



In 1991, the Republic of Estonia was restored as a legal successor to the republic created in 1918. This wish that was felt to be the only correct and possible way—to invoke legal continuity—was so strong that it was considered to re-establish the pre-war constitution of 1938 as the basis of constitutional order. It should be mentioned here that this was the option preferred by several states. However, in Estonia it was understood in serious legal and political discussions that the constitution must take account of the current realities of society, of the development of law during the 50 years that had passed, reflect the spirit of the times and be forward-looking in its views. A new constitution was created as a result of a public understanding agreement.

The 1992 constitution created a totally different order both from the previous constitutions of the Republic of Estonia and from that of the Estonian SSR that had been in effect to that date. Instead of a presidential republic, the state was moulded into a parliamentary republic. The state acquired a simple organisational framework: classical branches of powers, unicameral representation of the people, a head of state with merely sufficient powers, a legal chancellor called to review constitutionality as an institution distinctive of Estonia. The simplicity of the organisational structure of the state is vividly illustrated by the judicial power created by the constitution—a unified, three-instance system with at least one opportunity to appeal where all cases start from the first instance without an exception.

Thus the constitution created a state that was easily perceivable by the people and as such was easy to accept. The constitution is emphatically about the focus on the people, that the state must serve the people and not the other way round. The list of fundamental rights is open and the number of freedoms protected by them is virtually unlimited. In implementing the fundamental rights, the courts chose to amalgamate the provisions of the constitution with the European convention on the protection of human rights and fundamental freedoms and the charter of fundamental rights of the European Union. There cannot be an instance that a person has less freedoms and rights under the Estonian legal order than provided for in the convention or charter.

What is also so simple is how a person can protect himself or herself against abuses of power. Within this clear-cut and independent judicial system we described above there are means to review the constitutionality of the state power. In a court, a person can invoke directly the rights granted to him or her by the constitution. All courts are required to disregard a law that is in violation of the basic rights.

Proportionality is the most potent keyword that the constitution has rooted in the political culture, law-making and state administration. At the same time, the principle that those that are equal must be treated equally and those that are not are to be treated unequally is becoming a given in social culture.

It was in part a reaction to the persecution of people by the Soviet Union on the grounds of belonging to a national minority (i.e., Estonian among others) that the constitution of 1992 is emphatically centred on the Estonian nation. The preamble sets out the preservation of the Estonian nation, language and culture through the ages as one of the goals of the state. On the other hand, the current constitution ensures the rights of national minorities to preserve and develop their national culture.

An abundance of experts also believe that the current constitution is characterised by being puissantly protective of classical sovereignty. Section 1 of the

constitution sets out that the dependence and sovereignty of Estonia are timeless and inalienable. However, social and political consensus has supported flexible interpretation of the sovereignty provision. The preservation of the state and the Estonian nation does not seem to be possible in the world of the 21st century without surrendering some sovereignty in order to enjoy it together with the other nations and states.

During its 20 years of existence, the constitution successfully survived its biggest change when the Republic of Estonia acceded to the European Union. Unlike many other Member States, Estonia decided not to amend the core text of the constitution because of accession to the EU. The constitution was supplemented by an act under which the constitution applies to Estonia's membership in the European Union while taking into account the rights and obligations arising from the accession agreement. Hence, the old order continues to apply in the new constitutional situation insofar as it does not contradict the obligations arising from EU membership. This was an extension of the principle embraced when Estonia restored independence meaning that the legislation of the previous order continued to be enforceable insofar as it was not contrary to the new constitution. Thus, the old constitutional order is gradually replaced by a new possible order during EU membership. However, it is always possible to revert to the old constitution. Membership in the EU has an unsurpassable limit determined by the fundamental principles of the constitution which have to date not been specified in practical application of law.

It is difficult to say definitively whether the current Estonian constitution is principally a cultural, political or legal document, or whether it is a constitution of lawyers and experts or rather that of the politicians and people. Everyone can embrace this document. At the same time, the constitution has been implemented so well that it does not need to be directly invoked in day-to-day political activity, social life or legal practice. Political forces as well as the parliament and the public institutions that implement the constitution tend to abide by the constitution. Perhaps we can say to whom the constitution belongs when we celebrate its 50th anniversary. We may obviously predict that its place in the awareness of the people will be much more significant.



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Soziale Grundrechte unter den Bedingungen wirtschaftlicher und finanzieller Krisen

1. Vorbemerkung

Die Frage, ob und wie soziale Grundrechte in nationalen Verfassungen und im supranationalen und internationalen Recht normiert werden sollen und welche konkreten normativen Wirkungen solche Grundrechte haben, ist ein wesentlicher Diskussionspunkt in den letzten Jahrzehnten in Europa^{*1} gewesen. In der Sache geht es darum, ob dem einzelnen durch die staatliche Rechtsordnung eine Gewähr für einen sozialen Schutz eingeräumt werden kann und soll. Die verschiedenen Rechtsordnungen sehen insoweit formal unterschiedliche Lösungen vor, die von ausformulierten sozialen Grundrechten über allgemeine Verfassungsgrundsätze, wie das Sozialstaatsprinzip in Deutschland, bis zu materiellrechtlichen Regelungen im einfachen Gesetzesrecht reichen.

Neben den staatlichen Normierungen finden sich auch im supranationalen^{*2} und im internationalen^{*3} Recht entsprechende Regelungen.

Wie effektiv soziale Grundrechte die Bürger vor sozialen Notlagen schützen können, erweist sich vor allem in Zeiten wirtschaftlicher und sozialer Krisen^{*4}, weil für den Staat unter diesen Bedingungen die finanziellen Möglichkeiten für ein effektives Sozialleistungssystem nicht oder nur unzureichend bestehen. Dadurch könnten die Skeptiker bestätigt werden, die den sozialen Grundrechten die Effektivität absprechen.^{*5}

¹ Dies gilt auch für viele Länder außerhalb Europas, auf die in diesem Beitrag nicht eingegangen werden kann.

² Vgl. aus der umfangreichen Literatur B. v. Maydell (Hrsg.), *Soziale Rechte in der EG*. Berlin: Erich Schmidt 1990; Bundesministerium für Arbeit und Sozialordnung u. a. (Hrsg.), *Soziale Grundrechte in der Europäischen Union*. Baden-Baden 2000/2001; M.H. Knecht, *Die Charta der Grundrechte der Europäischen Union*. Stuttgart 2005; X. Neubeck, *Die europäische Sozial-Charta und deren Protokolle. Einfluss und Bedeutung der sozialrechtlichen Bestimmungen der europäischen Sozial-Charta auf das deutsche Recht und auf das Recht der Europäischen Union*. Frankfurt: Peter Lang 2002.

³ Grundlegend A. Nußberger, *Sozialstandards im Völkerrecht*. Berlin 2005; siehe auch B. v. Maydell, A. Nußberger (eds), *Social Protection by Way of International Law*. Berlin: Duncker and Humblot 1996; F. Pennings (ed.), *International Social Security Standards*. Antwerpen: Intersentia 2007; Die Auswirkungen des internationalen Rechts auf einzelne Staaten, nämlich die Tschechische Republik und Estland, untersucht T. Dijkhoff, *International Social Security Standards*. Cambridge, Portland: Intersentia 2011.

⁴ Diesen Ansatz wählt z. B. auch G. Vettori, *Fundamental and Social Rights. A Discussion between two Crises*. – *European Journal of Social Law* 2011/4, S. 232 ff.

⁵ Vgl. etwa M. Heinze, *Soziale Grundrechte in Europa – Chancen und Risiken*. – Bundesministerium für Arbeit und Sozialordnung (Hrsg.), *Soziale Grundrechte in der Europäischen Union*. Baden-Baden: Nomos 2000/2001, Fn. 2, S. 227 ff.

2. Wechselwirkung zwischen sozialen Rechten einerseits und wirtschaftlich/finanzieller Lage andererseits

Unstreitig ist, dass sich eine gesunde Volkswirtschaft mit einem funktionierenden Finanzsystem auf den Sozialsektor auswirkt. Es können die notwendigen Mittel für die Finanzierung der Sozialleistungen erarbeitet werden. Das ist die wirtschaftliche Voraussetzung dafür, dass eingeräumte soziale Rechte zu realisieren sind. Andererseits haben das Sozialrechtssystem und die sozialen Rechte auch Auswirkungen auf den wirtschaftlichen Erfolg eines Landes. Die Sozialleistungen können, je nach ihrer Ausgestaltung, die Incentives der Erwerbsbevölkerung lähmen, sie können aber auch die notwendigen Voraussetzungen dafür schaffen, dass ein möglichst hoher Prozentsatz dieser Erwerbsbevölkerung dem Arbeitsmarkt zur Verfügung steht und den Beschäftigten Anreize für eine möglichst effektive Arbeitsleistung vermittelt werden. Darüber hinaus schafft ein gerechtes und transparentes Sozialsystem die Voraussetzungen für eine stabile gesellschaftliche Ordnung.

Für die wechselseitigen Beziehungen zwischen Sozialrechtsordnung und Wirtschafts- und Finanzordnung ist die Ausgestaltung der sozialen Rechte – und der Sozialrechtsordnung insgesamt – ein wichtiges Datum. Deshalb soll zunächst darauf eingegangen werden.

3. Soziale Grundrechte, Sozialstaatsgrundsätze und Struktur des Sozialrechts

3.1. Unterschiedliche Rechtsgrundlagen und Konzepte

Soziale Positionen können sehr unterschiedlich rechtlich geschützt werden. Dies kann durch völkerrechtliche⁶ oder supranationale⁷ Normen, aber auch durch nationale Regeln⁸ (in der Verfassung oder in einfachen Gesetzen) geschehen.

Eine weitere Unterscheidung betrifft die Normqualität der Verbürgung sozialer Rechte. Es kann sich um verfassungs- oder völkerrechtliche normierte Grundrechte handeln, die den liberalen und politischen Freiheitsrechten nachgebildet und als Menschenrechte akzeptiert sind.⁹ Inwieweit aus diesen Grundrechten Leistungsansprüche entspringen und ob diese Rechte individuell vor Gerichten geltend gemacht werden können, wird in den einzelnen Staaten und bezüglich der verschiedenen völkerrechtlichen Normen unterschiedlich beantwortet.¹⁰ Generell gilt jedoch, dass die sozialen Grundrechte insoweit schwächer ausgestaltet sind. Das zeigt sich am Beispiel des Rechts auf Arbeit.¹¹ Da der Staat, jedenfalls in einer Marktwirtschaft, nicht selbst über die Besetzung der Arbeitsplätze außerhalb der Staatsverwaltung verfügen kann, kann das Recht auf Arbeit nicht auf die Zuweisung eines Arbeitsplatzes gerichtet sein.

Bei den völkerrechtlichen Verbürgungen sozialer Rechte, wie etwa bei der Europäischen Sozialcharta, fehlt es zudem regelmäßig an der Möglichkeit einer gerichtlichen Durchsetzung, stattdessen gibt es völkerrechtliche Kontrollmechanismen, so etwa bei der Überwachung der Einhaltung der ILO Konventionen durch einen Untersuchungsausschuss.¹² Insoweit ist die Durchsetzung der liberalen Menschenrechte weiterentwickelt, denn es gibt dort bereits punktuelle Klagemöglichkeiten des Einzelnen, wie etwa bei Verletzungen der europäischen Menschenrechtskonvention. Diese Klagemöglichkeiten sind in Einzelfällen auch

⁶ Siehe Fn. 3.

⁷ Siehe Fn. 2; vgl. auch B. v. Maydell *et al.* *Enabling Social Europe*. Berlin u.a.: Springer 2006.

⁸ Auf das deutsche Beispiel wird nachfolgend unter 3.2 eingegangen.

⁹ Vgl. kritisch insbesondere für das internationale Recht D. Richter. *Soziale Grundrechte und internationales Recht*. – S. Knickrehm, U. Rust (Hrsg.). *Arbeitsmarktpolitik in der Krise*. Festgabe für Karl-Jürgen Bieback. Nomos 2010, S. 265 ff.

¹⁰ Siehe die vergleichende Studie von J. Iliopoulos-Strangas (ed.). *La protection des droits sociaux fondamentaux dans les Etats membres de l'Union européenne*. Athènes: Ant. N. Sakkoulas, Bruxelles: Bruylant, Baden-Baden: Nomos 2000.

¹¹ Vgl. B. v. Maydell. *Recht auf Arbeit – völkerrechtliche Aspekte*. – *Recht auf Arbeit*. Vorträge anlässlich des Symposiums zum 70. Geburtstag von Karl Josef Partsch am 30.6.1984. Bonn: Rheinischen Friedrich-Wilhelms-Universität Bonn 1984, S. 62 ff. In einem weiteren Sinne spricht Bryde von den Grundrechten der Arbeit und Europa. – *RdA* 2003, Sonderbeilage Heft 5, S. 5 ff.

¹² Zur Arbeit dieses Ausschusses vgl. N. D. Wagner. *Internationaler Schutz sozialer Rechte*. Die Kontrolltätigkeit des Sachverständigenausschusses der IAO. Nomos 2002.

benutzt worden, um soziale Positionen unter Berufung auf die Verletzung von Menschenrechten (Eigentum, Diskriminierungsverbot etc.) geltend zu machen.^{*13}

Abgesehen von sozialen Grundrechten können soziale Positionen auch in anderer Form in einem Rechtssystem zur Geltung kommen. Die Verfassung kann Prinzipien vorsehen, wie z. B. das Sozialstaatsprinzip. Unterhalb der Verfassung kann der Gesetzgeber die soziale Sicherheit in vielfältigen Strukturen normieren, wie eine rechtsvergleichende Betrachtung zeigt. Auch diese Strukturen können bei der Frage bedeutsam werden, wie soziale Rechte durch wirtschaftliche und finanzielle Krisen tangiert werden.

Wie soziale Grundrechte, Verfassungsprinzipien und die Gestaltung des gesetzlichen Sozialrechts auf nationaler Ebene zusammenwirken können, soll nachfolgend am Beispiel Deutschlands verdeutlicht werden.

3.2. Soziale Rechte in der deutschen Rechtsordnung

Im deutschen Grundgesetz vom Jahr 1949 fehlen ausformulierte soziale Grundrechte. Diese Entscheidung der verfassungsgebenden Versammlung ist bewusst erfolgt. Ein Grund dafür waren die „ambivalenten verfassungsrechtlichen Erfahrungen mit den wirtschafts- und sozialrechtlichen Bestimmungen der Weimarer Reichsverfassung“.^{*14}

Es findet sich allerdings im Grundgesetz eine Staatszielbestimmung, das sog. Sozialstaatsprinzip, das trotz seines fehlenden materiellrechtlichen Regelungsgehalts^{*15} für die Ausgestaltung der Gesetzgebung und die Auslegung der Verfassung und der Gesetze eine große praktische Bedeutung erfahren hat.^{*16} Abgesehen vom Sozialstaatsgrundsatz sind verschiedene Verfassungsgrundsätze für die Ausgestaltung und die Auslegung des Sozialrechts wichtig^{*17}, etwa die Würdegarantie^{*18}, der Eigentumsschutz^{*19}, die Rechtsstaatlichkeit, die u. a. einen Vertrauensschutz begründet, und verschiedene andere Grundgesetzbestimmungen. Diese Vielzahl verfassungsrechtlicher Vorgaben, die durch das Bundesverfassungsgericht umgesetzt werden können, führt dazu, dass für das Sozialrecht ein Rahmen besteht, der vom Gesetzgeber beachtet werden muss.

Die sozialen Rechte der Bürger werden in diesem Rahmen durch das Sozialrecht, d. h. die Gesamtheit der sozialpolitischen Gesetze, konkretisiert.^{*20} Die Mehrzahl dieser Gesetze ist systematisiert und im Sozialgesetzbuch zusammengefasst. Mit der Materie befasst sich, abgesehen von der Sozialrechtswissenschaft, eine eigene Gerichtsbarkeit, die Sozialgerichtsbarkeit, die zur Konkretisierung und Verfestigung der Rechtspositionen des Einzelnen beiträgt.

Das Sozialrecht hat im Laufe der Jahrzehnte einen enormen Ausbau und eine Differenzierung erfahren, die den Gesetzgeber zu laufenden Anpassungen, Korrekturen und Ergänzungen zwingen.^{*21}

¹³ Siehe dazu A. Schmidt. Europäische Menschenrechtskonvention und Sozialrecht. Nomos 2003.

¹⁴ So F. X. Kaufmann. Die Entstehung sozialer Grundrechte und die wohlfahrtsstaatliche Entwicklung. Nordrhein-Westfälische Akademie der Wissenschaften, Vorträge - G 387. Schöningh 2003, S. 46, 47.

¹⁵ So F. H. Zacher. Sozialstaatsprinzip. – W. Albers u. a. (Hrsg.). Handwörterbuch der Wirtschaftswissenschaften. Band 7. Stuttgart 1977, S. 152 ff., 159.

¹⁶ Siehe E. Eichenhofer. Der Verfassungsauftrag: Ein sozialer Rechtsstaat. – Sozialer Fortschritt 2011 (60) 1–2, S. 1 ff.

¹⁷ Siehe H.-J. Papier. Der Einfluss des Verfassungsrechts auf das Sozialrecht. – B. v. Maydell, F. Ruland, U. Becker (Hrsg.). Sozialrechtshandbuch (SRH). 5. Aufl. Nomos 2012, § 3. Vgl. auch R.-U. Schlenker. Soziales Rückschrittsverbot und Grundgesetz: Aspekte der verfassungsrechtlichen Einwirkungen auf die Stabilität sozialer Rechtslagen. Duncker & Humblot 1986.

¹⁸ die einen Mindest-Sozialschutz gebieten kann.

¹⁹ der Eingriffe in Renten- und Rentenanwartschaften ausschließen kann.

²⁰ Das Sozialgesetzbuch sieht in seinem ersten Teil soziale Rechte vor, die aber keinen Verfassungsrang haben und deren rechtliche Relevanz daher umstritten ist, vgl. dazu B. v. Maydell. Die „sozialen Rechte“ im Allgemeinen Teil des Sozialgesetzbuchs. – DVBl. 1976, S. 1 ff.; ferner E. Eichenhofer. Soziale Rechte im Sozialgesetzbuch. – SGB 06/11, S. 301 ff.

²¹ Vgl. B. v. Maydell. Sozialpolitische Gesetzgebung – zwischen Anpassungszwängen und dem Gebot der Rechtsstaatlichkeit. – FS für Herbert Helmrich zum 60. Geburtstag. C.H.Beck 1994, S. 549 ff.

4. Die Folgen der Finanz- und Wirtschaftskrisen auf die soziale Lage der Bürger

4.1. Interdependenzen

Will man die Wirkung sozialer Rechte beurteilen, so muss man zunächst die Folgen der Finanz- und Wirtschaftskrisen auf die soziale Lage der Bürger analysieren und danach fragen, ob diese Folgen durch das Bestehen sozialer Grundrechte – in welcher Form auch immer – abgemildert oder sogar vermieden werden können.^{*22} Es geht somit um die entscheidende Frage, ob soziale Rechte sich in der Krise bewähren oder ob sie wirkungslos bleiben oder vielleicht sogar die Krise verschärfen, weil sie wirksame wirtschaftspolitische Maßnahmen erschweren.

Die Wirkanalyse wird dadurch erschwert, dass die soziale Lage nicht durch Finanz- und Wirtschaftskrisen allein beeinflusst wird; hinzu kommen weitere Faktoren, wie insbesondere die demographische Entwicklung, d. h. der Anstieg der Lebenserwartung und der dadurch wachsende Anteil alter und sehr alter Menschen an der Bevölkerung, wobei dieser Alterungsprozess durch die niedrige Geburtenrate in den meisten europäischen Staaten, wie etwa Deutschland oder Estland, noch verstärkt wird.^{*23} Ein anderer Einflussfaktor ist die Globalisierung.^{*24}

Die möglichen Interdependenzen dieser verschiedenen Einflussfaktoren muss die Sozialpolitik im Auge behalten. Im vorliegenden Zusammenhang ist es allerdings ausreichend, den Blick auf die Auswirkungen der Finanz- und Wirtschaftskrise zu konzentrieren.

4.2 Auswirkungen auf verschiedenen Ebenen

Finanz- und Wirtschaftskrisen wirken sich primär auf der gesamtwirtschaftlichen und gesellschaftlichen Ebene aus, aber auch auf einzelne Institutionen, wie den Staatshaushalt, die Haushalte der Sozialversicherungsträger, die privaten Banken und Versicherungen etc. Auf der individuellen Ebene treffen die Auswirkungen die einzelnen Bürger und beeinflussen ihre soziale Lage.

Auf der gesamtwirtschaftlichen Ebene wirken sich Finanz- und Wirtschaftskrisen auf das Sozialprodukt aus. Das Wachstum kann zum Stillstand kommen und in eine Rezession umschlagen. Das hat Auswirkungen auf den Arbeitsmarkt; eine steigende Arbeitslosigkeit hat Folgen unmittelbar für die einzelnen Arbeitnehmer, deren Einkommen zurückgeht und deren soziale Absicherung (etwa die Alterssicherung) negativ beeinflusst werden kann. Aber auch die Finanz- und Kapitalmärkte werden beeinträchtigt. Eine Rezession führt weiter zu einem Rückgang der Steuereinnahmen und der Beitragseinnahmen der Sozialversicherungsträger. Dadurch gehen Mittel, die für die Bekämpfung der Krise und eine Abfederung der sozialen Folgen eingesetzt werden könnten, zurück. Auch die Kapitalmärkte leiden in der Krise. Kapitalanlagen, die auch für die Absicherung sozialer Risikolagen eingesetzt werden, erbringen eine niedrigere Rendite oder verlieren an Wert. Die Schwierigkeiten der Banken und Versicherungen belegen diese sozialen Folgen der Krise der vergangenen Jahre sehr deutlich.

5. Einfluss sozialer Grundrechte auf die Folgen der Krise

Die sozialen Grundrechte stellen für den Gesetzgeber den Rahmen für die Ausgestaltung des Sozialrechts dar; ob sie darüber hinaus konkrete rechtliche Wirkungen bei der Bewältigung und Abmilderung der Folgen von Finanz- und Wirtschaftskrisen entfalten, soll nachfolgend untersucht werden. Dabei ist keine flächendeckende Analyse möglich, es sollen vielmehr zwei soziale Grundrechte – das Recht auf Arbeit und das Recht auf soziale Sicherheit – beispielhaft herausgegriffen werden, wobei von den deutschen Erfahrungen der letzten Jahre ausgegangen wird.

²² Darauf wird nachfolgend unter 5. eingegangen.

²³ Vgl. z. B. v. Maydell. Die sozialen Alterssicherungssysteme im europäischen Binnenmarkt unter besonderer Berücksichtigung des demographischen Problems. – ZfSH/SGB 1991, S. 669 ff.

²⁴ Dazu siehe u. a. E. Rieger, S. Leibfried. Grundlagen der Globalisierung. Perspektiven des Wohlfahrtsstaates. Suhrkamp 2001; R. Sigg, C. Behrendt (Hrsg.). Soziale Sicherheit im globalen Dorf. Bern u. a.: Peter Lang 2003.

5.1 Das Recht auf Arbeit

Wie schon dargelegt, fehlt ein Grundrecht auf Arbeit im Grundgesetz^{*25}; allerdings enthalten einzelne Länderverfassungen eine entsprechende Bestimmung.^{*26} Gleichzeitig wird das Recht auf Arbeit in der deutschen Rechtsordnung sehr intensiv geregelt. Hinzuweisen ist vor allem auf das Arbeitsförderungsrecht mit einem breiten Spektrum von Fördermaßnahmen und auf das Arbeitsrecht, das allerdings primär das Recht auf Erhalt eines bestehenden Arbeitsverhältnisses schützt.^{*27}

Bezogen auf die Krisen der letzten Jahre ist festzustellen, dass der Anstieg der Arbeitslosigkeit in Deutschland wesentlich geringer ausgefallen ist als in den meisten anderen europäischen Staaten. Ein wichtiger Grund dafür ist, wie allgemein anerkannt wird, dass Entlassungen vor allem durch die Zahlung von Kurzarbeitergeld durch die Bundesagentur für Arbeit in großem Umfang verhindert werden konnten.^{*28} Dies hatte zudem den großen volkswirtschaftlichen Vorteil, dass nach der überraschend schnellen Verbesserung der Auftragslage in der Industrie die Arbeitskräfte zur Bewältigung dieser Aufträge zur Verfügung standen.

Das staatliche Instrumentarium zum Schutz vor Arbeitslosigkeit hat also nicht nur zur Abmilderung der sozialen Folgen der Krise beigetragen sondern gleichzeitig die Voraussetzungen für eine Erholung der Volkswirtschaft geschaffen.

5.2. Das Recht auf soziale Sicherheit

Ein Menschenrecht auf soziale Sicherheit^{*29} ist in verschiedenen internationalen Dokumenten niedergelegt^{*30}, nicht aber im deutschen Grundgesetz, das sich auf die Normierung des Sozialstaatsgrundsatzes beschränkt, der durch ein umfassendes System sozialer Sicherheit umgesetzt wird. Es ist also zu fragen, ob die sozialrechtlichen Normen die Wirkungen der Finanz- und Wirtschaftskrisen erfolgreich abmildern.^{*31} Als Beispiel soll die Alterssicherung^{*32} dienen, die für die Arbeitnehmer in Deutschland durch die primär mit Beitragsmitteln finanzierte Rentenversicherung gewährleistet werden soll. Finanz- und Wirtschaftskrisen führen aber dazu, dass die Arbeitseinkommen sinken und prekäre Arbeitsverhältnisse (Leiharbeit, geringfügige Beschäftigungen etc.) zunehmen und die Berufskarrieren durch Arbeitslosigkeit unterbrochen werden. Das bedeutet für die betroffenen Arbeitnehmer, dass sie für solche Zeiten keine oder nur geringe Beiträge entrichten^{*33} und daher keine vollwertigen Anwartschaften erwerben können. Die Folge ist, dass der Rentenanspruch niedriger als bei einer ununterbrochenen vollen Erwerbstätigkeit ausfällt und unter Umständen nicht zur Bestreitung des Lebensstandards ausreicht. Dem könnte durch eine Grundrente, die ohne Rücksicht auf die geleisteten Beiträge gezahlt wird, entgegengewirkt werden. Solche Grundrenten werden in vielen Alterssicherungssystemen vorgesehen, nicht aber in Deutschland.

²⁵ Vgl. Fn. 11.

²⁶ Siehe A. Brenne. Soziale Grundrechte in den Landesverfassungen. Peter Lang 2003.

²⁷ Das wird besonders deutlich beim Kündigungsschutzrecht. Dieser Schutz kann aber die Schaffung neuer Arbeitsplätze erschweren.

²⁸ So C. Brauksiepe. Sozialpolitische Herausforderungen in Zeiten der Krise. – R.T. Baus, G. Krings, R. Schleger (Hrsg.). Aktuelle Fragen des Sozialrechts. Konrad Adenauer-Stiftung 2010, S. 21 ff.; auch Adamy (Arbeitslosenversicherung wird ins Rekorddefizit getrieben. – Soziale Sicherheit 2009/9, S. 285 ff.) erkennt bei aller Kritik an dem wirtschaftlichen Krisenmanagement der Regierung die stabilisierende Wirkung der Arbeitsförderung auf die Beschäftigung an. Die Wirkung der Arbeitsmarktpolitik bei der Vermeidung von Kündigungen betont auch Waltermann in seinem Referat im Rahmen der 33. Tagung der Gesellschaft für Rechtsvergleichung in Trier (vgl. den Tagungsbericht in EuZA 2011/5, S. 121 ff.).

²⁹ So E. Eichenhofer. Menschenrecht auf soziale Sicherheit. – VSSR 2007/2, S. 87 ff.

³⁰ Vgl. z. B. Artikel 22 der Allgemeinen Erklärung der Menschenrechte der Vereinten Nationen, Artikel 9 des VN-Paktes über wirtschaftliche, soziale und kulturelle Rechte, Artikel 12 der Europäischen Sozialcharta.

³¹ Zu den Wirkungen der Finanzkrise auf die sozialen Sicherungssysteme vgl. die Expertise, die im Auftrag der Friedrich-Ebert-Stiftung und der Hanns-Böckler-Stiftung erarbeitet worden ist: „Kurzfristige Auswirkungen der Finanzmarktkrise auf die sozialen Sicherungssysteme und mittelfristiger Handlungsbedarf“, Bonn, September 2009.

³² Vgl. dazu die Ergebnisse eines Workshops der GVG zu den „Auswirkungen der Wirtschafts- und Finanzkrise auf die Alterssicherung“, Informationsdienst der GVG Nr. 328 vom September 2009.

³³ Das hat naturgemäß auch Auswirkungen auf die Finanzlage der Rentenkassen, vgl. dazu A. Buntentbach. Die Finanzsituation in der Gesetzlichen Rentenversicherung. – DRV 2009, S. 273 ff.; siehe auch H.-J. Urban. Sozialstaatliche Sicherung in der großen Krise des Finanzmarkt-Kapitalismus. – Soziale Sicherheit 2010/4, S. 130 ff.

Dieses Ergebnis zeigt – im Gegensatz zum ersten Beispiel –, dass das Sozialrecht auch so ausgestaltet sein kann, dass die Wirkungen der Krise sich auf den Einzelnen negativ auswirken. Allerdings würde dieses Ergebnis nicht anders ausfallen, wenn ein Menschenrecht auf soziale Sicherheit in der Verfassung niedergelegt wäre. Wirksam wäre nur eine entsprechende Umgestaltung des Alterssicherungsrechts.

6. Einige zusammenfassende Feststellungen zum Verhältnis von normierten sozialen Rechten und den Wirkungen der Finanz- und Wirtschaftskrise

- (1) Die europäischen Staaten weisen unterschiedliche Formen von Normierungen sozialer Grundrechte auf. Auch die Auswirkungen der Finanz- und Wirtschaftskrise sind von Land zu Land sehr verschieden. Exakte Aussagen über bestehende Interdependenzen zwischen Normbestand und Krisenauswirkungen sind daher immer nur für konkrete Fallbeispiele möglich.
- (2) Die Krisen der vergangenen Jahre haben zu zahlreichen Gesetzen geführt, die das soziale Sicherungssystem an die Folgen der Krisen anzupassen versuchten. Soweit diese Gesetze darauf gerichtet waren, die Sozialsysteme durch eine Konzentration auf die Kernbereiche zu reformieren, konnten diese Reformen, auch wenn sie mit einem Abbau von sozialen Leistungen verbunden waren, zu einer Stärkung der sozialen Absicherung führen.
- (3) Man kann nicht feststellen, dass die Wirkungen der Krise in den Staaten weniger gravierend waren, in denen ein umfassendes System sozialer Grundrechte in der Verfassung besteht. Deutschland, wo solche soziale Grundrechte im Grundgesetz weitgehend fehlen, wo aber gleichzeitig die Folgen der Krise sehr schnell überwunden werden konnten, ist ein Gegenbeispiel.
- (4) Ob ein Rechtssystem seine Bürger gegen die Auswirkungen von Krisen schützen kann, hängt davon ab, dass spezifische Rechtsinstitute bestehen, die auf die jeweiligen sozialen Folgen abgestimmt sind.
Ein Beispiel ist die Ausgestaltung des Arbeitsförderungsrechts, das durch geeignete Institute, wie z. B. ein effektives Kurzarbeitergeld, das Ausmaß der Arbeitslosigkeit eindämmen und die nachfolgende Wiederbelebung des Arbeitsmarktes fördern kann.
- (5) Das deutsche Recht bietet aber auch Beispiele dafür, dass die Wirkungen der Krise sich zum Nachteil der Bürger auswirken, obwohl dies durch eine anderweitige Gestaltung z. B. des Alterssicherungsrechts, nämlich durch eine vom Alterseinkommen, das von der Krise beeinflusst wird, unabhängige Grundrente im Alter möglich wäre.
- (6) Diese Beispiele, die erweitert werden könnten, zeigen, dass durch eine Gestaltung des materiellen Sozialrechts eine Abmilderung von Krisenfolgen erreicht werden kann. Der Ausgestaltung des materiellen Sozialrechts und seiner dogmatischen und sozialpolitischen Präzisierung kommt daher eine große Bedeutung zu. Vollmundige soziale Grundrechte wirken demgegenüber häufig nur wie ein Alibi, soweit sie nicht vom Gesetzgeber als verbindliche Handlungsanleitung empfunden und umgesetzt werden.
- (7) Letztlich werden Wirtschafts- und Finanzkrisen nur dort sozial abgefedert werden, wo soziale Gerechtigkeit ein anerkanntes Grundprinzip und das Sozialrecht, das dieses Prinzip umsetzen soll, eine voll ausgebildete und anerkannte Rechtsmaterie ist.



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The Financial Guarantee of Local Government and Possibilities for its Protection

1. Introduction

Themes related to the financial guarantee of local government (LG) tend to be ‘evergreen’ both in Estonia and more broadly. One can here refer to the words spoken a full 20 years ago by P. Galina, then mayor of the Italian city of Cesena and vice-president of the National Association of Italian Municipalities: ‘The reform of local finances in our country, centring on the provision of independent resources, is another *fata morgana*: despite the new regulations, municipal bodies are still obliged to operate under conditions of uncertainty as to the financial resources actually available.’¹ Cuts made in the basis for LG income and lack of clarity surrounding determination and funding of LG units (LGUs) represent the situation in which on 16 March 2010 the highest judicial authority of the Estonian state—the Supreme Court acting *en banc* in Constitutional supervision procedure—made an important decision declaring unconstitutional the failure to adopt such legislation of general application as would

- 1) Stipulate what obligations imposed on LGUs by law are of a local character and which are of a national character, and
- 2) Distinguish between the funds allocated to LGUs for deciding on and organising the addressing of local issues from the funds allocated for performance of national obligations and provide for funding of the national obligations imposed on LGUs by law out of the state budget.²

These conclusions of the Supreme Court have not lost their relevance.

The author’s aim is to proceed from the Constitution of the Republic of Estonia³ (CRE), European Charter of Local Self-Government⁴ (ECLSG), valid legislation, case law of the Supreme Court, and relevant legal literature⁵ to give answers to the following main questions:

¹ Conference on the European Charter of Local Self-Government (Barcelona, 23.–25.1.1992). ‘What have you done with the European Charter of Local Self-Government?’ Legislation and Jurisprudence. Standing Conference of Local and Regional Authorities of Europe. Studies and Texts, No. 27. Council of Europe Press 1993, p. 86.

² Supreme Court *en banc* decision of 16.3.2010, 3-4-1-8-09. – RT III 2010, 13, 97 (in Estonian). English text available at <http://www.nc.ee/?id=1122> (most recently accessed on 20.3.2012).

³ Eesti Vabariigi põhiseadus. – RT 1992, 26, 349; RT I, 27.4.2011, 1 (in Estonian).

⁴ Euroopa kohaliku omavalitsuse harta. – RT II 1994, 26, 95.

⁵ There is a scarcity of relevant legal writings on this particular subject in the Estonian language. The following ones can be mentioned: Eesti Vabariigi põhiseadus. Kommenteeritud väljaanne. Teine, täiendatud väljaanne (Constitution of the Republic of Estonia. Commented Edition. Second, Revised Edition). Tallinn: Juura 2008; T. Kolk. Millist kohaliku omavalitsuse rahastamise süsteemi nõuab põhiseadus? (Which Funding System is Required by the Constitution?). – Riigikogu Toimetised

- 1) What purpose does financial guarantee of LG serve as a whole? (The role of a financial guarantee within the whole structure of the Constitutional guarantee of LG.)
- 2) Which levels (elements) are included in the financial guarantee, and what is their purpose within the structure of this guarantee?
- 3) How can the financial guarantee be protected?

In the interests of better coverage of the income basis for Estonian LGs, the following breakdown is presented:

Sources of municipal revenue, 2003–2009^{*6}

	2003	2004	2005	2006	2007	2008	2009
Taxes ^{*7}	46.48%	47.57%	47.66%	46.85%	52.49%	54.62%	53.55%
Grants	39.77%	35.56%	35.16%	33.23%	33.21%	32.32%	32.31%
Sales of goods and services	8.39%	10.94%	10.43%	9.03%	8.87%	9.66%	10.77%
Sales of tangible and intangible property	3.22%	4.04%	4.80%	8.56%	2.86%	0.94%	0.89%
Revenue from property	1.44%	1.53%	1.23%	1.65%	2.03%	2.02%	1.98%
Other income	0.71%	0.37%	0.71%	0.68%	0.54%	0.44%	0.50%
Total	100%						

2. The concept and structure of the guarantee of local government

Under the guarantee of LG, a complex of rights at the level of Constitutional law can be understood to be provided to each LGU, with a view to its formal and substantial existence within a system of public administration. The guarantee functions as a structural principle of state organisation as well.^{*8} Municipal self-management (right to exercise discretion upon taking decisions and making choices when resolving and managing local issues) as a basic guarantee of LG is provided in §154 (1) of the CRE, according to which all local issues shall be resolved and managed by LGs, which shall operate independently pursuant to law.

2011 (23), pp. 71–80; Ü. Madise. Kohaliku omavalitsuse garantii Eesti Vabariigi 1992. a põhiseaduses (The Guarantee of Local Self-government in the Estonian Constitution of 1992). Master's thesis. Tartu 2001.

⁶ OECD Public Governance Review, Estonia: Towards a Single Government Approach. 2010, p. 52. Available at http://www.valitsus.ee/UserFiles/valitsus/et/riigikantslei/uldinfo/dokumendiregister/Uuringud/OECD_Public%20Governance%20Review_Estonia_full%20report.pdf (most recently accessed on 20.3.2012).

⁷ Local budgets receive money from state taxes as follows: 1) without taking into account the deductions provided for in Chapter 4 of the Income Tax Act (tulumaksuseadus. – RT I 1999, 101, 903; RT I, 28.12.2011, 1 (in Estonian)), 11.4% of the taxable income of a resident natural person (§5 (1) 1)) and 2) 100% of land tax (Land Tax Act (maamaksu seadus), §6. – RT I 1993, 24, 428; 2010, 22, 108 (in Estonian)). Local taxes, which generally are of marginal importance in LG budget incomes, are the following: advertisement tax, road- and street-closure tax, motor vehicle tax, animal tax, entertainment tax, and parking charges (Local Taxes Act (kohalike maksude seadus), §5 5)–10). – RT I 1994, 98, 1169; RT I, 29.12.2011, 1 (in Estonian)).

⁸ See Eesti Vabariigi põhiseadus. Kommenteeritud väljaanne (Note 5), Chapter 14, introduction, p. 722; Madise (Note 5), p. 12; Supreme Court Constitutional Review Chamber decision of 29.9.2009, 3-4-1-10-09, paragraph 19. – RT III 2009, 41, 305 (in Estonian). English text available at <http://www.nc.ee/?id=1067> (1.3.2012) (in Estonian); Supreme Court *en banc* decision 3-4-1-8-09 (Note 2), paragraph 51. There exists also an approach in the legal literature according to which a particular complex of provisions can be qualified as a guarantee of LG. See E. Schmidt-Aßmann, H.-Chr. Röhl. Kommunalrecht. – R. Breuer *et al.* Besonderes Verwaltungsrecht. E. Schmidt-Aßmann, F. Schoch (Hrsg.). 14., neu bearbeitete Auflage. Berlin: De Gruyter Recht 2008, pp. 22–23. The author of this article has followed the terminology of the Supreme Court's case law.

Constitutional guarantee cannot be defined as a fundamental right of the LGU.^{*9} It applies neither to relations between LG and private persons (wherein LG should, according to §14 of the CRE, observe common rules) to be applied by public administration nor to lower-level units of the LGU (rural or city districts). A LGU cannot refuse to fulfil the obligations conferred upon it by law, basing its refusal on its Constitutional guarantee.^{*10}

The guarantee of LG involves the following levels:

- 1) Guarantee of institutional legal personality
- 2) Guarantee of institution of objective law
- 3) Financial guarantee
- 4) Guarantee of independence from a local budget
- 5) Guarantee of subjective legal status.^{*11}

3. The nature of the financial guarantee

Financial guarantee is established in §§ 154 and 157 (2) of the CRE as well as in Article 9 of the ECLSG.^{*12} From these provisions of Constitutional law, certain rights arise for the LGU in relation to its economic capability to perform public tasks (related to local issues (see §154 (1) of CRE) and national obligations (see §154 (2) of CRE)). Financial guarantee serves as the basis for arrangement of funding of LGUs, consisting, on the one hand, of the system for funding LG functions and, on the other, of provisions regulating the funding of national duties imposed on LGs by law.^{*13} It proceeds from §154 of the CRE that the establishment of a system of funding for LGs to guarantee them sufficient financial resources is a responsibility of the state.^{*14}

The financial resources of LGUs must be commensurate with the responsibilities provided for by the Constitution and the law.^{*15} An LGU must be able to resolve and manage all local issues independently under the law and should not have to use the finances meant for the handling of local issues for the performance of duties of the state imposed on it by law.^{*16} Thus, financial guarantee goes beyond the right of self-management of an LGU. At the same time, the rights related to the financial guarantee are, when compared to the right of self-management, of a secondary nature and oriented to the creation of necessary conditions for its exercise.^{*17}

It is up to the legislator to decide whether the receipt of funds shall be guaranteed by imposition of local taxes, by payment of state taxes directly into local budgets, or by allocations from the state budget.^{*18} Funding of national obligations must, pursuant to §154 (2) of the CRE, proceed from the state budget. Hence, the possibilities of the state in forming a system of funding to provide a sufficient income base for LGUs are more diverse in cases of local issues than in relation to national obligations to be imposed upon LGUs by law.

⁹ Supreme Court Constitutional Review Chamber decision of 19.3.2009, 3-4-1-17-08, paragraph 25. – RT III 2009, 14, 100 (in Estonian). English text available at <http://www.nc.ee/?id=1010> (most recently accessed on 1.3.2012); Supreme Court Constitutional Review Chamber decision of 19.1.2010, 3-4-1-13-09, paragraph 18. – RT III 2010, 5, 33 (in Estonian).

¹⁰ Supreme Court Constitutional Review Chamber decision of 9.3.2005, 3-11-139-04, paragraph 15. – RT III 2005, 10, 94 (in Estonian).

¹¹ See also Supreme Court Constitutional Review Chamber decision of 21.2.2003, 3-4-1-2-03, paragraph 12; Supreme Court *en banc* decision of 19.4.2004, 3-3-1-46-03, paragraph 20. – RT III 2004, 11, 128 (in Estonian). English text available at <http://www.nc.ee/?id=403> (most recently accessed on 1.3.2012); Supreme Court *en banc* decision 3-4-1-8-09.

¹² Two main directions can be differentiated within the framework of Article 9. One of them is of a quantitative nature and has to do with the extent of the finances to be managed by LGUs. In the other one there appears a qualitative dimension, which results from independence of LG and is aimed at its financial power. – B. Schaffarzik. Handbuch der Europäischen Charta der kommunalen Selbstverwaltung. Stuttgart, Munich, Hannover, Berlin, Weimar, Dresden: Boorberg 2002, p. 505.

¹³ Supreme Court *en banc* decision 3-4-1-8-09, paragraph 61.

¹⁴ Supreme Court *en banc* decision 3-3-1-46-03, paragraph 21.

¹⁵ Article 9 (2) of ECLSG.

¹⁶ Supreme Court Constitutional Review Chamber decision of 9.6.2009, 3-4-1-2-09, paragraph 43. – RT III, 18.6.2009, 31, 227 (in Estonian). English text available at <http://www.nc.ee/?id=1038> (most recently accessed on 1.3.2012).

¹⁷ *Ibid.*

¹⁸ Supreme Court *en banc* decision 3-3-1-46-03, paragraphs 24, 28.

Article 9 (4) of the ECLSG requires diversity and buoyancy of the system of funding of LGs. Diversity means proceeds of various nature, buoyancy—*inter alia*—that, upon allocation of funds to LGs, it should be possible to take into account all revenue received by an LG, including extraordinary revenue.^{*19}

Article 9 (5) establishes that the protection of financially weaker LGs calls for the institution of financial equalisation procedures or equivalent measures that are designed to correct the effects of the unequal distribution of potential sources of financing and of the financial burden they must support. Such procedures or measures shall not diminish the discretion local authorities may exercise within their own sphere of responsibility. This article does not prescribe criteria a state must take into consideration when equalising financial resources. It is important that the measures a state takes should equalise the differences upon unequal distribution of potential sources of financing and expenditure.^{*20} Local authorities must be consulted on the way in which redistributed resources are to be allocated to them (i.e., they have a right to a hearing).^{*21} As far as possible, grants to LGs should not be earmarked for the financing of specific projects. The provision of grants shall not remove the basic freedom of LGs to exercise policy discretion within their own jurisdiction.^{*22} The requirement of clarity as to which particular national duties will be financed from the state budget is not in contradiction with Article 9 (7) of the ECLSG.^{*23}

Financial guarantee is not unlimited any more than is the right of self-management. With respect to delimitation, it is the legislator who must decide on all major restrictive measures.^{*24} Less intensive restrictions may also be imposed by the executive through regulation based on an accurate and clear provision delegating authority whose intensity is in line with the restriction.^{*25} It is not in accordance with the principle of the rule of law to balance possible prejudices of the financial guarantee of LG with ostensible measures (e.g., illusory possibilities for savings).^{*26}

4. The structure of financial guarantee

The financial guarantee of LGUs includes

- 1) The right to sufficient funds for performance of LG functions,
- 2) The right to the stability of the system of funding for LG functions,
- 3) The right to full funding from the state budget of national duties imposed by law,
- 4) The right to levy local taxes and to receive revenue from charges, and
- 5) The right to assume debt obligations.^{*27}

¹⁹ Providing buoyancy of the system is also the aim of §25 of the Local Government Financial Management Act (kohaliku omavalitsuse üksuse finantsjuhtimise seadus. – RT I 2010, 72, 543; RT I, 23.12.2011, 1 (in Estonian)), which, though not itself offering a provision at the level of financial guarantee, establishes that if decreases in budget income and increases in budget expenses of an LG occur during the current budgetary year on the basis of legislation enacted by the Riigikogu or the Government of the Republic after the beginning of the budgetary year of the LG, the state shall compensate for such impacts of legislation to the same extent or proportionally decrease the obligations imposed on the LG.

²⁰ Supreme Court *en banc* decision 3-3-1-46-03, paragraph 30. Financial equalisation cannot, however, lead to overcompensation of differences in financial capability. A result of this kind would practically abolish responsibility of the LGU for results of its policy.

²¹ Article 9 (6) of the ECLSG.

²² Article 9 (7) of the ECLSG. See in this respect, for example, the 1998 report entitled 'Limitations of local taxation, financial equalisation and methods for calculating general grants', by the Steering Committee on Local and Regional Democracy (CDLR), prepared with the collaboration of Jørgen Lotz (Local and Regional Authorities in Europe, No. 65) from Council of Europe Publishing.

²³ Kolk (see Note 5), p. 77.

²⁴ Supreme Court Constitutional Review Chamber decision of 4.11.1993, III-4/1-4/93. – RT I 1993, 72/73, 1052 (in Estonian). English text available at <http://www.nc.ee/?id=487> (most recently accessed on 1.3.2012).

²⁵ Supreme Court *en banc* decision of 3.12.2007, 3-3-1-41-06, paragraph 22. – RT III 2007, 44, 350 (in Estonian). Available at <http://www.nc.ee/?id=883> (1.3.2012); Supreme Court *en banc* decision 3-4-1-8-09, paragraph 160.

²⁶ Supreme Court *en banc* decision of 3-4-1-8-09, paragraph 112.

²⁷ Supreme Court Constitutional Review Chamber decision of 9.6.2009, 3-4-1-2-09, paragraph 61.

4.1. The right to sufficient funds for performance of local government functions

The right to sufficient funding for local government functions follows from §154 (1) of the CRE and subsections 1 and 2 of Article 9 of the ECLSG.

Subsection 154 (1) requires of the system of funding of LG functions that

- It be clearly distinguishable which funds are earmarked for performance of LG functions and what funds are meant for performance of national functions imposed on the LG by law^{*28};
- As a whole, it not be disproportionately dependent on one-off allocations by the state, and it adequately mirror the overall economic situation; and
- It takes into account differences in the social, demographic, geographic, and economic situations of LGs.^{*29}

Although the legislator has extensive discretion in formation of the state's economic and tax policies^{*30}, funding of LG functions (both compulsory ones and voluntary functions to be reasonably expected from LG) must be provided at least at the minimum level necessary for performance of these functions.^{*31} In choosing between compulsory and voluntary functions of LG, only the latter need not be performed. Although voluntary LG functions can differ from one LGU to the next, it is incorrect to maintain that the state has no obligation whatsoever to fund this group of functions to a certain extent.

The minimum level of local functions that need to be performed and whose funding must be ensured arises, above all, from §154 (1), §28 (4), §37 (2), etc. of the CRE and from the local functions imposed on the LG by legislative acts. The need for financing of local functions arising from law is directly affected by various requirements established in relation to the performance of these functions in acts and in lower-ranking legislation.

It follows from §14 of the CRE that lack of funds must not bring the level of the local public services provided by the LGU substantially below the general level of similar services in other LGUs in Estonia.^{*32} Among other things, this presupposes (more) effective regional policy of the state and systematic reform of existing LG organisation.^{*33}

Article 9 (1) of the ECLSG places a LG's right to sufficient funds within the framework of the state's economic policy. If necessary, the state may also reduce the funding of LG functions, to the minimum extent necessary.

For establishment of an infringement, it is not sufficient that the contested provision be only capable of rendering performance of the LG functions more difficult: it actually must have this effect^{*34} (e.g., the state decreases the income of LGUs or increases the volume of mandatory local functions without allocating additional financial resources).

Violation of said right can arise only from such provisions (or failures to adopt them) as regulate (or that, because of failure to adopt, do not sufficiently regulate) the system of funding LG functions. These include provisions—or their absence—as a result of which the funding of local functions proves insufficient in the specific LGU in question. However, it is not a provision making performance of some local function compulsory for the LGU that may violate the right to sufficient funds for performance of LG functions but

²⁸ Supreme Court *en banc* decision of 3-4-1-8-09, paragraph 72.

