisierung eignet sich für den flexiblen Einsatz vertragsrechtlicher Instrumente zur Detailausgestaltung eines bestimmten Privatisierungsvorgangs. Ferner muss man sich bewusst machen, dass in der Praxis kaum die vollständige Privatisierung einer Aufgabe – in welcher Form auch immer – den Regelfall darstellt, sondern oftmals nur **Teilprivatisierungen** von Verwaltungsaufgaben vorgenommen werden. Auf die damit verbundenen Einzelheiten braucht hier nicht eingegangen zu werden. Zur rechtlichen Analyse der Einbeziehung Privater in die Wahrnehmung von **Sicherheitsaufgaben** können wir es bei den erwähnten Grundmodellen bewenden lassen.

3. Innere Sicherheit als Staatsaufgabe

Ob überhaupt und gegebenenfalls unter welchen Voraussetzungen und in welchem Umfang welche Art der Privatisierung rechtlich zulässig ist, hängt nach der deutschen Rechtsordnung in erster Linie von der Art der Aufgabe und dem jeweiligen Rechtsgebiet ab. Dazu müssen hier einige wenige Hinweise genügen.

3.1. Staatliche Aufgaben

In Deutschland ist der Aufgabenbestand des Staates verfassungsrechtlich nicht abschließend festgelegt. Auch „natürliche" Staatsaufgaben gibt es nicht. Staatliche Aufgaben können daher nicht etwa aus einem abstrakten Staatsbegriff abgeleitet werden, sie sind vielmehr einzeln nach Maßgabe des **Verfassungsrechts** zu bestimmen.[*21]

Zu unterscheiden ist zwischen „öffentlichen Aufgaben" und „Staatsaufgaben". **Öffentliche Aufgaben** betreffen Angelegenheiten des Gemeinwesens mit einem *Gemeinwohlbezug*, an deren Erledigung folglich ein öffentliches Interesse und nicht nur ein privates Partikularinteresse besteht.[*22] Öffentliche Aufgaben werden

[17] Einzelheiten bei H. Gersdorf. Privatisierung öffentlicher Aufgaben – Gestaltungsmöglichkeiten, Grenzen, Regelungsbedarf. – JZ 2008, S. 831 f.

[18] F. Schoch. Gewährleistungsverwaltung: Stärkung der Privatrechtsgesellschaft? – NVwZ 2008, S. 241 ff.; J. Wieland. Privatisierung öffentlicher Aufgaben – Gestaltungsmöglichkeiten, Grenzen, Regelungsbedarf. – NdsVBl 2009, S. 33 ff.

[19] Zu „Verwaltungshilfe" und „Beleihung" im Rahmen von Privatisierungsmaßnahmen C. Sellmann. Privatisierung mit oder ohne gesetzliche Ermächtigung. – NVwZ 2008, S. 817 ff.

[20] G. Kirchhof. Rechtsfolgen der Privatisierung – Jede Privatisierung lockert, löst öffentlich-rechtliche Bindungen. – AöR 2007 (132), S. 224 ff.

[21] H. Dreier. Die drei Staatsgewalten im Zeichen von Europäisierung und Privatisierung. – DÖV 2002, S. 541.

[22] BVerfGE 38, 299.

nicht notwendigerweise vom Staat selbst wahrgenommen; sie sind unabhängig vom Aufgabenträger und vom Ausführenden der Aufgabe.[*23] So müssen z.B. Aufgaben der Daseinsvorsorge nach der Rechtsprechung des Bundesverfassungsgerichts nicht deshalb unmittelbar vom Staat erledigt werden, weil sie von wesentlicher Bedeutung für das Gemeinwohl sind.[*24] Es genügt, wenn der Staat z.B. durch seine Rechtsordnung gemeinwohlsichernde Rahmenbedingungen für die private Leistungserbringung setzt.

Mangels geschlossener Staatsaufgabenlehre gilt in Deutschland der **formale Staatsaufgabenbegriff**.[*25] Danach sind staatliche Aufgaben diejenigen öffentlichen Aufgaben, die vom Staat – in der Regel auf Grund gesetzlichen Zugriffs – nach geltendem Recht zur Wahrnehmung in Anspruch genommen werden.[*26] Gesetzgeberische Gestaltungsbefugnisse fehlen nur dort, wo das Verfassungsrecht in Bezug auf die Privatisierung strikte Direktiven vorgibt. Das ist zwar selten der Fall, kommt jedoch durchaus vor. **Obligatorische Staatsaufgaben** sind einer Aufgabenprivatisierung nicht zugänglich. Dazu zählen insbesondere alle dem **staatlichen Gewaltmonopol** unterfallenden Bereiche; sie sind einer Entäußerung durch Privatisierung entzogen.[*27] Beispiele sind die Justiz und das Militär, die Zwangsvollstreckung und das öffentliche Beurkundungswesen sowie das Währungswesen[*28]; erfasst sind auch, wie zu zeigen sein wird, polizeiliche Aufgaben.[*29]

3.2. Innere Sicherheit und staatliches Gewaltmonopol

Die Gewährleistung der Inneren Sicherheit ist nach deutschem (Verfassungs-)Recht eine fundamentale und originäre Aufgabe des Staates.[*30] Zwar fehlt eine ausdrückliche Benennung dieser Staatsaufgabe im Grundgesetz für die Bundesrepublik Deutschland. Aber aus der **Garantiefunktion der Grundrechte** (mit der Statuierung einer staatlichen Schutzpflicht) und dem **staatlichen Gewaltmonopol** lässt sich herleiten, dass die Gewährleistung der Inneren Sicherheit eine obligatorische Staatsaufgabe darstellt.[*31]

Das Bundesverfassungsgericht hebt hervor, dass der Staat als rechtlich verfasste Friedens- und Ordnungsmacht fungiert und die Sicherheit seiner Bevölkerung zu gewährleisten hat.[*32] Die Schaffung der allgemeinen Rechtsordnung und ihre Durchsetzung sind beim Staat monopolisiert.[*33] Die Gewährleistung der **Inneren Sicherheit** stellt eine notwendige **Staatsaufgabe** dar.[*34] Daraus resultiert kein staatliches Monopol auf Sicherheitsgewährung; denn in die Aufgabendurchführung können, wie zu zeigen sein wird, Private einbezogen werden. Aber die *kategoriale* Aufgabenzuordnung muss klar erkannt werden; die prinzipielle Aufgabenzuweisung an den Hoheitsträger begründet die Pflicht des Staates, die Sicherheit seiner Bürger zu schützen.[*35]

4. Grenzen der Privatisierung auf dem Gebiet der Inneren Sicherheit

Nach den bisherigen Überlegungen steht fest, dass der Einbeziehung Privater in die Wahrnehmung von Sicherheitsaufgaben rechtlich mit Zurückhaltung zu begegnen ist. Welche Möglichkeiten überhaupt bestehen und welche Direktiven zu beachten sind, soll nun anhand der drei Grundtypen der Privatisierung untersucht und mit praktischen Beispielen verdeutlicht werden.

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23 BVerfGE 30, 311 f. – am Beispiel der Energieversorgung.

24 BVerfGE 107, 93.

25 BVerfGE 12, 243.

26 E. Schmidt-Aßmann. Das allgemeine Verwaltungsrecht als Ordnungsidee. 2. Aufl. Springer 2004, 3/79; M. Burgi (FN 2), S. 14 f.

27 M. Burgi. Privatisierung. – J. Isensee, P. Kirchhof (Hrsg.). Handbuch des Staatsrechts. Band IV. 3. Aufl. Müller 2006, § 75 Rn. 16 ff.

28 J. Isensee. Staatsaufgaben. – J. Isensee, P. Kirchhof (Hrsg.) (FN 27), § 73 Rn. 27, der insoweit von „ausschließlichen" Staatsaufgaben spricht und dies von den „obligatorischen" Staatsaufgaben (aaO Rn. 29) unterscheidet.

29 F. Schoch. Privatisierung polizeilicher Aufgaben? – Festschrift für Rolf Stober. Heymanns 2008, S. 566 ff.

30 T. Stoll. Sicherheit als Aufgabe von Staat und Gesellschaft. Mohr Siebeck 2003, S. 15 ff.

31 A. Saipa, H. Wahlers, K. Germer. Gewaltmonopol, Gefahrenabwehrauftrag und private Sicherheitsdienste: Ergänzung oder Beeinträchtigung staatlicher Kernaufgaben? – NdsVBl 2000, S. 287 f.; P. J. Tettinger. Freiheit in Sicherheit. – Festschrift für Jochen F. Kirchhoff. Schmidt 2002, S. 285 ff.; V. Götz. Innere Sicherheit. – J. Isensee, P. Kirchhof (Hrsg.) (FN 27), § 85 Rn. 24.

32 BVerfGE 49, 56 f.

33 BVerfGE 69, 360.

34 A. Saipa, H. Wahlers, K. Germer (FN 31), S. 288.

35 BVerfGE 46, 223.

4.1. Privatisierungsverbote

Da die Gewährleistung der Inneren Sicherheit in Deutschland eine notwendige Staatsaufgabe ist, scheidet eine **Aufgabenprivatisierung** aus; das staatliche Gewaltmonopol stellt eine absolute Sperre für die materielle Privatisierung dar.[*36] Eine **Organisationsprivatisierung** kommt grundsätzlich ebenfalls nicht in Betracht, da die Gesetzesausführung in Deutschland in der Regel durch die bundeseigene bzw. landeseigene Verwaltung oder durch bundesunmittelbare bzw. landesunmittelbare Körperschaften oder Anstalten des Öffentlichen Rechts erfolgt; Ausnahmen von diesem Organisationsmodell kommen nur kraft besonderer verfassungsrechtlicher Zulassung in Betracht.

Zur Veranschaulichung des Befundes sollen drei Beispiele aus der Praxis etwas näher beleuchtet werden:

- Die **Flugsicherung** dient in Deutschland der Sicherheitsgewährleistung im Luftraum und ist nach eigenem Bekunden des Bundesgesetzgebers dem Kernbereich staatlicher Aufgaben zuzuordnen.[*37] Nach dem deutschen Grundgesetz wird die Luftverkehrsverwaltung in bundeseigener Verwaltung geführt, allerdings kann durch Bundesgesetz eine privatrechtliche Organisationsform vorgesehen werden (Art. 87d Abs. 1 GG), so dass verfassungsrechtlich eine Organisationsprivatisierung erlaubt ist. Als bundeseigene Gesellschaft wurde die „Deutsche Flugsicherung GmbH" (DFS) gegründet und zur Wahrnehmung der hoheitlichen Aufgaben im Wege der Beleihung mit Hoheitsbefugnissen betraut.[*38] Im Jahr 2006 wollte der Bundesgesetzgeber eine Kapitalprivatisierung der Deutschen Flugsicherung vornehmen, indem eine Beteiligung Privater an der DFS GmbH in Höhe von 74,9% erlaubt werden sollte.[*39] Da das deutsche Verfassungsrecht bezüglich der Flugsicherung nur eine Organisationsprivatisierung zulässt, so dass der Bund an der DFS GmbH 100% der Geschäftsanteile halten muss, war die geplante Beteiligung Privater an der DFS GmbH verfassungswidrig.[*40] Der Bundespräsident verweigerte zu Recht die Ausfertigung des ihm zugeleiteten Gesetzes.[*41]
- Für die **Parkraumüberwachung** waren im Rahmen eines neuen Berliner Parkraumüberwachungskonzepts private Ermittler einbezogen worden, um staatliche Verfolgungsmaßnahmen zu unterstützen. Für die Ahndung von Verkehrsordnungswidrigkeiten sind nach deutschem Recht jedoch ausschließlich Behörden oder Bedienstete der Polizei zuständig (§ 26 StVG). Gerichtlich wurde festgestellt, als typische Hoheitsaufgabe gehöre die Verfolgung und Ahndung von Ordnungswidrigkeiten zum Kernbereich hoheitlicher Staatsaufgaben und sei daher Privatunternehmen verschlossen; die Mitwirkung von Privatfirmen und ihren Beschäftigten bei der Überwachung des ruhenden Verkehrs durch Erforschung und Feststellung von Verkehrsverstößen verletze nicht nur Gesetzesrecht, sondern auch die Verfassung (Art. 20 Abs. 3, 33 Abs. 4 GG).[*42] Ergänzend ist darauf hinzuweisen, dass die Tätigkeit privater Ermittler im Rahmen jenes Berliner Parkraumüberwachungskonzepts in Bezug auf Betroffene Eingriffsqualität aufweist, da es um die Verfolgung und Ahndung begangenen Unrechts geht.[*43]
- Vergleichbar ist die Rechtslage, wenn Private bei der **Geschwindigkeitsmessung** im Straßenverkehr eingesetzt werden und anschließend ein Ordnungswidrigkeitenverfahren eingeleitet wird. Zu einer entsprechenden Praxis in Bayern wurde gerichtlich festgestellt, die behördliche Beauftragung Privater mit der Messung, Registrierung und Dokumentation von Geschwindigkeitsverstößen sei unzulässig. Denn Maßnahmen der Geschwindigkeitsüberwachung und die Ermittlung sowie Verfolgung der sich daraus ergebenden Verkehrsverstöße seien Maßnahmen zum Schutz der öffentlichen Sicherheit und gehörten damit zum Kern der originären Staatsaufgaben. Weil diese aber vom Staat selbst wahrgenommen werden müssten, dürfe keine Verlagerung auf Private erfolgen; eine Privatisierung von Sicherheitsaufgaben dürfe nur durch Beleihung Privater mit Hoheitsbefugnissen geschehen, was aber nicht von der Verwaltung selbst vorgenommen werden könne, sondern einer gesetzlichen Ermächtigung bedürfe.[*44]

Der Staatsgerichtshof (Generalversammlung) der Republik Estland hat aus Anlass einer Geldbuße nach dem Gesetz über den öffentlichen Personennahverkehr (ÖPNVG) am 16. Mai 2008 ein Urteil gefällt, das der in Deutschland geltenden Rechtslage entspricht. Ein öffentliches Verkehrsmittel war von einem Fahrgast ohne Fahrberechtigung benutzt worden. Das estnische ÖPNVG erlaubt die Wahrnehmung behördlicher Aufga-

[36] A. Krölls. Die Privatisierung der inneren Sicherheit. – GewArch 1997, S. 448; S. Rixen. Vom Polizeirecht über das Gewerberecht zurück zum Policeyrecht? – DVBl 2007, S. 229.

[37] Gesetzentwurf der Bundesregierung, BT-Drs. 16/240 S. 2, 18 und 21.

[38] § 31b Abs. 1 S. 1 LuftVG i. V. m. der Verordnung zur Beauftragung eines Flugsicherungsunternehmens vom 11.11.1992, BGBl I S. 1928.

[39] Beschlussempfehlung des 15. BT-Ausschusses, BT-Drs. 16/1161.

[40] F. Schoch. Vereinbarkeit des Gesetzes zur Neuregelung der Flugsicherung mit Art. 87d GG. Dunker & Humblot 2006, S. 35 ff.

[41] Unterrichtung durch den Bundespräsidenten, BT-Drs. 16/3262.

[42] Amtsgericht Berlin, NJW 1997, 2896.

[43] Kammergericht Berlin, NJW 1997, 2896.

[44] BayObLG, BayVBl 1997, 413; bestätigend BayObLG, NJW 1999, 2200.

ben im Ordnungswidrigkeitenrecht durch juristische Personen des Privatrechts. Der Staatsgerichtshof hat erkannt, dass es hier – zumal Grundrechtseingriffe vorgenommen werden können – um eine **Kernfunktion der Staatsgewalt** gehe, die nicht einem Privatrechtssubjekt übertragen werden könne. Die im öffentlichen Interesse notwendige behördliche Objektivität und Neutralität werde beeinträchtigt, wenn Privatinteressen wahrgenommen werden könnten. Zwar sei die Übertragung staatlicher Befugnisse auf Private nicht absolut ausgeschlossen, jedoch seien im konkreten Fall die Anforderungen des Gesetzesvorbehalts nicht beachtet worden. – Aus deutscher Sicht darf betont werden, dass ein deutsches Gericht in einer vergleichbaren Streitfrage nicht anders hätte entscheiden dürfen.

4.2. Privatisierungsmöglichkeiten

Die Restriktionen der deutschen Rechtsordnung zur materiellen Privatisierung von Sicherheitsaufgaben bedeuten nicht, dass eine stärkere Kooperation zwischen Polizei-/Sicherheitsbehörden und Privaten rechtlich ausgeschlossen ist. Zu beschreiten ist der Weg der **funktionalen Privatisierung**, falls Private, insbesondere private Sicherheitsdienstleister („Security"-Firmen), stärker in die Wahrnehmung von Sicherheitsaufgaben einbezogen werden sollen. Gegen eine derartige Einbeziehung des privaten Sicherheitsgewerbes[*45] in die Aufgabenerfüllung bestehen verfassungsrechtlich keine prinzipiellen Bedenken.

Die in Betracht kommenden Tätigkeitsfelder für private Sicherheitsdienstleister sind breit gestreut. Juristisch müssen allerdings mehrere Unterscheidungen getroffen werden. Die Wahrnehmung von Sicherheitsaufgaben von *Privaten für Private* bestimmt sich nach **Zivilrecht** (unter Einschluss der Selbsthilfe-, Notwehr- und Nothilfebefugnisse, die jedermann zustehen), hoheitliche Befugnisse gegenüber Dritten existieren in diesem Fall nicht; bekannte Beispiele sind in diesem Zusammenhang der Objektschutz, die Sicherung von Geld- und Werttransporten sowie der Personenschutz. Die Kooperation privater Sicherheitsdienstleister mit Sicherheits*behörden* muss zusätzlich den Vorgaben des **Öffentlichen Rechts** entsprechen. Denkbare Einsatzbereiche sind etwa gemeinsame Patrouillen von Polizei und Privaten in Fußgängerzonen und Bahnhöfen, Kooperationen bei der Personen- und Gepäckkontrolle auf Flughäfen, die Zusammenarbeit bei der Durchführung von Großveranstaltungen und die Verkehrsüberwachung sowie der Einsatz von Sky Marshals in Flugzeugen.[*46]

Rechtlich ist es nicht korrekt, wenn die verschiedenen Formen von Police-Private-Partnership als „geteilte Sicherheitsverantwortung" qualifiziert werden.[*47] Denn politikwissenschaftliche, sozialwissenschaftliche oder verwaltungswissenschaftliche Deutungsmuster sind im vorliegenden Zusammenhang unbrauchbar; im Rechtssinne kann es angesichts des staatlichen Gewaltmonopols beim Schutz der Inneren Sicherheit eine „Verantwortungsteilung" nicht geben.[*48] Das zeigt eine weitere wichtige Unterscheidung: Im Regelfall ist die funktionale Privatisierung als bloße **Verwaltungshilfe** ausgestaltet (z.B. Einsatz privater Abschleppunternehmer bei verbotswidrig geparkten Fahrzeugen); der als „Erfüllungsgehilfe" einer Behörde agierende Private verfügt über keinerlei Hoheitsrechte. Soll der Private bei der Wahrnehmung von Sicherheitsaufgaben auch Hoheitsbefugnisse, insbesondere Grundrechtseingriffe, vornehmen können, bedarf es nach deutschem Recht der **Beleihung**, die jedoch nur auf Grund einer besonderen gesetzlichen Ermächtigung vorgenommen werden darf. In dem erwähnten Beispiel der Geschwindigkeitsmessung durch eine Privatfirma im Rahmen der Verkehrsüberwachung wurde gerichtlich ausdrücklich festgestellt, eine funktionale Privatisierung in Form einer bloßen Verwaltungshilfe scheide angesichts der beim Verkehrsverstoß drohenden hoheitlichen Sanktion aus; der mit hoheitlichen Mitteln zu erledigende Schutz der öffentlichen Sicherheit durch Private sei nur in Gestalt der Beleihung Privater zulässig, die einer gesetzlichen Ermächtigung bedürfe, an der es jedoch im konkreten Fall fehlte.[*49] Kommt es zur Beleihung, ist das betreffende Privatrechtssubjekt funktional (nicht: institutionell) in die Verwaltungsorganisation eingebunden und staatlicher Aufsicht unterstellt. Folglich greifen alle Sicherungen des Öffentlichen Rechts, die zum Freiheitsschutz des Individuums bestehen.

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[45] Aktuelle Zahlen zu diesem expandierenden Wirtschaftszweig bei F. Schoch. Polizei- und Ordnungsrecht. – E. Schmidt-Aßmann, F. Schoch (Hrsg.). Besonderes Verwaltungsrecht. 14. Aufl. De Gruyter 2008, 2. Kapitel Rn. 24.

[46] Vgl. G. Brauser-Jung, M. Lange. Das neue Bewachungsgewerberecht auf dem Prüfstand. – GewArch 2003, S. 224.

[47] So aber R. Stober. Private Sicherheitsdienste als Dienstleister für die öffentliche Sicherheit? – ZRP 2001, S. 260.

[48] M. Möstl. Engagement des Sicherheitsgewerbes in Ordnungs- und Sicherheitspartnerschaften. – R. Stober, H. Olschok (Hrsg.). Handbuch des Sicherheitsgewerberechts. C. H. Beck 2004, Abschnitt IX Rn. 26.

[49] BayObLG, BayVBl 1997, 413.

5. Fazit

Mit einem knappen Fazit kann festgehalten werden, dass die staatliche Einbeziehung Privater in die Wahrnehmung von Sicherheitsaufgaben nicht von vornherein ausgeschlossen ist, aber verfassungsrechtlichen Direktiven unterliegt und an gesetzliche Grenzen stößt. Nach deutschem Recht ist die **Aufgabenprivatisierung** der Inneren Sicherheit ausgeschlossen; einzelne Aufgaben können jedoch Privaten im Wege der **funktionalen Privatisierung** zur Erledigung übertragen werden. Sind hierzu, also bei der Aufgaben*durchführung*, keine Hoheitsbefugnisse erforderlich, kann die Verwaltung mit Privaten nach Maßgabe der Verwaltungshilfe kooperieren. Muss der Private dagegen zur Aufgabenerfüllung auch hoheitlich handeln können, bedarf es der Beleihung mit Hoheitsmacht. Nach deutschem Recht kann ein solcher Akt von der Exekutive nicht eigenständig vorgenommen werden. Vielmehr gilt der Gesetzesvorbehalt; das Parlament entscheidet, ob überhaupt und in welchen Bereichen sowie in welchem Umfang Privatrechtssubjekte mit Hoheitsmacht ausgestattet werden, um Aufgaben der öffentlichen Sicherheit wahrnehmen zu können. Diese rechtsstaatliche Sicherung, die zudem die Demokratie stärkt, erscheint Regierungspolitikern mitunter umständlich und unbequem. Aber **Rechtsstaat** und **Demokratie** haben nun einmal ihren Preis, und sie müssen manchmal zur Zügelung der „Selbstherrlichkeit" der Exekutive unbequem sein.

In Deutschland ist im Jahr 2002 eine Reform des Bewachungsgewerberechts durchgeführt worden. Ziel der Reform war eine Anpassung der Voraussetzungen für die im öffentlichen Bereich ausgeführten Tätigkeiten des **privaten Bewachungsgewerbes** an die gestiegenen qualitativen Anforderungen; außerdem sollte jedoch sichergestellt werden, dass das **staatliche Gewaltmonopol** auch in Zukunft unangetastet bleibt.[*50] Unter wirtschaftsverwaltungsrechtlichen Vorzeichen ist bestimmt, dass das Bewachungsgewerbe bei der Durchführung von Bewachungsaufgaben gegenüber Dritten nur diejenigen Rechte ausüben darf, die jedermann im Falle einer Notwehr oder einer Selbsthilfe zustehen; hinzu treten die vom jeweiligen Auftraggeber übertragenen Selbsthilferechte sowie die gegebenenfalls gesetzlich übertragenen Befugnisse (§ 34a Abs. 5 GewO). Die Gesetzesbegründung erklärt hierzu, im Umkehrschluss verdeutliche die getroffene Regelung, „dass das Gewaltmonopol der hoheitlich agierenden Polizei unangetastet bleiben muss"[*51]. Dabei sollte es im aufgeklärten demokratischen Rechtsstaat des 21. Jahrhunderts – unabhängig von aufsteigenden und auch schnell abflauenden Privatisierungseuphorien – in der Tat bleiben!

[50] Gesetz zur Änderung des Bewachungsgewerberechts vom 23.7.2002, BGBl I S. 2724; erläuternd dazu U. Schönleiter. Das neue Bewacherrecht. – GewArch 2003, 1 ff. und (Korrigendum) GewArch 2003, 46.

[51] BT-Drs. 14/8386 S. 14.

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Privatisierung und modernes kommunales Unternehmensrecht

Eigengesellschaft oder Kommunalunternehmen in der Rechtsform der Anstalt des öffentlichen Rechts als Gegenbewegung zur Privatisierung[*1]

Über Bedeutung und Notwendigkeit der Privatisierung zur Staatsentlastung und Haushaltsschonung aber auch zur Konzentration auf die Kernverwaltung besteht Einigkeit.[*2]

Herr Maurer hat ausgehend von den verschiedenen Begriffen der Privatisierung vor allem die verfassungsrechtlichen Voraussetzungen und Grenzen materieller Aufgabenprivatisierung entwickelt.

Die Vielfalt der Privatisierungsmöglichkeiten, Formen und Mischformen, Kooperationsmöglichkeiten zwischen Staat und privatem Sektor (bei Verbleib hoheitlicher Gesamtverantwortung) hat Herr Schoch noch einmal aufgegriffen.[*3] Er ist dann in einen Bereich vorgedrungen, der lange Zeit in der Privatisierungsdiskussion tabu war, die Sicherheitsaufgaben.[*4] Schoch hat dabei auch dargelegt, wie private Anbieter Handlungsfelder entdecken und für sich nutzen, die der Staat hat brachliegen lassen, die aber infolge gewandelter Verhältnisse

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2 Zur neueren Privatisierungsdiskussion im Kommunalbereich in Deutschland: M. Ronellenfitsch. Neuere Privatisierungsdiskussion. – W. Hoppe, M. Uechtritz (Hrsg.). Handbuch Kommunale Unternehmen. 2. Aufl. Köln 2007, S. 15 ff; U. Cronauge, G. Westermann. Kommunale Unternehmen. 6. Aufl. 2007. S.a. das Praktikerhandbuch B. Fabry, U. Augsten. Handbuch Unternehmen der öffentlichen Hand. Baden-Baden 2002.

3 F. Schoch. Rechtliche Steuerung der Privatisierung staatlicher Aufgaben. JURA 2008, S. 672 ff., 673 m.w.Nachw.

4 Welche Fülle von Rechtsfragen die verschiedenen Arten von Privatisierungen im immer komplexer werdenden System kommunaler Aufgabenerfüllung aufwerfen, hat anschaulich schon der 1994 erschienene Beitrag von F. Schoch. Privatisierung von Verwaltungsaufgaben. – DVBl. 1994, S. 922 ff. aufgezeigt. Nicht umsonst hat sich auch eine Abteilung des 64. Deutschen Juristentags im September 2002 in Berlin mit der Frage beschäftigt, ob sich im Spannungsfeld vom öffentlichen Auftrag und Wettbewerb national und gemeinschaftsrechtlich eine Neuregelung des Rechts der öffentlichen Unternehmen empfiehlt. Vgl. D. Ehlers. Gutachten zum 64. Deutschen Juristentag, sowie G. Püttner. Neue Regelungen für öffentliche Unternehmen? – DÖV 2002, S. 731 ff. Auch die Staatsrechtslehrertagung 2001 hat sich der Privatisierung gewidmet (VVDStRL 2002). Mit der allgemeinen Bedeutung der Privatisierung befasst sich schließlich die öffentlich-rechtliche Abteilung des 67. Deutschen Juristentages 2008 auf der Basis des Grundsatzgutachtens D von M. Burgi und den Begleitaufsatz von J.-A. Kammerer. Privatisierung von Staatsaufgaben – Versuch einer Zwischenbilanz. – DVBl 2008, S. 1005 ff. sowie F. Schoch (FN 3).

beackert werden müssen: z.B. private Sicherheitsdienste, deren Tätigkeit indirekt auch zur Sicherheit im öffentlichen Bereich beitragen.[*5]

So kann ich mich einem Aufgabenspektrum zuwenden, in dem Privatisierungsbemühungen schnell an Grenzen stoßen: der kommunalen Daseinsvorsorge. Auch generelle Aufforderungen in Kommunalordnungen zur Prüfung von Privatisierungsmöglichkeiten – gedacht zur Haushaltsentlastung und eingefügt im Rahmen der Reform der Haushaltsrechte[*6] haben wenig gebracht. Immerhin haben sie der Privatisierungsdiskussion weiteren Auftrieb gegeben.[*7]

Im Bereich der kommunalen Daseinsvorsorge verpflichten die Landesgesetzgeber die Kommunen, lebensnotwendige Leistungen für die Bürger selbst zu erbringen oder zumindest deren nachhaltige und sozialverträgliche Erfüllung zu garantieren. Kommunale Pflichtaufgaben[*8] sind privatisierungsfest.[*9] Echte materielle Privatisierungen – also der volle Rückzug aus einer originär kommunalen Aufgabe – im Bereich kommunaler Daseinsvorsorge kommen infolge des Bestandsschutzes[*10] oder mangels wirtschaftlicher Lukrativität[*11] kaum in Betracht. So bleibt unter dem Schlagwort Privatisierung im kommunalen Bereich im Wesentlichen der Aufgabenkomplex der Leistungsverwaltung, die in wirtschaftlichen Formen erbracht werden kann.

Ein kommunales Wirtschaftsrecht ist nicht neu. Eigengesellschaft und Beteiligungsgesellschaft stehen schon lange neben öffentlichrechtlichen Formen der wirtschaftlichen Leistungserbringung namentlich im Eigenbetrieb. Eigengesellschaft, Beteiligungsgesellschaft und speziell auf das wirtschaftliche Handeln von Kommunen zugeschnittene Mischformen haben jedoch vor dem Hintergrund von Privatisierungsforderungen an Bedeutung gewonnen.

Unter dem Aspekt Privatisierung ging und geht es im kommunalen Bereich[*12] freilich primär um Fragen der formellen Privatisierung, der Organisationsprivatisierung – die Aufgabe verbleibt bei der Kommune, nur die Aufgabenerfüllung erfolgt in privatrechtlicher Rechtsform. Privatisierung bedeutet also im kommunalen Bereich grundsätzlich eine Verlagerung von Aufgaben aus der unmittelbaren in die mittelbare Kommunalverwaltung mit dem Ziel einer effektiveren, marktkonformeren Aufgabenerfüllung sowie der Haushaltsentlastung. Erreicht wird dies durch einen Wechsel der Rechtsform in der Aufgabenerledigung.

Ausblenden werde ich in meinem Referat die funktionale Privatisierung, die Einschaltung privater Dritter als Beliehener in die Aufgabenerfüllung. Zudem kann ich nicht eingehen auf Fragen der Zulässigkeit kommunaler Wirtschaftstätigkeit primär unter dem Aspekt des Rechtsschutzes privater Konkurrenten beim Einstieg von Kommunen in neue Geschäftsfelder.[*13] Hier haben sich die Kommunen trotz zwischenzeitlich erfolgter gesetzlicher und gerichtlicher Klärungen immer noch Zangenangriffen der Privatwirtschaft und der EU zu erwehren.[*14] Kommunale Spitzenverbände und Kommunalminister erteilen in seltener Einigkeit allen Liberalisierungsbestrebungen aus Brüssel in Bezug auf kommunale Daseinsvorsorgeaufgaben wie etwa die Trinkwasserversorgung eine Absage.[*15]

Im Folgenden geht es also vor allem um die Abgrenzung von Eigengesellschaft und Wirtschaftsunternehmen in der Rechtsform der Anstalt des öffentlichen Rechts. Dazu werde ich in einem ersten Teil kurz allgemein auf Privatisierungen im Bereich kommunaler Daseinsvorsorge und die Gegenbewegung zur Festigung öffentlichrechtlicher Organisationsformen eingehen. Im ausführlicheren zweiten Teil steht dann das moderne kom-

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5 Siehe auch den Beitrag von F. Schoch in der Festschrift Stober zum Thema: Privatisierung polizeilicher Aufgaben? Köln, München 2008, S. 559 ff. – Zu einem anderen, nicht kommunalen Bereich siehe etwa H. Mühlenkamp. (Teil-)Privatisierung von Justizvollzugsanstalten. – DÖV 2008, S. 525 ff.

6 Dazu F. Schoch (FN 3), S. 674.

7 Prüfstand Privatisierung – Gesetzlicher Auftrag an die Kommunen: Dem strategischen Handlungskonzept der Entstaatlichung oder Staatsentlastung entsprechend wurde wie auf Bundesebene in der § 7 BHO auch in Kommunalordnungen neben Experimentierklauseln Privatisierungsklauseln eingefügt. So fordert z.B. der bayerische Gesetzgeber (Art. 61 Abs. 2 Satz 2 GO) von den Kommunen, ihre Aufgaben dahingehend zu überprüfen, ob und in welchem Umfang sie durch nichtkommunale Stellen, insbesondere durch private Dritte oder durch Heranziehung Dritter, mindestens ebenso gut erledigt werden können. Diese Vorschrift erfasst freilich nicht die Abgabe von Aufgaben an andere Hoheitsträger oder auch die Organisationsprivatisierung in der Form von Eigengesellschaften sondern allein die Abgabe von Aufgaben nach außen. Damit aber betrifft sie – wie oben schon gesagt – zu vernachlässigende Bereiche. Für unrentable Bereiche findet sich kein Privatunternehmer, und dort, wo nach Einführung geeigneter Organisationsformen rentables Wirtschaften möglich ist, sinkt die Bereitschaft zu Abgabe von Aufgaben. Für Bayern ist dies seit Einführung der vollen Wahlfreiheit – der Aufgabe der „Eigengesellschaftsfeindlichkeit“ Mitte der 90er Jahre – evident.

8 In Art. 83 der Bayerischen Verfassung sogar katalogmäßig festgelegt.

9 Dazu F. Schoch (FN 3), S. 681.

10 Gegen einen Bestandsschutz dezidiert J. Suerbaum. Durchbruch oder Pyrrhussieg? – Neues zum Schutz Privater vor der Kommunalwirtschaft, Die Verwaltung 2007, S. 29 ff.

11 Dazu am Ende von Teil 1.

12 Zur Abgrenzung siehe etwa M.-E. Geis. Kommunalrecht. München: C.H.Beck 2008, Rn. 100 ff.

13 Dazu näher hinten 2.1 und FN 35.

14 Signifikant dazu der Beitrag von J. Suerbaum (FN 10). Das EU-Recht gibt jedoch keine Basis für einen Privatisierungszwang. Dazu auch F. Schoch (FN 3), S. 678 f.

15 Siehe etwa BayGT 2008, S. 258.

munale Unternehmensrecht im Focus. Dabei geht es auch und vor allem um eine wirksame Steuerung durch die kommunalen Vertretungsorgane. Der Vortrag schließt mit einer Gesamtbewertung.

1. „Privatisierung" kommunaler Daseinsvorsorge

Bis in die 90er Jahre war es gemeinsame gesellschaftspolitische Überzeugung, dass die kommunalen Aufgaben grundsätzlich öffentlich-rechtlich, grundsätzlich auf das eigene Gebiet beschränkt und grundsätzlich ohne Beteiligung privater Dritter zu erfüllen waren. „Zwei politische Entwicklungen markierten Mitte der 90er Jahre des letzten Jahrhunderts das Ende dieser heilen Welt: Zum einen die vom angloamerikanischen Raum auf den europäischen Kontinent überschwappende und erst jetzt allmählich auslaufende Grundwelle („Reaganomics", „Thatcherismus"), wonach „Private" alles besser, schneller und vor allem billiger können als öffentliche Unternehmen, zum anderen die Einführung des Europäischen Binnenmarkts."[*16]

Gerade in der Daseinsvorsorge sind die Kommunen schon lange an Grenzen ihrer Leistungs- und Finanzierungsfähigkeit gestoßen. Wettbewerbsdruck, kommunale Haushaltsprobleme und allgemeine strategische Überlegungen haben namentlich ab Mitte der 90er Jahre zu einer Welle von Auslagerungen und Kooperationen mit privaten Anbietern geführt. Alfred Katz stellt diesen Wandel unter das Schlagwort: Von Omnipotenz zu Subsidiarität und Dezentralisation.[*17] Die kommunale Daseinsvorsorge – traditioneller Kernbestand des kommunalen Leistungsprofils – ist von dieser Entwicklung besonders betroffen. In Bereichen der kommunalen Ordnungsverwaltung – z.B. der Bauleitplanung – spielen insbesondere Kooperationen mit privaten Anbietern eine steigende Rolle. So wird nicht zu Unrecht vor einem schleichenden Ausverkauf oder doch einem bedenklichen Verlust an Steuerungs- und Kontrollmöglichkeiten urkommunaler Agenden gewarnt.[*18]

Besondere Brisanz hat das Thema Organisations-Privatisierung gewonnen, seit Kommunen die Privatisierung oder richtiger gesagt: die Tätigkeit am Markt – zur Konsolidierung ihrer Haushalte entdeckt und in Annexbereiche kommunaler Aufgaben und darüber hinaus auch in nicht unmittelbar dem Bürgerwohl dienende Bereiche ausgeweitet haben: Einsatz ihres Fahrzeugparks jenseits der Grenzen, der Reparaturbetriebe für Privatunternehmen, der Gartenbetriebe für nichtkommunale Anlagen etc. etc.[*19]

Blenden wir privatisierungsfeste Kern-Bereiche[*20] kommunaler Ordnungsverwaltung aus wie die Sicherheitsverwaltung, das Ausweis- und Meldewesen und der Gleichen, und vernachlässigen wir voll privatisierbare Aufgaben – Gebäudereinigung, Reparatur von Fahrzeugen, gärtnerische Gestaltung, also technische Hilfsaufgaben und Nebenleistungen – so suchen und finden die Kommunen Partner aus der freien Wirtschaft oder verschieben Leistungsaufgaben aus dem eigenen Wahrnehmungsbereich und Kommunalhaushalt in die „kommunale Schattenwirtschaft" oder positiv ausgedrückt: in den Bereich der mittelbaren Kommunalverwaltung.

Ist der Wandlungsprozess in der öffentlichen Aufgabenerfüllung namentlich im Bereich des Public-Private-Partnership[*21] noch in vollem Gange, so befinden wir uns auf dem Felde des Outsorcing wirtschaftlicher Agenden in kommunale Eigengesellschaften auf gesetzlich weitgehend gesichertem Terrain. Der Wandel vom Leistungs- zum Gewährleistungsstaat ist gekennzeichnet allein durch eine Verschiebung der Wahrnehmungskompetenzen[*22] auf eigenständige aber von den Kommunen getragene juristische Personen. Steuerung und Kontrolle bleiben – jedenfalls rechtlich – in der Hand der unmittelbaren Kommunalverwaltung mit ihren demokratisch legitimierten Gremien. Der Gewährleistungsverantwortung ist auf diese Weise noch am ehesten nachzukommen. – Kommunale Steuerung und unternehmerische Freiheit bedeuten keinen unlösbaren Spagat![*23]

Dies gilt gleichermaßen für eine Verselbständigung der Aufgabenwahrnehmung in der Form der öffentlichrechtlichen Anstalt wie für ein Outsorcing in eine Eigengesellschaft privaten Rechts.

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16 H. Wiethe-Körprich. Gemeindewirtschaft – nicht (mehr) nur ein nationales Thema. – GZ 2008, S. 65 f.

17 A. Katz. Privatisierung öffentlicher Aufgaben, Kommunalrechtliche Bedingungen und wirtschaftliche Zielsetzungen. – Notarielle Vertragsgestaltung für Kommunen (NotRV), Würzburg 2003, S. 5 ff. 17.

18 Zum Pro und Contra siehe etwa J. Hellermann. Örtliche Daseinsvorsorge und gemeindliche Selbstverwaltung, 2000 mit umfangreichen weiterführenden Nachweisen.

19 Siehe dazu nur die Beispiele bei J. Suerbaum (FN 10), S. 29 f. Zu den Gründen für Privatisierungen F. Schoch (FN 3), S. 674.

20 Auch hier bleibt Raum für die Einbeziehung Privater in Randbereichen.

21 Dazu etwa J. Hellermann. Handlungsformen und Handlungsinstrumentarien wirtschaftlicher Betätigung. – W. Hoppe, M. Uechtritz (Hrsg.) (FN 2), S. 182 ff. und W. Bausback. Public Private Partnerships im deutschen Öffentlichen Recht und im Europarecht. – DÖV 2006, S. 901 ff.

22 Zur Abgrenzung Aufgabenübertragung/Wahrnehmungsübertragung, Übernahme nicht der Aufgabe selbst sondern allein der Erfüllungskompetenz, F.-L. Knemeyer. Der angereicherte Zweckverband. – BayVBl. 2003, S. 254 ff., 259.

23 Näher dazu F.-L. Knemeyer. Kommunale Steuerung und unternehmerische Freiheit – ein lösbarer Spagat. – KommJur 2007, S. 241 ff.

Steuerung und Kontrolle und damit die unmittelbare demokratische Anbindung an das kommunale Muttergemeinwesen bestimmen aber auch die Einbeziehung außenstehender Privater in die Erfüllung kommunaler Aufgaben, so etwa in Kooperations-, Betreiber- oder Betriebsführungsmodellen, in Leasing- oder Konzessionsmodellen.[*24] – Diese Möglichkeiten der Privatisierung müssen im Referat ebenso ausgeschlossen bleiben wie ein Blick auf die namentlich durch die Privatisierung bescheunigte Reform des kommunalen Haushaltsrechts von der Kameralistik zur Doppik, um den Kernbereich des kommunalen Unternehmensrechts – die Eigengesellschaft und das Kommunalunternehmen in Anstaltsform näher betrachten zu können.

Spätestens seit der GO 1935 hat den Kommunen bereits ein auf sie zugeschnittenes Wirtschaftsrecht zugestanden.[*25] Auch war ihnen grundsätzlich die Wahlfreiheit zwischen der Nutzung öffentlich- oder privatrechtlicher Rechtsformen eingeräumt. Freilich ist nicht zu übersehen, dass manche Länder der Nutzung öffentlichrechtlicher Formen im Hinblick auf eine besser zu kontrollierende Anbindung an die kommunalen Vertretungsorgane eine Präferenz eingeräumt haben. Die sprichwörtliche Eigengesellschaftsfeindlichkeit[*26] etwa des Bayerischen Gesetzgebers, die Furcht vor einem Entgleiten in nicht zu steuernde Bereiche, ist erst unter dem Privatisierungsdruck der 90er Jahre aufgegeben worden. Gleichzeitig wurde aber die öffentlichrechtliche Rechtsform der Anstalt so attraktiv ausgestaltet, dass man damit glaubte, der Flucht kommunaler Betriebe aus dem öffentlichen Recht gegensteuern und den Druck ins Gesellschaftsrecht der GmbH abfangen zu können.[*27] Auf diese speziell für das kommunale Wirtschaftsrecht entwickelte öffentlichrechtliche Rechtsform des „Kommunalunternehmens“ wird in Abgrenzung zur kommunal getragenen GmbH im Folgenden einzugehen sein.

Neuerdings ist mit Schoch[*28] eine „Gegenbewegung“ zur Privatisierung festzustellen, bestimmt durch nicht erfüllte Erwartungen und auch schlechte Erfahrungen.

2. Ein modernes kommunales Unternehmensrecht

2.1. Erweiterung der „defizitären Formentypik des öffentlichen Rechts“ – die unternehmensadäquate Ausgestaltung der Anstalt öffentlichen Rechts – AöR

Ein modernes kommunales Unternehmensrecht ist gekennzeichnet durch eine breite Formenpalette[*29], volle Wahlfreiheit zwischen öffentlichrechtlicher oder privatrechtlicher Ausgestaltung der Unternehmensstrukturen und Einbeziehung Privater in die mittelbare kommunale Unternehmensverwaltung. Grundvoraussetzung jeder Auslagerung ist und bleibt jedoch die Sicherung der Erfüllung des Gemeinwohls oder anders ausgedrückt: des öffentlichen Zwecks sowie die demokratische Legitimation im Wege effektiver Steuerung und Kontrolle durch die kommunalen Vertretungskörperschaften.

Ausgelöst durch die immer deutlicher zu Tage tretende Finanzmisere und die Erkenntnis, diese mit herkömmlichen Mitteln nicht mehr in den Griff zu bekommen, haben immer mehr Kommunen ihr Heil in einer neuen Selbstverwaltungsphilosophie gesucht, bestimmt durch Schlagworte wie „Unternehmen Stadt“[*30], „Wirtschaft statt Stadt“[*31], Outsorcing[*32] und neue Steuerung[*33], Budgetierung und Doppik statt Kameralistik. Verstärkt wird der Druck zu Reformen in der Daseinsvorsorgeverwaltung durch die im Zuge der Europäisierung stattfindende Liberalisierung insbesondere in der Strom- und Wasserversorgung, die die nunmehr im Wettbewerb befindlichen kommunalen Unternehmen vor bisher nicht gekannte Herausforderungen stellt. Aus allem klingt

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[24] Dazu näher T. Lämmerzahl. Die Beteiligung Privater an der Erledigung öffentlicher Aufgaben. Duncker & Humblot 2007, S. 70 ff.

[25] Näher dazu F.-L. Knemeyer. Grundzüge eines modernen kommunalen Unternehmensrechts. – Festschrift für Hans-Ernst Folz. Wien, Graz 2003, S. 145 ff.

[26] Näher dazu vorne FN 7.

[27] Zu den Umbrüchen im kommunalen Wirtschaftsrecht F.-L. Knemeyer. – A. Kirchgässner, F.-L. Knemeyer, N. Schulz. Das Kommunalunternehmen. Neue Rechtsform zwischen Eigenbetrieb und GmbH. Stuttgart u.a. 1997, S. 5 ff.

[28] Rechtliche Steuerung (FN 3), S. 673.

[29] Dazu etwa J. Hellermann (FN 21), S. 130 ff.

[30] J. Dieckmann. Unternehmen Stadt. – Der Gemeindehaushalt 1993, S. 121 f.; J. Dieckmann u.a. Reformen im Rathaus. Köln 1996.

[31] Siehe etwa die Angaben bei O. Otting. Öffentlicher Zweck, Finanzhoheit und fairer Wettbewerb – Spielräume kommunaler Erwerbswirtschaft. – DVBl. 1997, S. 1258, 1259.

[32] Outside Recourse Using oder im kommunalen Bereich: Überführung in mittelbare Kommunalverwaltung; dazu W. Engel. Mittelbare Kommunalverwaltung. – Schriften zur öffentlichen Verwaltung. Bd. 20, 1981.

[33] Dazu etwa O. Otting. Neues Steuerungsmodell und rechtliche Betätigungsspielräume der Kommunen. Deutscher Gemeindeverlag 1997, S. 4 ff., 44 ff. Zur Diskussion auch U. Steckert. Neue Aufgaben für die Kommunalwirtschaft. – Der Städtetag 1996, S. 281 ff.; siehe auch etwa H. Hill. Neue Organisationsformen in der Staats- und Kommunalverwaltung. – ders., Verwaltung im Umbruch 1997, S. 17 f.

ein „unternehmerischer Geist", der die Diskussionen bestimmt und zunehmend in den Kommunen Einzug hält, aber auch den herkömmlichen kommunalen Aufgabenbestand ausdehnt und kommunale Verwaltungen zum Eindringen bzw. Expandieren in den Markt[*34] veranlasst. Vermehrt dienen derartige Tätigkeiten nicht in erster Linie der Deckung des Bedarfs der Bürger, sondern primär der Erzielung von Einnahmen für das jeweilige Budget. Diesen Aktivitäten klare und den neuen Prämissen gerecht werdende Grenzen zu setzen, eine Rückbindung an das Kommunalrecht zu geben und gleichzeitig die „defizitäre Fomentypik des öffentlichen Rechts"[*35] zu erweitern, musste Aufgabe und Ziel eines neuen kommunalen Unternehmensrechts sein.

Mag mit der notwendigen Rückbesinnung auf die kommunalen Kernaufgaben die unmittelbare unternehmerische Betätigung auch zurückgehen – die Stadt der Zukunft soll ja Gewährleister statt Rundumversorger sein – ein modernes, eigenständiges Kommunalunternehmensrecht ist nötiger denn je geworden.

2.2. Vom kommunalen Wirtschaftsrecht zum kommunalen Unternehmensrecht[*36] als Gegenbewegung zur Privatisierung kommunaler Daseinsvorsorgeaufgaben

Bis in die 90er Jahre bilden die Bestimmungen der DGO 1935 – sieht man einmal von föderalismusbedingten unterschiedlichen Ausgestaltungen in den Gemeindeordnungen der Länder mit Schwerpunkten beim kommunalen Eigenbetrieb ab – die Grundlage des kommunalen Wirtschaftsrechts.

Schon in den 60er Jahren und verstärkt wieder in den neunziger Jahren setzte dann allerdings ein Trend zur Verselbständigung kommunaler Wirtschaftsunternehmen ein. Mehr und mehr Gemeinden erkannten einen echten oder vermeintlichen Vorzug privatrechtlicher Organisationsformen und wandelten ihre Eigenbetriebe in Eigengesellschaften um.[*37] Mit der zweiten Welle der Privatisierungsdiskussion[*38] ging schließlich die neue Kommunalphilosophie einer zunehmenden Beschränkung auf die Kernverwaltung einher. Ausgelagerte kommunale Betriebe aber sollten möglichst eigenständig agieren und Organisations- und Handlungsmuster aus der Wirtschaft übernehmen.

Diese Entwicklung rief eine Gegenbewegung hervor, die die Gefahren der Abkopplung kommunaler Wirtschaftsunternehmen von der Kontrolle ihrer Muttergemeinwesen herausstellte[*39] und den Vorrang des öffentlichrechtlichen Eigenbetriebsrechts besonders betonte.[*40]

Das in die Jahre gekommene Eigenbetriebsrecht machte eine grundlegende Reform des kommunalen Wirtschaftsrechts erforderlich, die dem Bedürfnis nach Verselbständigung der kommunalen Betriebe und der Notwendigkeit ihrer Steuerung und Kontrolle durch die kommunalen Vertretungskörperschaften gleichermaßen Rechnung

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[34] Zur „Erschließung neuer Märkte" und zu Beispielen für „neue Geschäftsfelder" siehe etwa M. Moraing. Kommunales Wirtschaftsrecht vor dem Hintergrund der Liberalisierung der Märkte. Wirtschaft und Verwaltung 1998, S. 233 ff., 239 f.

[35] Vgl. dazu die grundlegende Arbeit von D. Ehlers. Verwaltung in Privatrechtsform. Duncker & Humblot 1984, insbesondere S. 377 f., der nach vielfältigen Vorschlägen in den fünfziger und sechziger Jahren eine eigene Rechtsform für öffentliche Unternehmen forderte, die eine bessere Steuerung ermöglichen sollte als die privatrechtlichen Organisationsformen, die aber auch dem Unternehmen mehr Spielraum geben sollte als dem Eigenbetrieb. Zur Forderung einer speziellen öffentlich-rechtlichen Rechtsform für öffentliche Unternehmen auch J. Hellermann (FN 21), S. 153.

[36] Vgl. dazu ausführlich den gleichlautenden Beitrag von F.-L. Knemeyer. – BayVBl. 1999, S. 1 ff. m.w.N.

[37] Ausführlich hierzu R. Scholz, R. Pitschas, Gemeindewirtschaft zwischen Verwaltung- und Unternehmensstruktur. – Schriften zum öffentlichen Recht. Bd. 416. Duncker & Humblot 1982, S. 11 ff. und G. Püttner. Die öffentlichen Unternehmen. 2. Aufl. Boorberg 1985, S. 60. Dazu auch T. Pencereci, C. Brandt. Die kommunale Anstalt. – LKV 2008, S. 293 ff., 294.

[38] Zur Privatisierungsdiskussion allgemein F. Ossenbühl und H.-U. Gallwas. Die Erfüllung von Verwaltungsaufgaben durch Private. – VVDStRL 1971 (29), S. 137 ff. und 211 ff.; U. Steiner. Öffentliche Verwaltung durch Private. Hansischer Gildenverlag Heitmann 1975; F. Schoch. Privatisierung von Verwaltungsaufgaben. – DVBl. 1994, S. 962 ff.; J. Wieland. Kommunale Selbstverwaltung zwischen Privatisierung öffentlicher Aufgaben und Ausdehnung wirtschaftlicher Betätigung. – G. Henneke (Hrsg.). Stärkung der kommunalen Handlungs- und Entfaltungsspielräume. Schriften zum deutschen und europäischen Kommunalrecht. Bd. 1. Stuttgart u.a. 1996, S. 17 ff.; C. Gröpl. Möglichkeiten und Grenzen der Privatisierung kommunaler Aufgaben. – Assistententagung Öffentliches Recht, Rostock 1995; M. Hoffmann u.a. (Hrsg.). Kommunale Selbstverwaltung im Spiegel von Verfassungsrecht und Verwaltungsrecht. Stuttgart u.a. 1996, S. 99 ff.

[39] Vgl. F. Schoch. Der Beitrag des kommunalen Wirtschaftsrechts zur Privatisierung öffentlicher Aufgaben. – DÖV 1993, S. 377, 381, der im Rahmen der Privatisierungsdebatte der neunziger Jahre darauf hinwies, dass kommunale Unternehmen in Privatrechtsform weitaus häufiger der Einflussnahme ihres Trägers entgleiten, als dies bei öffentlich-rechtlich organisierten Unternehmen der Fall ist.

[40] Für Bayern insbesondere S. Süß. Eigenbetrieb oder Gesellschaft? – BayVBl. 1986, S. 257 ff. Vgl. auch die Amtliche Begründung zur Einführung des Vorrangs der öffentlich-rechtlichen Organisationsform und des Genehmigungsvorbehalts in das bayerische kommunale Wirtschaftsrecht im Jahre 1973, LT-Drs. 7/3103. Dieser Vorrang ist mittlerweile in allen Ländern aufgegeben.

Unter den öffentlich-rechtlichen Rechtsformen nimmt aber auch heute noch der Eigenbetrieb die erste Stelle ein. So sind z.B im Verband Kommunaler Unternehmen über 300 Eigenbetriebe, ca. 280 Betriebe in sonstiger öffentlich-rechtlicher Rechtsform und über 660 in der Rechtsform der GmbH sowie weitere ca. 100 in anderer privatrechtlicher Rechtsform organisierte kommunale Unternehmen organisiert (Stand Ende 2007).

tragen konnte. Gleichzeitig musste ein neues kommunales Unternehmensrecht den Herausforderungen gerecht werden, die durch fortschreitende Deregulierung und Liberalisierung der Märkte erwachsen waren, ohne dabei die ordnungspolitische Balance zwischen kommunaler und privater Wirtschaft zu stören.[*41]

Entscheidender Beweggrund für die Einführung dieser Rechtsform war es, den Trend zur Umwandlung in und zur Gründung von Unternehmen in privater Rechtsform einzudämmen. Es sollte die „Konkurrenzfähigkeit" der öffentlich-rechtlichen Rechtsform wiederhergestellt werden, indem diese flexibler ausgestaltet wurde, eine größere Selbständigkeit als Regie- und Eigenbetriebe gewährte und insoweit der GmbH angenähert ist, gleichzeitig aber die Vorteile des öffentlichen Rechts aufweist.

Bayern hat nach der ersten Modernisierung im Jahre 1995[*42] in einem zweiten Schritt 1998[*43] sein kommunales Wirtschaftsrecht grundlegend reformiert und zu einem kommunalen Unternehmensrecht umgestaltet: Zudem hat es den Vorrang der öffentlichrechtlichen Rechtsform anders als Z.B. Mecklenburg-Vorpommern, Sachsen-Anhalt, Schleswig-Holstein und Thüringen aufgegeben. Gleichermaßen verzichtet das kommunale Unternehmensrecht in Bayern nunmehr anders als z.B. das in Nordrhein-Westfalen auf die Unterscheidung zwischen wirtschaftlichen und nichtwirtschaftlichen Tätigkeiten, eine Unterscheidung die seit eh und je Streitfragen aufgeworfen hat.[*44] Damit hat Bayern die Vorreiterrolle[*45] auf dem Weg zu einem modernen kommunalen Unternehmensrecht übernommen.

In diesem „kommunalen Unternehmensrecht" kommt eine Philosophie zum Ausdruck, nach der öffentlich-rechtliche Rechtsformen mit den Vorzügen der privatrechtlichen Organisationsformen verbunden und gleichzeitig die Steuerungs- und Kontrollmöglichkeiten der Kommunen bei Verbesserung der Transparenz der Aufgabenerfüllung gesichert werden.[*46]

Mit der neuen selbständig ausgeformten Rechtsform des Kommunalunternehmens als besonders ausgeformte Anstalt des öffentlichen Rechts ist eine Lücke geschlossen zwischen Eigenbetrieb und Eigengesellschaft.[*47]

Nicht beabsichtigt war es, bestehende Unternehmen auf den Prüfstand zu stellen und der Neufassung der Schrankentrias zu unterwerfen.[*48]

Damit fängt das Kommunalunternehmen – die besonders ausgestaltete AöR – Entwicklungen der Organisationsprivatisierung auf, die zu einer „demokratischen Schattenwirtschaft" geführt haben.[*49]

2.3. Die Entwicklung in anderen Ländern

Während die Stadtstaaten Berlin[*50] und Hamburg[*51] bereits zuvor Eigenbetriebe kraft Gesetzes in rechtsfähige Anstalten des öffentlichen Rechts umgewandelt hatten, war Bayern das erste Flächenland, das den Kommunen 1995 die Rechtsform des Kommunalunternehmens neben anderen Rechtsformen zur Auswahl zur Verfügung stellte. In der Folgezeit sind die Länder Rheinland-Pfalz (1998)[*52], Nordrhein-Westfalen (1999)[*53], Sachsen-Anhalt (2001), und Schleswig-Holstein (2002), Niedersachsen (2003)[*54] und zuletzt Brandenburg (2007)[*55] im Wesentlichen dem bayerischen Beispiel gefolgt. Nordrhein-Westfalen, Sachsen-Anhalt und Schleswig-Holstein haben auch den Begriff des Kommunalunternehmens übernommen. Die anderen Gemeindeordnungen

41 Zu europäischen Abhängigkeiten K. Stern. Kommunale Wirtschaftsunternehmen im Lichte des Europäischen Gemeinschaftsrechts. – Festschrift Stober. Köln, München 2008, S. 97 ff.

42 Gesetz zur Änderung kommunalrechtlicher Vorschriften vom 6. Juli 1995, GVBl. S. 376.

43 Gesetz zur Änderung des kommunalen Wirtschaftsrechts und anderer kommunalrechtlicher Vorschriften vom 24. Juli 1998, GVBl. 1998, S. 424.

44 F.-L. Knemeyer. Vom kommunalen Wirtschaftsrecht zum kommunalen Unternehmensrecht. – BayVBl. 1999, S. 1 ff.; N. Schultz. Wirtschaftliche, nichtwirtschaftliche und nicht nichtwirtschaftliche Unternehmen. – BayVBl. 1997, S. 518 ff.

45 So zu Recht J. Handlungsformen (FN 21), S. 154.

46 Allgemein dazu N. Scharpf. Kommunales Unternehmensrecht in Bayern. München 2004.

47 Zu Einzelheiten F.-L. Knemeyer (FN 25), S. 148 ff. Grundlegend dazu F. Eckert. Kommunale Aufgaben im Bereich der Wirtschaftsverwaltung. Würzburg: Ergon 2004 und zur Umwandlung vor Unternehmensrechtsformen A. Gaß. Die Umwandlung gemeindlicher Unternehmen. Stuttgart 2003 und F.-L. Knemeyer (FN 25), S. 157 ff. sowie zur Neugründung S. 159 f.

48 Zu diesem Bestandsschutz besonders kritisch J. Suerbaum (FN 10), S. 29 ff., 41 f.

49 Dazu näher F.-L. Knemeyer. Das selbständige Kommunalunternehmen des öffentlichen Rechts. – A. Kirchgässner, F.-L. Knemeyer, N. Schulz. Das Kommunalunternehmen. – Kommunalforschung für die Praxis 1997, Heft 35, S. 10.

50 Eigenbetriebsreformgesetz vom 9.7.1993, GVBl. S. 319 (Hafen- und Lagerhausbetriebe, Stadtreinigungsbetriebe, Verkehrs- und Wasserbetriebe).

51 Gesetz vom 9.3.1994, GVBl. S. 79 (Stadtreinigung); Gesetz vom 20.12.1994, GVBl. S. 435 (Stadtentwässerung).

52 Viertes Landesgesetz zur Änderung kommunaler Vorschriften vom 2.4.1998, GVBl. 108.

53 Erstes Gesetz zur Modernisierung von Regierung und Verwaltung (1. ModernG) vom 15.6.1999, GV. NW S. 386.

54 Klaes/Kunze. Das Kommunalunternehmen als Anstalt des öffentlichen Rechts. – NSt-N 2002, S. 191 ff.

55 Dazu näher T. Pencereci, C. Brandt (FN 37), S. 293 ff.

– ausgenommen Baden-Württemberg und Sachsen, die keine Neuregelung kennen – sprechen schlicht von der Anstalt öffentlichen Rechts (AöR).[*56] Die konkrete Ausgestaltung der Rechtsform variiert freilich je nach Unternehmensphilosophie von Land zu Land, abzulesen im wesentlich an der Fassung der Privatschutz- und Subsidiaritätsklausel sowie an der Dichte kommunaler Steuerungs- und Kontrollrechte ihrer in die mittelbare Kommunalverwaltung[*57] ausgelagerten Aufgaben.[*58]

Einen anderen Weg hat dagegen **Baden-Württemberg** und ihm folgend **Sachsen** eingeschlagen.[*59] Dort wurde 1999 wie in Bayern zwar auch die Unterscheidung zwischen wirtschaftlichen und nichtwirtschaftlichen Unternehmen sowie der Vorrang öffentlich-rechtlicher Rechtsformen aufgegeben[*60], die Subsidiaritätsklausel und die Regelung über die Zweckbindung neu gefasst bzw. konkretisiert sowie die Transparenz unternehmerischer Betätigung der Gemeinden erhöht.[*61] Als Ausgleich für den Wegfall des Vorrangs der öffentlich-rechtlichen Rechtsform wurden die gesetzlichen Anforderungen an und Möglichkeiten zur Steuerung und Kontrolle der Unternehmen in Privatrechtsform durch die Kommune verstärkt. Gleichzeitig entschied sich der baden-württembergische Gesetzgeber aber gegen die Einführung einer neuen Rechtsform und für den Ausbau der Eigenbetriebsform – als nichtrechtsfähige öffentliche Anstalt.[*62] Der Betriebsleitung wurde eine weitergehende Selbständigkeit zugestanden und die Betriebsführung und -prüfung wirtschaftlichen Grundsätzen unterworfen.

Ob diese Maßnahmen ausreichen, um den „ungebrochenen Trend zur Ausgliederung“[*63] auf privatrechtliche Organisationsformen aufzuhalten, darf indes bezweifelt werden.[*64]

2.4. Voraussetzungen kommunaler Unternehmenstätigkeit

Ausgehend von einer selbstverständlichen Zulässigkeitsvoraussetzung der Geeignetheit einer Daseinsvorsorgeaufgabe zur Wahrnehmung in unternehmerischer Handlungsform sind die Grundvoraussetzungen der seit der DGO 1935 geltenden Schrankentrias den verfassungsrechtlichen Vorgaben und Grenzen[*65] und in der Dichte der Aussage der neuen Kommunalwirtschaftsphilosophie angepasst worden. In kaum einem anderen Bereich haben sich Voraussetzungen kommunaler Tätigkeit in den Bundesländern in den letzten Jahren so auseinander entwickelt wie in der Ausgestaltung der Kommunalwirtschaftsklauseln – den Detailvoraussetzungen der Schranken kommunaler Wirtschaftstätigkeit.

Lassen Sie uns von der bayerischen Regelung ausgehen und die Einzelvoraussetzungen kommunaler Wirtschaftstätigkeit betrachten:

2.4.1. Der öffentliche Zweck kommunaler Aufgabenerfüllung

Bedeutsam für die Zulässigkeit der Errichtung, Übernahme und Erweiterung – nicht aber die Fortführung – kommunaler Unternehmen (Art. 87 BayGO) ist vor allem die Konkretisierung dahingehend, dass „ein **öffentlicher Zweck** das Unternehmen **erfordert**“ (Art. 87 Abs. 1 Satz 1 Nr. 1 BayGO).[*66] Ein nur „rechtfertigt“ wie es andere Kommunalgesetze z.B. § 116 GO LSA oder § 121 HGO (noch) vorsehen, reicht nicht mehr aus.

Noch weniger reicht es aus, dass eine Verschiebung von Aufgaben in den privaten Sektor **öffentlichen Interessen nicht schadet**, so wie es wohl im estnischen Gesetz zur Verwaltungszusammenarbeit normiert ist.

Vor allem aber hat der bayerische Gesetzgeber eine klare Aussage zur Gewinnerzielungsabsicht formuliert und damit Tendenzen zur Ausweitung kommunaler Agenden in den Bereich der Wirtschaft – zum Zwecke der Haushaltskonsolidierung – einen klaren Riegel vorgeschoben. Ausdrücklich wird Tätigkeiten, mit denen gemeindliche Unternehmen an dem vom Wettbewerb beherrschten Wirtschaftsleben teilnehmen und deren

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[56] J. Wolf. Anstalt des öffentlichen Rechts als Wirtschaftsunternehmen. Köln u.a. 2002.

[57] Dazu schon W. Engel. Grenzen und Formen der mittelbaren Kommunalverwaltung. Köln 1981.

[58] Zum Vergleich der unterschiedlichen Länderregelungen siehe die Synopse bei A. Katz. Kommunale Wirtschaft. Stuttgart 2004, S. 144 ff.

[59] Gesetz zur Änderung gemeindewirtschaftsrechtlicher Vorschriften und anderer Gesetze vom 19.7.1999, GBl. S. 292. Zum kommunalen Wirtschaftsrecht in BW insbesondere A. Katz (FN 58).

[60] Eine gesetzliche Subsidiarität besteht nur für die Rechtsform der Aktiengesellschaft, § 103 Abs. 2 GO BW.

[61] Dazu W. Weiblen. Die Novellierung des Gemeindewirtschaftsrechts zur besseren Steuerung und zu mehr Verantwortung für die Gemeinden. – BWGZ 1999, S. 1005 ff.; ders., Das neue kommunale Unternehmensrecht: Freibrief für neue Märkte oder Interessenausgleich. – BWGZ 2000, S. 177 ff.

[62] Zur Struktur des Eigenbetriebs in BW P. Giebler. Eigenbetrieb und gemeindliche Gesamtorganisation. – VBlBW 1999, S. 255 ff.

[63] So W. Weiblen (FN 61), BWGZ 1999, S. 1005, 1006.

[64] Dazu etwa A. Katz. 50 Jahre Gemeindeordnung Baden-Württemberg. – BWGZ 2006, S. 841 ff., 888.

[65] Zu den rechtlichen Vorgaben und Grenzen der Privatisierung im kommunalen Bereich F. Schoch (FN 3), S. 678 ff.

[66] Zum öffentlichen Zweck M. Uechtritz, O. Otting. Kommunalrechtliche Voraussetzungen für die wirtschaftliche Betätigung. – W. Hoppe, M. Uechtritz (FN 2), S. 63 ff., 80 ff.

Hauptzweck es ist, Gewinn zu erzielen, vom Gesetzgeber selbst der öffentliche Zweck abgesprochen (Art. 87 Abs. 1 Satz 2 BayGO).*[67] Vor dem Hintergrund der zunehmenden Expansion der Städte und Gemeinden in immer neue Aufgabenbereiche, dem Trend zur Ausgliederung und Verselbständigung kommunaler Wirtschaftseinheiten und der daraus resultierenden Gefahr des Verlusts kommunaler Steuerung und Kontrolle sollen sich die Kommunen – im eigenen und letztlich im Interesse der Bürger – auf ihre Kernaufgabe als Gewährleister einer Grundversorgung ihrer Bürger beschränken.*[68]

Verwaltungsrechtsprechung und herrschende Meinung in der Literatur verneinen einen Drittschutzcharakter der kommunalrechtlichen Schrankentrias, insbesondere der Subsidiaritätsklausel zugunsten privater Unternehmen im Wesentlichen mit dem Hinweis auf den Zweck der Vorschrift. Auch der Zivilrechtsweg über § 1 des Gesetzes über unlauteren Wettbewerb hat der BGH verbaut.*[69] Dementsprechend fordert etwa Suerbaum den Gesetzgeber auf, den Konkurrentenschutz zu regeln.*[70]

Zudem sei schließlich darauf hingewiesen, dass die Kommunalminister ihrer Klientel entsprechend eher für eine Stärkung und Einengung der Schranken kommunaler Unternehmenstätigkeit, die Wirtschaftsminister dagegen für einen Rückzug der Kommunen eintreten. Besonders deutlich wurde dies in einem Grundsatzreferat des Niedersächsischen Wirtschaftsministers bei den 17. Bad Iburger Gesprächen zum Kommunalrecht 2007, der für einen „geordneten Rückzug der Kommunen" plädiert hat.*[71]

2.4.2. Die Kommunalschutzklausel

Die Kommunalschutzklausel fordert nach wie vor, dass das Unternehmen nach Art und Umfang in einem angemessenen Verhältnis zur Leistungsfähigkeit der Kommune und zum voraussichtlichen Bedarf steht.

2.4.3. Die Schutzklausel zugunsten der Privatwirtschaft

Die dritte Schranke, die Schutzklausel zugunsten der Privatwirtschaft wurde in Bayern auf den Bereich kommunalen Tätigwerdens außerhalb der kommunalen Daseinsvorsorge eingeschränkt (Art. 87 Abs. 1 Satz 1 Nr. 4 BayGO)*[72] und damit die ordnungspolitische Balance zwischen kommunaler und privater Wirtschaft erneut festgeschrieben: die Erfüllung ureigener kommunaler Daseinsvorsorgeaufgaben – wie sie sogar in der Bayerischen Verfassung verankert sind – sollen auch wirtschaftlich angeboten werden können. – In diesem Bereich besteht eine gewisse Variationsbreite für die Kommunal-Philosophie der Landesgesetzgeber. – Ergänzt wird diese generelle Zielrichtung der Beschränkung kommunaler Wirtschaftstätigkeit durch das Schädigungsverbot im Rahmen der Führung eines konkreten kommunalen Unternehmens (Art. 95 BayGO).*[73]

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[67] Mit der Subsidiaritätsklausel verfolgt der Gesetzgeber einen doppelten Schutzzweck: Zum einen sollen die Kommunen vor einer überzogenen unternehmerischen Tätigkeit geschützt werden, zum anderen soll „einer ungezügelten Erwerbstätigkeit der öffentlichen Hand zu Lasten der Privatwirtschaft" vorgebeugt werden. Zur Bedeutung der Subsidiaritätsklauseln im Lichte des verfassunggewährleisteten Selbstverwaltungsrechts schon M. Moraing. Kommunales Wirtschaftsrecht vor dem Hintergrund der Liberalisierung der Märkte. – Wirtschaft und Verwaltung 1998, S. 233 ff. 248 ff.

[68] Vgl. zur Diskussion um die Stadt der Zukunft als „Gewährleister statt Rundumversorger" zuletzt die Beträge von A. Articus und G. Witte, C. Geiger. – Der Städtetag 2002/7-8, S. 6 ff., 10 ff.

[69] Dazu etwa C. Althammer, C. Zieglmeier. Der Rechtweg bei Beeinträchtigungen Privater durch die kommunale Daseinsvorsorge bzw. erwerbswirtschaftliches Handeln der Kommune. – DVBl. 2006, S. 810 ff. mit weiteren Nachweisen.

[70] J. Suerbaum (FN 10), S. 29 ff., 50. Zum Konkurrentenschutz auch M. Burgi. Kommunalrecht. München 2006, S. 208 ff. Eine Klärung hat z.B. die neue Brandenburgische Kommunalverfassung versucht. Dazu etwa M. Grünewald. Die neue Kommunalverfassung des Landes Brandenburg. – LKV 2008, S. 351 ff., 353. Gemäß § 91 Abs.1 Satz 2 BbgKommVerf. sollen die Vorschriften zur wirtschaftlichen Betätigung ausschließlich dem Schutz der Gemeinden dienen.

[71] W. Hirche. Kommunale Körperschaften als Wirtschaftsfaktor. – J. Ipsen (Hrsg.). Unternehmen Kommune? Osnabrück 2007, S. 10 mit statistischen Angaben S. 14 ff.

[72] Diese Einschränkung macht z.B. Nordrhein-Westfalen nicht, normiert dafür aber einen umfangreichen Katalog von Aufgaben, die der Schrankentrias nicht unterliegen und gelangt damit zu einem ähnlichen Ergebnis.

[73] Zur korrigierenden Begrenzung kommunaler unternehmerischer Tätigkeit durch das Wettbewerbsrecht L Meyer. Wettbewerbsrecht und wirtschaftliche Betätigung der Kommunen. – NVwZ 2002, S. 1075 ff.; Ch. Held. Die Zukunft der Kommunalwirtschaft im Wettbewerb mit der Privatwirtschaft. – NWVBl. 2000, S. 201 ff.; S. Tomerius. Wirtschaftliche Betätigung der Kommunen zwischen Gemeindewirtschafts- und Wettbewerbsrecht. – LKV 2000, S. 41 ff.; U. Schliesky. Über Notwendigkeit und Gestalt eines Öffentlichen Wettbewerbsrechts. – DVBl. 1999, S. 78 ff.; O. Otting. Die Aktualisierung öffentlich-rechtlicher Schranken kommunalwirtschaftlicher Betätigung durch das Wettbewerbsrecht. – DÖV 1999, S. 549 ff.

2.4.4. Die Öffnung der Territorialklausel

Zudem ist die Territorialklausel in Art. 87 Abs. 2 BayGO den neuen Anforderungen entsprechend gefasst. Ausnahmsweise zulässige Gebietsüberschreitungen werden allgemein geregelt.*[74]

Die aufsichtliche Genehmigung ist entfallen.

Nebenbei sei schließlich bemerkt: Der eingangs angesprochenen neuen Kommunal-Unternehmensphilosophie entsprechend fordert z.B. der bayerische Gesetzgeber zudem für die **allgemeine tägliche Unternehmensführung ausdrücklich** die Einhaltung betriebswirtschaftlicher Grundsätze, insbesondere des Grundsatzes der Sparsamkeit und Wirtschaftlichkeit und mahnt die Erfüllung des öffentlichen Zwecks auch bei der Unternehmensführung an. Dadurch wird nochmals die angestrebte Symbiose zwischen kommunaler Aufgabenerfüllung und einer (privat-)wirtschaftlichen Grundsätzen gerecht werdenden Unternehmensführung verdeutlicht.

2.4.5. Zur notwendigen Steuerung und Kontrolle*[75]

Mit der Feststellung der kommunalwirtschaftsrechtlichen Adäquanz der neuen Organisationsform ist jedoch die zweite wesentliche Wertungsfrage noch nicht beantwortet. Auslagerung und/oder Organisationsprivatisierung müssen nicht nur wirtschaftlich und wirtschaftsrechtlich, sondern auch verfassungsrechtlich gerechtfertigt sein.*[76] Sie müssen der besonderen Bedeutung und den Aufgaben kommunaler Selbstverwaltung unter dem Grundgesetz und der jeweiligen Landesverfassung entsprechen. Das bedeutet aber, dass Privatisierung nicht um jeden Preis zu haben ist. Neben der Effizienz darf die demokratische Legitimation kommunaler Selbstverwaltung nicht unbeachtet bleiben, ja sie bestimmt wesentlich Voraussetzungen und Grenzen verwaltungsorganisatorischer Neuerungen.

Aus den verfassungsrechtlichen Vorgaben für das kommunale Wirtschaftsrecht kommt dem Demokratieprinzip vorrangige Bedeutung zu. Aus ihm ist als wesentliches Strukturelement für alles kommunale Handeln u.a. der Grundsatz der parlamentarischen Verantwortlichkeit (Art. 20 Abs. 2 GG) abzuleiten, der über den Art. 28 Abs. 1 Satz 2 GG auch für den kommunalen Bereich gilt.*[77] Kommunale Unternehmen müssen daher grundsätzlich der Leitungs-, Steuerungs- und Kontrollverantwortung eines aus Wahlen hervorgegangenen repräsentativ-demokratischen Organs unterworfen sein.*[78] Auslagerung und/oder Organisationsprivatisierung dürfen die Gesamtverantwortlichkeit vom Rat und Bürgermeister nicht grundlegend ändern.

Die Grundverantwortung bleibt hoheitlich. Diese Verantwortung ist nicht teilbar.

Auf dieser verfassungsrechtlichen Grundlage ergeben sich notwendigerweise maßgebliche Ingerenzpflichten des Rates bzw. des Bürgermeisters gegenüber kommunalen Unternehmen, bestimmt durch das Verbot der Flucht aus der Grundrechtebindung in Privatrechtsformen, den Grundsatz der Einheit der Kommunalverwaltung und die Begrenzung der Organisationshoheit durch die Sicherung notwendiger Einwirkungsmöglichkeiten.

Zur Sicherung einer gesetzesentsprechenden Führung eines kommunalen Unternehmens darf freilich nicht allein auf die kommunaladäquate Handhabung der Möglichkeiten durch die maßgeblichen Personen – hier den Bürgermeister und die Mitglieder des Verwaltungsrats – vertraut werden, es bedarf vor allem der rechtlichen **Absicherung der Einwirkungsnotwendigkeiten**. Hier liegt ein besonderes Problem, aber auch ein Vorteil der neuen Rechtsform, da die meisten Gesetzgeber sich in konkreten Vorgaben zurückgehalten*[79] und nur Grundvoraussetzungen für das Kommunalunternehmen bzw. die AöR formuliert haben. Auch die Kommunalunternehmensverordnung Bayern – in Anlehnung an die EVO formuliert – hat z.B. zum Weisungsrecht (Art. 9o Abs. 2 Satz 4 GO), zu Transparenz und Sachkundevoraussetzungen keine näheren Vorgaben normiert. Daher bedarf es für Kommunalunternehmen ebenso wie für Eigengesellschaften – kommunale Unternehmen in Privatrechtsform – der entsprechenden Ausgestaltung der Unternehmenssatzung. Dabei kommt es darauf an, den Spagat zwischen Kommunaler Steuerung und unternehmerischer Freiheit zu lösen.*[80]

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[74] Zu den Konsequenzen dieser Öffnung N. Schulz. Anmerkungen zur Tätigkeit gemeindlicher Unternehmen außerhalb des Gemeindegebiets. – BayVBl. 1998, S. 449 ff.

[75] Siehe dazu grundsätzlich den Beitrag von R. Wahl. Organisation kommunaler Aufgabenerfüllung im Spannungsfeld von Demokratie und Effizienz. – H.-G. Henneke (Hrsg.). Organisation kommunaler Aufgabenerfüllung. Schriften zum deutschen und europäischen Kommunalrecht. Bd. 6. Boorberg 1998, S. 15 ff.

[76] Dazu grundlegend M. Ronellenfitsch, A. Stein. Verfassungsrechtliche und gemeinschaftsrechtliche Vorgaben. – W. Hoppe, M. Uechtritz (FN 2), S. 29 ff.

[77] R. Herzog. – T. Maunz, G. Dürig, R. Herzog. Art. 20 GG, II, Rn. 91 ff. Speziell auf den kommunalen Bereich bezogen: F. Schoch (FN 3), S. 680 f.

[78] Dazu im Einzelnen auch J. Dieckmann. Unternehmen Stadt. – Der Gemeindehaushalt 1993, S. 121 f.

[79] Zu Möglichkeiten und Grenzen gesetzlicher Festlegungen siehe etwa die Ausführungen zur Handhabung durch den Verordnungsgeber in Bayern bei F.-L. Knemeyer (FN 25), S. 156. Sachsen-Anhalt hat die AöR sogar in einem eigenständigen Gesetz, dem SachsAnhAnstG, geregelt. Dazu T. Pencereci, C. Brandt (FN 37), S. 293 ff.

[80] Dazu im einzelnen F.-L. Knemeyer. Kommunale Steuerung und unternehmerische Freiheit – ein lösbarer Spagat. – KommJur 2007, S. 241 ff. Transparenz und Sachkunde von Verwaltungs-/Aufsichtsratsmitgliedern sind nur zwei der grundlegenden Voraussetzungen. Die Sachkundevor-

Steuerung und Kontrolle dürfen nicht durch das Gesellschaftsrecht unterlaufen werden.

Um keine Missverständnisse aufkommen zu lassen: Weisungsrechte und Kontrollen bedeuten nicht ein Hineinregieren des Gemeinderats in sein kommunales Unternehmen. So wie der Rat sich – entgegen vielfältiger Praxis – auf echte Ratsaufgaben beschränken und aus der Einzelfallentscheidung zurückziehen sollte, so kann seine Aufgabe im Bereich des Kommunalunternehmens auch nur eine (Vor-)Steuerung in Form von Leitentscheidungen und eine allgemeine Kontrolle darstellen. Ratsgremien müssen sich darauf beschränken, Ziele gemeindlichen Handelns zu formulieren und nicht den Beschlussvollzug bis an die Schreibtische zu reglementieren. Würde man Steuerung und Kontrolle anders sehen – Steuerung der Einzelentscheidung, Kontrolle der Einzelentscheidung etc. –, so würde dies den Zweck einer Auslagerung kommunaler Aufgaben auf eine selbständige Anstalt oder auch ein Unternehmen in Privatrechtsform konterkarieren.*[81] Nicht umsonst ist die neue Organisationsform geschaffen worden, um unternehmerisches Handeln und Kostenbewusstsein zu ermöglichen.*[82]

Steht die einzelne Kommune vor der Gründung, Ausgründung oder Umgründung eines Unternehmens, so hat sie neben den kommunalrechtlichen Kernvoraussetzungen – auf die im Vortrag allein eingegangen werden konnte – eine ganze Palette von weiteren rechtlichen aber auch strategischen Fragen zu prüfen.*[83]

Die neue brandenburgische Kommunalverfassung verlangt sogar, jeder Neugründung ein öffentliches Markterkundungsverfahren vorzuschalten und auch der zuständigen IHK Gelegenheit zur Stellungnahme zu geben.*[84] In jedem Falle wird es maßgeblich um die Abgrenzung der nutzbaren Rechtsformen gehen.

Eine besondere Bedeutung kommt schließlich der konkreten Ausgestaltung des **kommunalen Beteiligungsmanagements** zu.*[85] In der Folgezeit werden sich wohl alle Gesetzgeber zu einer detaillierter werdenden Normierung der Voraussetzungen entschließen, so wie dies jüngst der brandenburgische Gesetzgeber getan hat.*[86]

5. Zusammenfassung und Wertung

Im Gesamtsystem eines modernen kommunalen Wirtschaftsrechts stellt das Kommunalunternehmen als öffentlich-rechtliche Rechtsform – ausgestaltet mit Vorzügen privatrechtlicher Organisationsformen – ebenso wie die unternehmensbezogene Anstalt öffentlichen Rechts (AöR) in Abgrenzung zur bevorzugten Unternehmensform der GmbH einen wesentlichen Eckpfeiler dar. Es offeriert den Kommunen bei der Entscheidung über Umstrukturierungen oder Neugründungen eine denkwürdige Alternative zur Privatrechtsform.

Der „wind of change“*[87] hat die Ländergesetzgeber veranlasst, den Kommunen die adäquaten Organisationsformen bereitzustellen. Die Kommunen sollten ihren Nutzen bedenken und gegebenenfalls im Wege von Um- und Neugründungen realisieren.*[88]

Seit Einführung des Kommunalunternehmens als Anstalt des öffentlichen Rechts im Jahre 1995 entstanden in Bayern bereits 123 Unternehmen dieser Rechtsform, davon 9 gKU. Diese Zahlen können sich sehen lassen, zumal sie sich nur auf Neugründungen beziehen. Alexander Schraml spricht sogar von der Erfolgsgeschichte einer Rechtsform.*[89] Für Umgründungen privater kommunale Unternehmen besteht allerdings regelmäßig kein Anlass, da auch namentlich die kommunalen GmbHs gut funktionieren und den „neuen“ Steuerungs- und

aussetzung ist jetzt ausdrücklich in § 97 Abs. 4 BbgKommVerf gefordert, aus verfassungsrechtliche Gesichtspunkten aber in einer Sollvorschrift gefasst.

[81] Zu den Möglichkeiten kommunaler Vertreter in den Organen kommunaler Unternehmen Oebbecke, Rechtliche Vorgaben für die Führung kommunaler Gesellschaften. – W. Hoppe, M. Uechtritz (FN 2), S. 229 ff., 238 ff.

[82] Mehr als deutlich macht z.B. die Kommunale Gemeinschaftsstelle für Verwaltungsvereinfachung – KGSt eine Rückbesinnung auf die eigentlichen Ratsaufgaben zur Voraussetzung für den Erfolg der sogenannten neuen Steuerungsmodelle. – BayBgm 1997, S. 6; zu den neuen Steuerungsmodellen siehe etwa J. Dieckmann, M. Schöneich (Hrsg.). Reformen im Rathaus. Köln u.a. 1996.

[83] Siehe dazu etwa das Praktikerhandbuch von B. Fabry, U. Augsten (FN 2) und A. Katz (FN 17), S. 4 ff. 20 ff.

[84] § 92 Abs. 3 BbgKommVerf..

[85] Dazu etwa K. Ade (Hrsg.). Kommunales Beteiligungsmanagement. 2. Aufl. Stuttgart 2005 und Weiblen. Beteiligungscontrolling und -management. – B. Fabry, U. Augsten (FN 2), S. 443 ff.

[86] Dazu M. Grünewald (FN 70), S. 351 ff., 353.

[87] Vgl. H. G. Henneke. Wind of change – Neue Entwicklungen im Recht der Kommunalwirtschaft. – der Landkreis 1999, S. 577 ff., S. 656 ff.

[88] Zu Handlungsstrategien siehe A. Katz (FN 17), S. 4 ff., 23 ff., 34 f.

[89] A. Schraml. Das Kommunalunternehmen – Erfahrungen mit einer neuen Rechtsform. – J. Ipsen (Hrsg.) (FN 71), S. 73 ff.

Kontrollerfordernissen angepasst wurden und werden.[*90] In diesem Punkte leiden noch viele ältere Unternehmenssatzungen.

In Nordrhein-Westfalen wurde ca. 70 Mal von der seit 1999 bestehenden Möglichkeit der Errichtung einer „rechtsfähigen Anstalt des öffentlichen Rechts" Gebrauch gemacht.[*91] In anderen Ländern hat die neue Rechtsform bislang weniger Resonanz gefunden. Ein Grund dafür liegt sicher in der Tatsache, dass im Zeitpunkt der Einführung der neuen Rechtsform bereits weitgehend Ausgründungen in private Rechtsformen bestanden haben.

Das Spektrum der Unternehmensgegenstände reicht von der Vermarktung einer Stadthalle über den Betrieb von Kläranlagen, Wasserwerken und Bauhöfen bis hin zu Krankenhäusern, Alten- und Pflegeheimen, Verkehrsbetrieben und Theatern.

Die Erfahrungen mit dieser Rechtsform sind bislang durchweg positiv.[*92]

Nutzen die Kommunen bei Gründung kommunaler Unternehmen oder Umwandlung in kommunale Unternehmen die offene Ausgestaltung des neuen Rechtsinstituts selbstverwaltungsadäquat, d.h. nutzen sie ihre Organisationshoheit bei der Formulierung der Unternehmenssatzung so aus, dass ihnen die erforderlichen Einwirkungsmöglichkeiten und den Unternehmensorganen die erforderliche Freiheit für die Erfüllung ihrer Aufgaben garantiert sind, so kann man die neue, mittlerweile sich etablierende Organisationsform als gelungenen Verbund zwischen unternehmerischer Freiheit und kommunaler Steuerung bewerten.

Im Blick auf eine weitere Fortentwicklung des kommunalen Unternehmensrechts[*93] müssten eine ganze Reihe von Aspekten angesprochen werden, so etwa die Öffnung in Richtung kommunaler Zusammenarbeit[*94] oder „auch nur" der Kapitalbeteiligung Privater an kommunalen Unternehmen, vor allem aber müsste der in manchen Rechten immer noch bestehende Streit über die Bedeutung der Subsidiaritätsklausel entschärft werden. Zudem bedarf es der legislatorischen Klärung, dass auch Tochter- und Enkelunternehmen in die Steuerung und Kontrolle einzubeziehen sind.

[90] Zu den allgemeinen Kriterien für die Rechtsformenwahl siehe etwa M. Uechtritz. Rechtsform kommunaler Unternehmen – Rechtliche Vorgaben und Entscheidungskriterien. – W. Hoppe, M. Uechtritz (FN 2), S. 679 ff.

[91] Knappe Darstellung dieser Rechtsform F.-L. Knemeyer. Grundzüge eines modernen kommunalen Unternehmensrechts. – Festschrift Folz. NWV 2003, S. 145 ff., 153 ff. mit weiterführenden Literaturangaben. Hier sei nur hingewiesen auf D. Ehlers. Das selbständige Kommunalunternehmen des öffentlichen Rechts. – H. G. Henneke (Hrsg.). Kommunale Aufgabenerfüllung in Anstaltsform. Schriften zum deutschen und europäischen Kommunalrecht. Bd. 13. Boorberg 2000, S. 47 ff.; J. Riedmayer, A. Schraml. Das Kommunalunternehmen – Anstalt des öffentlichen Rechts. – Kommunalforschung für die Praxis 2000, Heft 42/43, m.w.N.

[92] Für Bayern vgl. J. Riedmayer, A. Schraml (FN 91). Für Nordrhein-Westfalen vgl. Praxisbericht der Stadt Hürth. – Städte- und Gemeindebund NRW (Hrsg.). Anstalt des öffentlichen Rechts. – Leitfaden 2001/11, S. 16 bis 18.

[93] Dazu näher F.-L. Knemeyer (FN 25), S. 161 ff.

[94] Dazu etwa F.-L. Knemeyer (FN 25), S. 145 ff. 163 f.

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On Assignment of Local Government Tasks to the Private Sector in Estonia[*1]

1. Introduction

The assignment of public tasks to the private sector has been topical in Estonia since the 1990s, and practical solutions to this question cluster have been sought actively at both state and local level over the years. Today, local government units — rural municipalities (numbering 194) and cities (33) — provide an estimated 70% of all public services rendered to people.[*2] Although this topic has not been overlooked by representatives of research in any of several fields, we have to agree with the opinion of the Chancellor of Justice that, unlike other countries, where the topic has been featured in numerous publications and judicial practice has provided necessary guidelines, Estonia has, thus far, shown a dearth of relevant theoretical discussions.[*3] At the same time, assignment of public tasks to the private sector prompts various questions that require opinions from jurists.

If we are to understand the situation that has developed and the issues arising from the assignment of public tasks to persons in private law, it is impossible to ignore the wider social context in which the performance of public tasks by local governments has taken, and is taking, place. Thus, the one-level local government system existing in Estonia can be criticised with keywords like 'inadequate administrative capacity' (weak planning of investments and development; shortcomings in the areas of waste management, budgeting and accountancy, and information technology; irregular and secondary local government supervision in their areas of activity; etc.)[*4], 'weak and unevenly distributed revenue base'[*5], and 'scant legal competence'.[*6] The recently emerg-

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2 Kohalik omavalitsus Eestis (Local Government in Estonia). Ministry of Internal Affairs 2008, p. 7. Available at http://www.siseministeerium.ee/public/Kohalik_omavalitsus_Eestis_2008.pdf (23.03.2009) (in Estonian).

3 Õiguskantsleri 2006. aasta tegevuse ülevaade (Overview of the Activities of the Chancellor of Justice in 2006), pp. 75–76. Available at http://www.oiguskantsler.ee/public/resources/editor/File/_levaade_2006_e_k_L_PLIK.pdf (23.03.2009) (in Estonian).

4 See, e.g., Auditor General Mihkel Oviir: Haldusreformiga ei saa oodata viimsepäeva laupäevani (Administrative Reform cannot Wait till Doomsday Eve). Press release of 2.03.2009. Available at http://www.riigikontroll.ee/ (16.04.2009) (in Estonian).

5 See, e.g., E. Ulst. Eesti kohalike omavalitsuste tuludebaas Leping LMJRI 10699. EMFA komponent A-3 (Revenue Base of Estonian Local Governments Contract LMJRI 10699. EMFA component PA-3). Tartu: University of Tartu Faculty of Economics 2000, pp. 49–52. Available at http://portaal.ell.ee/7942 (16.04.2009) (in Estonian); Analysis of the National Audit Office of the revenues and expenditure of local government budgets. Chief auditor's decision of 18.01.2000, No. 70-13/008. Available at http://www.portaal.ell.ee/1577 (16.04.2009) (in Estonian).

6 See, e.g., K. Paas. Interview with Chancellor of Justice Indrek Teder: The Chancellor is Missionary for Small Local Governments. – Äripäev, 27.03.2009 (in Estonian).

ing economic depression certainly fails to assist in the resolution of the problems that have accumulated over time. All of the above directly relates to the topic of this article.

The main objective of the authors of this article here is to provide a reasoned assessment of the legal and factual circumstances related to the performance of a group of local tasks by Estonian local governments. For this purpose, the sphere of public tasks performed by local government is firstly determined and constructed, proceeding from the requirements of the valid legal order. The legal limits of assigning public tasks to persons in private law and the different forms of such delegation are then discussed, and the substantive soundness (systematicity) of legal regulations established here by the legislator is examined. The focus of the analysis is then shifted to questions concerning competition procedures or public procurement procedures prior to delegation, for the performance of a public task under a contract in public law, and then to issues related to the performance of mandatory local tasks. The analysis thus makes use of the findings of a survey the authors conducted among local governments in the summer of 2008.[*7]

2. The structure of public tasks performed by local governments

On the basis of the principles of the legal order of Estonia, public tasks may legally be determined to be tasks assigned to administrative institutions directly by law or pursuant to law and tasks that have been derived from the relevant legal norm by way of interpretation.[*8] Problems arising from the delegation of public tasks arise not only on the state level but also on the local government level. The situation that has arisen in Estonian legislation regarding the determination of public tasks is on the whole characterised as indefinable and unclear.[*9] The Constitution of Estonia distinguishes between local issues (§ 154 (1)) and state issues ("duties of the state") (§ 154 (2)). In resolving and managing local issues, the local government has universal competence.[*10] Assigned competence (state issues) is formed pursuant to the law (reservation of law) or pursuant to an agreement between the state and the local government (contract under public law). The differentiation between issues that are essentially local and national is characteristic of the dualistic theory of classifying public tasks.

Local tasks that essentially belong to the competence of a local government can be classified in various ways.[*11] Their classification into voluntary and compulsory local tasks is the most important.

Voluntary local tasks are those tasks that the local government is not obliged to fulfil but which it can undertake to fulfil at any time (the so-called right of discovering tasks). In the case of a voluntary local task, the local government has the right to decide whether, when, and how the performance should be carried out. Voluntary local tasks include co-operation with other local government units, establishment of sporting facilities, various cultural tasks, creation of recreation opportunities for residents, etc.

Mandatory local tasks are such local tasks as the state requires local governments to perform on account of heightened public interest. The obligation to perform a task may be unconditional (that is, the task must be performed in any case) or conditional (the task must be performed if necessary, or under certain conditions). In principle, with regard to local tasks, the local government is free to decide only on how to complete a certain task, not whether to perform it at all. Mandatory local tasks have been set out, e.g., in § 6 (1) and (2) of

[7] We interviewed 92 local government units, i.e., 40.5% of their total amount. We more specifically addressed rural municipality and city secretaries as local government officials who daily engage in the preparation and implementation of legislation. Legally speaking, the issued questionnaire constituted a request for public information pursuant to the Public Information Act. Proceeding from calculated revenue per resident, we divided local government units into "the wealthy" and "the poor"; in order to achieve better representation, we added local government units with larger populations and proceeding from the specific goal-setting, we also added the rural municipalities and cities that have established parking charges. We received (on time and after additional reminders) a total of 76 responses, forming 83% of the questionnaires issued — a result, on the one hand, showing existing reserves in the proper performance of requests for public information by local governments, on the other hand, constituting a relatively foreseen result. The Public Information Act (avaliku teabe seadus) referred to has been published in RT I 2000, 92, 597; 2008, 35, 213 (in Estonian).

[8] K. Merusk. Assignment of Public Tasks to Private Legal Persons. Legal Basis and Limits. – Juridica International 2000 (5), p. 41.

[9] SCebd, 19.04.2004, 3-3-1-46-03 (in the appeal of Avanduse Rural Municipality Government against a regulation of the Government of the Republic to be declared unlawful), pp. 22–23. – RT III 2004, 11, 128 (in Estonian).

[10] CRCSd, 22.12.1998, 3-4-1-11-98 (Application of the Chancellor of Justice to repeal items 2, 6, 7 and 8 of the prohibition on entry and parking in Tallinn Old Town, approved by regulation No. 8 made by Tallinn City Council on 22.02.1996). – RT I 1998, 113/114, 1887 (in Estonian); 9.02.2000, 3-4-1-2-00 (Application of the Chancellor of Justice to repeal regulation No. 672 of 16.04.1999 of the Narva City Government, "Approval of the Rules of Using the Transit Transport Square" and the annex thereto of 21.04.1999, and regulation No. 1215 of 4.06.1999, "Additions to the Rules of Using the Transit Transport Square" and the annex thereto of 2.06.1999). – RT III 2000, 5, 45 (in Estonian).

[11] See V. Olle. Kohaliku omavalitsuse ülesannete struktuur ja liigitamiskriteeriumid (The Structure and Classification Criteria of Local Government Tasks). – Juridica 2002/8, pp. 524–531 (in Estonian).

the Local Government Organisation Act*[12] (LGOA). It is thus provided in § 6 (1) of the LGOA that the functions of a local government include the organisation, in the rural municipality or city, of social assistance and services, welfare services for the elderly, youth work, handling of housing and utilities, the supply of water and sewerage, the provision of public services and amenities, waste management, physical planning, public transportation within the rural municipality or city, and the maintenance of rural municipality roads and city streets unless such functions are assigned by law to other persons. In addition to the above-mentioned functions, local governments also resolve, and organise response to, local issues assigned to them by other acts of law (LGOA § 6 (3)1)). These areas are also largely regulated by the relevant specific laws (the Social Welfare Act*[13], the Public Water Supply and Sewerage Act*[14], the Waste Act*[15], etc.), which have set out in greater detail how local governments should organise operations in a certain area.

Despite certain differences, both above-mentioned groups of local tasks belong to the scope of § 154 (1) of the Constitution, thus being subject to the provision of the said constitutional provision: "All local issues shall be resolved and managed by local governments, which shall operate independently pursuant to law."

3. Legal limits and forms of the delegation of local government tasks

3.1. Local government guarantee and delegation

The guarantee of local governments as institutions of objective law, set out in § 154 (1) and § 158 of the Constitution, provides local governments with exclusive competence to resolve and manage all local issues. Local governments have thus been given room for decision — whether and how to manage local issues, and henceforth also the liberty to choose organisational-legal forms, insofar as doing so is not restricted with a reservation of law. The freedom to choose organisational-legal forms applies primarily in the case of fulfilment of voluntary local tasks. The local government can fulfil such tasks itself in an organisational form through a structural unit or municipal agency; establish a legal person in private law and assign to it the performance of the task concerned; or assign the task to a natural person or a legal person in private law, established by persons in private law. Here, the state cannot provide for a requirement of delegation of tasks or prohibition thereof. The choice of the organisational-legal forms for fulfilling a task, in turn, depends on several economic and social factors and also on the capability of the local government itself to fulfil the given task. Upon delegation of a task, the capabilities of local governments to influence the quality of completion of the task are reduced.

3.2. Mandatory local tasks and the legal limits of delegation

The legal limits of the delegation of tasks imposed on local governments by law, both local and state tasks, do not proceed solely from the associated provision delegating authority but are also related to constitutional limits. This is particularly relevant in the case of tasks related to authorised powers. In the case of constitutional limits, what must be considered are the nature of the task, the legal status of the person fulfilling the task, and the potential intensity of interference with a person's fundamental rights — the intensity of infringement of fundamental rights. The legislator cannot grant authority to a local government to assign such tasks to a person in private law as are among the core tasks of the authority of the state. The Supreme Court has thus assumed the position that the delegation of misdemeanour procedure and the related penal power of the state to a legal person in private law is in contravention of §§ 3, 10, 13, and 14 of the Constitution, in conjunction with them. These provisions together establish the principle that the authority of the state must only be exercised pursuant to the Constitution and that exercise of the authority of the state cannot be unconstitutional. In the decision, the Supreme Court analysed item 3 of § 9, which provides that in the cases provided by law, extra-judicial proceedings shall also be conducted by legal persons in private law on the basis of a contract under public law, and § 54^{11} (3), which gives local governments the authority to delegate the conducting of misdemeanour procedure and punishment for travelling without a document certifying the right to use public transport and refusing to pay a taxi travel fare to a legal person in private law with a contract under public law. The court

[12] Kohaliku omavalitsuse korralduse seadus. – RT I 1993, 37, 558; 2008, 53, 293 (in Estonian).

[13] Sotsiaalhoolekande seadus. – RT I 1995, 21, 323; 2008, 58, 329 (in Estonian).

[14] Ühisveevärgi ja -kanalisatsiooni seadus. – RT I 1999, 25, 363; 2009, 3, 15 (in Estonian).

[15] Jäätmeseadus. – RT I 2004, 9, 52; 2009, 3, 15 (in Estonian).

found that penal power, including the conducting of misdemeanour procedure, belongs among the core functions of the state, which cannot be delegated to persons in private law pursuant to the Constitution.*[16]

The core tasks of the state should also include the right to exercise power in the name of the state, which cannot be delegated to persons in private law.*[17]

Upon granting of authority for the delegation of other tasks with authorised powers, the content and scope of the task and the intensity of the potential infringement of fundamental rights must be considered. Pursuant to §§ 13 and 14 of the Constitution, everyone has the right to management and procedure that includes a right to the normative and factual activity of the state in order to guarantee the protection of rights of a person.*[18] This requires that the legislator guarantee the relevant legal regulations. In this regard, the conformity of § 50^1 (3) of the Traffic Act*[19] with the Constitution is questionable. Pursuant to said provision, the local government may transfer, on the basis of a public-law contract, the monitoring of parking and of payment of parking charges, and imposition of fines for delay upon failure to pay the parking charges or if the parking time paid for is exceeded, to a legal person in private law. Pursuant to § 5 (10) of the Local Taxes Act*[20], parking charges are one of the local taxes. Pursuant to the provision of the Traffic Act considered here, a legal person in private law shall participate in the procedure through its employees to whom the provisions concerning officials that are provided by said act extend. At the same time, the act does not contain additional provisions concerning such employees. The legal person in private law has acquired the status of an administrative authority and its employees the status of public servants. The Public Service Act has established service requirements for public servants, which guarantee the quality of performance of administrative duties, and therefore also the protection of persons' rights. In addition, the public authority is responsible for the training and in-service training of officials. None of this is guaranteed in the given case.

There is also lack of regulation of supervision. Delegation of tasks imposed on local governments by law presupposes the existence of a provision delegating authority, established by law. Pursuant to § 3 (2) of the Administrative Co-operation Act*[21], a local government may grant the authority to perform an administrative duty assigned thereto by law or pursuant to the law to a legal or natural person by means of an administrative act issued on the basis of law or via a contract under public law entered into under the conditions of, and pursuant to the procedure provided for in, said act on the basis of law. According to the act, performance of administrative duties may be delegated only if this is economically justified, in consideration of the expenses involved in delegation, any funding, and supervision, and also only if delegation does not reduce the quality of performance of such duties or damage public interests or the rights of persons subject to performance of these administrative duties.

3.3. Delegation and reservation of law: Discretion or imperative

Upon granting authority for the delegation of mandatory local tasks, the legislator has either directly prescribed the delegation requirement — in many cases, determining whom the performance of the task may be assigned to — or has given the local government the right of discretion, the freedom to choose whether or not to delegate.

The Public Water Supply and Sewerage Act, for instance, sets out that if a public water supply and sewerage system is in local government ownership, a water undertaking shall be appointed by way of a public competition by a decision of the local government council on the basis of the provisions of subsection 14 (2) of the Competition Act (§ 7 (2)). According to this act, a water undertaking can be a legal person in private law (§ 7 (1)). Such a legal person in private law can be established on private initiative or as a company the sole partner or shareholder of which is the relevant local government, or as a company in which the latter has majority interest, or as a foundation whose sole founder is the rural municipality or city.

Pursuant to § 67 (1) of the Waste Act, for granting a special or exclusive right for waste transport, a local government shall organise, independently or in co-operation with other local governments, a competition pursuant to the procedure provided for by the Competition Act. That act refers to the waste transport operator with the term 'undertaking' (§ 68 (1)). The Waste Act does not define the concept of undertaking; it is, however, laid

[16] SCebd, 16.05.2008, 3-1-1-86-07 (Punishment of Indrek Eiche pursuant to § 54^7 (1) of the Public Transport Act). – RT III 2008, 24, 159 (in Estonian).

[17] K. Merusk, T. Annus, M. Ernits, H. Lindpere, L. Madise. I Chapter. General Provisions. – Constitution of the Republic of Estonia. Commented edition. 2nd updated edition. Tallinn: Juura 2008, p. 49 (in Estonian).

[18] See SCebd, 28.10.2002, 3-4-1-5-02 (Application of Tallinn Administrative Court to validate the conformity of § 7 (3) of the Republic of Estonia Principles of Ownership Reform Act with the Constitution). – RT III 2002, 28, 308 (in Estonian).

[19] Liiklusseadus. – RT I 2001, 3, 6; 2008, 54, 304 (in Estonian).

[20] Kohalike maksude seadus. – RT I 1994, 68, 1169; 2005, 57, 451 (in Estonian).

[21] Halduskoostöö seadus. – RT I 2003, 20, 117; 2008, 58, 329 (in Estonian).

down in the Commercial Code[*22] (§ 1), which provides that an undertaking is a natural person who offers goods or services for charge in his or her own name where the sale of goods or provision of services is his or her permanent activity, or is a company provided for by law. The Waste Act generally establishes mandatory delegation by way of a public competition, and the relevant task may also be assigned to a company (which may be a municipal company) or to a sole proprietorship. Pursuant to § 67 (1) of the Waste Act, a local government may authorise a not-for-profit association of which the local government is a member and that, pursuant to its statutes, can have only local governments or local government associations as its members to perform the functions related to a public competition for choice of a waste transport operator. For the purpose of delegating this task, the local government has the right of discretion.

The Public Transport Act[*23] also generally anticipates the obligation to delegate the provision of public transport services by way of a public competition. According to § 2 (2) of the act, a carrier providing public transport services can be an undertaking that holds a relevant licence and is entered in the commercial register, a sole proprietorship, or a legal person entered in another register pursuant to the law. In comparison with the Waste Act, this act also allows provision of the service (public transport) by, in addition to a company and a sole proprietorship, other legal persons in private law, who own a relevant licence and have been entered in a relevant register, on assignment. Local government units can transfer the task of specific management of public transport on the basis of the right of discretion to a company or not-for-profit association established by a local government and the state where the state and the local government have a majority interest (§ 7 (1)). Here, the law prescribes freedom of choice regarding delegation and at the same time specifies the subjects to whom the task may be assigned.

The Roads Act[*24] differentiates among road management works according to whether or not an activity licence is requisite for the performance of them. The performance of those kinds of road management work that require an activity licence must be delegated by the local government unit by way of a public competition (§ 25 (1)). Such work types include the design, repair, and maintenance of roads; the design, construction, and repair of bridges; and others. Pursuant to this act, the relevant activity licence can be applied for by natural or legal persons in compliance with the requirements for the performance of the corresponding road management works, whereas only certain road management work can be assigned to natural persons (design and assessment of the relevant design documentation, etc.). The Roads Act does not specify to which subjects more specifically the performance of road maintenance work can be assigned, and general concepts are used here — referring to a legal person who has fulfilled the relevant requirements. In the case of certain road maintenance work types that do not require an activity licence (installation and maintenance of traffic signs, maintenance of passenger shelters and road service facilities, etc.), the local government has been given the freedom to decide whether to fulfil the relevant task in the organisational form of the local government — i.e., through its structural unit or municipal institution — or instead to assign it to a municipal company or a legal person established under private initiative, or to a natural person. If a local government council decides to assign the task to a company of which the local government is the sole shareholder, or in which the relevant local government has the majority interest, or to a foundation with the relevant local government as its sole founder, then, upon conclusion of a contract under public law, the procedure for negotiated procurement without prior publication of a tender notification established in the Public Procurement Act is implemented, proceeding from the terms of the Administrative Co-operation Act (§ 14 (3)).

In the provision of social services, the local government has, pursuant to the Social Welfare Act, the right of discretion to decide whether to provide the relevant service in its organisational form or to assign it to a person in private law, including to a municipal company. The act does not specify the subjects of law to whom the relevant task may be assigned. The requirement under the Administrative Co-operation Act that the delegation of a task must proceed from the Public Procurement Act generally applies also here.[*25] Said Act does not apply if a task is assigned to a not-for-profit organisation whose members may be, pursuant to statutes, only local government units.[*26]

With regard to the performance of maintenance tasks, the local government also has the right of discretion in deciding whether to fulfil the task itself through its structural unit or to assign the performance thereof to a person in private law. Delegation generally also requires a public competition.

The analysis of legal regulations gives reason to claim that the legislator has imperatively prescribed that delegation of the more important mandatory local tasks must be made to only local government units with the purpose of protection related to competition proceeding from the interests of free enterprise and its effects on the provision of the relevant services. In certain cases, specific subjects of law are specified, to whom the

[22] Äriseadustik. – RT I 1995, 26–28, 355; 2009, 12, 71 (in Estonian).

[23] Ühistranspordiseadus. – RT I 2000, 10, 58; 2009, 3, 14 (in Estonian).

[24] Teeseadus. – RT I 1999, 26, 377; 2009, 15, 93 (in Estonian).

[25] Riigihangete seadus. – RT I 2007, 15, 76; 2008, 14, 92 (in Estonian).

[26] Clause 13 (1^1) 1^1) of the Administrative Co-operation Act.

relevant tasks may be assigned. The determination (differentiation thereof) often lacks a unified conceptual basis, substantive justification, and terminological unity.

The right of discretion is primarily a basis for delegation in the case of tasks belonging to the social and maintenance arenas and also for the preparation of detailed plans and with regard to public roads on the basis of a detailed plan, and to public green zones, etc.

Upon delegation of mandatory local tasks, the respective task nevertheless remains within the sphere of responsibility of the local government unit.

4. Issues related to the procedure applied before entry into a contract under public law

Decisions on the grant of authority to perform an administrative duty of a local government shall be taken by the council, which shall authorise a rural municipality or city government to enter into a contract under public law.[*27] Entry into a contract under public law with a person to grant that person authority to perform an administrative duty shall be based on the conditions for entry into procurement contracts for contracting for services and on the procedure for organisation of the tendering procedure provided for in the Public Procurement Act, taking into consideration the specifications set forth in § 13 of the Administrative Co-operation Act.[*28] In a number of cases already mentioned in this article, a public competition procedure[*29] must be completed instead of a public procurement procedure, pursuant to the Competition Act.[*30] It is established in § 14 (2) of the latter act that the procedure for the organisation of public competitions for granting special or exclusive rights shall be established by the Government of the Republic. If legislation on the basis of which special or exclusive rights are granted does not provide the procedure for the granting of a special or exclusive right, a public competition for the granting of said right shall be organised in keeping with the procedure established by the Government of the Republic. The Government of the Republic has established the relevant procedure in its regulation 303 of 25 September 2001.[*31] If the authority to perform an administrative duty shall be granted by a decision of a local government council to a company the sole partner or shareholder of which is the corresponding local government, a company in which the corresponding local government has a majority interest, or a foundation the sole founder of which the corresponding local government is, a negotiated tendering procedure without prior publication of a tender notice, as provided for in the Public Procurement Act, shall be applied.[*32] This constitutes the so-called formal privatisation model for public tasks. Despite the peculiarity of one or another procedure, the issues arising upon their implementation in local governments can be considered similar and discussed together.

It must be said that in Estonia, as a small country with a rapidly developing legal system, the assignment of public tasks on the local government level to persons in private law was commenced in the 1990s in a legal situation considerably different from that of today, with the former situation lacking several necessary legal regulations that are in force now. When the Commercial Code entered into force, on 1 September 1995, providing in § 507 that municipal enterprises were to be transformed in two years into private limited companies, become local government agencies, or be dissolved, the country saw what was on the one hand a very significant legal political decision while, on the other hand, the local governments proceeded in their choices not so much from the content of the functions performed by the municipal enterprise but from logic — a sustainable enterprise would be transformed into a company, and a non-sustainable enterprise would be dissolved. As a rule, transformation did not entail relevant analyses or major substantive discussions. Now, the legal situation has changed, and, pursuant to the Administrative Co-operation Act, a legal or natural person may be granted the authority to perform an administrative duty if

1) performance of the administrative duty by the legal or natural person is economically justified, in consideration of, *inter alia*, the costs incurred by the state or a local government for the grant of authority to perform the administrative duty for possible financing and for supervision;
2) the grant of authority to perform the administrative duty will not impair the quality of the performance thereof; and

[27] Section 9 of the Administrative Co-operation Act.

[28] Subsection 13 (1) of the Administrative Co-operation Act.

[29] See § 13 (1^1) of the Administrative Co-operation Act.

[30] Konkurentsiseadus. – RT I 2001, 56, 332; 2007, 66, 408 (in Estonian).

[31] Eri- või ainuõiguse andmiseks avaliku konkursi korraldamise kord (The Procedure for the Organisation of Public Competitions for Granting Special or Exclusive Rights). – RT I 2001, 78, 469; 2006, 13, 103 (in Estonian).

[32] Subsections 14 (2) and (3) of the Administrative Co-operation Act.

3) the grant of authority to perform the administrative duty will not harm public interests or the rights of persons in respect of whom the administrative duty is to be performed.*[33]

Also, before a decision on granting of authority to perform an administrative duty is made, an official or body (council) entitled to grant the authority to perform the administrative duty shall organise the preparation of an analysis including economic estimations related to the conditions for the grant of authority, the accompanying costs to be incurred by the local government, and the legal and factual effect arising from the grant of authority to perform the administrative duty on persons in respect of whom the administrative duty is to be performed.*[34] A substantive analysis, together with arrangement of a public procurement/competition prior to entry into a contract under public law, should guarantee the protection of public interests. Regrettably, it appears that often either conducting of relevant analyses prior to decision on the delegation of an administrative duty is omitted by the local government (e.g., it appeared from a survey that two out of five local governments that transferred the monitoring of parking and of payment of parking charges and/or imposition of fines for delay specified in § 50 of the Traffic Act to a legal person in private law had not performed such analysis) or the preparation of the analyses has been approached in a manner that merely meets formal requirements.*[35] The reasons for such an approach may be related to insufficient competence of those conducting the analysis and the fact that, actually, the decision in the favour of delegation of a public task has politically already been made and the analysis is only expected to provide confirmation of it.

A local government should not assign the performance of an administrative duty to a subject of law that is objectively unable to perform that duty suitably (to a so-called shell company). It proceeds from the Administrative Co-operation Act that if a natural person or a legal person in private law is granted the authority to perform an administrative duty, that person must be reliable (§ 12 (1)) and the body (council) that is entitled to take the decision on the grant of authority shall verify the facts that prove reliability (§ 12 (2)).*[36] In this respect, local governments face certain issues of how to present these criteria in procurement documents as objective requirements, such as that of how to combine the existence of experience proving a person's reliability with the prohibition contained in § 39 (5) of the Public Procurement Act, to leave the tenderer or applicant disqualified on account of absence of previous contracts under public law. Undertakings and their unions have repeatedly expressed their discontent with the terms of procurement and competition (describing them as unclear, contradictory, disposed, etc.) established by local governments, and also with how the local governments observe them.*[37] Leaving it undisputed that in several cases the local governments have established procurement or competition conditions with different forfeitures, there is reason to claim that these conditions have in certain cases been contested for the purpose of continuing provision of the service during judicial proceedings (which

[33] Subsection 5 (1) of the Administrative Co-operation Act.

[34] Subsection 5 (2) of the Administrative Co-operation Act.

[35] Thus, the Chancellor of Justice notes in his overview of 2006 that unfortunately the obligation of preparing an analysis is in practice often viewed as a formality, trying to make do in a generalised fashion, without any actual substantive analysis. See Õiguskantsleri 2006. aasta tegevuse ülevaade (Overview of the Chancellor of Justice of 2006), p. 109. Available at http://www.oiguskantsler.ee/public/resources/editor/File/_levaade_2006_e_k_L_PLIK.pdf (17.04.2009) (in Estonian). The city secretary of Tartu — the city with second-largest population in Estonia — has described the existing situation as follows: "From my practice I remember preparing an analysis in the form established by law only once, when the city decided on granting authority for the performance of tasks related to organising paid parking. Interestingly, this is among a few administrative duties which the city has currently no problems with and in the case of which the activity of the performer of the duty has proved their ability to perform the said task significantly better than the city." See J. Mölder. Kohalikes omavalitsustes haldusülesannete üleandmisel tõusetunud probleemid (Problems Arising in Local Governments upon the Transfer of Administrative Duties). Presentation at the XXX Estonian Jurists' Days in the third public law section "Avalike ülesannete erasektorile üleandmise põhimõtted ja kogemused" (Principles and Experience of the Transfer of Public Tasks to the Private Sector), p. 4.

[36] Pursuant to § 12 (2) of the Administrative Co-operation Act, the reliability of a person is proved by the following facts:

1) the person has the possibility of using technical means necessary for the performance of the administrative duty, and the person has employees with the required knowledge and skills as well as other prerequisites and experience to perform the administrative duty which the person is authorised to perform;

2) liquidation or bankruptcy proceedings have not been initiated with respect to the person;

3) no circumstances exist which may cause the permanent insolvency or termination of the activities of the person;

4) there is no information in the punishment register concerning the punishment of the person;

5) the person has not materially violated any contracts under public law or public procurement contracts entered into with the person;

6) the person does not have tax arrears, including tax arrears to be paid in instalments, or arrears regarding fees, fines or compulsory insurance payments.

[37] The CEO of the Estonian Waste Management Association recently expressed the following opinion: "The [competition] conditions are often such that it is impossible to understand what the local government wishes to receive in the course of the competition or how the submitted applications will be assessed at all. It is not infrequent that one condition is exclusively contradictory to another condition. There are also situations where conditions are neatly written down, but are for some reason later ignored when it comes to making a decision." The CEO also brings an illustrative example: "The competition conditions of the city of Pärnu included clause establishing that if justified complaints were submitted regarding waste transport, the waste transport operator would be obliged to reduce the sum of all invoices issued in these regions by 10%. […]. Such a condition does not proceed from any law or good practice and is clearly too much of a burden for an enterprise." See Margit Rütelmann: Ajame kõik prügifirmade kaela (Margit Rütelmann: Let's Blame it on the Waste Transporters). – Postimees, 13.04.2009 (in Estonian).

is a relatively lengthy process) at the previously applicable higher prices.[*38] It has also been said that the types of procurement procedure and the grounds for their usage, established by law, are insufficiently flexible for entering into a contract under public law and fail to enable holding negotiations through which it would be possible to achieve a lower cost for the service than through a public tendering procedure.[*39] This statement is questionable, and it is also impossible to ignore the increasing risk of corruption.

Estonia with its low population (1.34 million people) is inevitably a rather limited market, and this often also applies to the circle of competitors who are persons in private law and who compete for provision of one or another public service (in the case of mandatory local tasks, the competition occurs partly in the market and partly regarding entering the market (e.g., for waste transport)). It is relatively commonplace for the local government to be (at least in the short term), because of absence of a suitable alternative, forced to commission a public service under unfavourable conditions; this is particularly common where the local government itself lacks sufficient competence and resources for the provision of a certain public service. For instance, the city of Tartu has faced this situation upon granting authority for performance of both utilities-related and social tasks.[*40] Although only five competition offences were registered in 2008, it can still be pointed out that, according to a survey conducted by the University of Tartu and the Ministry of Justice, about nine per cent of Estonian undertakings consider market agreements (i.e., cartels) rather commonplace in their area of activity.[*41] In 2008, for instance, a case reached the press where cartel agreements between two waste transporters were suspected in Tallinn, as the two companies' tenders in waste transport competitions coincided fully[*42] and the city, in fear of a cartel agreement, decided to cancel the waste transport competitions.

5. Performance of mandatory local tasks: Factology, problems, and some solutions

Prescription of the fulfilment of a local government task by law should legally exclude the question of whether the task should be fulfilled, for the local government. Within the law it can then be decided how the task may be performed. Unfortunately, it is evident that, in practice, problems exist. For instance, in the summer of 2008, approximately 43% of local governments had failed to fulfil the obligation of organised waste transport pursuant to the Waste Act, approximately 30% had failed to fulfil the obligation of preparing a waste management plan, and five per cent had failed to fulfil the obligation of establishing waste management rules.[*43]

Upon assignment of public tasks to the private sector, financial issues certainly occupy a core position. The funding of public tasks can basically be divided among three possibilities:

1) 100% public funding (as in maintenance of roads/streets);
2) combination of public and private funding (as for sports schools and nursery schools);
3) 100% private funding (for monopolistic public utilities, such as water supply and sewerage, or waste transport).[*44]

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38 K. Blumberg. Kohtuvaidlused on osa prügifirma äriplaanist (Summations are Part of Waste Company's Business Plan). – Äripäev, 14.01.2009 (in Estonian).

39 J. Mölder (Note 35), p. 5.

40 *Ibid*.

41 A. Ahven, A. Rämmer, K. Rootalu, R. Murakas. Ettevõtete kokkupuuted kuritegevusega (Contacts of Companies with Crime). A Survey of Company Executives and Employees. 2007. Tallinn 2008, p. 36. Available at http://www.just.ee/orb.aw/class=file/action=preview/id=35804/Ettev%F5tete+kokkupuuted+kuritegevusega.pdf (18.04.2009) (in Estonian).