²⁹ *Ibid.*, paragraph 66.

³⁰ For example, when collecting tax arrears, the state should not, in any case, prefer the taxes accrued for LGs over the taxes retained by the state. See Supreme Court Constitutional Review Chamber decision of 26.6.2009, 3-4-1-4-09, paragraph 26. – RT III 2009, 37, 280 (in Estonian). English text available at <http://www.nc.ee/?id=1040> (most recently accessed on 1.3.2012).

³¹ Supreme Court *en banc* decision 3-4-1-8-09, paragraph 66.

³² *Ibid.*, paragraph 67.

³³ See, e.g., 'Assumptions for provision of public services in small and remote local authorities'. Available at <http://riigi-kontroll.ee/Suhtedavalikkusega/Pressiteated/tabid/168/ItemId/626/amid/557/language/en-US/Default.aspx> (most recently accessed on 1.3.2012); Kohaliku omavalitsuse üksuste võimekuse indeks 2010. Metoodika ja tulemused (Index of Capability of Local Government Units 2010. Methodology and Results). Tartu: Geomedia 2011. Available at http://www.siseministeerium.ee/public/KOV_voimekuse_indeks_Geomedia.pdf (most recently accessed on 1.3.2012) (in Estonian). Also see Note 6.

³⁴ Supreme Court Constitutional Review Chamber decision of 9.6.2009, 3-4-1-2-09, paragraphs 48, 50.

the legislation regulating the funding of local functions, to the extent that it does not provide the LGU with funds for performance of local functions at least to the minimum extent required.

It is possible that the state, finding that the funding of local functions cannot be increased for the purpose of eliminating the violation, may reduce the requirements arising from law in relation to performance of local functions.^{*35} This is not, however, a common solution.

To comply with the requirements of §154 (1) of the CRE, a system of funding of LG functions must allow evaluation of the level of sufficiency on a case-by-case basis. Otherwise, it becomes impossible to identify whether the LG's right to sufficient funding has been violated or not^{*36} and consequently for the LGU to seek efficient judicial protection against the insufficiency of funding for local functions.^{*37} Therefore, there must be clarity as to whether a particular public task is of a local background or not.^{*38}

4.2. The right to the stability of the system for funding of local government functions

A right to the stability of the system for funding LG functions follows from the principle of legitimate expectation in combination with §154 (1) of the CRE and specifies it in relationships between LGUs and the state in matters concerning funding.^{*39}

A stable and foreseeable system of funding allows LGUs to draft more accurate development plans and implement them more effectively.^{*40} A stable funding system, while an auxiliary element of financial guarantee, is unavoidable for independent decision-making on and management of any and all local issues.^{*41}

LGUs need to be able to act in reasonable expectation that the regulation established for funding their functions remain stable and not suddenly be made less favourable for them, especially in the middle of the budgetary year.^{*42} Any legal act decreasing funding restricts the right to the stability of the funding system even if it does not result in insufficiency of funding for LG functions.

Adverse amendment of legislation regulating LG functions is not precluded.^{*43} The right to stability of the funding system may, similarly to other rights arising from §154 (1) of the CRE, be limited on the same terms and conditions as is the right to self-management.^{*44}

In the event of major changes to the funding system, LGUs must be granted the right to be heard.^{*45}

The right to stability of the system of funding for LG functions means also that a reasonable period for adaptation (*vacatio legis*) must be granted to LGUs.^{*46} It need hardly be said that the evaluation of adequacy has to be carried out case-specifically.

³⁵ Supreme Court *en banc* decision 3-4-1-8-09, paragraph 69.

³⁶ *Ibid.*, paragraph 70.

³⁷ *Ibid.*, paragraph 71.

³⁸ On problems of qualification of public tasks, see V. Olle. Kohaliku omavalitsuse poolt täidetavate avalike ülesannete struktuur ja liigitamiskriteeriumid (Structure and Classification Criteria of Local Government Functions). – *Juridica* 2002/8, pp. 523–531 (in Estonian); K. Merusk, V. Olle. On assignment of local government tasks to the private sector in Estonia. – *Juridica International* 2009 (XVI), pp. 34–35; Kohustuslike kohaliku omavalitsuse ülesannete ja kohaliku omavalitsuse üksuste täidetavate riiklike ülesannete piiritlemise juhend (Instruction on Delimitation of Compulsory Local Government Functions and National Obligations Performed by Local Authorities). Available at http://webcache.googleusercontent.com/search?q=cache:ynOcJOiGFMUJ:www.siseministeerium.ee/public/SiM_juhend.rtf+Kohustuslike+omavalitsuse+%C3%BClesannete+piiritlemise+juhend&cd=1&hl=et&ct=clnk&gl=ee (most recently accessed on 1.3.2012) (in Estonian).

³⁹ Supreme Court *en banc* decision 3-4-1-8-09, paragraph 78.

⁴⁰ Supreme Court *en banc* decision 3-3-1-46-03, paragraph 25.

⁴¹ Supreme Court *en banc* decision 3-4-1-8-09, paragraphs 79, 110.

⁴² *Ibid.*, paragraph 79.

⁴³ *Ibid.*, paragraph 81.

⁴⁴ *Ibid.*, paragraph 82.

⁴⁵ Article 9 (6) of the ECLSG.

⁴⁶ Supreme Court *en banc* decision 3-4-1-8-09, paragraph 83.

4.3. The right to full state-budget funding for national duties imposed by law

From the second sentence of §154 (2) of the CRE arises the right for the LGU to full funding from the state budget of national duties imposed by law or administrative contract.^{*47}

This particular right protects the LGU against having to use funds earmarked for performance of LG duties for performance of national duties.^{*48} It should be noted that the purpose of this right is not to empower LGUs to interfere substantively in the resolution of some state affair.^{*49}

National duties imposed by law upon LGUs must be funded in a manner that allows for evaluation of whether the state actually covers from the state budget all the expenses incurred in the national duties imposed by law. Also, an LGU must have the opportunity to protect itself in court in the event of insufficient funding for national duties imposed by law.^{*50} Once again, there appears a necessity for clear delimitation of national duties and local functions as well as of funds to be provided for performance of these two groups of public tasks.

The second sentence of §154 (2) of the CRE establishes specific requirements associated with allocation of money to LGUs for performance of national duties.

Expenditure related to national duties imposed by law on LGUs must be funded from the state budget.^{*51}

Under the principle of universality (set forth in §115 (1) of the CRE), the state budget must include any and all revenue and expenditure of the state and, consequently, also recognise the expenses of the state that, according to the second sentence of §154 (2) of the CRE, arise upon covering of the expenses related to the national duties imposed on LGUs. The principle of transparency arising from the same Constitutional enactment requires at least that the costs of performance of national duties imposed on LGUs be recognised as function-based state budget entries. This means that the state budget must clearly specify how much money is allocated for performance of one or another national duty imposed on LGUs. How the money to be allocated for performance of some national duty is divided among LGUs does not have to be indicated directly in the state budget. That may be specified in legislation on the basis of the state budget.^{*52}

The second sentence of §154 (2) of the CRE forbids the LGU using the funds allocated to it for some national duty without any legal basis for performance of other national duties or LG functions. However, in legal acts regulating the allocation of funds to LGs, terms and conditions may be provided whereby the LGU may use the funds obtained for performance of a national function for financing other national duties or LG functions.^{*53}

The second sentence of §154 (2) of the CRE also requires that the funding of the duties of the state imposed on an LG be cost-oriented. The income-oriented funding of some national duties need not be excluded, but, as a whole, income-oriented funding of duties of the state is not in conformity with §154 of the CRE.

Cost-oriented funding has, in principle, two levels. It must be

- 1) Clearly and transparently stated in the annual budget how much money is required for the fulfilment of any given national duty, and
- 2) Determined how much money each LGU would need for the fulfilment of these duties.^{*54}

⁴⁷ Supreme Court Constitutional Review Chamber decision of 8.6.2010, 3-4-1-1-10, paragraph 75. – RT I 2010, 32, 166 (in Estonian). English text available at <http://www.riigikohus.ee?id=11&tekst=22252846> (most recently accessed on 1.3.2012).

⁴⁸ Supreme Court *en banc* decision 3-4-1-8-09, paragraph 74.

⁴⁹ *Ibid.*, paragraph 132.

⁵⁰ *Ibid.*, paragraph 74.

⁵¹ Also a model of funding under which an LGU first bears the expenses and then ‘presents the bill’ to the state agency for compensation is in conformity with the Constitution. See Kolk (Note 5), pp. 76–77.

⁵² Supreme Court *en banc* decision 3-4-1-8-09, paragraph 76.

⁵³ *Ibid.*, paragraph 77.

⁵⁴ See, for example, the report ‘Methods for estimating local authorities’ spending needs and methods for estimating revenue’, by the Steering Committee on Local and Regional Democracy, prepared with the collaboration of Professor Jens Blom-Handsen and adopted by the CDLR at its 26th meeting, on 4.–6.12.2000. Local and Regional Authorities in Europe, No. 74. Council of Europe Publishing 2001.

Cost-oriented entries are necessary for fulfilment of the requirements of §§ 115 and 154 of the CRE. For compliance with clauses 1 and 6 of §65 of the CRE, the possibility must exist for Parliament to check the funding of national duties imposed on LGUs by its actions.^{*55}

4.4. The right to levy local taxes and to receive revenue from charges

From the above-mentioned §157 (2) arises the right of an LGU to levy and collect taxes on the basis of law. Article 9 (3) of the ECLSG establishes that at least some of the financial resources of LGs shall be derived from local taxes and charges whose rate they have the power, within the limits set forth by statute, to determine. Charges may be determined for the use of various public services provided by an LGU. The exercise of political choice in weighing the benefit of the services provided against the cost to the local taxpayer or the user is a fundamental duty of local elected representatives. It is accepted that central or regional statutes may set overall limits to LGs' powers of taxation; however, they must not prevent the effective functioning of the process of local accountability.^{*56} The right of an LGU to levy and collect taxes is placed under legal reservation in the CRE. The same requirement applies to other financial obligations under public law. Therefore, an LG council shall not levy any local tax or other financial obligation under public law without legal basis.^{*57} With respect to local taxes, such a legal basis is established in the Local Taxes Act; however, the respective catalogue of taxes is permanently decreased therein.^{*58}

The legislator cannot delegate its competence in regulating any main elements of local taxes (the establishment of the nature of local taxes, etc.) to the executive power.^{*59}

4.5. The right to assume debt obligations

Subsection 154 (2) of the CRE includes also a right to decide independently on assumption of debt obligations. Pursuant to Article 9 (8) of the ECLSG, LGUs shall, for the purpose of borrowing for capital investment, have access to the national capital market within the limits of the law.

Assumption of debt obligations (loan, financial lease, issue of bonds, etc.) allows LGUs to make investments necessary for performance of their functions, against future revenue. At the same time, it influences the development of the budget deficit of LGUs.

The state is obliged to refrain from establishment of legislation that prevents LGUs from obtaining funds from the capital market. This means that the state does not have to act as LGs' creditor or guarantee their obligations.^{*60}

The right to assume debt obligations may be limited on the same conditions as the right of self-management arising from §154 (1) of the CRE.^{*61} The Supreme Court has declared the Constitutionality of terminal limitation of the right of LGUs to assume debt obligation (1.3.2009–31.12.2011), established by the legislator for fulfilment of the obligations arising from the founding treaties of the EU, which essentially forbade LGUs from assuming any debt obligation, though certain clearly delimited exceptions in line with the aim of the obligations were provided.^{*62}

⁵⁵ Dissenting opinion to Supreme Court *en banc* decision 3-3-1-46-03 of Justice Jüri Põld, joined by Justices Tõnu Anton, Indrek Koolmeister, Jaak Luik, and Harri Salmann.

⁵⁶ Explanatory report on the European Charter of Local Self-government, Article 9 (3). Available at <http://conventions.coe.int/treaty/en/Reports/Html/122.htm> (1.3.2012).

⁵⁷ Supreme Court Constitutional Review Chamber decision 3-4-1-11-98, Section V. Available at <http://www.nc.ee/?id=455>.

⁵⁸ On 1.1.2012, the sale tax and boat tax were abolished by respective amendment to the Local Taxes Act.

⁵⁹ Supreme Court Constitutional Review Chamber decision III-4/1-4/93.

⁶⁰ Supreme Court *en banc* decision 3-4-1-8-09, paragraph 63.

⁶¹ *Ibid.*, paragraph 64.

⁶² *Ibid.*, paragraphs 135–151; Supreme Court Constitutional Review Chamber decision of 1.4.2010, 3-4-1-7-09. – RT III 2010, 15, 103 (in Estonian).

5. Options for protection of the financial guarantee of local government

Under §15 (1) of the CRE, everyone whose rights and freedoms are violated has the right of recourse to the courts. 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. According to Article 11 of the ECLSG, local authorities have the right of recourse to a judicial remedy in order to secure free exercise of their powers and respect for such principles of LG as are enshrined in the Constitution or domestic legislation. It proceeds from this (i.e., the guarantee of subjective legal status) that an LGU must have a right to apply to an independent court or tribunal for protection against unsubstantiated limitations of elements of its Constitutional guarantee. It must have an opportunity to contest legislation of general application, individual acts, and administrative measures.

An LGU may, depending on the nature of the legal dispute, bring a case against the state or one or more other LGUs before an administrative court or, on the basis of §7 of the Constitutional Review Court Procedure Act^{*63} (CRCPA), directly to the Supreme Court.

Since 1 July 2002, §7 of the CRCPA has allowed an LG council to submit a request to the Supreme Court pertaining to an act that has been proclaimed but has not yet entered into force or a regulation of the Government of the Republic or a minister that has not yet entered into legal effect, in which it asks for declaration of said act or regulation to be in conflict with the Constitution or for repeal of an act that has entered into force, a regulation of the Government of the Republic or a minister, or a provision thereof if it is in conflict with Constitutional guarantees of the LG. Thus an LG council can contest in a Constitutional supervision procedure such items as a formula for calculation of support allocated from the support fund of the state budget to the budget of an LGU.^{*64}

With respect to an LG council and application of Constitutional review proceedings for contesting of failure to pass legislation of general application, the CRCPA does not provide the LG council, within the scope of abstract norm control, with such a competence for the realisation of its Constitutional guarantees.^{*65}

It should be noted that, when the request submitted by the LG council on the basis of §7 of the CRCPA is granted by the Supreme Court, that judgement will not in itself provide the LGU with the money necessary for performance of any particular public tasks. However, by resting upon this judgement, the LGU can, if necessary, in an administrative court procedure claim from the state the funds needed for a particular task. Since the LGU has no right to neglect any duty arising from law, grounding this refusal in its Constitutional guarantee means that a violation of a financial guarantee grows sooner or later into causing of damage to the LGU (a national duty left without proper funding from a state budget should be financed from the LGU's own resources; in cases of insufficiency of funding of LG functions, loans should be taken out and, consequently, interest paid etc.). In the case of damage caused to an LGU by violation of its financial guarantee, direct patrimonial damage, not a loss of profit, is conceivable.^{*66}

When, through a failure to pass legislation of general application, sufficient funds for performance of LG functions are not provided or sufficient funds are not allocated from the state budget for performance of national duties, and also in cases when such a failure has caused damage to an LGU in some other way, the LGU can submit a claim for compensation for damage arising from §14 (1) of the State Liability Act (SLA) to a first-instance administrative court and demand that the absence of such regulation be declared to be in conflict with the Constitution. Subsection 1 of §9 and §15 (1) 2¹) of the CRCPA are interrelated with §14 (1) of the SLA, and, consequently, were intended for application only in relation to claims for compensation for

⁶³ Põhiseaduslikkuse järelevalve kohtumenetluse seadus. – RT I 2002, 29, 174; 2010, 19, 101 (in Estonian).

⁶⁴ Supreme Court *en banc* decision 3-3-1-46-03.

⁶⁵ Supreme Court *en banc* decision of 21.5.2008, 3-4-1-3-07, paragraph 30. – RT III 2008, 34, 228 (in Estonian). English text available at <http://www.nc.ee/?id=920> (most recently accessed on 1.3.2012).

⁶⁶ An exemplary list of direct patrimonial damages is provided in §128 (3) of the Law of Obligations Act (*võlaõigusseadus*. – RT I 2001, 81, 487; RT I, 8.7.2011, 6 (in Estonian)). It should be decided on a case-by-case basis whether in cases of compensation for damage, provisions of the Law of Obligations Act may be applied or, on account of the particular feature of legal relationships under public law, damages should be compensated for to an extent different from this (§7 (4) of the State Liability Act (*riigivastutuse seadus*. – RT I 2001, 47, 260; RT I, 13.9.2011, 9 (in Estonian)).

damage caused by failure to pass legislation of general application.^{*67} In cases wherein the legislator's failure to act is declared to be in contradiction with the Constitution, the Supreme Court can set a reasonable term for Parliament's correction of the situation.^{*68} It probably would have been reasonable to include such a term also in Supreme Court judgement 3-4-1-8-09.

The principle that an LGU alleging violation of its right to sufficient resources must also show which of the functions it might fail to perform on account of lack of finances is relevant both in Constitutional supervision and in administrative court procedures.^{*69} In consideration of the complexity of the LGU proving unconstitutionality of the valid system of funding, the burden of proof on the LGU may be eased and partially or fully transferred to the state.^{*70} It is quite probable that the future will see such a transfer take place in most cases of this kind.

When the violation of financial guarantee stems from an omission by an administrative authority (e.g., failure of the Tax and Customs Board to transfer income tax paid by resident natural persons or land tax to the local authority), an LGU may submit a claim under which the state is to take a measure of allocating money.^{*71} A claim for annulment of an administrative act of the state^{*72} (e.g., an administrative act entailing refusal to allocate funds) together with a claim in compliance with which the state is required to take a respective measure, is conceivable also, as is a request for non-application of the act or other legislation of general application on which the relevant administrative act is based and that is in conflict with the Constitution (§152 (1) of the CRE; §158 (4) of the Administrative Court Procedure Act). If the court of first instance or the court of appeal has declared in the resolution of the judgement that a piece of legislation of general application or refusal to issue an instrument of legislation of general application is in conflict with the Constitution, it will forward the judgement or ruling to the Supreme Court, thereby initiating the Constitutional review court procedure (§9 (1) of the CRCPA).

Section 171 of the new Administrative Court Procedure Act^{*73} (ACPA) allows interim judgements and partial judgements, which can also be used in the interests of procedural economy in complicated fiscal disputes between the state and an LGU in administrative court proceedings.

It cannot be excluded that a legal dispute takes place between an LGU and the state over the funds necessary for performance of a certain public task while at the same time the LGU (in the form of its council) has submitted a request in the Constitutional review procedure for declaration of non-conformity with the Constitution of the act or other legislation of general application that established the legal basis for the disputed administrative act or measure. In this case, the administrative court may, pursuant to §95 (3) of the ACPA, suspend a proceeding for the duration of adjudication of the Constitutional review matter in the proceedings of the Supreme Court. Subsection 95 (2) of the ACPA allows also a suspension of the administrative court proceeding until entry into force of a judgement on another administrative matter, where the matter in question lies in interpretation of a provision having decisive effect for the settlement of that proceeding to be suspended. Prerequisite for this is that at least 10 similar cases be pending with the court.

As an alternative to the court procedure, the challenge proceeding on the basis of provisions of Chapter 14 of the Administrative Procedure Act^{*74} (APA) is available to an LGU. It may submit various primary claims against an administrative act or measure of the state (in line with Chapter 2 of the SLA) and, under §17 (1) of the SLA, claim for compensation for damage caused by an administrative activity of the administrative authority.

Also, the President of the Republic (§107 of the CRE) and the Chancellor of Justice (§142 of the CRE) should be mentioned as institutions of indirect protection of the financial guarantee of LG.

⁶⁷ Supreme Court *en banc* decision 3-4-1-3-07, paragraph 29; Supreme Court *en banc* decision 3-4-1-8-09, paragraph 74.

⁶⁸ Eesti Vabariigi põhiseadus. Kommenteeritud väljjaanne (Note 5), §152 (comment 5.3.2), p. 716.

⁶⁹ Supreme Court *en banc* decision 3-3-1-46-03, paragraphs 35–36; Supreme Court Constitutional Review Chamber decision 3-4-1-2-09, paragraph 50.

⁷⁰ Supreme Court *en banc* decision 3-4-1-8-09, paragraph 98.

⁷¹ Section 6 of the SLA; §37 (2) 2) of the Administrative Court Procedure Act (halduskohtumenetluse seadustik. – RT I 23.2.2011, 3; RT I, 28.12.2011, 1 (in Estonian)). See Supreme Court Administrative Law Chamber ruling of 10.5.2001, 3-3-1-24-01, paragraph 1. – RT III 2001, 16, 172 (in Estonian); Supreme Court Administrative Law Chamber ruling of 12.6.2008, 3-3-1-29-08, paragraph 10. – RT III 2008, 30, 208 (in Estonian).

⁷² Section 3 of the SLA; §37 (2) 1) of the ACPA.

⁷³ Halduskohtumenetluse seadustik. – RT I, 23.02.2011, 3; RT I, 29.06.2012, 56 (in Estonian).

⁷⁴ Haldusmenetluse seadus. – RT I 2001, 58, 354; RT I, 23.2.2011, 3 (in Estonian).

From the perspective of protection of the financial guarantee of LG, the procedural guarantees related to the ECLSG are also certainly relevant. The standard of control of the charter, however, does not reach the level of the European Convention for the Protection of Human Rights and Fundamental Freedoms.^{*75} According to Article 14 of the charter, each party thereto forwards to the Secretary General of the Council of Europe (CoE) all relevant information on legislative provisions and other measures taken by it for the purposes of compliance with the terms of the charter.

The emphasis of the supervision activity of the Congress of Local and Regional Authorities of Europe (CLRAE) lies in *ex officio* control (with application of a thematic approach and an approach related to a particular country). In some instances, control on the basis of a municipal complaint may take place also.^{*76}

Resolutions and recommendations are drafted on the basis of detailed reports presented by one or more rapporteurs appointed by the Committee on Honouring of Obligations and Commitments by signatories of the ECLSG (also referred to as the Monitoring Committee)^{*77} and then acted upon. The rapporteurs are supported by the Independent Group of Experts on the ECLSG (with each member state of the CoE being represented^{*78}) and by officials of the Secretariat of the Congress. The task of the group of experts is related mainly to research work and gathering of relevant information.

In individual cases, the Committee of Ministers also deals with matters of applications by signatory states of the charter and adopts legally non-binding recommendations (serving an indirect guarantee function).

The monitoring system can be classified as an instrument of political control but one whose quality approximates it to the form of judicial supervision.^{*79}

The CLRAE has adopted two relevant recommendations concerning Estonia: Recommendation 81 (2000), on the situation of local democracy in Estonia^{*80}, and Recommendation 294 (2010), 'Local democracy in Estonia'^{*81}, in which, *inter alia*, attention is paid to the financial problems of local authorities. It seems quite symptomatic of the issues found that in the latter recommendation the congress had to remind Estonia that the urgent change of domestic legislation—a theme already mentioned in the former recommendation—remains to be resolved.^{*82}

6. Conclusions

It is a purpose of the financial guarantee of LG (§§ 154 and 157 (1) of the CRE; Article 9 of the ECLSG) first to enable effective performance of the right of self-management for LGUs where matters of local importance are involved and, second, to enable proper execution of national duties imposed by law (§154 (2) of the CRE). Whereas most elements of the financial guarantee—the right to sufficient funds for performance of LG functions, the right to the stability of the system for funding LG functions, the right to levy local taxes and to receive revenue from charges, and the right to assume debt obligations—are related to a sphere of

⁷⁵ RT II 1006, 11/12, 34 (in Estonian). English text available at <http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm> (most recently accessed on 1.3.2012).

⁷⁶ In May 2009, a delegation of the Association of Estonian Cities and the Association of Municipalities of Estonia turned to the CLRAE in Strasbourg. A protest was entered against cuts made in February of the same year via the supplementary budget of 2009. A monitoring visit was requested to be paid to Estonia for assessment of whether activities of the central government were in conformity with the provisions of the ECLSG and for rendering of an opinion of the CoE in this respect.

⁷⁷ Rule 55 (1) of the Rules of Procedure of the Congress and Its Chambers. Available at <https://wcd.coe.int/ViewDoc.jsp?id=1923543&Site=Congress&BackColorInternet=DBDCF2&BackColorIntranet=FDC864&BackColorLogged=FDC864> (most recently accessed on 25.3.2012).

⁷⁸ Estonia is represented at present by Professor S. Mäeltsemees (of Tallinn Technical University) and the author. It should be emphasised that an expert acts fully independently within a group and does not represent the 'official point of view' of his or her country of origin.

⁷⁹ B. Schaffarzik. *Kommunale Selbstverwaltung im europäischen Mehrebenensystem. – Handbuch der kommunalen Wissenschaft und Praxis. Band 1. Grundlagen und Kommunalverfassung. Dritte, völlig neu bearbeitete Aufl. Berlin & Heidelberg: Springer-Verlag 2007, pp. 274–278.*

⁸⁰ Available at https://wcd.coe.int/ViewDoc.jsp?Ref=REC%282000%29081&Language=lanEnglish&Ver=original&Site=DC&ShowBanner=no&Target=_self&BackColorInternet=F5CA75&BackColorIntranet=F5CA75&BackColorLogged=A9BACE (most recently accessed on 15.1.2012).

⁸¹ Available at <https://wcd.coe.int/ViewDoc.jsp?id=1689329&Site=Congress> (most recently accessed on 1.3.2012).

⁸² Subsection c of §6 of Recommendation 294 (2010).

local, communal life-organisation, the right to full funding from the state budget of national duties imposed by law goes beyond the right of self-management of local authorities. Accordingly, the role of the financial guarantee within the structure of a full Constitutional guarantee for LG is of a supportive, secondary nature.

The financial guarantee with its various levels does not function in the Estonian legal system as an unlimited right: the legislator and, to a certain extent, the executive power can restrict it on condition that they have a legitimate purpose in so doing and that the measures to be applied are proportionate to this purpose.

Legal protection of the financial guarantee of LG must be efficient. A guarantee of subjective legal status can be characterised as being efficient when there exists a possibility for an LGU to obtain protection from an independent court or tribunal for all levels of the guarantee (Article 11 of the ECLSG). When an LGU alleges that its right to have sufficient resources is violated, it must also show which of the functions it may fail to perform. Given the objective complexity for the LGU of substantiation of unconstitutionality of the existing system of funding of local authorities (related to failure in proper delimitation of public tasks), it seems quite probable that partial or full transfer to the state of the burden of proof to substantiate violation of a financial guarantee of LG will become the prevailing tendency in cases of such a nature.

Depending on the nature of the legal dispute, the LGU can bring a case against the state or one or more other LGUs:

- Directly before the Supreme Court on the basis of §7 of the CRCPA, or
- To an administrative court, where it can also request the court not to apply the unconstitutional act or other legislation of general application on which the administrative act is based (§152 (1) of CRE; §158 (4) of ACPA).

If the court of first instance or the court of appeal accepts this request, it will forward the corresponding judgement or ruling to the Supreme Court, by which means the Constitutional review court procedure will start (§9 (1) of CRCPA). When failure to pass legislation of general application has led to sufficient funds not being provided for performance of public tasks and damage has been caused to the LGU, or such a failure has caused damage to an LG in some other way, a local authority can submit a claim for compensation for damage arising from §14 (1) of the SLA and demand that the absence of such a regulation be declared to be in conflict with the Constitution (§9 (1) and §15 (1) 2¹) of CRCPA).

As an alternative to the court procedure when violations of a financial guarantee of LG are caused by administrative (in)action of the state executive authority, the option of a challenge proceeding on the basis of provisions of Chapter 14 of the APA remains open to an LGU.

Within the framework of the CoE, a monitoring system—an instrument of political control to be exercised *ex officio* and on the basis of a municipal complaint—applied by the CLRAE (taking a thematic approach and an approach related to a particular country) in order to ensure compliance of state activities with the provisions of the ECLSG remains essential for the financial guarantee of LG and may now be even more vital.



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Evaluation of the Constitutionality of Good-Faith Acquisition

The purpose of this article is to provide an evaluation addressing the specific grounds on which the constitutionality of the good-faith acquisition of things ought to be assessed. Since the regulation of the protection of property in the Estonian Constitution and the regulation of the good-faith acquisition of things in Estonia constitute solutions that are rather typical within the legal tradition of Continental Europe, the topic can be viewed in the context of a broader legal discussion, wherein Estonia can be considered only one of many possible examples.

Three groups of countries may be distinguished in Continental Europe in terms of the acceptability of the good-faith acquisition of a movable. The first group of countries (e.g., Spain and Portugal) relies on a notion stemming from Roman law, under which the initial owner may reclaim a movable from a possessor in good faith, as a rule. The unambiguousness of such regulation is, however, countered by countries' differences in the provisions of prescription, exceptions in the case of certain public methods of sale, etc.^{*1}

In other jurisdictions (such as Italy and formerly Sweden), the possibility of good-faith acquisition is recognised both when the initial owner has voluntarily delivered a thing from his possession and in the case of the owner being dispossessed of a thing against his will.^{*2}

Modern Estonia belongs to an intermediate group of countries that allow the owner to reclaim a thing from a possessor in good faith if it was removed from the owner's possession against said owner's will.^{*3} With discrepancies in details, this group includes Germany, Austria, France, and Switzerland, among others.^{*4}

The possibility and probability of the good-faith acquisition of immovables depend on which legal meaning is attributed to an incorrect entry in the land register by the legal system.

An entry in the register can be accorded negative disclosure effect, which allows a person in good faith to deny a legally existing circumstance that is not evident from the land register, as well as positive disclosure effect, which deems an incorrect entry to be correct for the benefit of a person in good faith. Negative disclosure effect has been more widespread in various legal systems than positive disclosure effect. Positive disclosure effect in various forms is, in addition to Germany, inherent also to the systems of Austria,

¹ E. Karner. *Gutgläubiger Mobiliarerwerb. Zum Spannungsverhältnis von Bestandschutz und Verkehrsinteressen*. Springer-Verlag 2006, pp. 12–16.

² *Ibid.*, pp. 16–17.

³ *Asjaõigusseadus* (Law of Property Act), §95. – RT I 1993, 39, 590; RT I, 29.6.2011, 1 (in Estonian). English text available via <http://www.legaltext.ee/> (most recently accessed on 14.4.2012).

⁴ Karner (see Note 1), p. 19.

Switzerland, Spain, Finland, and Sweden, for instance.^{*5} Positive disclosure effect also involves risks, owing to which an owner may irreversibly lose ownership of his property because of the emergence of incorrect entries in the case of the immovable being acquired in good faith.

In Estonia, an entry in the land register has been accorded negative disclosure effect, which stems from paragraph 2 of §56¹ of the Law of Property Act, as well as positive disclosure effect, which is secured by paragraph 1 of the same section.

1. Significance of the topic for a transitional society

The regulation of the good-faith acquisition of both movables and immovables has prompted serious debate in Estonian legal thought, which will be covered below. The possibility of the good-faith acquisition of things is not alien as such to the Estonian Germanic private-law tradition; such regulation was known in the autonomous Baltic provinces belonging to the Russian empire as well as the law in effect in independent Estonia prior to World War II. In the 1940s, the Soviet Union repeatedly occupying Estonia established its law here. The Soviet Union, unlike some of its satellites, never allowed even limited non-state ownership of land. Accordingly, regulation similar to regulations based on the idea of the protection of legal transactions (*Verkehrsschutz*) can be found mainly in the provisions on the good-faith acquisition of a movable alone. If usually the regulation of good-faith acquisition is justified by the idea of the protection of legal transactions, according to which market players need to be encouraged to enter into transactions in order to purchase things, then people having lived in territory under the supervision of the Soviet Union, who were suffering from a deficiency of basic commodities, required no special encouragement to purchase inexpensive movables. Whereas during an occupation lasting half a century the regulation of good-faith acquisition had only marginal meaning for Estonia, it is understandable that recognition of the consequences of the regulation may be shocking and the constitutionality of the situation subject to doubt, especially for people having lost their property.

The regulation of the good-faith acquisition of movables induced a number of debates in Estonia in the 1990s owing to the fact that in Estonia provisions pertaining to movables were applied also to those houses and flats that had not yet been entered in the land register.^{*6} This means that in such disputes the point had to do with much higher values than common movables usually involve. The regulation of the good-faith acquisition of movables was more seriously criticised by Tambet Toomela in Estonian legal literature.^{*7}

In works of a significant scientific standard, the regulation of good-faith acquisition has been accepted as such.^{*8} More widespread debate on the risks of positive disclosure effect was initiated in the general media in 1998 by an influential lawyer, later Chancellor of Justice Indrek Teder^{*9}, who highlighted the injustice created when the owner is deprived of a movable because of an incorrect entry, yet he did not specify in further detail which alternative with respect to the legal meaning of the land register he supported. His approach represents the widespread notions of the land register as archaic and exceptional, and he intimates also the possibility of the unconstitutionality thereof.

The problem raised by Teder was amplified publicly after the 1999 transfer, with a letter of authorisation prepared on the basis of a counterfeit passport, of a valuable house in the medieval heart of Tallinn belonging to the successors of a noble Baltic German family and its later transfer to persons allegedly in good faith. Discussion of a need to amend the law subsided after the registered immovable was restored to the initial owner by the alleged acquirer in good faith under trial in a criminal proceeding. The reason for

⁵ V. Kõve. *Varaliste tehingute süsteem Eestis (System of Property Transactions in Estonia)*. Doctoral thesis. Tartu 2009, p. 197. Available at <http://dspace.utlib.ee/dspace/bitstream/handle/10062/8251/k%F5vevillu.pdf?sequence=1> (most recently accessed on 14.4.2012) (in Estonian).

⁶ *Asjaõiguseaduse rakendamise seadus (Law of Property Act Implementation Act)*, §13. – RT I 1993, 72, 1021; RT I, 29.6.2011, 1 (in Estonian). English text available via <http://www.legaltext.ee/> (most recently accessed on 14.4.2012).

⁷ T. Toomela. *Vallasasjade heauskse omandamise regulatsioon: muudatused ja probleemid (Regulating the Good-faith Acquisition of Movables: Changes and Problems)*. – *Juridica* 2004/8, pp. 530–539 (in Estonian).

⁸ Kõve (see Note 5), p. 206.

⁹ I. Teder. *Kuidas omastada Toompea lossi (How to Embezzle Toompea Castle)*. – *Eesti Päevaleht*, 11.5.1998. Available at <http://www.epl.ee/news/arvamus/kuidas-omastada-toompea-lossi.d?id=50755491> (most recently accessed on 14.4.2012) (in Estonian).

the waning of this discussion too was probably failure by the participants therein to offer clear alternatives, which would have allowed speaking about a solution that addresses law for the land register that is suitable for today's situation.

2. The Constitutional framework of good-faith acquisition

Estonian Constitutional tradition is also related to the German legal tradition, which is emphasised less here than in the realm of private-law traditions. In Estonia, the third Constitution, in effect at present, was established in 1992.^{*10} It was preceded by the constitutions of 1920 and of 1938. After the Constitutional Assembly completed the draft of the current Constitution, its chairman, Tõnu Anton, emphasised that the models in preparation of the draft were the earlier Estonian constitutions and the experience obtained through their enactment. According to him, no constitution of any other country could have been regarded as a model, but those of Germany, Hungary, Austria, Sweden, Finland, and Iceland were analysed in more detail during the work.^{*11}

When one is evaluating the constitutionality of the good-faith acquisition of things, central meaning is found in §32 of the Estonian Constitution, the illogic of whose structure^{*12} has been repeatedly pointed out.^{*13} One has to concur with Maruste's conclusion that sentence 1 of paragraph 1 of §32 ought to be followed by what is stipulated in paragraph 2, which constitutes a logical special provision related to the general principle of the inviolability of property mentioned in paragraph 1. In the Estonian Constitution of 1938, the sentence flow was more logical, while at the same time the current form might be influenced by the fact that several constitutions of foreign countries that the Constitutional Assembly used in its work do not explicitly regulate restriction on ownership and therefore their regulation of expropriation immediately follows the principle of the inviolability of property.^{*14} Thus, in the Constitution in effect, sentence 1 of paragraph 1 and paragraph 2 of §32, composing the regulation of the contents of ownership and general restrictions, could be logically grouped together. Another, differentiating, domain, a considerably more specific one, is the regulation of the alienation of property without the consent of the owner, which consists of sentences 2 and 3 of paragraph 2. In evaluation of the constitutionality of the regulation of the good-faith acquisition of a thing, paragraphs 3 and 4 of the section dealing with a restriction on the acquisition of some classes of property by some categories of persons and issues of the right of succession do not have to be considered, as a rule.

Even though §32 of the Constitution uses the notion of 'property' in a meaning differing from the terminology of property law, considering it to include different types of proprietary rights, much as the Convention for the Protection of Human Rights does in the interpretation of the practice of the Court of Human Rights^{*15}, it no doubt also involves tangible property. The Constitution protects property that one has acquired^{*16}, yet it fails to distinguish between cases of its acquisition for a fee and that without a charge—this is indirectly confirmed by, among other things, the provision on the protection of the right of succession included in the same section, which, obviously, does not assume paid performance by the successor.

¹⁰ Eesti Vabariigi põhiseadus (Constitution of the Republic of Estonia). – RT I 1992, 26, 349; RT I, 27.4.2011, 1 (in Estonian). English text available via <http://www.legaltext.ee/> (most recently accessed on 14.4.2012).

¹¹ Vastab Põhiseaduse Assamblee juhataja Tõnu Anton (Interview with Chairman of the Constitutional Assembly Tõnu Anton). – Eesti Jurist 1992/2, p. 120 (in Estonian).

¹² R. Maruste. Konstitutsionalism ning põhiõiguste ja -vabaduste kaitse (Constitutionalism and Protection of Fundamental Rights and Freedoms). Juura 2004, p. 475 (in Estonian).

¹³ K. Ikkonen. Omandipõhiõigus ja selle piirid (The Basic Right of Ownership and Its Limits). – Juridica 2006/1, p. 60 (in Estonian).

¹⁴ See, e.g., Article 72 (1) of the Constitution of Iceland, available at <http://www.government.is/constitution/> (most recently accessed on 14.4.2012), or Article 15 of the Constitution of Finland, available at <http://www.finlex.fi/fi/laki/kaannokset/1999/en19990731.pdf> (most recently accessed on 14.4.2012).

¹⁵ E.-J. Truuväli *et al.* (eds). Eesti Vabariigi põhiseadus. Kommenteeritud väljaanne (Constitution of the Republic of Estonia, Commented Edition), 2nd edition. Juura 2008, §32 (comments 2.1–2.2) (in Estonian); K. Kullerkupp. National Report on the Transfer of Movables in Estonia. – W. Faber, B. Lurger (eds). National Reports on the Transfer of Movables in Europe. Sellier European Law Publishers 2008, p. 236.

¹⁶ See §32 (comment 2.4) in the first work referred to in Note 15.

Therefore, more insufficient or deficient Constitutional protection of the good-faith acquisition of a thing cannot be automatically deduced from the fact that the acquirer in good faith need not have paid for the thing. Whereas one of the central objectives of the protection of property is considered to be the protection of a free market,^{*17} it will also assume, to an extent, a neutral attitude of the state toward the circumstances of the emergence of the property.

Whereas the Constitutional protection of property involves, in addition to the notion of tangible property, also any other substantial tangible positions, including claims under private law, it will also then involve claims for acquisition. It does not matter whether the claim stems from a synallagmatic contract or a transaction charge. Even though the Constitution does not protect the hope or opportunity of persons to acquire property^{*18}, it protects claims for the acquisition of property, inclusive of things. As it is in the case of property, the ownership of a claim of a specific entitled person is protected.

If the state is obliged to lay down rules pursuant to which property is to be protected^{*19}, it will also include a need to establish more specific regulation pertaining to property. The legislator has to determine the nature of property (in terms of the Constitution, not only in terms of property law) in its various forms in a sufficient manner, as well as to establish regulation for the emergence and extinguishing of property. Such regulation has to balance the objectives stipulated in sentences 1 and 3 of paragraph 2 of §32 of the Constitution on securing of the rights of ownership, use, and disposal of property for the owner and to avoid the use of property against the public interest. When making these choices, one has to proceed from the principle of proportionality. One has to deem logical in itself the position that the possibilities of restriction of ownership that are stipulated in sentence 2 of paragraph 2 may not lead to actual expropriation, wherein the owner is fully deprived of the object of ownership.^{*20} Alongside this, one is to analyse whether acquisition in good faith for the purposes of the Constitution is alienation without the consent of the owner or a restriction on ownership.

3. Acquisition in good faith as alienation without the consent of the owner

The regulation of the good-faith acquisition of a movable or an immovable favours the interests of the acquirer over those of the former owner, as a rule. Where in the case of good-faith acquisition the right of ownership of the former owner is extinguished in full, it may be reasonable to deem this to involve alienation of property without the consent of the owner for the purposes of sentence 2 of paragraph 1.

The alienation^{*21} of property without the consent of the owner is associated primarily with the notion of expropriation^{*22} for the purposes of the Constitution.^{*23} In addition to cases referred to as expropriation in law, which involves primarily the dispossession of lots for specific purposes stemming from the public interest^{*24}, in the legal theory the literature deems the confiscation of property due to the commission of an offence to fall under the concept of expropriation.^{*25} Also the Chancellor of Justice has, in an opinion submitted to the Supreme Court, considered confiscation to be the alienation of property without the consent of the owner for the purposes of the Constitution in Constitutional review court procedure.^{*26} The Supreme

¹⁷ Supreme Court Constitutional Review Chamber decision of 30.4.2004, 3-4-1-3-04, paragraph 24 (in Estonian).

¹⁸ Truuväli *et al.* (see Note 15), §32 (comment 2.3).

¹⁹ *Ibid.*, §32 (comment 3).

²⁰ See the work of Ikkonen (Note 13), p. 64.

²¹ The English translation of the Constitution uses, in sentences 2 and 3 of paragraph 1 of §32, the somewhat interpretation-dependent term 'expropriation', rather than 'alienation'.

²² Truuväli *et al.* (see Note 15), §32 (comments 4.1–4.4).

²³ Eesti Vabariigi põhiseaduse ekspertiisikomisjoni lõpparuanne (Final Report of the Constitutional Expert Committee of the Republic of Estonia). Available at <http://www.just.ee/10725> (most recently accessed on 14.4.2012) (in Estonian).

²⁴ Kinnisasja sundvõõrandamise seadus (Immovables Expropriation Act). – RT I 1995, 30, 380; 2010, 38, 231 (in Estonian). English text available via <http://www.legaltext.ee/> (most recently accessed on 14.4.2012).

²⁵ Maruste (see Note 12), p. 479.

²⁶ Õiguskantsleri arvamused põhiseaduslikkuse järelevalve kohtumenetluses (Opinion of the Chancellor of Justice in Constitutional Review Court Procedure), 19.2.2008, No. 9-2/080133/00800836, paragraph 39 (in Estonian).

Court, on the other hand, in its somewhat unclear statement in the same court case, has considered confiscation to be a restriction on property for the purposes of paragraph 2 of §32.^{*27}

The classification of compulsory auctions taking place in enforcement procedure in the context of the Estonian Constitution is also debatable. For some reason, Maruste has referred to the compulsory auction of movable property as only the alienation of property without the consent of the owner for the purposes of the Constitution^{*28}, which in essence should not be different from analogous procedure applied for immovables. In the prevailing opinion in German jurisprudence, sale in compulsory execution is not deemed to fall within the scope of the notion of expropriation for the purposes of the Constitution.^{*29} Ikkonen has strongly reasoned in favour of deeming compulsory auction to be alienation without the consent of the owner for the purposes of the Constitution, rather than a restriction on ownership, in a contrast to the prevailing opinion of German jurisprudence.^{*30} The central reasoning applied by Ikkonen is linguistic; it lies in emphasising that the German Constitution^{*31} uses the narrowly delimited concept of *Enteignung* when speaking about expropriation^{*32}, and this term denotes primarily action by a public authority in dispossession of a specific object on account of public interest. According to her, the formulation ‘alienation of property without the consent of the owner’ used in the Estonian Constitution is fundamentally broader and the earlier identification thereof primarily with expropriation is erroneous. On the basis of such logic, the extinguishing of the ownership of the former owner upon the good-faith acquisition of things could also be considered to belong to the scope of application of the same paragraph of the Constitution. However, one may cast doubt on the linguistic reasoning of Ikkonen, as the Estonian language lacks a general-language term that might be compared to the German *Enteignung*. In the Estonian Constitution, attempts have been made to avoid specific technical language; at times, preservation of archaic images characteristic of the previous forms of the Constitution have been preferred, in order for the new Constitution also to emphasise the idea of the continuity of the state. This may be why expropriation is not denoted by a single, shorter term rather than a longer phrase. Also, one has to consider important the fact that the Constitution of 1920 and the Constitution of 1938 used phrases similar to ‘alienation of property without the consent of the owner’ in analogous provisions.^{*33} One cannot deduce from such usage of language any specific desire to move away in any special way from German-influenced regulation. Obviously, it takes more to evaluate the meaning of a notion than to evaluate the intent of the designers of the draft Constitution; in any case, it was impossible to predict the future influence of the regulation of all property in the market economy of a just-recovering society of the early 1990s.

Cases of good-faith acquisition are distinguishable from application of the common concept of expropriation by the fact that here the dispossession does not take place via action by the state; instead, it depends on action by a private person. At the same time, regulation established by the legislator, as a result of which property is extinguished, can be considered to be definitive upon the arrival of the consequence.^{*34}

To be in accordance with the Constitution, the alienation of property without the consent of the owner assumes that the alienation takes place ‘in cases and pursuant to procedure provided by law’. The regulation of good-faith acquisition is distinguished from the expropriation of an immovable in the public interest or the confiscation of property owing to an offence by the fact that the state will establish the terms and conditions of the extinguishing of ownership abstractly, not knowing the specific person whose right of ownership is extinguished in the case in question. Also, the person acquiring the thing as a result of its decision will be indefinable for the state. It is impossible for the legislator to evaluate the relevance of its decision-making criteria in a single case; it can do so only on the basis of specific larger groups of cases. Therefore, it could be stated that alienation of property without consent was decided upon by the state as early as in 1993,

²⁷ Supreme Court of Estonia *en banc* decision of 16.5.2008, 3-1-1-88-07, paragraphs 41 and 43 (in Estonian).

²⁸ Maruste (see Note 12), p. 479.

²⁹ H.-J. Papier. Kommentierung zum Art. 14. – T. Maunz, G. Dürig. Grundgesetz Kommentar. Band II. Verlag C. H. Beck 2010 (July), p. 327; O. Depenheuer. Kommentierung zum Art. 14. – H. Mangoldt, F. Klein, C. Starck. Kommentar zum Grundgesetz. Band 1. Verlag Franz Vahlen 2010, p. 1484.

³⁰ Ikkonen (see Note 13), pp. 66–70.

³¹ Basic Law for the Federal Republic of Germany, §14 (3). Available at <http://www.iuscomp.org/gla/statutes/GG.htm#14>.

³² Ikkonen (see Note 13), p. 60.

³³ Eesti Vabariigi põhiseadus (Constitution of the Republic of Estonia 1920), §24. – RT 1920, 113/114 (in Estonian); Eesti Vabariigi põhiseadus (Constitution of the Republic of Estonia 1938), §26. – RT 1937, 71, 590 (in Estonian).

³⁴ D. Neundörfer. Die Bedeutung des Vertrauens bei den Gutgläubensvorschriften. Peter Lang 1998, p. 253.

through adoption of the Law of Property Act or amendment to the regulations on good-faith acquisition at a later time, but in the case of such interpretation one should assert that the alienation was induced by ‘the law’ rather than ‘in cases and pursuant to procedure provided by law’. Therefore, in the case of good-faith acquisition, alienation could be considered to be occurring in cases and pursuant to procedure provided by law, if one proceeds from the fact that the alienation is still being performed by a person not entitled thereto in the law, rather than occurring through adoption of a law by the state.

When considering the extinguishing of property due to good-faith acquisition as alienation of the property without the consent of the owner—in accordance with the Constitution—one ought to evaluate whether such alienation takes place in the public interest. Even though in a single case of good-faith acquisition there are few beneficiaries (usually one) in comparison to the expropriation of an immovable for road construction, there are still no grounds to deny the presence of public interest. The protection of legal transactions is aimed at protection of an economic order based on private property, the beneficiaries of which can be deemed to consist of society as a whole. Section 31 of the Constitution, which prescribes the freedom of business, refers to the recognition of the market-economy bases of society too. If one assumes that good-faith acquisition really promotes the protection of legal transactions that support the persistence and development of such an economic order, then it will correspond to that definition of the public interest pursuant to which the object of the public interest is indivisible among the members of society.^{*35}

It is more complicated to assume a position in relation to the fair and immediate compensation required by sentence 2 of paragraph 1 of §32. In interpretations that includes compulsory auction or the confiscation of property due to an offence as alienation without the consent of the owner, fair and immediate compensation too can be interpreted broadly. Thus exemption from debt has been considered to be fair and immediate compensation obtained by the former owner in the case of compulsory sale, as has exemption from a public-law duty in the case of confiscation of a punishable nature.^{*36} In the case of good-faith acquisition, there is no compensation secured efficiently for the former owner as would correspond to the value of the thing. He may be entitled to file claims for damage against a person, yet the efficiency of such a claim is questionable in every way. He cannot file a claim against a person having acquired his movable or immovable in good faith. Of course, one can say from a theory-based perspective that where there is still a claim against the non-entitled transferor, the acquirer in good faith has not totally lost his property. As the Constitution sets no limits to the notion of property as tangible property, the person has retained the property in the form of a certain tangible position or, in the specific case considered here, of a claim. Such a train of thought should still be considered to be merely an academic exercise, rather than a purposeful interpretation of the Constitution. The objective of a Constitutional provision that still addresses expropriation executed immediately by the state in public interests is securing of compensation that has actual value, which does not have a substitute in a claim against a person who is not precisely identified, whose whereabouts are unknown, or who is insolvent, for instance. In the case of good-faith acquisition, no practical grounds for interpreting the notion of fair compensation as broadly as has been done at times in the case of compulsory sale or confiscation of a punishable nature can be found.

Sentence 3 of paragraph 1 of §32 of the Constitution gives a person whose property was alienated without his consent the right to contest in court the alienation, or the compensation or the amount thereof. Maruste states that this regulation in itself is pointless, since paragraph 1 of §15 of the Constitution still ensures the right to court proceedings for everyone whose rights or freedoms have been violated.^{*37} The reasons for the emphasis on the right to address a court in the case of the alienation of property against the will of the owner are historical—similar reference can be found in the Estonian Constitution of 1938, as well as in the German Constitution. This sentence allows us to understand that the Constitution has focused primarily on common expropriation. Debate over the necessity of expropriation and the amount of compensation is logically possible. One can find that also in the case of good-faith acquisition it is possible to contest the matter of whether the terms and conditions for the extinguishing of ownership were met or how substantial a claim for the compensation of damage directed at a person having unjustifiably transferred a thing ought to be, but this surely was not the initial objective behind the provision. The above-mentioned

³⁵ K. Ikkonen. *Sundmüügi põhiseaduslikkus (Constitutionality of Compulsory Sale)*. Master's thesis. Tartu 2005, p. 78. Available at <http://dspace.utlib.ee/dspace/bitstream/handle/10062/660/ikkonen.pdf?sequence=5> (most recently accessed on 14.4.2012) (in Estonian).

³⁶ See the work cited in Note 26, paragraph 46.

³⁷ Maruste (see Note 12), p. 481.

sentence in the Constitution demonstrates, in addition to the linguistic reasoning described above, that at the time of preparation of the Constitution, alienation of property without the consent of the owner was understood primarily in terms of expropriation.

Therefore, the extinguishing of ownership in the course of good-faith acquisition cannot be deemed to be in conformity with the regulation of the Constitution pertaining to the alienation of property without the consent of the owner. Any other features required pursuant to the Constitution can be deemed to be present with greater or less doubt, but, in its essence, the regulation of good-faith acquisition fails to meet the requirement of fair and immediate compensation.

4. Good-faith acquisition as a restriction on ownership

Another option is to regard good-faith acquisition as a restriction on ownership, which has to be subject to the requirement of proportionality in the first place, being suitable, required, and moderate for reaching of a certain objective. The latter is first and foremost among these criteria; one has to evaluate whether the objective achievable by the means in question is in reasonable relation with the legal rights under infringement.

When good-faith acquisition is deemed to be a restriction on ownership, a linguistic obstruction arises, as the former owner loses his property in full. When sentence 1 of paragraph 2 of §32 of the Constitution speaks about the right to dispose of one's property, the obstruction of disposal by the owner rather than, in his place, the disposal of a thing should be considered to be the restriction on this right in the first place. Placing the extinguishing of the good-faith acquisition of ownership under a restriction of ownership, however, is better suited to the more abstract formulation of paragraph 2 of §32, as specific difficulties that would arise in dealing with good-faith acquisition without the consent of the owner in the absence of dispossession of his property are lacking. Such a seemingly opportunistic approach is supported by a genetic argument. Property is not a notion devoid of context, but the Estonian Constitution has brought it into use with a generally formed meaning. It is safe to declare that the regulation of good-faith acquisition has traditionally existed side by side with the notion of property and no explicit desire to amend this approach was expressed in the adoption of the Constitution. From the point of view of formal logic, it could be stated that the extinguishing of ownership in the course of good-faith acquisition is integral to the notion and content of property and therefore there are no grounds to treat it as a restriction on ownership. Similarly, German legal theory represents a position according to which the treatment of property in the Constitution can be formed on the basis of institutes of private law developed earlier, which were transposed to the Constitution as they stood.³⁸ Such an approach would leave the regulation of good-faith acquisition fully in a space free of control, which cannot be deemed to be the idea behind the Constitution. However, the extinguishing of ownership upon good-faith acquisition can be considered to be a restriction inherent to the legal tradition, which no obvious attempt has been made to amend through adoption of the Constitution. In evaluation of the constitutionality of the regulation of every possible good-faith acquisition, the assessment of the proportionality thereof will be reduced primarily to the value of the protection of legal transactions of good-faith acquisition. In principle, the profitability of specific regulations for economic turnover in general has to be verifiable. One must be able to determine how specific regulation can encourage market players to conclude acquisition transactions.

Surely the legislator must have certain boundaries when designing good-faith acquisition. It is hard to declare uniformly whether Constitutional choices should also involve full abolition of the good-faith acquisition of movables and immovables. In essence, it would be impossible to withdraw fully from the protection of the acquirer in good faith, even though it obviously need not be formally protected by means of the institutes of law in effect. Practical alternatives to good-faith acquisition could certainly be the shortening of the prescription period and giving of greater advantage to a possessor in good faith who has not become the owner of the relevant thing.³⁹ In principle, the Estonian legislator could make a choice from among all solutions existing in Continental Europe and not face any difficulties worth mentioning, so long as the details of the regulation resolve the issues of the protection of good faith in a satisfactory manner. Of

³⁸ J. Hager. *Verkehrsschutz durch redlichen Erwerb*. C. H. Beck 1990, pp. 11–12.

³⁹ *Ibid.*, p. 81.

course, every more substantial amendment would require considering the principle of legitimate expectations, which would not allow changing the proprietary positions rapidly.

A choice substantially preferring one party with a competitive interest to another will have to be justifiable, of course, from the standpoint of proportionality and from that of equal treatment. As a fundamental practical issue of the choices of the legislator, this context has highlighted a need for different treatment of acquirers in good faith, depending on whether they have contributed materially when acquiring a thing. In German theory of Constitutional law, the choice that would not allow the initial owner to reclaim a thing if the acquirer in good faith has received it at no cost has been considered to be illicit for the legislator, owing to the requirement of proportionality.^{*40} Placing free good-faith acquisition in a less favourable situation is also inherent to Estonian legal thought, yet no distinct position has been assumed such that the basis for it would stem from the Constitution. The Law of Obligations Act adopted in 2001 does not amend the terms and conditions for the good-faith acquisition of movables or immovables stemming from the Law of Property Act, but §1040 thereof provides a specific claim against unjustified enrichment in favour of the former owner of a thing, which will allow reclaiming both a movable and an immovable from a person that has acquired it via free disposal.^{*41} An explanatory note on the draft points out the grounds that in the case of free disposal the 'good faith of the acquirer is not as worthy of protection as the lost property of the former owner is'^{*42}, but it fails to assume a position on whether the choice of the legislator is restricted by the Constitution here.

In the case of immovables, the Supreme Court has in its practice limited the possibility of good-faith acquisition provided for by the Law of Property Act, finding that 'first- and second-order intestate successors cannot rely also on the good-faith acquisition of the real right in immovable property pursuant to a free transaction. There are no reasonable grounds for said persons being more protected when acquiring following a free transaction than in the case of succession'.^{*43} In this judgement, the Supreme Court has not explicitly pointed out its decision-making space stemming from the Constitution, as the case did not involve Constitutional review court procedure, but, taking into account its legal-political essence, one can sense the perception of certain Constitutional boundaries.

5. Conclusions

Estonian private-law regulation protects good-faith acquisition with largely the same reasoning applied in the general Continental European legal tradition (especially in its Germanic variation). The Estonian Constitution, which was worked out immediately after the extinguishing of an imposed Communist way of life, protects the market-economy grounds of society at times more emphatically than do its Western European counterparts. Estonian practical experience in the application of law, on the other hand, has made Estonian jurisprudence answer anew to the questions related to good-faith acquisition that other countries consider done away with. A peculiarity of the transition period in the field of good-faith acquisition was surely the possibility of the good-faith acquisition of immovables of buildings pursuant to the regulation of immovables, which raised suspicions as to the relevance of the regulation of good-faith acquisition as such but did not entail the amendment or fundamental re-evaluation thereof in court practice. Risks related to the function of the positive disclosure effect of the land register have also led Estonian legal scholars to deal with the topic in a more profound manner, yet without abandoning solutions that have become traditional. The intensively presented position in Estonian legal literature that the alienation of property without the consent of the owner has to be treated considerably more broadly than is done in the common handling of expropriation for the purposes of the Constitution can be deemed to be the starting point for discussion that has yet to reach a conclusion. It is clear that the Constitution protects persons from the arbitrary dispossession of property more broadly than only in cases that laws inferior to the Constitution call expropriation,

⁴⁰ *Ibid.*, p. 83.

⁴¹ *Võlaõigusseadus* (Law of Obligations Act). – RT I 2001, 81, 487; RT I, 8.7.2011, 6 (in Estonian). English text available via <http://www.legaltext.ee/> (most recently accessed on 14.4.2012).

⁴² *Võlaõigusseaduse eelnõu seletuskiri* (Explanatory Note to the Draft Law of Obligations Act). Available at http://www.riigikogu.ee/?op=emsplain&content_type=text/html&page=mgetdoc&itemid=991610001 (most recently accessed on 14.4.2012) (in Estonian).

⁴³ Supreme Court Civil Chamber decision of 20.11.2003, 3-2-1-128-03, paragraph 21 (in Estonian).

but the juxtaposition of compulsory auction with expropriation in a Constitutional framework, for example, is a matter of some doubt. Extending the above-mentioned treatment to the regulation of good-faith acquisition would constitute a distinct departure from the intention that served as a basis for the preparation of the Constitution and would not allow reasonably following the requirement of fair and immediate compensation that is set forth by the Constitution. In the present stage of development of legal practice and the court practice related to the debate, it seems teleologically motivated to maintain the position that the extinguishing of ownership in the course of good-faith acquisition constitutes a restriction on ownership for the purposes of paragraph 2 of §32 of the Estonian Constitution. Surely this position cannot resolve all specific issues related to the constitutionality of the regulation of good-faith acquisition. Rather, it will demand continuous analysis among various issues, of which the central place on the current stage is held by the regulation of the good-faith acquisition of things in the case of free disposal.



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Magister iuris
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The *numerus clausus* Principle and the Type Restriction—

Influence and Expression of These Principles Demonstrated in the Area of Common Ownership and Servitudes

The *numerus clausus* principle and the type restriction are basic principles of property law. These principles pervasively influence the whole of property law. Different from the abstraction principle and from the distinction principle¹, both the *numerus clausus* principle and the type restriction have not been set forth *expressis verbis* by written provisions of the law. Nevertheless, these principles form a basis for the whole manner of regulation applied in property law. The freedom of contract (as freedom of agreeing on the content of property law rights) is expressly foreseen in specific sections of Estonia's Law of Property Act² (LPA) and in other laws that set forth provisions of property law and real rights.

There is a principle in accordance with which the legal order includes only such real rights as are defined by law, and contracting parties themselves can neither create additional, new real rights nor remake or impermissibly further develop the content of existing real rights. This principle seems simple only at first glance. It is usual in conclusion of transactions involving property rights that time and again the following questions, among others, arise: what exactly may belong to the content of a specific real right, how far can the contracting parties go in forming the content of a real right, what is the content of agreements that can be carried forth into the Land Register under a notation and turn them thus into agreements under law of property, etc.? In transactions with real estate, presumably most of these questions arise in conclusion of a notarised transaction but also in carrying of the transaction forward into the Land Register. Also, court actions involving these questions are obviously unavoidable in cases wherein a party presents a claim for altering or deleting an entry in the Land Register because due to the *numerus clausus* principle such real right under the disputed entry could not become into being, or certain real right has been further developed exceeding the type restriction by it. In the first place, the *numerus clausus* principle and the type restriction are important for the reason that in cases of their violation no corresponding real right can arise or no respective legal relationship can acquire the desired character under property law. The result will be an incorrect entry or, in the preferable case, refusal of making an entry. The subject is especially important for reason of arguments that continuously arise as to the permissibility of forming real rights' content. In the

¹ See the principles expressed in Estonian law in force today, as in §6 (4) of the General Part of the Civil Code Act. Tsviil-seadustiku üldosa seadus. – RT I 2002, 35, 216; RT I, 6.12.2010, 1 (in Estonian).

² Asjaõigusseadus. – RT I 1993, 39, 590; RT I, 23.4.2012, 1 (in Estonian).

course of such debates, specialists have exhibited a misunderstanding of why the corresponding principles exist and what the positive influence of these principles is on the legal system and on commerce.

The author of the present article assesses the particular influence of the *numerus clausus* principle and the type restriction exercise in legal commerce.

This article provides an assessment of rigid type restriction: is it necessary and well grounded, or should considerably greater breadth be allowed in ways of forming the content of real rights as far as sales interests are concerned?

Because of the limited length of the article, the influence of the principles mentioned is discussed and demonstrated with the aid of examples of the following valid restrictions: 1) the content of servitudes, 2) the permissibility of supplying real right content for agreements concluded between co-owners, and 3) the permissibility of applying real rights to agreements concluded between flat-owners. In considering similarities in regulations, the author has proceeded from the German, the Swiss, and the Estonian law when assessing the essence, influence, and justification of the *numerus clausus* principle and the type restriction. As there are sufficient similarities between the Estonian real right and the German real right, the standpoints expressed in German court practice and jurisprudence have also been used in addition to the Estonian law in the analyses below.

1. Expression and meaning of the principles

1.1. Expression of the principles

Every more important discussion that includes treatment or analysis of basic real right principles³ also touches on the *numerus clausus* principle and the type restriction. Unfortunately, authors usually confine themselves to presenting a laconic definition of the concepts. But the expression of the *numerus clausus* principle and the type restriction and the influence due to them in fitting up of real rights and in determination of the limitations arises with every single real right in all cases wherein the transfer participants are given even the slightest possibility of forming the content of a real right. Therefore, the actual content, influence, and meaning of the *numerus clausus* principle should be looked for with all of the various real rights and not confined to theoretical treatments that include the respective definitions. Thus the influence of the corresponding principles becomes apparent in establishment of a real right, in entry of real rights in the Land Register, and in realisation of rights due to a real right. The principles have especially great meaning in cases in which the legislator has allowed the parties to form the content of a real right but has not precisely described the limits to the content of that formation (for example, forming the content of the servitudes, making co-owners' agreements binding for legal successors, and making agreements between flat-owners).

1.2. Meaning of the principles

Real right and disposals are transactions that bring about changes as for real rights. The characteristic qualities of the right concerning these transactions (real right and disposals) are to a considerable extent ensured through the imperative right. By the corresponding regulation we predominantly have got to do with the imperative right. The law of obligations, on principle, influences only the parties to an obligation. Therefore, in the law, the obligation of the parties may be left to the parties to the obligation themselves. However, all persons should accept real rights as valid for themselves, not only parties to the obligation.⁴ It is, therefore, understandable that the property law takes into account everybody's interests; i.e., the law proceeds not only from the interests of persons directly connected with the legal relationship in question. The imperative norms are, therefore, created by law. The aim in enacting restrictions to freedom of form-

³ See, for example, K.H. Schwab, H. Prütting, *Asjaõigus. Õpik* (Property Law. Textbook). Tallinn 1995, p. 5 (in Estonian) or Soergel, *Bürgerliches Gesetzbuch (BGB). Mit Einführungsgesetz und Nebengesetzen*, Vol. 4: Sachenrecht (§§ 854–1296). *Wohnungseigentumsgesetz, Erbbaurechtsverordnung, Schiffsrechtsgesetz*. Prof. Dr. Fritz Baur (scientific editor of Vol. 4). Stuttgart, Berlin, Cologne, Mainz, Tübingen: W. Kohlhammer Verlag 1968, paragraph 21 of the introduction.

⁴ P. Schlechtriem, *Võlaõigus. Üldosa. Teine, ümbertöötatud trükk* (Law of Obligations. General Part. Second, Revised Edition). Tallinn 1999, p. 4 (in Estonian).

ing is also the necessity of ensuring certainty and clarity in application of the law.^{*5} Long-term legal relations that apply to everyone are protected through the simplification of legal relations and avoidance of the permissibility of changes in their content.^{*6} If it were not so, freedom of forming real rights would lead to generation of too many real rights, each with different content, and would thus impair certainty in application of the law. To a certain extent, the aim of the type restriction and the reason for its establishment can be characterised as the legislator's wish to place certain limits on the owner of a thing so that the owner would not be able to go too far in encumbrance with a real right of the ownership belonging to him or her. The imperative character of a real right as normative has results proceeding first of all from two elements: a definitively specified number of real rights and the type restriction. With a specified number of real rights, the participants cannot think up any new real rights. The type restriction means that the interested parties may change real rights only as far as space is left for this by law. Accordingly, it is not possible, for example, to agree that the extinguishment of a claim would not have meaning with respect to continued validity of the accessory right of security. Likewise, is not allowed to exercise a real servitude the content of which falls outside the needs of the dominant immovable.^{*7}

Different from types of contract under the law of obligations, the content of real rights cannot be freely amended through an agreement. Agreements that fall outside the limits of the type catalogue can only be a part of complementary agreements, which cannot amend the real right under property law itself. Such complementary agreements cannot have arbitrary content under property law: the type restriction excludes re-forming the content of the existing real rights to an extent that exceeds the limits set forth by law.

However, this does not mean that no freedom of contract exists for real rights. Indeed, with real rights there is no such freedom of contract as seen with the right of obligation, which also involves freedom of forming a contract^{*8}, but freedom of contract as freedom to conclude contracts is, in practical terms, without any limits in the context of real rights. Freedom of contract in the meaning of freedom of re-forming is possible only within the framework of the set types, and it is limited to the choice of types; it does not extend to re-forming the content of a given type. With the right of obligation, one also encounters several types of contracts the content of which is imperatively determined to a great extent because of high social sensitivity and that is why the freedom of contract is there restricted to a considerable extent (examples include a residential lease contract, a contract with model conditions, and also labour law). If one proceeds from this point of view, the difference between freedom of contract as valid with the right of obligation and for real rights is clearly quantitative—regardless of restrictions due to private autonomy, there are considerably more re-forming possibilities with the right of obligation than in cases involving real rights.

1.3. Possibilities for giving content in property law to agreements that do not have the content of a real right

There is a preliminary notation in between the rights with a character under property law and the rights related to the right of obligation.^{*9} This should be understood as an instrument securing the creation of a real right with respect to an immovable. With a preliminary notation, the access and definition have been secured through the Land Register entry. The claim securable with a preliminary notation has got the content under the law of obligations. The securing lies in the fact that a preliminary notation brings about nonentity to disposal, which in its turn damages a securable claim. The validity of a preliminary notation as a security depends on the securable claim.^{*10}

⁵ O. Palandt. Bürgerliches Gesetzbuch. mit Einführungsgesetz, Gesetz zur Regelung des Rechts der Allgemeinen Geschäftsbedingungen, Verbraucherkreditgesetz, Gesetz über den Widerruf von Haustürgeschäften und ähnlichen Geschäften, Gesetz zur Regelung der Miethöhe (Art. 3, des 2. WKSchG), Produkthaftungsgesetz, Erbbaurechtsverordnung, Wohnungseigentumsgesetz, Ehegesetz, Hausratsverordnung. Bearbeitet von P. Bassenge, W. Edenhofer u.a. 54., neuarbeitete Auflage. München: C.H. Beck'sche Verlagsbuchhandlung 1995, preceding 854, paragraph 3.

⁶ Soergel (see Note 3), in paragraph 21 of the introduction.

⁷ H. Westermann. Sachenrecht. Ein Lehrbuch. Unveränderter Nachdruck der 5., neu, überarbeitete Ausgabe, 1966. Karlsruhe: Verlag C.F. Müller 1969, pp. 19–20.

⁸ H. Köhler. Tsiivilseadustik. Üldosa. Õpik (Civil Code. General Part. Textbook). Tallinn 1998, p. 91 (in Estonian).

⁹ For acts of law providing for elements similar to the preliminary notation, see, for example, §883 of BGB. – RGL. S. 195; Schweizerisches Zivilgesetzbuch (ZGB), Art. 961. – AS 24. 233; §63 of LPA.

¹⁰ See §63 (3) and §63² (1) of LPA.

The other important option for formation of the content of real rights, whose possibility and its legal permissibility are not discussed or debated, is linking real rights contracts to the condition of changing or postponing or to both of these. In the event of such a construction, the entry into force of a contract under valid property law (or its continuation) depends on the actualisation of the condition established within the framework of the causal transaction, which is the basis of a contract in property law. The application of conditional contracts under property law in this form is no longer debatable at present. Only that contract under property law that is directed to the transfer of ownership of an immovable shall be condition-free (unconditional) (such a requirement in Estonian law results from §120 (2) of the LPA and in German law from §952 (2) of the *Bürgerliches Gesetzbuch*, or BGB).^{*11}

1.4. Justification of the numerus clausus principle and the type restriction

In legal disputes about content permissibility for a real right, people have often pointed out certain knotty issues for parties to a transfer. What is the need for the corresponding principles and restrictions due to those principles, what is the positive effect of restrictions on commerce and on the legal system, and why can't restrictions be treated in a fairly 'lenient' manner? These are the questions most often brought up by critics of the *numerus clausus* principle and the type restriction. In the first place what they refer to is that those principles harm freedom of contract and through that persons' free self-realisation. First of all, it should be stressed that the disposing principle of a thing is mainly characteristic of the right of obligation. A viewpoint has even been expressed in jurisprudence that, in addition to the real right, the contract freedom should be treated in the same restrictive way with respect to all other parts of civil-law rights because the principle of contract freedom has been enshrined in the right of obligation.^{*12} That means that full freedom of contract is not characteristic of the whole of civil law.

Thus the *numerus clausus* principle and the type restrictions are not characteristic of only real rights. Certainty and clarity in application of law should be ensured and protected too, in addition to free self-realisation. If freedom of contract in the sense of freedom to form the content of a contract were allowed for real rights, parties engaging in commerce would determine the content of a certain real right when creating real rights. This would grant innumerable unique real rights that should be valid not only for the initial parties to the legal relationship but also for everybody.^{*13}

In connection with those rights in force for everybody, the courts would most properly then proceed from ascertaining what the contract-makers thought in every individual case instead of assessing what the legislators had in mind when creating certain restricted real rights. It would not be possible to apply unified court practice that clarifies the content of real rights, because every real right would be unique. The rights created by the parties themselves can be protected in the legal relationship between two persons. It would be inconceivable for the lawmaker to oblige third parties to honour the rights created by another third party. These are the reasons for which a firm point of view should be taken on the *numerus clausus* principle. This principle shall be stated to be justified and necessary.

The type restriction can exist only if it is followed strictly and for all real rights. We could not speak about the *numerus clausus* of a real right if the participants could not create any more properly new real rights but could considerably alter the content of existing real rights instead. Accordingly, the restrictive attitude toward forming of real rights' content should be retained, which means that, unless the right to form the content of a real right is not directly provided for by law, it shall be considered inadmissible. Indeed, this is how the type restriction has been treated.^{*14}

¹¹ F. Quack (ed.). Münchener Kommentar zum Bürgerlichen Gesetzbuch, Band 4: Sachenrecht (§§ 854–1296). Wohnungseigentumsgesetz. Erbbaurechtsverordnung. C.H. Beck'sche Verlagsbuchhandlung 1981, specifically Quack's introduction, paragraph 38.

¹² P. Varul, I. Kull, V. Kõve, M. Käerdi, K. Saare. Tsiviilõiguse üldosa (General Part of Civil Law). Tallinn 2012, p. 137 (in Estonian).

¹³ Schlechtriem (see Note 4), p. 4.

¹⁴ Schwab, Prütting (see Note 3), p. 5.

2. The influence of the numerus clausus principle and the type restriction—examples with certain instruments

2.1. Restrictions applied to the content of servitudes

The Estonian and the German law, as well as the Swiss law, know servitudes whose exact content shall be determined by the participants at the moment of the establishment of a servitude.^{*15} In the proper sense of the word, no special restrictions are provided by law as to the content of a servitude. Nevertheless, the law opens the concept of the servitude and sets forth restrictions according to which a servitude shall not oblige an owner of the servient immovable to any kind of act except the acts that have supporting meaning through exercising of a real servitude.^{*16} The law also sets forth a restriction according to which a real servitude entails the right to carry out only those acts that, because of the content of the servitude, are necessary in the interests of the dominant immovable. No exact restrictions are established by law as to the content of a servitude. And yet a stance shall be taken that by establishing a servitude, one cannot agree on whatsoever one wishes as far as the content of the servitude is concerned. The content of the servitude shall not contort the essence of the servitude.

Restrictions set as to the content of a servitude serve the aim of excluding excessively far-reaching restrictions to the owner's rights.^{*17} The type restriction valid with respect to restricted real rights has the following influence in the case of servitudes: only servitudes with certain content are allowed. The questions pertaining to the permissibility of the content may be complicated. Different from the usufruct, the servitude can be directed only to the right of use with certain content or to the toleration obligation. The content of the servitude cannot be such as to prohibit *in toto* the right to use the immovable, the right that the owner of the immovable would otherwise have.

One criterion in coming to a conclusion on the permissibility of the content is the following: the servitude can only be directed to the toleration of something, and it cannot require the owner of the encumbered immovable to do something positive. The content of a servitude may also be the obligation to avoid some kind of activity.^{*18}

As far as restrictions to the content are concerned, the difference between restrictions to the content of the real servitude and the personal servitude are the following: §1019 of the BGB requires that the content of the servitude create advantages for the dominant immovable. This is an additional restriction to the content valid for the real servitude (in Estonian law, the analogous restriction has been enacted in §178 (1) of the LPA). In contrast, the content of the personal servitude may be any protection deserving of the interest of a person entitled thereto in accordance with the servitude or of the interest of another person. To decide on the permissibility of the content of a real servitude, one has to take into account the fact that a real servitude shall be an encumbrance of an immovable; i.e., it has to create restrictions to the use of the immovable. However, the real servitude that is not directly connected with restrictions to use of the immovable cannot create such obligations for the owner of the immovable. The German Supreme Court (BGH) has taken a stance on the servitude: the servitude shall have influence on the actual and immediate use of the immovable.^{*19} The BGH derives from this conclusion the following: the content of the servitude may be prohibition of a certain economic activity (such as avoidance of hotel-keeping or prohibition of petrol-station-keeping), while the content of the servitude shall not be prohibition of selling certain goods or commodities or of selling other goods or commodities than those specified. For example, one may establish a servitude the content of which is prohibition of keeping a petrol station with the encumbered immovable but one may not establish a servitude whose content is prohibition of sale of certain products at a petrol station there. The BGH has found it permissible to establish a servitude the content of which is to prohibit sale of any kind of beer on the immovable, including also sales of bottled beer on said immovable. Should the content proposed for the servitude be a right of claim directed toward some positive activity, this cannot be established

¹⁵ See §1018 of BGB; Articles 730 and 737 of ZGB; §§ 172 and 178 of LPA.

¹⁶ See §1019 of the BGB; Article 730 (2) of ZGB; §172 (2) of LPA.

¹⁷ Münchener Kommentar (see Note 11), specifically §1019, paragraph 1, by Falckenberg.

¹⁸ Section 1018 of BGB; Article 730 of ZGB; §172 of LPA.

¹⁹ Westermann (see Note 7), pp. 606–608.

within the framework of a servitude, so one shall choose another form of the restricted real right—the real encumbrance.^{*20} Such restrictions to the content of servitudes could also be applied in Estonia.

The servitude does not have to increase the objective value of an immovable, but it does have to offer some kind of advantage to a person entitled thereto in accordance with the servitude. We are dealing with an advantage when a benefit or blessing due to the servitude is objectively useful for the entitled person. For example, such aims as restriction of competition, preservation of a peaceful environment, and preservation of certain aesthetic elements (such as the existing surroundings or architectural style) or an interest in preserving free sight have been considered permissible, essential, and objectively useful in the context of the content of a real servitude. In cases involving a real servitude, the separate immovable properties need not be situated directly adjacent to one another, they have to be close enough to each other that one can offer a useful advantage to another. In cases of servitudes setting forth a competition prohibition, some certain advantage for the dominant immovable must result from the prohibition of competition.^{*21}

2.2. Restrictions to the establishment of real rights to agreements on procedures of use between co-owners

The legal relationship between co-owners with respect to exercise of common ownership has been extremely abstractly regulated. At the same time, the law makes it possible to conclude practically unrestricted agreements between co-owners on procedure of use. At least from the literal text of the law^{*22}, it does not follow that the legislator would set any restrictions on the use of common ownership with respect to agreements between co-owners. At the same time, the character of this kind of agreement concluded between co-owners should be evaluated. Inasmuch as an agreement between co-owners is firstly valid only between co-owners and exercises only internal influence, it shall be considered an agreement deriving its character from the law of obligations; i.e., such an agreement is valid only for the parties to the relevant legal relationship. Extending outside the legal relationship between co-owners are every co-owner's owner's rights relative to a third party^{*23}; therefore, agreements between co-owners have no influence with regard to everybody, only with regard to parties to the corresponding agreement. In such a situation, the application of restrictions to the respective agreement under property law is not well-founded. This includes the application of restrictions due to the type restriction or arising from the *numerus clausus* principle. In a situation wherein the agreement among co-owners becomes valid with respect to all of the co-owners, the agreement between the co-owners does, however, acquire content characteristic of a certain real right—i.e., validity with regard to each actual co-owner, including with regard to every individual co-owner's special legal successor.

As far as the law allows, co-owners may specify through the agreement that the use of a thing in common ownership shall take place in a manner totally different from that set forth by law and it is possible to amend such an agreement so as to be valid with respect to all actual co-owners of the thing.^{*24} That is why such an agreement shall be considered to be of the kind that under property law influences the legal share of a common ownership as an object of commerce. Because of the above-mentioned fact, one shall evaluate whether any restrictions pertaining to the content result in the corresponding agreements, stemming from the type restriction or from the *numerus clausus* principle.

Of importance here are those agreements between co-owners with the aid of which the manner of use of a thing or a part of a thing is regulated such that certain conditions are specified: how a thing may not be used or a manner of use of a thing as such. These agreements are important because, with them, one can fundamentally and essentially amend a thing in common ownership as an object of the right under property law—i.e., such that the object corresponding to the right provides considerably fewer or more restricted possibilities of use for the thing in common ownership than those possibilities would be in the case of their regulation by the normative enacted in the law. Also among the aims of the *numerus clausus* principle and the type restriction is to exclude overly far-reaching formation of real rights and also the owner's rights excessively limiting these. Because of this fact, the author of the present article finds that some restrictions

²⁰ *Ibid.*

²¹ Münchener Kommentar (see Note 11), specifically §1019 2)–6), by Falckenberg.

²² See Article 649a of ZGB and also §79 of LPA.

²³ Section 1011 of BGB; §71 (4) of LPA.

²⁴ Section 1010 of BGB; Article 649a² of ZGB; §79 of LPA.

as to content should also be applicable with regard to agreements of the co-owners on procedure of use in situations wherein these agreements gain an effect in property law—that is, when they are valid with respect to actual co-owners.

2.3. Limitations valid with regard to legal successors of agreements concluded between flat-owners

Flat-owners may regulate the legal relations between themselves in a manner departing from the procedure provided by law unless the law directly excludes the conclusion of certain contracts.^{*25} It is possible to enter agreements concluded between flat-owners in the Land Register. As a consequence, they become valid with regard to an actual owner of flat-ownership.^{*26} Flat-owners may regulate with an agreement the physical share of the flat-ownership and the use of the co-ownership. Such agreements too can be entered in the Land Register.

Only the information provided by law is entered in the Land Register. In point of fact, a notation can be entered in the Land Register for only agreements the possibility of whose entry has explicitly been set forth by law.^{*27}

Those agreements whose entry is explicitly set forth as possible by law consist of, first of all, agreements that regulate the use of the flat-ownership (including common ownership as well as physical shares), agreements deviating from the legally specified relationship for flat-owners, and agreements deviating from a relationship that involves bearing of encumbrances and expenses for the flat-ownership. Through entry of corresponding agreements in the Land Register, these agreements acquire validity with regard to actual flat-owners—i.e., certain effect under property law. That is why these agreements are also subordinated to the *numerus clausus* principle and to the type restriction.

Within the relations of a flat-owners' association, agreements may be concluded with which restrictions on use of flat-ownership are established. In a parallel with Estonian law, there is an analogous norm in the German Apartment Ownership Act^{*28} that sets forth the possibility of conclusion of such agreements. Restrictions of use can first and foremost be established by excluding certain manner of use. For example, flat-owners may agree that ownership of flats shall not be used within the framework of economic activity. By means of an agreement, flat-owners may also prohibit playing of music or music-making, for example, during certain hours in daytime or during the night. In principle, flat-owners may also exclude through an agreement the residential letting of flat-ownership. In accordance with §15 of the *Wohnungseigentumsgesetz* (WEG), flat-owners may give, via an agreement, exclusive rights of use to certain flat-owners—for example, with regard to parking places situated outside the building. With an agreement, flat-owners may prohibit keeping pets or raising of animals in the building.^{*29}

Primary restrictions on establishment of a real right to flat-owners' agreements stem from the imperative acts of the law—flat-owners cannot establish a real right to such agreements as are in conflict with the imperative acts of the law. However, agreements pertaining to the procedure of use should be restricted by the aims that have been the grounds for establishment of the type restriction—i.e., the aim to protect the owner from excessive restriction of his or her ownership. It is only natural that flat-owners' agreements shall be in accordance with general principles of civil law.

²⁵ Gesetz über das Wohnungseigentum und das Dauerwohnrecht (Wohnungseigentumsgesetz) (WEG), §10. – BGBl. I S. 175, ber S. 209; Korteriomandiseadus (Apartment Ownership Act, hereinafter AOA), §8 (1). – RT I 2000, 92, 601; 2006, 43, 326 (in Estonian).

²⁶ Section 10 of WEG; §8 (2) of AOA.

²⁷ See §53 of LPA.

²⁸ See §15 (1) of WEG.

²⁹ See §15 (1) of WEG.

3. Conclusions

The aim of the *numerus clausus* principle and the type restriction is to ensure certainty and clarity in application of the law and thus that participants in commerce not be able to form new real rights or, alternatively, unique restricted ones. The wish of the legislator may be considered also as an attempt to ensure through restrictions that an owner of a thing would not be able to 'give the ownership away' on an impermissibly large scale.

Therefore, it is possible to furnish real rights with content only when this explicitly stems from the law, and it is still not possible to develop real rights further in an unrestricted manner, even in places where this is actually allowed. This means that no further development of real rights is unrestrictedly possible. The furnishing of a real right with content shall hinge on the essence of the real right itself, and it shall not be so far-reaching that the owner of a thing, in essence, gives ownership away excessively. It is possible to establish a real right for different agreements only if such a possibility is directly due to the law.

The legal relationships that cannot be changed under property law that arise from the *numerus clausus* principle and those due to the type duress (compulsion) can be ensured, for example, with the help of a preliminary notation and a conditional real rights contract.

Although again and again people express dissatisfaction with the situation wherein participants in a transfer cannot be as free in forming the content of real rights as they are in concluding contracts under the law of obligations, one should still take the position that the *numerus clausus* principle and the type restriction are justified and important and that they have considerable positive influence on commerce and on the legal system. Subordinating real right to the type restriction creates certainty and clarity in application of the law. It prevents legal disputes. Thanks to these principles, we have not innumerable unique and one-time-only real rights but, instead, a certain small number of real rights. This small number of real rights has been compiled by a legislator. The content of these rights too has been set forth by lawmakers. That is very important in property law, because it is easier for third parties to honour them this way.

Judging by the content of real rights, we can proceed from regulations enacted by law and from the court practice formed in respect of the corresponding real rights.

The *numerus clausus* principle and the type restriction are valid also for those real rights the content of which has to be created by commerce participants themselves. It is thus, for example, for servitudes and agreements concluded between co-owners and between flat-owners. The type restriction is also valid in cases wherein the lawgiver leaves the content of a real right to be determined by the parties themselves. Then the fact shall be taken into account that the content of a real right agreeable to the parties shall not pervert the essence of the law and not restrict the rights of an owner to an inadmissible extent.



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Copyright and Constitutional Aspects of Digital Language Resources:

The Estonian Approach^{*2}

1. Introduction

Language is the fundamental basis of national identity, self-determination, and culture. Linguistic diversity is a major guarantee of the cultural diversity of the world. Therefore, it is hard to overestimate the importance of the preservation and development of national languages. Language is also a tool of communication between people both within a state and internationally. Language constitutes an interdisciplinary domain of which legal issues form an important part, and language is a precondition for formulation and enjoyment of fundamental rights.

This approach has been recognised at the highest regulatory level in Estonia. Namely, the preamble of the Constitution of the Republic of Estonia^{*3} provides that: '[w]ith unwavering faith and a steadfast will to strengthen and develop the state [...] which shall guarantee the preservation of the Estonian nation, language and culture through the ages'. According to legal commentators, 'the inclusion of the protection of the Estonian language as a basic principle in the preamble of the Constitution implies its recognition as the core value of the nation. It is impossible to separate the Estonian culture from language'.^{*4}

The Estonian Constitution establishes an additional principle related to language. Pursuant to § 6 of the Constitution, '[t]he official language of Estonia is Estonian'.^{*5} It is explained that '[e]very society needs to

¹ The views expressed in this article are those of the authors and do not reflect the official opinion of the Council of the European Union.

² This publication has been supported by the European Social Foundation through the Research and Innovation Policy Monitoring Programme.

³ Eesti Vabariigi põhiseadus (as entering into force on 3.7.1992). – RT 1992, 26, 349; RT I, 27.4.2011, 1 (in Estonian). English translation available via <http://www.legaltext.ee/> (most recently accessed on 11.3.2012).

⁴ R. Narits, H. Schneider. Preambul (Preamble). – Eesti Vabariigi põhiseadus. Kommenteeritud väljaanne. Teine, täiendatud väljaanne (Constitution of the Republic of Estonia, Commented Edition, Second Edition), edited by a panel led by E.-J. Truuväli. Tallinn: Juura, Õigusteabe AS 2008, p. 35 (in Estonian).

⁵ This Constitutional provision is implemented by the Language Act, which is intended to 'develop, preserve and protect the Estonian language and ensure the use of the Estonian language as the main language for communication in all spheres of

have normal communication and social cohesion among its members. This, however, can be achieved only if there is a shared language. According to the Constitution, the shared language in the Estonian society is Estonian'.⁶

New information and communication technologies (ICT), as well as the entirety of progress of technology, can influence the development of language. This can be illustrated by the fact that, in increasing numbers, conversation partners who use the Estonian language are artificial technical systems. Ranging from user interfaces of mobile phones to central information services, these systems also include safety-critical applications such as medical devices and vehicles' driver information systems. None of these systems at their present level of development really understands or speaks natural languages in the human sense. Instead, they use sophisticated technology to emulate human language behaviour and extract unambiguous information from human input. All of these language technologies are built upon digital language resources.

For the purpose of this article, digital language resources are defined as databases whose content consists of many written and oral texts. Selection of the texts to be included in this database is a creative process that requires collection and systematisation of the material for inclusion in this database. Therefore, the database is protected by copyright as a work⁷ under the Estonian Copyright Act.⁸ In this article, 'digital language resources' refers to the content of the database, a collection of written and spoken texts, and not to technical tools and Web applications.

The challenges related to creation of new language technologies are not limited to technological problems. There is also a myriad of legal issues, ranging from personal data protection to intellectual property problems, first and foremost in the field of copyright.

The aim of this article is to study some issues related to the development of digital language resources, which constitute a crucial challenge for new language technologies. For establishment of digital language resources, there is a need to utilise texts in enormous quantities and great variety. Most of these texts are protected by copyright as literary works.⁹ According to copyright rules, the use of works can either be based on right-holders' consent in the form of a contract or follow the rules of free use of works or, in other words, copyright exceptions to the exclusive rights of the author established by the legislator. The first option is called the licensing model and the second one the exception model. The practice of different countries in relying on the licensing or exception model to develop digital language resources varies, depending on policy and legal considerations and on the size and structure of the local market.

The creation of national digital language resources in Estonia serves public interests. Such a digital language resources database is created not for direct commercial purposes. The aim is to fulfil the Constitutional task of preserving and developing the Estonian language. Therefore, in this article, the authors concentrate on the issues of applicability of exceptions to exclusive rights of the author in the Estonian Copyright Act, which facilitates the creation of digital language resources.

The research related to copyright aspects of digital language resources is in its initial stage in Europe. This is a field of knowledge that requires an interdisciplinary approach and joint effort of linguists, lawyers, and IT specialists. The present article reflects the research results from the Estonian state programme for language technology and the research and innovation policy monitoring programme. The research in this interdisciplinary field is undertaken by scientists from the Institute of the Estonian Language and the Faculty of Law of the University of Tartu.

The topic of this article is directly tied in with several European Union policies. One of the aims of the European Union is to promote multilingualism. The overall goal is 'to contribute to a truly integrated, borderless digital Single Market by ensuring easy access to online services and creating better conditions for the development and use of rich content in Europe's many languages. The end result will be a digital economy, a society where knowledge and skills as well as online services, both public and private, can flow

public life' (§1). See Keeleseadus (as entering into force on 1.7.2011). – RT I, 18.3.2011, 1 (in Estonian). English translation available via <http://www.legaltext.ee/> (most recently accessed on 13.3.2012).

⁶ K. Merusk *et al.* §6. – Eesti Vabariigi põhiseadus. Kommenteeritud väljaanne (see Note 4), p. 72 (in Estonian).

⁷ Another option is to protect databases through sui generis rights provided by Directive 96/9/EC of the European Parliament and of the Council of 11.3.1996 on the legal protection of databases and Chapter VIII1 of the Estonian Copyright Act.

⁸ Autoriõiguse seadus (as entering into force on 12.12.1992). – RT 1992, 49, 615; RT I, 28.12.2011, 1 (in Estonian). Unofficial translation available via <http://www.legaltext.ee/> (most recently accessed on 11.3.2012).

⁹ To some extent, problems related to management of digital language resources are not entirely unique. For instance, mass digitalisation projects (e.g., by libraries) often face the same obstacles.

freely across national and language borders'.^{*10} Therefore, the Member States co-operate with the aim of sharing and trading language resources, both content data and digital tools.^{*11} In this article, the authors concentrate primarily on national issues of creation of digital language resources.

In the following sections, the authors first explain technological and copyright-related aspects of digital language resources. After that, they consider limitations of an author's exclusive rights—in other words, the free-use provisions of the Estonian Copyright Act, which could serve as a legal basis for development of national digital language resources. These copyright exceptions are analysed in light of the Constitutional guarantee of preservation of the Estonian language and in the conceptual framework of the 'three-step test', which is a fundamental concept for limitation of authors' rights.

2. Some technical and copyright issues of digital language resources

Language can be supported by technology on a variety of levels. Accented characters, sorting orders, and date formats are already taken for granted. Language-technology applications that are available for the Estonian language include spelling checkers, machine translation, speech synthesis (converting written text into speech), and speech recognition (converting speech to written text). There is a noticeable difference in quality between these tools and similar tools for major languages. Given the market sizes, it is natural for English to be the first language in which the cutting edge of technology is developed. For instance, conversation agents such as Apple's Siri and intelligent information retrieval were 'born' in English. An example of the latter is the IBM Watson computer system^{*12}, which in 2011 defeated human champions in an episode of the quiz show *Jeopardy*^{*13}, which is based on contestants answering questions posed in natural language.

While it would be theoretically possible to program such systems explicitly with language competence, this task would be prohibitively time-consuming and error-prone in practice. Also, the entire task of coding language rules would have to be repeated for each new language, making the effort non-scalable and especially infeasible for languages with smaller numbers of speakers, which, in turn, makes fewer resources available for language-technology development.

Modern statistical methods employ a different approach by shifting the emphasis from program logic to language data.^{*14} The program is mainly concerned with implementing a machine learning algorithm, which then enables the system to learn natural languages more or less as a human being would have, only on a more formal level. To this end, the system needs to be provided with numerous authentic examples of how humans use the language in question. The quantity of such language data is correlated with the quality of the resulting language-technology system. The current worldwide trend is to keep increasing the sizes of language resources, from hundreds of millions to billions of words. A billion words corresponds to roughly 15,000 midsize printed books.

It is possible to distinguish between two types of machine learning: assisted and unassisted. In language technology, the difference lies in the kind of texts presented to the system. Unassisted learning uses normal texts as they are found: books, Web sites, chat transcripts, recordings of talk shows, and any others that can be made available to the machine in huge quantities. For straightforward topics such as learning of translational equivalents at sentence or phrase level, on the basis of existing human translations, this works fairly well, as confirmed by the constantly growing usefulness of machine translation systems such as Google Translate. However, even slightly more complex inferences require more sophisticated learning techniques and greater processing power than are currently available for mainstream language-technology

¹⁰ An inventory of Community actions in the field of multilingualism – 2011 update. Commission Staff Working Paper. Brussels, 7.7.2011, SEC(2011) 926 final, p. 26.

¹¹ For instance, Estonia is one of the founding members of the Common Language Resources and Technology Infrastructure (CLARIN).

¹² D. Ferrucci, E. Brown, J. Chu-Carroll, J. Fan, D. Gondek, A.A. Kalyanpur, A. Lally, J.W. Murdock, E. Nyberg, J. Prager, N. Schlaefer, C. Welty. Building Watson: An overview of the DeepQA Project. – AI Magazine 2010/Fall. Available at <http://www.aaai.org/Magazine/Watson/watson.php> (most recently accessed on 5.4.2012).

¹³ Watson—a system designed for answers. An IBM White Paper. <ftp://public.dhe.ibm.com/common/ssi/ecm/en/pow03061usen/POW03061USEN.PDF> (most recently accessed on 5.4.2012).

¹⁴ D. Jurafsky, J.H. Martin. Speech and Language Processing. Prentice Hall 2009.

applications. For example, the relatively simple knowledge that in English ‘is’ and ‘were’ are both forms of ‘to be’ is very hard to extract from running text, unless human beings give the machine some explicit clue about it first.

Assisted machine learning, which is, in essence, learning by example, is more realistic for most types of linguistic knowledge at our present level of technological development. Human linguists annotate texts with the kind of tags that they want the machine to be able to apply, then feed these tagged texts into the system (this is called training), and the system quickly learns to perform the same job independently.

The texts to be included in language resources need to be from the areas of language use that the resulting system will be used for. If training is limited to texts with no copyright protection—i.e., legislative texts and fiction from previous centuries^{*15}—the system will not cope with the modern discourse of user manuals or medical-information systems.

Samples of both written and spoken language use are needed for development of language-technology systems. Spoken-language resources contain audio or multimedia recordings of speech of various types, including spontaneous conversations. Written-language resources include anything from legislative texts to chat-room transcripts. For most types of resources, the important parameters of the source material, in addition to its size, are the topic and register. The meaning or message of the text is not used by language-technology applications at their present stage of development. In the compilation of a language resource, the texts are just piled together into a huge database with specific search capabilities, possibly with added tagging. Although it may be technically possible to retrieve substantial portions of the source texts from language resources, this is not what they are designed and normally used for. They are intended only for extraction of information about how language works, by both human researchers and machine learning algorithms in language-technology applications.

From the copyright perspective, the creation of digital language resources involves the use of written and oral texts that are usually protected by copyright. Subsection 4 (2) of the Copyright Act defines protectable work as ‘any original results in the literary, artistic or scientific domain which are expressed in an objective form and can be perceived and reproduced in this form either directly or by means of technical devices’.^{*16} Subsection 4 (6) of the Copyright Act provides that ‘[t]he protection of a work by copyright is presumed [...]. The burden of proof lies on the person who contests the protection of a work by copyright’. In practical terms, this means that any text written or spoken by a human being^{*17} enjoys copyright protection and its use either requires authorisation or shall be based on limitations.

Creation of digital language resources includes collection and reproduction of copyright-protected and non-protected written and oral texts. There are two clear legal possibilities for creation of digital language resource databases from non-protected texts:

- 1) It is allowable to use works that are not protected, on account of the expiry of the term of protection (which is, as a rule, 70 years *post mortem auctoris*)^{*18}, and
- 2) It is possible under §5 of the Estonian Copyright Act, which provides that legislation, administrative documents, court decisions, and official translations thereof are not copyright-protected.

It should be mentioned that even after a work leaves copyright, authorship has to be honoured. This requirement is provided by Article 6*bis* of the Berne Convention and also integrated into the Estonian Copyright Act. It is necessary to distinguish between two distinct legal concepts here: authorship^{*19} and the right to authorship.^{*20} The only obligation of the user after the end of the term of copyright protection is to honour authorship by making reference to the author of the text used. Pursuant to §44 (1) of the Copyright Act,

¹⁵ These two account for a large part of the material in current Estonian language resources; see <http://www.cl.ut.ee/korpused/> (most recently accessed on 5.4.2012).

¹⁶ The definition is based on Article 2 (1) of the Berne Convention for the Protection of Literary and Artistic Works. Berne, 9.9.1886 (which entered into force with respect to Estonia on 26.10.1994). – RT II 1994, 16–17, 49 (the Berne Convention).

¹⁷ One of the underlying concepts of Estonian copyright law reads: ‘The author of a work is the natural person or persons who created the work’ (§28 (2) of Copyright Act). In view of this concept, it is hard to say whether a work generated by a computer program is protectable or not. One approach would be to vest copyright in the person who created the program.

¹⁸ The copyright terms are unified within the EU, and, therefore, all EU countries have a similar situation. See Council Directive 93/98/EEC of 29.10.1993 harmonizing the term of protection of copyright and certain related rights. – OJ L 290, 24.11.1993, pp. 9–13.

¹⁹ Authorship is a connection between the work and its creator, and it is protected forever. See §44 of Copyright Act.

²⁰ The right of authorship involves a general term of protection, as a rule, of the life of the author plus 70 years. See §12 (1) 1) of Copyright Act.

‘[t]he authorship of a certain work, the name of the author and the honour and reputation of the author shall be protected without a term’^{*21}. As a matter of fact, the right to authorship is also enshrined in §39 of the Estonian Constitution^{*22}, which provides that ‘[a]n author has the inalienable right to his or her work. The state shall protect the rights of the author’. Compliance with this requirement in the context of development and management of digital language resources is not complicated or burdensome.