42 For instance, the nationwide Estonian daily Newspaper *Eesti Päevaleht* has discussed the event in the following articles: Tallinna prügivedajate kokkulepped haisevad kokkumängu järele (The Agreements between Waste Transport Operators of Tallinn Smell of Foul Play) (15.04.2008); V. Toomet. Ragn-Sells ja Cleanaway – kartellikokkulepe Tallinnas (Ragn-Sells and Cleanaway — Cartel Agreement in Tallinn) (15.04.2008); Prügiraha jääb perekonda (Waste Money Stays in the Family) (15.04.2008); A. Eilart. Argo Lunde: pakkumiste sarnasus on juhus (Argo Lunde: Similarity of Tenders Coincidential) (15.04.2008); J. Jõgis-Laats. Remmelg: eesmärk on konkurendid prügiärist välja süüa (Remmelg: The Goal is to Crowd Competitors out of Waste Business) (15.04.2008); J. Jõgis-Laats. Päevalehe paljastus toob prügikartelli uurimise kahtluse (Revelations of the *Päevaleht* Brings Investigation of Suspicion of Waste Cartel) (16.04.2008); J. Jõgis-Laats. Tallinn tühistas Mustamäe ja Lasnamäe prügikonkursid (Tallinn Cancels Waste Management Tenders of Mustamäe and Lasnamäe Districts) (16.04.2008); Remmelg: kolme pakkumise eesmärk on konkurendid välja süüa (Remmelg: The Purpose of Three Tenders is to Crowd Competitors out of the Market) (15.04.2008); J. Jõgis-Laats. Uurijad otsisid prügikartelli kahtlusega Ragn-Sellsi läbi (Investigators Searched Ragn-Sells with Suspicions of a Waste Cartel) (30.04.2008); M. Kruuse. Päevalehe artikkel viis prügihanke tühistamiseni (Article in the *Päevaleht* Leads to Cancelling of a Waste Management Tender) (12.06.2008); Prügiäri haisu peletades (Getting Rid of the Stink of the Waste Business) (12.06.2008); M. Kodres. Kartellileppes kahtlustatud prügihiiud taas vastakuti (Cartel-suspected Waste Giants in Opposition Again) (31.12.2008).

43 National Audit Office: Several Local Governments Ignore the Obligation of Organising Waste Management. Press release of 7.08.2008. Available at http://www.riigikontroll.ee/pressiteade.php?nr=421&lang=et (20.04.2009) (in Estonian).

44 R. Altnurme. Avalike teenuste lepinguline delegeerimine kolmandale sektorile. Käsiraamat (Contractual Assignment of Public Tasks to Third Sector. Handbook). Tallinn: Baltic-American Partnership Program 2002, p. 26 (in Estonian).

A good example of the contradictions existing in the field are the problems arising in connection with organisation of public transport in Tartu, where the city government decided in December 2007 to terminate the contract, for reason of breach of contract, with the public limited company that had won the city bus lines procurement contract in 2005 and had entered into a five-year contract for passenger transport, and to collect a contractual penalty of 10 million kroons from the company. The most serious of the infringements was failure to submit a new letter of guarantee of 10 million kroons (639,116 euros), on the basis of which the city could have collected money from the issuing bank or insurance company if the undertaking had encountered a situation wherein continuation of regular bus services would have been impossible. This created a situation in which one scenario threatened the city with no public service at all, in view of the fact that there was little time to find a new company for the urban lines. The public limited company was interested in receiving extra money from the city, on the one hand (the company notified the city of its considerable losses with regard to the rise of the fuel excise duty; inflation; and other, unforeseeable factors), and in economising, on the other hand (e.g., through reorganisation of the urban route network). As the public limited company submitted the requisite letter of guarantee to the city government at the last minute, it cancelled the termination of the contract. At the end of September 2008, the public limited company, which by then had become a company, submitted an application for withdrawal from the regular service contract to the city government (on 1 January 2009) with the justification that the city had been insufficiently engaged in the inspection of documents certifying the right to ride the bus and in co-operation regarding covering the company's loss (27 million kroons[*45], according to the company, mainly due to an unexpectedly rapid rise in fuel prices). The company also expressed readiness to hold negotiations with the city regarding the provision of the public transport service. The mayor saw no possibilities for commencing negotiations (as the public limited company had failed to submit the letter of guarantee on time) and expressed readiness on the part of the city to soon declare a public procurement in order to find new transport partners. In the situation that emerged, the city had the following possible solutions:

1) the company submits the letter of guarantee, the city finds a way to pay them extra money, and everything continues as before;
2) the company ceases its activity in Tartu, and the city arranges a new procurement, dividing the lines into three, in order to create competition;
3) the city creates a municipal company, which shares the market with private companies.[*46]

The situation was resolved (this time) with a decision[*47] of the Tartu City Council, giving the city government permission to alter the route transport contract with the company and paying a larger subsidy to the enterprise in order to cover the appreciation of route transport costs to a justified extent and not increase the price of bus tickets. The council did not approve the draft proposal for preparation to establish a 100% municipal company in order to serve the city bus lines. By way of justification, a study by the city government was pointed out that proved that the price per line kilometre payable to the municipal company would have been significantly higher than the price paid to the company that had served the bus lines thus far.

The above-mentioned case reflects several problems that emerge upon assignment of public tasks to the private sector, whether these be related to the legal quality of the contracts concluded under public law, excessively low tenders of enterprises together with the possibility to pressurise the local government if need be, limited resources of the local government for finding alternatives for the company that has already won the contract once, reduced influence of the local government on the provision of a public task, or other factors. In the above-mentioned analogous situations, the position of the local government naturally depends on the legal nature of the contract between the parties — such as on which indicators (consumer price index, etc.) are used and what the influence of one or another indicator should be with regard to the subsidy allocated by the local government, how the contract under public law establishes control over performance of the administrative duty, and whether the local government has sufficient human resources and competence for the utilisation thereof.

Responding to the problems arising from the delegation of public tasks, some local governments have considered the solution to lie in the formation of municipal companies — i.e., companies in regard of which the local government exerts a governing influence. As mentioned before, it is legally permissible to assign all mandatory local tasks to such companies. It is irrational to give an abstract response to the question of whether it is purposeful to use such a model in relation to the delegation of public tasks — the choice of model to use should primarily depend on economic purposefulness. While in Tartu the forming of such a company in the area of public transport was rejected, in Tallinn two municipal companies are active in this area — Tallinna Autobussikoondise AS (Tallinn bus lines) and Tallinna Trammi- ja Trollibussikoondise AS (Tallinn tram and trolley-bus lines). The debate over the necessity of forming municipal companies has recently become more

[45] I.e., 1,725,614 euros.

[46] J. Saar. GoBus vallandas uue bussikriisi (GoBus Starts a New Bus Crisis). – Tartu Postimees, 2.10.2008 (in Estonian).

[47] Decision No. 461 of Tartu City Council of 18.12.2008 "Avaliku bussiliiniveo teostamiseks sõlmitud töövõtulepingu L-163 muutmine" ("Alteration of the contract for services L-163 entered into for the operation of public bus lines transport"). Available at http://info.raad.tartu.ee/webaktid.nsf/web/viited/VOLO2008121800461 (18.04.2009) (in Estonian).

lively: The Tallinn City Council has considered the possibility of establishing a municipal company for waste transport management[*48] and the performance of road maintenance work.[*49] When we take a broader view, however, of the extent to which mandatory local tasks actually are assigned to municipal companies by local governments, it appears from our survey that the representation of municipal companies in the performance of mandatory local tasks on the whole is marginal or scant:

- waste transport (two cases);
- tasks related to road maintenance work (eight cases);
- social assistance and services — domestic services (one case), substitute-home services (one case), and social welfare services provided to disabled persons and the elderly (three and six cases, respectively);
- maintenance-related tasks pursuant to the property maintenance rules[*50] (nine cases);
- the capture, keeping, and killing of stray animals and the destruction of animal carcasses[*51] (two cases);
- the building of public roads, public green areas, exterior lighting, and rainwater pipes on the basis of a detailed plan, up to the boundary of a land unit specified in a building permit[*52] (six cases).

The role of municipal companies as water undertakings is important (there are 35 such companies, representing 44% of respondents), and it is worth mentioning that quite often (in 20 cases) local governments have not yet appointed a water undertaking and established the licensed territory thereof and the undertaking that has provided the services of supplying water and leading off wastewater via the public water supply and sewerage system thus far is required to continue its activities until the date specified in the associated contract.[*53]

In economics literature, the differences between the business sector and the third sector as providers of public functions have been described through focusing on the different values of these organisations: while the purpose of a business undertaking is only to increase the profits of shareholders and the specific activity is only the means to achieve this purpose, the purpose of a not-for-profit organisation is the achievement of statutory purposes — i.e., the activity itself.[*54] Pursuant to § 35 (1) of the Local Government Organisation Act, a rural municipality or city may establish foundations and be a member of a not-for-profit association; the relevant decision will be made by the council (§ 22 (1) 25)). Such not-for-profit organisations cannot be treated as expressions of citizens' initiative. If one assesses the extent to which the performance of mandatory local government tasks has been assigned to the third sector by local governments (see section 3.3 above), it appears from our survey that rural municipalities and cities make little use of (that is, exercise in 10 cases) the possibility of granting authority in relation to performance of administrative tasks related to waste transport competition to a not-for-profit organisation that has as a member the relevant local government unit and has a membership that, pursuant to the relevant statutes, consists of only local government units in an association thereof. The role of not-for-profit organisations is modest with regard to performance of maintenance tasks (seen in three cases) under the property maintenance rules and provision of social assistance and services (such as domestic services, seen in three cases). Their role is somewhat greater in the case of provision of substitute-home service (14 cases) and that of social welfare services provided to disabled persons and the elderly (14 and 19 cases, respectively). Provision of the relevant public services through local government agencies predominates here. The role of not-for-profit organisations is more noticeable with regard to tasks related to stray animals (24 cases). As a rule, local governments are not members of such organisations.

As for the possible link between the relative wealth or poverty of a local government, on the one hand (judged in terms of calculation of income per resident), and the assignment or non-assignment of a certain public task to the private sector, on the other, it is impossible to posit from our survey the existence of a single-valued link along these lines: a wealthy rural municipality/city performs the task itself while a poor one assigns it to the private sector. For instance, the option of agreement between the local government and a person requesting the preparation of a detailed plan or an applicant for a building permit for the purpose of building roads,

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[48] U. Tooming. Tallinn tahab prügiveo oma hoole alla võtta (Tallinn Wants to Take Charge of Waste Transport). – Postimees, 20.03.2009 (in Estonian).

[49] Savisaar: linn võib lumekoristust ise korraldama hakata (Savisaar: The City May Start Organising Snow Clearing Itself). – Äripäev, supplement to the Eesti Päevaleht, 4.12.2008. Available at http://www.aripaev.ee/artikkel/450999 (19.04.2009) (in Estonian); Tallinn otsib võimalusi teehooldustööde munitsipaliseerimiseks (Tallinn Seeks Opportunities for Municipalisation of Road Maintenance Works). – Eesti Päevaleht, 4.02.2008. Available at http://www.epl.ee/artikkel/457550 (19.04.2009) (in Estonian).

[50] For the purpose of ensuring the task of property maintenance, § 22 (1) 36[1]) of the Local Government Organisation Act foresees the establishment of property maintenance rules as belonging to the sole competence of the Council.

[51] These maintenance-related tasks are imposed on local governments pursuant to the Animal Protection Act (loomakaitseseadus). – RT I 2001, 3, 4; 2009, 3, 15 (in Estonian).

[52] Section 13 of the Building Act (ehitusseadus). – RT I 2002, 47, 297; 2008, 8, 59 (in Estonian).

[53] Subsection 7 (4) of the Public Water Supply and Sewerage Act.

[54] R. Altnurme (Note 44), p. 25.

utility networks, and utility works, laid down in § 13 of the Building Act, was exercised roughly equally by 'wealthy' and 'poor' local governments (23 and 15, respectively).

6. Conclusions

In view of the institutional guarantee of local governments pursuant to § 154 (1) and § 158 of the Constitution, the local government has the liberty of choice regarding the performance of local government tasks, in terms of whether to perform the tasks itself or to assign them to private persons insofar as this is not limited with a reservation of law. The freedom to choose organisational-legal forms applies primarily in the case of performance of voluntary local tasks.

Upon delegation of tasks imposed on local governments by law, whether local tasks or state tasks, both the constitutional and legal limits of the provision of granting authority must be taken into consideration.

It is unconstitutional to grant authority for the delegation of tasks that are among the core functions of the state. The Supreme Court has thus found that penal power (punishment for misdemeanours) and the handling of offences belong among the core functions of the state, which cannot be assigned to persons in private law pursuant to the Constitution.

Upon granting of authority for the delegation of other tasks with authorised powers, the content of the task and the extent of the potential infringement of fundamental rights must be considered. Such granting of authority for delegation requires legal regulation from the legislator, which should set out requirements for those persons to whom the tasks are assigned, terms for supervision, and guarantees of legal protection to the persons affected. In the Estonian legal order, with respect to mandatory local tasks, the legislator either has directly prescribed the delegation requirement, in many cases determining to whom the performance of the task can be assigned, or has given the local government the freedom to choose whether or not to delegate. The analysis of legal regulations gives reason to claim that the legislator has imperatively prescribed the rules for delegation of the more important mandatory local tasks to local government units with the purpose of protection related to competition proceeding from the interests of free enterprise. On the basis of the right of discretion, delegation of tasks primarily takes place in relation to those tasks belonging to the social and property maintenance areas. Specific subjects of the law to whom a task may be assigned are often specified differently in the law on various matters, often lacking a unified conceptual basis, also substantive justification and terminological unity. Imperative delegation and delegation on the basis of the right of discretion must generally be preceded by a public competition that is also open for participation under general circumstances for municipal companies.

Several problems arise from the performance of mandatory local tasks by local governments. In certain cases (e.g., that of the obligation of waste transport management), rural municipalities and cities have not begun timely and proper performance of the assigned tasks. In the conduction of competition and procurement procedures, the issues of concern include the proper preparation of competition and procurement conditions and the preparation of documents that would ensure fair proceedings and reduce the possibilities for the results being contested later. The legal obligation of preparing a substantive analysis prior to the delegation of a task is often fulfilled merely formally, and inadequately. Local governments also lack sufficient capability for exertion of effective control over the performance of a public task by a person in private law. Weak market competition in regard of public tasks means the absence or limitedness of alternative solutions for the local government, and it enables a person in private law engaged in improper performance of a public task to put pressure on the local government. The legal quality of the contract under public law entered into for the performance of a task is thus very significant in the context of the resolution of legal disputes between the parties, and reserves are provided here for local governments for ensuring better protection of public interests. Seeking solutions for legal-economic conflicts that have developed with the partners to the contract upon the delegation of public tasks, certain local governments have started to analyse the possibilities for commencing performance of certain public tasks (waste transport and road maintenance work) by so-called self-controlled municipal companies. As a whole, the performance of mandatory local tasks through municipal companies is relatively modest in Estonia (with the exception of their role as water undertakings). Social welfare services, wherein it is legally possible to include not-for-profit organisations, are generally provided by rural municipalities and cities through their structural units/agencies.

With regard to the delegation of mandatory local tasks, it is impossible to point to a correlation with the rural municipality or city belonging to the group of the so-called wealthy or poor: insofar as the legislator has provided the local government with the right of discretion for deciding on the delegation, local governments belonging to the two above-mentioned groups have applied that possibility to a relatively equal extent (e.g., with regard to the obligation to build roads, utility networks, and utility works).

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Constitutional Boundaries of Transfer of Public Functions to Private Sector in Estonia[*1]

The possibility and necessity of transferring public functions to the private sector has been acknowledged both in Estonian and international legal literature and practice[*2] for quite a few years already. The concept of a slim state is mentioned, in which the public authority retains only certain functions as directly executable by it, as well as the concept of an enabling state (*Gewährleistungsstaat*), i.e., the state relinquishes in one way or another or to a certain degree its functions, enabling the private sector to perform them within a nationally governed framework, while the state itself only assumes a so-called enabling function.[*3]

The other terms used besides 'transfer of public functions' often include terms such as 'grant of authority to perform a public duty (Administrative Co-operation Act[*4] (ACA)), 'involvement of the private sector' (judicial practice[*5]) and 'privatisation'. The meaning and scope that is attributed to them often varies greatly depending

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2 E.g., the Supreme Court of Estonia has analysed the constitutionality of the transfer of the right to impose a fine for misdemeanour to the private sector: SCebd, 16.05.2008, 3-1-1-86-07. – RT III 2008, 24, 159 (in Estonian). Translation into English available at http://www.nc.ee/?id=908 (9.05.2009). Also, the Supreme Court of Austria has dealt with the problem of constitutional boundaries of the transfer of public functions to private sector in the so-called *Austro Control* judgment (14.03.1996, VfSlg 14.373/1996). Available at http://www.ris.bka.gv.at/vfgh/.

3 For details, see, e.g., F. Schoch. Gewährleistungsverwaltung: Stärkung der Privatrechtsgesellschaft? – NVwZ 2008/3, p. 241 *ff.*; C. Franzius. Der Gewährleistungsstaat. – Verwaltungsarchiv 2008 (99), p. 351 *ff.*; H. Gersdorf. Privatisierung öffentlicher Aufgaben – Gestaltungsmöglichkeiten, Grenzen, Regelungsbedarf. – JZ 2008/17, p. 834; W. Weiβ. Privatisierung und Staatsaufgaben. Tübingen 2002, p. 291 *ff.*; M. Burgi. Privatisierung öffentlicher Aufgaben – Gestaltungsmöglichkeiten, Grenzen, Regelungsbedarf. – Gutachten D zum 67. Deutschen Juristentag. Erfurt 2008, E II *ff.*

4 Halduskoostöö seadus. – RT I 2003, 20, 117; 2009, 23, 143 (in Estonian). ACA § 1 (1): "This Act determines the conditions and procedure for the grant of authority to natural and legal persons to perform public administration duties of the state and of local governments (hereinafter 'administrative duties') independently […]." See also draft Maintenance of Public Order Act (korrakaitse seaduse eelnõu) as of 17.12.2008, No. 49 SE, Ch. VI ("Granting an authority for performing a function of the state to maintain public order based on a contract under public law"); also § 13 ("Mandatory involvement of a person other than the person responsible for maintaining public order in maintenance of public order"). Available at www.riigikogu.ee (in Estonian).

5 E.g., CCSCr, 27.04.2004, 3-2-1-49-04, paragraph 6: "A contract is a contract under public law if a natural person is only involved in performing a public function in the course of procuring the service […]." – RT III 2004, 12, 157 (in Estonian); ALCSCd, 20.10.2003, 3-3-1-64-03, paragraph 12: "The public authority may, however, enter into both contracts under public law and civil law contracts to secure the performance of a public function. A contract entered into for securing the performance of public functions qualifies as a contract under public law if the authorities of the public authority have been granted to a person in private law under the contract or if the contract governs the subjective rights in public law of third parties. A contract may be a civil law contract if a private person is only involved in the performance of a public function in the course of procuring the service, without conferring any authorised powers to the person or governing the rights of third parties by the contract." – RT III 2003, 32, 323 (in Estonian).

on the form, legal basis, scope, legal effects, etc. of the transfer of the function to the private sector. Since there is no clear and unambiguous approach to distinguishing between these notions either in Estonian or international literature, the following paper will use the terms 'transfer', 'involvement' and 'privatisation' as synonymous in their widest sense, i.e., as encompassing a transfer of a public function to the private sector in any manner, regardless of the aspects described above.

In brief, the main objective of the transfer of public functions to the private sector may be considered to be the hope of gaining value for money — a less costly, higher quality public service. According to the opinions prevailing in literature, the private sector is reportedly more efficient; also, the private sector is said to possess knowledge and know-how that the public sector lacks. One of the reasons pointed out is naturally the scarcity of public resources, especially staff. Yet there is consensus that the involvement of the private sector must not damage the protection of the rights or public interests of people in whose interests the functions are performed. The possibility of involving the private sector must not serve as a cause or motive for the public sector to be inefficient.[*6]

Although the decision to involve the private sector in the execution of a function is, above all, political, there is certainly a clear constitutional dimension to it.[*7] We may ask, on the one hand, if an obligation to transfer a public function to the private sector could be derived from the Constitution (e.g., based on the principle of subsidiarity or efficient use of means of the public authority[*8]). This aspect is obviously not topical in practice; at least there is no information that the private sector has demanded that or has considered demanding thereof in Estonia. On the other hand, the question is where the boundaries set out in the Constitution lie, what, how and under what conditions the public authority may transfer to the private sector. These are the questions that several officials must answer in their everyday work. However, by merely reading the text, the Constitution as an abstract legislative act does not provide simple 'may / may not transfer' answers.

In practice, the notion that has come to denote non-transferable public functions is 'the core function of the state authority'.[*9] Yet the fact that a function is covered or not covered by the notion 'core function of the authority of the state' or 'monopoly of the authority of the state'[*10] does not generally answer the question whether involvement of the private sector in performing the particular function is permissible. In other words, labelling a certain function as a core function does not by any means or fully preclude the possibility of involving the private sector — the involvement of the private sector is, in the light of the Constitution, *a priori,* precluded, only when and to the extent of the so-called core of a core function.[*11] The same applies the other way round, i.e., the fact that a function is not labelled as a core function does not, in essence, mean that the involvement of the private sector in any form or manner is certainly and without limitations permissible in the light of the Constitution.

Two levels must be distinguished when analysing the question where the constitutional boundaries of transferring the public functions to the private sector run:

- the level of a public function; and
- the level of the form of transferring a public function to the private sector.

These levels are intertwined and a constitutional solution upon determining the transfer of public functions can be found only by analysing these two in conjunction with each other. Thus, for example, the criteria described below and arising from the level of the public function take on a different meaning in various forms of involvement. If, on the level of the public function, an understanding is reached that the involvement of the private sector is completely ruled out, there is naturally no point in analysing the form of the transfer.

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6 For the pros and cons of involvement of the private sector, see, e.g., R. Stober. Privatisierung öffentlicher Aufgaben. Phantomdiskussion oder Gestaltungsoption in einer verantwortungsgeteilten, offenen Wirtschafts-, Sozial- und Sicherheitsverfassung? – NJW 2008/32, p. 2301; F. Schoch (Note 3), p. 242; O. Freitag. Das Beleihungsrechtsverhältnis. Rahmen, Begründung und Inhalt. Baden-Baden 2005, p. 16 *ff.*

7 For different angles of the discussion of privatisation (theory of the state, public management, legal history, etc. perspective) see, e.g., R. Stober (Note 6), p. 2301.

8 See, e.g., O. Freitag (Note 6), pp. 81–84; M. Burgi (Note 3), D III.

9 SCebd, 16.05.2008, 3-1-1-86-07, paragraph 21: "The general assembly agrees with the Chancellor of Justice that also those functions which, pursuant to the Constitution, must be exercised by the state power and which therefore make up the core functions of the state can not be delegated by the state to a legal person in private law."

10 It is emphasised in literature that the notion 'monopoly of power' (*Gewaltmonopol*) must not be confused with the notions of the monopoly of security and the monopoly of exercising power; its actual content is said to be that the legislator has the monopoly of power and it must not be limited upon establishing the regulations characteristic of a state based on the rule of law. See R. Stober (Note 6), p. 2305.

11 Or, as one of my colleagues vividly described: if comparing the core functions of the state to a fried egg, the part that the state must by no means renounce is the yolk. It must be admitted, however, that occasionally the yolk is broken and it spreads into the egg white.

1. Level of public function

The state is traditionally broken down into three branches of power: the legislative, the executive and the judicial power. Although in practice it is said that the private sector is, above all, involved in the exercise of the executive power (issuing of activity licences, payment of benefits, provision of so-called genuine public services[*12]), in reality, none of these branches have escaped the discussion of the transfer of the public functions to the private sector.

Even if considering the state monopoly of legislation and administration of justice as self-evident, it is possible to, for example, ask whether a summons or a ruling may be served to the defendant by AS Eesti Post as a private entrepreneur (although the state holds 100% of its shares). How can the monopoly of administration of justice by the state be combined with arbitration proceedings[*13], provision of state legal aid by lawyers in judicial proceedings or execution of judgments by bailiffs who stand on the borderline between private and public authority?[*14] Should publication of legislation in print and/or online be completely in the hands of the state?[*15] We could carry on with analogous confusing, but in practice topical, questions. That is why a discussion about the constitutionality of the transfer of public functions to the private sector has also been referred to as phantom discussion in literature.[*16]

A big contribution to the complexity of the discussion of the constitutional boundaries of transferring public functions to the private sector is also presented by the question of what actually is a public function (for example, whether the assignment of domain names or burial of the dead who do not have relatives serve as such), as well as the confusion related to the term in distinguishing (or not distinguishing) between a particular public function and some area (*cf*. conducting tax proceedings and delivery of a notice of assessment).[*17] A more detailed analysis of these issues unfortunately exceeds the limits of this paper. Below, we will proceed, above all, from the narrow approach to the function of the state, i.e., denoting particular functions that are vested in the state in general understanding.

Based on the causes of the restrictions, the boundaries of the involvement of the private sector arising from the Constitution can be divided into three on the level of a public function: objective boundaries, subjective boundaries (as an individual right) and their connection. Such a division is naturally only conventional and serves the purpose of a better understanding. These three also partly overlap (e.g., the protection of fundamental rights and the principle of a state based on the rule of law).

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[12] Explanations about the narrow and wide approach to the notion 'public service' have been given, e.g., by the State Audit Office in its report of 1.11.2007 "Quality of public service in information society", p. 66: "Public services can be divided into two large groups: firstly, the issue of beneficial administrative acts (e.g., award of a benefit) and creation of an environment for exercising rights (e.g., voting at the elections) and performing duties (e.g., reporting taxes); secondly, the so-called genuine public services, such as waste handling, supply of water and energy, public transport, medical care." Available at www.riigikontroll.ee (9.05.2009) (in Estonian).

[13] In Estonia, arbitration proceedings are governed by Part XIV of the Code of Civil Procedure (tsiviilkohtumenetluse seadustik. – RT I 2005, 26, 197; 2008, 59, 330 (in Estonian)) as well as by the Rules of the Arbitration Court of the Estonian Chamber of Commerce and Industry (Eesti Kaubandus-Tööstuskoja Arbitraažikohtu reglement), approved by the resolution of the board of the Estonian Chamber of Commerce and Industry on 13.12.2007 (entered into force on 1.01.2008). Available at http://www.koda.ee/?id=44245 (29.03.2009) (in Estonian).

[14] Subsections § 2 (1) and (2) of the Bailiffs Act (kohtutäituri seadus): "A bailiff is an independent person who holds an office in public law. A bailiff engages in liberal profession and holds office in his or her own name and at own liability. An undertaking or a state official shall not be a bailiff. In the taxation of professional activities of bailiffs, provisions applying to sole proprietors are applied." – RT I 2001, 16, 69; 2008, 59, 330 (in Estonian).

[15] The publication of *Riigi Teataja* (State Gazette) is organised by the State Chancellery, more precisely the Riigi Teataja Department (§ 6^1, § 17 (1) 3) of Government of the Republic Regulation No. 267 of 21.12.2006 "Statutes of the State Chancellery" (Riigikantselei põhimäärus. – RT I 2006, 60, 449; 2007, 73, 450 (in Estonian)); State Secretary directive No. 3 of 12.01.2007 "Statutes of the Riigi Teataja Department"). At the same time, the Riigi Teataja Act (Riigi Teataja seadus. – RT I 1999, 10, 155; 2008, 59, 330 (in Estonian)) provides a possibility of transferring the task also to the private sector: the State Secretary may, inter alia, enter into a contract under public law for the performance of the functions of the authorised processor of the electronic *Riigi Teataja* (§ 7^2 (3)), the functions of the authorised processor of the electronic *Riigi Teataja* may also be performed by a legal person in private law on the basis of a contract under public law (§ 7^3 (2)).

[16] See R. Stober (Note 6), p. 2302.

[17] It is emphasised in the theory that the term 'state function' has to be distinguished from similar terms, such as 'state objective' (i.e., the question about what justifies the existence of a state as it is; so to say the reason of the existence of the state) and 'public function' (i.e., all the functions falling within the scope of public interest or that serve the common good). A duty of the state is above all a formal notion. For details, see, e.g., BVerfGE 12, 205 (243); W. Weiβ (Note 3), p. 53 *ff*.; R. Stober (Note 6), p. 2303 *ff*.; M. Burgi (Note 3), B I; A. Mackeben. Grenzen der Privatisierung der Staatsaufgabe Sicherheit. Baden-Baden 2004, p. 35 *ff*.; M. Gamma. Möglichkeiten und Grenzen der Privatisierung polizeilicher Gefahrenabwehr. Bern, Stuttgart, Wien 2001, p. 9 *ff*.; C. Gramm. Privatisierung und notwendige Staatsaufgaben. Berlin 2001, p. 50 *ff*. See also K. Merusk. Avalike ülesannete eraõiguslikele isikutele üleandmise piirid (Boundaries of Transfer of Public Functions to Persons Governed by Private Law). – Juridica 2000/8, p. 500 *ff* (in Estonian).

2. Objective boundaries

The objective boundaries of the involvement of the private sector in performing public functions encompass the principle of a state based on the rule of law and democracy and a criterion that can be characterised by 'the ability of a state to act as a state'.

2.1. Principles of state based on the rule of law and democracy

Based on the Constitution*[18] (§§ 59 *ff*., 102 *ff*., 87 (6), 94 (2), § 146 *ff*.) it is unambiguously clear that the adoption of legal provisions by a parliament elected in free, general, uniform and secret elections (and by the executive power as delegated by the parliament*[19]) as well as administration of justice by independent courts in accordance with law and the Constitution (in its narrow sense)*[20] are areas in which the sole authority of state power must be preserved. The sole power of the state in these areas can be derived from the principles of democracy*[21] and a state based on the rule of law (§§ 1 (1), 10 of the Constitution).

Thus, the principle of a state based on the rule of law presumes, for example, the recognition of the existence of fundamental rights (see Part 3 of the paper) and that the state ensures their protection through the activities of independent courts. A part of the principle of democracy is democratic legitimation, i.e., the authorities exercising state power must be connected to the people. In this, democracy presumes that the more important the decision is, the stronger and the more direct must be the legitimation of the authority making the decision.*[22] Hence, the principle of the parliament reservation or the principle of importance arising from § 3 (1) of the Constitution obliges the legislator to independently decide on all the issues that are important regarding the functioning of the public authority and fundamental rights.

Democratic legitimation, above all, signifies the exercise of the supreme power of state by the people through their participation in the elections of the *Riigikogu* and in a referendum (§ 56 of the Constitution). The principle of importance is usually discussed in relation to the relationship of competence between the legislator and the executive power. Considering the topic, the latter, above all, means when the executive power needs the legislator's permission to involve the private sector, when it is not necessary.*[23]

In addition to the above, democratic legitimation and the principle of importance deriving from the principle of democracy also carry considerable weight when an administrative organisation decides on the involvement of the private sector.

Proceeding from democratic legitimation, a minister shall manage issues within the area of government of the ministry, be responsible for the implementation of legislation, appoint to and release from office more important officials (e.g., directors general of agencies) and has an extensive supervisory control over public servants of the state agencies falling within the area of government of the ministry to exercise his or her liability (§§ 49 (1), 95 of the Government of the Republic Act). In doing so, the minister directing the ministry and the agencies within its area of government have political liability*[24] to the parliament as a representative body elected

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[18] Põhiseadus. – RT I 1992, 26, 349; 2007, 33, 210 (in Estonian).

[19] Regulations are issued in Estonia by the Government of the Republic, ministers, local governments (based on the autonomy of local governments set out in § 154 (1) of the Constitution), by a council of a university in public law (based on the autonomy set out in § 38 (2) of the Constitution), by the President of the Bank of Estonia (based on § 111 of the Constitution), and by the National Electoral Committee.

[20] Imposition of a punishment for misdemeanour by a body conducting extra-judicial proceedings is in principle also exercise of a jurisdictional function, not issue of an administrative act (SCebd, 28.04.2004, 3-3-1-69-03, paragraph 24. – RT III 2004, 12, 143 (in Estonian); CCSCr, 13.06.2006, 3-1-2-2-06, paragraph 10. – RT III 2006, 24, 218 (in Estonian)).

[21] The principle of democracy is one of the fundamental principles and values applicable in the European judicial area (CRCSCd, 17.02.2003, 3-4-1-1-03, paragraph 15. – RT III 2003, 5, 48 (in Estonian)), also defined as "Government of the people, by the people, for the people" — from Abraham Lincoln's Gettysburg address of 1869.

[22] T. Annus. Riigiõigus (Constitutional Law). Tallinn 2006, p. 48 (in Estonian).

[23] E.g., according to the Administrative Co-operation Act, a law must contain a provision delegating authority to enter into a contract under public law (ACA § 3 (1) and (2); the same is stated in § 97 of the Administrative Procedure Act (haldusmenetluse seadus. – RT I 2001, 58, 354; 2009, 1, 3 (in Estonian)) and § 41 (5) of the Government of the Republic Act (Vabariigi Valitsuse seadus. – RT I 1995, 94, 1628; 2009, 11, 67 (in Estonian)), whereas the private sector may be involved without the provision to delegate authority only based on a contract in private law if all the terms and conditions set out in ACA § 3 (4) have been met (i.e., the Act does not only prescribe entry into a contract in public law, the contract is not used to regulate the rights or duties of a person using a public service or any other third party, the state or a local government is not released from its duties and the authorities of the executive power are not used in performing the function). The Supreme Court has discussed the criteria of distinguishing between a contract in public law and a contract in private law in the following decisions, for example: CCSCr, 27.4.2004, 3-2-1-49-04, paragraph 15; ALCSCd, 20.10.2003, 3-3-1-64-03, paragraph 12. For the distinction between secondment and so-called administrative assistance in Germany and when a provision delegating authority is required for involving the private sector, see, e.g., C. Sellmann. Privatisierung mit oder ohne gesetzliche Ermächtigung. – NVwZ 2008/8, p. 817 *ff*.

[24] The principle of political liability arises from the principle of democracy and ensuring it is a constitutional value (SCebd, 19.04.2005, 3-4-1-1-05, paragraph 26. – RT III 2005, 13, 128 (in Estonian)).

by the people through democratic elections (e.g., the right to express no confidence according to § 97 of the Constitution). This represents the, so to say, legitimation chain of the administrative organisation directed by the minister (retraceability to the people's will or departure from the people's will) upon the implementation of the liability accompanying the performance of public functions. The latter is particularly important in areas in which the legal regulation allows for extensive freedom of decision (unspecified legal notions, right of discretion).*[25] Because of the principle of importance, the administrative organisation directed by the minister must decide on the more important functions assigned by the legislator to the executive power and may not transfer the functions to independent subjects. Important issues cover decisions that are significant with regard to both the organisation of the state as well as the fundamental rights and freedoms of an individual. Pursuant to the Constitution, the functions must be performed on behalf of the administrative organisation directly by the persons appointed to the office (§ 30 of the Constitution).

Hence, the principle of democracy presumes that upon the performance of public functions, important issues are decided directly by a legitimised legislator and the administrative organisation legitimised by the latter. Proceeding from the principle of a state based on the rule of law, issues related to the infringement of fundamental rights and freedoms, *inter alia*, must certainly be considered important.

2.2. Ability of state to act as a state

The criterion 'the ability of a state to act like a state' can, in turn, be divided into two: monopoly of power and the obligation to preserve minimal resources.

2.2.1. Monopoly of power

According to the preamble to the Constitution, the Republic of Estonia has been established to protect internal and external peace. The internal and external peace are legal rights that, in encompassing a number of legal rights of an individual (e.g., life, health, and honour) and collective (e.g., functional legal order) nature, obligates the state to guarantee the protection thereof.*[26]

The ability of the human community to ensure internal peace and order and to protect themselves against external enemies is exactly that which has been associated with the origin and development of a state.*[27] In order to control a blood feud violating peace and order (including the legal order) and to put an end to a feud between rival groups, the state assumed social regulation in medieval times, taking upon itself the right to impose sanctions and use the force necessary therefor, indicating that not only moral, but also justice are the valid standards of community. In doing so, the administration of retributions and the use of force required therefor became an issue in the exclusive competence of the state.*[28] The state institutionalised organisation of

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[25] E.-W. Böckenförde distinguishes between organisational and personal democratic legitimation (related to appointments to office, etc.) and material and substantive democratic legitimation (related to the determination of the substance of laws). It is important that although these aspects of legitimation may counterbalance each other (e.g., when one of them is weaker) but are not fully substitutable. See E.-W. Böckenförde. Staat, Verfassung, Demokratie. Frankfurt am Main 1992, p. 11, paragraphs 11–25. See also H.-H. Trute. Die demokratische Legitimation der Verwaltung. – Grundlagen des Verwaltungsrechts. Band I. München 2006, § 6; O. Freitag (Note 6), p. 86 *ff*.

[26] See also, e.g., K. Jaanimägi. Politsei sisemise rahu tagajana (Police as Guarantor of Internal Peace). – Juridica 2004/7, p. 453 (in Estonian). The explanatory memorandum to the draft Maintenance of Law and Order Act explains the interrelationship between internal and external peace as follows: "In addition to the concept of public order, the Constitution also operates with the concepts of internal and external peace, the protection of which is pursuant to the preamble one of the fundamental functions of the Estonian State. The protection of external peace is the protection of the state against all dangers, originating from outside, first and foremost, the dangers of military nature (national defence function). Compared to the public order, the internal peace can be viewed as a wider concept, the protective scope of which encompasses the protection of public order against all the threats posing danger to it (in the wider sense given to the concept of public order by this draft Act) on the one side and the proceeding of offences in the criminal and misdemeanour proceedings on the other side. As the third tool for the protection of internal peace would be possible to perceive the activities performed by the security authorities pursuant to the Security Authorities Act […], which can be understood as the protection of 'national security', the latter being mentioned by §§ 47 and 130 of the Constitution, clearly distinguishing it from the maintenance of public order. The protection of national security can be directed, besides the internal peace, also to the guarantee of external peace." See the explanatory memorandum to the Draft Maintenance of Public Order Act (korrakaitse seaduse eelnõu seletuskiri) as of 10.05.2007, No. 49 SE. Available at www.riigikogu.ee.

[27] E.g., R. Narits. Õiguse entsüklopeedia (Encyclopaedia of Law). Tallinn 2002, pp. 169, 175 (in Estonian). The evolvement of the state has been explained in this way also in theories of contract. See, e.g., J. Locke. Teine traktaat valitsemisest (Second Treatise on Government). – Akadeemia 2007/3 – 2007/7, e.g., p. 912: "But because no *political society* can be, nor subsist, without having in itself the power to preserve the property, and in order thereunto punish the offences of all those of that society, there, and there only, is *political society* where every one of the members hath quitted this natural power, resigned it up into the hands of the community in all cases that exclude him not from appealing for protection to the law established by it."

[28] J. Sootak. Kriminaalpoliitika (Criminal Policy). Tallinn 1997, p. 59 (in Estonian); J. Sootak. Karistusõiguse alused (Foundations of Penal Law). Tallinn 2003, pp. 16, 141 (in Estonian). See also W. Gropp. Füüsilise jõu kasutamise õiguslikud alused (Legal Foundations of Using Physical Force). – Juridica 2007/2, p. 75 (in Estonian). For the historical development of the national monopoly of power (from the Middle Ages up to this day, including, e.g., the theories of Bodin, Hobbes and Weber), see, e.g., M. Gamma (Note 17), p. 50 *ff*.

settlement of (legal) disputes. For the first time in history, this allowed for guaranteeing peace for all members of the community.*[29]

The state tolerates the use of physical force by someone else (other than the state itself) only up to a limited extent and only in extremely exceptional situations. Using physical force for the enforcement of one's rights at one's own discretion is precluded in principle — a person has to have recourse to public authority (court, investigative body, etc.) for that.*[30]

A private person has a legitimate authorisation to use physical force against another private person only in limited cases.*[31] A state can tolerate the use of physical force by someone else (other than the state itself) only when the state is unable to use force or do it on time. For example, in the case of a collision of self-defence, necessity or duties*[32], in which case the state itself is unable, due to some objective reason (generally the speed at which the situation is played out), to provide sufficient protection for the person.*[33] Security services rendered by a licensed security services company on the basis of a contract for the supply of security services also serve as an exception: one natural or legal person governed by private law enters into a contract with a security services provider as another legal person governed by private law in order to gain protection against a third person governed by private law.*[34] In such a case, an employee of the security services company applies the right of self-defence, if necessary. These are the national powers vested in a private person to legitimately apply force against another private person. Using force beyond these powers is prohibited and generally entails a national punishment. Pursuant to the aforementioned, it is necessary to emphasise the keyword 'governed by private law', i.e., the use of force does not take place in the name of public authority (a state), but in the name of a private individual — a natural or legal person.

Monopoly of punishment is part of the monopoly of power. There are two aspects to the punishment of the offender. Firstly, this involves the application of physical force (or at least a possibility thereof) and through that, the restriction of the rights and freedoms of the person to a greater or lesser extent. Secondly, the state expresses its reproachful attitude to committing the act. The constraints applied through punishment of the offender are, above all, based on the guilt of the person*[35] and the resulting repression — a so-called idea of

[29] C. Gramm (Note 17), p. 38.

[30] A. Krölls. Privatisierung der öffentlichen Sicherheit in Fußgängerzonen? – NVwZ 1999/3, p. 234. See, e.g., CCSCd, 4.02.2005, 3-1-1-111-04, paragraph 13: "For example, a failure to act in performing a financial obligation does not create a self-defence status, as the injured party has an opportunity to take recourse for the protection of their rights to the proceedings provided by law (for example civil proceeding). Otherwise the whole state system set in place for the purposes of resolving conflicts would lose its meaning, which in turn would present a serious danger to the legal peace." – RT III 2005, 6, 53 (in Estonian); CCSCd, 30.10.2006, 3-1-1-95-06, paragraph 9 *ff.* explains issues related to the application of self-defence and necessity as circumstances precluding unlawfulness of an act. – RT III 2006, 40, 339 (in Estonian); SCebd, 30.11.2005, 3-2-1-123-05, paragraph 30: "In the civil society the financial claims are realised first and foremost through the court and not by self-help." – RT III 2005, 43, 427 (in Estonian).

[31] According to § 19 (2) of the Constitution, everyone shall honour and consider the rights and freedoms of others, and shall observe the law, in exercising his or her rights and freedoms and in fulfilling his or her duties. This provision firstly gives rise to the universal obligation of members of the society to abide by law and secondly to the principle that fundamental rights also apply in relationships between private persons.

[32] In Estonian law, the relevant provisions are the following: §§ 28–30 of the Penal Code (karistusseadustik. – RT I 2001, 61, 364; 2009, 19, 114 (in Estonian)); § 217 (4) of the Code of Criminal Procedure (kriminaalmenetluse seadustik. – RT I 2003, 27, 166; 2008, 52, 288 (in Estonian)); §§ 140 and 141 of the General Part of the Civil Code Act (tsiviilseadustiku üldosa seadus. – RT I 2002, 35, 216; 2009, 18, 108 (in Estonian)); § 41 of the Law of Property Act (asjaõigusseadus. – RT I 1993, 39, 590; 2008, 59, 330 (in Estonian)); § 1045 (2) 3) and 4) of the Law of Obligations Act (võlaõigusseadus. – RT I 2001, 81, 487; 2009, 18, 108 (in Estonian)).

[33] See also C. Gramm (Note 17), p. 39; A. Mackeben (Note 17), p. 95 *ff.*; S. Schoch. Politzei- und Ordnungsrecht. – Besonderes Verwaltungsrecht. E. Schmidt-Aβmann u.a (Hrsg.). Berlin 2003, I 2 paragraph 27; W. Gropp (Note 28), p. 76 *ff.*; A. Krölls (Note 30), p. 233. See also judgment of the European Court of Justice dated 31.05.2001 in case No. C-283/99, *Commission v. Italy*, paragraphs 20–21: "[…] the activities of undertakings providing caretaking and security services are not normally directly and specifically connected with the exercise of official authority […]. In particular, as regards the arguments relating to the power of sworn private security guards employed by security firms to arrest persons engaged in the commission of offences, suffice it to note that, as pointed out by the Advocate General in paragraph 45 of his Opinion, such guards have no more power to do so than any other ordinary member of the public." (Judgment dated 13.12.2007 in case No. C-465/05, *Commission v. Italy*, paragraph 42.)

[34] In Estonia, it is governed by the Security Act (turvaseadus. – RT I 2003, 68, 461; 2008, 28, 181 (in Estonian)), e.g., § 4 (1) (types of security services), § 14 (principal functions of security firms), § 32 (rights of security agents).

[35] SCebd, 25.10.2004, 3-4-1-10-04, paragraph 18: "In its essence a punishment means a restriction of a person's rights or freedoms. Nevertheless, not any restriction of rights and freedoms amounts to a punishment, even if the reason for the restriction is an offence. The difference between a punishment applicable for an offence and a non-punitive coercive measure lies in the following. Guilt of a person is an inevitable basis for a punishment, a punishment means a reproach manifested in the restriction. On the other hand, it is not the guilt of a person which is the basis for imposition of a non-punitive coercive measure, but the danger emanating from the person, indicated by the actions he or she has committed." – RT III 2004, 28, 297 (in Estonian). CCSCd, 20.02.2007, 3-1-1-99-06, paragraph 14: "Proceeding from § 56 of the Penal Code, after it has been established that the criminal offence has been committed, the court must give, proceeding from the guilt, a reasoned evaluation under penal law of the offence committed, which contains the type and term of punishment. According to the spirit of the Penal Code, the evaluation must be focused primarily on the offence and the personality of the accused as separated from the offence may not serve as the basis for imposing the type and term of punishment. Above all, the latter encompasses a prohibition to evaluate instead of the particular offence the earlier life of the accused and his or her traits in general when choosing the type and term of punishment." – RT III 2007, 8, 65 (in Estonian). See also CCSCd, 14.06.2006, 3-1-1-43-06, paragraph 13.1: "It is a classical concept that penal law is primarily aimed at the offence, not the

requittal —, not a threat resulting from the person (social prevention, e.g., prevention of a harmful consequence). The latter is characteristic of administrative coercive measures. Although the punishment carries certain (general and special) preventive goals, the main aspect of a punishment is still the **national** negative assessment of the act that violated the rules of conduct. It is a reproach, the essential part of which is the fact that it originates from the state, not from any other person.

2.2.2. Obligation to maintain minimal resources

The state must be able to perform all the functions vested in it based on the Constitution, including the function to protect the fundamental rights of people (see also Part 3 of the paper). Upon performing its functions, the state has to be capable of acting like a state — to direct or prohibit independently, at its own discretion. This presumes the ability of the state to have an overview of its means and maintain the minimal resources necessary for the performance of public functions when cooperating with the private sector in order to uphold its identity as a state and exercise its discretion without any internal or external restrictions. It has to be emphasised that the minimum resources are meant to include both legal instruments and organisational measures (e.g., appointment of the composition of the supervisory board of a foundation, the consent of a national authority for performing certain actions or other) as well as personnel, technical equipment, financial resources, etc.[*36] Most certainly the state has to avoid the possibility of being kept on a leash, where the public authority has to submit themselves to the dictate of the private sector in relation to the performance of a public function.

The obligation to maintain minimal resources does not solely apply to the monopoly of power discussed above. It extends to all areas, including the so-called soft areas. The refusal of the continuation of a public service contract concerning the shipping service between Saaremaa Island and the mainland by AS Saaremaa Laevakompanii in 2004[*37] was obviously a lesson to be learned for the Estonian State as to what may happen when the public authority loses its ability to dictate. The provision of a public transport service is not traditionally one of the core functions of the state. Yet, the acts (omissions) of a company could have led to an unconstitutional situation in the case of which part of the people living in Estonia would have been completely cut off from the rest of Estonia — the state would have been unable to perform the constitutional functions vested in it.

Hence, the involvement of the private sector also in the performance of public functions outside the core functions to an extent in which the state fully relinquishes its possibility (capacity) of directing and/or interfering, may be unconstitutional.

3. Subjective limits

The subjective limits of the involvement of the private sector in the performance of public functions relate to the infringement of the fundamental rights and freedoms accompanying the activities of the public authority — the individual rights aspect of the performance of a public function.

When analysing whether the involvement of the private sector in the performance of some public function should be permissible, the definition of the public function does not give us the answer to what extent the fundamental rights or freedoms of an individual may be infringed upon in the performance of a public function. It is true that the performance of the core functions, for example, usually presumes the existence of authorised powers (orders, prohibitions, duress) but not unavoidably and always. Yet a need may arise in essentially soft areas to apply authorised powers. In other words, when deciding on the involvement of the private sector, after the delimitation of the function, one must always proceed to the level of powers in order to identify the powers presupposed by the performance of a particular function.[*38] Hence, besides core functions we can certainly speak about core powers. For example, the guarding of the building of a ministry as state assets, in which case the state acts to a great extent as an ordinary owner comparable to a private person, does not yet serve

offender — an evaluation under penal law is generally based on the offence committed by the person, not the person himself or herself and the punishment is above all founded on the guilt of the person." – RT III 2006, 25, 226 (in Estonian).

[36] In German legal theory, the responsibility of the state to guarantee (*Gewährleistungsverantwortung*) is used when speaking about the enabling state. For details about the potential ways of it (proprietary prerequisites, organisational and procedural measures, use of self-regulation, etc.). See M. Burgi (Note 3), E II; R. Stober (Note 6), p. 2305; F. Schoch (Note 3), p. 245 *ff.*; W. Weiβ (Note 3), p. 300 *ff.*

[37] AS Saaremaa Laevakompanii provided public transport services between mainland Estonia and Saaremaa Island. Negotiations for the renewal of the contract started in relation to the expiry of the term of the contract entailed serious disagreements between the state and the company over the compensation paid by the state. AS Saaremaa Laevakompanii was at that moment the only carrier owning the ferries necessary for providing the service (because of the natural peculiarities of the sea, the ferries had to have a special construction), while the state itself lacked the necessary vessels to continue the ship traffic. This put the state in a very uncomfortable situation in negotiating the terms and conditions of the contract.

[38] That is why the study of the monopoly of power has also been considered as oriented to powers (*Lehre vom Gewaltmonopol ist befugnisbezogen*). See M. Burgi (Note 3), D I 2 a.

as a core function of the state. However, if this involves the guard's right to decide on access to the ministry, to identify the person and/or search, X-ray or feel the person or his or her belongings for ensuring security, a different position must be adopted thereto.

Everyone's right to the protection of the state and of law has been set out in § 13 (1) of the Constitution, while according to § 14, the guarantee of rights and freedoms is the duty of the legislative, executive and judicial powers, and of local governments. The state may restrict rights and freedoms, but only in accordance with the Constitution and if the restrictions are necessary in a democratic society and do not distort the nature of the rights and freedoms restricted (§ 11 of the Constitution). Regardless of the fact, whether it is a right of performance (right to demand positive action from the state) or a right to freedom (right to demand non-interference from the state), the state must, in any case, be able to ensure the minimal level of protection of fundamental freedoms arising from the Constitution.

Although the fundamental rights are not classified as more important and less important ones, there are certain fundamental rights that are deemed to be more substantial than others, such as human dignity (§ 10 of the Constitution), the right of recourse to the courts (§ 15 of the Constitution), the right to life (§ 16 of the Constitution), the prohibition of torture or cruel or degrading treatment or punishment (§ 18 of the Constitution) as well as the right to liberty and security of a person (§ 20 of the Constitution).[*39] For example, the performance of public functions that presume the powers to use physical force and special equipment, including firearms (core powers) and which may bring about the violation of the corporeal integrity of a person, restriction and deprivation of liberty and danger to life should certainly be at the heart of the core functions not subject to transfer on the basis of the Constitution. The latter also applies if the infringement of a fundamental freedom may become particularly intense (e.g., the inviolability of home during a search (§ 33 of the Constitution)).

The importance of the fundamental rights subject to infringement and/or the intensity of the infringement necessitate the preclusion of violations from early on. The, so to say, preventive measures (including, e.g., professional training of officials) has a very big role here because it may not be possible to remedy the consequences of using physical force, for example.

4. Requirement to use public servants

The constitutional requirement to use public servants links the objective and subjective limits of the involvement of the private sector in the performance of public functions. The reason is that, on the one hand, the requirement of using public servants relates to the requirement of legitimation that derives from the principle of democracy and the ability of the state to act as a state (public servants as a resource), on the other hand, it relates to the need to ensure the maximum protection of fundamental rights and freedoms.

The state, as such, is an abstraction and the authority of the state is exercised directly by the people "of special status" working in the state organisation, who have to guarantee the protection of public interests through their activities.[*40] Section 30 of the Constitution emphasises the importance of the public service. This means that presumably[*41] the executive power is exercised by a public servant working in a government agency, the activities of which are directed and coordinated by the Government of the Republic (§ 87 2)) of the Constitu-

[39] E.g., SCALCd, 9.06.2006, 3-3-1-20-06, paragraph 15: "[…] the right of the individual that was restricted constituted one of the most important fundamental rights — liberty." – RT III 2006, 27, 251 (in Estonian). ALCSCd, 10.01.2008, 3-3-1-65-07, paragraph 19: "The Chamber is of the opinion that the use of force serves as a preventive measure the application of which infringes with one of the most significant fundamental freedoms of a person — the security of a person." – RT III 2008, 4, 32 (in Estonian). The significance of various fundamental rights (the right to liberty, the freedom of self-realisation, etc.) have been addressed also in, e.g., CCSCr, 20.05.2003, 3-1-1-69-03. – RT III 2003, 20, 190 (in Estonian). Deprivation and restriction of liberty have been distinguished based on the practice of the European Court of Human Rights regarding the intensity of the infringement of fundamental rights. E.g., ALCSCd, 24.11.2005, 3-3-1-61-06, paragraph 33: "[…] upon deciding whether liberty is deprived for the purposes of Article 5 of the Convention or restriction of liberty, account must be taken of all the circumstances, including the type, duration, consequences and manner of application of the measure. Deprivation of liberty and restriction of liberty only differ by the level of intensity of the infringement […]." – RT III 2005, 42, 416 (in Estonian).

[40] The European Court of Justice furnishes the notion 'public service' found in the Treaty (on the basis of which a member state can limit, e.g., the free movement of workers) with a very narrow content: "[…] the person working in it directly or indirectly participates in the exercise of public authority and performs his or her duties, the objective of which is to protect the overall interests of the state and other administrative units." See, e.g., the judgment of the European Court of Justice dated 26.04.2007 in the case C-392/05, *Georgios Alevizos v. Ipourgos Ikonomikon*, paragraph 69. That is why the employees of private security companies, for example, are not considered as members of public service and the member state may not impose restrictions on their citizenship. See the judgment of the European Court of Justice dated 31.05.2001 in the case C-283/99, *Commission v. Italy*, paragraph 25.

[41] See R. Stober (Note 6), pp. 2304, 2306: the state in principle has a freedom to choose how to perform a function and to what extent it involves the private sector; Article 33 (4) of the German Constitution, according to which the exercise of sovereign authority is, as a rule, entrusted to a member of the public service who stands in a relationship of loyalty with the state, cannot be used as an argument directly impeding privatisation; we can speak about Articles 33 (4) as a constitutional restriction only in the case of secondment. An identical position: M. Burgi (Note 3), D I 2 b; O. Freitag (Note 6), p. 58 *ff.*

tion) or at the agency governed by that. A public servant should be, *a priori*, the one who, pursuant to § 14 of the Constitution, guarantees the fundamental rights, according to § 3 (1) exercises the state authority and pursuant to § 13 (1) fulfils the duty of the state to protect everyone. This is the priority of the public exercise of the public authority.*[42]

The service requirements of the public servants who are officials have been formed in such a way that they will guarantee the achievability of these values and aims that the service relationship of the officials is meant to serve, including the ability of the authority of a state to guarantee the protection of the fundamental rights and freedoms and peace set forth in the preamble to the Constitution.

For example, the Constitution establishes the requirement of citizenship for the officials, emphasising their obligation of loyalty to the state, arising from their citizenship bond (§ 30 (1) of the Constitution).*[43] In addition, the Constitution sets forth a restriction on the freedom to engage in enterprise and the freedom of political beliefs, directing the attention to the need to avoid the conflict of interests of the officials in order to ensure independence and impartiality. The obligation of loyalty to the state and the performance of duties that is independent (also ostensibly) from private, political etc., interests and impartial, is extremely important in the case of the Defence Forces and the police, but also in other areas where an intense infringement (including the use of physical force) with the fundamental rights and freedoms of the persons may occur. We cannot agree with the opinion that the obligation of loyalty arising from citizenship is merely an abstract declaration that is irrelevant in practice. The news about an employee of a security services provider who performs several public functions in the name of the state or local government and has joined an anti-Estonian campaign, is somewhat unsettling.*[44]

The ability of the state to establish itself and ensure the performance of minimal public functions also relates to the international principle, according to which officials performing the core functions may be subjected to the prohibition to go on a strike.*[45]

We should not forget the specialised professional training of the officials and the special requirements established therefor. For example, the state has enacted separate service regulations for the agencies employing force (such as the police service, prison service, service in the Defence Forces and border guard service), and also on the basis of such regulations the requirements for professional qualifications for their physical condition, education and state of health.*[46] In the course of the relevant professional training, the officials acquire the knowledge required for the performance of their functions in the form of in-depth theoretical and practical training that is meant to ensure their ability to make an expert decision, taking into account all the material circumstances even in extreme circumstances and within the legal framework of extensive freedom to exercise will (unspecified legal definitions, discretion). The requirement to have sufficient language skills

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[42] The Supreme Court has noted: "It is not possible to fully distinguish between private and public law in practice. In many cases, both provisions in private and public law have to be applied to the activities of administrative agencies. Such a situation may evolve in the course of the participation of a legal person governed by public law in private law relationships because even in such relationships, the legal person governed by public law must take into account fundamental freedoms, proportionality, equal treatment, legitimate expectations as well as any other principles and provisions of public law." See SPSCd, 20.12.2001, 3-3-1-15-01, paragraph 12. – RT III 2002, 4, 34 (in Estonian).

[43] Subsection 30 (1) of the Constitution: "Positions in state agencies and local governments shall be filled by Estonian citizens, on the basis of and pursuant to procedure established by law. These positions may, as an exception, be filled by citizens of foreign states or stateless persons, in accordance with law."

[44] R. Poom. Pihl: tuututamisega jäi vahele ka Falcki auto (Falck Vehicle Also Caught Blowing the Horn). – Eesti Päevaleht, 4.05.2007 (in Estonian). The first sentence of § 22 (1) of the Security Act: "A person who is an Estonian citizen or a person to whom a permanent residence permit has been issued in Estonia, who is at least 19 years of age, who has completed basic education and who holds the qualifications of a security guard, who is proficient in Estonian at the level established by law or by legislation issued on the basis thereof, and who is capable of performing the duties of a security guard in terms of his or her personal characteristics, moral standards, physical condition and health may work as a security guard." The European Court of Justice has established that the oath ('solemn oath of allegiance') that the employees of private security undertakings are obliged to swear to the republic of Italy and its head of state, because of its symbolic significance for the undertakings located outside Italy, serves as an impediment to the exercise of the freedom of establishment and the freedom to provide services and thus is in conflict with the Treaty. See judgment dated 13.12.2007 in case No. C-465/05, *Commission v. Italy*.

[45] The right to strike has been provided in: § 29 (5) of the Constitution (the right to strike is a fundamental right that comes with a simple reservation), it has been noted in Article 6 of the European Social Charter and Article 8 (1) d) of the UN Covenant on Economic, Social and Cultural Rights. ILO has noted that restrictions relating to strikes may be imposed on persons working in the public sector but the restrictions must be established in the minimum necessary extent; prohibition on the right to strike of police officers, members of the Defence Forces and court officials has been regarded explicitly as permissible. For details, including references to international practice, see presentation of Chancellor of Justice No. 2 "Kollektiivse töötüli lahendamise seaduse § 21 lõike 1 põhiseaduslikkus" (Constitutionality of § 21 (1) of the Collective Labour Dispute Resolution Act). Available at http://www.oiguskantsler.ee/index.php?menuID=15 (in Estonian).

[46] However, in the case of the so to say regular officials, who lack the right to violate the fundamental rights of persons in such intense way as it could happen in the course of application of physical force, the legislator has given the right to enact the qualification requirements to the head of the agency — the second sentence of § 17 (2) of the Public Service Act (Avaliku teenistuse seadus. – RT I 1995, 16, 228; 2009, 15, 94; in Estonian). "The head of an administrative agency, or a person or administrative agency superior to him or her may establish supplementary qualification requirements."

to ensure problem free communication by the person performing a public function and a person subjected to the activities of the public authority is no less important.[*47]

5. Level of form of transfer of function

Traditionally, the theory distinguishes between material privatisation (the state fully relinquishes the performance of the function) and formal privatisation (e.g., the state participates in legal persons governed by private law) and a form that lies in between these two — functional privatisation (e.g., transfer of public function to private sector on the basis of a contract under civil law or public law, so-called secondment (*Beleihung*) and administrative assistance (*Verwaltungshilfe*) in Germany).[*48] It is often debated in literature for which type a particular form of transfer should qualify, for example, whether secondment is part of functional privatisation or something separate therefrom.[*49] Different forms may also be interrelated, such as the formal and functional (e.g., the state established a foundation to organise the use of funds collected from environmental charges, with whom the state entered into a contract under public law).

No categorisation serves as a goal in itself; instead, it should contribute to informed choices in practice, clarifying presumptions of law and potential legal consequences.

Since the above division into three has become somewhat outdated, with regard to both practice (e.g., authorised and recognised agencies, accreditation institutions, universal services, etc.) as well as the developments in European Union law[*50] (above all, service concessions[*51]), there is a need for new classifications. A distinction has been made, for example, between contractual public private partnership (PPP) and organisational PPP.[*52]

In the practical sense, the following may be considered as one of the best classifications of the forms of transfer of public functions:

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47 Clause 4 of § 14 (2) of Government of the Republic Regulation No. 5 of 26.06.2008 "Avalike teenistujate, töötajate ning füüsilisest isikust ettevõtjate eesti keele oskuse ja kasutamise nõuded" (Requirements for the Estonian skills and the use of Estonian by public servants, employees and sole proprietors) (RT I 2008, 26, 176; 2009, 8, 55; in Estonian): private security agents whose duties are related to maintaining public order or who carry firearms or use special equipment must know Estonian at least on level B2 (§ 6 (2): "A level B2 user can understand the main ideas of complex text on both concrete and abstract topics, including technical discussions in his/her field of specialisation. Can interact with a degree of fluency and spontaneity that makes regular interaction with native speakers quite possible without strain for either party. Can produce clear, detailed text on a wide range of subjects and explain a viewpoint on a topical issue giving the advantages and disadvantages of various options.")

48 See, e.g., K. Merusk (Note 17), pp. 505–506; T. Annus. Riigi funktsioonide delegeerimine eraõiguslikele isikutele kohtutäiturite näitel (Delegation of the Functions of the State to Persons Governed by Private Law, Case Study on the Bailiffs.). – Juridica 2002/4, p. 225 (in Estonian); H. Gersdorf (Note 3), pp. 831–832; R. Stober (Note 6), p. 2302. For different categorisation, see also, e.g., W. Weiβ (Note 3), p. 29 *ff.*; A. Mackeben (Note 17), p. 18 *ff.*; F. Schoch (Note 3), p. 243.

49 For a summary, see, e.g., O. Freitag (Note 6), p. 27 *ff.*

50 See, e.g., Commission interpretative communication on concessions under Community law (2000/C 121/02); The public consultation on the Green Paper on Public-Private Partnerships and Community law on public contracts and concessions (30.04.2004, COM(2004) 327); Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on Public-Private Partnerships and Community Law on Public Procurement and Concessions (15.11.2005, COM(2005) 569). About the transfer of functions to the private sector by the European Union institutions see, e.g., P. Graig. EU Administrative Law. Oxford 2006, pp. 15 *ff.*, 32; U. Mörth. Public and Private Partnerships as Dilemmas between Efficiency and Democratic Accountability: The Case of Galileo. – European Integration 2007/5, p. 601 *ff.*; Privatization Experiences in the European Union. M. Köthenbürger, etc. (ed.). London 2006.

51 Subsection 6 (2) of the Public Procurement Act: "For the purposes of this Act, a concession of services is granted by a procurement contract, the object of which is contracting for services set out in Annex 2 to this Act and according to which the fee for the provision of the service consists in the right given to the concessionaire to provide the service and obtain a fee for the provision of the service from the users of the service or in such a right together with a monetary payment of the tenderer." – RT I 2007, 15, 76; 2008, 14, 92 (in Estonian). See also ALCSC, 15.12.2005, 3-3-1-59-05, paragraph 16: "First of all, the Administrative Law Chamber of the Supreme Court considers it necessary to point out that although the courts have regarded the contracts serving as the object of the appeal as civil law contracts, their content and objective differ from the contracts entered into by a public authority acting under private law. These contracts have the features of the concession contracts entered into by public authority. By these contracts, public authority grants a private person use of an important public resource (in this case, streets or areas bordering on the streets), giving its permission to erect there facilities that are used for a charge or free of charge both in public and private interests, while the risks arising from the contract rest with the private person that is a party to the contract. The preamble to the contested contracts contains references to the function of public authority performed through the contract." – RT III 2006, 1, 12 (in Estonian).

52 See COM(2005) 569; H. Gersdorf (Note 3), p. 832 *ff.*; M. Burgi (Note 3), D 31. A relevant US council may be pointed out as an example: http://www.ncppp.org/. For the complexity of defining PPPs, see, e.g., J. Ziekow. Public Private Partnership – auf dem Weg zur Formierung einer intermediären Innovationsebene? – Verwaltungs Archiv 2006/3–2006/4, p. 627 *ff.* ("defining a PPP is just as complicated as nailing pudding on the wall"); see also H. Gersdorf (Note 3), p. 833; J.A. Kämmerer, P. Starski. Über Nutz und Frommen einer ÖPP-Gesetzbegung. – Zeitschrift für Gesetzgebung 2008/3, p. 227 *ff.*

1. privatisation of a function;
2. a contractual PPP and other forms of functional privatisation, where the public authority does not renounce the function and the person performing the function does not act in place of the public authority but works for the public authority.

   Subcategories:
   – administrative assistance or transfer of an administrative function based on a civil law contract and service concession;
   – project-based PPP (PPP in its narrow sense);
3. institutionalised PPP;
4. secondment and accreditation.*[53]

Different forms of transferring public functions come with a differing intensity of the involvement of the private sector (e.g., either only assists the public authority or fully performs the entire function) and different legal consequences. In the latter case, the most important question is whether the performance of the public function remains within the sphere of public law (imperativeness dominates) or it fully transfers to the domain of private law (non-mandatory capacity dominates). Secondly, we must ask whether and between whom legal relationships evolve when performing a public function.

For example, upon the transfer of an administrative function by a contract under public law, legal relationships develop immediately between the person performing the function and the person in respect of whom the function is performed. In this, the relationships between the person performing the function and the person in respect of whom the function is performed generally remain governed by public law — the person performing the function is an administrative body together with all the resulting rights and obligations, e.g., development into a holder of public information as defined in the Public Information Act*[54] (PIA), the obligation to pursue all the requirements arising from the Administrative Procedure Act, including to ensure the rights of the participants in the proceeding, serve as a respondent in an administrative court if dissenting opinions arise during the performance of administrative function, including the presumed obligation to incur legal costs as a natural part of or risk accompanying service as an administrative body*[55], etc. However, in the case of material privatisation, all the relationships between the person performing the function and the person are governed by private law.

It is essentially important for the person in respect of whom a function is performed to know the liability based on specification of the legal consequences described above. In other words, the question is whether compensation for damage is governed by substantive and procedural law contained in public law, i.e., above all in the State Liability Act*[56] and Code of Administrative Court Procedure*[57], or in private law, i.e., above all in the Law of Obligations Act and the Code of Civil Procedure. As it is known, the requirements for liability and the procedural principles differ greatly.

It may also be asked to what extent the penal provisions applied to a recipient of a public service upon non-compliance regarding the person performing the function differ. Division 3 (Offences Against Exercise of Public Authority) of Chapter 16 (Offences Against Public Peace) of the Penal Code contain provisions that prescribe liability for obstruction of state supervision (§ 279), violence against a representative of state authority or other person protecting public order (§ 274) or defamation or insult (§ 275) or disregard of lawful order given by a representative of state authority (§ 276) that are rather ambiguous to provide clear answers whether and to what extent the legal consequences would differ in the case of different forms of transfer.

As regards different forms of the involvement of the public sector, keeping in mind the permissible restrictions on the freedom of enterprise set out in § 31 of the Constitution*[58], it certainly differs to what extent the

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[53] M. Burgi (Note 3), D 32 *ff.*

[54] Avaliku teabe seadus. – RT 2000, 92, 597; 2008, 35, 213 (in Estonian). PIA § 5 (2): "The obligations of holders of information extend to legal persons in private law and natural persons if the persons perform public duties pursuant to law, administrative legislation or contracts, including the provision of educational, health care, social or other public services, — with regard to information concerning the performance of their duties." Indeed, the obligations set out in PIA in certain cases also extend to other private persons, e.g., sole proprietors, non-profit associations, foundations and companies — with regard to information concerning the use of funds allocated from the state or a local government budget for the performance of public duties or as support are deemed to be equal to holders of information (PIA § 5 (3)).

[55] ALCSCd, 19.06.2007, 3-3-1-24-07, paragraph 16: "AS Falck Eesti (regardless of its private law form) participates in the proceedings in relation to the settlement of a dispute arising in the course of the performance of an administrative function acquired under a contract under public law; as a result, the right of AS Falck acting pursuant a contract under public law to the compensation for legal costs must be handled just as in the case of any other administrative body." – RT III 2007, 27, 226 (in Estonian). *Ibid*., 15.11.2007, 3-3-1-58-07, paragraph 13. – RT III 2007, 41, 330 (in Estonian).

[56] Riigivastutuse seadus. – RT I 2001, 47, 260; 2006, 48, 360 (in Estonian).

[57] Halduskohtumenetluse seadustik. – RT I 1999, 31, 425; 2008, 59, 330 (in Estonian).

[58] CRCSCd, 12.06.2002, 3-4-1-6-02, paragraph 9: "The freedom to engage in enterprise is infringed if the liberty is adversely affected by the public power." – RT III 2002, 18, 202 (in Estonian); 10.05.2002, 3-4-1-3-02, paragraph 14: "The second sentence of § 31 of the Constitution,

state can interfere with the activities of the person performing the function through legislation (developing the organisation[*59], imposing restrictions on the activities[*60], establishing additional responsibilities[*61]) or exercising supervision later on (state supervision, state audit, Chancellor of Justice, etc.).

In summary, we may conclude about the form of transfer of a public function that the more intense the involvement of the private sector in the performance of a public function, the greater the extent to which the performance of the public function transcends the domain of public law, and the more powers of the public authority the private individual performing the function may use, the more conservative the attitude towards transfer should be.

6. Conclusions

There are very few black-and-white solutions, i.e., simple yes/no answers to the questions whether a public function can be transferred to the private sector in the light of the Constitution or not, while there are many grey areas.

Both objective and subjective limits are decisive when deciding on the permissibility of constitutional restrictions on the transfer of public functions to the private sector: the principles of democracy and a state based on the rule of law, the ability of a state to act like a state (encompassing the monopoly of power of the state and the obligation to maintain minimal resources) as well as the intensity of interference with the fundamental rights of a person. These two are, in turn, bound by the constitutional requirement to use officials. Assessing the limits in conjunction in the particular case allows for deciding whether a public function can, in principle, be transferred to the private sector and what could be the permissible form of transferring the function. There are various types and classifications to the latter, such as material, formal and functional privatisation.

However, besides the constitutional dimension of the issue, one must not lose contact with reality when deciding on the transfer of a public function to the private sector: "these partnerships have not been marriages based on love, or even on respect for the qualities each could bring to the relationship, but rather marriages for money."[*62]

which provides that conditions and procedure for the exercise of the freedom to engage in enterprise may be provided by law, gives the legislator much freedom to regulate the conditions of exercise of freedom to engage in enterprise and to impose restrictions thereon. Any reasonable ground is sufficient for the restriction of the freedom to engage in enterprise. Such a ground must follow from public interest or necessity to protect the rights and freedoms of others, it must be weighty and, certainly, lawful. The more intense the infringement into the freedom to engage in enterprise, the stronger must be the grounds justifying the infringement." – RT III 2002, 14, 157 (in Estonian).

[59] For example, regulate the composition of a supervisory board of a foundation by law.

[60] For example, by listing prohibited activities or imposing the agreement of a public authority as a precondition on an activity (e.g., economic activity, pricing or transformation of a legal person).

[61] Such as the obligation to disclose the amount of salary, based on the Anti-corruption Act (korruptsioonivastane seadus. – RT I 1999, 16, 276; 2008, 59, 330 (in Estonian)) or other.

[62] T. Bovaird. Public-private partnerships: from contested concepts to prevalent practice. – International Review of Administrative Sciences 2004/7, p. 201. Cited from: J. Ziekow (Note 52), p. 631.

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About the Principles of the Constitution of the Republic of Estonia from the Perspective of Independent Statehood in Estonia[*1]

At the end of the 20th century, on 28 June 1992, a referendum was held by which Estonia adopted a liberal constitution[*2] based on people's natural and inalienable rights. The commentaries that were published on the tenth anniversary of the Constitution noted that our constitutional governmental system, which is characterised by parliamentary democracy based on legitimacy, the principle of the rule of law, republicanism, and sovereignty of the people, unitary statehood is derived from and based on the Constitution.[*3] Principally, the 21st century brought a new epoch to the development of Estonia and its nation in relation to accession to the European Union. Everything connected to the European Union became especially topical.[*4] The accession to the European Union was a relatively long process, as we know, and gave rise to conflicting opinions. I will present the viewpoint on the question of accession to the European Union that was adopted by L. Meri, the first president of Estonia after the nation regained its independence: "We do not need the European Union because of the Union itself. We need the Republic of Estonia. We need a state where Estonians would feel that the prerequisites for the increase in their standard of living and for education for their children are ensured. For the continuation of this Estonia, we need to accede to the European Union and not vice versa."[*5]

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1 This is a continuation to the article R. Narits Principles of Law and Legal Dogmatics as Methods Used by Constitutional Courts. – Juridica International 2007 (12), p.15. It is published with support from ESF grant No. 6676.

2 RT 1992, 26, 349; RT I 2007, 33, 210 (in Estonian). English translation available at http://www.just.ee/23295 (8.05.2009).

3 Eesti Vabariigi põhiseadus. Kommenteeritud väljaanne (Republic of Estonia Constitution. Commented edition). Tallinn: Juura, Õigusteabe AS 2002, p. 9 (in Estonian).

4 Referring to J. Tõnisson, R. Ruutsoo writes that even ardent Estonian nationalists started to advocate the advantages of the unified Europe and unavoidability of the participation of Estonia in it. The former states- and public man J. Tõnisson wrote: "I hope that the examples of the past are used when realising the idea of the European Federation. It should not be much easier than taming the individualism of European nations and overcoming the absolute excitement over sovereignty of statehood that based on federality in the spirit of freedom and the rule of law which makes life worthy to live." See J. Tõnisson. Euroopa föderatsiooni idee (The Idea of European Federalism). The ninth album of the Estonian Students Society: EÜS publishing 1940, 74 (in Estonian).

5 L. Meri. Euroopa Uniooni on vaja Eesti riigi püsimiseks (The European Union is Needed for the Continuation of the Republic of Estonia). – Luup (journal) 1997/26, p. 11 (in Estonian).

1. The necessity of the Constitution of the Republic of Estonia Amendment Act

Estonian accession to the European Union had to be formalised in a legally correct manner. For this, the Government of the Republic of Estonia decided to hold a referendum concerning the draft legislation titled the Constitution of the Republic of Estonia Amendment Act (CAA).*[6] Changing the Constitution in such a manner was necessary as § 3 of the Constitution of the Republic of Estonia provides the principle under which state authority is exercised solely pursuant to the Constitution and laws that are in conformity therewith. The Constitution of the Republic of Estonia does not refer to EU legislation in any of its paragraphs. The above-mentioned § 3 is among the so-called general provisions that can be changed substantially only via a referendum. The adoption of the CAA on 14 September 2003 and its entry into force on 6 January 2004 enabled the *Riigikogu* (Estonian parliament) to ratify the Treaty of Accession of the Republic of Estonia to the European Union, which had already been signed on 16 March 2003. At four paragraphs, the CAA is not a voluminous law.*[7] The same cannot be claimed about the constitutional content of the CAA. The fact is that at the accession of Estonia to the European Union, the text of the Constitution was not changed, but through and with the CAA, the Constitution was recurrently changed so that Estonia could accede to the European Union.*[8] Thus, the four paragraphs of the CAA are of immense importance for Estonian statehood; they contribute to the explanation of the present constitutional situation, and, in my opinion, elucidate the perspective of our statehood. The CAA has changed the whole judicial attitude toward the Constitution.*[9] Doctrinally, complementing the Constitution by a separate law is still changing the Constitution, even if there are no changes made in the text of the Constitution. To understand the Constitution in this situation, one should start reading both texts such that, in an applied sense, only that part of the text of the Constitution is imposed that is not in opposition to the CAA.*[10]

2. The CAA and the principles of the Constitution

In the present article, I would like to concentrate on § 1 of the CAA, which provides: "Estonia may belong to the European Union in accordance with the fundamental principles of the Constitution of the Republic of Estonia", which is one of the most important provisions that necessitate the interpretation of the essence of the Constitution in the situation in which Estonia is a member state of the European Union from 1 May 2004. It is fortunate that this question can be handled in an academic manner. Also philosophers recognise that "[d]ispassionate, public, and serious thinking is a prerequisite for the continuation of Estonian statehood".*[11] Moreover, as the spirit of the Constitution does not fit only in the norms of the Constitution, its text and words, § 1 of the CAA similarly is a generalisation and a provision in need of interpretation. The specialist literature notes: "Through interpretation of constitutional law, dubious places in the Constitution are eliminated and constitutional law is developed."*[12]

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6 CAA was adopted by the referendum held on 14 September 2003. 64% of the citizens with the right to vote participated in the referendum. 66.8% of them voted in favour of CAA and 33.2% voted against it. There were below 0.5% of invalid ballot papers. CAA was published in RT I 2002, 107, 636 (in Estonian). English translation available at http://www.just.ee/23295 (8.05.2009).

7 CAA § 1: "Estonia may belong to the European Union in accordance with the fundamental principles of the Constitution of the Republic of Estonia."; § 2 "As of Estonia's accession to the European Union, the Constitution of the Republic of Estonia applies taking account of the rights and obligations arising from the Accession Treaty."; § 3 "This Act may be amended only by a referendum."; § 4 "This Act enters into force three months after the date of proclamation."

8 The amendments of the constitutions of EU Member States are either considering the possibilities of assigning competences and thereby the accession to the EU or regulating the situation in a Member State also after the accession. CAA is the second option as we wished to change the Constitution, when acceding to the EU, to such extent that it would not conflict with the fundamental principles of Estonian statehood.

9 The introduction of the commentaries of the Constitution of the Republic of Estonia note that "Despite the laconicism of the provisions of CAA, they embody the crucial constitutional questions related to the accession to the EU; they regulate the questions clearly enough and understandably for a person with a judicial education". See Eesti Vabariigi Põhiseadus. Kommenteeritud väljaanne (The Constitution of the Republic of Estonia. Commented edition). Tallinn: Juura 2008, p. 28 (in Estonian).

10 In the commentaries of the Constitution the CAA is noted as so-called "the third legal instrument of the Constitution". The second legal instrument is the Constitution of the Republic of Estonia Implementation Act. See Eesti Vabariigi Põhiseadus. Kommenteeritud väljaanne (The Constitution of The Republic of Estonia. Commented edition) (Note 9), p. 774.

11 E. Loone. Eesti riik ja rahvas maailmas. – Eesti tulevikusuundumused (Estonia and its Nation in the World. The Future Trends of Estonia). E.-M. Tiit (ed.). Tartu: Estonian Union of Scientists 1996, p. 31.

12 T. Würtenberger. Auslegung von Verfassungsrecht – realistisch betrachtet. – Verfassung – Philosophie- Kirche. Festschrift für Alexander Hollenbach zum 70. Geburtstag. Duncker und Humblot 2001, p. 223. Moreover, the specification and development the Constitution is in some respects changing the Constitution and connected to politics. Namely, the more the Constitution is being interpreted, the smaller its political development space will become. Therefore, the interpretation of the Constitution is limited by legislative and judicative. The constitutional

Initially, the draft text of the CAA did not contain the principles, nor did the explanatory memorandum mention them.*[13] Then, the Chancellor of Justice at the time suggested that the Constitutional Committee complement the draft of the CAA with a so-called crisis reservation: "Estonia can be a member of a European Union that functions according to the principles of human dignity and the social and democratic rule of law, and which is founded on liberty, justice, and law, and which shall guarantee the preservation of the Estonian nation, language, and culture through the ages" (in Estonian, "Eesti võib kuulda Euroopa Liitu, mis vastab inimväärikuse ning sotsiaalse ja demokraatliku õigusriigi põhimõtetele, mis on rajatud vabadusele, õiglusele ja õigusele, mis peab tagama eesti rahvuse ja kultuuri säilimise läbi aegade").*[14] The Constitutional Committee supported the suggestion of the Chancellor of Justice, but, to prevent the repetition of the text of the Constitution in the CAA, the committee decided to use only the words 'the principles of the Constitution' in the law. The course of the draft proceedings demonstrates that the parliament accepted the suggestion of the Constitutional Committee.

Already the pre-CAA constitutional discourse often concentrated on the values expressed in the Constitution and the different characteristics of these values. It was wondered whether it is possible to find an ultimate value in the Constitution that is the foundation for our statehood. And it is so. This is the issue of the relationship between the individual and the state. In Estonian statehood, the individual is not for the state but the state is for the individual. Statehood is a constant search for balance between personal liberty and the state that is created to warrant personal liberty.*[15] In fact, the ultimate value is not a legal concept but an ethical-cultural category. Once this concept is situated in the Constitution, it is transformed into a judicial and therefore binding category. The Preamble to the Constitution states that the idea behind strengthening and developing the state is to guarantee the preservation of the Estonian nation, language, and culture through the ages. Here, it is important to know that the individual's priority over the state is not prescribed by the state, but the Republic of Estonia acknowledges this as a natural right of the individual. The state is competent to organise through its juridical precepts the behaviour of people to such extent that the organisation would not encroach groundlessly on their liberties but guarantee at the same time the realisations of public interests. This ultimate value has to be realised primarily by the state.*[16] Therefore, the content of the questions about the continuation of the Constitution (read: statehood) is timeless and the questions cannot be sacrificed to objectively changing circumstances. It is obvious that membership in the European Union is of extreme importance to Estonia, but our considering this reality must not harm Estonian statehood, the ultimate goal of which is to guarantee the preservation of the Estonian nation, language, and culture throughout the ages.

Obviously, there is no doubt that our constitution embodies those European values on which European Union law is based and according to which it is being constantly improved. The Constitution of Estonia, in turn, is through the values embodied in it in accordance with European Union law. The opposite situation would not have enabled signing of the Treaty of Accession to the European Union. Signing the Treaty of Accession was preceded also by the process of harmonisation between Estonian legislation and European Union law. From this, an important conclusion can be drawn — the influence of the CAA is directed to the future. There is no doubt that, in the course of implementation of European Union legislation, the Constitution still has to be applied, and at the same time the rights and obligations arising from the Treaty of Accession have to be taken into account. As we know, the *expressis verbis* content of § 1 of the CAA prescribes that Estonia may belong to the European Union proceeding from the fundamental principles of the Constitution of the Republic of Estonia. This enactment gave the possibility to sign the Treaty of Accession to the European Union.*[17] It is important to note that the European Union accepted the amendment of the Estonian Constitution by the CAA, notwithstanding the fact that the CAA introduced the new term 'fundamental principles' to the Constitution while leaving its content unexplained. It seems that the reason for the laconic approach was that views concern-

theory will give the points of departure for the interpretation of the Constitution. Namely, is it possible that the Constitution determines only the process and limits of the political forming process or does the constitutional order enable to be open to the future, adopting the scopes of economic, social, etc. development? Different schools of constitutional law and also the theory of the interpretation of the Constitution are searching the answer to this.

13 The original text of the draft CAA was: "Estonia can accede to the European Union."

14 The modern Estonian law literature calls the present provision "crisis reservation".

15 Chief Justice or the Supreme Court writes about regaining and keeping a balance between an individual and the state in the parliamentary journal Riigikogu Toimetised (The Proceedings of the Riigikogu) and he has chosen a moto for his essay by a known Estonian author, H. Runnel: "The state and an individual. The individual is weak; our dream was to create our own country to join our forces through the state. But a question rose at once: would not the state suppress an individual, a free person? It is a continuous search for a balance so that the state could be a powerful co-creation and there would be a free individual whose personal freedom would be warranted." M. Rask. Tänu põhiseadusele (Thanks to the Constitution). – Riigikogu Toimetised (The Proceedings of the Riigikogu) 2007 (15), p. 11 (in Estonian).

16 See for example R. Narits. Eesti Vabariigi põhiseadus kestab ka uues Euroopas (The Constitution of the Republic of Estonia will Continue also in the New Europe). – Riigikogu Toimetised (The Proceedings of the Riigikogu) 2003 (7), p. 47 (in Estonian).

17 The *Riigikogu* ratified the Treaty of Accession to the European Union on 21 January 2004 unanimously. The European Parliament ratified the Treaty of Accession on 9 April 2004. When the Treaty entered into force on 1 May 2004, Estonia became a full member of the European Union.

ing the fundamental principles were conflicting, and, indeed, consensus has not been achieved to this day.*[18] There is no doubt that the CAA is a link between the Estonian national legal order and European Union law. The force that forms the whole is binding, while in the present case two laws that have different importance and meaning are linked to each other. Although the content of law of the linked subjects is different, they have at least two common features: the indicator 'law' and the roots 'the fundamental principles'. And here lies the solution for creating cognition of the fundamental principles and for understanding any further developments. Until the CAA was adopted, the Constitution fully encompassed the criteria for legality of norm creation. After introduction of the fundamental principles to the CAA, a category was created to which the Constitution has to comply. The fundamental principles are the new standard for legality.

3. The juridical essence of fundamental principles

Apparently, we should not doubt that the fundamental principles have a legal meaning in addition to an intrinsic one, as they are provided by a legal provision. Thus, a question arises as to their ability to be legally binding. We find the answer when reading the text of § 1 of the CAA, from which a conclusion can be drawn that, on the basis of § 1, the fundamental principles of the Constitution are binding only for Estonia because the paragraph discusses the fundamental principles of the Estonian Constitution.*[19] Estonia could sign the Treaty of Accession provided that said treaty was in accordance with the fundamental principles of the Constitution. Therefore we have to agree with the commentaries to the Constitution, which stated: "The accordance of the Treaty of Accession with the fundamental principles of the Constitution had to be verified before signing of the treaty, during adoption of the ratification law in the *Riigikogu*, and in proclaiming the ratification law".*[20] At the same time, we cannot agree with the viewpoint according to which the proclamation of the ratification law of the Treaty of Accession by the President of the Republic could not be a final guarantee for the accordance of the treaty with the fundamental principles of the Constitution. It is not rational to doubt in the legitimacy of the Treaty of Accession, even in the present situation where it is not clear which principles are part of the set of fundamental principles. Instead, Estonia should be careful when signing other treaties with the European Union. In each individual case, the direct or indirect influence of the treaty being signed on the fundamental principles has to be assessed. Entering into a treaty that is in conflict with the fundamental principles should be avoided. As the doctrine of the fundamental principles is in constant development, it may be that a treaty already signed may newly appear to be in conflict with the fundamental principles of the Constitution. It seems that in this situation European Union law still has to be applied, notwithstanding any conflict with the fundamental principles*[21], but this conflict should be resolved by achieving change in the primary or secondary legislation of the European Union. The authors of the commentaries to the Constitution see a third possibility here — leaving the European Union.*[22] It seems that this option is not a method for resolving conflict between the national legislation and European Union law but a result of a certain political decision, after which the institutional and also legal connections are severed between the European Union and a Member State.

From the approaches described above, it follows that the crisis reservation is not of an offensive nature and does automatically allow not applying European Union law when it is in conflict with the fundamental princi-

[18] Until CAA entered force, the exact elucidation of the fundamental principles of the Constitution was not a topical issue. Actually, no difference was often made between the fundamental principles of the Constitution, the principles of the Constitution or principles. After CAA entered into force, the situation changed as § 1 of CAA provided the fundamental principles in a legal provision. The question is how to do this. We will find a known author from the literature, who presents a thesis about 'one right answer'. Also in case of so-called hard case there is one right answer. See R. Dworkin. Bürgerrechte ernstgenommen, Frankfurt a. Main: Suhrkamp 1990, p. 448 (The original title: Taking rights seriously); R. Dworkin. No right answer? FS Hart. Oxford 1977, p. 58; R. Dworkin. A Matter of Principle. Cambridge (Mass.)/London: Harvard Univ. Pr. 1985, p. 119. For the criticism of this opinion (also the author of the present article agrees with the criticism to a large extent) see A. D. Woozley. No right answer. – M. Cohen (Ed.). Ronald Dworkin and contemporary jurisprudence. London 1984, p. 173. When trying to find the answers one should rather contribute to a rational discourse and argumentative procedures. See R. Alexy. Theorie der juristischen Argumentation. 2. Aufl. Frankfurt a. Main: Suhrkamp 1991; R. Alexy. Probleme der Diskurstheory. – Recht, Vernuft, Diskurs. Frankfurt a.Main: Suhrkamp 1995, p. 109. K.-E. Hain writes figuratively about the "one right answer": "It is clear that this thesis is, philosophically speaking, not on the solid ground but rather on thin ice." See K.-E. Hain. Unbestimmter Rechtsbegriff und Beurtailungsspielraum – ein dogmatisches Problem rechtstheoretisch betrachtet. – Die Ordnung der Freiheit. Festschrift für Christian Starck. Tübingen: Mohr Siebeck 2007, p. 40.

[19] The fundamental principles of the Constitution are not binding for Estonian members of the European Parliament, for the members of the European Commission, for the judges of the European Court and for the judges of the European Court of First Instance in their professional work.

[20] Eesti Vabariigi põhiseadus. Kommenteeritud väljaanne (The Constitution of the Republic of Estonia. Commented edition) (Note 9), p. 777.

[21] This is the opinion also of the Supreme Court of the Republic of Estonia in the case 3-4-1-3-06 of 11 May 2006 – RT III 2006, 19, 176 (in Estonian). English translation available at http://www.nc.ee/?id=663 (8.05.2009).

[22] Eesti Vabariigi põhiseadus. Kommenteeritud väljaanne (The Constitution of the Republic of Estonia. Commented edition) (Note 9), p. 778.

ples of the Constitution.*[23] At the same time, the provision in § 1 of the CAA is clearly a provision curtailing the primacy of European Union law. The commentaries to the Constitution allege that jurists have difficulties agreeing on this provision, as different juridical schools have fundamentally different opinions about applying the crisis reservation.*[24] Expecting agreement from the research community betrays a rather simplified conception of the role of the practitioner of jurisprudence. The idea found in the commentaries to the Constitution in relation to the fact that Estonia could not belong to the European Union if it were to nullify the functioning of the fundamental principles of the Constitution or were to jeopardise their functioning could serve as a good reference point for the appliers of law. The commentaries to the Constitution claim justifiably that the fundamental principles of the Constitution belong to a category the origins of which lie in the Preamble to the Constitution. As the Preamble is not an adjunct to the Constitution but the integrating and regulating core of the Constitution, the category of the fundamental principles will become even more important. The broader the generalisations made about the Preamble, the more significant is its integrative role and is its impact on the other provisions of the Constitution.*[25]

4. The possibility of creating a catalogue of the fundamental principles

It seems that the conflict between the high level of abstraction of the fundamental principles and their regulative core is at least one of the reasons we cannot grasp them. So far, neither Estonian legal scholars nor lawyers have done much to explain the essence of the fundamental principles.

Our understanding of the Constitution has to be based on structured thinking. To be more exact, it has to be based on ordered legal thinking. The purpose of understanding law is always to obtain an adequate overview of the relevant reality with the help of the law. The commentaries to the Constitution of the Republic of Estonia (2002) note that, figuratively speaking, it creates an integrated notion of law and that "[f]ormation of this integrated notion — at the same time taking into account the national legal order — has to rest both on the legal order as a specific whole and, as its peak, on the idea of the coherence of the Constitution".*[26] It is interesting to note that the commentaries also apply the category 'fundamental principles'. This is done by highlighting two cognitive achievements (fundamental principles) of the theory of law. These are the principles of consistency and contextuality. The commentary material states: "To understand the Constitution, one has to handle these fundamental principles such that there would not be conflicts between the different parts of the Constitution (consistency) and there would form a clear-cut conception of the place of the constitutional provision in the text of the Constitution (contextuality)."*[27] It seems that the fundamental principles belonging to the theory of law — or, rather, knowledge and use of them — are the first starting point for creating necessary cognition about the fundamental principles of the Constitution.

The other starting point for explaining the essence of the Constitution could be the rapid developments in continental European legal culture over the last two decades. Such developments had been hindered by natural law for a considerable time. Namely, in such a system one has to see, know, and perceive the correlation between society and law. In fact, law embodies all that is connected to the legally relevant part of human

[23] In the current situation, it is not possible to find any support from Estonian court practice, as the Supreme Court has not treated the relation of the primacy of the European Union law with the fundamental principles yet. The European Court of Justice has indeed said in its judgment C-11/70 *Internationale Handelsgesellschaft* that the validity of legal provision of the European Union cannot be influenced by the conflict with the constitution of a member state. The specialised literature notes that neither the higher instances of the courts of the European Union nor the constitutional courts of Member States have been ready to admit the primacy of European Union law over the constitutions of Member States. See for example J. Laffranque. Euroopa Liidu õigussüsteem ja eesti õiguse koht selles (The Legal System of the European Union and the Place of Estonian Law in It). Tallinn: Juura 2006, pp. 487–524 (in Estonian).

[24] Eesti Vabariigi põhiseadus. Kommenteeritud väljaanne (The Constitution of the Republic of Estonia. Commented edition) (Note 8), p. 774. When one reads this commentary (16) carefully, it appears that according to its authors' opinion, different schools have different viewpoints both on the meaning and application of § 1 of CAA. It seems, however, that the agreement on the meaning is far stronger than on its application.

[25] The content of the fundamental principles is not limited only with those mentioned in the Preamble. Already during the preparation of the constitutions of 1920 and 1938, often an expression "the historical constitution of our nation" was used in the National Constituent Assembly and the National Assembly, and when seeking for solutions to problems, the statesmen ceaselessly reached the roots of our constitution — the abundant experiences, values and beliefs of our ancestors, which have been proved by the constant everyday struggle and are proven to be useful also today. See Eesti Vabariigi põhiseadus. Kommenteeritud väljaanne (The Constitution of the Republic of Estonia. Commented edition) (Note 9), p. 36.

[26] The commentaries of the Constitution of the Republic of Estonia have a viewpoint according to which systematical interpretation is being considered as one of the most complicated ways of interpretation that embodies the consistency and contextuality arguments, the notional-systematical arguments, the arguments of principle, special judicious, prejudicial and comparative arguments. See Eesti Vabariigi Põhiseadus. Kommenteeritud väljaanne (The Constitution of the Republic of Estonia. Commented edition) (Note 8), p. 31.

[27] *Ibid.*, p. 29.

behaviour and the human condition. This connection has a normative (binding) nature. Law is therefore a normative medium not only for information but also for communication. In the context of the fundamental principles of the Constitution, we must turn special attention to this fact, as the level of abstraction of the legal provisions of the Constitution is higher when compared to the majority of the other elements of the legal order. This is why it is more difficult to recognise the social dimensions of law in constitutional law. Thus, in isolating and explaining the fundamental principles, it is extremely important which method or methods we use to reach this goal.

A discussion has begun, however, on the strictness and efficiency of the study of legal methods in the modern specialist literature. German legal scholar B. Rüther represents a viewpoint according to which, in application of the law, the study of legal methods is a necessary protective element for the Constitution. Also, the questions of method are constitutional questions. The answers to these questions show whether the state is a democracy based on the rule of law or is changing into an oligarchic judge state.*[28] At the same time, another well-known jurist, W. Hassmer, claims that his colleague is overestimating the binding element of the study of legal methods. The study of legal methods is only one of the possibilities for determining law. Determining law is a complex phenomenon and one that remains not fully explained in legal theory, to this day.*[29]

How are we to act in the light of these almost conflicting opinions? The Constitution does not restrict interpreters and appliers of law to using a certain method.*[30] Clearly, the Constitution does not prescribe a method for this. How can we find a method, or multiple methods, that can guarantee full coherence with the Constitution? In those states with codified law, the real situation has always been that the systematised collection of law demands connection of the interpreter and applier to the law. Here I agree with the above-mentioned jurist W. Hassmer, who finds that without knowing and using certain rules it is impossible to create a connection with law and that as the connection with law grows closer, the better is the choice of the method.*[31] Thus, we can put aside the understanding that the more stringent the method the better it is for understanding the fundamental principles of the Constitution. The latter approach may be suitable for a state of law wherein the law decides the case and the judge has the role of a subsuming automaton.*[32] In trying to perceive the fundamental principles of the Constitution, we face a problem — the Constitution allows neither specifying the fundamental principles without interpretation nor determining how binding they are. Determination of the fundamental principles is not a traditional subsumption problem. Here I would like to remind the reader of Savigny's classical teachings on the study of legal methods. Namely, to find the solution, one has to read the text of the law in full, in order to take into account the systematic connections of the constitution*[33] and the purpose of regulation, and to find the present-day meaning of the constitution.*[34] Thus, it seems that the study of methods has never been connected to law but has maintained a rather indifferent, outside position. Yet, by making use of the achievements of the study of methods, one is enabled to connect oneself with law in the most successful way possible and to create the necessary cognition of law.

We have already noted that the fundamental principles of the Constitution of the Republic of Estonia form an undefined legal conception and this situation has not emerged incidentally. The authors of the commentaries to the Constitution conclude: "Therefore, we have to proceed from the list of the fundamental principles of the Constitution offered in the specialist literature and expert opinions, and also from the list of the principles developed in legal practice related to the fundamental principles of the Constitution (if such exists)."*[35] One can agree with the above only if the necessary conditions have developed for forming the necessary cognition of law proceeding from the study of judicial methods.*[36]

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[28] B. Rüthers. Methodenrealismus in Jurisprudenz und Justiz. – Juristen Zeitung 2006, pp. 53, 60.

[29] W. Hassemer. Juristische Methodenlehre und richterliche Pragmatik. – Rechtstheorie. 39. Band, 2008, Heft 1, p. 3. As B. Rüthers rules out the situation where judges are like pianists, W. Hassmemer finds that the legislator is like a composer and the applier of law is a pianist who interprets more or less masterly, but of course the piece cannot be forged.

[30] The commentaries of the Constitution of the Republic of Estonia note that "Primarily the interpretation of constitutional law has a nature where the methodotical preciseness does not guarantee solid results." See Eesti Vabariigi Põhiseadus. Kommenteeritud väljaanne (The Constitution of the Republic of Estonia. Commented edition) (Note 9), p. 30. This does not mean that we should not try to find a suitable method.

[31] W. Hassemer (Note 29), pp. 3–4.

[32] Already K. Engisch wrote in his book 'The Introduction to Judicial Thought' that the judicial logic (thesaurus) does not belong to this world and even in the best circumstances, it is not possible to formulate laws explicitly. See K. Engisch. Einführung in das juristische Denken. Stuttgart: Kohlhammer 1964, pp. 63, pp. 72.

[33] See Note 25.

[34] Juristische Methodenlehre. Stuttgart: Koehler 1951, p. 19. H.-M. Pawlowski finds that exactly this means the connection with law (law is taken seriously). See H.-M. Pawlowski. Methodenlehre für Juristen. Theorie der Norm und des Gesetzes. 3. Aufl. Heidelberg: Beck 1999, p. 263.

[35] Eesti Vabariigi põhiseadus. Kommenteeritud väljaanne (The Constitution of the Republic of Estonia. Commented edition) (Note 9), p. 778.

[36] We cannot make any final conclusions about the fundamental principles based on the CAA proceedings in the *Riigikogu*. At the second reading of the draft, the chair of the Constitutional Committee referred to the viewpoint of Chancellor of Justice, who was the initiator of the crisis reservation. Also at the second reading of the draft, one of the initiators of CAA claimed that the fundamental principles are the principles that are in the Preamble and the first paragraph of the Estonian Constitution.

The team performing constitutional analysis of the Treaty establishing a Constitution for Europe formed by the Constitutional Committee of the *Riigikogu* contributed significantly to elucidating the fundamental principles of the Constitution. The fifth part of the description of the positions adopted by the team notes that in the applicable law there is no legal definition of the fundamental principles. According to the theoretical treatise, the fundamental principles of the Constitution are first and foremost derivable from the Preamble to the Constitution, from Chapter I ('General Provisions'), and from §§ 10 and 11 of Chapter II ('Fundamental Rights, Freedoms and Duties'). Proceeding from the above, the task force adopted a position that the fundamental principles can be determined either as a closed catalogue or as an open catalogue. The team preferred an open catalogue. A closed catalogue could hinder the further development of Estonian statehood.*[37] This understanding gave the team the possibility of creating an open catalogue for the fundamental principles. The fundamental principles in this catalogue were stated to be the following: national sovereignty; a state that is based on liberty, justice, and law; the defence of internal and external peace; preservation of the Estonian nationality and culture through the ages; human dignity; the social state; democracy; the rule of law; honouring of fundamental liberties and freedom; and the proportionality of the actions taken under state authority.

It is very important to note that we can find a direct link between the fundamental principles of the Constitution and the values expressed in the position adopted by the team conducting constitutional analysis of the Treaty Establishing a Constitution of Europe: "The fundamental principles of the Constitution are principal values*[38], and without them Estonia and the Constitution established on behalf of it lose their essence. The fundamental principles of the Constitution have a universal nature — the constitutions of all other democratic states are based on the same or similar principles. At the same time, when determining the fundamental principles of the Constitution we do not have to proceed from the values set forth in the Treaty Establishing a Constitution for Europe, other treaties of the European Union, or other constitutions of European states."*[39] It is indisputable that the essence of the Constitution is more than the text of the Constitution. That essence runs significantly deeper than the ideas and opinions that direct community life; enshrine certain moral values, traditions, and customs; and represent a considerable element of sanity and logic. Although the Constitution adopted in 1992 has seen inevitable changes over time, it has not lost its essence oriented toward principal values (read: fundamental principles). At the same time, it is important to remember that "[n]ot all values but only long-lived permanent values, which have been verified by practice countless times and that have always been useful, can be such a criterion."*[40]

The specialist literature in the field of law has discussed the historical conditionality of the state and its normative basis enough. A view to the historical conditionality and the highlights of the jural society behind them together are a part of the classical reservations of constitutional law.*[41] For that reason, it is not possible to adopt a position according to which the principal conceptions of the Constitution (e.g., human dignity or the fundamental principles) are only conceptions of positive law. They are a kind of art condominium, the essence of which can be perceived both through specifying natural law and via natural cognition.*[42]

Still, I consider it important to note that the modern specialist literature turns our attention also to the dangers of the pronouncement that one must take hyper-positivist law (standing above natural law) into account. Namely, it is considered the case that application of this pronouncement has a tendency to limit liberties. The greatest danger accompanying the pronouncement that one must use hyper-positivist law is thought to be its potential to destroy the unity of the legal order of a heterogeneous society.*[43] It is claimed that a pluralistic

[37] During the proceedings of CAA, Chancellor of Justice made a proposition to use not the concept "fundamental principles" but give the list of the fundamental principles in § 1 of CAA. During the proceedings of the draft, this proposition was abandoned. Nevertheless, the viewpoint of Chancellor of Justice speaks against the closed catalogue of the fundamental principles.

[38] The concept here is clear evidence that Estonia sees values as a key to reaching the solution that corresponds to law. Value jurisprudence recognises the value scopes that stand above law and considers them binding. To understand the Constitution, we have to know how to specify value scopes. See Eesti Vabariigi põhiseadus. Kommenteeritud väljaanne (The Constitution of the Republic of Estonia. Commented edition) (Note 8), p. 21 (Chapter 'About the conception of law in the context of the Constitution, the fundamental principles of the Constitution, values and the methods of interpretation').

[39] Eesti Vabariigi põhiseadus. Kommenteeritud väljaanne (The Constitution of the Republic of Estonia. Commented edition) (Note 9), p. 779.

[40] *Ibid.*, p. 30.

[41] See, for example, J. Isensee. Staat und Verfassung. – Handbuch des Staatsrechts der Bundesrepublik Deutschland. P. Kirchoff (Hrsg.). Bd.II, 3. Aufl. Heidelberg: Müller 2004, paragraph 15; M. Herdegen. Verfassungsinterpretation als methodische Disziplin. – Juristen Zeitung 2004, p. 873; M. Herdegen. Verfassungsauslegung und meta-konstitutionelle Interpretationsreserven. – Recht.Wirtschaft. Kultur. Festchrift für Hans Halblitzel. Berlin: Duncker & Humblot 2005, p. 177.

[42] K.-E. Hain. Konkretisierung der Menschenwürde durch Abwägung? – Der Staat 2006, pp. 192; J. Isensee. Menschenwürde:die säkuläre Gesellschaft auf der Suche nach dem Absoluten. – Archiv des öffentlichen Rechts. Bd. 131. Tübingen: Mohr Siebeck 2006, p. 195.

[43] The modern proclamation to acknowledgement hyperpositive law is not aimed against state arbitrariness but against the so-called and disapproved advances connected to the development of natural sciences. And finally, it can lead to the distrust of the democratic legislator. See M. Herdegen. Das Überpositive im Positiven Recht. Von der Sehnsucht nach der heilen Wertewelt zum kampf der Rechtskulturen. – Staat im Wort. Festschrift für Josef Isensee. Heidelberg: C.F.Müller Verlag 2007, pp. 137, 142.

society considers thinking in hyper-positivist categories to be a threat.*[44] But there is a way out of this situation — namely, that hyper-positivist categories state certain demands for legal methodology, and when all that can be called hyper-positivist in connection with law is consistently subjected to the interpretation mechanisms adopted by natural law, the methodological demands stated in those categories are met.*[45] At the same time, the study of legal methods is not the only way to hyper-positivist cognition. This process is in many ways subjective cognition that has a strong intuitive element to it.*[46]

I noted above that the fundamental principles of the Constitution are binding only for Estonia. In relation to this claim, a question arises as to whether it is possible that the fundamental principles are valid for all of *genus humanum* but are binding only for us and should be separately explained. Or are the fundamental principles at least partly valid more broadly — regionally and inter-culturally (with so-called Estonian hyper-positivist law)? This question has no single answer, but German specialist literature in the field has noted: "In general, the German hyper-positivists have to go through unpleasant experiences as the constitutional doctrines developed by them are much more their standards of natural dignity than that of legislators of EU institutions or other Member States of the EU."*[47] At the same time, the search for hyper-positivist law in Germany has aimed more at the fundamental principles developed by the German constitutional order.*[48]

To conclude, I think that in searching for the fundamental principles through value-based action, it is sensible to find connections with culture.*[49] Law has always been, and it remains today, one of the world's cultural elements.*[50] Culture has always been one of the ways in which a nation expresses its will and a result of self-actualisation; in many cases, culture is nothing more than an obligatory pattern of human behaviour. We should study the Constitution through the many faces of culture. We have to agree with those legal scholars who proceed from the assumption that the Constitution is not only the basis for the legal order but also an expression of the level of cultural development, a reflection of the nation's cultural heritage, and the basis for the nation's hopes.*[51] Therefore, cultural study of the Constitution is clearly necessary, as the Constitution not only indicates the level of development of a nation's culture but incorporates a cultural heritage that has stood the test of time. Just as it is not easy to find results by applying value-jurisprudence, it is not easy to find them in a cultural context either. Maybe I am mistaken, but it seems to me that the Newtonian worldview has effects also on jurists. And rightly so. Nevertheless, this worldview is not without its problems, as the mechanistic worldview does not offer solutions to socio-cultural problems. Also, Estonian judicial practice has repeatedly demonstrated that linguistic interpretation is considered better than, for example, interpretation focusing on values.

5. Words in the stead of a conclusion

As the fundamental principles of the Constitution have a regulatory effect – they are binding – the need for finding them is undoubted. We should begin our search with the general legal theoretical knowledge (the fundamental principles), and for forming the integrated notion we have to consider the principles guaranteeing consistency and contextuality. We should continue by focusing on the search for a method, and one effective method seems to be that connected to value-jurisprudence. As the fundamental principles of the Constitution belong to a category of values, with the help of value-jurisprudence we can, and indeed have to, specify the scope of these values. It is in this way that the catalogue of the fundamental principles of the Constitution is being compiled. This catalogue cannot be a closed catalogue. Using value-jurisprudence is an approach that does not allow any closedness; the catalogue of the fundamental principles can **only** be open. As we can see,

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[44] B. Rüthers. Zwischenruf aus der methodischen Wüste. – Neue Juristische Wochenschrift 2006, p. 958.

[45] *Ibid.*, p. 138.

[46] M. Herdegen calls this the authority dilemma of hyperpositive law. See M. Herdegen (Note 43), p. 139.

[47] M. Herdegen (Note 43), p. 141.

[48] *Ibid*., p. 143. Herdegen notes that the violent potential for a conflict through the proclamations to hyperpositive law to elucidate the legal order in the modern multi-cultural Germany is illustrated solely by the different understanding of human dignity in the fight against *hijab* or in the education of girls!

[49] The commentaries of the Constitution of the Republic of Estonia note that the object of shaping the understanging of the Constitution is the text; at the same time the text has to be dealt as a legal-cultural phenomenon. – Eesti Vabariigi põhiseadus. Kommenteeritud väljaanne (The Constitution of the Republic of Estonia. Commented edition) (Note 9), p. 30.

[50] Already R. von Ihering characterised law as a cultural element of the modern world. – R. von Ihering. Geist der Römischen Rechts auf der verschiedenen Stufen seiner Entwicklung. 1.Teil. 7. und 8. Aufl. Leipzig: Breitkopf und Hartel 1924, p. 14. It is not surprising that one of the sharpest critics of the conception jurisprudence wanted to see law having this quality. It is claimed in the specialised literature that law and understanding it could be considered as a part of cultural sciences. – Festschrift für Otto Sandrock. Heidelberg: Verl. Recht und Wirtschaft 2000, p. 408.

[51] P. Häberle. Vom Kulturstaat zum Kulturverfassungsrecht. – P. Häberle (Hrsg.). Kulturstaatlichkeit und Kulturverfassungsrecht. Darmstadt: Wiss. Buchgesellschaft 1982, p. 21.

the compilation of the catalogue of the fundamental principles is a necessary but difficult task. To complete this task, application of the study of legal methods is not enough. We need the application of modern jurisprudence — value-jurisprudence. Alongside value-jurisprudence and the cognition of the fundamental principles, also consideration of the authority dilemma — a situation involving the problem of method and of the finder of the fundamental principles as a jurist / legal practitioner — has its place. It appears that we can be certain that, if an important part of hyper-positivist law is a part of the normative heritage of human society, it should be possible to find and articulate the content of the natural norms (the fundamental principles). We should not forget that in attempting to find the fundamental principles, we should be able to connect ourselves with our cultural background in both the modern and retrospective context. Taking the cultural context into account is related to historical interpretation but is not reducible to only this, as the Estonian constitution is formally only a century old. At the same time, the roots of the Estonian constitutional order lie in the distant past, as by the 13th century a distinctive socio-political order had been formed in relation with economic, social, and spiritual development and precipitated in part by conflicts with foreigners.*[52] Certainly, finding and articulating the fundamental principles is not an everyday task for jurists. One can reach all the way to the fundamental principles (to specifying values) not through deductive decisions, which are a usual method for jurists, but through values. It is the non-conditionality of the fundamental principles that enables finding suitable and at the same time different specifications. I would call this aspect of the work of a practitioner of jurisprudence the 'specification of the fundamental principles'. This is not work with the text of the Constitution but involves interpretation of the Constitution, the aim of which should be development of the constitutional order (statehood) that is open for the future. The goal is, as is written in the specialist literature, "that less of the central parts of material constitutional law would stand in the text and more of them be found in court files".*[53]

The Constitution should be realised in the way Prof. J. Uluots spoke of on the 20th anniversary of our constitution: "I personally think that applying and supporting the Constitution peacefully, in mutual understanding and co-operation, would be the most beautiful and powerful evidence of support for democratic statehood and, at the same time, of the maturity of this kind of statehood".*[54] These words are of a modern nature. The jural society should be able to find the fundamental principles of the Constitution, respect them, and apply them in the everyday work of its jurists. When this is accompanied by taking into consideration human values — such as peacefulness, understanding, and co-operation — the Republic of Estonia will continue not only for the present but also far into the world of the future.

[52] J. Uluots. Eesti Vabariigi konstitutsioonilised aktid (The Constitutional Acts of the Republic of Estonia). – J. Uluots. Seaduse sünd (The Birth of Law). H. Runnel (ed.). Tartu: Ilmamaa 2004, p. 278 (in Estonian).

[53] T. Würtenberger (Note 12), p. 234.

[54] J. Uluots. Eesti poliitiline areng kahekümne aasta jooksul (The Political Development of Estonia during 20 Years). – J. Uluots. Seaduse sünd (The Birth of Law). H. Runnel (ed.). Tartu: Ilmamaa 2004, p. 361 (in Estonian).

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Le concept estonien de référendum sur d' « autres questions d'intérêt national » : tentative de définition

1. Introduction

L'article 56 de la Constitution de la République d'Estonie (ci-après CRE) du 28 juin 1992 consacre le droit pour le peuple, à qui elle reconnaît, en son article 1er, la qualité de « détenteur du pouvoir étatique suprême », d'exercer ce pouvoir, à travers les citoyens-électeurs, au moyen de l'élection du Parlement ou par la voie du référendum. Dans ce dernier cas, le peuple peut être appelé à se prononcer sur diverses questions qui ont un intérêt particulier pour l'État et ainsi rendre incontestable, en termes de légitimité démocratique, toute décision qui en émane.

L'objet de ces questions est assez varié, si l'on en croit l'article 105 CRE, en vertu duquel un référendum peut porter sur l'adoption d'un texte de loi ou sur toute « autre question d'intérêt national ».[*1] Ainsi, le recours à cette institution de démocratie directe ne se limite pas uniquement au vote populaire sur un projet de loi, qu'il soit de nature législative ou constitutionnelle. De même, la dernière Constitution en vigueur en Estonie, avant l'occupation soviétique, celle de 1938, ne réduisait pas le référendum à un seul usage normatif, comme c'était le cas dans la Constitution de 1920. D'ailleurs, la formule employée par le constituant de 1992 est très proche de celle qui apparaît pour la première fois dans la Loi fondamentale de 1938 où le droit référendaire pouvait être exercé « sur une question importante touchant aux intérêts de l'État » (art. 98 al. 1er).

Les citoyens estoniens ont donc la possibilité d'être pleinement associés à la résolution des grandes questions de la vie publique. Du moins en théorie, car depuis l'entrée en vigueur de l'actuelle Constitution, seul un référendum national a été organisé en Estonie, à savoir celui du 14 septembre 2003.

Parmi les deux grandes catégories de votation populaire que connaît le droit constitutionnel estonien, la première, définie dans un cadre strictement normatif, suscite bien moins d'interrogations que la seconde aux contours indéterminés et au contenu indéfini. Quelles sont ces « autres questions d'intérêt national » ou, si nous traduisons mot à mot la terminologie estonienne, ces « autres questions de la vie de l'État[*2] » auxquelles

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1 Cf. R. Laffranque. L'objet du référendum en Estonie. – Juridica International 2006 (11), pp. 175–183.

2 En estonien : « *muu riigielu küsimused* ».

renvoie l'article 105 CRE, sans plus de précisions ? C'est ce que nous allons tenter de définir dans le présent article. Bien qu'énigmatique sur ce point, la Constitution estonienne nous laisse deux pistes à explorer. D'une part, que la question soumise au vote présente un intérêt pour l'État, que son enjeu revête une importance particulière pour la nation. D'autre part, que le référendum porte sur des questions n'ayant pas pour objet l'adoption d'un texte normatif.

2. Un référendum sur des questions d'importance nationale

Si un référendum peut ne pas avoir pour objet l'adoption d'un projet de loi, il doit, dans ce cas, obligatoirement porter, nous dit l'article 105 CRE, sur une « question relative à la vie de l'État », ou, pour dire autrement, une question d'intérêt national.

Mais, comment définir alors ce qui relève de la vie de l'État, ce qui présente un intérêt national ? Pour y répondre, nous avançons deux hypothèses. La première est qu'il n'appartient qu'au Parlement national, au *Riigikogu*, de déterminer ce qui constitue une question d'intérêt national pouvant être soumise au vote populaire. La seconde est que ces questions d'intérêt national ne sauraient concerner que des enjeux d'envergure étatique par opposition aux questions d'intérêt purement local, lesquelles pourraient faire l'objet de référendums locaux.

2.1. Constituent un intérêt national les questions que le *Riigikogu* reconnaît comme telles

Les référendums sur « d'autres questions d'intérêt national » ne sauraient, selon nous, se restreindre à interroger le corps électoral à propos de questions ayant uniquement une incidence sur l'existence de l'État. L'expression estonienne de « questions sur la vie de l'État » ne doit pas être prise au pied de la lettre. Elle s'entend, plus largement, de tout ce qui, pour l'État, présente un caractère essentiel.

Cependant, aucune norme ne précise ce qui est essentiel pour l'État. On se situe donc dans un domaine qui n'est pas de l'ordre du juridique mais du politique, où seul le Parlement est à même de dire ce qui constitue une question d'intérêt national. Cette compétence relève exclusivement du *Riigikogu* car il est le seul, en vertu de l'article 105 CRE, à pouvoir décider de la tenue d'un référendum. C'est là une différence fondamentale par rapport à la Constitution de 1938 qui prévoyait, comme nous l'avons indiqué, la possibilité de consulter le peuple sur une question importante touchant aux intérêts de l'État, mais seulement lorsque le chef de l'État le jugeait nécessaire. Tout référendum étant, selon le droit constitutionnel estonien en vigueur, d'initiative parlementaire, il n'appartient qu'au *Riigikogu* d'apprécier l'opportunité de s'adresser au peuple sur une question qu'il désignera lui-même comme étant d'importance nationale.

Ces « autres » questions d'intérêt national, comme le souligne pertinemment Rait Maruste, relèvent ainsi essentiellement de la décision politique, à laquelle il appartient à l'organe politique représentatif de la Nation, au *Riigikogu*, de prendre part et de déterminer leur contenu.[*3]

Ce concept est donc à rapprocher de celui que connaît le droit espagnol sous le terme de « décisions politiques d'une importance particulière » (art. 92-1 Const. espagnole). À l'égard de ce dernier, il est dit que, quoi qu'étant un concept juridique indéterminé, son sens est clair, à savoir, « laisser à l'initiateur du référendum *une marge de liberté d'une ampleur extraordinaire* [c'est nous qui soulignons]».[*4]

La seule limite que nous trouvons à cette liberté du *Riigikogu* dans la définition de ce qui pourrait être une question d'intérêt national susceptible de référendum est celle qui correspond au domaine de compétence du *Riigikogu* fixé dans la Constitution. Bien que très étendu, ce domaine n'est pas illimité. Ainsi, l'article 65, point 16 CRE dispose que le Parlement a le pouvoir de régler « tout autre question d'intérêt national qui, selon la Constitution, ne relève pas de la compétence du Président de la République, du Gouvernement de la République, des autres organes de l'État ou des collectivités locales ».

Par conséquent, une question non normative peut être soumise au référendum si elle présente, selon la libre appréciation du *Riigikogu*, un intérêt pour l'État et si elle ne relève pas de la compétence d'une autre autorité étatique que celle du Parlement ou d'un organe d'une collectivité locale.

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[3] Cf. R. Maruste. Põhiseadus ja selle järelevalve (La Constitution et son contrôle). Juura, Õigusteabe AS 1997, p. 55 (en estonien).

[4] Cf. L. Ladisa. Le référendum national consultatif en Espagne. – Revue internationale de droit comparé 2000/3, p. 618. La partie de phrase que nous avons mis en italique est une expression d'Enrique Linde Paniagua cité par Laurent Ladisa.

2.2. Les questions d'intérêt national par opposition aux questions d'intérêt local

Si l'article 105 CRE ne peut être invoqué pour organiser un référendum non normatif qu'à la condition que la question qui en est l'objet présente un intérêt pour la vie de la Nation, inversement, cela signifie que toute question qui intéresse la vie de la Nation ne peut être soumise au vote populaire que sur le fondement de l'article 105 CRE. Elle ne saurait donc faire l'objet d'un référendum au niveau local.

Sur ce point précisément, s'est produit en Estonie un événement assez insolite au cours de l'été 1993 qui, finalement, donna l'occasion à la plus haute instance juridictionnelle du pays – la Cour d'État – de se prononcer pour la première fois, non seulement, sur une question relative au référendum mais aussi de tracer une ligne de partage entre le référendum d'intérêt national et le référendum d'intérêt local.[*5] Les faits qui ont mené à cette affaire étaient les suivants.

En réaction contre certaines lois[*6] qu'ils jugeaient discriminatoires à l'égard d'une grande partie de leurs électeurs, les conseils municipaux des villes de Narva et de Sillamäe, dont la population est majoritairement russophone, prirent la décision d'organiser sur leur territoire respectif un référendum et de demander à leurs administrés s'ils souhaitaient que leur ville eût le statut d'autonomie nationale territoriale au sein de la République d'Estonie.[*7] Le référendum de Narva eut lieu les 16 et 17 juillet 1993[*8] et celui de Sillamäe, le 17 juillet 1993[*9], malgré le grief d'inconstitutionnalité et d'illégalité soulevé par le chancelier du droit.