The creation of language resources cannot rely solely on materials outside the scope of copyright protection. In the process of development and preservation of language, it is crucial to use contemporary texts as ‘raw material’. These texts include works and extracts thereof that are still under copyright protection. The utilisation of copyright-protected material, however, can be based either on right-holders’ direct consent or on limitations of right-holders’ exclusive rights. Such limitations are foreseen in Chapter IV of the Estonian Copyright Act, ‘Limitations on Exercise of Economic Rights of Authors (Free Use of Works)’. In this article, we refer to these limitations also as copyright exceptions.

3. The application of copyright limitations for development of digital language resources

Copyright laws are not drafted in consideration of rapid technological developments.^{*23} Therefore, it has been established practice throughout the history of copyright law to try to interpret existing provisions in light of new developments, before corresponding changes to the law have been introduced. Now is not the first time when technological progress has been in tension with intellectual property (IP) systems. Often, IP experts have emphasised that technological advances have a destabilising effect on IP systems.^{*24} From our point of view, it is not so much IP systems that are adversely affected by technological advances. *Vice versa*, the IP system is not a thing in itself. Its main purpose is to enhance innovation in all spheres of life, including culture and social welfare—and also language. As far as the utilisation of the emerging IT technologies is concerned, the IP system more often constitutes a barrier to them than a mechanism to leverage unforeseen opportunities offered by these technologies.

This, however, does not mean that language resources cannot be developed within the current copyright regulations. It is essential to bear in mind that different exploitation methods determine whether one should utilise the exception or licensing model. In most cases, digital language resources can be developed and utilised in accordance with the existing copyright limitations (i.e., under the exception model). All copyright limitations, including those relevant to development of digital language resources, have to be placed within the context of the three-step test, which is a key in how to conceptualise, interpret, and implement the existing framework of copyright limitations in the Copyright Act.

The three-step test has its origins in the Berne Convention and is expressed there as follows: ‘[i]t shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.’^{*25} This provision entitles states signing the Berne Convention to limit the reproduction right under certain conditions. Similar regulation was included in the Agreement on Trade-Related Aspects of Intellectual Property Rights^{*26} (the TRIPS

²¹ According to §12 (1) 1) of Copyright Act, the right to authorship means to ‘appear in public as the creator of the work and claim recognition of the fact of creation of the work by way of relating the authorship of the work to the author’s person and name upon any use of the work’.

²² The Estonian Constitution has several provisions that address intellectual property protection. Section 39 protects creators’ (authors and inventors’) personal rights, and §32 covers, in addition to tangible property, economic rights and interests of IP-owners.

²³ On the EU level, there is Directive 2001/29/EC of the European Parliament and of the Council of 22.5.2001 on the harmonisation of certain aspects of copyright and related rights in the information society. – OJ L 167, 22.6.2001, pp. 10–19 (the InfoSoc Directive). This directive, however, does not introduce a new copyright paradigm. It instead specifies and complements the existing copyright regulations.

²⁴ See W. Cornish, D. Llewelyn. *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights*, Sixth Edition. London, Sweet & Maxwell 2007, p. 34.

²⁵ Article 9 (2) of the Berne Convention.

²⁶ Agreement on Trade-related Aspects of Intellectual Property Rights. Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization. Marrakech, 15.4.1994. This entered into force with respect to Estonia on 13.12.1999 (cited in RT II 1999, 22, 123).

Agreement), which is also applicable in respect of Estonia. Pursuant to Article 13 of the TRIPS Agreement, 'Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder'. The meaning of the provision is explained in the literature as follows: '[A]ny limitations imposed nationally to any exclusive rights granted under TRIPS, must satisfy the three-step criteria. Thus, the three-step test has been transformed into a general litmus test for domestic limitations on copyrighted works. The three-step test is not a public interest limitation to exclusive rights. Instead, it is a limitation on the *scope of limitations* that member states can implement to promote access and dissemination of works domestically. In sum, what appears to be a limitation to copyright, is actually [a] limit on the discretion and means by which member states can constrain the exercise of exclusive rights.'²⁷

There are certain differences in the conceptualisation of the three-step test between the Berne Convention and the TRIPS Agreement. According to commentaries on the TRIPS Agreement, 'while the Berne Convention only refers to the "reproduction" right of literary and artistic works, Article 13 of the TRIPS Agreement applies to all exclusive rights conferred'.²⁸ As a result, the TRIPS Agreement further limits the freedom of WTO countries to introduce new copyright exceptions to address challenges brought by technological change.

The Estonian Copyright Act has incorporated the concept of the three-step test²⁹ in the following wording: '[P]rovided that this does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author, it is permitted to use a work without the authorisation of its author and without payment of remuneration only in the cases directly prescribed in §§ 18–25 of this Act'.³⁰ It is necessary to explain that, upon inclusion of the three-step test in national copyright acts, its function is transformed. In the Berne Convention and the TRIPS Agreement, it is meant to limit countries' freedom to introduce copyright limitations in their national legislation. In copyright legislation such as the Estonian Copyright Act, its role is to guarantee that the author's rights are not violated even in cases in which use of a copyright-protected work is formally covered by an exception, where it still has an extremely adverse impact on the author's legitimate interests and there are no justifying circumstances. Below, the authors analyse the interaction of specific elements of the three-step test with the development of digital language resources. It is necessary to remember that the three conditions in the three-step test are cumulative.³¹

Next, the authors address copyright exceptions applicable in the process of creation of digital language resources. Since it is not enough to analyse specific exceptions if one is to determine their appropriateness, the authors place them within the framework of the three-step test. Therefore, the authors start by outlining conditions of specific exceptions such as the quotation right and the research exception. After this, the paper explores whether utilisation of these exceptions is in conflict with the normal exploitation of the work. Finally, arguments are presented to support the use of the quotation right and research exception to develop language resources. Constitutional guarantees for preservation of the Estonian language serve here as a central justification of development of digital language resources.

The first requirement of the three-step test is that an exception be directly prescribed in the Copyright Act. There are several exceptions under which the use of copyright-protected works is allowed without the consent of the author and without payment of remuneration. Section 19 of the Estonian Copyright Act sets forth several exceptions allowing 'free use' for certain scientific, educational, informational, and judicial aims. The exceptions relevant to digital language resources are the right to quote³² and use of works for

²⁷ R. Okediji. *Fostering Access to Education, Research and Dissemination of Knowledge through Copyright*. UNCTAD-ICTSD Dialogue on Moving the Pro-development IP Agenda Forward: Preserving Public Goods in Health, Education and Learning (2004), pp. 3–4. Available at http://www.iprsonline.org/unctadictsd/bellagio/docs/Okideiji_Bellagio4.pdf (most recently accessed on 17.3.2012).

²⁸ C.M. Correa. *Trade Related Aspects of Intellectual Property Rights: A Commentary on the TRIPS Agreement*. Oxford: Oxford University Press 2007, p. 136.

²⁹ Article 5 of the InfoSoc Directive also includes the three-step-test regulation.

³⁰ Copyright Act, §17.

³¹ See S. Ricketson, J.C. Ginsburg. *International Copyright and Neighbouring Rights: The Berne Convention and Beyond*, Second Edition, Volume I. Oxford University Press 2006, p. 763.

³² On the international level, the right to quote is regulated by the Berne Convention, which provides that '[i]t shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by the purpose' (Article 10 (1)).

scientific purposes.^{*33} Both exceptions offer opportunities for, and limitations to, development of digital language resources.

In order to exercise the quotation right, one need not seek the author's authorisation or pay him or her remuneration. However, it is required to indicate the source, use only works that have been lawfully published, convey the idea of the work correctly, and confine quotations to reasonable limits.^{*34} Fulfilment of the requirements to use lawfully published works, make reference to the source, and convey the author's ideas correctly is not complicated, even though in the Internet era it is sometimes hard to say whether a work has been lawfully published.

The most complex issue is that the extent of included quotations must not exceed that justified by the purpose.^{*35} According to legal commentators, no limitation is placed on the amount that may be quoted. The concept of 'quotation' usually suggests that the thing quoted is part of a greater whole rather than the whole itself. Still, quotation of the whole work may be justifiable.^{*36} Within the context of development of digital language resources, the extent of quotation depends on the type of text. If a work is relatively short, it may be included in its entirety in the database of digital language resources. It is very hard to state an approximate percentage. The authors believe that this criterion is evaluated within the second and third requirements of the three-step test.

Since copyright law allows commercialisation of new works that contain quotations from works of other people, digital language resources made up of quotations can be sold or licensed for a fee.

Use for scientific purposes (i.e., under the research exception) is not to involve commercial exploitation of language resources. It also has to be limited to the purpose of illustration or to the extent justified by the purpose at educational and research institutions. According to copyright experts, '[b]oth illustration for teaching and scientific research must be the sole purpose of the use for which the exclusive rights may be restricted. Accordingly, when the reproduction or other use also fulfils an additional purpose, the exception or limitation must not apply'.^{*37} Here again, the validity and relevance of these purposes are evaluated within the second and third requirements of the three-step test.

The second requirement of the three-step test is that the use not conflict with the normal exploitation of the work. According to the explanation by copyright experts, 'whether the exempted use would otherwise fall within the range of activities from which the copyright owner would usually expect to receive compensation [...] "normal exploitation" will therefore require consideration of potential, as well as current and actual, uses or modes of extracting value from a work'.^{*38}

In this context, it is useful to refer to a case brought before a WTO dispute resolution panel in relation to interpretation of three-step test provisions in the TRIPS Agreement (described in a WTO report). This case provided the main official legal analysis of the scope and conditions of the three-step test and offers further insights into this matter. According to the WTO report, 'an exception or limitation to an exclusive right in domestic legislation rises to the level of a conflict with a normal exploitation of the work (i.e., the copyright or rather the whole bundle of exclusive rights conferred by the ownership of the copyright), if uses, that in principle are covered by that right but exempted under the exception or limitation, enter into economic competition with the ways that right holders normally extract economic value from that right to the work (i.e., the copyright) and thereby deprive them of significant or tangible commercial gains'.^{*39}

The preliminary market analysis of exploitation-models practice by copyright-holders of written and oral texts in Estonia reveals that the value is extracted mostly through selling of the texts as literary works (books, journals, e-books, etc.) or offering of advertising on a Web site or blog that contains copyright-protected texts, or these texts are not commercialised at all. The authors are unaware that any business actor holding copyright to many written texts would commercially exploit them by means of development and utilisation of digital language resources. The WTO report also emphasises that 'the extent of exercise or non-exercise of exclusive rights by right holders at a given point in time is of great relevance for assessing

³³ Copyright Act, §19.

³⁴ Clause 19 1) of Copyright Act.

³⁵ Clause 19 1) of Copyright Act.

³⁶ Ricketson, Ginsburg (see Note 31), p. 788.

³⁷ M.M. Walter, S. von Lewinski. *European Copyright Law: A Commentary*. Oxford University Press 2010, p. 1044.

³⁸ Ricketson, Ginsburg (see Note 31), p. 769.

³⁹ WTO. Report of the Panel. WT/DS160/R (15.6.2000), p. 48. Available at http://www.wto.org/english/news_e/news00_e/1234da.pdf (most recently accessed on 17.3.2012).

what is the normal exploitation with respect to a particular exclusive right in a particular market⁴⁰. Therefore, the authors assert that creation of digital language resources for scientific purposes is not in conflict with the normal exploitation of the work.

The third requirement of the three-step test is that the act not unreasonably prejudice the legitimate interests of the author. According to copyright experts, '[t]he words "not unreasonably prejudice" therefore allow the making of exceptions that may cause prejudice of a significant or substantial kind to the author's legitimate interests, provided that (i) the exception otherwise satisfies the first and second condition [...], and (ii) it is proportionate or within the limits of reason, i.e., if it is not unreasonable'⁴¹. The WTO report further elaborates on this matter: '[P]rejudice to the legitimate interests of right holders reaches an unreasonable level if an exception or limitation causes or has the potential to cause an unreasonable loss of income to the copyright owner.'⁴² This criterion requires one to consider whether development of digital resources of the Estonian language takes precedence over right-holders' economic interests in restriction of the quotation right and the research exception. The question has to do with public interest, which is country-specific. Legal scholars have characterised it as follows: "'Public interest', however, is a shifting concept that requires a careful balancing of competing claims in each case and one that is frequently interpreted in different ways at the national level, depending upon historical, cultural, and social circumstances"⁴³.

In Estonia, our language is protected at the Constitutional level. This means that the Constitutional guarantee of preservation of the Estonian language is a key in construction and implementation of the Estonian Copyright Act and a basis and justification for development of digital language resources.

Summary of conditions for use of the exception model to develop digital language resources

Name of the exception	Quotation right Copyright Act, §19's clause 1	Research exception Copyright Act, §19's clauses 2 and 3
Requirements of the Copyright Act	1) no need for authorisation and payment of remuneration; 2) reference to the source; 3) quoting from a lawfully published work in an extent that does not exceed that justified by the purpose; 4) commercial exploitation as allowed; and 5) exercise of the quotation right for non-profit and commercial purposes	1) no need for authorisation and payment of remuneration; 2) reference to the source; 3) the use of a lawfully published work for the purpose of illustration for scientific research to the extent justified by the purpose; 4) reproduction from a published work for the purpose of teaching or scientific research to the extent justified by the purpose at educational and research institutions; and 5) commercial exploitation as not allowed
Potential conflict with normal exploitation of the work	Right-holders of literary works do not usually commercially exploit their works to create digital language resources in Estonia. Development of digital language resources is not in conflict with normal exploitation of the works.	
Unreasonable prejudicing of the legitimate interests of the author	An important consideration in determination of whether the creation of digital language resources unreasonably prejudices the right-holders' legitimate interests is the need to preserve the Estonian language.	

⁴⁰ *Ibid.*, p. 50.

⁴¹ Ricketson, Ginsburg (see Note 31), p. 776.

⁴² WTO (see Note 39), p. 59.

⁴³ Ricketson, Ginsburg (see Note 31), p. 756.

4. Conclusions

Language is a *conditio sine qua non* for every culture; i.e., without language there is no culture. Language is not a static phenomenon. In contrast, its character is rather dynamic and it is continuously evolving in response to trends in society, culture, and technology. Advances in information and communication technologies enable the enhancement of language technologies. These technologies, however, are based on digital language resources, whose creation requires the utilisation of numerous copyright-protected texts. Therefore, copyright is an important issue in the development of digital language resources.

The official language of Estonia is Estonian, and the Constitution and other legal acts set in place measures to enforce this Constitutional provision. Therefore, the creation of digital language resources databases fulfils certain important aims of public law. At the same time, the exclusive economic and personal rights of an author or other right-holder are protected at the Constitutional level and more specifically by private law, in the Copyright Act. It is not easy to find the right balance between public- and private-law measures and among the divergent interests of the various stakeholders.

There are two main methods for creation of digital language resources databases: on the basis of a contract with copyright-holders (licensing model) and reliance on the provisions for fair-use exceptions (limitations to exclusive rights of the authors) in the Copyright Act (exception model).

In this article, the authors have explored whether copyright exceptions allow the development of digital language resources without acquisition of authorisation from right-holders and payment of remuneration. These exceptions were placed within the conceptual framework of the three-step test and interpreted in light of the Constitutional guarantee to preserve the Estonian language.

The authors' main conclusion is that the Estonian Copyright Act as constructed and implemented in light of the Estonian Constitution allows creation of digital language resources by exercise of the quotation right and the research exception. This conclusion is supported by the fact that the development of language resources is not in conflict with the normal exploitation of works. That is, right-holders for these texts are not commercially exploiting their works to create language resources. These activities are conducted mostly by public research institutions. The reason is that, because of the small number of individuals speaking the Estonian language, it is not economically sustainable for profit-oriented entities to invest in the development of digital language resources. Therefore, research institutions developing and utilising digital language resources are not depriving the right-holders whose texts are included in the resources of any revenue and there are no adverse financial consequences for right-holders.

It is also crucial to consider the Constitutional guarantees made for the Estonian language. The three-step test that constitutes the main standard for determination of whether a right-holder's interests and rights are violated allows limiting of these rights in cases wherein there is compelling reason for so doing. The authors conclude that the need to develop and preserve the Estonian language qualifies as compelling reason.



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The Constitutional Approach to Basic Consumer Rights

1. Introduction

Awareness of consumer rights as basic rights began when US President John F. Kennedy outlined in his special message to the United States Congress, on 15 March 1962, four fundamental consumer rights.*¹ From a Constitutional point of view, this declaration of certain consumer rights as ‘fundamental rights’ does not in itself have any specific value. Nevertheless, the speech attracted widespread attention elsewhere, descriptive of, and contributing to, the emergence of new social and legal phenomena.

Over the last 50 years, consumer law has developed considerably, influenced by growth in trade and wealth, globalisation, and the strengthening of the consumer movement. As a result of these trends, numerous regulations have been adopted to balance the greater power of professional suppliers over individuals.

Today, we have put behind us the era of declarative policies and embrace consumer rights at the highest Constitutional level, both in the EU’s primary law and in several EU member states. At the same time, the discussion of the substantive meaning of consumer rights as a new type of fundamental rights has been rather modest in the specialist literature. The main purpose of this paper is to explore the extent to which consumer rights are recognised as fundamental rights at the international and national level, and to analyse whether the declaration of basic consumer rights as Constitutional rights can improve the standard of consumer protection or is merely a symbolic instrument, not associated with any major changes.

This paper is structured as follows. In the first part of the article, the author examines whether consumer rights have potential to be recognised as the universal human rights of the new generation insofar as these rights have several shared features. In the second section, the author explores to what extent the main rights of the consumer are accepted as fundamental rights at an international level in agreements, conventions, and the primary law of the European Union. As the Charter of Fundamental Rights has become part of the European Union’s primary law, the author is keen to find an answer to questions related to the legal meaning that the charter ascribes to consumer rights. In the final part of the paper, the author focuses on consumer rights as fundamental rights in national constitutions. Firstly, the Constitutional provisions of EU member states that, *expressis verbis*, highlight consumer rights are addressed. Then the author analyses the status of consumer rights in Estonian law, attempting to find an answer to the question of whether or not consumer rights that are not directly mentioned in the Estonian Constitution could be treated as fundamental rights that carry Constitutional value. For this purpose, the author interprets consumer rights in the context of §10 of the Constitution. This section includes a special development clause, which allows rights not expressly mentioned in the Constitution to be treated as fundamental rights by way of interpretation. Finally, the author presents his opinion as to whether the potential recognition of consumer rights as Constitutional fundamental rights would ensure a greater level of protection for Estonian consumers.

¹ Public Papers of the United States. J. F. Kennedy – Public Messages, Speeches and Statements of the President, 1.1.– 31.12. pp. 235–240, United States. Office of the Federal Register. U.S. Govt. Print. Off., 1962.

2. Consumer rights and universal human rights

To counterbalance market inequalities, there have been continuous attempts to create global ethical values through a declaration of fundamental consumer rights.

One may argue that recognition of certain 'basic' higher-order consumer rights may be derived from the fact that being a consumer of some kind is a basic human condition.

The concept of human rights traditionally refers to the notion of human beings as having universal rights. These rights are commonly understood as 'inalienable fundamental rights to which a person is inherently entitled simply because she or he is a human being'². Human rights are, therefore, conceived of as universal and equally applicable rights. These rights may exist as legal rights, in both national and international law.

In a number of respects, consumers benefit from human rights protection if they are viewed in the broader context of consumer activity. For example, interests in human health and physical integrity—which indeed feed in to the right to life—are already well established in the canon of protection, and their projection as consumer rights is then a matter of context.³ Consumer law may also be connected indirectly to human rights issues of other kinds, such as the fight against child labour or against discrimination. To a lesser extent, perhaps, the same could be said of economic self-determination.

The UN International Covenant on Economic, Social and Cultural Rights⁴, which is part of the International Bill of Human Rights, refers to the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing, and housing, and to the continuous improvement of living conditions (Article 11 (1)). These goals are at least partly reachable through effective consumer protection legislation.

Some legal scholars, such as S. Deutch, suggest that consumer rights have the potential to become 'soft human rights', because they possess the three main characteristics of human rights. Deutch argues for his novel thesis by referring to the following circumstances. First, there is increasing international recognition of consumer rights in international treaties, which shows the universal acceptance of such a right. Consumer rights are rights of all individuals, as every person is a consumer from time to time. Second, consumer rights to fair trade, safe products, and access to justice are granted to maintain human dignity and well-being, notwithstanding the economic market impact. Third, consumer rights are similar to other accepted human rights in that they are intended to protect individuals from arbitrary infringements by governments.⁵

This point of view has not, however, become widely accepted in the legal literature.⁶ The author is also of the opinion that the treatment of consumer rights as modern human rights of the new generation is not sufficiently justified.

The author does not share the viewpoint of Deutch that enshrining of consumer rights is intended to protect individuals from arbitrary infringements on the part of governments, because the primary goal with consumer rights has been the protection of individuals against market failures.⁷

A distinctive feature with respect to human rights as universal rights is the satisfaction of fundamental interests and needs, which is seen if their violation or neglect could cause death or dire suffering. Violation of consumer rights is not normally accompanied by such drastic consequences.

Another of the key features of human rights is their abstractness. Unlike human rights, consumer rights have been set out in legislation as relatively clear-cut rights whose scope of application is limited to the legitimate (primarily economic) interests of the consumer.

² M. Sepulveda *et al.* Human Rights Reference Handbook. Ciudad Colón, Costa Rica: University of Peace 2004, p. 3.

³ C. Harding, U. Kohl, N. Salmon. Human Rights in the Market Place: The Exploitation of Rights Protection by Economic Actors. Ashgate Publishing 2008, p. 69.

⁴ United Nations. International Covenant on Economic, Social and Cultural Rights, 16.12.1966. Available at <http://www2.ohchr.org/english/law/cescr.htm> (most recently accessed on 28.5.2012).

⁵ S. Deutch. Are consumer rights human rights? – *Osgoode Hall Law Journal* 1995 (32)/3, pp. 551–552.

⁶ I. Benöhr, H.-W. Micklitz. Consumer protection and human rights. – G. Howells, I. Ramsay, T. Wilhelmsson (eds). *Handbook of Research on International Consumer Law*. Edward Elgar 2010, p. 25.

⁷ For more about market failures, see T. Bourgoignie. Foundations, features and instruments of European Union consumer law and policy. – *Summer Programme in European Community Consumer Law*. Centre de droit de la consommation, Université Catholique de Louvain 1996, pp. 3–4.

3. Recognition of consumer rights as fundamental rights at the international level

3.1. Consumer rights in international treaties

At the international level, eight fundamental consumer rights were first declared in the 1985 UN Guidelines for Consumer Protection.^{*8} These rights include the right to safety, to choice, to redress, to consumer education, and to a healthy and sustainable environment, along with the right to satisfaction of basic needs, the right to be informed, and the right to be heard. In 1999, the above-mentioned UN guidelines were supplemented by a new principle—the right to sustainable consumption. The guidelines are not binding but do provide a set of basic consumer protection objectives upon which governments have agreed, thereby providing a policy framework for implementation at national level. Although these fundamental consumer rights are not mandatory, they have significantly influenced international legal thinking. This influence has resulted in the enactment of binding laws elsewhere in the world.

A review of international treaties at a European level reveals that considering consumer rights to be fundamental rights is a rare exception. Neither the Convention for the Protection of Human Rights and Fundamental Freedoms^{*9} (commonly known as the 1950 European Convention on Human Rights) nor the European Social Charter^{*10} mentions consumer rights explicitly. However, Article 11 of the European Convention on Human Rights declares a freedom of assembly and association, and the European Social Charter refers to the right of health protection (Article 11), which might indirectly be considered a consumer right. The right to life is among the oldest of declared human rights and is enshrined in Article 6 of the European Convention on Human Rights. With this right, citizens are given a foundation for expecting the state to bear a certain responsibility to protect them against risks to their health and safety.

3.2. Consumer rights in EU primary law

In the legal literature, it is remarked that without a guarantee that fundamental rights are properly protected at the EU level, the conferral by Member States of competencies on the EU might have entailed a lowering of the level of protection of human rights.^{*11}

The Treaty establishing the European Economic Community^{*12} does not make any reference to consumers or human rights. Article 2 of the Treaty on European Union also indirectly provided protection for consumers by providing that said union pursues ‘a highly competitive social market economy’. Health and safety are mentioned in Article 30 of the Treaty of Rome, which is aimed at restricting trading in dangerous products and services.

The Treaty of European Union does not contain a catalogue of fundamental rights, of the sort found in the national constitutions of individual Member States, although it does include individual statements related to fundamental rights.

Remarkable change appeared in 1975, when the Council of the European Union issued its first special programme for a consumer protection and information policy.^{*13} The council set out five fundamental consumer rights: the right to the protection of health and safety, the right to the protection of economic interests, the right to claim for damages, the right to an education, and the right to legal representation (or the right otherwise to be heard).^{*14} This programme and its successors have served as a basis for a still

⁸ United Nations Guidelines for Consumer Protection (as expanded in 1999). New York: United Nations 2003.

⁹ Council of Europe. Convention for the Protection of Human Rights and Fundamental Freedoms (as amended by protocols 11 and 14). Available at <http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=005&CL=ENG> (most recently accessed on 28.5.2012).

¹⁰ Council of Europe. European Social Charter (as revised in 1996). Available at http://www.coe.int/t/dghl/monitoring/social-charter/default_en.asp (most recently accessed on 28.5.2012).

¹¹ J.-C. Piris. *The Lisbon Treaty – a Legal and Political Analysis*. Cambridge University Press 2010, p. 146.

¹² Treaty establishing a European Economic Community (EEC) (1957). Available at <http://eur-lex.europa.eu/en/treaties/index.htm#founding> (most recently accessed on 28.5.2012).

¹³ Council Resolution of 14.4.1975 on a preliminary programme of the European Economic Community for a consumer protection and information policy. – OJ C-092, 25.4.1975.

¹⁴ First Consumer Programme (FN.2). – OJ (1975) EU C 92/1, p. 3.

growing corpus of directives and regulations in the area of consumer protection. The right to protection of health and safety is reflected most clearly in the General Product Safety Directive (2001/95/EC).^{*15} The right to claim damages is addressed mainly by the Product Liability Directive, 85/374/EEC.^{*16} The right of protection of the economic interests of the consumer constitutes the foundation of several directives aimed at protection of consumers against unfair commercial practices and ensuring reasonable contract terms.

Before the 1992 Treaty of Maastricht, consumer protection was mentioned in the treaties only as a distinct European Community policy.^{*17} In the Treaty of Maastricht, consumer protection was established for the first time as a Community common policy (in Article 3).

The Charter of Fundamental Rights, which enshrines a set of political, social, and economic rights in EU law, also names, alongside other rights and freedoms, consumer rights. In modified form, this charter constituted part of the defunct Treaty Establishing a Constitution for Europe. Its legal status was unclear, and it did not have full legal effect until the entry into force of the Lisbon Treaty, on 1 December 2009. Article 6 (1) of the Lisbon Treaty now expressly states that the 'Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000 [...] which shall have the same legal value as the Treaties'. Accordingly, the treaty suggests that the charter would have the status of 'primary law'.

The charter clarifies the legal status and freedoms of the Union's citizens in respect of the institutions of the Union. According to Article 51 of the charter, 'the provisions of the Charter are addressed only to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers.' This means that the charter does not address itself to the Member States in nation-specific situations and these rights are obligatory only for EU institutions, not for the national public authorities, except when they implement EU law.

The right to consumer protection is enshrined in Article 38 of the charter, which is the last article of Chapter IV ('Solidarity'). The charter refers to solidarity in a number of senses and does not define the term. Therefore, one may argue that the notion of solidarity offers considerable creative opportunities for interpretation.^{*18} In the legal literature, solidarity has been expressed as preparedness or a duty to share resources with others in need thereof, in a spirit of mutual support.^{*19}

Article 38 of the charter states that 'union policies shall ensure a high level of consumer protection'^{*20}. Does this mean that consumer rights are now accepted for the first time as fundamental substantive rights at the EU primary-law level? Official explanations associated with the Charter of Fundamental Rights state that the principles set forth in that article have been based on Article 169 of the Treaty on the Functioning of the European Union.^{*21} The above-mentioned article establishes a task for the Union to ensure a high level of consumer protection. For this, the Union shall contribute to protection of the health, safety, and economic interests of consumers, as well as to promotion of their right to information, to education, and to organise themselves in order to safeguard their interests.

Whenever anyone has a Constitutional right, there must be a valid norm of Constitutional rights that grants them that right. Only norms according to which Constitutional rights are granted are taken to be Constitutional-rights norms.^{*22} While all rights listed in the European Convention on Human Rights are

¹⁵ Directive 2001/95/EC of the European Parliament and of the Council of 3.12.2001 on general product safety. – OJ L 11, 15.1.2002, p. 417.

¹⁶ Council Directive 85/374/EEC on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products. – OJ L 210, 7.8.1985.

¹⁷ M. Hesselink. *European contract law: A matter of consumer protection, citizenship, or justice?* – S. Grundmann (ed.). *Constitutional Values and European Contract Law*. Wolters Kluwer 2008, p. 242.

¹⁸ M. Ross. *Solidarity: A new constitutional paradigm for the EU?* – M. Ross, Y. Borgmann-Prebil (eds). *Promoting Solidarity in the European Union*. Oxford University Press 2008, p. 44.

¹⁹ C. Hilson. *EU environmental solidarity and the ecological consumer: Towards a republican citizenship.* – M. Ross, Y. Borgmann-Prebil (eds). *Promoting Solidarity in the European Union*. Oxford University Press 2010, p. 137.

²⁰ Article 38 of the Charter of Fundamental Rights of the European Union. – OJ C 303/10, 14.12.2007.

²¹ Explanations relating to the Charter of Fundamental Rights. – OJ C 303/28, 14.12.2007.

²² R. Alexy. *A Theory of Constitutional Rights*. Oxford University Press 2004, p. 19.

also substantive rights of the citizens, the equivalent is not true for the charter.^{*23} In any event, no clear line has been drawn to indicate when a true right is granted.^{*24} Therefore, for one to understand the meaning and the scope of the content of Article 38 of the charter, it is important to clarify whether Article 38 establishes a new subjective fundamental right or a mere principle. Basic distinctions established in R. Alexy's structural theory of fundamental rights allow us to establish the basis for a systematisation of the provisions of the Charter of Fundamental Rights, given that we can distinguish between fundamental rights formulated as individual rights and fundamental rights that are formulated as collective good.^{*25}

Explanation of Article 52 of the charter clarifies the distinction between 'rights' and 'principles'. Under that distinction, subjective rights shall be respected, whereas principles shall be observed (Article 51 (1)). Principles may be implemented through legislative or executive acts (adopted by the Union in accordance with its powers and by the Member States only when they implement Union law); accordingly, they become significant for the courts only when such acts are interpreted or reviewed. They do not, however, give rise to direct claims for positive action by the Union's institutions or Member States' authorities.^{*26} These provisions may only be considered to be 'Union objectives', as they require public institutions to reach a certain objective or goal, without giving rise to any subjective fundamental position—that is, without assigning to individuals rights counter to those set forth by the legislator.

As the charter contains no clear list of rights and principles, it is the way in which a given provision is drafted that enables it to be made clear. There is no doubt that the content of Article 38 refers to the 'principle', because it does not describe everyone's right, instead referring to the Union's policy. Such provisions have been referred to as 'policy clauses', something rather equivalent to what Alexy might term 'collective goods' or as provisions affirming principles supported by collective goods, which do not necessarily give rise to subjective individual rights.^{*27}

It may be concluded that the formulation of Article 38 neither considers consumer protection to be a substantive right of European citizens nor establishes a right to a minimum threshold of consumer protection. Nevertheless, it certainly forms part of the broader Constitutional view that a high level of consumer protection is part of the Union's mission.

4. Constitutional recognition of consumer rights

4.1. Recognition of consumer rights in national constitutions of EU member states

Any theory of fundamental rights presupposes a distinction between Constitutional and non-fundamental rights. Such a distinction refers to a hierarchical relationship between the Constitution and ordinary laws and lies at the very root of the idea of fundamental rights as binding on the legislature. Consumer rights are nowadays fixed in the ordinary legislation of every EU member state and even included in modern national constitutions as a new generation of welfare-state rights. Some Member States, such as Spain and Portugal, have incorporated fundamental or basic consumer rights into their national constitution. The Constitution of the Portuguese Republic acknowledges consumer rights in its Article 60 (1), by stating that consumers shall possess the right to good quality of the goods and services consumed; to training and information; to the protection of health, safety, and their economic interests; and to reparations for damages.^{*28}

Article 60 (3) of the Portuguese Constitution contains an institutional guarantee of consumer associations and co-operatives and grants them the 'procedural right to sue in order to protect the interests of

²³ U. Lõhmus. Põhiõiguste kaitse kolmnurgas riik – Euroopa Nõukogu – Euroopa Liit (The Protection of Fundamental Rights in the Triangle State—Council of Europe, European Union). – *Juridica* 2010/5, p. 359 (in Estonian).

²⁴ K. Stern. Von der Europäischen Menschenrechtskonvention zur Europäischen Grundrechte-Charta. Perspektiven des Grundrechtsschutzes in Europa. – K. Stern, P. Tettinger (eds). *Die Europäische Grundrechte-Charta im wertenden Verfassungsvergleich*. Berlin 2005, p. 24.

²⁵ A.J. Menéndez. Some elements of a theory of European fundamental rights. – A.J. Menéndez, E.O. Eriksen (eds). *Arguing Fundamental Rights*. Springer 2006, p. 163.

²⁶ Explanations relating to the Charter of Fundamental Rights: Explanation on Article 52. – OJ C 303/35, 14.12.2007.

²⁷ Menéndez (see Note 25), p. 165.

²⁸ Constitution of the Portuguese Republic, seventh revision (2005). Available at <http://www.en.parlamento.pt/Legislation/CRP/Constitution7th.pdf> (most recently accessed on 28.5.2012).

members or common interests'. These rights have been included in the catalogue of fundamental rights within the category of economic, social, and cultural rights and duties (Title III).

The Constitution of Spain similarly lays out basic consumer rights, in its Article 51. This article states that the public authorities shall guarantee the protection of consumers and shall, by means of effective measures, safeguard their safety, health, and legitimate economic interests. Article 51 is part of Chapter III of the Spanish Constitution, which deals with 'Guiding Principles of Economic and Social Policy' but not with fundamental rights as in Portugal. These guiding principles contain only provisions indicating the principles of the state's policy. It would seem erroneous, therefore, to read these principles as granting subjective rights to the individual.^{*29} Article 51 of the Spanish Constitution has, however, prompted the legislator to enact several important acts especially aimed at enhancing the protection of consumers' economic interests.^{*30}

Some new EU member states too have emphasised the importance of consumer rights through Constitutionalisation of the state obligation to ensure consumer protection.

According to Article 76 of the Polish Constitution, the state has to protect consumer interests and the Constitutional Court has the possibility of testing laws' compliance with the principles of consumer protection.^{*31} In the legal literature it is mentioned that Article 76, despite being contained in the chapter on rights and freedoms (in its subchapter on economic, social, and cultural rights and freedoms), contains only 'framework provisions' indicating the principles of the state's policy. This article does not indicate the standards for the realisation of these policies, nor does it create any subjective rights or constitute a basis for specific legal claims.^{*32}

Article 46 of the Lithuanian Constitution also declares that the state shall defend the interests of the consumer. Neither the Polish nor the Lithuanian Constitution gives a catalogue of subjective consumer rights. Although the status of consumer rights in the constitutions of the above-mentioned EU member states varies, it must nevertheless be borne in mind at least that integration of consumer rights into the Constitution is a strong indication of their role as important new social rights.

The provisions mentioned here reflect the apprehension of the fundamental responsibility of the state to protect consumers. It means that the state is responsible to its citizens not only for economic efficiency but also for social justice and looking after consumers' legitimate interests.

Some other Member States, among them Germany, Finland, Great Britain, Sweden, and also Estonia, do not mention consumer rights in their various constitutions and are therefore far from awarding consumer rights the status of fundamental rights.

Some legal scholars maintain that the inclusion of fundamental consumer rights in national constitutions would result in the promise of a certain standard of living, which changing economic and financial circumstances might make it impossible to sustain.^{*33}

Such a position is, however, not quite acceptable. The main rights of the consumer, as set out in the constitutions of the above-mentioned Member States, do not directly require that a certain living standard be guaranteed by the government to consumers. Instead, the goal of constituting consumer rights is to ensure that consumers are treated fairly in market conditions that are unfavourable for the consumer. This, established as a Constitutional principle, obliges governments to take measures to ensure that consumers are effectively protected. Here, one might agree with E.-U. Petersmann, who has concluded that economic welfare and the welfare of consumers is clearly related to their Constitutional guarantees of freedom, property rights, and other human rights.^{*34}

²⁹ G. Brüggemeier *et al.* *Fundamental Rights and Private Law in the European Union I – a Comparative Overview*. Cambridge: Cambridge University Press 2010, pp. 651–652.

³⁰ H. Schulte-Nölke, C. Twigg-Flesner, M. Ebers. *EC Consumer Law Compendium – the Consumer Acquis and Its Transposition in the Member States*. Sellier European Law Publishers 2008, p. 70; A. Ferreres-Comella, C. Ayo-Ferrándiz. *Spain: Consumers protection/product liability legal framework in Spain [sic]*. Available at <http://www.mondaq.com/article.asp?articleid=23461> (most recently accessed on 28.5.2012).

³¹ E. Letowska. *The Constitutional aspect of consumer protection in Poland*. – N. Reich, L. Thévenoz (eds). *Droit de la consommation – Konsumentenrecht – Consumer law*. Liber amicorum Bernd Stauder. Zürich/Geneva 2006, p. 227 *et seq.*

³² Brüggemeier *et al.* (see Note 29), p. 542.

³³ Benöhr, Micklitz (see Note 6), pp. 24–25.

³⁴ E.-U. Petersmann. *Taking human dignity, poverty and empowerment of individuals more seriously: Rejoinder to Alston*. – *EJIL* 2002 (13)/4, p. 849.

4.2. Fundamental consumer rights in Estonian ordinary legislation

While the Portuguese Constitution refers explicitly to fundamental consumer rights, the Estonian Constitution does not. Unlike the countries that have incorporated basic consumer rights into their constitution, in Estonia the rights of consumers are regulated in detail by ordinary legislation. Consumer law in Estonia consists of a variety of legal rules, which are concentrated for the most part in two statutes—namely, the Consumer Protection Act^{*35} and the Law of Obligations Act.^{*36} The latter consists of regulations pertaining to various types of consumer contracts.

The Consumer Protection Act expressly names basic consumer rights as fundamental rights in a statute. A similar approach is employed in Italy.^{*37} Section 3 of the Consumer Protection Act enumerates six fundamental consumer rights: the right to obtain goods and services which meet the requirements and are harmless; the right to the protection of a consumer's health and safety; the right to appropriate information; the right to claim for damages; the right to advice and assistance; and the right to be heard.

However, these fundamental rights have not been explicitly recognised by court practice as Constitutionally protected interests. The idea of 'Constitutionalising' consumer rights fixed in ordinary legislation has also not been on the agenda of the legal debate.

Therefore, it seems that there is no clear tendency to Constitutionalise the basic rights of consumers fixed in ordinary legislation.

4.3. Fundamental consumer rights and the developmental clause of the Estonian Constitution

Constitutional provisions confer a Constitutional legal power on the values listed in the catalogue of fundamental rights by setting them apart from other values.^{*38} Although the author has stated above that the Estonian Constitution does not mention the consumer rights in its catalogue of fundamental rights and freedoms, there is a backdoor in the Constitution that could be used, if necessary, to elevate consumer rights to the level of Constitutional values: §10 of the Constitution includes a rare clause in the international plane, which allows consideration of the needs and changes due to the dynamic development of the legal order without direct amendment to the text of the Constitution. Section 10 of the Estonian Constitution states that '[t]he rights, freedoms and duties set out in this Chapter shall not preclude other rights, freedoms and duties which arise from the spirit of the Constitution or are in accordance therewith, and conform to the principles of human dignity and of a state based on social justice, democracy, and the rule of law'. This clause may be treated as a development clause of the Constitution, as this provision gives rise to the possibility of broadening the catalogue of fundamental rights.^{*39} The clause allows for treating as subjective fundamental rights also rights that are not included in the open catalogue of the fundamental rights as contained in the Constitution.^{*40}

Section 10 of the Constitution allows the Constitutional review court the creation of new rights, freedoms, and obligations that arise from the spirit of the Constitution or are in compliance with it. Section 152 of the Constitution assigns the obligation, competence, and mandate of constitutional review to the Supreme Court, allowing the court to revoke any law or legislation that is contrary to the provisions and spirit of the Constitution.^{*41}

³⁵ Tarbijakaitseseadus. – RT I 2004, 13, 86; 2010, 31, 158 (in Estonian).

³⁶ Võlaõigusseadus. – RT I 2001, 81, 487, RT I, 4.2.2011, 2 (in Estonian).

³⁷ C. Comandé. Co-determining European private law(s) and Constitutionalization process(es). – S. Grundmann (ed.). Constitutional Values and European Contract Law. Wolters Kluwer 2008, p. 183.

³⁸ E.-J. Truuväli *et al.* (eds). Eesti Vabariigi põhiseadus. Kommenteeritud väljaanne (Constitution of the Republic of Estonia. Commented Edition), 2nd, revised edition. Tallinn: Juura 2008, p. 75 (in Estonian).

³⁹ The possibility of broadening the protection of fundamental rights was also foreseen by the authors of the Constitution. See Põhiseadus ja Põhiseaduse assamblee (The Constitution and the Assembly of the Constitution). Tallinn: Juura 1997, p. 528 (in Estonian).

⁴⁰ The right to elect has been treated as a right not covered by the catalogue of fundamental rights in the Estonian Constitution. See M. Ernits. Tõlgendamisest Riigikohtu praktikas (About Interpretation in the Supreme Court Case Law). – Juridica 2010/9, p. 666 (in Estonian).

⁴¹ Ernits (see Note 40).

In his analysis of the Estonian Constitution, Alexy has mentioned that, pursuant to the meaning or spirit of the Constitution, other rights, freedoms, and obligations must be derived from the meaning of the Constitution.^{*42} Thus the development clause of §10 of the Constitution leaves the catalogue open, subject to the new fundamental rights being in concord with the fundamental principles of the Constitution.^{*43} Section 10 of the Constitution refers to four important fundamental principles—human dignity, the social state, democracy, and the rule of law. Next, the author considers the extent to which the consumer rights might comply with these important fundamental principles.

The principle of human dignity arises from Article 1 of the Universal Declaration of Human Rights, pursuant to which '[a]ll people are born free and equal in dignity and rights'. By nature, the principle of human dignity is abstract, and it is expressed through the medium of several elements. One of the elements of human dignity is the guarantee of decent living conditions in the meaning of §28 (2) of the Constitution.^{*44} Alongside social support mechanisms, consumer law aids in reaching of this goal by setting out the requirements related to the quality of housing, food, and other consumer goods.

The Supreme Court has treated the right to informational self-determination as one of the elements of human dignity.^{*45} One aspect of the right to informational self-determination is the right of consumers to receive truthful and necessary information about the goods and services being provided, so that they can make an informed choice. The protection of the fundamental rights of the consumer in the collection and processing of personal data is regulated in Estonia by the Personal Data Protection Act^{*46}, which sets in place significant restrictions on the collection and processing of information about the purchasing behaviour, habits, and preferences of consumers.

The Estonian Constitution does not explicitly declare that Estonia is a social state; however, Section 10 implies that the principles of a social and democratic state based on the rule of law form the bases of any rights, freedoms, and obligations not mentioned in the Constitution. The idea of a social state is that the state has a general obligation to take care of social justice. This is a counter-reaction to the individual liberal rights and freedoms: the freedom of contract, the freedom of entrepreneurship, and the freedom of inviolability of property.^{*47} Consumer law has been treated in the legal literature as one of the clearest cases of restriction to the principle of freedom of contract.

The principle of a social state requires that the powers of the state ensure social justice, so that all people are treated equally and in consideration of their human dignity and so that the state cannot leave its citizens without help. The consumer is the weaker party in relations with a professional trader holding a stronger economic position; accordingly, the consumer must be guaranteed a certain minimum base of rights based on social justice.

In academic discussions, social justice has been considered to be one of the values of a welfare state, which should also be taken into account in the developments to contract law. In relation to this, T. Wilhelmsson has remarked that if welfarism is understood as signifying mandatory rules protecting the alleged weaker party to the contract, including a fairness principle giving the courts and other decision-makers the right to interfere with unfair contract terms, then practically the whole contract law *acquis* is of this kind, with the most important examples being the Consumer Sales Directive and the Unfair Contract Terms Directive.^{*48}

The basic rights of the consumer also comply with the fundamental principle of democracy. Fundamental rights create conditions precedent to the functioning of a democratic public order. Democracy is reflected in such important fundamentals to consumer rights as the right to free self-realisation (§19 of the Constitution), the freedom to collect information (§44 of the Constitution), and the right to organise into voluntary consumer organisations and associations in order to protect people's rights (§48 of the Constitution).

⁴² R. Alexy. Põhiõigused Eesti põhiseaduses (Fundamental Rights in the Estonian Constitution). – *Juridica* 2001, special issue, p. 108 (in Estonian).

⁴³ Lõhmus (see Note 23), p. 355.

⁴⁴ Truuväli *et al.* (see Note 38), p. 113.

⁴⁵ Supreme Court Criminal Chamber decision of 26.8.1997, 3-1-1-80-97, paragraph 1 (in Estonian).

⁴⁶ Isikuandmete kaitse seadus. – RT I 2007, 24, 127; RT I, 30.12.2010, 2 (in Estonian).

⁴⁷ R. Maruste. Konstitutsionalism ning põhiõiguste ja -vabaduste kaitse (Constitutionalism and Protection of Fundamental Rights and Freedoms). Tallinn: Juura 2004, p. 122 (in Estonian).

⁴⁸ T. Wilhelmsson. Varieties of welfarism in European contract law. – *European Law Journal* 2004 (10)/6, p. 714.

The Supreme Court holds the position that the fundamental principle of democracy implies that the powers are to be effected with public involvement and that important decisions of governance are to be made on the most extensive and co-ordinated basis.^{*49} This principle is directly related to the fundamental right of the consumer to be heard—i.e., to have his interests taken into account.

The right of non-governmental consumer organisations to participate in the development and implementation of consumer protection policy has been laid down in §15 of the Consumer Protection Act. Consumer rights also comply with the requirements of the rule of law insofar as they reflect, in a material sense, the main idea of the social state: the guaranteeing of social justice.

In interpreting the Constitution, besides the fundamental rights set out in the Estonian Constitution, one must take into account both the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union.

The Supreme Court noted already back in 2004 that the Charter of Fundamental Rights is not directly binding for Estonia; however, as is expressed in the preamble to the charter, this instrument is based, *inter alia*, on the shared Constitutional traditions of the EU member states and the principles of democracy and the rule of law. The principles of democracy and the rule of law, as well as the other general principles of law effective in the European legal space, are valid in Estonia too.^{*50} Insofar as consumer rights have been included in the Charter of Fundamental Rights of the EU, they comply with the principles of democracy and the rule of law.

Given the above, the author believes that consumer rights are in compliance with the fundamental principles of the Constitution, which is necessary if such rights are to be recognised as Constitutional fundamental rights.

However, there is no clear evidence of the practical importance of formal declaration of consumer rights at the Constitutional level. One may argue that there is no need for a judicial intervention through Constitutionalisation in this field. In general, the Constitutional rights guaranteed by the Constitution are not addressed to individuals. The Estonian Constitution does not provide for the binding force of fundamental rights between private parties. Instead, §14 of the Estonian Constitution states that guaranteeing the rights and freedoms is the duty of the legislative, executive, and judiciary powers, and of local governments. Such individuals may not rely on them against one another in private litigation directly. Constitutional rights are in play in private litigation only **indirectly** as duties of the respective public authorities and, in particular, the civil courts to respect Constitutional rights in the legislation and interpretation of private law.^{*51} The option of direct application of fundamental rights should be avoided also because this would destroy the mutual private autonomy between the parties.^{*52} Relevant Estonian legal literature has also concluded that, insofar as direct application of the Constitution in civil law should be eschewed, the Constitution as a source of civil law has the meaning mostly of a basic norm and that fundamental rights and freedoms should be protected via civil-law norms.^{*53}

The legal consumer protection system in Estonia operates appropriately, and protection at a higher level is not actualised today. Estonia has fulfilled its duty of high-level protection of consumers by enacting specific consumer laws (which are strongly influenced by EU law) and, when necessary, modifying them over the course of time. The conformity of the consumer protection legislation with the Constitution is ensured by §139 of the Constitution, which states that the Chancellor of Justice shall review the legislation of the legislative and executive powers and of local governments for conformance with the Constitution.

To the author's mind, the acknowledgement of consumer rights as Constitutional rights is more rhetorical than real, amounting simply to a formal acceptance of the legal instruments already in place.

⁴⁹ Supreme Court Constitutional Review Chamber decision of 21.12.1994, III-4/1-11/94 (in Estonian).

⁵⁰ Supreme Court Constitutional Review Chamber decision of 17.2.2004, 3-4-1-1-03 (in Estonian).

⁵¹ M. Kumm. Who is afraid of the total Constitution? Constitutional rights as principles and the Constitutionalization of private law. – German Law Journal 2006 (7)/4, p. 352.

⁵² For more about this, see D.W. Belling. Põhiõiguste tähendus eraõigusele (Implication of Fundamental Rights in Respect of Private Law). – Juridica 2004/1, p. 4 (in Estonian).

⁵³ I. Kull. Eesti tsiviilõiguse allikate tugev ja nõrk kohustuslikkus (Strong and Weak Mandatoriness of Estonian Civil Law Sources). – Juridica 2010/7, p. 464 (in Estonian).

5. Conclusions

Our analysis of consumer rights has shown that, in a number of respects, consumers benefit from human rights protection if these rights are viewed in the broader context of consumer activity. Although some legal scholars suggest that consumer rights have potential to become soft human rights, the author does not believe that the treatment of consumer rights as a new generation of human rights is sufficiently justified.

Unlike abstract human rights, consumer rights have been designated in legislation as specific rights whose scope is relatively clear-cut.

The violation or ignoring of consumer rights is not normally accompanied by grave consequences, in contrast to what may be the case with a violation of human rights.

A review of international treaties at the European level reveals that the consideration of consumer rights as fundamental rights is a rare exception and treaties protect consumers only indirectly. Although the right to consumer protection is now enshrined in Article 38 of the Charter of Fundamental Rights, this does not grant a substantive right to European citizens; rather, it refers to the Union's objective of ensuring a high level of consumer protection.

In its catalogue of fundamental rights and freedoms, the Estonian Constitution does not mention consumer rights. However, its §10 allows the Constitutional review court to create new rights, freedoms, and obligations that arise from the meaning of the Constitution or are in compliance with it. Hence, the author analysed whether or not consumer rights could be elevated, if necessary, to the level of a Constitutional value and concluded that for consumer rights, the condition of compliance with the fundamental principles of the Constitution, necessary for their recognition as fundamental rights, has been met.

Nevertheless, the author believes that there is no direct need to recognise consumer rights among fundamental Constitutional rights in Estonia, insofar as many important fundamental principles of consumer law are reflected through other fundamental rights and freedoms in the Estonian Constitution. The specific consumer protection system in Estonia works properly, and the state has fulfilled its duty of the high-level protection of consumers by enacting specific consumer laws and, when necessary, modifying them over the course of time. Consumer protection legislation being in line with the Constitution is ensured by §139 of the Constitution, which states that the Chancellor of Justice shall review the legislation of the legislative and executive powers and of local governments for conformity with the Constitution.



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Transparenzgebot der AGB-Klauseln in den Verbraucherverträgen

1. Einleitung

Die mit AGB^{*1} in Verbraucherverträgen verbundenen Fragen werden durch die Richtlinie 93/13/EWG^{*2} geregelt. Bekanntlich ist die Klausel-Richtlinie darauf gerichtet, den Verbrauchern vor den missbräuchlichen Klauseln zu bewahren. Daneben legt die Klausel-Richtlinie auch das sogenannte Transparenzgebot fest: nach Art. 4 Abs. 2 und Art. 5 Klausel-RL müssen alle dem Verbraucher unterbreiteten Klauseln klar und verständlich abgefasst sein. In dem vorliegenden Aufsatz wird zuerst der Inhalt des Transparenzgebots beschrieben. Danach wird untersucht, wie und auf welcher Ebene die Transparenz einer AGB-Klausel in den innerstaatlichen Rechtsordnungen geprüft wird und welche Folgen die fehlende Transparenz der Vertragsklausel mit sich bringt. Diese Fragen werden für das estnische, deutsche und österreichische Recht vergleichend analysiert. Zusätzlich wird danach gefragt, ob die estnische Regelung des Transparenzgebots richtlinienkonform ist. Die Autoren wollen zeigen, dass in den deutschen und österreichischen Rechtsordnungen das Transparenzgebot bei dem effektiven Verbraucherschutz – sowohl in Individual- als auch in Verbandsverfahren – eine sehr wichtige Rolle spielt und dass man auch in Estland von diesem Verbraucherschutzinstrument öfter Gebrauch machen sollte. Deswegen bedarf das estnische positive Recht einer Änderung, nachdem die Prüfung des Transparenzgebots auch im Verbandsverfahren möglich wäre.

2. Grundlagen des Transparenzgebots

2.1. Begriff und Inhalt des Transparenzgebots

In Estland sind die Bestimmungen der Klausel-RL durch den 2. Abschnitt des 2. Kapitels des am 01.07.2002 in Kraft getretenen Schuldrechtsgesetzes^{*3} (SchG) umgesetzt worden. Das estnische AGB-Recht ist überwiegend durch das in Deutschland bis 2001 geltende AGB-Gesetz und dessen Anwendungspraxis, aber auch durch die Zivilgesetzbücher der Schweiz, Österreichs, Griechenlands und der Niederlande inspiriert wor-

¹ Unter den allgemeinen Geschäftsbedingungen (AGB) werden im folgenden Aufsatz die im Einzelnen nicht durchspröchenen Vertragsklauseln verstanden.

² Richtlinie 93/13/EWG des Rates vom 05.04.1993 über missbräuchliche Klauseln in Verbraucherverträgen. – ABl. 1993 L 95 S. 29.

³ Võlaõigusseadus. – RT I 2001, 81, 487; RT I, 8.7.2011, 21 (auf Estnisch).

den.⁴ In Deutschland sind die Bestimmungen über AGB in das Bürgerliche Gesetzbuch⁵ (BGB) integriert worden (§§ 305–310); in Österreich finden sich allgemeine, nicht auf Verbraucherverträge beschränkte Regelungen in §§ 864a und 879 Abs. 3 des Allgemeinen Bürgerlichen Gesetzbuches⁶ (ABGB) und spezielle Bestimmungen für Verbraucherverträge in § 6 des Konsumentenschutzgesetzes⁷ (KSchG).

Im Folgenden wird vergleichend untersucht, nach welchen Kriterien die Transparenz beurteilt werden kann und wann eine Klausel als intransparent angesehen wird. Diese Ergebnisse sind nötig, um den Umfang des Anwendungsbereichs der Transparenzkontrolle schätzen zu können.

Aus dem Gedanken der Art. 5 der Klausel-RL ergibt sich, dass es Sache des Verwenders ist, sich klar und unmissverständlich auszudrücken.⁸ Das Transparenzgebot verpflichtet den Verwender, Rechte und Pflichten seines Vertragspartners in den AGB möglichst klar, einfach und präzise darzustellen.⁹ Das Transparenzgebot ist darauf gezielt, im Interesse der Kunden für Verständlichkeit der AGB zu sorgen und den Verwender die Nachteile unklarer oder undurchsichtiger Vorformulierungen tragen zu lassen.¹⁰ So müssen die Rechte und Pflichten des Vertragspartners möglichst klar und durchschaubar dargestellt sein.

Das Transparenzgebot ist eng mit der Verschaffung der Möglichkeit verbunden, anderer Vertragspartei in zumutbarer Weise vom Inhalt der AGB Kenntnis zu nehmen (sich auch § 305 Abs. 2 BGB; § 37 Abs. 1 SchG). Zur Verschaffung der Möglichkeit zumutbarer Kenntnisnahme ist erforderlich, dass der AGB-Text dem Kunden in verständlicher und lesbarer Form zugänglich gemacht wird.¹¹ Das Transparenzgebot bezieht sich also auf die inhaltliche Verständlichkeit sowie auf die Lesbarkeit. Die inhaltliche Verständlichkeit und Lesbarkeit sind als Kriterien zur Beurteilung des Transparenzgebots auch in der Rechtsprechung des Estnischen Staatsgerichts verankert worden.¹² Die Rechtsprechung Österreichs hat als Einzelwirkungen des Transparenzgebots das Gebot der Erkennbarkeit und Verständlichkeit, das Gebot, den anderen Vertragsteil auf bestimmte Rechtsfolgen hinzuweisen, das Bestimmtheitsgebot, das Gebot der Differenzierung, das Gerichtigkeitsgebot und das Gebot der Vollständigkeit genannt.¹³

Das Erfordernis zur Verständlichkeit der AGB ist vom Grundsatz der Privatautonomie abgeleitet.

Die Verständlichkeit der AGB bedeutet, dass die AGB keine viel zu komplizierte Sätze, ungewöhnliche Wörter, Fachterminologie, deren Kenntnis vom Durchschnittskunden nicht zu erwarten ist, beinhalten darf.¹⁴ Die einzelnen Klauseln müssen in ihrer Formulierung verständlich sein und auch die mit ihr verbundenen wirtschaftlichen Nachteile und Belastungen verdeutlichen.¹⁵ Eine Unverständlichkeit kann gegeben sein, weil die Einsichtnahme in den Vertragstext unmöglich ist, weil der Vertragstext unvollständig oder unleserlich ist, einen unverhältnismäßigen Umfang hat, verwirrend gegliedert oder unübersichtlich aufgebaut, inhaltlich unbestimmt oder widersprüchlich ist, in einer unverständlichen Fachsprache oder in einer unbekannt Fremdsprache abgefasst wurde oder unklare Abkürzungen oder zu komplizierte Regelungen enthält, trotz an sich verständlicher Formulierungen den eigentlichen Vertragsinhalt verschleiert oder die Tragweite seiner Regelungen nicht erkennen lässt.¹⁶ Die Intransparenz kann nicht nur bei

⁴ P. Varul, I. Kull, V. Kõve, M. Käerdi. *Võlaõigusseadus I. Üldosa* (§§ 1-207). *Kommenteeritud väljaanne* (Schuldrechtgesetz I. Allgemeiner Teil (§§ 1-207). *Kommentar zum Schuldrechtgesetz*). Tallinn: Juura 2006, S. 125 (auf Estnisch).

⁵ BGBl. I S. 42, 2909; BGBl. 2012 II S. 178.

⁶ Allgemeines bürgerliches Gesetzbuch für die gesammten deutschen Erbländer der Oesterreichischen Monarchie. – JGS Nr. 946/1811; BGBl. I 58/2010.

⁷ Bundesgesetz vom 08.03.1979, BGBl. Nr. 140/1979.

⁸ C. Grüneberg. – O. Palandt. *Bürgerliches Gesetzbuch. Kommentar*. 70. Aufl. München: Verlag C.H. Beck 2011, § 305c Rn. 15.

⁹ *Ibid.*, § 307 Rn. 21.

¹⁰ C. Schäfer. – P. Ulmer, E. Brandner, H.-D. Hensen. *AGB-Recht. Kommentar zu den §§ 305-310 BGB und zum UKlaG*. 11. Aufl. Köln: Verlag Dr Otto Schmidt 2011, § 305c Rn. 81.

¹¹ M. Habersack. – P. Ulmer, E. Brandner, H.D. Hensen (Fn. 10), § 305 Rn. 150.

¹² Entscheidung des estnischen Staatsgerichts, 18.06.2007, 3-2-1-76-07, Rn. 22; Entscheidung des estnischen Staatsgerichts 9.4.2008, 3-2-1-17-08, Rn. 11. Unverständlich ist eine AGB-Klausel des Versicherungsvertrages, wenn der Versicherungsnehmer die Klausel abgeleitet vom Grundsatz der Vernünftigkeit nicht ohne erhebliche Anstrengung verstehen kann. Unverständlich sind vor allem auch die sprachlich schwer zu verstehenden AGB-Klauseln, als auch AGB-Klauseln, deren Inhalt in Beziehung der anderen Klauseln des Vertrags und der Aufbau des Vertrags vernünftig nicht zu verstehen ist.

¹³ Entscheidung des Oberlandesgerichts (OLG) Wien 14.09.2011. – 1R 66/10y, siehe auch Entscheidung des Obersten Gerichtshofs (OGH) 22.03.2001. – 4 Ob 28/01y; OGH 13.09.2001. – 6 Ob 16/01y.

¹⁴ P. Varul *et al.* (Fn. 4), S. 137.

¹⁵ A. Fuchs. – P. Ulmer, E. Brandner, H.-D. Hensen (Fn. 10), § 307 Rn. 335.

¹⁶ H. Krejci. *Thesen zum Vortrag: „Das Transparenzgebot im Verbraucherrecht“*, Rz 4, <www.gvfw.at/files/krejci.pdf>.

einzelner Klausel aus ihrer inhaltlichen Unklarheit, mangelnden Verständlichkeit oder der unzureichender Erkennbarkeit ergeben, sondern auch aus der Gesamtregelung in den AGB.^{*17}

Die Klauseln in den Verbraucherverträgen müssen vollständig sein, das bedeutet zusätzlich den vertraglichen Rechten müssen auch alle aus dem Gesetz ergebenden Rechte dem Verbraucher dargestellt sein.^{*18} Der Verwender ist gehalten, die Voraussetzungen und Ausschlussgründe für die vertraglichen Leistungen klar, deutlich und vollständig zu beschreiben. Das gilt auch für die deklaratorischen Klauseln, die nur eine gesetzliche Regelung wiederholen. Die Wiedergabe der gesetzeskonformen Regelungen muss prinzipiell auch vollständig und unverkürzt sein.^{*19} Das Transparenzgebot verbietet es, eine Rechtsunsicherheit zu schaffen, weil dies den Kunden in unzumutbarer Weise belastet.^{*20} Bedenken in Bezug auf die Verständlichkeit bestehen im Hinblick auf den juristisch ungeschulten Durchschnittskunden auch gegen generelle Verweisungen auf dispositive Gesetzesregelungen oder auf allgemeine gesetzliche Garantieansprüche.^{*21} Das Verständlichkeitsgebot wird z. B. missachtet, wenn es um salvatorische Klausel („soweit gesetzlich zulässig“ oder ähnliche Formulierungen) geht.^{*22}

Zum Inhalt des Transparenzgebots gehört auch die Lesbarkeit der AGB. Eine bestimmte Mindestschriftgröße oder ein besonderes Druckverfahren ist gesetzlich nicht festgelegt. Der Bereich des Zumutbaren wird erst dann überschritten, wenn die AGB wegen Art oder Größe des Schriftbilds nur mit Mühe zu entziffern sind.^{*23} Laut der österreichischen Rechtsprechung^{*24} muss der Text mühelos lesbar sein: die Schriftgröße 5,5 gedruckt ist kaum lesbar und somit intransparent im Sinne des § 6 Abs. 3 KSchG.

Bei der Beurteilung, ob eine Regelung dem Transparenzgebot genügt, ist sich nach den Verständnismöglichkeiten und Erwartungen der typischerweise bei Verträgen der geregelten Art zu erwartenden Durchschnittskunden zu richten.^{*25} Dabei ist nicht auf den flüchtigen Betrachter, sondern auf den aufmerksamen und sorgfältigen Teilnehmer am Wirtschaftsverkehr abzustellen.^{*26} Weitergehende Kenntnisse und Verständnismöglichkeiten des konkreten Vertragspartners ändern laut der deutschen Rechtsprechung nichts an der Verletzung des Transparenzgebots.^{*27} In der deutschen Rechtsliteratur ist die Meinung geäußert worden, dass zu den nach § 310 Abs. 3 Nr. 3 BGB bei der Inhaltskontrolle im Individualprozess zu berücksichtigenden Begleitumstände auch die Kenntnis und Fähigkeit des konkreten Vertragspartners gehören. Ist eine Klausel für den typischen Kunden intransparent, für die konkrete Vertragspartei (z. B. einen Juristen) aber verständlich, kann ihre Unwirksamkeit im Individualprozess nicht mehr aus einer Verletzung des Transparenzgebots hergeleitet werden.^{*28} Obwohl laut der Meinung einiger Autoren diese Lösung nicht gegen Gemeinschaftsrecht verstößt^{*29}, ist diese Auffassung nicht zu unterstützen. Im Verbandsverfahren ist es sowieso möglich, die Transparenz einer Klausel nur von der Verständnismöglichkeit des typischerweise zu erwartenden Durchschnittskunden zu beurteilen. Es gibt keinen besonderen Grund dafür, dass die Ergebnisse der Transparenzkontrolle einer Klausel im Individualverfahren sich von den Ergebnissen derselben Klausel im Verbandsverfahren unterscheiden sollten. Dem effektiven und einheitlichen Schutz der Verbraucherrechte wird mehr beigetragen, wenn man sich nach den Verständnismöglichkeiten der zu erwartenden Durchschnittskunden richtet. Auch in der Rechtsprechung des estnischen Staatsgerichts ist bisher auf das Verständnis einer vernünftigen Person abgestellt worden^{*30}, obwohl in der Rechtsliteratur auch andere Meinung vertreten worden ist.^{*31}

¹⁷ A. Fuchs. – P. Ulmer, E. Brandner, H.-D. Hensen (Fn. 10), § 307 Rn. 335a.

¹⁸ P. Varul *et al.* (Fn. 4), S. 138.

¹⁹ A. Fuchs. – P. Ulmer, E. Brandner, H.-D. Hensen (Fn. 10), § 307 Rn. 343.

²⁰ F. G. von Westphalen, G. Thüsing. *Vertragsrecht und AGB-Klauselwerke*. München: Verlag C.H. Beck 2012, § 307 Rn. 13.

²¹ M. Habersack. – P. Ulmer, E. Brandner, H.-D. Hensen (Fn. 10), § 305 Rn. 152.

²² F. G. von Westphalen, G. Thüsing (Fn. 20), § 307 Rn. 8.

²³ M. Habersack. – P. Ulmer, E. Brandner, H.-D. Hensen (Fn. 10), § 305 Rn. 154.

²⁴ OLG Wien 14.09.2011. – 1R 66/10y.

²⁵ A. Fuchs. – P. Ulmer, E. Brandner, H.-D. Hensen (Fn. 10), § 307 Rn. 344.

²⁶ C. Grüneberg. – O. Palandt (Fn. 8), § 307 Rn. 23.

²⁷ Entscheidung des Bundesgerichtshofes 19.10.1999. – Az XI ZR 8/99.

²⁸ C. Grüneberg. – O. Palandt (Fn. 8), § 307 Rn. 21.

²⁹ E.-M. Kieninger. – *Münchener Kommentar zum Bürgerlichen Gesetzbuch*. 5. Aufl. München: Verlag C.H. Beck 2007, § 310 Rn. 74, auch C. Grüneberg. – O. Palandt (Fn. 8), § 310 Rn. 19.

³⁰ Entscheidung des estnischen Staatsgerichts 18.06.2007, 3-2-1-76-07, Rz 22. Unter dem Begriff „vernünftige Person“ wird in der Entscheidung eine in ähnlicher Situation sich befindende Durchschnittsperson verstanden.

³¹ P. Varul *et al.* (Fn. 4), S. 137.

Im Ergebnis kann man betonen, dass bei der Prüfung des Transparenzgebots die förmlichen als auch inhaltlichen Aspekte der AGB betrachtet werden. Entscheidend ist nicht das subjektive Verständnis und Lesbarkeit der Bestimmung, sondern die Verständnismöglichkeit der zu erwartenden Durchschnittskunden.

2.2. Abgrenzung des Transparenzgebots von den überraschenden Klauseln

In der Klausel-Richtlinie fehlt es an einer ausdrücklichen Regelung von überraschenden Klauseln. Die innerstaatlich geregelte Erschwerung der Einbeziehung ungewöhnlicher AGB-Klausel ist in der deutschen Rechtsliteratur als Ausprägung des allgemeinen Transparenzgebots verstanden worden^{*32}, obwohl die Richtlinie darauf nicht hinweist. Im Folgenden wird deswegen untersucht, ob die Abgrenzung der unverständlichen und überraschenden Klauseln in den drei Rechtsordnungen eindeutig ist und ob diese Abgrenzung rechtlich von Bedeutung ist?

Um eine Klausel als überraschend zu beurteilen, muss die Klausel im Hinblick auf den typischen Inhalt des geschlossenen Vertrages aus der Sicht der angesprochenen Verkehrskreise nach den Gesamtumständen objektiv ungewöhnlich sein. Hinzu muss kommen in subjektiver Hinsicht die Überraschung des Kunden, der wegen des ungewöhnlichen Charakters der Klauseln und der fehlenden Aufklärung über ihren Inhalt nicht mit ihm rechnete.^{*33} In der estnischen Rechtsliteratur sind die Ungewöhnlichkeit und die Überraschung einer Klausel voneinander nicht zu unterscheiden und sind als Synonyme zu verstehen.^{*34}

Laut dem deutschen, österreichischen und estnischen Recht ist ein wesentliches Merkmal einer ungewöhnlicher Klausel, dass mit dem der andere Vertragsteil vernünftigerweise nicht zu rechnen brauchte (§ 305c Abs. 1 BGB; § 864a ABGB; § 37 Abs. 3 SchG). Die Ungewöhnlichkeit der Klausel bedeutet einen überraschenden Inhalt oder eine überraschende Einordnung im Vertragstext oder einen anderen überraschenden Moment, die von den berechtigten Erwartungen des Vertragspartners abweichen.^{*35} Die Ungewöhnlichkeit kann sich aus der Unvereinbarkeit mit dem Leitbild des Vertrages, der Höhe des Entgelts, einem Widerspruch zum Verlauf der Vertragsverhandlungen oder zur Werbung des Verwenders, einer erheblichen Abweichung vom dispositiven Recht oder von den üblichen Vertragsbedingungen, aber auch aus der Unvereinbarkeit mit dem äußeren Erscheinungsbild des Vertrages ergeben.^{*36} Zur Beurteilung der Ungewöhnlichkeit ist also einerseits der Inhalt der Klausel zu bewerten. Andererseits kommt es auf die äußeren Umstände, vor allem die Stellung der Klausel in Gesamtgefüge des Vertragstextes an.^{*37} Außer dem ungewöhnlichen Charakter muss nach dem österreichischen – nicht aber nach dem estnischen und deutschen Recht – die Klausel dem Kunden auch objektiv nachteilig sein.^{*38}

Obwohl vom Begriff her die überraschenden Klauseln von den intransparenten Klauseln zu unterscheiden sind, fällt die Abgrenzung der beiden Klauseln oft schwer, besonders bei der unübersichtlicher Aufbau oder fehlender Gliederung der Klauselwerke. Die Ungewöhnlichkeit als die Unklarheit können sowohl dem Inhalt, der Ausdrucksweise als auch der Darlegungsart einer Klausel nach beurteilt werden. Das ist auch der Grund dafür, dass der estnische Gesetzgeber sowohl die Unverständlichkeit als auch die Ungewöhnlichkeit einer Klausel in § 37 SchG geregelt und einheitliche Rechtsfolgen dazu vorgesehen hat.^{*39} Ausgehend von der einheitlichen gesetzlichen Regelung der beiden Sachfragen ist in der estnischen Gerichtspraxis das Transparenzgebot und das Verbot überraschender Klauseln schwer voneinander zu unterscheiden.^{*40} Die Ungewöhnlichkeit einer Klausel wird ebenso wie die Unklarheit objektiv beurteilt, also nach den Erkenntnismöglichkeit des typischerweise zu erwartenden Durchschnittskunden.^{*41}

³² C. Schäfer. – P. Ulmer, E. Brandner, H.-D. Hensen (Fn. 10), § 305c Rn. 2.

³³ *Ibid.*, § 305c Rn. 11.

³⁴ P. Varul *et al.* (Fn. 4), S. 138.

³⁵ *Ibid.*

³⁶ C. Grüneberg. – O. Palandt (Fn. 8), § 305c Rn. 3.

³⁷ P. Apathy, A. Riedler. – Schwimann ABGB. Praxiskommentar. 3. Aufl. Bd 4. §§ 859–1089 ABGB WucherG, UN-Kaufrecht. Wien: LexisNexis 2006, §864a Rn. 8–9.

³⁸ *Ibid.*, § 864a Rn. 5.

³⁹ P. Varul *et al.* (Fn. 4), S. 139.

⁴⁰ Entscheidung des estnischen Staatsgerichts 20.10.2010, 3-2-1-75-10.

⁴¹ C. Grüneberg. – O. Palandt (Fn. 8), § 305c Rn. 3; P. Varul *et al.* (Fn. 4), S. 138; P. Apathy, A. Riedler. – Schwimann (Fn. 37), § 864a Rn. 8–11.

Die Rechtsfolgen der ungewöhnlichen und intransparenten Klauseln in den vergleichenden Rechtsordnungen sind ähnlich. Die überraschenden Klauseln werden in allen drei Rechtsordnungen nicht Vertragsbestandteil (§§ 305c BGB, 864a ABGB, 37 Abs. 3 SchG). Die intransparenten Klauseln können auch der Inhaltskontrolle unterliegen und wegen der Missbräuchlichkeit auch die Unwirksamkeit der Klausel begründen (im deutschen und österreichischen Recht). Die Rechtsfolgen von Nichteinbeziehung und Unwirksamkeit sind gleichartig^{*42}: In beiden Fällen sind die Klauseln dem Verbraucher nicht bindend.

So kann man nicht ausschließen, dass eine intransparente Klausel zugleich einen überraschenden Charakter besitzt und umgekehrt. Das Transparenzgebot und Verbot von überraschenden Klauseln sind beide vom Ziel der Klausel-RL geprägt und dienen dem Schutz der Verbraucher vor den Klauseln, von denen der durchschnittliche Verbraucher wegen der Unklarheit und der Undurchschaubarkeit nicht Kenntnis nehmen kann oder mit denen der durchschnittliche Verbraucher nicht zu rechnen braucht.

3. Transparenzgebot – Teil der Einbeziehungskontrolle oder Inhaltskontrolle?

Die Klauselrichtlinie beinhaltet keine ausdrücklichen Hinweise zu der Frage, ob die unklaren und unverständlichen Klauseln stets bei der Einbeziehungskontrolle der AGB oder bei der Inhaltskontrolle der AGB scheitern sollten. Aus dem Gedanken des Art. 4 der Klausel-RL ergibt sich nur die Forderung, dass dem Transparenzgebot auch die Klauseln betreffend die Preisabreden unterliegen müssen, die der Inhaltskontrolle entzogen sind.

Im Folgenden wird untersucht, auf welcher Ebene die Transparenz der Klausel innerstaatlich geprüft wird, welche rechtlichen Konsequenzen es mit sich bringt und ob die Prüfung der Transparenz im Laufe der Einbeziehungskontrolle (z. B. wie in Estland) im Einklang mit der Richtlinie steht.

Von der Sicht des Kontrollumfangs spielt es keine bedeutende Rolle, ob die Kontrolle des Transparenzgebots als Einbeziehungs- oder Inhaltskontrolle stattfindet. Gemäß Art. 1 Abs. 2 der Klausel-RL unterliegen Vertragsklauseln, die auf bindenden Rechtsvorschriften beruhen, nicht der Missbrauchskontrolle. Laut der Art. 4 Abs. 2 der Richtlinie betrifft die Beurteilung der Missbräuchlichkeit der Klauseln weder den Hauptgegenstand des Vertrages noch die Angemessenheit von Preis und Gegenleistung. Im letzten Fall ist jedoch die Transparenzkontrolle wegen des ausdrücklichen Transparenzvorbehalts in Art. 4 Abs. 2 möglich.^{*43} So kann man behaupten, dass der Anwendungsbereich der Transparenzkontrolle über die materielle Inhaltskontrolle hinausgeht.^{*44}

In Deutschland hat die Verletzung des Transparenzgebots zur Folge, dass eine inhaltlich unklare Klausel als missbräuchlich angesehen wird: Nach § 307 Abs. 1 S. 2 BGB kann sich eine unangemessene Benachteiligung auch daraus ergeben, dass die Bestimmung nicht klar und verständlich ist. Obwohl es im deutschen Recht an einem *expressis verbis* Transparenzgebot (im Vergleich zum estnischen Recht) bei der Einbeziehungskontrolle der AGB fehlt, wird in der Rechtsliteratur die Auffassung vertreten, dass das Transparenzgebot doch bei der Einbeziehungskontrolle der AGB zu prüfen ist. Aus § 305 Abs. 2 Nr. 2 BGB ergibt sich, dass AGB für den Kunden verständlich sein müssen. Nur Regelungen, die dem Transparenzgebot entsprechen, werden Vertragsinhalt.^{*45} Bei der Einbeziehungskontrolle ist vor allem die formelle Unklarheit der AGB entscheidend und erst im Rahmen der Inhaltskontrolle wird die inhaltliche Klarheit und Verständlichkeit der AGB geprüft.^{*46} Um eine formelle Intransparenz handelt es sich dann, wenn nur solche Klausel intransparent sind, die weder für den Vertragsschluss noch für die Durchführung, Beendigung oder Abwicklung des Vertrages eine relevante Bedeutung haben.^{*47}

Folglich ist die Transparenzkontrolle der AGB im deutschen Recht als Teil der Inhaltskontrolle sowie der Einbeziehungskontrolle zu verstehen. Nach dem in der deutschen Rechtsliteratur vertretenen Standpunkt ist es nicht ausgeschlossen, dass eine mehr oder weniger unklare Bedingung Vertragsbestandteil

⁴² C. Schäfer. – P. Ulmer, E. Brandner, H.-D. Hensen (Fn. 10), § 305c Rn. 5. siehe auch § 306 Abs. 1 BGB; § 41 SchG.

⁴³ E.-M. Kieninger. – Münchener Kommentar zum BGB (Fn. 29), § 307 Rn. 2–5.

⁴⁴ Ähnlich auch im deutschen Recht, siehe A. Fuchs. – P. Ulmer, E. Brandner, H.-D. Hensen (Fn. 10), § 307 Rn. 10.

⁴⁵ C. Grüneberg. – O. Palandt (Fn. 8), § 305 Rn. 39.

⁴⁶ A. Fuchs. – P. Ulmer, E. Brandner, H.-D. Hensen (Fn. 10), § 307 Rn. 11.

⁴⁷ *Ibid.*, § 307 Rn. 366.

wird (wenn sie die Kontrolle nach §§ 305 Abs. 2 Nr. 2 und 305c Abs. 1 BGB besteht), aber wegen Verstoßes gegen das Transparenzgebots als für die andere Partei unangemessen benachteiligend angesehen wird und damit unwirksam ist (§ 307 Abs. 1 S. 2 BGB).^{*48}

In Österreich ist das Transparenzgebot in § 6 Abs. 3 KSchG getrennt von der AGB-Generalklausel des § 879 Abs. 1 ABGB geregelt. Laut § 6 Abs. 3 KSchG ist eine in Allgemeinen Geschäftsbedingungen oder Vertragsformblättern enthaltene Vertragsbestimmung unwirksam, wenn sie unklar oder unverständlich abgefasst ist. In Österreich ist es strittig, ob das Transparenzgebot ein Instrument der Einbeziehungs- oder Inhaltskontrolle ist.^{*49}

Im estnischen Recht ist das Transparenzgebot in § 37 Abs. 3 SchRG verankert worden und es ist nur als Einziehungshindernis zu verstehen.^{*50} Laut § 37 Abs. 3 SchRG wird eine AGB-Klausel, deren Inhalt, Ausdrucksweise oder Darlegungsart so ungewöhnlich oder unklar ist, dass die andere Vertragspartei das Vorhandensein dieser Klausel im Vertrag nach den Grundsätzen der Vernunft nicht erwarten oder diese Klausel ohne wesentliche Anstrengung nicht verstehen konnte, nicht zum Inhalt des Vertrages.

Angesichts des Umstands, dass im estnischen Recht ein ausdrückliches Transparenzgebot bei der Inhaltskontrolle von AGB fehlt, ist in der europäischen Rechtsliteratur die Meinung geäußert worden, dass das sich aus der Richtlinie ergebende Transparenzgebot im estnischen Recht mangelhaft umgesetzt worden sei.^{*51} Deswegen ist im Folgenden zu untersuchen, ob die estnische Transparenzregelung in § 37 Abs. 3 SchG die Anforderungen der Klausel-RL entspricht.

Artikel 5 Satz 1 der Richtlinie legt Folgendes fest: „Sind alle dem Verbraucher in Verträgen unterbreiteten Klauseln oder einige dieser Klauseln schriftlich niedergelegt, so müssen sie stets klar und verständlich abgefasst sein.“ Wenn man diese Vorschriften vergleicht, wird es zuerst klar, dass die estnische Regelung teilweise sogar verbraucherfreundlicher ist als die Richtlinie, da das Transparenzgebot im estnischen Recht auf alle Vertragsklausel anwendbar ist, d. h. auch auf solche Klausel, die nicht schriftlich niedergelegt worden sind.

Zweitens muss man im Auge behalten, dass die Folgen der Verletzung des Transparenzgebots in der Richtlinie nicht ausdrücklich vorgeschrieben worden sind. Insbesondere ist in der Richtlinie nicht vorgesehen, dass die Folge der Verletzung des Transparenzgebots die Unwirksamkeit der AGB-Klausel sein sollte.^{*52} Deswegen werden zu der Frage, welche Folgen aus der Verletzung des Transparenzgebots abgeleitet werden müssen, drei verschiedene Meinungen vertreten, nämlich dass: (i) die Mitgliedstaaten das Recht haben, frei über die Folgen zu entscheiden; (ii) die Verletzung des Transparenzgebots als Einziehungshindernis anzusehen ist; sowie dass (iii) aus der Intransparenz eine unangemessene Benachteiligung folgt.^{*53}

Folglich schreibt die Richtlinie den Mitgliedstaaten nicht vor, dass die Kontrolle der Transparenz auf der Ebene der Inhaltskontrolle stattfinden sollte und dass eine intransparente Klausel als missbräuchlich angesehen werden muss. So wird in mehreren Mitgliedstaaten – wie auch in Estland – die Transparenz nur bei der Einziehungskontrolle der AGB geprüft.^{*54} Letztendlich gibt es auch keinen praktischen Unterschied, ob das Gericht die Klausel im Rahmen von Inhalts- oder Einziehungskontrolle prüft: Bei der Verletzung des Transparenzgebots gilt die betreffende Klausel nach dem estnischen Recht nicht als Bestandteil des Vertrags, nach dem deutschen Recht kann eine intransparente Klausel entweder nicht als Bestandteil des Vertrags gelten (305 Abs. 2 Nr. 2 BGB) oder nach § 307 Abs. 1 S. 2 BGB missbräuchlich und daher unwirksam sein. Das Endergebnis ist aber in beiden Rechtsordnungen das Gleiche – intransparente Klauseln sind sowohl nach dem estnischen als auch dem deutschen Recht für den Verbraucher nicht bindend. Genau dasselbe gilt für das österreichische Recht (§ 6 Abs. 3 KSchG).

⁴⁸ *Ibid.*, § 307 Rn. 327.

⁴⁹ H. Krejci (Fn. 16), Rn. 20; B. Lurger, S. Augenhöfer. Österreichisches und europäisches Konsumentenschutzrecht. 2. Aufl. Wien: Springer 2008, S. 132. Für den Standpunkt, dass die Transparenz in Österreich im Rahmen der Inhaltskontrolle geprüft wird – M. Ebers, H. Schulte-Nölke, C. Twigg-Flesner. EC Consumer Law Compendium. Sellier 2008, S. 250.

⁵⁰ P. Varul *et al.* (Fn. 4), S. 137.

⁵¹ C. von Bar, E. Clive (ed.). Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group). Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference (DCFR). Full Edition. Vol II. (Munich: Sellier 2009), Fußnoten 3 und 6 zu II.–9:402, S. 631–632; M. Ebers *et al.* (Fn. 49), S. 246.

⁵² M. Ebers *et al.* (Fn. 49), S. 248.

⁵³ *Ibid.*

⁵⁴ *Ibid.*, S. 249.

Die Richtlinie verlangt ferner, dass das Transparenzerfordernis auch auf die Preisabreden anwendbar ist. Während die Klauseln, die das Hauptgegenstand des Vertrages betreffen oder unmittelbar auf die Bestimmung der Art und Höhe des Entgelts gerichtet sind, von der Inhaltskontrolle ausgeschlossen sind, unterliegen diese Klauseln jedoch dem Transparenzgebot (Art. 4 Abs. 2 Klausel-RL).⁵⁵ Auch dieses Erfordernis ist im estnischen Recht erfüllt: Das in § 37 Abs. 3 SchG verankerte Transparenzgebot ist – anders als die Missbrauchskontrolle (§ 42 Abs. 2 SchG) – auf das Hauptgegenstand des Vertrags und das Wertverhältnis anwendbar.⁵⁶

Obwohl formalrechtlich das estnische Recht mit der Richtlinie im Einklang steht, liegt das inhaltliche Problem bei der Prüfung der Transparenz nur bei der Einbeziehungskontrolle unseres Erachtens darin, dass laut § 45 Abs. 1 SchG im Verbandsverfahren nur die Missbräuchlichkeit – nicht aber das Transparenz oder die Überraschbarkeit – der AGB bewertet werden kann. Zwar verlangt die Richtlinie gem. Art. 7 Abs. 1 nur, dass es möglich sein muss, die missbräuchliche Klauseln in Verbandsverfahren anzugreifen.⁵⁷ Die Autoren wollen aber im Folgenden zeigen, dass zum Zweck des effektiven Verbraucherschutzes auch die Transparenz der AGB-Klauseln im Verbandsverfahren überprüfbar sein sollte.

4. Die Kontrolle des Transparenzgebots im Verbandsverfahren

Die Wirksamkeitskontrolle der AGB kann sowohl im Individualverfahren als auch im Verbandsverfahren stattfinden. Art. 7 Abs. 2 Klausel-RL, der die Einführung von Verbandsklagen und vergleichbaren Rechtsbehelfen zur Entscheidung über die Missbräuchlichkeit von AGB vorsieht, ist in Estland durch § 45 SchG und durch das Verbraucherschutzgesetz⁵⁸ (VSchG), in Deutschland durch das Unterlassungsklagengesetz⁵⁹ (UKlaG) und in Österreich durch die §§ 28-29 KSchG umgesetzt worden. Nach diesen Rechtsakten sind bestimmte durch das Gesetz vorgesehene Organisationen berechtigt, im Gerichtswege die Unterlassung der Verwendung einer unangemessen benachteiligenden AGB-Klausel, sowie vom Empfehler einer solchen AGB-Klausel die Beendigung des Empfehlens und die Rücknahme der Empfehlung zu verlangen. Unterschiede bestehen allerdings sowohl hinsichtlich der zur Erhebung einer Verbandsklage berechtigten Personen als auch der Effizienz dieser Verfahren. Sowohl in Estland⁶⁰ als auch in Deutschland⁶¹ und in Österreich⁶² sind zur Erhebung von Verbandsklagen verschiedene Verbraucher- und Unternehmerverbände berechtigt. Außer Verbraucherverbänden steht nach dem estnischen Recht auch dem Verbraucherschutzamt, d. h. einer für den Schutz der Verbraucher gegründeten staatlichen Behörde, die Möglichkeit zur Erhebung einer Verbandsklage zu (§ 17 Abs. 2 Nr. 8 VSchG).⁶³

⁵⁵ Art. 4 Abs. 2 der Richtlinie lautet: „Die Beurteilung der Mißbräuchlichkeit der Klauseln betrifft weder den Hauptgegenstand des Vertrages noch die Angemessenheit zwischen dem Preis bzw. dem Entgelt und den Dienstleistungen bzw. den Gütern, die die Gegenleistung darstellen, sofern diese Klauseln klar und verständlich abgefasst sind.“

⁵⁶ Darauf hat das estnische Staatsgericht in seinem Urteil 20.10.2010, 3-2-1-75-10 ausdrücklich hingewiesen.

⁵⁷ Art. 7 Abs. 1 und 2 der Richtlinie lauten: „(1) Die Mitgliedstaaten sorgen dafür, daß im Interesse der Verbraucher und der gewerbetreibenden Wettbewerber angemessene und wirksame Mittel vorhanden sind, damit der Verwendung mißbräuchlicher Klauseln durch einen Gewerbetreibenden in den Verträgen, die er mit Verbrauchern schließt, ein Ende gesetzt wird. (2) Die in Absatz 1 genannten Mittel müssen auch Rechtsvorschriften einschließen, wonach Personen oder Organisationen, die nach dem innerstaatlichen Recht ein berechtigtes Interesse am Schutz der Verbraucher haben, im Einklang mit den einzelstaatlichen Rechtsvorschriften die Gerichte oder die zuständigen Verwaltungsbehörden anrufen können, damit diese darüber entscheiden, ob Vertragsklauseln, die im Hinblick auf eine allgemeine Verwendung abgefasst wurden, mißbräuchlich sind, und angemessene und wirksame Mittel anwenden, um der Verwendung solcher Klauseln ein Ende zu setzen.“

⁵⁸ Tarbijakaitseadus. – RT I 2004, 13, 86; RT I 2010, 77, 590 (auf Estnisch).

⁵⁹ Gesetz über Unterlassungsklagen bei Verbraucherrechts- und anderen Verstößen. – BGBl. I S. 3422, 4346.

⁶⁰ § 45 SchRG, § 15 Abs. 4 Nr. 1 VSchG.

⁶¹ § 3 Abs. 1 UKlaG.

⁶² § 29 Abs. 1 KSchG.

⁶³ In mehreren Mitgliedstaaten ist eine staatliche Behörde berechtigt, eine Verbandsklage zu erheben; siehe die tabellarische Übersicht von H.-W. Micklitz. – Münchener Kommentar zur Zivilprozessordnung, 3. Aufl. München: Verlag C.H. Beck 2008, Vorbem zu UKlaG Rn. 45.

Während in Deutschland^{*64} und Österreich^{*65} die Erhebung einer Verbandsklage auf Unterlassung der Verwendung von missbräuchlichen und/oder intransparenten AGB-Klauseln in der Praxis sehr verbreitet und die Rechtsprechung teilweise schon unübersichtlich geworden ist, wird diese Möglichkeit in Estland ungeachtet der bestehenden gesetzlichen Voraussetzungen praktisch nicht genutzt. Obwohl der estnische Gesetzgeber die Möglichkeit zur Erhebung einer Verbandsklage mehreren Institutionen gewährt hat, haben sowohl die estnischen Verbraucherverbände als auch das Verbraucherschutzamt diese Möglichkeiten *de facto* nicht aufgegriffen. Das Verbraucherschutzamt hat während der gesamten neunjährigen Geltung der Bestimmungen über allgemeine Geschäftsbedingungen kein einziges Mal eine Unterlassungsklage betreffend missbräuchliche Klauseln bei Gericht eingelegt.^{*66}

Folglich ist es nach dem estnischen Recht möglich, die Missbräuchlichkeit der AGB in Verbandverfahren zu überprüfen, nur ist von dieser Möglichkeit bisher leider keinen Gebrauch gemacht worden. Was die Prüfung der Transparenz der AGB betrifft, ist die rechtliche Situation aber anders: Nach § 45 SchG ist es im Rahmen des Verbandverfahrens nämlich nur möglich, die missbräuchliche Klauseln anzugreifen und deren Verwendung zu verbieten. Ob eine Klausel aber intransparent ist, d. h. ob eine Vertragsbestimmung nach § 37 Abs. 3 SchG überhaupt Vertragsbestandteil geworden ist, kann nach dem geltenden estnischen Recht im Verbandsprozess nicht geprüft werden.

Dagegen ist in Deutschland und in Österreich das Transparenzgebot gerade in Verbandverfahren ein sehr oft benutzbares und effektives Verbraucherschutzinstrument. In diesen Mitgliedstaaten sind die Verbraucherverbände aktiv mit der Erhebung von Verbandsklagen beschäftigt; in einem Verbandverfahren werden normalerweise mehrere – oder sogar mehrere Zehnte – Vertragsbestimmungen des Vertragswerkes eines Unternehmens angegriffen. Es ist nicht selten der Fall, dass viele von solchen Vertragsklauseln gerade wegen der fehlenden Transparenz von dem Gericht als unzulässig erklärt werden. Zum Beispiel hat man 2007 in Österreich die Klauselwerke von 25 Heimträgern aus allen Bundesländern überprüft; dabei hat man in 54% Verstoß-Fällen die fehlende Transparenz festgestellt.^{*67} Ein weiteres und sehr illustratives Beispiel bietet auch ein Urteil des österreichischen Obersten Gerichtshofs aus dem Jahr 2011.^{*68} In dieser Rechtssache hat ein Konsumentenschutzverein eine Verbandsklage gegen einen Leasingunternehmen erhoben und die Verbotung von 34 Leasingvertragsklauseln beantragt. Im Ergebnis haben 12 von diesen Klauseln gerade an die fehlende Transparenz gescheitert.

Intransparente Vertragsklauseln sind auch den estnischen Klauselwerken nicht fremd; leider ermöglicht das estnische Recht – wie oben vorgelegt – zur Zeit nur das Angreifen der intransparenten Klauseln im Individualverfahren. Die Schutzmöglichkeiten der estnischen Verbraucher würden aber erheblich erhöht, wenn es auch in Estland möglich wäre, die Verwendung solcher unklaren AGB-Bestimmungen in Verbandverfahren für unzulässig zu erklären. Um den von der Richtlinie bezweckten effektiven gerichtlichen Schutz zu gewährleisten, sollte es daher nach der Auffassung der Autoren möglich sein, die Transparenz einer Klausel auch im Verbandverfahren zu prüfen. Dazu gibt es zwei Möglichkeiten, die jeweils eines Eingreifens des estnischen Gesetzgebers bedürfen: (i) die Prüfung der Transparenz auf Ebene der Inhaltskontrolle einzuführen; oder (ii) die Änderung des § 45 SchG in der Weise, dass es im Verbandverfahren möglich wäre, die Unterlassung der Verwendung missbräuchlicher sowie intransparenter ABG-Klauseln zu verlangen. Nach der Auffassung der Autoren ist die zweite Alternative zu bevorzugen und nicht die Transparenzprüfung auf die Ebene von Inhaltskontrolle zu verlegen.

⁶⁴ Vgl. H.-W. Micklitz. – Münchener Kommentar (Fn. 63), Vorbem zu UkaG Rn. 31.

⁶⁵ Siehe „Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union – country report Austria“, S. 44–58. Zugänglich unter: ec.europa.eu/consumers/redress_cons/au-country-report-final.pdf.

⁶⁶ Dies ergibt sich aus der Antwort des Verbraucherschutzamtes auf eine diesbezügliche Anfrage der Autoren vom 24.05.2011. Auch in Individualverfahren sind die Bestimmungen über AGB in Estland im Vergleich zu Deutschland und Österreich in verhältnismäßig wenigen Fällen angewandt worden. So wurden im Jahre 2010 vor Gerichten der ersten und zweiten Instanz die Bestimmungen über AGB nur in ca. 35 Rechtsstreiten herangezogen. Bei der Analyse der betreffenden Rechtsprechung kommt auch die klare Tendenz zum Ausdruck, dass estnische unterinstanzliche Gerichte regelmäßig nur die Unwirksamkeit solcher AGB festgestellt haben, hinsichtlich derer in analogen Fällen schon entsprechende Rechtsprechung des Staatgerichts vorliegt; nur in seltenen Fällen ist man bereit, einen neuen (so genannten) Präzedenzfall zu schaffen.

⁶⁷ Country Report Austria (Fn. 65), S. 56.

⁶⁸ Urteil des Obersten Gerichtshofs (OGH) von 11.05.2011 Nr. 7Ob173/10g.

5. Schlussfolgerungen

Das Transparenzgebot bezieht sich sowohl auf die förmlichen als auch auf die inhaltlichen Aspekte der nicht im Einzelnen ausgehandelten Klauseln. So wird die Wirksamkeit dieser Klauseln in vielen Fällen schon bei der Prüfung der Transparenz scheitern und die Kontrolle der weiteren Missbräuchlichkeit dieser Klauseln ist daher nicht erforderlich. Die Rechtsfolgen des Transparenzgebots sind in der Klausel-RL nicht geregelt worden und unterliegen deshalb der Diskretion der Mitgliedsstaaten. Folglich ermöglicht die Klausel-RL die Transparenzkontrolle der nicht im Einzelnen ausgehandelten Klauseln sowohl auf der Ebene der Einbeziehungs- als auch auf der Inhaltskontrolle. In Estland wird die Transparenz der AGB-Klauseln auf der Einbeziehungsebene geprüft: Dies ist richtlinienkonform und die Regelung sollte nach der Auffassung der Autoren nicht geändert werden.

Die Erfahrungen von der deutschen und österreichischen Rechtsprechung zeigen, dass das Transparenzgebot ein sehr effektives Verbraucherschutzinstrument der AGB-Kontrolle darstellt und dies sowohl in Individual- als auch in Verbandsverfahren. Nach dem heutigen estnischen Recht ist die Prüfung von Transparenz der AGB-Klauseln aber nur im Rahmen von Individualverfahren möglich: In Verbandsverfahren kann nur die Missbräuchlichkeit, nicht aber die fehlende Transparenz der AGB-Klauseln festgestellt werden. Um den von der Klausel-RL bezweckten effektiven Schutz von Verbrauchern zu gewährleisten, sollte nach der Auffassung der Autoren eine Gesetzesänderung vorgenommen werden, so dass die Prüfung der Transparenz von AGB-Klauseln zukünftig auch im Verbandsverfahren möglich wird. Die Erhöhung des Verbraucherschutzniveaus wird jedoch erst dann erreicht, wenn von den Möglichkeiten der Verbandsklage im Praxis auch tatsächlich Gebrauch gemacht wird.



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The Position of the Duty of Care in the Structure of the General Composition of Delict

1. Introduction

When one speaks about the liability stemming from violation of a duty of care, one cannot avoid addressing the definition of the position of the duty of care in the general composition of delict. Notwithstanding the circumstances of the damage behind the particular violation of the duty of care involved, we inevitably need an answer to the question of how to solve such cases in terms of methodology and what exceptions to general rules are involved in recognition of the duty of care in the general composition of delict. According to C. von Bar, recognition of the concept of duties of care creates several dogmatic issues in the system of elements of delictual liability, expressed by the difference of distinguishing among three levels: objective elements of an act, unlawfulness, and fault.^{*1} In the author's opinion, this is not only a theoretical question, as the distribution of the burden of proof depends on the position in the delictual structure. The question of who is under the obligation to prove the facts significant for judicial proceedings may become a crucial factor for the outcome of the litigation and so is rarely of secondary importance for the parties to the proceeding. The importance of the distribution of the burden of proof is indicated by the fact that the setback of an action in court is often caused not by the complexity of the point of law but by the claimant's inability to convince the court of the facts on which the claim relies.^{*2}

In this article, the author first attempts to find a motivated answer to the question of whether, in cases where determining the unlawfulness of the damaging of legal rights necessitates establishment of the violation of the duty of care by the tortfeasor, the latter should be proved by the injured party or violation of the duty of care by the tortfeasor should be assumed, with the tortfeasor therefore obliged to prove that the duty of care was fulfilled. Secondly, the author tries to answer the question of what a methodically applied model for the solving of a case of violation of the duty of care should look like.

Because several problems discussed below are not present in cases with similar aspects outside the Germanic law tradition, the references in this article to works by Estonian authors are supplemented primarily by views from the literature on the regulations of the *Bürgerliches Gesetzbuch*^{*3} (BGB). In efforts to reveal the just delictual structure of the composition of delict, additional attention has been paid to the

¹ C. von Bar. *Verkehrspflichten. Reichterliche Gefahrsteuerungsgebote in deuchen Deliktsrecht*. Cologne, Berlin, Bonn, & Munich: Carl Heyemanns Verlag KG 1980, pp. 112–113.