Ayant reçu une réponse négative de la part des deux conseils municipaux à la proposition d'annuler les décisions litigieuses, le chancelier du droit d'alors, Eerik-Juhan Truuväli, saisit la Cour d'État pour lui demander, en sa qualité de juge constitutionnel, d'annuler lesdites décisions, ce qu'elle fit.[*10] La chambre des recours constitutionnels de la Cour d'État retint notamment que « la tenue d'un référendum sur la question de l'autonomie nationale territoriale est en dehors de la compétence d'une collectivité locale et contraire à l'article 154 al. 1 de la Constitution » dans la mesure où « la création d'une entité autonome nationale territoriale n'est pas une question d'intérêt local mais une question nationale » qui doit être décidée selon la procédure décisionnelle de niveau étatique.

3. Un référendum sur des questions non normatives

L'alternative prévue à l'article 105 al. 1er CRE, matérialisée par la conjonction de coordination « ou », entre la possibilité de soumettre au référendum un projet de loi et celle de soumettre au référendum d'autres questions d'intérêt national, n'a véritablement de sens que si elle met en opposition les référendums normatifs aux référendums non normatifs. C'est donc bien de ces derniers dont il est question dans la seconde partie de phrase de l'article 105 al. 1er CRE, nonobstant le fait que cette disposition se trouve inscrite dans le chapitre de la Constitution relatif à la législation. Cet emplacement ne doit pas nous induire en erreur.

Si les référendums sur d'autres questions d'intérêt national entrent dans la catégorie des référendums exclusivement non normatifs, il importe, pour être en mesure de mieux les identifier, de définir ce qu'il faut entendre par « non normatif ». Quel peut être l'objet d'une question non normative soumise au référendum ? Nous y répondrons en étudiant, en premier lieu, son aspect formel et en second lieu, son aspect matériel.

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5 Pour un résumé de l'affaire, voir M. Saarmann, K. Žurakovskaja, J. Padrik, et al. 15 Kaasust (15 cas). Õiguskantsleri Kantselei 2008, pp. 1–4 (en estonien).

6 Notamment la loi sur les étrangers, la loi sur la langue et loi sur la citoyenneté.

7 Ce fait a même été relaté dans un article du journal Le Monde paru dans l'édition du 30 juin 1993. José Alain Fralon. Les russophones de Narva veulent organiser un référendum sur l'autonomie.

8 La question était la suivante : « Désirez-vous que Narva ait le statut d'autonomie nationale territoriale au sein de la République d'Estonie ? »

9 La question était la suivante : « Désirez-vous que Sillamäe ait, au sein de la République d'Estonie, le statut d'autonomie nationale territoriale et sur le territoire duquel on garantirait des droits égaux pour tous les citoyens ? »

10 Sur l'affaire du référendum de la ville de Narva : arrêt de la Cour d'État du 11 août 1993 n° III-4/1-2/93 (RT I 1993, 59, 841). Disponible (en anglais) sur : http://www.nc.ee/?id=489 (dernière consultation 17 avril 2008). Sur l'affaire du référendum de la ville de Sillamäe : arrêt de la Cour d'État du 6 septembre 1993, n° III-4/1-3/93 (RT I 1993, 61, 890). Disponible (en anglais) sur : http://www.nc.ee/?id=488 (dernière consultation 17 avril 2008).

3.1. L'aspect formel des questions autres que normatives

Sur le plan formel, l'élément caractéristique de ces questions autres que normatives ne ressort qu'en contraste avec celles dont font l'objet les référendums portant sur des projets de loi. Contrairement à ces derniers où le corps électoral est appelé à s'exprimer sur l'adoption ou le rejet d'un projet de loi complètement rédigé, le référendum de la seconde catégorie (nous ne disons pas qu'elle est une catégorie secondaire de référendums !) peut porter sur un texte ayant la forme d'une simple question de principe ou d'une proposition concrète, dite encore « proposition non-formulée », selon la distinction retenue par la Commission européenne pour la démocratie par le droit (Commission de Venise).*[11]

Le fait qu'ils n'aient pas pour objet de soumettre au vote des citoyens un projet rédigé sous forme de loi, ne signifie pas pour autant que les référendums sur d'autres questions d'intérêt national se présentent exclusivement sous la forme de questions de principe ou de propositions non-formulées. Il peut aussi s'agir d'interroger le peuple sur un texte dûment rédigé non pas sous la forme d'une loi mais sous la forme d'une résolution.

On le sait, le référendum donne l'occasion au peuple d'agir, en final, à la place du Parlement pour accomplir des fonctions qui lui sont normalement dévolues. Or, les fonctions du Parlement ne sont pas toutes du domaine législatif ; nous dirions ici, du domaine normatif, afin d'y inclure les questions constitutionnelles. C'est ainsi qu'en plus du pouvoir d'adopter des lois, l'article 65 ch. 1 CRE reconnaît au *Riigikogu* celui d'adopter des résolutions (« *otsus* » en estonien). En ayant recours à ces dernières, le *Riigikogu* est en mesure d'exercer ses attributions extra-législatives, c'est-à-dire, au regard de la doctrine juridique estonienne*[12], d'accomplir des fonctions tant juridictionnelles*[13] qu'administratives.*[14] Le peuple peut donc être amené à légitimer par la voie référendaire toute décision du *Riigikogu* prise sous la forme d'une résolution dans les domaines qui relèvent de ses compétences juridictionnelles et administratives, de la même façon qu'il peut le faire en ce qui concerne le domaine normatif, par l'adoption de projets de loi. Sous un angle purement formel, les textes juridiques auxquels fait référence l'article 65, point 1 CRE (lois et résolutions) peuvent être adoptés par référendum.

Finalement, le référendum portant sur des résolutions prises par le *Riigikogu* est à rapprocher de la catégorie, connue en droit suisse, des « référendums administratifs », lesquelles portent sur des arrêtés pris par l'Assemblée et qui ne contiennent pas de règles de droit.*[15]

On le comprend bien, lorsque nous employons ici l'adjectif « normatif », il doit être entendu *stricto sensu*, c'est-à-dire comme synonyme de « projet de loi rédigé ». Le présent point concerne donc, plus précisément, les référendums sur des questions, d'un point de vue formel, autres que l'adoption de projets de loi rédigés. Cela n'empêche pas qu'une question n'ayant pas pour objet l'adoption d'un projet de loi rédigé puisse, sur le plan matériel, avoir un contenu normatif (législatif ou constitutionnel), comme nous allons le démontrer maintenant.

3.2. L'aspect matériel des questions autres que normatives

Que ce soit pour adopter un projet de résolution ou pour répondre à une simple interrogation sur un sujet quelconque d'intérêt national, l'objet qui est soumis au référendum ne doit pas, dans son contenu, être en relation avec l'une des matières auxquelles renvoie l'article 106 al. 1er CRE. Celui-ci dispose que « les questions relatives au budget, aux impôts, aux obligations financières de l'État, à la ratification et à la dénonciation des traités internationaux, celles tendant à décréter et à mettre fin à l'état d'urgence et celles concernant la défense nationale ne peuvent être soumises au référendum ». L'exclusion du domaine référendaire des matières mentionnées à l'article 106 al. 1er CRE s'applique aux référendums sur d'autres questions d'intérêt national, tout comme aux référendums normatifs, et ce dans les mêmes conditions que ces derniers et avec les mêmes réserves.

Intéressons-nous alors à présent, plus en détails, au contenu matériel que peuvent avoir ces référendums. En premier lieu, lorsque la question concerne l'adoption d'un projet de résolution et en second lieu, lorsqu'il est

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[11] Cf. Le référendum en Europe – Analyse des règles juridiques des États européens. Rapport adopté par le Conseil des élections démocratiques lors de sa 14e réunion (Venise, 20 octobre 2005) et la Commission de Venise lors de sa 64e session plénière (Venise, 21-22 octobre 2005), Étude n° 287/2004, CDL-AD(2005)034. Disponible sur : http://www.venice.coe.int/docs/2005/CDL-AD(2005)034-f.pdf (dernière consultation 27 juin 2008).

[12] Cf. K. Merusk. Kehtiv õigus ja õigusakti teooria põhiküsimusi (Le droit en vigueur et les questions fondamentales de la théorie des actes juridiques). 2e édition. Juristide Täienduskeskus 1995, p. 10 (en estonien).

[13] Dans le cadre des fonctions dites juridictionnelles du *Riigikogu*, il appartient à ce dernier, en vertu des articles 85, 101, 138 et 145 CRE, de donner son accord afin d'engager des poursuites pénales à l'encontre du Président de la République, d'un des membres du Gouvernement, du contrôleur d'État et du chancelier du droit.

[14] Dans le cadre de ses fonctions administratives, le *Riigikogu* est compétent notamment pour gérer ses affaires intérieures ou encore pour nommer certains hauts fonctionnaires de l'État.

[15] Cf. A. Auer, G. Malinverni, M. Hottelier. Droit constitutionnel suisse. 2e éd. Vol. 1 (L'État). Stämpfli Éditions SA Berne 2006, p. 528.

demandé au peuple de ne répondre qu'à une question de principe, voire de statuer sur une proposition non-formulée.

Dans le cadre des référendums portant sur des projets de résolution parlementaire, le peuple serait en droit de statuer sur des questions relevant du domaine de la justice comme par exemple le fait de savoir si une action pénale peut effectivement être engagée contre une haute autorité étatique (telle que le Président de la République, un ministre ou le chancelier du droit) ainsi que le prévoient les articles 85, 101, 138 et 145 CRE. Dans ce domaine, il peut aussi s'agir de prendre une décision sur le fait d'accorder ou pas une amnistie à des individus condamnés par les tribunaux. Contrairement à plusieurs droits étrangers[*16], le droit estonien ne fait pas obstacle à la tenue de référendums pour l'adoption d'un acte d'amnistie.[*17]

S'agissant des référendums sur des questions de principe ou des propositions concrètes, la nature des questions susceptibles d'être posées peut être regroupée en deux catégories selon qu'elles ont ou non une orientation ou une perspective normative. Le cas le plus classique où de tels référendums présentent un caractère normatif apparaît lorsque le peuple doit trancher une question, dont la réponse positive invite le Gouvernement et le Parlement à travailler sur la préparation d'un projet de loi, pour concrétiser la volonté populaire sur la question objet du vote et la traduire, au final, sous une forme normative. La question posée n'est pas liée à un projet de texte de loi concret, préalablement rédigé et adopté par le Parlement mais elle est liée à une proposition abstraite qui, pour se réaliser, devra être transformée, ultérieurement, en projet de loi. Par exemple, pour ne citer que celui-là, le fait de demander aux électeurs s'ils sont favorables à une interdiction de la vente d'alcool dans tel ou tel lieu public et de telle à telle heure. On pourrait qualifier cette catégorie de référendum de « référendum *ante-legem* », selon l'expression des constitutionnalistes français Joseph Barthelemy et Paul Duez, qui le définissent, par opposition au « référendum *post-legem* », comme étant un référendum portant sur une simple question et dont le texte définitif sera élaboré après le vote au Parlement.[*18]

Il y a enfin le cas où le référendum ne présente aucun caractère normatif et où la question posée au vote se limite à demander au peuple d'approuver la réalisation d'un projet concret, comme, pour citer l'exemple donné par Jüri Põld[*19], la construction d'une centrale nucléaire sur le territoire estonien.

Parmi les référendums sur d'autres questions d'intérêt national à caractère normatif, que nous qualifions de référendums *ante-legem*, il est possible de retrouver la dichotomie classique appliquée aux référendums normatifs entre référendum constitutionnel et référendum législatif. Effectivement, la question de principe à laquelle le corps électoral est convié à répondre peut conduire à la préparation d'un projet de loi soit de nature législative soit de nature constitutionnelle en fonction de l'objet de la question. Par conséquent, la liste, établie à l'article 106 al. 1er CRE, des matières exclues du champ référendaire, qui n'est pas applicable aux référendums constitutionnels[*20], ne le serait pas non plus, selon nous, aux référendums sur des questions de principe ayant une nature constitutionnelle. L'article 106 al. 1er CRE ne pouvant alors faire obstacle à la tenue d'un référendum sur une autre question d'intérêt national qu'à condition que ce soit au pouvoir législatif et non au pouvoir constituant qu'il appartiendra, à l'issue des résultats du référendum, de concrétiser la volonté du peuple dans un texte de loi.

En ce qui concerne les référendums non normatifs de portée constitutionnelle, il faut observer que ceux-ci présentent les mêmes caractéristiques que celles décrites chez les référendums constitutionnels, à savoir, selon une typologie admise par la doctrine contemporaine, le fait d'être constituants, de révision constitutionnelle ou de souveraineté.[*21]

En tant que référendum constituant, le référendum sur une autre question d'intérêt national consiste à demander au peuple de se prononcer sur la fondation d'un nouvel ordre constitutionnel en rupture avec le précédent, ce qui, en général, concerne la forme de gouvernement qui sera institué par la future Constitution. Selon nous, une illustration exemplaire de ce cas, que nous tirons de l'histoire de la pratique référendaire estonienne, nous est offerte par le référendum des 23, 24 et 25 février 1936. À cette occasion, le chef de l'État de l'époque, Konstantin Päts, posa aux électeurs la question de savoir s'ils acceptaient de lui donner le mandat de convoquer une Assemblée nationale constituante (*Rahvuskogu*)[*22], dont la mission serait de modifier la Constitution

16 C'est le cas explicitement, par exemple en Hongrie (art. 28/C let. j Const.) et en Italie (art. 75 al. 2 Const.).

17 En Estonie, le *Riigikogu* peut décider d'amnistier des condamnés non pas en votant une loi mais en adoptant une résolution. Cela ne s'est produit jusqu'à présent qu'une seule fois, le 13 novembre 1997.

18 Cité par M. F.-R. Stefanini. Le contrôle du référendum par la justice constitutionnelle. Paris, Aix-en-Provence : Economica, P.U.A.M. 2004, p. 20.

19 Cf. J. Põld. Loenguid Eesti riigiõigusest (Cours de droit constitutionnel estonien). Tartu 2001, p. 70 (en estonien).

20 Selon Taavi Annus, toutes les dispositions de la Constitution peuvent faire l'objet d'un référendum afin d'être modifiées, y compris celles qui ont trait aux finances et au budget de l'État, aux relations internationales et à la défense nationale, figurant respectivement aux chapitre 8, 9 et 10 de la Constitution. Cf. T. Annus. Riigiõigus (Droit constitutionnel). Juura 2006, p. 55 (en estonien).

21 Cf. A. Auer. Le référendum constitutionnel. – A. Auer (éd.). Les origines de la démocratie directe en Suisse. Actes du colloque organisé les 27-29 avril 1995 par la Faculté de droit de Genève et le C2D. Bâle et Francfort-sur-le-Main : Helbing & Lichtenhahn 1996, pp. 80–82.

22 Dans une édition officielle de 1937 sur la Constitution de la République d'Estonie, le terme « *Rahvuskogu* » est traduit par « Assemblée nationale constituante ». Voir Constitution de la République d'Estonie avec la décision du peuple estonien pour la convocation d'une Assemblée nationale constituante et la loi relative au régime transitoire, précédées des articles introductifs de J. Uluots, de J. Klesment. Tallinn 1937.

ou d'en élaborer une nouvelle. Or, la Constitution de 1920 (même après sa révision en 1933) ne donnait pas compétence au chef de l'État pour initier un référendum sur une matière constitutionnelle ou sur tout autre matière. La rupture par rapport au texte constitutionnel en vigueur apparaît notamment dans la mesure où la procédure de révision constitutionnelle n'a pas été suivie. En soutenant l'idée du chef de l'État de convoquer une Assemblée nationale pour modifier la Constitution[*23], le peuple choisit, du même coup, de recourir à un mode de révision constitutionnelle autre que celui qui était prévu à cet effet, à savoir, au terme de l'article 88 de la Constitution de 1920, de se prononcer lui-même par référendum sur la modification de la Constitution.[*24] L'année 1936 a vu le peuple estonien non pas agir en tant que pouvoir constituant institué, dans le cadre fixé par la Constitution, mais bien en tant que pouvoir constituant originaire, pouvant s'affranchir des dispositions constitutionnelles, même celles qui lui attribuent des compétences fondamentales pour réviser la Constitution.[*25]

Est également envisageable le référendum non normatif de révision de la Constitution qui se caractérise par le fait de soumettre au peuple une question de principe sur l'opportunité de réviser la Constitution soit dans sa totalité soit partiellement en ne visant que certaines de ses dispositions. Dans le cas d'une révision partielle, la question qui, si la réponse est positive, doit conduire les autorités concernées à modifier le texte constitutionnel conformément à la décision populaire, peut se rapporter à n'importe quelle disposition de la Constitution, y compris celles qui entrent dans le domaine des matières mentionnées à l'article 106 al. 1er CRE. Ainsi, on peut très bien imaginer qu'un référendum soit organisé, par exemple, sur la question de savoir si le service militaire obligatoire doit être maintenu ou supprimé. Certes, l'article 106 CRE exclut du champ référendaire les questions de défense nationale, mais seulement si le référendum a un objet infraconstitutionnel. Or, demander au peuple de statuer sur la question de l'abandon de la conscription, cela revient indirectement à l'interroger sur l'opportunité de réviser l'article 124 al. 1er CRE qui constitue le fondement du service militaire obligatoire en Estonie. Il s'agit là d'une question constitutionnelle de principe qui, si le peuple y répondait favorablement, appellerait inévitablement une modification des dispositions de l'article 124 CRE et de la législation qui, comme le prévoit cet article, précise les modalités de la participation des citoyens estoniens à la défense nationale.

Le type de référendum qui caractérise certainement le mieux ceux que nous qualifions de référendums non normatifs de portée constitutionnelle est celui que l'on désigne sous le terme de « référendum de souveraineté ». Ce dernier est défini comme ne comportant que « rarement une révision formelle de la Constitution » mais sanctionnant « une réorientation spatiale, structurelle ou internationale de l'État qui modifie les éléments fondamentaux de la souveraineté de ce dernier ».[*26] Ce type de référendum est d'ailleurs très proche de celui connu en droit international sous le nom de « référendum d'autodétermination » en ce sens que, dans l'un comme dans l'autre cas, il est question de modification de territoire ou d'autodétermination de populations locales.[*27] Outre qu'il puisse avoir pour objet le démembrement du territoire national, le référendum de souveraineté a pour particularité de permettre au peuple de décider du transfert de prérogatives régaliennes de l'État, de ses pouvoirs souverains, vers des entités soit supra-étatiques (organisations internationales ou supranationales), soit infra-étatiques (comme les collectivités régionales).

La consultation populaire du 14 septembre 2003 donne, selon nous, un exemple concret d'application en Estonie de ce type de référendum avec la question de l'adhésion à l'Union européenne. Question qui, bien que légitime sur le plan politique car largement réclamée par l'opinion publique, soulevait des difficultés sur le plan juridique au regard notamment de la Constitution. En effet, alors que les partis politiques représentés au *Riigikogu* s'étaient finalement tous mis d'accord en mars 2001 sur la nécessité d'organiser un référendum sur cette question en tant qu'elle était fondamentale pour la vie de l'État[*28], certains jugeaient au contraire que la question ne pouvait pas faire l'objet d'un référendum étant donné l'interdiction posée à l'article 106 CRE s'agissant des questions relatives à la ratification des traités internationaux. Il est vrai que dans son

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23 Plus de 75% de votes favorables, soit plus de 62% du corps électoral en faveur de la convocation de l'Assemblée nationale.

24 On pourrait même qualifier ce référendum de « double référendum » pour reprendre l'expression de Francis Hamon qui l'utilise à propos du référendum français de 1945. Le 21 octobre 1945, les électeurs français étaient invités à répondre notamment à la question de savoir s'ils voulaient « que l'Assemblée élue ce jour soit constituante ». Francis Hamon indique à ce sujet qu'en répondant massivement oui à cette question, « les électeurs ont en fait décidé d'enterrer définitivement les institutions de la troisième République ». Ceci étant caractéristique « d'un double référendum ». Cf. F. Hamon. Le référendum – Études comparatives. LGDJ, « Systèmes » 1995, p. 79.

25 Dans la mesure où ce référendum se traduit en définitive par le fait que le peuple renonce à l'un de ses droits politiques les plus fondamentaux, il est vu comme un événement charnière du déclin en Estonie de la participation directe du peuple au processus décisionnel. Cf. A. Mägi. Rahvahääletus ja rahvaalgatus Eestis omariikluse taustal (Référendum et initiative populaire lors de l'indépendance étatique). – Üliõpilasselts Raimla koguteos. Uppsala : Üliõpilasselts Raimla Kirjastus 1955, p. 42 (en estonien).

26 Selon la définition qu'en donnent A. Auer, G. Malinverni, M. Hottelier (référence 15), p. 263.

27 Le référendum de souveraineté serait en quelque sorte le pendant en droit constitutionnel du référendum d'autodétermination de droit international. Concernant le plébiscite en droit international, voir J.-F. Dobelle. Référendum et droit à l'autodétermination. – Pouvoirs 1996 (77), pp. 41–60.

28 Cf. A. Albi. Põhiseaduse muutmine Euroopa Liitu astumiseks (La révision de la Constitution pour l'adhésion à l'Union européenne). – Juridica 2001/9, p. 613 (en estonien).

étude juridique réalisée en 1996 pour le compte du Gouvernement estonien[*29], McKenna & Co proposait notamment de modifier l'article 106 CRE afin d'y faire figurer une exception permettant de rendre possible la tenue d'un référendum sur la question de l'adhésion à l'Union européenne. On le sait, le *Riigikogu* parvint à surmonter ce problème juridique en abandonnant son projet d'organiser le même jour deux référendums, l'un portant sur l'amendement de la Constitution et l'autre sur l'adhésion à l'Union[*30] et en choisissant à la place de coupler ces deux questions en un seul référendum.[*31] De ce fait, le référendum de septembre 2003 n'est pas un exemple à part entière de référendum sur une autre question d'intérêt national. Parmi les raisons qui ont conduit le *Riigikogu* à ne pas s'engager sur la voie d'un référendum séparé sur la question de l'adhésion se trouve précisément celle de la supposée non-conformité à l'article 106 al. 1er CRE. Ceci étant, nous ne sommes pas d'accord avec ceux qui considèrent que ce référendum n'avait, d'un point de vue juridique, que pour seul objet l'adoption de la loi portant amendement de la Constitution.[*32]

Nous pensons qu'un référendum aurait parfaitement pu avoir lieu sur la seule question consistant à demander au peuple s'il était favorable ou non à l'adhésion de l'Estonie à l'Union européenne et ce, sans que cela n'entre en conflit avec l'article 106 CRE. Ceci pour la bonne et simple raison qu'il s'agît de référendum de souveraineté appartenant par conséquent, d'un point de vue matériel, à la catégorie des référendums constitutionnels pour lesquels l'article 106 al. 1er CRE ne saurait faire obstacle. Rappelons les conclusions sur ce point du rapport d'expertise sur la Constitution estonienne qui viennent à l'appui de notre thèse en ce qu'elles soutiennent qu'un référendum sur la question de l'adhésion à l'Union européenne est possible, voire souhaitable, nonobstant les dispositions de l'article 106 al. 1er CRE. On peut y lire ceci : « L'adhésion à l'Union européenne ne peut certainement pas être considérée comme la simple ratification d'un traité international, qui ne peut faire l'objet d'un référendum. Il s'agit d'un choix d'intérêt national d'une extrême importance qui entraîne par ailleurs une modification du chapitre 1er de la Constitution, laquelle n'est possible, selon l'article 162 de la Constitution, que par référendum. »[*33]

Puisqu'il a été admis que le peuple peut se prononcer par référendum sur l'adhésion de l'Estonie à l'Union européenne, c'est-à-dire, sur la question de principe de la ratification du traité d'adhésion, faut-il en conclure que toute nouvelle étape du processus d'intégration européenne découlant de la modification des traités pourrait, de la même façon, faire l'objet d'un référendum et plus précisément, d'un référendum de souveraineté ? Rien n'est moins sûr, si l'on s'en tient aux idées et aux principales tendances qui se sont dégagées des débats juridiques et parlementaires ayant eu lien autour de la question de la ratification en Estonie du traité établissant une Constitution pour l'Europe entre fin 2004 et 2006.

A nouveau, la disposition de l'article 106 al. 1er CRE fut mise en avant par une majorité de groupes parlementaires pour justifier l'impossibilité d'organiser un référendum sur la question dudit traité constitutionnel.[*34] Un point de vue que nous ne partageons pas, étant donné qu'il laisse à penser que l'article 106 al. 1er CRE aurait une emprise également sur les référendums constitutionnels, ce qui est totalement faux. Le fait notamment de considérer qu'il n'est pas possible, sur la base de cet article, d'organiser un référendum de souveraineté sur le traité constitutionnel européen, c'est-à-dire de demander au peuple son approbation de principe aux modifications substantielles des traités fondateurs de l'ordre juridique communautaire qui ont une incidence sur la répartition des compétences de la souveraineté nationale ou les conditions d'exercice de celles-ci, cela revient à faire de l'article 106 al. 1er CRE un obstacle à l'organisation d'un référendum constitutionnel, ce qui, comme nous l'avons indiqué plus haut, n'est pas le sens de cette disposition. Cette erreur que beaucoup commettent vient peut-être moins d'une mauvaise interprétation de l'article 106 al.1er CRE et d'une confusion à cet égard entre référendum législatif et référendum constitutionnel que d'une mauvaise appréciation de la nature juridique des référendums portant sur l'approbation de principe des traités modificateurs des textes fondateurs de l'Union européenne, lesquels ont une incidence sur l'exercice de la souveraineté de l'État. Ce sont là des questions de nature constitutionnelle qui se distinguent formellement de celles se rapportant aux projets de loi de ratification des traités internationaux, qui sont de nature législative et qui, par conséquent, ne peuvent être soumises à référendum.

Selon l'opinion juridique dominante, un référendum ne pouvait avoir lieu sur la question liée au traité constitutionnel européen qu'a condition qu'il soit nécessaire de réviser la Constitution avant de pouvoir ratifier le traité. En estimant que le référendum n'était juridiquement possible que s'il était obligatoire du fait de la

[29] McKenna & Co (PHARE). Seadusandluse ühtlustamine : konstitutsioonilised parandused (L'harmonisation de la législation : les corrections constitutionnelles). 1996 (en estonien).

[30] Projet de résolution n° 1214 OE portant organisation d'un référendum pour l'adhésion à l'Union européenne, initié par la commission des lois constitutionnelles du *Riigikogu* le 5 novembre 2002.

[31] Projet de résolution n° 1251 OE portant organisation d'un référendum sur la question de l'adhésion à l'Union européenne et de l'amendement de la Constitution, initié par la commission des lois constitutionnelles du Riigikogu le 9 décembre 2002.

[32] Cf. Eesti Vabariigi põhiseadus. Kommenteeritud väljaanne (La Constitution de la République d'Estonie. Édition commentée). 2e édition augmentée. Juura 2008, p. 773 (en estonien).

[33] Cf. Rapport final de la Commission d'experts sur la Constitution de la République d'Estonie (*Eesti Vabariigi põhiseaduse ekspertiisikomisjon*) de 1998, chapitre sur la législation, article 105. Disponible (en estonien) sur : http://www.just.ee/10716 (dernière consultation 23 septembre 2007).

[34] Enamik Eesti parteisid on hääletuse vastu (La majorité des partis estoniens sont contre le référendum). – Postimees, 26 avril 2004 (en estonien).

nécessité de réviser la Constitution, on admettait qu'un référendum sur une autre question d'intérêt national ne puisse avoir pour objet l'approbation d'un traité international, y compris d'un traité sur l'Union européenne, à moins que la question de principe ne soit associée, comme ce fut le cas pour le référendum de septembre 2003, à la question d'une révision de la Constitution. En fin de compte, le débat autour de la question de savoir si un référendum pouvait porter sur le traité constitutionnel européen permet de mieux comprendre le précédent référendaire de septembre 2003. L'un et l'autre cas mettent en évidence qu'un référendum de souveraineté se rapportant à un traité international ne serait possible en Estonie que s'il est associé à un référendum de révision constitutionnelle.

Le *Riigikogu* décida finalement que la ratification du traité établissant une Constitution pour l'Europe se fasse sans qu'il y ait lieu d'organiser au préalable un référendum étant donné que ledit traité n'était en contradiction ni avec la Constitution estonienne, ni avec la loi portant amendement de la Constitution[*35], comme en conclut le groupe de travail sur l'analyse constitutionnelle du traité établissant une Constitution pour l'Europe dans son étude remise à la commission des lois constitutionnelles du *Riigikogu* en décembre 2005.[*36] Par ailleurs, il est intéressant de souligner que l'étude en question montre que ce n'est pas parce que la Constitution ne doit être révisée qu'un référendum n'a aucune raison d'être. Les experts indiquent que si tel est le cas d'un point de vue juridique, rien empêche le Parlement, sur le plan politique, de décider de réviser la Constitution et notamment la loi portant amendement de la Constitution conduisant ainsi obligatoirement à la tenue d'un référendum.[*37]

4. Conclusion

La catégorie estonienne des référendums sur d'autres questions d'intérêt national permet donc au Parlement d'interroger le peuple sur des questions qui n'ont pas de caractère normatif, en ce sens qu'elles n'ont pas directement pour objet l'adoption d'un projet de loi législatif ou constitutionnel, mais qu'il estime, en tant qu'elles relèvent de son domaine de compétence, être d'un intérêt capital pour la nation. Il s'agit, par conséquent d'un concept qui est difficilement maîtrisable sur le plan juridique et beaucoup plus compréhensible d'un point de vue politique.

Un bref aperçu des droits étrangers européens, nous montre que l'Estonie n'est pas un cas exceptionnel dans le fait que le référendum puisse être déconnecté d'une conception purement normative. Il en est ainsi plus généralement dans les pays d'Europe centrale et orientale[*38], mais aussi dans certains pays d'Europe occidentale[*39], qui utilisent des expressions ressemblantes à celle qui est connue en Estonie sous le vocable de « référendums sur des questions d'intérêt national ». Cependant, il est important de souligner, et nous terminerons par là, que la Constitution reconnaît un effet juridique obligatoire à la réponse issue du référendum, même si la question soumise à l'arbitrage populaire ne se rapporte pas à l'adoption d'un texte normatif. L'article 105 al. 3, 2e phrase, CRE dispose en effet que « la décision du référendum s'impose à tous les organes de l'État ». Ainsi, non seulement le *Riigikogu*, en tant qu'autorité à l'origine de la procédure référendaire, mais aussi tous les autres organes étatiques, sont juridiquement liés par le résultat du référendum, quelle qu'en soit la question. Le référendum sur d'autres questions d'intérêt national est donc, en droit estonien, un référendum décisionnel alors que ce dernier se définit comme une « consultation [qui] est suffisante pour modifier le droit positif ».[*40] Encore un élément de la complexité de cette catégorie estonienne de référendum que nous avons tentée de définir.

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35 Cf. l'exposé des motifs du projet de loi de ratification du traité établissant une Constitution pour l'Europe (n° 645 SE). Le projet de loi fut adopté le 9 mai 2006.

36 Le groupe de travail sur l'analyse constitutionnelle du traité établissant une Constitution pour l'Europe (en estonien : *Euroopa põhiseaduse lepingu riigiõigusliku analüüsi töörühm*) a été créé par la commission des lois constitutionnelles du Riigikogu le 14 décembre 2004 dans le but de répondre à la question de savoir si la Constitution estonienne et la loi portant amendement de la Constitution permettaient au Riigikogu de ratifier ledit traité ou si, au contraire, une révision constitutionnelle était nécessaire préalablement à sa ratification. Le rapport final de son étude est disponible sur : http://www.Riigikogu.ee/public/Riigikogu/epsl_20051211_ee.pdf (dernière consultation 19 août 2008).

37 Idée soutenue notamment par l'ancien chancelier du droit. Cf. A. Jõks. Rahvahääletust ei ole vaja karta (Il n'est pas nécessaire d'avoir peur du référendum). – Postimees, 28 avril 2005 (en estonien).

38 C'est le cas de la Croatie avec l'expression : « question […] importante pour l'indépendance, l'unité et l'indépendance de la République de Croatie » (art. 86 al. 2 Const.), de la Lituanie avec l'expression : « questions les plus importantes relatives à la vie de l'État et du peuple » (art. 9 al. 1 Const.), de la Pologne avec l'expression : « affaires d'une importance particulière pour l'État » (art. 125 al. 1 Const.), de la Russie avec l'expression : « problèmes d'importance nationale » (art. 1er de la loi constitutionnelle fédérale du 10 octobre 1995 relative aux référendums de la Fédération de Russie), de la Roumanie avec l'expression : « problèmes d'intérêt national » (art. 90 Const.) ou encore de la Slovaquie avec l'expression : « questions cruciales d'intérêt public » (art. 93 al. 2 Const.). Voir notamment F. Hamon. The Subject-Matter of Popular Votes. – A. Auer, M. Bützer (éd.). Direct Democracy: the Eastern and Central European Experience. Aldershot, Ashgate 2001, p. 249.

39 Comme par exemple en Espagne avec l'expression : « décisions politiques d'une importance spéciale » (art. 92 al. 1 Const.) et en Grèce avec l'expression : « questions nationales cruciales » (art. 44 al. 2 Const.).

40 J.-M. Denquin. Référendums consultatifs. – Le référendum. Pouvoirs (Revue française d'études constitutionnelles et politiques) 1996 (77), p. 82.

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The Harmonisation of the Law of Personal Security

In this paper in honour of Prof. Drobnig[*1], I would like to deal with the following topics in relation to (the harmonisation of the law of) personal security:

- The level of abstraction fit for a European restatement on this matter (1)
- The structuring of the different institutions in a conceptual and regulatory framework (2)
- The relationship between the specific rules for personal security and general contract law in the proposed Draft Common Frame of Reference[*2] (3)
- The rules applicable to provision of proprietary security by a third party (4)

1. General problems of harmonisation

The draft common frame of reference tends to formulate rules as much as possible on a general level, and this is clearly also true in the field of personal security. As we will see, many questions are already dealt with in general terms in Book II, on contracts and juridical acts in general, or in Book III, on obligations in general. Further, within the field of personal security, matters are regulated basically for two broad categories of personal security, dependent and independent personal security, with even a substantial general part for both of them.

Is this tendency merely a revival of the Pandectist temptation, as some opponents have cried, reducing the *Pandektenschule* further unjustly to mere *Begriffsjurisprudenz*? There are some objective elements explaining and probably also justifying this style. I would like to mention four. All four were to some extent — and *mutatis mutandis* — also present in the context of 19th-century Germany.

1) The lasting importance of freedom of contract, allowing private parties to create new forms or variations of contractual relationships, including personal security. There is no *numerus clausus* of nominate contracts. This obliges the legislator to use general categories.
2) The growing pressure of the equality principle as a principle of good legislation. Differences in rules have to be justified. Thus, even more than in Germany, private law is weekly under scrutiny by the Belgian Constitutional Court and private law rules are regularly declared unconstitutional because there is not sufficient justification for differences between comparable situations.

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[1] Presented in German as "Die Harmonisierung der persönlichen Sicherheiten in Europa (Garantien / Bürgschaften), Tagung "Europäisches Kreditsicherungsrecht" zu Ehren von Prof. Dr. Dr. h.c. mult. Ulrich Drobnig aus Anlass seines 80. Geburtstags, Hamburg, 12 December 2008.

[2] The complete draft is published as Principles, Definitions and Model Rules of European Private Law — Draft Common Frame of Reference (DCFR), edited by Christian von Bar, Eric Clive and Hans Schulte-Nölke and Hugh Beale, Johnny Herre, Jérôme Huet, Peter Schlechtriem†, Matthias Storme, Stephen Swann, Paul Varul, Anna Veneziano and Fryderyk Zoll, in an Outline edition, Sellier 2009 and a full edition later in 2009. Part IV G of the DCFR is in essence the book Personal Security written by Prof. Ulrich Drobnig, published in 2007 in the series Principles of European Law (Study Group on a European Civil Code), with some modifications due to its integration in the whole of the DCFR.

3) The transnational character, which imposes pressure to use categories in which more specific national institutions can be classified.

4) Ockham's razor: where the rule is the same, it is not rational to repeat it many times.

On the other hand, the criticism addressed to such general rules is known also, the well-founded as well as the unfounded criticism. On the one hand, the arguments criticising the intellectual level of abstraction are an expression of laziness. But the arguments criticising the societal level of abstraction, rules abstracted from the concrete societal contexts they regulate, have to be taken seriously. However, this has to be done by providing compensatory mechanisms with an equally general playing field, not pointillist measures.

I have strongly objected to putting 'general principles' in a legal code or DCFR, as these principles are always in competition, contradicting each other, and their balance can only be expressed in rules, not in principles themselves. It is the task of the rules to indicate in which circumstances one or another underlying principle prevails.[*3] But this is not an objection against rules of a general character, as long as they are still rules — i.e., containing their conditions of application. It does not make sense to formulate large-scale principles and then add here and there some exceptions without reflection on the principles underlying such exceptions. The balance to be found, e.g., between parties' autonomy and consumer protection is not a balance to be found only for very specific types of cases; it is a more general problem. Many rule-makers tend to formulate consumer protection rules too strictly (as to their field of application), allowing business parties to circumvent them too easily.

Thus any consumer protection legislation that has been drafted in terms of suretyship (*Bürgschaft*) alone is immediately circumvented by stipulating co-debtorship instead of suretyship in the strict sense, which necessitates 'reparation statutes' to broaden the field of application. We have seen this in Belgium, but it has not prevented the legislator from repeating the same mistake over and over again. The DCFR's Book IV G has rightly chosen to formulate consumer protection for personal security in a general way, in Chapter 4.

By virtue of Article IVG–4:102[*4], the rules on dependent personal security will apply to any personal security given by a consumer to a business[*5], thus converting independent personal security as well as co-debtorship for security purposes into dependent personal security (*Bürgschaft*). While co-debtorship for security purposes by a consumer is not explicitly excluded, it follows from Article IVG–4:102 that it too is converted into dependent personal security.

I will illustrate the general tendency in this draft more specifically by analysing two perspectives on the draft rules:

– firstly, the general structure of the different types of personal security and how they fit into the law of obligations in general (2);

– secondly, the relationship between the specific rules and general contract law (3).

2. Structure of personal security as a type of plurality of debtors

The basic idea in all cases of personal security is that there are at least three parties involved and that there is some form of plurality of debtors.

2.1. Dependent and independent security in general

In most legal traditions, the various forms of plurality of debtors can first of all be classified into the following three general categories:

1) Co-debtors liable for the same obligation, either solidarily or jointly. A performing debtor performs an obligation, which is its 'own' obligation but not merely its own obligation. It is also someone else's obligation, each of them having a 'share' to bear. These situations are in the DCFR governed by Book III, Chapter 4.

[3] M. E. Storme "Une question de principe(s)? Réponse à quelques critiques à l'égard du projet provisoire de "Cadre commun de référence", Konferenz "The Draft Common Frame of Reference", European Legal Academy / Europäische Rechtsakademie Trier 6–7 März 2008, 9. *ERA-Forum* 2008 Supplement 1, p. S. 65–77. Available at http://webh01.ua.ac.be/storme/ERA-ForumTrier2008.pdf.

[4] For the sake of clarity, the conversion of independent security is explicitly provided for in Article IVG–4:105 (c).

[5] With the exception of security providers able to exercise substantial influence upon the debtor where the debtor is not a natural person (Article IV.G–4:101 (2) (b)).

2) A debtor liable for a debt that is the debt of someone else, the main debtor. The first mentioned has no 'share'; internally the debt is apportioned solely to the main debtor. The main figure is the dependent personal security. This category encompasses, in my view, also the cases where a third party grants a proprietary security right to secure someone else's debt (see also 4. below).
3) Two debtors each liable for a different obligation. Their obligations are concurrent, not cumulative, and in the internal relationship the debt is apportioned to one of them while the other has no share to bear. One of the main figures is the independent personal security, in the DCFR governed by Book IV G, Chapter 3.

The 'odd' figure is the co-debtorship for security purposes, where the creditor stipulates that the personal security's guarantor is nevertheless liable as a main debtor. The DCFR has not abolished this figure, except for B-to-C relationships.

The main difference between the second and third category above is evidently expressed by the words 'dependent' and 'independent'. The obligation with the personal security is either dependent on or (wholly or partially) independent from the 'valuta relationship', the relationship between the creditor and the 'main' debtor (whose debt it primarily is). The word 'independent' is to be preferred over 'abstract', because the abstraction of their obligation describes the relationship to the internal relationship between the debtors, the 'provision relationship', and both types of personal security are in principle 'abstract' in that sense.

Figure: Dependent personal security

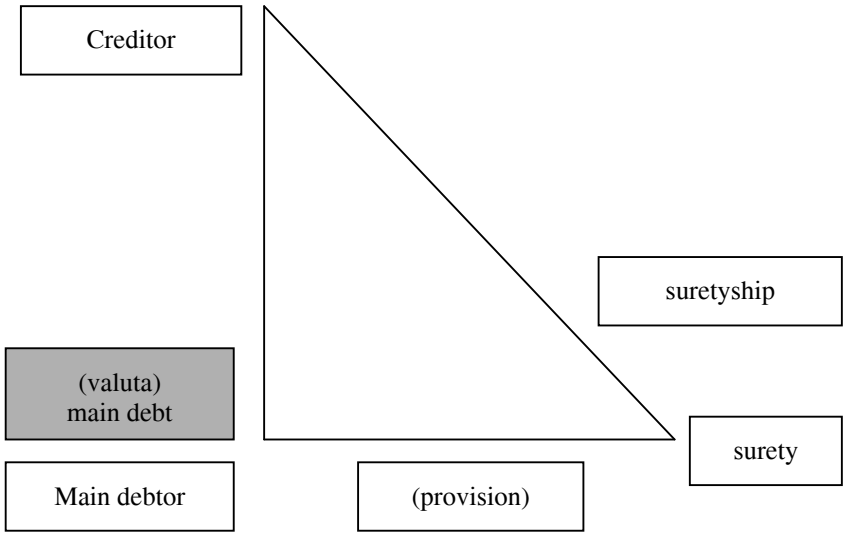
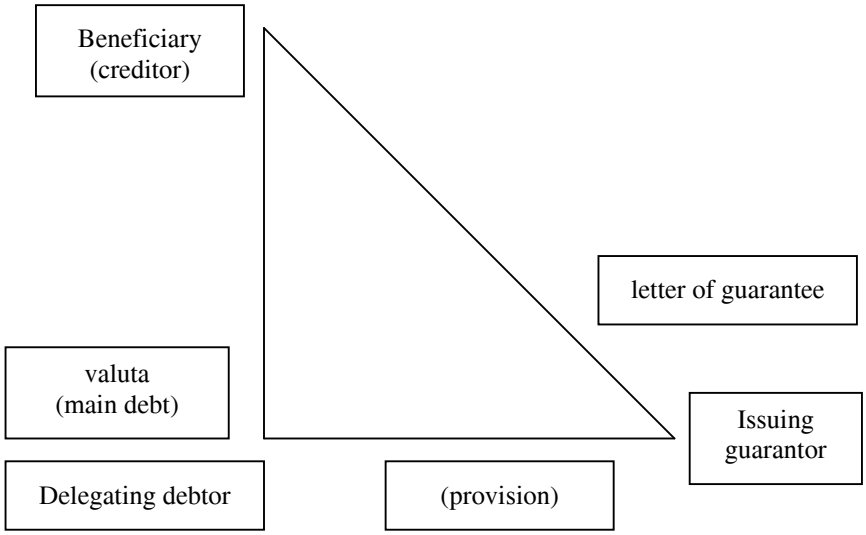


Figure: Independent personal security



2.2. Guarantee function and payment function

The different forms of plurality, or at least the second and third type, can, however, also be classified on the basis of another criterion, according to whether the addition of a debtor has first of all a security (guarantee) function or a payment function. A third possibility is that a new debtor is fully substituting for the old debtor, who is discharged (perfect or complete substitution of a debtor — see Article III–5:203 and 204 of the DCFR).

Leaving aside the last figure, wherein there is no longer a plurality of debtors, this brings us the four following categories of plurality of debtors other than simple co-debtorship.

	Dependent on valuta relationship	Independent from valuta relationship
Guarantee function (whether subsidiary or solidary)	Dependent personal security Subsidiary liability, old debtor	Independent personal security – borderline cases: demand guarantees; standby letter of credit
Payment function	Dependent *delegatio solvendi*, such as contract bonds Compare substitute debtor when old debtor not discharged	Independent *delegatio solvendi*, such as: – credit card – documentary credit – money transfer – bill of exchange

The distinction between security instruments and payment instruments is not absolute, and intermediate figures are in principle possible. The whole matter is in a certain sense law of obligations in its purest form: the rules express the relation between the different party relationships involved. Nevertheless, it is possible for a legislator to, for reasons of consumer protection or more generally transparency for the market participants, introduce a certain *Typenzwang* or convert divergent figures into one of the pre-established ones. The latter policy has indeed been followed in the DCFR for personal security provided by a consumer to a business.

2.3. Classification of the internal relationship

One can also classify the situations according to the intended effect in the internal relationship between the different debtors: is the performing party engaging itself to pay an existing debt toward the main debtor (*solvendi causa*), to obtain a claim for reimbursement and perhaps remuneration (*credendi causa*), or gratuitously (*donandi causa*)? This distinction does, however, only have an indirect effect on the obligation of the debtors towards the creditor and is therefore not used in the given scheme.

The internal relationship is, on the other hand, interesting from the standpoint of proprietary security, something that may seem curious at first sight. If the delegating debtor requests the delegated debtor to engage itself towards the creditor — especially by drawing a bill of exchange or a cheque —, in many national systems and some uniform laws this request amounts to a disposition of the right to performance that the delegating debtor has against the delegated debtor, a disposition in favour of the creditor. Where the delegated debtor is indeed becoming a debtor of the creditor, this does not matter very much, but where it doesn't, the creditor has a proprietary security right in the delegator's right against the delegated party.

2.4. Four basic types

Where do we find these four categories in the DCFR?

1. 'Dependent' obligations with a guarantee function: We find them mainly in the form of the dependent personal security in Book IV G, Chapters 2 and 4, discussed in more detail *infra*. The DCFR has rightly chosen functional and neutral terminology.

We also find them in the case of an incomplete substitution of debtor, where the old debtor has a similar function, in Article III–5:206 and 5:207. The remaining obligation of the old debtor certainly has a guarantee function, although it is not 'dependent' in the strict sense, as it was the original obligation. Article III–5:207 thus provides that

> "(1) The effects of an incomplete substitution on defences and set-off are the same as the effects of a complete substitution.

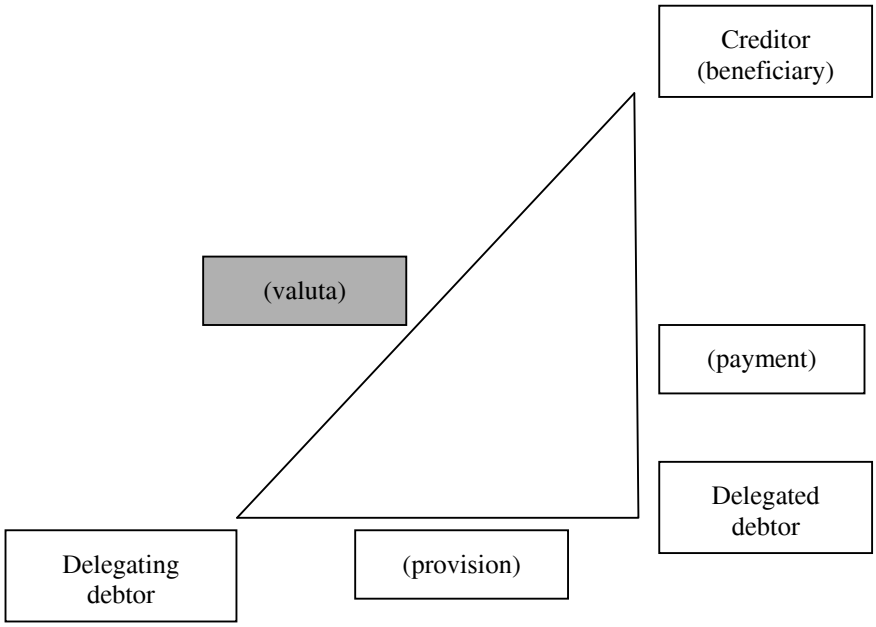
(2) To the extent that the original debtor is not discharged, any personal or proprietary security provided for the performance of that debtor's obligations is unaffected by the substitution.

(3) So far as not inconsistent with paragraphs (1) and (2) the liability of the original debtor is governed by the rules on the liability of a provider of dependent personal security with subsidiary liability."

2. 'Independent' obligations with a guarantee function. We find them as "independent personal security" in Book IV G, Chapter 3, also discussed *infra*. Here again, the DCFR has rightly chosen functional and neutral terminology.

3. 'Dependent' obligations with a payment function. The third category is found in the *delegatio solvendi* where the obligation of the additional debtor is not independent in the sense of not being abstracted from the original or valuta relationship.

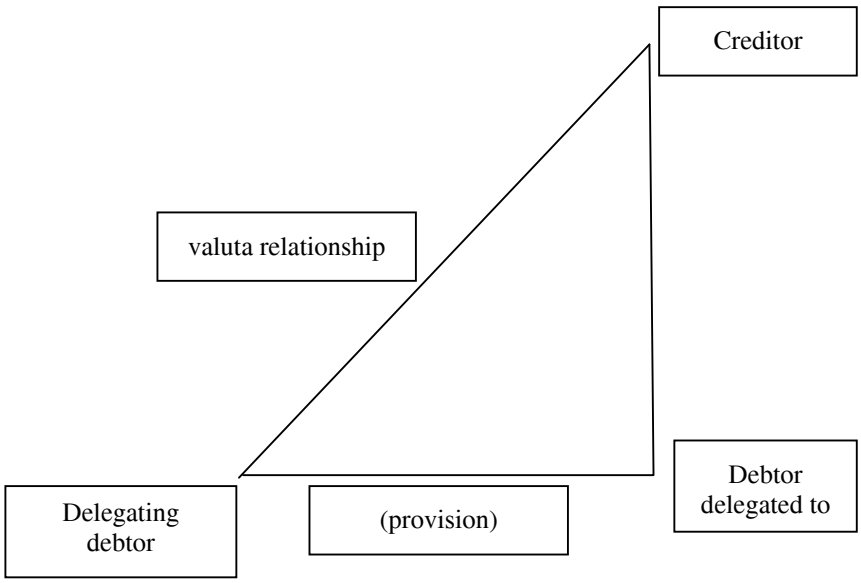
Figure: Dependent *delegatio solvendi*



This figure is not regulated by the DCFR but is in a certain sense the mirror image of the incomplete substitution of debtor of Article III–5:206. Where the creditor has accepted the delegation, it has to pursue performance from the delegated debtor in the first place and the original debtor is now merely a subsidiary debtor, although in the internal relationship between both debtors he has to bear the full obligation. The relationship between the creditor and its debtor will determine whether the creditor is obliged to accept a delegation of debt by its debtor to a delegated debtor. As long as the creditor neither accepts the delegation nor is bound to accept, the old debtor remains bound unconditionally and will be discharged only if the third party effectively pays for the account of the old debtor.

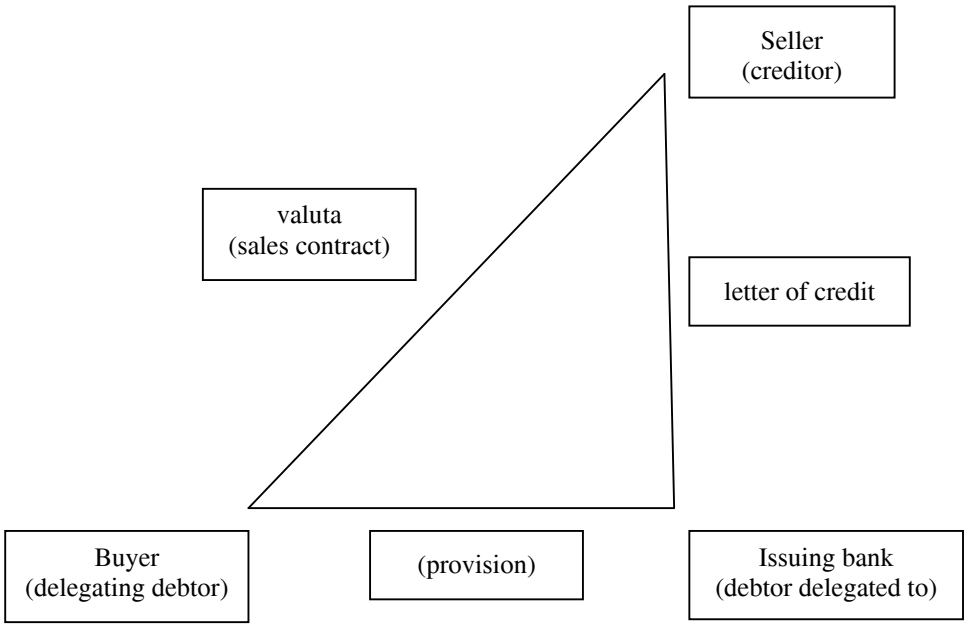
4. 'Independent' obligations with a payment function: The final category is, again, a *delegatio solvendi*, but it is one where the delegated debtor engages in an obligation that is not dependent upon the original obligation. The conditions under which the delegated debtor is bound (i.e., the modalities of his obligation) are a question of interpretation of his promise. This figure too is not regulated by the DCFR, although some aspects can be traced — e.g., in Article III–2:108 (2), which provides that "a creditor who accepts a cheque or other order to pay or a promise to pay is presumed to do so only on condition that it will be honoured. The creditor may not enforce the original obligation to pay unless the order or promise is not honoured". Here, too, the 'main' debtor becomes a subsidiary debtor in the relationship with the creditor.

Figure: Independent *delegatio solvendi*



An example mentioned in the Comments to Book IV G is the letter of credit in a documentary credit.

Figure: Documentary credit



Other examples are the various payment instruments, such as credit cards, bills of exchange, and even simple money transfer. Some elements of these figures are governed by acquis rules, especially in the Payment Services Directive. That directive does not, however, elaborate on the basic infrastructure of payment instruments in the general law of obligations.

2.5. The main content of personal security

Dependent personal security and independent personal security differ from each other in the role the valuta relationship plays. More precisely, this follows from the different modes in which the terms of the obligation are determined:

1) In cases of **independent security**, the terms of the obligation are determined in principle by the contract with the creditor in itself, without reference to one or more secured obligations.
2) In the case of **dependent security**, the terms of the obligation are primarily limited in a double way:
   – by the extent of the obligations of the main debtor;
   – by the extent to which these obligations are 'covered' by the security (an extent that cannot be completely unlimited).

The notion of coverage combines these two cumulative limitations. Fortunately, the DCFR does not follow a certain tendency seen in the French and Belgian doctrine to see two different obligations on the side of the security, a so-called *obligation de garantie* and *obligation de payement*; there is only one obligation of the security, but the content of that single obligation is determined by the notion of coverage, which refers to covered obligations of the main debtor.

Apart from the limitation of coverage, the obligation can also be limited by other terms, such as a time for resort to the security (Article IVG–2:108) or other modes of extinction or modalities of the obligation of the security provider (e.g., its possible subsidiary character). As it would go against public policy for the obligation of the security to be able to increase indefinitely because the agreed coverage is 'global', the object of the obligation can by notice be limited to obligations that have arisen before the end of the notice period (see *infra*).

3. Relationship with the general law of contracts and obligations

National systems also differ in the extent to which they rely on general contract law and general law of obligations. In the DCFR, personal security is to a large extent governed by the general law of obligations.

3.1. Formation

Apart from slight precision in Article IVG–1:103 on creditor's acceptance, there are no specific rules on formation or personal security in general. This corresponds to the general approach of the DCFR to specific contracts. In B-to-C contracts, however, writing and signature are required by Article IVG–4:104. In all other respects, the rules of Book II's Chapter 4 apply (and some rules relating to formation found elsewhere, such as the rule in II–9:103 on the integration of terms not individually negotiated).

3.2. Pre-contractual information duties

The most important rule in this respect is a specific rule applicable when the security giver is a consumer, stated in Article IVG–4:103, paragraph 1:

> "the creditor has a duty to explain to the intending security provider:
> (a) the general effect of the intended security; and
> (b) the special risks to which the security provider may according to the information accessible to the creditor be exposed in view of the financial situation of the debtor."

In the general contract law, there is no corresponding rule. The specific articles on pre-contractual information duties in the DCFR's Book II, Chapter 3, including the general duty set forth in Article II–3:101, only apply to businesses supplying goods and services; thus, they do not apply to creditors stipulating a personal security. They will, on the other hand, apply to professional security givers such as banks, who do provide services when they provide personal security — depending on the circumstances, the service can be a service toward the creditor or toward the main debtor, or toward both. The more specific rules of Article II–3:102 *ff.* in any case will only apply if the security giver is providing a service to a consumer. A bank securing the right to payment of rent may have an information duty towards the landlord and/or the tenant, depending on their status as consumer. Given the content of these rules, however, they will only play a marginal role and

probably only in the internal relationship between professional security giver and main debtor (as to their mutual obligations).

Apart from these, information duties can follow indirectly from the general rules on mistake and other defects of consent. Relevant here are only the cases of a defect of consent on the side of the security giver, especially mistake caused by the other party (by giving incorrect information) (II–7:201 (1) (b) (1)), a mistake known by or apparent to the other party and not disclosed (II–7:201 (1) (b) (2)), and consent induced through the fraudulent non-disclosure of information that good faith and fair dealing required the other party to disclose (II–7:205). The latter article in its third paragraph states criteria for information duties, which in my view belong rather more in a general article than in the fraud article alone. The paragraph states that

> "regard should be had to all the circumstances, including:
> (a) whether the party had special expertise;
> (b) the cost to the party of acquiring the relevant information;
> (c) whether the other party could reasonably acquire the information by other means; and
> (d) the apparent importance of the information to the other party."

These information duties apply to all parties, not merely creditors stipulating an obligation of a consumer. There clearly is a difference in the greater protection of consumers under Article IVG–4:103, paragraph 1:

- In relation to consumers, the creditor who has information regarding the financial situation of the main debtor cannot hide behind the duty of the security giver to inform itself.
- In relation to the content of the obligation, there is basically a duty to explain the effects to a consumer. This is corroborated by more specific duties following from other articles, especially Article IVG–4:105 (a): where no maximum amount is agreed upon with the consumer-security provider, the obligation of the security provider is necessarily limited to the value of the secured rights at the time the security becomes effective.

The absence of a more specific information duty for all contracts for personal security is obviously a compromise between the very different national laws; the complexity of the relationship made it more difficult to go forward in this part of the DCFR than, for example, in the part on services (Book IV C).

3.3. Validity: Defects of consent

Recent developments in the law on personal securities have to a large extent been focused on the area of defects of consent. The DCFR does not add many specific rules to the general rules in Book II, Chapter 7.

As to mistake and fraud, apart from the additional content of information duties (already mentioned), there is a slight difference following from Article IVG–4:103, paragraph 4, as the contract can be avoided at any time, whereas in general contract law notice must be given within a reasonable time, according to Article II–7:210. As to the general rules on mistake and fraud, attention must also be given to Article II–7:208:

- Where the main debtor is guilty of fraud in relation to the conclusion of the security contract by the security provider, the security provider can avoid the security contract if the creditor knew or could reasonably be expected to have known of the facts (Article II–7:208 (2)).
- Where the main debtor is, moreover, with the creditor's assent involved in the making of the security contract, the causing of a mistake or fraud is attributed to the creditor itself, irrespective of that knowledge (Article II–7:208 (1)).

Important additions to the general rules are found in relation to abuse of circumstances or 'unfair exploitation'. Article II–7:207 does not deal in itself with cases where the security provider is in a relationship of trust or dependency with the main debtor; it addresses only cases of such relationship with the creditor. Article IVG–4:103 thus gives a more specific rule for a relationship of trust or confidence between the consumer security provider and the main debtor: as soon as the creditor (being a business) knows or has reason to know that there is a significant risk that the security provider is not acting freely or with adequate information, the creditor must ascertain that the security provider has received independent advice and has enjoyed a period for reflection of at least five days. Where the issue is not merely knowledge of a significant **risk** but knowledge or constructive knowledge of an **actual** unfair exploitation of the security provider's dependency, trust, or other weaknesses (improvidence, ignorance, or inexperience — see Article II–7:207 (1) (a)) by the main debtor, the general rule of II–7:207 *iuncto* II–7:208 (2) applies and the security provider can avoid the contract whether or not it is a B-to-C contract. Equally, where the main debtor is with the creditor's assent involved in the making of the security contract, the unfair exploitation by the principal is attributed to the creditor itself, irrespective of such knowledge and irrespective of the business or consumer character (*cf.* Article II–7:208 (1)).

3.4. Withdrawal right in contracts negotiated away from business premises

The Book on personal security has no specific rules on withdrawal rights, as Article II–5:201 on contracts negotiated away from business premises explicitly also covers personal security granted by a consumer. The withdrawal period of 14 days starts when the contract is concluded and adequate notice of the withdrawal right is given; it ends one year after conclusion, even if such notice has not been given (see Article II–5:103).

3.5. Interpretation

As regards interpretation, here, too the general rules apply. Relevant are, *i.a.*, the general rule of II–8:101, the rule of interpretation against the dominant party in II–8:103, and the preference for negotiated terms in II–8:104.

Book IV G adds a "presumption" for dependent personal security (rather than independent security or co-debtorship) in Article IVG–2:101, which can, however, also be understood as a default rule (in exactly the manner in which the non-subsidiary character outside B-to-C contracts, the non-global character, and the limitability of security not limited to specific obligations are default rules — see Articles IVG–2:105, IVG–2:102 (3), and IVG–2:109).

3.6. Contents and modalities of performance — 'external' relationship

Evidently, the main topic on which Book IV G takes over from the general law of contracts and obligations in Books II and III is the content of the contract, i.e., the rights and obligations arising out of the contract and their specific modalities.

Thus, Book IV G states as a default rule that personal security is **dependent** on the debtor's obligation (IVG–2:101) and subject to all defences of the debtor (IVG–2:103), with the exception of some personal defences (Article IVG–2:102 (2) (a) to (c)); where the security is nevertheless an independent security, Chapter 3 contains more specific default rules.

Further, it contains, in essence, the following rules for **dependent personal security**:

- The default rule that a dependent personal security **covers** only an existing right of the creditor against the debtor and only up to the value of the secured right at the time the security becomes effective plus the ancillary obligations of the debtor (Articles IVG–2:102 (3) and IVG–2:104 (1 and 2)) and that later agreements between the creditor and the main debtor do not extend that coverage or otherwise adversely affect the obligation of the security provider (see Article IVG–2:102 (4)).
- A notification duty for the creditor in case of events of non-performance by the main debtor (Article IVG–2:107 (1)) and a more general annual notification duty of the creditor in B-to-C contracts (Article IVG–4:106).
- A rule of interpretation when a time limit for resort to a security has been agreed upon (in Article IVG–2:108, a more specific rule when compared to the general rule on time-limited obligations in Article III–1:107).
- Specific rules for the case in which a security is neither limited to cover specific obligations nor limited to cover obligations arising before an agreed time limit — namely, the limitability of the security via notice of (at least) three months (Article IVG–2:109). This rule replaces the general rule of Article III–1:109 (2) on continuous or periodic performances for an unlimited period of time, which requires merely a reasonable period of notice. In B-to-C contracts, any time limit of more than three years can be set by the consumer, given its possibility to limit the coverage to existing obligations by giving notice of at least three months (Article IVG–4:107).
- Specific rules for the case wherein a global security has been agreed on (in derogation from IVG–2:102 (3 and 4)), such as the limitation to rights arising from contracts between the creditor and the main debtor (Article IVG–2:104 (3)), the necessity of a maximum amount in B-to-C contracts (Article IVG–4:105 (a)), and additional notification duties in certain cases of increase (Article IVG–2:107 (2)).
- As a default rule outside B-to-C contracts: the solidarity between the security provider and the main debtor (Article IVG–2:105), but equally a rule in case subsidiary liability has been agreed upon (see Article IVG–2:106);

– A duty of care of the creditor to maintain the security provider's right to subrogation or recourse/ reimbursement from the debtor (Article IVG–2:110).

In cases of **independent personal security**:

– The contents of the obligation are determined not by the delimitation of 'coverage' given to obligations of the main debtor but by requirements for a demand for performance. The security provider can only invoke defences out of its own relationship with the creditor, including evidently that the demand does not comply with the terms of the obligation (Article IVG–3:103 (1 and 2)); this rule is restricted in cases of guarantees on first demand (Article IVG–3:104). The security provider cannot invoke defences from the relationship between the main debtor and the creditor, except where the creditor's demand for performance is manifestly abusive or fraudulent (Article IVG–3:105).
– There is also a rule of interpretation in cases where a time limit for resort to a security has been agreed upon (Article IVG–3:107).
– There is a default rule on the time of performance (Article IVG–3:103 (3)).

These rules are **not mandatory** except in B-to-C contracts (which are always converted into dependent personal security). In other relationships, only the general limitations to freedom of contract apply, such as can be found in the chapter on validity (Book II, Chapter 7) and the rules on the duty of transparency in terms not individually negotiated (Article II–9:402), and on unfair terms (Article II–9:404 for contracts between non-business parties and II–9:405 for contracts between business parties). As Article II–9:406 (2) recalls, for contract terms drafted in plain and intelligible language, the unfairness test extends neither to the definition of the main subject matter of the contract nor to the adequacy of the price to be paid.

Some **terms of the relationship** arising out of contracts of personal security are determined by general rules of the law of obligations, such as the duty to act in accordance with good faith and fair dealing (Article III–1:103), the duty to co-operate for the performance of the obligations (Article III–1:104), the duty not to discriminate on forbidden grounds in the exercise of a right to performance (Article III–1:105), and the rules on the modalities of performance (Articles III–2:101 to III–2:109 and III–2:111 to III–2:113, except insofar as the more specific rules of IV G deviate from them[*6]).

3.7. Non-performance, remedies, and extinction

The specific part on personal security in Book IV G contains very few rules concerning non-performance of obligations or extinction.[*7] Nearly all of the more specific rules on performance and non-performance relate to reduction of rights as a remedy for requirements for the parties, requirements that are, technically speaking, neither duties nor obligations but mere charges or *Obliegenheiten*. See, e.g., Article IVG–2:107 (4) concerning the remedy in cases of non-notification by the creditor, IVG–2:110 concerning the reduction of creditor's rights for lack of care, and IVG–2:112 *c.q.* IVG–3:102 on the reduction of the security provider's rights of recourse or subrogation in case of non-notification of the debtor by the security provider.

Evidently, in cases of dependent security, one has to distinguish clearly on the one hand the obligation of the main debtor, which is not as such an obligation of the security provider but merely an element determining (and fundamentally limiting) the content of the obligation of the security provider, and the obligation of the security provider in its own right: the secured obligation and the securing obligation, the obligation that may be covered, and the coverage of it by the securing obligation.

Thus, for example, one has to distinguish the interest due from the debtor on the secured obligation, which is covered by the obligation of the security provider as part of the secured right, and the interest due from the security provider itself because of its non-performance of its own obligation to pay once that obligation becomes due. The same can be said about costs of legal proceedings. Article IVG–2:104 determines which ancillary obligations of the main debtor are covered by the dependent security; the ancillary obligations of the security provider itself are determined by the general rules of Book III (as are those of the main debtor, unless more specific rules dependent on the type of relationship between the creditor and main debtor apply). Book IV G does not contain an explicit rule against unjust enrichment, but it should be clear that the creditor is not entitled to both types of interest for the same period of time.

[6] E.g., in case of subsidiary liability of the security provider (Article IVG–2:106), or in case of independent personal security (Article IVG–3:103 or IVG–3:104).

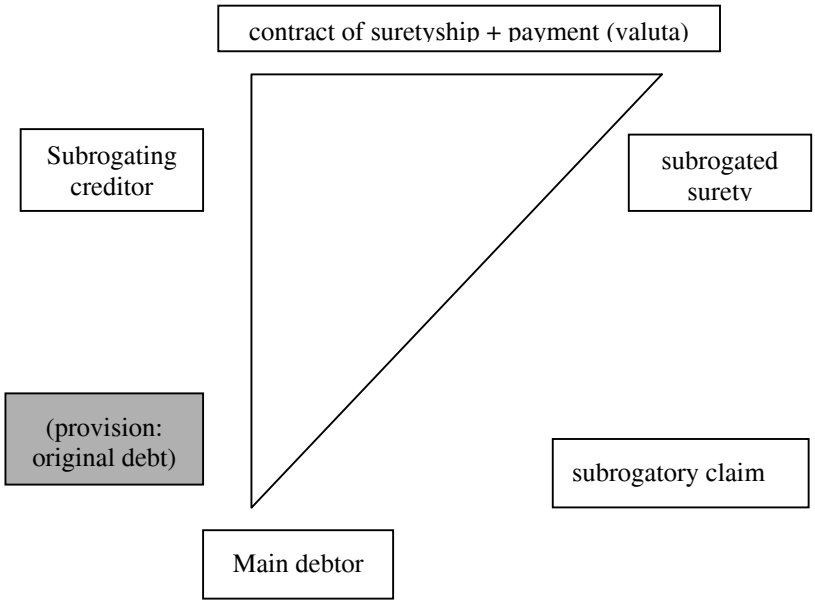
[7] Apart from the rule of interpretation where a time limit for resort to a security has been agreed (Article IVG–2:108 for dependent security *c.q.* IVG–3:107 for independent security, a more specific rule compared to the general rule on time-limited obligations in Article III–1:107).

3.8. Effects in the internal relationship

As to the internal relationship, the following specific rules are found:

- For dependent security, the right of the security provider to request relief by the debtor (Article IVG–2:111).
- Both for dependent and for independent security, the rights of the security provider after performance — namely, a right to reimbursement (recourse) and a subrogation in creditors' rights (Article IVG–2:113), subject to some duties of the security provider such as notification of the (main) debtor before and/or after performance toward the creditor (Article IVG–2:112 for the case of dependent security and Article IVG–3:102 for independent security).
- Rules concerning cases involving several security providers (IVG–1:105 to 1:107).

The corresponding figure would look as follows for the subrogatory claim.



In the subrogatory relationship, the main debtor can indeed invoke all exceptions arising from the original relationship with the creditor. As to the relationship between the subrogating creditor and the subrogated creditor, the debtor can, in principle, invoke it only in order to limit the subrogation to the amount of performance by the subrogating party.

As in the case of assignment, personal subrogation entails as much a transmission of property in a right as a change in the relationship with the debtor. The rules of the DCFR do not yet really distinguish these two aspects or spell out the specific rules. In my opinion, this means that the rules on assignment must be applied with appropriate adaptations. I have discussed them in another article.[*8]

Although Article IVG–4:102 seems to imply that these rules too are mandatory in cases of personal security of a consumer toward a business, I doubt that this interpretation is correct. The internal relationship is not governed by the contract between the security provider and the creditor, and these rules are therefore default rules, which can be modified as far as this can be done validly on the basis of the internal relationship itself.

3.9. Rules on plurality of debtors

Article IVG–1:108 provides for the subsidiary application of the rules on solidary debtors from Book III, Chapter 4 — namely, Article III–4:107 and III–4:112. The other rules on plurality of debtors will further apply in cases of co-debtorship for security purposes (Article IVG–1:104). III–4:107 deals with the subrogation of the co-debtor who has performed and the associated right of recourse. These rules thus apply to co-debtorship for security purposes and subsidiarily to dependent and independent personal security, where Article IVG–2:113

[8] M. E. Storme. The Structure of the Law on Multiparty-situations in the Draft Common Frame of Reference. – Juridica International 2008 (14), pp. 78–88. Available at http://www.storme.eu/ji_08_1_78.pdf.

primarily governs the matter. Formulated for dependent security, IVG–2:113 applies "with appropriate adaptations" in the case of independent securities (IVG–3:109).

However, it seems as if time constraints have prevented co-ordination between these different articles. In essence, III–4:107 and IVG–2:113 say the same thing in rather different words. IVG–2:113 is more detailed and precise than is III–4:107, which is still the PECL rule, drafted before the matter was considered in greater detail by the security group and not revised since. In each of these articles, we have two concurrent remedies (IVG–2:113 (1) *in fine* also uses the word 'concurrent' explicitly); they are the same in essence but have different names:

- The remedy of subrogation is called subrogation in IVG–2:113 but not in III–4:107.
- The remedy based upon the internal relationship (a kind of enrichment remedy) is called recourse in the one and reimbursement in the other.

The priority for the old creditor in the case of partial performance is spelled out in both, in different words. Thus, some co-ordinating work remains to be done.

4. Proprietary security by a third party

Proprietary security by a third party that is not the main debtor is, in my view, also personal security. In the DCFR, the transfer of property and constitution of limited property rights are not abstract but causal. Creation of the proprietary security right thus requires an obligation of the third party to grant this right. Such an obligation is certainly an obligation to secure a right to performance of the main debtor. In that sense it is a form of personal security, even if it would not fall under the three categories defined for personal security. It follows from Article IVG–1:102 that the notion of personal security is not necessarily restricted to these three categories. But I understand the definition of 'dependent personal security' in this way as, in fact, covering these security rights, even if the obligation to grant the right is due before the performance of the secured obligation is due.

The question is relevant, *i.a.*, for the application of Article IVG–4:103. If proprietary security by a third party is included, the creditor's pre-contractual duties provided by that article also apply in relation to a consumer-grantor, which is perfectly reasonable. We should not allow creditors to circumvent the protection of consumer sureties by demanding, instead of an obligation of liability with all one's assets, the granting of security rights over all or nearly all assets.

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The Seller's Liability in the Event of Lack of Conformity of Goods

1. Introduction

If the seller delivers to the buyer goods not conforming to the contract, the buyer may resort to various legal remedies. In the case of consumer sale, the law of the EU member states has been harmonised by Directive 1999/44/EC[*1], under which the buyer may demand the repair or replacement of goods, to have the price reduced, or to have the contract rescinded. The directive does not regulate the issues of compensation for damages; according to its Recital 6, this directive's objective is to approximate national legislation governing the sale of consumer goods, without, however, impinging on provisions and principles of national law related to contractual and non-contractual liability.

In Estonia, issues regarding a contract of sale are governed by the Law of Obligations Act[*2] (LOA), in which the regulation of the contract of sale mainly derives from the United Nations Convention on Contracts for the International Sale of Goods[*3] (CISG) and the German Civil Code[*4] (BGB). According to the LOA, strict liability is applied as a rule upon breach of contract, which means that the obligor is released from liability only in cases of *force majeure*. The legal literature in Estonia has adopted a position regarding the contract of sale that the seller who has delivered to the buyer defective goods cannot be released from liability even in cases of *force majeure*, which essentially means the seller's absolute liability.

The authors of this paper believe that such interpretation stems from the Estonian legislator not having taken account of Recital 6 upon the transposition of Directive 1999/44 — in this case, in the part that excludes the impact of the directive on the national principles related to contractual liability. There is no uniform regulation of the liability of an obligor in breach of contract in the Member States regarding either the content of damages or the standard of liability to be applied[*5], and that is why the extent of the seller's liability may vary from one Member State to another. On the one hand, it need not be acceptable from the standpoint of

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1 Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees. – OJ L 171, 7.07.1999, pp. 0012–0016.

2 Võlaõigusseadus. – RT I 2001, 81, 487; 2008, 59, 330 (in Estonian). Available in English at http://www.legaltext.ee/en/andmebaas/ava.asp?m=022 (30.03.2009).

3 RT II 1993, 21/22, 52.

4 Bürgerliches Gesetzbuch. – RGBl. P. 195.

5 C. von Bar, U. Drobning. Study on Property Law and Non-contractual Liability Law as they relate to Contract Law. Available at http://ec.europa.eu/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/study.pdf (30.03.2009).

consumer protection; on the other hand, though, empirical studies[*6] show that differences in the laws of the Member States may also produce problems for entrepreneurs.[*7]

The authors of this paper are of the position that, even if the seller's absolute liability could be justified on grounds of consumer protection, such a rigid approach is still not appropriate. The paper shows that the recognition of the seller's absolute liability may at least in certain cases lead to an unjust result. For that purpose, the paper sets out to examine the standard for liability of a seller delivering to a buyer a defective movable in the Estonian and German law and in the CISG as exemplified by the following case[*8]:

> A buyer buys from the seller a two-month-old puppy. Four months after the delivery of the puppy, it becomes evident that the dog has an anomaly of the ankle in a hind leg, which would lead to excessive bowleggedness in the dog. Such an ankle can be treated in a surgery during which a metal plate is inserted in the dog's leg. The metal plate is permanent and, because of this, the dog has to be taken to the veterinarian twice a year for check-ups from that moment on. The cost of the operation exceeds the sales price of the puppy more than twofold. The buyer demands from the seller compensation for the price of the operation and the cost of the two checks each year. Does the seller have to compensate for the damages?

2. The seller's liability according to German law

In the BGB, the general issues related to legal remedies are regulated in the general part; §§ 434–435 govern the lack of conformity of a thing, and § 476 addresses the risk of accidental destruction and damage of a thing in relation to its delivery to the buyer. The legal remedies that the buyer can apply in response to a seller who has delivered defective goods are listed in § 437, found in the special part, Clause 3 of which sets out the buyer's right to demand compensation for damages according to §§ 440, 280, 281, 283, and 311a.

Section 280, contained in the general part, is central to the issue of compensation for damages; according to its Subsection 1, if the obligor breaches a duty arising from the obligation, the obligee may demand damages for the damage caused by the obligor, except if the obligor is not responsible for the breach of duty. According to § 276, 'responsibility' may refer to the obligor's intentional act or negligence (that is, fault-based liability), or also the obligor's higher degree of liability if the obligor has given a guarantee or assumed a procurement risk. The provision of a guarantee presumes a relevant agreement[*9] or other circumstances based on which one may infer that the seller has given a guarantee (for example, previous advertising of the goods).[*10] Subsection 276 (2) specifies that a person acts negligently if he fails to exercise reasonable care — for this reason, the courts apply an objective standard in evaluation of the culpability of a person, proceeding not from the usual knowledge and abilities of a particular obligor but from those of a person acting in the field.[*11]

Three types of claims for compensation for damages are distinguished among on the basis of BGB § 280: compensation for damages along with the claim for the performance (*Schadenersatz neben Leistung,* § 280 (1)), compensation for damages caused by the obligor's delay in performance (§ 280 (2)), and damages in lieu of performance (*Schadenersatz statt Leistung*, § 280 (3)).[*12] The buyer can request the last if the seller has not cured the goods during an additional period set by the buyer or the curing of the defect is excluded according to § 275 (for example, curing the defect is impossible). In such a claim, the obligor's liability is specified by BGB § 311a (2): if the circumstance that excludes the performance was already present at the time of entry into the contract, the obligation to compensate for damages is excluded if the obligor was not aware of the obstacle to performance when entering into the contract and is not responsible for his or her lack of awareness.

This means that a claim for the compensation of damages can be considered only after the seller is deemed responsible for the circumstances because of which the defect cannot be cured (the seller being aware of or

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6 S. Vogenauer, S. Weatherill. The European Community's Competence for a Comprehensive Harmonisation of Contract Law – an Empirical Analysis, – European Law Review 2005 (30) 6, pp. 821–837.

7 These arguments are used to substantiate the position that in the European contract law, harmonisation should be applied besides other issues also to compensation for damage. See L. J. Smith. The Eye of the Storm: On the Case for Harmonising Principles of Damages as a Remedy in Contract Law. – European Review of Contract Law 2006/2, p. 242.

8 A decision of the Supreme Court of the Federal Republic of Germany of 22.06.2005. – BGHZ 163, 234; NJW 2005, 2852.

9 Ernst- Münchener Kommentar zum BGB. 5. Aufl. 2007, § 280 paragraph 24.

10 K. Riesenhuber. Damages for Non-Performance and the Fault Principle. – European Review of Contract Law 2008/2, p. 128.

11 Ernst- Münchener Kommentar zum BGB. 5. Aufl. 2007, § 276 paragraph 55–56; K. Riesenhuber (Note 10), p. 130.

12 R. Zimmermann. Breach of Contract and Remedies under the New German Law of Obligations. Roma 2002. Available at http://w3.uniroma1.it/idc/centro/publications/48zimmermann.pdf (30.03.2009); S. Lorenz. Schuldrechtsreform 2002: Problemschwerpunkte drei Jahre danach. – NJW 2005/27, pp. 1890–1892.

having to be aware of the defect and the impossibility of cure in itself do not give reason for the claim for the compensation of damages*[13]).

In the case described above, the buyer claimed that the anomaly of the ankle of the dog was caused by a genetic abnormality and concluded that the defect existed already at the time of the delivery of the puppy. According to BGB § 90a, animals are not things but they are governed by provisions that apply to things. The court (the *Bundesgerichshof*, or BGH) noted that the anomaly of the dog's hind leg could be thus regarded as a defect under BGB § 434. The court established that if the defect was indeed caused by a genetic abnormality, the seller could not cure it — it would be possible to avoid the excessive bowleggedness of the dog via a surgery but the genetic abnormality could not be removed. As a result, only the buyer's claim for damages in lieu of performance (under the *Schadenersatz statt Leistung*) could be considered and the seller has to compensate for damages only when responsible for the circumstances that render curing the defect impossible.

The court noted that, in the case at hand, it was questionable whether a seller raising dogs as a hobby was an entrepreneur as defined in BGB § 14, which would mean that the contract being disputed could be regarded as consumer sale and that would entail the seller's obligation deriving from BGB § 476 to prove that the defect appeared after the dog was delivered to the buyer. At the same time, the court noted that the issue was not decisive in the dispute since the buyer's claim for compensation for damages was excluded anyway.

The BGH established that the buyer could not demand compensation for damages from the seller because the seller was not responsible for the defect under the BGB's § 437 (3), the second sentence of § 311a (2), and the second sentence of § 280 (1). The BGH first substantiated its judgement by asserting that it had not been proven that the seller had provided a guarantee regarding genetic defects of the dog.

The BGH also established that the seller was not liable for the genetic abnormalities of the dog (§ 280 (1)) if said seller could not be blamed for negligence in breeding — in other words, provided that the seller had proceeded from breeding principles based on contemporary law and experience. The BGH concluded that, since the seller was a recognised expert in dog breeding in Germany and had decades of experience in it, selling nearly 50 puppies each year both in Germany and abroad, there was no reason to presume that the seller had acted contrary to the above-mentioned principle.

In addition, the BGH mentioned that the seller who had pursued dog raising and breeding as a hobby for 30 years prior to the case at hand did not notice the puppy's abnormality before it was delivered to the buyer and that the defect was discovered by the veterinarian (i.e., a specialist) hired by the buyer only four moths later. Also, the buyer had had the veterinarian examine the puppy several times. Even if the alleged genetic problem could be detected in a puppy of two months' age via a relevant X-ray, for example, the seller could not be expected to carry out such a test without an obvious need. Hence, the BGH concluded that the seller had been unaware of the genetic problem of the puppy at the time of entry into the contract and was not liable for such unawareness (§ 311a (2)).

The BGH also briefly touched upon the fact that the buyer had, among other things, refused the opportunity offered by the seller to replace the crippled puppy with a healthy one because the buyer and his family had developed a deep emotional bond with the pet. The BGH noted that the performance (in this case, replacement) was impossible according to § 275 and the seller could not be held liable for the impossibility.

Thus, the BGH excluded the buyer's claim for the compensation for damages. In addition, the court pointed out that the buyer's interests had been already adequately protected by other legal remedies (reduction of price and rescission of the contract).

It may be concluded on the basis of the reasons cited for the judgement that according to German law, in the part regarding the seller's liability, the results would be the same in the case of consumer sale and a contract of sale in which both parties are engaged in professional and economic activities, or in the case in which both parties are consumers.

3. The seller's liability according to Estonian law

Just as in the BGB, non-performance and legal remedies are discussed in the general part of the LOA, while the specifications applying to various types of contracts regarding both the foundations of the liability and legal remedies are tackled in the special part.

LOA § 100 proceeds from a uniform definition of non-performance: non-performance is failure to perform or defective performance of an obligation, including a delay in performance. At the same time, it may be said

[13] S. Lorenz. Rücktritt, Minderung und Schadensersatz wegen Sachmängeln im neuen Kaufrecht: Was hat der Verkäufer zu vertreten? – NJW 2002/35, p. 2501.

that types of a seller's non-performance can be distinguished[*14], and the seller's obligation to compensate for damages may depend on the nature of the non-performance. In the example discussed in this paper, the existence of non-performance can be identified by using LOA § 217 (on conformity of a thing), which has been founded proceeding from Article 2 of Directive 1999/44, BGB §§ 434–435, and Article 35 (paragraphs 2 and 3) and Article 41 of the CISG.[*15] LOA § 217 (2) lists as defects of a thing both material defects (for example, the goods not having the agreed characteristics or, in the case of consumer sale, the goods not possessing the quality usual for that type of goods) and legal defects (the claim of a third party or other rights). Although the pet involved in the example case is not a thing, § 217 must be taken as the basis for decision concerning the breach of the contract of sale because § 49 (3) of the General Part of the Civil Code Act[*16] (GPCCA) allows for subjecting animals to the provisions applicable to things.

The central provision governing compensation for damages is § 115, in the general part of the LOA (derived primarily from BGB §§ 280 and 281[*17]). According to its Subsection 1, the obligee may, together with or in lieu of performance, claim compensation for damages caused by the non-performance from the obligor[*18], except in cases where the obligor is not liable for the non-performance or the damages for some reason provided by law are not subject to compensation, in which case the obligor's liability serves as a precondition for the claim for compensation for damages.

Unlike the principle of fault-based liability as set out in the BGB, the LOA usually proceeds from strict liability: LOA § 103 (2) prescribes that non-performance by an obligor is excused if it is caused by *force majeure* and that *force majeure* consists of circumstances that are beyond the control of the obligor and which, at the time the contract was entered into 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 of that the obligor could not reasonably have been expected to overcome. LOA § 103 (4) provides that in the cases provided by law or the contract, a person shall be liable for non-performance regardless of whether the non-performance is excused. LOA § 106 enables the parties to an obligation to agree in advance to preclude or restrict liability in the case of non-performance of an obligation, but the parties must take into account that agreements that unreasonably exclude or restrict liability (for intentional breach, for example) in some other manner are void. The parties may, for instance, agree on the application of fault-based liability (§ 104); in such a case, objective standards are applied to the establishment of a person's culpability: to identify carelessness or gross negligence, the behaviour of the person is compared to the care necessary.

If the seller fails to deliver the goods set out in the contract, the buyer may claim compensation for damages, except in cases where the seller is not liable for the non-performance, which means that the non-performance was caused by *force majeure* (LOA § 115, § 103 (1) and (2)). In the situation examined in the paper, in which the seller delivers to the buyer goods not conforming to the contract, the seller's liability is specified by § 218, contained in the special part of the LOA — more precisely, in Chapter 11, on contracts of sale. According to § 218 (1), the seller is liable for any lack of conformity of goods if it exists at the time when the risk of accidental loss of or damage to the goods passes to the buyer, even if the lack of conformity becomes apparent only later. The seller's liability is excluded if the buyer was or ought to have been aware of the lack of conformity of the goods (§ 218 (4)).

Since, unlike the provisions governing a contract of sale in the BGB (§ 437), the LOA does not directly refer to the provisions of the general part that would clarify the liability, we can ask what type of liability is applied with regard to the seller. On the one hand, LOA § 218 could be viewed as a provision the objective of which is to regulate the moment starting from which the seller is liable for the defects of the goods; that would mean that, in addition, the seller could be released from liability under § 103 if he or she proved that the non-performance could be excused.[*19] However, according to the comment on LOA § 218, the provision serves as a special provision to LOA § 103 (more specifically, concerning a situation described in § 103 (4), for which case the law provides that a person shall be liable for non-performance regardless of whether the non-performance is excused) and, as a result, the seller cannot be released from liability for the delivery of

[14] V. Kõve. Draft Common Frame of Reference and Estonian Law of Obligations Act: Similarities and Differences in the System of Contractual Liability. – Juridica International 2008 (14), p. 200.

[15] P. Varul *et al*. Võlaõigusseadus II. Kommenteeritud väljaanne (Law of Obligations Act II. Commented edition). Tallinn 2007, p. 41 (in Estonian).

[16] Tsiviilseadustiku üldosa seadus. – RT I 2002, 35, 216; 2007, 24, 128 (in Estonian). English text available at http://www.legaltext.ee/en/andmebaas/ava.asp?m=022 (30.03.2009).

[17] P. Varul *et al*. Võlaõigusseadus I. Kommenteeritud väljaanne (Law of Obligations Act I. Commented edition). Tallinn 2006, p. 391 (in Estonian).

[18] The legal literature refers to these two claims as to a 'small' and 'big' claims for compensation for damage.

[19] When deciding on the issue, it should be kept in mind, among other things, that the word 'liability' has a double meaning in the LOA. On the one hand, it concerns determination if a particular legal remedy can be used; on the other hand, it is about whether the obligor could be reproached for his or her behaviour. See I. Kull, M. Käerdi, V. Kõve. Võlaõigus I: Üldosa (Law of Obligations I. General Part). Tallinn 2004, p. 26 (in Estonian).

defective goods, even though it could be excused.[*20] Hence, the comments of the LOA have assumed the position that the seller is liable with no exceptions (i.e., even in the case of *force majeure*) for the defects that the goods have at the moment when the risk is passed. This, in turn, means that the seller is no longer subject to strict liability but absolute liability.

It is not possible to tell from the explanatory memorandum to the Law of Obligations Act[*21] whether the legislator had such a goal, because it does not touch upon the interrelationship between LOA § 103 and § 218. Neither has the position presented in the comments on LOA § 218 been discussed in the judicial practice of the Supreme Court. The Supreme Court has indeed analysed the issues related to LOA § 218 (1) in two judgements[*22], but instead from the perspective of what the moment is from which the seller is liable for the defects of the goods. In both cases, the Civil Chamber has noted that the non-conformity served as the basis for the seller's liability according to LOA § 100, § 101, and § 218 (1)[*23], yet this does not provide a direct answer to the question of whether the seller could be released from liability by reason of *force majeure*. In its decisions concerning contracts of sale, the Supreme Court has noted, for example, regarding reduction of price that the obligor is liable for the non-performance unless the non-performance is excused (§ 103) but that reduction of price could also be applied regardless of whether the non-performance is excused.[*24] One possible conclusion that can be drawn from this wording is that in the case of legal remedies that depend on whether the non-performance is excused (above all, compensation for damages), § 103 should still be applied, as a result of which the release of the seller from liability could be considered.

However, a different assumption can be made on the basis of decision 3-2-1-80-08 of the Supreme Court, in which the court considered the liability of a contractor in the event of lack of conformity of work (LOA § 642) and established that the special regulation of the contract for services was exhaustive regarding the liability of the contractor and that the regulation of excusability set out in LOA § 103 did not have a supplementary significance in the case of unsatisfactory performance.[*25] As the Estonian legislator has transposed the provisions of Directive 1999/44 both to the regulation of contracts of sale and to contracts for services[*26], the provisions concerning the liability of a contractor are extremely similar to those governing the liability of a seller, and it may be concluded from the decision of the Supreme Court that the existence of *force majeure* would be insignificant as regards the liability of the seller upon the delivery of defective goods.[*27]

Hence, in the sample case presented in the paper, the seller would always be liable according to Estonian law (on the assumption that the buyer was unaware and not expected to be aware of the defect of the goods). In this case, in order to file a claim for compensation for damages, the buyer need not rely on the seller's warranty according to which he is liable for the genetic abnormalities of the dog. Pursuant to LOA § 230, warranty against defects means that the seller gives a promise by which he or she secures for the buyer a more favourable position than the one prescribed by law. Since warranties are usually expressed in the delivery of a document containing the conditions of the warranty to the buyer[*28], it, obviously, cannot be concluded in the sample case that such a warranty had been given. However, if we proceed from the comments on the LOA and the position of the Supreme Court in its decision 3-2-1-80-08, the lack of warranty is probably not a problem for the buyer, because the liability of the seller is already very strict.

The Supreme Court has established that a claim for the compensation of costs to be made in the future to repair an object of sale that has defects instead of the actual curing of the damages (performance) can be regarded as a claim for the compensation of 'big' damage (i.e., compensation for damages instead of performance).[*29] The sample case allows for inferring that, as it would be impossible to eliminate the genetic abnormality, the buyer could claim compensation for damages instead of performance (i.e., elimination of the deficiency) under § 115 (1).

Unlike the principle arising from BGB § 311a, the seller's unawareness of the genetic abnormality of the dog is absolutely insignificant according to Estonian law, which has also been emphasised by the Supreme Court[*30] and derives from the fact that fault-based liability is usually not applied to breach of contract pursuant to the

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20 P. Varul *et al.* (Note 15), p. 33.

21 116 SE I. Võlaõigusseadus. Eelnõu (Law of Obligations Act. Draft). Available at http://web.riigikogu.ee/ems/saros- bin/mgetdoc?itemid=991610001&login=proov&password=&system=ems&server=ragne11 (30.03.2009) (in Estonian).

22 CCSCd ,3-2-1-131-05. – RT III 2005, 43, 425; CCSCd, 3-2-1-115-04. – RT III 2004, 28, 311 (in Estonian).

23 CCSCd, 3-2-1-131-05, paragraph 11; CCSCd, 3-2-1-115-04, paragraph 21.

24 CCSCd, 3-2-1-131-05, paragraph 18; CCSCd, 3-2-1-71-07, paragraph 11. – RT III 2007, 32, 261 (in Estonian).

25 CCSCd, 3-2-1-80-08. – RT III 2008, 43, 293 (in Estonian).

26 M. Kingisepp, The European Consumer Sales Directive — the Impact on Estonian Law. – Juridica International 2008 (14), p. 220.

27 It could also be argued that a contractor and seller do not always have identical opportunities to influence the object of contract: a contractor has more control of the work process and material used than for example a seller who has not created the object to be sold.

28 P. Varul *et al.* (Note 15), p. 73.

29 CCSCd, 3-2-1-115-04, paragraph 26; it is opined in the legal literature that such a position could obviously be discussed. See P. Varul *et al.* (Note 17), p. 392, footnote 220.

30 CCSCd, 3-2-1-115-04.

LOA. It should have been investigated in this case whether the seller was aware or ought to have been aware if the parties had made use of the possibility provided for in LOA § 106 and agreed on the application of fault-based liability. Even in that case, it would not be important whether the seller acted within the framework of his economic and professional activities or not.

As to the alleged reason for the dog's anomaly — i.e., the genetic abnormality — when proceeding from the comments on the LOA and the position of the Supreme Court in decision 3-2-1-80-08 mentioned above, the court would not apply LOA § 103 and, hence, would not analyse whether the genetic defect was a deficiency that the seller could influence in any manner or take that into account in view of the principle of reasonableness. For release from liability, the seller's sole opportunity would lie in proving that the buyer was aware or had to be aware of the defect already at the time of entry into the contract, which cannot be considered in this case because the circumstances of the case showed that the defect could not be discovered over several months even by the specialist (i.e., veterinarian) hired by the buyer. Such a very strict position concerning the seller's liability seems unfair, especially in the case where the seller himself or herself is also a consumer — for example, if the person sells his or her dog's puppy to a neighbour.

LOA § 127 (3) allows for limiting the liability of the obligor in breach by the rule of the foreseeability of the damages.[*31] However, in this case, it would not allow for reasonably limiting the compensation for damages, because the application of § 127 (3) does not presume that the obligor foresaw or should have foreseen the non-performance. Instead, what is important is whether the obligor had to foresee that such damages could result from the defect.[*32] It could be said that even the seller who is not familiar with raising dogs should foresee that an anomaly in the dog may entail expenditure on medical assistance. Yet the outcome would be unfair: it is questionable why such a seller would have to be liable for a defect that was not visible or could not have been influenced; rather, it could be said that the defect was caused, so to say, by a decision of nature.

Of course, it could be claimed that a seller can enter into a relevant agreement based on LOA § 106 with a buyer to limit his or her liability. If both parties to the contract are consumers (i.e., a C-to-C contract is involved), entry into such an agreement is usually very unlikely. Rather, such agreements can be presumed when the seller is a person engaged in economic or professional activities. It must still be said that pet raising and breeding cannot be fully equated with the manufacturing of a thing, in which case the seller as the producer can in principle fully control the production process. As the sale of pets is subject to provisions in the drafting of which the legislator has, above all, kept in mind transactions conducted with things, the achievement of a fair result also in contracts entered into between parties engaged in economic and professional activities would be secured if the seller who had delivered non-conforming goods would retain the possibility that the non-performance could be excused.

The authors of this paper find that the interpretation of LOA §§ 218 and 642 has stemmed from the fact that, when regulating the deficiencies of goods and work, the Estonian legislator proceeded from the terms used in Directive 1999/44 that tackled the seller's liability but failed to take into account that the seller's 'liability' in the directive relates to legal remedies that do not presume the seller's liability as such according to Estonian law (LOA § 105). Clause 2 of Article 8 of the directive prescribes that Member States may adopt or maintain more stringent provisions, compatible with the Treaty in the field covered by this directive, to ensure a higher level of consumer protection, but the field covered is obviously limited to the legal remedies listed in the directive in the case of consumer sale. It is not the primary goal of the directive to harmonise national law regarding C-to-C or B-to-B contracts, and, although both the Estonian and German legislator have transposed the directive to all sales rights, the Estonian legislator has disregarded Recital 6 of the directive, according to which the directive does not impinge on provisions and principles of national law related to contractual and non-contractual liability.

Hence, the authors of this paper are of the opinion that, upon the breach of any contract of sale, the seller's liability under §§ 218 and 103 should be regarded as a precondition for the claim for the compensation of damages. Legal clarity would improve if LOA § 218 contained a direct reference to § 103 (analogously to BGB § 437 referring to the particular provisions contained in the general part).

It could be further asked whether Estonian law allows for achieving a result in conjunction with §§ 218 and 103 in which the degree of liability of a seller who is a consumer would differ from that of a seller engaged in economic or professional activities. In other words, on the basis of the sale of the puppy, we could ask whether both a dog-keeper who is a seller and a seller from a professional kennel are liable for the defect of a dog in the same way. It could be presumed, though, that a kennel that has relevant knowledge and experience could at least theoretically have greater opportunities for avoiding the genetic abnormality of a dog or could at least be considered to take it into account if the defect concerned is not rare in dogs of the species in question. It is still questionable whether a person who has engaged in dog breeding for 30 years and sells about 50 pup-

[31] The obligor shall only compensate for such damage which the party foresaw or should have foreseen as a possible consequence of non-performance at the time of entering into the contract unless the damage is caused intentionally or due to gross negligence.

[32] K. Sein. Kahju ettenähtavuse reegel kahjuhüvitise piiramise alusena (Rule of Foreseeability as Basis for Limiting Compensation for Damage). – Juridica 2003/4, p. 245 (in Estonian).

pies each year could claim under Estonian law that he was not engaged in economic or professional activities and that thus the case would not be one of consumer sale[*33], but it would be significant in consideration of whether the defects appearing after the delivery of the goods can be presumed to have existed at the time of the delivery of the goods or the buyer would have to prove it.

It could be significant from the perspective of the seller's liability — that is, from the standpoint of compensation for damages — if the legal act or the contract prescribed a lower standard of liability for a seller who is a consumer. If the parties have not entered into a relevant agreement, the wording of § 103 (1) and (2) does not allow for varying the standard of liability applicable to the seller according to the person of the seller. As is evident from the case considered here, such a possibility could still derive from law, especially given that the seller who is a consumer often lacks knowledge of the possibilities for limiting contractual liability. Thus, the authors believe that the Estonian legislator could consider the possibility of setting out a lower standard of liability for a seller who is a consumer in the Law of Obligations Act, supplementing § 218 accordingly — even more so as such a rule has also been prescribed in the Draft Common Frame of Reference[*34] (DCFR), which has been said to be a document that may necessitate the supplementation of the regulation of the Law of Obligations Act regarding different types of contracts.[*35] Article IVA–4:203 of the DCFR thus limits the liability of a non-business seller for damages up to the contract price, except if he or she knew or could reasonably be expected to have known the facts relating to lack of conformity of the goods.[*36]

How should the Estonian legislator interpret the standard for liability of the seller if both parties to the contract engage in economic or professional activities? To answer this question, it would be reasonable to analyse those provisions of the CISG that served as one of the most important international sources in drafting the LOA's §§ 103 and 218.[*37]

4. The seller's liability according to the CISG

The liability of the obligor is governed by Article 79 (1) of the CISG, which prescribes the release of the obligor from any of his or her obligations in the case of circumstances that can be regarded as *force majeure*.[*38] The provisions of the LOA and CISG are very similar in this respect. According to Article 36 (1) of the CISG, the seller is liable for any lack of conformity that exists at the time when the risk passes to the buyer, even though the lack of conformity may become apparent only after that time.[*39] If the delivery of defective goods to the buyer can be excused, it would mean, above all, that the seller would not have to compensate the buyer for damages caused by non-performance.[*40] In other words, as in the LOA and BGB, a claim for compensation for damages presumes the liability of the obligor. The question of whether the delivery of defective goods by the seller to the buyer could be excused is complicated by the wording of Article 79 of the CISG, containing the word 'impediment' but not prescribing excuse only for the complete non-performance — rather, it speaks about failure to perform any obligation.[*41] Some commentators are of the opinion that the word 'impediment' in Article 79 (1) should be interpreted as referring to a circumstance fully impeding the performance of the

[33] In the above case, the seller pointed out in the burden of proof among other things that since he was breeding dogs as a hobby, he was not an entrepreneur as defined in BGB § 14 and a contract entered into between him and the buyer was not a contract of consumer sale. The BGH did not consider it necessary to analyse this because it established that the seller was not liable for the genetic abnormality of the pet anyway. According to LOA § 208 (4), consumer sale is the sale of a thing where a consumer is sold a movable by a seller who enters into the contract in the course of his or her economic or professional activities; as the Act does not prescribe that the seller should be a legal person or a sole proprietor, it may be possible on the basis of Estonian law that the contract would still be considered consumer contract.

[34] C. von Bar, E. Clive, H. Schulte-Nölke (eds.). Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference, Interim Outline Edition. München: Sellier 2008.

[35] P. Varul. The Creation of New Estonian Private Law. – European Review of Private Law 2008 (16) 1, p. 109.

[36] See also U. Huber. Modellregeln für ein Europäisches Kaufrecht. – Zeitschrift für Europäisches Privatrecht 2008/4.

[37] The persons drafting the Act have found the regulation of the CISG to be internationally the most acceptable both in theory and practice especially regarding the contract of sale. See Võlaõigusseadus. Eelnõu (Note 21). It is important to keep in mind that the CISG only regulates contracts of sale in which case the parties reside in different countries and the parties engage in economic and professional activities.

[38] Pursuant to Article 79 (1) of the CISG, a party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.

[39] *Cf.* LOA § 218 (1).

[40] CISG Art. 79 (5).

[41] When comparing the similar provisions of the LOA and the CISG, it is important to note that LOA § 103 (1) also speaks about the obligor's liability for non-performance, except when the non-performance can be excused. LOA § 100 refers to non-performance both as a failure to perform and unsatisfactory performance.

obligation and that, hence, Article 79 would not be applicable to the delivery of defective goods to the buyer.[*42] The prevailing opinion is, however, that the delivery of non-conforming goods to the buyer also is a failure to perform an obligation[*43] and falls within the area of government of Article 79.[*44] The preference of such an interpretation of Article 79 in the comments on the CISG has been justified by the fact that the seller's unlimited liability for unavoidable and unforeseeable circumstances would not be in the buyer's interests, as the seller would include the likelihood of *force majeure* in calculation of the price, which would increase the price of the goods.[*45] In addition, a party to the contract cannot be expected to assume liability for absolutely all circumstances that could affect the performance of the contract, including circumstances that cannot be foreseen upon entry into the contract and that the obligor cannot affect in any manner.[*46]

The question of whether the breach of the obligation of the seller as manifested in the delivery of defective goods to the buyer could be excused has been examined by courts several times upon the application of the CISG. The court has only once assumed the position that the delivery of defective goods could be excused.[*47] The position taken by the court was, however, undermined by the fact that the final remedy came to be reduction of price, which can be applied on the basis of the CISG regardless of whether the obligation of the obligor can be excused. There are no more recent judgements available that would be so specific, but in the relevant cases the courts have rather admitted to the possibility that the delivery of defective goods by the seller to the buyer could be excused.[*48]

The analysis of the judicial practice described above shows that there may only be rare cases in which the delivery of defective goods can be excused. To date, excluding the seller from liability has been prevented by the fact that the criteria necessary for excluding from liability specified in Article 79 (1) of the CISG have not been met. According to the courts, the non-performance has not been beyond the seller's control and, consequently, it cannot be excused.

In all of the judgements relevant to the subject of this paper and on the basis of the CISG so far, the seller can be deemed to have only served as a broker. Yet the delivery of defective goods by a seller who is the producer of the goods or has previously been their owner for an extended time could be excused. In such a case, the number of cases in which the breach of the obligations of the seller could be excused is even more limited, because of the more extensive control of the seller with regard to the goods.[*49] However, such cases cannot be fully excluded. This could be considered, for example, in the case presented in the introduction to this paper. Let us presume that the puppy was sold by a kennel located in Germany and purchased by a kennel located in Estonia that would wish to take it to dog shows and use it in breeding. The other facts of the case remain the same. With due regard to the positions provided in the comments on the CISG and the judicial practice so far, the court would certainly consider whether the breach of the obligation of the seller could be excused if the seller relied on the possible excusability. We cannot exclude the possibility of the court ruling that the damage to the puppy's ankle could be viewed as a defect caused by *force majeure* and, hence, the seller not being deemed liable for the breach of his obligation.

How would the application of Article 79 be influenced by Article 36, which analogously to LOA § 218 provides for the liability of the seller for the non-conformity of the goods if it existed at the time of passing of the risk to the seller? Article 36 has been viewed as setting a time limit as a precondition for the liability of the seller in the first place. The issue has been analysed, for example, by the Appellate Court of Bern in the 'wire and

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[42] For example, J. O. Honnold. Uniform Law for International Sales under the 1980 United Nations Convention. Third Edition. The Hague 1999, comm 427; B. Nicholas. Impracticability and Impossibility in the U.N. Convention on Contracts for the International Sale of Goods. § 5.02, comment 2. Available at http://www.cisg.law.pace.edu/cisg/biblio/nicholas1.html (17.03.2009).

[43] According to the wording of Article 79 of the CISG 'A party is not liable for a failure to perform any of his obligations ...'

[44] P. Schlechtriem, I. Schwenzer. Commentary on the UN Convention on the International Sale of Goods. Oxford 2005, Article 79, paragraph 6; F. Enderlein, D. Maskow. International Sales Law: United Nations Convention on Contracts for the International Sale of Goods: Convention on the Limitation Period in the International Sale of Goods. New York 1992, Article 79, comment 2; F. Ferrari, H. Flechtner, R. A. Brand. The Draft UNICITRAL Digest and Beyond: Cases, Analysis and Unresolved Issues in the U.N. Sales Convention. London 2004, Art. 79, comment IV A 4; C. Liu. Force Majeure: Perspectives from the CISG, UNIDROIT Principles, PECL and Case Law, comment 3. Available at http://www.cisg.law.pace.edu/cisg/biblio/liu6.html#fmiii (11.03.2009).

[45] P. Schlechtriem, I. Schwenzer (Note 44), Article 79, paragraph 1.

[46] K. Sein. Mis on vääramatu jõud? (What is *Force Majeure*?) – Juridica 2004/8, p. 511 (in Estonian).

[47] CISG Case Presentation France 19. January 1998 District Court Besancon. Available at http://cisgw3.law.pace.edu/cases/980119f1.html (12.03.2009).

[48] CISG Case Presentation Germany, 31 March 1998, Appellate Court Zweibrücken (Vine wax case). Available at http://cisgw3.law.pace.edu/cases/980331g1.html (11.03.2009); CISG Case Presentation Germany, 24 March 1999, Supreme Court (Vine wax case). Available at http://cisgw3.law.pace.edu/cases/990324g1.html (11.03.2009); CISG Case Presentation Germany, 9 January 2002, Supreme Court (Powdered milk case). Available at http://cisgw3.law.pace.edu/cases/020109g1.html (11.03.2009); CISG Case Presentation Switzerland, 11 February 2004, Appellate Court Bern (Wire and cable case). Available at http://cisgw3.law.pace.edu/cases/040211s1.html (9.03.2009). See also F. Ferrari, H. Flechtner, R. A. Brand (Note 44), Article 79, comment 8; P. Schlechtriem. Federal Supreme Court (Bundesgerichtshof), Civil Panel VII, 24 March 1999, Index No. VIII ZR 121/98. Available at http://cisgw3.law.pace.edu/cases/990324g1.html (9.03.2009).

[49] P. Schlechtriem (Note 48).

cable case' in which it noted, *inter alia*, that Article 36 had to be viewed in conjunction with Article 79.*[50] According to the reasoning of the court, the seller is liable under Article 36 but in the case of *force majeure*, the possibility of applying Article 79 has to be taken into account regardless of the provisions of Article 36. Hence, if there are grounds for the application of Article 79, this precludes the liability of the seller stemming otherwise from Article 36.*[51]

In the cases in which the liability of the seller for the delivery of defective goods to the buyer cannot be applier of law on the basis of Article 79 (1) of the CISG, the CISG relieves the strict objective standard for the obligor through the rule of the foreseeability of damages.*[52] According to this, the damages may not exceed the loss that the party in breach foresaw at the time of conclusion of the contract. This helps to avoid the creation of an unreasonably extensive obligation of the obligor to compensate for damages.

5. Conclusions

The comparison provided in the paper showed that the extent of the liability of the seller is different in German and Estonian law and that the seller's liability is considerably stricter according to the applicable interpretation of Estonian law, which essentially means absolute liability.

The authors of this paper are of the opinion that the Estonian applier of law could abandon such interpretation of the Law of Obligations Act, according to which in fact absolute liability must be applied to the seller who has delivered defective goods to the buyer.

The first reason is that recognition of the absolute liability of the seller would mean disregard for the fact that the Estonian legislator, in creating the system of contractual liability, has taken as the basis the CISG, which governs contracts of sale and which prescribes the possibility of the seller to be released from the obligation to compensate for damages if non-performance was caused by circumstances that were beyond the seller's control and could not have been reasonably foreseen.

Secondly, such a strict approach would entail unfair consequences above all for a seller who is a consumer. There is no convincing justification for such strict liability of the seller who is a consumer if the internationally recognised approach is that even if both parties engage in economic or professional activities, the principle of strict liability and not absolute liability should be taken as the basis in compensation for damages

Thirdly, the authors hold that also recognition of the absolute liability of the seller is not justified because of an unjustified disregard for the fact that Directive 1999/44 does not impinge on the provisions and principles of national legislation related to contractual and non-contractual liability in transposition of the directive and preparation and interpretation of the text of the LOA. The German legislator has prevented deviation from the principle of fault-based liability applicable in the BGB by giving direct reference in BGB § 437 to the provisions of the general part, which discuss the liability applied. The authors are of the opinion that the Estonian legislator should also adhere to the regime of contractual liability for which it opted when drafting the Law of Obligations Act and supplement the LOA's § 218 with a direct reference to § 103.

[50] CISG Case Presentation Switzerland, 11 February 2004 Appellate Court Bern (Wire and cable case). Available at http://cisgw3.law.pace.edu/cases/040211s1.html (9.03.2009).

[51] P. Schlechtriem, I. Schwenzer (Note 44), Art. 36, paragraph 6.

[52] The second sentence of Article 74 of the CISG. See also P. Schlechtriem, I. Schwenzer (Note 44), Article 74, paragraph 34. The analogous provision in the LOA is § 127 (3). In the CISG, the rule of foreseeability is understood proceeding from the reasonable division of risk between the parties. On the basis of the LOA, the damage foreseen is such as the obligor foresaw or could have foreseen upon entry in the contract.

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The Importance of Distinguishing between Forms of Fault in the Law of Delict

1. Introduction

The tortfeasor's fault is one of the prerequisites for general delictual liability (general elements of a delict). Section 1043 of the Law of Obligations Act[*1] (LOA) provides that a person (tortfeasor) who unlawfully causes damage to another person (injured party) shall compensate for the damage if the tortfeasor is culpable of causing the damage or is liable for causing the damage pursuant to law. The burden of proving the lack of fault lies with the tortfeasor according to LOA § 1050 (1).

As a rule, the form of fault is irrelevant as regards the creation of delictual liability and the scope of the tortfeasor's liability. However, there are certain cases in the law of delict where the forms of fault have to be distinguished. Such distinction is often necessary to reach a fair final solution in a particular case.

The purpose of this article is to study the cases in which it is important to distinguish between forms of fault in the law of delict. The main sources for the article are the LOA, the Common Frame of Reference[*2] (CFR) and the German Civil Code[*3] (BGB). The article also makes use of relevant legal literature, case law, and the laws and regulations of various countries.

Apart from the introduction and summary, the article consists of six parts, the first of which gives a brief overview of the forms of fault, while the remaining parts analyse specific cases where a distinction between forms of fault may be relevant in the law of delict.

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1 Võlaõigusseadus. – RT I 2001, 81, 487; 2007, 56, 375 (in Estonian). Available in English at http://www.just.ee/23295.

2 The draft Common Frame of Reference, which may also be called the draft European Civil Code and which was prepared by the Study Group on a European Civil Code, is available at http://www.sgecc.net/pages/en/texts/index.draft_articles.htm. About the feasibility of the European Civil Code and the idea behind it, see M. W. Hesselink (ed.). The Politics of a European Civil Code. Hague: Kluwer Law International 2006, pp. 73–79.

3 The text of the BGB is available at http://www.gesetze-im-internet.de/bgb/BJNR001950896.html.

2. Forms of fault

The generally recognised forms of fault are intent, which is divided into direct and indirect intent, and negligence, which is divided into carelessness and gross negligence. According to LOA § 104 (2), the forms of fault are carelessness, gross negligence, and intent.

LOA § 104 (5) provides that intent is the will to bring about an unlawful consequence upon the creation, performance or termination of an obligation. CFR Article 3:101 provides that a person causes legally relevant damage intentionally when that person causes such damage either: (a) meaning to cause damage of the type caused; or (b) by conduct which that person means to do, knowing that such damage, or damage of that type, will or will almost certainly be caused.

LOA § 104 (5) defines the concept of direct intent. It may be said that the concepts of direct intent as defined in the LOA and CFR (Article 3:101 (a)) are principally similar in that they relate direct intent to a person's wish to cause damage or an unlawful consequence. As opposed to the LOA, the CFR also defines indirect intent (Article 3:101 (b)). In Estonia, indirect intent has been left to legal literature and case law to define.[*4]

Like the concept of intent, the legal concepts of carelessness and gross negligence have been introduced in the Estonian positive law. LOA § 104 (3) provides that carelessness is failure to exercise necessary care. Necessary care should be assessed considering various aspects, especially the scope and likelihood of damage, as well as the expenses that a person should have incurred to avoid the damage.[*5] It should be added that in the law of delict, carelessness should be also assessed under LOA § 1050 (2), which provides that the situation, age, education, knowledge, abilities and other personal characteristics of a person shall be taken into consideration upon assessment of the fault of the person.

According to CFR Article 3:102, a person causes legally relevant damage negligently when that person causes the damage by conduct which either: (a) does not meet the particular standard of care provided by a statutory provision whose purpose is the protection of the injured party from the damage suffered, or (b) does not otherwise amount to such care as could be expected from a reasonably careful person in the circumstances of the case.

CFR Article 3:102 (b) is especially similar to LOA § 104 (3). An assessment of necessary care also involves deciding what kind of conduct could be expected from a reasonably careful person in the circumstances of the case. The Estonian law does not contain a provision similar to CFR Article 3:102 (a). However, there are provisions in the LOA that specify a person's care, see, e.g., LOA § 762 — the care of a provider of health care services. A major difference between CFR Article 3:102 and the LOA is that LOA § 1050 (2) requires that subjective circumstances should be taken into account when assessing carelessness.

Unlike the CFR, the LOA also defines gross negligence: LOA § 104 (4) provides that gross negligence is failure to exercise necessary care to a material extent. The meaning of "material extent" could be questioned. This is primarily a question of assessment that depends on the standards applicable in the relevant field. The author of this article believes that carelessness and gross negligence should be distinguished on the basis of factual circumstances and, in each particular case, one should try to answer the question of whether the person has failed to take the precautions that seem to be elementary in the particular situation.

3. Implication of forms of fault upon joint causation of damage

The importance of distinguishing between forms of fault may firstly become evident when determining the scope of liability in the relations between joint tortfeasors. Although joint tortfeasors bear solidary liability for compensating the injured party, their liability need not necessarily be equal. A fair division of liability can be reached and should be reached by taking various circumstances into account.

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[4] See, e.g., I. Kull, M. Käerdi, V. Kõve. Võlaõigus I. Üldosa (Law of Obligations I. General Part). Tallinn 2004, p. 200 (in Estonian). It should be noted that indirect intent may be relevant, e.g., to the creation of liability under LOA § 1045 (1) 8), as well as, e.g., the division of the scope of liability in the relations between joint tortfeasors. The fact that LOA does not define indirect intent does not mean that indirect intent as such no longer exists.

[5] H. Kötz, G. Wagner. Deliktsrecht. Neunte, überarbeitete Auflage. Neuwied, Kriftel: Luhterhand 2001, p. 45. T. Tampuu has also stressed the importance of such factors. He believes that an assessment of a breach of the duty of care should also involve consideration of a reasonable person's understanding of the existence of duties of conduct or the circumstances precluding the unlawfulness of the act, and also whether the tortfeasor followed (especially public law) safety rules. See T. Tampuu. Deliktiõigus võlaõigusseaduses. Üldprobleemid ja delikti üldkoosseisul põhinev vastutus (Tort Law in the Law of Obligations Act: General Problems and Liability). – Juridica 2003/2, p. 81 (in Estonian).

CFR Article 6:105 (1) provides that where several persons are liable for the same legally relevant damage, they are liable solidarily. As for the relationship between the solidary debtors themselves, the share of liability is equal unless different shares are more appropriate, taking into consideration all circumstances of the case and in particular fault or the extent to which a source of danger mentioned in Chapter 3 contributed to the occurrence or extent of the damage (2).

According to BGB § 426, joint debtors must compensate for the caused damage in equal parts, unless it is proved that the compensation obligation should be divided disproportionately. In the French law, the balance of liability in the event of joint liability depends on the weight of each person's breach. Where one tortfeasor is liable for strict liability and the other for *faute*, only the latter may remain liable as between the two persons.[*6]

The form of fault is principally one of the factors regulating the relations between joint tortfeasors also in many other legal regimes. For example in Italy, the right of recourse of the person who compensated for damage depends on the person's fault and the gravity of the consequences of his or her act. The Hungarian jurist Harmathy claims that although the question of whether damage was caused intentionally or by negligence is usually irrelevant in cases of delictual liability, it is a decisive element in settling the mutual disputes between tortfeasors themselves, and is probably even more important than the act that caused the damage.[*7] Also, according to Swedish civil law, the type of the tortfeasor's fault is decisive when determining the division of the tortfeasors' liability.[*8]

In the Estonian law, the solidary liability of joint tortfeasors is set forth in LOA § 137 (1).[*9] The relations between joint tortfeasors are governed by LOA § 137 (2), according to which in relations between the persons specified in subsection (1) (joint debtors), liability shall be divided taking into account all circumstances, in particular the gravity of the non-performance or the unlawful character of other conduct and the degree of risk borne by each person.

This provision establishes an open list of circumstances that have to be taken into account in the division of liability between solidary debtors. The gravity of the non-performance should be thus considered in the first order, followed by the unlawful character of other conduct and finally the intensity of the risk (the degree of risk of the major source of danger). What should be taken into account as regards the unlawful character of other conduct may remain unclear, because the law does not distinguish between degrees of unlawfulness. One should probably be guided by the understanding that where, e.g., damage is caused by a violation of a provision of the Penal Code, the degree of unlawfulness is greater when compared to a violation of, e.g., property maintenance rules.

A comparison of LOA § 137 (2) with relevant provisions of the CFR shows that as opposed to the CFR, the LOA stipulates no direct obligation to take fault into account. However, considering that the fault of the tortfeasor is the most important aspect in the relations between several tortfeasors in the legal regimes of all the observed countries, it should be considered natural that "all circumstances" in LOA § 137 (2) cover the fault of the tortfeasors. The fact that the division of liability between solidary debtors should consider their fault has also been noted by the Civil Chamber of the Supreme Court (CCSC) in its decision of 25 September 2006 in matter No. 3-2-1-70-06.[*10] The decision also notes, with due justification, that in the event of a tortfeasor's malicious unlawful act motivated by lucrative interest, the court may, based on the principle of good faith, impose the entire liability for compensation on the one of the solidary debtors who acted maliciously and pursued a lucrative interest.

Distinction between forms of fault is decisive where the tortfeasors (or one or some of them) are liable under the provisions governing strict liability. In such case, the division of the compensation obligation between the liable persons should take into account the wrongfulness of the behaviour and the form of fault of the tortfeasors pursuant to LOA § 1050 (3).[*11]

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6 C. v. Bar, P. Cotthard. Deliktsrecht in Europa. Systematische Einführungen, Gesetztexte, Übersetzungen. Landberichte Frankreich, Griechenland. Cologne, Berlin, Bonn, Munich: Carl Heymanns Verlag KG 1993, p. 53.

7 A. Harmathy. Introduction to Hungarian Law. The Hague, London, Boston: Kluwer Law and International 1998, p. 118.

8 S. Strömholm. An Introduction to Swedish Law. 2nd ed. Norstedts 1998, p. 313.

9 A difference in the legal bases for the liability of the tortfeasors is irrelevant to the creation of solidary liability. See CCSCd, 7.12.2005, 3-2-1-149-05. – RT III 2005, 45, 441 (in Estonian).

10 RT III 2006, 32, 274 (in Estonian).

11 A situation where two major sources of danger have mutually caused damage to each other should be regarded separately from the events governed by LOA § 1050 (3). In CCSCd, 8.02.2000, 3-2-1-11-00, the CCSC noted that where possessors of several major sources of danger have jointly caused damage to themselves, the culpability of each such possessor is relevant in determining their civil liability. See RT III 2000, 5, 54 (in Estonian). This position has been reviewed, however in CCSCd, 24.09.2007, 3-2-1-75-07, the court found that liability independent of the culpability of the possessor of a major source of danger, i.e., strict liability, is applied even where the possessor of the major source of danger who caused the damage was not culpable of causing damage to another possessor of a major source of danger. In the event of the defendant's strict liability, the possible role of the plaintiff as the possessor of another major source of danger in causing the damage should be assessed as a basis for possible reduction of compensation. See RT III 2007, 31, 255 (in Estonian).