² E. Karner. *The function of the burden of proof in tort law.* – H. Koziol, B.C. Steininger (eds). *Tort and Insurance Law Yearbook. European Tort Law 2008*. Wien & New York: Springer 2008, p. 68.

³ Available at http://www.gesetze-im-internet.de/bgb/BJNR001950_896.html (most recently accessed on 1.5.2012).

corresponding regulations of European model laws: the Draft Common Frame of Reference^{*4} (DCFR) and Principles of European Tort Law^{*5} (PETL), which are attempts to give a uniform direction to the development of European tort law.

2. The traditional general composition of delict and distribution of the burden of proof

To discuss the impact of recognising the concept of duties of care on the general composition of delict and the distribution of the burden of proof, one should first be reminded of the traditional general composition of delict and traditional distribution of the burden of proof. Similarly to the §823 (1) of BGB, Division 1 of Chapter 53 of Estonia's current Law of Obligations Act^{*6} (LOA) states that generally the basis for liability caused by fault consists in three-level composition of a delict. On the first level of the composition of delict, the objective elements of an act—the act, the consequence, and the causal relationship—have to be established. The second level has to do with unlawfulness, and on the third level fault must be assessed.

The establishment of the elements of an act takes place in stages, methodically, in the order given above. If the objective elements of an act are absent, there will be no assessment with respect to unlawfulness and fault. If the objective elements of an act are present but there is no unlawfulness, the question of fault is no longer discussed.^{*7}

Pursuant to the rule of distribution of the burden of proof recognised irrespective of the general and particular legal system, both parties to the dispute must prove the facts supporting their claims or objections.^{*8} Enforcement of a claim by means of judicial proceedings is directed toward changing the *status quo*, but the purpose of property-protection and peace-keeping speaks to the general preference given to maintaining the *status quo* in the legal order. The prerequisite for the legal basis of the *status quo* acts as a barrier against constant obligation of its justification; accordingly, it is the duty of the plaintiff, on the basis of the principle of justice, to substantiate his or her having been offended before this is changed.^{*9} This has been expressed succinctly by R. von Jhering, according to whom the burden of proof is the price to be paid in the proceedings for acquisition of the right.^{*10}

In terms of the delictual structure, the legal orders seem to agree that, traditionally, the victim has to prove the existence of damage, a relationship between the damage and the putative cause thereof, and the facts crucial in establishment of the unlawfulness. The tortfeasor has to prove all the facts that might lead to his or her release from or alleviation of the liability. However, there is no common approach to the question of who must prove the fault of the tortfeasor as a prerequisite for liability, with certain subjective elements.^{*11} The author finds that the issue of proving fault is particularly acute in cases of violation of a duty of care.

⁴ Principles, definitions and model rules of European private law: Draft Common Frame of Reference (DCFR). Outline edition, prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group). C. von Bar, E. Clive, H. Schulte-Nölke (eds). Munich: Sellier. European Law Publishers 2009. Available at http://ec.europa.eu/justice/contract/files/european-private-law_en.pdf (most recently accessed on 1.5.2012).

⁵ Principles of European Tort Law. Available at <http://www.egtl.org/> (most recently accessed on 1.5.2012).

⁶ Võlaõigusseadus. – RT I 2001, 81, 487; RT I, 8.7.2011, 21 (in Estonian).

⁷ T. Tampuu. Lepinguväliste võlasuhete õigus. Loengud (Tort Law. Lectures). Tallinn: Juura 2007, p. 159 (in Estonian).

⁸ I. Giesen. The burden of proof and other procedural devices in tort law. – H. Koziol, B.C. Steininger (eds). Tort and Insurance Law Yearbook. European Tort Law 2008. Wien & New York: Springer 2008, pp. 50–51.

⁹ Karner (see Note 2), p. 70.

¹⁰ R. von Jhering. Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung, 5. Aufl. Leipzig, Breitkopf und Härtel 1906, p. 206.

¹¹ J. Lahe. Süü deliktiõiguses (Fault in Delict Law). Doctoral thesis. Tartu, Estonia: Tartu Ülikooli kirjastus 2005, p. 84 (in Estonian).

3. The impact of the concept of duty of care on the elements of the general composition of delict

3.1. Objective elements of an act

Liability based on violation of duties of care is first and foremost evident in cases wherein damage is done through omission or indirect acts. The author believes that this is the first major departure of these cases from the traditional structure of the general composition of delict, in which the cause of damage—the first of the objective elements of an act—consists in direct action. In cases of omission and indirect acts, the violation of legal rights can be reproached only if there has been a violation of a legal duty to behave differently.^{*12} Therefore, in cases of violation of a duty of care, the elements of illicit acts depend not only on having caused the consequence of violation but also on the assessment of the behaviour of the person at fault.

In terms of consequence, the liability arising from violation of a duty of care does not differ from the liability seen in the traditional approach to the general composition of delict, because the elements of an act still rest on the consequence as main element. As with direct damaging, in the case of violation of a duty of care, the consequence also depends on whether the damage caused indicates violation of legal rights that deserve protection.

To ascertain the causality creating liability (*conditio sine qua non*), one should use a method involving replacement when adjudicating a case surrounding violation of a duty of care; here, the unlawful behaviour of the tortfeasor is replaced with lawful behaviour, followed by verification of whether the consequence would have been evident in the case of lawful behaviour. One must note that the harmful consequence affecting the victim can be deemed an unlawful causal consequence of the omission or indirect damage of the tortfeasor only if the tortfeasor had the duty to perform a certain act as would have prevented or alleviated the harmful consequence. In other words, the difference between direct damage to legal rights, on the one hand, and violation of a duty of care, on the other, consists in a causal relationship to the extent that the causality of the act for the purposes of *conditio sine qua non* is sufficient in the first case but in the second case liability for the consequence arises only if the behaviour was contrary to duty. One has to agree with the figurative expression applied by T. Raab, according to which verification of a causal relationship in the absence of establishment of a particular duty to act ‘hangs in the air’.^{*13}

In cases of omission or indirect acts, the determination of the liability-related causality does not differ from the case of direct damaging. Neither in the case of violation of a duty of care is the *conditio sine qua non* formula alone enough to limit the tortfeasor’s liability and prevent harmful consequences in cases wherein an obligation to compensate for damage would be unreasonable or not recommended.^{*14} Therefore, for creation of the obligation to compensate for damage, one has to assess whether damaging of legal rights has led to the damage for which compensation is sought in terms of the law of delict.^{*15} The outcome of the lawful reason test traditionally has consisted first and foremost in various modifications of adequacy theory established by J. von Kries^{*16} and theory addressing the purpose of the obligation.

3.2. Unlawfulness

When determining the unlawfulness, one has to keep in mind that legally relevant omission can be considered only if the person had a duty to act in a certain manner. The same applies to cases wherein legal rights are damaged by indirect acts, as they are considered unlawful only if the legal order prescribes different behaviour.^{*17} In the Germanic legal tradition, this means that in cases of violation of a duty of care, the

¹² B.S. Markesinis, H. Unberath. *The German Law of Torts: A Comparative Treatise*, 4th ed. Oxford & Portland, Oregon: Hart Publishing 2002, p. 81.

¹³ T. Raab. *Bedeutung der Verkehrspflichten und ihre systematische Stellung im Deliktsrecht*. Juristische Schulung. Zeitschrift für Studium und praktische Ausbildung. 42. Jahrgang, Heft 11. Munich & Frankfurt am Main: Verlag C.H. Beck 2002, p. 1042.

¹⁴ H. Koziol, B.C. Steininger. *European Tort Law 2003*. Wien & New York: Springer 2004, p. 27.

¹⁵ See P. Schlechtriem. *Võlaõigus. Eriosa (Law of Obligations. Special Part)*. Tallinn: Juura 2000, pp. 256–259 (in Estonian).

¹⁶ See M. Heidelberg. *From Mill Via von Kries to Max Weber: Causality, Explanation, and Understanding*. – U. Feest (ed.). *Historical Perspectives on Erklären and Verstehen*. Springer 2010, pp. 241–267.

¹⁷ Raab (see Note 13), p. 1041.

wrongful consequence theory is not applied to determination of unlawfulness and one can only rely on the wrongful act theory. Therefore, in cases of violation of a duty of care, if one is to establish unlawfulness, it is necessary to prove that the tortfeasor had a duty of care and that it has been violated.^{*18} Thus, behaviour has to be assessed from the angle of contrariness to duty, meaning that unlawfulness and fault cannot be entirely separated in cases involving putative violation of a duty of care.^{*19}

3.3. Fault

In determination of the fault, the question arises as to whether the violation of the duty of care exists only for unlawful behaviour or also serves as a basis for claiming that the tortfeasor behaved in a careless manner. The same question has been posed by von Bar, who finds that clear-cut distinction between fault and unlawfulness is complicated in cases of violation of a duty of care.^{*20} In view of the definition of violation of a duty of care, which states that this violation represents failure to adhere to an obligation to behave in a legally binding and circumstantially relevant manner^{*21}, and in consideration of the definitions of carelessness provided for in the legislation, according to which a person who does not exercise the required care is acting carelessly^{*22}, it is not difficult to conclude that the definition of violation of a duty of care and that of carelessness are remarkably similar.^{*23} This raises the question whether the victim who proves violation of a duty of care on the part of the tortfeasor proves the unlawfulness or fault of the act or both.^{*24} One has to agree with Raab, according to whom the answer to this question lies in giving substance to the concept of carelessness or, to be more exact, drawing a distinction between the components of carelessness—extrinsic and intrinsic carelessness.^{*25}

As intrinsic care is a subjective category, the question of a distinction between violation of the duty of care and carelessness boils down to the distinction between duties of care and extrinsic care. In other words, duties of care are composed of the requirements of extrinsic care, meaning that behaviour violating the requirements of extrinsic care is always understood as violation of a duty of care and, accordingly, unlawful.^{*26}

Given that the duty of care coincides with only one element of carelessness—related to extrinsic care—the violation of a duty of care and fault are not considered to be coinciding elements and following of intrinsic care should be verified in subjective terms (i.e., on a separate level in the structure).^{*27}

¹⁸ C. van Dam. *European Tort Law*. Oxford University Press 2006, p. 73.

¹⁹ Raab (see Note 13), p. 1047.

²⁰ Bar (see Note 1), p. 112.

²¹ On the definition of the concept of the duty of care in German judicial practice, see, for example, BGH 28.4.1952, BGHZ 5, S. 378, 380-381; BGH 15.6.1954, BGHZ 14, S. 83, 85; BGH 30.1.1961, BGHZ 34, S. 206, 209. In Estonian judicial practice, see Supreme Court Civil Chamber decision 3-2-1-43-09 (in Estonian).

²² Subsection §276 (1) of BGB; §104 3) of LOA).

²³ J. Lahe. *The Concept of General Duties of Care in the Law of Delict*. – *Juridica International* 2004 (IX), p. 113.

²⁴ Lahe (see Note 11), p. 68.

²⁵ Raab (see Note 13), p. 1048. Extrinsic care is understood as consisting of the care requirements imposed on the average careful person by the legal order for the protection of third parties' legal rights in a specific situation. Intrinsic care refers to the endeavours and efforts that a person has to make to recognise and follow the requirements of extrinsic care.

²⁶ H. Kötz, G. Wagner. *Deliktsrecht*. Neunte, überarbeitete Auflage. Neuwied & Kriftel: Luchterhand 2001, p. 44.

²⁷ E. Deutsch, H.-J. Ahrens. *Deliktsrecht*. Unerlaubte Handlungen. Schadenersatz. Schmerzensgeld. 4., völlig überarbeitete und erweiterte Auflage. Cologne, Berlin, Bonn, & Munich: Carl Heyemanns Verlag 2002, p. 126.

4. The general composition of delict and distribution of the burden of proof when liability arises from violation of a duty of care

4.1. Distribution of the burden of proof when a duty of care has been violated

In view of the fact that liability arising from the violation of a duty of care leads to deviations in liability elements, the structure of the composition and distribution of the burden of proof cannot remain unaffected. According to B.S. Markesinis, the question of whether the establishment of the duties of care should belong to the level of behaviour, unlawfulness, or fault has been subject to some discussion, but significant differences do not result in terms of the consequent outcome.^{*28} The author finds that such a position is acceptable only when one overlooks the issue of distribution of the burden of proof—i.e., which of the parties to the proceedings must carry the burden of proving the existence and violation of the objective behavioural standard in the event of violation of duties of care.

According to the method study based on the BGB, the burden of proof of the existence and violation of a duty of care should be imposed on the aggrieved party.^{*29} However, in German judicial practice, the distribution of the burden of proof in cases of liability arising from violation of duties of care is not always so.^{*30} According to von Bar, at least in cases involving violation of duties of care with regard to producer liability and environmental harm, German courts (in similarity to the consideration of the liability elements provided for in §§ 831–836 of BGB tend to show reliance more on the opinion that it is up to the tortfeasor to prove the lawfulness of his or her behaviour.^{*31} This view is confirmed by Markesinis, who explains that in such cases the tortfeasor must prove the absence of extrinsic carelessness.^{*32} In all other cases, the victim is subject to the burden of proving the existence and the violation of a duty of care. After the existence and violation of a duty of care have been established, the burden of proof is transferred to the tortfeasor for resolution of the question of fault or intrinsic carelessness, which provides a basis for creating the liability under §823 (1) of BGB.^{*33}

According to the main rule laid down in §1050 (1), the LOA is based on the presumption of fault, which makes it impossible to use an approach that requires the victim to prove the violation of a duty of care by the tortfeasor. While both the LOA and other legislation provide for delict compositions wherein the obligation to prove the carelessness of the tortfeasor lies with the victim^{*34}, the author believes that in those cases where liability arises from violation of a duty of care, one should generally rely on the presumption of fault. The author finds that the burden of proof could be imposed on the victim only if the court finds that a particular duty of care can only be violated via intent or gross negligence and that the burden of proof of the tortfeasor's intent or gross negligence should be imposed on the victim. In the author's opinion, the specific nature of §1050 of LOA should not be suppressed by following the example of the BGB; on the contrary, it should be highlighted and viewed first and foremost in terms of its several advantages in imposing the burden of proof of lack of fault on the tortfeasor.

²⁸ Markesinis, Unberath (see Note 12), p. 86.

²⁹ Raab (see Note 13), pp. 1050–1051.

³⁰ R. Welser, B. Jud, C. Rabl. Grundriss des bürgerlichen Rechts. Band II. Schuldrecht. Allgemeiner Teil. Schuldrecht. Besonderer Teil. Erbrecht. 12., neuarbeitete Auflage. Wien: Manzsche Verlags- und Universitätsbuchhandlung 2000, pp. 300–301.

³¹ C. von Bar. The Common European Law of Torts, Volume 1: The Core Areas of Tort Law, Its Approximation in Europe, and Its Accommodation in the Legal System. Oxford: Clarendon Press 1998, p. 126.

³² Markesinis, Unberath (see Note 12), p. 88.

³³ Bar (see Note 31), p. 126.

³⁴ Therefore, for example, if violation of the protective provision (§1045 (1) 7) of LOA presupposes intent or gross negligence, the victim has to prove the existence of said form of fault. The same applies if damage is caused as a result of intentional behaviour contrary to good morals (§1045 (1) 8) of LOA. In that case, the victim has to prove both intent and that the behaviour of the tortfeasor was contrary to good morals. Proving fault can also be a prerequisite for establishing unlawfulness in cases of special elements of delict, wherein the victim may be subject to obligation to prove all of the special elements of the act. For instance, in order for §84 (2) of the Law of Property Act to apply, the plaintiff must prove the bad faith of the defendant in possession of a thing. See T. Tampuu. Deliktioõigus võlaõigusseaduses. Üldprobleemid ja delikti üldkoosseisul põhinev vastutus (Delict Law in the Law of Obligations Act. General Problems and Liability Based on the General Composition of Delict). – Juridica 2003/2, pp. 79–80 (in Estonian).

To see the advantages of the presumption of fault, one must first distinguish between the burden of proof of existence of a duty of care and the burden of proof of the violation of a duty of care. It can be stated that unlawfulness and extrinsic carelessness, which, according to the methodical study based on the BGB, represent a single unit when the liability is being established^{*35}, should be formally separated from each other so as to ensure compliance with §1050 (1) of LOA. Undoubtedly, the victim is subject to the burden of proof of the objective behavioural standard. This means that the victim must elicit the facts showing the existence of the duty of care of the tortfeasor in a particular situation and provide evidence thereof. The victim has to prove that the tortfeasor created or controlled a danger that was realised and that he or she was associated with a certain behavioural standard that required the tortfeasor to take all reasonably required, suitable, and affordable measures to protect the victim against the actualisation of the danger. The author believes that, pursuant to the provisions of §1050 (1) of LOA, the burden of proof of the victim does not involve the obligation of proving the violation of a duty of care and, in light of the causing of damage and after the victim has established the existence of a duty of care by the tortfeasor, the tortfeasor must be presumed to have violated a duty of care and behaved unlawfully. To be released from the associated liability, the tortfeasor may opt to prove the presence of facts precluding unlawfulness pursuant to §1045 (2) of LOA, having followed extrinsic care, i.e., the duty of care pursuant to §1050 (1) of LOA, or the presence of subjective facts releasing him or her from liability pursuant to §1050 (2) of LOA.^{*36}

The author believes that the presumption of fault proceeds primarily from the fact that delictual liability is generally applied in cases in which damage caused by the behaviour of one person is imposed on another person without a prior legal relationship. In a delict situation, victim and tortfeasor are usually unfamiliar with each other before the event; they have no former legal relationship to rely on in terms of proof.^{*37} Delict is generally a violation of rights taking place in a split second, unexpectedly, and progresses in such a limited time frame that no-one is able to pay accurate attention to what happens or, to be more exact, has happened.^{*38} In addition, in a case of violation of a duty of care, there is no direct act by the tortfeasor, which makes it very difficult for the victim to gather evidence about what happened. Thus the violation of duties of care represents delicts that—owing to the systematic nature of the evidential difficulties—are in chronic need of evidential assistance. This, however, means that in such cases, reversal of the burden of proof based on the *res ipsa loquitur* doctrine in the court would be deemed a rule, not an exception. This being the case, the author believes it to be more logical and compliant with the wording of LOA §1050 (1) to apply the presumption of fault of the tortfeasor instead of constant doctrinal reversal of the burden of proof.

Imposing the burden of proof pertaining to adherence to extrinsic care on the tortfeasor involves stricter liability^{*39}, but it is justified in situations wherein the violation of the obligation that is the basis for a claim has been committed within the scope of risk or power of the tortfeasor, which is traditionally not fully understandable for the victim.^{*40} One has to consider that in cases of violation of duties of care the victim has no access to the ‘internal sphere’ of the tortfeasor for possible explanation of potential non-compliance of the tortfeasor’s behaviour with extrinsic care. For instance, in a situation in which A leaves a manhole uncovered and B falls in, A is held responsible for causing damage to B only if A violated a protection standard or duty of care. However, B has no access to A’s ‘internal sphere’ for verification of whether A’s behaviour complied with the duty of care. Therefore, if A states that he or she was not careless, because he or she provided relevant warning signs as prescribed, then—in the author’s opinion—it would be more reasonable that A must prove his or her statements, instead of B refuting them. It is much simpler for A to prove the events that occurred in his or her ‘internal sphere’—i.e., fulfilment of the duty of care—than for B to enter an unfamiliar ‘internal sphere’ and find evidence of the violation of a duty of care (through an omission or indirect act) on the part of A.

³⁵ Raab (see Note 13), pp. 1050–1051.

³⁶ Such an approach to the distribution of the burden of proof could be called ‘separation of the burden of proof of existence and violation of the duty of care’ or ‘formal separation of unlawfulness and extrinsic carelessness’.

³⁷ D.G. Mattiacci. The Core of Pure Economic Loss. Amsterdam Center on Law & Economics. Working Paper No. 2005-03, p. 169. See <http://www.bepress.com/cgi/viewcontent.cgi?article=1124&context=gwp> (3.4.2012).

³⁸ Giesen (see Note 8), p. 53.

³⁹ V. Emmerich. BGB Schuldrecht. Besonderer Teil. 10. völlig neubearbeitete Auflage. Heidelberg: C. F. Müller Verlag 2003, p. 254.

⁴⁰ Schlechtriem (see Note 15), p. 272.

The author believes that one must adhere to the notion that ‘an honest man has nothing to fear’ and keep in mind that adhering to the duty of care—i.e., taking special measures to protect other persons after creating a danger or while controlling the danger—should facilitate the submission of evidence. The activities related to exercise of the duty of care are usually long-term and hence easier to prove. For example, in a danger area one can find a series of reliable witnesses to building of fences or erection of a warning sign, people who participated in building such fences or noticed the presence of a warning sign prior to the event of damage. The person with the duty of care may also collect evidence of execution of the duty of care or of precautions taken to avoid the actualisation of danger—e.g., taking a photo of the situation after building the fence or putting up a warning sign, or asking someone to witness the precautions taken. Understandably, because of the unexpected nature of the event for the victim, the latter has no equivalent measures to strengthen his or her position in the proceedings.

In addition to justified relief of the burden of proof of the victim, who usually represents an involuntary participant in the delictual relationship, the author believes that presumption of fault contributes to procedural simplification in the form of more reliable evidence. The requirement that the victim prove omission of an act by the tortfeasor essentially means the obligation of the victim to prove a negative circumstance. Not only is this unreasonable for the victim; the author finds that it also involves unnecessary procedural complexity for the court. It is clearly evident that it is easier to establish something that was done than something that was not done. This is due to the fact that an event or act committed can be reconstructed from the evidence, whereas an event that did not happen or an act never committed cannot.

In the end, imposing the burden of proof of the execution of the duties of care on the person who creates the risk would, in the opinion of the author, also contribute to the improvement of overall safety, as it would force the persons creating or controlling danger to pay greater attention. Forcing someone to consider possible liability by whatever means necessary has a preventive effect, which is one of the main objectives of the law of delict.

4.2. Substantiated general composition of delict when a duty of care has been violated

As the consideration of the concept of a duty of care adds further criteria both to objective elements of an act and to assessment of unlawfulness and fault, it is impossible to rely on the traditional three-level structure of the general composition of delict when verifying the prerequisites for delictual liability. Raab too finds that, as the question lies in causing or not causing indirect damage, attention should be paid to the violation of a duty of care already at the level of the objective elements of an act. The duty of care and its protective purpose form inseparable unity with the causality that creates liability, so they need to be verified together on the level of the objective elements of an act. The level of unlawfulness is used for assessment of the presence of facts precluding unlawfulness, and the level of fault involves ascertaining the presence of delictual capacity and following of intrinsic care.^{*41}

According to Raab, in cases of violation of a duty of care pursuant to BGB regulations, the elements in the general composition of delictual liability should be set in methodical sequence on the basis of a two-level structure. The construction of the first level should begin with the objective structure of delict; here, on the basis of the evidence provided by the plaintiff, it is necessary to establish the consequence of the violation—i.e., violation of legal rights—and to assess the non-compliance of the behaviour with a duty of care. The latter presumes establishment of the violation of a duty of care, or extrinsic carelessness. This means that it is necessary to explain whether the defendant had a duty of care and whether it has been violated. A positive response to these questions enables us to conclude that the defendant has also violated extrinsic care and his or her behaviour was unlawful. Here also the facts that justify the behaviour have to be determined, which means for the defendant an opportunity to provide evidence that precludes unlawfulness. On this level, also the causality that creates liability consisting in explaining the causal relationship between the violation of a duty of care and violation of legal rights has to be established and the relationship between the damage caused and the purpose of implementing a duty of care, which means verification of whether the purpose of the duty of care was to prevent the damage that was caused to the plaintiff in the case at hand, has to be explained. On the second level of the structure of the general composition of delictual liability,

⁴¹ Raab (see Note 13), p. 1047.

the question of fault has to be assessed through determination of the delictual capacity and the following of intrinsic care⁴² through the evidence provided by the defendant.

As one compares the approach based on the BGB with the regulations of the model laws that serve as attempts to create uniform European tort law, it would, in the author's view, be an exaggeration to call the differences with the proposed method of solving a case of violation of the duty of care and the difference in the obligation of proof in the latter case fundamental. The similarities in the general composition of the delictual structure are due to the fact that, as in the BGB, neither the DCFR nor the PETL document draws a strict distinction between unlawfulness and extrinsic carelessness and they are viewed together as uniform grounds for liability.⁴³ The joint view of unlawfulness and extrinsic carelessness is permitted not only through the fact that violation of the duty of care basically equals extrinsic carelessness but also because in both cases the general rule applies according to which the obligation to prove both the existence of the duty of care and the violation of it rests with the aggrieved party.

Article 1:101 of Book VI of the DCFR, which states the general rule for compensation for non-contractual damage, names legally relevant damage, which is defined in Article 2:101. This means that the violation of rights deserving legal protection is also primary in the DCFR in evaluation of conduct and hence has similarity to what is described in Article 4:102 of the PETL. Article 3:102 of Book VI of the DCFR, referring to extrinsic carelessness, is largely in accordance with the PETL approach. According to the approach of both model laws, it is necessary to evaluate whether the tortfeasor has violated a general objective standard of conduct. In this, the PETL approach takes into consideration factors stated in articles 4:102 (Section 1) and 4:103 and the DCFR's above-mentioned Article 3:102. An important provision with reference to the liability arising from violation of the duty of care is found in Section b of Article 3:102 of the DCFR's Book VI, which states that grounds exist for liability in behaviour that does not directly violate a certain provision of the law (the provision protected) but nonetheless is not in conformity with the level of due diligence to be expected from a reasonably cautious person under the circumstances in question. The stated view is largely consistent with the theory of the unjust conduct of the act. According to both model laws, it has to be evaluated whether the particular violator's behaviour can be blamed, which means the establishing of the existence of extrinsic carelessness (Article 4:102, Section 2 of PETL) as the last step in ascertaining liability. Unlike the PETL, Article 3:103 of the DCFR takes extrinsic carelessness into consideration only in view of the violator's age, ignoring other subjective factors arising from the violator as grounds for mitigating or excluding liability.

The author finds that neither BGB, nor DCFR or PETL methods are suitable for adjudication of cases based on the claim of violation of a duty of care pursuant to the LOA. The unsuitability arises from §1050 (1) of LOA, which provides for distribution of the burden of proof on the basis of the prevailing presumption of fault in cases stemming from violation of duties of care. As mentioned in §4.1, above, in order to adhere to §1050 (1) of LOA, one should formally separate unlawfulness and extrinsic carelessness despite their substantial similarity. Such a solution imposes the burden of proof of the existence of a duty of care on the victim, and the burden of proof of having fulfilled a duty of care rests with the tortfeasor. In consideration of the aforesaid and in line with the Estonian law of delict—i.e., the presumption of fault—the author proposes the traditional general composition of delict for adjudication of a case based on the violation of a duty of care, which could methodically be the following:

- 1) Establishment of the consequence of the offence: violation of the protected legal right, which is to be proved by the plaintiff.
- 2) Establishment of whether the defendant had a duty of care. Here the plaintiff has to prove that the defendant created or controlled a danger that was actualised and that he or she was, under the given circumstances, bound to a certain behavioural standard that objectively obliged him or her to take all reasonably necessary, suitable, and affordable measures to protect the defendant against the actualisation of the danger. In determination of the existence of a duty of care, the main focus is given to the degree of the offence, probability of damage and amount of costs, and efforts that would have been necessary to avoid or remove the danger. The greater the damage, the higher the probability of damage, and the lower the objective costs and the amount of effort required to avoid

⁴² *Ibid.*, p. 1048.

⁴³ G. Wagner. The Law of Torts in the Draft Common Frame of Reference. Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1394343 (most recently accessed on 1.5.2012); P. Widmer. Principles of European Tort Law, Text and Commentary. European Group on Tort Law. Springer, Wien, & NewYork 2005, p. 81.

the damage, the greater the likelihood that the defendant had a duty of care for avoiding or eliminating the danger.*⁴⁴

- 3) Assessment of whether the behaviour violated the duty of care. Here, in light of the fact of causing of damage and on the basis of §1050 (1) of LOA, it must be presumed that the defendant has violated the objective behavioural standard proved to exist by the plaintiff and that the defendant's behaviour was unlawful. The defendant must provide evidence to disprove this presumption. For that, the defendant may prove that he or she had a foundation for justification of such behaviour (§1045 (2) of LOA) and/or provide evidence of following extrinsic care (§1050 (1) of LOA). If the defendant is unable to prove either the facts precluding unlawfulness or following of extrinsic care, one has to conclude that the defendant has violated a duty of care and that his or her behaviour has been unlawful.
- 4) The causality that causes the liability, consisting in explaining the causal relationship between the violation of the duty of care and the damage to the legal right (*conditio sine qua non*; §127 (4) of LOA), has to be established as the first stage of the causal relationship. For this, a replacement-based method has to be used, wherein the unlawful behaviour of the defendant is replaced by a lawful act to verify whether lawful behaviour would have prevented such consequences. As the second stage of the causal relationship the lawful reason for liability has to be clarified, consisting in the establishment of the relationship between the damage caused and the purpose of implementing a duty of care, which means verification of whether the purpose of the duty of care was to prevent the damage that was caused to the victim in this particular case. This has to do with the scope of protection in the case of the particular duty of care and the extent of the damage to be compensated for. In addition to determining the two stages of the causal relationship in order to follow the principle of double-causality, here attention has to be paid also to the two-level nature of the causal relationship. For this, in addition to determining the causal relationship between the violation of the duty of care and the unlawful consequence (liability inflicting causality) it has to be also determined if the unlawful consequence was the reason for the particular damage (liability fulfilling causality). The burden of proof of the circumstances of the causal relationship lies on the plaintiff on both stages and levels of the causal relationship, except when being firsthand different due to law or judicial practice.
- 5) Establishment of the delictual capacity of the defendant, lack of which must be proved by the defendant. A person is deemed to have delictual capacity if he or she is capable of understanding that the violation of a duty of care was unlawful (§1052 (2) of LOA).
- 6) Establishment of the following of intrinsic care by the defendant, which means proof of whether violation of objective care requirements by the defendant can be subjectively excused (§1050 (2) of LOA). If extrinsic care was not followed, failure to follow intrinsic care is presumed, but the tortfeasor is given an opportunity to prove otherwise.*⁴⁵

It is important to follow the structure in order to ensure the logic of the determination and guarantee economical proceedings. Similar to the traditional general composition of delict, the scheme proposed by the author relies on the principle that the elements of an act are established in stages—in the order listed above. If any of the elements is missing, there will be no evaluation of the next element in the sequence.

Consideration of the concept of duties of care adds further criteria to both objective elements of an act and unlawfulness, incorporating these criteria therein, and promotes the establishment of extrinsic carelessness relative to that in the traditional general composition of delict. Therefore, in the case of the methodical scheme proposed by the author, it is impossible to place the elements of an act, unlawfulness, and fault on completely separate levels in the conventional way; furthermore, the author sees no practical need to do so. The proposed scheme however, allows for distinction among

- 1) Consequence,
- 2) Establishment of a behavioural standard,
- 3) Unlawfulness and extrinsic carelessness,
- 4) Causal relationship and the purpose of a duty of care, and
- 5) The level of establishing subjective components of fault.

⁴⁴ Raab (see Note 13), p. 1044.

⁴⁵ Deutsch, Ahrens (see Note 27), p. 126.

The structure of the general composition of delict provided for in the LOA is not limited to absolute legal rights. Besides the rights to life, physical and mental health, freedom, property, and similar rights, protection is granted for personality rights (§1045 (1) 4) and §§ 1046 and 1047 of LOA) and the right to established and functional economic activities (§1045 (1) 6) and §1049 of LOA). Violation of these rights is possible through the neglect of duties of care. These delicts are characterised by the fact that the unlawfulness seen in the general composition of delict must be established via a separate decision. If the delicts in question are based on the violation of a duty of care, then on the level of the establishment and violation of a duty of care further provisions should be applied to establish unlawfulness (§§ 1046, 1047 and 1049 of LOA) and take into account the factors covered in those provisions. Should the victim rely on the claim that the tortfeasor violated the particular duty of care intentionally (§104 (5) of LOA), the delict structure should consider the exception that the intent as the form of fault should be proved by the victim.

The only elements the tortfeasor should prove are any facts that preclude unlawfulness (§1045 (2) of LOA), delictual incapacity (§1050 (2) of LOA), and facts precluding intent (which, according to the theory of intent, include unawareness of the unlawful nature of the behaviour and, according to the theory of fault, incorrect understanding of the facts of the violation of law).^{*46}

5. Conclusions

The methodical appearance of a delictual structure in the case of violation of a duty of care depends on the structural level at which the violation of a duty of care is verified. The position of control, in turn, depends on the criteria considered in establishment of the existence and violation of a duty of care and what deviations in elements may occur. Given that recognition of the concept of duties of care adds further criteria to the assessment of almost all elements of the general composition, the verification of answers does not allow relying on the traditional three-level composition of a delict. Difference between use of the BGB, DCFR, or PETL approach and the LOA approach is caused by §1050 (1) of LOA, which, unlike §823 (1) of BGB, relies on the presumption of fault of the tortfeasor. For one to follow the presumption of fault, unlawfulness and extrinsic carelessness must be formally separated, regardless of their substantial similarity. In this case, the victim has to prove the existence of a duty of care, and the tortfeasor has to prove adherence to a duty of care. The author believes that such an approach has several advantages for adjudication of cases based on violation of a duty of care. The main advantages are the removal of the duty to prove a negative fact on the part of the aggrieved party, the placing of the obligation of proof with the party in whose 'internal sphere' the facts that have to be proved are positioned, the facilitation of court proceedings, more reliable proof, and the preventive effect with respect to violation of duties of care.

⁴⁶ I. Kull, M. Käerdi, V. Kõve. *Võlaõigus I. Üldosa* (Law of Obligations I. General Part). Tallinn: Juura 2004, p. 200 (in Estonian).



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Vertragsfreiheit und ihre Grenzen im Ehevertragsrecht

1. Einführung

Dem Familienrecht ist im estnischen Recht ein relativ hohes Maß an Imperativität zu eigen, so sind die Form der Eheschließung und ihre rechtlichen Folgen gesetzlich festgelegt worden, auch sind die Rechte und Pflichten der Eltern und des Kindes vom Gesetzgeber festgelegt worden. Es handelt sich aber nicht um ein Spezifikum des estnischen Rechts und in der juristischen Literatur wird daher der Standpunkt vertreten, dass die imperativen Normen, die im Familienrecht enthalten sind, teilweise unter den Regulierungsbereich des öffentlichen Rechts fallen (zum Beispiel die Eheschließung und ihre rechtlichen Folgen).^{*1} Auch die güterrechtlichen Beziehungen der Ehegatten, deren privatrechtlicher Charakter nicht angezweifelt werden dürfe und welche wegen der Natur ihrer Interessen dem freien Willen der Eheleute zur Gestaltung überlassen werden sollten, sind vom Gesetzgeber doch genau festgelegten Regeln unterworfen.

Am 1. Juli 2010 trat in Estland das neue Familiengesetz^{*2} (FamG) in Kraft. Die vermögensrechtlichen Verhältnisse zwischen den Ehepartnern werden vom Kapitel vier FamG geregelt. Im Vergleich zu dem früher geltenden Recht^{*3} haben im neuen Gesetz vor allem die vermögensrechtlichen Verhältnisse der Ehepartner umfangreiche Reformen durchgemacht. Als das Wichtigste sollte die Vereinheitlichung der vermögensrechtlichen Verhältnisse eingestuft werden, d. h. das FamG legt ausgehend vom Grundsatz des im Sachenrecht überwiegenden sog. *numerus clausus* die Arten der vermögensrechtlichen Verhältnisse fest^{*4}, woraus die Ehepartner sich die nur unter im Gesetz genau festgelegten Typen geeignete auswählen können, um ihre Vermögensbeziehungen zu regeln.^{*5} Neben der Auswahl der vermögensrechtlichen Verhältnisse (oder stattdessen) können die Ehepartner auch einen Ehevertrag abschließen. Ungeachtet der Tatsache, dass es sich um den Ausdruck eines Grundprinzips des Privatrechts – der Privatautonomie – handelt:

¹ E. Koch. – Münchener Kommentar zum Bürgerlichen Gesetzbuch. Band 7. Familienrecht I. 5. Aufl. München: C.H. Beck 2010, Einl., Rn. 41.

² Perekonnaseadus. – RT I 2009, 60, 395; RT I, 29.12.2011, 1 (auf Estnisch). Englische Übersetzung zugänglich über die Homepage: <http://www.legaltext.ee/> (5.4.2012).

³ Perekonnaseadus (Familiengesetz). – RT I 1994, 75, 1326 (auf Estnisch). Das frühere Familiengesetz ist am 1.1.1995 in Kraft getreten. Englische Übersetzung zugänglich auf: <http://www.legaltext.ee/> (5.4.2012).

⁴ P. Bassenge. – Palandt. Bürgerliches Gesetzbuch. 70. Aufl. München: C.H. Beck 2011, Einl. § 854 Rn. 3; K. Larenz, M. Wolf. Allgemeiner Teil des Bürgerlichen Rechts. 8. Aufl. München: Beck 1997, § 34 Rn. 47; F. Baur, R. Stürner. Sachenrecht. 18. Aufl. München: Beck 2009, § 1 Rn. 10; P. Pärna. Asjaõigusseadus. Kommenteeritud väljaanne (Sachenrechtsgesetz. Kommentierte Auflage). Tallinn 2004, S. 33 (auf Estnisch). S. Perekonnaseaduse eelnõu (55 SE III) seletuskiri (Die Erläuterung zu dem Entwurf des Familiengesetzes (55 SE III)). Zugänglich über die Homepage: <http://www.riigikogu.ee> (22.02.2010) (auf Estnisch).

⁵ Perekonnaseaduse eelnõu seletuskiri (Fn. 4).

in § 19 Abschnitt 1 der Verfassung der Republik Estland⁶ gehört die Vertragsfreiheit zu den geschützten Gegenständen⁷, ist der Ehevertrag mehreren sowohl direkt vom Gesetz ausgehenden als auch den allgemeinen Grundsätzen des Privatrechts entspringenden Einschränkungen unterworfen. Grundsätzlich ist aber niemand auch im Familienrecht zu einem Abschluss eines Vertrages verpflichtet, d. h. beide Parteien können einen Vertrag abschließen, indem sie vom Selbstbestimmungsrecht ausgehen⁸, aber die Freiheit, den Inhalt des Ehevertrages als den eines Geschäfts zu gestalten, ist eingeschränkt. Im Folgenden werden das rechtliche Wesen des Ehevertrages, die Voraussetzungen seines Abschlusses und die Möglichkeiten, seinen Inhalt zu gestalten, analysiert. Die Autorinnen versuchen eine Antwort auf die Frage zu finden, wie viel Raum bleibt beim Abschließen eines Ehevertrages der Privatautonomie der Ehepartner und wie unterscheidet man einen Ehevertrag von weiteren güterrechtlichen Abmachungen zwischen den Ehepartnern. Da das Vorbild für das neue estnische Familiengesetz größtenteils das deutsche Familienrecht war, werden einzelne Rechtsinstitute vergleichend zu dem deutschen Recht betrachtet.

2. Ehevertrag als ein Rechtsgeschäft

2.1. Allgemeines

Ehevertrag ist ein Rechtsinstitut, das eine gegenseitige Vereinbarung zwischen den Ehepartnern über die Regelung ihrer vermögensrechtlichen Verhältnisse untereinander beinhaltet.⁹ Der Kommentar, der von dem estnischen Justizministerium dem Entwurf des Familiengesetzes beigelegt wurde, spricht über den Ehevertrag wie über eine Vereinbarung, die im vollen Maße oder in einem entsprechend festgelegten Maße das frühere Regime, das bezüglich der vermögensrechtlichen Verhältnisse der Ehepartner galt, verändert.¹⁰ Solch eine Definition, die ein bereits existierendes vermögensrechtliches Verhältnis unter den Ehepartnern, das der Ehevertrag ändern soll, voraussetzt, ist jedoch etwas irreführend. Ein Ehevertrag setzt bezüglich der vermögensrechtlichen Verhältnisse der Ehegatten kein Vorhandensein eines bereits gültigen güterrechtlichen Regimes voraus. Laut § 59 Abs. 2 FamG kann ein Ehevertrag sowohl vor der Eheschließung als auch während der Ehe abgeschlossen werden. Ein Ehevertrag, der vor der Eheschließung abgeschlossen wurde, wird am Tag der Eheschließung gültig. Somit kann mit einem Ehevertrag auch eine Regelung der vermögensrechtlichen Verhältnisse der Ehegatten festgelegt werden, die durch das Inkrafttreten der Ehe gültig wird. Falls die Ehegatten bei der Eheschließung bezüglich ihrer vermögensrechtlichen Verhältnisse eine Wahl getroffen haben, können sie dies mit einem Ehevertrag ändern. Wenn die Ehegatten keine vermögensrechtlichen Verhältnisse auswählen, dann werden gemäß § 24 Abs. 2 FamG auf die vermögensrechtlichen Verhältnisse der Ehegatten die vermögensrechtlichen Verhältnisse einer Gütergemeinschaft der Ehegatten angewandt.¹¹ Auch diese vermögensrechtlichen Verhältnisse können die Ehegatten mit Hilfe eines späteren Ehevertrages ändern.

Da es sich im Allgemeinen um ein zweiseitiges Rechtsgeschäft handelt, sind dann auf den Ehevertrag auch alle allgemeinen Bestimmungen, welche die Gültigkeit der Rechtsgeschäfte regeln, anwendbar – dies sowohl im Bezug auf den Vertragsabschluss als auch seine Gültigkeit.

⁶ Põhiseadus. – RT 1992, 26, 349; RT I, 27.4.2011, 1 (auf Estnisch). Englische Übersetzung zugänglich über die Homepage: <http://www.legaltext.ee/> (5.4.2012).

⁷ Eesti Vabariigi Põhiseadus. Kommenteeritud väljaanne (Verfassung der Republik Estland. Kommentierte Auflage). 2. überarbeitete Auflage. Tallinn 2008, S. 198 (auf Estnisch). § 27 Abschnitt 2 der Verfassung der Republik Estland sichert den Ehepartnern die Gleichberechtigung im Bereich des Ehe- und Familienrechts zu, dies umfasst auch die Vermögensverhältnisse der Ehepartner. Eesti Vabariigi Põhiseadus. Kommenteeritud väljaanne (Fn. 7), S. 198.

⁸ A.-M. Kaulbach. Typenzwang im BGB? – Juristische Schulung 2011, S. 398.

⁹ So auch J. Gernhuber, D. Coester-Waltjen. Familienrecht. 6. Aufl. München: C.H. Beck 2010, § 32 I, S. 354; W. Schlüter. BGB-Familienrecht. 11. Aufl. Heidelberg: C. F. Müller 2005, S. 69.

¹⁰ So auch Perekonnaseaduse eelnõu seletuskiri (Fn. 4).

¹¹ Die Autorinnen möchten an dieser Stelle die Aufmerksamkeit auf die bei der Umsetzung des neuen FamG in der Praxis entstandenen Probleme lenken. Nämlich sind laut des am 1. Juli 2010 in Kraft getretenen Erlasses des Regionalministers für Personen, die heiraten wollen, drei Formen der vermögensrechtlichen Verhältnisse wählbar, jedoch fehlt wegen des Aufbaus des Antragsformulars praktisch die Möglichkeit, die Art der vermögensrechtlichen Verhältnisse nicht auszuwählen. Das letztere entspricht aber nicht der Intention des Gesetzgebers und legt ungewollt den Standesbeamten die Verpflichtung auf, die vermögensrechtlichen Verhältnisse zu erläutern. S. Perekonnaseaduse eelnõu seletuskiri (Fn. 4). Die Autorinnen möchten an dieser Stelle die Aufmerksamkeit auf die bei der Umsetzung des neuen FamG in der Praxis entstandenen Probleme lenken. Nämlich sind laut des am 1. Juli 2010 in Kraft getretenen Erlasses des Regionalministers für Personen, die heiraten wollen, drei Formen der vermögensrechtlichen Verhältnisse wählbar, jedoch fehlt wegen des Aufbaus des Antragsformulars praktisch die Möglichkeit, die Art der vermögensrechtlichen Verhältnisse nicht auszuwählen. Das letztere entspricht aber nicht der Intention des Gesetzgebers und legt ungewollt den Standesbeamten die Verpflichtung auf, die vermögensrechtlichen Verhältnisse zu erläutern. S. Perekonnaseaduse eelnõu seletuskiri (Fn. 4).

Die rechtliche Bedeutung des Ehevertrages gegenüber den Dritten wird im § 61 Abs. 2 und 3 FamG festgelegt. Haben die Ehegatten den gesetzlichen Güterstand ausgeschlossen oder geändert, so haben diese Veränderungen nur dann einer Dritten gegenüber rechtliche Bedeutung, wenn der Ehevertrag im Güterrechtsregister eingetragen oder der Dritten bekannt war.

2.2. Das Wesen des Ehevertrages

In der estnischen Rechtsliteratur vertritt man klar und deutlich die Auffassung, dass ein Ehevertrag ein Verfügungsgeschäft ist.^{*12} Beide Seiten verfügen über die Möglichkeit, mit Hilfe eines Ehevertrages das sachenrechtliche Regime des den Ehegatten gehörenden Vermögens zu regeln – so könnte ein Ehevertrag wie eine Verfügung behandelt werden, welche die Anwendung der gesetzmäßigen rechtlichen Regelung auf die vermögensrechtlichen Verhältnisse der Ehegatten aufhebt und die sachenrechtliche Zugehörigkeit des Vermögens der Ehegatten verändert oder die sachenrechtliche Zugehörigkeit, die dem Inkrafttreten der Ehe voranging, beibehält. So wird mit dem Abschluss eines Ehevertrages, falls die Ehegatten zur Regelung ihrer vermögensrechtlichen Verhältnisse das Regime der Gütergemeinschaft ausgewählt haben, kraft Gesetzes, d. h., ohne dass es jeweils einer Übertragung durch Rechtsgeschäft bedarf, das im Laufe der Gütergemeinschaft der Ehegatten erworbene Vermögen zum gemeinschaftlichen Vermögen beider Ehegatten.^{*13} Man könnte sich mit dieser Herangehensweise sogar einverstanden erklären, wenn man von der engen Auslegung des Ehevertragsbegriffs ausgeht. Denn aufgrund des neuen Familiengesetzes sollten jene mit der ehelichen Beziehung verbundenen materiellen Verpflichtungen, die nicht mit den Eigentumsbeziehungen des Vermögens verbunden sind, außerhalb des Regelungsbereiches des Ehevertrages liegen.^{*14} Gleichzeitig ist zum Beispiel die im § 28 Abschnitt 2 FamG den Ehegatten mit einem Ehevertrag gegebene Möglichkeit, das Verwaltungsrecht des gemeinschaftlichen Eigentums einem Ehegatten zu übergeben, seinem Wesen nach keine sachenrechtliche Vereinbarung, sondern eine schuldrechtliche Vereinbarung (in den Eigentumsbeziehungen fanden ja keine Veränderungen statt). Das neue Familiengesetz brachte auch den Begriff der Unterhaltsvereinbarung mit sich (s. § 79 FamG), was dazu beitragen sollte, alle Anordnungen, die nicht das Sachenrecht direkt beeinflussen, aus dem Ehevertrag auszuschließen. In der Praxis werden voraussichtlich aber auch weiterhin die Vereinbarungen bezüglich des Unterhalts zusammen mit dem Ehevertrag abgeschlossen. Deshalb vertreten die Autorinnen die Meinung, dass die erwähnte Veränderung im Familiengesetz, die zu einem Abschluss mehrerer selbständiger Vereinbarungen führen sollte, nicht berechtigt ist. Auch die estnische Rechtstheorie sollte weiterhin den ausgeweiteten Begriff des Ehevertrages verwenden^{*15}, gemäß dem die Ehegatten mehrere verschiedene Vereinbarungen in einem Vertrag zusammenfassen könnten. Bei der Vertragsauslegung bleiben im rechtlichen Sinne im Regelungsbereich des Ehevertrages jene Vertragsbestimmungen, die direkt die sachenrechtliche Zugehörigkeit des Vermögens der Ehegatten verändern. Diese Vereinbarungen unter den Ehegatten aber, die zwar in den Ehevertrag aufgenommen worden sind, aber an sich auch ohne die für einen Ehevertrag vorgesehene Formanforderungen gültig wären, sind zwar im rechtlichen Sinne selbständige Vereinbarungen, können aber auch in einem Ehevertrag enthalten sein. So würden die Parteien das Treffen juristisch komplizierter getrennter Vereinbarungen vermeiden können. So befand auch das estnische Staatsgericht in seiner neuesten Entscheidung Nr. 3-2-1-149-11 vom 6. Februar 2012, die den Ehevertrag behandelte, dass „das Dokument des Ehevertrages auch Vereinbarungen der Ehegatten über die vorehelichen Vermögensfragen beinhalten darf, obwohl sie laut dem Gesetz nicht den Regelungsgegenstand des Ehevertrages darstellen“^{*16}. Dies unterstützt den Standpunkt der Autorinnen über die breitere Auslegung des Ehevertrages. In der erwähnten Entscheidung vertrat das Staatsgericht den Standpunkt, dass die in dem Ehevertrag vorhandene Vereinbarung vor allem als ein Schuldbekennnis über die Verpflichtung der Vergütung der für eine unbewegliche Sache gemachten oder in der Zukunft zu entstehenden Kosten auslegbar sind.

¹² So V. Kõve. *Varaliste tehingute süsteem Eestis*. Doktoritöö (Das System der Vermögensgeschäfte in Estland. Dissertation). Tartu: Tartu Ülikooli Kirjastus 2009, S. 309 (auf Estnisch). Zugänglich über die Homepage: http://tartu.ester.ee/search~S1*est?/.b2421770/.b2421770/1,1,1,B/1856~b2421770&FF=&1,0,,1,0 (5.4.2012) (Zusammenfassung auf Deutsch).

¹³ So U. Carlberg. – H. Scholz, N. Kleffmann, S. Motzer. *Praxishandbuch. Familienrecht*. 22. Ergänzungslieferung. München: C.H. Beck 2012, Rn. 103.

¹⁴ *Perekonnaseaduse eelnõu seletuskiri* (Fn. 4).

¹⁵ Vgl. zum Begriff des erweiterten Ehevertrags G. Langenfeld. *Handbuch der Eheverträge und Scheidungsvereinbarungen*. 6. Aufl. München: C.H. Beck 2011, Rn. 3.

¹⁶ S. P. 18. Zugänglich über die Homepage: <http://www.riigikohus.ee> (5.4.2012) (auf Estnisch).

Auch bedingte Eheverträge sollten im Allgemeinen erlaubt sein.^{*17} In der oben erwähnten Entscheidung erteilte das Zivilkollegium des Staatsgerichts einem Gericht erster Instanz eine deutliche Direktive, indem es vermerkte, dass es bei der Auslegung des Vertrages wichtig sei, dass die Verpflichtung des Beklagten, Geld zu zahlen nur bei der Scheidung der Ehe oder einer Veräußerung der unbeweglichen Sache entstehen sollte, d. h. es handelte sich um eine getroffene Vereinbarung mit einer verschiebenden Bedingung. Dies verweist auf die Möglichkeit, dass auch die Kausalbeziehung derart verändert worden ist, dass die anerkannte Schuld nur im Falle der Enteignung der unbeweglichen Sache oder der Scheidung der Ehe zur Zahlung gebracht werden kann. Die Autorinnen vertreten trotzdem die Auffassung, dass Bedingungen nicht aufgrund einer anderen rechtlichen Grundlage ungültig sein können, zum Beispiel ist gemäß § 120 Abschnitt 2 des Sachenrechtsgesetzes^{*18} ein Sachenrechtsvertrag über die Übergabe einer unbeweglichen Sache nichtig, der bedingt oder unter der Festlegung eines Termins abgeschlossen worden ist. Nach der Meinung der Autorinnen sollte nach dem estnischen Recht auch der Abschluss eines Vorvertrages erlaubt sein, was aber die Form eines Ehevertrages beibehalten sollte.

Die Ehegatten können während der Ehe mehrere verschiedene Verträge, die ihre güterrechtlichen Verhältnisse regeln (z. B. Arbeitsverträge, Darlehensverträge u. a.), abschließen. Zusätzlich zu den Formanforderungen, die für einen Ehevertrag verbindlich sind, hilft bei der Unterscheidung der Eheverträge von anderen Verträgen auch die Tatsache, ob die Voraussetzung des Geschäftes eine gültige Ehe ist oder nicht.^{*19} Wenn die Vereinbarung unter den Ehegatten die Formanforderungen eines Ehevertrages beinhaltet, dann kann es sich auch dann um einen Ehevertrag handeln, wenn die Parteien beim Abschluss des Vertrages nicht direkt auf den Ehevertrag verwiesen. So fand das Staatsgericht in seiner Entscheidung Nr. 3-2-1-160-04 vom 2. Februar 2005^{*20} bei der Auslegung eines Vertrages unter den Ehegatten, dass es möglich ist, dass die Ehegatten gleichzeitig zum Abschluss eines Kaufvertrages über eine unbewegliche Sache auch einen Ehevertrag abschlossen. Ob die in einem Kaufvertrag erhaltene Vereinbarung, ein Grundstück in Miteigentum zu erwerben, als ein Ehevertrag zu behandeln ist, hängt davon ab, ob die Vereinbarung in ihrem Grundwesen einem Ehevertrag entspricht und ob die nötigen Formanforderungen erfüllt sind.

3. Vertragsschluss

Den Ehevertrag müssen die Eheleute gemäß § 60 FamG vor einem Notar abschließen. Der Formzwang dient der Warnung der Parteien, der Beweissicherheit und zwingt sie, sich beraten zu lassen.^{*21}

Nach dem neuen Familienrecht ist die persönliche Anwesenheit der Parteien beim Abschluss des Ehevertrages vorgesehen (s. § 60 FamG), d. h. dass die Stellvertretung (sowohl gewillkürte als auch gesetzliche^{*22}) ausgeschlossen ist.^{*23}

¹⁷ Vgl. zu den Bedingungen im Ehevertrag R. Kanzleiter. – Münchener Kommentar zum Bürgerlichen Gesetzbuch. Band 7. Familienrecht I. 5. Aufl. München: C.H. Beck 2010, § 1408 Rn. 4.

¹⁸ Asjaõigusseadus. – RT I 1993, 39, 590; RT I, 29.6.2011, 1 (auf Estnisch). Englische Übersetzung zugänglich über die Homepage: <http://www.legaltext.ee/> (5.4.2012).

¹⁹ S. auch J. Bredthauer. – H. Scholz, N. Kleffmann, S. Motzer. Praxishandbuch Familienrecht. 22. Ergänzungslieferung. München: C.H. Beck 2012. Teil T, Rn. 8.

²⁰ RT III 2005, 5, 48 (auf Estnisch).

²¹ S. die Entscheidung Nr. 3-2-1-49-03 des Staatsgerichts vom 13.5.2003. – RT III 2003, 19, 178 (auf Estnisch); K. Sein. – P. Varul, I. Kull, V. Kõve, M. Käerdi. Tsiviilseadustiku üldosa seadus. Kommenteeritud väljaanne (Das Gesetz über den Allgemeinen Teil des Zivilgesetzbuches. Kommentierte Auflage). Tallinn 2010, § 82, Komm. 3.1. ff (auf Estnisch). Die Beratungspflicht des Notars sieht § 18 Beurkundungsgesetz (Tõestamiseseadus. – RT I 2001, 93, 564; 2010, 38, 231 (auf Estnisch)) vor. Diese Funktionen der notariellen Beurkundung werden auch im deutschen Recht genannt, s. N. Dethloff. Familienrecht. 29. Aufl. München: C.H. Beck 2009, § 5 Rn. 6; J. Gernhuber, D. Coester-Waltjen (Fn. 9), § 32 Rn. 15; R. Kanzleiter (Fn. 17), § 1410 Rn. 1, 2; J. Mayer. – H. G. Bamberger, H. Roth. Beck'scher Online-Kommentar BGB. München: C.H. Beck 2012, § 1410 Rn. 1. Dabei können die Meinungen darüber, welcher von den Formzwecken im Vordergrund steht, bei den verschiedenen Autoren auseinander gehen. K. Sein ist der Meinung, dass im estnischen Recht die Beratungsfunktion beim Ehevertrag im Vordergrund steht, s. K. Sein. Tehingu vorminõuded ning nende järgimata jätmise tagajärjed (Die Formanforderungen eines Rechtsgeschäfts und die Folgen deren Nichtachtung). – Juridica 2010/7, S. 509 (auf Estnisch).

²² Anders dagegen das deutsche Recht, das eine persönliche Anwesenheit der Parteien nicht fordert. S. J. Gernhuber, D. Coester-Waltjen (Fn. 9), § 32 Rn. 17; N. Dethloff (Fn. 21), § 5 Rn. 7.

²³ S. P. Varul. – Tsiviilseadustiku üldosa seadus. Kommenteeritud väljaanne (Fn. 21), § 9, Komm. 3.1. Das alte Familiengesetz hat die persönliche Anwesenheit dagegen nicht vorgesehen, so dass auch die Stellvertretung beim Abschluss des Ehevertrages

Nach dem estnischen Recht wird man mit der Vollendung des 18. Lebensjahres voll geschäftsfähig (s. § 8 Abs. 2 das Gesetz über den Allgemeinen Teil des Zivilgesetzbuches, ZGB ATG^{*24}). Allerdings kann das Gericht nach den Vorschriften der Erweiterung der Geschäftsfähigkeit^{*25} die Geschäftsfähigkeit eines mindestens 15-jährigen Minderjährigen erweitern und ihn ermächtigen diejenigen Geschäfte uneingeschränkt zu tätigen, die für die Eheschließung und Ausübung der mit der Ehe verbundenen Rechte und Pflichten notwendig sind. Insbesondere sollten es die Rechte und Pflichten sein, die gemäß §§ 15–18 FamG vorgesehen sind (Haushaltsführung, Erwerbstätigkeit, Geschäfte zur Deckung des Lebensbedarfs, aber auch die Möglichkeit, das Güterrechtsverhältnis zu wählen und den Ehevertrag zu schließen).^{*26} Es könnte aber sein, dass das Gericht die Geschäftsfähigkeit des Minderjährigen für den Ehevertragsschluss nicht erweitert, insbesondere dann, wenn es einen Grund gibt, anzunehmen, dass der Entwicklungsstand des Minderjährigen den Abschluss eines so wichtigen Geschäftes nicht ermöglicht. Im letzten Fall bleibt nur die Möglichkeit, dass der Minderjährige für den Vertragsschluss die Zustimmung seines gesetzlichen Vertreters braucht (entsprechend dem § 11 ZGB ATG).^{*27}

4. Der Inhalt

Von einer Vertragsfreiheit (was im Allgemeinen sowohl die Freiheit ihn abzuschließen, als auch die Freiheit seinen Inhalt und seine Form frei zu gestalten bedeutet^{*28}) kann bei der Behandlung der Eheverträge nur in einem begrenzten Umfang die Rede sein. Eine Privatautonomie herrscht beim Abschließen eines Ehevertrages – es fehlt die Verpflichtung, einen Ehevertrag abzuschließen, also gilt die Freiheit einen Vertrag abzuschließen. Die Gestaltung des Vertragsinhalts ist aber vom Gesetzgeber begrenzt worden. Im Folgenden wird auf die einzelnen Begrenzungen eingegangen, die direkt aus dem Familiengesetz selbst folgen und auf die Einschränkungen, die sich nach der Meinung der Autorinnen aus den allgemeinen Prinzipien des Privatrechts ergeben.

4.1. Einschränkungen, die sich aus dem Familiengesetz ergeben

Das Familiengesetz, das vor dem 1. Juli 2010 galt, gab den Ehegatten vielseitige Möglichkeiten, um ihre vermögensrechtlichen Verhältnisse untereinander mit Hilfe von Eheverträgen zu regeln. Das neue Familiengesetz legte die Güterstandsregime fest, die bezüglich der vermögensrechtlichen Verhältnisse der Ehegatten erlaubt sind, was wiederum die Freiheit, den Inhalt des Ehevertrages zu gestalten, wesentlich veränderte, indem es sie mit bestimmten im ehelichen Güterrecht herrschenden Arten der Güterstandsregime begrenzte. Das FamG sieht als Güterstandsregime die Gütergemeinschaft, die Zugewinnsgemeinschaft und die Gütertrennung vor.^{*29}

Gemäß § 59 FamG können die Ehegatten mit einem Ehevertrag die von ihnen bei der Heirat getroffene Auswahl oder die aufgrund des Ehevertrages gültigen vermögensrechtlichen Verhältnisse aufheben,

möglich war, s. dazu R. Tiivel. Abikaasade varasuhetest abieluvararegistri ja kinnistusraamatu valguses (Über die Vermögensverhältnisse der Ehegatten im Lichte des Ehevertragsregisters und Grundbuchs). – *Juridica* 2005/7, S. 446 (auf Estnisch). Nach Kanzleiter wäre es aber auch im deutschen Recht sachgerechter, wenn man *de lege ferenda* den persönlichen Abschluss des Ehevertrages verlangen würde, s. R. Kanzleiter (Fn. 17), § 1410 Rn. 4: „während der Gesetzgebungsarbeiten zum GleichberG wurde dies bereits erörtert, damals aber schließlich nicht verwirklicht.“

²⁴ Tsiivilseadustiku üldosa seadus. – RT I 2002, 35, 216; 2010, 38, 231 (auf Estnisch). Englische Übersetzung zugänglich über die Homepage: <http://www.legaltext.ee/> (5.4.2012).

²⁵ Möglich ab dem 15. Lebensjahr, wenn es im Interesse des Minderjährigen ist und der Entwicklungsstand des Minderjährigen es ermöglicht, s. § 9 des Gesetzes über den allgemeinen Teil des Zivilgesetzbuches.

²⁶ S. P. Varul. – Tsiivilseadustiku üldosa seadus. Kommenteeritud väljaanne (Fn. 21), § 9, Komm. 3.1.

²⁷ *Ibid.*, § 9 Komm. 3.1; s. auch T. Göttig, T. Uusen-Nacke. Perekonnaõiguse seosed teiste tsiviilõiguse valdkondadega (Das Verhältnis des Familienrechts zu den anderen Zivilrechtsbereichen). – *Juridica* 2010/2, S. 88 (auf Estnisch).

²⁸ S. H. Heinrichs. – Palandt. Bürgerliches Gesetzbuch. 70. Aufl. München: C.H. Beck 2011, Einf. v. § 145 Rn. 7; K. Larenz. Lehrbuch des Schuldrechts. Erster Band. Allgemeiner Teil. 14. Aufl. München: C.H. Beck 1987, S. 42.

²⁹ T. Göttig, L. Hallik, T. Uusen-Nacke. Abielulahutuse õiguslik regulatsioon Eestis. Võrdlus Euroopa perekonnaõiguse printsiipidega abielu lahutamise ja lahutatud abikaasa ülalpidamise kohta. – *Juridica* 2006/4, S. 244–256. Zusammenfassung in englisch: Legal Regulation of Divorce in Estonia. Comparison With the Principles of European Family Law As Regards Divorce and Maintenance of a Divorced Spouse. – *Juridica Abstract* 2006/4, S. 244.

andere im Gesetz vorgesehene vermögensrechtliche Verhältnisse einführen oder in den im Gesetz vorgesehenen Fällen die vermögensrechtlichen Verhältnisse ändern. Was der Gesetzgeber mit der Veränderung der vermögensrechtlichen Verhältnisse genau beabsichtigt hat, bleibt der Rechtsprechung überlassen. Voraussichtlich ist jegliche Veränderung der vermögensrechtlichen Verhältnisse erlaubt, womit nicht die für das zu verändernde Güterstandsregime charakteristischen imperativen Anordnungen verändert werden, d. h. die Normen, welche die Interessen von einem Ehegatten oder Dritter schützen sollen. So können beide Seiten festlegen, welche Güter unter das Anfangsvermögen oder unter den Zugewinn fallen, ob ein konkreter Gegenstand unter das Miteigentum der Ehegatten oder unter die Gütertrennung eingeordnet werden sollte; auch können sie in Fragen von Verfügungsbeschränkungen zu einem Übereinkommen gelangen, zum Beispiel vereinbaren, dass für die Veräußerung der einzelnen Vermögensgegenstände die Zustimmung der beiden Ehegatten erforderlich ist.^{*30} Also dürfte es in Bezug auf die Gültigkeit des Ehevertrages nicht von Bedeutung sein, wie groß der Regulierungsbereich des von den Ehegatten gewünschten Ehevertrages ist: ob er nur einzelne Bestandteile des Vermögens oder das ganze Vermögen der Ehegatten als eine Ganzheit umfasst. Gemäß § 27 Abschnitt 4 FamG können mit einem Ehevertrag einzelne Gegenstände oder Gegenstände, die einer bestimmten Art zugeordnet werden können, unter das gemeinschaftliche Vermögen oder unter die Gütertrennung fallen. Natürlich wäre es aus der Sicht der Rechtsklarheit besser, falls der Regelungsbereich des Vertrages das gesamte den Ehegatten gehörende Vermögen umfassen würde^{*31}, aber rechtsgültig sind auch Vereinbarungen, welche die rechtliche Zugehörigkeit einzelner Vermögensgegenstände regeln. Die Bestimmung der Zugehörigkeit der einzelnen Vermögensgegenstände sollte im Rahmen aller von den Ehegatten ausgewählten Güterstandsregime erlaubt sein. Da seit dem Inkrafttreten des neuen Familiengesetzes nur wenig Zeit vergangen ist, ist in der Praxis die Auffassung verbreitet, dass im Falle des Regimes der Gütertrennung in Bezug auf die einzelnen Vermögensgegenstände der Ehegatten keine Vereinbarungen mit Hilfe eines Ehevertrages über die Zugehörigkeit dieses Gegenstandes in das gemeinschaftliche Vermögen der Ehegatten getroffen werden dürfen. Solch ein Standpunkt ist laut Auffassung der Autorinnen des Artikels irreführend und rechtstheoretisch fraglich. Das gemeinschaftliche Eigentum kann laut § 70 Abs. 2 des Sachenrechtgesetzes gesamthänderisches Eigentum oder Miteigentum sein. Es widerspreche dem Wesen der Gütertrennung, die Vermögensgegenstände durch den Ehevertrag in das gesamthänderische Eigentum zu überlassen, wohl können die aber als Miteigentum bestimmt werden.

4.2. Grenzen der Vertragsfreiheit bezüglich der Scheidungsfolgen im Ehevertrags- und Scheidungsfolgenrecht

In Deutschland besteht hinsichtlich der Regelung der gesetzlichen Scheidungsfolgen wie z. B. Zugewinnausgleich, Versorgungsausgleich und nachehelicher Unterhalt grundsätzlich Ehevertragsfreiheit.^{*32}

Wie schon oben erwähnt, sind auch in Estland die Normen über die güterrechtlichen Beziehungen der Ehegatten generell dispositiv. Neben einem Ehevertrag können die Ehegatten auch Unterhaltsverträge schließen und die Unterhaltspflicht im Prinzip anders bestimmen, als das Gesetz es vorsieht.^{*33} Auch Unterhaltsverträge unterliegen der notariellen Form (s. § 78 Abs. 1 FamG). Nur für einen Unterhaltsvertrag ist im § 78 Abs. 2 FamG vorgesehen, dass eine Vereinbarung, nach der die Unterhaltspflicht des geschiedenen Ehegatten ausgeschlossen oder unangemessen eingeschränkt wird, nichtig ist.

Dagegen ist nach dem alten Recht in § 9 des Familiengesetzes von 1995 vorgesehen, welchen Inhalt der Ehevertrag haben kann, d. h. worin die Ehegatten sich einigen können und worin eine Vereinbarung ausgeschlossen ist. Gemäß § 9 Abs. 2 FamG (1995) konnten die Ehegatten durch Ehevertrag das Vermögen, das ein Ehegatte von einer Dritten unentgeltlich oder von Todes wegen erwirbt, wenn die Dritte bei der Zuwendung oder der Erblasser durch letztwillige Verfügung bestimmt hat, dass der Erwerb ein getrenntes Vermögen des Ehegatten bilden soll, nicht zum gemeinschaftlichen Vermögen erklären, darüber hinaus

³⁰ Perekonnaseaduse eelnõu seletuskiri (Fn. 4).

³¹ S. J. Gernhuber, D. Coester-Waltjen (Fn. 9), § 32 I, S. 354.

³² G. Langenfeld (Fn. 15), 1. Kapitel: Grundlagen, Rn. 52.

³³ Nach dem neuen Familiengesetz hat ein geschiedener Ehegatte Unterhaltsanspruch gegen den anderen geschiedenen Ehegatten im Falle der Betreuung eines unter 3-jährigen gemeinsamen Kindes (§ 72 FamG) oder wegen Alters oder Krankheit (§ 73 FamG).

konnten die Ehegatten durch Ehevertrag nicht die gesetzliche Unterhaltspflicht des Ehegatten oder des geschiedenen Ehegatten oder das Recht das gemeinschaftliche Vermögen nach der Ehescheidung zu teilen, ausschließen.

Das bedeutet, dass es auch nach dem neuen estnischen Familienrecht in der Zukunft im größeren Umfang im Ermessen des Gerichtes liegt, wo die Grenzen der Vertragsfreiheit laufen.

Der Bundesgerichtshof in Deutschland hat im Bereich des Scheidungsfolgenrechts eine so genannte familienrechtliche Kernbereichslehre mit einer Stufenfolge entwickelt.^{*34} Auf der ersten Stufe stand früher der Betreuungsunterhalt, weil er am Kindeswohl ausgerichtet sei und deswegen nicht der freien Disposition der Ehegatten unterliegen könne; jedoch war er aber nicht jeder Modifikation entzogen, z. B. wenn die Art des Berufs der Mutter es erlaubte, die Kinderbetreuung und Erwerbstätigkeit miteinander zu vereinbaren, ohne dass das Kind Erziehungseinbußen erlitt, oder wenn ab einem bestimmten Kindesalter zur Betreuung die Dritten hinzugezogen werden konnten.^{*35}

Durch das neue Unterhaltsrecht ist aber der Rahmen für ehevertragliche Vereinbarungen erweitert worden, die Kernbereichslehre tritt in den Hintergrund.^{*36} Nach dem neuen Recht ist für Unterhaltsvereinbarungen eine Beurkundungspflicht vorgesehen (s. § 1585c S. 2 BGB^{*37}), mit der ausdrücklich die grundsätzliche Gestaltungs- und Vertragsfreiheit auch in diesem Bereich bestätigt wird. Darüber hinaus sieht § 1569 BGB nun den Grundsatz der nahehelichen Eigenverantwortung ausdrücklich im Gesetz vor, die wiederum für eine größere Vertragsfreiheit spricht.^{*38} Dies gebietet entsprechend dem neuen Recht auch eine zeitliche Begrenzung des Kindesbetreuungsunterhalts.^{*39}

Nach Langenfeld müssen alle Ansprüche, die ein Richter nach den jetzigen gesetzlichen Instrumentarien durch seine Unterhaltsentscheidung kürzen, herabsetzen oder sogar versagen kann, bei Vorliegen der entsprechenden sachlichen Voraussetzungen auch von den Ehegatten durch privatautonome ehevertragliche Gestaltung entsprechend geregelt werden können.^{*40}

Dabei ist aber zu beachten, dass es beim Kindesbetreuungsunterhalt auch um verfassungsrechtlich gewährleistete Rechte des betroffenen Kindes geht. Der Basisunterhalt für die Mindestzeit von drei Jahren nach § 1570 Abs. 1 S 1 BGB ist unabhängig davon ausgestaltet, ob eine Versorgung des Kindes durch die Dritten möglich ist, er schließt i. d. R. eine Erwerbsobliegenheit aus.^{*41}

Wenn der Kindesbetreuungsunterhalt für mindestens drei Jahre in Deutschland verfassungsrechtlich geschützt wird, dann hat die estnische Gerichtspraxis schon bereits während der Geltung des alten Familiengesetzes^{*42} (meistens) den Müttern zugemutet, dass sie trotz der Betreuung eines unter 3-jährigen Kindes schon die Erwerbstätigkeit (vielleicht auch nur teilweise) wieder aufnehmen und nicht im vollen Umfang oder sogar gar nicht den gesetzlichen Unterhaltsanspruch durchsetzen können. Nach dem alten Gesetz konnte man gemäß § 9 Abs. 2 P 2 FamG vom 1995 ehevertraglich die gesetzliche Unterhaltspflicht nicht ausschließen. Die Regelung über den Betreuungsunterhalt (s. § 22 Abs. 2 FamG von 1995) hat nicht verlangt, dass der geschiedene Ehegatte im Falle der Betreuung eines unter 3-jährigen Kindes hilfsbedürftig sein sollte (d. h. die Unterhaltspflicht des geschiedenen Ehegatten war gegeben, wenn es ein unter 3-jähriges Kind gab und der geschiedene Ehegatte finanziell in der Lage war, den Unterhalt zu gewähren). Also ist die Gerichtspraxis bei der Betonung der Eigenverantwortlichkeit des Unterhaltsberechtigten eigentlich weiter gegangen, als das Gesetz erlaubt hat. Nach dem alten Familienrecht war der Betreuungsunterhalt des

³⁴ G. Langenfeld (Fn. 15), 1. Kapitel: Grundlagen, Rn. 53.

³⁵ J. Mayer (Fn. 21), § 1408 Rn. 20.

³⁶ G. Langenfeld (Fn. 15), 1. Kapitel: Grundlagen, Rn. 69.

³⁷ Bürgerliches Gesetzbuch. – In der Fassung vom 2.1.2002, BGBl. I, S. 42, ber. S. 2909, BGBl. 2003 I, S. 738; zuletzt geändert 15.3.2012, BGBl. II, S. 178.

³⁸ So die überwiegende Meinung im Schrifttum: J. Mayer (Fn. 21), § 1408 Rn. 26a. S. z.B. L. Bergschneider. Das Unterhaltsrechtsänderungsgesetz. Einige Überlegungen zur Vertragsgestaltung. – DNotZ 2008, S. 103; Ch. Berringer, R. Menzel. Das neue Unterhaltsrecht – Folgerungen für die notarielle Praxis. – MittBayNot 2008, S. 172; H. Grziwotz. – G. Brambring, H.-U. Jerschke, W. Waldner. Beck'sches Notar-Handbuch. 5. Aufl. München: C.H. Beck 2009, B I. Eheverträge, Rn. 148; G. Langenfeld. Die notariell zu beurkundende Vereinbarung über den nahehelichen Unterhalt nach § 1585c BGB n.F. – FPR 2008, S. 39. Der BGH hat dies nunmehr ausdrücklich bestätigt.

³⁹ BGH, Urt. v. 2. 2. 2011 – BGH Aktenzeichen XII ZR 11/09 (KG). – NJW 2011, 2971 m Anm J Mayer.

⁴⁰ G. Langenfeld (Fn. 38), S. 39.

⁴¹ J. Mayer (Fn. 21), § 1408 Rn. 26e.

⁴² S. z. B. die Entscheidungen des Stadtgerichts Narva vom 1.3.2004 Nr. 2-754/03, 15.4.2005 Nr. 2-988/04, 21.6.2005 Nr. 2-255/05. Die Entscheidungen sind zugänglich über die Homepage: <http://kola.just.ee> (5.4.2012) (auf Estnisch).

geschiedenen Ehegatten für die Mindestzeit von drei Jahren stärker gewährt als nach dem neuen Recht. Ein völliger Ausschluss der Unterhaltspflicht durch Ehevertrag ist auch nach dem neuen Gesetz nichtig. Die Einschränkung der Unterhaltspflicht ist nach dem neuen Gesetz gemäß § 78 Abs. 2 FamG dagegen nur dann nicht erlaubt, wenn sie unangemessen ist. Daher ist nach dem neuen Gesetz die Vertragsfreiheit im Falle des Betreuungsunterhalts im bestimmten Umfang größer. Nach dem neuen Familiengesetz kann der geschiedene Ehegatte Unterhalt verlangen, wenn er wegen der Kindesbetreuung nicht in der Lage wäre, für sich selbst zu sorgen (s. § 72 FamG).

Bei dem Unterhalt wegen des Alters oder der Krankheit sollte nach dem deutschen Recht (§§ 1571 und 1572 BGB) anstelle eines vollständigen Ausschlusses der Vertragsfreiheit in Zukunft eher eine zeitliche oder höhenmäßige Limitierung erwogen werden.^{*43}

Nach dem neuen estnischen Recht gilt das oben beim Betreuungsunterhalt Gesagte im Prinzip auch beim Unterhalt wegen des Alters oder der Krankheit (§ 73 FamG), d. h. der Anspruch ist nur gegeben, wenn der Ehegatte nicht in der Lage ist, für sich selbst zu sorgen. Nach § 78 FamG sind Vereinbarungen auch hinsichtlich des Unterhalts wegen des Alters oder der Krankheit generell möglich, das bedeutet, dass eine zeitliche oder höhenmäßige Limitierung sollte auf jeden Fall erlaubt sein, wenn es angemessen ist, nur der vollständige Ausschluss ist nichtig.

Also sollte eine Vereinbarung über den nahehelichen Unterhalt, die sich in ausgewogener Weise um die Verwirklichung des Grundsatzes der Eigenverantwortung nach § 1569 BGB bemüht, nicht sittenwidrig sein.^{*44}

Nachrangig und der Disposition der Ehegatten am weitesten zugänglich soll nach dem deutschen Recht der Zugewinnausgleich sein.^{*45} Er sei, auch wegen der vom Gesetz ausdrücklich zur Verfügung gestellten verschiedenen Güterstände, ehevertraglicher Gestaltung am weitesten zugänglich. Denn das Eheverständnis erfordere keine bestimmte Zuordnung des Vermögenserwerbs in der Ehe. Die eheliche Lebensgemeinschaft sei nicht notwendig Vermögensgemeinschaft.^{*46} Anders als das Unterhaltsrecht knüpft das Güterrecht nicht an aktuelle Bedarfslagen an.^{*47} Das ist aber nicht unumstritten. Nach Dethloff wird dies der Teilhabefunktion des Zugewinnausgleichs nicht gerecht.^{*48}

Wie weit er nach dem neuen estnischen Recht der Vertragsfreiheit unterliegen kann, ist momentan schwer zu sagen, weil es diesbezüglich noch keine Rechtspraxis gibt.

Wie bereits erwähnt, war es nach dem alten Familiengesetz verboten, durch Ehevertrag das Recht, das gemeinschaftliche Vermögen nach der Ehescheidung zu teilen, auszuschließen. Wenn die Ehegatten Gütergemeinschaft gewählt haben, verbietet nun § 26 Abs. 1 des neuen Gesetzes es den Ehegatten während der Ehe die Teilung des gemeinschaftlichen Vermögens zu verlangen.

In der Praxis aber wurde während der Geltung des alten Familiengesetzes von den Ehegatten das gemeinschaftliche Vermögen in mehreren Fällen geteilt, z. B. in den Fällen, in denen ein Ehegatte sein Teil des gemeinschaftlichen Vermögens den Kindern schenken wollte, die ehelichen Beziehungen faktisch beendet waren oder die Ehegatten die Absicht hatten, in der näheren Zukunft sich scheiden zu lassen. Auch gab es Fälle, wo ein Ehegatte das ihm gehörende Teil von dem gemeinschaftlichen Vermögen dem anderen Ehegatten schenken wollte (diese Möglichkeit war allerdings den Ehegatten gemäß § 16 des alten Gesetzes nicht vorgesehen).^{*49}

Nach dem alten Gesetz konnten die Ehegatten während der Ehe zwischen dem Ehevertrag und der Vereinbarung zur Teilung des gemeinschaftlichen Vermögens wählen, wobei der letzteren keine Form vorgese-

⁴³ J. Mayer (Fn. 21), § 1408 Rn. 22.

⁴⁴ So G. Langenfeld (Fn. 15), 1. Kapitel: Grundlagen, Rn. 69.

⁴⁵ *Ibid.*, Rn. 57 und 63. So auch R. Kanzleiter (Fn. 17), § 1408 BGB Rn. 34; ebenso J. Mayer (Fn. 21), § 1408 Rn. 28; BGH, Urteil vom 12. 1. 2005 - XII ZR 238/03 (OLG Karlsruhe). – NJW 2005, 1372; BGH, Urteil vom 9. 7. 2008 – XII ZR 6/07 (OLG Frankfurt a.M.). – NJW 2008, 3428.

⁴⁶ R. Kanzleiter (Fn. 17), § 1408 BGB Rn. 43: „schon die Existenz des Güterstands der Gütertrennung zeigt, dass die Ehe nicht notwendigerweise eine Vermögensgemeinschaft ist“; so auch J. Mayer (Fn. 21), § 1408 Rn. 27.

⁴⁷ J. Mayer (Fn. 21), § 1408 Rn. 28.

⁴⁸ N. Dethloff (Fn. 21), § 5 Rn. 29; s. auch B. Dauner-Lieb, A. Sanders. Abdingbare Teilhabe – unabdingbare Verantwortung? – Grenzen güterrechtlicher Vereinbarungen im Lichte der Rechtsprechung des BVerfG und des BGH. – FPR 2005, S. 141–146.

⁴⁹ O. Vijard. Kinnisasja abikaasa ühis- või lahusvara hulka kuulumise alused. Magistritöö (Die Grundlagen über die Zurechnung des Grundeigentums zu dem Gesamtgut oder getrennten Vermögen des Ehegatten. Magisterarbeit). Tallinn 2008, S. 45 (auf Estnisch).

hen war (es sei denn, die Teilung betraf ein Grundstück; in diesem Fall musste die Vereinbarung notariell beglaubigt werden). Dies führte allerdings oft in der Praxis zu Schwierigkeiten, weil ein nach solcher Vereinbarung erworbenes Vermögen wiederum zu dem gemeinschaftlichen Vermögen der Ehegatten gehörte, außerdem konnte man so eine Vereinbarung nicht in das Güterrechtsregister eintragen.

Nach dem neuen Gesetz haben die Ehegatten nun, wenn sie in der Gütergemeinschaft leben, nur die Möglichkeit, durch einen Ehevertrag einzelne Gegenstände zum gemeinschaftlichen oder getrennten Vermögen zu erklären (s § 27 Abs. 4 FamG).

Eine andere Frage stellt sich im estnischen Recht bezüglich der Wahlfreiheit des Güterstandes nach dem neuen Gesetz. Nämlich, ob es zukünftig zu erwarten ist, dass auch die Gültigkeit der Vereinbarungen über die Wahl des Güterstandes bei der Heirat später gerichtlich überprüft werden, weil die Statistik bis jetzt gezeigt hat^{*50}, dass in sehr vielen Fällen Gütertrennung gewählt wird.

Das privatautonome Handeln, das auch beim Abschluss eines Ehevertrags oder auch bei der Vereinbarung des Güterstandes bei der Heirat stattfindet, setzt eine paritätische Vertragsabschlussituation voraus. Eine ausgeglichene Verhandlungssituation muss vor allem im Bereich ehevertraglicher Gestaltungen gewährleistet sein, da die Ehe nur als eine Beziehung gleichberechtigter Partner geschützt ist.^{*51}

Es könnte sein, dass es sich auch bei diesen Ehen, bei denen immer mehr Paare nach dem Inkrafttreten des neuen estnischen Familiengesetzes Gütertrennung als Güterstand wählen, nicht immer um Ehen handelt, bei denen die Parteien keinen Schutz brauchen.

Wenn man so eine Vereinbarung über die Wahl des Güterstandes bei der Eheschließung theoretisch als Ehevertrag behandelt, könnte man behaupten, dass es nach dem neuen Gesetz in Estland möglich ist, güterrechtliche Vereinbarungen zwischen den Ehegatten zu schließen, ohne dass die Ehegatten dabei juristischen Rat bekommen könnten (z. B. von einem Notar, der ihnen den passendsten Güterstand ausgehend von dem gelebten Ehetyp empfehlen könnte).

Nach § 37 Abs. 4 des Personenstandsgesetzes^{*52} erklärt der Standesbeamte den Ehegatten bei der Wahl des Güterstandes während der Eheschließung nur die rechtliche Bedeutung der Güterstände Gütergemeinschaft, Zugewinnngemeinschaft und Gütertrennung. Das bedeutet, dass momentan niemand außer den Ehegatten selbst es beurteilt, welcher Güterstand bei bestimmten Ehegatten am geeignetsten sein könnte. Daher ist leider festzustellen, dass es momentan auf keinen Fall ausgeschlossen ist, dass es sich bei der Wahl des Güterstandes zu sehr um eine Vereinbarung handelt, die zum Nachteil eines Ehegatten ist und aus diesem Grund auch nichtig sein könnte.

Im deutschen Recht behauptet man dagegen, dass sich der Vertragsgestalter solange auf sicherem Boden befindet, wenn er sich an den Grundsätzen der Ehevertragsgestaltung nach Ehetypen orientiert. Wichtig wäre bestimmt im Auge zu behalten, was die Ehegatten auf dem Weg zum richtigen Recht vereinbart hätten, wenn ihnen bewusst gewesen wäre, dass die von ihnen vereinbarte Klausel einer richterlichen Ausübungskontrolle nicht standhält.^{*53}

4.3. Sittenwidrigkeit bei einem Ehevertrag

Das Staatsgericht Estlands hat vor kurzem darüber entschieden^{*54}, wie eine Bestimmung im Ehevertrag auszulegen sei, die für den Fall der Ehescheidung oder des Verkaufs des Grundstückes den Ersatz der für die Erhöhung des Grundstückswertes gemachten Aufwendungen in Höhe von 500.000 Kronen vorsieht.

Das Staatsgericht ist der Meinung, dass eine Vereinbarung, die den Ehegatten zur Zahlung des Geldes nur als Ersatz für die Ehescheidung (Vertragsstrafe) verpflichten würde, nichtig wäre. Solche Vereinbarung würde die Ehescheidungsfreiheit wesentlich einschränken und wäre gemäß § 86 ZGB AGT sittenwidrig.^{*55} In dem konkreten Fall hat das Staatsgericht aber diese Vereinbarung nicht als eine Vertragsstrafe ausgelegt, weil die Zahlungspflicht direkt mit dem Ersatz der für die Erhöhung des Grundstückswertes gemachten Aufwendungen verbunden war und die Gültigkeit so einer Vereinbarung deswegen nicht in Frage steht.

⁵⁰ Die Statistik ist zugänglich über die Homepage: <http://www.just.ee> (5.4.2012) (auf Estnisch).

⁵¹ BverfG FamRZ 2001, 343, 345. Zitiert bei N. Dethloff (Fn. 21), § 5 Rn. 20.

⁵² Perekonnaseisutoimingute seadus. – RT I 2010, 30, 177; RT I, 28.12.2010, 6 (auf Estnisch).

⁵³ G. Langenfeld (Fn. 15), 1. Kapitel: Grundlagen, Rn. 79.

⁵⁴ S. Fn. 16.

⁵⁵ S. P. 17 und 18 in dieser Entscheidung.

Auch im deutschen Recht ist man der Meinung, dass die Sittenwidrigkeit bei einem Ehevertrag daraus ergeben kann, dass ein Fall eines unmittelbar unter die allgemeinen Tatbestandsmerkmale des § 138 Abs. 2 BGB fallenden Verhaltens vorliegt, etwa ein Ehegatte durch die vertragliche Vereinbarung nach der Art einer Vertragsstrafe von der Scheidung abgehalten werden soll.^{*56} Erheblich einseitige Vertragsgestaltungen können nach Dethloff sogar zu einer faktischen Beeinträchtigung der Eheschließungs- bzw. Ehescheidungsfreiheit führen, wenn sich ein Ehepartner die Scheidung aufgrund der ehevertraglichen Lastenverteilung „nicht leisten kann“, was mit dem Art 6 I GG nicht vereinbar wäre.^{*57}

Nach Gernhuber/Coester-Waltjen sind Ehe und Kinder keine legitimen Objekte des Gewinnstrebens und deshalb sei jedes Rechtsgeschäft, das sie kommerzialisiert, sittenwidrig und damit nichtig.^{*58}

5. Fazit

Der Ehevertrag im estnischen Recht ist eine Vereinbarung, anhand welcher die Ehegatten ihre vermögensrechtlichen Beziehungen vor der Eheschließung festlegen oder im Laufe der Ehe ändern können. Der Ehevertrag wird in der estnischen Literatur als ein Verfügungsgeschäft angesehen. Die Autorinnen vertreten die Meinung, dass in Estland weiterhin der erweiterte Begriff des Ehevertrages verwendet werden sollte, gemäß dem die Ehegatten mehrere verschiedene Vereinbarungen in einem Vertrag zusammenfassen könnten.

Der Ehevertrag wird im estnischen Recht persönlich vor dem Notar geschlossen.

Es gibt keine Verpflichtung, einen Ehevertrag abzuschließen. Die Gestaltung des Vertragsinhalts ist aber vom Gesetzgeber begrenzt worden. Die Autorinnen sind der Meinung, dass es im Angesicht des Schutzes des Rechtsverkehrs auch begründet ist. Auch die Interessen der Gläubiger sind damit besser geschützt. Das neue estnische Familiengesetz begrenzt die Möglichkeit der Ehegatten ein ihnen passendes Güterstandsregime zu wählen auf drei Regime: die Gütergemeinschaft, die Zugewinnsgemeinschaft und die Gütertrennung. Wenn die Ehegatten bei der Heirat keine vermögensrechtlichen Verhältnisse auswählen, dann werden auf die vermögensrechtlichen Verhältnisse der Ehegatten die vermögensrechtlichen Verhältnisse einer Gütergemeinschaft angewandt.

Die Normen über die güterrechtlichen Beziehungen der Ehegatten sind generell dispositiv. Es liegt also auch im Ermessen des Gerichts zukünftig festzulegen, wo die Grenzen der Vertragsfreiheit beim Ehevertrag laufen.

Im Bereich des Scheidungsfolgenrechts wäre ein völliger Ausschluss der Unterhaltspflicht nach dem neuen estnischen Gesetz nichtig, die Einschränkung der Unterhaltspflicht wäre dagegen nur dann nicht erlaubt, wenn sie unangemessen wäre. Allerdings müssten nach dem Sinn des neuen Gesetzes die Vereinbarungen über den Unterhalt und den nachehelichen Unterhalt Gegenstand des gesonderten Unterhaltvertrages sein.

Nach dem neuen Familiengesetz kann der geschiedene Ehegatte Unterhalt verlangen, wenn er wegen der Kindesbetreuung nicht in der Lage wäre, für sich selbst zu sorgen und dies sogar im Falle einer Betreuung eines unter dreijährigen Kindes. Das neue Gesetz betont also sogar bei diesem Betreuungsunterhalt die Eigenverantwortung und lässt eine größere Vertragsfreiheit zu. Dies gilt im Prinzip auch beim Unterhalt wegen des Alters oder der Krankheit (eine zeitliche oder höhenmäßige Limitierung sollte auf jeden Fall erlaubt sein, wenn es angemessen ist, nur der vollständige Ausschluss ist nichtig).

Wie weit der Ausschluss des Zugewinnausgleichs durch den Ehevertrag nach dem neuen estnischen Recht der Vertragsfreiheit unterliegen kann, ist momentan schwer zu sagen, weil es diesbezüglich noch keine Gerichtspraxis gibt.

Die Autorinnen sind der Meinung, dass auch die Gültigkeit der Vereinbarungen über die Wahl des Güterstandes bei der Heirat zukünftig gerichtlich überprüft werden könnte. Außerdem sehen die Autorinnen es kritisch, dass momentan nach dem neuen Gesetz in Estland möglich ist, güterrechtliche Vereinbarungen zwischen den Ehegatten zu schließen, ohne dass die Ehegatten dabei juristischen Rat bekommen könnten.

⁵⁶ J. Gernhuber, D. Coester-Waltjen (Fn. 9), § 26 Rn. 1; J. Mayer (Fn. 21), § 1408 Rn. 47; s. auch BGH, Urteil vom 19-12-1989 - IV b ZR 91/88 (Koblenz). – NJW 1990, 703.

⁵⁷ N. Dethloff (Fn. 21), § 5 Rn. 20.

⁵⁸ J. Gernhuber, D. Coester-Waltjen (Fn. 9), § 26 Rn. 16.



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The Role of Collective Agreements in Regulation of Work Conditions in View of the Effects of Estonian Labour-law Reform

1. Introduction

The new Employment Contracts Act^{*1} (ECA) has been in force in Estonia for two and a half years. One of the key motivations for its adoption was to increase labour-market flexibility. As outlined in the Explanatory Statement of the Draft of the Employment Contracts Act^{*2}, modernisation of labour laws was considered a key element for bringing greater flexibility to the labour market. From the standpoint of employee security, it was concluded that, in addition to the new aspects of regulation under the new ECA (e.g., amended regulation of proprietary liability)^{*3}, there was also a need for addressing security elements that lie outside the regulation of employment contracts, such as unemployment benefits, increases in unemployment insurance compensation, expansion of the range of people eligible for benefits, and establishment of schemes facilitating access to lifelong learning.^{*4}

Although one component of the European Commission policy on the common principles of flexicurity^{*5} is to provide for flexible and reliable contract terms through labour laws, collective agreements, and the work organisation, the role of collective agreements was not prominent in the drafting of the ECA. At the same time, in the implementation of all elements of flexibility (institutional, working time, wage, and

¹ Töölepingu seadus. – RT I 2009, 5, 35; RT I, 25.5.2012, 26 (in Estonian). English text available via <http://www.legaltext.ee/> (most recently accessed on 10.4.2012).

² Seletuskiri töölepingu seaduse juurde. Available via <http://www.riigikogu.ee/> (most recently accessed on 10.4.2012) (in Estonian).

³ Eesti Vabariigi töölepingu seadus (Republic of Estonia Employment Contracts Act). – RT 1992, 15/16, 241; 2007, 44, 316 (in Estonian). English text available via <http://www.legaltext.ee/> (most recently accessed on 10.4.2012).

⁴ Seletuskiri töölepingu seaduse juurde (see Note 2).

⁵ Communication of the Commission on the common principles of flexicurity. Brussels: European Commission 2007. Available at <http://eur-lex.europa.eu/lexUriServ/LexuriServ.do?uri=CELEX:52007DCO359:EN:NOT> (most recently accessed on 10.4.2012).

worker- and job-mobility elements)⁶, collective agreements definitely play a significant role, in addition to laws and in conjunction with individual employment agreements and regulations on employers' work procedures.

Because of the economic recession, there was no increase in unemployment insurance compensation or unemployment benefits and no expansion in the range of people eligible for benefits. In the final findings of a study completed in 2010⁷, it was concluded that the focus in Estonia has been placed rather heavily on increasing the flexibility of the labour market and that labour and social policies have, to date, not facilitated the implementation of the balanced European social model in Estonia.

On account of the above, it is necessary to analyse the role of collective agreements in regulation of labour relations and achievement of flexicurity since the new ECA's entry into force in Estonia, in comparison to other EU countries. This article is intended to answer the following questions: What is the coverage of collective agreements in Estonia, and what are the levels of these agreements; which material labour relations are regulated in Estonia by collective agreements; how do collective agreements regulate non-typical labour relations, work and rest time, and other work conditions in Estonia; how and on what conditions may collective agreements deviate from the imperative provisions of the Employment Contracts Act; and what legislative amendments would contribute to improvement in the regulation of collective agreements?

2. Collective agreements' coverage, and levels of agreements in Estonia

For one to understand the role of collective agreements in Estonia, it is important to note that about 32.7% of employees are covered by collective agreements.⁸ For the most part, collective agreements in Estonia are entered into at the enterprise level. In 2010–2012, seven expanded contracts at sector level have been signed in the fields of transport and health care.⁹

Of 465 actual enterprise-level collective agreements, 105 have been entered into by those not representing trade unions.¹⁰ The reason for such dualism in agreements from the angle of employees is that there are few trade-union members in Estonia. Trade unions have been set up in 6% of enterprises, and an employee representative has been elected in 13.3% of enterprises.¹¹ One reason the percentage of coverage by the agreements is higher than that of union membership is the provision in §4 (1) of the Collective Agreements Act¹² (CAA) by which a collective agreement can be applied to all workers at an enterprise, regardless of their membership in the trade union, if the parties to the agreement so agree. The second reason for the percentage of coverage by agreements being higher is the provision in §4 (4) of the CAA according to which the wages and the work- and rest-time conditions regulated by sector-based and nationwide agreements can be expanded to all workers in the relevant sector or to all enterprises in Estonia.

In many European countries, regardless of legislative initiative, the practice of transition from collective agreements made centrally (state and branch activity level) to enterprise-level agreements is not so common. An example is the practical outcome of the collective-agreement reform that was carried out in Holland, where industry-wide agreements cover 70% of all employees and around 10% of workers are covered additionally by enterprise-level collective agreements.¹³ In Estonia, the situation is quite the opposite—the

⁶ R. Eamets, T. Paas. *Labour Market Flexibility, Flexicurity and Employment: Lessons of the Baltic States*. Nova Science Publishers 2007, p. 198.

⁷ *Turvaline paindlikkus Eestis: Hetkeolukord ja arenguperspektiivid (Flexicurity in Estonia: Current Situation and Development Prospects)*. RAKE and Praxis 2010. Available via <http://www.eakl.ee/> (most recently accessed on 10.4.2012) (in Estonian).

⁸ Background information on industrial relations in companies in Estonia was used, with data from 2009. Available at <http://www.eurofound.europa.eu/eiro/2012/country/estonia.htm> (most recently accessed on 10.4.2012).

⁹ Statistics from the collective agreements database. Available via <http://klak.sm.ee/> (most recently accessed on 10.4.2012) (in Estonian).

¹⁰ Statistics from the collective agreements database (see Note 9).

¹¹ From background information on industrial relations in companies in Estonia (see Note 8).

¹² *Kollektiivlepingu seadus*. – RT I 1993, 20, 353; 2009, 5, 35 (in Estonian). English text available via <http://www.legaltext.ee/> (most recently accessed on 10.4.2012).

¹³ R. Blanpain, T. Blanke, E. Rose. *Collective Bargaining and Wages in Comparative Perspective: Germany, France, the Netherlands, Sweden and the United Kingdom*. Hague: Kluwer Law International 2005, p. 91.

modest number of industry-wide agreements itself ensures a flexible process, but it also enables major differences in regulation of material work conditions within the same sector of activity and for employees of the same enterprise.

3. Content of collective agreements

In most European countries, the regulation of collective agreements has undergone major changes in the past decade. In addition to traditional issues, such as wages, working time, and terms for termination of an employment relationship, collective agreements are increasingly used for agreeing on issues such as employability, balance between work and family life, efficiency and quality of work, and sustainability.^{*14} The key role of collective agreements is still to protect employees, as the weaker side in labour relations, from market forces by reducing inequality, though collective agreements are seeing increasing use for balancing employers interests for workplace flexibility with workers interest for worker-oriented forms of flexibility.^{*15}

Pursuant to §2 (1) of the CAA, the role of a collective agreement in Estonia is relatively broad and one may enter into a collective agreement in different segments of the employment relationship. The subject fields of labour relations provided in §6 (1) of the CAA (wages, working and rest time, terms of employment, termination of contract, redundancy, occupational health and safety, retraining and training at work, refusal to work, and other terms that the parties regard as necessary to agree on) is regulated, with minor changes, in the most of the collective agreements entered into in the field of transport, communication, energy, the manufacturing industry, health care, service, and the public sector.^{*16} Although the list in §6 (1) of the repealed CAA does not provide for such highly important labour issues as promotion of employment, support for balance between work and family life, equal treatment, inclusion of employees in decision-making, and employees' notification and consultation, one can say that these issues are regulated in some respects in Estonian collective agreements. However, collective agreements at their various levels seldom address gender equality issues and matters of achieving higher productivity, innovation, and quality of work with a view to stabilising the employment situation and cutting costs. In summary, the above-mentioned §6 (2) of the CAA allows collective agreements to regulate all and any work conditions as the partners deem necessary; however, it is the sample list contained in this provision that has had the greatest impact on the content of collective agreements in Estonia.