4. Implication of forms of fault upon reduction of compensation

Distinction between the forms of fault may be relevant to limiting the compensation payable for damage based on the principle of fairness.

The drafters of CFR have also come to the conclusion that in certain cases, the tortfeasor should be relieved of liability in full or in part, as CFR Article 6:202 provides that where it is fair and reasonable to do so, a person may be relieved of liability to compensate, either wholly or in part, if, where the damage is not caused intentionally, liability in full would be disproportionate to the accountability of the person causing the damage or the extent of the damage or the means to prevent it.

Also, § 44 (2) of the Swiss Civil Code*[12] (ZGB) provides that where the tortfeasor would meet economic difficulties as a result of fully compensating for the damage, and if the tortfeasor did not cause the damage by gross negligence or intentionally, the court may reduce the compensation. However, according to the BGB and the French *Code Civil*[*13], a low degree of the tortfeasor's fault does not serve as a basis for reduction of compensation.

LOA § 140 (1) provides that the court may reduce the amount of compensation for damage if compensation in full would be grossly unfair with regard to the obligated person or not reasonably acceptable for any other reason. In such case, all circumstances, in particular the nature of the liability, relationships between the persons and their economic situations, including insurance coverage, shall be taken into account.*[14] It means that where damage was caused jointly, each tortfeasor can be ordered to pay a different amount of compensation under LOA § 140 (1).

Although LOA § 140 (1) does not expressly require that fault should be taken into account, it could serve as one of the criteria in the application of this provision. Namely, a low degree of the tortfeasor's fault could serve as a basis for reduction of compensation in addition to the other circumstances specified in LOA § 140.

While the CFR expressly provides that relief from liability is out of the question in the event of damage caused intentionally, LOA § 140 (1) does not contain such a limitation. However, LOA § 140 (1) can certainly be interpreted similarly to CFR: e.g., reduction of liability under the LOA should be out of the question where this would be fair considering the relations between the persons and their economic situation, but where the tortfeasor caused the damage intentionally (or by gross negligence).

5. Implication of the forms of fault upon compensation for non-pecuniary damage

The importance of distinguishing between forms of fault may also be apparent in deciding on the amount of compensation for non-pecuniary damage. It should be noted that the type of the tortfeasor's fault is an import basis for ordering compensation for non-pecuniary damage in the Federal Republic of Germany. Schlechtriem argues that compensation should take into account both the economic situation of the tortfeasor and the degree of his or her fault.*[15] The CFR does not specify which circumstances should be taken into account when ordering the payment of compensation for non-pecuniary damage. CFR Article 6:203 (2) provides that national law determines how compensation for personal injury and non-economic loss is to be quantified.

The provisions of the LOA governing compensation for non-pecuniary damage (LOA § 130 (2) and § 134 (2)–(4) are relevant to the law of delict) do not expressly require the tortfeasor's fault to be taken into account when determining the amount of compensation. However, one may take the view that since determining the amount of compensation for non-pecuniary damage is not subject to clear criteria, it may be considered reasonable that a person who caused non-pecuniary damage intentionally is liable to a greater extent than a person who acted carelessly.*[16]

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[12] Schweizerisches Zivilgesetzbuch. Zürich: Schulthess Polügraphischer Verlag 1996.

[13] The French Civil Code. Text as published in: C. v. Bar, P. Gotthard (Note 6).

[14] It should be noted that the application of LOA § 140 (1) may fail as a result of the provisions of LOA § 139 (3). See CCSCd, 26.06.2006, 3-2-1-53-05. – RT III 2006, 33, 283 (in Estonian).

[15] P. Schlechtriem. Võlaõigus. Eriosa. Neljas, ümbertöötatud trükk (Law of Obligations. Special Part. Fourth, revised edition). Tallinn: Õigusteabe AS Juura 2000, p. 302 (in Estonian).

[16] A direct reference to the requirement to consider the type and degree of culpability when determining the amount of compensation for non-pecuniary damage is made in § 9 (2) of the State Liability Act (riigivastutuse seadus. – RT I 2001, 47, 260; 2006, 48, 360, in Estonian).

The need to consider fault when deciding on compensation for non-pecuniary damage has also been confirmed by Estonian case law (e.g., CCSCd, 17.10.2001, 3-2-1-105-01*[17]). Also in its decision of 22.10.2008, in matter No. 3-2-1-85-08, the Supreme Court noted that when ordering the payment of a reasonable amount of compensation for non-pecuniary damage, the court takes into account, regardless of the requests of the parties, the type and gravity of the offence, the offender's fault and its degree, the economic situation of the parties, the injured party's own role in causing the damage, and other circumstances, disregard for which could result in unfair compensation.*[18]

6. Implication of the forms of fault upon reduction of compensation due to the injured party's own role in causing the damage

6.1. General

The delict law of most countries contains provisions according to which compensation can be reduced or refused if the injured party's own role in causing the damage (or his or her fault) is proved. However, there is no common position as regards, e.g., the form in or degree to which the injured party's fault may be considered when adjusting the compensation.

In order to explain the conceptual apparatus, it should be noted that the laws and theoretical literature of most countries mention namely the fault of the injured party as a basis for reduction of compensation: in the Federal Republic of Germany the relevant term is contributory fault (*Mitverschulden*); common law countries speak about contributory negligence.*[19] In Estonia, LOA § 139 does not use the concept of the injured party's contributory fault. LOA § 139 (1) provides that if damage is caused in part by circumstances dependent on the injured party or due to a risk borne by the injured party, the amount of compensation for the damage shall be reduced to the extent that such circumstances or risk contributed to the damage.*[20]

It is noted in the decision of the CCSC of 11.05.2005, matter No. 3-2-1-38-05, that application of LOA § 139 (1) and (2) does not involve an assessment of the injured party's negligence, i.e., compensation can be reduced under the above provision even if the injured party was not culpable of causing the damage.*[21] The author of this article agrees that LOA § 139 (1) is essentially also applicable where the injured party is not culpable. For example, the injured party's fault need not be taken into account if the damage was partly caused as a result of a danger for which the injured party is responsible, or if the damage resulted from the actions of persons for whom the injured party is responsible. However, the author still considers that in other cases, the question of whether the damage was partly caused by circumstances dependent on the injured party should often be answered with due regard to whether the injured party can be reproached for his or her conduct. As a rule, if the injured party has not behaved reproachably, the damage cannot be claimed to have resulted (at least) in part due to circumstances dependent on the injured party.*[22]

From the legal dogmatic viewpoint, it is important to distinguish between the injured party's contributory fault and his consent to the damage being caused. The former concerns the scope of compensation; the latter is a circumstance precluding unlawfulness (LOA § 1045 (2) 2)).

It is noted in special literature that voluntary acceptance of risk is similar, though not identical to the consent of the injured party. A person acts at the person's own risk when the person voluntarily places himself or herself

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17 RT III 2001, 28, 105 (in Estonian).

18 RT III 2008, 41, 282 (in Estonian).

19 Markesinis notes that the continental European concept of the injured party's fault is a broader concept than contributory negligence, as it may also cover the injured party's intentional activity. See B. S. Markesinis. The German Law of Obligations. Volume 2. The Law of Torts. A Comparative Introduction. 3rd ed. Oxford: University Press 1997, p. 103.

20 LOA § 139 (2) allows for a reduction of compensation also if the injured party failed to draw the attention of the person causing the damage to an unusually high risk of damage or to prevent the risk of damage or to perform any act which would have reduced the damage caused if the injured party could have reasonably been expected to do so.

21 RT III 2005, 18, 187 (in Estonian).

22 Even when compensation is reduced because of the inculpable injured party's role in causing the damage, the person's behaviour still needs to be assessed. Legal literature also generally affirms the possibility of taking an inculpable injured party's behaviour into account, because the question is not in the person's liability but in the principle that every person, even an inculpable person, has to incur the damage caused to the person by circumstances dependent on himself/herself. An example from general case law is the case where an 11-year-old child ran to the carriageway to get his ball and suffered damage as a result of a car running over him. In this case, the compensation was reduced by 75%. See R. Tiernan. Tort in a Nutshell. 4th ed. London: Sweet & Maxwell 1996, p. 46.

in a situation the risky nature of which is generally known — v*olenti non fit iniuria* (a plaintiff who risks the defendant's potential careless behaviour risks losing his defence).*[23] CFR Article 5:101 (2) also mentions that the same applies (i.e., a person is relieved of liability to the injured party and any other damaged party) if the injured person, knowing the risk of damage of the type caused, voluntarily exposes himself to that risk and is to be regarded as accepting it. The LOA does not contain any provision similar to CFR Article 5:101 (2).*[24]

6.2. Consideration for the injured party's contributory fault upon reduction of compensation

Before the LOA entered into force, the amount of compensation could be reduced in Estonia only in the event of the injured party's gross negligence (and intent) (Civil Code of the Estonian Soviet Socialist Republic*[25], § 462 (1)). The injured party's carelessness was knowingly left out of the bases for reduction of compensation.*[26] This paved the way for a number of court decisions whose fairness is arguable: e.g., the compensation was not reduced in a situation where the injured party ran to the football goal after another player had scored a goal and lifted himself up on the goal's crossbar using his hands, as a result of which the goal fell on the injured party. The court admitted that although the injured party behaved carelessly, this did not serve as a basis for reduction of compensation.*[27] LOA § 139 (1) does not limit the reduction of compensation the way § 462 (1) of the Civil Code of the Estonian Soviet Socialist Republic did.

It should be added that the Estonian courts have repeatedly taken the view that a compensation claim may be precluded or the tortfeasor's liability also limited, e.g., where the injured party failed without good reason to dispute an administrative act from which the damage resulted, while disputing the act would have prevented the occurrence or escalation of the damage.*[28]

In the Federal Republic of Germany, if the injured party's culpable behaviour has contributed to the damage, the obligation and scope of compensation depend on various circumstances, especially the degree to which one or the other party caused the damage (BGB § 254 (1)). LOA § 139 (2) is similar to BGB § 254 (2). In German law, the contributory fault of the injured party does not result in a clearly defined legal consequence. The injured party's contributory fault may be so small that it is not considered at all, or it may be so important that it precludes a claim entirely.*[29]

The injured party's fault or participation in the causation of damage as a basis for reduction of compensation is recognised in most legal orders. For example in France, where the injured party's participation in causing damage leads to the division of damage (with the exception of personal injury caused by a motor vehicle);*[30] Switzerland (see ZGB § 44 (1)); as well as Sweden, where only the injured party's intention or gross negligence is taken into account*[31], etc.

In the UK, an injured party was not able to claim compensation before 1945 if the injured party himself was culpable in the damage (regardless of the extent). From 1945, when the Contributory Negligence Act came into force, an injured party's claim must not be dismissed if the injured party contributed to the damage. However, compensation is reduced to the degree deemed fair by the court, considering the injured party's role in causing the damage.*[32]

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[23] C. v. Bar, J. Shaw. Deliktsrecht in Europa. Systematische Einführungen, Gesetztexte, Übersetzungen. Landberichte Dänemark, England, Wales. Cologne, Berlin, Bonn, Munich: Carl Heymanns Verlag KG 1993, p. 35.

[24] About voluntary acceptance of risk see, e.g., J. Lahe. Riigikohtu praktika tähendus riskivastutuse edasiarendamisel (Implication of the Supreme Court Case Law for the Development of Strict Liability). – Kohtute aastaraamat 2007 (Courts Yearbook 2007). 2008, pp. 99–105 (in Estonian).

[25] The Civil Code was passed by the Supreme Council of the Estonian Soviet Socialist Republic on 12 June 1964. – ÜNT 1964, 25, 115; RT I 1997, 48, 775 (in Estonian).

[26] E.g., a situation where a person ineptly performed a trampoline jump and received injuries has been classified as carelessness. The Tallinn Circuit Court found that since the plaintiff was a beginner firefighter/rescuer and had no theoretical preparation for or practical experience in trampoline jumps, the lack of skill to perform a trampoline jump correctly could not classify as gross negligence. See Tallinn Circuit Court decision, 24.05.2000, II-2/698/2000. Also classified as gross negligence by the Supreme Court was an employee's conduct who started to fix a breakdown in an electrical system on his own initiative and without guidance. See CCSCd, 13.06.2002, 3-2-1-79-02. – RT III 2002, 19, 230 (in Estonian).

[27] Tartu CCd, 30.04.2002, 2-2-151/2002.

[28] See, e.g., CCSCd, 24.12.2002, 3-2-1-153-02 (RT III 2003, 2, 25; in Estonian) and Tartu CCd, 27.12.2002, 2-3-206/2002.

[29] E. Deutsch. Unerlaubte Handlungen, Schadenersatz und Schmerzengeld. 3., ergänzte Aufl. Cologne, Berlin, Bonn, Munich: Carl Heymanns Verlag KG 1995, p. 91.

[30] C. v. Bar, P. Cotthard (Note 6), p. 46.

[31] S. Strömholm (Note 8), p. 312.

[32] V. Harpwood. Principles of Tort Law. 4th ed. London, Sydney 2000, p. 460; C. v. Bar, J. Shaw (Note 23), p. 34.

CFR Article 5:102 (1) provides that where the injured person contributes by their own fault to the occurrence or extent of legally relevant damage, reparation is to be reduced according to their degree of fault. However, pursuant to CFR Article 5:102 (2), no regard is to be had to: (a) an insubstantial fault of the injured person; (b) fault or accountability whose contribution to the causation of the damage is insubstantial; (c) the injured person's want of care contributing to that person's personal injury caused by a motor vehicle in a traffic accident, unless that want of care constitutes profound failure to take such care as is manifestly required in the circumstances. According to CFR Article 5:102 (3) and (4) compensation is likewise to be reduced if the person for whom the injured person is responsible contributes by their fault to the occurrence or extent of the damage, and if and in so far as any other source of danger for which the injured person is responsible under Chapter 3 contributes to the occurrence or extent of the damage.

While LOA § 139 (1) is principally similar to CFR Article 5:102 (1), although the former does not mention the injured party's fault, the LOA does not contain any provisions similar to CFR Article 5:102 (2) (a) and (b). LOA § 139 (1) does, however, allow for disregarding the injured party's insubstantial fault. Comparable to CFR Article 5:102 (2) (c) is LOA § 139 (3), but the latter applies not only to traffic accidents but to all events resulting in the death of or damage to the health of a person.[*33]

The LOA does not contain any provision similar to CFR Article 5:102 (3), but it may be asked in the context of the LOA whether the injured party's role involves the culpable conduct of persons for whom the injured party is responsible. LOA § 139 allows for an affirmative answer, because the conduct of persons for whom the injured party is liable is a circumstance dependent on the injured party. However, it should be noted that the author of this paper considers possible an interpretation according to which in the events when the damage to the injured party was caused by a person for whom the injured party is responsible and by a third person, these persons should be treated as joint tortfeasors and LOA § 139 should not be applied.

LOA § 139 is not consistent in its non-use of the concept of the injured party's fault. Namely, where damage takes the form of a person's death or damage to their health, compensation may be reduced only if the injured party's intent or gross negligence contributed to the damage. Therefore, in the event of causing the death or damage to the health of a person, compensation cannot be reduced on the grounds that the injured party behaved carelessly or the damage resulted from a danger for which the injured party was liable, but in the realisation of which the injured party was not at fault (by way of gross negligence or intent). The reasons behind these special provisions are not unambiguous: it is not clear whether the tortfeasor's stricter liability can be justified only by a grave adverse result. A court could also make a fair decision without the special provisions because its discretionary power under LOA § 139 is wide enough.

The author believes that regulation which does not distinguish between the forms of fault of the injured party and allows for a reduction of compensation taking into account the injured party's culpable conduct in any form is justified. A fair decision can be made only if all the circumstances of causation of the damage are assessed thoroughly, including both the tortfeasor's and the injured party's fault.[*34] The relevant provisions of the German and Swiss civil codes, which are essentially close to the Estonian law of delict, employ the same principle.

Where causation or escalation of the damage was caused by the injured party's intentional act, the question arises whether and on what conditions the tortfeasor should be claimed compensation at all if the injured party's self-damage was intentional.

It is noted in the decision of the CCSC of 22.10.2008, matter No. 3-2-1-85-08, that the injured party's intent according to LOA § 139 (3) means the intent of self-damage, not the injured party's intentional acts that only contributed to pecuniary damage. The injured party's intent as a contributor to damage and a circumstance reducing compensation for pecuniary damage under LOA § 139 (3) may occur when the injured party intentionally increased his or her damage after the damage was caused, such as having refused treatment. Also, in the application of LOA § 130 (2), if the injured party's non-pecuniary damage increased as a result of the injured party's intent; this influences the amount of monetary compensation for non-pecuniary damage.

As regards the injured party's intent, it has to be identified to what extent the damage was caused by the injured party's act. It may be concluded that the injured party's intentional act was decisive in the causation of damage. It may also be revealed that the chain of causality was broken as a result of the injured party's act. In such case, the question no longer concerns reduction of compensation but the lack of causality between the tortfeasor's act and the damage. Where the injured party's intentional act has not fully replaced the cause, both the tortfeasor's and the injured party's contribution to the damage must be assessed and LOA § 139 must

[33] According to LOA § 139 (3), in the event that the death of a person or damage to the health of a person is caused, the compensation for damage may be reduced on the grounds of the aggrieved person's contribution to the damage only if the aggrieved person contributed to the damage intentionally or through gross negligence. The restriction does not apply to the extent that the injured party is compensated for the damage by an insurer (LOA § 139 (4)).

[34] Markesinis is sceptical of the practical application of the equal assessment of both parties' faults; he finds that the courts may be much less eager to assess the injured party's fault than to establish the tortfeasor's fault, especially where, e.g., the tortfeasor's liability was insured. See B. S. Makesinis (Note 19), p. 104.

be applied accordingly. The question of whether the chain of causality was broken as a result of the injured party's act should be answered based on the circumstances of the particular case.

7. Implication of the forms of fault in a delict arising from violation of a protective provision or conduct contrary to good morals

While the previous parts of the article focused on the importance of distinguishing between forms of fault in the context of the scope of liability, forms of liability may also be relevant to the creation of liability. This means that a specific delict may presume a certain form of the tortfeasor's fault. A delict arising from the violation of a protective provision is one such delict.

Conduct contrary to protective provisions is primarily understood as action that violates a legal duty and results in damage to another person. Schlechtriem lists the provisions of the Penal Code, as well as relevant provisions of the Constitution, private law, procedural law, and administrative law as the main protective provisions.[*35]

BGB § 823 (2) I provides that anyone who violates a law enforced to protect another person also has the obligation to compensate for the damage referred to in subsection 1 of the same section. The second sentence adds that if according to the content of the law its violation is possible without fault, the compensation obligation arises only in the event of culpable violation. A protective provision may be constructed so that its violation can be only intentional. It is also possible that a protective law can be violated both intentionally and by negligence. The cases where intent is a precondition for violation of a protective provision are identified by way of interpretation of the provision.[*36]

Violation of a protective provision is also the basis for liability in the British[*37] and French law. According to the *Code Civil*, violation of a legal provision, which may be a formal law or the legislation of an administrative body, results in *faute*.[*38]

LOA § 1045 (1) 7) provides that the causing of damage is unlawful if, above all, the damage is caused by behaviour which violates a duty arising from law. The author finds that "a duty arising from law" should be interpreted expansively in this provision: a duty may be contained in a law in the formal sense or in another type of legislation. A protective provision may thus consist in a provision of property maintenance rules, which obliges the owner of an immovable to maintain the sidewalk adjacent to the immovable (e.g., de-icing in winter). If the owner of the immovable breaches this duty, his or her behaviour is unlawful pursuant to LOA § 1045 (1) 7) and the provision that prescribed the duty.

A provision of the Penal Code may also serve as a protective provision. In such case, the prerequisites for criminal liability are relevant to the law of delict, because a protective provision of penal law can be claimed to have been violated only if the offender's conduct contains all the prerequisites for criminal liability, including fault.[*39]

If a protective provision can only be violated intentionally, one may ask whether careless violation can also result in a compensation obligation, because fault seems to be present. This question has to be answered negatively, because if the subjective element of intent is a necessary prerequisite for violation of the protective provision, then careless violation is not violation of the provision at all. At the same time, such behaviour can be unlawful for other reasons, such as damaging an absolutely protected legal right.

Intentional behaviour against good morals is a delict that is related to a specific form of fault. The German BGB § 826 sets out the (minor) general elements of compensation for damage: a person who, against good morals, intentionally causes damage to another person, must compensate the other person for the damage caused.[*40]

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35 P. Schlechtriem (Note 15), p. 263.

36 O. Mühl, W. Hadding. Bürgerliches Gesetzbuch mit Einführungsgesetz und Nebengesetzen. Band 5/2. Stuttgart, Berlin, Cologne: Verlag W. Kohlhammer 1998, pp. 118–119. It should also be noted that the German civil law presumes the fault of a person who violates a protective provision.

37 C. v. Bar, J. Shaw (Note 23), p. 42.

38 K. Larenz. Lehrbuch des Schuldrechts. Erster Band. Allgemeiner Teil. 13., neuarbeitete Auflage. Munich: C. H. Beck'sche Verlagsbuchhandlung 1982, p. 834.

39 See also D. Medicus. Bürgerliches Recht. 18. neuarbeitete Auflage. Cologne, Berlin, Bonn, Munich: Carl Heymanns Verlag 1999, p. 456.

40 E.g., the Swiss ZBG § 41 (2) establishes similar elements of liability to BGB § 826. The British law also contains certain delicts in which case the compensation obligation depends on the tortfeasor's intent, such as trespass. See G. H. L. Fridman. Torts. London, Ontario, Canada: Waterlow publishers 1990, p. 12. The Civil Code of the Estonian Soviet Socialist Republic did not contain this type of a basis for liability.

Intent has to be aimed only at causing damage (not at being contrary to good morals), so it is sufficient to know the factual circumstances. In this context, intentional causing of damage also occurs in the event of merely indirect intent.[*41] Schlechtriem notes that in addition to contrariness to good morals, intention has to be established separately, while behaviour contrary to good morals may be an indirect proof of intent.[*42]

LOA § 1045 (1) 8) provides that the causing of damage is unlawful if, above all, the damage is caused by intentional behaviour contrary to good morals. This is the "small general clause" of delictual liability. LOA § 1045 (1) 8) is based on relevant examples from the Germanic law. These are the subjective elements of an act, which the author believes can be also considered met if a person acted with indirect intent. It should be stressed that the delict described in LOA § 1045 (1) 8) cannot be committed by way of carelessness or grave negligence. The CFR does not contain the small general clause of delictual liability similar to LOA § 1045 (1) 8).

There is no universal answer to the question of what constitutes behaviour contrary to good morals. The Supreme Court has found that when a person purchases a thing from a person who may be subject to an obligation under the sales contract due to the exercise of a right of pre-emption with respect to the same thing, this does not constitute intentional behaviour contrary to good morals within the meaning of LOA § 1045 (1) 8) even if the person discloses the possibility of exercising the right of pre-emption.[*43]

If A asks B the way and B intentionally guides A in the wrong direction, as a result of which A misses his flight and loses an opportunity for a good business deal, this could be regarded as behaviour against good morals. In this example, B's behaviour could be motivated by B's own wish to sign a contract with A's business partner. In such case, B would have to compensate A for the damage caused (purely economic damage in this case). If B was careless in his guidance (e.g., B himself was not quite sure if he was correct), no liability should ensue.

8. Conclusions

While distinction between forms of fault is usually of little relevance in the law of delict, there are certain groups of cases where forms of fault can be decisive to the final solution of the case. It should be kept in mind that distinction between forms of fault may be very important, even where the relevant legal provisions do not directly refer to the need for such distinction. In the context of the Estonian law of delict, forms of fault are relevant in the following cases:

- division of liability between tortfeasors;
- reduction of compensation under LOA § 140 (1);
- ordering the payment of compensation for non-pecuniary damage;
- reduction of compensation due to the injured party's contribution to the damage;
- delicts arising from violations of protective provisions and intentional behaviour against good morals.

These cases are not specific to Estonian law, but are more or less characteristic of most legal orders. It may be said that, e.g., in the German law, forms of fault are relevant to almost all of the aforementioned cases.

A comparison of the provisions of the CFR and LOA suggests that despite the different wording of some of the relevant provisions in these two instruments, they allow for arriving at the same end result in many cases. This is true both in the events of dividing liability between tortfeasors or reducing compensation according to the principle of fairness, but also where compensation is reduced due to the injured party's own contribution to the damage.

41 E. Deutsch (Note 29), p. 126.

42 P. Schlechtriem (Note 15), p. 270.

43 CCSCd, 8.05.2008, 3-2-1-37-08. – RT III 2008, 21, 144 (in Estonian).

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Development of Apartment Ownership Legislation in Estonia in 1994–2009 and Reform Plans in the Context of European Judicial Practice

1. Introduction

Apartment ownership represents a construction created by law, which combines the principles of law of property, law of obligations and company law. Particular attention has been paid in legal theory and practice to the legal relationships between apartment owners, i.e., to the internal relationships between owners and the external effects of the relationships. In this paper, I will analyse the development of apartment ownership legislation in Estonia, including the legal nature of the community of apartment owners and its possible development.[*1]

Since the Apartment Ownership Act[*2] (AOA) is largely based on the Apartment Ownership Act of the Federal Republic of Germany of 1951[*3] (WEG), I will present a comparative overview of the problems discussed in the local jurisprudence in relation to the community for decades. The German legislator has arrived at the amendment of WEG, by which a community of apartment owners has been given a limited passive legal capacity that was recognised by judicial practice already before. The passive legal capacity of a community of apartment owners has also been recognised in many other legal orders and the AOA also needs to be supplemented.

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[1] Apartment ownerships are economically significant in Estonia as out of the 896,000 registered immovables entered in the land register, 461,000 are apartment ownerships (51%). Hence, the percentage of apartments in private ownership is considerably higher than in the Federal Republic of Germany, where the number of apartment ownerships is estimated to be five million. See S. Hügel, O. Elzer. Das neue WEG-Recht. München 2007, p. 1.

[2] Korteriomandiseadus. – RT I 2000, 92, 601; 2006, 43, 326 (in Estonian).

[3] Gesetz über das Wochnungseigentum und das Dauerwohnrecht. – BGBl. I pp. 175, 209.

2. Apartment Ownership Acts I and II

The Principles of Ownership Reform Act of 1989[*4] paved way for the privatisation of the dwellings created during the Soviet period. In 1993, the Privatisation of Dwellings Act[*5], was adopted, and pursuant to its § 3, the object of the privatisation was an apartment together with the other relevant part of the dwelling. Here we must say that the reforms went ahead of the development of private law. Civil law did not recognise an apartment that is a physical share of a dwelling as a property law object. Section 14 of the Law of Property Act[*6] (LPA), which entered into force on 1 December 1993, provided that a thing could be in commerce as a whole, as a physical share or as a legal share; yet it did not create an institute of an apartment ownership. The reason is that the LPA was based on the draft Civil Code completed by 1940[*7], which did not recognise the physical share of a dwelling. However, during the privatisation of dwellings, hundreds of thousands of objects similar to apartment ownership entered commerce, whereas dwellings were privatised as separate from the plot underneath then, while later on, the plot was transferred to the owners of the apartments usually free of charge and the apartment ownerships were entered in the register (establishment of apartment ownerships).

The Apartment Ownership Act[*8], based on WEG entered into force on 23 March 1994. Section 1 of the AOA defined apartment ownership as the ownership of an apartment which was a physical share of a structure, and of a legal share corresponding to the size of the physical share of both the plot of land and the essential part of the structure which was not a physical share of any apartment ownership. Such an apartment ownership was regarded as immovable by law, and was subjected to the immovable property provisions of the LPA. Although the AOA was an independent Act, it could be seen as an inseparable but non-codified part of the law of property system.

AOA I did not include provisions governing the maintenance of blocks of flats because of the legal policy decision that the blocks of flats would be maintained through apartment associations as independent legal persons. Administration under a contract of partnership was preserved as an alternative. At the same time, the legislative proceeding of the Apartment Associations Act[*9] (AAA) was in progress in the *Riigikogu* and the Act entered into force on 3 August 1995. It became clear over time that the establishment of apartment associations was not going as planned and a need arose for alternative forms of administration. The situation has been described in the explanatory memorandum to the draft AOA of 2001[*10], according to which the need for administering blocks of flats does not depend on whether a separate legal person has been formed, while the duties of an apartment association and its members also remain ambiguous.

AOA II entered into force on 1 July 2001, and continued to define in its § 1 the apartment ownership as ownership of the physical share of a structure together with a legal share of common ownership to which the physical share belongs. The law no longer regards the apartment ownership directly as an immovable; however, according to § 5^1 of the Land Register Act[*11], an apartment ownership is (registered immovable) entered in the land register as an independent unit. An apartment ownership is a registered immovable from the point of view of formal real right in immovable property, i.e., independent register parts are opened for apartment ownerships in the land register, through which they can be transferred and encumbered. The biggest change included in the AOA was the statutory regulation of the administration of blocks of flats through a community of apartment owners (Chapter 2 'Administration'), which is additionally applied if an apartment association as a legal person has been established to administer the dwelling.[*12]

At the moment, the Ministry of Justice has completed the concept of AOA III, which is intended to solve the questions of the passive legal capacity of the community, which have proven problematic, and decide on the possibilities of uniting the apartment association and the community of apartment owners as parallel forms.[*13]

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4 Omandireformi aluste seadus. – RT 1991, 21, 257; 2006, 25, 184 (in Estonian).

5 Eluruumide erastamise seadus. – RT I 1993, 23, 411; 2006, 26, 191 (in Estonian).

6 Asjaõigusseadus. – RT I 1993, 39, 590; 2008, 59, 330 (in Estonian).

7 A. Traat. Tsiviilseadustik (Civil Code). Tartu 1992 (in Estonian).

8 Korteriomandiseadus. – RT I 1994, 28, 426 (in Estonian).

9 Korteriühistuseadus. – RT I 1996, 42, 811; 2006, 61 456 (in Estonian).

10 Korteriomandiseaduse eelnõu seletuskiri (Explanatory Memorandum to the Apartment Ownership Act). Available at http://web.riigikogu.ee/ems/saros-bin/mgetdoc?itemid=003671897&login=proov&password=&system=ems&server=ragne11 (10.07.2009) (in Estonian). Explanatory memorandum to AAA: "The presently applicable Act obliges the owners of apartments to establish an apartment association to maintain the shares of apartments in common ownership or to enter into a contract of joint operation. […] as the apartment association is liable for its liabilities with its assets, the failure to collect the payment from apartment owners or errors in management may quite soon lead to insolvency [...] The situation is absurd from the legal point of view: apartment owners become wealthier on account of the works ordered by the apartment association because the apartment association pays for them and is liable with its assets. The activities of the apartment association are determined by apartment owners who also determine whether the apartment association makes claims to apartment owners."

11 Kinnistusraamatuseadus. – RT I 1994, 94, 1609; 2008, 59, 330 (in Estonian).

12 AOA § 8 (1).

13 Korteriomandiseaduse ja korteriühistuseaduse reformi kontseptsioon (Concept of the Apartment Ownership Act and Reform of the Apartment Associations Act). Justiitsministeerium. Tallinn 2008 (in Estonian).

3. Development of community of apartment owners

A community of apartment owners is founded on AOA § 8 (1) which regards as a community of apartment owners their legal relationships concerning the object of common ownership.[*14] The authors of the AOA of 2001 viewed as a solution to the administration problems in situations where there were no apartment associations as legal persons in most of the blocks of flats the development of legal relationships under the law of obligations between apartment owners:

> Since an apartment ownership creates specific obligations and needs arising from the relevant area, which are independent of the existence of legal persons or entry into contracts, to resolve the problematic situation, it would be necessary to establish provisions that determine the legal relationship developed on the basis of law. In the case of a community of apartment owners, it would be a **relationship under the law of obligations** set out in the Apartment Ownership Act and specified by the Law of Property Act, General Part of the Civil Code Act, the Law of Obligations Act after it enters into force, as well as other Acts [author's emphasis – P.P.].

I will examine below how these civil Acts detail the community of apartment owners, i.e., to what extent it can be supported by the provisions of the General Part of the Civil Code Act[*15] (GPCCA), LPA and the Law of Obligations Act[*16] (LOA). It is clear that the AOA considers administration based on law as the principal form of administration.[*17]

The regulation of a community is problematic because there is no clear definition for a community.[*18] Contrary to the expectations expressed in the explanatory memorandum to the AOA, we can find an unambiguous approach to a community neither in the GPCCA nor LOA. In German law, a community is included in the special part of the law of obligations (BGB[*19] §§ 741–758). We can find an institute similar to a community in the LOA — a contract of partnership[*20] (LOA § 580 *ff.*) — whereas according to Estonian law, a partnership is characterised by achievement of a mutual objective and making contributions thereto, joint management and decision-making, partnership property that is in joint ownership, solidary liability, integrity of partnership property, non-transferability of the rights of a partner, a possibility to terminate and cancel a partnership. According to § 2 (2) of the Non-profit Associations Act[*21] (NAA), associations of persons with non-profit characteristics which are not entered in the register are not legal persons and the provisions for civil law partnerships apply to them. Spouses and co-successors also serve as a community.[*22]

However, a community was still regarded in LPA § 70 (7) (shared ownership), published in 1999, which precludes the application of provisions of a partnership. Namely, the provision sets out that if a right belongs to several persons (community), the provisions concerning joint ownership are applied thereto unless otherwise provided by law. This section appeared in the draft Law of Property Act, Law of Property Act Implementation Act, Land Register Act and Code of Enforcement Procedure Amendment Act[*23] on the initiative of its initiator (Ministry

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[14] AOA § 8 (1): "On the basis of an agreement, apartment owners may organise legal relationships concerning the object of common ownership (community of apartment owners) differently than provided by this Act, except if this is directly precluded by law. If apartment owners decide to found an apartment association pursuant to the requirements of the Apartment Associations Act, the owners shall administer the object of common ownership pursuant to the Apartment Associations Act as of the creation of the legal capacity of the apartment association. In the case provided for in the previous sentence, this Act applies to administration of the object of common ownership in so far as this is not in conflict with the Apartment Associations Act."

[15] Tsiviilseadustiku üldosa seadus. – RT I 2002, 35, 216; 2008, 59, 330 (in Estonian).

[16] Võlaõigusseadus. – RT I 2001, 81, 487; 2008, 59, 330 (in Estonian).

[17] Explanatory memorandum to the AOA (Note 10): "The draft Act mostly proceeds from the German Apartment Ownership Act and judicial practice. The structure of the Estonian Apartment Ownership Act has remained the same; provisions concerning administration have been added along with procedural provisions required by the administration provisions. […] According to the draft Act, an apartment association will remain included in our law as an alternative to a community of apartment owners. The draft Act abolishes the requirement for an obligatory apartment association. […] The draft Act does not limit in any manner the activities of the existing apartment associations or the foundation of new apartment associations."

[18] Kaupo Paal has regarded aspects related to a community of apartment owners in his article "Võlaõigusseaduse mõju valitseja nimetamisele ja õigussuhtele korteriomanikega" (Impact of the Law of Obligations Act on Appointment of Administrator and Legal Relationships with Apartment Owners) (Juridica 2003/5) (in Estonian) and the passive legal capacity of a community of subjects who are not legal persons has been discussed in the doctoral thesis of Kalev Saar "Eraõigusliku juriidilise isiku õigussubjektsuse piiritlemine" (Delimitation of the Subject of Law Status of a Legal Person Governed by Private Law), published by TÜ Kirjastus under the same title in 2004 (in Estonian).

[19] BGBl. I 42 p. 2909; 2003 I p. 738.

[20] Note 17.

[21] Mittetulundusühingute seadus. – RT I 1996, 42, 811; 2008, 59, 330 (in Estonian).

[22] A community must be regarded as a community of persons, just as spouses; in both cases, a community owns property in undivided parts (joint ownership). See K. Saare. Eraõigusliku juriidilise isiku õigussubjektsuse piiritlemine (Delimitation of the Subject of Law Status of a Legal Person Governed by Private Law). Tartu 2004, p. 78 (in Estonian).

[23] Asjaõigusseaduse, asjaõigusseaduse rakendamise seaduse, kinnistusraamatuseaduse ja täitemenetluse seadustiku muutmise seadus. – RT I 1999, 27, 380 (in Estonian).

of Justice) before the adoption of the draft, which is why the explanatory memorandum to the draft does not contain the reasons of the amendment. Hence, the general notion of a community has been defined via the law of property or application of the provisions regarding (joint) ownership. If a thing belongs to several persons, it is presumed that a common ownership exists; if a right belongs to several persons, we can presume that the right belongs to the persons in legal shares and we proceed from the rules of common ownership when exercising the rights and obligations relating to legal shares.*[24] According to the explanatory memorandum to AOA, the joint exercise of rights must be regarded as a law of obligations, not a property law relationship. It is also evident from the second chapter of the AOA that besides the provisions of common ownership special provisions arising from the AOA or agreements of apartment owners (so-called right to exercise will) must be applied.*[25] Because of the detailed nature of the AOA, it is applied above all and the LPA only applies to individual areas for which there are no special provisions in the AOA. Thus, for example, based on LOA § 79 (2), any agreements between co-owners concerning the procedure for use of a shared thing are entered in the land register.

It is obvious that the notions of community provided in LOA § 70 (7) and AOA § 8 (1) do not coincide. While LPA § 70 regards as a community the joint ownership of rights, AOA § 8 (1) regards as a community of apartment owners the legal relationships concerning the object of common ownership, i.e., the mutual rights and obligations as well as the rights and obligations to third parties. The wording of WEG § 10 (2) can be considered more appropriate as it sets out that the provisions of community of the BGB are applied to the relationships between apartment owners because it does not derive otherwise from the Apartment Ownership Act.*[26]

4. Nature of community of apartment owners

When defining the community of apartment owners, regard must be given besides the law of obligations to the relationships of the institute with company law since directing bodies are connected with the administration of apartment associations, which serves as a feature of associations and not of joint ownership.*[27] As a community has arrived in Estonian law via the impact of German law, I will present a comparative overview of defining a community of apartment owners.

When defining a community of apartment owners, we also have to define the nature of an apartment ownership. This is complicated by the fact that an apartment ownership consists of various elements (plot, apartment, the administrative property of apartment owners, apartment owners' rights to vote, etc.), which gives rise to the question what the object in commerce is in the case of an apartment ownership.*[28]

WEG § 1 regards the special ownership (physical ownership)*[29] and the share in the common ownership as a single legal entity (*rechtliche Einheit*)*[30], in which the share in the common ownership is necessary in order to enter the apartment ownership in the land register (in the case of an apartment ownership, special ownership is in the foreground and common ownership is its accessory).*[31] The prevailing German approach admits here that several corporate elements relate to the shared ownership and special ownership. The theory divides apartment ownership into three parts: besides the special ownership and the share in the common ownership there is also the membership element, i.e., the right and obligations arising from the community of apartment owners.*[32]

Hence, the apartment ownership by nature belongs to the mixed legal type consisting of law of property and law of obligations elements. None of the elements stand out among others. Because of the uniformity of the elements, the rights arising from the membership of the community also transfer to the transferee upon the transfer of the apartment ownership. An apartment ownership is a unique legal institute, an original ownership that can be

[24] Pursuant to § 147 of the Law of Succession Act that entered into force on 1.01.2009, if several successors have accepted the succession (co-successors), the estate is owned by the successors jointly (community of the estate), to which the provisions of common ownership apply. A co-successor may not dispose independently of the items that belong to the estate, but may dispose of the legal share in the community of the estate. – RT I 2008, 7, 52 (in Estonian).

[25] AOA § 8 (2)–(4).

[26] Palandt. Bürgerliches Gesetzbuch. Kommentar. 67. Aufl. München 2008, § 741, p. 1102.

[27] In German legal theory, the theory of association of apartment ownerships has remained isolated so far, yet there are several overlaps between the possibility of establishing an apartment association based on the AOA and the German theory of associations. K. Paal. Korteriomandiseaduse väljatöötamise alustest (On the Foundations of Preparing the Apartment Ownership Act). – Juridica 2001/4, p. 274 (in Estonian).

[28] A. Brehm. Sachenrecht. Mohr Siebek Verlag 2006, p. 380.

[29] Wesenberg admits that an apartment ownership as an ownership defined in the Apartment Ownership Act is a special ownership in two ways — it includes special ownership and serves itself as special ownership. See A. Brehm (Note 28), p. 12.

[30] J. Bährmann. Wohnungseigentum. München 1991, p. 9.

[31] In comparison, according to judgment No. 3-2-1-164-05 of the Supreme Court of Estonia of 11.04.2006, in the case of an apartment ownership created as a result of privatisation, it is the special ownership (apartment) that is in the foreground, so an apartment serving as the separate property of spouses does not become the joint property of spouses even if an apartment ownership is established, if this happens during the marriage.

[32] E. Pick. Wochnungsigentumsgesetz. München 2007, p. 39.

furnished with a content because the content of the apartment ownership could be developed by the agreement of apartment owners to the extent not prohibited by law (*typus sui generis*). AOA § 8 (2–4) generally allow for free development of the membership rights serving as the content of apartment ownership. This applies to a special legal successor insofar as the agreements differing from law have been entered in the land register.

A particular association of people is created upon the establishment of apartment ownerships. The membership of the association, above all, relates to law of property. A share in the common ownership is an integral part of special ownership, while there is also an indirect link between a share in common ownership and a share held by each member of the community in the assets of the community. AOA § 1 (2) defines the object of common ownership so that a plot of land and such parts of a structure which are not in sole ownership are in the common ownership of apartment owners. This gives rise to the question in Estonian legal order about the ownership of the assets accumulated collectively. The assets of a community are made up of the acts of apartment owners that they are obliged to perform in line with the size of their share in the common ownership, but it also encompasses obligations, movable property required for administration, receivables from other apartment owners and third parties, as well as the fruit from shared ownership, etc. The assets of a community do not belong to the common ownership related to special ownership but it belongs to the community — the membership of the community entails the right to receive part of these assets. In essence, each apartment owner holds an independent legal share of the assets of the community, yet it cannot be disposed of independently or pledged without the apartment ownership. The claims of the community do not constitute a common obligation relationship in which case all the apartment owners could demand its satisfaction.[*33] A claim must be satisfied to the community as such.

AOA §§ 1 and 8 do not contain an immediate reference to the provisions of common ownership, yet § 1 sets out that the provisions of the Law of Property Act concerning immovable property ownership apply to apartment ownership in issues not regulated by the Act (which precludes the application of the provisions of the LOA concerning a partnership). The German theory criticises the application of the BGB (§ 741) provisions on community as the provisions of the law of obligations to an apartment ownership because in reality their application is of little significance. Because of the directing bodies, Brehm finds that a community of apartment owners is organised in the same way as a legal person.[*34] Some authors regard a community related to the apartment ownership rather as a partnership in which undivided joint property is created for the participants.[*35] The use of a partnership would be difficult because the owners need not be bound by personal trust and confidence. The difference between a partnership and a community is that a partner cannot dispose of a legal share of the partnership property[*36], whereas such a right of disposal is held by the members of a community (disposal still requires an apartment ownership). A community of apartment owners is a community of rights that have legal shares, which means that the size of the share each member has in the community is predetermined. While a partnership is usually created based on an agreement, a community is established by law.

All in all, a community of apartment owners formed pursuant to Estonian law is a community *typus sui generis*, the existence of which requires the following preconditions: an apartment ownership cannot exist without a community; a community is created based on law; a community functions through the Apartment Ownership Act or the expression of will permitted by law; only apartment owners can be members of a community (obligatory membership); unlike in the case of common ownership, an apartment owner cannot terminate a community (AOA § 9), neither can the apartment owner transfer or pledge it as parts separate from the apartment ownership. Here we must also point out the organisational structure of a community (the existence of a general meeting, house council, administrator, AOA §§ 17, 20 and 23).[*37] If all the apartment ownerships belong to the same person, he or she cannot serve as a community of a single individual.

5. Passive legal capacity of a community of apartment owners

The existence of independent liability, as well as the ability to take on rights and obligations, is decisive in the case of a community of apartment owners. The prevailing approach in German legal theory had not recognised the passive legal capacity of a community of apartment owners until 2005. However, attempts were made in relation to a community of apartment owners to find similarities with other communities of persons who did

[33] I. Kull, M. Käerdi, V. Kõve. Võlaõigus I. Üldosa (Law of Obligations I. General Part). Tallinn 2004, p. 419 (in Estonian).

[34] A. Brehm (Note 28), p. 380.

[35] M. Lutter. Theorie der Mitgliedschaft. AcP 1980, Volume 180, paragraph 146; J. Bährmann (Note 30), p. 114. Yet such associations constitute communities oriented to a particular goal (*Zweckgemeinschaft*), while in the case of apartment owners a community is rather oriented to exercising common interests (*Interessengemeinschaft*).

[36] P. Varul, I. Kull, V. Kõve, M. Käerdi. Võlaõigusseadus II. Kommenteeritud väljaanne (Law of Obligations Act II. Commented edition). Tallinn 2007, p. 671 (in Estonian).

[37] Unlike in the partnership and common ownership. The bodies of a community of apartment owners can also be external bodies in the form of an administrator appointed from outside. S. Renner. Die Wohnungseigentümergemeinschaft im Rechtsverkehr. Berlin 2005, p. 41.

not have passive legal capacity, above all, with partnerships.[*38] Estonian law also recognises associations of persons that are not legal persons to which provisions of civil law partnerships are applied (NAA § 2 (2)). K. Saare has been of the opinion that because of the organisation, identity and liability assets of a partnership, the recognition of the passive legal capacity of a partnership would be justified for practical reasons.[*39] The same practical reasons apply to a community of apartment owners. If an administrator enters into an agreement for purchasing a service, the administrator would do it in the name of the community, not apartment owners, i.e., the party to the agreement is the community.

The liability of apartment owners for the performance of the agreement is unclear in Estonian law and criticism towards limiting the liability of apartment owners may be justified because a community and also an apartment association often lack enough assets to be liable. Problems of liability arise also if any of the members of the community are replaced. Whereas a new partner in a partnership is expected to be liable for the earlier obligations only by a special agreement with the creditor, the prevailing opinion is that a new apartment owner is also liable for the obligations of the former owner in a community of apartment owners. The reason is that the community is of an obligatory nature in which the rights and obligations arising from membership are inseparably related to the special ownership and share in the common ownership. In Estonian law, the transfer of obligations to the transferee has not been directly set out in the AOA but the principle has been set out in AAA § 7 (3). At the same time, the judicial practice of the Supreme Court has denied the automatic transfer of the former owner's obligations to the new owner and regarded such obligations as personal obligations.[*40]

Since the AOA is based on the WEG, it is important to discuss the amendments made to the WEG in 2007[*41], which sum up as positive law the previous discussion and the judicial practice of higher courts in recognising the passive legal capacity of a community.[*42] Subsection § 10 (1) of the Act sets out a general rule that apartment owners bear the rights and obligations arising from an apartment ownership but the provision also provides for a possibility to set out differently by law. According to supplemented subsections 6–8, a community of apartment owners may, within the framework of administering a shared ownership, assume rights and obligations both to third parties and apartment owners themselves. A community may file an action and be actionable.[*43] A community is recognised as a subject of law, yet it is not considered a legal person.[*44]

WEG § 10 (7) also sets out the ability of a community to own assets necessary for administration, consisting of things acquired during administration, including money, rights and obligations, as well as claims against third parties and apartment owners. A community may acquire real rights in immovable property only within the framework of common administration.[*45]

WEG § 10 (8) adds provisions concerning the liability of apartment owners to a community of apartment owners. Each apartment owner is liable to the creditor for the performance of the obligations of the community in proportion to his or her share in the common ownership, if the obligations have arisen or become recoverable during the period when the apartment owner was a member of the community. It is limited partial liability.[*46] An apartment owner is liable to the community for the performance of his or her obligations based on the legal share of common ownership. It is not, however, additional liability, but a creditor is able to file a claim directly against the owner.[*47] WEG § 11 allows for declaring a bankruptcy regarding the assets of the community, which in itself does not entail the termination of the community.[*48] It is possible to apply § 93 of the German Bankruptcy Act, according to which a trustee in bankruptcy may make a claim for payment against the members of the community.

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38 A decision of BGH dated 29.01.2001 was decisive, defining a partnership as having passive legal capacity and procedural capacity. – ZIP 2001, p. 330.

39 K. Saare. Seltsing – kas leping või ühing? (Partnership — Agreement or Association?) – Juridica 2003/1, p. 64 (in Estonian).

40 In the judgment of Supreme Court in civil matter No. 3-2-1-105-05, 2.11.2005 (RT III 2005, 38, 371), the Court has established that the debts not paid by the former owner do not transfer to the new owner unless separately agreed upon. The judgment also assumes a position that the obligations created from the moment of becoming the owner must be borne by the new owner in relations with the other co-owners. Each co-owner is liable for the performance of the obligations that have become recoverable during the period when he or she has been a co-owner.

41 BGBl. I p. 2866.

42 In 2005, the Supreme Court of the Federal Republic of Germany (BGH) recognised the partial passive legal capacity of a community of apartment owners **insofar as it participated in the administration of shared ownership in legal proceedings**. According to that, a community of apartment owners may have rights and obligations, serve as a respondent and plaintiff and participate in an execution proceeding as a debtor and a creditor. Pursuant to the judgment concerned, a community of apartment owners cannot file claims against a member of the community and in this case apartment owners have the right of claim because such a claim does not involve 'participation in commerce'; however, a community can file such claims against third parties.

43 Apartment owners may file an action against a community and a community may file an action against apartment owners.

44 L. Rühlicke. Gesamthand, rechtsfähige Personengesellschaft, juristische Person und Wohnungseigentümergemeinschaft. – Zeitschrift für Wohnungseigentumsrecht (ZWE) 2007 (8) 7, p. 266.

45 J. Demharter. Grundbuchordnung. 26. Aufl. München 2007, p. 332.

46 W. Boeckh. Wohnungseigentumsrecht. Baden-Baden 2007, p. 60.

47 G. Jennissen. Wohnungseigentumsgesetz. Köln 2008, p. 166.

48 E. Braun. Insolvenzordnung. 3. Aufl. München 2007, p. 118.

In addition, the rights and obligations of an administrator of an apartment ownership to the community have been specified in WEG § 27. An administrator is regarded as a directing and representative body of a community that has passive legal capacity. If there is no administrator, apartment owners represent the community jointly, unless the right of representation has been transferred to one or several apartment owners by a resolution of the apartment owners.

Several European legal orders have recognised the limited passive legal capacity of a community of apartment owners; some countries have even recognised the concept of an independent legal person.*[49]

According to the Swiss Apartment Ownership Act of 1965, which proceeds from a specially developed concept of common ownership, a community of co-owners has a limited legal capacity and the community may independently assume obligations, own assets necessary for its activities, file actions and be actionable, and is represented by an administrator. The concept of liability departs from the precondition that each apartment owner is liable for the obligations of the community to the extent of the legal share owned by him or her, i.e., not solidarily.*[50]

According to the French Apartment Ownership Act of 1965, a community of apartment owners (*syndicat*) is created by law and has passive legal capacity.*[51]

Section 2 of the Austrian Apartment Ownership Act of 2002 regards an apartment ownership as a real right and a community of apartment owners *expressis verbis* as a legal person having limited passive legal capacity, represented by an administrator. According to § 18 of the Act, a community may assume obligations and rights in administration as well as serve as a plaintiff and defendant. As regards the concept of liability, additional liability is presumed based on the size of the legal share of the common ownership of the apartment owner if an execution proceeding from the assets of the community is not a success.*[52]

Pursuant to § 124 of the new Dutch Civil Code, a society of owners (*vereniging van eigenaars*) holding apartment rights (*appartementsrechten*) created as a result of dividing an immovable is a legal person, while all the apartment owners are obliged to be its members.*[53]

6. Interrelationship between community of apartment owners and apartment association

The explanatory memorandum to the AOA viewed an apartment association merely as an alternative to a community, not a rule. An apartment association is a legal personality that has been formed for the administration of blocks of flats, i.e., the formation of the association and the election of its management board substitutes for the appointment of the administrator for the purposes of the AOA. According to § 2 of the Act, the association is a non-profit association that is besides the AAA also subject to the NAA and is entered in the non-profit associations register maintained by the court.*[54] Just as in the case of a community, membership of the apartment association is obligatory (AAA § 5 (1)) and although a separate memorandum of association is not entered into, an apartment association is not created automatically upon the establishment of apartment ownerships. Pursuant to AAA § 6, an apartment association has independent assets, apartment owners are liable for the obligations assumed by the association only to the extent of the contributions made, which limits the liability of apartment owners, although it is usually the apartment owners who gather wealth on account of the expenses incurred by the association.*[55] Apartment owners are not liable to the creditors of the association but the claims of the association against its members are secured by a mortgage established in the apartment ownerships.*[56]

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[49] The lack of passive legal capacity has been regarded as a negative factor in making investments in the housing sector. See R. Fritsch. Das neue Wohnungseigentumrecht. Baden-Baden 2007, p. 18.

[50] T. P. Ruetschi. Das schweizerische Stockwerkeigentum. Zürich 1980, pp. 31, 36.

[51] S. M. Wietek.Wohnungseigentum in Frankreich. Frankfurt 1976, p. 72.

[52] B. Schober. Rechte und Pflichten der Eigentümergemeinschaft. Wien 2004, pp. 23, 45.

[53] A. S. Westerdijk. Niederländisches Bürgerliches Gesetzbuch. Buch 5 Sachenrecht. München 1996, p. 291.

[54] AAA § 2 (1): "An apartment association is a non-profit association established by apartment owners provided for in the Apartment Ownership Act […] for the purpose of shared management of the legal shares of the buildings and plot of land which are part of the object of apartment ownership and representation of the shared interests of the members of the apartment association."

[55] According to judgment No. 3-2-1-111-04 of the Supreme Court dated 30.11.2004, an apartment association is, based on AAA § 2 (1), a representative of the interests of apartment owners; hence, an apartment association may enter into a subscription contract and a sales contract of heat with a network operator. If an apartment association enters into a sales contract of heat on behalf of itself, it is also liable to the network operator for the performance of the contract. Thus, the apartment association distributes heat between apartment owners and claims from the apartment owners their proportional part of the management expenditure according to the resolutions of the apartment association and its articles of association. – RT III 2004, 36, 373 (in Estonian).

[56] AAA § 9 (1). The Act does not specify whether the mortgage arises from law or the association has a right of claim for the establishment of the mortgage.

Consequently, an apartment association and a community of apartment owners have a number of similarities in the Estonian legal order, while the greatest difference is that the association has a passive legal capacity and assets. Pursuant to AOA § 8 (1), the provisions of the AOA apply also to administration of the object of common ownership when an apartment association has been formed in so far as this is not in conflict with the AAA. Difficulties in interpreting the nature of the apartment association result from a legal maze, in which the NAA and AOA must be applied to the activities of the association besides AAA. It is incomprehensible why the actual solutions of the administration of blocks of flats must be different in a community and association. This gives rise to the need to harmonise the provisions of the AAA and AOA or once the judicial practice recognises the passive legal capacity of a community of apartment owners, there would be no need for an apartment association as a legal person.

7. Concept of Apartment Ownership Act III

7.1. Choices between different forms of administration

The Concept of the Reform of the Apartment Ownership Act and Apartment Associations Act[*57], which offers unique solutions considering the regulations adopted in Europe in setting out the passive legal capacity of the community, prepared in the Ministry of Justice, seeks solutions for the problems described in the previous sections.

There are three ways of regulating the administration of apartment ownerships:

1) to preserve the present dualism between the community and apartment ownership;
2) a community that is not a legal person but the passive legal capacity of which has been strengthened will be the only form of administration;
3) an association that is a legal person will be the only form of administration.

Version 1 involves a contradiction that the unjustified dualism will preserve, three different Acts (AOA, AAA, NAA) are applied, it is difficult to understand a community in legal proceedings. The advantages of maintaining the present system would be the continuing legal peace, i.e., nobody is compelled to change the form of administration and different forms allow for flexible consideration of the needs of blocks of flats of various sizes.

Version 2 is contradicted by the fact that the present communities should be liquidated and this would not be met with approval in legal proceedings; the advantage would be that the administration of blocks of flats would be organised on the same bases with the system prevailing in Continental Europe, which would match up better with our civil law.

Version 3 would have the advantage of preserving the present apartment associations that have been adopted more readily than the communities of individuals that are not legal persons. A status of a legal person has been analogously granted to a general partnership in our legal order (§ 79 of the Commercial Code).[*58] Such an association would serve as a compulsory association or a legal person *typus sui generis*. The disadvantages are that a legal person would also be created where it would not be necessary (small houses), while additional (financial) obligations (such as independent accounting) ensue from a legal person. If in a community an apartment owner serves as a client through a general meeting and the administrator engages in administration, then in an association a greater liability and a more active role in administering the house is expected from apartment owners, for which they need not be prepared. Administration through a compulsory legal person would set a precedent in Europe, which is why its relations with the rest of civil law must be carefully considered.

The legislator, in essence, has two solutions: to recognise the limited passive legal capacity of a community of apartment owners and dissolve apartment associations or to create by law a situation in which it is compulsory to form an apartment association upon the establishment of apartment ownerships or to provide that an apartment association as a legal person is created automatically, so it will not be necessary to regulate the passive legal capacity of a community as a personal society. Since there are approximately 9000 apartment associations in Estonia, according to the information system of the commercial register, their liquidation would be an extremist choice with regard to legal traditions. It would be easier to regard communities as legal persons created on the basis of law (apartment associations) based on the examples set by the Netherlands and Austria.

The completed concept prefers version 3 and it should be accepted regardless of its flaws.[*59] First of all, it is necessary to determine how such a legal person would be created. Section 26 of the GPCCA presumes

[57] Note 13.

[58] Äriseadustik. – RT I 1995, 26–28, 355; 2009, 12, 71 (in Estonian).

[59] Concept (Note 13), p. 12.

the creation of passive legal capacity through making an entry in a register (without specifying the register). According to the present regulation, an apartment association is created by making an entry in the register of non-profit associations.[*60] An alternative would be to enter an apartment association in the land register — it would be necessary to establish a general part or a separate box in the register part of apartment ownership (the administrators of state assets are entered in the land register in the same way). The general part would contain the general data on the registered immovable and there would be no need to repeat them in individual register parts. A disadvantage of the alternative is that it would require considerable reorganisation of the land register law and the register itself, also giving rise to the question whether the existing associations should be reregistered.

It would be less painful to continue with a system in which the present associations and future obligatory associations would be entered in the register of non-profit associations, which would, above all, eliminate the need for reregistering the associations. There is still a disadvantage that both the land register and the register of non-profit associations would have to be examined in legal proceedings; however, the problem can be solved by provision of online access. If an association remains the only form of administration, it is an obligatory association; hence, such an association must be created along with opening the register parts of apartment ownerships. The concept suggests that the registrar open a registry card for an association and the register of non-profit associations tackle the legal issues from that point onwards.[*61] Such a procedure is acceptable because it is necessary to contact the register of associations to identify the right of representation of an owner who is a legal person in real property transactions today. The title page of the land register should still show the name and registry code of the association.

7.2. Specifications related to company law

The next step is to answer the question how an apartment association should be defined in company law and to what company type it bears the closest resemblance, i.e., whether the Non-profit Associations Act should continue to the applied, or the association is a commercial association aimed at joint activities, to which the Commercial Associations Act should be applied[*62], or it is an independent type of company to which only the general part of the GPCCA is applied. When analysing the objectives of the activities of an apartment association, they are clearly oriented to commercial activities. Although an apartment association does not pay dividends, the association still serves the economic interests of its members and presumes the joint activities of its members like a commercial association. Unlike a commercial association and a non-profit association, an association cannot control its members because the membership comes with an apartment ownership. Due to lack of attachment of the members, an apartment association is sooner similar to a public limited company. The concept offers to create a completely independent regulation for an apartment association in the AOA and to supplement GPCCA § 25 with a new type of a legal person, which eliminates problems related to the application of several Acts.[*63] It is hard to agree to this since it is rather characteristic of a legal order to apply the rules of a body subsidiarily similar to a special type of an association (political parties, congregations, etc.). It would not be justified to apply regulation different from that applied, for example, to housing associations which are entered in the register of non-profit associations and to which the provisions of commercial associations are additionally applied.[*64]

Basic data are required when the foundation of an apartment association is registered by an assistant judge opening the register parts of apartment ownerships. This gives rise to the question whether a memorandum of association and the articles of association are necessary. It would be logical if the memorandum of association is contained in the application to divide an immovable into apartment ownerships and no separate memorandum of association is entered into.[*65] AAA § 3 (1) provides today that a memorandum of association is not entered into upon the foundation of an apartment association. A legal person in private law has articles of association or a partnership agreement according to GPCCA § 28. A present-day apartment association is required to have articles of association as well. The concept does not presume that an apartment association has articles of association at all times, especially in the case of smaller associations in which the regulation of the Act is sufficient.[*66] When proceeding from § 15 (6) of the applicable AOA, it is expected that apartment owners establish internal rules that are by nature analogous to the articles of association. In an obligatory

60 NAA § 3.

61 Concept (Note 13), p. 14.

62 Tulundusühistuseadus. – RT I 2002, 3, 6 (in Estonian).

63 Concept (Note 13), p. 16.

64 Subsection 1 (2) of the Dwelling Associations Act (hooneühistuseadus). – RT I 2004, 53, 368 (in Estonian).

65 Junkers in his theory of associations regards a community of apartment owners as an independent law of property society (*dingliche Gesellschaft*), in which an agreement between apartment owners for the establishment of apartment ownerships also represents a partnership agreement. M. Junkers. Die Gesellschaft nach dem Wochnungseigentumsgesetz. München 1993, p. 281 *ff*.

66 Concept (Note 13), p. 17.

association, it should be taken as the basis that an association has articles of association that substitute for the internal rules and all the amendments to the articles of association (internal rules) can be seen from the register. This would eliminate the need to enter any agreements derogating from law as specified in AOA § 8 (2) in the land register. It has to be decided whether an agreement on the procedure for the possession and use of the shared ownership (plot, basement, etc.) of blocks of flats could be governed by the articles of association or whether it should be entered in the land register as an issue regarding the law of property. The concept suggests that such issues be regulated by the articles of association[*67], but in such a case, it is difficult to ensure the protection of the rights of third parties (an amendment to the procedure for use of common ownership, for example, relates to the interests of a mortgagee and the ranking of the entry concerning procedure for use is important in an execution proceeding).

The objective of the new regulation must be to harmonise the mechanism of making decisions. AOA § 12 presumes that the resolutions of apartment owners are reached by consensus and only issues regarding normal use are decided by majority vote. Such a provision differs both from LPA § 72 (1), according to which co-owners may decide on the possession and use of a thing by a decision of the majority and an apartment association in which issues regarding administration can be adopted by majority vote. The provisions must ensure that the present situation, in which the same persons start a general meeting to decide on law of property issues after a general meeting of an apartment association has ended, is discontinued. A distinction must be made regarding which decisions can be reached by consensus and which by majority vote. The number of the votes of apartment owners must also be harmonised. According to AAA § 11, each apartment owner has one vote, i.e., each apartment ownership gives one vote. AOA § 19 gives an apartment owner one vote regardless of the number of apartment ownerships in order to avoid excessive influence of one person. In the case of common ownership, LPA § 72 proceeds from the size of the ownership. It seems more appropriate to retain the solution contained in the AAA, in which one apartment ownership gives one vote at a general meeting.

When introducing an obligatory apartment association, the present triple administration form — general meeting (AOA § 17), administrator (AOA § 20), house council (AOA § 23) — in which the administrator is a representative body of the community acting under an authorisation agreement must be abandoned. In an association, a management board serves as a representative body, which presumes that there are enough apartment owners capable of administration in the house but the members of the management board may also come from outside the circle of owners. Lack of apartment owners competent in housing may prove a problem, which is the reason why the administration service is partly outsourced, as evident in the present associations. The concept suggests that a management board need not be elected in smaller associations and apartment owners jointly have a right of representation.[*68] Assuming that there may not be people with sufficient experience and time resources in the apartment association to organise everyday administration, it should be considered to retain the administrator (as the administrative body of a community) and regulate the internal relations between the administrator (as a procurator) and the association (management board).

7.3. Apartment owner's liability for association and to association

The applicable law does not rule out the insolvency of an apartment association and the commencement of bankruptcy proceedings, while apartment owners are liable to the association and not to the creditors of the association. Apartment owners are liable in a community that does not have passive legal capacity. In an obligatory association, the membership is related to ownership, so it is essentially impossible to liquidate an association on the grounds of insolvency[*69], and the new regulation must provide for the supplementary liability of apartment owners also upon the formation of a legal person.

It would be appropriate to analogously apply the regulation of a general partnership where according to § 101 of the Commercial Code, the solidary liability of the partners applies to all the obligations of the partnership, which can, however, be enforced only after the creditor failed to receive full satisfaction of his or her claims from the assets of the partnership. WEG § 10 (8) sets out the partial liability of apartment owners for the obligations of the community, depending on the size of the legal share of common ownership, but a creditor may file a claim jointly against both the community and apartment owner. As an apartment association is a specific commercial association, acting in the field of housing, it would be justified to apply the principle of subsidiary partial liability, in which case a creditor may file a claim not satisfied by the association against the apartment owner depending on the size of his or her common ownership.[*70]

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[67] *Ibid*.

[68] *Ibid.*, p. 19.

[69] WEG § 11 (3) precludes commencement of bankruptcy proceedings against the assets of a community.

[70] Concept (Note 13), p. 34.

The liability of the transferee of an apartment ownership for the debts incurred by the previous owner should be further specified. AAA § 7 (3) provides that the new owner is liable for all the unpaid obligations of the previous owner. Such a simplified approach needs to be differentiated since both the continuation of the liability of the previous owner and the new owner's liability for obligations assumed by the previous owner, which have become recoverable after the transfer of the ownership, need to be settled (e.g., loans for major repairs). The regulation of general partnership should be taken as an example as according to § 102 of the Commercial Code, a former partner of the general partnership is also solidarily liable with the other partners within five years.*[71] Such a liability must be related to the obligations assumed during the period when the former apartment owner was the owner. The liability of the new owner for the unpaid obligations of the former owner also needs to be limited and could be limited to the value of the apartment ownership or the apartment ownership itself, not to the personal property of the new owner.*[72]

8. Conclusions

The law of property content of the institute of apartment ownership in Estonia has been developed similarly to the German WEG, in which an apartment ownership consists of a physical share and a legal share of a common ownership in the registered immovable which is an integral part thereof. The legal relationships created between apartment owners need to be reformed in order to eliminate ambiguity regarding the extent of the liability of the apartment owners and different legal treatment in dwellings for the administration of which an apartment association has been established and in dwellings where there is no apartment association. A community of apartment owners established on the basis of the AOA has the following characteristics: an apartment ownership cannot exist without a community developing on the basis of law; the community functions through the rules of the APA or the expression of will of the apartment owners as permitted by law; only apartment owners can be members of the community of apartment owners (obligatory membership). A community of apartment owners is described by the organisational structure of the community or the existence of directing bodies (general meeting, house council, administrator). An important feature distinguishing between a community of apartment owners and common ownership (as well as partnership) is the fact that nobody can demand the termination of the community. Due to certain similarity, the application of provisions concerning a partnership to a community could be considered since the explanatory memorandum to the AOA regards a community as based on a law of obligations relationship. NAA § 2 also implies the possibility of applying the provisions concerning a partnership, by prescribing the application of partnership provisions to a non-profit association of persons that is not a legal person. At the same time, the AOA refers to the application of provisions concerning immovable property ownership and hence the provisions of common ownership. Most of the time, the provisions of common ownership are not applicable since the AOA contains enough special provisions. A community of apartment owners does not, in fact, coincide with any association of persons, so according to the Estonian law it is a community *typus sui generis*. Such a new type of personal association has not been discussed in legal theory and judicial practice, which is why the issues of the passive legal capacity and independent assets of a community have not been settled. The topic is important in the context in which an apartment association has such passive legal capacity and independent assets, while administration has been organised differently.

When examining the amendments made to the WEG in 2007, as well as the civil laws of the Netherlands, Switzerland, Austria and France, a legal personality has been granted to a community to meet the needs of legal proceedings. Legal personality is characteristic of individuals. According to German law, a community is a subject that has passive legal capacity created by law, which does not need to be entered in the register to be created. Granting passive legal capacity created under law to a community of apartment owners also in Estonia gives rise to the question why distinguish between a community and association as two forms of administration that have similar objectives. When recognising the passive legal capacity of a community by law, starting from the establishment of apartment ownerships and delimiting the liability of the members of a community for the obligations of a community, there is no need for the foundation of an apartment association as a separate legal person. It has to be admitted that the implementation of such a change would be difficult because of the large number of apartment associations, which is why it would be reasonable to regard the passive legal capacity of an apartment association as created by the formation of apartment ownerships by law, while the registrar of the land register *ex officio* makes relevant entries in the non-profit associations register.

[71] WEG § 10 (8) also sets out the five-year solidary liability of the former owner.

[72] Concept (Note 13), p. 35.

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Improvement of the Intellectual Property System as a Measure to Enhance Innovation[*2]

1. Introduction

The Estonian economy requires a transformation to tackle economic crisis and to achieve sustainable growth. The recent report on the competitiveness of the Estonian economy emphasises that Estonia has to concentrate on increasing exports and innovation.[*3] It is obvious that orientation to the domestic market and low labour costs cannot serve as competitive advantages for Estonia any longer. As a result, Estonian companies should start creating value within different value chains by contributing to knowledge-incentive products and services. In other words, more Estonian companies have to become innovative[*4] and internationally oriented. As a matter of fact, these two objectives are closely interrelated. The cost of knowledge creation does not depend on whether the knowledge is utilised in domestic, regional, or global markets. Because of the possibility of such parallel exploitation of knowledge, entrepreneurs are interested in commercialising it in regional and global markets. Since intellectual property (IP) encourages innovation by protecting investments in knowledge creation and enhancing utilisation of knowledge, the author analyses the possibilities of improving the legal framework for IP to enhance innovation in the example case of Estonia.

The author's approach is based on the following assumptions. Firstly, without any doubt highly qualified and skilled human capital combines with entrepreneurial spirit to constitute a key driving force behind innovation.

Secondly, fostering innovation requires several measures. Improvement of IP regulations is one of these. The regulatory framework that supports innovation is, however, much wider than that covering just IP matters. For instance, the legal framework for biotechnological research is just as crucial for innovation as IP law is. These

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[3] U. Varblane *et al*. Eesti majanduse konkurentsivõime hetkeseis ja tulevikuväljavaated. Aruanne tellitud Eesti Arengufondi poolt (The Estonian Economy's Current Status of Competitiveness and Future Outlooks. Report ordered by the Estonian Development Fund), p. 39. Available at http://www.arengufond.ee/upload/Editor/ty_raport.pdf (8.02.2009) (in Estonian).

[4] For the purpose of this paper, innovation means creation and exploitation of new knowledge. For further discussion, see A. Kelli. Some Issues of the Estonian Innovation and Intellectual Property Policy. – Juridica International 2008 (15), pp. 104–114.

regulations are especially relevant since Estonia has defined biotechnologies as the strategic key technologies in supporting innovation.[*5] In addition, different incentive systems (tax incentives to stimulate business research, export subsidies, etc.) could play an important role.[*6] Still the impact of IP should not be underestimated. The pivotal role of IP for innovation has been given particular emphasis by the European Commission.[*7]

Thirdly, the author presumes that every country has its unique cultural, economic, demographic, natural, historical, and other conditions that have to be considered in the structuring of legal frameworks for enhancing innovation. As a result, the legal framework of IP cannot be 'imported' even from highly innovative and successful countries.[*8] However, this definitely does not mean that experience of other countries should be disregarded.

The first section of the paper addresses problems pertaining to the legal validity and scope of IP protection. The author argues that possibilities to challenge legal validity of IP rights applying to specific knowledge and the existence or absence of a clearly defined scope of protection influence the utilisation of the IP system. Some practical aspects of this are highlighted in the article.

In the second section, the author analyses how to increase the comprehensibility and consistency of IP legislation. According to the OECD, good regulations have to "(i) serve clearly identified policy goals, and be effective in achieving those goals; (ii) have a sound legal and empirical basis; (iii) produce benefits that justify costs, considering the distribution of effects across society and taking economic, environmental and social effects into account; (iv) minimise costs and market distortions; (v) promote innovation through market incentives and goal-based approaches; (vi) be clear, simple, and practical for users; (vii) be consistent with other regulations and policies; and (viii) be compatible as far as possible with competition, trade and investment-facilitating principles at domestic and international levels".[*9] Acknowledging the importance of all requirements put forward by the OECD, the analysis in the paper is, for reasons of space, confined to addressing clarity, simplicity, practicality for users, and consistency of IP regulations.

In the last section of this article, the author focuses on enhancement of the flexibility and appropriateness of IP limitations. The author's argument is that strong IP regimes that would include a broad scope of protection, extensive rights, few limitations, harsh sanctions, etc. do not necessarily facilitate innovation. The design of an IP system (including limitations) should be based on the socio-economic conditions of the relevant country. In addition, a constantly changing IP system requires limitations that are flexible enough to balance the differing interests of the stakeholders of the IP system.

2. The legal validity and scope of IP protection

IP is traditionally defined as legal rights resulting from intellectual activity.[*10] It has been explained that information constitutes the subject matter of IP protection.[*11] The immaterial nature of protectable subject matter entails advantages and challenges at the same time. One of the advantages is the possibility of parallel exploitation of information. Given the intangible nature of knowledge, it is also a challenge to exclude others from using it. The protection of information in some form of IP establishes control over it.

Utilisation of IP is facilitated when the legal validity of protection is not easily challenged and the subject matter of IP protection is clearly defined. For instance, the parties to a copyright or patent licence agreement usually assume that a work or invention is legally protected and invalidation or narrowing the scope

5 Knowledge-based Estonia. Estonian Research and Development and Innovation Strategy 2007–2013, p. 6. Available at http://www.hm.ee/index.php?0&popup=download&id=6175 (25.03.2009).

6 Innovation voucher scheme and a start-up and growth assistance programme are good examples. See Innovatsiooniosakute toetusmeetme tingimused ja kord (Conditions and Procedure for Support Measure of Innovation Vouchers). Entered into force on 7.02.2009. – RTL 2009, 13, 141 (in Estonian); Alustava ettevõtja stardi- ja kasvutoetuse tingimused ja kord (Conditions and Procedure for Start-up and Growth Assistance for Starting Entrepreneurs). Entered into force on 8.02.2008. – RTL 2008, 11, 136; 2008, 96, 1327 (in Estonian).

7 See, e.g., Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions. Putting knowledge into practice: A broad-based innovation strategy for the EU – COM(2006) 502, 13.09.2006, p. 6.

8 See G. S. Erickson. Patent Systems: Does One Size Really Fit All?, pp. 1–10. Available at http://www.iprinfo.com/tiedostot/Erickson_FINAL.pdf (15.12.2008); M. Pohlmann. The Evolution of Innovation: Cultural Backgrounds and the Use of Innovation Models. – Technology Analysis & Strategic Management 2005 (17) 1, pp. 9–19.

9 OECD. OECD Guiding Principles for Regulatory Quality and Performance, p. 3. Available at http://www.oecd.org/dataoecd/19/51/37318586.pdf (26.02.2009).

10 See Article 2 (viii) of the Convention establishing the World Intellectual Property Organisation. Stockholm, 14.07.1967, entered into force in respect to Estonia on 5.02.1994. – RT II 1993, 25, 55.

11 See W. Cornish, D. Llewelyn. Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights. 6th ed. London: Sweet & Maxwell 2007, p. 6; P. Drahos. The Universality of Intellectual Property Rights: Origins and Developments, p. 2. Available at http://www.wipo.int/tk/en/hr/paneldiscussion/papers/pdf/drahos.pdf (10.01.2006).

of protection is not very likely. The same holds true in cases of collateralisation of, for example, a patent. In this section, the author considers how well the subject matter of IP protection is defined and how well the validity of the acquired rights is guaranteed under Estonian law. The following analysis is mostly limited to copyright[*12] and patent issues.

The Copyright Act[*13] provides that copyright protection does not require registration or fulfilment of any formalities (following the principle of the absence of formalities)[*14] and that the creation of a work gives rise to copyright.[*15] Works that enjoy copyright protection have to be "original results in the literary, artistic or scientific domain which are expressed in an objective form and can be perceived and reproduced in this form".[*16] At the same time, "[t]he purpose, value, specific form of expression or manner of fixation of a work shall not be the grounds for the non-recognition of copyright".[*17]

There are provisions in the Copyright Act that make it virtually impossible to challenge the legal validity of the protection of a work by copyright. For instance, § 4 (6) of the Copyright Act sets out that "[t]he protection of a work by copyright is presumed except if, based on this Act or other copyright legislation, there are apparent circumstances which preclude this. The burden of proof lies on the person who contests the protection of a work by copyright". Already early decisions of the Estonian Supreme Court have supported the argument that it is very complicated to challenge the legal validity of copyright protection of a work.[*18]

On the basis of the above, it can be said that the absence of registration requirements has not caused significant disputes as to the existence and legal validity of copyright protection. One of the main reasons is that copyright protects not ideas but expression of ideas. Furthermore, the expression itself does not have to be new in the sense of patent law but has to be original. Originality is defined as "the author's own intellectual creation".[*19] This means that there are no legal obstacles to using an independently created work even though it is very similar to a pre-existing work created by somebody else. It has also been noted that "[i]f the level of originality of a work is very low, then it is difficult to distinguish the work from its idea".[*20] The author agrees that works with a high level of originality enjoy stronger protection than do works with a low level of originality. The likelihood of independent creation of a similar work decreases if the work is highly original.

To sum up, the utilisation of copyright-protected works is not substantially hindered by the possibility of a successful challenge to the protection by copyright. Firstly, it is almost impossible to prove that a work does not enjoy copyright protection. Secondly, on account of the concept of originality, different embodiments of the same idea are protectable.[*21] Still the exact scope of copyright protection can cause disputes.[*22] The present author is of the opinion that there is no need to amend the legal framework under analysis to make it more innovation-friendly. Some measures, however, could be taken at the company level. Since the principle of presumption of authorship[*23] does not always preclude authorship disputes[*24], companies whose business models depend on copyright protection should develop procedures to guarantee the existence of proof of their title.

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[12] Even though innovation is often associated with patents (e.g., innovation is measured by number of patent applications, etc.) the role of copyright for innovation should not be underestimated. It has been correctly emphasised in an EU directive that "[c]opyright and related rights play an important role in this context as they protect and stimulate the development and marketing of new products and services and the creation and exploitation of their creative content". See 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, the preamble, p. 2.

[13] Autoriõiguse seadus. Entered into force on 12.12.1992. – RT 1992, 49, 615; 2008, 59, 330 (in Estonian). Unofficial translation available at http://www.legaltext.ee (13.02.2009).

[14] The Copyright Act § 7 (3).

[15] The Copyright Act § 7 (1).

[16] The Copyright Act § 4 (2).

[17] The Copyright Act § 6.

[18] See, e.g., CCSCd, 6.05.1998, 3-2-1-60-98. – RT III 1998, 17, 178 (in Estonian); CCSCd, 25.06.1998, 3-2-1-84-98. – RT III 1998, 22, 227 (in Estonian).

[19] The Copyright Act § 4 (2).

[20] K. Härmand. Autoriõiguse ja autoriõigusega kaasnevate õiguste kohtupraktika küsimusi Eestis ja Euroopa Liidus (Some Issues about Estonian and European Union Court Practice on Copyright and Related Rights). Master's thesis. Supervisor Professor H. Pisuke (2006), p. 64. Available at http://dspace.utlib.ee/dspace/bitstream/10062/993/5/harmand.pdf (16.03.2009) (in Estonian).

[21] However, some case law indicates that it is not always understood that copyright does not protect ideas. For instance, the court has had to explain that the use of technical solution described in documents did not constitute copyright infringement. See Judgment of the Tallinn Circuit Court, 19.06.2007, 2-05-17713. Available at http://www.kohus.ee/kohtulahendid/temp/2-05-17713.pdf (6.06.2009).

[22] The analysis of the Estonian legal practice implies that there is a lack of capabilities in conducting expert assessments related to issues such as whether a work constitutes an unlawful reproduction of work(s) created by other authors. See, e.g., Ruling of the Harju County Court, 3.04.2007, 1-04-156. Available at http://www.kohus.ee/kohtulahendid/temp/kohtumaarus.pdf (15.03.2009).

[23] Presumption of authorship is provided by § 29 (1) of the Copyright Act which reads: "[t]he authorship of a person who publishes a work under his or her name, a generally recognised pseudonym or the identifying mark of the author shall be presumed until the contrary is proved".

[24] This has been acknowledged in Estonian legal literature as well. See M. Rosentau. Intellektuaalse omandi õigused infotehnoloogia valdkonnas. Infotehnoloogilise loomingu olemus (Intellectual Property Rights in Information Technology. The Essence of a Work in Information Technology). – Juridica 2008/3, p. 180 (in Estonian).

There are also other problems of copyright regimes, such as issues related to ownership of a work created in the fulfilment of contractual obligations[*25], exercise of moral and economic rights, limitations, and procedural issues (e.g., estimating damages and proving infringement on the Internet[*26]), which should not be ignored by entrepreneurs. Proper IP management (with conclusion of detailed contracts, development of enforcement strategy, etc.) could be of great help.

Although copyright and patent systems form a part of the IP system, their basic principles in respect of giving protection are not similar. A work is protected by copyright as of its creation without fulfilment of any formalities. In order to protect an invention[*27] that complies with the criteria for patentability (novelty, inventive step, and susceptibility to industrial application), formal registration is required.[*28] Patenting is a complex procedure that involves filing a patent application that could lead to the issuance of a patent. It is important to bear in mind that a patent application and a granted patent are substantially different. Application for a patent has been described as an expression of the applicant's interest and will but a granted patent as an expression of the will of the patent office.[*29] The question is to what extent stakeholders of the IP system can rely on legal validity and a clear scope of protection of granted patents. It should be noted that a patent can be invalidated and that legal disputes as to the exact extent of the protection are possible. It has been explained that "since the purpose of any patent law is to protect inventions, the patent office will only refuse to grant a patent if the results of the examination clearly preclude the grant. In general, any doubt is resolved in the applicant's favour, since final adjudication on the validity or otherwise of a patent is usually possibly via the courts".[*30] At the same time, it is essential to consider that low quality of patents could cause several problems (expensive legal disputes, high transaction costs, etc.). The statistics on patents that are valid in Estonia reveal that 172 patents were granted under the Estonian Patent Act[*31] and 1,009 European patents were entered in the Register of European patents valid in Estonia in 2008.[*32] As one can see, the quality of European patents is even more relevant for innovation in Estonia than the quality of national patents is. Concerns have been raised over patent quality by the European Commission[*33] and IP experts.[*34] The aim of this paper, however, is neither to analyse different aspects of the quality of the European or Estonian national patents nor to make any suggestions on how to improve the quality of patents. The author's main argument is that, even though inventions are protected through patenting procedure, there is no guarantee that a granted patent cannot be invalidated or the scope of its protection disputed. In cases of licensing, transfer, or collateralisation of patent rights, it is crucial in addition to finding the value of a patented invention, analysing technical aspects of the invention, etc. also to address the risks caused by the possibility of invalidation of the patent and unclear scope of protection. It has been suggested that a patent "will only have industrial value to the extent that it covers all embodiments of its innovative concept. Otherwise there will be ways of taking the idea over without infringing the right and any patent will be good only against simple imitators".[*35] Therefore, it is hard to overestimate the importance of knowing the exact scope of patent protection.

Although the risks outlined can usually be managed by means of a detailed contract, some economic activities, such as collateralisation of IP, could be hampered. The main initiative now should be to raise the IP awareness of Estonian entrepreneurs. These actions should follow the European Commission's advice that "[a] bigger effort is needed to raise awareness of the practical aspects of IP protection in the innovation community".[*36]

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[25] Subsection 32 (1) of the Copyright Act provides that the economic rights in respect of a work created under an employment contract or in the public service are transferred to the employer. The Supreme Court has extended the concept of employment contract by saying that it also covers other lasting contractual relationships such as a contract between a company and a board member. See CCSCd, 23.05.2003, 3-2-1-39-03, paragraph 23. – RT III 2003, 20, 196 (in Estonian). Still the situation is not clear if a work is created to fulfil a single order.

[26] Section 111[1] of the Electronic Communications Act, which became effective on 15.03.2009, obliges a communications undertaking to preserve information concerning electronic communications. This regulation could be useful in proving copyright infringement taking place on the Internet. See Elektroonilise side seadus. Entered into force on 1.01.2005. – RT I 2004, 87, 593; 2008, 28, 181 (in Estonian). Unofficial translation available at http://www.legaltext.ee (14.06.2009).

[27] An invention could be defined as "a solution to a specific problem in the field of technology". See WIPO. WIPO Intellectual Property Handbook: Policy, Law and Use. Geneva: WIPO publication 2001, p. 17.

[28] Protection of an invention as a utility model or trade secret and defensive publishing are not analysed.

[29] B. Godenhielm. Patentskyddets omfattning i europeisk och nordisk rätt. Juristförbundets förlag 1994, p. 150. Cited from: U. Petrusson. Intellectual Property & Entrepreneurship: Creating Wealth in an Intellectual Value Chain. CIP Working Paper Series. Göteborg: Center for Intellectual Property Studies 2004, pp. 197–198.

[30] WIPO. WIPO Intellectual Property Handbook: Policy, Law and Use. Geneva: WIPO publication 2001, p. 26.

[31] Patendiseadus. Entered into force on 23.05.1994. – RT I 1994, 25, 406; 2009, 4, 24 (in Estonian). Unofficial translation available at http://www.legaltext.ee (7.03.2009).

[32] Statistical data available at http://www.epa.ee/client/default.asp?wa_id=525&wa_object_id=1&wa_id_key= (19.01.2009).

[33] See Communication from the Commission to the European Parliament and the Council. Enhancing the patent system in Europe – COM(2007) 165, 3.04.2007.

[34] See B. Andersen, S. Konzelmann. In search of a useful theory of the productive potential of intellectual property rights. – Research Policy 2008 (37), pp. 12–28.

[35] W. Cornish, D. Llewelyn (Note 11), p. 8.

[36] Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions. Putting knowledge into practice: A broad-based innovation strategy for the EU – COM(2006) 502, 13.09.2006, p. 7.

3. Increasing the comprehensibility and consistency of IP legislation

It has been explained in the legal literature that the success of regulation depends on that regulation's comprehensibility.[*37] Ambiguous and contradictory regulations could lead to high transaction costs, which might hinder entrepreneurship and innovation. Furthermore, considering that the majority of Estonian entrepreneurs are SMEs with limited resources, the legislator should provide standard regulations to address situations wherein companies have not concluded detailed IP-related contracts. Absence of clear and sufficient regulations serves as good grounds for legal disputes, which divert resources from companies' core business.

The need to analyse the consistency of Estonian IP regulations with the rest of private law was already being emphasised by Estonian lawyers in 2006.[*38] The author agrees with their argument and adds that there is also a need for some unification within the IP system itself. For instance, the legal status of IP created within an employment relationship should not depend on whether this is a design, invention, or copyright-protected work.[*39] At the same time, it is necessary to bear in mind that knowledge protected by IP rights is often exploited in regional and global markets. Some IP instruments (e.g., European patents, Community trademarks, and designs) even though valid in Estonia are not 'products' of the Estonian national legal system. Consequently, initiatives to improve the existing IP system should not be limited to alignment of IP legislation with the rest of national law, including private law. The author argues that one of the main objectives of improvement of the Estonian IP system is to make it more user-friendly. Stakeholders of the IP system (entrepreneurs, consumers, the third sector, public institutions, academia, etc.) should be able to understand and utilise that system. To achieve this objective, fragmented and unsystematic efforts should be avoided. Currently, the Organisation of Research and Development Act[*40] provides that "the Ministry of Economic Affairs and Communications shall organise technological development and innovation policy".[*41] It should be acknowledged that fostering innovation requires contributions from all public institutions and agencies. Of course, at the end of the day, it is up to Estonian entrepreneurs how well they can manage innovation and take advantage of the IP system.

The European Commission has suggested: "The assessment of the impact of regulation on innovation needs to be enhanced. Regulation should be predictable, flexible, simple and effective.'"[*42] This advice is especially valid for Estonia because the IP awareness of Estonian society (including entrepreneurs) is not very high and the majority of Estonian entrepreneurs are SMEs who have not acknowledged all of the possibilities that IP offers. The actions to be taken are twofold. Firstly, there is a continuous need to raise entrepreneurs' IP awareness and encourage them to actively use IP instruments (e.g., patents, utility models, designs, licensing and assignment of rights, and compulsory licensing). Secondly, the author shares the widespread opinion among Estonian IP experts that IP regulations should be clear, detailed, comprehensive, and even explanatory. The author believes that development of the legal framework for IP according to this approach could facilitate exploitation of the IP system. This section focuses on the last measure mentioned. There are a myriad of controversial issues that should also be addressed — for instance, procedural issues such as the compatibility of the obligation to provide information in action related to IP[*43] set out by § 280 of the Code of Civil Procedure with the principle *nemo tenetur se ipsum accusare* provided by § 22 (3) of the Constitution of the Republic of Estonia.[*44] The analysis in this article is for the most part limited to issues of clarity and consistency of regulation concerning exploitation of IP rights. The Estonian copyright, patent, and utility model regulations are used as examples.

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37 R. Narits. Õiguse entsüklopeedia (Encylopeadia of Law). Juura, Õigusteabe AS 2002, p. 133 (in Estonian).

38 M. Käerdi, R. Lang, J. Raidla, P. Varul, U. Volens. Ettevõtja õigus. Tegevuskava ettevõtlusealase õiguskeskkonna rahvusvahelise konkurentsivõime parandamiseks (Entrepreneurial Law. Action Plan for Improving the International Competitiveness of the Corporate Legal Environment). – Juridica 2006/4, p. 232 (in Estonian).

39 This approach is also supported by Estonian IP professionals. See, e.g., J. Ostrat. Töösuhtes või muu lepingu täitmisel tehtud leiutise õigusliku reguleerimise probleeme. Kas lepinguvabadus või eraldi seadus? (Problems in the Legal Regulation of an Employment-Relationship Invention. Freedom of Contract or a Separate Law?). – Juridica 2007/3, p. 198 (in Estonian).

40 Teadus- ja arendustegevuse korralduse seadus. Entered into force on 2.05.1997. – RT I 1997, 30, 471; 2007, 12, 66 (in Estonian). Unofficial translation available at http://www.legaltext.ee (26.02.2009).

41 The Organisation of Research and Development Act § 13 (3) 1).

42 Putting knowledge into practice: A broad-based innovation strategy for the EU (Note 36), p. 6.

43 Subsection 280 (1) of the Code of Civil Procedure provides: "If an action is filed due to an infringement or danger of infringement of copyright and related rights or industrial property rights, the court may require at the reasoned request of the plaintiff that the defendant or another person provide written information concerning the origin and distribution systems of the goods or services infringing a right arising from intellectual property". See Tsiviilkohtumenetluse seadustik. Entered into force on 1.01.2006. – RT I 2005, 26, 197; 2008, 59, 330 (in Estonian). Unofficial translation available at http://www.legaltext.ee (8.03.2009).

44 Eesti Vabariigi põhiseadus. Entered into force on 3.07.1992. – RT 1992, 26, 349; 2007, 33, 210 (in Estonian). Unofficial translation available at http://www.legaltext.ee (7.03.2009).

The conclusion that it is almost impossible to challenge the legal validity of the protection of a work by copyright does not mean that there are not any problems related to the copyright regime. Besides issues concerning the subject matter of protection, other elements in the copyright system are crucial as well. For instance, the catalogue of rights vested in the author of a work and the possibilities for exercising these rights form a legal framework within which economic exploitation of a work takes place. The Copyright Act provides a general principle that "[a]n author shall enjoy the exclusive right to use the author's work in any manner, to authorise or prohibit the use of the work in a similar manner by other persons".*[45] The Copyright Act, however, does not explain specific issues such as the possibility to transfer and license an unknown use of a work. Since the Copyright Act does not forbid or restrict it, because of the principle of freedom of contract*[46], these agreements should be held to be valid. The IP-related literature supports the position that it is allowed to transfer and license the right to use a work in a manner that was unknown at the time of the conclusion of the contract.*[47] Still, if we adhere to an approach whereby the Copyright Act must enhance awareness and be explanatory, a provision allowing transfer and licensing of an unknown use of a work could be added.

The exercise of the moral rights of an author and the interrelation of economic and moral rights is a problem requiring clear regulation. Some moral rights may interfere with the economic exploitation of a work.*[48] The usual practice is that Estonian entrepreneurs do not always conclude detailed author's contracts*[49] that include provisions on the exercise of moral rights.

While economic rights are transferable*[50], the same cannot be said of moral rights. The Copyright Act*[51] explicitly provides that "[t]he moral rights of an author are inseparable from the author's person and non-transferable".*[52] This provision gives rise to the question of whether it is possible to license the moral rights. The general understanding is that it indeed is allowed to license moral rights.*[53] The wording of some provisions of the Copyright Act supports this approach.*[54]

From the above, it can be said that, presumably, it is possible to license at least some of the moral rights. Still many aspects of licensing of moral rights remain a controversial issue in the Estonian legal literature. For instance, H. Pisuke by referring to 'ghost authorship' and trademark issues*[55] suggests that "for the purposes of Estonian law, moral rights cannot be assigned. However, it is possible to issue an exclusive licence and a non-exclusive licence for exercising any moral right".*[56] There are also opinions that differ from this. M. Rosentau poses the question of how to distinguish a general exclusive licence from transfer of the moral rights, the latter being forbidden. Therefore, he argues that it is not allowed to license the moral rights *in corpore et in genere*. It is essential to agree on how every single moral right will be exercised. Some moral rights are not licensable at all.*[57] The author admits that licensing moral rights involves some degree of risk. This gives rise to questions such as what happens when there is a general exclusive licence for the exercise of the moral rights or no agreement exists in respect of the moral rights.

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[45] The Copyright Act § 13 (1).

[46] The principle of freedom of contract is based on the right to free self-realisation which is guaranteed by § 19 of the Constitution of the Republic of Estonia.

[47] See A. Kalvi. Autorilepingu uus kuub (New Skin of Author's Contracts). – Juridica 2003/4, pp. 251, 257 (in Estonian); P. Varul, I. Kull, V. Kõve, M. Käerdi. Võlaõigusseadus II. Kommenteeritud väljaanne (Law of Obligations Act II. Commented edition). Tallinn: Juura, Õigusteabe AS, 2007, p. 337 (in Estonian).

[48] Subsection 12 (1) of the Copyright Act defines the right of integrity of the work, the right of additions to the work and the right of supplementation of the work as moral rights. Pursuant to § 13 (1) of the Copyright Act the right of alteration of the work is an economic right. As seen there is an overlap of these rights.

[49] An author's contract is defined as "an agreement between the author or his or her legal successor and a person who wishes to use the work for the use of a work on the basis of which the author or his or her legal successor transfers the author's economic rights to the other party or grants to the other party an authorisation to use the work to the extent and pursuant to the procedure prescribed by the conditions of the contract". See the Copyright Act § 48 (1).

[50] The Copyright Act § 11 (3).

[51] Section 39 of the Constitution of the Republic of Estonia also provides the following principle: "[a]n author has the inalienable right to his or her work". Literal interpretation of this section could mean that it is not allowed to transfer or license the moral and economic rights. This, however, is not the case. The problem has been analysed by H. Pisuke. See H. Pisuke. Kas autori õigusi saab võõrandada? (Are the Author's Rights Inalienable?) – Juridica 1994/4, pp. 89–90 (in Estonian).

[52] The Copyright Act § 11 (2).

[53] See, e.g., A. Kalvi (Note 47), p. 258; P. Varul, I. Kull, V. Kõve, M. Käerdi (Note 47), p. 337; H. Pisuke. Moral Rights of Author in Estonian Copyright Law. – Juridica International 2002 (7), p. 170.

[54] See the Copyright Act §§ 12 (1) 3) and 4).

[55] H. Pisuke refers that sign marks usually do not contain any reference to the authors who created them.

[56] H. Pisuke (Note 53), pp. 170–171.

[57] M. Rosentau. Intellektuaalse omandi õigused infotehnoloogias. Autori isiklikud õigused (Intellectual Property Rights in Information Technology. The Moral Rights of the Author). – Juridica 2007/9, pp. 653–654 (in Estonian).

The author is of the opinion that there are some safety net provisions that can be used in the above described situations. Subsection 370 (3) of the Law of Obligation Act*[58] provides: "If the right of use to which a licence agreement extends is not clearly specified in the agreement, the extent of the right of use shall be determined pursuant to the objective of the agreement." According to the Estonian legal literature, the above-mentioned provision might be applicable to moral rights as well.*[59] It could also be assumed that if an author had given someone else his permission to use his work, for instance, as a logo incorporated into a trademark, and were to claim afterwards that this use violates his moral rights (e.g., his name not being attached to the trademark violates his right of authorship), then his conduct could be considered to go against the principle of good faith (the prohibition of *venire contra factum proprium*).

M. Rosentau proposes that the overlap of some moral and economic rights should be removed.*[60] The current position of the Estonian Ministry of Culture, which is responsible for drafting the new Copyright and Neighbouring Rights Act, seems to be that the right of integrity of the work, the right of additions to the work and the right of supplementation of the work will be moved to the catalogue of the economic rights.*[61] The author supports both suggestions and is also of the opinion that it should be provided *expressis verbis* that all moral rights which concern exploitation of a work are licensable. This would certainly enhance legal certainty.

The lack of legal certainty is not common only for copyright law. The same problems exist in Estonian industrial property law as well. The Patent Act and the Utility Models Act*[62] do not provide regulation concerning how two or more patent or utility model owners can exercise their rights (if together, separately, or some rights together and others separately). Some Estonian patent law experts have suggested that, because of unity of invention (an invention is an indivisible whole), joint owners of a patent or utility model should exercise their rights together. It is not excluded that law should be amended to entitle every patent or utility model owner to the right to issue non-exclusive licences. Preferably, however, these issues should be regulated by joint owners in a contractual relationship.*[63] Still the author would like to emphasise that, especially in respect of utility models, which are often utilised by SMEs, there could be some standard dispositive regulation. Even though in the absence of a detailed contract the principle of analogy and provisions on interpretation of a contract etc. could be applied the rights and obligations of joint patent or utility model owners remain unclear. Therefore, a dispositive regulation is needed that would determine how joint patent or utility model owners could exercise their rights.

The possibilities for exercising the rights of an inventor are not very clearly set out either. Subsection 13 (9) of the Patent Act provides that "[t]he proprietary rights of an author are transferable and inheritable". On the basis of this principle, it could be assumed that the right of an inventor "to receive fair proceeds from the profit received from the invention", as provided by § 13 (8) of the Patent Act, is freely transferable. However, § 43 (1) of the Patent Act sets out that a contract transferring the right to apply for a patent "shall contain provisions which ensure, pursuant to § 13 (8), the right of the author to receive fair proceeds from the profit received from the invention during the entire period of validity of the patent".*[64] This requirement creates legal uncertainty. On the one hand, the right to receive fair proceeds from the profit received from the invention is a proprietary right and therefore transferable. On the other hand, the wording of § 43 (1) of the Patent Act prescribes that a contract transferring the right to apply for a patent has to ensure an inventor's right to fair proceeds from the profit received from the invention. The author of this paper suggests that, in order to avoid legal disputes and foster exploitation of the patent system and thereby innovation, it should be clearly provided that the right to fair proceeds from the profit received from the invention is transferable. Subsection 43 (1) of the Patent Act should be amended to comply with the principle of transferability of the proprietary rights.

The format requirements for IP contracts (contracts related to licensing or transfer of IP rights) involve practical issues concerning copyright and industrial property regimes alike. The Copyright Act, the Patent Act, the Utility Models Act, and the Industrial Design Protection Act*[65] require a written licence agreement.*[66] The Trade Marks Act*[67] does not prescribe format requirements for licence agreements. Despite the fact that licence agreements are essential tools for the utilisation of IP, written form is not always used. Subsection

[58] Võlaõigusseadus. Entered into force on 1.07.2002. – RT I 2001, 81, 487; 2008, 59, 330 (in Estonian). Unofficial translation available at http://www.legaltext.ee (14.02.2009).

[59] A. Kalvi (Note 47), p. 258.

[60] M. Rosentau (Note 57), p. 666.

[61] Isiklike õiguste kataloog (The Catalogue of the Moral Rights). Available at http://wp.kul.ee/ (14.06.2009).

[62] Kasuliku mudeli seadus. Entered into force on 23.05.1994. – RT I 1994, 25, 407; 2008, 59, 330 (in Estonian). Unofficial translation available at http://www.legaltext.ee (19.02.2009).

[63] The author's personal communication with R. Kartus (e-mail, 11.02.2009).

[64] The Utility Models Act provides the same regulation. See the Utility Models Act §§ 12, 40.

[65] Tööstusdisaini kaitse seadus. Entered into force on 11.01.1998. – RT I 1997, 87, 1466; 2008, 59, 330 (in Estonian). Unofficial translation available at http://www.legaltext.ee (19.02.2009).

[66] The Copyright Act § 49 (1), the Patent Act § 46 (1), the Utility Model Act § 43 (1); the Design Act § 74 (7).

[67] Kaubamärgiseadus. Entered into force on 1.05.2004. – RT I 2002, 49, 308; 2006, 61, 456 (in Estonian). Unofficial translation available at http://www.legaltext.ee (19.02.2009).

83 (1) of the General Part of the Civil Code Act*[68] provides that "[u]pon failure to comply with the format provided for a transaction by law, the transaction is void unless otherwise provided by law or the objective of the format requirements". The Estonian Supreme Court has found that an author's contract authorising the use of a work is not void on account of not having been concluded in writing. The requirement of written form protects both parties by ensuring legal certainty in respect of the rights and obligations. However, declaring oral author's contracts void would be harmful for authors because they would lose their rights and the other parties would be freed from their obligations.*[69] The author is of the opinion that the impact of the Supreme Court's decision is not limited to copyright licence agreements. In principle, it should be applicable to technology and design licence agreements as well. Since entrepreneurs do not always conclude written IP contracts, the author proposes that IP laws should be changed to allow oral non-exclusive licences. Depending on the type (e.g., licensing or transfer of the rights) and object (e.g., a work, an invention, a design, or trade secrets) of the IP contract, format requirements can be differentiated. Any approach that may be chosen, however, should be consistent.

Format requirements are only one facet of problems related to IP contracts. It has also been suggested that IP contracts require a consistent conceptual framework, the legal status of the industrial property registers has to be specified, and regulations concerning similar issues should be unified.*[70] All of the issues raised require thorough and extensive analysis.

4. Enhancement of flexibility and appropriateness of IP limitations

One of the main objectives of IP limitations is to strike a balance between the interests of the stakeholders of the IP system. This means avoiding blocking of the development of new useful products, ensuring the free movement of goods, allowing private use, etc. It is possible to distinguish among several types of limitations. Firstly, the definition of protectable subject matter (e.g., the scope of protection can be narrow or wide, and some information may even be excluded from protection) and also the catalogue, extent, and duration of exclusive rights have an impact on a right holder's legal position.*[71] Secondly, there are explicitly provided limitations existing within IP systems (e.g., a private use exception). Thirdly, the limitations can also originate from outside the IP system (e.g., competition law concepts to avoid abuse of dominant position). All of these limitations constitute an integral part of the IP system.

The author's approach is based on the assumption that strong IP regimes (those with a broad scope of protection, extensive rights, few limitations, harsh sanctions, etc.) do not necessarily enhance innovation. Extensive IP limitations could facilitate innovation as well. The design of the IP system should be determined by general and country- and region-specific requirements. A general question that needs to be answered is what kind of IP system would enhance innovation the most. In addition, the IP system should not ignore country- and region-specific conditions (e.g., stage of development). At least wealthy and developed countries have not done this.*[72] Although Estonia is bound by international obligations, there might be some room for manoeuvring without infringing these obligations. The author takes no stand on whether Estonia should favour a high or low level of IP protection. Probably the approach should be differentiated on the basis of the specific IP regime concerned, the subject of protection, etc. Sometimes extra incentives are created to encourage development of knowledge.*[73]

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[68] Tsiviilseadustiku üldosa seadus. Entered into force on 1.07.2002. – RT I 2002, 35, 216; 2008, 59, 330 (in Estonian). Unofficial translation available at http://www.legaltext.ee (19.02.2009).

[69] CCSCd, 13.12.2006, 3-2-1-124-06, paragraph 16. – RT III 2006, 47, 397.

[70] V. Kõve. Varaliste tehingute süsteem Eestis (System of Proprietary Transactions in Estonia). Doctoral thesis. Supervisor Professor I. Kull (2009), p. 226. Available at http://dspace.utlib.ee/dspace/bitstream/10062/8251/1/k%C3%B5vevillu.pdf (8.07.2009).

[71] W. Cornish and D. Llewelyn regard protectable subject-matter and the rights conferred as core components of IP system: "As a regime is developed for protecting a form of intellectual property a number of basic decisions have to be made: What types of subject-matter are to be included? Is the right to be conferred only upon application to a government office? How long is it to last? Is it to be a right good only against imitators (as with copyright and unregistered designs), or is it a "full monopoly" that even affects independent devisers of the same idea (as with patents for inventions, registered designs and trade marks)"? See W. Cornish, D. Llewelyn (Note 11), p. 12.

[72] According to S. Salazar "[t]he exclusion of chemicals from patentability occurred for the first time in history in a German law of 1877. The reasons given at the time were that it was necessary to reinvigorate an industry that was lagging behind its counterparts in other countries. Even before that, a French law of 1844 had expressly excluded pharmaceutical chemicals from patentability. [...] It is said that, once they had achieved a certain level of development of their pharmaceutical industries, the developed countries amended their legislation to extend patent protection to pharmaceutical products. What is certain is that it was not until 1960 that France introduced protection, with Germany following in 1968, Italy in 1978, and Japan and Switzerland in 1976 and 1977 respectively". See S. Salazar. Intellectual Property and the Right to Health, p. 8. Available at http://www.wipo.int/tk/en/hr/paneldiscussion/papers/pdf/salazar.pdf (12.03.2009).

[73] See, e.g., Regulation (EC) No. 141/2000 of the European Parliament and of the Council of 16 December 1999 on orphan medicinal products. – OJ L 18, 22.01.2000, pp. 1–5.

In this section of the paper, the author analyses some key issues that have to be considered when one designs a set of IP limitations that are intended to enhance innovation. The author's approach is based on two postulates. Firstly, the IP system is in essence a constantly changing dynamic system. This also has implications for the IP limitations. Secondly, the overlap of IP regimes (e.g., the same object can be protected as a work, design, or trademark) has to be considered in the design of limitations.

The IP system is undergoing transformation due to several circumstances.[*74] Among other factors, the extension of the IP system plays an important role. Broadening of the subject matter of IP protection has been a characteristic feature of the IP system since its inception.[*75] In addition to the extension of protectable subject matter (to encompass software, biotechnological inventions, domain names, *sui generis* databases, etc.), the inherent tendency toward expansion of the IP system applies to the catalogue of rights as well (e.g., the list of an author's economic rights[*76] was supplemented with the right of making the work available to the public[*77]). Also, the term of protection has continuously been extended.[*78] According to P. Drahos, "[t]he strongly expansionary nature of IP systems shows no sign of changing".[*79] Consequently, the concept of IP limitations cannot ignore the dynamic nature of IP systems.

It has been emphasised that "[b]efore the WTO TRIPS Agreement[*80] was signed, states were free to determine what would or would not be patentable within the country. [...] The patenting of essential goods such as medicines and foods was for a long time thought to be self-evidently against the public interest".[*81] Setting a general standard on an international level, the TRIPS Agreement requires that patents be available for all inventions, whether products or processes, in all fields of technology.[*82] The TRIPS Agreement explicitly provides that exclusion of micro-organisms from patentability is not allowed.[*83] Article 1 of the directive on biotechnological inventions[*84] obliges the EU's member states to protect biotechnological inventions under national patent law, and Recital 11 emphasises the importance of the patent system for encouraging research in biotechnology.

This course of action has raised several ethical[*85] and practical concerns. W. Cornish and D. Llewelyn have noted that "each type of subject-matter calls for a different balance of public and private interests — the interests of the society as a whole in its economic and cultural development, and interest of the individual to secure a 'fair' value for his intellectual effort or investment of capital or labour".[*86] Opinions have been expressed also that concern the issues of drug patents specifically. It has been suggested that the patent protection of pharmaceuticals "is a subject with strong social connotations: it touches on areas as sensitive as health and man's quality of life, even his survival".[*87] In addition, M. A. Heller and R. S. Eisenberg have pointed out that "the lack of substitutes for certain biomedical discoveries (such as patented genes or receptors) may increase the leverage of some patent holders, thereby aggravating holdout problems".[*88]

Various suggestions have been put forth for addressing this issue. For instance, W. Kingston has expressed an opinion that patents are unsuitable for biotechnology, for a variety of reasons (monopolisation of life science,

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74 L. Davis describes the following trends which have affected IP: growing prominence of intangible assets as sources of competitive advantage, globalization of business activities, advances in digital technologies of replicability and transferability, and changes in the regulatory framework governing intellectual property rights. See L. Davis. The Changing Role of Intellectual Property Rights. – Economics of Innovation and New Technology 2004 (13) 5, pp. 401–404.

75 See P. Drahos (Note 11), p. 1; W. Cornish, D. Llewelyn (Note 11), p. 34.

76 The Copyright Act § 13.

77 H. Pisuke characterises the right of making the work available to the public as an Internet environment right. See H. Pisuke. Autoriõiguse alused (Copyright Basics). Tallinn 2006, p. 41 (in Estonian).

78 E.g., Council Regulation (EEC) No. 1768/92 of 18 June 1992 concerning the creation of a supplementary protection certificate for medicinal products. – OJ L 182, 2.07.1992, p. 1–5; Regulation (EC) No. 1610/96 of the European Parliament and of the Council of 23 July 1996 concerning the creation of a supplementary protection certificate for plant protection products. – OJ L 198, 8.08.1996; Council Directive 93/98/EEC of 29 October 1993 harmonizing the term of protection of copyright and certain related rights. – OJ L 290, 24.11.1993, p. 9–13.

79 P. Drahos (Note 11), p. 1.

80 Agreement on Trade-related Aspects of Intellectual Property Rights. Marrakech, 15.04.1994, entered into force on in respect to Estonia 13.12.1999. – RT II 1999, 22, 123.

81 P. Boulet, C. Garrison, E. 't Hoen. Drug Patents under the spotlight. Sharing practical knowledge about pharmaceutical patents (2003), p. 5. Available at http://www.who.int/3by5/en/patents_2003.pdf (11.03.2009).

82 TRIPS Article 27 (1).

83 TRIPS Article 27 (3) b).

84 European Parliament and Council Directive 98/44/EC of 6 July 1998 on the legal protection of biotechnological inventions. – OJ L 213, 30.07.1998, 13.

85 For further discussion, see A. Kelli. Some Issues of Intellectual Property and Ethics — Recent Developments in IP Law. Kraków: Wolters Kluwer Polska 2007, pp. 153–165.

86 W. Cornish, D. Llewelyn (Note 11), p. 12.

87 S. Salazar (Note 72), p. 8.

88 M. A. Heller, R. S. Eisenberg. Can Patents Deter Innovation? The Anticommons in Biomedical Research. – Science 1998 (280), p. 700.

blocking, and difficulties in determining the type of funding: public or private).[*89] Recital 2 of the directive on biotechnological inventions, on the other hand, emphasises that "in the field of genetic engineering, research and development require a considerable amount of high-risk investment and therefore only adequate legal protection can make them profitable". The author is of the opinion that there is no simple solution to the problems described. For the most part, the success of an IP system in fostering innovation depends on the co-operation among the stakeholders of that IP system. There are also legal instruments such as competition law and compulsory licensing that can be used to address problems caused by non-co-operative behaviour.

It is commonplace for one product to be protected by several patents, designs, trademarks, copyrights, secret know-how, etc. Furthermore, several IP instruments could be used to establish control over the same knowledge. Therefore, it is crucial to ensure that these aspects all are considered in the design of IP limitations.[*90] The copyright, design, trademark, and patent regimes are used as examples.

It is possible for the same object to be protected as a work, design, and trademark. The illustrative list of works protected by copyright includes works of design and fashion design.[*91] Subsection 2 (3) of the Industrial Design Protection Act provides that "[t]he legal protection of industrial designs provided for in this Act is independent of the protection provided for in the Copyright Act". The Trade Marks Act requires the author's consent if a work is to be protected as a trademark.[*92] The problem is that every IP regime (among them copyright, design, and trademark) has its own set of limitations, which is not necessarily coherent with those of the other regimes. For instance, a trademark owner has no right to prohibit other persons from using the trademark to indicate the intended purpose of a product.[*93] The Copyright Act does not explicitly provide this kind of limitation. The problem described is not merely of a theoretical nature. The *Dior v. Evora* case[*94] also involved a question of cumulative protection of trademarks containing pictures by the trademark and copyright regimes. The court held that "the protection conferred by copyright as regards the reproduction of protected works in a reseller's advertising may not, in any event, be broader than that which is conferred on a trademark owner in the same circumstances".[*95]

There is an overlap of patent and design protection as well. This means that the same technical solution can be protected by both patent and design regimes. M. Schlötelburg explains that "[t]he close relation between design and function is, however, common knowledge ('form follows function') and established practice. [...] Supplementary protection of an invention by a design in addition to a patent can be achieved in a fast and cost-efficient way by using the figures contained in the patent application for the design registration".[*96] The possibilities for protecting a technical solution as a design are limited. It has been emphasised that "design law is only applicable to patentable matter where the invention has materialised in a specific product. The design law does not allow protection of ideas, concepts, or methods. A design right can only provide protection for a concrete embodiment of an apparatus claim or a well-defined product achieved with a method claim".[*97] Article 7 (1) of the directive on the legal protection of designs[*98] sets an additional requirement that "[a] design right shall not subsist in features of appearance of a product which are solely dictated by its technical function". According to the opinion of Ruiz-Jarabo Colomer, "a functional design may, none the less, be eligible for protection if it can be shown that the same technical function could be achieved by another different form".[*99] This reasoning is supported by the EU documents[*100] and theoretical literature.[*101] A relevant issue has been raised that it is possible to obtain a monopolistic position over a technical solution by registering all of its materialisations as designs.[*102]

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89 W. Kingston. Unlocking the Potential of Intellectual Property. – O. Granstrand. Economics, Law and Intellectual Property. Seeking Strategies for Research and Teaching in a Developing Field. Boston/Dordrecht/London: Kluwer Academic Publishers 2003, p. 314.

90 The need to analyse the existing system of IP limitations from a holistic perspective has been acknowledged by IP experts. See A. Kur. Differentiated Approach Based on Unitary Ground — A Feasible Approach? Available at http://www.iprinfo.com/tiedostot/Netti1_Kur.pdf (13.06.2009).

91 The Copyright Act § 4 (3) 16).

92 The Trade Marks Act § 10 (2).

93 The Trade Marks Act § 16 (1) 4).

94 Case C-337/95 (*Parfums Christian Dior SA and Parfums Christian Dior BV v. Evora BV*). – ECR 1997, p. I-06013.

95 *Ibid*., paragraph 58.

96 M. Schlötelburg. Design protection for technical products. – Journal of Intellectual Property Law & Practice 2006 (1) 10, p. 675.

97 *Ibid*., p. 676.

98 Directive 98/71/EC of the European Parliament and of the Council of 13 October 1998 on the legal protection of designs. – OJ L 289, 28.10.1998, pp. 28–35.

99 Opinion of Mr. Advocate-General Ruiz-Jarabo Colomer delivered on 23 January 2001, Case C-299/99 (*Koninklijke Philips Electronics NV v. Remington Consumer Products Ltd.*). – ECR 2002, p. I-05475, paragraph 34.

100 The Commission of the European Communities. Green Paper on the Legal Protection of Industrial Design. Working document of the services of the Commission. III/F/5131/91-EN, June 1991, p. 60; The Commission of European Communities. Amended proposal for a European Parliament and Council directive on the legal protection of designs – COM(1996) 66, 21.02.1996, p. 7.

101 G. Tritton. Intellectual Property in Europe. 3rd ed. London: Sweet & Maxwell 2008, p. 573; WIPO. WIPO Intellectual Property Handbook: Policy, Law and Use. Geneva: WIPO publication 2001, p. 114; M. Schlötelburg (Note 96), p. 677.

102 G. Tritton (Note 101), p. 573; W. Cornish, D. Llewelyn (Note 11), p. 579.

It has been suggested that "[b]ecause overlapping protection presents a variety of challenges to the IP system, disrupts the IP balance, and impoverishes the public domain, we should work to eliminate the overlaps that do exist and, perhaps more importantly and more realistically, attempt to avoid creating overlaps in the future".*[103] In principle the author agrees with this suggestion. However, since it is very hard to avoid overlapping protection then the re-conceptualisation of the existing limitations could also be of help. The author does not argue that it is absolutely necessary to introduce several new limitations. Recommendable among the first actions is to analyse the exact scope of the existing limitations and determine whether they are applicable to cases of overlapping protection. For instance, in *Dior vs. Evora* case the court extensively construed the principle of exhaustion of rights by saying that "when trade-marked goods have been put on the Community market by the proprietor of the trademark or with his consent, a reseller, besides being free to resell those goods, is also free to make use of the trademark in order to bring to the public's attention the further commercialization of those goods".*[104] It has also been suggested that "increasing dynamism of technical development and frequency of overlaps will call for "creative interpretation" of the law in any case".*[105]

In addition, two further elements remain to be considered. Firstly, the design of the national IP system cannot disregard international and regional legal instruments. The author is of the opinion that Estonia has not taken advantage of all flexibilities found in international IP instruments. For instance, only recently was the Patent Act amended to include provisions on public non-commercial use of invention (§ 47^1).*[106] Secondly, since IP lawmaking is to a large extent moving into regional and international arenas, perhaps it is more appropriate to take the necessary steps for adopting the necessary limitations in those arenas.

5. Conclusions

The global economic downtown is not the only challenge that Estonia has to face. The problem is that the Estonian economy is not as advanced as the economies of many other European countries. This makes the current economic situation especially difficult. A possible solution could be for Estonian entrepreneurs to focus on the development of innovative and competitive services and products. In this article, the author has explored some possible improvements of the IP system that could enhance innovation in Estonia.

The author presumes that the utilisation of IP is facilitated when the legal validity of protection is not easily challenged and the subject matter of IP protection is clearly defined. In respect of the copyright system, the author concludes that it is very hard to challenge protection of a work by copyright. However, the exact scope of copyright protection can occasion disputes and there is a need to develop capabilities in conducting expert assessments related to issues such as whether a work constitutes an unlawful reproduction of work(s) created by other authors. Measures should be taken by authors to provide ability to prove authorship.

In respect of the patent system, the author has concluded that, although inventions are protected through patenting procedure, there is no guarantee that a granted patent cannot be invalidated or the scope of its protection disputed. The risks created by the possibility of a patent being invalidated or its scope of protection being narrowed have to be managed by means of detailed contracts.

In neither case does the author recommend amendment of the law. Raising the IP awareness of Estonian entrepreneurs could have a better effect for business. Entrepreneurs have to enhance their skills to contractually manage IP-related risks.

The consistency of Estonian IP regulations with the rest of private law is important. Still it is necessary to bear in mind that knowledge protected by IP rights is often exploited in regional and global markets. Some IP instruments, such as European patents and Community designs, are not 'products' of the Estonian national legal system. Consequently, initiatives to improve the existing IP system should not be limited to alignment of IP legislation with the rest of national law, including private law. The author has argued that one of the main objectives of improvement of the Estonian IP system is to make it more user-friendly for Estonian entrepreneurs by increasing its comprehensibility and through provision of standard regulations to be applied in cases where the parties have not concluded detailed contracts. Measures to encourage Estonian entrepreneurs' active use of IP instruments should be initiated.

As a result of the analysis of the legal framework determining the possibilities for exercise of an author's exclusive rights, the author of this article arrived at two conclusions. Firstly, if we adhere to an approach by

[103] V. Moffat. Mutant Copyrights and Backdoor Patents: The Problem of Overlapping Intellectual Property Protection. – Berkeley Technology Law Journal 2004 (19), p. 1530.

[104] *Parfums Christian Dior SA and Parfums Christian Dior BV v. Evora BV*, paragraph 2 of the operative part.

[105] A. Kur (Note 90).

[106] Tööstusomandi õiguskaitset reguleerivate seaduste ja nendega seonduvate seaduste muutmise seadus. Entered into force on 1.03.2009. – RT I 2009, 4, 24 (in Estonian).

which the Copyright Act must enhance awareness and be explanatory, provisions on permissibility of transfer, on licensing an unknown use of a work, and on similar matters should be added. Secondly, considering problems related to the moral rights, the author supports the position that the overlap of some moral and economic rights has to be removed by narrowing the scope of the moral rights. It should be provided *expressis verbis* that all moral rights which concern exploitation of a work are licensable. This would certainly enhance legal certainty.

The lack of legal certainty is not only common for copyright law. Similar problems exist in Estonian industrial property law as well. For instance, the Patent Act and the Utility Models Act are silent about how joint patent or utility model owners can exercise their rights (for instance, if together, separately, or some rights together and others separately). Although in the absence of a detailed contract the principle of analogy and provisions on interpretation of a contract, etc. could be applied, the rights and obligations of joint patent or utility model owners remain unclear. Therefore, a standard dispositive regulation is needed that would determine how joint patent or utility model owners could exercise their rights.

The author also proposes that, in order to comply with the principle of transferability of economic rights and avoid legal uncertainty, it should be clearly provided that an inventor's right to fair proceeds from the profit received from the invention is transferable.

Format requirements for IP contracts are a practical issue concerning copyright and industrial property regimes alike. The author proposes that IP laws should be changed to allow oral non-exclusive licences. Depending on the type (e.g., licensing or transfer of the rights) and object (e.g., a work, invention, design, or trade secret) of IP contracts, format requirements can be differentiated. Any approach chosen, however, should be consistent.

On the basis of the analysis of flexibility and appropriateness of IP limitations, the author proposes that strong IP regimes do not necessarily enhance innovation. Equally, extensive IP limitations could facilitate innovation. The design of IP systems should be determined by general and country- and region-specific requirements.

The author suggests that a need to review the existing IP limitations is created in consequence of two factors. Firstly, the IP system is a constantly changing dynamic system. For instance, the area subject to IP protection is becoming broader. Intellectual property limitations that are appropriate and proportionate in one phase of development are not necessarily so in another phase. Secondly, the current tendency is for IP regimes to overlap, which means that a technical solution can be patented and also its appearance protected as a design. In addition, it is usual that many different IP rights are attached to a single product. Consequently mechanisms are needed to reduce the possibilities of abuse of the IP system (use of exclusive rights to block development of new products, problems of excessive pricing, etc.). The problem is that every IP regime has its own set of limitations, which does not necessarily match the other regimes. The author does not argue that it is absolutely necessary to introduce several new limitations. Among the first actions to be taken it is recommendable to analyse the precise scope of the existing limitations and determine whether they are applicable to cases of overlapping protection.

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Is Goodwill Synonymous with Reputation?

1. Introduction

The Georgian Parliament on 2 September 1997 adopted resolution 828-1s, according to which "All laws and normative acts adopted by the Georgian Parliament from 1 September 1998 shall be compatible with the standards and rules established by the European Union."*[1]

On 22 April 1996, the Georgian parliament concluded the Partnership and Cooperation Agreement with the European Community.*[2] Besides other important issues, this agreement deals with the protection of intellectual, industrial, and commercial property. Pursuant to Article 42 of the agreement, Georgia shall continue to improve the protection of intellectual, industrial, and commercial property rights in order to provide for a level of protection similar to that existing in the community, including effective means of enforcing such rights. In addition, Georgia shall accede to the multilateral conventions on intellectual, industrial, and commercial property rights.

This agreement was followed by the national programme on harmonisation of Georgian legislation with the legislation of the European Community. Then, 2006 saw the entry into force of an action plan*[3] forming part of the European neighbourhood policy. With this document Georgia is obliged to approximate its intellectual and industrial property rights to the requirements of the PCA and TRIPS agreements and ensure their effective implementation.

Today, Georgia is a signatory to many international conventions. The national parliament has gradually made Georgian legislation compatible with that of the wider community. But still there exist gaps in laws; some legal acts should have been altered. Georgian legislation contains some concepts that need comprehensive study.

As regards legislation in the field of intellectual property law, most is compatible with the directives and regulations of the European Community as well as with international conventions. However, problems arise concerning some terms and concepts included in Georgian laws, the content of which is explained neither in the legislation nor in Georgian juridical literature. For this reason, only through theoretical analyses and comparative study of international acts and foreign literature in the field of intellectual and industrial property law is it possible to determine what should, or could, have been mentioned in those terms and concepts.

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[1] Resolution of Georgian Parliament № 828-1s, 2 September 1997. Available at http://embassy.mfa.gov.ge/index.php?lang_id=ENG&sec_id=65878&new_month=12&new_year=2008 or www.parliament.ge.

[2] Partnership and Cooperation Agreement between the European Communities and their Member States, of the one part, and Georgia, of the other part, 26 April 1996. – OJ L 205, 4.08.1999, p. 3.

[3] EU/Georgia Action Plan. Available at http://ec.europa.eu/world/enp/pdf/action_plans/georgia_enp_ap_final_en.pdf.

One of those terms that is not clarified in Georgian legislation and needs to be studied is goodwill. This term is mentioned only in the Tax Code of Georgia. But definition of the concept of goodwill can be found neither in the Tax Code nor in other legal acts of Georgia.

Because so far it has not been distinctly explicated in Georgia what function goodwill serves, what its basic characteristics are, and what role it plays in competitive relationships, it is preferable to define, through scientific literature and case-law studies, the characteristics and functional meaning of this object.

On the basis of the present analysis of the Georgian legislation, this is the first attempt to define the place accorded to goodwill in the Georgian legal landscape and the extent of its protection in Georgia. It is a rather arduous task to study the nature of goodwill and set it out in an exhaustive manner; however, one can state that, as a rule, the concept is identified almost in an equality relationship with reputation.

Goodwill and reputation are indeed very tightly interconnected. 'Goodwill' and 'reputation' as legal terms are defined by the legislature and/or jurisprudence in the legal system within which they operate. Each country may give them different meanings. Georgia is no exception here. But the problem arises in relation to specification of the legal framework within which the meaning of those terms is explored.

As was mentioned above, goodwill and reputation are very often considered to be synonyms. Perhaps the reason for this is the following: these terms are reflected in different legal systems but are used in connection with the same objects of intellectual property, such as trademarks and geographical indications, and therefore it is quite difficult to give an exhaustive answer to the question of whether they are the same objects but with different names or instead differ from each other.

In order to address this question, it is necessary to examine whether and how the concepts of goodwill and reputation are reflected in different legal systems.

If one proceeds from the Georgian legislation, it is hard to conclude that goodwill and reputation are synonyms. That is the very reason this article focuses not only on study of goodwill but also on its distinction from reputation.

In order to elucidate the existing similarities and differences between the two terms, it is expedient to clarify the notion — and the characteristics — of goodwill itself. This is the lens through which the substance of this object shall be studied and compared with reputation.

The article focuses on the definition of legal boundaries within which goodwill and reputation may be protected.

2. The notion of goodwill

'Goodwill' is an English term, and probably English lawyers were the first to take interest in its content. William Henry Browne mentioned in his work that English courts tried to clarify what was meant under this term.[*4]

Griffits carried on consideration of the question: "What is goodwill? It is a thing very easy to describe, very difficult to define. It is the benefit and advantage of the good name, reputation and connection of a business. It is the attractive force which brings in custom. It is the one thing which distinguishes an old-established business from a new business at its first start."[*5]

A generally accepted definition of goodwill does not exist, though most opinions are very similar to each other. For example, in 1856, M.R. Romilly said: "There is a considerable difficulty in defining accurately what is included under this term goodwill. It seems to be that species of connection in trade which induces customers to deal with a particular firm"[*6] or, as Lord Eldon put it, "the probability that the old custom will resort to the old place"[*7].

According to Goyal, "[g]oodwill denotes the benefit arising from connection and reputation. It includes whatever adds value to a business by reason of situation, name and reputation, connection, introduction to old customers and agreed absence from computation, or any other things"[*8].

In view of the above-mentioned opinions, goodwill can be defined as a power of attraction gained by an enterprise. This is an outcome of the favourable attitude of the customers and their constant support. Besides, goodwill acts as a preface to future successful activities. Acquisition of goodwill might be the main purpose

[4] See W. H. Browne. A treatise on the law of trade-marks and analogous subjects (firm names, business signs, goodwill, labels, etc.). 2nd ed. Boston 1985, p. 525.

[5] A. W. Griffits. Trade Mark Law and Practice. London 1930, p. 1.

[6] M. R. Romily. Weddeburn v. Weddeburn, 1856. See: W. B. Browne (Note 4), p. 526.

[7] *Lord Eldon.* Crutwell v. Lye. See: W. B. Browne (Note 4), p. 526.

[8] P. C. Goyal. Goodwill — its treatment & valuation in direct tax proceeding. Allahabad 1982, p. 2.

of each enterprise while goodwill encompasses everything that conduces to the growth in value of the enterprise.

Goodwill is a property. It is an intangible asset and always has a particular value. According to its nature as a property, goodwill may be alienated. It is natural to raise the question of how an intangible thing can be transferred to another person. Goodwill may not be sold or transferred separately from the business with which it is associated or apart from trademarks, trade names, or other symbols that represent goodwill. A purchaser of goodwill obtains all of the privileges and benefits which the vendor had.

The owner of goodwill has a property right that can be protected by an action of passing-off. Passing-off is a tort and can be described as the common-law form of trademark protection. Business 'goodwill' is protected by passing-off and, whilst this may be associated with a particular name or mark used in the course of trade, this area of law is wider than trademark law in terms of the scope of marks, signs, materials, and other aspects of a trader's 'get-up' that can be protected.

In the opinion of Buckley, a proprietary right protected by an action of passing-off may be described in the following manner:

> A man who engages in commercial activities may acquire a valuable reputation in respect of the goods in which he deals, or of the services which he performs, or of his business as an entity. The law regards such a reputation as an incorporeal piece of property, the integrity of which it is entitled to protect.[*9]

He wished to confirm that the property right is not a right in the name, mark, or get-up itself but that it is a right in the reputation or goodwill, of which the name, mark, or get-up is the badge or vehicle. The words 'reputation' and 'goodwill' are often used interchangeably, but it is really in connection with goodwill that passing-off is applied. It is possible after all to have a reputation without goodwill.[*10]

In the common law system, for a long while, a passing-off action required proof of local goodwill, not merely a reputation. The first case in which the court granted protection against passing-off to a foreigner who could prove reputation but no local goodwill was *Catersham Car Sales & Coachworks Ltd v. Birkin Cars (Pty) Ltd.*, which was heard in 1998.[*11]

As we can see, goodwill and reputation are not considered synonyms under common law. The courts tend to give broader protection to goodwill than to reputation. In the common law approach, when a business has a reputation, this does not mean that it also has goodwill. But reputation, in its turn, serves as one of the preconditions for the acquisition of goodwill.

It is impossible to set out clearly the difference between the concepts of reputation and goodwill according to common law. The reason for this is that neither in the case law nor in the literature is the definition of reputation found. It is unclear what is implied by this term within the common law system. As for goodwill, we can conclude that it is a combination of the company's positive characteristics. Good name, reputation, experience, talent, affordable prices, stability, and an influential position in the market serve as the preconditions for acquiring those characteristics. It is one of the most valuable assets of a company, acquisition of which is difficult but loss of which is too easy.

3. Goodwill and reputation under Georgian legislation

In Article 12, paragraph 27 of the Georgian Tax Code[*12], goodwill is said to be one of the types of intangible assets. The notion of intangible asset set forth in this code is the following: An intangible asset is a non-pecuniary asset without physical form that is used for production, supply of goods/services, leasing, and/or administrative purposes.

Despite the fact that Georgia is a signatory to the Paris Convention for the Protection of Industrial Property, and this convention contains some provisions concerning goodwill, Georgian legislation in the field of intellectual property law does not even mention it.

Only the law on monopolistic activity and competition, which is no longer in force, provided indirect protection of this object, as it used to protect those objects of intellectual property which are tightly connected with

[9] *H P Bulmer Ltd. v. Bollinger SA*. See D. Bainbridge. Intellectual property. 4th edition. Financial Times Management. London, San Francisco, Kuala Lumpur, Johannesburg, First published in Great Britain 1999, p. 598.

[10] *Ibid*.

[11] See R. Kelbrick. "Gaps" in time: When must a mark be well known? – IIC 2006/8, p. 921.

[12] Tax Code of Georgia, 22 December 2004. – Law-profile edition "Sakanonmdeblo Matsne" (Legislative Newsletter), Part I, #31, 2004, Registration #692.

goodwill. Nowadays, this law has been amended by the law of free trade and competition which does not refer to goodwill at all.

The fact that goodwill is an intangible asset is evident from analysis of the Georgian legislation. Namely, commensurate with Article 152 of the Civil Code of Georgia*[13], intangible property is interpreted as meaning "the claims and rights which may be transferred from one person to another or are intended for yielding material profit for their owner, or entitling him to demand anything from the others". Goodwill is indeed such an object whose owner can enjoy certain rights and have claims. Goodwill can be transferred; as noted above, it can be profitable for its owner, and the goodwill owner has a right to certain claims with respect to a third party.

Goodwill is characterised by all of the features that are typical of intangible property. As a result of its transfer, all privileges and benefits enjoyed by its alienator pass to the purchaser. The purchaser of goodwill may prohibit a third party from damaging goodwill or demand the imposition of liability on an infringer.

Reputation, in its turn, is a personal non-property right that is proved by Article 18 of the Civil Code of Georgia. This article refers to personal non-property rights and envisages the possibility of applying to the court in cases of violation of business reputation along with the protection of the right to a name, honour and dignity, the confidentiality of one's personal life, and the inviolability of one's person. The Civil Code of Georgia is aware of this concept as a "business reputation" and, accordingly, guarantees its protection.*[14]

According to Article 27, paragraph 5 of said code, in the case of violation of the business reputation of a legal entity, the provisions of Article 18 of the code shall apply.*[15]

The term 'reputation' is also contained in the laws on the protection of the objects of industrial property rights. Namely, this term is mentioned several times in the Law of Georgia on Trademarks (e.g., in Article 5's paragraphs e and g).*[16] Furthermore, reputation is repeatedly referred to in the Law of Georgia on Appellation of Origin and Geographical Indications of Goods*[17], as seen in Article 3's paragraph 2, point b, and also Article 7's paragraph 4, point i, etc. Further discussion of these issues is provided in paragraphs 4 and 5 of Article.

Insofar as reputation is a personal non-property right, it is indivisible as well; however, this cannot be said about goodwill.

Because of the non-material character of reputation, it is impossible to assess the value of reputation. By contrast, the existence of goodwill is inconceivable without the estimation of value. It is an enterprise asset and, as a rule, is reflected in the balance sheet figures. Moreover, various types of methods are used to calculate goodwill. The term 'goodwill' is sometimes used to denote the entire body of incorporeal assets of an enterprise. In a narrower sense, goodwill is a total sum of only intangible characteristics that attract future customers.*[18]

Goodwill as used in accounting entries differs in nature from the concept that is used in legal relationships. Such 'legal goodwill' usually means the value that exists in consideration of tangible assets.*[19]

The above discussion demonstrates that it would not be correct to identify the meanings of goodwill and reputation according to Georgian legislation. On the basis of its property type, goodwill is admitted not only as a legal but also as an economic category. As to reputation, its material estimation can be done only in cases where, for instance, the court imposes payment of compensation in cases of damage to reputation. Furthermore, the amount of compensation is determined by the court. Reputation itself has no value.

[13] Civil Code of Georgia, 26 June 1997. – Law profile official edition of the Parliament of Georgia "Saparlamento Utskebani" (Parliamentary News), #31, 1997. Registration #786; Sakanonmdeblo Matsne, #42, 2006, Registration #3967.

[14] *Ibid*.

[15] *Ibid*.

[16] Law of Georgia on Trademarks, 5 February 1999. – Sakanonmdeblo Matsne, Part I, #1, 2006, Registration #2380.

[17] Law of Georgia on "Appellation of Origin and Geographical Indications of Goods", 22 June 1999. – Sakanonmdeblo Matsne, #25 (32), 1999, Registration #2108.

[18] See S. P. Pratt. Cost of Capital. Estimation and Application. New York: John Wiley &Sons, Inc. 1998, p. 46.

[19] See M. J. Mard, J. R. Hitcher, S. D. Hyden, M. L. Zyla. Valuation for Financial Reporting: Intangible Assets, Goodwill, and Impairment Analysis, SFAS 141 and 142. New York 2002, p. 16.

4. The meaning of goodwill and reputation in regard of geographical indications under Georgian legislation

Differentiation between the meanings of goodwill and reputation is particularly important for the regulation of relationships related to the objects of industrial property protection, such as an appellation of origin and geographical indication. The study of the nature and the distinguishing features of these objects greatly simplifies recognition of the difference between goodwill and reputation.

The special requirements for geographical indications were set out by the Agreement on Trade-Related Aspects of Intellectual Property Rights[*20] (TRIPS). This very agreement made the term 'geographical indication' an internationally applicable one. Formerly, the phrase was used only in special literature. The Paris Convention, for example, is not aware of the mentioned term.

'Geographical indication' is used as a summary term in reference to two objects, such as the indication of source and appellation of origin envisaged by the Paris Convention. It is worth mentioning that, in line with the Law of Georgia on Appellations of Origin and Geographical Indications of Goods, the geographical indication (or location) does not merely maintain the meaning of appellation of origin, but it appears to be another independent object of protection. As to the indication of source, it is not mentioned in the Georgian legislation.[*21]

The Georgian Law on Appellations of Origin and Geographical Indications of Goods determines 'geographical indication' to be defined as follows:

Geographical indication is a name or any other symbol designating a geographical place, and is used for the description of goods:

a) That originated in that geographical area;
b) The specific quality, reputation, or other characteristics of which are attributable to that geographical area;
c) Production, processing, or preparation of which takes place in the defined geographical area.

As to the 'appellation of origin', it is defined as a name referring to the modern or historical name of a geographical location or region or, in exceptional cases, of a country (together referred to hereinafter as 'geographical area'), used for the designation of goods:

a) That originated within the given geographical area;
b) The specific quality and features of which are essentially or exclusively due to a particular geographical environment and human factors; and
c) Production, processing, and preparation of which take place within the specified geographical area.

The comparison of the meanings of appellation of origin and geographical indications has shown that, in the case of geographical indication, the demand concerning the characteristics of goods or indication of origin of goods is relatively weak. It would be sufficient for a specific quality of the product, reputation, or any other feature to be related to the geographical place. This opinion was expressed by certain scientists[*22] who have referred to the international regulation on the protection of the place of origin, such as the Lisbon Agreement for the Protection of Appellations of Origin and Their International Registration[*23] and the TRIPS agreement.

With regard to a geographical indication, the subject of protection is the goodwill of a specific name or symbol.

Only certain property rights aimed at the protection of goodwill are attached to the subject, which uses the geographical indication. Copyrighting does not take place at all, even if the country symbol (e.g., the Eiffel Tower or the Statue of Liberty) is used as a mark.

Unlike trademarks, the property related to geographical indications is for collective use, since its goodwill is not created by one person. In the case of trademarks, the subject of protection is goodwill, whilst in the case of a geographical indication it is a specific geographical place or symbol. The name and symbol identifying some product are just those elements that accrue goodwill. It should be mentioned that without reference to

[20] The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) Annex 1C to the Agreement Established the World Trade Organization adopted on 15 April 1994. Available at www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm.

[21] See T. Taliashvili. Certain Issues of Legal Protection of Geographical Indications. – Samartali 2000, #6–7, p. 77.

[22] See Protection of Geographical Indications in France and European Community, by Jacques Audier, WIPO Regional Seminar on Trademarks and Geographical Indications, Tbilisi, 28–29 October 1996; N. Liberis. Appellation of Origin and Geographical Indications. – Georgian Legal Review, 1st–2nd quarters in 2001, pp. 90–97.

[23] The Lisbon Agreement for the Protection of Appellations of Origin and their International Registration, 1958. Available at www.wipo.int/lisbon/en/legal_texts/lisbon_agreement.htm.

some specific product, this name or symbol will remain only a geographical indication and will never acquire goodwill.

As to the appellation of origin, the Lisbon Agreement for the Protection of Appellations of Origin and Their International Registration underscores that an appellation of origin means the geographical name of a country, region, or locality. In addition, it must serve to designate a product originating therein, the quality, and the characteristics. Furthermore, a qualitative connection between the product and the place of origin must exist. Namely, the quality of a product and its characteristics must be especially and substantially conditioned by geographical environment; unless this requirement is satisfied, the name will be considered simply an indication of origin and would not be protected in the form of appellation of origin.[*24]

Therefore, we can conclude that, while protecting appellation of origin, the subject of protection is not the name or symbol that marked a given product but the reputation of the place the goods originated from or to which they have a particular connection.

Generally, the names of places attract customers with their good reputation instead of goodwill. Reputation appears to be the subject of protection, not goodwill. A territory cannot own goodwill, since the latter is created after a while by means of the use of certain marks by a specific person. Reputation of a territory may belong to any acting subject or a resident of the given place.

We cannot pass by Article 11, paragraph a of the Law on Appellations of Origin and Geographical Indications of Goods, which establishes prohibitions against "any direct or indirect commercial use of an appellation of origin or geographical indication registered in respect to the goods not covered by the registration, insofar as those goods are similar to the ones registered under that name or insofar as using the name exploits the reputation of the protected name".[*25]

This article requires specific amendment, namely that "appellation of origin or reputation of geographical indication" should be replaced by "reputation of appellation of origin and goodwill of geographical indication".

Judging from the above-mentioned, one readily concludes that the meanings of goodwill and reputation should not be identified with each other. Goodwill is a priority or benefit, which can be acquired by an enterprise or its product, or any means of identification (in the above-mentioned case, geographical indication) as a result of entrepreneurship. As to reputation, we can discuss the concept as a priority, which comes from the specific characteristics of the particular place. While acquisition of goodwill is impossible without taking measures leading to success in the market, the reputation of a certain place emanates from that very place. It is impossible to identify goodwill with reputation when the case concerns a specific geographical place. This place may definitely have a good reputation, but goodwill can be acquired by the enterprise and its means of identification and not by the place.

That the given place enjoys a good reputation results from the significant features of the place concerned, as well as from natural or human-related factors existing in the mentioned territory, instead of the activities performed by some enterprise. The above should not be interpreted as implying that the activity of a particular enterprise has no meaning for this territory. To the contrary, it is impossible to demonstrate the positive characteristics of the geographical place just through the use of its special features in industrial and commercial fields. Parting its turn, the geographical place owning a good reputation supports those enterprises' acquisition of goodwill that operate in this territory.

5. The connection of goodwill with trademarks

An analysis of goodwill would not be complete without discussion of the issue of the relationship between goodwill and trademarks. Trademarks, whether registered or not, symbolise goodwill.

A trademark is a name or symbol used to denote the commercial origin of a product. Moreover, a distinctive mark embodies the goodwill of the trader, which enables the trader's enterprise to draw customers. This capacity of an enterprise is based on its commercial status established through carrying on business and using the trademark for particular goods and services.

In essence, it is the goodwill that gives value to the trademarks. In the common law system, goodwill therefore plays a significant role in the context of protection of a given symbol. It is commonly held that when a trademark owner seeks protection for his mark, the property to be protected is not the mark but the goodwill behind it, of which it is but a symbol.[*26]

[24] *Ibid*.

[25] See G. Gugeshashvili. Goodwill in accordance with the Georgian Legislation. – Samartali 2000, #6–7. p. 103.

[26] H. D. Nims. The Law of unfair competition and trade marks with chapters on goodwill, trade secrets..., New York 1947, p. 81.

It follows that in common law a trademark cannot exist without goodwill standing behind it. As was said above, this basically applies irrespective of whether the trademark is registered. When this approach is compared to what was discussed in the first paragraph of this article, it may be concluded that some contradictions concerning the notion and character of goodwill exist even in the common law system. Goodwill is frequently defined as a priority or benefit arising from market connections and good reputation. If the acquisition of goodwill is possible only by means of good relations with third parties and advantageous commercial status of the business in the market, then how can it be assumed that every trademark has goodwill? Is it possible for a mark to have goodwill at the very beginning of its use? If the customers are not satisfied with the activities of a particular business, may the trademark used by that business nevertheless have goodwill? Is it not necessary for a mark to gain popularity or at least to be known by a particular group of people in order to acquire goodwill? An answer needs to be given to these and many other questions.

If every mark has or may have goodwill irrespective of its popularity and reputation, then the concept of goodwill in the meaning of a benefit or priority arising from all the positive characteristics that a business and its trademark have seems to be called into question, though the nature of goodwill does seem to be most adequately reflected by that concept.

The questions posed above can only be answered after reflection on the issue of a trademark's value.

It is obvious that, as soon as a trademark is registered and/or used for particular goods or services, it has a value. This value may be called the 'general value' of the trademark. Obviously, a trademark's value may fluctuate over time. A trademark's general value is indivisible from the mark. As long as a trademark is in use, its general value also remains in existence.

Is goodwill synonymous with the general value of a trademark? On the basis of the opinion that every trademark has goodwill, the answer would be positive. However, taking into account all the characteristics of goodwill, one finds it hard to conclude that goodwill is nothing more than the general value of a trademark.

Goodwill is an extraordinary or specific value that a mark may have only in cases where it has popularity, is known, and has the support of customers. That is why goodwill should not be identified with the general value of a trademark. Every trademark may have a general value, but it does not necessarily have goodwill.

From the beginning of its use, a trademark symbolises its own general value; then, if it acquires those positive characteristics that are necessary for the acquisition of goodwill, it undergoes transformation into a symbol of goodwill. In this regard, it may be concluded that a trademark is a sign picked out with the hope that it will symbolise goodwill.

Protection of trademarks is not dependent on goodwill in the continental European system of law. Moreover, the law of the European Community says nothing about goodwill.

In order to define the legal framework for protection of goodwill and reputation, it is of great importance to clarify whether the term 'reputation' as mentioned in EU law is equal in meaning to the term 'goodwill' as used in common law.

Because the present article is focused on analysis of Georgian legislation, where conceptual differences exist between goodwill and reputation, it is necessary to determine whether the meanings of these terms are identical to those used in EU and common law.

The phrase "trade mark having a reputation" was first used in the trademark-related directive that was passed by the Council of the European Union on 21 December 1988.*[27] This directive authorises the member states to broaden, at their own discretion, the scope of protection of those trademarks that have a reputation.

According to Article 4, paragraph 3 of said directive: "A trade mark shall furthermore not be registered or, if registered, shall be liable to be declared invalid if it is identical with, or similar to an earlier Community trade mark within the meaning of paragraph 2 and is to be, or has been, registered for goods or services which are not similar to those for which the earlier Community trade mark is registered, where the earlier Community trade mark has a reputation in the Community and where the use of the later trade mark without due cause would take unfair advantage of, or be detrimental to, the distinctive character or the repute of the earlier Community trade mark."

Within the meaning of the directive, 'earlier mark' means a trademark that, on the date of application for registration of the trademark or, where appropriate, of the priority claimed in respect of the application for registration of the trademark, is well known in a Member State, in the sense in which the concept of being well-known is used in Article 6bis of the Paris Convention.*[28]

Scientists and courts attempt to explain the meaning of a trademark's repute. For example, one author says that a mark's "repute is a psychological factor, the full extent of which cannot be precisely quantified. The

[27] First Council Directive of 21 December 1988 to approximate the laws of the member states relating to trade marks (89/104 EEC). Available at wipo.int/clea/docs_new/pdf/en/eu/eu014en.pdf.

[28] *Ibid.*, Article 4 (3).

strength of a mark's repute depends upon the scope of the possible image transfer. An already existing image transfer, i.e., the economical exploitation of a mark for use on different goods and services can be taken as an indication of strong repute."*[29]

In the 'DIMPLE' decision, the court held that a mark receives a special repute when its reputation is so outstanding that its economically reasonable exploitation is also possible for other goods and services.*[30]

Yet what is implied in the concept of reputation under European Union law? This question was addressed by the European Court of Justice on 14 September 1999 in the case *General Motors Corporation v. Yplon SA*.

According to the decision of the court: "Article 5 (2) of the first Council Directive (89/104/EEC) of 21 December 1988 to approximate the laws of the Member States relating to Trade Marks is to be interpreted as meaning that, in order to enjoy protection extending protection to non-similar products and services, a registered trade mark must be known by a significant part of the public concerned by the products or services which it covers."

In the European Commission's submission, the idea of a trademark with a reputation should be understood as meaning a trademark having a reputation with the public concerned. This is something that is clearly distinguished from a 'well-known' mark as referred to in Article 6bis of the Paris Convention.

In so far as Article 5 (2) of the directive protects trademarks registered for non-similar products and services, its first condition implies a certain degree of knowledge of the earlier mark among the public. The degree of knowledge requested must be considered to be reached when the earlier mark is known by a significant proportion of the public concerned with the products and services covered by that trademark.

When examining whether this condition is fulfilled, the national court must take into consideration all the relevant facts of the case — in particular, the market share held by the trademark; the intensity, geographical extent, and duration of its use; and the size of the investment made by the undertaking in promoting it.

Territorially, the condition is fulfilled when, in the terms of Article 5 (2) of the directive, the trademark has a reputation "in the member state".

If the national court decides that the condition as to the existence of a reputation is fulfilled, as regards both the public concerned and the territory in question, it must then go on to examine the second condition laid down in Article 5 (2) of the directive, which is that the earlier trademark must be detrimentally affected without due cause. Here it should be observed that the stronger the earlier mark's distinctive character and reputation, the easier it will be to accept that detriment has been caused to it.*[31]

The mark's reputation is a precondition for granting extended protection. Trademarks that have not acquired reputation cannot be protected against use on non-similar goods and services.

It should be noted that at present extended protection of non-competing goods or services is afforded also to "famous" and "well-known" marks. For example, Article 16 (3) of the TRIPS agreement makes it mandatory to grant in certain cases extended protection to marks that are well known in the sense of Article 6bis of the Paris Convention.*[32]

One thing is clear: famous and well-known marks always have a reputation. The differences between famous, well-known marks and marks having a reputation are not discussed in this article, since, as one author has pointed out, "strict differentiation is not possible as these concepts are relative".*[33]

It is not hard to guess that in EU law reputation plays the most important role in the case of trademark protection. The trademark's reputation — not goodwill — is the decisive factor for granting extended protection.

As German scientist Annette Kur says: "[I]t is precisely a trademark's 'reputation' beyond its distinguishing function upon which its commercial exploitability beyond the scope of similarity of goods is bounded; therefore, the heightened risk through acts undertaken by third parties is also based upon this."*[34]

According to the decision of the European Court of Justice and also the definitions of reputation and goodwill established by certain legal scientists, the following conclusion should be drawn: the term 'reputation' as used in the legislation of the European Union has the same meaning as the term 'goodwill'. Reputation encompasses all the characteristics that goodwill should have in common law; i.e., reputation is an indicator of the trademark's extraordinary value. Reputation, unlike goodwill, is not an intangible asset. But still in EU law it plays the same role and has the same functions as goodwill has in the case of trademark protection.

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[29] M. Franzosi. European Community Trade Mark, Commentary to the European Community Regulation. The Hague, Netherlands 1997, p. 217.

[30] Bundesgerichtshof, Gewerblicher Rechtsschutz und Urheberrecht 1985, 550, 552.

[31] *General Motors Corporation v. Yplon SA*, C-375/97, European Court of Justice, 14.09.1999 (1) Available at www.curia.europa.eu/jurisp/cgi-bin/gettext.pl.

[32] See A. Kur. Harmonization of trademark law in Europe — an overview. – IIC 1997/1, p. 3.

[33] F. Mostert. Famous and well-known marks. Butterworth, printed and bound in Great Britain 1997, p. 20.

[34] A. Kur. Well-Known Marks, Highly Renowned Marks and Marks Having a (High) Reputation What's It All About? – IIC 1992/2, p. 227.

As regards the Georgian legislation, it should be noted that, the wording 'goodwill of a trademark' is not applied in the Georgian Law on Trade Marks. Article 5 (z) of this act grants extended protection to those trademarks that have a good reputation. This article actually corresponds to the directive of the European Union; only the word 'good' is added in the Georgian law. Nevertheless, it would be better to use the wording 'trademark having goodwill' instead of referring to a trademark 'having a good reputation'. The reason is not a desire to give the priority to goodwill but the definition of reputation, given in the Civil Code of Georgia, that indicates that this is a personal non-property right.

Because of the personal nature of reputation, it is impossible for a trademark to have a reputation. Because of its non-property nature, reputation has no value. By contrast, as was mentioned above, a trademark always has a value. Hence, the concept of reputation used in the Civil Code of Georgia is not suitable for use in relation to trademarks.

The concept of goodwill but not of the reputation given in Georgian legislation corresponds to the EU concept of reputation. In the case of the amendment that was discussed above, the Georgian law on trademarks will continue to correspond to EU law. The reason for this is that in EU law goodwill and reputation are synonymous. Hence, the wording 'trademark having goodwill' will not lead to uncertainties and extended protection will be granted to trademarks despite the absence of the term 'reputation'.

6. Conclusions

Analysis of the nature and characteristics of goodwill and reputation enables us to conclude that it is impossible to give a direct answer to the question of whether goodwill and reputation are synonyms. While in one system they operate as identical concepts (e.g., in the continental European system of law), in another the definitions of goodwill and reputation are not equal to each other. Even in countries belonging to the same legal family, goodwill and reputation may have different meanings. Consequently, the legal boundaries of the protection of goodwill and reputation differ from one legal system to another. When in common law broader protection is granted to goodwill, it is not easy to compass the legal boundaries of goodwill protection in EU law, as the term 'goodwill' is not mentioned there. Only through analysis of the content of goodwill may it be presumed that goodwill might have the same legal boundaries of protection under EU law as reputation has.

As to Georgian legislation, despite the fact that Georgia is a country with a continental European system of law, the concepts of reputation and goodwill are not equivalent to each other here. Moreover, the concept of reputation under Georgian legislation does not correspond to that of the relevant EU law. As regards goodwill, it has the same meaning as in common law.

It should be given particular stress with respect to the protection of goodwill and reputation in Georgia that the current legislation enables an owner of a trademark to protect a mark from use on non-similar goods and services in cases where the mark has a good reputation. By contrast, the concept of reputation given in the Civil Code of Georgia is not suited to use with regard to trademarks. It would be preferable to use the term 'goodwill' instead of 'good reputation' in the Law on Trade Marks to express the extraordinary value of a trademark.

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Dividend Payments and Protection of Minority Shareholders[*1]

1. Introduction

The minority protection is one of the central problems of company law. The objective of this article is to examine whether the Estonian law in force (above all, the Commercial Code[*2], CC) provides minority shareholders with efficient remedies, while the analysis also serves as the basis for formulating potential future solutions.

Contemporary company law presumes that the resolutions of shareholders are passed by a majority vote. Although the notion of the majority vote may have a different content, it in principle refers to a result in which case the persons holding more votes actually form the content of the shareholder's resolutions. There are exceptions to this principle, and for certain resolutions the law prescribes a bigger majority; however, the requirement does not apply to ordinary resolutions but issues on fundamental changes in the company (e.g., amendment of the articles of association, increase and reduction of share capital, merger, division, and transformation of legal form). As the objective of a company is to earn profit, then the distribution of profit is an ordinary resolution due to the nature of the company, and consequently it is essentially not allowed to impose a greater majority requirement on profit distribution resolutions by law. Yet the requirement does not prohibit imposing a higher majority requirement by the articles of association. It must also be taken into account that the imposition of a greater majority requirement by law must ensure that the company remains a going concern, so the requirement of a greater majority never means a 100% majority vote.[*3]

The requirement of a majority vote leaves always a possibility that the majority adopts a resolution based solely on their interests. The minority shareholders face the biggest risk from the fact that they are not protected by voting rights. Instead, the minority must depend on other legal strategies for protection, such as the sharing norms, rules and standards.[*4] This concerns, above all, the fundamental rights of shareholders and may give rise to a question whether and to what extent the right to receive a dividend is a fundamental right of a shareholder. The dividend policy should be decided by every company and therefore the situations in

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2 RT I 1995, 26–28, 355; 2009, 12, 71 (in Estonian). Translation of the Code into English is available at http://www.just.ee/23295 (1.05.2009).

3 In Estonia, the limits are either 2/3 (e.g., CC § 300 (1), § 341 (1), § 356 (1)) or 3/4 of the votes represented at the general meeting (e.g., CC § 345 (1)). The agreement of a particular shareholder (e.g., CC § 356 (2^1)) or the agreement of all shareholders (CC § 440 (4)) in certain resolutions is only required as a total exception.

4 E. Rock, H. Kanda, R. Kraakman. Significant Corporate Actions. – R. Kraakman *et al*. The Anatomy of Corporate Law. Oxford: OUP 2004, p. 147.

which the company does not pay dividends are not excluded. There is basically no problem if the shares of the company are listed on a stock exchange, as in such a situation a shareholder is able to obtain profit and money by selling part of his or her shares, since (if to leave the general processes affecting the securities market aside) the share prices should increase when the company earns profit and does not distribute it to shareholders. However, the situation is different when the shares of the company are not listed because in that case, the shares are not marketable.[*5] In this situation a shareholder does not have an opportunity to sell his or her shares, while the shares do not have an actual market price and as a result, it is not possible to say that the resolution not to pay dividends could increase share prices. In such a situation, the only potential buyer of the minority shares is, in practice, a majority shareholder, i.e., a person whose votes determine the position of the minority and consequently, there is no sales option that would give the minority an actual opportunity to benefit from the profit earned by the company. Considering these arguments, the special situation in Estonia has to be taken into account, as only few companies have been listed here[*6], and that fact has to be kept in mind when developing any provisions.

It is certainly another question, should the shareholders have at all any power to decide the payment of dividends, as the payment of dividends by a company to its shareholders should be determined by the management board's investment strategy. The management board should retain for the company only the capital that yields more against justified risks than the shareholders would be able to make elsewhere.[*7] In principle, the payment of dividends does not to be decided by the general meeting, yet this does not affect the need to establish rules for the protection of the minority.

2. Estonian law in force

The payment of dividends is regulated by CC § 278, which sets out the following provisions:

- the amount of a dividend shall be approved by the general meeting (CC § 278, the first sentence);
- the management board shall present a proposal co-ordinated with the supervisory board (CC § 278, the second sentence).

CC § 277 (2) is also relevant; according to that, the procedure for payment of dividends shall be prescribed in the articles of association or by a resolution of the general meeting.

The first sentence of CC § 278 is essential, as it gives a power to make a decision on the size of the dividend clearly to the shareholders (the same is prescribed by CC § 298 (1) 7)). The only exception are interim dividends whose payment can be decided by the management board (§ 277 (3)). Since the possibility to pay interim dividends has to be provided by the articles of association, the management board does not derive that right automatically from law but gets it from shareholders. The payment of interim dividends is rather an exception.

CC § 278 does not allow different interpretations regarding the powers of company organs. The payment of dividends is the power of the general meeting and the only limitation that may give rise to questions is the legal effect of the management board's proposal. Firstly, it is probably not entirely correct to refer to the proposal as the management board's proposal, as the requirement that the proposal has to be co-ordinated with the supervisory board implies that the proposal must also be approved by the supervisory board. As co-ordination is a rather ambiguous notion from the legal point of view, it should be understood that if the supervisory board does not agree to the management board's proposal, the management board must draft a new proposal. Otherwise, the requirement that the proposal presented to shareholders has to be co-ordinated by the supervisory board is not met. It must be noted that the sole requirement in law is that the management board's proposal has to be presented to the general meeting. Therefore, the proposal has no legal effect and the corresponding provision has to be interpreted in the way that the management board's proposal is only informative. It gives the shareholders the information about the potential investment plans of the management board, of their vision for the dividends, etc., but the proposal does not impose any restrictions on the resolution of the shareholders.

It can be concluded that the general meeting is free to decide any amount of the dividends, while the only upper limit is the general amount of permitted distributions (the third sentence of CC § 278, which directly derives from Article 15 of the 2nd company law directive[*8]). However, such regulation also means that the law

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5 G. Morse *et al*. Charlesworth's Company Law. 17th ed. London: Sweet & Maxwell 2005, p. 481.

6 As of 1.03.2009, there were 5307 public limited companies in Estonia (see http://www.rik.ee/stat/9_3mk.phtml), the shares of 18 companies were listed on a stock exchange (see http://www.nasdaqomxbaltic.com/market/?pg=mainlist&lang=en).

7 G. Morse (Note 5), p. 481.

8 Second Council Directive of 13 December 1976 on co-ordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent (77/91/EEC). – OJ L 26, 31.01.1977, pp. 1–13.

does not prescribe the minimum dividend but leaves the decision on the size of a dividend entirely up to the shareholders. The resolution to pay dividends is an ordinary resolution requiring that over one-half of the votes represented at the meeting are given in favour (CC § 299 (1)). The size of a dividend is therefore determined by the majority shareholders votes and there is not any restriction.

It could be asked whether it is possible to prescribe the size of a dividend in the articles of association. The formative freedom of the articles of association is limited by the imperative provision of law (CC § 244 (2)). Consequently, the question is: Does the first sentence of CC § 278 contain an imperative provision or not? The text of the provision does not allow for any interpretations regarding other solutions, which gives good grounds to regard the provision as imperative. In addition, we should examine other similar legal regulations. One example might be CC § 345 (2), which allows to bar the pre-emptive rights of subscription of the existing shareholders for the new shares upon increasing share capital by a resolution of a general meeting. The wording of both provisions is essentially the same — a resolution of a general meeting has been prescribed as the form for resolving the issue. CC § 345 (2) is based on Article 29 of the 2nd company law directive, which sets out that the right of pre-emption may not be withdrawn by the articles of association but requires an *ad hoc* decision of shareholders. Our relevant provision proceeds from the presumption that it is not necessary to establish a direct prohibition in the situation, whereas the law contains an exhaustive permitting rule and following this presumption § 345 (2) makes it impossible to provide for such a limitation in the articles of association. It means that the prohibition has been expressed in a positive way — the manner of deviation from law is prescribed and any other possibilities have been excluded. As these two comparable provisions have the same wording, it is probably not correct to interpret them differently. Consequently, we must infer that the size of a dividend should be also determined by an *ad hoc* resolution.

It should be noted in addition that the payment of dividends is ruled by a provision that refers to the articles of association (CC § 277 (2)), giving the opportunity to set the procedure for the payment of dividends in the articles of association. Since according to this provision the articles of association can be used to settle one issue regarding the payment of dividends, this gives rise to doubts that if the legislator had intended to allow for providing the size of dividend in the articles of association, it would have been provided as such in law. The Supreme Court has also stated, when applying this provision, that the provision, above all, governs the procedure for making payments (including the term of making the payment).[*9] Hence, this does not imply the contrary; the first sentence of CC § 278 is an imperative provision whose scope of application does not include the determination of the amount of a dividend, while the articles of association consequently cannot prescribe the amount of dividend.

3. Estonian previous law and proposed amendments

Besides the current law, the provisions of earlier law in force and proposed amendments have to be analysed to find the answers. Starting the historical approach from the re-establishment of the independence of Estonia, we must first note that the Statute on Limited Liability Companies[*10], which regulated companies initially, contained only one provision regarding the payment of a dividend — a shareholder is entitled to the part of the net profit proportional to his or her shares (dividend), to be distributed to shareholders pursuant to the articles of association of the company. Considering that generally the statute did not contain almost any provisions on legal capital[*11], a provision with such substance appears even more surprising. This norm imposed imperatively the principle of proportionality upon the payment of dividends. Indeed the provision was not applied in practice like that. On the contrary, the shares of different classes carried commonly various dividend rights. The statute contained regarding to the dividends no minority protection rules.

Let us proceed with the discussion of the drafts of the Commercial Code. Their initial texts contained rules that were in principle based on the Swedish law of that time.[*12] In the draft submitted for the second reading in the *Riigikogu*, § 290 provided that the shareholders having at least 1/10 of the votes represented by shares have a right to request the distribution of at least one-half of the net profit remaining after the deduction of the amounts prescribed by law or in the articles of association, if this sum does not exceed 1/20 of the total of the share capital, legal reserve and share premium.[*13] This provision was removed under unclear circumstances from the text of the draft submitted for the third reading.[*14] There have been later attempts to change the pro-

9 CCSCd, 10.02.2004, 3-2-1-16-04. – RT III, 2004, 6, 64 (in Estonian).

10 ENSV ÜVT 1989, 37, 573; RT I 1994, 62, 1043 (in Estonian).

11 See A. Vutt. Aktsiakapitali õiguslik reguleerimine: eesmärgid ja moodustamine (Legal Regulation of Share Capital: Objectives and Formation). MA thesis. Tartu 2005, p. 9 (in Estonian).

12 Aktiebolagslag (1975:1385), § 12:3. Available at http://www.notisum.se/rnp/SLS/LAG/ 19751385.HTM.

13 Äriühingute ja nende registreerimise seadus (Companies and Their Registration Act). Draft 733 SE II. 30.01.1995. Unpublished.

14 Äriseadustik (Commercial Code). Draft 733 SE II. 8.02.1995. Unpublished.

cedure for passing the resolution on dividends but they have not been successful. The amendments submitted in 2004 were discussed on a wider scale and strongly opposed by entrepreneurs. The arguments presented by them were rather peculiar. For example, it was pointed out that minority shareholders could protect themselves by other means (e.g., shareholders' agreement) and it was even stated that 'the minority shareholders are not so incapable that they are unable to protect themselves'.*[15]

The draft of 2004 contained the following amendment to CC § 276 (1): a public limited company must distribute to shareholders at least one-half of the amount applicable for distribution to the shareholders as a profit. The distribution of profit may be precluded or limited by a resolution of the general meeting, if at least 3/4 of the votes represented at the general meeting have been given in favour.*[16] The explanatory memorandum of the draft substantiated that this provision is necessary for protection of minority shareholders and referred to the inadequacy of the former wording that allowed for withholding the payments from net profit for an indefinite period by a relevant resolution of the general meeting.*[17] The draft presented to the *Riigikogu* did not already contain this provision.*[18]

If one compares the drafts of 1995 and 2004, one has to admit that the first one was better. It did not set out the payment of dividends as an obligation of the company but rather as a claim of the minority. The latter is not that burdensome for a public limited company because it does not oblige the company to pay dividends always in a certain amount, but forces it to take into account the minority interest. Another difference is that the draft of 1995 limited the maximum amount of a dividend. Thirdly, the draft of 2004 allowed for a possibility not to pay dividends if the relevant resolution had been adopted by a qualified majority. Therefore the opinion that the draft enabled a majority shareholder to refuse to pay dividends, whereas the minority lacked any remedies in such a situation*[19], has to be agreed with. It has to be admitted that whereas the draft of 2004 expressed the right principle as such, the provision failed to take into account important circumstances and as a result the failure to adopt the draft in the form it was presented was obviously justified.

4. Law of other countries

Different countries have used different methods to regulate the rights of the minority upon the payment of dividends. It has to be mentioned for a start that regardless of the pursuit of the 2nd company law directive to regulate issues related to legal capital very strictly, the directive does not handle the payment of the so-called minimum dividends.

It was referred above to the previous Swedish law that had served as the main model for developing Estonian capital rules. It has to be admitted that regardless of the adoption of a new Companies Act*[20], no principal changes of these rules have been made in Sweden. ABL § 18:11 provides that at the request of the holders of at least 1/10 shares, the general meeting must adopt a resolution to pay dividends from the profit of the financial year which remains after making assignments to cover previous losses, if there are no other available reserves, into mandatory and other reserves that have to be used for purposes other than distributing to the shareholders according to the articles of association. The articles of association may prescribe that minority shareholders may also submit such a request. The request must be submitted before the special general meeting deciding on the distribution of profit. A general meeting is not obliged to decide to pay dividends that exceed 5% of the owners' equity.

Germany applies a considerably different approach. AktG*[21] § 58 I provides that if the management or supervisory board approves the annual report, they may transfer part of the net profit, but not over one-half, to other reserves. There is also a possibility that the transfer of profit to reserves has been provided differently from the above in the articles of association and in that case, it is not permitted to pass a different resolution, while the general meeting is not allowed to adopt a resolution that differs from the articles of association either.

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[15] S. Männik, A. Hundimägi. Parts toetab kohustuslikku dividendi (Parts Supports the Obligatory Dividend). – Äripäev, 1.06.2004 (in Estonian).

[16] Äriseadustiku muutmise seadus (Commercial Code Amendment Act). Draft 21.05.2003. Available at http://eoigus.just.ee/?act=6&subact=1&OTSIDOC_W=17168 (in Estonian).

[17] Seletuskiri äriseadustiku muutmise seaduse eelnõu juurde (Explanatory Memorandum to the Draft Commercial Code Amendment Act). 26.01.2004. Available at http://eoigus.just.ee/?act=6&subact=1&OTSIDOC_W=17168 (in Estonian).

[18] Äriseadustiku muutmise seadus (Commercial Code Amendment Act). Draft SE 552 I. 16.12.2004. Available at http://web.riigikogu.ee/ems/saros-bin/mgetdoc?itemid=043510004&login=proov&password=&system=ems&server=ragne11 (in Estonian).

[19] P. Sander. Dividendipoliitika seadusandlik regulatsioon väikeaktsionäride õiguste kaitsel (Legal Regulation of Dividend Policy in Protecting Minority Shareholders' Rights). – XIII majanduspoliitika teaduskonverents (13th Academic Conference on Economic Policy). Berliner Wißenschafts-Verlag, Mattimar 2005, pp. 314 (in Estonian).

[20] Aktiebolagslag 2005:551. Available at http://www.notisum.se/rnp/sls/LAG/20050551.htm.

[21] Aktiengesetz vom 6. September 1965 (BGBl. Is.1089 ff). Available at http://bundesrecht.juris.de/bundesrecht/aktg/.

The objective of this provision is to protect the minority from the majority's resolution to pay dividends that are too large. In addition, it is not precluded that the articles of association provide the transfer of all profit to reserves. In a similar way, the articles of association may preclude the transfer of the profit to reserves.[*22] If a general meeting adopts a resolution that is in contradiction with the articles of association, a shareholder may challenge it (AktG § 254).

In the United Kingdom, the principles of paying dividends have also been left to the domain of the articles of association (See Table A, 1 October 2007[*23] 102 *ff*.). Yet there are no rules protecting the minority, and in the case of inadequate dividends the courts have taken as the basis a provision that gives a shareholder the right to challenge the decision of the general meeting on grounds of unfair prejudice. A central case here is *Re Sam Weller & Sons Ltd.*, in which shareholders who were not involved in the management of the company were dissatisfied with the dividend which had remained at the same level for 37 years. In this case, the court established that the situation could amount to conduct unfairly prejudicial to the interest of those shareholders who did not participate in management; yet it also noted that this position should not be construed so that a shareholder who does not receive any other benefits from the company besides the dividends is automatically entitled to comply, but the claim must be founded on unfairly prejudicial conduct.[*24]

5. Future of Estonian law

As it was mentioned above, the European Union does not regulate the remedies available upon the payment of dividends and therefore there are not any restrictions for modelling of our law. This gives rise to the question whether it would be reasonable to change the current law or is the present situation satisfactory. It is impossible to give an answer on the basis of the case law because the lack of relevant provisions also means the lack of legal disputes. Yet it would be incorrect to reach a conclusion that the lack of court cases indicates the absence of problems.

The laws of the three countries described above are using different ways of solving the problems and it would probably be reasonable to take them as examples.

Application of the principles of the United Kingdom presumes the amendment of current law by adding a regulation the content of which would correspond to Companies Act 2006 § 994. The Estonian current law does not give a shareholder a clear option to challenge the unfair prejudice of a company. Assuming that we could rely on such an approach, the grounds for challenging the resolutions should also be amended accordingly. According to the law in force, a shareholder may contest a resolution of the general meeting of a company which is in conflict with the law or the articles of association (CC § 302 (1)). Such a claim has always to be based on a specific provision of the law or the articles of association, whereas the shareholder has to be able to prove the breach of the law by the company. It cannot be naturally ruled out that the court would also regard the violation of general principles as a breach of law; however, it is complicated and there is no case law available, so far.

Such a claim could *per se* be based on § 32 of the General Part of the Civil Code Act[*25], which provides that the shareholders or members of a legal person and the members of the directing bodies of a legal person shall act in accordance with the principle of good faith and consider each other's legitimate interests in their mutual relations. It is the elaboration of the general principle of good faith in company law: that is why one should behave upon the application of that provision in the same manner as upon the general application of the principle of good faith. It has been clearly pointed out that the principle of good faith can be applied only after the other possibilities prescribed by law for deriving an appropriate maxime have been exhausted.[*26] In relation to the abuse of minority interests upon the payment of dividends, this provision could be taken as the basis because the law simply does not grant any other options. Although such an approach by the court should not be ruled out, it is still doubtful whether the courts would actually rely on the principle of good faith in a situation in which the dividends are not paid, and the company justifies such a behaviour by its investment and development plans. In such a situation, the court should at least have doubts that it is too excessive interven-

[22] U. Hüffer. Aktiengesetz: Beckliche Kurzkommentare. Band 53. 8., neuarbeitete Auflage. München: Verlag C. H. Beck 2008, paragraphs 6, 7.

[23] Companies (Tables A to F) Regulations 1985 as amended by SI 2007/2541 and SI 2007/2826. Available at http://www.companieshouse.gov.uk/companiesAct/implementations/TableAPublicOct2007.pdf. For the area of application, see P. Davies. Gower and Davies' Principles of Modern Company Law. 7th ed. London: Sweet & Maxwell 2003, pp. 55–56.

[24] E. Ferran. Company Law and Corporate Finance. Oxford: OUP 1999, pp. 415–416. In current law, the claim may be based on Companies Act 2006 § 994.

[25] RT I 2002, 35, 216; 2008, 59, 330 (in Estonian). Translation into English available at http://www.just.ee/23295.

[26] P. Varul *et al*. Võlaõigusseadus I. Üldosa (§§ 1–207). Kommenteeritud väljaanne (Law of Obligations Act I. General Part (§§ 1–207). Commented edition). Tallinn: Juura 2006, § 6 comment 4.2.1 (in Estonian).

tion to the business of a company. Also, in addition to the establishment of facts, an unfair prejudice towards shareholders must be identified, which is likely to imply long-term activity and benefits to other shareholders in any other manner (remuneration of directors, agreements, etc.).

The fact that we are a part of continental European law has to be taken into account also, as the provisions of statutes are according to our legal tradition the primary source of the law. Hence, it is important in perceiving and applying the law that the indicators be included in it. If the law does not state the rights or obligations, this leads to doubts whether such rights or obligations exist at all. Also, consideration should be given to the failed attempt to amend the code in 2004, since the factual situation *inter alia* implies that since the code did not prescribe obligatory minimum dividends, they do not exist either. We cannot agree to the latter interpretation but there is a clear threat that the court may assume such a position.

Based on the above, we can infer that although the minority may be entitled to request dividends under Estonian law, the possibility is ambiguous, its application problematic and it does not offer adequate opportunities for the minority.

As a second option, it is possible to take Germany as a model for the payment of dividends. This would mean that the law should prescribe the obligatory size of a dividend. However, German law grants unlimited opportunities for changing the limit in the articles of association, which may lead to a failure to apply the relevant provisions (including the minimum dividend). A positive effect of this regulation would be the obligation to pay dividends, which would entitle the shareholders to clear expectations upon acquisition of shares. The determination of the *ex ante* regulation protects a shareholder from arbitrary *ad hoc* resolutions. Such a situation resembles an agreement, the performance of which a shareholder can claim. A negative effect would be the rigidity of the regulation as the *ex ante* provisions of the law or the articles of association could not permit resolutions that might be reasonable due to the changes in the financial situation of a company. Besides, such a regulation would make the company law rules less flexible and it is probably in nobody's interests. In addition to that, the majority of companies may be expected to amend their articles of association after the establishment of such regulations and preclude the payment of dividends unless a general meeting decides otherwise, etc., which would actually not change the present situation. It must also be taken into account that the German approach proceeds from the fact that decision on the payment of dividends is not the power of shareholders and these *ex ante* regulations are inevitable in such a case (a body deciding on the distribution of profit only observes the articles of association adopting the resolution on the distribution of profit). In our law the decision on the payment of dividends is a power of the general meeting and if we adopt the German system then this requirement could be changed as it makes ultimately no difference who performs the agreements set out in the articles of association.

The third solution (Swedish), which entitles the minority to request the payment of a minimum dividend, is in some respects the clearest. The main value of this regulation is that it does not oblige the company to adopt certain resolutions but grants the right of request to the minority which they are free to use. Hence, a company is not by default bound by prescribed solutions but the obligatory dividends deriving from law must only be paid if a relevant request is submitted. In addition, the amount of obligatory dividends prescribed by law in Sweden is smaller than the one in German law. A disadvantage of such a solution (and any other solutions directly deriving from law) is the fact that the amount of dividends would completely depend on the amount of profit reported in the balance sheet and since the application of the accounting rules is not unambiguously prescribed, the management board may take measures that reduce the profit. However, this problem is inevitable as the legal capital rules are directly related to accounting rules, while the latter will always allow for various interpretations and the management board cannot be blamed on any grounds as long as it acts within that framework.

In summary, it should be noted that the Estonian current law does not grant the minority an explicit right to request the payment of dividends. Although the possibility to submit such a request can be found from valid law, this is too ambiguous; also, the relevant legal remedies could be used only under very exceptional circumstances. Consequently, Estonian law should be amended and the minority should have a clear right to receive dividends. Comparing the German and Swedish approaches, the author of the article considers the latter to be more appropriate. It means basically that we could return to the preliminary sources and resume with the draft Commercial Code submitted to the second reading in the *Riigikogu* in 1995.

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Anti-tax-avoidance Measures and Their Compliance with Community Law

How to treat taxpayers' transactions may differ according to whether, in applying tax norms, the tax administrator is directly guided by the institute in private law, or whether the existence of a taxable event becomes clear only after interpretation of the legal relationship. In the first case, there is no room for interpretation of the tax-related circumstances and the tax is levied directly by subsuming the facts of the transaction in compliance with the applicable tax norm. However, in many cases interpretation is necessary because no law can foresee all of the taxable situations and a casuistic tax law would allow easy avoidance of the realisation of the taxable event, e.g., through use of a wording that rules out the existence of any tax events described by said law. In order to apply an abstract norm, by contrast, one must be able to interpret it.

In applying tax norms, one must take into account the peculiarity of tax law, which does not proceed from the definitions and principles of other fields of law. If a transaction by a taxpayer is of a form that precludes, for example, the application of a taxable norm on the basis of grammatical interpretation, then the taxation shall still be based on the economic substance and result of the transaction. Tax avoidance purports to avoid the realisation of a tax norm or tax liability; thereby, the taxpayer benefits by having to pay less tax. Interpretation should enable a different assessment of the legal relationship, one aimed at a more favourable taxation regime. The rules of interpretation should be understood as measures that justify a tax authority's invasion of a taxpayer's private autonomy. States can be differentiated in their types of anti-tax-avoidance regulation.

As to their content and applicability, general anti-avoidance measures differ, depending on whether one proceeds from the provisions adopted by the legislator, which are of a general nature and can be used in the majority of cases, or from the rules (doctrines) that have evolved in judicial practice. In the first case, tax liability is determined on the basis of the criteria laid down in the legal norm, which enable assessment of a transaction under tax law. Examples of this approach can be found in the provisions of German, Austrian, Belgian, Spanish, Swedish, and Finnish tax laws. On the other hand, one can also see plenty of rules of interpretation that have evolved from judicial practice. In practice, principles have been developed over time to aid in interpreting the transactions of taxpayers. Such principles are used, for example, by the tax authorities and courts of the UK, the Netherlands, France, and Norway in determining tax liability.

The question, however, is whether a tax administrator needs special authorisation from the legislator in order to determine the existence of a taxable event with respect to transactions of taxpayers, which authorisation should also be proportionate in its accounting for the interests of the taxpayer while at the same time ensuring equal and uniform taxation. The author will analyse the measures employed by different states in order to prevent tax avoidance, how those measures have developed, and whether they comply with the stances adopted by the European Court of Justice.

1. Measures to prevent tax avoidance

1.1. Bases for the general measure

In most cases, tax avoidance measures have their beginnings in the *fraus legis* principle from Roman law. According to this, a person cannot rely on recourse to the law when he in bad faith aspires to gain benefit from the exercise of his subjective right. This principle, transposed from private law, has been successfully applied in developing measures to prevent tax avoidance, both in the form of a provision of law and as a doctrine evolving in judicial practice. Exceptions are Belgium and Italy, both of whom maintain that the concept of *fraus legis* is applicable only in civil law and not in tax matters.[*1] This principle means that exercise of rights arising from contract and law is always deemed abuse of the law where such rights are exercised contrary to the principle of good faith. This means that a court shall not, in a concrete case of *mala fide* tax behaviour, apply the provisions of the law or the contract concerned.[*2] Common-law countries, not influenced by Roman law, approach this issue a bit differently although possessing the principles of interpretation developed by the courts.

The principle of interpretation according to the substance of the transaction is widely used in examining the taxpayer's behaviour where tax avoidance is suspected. The substance is understood as the economic characteristics and results of a transaction, which are to be approached differently from the legal form of the transaction. The principles of uniformity and solvency are realised through the rule of economic interpretation.[*3] The tax administrator is required to treat all taxpayers equally in taxable situations; therefore, taxes cannot be avoided merely by taking advantage of formative options possible in civil law. The concept of proceeding from the economic substance points to a need to clarify whether the conditions agreed upon by the parties have been realised in that particular legal relationship, so that the type of the taxable event can be determined. The main expression of such a method of interpretation lies in detailed description of the essential circumstances in order to identify the characteristics of a sham transaction or an incorrect legal form that the taxpayer used to avoid taxes.[*4]

The general anti-avoidance rule is used by the legislator to express the intent to preclude manipulation of the tax incentives set out in law. The measure creates standards to be considered in interpreting transactions under tax law, which enable examining the compliance of a transaction in view of the meaning of the norm. Doctrines and legal norms undertake to limit tax avoidance in situations where such avoidance cannot be prevented by a special provision. In application of the measures, two important similarities can be observed:

1. the test of the business purpose; and
2. teleological interpretation of a tax norm in order to distinguish a forbidden transaction from one that is allowed.

The courts dealing with tax avoidance cases must be capable of coming to the right conclusions in order to recognise forbidden behaviour wherein the actors just proceed to realise the wording of the law, ignoring its spirit.[*5] The courts need to render their opinion as to the intent of the legislator and to form conclusions as to whether or not the taxpayer meets the conditions entitling him to the right. The general measure enables precluding a situation where a more beneficial tax regime is applied to transactions entered into with improper intent.

The test of purpose or the determination of the business goal of the taxpayer's actions refers to the desired results of the transaction, as, in principle, it is possible for the same economic result to be achieved with several legal forms.[*6] This may be referred to as a subjective element that attempts to identify the taxpayer's intentions in his tax planning activity. If a transaction carries no business goal, one may conclude that the form assigned to the transaction is incorrect and that characteristics of abuse of the law are present. Lack of a business goal is also seen with transactions that may bring about an economic result but in whose execution the tax aspects were the primary focus. Such an approach carries greater weight in those cases where a taxpayer wishes to choose between modes of actions that have different tax implications. To a certain extent, it is allowed to plan taxes, and therefore the tax administrator's activity might be seen as arbitrary if they treat a taxpayer's preference for a milder tax regime as automatically constituting tax avoidance on the taxpayer's part.

After identifying the business goals, the tax administrator is tasked with contrasting the result against the spirit of the tax norm. Tax avoidance should be understood as activity that abuses the rights set forth in the tax law.

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[1] F. Zimmer. – Form and substance in tax law. Studies on International Fiscal Law by the International Fiscal Association. Volume LXXXVIIa. Subject I. F. Zimmer (ed.). Haag: Kluwer 2002, pp. 41–42.

[2] P. Varul, I. Kull jt. Võlaõigusseadus I. Kommenteeritud väljaanne (Law of Obligations I. Commented edition). Tallinn 2006, p. 31, comment 4.3 (in Estonian).

[3] L. Lehis. Maksuõigus (Tax Law). Tallinn 2004, p. 63 (in Estonian).

[4] F. Zimmer (Note 1), p. 24.

[5] T. Edgar. Building a Better GAAR. – Virginia Tax Review 2006 (27) 833, p. 875.

[6] V. Thuronyi. Tax Law Design and Drafting. International Monetary Fund 1996, p. 51.

In interpretation of the norm, it should be clarified whether the result achieved by the concrete transaction is in compliance with the intent of the legislator. If there are several options, the administrator must evaluate whether the transaction has artificially been adjusted to fit the taxation scheme, with the substance of said transaction being more in line with the characteristics of another type of transaction.[*7] General measures help the tax administrator in preventing tax avoidance, subject to application in cases where the employment of a form under civil law hinders just taxation.

1.2. Differences between interpretation in civil law and tax law

The majority of the tax norms tie consequences in tax law to legal relations, which take a typical civil-law form; this might cause problems where the elements of a tax event are provided for too rigidly. In civil law, the economic effect actually desired by a taxpayer is also achievable through atypical activity. The more directly one relies on a certain type of contract, the more the interpretation should be based on the economic substance of the transaction.[*8] Contractual relationships that are similar but executed in an unusual form must be subjected to the same tax regime as is applicable to all analogous situations. Distinction should be drawn among the situations in which parties have built, taking into account individual specific characteristics, another kind of contractual relationship from a transaction whose form was changed in order to hide or obfuscate the actual legal relationship. Some taxpayers use such contracts to avoid payment of taxes or to gain tax incentives.

Where a tax administrator suspects tax avoidance, they should first explore the civil-law form of the transaction in order to identify whether the transaction was aimed at achieving a result in civil law. After that, the results of the transaction and the economic substance of the parties' agreement should be analysed.[*9] The tax authority's interpretation shall initially be guided by the civil-law approach, in assessment of the legal relationship of the parties under private law. In several countries, among them the United Kingdom, France, and Belgium, the attention is on the legal substance of the transactions, which is considered to be the correct method of providing an assessment under tax law.[*10] If the legal substance is deemed to be beyond reproach, there will be no need for further interpretation. Problems arise in situations where there are doubts regarding the correctness of form and where the application of the rule contained in the general measure intensely offends the private autonomy of a taxpayer. The question is this: Does interpretation under civil law prevail over the tax-law approach?

Approaching a transaction on the basis of its legal substance allows solving those cases where it is clear from the civil-law form of the transaction that the contractual relationship is ostensible only, with the parties feigning another legal substance or just creating an impression of having contractual relations. Interpretation under civil law proceeds from the intent of the parties and from the parties' perception of what is to be achieved by their agreement. This is based on so-called *Innentheorie*, a teleologically oriented approach relying on the civil-law treatment of the validity of a transaction in which any result at all could be achieved thereby.[*11] The legal substance approach can be used to solve cases where the form is, in view of the circumstances, obviously unsuitable and where the transaction is incorrectly qualified under civil law in order to avoid taxes.

The issue of whether the form of the taxpayer's transaction is correct or not must be resolved separately in each specific case, and it is very difficult to find a universally applicable rule. Employment of a civil-law form may be unsuitable if the parties to the contract would not have chosen that form for the purpose of achieving their economic goal. Unsuitable also are forms that are tax-evasive, wrong, and deceitful, where the aim is to arrive at the desired final result via indirect methods.[*12] Taxation of a transaction is directly dependent on the objective circumstances that come about in life — i.e., on the facts of life. Wrong qualification occurs in the cases where the taxpayer hides actual circumstances behind an incorrect form of contract.

The tax-law approach to a transaction foresees such interpretation as does not consider the form of the transaction and renders new meaning to the taxable circumstances. This means that the tax administrator re-qualifies the legal relationship, detecting the elements of a hidden legal relationship that are sufficient to determine the legal relationship under tax law. Prevention of abuse of freedom of contract by way of interpretation according to economic reality is a general principle that precludes the parties' options of entering into mutual arrangements to reduce or completely avoid state-imposed tax obligations. The rule of interpretation based on the general provision allows the tax administrator to exercise wider regulative options because where a

7 T. Edgar (Note 5), p. 900.

8 K. Tipke, J. Lang. Steuerrecht. Köln 1998, p. 165.

9 T. Edgar (Note 5), p. 877.

10 F. Zimmer (Note 1), p. 24.

11 *Ibid.*, p. 41.

12 K. Tipke, J. Lang (Note 8), p. 167.

tax is levied in consequence of abuse of freedom of contract the related administrative act can be justified by all facts that refer to an abuse of freedom of contract.*[13]

Tax laws do not restrict a taxpayer's right to choose the form of contract and exercise the right to alter the contract (*Gestaltungsrecht*), nor do they set out conditions precedent to the validity of a contract. The consequences of civil-law transactions and activities in civil and tax law may differ because tax law is public law wherein private autonomy is invalid.*[14] In other words, the parties in a legal relationship have the right to determine the substance of their agreements but they cannot determine the *causa* of the transaction recognised by law, because this is not a freedom of legal qualification of a contract.*[15] In such cases, a transaction is a means to achieve a goal, where the taxpayer is applying it to create an incorrect picture of the actual taxable circumstances so that ultimately he will benefit considerably from reduced payment or from non-payment. However, the identification of a tax obligation occurs during tax proceedings and is tied to the rules of interpretation, which take into account the special position of the tax law in the legal system.

2. Different approaches

2.1. Countries with general measures provided by law

2.1.1. The German and Estonian approach

Germany and other countries in the Germanic legal family have since 1919 been moving toward tax-law interpretation (*Wirtschaftliche Betrachtungsweise*), and such interpretation is not guided by the meaning set forth by the definitions of civil law. Interpretation of a taxpayer's activities according to economic reality as a rule of law is set out in the German General Tax Act (AO)'s § 42, pursuant to which abuse of the options of legal form does not allow avoidance of the tax obligation. This section of the law provides for the following rule of interpretation:

> (1) The tax statute shall not be avoided by an abuse of the arrangement opportunities of the law. If there is an abuse, the tax claim originates as it does from a legal arrangement that adequately reflects the economic substance of the transaction.*[16]

This particular regulation is distinctive in that it combines the economic substance of a transaction and the correct legal substance while many other tax systems concentrate, in deciding whether taxes are avoided, just on exploring the business sense of a taxpayer's behaviour.

In German judicial practice, AO § 42 has been used in different circumstances. Court practice allows distinguishing among four important elements whose existence allows application of AO § 42. First, the legal form of transaction chosen by the taxpayer is not adequate. A transaction should be deemed inadequate if an impartial third party would not have entered into the transaction under the same conditions. Second, the form chosen by the taxpayer clearly brings about a more favourable tax regime when compared to an adequate transaction. Third, there is no acceptable justification of the choice of form. The fourth is a subjective element that follows the actual intent and motivation of the taxpayer to reduce his tax burden.*[17]

This section of the tax law may be applied to transactions that, although formalised incorrectly, still carry an economic substance as well as to transactions that are both inadequate and entered into solely for the purpose of avoiding taxes. Where all four elements exist, the transactions of taxpayers can be interpreted for taxation purposes. However, the German courts do not treat the rule of economic interpretation as the highest rule, as the customary methods of interpretation (grammatical, systematic, etc.) should be employed first and foremost. First the norms of the tax law are interpreted and special circumstances are subsumed. Only after this fails is the actual substance of the transaction explored in order to determine the taxable event.*[18] Thus, such an interpretation has been used in Germany only in those cases where there is reasonable doubt that the taxpayer is avoiding taxes.

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[13] MKS eelnõu seletuskiri (Explanatory Memorandum to the Draft Taxation Act). Available at http://web.riigikogu.ee/ ems /plsql/motions. active (in Estonian).

[14] Eesti maksuseadused koos rakendusaktidega. Õigusaktide kogumik seisuga 15. märts 2007. Lasse Lehise kommentaaridega (Estonian Tax Laws and Their Implementation Acts. Collection of Legal Acts as of 15 March 2007. Commentary by Lasse Lehis). M. Huberg, M. Uusorg (ed.). Tartu: Casus 2007, p. 19 (in Estonian).

[15] V. Lopman. Majandusliku lähenemise põhimõte Eesti maksuõiguses (The Principle of Economic Approach in Estonian Tax Law). – Juridica 2005/7, p. 491 (in Estonian).

[16] Abgabenordnung. – Steuergesetze. Textsammlung mit Verweisungen und Sachverzeihnis. München 1999.

[17] Z. Prebble, J. Prebble. Comparing the General Anti-Avoidance Rule of Income Tax Law with the Civil Law Doctrine of Abuse of Law. – Bulletin of International Taxation, April 2008, p. 153.

[18] M. Schiessl. – F. Zimmer (Note 1), p. 311.

Estonia has followed Germany's example and also employs the rule of interpretation according to economic reality; i.e., in interpreting economic transaction subject to taxation, the tax authorities proceed primarily from the economic and not legal substance of the transaction. The reason is that economic actions, usually in fulfilment of a contract, are the object of taxation, and not legal relations. Also where actual economic actions occur without a contractual relationship, the object of taxation still exists and tax liabilities are still incurred.*[19] This principle has been laid down in § 84 of the Taxation Act (TA), which has been established according to the example of AO § 42 and provides a legal basis for using the method of economic interpretation. Pursuant to TA § 84, if it is evident from the content of a transaction or act that said transaction or act is performed for purposes of tax evasion, conditions that correspond to the actual economic content of the transaction or act apply for taxation. Those provisions reinforce the position that tax law is a part of public law and that, in taxation, the principle of uniform taxation should be observed and that taxpayers cannot modify tax obligations at their own discretion.*[20]

The German and Estonian legislators have provided for a possibility to interpret the agreements of a taxpayer and identify the taxable event that necessitated the taxation of the transaction in question. It is possible for the tax administrator to come to a conclusion that, in view of the circumstances of the transaction, it is taxable because of its economic substance. There is, however, a danger of the tax administrator treating civil-law relations too 'economically', which may lead to use of analogies and unacceptable exploitation of loopholes in tax law. The tax administrator is nevertheless required to observe the principle of legality and to apply the tax law in accordance with its spirit and purpose, giving consideration to the civil-law definitions used by the taxpayer in the contract as well as to the actual economic actions that have taken place.

2.1.2. The Belgian approach

The countries that acknowledge a special rule for the purpose of interpreting tax relations are appreciative of legal clarity and recognise the principle of lawfulness in that only written law can be the basis of burden-encumbering administration. In Germany, a tax administrator may re-assess taxable circumstances and ignore the civil-law form, which is not something that is allowed in all of the countries employing a general tax rule. Belgium represents the countries that, while having a general rule, still require that the legal substance be explored in identification of the tax liability.

According to the principle adopted by Belgian tax law, the definitions and transactions in private law must be recognised by the tax law because tax proceedings cannot interfere with civil-law treatment. This position is based on Article 170 of the Belgian Constitution, pursuant to which taxes to the benefit of the state can only be introduced by a law. Because said rule is interpreted narrowly, in order to identify tax liability, tax authorities must directly rely on the provision allowing taxation. Such a favourable situation for the taxpayer is possible because of the positions adopted in the judicial practice of the Belgian Supreme Court, which precludes the application of the doctrines of *fraus legis* and economic substance. The court maintains that in ascertaining of tax liability, the taxpayer's transaction should not be reassessed but, rather, it should be identified whether or not the transaction is ostensible.*[21] This transposes the civil-law concept of the ostensibility of a transaction, according to which a transaction cannot have legal consequences if the declarations of intent made upon entry into the transaction were either ostensible or sham.

By recognising the form of a transaction by which at least some kind of goal can be achieved, one gets a chance to plan taxes. Under Belgian law, tax avoidance schemes are successful as long as a tax administrator ascertains that the transaction is ostensible and that the taxpayer intended to avoid taxes. This means that where a transaction is correct, the civil-law approach shall prevail over the tax-law approach. In several instances, the Supreme Court has dismissed tax authorities' attempts to restrict the sphere of applicability of the free choice principle to prevent excessive tax planning. The application of the previously mentioned principle led to a situation that in 1993 necessitated the addition of a general rule to the Belgian tax law.*[22] Pursuant to Article 344 (1) of the Belgian Income Tax Code (BITC):

> The legal characterisation given by the parties to one act or to separate acts which together realise the same operation is not binding on the income tax authorities when those authorities determine, by means of presumptions or other proof admitted by Article 340, that this characterisation aims at avoiding taxes, unless the taxpayer proves that his characterisation is justified by legitimate needs of a financial or economic nature.*[23]

[19] L. Lehis (Note 3), pp. 62–63.

[20] *Ibid*., p. 63.

[21] L. De Broe. International Tax Planning and Prevention of Abuse. Amsterdam 2008, pp. 68–69.

[22] *Ibid*., pp. 75–76.

[23] BITC — Belgian Income Tax Code was implemented by a royal decree of 9 November 1992.

By adding a general rule, the Belgian tax law now codifies the principle of the abuse of rights whose purpose is to prevent tax avoidance stemming from the taxpayer's motives. It was the legislator's attempt to use the principle of interpretation for identifying the circumstances that are important for taxation, and for ignoring transactions that are legally correct but are triggered by the intent to avoid taxes. The general rule should be disregarded if the taxpayer can prove the economic goal of the transaction; the level of proof to be provided is not high.[*24] Belgian judicial practice has been governed by the understanding that, in concert with the principle of lawfulness, the taxation rule should be relied on directly and not through interpretation. Reliance on the civil-law norm has caused application of the principle of the legal substance of a transaction. The tax administrator must identify the correct legal form on the basis of which tax could be levied directly on the basis of the provision of tax law.

The tax authorities and the courts do not have the discretion to ascertain the content of a transaction and to identify the economic substance; thus, is it not possible to proceed from the concept of substance and form. As a rule, the legal form prevails over the economic substance and the courts do not regard economic interpretation as the preferred method. The positions of the European Court of Justice have influenced Belgium to move closer to the understanding that through employment of a general tax rule, the doctrine of *fraus legis* is applied to interpretation in tax law. In order to definitively adopt the doctrine, Belgium needs to change principles that have been developed in the judicial practice of the high court and have been applied for more than a hundred years.

2.2. Countries with general measures settled in judicial practice

2.2.1. The Dutch and French approach

In cases of tax avoidance, the interpretation principle provided by law is generally applicable to the interpretation of facts, but there are countries that mainly abide by principles created by the courts. One of these is the Netherlands, where there is a legal provision to combat tax evasion but the *fraus legis* doctrine has been created by the Supreme Court through abundant practice. In Dutch judicial and administrative practice, an acceptable solution is an interpretation under which factual circumstances have more decisive meaning than does form in ascertaining tax-related legal relationships (the 'substance over form' principle). To prevent tax avoidance, the following measures are applied:

1) AWR Art. 31 (*richtige heffing*) enables looking beyond the scope of a transaction that is carried out mainly for the purpose of tax avoidance. This provision is applied upon the approval of the Dutch Ministry of Finance and therefore requires good administrative organisation. This is seldom applied, because of excessive bureaucracy.
2) The principle of *fraus legis*, dealing with abuse of rights, is not contained in the tax law but has been created by judicial practice. According to this principle, the meaning of the law is of greater importance than its precise wording is.[*25]

On the basis of the opinion of the Dutch Supreme Court, the legal substance of a transaction must be set to the side if a tax avoidance motive prevailed in the conducting of the transaction.[*26] The court believes that tax evasion can be assumed if acts of a taxpayer did not have a business motive and gaining of tax incentive is in conflict with the meaning of the law.[*27] Contested transactions may be revalued on the basis of the closest possible legal substance that would lead to removal of doubt concerning abuse of rights. In the Dutch approach, factual circumstances are to be analysed in order to obtain assurance as to whether the essential circumstances correspond to the elements that are taxable by law.

To identify the content of activities of a taxpayer, the circumstances must be subject to so-called review. In particular, this means interpretation of a transaction or act. During this process, it is established whether the form of the transaction or act is in compliance with the principles of civil law and then the economic substance of the transaction is identified. Business objectives must provide a basis for making a decision as to whether a transaction with correct legal substance was actually carried out with the motive of tax avoidance.[*28] Such a principle enables judging acts on the basis of a correct form that obstructs the granting of tax incentives in events other than the situations specified in the legislation.[*29] Hence, irrespective of what the transactions or

[24] D. Garabedian. – F. Zimmer (Note 1), p. 154.

[25] R. Ijzerman. – F. Zimmer (Note 1), p. 453.

[26] G. te Spenke. Taxation in the Netherlands. Deventer, Boston 1995, p. 14.

[27] C. Change. Netherlands: Deductibility of interest on intra-group debt from external acquisition clarified. Available at http://www.internationaltaxreview.com/?Page=10&PUBID=35&ISS=14051 &SID=494332&SM=&SearchStr= (10.04.2008).

[28] R. Ijzerman. – F. Zimmer (Note 1), pp. 452–453.

[29] Proposition of the European Court of Justice Advocate-General Damaso Ruiz-Jarabo Colomer in the case *Belgium v. Temco Europe SA*, C-284/03, pp. 46, 37.

acts look like, no rights can derive from them if this is in conflict with the meaning of a legal provision granting tax incentive on the basis of evidence established with the aid of objective facts.

In comparison of the Dutch interpretation rule with the French positions, it appears that the objective elements of the transaction and the setting of the intention of the taxpayer have a decisive meaning in both countries for addressing doubts concerning tax avoidance. The interpretations of both countries are based on a principle arising from civil law under which the authority is to exercise its rights in good faith and avoid abuse of rights. The difference lies in the fact that interpretation of the tax authority in France may be applied only on the basis of Article 64 of the French code of tax proceedings, which is limited to events wherein the only objective of the taxpayer is to a avoid tax, and to taxation objects specified by law (e.g., application is precluded in the case of real-estate taxes).[*30] According to Article 64, a tax authority may

1) ignore a legal substance the objective of which is to hide income and other earnings and
2) provide a transaction with a new meaning that corresponds to its actual content.[*31]

The principle established in Article 64 has entered into use through judicial practice. For example, in the *Janfin* case it was found that the doctrine of abuse of rights is a general legal principle that is also applicable in tax law. A tax authority is provided with an instrument that enables it to prevent behaviour motivated by tax avoidance and identify the actual tax liability. This is subject to limitations.[*32] Limitation of the possibilities in interpretation by a tax authority or the courts has been proved necessary by cases of excessive interference with the contractual freedom of a taxpayer. Therefore, the application of Article 64 is subject to conditions that should ensure legal clarity, because otherwise forecasting the scope of tax liability would be very difficult.

The French approach recognises the principle of the content and form of transactions, but theory for management of abnormal situations has been additionally developed by judicial practice, to allow taking into account, substantiation, in cases where tax avoidance must be determined, of behaviour that in the same situation would be considered unusual in the eyes of an average undertaking.[*33] Comparison of the interpretation principles created by the judicial practice of the two countries reveals overlapping solutions and possible results, but the French rule is subject to stricter requirements because the meaning of a transaction under private law is given greater recognition in consequence of the cultural background involved.

2.2.2. The Anglo-American approach

The United Kingdom and the USA are countries that, owing to the peculiarity of their legal systems, have abundant judicial practice and have developed doctrines that are applied in cases of suspicion involving tax avoidance. The approaches of these countries are similar to some extent, but they have different views as to the importance of private law in identifying tax law relationships. Their interpretation principles that have been developed through judicial practice, enabling provision of the tax authority, as necessary, with new possibilities to prevent tax avoidance, have been taken as an example by several countries (e.g., Norway and Sweden).

In the judicial practice of the United Kingdom, the prevailing position involves a principle under which legal substance must be relied upon in identifying circumstances that are subject to taxation. The function of that position is to establish whether transactions are ostensible or sham, and whether the wrong form was selected with the purpose of tax avoidance. In the judicial practice, the interpretation of such transactions has led to the creation of sham-transaction-related doctrine originating from the 1936 court judgment *IRC v. Duke Westminster*, in which the court clarified the right of each person to freely organise his or her business transactions, provided that the transaction is not sham and yields a financial result.[*34] A tax authority must accept transactions that are not ostensible or sham. Doubts of the correctness of transactions arise only if the parties that have entered into contracts do not intend to perform them in the manner one would expect from the documents.[*35] For reliance upon this doctrine, it is not sufficient that the contractual relations be artificial, which would show the sham nature of the transactions. It is necessary to establish the receipt of benefits by way of a taxpayer creating a false impression with transactions, as a result of which the tax burden would decrease.

Since 1980, judicial practice in the United Kingdom has been paying more attention to the objective and economic content of transactions. In parallel with the sham-transaction doctrine, principles were developed that did not rely only upon identifying the circumstances and legal substance of a transaction. Implementation of

[30] Z. Prebble, J. Prebble (Note 17), pp. 159–160.

[31] Code général des impóts (General Tax Code). Loi n° 92-40 du 09 juillet 1992 publié dans le Journal Officiel du Sénégal sous le n° 5476 du 11 juillet 1992.

[32] L. Leclercq. Interacting Principles: The French Abuse of Law Concept and the EU Notion of Abusive Practices. – Bulletin for International Taxation, June 2007, p. 239.

[33] F. Zimmer (Note 1), p. 44.

[34] Z. Prebble, J. Prebble (Note 17), p. 167.

[35] J. VanderWolk. Purposive Interpretation of Tax Statutes: Recent UK Decision on Tax Avoidance Transaction. IBFD 2002, p. 71.

the conception provided by the provision on taxes was involved as well.[*36] According to the principle added via the *Ramsey* case, the conclusion of interrelated transactions with the purpose of creating possibilities for tax avoidance does not have more favourable consequence in terms of taxation.[*37] In the opinion of the court, the series of transactions concerned must be considered as a set, which circumvents the issue of transactions without independent economic content and identifies the actual objective of the transactions in relation to the conceptions of the provisions on taxes. In order for one to rely upon the Ramsey, or 'step transactions', doctrine, the following elements must be present:

1) there must be transactions that are interrelated in terms of both time and space, which have been agreed upon previously and are carried out as planned, and
2) the interim transactions do not have any independent business objective; they, taken together, facilitate tax avoidance.[*38]

The Ramsey doctrine is partially congruent with the principle of economic content and form, because in order to identify the business objective it is necessary to find the factual circumstances that would correspond to the economic content underlying taxation. The principle of economic content and form, which has been the main measure in the USA to prevent tax avoidance, allows a tax authority to avoid strict attention to legal substance and to offer a new assessment of the factual circumstances. Furthermore, the USA has an abundant complex of doctrines to judge taxable transactions, the most important being those concerning sham, related transactions and the business objective.[*39]

The business objective or achievable results of a transaction determine needs as regards whether to rely upon the rule on tax avoidance or recognise the form selected by the taxpayer. With the use of these rules, also those factors influencing a taxpayer should be taken into account that do not directly yield economic results but may create new value in view of the interests of the relevant undertaking (e.g., reorganisation for better management of a company).[*40] The US approach in interpretation of transactions carried out for the purpose of tax avoidance is more subjective than that of the United Kingdom, enabling the transactions to be assessed in a manner that does not take into account design under civil law and that ensures uniform taxation.

3. Compliance of tax avoidance rules with European Community law

3.1. Proportional measures

Application of the general tax avoidance rules must be proportional and mindful of the balance of different interests. The tax authority cannot have unlimited rights in resolving tax issues: it has to respect constitutional rights and freedoms, and it may not excessively suppress taxpayers' operations or cause undue trouble.[*41] The ECJ has established certain principles through case law for judging when tax avoidance measures are to be considered proportional. The principle of proportionality is of considerable weight in Community law and as such must be respected as part of the aims and basic values of the EC Treaty.

The principle of proportionality involves seeking to establish whether it is possible to achieve a legal result of higher value while bearing in mind all related interests. The effort put into prevention of tax avoidance should be proportional to the consequences of intervening in taxpayers' economic activity.[*42] Loss of tax revenue cannot by default be declared the dominant public interest to justify measures that do not respect fundamental freedoms. If fundamental freedoms may be compromised, the interest in opposition to them should be weighed with extra care.[*43] The ECJ judgment in the case *Leur v. Bloem* noted that the tax authority should assess tax liability according to the specific details of the transaction, taking into account the individual nature of each case, which must be open to judicial review.[*44] The court also noted that the measure should not be exploited beyond the prevention of tax avoidance.

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[36] Z. Prebble, J. Prebble (Note 17), p. 167.

[37] *Ramsay v. IRC*; *W. T. Ramsay Ltd. v. Inland Revenue Commissioners, Eilbeck (Inspector of Taxes) v. Rawling*, [1982] A.C. 300.

[38] R. M. Ballard, P. E. M. Davison aut. – F. Zimmer (Note 1), pp. 579–580.

[39] W. P. Streng, L. D. Yoder. – F. Zimmer (Note 1), p. 608.

[40] B. Banoun. Tax Avoidance Rules in Scandinavian and Anglo-American Law. – IBFD, September 2002, p. 489.

[41] L. Lehis. Means Ensuring Protection of Taxpayer´s Rights in Estonian Tax Law. – Juridica International 1999 (4), p. 104.

[42] A. Zalinski. Proportionality of Anti-Avoidance and Anti-Abuse Measures in the ECJ's Direct Tax Case Law. – Interfax 2007 (35) 5, pp. 320–321.

[43] ECJ judgments, 13.12.2005, case *Marks & Spencer plc. v. David Halsey*, C-446/03, p. 44.

[44] ECJ judgments, 17.07.1997, case *Leur-Bloem v. Inspecteur der Belastingdienst/Ondernemingen*, C-28/95.

Any rules that justify violation of fundamental rights deriving from the EC Treaty are in contradiction with Community law. Member States cannot apply indefinite measures that allow loose interpretation of transactions and serve the purpose of tax collection only.[*45] General tax avoidance provisions have to be specific enough for taxpayers to predict the amount of the tax obligation. The measure must be usable for the prevention of tax avoidance and should not involve significant deterioration of economic activity — i.e., the taxable person's legitimate expectations and state fiscal interests should be in balance. Taxpayers need the tax obligation to be predictable, which means that greater legal clarity should be ensured by legal measures and consistent administrative practice.

Tax avoidance measures are not proportional if they do not consider specific details of transactions and are based only on predetermined circumstances. The measure taken must be usable as a general provision and be relevant to a variety of situations, provided that the transaction bears no economic substance and its only aim is to obtain a tax advantage.[*46] Prevention of tax avoidance should not consist of prohibitions, and it cannot rely on the 'allow all or nothing' principle, which excludes certain types of transactions or operations. Interests under public and private law have to be taken into account equally. The principle of proportionality requires that the measures be appropriate, necessary, and reasonable, to be used only in cases of sham transactions and tax avoidance.

3.2. Limitations in application

Measures must be concrete yet ensure flexible interpretation of relations under tax law. This means that the use of a measure has to be within the established legal or doctrinal framework. Application of the measure could be restricted. For example, in Dutch tax practice there is an *ultimum remedium* principle applied, which means that the content of the taxpayer's operations can be reviewed only after standard interpretation remedies are exhausted.[*47] Rules of interpretation may be problematic if they set assumptions and limit the definition of tax avoidance to certain transactions or operations.

The first thing to determine is when reasonable doubt of tax avoidance applies. With that established, one knows when to start interpreting the taxable person's operations for the purpose of re-evaluating a transaction under tax law. In the *Halifax* case, the ECJ considered the existence of a violation to be determined by whether the operations involved are motivated by obtaining of a tax advantage. The court noted that a national court must determine the substance and actual meaning of such transactions.[*48] The court handed down a similar judgment in the *Part Service* case in its answer to the question of whether an abuse of rights is defined by the essential aim of obtaining a tax advantage, without any other commercial reasons. The ECJ found that, for application of the measures, the taxable person's activity has to go against the intent of the tax norm, which mainly involves taxation aspects.[*49]

Use of measures against tax avoidance is justified in cases of sham transactions, when legal, economic, and personal relations between operators show that the main aim of the transaction is to obtain tax advantages. In the *Part Service* case, the ECJ set forth guidelines for national courts for interpreting interrelated transactions. The court found that it is necessary to look beyond the contractual façade to assess whether the evidence shows one single transaction, if the transactions involved are not clearly independent.[*50] These ECJ positions coincide with practical application of measures in most Member States that consider the economic substance of transactions, not the artificial form.

Measures cannot be taken only because of suspicion of tax avoidance and a wish to prohibit the taxable person from exercising that tax advantage. The interpretation should not cause harm to normal, legal operations, and the following criteria should be used:

1) the interpretation must adhere to fundamental Community principles, and
2) the interpretation must be relevant to the aim of prevention of tax avoidance.

All EU member states must ensure that the fundamental freedoms of the EC Treaty are transposed into national legislation. The same applies to rules governing prevention of tax avoidance, which must not violate or undermine the rights and freedoms provided for in the treaty. The ECJ ruled in the *X&Y v. AB* case that a state cannot impose rules that differentiate between transactions with national and foreign companies to the

[45] Z. Prebble, J. Prebble (Note 17), p. 163.

[46] A. Zalasinski (Note 42), p. 316.

[47] R. IJzerman. – F. Zimmer (Note 1), p. 455.

[48] ECJ judgments, 21.02.2006, case *Halifax plc., Leeds Permanent Development Services Ltd., County Wide Property Investments Ltd v. Commissioners of Customs & Excise,* No. C-255/02, p. 81.

[49] ECJ judgments, 21.02.2008, case *Ministero dell'Economia e delle Finanze v. Part Service Srl*, No. C-425/06, p. 44, 45.

[50] *Ibid*., p. 54.

etriment of the latter.*[51] Similarly, the court found in the *Cadbury Schweppes* case that mere establishment of a subsidiary in another Member State by a resident company cannot give rise to a general assumption that tax fraud is involved or justify measures that hinder the exercise of the fundamental freedoms.*[52] Rules must be effective and suitable for ascertaining the tax obligation, but the measures must avoid erosion of other legal rights.

In the *Marks & Spencer* case, the ECJ found that a restrictive measure may not go beyond what is necessary to attain the objectives pursued.*[53] Thus, application of said measure must comply with the principles of legal certainty and proportionality, since a suspicion of tax avoidance cannot involve it being an insuperably difficult task to prove the contrary, beyond what is necessary to protect one's rights.*[54] In order to protect all legitimate interests, measures are applicable within clear boundaries, which take into account the regularity of tax proceeds, on one hand, and legitimate business interests, on the other. This should ensure equal treatment of taxable persons.

4. Conclusions

The common denominator of tax avoidance prevention measures is that they cover most cases wherein the aim of the transaction is to reduce tax liability. These transactions also include contracts aimed at creating a more favourable fiscal status or concealing the tax object.*[55] Such measures require courts to interpret tax law in a broad and economically oriented sense; a transaction must be evaluated against tax law, free of artificial legal constructions and on the basis of the actual economic performance of the taxable person. The aim in both instances (legal derogation and court interpretation) is to identify the legal circumstances as provided in the tax norms for purposes of achieving uniform taxation.

Case law shapes and sets boundaries for the ascertaining of relations under tax law, based on transactions' economic substance and form. In many countries, rules of interpretation are set by Supreme Court doctrine, which over time has made its way into legislation. It can be said that also in Estonia a Supreme Court judgment has for the first time established a requirement to consider the economic substance of a transaction over the form chosen by the taxpayer. Principles established via case law have helped to improve tax avoidance prevention measures and provided options for reaction to different tax optimisation tricks. Yet a measure based only on case law offers poor legal certainty, since it is often impossible to foresee whether a transaction will be taxable.

General anti-tax-avoidance measures determine a certain standard as to the situations in which one should suspect tax avoidance and possible creative interpretation of tax law. The general rule aims to ensure application of the principle of legality in relations under tax law and set boundaries to the tax authority's investigations. Under the principles of legal certainty and proportionality, a taxpayer must be able to assess the circumstances it should take into account in the calculation of its tax liability. The ECJ has taken the position that intervention in a taxpayer's economic activity and re-evaluation of transactions are possible only in cases of misapplication, if normal economic relations are not undermined.

[51] ECJ judgments, 21.11.2002, case *X&Y AB v. Riksskatteverket*, No. C-436/00, p. 63.

[52] ECJ judgments, 12.12.2006, case *Cadbury Schweppes plc v. Commissioners of Inland Revenue*, C-196/04, p. 50.

[53] ECJ judgments, 13.12.2005, case *Marks & Spencer plc. v. David Halsey*, C-446/03.

[54] ECJ judgments, 11.05.2006, case *Commissioners of Customs & Excise v. Federation of Technological Industries et al*., C-384/04, pp. 32, 33.

[55] T. Edgar (Note 5), p. 839.

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Criminal Liability of Legal Persons in Estonia

1. General remarks

Estonia introduced criminal liability of legal persons with the adoption of the new Penal Code of 2002.*[1] The Estonian courts and public prosecutors have applied the provisions extensively, but so far the topic has attracted the attention of only a few legal scholars.*[2]

According to § 14 of the Penal Code, "in the cases provided by law, a legal person shall be held responsible for an act which is committed by a body, a member of a body, a senior official, or a competent representative in the interest of the legal person. Prosecution of a legal person does not preclude prosecution of the natural person who committed the offence. The provisions of this act do not apply to the state, local governments, or legal persons in public law". Section 37 asserts that "legal persons with passive legal capacity are capable of guilt". Before the introduction of the new Penal Code, legal persons were liable only for administrative offences.

1.1. Liability only for listed crimes

In Estonia, legal persons can be held criminally responsible only for those acts for which there exists a special provision in the Special Part of the Penal Code laying down that they are punishable when performed by legal persons. The number of crimes for which criminal liability is imposed on legal persons has increased since 2002 and today there are 133 such crimes in the Special Part of the Penal Code. The list includes crimes — such as pollution of the environment, abuse of inside information, tax evasion, fraud, giving bribes, and trading in pirated works — that have been commonly associated with the idea of criminal liability of legal persons. However, there are a number of crimes that are quite remote from the usual activities of legal persons, such as war propaganda, the sale or purchase of children, and acts of terrorism, that also form part of the list. Everyday street crimes like assault and theft are excluded from the list, as are murder and manslaughter. It is not very clear why for certain crimes legal persons are liable and for others they are not. Nevertheless, it is practical to limit the number of crimes for which legal persons can be held liable because in Estonia, according to the legality principle, criminal proceedings are initiated whenever information exists that a crime may have been committed. In addition, criminal proceedings may be terminated only on the grounds listed in the Code of

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[1] Karistusseadustik. – RT I 2001, 61, 364; 2008, 54, 305. Estonian text available at https://www.riigiteataja.ee/ert/act.jsp?id=13094249 (28.07.2009). English translation available at http://www.legaltext.ee/et/andmebaas/paraframe.asp?loc=text&lk=et&sk=en&dok=X30068K7.htm&query=karistusseadustik&tyyp=X&ptyyp=RT&pg=1&fr=no (28.07.2009).

[2] J. Sootak, E. Elkind. Juriidilise isiku vastutus: uued arengusuunad Eesti kohtupraktikas (Liability of a Legal Person: New Trends in Estonian Court Practice). – Juridica 2005/10, p. 671 (in Estonian); J. Sootak, P. Pikamäe. Karistusseadustik. Kommenteeritud väljaanne (Penal Code. Commented Edition). Tallinn 2004, § 14, comment 5.1.1. p. 66 (in Estonian).

Criminal Procedure.[*3] Without such limitation, there would be an inquiry in every criminal case as to whether a legal person should be held responsible for the crime.

1.2. Sanctions

There are only two sanctions in the Penal Code that can be employed to punish legal persons — pecuniary punishment[*4] and compulsory dissolution of the legal person.[*5] In the case of a legal person, the court may impose a pecuniary punishment of 50,000 to 250 million kroons — i.e., a fine of about 3,000 to 16,000,000 euros — on the legal person. A pecuniary punishment may be imposed on a legal person also as a supplementary punishment in combination with compulsory dissolution. A court may impose compulsory dissolution on a legal person that has committed a criminal offence only if the commission of the criminal offence has become part of the activities of the legal person.

1.3. Who can be held liable?

In Estonia, a legal person can be held responsible only if the entity is a legal person according to § 6 of the Estonian General Part of the Civil Code Act.[*6] An entity that does not act in its own name, such as a group of natural persons acting in agreement, and with no registration or capacity to have legal rights, cannot be held criminally liable. The state, local governments, and legal persons in public law cannot be held criminally responsible either. The reason for the exclusion of the state is fairly self-evident, since criminal responsibility is enforced by the same state. However, the reasons for excluding local governments and legal persons in public law are less obvious. It has been suggested that they are excluded because they act in the public interest, their functions are established by public legal acts, and it is not possible to apply compulsory dissolution to them.[*7]

1.4. Liability for intentional crimes and crimes of negligence

According to the Estonian Penal Code, a legal person may be responsible for both intentional and negligent acts. Although the literal text of § 14 of the Penal Code states that legal persons are liable only for acts committed in the interests of the legal person and given that it is not completely clear whether it is possible to be negligent in the interests of a legal person, the Special Part of the Estonian Penal Code explicitly specifies that legal persons are liable for several concrete crimes of negligence as well. Therefore, the text of § 14 (1) stating that a legal person is responsible only for an act that is committed "in the interest of the legal person" should be interpreted to mean that the legal person is responsible for negligent acts that have been committed while the controlling body or senior official of the legal person was acting in the interests of that legal person.

2. Rules of imputation

The text of § 14 states that only acts committed by a body, a member of a body, a senior official, or a competent representative of a legal person can be imputed to the legal person. The code is silent about which bodies' acts can be imputed. The most well-acknowledged opinion is that the acts of all the bodies listed in the statutes of the legal person, including the general meeting, the management board, the supervisory board, and the bodies that can act in the name of the legal person, can be imputed to the legal person.[*8] Still there remains a question as to whether additional corporate organs such as audit committees qualify as well.[*9] The wording of § 14 is somewhat

[3] Kriminaalmenetluse seadustik. – RT I 2003, 27, 166; 2008, 52, 288. Estonian text available at https://www.riigiteataja.ee/ert/act.jsp?id=13088645 (28.07.2009). English translation available at http://www.legaltext.ee/et/andmebaas/paraframe.asp?loc=text&lk=et&sk=en&dok=X60027K4.htm&query=kriminaalmenetluse&tyyp=X&ptyyp=RT&pg=1&fr=no (28.07.2009).

[4] Section 44 of the Estonian Penal Code.

[5] Section 46 of the Estonian Penal Code.

[6] Tsiviilseadustiku üldosa seadus. – RT I 2002, 35, 216; 2008, 59, 330. Estonian text available at https://www.riigiteataja.ee/ert/act.jsp?id=13111425 (28.07.2009). English translation available at http://www.legaltext.ee/et/andmebaas/paraframe.asp?loc=text&lk=et&sk=en&dok=X0015.htm&query=%FCldosa%20seadus&tyyp=X&ptyyp=RT&pg=1&fr=no (28.07.2009).

[7] J. Sootak, E. Elkind (Note 2), p. 671.

[8] J. Sootak, P. Pikamäe (Note 2), § 14, comment 5.1.1. p. 66.

[9] Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions. ESTONIA: PHASE 2. Working Group on Bribery in International Business Transactions OECD, 2008, p. 40. Available at http://www.oecd.org/dataoecd/60/57/40953976.pdf (28.07.2009).

strict in listing the actors whose acts can be imputed to a legal person, and the English translation of the text is even stricter. The Estonian term 'juhtivtöötaja' has been translated into English as 'senior official'. The Estonian term 'juhtivtöötaja' can be understood as referring to an employee having some administrative functions in an organisation, but the term 'senior official' refers to some higher level of administration. Estonian court practice has applied a broad interpretation of the concept of *juhtivtöötaja*. The Estonian Supreme Court has asserted in several cases that "as in big companies top-level executives do not handle everyday business and in concrete spheres they delegate their powers to lower-standing executives, the term 'juhtivtöötaja' includes middle-ranking executives having independent decision-making power in certain fields and therefore being able to direct the will of the legal person".*[10] The Supreme Court has indicated that a legal person may be responsible even if the criminal act to be imputed to that legal person was committed not by an executive but merely by an employee of the legal person, provided that the act was ordered or at least approved by an executive official or a body.*[11]

Until 28 July 2008, the Estonian penal law denied the opportunity to impute actions of its contracted agents to a legal person. In this respect, the Supreme Court did not agree to broaden the definition and decided that if the criminal act — for example, presenting false information to customs authorities — was committed not by a senior official or a body of the legal person but by a contracted agent, the legal person is not liable.*[12] The situation was criticised by scholars*[13] and international bodies.*[14] The Estonian Parliament, *Riigikogu*, reacted and adopted amendments to the Estonian Penal Code adding "competent representative" to the list of persons whose acts can be imputed to a legal person. The term 'competent representative' is not defined in Estonian jurisprudence. In the explanatory memorandum to the draft amendment, it was explained that the term was designed to refer to a broad spectrum of persons but that there is expectation of some concrete authority to represent the legal person as, e.g., a commercial agent or marketing specialist. The explanatory memorandum adds that a competent representative does not have necessarily to have an employment contract with the legal person, and at the same time that not all employees of a legal person can be regarded as competent representatives and that the acts of a competent representative in excess of said representative's authority cannot be imputed to the legal person.*[15]

The Estonian Penal Code is most probably still too narrow in specifying those natural persons whose acts can be imputed to a legal person. It does not include employees of those legal persons who are not senior officials or members of a body or competent representative but who have committed criminal acts in the interests of the legal person due to lack of supervision by the management of the legal person.

Estonia has ratified the Council of Europe Criminal Law Convention on Corruption.*[16] Article 18.2 of the convention requires taking "the necessary measures to ensure that a legal person can be held liable where the lack of supervision or control by a natural person referred to in paragraph 1 has made possible the commission of the criminal offences mentioned in paragraph 1 for the benefit of that legal person by a natural person under its authority"*[17]. Unfortunately, Estonia still has not been able to fulfil its obligations under this convention.

The Estonian Supreme Court has indicated that for some criminal act to be imputed to a legal person one or more natural persons have to fulfil all the material elements of a crime and the act should be unlawful and the person culpable. The court has indicated that in some cases it may be impossible to determine exactly which natural persons committed a criminal act on behalf of the legal person. Such a case might be a secret ballot in the governing body of a legal person where it may be impossible to determine who exactly the members of the governing body were who voted for the criminal decision. The natural person does not have to be convicted for the legal person to be convicted. Even if the specific natural person is known, the criminal proceedings against the natural person may be terminated.*[18]

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[10] CLCSCd, 23.03.2005, 3-1-1-9-05. – RT III 2005, 12, 118. Available at http://www.nc.ee/?id=11&tekst=RK%2F3-1-1-82-04&print=1 (28.07.2009) (in Estonian).

[11] CLCSCd, 10.02.2006, 3-1-1-145-05. – RT III 2006, 7. Available at http://www.nc.ee/?id=11&tekst=RK%2F3-1-1-145-05&print=1 (28.07.2009) (in Estonian).

[12] CLCSCd, 19.10.2004, 3-1-1-70-04. – RT III 2004, 27, 292. Available at http://www.nc.ee/?id=11&indeks=0%2C1%2C69%2C639%2C2180&tekst=222475582&print=1 (28.07.2009) (in Estonian).

[13] J. Ginter. Criminal Liability of Legal Persons in Estonia — A Working System Still subject to Improvement. – Corporate Criminal Liability in Europe. La Charte 2008, p. 151.

[14] Report (Note 9), p. 40.

[15] Karistusseadustiku ja kriminaalmenetluse seadustiku muutmise seaduse eelnõu seletuskiri (The Explanatory Memorandum to the Draft Amendment to the Penal Code and the Code of Criminal Procedure). Available at http://www.riigikogu.ee/?page=pub_file&op=emsplain&content_type=application/msword&file_id=280345&file_name=karistusseadustiku%20ja%20seletuskiri%20(242).doc&file_size=51712 (28.07.2009) (in Estonian).

[16] RT II 2001, 28, 140. Available at https://www.riigiteataja.ee/ert/act.jsp?id=979019 (28.07.2009).

[17] Criminal Law Convention on Corruption. Available at http://conventions.coe.int/Treaty/EN/Treaties/Html/173.htm (28.07.2009).

[18] CLCSCd, 28.09.2004, 3-1-1-82-04. – RT III 2004, 24, 263. Available at http://www.nc.ee/?id=11&tekst=RK%2F3-1-1-82-04&print=1 (28.07.2009) (in Estonian).

The Supreme Court has decided that in the case of omission it should be ascertained which specific natural person (senior official of the legal person) had the obligation to act and failed to perform that legal obligation.*[19]

The Supreme Court has not had an opportunity to render a judgment in a case where the governing body of a legal person committed a crime through omission and where said omission was decided upon in a secret ballot. In this case, it could happen that it is not possible to find out who voted in a secret ballot against some legal decision whereby the legal person was obliged to perform some activities and, following the governing body's decision, the legal person failed to act. The Supreme Court has suggested that the situation where the legal person is responsible for an omission by a body of the legal person is not analogous to the situation where a legal person is responsible for a decision made by one of its bodies in a secret ballot to act in violation of criminal law. In the case of omission, the Supreme Court has found that it is possible and necessary to identify the person(s) who, according to the division of responsibilities within the legal person, was (were) obliged to perform the action that the legal person failed to perform. If there has been no division of responsibilities, all members of the legal person's body may be liable.*[20] The author of this paper still favours the opposing view that cases of omission should be treated equivalently to other cases and that it should be recognised that in some cases it may be impossible to single out which members of a body of a legal person voted in a secret ballot against taking action (when the legal person was legally obliged to act). It would also be unjust to hold responsible the members of the body who in the secret ballot voted to take the mandatory action (i.e., those who did everything they could have been required to do to fulfil the obligation) but were simply outnumbered in the secret ballot.

The Supreme Court has analysed in several judgments how to decide that a senior official or a body of a legal person has acted in the interests of the legal person. The court has decided that it is not only acts that offer pecuniary benefits to the legal person that can be regarded as acts committed in the interests of that legal person. To be considered an act committed in the interests of a legal person, the act should be connected to the legal person. The act should be committed in the sphere of activities of the legal person or in a sphere connected to it. Of course, not all acts of senior officials or bodies of a legal person are committed in the interests of the legal person. The acts of senior officials committed exclusively in their personal interests cannot be imputed to the legal person. However, the interests of a legal person are broader than only financial benefit and may concern spheres that lie far afield of the main spheres of activities of the legal person (as recorded, for example, in the trade register). Therefore, the issue of whether an act has been committed in the interests of a legal person has to be decided in every case independently, in accordance with the circumstances ascertained as pertaining to that concrete case.*[21]

In another case, the Supreme Court decided that there was no need to conduct empirical research or extensive analysis to determine the extent of financial benefits in relation to the issue of whether playing music (without the authors' permission) in a store was conducted in the interests of the store. The court decided that, since the playing of music was inextricably connected to the store's main activities and was not done in the exclusive interests of a senior official or a body of the legal person, it was sufficient to consider this act to have been committed in the interests of the legal person.*[22]

The court has not had an opportunity to rule on the application of the *nulla crime sine culpa* principle in the case of criminal responsibility of a legal person. But some Estonian legal scholars have proposed that, although the criminal liability of legal persons is derivative liability, this should not mean that if an individual (a senior official or member of a body of a legal person) who has committed criminal acts in the interests of a legal person is legally incapable of guilt, the legal person's criminal liability should be excluded. Their argument is that if the legal person is not capable of exerting sufficient supervision of its senior officials and members of bodies to ensure that they are at least legally capable of guilt, the existence of the legal person is not of such value that it should be tolerated if its senior officials or members of its bodies commit criminal acts.*[23] The author of this paper holds a different opinion. The criminal liability of legal persons should not serve to erode the general principles of criminal law, and therefore the *nulla crime sine culpa* principle should be considered in respect of the criminal acts of legal persons as well. For those unlikely situations wherein senior officials or members of bodies of a legal person who commit criminal acts are legally incapable of guilt, legal tools outside criminal law should be employed.

[19] CLCSCd, 27.03.2006, 3-1-1-4-06. – RT III 2006, 11, 100. Available at http://www.nc.ee/?id=11&tekst=RK%2F3-1-1-4-06&print=1 (28.07.2009) (in Estonian).

[20] CLCSCd, 6.05.2005, 3-1-1-137-04. – RT III 2005, 18, 184. Available at http://www.nc.ee/?id=11&tekst=222479341&print=1 (28.07.2009) (in Estonian).

[21] CLCSCd, 3-1-1-9-05.

[22] CLCSCd, 3-1-1-137-04.

[23] J. Sootak, E. Elkind (Note 2), p. 671.

3. The *ne bis in idem* principle not precluding simultaneous liability of a natural person

In Estonia, prosecution of a legal person does not preclude prosecution of the natural person who committed the offence. Some courts of first instance have been of the opinion that the *ne bis in idem* principle precludes liability of the natural person if the legal person has already been convicted. Some courts have insisted that the act of the natural person and the act of the legal person should be assessed as complicity. The Supreme Court has ruled that, since the liability of a legal person is a derivative liability, the two separate persons have two separate liabilities for the same act and the *ne bis in idem* principle and the rules of complicity do not apply. Even in the case of a single-shareholder company, where the single shareholder is the only official and the sole member of the body of the company, the court decided that both the natural person (the shareholder) and the legal person should be held responsible.[*24]

The Supreme Court has ruled that the text of the code, "[p]rosecution of a legal person does not preclude prosecution of the natural person who committed the offence", does not refer to prosecutorial discretion in decision of whether or not to prosecute the natural person. The court decided that the standard procedure should be that both the legal and the natural person(s) are held responsible because it was not the purpose of the criminalisation of the acts of legal persons to exculpate natural persons who have committed criminal acts and the intent was instead to exclude the possibility of utilising legal persons for the commission of crimes. Only if there are grounds to terminate criminal proceedings against the natural or legal person should one (or both) sets of proceedings be terminated. In the stage of initiating a criminal procedure, the legality principle takes precedence and the principle of opportunity becomes available only if there are certain grounds for termination of the proceedings. But the court does not insist that the conviction of a legal person necessarily requires the earlier or subsequent conviction of the natural person. The proceedings against the natural person may be terminated, for example, on grounds of a lack of public interest in prosecution. The court refers also to another possible situation, of convicting only a legal person. It is possible for the legal person to be held responsible for an act committed by a body of the legal person that made a particular decision by secret ballot. In this situation, the *in dubio pro reo* principle excludes the responsibility of natural persons, but there are no grounds for excluding responsibility of the legal person. Still, the court mentions in the judgment that decision-making in a secret ballot does not in itself preclude interrogation of the members of the body of the legal person.[*25] However, the court understands that it is not very likely that sufficiently reliable evidence can be obtained from such interrogations to decide how votes were cast and by whom in a secret ballot.

4. Is the Estonian Penal Code in accordance with EU law?

An analysis of the Estonian Penal Code and court practice does not provide a concrete answer to the question of whether Estonian criminal law is in full accordance with EU law. There is no doubt that the types of acts of legal persons that should be criminalised according to EU law are criminalised in Estonia. Article 3 of the Second Protocol to the Convention on the Protection of the European Communities' Financial Interests requires criminalisation of fraud, active corruption, and money-laundering committed by a legal person[*26], and Article 2 of Council Framework Decision 2003/568/JHA on combating corruption in the private sector requires criminalisation of active and passive corruption committed by legal persons in the private sector.[*27] All of these acts are also crimes according to Estonian criminal law if committed by legal persons, and these acts are punishable at least by fines as required in the relevant EU acts. The problem is in defining the persons whose acts can be imputed to a legal person. Both of the acts mentioned above require all Member States to ensure that a legal person can be held liable where lack of supervision or control by a person with a leading position in that legal person has made it possible for fraud, an act of active corruption, money-laundering, or active or passive corruption to be committed in the private sector for the benefit of that legal person by a person under its authority.

The text of the Estonian Penal Code is silent about this situation. The Supreme Court has in some cases referred to the possibility that a legal person may be responsible if the criminal act to be imputed to that legal person

[24] CLCSCd, 3-1-1-7-04.

[25] CLCSCd, 3-1-1-137-04.

[26] OJ C 221, 19.07.1997, p. 0011–0011. Available at http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexapi!prod!CELEXnumdoc&lg=EN&numdoc=41997A0719(02)&model=guichett (28.07.2009).

[27] OJ L 192, 31.07.2003, pp. 0054–0056. Available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32003F0568:EN:HTML (28.07.2009).

was committed by an employee whose act was ordered or at least approved by an executive official or a body of the legal person.*[28] However, the Supreme Court has not broadened the definition to encompass other persons acting under the authority of the legal person where the lack of supervision or control by a person with a leading position in that legal person has made it possible for these other persons to commit crimes. The court examined a case involving a contracted agent a few years before the amendment of the Penal Code explicitly introduced imputation of acts committed by competent representatives to the legal person. In that case, the court decided that if the criminal act was committed not by a senior official or body of the legal person but by a contracted agent, the legal person is not liable.*[29] In that case, the court did not examine whether or not the contracted agent acted under the authority of the legal person. The author of this paper believes that the text of the Estonian Penal Code needs amendment to criminalise explicitly the legal person for criminal acts committed for its benefit by a person under its authority in the case where the legal person had not exercised due supervision or control. As long as the text of the code remains as it is, the only hope is that if the Supreme Court has to rule on a case where lack of supervision or control by a person with a leading position in a legal person has made it possible for fraud, an act of active corruption, money-laundering, or active or passive corruption to be committed in the private sector for the benefit of that legal person by a person under its authority, the court will be ready to interpret the Estonian Penal Code in accordance with the EU acts. This would not be easy for the court, given the above-mentioned case wherein the court denied the criminal liability of a legal person for acts committed by a contracted agent. No attention was paid to whether the contracted agent acted under the authority of the legal person and whether the legal person had an obligation to supervise or control the activities of the agent. When speaking plainly about the judgment, one should mention that the court did not even analyse whether it would matter if the senior officials or body of the legal person had given direct orders to present false information to the tax authorities.

The unclear situation surrounding the criminalisation of acts committed by legal persons as a result of a lack of supervision or control drew the attention of the team that evaluated Estonian criminal law on behalf of GRECO. Their report concluded that "[i]t is not entirely clear that a legal person can be held responsible for the crime committed by a natural person under its authority, where the lack of supervision or control by a leading official or a body has made the commission of the offence possible".*[30]

The Criminal Policy Department of the Estonian Ministry of Justice responded to the team by saying that it was planning to further examine § 14 of the Penal Code in 2007 in the light of Article 18.2 of the Criminal Law Convention on Corruption — namely, examine the issue of lack of supervision or control by a natural person. So far, the text of the Penal Code has not been changed in this respect.

5. Conclusions

In conclusion, it may be asserted that Estonian criminal law plays an active role in providing opportunities to penalise legal persons for wrongdoing. A substantial number of legal persons have been convicted in court, and the Supreme Court has done well to harmonise the efforts of the lower courts. Still, there are several aspects of this area of legal practice that need further judicial and/or legislative clarification. Of particular importance here is the criminal responsibility of legal persons for criminal acts committed by persons under their authority that result from a lack of supervision or control by natural persons with a leading position in the legal person.

[28] CLCSCd, 3-1-1-145-05.

[29] CLCSCd, 3-1-1-70-04.

[30] Compliance Report on Estonia. Second Evaluation Round, Adopted by GRECO at its 30th Plenary Meeting (Strasbourg, 9−13 October 2006). Available at: http://www.coe.int/t/dghl/monitoring/greco/evaluations/round2/GrecoRC2(2006)3_Estonia_EN.pdf (28.07.2009).

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State Tasks of the Public Office of Notary —

Belonging to the Domain of National or European Union Law?[*1]

State tasks (*Staatsaufgaben*) are public tasks that, proceeding from the constitutional framework of the state and the political decisions of the legislator, have to be implemented by the state. Although the procedure for implementing state tasks in many fields is regulated also by the norms of European Union law, Member States may mainly decide independently on the organisational form of implementation of these functions. Systems of legal protection of Member States form one of the few fields wherein the influence of the European Union has been modest thus far. Therefore, there have been only a few connections between office of notary (*notariat*), which is part of the national system of legal protection, and European Union law.

In many Member States with a continental European legal system, the notary performs state tasks, at the same time standing organisationally apart from the state and holding state authority. The fact that the functions of civil law notaries are performed not by state officials but by independent office-holders has raised the question of whether freedom of establishment as provided by the EC Treaty should be applied to the activities of the notary. Recently, the European Commission initiated proceedings in the European Court of Justice that should provide an answer to the question of whether Article 45 of the EC Treaty can be applied to notaries' professional activities and would therefore preclude the extension of European Union law on the professional rights of notaries. Many thorough studies have been published on this question.[*2]

The problem is examined from a slightly different point of view in the present article. The aim of this article is to determine the combined effect of national law and Article 45 of the EC Treaty on the public office and on the tasks performed within the framework of that kind of office.

The professional law pertaining to the Estonian notary provides a good opportunity for this examination. The article demonstrates that, although Estonia is among the small number of Member States wherein the requirement of citizenship for notaries has been replaced with a requirement for citizenship of the European Union, the Estonian notary participates in the exercise of state authority. Recent legislative amendments that extended the competence of the Estonian notary provide a strong reason for examining the nature of the tasks that can be suitably performed in the framework of the public office. The main argument of this article is that the notary's profession can remain in its present organisational form only if the competence of the notary does not in its essence cover entrepreneurship. At the same time, the article indicates that the application of Article 45 may in the long term lead to a situation wherein the state task is transformed into a public task whose performance is not within the competence of the state or other individuals belonging to a state organisation.

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[2] See Notes 38–40.

1. Public office

There are more organisational forms for fulfilling the state tasks today than there have ever been. Depending on the nature and importance of the task, the state has an opportunity to consider whether to perform the state tasks through its own organs, to create a legal person in public law for performing the tasks, to authorise legal persons in private law or natural persons to perform administrative duties independently under public law regulations, or to decide in favour of different forms of privatisation. One of the organisational forms for performing state tasks, which has been groundlessly overlooked in jurisprudence, is the public office.

As the state is a legal person, it needs natural persons who would exercise state authority on behalf of the state. The office is functionally the smallest entity of the state organisation that denotes a certain amount of state tasks which are given to a natural person for performance.[*3] Only an individual, one who has been appointed by the state, can be the office-holder here. The office-holder who has received state authorisation through the appointment acts not as an individual but as a holder of state authority.[*4] The office embodies the state tasks that the office-holder is obliged to perform and he himself cannot choose the tasks accompanying the office. Since the state has reserved the tasks to be performed within the framework of the office as its own, performance of these tasks takes place because of their nature outside the competition that is characteristic of the subjects of private law.

An office can be a part of either the direct or indirect state organisation. In the latter case, the office stands outside the hierarchy of state organs and is an independent organ of state authority. In the Estonian legal order, this office is called public office.[*5] There can be several reasons for creating a public office. One of the most important factors is creation of sufficient distance between the state and the office-holder to assure the independence of the office-holder from the state.[*6]

The holder of the public office is not a private individual who may be partly involved in performing certain particular tasks carried out by the state. It is true that in both cases the state has decided to withdraw from performing its tasks through state officials, but in the case of the public office, the office-holder is fully subordinate to the public regulation. The holder of public office is a part of state authority not only functionally but also institutionally. At the same time, creating the public office is not any form of privatisation, because performance of the tasks does not happen in a private form but fully in the framework of the state organisation.

2. Connections of the office of notary with European Union law

The influence of European Union law on performance of the state tasks and the state organisation is not limited to only those fields that are regulated by European Union law. Because of the wide scope of application of fundamental freedoms, the institutions of the European Union can have a say in the areas that belong to the competence of Member States.[*7]

The office of notary is, both in Estonia and in many other Member States, an independent public office that is a part of the national system of legal protection. Steady increase in cross-border legal relations has led to several important developments in the field of recognition of notarial deeds between states, but notaries themselves have been active mainly on the basis of national legislation and within the territory of their country. The notaries' acts of most Member States prescribe that only a citizen of that Member State may be a notary. The extent of the influence of the European Union on the organisation of the office of notary will become obvious in the near future.

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[3] On different meanings of the office ("*Amt*"), see R. Summer. Beiträge zum Beamtenrecht. Mohr Siebeck 2007, p. 48 *ff*.

[4] J. Isensee. Transformation von Macht in Recht – das Amt. – ZBR 2004, p. 3.

[5] Under the current law, the office holders for the public office are the notary, bailiff and sworn translator. More on their legal status in E. Andresen. State Liability without the Liability of State. Constitutional Problems related to Individual Professional Liability of Estonian Notaries, Bailiffs and Sworn Translators. – Juridica International 2006 (11), p. 147.

[6] The independence, however, is not a constitutive characteristic of the public office. See W. Leisner. Öffentliches Amt und Berufsfreiheit. – AöR 1968, p. 188 *ff*.

[7] On the critical analysis of these areas, see G. H. Roth, P. Hilpold (Hrsg.). Der EuGH und die Souveränität der Mitgliedstaaten. Bern: Stämpfli 2008.

2.1. The polemics over the application of freedom of establishment to the office of notary

Freedom of establishment is an important part of four freedoms of movement, the purpose of which is to guarantee the functioning of the internal market. According to Article 43 (1) of the EC Treaty, restrictions on the freedom of establishment of nationals of a Member State in the territory of another Member State are prohibited. At the same time, Article 45 also prescribes an exception according to which the provisions of freedom of establishment are not applied, so far as any given Member State is concerned, to activities which in that State are connected, even occasionally, with the exercise of official authority in this Member State.

The question of whether the freedom of establishment should be extended for professional activities of notaries has been topical for 20 years already.[*8] The European Commission has expressed with varying activity the opinion that the professional activities of notaries should be subjected to the provisions of the Treaty. However, those Member States following the continental European legal tradition, where a civil law notary exists, consider the notary to exercise state authority and professional activities of notaries thus should be covered by the exception prescribed in the first paragraph of Article 45, the purpose of which is to defend the sovereignty of Member States.

The European Commission filed an action against six Member States — Austria, Belgium, France, Germany, Greece, and Luxembourg — with the European Court of Justice at the beginning of 2008.[*9] In 2009, the Netherlands joined these Member States.[*10] On the side of the seven Member States sued, all states that acceded to the EU in 2004 and 2007 with exception of Cyprus and Malta have become party to the legal proceedings as the European Commission had initiated an infringement proceeding also against them.[*11] The European Commission is going to file an action also against Portugal, because, although the requirement for citizenship for a notary was abolished there in 1997, under the prevailing interpretation of the Portuguese constitution the office of notary can be held only by citizens of Portugal.[*12] The polemics over the application of Article 45 of the Treaty affect 18 Member States directly, because, despite the differences in the competence of notaries and the organisation of their office, all these Member States have Latin notaries, who are considered to be exercisers of state authority. Only the Scandinavian countries and those Member States with an Anglo-American legal system, where the office of notary has a different form, do not face this problem. At the same time, lawyers in the United Kingdom in particular have expressed their desire to the European Commission to extend their practice to continental Europe.[*13]

In its actions, the Commission takes issue with only the fact that the Member States in question have a requirement of citizenship for notaries and that, with respect to notaries, the Member States have not adopted the directive on the recognition of professional qualifications.[*14] In its press release announcing the proceedings against the old Member States, the Commission noted that abolishing the requirement for citizenship would not involve changes in the legal status of the notary, especially in relation to the activities assigned to the notary. The infringement proceedings are claimed not to affect the powers of the Member States to regulate the office of notary, especially in terms of laying down the measures to ensure the quality of notarial acts —

[8] The European Commission's answer of 19 May 1989 to the Written Question by Mr. Willy Kuijpers No. 2199/88. – OJ 1989 C270, 28. The same question was briefly discussed also when compiling the Treaty of the European Community. On the origin of Article 45, see U. Karpenstein, I. Liebach. Das deutsche Notariat vor dem Europäischen Gerichtshof. – EuZW 2009, p. 164.

[9] Case C-53/08 *Commission v. Austria*. – OJ C 107, 26.04.2008, pp. 15–16; Case C-47/08 *Commission v. Belgium*. – OJ C 128, 24.05.2008, p. 18; Case C-50/08 *Commission v. France*. – OJ C 128, 24.05.2008, pp. 18–19; Case C-54/08 *Commission v. Germany*. – OJ C 107, 26.04.2008, pp. 16–17; Case C-61/08 *Commission v. Greece*. – OJ C 92, 12.04.2008, pp. 20–21; Case C-51/08 *Commission v. Luxembourg*. – OJ C 128, 24.05.2008, p. 19.

[10] During the infringement proceedings, the Netherlands had notified the European Commission about the draft that prescribed abolishing the requirement for citizenship in 2007. As the parliament of the Netherlands had not adopted the law by February 2009, the European Commission filed an action also against the Netherlands. See the Press Release of 29 January 2009 of the European Commission "Nationality requirements for notaries: Commission takes the Netherlands before the Court of Justice to ensure compliance with non-discrimination principle" (IP/09/152). Available at europa.eu/rapid/pressReleasesAction.do?reference=IP/09/152&type=HTML&aged=0&language=EN&guiLanguage=en.

[11] The Press Release of 12 October 2006 of the European Commission "Nationality requirements for notaries: Commission acts to ensure correct implementation of EU law in 16 Member States" (IP/06/1385). Available at europa.eu/rapid/pressReleasesAction.do?reference=IP/09/1385&type=HTML&aged=0&language=EN&guiLanguage=en.

[12] The Press Release of 19 February 2009 of the European Commission "Nationality requirements for notaries: the Commission takes new steps to ensure compliance with the principle of non-discrimination in Portugal" (IP/09/280). Available at europa.eu/rapid/pressReleasesAction.do?reference=IP/09/280&format=HTML&aged=0&language=EN&guiLanguage=en.

[13] The United Kingdom is on the side of the European Commission in the joint action. See for example the regulation of 16 September 2008 of the European Court of Justice in regard with lawsuit C-54/08 *Commission v. Germany.*

[14] In the actions of the Commission, both Directive 89/48/EC and 2005/36/EC are referred to.

for example, arrangement of exams.*[15] At the same time, it is known that the European Commission wishes to apply the provisions of competition law to restrictions in notarial profession.*[16]

The foregoing shows that the question concerns not only the fact of whether citizens of the state should perform certain tasks of the state. The polemics are even more fundamental. When the European Court of Justice takes the view that the main tasks of notaries do not involve exercising official authority, this does not mean only that the Member States have to abolish the requirement of citizenship for their notaries. In this case, despite the circumstances of the arrangement of the notaries' professional activities falling within the competence of Member States, the fundamental freedoms guaranteed by the Treaty should be honoured. All of the measures that prohibit or hinder the exercise of fundamental freedoms or make doing so less attractive are considered to be restrictions on the fundamental freedoms.*[17] Additionally, the question of applying the provisions of competition law should be considered.*[18] Under this scenario, undoubtedly not only would the office of notary change fundamentally, but, in the longer perspective, there could arise hindrance to performance of the functions of other state institutions — such as registers — that are oriented to preventing legal disputes.*[19] Therefore, the answer of the European Court of Justice to the question of whether Article 45 is applicable to notaries' professional activities is of great importance to the future of systems of legal protection in many Member States.

2.2. The practice of implementation of Article 45 of the EC Treaty

Although most of the Member States hold the opinion that regulating notaries' professional activities is the sovereign right of the national legislator and that the European Union does not have competence in this field, the established case law of the European Court of Justice shows that, on this question, the outlines of sovereignty of Member States are to be decided according to the criteria developed by the European Court of Justice.

To ensure common implementation practice for European law, the European Court of Justice has secured for itself hermeneutical monopoly on elucidating Article 45.*[20] Thereby, the criterion 'exercise of official authority', which has a functional content, is of central importance. Unfortunately, the established case law of the European Court of Justice has not clarified this concept very clearly but has confined itself only to case-based opinions.*[21] However, Advocate-General Mayras described the exercise of official authority in the *Reyners* case as follows: "Official authority is that which arises from the sovereignty and majesty of the State; for him who exercises it, it implies the power of enjoying the prerogatives outside the general law, privileges of official power and powers of coercion over citizens."*[22]

As Article 45 is a norm prescribing an exception, the court has interpreted Article 45 in a manner which limits its scope to what is strictly necessary to safeguard the interests that are allowed to protect by Member States through this exception.*[23] Therefore, when one is applying the norm in the first place, it is important to consider the reasons for which this exception was created. The European Court of Justice has found that Article 45 has to enable Member States to prevent a non-citizen from performing the functions connected to

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[15] The Press Release of 27 June 2007 of the European Commission "Nationality requirements for notaries: Commission takes seven Member States to Court of Justice to ensure compliance the principle of non-discrimination" (IP/07/915). Available at europa.eu/rapid/pressReleasesAction.do?reference=IP/07/915&format=HTML&aged=0&language=EN&guiLanguage=en.

[16] See, e.g., Commission Staff Working Document. Progress by Member States in reviewing and eliminating restrictions to Competition in the area of Professional Services. COM(2005) 405 final. 5.09.2005. SEC(2005) 1064 at paragraph 71 *ff*. The organisation *Conférence des Notariats de l'Union Européenne* (CNUE), which associates the civil law notaries of the Member States, holds a different opinion. See Position der europäischen Notare zum Wettbewerbsrecht. 3. Juni 2005. Available at www.cnue-nouvelles.be/pdf/pdf_de_20050609090224-2.pdf.

[17] In that case, every national restriction — for example, the specified number of positions and districts — has to be analysed to determine whether the restriction is discriminating against the citizens of the other Member States; is creating of such restrictions justified by the overriding public interest — be it then defending the interests of the individuals participating in the legal relationship or the proper functioning of the justice system; are the restrictions suitable for achieving the objective which they pursue and do not go beyond what is necessary to attain the purpose. Case C-55/94 *Gebhard*. – ECR 1995, p. I–4165 at paragraph 37.

[18] About the applicability of the provisions of competition law on the public activities, see E.-J. Mestmäcker, H. Schweitzer. Art. 86 Abs. 1, Rn. 15 *ff*. – U. Immenga, E.-J. Mestmäcker. Wettbewerbsrecht. Kommentar zum Europäischen Kartellrecht. Band I. 4. Aufl. 2007.

[19] About the possible influence of applying the provisions of the freedom of establishment, see J. Fleischhauer. Europäisches Gemeinschaftsrecht und notarielles Berufsrecht. – DNotZ 2002, p. 349 (the practices of the notary would qualify under the legal services that are similar to the lawyer's legal aid). U. Karpenstein, I. Liebach. Das deutsche Notariat vor dem Europäischen Gerichtshof. – EuZW 2009, p. 162 ("erosion of the system of preventive legal protection").

[20] F. Mancini. Democracy and Constitutionalism in the European Union. 2000, p. 134.

[21] Critically, it has been called also an apodictic view, see M. Henssler, M. Kilian. Die Ausübung hoheitlicher Gewalt im Sinne des Art. 45 EG. – EuR 2005, p. 195.

[22] The opinion of Advocate-General Mayras in *Reyners*, case 2/74. – ECR 1974, pp. 631, 665.

[23] Case 147/86 *Commission v. Hellenic Republic*. – ECR 1988, p. 1637 at paragraph 7; C-404/05 *Commission v. Germany*. – ECR 2007, p. I-10195 at paragraph 37.

the exercise of official authority.*[24] In accordance with the court's assessment, the objective is fully achievable when Article 45 covers only those activities which "constitute a direct and specific connexion with the exercise of official authority".*[25]

From the case law of the court, it can be claimed that the concept of exercise of official authority includes certainly the activities connected to coercion.*[26] At the same time, this is not a decisive criterion.*[27] When rendering its assessment, the court proceeds from the question of whether the decisions of a person or entity carrying out an activity are binding.*[28] Also the public real acts (*Realakte*) are not excluded *per se*.*[29] Rather the fact that the scope of application of Article 45 does not cover actions that are complementary or additional to the exercise of official authority or actions that are only of a technical nature is decisive.*[30]

So far, the European Court of Justice has not considered any disputed activity belonging to the exception provided by Article 45. The court has denied that the activities of advocates, private security firms, teachers in private schools, traffic accident experts, auditors acknowledged by insurance undertakings, data processing systems developers (and corresponding programmers and operators), and services connected to arranging games of chance, tax assistance and consulting services of tax consulting centres, as well as activities of private inspection bodies for organic agricultural production are exercise of official authority.*[31]

If the exception provided in Article 45 is to apply, the test of restrictions' proportionality will not be used. Therefore, it is not important whether another restriction could replace the requirement for citizenship.*[32] Generally, Article 45 is applicable only to specific activities. Expanding the exception to the whole profession can be possible only when a certain activity is connected to the profession in such a way that, because of freedom of establishment, the relevant Member State would be obliged to allow non-nationals — even occasionally — to exercise the functions appertaining to official authority.*[33]

2.3. The applicability of Article 45 of the EC Treaty to the office of notary

In its case law, the European Court of Justice has highlighted that the applicability of Article 45 should be assessed separately in the case of every Member State, taking into consideration the national provisions regulating the activities and organisation of the profession.*[34] Although the independent objective of this article is not to answer the question of whether the professional activities of Estonian notaries are covered by Article 45, it is important to stress that the Estonian notary does not perform notarial acts that would have a subsidiary or preparatory role in relation to some other institution and that his or her acts do not need state approval to have a conclusive force. Similarly, the notary does not perform notarial acts "under the active supervision" of some other institution, nor is any other institution responsible for the actions of the notary.*[35]

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[24] Case 2/74 *Reyners*. – ECR 1974, p. 631 at paragraph 44.

[25] Case 2/74 *Reyners*. – ECR 1974, 631 at paragraph 45; Case C-355/98 *Commission v. Belgium*. – ECR 2000, p. I-1221 at paragraph 25.

[26] Case C-114/97 *Commission v. Spain*. – ECR 1998, p. I-6717 at paragraph 37.

[27] This is, however, the argument in the action filed against Belgium by the Commission in the Case C-47/08: *Commission v. Belgium*. – OJ C 128, 24.05.2008, p. 18.

[28] Case 2/74 *Reyners*. – ECR 1974, p. 631 at paragraphs 52 to 53; Case C-42/92 *Thijssen*. – ECR 1993, p. I-4047 at paragraph 21, and Case C-306/89 *Commission v. Greece*. – ECR 1991, p. I-5863 at paragraph 7.

[29] A. Randelzhofer, U. Forsthoff. Art. 45 EGV, Rn. 8. – E. Grabitz, M. Hilf, M. Nettesheim (Hrsg.). Das Recht der Europäischen Union. Band II. Loseblatt, Stand May 2001.

[30] Case C-3/88 *Commission v. Italy*. – ECR 1989, p. 4035 at paragraph 13; Case C-42/92 Thijssen. – ECR 1993, p. I-4047, at paragraph 22; Case C-114/97 *Commission v. Spain*. – ECR 1998, p. I-6717 at paragraph 38.

[31] Advocates: Case 2/74 *Reyners*. – ECR 1974, p. 631; private security activities: C-283/99 *Commission v. Italy*. – ECR 2001, p. I-04363; C-355/98 *Commission v. Belgium*. – ECR 2000, p. I-1221; C-514/03 *Commission v. Spain*. – ECR 2006, p. I-963; teachers in private schools: 147/86 *Commission v. Greece*. – ECR 1988, p. 1637; traffic accident experts: C-306/89 *Commission v. Greece*. – ECR 1991, p. I-5863; auditors acknowledged by insurance undertakings: C-42/92 *Thijssen*. – ECR 1993, p. I-4047; data processing systems developers, programmers and operators: C-3/88 *Commission v. Italy*.– ECR 1989, p. I-4035; services necessary for computerization of lottery: C-272/91 *Commission v. Italy*. – ECR 1994, p. I-1409; tax assistance and consulting services by tax consulting centres: C-451/03 *Servizi Ausiliari Dottori Commercialisti*. – ECR 2006, p. I-2941; private inspection bodies of organic agriculture production: C-393/05 *Commission v. Austria*. – ECR 2007, p. I-10195 and C-404/05 *Commission v. Germany*. – ECR 2007, p. I-10239.

[32] A. Randelzhofer, U. Forsthoff. Art. 45 EGV, Rn. 9. – E. Grabitz, M. Hilf, M. Nettesheim (Hrsg.). Das Recht der Europäischen Union. Band II. Loseblatt, Stand Mai 2001. Still, the European Commission uses this argumentation in notaries' cases. See, e.g., case C-47/08: *Commission v. Belgium*. – OJ C 128, 24.05.2008, p. 18.

[33] Case 2/74 *Reyners*. – ECR 1974, p. 631 at paragraph 46.

[34] *Ibid*., paragraph 49.

[35] Proceeding from these arguments, the European Court of Justice did not acknowledge the activities of private inspection bodies of organic agriculture production as the exercise of official authority within the meaning of Article 45. C-393/05 *Commission v. Austria*. – ECR 2007, p. I-10195 at paragraph 42 and C-404/05 *Commission v. Germany*. – ECR 2007, p. I-10239 at paragraphs 43 to 44.

Despite the fact that the European Commission does not consider Article 45 applicable to the office of notary, in European Union legislation several exceptions have been made for notaries as compared to other professions. For example, the Services Directive is not applicable to the professional activities of notaries.[*36] Similarly, the European Parliament holds the viewpoint in its resolution adopted in 2006 that Article 45 has to be fully applied to the profession of a civil law notary.[*37]

The literature in which this question has been analysed in depth has adopted mainly the viewpoint according to which Article 45 is applicable to the office of notary.[*38] The office of notary is often the only profession the literature cites as a specific example belonging to Article 45.[*39] However, there are also opposing views.[*40]

These differing views refer to the fact that, because of the casuistic practice of the European Court of Justice, it is not possible to predict with sufficient certainty what kind of approach the court will adopt.[*41]

At the same time, the office of notary is a good example based on which the influence of Article 45 on the public office as an organisational form of the exercise of official authority can be assessed. Since in the state organisation the legal status is determined on the basis of the legal nature of the functions to be performed, the starting point should be the national legislator's assessment of the tasks fulfilled in the framework of the public profession. The multifaceted competence of the Estonian notary offers suitable base material.

3. Organisation of the office of notary in Estonia

3.1. Abolishment of the requirement for Estonian citizenship in the Notaries Act

Estonia was among the Member States against whom the European Commission initiated the infringement proceedings because of citizenship requirement for notaries. Of the new Member States, only Estonia decided to abolish this requirement.[*42] According to the amendment of the Notaries Act that entered into force on 10 July 2008, a citizen of any member state of the European Union may be a notary in Estonia.[*43]

The reason the Estonian legislator decided to replace the former requirement of Estonian citizenship for notaries with the requirement for the European Union citizenship is not given in the explanatory memorandum of the Act of Amendment of the Notaries Act. It is remarkable that the amendment of the requirement for citizenship is not justified explicitly by the action of the European Commission, and the explanatory memorandum does not even mention the address of the European Commission. It only briefly refers to the fact that the abolishment of the requirement for Estonian citizenship is in accordance with European Union law. At the same time, the explanatory memorandum stresses that abolishing the requirement for citizenship does not reduce state

[36] See Article 2 (2) 1) of the Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services on the internal market. – OJ L 376, 27.12.2006, p. 36. There is a separate provision prescribing that the directive is not applicable to the cases provided by Article 45 (Article 2 (2) i)).

[37] The resolution of the European Parliament of 23 March 2006 on legal professions and general interest in the functioning of legal systems, p. 17. – OJ C 292E, 1.12.2006, pp. 105–109.

[38] On the German notary with references to earlier research, see N. Preuß. Der Notar als Außenstelle der Justiz – Erfüllung staatlicher Rechtspflegeaufgaben durch externe Funktionsträger. – DnotZ 2008, pp. 258–277; U. Karpenstein, I. Liebach. Das deutsche Notariat vor dem Europäischen Gerichtshof. – EuZW 2009, pp. 161–167. On the Austrian notary, see G. Holley, B. Raschauer, S. Zleptnig. Niederlassungsfreiheit auch für öffentliche Ämter? – ÖJZ 2007, pp. 525–532.

[39] For example, A. Haratsch, C. Koenig, M. Pechstein. Europarecht, 5. Aufl. 2006, paragraph 813; U. Karpenstein, I. Liebach. Das deutsche Notariat vor dem Europäischen Gerichtshof. – EuZW 2009, p. 164 with references to the earlier literature.

[40] The viewpoints that the German notary does not exercise official authority as it is expressed in Article 45 with references to earlier research: S. Haeder. Das deutsche Notariat als Bereichsausnahme von der Niederlassungs- und Dienstleistungsfreiheit? – ZeuS 2007, pp. 117–150; S. Schill. Staatsangehörigkeitsvorbehalt für Notare und europäische Niederlassungsfreiheit – Der Anfang vom Ende eines Privilegs? – NJW 2007, pp. 2014–2018; G. Schiller. Freier Personenverkehr im Bereich der freiwilligen Gerichtsbarkeit? – EuR 2004, pp. 27–51. The viewpoint that the citizenship requirement for German notaries is in conflict with the Community law, see J. Bröhmer. Art. 45 EGV, at paragraph 3. – C. Calliess, M. Ruffert (Hrsg.). EUV/EGV. Kommentar. 3. Aufl. 2007.

[41] The same viewpoint: M. Henssler, M. Kilian. Die Ausübung hoheitlicher Gewalt im Sinne des Art. 45 EG. – EuR 2005, p. 197.

[42] On 4 June 2008, *Riigikogu*, the Estonian Parliament, adopted the Act to Amend Commercial Code, Non-profit Associations Act and Other Acts Related to Them (äriseadustiku, mittetulundusühingute seaduse ja nendega seonduvate teiste seaduste muutmise seadus) that amended § 6 (1) of the Notaries Act. Spain and Italy had abolished the citizenship requirement for notaries already earlier.

[43] The other requirements — the individual who wishes to become a notary has to complete candidate service, pass the notary exam, have a sound knowledge of oral and written Estonian, be honest and with high moral standards and meet educational qualifications suitable for a judge — remained the same. The citizens of the European Union may also become notary candidates and substitute notaries.

supervision over notaries and that the notary's oath of office and the requirement for language skills, candidate training, and passing of the notaries' exam will remain.[*44]

Despite the laconic nature of the Estonian legislator here, it can be assumed that Estonia did not, however, agree with the viewpoint of the European Commission according to which freedom of establishment should be extended to the notary. Estonia's later activities demonstrate this. Estonia entered the proceedings to support Germany's requests in the case *Commission v. Germany*.[*45] It seems that the decision of the Estonian legislator could have been caused by the consideration that if all other conditions for becoming a notary — especially Estonian language skills — were to remain the same, it is unlikely that abolishing the requirement for citizenship would have a major influence in practice.[*46] Also, the approach described below demonstrates that the Estonian legislator considers the practice of the notary to be exercise of official authority.

3.2. The tasks of the Estonian notary

The competence and the legal status of the Estonian notary are regulated by the Notaries Act[*47] (NotA). Pursuant to § 2 (1) of the NotA, the notary performs the tasks assigned by the state. The most important of these are acts of attestation, which are regulated by the Notarisation Act[*48] (NA). The notary attests both transactions and declarations of intention (substantive attestations) and also attests to the authenticity of signatures and transcripts (authentication). The office of notary is, above all, designed for substantive attestations. A notary has to be turned to when individuals want to enter into a transaction with substantial legal consequences or a property, partnership, family, or succession transaction (e.g., the transactions to transfer and encumber an immovable, or marital property and succession contracts). These transactions become valid only after notarial substantive attestation.

During the notarial substantive attestation, the notary has to clarify the intention of the parties to the transaction, to warn them against the risks arising from the transaction, and to explain impartially to the parties the possibilities for achieving the desired legal consequences (NA, § 18 (1)). The notary has to verify whether parties to a transaction have passive or active legal capacity and the capacity to exercise will; the notary also has to assess whether the objectives of the notarial act are legitimate. If they are not, the notary is required to refuse to perform the act of attestation and the parties cannot enter into the transaction (NA, § 4). If the notary has met all his or her obligations and there are no hindrances to the act of attestation, the notary attests the content of declaration of intention and verified circumstances and prepares the notarial deed.

The legal effects of the notarial deed are not restricted to giving transactions legal force. Although according to § 232 (2) of the Code of Civil Procedure[*49] no evidence has predetermined force for the courts, § 1 (5) of the NA prescribes that the correctness of notarial deeds and notarial certifications that are prepared within the competence and in compliance with the formal requirements is assumed. Additionally, several important notarised agreements constitute execution documents[*50] on which the bailiff can rely without verifying the substantial circumstances.[*51]

The state has assigned also succession proceedings to the notary, and these result in the issuing of succession certificates.[*52] When issuing a succession certificate, the notary decides who is a successor, who has the right of succession, and what size each successor's share of the estate will be.

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44 The Explanatory Memorandum of the Draft Act to Amend Commercial Code, Non-profit Associations Act and Other Acts Related to Them (Äriseadustiku, mittetulundusühingute seaduse ja nendega seonduvate teiste seaduste muutmise seaduse eelnõu seletuskiri). Available at www.riigikogu.ee/?page=en_vaade&op=ems&eid=248053&u=20090329220643 (in Estonian).

45 The regulation of the President of the European Court of Justice of 16 September 2008 in case C-54/08.

46 Regrettably, it was not analysed whether abolishing the requirement of citizenship is in accordance with the Estonian Constitution. According to § 30 (1) of the Constitution the offices in state institutions and local municipalities are to be filled with Estonian citizens pursuant to law. These offices may, as an exception, be filled with foreign state citizens or stateless persons, in accordance with law. As Estonian notary is a holder of the public office this provision expands on the notary, too.

47 Estonian Notaries Act (as at 25 December 2008) is available in English at www.legaltext.ee/et/andmebaas/tekst.asp?loc=text&dok=X50001K6&keel=en&pg=1&ptyyp=RT&tyyp=X&query=notariaadiseadus.

48 Estonian Notarisation Act (as at 1 January 2008) is available in English at www.legaltext.ee/et/andmebaas/tekst.asp?loc=text&dok=X50058K3&keel=et&pg=1&ptyyp=RT&tyyp=X&query=t%F5estamisseadus.

49 The Code of Civil Procedure as at 1 January 2006 is available at www.legaltext.ee/et/andmebaas/tekst.asp?loc=text&dok=X90041&keel=en&pg=1&ptyyp=RT&tyyp=X&query=tsiviilkohtu.

50 The Code of Enforcement Procedure § 2 (1) 18-191. The code as at 1 May 2007 is available at www.legaltext.ee/et/andmebaas/tekst.asp?loc=text&dok=X80003K1&keel=en&pg=1&ptyyp=RT&tyyp=X&query=t%E4itemen.

51 In Estonian execution proceeding, the principle of formalisation is valid. About the preceding, see Regulation 3-2-1-132-07 of the Civil Chamber of the Supreme Court of 16 January 2008, at paragraph 11. – RT III 2008, 5, 35 (in Estonian).

52 As from 1 January 2009, the new Law of Succession Act has been in force in Estonia. Its §§ 165–175 regulate the succession proceeding. The Act as at 1 January 2009 is available at www.legaltext.ee/et/andmebaas/tekst.asp?loc=text&dok=XXX0002&keel=en&pg=1&ptyyp=RT&tyyp=X&query=p%E4rimis.

In addition to attestation and succession proceedings, the notary may perform several other notarial acts that can, but may not, be connected to attestation. For example, the notary deposits money, securities, and valuables.[*53] For all notarial acts, the notary is required to prepare the necessary draft documents, verify the data related to the notarial act from the national records, provide legal consultation to the parties, and represent them in connection with the notarial act with the court and administrative authorities (NotA, §§ 30 and 31).

3.3. Extension of competency of the notary

In May 2009, the Estonian Parliament adopted amendments to the Notaries Act according to which the competency of the notary extends considerably.[*54] The new notarial acts include issuing apostilles, the authentication of entry into a contract of marriage, and divorce, along with preparation of register entries for marriage and divorce.[*55]

Previously, notaries performed only compulsory notarial acts; the new provisions added to the office of notary also the performance of notarial services. The notarial services include, among others, legal counselling outside the framework of acts of attestation, tax counselling and counselling on issues of foreign law both within and outside the framework of acts of attestation, mediation pursuant to the Mediation Act, and acting as an arbitrator through the mediation and arbitration tribunal of the Chamber of Notaries.[*56] Also a small number of acts of attestation that earlier belonged among notarial acts are considered now to be notarial services: authentication of the results of auctions, voting, draws, and sortitions; authentication of testimony given under oath; and verification of the authenticity of the translation of a document (NotA, § 32).

A notary receives the fees prescribed by law for notarial acts, and departing from these stated fees is forbidden. However, the notary and applicant agree in writing on the fee for a notarial service before the service is provided. In a further distinction from notarial acts, the notary is not obliged to perform notarial services. The notary can decide which notarial services he or she will provide. At the same time, the notary may perform only those notarial services on which he or she has published data on the Web site of the Chamber of Notaries and that are covered under a valid liability insurance contract. State supervision of the notary, professional liability, and disciplinary liability cover both notarial acts and notarial services.[*57] The obligation of impartiality on the part of the notary and other institutional professional obligations extend to the supply of notarial services.

In the explanatory memorandum to the draft law, the extension of competency of the notary was explained by the need to make the office of notary more flexible and attractive to both notaries and the public, to foster competition of legal practitioners, to create more accessible opportunities for people to attend to their business and solve their problems extra-judicially, and to subject heretofore unregulated activities of notaries to state supervision.[*58] Therefore, it can be claimed that the main objectives for extending the competency of notaries are to expand the prevention of legal disputes and to ensure the viability of a self-supporting notaries' office.[*59]

3.4. The legal status of the tasks of the notary

Classifying the professional activities of the notary into notarial acts and notarial services refers to the substantial differences of these tasks.

When performing substantive attestations, the notary prepares a notarial deed by which he or she attests that the transaction is in compliance with the law, confirms that the declarations of intention of the parties correspond to the parties' actual intentions, and states that he or she has verified that the parties' identities and the

53 The exhaustive list of notarial acts is given in § 29 of NotA.

54 The Act to Amend the Notaries Act and the Acts Related to It. – RT I 2009, 27, 164 (in Estonian).

55 Notaries start performing these new notarial acts respectively from 1 January 2010 and 1 July 2010.

56 The draft of the Mediation Act that is being proceeded in the *Riigikogu* provides the time of entering into force 1 January 2010.

57 As an exception, the provisions of disciplinary liability are not applied in case the notary is acting as an arbiter, except for the notary who has committed an indecent act (§ 2 (2) of the Notaries Disciplinary Action Act). About the notaries' liability, see E. Andresen. State Liability without the Liability of State. Constitutional Problems related to Individual Professional Liability of Estonian Notaries, Bailiffs and Sworn Translators. – Juridica International 2006 (11), pp. 146–157.

58 The Draft Act to Amend the Notaries Act and the Acts Related to It, at paragraph 2. Available at www.riigikogu.ee/?page=en_vaade&op=ems&eid=515598&u=20090402140049 (in Estonian).

59 Undoubtedly, the state has to safeguard that the notary's office were able to fulfil the tasks imposed on it in a proper and modern way. The notary' office is not funded by the state budget but the notary's office manages itself independently by using the means returned from the fees for deeds. The Estonian Chamber of Notaries not only deals with the self-government questions of the notary's office, the candidate training and advanced training, but has contributed to the development of the notary's office by using the membership fees of notaries. For example, the Chamber of Notaries ordered an electronic information system of notaries called *e-notar* that enables digital data exchange between state-operated databases and which facilitates significantly everyday work of notaries.

data concerning the transaction are accurate. This control over the legal relationships, being in the majority of cases compulsory, can be performed only with state empowerment. By appointing the notary, the state has granted him or her authority that other state officials and representatives of other professions do not have. Although, according to § 2 (3) of the NotA, the notary holds office on his or her own behalf, his or her professional activities in relation to acts of attestation are attributed to the state. Therefore, the notary adds the impression of a seal with the image of the national coat of arms and the first page of the notarial deed bears the image of the national coat of arms.*[60] The documents prepared during the notarial act belong to the state (NotA, § 16 (1)). As the notarial act is an act of official authority, its performance is allowed only in Estonian territory (NotA, § 36 (6)).

Similarly to performing notarial acts, the acts of issuing succession certificates, authenticating entry into a contract of marriage or divorce, and issuing apostilles are tasks the performance of which requires state authority. The notary can perform these acts only because the state has provided him or her by law with the right to make binding decisions on behalf of the state. All of these notarial acts are state tasks.

However, several tasks among notarial services — legal counselling not related to acts of attestation, mediation, and acting as an arbitrator — do not require state authority. Additionally, two important characteristics of public office are missing in the case of notarial services: the notary is not required to perform these tasks, and the fee for the services is negotiable. Therefore, the state does not require that these tasks be performed and has left both the supply and the price to competition. The simple circumstances that the notary has to be impartial and apply confidentiality also when providing notarial services and that the state has subjected notarial services to as rigid state supervision and responsibility requirement as it has done by performance of notarial acts do not change the nature of these services. The nature of the notarial services is very similar to that of legal services supplied in the framework of entrepreneurship. For example, the advocate acting as an arbitrator has to be as impartial and independent for the parties as the notary does. Despite the fact that, according to § 2 (1) of the NotA, the notary is an independent official to whom the state has delegated the function of ensuring safety of legal relationships and prevention of legal disputes, all the notarial services, whose objective is to prevent court action and guarantee safety of legal relationships, cannot be regarded as state tasks, i.e., tasks that should be fulfilled by the state. These are merely public tasks in which society has a public interest. The aims of the extension of competency of the notary are undoubtedly legitimate and enable people to arrange their legal relationships even better, but that kind of limitation to freedom of profession is not necessary.

3.5. Compatibility between the legal status of the notary and the notary's tasks

Although since 1993, when the model of the Latin notaries' office was restored in Estonia, different terminology has been used in the law at various points in time to describe the legal status of the notary, the latter has remained unchanged.*[61] According to the new Notaries Act, which entered into force in 2002, the notary is a holder of a public office.

The constitutional position of each profession and limitations to it are dependent on the tasks that are being fulfilled in the framework of that profession. State intervention in relation to professional freedom is allowed only so far as it can be justified by functions of those tasks. Also, the legal status of the notary depends on his or her tasks.

The creation of the public office demonstrates the importance to the state of the tasks being fulfilled within the framework of the profession. When introducing the public profession of notary, the state proceeded from the act of attestation as the main task of the notary. Besides the procedural professional obligations, institutional professional obligations such as impartiality, independence, and confidentiality are required to perform the functions of acts of attestation. Owing to performance of acts of attestation and other state tasks, the obligation to perform notarial acts, the prescribed office district, state supervision, and the provisions of disciplinary and professional liability are justified.

However, the public office is not a suitable organisational form for providing notarial services. Although notarial services that are not acts of attestation are not state tasks by their nature, the same rigorous regulation of the public office applies to them as applies to acts of attestation. At the same time, notarial services are not tasks that the state would reserve to itself because of their importance. Notarial services that are not acts of

[60] The right to use the image of the national coats of arms is prescribed in § 4 of the NotA and the procedure is specified by § 8 (2) and § 15 (5) of the regulations for the notaries' office approved by regulation No. 5 of Minister of Justice of 25 January 2002. – RTL 2002, 19, 245; 2008, 64, 910 (in Estonian).

[61] On terminology used to describe the legal status of the notary, see E. Andresen. Status and Role of Notary in Legal System of Estonia. – 10th Anniversary of the Estonian Chamber of Notaries. Tallinn 2003, p. 54.

attestation can be performed also by other professions, and thereby on less limited conditions. The notary has to compete with other professions and at the same time comply with significantly more rigorous regulations.

Although the office of notary belongs to the state organisation, the discussion above demonstrated that, during extension of competency of the notary, there has appeared mixing of the spheres of the state and society. Despite the legal status of the notary, the professional activities of the notary can be considered exercise of official authority only in part.

4. The influence of the EU law on the public office, taking the office of notary as an example

European Union law does not prescribe to Member States the legal form in which the state tasks within their area of competence should be performed. Therefore, European Union legislation and the established case law of the European Court of Justice have not paid much attention to the public office.

The influence of European Union law on the public office is shown through the tasks performed in the framework of the office. The continuation of the office is dependent on the meaning assigned to these tasks by the European Court of Justice. As the practice in implementation of Article 45 of the EC Treaty shows, the application of freedom of establishment would not be precluded only because the performance of the tasks takes place in the framework of the public office or because the public-office-holder performs the tasks that are considered exercise of official authority according to national law. When the activities within the framework of the public office are not in compliance with the criteria for the exercise of official authority that have been elucidated by the European Court of Justice, exercise of the exception to freedom of establishment is not possible under Article 45. In this case, the necessity of limitations to the professional activities is to be assessed in view of the objectives of European Union law, result of which may not coincide with the earlier opinions of national courts on the legitimacy of the same limitations. This revision may cause a situation wherein the state has no possibilities for achieving the public objectives and thus is forced to abandon the performance of the state task. In this way, state task would be transformed into public task that belong to the public sphere. This, in turn, would mean disappearance of the public office.

Also the future of the public office of notary is dependent on the assessment of the European Court of Justice on professional duties of the notary.*[62] Despite the fact that the current cases of the European Court of Justice will not decide the status of the Estonian notaries' office, the court's approach will have a future influence on it.

Estonia did away with the requirement for citizenship when the office of notary included mostly only tasks connected to the exercise of official authority. With the extension of notaries' competency, several tasks were added, the performance of which pursuant to European Union law cannot be reserved only to nationals of a given Member State. The fundamental freedoms of European Community law need to be safeguarded in performing these tasks. As the office-holder cannot be split in two for performing the two sets of tasks, only those requirements can be imposed on the notary that are required for holding the office as a whole. Therefore, solely from the citizenship standpoint and in view of the later amendments to the law, the legislator could not have retained the requirement for citizenship that was applied to the Estonian notary.

Despite the fact that the Estonian notary has to perform not only state tasks but also other public tasks, the unitary office of notary has been retained and a unitary set of rules is applied to holding of this office. As Article 45 is not applicable to some of these tasks, the fundamental freedoms of the European Community cover these tasks and Member States cannot groundlessly hold back exercise of the freedoms. Therefore, one must acknowledge that there are two distinct groups of tasks: those corresponding to the criteria in Article 45 and thus, can be regulated by the norms of national law; and the rest of the tasks falling under the requirements of the European law.

In principle, this differentiation corresponds to the logic of Article 45, according to which it is specific activities that have to be set apart. However, in the case of the office of notary is this double-regulation at the national level is not acceptable. Estonian national law does not support performing both state tasks and public tasks in the same office. The reason for this is that the state cannot from the national level perform the tasks that can be performed in same manner at the public level. Limitations to the professional activities in the framework of the public office are in most cases unnecessary for performance of merely public tasks and are therefore disproportionate. Furthermore, applying the norms of state supervision, public disciplinary liability and of state liability, is not justified in these cases.*[63] However, deregulation of the public office would not make it possible to realise the state tasks that are assigned to the public office by the state.

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[62] About the influences, see subsection 2.1 of this article.

[63] It has also been noted before: W. Baumann. § 5, Rn. 6. – H. Eylmann, H.-D. Vaasen (Hrsg.). Bundesnotarordnung. Beurkundungsgesetz. Kommentar. 2. Aufl. 2004.

The above shows that the continued existence of the public office is guaranteed only if the state tasks are assigned to the public office and when these tasks constitute the exercise of official authority in the sense of Article 45 of the EC Treaty.

5. Conclusions

Similarly to many Member States, also the Estonian legislator has trusted the notary with tasks that the state considers to be its own. A public office has been created for the notary, through which these tasks are performed. Recently, several new tasks were added to the competency of the Estonian notary. These new tasks are called notarial services. Unlike with notarial acts, the notary can decide whether to perform these or not and the fee for the services is negotiable. Notarial services are public tasks, and there is a public interest in them, but they are not inherently state tasks. Provision of notarial services belongs to the public sphere, and they do not require strict public regulation. Therefore, holding a public office and a private profession cannot be connected in the framework of the office of notary, and the legislator will have to decide in favour of one or the other. However, the notary could provide public services outside the framework of the office of notary on equal bases with other individuals offering similar services.

However, in considering the question of the applicability of European Union law, it is not important whether the office-holder performs state tasks. The national legislator can leave performing state tasks, which are trusted to the public office, to its nationals and to the sphere of influence of national law only if the competence of the notary is determined by only these activities that constitute exercise of official authority as explained in Article 45 of the EC Treaty.

The office of notary, which has remarkably long traditions, has an important place in systems of legal protection in most Member States. The Estonian notary too has served the state down through history. In the last 16 years, the notary has been an independent holder of state authority and the office of notary has grown into a strong and trustworthy institution that is valued highly by parties to legal relationships and the state. Still, the office of notary can continue to exist only if the notarial acts of civil law notaries are valued also at the level of the European Union.

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The Influence of European Union Law on the Conservation of Estonian Biological Diversity —

the Case of Natura 2000 Areas

1. Introduction to the subject

Section 5 of the Constitution of the Republic of Estonia[*1] provides: "The natural wealth and resources of Estonia are national riches which shall be used economically." The riches of Estonian nature are indeed remarkable. A variety of valuable and unique aspects of Estonian biodiversity are worth mentioning. The diversity of Estonian flora and fauna when compared to that of other territories north of the latitude 57° N is among the greatest in the world. This is due to climate conditions and climatic diversity in Estonia that are related to the country's geographic position, the fact that there are both islands and mainland territory in Estonia, the abundance of sea and inland waters, and the versatility of soil conditions. Plant colonies can be found in Estonia with the largest small-scale diversity of species in the world. There are plant colonies in Eastern Estonian wooded meadowland that have been in use for a long time; that are still thriving; and where, for instance, the number of tracheophytes amounts to 74 species per square metre.[*2] The general diversity of landscape is great in Estonia as well. These riches must be cherished.

Nature conservation is one of the priorities of European Union environmental policy. It has now been five years already since Estonia joined the EU. Analysis of Estonian legal practice, especially administrative practice, often seems to indicate that we have not joined the European Union yet, as only Estonian law is known and implemented, even when it is in direct contradiction with Community law. European Union law has affected different areas of law differently. Environmental law is undoubtedly one area where the influence of European Union law can be felt at every step, although conflicts between Estonian law and European Union law are not uncommon. A good example is the so-called Suurupi logging case in the Tallinn Administrative Court[*3], where

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1 RT 1992, 26, 349; RT I 2007, 33, 210 (in Estonian). English translation available at www.just.ee/23295 (28.07.2009).

2 Bioloogilise mitmekesisuse kaitse strateegia ja tegevuskava (Estonian Protection of Biological Diversity Strategy and Action Plan). Available at http://www.envir.ee/orb.aw/class=file/action=preview/id=1993/Bioloogilise+mitmekesisuse+kaitse+strateegia+ja+tegevuskava.pdf (20.03.2009) (in Estonian).

3 Tallinn ACd, 19.12.2007, 3-07-2209. Available at http://kola.just.ee/ (10.07.2009) (in Estonian).

Estonian law could not find a reason to prohibit logging, whereas the decision for a ban was quite obvious under European Union law, as the case concerned an area of valuable natural habitats to be conserved, not logged. The court pointed out that the same. Natura 2000 network areas taken under protection pursuant to the European Union nature conservation directives are often a collision ground for nature conservation with economic and related social interests. Such conflicts are not uncommon also in other European Union Member States and have been brought also before the European Court of Justice.

The analysis that follows is largely based on European Court of Justice case law. The European Court of Justice has demonstrated its dedication to nature conservation and regularly given priority to nature conservation considerations. The European Court of Justice called for radical implementation of the precautionary principle in several cases analysed below. At the same time, an infantile understanding prevails in Estonia that economic concerns always outweigh environmental values. Even the Supreme Court found, in the so-called Paluküla sacred grove case, that nature conservation does not prevail at Natura sites but that the need to ensure sustainable development does.[*4] The objective of this article is to consider which instructions the European Court of Justice's case law provides to the Member States for resolving the conflict of economic and environmental interests at Natura sites. There are plenty of legal problems with Natura sites; therefore, the primary aim of this article is to determine whether Estonian law provides sufficient protection to Natura sites — i.e., protection in the meaning of the European Court of Justice's interpretations. Attention is paid primarily to the selection of Natura sites and the so-called Natura assessment. The article begins with an examination of the principles of EU nature conservation law.

2. The main principles of European Union nature conservation law: Member States as keepers of the common European nature heritage

The Supreme Court has touched on the relationship between Estonian law and EU law in the Paluküla sacred grove case, noting that in that particular case there were no grounds for the direct application of European Union law, as Estonian law provides sufficient protection to the pre-selected Natura 2000 Kõnnumaa landscape protection site in accordance with European Union law. This article does not address the direct legal effect of the EU nature conservation directive's provisions. It does underscore, though, that interpretation of the Natura network protective measures derives from EU law.[*5]

The two pillars of EU nature conservation law are Council Directive 79/409/EEC, on the conservation of wild birds[*6] (hereinafter 'the Bird Directive'), and Council Directive 92/43/EEC, on the conservation of natural habitats and of wild flora and fauna[*7] (hereinafter 'the Habitats Directive').

Harmonisation of bird protection measures via the adoption of the Bird Directive is a good example of the application of the principle of subsidiarity. Birds know no 'state borders'; therefore, national protective measures cannot be sufficient. The Bird Directive compels all Member States to maintain the population of all species of naturally occurring birds at a level that corresponds in particular to ecological, scientific, and cultural requirements, while taking account of economic and recreational requirements. For that the Member States have to establish protected areas and maintain or re-establish habitats for the bird species. Thus, a situation arises wherein the aim of protection of natural resources requires the regulation of certain areas and evaluation of how the environmental impact of various types of activities affects protection of birds and conservation of their natural habitats.[*8]

The Habitats Directive is regarded as the most important legal instrument for nature conservation in the EU. The aim of the Habitats Directive is to ensure the protection of biodiversity in the territory of the Member States through the conservation of natural habitats and of flora and fauna. The directive is based on the following considerations. In the European territory, natural habitats are continuing to deteriorate and an increasing number of wild species are seriously endangered. As the endangered habitats and species are part of the Community's natural heritage and the threats to them are often of a trans-boundary nature, it is necessary to take measures at Community level in order to conserve them. In order to ensure the restoration or maintenance of natural habitats and species of Community interest with a favourable conservation status, the Member States have to designate areas of conservation and create a coherent European ecological network: Natura 2000. The direc-

4 ALCSCd, 25.09.2008, 3-3-1-15-08. – RT III 2008, 37, 249 (in Estonian).

5 *Ibid*., p. 19.

6 OJ L 103, 25.04.1979, p. 1.

7 OJ L 206, 22.07.1992, p. 7.

8 See also C. L. Diaz. The EC Habitats Directive Approaches its Tenth Anniversary: An Overview. – Review of European Community and International Environmental Law 2001 (10) 3.

tive foresees criteria for the designation of conservation sites, and it lists animal and plant species and types of natural habitats of European interest. The main criterion for successful implementation of the directive is maintenance of a favourable conservation status for natural habitats and species. For this purpose, appropriate measures have to be implemented — with regard to not only conservation sites but also any activities outside conservation sites that might adversely affect that area.[*9]

One of the most problematic provisions is Article 2 of both directives is foreseeing that the measures taken pursuant to the Birds Directive and the Habitats Directive should take account of economic and related social circumstances. Many Member States have leaned on that and tried to give preference to development activities over the establishment of conservation areas, preferring economic interests to nature conservation. As shown below, this has been done in Estonia. N. de Sadeleer refers to several cases wherein the European Court of Justice has clearly expressed that nature conservation interests prevail for nature conservation areas established under EU law and that other interests are clearly subordinate to that.[*10] Many Member States are reluctant to implement that principle. By contrast, in the Supreme Court judgment in the case of the Paluküla sacred grove[*11], the court indicated that the aim of the Natura 2000 network created under the European Union nature conservation directives is to support sustainable development, not to rule out all economic activity. The court is right in the sense that, indeed, the Natura conservation scheme does not rule out all economic activity, but it remains unclear what the court regards as sustainable development. The classical concept of sustainable development refers to the balance of economic, social, and environmental interests. That definition does not apply for Natura sites. Several European Court of Justice cases mentioned below prove that nature conservation interests are to be given clear preference over other interests at Natura sites.

The Habitats Directive indicates that the creation of the European Natura network is "an essential objective of general interest pursued by the Community". The conservation areas that constitute that network are "sites of Community interest". Thus, EU nature conservation law regards Member States as the guardians of a common natural heritage. Contemporary international environmental law also considers the environment a common heritage of mankind, since nature knows no state borders. P. Sands describes the development of international environmental law as follows. Classical (positivist) environmental law was based on norms that were established and implemented only with the consent of states. This was based on reciprocity, which, in turn, rested on Roman Law's *do ut des* principle, according to which the obligations of one (international) contracting party should be equal to the benefits received from the other party to the contract. A turn was taken in the 1970s when several conventions were signed whereby states accepted environmental obligations without receiving any direct benefit from other parties to the contract. P. Sands calls such obligations "obligations *erga omnes*" — obligations to all — and the aim is to protect interests of humanity as such. As we can see, EU nature conservation law rests on the same principle, underscoring common nature conservation interests and responsibilities.[*12]

In the case of Estonia, all of the above means that, pursuant to international law, and especially EU law, we no longer have an exclusive right to decide over the conservation and use of our precious nature. It is shown below, however, that Estonian environmental law is not entirely dedicated to ensuring protection of the Natura 2000 EU nature conservation network sites, which means that the above-quoted Supreme Court ruling on the inapplicability of EU law is not convincing.

3. Formation of the nature conservation network Natura 2000 in Estonia

The decisive factor in attaining the aim of the Habitats Directive — favourable conservation of natural habitat types and the species' habitats as indicated in its annexes — is a catalogue of prospective Natura network sites by a Member State. In the *First Corporate Shipping* (C-371/98)[*13] case, the European Court of Justice stated that Member States must submit a full list of all sites eligible for identification as sites of Community importance, and that no such site may be omitted.

Estonia's list of Natura sites was submitted to the European Commission by 1 May 2004. According to this document, we have 66 Natura bird sites, with an area of 1,236,808 ha, and 509 Natura habitat sites, with an area of 1,058,981 ha.[*14] The areas of bird sites and habitat sites overlap greatly, which means that the total area

[9] See also N. de Sadeleer. Habitats Conservation in EC Law ± From Nature Sanctuaries to Ecological Networks. – Yearbook of European Environmental Law 2005 (5), pp. 215–252.

[10] *Ibid*., p. 218.

[11] ALCSCd, 3-3-1-15-08, p. 18.

[12] P. Sands. Principles of International Environmental Law. Frameworks, Standards and Implementation. Manchester University Press 1995, pp. 170–173.

[13] Available at http://curia.europa.eu/.

[14] The area of the Republic of Estonia is 4,522,700 ha.

of Natura sites is actually 1,422,500 ha, 51% of which is sea sites and 49% areas on land (16% of Estonia's land is covered by Natura sites).

The selection of Natura sites is a serious task, as Natura site classification usually means significant operational limitations, which can considerably impede property development. It must be mentioned that, unfortunately, the process was poorly regulated legally in Estonia. The main document regulating those activities was Government of the Republic Decree 622-k, of 25 July 2000, 'Approval of the National Programme (2000–2007) Estonian NATURA 2000'.*[15] That programme was in essence a planning document and did not regulate the selection of sites or the legal aspects of the procedure. The media*[16] have said that the selection of Natura sites was done in a rush and incorrectly, and that some Natura sites were assigned that status falsely. The only court case the author is aware of wherein such an oversight is referred to is the Paluküla sacred grove case heard by the Tallinn Circuit Court, in which the court pointed out that a Rapla County Environmental Authority representative had explained at the Circuit Court sitting that the designation of an alvar as a pre-selected area on one slope of the Paluküla sacred grove was outright wrong, since in fact there is no alvar on that slope. The Circuit Court believed this argument, pointing out that alvars are to be found on flat limestone terrain, while the slope in question is a rise and not limestone terrain.*[17]

The National Audit Office pointed out significant limitations in the selection of Natura sites in its audit "Conservation of Valuable Forest Habitats at Natura 2000 sites"*[18]. The National Audit Office reproaches that, since the Ministry of the Environment did fail to use all available options for gathering information about the extent and location of habitats, some valuable sites have mistakenly been left out of the Natura 2000 network. It was mostly earlier conservation areas that were listed in the Natura network, and the abundance and distribution of habitats in the territory of Estonia was in fact not examined. Limited information about the distribution of habitats impedes the formation of the Natura network, which would help to maintain favourable conservation status and evaluate changes in the status of habitats.

Estonian environmental non-governmental organisations are not satisfied with the selection of Natura sites. In 2005, the Estonian Fund for Nature, in collaboration with the Estonian Seminatural Community Conservation Association and other environmental organisations and experts, prepared the so-called Natura 2000 shadow list. The Natura shadow list was prepared — similarly to other member countries' lists — before the relevant negotiations between the European Commission and the Member States (the so-called biogeographical seminar), the Estonian part of which took place in December 2005. This shadow list of sites is one of the main sources of information for Member States wanting to add types of habitat and certain habitats of species to the European Commission list. The Estonian shadow list includes 628 larger and smaller sites, with a total area of 845 km^2. Thus, the shadow sites cover 1.8% of Estonian territory (in addition to the 16% of the 'official' Natura pre-selection sites).

The European Commission also has claims against Estonia. The Commission reviewed the Estonian list of habitat sites and found that the Natura sites provide sufficient protection to 22 types of habitat and 15 species. There are 19 types of habitat and 25 species that need elaboration in the database, and nine types of habitat and two species need additional analysis as to whether and to what extent that type of habitat or species is present in Estonia, and whether, and how many, additional sites are needed. The European Commission requires additional sites for the protection of 10 types of habitat and seven species.*[19]

Thus, it can be argued that the Natura network formation process is far from over for Estonia, and the existence or absence of discretionary space in the choice of the sites is still acute for the country. Many other European Union Member States have had similar problems with the registration of sites in the Natura network.

Section 24 of the above-quoted audit by the National Audit Office states: "The Ministry of the Environment has publicly explained that the formation of the Natura network was based not merely on the ecological value of the site. The final approved selection was a range of compromises with land-owners, and several sites were excluded from the Natura network because of land-owners' protests." A question arises as to whether other considerations besides nature conservation factors may play a role in the listing. This question has come up also with respect to the potential construction of a bridge to the island of Saaremaa.

The European Court of Justice is of the opinion that only ecological criteria matter in the selection of Natura sites. The most important European Court of Justice case regarding the balance of biodiversity and economic (and related social) development is the *Lappel Bank* case.*[20] That case concerned the United Kingdom giving preference to a port extension over a bird conservation site that was obligatory under EU law. The European

[15] Riikliku programmi "Eesti NATURA 2000" kinnitamine aastateks 2000–2007. Available at http://trip.rk.ee/cgi-bin/thw?${BASE}=akt&${OOHTML}=rtd&TA=2000&TO=5&AN=1337&KP=2000-07-25 (10.07.2009) (in Estonian).

[16] Unfortunately no scientific research is available.

[17] Tallinn CCd, 4.10.2007, 3-05-43, p. 12. Available at http://kola.just.ee/ (10.07.2009) (in Estonian).

[18] Available at the National Audit Office website http://www.riigikontroll.ee (10.07.2009) (in Estonian).

[19] Available at http://www.envir.ee/1684 (in Estonian).

[20] Judgment of the Court, Case C-44/95. Available at http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&numdoc=61995J0044&lg=en (10.07.2009).

Court of Justice found that failure to designate an important bird habitat as a conservation site could be justified only by general interests outweighing the ecological interest protected by the directive. At the same time, the court ruled that in the designation of conservation sites economic considerations can never outweigh ecological interests. Thus, the selection and designation of borders is possible only in a manner that bears in mind the ecological criteria.*[21] The European Court of Justice has clearly ruled also in other cases that at this stage economic, social, and cultural considerations must entirely be left to the side.*[22] Therefore, if there are sites that because of economic considerations or land-owners' protests were not listed as Natura sites, as the National Audit Office audit indicates, this is a clear violation of EU law.

An interim conclusion can be drawn here that the selection of conservation sites must depend only on ecological criteria. Theoretically, a Member State does have a certain right of discretion in the selection of sites, but this can be reduced to zero in many cases, if the ecological value of the site requires it to be designated as a conservation site.

The European Court of Justice has stated in the *Lappel Bank* case that there are certain general interests that outweigh ecological interests linked to Natura sites. An explanation can be found in the materials from the *Leybucht* case.*[23] That case concerned the problem of how to deselect or reduce the size of an already-listed site. The case revealed that there can indeed be public interests that outweigh European ecological interests. Extensive land improvement works were carried out on the coast of Germany. A conservation site designated pursuant to the Bird Directive was reduced in size when dams and other barriers were built. Germany justified this with three arguments. Firstly, the construction of dams was necessary in order to avoid floods and thereby save human lives. Secondly, new and valuable habitats are appearing because of those dams. Thirdly, the construction of dams was necessary to allow ships to approach the local port, which was allegedly important because of economic and related social considerations, in order to ensure the development of the region and avoid loss of jobs. The European Court of Justice accepted the first and the second argument but resolutely dismissed the third. The conclusion to be drawn from this is that economic (and related social) considerations do not justify giving up Natura areas, and that Estonia should dismiss such plans. Such proposals have been made in Estonia in connection with, for example, the intention to build a rowing canal and a leisure centre in Tartu, on the Emajõgi River meadow. That meadow is a habitat of the great snipe, a very rare bird in Europe, protected under the Bird Directive. The meadow should therefore be taken under protection as a Natura site.*[24] A favourable conservation state for great snipe stands in a face-off with economic interests related to the rowing canal and sports and leisure facilities.*[25] The *Lappel Bank* and *Leybucht* cases clearly indicate that the leisure centre construction plans are irrelevant to listing of the Emajõgi River meadow as a Natura site. That would clearly contradict EU law.

4. Ensuring protective measures for Natura sites: Critical analysis of Estonian law

As shown above, economic and social interests should have no weight whatsoever in the selection of Natura sites. The next question is whether economic and social considerations play a role in the implementation of protection measures for the sites already listed as Natura sites. They do somewhat. Designation as a Natura site does not mean complete abatement of human activity, including economic activity.

When the new Nature Conservation Act was prepared in 2004, Estonia decided not to lay down special measures for the protection of Natura sites but rather to regulate them by means of traditional nature conservation instruments, since the system of protected natural objects had worked quite well since 1994. This has not been the case in all Member States. Chapter 10 of the Nature Conservation Act of Finland is entirely devoted to conservation of the Natura network.*[26] The author is of the opinion that in general the Estonian approach is justified but Estonian law needs significant amendments and to be brought in line with EU requirements.

The two main legal acts that should ensure sufficient protection of Natura sites in Estonia are the Nature Conservation Act*[27] and the Environmental Impact Assessment and Environmental Management System Act.*[28] In view of the limited length of this article, the analysis below is limited to only environmental impact assessment as one of the main instruments of ensuring protective measures for the Natura sites.

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[21] See also L. Krämer. EU Casebook on Environmental Law. Oxford: Hart Publishing 2002, pp. 316–320.

[22] See, e.g., the judgment of the Court, Case C-371/98. – ECR 2000, p. I-9235.

[23] Judgment of the Court, Case C-57/89. – ECR 1991, p. I-883.

[24] Again, the debates are limited to media and scientific sources are unfortunately not available.

[25] See, e.g., Kas rohunepp ja täpikhuik peaksid sõudekanali ees taanduma? (Should Great Snipe and Spotted Crake Give Way to a Rowing Canal?). – Tartu Postimees, 2.06.2006. Available at http://tartu.postimees.ee/050606/tartu_postimees/204052.php (23.03.2009) (in Estonian).

[26] Available at http://www.finlex.fi/fi/laki/kaannokset/1996/en19961096.pdf (23.03.2009).

[27] Looduskaitseseadus. – RT I 2004, 38, 258; 2009, 3, 15 (in Estonian).

[28] Keskkonnamõju hindamise ja keskkonnajuhtimissüsteemi seadus. – RT I 2005, 15, 87; 2009, 3, 15 (in Estonian).

Environmental impact assessment is prominent also in the Habitats Directive. Article 6 (3) of the Habitats Directive provides that any plan or project likely to have a significant effect on a Natura site shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives.

Implementation of Article 6 (3) of the Habitats Directive involves four main problems: (1) what constitutes a plan or project in the meaning of Article 6 (3) of the Habitats Directive, (2) when a plan or project should be subject to an assessment of its implications for a Natura site, (3) how thorough the assessment should be, and (4) when a plan or project can be granted authorisation in the meaning of Article 6 (3) of the Habitats Directive. Now follows the analysis of how Estonian law (and case law) solves these problems.

4.1. What is a plan or project in the meaning of Article 6 (3) of the Habitats Directive?

The directive defines a plan or project very loosely.*[29] The problem with Estonian legislation is that it allows an environmental impact assessment only when an action requires official authorisation (permit). Section 3 of the Environmental Impact Assessment and Environmental Management System Act specifies that environmental impact is assessed upon application for development consent or on application for amendment of that consent. Article 6 (3) of the Habitats Directive does not link the term 'plan or project' with mandatory authorisation procedure. The directive is based on the premise that many activities do not require authorisation but may nevertheless involve potentially significant adverse impact.

At the same time, it is evident that it is impossible for environmental authorities to control activities that do not require authorisation. Therefore, it could be a good idea to harmonise Estonian law with EU law by extending the list of activities that require authorisation such that it encompasses all activities with potential adverse impact on Natura sites. A good example is the regulation of protection measures for one of the protected natural objects — a special conservation area. The designation 'special conservation area' in the meaning of the Nature Conservation Act was intended primarily for the protection of Natura sites. The explanatory memorandum to the Nature Conservation Act*[30] indicates that the need for a special conservation area derives from Council Directive 79/409/EEC, on the conservation of wild birds, and Council Directive 92/43/EEC, on the conservation of natural habitats and of wild flora and fauna. Section 33 of the Nature Conservation Act foresees notification concerning a special conservation area, and the subsequent official approval thereof, additional conditions, and prohibition of any planned work, as a specific instrument for ensuring the protective measures. The activities subject to notification are listed in Section 33 of the Nature Conservation Act. The list includes such activities also as removal of natural rock or soil, cultivation and fertilisation of natural and semi-natural grasslands and polders, cutting of trees located within areas that have the characteristics of a wooded meadow, and construction and reconstruction of land improvement systems. The question of whether requirement of environmental authorisations and notifications concerning special conservation areas cover all activities with a potential adverse impact must be thoroughly examined. As mentioned above, the list of activities that require authorisation must be open for new entries.

4.2. When should a plan or project be subject to assessment of its implications for a Natura site?

Pursuant to Article 6 (3) of the Habitats Directive, all plans and projects likely to have a significant effect on a Natura site are subject to an assessment. What effect can be classified as significant is to be decided separately for every site, taking into account the aim of protecting that site and its specific characteristics and environmental conditions. The European Court of Justice gave its interpretation of Article 6 (3) of the directive in the *Waddenzee* ruling.*[31]

The European Court of Justice replied to the Dutch Supreme Court (*Raad van State*) request for preliminary ruling that any plan or project is subject to an appropriate assessment if it cannot be excluded that it has significant impact on a Natura site. Thus, an assessment must be carried out in all cases where there is a suspicion of absence or presence of significant impact. There is no assessment needed only if all doubt can be excluded.*[32] It is clear that with such major projects as a bridge between the mainland and Muhu Island no sensible person

[29] See, e.g., the European Commission article Managing Natura 2000 Sites: The provisions of Article 6 of the 'Habitats' Directive (92/43/EEC). Tallinn: Estonian Ministry of the Environment 2001, p. 30.

[30] Seletuskiri looduskaitseseaduse eelnõu juurde (Memorandum of Explanation to the Draft Nature Conservation Act). Available at http://www.legaltext.ee/et/andmebaas/tekst.asp?loc=text&dok=X90008&keel=en&pg=1&ptyyp=RT&tyyp=X&query=LOODUSKAITSESEADUS (10.07.2009) (in Estonian).

[31] Judgment of the Court, C-127/02. Available at http://curia.europa.eu/.

[32] *Ibid*., paragraph 44.

could exclude significant impact in advance. It is important to take into consideration that the European Court of Justice is of the opinion that all plans and projects that undermine the site's conservation objectives (e.g., conservation of certain types of bird species) must be considered likely to have a significant effect on that site.

Estonian law does not differentiate between an assessment of possible impact activities (the so-called Natura assessment) and a regular environmental impact assessment for a development project. The author is of the opinion that the Natura assessment procedure should in the future be different from what is provided for in the current regulation. A Natura assessment, in the author's opinion, has three distinct features.

The first is related to initiation of an assessment. An environmental impact assessment of proposed activity is initiated in Estonia only if the proposed activity has supposedly significant environmental impact; the same applies to a strategic environmental assessment. Section 3 of the Environmental Impact Assessment and Environmental Management System Act provides that environmental impact be assessed upon application for (or application for amendment of) development consent, if the proposed activity that is the basis for the application has potential to result in significant environmental impact. The European Court of Justice found in the *Waddenzee* case that with regard to plans and projects referred to in Article 6 (3) of the Habitats Directive, it must always be assumed that there is potential significant impact on the site. Therefore, the impact of those plans and projects must always be assessed. No assessment is needed only if significant impact of the plans or projects can be reasonably excluded in advance. This means that the threshold for initiating a Natura assessment is considerably lower than that for other types of environmental assessments, and Estonian law should be amended accordingly.

Secondly, a Natura assessment is more focused and limited, since it places more emphasis on conservation objectives and the integrity of the Natura site, whereas other environmental assessments look at the overall impact of the project on the environment as a whole. What is also important is that when a regular environmental assessment includes consideration of realistic alternatives, then allowing a project with significant adverse impact on a Natura site requires absolute absence of alternatives, regardless of whether any alternative is economically sound from the implementer's point of view.*[33]

4.3. How thorough should the assessment be?

The question in the heading of this section of the paper is highly relevant in view of the abundance of Natura sites in Estonia, which means that Natura assessments could be quite frequent. In the Saaremaa port case, environmental organisations claimed that the environmental assessment carried out prior to the special exercise of water authorisation was not thorough enough and did not consider all possible effects. The Tallinn Administrative Court ruled as follows:

> [C]onsidering the complexity of natural habitat, impacts of a proposed activity can be examined and predicted over a long period of time: such research is a thorough scientific work. The aim of proportional impact assessment procedure is not to make the developer carry out and finance such large and long-lasting research projects.*[34]

The Tallinn Circuit Court ruled similarly, finding that the environmental impact assessment was quite thorough for the issue of water permit and that an assessment should consider the most probable (i.e., not all) effects.*[35] The position of the Estonian courts is understandable, as both the Tallinn Administrative Court and the Tallinn Circuit Court did not want to broaden the permitting procedure and view the Saaremaa port case on a larger scale, which was the request of the environmental organisations. The author nevertheless dares to suppose that the above rulings are not in line with the objectives of the Habitats Directive. The European Court of Justice has repeatedly highlighted the principle that national courts must interpret national law on the basis of EU law. In order to position the thoroughness of an environmental impact assessment in the context of Natura sites, once again the *Waddenzee* case applies. In that case, the Dutch Supreme Court asked the European Court of Justice a question about what 'appropriate assessment' as provided for in Article 6 (3) of the Habitats Directive meant.*[36] The European Court of Justice ruled that appropriate assessment in that case meant that "all the aspects […] which can […] affect [site conservation] objectives must be identified in the light of the best scientific knowledge in the field"*[37]. Thus, the European Court of Justice found that an assessment basically means scientific work and has to be so thorough as to take account of all (not only the most probable) aspects of activities affecting the sites and that all reasonable doubts are eliminated regarding presence or absence of significant impact.

What conclusions can be drawn from the *Waddenzee* case for Estonian law? Firstly, as a Natura assessment is aimed at quite a specific objective (to ascertain whether the proposed activity could have significant adverse

[33] See Managing Natura 2000 sites. The provision of Article 6 of the Habitats Directive 92/43/CEE. European Commission 2000, p. 43. Available at http://ec.europa.eu/environment/nature/natura2000/management/docs/art6/provision_of_art6_en.pdf (23.03.2009).

[34] Administrative case No. 3-1152/2004.

[35] Administrative case No. 2-3/271/05.

[36] Judgment of the Court, C-127/02, paragraph 21. Available at http://curia.europa.eu/.

[37] *Ibid*., paragraph 54.

impact on the integrity of the site) and the initiation threshold is low, then the requirement of full environmental impact assessment procedure in cases where the need for the impact assessment arises only because of the Natura assessment need would be a disproportionate burden for the applicant for development consent, and thus an easier and quicker assessment procedure should be provided for. It could be claimed that this is the only possible solution, given the very low threshold for initiation of a Natura assessment and the anticipation of a large number of assessments. Maintaining the current full open procedure in all assessment cases would clearly be burdensome and eliminate some projects that would not adversely affect Natura sites. The author is of the opinion that a simplified Natura assessment procedure should not involve full open procedure with public hearings and discussions, as regular environmental impact assessment requires. An expert survey should answer the specific questions raised and provide a clear answer as to whether significant impact on the conservation objective and integrity of the site is possible or could be reasonably excluded. A Natura assessment may require very specific knowledge about species and habitats — thus, it should be provided in Estonian law that an assessment can be carried out by an expert who may be an individual with extensive knowledge in research of the protected species or habitat and who has given reliable assessments concerning the protection of that species or habitat. Such a qualification requirement would considerably expedite the Natura assessment procedure.

4.4. When may a plan or project be granted authorisation in the meaning of Article 6 (3) of the Habitats Directive?

The final question considered here was also asked by the Dutch Supreme Court in the *Waddenzee* case. The European Court of Justice found that a plan or project may be granted authorisation only on the condition that the competent authorities are convinced that it will not adversely affect the integrity of the site concerned.[*38] The European Court of Justice ruled that that is the case where no reasonable scientific doubt remains as to the absence of such effects.[*39] The court explained its ruling again with the precautionary principle and indicated that only the above authorisation criterion (absence of suspicion of adverse impact) allows effective prevention of adverse effects on the integrity of protected sites created by the plans or projects being considered. The court also indicated that "[a] less stringent authorisation criterion than that in question could not as effectively ensure the fulfilment of the objective of site protection".[*40]

The *Waddenzee* case implies the third distinct feature of Natura assessments, which should be stipulated more clearly in Estonian law. A regular environmental assessment is not always binding for the issuer of the development consent: granting of authorisation is often a discretionary decision, wherein other interests besides the environmental are taken into consideration. Existence of discretion is evident in Subsection 24 (2) of the Environmental Impact Assessment and Environmental Management System Act, which provides that "[i]f, upon making a decision to issue or refuse issue of a development consent, the decision-maker fails to take account of the results of environmental impact assessment and the environmental requirements appended to the report, the decision-maker shall set out a reasoned justification in the decision to issue or refuse issue of the development consent". Hence, it is possible here for the decision-maker to prefer economic and social interests over environmental interests. The European Court of Justice has ruled that a Natura assessment is directly binding on the decision-maker. If suspicion remains regarding adverse impact on the Natura site, the authorisation must not be issued and the plan should not be approved. Hence, unlike a regular environmental impact assessment, a Natura assessment decision-maker has little or no room for discretion.

5. Conclusions

The question posed at the beginning of this article, that of whether Estonian law fully ensures the necessary conservation of Natura sites, must be answered in the negative. Estonian law does not ensure total disregard of economic and social interests in the selection of Natura network sites, which disregard is what EU law requires. Neither is Estonian law in full harmony with EU law with regard to Natura assessments. Estonian law does not allow assessment of activities with environmental impact that do not require environmental authorisation. The Habitats Directive does not mandate Natura assessment merely for those activities that require authorisation. The other respect in which Estonian law is not in line with EU law is related to the low threshold for Natura assessment initiation and the binding nature of Natura assessment for the decision-maker.

[38] *Ibid*., paragraph 56.

[39] *Ibid*., paragraph 59.

[40] *Ibid*., paragraph 58.

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Influence of Article 9 (3) of the Aarhus Convention on Legal Standing in Estonian Administrative Courts

Most countries of the world, including Estonia, declared in 1992 in Rio de Janeiro that the better resolution of environmental issues requires public participation in decision-making, provision of access to environmental information, and ensured access to justice.[*1] Observance of the declaration helps not only to solve environmental issues but also to implement the principle of democratic rule of law. Environment-related procedural rights significantly contribute to the transparency of the authority of the state, increase the legitimacy of decisions, ensure better protection of persons' rights, and provide for more effective implementation of laws.

The Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters[*2] opened for signing on 25 June 1998 in Aarhus proceeds from the above principle of the Rio Declaration and has become the most important international agreement on environmental rights. Estonia ratified this convention on 6 June 2001[*3], and it entered into force on 30 October 2001. By the beginning of 2009, the convention had been ratified by the European Union and all of its member states, except Ireland.[*4]

The provisions of the convention regarding access to justice have proved the most difficult to implement.[*5] The most problematic of these provisions is perhaps Article 9 (3). The wording of the paragraph is vague, allowing radically divergent interpretations. The purpose of this paper is to explain the meaning of Article 9 (3) of the convention and to examine whether Estonian administrative court practice complies with this provision upon giving meaning to standing. The wording and interpretation of the convention provision are therefore analysed through examination of the practice of the committee reviewing the implementation of convention requirements, and the extent of the legal standing in Estonian administrative courts and the influence of the convention provision thereon are analysed. As a result of limitations of space, the article does not discuss the

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1 Rio Declaration on Environment and Development (Rio de Janeiro, 1992). Available at http://www.unep.org/Documents.Multilingual/Default.asp?documentID=78&articleID=1163 (31.03.2009). Pursuant to § 1 (2) of the Sustainable Development Act (RT I 1995, 31, 384 (in Estonian)), the Estonian National Sustainable Development Strategy is based on the principles stipulated in the decisions of the UN Conference on Environment and Development.

2 Available at http://www.unece.org/env/pp/treatytext.htm (31.03.2009).

3 RT II 2001, 18, 89.

4 The current status of the ratification is displayed on the web page of the Convention at http://www.unece.org/env/pp/ratification.htm.

5 Opening remarks of Mr. M. Belka, Executive Secretary of UN Economic Commission for Europe, at the Meeting of the Parties to the Aarhus Convention in June 2008 in Riga, pp. 2–3. Available at http://www.unece.org/env/pp/mop3/web/speechBelkaRigafinal.pdf (22.12.2008).

compliance of administrative court procedure with the minimum requirements of Article 9 (4), and the relation of Article 9 (3) to other Estonian administrative and court procedures.

1. Article 9 of the Aarhus Convention: Access to justice

Article 9 of the convention consists of five paragraphs. The first two are closely connected to certain aspects of the right of information and participation. Paragraph 1 of Article 9 sets forth an obligation to ensure access to justice upon violation of the right to request information, established in Article 4 of the Aarhus Convention. Paragraph 2 obliges the party to ensure access to justice upon violation of the right to participate in the procedure granting permission for projects with a significant effect on the environment, stipulated in Article 6. A more detailed specification of these projects is provided in Annex 1 to the convention. Both substantive and procedural aspects can be challenged. Filing a complaint pursuant to Article 9 (2), environmental associations are not required to prove either impairment of their rights or sufficient interest.

It must be noted that, proceeding from the practice of the Supreme Court, the scope of application of Article 9 (2) of the Aarhus Convention is broader in Estonia than the text implies.[*6] The convention enables reference to paragraph 2 not only upon the impairment of Article 6 but also upon infringement of other requirements of the convention if so provided in national law. In the interpretation of the Supreme Court, this means that there is no need for a special regulation that would provide such a possibility — it is sufficient if a decision, act, or omission mentioned in the Constitution is essentially challengeable in an administrative court. Not only compliance with the convention but also compliance with other relevant legislation can be subject to challenge. Therefore, if a decision, act, or omission belongs within the competence of an administrative court, the legality thereof can be checked because of infringement of both convention provisions and other relevant legislation.[*7]

Article 9 (3) of the Aarhus Convention lacks direct association with the right of information and participation. The paragraph provides:

> In addition and without prejudice to the review procedures referred to in paragraphs 1 and 2 above, each Party shall ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.

Article 9 (4) of the convention lays down the minimum requirements that the access-ensuring procedures (established in paragraphs 1 to 3) must meet. Procedure shall be fair, equitable, timely, and not prohibitively expensive. Also, the powers of the body conducting procedures shall be adequate and effective, and the final decision shall be rendered in writing.

Article 9 (5) obliges each party to provide information to the public about the possibilities of access to justice, and to consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to justice.

2. Possible interpretations of Article 9 (3)

The vagueness of the wording of paragraph 3 is not incidental. The negotiations preceding the adoption of the convention featured heated discussions regarding the extent (if any) to which the public should be able to demand adherence to requirements of environmental law.[*8] The initial purpose of the provision was to allow the broadest possible access to justice, but during negotiations the wording was changed such that the requirements of national law obtained a focal position.[*9] The final wording of the provision seems to reflect a lack of consensus, allowing radically different interpretations.

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6 ALCSCd, 29.01.2004, 3-3-1-81-03. – RT III 2004, 5, 47 (in Estonian).

7 *Ibid*., subparagraphs 23–27.

8 J. Jendrośka Aarhus Convention and Community Law: The Interplay. – Journal of European Environmental & Planning Law 2005/1, p. 19.

9 M. Zschiesche. The Aarhus Convention — More Citizens' Participation by Setting out Environmental Standards? – ELNI Review 2002/1, pp. 26–28.

According to one radical interpretation, the provision merely constitutes a plea to broaden access to justice and fails to directly bind the parties in any respect. According to another radical interpretation, the provision gives rise to anyone's right to initiate judicial or other, similar proceedings in private or public interests. There are, naturally, several other interpretations between these extremes. Most EU Member States tended to favour the first line, claiming during the negotiations that paragraph 3 does not presume changing of national law.*[10] Positions close to the first extreme have also been expressed in academic discussion. These state that the parties enjoy great freedom in decision upon the determination of criteria. In order to implement the provision, it is enough to have the possibility to draw the attention of state supervisory bodies to the violations, and the right to challenge omission on the part of supervisory bodies, if they fail to take relevant measures on the basis of the information.*[11]

In the Implementation Guide to the Convention, instructions regarding the implementation of paragraph 3 remain vague, but the guide seems to exclude extreme interpretations. According to the guide, the convention makes it abundantly clear that it is not only the province of the public authorities to enforce environmental law: the public also have a role to play. The purpose of Article 9 (3) of the convention is to provide certain persons with the right to enforce environmental requirements directly or indirectly. Indirect enforcement constitutes the possibility to participate in state-initiated procedures. A person must have official status in that procedure. The convention nonetheless limits the right of the parties to determine criteria the meeting of which is prerequisite for initiation of enforcement procedure or participation therein.*[12]

At the same time, opinions supporting the other extreme can also be found in the literature. There are, e.g., references to the possibility of considering Article 9 (3) a means for the provision of "the right to a clean environment", established in Article 1.*[13] According to another view, paragraph 3 presumes the right of environmental organisations to file altruistic challenges in respect of all environmental matters.*[14]

The author of this article has no doubts that the purpose of the provision is to broaden access to justice. The preamble highlights that the purpose of procedural rights is to ensure the above-mentioned right to a clean environment, on the one hand, and to provide everyone with the obligation to protect and improve the environment, on the other. The preamble also indicates that access to effective judicial mechanisms is given to the public not only for the purpose of protecting their justified interests but also for ensuring the implementation of laws. The public are not able to protect their interests, or meet the expectations imposed on them in environmental protection, if access to justice rests on ordinary restrictive criteria. Reference to this can also be found in the language referring to the criteria, "if any", laid down in paragraph 3 — if requirements meant ordinary grounds for access, this phrasing would not make sense. On the other hand, it would be odd if, upon the violation of any environmental provision (Article 9 (3)), more extensive access should be provided to justice than with regard to activities with significant environmental effect (Article 9 (2)).

With all of this taken in sum, it can be said that the convention provision is contradictory, and that on the basis of the convention alone it is difficult to decide on the extent of the obligation established in Article 9 (3). Luckily, the past years have brought certain clarity to the content of the provision with a committee reviewing the implementation of convention requirements, having had to interpret Article 9 (3) within the context of specific cases.

[10] J. Jendrośka (Note 8), p. 19; M. Contiero. Special Report of the European Environmental Bureau (EEB). Your Rights Under the Environmental Legislation of the EU. – EEB. 2004/016, p. 35. Available at http://www.unece.org/env/pp/Media/Your_Rights_2004_e.pdf (22.12.2008).

[11] V. Rodenhoff. The Aarhus Convention and its Implications for the "Institutions" of the European Community. – Review of European Community & International Environmental Law 2002 (11) 3, p. 349; M. Lee, C. Abbot. The Usual Suspects? Public Participation Under the Aarhus Convention. – Modern Law Review 2003 (66) 1, p. 105.

[12] UNECE. The Aarhus Convention Implementation Guide, pp. 130–131. Available at http://www.unece.org/env/pp/publications.htm (22.12.2008).

[13] J. Jendrośka. Public Information and Participation in EC Environmental Law. – R. Macrory (ed.). Reflections on 30 Years of EU Environmental Law. The Avosetta Series (7). Europa Law Publishing 2006, p. 81.

[14] German Advisory Council on the Environment. Access to Justice in Environmental Matters: The Crucial Role of Legal Standing for Non-Governmental Organisations. Statement. No. 5. February 2005, p. 12. Available at http://www.participate.org/index2.php?option=com_docman&task=doc_view&gid=40&Itemid=50 (22.12.2008).

3. Interpretation of Article 9 (3) in the practice of the committee reviewing compliance with convention requirements

Review of compliance with the requirements of the Aarhus Convention is discussed in Article 15. According to a more detailed regulation approved by the parties, reviewing compliance with requirements is the task of the Compliance Committee, consisting of nine members. One of the tasks of the Compliance Committee is to process communications from the public. The committee reports at the 'Meeting of the Parties', which decides on the implementation of appropriate measures upon contravention of convention requirements.[*15] Possible measures include a declaration regarding the contravention of requirements, but also suspension of rights and privileges under the convention. In view of the generality of Article 15, it is surprising that agreement could be reached on a question such as provision of the right of communication to the public, which essentially means the rights to file challenges regarding the omissions of the convention. Committee Chairperson V. Koester explains this in terms of the countries most opposing the strong convention not becoming signatories to it at once, and thus not participating in the negotiations regarding the organisation of the next convention review.[*16]

The mechanism for reviewing compliance with the requirements of the Aarhus Convention has proved to function well. The main reason for this success is the decision to allow the public to submit communications. In most environmental conventions, this right is granted to only the parties to the convention. As communications regarding contravention of the convention can be considered to be hostile acts, the parties shall submit such communications only if significant national interests are at stake — i.e., very rarely.[*17] In 2004–2008, the Compliance Committee received 29 communications, 28 of them from members of the public.[*18] Several of these cases are related to Article 9 (3), but, in order to clarify the contents of the provision, two cases are especially interesting, in which the committee more thoroughly addressed the meaning of Article 9 (3): the communication from the Belgian umbrella organisation for environmental organisations, the BBL, regarding Belgian planning law[*19], and the communication from a citizen of Denmark, Søren Wium-Andersen[*20], regarding nature conservation law.

The main subject of the communication submitted by the BBL in 2005 was the excessively narrow treatment of the legal standing of environmental organisations in courts. The BBL concluded that these criteria make it especially difficult for local organisations to file challenges, even more so on account of the relevant judicial practice being inconsistent.[*21] The main content of the communication submitted by Søren Wium-Andersen in 2006 was the lack of possibility to challenge the culling of *Corvus frugilegus* in the local government of Hillerød. Pursuant to Danish law, the legal standing of both natural and legal persons is based on specific, significant, and individual interest. Although Danish judicial practice regarding the legal standing of environmental organisations is scant, it nevertheless follows that at least some national and local organisations dedicated to nature conservation have the legal standing in disputes related to nature conservation. Natural persons, however, usually lack a legal standing regarding nature conservation.[*22]

Addressing the cases, the committee assumed the position that the purpose of Article 9 (3) of the convention is, firstly, to enable public access to adequate judicial mechanisms in the event of acts and omissions in contravention of environmental law and, secondly, to provide means for the enforcement of environmental law to ensure its effectiveness. According to the committee, Article 9 (3) should be given meaning in compliance with articles 1–3 of the convention, with regard to paragraph 18 of the preamble.[*23] The committee sees Article

[15] Decision 1/7 taken at the Meeting of the Parties; see also decisions 2/5 and 3/6. The Committee has itself also approved several administrative documents. Available at http://www.unece.org/env/pp/ (22.12.2008).

[16] V. Koester. Review of Compliance under Aarhus Convention: A Rather Unique Compliance Mechanism. – Journal of European Environmental & Planning Law 2005/1, p. 35.

[17] Statement of Committee Chairperson V. Koester at the Meeting of the Parties to the Convention in June 2008 in Riga, p. 1. Available at http://www.unece.org/env/pp/mop3/web/Veit_Koester_HLS_Panel_1_MOP_3.pdf (22.12.2008).

[18] The list of communications from the public is available at http://www.unece.org/env/pp/pubcom.htm (22.12.2008).

[19] Observations and recommendations of the Committee with respect to the communication regarding Belgium. ECE/MP.PP/C.1/2006/4/Add.2. 28 June 2006. Available at http://www.unece.org/env/pp/compliance.archives.htm (22.12.2008) (hereinafter: Communication Belgium).

[20] Observations and recommendations of the Committee with respect to the communication regarding Denmark. ECE/MP.PP/2008/5/Add.4. 29 April 2008. Available at http://www.unece.org/env/pp/compliance.archives.htm (22.12.2008) (hereinafter: Communication Denmark).

[21] Communication Belgium (Note 19), items 11–19.

[22] Communication Denmark (Note 20), items 13–21.

[23] Article 1 words the purpose of the Convention, which is securing the right of every member of the present and future generations to live in an environment adequate to their health and well-being. Article 2 defines the key concepts. Article 3 stipulates the general provisions of the Convention, e.g., the establishment of a transparent, clear and consistent framework to implement the provisions of the Convention. Pursuant to paragraph 18 of the Preamble, effective judicial mechanisms should be accessible to the public so that its legitimate interests are protected and the law is enforced.

9 (3) as providing the parties with great flexibility.[*24] The opportunity for the public to address the state and draw attention to the violation of environmental law is nevertheless insufficient for the implementation of the provision. In addition, there must be a possibility to challenge acts or omissions that contravene environmental law in the event that the state fails to take measures in relation to that matter.[*25] On the one hand, a party is not obliged to allow general *actio popularis*; at the same time, a party cannot establish or maintain such strict requirements that almost no member of the public has access to justice. Potential access-restricting criteria may include those of being affected or having an interest, but these criteria cannot exclude access.[*26] At the same time, Article 9 (3) does not presume that every person should be able to protect public environmental interests. For the implementation of the convention it suffices if a member of the public has access to justice in respect of these issues.[*27]

With respect to the BBL communication, the committee noted that exclusion of the legal standing of certain organizations (such as umbrella organisations) is essentially not in contravention of the convention. At the same time, it is unacceptable to create a situation wherein almost no organisation is able to meet the criteria for the legal standing. It appeared from Belgian judicial practice that, in planning disputes, most if not all environmental organisations lack the legal standing. The committee estimates that the continuation of such a situation would be in contravention of Article 9 (3).[*28] Addressing the communication from the Danish citizen, the committee concluded that Danish law cannot be considered to be in contravention of Article 9 (3) on the basis of the information at hand. Although it is likely that the person who submitted the communication cannot challenge the culling of *Corvus frugilegus* in Denmark, it has not been proved that such activity could not have been challenged by an environmental organisation. Rather, the contrary could be presumed on the basis of the scant judicial practice.[*29]

It seems that the committee favours neither of the extreme interpretations of Article 9 (3). The committee recognises the extensive right of discretion of the parties to the convention upon establishment of the access criteria but at the same time presumes that at least some element of the public shall be granted access to justice. It appears from committee practice that access to justice pursuant to Article 9 (3) should be distinguished in the case of private and public interests. From the convention text and committee practice, it is unclear to what extent access to justice should be granted for a person in protection of private interests in cases other than the infringement of the right of information and participation. In respect of protection of the public interest, it is important to note that the committee sees the enforcement of the environmental law as a goal of Article 9 (3). What should also be highlighted is the opinion of the committee that at least some members of the public must have the right to represent public environmental interests. Given the emphasis of the role of environmental organisations in respect of the convention, the role of ensuring appropriate environmental law seems best suited to environmental organisations.

4. Implementation of Article 9 (3) in Estonian administrative court practice

In Estonian law there is no special regulation for the implementation of Article 9 (3) of the convention. There are several relevant procedures, but among them the most pertinent is administrative court procedure. The first reason for this is that most environmental disputes are disputes in public law. Another important factor is limited access under other procedures or problems with the implementation of the requirements of Article 9 (4) of the convention in these procedures.

The Estonian administrative court system has three levels. The courts of first instance are the administrative courts of Tallinn and Tartu. The courts of appeal are the Administrative Chambers of the Circuit Courts of Tallinn and Tartu. The court of cassation is the Administrative Law Chamber of the Supreme Court, whose decisions have central importance for interpretation of the law in practice. The competence of administrative courts includes adjudication of disputes in public law, especially adjudication of appeals filed against administrative acts and measures. Review of legislative acts does not fall within the competence of administrative courts.[*30]

[24] Communication Belgium (Note 19), items 34–35.

[25] Communication Denmark (Note 20), item 28.

[26] Communication Belgium (Note 19), item 36.

[27] Communication Denmark (Note 20), item 32.

[28] Communication Belgium (Note 19), items 39–40.

[29] Communication Denmark (Note 20), items 36−37.

[30] Halduskohtumenetluse seadustik (Code of Administrative Court Procedure) (RT I 1999, 31, 425; 2008, 59, 330 (in Estonian)) §§ 3 and 4 (hereinafter: CACP).

4.1. The basis for access to a review procedure before administrative courts and the interpretation thereof in judicial practice

The main grounds for the legal standing of natural and legal persons in Estonian administrative courts involve violation of a subjective public right*[31], although some exceptions are set forth in specific laws.*[32] According to the Supreme Court, the violation of rights means direct contiguity.*[33] On the basis of the purpose of the violated provision and the importance of the interest of the person, the court must decide whether the provision protects only public interests or that person's interests too. Only in the event that a provision protects or must protect a person's interests, that person's subjective right to request compliance with the provision shall stem from the provision.*[34] The legal standing of associations of persons is essentially no different from that of natural persons. Proceeding from § 7 (3) of the Code of Administrative Court Procedure (or CACP), an association of persons may file an action in the interests of the members of the association or other persons if the corresponding right is granted to the association by law. The courts have interpreted the provision narrowly, assuming the position that such a right must proceed from law expressly. The fact that an association has been established for the protection of the interests of the members is not enough for the creation of the legal standing.*[35]

As has appeared from committee practice, Article 9 (3) of the convention does not prohibit criteria restricting access to justice. At the same time, these criteria are not to result in a situation where almost no person has access to justice in environmental disputes. A strict implementation of the criterion of violation of subjective rights, however, yields exactly this kind of result. Negative environmental effects are dispersed and generally affect a large number of persons. Upon review before the courts, it is difficult for a person to show that the impact affects him especially and that his interest is different from public or collective interest. Therefore, the violation of a subjective right is considered a very restrictive basic criterion for access to justice in relation to environmental matters.*[36]

Estonian administrative court practice initially seemed to confirm a tendency toward the narrow interpretation. In two decisions handed down in 1999, the Supreme Court noted that a person cannot rest on the violation of environmental protection requirements because this constitutes a violation of public interest.*[37] Also, in 2000 a court of first instance assumed the position that the legal standing could not belong to a bird protection organisation with a long history and a large membership with regard to a project that allegedly would have had a significant impact on a bird site of international importance.*[38]

In recent years, Estonian administrative court practice has nevertheless significantly broadened the legal standing in environmental matters. Two approaches serve as the basis for a more extensive legal standing: abandonment of the criterion of the violation of a subjective right and recognition of the 'right to a clean environment'. The first of the two proceeds from Supreme Court practice. Addressing the appeal of a local municipality regarding an environmental impact assessment for extraction of mineral resources, the Supreme Court thought it necessary to note the following:

> In matters pertaining to decisions on environmental issues, the legal standing cannot be given meaning identically to in ordinary administrative cases through the violation of a subjective public right. Violation of a subjective right may or may not appear in environmental matters. Therefore, the basis for the right to address the court in respect of matters of environmental protection can be not only the violation of rights but also the contiguity of the complainant by the challengeable administrative act or measure. The complainant must show that the challengeable act concerns his interests. Contiguity does not merely mean the possibility that the activity or planned activity affects the person; such effect should be significant and real. The administrative court must check such contiguity of the complainant

[31] CACP § 7 (1).

[32] Section 26 (1) of the Planning Act (RT I 2002, 99, 579; 2009, 3, 15 (in Estonian)) allows public appeals. Section 23 (1) of the Environmental Liability Act (RT I 2007, 62, 396; 2009, 3, 15; in Estonian) establishes that appeals may also be filed by persons who are affected or may be affected by environmental damage. Also, Subsection 2 presumes the violation of rights and justified interest of environmental protection organisations. These two exceptions nevertheless by far cover all possible cases of the violation of national environmental law.

[33] ALCSCd, 23.03.2005, 3-3-1-86-04. – RT III 2005, 11, 109 (in Estonian).

[34] SPSCd, 20.12. 2001, 3-3-1-15-01. – RT III 2002, 4, 34 (in Estonian).

[35] ACSCr, 10.04.2001, 3-3-1-16-01. – RT III 2001, 12, 125 (in Estonian); see also Tallinn CCr, 7.12.2006, 3-06-2199.

[36] N. Sadeleer. Synthesis of the National Reports. – N. Sadeleer, G. Roller, M. Dross et al. Access to Justice in Environmental Matters and the Role of NGOs. Groningen: Europa Law Publishing 2005, p. 185.

[37] ALCSCd, 7.06.1999, 3-3-1-26-99. – RT III 1999, 20, 189 (in Estonian); ALCSd, 25.05.1999, 3-3-1-23-99. – RT III 1999, 18, 171 (in Estonian).

[38] Saare County Court, 22.12.2000, 4-15/2-2000.

> by the challengeable activity separately in every case. The requirement for significant and real contiguity excludes filing an appeal in public interests.*[39]

The decision of the Supreme Court to abandon the criterion of the violation of a subjective right in relation to environmental matters seems revolutionary. The weight of the decision is, however, considerably decreased by the fact that the Supreme Court has remained very taciturn. The abandonment of the criterion of the violation of a subjective right was probably due to the wish to broaden the environment-related legal standing, but it is far from clear what kind of connection the requirement presumes to be shown. Possibilities include a very narrow interpretation, which fails to significantly broaden the legal standing as compared with the violation of subjective rights, as well as a very broad interpretation, which enables protecting any collective and dispersed interests that are associated with the person. The only clear instruction is the illegality of an appeal to be filed in public interests.

In some decisions of the courts of first instance and the courts of appeal, another way has been chosen for the broadening of the environmental legal standing, recognising the subjective right to a clean environment. This right is not expressly mentioned in the Constitution of Estonia. The right is most associated with § 53 of the Constitution, in the chapter on fundamental rights and duties, which lays down: "Everyone has a duty to preserve the human and natural environment and to compensate for damage caused to the environment by him or her. The procedure for compensation shall be provided by law." The Tallinn Circuit Court in particular has assumed the position that there is a fundamental environmental right stemming from the provision.*[40] Closer attention should be paid to a decision of 2008 that highlights the content of this right and the relation thereof to the legal standing. In the case in question, the Ministry of the Environment had left part of a city park in the ownership of the state, determining its intended purpose to be residential land, and then had decided to sell it as unnecessary. The respective decisions were challenged by a resident of a building adjacent to the park. The court of first instance assumed the position that the subjective rights of the complainant had not been violated. The Circuit Court did not agree. The court concluded that, pursuant to § 53 of the Constitution, a person has a right to demand from the state the preservation of the environment at least in the event that it affects his or her living environment. According to the court, the judicial protection provided under § 53 of the Constitution nevertheless presumes significant and real contiguity. Contiguity cannot be confined to cases where a person's life, health, property, or other fundamental rights are damaged through environmental impact. The fundamental environmental right is directly aimed at the preservation of environmental values, not only at avoidance of violations of other fundamental rights through environmental damage. Environmental impact involves personal contiguity despite the impact on other fundamental rights if a person has used the ordinarily affected environmental resource, if the person often stays in said environment, or if the person has closer contact therewith than the rest of the public, or if the person's wellbeing significantly depends on the environmental impact in other ways. The court assumed the position that a person's living environment constitutes not only registered immovable or apartment ownership but also at least the public space immediately surrounding the place of residence, especially parks and green areas in the vicinity of the place of residence, and also areas where the person usually walks, engages in sports, plays with a child, or spends time in other ways. An appeal filed for the purpose of preserving a person's own living environment and ensuring the possibility of using it cannot be equated with an appeal filed in local government interests or public interests (a public appeal). The fundamental environmental right presumes that concerned persons have been effectively incorporated into making of decisions that can entail changes in their living environment, that such decisions have been motivated, and that damaging a living environment and restricting the use thereof only take place with significant reasons.*[41]

The Circuit Court thus relates the right to a clean environment to significant and real contiguity highlighted by the Supreme Court and gives it meaning primarily with content related to actual usage of the environment. It is, however, impossible to say at present whether the Supreme Court considers this approach to be correct. The decision of the District Court undoubtedly significantly broadens the legal standing as compared with the interpretation of the violation of subjective rights, enabling filing of appeals also in protection of collective and dispersed interests. At the same time, the scope of the legal standing does not become entirely clear from the decision of the Circuit Court. For example, it needs to be specified which elements of a city environment are subject to the right and in which cases "the well-being of a person [may] depend on environmental impact in other ways".

The impact of Article 9 (3) of the convention on this decision is difficult to determine on the basis of the Supreme Court decision and the Circuit Court decision. The courts do not analyse this provision of the convention nor refer to it directly. The author of this article would still dare to suppose that the provision has been taken into consideration in both cases. In the above-mentioned case and other decisions*[42], the Supreme

[39] ALCSCd, 28.02.2007, 3-3-1-86-06. – RT III 2007, 9, 78 (in Estonian).

[40] See, e.g., Tallinn CCd, 15.12.2004, 2-3/140/04; Tallinn CCr, 13.08.2007, 3-07-102; Tallinn CCd, 18.03.2008, 3-06-1136.

[41] Tallinn CCd, 18.03.2008, 3-06-1136.

[42] See, e.g., ALCSCr, 7.05.2003, 3-3-1-31-03. – RT III 2003, 18, 167 (in Estonian); ALCSCd, 29.01.2004, 3-3-1-81-03; ALCSCd, 28.11.2006, 3-3-1-86-06.

Court has referred to the convention, and it is hard to believe that Article 9 (3) has been left without attention. In the decision of the Circuit Court, consideration of Article 9 (3) of the convention seems to have been even more likely, if one bears in mind that, while addressing the right to a clean environment, the court refers to Articles 1 and 9 of the convention, among other sources. Even if Article 9 (3) has not played a significant role in the deliberations of courts, it can be said that the broadening of the legal standing in administrative court practice is consistent with the purposes of the convention. Although final conclusions cannot be drawn on the basis of scant judicial practice, it seems that giving meaning to significant and real contiguity in the Circuit Court decision complies with Article 9 (3) of the convention and implements it at least on a minimum level.

4.2. Direct application of Article 9 (3)

Pursuant to § 123 (2) of the Constitution of the Republic of Estonia, the sufficiently appropriate provisions of ratified international treaties shall be directly applicable if they are in conflict with laws or other legislation. Courts have repeatedly applied Article 9 (2) of the convention directly with regard to appeals filed by organisations.*[43]

The convention fails to specify the requirements an association of persons must meet such that violation of the rights of the association could be presumed pursuant to Article 9 (2). Pursuant to Article 2 (5) of the convention, the organisation must be non-governmental, promote environmental protection, and meet the requirements established by the parties to the convention. In other words, the convention provides parties with relatively great freedom of decision regarding which criteria an association of persons must meet in order to qualify as an environmental organisation. The applicable Estonian legislation lacks relevant detailed requirements.*[44] The courts have nevertheless not been held back by the lack of criteria; they have recognised the appeals of several not-profit organisations, the legal standing of a foundation, and also the legal standing of a two-member non-legal-person *ad hoc* protest group on the condition of it representing the opinion of a significant proportion of local residents.*[45]

Pursuant to Article 9 (3) of the convention, access must be granted for a member of the public who meets the requirements for the right of a party, if such requirements have been established. Considering that Estonian courts have not seen the lack of more precise national requirements as an obstacle in Article 9 (2), one could presume that this would not be a problem in the case of paragraph 3 either. However, Estonian courts have referred to the provision only in isolated cases. Paragraph 3 has been directly referred to in only two decisions of the Tartu Administrative Court.*[46] In neither of these has that court recognised the legal standing on the basis of the provision, but in principle it did accept the possibility of recognition thereof. The court was of the view that Article 9 (3) can be relied on by a representative of the public upon protection of public environmental interest. It is possible that this situation was a consequence of the Estonian text of the convention, which misleadingly defines a 'member of the public' with a term that directly translates as 'representative of the public'. At the same time, it was considered possible in one of these decisions to apply the provision on the condition that the person was affected by the activity permitted by the challenged administrative act. Another curious example is a decision of the Tallinn Administrative Court*[47] wherein Article 9 (2) is referred to but the text abstracted by the court adheres instead to the wording of paragraph 3. In this case, an environmental organisation had filed an appeal concerning failure of the Minister of the Environment to revoke the licence of an environmental impact assessment expert who had provided false assessments. The Ministry of the Environment pointed out that retention of the licence does not violate the rights of the environmental organisation and that the organisation cannot rely on Article 9 (2) of the convention, because the provisions of the convention do not regulate the issuing of licences. The court did not agree with the Ministry of the Environment. The court stated that due to its statutes the organisation has sufficient interest that the licence is given only to a person competent to assess environmental impact.

In summary, it is impossible to claim with confidence on the basis of individual decisions that the courts are ready for the direct application of Article 9 (3), although the decisions of the courts of first instance do seem to confirm this. At the same time, it should be stressed that no decision of a higher court that is central with

[43] ALCSCd, 28.11.2006, 3-3-1-86-06 (Seltsing Roheline Urvaste); see also Pärnu AC, 24.11.2003, 3-119/2003 (MTÜ Eesti Ornitoloogiaühing), Tartu AC, 2.12.2002, 3-289/2002 (MTÜ Eesti Looduskaitse Selts), Tallinn AC 17.10.2003, 3-1398/203 (MTÜ Eesti Roheliste Liikumine), Tallinn AC, 11.09.2003, 3-1207/03 (MTÜ Nõmme Tee Selts), Pärnu AC, 24.11.2003, in the administrative case No. 3-119/2003 (SA Eestimaa Looduse Fond).

[44] An exception is the Environmental Liability Act, which defines the concept of an environmental organisation in the context of this Act (§ 24). Pursuant to the provision, a non-governmental environmental organisation means a non-profit association or a foundation which, pursuant to its statutes, promotes environmental protection, also an association promoting environmental protection which is not a legal person and which represents the opinions of a significant part of local residents.

[45] See Note 43.

[46] Tartu ACd, 24.04.2006, 3-06-271; Tartu ACd, 23.10.2008, 3-08-1199.

[47] Tallinn ACd, 17.10.2003, 3-1398/2003.

regard to the environmental legal standing has expressly relied on Article 9 (3). The author of this article believes that the courts' cautiousness in addressing the implementation of Article 9 (3) of the convention can be explained by the vagueness of the provision, poor translation into Estonian, and the radicalism with which the provision seems to change the bases for access to justice. Also, there is no need for direct application of the provision if broad meaning is given to the requirement of significant and real contiguity.

5. Conclusions

The most difficult aspect of implementation of the Aarhus Convention has turned out to be securing access to justice. Among the relevant convention provisions, the most problematic is Article 9 (3), regulating access to justice in the event of the violation of any provision of national environmental law. The paragraph allows radically different interpretations. According to one radical interpretation, the provision merely constitutes a plea to broaden access to justice and fails to directly bind the parties in any respect. According to another extreme interpretation, the provision allows public appeals on all environmental matters. From the text of the convention and related literature, arguments can be found in favour of either interpretation.

In analysis of the practice of the committee reviewing compliance with the convention's requirements, it appears that the committee favours neither of the extreme interpretations of Article 9 (3). The committee recognises the extensive right of discretion of the parties in establishment of the access criteria, but at the same time it presumes that at least some portion of the public, especially environmental organisations, shall be granted access to justice upon violation of any provision of national environmental law, in order to protect public environmental interests.

The main grounds for the legal standing in Estonian administrative courts is the violation of subjective public rights. The violation of a subjective right is considered a very restrictive criterion for access to justice in relation to environmental matters, because the ordinary interpretation of the criterion presumes direct and special contiguity. Estonian administrative court practice initially seemed to confirm a trend toward narrow interpretation, but in recent years the courts have considerably broadened the environmental legal standing. Two approaches serve as the basis for this more extensive legal standing: abandonment of the criterion of violation of subjective rights and replacement of it with the requirement of significant and real contiguity in the decisions of the Supreme Court, and the recognition of the right to a clean environment in the decisions of the Tallinn Circuit Court. On account of the brevity of the relevant Supreme Court decision, it is unclear how extensive a legal standing the criterion provides. It appears from Circuit Court decisions that the environmental legal standing is broad and follows Article 9 (3) of the convention at least on the minimum level. Neither Supreme Court nor Circuit Court decisions analyse or refer to Article 9 (3) of the convention, but it may be supposed that in both cases the provision has been taken into consideration. Pursuant to the Constitution, it would in principle be possible to apply the provision directly, and some courts of first instance seem to be rather accepting of this possibility. The cautiousness of the courts with respect to the implementation of Article 9 (3) of the convention can be explained by the vagueness of the provision, poor Estonian translation, and the radicalism with which the provision seems to change the bases for access to justice. Also, there is no need for direct application if one wishes to give a broad meaning to the requirement of significant and real contiguity.

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Der Streitgegenstand im estnischen Verwaltungsprozess

1. Einführung

Die richtige Bestimmung des Streitgegenstandes ist eine schwierige, aber unvermeidbare Aufgabe in der täglichen Gerichtspraxis sowie in der Verwaltungsprozesslehre. Von ihr hängen viele zentrale verwaltungsprozessuale Fragen, insbesondere die Konturen der gerichtlichen Kontrolle, die materielle Rechtskraft des Urteils, sowie die Feststellung der Rechtshängigkeit, der Klagehäufung und der Klageänderung ab. Der zu lockere Umgang mit dem Streitgegenstand würde wegen des unklaren Prozessstoffes die Rationalität der Streitlösung beeinträchtigen und die Grenzen der Rechtskraft trüben. Die zu strenge und detaillierte Handhabung könnte indes die Klageerhebung unnötig erschweren sowie die Rechtskraft unsachgemäß verkürzen. Dies haben u.a. die zahlreichen Fälle in der estnischen Rechtsprechung gezeigt, in denen der Kläger sein Klageantrag unrichtig formuliert hat bzw. das Gericht den Streitgegenstand falsch festgestellt hat. Das Ziel des folgenden Beitrags ist nicht rein theoretisch über den zutreffenden Streitgegenstandsbegriff zu polemisieren. Er versucht für den estnischen Verwaltungsprozess ein angemessenes Modell des Streitgegenstands zu finden, das den Leitlinien des effektiven Rechtsschutzes und der Rechtssicherheit entspricht.

2. Begriff des Streitgegenstandes

Die estnische Verwaltungsprozessordnung (*halduskohtumenetluse seadustik* – HKMS) definiert den Streitgegenstand nicht, setzt den Begriff aber im Kontext der Verhinderung der wiederholten Klageerhebung voraus (§ 11 Abs. 3[1] Nr. 3 und 4; § 23 Abs. 1 Nr. 3 und 4 HKMS). Der Streitgegenstandsbegriff wird auch in der im Verwaltungsgerichtsverfahren subsidiär anwendbaren Zivilprozessordnung (*tsiviilkohtumenetluse seadustik* – TsMS) nicht ausdrücklich festgelegt. Sie fordert jedoch, dass die Klageschrift einen ausdrücklichen Anspruch (Klagegegenstand) sowie den der Klage zugrunde legenden Sachverhalt (Klagegrund) enthalten muss.[*2] Das formell rechtskräftige Urteil ist für die Beteiligten so weit verbindlich, wie der Klageantrag bezüglich des für die Klage grundlegenden Sachverhalts entschieden ist.[*3] Die Rechtskraft des Urteils betrifft damit neben dem Klageantrag im gewissen Maße auch den Klagegrund. Dementsprechend kann man auch im estnischen Verwaltungsprozess – zuerst als Hypothese – vom in der Bundesrepublik Deutschland herrschenden zweigliedrigen Streitgegenstandsbegriff ausgehen: der Streitgegenstand ergibt sich demnach aus dem im Klageantrag geltend gemachten (prozessualen) Anspruch und aus dem Klagegrund.[*4]

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1 Für die freundliche Hilfe danke ich Dr. Christoph Schewe.

2 § 363 Abs. 1 Nr. 1 und 2 TsMS. Vgl. § 253 Abs. 2 Nr. 2 ZPO in Deutschland.

3 § 457 Abs. 1 TsMS.

4 S. dazu B. Clausing. – F. Schoch, E. Schmidt-Aßmann, R. Pietzner (Hrsg.). VwGO. 16. Ergänzungslieferung. München: Beck 2008, § 121 Rn. 56; F. O. Kopp, W.-R. Schenke. VwGO. München: Beck 2007, § 90 Rn. 7; sowie z.B. BVerwG, NVwZ 1994, S. 1115. Auch für F. Hufen

Der Klageantrag (Anspruch) ist näher durch den begehrten Richterspruch, sowie durch die umstrittene behördliche Handlung bzw. das umstrittene Rechtsverhältnis bestimmt (z.B. die Aufhebung eines Steuerbescheids). Unter Klagegrund ist nach § 363 Abs. 1 Nr. 2 TsMS der Tatsachenkomplex (Lebenssachverhalt) zu verstehen, aus dem der Kläger sein Recht auf die Befriedigung seines Anspruchs herleitet.[*5] Der Klagegrund ist nicht mit den vom Kläger vorgebrachten Tatsachen identisch. Auch werden nicht alle vom Gericht inzident geprüften Vorfragen als Elemente des Klagegrunds mit dem rechtskräftigen Urteil verbindlich.[*6] Der Grund einer verwaltungsprozessualen Klage muss viel abstrakter bestimmt werden. Sicher ist zuerst, dass die Bestimmung des Klagegrunds das Programm der Begründetheits- oder zumindest der Zulässigkeitsprüfung der entsprechenden Klageart berücksichtigen muss.[*7] Analog zum § 113 Abs. 1 S. 1 und Abs. 5 VwGO erweist sich dabei in Estland wohl das estnische Staatshaftungsgesetz (*riigivastutuse seadus* – RVastS)[*8] als maßgeblich. In diesem Rahmen wird zweitens die funktionale und wertende Abwägung notwendig. Besonders unter Berücksichtigung der Gebote der Rechtsicherheit und des effektiven Rechtschutzes sollte man bewerten, welche entscheidungserhebliche Tatsachen für die eventuellen Folgeverfahren verbindlich bleiben müssen und dürfen, sowie welche Kennzeichen eine frühere Streitsache bei der Vermeidung wiederholender Klageerhebungen identifizieren sollen.

3. Der Streitgegenstand einzelner Klagearten

§ 6 Abs. 2 und 3 HKMS kennt vier Grundarten von verwaltungsgerichtlichen Klagen: Anfechtungsklage (3.1); Verpflichtungsklage (3.2); Entschädigungsklage (3.3) und Feststellungsklage (3.4).[*9]

3.1. Anfechtungsklage

3.1.1. Klageantrag

Zuzustimmen ist der Position, dass das Aufhebungsbegehren den Kern des Anfechtungsprozesses darstellt und deshalb nicht aus dem Streitgegenstand verdrängt werden darf.[*10] Der Gegenstand des Aufhebungsstreits kann sich nicht mit der Feststellung der Rechtsverletzung oder der Rechtswidrigkeit begnügen. Aus der Rechtsverletzung folgt keineswegs unbedingt die volle Begründetheit der Anfechtungsklage, da deren Stattgabe noch von zusätzlichen Voraussetzungen abhängt.[*11] Die Gegenmeinungen, die den Streitgegenstand der Anfechtungsklage nur in der Feststellung der Rechtsverletzung sehen[*12], setzen die Anfechtungsklage unbegründet mit der Feststellungsklage gleich. Das Anfechtungsurteil ist Gestaltungsurteil. Deswegen ist es in diesem Kontext auch unpräzise, über die Feststellung des Aufhebungsanspruchs oder die Feststellung der Unwirksamkeit des angefochtenen Bescheids zu sprechen. Das Gericht muss vielmehr die bisherige, normalerweise trotz der Rechtswidrigkeit bestehende Gültigkeit des Bescheids konstitutiv beseitigen.[*13] Das Fehlen

ist der Streitgegenstandsbegriff zweigliedrig. Dessen Gliede sind aber erstens der Rechtsbehauptung des Klägers, dass seine Rechte verletzt sind, und zweitens die Klage tragende Elemente des Lebenssachverhaltes, s. Verwaltungsprozessrecht. München: Beck 2008, § 11 Rn. 9.

5 Vgl. zum Zivilprozess H.-J. Musielak. ZPO. München: Beck 2008, Einl. Rn. 69; O. Jauernig. Zivilprozessrecht. München: Beck 1991, S. 145.

6 Näher B. Clausing (FN 4), § 121 Rn. 45. Zu dem Ergebnis führt auch § 457 Abs. 1 TsMS.

7 M. Gerhardt. – F. Schoch u.a. (Hrsg.) (FN 4), § 113 Rn. 64.

8 Dies regelt neben dem Schadenersatz-, Folgenbeseitigung- und Erstattungsansprüche auch die materiell-rechtlichen Voraussetzungen der sog. primären öffentlich-rechtlichen Ansprüche wie Aufhebungs-, Unterlassungs- und Verpflichtungsanspruch. S. dazu E. Andresen. State Liability without the Liability of State: Constitutional Problems related to Individual Professional Liability of Estonian Notaries, Bailiffs and Sworn Translators. – Juridica International 2006 (11), S. 146; dies. The for Elimination of Unlawful Consequences and the Claim for Compensation for Damage under Estonian State Liability Law. – Juridica International 2005 (10), S. 168.

9 Die Anfechtungsklage und die Feststellungsklage von HKMS entsprechen der Anfechtungsklage und der Feststellungsklage nach § 42 Abs. 1 und § 43 Abs. 1 VwGO. Die estnische Verpflichtungsklage enthält sowohl die Verpflichtungsklage nach § 42 Abs. 1 VwGO als auch die deutsche Unterlassungsklage und die allgemeine Leistungsklage. Die Entschädigungsklage ist eine Sonderform der Leistungsklage für die sekundären staatshaftungsrechtlichen Ansprüche (Schadensersatz und Folgenbeseitigung).

10 M. Hößlein. Der Streitgegenstand der verwaltungsgerichtlichen Anfechtungsklage gem. § 113 Abs. 1 Satz 1 VwGO. – VerwArch 2008 (99), S. 127 (131, 147). Anders aber F. Hufen (FN 4), § 11 Rn. 10. Für ihn ist der Aufhebungsanspruch „nur Ergebnis, nicht Gegenstand der Klage".

11 Deutlich so M. Hößlein (FN 10), S. 139. Gemäß § 3 Abs. 2 und 3 RVastS darf die Rechtsverletzung nicht schon beseitigt oder bloß formell sein; auch darf die Aufhebung nicht ausnahmsweise wegen des schutzwürdigen Vertrauens eines Dritten oder aufgrund der Sonderregeln zur Aufhebung der Nebenbestimmungen (§ 26 Abs. 1^1 ja 1^2 HKMS) ausgeschlossen sein.

12 Statt vieler B. Clausing (FN 4), § 121 Rn. 61; vgl. auch F. Hufen (FN 4), § 11 Rn. 9.

13 Deutlich M. Sachs. – P. Stelkens, H. J. Bonk, M. Sachs. VwVfG. München: Beck 2008, § 43 Rn. 201; vgl. aber M. Hößlein (FN 10), S. 137; C. Bickenbach. Das Bescheidungsurteil als Ergebnis einer Verpflichtungsklage. Duncker & Humblot 2006, S. 42 f. Der Unterschied zwischen der Kassation und der Feststellung der Unwirksamkeit des Verwaltungsakts ist nicht nur rechtstechnisch. Er spiegelt die rechtswidrigkeitsunabhängige Bindungswirkung des Verwaltungsakts und kann für die Beurteilung der aufgrund des Verwaltungsakts durchgeführten Handlungen maßgeblich werden. Dazu näher I. Pilving. Die Bindungswirkung von Verwaltungsakten in Estland: Deutsche Rechtsdogmatik im Spiegel der Rezeption. – Die Verwaltung 2008 (41), S. 571 (579).

der feststellenden Wirkung schließt aber die Maßgeblichkeit des Urteils hinsichtlich der Unwirksamkeit des Verwaltungsakts nicht aus. Die Bindungswirkung eines Gestaltungsurteils ist sogar umfangreicher als die Rechtskraft des Feststellungsurteils, da das erste die materielle Rechtslage ändert und dadurch auch die nicht beigeladenen Personen oder Behörden binden kann.*[14]

3.1.2. Klagegrund

Umstritten ist, ob das Aufhebungsurteil neben der Gestaltungswirkung auch die Rechtswidrigkeit oder die subjektive Rechtsverletzung des Klägers feststellt. Sicher ist, dass die subjektive Rechtsverletzung – anders als die objektive Rechtswidrigkeit – im Aufhebungsstreit während der Begründetheitsprüfung relevant ist und deshalb grundsätzlich den Klagegrund darstellen kann. Die rechtspolitischen und die praktischen Erwägungen sprechen eher zugunsten der Erweiterung der Rechtskraft auf die Rechtsverletzung. Im Aufhebungsprozess werden erhebliche Ressourcen für die Klärung des Eingriffs und dessen Rechtmäßigkeit aufgewendet.*[15] Es lässt sich kaum erläutern, warum das Ergebnis der Beurteilung nicht in möglichen weiteren Verfahren maßgeblich sein soll. Zwar kann die Verbindlichkeit der detaillierten Vorfragen mitunter für die Beteiligten unvoraussehbare Konsequenzen bedeuten. Bei der rechtskräftigen Feststellung der Rechtsverletzung ist dies jedoch grundsätzlich nicht der Fall: so dürfte ein möglicher Schadensersatz- bzw. Folgenbeseitigungsanspruch aufgrund der Rechtsverletzung die Beteiligten des Aufhebungsprozesses kaum überraschen. Vielmehr wäre es unbefriedigend, wenn man die Rechtsverletzung eines gerichtlich aufgehobenen Verwaltungsakts im folgenden Entschädigungssprozess verneinen würde. Die Feststellungsklage schütze dann die Rechte des Klägers – ungeachtet des eventuellen Feststellungsinteresses – umfangreicher als die Anfechtungsklage. Die Anfechtungsklage stellt aber das Hauptrechtsmittel gegen belastenden Verwaltungsakte dar.*[16] Zweitens ist die Feststellung der Rechtsverletzung zum Schutz des Klägers gegen den wiederholten Erlass des aufgehobenen Bescheids nötig. Das stattgegebene Aufhebungsbegehren selbst verbietet den neuen Erlass des Verwaltungsakts nicht; bekanntlich ist der Neuerlass nur dann verboten, wenn die Behörde ihre neue Entscheidung auf die vom Gericht mißbilligten Gründe stützt. Käme der Feststellung der Rechtsverletzung keine präjudizielle Werkung zu, müsste der erfolgreiche Kläger bei der Wiederholung des rechtswidrigen Verwaltungsakts erneut die vollständige Sachprüfung begehren. Dies würde ihn jedoch unsachgemäß belasten.*[17] Deshalb nimmt die Rechtsverletzung als Grund der Anfechtungsklage an der Rechtskraft teil und das Aufhebungsurteil stellt neben seiner Gestaltungswirkung für die Beteiligten auch die Rechtsverletzung verbindlich fest.*[18]

Die Feststellungswirkung des Aufhebungsurteils ist dadurch begrenzt, dass das Gericht nur die Befolgung derjenigen Normen prüfen darf, die den Kläger subjektive Rechte verleihen.*[19] Die Verletzung der Rechte von Dritten oder der Normen, die nur das öffentliche Interesse schützen, darf das Gericht in der Regel nicht kontrollieren und damit gar nicht rechtskräftig feststellen. Weitere Konkretisierungen des Klagegrundes hinsichtlich der in der Klage erwähnten Normen oder des vorgetragenen Sachverhalts wären aber zu weitgehend. Nach § 3 Abs. 1 RVastS*[20] kann jede Rechtsverletzung durch den angefochtenen Verwaltungsakt den Aufhebungsanspruch begründen, so dass sie alle entscheidungserheblich sind. Wegen der Untersuchungsmaxime muss das Gericht sie alle von Amts wegen prüfen, unabhängig davon, ob der Kläger sie vorbringt.*[21] Außerdem würde die Beschränkung des Klagegrundes nur auf die jeweils vom Kläger vorgebrachte Rechtsverletzung das Verbot der erneuten Klageerhebung unzulässigerweise kürzen. Nach der hier vertretenen Auffassung hat man mit „derselben Streitsache“ im Sinne des § 11 Abs. 3^1 Nr. 2–4 HKMS auch dann zu tun, wenn derselbe Kläger abermals die Aufhebung desselben Verwaltungsakts begehrt, obwohl er sich auf andere Tatsachen, Normen, bzw. Rechte lehnt, die in der erste Klage nicht erwähnt wurden.*[22] Dies geschieht aus der Grund, dass die mehrfache Anfechtung aufgrund der früher nicht vorgebrachten Tatsachen beeinträchtigt die Rechtssicherheit.*[23] Dieser abstrakte Rechtsverletzungsbegriff kann sogar in spezifischen Bereichen wie Asylrecht bestehen bleiben, wobei im deutschen Schrifttum ausnahmsweise der eingliedrige Streitgegenstandsbegriff vertreten wird.*[24] Die Rechtsver-

[14] Vgl. B. Pieroth, B. J. Hartmann. Gewaltenübergreifende Bindungswirkung. Zur Maßgeblichkeit von Gerichtsentscheidungen für Behörden. – Die Verwaltung 2008 (41), S. 463 (469 ff.); B. Clausing (FN 4), § 121 Rn. 37, 94; M. Winkler. Normenumschaltende Verwaltungsakte: Zugleich eine Besprechung zum „Dosenpfand”-Urteil des BverfG. – DVBl. 2003, S. 1490, IV. S. auch zur subjektiven Reichweite der Bindungswirkung von Verwaltungsakten I. Pilving (FN 13), S. 581.

[15] So M. Hößlein (FN 10), S. 150.

[16] Zur „Systemwidrigkeit“ M. Hößlein (FN 10), S. 146 f.

[17] Dazu B. Clausing (FN 4), § 121 Rn. 26; M. Hößlein (FN 10), S. 149.

[18] So z.B. F. O. Kopp, W.-R. Schenke (FN 4), § 90 Rn. 8. Dagegen C. Bickenbach (FN 13), S. 58. Zu den Ausnahmen unten (3.1.3).

[19] M. Hößlein (FN 10), S. 130 ff.

[20] Vgl. § 113 Abs. 1 S. 1 VwGO.

[21] Zum Umfang des Untersuchungsgrundsatzes etwa F. O. Kopp, W.-R. Schenke (FN 4), § 86 Rn. 2, 4. Vgl. auch zu den inquisitorischen Zivilprozesse O. Jauernig (FN 5), S. 139.

[22] Anders die h.M. in Deutschland, s. m.w.N. F. Hufen (FN 4), § 11 Rn. 10.

[23] So Bezirksgericht (BG) Tallinn, Rs. 3-06-1428/7, Rn. 7; s. auch Rs. 3-07-757.

[24] K. Rennert. Der Streitgegenstand im Asylprozess. – DVBl. 2001, S. 161.

letzung im Sinne des § 3 Abs. 1 RVastS umfasst alle mögliche Verfolgungs- und Schutzgründe, die während des Asylverfahrens behandelt worden könnten.

Eine Präzisierung bleibt dennoch unumgänglich. Man muss auch die Fallkonstellationen betrachten, in denen das Verwaltungsgericht während des vorangehenden Anfechtungsprozesses den Eingriff in die Rechtssphäre des Klägers zu Recht verneint und deshalb die Klage abgewiesen hat. Nach dem Inkrafttreten des Urteils kann die Sachlage sich aber verändern, damit jetzt ein Zusammenhang zwischen den Verwaltungsakt und der Rechtsposition des Klägers entsteht. Dies kann etwa bei Vorbescheiden oder Allgemeinverfügungen[*25] vorkommen. In solchen Situationen könnte der Ausschluss der erneuten Klageerhebung die verfassungs- bzw. europarechtliche Rechtsweggarantie verletzen, da auch die Wiederaufnahme des früheren Gerichtsverfahrens ausgeschlossen ist.[*26] Es kann also festgehalten werden, dass der wegen der Änderung der Sachlage entstandene neue Eingriff als ein anderer Klagegrund betrachtet werden muss.

3.1.3. Klagegrund bei der erweiterten Klagebefugnis

In Ausnahmefällen ermöglicht das Gesetz die Klageerhebung auch nur zur Prüfung der objektiven Rechtmäßigkeit der Verwaltungsentscheidung bzw. zum Schutz des öffentlichen Interesses: in Estland sind dies die Anfechtungsklagen gegen die Planungsentscheidungen[*27], die Klagen in Umweltsachen, die Verbandsklagen und die Klagen der Gemeinden zum Schutz der kommunalen Selbstverwaltungsgarantie.[*28] Da die subjektive Rechtsverletzung in solchen Fallkonstellationen für die Klagebefugnis irrelevant ist, muss bei diesen der Klagegrund und damit der Streitgegenstand modifiziert werden[*29]: als Klagegrund wird hier die objektive Rechtwidrigkeit festgestellt.

3.1.4. Das Verhältnis der Anfechtungs- und Rechtswidrigkeitsfeststellungsklage

Ist die Rechtsverletzung durch die Stattgabe der Anfechtungsklage rechtskräftig festgestellt, muss die Feststellungsklage desselben Klägers gegen denselben Verwaltungsakt ausgeschlossen sein.[*30] Auch nach der Auffassung des estnischen Staatsgerichtshofs umfasst der Aufhebungsantrag rechtslogisch den Antrag auf die Feststellung der Rechtswidrigkeit des Verwaltungsakts.[*31] Man darf hieraus jedoch nicht zu weitgehende Folgerungen ziehen. Die Anfechtungsklage muss nicht zwingend wegen der fehlenden Rechtsverletzung erfolglos bleiben.[*32] Derselbe Kläger darf die Feststellungsklage nur dann nicht erheben, wenn der Anfechtungsklage rechtskräftig stattgegeben wird oder gerade wegen der fehlenden Rechtsverletzung rechtskräftig abgewiesen wird.[*33] Außerdem hat der StGH wiederholt verdeutlicht, dass das Gericht in den Fällen, in denen die Anfechtungsklage trotz der Rechtsverletzung abgewiesen wird, die Rechtswidrigkeit des Verwaltungsakts im Tenor nicht feststellen darf, wenn der Kläger die Feststellung nicht beantragt hat.[*34] Ohne einen ausdrücklichen Entscheidungssatz kann ein solches „negatives Aufhebungsurteil" gar keine Feststellungswirkung erlangen. Daraus folgt, dass der Kläger bei einem berechtigten Feststellungsinteresse die Anfechtungsklage mit dem Feststellungsantrag ergänzen oder die Anfechtungsklage zur Feststellungsklage ändern darf. Demnach kann die Feststellungsklage auch trotz der Rechtshängigkeit der Anfechtungsklage gegen dieselbe Verfügung zulässig sein.

3.1.5. Zwischenergebnis

Der Streitgegenstand der Anfechtungsklage ist der prozessuale Anspruch des Klägers auf die Aufhebung des angefochtenen Verwaltungsakts (Klageantrag) sowie die Verletzung der Rechte des Klägers durch diesen Verwaltungsakt (Klagegrund).

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[25] In Estland z.B. die internen Vorschriften der Gefängnisverwaltung, dazu Staatsgerichtshof (StGH), Rs. 3-3-1-54-07; Rs. 3-3-1-95-07.

[26] Vgl. § 702 Abs. 2 TsMS; §§ 579 f. ZPO.

[27] § 26 Abs. 1 PlanS.

[28] Zu Umweltsachen StGH, Rs. 3-3-1-86, Rn. 16; zu Verbandsklagen StGH, Rs. 3-3-1-43-06, Rn. 24 f.; zu Klagen der Gemeinden StGH, Rs. 3-3-1-86-06, Rn. 16; Rs. 3-3-1-78-05, Rn. 10; Rs. 3-3-1-25-08, Rn. 15. Auch der im estnischen Verwaltungsprozess vorgesehene Behördenprotest (§ 6 Abs. 1 und 2 HKMS) stellt eigentlich eine außerordentliche Klageart (Aufsichtsklage) dar. Bisher ist die Protestbefugnis nur den Landräte gegen die kommunalen Verwaltungsakte gegeben (§ 85 Abs. 4 des Regierungsgesetzes).

[29] So auch M. Hößlein (FN 10), S. 139 f.; F. O. Kopp, W.-R. Schenke (FN 4), § 90 Rn. 8. Vgl. B. Pieroth, B. J. Hartmann (FN 14), S. 475 f.

[30] § 457 Abs. 1 TsMS.

[31] Deutlich so Rs. 3-3-1-47-01, Rn. 3; Rs. 3-3-1-14-02, Rn. 12; indirekt auch Rs. 3-3-1-39-06, Rn. 12.

[32] M. Hößlein (FN 10), S. 144 f.

[33] StGH, Rs. 3-3-1-47-01, Rn. 3; anders ohne nähere Begründung Rs. 3-3-1-49-08, Rn. 12.

[34] Vgl. StGH, Rs. 3-3-1-6-05, Rn. 20; Rs. 3-3-1-18-07, Rn. 25. Vgl. F. O. Kopp, W.-R. Schenke (FN 4), § 90 Rn. 8; M. Hößlein (FN 10), S. 141 ff., 150 f.

3.2. Verpflichtungsklage

3.2.1. Klageantrag

Der Gegenstand des Verpflichtungsstreits ist zunächst das Begehren des Klägers, die Behörde zum Erlass eines Verwaltungsakts oder – in Estland – zur Durchführung eines Realakts zu verurteilen. Auch die Verpflichtungsklage ist keine Feststellungsklage sondern eine Verurteilungsklage.*[35] Sie stellt den materiellen Anspruch auf die Verwaltungshandlung nicht bloß fest, sondern ermöglicht auch die Vollstreckung durch das Zwangsgeld.*[36] Für die Bestimmung des Klageantrags muss es unerheblich bleiben, ob der Kläger eine bestimmte Verwaltungshandlung oder nur die (neue) behördliche Bescheidung seines Antrags begehrt. Zu oft ist es für den Kläger nicht vorauszusehen, ob er einen Anspruch auf einen konkreten Verwaltungsakt oder nur auf die Bescheidung hat. Die Möglichkeit der bestimmten Verurteilung hängt zu stark vom gerichtlichen Beurteilungsspielraum ab, um die Erfolgsaussichten des konkreten Verpflichtungsantrags richtig einzuschätzen. Auch die Möglichkeit der Klagebeschränkung bzw. -erweiterung und die Belehrungspflicht des Vorsitzenden in der ersten Gerichtsinstanz helfen nur wenig, da das Berufungs- oder Revisionsgericht die Lage abweichend beurteilen kann.*[37] Um die Risiken des Klägers zu vermeiden, sollte man auf den Bescheidungsantrag nicht völlig verzichten. Verpflichtungs- und Bescheidungsbegehren können auch als der gleiche prozessuale Antrag angesehen werden. Dies entspricht dem Wortlaut des § 6 Abs. 4 und 5 RVastS, der die gerichtlichen Entscheidungsoptionen ohne Rücksicht auf die Bestimmtheit des Verpflichtungsantrags regelt. Die Dispositionsmaxime bleibt unverletzt, da die Bestimmtheit der Verpflichtungsklage m.E. den Umfang des klägerischen Antrags nicht begrenzt; das Gericht muss bei der Wahl zwischen Verpflichtungs- und Bescheidungsurteil nur die materielle Rechtslage berücksichtigen. Demnach ist die strikte Verpflichtungsklage auch in den Fällen der Bescheidung völlig begründet und die Beklagte trägt die Kosten.*[38] Der Kläger verliert dadurch nicht sein Recht auf die Rechtsmittel in den Fällen, in denen statt des Verpflichtungsurteils ohne Grund ein Bescheidungsurteil ergeht*[39], da ein solches Urteil trotz der Stattgabe der Klage seine Rechte verletzt, wenn ihm der strikte Anspruch zusteht.

3.2.2. Klagegrund

Die Bestimmung des Klagegrundes ist im Verpflichtungsprozess erschwert, da hier schon die Elemente der Begründetheitsprüfung umstritten sind. Nach einer Auffassung muss das Gericht sich gemäß § 113 Abs. 5 VwGO von der Rechtswidrigkeit der Versagung oder der Unterlassung des beantragten Verwaltungsakts und von der damit verbundenen subjektiven Rechtsverletzung überzeugen.*[40] Andere Stimmen behaupten, dass es im Verpflichtungsstreit nur auf den materiellen Leistungsanspruch des Klägers ankommt.*[41] Laut § 6 Abs. 1 RVastS kann der Kläger den Erlass eines Verwaltungsakts oder die Durchführung eines Realakts beantragen, wenn der Träger der öffentlichen Gewalt dazu verpflichtet ist und seine Pflicht die Rechte des Klägers betrifft. Diese Regelung schließt sich offenbar der letztgenannten Literaturmeinung an. Der materielle Verpflichtungsanspruch bedeutet gerade die Handlungspflicht und das damit verbundene subjektive Recht des Klägers.*[42] Der StGH dagegen ist der Meinung, dass die Begründetheit der Verpflichtungsklage stets die Rechtswidrigkeit der Versagung oder der Unterlassung voraussetzt.*[43] Vertieft man in die rechtsdogmatische Struktur dieser Auffassungen, ist im Ergebnis U. Ramsauer darin zuzustimmen, dass sie inhaltlich gleich sind.*[44] Die Stattgabe der Verpflichtungsklage setzt neben dem Anspruch auch seine Verletzung aus. Die Klage scheitert, wenn der begehrte Verwaltungsakt schon erlassen ist. Dieser Unterschied zwischen der tatsächlichen und der normativen Lage – die Weigerung der Behörde trotz des bestehenden Anspruchs*[45] – impliziert zwingend die subjektive Rechtsverletzung. Damit schließen die Begründetheitsvoraussetzungen die Rechtsverletzung als Element des Streitgegenstandes der Verpflichtungsklage nicht aus. Das Bedürfnis zur Feststellung der Rechtsverletzung ist im Verpflichtungsprozess zwar nicht so dringend wie bei der Anfechtungsklage (3.1.2), darf aber nicht völlig

[35] Zu Grundtypen von Klagen R. Pietzner. – F. Schoch u.a. (Hrsg.) (FN 4), Vorb. § 42 Abs. 1 Rn. 1; H.-J. Musielak (FN 5), Vorb. § 253 Rn. 14 ff.

[36] Vgl. § 98 Abs. 3 HKMS und § 172 VwGO.

[37] Vgl. C. Bickenbach (FN 13), S. 75 ff.

[38] So zu den Protzesskosten, StGH, Rs. 3-3-1-46-06, Rn. 19; Rs. 3-3-1-24-06, Rn. 21 f. In Deutschland anders, s. F. Hufen (FN 4), § 26 Rn. 19, 24; R. Pietzner (FN 35), § 42 Abs. 1 Rn. 101 ff.; näher C. Bickenbach (FN 13), S. 69 ff.

[39] Anders R. Pietzner (FN 35), § 42 Abs. 1 Rn. 102.

[40] F. Hufen (FN 4), § 26 ff.; F. O. Kopp, W.-R. Schenke (FN 4), § 113 Rn. 183, 186.

[41] R. Pietzner (FN 35), § 42 Abs. 1 Rn. 91; M. Gerhardt (FN 7), § 113 Rn. 64; C. Bickenbach (FN 13), S. 44. Eine detaillierte Übersicht zu den Literaturmeinungen ebd., S. 36 ff.

[42] Vgl. zum Anspruchsbegriff ebd., S. 39.

[43] Rs. 3-3-1-56-08, Rn. 21.

[44] Den Anspruchsaufbau und den Rechtswidrigkeitsaufbau der Begründetheitsprüfung der Verpflichtungsklage vergleichend, Die Assessorprüfung im öffentlichen Recht. München: Beck 2007, S. 131.

[45] Vgl. BVerwG, NVwZ 1992, S. 563.

verneint werden. Anders als im Aufhebungsstreit ist im Verpflichtungsprozess die verbindliche Feststellung der Rechtswidrigkeit nicht für die Vermeidung der wiederholten Rechtsverletzung erforderlich, da das künftige behördliche Handeln durch den Tenor des Verpflichtungsurteils schon hinreichend vorgeschrieben ist. Der Kläger erreicht aber dadurch nicht immer sein Ziel im vollen Umfang.*[46] Durch den Nichterlass einer Baugenehmigung kann z.B. ein Verzögerungsschaden entstanden sein, der vom Verpflichtungsurteil und sogar vom späteren Erlass der Genehmigung nicht automatisch beseitigt wird. Ein zusätzlicher Staatshaftungsprozess, bei dem die Rechtsverletzung wieder relevant werden kann, ist damit nicht ausgeschlossen. Da die Feststellung der Rechtverletzung andererseits niemanden unsachgemäß schädigen kann, ergibt sich, dass die Bindungswirkung des Verpflichtungsurteils sie dennoch umfasst.

Wie bei der Anfechtungsklage, muss auch hier vom abstrakten Rechtsverletzungsbegriff (oben 3.1.2) ausgegangen werden, d.h. man darf nicht das konkret verletzte Recht, sondern nur die Tatsache der Rechtsverletzung als Klagegrund bestimmen. Sogar dies ist offen zu lassen, ob die Behörde das Recht auf eine bestimmte Leistung oder nur den Anspruch auf die ermessens- und beurteilungsfehlerfreie Bescheidung verletzt hat. Wenn nötig, muss das Gericht im Verpflichtungsstreit die beiden Ansprüche von Amts wegen prüfen. Ein wiederholter Verpflichtungs- oder Bescheidungsantrag aufgrund desselben Sachverhalts muss ausgeschlossen sein. Andererseits ist aber zu bestimmen, welche behördliche Handlung eigentlich als rechtswidrig erklärt wird: der Ablehnungsbescheid, die ehemalige Unterlassung oder die andauernde Weigerung im maßgeblichen Zeitpunkt? Hier muss zwischen Versagungsgegenklage und Untätigkeitsklage differenziert werden. Die behördliche Weigerung muss zwar in beiden Fällen erst im maßgeblichen Zeitpunkt und nicht unbedingt früher die Rechte des Klägers verletzen. Das Gericht hat aber zu berücksichtigen, ob der Nichterlass des Verwaltungsakts schon durch den Versagungsbescheid rechtsverbindlich entschieden ist oder nicht. Der wirksame Versagungsbescheid erlangt Bindungswirkung hinsichtlich des Anspruchs auf die Erteilung des Verwaltungsakts und hat den Anwendungsvorrang vor den abstrakt-generellen Normen. Zwar muss etwa die Ablehnung der Baugenehmigung nicht unbedingt die materielle Rechtswidrigkeit des Bauvorhabens verbindlich feststellen.*[47] Der Ablehnungsbescheid bleibt aber während seiner Wirksamkeit maßgeblich für die Frage, ob die Baugenehmigung zu erteilen ist. Die Versagungsgegenklage kann nur erfolgreich sein, soweit das Gericht den Ablehnungsbescheid aufhebt.*[48] Für die Aufhebung ist zu prüfen, ob der Bescheid die Rechte des Klägers verletzt. In Fällen der schweigenden Unterlassung dagegen hängt die Rechtmäßigkeit der Untätigkeit oder der Verzögerung von verbindlichen Verwaltungsentscheidungen nicht ab.*[49]

Anders als in Deutschland, ist nach der deutlichen Rechtsprechung des StGH der maßgebliche Zeitpunkt zur Beurteilung der Begründetheit der Verpflichtungsklage in Estland der Moment der Klageerhebung.*[50] Wird die Untätigkeit der Behörde erst nach der Klageerhebung rechtswidrig, muss der Kläger durch die Klageänderung den neuen Klagegrund vorbringen oder eine neue Verpflichtungsklage erheben.*[51] Dementsprechend stellt das Verpflichtungsurteil verbindlich fest, dass die Behörde durch die Versagung oder durch die Unterlassung der Leistung die Rechte des Klägers verletzt hat.

3.2.3. Unbegründete Verpflichtungsklage

Man kann die Rechtskraft des „negativen Verpflichtungsurteils“ in ähnlicher Weise eines die Anfechtungsklage abweisenden Urteils bestimmen. Wird die Rechtsverletzung als Klagegrund in der Urteilsbegründung ausdrücklich verneint, so steht deren Fehlen für die Beteiligten rechtskräftig fest. Beruht die Abweisung auf anderen Begründungen, fehlt die Feststellungswirkung.*[52]

3.2.4. Unterlassungsklage

Durch die estnische Verpflichtungsklage können auch Unterlassungsansprüche geltend gemacht werden.*[53] Der Klageantrag ist dann der prozessuale Anspruch auf Unterlassen eines Verwaltungsakts oder eines Realakts.*[54] Auch hier muss die Rechtsverletzung durch (drohende) Verwaltungshandlung als Klagegrund angesehen werden.*[55]

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[46] So aber B. Clausing (FN 4), § 121 Rn. 64.

[47] In Deutschland umstritten, vgl. M. Sachs (FN 13), § 43 Rn. 60, 125 m.w.N.

[48] C. Bickenbach (FN 13), S. 63. Grundsätzlich so auch StGH, Rs. 3-3-1-6-02, Rn. 20. Anders M. Gerhardt (FN 7), § 113 Rn. 64; BVerwGE 48, S. 271 (276).

[49] S. C. Bickenbach (FN 13), S. 67.

[50] Rs. 3-3-1-56-08, Rn. 22; dem folgend auch BG Tallinn, Rs. 3-07-1434, Rn. 9.

[51] StGH, Rs. 3-3-1-56-08, Rn. 21 f.

[52] F. O. Kopp, W.-R. Schenke (FN 4), § 90 Rn. 9.

[53] § 4 Abs. 2 i.V.m. § 6 Abs. 2 Nr. 2 HKMS.

[54] Vgl. zur deutschen allgemeinen Leistungsklage F. O. Kopp, W.-R. Schenke (FN 4), § 90 Rn. 10; B. Clausing (FN 4), § 121 Rn. 66.

[55] S. § 4 Abs. 1 und § 5 Abs. 1 RVastS.

3.2.5. Zwischenergebnis

Der Streitgegenstand des Verpflichtungsstreits ist der prozessuale Anspruch auf den Erlass des Verwaltungsakts oder auf die Durchführung des Realakts (Klageantrag) sowie die Verletzung der Rechte des Klägers durch die Versagung oder der Unterlassung des Verwaltungsakts bzw. des Realakts (Klagegrund).

3.3. Entschädigungsklage

3.3.1. Klageantrag

Im Entschädigungsprozess richtet der Klageantrag sich entweder auf die Entschädigung eines Schadens in Geld oder auf die Maßnahmen für die Beseitigung der rechtswidrigen Folgen eines Verwaltungsakts bzw. eines Realakts. Der Streitgegenstand bestimmt sich demnach zuerst durch die beantragte Leistung und durch den Schaden, der kompensiert werden muss, oder durch die Folgen, die beseitigt werden müssen. Zusätzlich wird das Entschädigungsbegehren durch die Höhe der Forderung beschränkt.

3.3.2. Klagegrund

Aus der Rechtsprechung des StGH folgt, dass auch der Verwaltungsakt oder der Realakt, mit dem nach der Auffassung des Klägers der Schaden oder die rechtswidrigen Folgen verursacht wurden, den Streitgegenstand bestimmt. Derselbe Kläger kann die Entschädigung desselben Schadens erneut beantragen, wenn er sich auf einen neuen Verwaltungs- oder einen neuen Realakt stützt.[*56] Die Berufung auf eine andere Verwaltungshandlung im derselben Staatshaftungsprozess stellt eine Klageänderung dar.[*57] Das Gericht hat den Kläger zu belehren, damit er sein Entschädigungsbegehren auf die richtige Verwaltungshandlung richten kann. Von Amts wegen darf das Gericht aber einen neuen Verwaltungs- bzw Realakt nicht in den Staatshaftungsprozess einbringen.[*58] Die in der Staatshaftungsklage genannte Verwaltungshandlung ist derjenige Lebenssachverhalt, der den Anlass zur Klageerhebung gibt. Er ist damit der Klagegrund im Entschädigungsstreit. Dieses Ergebnis ist auch rechtsdogmatisch und rechtspolitisch begründet. Die Ursache des Schadens ist während der Prüfung der Begründetheit der Entschädigungsklage festzustellen und sie schafft angemessene Konturen für einen Staatshaftungsprozess. Würde sie den Gegenstand des Entschädigungsstreits nicht beschränken, könnte das Gerichtsverfahren uferlos werden. Es besteht im Entschädigungsprozess aber kein Bedürfnis für die verbindliche Feststellung der Rechtswidrigkeit der Schadensverursachung, obwohl sie als ein Tatbestandselement stets geprüft werden muss. Auch die materiell-rechtliche Grundlage des Schadensersatzanspruchs bestimmt den Gegenstand der Entschädigungsklage nicht.[*59]

3.4. Feststellungsklage

3.4.1. Allgemeine Feststellungsklage

Durch eine Feststellungsklage kann in estnischen Verwaltungsgerichten die Feststellung der Rechtswidrigkeit eines Verwaltungsakts bzw. eines Realakts oder das Bestehen bzw. Nichtbestehen eines Rechtsverhältnisses begehrt werden.[*60] Der Klageantrag und der Klagegrund fallen hier grundsätzlich zusammen – der prozessuale Antrag ist auf die Feststellung der Tatsache gerichtet, deren Vorliegen auch den Grund der Klage darstellt.[*61] Bei der Rechtswidrigkeitsfeststellungsklage ist diese Tatsache die subjektive Rechtsverletzung.[*62]

3.4.2. Nichtigkeitsfeststellung

Die Nichtigkeitsfeststellungsklage wird in der HKMS nicht ausdrücklich erwähnt. In der Rechtsprechung wird sie aber als eine Sonderform der Feststellung des Nichtbestehens des Rechtsverhältnisses anerkannt.[*63] Eine maßgebliche Begründetheitsvoraussetzung dieser Klageart ist neben der Nichtigkeit des Verwaltungsakts die subjektive Rechtsverletzung durch die nichtige Verfügung.[*64] Dies muss nach dem Inkrafttreten des Urteils

[56] StGH, Rs. 3-3-1-82-06, Rn. 12; Rs. 3-3-1-50-07, Rn. 9.

[57] StGH, Rs. 3-3-1-60-06, Rn. 9.

[58] StGH, Rs. 3-3-1-85-06, Rn. 9.

[59] Vgl. B. Clausing (FN 4), § 121 Rn. 66; H.-J. Musielak (FN 5), Einl. Rn. 72; BGH, DVBl. 1996, S. 1312, II.2.a.

[60] § 6 Abs. 3 Nr. 1 und 3 HKMS.

[61] Vgl. F. O. Kopp, W.-R. Schenke (FN 4), § 90 Rn. 11; B. Clausing (FN 4), § 121 Rn. 67.

[62] Unter der Rechtswidrigkeit ist genauer die subjektive Rechtsverletzung zu verstehen, so StGH, Rs. 3-3-1-46-03, Rn. 33.

[63] Grundlegend StGH, Rs. 3-3-1-21-03, Rn. 15.

[64] Die Unwirksamkeit des Verwaltungsakts schließt die Rechtsverletzung nicht aus, da auch der nichtige Verwaltungsakt die Rechtsnormen, die die Belange des Klägers schützen, verletzen kann.

auch verbindlich fest stehen, da der Kläger bei der Nichtigkeit des Verwaltungsakts nicht schlechter gestellt werden darf als bei der begründeten Anfechtungsklage.[*65]

3.4.3. Fortsetzungsfeststellung

Der Streitgegenstand der Fortsetzungsfeststellungsklage[*66] ist in der estnischen Rechtsprechung bisher ohne Betrachtung geblieben. In vergleichbaren Situationen, in denen die Anfechtungsklage trotz der Rechtsverletzung abgewiesen worden ist, hat der StGH über den (verbotenen) Übergang von der Anfechtungsklage zur Feststellungsklage gesprochen.[*67] Demnach ist die Fortsetzungsfeststellungsklage eher eine Sonderform der Feststellungsklage als eine „amputierte Anfechtungsklage", obwohl die Anfechtungsklage andererseits den Antrag der Rechtswidrigkeitsfeststellung beinhaltet.[*68] Klar ist, dass sich das Klagebegehren nach der Erledigung des Verwaltungsakts statt auf seine Aufhebung auf die Feststellung der Rechtsverletzung[*69] des Klägers richtet. Der Streitgegenstand darf damit die Rechtsverletzung nicht ausschließen. Daneben ist in den Streitgegenstand auch die Erledigung des Verwaltungsakts als Zulässigkeitsvoraussetzung der Fortsetzungsfeststellungsklage hinzufügen. Dafür sprechen erhebliche funktionale Gründe, denn nur dadurch kann die eventuelle behördliche Anwendung des Verwaltungsakts trotz seiner Erledigung ausgeschlossen werden.[*70]

4. Schlussfolgerungen

Der vorstehende Blick auf die verschiedenen Klagearten bestätigt, dass der Streitgegenstand im estnischen Verwaltungsprozess stets zweigliedrig ist. Es muss sowohl den prozessualen Klageantrag als auch den Klagegrund beinhalten.

Ohne Berücksichtigung des Klageantrags könnten die Wirkungen von Urteilen nicht präzise genug beschrieben und die Eigenschaften verschiedener Klagearten nicht hinreichend beachtet werden. Der Klageantrag bringt am deutlichsten das klägerische Ziel zum Ausdruck. Gerade über diesen Endpunkt, nicht über die Zwischenfragen, wird vor dem Gericht gestritten. In der Regel ist der Klageantrag durch die angefochtene bzw. begehrte Verwaltungshandlung und durch die vom Kläger gewählte Rechtsschutzform bestimmt. Der bestrebte Richterspruch hinsichtlich dieser behördlichen Handlung ist wesentlich für die Identität des Streitfalles. Unterschiedliche Klageanträge hinsichtlich derselben Verwaltungshandlungen bedeuten zwar unterschiedliche Streitgegenstände; eine früher erhobene Anfechtungs- bzw. Verpflichtungsklage kann jedoch die spätere Rechtswidrigkeitsfeststellungsklage umfassen und ihre Erhebung ausschließen.

Auch bei der völligen Nichtbeachtung des der Klage zugrunde liegenden Lebenssachverhaltes bliebe die Beschreibung der Gerichtssache zu oberflächlich (insb. bei Staatshaftungsklagen) bzw. die Bindungswirkung des Urteils zu kurz (bei Anfechtungs- und Verpflichtungsklagen). Andererseits dürfen nicht alle detaillierte Vorfragen des Falls am Klagegrund teilnehmen. Verschiedene materielle Anspruchsgrundlagen bedeuten nicht unterschiedliche Streitgegenstände. Der Umfang der Feststellungswirkung des Urteils muss voraussehbar bleiben. Außerdem würde die Bindungswirkung aller Vorfragen die Möglichkeit des isolierten Streits über die Begründungen des Urteils voraussetzen. Dieses Ergebnis ist aber offensichtlich zu vermeiden. Der Klagegrund besteht in abstrakten Umständen, die relevant und wesentlich für den Erfolg der Klage sind. Bei den primären verwaltungsgerichtlichen Klagearten (Anfechtungs- und Verpflichtungsklage), sowie bei der Rechtswidrigkeitsfeststellungsklage ist der Klagegrund die Verletzung von Rechten des Klägers durch den angefochtenen Verwaltungsakt oder durch die Weigerung der Behörde. Die in Deutschland vorgenommene Unterscheidung zwischen Verpflichtungs- und Bescheidungsklage soll in Estland flexibilisiert werden. Das Gericht soll nur mit der bestrebten Verwaltungshandlung, nicht mit der Bestimmtheit des Klagebegehrens verbunden sein. Der Klagegrund des Schadensersatzprozesses ist die Verwaltungshandlung, die nach der Auffassung des Klägers den Schaden verursachte. Ein die Klage abweisendes Urteil erlangt die Feststellungswirkung nur insoweit, als die Elemente des Klagegrundes in der Begründung ausdrücklich verneint werden.

Der zweigliedrige Streitgegenstandsbegriff ist in allen Bereichen des Verwaltungsrechts anwendbar. Auch in Sonderfällen ändert sich die zweiteilige Struktur des Streitgegenstandes nicht. In den Fällen, in denen statt der Rechtsverletzung andere Umstände die Klage begründen können, soll der Inhalt des Klagegrundes modifiziert werden.

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[65] Vgl. oben 3.1.2.

[66] § 24 Abs. 1 Nr. 4 HKMS.

[67] Insb. Rs. 3-3-1-6-05, Rn. 20.

[68] Oben 3.1.4.

[69] Näher F. O. Kopp, W.-R. Schenke (FN 4), § 90 Rn. 8; M. Hößlein (FN 10), S. 135. Für B. Clausing dagegen nur die Rechtswidrigkeit des erledigten Verwaltungsakts (FN 4), § 121 Rn. 67. Dies kann nicht zugestimmt werden, da die objektive Rechtswidrigkeit nicht eine Zulässigkeits- oder Begründetheitsvoraussetzung der Fortsetzungsfeststellungsklage ist.

[70] So F. O. Kopp, W.-R. Schenke (FN 4), § 90 Rn. 8.

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The Estonian Judicial System in Search of an Effective Remedy against Unreasonable Length of Proceedings

1. Introduction

This article will review the question of whether the Estonian national judicial system offers a domestic judicial remedy for individuals complaining that judicial proceedings in which they are involved have taken unreasonable time. The right to have a judgment rendered within reasonable time on one's civil rights and obligations or on criminal charges is categorised as a fundamental right and as such protected under the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter 'the Convention').[*1] Since Estonia is a member of the Council of Europe[*2] and has ratified the Convention[*3], it has the obligation to abide by the latter and also be guided by the case law of the European Court of Human Rights (ECHR). Estonia belongs to the group of European countries for which the Convention has a status by which it is superior to general domestic laws but remains subordinate to the national constitution.[*4] Section 123 of the Estonian Constitution[*5] provides that if domestic laws are in conflict with any international treaties ratified by the Parliament (*Riigikogu*), then the provisions of the international treaty concerned shall prevail. The Constitution has a 'special' status since it is the only legal act in Estonia that has been adopted by a national referendum.

The Estonian Supreme Court has on numerous occasions declared that the provisions of the Convention are superior to domestic laws. For example, in a 6 January 2004 judgment of the General Assembly, the following

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1 Article 6 (1) of the Convention provides the respective fundamental right alongside with other procedural fair trial guarantees. See European Convention for the Protection of Human Rights and Fundamental Freedoms, 4.11.1950, ETS No. 5 (ECHR).

2 Estonia acceded to the Council of Europe on 14 May 1993, shortly after the restoration of its independence.

3 The Estonian Parliament (*Riigikogu*) ratified the Convention on 13 March 1996 by adopting The Law on the Ratification of the Convention on the Protection of Human Rights and Fundamental Freedoms (supplemented by Protocols Nos. 2, 3, 5 and 8) and its Protocols Nos. 1, 4, 7, 8, 10 and 11. – RT II 1996, 11/12, 34.

4 J. Polakiewicz. The Status of the Convention in National Laws. – R. Blackburn, J. Polakiewicz (eds.). Fundamental Rights in Europe. The European Convention on Human Rights and its Member States. 1950–2000. Oxford University Press 2001, pp. 37–46.

5 Eesti Vabariigi põhiseadus (Republic of Estonia Constitution). Adopted in the national referendum on 28 June 1992. – RT 1992, 26, 349 (in Estonian). Available — also in English, at http://www.just.ee/23295.

was expressed: "The European Convention for the Protection of Human Rights and Fundamental Freedoms constitutes an international treaty, ratified by the *Riigikogu* (Parliament), which has priority over Estonian laws or other legislation."[*6] Recently the Supreme Court has *expressis verbis* confirmed that the judgments and decisions of the ECHR are to be directly applied in Estonia in cases similar to those decided by the international court.[*7] The Supreme Court has not ruled on the question of which judgments have priority in the event of conflict of opinion — the decisions of the ECHR or its own judgments.[*8] The present article will touch upon this interesting question as well.

These brief introductory remarks are intended to demonstrate that there is no doubt that Estonia has an obligation to apply the Convention standards, and indeed the country has on numerous occasions expressed its willingness to do so. This commitment has been manifested both in theory and in practice — for example, through the law-making activity of the legislative branch of the Estonian state and through the application of laws by the Supreme Court.[*9] The author of this article has recently argued that explanatory reports accompanying amendments to existing laws or associated with the new proposed laws discussed in the Estonian Parliament often analyse the proposed Estonian legal norm in the context of the Convention as applied by the ECHR.[*10] The author has also demonstrated that in 2008 the General Assembly of the Supreme Court relied upon the ECHR case law in only one judgment out of 12[*11], which is a considerable decrease from the proportion seen in the years up until 2005, in which era the General Assembly had relied upon ECHR case law in some capacity in 11 judgments out of 26.[*12] In this way or another, it can be safely argued that both the Convention and the case law of the ECHR have found their way into the Estonian everyday legal discourse, at least at the Supreme Court level.

However, the question of whether the Estonian judicial system offers an effective remedy against unreasonable length of proceedings has become a 'testing ground' for the question of whether the Estonian legal system indeed is guided fully by the case law of the ECHR. This is so because until now the latter question had remained mainly theoretical. There have not been any 'embarrassing' judgments with respect to Estonia — that is, judgments raising serious questions about the quality of our judicial system as a whole or about certain aspects of it corresponding to the standards set by the ECHR.[*13] Whether this is so because of diligent work by the Estonian judiciary, unawareness of Estonia's legal subjects about the protection possibilities offered by the ECHR machinery, or the impact of the Strasbourg 'filter' on the outcome of a case — in both the formal and informal meaning of the word — remains beyond the scope of this article.[*14]

At the time of the writing of this article, there seems to be a different principal position taken by the ECHR and the Estonian Supreme Court as to the existence of such an effective national remedy. Both courts seem to stand firmly behind their position. It is therefore a unique possibility to follow how this conflict of courts will be resolved. It also allows one to ask whether reliance on the ECHR case law on the part of the Estonian

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6 SCebd, 6.01.2004, 3-1-3-13-03, paragraph 31. Available — also in English, at http://www.nc.ee. For previous wording see "If Estonian laws or other legislation is in conflict with international treaties ratified by the *Riigikogu*, then [...] the provisions of the international treaty shall apply." See CRCSd, 27.05.1998, 3-4-1-4-98, paragraph III.7. Available — also in English, at http://www.nc.ee.

7 CRCSd, 30.12.2008, 3-4-1-12-08. Available — also in English, at http://www.nc.ee.

8 The text of the Convention does not provide a clear answer on this question, since the Member States have taken the obligation to be bound only by these ECHR judgments where they have been one party. See Convention Article 46.

9 For understandable reasons the question about the direct applicability of the ECHR case-law is limited to the question about this direct applicability by the Supreme Court. The author is not aware of any statistically reliable studies about the question how often and in what capacity lower domestic courts of a Council of Europe member state rely on the ECHR case-law. This has not been studied in Estonia either. For reflections about the positions of the domestic judiciary towards the need to apply directly international treaties or court judgments, see R. Clements. Bringing It All Back Home. "Rights" in English Law Before the Human Rights Act 1998. – Human Rights Law Journal 2000 (21), p. 134 *ff.*; S. Beaulac. National Application of International Law: The Statutory Interpretation Perspective. – Canadian Yearbook of International Law 2003 (XLI), pp. 225, 229; G. W. Anderson. Using Human Rights Law in Scottish Courts. – European Law Review 2000 (25), Human Rights Survey 2000, HR/3; I. Cameron. The Swedish Experience of the European Convention of Human Rights Since Incorporation. – International and Comparative Law Quarterly 1999 (48), p. 20.

10 M. Susi. Õigus tõhusale menetlusele enda kaitseks. Euroopa Inimõiguste Kohtu käsitluse ja Eesti õigusruumi näitel (Right to Effective Procedure in One's Own Defence. On the Example of the Approach of the European Court of Human Rights and the Estonian Legal Space). – Juridica 2009/1, p. 4 (in Estonian).

11 *Ibid.*, p. 3.

12 K. Merusk, M. Susi. Ten Years Since Ratification — the European Convention on Human Rights and Its Impact on Estonia. – German Yearbook of International Law 2005 (48), pp. 350–353.

13 For an overview of the ECHR case-law towards Estonia see the Note above and also M. Susi. Recent Judgments and Decisions of the European Court of Human Rights towards Estonia. – Juridica International 2006 (11), pp. 93–101. In the latter article two main types of Convention violations were reported — of Article 6 (3) "d" due to the failure to provide opportunities for the accused and his counsel to question the witnesses in a public court hearing; and due to Estonia's prison conditions. Both types do not constitute a structural problem, since the first is only a reflection of errors by an individual judge and the latter is a relic of the Soviet time prison facilities.

14 I. Ziemele has argued that Estonia's relative 'success' in Strasbourg is attributable to the 'compatibility' exercise carried out by a group of experts prior to Estonia's ratification of the Convention. See I. Ziemele. The Role of International Organizations in Strengthening Human Rights Performance in the Baltic Sea Region. – German Yearbook on International Law 2000 (43), p. 9.

Supreme Court has been only a matter of convenience or need[*15] in a search for additional argumentation for its judgments, or whether the Supreme Court is indeed willing to change its understanding of certain aspects of law — by reversing or reviewing its previous position written into its judgments — in consequence of the directives stemming from judgments of international courts. Although the author of this article has not noted such change of Supreme Court positions in respect to the judgments of the ECHR[*16], the Supreme Court has declared its change of position due to developments in European Court of Justice (ECJ) jurisprudence. Specifically, the Supreme Court has ruled that, since the ECJ judgment of 11 December 2007 in case C-161/06, *Skoma-Lux*, prohibited imposing obligations on individuals stemming from the Union Law if the respective law had not been published in the Official Journal of the European Union[*17], the Supreme Court reversed its position that professionals in the corresponding field needed to abide by the EU rules irrespective of the official publication of these norms.[*18]

The article begins by presenting a short overview of the position of the ECHR concerning an effective national remedy against unreasonable length of proceedings. Then, the article will review the judgments of the ECHR with respect to Estonia regarding complaints in this area — where the ECHR has established the absence of such an effective domestic remedy, counterbalanced by the findings of the Estonian Supreme Court, which suggest that such a domestic remedy is available. The article will conclude with contemplation of possible scenarios for resolving this conflict of courts.

2. The position of the European Court of Human Rights

The ECHR had until 2000 refused to review applications that claimed violation of the Convention's Article 6 (1) due to the unreasonable length of proceedings and simultaneously argued that the applicant did not have an effective remedy in the domestic judicial system to have this argument decided. According to the position of the ECHR until 2000, the Convention did not bestow upon an individual the right to turn to domestic authorities during the ongoing judicial proceedings with a request to establish the violation of fundamental rights in view of the unreasonable length of these proceedings. The 'victim' of the situation had to wait until the final court judgment in the proceedings concerned. The ECHR has explained its former position in one of the most important judgments of the new millennium — *Kudla v. Poland*[*19] — by saying that in the situations concerned the court did not examine the violation of Article 13[*20] of the Convention because it considered Article 6 (1) to be *lex specialis* toward Article 13 in respect of claims related to the unreasonable length of proceedings.[*21]

The ECHR explained its change of position through two main arguments:

1) A complaint about the unreasonable length of proceedings under the Convention's Article 6 (1) does not incorporate the notion that the individual wishes this complaint to be reviewed by a 'domestic authority': "The question of whether the applicant in a given case did benefit from trial within a

[15] It has been noted that the ECHR judgments are hardly ever cited in the Supreme Court judgments and there are usually only formal references to the cases and presentation of some relevant points. See Note 12, p. 351.

[16] In the recent years the Supreme Court has explained some key legal concepts through relying mainly on the ECHR jurisprudence. For example, the question about the scope of the right not to incriminate oneself is explained through citing one of the key ECHR judgments in this respect, *Saunders v. the United Kingdom*, judgment of 17 December 1996. – Reports 1996–VI.

[17] ECJ judgment of 11 December 2007 in case C-161/06 *Skoma-Lux* paragraph 51: "Article 58 of the Act concerning the conditions of accession to the European Union of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded, precludes the obligations contained in Community legislation which has not been published in the Official Journal of the European Union in the language of a new Member State, where that language is an official language of the European Union, from being imposed on individuals in that State, even though those persons could have learned of that legislation by other means."

[18] ALCSCd, 13.10.2008, 3-3-1-36-08, paragraph 15 reversed the previous position, expressed in ALCSCd, 10.05.2006, 3-3-1-66-05, paragraph 12.

[19] ECHR, *Kudla v. Poland*, judgment of 26 October 2000 (Grand Chamber). – Reports of Judgments and Decisions 2000–XI, p. 146.

[20] Article 13 of the Convention contains the following fundamental right: "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persona acting in official capacity."

[21] The ECHR also considers the right to have the reasons and legality of one's detention reviewed under Convention Article 5 (4) as *lex specialis* of Convention Article 13. See the following citation of a case, where the applicant argued that his Convention rights under Article 13 were violated: "[...] irrespective of the method chosen by Mr. Chahal to argue his complaint that he was denied the opportunity to have the lawfulness of his detention reviewed, the Court must first examine it in connection with Article 5 paragraph 4 (Articles 5–4)". See ECHR, *Chahal v. United Kingdom*, judgment of 15 November 1996. – Reports of Judgments and Decisions, 1996–V, p. 126.

reasonable time in the determination of civil rights and obligations or a criminal charge is a separate legal issue from that of whether there was available to the applicant under domestic law an effective remedy to ventilate a complaint on that ground."*[22]

2) The number of applications to the ECHR concerning the unreasonable length of domestic proceedings might undermine the effectiveness of the Strasbourg system as a whole. The Court noted that "the important danger that exists for the rule of law within national legal orders when 'excessive delays in the administration of justice occur' in respect of which litigants have no domestic remedy".*[23]

For the purposes of this article, it is necessary to note two aspects of this change in the ECHR's position.

Firstly, the fact of the change itself in the Court's position was clearly emphasised, with the note that "the Court now perceives the needs to examine the applicant's complaint under Article 13 taken separately, notwithstanding its earlier finding of a violation of Article 6 (1) for failure to try him within a reasonable time"*[24]. From the time of this judgment, domestic legal systems had the obligation to provide a national judicial remedy for individuals' claming to be a 'victim' of unreasonably long proceedings.*[25] It must be noted that the Estonian Supreme Court has not questioned this obligation. Rather, the problem may lie in determining whether national judicial systems actually provide this remedy.*[26]

Secondly, the ECHR changed its rigid requirement concerning the meaning of 'effective remedy' in relation to complaints about the unreasonable length of proceedings. The 'standard' meaning of the concept of effective remedy was already defined in 1983 and requires simultaneous existence of two remedies — the decision about the substance of the claim and the possibility of obtaining compensation for the violation. The Court has formulated this, regarding the individual who puts forward an 'arguable claim'*[27] of violation of his fundamental rights, as follows: "[H]e should have a remedy before a national authority in order to have his claim decided and, if appropriate, to obtain redress."*[28] This approach has remained unchanged to this day, with the clarification, dating back to the last millennium in its substance, that the redress offered for the violation does not necessarily need to be financial compensation. This formulation is the following: "However, article 13 (art. 13) does not go so far as to require any particular form of remedy. Contracting States are being afforded a margin of discretion in conforming to their obligation under this provision."*[29]

The only type of violations for which the ECHR accepts a departure from this standard are violations related to the unreasonable length of proceedings. The ECHR presented this principle in the case of *Mifsud v. France* in the following formulation: "Article 13 therefore offers an alternative: a remedy is 'effective' if it can be used either to expedite a decision by the courts dealing with the case, or to provide the litigant with adequate redress for delays that have already occurred."*[30] The Court has not elaborated on this further in the decision, nor has it addressed in subsequent case-law the reasons for departing from the standard discussed in the previous paragraph. Neither has the Court explained whether this new position is applicable to other substantive

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[22] *Kudla v. Poland*, p. 147.

[23] *Ibid.*, p. 148.

[24] *Ibid.*, p. 149.

[25] It is quite unusual for the ECHR to change its position regarding a principal legal question abruptly. Usually the Court gives hints from judgment to judgment that it is ready to re-examine its previous position. See, for example, the gradual shift from denying that companies have morals to the understanding that companies can be victims of moral harm. See ECHR, *Vereinigung demokratischer Soldaten Österreichs and Gubi v. Austria*, judgment of 19 December 1994, A 302; *Comminregsoll S.A. v. Portugal*, judgment of 6 April 2000. – Reports of Judgments and Decisions 2000–IV.

[26] The question of the parameters when the ECHR is likely to establish the violation of a reasonable time requirement is outside of the scope of this article. It is sufficient to note that there are no set time-limits from where the violation is likely to be established. The general position of the ECHR is repeated in almost standard formulation from judgment to judgment: "The Court reiterates that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicant and the relevant authorities and what was at stake for the applicant in the dispute." ECHR, *Shchiglitsov v. Estonia*, judgment of 18 January 2007. For general analysis of the Court's case law in this question, see also Study on the Effectiveness of National Remedies in respect of Excessive Length of Proceedings adopted by the Venice Commission at its 69th Plenary Session (Venice, 15–16 December 2006) (CDL – AD (2006)) 036rev.

[27] Although the ECHR introduced the concept of an effective remedy already in 1978 in the judgment of *Klass et al. v. Germany*, judgment of 6 September 1978, application No. 5029/71, it subsequently changed its view that an effective remedy should be available to anyone who claims that his fundamental rights are violated. Subsequently the ECHR replaced this approach by saying that an effective remedy should be available to anyone who puts forward an "arguable claim" about the violation of his fundamental rights. Regarding the concept of an "arguable claim", see M. Susi. The Right to an Effective Remedy — through the Dynamic Interpretation of the European Court of Human Rights. Dissertationes Iuridicae Universitatis Tartuensis. Tartu 2008, pp. 163–164.

[28] ECHR, *Silver v. the United Kingdom*, judgment of 25 March 1983, A61, p. 113 (a).

[29] ECHR, *Vilvarjah et al v. the United Kingdom*, judgment of 30 October 1991, A215, p. 122. It also needs to be noted that in the case-law of the last decade the ECHR sometimes uses the broader term "relief" instead of the formerly used term "redress". See *Hasan and Chaush v. Bulgaria*, judgment of 26 October 2000, application No. 30985/96, paragraph 96.

[30] ECHR, *Mifsud v. France*, decision of 11 September 2002, application No. 57220/00, p. 17.

Convention violations. One way or another, the ECHR accepts a situation in which violation of the Convention due to the unreasonable length of proceedings continues and the affected person is only paid compensation.

After the *Kudla v. Poland* judgment, the ECHR took upon itself the task of reviewing situations in several Member States related to meeting of the need to offer a separate domestic remedy for claims pertaining to unreasonable length of proceedings. The case law can be generalised to argue that three types of situations meet the Convention standards in respect of this new national remedy:

1) the adoption of a special law providing the remedy for complaints against the unreasonable length of proceedings;
2) amendments to the existing procedural laws;
3) directives of the supreme court of the country to lower courts for applying the already existing procedural laws.

The author will briefly present the possibilities these make available to the Member States by considering the example cases of Slovakia, Poland, and Portugal.

According to the interpretation of the ECHR, Slovakia did not meet the Convention's standards in this respect until 1 January 2002. On this date, change in the Slovakian Constitution took effect[*31] that provided the possibility for both natural and legal persons to turn to the Constitutional Court with complaints about their fundamental rights' violation. Here, the Constitutional Court can award just redress if it establishes that a violation has occurred. Previously, Slovakia had lost several cases in the ECHR, where the national government argued that the existing State Liability Act provided the option for potential victims of this violation to seek damages for the delays in the administration of justice. The ECHR considered this option too vague and not to offer any realistic chances of success.[*32]

This new situation was judged to meet the Convention's standards. In the judgment of *Andrá ik v. Slovakia*, the ECHR found the remedy through the constitutional complaint to be "effective", since it gave authority to the Constitutional Court not only to establish the fact of the violation but also to oblige the domestic authorities in question to cease the violation and to award just compensation.[*33] In the stage of presenting the parties' observations, the Slovakian government brought to the attention of the ECHR several judgments of the Constitutional Court applying Article 127, and therefore the ECHR had to conclude that "the remedy in question is effective not only in law, but also in practice"[*34].

After the *Kudla v. Poland* judgment, Poland passed the so-called 17 June 2004 Law, which regulates the procedure for complaints about the unreasonable length of proceedings.[*35] The ECHR analysed this law in the case of *Charzyński v. Poland* and concluded that it "satisfies the 'effectiveness' test established in the Kudla judgment"[*36]. It has to be mentioned here that the 17 June 2004 Law limits the amount of monetary compensation to a maximum of 10,000 Polish złotych.[*37] The ECHR did not consider this problematic and indicated that the injured party always has the opportunity to seek additional damages under the amended Civil Code.[*38] It must be indicated here that, although by the time of the decision in the case of *Charzyński v. Poland* no final judgments had been made in Poland applying this new law, the ECHR was satisfied with the existence of the legal possibility in theory.[*39] This clearly signifies departure[*40] from the well-established principle applied by the ECHR that for a remedy to be effective, the respective government also needs to demonstrate that the remedy is applied in practice by the national courts.[*41]

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31 Article 127 of the Slovakian Constitution, available at www.legislationonline.org.

32 ECHR, *J.K. v. Slovakia*, decision of 13 September 2001, application No. 38794/97 and *Havala v. Slovakia*, decision of 13 September 2001, application No. 47804/99.

33 ECHR, *Andrašik v. Slovakia*, judgment of 22 October 2002, application No. 57984/00, p. 10.

34 The Note above.

35 Complaints for delays in the first instance court are reviewed by the district court and complaints for delays in the district court are reviewed by the Supreme Court.

36 ECHR, *Charzyński v. Poland*, decision of 1 March 2005, application No. 15212/03, p. 39.

37 Corresponds to approximately 2,150 euros.

38 The Civil Code was also amended by the 17 June Law.

39 Note 36 above.

40 Similar acceptance of a situation where there are yet no domestic judgments, but the written law provides a remedy, is present in the following judgment: "[...] the new remedy at national level is open to the applicant and may address this problem since it not only provides for compensation to be awarded but also obliges the Constitutional Court to set a time-limit for deciding the case on the merits." ECHR, *Nogolica v. Croatia*, decision of 5 September 2002, application No. 77784/01, p. 6.

41 As a rule, the ECHR defines the concept of an 'effective remedy' partly through the ability of the respondent government to present court judgments where the remedy has been applied. For example, the Court has noted: "[…] the Government did not establish the existence of any domestic decision that had set a precedent in the matter. It has therefore not been shown that such a remedy would have been effective". See ECHR, *Rotaru v. Romania*, judgment of 4 May 2000. – Reports of Judgments and Decisions 2000–V, p. 70.

Still the country may not need to change any laws, but only modify the case law of its courts. This is evident in the example case of Portugal. The Government of Portugal used to submit an argument in cases of the type considered here that Portugal has a law, dating back to 1967[*42], that regulates the state's non-contractual liability. The ECHR considered this legal provision to be "theoretical" and indicated: "The Government has not cited a single precedent to show that such an action had real prospects of success, although the legal provision in question had been in force for more than twenty years."[*43] In the judgment of *Paulino Thomas v. Portugal*, the ECHR changed its view and accepted the national government's argument that the domestic remedies for complaints against unreasonable length of proceedings are effective. This was because the government had referred to a judgment of the Supreme Court from 1998 whereby the possibility was accepted of the state being responsible for the violation of the reasonable time limit under the Convention's Article 6 (1). The Portuguese government likewise presented several court judgments wherein the litigants were awarded monetary compensation for violation of the reasonable time requirement. On this basis, the ECHR established that an effective domestic remedy in Portugal against complaints of unreasonable time did exist.[*44] This was achieved merely through the Supreme Court directives.

3. The cases from Estonia related to violation of the reasonable time requirement and absence of effective remedy

The ECHR has directed five substantive judgments toward Estonia regarding complaints of unreasonable length of proceedings. In the case of *Treial v. Estonia*, the ECHR established that there was violation of the Convention's Article 6 (1).[*45] In this application, no claim of absence of a domestic remedy for decision on the complaint in the Estonian national legal system was raised; consequently, the Court could not rule on this issue. Similarly, in the case of *Mõtsnik v. Estonia*, no complaint under the Convention's Article 13 was raised — here the ECHR did not establish existence of a violation of Article 6 (1) either.[*46] In the case of *Shchiglitsov v. Estonia*, violation of the Convention's Article 6 (1) was established on account of the duration of marital property division: five years and 10 months.[*47] As in the previous two cases, no argument under Article 13 was raised.

On 8 November 2007, the ECHR issued a judgment wherein it established violation of both Article 6 (1), due to unreasonable length of proceedings, and of Article 13, due to the absence of an effective remedy for having this claim decided domestically. In the case of *Saarekallas OÜ v. Estonia*, it was established that the litigant had spent seven years and two months in the Estonian courts.[*48] For the purposes of this article, it is important to note what the arguments of the Estonian government were in defence of the availability of an effective domestic remedy for decision of such a case. The Estonian government made reference to the provisions of the Code of Administrative Court Procedure — according to which the administrative courts were empowered to adjudicate disputes under public law — and the Constitution. Furthermore, it quoted the case law of the Supreme Court, according to which administrative courts were authorised to examine whether public authorities performed their actions within reasonable time. The Supreme Court had found that the administrative courts were authorised to award compensation to individuals for actions — including delay — of public authorities even in cases where no specific legal provisions existed to that effect. The government concluded that a person could file a complaint with an administrative court against delays in judicial proceedings and against inaction of a court and also claim compensation for damage caused thereby. The government concluded that even if the Court were to find that none of the above-mentioned remedies individually constituted sufficient and effective remedy, the aggregate of remedies nevertheless ensured effective legal protection to the individuals in respect of the length of proceedings. The government contended that there had been sufficient remedies available to the applicant company, which, however, did not make any attempts to make use of them.[*49]

The applicant company pointed out that no example cases had been provided wherein the remedies referred to by the government would have been used and in which they would have been effective. Furthermore, no

42 Portuguese Law No. 48051.

43 ECHR, *Gama da Costa v. Portugal*, decision of 5 March 1990, application No. 12659/87. – Decisions and Reports 65, p. 136.

44 ECHR, *Paulino Thomas v. Portugal*, decision of 27 March 2003. – Reports of Judgments and Decisions 2003–VIII.

45 ECHR, *Treial v. Estonia*, judgment of 2 December 2003, application No. 48129/99.

46 ECHR, *Mõtsnik v. Estonia*, judgment of 29 April 2003, application No. 50533/99.

47 ECHR, *Shchiglitsov v. Estonia*, judgment of 18 January 2007, application No. 35062/03.

48 ECHR, *Saarekallas OÜ v. Estonia*, judgment of 8 January 2007, application No. 11548/04.

49 Above, pp. 59–61.

examples had been given of situations in which compensation would have been paid for excessive length of court proceedings.[*50]

The ECHR noted that the provisions of the Civil Code and the Constitution, referred to by the government, were of a general nature and did not include reference to a specific remedy for complaints against the unreasonable length of proceedings. The decisive argument was as follows: "The applicant company pointed out that no examples had been provided where the remedies referred to by the Government would have been used and where they would have been effective. Furthermore, no examples had been given where compensation would have been paid for the excessive length of court proceedings."[*51] The Court did not comment on the arguments of the government regarding the aggregate effect of remedies and that the administrative courts were empowered to review complaints against the delays in general county courts.

The author of this article is of the opinion that at least until the end of 2007 there was no effective remedy available in the Estonian judicial system for having a claim against unreasonable length of proceedings decided. The ECHR may have hinted to the Supreme Court that it could create this effective remedy by directing the practice of the lower-level courts. This is because the Court commented positively on the practice of the Supreme Court when interpreting the provisions of the Constitution broadly.

The Estonian Supreme Court had an opportunity to abide by the findings of the ECHR in its decree of 30 December 2008. The case was brought to the Supreme Court as an individual constitutional complaint by 'R.P.', who argued that criminal proceedings (including the pre-trial investigation) directed toward him had lasted more than 12 years. At the time of submission of the application to the Supreme Court Constitutional Review Chamber, the trial was still pending in the court of first instance. R.P. asked the Supreme Court to establish violation of the reasonable time requirement, or as an alternative the absence of an effective remedy within the meaning of the Convention's Article 13.

The possibility of submitting an individual constitutional review claim to the Estonian Supreme Court is limited. The Constitutional Review Court Procedure Act does not allow an individual to bring a constitutional complaint to the Supreme Court directly. The Constitution provides the right for anyone to ask that a legal norm be declared unconstitutional or not applied, but only in the context of one's legal dispute.[*52] However, the Supreme Court has taken a 'broad' approach to this limitation. It has reviewed an individual constitutional complaint on 11 occasions and only in one instance issued a substantive judgment.[*53] In the latter case, the Supreme Court introduced a position according to which the Court "verifies which judicial remedies are available to the litigant for the control of the alleged violation of his fundamental rights"[*54] In ten cases out of eleven, the Supreme Court has taken the position that proceedings in the administrative or county court provide sufficient effective remedy for the person's claim concerning violation of fundamental rights.[*55] It is debatable whether only one judgment decided on the merits through individual constitutional review proceedings satisfies the requirement of an effective remedy or whether instead this should be viewed as theoretical and illusory[*56] protection of the fundamental rights.

The Supreme Court applies here the so-called gapless court protection doctrine of fundamental rights, which in the view of the Supreme Court is provided by § 15 of the Estonian Constitution.[*57] In other words, even if the capacity of the administrative or another court to decide a case does not specifically derive from the text of the procedural law, the court is still empowered to discuss the case and issue a judgment on account of the authority granted to it by the Constitution.

Thus the Supreme Court faced a dilemma when deciding on the case brought forward by R.P. It could have decided it on the merits, which would have meant a second judgment on the merits made in an individual constitutional complaint case. This, in turn, would have meant that the Supreme Court could face a mounting number of applications arguing the same type of violation. Or the Supreme Court could have decided that there indeed is no effective remedy available, which could have meant an equivalent situation with complaints

[50] Above, p. 62.

[51] Above, p. 66.

[52] The second sentence of § 15 of the Estonian Constitution provides the following right: "Everyone has the right, while his or her case is before the court, to petition for any relevant law, other legislation or procedure to be declared unconstitutional."

[53] SCebd, 17.03.2003, 3-1-3-10-02. Available — also in English, at http://www.nc.ee.

[54] CRCSd, 17.01.2007, 3-4-1-17-06, paragraphs 4–5. Available — also in English, at http://www.nc.ee.

[55] CRCSd, 3-4-1-12-08, 3-4-1-13-08, 3-4-1-10-08, 3-4-1-3-08, 3-4-1-11-07, 3-4-1-8-07, 3-4-1-17-06, 3-4-1-4-06, 3-4-1-10-05 and 3-4-1-6-05.

[56] At the same time the approach of the Supreme Court is not in violation of the requirements of the Convention or of the ECHR, since the ECHR does not consider the absence of individual constitutional review proceedings to be a Convention violation. Should the Supreme Court, through its subsequent case-law, introduce a practice through which an individual has a reasonable expectation as to the existence of this right in practice, then the issue of Convention violation may emerge, if the individual does not achieve a complaint review by the Supreme Court in its capacity as a constitutional court.

[57] CRCSd, 9.04.2008, 3-4-1-20-07, paragraph 18.

mounting. Instead, the Supreme Court applied the 'gapless court protection' doctrine.*[58] It indicated that in its view the reasonable time limit was violated in R.P.'s case, but it did not establish this violation in the formal judgment. While the Supreme Court did not give leave for the application it explained, that county courts discussing criminal cases had to decide on this claim concerning reasonableness of time. The county courts need to decide the claim immediately after it is presented in the course of the proceedings and not wait until the stage of the substantive judgment in the case. Since the criminal courts do not have the authority to decide on appropriate monetary compensation, the Supreme Court provided guidance stating that such claims need to be decided separately in administrative courts under the provisions of the State Liability Act.

As for the remedies, the Supreme Court indicated three possible actions that the county court could take. These are:

1) termination of the criminal court proceedings;
2) acquittal;
3) taking into account the fact of the violation of fundamental rights at the time of sentencing.

The author of this article is of the opinion that the latter option — using the fact of the violation as a mitigating argument in the sentencing — does not meet the criteria for effective remedy. This is because an effective remedy needs to take immediate effect. By contrast, when the criminal court establishes violation of the reasonable time requirement during the proceedings, then it is not known how long the proceedings still may take. In general, during the proceedings it is not known whether the court will find the accused guilty. If it does not, then the person would remain without a remedy for the reasonable time violation.

At first sight, neither the termination of proceedings nor summary acquittal seems to correspond to the meaning of effective remedy either.*[59] However, on deeper contemplation, this possibility cannot be excluded. According to the position of the ECHR and with application of the principle of subsidiarity, the Member States are in a better position than the international Court to decide which exact type of redress is most suitable for a particular violation.*[60] Monetary compensation is only one possible type of compensation, and the latter may also constitute actions by the state authority or courts that are intended to remedy the situation.

It still remains open to debate whether these remedies referred to by the Estonian Supreme Court meet the requirements of foreseeability and universality. For example, an individual may not agree to termination of the criminal proceedings, since he is interested in his reputation being cleared via a direct court judgment. It also seems disproportionate to discontinue proceedings in cases involving crimes against life or other serious offences. Therefore, the author of this article is of the opinion that in its 30 December 2008 decree the Supreme Court preferred to rely on the 'gapless court protection' doctrine rather than acknowledge that there are indeed gaps in the Estonian judicial system. The latter would have meant admission that there is no effective remedy against claims of unreasonable length of proceedings. The Supreme Court directed the county courts — at least in criminal matters — to apply the 'gapless court protection' doctrine while there are not very suitable remedies in the 'arsenal' of the county courts. The county courts cannot award monetary compensation in relation to criminal matters to the accused, nor are the remedies of termination or acquittal the most suitable ways of compensating the person concerned for the unreasonable length of proceedings.

Shortly after the 30 December 2008 Supreme Court decree, the ECHR published yet another judgment directed toward Estonia, establishing violation of the Convention's Article 13 — the judgment in the case of *Missenjov v. Estonia*.*[61] Since the arguments of the government were submitted before the 30 December 2008 Supreme Court decree, it is safe to argue that the government could not have been aware, at the time of submitting its arguments, of the Supreme Court's position. In this case, a litigant who had allegedly taken out a loan from one of Estonia's commercial banks (*AS Eesti Maapank*) failed to pay the sums back and the bank lodged a claim against him on 19 October 1999. After years of inactivity, the parties finally reached a settlement, which was approved by the Viru County Court (*maakohus*) on 29 May 2006. The government advanced arguments similar to those applied in the *Saarekallas OÜ v. Estonia* case. It further stated that the injured party could have initiated disciplinary proceedings against the judge and also asked for jurisdiction to be transferred to another court.*[62]

If one compares the arguments in the two cases — *Saarekallas OÜ v. Estonia* and *Missenjov v. Estonia* — decided on the merits regarding the violation of Article 13 of the Convention, it appears that the arguments

[58] It is worth considering whether the 'gapless court protection' doctrine is a procedural question — in principle, for every type of claim there is a suitable domestic court, and the Supreme Court decided an individual constitutional complaint only when due to some exceptional circumstances the particular claim cannot be brought before the court which usually decides respective types of cases. In the other words, the Supreme Court could stand as the guardian of the right of access to court within the meaning of Convention Article 6 (1).

[59] The ECHR has issued several judgments where the absence of an effective remedy is established due to the lack of the ability of the national court to order compensation for the reasonable time requirement violation. See for example *Sürmeli v. Germany*, judgment of 8 June 2006, application No. 75529/01.

[60] ECHR, *Liakopoukou v. Greece*, judgment of 24 May 2006, application No. 20627/04, pp. 19–25.

[61] ECHR, *Missenjov v. Estonia*, judgment of 29 January 2009, application No. 43276/06.

[62] The Note above.

of the government are not entirely consistent. While in the *Saarekallas* case the government admitted that the litigant could not appeal against the decisions to adjourn the hearings*[63], in the *Missenjov* case the government stated that the applicant could have appealed even in the absence of a separate written court ruling whereby the hearing was adjourned.*[64] In the *Saarekallas* case, there was no reference to the possibility of requesting disciplinary proceedings.*[65]

Although the ECHR referred to the government's arguments in the *Missenjov* case only in part, stating that they mainly followed arguments similar to those in the *Saarekallas* case*[66], it seems that the cornerstone of the government's position is that the applicants could have filed a complaint with an administrative court against delays in judicial proceedings and against inaction of a court and also claim compensation for damage caused thereby.*[67] The ECHR has responded to this argument by stating that the provisions of the Code of Administrative Court Procedure were general in nature and, secondly, that the government had failed to produce any court precedents where the litigant's case was decided by an administrative court and compensation was awarded.*[68]

One needs to distinguish between the position of the government and that of the Supreme Court on the question referred to above. The arguments in proceedings at ECHR level are prepared by the government of the Member State concerned, and the government is not obliged to argue its case via the legal doctrine of the national courts. Furthermore, in the two cases discussed above, the government made minimal reference to the case law of the Supreme Court, probably for the simple reason that such case law was not available. So these were the arguments of the government that the ECHR had to evaluate and analyse. The government's belief in the existence of an effective remedy through administrative court proceedings is supported also by the information it provided about the measures for complying with the judgment in the case of *Treial v. Estonia*. The following statement is included in the information: "Anyone may file a complaint before the administrative courts against delays in judicial proceedings or inaction by the courts. In doing so, he may rely on the relevant provisions of the Constitution or of the Convention as well as on the provisions of the Code of Administrative Procedure and the case law of the Supreme Court. It is possible during such proceedings to demand compensation for damage caused by such delays/inaction, and the administrative courts have competence to order payment of compensation."*[69] Following the logic of the ECHR, one can only conclude that this remedy is **theoretical and illusory** and that until there emerges case law to support this argument it will not be a **practical and effective** remedy.*[70] Since the ECHR has even considered the provisions of the Code of Administrative Court Procedure to be of too general a nature to satisfy the Convention's standards, the current position of the ECHR on the remedies suggested by the government needs to be read as stating that there is no such effective remedy in Estonia at any level — not in theory and not in practice.

Ironically, the ECHR thus far has been unable to evaluate the position of the Estonian Supreme Court regarding the existence or absence of an effective national remedy against unreasonable length of proceedings. In this respect, it cannot be argued that there is open conflict of opinion between the ECHR and the Supreme Court in this matter — the former being of the opinion that there is no such effective remedy available and the latter directing the lower courts to apply this remedy immediately in their proceedings once the relevant claim by the litigant or accused has been made. The 'testing' of the national remedy suggested by the Supreme Court will be done sooner or later by the ECHR.

If the Supreme Court wishes to follow the Portuguese model and create this remedy through the lower courts' case law, it is inevitable that this remedy will meet the Convention's standards as required by the ECHR. Soon the government will be required to be able to produce for the ECHR lower-court judgments implementing the directives of the Supreme Court regarding immediate review of complaints about unreasonable length of proceedings. Then the ECHR may have to decide whether the rather unique remedy suggested by the Estonian Supreme Court — termination of criminal proceedings or acquittal — can be regarded as an appropriate form of redress. If it is, then the concept of 'gapless court protection' by the Estonian courts finds a strong

[63] *Saarekallas OÜ v. Estonia*, pp. 56–57.

[64] *Missenjov v. Estonia*, p. 36.

[65] This argument was used in the *Missenjov* case to which the ECHR responded that there was no causal link established how the disciplinary proceedings could have expedited the proceedings in the main court case.

[66] *Missenjov v. Estonia*, p. 36.

[67] *Saarekallas v. Estonia*, p. 60.

[68] The Note above, p. 66 and *Missenjov v. Estonia*, pp. 49 and 51.

[69] Appendix to Resolution CM/ResDH (2007) 152, available online at HUDOC.

[70] The statement that an effective remedy is *practical and effective* and not *theoretical and illusory* is perhaps one of the most well-known statements of the ECHR. See for exact formulations: "The existence of the remedies in question must be sufficiently certain not only in theory but in practice, failing which they will lack the requisite accessibility and effectiveness […]." See *Akdivar et al. v. Turkey*, judgment of 16 September 1996. – Reports of Judgments and Decisions 1996–IV, p. 66 and "[...] the right of access to court must not only be entrenched in law as a principle but also secured with sufficient certainty in practice". See *Angel Angelov v. Bulgaria*, judgment of 15 February 2007, application No. 51343/99, p. 39.

supportive argument and perhaps can be regarded as a contribution of Estonian legal thought to European jurisprudence.

As for the potential 'victim' of excessive length of proceedings and the legal profession, it is not clear which path to follow in this 'conflict' of courts. From one side, the applicant is not supposed to rely on the remedy that in his view is not effective. The belief in the non-effectiveness or even unavailability of a national remedy has been confirmed by the ECHR, so the argument that the potential applicant has not exhausted the domestic remedies would probably not hold water in proceedings with the ECHR. On the other hand, should the remedy suggested by the Supreme Court prove effective, the applicant would lose much time in the ECHR proceedings and in the end may be advised to turn back to the domestic remedy. Therefore, the current situation may be regarded as a 'window of opportunity' for only those who may wish to use the 'conflict of courts' to their procedural advantage. For purposes of legal certainty, it is advisable that Estonia fulfil its obligations under the Convention soon — whether through the legislative initiative of the Parliament, via the developing case law of the lower courts, or through a combination of these two measures.

4. Conclusions

This article has provided a brief overview of the case law of the ECHR in relation to the Convention's Article 13 standards in cases arguing the violation of fundamental rights due to unreasonable length of proceedings in civil or criminal matters. The ECHR has, beginning with its judgment in the case *Kudla v. Poland*[*71], required that there be a national remedy under domestic law for having the associated claim decided and, if appropriate, adequate redress made. The ECHR accepts three venues whereby Member States can meet their obligations: the adoption of a special law to deal with the relevant claims, amendment of the existing procedural laws, and directives by the country's highest court to the lower-level courts on how to guarantee the respective domestic remedy.

The ECHR is of the opinion that there is no such domestic remedy available in Estonia. In the cases of *Saarekallas OÜ v. Estonia*[*72] and *Missenjov v. Estonia*[*73], the Estonian government advanced the argument that the administrative courts are empowered to decide claims against delays in court proceedings and also award compensation, if the violation is established. The ECHR has rejected these claims by stating that the provisions of the Code of Administrative Court Procedure are of too general a nature to satisfy the Convention's standards. The ECHR has also stated that the government has not produced a single court judgment wherein the administrative court has rendered judgment concerning the associated claim. This leads the author to conclude that in the view of the ECHR the respective national remedy does not exist in Estonia — neither in theory nor in practice.

The Estonian Supreme Court's Constitutional Review Chamber has in its decree of 30 December 2008 directed the lower-level criminal courts to decide any claims about unreasonable length of proceedings immediately after it is presented to the court. The Supreme Court has proposed three possible remedies: termination of the proceedings, acquittal, and taking the fact of the violation into account during sentencing. The author of this article has shown above why the last of these does not meet the conditions for being an effective remedy. As for the other two, although their suitability as an effective remedy cannot be excluded, they cannot at the same time meet the requirements of universality and foreseeability. The ECHR has not yet analysed this approach to effective remedy proposed by the Supreme Court, which differs substantially from what has been offered in the arguments of the government. If the ECHR approves of this position, then the 'gapless court protection' doctrine advanced by the Estonian Supreme Court is given great impetus.

[71] Note 19 above.

[72] Note 48 above.

[73] Note 61 above.

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The World Bank *Doing Business* Ranking of Quality of Justice:

Critical Analysis[*1]

1. Introduction

Economic theory, econometrics, and game theory have recently shed new light on the study of diverse social phenomena, including the law and the causes of social and economic development. Economic tools have been used in attempts to understand the effect of laws and regulations in the economic development of a given society. If 'good laws' and 'good institutions' somehow 'cause' economic development, it would be worthwhile to try to identify such laws and institutional arrangements, understand how they foster development, and replicate them everywhere.

The World Bank and other international organisations have generated rankings and measures based on these ideas, including those featured in the six *Doing Business* reports published by the IFC since 2003 (hereinafter 'the Reports').[*2] The Reports focus on business legislation around the world, purporting to objectively measure, compare, and report on the quality of laws and regulations affecting businesses in different countries.[*3] Their aim is to identify the world's 'best practices' related to the aspects of business regulation their authors consider relevant for entrepreneurship and to benchmark the regulations of other countries in comparison to such best practices. They measure regulation quality, for example, in the categories 'starting a business', 'hiring and firing workers', 'getting credit', 'registering property', and 'enforcing contracts'. The Baltic States have enjoyed high rankings in the Reports, being among the top 30 in the 'ease of doing business' ranking since its

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[1] This paper elaborates on previous articles written for the Law and Development course held by Prof. Kevin Davis in Singapore in 2007 for the NYU and NUS Dual LL.M. program in Law and Global Economy, and as master thesis for the LL.M. in Law and Economics program of the Universidad Torcuato Di Tella (UTDT) School of Law in Buenos Aires, Argentina. The author wishes to thank Prof. Davis and all the participants in the Law and Development course, Prof. Julio Kelly and Prof. Eduardo Baistrocchi from UTDT, Prof. Tiiu Paas from the University of Tartu, Dr. Carri Ginter from Sorainen, Mr. Ludovico Baistrocchi and Ms. Katri Paas for the encouragement, support and enlightening comments provided. Any opinions and shortcomings of this paper are the author's exclusive responsibility.

[2] The Reports are the following: Doing Business in 2004: Understanding Regulation. Washington DC: World Bank 2004. Available at http://www.doingbusiness.org/Documents/DB2004-full-report.pdf (hereinafter 'Report 2004'); Doing Business in 2005: Removing Obstacles to Growth. Washington DC: World Bank 2005. Available at http://www.doingbusiness.org/documents/DoingBusiness2005.PDF (hereinafter 'Report 2005'); Doing Business in 2006: Creating Jobs. Washington DC: World Bank 2006. Available at http://www.doingbusiness.org/documents/DoingBusines2006_fullreport.pdf (hereinafter 'Report 2006'); Doing Business 2007: How to Reform. Washington DC: World Bank 2006. Available at http://www.doingbusiness.org/documents/DoingBusiness2007_FullReport.pdf (hereinafter 'Report 2007'); Doing Business 2008. Washington DC: World Bank 2007. Available at http://www.doingbusiness.org/documents/DB08_Full_Report.pdf (hereinafter 'Report 2008'); Doing Business 2009. Washington DC: World Bank 2008. Available at http://www.doingbusiness.org/Documents/FullReport/2009/DB_2009_English.pdf (hereinafter 'Report 2009').

[3] See www.doingbusiness.org, cited in J. Berg, S. Cazes. Policymaking Gone Awry: The Labor Market Regulations and the Doing Business Indicators. – Comp. Labor Law & Pol'y Journal 2008 (29), p. 350.

inception in 2006 (when among 155 countries Estonia ranked 16th, Latvia 26th, and Lithuania 15th) through to the latest, 2009 release (where among 181 countries they ranked 22nd, 29th, and 28th, respectively).*4

One of the pillars in the Reports' consideration of the ease of doing business is the measure of 'enforcing contracts', for which Estonia ranks 30th, Latvia fourth, and Lithuania 16th. Its aim is to measure the quality of courts, on the basis of the number of procedures, cost for the plaintiff, and the time it takes to enforce a hypothetical contractual dispute in a given economy. The lower these three figures, the higher the ranking.

But does this mean anything? Does a good place in the rankings mean that the Baltic States have 'better laws' or 'better courts', fostering development better than those of countries with worse ratings? More importantly, does it make sense to reform in order to have a better ranking? Unfortunately, the answer might not be 'yes'. Using simple law and economics theory, this paper seeks to scratch the surface of the 'Enforcing Contracts' section of the Reports, showing that, of the three measures the Reports now employ in relation to contract enforcement, only 'days to enforce' seems theoretically sound and giving some suggestions as to how to complement said measure to more meaningfully reflect efficiency in dispute resolution. Of the three measures — procedures, cost, and time — the first needs more solid theoretical foundations, the second is at odds with economic theory, and the third needs improvement to guide policy.

Section 2 offers a brief overview of the Reports, their background, and the issues addressed in this paper. Section 3 critically analyses the measure of number of procedures, and then Section 4 addresses the measure of costs in the light of economic theory. Section 5 looks at the impact of delay in enforcement and makes suggestions for improvement. Finally, Section 6 offers the author's conclusions.

2. The Reports and enforcing contracts: An overview

The Reports' stated goals are "to advance the World Bank Group's private sector development agenda" by "motivating reforms through country benchmarking", "informing the design of reforms", "enriching international initiatives on development effectiveness", and "informing theory".*5 As these statements and the Reports' titles suggest, the authors — a World Bank team led by economist Simeon Djankov — have a particular view of the effect of the regulatory environment on development. For them, 'law matters' for development, and better (frequently fewer) regulations lead to growth and job creation.*6 Moreover, they very explicitly try to promote legal reform according to their findings, highlighting "top reformers", pointing at "who is not reforming", showing "success stories", and ranking countries according to the "ease of doing business".*7

Intellectually, the Reports are inspired both by the Law and Finance movement started by Rafael La Porta, Florencio López-de-Silanes, Andrei Shleifer, and Robert Vishny, who tried to apply econometric analysis to the study of the law and legal traditions*8; and by the ideas of Hernando de Soto, a Peruvian economist who argues that the legal framework could push people toward the informal economy and prevent them from owning property, doing business, and raising themselves and their countries out of poverty.*9 These ideas were the origin of the New Comparative Economics movement and of the Reports.*10 They are also related to the New

4 See Report 2006, p. 92; Report 2007, p. 6; Report 2008, p. 6; Report 2009, p. 6.

5 See, e.g., K. E. Davis, M. B. Kruse. Taking the Measure of Law: The case of the *Doing Business* Project. – Law & Soc. Inquiry 2007 (32), p. 1098; Report 2004, pp. ix–x.

6 See in general, the Reports (Note 2), "Overview" section. See also Association Henri Capitant des Amis de la Culture Juridique Française. Les Droits de Tradition Civiliste en Question: À Propos des Rapports. Doing Business de la Banque Mondiale. Paris: Société de Législation Comparée 2006, p. 16 (hereinafter AHC); K. E. Davis, M. B. Kruse (Note 5); B. Arruñada. Pitfalls to Avoid when Measuring Institutions: Is 'Doing Business' Damaging Business? – Universitat Pompeu Fabra Economics and Business Working Paper 2007/1040. Available at http://ssrn.com/abstract=997225 (28.07.2009).

7 See, e.g., Report 2007, pp. 1–7; S. Djankov, C. McLiesh. Celebrating Reform. – Celebrating Reform. Washington DC: World Bank 2007, pp. 1–9 (where the authors even give "Oscar" prizes for "outstanding reformers"); B. Arruñada (Note 6), pp. 4–5; K. E. Davis, M. B. Kruse (Note 5), pp. 1114–1116.

8 See AHC (Note 6), pp. 14–15; K. E. Davis, M. B. Kruse (Note 5), pp. 1096–1097. The first paper published by the group Rafael La Porta *et al.* Law and Finance. – Journal of Political Economy 1998 (106), pp. 1113–1155, used econometric regressions to show that "common-law countries generally have the strongest, and French civil-law countries the weakest, legal protections of investors, with German- and Scandinavian-civil-law countries located in the middle" (Paper's abstract). This paper (and studying the law through mere econometrics) is aptly ridiculed in M. D. West. Legal Determinants of World Cup Success. – John M. Olin Center for Law & Economics (University of Michigan) 2002, paper #02–009.

9 See, e.g., Report 2004, pp. vii, x, 17; K. E. Davis, M. B. Kruse (Note 5), p. 1101; H. de Soto, E. Ghersi, M. Ghibellini. El Otro Sendero. Buenos Aires: Sudamericana 1987.

10 S. Djankov *et al.* The New Comparative Economics. – J. Comp. Econ. 2003 (31), pp. 595–619. For a good account on the history of the movement and of the Reports, see C. Ménard, B. du Marais. Can We Rank Legal Systems According to Their Economic Efficiency? – Journal of Law & Policy 2006 (26), pp. 55–80.

Institutional Economics school of thought, founded by Douglass North[*11], for which the institutional framework within which the agents of a given economy operate is determinant of the capability of that economy to achieve development.[*12]

Although cutting red tape seems in principle a good idea and the wealth of data the Doing Business project is gathering is remarkable[*13], both the Reports and their theoretical background have been subject to serious criticisms.[*14] Furthermore, because of the impact in the media and the endorsement by the World Bank and other international institutions (most notably, the United States Millennium Challenge Corporation)[*15], the shortcomings of the Reports may be potentially harmful.[*16] For some critics, the procedure for testing the Reports' underlying hypotheses has been different from the one normally applied in economic research, which involves the risk of the measurement of institutional performance remaining subject to aprioristic policy recommendations:

> The indirect cost of [the Reports] from the adoption of defective policies could therefore be huge, for two reasons. Firstly, the authors of the preliminary research are responsible for the subsequent reports. [Although probably insignificant, there could be a] risk that they will tend to search for or interpret the new information in such a way that it confirms their preconceptions[… Secondly], the fact that an institution as relevant as the World Bank is involved in the project covers up its defects and vouches for its conclusions which, in a normal situation, would be taken as preliminary, having a limited effect on policy. For these two reasons — the incorrect procedure and the participation of the World Bank in the project — there is considerable risk that such preliminary conclusions will be taken as final [determinations] and used for establishing wrong 'best practice' standards and for taking mistaken decisions in institutional reform.[*17]

In other words, because of the involvement of the World Bank and other international development aid institutions in the crafting of the rankings, and the potential (or effective) conditioning of aid and investment on how well a country scores in those rankings, the indicators have the potential of being very influential. Therefore, such measures have to be designed and tested with the utmost care and, further, have to be methodologically and theoretically sound, to avoid generating widespread implementation of inappropriate reforms or wrongly punishing the right policies.[*18] This is particularly important in view of the emphasis the Reports' authors (and, ultimately, the World Bank) place on highlighting the 'good' and 'bad' economies, those that have reformed according to the Reports' metrics or not[*19], on suggesting the use of the Reports to guide reform[*20], and on how 'what gets measured gets done'[*21], suggesting that reforms that do not get measured or do not help the country improve its rankings may be overlooked despite their necessity or convenience.

The 'Enforcing Contracts' chapter focuses on measuring procedural laws and judicial institutions. The authors argue that courts should be "fast, fair and affordable"[*22], and they try to measure these qualities by setting up a hypothetical contractual dispute, examine the procedural laws of the countries surveyed to see how the dispute would be handled, check with local counsel, and use the information to build the measurement indices.[*23] The indices were originally four: number of mandatory procedures requiring interaction between the

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[11] See, e.g., D. C. North. Institutions and Economic Growth: An Historical Introduction. – World Dev. 1989 (17), pp. 1319, 1320, cited in T. Ringer. Development, Reform**,** And The Rule Of Law: Some Prescriptions For A Common Understanding Of The "Rule Of Law" And Its Place In Development Theory And Practice. – Yale Hum. Rts. & Dev. L.J. 2007 (10), p. 178; K. E. Davis, M. B. Kruse (Note 5), p. 1096.

[12] See, e.g., M. K. Nabli, J. B. Nugent. The New Institutional Economics and its Applicability to Development. – World Dev. 1989 (17), pp. 1333, 1342, quoted in T. Ringer (Note 11) ("by affecting transaction costs and coordination possibilities, institutions can have the effect of either facilitating or retarding economic growth. The choice of appropriate political institutions, rules and policies enhances economic growth. Moreover, by affecting resource mobility and the incentives for innovation and accumulation, institutions may induce or hinder economic efficiency in the allocation of resources and growth. Institutions affect growth also through their effects on expectations, social norms and preferences").

[13] See K. E. Davis, M. B. Kruse (Note 5), p. 1100.

[14] See, in general, AHC (Note 6); B. Arruñada (Note 6); J. Berg, S. Cazes (Note 3); B. Arruñada. How Doing Business Jeopardizes Institutional Reform. – Universitat Pompeu Fabra, Economics and Business Working Paper 2008/1088, May. Available at www.arrunada.org (28.07.2009). See also K. E. Davis, M. B. Kruse (Note 5).

[15] Millenium Challenge Corporation. Guide to the MCC Indicators and the Selection Process, Fiscal Year 2008, pp. 3, 23–35; Millenium Challenge Corporation. Guide to the MCC Indicators and the Selection Process, Fiscal Year 2009, pp. 3, 26–35. Available at http://www.mcc.gov/mcc/bm.doc/mcc-fy-09-guidetotheindicators.pdf (28.07.2009).

[16] See, e.g., B. Arruñada. Will Doing Business Keep Damaging Business? Available at www.arrunada.org (28.07.2009); B. Arruñada (Note 6); J. Berg, S. Cazes (Note 3); C. Ménard, B. du Marais (Note 10); B. Arruñada (Note 14); K. E. Davis, M. B. Kruse (Note 5), pp. 1114–1116.

[17] B. Arruñada (Note 6), pp. 3–4.

[18] See, e.g., C. Ménard, B. du Marais (Note 10), p. 57.

[19] See, e.g., Report 2007, pp. 1–7; Report 2008, pp. 1–8; Report 2005, pp. 1–15.

[20] See, e.g., Report 2005, p. 10.

[21] See, e.g., Report 2007, pp. 3–4; Report 2008, pp. 7–8.

[22] Report 2004, p. 46.

[23] *Ibid*., pp. 1–7.

parties and/or the court; cost incurred by the plaintiff; estimated time to resolve the dispute; and a measure that disappeared with the 2005 report, termed procedural complexity.*[24] With this information, they rank the surveyed countries, stating that courts in richer countries (which arguably have the most 'efficient' courts) have fewer procedures*[25], are less costly*[26], and take less time to resolve the dispute.*[27] In the 2004 report, the authors blame poverty, legal tradition, and procedural complexity as the main causes of court 'inefficiency', and suggest various reforms.*[28] The theoretical and methodological background of the indicators and suggestions consists of a research paper authored by Djankov and others (hereinafter 'the BP') that argues that legal tradition and 'formalism' of procedure are associated with less desirable courts.*[29]

At first glance, the assertions might seem plausible, but this is less clear once the level of scrutiny is increased. If upon close scrutiny the measures do not prove methodologically or theoretically sound, their continued usage in the rankings may mislead governments into pushing for unnecessary or even incorrect reforms, hampering rather than fostering development. If that were to prove the case, the World Bank should reform the Reports forthwith, abandoning such measures for ones more meaningfully reflecting a legal system's efficiency of enforcement of business contract arrangements.

The problem is that the 'enforcing contracts' chapter does not pass such scrutiny. Firstly, the Reports assume a certain judicial dispute resolution procedure to be ideal, one that has very few steps and formalities. This is most apparent in the BP, which explicitly assumes the 'ideal' (in the sense of better justice) of the neighbour dispute and constructs the 'formalism' index to measure departures from said ideal. Thus was the 'Number of Procedures' indicator derived, under which a country scores better the fewer steps are necessary for enforcing a contract. As Section 3 attempts to show, ranking based purely on number of procedures appears baseless, as claiming the neighbour dispute is 'ideal' is a mere assertion without sufficient theoretical or authoritative backing. Moreover, a simple *reductio ad absurdum* shows the 'ideal' justice promoted by this chapter of the Reports is arguably no justice at all. It may even fail the test of econometric regression. The assertion that using fewer procedures leads to 'better', or more 'efficient' justice, whatever that may mean, is not obviously true and needs to be argued properly.

Secondly, the Reports, elaborating on the neighbours' ideal, posit that enforcing a contract in court should be cheap, fast, and fair, meaning that the (hypothetical) plaintiff should be able to go to court, get a judgment, and collect the debt in as short a time as possible, without any lawyers or appeals and paying as little as possible in court and attorneys' fees. For the Reports, a court system that is able to achieve such a state of affairs would be 'efficient'. Section 4 seeks to show that this idea is completely at odds with the basic literature on the economic analysis of procedural law and rational choice. For these theories (not disproved or argued against by the Reports or the BP), the aim of procedural law is to minimise the total costs of settling disputes for society as a whole: the 'administrative' cost of deciding the claim for the parties and the state and the cost of the case being decided 'wrongly' (not according to substantive law), and thus giving the wrong behavioural signals to society (taking into account the number and the quality of cases allowed to be filed). These costs are minimised in principle by doing the contrary of what the Reports prescribe: with out-of-court settlements that save on time and money spent on trials, which are more likely to come about the costlier going to court is for the parties; by enhancing the role of professional lawyers and judges; and through the existence of appeals.

However, the time measure does give some hint of judicial economic efficiency given the disruption that judicial delay may have on plaintiff claims. Section 5 thus argues that costs and procedural hurdles may be redeemed as efficiency gauges if the focus is placed on the issues that exacerbate the disruptive effect of time — particularly the enforceability of settlements themselves.

If the rationale for defining and detecting 'best practices' is flawed, the policy implications may be correct only by chance. Therefore, if the Reports are not framing the correct picture as regards enforcing contracts, then using their indicators to inform policy and reform may be harmful and should be discouraged.

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[24] "[Based on local attorney questionnaire responses] four indicators of […] commercial contract enforcement [efficiency] are developed: 1. the number of procedures, mandated by law or court regulation, that demand interaction between the parties or between them and the judge or a court officer; 2. the time needed for dispute resolution in calendar days, counted from the moment the plaintiff files the lawsuit in court until the moment of settlement or, when appropriate, payment ([including] the days when actions take place and the waiting periods between actions); 3. the official cost of going through court procedures, including court costs and attorney fees; and 4. the procedural complexity of contract enforcement—an index that scores countries on how heavily dispute resolution is regulated." *Ibid*., p. 6.

[25] *Ibid*., p. 44.

[26] In terms of income per capita, *ibid*., p. 109; Report 2007, p. 72.

[27] Report 2004, p. 48.

[28] In the Report 2004, pp. 48–53, the suggested reforms are establishing information systems and judicial statistics, taking non-dispute cases out of court, simplifying judicial procedures and establishing specialized courts. This has somewhat changed over the years; in the Report 2007, pp. 51–52, they suggest better salaries for the judges, transparent and merit-based appointment, fighting corruption (perception) through asset disclosing of judges and publicizing imprisonment of corrupt judges, and specialized courts (that provide mass production, simplified procedures and less formalism).

[29] S. Djankov *et al.* Courts. – Quarterly Journal of Economics 2003 (118) 2, pp. 342–387. Available at http://www.doingbusiness.org/documents/LexPaperAug211.pdf (28.07.2009).

3. Puzzling maths: The fewer the procedures, the better the court

3.1. A thin concept of an ideal court

The Reports have a special concept of what desirable courts administering desirable contract enforcement processes look like. For them, an ideal court uses few procedures and specialises in commercial matters; procedures do not require writing, lawyers, or legal argumentation; the judge is a layperson who does not need to give legal justification for the decision rendered; going to court is free or very cheap, with no court or attorney fees; there are few rules of evidence; and there are no appeals.[*30] Such a court would be 'fast, fair, and affordable'. Moreover, according to the Reports' number of procedures indicator, the fewer procedures necessary to enforce the model contractual dispute, the better the court.[*31]

The description is rather surprising, since it would count as 'ideal' procedures that might intuitively not seem fair. In the extreme, the 'best' possible court under this scheme would have only one procedure and a (merchant) lay judge. This can hardly be anything else than a plaintiff orally telling her story and the lay judge deciding on the spot without consulting the law, what the defendant has to say, or anything else. Let us imagine, for example, the following dispute settlement process.

D borrows € 100 from P and promises to pay back in three months the € 100 plus € 10 interest. One month later, the legislature validly passes a statute prohibiting and making void charging interest for non-banking loans of less than six months' time term, but allowing the recovery of the principal. At the end of the third month, D pays P € 100. P claims the interest, D refuses to pay, citing the statute. P goes to the court, which does not charge any fees and therefore has a long queue, and when his turn arrives he explains the situation to the judge orally. She hears P and believes his contention that D owes him € 110 and not € 100. Nobody writes anything down, and she gives no justification for the decision.[*32] She then asks P to go with the sheriff to D's house, notify him of the decision, and seize the € 10 from D's assets. The decision of the judge, who is a layperson, cannot be appealed. Let us imagine the same case, but now D never paid back the € 100, and P is a person with a bad reputation in the neighbourhood. P comes to the courthouse, the judge hears his case, and when P is finished the judge denies the claim immediately without giving any explanation. Again, there is no appeal, and P cannot question the judge's impartiality.

Albeit arguably extreme, the process depicted above bears many characteristics the Reports consider desirable: it is free, is fast, and has few procedures, with no writing, no lawyers, no legal justifications, and no appeal. It would be almost instant justice — if it were justice at all. And, of course, it is far from being a 'fair' procedure. D's clear legal right to not pay interest was denied in the first case. He had no opportunity to present a defence or correct the judge's mistake in applying the law. Some procedures can be superfluous, but others may have a justification in adding fairness. For example, without proper notification of lawsuits against her, a person may not be able to adequately defend her rights; the plaintiff has the whole statute of limitations period to prepare the lawsuit, but the defendant may have just a few days to gather all the evidence and counter the plaintiff's arguments; the participation of lawyers and professional judges charged with the duty of *iura novit curia* help to ensure respect for the rights of each party; and so on.

More generally, the different procedures and institutions within a dispute settlement process may be devices to, apart from reducing the 'cost of error', maintain what Shapiro calls the basic social logic of courts — the triad decision structure of the impartial third party deciding the dispute — from breaking down into a bullying two against one.[*33] He argues that, although the basic social logic of courts is the triad of the parties and an impartial third, the triad is unstable because when the third decides the social logic becomes a defeat by two against one. Thus, a "substantial portion of the total behaviour of courts in all societies can be analyzed in terms of attempts to prevent the triad from breaking down into two against one".[*34] The process's fairness arguably contributes to convincing the losing party "that he should obey the third man because he has consented in advance to obey"[*35] by participating in the process.

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[30] See Report 2004, pp. 42–46; BP, pp. 4, 6.

[31] See Report 2004, pp. 45, 48, 109–10; Report 2008, pp. 50, 80 ("A procedure is defined as any interaction between the parties, or between them and the judge or court officer. This includes steps to file the case, steps for trial and judgment and steps necessary to enforce the judgment").

[32] Note that because under the Reports "ideal" there is no need to give any rationale for the decision, the hypothetical judge may use any method she sees fit (under her own criteria) to arrive to a decision, including methods that may not be otherwise regarded as proper for a court, e.g., tossing a coin or rolling dice.

[33] M. Shapiro. Courts. Chicago and London: The University of Chicago Press 1981, pp. 1–3.

[34] *Ibid*., p. 2.

[35] *Ibid*.

On a more legalistic note, the International Covenant on Civil and Political Rights sets forth in its Article 14 what a minimally fair procedure should be. The Reports' ideal court is a far cry from what this covenant prescribes.*[36] The World Bank being an international institution related to the United Nations — in turn, devoted to fostering respect for human rights as embodied in international law — the Reports adopting such a weak concept of a 'fair' process is rather contradictory.*[37]

3.2. In search of a rationale

What is the Reports' rationale for advocating such a model of dispute settlement? The Reports state that "fewer procedures are associated with reduced time and cost and with perceptions of improved fairness".*[38] Let us focus first on the fairness perception. The Reports mention that fewer procedures and less of what they term procedural complexity are associated with "perceived fairness" and "less corruption".*[39] These two measures, subjective in nature, are built upon figures from the World Business Environment Survey, a structured survey administered at the managerial level in enterprises around the world.*[40] That seems odd, because the 2004 report harshly criticises subjective measures a few pages earlier and purports to depart from them*[41], on several grounds: "[a] large body of evidence shows that survey questions on perceptions do not always elicit meaningful responses"; are subject to design biases, varying responses due to the different scales used, uninformed answers, lack of a reference point, and sample selection issues; and "are often driven by general sentiment but do not provide useful indicators of specific features of the business environment".*[42] Therefore, when one applies the Reports' own logic, the inference is somewhat questionable. Furthermore, the measures have the problem of reverse causality: it may be the case that because of the negative general perception of the courts, some procedures have been introduced to enhance fairness, not the other way around.

The Reports also mention that "[c]omparing by income quartiles […] the richest jurisdictions […] have the lowest number of procedures" and that "legal tradition is also associated with the efficiency of contract enforcement", with the countries with Nordic legal origin having on average a lower number of procedures than the ones with a French legal origin.*[43] However, it is not at all clear how 'number of procedures' relates to development or a country being relatively rich, nor is it obvious how a Nordic or French legal origin may be better or worse for development, or what the direction of causality is, despite the claims of the Law and Finance movement.*[44]

More importantly, the theory behind the inferences is not so clear either, the only suggestion being that "a higher number of procedures is associated with more opportunities in the judicial system for extracting bribes".*[45] If the judge in a given case is the only official able to take a bribe to speed up the process or favour one party, it may be irrelevant whether she takes, say, 10 bribes of € 100 in an equal number of procedures or one € 1000 bribe just before issuing a judgment. The assertion would make more sense if the procedures that open bribe opportunities have to be performed by different and independent officials, which may lead to a sort of 'tragedy of the anti-commons' bribing scenario.*[46] Unfortunately, the Reports do not explain in any depth why procedures are relevant to development. We should look for a rationale elsewhere.

The Reports are an elaboration of previous scholarly research studies published in peer-reviewed journals.*[47] The idea of the desirable process being very simple comes from the BP, which tries to show that courts' performance and quality are determined by the level of 'procedural formalism' (how the law regulates their operation), trying then to measure empirically the determinants of such 'formalism' and its consequences for the quality

[36] See International Covenant on Civil and Political Rights, Article 14. Available at http://www2.ohchr.org/english/law/ccpr.htm (28.07.2009).

[37] For similar arguments regarding the *employing workers indicator* and ILO labour standards, see J. Berg, S. Cazes (Note 2); ILO Governing Body Document GB.300/4/1, 300th Session. November 2007. Available at http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meetingdocument/wcms_085125.pdf (28.07.2009).

[38] Report 2004, p. 46.

[39] *Ibid*., pp. 46–47. See K. E. Davis, M. B. Kruse (Note 5), pp. 1111–1112, n. 13.

[40] *Ibid*., citing G. Batra, D. Kaufmann, A. H. W. Stone. The Firms Speak: What the World Business Environment Survey Tells Us about Constraints on Private Sector Development. 2003. Available at http://ssrn.com/abstract=541388 (28.07.2009).

[41] See K. E. Davis, M. B. Kruse (Note 5), p. 1112.

[42] Report 2004, pp. 12–13 [citations omitted].

[43] *Ibid*., p. 48.

[44] See AHC (Note 6). See also K. E. Davis, M. B. Kruse (Note 5), pp. 1109, 1111–1113.

[45] Report 2004, p. 47.

[46] See in general, M. A. Heller. The Tragedy of the Anticommons: Property in the Transition from Marx to Markets. – Harv. L. Rev. 1998 (111), p. 621.

[47] Report 2004, p. ix.

of dispute resolution in courts.*[48] The authors loosely apply the concepts of judicial efficiency, effectiveness, performance, and quality. Ultimately, the two measures of outcomes are the estimated duration*[49] of dispute resolution and the 'public' perception of the quality of the legal system (using data from the World Business Environment Survey).*[50] The two measures are subjective and subject to the objections mentioned above.

It is also apparent from the BP the manner in which the particular 'ideal' court notion seen here originated:

> In a theoretical model of an ideal court, a dispute between two neighbors can be resolved by a third on fairness grounds, with little knowledge or use of law, no lawyers, no written submissions, no procedural constraints on how evidence, witnesses, and arguments are presented, and no appeal [Shapiro 1981]. […]
>
> According to Shapiro [1981], the essence of an idealized universal court is the resolution of a dispute among two neighbors by a third, guided by common sense and custom. Such resolution does not rely on formal law and does not circumscribe the procedures that the neighbors employ to address their differences. Yet courts everywhere deviate from this ideal.*[51]

Then, the authors generate indices of 'formalism' as departures from their 'neighbour model', which looks a lot like the hypothetical case at the start of this section. They define seven aspects of it, including professionalism (professional judges and lawyers), whether procedures are oral or written, the need for legal justification, the characteristics of the rules of evidence, the existence of appeal, the characteristics of the engagement formalities (service of process), and the procedure count.*[52]

As above shown, the authors do not argue why they think the ideal court is the neighbour model; instead, they simply cite Shapiro*[53] as authority. The problem is that Shapiro's book does not seem to provide much authority for the claims the BP makes. He does not seem to propose a normative ideal court procedure to which all courts should approximate but, rather, suggests what the basic logic of the institution of a court is and how that basic logic has given way to modifications and additions in different countries and regimes. In short, Shapiro's 'ideal' looks not like an ideal in the sense of 'the best court' but an ideal in the sense of the 'basic idea of a court'.*[54] Moreover, as argued above, procedures could be viewed as efforts to prevent Shapiro's triad from breaking down; and, in that sense, the prescriptions of the BP and the Report as to the number of procedures and the lack of necessity of active participation of the defendant are directly at odds with what Shapiro describes as the logic of consent.*[55] The example at the beginning of this section would not elicit D's consent to the first decision and thus would fail as a triad.

Additionally, comparing the reasoning of the BP and the Reports reveals a peculiar shift. The BP identifies 'formalism' as the cause of 'bad quality' courts; with legal origins as the root of formalism. That was still the argument in the 2004 report, with 'procedural complexity' aggregating all formalism indicators except number of procedures. But since 2005 that indicator has been absent without trace or explanation. The only measured 'cause' of the 'quality' of courts in the subsequent reports is (apart from cost) the number of procedures. But the number of procedures is not what the BP pointed to as 'cause'. So even if we considered the BP to be correct, it still would not provide support for the claim that fewer procedures is associated with 'better justice'.

In sum, the court model the Reports promote has yet to be properly argued and justified.

3.3. Having fewer procedures does not mean having faster trials

Additionally, although the 2004 report claims that "fewer procedures are associated with […] reduced time"*[56], this claim does not seem to be supported by the data in that report or the subsequent ones. The countries ranking in the top and bottom 10 positions as regards number of procedures seldom match the corresponding top and bottom 10 for average length of proceedings. The 2004 report shows only Tunisia among the top 10 for both variables and only Angola among the bottom 10 for both measures. In the 2008 and 2009 reports, only Singapore and Hong Kong are among the 10 countries with fewest procedures and among the 10 with shortest trials, while only East Timor is among the bottom 10 in both counts. Irish processes, with 20 procedures, are 515 days long; Estonian ones are shorter (at 425 days) even though they involve 36 procedures. Sierra Leone

[48] BP, p. 4.

[49] For the lawyers answering the questionnaires. *Ibid*.

[50] *Ibid*., p. 17. From that it could be inferred that the number of procedures and the cost are both independent variables and not "outcome" measures.

[51] *Ibid*., pp. 4–6.

[52] *Ibid*., pp. 12–17.

[53] M. Shapiro (Note 33).

[54] *Ibid*., pp. 1–2, 36–37.

[55] *Ibid*., p. 2.

[56] Report 2004, p. 46.

has twice the Irish procedure count but the same process length, and in Brunei the process takes a very similar 540 days but has the highest number of procedures: 58. A simple regression between the two variables, using the data from the *Doing Business* site (calculated with the 2009 report's methodology)[*57], confirms that the correlation between these variables is weak and procedure number explains less than 10% of the trial length. No correlations ever reach above 0.307, with R^2 never above 0.094, weakening any claims that having fewer procedures in general means having quicker trials.[*58]

In sum, the contention that the use of fewer procedures to enforce the hypothetical contract is associated with fairer and faster courts needs further argumentation and proof if it is to be convincing. If procedure number is not an independent 'outcome' measure of court quality[*59], the Reports' advocacy for trials with few steps seems misplaced.[*60]

4. Forgetting economics: What appears to be cheap justice might be actually costly

Even if one were to concede that a fast and simple judicial process is somehow 'ideal' or desirable from the individual plaintiff's standpoint, the Reports proposed process still may not be the most efficient from the point of view of society as a whole. Another element of the contract enforcement ranking is the enforcement cost for plaintiffs, computed such that a jurisdiction scores better the cheaper it is to go to court and enforce the hypothetical contract.[*61] The underlying assumption is that justice should be cheap and within the reach of everybody, rich or poor, regardless of the amount the dispute concerns, to promote entrepreneurs resolving their disputes in court and avoid informal justice. For the Reports,

> Courts have four important functions. They encourage new business relationships, because partners do not fear being cheated. They generate confidence in more complex business transactions by clarifying threat points in the contract and enforcing such threats in the event of default. They enable more sophisticated goods and services to be rendered by encouraging asset-specific investments in their production. And they serve a social objective by limiting injustice and securing social peace. Without courts, commercial disputes often end up in feuds, to the detriment of everyone involved.
>
> Companies that have little or no access to courts must rely on other mechanisms, both formal and informal — such as trade associations, social networks, credit bureaus, and private information channels — to decide with whom to do business. Companies may also adopt conservative business practices and deal only with repeat customers. Transactions are then structured to forestall disputes. Whatever alternative is chosen, economic and social value may be lost.[*62]

In other words, if it is cheap to go to court for an entrepreneur when a new customer defaults, she does not need to be too careful in choosing customers and making client-specific investments, expanding her potential market, and improving her capacity to compete. The wide availability of low-cost contract enforcement would promote entrepreneurship and thus be development-enhancing.

This 'entrepreneur-empowering' story looks plausible. However, little thought has been given to the efficiency of a cheap judicial contract enforcement scheme. It may well be the case that cheap enforcement for a person as an entrepreneur may mean costly government spending and heavy taxes for her as a taxpayer (or reallocation of funds from other programmes, such as those for hospitals and schools), perhaps an unreasonable high price to pay.

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[57] The methodology has changed over the years, *cf.* Report 2009, pp. viii, 76–77 with Report 2004, pp. 109–110.

[58] The correlation for 2004 is 0.249, with an R^2 of 0.062; the correlation for 2005 is 0.215, with an R^2 of 0.046. The correlation for 2006 is 0.303, with an R^2 of 0.092; for 2007 it is 0.307 with R^2 of 0.094. The correlation for 2008 is 0.291 with R^2 of 0.084; while for 2009 the correlation is 0.301 and the R^2 is 0.09. The graphs and the correlations are available by request with the author.

[59] Apparently for the authors it is not, see above Note 51.

[60] See AHC (Note 6), pp. 71–72.

[61] See, e.g., Report 2004, p. 46; Report 2008, pp. 50, 82.

[62] Report 2004, p. 41. See also H. de Soto (Note 9).

4.1. The bill that the plaintiff picks up is not the whole story

The data notes reveal, interestingly, that the enforcement cost indicator only comprises the cost incurred by the plaintiff as court, attorneys' and enforcement fees.*[63] However, the cost of the court system may be much greater, and such costs are not captured by the index. Perhaps in some cases the judicial branch is exclusively funded by explicit fees to the users, but that may not be the case always: the fixed costs of the judicial branch (such as salaries and rental costs) may be borne by the government budget from taxes on businesses and consumers. Moreover, following the Reports' logic, an ideal commercial court could be one that enforces all contracts for free, coupled with a 100% government subsidy of attorney's fees, in which case the whole cost would have to be borne by the taxpayers. But if two systems had identical procedures and equal total cost, only differing in that one is 100% funded by fees and the other 100% funded by taxes, it would be odd to say that the second is 'less costly' and therefore preferable from society's point of view. Furthermore, there could be specific taxes paid at the time of signing a contract that make subsequent enforcement in court less expensive, faster, or even possible. In our example, the second system may be funded by a stamp tax paid upon signing a contract as a condition for its validity, making all contracts for which the tax was not paid effectively unenforceable. Such a system would be 'free' for the Reports yet clearly increases the cost for the plaintiff.*[64]

That the state bears part of the judicial burden might help to explain why richer countries (with presumably bigger budgets) have faster and 'cheaper' (in the Reports' sense) courts, assuming, for example, that the judiciary's main costs are fixed, such as salaries and costs of facilities. On the other hand, it could be argued that computing the cost as a percentage of the per capita income*[65] already incorporates the increased resources available in rich countries. Again, countries with similar per capita income might have different judicial expenditure; countries with a similar judicial budget could use such resources with different degrees of efficiency. In any case, the Reports fail to take into account both a part of the cost and how efficiently it is incurred.*[66]

More importantly, focusing on how affordable courts are for plaintiffs and simplistically stating that the more affordable the better overlooks the simple economic logic of demand and supply of goods and efficient allocation of resources. The lower the price of an item, the greater the quantity demanded. But because the production of that item is not cost-free and resources are not infinite, producing too many of those items would lead to waste. Therefore, there is a point at which the marginal cost of producing an item is equal to the price the demand side is willing to pay for the last unit offered, such that the quantity offered is equal to the quantity demanded, and the price paid is equal to the marginal cost. Producing more or less than this would be wasteful.*[67]

This is no different for contract enforcement services. If going to court is too cheap, there will be just too many lawsuits.*[68] The service is not costless; it needs judges, books, computers, courtrooms, clerks, lawyers, sheriffs, expert witnesses, juror compensation, and so forth. As in any enterprise, some costs will be fixed and some will depend on how many lawsuits are brought. There will then be a marginal cost of the enforcement service: the cost of having one more lawsuit. In the end, somebody will have to pay the bill. If the only one paying is the government and the cost for the plaintiff is zero, then she will file a suit even if the expected benefit for her is very small, regardless of the litigation cost for society. In a world of limited resources, subsidised demand may lead to queues, inefficient allocation, delay, and waste. A free court would be ideal for the Reports' cost indicator but would be a nightmare of a court system, with a huge budget that is never enough and full of unresolved cases that will take years to conclude.

Conversely, if the fees are too high, there will be too few lawsuits.*[69] Lawsuits have 'positive externalities', benefits that are perceived not by the parties but by society. For instance, the decision in a case between two persons may clarify a point of law that prevents (or promotes) the filing of similar cases between other people. Likewise, the likelihood that a lawsuit will be successful against a person if she breaches a contract may affect her decision to breach it; that makes publicising the outcome of breach of contract lawsuits important to deter (or positively sanction) contract breaching.*[70] The Reports' account of the courts' development 'functions' quoted above could be construed as a story of positive externalities. Therefore, it may be the case that judicial enforcement of contract should be subsidised to promote development. Such considerations, however, should

[63] See Report 2004, p. 109; Report 2009, p. 77 and in general the Survey on Contract Enforcement available at http://www.doingbusiness.org/Documents/DBSurvey/FullSurveysDB08/Enforcing_Contracts_Survey2008.pdf (28.07.2009).

[64] For the reciprocal problem of measuring only *ex ante* costs regarding the "Starting a Business" section of the Reports, see B. Arruñada (Note 6), pp. 12–14.

[65] As from the Report 2005, the claimed amount of the hypothetical is defined as 200% of income per capita, and the cost is quoted as percentage of the claim. See Report 2007, p. 72, Report 2009, p. 77, and the Survey (Note 63).

[66] See B. Arruñada (Note 6), pp. 14–18.

[67] See, e.g., S. Shavell. Economic Analysis of Litigation and the Legal Process. – Harvard Law School John M. Olin Center for Law, Economics and Business, Dicussion Paper No. 404 (13.02.2003). Available at http://lsr.nellco.org/harvard/olin/papers/404 (28.07.2009).

[68] *Ibid*.

[69] *Ibid*.

[70] *Ibid*.

not be translated into a simplistic grading scale in which 'the cheaper the better'; on the contrary, all cost and benefits should be taken into account if we want to accurately measure court 'efficiency'.

4.2. The peculiar relationship between cost and chances of settlement

Besides overlooking the cost borne by the state, the Reports fail to consider the courts' efficiency in generating the usual instruments by which disputes are solved: settlements. As the famous Hollywood quote puts it, "the whole idea of lawsuits is to settle"[*71], and some argue that fewer than 10% of the civil disputes filed in the US actually require a trial to be concluded.[*72] Consequently, the Reports fail to consider more than 30 years of scholarly research in the economics of procedural law. Ever since the seminal work of Landes[*73], economic analysis has shown that, for an equal cost of error or quality of judicial decision, a more expensive court proceeding is preferable to a less expensive one because it promotes settlements and discourages frivolous suits, which in turn saves on costs, prevents queues, and promotes efficiency.[*74]

How is that so? Procedural rules have the function of regulating the application of substantive law.[*75] Their use generates costs, not only 'administration' costs (such as courts, lawyers, and time) but also the cost of the court deciding 'wrongly' (i.e., contrary to what the substantive law prescribes) and consequently affecting incentives and behaviour in society, what Cooter & Ulen call the 'error' cost.[*76] If we are concerned about court efficiency, we should assess whether the particular procedural law and court system concerned minimises the sum of administrative and error cost. If for a dispute an out-of-court settlement could imitate the outcome of the court decision (i.e., the trial cost of error is the same as the settlement cost of error) and the cost of reaching a settlement is lower than the administrative cost of trial, then it is socially preferable that the dispute be settled out of court to minimise administrative costs. In such a case, the only costs remaining would be the error costs. Arguably, these costs could be minimised by requiring more information from the parties (assuming that the more and better information judges have, the less the chance of error), providing for closer scrutiny of the evidence and its handling, maximising the chances for the parties to interact under the court's auspices (providing opportunities to negotiate a settlement in an 'impartial' environment), requiring extensive and sophisticated legal argumentation from the parties' counsel (that may better guide the judge in the decision), having professional judges available who understand such arguments, and allowing appeals (which are especially designed to correct mistakes).[*77] That is the opposite of what the Reports prescribe.

Furthermore, from a rational choice standpoint, an efficient judicial procedure system is one that gives incentives to the parties to minimise costs and thus promotes settlements, discourages frivolous suits[*78], and minimises the risk of obtaining wrong judgments. What kind of procedure delivers these outcomes?

A settlement is possible when the expected value of the trial for each party (the judgment's expected present value net of its expected cost) is lower than the expected value of the settlement net of its cost. In other words, if the plaintiff is better off going to trial than accepting the defendant's offer for settlement, then she will not co-operate; she will go to trial to get more. If the defendant would lose less by letting the trial continue than the price the plaintiff is demanding to settle, then he will not co-operate and would refuse to settle. Since a settlement could achieve the same outcome as the trial, the only thing the parties would be bargaining for would be the trial's expected cost — that is, what the parties could save and divide between them. To put it differently, the savings in transaction costs create a co-operative surplus, which is equal to the joint costs of litigating net of the costs of settlement. Therefore, the higher the expected cost of trial, the lower the non-co-operative reserve price, the greater the co-operative surplus and the wider the room for bargaining to achieve a settlement. Conversely, if the parties have different expectations as to the outcome of the trial (value times probability) and they are both too optimistic, the non-co-operative reserve price would rise, reducing the surplus and with it the chances of settlement. Then, the higher the accuracy with which the parties could predict the judgment, the higher the chances of reaching an agreement.[*79]

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[71] The quote comes from Jan Schlichtmann, the character played by John Travolta in the motion picture A Civil Action (Touchstone Pictures, 1998). Available at http://www.imdb.com/title/tt0120633/ (28.07.2009).

[72] R. Cooter, T. Ulen. Law and Economics. Addison-Wesley 2004, p. 414. See also S. Shavell (Note 69); K. E. Davis, M. B. Kruse (Note 5), p. 1107.

[73] W. M. Landes. An Economic Analysis of the Courts. – Journal of Law & Economics 1971 (14), pp. 98–103.

[74] *Ibid*.; R. Cooter, T. Ulen (Note 72), pp. 391, 398 and 413–427; S. Shavell (Note 69), and literature mentioned there.

[75] R. Cooter, T. Ulen (Note 72), p. 391.

[76] *Ibid*.

[77] *Ibid*., pp. 391, 413 and 435–436.

[78] *Ibid*.

[79] *Ibid*., pp. 414–417.

Similarly, if the expected cost of suing is too low for the plaintiff but too high for the defendant, the former could file a suit even knowing that the expected net value of the trial judgment is low or negative (a frivolous 'nuisance' suit) and ask the defendant to buy her off under the threat of continuing the suit, thus causing the defendant to incur great losses. In such cases, again, the costlier the trial is for the party who would eventually lose (in this case, the plaintiff), via either a high bill or a 'loser pays all' rule for allocating trial costs, the less the incentive to file nuisance suits.[*80]

4.3. The efficiency of having appeals

Finally, appeals are an instrument to reduce the error cost at low administrative cost, thus promoting social efficiency.[*81] To consider a hypothetical situation similar to the one Cooter & Ulen use in their book[*82], imagine that in a dispute a judge, at an administrative cost of € 1000, has a 40% probability of deciding wrongly, generating € 25,000 of error cost. Then, the expected social cost of the judgment without appeal is € 11,000. Imagine now that a court of appeals is created, that parties file an appeal when the trial judge makes a mistake, and that the appeal court has the same 40% error probability as the trial judge and an administrative cost of € 1000. In such a case, the expected social cost of the dispute settlement would be reduced to € 5400 because the reduction in the cost of error would more than compensate for the higher administrative costs.[*83] Of course, this is just a numerical example and different numbers yield different results. However, it shows that appeals are not generally 'inefficient', as the Reports suggest they are. Quite the contrary, under conservative assumptions, potential efficiency gains are apparent once the error cost is considered. Moreover, the appeal stage is also subject to the strategic interaction for a settlement, which will discourage filing appeals and encourage settlements if appealing is costly and the parties know the expected value of the appellate decision. In fact, few cases would reach appeal, and the plaintiff would consider the appeal's expected value at the beginning, when deciding whether to sue or not.[*84] Therefore, appeals may be helpful tools for preventing dispute settlement error cost, rendering the court system more efficient and not less. This is the opposite of what the Reports suggest.

In sum, the economic analysis of procedural law yields findings in direct contradiction with what the Reports depict as desirable courts. The costlier the trial, the greater the chance of a settlement, and thus the lower the social cost of resolving the dispute. Moreover, if trial fees are too low they may generate a non-optimal number of lawsuits. Additionally, the involvement of professionals and the existence of appeals may prevent or reduce the generation of error cost, making a system with professionals and appeals, *ceteris paribus*, more efficient than a system without lawyers or appeals. In sum, the Reports' 'cheap' justice for the plaintiff is 'costly' for society.

Nevertheless, room might remain for the Reports to do some good. Since settlements' likelihood depends on the parties' perceptions, the information the Reports provide on the actual costs and length of trials could help parties with cases identical to the hypothetical to calculate better the cost of trial and the value of the surplus to be divided.

5. Hamlet's dread: The disruptive effects of the law's delay

Hamlet's first lines in Act III of that Shakespeare play are among the most famous in world literature. A few words after "To be or not to be", Hamlet mentions "the law's delay" as one of life's tragedies.[*85] Centuries later, the delay in enforcing contracts around the world is still significant, as the Reports, for instance, point out.[*86] Although court delay does not obviously relate to development directly[*87], it has been argued that strong protection of property rights is a necessary condition for development[*88], and having an effective enforcement system addressing property rights violations thus might be development-enhancing.

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80 *Ibid*., pp. 418–419. But see S. Shavell (Note 67) (arguing that fee-shifting may worsen the problem of excessive suit).

81 *Ibid*., p. 435.

82 *Ibid*.

83 New Exp.Soc.Cost = Trial.Adm.Cost + Prob.Trial Mistake x [App.Adm.Cost + (Prob.App. Mistake x Error Cost)] and thus: New Exp.Soc. Cost = € 1000 + 0.4 x [€ 1000 + (0.4 x € 25,000)] = € 5400.

84 *Ibid*., pp. 392–398.

85 After "Th' oppressor's wrong, the proud man's contumely" and "the pangs of disprized love", Shakespeare. Hamlet, Prince of Denmark. Act III, scene I. – W. Shakespeare. The Complete Works. Oxford: Oxford University Press 1988, p. 670, quoted in Report 2004, p. 41.

86 See, e.g., Report 2008, p. 49.

87 See K. E. Davis, M. B. Kruse (Note 5), p. 1109.

88 See, e.g., G. P. O'Driscoll Jr., L. Hoskins. Property Rights, The Key to Economic Development. – Policy Analysis 2003/482, pp. 8–9.

In the context of a legal conflict, the delay to resolve the dispute may disrupt the underlying property rights — and economic efficiency in general — in several ways. Firstly, and fundamentally, property rights that are in dispute cannot be bought or sold on the market at their usual market value (if they can be sold at all); there is a probability of the seller losing the dispute totally or in part and the right then losing its value or even becoming worthless, determining a risk premium. Every day that passes without the dispute being resolved is one more day in which the affected resources cannot be routed to the most efficient use, one more day of opportunity cost and economic loss.

Secondly, the passage of time allows the evidence backing a legal claim to decay, making it more difficult to gather witnesses (who may forget, become incapacitated, or even die before appearing in court) or necessary documents (which may get lost or damaged), etc. Moreover, delay in resolving a dispute may trigger statutes of limitation of related rights, affecting their value. As the probability of a lengthy process grows, the probability of having a worse case to put to trial also grows, and the value of the legal claim and the underlying right diminishes.

Thirdly, the very interest of the parties in the dispute may shift or disappear with the passage of time. Plaintiffs and defendants may go out of business; corporate parties may be sold, taken over, dissolved or their management be changed or retire; and parties that are natural persons may die or grow tired of going to court. Furthermore, some disputes may be very time-sensitive and the value of pursuing them may change dramatically, depending on whether they could be resolved rapidly or not. For instance, a dispute over a corporate merger that is not resolved quickly may affect the share price of the companies involved, reduce or destroy the profit the parties expect from the deal, and remove the incentive to make it, eliminating the efficiency gains that may result from the merger.

Fourthly, and related to the first issue, time is money and a euro today is worth more than a euro tomorrow. If the successful plaintiff is not granted interest and inflation adjustment on the amount claimed for the time of the enforcement process at the end of it, or the interest rate is lower than the (inflation-adjusted) market rate, every day of delay in enforcement implies economic loss for the plaintiff. Conversely, the defendant may have a financial benefit from the delay, as she does not have to pay unless and until the court's decision has been issued, upheld (if appealed), and executed.

Finally, parties in court systems subject to the above-mentioned factors may be well aware of them and adjust their behaviour strategically to manipulate the delay to their advantage. For a defendant, for instance, it would often be financially and economically efficient to let the process continue as long as possible because the likelihood of an adverse court decision and its expected amount diminish the later the decision is issued. Conversely, known court delay may also strategically benefit a plaintiff, who may file a frivolous claim against a corporate merger proposal and take advantage of the delay to 'kill' the deal. Likewise, a person suspecting she will be sued may engage in perverse forum shopping, precluding the claim against her by filing a counterclaim in a court that lacks jurisdiction but will take too long to issue a decision declining jurisdiction, forcing the appropriate court to wait and improving her negotiating position *vis à vis* the suing party.

In these contexts, settlements that prevent trials and save on total social cost are less likely. If the delay in the process asymmetrically benefits defendants, if the cost of postponing the dispute resolution (including the present value of the eventual judgment) is lower for her than the cost of settlement, she will have an incentive to try to make the litigation as slow and difficult as possible — filing obstructive appeals, introducing extraneous witnesses, contesting every procedural issue, contesting the court's jurisdiction, etc. — instead of trying to settle, investing effort, time, and money that may have better uses. Therefore, efficiency would require mechanisms to prevent this kind of abuse. Note that the abuse comes not from the mere existence of appeals or other procedural hurdles but from the economic and financial effect the delay has on the plaintiff's claim and the underlying property right. In other words, because of glitches in the system, time favours one party over the other, and those problems should be solved just enough for the incentives to be again in favour of settling.

Likewise, it may be the case that settlement as an institution cannot perform the cost- and time-saving function. In some jurisdictions, for instance, settlements may be too expensive or difficult to complete, or they may not even be legally possible. As mentioned above, if the cost of settlement for one party is higher than the cost of trial for him, it will be rational for him to go to trial instead of settle.

Furthermore, even if settlements are not too expensive, they may not be helpful in certain contexts. A settlement in a case may save the parties going to trial but may need another lengthy process to be actually enforced and let the plaintiff collect the amount agreed upon. Many settlements feature the defendant paying a lump sum to the plaintiff and the plaintiff relinquishing her rights and abandoning the trial, all at the same time; the court is notified after the fact that the dispute has been settled and the trial is over. In many situations, however, it would be necessary or convenient that the defendant promise to do additional things (such as refrain from doing something), the parties may have reached an agreement about the legal rights but the amount to be paid is still undecided, or the settlement might be void (unless and) until the judge endorses it. In such cases, some elements would remain pending and there will be a chance of a settlement breach, or, put more plainly, the plaintiff will still have to do a lot to collect her money. Therefore, if a settlement is not equivalent to a court judgment and has to undergo a long process to be enforced, the trial time and cost saved may not

be substantial.*[89] Imagine, for example, a jurisdiction where a court in average trials takes 100 days to issue a decision but it takes a further 100 days for the successful plaintiff to enforce the judgment and finally collect. If the parties reach a settlement that saves half of the first 100 days (for instance, agreeing on the allocation associated with negligence but contesting the damages), or the settlement has the same status as a normal contract subject to breach (in which case, a trial of, let us say, 50 days will ensue), or if the settlement, even if equivalent to the judgment, requires completion of the post-trial execution process, the time and cost saved by settling will account for only a fraction of the total time and cost involved.

Taking into account the considerations stated above, it may be possible to reform the indicators to more accurately measure the effect of court delay and efficiency. Although designing a statistical indicator is beyond the scope of this paper, three areas may be explored to reform the Reports. First, most objections made above to the number of procedures indicator focused on the trial part, wherein the legal rights are determined and fairness has to be attended to particularly. By contrast, the post-judgment part of the process might prompt fewer fairness concerns, as in that stage the legal entitlements have already been defined. Moreover, settlements tend to be better in saving on trials than they are in saving on judgment enforcement (to which they may be subject just as court decisions are). Therefore, the indicator may still play a useful role if its emphasis were to shift to assessing judgment enforcement and enforcement asymmetries between settlements and court decisions. The Reports, although retaining the opacity in how they reach their conclusions, have started to raise these issues by changing their recommendations.*[90] However, they have yet to shed the mechanical assumption that a system with fewer procedures is automatically better.

Second, settlements are costly and the cost differential for each of the parties between settling out of court and going to trial shapes the incentives that guide their behaviour. If the enforcement cost indicator were to focus not only on court costs but also on the cost of alternative dispute resolution mechanisms and their relative enforcement value, or on the availability of financing for plaintiffs to go to court, without simplistically assuming that 'cheaper is better', it could yield a wealth of useful information.

Third, how different jurisdictions deal with the disruptive effect of court delay may be something useful to measure. Therefore, it might be worth knowing how easy obtaining a preliminary injunction is in each jurisdiction, whether there is a gap between the interest rate granted to the plaintiff in judgments and the market rate (or whether adjustment of the claim to offset inflation is allowed), whether there are adequate measures to protect the evidence and the defendant's solvency, and so forth.

6. Conclusions

The first report was entitled *Understanding Regulation*. 'Understanding' implies a humble enterprise, one of observing, theorising, testing and validating. With later issues, the statements of the *Doing Business* project unfortunately became bolder and their sweeping conclusions more assertive. In six short years, the focus shifted from the search for knowledge to a push for reform, and in that process the concern for backing the indicators with solid theory was left behind somewhat. Thus, the Reports continue measuring legal institutions according to a preconceived supposed ideal, the neighbours' dispute settlement, whose basis in reasoning is not solid. The measures that are utilised on such a basis are presented as bold facts, but important shortcomings lie under the surface. From these shattered measures, the Reports go further then, to issue policy recommendations, which have a great chance of being flawed and harmful.

Even if we were to concede that fewer procedures and less formalism lead to better courts, the Reports would still not be saved. For more than 30 years now, the economic analysis of procedural law has shown that the most efficient procedural rules (in the sense of reducing the costs for society as a whole) are the ones that establish a court system that elicits the optimal number of lawsuits, minimises the probability and cost of issuing a wrong judgment, and also minimises the administrative cost of resolving the disputes — by promoting out-of-court settlements. Such a system requires a procedure completely different from, and practically the antithesis to, the Reports' ideal; that is, the costlier and the more legally sophisticated, the better.

However, court delay may be a significant problem, as the passage of time affects the value of claims and the underlying property rights and also may hamper a court system's ability to reduce the administrative and error cost of disputes. If the Reports' measures were to shift their focus back to 'understanding' and explore how court systems around the world cope with the disruptive effect of delay and shape litigant behaviour, they could contribute greatly to development and justice.

The Reports have the aim of motivating reforms through country benchmarking, informing the design of reforms, enriching international initiatives on development effectiveness, and informing theory. The 'Enforcing Contracts' chapter has certainly missed the target.

[89] I am leaving aside the problem of the proficiency of the parties in developing and drafting the settlements.

[90] See, e.g., Report 2008, p. 52 (suggests as positive reform making the enforcement of judgments faster and cheaper).

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Terrorism as a Threat to Peace

Terrorism is a phenomenon that has been known to mankind for more than two millennia, but over this long period of time, no-one has succeeded in defining terrorism in a manner that is universally acceptable and encompasses all essential elements.[*1] Therefore, the frequently utilised word 'terrorism' does not refer to a well-defined and clearly identified set of factual events or to a widely accepted legal doctrine.

The lack of a generic definition cannot invalidate the fact that for several decades, terrorism has been a serious security problem demanding both domestic and international countermeasures. The latter are especially important, as the leading terrorist factions operate internationally in order to gain wider exposure and, as a result, more success, but also to find supporters — namely, states that sympathise with their political objectives. The relevant international countermeasures are naturally associated with the Security Council, to whom the states have conferred primary responsibility for the maintenance of international peace and security.[*2] The Security Council, a constantly attentive executive organ, has considerable means, of a broad range, at its disposal for that purpose, starting with diplomatic or economic sanctions and ending with military measures.[*3] But before the Security Council can utilise these means, it must first determine whether terrorism falls within its competence. For example, does terrorism constitute a threat to peace that justifies its response?

The present article examines this matter from three perspectives. Firstly, why is the determination of the existence and nature of this situation important? Secondly, what is the nature of a threat to peace in general? Thirdly, can terrorism, generally or specifically, constitute a threat to peace? These questions are discussed in the light of the collective security system envisaged in the United Nations Charter and administered by the Security Council.

1. Determination of the situation

The Security Council is a guardian of international peace and security. Although it is composed of only 15 member states[*4], the Security Council acts on behalf of all UN member states when carrying out its duties in connection with maintenance of international peace and security.[*5] Despite being a political organ whose decisions are, and also have every right to be, linked to political motivations not necessarily congruent with

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1 The search for a legal definition of terrorism resembles the quest for the Holy Grail as periodically eager souls set out, full of purpose, energy and self-confidence, to succeed where so many others before have tried and failed. G. Levitt. Is 'Terrorism' Worth Defining? – Ohio Northern University Law Review 1986 (13), p. 97.

2 United Nations Charter, Article 24 (1).

3 *Ibid*., Articles 41–42.

4 Altogether there are 192 member states in the United Nations.

5 United Nations Charter, Article 24 (1).

legal considerations, the Security Council's activity has legal consequences. It is the one organ of the United Nations that can impose legally binding obligations and non-military or military sanctions on the member states.[*6] Such means are called (collective) enforcement measures if adopted under the charter's Chapter VII in order to maintain or restore international peace and security.

1.1. The importance of determination

The Security Council cannot avail itself of enforcement measures at any given moment; it is supposed to follow certain procedure to establish that the conditions for the use of such measures are satisfied. The primary condition is the existence of a threat to peace, a breach of the peace, or an act of aggression.[*7] Through the construction of the sentence in Chapter VII[*8], the determination that a relevant situation has arisen is clearly singled out as a condition for the exercise of powers described in said chapter.[*9] So, once a positive determination is made, the door is automatically opened to enforcement measures of a non-military or military nature.[*10] Nevertheless, this is a procedural rather than substantive limitation, basically demanding that the Security Council as a collective organ reach consensus before imposing enforcement measures. Yet such a limitation may equally help to ensure consistency in the Security Council's practice if the determination is not made on the basis of political expediency but after a genuine assessment of the situation and comparison of the latter with other, similar situations.

The practice demonstrates that the Security Council has not always determined that a threat to peace, a breach of the peace, or an act of aggression existed before it imposed sanctions. The situation in Kosovo had deteriorated to such a point by March 1998 that the Security Council decided to impose a mandatory arms embargo on the Federal Republic of Yugoslavia, including Kosovo, without first determining the situation.[*11] For the first time, the Security Council dispensed with declaring that the application of its powers under Chapter VII was based on a determination that there was a threat to peace.[*12] Later the United Kingdom insisted that such determination was implied[*13], but the Russian Federation declared, while voting in favour, that the situation under consideration did not constitute a threat to peace.[*14] If a majority had shared the latter position, the resolution in question would have been an *ultra vires* act.

Two more aspects should be taken into account. Firstly, there is no need to expressly refer to Article 39 when making the determination. Indeed, in a significant number of resolutions, the Security Council has established the threat to peace without a proper reference and therefore leaving the legal basis in doubt.[*15] Secondly, a determination is not necessary in cases of resolutions following on from previous resolutions that did contain a determination. The latter are cited in the preambles to the former; therefore, the necessary link and legal basis are established.[*16] In terms of time, the validity of a determination does not expire[*17]; that is, it remains valid until the Security Council decides otherwise, even if there is a change in the facts on the ground. While the keeping in place of enforcement measures inevitably implies that the threat continues to exist[*18], one cannot generally infer from their suspension or termination that there has been a reduction in threat[*19], because such a

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6 *Ibid*., Article 25. The other organs may legally bind the member states only in certain administrative matters within the United Nations, for example, the General Assembly adopts the budget and determines the amount every member states has to contribute.

7 United Nations Charter, Article 39.

8 "The Security Council **shall determine** the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security." (emphasis added)

9 J. Frowein, N. Krisch. Article 39. – B. Simma (ed.). The Charter of the United Nations: A Commentary. 2nd ed. Vol. I. Oxford University Press 2002, p. 726; T. D. Gill. Legal and Some Political Limitations on the Power of the UN Security Council to Exercise Its Enforcement Powers under Chapter VII of the Charter. – Netherlands Yearbook of International Law 1995 (26), p. 39; but see also B. Conforti. The Law and Practice of the United Nations. 3rd ed. Leiden: Martinus Nijhoff Publishers 2005, p. 172.

10 I. Österdahl. Threat to the Peace: The Interpretation by the Security Council of Article 39 of the UN Charter. Uppsala: Iustus 1998, p. 28.

11 SC Res. 1160, 31 March 1998.

12 See also G. Nolte. The Limits of the Security Council's and Its Functions in the International Legal System: Some Reflections. – M. Byers (ed.). The Role of International Law in International Politics. Oxford University Press 2001, p. 316.

13 UN Doc. S/PV.3868, paragraph 12.

14 *Ibid*., paragraph 10.

15 See, for example, SC Res. 713, 25 September 1991; SC Res. 733, 23 January 1992; SC Res. 748, 31 March 1992; SC Res. 757, 30 May 1992; SC Res. 788, 19 November 1992; SC Res. 807, 19 February 1993; SC Res. 827, 25 May 1993; SC Res. 841, 16 June 1993.

16 See, for example, SC Res. 687, 3 April 1991; SC Res. 724, 15 December 1991; SC Res. 771, 13 August 1992; SC Res. 819, 16 April 1993; SC Res. 833, 27 May 1993; SC Res. 844, 16 June 1993.

17 See K. Wellens. The UN Security Council and New Threats to the Peace: Back to the Future. – Journal of Conflict and Security Law 2003 (8), pp. 27–28.

18 SC Res. 1439, 18 October 2002.

19 SC Res. 1022, 22 November 1995.

step may well be influenced by considerations of a humanitarian nature or by the wish to further encourage a peace process.[*20] In other cases, the removal of an item from the Security Council's agenda or the termination of enforcement measures as their objective has been achieved leaves no doubt that, at least temporarily, the threat to peace has ceased to exist.[*21]

1.2. Security Council discretion

The discretionary power of the Security Council is very broad under Article 39, in terms of decision of both **when** to act and **how** to act. At the San Francisco Conference when the United Nations Charter was adopted, various proposals were made that the regulations should be more detailed with regard to the conditions for the applicability of Chapter VII, but, in the end, the present wording was preferred.[*22] It was expressly stated that the lack of more specific criteria was necessary if the Security Council were to be allowed to decide how to act on a case by case basis.[*23] Therefore, the International Criminal Tribunal for the Former Yugoslavia has aptly stated that "it is clear [...] that the Security Council plays a pivotal role and exercises a very wide discretion".[*24] However, there are some who adhere to a view that discretion is not unlimited here.[*25] The legal source of potential limitations remains unclear.

A determination is essentially a judgment based on factual findings and the weighing of political considerations that cannot be measured by legal criteria. The latter usually prevail. As a result, the decisions made in the interest of international peace and security are almost exclusively taken in accordance with (national-level) political considerations.[*26] The political nature of Article 39 is further emphasised by the fact that the permanent members[*27] of the Security Council have a power of veto. However, as a non-judicial organ, the Security Council is not required to give reasons for its decisions.[*28] Nonetheless, once it has made a determination, this is conclusive and all member states must accept the Security Council's verdict, even if they do not share its opinion.[*29]

The Security Council is not obliged to make a determination and subsequently take any enforcement measures.[*30] Both the drafting history of the United Nations Charter and the practice of the Security Council indicate that the council does not have to respond to all situations that would seem to call for exercise of its competencies but, rather, operates selectively and with discretion.[*31]

2. The nature of threat to peace

'Threat to peace' is the most flexible and dynamic of the three terms in Article 39, and it is here that the Security Council enjoys the widest discretion. It is equally true that within this discretion lies the possibility of subjective political judgment. Hans Kelsen has expressed concern that the "threat to peace [...] allow[s] a highly subjective interpretation"[*32], but at the same time claimed that "it is completely within the discretion of the Security Council as to what constitutes a threat to the peace".[*33] Michael Akehurst worded this position perhaps even more bluntly by stating that "a threat to the peace is whatever the Security Council says is a threat to the peace".[*34] This is the accepted reality nowadays. Obviously, here one should distinguish this

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20 SC Res. 1432, 15 August 2002.

21 SC Res. 919, 26 May 1994; SC Res. 1367, 10 September 2001.

22 G. Nolte (Note 12), p. 172.

23 12 UNCIO 505.

24 ICTY, Judgment of the Appeals Chamber (Jurisdiction), 2 October 1995, *Prosecutor* v. *Duško Tadić*, Case No. IT-95-I-AR-72, paragraph 28.

25 See E. de Wet. The Chapter VII Powers of the United Nations Security Council. Oxford: Hart Publishing 2004, pp. 134–144.

26 See, for example, L. M. Goodrich, E. Hambro, A. P. Simons. The Charter of the United Nations: Commentary and Documents. 3rd ed. Columbia University Press 1969, p. 291; D. Bowett. The Impact of Security Council Decisions on Dispute Settlement Procedures. – European Journal of International Law 1994 (5), p. 94.

27 France, People's Republic of China, Russia, United Kingdom and United States.

28 J. E. S. Fawcett. Security Council Resolutions on Rhodesia. – British Year Book of International Law 1965–1966 (41), pp. 116–117.

29 Y. Dinstein. War, Aggression and Self-Defence. 4th ed. Cambridge University Press 2005, p. 285.

30 J. Frowein, N. Krisch (Note 9), p. 719; H. Kelsen. Collective Security and Collective Self-Defense under the Charter of the United Nations. – American Journal of International Law 1948 (42), pp. 733, 737.

31 See I. Österdahl (Note 10), pp. 103–105.

32 H. Kelsen (Note 30), p. 737.

33 *Ibid*., p. 727.

34 M. Akehurst. A Modern Introduction to International Law. 6th ed. London: Allen & Unwin 1987, p. 219.

discretion from the necessity of sufficient explanation to the states of the characteristics of a specific threat to peace. While this may not be necessary in cases of more traditional threats (preparing an armed attack against a state), it may well be vital if the Security Council is referring to a continuous state of affairs (inability to demonstrate the denunciation of terrorism) or an abstract phenomenon (international terrorism).

The Security Council's determinations involve almost exclusively threats to peace, whereas the existence of breaches of peace and acts of aggression is usually not specifically declared, even if obvious.[*35] In the most typical situations, a threat to peace precedes a breach of the peace or an act of aggression. However, the range of situations potentially giving rise to a threat to peace now reaches far beyond these confines. In the United Nations Charter, there are two somewhat similar terms — namely, "threat to peace" in Article 39 and "threat of force" in Article 2 (4). Although they may look alike, the former is broader than the latter, as a 'threat to peace' is not necessarily linked to a past, present, or future use or threat of armed force.[*36] A threat to peace is not even linked to any breach of international law.[*37] In the words of Yoram Dinstein, "a threat to the peace is not necessarily a state of facts: it can be merely a state of mind; and the mind that counts is that of the [Security] Council".[*38]

In order to understand the threat to peace, it is also important to reflect on the meaning of the word 'peace'. The latter can be defined either negatively (narrowly) or positively (widely). In the negative sense, the word refers to the absence of organised use of armed force; therefore, in order to constitute a threat to peace, the situation in question must have the potential of provoking armed conflict between states in the short or medium turn.[*39] Still, an actual outbreak of armed conflict is not necessary. The term 'threat to peace' is sufficiently flexible and dynamic to include all major forms of serious international misconduct. However, in every case, a threat to peace is a situation that objectively can be characterised as destabilising and potentially explosive.

The positive concept of peace is wider and includes also friendly relations between states, as well as other political, economic, social, and environmental conditions that are needed for a conflict-free international community.[*40] There is some textual support for the positive notion of peace in the United Nations Charter; for example, Article 1's sections 2 and 3 speak about the strengthening of universal peace through the development of friendly relations and co-operation among nations. In a statement of the president of the Security Council, it was equally stated that the "absence of war and military conflicts amongst States does not in itself ensure international peace and security" and that the "non-military sources of instability in the economic, social, humanitarian and ecological fields have become threats to peace and security".[*41]

The Security Council is a reaction-oriented organ and not authorised or equipped to prevent all possible long-term tensions; its functions are normally limited to military conflicts.[*42] The long-term problems need the attention of and integrated measures by the General Assembly as well as the Economic and Social Council, with their sub-organs. Such an approach was also envisaged in the above-mentioned statement, which included comment that "the United Nations membership as a whole, working through the appropriate bodies, needs to give the highest priority to the solution of these matters".

Nevertheless, when examining the Security Council's practice, one notices that very different situations may qualify as a threat to peace. Over the years, the following types of situations have been deemed a threat to international or regional peace: (1) non-international armed conflicts[*43]; (2) serious violations of human rights[*44]; (3) violations of democratic principles[*45]; (4) violations of international humanitarian law[*46]; and (5) proliferation of nuclear, chemical, and biological weapons, as well as their means of delivery.[*47]

As the Security Council is not obliged to respond to all situations that are potentially a threat to peace, it has turned a blind eye even to some clear-cut threats to peace or, perhaps more correctly, to existing breaches of

35 J. Frowein, N. Krisch (Note 9), p. 722.

36 The word "force" in Article 2 (4) refers to "armed force", not to political or economic coercion. See A. Randelzhofer. Article 2 (4). – B. Simma (Note 9), pp. 117–121.

37 R. Kolb. Ius contra bellum: le droit international relatif au maintien de la paix. Bruxelles: Bruylant 2003, p. 68.

38 Y. Dinstein (Note 29), p. 284.

39 B. Martenczuk. The Security Council, the International Court and Judicial Review: What Lessons from Lockerbie? – European Journal of International Law 1999 (10), pp. 543–544.

40 E. de Wet (Note 25), pp. 138–139.

41 UN Doc S/23500 (1992).

42 J. Frowein, N. Krisch (Note 9), p. 720.

43 See, for example, SC Res. 713, 25 September 1991 (Yugoslavia); SC Res. 733, 23 January 1992 (Somalia); SC Res. 788, 19 November 1992 (Liberia); SC Res. 864, 15 September 1993 (Angola).

44 See, for example, SC Res. 217, 20 November 1965 (racist minority regime in Rhodesia); SC Res. 688, 5 April 1991 (Kurdish population in the Northern Iraq).

45 See, for example, SC Res. 841, 16 June 1993 (Haiti); SC Res. 1132, 8 October 1997 (Sierra Leone).

46 See, for example, SC Res. 808, 22 February 1993 (Former Yugoslavia).

47 See, for example, SC Res. 1172, 6 June 1998 (India and Pakistan); SC Res. 1540, 28 April 2004.

peace. The response may also be delayed. In June 1948, the Security Council determined that the situation in Palestine constituted a threat to peace two months after the war had started.[*48]

In terms of enforcement measures, it is worth mentioning that the Security Council may initiate an anticipatory war against a future breach of the peace or act of aggression, regardless of whether it is imminent or, by contrast, remote and uncertain in time. This is a privilege withheld by the United Nations Charter from states acting individually or collectively.[*49]

3. Relationship with terrorism

The Security Council was slow in joining the fight against terrorism.[*50] The first resolution to use the term 'terrorism' was adopted only in December 1985.[*51] However, since the end of the Cold War, the body has gradually become more active in this respect and finally assumed a central role after the events of 11 September 2001. By now, the Security Council has on several occasions designated terrorism as a threat to peace.

3.1. Reaction to different situations

In a number of cases, insufficient action of states against terrorism has been deemed a threat to peace. One such situation was related to Libya's involvement in the Pan Am Flight 103 bombing over Lockerbie in December 1988.[*52] The investigation found that the bomb was planted by two Libyans. The United Kingdom and the United States, and later also France in connection with another bombing, demanded their extradition, but Libya refused. Finally, in January 1992, the Security Council intervened by condemning the destruction of a civilian aircraft and denouncing the failure of Libya to co-operate.[*53] The resolution urged Libya to contribute to the "elimination of international terrorism" and demanded the surrender of the two nationals for trial. Libya ignored the demand, and, in its following resolution[*54], the Security Council determined that "the failure by the Libyan Government to demonstrate by concrete actions its renunciation of terrorism and in particular its continued failure to [extradite the designated persons] constitute a threat to international peace and security". So, under specific circumstances, failure to renounce terrorism and to extradite people may result in a threat to peace. A refusal to extradite particular persons could pose a threat to peace in the sense that it may provoke a unilateral military action (in this case, against Libya by the states mentioned above), but also because these persons might commit another terrorist act. Indeed, the United States had previously bombed Libya for its suspected terrorist activities.[*55] One must keep in mind that the Pan Am Flight 103 bombing was a case of state terrorism[*56] and potentially a violation of the prohibition to use armed force in international relations.[*57]

A similar approach was taken when Sudan refused to extradite three persons suspected in connection with an attempt to assassinate the president of Egypt in Addis Ababa, Ethiopia, in June 1995.[*58] Sudan was enjoined to generally "desist from engaging in activities of assisting, supporting and facilitating terrorist activities and from giving shelter and sanctuaries to terrorist elements" and more specifically to "undertake immediate action to extradite to Ethiopia for prosecution the three suspects sheltering in the Sudan". Again, the refusal of co-operation was followed by a new resolution, in this case determining that the "non-compliance by the Government of Sudan with the requests [to desist from engaging in terrorism and to extradite the designated persons] constitutes a threat to international peace and security".[*59] Unlike in the case of Libya, this situation did not involve state terrorism, as the suspected persons were not agents of Sudan. However, the reasons whereby

48 SC Res. 54, 15 July 1948.

49 Y. Dinstein (Note 29), pp. 182–187.

50 For a long time, the question of terrorism was largely consigned to the General Assembly. See, for example, N. Rostow. Before and After: The Changed UN Response to Terrorism since September 11th. – Cornell International Law Journal 2002 (35), pp. 479–481.

51 SC Res. 579, 18 December 1985.

52 H. W. Kushner. Encyclopedia of Terrorism. London: Sage Publications 2003, pp. 285–286.

53 SC Res. 731, 21 January 1992.

54 SC Res. 748, 31 March 1992.

55 See G. F. Intoccia. American Bombing of Libya: An International Legal Analysis. – Case Western Reserve Journal of International Law 1987 (19), pp. 177–213.

56 The first hint that states can commit terrorist acts is found in the resolution ending the First Gulf War and demanding that Iraq "will not commit [...] any act of international terrorism". SC Res. 687, 3 April 1991.

57 United Nations Charter, Article 2 (4). See R. Värk. The Use of Force in the Modern World: Recent Developments and Legal Regulation of the Use of Force. – Baltic Defence Review 2003 (10) 2, pp. 27–44.

58 SC Res. 1044, 31 January 1996.

59 SC Res. 1054, 26 April 1996.

the non-compliance constituted a threat to peace were similar. The United States attacked a pharmaceutical factory in Khartoum[*60] and, as a result, itself endangered international peace and security.

The Security Council had been attentive to the situation in Afghanistan for some time already, but the first associated resolution concerning terrorism and a threat to the peace was adopted after the simultaneous attacks on the embassies of the United States in Nairobi, Kenya, and Dar es Salaam, Tanzania, in August 1998.[*61] The Taliban regime was required to stop providing sanctuary and training for international terrorists and their organisations as well as to co-operate with efforts to bring indicted terrorists to justice.[*62] Afghanistan was given almost a year before the Security Council determined that the Taliban's failure to meet these demands constituted a threat to international peace and security.[*63] The case of Afghanistan is different from that of Libya (in which terrorists were agents of the state) and Sudan (where terrorists were not agents of state) in that the relationship between the state and the terrorists was not clear. It is not implausible that the members of Al Qaeda were *de facto* agents of Afghanistan according to the law of state responsibility.[*64] If this was the case, then the situation in Afghanistan was also one of state terrorism and therefore similar to that of Libya. Once again, the engagement in terrorism and non-compliance with the demands of the Security Council led to use of armed force, with the Unites States and its allies attacking Afghanistan on 7 October 2001.

The events of 11 September 2001 brought about a new approach. The Security Council condemned unequivocally in the strongest terms these horrifying terrorist attacks and regarded "such acts, like **any** act of international terrorism, as a threat to international peace and security".[*65] This determination goes further than previous determinations did, as it was not confined to merely the terrorist attacks in question but extended to all present and future terrorist acts. Moreover, this was not an isolated incident immediately after these unprecedented attacks invoking global solidarity but the beginning for a series of similar resolutions.[*66] Resolution 1373 was the first one enacted specifically under Chapter VII to reconfirm this position.[*67] A little while later, the Security Council declared that "acts of international terrorism constitute one of the most serious threats to international peace and security in the twenty-first century".[*68] Resolutions 1368 and 1373 recognised in their preamble the right to self-defence, hinting that a terrorist attack can be considered an 'armed attack', which is a precondition to exercise of self-defence under Article 51.

3.2. Evaluation of the Security Council's approach

The Security Council's decision to condemn terrorist acts so strongly and decisively was certainly welcomed, but the approach that was adopted brought with it certain problems also. To borrow the words of Judge Kooijmans, the novelty of these resolutions lies in classifying "acts of international terrorism, without any further qualification, a threat to international peace and security [...] without ascribing these acts of terrorism to a particular State".[*69]

The first problem is that terrorism was not defined in the resolutions adopted after 11 September 2001.[*70] The lack of definition was deliberate because then there was no consensus on the definition and states did not want to jeopardise the adoption of the resolutions, including the measures therein.[*71] To some extent, the Security Council has adopted an approach of 'we know it when we see it'.[*72] The inability to adopt a binding definition of terrorism is certainly contributing to instability and unpredictability in the context of terrorism as well as

[60] R. Wedgwood. Responding to Terrorism: The Strikes against Bin Laden. – Yale Journal of International Law 1999 (24), pp. 559–576.

[61] H. W. Kushner (Note 52), pp. 113–116. The terrorist bomb attacks were also condemned. SC Res. 1189, 13 August 1998.

[62] SC Res. 1214, 8 December 1998.

[63] SC Res. 1267, 15 October 1999; reaffirmed in SC Res. 1333, 19 December 2000.

[64] See Draft Articles on Responsibility of States for Internationally Wrongful Acts, UN Doc. A/56/10 (2001), Article 8; see also R. Värk. State Responsibility for Private Armed Groups in the Context of Terrorism. – Juridica International 2006 (11), pp. 188–190.

[65] SC Res. 1368, 12 September 2001 (emphasis added).

[66] See, for example, SC Res. 1438, 14 October 2002 (Bali), SC Res. 1440, 24 October 2002 (Moscow), SC. Res 1450, 13 December 2002 (Kikambala); SC Res. 1465, 13 February 2003 (Bogotá); SC Res. 1516, 20 November 2003 (Istanbul); SC Res. 1530, 11 March 2004 (Madrid); SC Res. 1611, 7 July 2005 (London); SC Res. 1618, 4 August 2005 (Iraq).

[67] SC Res. 1373, 28 September 2001.

[68] SC Res. 1377, 12 November 2001.

[69] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports (2004) 136, Separate Opinion of Judge Kooijmans, paragraph 35.

[70] See, for example, E. Rosand. Security Council Resolution 1373, the Counter-Terrorism Committee, and the Fight against Terrorism. – American Journal of International Law 2003 (97), pp. 339–340.

[71] L. Bondì. Legitimacy and Legality: Key Issues in the Fight against Terrorism. – Fund for Peace Report 2002, p. 25.

[72] Paraphrasing Judge Potter Stewart who once used the words "I know it when I see it" to define pornography. United States Supreme Court, Judgment, 22 June 1964, *Jacobellis* v. *Ohio*. – 378 US 184 (1964), p. 197.

undermining the legal validity of the action against terrorism.[*73] Indeed, how can one determine the existence of a threat to peace when using undefined terms? This ambiguity and the Security Council's demands to take effective measures against terrorism have presented several states with a welcome opportunity to enact broad-reaching anti-terrorism laws directed against the political opposition or other inconvenient persons instead. The Human Rights Committee has criticised numerous states for defining the crime of terrorism and especially the association with terrorism too vaguely[*74] or for imposing the death penalty for such crimes.[*75] One should not refrain from trying to define terrorism merely because this definition seems to be an unrealistic task or because someone might find a way around the definition and claim that the conduct in question is therefore legal. Respect for the principle of legality should override the practical conveniences or fears of potential but fixable loopholes.

The second problem concerns the scope of the Security Council's authority to designate a generalised indeterminate phenomenon, not a specific incident, as a threat to peace.[*76] Moreover, there are neither temporal nor geographic limits here. Even though a determination regarding a specific incident (such as violation of international humanitarian law in the former Yugoslavia) is formally binding for all member states, it is not, however, likely to affect many of them in connection with the matter, on account of, for example, geographic distance. By contrast, in the case of an indeterminate phenomenon having no temporal or geographical limits, all member states are affected and potentially subject to different sanctions. Once again such a situation is open to abuses by individual states both domestically and internationally. The Security Council's determination may serve as a blanket excuse for illegitimate and forceful settlement of other disputes. One should keep in mind that the Security Council is a reaction-oriented organ, not equipped to prevent all possible long-term tensions. Therefore, it is somewhat irresponsible to provide blanket excuses and impose unspecific duties that may, if implemented overzealously, endanger international peace and security. As the threat to peace continues until the Security Council decides otherwise, the latter has placed itself in a very tricky position — a declaration that there is no longer a threat to peace would indicate that the problem of terrorism has been eliminated.

That the Security Council recognised the right to self-defence in the case of the events of 11 September 2001 cannot certainly be taken as general permission to employ armed force in the fight against terrorism. The exercise of self-defence still requires an 'armed attack' against a state[*77], and the self-defence must be immediate, proportional, and necessary.[*78] The importance of the relevant resolution lies elsewhere. The Security Council believed that (1) a 'terrorist attack' may be an 'armed attack' for the purpose of Article 51 and (2) the attacks of 11 September 2001 constituted an 'armed attack' in that sense.[*79] However, if another terrorist attack is sufficient in gravity and the involvement of a state is sufficient in degree, then the target state may use armed force in the exercise of self-defence.

Although misgivings have been expressed, the new approach is supported by several arguments. Firstly, alongside the traditional threats, terrorism is constantly becoming more topical and is an ever more serious international security threat.[*80] Terrorist acts can certainly threaten international peace and security, but not every terrorist act does so. Overly broad coverage may lead to abuses wherein the states use their obligations to fight terrorism to repress their political opponents or to enact regulations restricting human rights. Secondly, threat to peace is a dynamic, constantly evolving political concept that has been expanding since the establishment of the United Nations.[*81] Despite the broad and abstract nature of the determination in the new resolutions, it remains within the realm of negative definition of peace. This follows from the explicit reference to the international dimension of such attacks, combined with the fact that the use of armed force against a state would be inherent to terrorist attacks of any kind. Whilst there are novelties in these resolutions, these novelties do not relate to a de-linking of a threat to peace from the potential outbreak of international armed conflict.[*82] Thirdly, because the Security Council is entrusted with primary responsibility for the maintenance

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[73] A non-binding working definition recalls that terrorism in the form of "criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act, which constitute offences within the scope of and as defined in the international conventions and protocols relating to terrorism, are under no circumstances justifiable by considerations of a political, philosophical, ideological, racial, ethnic, religious or other similar nature". SC Res. 1566, 8 October 2004.

[74] Concluding observations of the Human Rights Committee: Estonia, UN Doc. CCPR/CO/77/EST (2003), paragraph 8.

[75] Concluding observations of the Human Rights Committee: Egypt, UN Doc. CCPR/CO/76/EGY (2002), paragraph 16 (a).

[76] B. Saul. Definition of 'Terrorism' in the UN Security Council: 1985–2004. – Chinese Journal of International Law 2005 (4), p. 158.

[77] United Nations Charter, Article 51; Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States of America*), Merits. – ICJ Reports (1986) 14, paragraph 195.

[78] *Ibid*., paragraphs 194, 237.

[79] See R. Värk. Terrorism and the Use of Force: From Defensive Reaction to Pre-emptive Action? – Security and Peace 2004 (22), p. 148.

[80] A More Secure World: Our Shared Responsibility. Report of the High-level Panel on Threats, Challenges and Change, UN Doc. A/59/565 (2004), pp. 2, 21–30, 52–54.

[81] S. Talmon. The Security Council as World Legislature. – American Journal of International Law 2005 (99), pp. 179–181.

[82] E. de Wet (Note 25), p. 172.

of international peace and security but also a right to take anticipatory steps, it should take the problem of terrorism most seriously and adopt appropriate measures in order to fight it.

4. Conclusions

Terrorism has been a menace to mankind for two millennia, but in recent decades it has become a pressing domestic and international security problem. The Security Council as a guardian of world order has the authority to take both non-military and military measures in order to maintain or restore international peace and security, provided that it has first determined a threat to peace, a breach of the peace, or an act of aggression to exist. Since 1992, it has gradually acknowledged that different manifestations of terrorism constitute a threat to peace and therefore justify the use of enforcement measures. A determination that certain manifestations of terrorism constitute a threat to peace is essentially a political decision, even more so because there is no generic definition of terrorism or guidelines for identifying threats to peace. The Security Council has repeatedly determined that providing sanctuary and training for terrorists and their organisations, and refusing extradition or to co-operate with efforts to bring indicted terrorists to justice, are a threat to peace. After the events of 11 September 2001, the Security Council embarked on a somewhat troublesome path, as it has classified all terrorist acts as a threat to international peace and security without any further qualification or ascribing these acts of terrorism to a particular state. Instead, the Security Council should describe its understanding of terrorism more specifically and preferably in a resolution adopted under Chapter VII in order to avoid a disagreement as to whether that description is legally binding. Additionally, it should be more cautious with portraying every act of international terrorism as a threat to international peace and security, because not every terrorist act has such potential. Overly frequent referrals to minor terrorist acts may also downgrade the momentum of major terrorist acts. While it is politically convenient not to assess individually every terrorist act brought to the Security Council's attention but to instead label all as a threat to peace, such an approach endangers numerous fundamental rules and inter-state relations as well as eventually international peace and security.

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The Unification of Law via the Institution of Jurisdiction in the 19th Century:

Commercial Law before the High Court of Appeal of the Four Free Cities of Germany

1. Introduction

The history of private law in Germany in the first half of the 19th century is well known for exhibiting a fascinating scientific awakening. Although there was little legislation, especially not many codifications, the scholars of the historic school of law (*Historische Rechtsschule*) with their thinking back to the tradition of the records laid the foundations for the modern system and dogmatics of legal doctrine that remain until today. In a way not imaginable today, the scientific doctrine formed the contemporary private law. But this well-known role of the literature as one of the main law-producing elements hides too easily the view of a second very important contribution to the modernisation of law: the jurisdiction of the courts. The following comments will show that the jurisdiction of the courts also played a large role in unifying the law and thus in the creation of supra-regional law. Therefore, this essay will focus on the activities of the most well-known German court of the first half of the 19th century.

The *Oberappellationsgericht* (High Court of Appeal) of the four free cities that operated in Lübeck between 1820 and 1879 was the most esteemed court of its time. Founded because of German constitutional law in 1815[*1], it was the third level of jurisdiction for mainly civil-law cases[*2] from Hamburg, Frankfurt, Bremen, and Lübeck. But in 1869, 60% of the cases had to do with commercial law.[*3] The members of the court were often well-known German legal scholars; in particular, the court presidents Georg Arnold Heise, Carl Georg von Wächter, and Johann Friedrich Kierulff were prominent jurists.[*4] As judged by Bernhard Windscheid, the

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1 Art. 12 Abs. 3 Deutsche Bundesakte 1815: Text available in E. R. Huber (ed.). Dokumente zur deutschen Verfassungsgeschichte. Vol. 1: Deutsche Verfassungsgeschichte 1803–1850. Stuttgart, etc. 1978, p. 88.

2 K. Polgar. Das Oberappellationsgericht der vier freien Städte Deutschlands (1820–1879) und seine Richterpersönlichkeiten. Frankfurt am Main 2007, pp. 97–134.

3 C. Bergfeld. Handelsrechtliche Entscheidungen des Oberappellationsgerichts der vier freien Städte Deutschlands. – K. O. Scherner (ed.). Modernisierung des Handelsrechts im 19. Jahrhundert. Heidelberg 1993, p. 71.

4 M. Braunewell. Georg Arnold Heise. Biographie und Briefwechsel mit Savigny und anderen. Frankfurt am Main 1999; B.-R. Kern (ed.). Zwischen Romanistik und Germanistik. Carl Georg von Waechter (1797–1880). Berlin 2000; J. Eckert. Johann Friedrich Martin Kierulff

seat of the president of the court was as important as Savigny's professorship in Berlin.[*5] Rudolf von Jhering's nice *bon mot* of Germany's educated court confirms this positive picture.[*6] The heyday of the court lasted until 1870 but came to an end with the foundation of the *Bundesoberhandelsgericht* in Leipzig. After having lost Frankfurt from its district in 1866, the court slowly but surely lost its jurisdiction and with the implementation of the reformatory laws (*Reichsjustizgesetze*) in 1879 it was dissolved and incorporated into the still existing Hanseatic *Oberlandesgericht* in Hamburg.

Suits under commercial law are of special interest for modern scholars for many reasons. Commercial law as a whole is known to have been one of the factors in the legal modernisation of the 19th century.[*7] Here there were possibilities of making law and solving problems independent from the stiff framework of Roman law. Therefore, many legal scholars, the so-called Germanists, found interest in commercial law. One speciality of maritime commercial law, with which the court had to deal much of the time, was that there was always a relationship with foreign law. The point of origin and the destination of a ship were in two different states. Hence questions arose about the areal and personal ambit of territorial rules of law. This was also a possible catalyst for unification of law, meaning the development of supra-regional legal provisions of commercial law beyond the ambit of rules of special law.

2. Case studies to maritime commercial law trials

In the following discussion, the legal practice of the *Oberappellationsgericht* will be illustrated by examining two case studies more closely.

2.1. The argument about spoilt southern fruit for Tallinn

The first of these cases was decided on 22 December 1831. As was the situation so often, it was about the loss of a shipload of cargo through rough weather conditions in winter.[*8] In older times, it was generally not permitted to pass through the Baltic Sea between 11 November and 22 February.[*9] Passage by sea in the 19th century in December and January was no longer problematic legally, but it was still dangerous. In December 1828, skipper Peter Larsen of Lübeck signed a contract with Dietrich Gottlieb Witte to deliver some fruit from Lübeck to Tallinn.[*10] The ship departed on New Year's Eve from Travemünde for Estonia but returned on 15 January 1829 because the bad weather rendered it impossible to open the portholes. The crew feared that the fruit could go bad because of smoke and dust, and so they came back. The skipper asked his partner in the contract what he should do to keep the fruit fresh, but the latter just answered that he was only the forwarding agent and the bills of lading had already been transferred to Tallinn, so the skipper would have to decide what was best for keeping the fruit fresh.[*11] When the skies grew lighter, the skipper opened the portholes and saw that the load had become wet and also that some boxes were so hot that one could not touch them with the bare hands. The steersman and the sailors made a formal statement about this, and the skipper demanded damages from his contract partner, Witte, to pay for his efforts to preserve the fruit.

In a seemingly harsh decision, the *Oberappellationsgericht* dismissed the claim completely but did refer the case back to the lower court to clarify further questions.[*12] In its reasons for the judgement, the court, as in other cases, managed to direct all disputes back to questions under the general law of obligations. Thus the solution in this special case gained judicial transparency and generalisability at the same time. As a possible basis for claim, or 'action' in the terminology of Roman law, the court considered agency of necessity (*nego-*

(1806–1894). Vom Universitätsprofessor zum Präsidenten des Oberappellationsgerichts zu Lübeck. – J. Eckert, P. Letto-Vanamo, K. Å. Modéer (eds.). Juristen im Ostseeraum. Dritter Rechtshistorikertag im Ostseeraum 20.–22. Mai 2004. Frankfurt am Main 2007, pp. 31–43; of the 28 judges in total, 13 had been professors before their appointment, thereto K. Polgar (Note 2) p. 159.

5 B. Windscheid. Carl Georg von Waechter. Leipzig 1880, pp. 14–15; the citation can be found in B. Kusserow. Das gemeinschaftliche Oberappellationsgericht der vier freien Städte Deutschlands zu Lübeck und seine Rechtsprechung in Handelssachen. Diss. jur. Kiel, Düsseldorf 1964, p. 91.

6 R. von Jhering. Agathon Wunderlich. Ein Nachruf. – [Jherings] Jahrbücher für die Dogmatik des heutigen römischen und deutschen Privatrechts 1879 (17), pp. 156.

7 K. O. Scherner. Die Modernisierung des Handelsrechts im 19. Jahrhundert. – K. O. Scherner (ed.) (Note 3), pp. 9–17.

8 Facts in Archiv der Hansestadt Lübeck (AHL) OAG L I 153, unquadr. Relation von Cropp vom 9. September 1831.

9 A. Cordes. Flandrischer Copiar Nr. 9. Juristischer Kommentar. – C. Jahnke, A. Graßmann (eds.). Seerecht im Hanseraum des 15. Jahrhunderts. Edition und Kommentar des Flandrischen Copiar Nr. 9. Lübeck 2003, p. 126.

10 K.-J. Lorenzen-Schmidt. – Gesamtinventar der Akten des Oberappellationsgerichts der vier Freien Städte Deutschlands. Vol. 2. Cologne, Weimar, Vienna 1994/96, p. 513: he mixes up Riga with Tallinn.

11 Archiv der Hansestadt Lübeck = AHL OAG L I 153 Q 21: Entscheidungsgründe, p. 3.

12 AHL OAG L I 153 Q 20: Urteil vom 22. Dezember 1831; in detail also in C. A. T. Bruhn (ed.). Sammlung von Entscheidungen des Oberappellationsgerichts zu Lübeck. – Lübecker Rechtssachen 1858 (1) 97, pp. 387. Imprecisely in B. Kusserow (Note 5), pp. 171–172.

tiorum gestio) and the freight contract. Remarkably, the agency as a quasi-contract stood at the beginning and was therefore supposedly superior to the contract.*[13] In a very brief decision, the court rejected reimbursement of expenses for two reasons. Firstly, the plaintiff's contracting partner had been in Lübeck. He had had the possibility to come to Travemünde at any time and look after the fruit on his own — which he did not do. Secondly, Witte had said that the bills of lading had already been sent to Tallinn. Hence the *Oberappellationsgericht* concluded that Witte as principal obviously had no interest in saving the fruit. At this point in the reasons for the judgement comes a sentence as might be seen in a textbook: "Now no right can be gained from an agency against someone who himself has declared that he has no interest in the thing, that he does not want anything to do with it and thus abandons the thing."*[14] Dogmatically it stands out that the court did not differentiate between the question of whether the defendant actually was the agent — and thus whether the preservation of the southern fruit was agency by Witte — and the connected question of whether this was part of his intention. Both issues could be subsumed under the interest of the agency.

Only after rejecting the claim for reimbursement of expenses from *negotiorum gestio* did the court deal with the matter of contractual claim for payment. This again shows the willingness to find generalisable solutions that break out of limitations of the special law. In general, the court acknowledged the duty of the skipper to take the best possible care of the shipload in cases of emergency at sea and in the emergency harbour. This resulted from an analogy to a statute from Lübeck about the cooling of grain and the recovery of shiploads in the event of a shipwreck.*[15] The intention to overcome the narrowness of the special law can be seen particularly well in the fact that, although the outcome was already clear, the reasoning for the judgement adds that the same also follows from the nature of a freight contract as a kind of lease contract (*locatio conductio*) in which the recipient has to apply the same amount of care to preserve the goods as a diligent head of household (*paterfamilias*).*[16] The reference to the 'nature of the thing' as comes up in the judgement was a topos often used by Georg Arnold Heise even before his time as president of the *Oberappellationsgericht* of Lübeck.*[17] He often used it as an argument in his later-to-be-printed lectures on commercial law*[18], which shows his apparent closeness to Savigny's doctrine of sources of law.*[19] With arguments such as these, the court left all the specialities of special law and maritime law behind and thus shifted the solution over to law of obligations only, here the discussion about rights and duties within the lease contract — the still unified type of contract known as *locatio conductio*.*[20] Considering Roman law, the court stated that this kind of contract would normally grant reimbursement of expenses*[21] but in this case the plaintiff had sued the wrong person.

After that, the *Oberappellationsgericht* examined whether the skipper could at least claim the agreed cartage or parts of it from the defendant if a coincidence concerning the skipper had kept him from finishing the promised tour. During this examination, the court prioritised a solution from Roman law, putting the relevant sources of special law second. Following the rules of Roman law, the court assumed that the contract had been annulled without the skipper being able to raise any claims against the defendant*[22], for the skipper had returned to his original port unsuccessfully. The return had been due to coincidence — namely, the bad weather conditions — and not on account of the fruit having gone bad. Had the skipper brought the spoilt fruit to Tallinn or had he berthed at a harbour on his route to Estonia, the situation might have been different. Now, however, the carrier could only be expected to adhere to the contract if the long stay in Travemünde for the necessary repairs was not to the disadvantage of the charterer. The court based this decision on Roman law*[23]

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[13] To the negotiorum gestio of the common law *cf.* U. Floßmann. Österreichische Privatrechtsgeschichte. Wien, New York 2005, p. 283; R. Zimmermann. The Law of Obligations. Roman Foundations of the Civilian Tradition. Reprint Munich 1993 of the edition Cape Town, 1990, pp. 433–450.

[14] AHL OAG L I 153 Q 21: Entscheidungsgründe, p. 4.

[15] AHL OAG L I 153 Q 21: Entscheidungsgründe, p. 7, with reference to the Revidiertes Lübecker Stadtrecht 1586 6, 1, 8, and the Hansische Seerecht Tit. 3, Art. 19; Tit 9, Art. 4; also in B. Kusserow (Note 5), p. 180, with reference to C. A. T. Bruhn (Note 12), pp. 389.

[16] AHL OAG L I 153 Q 21: Entscheidungsgründe, p. 8, with reference to J. A. Engelbrecht (anonymus). Der wohlunterwiesene Schiffer. Lübeck 1792, Abt. 2, chapt. 3, § 24, p. 58.

[17] Extensive J. K.-H. Montag. Die Lehrdarstellung des Handelsrechts von Georg Friedrich von Martens bis Meno Pöhls. Die Wissenschaft des Handelsrechts im ersten Drittel des 19. Jahrhunderts. Frankfurt am Main 1986.

[18] Heise's Handelsrecht. Nach dem Originalmanuskript hrsg. v. Agathon Wunderlich. Frankfurt 1858, pp. 2, 6, 10; methodical critique about Heise being too descriptive in P. Raisch. Die Abgrenzung des Handelsrechts vom Bürgerlichen Recht als Kodifikationsproblem im 19. Jahrhundert. Stuttgart 1962, p. 18; regarding differences between Heise's and Georg Friedrich von Martens' conceptions of commercial law *cf.* J. K.-H. Montag (Note 17), p. 68.

[19] J. Rückert. Handelsrechtsbildung und Modernisierung des Handelsrechts durch Wissenschaft zwischen ca. 1800 und 1900. – K. O. Scherner (ed.) (Note 3), p. 44; regarding Heise's closeness to Savigny — without references to commercial law — *cf.* O. Lenel. Briefe Savignys an Heise. – Zeitschrift der Savigny-Stiftung für Rechtsgeschichte (Romanistische Abteilung) 1915 (36), pp. 96–156.

[20] Regarding the dispartment of the locatio conductio in the 19th century *cf.* P. Oestmann. Mietvertrag. – M. Schmoeckel, J. Rückert, R. Zimmermann (eds.). Historisch-kritischer Kommentar zum BGB. Vol. 3. Forthcoming.

[21] AHL OAG L I 153 Q 21: Entscheidungsgründe, pp. 8-9, with reference to D. 19, 2, 55, 1 and D. 43, 10, 1, 3.

[22] Therefore, D. 19, 2, 15, 6 is quoted; regarding this aspect of the judgement *cf.* B. Kusserow (Note 5), pp. 185–189.

[23] AHL OAG L I 153 Q 21: Entscheidungsgründe, pp. 17–18: reference to D. 19, 2, 24, 4 and D. 19, 2, 27 pr.

as well as on several rules of maritime law from the French *Rôles d'Oléron*[*24], the Dutch *Vonnesse van Damme*[*25], the Scandinavian maritime law from Visby[*26], and the Prussian law of the 18th century.[*27] Taking a single case as an example, the fruit transporter that had an accident, the court set up general rules for impossibility without fault in a mutual contract.[*28] Along with this, it clarified where the boundary lay between delay without fault and complete impossibility. It was deemed impossibility when in the case of delay abiding by the contract leads to unreasonable disadvantages for the contracting party affected. By comparison, it seems a very harsh decision that the court denied the skipper even only some of the freight charges. Several maritime laws acknowledge this claim in principle[*29], but the court argued that the ship did not go ashore on its route but sailed back to Travemünde. At the end of the ruling, the conclusion come to is again affirmed with relative brevity by an analogy to law from Lübeck.[*30] But the reference to special law at this point once more has no discrete relevance. This case is a distinct example of the court developing general dogmatic principles from seemingly very special problems. Therewith, the *Oberappellationsgericht* with its manner of reasoning in its judgements contributed considerably to the unification of law, because the rules of special law were adapted to achieve respectively greater coherence.[*31] The reasoning in this case of impossibility and duties within a lease contract shows how the court administered justice beyond maritime commercial law in the main areas of the general law of obligations.[*32]

2.2. The confiscation of the Dora in Tallinn

A second example shows a very similar method of solving legal problems. The circumstances are like many other cases the *Oberappellationsgericht* of the four free German cities had to deal with many times: the fate of the Dora. In 1817, the skipper of this ship, one Hasse, sailed from Lübeck to Tallinn. A manifesto on the import and export trade of the Russian Empire from 19/31 December 1810 ordered that all imported goods had to have a bill of lading attached that declared the quality and quantity of the goods. Furthermore, anonymous import was forbidden. This meant that every time no recipient came forward, the skipper was seen as the owner of the freight and was held responsible for the non-cleared load.[*33] Therefore, a limitation of imports existed for Russia and thus also for the Baltic provinces in order to inhibit trading companies, shipping companies, and skippers from violating Russian customs regulations. Hasse knew of this statute, because in 1815 he had been caught in violation of the manifesto from 1810 and had just managed to flee Estonia. Two years later, he did not have as much luck. The Russian authorities confiscated the ship along with its load belonging to 13 different trading houses, with the accusation of Hasse having carried along loads that were to be brought to the Baltic provinces in secret. Hasse was taken into custody and died imprisoned in Tallinn. The skipper's widow and the shipping company took some of the merchants who had sent non-cleared goods to Tallinn to court for compensation.

The *Oberappellationsgericht* in Lübeck dealt with this case for the first time from December 1821. The parties did not agree about whether, on the one hand, the skipper had known that he had been transporting non-cleared goods and, on the other, whether the consignors had had knowledge that the import of such goods to Russia was forbidden. The City Court of Lübeck had delivered a judgement of proof, against which the consignors appealed. The parties' as well as the court's juristic argumentation shows an enormous level of

[24] Reference to Rôles d'Oléron Art. 4; regarding the Rôles d'Oléron *cf*. J. Schweitzer. Schiffer und Schiffsmann in den Rôles d'Oléron und im Llibre del Consolat de Mar. Ein Vergleich zweier mittelalterlicher Seerechtsquellen. Frankfurt am Main 2007.

[25] Reference to „Leges Dammenses Vonn[esse] 4", cited by the Oberappelationsgericht from J. M. Pardessus. Collection des lois maritimes antérieures au XVIIIe siècle. Vol. 1. Paris 1828, p. 373; regarding the Vonnesse van Damme *cf*. M. Ryckaert. Art. Damme, Seerecht. – Lexikon des Mittelalters III. 1986, col. 475.

[26] Reference to "Wisbysches Seerecht Art. 16, 37 (edit. v. Engelbrecht)"; regarding the source cf. G. Landwehr. Das Seerecht im Ostseeraum vom Mittelalter bis zum Ausgang des 18. Jahrhunderts. – J. Eckert, K. Å. Modéer (eds.). Geschichte und Perspektiven des Rechts im Ostseeraum. Frankfurt am Main 2002, pp. 279–280, 283–284.

[27] Reference to Preußisches Seerecht von 1727 Tit. 5, Art. 31; Allgemeines Preußisches Landrecht Teil 2, Titel 8 § 1703; regarding the Prussian maritime law cf. G. Landwehr. Das preußische Seerecht vom Jahre 1727 im Rahmen der europäischen Rechtsentwicklung. – Zeitschrift für Neuere Rechtsgeschichte 1986 (8), pp. 123; *id*. Seerecht im Ostseeraum (Note 26), pp. 288–289, 296–298.

[28] Regarding the history of this problem J. Rückert. Vom casus zur Unmöglichkeit und von der Sphäre zum Synallagma. Weichenstellungen bei der Risikoverteilung im gegenseitigen Vertrag, entwickelt am Beispiel des Dienstvertrages. – Zeitschrift für Neuere Rechtsgeschichte 1984 (6), pp. 40–73 (with examples to maritime law on p. 51).

[29] AHL OAG L I 153 Q 21: Entscheidungsgründe, pp. 18–19, with reference to D. 19, 2, 9, 1, D. 19, 2, 33 and D. 19, 2, 36; Rôles d'Oléron Art. 4; Ordonnance de la Marine Buch 3, Titel 3, Art. 11, 22; Code de Commerce Art. 296; Niederländisches Handelsgesetzbuch Buch 2, Titel 5, Art. 28; Hamburger Statut Teil 2, Titel 14, Art. 3; Preußisches Seerecht von 1727 Tit 5, Art. 31; Allgemeines Preußisches Landrecht part 2, Titel 8, §§ 1702, 1705; Schwedisches Seerecht Hauptstück 2, chapt. 12.

[30] AHL OAG L I 153 Q 21: Entscheidungsgründe, pp. 19–23.

[31] Similarly B. Kusserow (Note 5), p. 242; for the contemporary science J. Rückert (Note 19), p. 45.

[32] This judgement is documented in detail in C. A. T. Bruhn (Note 12), pp. 385–397.

[33] AHL OAG L I 22a No. 1: Einführung und Rechtfertigung der Appellation, p. 2; No. 19: Urteilsgründe, pp. 13–14.

juridical debate and demonstrates in this particular case why one could speak of this court as Germany's educated court.*[34] Throughout all written pleadings, one can detect the aim of generalising the argument about the ship and entering into a cardinal clarification of legal questions of international maritime law. The sentences formulated contain confessions of position on legal essentials of great range. In this manner the counsel for the defendants argued: "The law that through the declared will of the head of state receives its sanction and binding force is applied to the subjects of that state, and only for these as a regulation by which the free actions of the subjects are to be adapted and judged."*[35] Also regarded as temporal subjects are merchants who stay in the country only for a short time, as strangers. It follows in consequence that a skipper or a carter who in accordance with a freight contract travelled abroad became a temporal subject of that country, and thus had to observe the local laws and also endure the local punishments when having violated the laws.*[36] In contrast, this should not apply to those merchants who lived in Germany rather than in the state of the prohibition act: "The merchant who makes [the import regulations] subject to his actions does not trespass against laws that are binding for him, because he is only subject to the law of his state, and there exists no absolute duty for him to let his exercise of acts that are in themselves rightful be constrained by the will of an alien sovereign [...], and if the preacher of morality demurs, the jurist calls out to him that all is allowed that has not been forbidden in the state."*[37] This was a clear confession to a liberal view on freedom of action that could only be constrained by domestic laws. The distinction between law and moral in this almost declamatory argumentation had the purpose of claiming abidance by the laws even when it might clash with widespread moral attitudes. Some years later, Rudolf von Jhering referred to such maxims almost directly.*[38] The practical consequence was a totally different distribution of risks between merchant and skipper. The merchant who sent his goods abroad only risked having his goods confiscated, whereas the skipper had to fear personal disadvantages, as the prohibition acts addressing foreign import and customs laws applied to him as a person.*[39] On account of very basic considerations, without going into details of the matter, the merchants had found a general solution. That in this case the claim for compensation of the plaintiffs had to be dismissed went — according to the defendant's argumentation — without question.

Naturally, the counsel for the plaintiffs had a different opinion on this and also referred to the international law. Going into basic principles, just as the merchants did, he emphasised in his written pleading to the court: "As it belongs to the sovereign rights of every nation to determine whether and under which conditions, constrictions, and customs it wants to trade goods with other nations*[40], it may also, in contradiction to this incontestable right, be naturally assumed that every citizen of a nation — when he wants to trade abroad — has to abide by the rules and laws of that country to which he trades his goods. Therefore, the merchant violates the laws of the foreign territory when he imports forbidden goods or avoids customs duty [...]. If the skipper now claims compensation of the consigner of the contraband*[41], the latter is obliged to pay because he has violated the principle of international law that every merchant who wants to benefit from the conditionally granted foreign freedom of action has to abide by those foreign laws."*[42] Stemming from the argument about the confiscated ship, a dispute arose as to the personal ambit of foreign rules of law. While the merchants thought the laws only to apply to those who sojourn in the national territory of the legislator, the skipper and the shipping company extended the binding force to all those who perform legal transactions with respect to that country. The conclusion was very obvious, according to the argumentation of the plaintiffs: as the merchants also violated Russian law, they were liable for the confiscation of the ship in Tallinn.

The judgement of the *Oberappellationsgericht* is a masterpiece. The tenor of the judgement of 12 December 1822 is completely rooted in the traditional legal doctrine of evidence; it contains questions of evidence and counter-evidence and focuses solely on the actual dispute.*[43] However, the reasons given for the judgement, which were published almost in full*[44], resolved the conflict concerning international law in a short introduction and then traced the entire conflict back to basic questions of the general doctrine of private legal transactions. As study of many of the court's reasons for its judgements shows, this was the true strength of the *Oberappel-*

[34] R. von Jhering (Note 6), p. 156.

[35] AHL OAG L I 22a Nr. 1: Einführung und Rechtfertigung der Appellation, p. 57.

[36] AHL OAG L I 22a Nr. 1: Einführung und Rechtfertigung der Appellation, p. 60.

[37] AHL OAG L I 22a Nr. 1: Einführung und Rechtfertigung der Appellation, p. 59.

[38] With the same argument Rudolf von Jhering later on defends the strict adherence to formal requirements, thereto *cf.* R. von Jhering. Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung. Part 2, Sect. 2. Leipzig 1858, cited after 2nd edition 1869, pp. 475–476.

[39] AHL OAG L I 22a Nr. 1: Einführung und Rechtfertigung der Appellation, pp. 61–62.

[40] Footnote in the written pleading, reference to G. F. von Martens. Primae lineae iuris gentium Europaearum practici in usum auditorium adumbratae. Göttingen 1785, Cap 3, §§ 105, 106.

[41] Definition in Brockhaus Conversations-Lexikon. Vol. 7. Amsterdam 1809, p. 240: „Contraband (aus dem Italienischen) heißt alles, was einem Verbote wegen Einfuhr fremder Waaren zuwider ist."

[42] AHL OAG L I 22a Nr. 10: Widerlegung der Einführung und Rechtfertigung der Appellation, pp. 3, 5.

[43] AHL OAG L I 22a Nr. 18: Urteil.

[44] C. A. T. Bruhn (Note 12), pp. 110–124; H. Thöl (ed.). Ausgewählte Entscheidungsgründe des Oberappellationsgerichts der vier freien Städte Deutschlands. Göttingen 1857, No. 248, pp. 334–339: one of the more detailed accounts in Thöl.

lationsgericht. The court's reasons were able to solve problems that at first glance seemed to be complicated and detailed, doing so on a fundamental level and thus establishing legal certainty beyond the individual case at hand. In the case of the Dora, this was achieved as follows: First, the binding force of foreign laws was dealt with. Regarding this aspect, the court differentiated between general prohibitive laws and laws that favour nationals but discriminate against foreigners. In the first case, the court judged the laws of foreign states to be considered only because of "observance of the international laws". In the second case, however, regarding the unequal treatment of nationals and foreigners, "even the international law does not demand obeying these rules, these hostile steps"*[45]. In deciding this way, the court referred to leading French literature.*[46] The result was clear: the present European code of practice between states did not forbid establishing an enterprise that runs against foreign customs regulations or assuming the risk of such an enterprise.*[47] In the beginning, this was a definite commitment to the freedom of maritime trade, independent from foreign prohibitive laws. This corresponded to the defendant merchants' legal opinion. But the *Oberappellationsgericht* aimed to make distinctions in this respect, too. Namely, the introduction regarding international law only pointed out that the skipper and the shipping company could not demand compensation simply because the principal had violated Russian customs regulations.

In contrast to this, the court considered a contractual claim — bearing in mind the uncertain hearing of evidence — to appear obvious, for "such a trade with contraband would always be a dangerous trade"*[48]. As it was a dangerous legal transaction, the court stated certain duties of clarification and information that would justify a contractual claim for compensation if violated. According to the *Oberappellationsgericht*, each contracting party when entering into a bilateral contract was bound to "inform the other contracting party about possible physical and legal defects and about such characteristics of those defects as might threaten their means or even the contracting party's personal safety"*[49]. And exactly because of this general duty to inform the other about imminent dangers, the person loading contraband had at least to inform the skipper or carter if in the event of discovery not only the goods but also the ship, coach, or horses would be in danger of confiscation. A contracting party not doing so would owe damages because, according to the freight contract, the charterer was forbidden to load illegal goods, which might cause danger to an unknowing skipper.*[50] The court relied on the 'legal analogy' and the well-known treatise of the English Lord Chief Justice Charles Abbott Tenterden*[51] on the law of merchant ships.*[52] Virtually without any normative basis, the court developed a doctrine of duty of mutual clarification and information in bilateral contracts, which only had to be modified somewhat — for if the recipient knew about the dangerous aspects of the object, it was not necessary to inform him about them formally. At this point, the judgement again found a strong basis in academic law.*[53] Out of a problem that the parties understood as a question of international law the *Oberappellationsgericht* developed important and representative rules of law for general contract law. Obviously, this judgement from 1822 established the legal practice of the *Oberappellationsgericht* in a sustainable manner. When in May 1829 it had to interpret another case involving contraband, in which the Russian authorities had again confiscated goods, the *Oberappellationsgericht* referred to this decision directly and cited the principles developed therein, extensively and almost verbatim.*[54] Clearly, the representative and

45 AHL OAG L I 22a Nr. 19: Urteilsgründe, pp. 5–6.

46 Quoted are E. de Vattel. Le droit des gens ou principes de la loi naturelle, appliqués à la conduite et aux affaires des nations et des souverains. Vol. 1. 1758, chapt. 6, § 76; Estrangin. Additions ou supplément to: R. J. Pothier. Traité du contrat d'assurance. Paris 1810, p. 91.

47 AHL OAG L I 22a Nr. 19: Urteilsgründe, p. 7, with further reference to B. M. Emerigon. Traité des assurances et des contrats à la grosse. 2 volumes. Marseille 1783, part 1, chapt. 8, Sect. 5, pp. 210 *ff.*; J. A. Park. A system of the law of marine insurances, with three chapters of bottomry, on insurances of lives, and on insurances against fire. London 1787, p. 390; F. J. Jacobsen. Handbuch über das practische Seerecht der Engländer und Franzosen in Hinsicht auf das von ihnen in Kriegszeiten angehaltene Eigenthum, mit Rücksicht auf die englischen Assecuranz-Grundsätze über diesen Gegenstand. Vol. 2. Hamburg 1805, pp. 77–79; reference to this judgement also in B. Kusserow. Oberappellationsgericht (Note 5), pp. 182–183.

48 AHL OAG L I 22a Nr. 19: Urteilsgründe, p. 9.

49 AHL OAG L I 22a Nr. 19: Urteilsgründe, p. 9.

50 AHL OAG L I 22a Nr. 19: Urteilsgründe, p. 10.

51 1762–1832, to him M. Lobban. Art. Abbott. – Oxford Dictionary of National Biography 2004. Available at http://www.oxforddnb.com/view/article/12 (14.01.2009).

52 C. Abbott. A treatise of the law relative to merchant ships and seamen with an addenda relative to some laws and customs of the United States. Philadelphia 1802, p. 280.

53 AHL OAG L I 22a Nr. 19: Urteilsgründe, p. 33, with reference to D. 21, 1, 14, 10 and VI 5, 12, 31: "Eum, qui certus est, certiorari ulterius non oportet."

54 AHL OAG L I 111 Nr. 15: Entscheidungsgründe, pp. 10–13. The judgement is also based on several books from older and newer times: E. de Vattel (Note 46), vol. 2, chapt. 6 § 76; Estrangin (Note 46); B. M. Emerigon (Note 47), part 1, chapt. 8, sect. 5, pp. 210 *ff.*; J. Klefeker. Sammlung der Hamburgischen Gesetze und Verfassungen in Bürger- und Kirchlichen, auch Cammer- Handlungs- und übrigen Policey-Angelegenheiten und Geschäften samt historischen Einleitungen. Vol. 7. Hamburg 1769, §§ 484–486; S. Marshall. A Treatise on the Law of Insurance. Vol. 1. London 1823, chapt. 3, sec. 1, pp. 54–57; W. Benecke. System des Assekuranz und Bodmereiwesens [...] für Versicherer, Kaufleute und Rechtsgelehrte. Vol. 1. Hamburg 1808, p. 34; F. J. Jacobsen. Handbuch über das practische Seerecht der Engländer und Franzosen in Hinsicht auf das von ihnen in Kriegszeiten angehaltene Eigenthum, mit Rücksicht auf die englischen Assecuranz-Grundsätze über diesen Gegenstand. Vol. 2. Hamburg 1805, pp. 77–79; P. S. Boulay-Paty. Cours de droit commercial maritime d'après les principes et suivant l'ordre du Code de commerce. Vol. 4. Rennes 1823, p. 29.

generally formulated opinion of the *Oberappellationsgericht* was highly suitable for developing prevailing case law and thus strengthening the certainty of law.

Simply for the sake of completeness, it remains to be said, as alluded to earlier, that the *Oberappellationsgericht* had to deal with the case described, concerning the Dora, several times. In 1834, the Dora case was brought to the court in Lübeck for the fifth time. But here the lawsuit was finally ended with a settlement in July 1835.*[55] Thus, it had taken 13 years for the Dora case to be closed with the *Oberappellationsgericht*. Examples such as this show the disadvantages of a court procedure that allows unlimited appeals against interlocutory judgements. All told, four extensive decisions (*Relationen*) were worked out unavailingly by the members of the court. The respective separate proceedings before the *Oberappellationsgericht* seldom took longer than one year. Nonetheless, the case dragged on without fault on the part of the *Oberappellationsgericht* and was ended finally by an extrajudicial settlement without a final judgement being necessary. Hence, proceedings before the *Oberappellationsgericht* seemed to have had structural defects, which must not be forgotten even if the aspects of the court's legal practice described here are very fascinating. Concerning early modern jurisdiction, research into the history of law now tends to regard a high proportion of settlements also as proof for the effectiveness of the legal system.*[56] However, regarding the *Oberappellationsgericht* of the four free cities, one should be much more careful in arguing like this. In particular, the case described of the Dora shows the enormous work that the members of the court also had to do in those cases that finally ended through settlement. While the high courts of the Holy Roman Empire could save the trouble of issuing a final judgement by initiating numerous settlement proceedings — a point that still makes settlements attractive today*[57] — the *Oberappellationsgericht* of the four free cities had to deliver four judgements before the parties were able to settle. Thus, the transaction costs of settlements were very high, especially in those cases that were ended by settlement. Still, that the judges of the *Oberappellationsgericht* in Lübeck had a lot of work to do because of these cases, despite the settlements finally reached, did not seem to trouble contemporaries at all. At least the public perception of the court did not suffer from this, as it was the tangible judicature of the interlocutory judgements and the findings of fact that made the court famous, not the few final judgements.

3. Results

The most important result of this study appears astonishing and seems to contradict the so far self-evident modern theory. A specific maritime law is not tangible in the early judgements of the *Oberappellationsgericht* in Lübeck. This shows especially well the consequent scientific treatment of legal problems that had to be provided by the court. The judges were able to analyse the incoming cases in principal respects and to reduce them to basic general questions of law. Thus, cases of maritime law were integrated into the general law of obligations and judged according to principles of the universal doctrine of contract. But not only questions of maritime law were converted into the area of the law of obligations. A striving for representative results can also be found in the application of law. Special law was often used only to confirm results that the court had found on the basis of general principles of law anyway. Thus, even in the former cities of the Hanseatic League, maritime law was not of great importance. Often the court referred back to Roman and Canon law and compared it to sources of maritime law but also to sources of general private law from other countries, such as Portugal or Sweden.

The judgements of the early time of the *Oberappellationsgericht* in Lübeck are of especially great importance. The judgements analysed in this study were delivered at a time in which Thöl's and Goldschmidt's books — so renowned later — had not yet been written and Heise's lectures on commercial law had not been published, either.*[58] Thus, the relationship between judicature and science as factors in the modernisation of commercial law in the 19th century seems to appear in a different light. Possibly, academically grounded practice in the 1820s did not refer to scientific law but preceded it or at least contributed considerably to it.*[59]

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[55] AHL OAG L I 202; cf. K.-J. Lorenzen-Schmidt (Note 10), vol. 2, p. 522.

[56] B. Diestelkamp. Das Reichskammergericht im Rechtsleben des 16. Jahrhunderts. – H.-J. Becker, G. Dilcher, G. Gudian, E. Kaufmann, W. Sellert (eds.). Rechtsgeschichte als Kulturgeschichte. Festschrift für Adalbert Erler zum 70. Geburtstag. Aalen 1976, pp. 435–480; also in B. Diestelkamp. Recht und Gericht im Heiligen Römischen Recht. Frankfurt am Main 1999, pp. 257.

[57] P. Hartmann. § 278 ZPO Rn. 6. – A. Baumbach, W. Lauterbach, J. Albers, P. Hartmann. Zivilprozeßordnung mit Gerichtsverfassungsgesetz und anderen Nebengesetzen. Munich 2008; W. R. Wrege. Richten und Schlichten! Plädoyer für die Güteverhandlung im Zivilprozeß. – Deutsche Richterzeitung 2003, pp. 130–132.

[58] H. Thöl. Das Handelsrecht. Vol. 1. Göttingen 1841; L. Goldschmidt. Handbuch des Handelsrechts. Vol. 1. Stuttgart 1864; Heise's Handelsrecht (Note 18).

[59] Concerning the influence of the jurisdiction of the *Oberappellationsgericht* of the four free cities on Heinrich Thöl *cf.* H. Thöl (Note 58), Preface; E. Landsberg. Geschichte der Deutschen Rechtswissenschaft. Vol. III/2. Reprint Aalen 1978 of the edition Munich, Berlin 1910, p. 627; E. Döhring. Geschichte der deutschen Rechtspflege seit 1500. Berlin 1953, p. 348; U. Falk. Art. Thöl. – M. Stolleis (ed.). Juristen. Ein biographisches Lexikon von der Antike bis zum 20. Jahrhundert. Munich 2001, p. 626.

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Latin Terms in Estonian Legal Journalism in the Interwar Period:

Practical Tools for a Young Legal Culture[*1]

1. Introduction

The time between the two World Wars is of special significance in the history of Estonia: for the first time, the country enjoyed sovereignty, and a parliamentary democracy was established.[*2] Developing a legal order for our own state and drafting new legislation became undoubtedly one of the priorities in the Republic of Estonia, which was born in 1918. Until the adoption of the new laws, the old ones remained in force, having been imposed in the Estonian and Livonian provinces during the tsarist regime (for example, the Baltic Private Law Act[*3] with its special legislation such as town law, land law, statutes for peasants, and special regulations regarding the clergy), creating an obvious lack of uniformity from the point of view of the legal system.[*4] Regrettably, drafting of legislation is a remarkably time-consuming process, and in the few years of independence this process was not completed in some areas of law. Also, the Baltic Private Law Act, on which the new Civil Code was based, and which relied heavily on Roman law and contained a great number of Latin terms, remained in force until the Soviet occupation in 1940. Albeit outdated in essence, the Civil Code formed one of the central elements in the juridical discourse.

At the outset of self-determination, great importance was attached to the Estonian language, which began to be used for legal studies, legislation, and practice of law in general. Consequently, in the interwar period,

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1 This article was published with support from ESF Grant 7923.

2 About Estonian history in the period under scrutiny in this article: Z. Kiaupa, A. Mäesalu, A. Pajur, G. Straube. The History of the Baltic Countries. 3rd, revised ed. Tallinn: Avita 2002, in particular, the chapter "The Baltic States 1914–1939", pp. 129–164.

3 Provincialrecht der Ostseegouvernements. Dritter Theil. Privatrecht. Liv-, Est- und Curlaendisches Privatrecht. Zusammengestellt auf Befehl des Herrn und Kaisers Alexander II. St. Petersburg: Buchdruckerei der Zweiten Abtheilung Seiner Kaiserlichen Majestät Eigener Kanzlei 1864. More about the Baltic Private Law Act later in the article, in the context of land ownership and the right of succession.

4 More about the development of the legal order in Estonia, see T. Anepaio. Die rechtliche Entwicklung der baltischen Staaten 1918–1940. – Modernisierung durch Transfer zwischen den Weltkriegen. T. Giaro (Hrsg.). Frankfurt am Main: Vittorio Klostermann 2007, pp. 7–30; M. Luts-Sootak. Estland. – Handwörterbuch zur deutschen Rechtsgeschichte. Lfg. 6. (Eid-Familienfideikommiss). 2. Aufl. Berlin: Erich Schmidt Verlag 2007, p. 1430; P. Järvelaid. The Development of the Estonian Legal System. – Zeitschrift für Europäisches Privatrecht 2000 (8 Jhg.), pp. 873–877.

the Estonian legal language and the corresponding terminology developed, ousting the Russian and German languages, which had previously been used for legal purposes.[*5]

The concept of the relationship between language and nationality in modern society and the idea that each nation is unique, and that in order for a nation to survive, its language and culture must be preserved, stems from the 18th-century German *Sturm und Drang* movement and echoes the ideas of the French Enlightenment.[*6] This national and linguistic ideology was embraced by 19th-century thinkers and sociologists who attempted to find an explanation for the national and linguistic conflicts in the Russian, Austro-Hungarian, and Turkish empires and therefore readily accepted the German national-linguistic model. Furthermore, this model proposed political rights and democracy through national independence.[*7] These concepts and ideas were also mirrored in Estonia at the beginning of the 20th century, when the Estonian language was definitely a component of national identity as well as a political object and resource, particularly in the early years of independence as legislation began to be prepared by lawyers and politicians who were of Estonian origin.[*8]

Therefore, the era examined in the present article is, on the one hand, a time when legal terminology in the native language was created and developed. On the other hand, in the territory of Estonia, for centuries laws had been applied whose origins can be detected in the legal history of Europe. Similarly, over the centuries, Latin vocabulary had become an integral part of legal language, having been developed on the basis of Roman law or legal sources from the Europe of the Middle Ages. Accurate and relevant usage of professional terms of foreign origin requires a basic knowledge of the structure of the foreign language concerned. At the beginning of the century and in the interwar period, Latin was a natural part of schooling in Estonia.[*9] At university level, Latin was considered even more important. For instance, the students of the Faculty of Law at the University of Tartu were required to know enough Latin to be able to manage compulsory reading: Caesar's *Commentarii de Bello Gallico* ('Commentaries on the Gallic War'), Cicero's speeches, Ovid's *Metamorphoses*, and excerpts from the works of Horace and Livy.[*10] At that time, Roman law was taught in two stages at Tartu: in the first year, the students became familiar with the history and sources of Roman law, and the second year focused on study of the system of Roman law. Knowledge of professional terminology in Latin was perfected in practical classes during those courses, as extracts from the 'Institutes' of Gaius and Justinian were read and translated.[*11]

Thus, against the background of, on the one hand, the desire and urgent need for the development of native terminology and, on the other, the European terminological tradition and the legislation implemented at that time, my research aims at investigating the role and importance of Latin terms in the new legal culture. How and to what extent did Estonian lawyers and jurists use Latin terms in their writing in the time between the two World Wars, and which particular Latin terms were used? The research material is constituted by the Latin legal terms detected in the Estonian-language juridical periodical *Õigus* ('Law')[*12] published in 1920–1940. In comparison with other types of scholarly texts, such as course books, monographs, or dissertations on jurisprudence, the choice of a journal for this kind of terminological analysis has a clear advantage with regard to the topicality of its subject matter. Formally, periodicals are the most dynamic medium of law, reflecting the daily life of a particular legal culture.[*13] In addition, the variety of the topics touched upon enables us to draw more specific conclusions about the usage of terms. At the beginning of the 20th century, legal advice in the Estonian language was not widely accessible. Even though several legal course books compiled in Estonian were printed before World War II, material in Estonian about most areas of law was not available at that time.

The research method applied is quantitative and qualitative term analysis, which helps us to determine the total number of Latin terms used and the dynamic changes that occurred in the 20 years of publication of the periodical, as well as the number of distinct terms used in the articles published in the periodical, which in

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5 As a result of the work done on legal terminology in Estonian, "Õigusteaduse sõnastik" (Dictionary of Law) was published in 1934, compiled by F. Karlson, J. V. Veski, ed. E. Ilus. Tartu: Akadeemiline Kooperatiiv 1934 (in Estonian).

6 About this, see J. G. von Herder. Abhandlungen über den Ursprung der Sprache. Stuttgart: Reclam 2002, pp. 38–52.

7 M. Rannut, Ü. Rannut, A. Verschik. Keel, võim, ühiskond (Language, Power, Society). Tallinn: TPÜ Kirjastus 2003, pp. 44–47 (in Estonian).

8 A. Vettik, R. Kull. Tagasivaade eesti õigussõnavara kujunemisloole (1920–1940) (A Historical Overview of the Development of Estonian Legal Vocabulary (1920–1940)). Tallinn: Eesti Teaduste Akadeemia, Emakeele Selts 2002, p. 10 (in Estonian).

9 A good example would be the memoirs of E. Nurm, the author of several Latin grammars, who wrote about his school years and organisation of studies at a grammar school in Tallinn: E. Nurm. Mälestusi Tallinna Nikolai Gümnaasiumist 1907–1914 (Memoirs about Tallinn Nikolai Grammar School 1907–1914). – Keel ja Kirjandus 1981, pp. 300–309 (in Estonian).

10 The decision of the Faculty Council from 18.12.1923. Eesti Ajalooarhiiv (Estonian Historical Archives), 2100.10.17, pp. 28–29, 40–43.

11 H. Siimets-Gross. Die Lehre des römischen Rechts an der Universität Tartu in den Jahren 1919–1940. – Juristische Fakultäten und Juristenausbildung im Ostseeraum: zweiter Rechtshistorikertag im Ostseeraum, Lund 12.–17.03.2002. Stockholm: Rönnels Antikvariat AB 2005, pp. 343–347.

12 Juridical monthly *Õigus*, 1920–1940. Editor-in-chief F. Karlson; published by the Association of Legal Scientists in Tartu.

13 M. Stolleis. Juristische Zeitschriften – die neuen Medien des 18.–20. Jahrhunderts. – Juristische Zeitschriften. Die neuen Medien des 18.–20. Jahrhunderts. Ius Commune Sonderhefte, Studien zur Europäischen Rechtsgeschichte, 128. M. Stolleis (Hrsg.). Frankfurt a.M.: Klostermann 1999, p. XIV.

turn enables us to assess the knowledge of foreign terms of the jurists of the time. Analysis of the terms on the basis of the frequency of their occurrence additionally allows us to draw important conclusions about the range of subjects and the areas of law that required more frequent usage of Latin terms but simultaneously required more attention on the part of lawyers and were under close scrutiny in the juridical discourse.

2. Research material

The journal *Õigus* began to be published in October 1920. Even though *Õigus* was the first juridical periodical in the Republic of Estonia, it cannot be said to have been the very first journal in the Estonian language that contained text about legal matters. Since 1909, a few publications had already been printed in Estonian as newspaper supplements or separate periodicals in Tallinn, Tartu, and even St. Petersburg.*[14] However, these attempts were short-lived and rarely produced more than two or three issues, because, as the editorial board wrote in the introduction to the first issue of *Õigus*, in 1920, "there existed no national courts, nor government, thus rendering it unnecessary to have a national juridical periodical. Besides, because of strict censorship, it was impossible to publish certain pieces that needed to be published. Therefore, it is understandable why no progress was made in this area. Nevertheless, the situation has changed radically since the establishment of our independent state."*[15]

There was undoubtedly a need for primary legal information when the new state was created, and numerous questions arose pertaining to drafting and implementation of new laws. What is remarkable is that throughout its 20 years of publication, *Õigus* was the only juridical periodical to be published. This can be explained by the limited number of professional jurists in Estonia. Also later, after the Second World War and since the restoration of independence, there has usually been one legal journal at a time — e.g., *Nõukogude Õigus* ('Soviet Law')*[16] during the Soviet era and at present *Juridica*.*[17] *Õigus* was issued by the Association of Legal Scientists in Tartu, which had been formed only a few months prior to the release of the first issue. The editors and authors were professors from the University of Tartu, judges of the Supreme Court, well-known lawyers, and the Chancellor of Justice — the most active and renowned figures in the field of law in Estonia at the beginning of the 20th century.

Õigus appeared for 20 years without interruption. The last issue was printed in March 1940, only a few months before Estonia was occupied by Soviet Russia. In total, 176 issues were published in 20 years. In both the first and the last year of its publication, only three issues appeared. From 1921 to 1928, eight issues of *Õigus* were published per year, on average*[18], and from 1929 onwards, as many as 10 issues per year. All in all, the research material comprises 7,266 pages and 624 articles.

Graph 1 shows that in the first 10 years of publication the capacity of the journal was 230 pages a year on average, increasing by half by the end of the decade — 352 pages in 1929. In the second decade of its publication, from 1930, the capacity doubled in comparison with that of the early years, reaching 480 pages on average. This was made possible by the improved economic situation of the publisher of the journal. Summarising the first decade of publication, the editorial board stated that in the beginning they had faced serious financial difficulties and even paying fees to the authors of articles had been problematic. Thanks to support from the state and private donors, the second half of the 1920s was financially more favourable, and also a solid base of subscribers had been built, enabling the publishers to increase the number of issues per year from eight to 10 in 1929.*[19]

[14] Prior to the journal *Õigus* the following Estonian-language periodicals had been published: *Seadus ja Kohus:* õigusteadline ajakiri. Peterburi Teataja kaasanne (1909, 1911, 1913); Pealinna Teataja kaasanne (1910) (*Law and Court*: juridical journal. Supplement to gazette *Peterburi Teataja* (1909, 1911, 1913); supplement to gazette *Pealinna Teataja* (1910)). Published by A. Einer, A. Vares, M. Jaakson; St. Petersburg 1909–1911, 1913; *Õigus*: õigusteadline ajakiri (*Law*: juridical journal). Ed. J. Reinthal, M. Pung. Tallinn: Ühiselu, 1912; *Õigus ja Kohus*: õigusteadusline ajakiri: Päevalehe, Aja, Koidu hinnata eralisa. (*Justice and Cour*t: juridical journal: free special supplement to *Päevaleht*, *Aeg*, *Koit*). Issued by B. Mäns, J. Luiga; Tallinn: Pert, 1912–1914; *Õigus*: Meie Aastasada, Sakala, Meie Kodumaa õigusteadline hinnata kaasanne (*Law*: free juridical supplement to *Meie Aastasada*, *Sakala*, *Meie Kodumaa*). Editor-in-chief K. Pikk, Tartu, 1913–1914; *Õigus*: õigusteadline lisa: Tallinna Teataja, Tallinna Uudiste, Meie elu, Peterburi Teataja, Tartu Päevalehe, Meie Aastasaja, Oleviku, Sakala, Meie Kodumaa hinnata lisa nr 1; Tallinna Teataja hinnata kaasanne nr 2 (*Law*: juridical supplement: free supplement No. 1 to *Tallinna Teataja*, *Tallinna Uudised*, *Meie Elu*, *Peterburi Teataja*, *Tartu Päevaleht*, *Meie Aastasada*, *Sakala*, *Meie Kodumaa*; free supplement No. 2 to *Tallinna Teataja*). Ed. A. Birk, Tallinn: Ühiselu, 1914; issues 1–2.

[15] Editorial board of *Õigus* (in 1920: J. Lõo, N. Maim, R. Rägo). To the Readers. – Õigus 1920/1, p. 1.

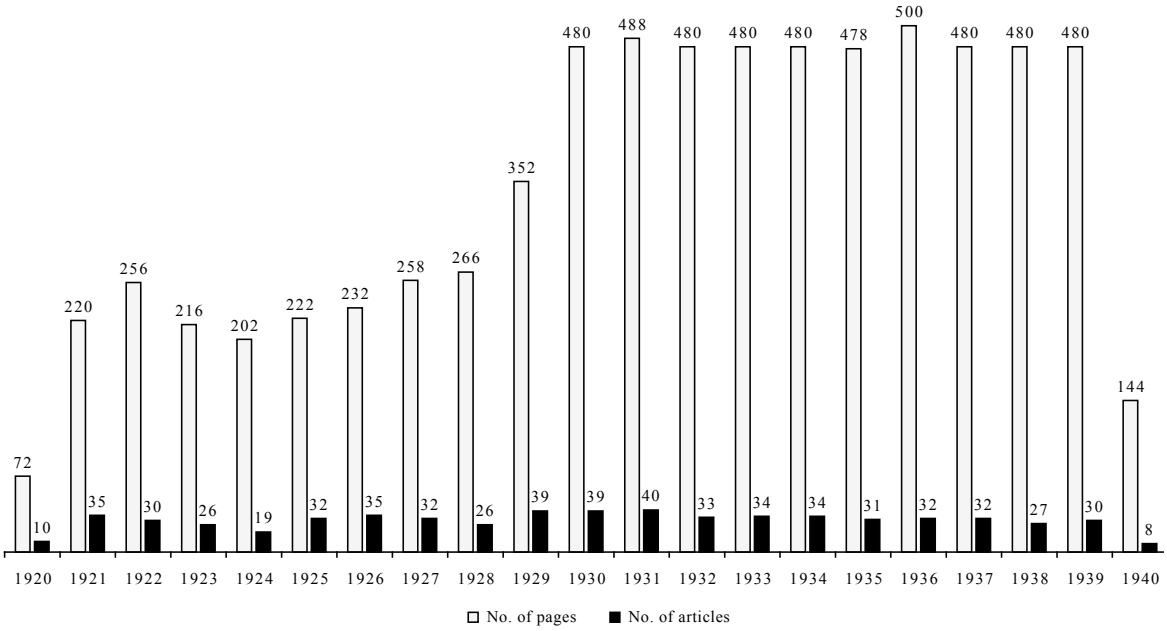
[16] *Nõukogude Õigus/Soviet Law*: Juridical Bulletin of the Ministry of Justice of Estonian SSR. Tallinn: Eesti NSV Justiitsministeerium, 1967–1989.

[17] *Juridica*: University of Tartu Faculty of Law periodical. Editor-in-chief P. Varul. Tartu: Iuridicum Foundation, 1993–present.

[18] In 1921 and 1928, several issues appeared as voluminous and thematically compiled editions containing for instance the presentations made at the conferences of the Association of Legal Scientists.

[19] A. Mägi. Märkmeid *Õiguse* kümneaastase ilmumise puhul (Notes on 10 Years of Publication of *Õigus*). – Õigus 1931/3, pp. 126–132 (in Estonian).

Graph 1: Number of articles and pages in *Õigus*



Contrasting the number of pages and articles, we notice that, despite the significantly increased volume, the average number of articles remained the same — approximately 30 to 33 articles a year. Subsequently, the quality of the pieces improved in *Õigus* in the second half of its lifetime: gradually the articles written became longer and more detailed. While in the beginning it was necessary to deal with juridical issues that surfaced in everyday life and to print articles often containing reviews and summaries of new legislation, the later period also witnessed the publication of exhaustive research articles in addition to papers focusing on legislation. Thus in the 1930s *Õigus* published on its pages several studies that have found a firm place in the history of legal science in Estonia. By way of illustration, three most detailed and extensive pieces of writing about Old Estonia (i.e., the time before and around the introduction of Christianity) can be mentioned: an article published in two parts (in 1935 and 1936) discussed the agreements between the Estonians and foreign conquerors in the 13th century, and an article published in 1937 concentrated on public assemblies in Old Estonia. All three articles were written by distinguished jurist Jüri Uluots, professor of the history of Estonian law at the University of Tartu and a politician.[*20] In the context of the present study, not only do scholars find these articles interesting from the viewpoint of legal history, but they are also fascinated by the philological aspect of the pieces, because all three quoted extensively the original *Heinrici Chronicon Lyvoniae*[*21] in Latin, which had been written in the 13th century. Additionally, the use of those quotations is a sign of the author's mastery of Latin: the translations provided by the author himself for many of the quotations demonstrate his good knowledge of the vocabulary of the Middle Ages, in which the meanings of terms may differ greatly from those applied in Roman law. References to such sources verify that the role of Latin in *Õigus* was not limited to a few practical legal terms; also lengthy citations from sources of legal history in Latin had their firm place in juridical argumentation.

Besides articles on legal science and commentaries on legislation, *Õigus* contained information about legal practice: each issue ended with a summary of the decisions made by the Supreme Court (*Riigikohus*). Once a year, a statistical review of the activities of different court instances in various towns in Estonia was printed (the number of cases heard, the number of cases settled, and the number of pending cases). In addition, some issues included summaries of the activities of the Parliament (*Riigikogu*), overviews of new legal literature in Estonia as well as abroad, reviews of international congresses and conventions, announcements and practical legal information, and summaries of the presentations of the speakers at the *Õigusteadlaste päev* ('Day of the Jurists') conferences. A great deal of attention is paid to introducing the legal affairs and legislation of the country's closest neighbours — Finland, Latvia, and Soviet Russia — as well as other European countries, among them Poland, Hungary, Italy, Germany, and Belgium. In 1939, even an article about China's new Civil Code was published. Latin terms are to be found in articles about all of these topics.

Next, the results of quantitative statistical analysis are presented. Besides the frequency of usage of Latin terms, terminological variety is considered, with examination of which different Latin terms occur in the articles

[20] J. Uluots (1890–1945) was many times a member of the parliament, Prime Minister in 1939–1940, and 1940–1945 Prime Minister in the capacity of the President. More about J. Uluots: K. Merusk. Sissejuhatus (Introduction), pp. 7–13; R. Ränk. Professor Jüri Uluots juristina ja ajaloolasena (Professor Jüri Uluots as a Lawyer and Historian), pp. 407–421. – Seaduse sünd: Eesti õiguse lugu (Birth of Law: The History of Estonian Legislation). Compiled by H. Runnel. Tartu: Ilmamaa 2004 (in Estoninan).

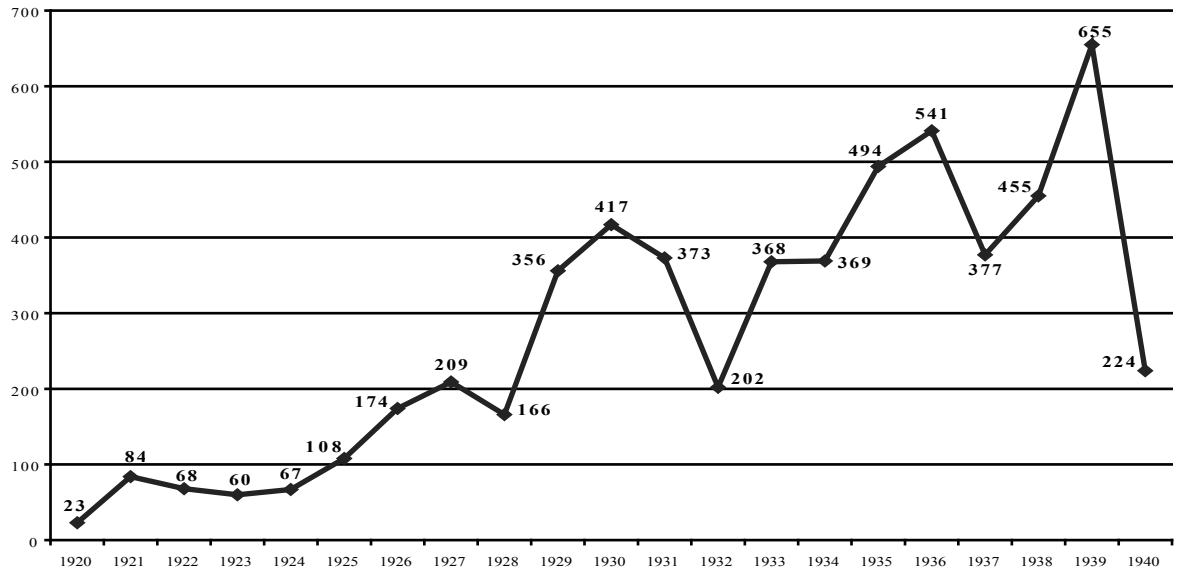
[21] Heinrici Chronicon Lyvoniae. Ex recensione W. Arndt. Hannover: Hahn 1874.

in *Õigus* and in what relationship. The usage of Latin terms with regard to land ownership and the right of succession is handled separately because these issues, more than others, generated heated debate among the authors of *Õigus* and thus a great deal of associated vocabulary in Latin was included. Therefore, the question of why the topics mentioned were so popular on the pages of *Õigus* and which Latin terms the writers used to discuss them ought to be delved into.

3. Frequency of usage of Latin terms

In total, in 20 years Latin terms were used 5,791 times, while, on average, 32 Latin expressions per issue and nine Latin terms per article were employed. If we divide the number of pages by the number of terms, we can see that, on average, 0.8 expressions per page were used; i.e., the Latin language appears on almost every single page of *Õigus*. In comparison with the current usage of Latin legal terms, this is a remarkably large number. For instance, in *Juridica*, the only juridical journal in the time of regained independence, the average number of Latin terms in the 16 years of publication is 3–4 expressions per article.[*22] In the articles in *Soviet Law*, only 0.2 Latin terms per article were used.[*23]

Graph 2: Latin terms in *Õigus*



Graph 2 illustrates the usage of Latin terminology in *Õigus* over the years. Looking at the total numbers, we clearly see a steady increase in the usage of Latin terms throughout the years of publication of the journal. There is a sharp difference between the first and last year of publication of *Õigus* — both in 1920 and 1940, only three issues were printed, but the usage of Latin expressions increased tenfold in 20 years, from 23 instances in the first year to 224 instances in the last year of publication. In the 1920s, the average number of Latin phrases used per year is 117, whereas by the end of the decade, in 1929, this number had tripled to 356. In the 1930s, 400 Latin terms were used in articles per year, and, again, the most noticeable increase appeared at the end of the decade, in 1939, when 655 Latin expressions were used.

The exponential increase in the usage of Latin terms in 1929–1931 (356 Latin expressions in 1929, 417 in 1930, and 373 in 1931), 1935–1936 (494 Latin expressions in 1935 and 541 in 1936), and 1939 (with 655 Latin expressions) can be explained by the topics analysed in those years: the greatest number of articles printed in the above-mentioned years focused on civil law, whose historical connection with Roman law and terminology based on Latin justify more frequent use of phrases originating from Latin. The use of terminology in 1935 and 1936 was influenced by the drafts of the Civil Code prepared in those years, which naturally led

[22] More about the usage of Latin terms in juridical texts in re-independent Estonia, see M. Ristikivi. *Lexica iuridica* in *Juridica*: Latin Terms as a Reflection of Europanisation of Estonian Legal Culture. – Juridica International 2007 (12), p. 175.

[23] About Latin terms in juridical articles in Estonian during the Soviet era, see M. Ristikivi. Terminological Turn as a Turn of Legal Culture. – Juridica International 2008 (15), p. 178.

to corresponding scholarly discussions.[*24] By comparison, in 1935 also the new Penal Code was adopted[*25], which had already been drafted in 1925. In the issues of *Õigus* from 1935, and even earlier, articles about the Penal Code were printed, but this topic failed to elicit such a wide response as the preparation of the new Civil Code. The lack of interest expressed in the articles of *Õigus* in the new Penal Code can be explained by the fact that, even though it was not an exact copy of the old Penal Code that had been enforced under the tsarist regime, it was based on it and obviously the changes in the content were not extensive enough to prompt more specific arguments. Similarly, the adoption of the Penal Code did not bring about marked changes in the usage of Latin terms. In comparison with what is seen in the articles written about the Civil Code, Latin terms are very few in the pieces dealing with the Penal Code.

In 1939, three articles were published, with one in two parts discussing the history of the Estonian Bar Association and the other focusing on the so-called Law of Vigala — the regional special law for 18th-century Estonian peasants. History is also typically an area in which the usage of Latin terms seems rather natural, since for centuries the law was developed on the basis of Latin and all major sources of our knowledge of Roman law are written in Latin.

However, considering the issues of *Õigus* in 1932 and 1937, in which the occurrence of Latin terms is clearly less frequent, we cannot very easily single out one particular cause for that: also in these years, articles about civil law and history were written, so such topics are not the only reason for resorting to Latin phrases. A common feature, though, is that in both years articles appeared that touched upon the legal orders of foreign states (e.g., Poland, Hungary, Latvia, and Italy), and apparently the authors' lack of use of Latin is due to the descriptive nature of these pieces.

4. Terminological variety

4.1 The most frequent terms

While the total number of Latin terms in *Õigus* in its 20 years of publication was 5,791, the number of distinct terms used was 2,615. This figure is surprising and is accounted for by a remarkable variety of Latin expressions.[*26] Dividing the total number of terms by the number of distinct terms, we see that one and the same term occurs slightly more than twice per article on average. Nevertheless, it must be pointed out that the majority of terms have been used just once, and only 490 terms appear at least twice per article. There are 297 terms that occur at least three times and 167 terms that appear five or more times — hence the conspicuousness of the most recurrently used expressions in the material researched. The 10 most frequently found Latin legal terms in *Õigus* are *laesio enormis*, *expressis verbis*, *ex officio*, *de lege ferenda*, *contra legem, ipso iure*, *detentor*, *detentio*, *in solidum*, and *praeter legem*.

The term the reader encounters most often in the articles in *Õigus* is *laesio enormis* ('gross disparity'), used 197 times. The term *laesio enormis* denotes the injury sustained by one of the parties to an onerous contract when he has been overreached by the other to the extent of more than half the value of the subject matter (e.g., when a vendor has not received half the value of the property sold, or the purchaser has paid more than double the value). In *Õigus*, the term *laesio enormis* enters the articles written by lawyers from 1930 and can be found in nine issues, in rather lengthy pieces of writing drawing attention to the shortcomings of the legislation imposed earlier in Estonia, in the Baltic Private Law Act. Analysing the development of this very term, the authors come to the conclusion in their articles that the legislation in force referring to *laesio enormis* ought to be amended or replaced in its entirety by a more specific regulation drafted along the lines of the German BGB.

The expressions next on the list of the most frequently used Latin terms — i.e., *expressis verbis* ('explicitly', with 118 occurrences), *ex officio* (meaning 'by virtue of office or position', with 72), *de lege ferenda* ('desirable to establish according to the law', 47), *contra legem* ('contrary to the law', 35), and *ipso iure* ('by the law itself', 34) — semantically belong to the general vocabulary of law, and they can be found equally in articles discussing all areas of law throughout the years of publication of the journal.

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[24] In 1935 and 1936, special issues of *Õigus* were published, introducing the drafts of the Civil Code and its differences in comparison with the Baltic Private Law Act. More about this, see Õigus 1935/6 and Õigus 1936/7.

[25] Kriminaalseadustik (Penal Code). Adopted on 26.03.1929. – RT 1929, 56 (in Estonian). Muudetud ja täiendatud Riigivanema poolt 19.09.1934 dekreedina antud Kriminaalseadustiku maksmapanemise seadusega (Amended and complemented by the Act of Enforcement of the Criminal Code issued on 19.09.1934 as a decree by the State Head). – RT 1934, 85 (in Estonian).

[26] Such a considerable number of terms would be sufficient for an average glossary. A case in point is a glossary compiled by W. Schwab and R. Pagé „Les locutions latines et le droit positif québécois. Nomenclature des usages de la jurisprudence" (Québec: Editeur officiel du Québec 1981). It consists of the Latin terms found in the documents concerning Québec court proceedings and contains approximately 700 juridical terms and phrases. In the Latin–Estonian Legal Dictionary compiled by K. Adomeit, H. Siimets-Gross, M. Ristikivi and printed in 2005 there are over 3,400 entries.

The next expressions on the list of the most frequently used terms were first printed in *Õigus* at the end of the 1920s in the articles about the right of obligation. Those terms are *detentor* ('detainer', 32) and *detentio* ('detention', 31), referring to holding a thing while having neither possession nor ownership thereof, nor the use of possessory remedies, and the term *in solidum* ('for the whole', 30) in the context of a joint obligation in full — if several co-obligants are bound *in solidum*, each is liable for full payment or performance, and the creditor may choose which of the obligants he will sue.

The next term in the order of frequency of usage, *praeter legem* ('beyond the law', 27), refers to norms not imposed as laws but supplementing the right defined in existing legislation within the given framework.

This term is typically used in combination with the above-mentioned phrase *contra legem* as well as *intra legem* ('within the law', 7), which denote regulations: a *praeter legem* regulation is a legal instrument that governs an area not regulated by legislation — i.e., a regulation that replaces or amends a law. The authors use the term '*contra legem* regulation' to refer to an act that is essentially incompatible with formal law, and the term '*intra legem* regulation' denotes an instrument specifying a law. All three of these terms are to be found in the journal throughout its 20 years of publication.

When we take a closer look at the phrases that follow the top 10 on the list of the most commonly used terms, we notice that they fall into two thematic groups: land ownership and the right of succession — these two matters are also among the most widely discussed problems throughout the issues of *Õigus* published over 20 years.

4.2. Succession

The issues of the right of succession were thoroughly discussed in the articles in *Õigus* because of the process of drafting of the Estonian Civil Code, which failed to be adopted before World War II, though. Consequently, until Soviet rule was imposed, the Baltic Private Law Act[*27] (1864/1865) was in force. The Baltic Private Law Act, which in 1856–1864 had been codified by Friedrich Georg von Bunge, professor of provincial law at the University of Tartu[*28], and which had entered into force on 1 July 1865, contained, besides German general law, also a great number of rules of Roman law.[*29] Now, in a new era, particularly after the adoption in 1920 of the act that abolished the nobility[*30], the right of succession in particular (and family law) in this legal act was rather problematic and outdated. As had the Baltic Private Law Act as a whole, these parts had been drafted in the interests of the landed gentry but were now taken as the basis of civil law to be applied to every citizen. As a result, the right of succession was one of the first subjects that the codification committee concentrated on, and in 1925 draft legislation of the Civil Code prepared by the Ministry of Courts was published.[*31]

The part of the new Civil Code concerning the right of succession was under active discussion in *Õigus* throughout its 20 years. The authors paid the most attention to the *hereditas iacens* as a legal person, the form and types of the will, the compulsory portion and the beneficiaries, and the scope of the liability of the heirs. The most commonly used Latin term related to the right of succession, *hereditas iacens* ('resting inheritance', with 23 occurrences), denotes succession that has been opened but where the inheritance has not been transferred to heirs. In the draft of the new Civil Code, the *hereditas iacens* was to be deemed a legal person, but the expediency of this provision was questioned in several articles, and it was suggested that it should be excluded. In this context, also the exclusion in the new law of *transmissio hereditatis* ('transmission of the inheritance', 10) and *ius accrescendi* ('right of survivorship', 10) of institutes, as well as a *donatio mortis causa* ('gift in prospect of death', 7) and *cessio hereditatis* ('cession of an inheritance', 6), originating from Roman law, was considered.

Other, more frequently used terms in articles about the right of succession were *hereditatis petitio* ('petition of an inheritance', 6), *beneficium inventarii* ('benefit of inventory', 5), *beneficium separationis* ('right to have the goods of an heir separated from those of the testator in favour of creditors', 4), *successio singularis* ('singular succession', 4), and *successio universalis* ('universal succession', 3).

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[27] Provincialrecht der Ostseegouvernements. Dritter Theil. Privatrecht. Liv-, Est- und Curlaendisches Privatrecht. Zusammengestellt auf Befehl des Herrn und Kaisers Alexander II. St. Petersburg: Buchdruckerei der Zweiten Abtheilung Seiner Kaiserlichen Majestät Eigener Kanzlei 1864.

[28] More about F. G. von Bunge (1802–1897) and his teaching of law, see M. Luts. Juhuslik ja isamaaline: F. G. von Bunge provintsiaalõigusteadus (Accidental and Patriotic: The Provincial Legal Science of F. G. von Bunge). Dissertationes iuridicae Universitatis Tartuensis, 3. Tartu: TÜ Kirjastus 2000 (in Estonian); by the same author, see also Tundmatu Friedrich Georg von Bunge (Unknown Friedrich Georg von Bunge), in a collection of publications by the Learned Estonian Society and the Faculty of Law of the University of Tartu. Tartu: Õpetatud Eesti Selts 2006 (in Estonian).

[29] More about the role of Roman law in the Baltic Private Law Act, see H. Siimets-Gross. Roman Law in the Baltic Private Law Act — the Triumph of Roman Law in the Baltic Sea Provinces? – Juridica International 2007 (12), pp. 180–189.

[30] Seisuste kaotamise seadus (Law on the Abolition of Nobility), 9.06.1920, adopted by the Estonian Constituent Assembly. – RT 1920, 129/130, 254 (in Estonian).

[31] Tsiviil seadustik. Pärandusõigus (Civil Code. Succession). Tallinn 1925 (in Estonian).

The abundance of Latin terms in the articles in *Õigus* discussing these problems can be explained by the strong influence of Roman law on the right of succession in the Baltic Private Law Act. Also, it should be mentioned that, even though the Baltic Private Law Act remained in force practically throughout the first period of independence in Estonia, it failed to be translated into Estonian. Therefore, close study of the articles in *Õigus* gives the impression that Latin terms, in addition to conveying juridical notions, had to play an intermediary role in the communication between the two languages (German and Estonian) and provide the required specificity of concepts.

4.3. The Land Reform Act, real estate, and ownership relations

The fact that so much was written about land ownership and immovable property can be explained with the Land Reform Act.*[32] At the very beginning of self-government, Estonia underwent a number of economic, social, and political reforms necessary for coming to terms with its new status as a sovereign state. Economically and socially, a radical land reform in 1919 was an important step in abolishing the previous feudal system. As expressed by then Prime Minister Otto Strandman*[33], the lack of land in Estonia had been a problem for centuries. The government considered it a priority that an opportunity to acquire and cultivate land be given to everyone who had the desire, courage, and strength to do so.*[34] Hence, after reduction, or expropriation of manor estates belonging to the Baltic nobility, in many instances the main part of an estate remained in the possession of the former owners but the rest of a large estate holding was redistributed among the peasants and especially among volunteers in the Estonian War of Independence (1918–1920). According to § 21 of the Land Reform Act, the primary beneficiaries to receive land from the state were the individuals who had demonstrated remarkable bravery in the War of Independence, as well as the families of the soldiers who had fought and died in that war. As a result, more than 30,000 new farms were established. As expected, the land reform resulted in tenser relations between Estonia, on one hand, and Germany and other countries whose citizens had been large landowners in Estonia.*[35]

Thus a new legal situation had been created and, naturally, various problems with real estate and ownership relations arose in everyday life. Latin legal terms in the articles focusing on these topics vary from short one-word terms, such as *fundus* (meaning 'land', with 3 occurrences) and *pignus* ('pledge', with 1), to longer phrases of several words — for instance, citations from Roman law: *illius fit aedificium, cuius et solum est*[*36] ('the building belongs to the one who also owns the land', 1) and *qui ad certum tempus conducit, finito quoque tempore colonus est; intelligitur enim dominus, quum patitur colonum in fundo esse, ex intergo locare, et huius modi contractus*, […] *nudo consensu convalescunt*[*37] ('the one who pays rent for the place for a certain period shall be the tenant also after the end of this period, for it shall be deemed the case that the owner, allowing the tenant to live on his land, continues to lease the place out and this type of contract […] shall be valid by mere consent', 1), or the last citation from the Digests, modified: *dominus non patitur colonum in fundo esse* ('the owner does not have to allow the tenant to be on his land', 1).

In several articles, the authors discuss the divided property in Estonian towns (*dominium divisum*) — i.e., *obrok* or ground rent. The Latin terms used in such cases are *dominium directum* ('strict ownership, the right of a landlord', 2) and *dominium utile* ('ownership of the soil itself, the right of a tenant', 6). According to this form of ownership, real estate was first owned by the primary or direct owner, the *dominus directus* (four occurrences), and secondly owned by the *dominus utilis* ('tenant or person who uses the property', 5) who had

[32] Maareformi seadus. – RT 1919, 79/80 (in Estonian).

[33] O. Strandman (1875–1941) was Estonian politician and diplomat, Prime Minister in 1919 and State Head in 1929–1931. More about O. Strandman, see H. Tuulik, J. Valge. Otto Strandman 1875–1941. – Looming 1989/7, pp. 963–973 (in Estonian).

[34] O. Strandman's speech to the Estonian Constituent Assembly at the reading of the Land Reform Act on 29 July 1919. Asutava Kogu II istungjärk. Protokollid Nr. 28–97 (2nd session of the Constituent Assembly. Minutes Nos. 28–97). Tallinn 1920, columns 430–435. *Ibid.*: "Also politically we are compelled to wipe out the estate holdings, whether we like it or not. […] When we look at what kind of role large landowners have played in the life of our nation, we see that there is no other way. […] 5,000–6,000 individuals should not be allowed to have power over the whole country and its people. They should not be allowed to have the economic power […] to establish the political order and supremacy in this country to serve their own interests. This power should be taken from them and given to the people."

[35] E.g., compare G. von Rauch. Balti riikide ajalugu 1918–1940 (The History of the Baltic States 1918–1940). Tallinn: Detlar 1995, p. 48: "Already at the first reading of the Act, it was clearly stated […] that the purpose was to deprive the German gentry of their economic and political power. The German delegates had a specially difficult time in June and July 1919. The suggestion that a third of the utilised agricultural land of the large estates be given for a reasonable price to the state to be distributed as individual farms (*asundustalud*) was not even considered. The proposal made by the moderate parties to gradually reduce the large estates to the minimum was also rejected. […] As a result of numerous debates, the Expropriation Act was passed on 10 October 1919, with 63 votes in favour, nine votes against, and one remained undecided. However, in protest before voting the representatives of the Estonian National Party and the Christian Party had left. The expropriation of manor estates constituted the intervention by the state in ownership relations, which can be deemed a revolutionary measure." Original book in German: Geschichte der baltischen Staaten 3. Aufl. München: Dt. Taschenbuch-Verlag 1990.

[36] Gaius. Dig. 41.1.7.12.

[37] Ulp. Dig. 19.2.14.

the hereditary right to ground rent and the right of ownership of the buildings on the lot. The divided property institute was also observed in dealings with the new farms established as a result of the land reform — the primary owner was the state, and the *obrok* tenant (*asunik*) had the right to use the property. It is not surprising, then, that the divided property principle, alien to ancient Roman law, created in the Middle Ages, and discarded in the process of developing modern private law, was adhered to in Estonia between the World Wars. It was conditioned, on the one hand, by the existing legislation pertaining to private law inherited from the Russian tsarist regime. At the same time, it was used to solve the regulatory problems that came with the new social reforms.

The basis of the hereditary right of *obrok* rent in the Baltic law was the Roman institute of *emphyteusis*. The term *emphyteusis* (used in the articles 20 times) denotes a contract by which a landed estate was leased to a tenant, either in perpetuity or for a long term, of many years, upon the reservation of annual rent and upon the condition that the tenant improve the property, by building, cultivating, or otherwise, and with a right vested in the tenant to alienate the estate or pass it to his heirs. Likewise, according to the Baltic law, two conditions had to be met for the hereditary right of *obrok* rent (as real right of use of another owner's property) to apply: 1) use of another owner's immovable property for an unspecified term and 2) paying the annual *obrok* rent in a specified amount. These two conditions set the right of *obrok* rent apart from a tenancy agreement and *usufructus* ('usufruct', 7), which denotes a right to use of the profits by one person while the ownership belongs to another.

In the 1935 draft of the Civil Code, *superficies* (referring to building rights, right of superficies, 2), which had disappeared from private law in Western Europe, could again be found as a separate institute, also mostly derived from the Russian tsarist legislation, and this was reviewed in *Õigus*, too. A right of superficies could be given for only a specified term, no less than 36 and no more than 99 years, and it could be terminated upon the demand of the owner if the superficiary had not erected the required constructions within the specified term.

Together with the term *condominium* ('co-ownership', 10), there are expressions in the articles that denote forms of such limited ownership as *hypotheca* ('obligation by which property of a debtor was made over to his creditor in security of his debt', 1), *usus* ('use', 8), and *habitatio* ('habitation or dwelling, right of free residence in another's house', 3).

The majority of Latin terms pertaining to the right of ownership and possession used by the authors in their articles in the corpus examined here originate from Roman law. On the one hand, this was conditioned by the reception of this area of law and application of the terminology in existing legislation — these institutions denoted by Latin terms had a legal basis in Estonian private law at the time in the form of the Baltic Private Law Act. On the other hand, the above-mentioned Latin terms, with their precision, conciseness, and clarity, are an attestation to the efficiency of the professional communication on the pages of the journal between the lawyers concerned.

5. Conclusions

The analysis of the articles published in the Estonian-language juridical journal *Õigus* in the interwar period reveals that, alongside the creation and development of legal terminology in the native language, expressions in Latin had a major role in Estonian legal language. In the 20 years of the journal's publication, Latin terms were used approximately 5,800 times on its pages. This was an era that witnessed more extensive use of Latin terminology than any other period in the history of juridical journalism in Estonian. Also, the terminological variety of the vocabulary of the jurists was remarkable — more than 2,600 different Latin terms could be found in their writings. It ought to be emphasised that the common use of Latin terms did not minimise the importance of the effort put into introducing and expanding legal terminology in the native language; on the contrary, Latin phrases helped to increase and improve it, functioning as intermediaries between the two languages while the German and Russian legal languages were replaced by the Estonian legal language, and adding Latin terms to the new technical vocabulary in Estonian facilitated understanding of their meaning and scope.

The preconditions for the effective use of Latin terms were created by the educational achievements in the given period, which allowed the professionals not only to quote short technical terms consisting of a few words but also to cite the Digests of Justinian and sources in Latin originating from the Middle Ages. On the other hand, the use of Latin terms was conditioned by the legal environment, since between the two World Wars the government failed to adopt the new Civil Code and the Baltic Private Law was in force, relying largely on the norms of Roman law. The examples of the right of succession and land ownership illustrate well the occurrence of Latin terminology in such circumstances: not only are the Latin terms in the relevant articles a manifestation of the historical development of these areas of law, but they also stemmed directly from the legislation enforced. Thus, we come to the realisation that Latin terms used in the interwar period were an essential part of the active vocabulary of lawyers and a practical tool for jurists in the course of legal reforms when drafting, explaining, and assessing the new legislation.

Abbreviations

RT	Riigi Teataja (State Gazette)
CCSCd	Civil Chamber of the Supreme Court decision
ENSV ÜVT	Official Gazette of the Supreme Council and Government of the ESSR
ÜNT	Supreme Council Gazette
SCCCd	Supreme Court of the Civil Chamber decision
SCCCr	Supreme Court of the Civil Chamber regulation
SCALCd	Supreme Court of the Administrative Chamber decision
SCebd	Supreme Court *en banc*
CCd	Civil Court decision
ACd	Administrative Court decision
CCr	County Court regulation