4. Regulation of the work conditions of non-typical employees by collective agreement

The European Commission's policy on common principles of flexicurity also requires that relevant regulations be established for non-typical employees and forms of work and for reducing gaps between employees.^{*17} According to §1 (2) of the CAA, a collective agreement is a voluntary agreement—between employees or a union or federation of employees and an employer or an association or federation of employers—that regulates labour relations between employers and employees (including public-sector employees and officials). Collective agreements can be entered into at enterprise, sector, or national level, according to §3 (2) of the CAA. Under the definition given, trilateral collective agreements cannot be entered into in the case of non-typical forms of work between an agency offering temporary staff, its employees, and the enterprise that uses these staff.

¹⁴ T. Fashoyin. Trends and developments in employment relations and the world of work in developing countries. – *The International Journal of Comparative Labour Law and Industrial Relations* 2010/2, p. 133.

¹⁵ S. Hayter. *The Role of Collective Bargaining in the Global Economy: Negotiating for Social Justice*. Geneva: International Labour Organization 2011, p. 8.

¹⁶ The author analysed 50% of the enterprise-level collective agreements concluded in 2010–2011 in her possession (50 agreements out of 100). Collective agreements registered in the database of collective agreements (after removal of personal data therefrom) too were made available to the author for scientific purposes.

¹⁷ Communication of the Commission on the common principles of flexicurity (see Note 5).

A similar restriction applies to persons defined as only worker-like persons. For instance, entry into a collective agreement is prohibited between economically dependent individuals who operate as self-employed persons or under contract in the law of obligations (they are legally not considered as under an employment contract) and their contractual partners. Although in Estonia there is use of such people working as self-employed persons to provide services as are generally contracted by a specific employer (making this person dependent on such an employer), our labour laws do not use the term 'economically dependent worker' as is done in the Czech Republic^{*18} or in Germany.^{*19} Pursuant to §1 (4) of the ECA, provisions of the ECA do not apply to contracts under which persons who carry out work responsibilities are significantly independent in terms of selection of the nature, time, and location of the work. This author believes that the concept of 'economically dependent worker' should be regulated by the ECA and that adapted labour law should be applied to such workers.

However, according to the general spirit of the CAA, in a collective agreement it is possible to agree that certain working conditions (minimum wage, requirements as to the quality of the work, etc.) are applied both to the terms for agency staff used in the enterprise and for self-employed persons contracted for the work by the employer. For example, the collective agreement signed between the Union of Estonian Automobile Enterprises and the Estonian Transport and Road Workers' Trade Union^{*20} requires the application of terms for working and rest time and for wages to both temp staff working in this field and those people working under a service contract.

The general spirit of the CAA also provides for entering into a collective agreement with an agency that rents labour as an employer. This is similar to the situation in Holland, which recognises collective agreements in establishing minimum working conditions for agency staff.^{*21} In 2003, Germany introduced the principle that agencies offering temporary staff must apply the minimum terms for the relevant field of activity.^{*22} But since the objective of hiring staff from an agency is to cut costs, German law allows payment of a lower minimum wage to these staff than to direct employees in that specific branch of activity, provided that this has been agreed upon with trade unions in the given sector.^{*23} At the same time, under §11¹ (2¹) of the Equal Treatment Act, which was recently amended^{*24}, agency staff in Estonia must be subject to work- and rest-time, wage, occupational safety, and health terms similar to those for employees of the relevant enterprise. While in Italy, for instance, collective agreements are used to regulate the causes of use of temporary agency work (technology, production, and organisational) and specific activities (cleaning and construction) allowing for the use of agency staff^{*25}, our collective agreements do not provide for such regulation. A collective agreement concluded in AS Fortum Termest^{*26} obliges the employer to hire persons outside AS Fortum Termest to carry out renovation, construction, or similar work if the employees of AS Fortum Termest themselves are fully occupied, no in-house employees have the required training, or there are justified economic reasons. A collective agreement concluded in AS Eesti Post^{*27} lays down the employer's obligation to inform the trade union every six months as to the number of agency staff, by unit.

Twenty per cent of our enterprises use telework (aka distance work).^{*28} Telework is indirectly defined in §6 (4) of the ECA; however, the law provides no specific terms for it. Since telework is a specific form of work and is increasingly common, it should have been legislated that the specific terms for telework may be agreed upon in collective agreements. This author's opinion is that such a reference in the law would provide an impetus to the work partners in society to regulate this area more broadly with collective agree-

¹⁸ J. Pichrt, M. Stefko. *Labour Law in Czech Republic*. Wolters Kluwer Law and Business 2010, p. 45.

¹⁹ M. Weiss, M. Schmidt. *Labour Law in Germany*. Austin: Wolters Kluwer 2008, p. 47.

²⁰ The collective agreement, concluded in 2012, is available via <http://www.etta.ee/> (most recently accessed on 10.4.2012) (in Estonian).

²¹ Communication of the Commission on the common principles of flexicurity (see Note 5).

²² Blanpain *et al.* (see Note 13), p. 24.

²³ *Ibid.*

²⁴ Võrdse kohtlemise seadus. – RT I 2008, 56, 315; RT I, 10.2.2012, 1 (in Estonian). English text available via <http://www.legaltext.ee/> (most recently accessed on 10.4.2012).

²⁵ T. Treu. *Labour Law and Industrial Relations in Italy*. Alphen aan den Rijn: Kluwer Law International 2007, pp. 42–43.

²⁶ In the possession of the article's author. The company operates in the energy sector. The agreement was concluded in 2011.

²⁷ In the possession of the article's author. The company operates in the communications sector. The agreement concluded in 2011.

²⁸ *Paindlikud töövormid Eestis (Flexible Forms of Work in Estonia)*. Praxis 2011. Available at http://www.pare.ee/files_www/Kristi_Nurmela.pdf (most recently accessed on 10.4.2012) (in Estonian). Data from 2009 were used.

ments. One of the few collective agreements that provide for telework has been concluded in the Chancellery of the Riigikogu.^{*29} The degree of regulation of teleworking via laws or collective agreements varies by country. In France, labour law designates telework as an agreement between the employer and employee within the framework of the existing collective agreement with regard to total annual working time, provided that time spent teleworking does not exceed 218 hours a year.^{*30} The national collective agreement in Belgium^{*31} regulates the terms for home-based telework, including the employer's obligation to avoid isolation of teleworking employees and see to technical support and software protection.

The role of collective agreements in regulating the versatility of contractual relations is increasingly important from the angle of the flexicurity of labour relations. It is necessary to update the CAA with regard to non-typical agreements. In view of the novelty and complexity of these issues, it is important to use a combination of laws and collective agreements to regulate non-typical forms of work. Since the work conditions with non-typical forms of work are especially dependent on the specific area of activity and the nature of the work, the ability to regulate work conditions sensibly via only laws is clearly restricted. It is important to agree with the relevant partners at the government level on the framework provided by the ECA for agreements related to the work conditions of non-typical workers and as to which conditions should belong to the realm of collective agreements.

5. The derogatory role of collective agreements

In the past decades, the role of the law, individuals, and collective agreements in regulating work conditions has significantly changed, in terms of both their essence and their interaction.

As a legal reference, in Estonia the collective agreement lies below law and higher than an individual employment contract in the hierarchy of legal sources. The provisions agreed upon in the collective agreement are mandatory for the parties who have entered into said agreement. Under §2 of the ECA, an agreement that is less favourable for the employee than what is prescribed by law (that is, a so-called derogatory agreement) is invalid, except if the possibility of agreement on derogation is provided for in the ECA. In comparison with the labour law that was in force until 2009 (where derogation that was less favourable for the employee was prohibited altogether), the role of agreements has thus been expanded. Although the lawmaker has not specified which contracts allow for making of derogations that are less favourable for the employee, the text of the ECA indicates that this category includes an individual agreement made between the employee and the employer, as well as a collective agreement. This principle is also supported by §4 (2) of the CAA, under which terms of a collective agreement that are less favourable than what is prescribed by law or some other legal act are invalid except when the possibility of entering into such an agreement is provided by law. Hence, if one explores the text of the ECA in its entirety (incl. the provisions on derogatory agreements) and proceeds from the rationale of the text, one may conclude that §2 of the ECA lays down a general principle of deviating from the law; however, the specific agreement that allows deviation from a specific provision of law to the detriment of the worker is determined by the very same provision of the ECA that allows such derogation.

When agreeing on working conditions that are less favourable than those prescribed by law, one should ask what is actually favourable for the employee. If the contract or law states that the condition is such a general principle as 'reasonable time', this can be interpreted differently, depending on the nature of the work. If the law clearly states who has priority in cases of redundancy, the derogation can be defined more clearly for employees in the relevant category. Finally it can be said that in Estonia it is not yet common to define a more favourable situation in the context of several conditions of the same collective agreement.

The ECA cites only three cases in which derogatory agreements in collective agreements are allowed: According to §97 of the ECA, collective agreements may, for economic reasons, establish a shorter term of notice in cases of termination of an employment contract than what is prescribed by law; §51 (3) of the ECA states that by collective agreement, the daily rest time can be reduced to less than 11 hours; and §46 (2) of the ECA states that a collective agreement may establish less favourable working time for up to one year for

²⁹ In the possession of the article's author. The collective agreement was concluded for the public sector in 2011.

³⁰ K. Nevens. Home work, telework and the regulation of working time: A tale of (partially) similar regulatory needs, in spite of historically rooted conceptual divergence. – *Journal of Comparative Labour Law and Industrial Relations* 2010/2, p. 214.

³¹ R. Blanpain. *Labour Law in Belgium*. Austin: Wolters Kluwer Law and Business 2010, p. 121.

employees in the health-care, welfare, agriculture, and tourism sectors. One reason the derogatory role of a collective agreement is so modestly being established is clearly the fact that it is a new principle for employees' representatives. For decades, the overall principle was application of a provision that is more favourable for employees. This is definitely also a key question for Estonian employees and employers unions in taking responsibility for entering into derogatory agreements. A study of collective labour relations in 2011 showed that where few enterprise-level trade unions were ready to accept the responsibility related to the derogatory role of collective agreements in entry into contracts, central trade unions have started to look positively at the derogatory role of collective agreements.^{*32} According to the same study, the central unions of employers see the role of a collective agreement as that of an agreement that permits the deviation from the protection arising from the ECA.

Section 2 of the ECA is formulated in a manner common to laws of many European countries where the principle of derogation is regulated by law. In the Czech Republic^{*33}, Italy^{*34}, Sweden^{*35}, Holland^{*36}, and Belgium^{*37}, enterprise-level trade unions have the right to make derogations from law in their collective agreements also if the derogation is less favourable for the employee, provided that such a possibility is provided for in the sector's collective agreement. For instance, in Sweden^{*38} the law establishes maximum ratios of working time, and these are mandatory for partners where working time is agreed upon neither via collective agreements nor otherwise.

In Finland, §§6 to 9 of Chapter 13 of the Employment Contracts Act^{*39} lay down the principle for when and by which level of collective agreement deviation from the provisions is allowed. The Lithuanian Labour Code allows for the use of collective agreements to agree on principles differing from the law in terms of entry into fixed-term employment contracts, the term of notice required of the employer for termination of an employment contract, and the level of compensation paid by employers.^{*40} In addition, the Lithuanian Labour Code delegates to collective agreements the regulation of rules on overtime (Article 152) and agreement on summary recording of working time (Article 149), laying down only a maximum. Also the basis for proprietary liability of workers (Article 255) and categories of employees who may enter into a proprietary liability agreement (Article 256) have been included in such regulation.^{*41}

In Hungary, collective agreements may derogate from labour laws with regard to work and rest time, the law provides specific instructions and maximum ratios for this kind of derogation.^{*42} In Poland, derogation from the legislation is allowed only if it provides more beneficial terms for the employee.^{*43} The Latvian Labour Code does not provide for derogatory regulation through collective agreements.^{*44} Similarly to Estonia, Latvia displays labour relations that are regulated mainly by law, while the individual employment contract is regarded as an alternative to the regulation more than the collective agreement is.

Generally, EU member states have a principle that derogations from the law that would affect employees are within the purview of collective agreements. This is because collective agreements are considered more suitable for offsetting the impact of work conditions worse than those prescribed by law than are individual contracts. The objective is for there to be adequate regulation to provide sufficient security and the greatest possible flexibility.

³² A study of collective labour relations in the private sector (Centar, 2011). Available at <http://www.sm.ee/meie/uringud-ja-analüüsid/toovaldkond.html> (most recently accessed on 10.4.2012) (in Estonian).

³³ Pichrt, Stefko (see Note 18), p. 241.

³⁴ Treu (see Note 25), p. 192.

³⁵ A. Adlercreutz, B. Nyström. *Labour Law in Sweden*. Austin: Wolters Law and Business 2010, p. 59.

³⁶ Blanpain *et al.* (see Note 13), p. 104.

³⁷ *Ibid.*, p. 46.

³⁸ Adlercreutz, Nyström (see Note 35), p. 58.

³⁹ Finnish Employment Contracts Act (55/2001). English text available via <http://www.finlex.fi/en/> (most recently accessed on 10.4.2012).

⁴⁰ R. Blanpain, W. Bromwich, O. Rymkevich, S. Spattini. *The Modernization of Labour Law and Industrial Relations in a Comparative Perspective*. The Hague: Wolters Kluwer Law and Business 2009, p. 361.

⁴¹ Lithuanian Labour Code, 4.6.2002. English text available via http://www3.lrs.lt/dokpaieska/forma_lhtm (most recently accessed on 10.4.2012).

⁴² Blanpain *et al.* (see Note 40), p. 344.

⁴³ M. Sewerynski. *Collective Agreements and Individual Contracts of Employment*. London: Kluwer Law International 2003, p. 193.

⁴⁴ I. Tare. *Labour Law in Latvia*. Austin: Wolters Kluwer Law and Business 2010, p. 48.

6. Regulation of work and rest time via collective agreements

Traditionally, most of the collective agreements in Estonia regulate work- and rest-time issues, since these conditions are highly dependent on the particular nature of the work and the applicable regulation is sometimes so detailed that it is not feasible to specify it via law.

Subsection 46 (2) of the ECA refers to the possibility of extending the period for working-time calculation (to one year at maximum) via a collective agreement in the fields of health care, welfare, agriculture, and tourism. This principle according to which working time is calculated for a period of up to one year, which entered into force on 1 July 2009, has already been adopted in collective agreements made in the field of health care. For example, West Tallinn Central Hospital has entered into a collective agreement in which the total calculation period agreed on for working time is as long as six months.^{*45} For all other fields of operation, the period for calculation of working time has been limited to four months.

Subsection 46 (3) of the ECA has delegated to individual agreements the right to make exceptions to working time. This provision limits working time to 52 hours per seven days over a calculation period of four months and this overtime conditions must not be unreasonably unfair to the employee. From the angle of the safety of the employees, thought might be given to changing Section 46 of the ECA. Namely, the law should require that collective agreements be used to regulate the principles for application of overtime in companies, including potentially unreasonably unfair conditions in respect of employees and the principles of occupational safety and health care involved in the overtime and that the Labour Inspector must monitor under §46 (4) of the ECA. In a parallel with the practice of many other EU member states, national laws have delegated the right to agree on the total length of working time for collective agreements in Belgium^{*46}; working time's organisation in Sweden^{*47}; and possible cases of overtime obligations in, for instance, Spain.^{*48}

Pursuant to §51 (1) of the ECA, an agreement by which the uninterrupted rest period left for an employee over a span of 24 hours is less than 11 hours is void unless the law provides otherwise. Pursuant to §51 (3) of the ECA, derogation (daily rest time that is less than 11 hours) from the terms of §51 (1) may be agreed upon only via a collective agreement. Special provisions in §51 (4) of the ECA state the principle that §51 (1) of the ECA does not apply to health-care and welfare workers. As §51 (1) of the ECA is not applicable in the health-care and welfare sectors, the requirement to conclude a collective agreement does not apply when one derogates from this provision for the length of the rest time. Regardless of the absence of such a delegation provision in the ECA, a rest-time period that is shorter than 11 hours is at present being agreed upon via collective agreements in the health-care sector. Given the importance of the issue, this is clearly justified. The collective agreement made in AS Põlva Haigla^{*49} states that the agreed working time of employees working to a shift list not exceed 12 hours and it is possible, by special arrangement, to agree that a shift shall be up to 24 hours long.

While considering the topic of making derogatory agreements under the ECA, one should also note that, in accordance with §50 (4) of the ECA, night-time work extending beyond eight hours, and up to 24 hours, may be agreed upon either in an individual employment contract or through a collective agreement. Subsection 51 (6) of the ECA also allows for the use of individual and collective agreements for apportioning daily rest time in a manner different from that prescribed by law (minimum blocks of six hours).

From examination of the regulation of working and rest time in the ECA, it is difficult to understand why the lawmaker decided upon establishing specific provisions to give such roles to the individual agreement and the collective agreement. No national agreement with the social partners is prescribed in Estonian law.

However, the specific provisions (allowing for derogations) on working-time regulation that are stated above are being implemented in various enterprise-level collective agreements. For instance, AS G4S has regulated in its collective agreement^{*50}, by employing a derogation that is permissible by law, the principles

⁴⁵ In the possession of the article's author. Concluded in 2010.

⁴⁶ Blanpain (see Note 31), p. 133.

⁴⁷ Adlercreutz, Nyström (see Note 35), p. 88.

⁴⁸ M.A. Olea, F. Rodrigues-Sanudo. *Labour Law in Spain*. Austin: Wolters Kluwer Law and Business 2010, p. 71.

⁴⁹ In the possession of the article's author. Concluded in 2011. The company operates in the health-care sector.

⁵⁰ In the possession of the article's author. Concluded in 2011. The company operates in the security sector.

for night-time work, shift lengths, and stints of rest time, as well as the scope for implementation of these terms, justification, and special situations in terms of occupational safety and health. At the same time, it should be said that such derogatory agreements enabled by law have value only if, in addition to the flexibility provided by law, these collective agreements also stipulate measures to protect workers' health and safety. This is a new area for collective agreements in Estonia, opened up by the adoption of the new regulation of the ECA, and this field of regulation in collective agreements will surely develop.

At any rate, one must support the trend toward regulating working- and rest-time issues in collective agreements for supplementation of individual contracts of employment and in addition to them. It must also be ensured that making of derogatory provisions is the result of carefully analysed decisions by those implementing them, looking at the entire package of work conditions and development in general that a single employee often cannot analyse when negotiating a contract. In the ECA's current provisions, the chapter on working and rest time is very detailed in comparison with other chapters, and it is likely to become even more detailed if these issues are not delegated to collective agreements.

One such area, in the author's opinion, in which the system of regulation could have continued, especially in view of the practice of current employment contracts, is on-call duty time and the remuneration for non-standard working time. Until the ECA entered into force, the terms and organisation of on-call duty work had to be agreed upon in collective agreements. However, §48 (1) of the ECA provides for a minimum wage for on-call duty work by law. While thus far, for instance, remuneration for on-duty work under collective agreements was given at a rate of 25–40% of the normal hourly rates, the minimum rate stated by §48 (1) of the ECA is 1/10 of the agreed fee. Collective agreements are also, in some respects, influenced by the fact that the ECA does not require the payment of additional fees for work done in late evening (from 18.00 to 22.00). As a result, several collective agreements now provide for payment of additional fees only for night-time work and work on public holidays. Therefore, the author's opinion is that in the case of enforcement of these minimum guarantees, one should weigh whether to provide for the principle that the law is applicable unless the issue is regulated by a collective agreement. Such a change would contribute to better use of the resources available in the companies and sectors that enter into such agreements (the parties habit of addressing this issue in their collective agreements until the new labour law was adopted) as well as enhance guidance of the social partners toward regulation of minimum conditions that match the actual situation.

7. Regulation of other work conditions via a collective agreement

The ECA does not provide a significant role for collective agreements in key issues of labour relations that many countries' law mandates to be regulated by collective agreements, such as terms for entering into fixed-term contracts in Italy⁵¹; the maximum duration of fixed-term contracts and principles for extension in Germany⁵²; terms of notice for termination of employment contracts that are shorter than those prescribed by law in Germany⁵³; principles for prohibition of ordinary redundancy in Germany⁵⁴; and the redundancy procedure, benefits, and reinstatement principles in Finland according to §7 of Chapter 13 of the Finnish Employment Contracts Act. In Estonia, these areas are regulated mostly in general terms in the ECA.

Undoubtedly, this is partly because collective agreements are relatively uncommon in Estonia. However, for instance, lawmakers in Lithuania have not been influenced by the modest coverage of collective agreements (no more than 15% of the population⁵⁵) and the government still has given collective agreements a bigger role in regulating labour relations (see also item 5).

At the same time, many collective agreements have started to agree on important issues for social partners that are generally regulated in the ECA and that have been legally easier to define. The general wording

⁵¹ Treu (see Note 25), p. 40.

⁵² Weiss, Schmidt (see Note 19), p. 55.

⁵³ *Ibid.*, p. 124.

⁵⁴ *Ibid.*, p. 135.

⁵⁵ Blanpain *et al.* (see Note 40), p. 361.

of §38 of the ECA, which regulates continuation of the payment of wages for a reasonable period if there are obstacles to the work, requires that the provision for cases wherein personal factors render the worker unable to work be made more specific by the social partners. For instance, AS Stockmanni Kaubamaja has entered into a collective agreement⁵⁶ that has a specific provision for when such remuneration is maintained (consultation of a physician, illness of a family member, job interview during one's term of notice, etc.) and for how long, if the employee needs to be away from the workplace. Other provisions address the procedure for applying; formulating; and, if necessary, proving such need. The collective agreement concluded in AS SEBE⁵⁷ has specified the necessary diligence in work (customer service for passengers, ticket sales rules, work in cases of accidents, etc.) that is considered in awarding of performance-based pay. Section 16 of the ECA refers to the degree of diligence very generally.

Ensuring that extraordinary termination of the employment relationship is handled correctly is constantly an important issue for employers, and collective agreements deal with principles that enable one to implement this provision more accurately. This is the case with employment contracts concluded in AS Eesti Energia Narva Elektriijaamad⁵⁸, which describe acts in connection with which such termination of the contract may be implemented in the relevant sector.

Moreover, for cases of violation of work responsibilities, collective agreements regulate the procedure of drawing up a warning and the validity of such a warning; examples are the collective agreements concluded in AS Eesti Energia, OÜ Eesti Energia Jaotusvõrk, and AS Eesti Energia Võrguehitus⁵⁹. Subsection 88 (4) of the ECA mentions such a warning only in passing.

As a rule, Estonian collective agreements do not regulate those aspects of labour relations that are more complex legally and are only generally formulated in our ECA, such as those principles of proprietary liability that are regulated by collective agreements in Germany⁶⁰ and the right and causes of extraordinary termination of employment (handled in Italy by collective agreements⁶¹). Under §75 of the ECA, the principles for calculation of proprietary damages, procedure for claiming damages, and the maximum degree of liability are regulated only via an agreement made between the employer and employee, although this may not be the best possible option from the viewpoint of the employee. Similarly, with reference to an agreement made between an employer and employee, §77 of the ECA prescribes a contractual penalty. For more detailed agreement on when the fine may be applied and its maximum rate, the law should have referred to regulation in collective agreements. In Estonia, collective agreements regulate, in the main, the notification in situations of termination of employment contracts (mostly for economic reasons), the pre-emptive right to maintain an employment relationship, terms for offering a different job, the employer's obligation to provide the necessary training in cases of transfer of employees, the pre-emptive right to regain a job in the event of vacancies, etc. At the same time, in cases of extraordinary termination of employment, it is not yet common to describe significant causes and reasonable time from becoming aware of significant circumstances until termination of employment, etc. In view of the issue of termination from the perspective of the importance of industrial harmony, ensuring employees' security, and prevention of breaches of work duties, it is reasonable to delegate the generally worded regulation in §§ 88 and 89 of the ECA to collective agreements. This is also important for better use of existing resources (practice of handling the issue via collective agreements).

The general principle is, naturally, that such collective agreements may not, in comparison with the law, affect the employee's situation (except in cases allowed by law), according to §4 (2) of the CAA. Neither may collective agreements be in conflict with the meaning of the law and the general principles of contracts under the law of obligations.

Analysis of collective agreements shows that the development of the regulation of material work conditions in collective agreements unguided by law has been unsystematic and vastly different between individual fields of operation and from one company to the next.

It arises from the current practices, described above, that in cases of a social dialogue, as it is today in Estonia, employers accept to regulate with collective agreements mainly those terms that are also dealt by

⁵⁶ In the possession of the article's author. The company operates in commerce. The agreement was concluded in 2011.

⁵⁷ In the possession of the article's author, it was concluded in 2011. The company operates in the transport sector.

⁵⁸ In the possession of the article's author, the agreement was concluded in 2011. The company operates in the energy sector.

⁵⁹ In the possession of the article's author, it was concluded in 2011. The company operates in the energy sector.

⁶⁰ Weiss, Schmidt (see Note 19), p. 187.

⁶¹ Treu (see Note 25), p. 108.

the law. This is shown additionally by a study of collective labour relations in 2011⁶², wherein, as one reason for entering into a collective agreement, participants indicated the relevant reference in the law—e.g., delegation of working-time regulation.

8. Conclusions

In most EU member states, the role of collective agreements has changed since the 1980s. In a global economy, social partners and states have an interest not only in stability but also in being able to adapt and be sustainable. In other words, the traditional role of collective agreements—agreement on terms that are more beneficial than those demanded by the law—is no longer enough. In addition to a distributor of profit and an instrument augmenting the legislation, it is seen as an instrument that is regulative and provides flexibility. Depending on the situation, the role of collective agreements is to supersede, develop, or implement a law.

Thus the lawmakers in countries where coverage by collective agreements is high have entrusted to them the regulatory role of providing content for the provisions of the law as well as the option of deviating from the imperative legal provisions, even to the detriment of the employee. Of the countries studied for this article, there are some exceptions—for instance, I have noted that Lithuania has rather modest coverage by collective agreements but a Labour Code that assigns the essential role to collective agreements (*inter alia*, allowing deviation from the law), probably from a wish to develop the regulatory role of collective agreements with the aid of the legal framework.

Unlike many other EU members, Estonia has stayed true to the traditional role of collective agreements, which prevailed until the early 1990s. This is true for both the content of the agreements and the role of the agreement in deviation from the imperative provisions laid down in the ECA (incl. to the detriment of the employee).

Neither Estonian lawmakers nor the major social partners have accentuated the regulation of labour relations by collective agreements during the reform of labour-related legislation. The current practices related to collective agreements have mostly been disregarded. Next to laws, a central role has been given to individual employment contracts in the regulation of work conditions. The provisions for the regulation of working and rest time form an exception in this regard, in giving collective agreements somewhat more weight than individual contracts, and this has also been applied in collective agreements by social partners.

The new ECA allows collective agreements' deviations from the imperative provisions of the law, to the detriment of the employee in just three cases.

Analysis of the regulation of collective agreements established after the reform of labour laws shows that collective agreements have started to agree on important issues for social partners that are generally regulated in the ECA and that have been legally easier to define. However, the development of the regulation of material work conditions in collective agreements unguided by law has been vastly different across areas of activity and company boundaries. The practices prevalent in Estonia have proved that the conclusion of collective agreements can be directly affected—through addition to the law of references to collective agreements—with a legal framework provided for resolution of the issues or by delegation of the agreement on the content of a matter provided for to collective agreements.

Today, the key to changing the role of the collective agreements lies in development of social dialogue and in the changing of the ECA. The current CAA does not directly restrict conclusion of agreements addressing the subjects, content, or validity of collective agreements. However, the current CAA needs to be made more detailed with respect to both the content of the agreement and parties to a non-typical contract.

The author of this article is, however, of the opinion that, as things stand in the Estonian labour market, where collective agreements are rarely entered into, it is necessary to guide the values of the parties to an employment relationship by making the law semi-mandatory, depending on whether or not the collective agreement applies to the parties in an employment relationship with respect to the given issue. This is true for the areas wherein certain detailed regulation is necessary for better protection of the employee (for instance, alternative terms and conditions for working and rest time, as well as extraordinary cancellation

⁶² Study of collective labour relations in the private sector (see Note 32).

of a contract with a view to achieving maximally adequate regulation in terms of flexibility and security in the given economic and labour market conditions).

The providing of content to the generally worded norms of the ECA might also be—subject to agreement with the social partners—delegated to collective agreements, especially where it is difficult for the law to give detailed guidelines to the parties to an individual employment contract on account of differences in work life and where an individual employee might lack the contracting skills to ensure security. The relevant areas include the degree of diligence, principles governing obstruction of work, proprietary liability, terms of contractual penalty, and principles and procedure for cancelling a contract. The goal is to create a better balance among competitiveness, job creation, and maintenance of jobs, and to take into account the minimum rights of employees.

Contrary to the trend in countries with a tradition of negotiating to conclude more agreements at the level of the enterprise, in Estonia we should, in view of the eclectic nature of the regulation of work conditions, attach more importance to the role of sector-level collective agreements in order to generalise the regulation of labour relations better while enjoying the benefits of regulation at the level of the enterprise. Consequently, the author holds that use of the combination of law and collective agreements needs support from the law and that, instead of law, regulation via collective agreements should be encouraged in establishment of work conditions—to the detriment of the employee, if necessary. Such diversification of the regulation of work conditions would enable flexibility and security matching the current situation, by granting discretion in decision-making to the level of the employees of the enterprise instead of to individual employees for important aspects of the employment relationship.



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The Importance of the Structure of the Insolvency System for Facilitation of Business Operators' Reorganisation

1. Introduction

The United Nations Commission on International Trade Law¹, The World Bank², and the International Monetary Fund³ have all recommended that states create, via legislation, options for the reorganisation of business operators. Although procedural alternative allowing the reorganisation of a business operator may be found in the insolvency laws of nearly all states today, countries vary in the thresholds that have to be met for initiation of reorganisation proceedings and in how reorganisation proceedings are positioned *vis-à-vis* bankruptcy proceedings structurally. The insolvency system's ability to promote reorganisation via legislation is another area in which states vary significantly.

The purpose of this article is to give an answer as to whether the structure of the insolvency system may help to promote the reorganisation of business operators in those situations wherein reorganisation should be preferred to liquidation. Also discussed is whether enabling the reorganisation of insolvent business operators may help to prevent the liquidation of viable business operators whose sustainable management after reorganisation would be possible in those kinds of insolvency systems whose structure does not promote reorganisation in appropriate cases.

2. The position of reorganisation in the system of objectives for insolvency law

In the structuring of their insolvency systems, states are—or at least should be—guided by the objectives of their insolvency law. Differences amongst states in terms of insolvency law range from the fundamental facts of their legal philosophy, specifically the key issue of whether the law is directed primarily at the pro-

¹ Legislative Guide on Insolvency Law. United Nations Commission on International Trade Law. New York 2005, p. 11. Available at http://www.uncitral.org/pdf/english/texts/insolven/05-80722_Ebook.pdf (most recently accessed on 7.4.2012).

² Principles and Guidelines for Effective Insolvency and Creditor Rights Systems. The World Bank 2001, p. 6. Available at <http://www.worldbank.org/ifa/FINAL-ICRPrinciples-March2009.pdf> (most recently accessed on 7.4.2012).

³ Orderly & Effective Insolvency Procedures: Key Issues. International Monetary Fund 1999. Available at <http://www.imf.org/external/pubs/ft/orderly/index.htm> (most recently accessed on 7.4.2012).

tection of the debtor or creditor, to issues of how proceedings are initiated and the content of the procedural rules.^{*4} Given the rather short history of insolvency law, the world's legal systems have developed no uniform traditions for channelling reorganisation proceedings.^{*5} However, providing the option of reorganisation as an alternative in the insolvency law of a state always points to the objective of allowing a business operator subject to bankruptcy proceedings to continue operating under certain circumstances instead of being liquidated.

One way of classifying insolvency systems is their bifurcation into debtor- and creditor-centric systems. A debtor-centric system is directed primarily at the protection of turnover, and its key objective is to minimise the adverse impact of insolvent business operators on the economy overall. The key objective of the creditor-centric system is to protect the rights of creditors and ensure fairness (equal treatment of creditors) in settlement of claims.^{*6} Although it has been claimed that the manner of expression of the objective of protecting the interests of the debtor and its creditors in the insolvency regulations of states is that the main emphasis in a creditor-centric system is normally on bankruptcy proceedings aimed at liquidation, with reorganisation proceedings established as an ancillary option^{*7}, the priority of reorganisation proceedings need not automatically imply limited protection for the interests of creditors. In certain instances, it is precisely by means of reorganisation that creditors may be able to have their claims settled on a larger scale than under bankruptcy proceedings, where the likelihood of settlement of the claims of creditors with unsecured claims is fairly low to nil.^{*8} Hence, an insolvency system that attaches significance to extensive protection of the creditor's rights does not necessarily presuppose, *per se*, an emphasis on bankruptcy proceedings directed toward liquidation.^{*9}

In view of the above, encouragement of reorganisation does not imply regulation of insolvency law proceeding from the fact that the objective of the insolvency system is mainly the protection of the debtor's interests. A more appropriate formulation is whether the objective of the relevant state's insolvency law is to encourage reorganisation at all costs or only in those instances wherein it secures optimal utilisation of the debtor's assets (and, thereby, also the best protection of the creditors' interests).

Therefore, for example, under French insolvency law, the continuation of the debtor's operations by means of reorganisation is always seen as having priority over liquidation of the business operator by means of bankruptcy proceedings.^{*10} In states following the German legal tradition, the emphasis is, instead, on the protection of the creditors^{*11}, as a result of which it is held in Germany, for instance, that if reorganisation is in the interests of the creditors and allows the value of the debtor's assets to be maximised, procedural rules should be no obstacle to reorganisation.^{*12} The Supreme Court of Estonia too has upheld reorganisation in instances in which better protection is secured for the creditors thereby than bankruptcy proceedings would provide.^{*13}

Both in instances wherein the objective of insolvency is to encourage reorganisation by all means and in those insolvency systems where reorganisation is given priority only if it allows more effective utilisation

⁴ I.F. Fletcher. *Insolvency in Private International Law: National and International Approaches*, 1st ed. US: Clarendon Press 1999, p. 4.

⁵ W.W. McBryde, A. Flessner, S.C.J.J. Kortmann (eds). *Principles of European Insolvency Law*, Vol. 4 in the *Law of Business and Finance* series. The Netherlands: Kluwer Legal Publishers 2003, p. 67.

⁶ P. Manavald. *Likvideeriva pankrotimenetluse alternatiivid maksejõuetuse tingimustes (Alternatives to Bankruptcy Proceedings Directed at Liquidation in the Event of Insolvency)*. – *Juridica* 2005/2, p. 125 (in Estonian).

⁷ *Ibid.*

⁸ The fact that larger proportions of creditors' claims are settled under a reorganisation plan than under bankruptcy proceedings has been analysed empirically in the context of Finnish reorganisation law: S. Sundgren. *Does a reorganization law improve the efficiency of the insolvency law? The Finnish experience*. – *European Journal of Law and Economics* 1998 (6)/2, p. 186. This position has been expressed also by D. Milman, C. Durrant. *Corporate Insolvency: Law and Practice*, 2nd ed. London: Sweet & Maxwell 1994, p. 125.

⁹ J. Israël. *European Cross-Border Insolvency Regulation*. Antwerp & Oxford: Intersentia 2005, p. 165.

¹⁰ See C. Jungmann, J. Thiessen. *Discussion report: Restructuring insolvent companies in the UK and in the US*. – *European Company and Financial Law Review* 2008, p. 190; S.A. Davydenko, J.R. Franks. *Do bankruptcy codes matter? A study of defaults in France, Germany, and the U.K.* – *The Journal of Finance* 2008 (63)/2, p. 566; Israël (see Note 9), p. 25.

¹¹ R. Blazy, B. Chopard, B. Fimayer. *Bankruptcy law: A mechanism of governance for financially distressed firms*. – *European Journal of Law and Economics* 2008 (25)/3, p. 265.

¹² M. Balz. *Market conformity of insolvency proceedings: Policy issues of the German insolvency law*. – *Brooklyn Journal of International Law* 1997 (23)/1, p. 168.

¹³ Supreme Court Civil Chamber ruling of 18.11.2009, 3-2-1-122-09, paragraph 17. – RT III 2009, 53, 395 (in Estonian).

of the debtor's assets, it is important for the insolvency system to ensure, by virtue of the structure of the insolvency system, that in situations in which the reorganisation of the debtor is warranted instead of bankruptcy proceedings, insolvency law should also be able to meet this objective. Hence, in all procedural systems that include an alternative to reorganisation proceedings, the legislation in effect should be impelled by the objective of ensuring a structure of proceedings that allow a choice to be made effectively with respect to the appropriate procedural alternative.^{*14}

3. The impact of the insolvency system's structure on the initiation of reorganisation proceedings

3.1. Problems arising from separation of bankruptcy and reorganisation proceedings

In terms of approaches to proceedings under the insolvency law of a state, a distinction is made between systems featuring uniformity of bankruptcy and reorganisation proceedings and the direction of procedural regulation in decision between liquidation and reorganisation proceedings under the proceedings initiated and, on the other hand, systems wherein the reorganisation and liquidation proceedings are detached from each other, with their initiation possible on a variety of bases.^{*15}

The entry into force of the Estonian Reorganisation Act^{*16} (ERA) on 26 December 2008, which for a business operator faced with solvency problems includes the option of overcoming the financial difficulties and continuing to operate by restoring liquidity, has not, in terms of its application in practice, brought with it the anticipated results, and reorganisation proceedings for business operators are conducted at a fraction of the rate seen with bankruptcy proceedings.^{*17} Although the regulation of insolvency law as a uniform type of proceedings has been considered a trend of contemporary legislation^{*18}, the establishment of Estonia's ERA was not guided by this principle. Since the word 'bankruptcy' sends a signal to society that a company is distressed, one reason for keeping the proceedings detached from each other was the legislator's desire to keep the negative meaning of bankruptcy from discouraging debtors from filing for reorganisation and creditors from accepting the reorganisation plan.^{*19} Considering bankruptcy as a result of preventable failures (in contrast to the US view, according to which it is recognised that failure need not rule out future suc-

¹⁴ Balz (see Note 12), p. 170.

¹⁵ Legislative Guide on Insolvency Law (see Note 1), p. 17.

¹⁶ Saneerimisseadus. – RT I 2008, 53, 296; RT I 2010, 2, 3 (in Estonian). English text available via <http://www.legaltext.ee/> (most recently accessed on 7.4.2012).

¹⁷ In 2009, 93 applications for reorganisation were filed with courts of the first instance, whereas applications filed for bankruptcy of legal entities numbered 1,562. Reorganisation petitions were satisfied with respect to only six of the 93 business operators that had filed for reorganisation (see: I ja II astme kohtute statistilised menetlusandmed. 2009. aasta kokkuvõte (Procedural Information from Courts of the First and Second Instances: 2009 Summary). Ministry of Justice 2010, p. 7 (in Estonian)). In 2010, 51 applications for reorganisation were filed in Estonia. By contrast, applications filed for the bankruptcy of legal entities numbered 1,345 (see: I ja II astme kohtute statistilised menetlusandmed. 2010. aasta kokkuvõte (Procedural Information from Courts of the First and Second Instances: 2010 Summary). Ministry of Justice 2011, p. 7 (in Estonian)). In the first half of 2011, 18 applications for reorganisation were filed with courts of the first instance. In contrast, applications filed for the initiation of bankruptcy proceedings for legal entities numbered 573 (see: I ja II astme kohtute statistilised menetlusandmed. 2011.a I poolaasta kokkuvõte (Procedural Information from Courts of the First and Second Instances: 2011 First-Half Summary). Ministry of Justice 2011, p. 7 (in Estonian)). The statistics do not provide information about the number of instances in which reorganisation proceedings reached the approval of a reorganisation plan or on the proportion of the applications filed that saw successful reorganisation proceedings. By comparison, it may be noted that in 2008, when there was no procedural alternative in the Estonian legal system to allow the initiation of reorganisation proceedings, 1,186 applications in all for bankruptcy of legal entities were filed with courts of the first instance (see: I ja II astme kohtute statistilised menetlusandmed. 2008. aasta kokkuvõte (Statistical Procedural Information from Courts of the First and Second Instances: 2008 Summary). Ministry of Justice 2009, p. 16 (in Estonian)). Even though the years following 2008 were also characterised by a decline in the economy due to the recession more generally, the above makes it possible nonetheless to infer that the adoption of the ERA did not significantly reduce the filing of applications for bankruptcy and that the proportion of instances of recourse to procedural alternatives directed toward reorganisation and the resolution of solvency problems remained lower than expected in comparison to bankruptcy proceedings.

¹⁸ McBryde *et al.* (see Note 5), p. 17.

¹⁹ Saneerimise kontseptsioon (The Concept of Reorganisation). Ministry of Justice of Estonia, Tallinn 2007, p. 22 (in Estonian)—copy in possession of author.

cess of incumbent management) is characteristic of other EU countries also.^{*20} The justification for making that kind of procedural choice may also be seen in the need to not encumber insolvency law that functions well for bankruptcy proceedings with profound legal changes.

On the other hand, precisely that strict separation of reorganisation and bankruptcy proceedings—in other words, the lack of integration in Estonian insolvency law more generally—may be why reorganisation proceedings are pursued so rarely in practice.

In order to understand the issues related to the structure of insolvency law in Estonia, one has to begin with explication of the regulation in effect under the Bankruptcy Act^{*21} (BA). Namely, before the ERA was passed, the BA already contained regulation allowing the business operator faced with solvency problems to undergo rehabilitation. This procedural alternative, essentially directed at allowing the business operator to continue operating, may be resorted to only in bankruptcy proceedings. In practice, the rehabilitation regulation under the BA has failed to gain extensive application. The reason may be that, following regulation under the BA, rehabilitation can be decided upon only after bankruptcy has been declared (§129 (3) of BA), or even later if composition is negotiated during rehabilitation, as under bankruptcy proceedings a decision on composition can be made only after claims have been defended (§180 (2) of BA). A decision for composition, however, is mandatory if, for instance, the goal of the rehabilitation is to reduce the creditors' claims, because under §178 (1) of the BA, repayment of debts may be agreed upon only by means of composition. To ensure successful rehabilitation, however, rehabilitation measures that include transformation of claims and working out a plan for sustainable management of the business operator should usually be implemented without the excessive delay that is characteristic of the BA, under which rehabilitation measures are to be applied only in the second stage of bankruptcy proceedings. In a situation of financial crisis, such a temporal gap could destroy the chances of rehabilitation of the business operator, creating a scenario wherein the financial situation of the business operator may become impaired irreversibly by the time rehabilitation is considered, with no actual possibility for successful rehabilitation.^{*22} The negative background of bankruptcy proceedings too may be seen as a reason creditors do not favour rehabilitation being carried out once bankruptcy has been declared. The rehabilitation taking place under bankruptcy proceedings may also have a negative effect on the debtor's willingness to apply rehabilitation. Hence, regulation of rehabilitation under bankruptcy proceedings in Estonia may be considered a failure, as in actual fact the conducting of the rehabilitation of the debtor is not encouraged by regulation under the BA.

Given the deficiencies in the regulation of rehabilitation conducted under bankruptcy proceedings, the ERA was established for a type of proceedings entirely detached from and independent of bankruptcy proceedings. The main effect of the strict separation of these proceedings is that once the bankruptcy petition is filed, a court cannot on its own initiative convert the proceedings into reorganisation if that appears to be more appropriate in the given circumstances. Hence, the initiation of reorganisation proceedings depends entirely on the debtor's ability to evaluate the financial state of the business operator and to understand the legal opportunities to overcome its solvency problems. As was mentioned above, reorganisation, however, need not be only to protect the interests of debtors, which is why the insolvency system has to ensure by its structure that application of reorganisation is considered in appropriate cases. Consequently, an insolvency system with strictly separated proceedings does not encourage the consideration of an alternative that allows the reorganisation of the business operator; instead, it imposes on the business operator the choice of whether to file for reorganisation when solvency problems appear or wait until insolvency comes to pass, when filing for bankruptcy is the only lawful way to proceed.

²⁰ M. Brouwer. Reorganization in US and European bankruptcy law. – *European Journal of Law and Economics* 2006 (22)/1, p. 9.

²¹ Pankrotiseadus. – RT I 2003, 17, 95; RT I, 29.6.2011, 1 (in Estonian). English text available via <http://www.legaltext.ee/> (most recently accessed on 7.4.2012).

²² U. Tross. Saneerimine kui alternatiiv ettevõtte likvideerimisele pankrotimenetluses (Reorganisation As an Alternative to the Liquidation of a Business Operator under Bankruptcy Proceedings). Master's thesis. Tartu 2003, p. 41 (in Estonian).

3.2. Methods for unification of the insolvency system

It has been pointed out that, to ensure the effectiveness of insolvency law, switching proceedings smoothly should be allowed by procedural rules.^{*23} For that, however, reorganisation and bankruptcy proceeding must be seen not as two strictly separated measures for resolving solvency issues but as alternative and closely linked parts of a single system that aims to allow the liquidation of business operators only if reorganisation is not an adequate means in the given solvency situation.

Unlike in the system of procedural regulation in effect in Estonia, under uniform insolvency proceedings the financial situation of the business operator is evaluated within a certain time after an application has been filed for the initiation of proceedings, and then a decision is made as to reorganisation or liquidation.

French insolvency law, for instance, by virtue of its structure, is always directed at the consideration of options for reorganisation before bankruptcy is declared. French insolvency regulation under the Commercial Code (*Code de commerce*^{*24}, CC) is in its structure directed at ruling out all options that allow reorganisation before liquidation occurs. Under any proceedings directed at resolving insolvency, this is made possible, in the initial phase, by the designation of an observation period, during which the prospects for reorganisation are established.^{*25} Hence, French insolvency law is directed at the consideration of alternatives to reorganisation before liquidation proceedings are initiated, precisely by virtue of the fact that the possibility of the reorganisation of the business operator is established during the observation period that is the first phase of the proceedings. That rules out liquidation occurring with respect to a business operator with positive prospects for reorganisation.

Under the Swiss Debt Enforcement and Bankruptcy Law^{*26} (*Bundesgesetz über Schuldbetreibung und Konkurs*, SchKG), objectives similar to that of the observation period applicable under French insolvency law are served by the designation of a moratorium upon initiation of proceedings (§§ 293–304 of SchKG).^{*27} For the duration of the moratorium, the court may appoint an administrator whose activity is aimed at establishing the options for the reorganisation of the debtor (§293 (3) of SchKG). Nevertheless, a court is not required to do so. Thus Swiss law entitles a court to initiate reorganisation proceedings in a situation wherein, under bankruptcy proceedings, reorganisation appears to be more expedient. In such an event, there is no need to wait for an application from the debtor or creditor before initiation of reorganisation proceedings; instead, a court can initiate proceedings at its own initiative^{*28}, regardless of whether reorganisation or liquidation proceedings have been initiated on the basis of an application to begin the relevant proceedings.

In such forms of insolvency systems, the reorganisation possibilities are considered and reorganisation measures are implemented betimes, enabling minimisation of the risk of the business operator becoming irreversibly insolvent during the time of the proceedings on account of the delay before reorganisation can be applied. However, as is clear from, for instance, the lack of implementation of the rehabilitation institution in Estonia (which, at least formally, in combination with bankruptcy proceedings forms a kind of unity of proceedings in which the time gap before the possibility to apply rehabilitation measures rules out the opportunity for the successful implementation of the rehabilitation institution), merely formal uniformity of the insolvency system cannot ensure that reorganisation is conducted when it is suitable. It is apparent that uniformity of the insolvency system alone cannot ensure that reorganisation is conducted if the procedural provisions themselves do not enable the reorganisation to be carried out—as, for example, if the reorganisations measures are to be applied by the time at which insolvency may have become irreversible.

For instance, in Germany, reorganisation proceedings quite similar to Estonian rehabilitation proceedings under the BA have been enforced. In Germany, when an application is filed, the proceedings initiated are always bankruptcy proceedings. In bankruptcy proceedings, however, a court may also approve

²³ Principles and Guidelines for Effective Insolvency and Creditor Rights Systems (see Note 2), p. 28.

²⁴ Code de Commerce, as entering force on 1.1.2006. English text available via <http://www.legifrance.gouv.fr/Traductions/en-English/Legifrance-translations> (most recently accessed on 7.4.2012).

²⁵ J. Marshall (ed.). *European Cross Border Insolvency*, Vol. 1. London: Sweet & Maxwell 2007, pp. 10–6, 10–8.

²⁶ *Bundesgesetz über Schuldbetreibung und Konkurs*, as entering force on 11.4. German text available via http://www.admin.ch/ch/d/sr/c281_1.html (most recently accessed on 3.6.2012).

²⁷ S.V. Berti. *Swiss Debt Enforcement and Bankruptcy Law*. Zürich: Schulthess Polygraphischer Verlag 1997, p. XVII.

²⁸ The Concept of Reorganisation (see Note 19), p. 28.

a reorganisation plan, according to §217 of the German Insolvency Act²⁹ (*Insolvenzordnung*, InsO). As in Estonian rehabilitation proceedings under the BA, the debtor may seek the initiation of bankruptcy proceedings also by submitting a reorganisation plan (§218 (1) of InsO). In the event of the initiation of proceedings upon an application being filed by the debtor or creditor, in Germany the decision as to the approval of the reorganisation plan can be made on the basis of the reorganisation plan submitted by the bankruptcy administrator, if the bankruptcy administrator has determined that reorganisation might meet with success (§156 (1) of InsO) and if the committee of creditors has tasked the administrator with the preparation of this kind of plan (§157 of InsO). Hence, analogously to what occurs in Estonian rehabilitation proceedings, under German insolvency law the reorganisation measures, at least in theory, are applied with inappropriate delay that may render successful reorganisation impossible. It has been pointed out that reorganisations occur infrequently in Germany, as they do in Estonia, regardless of uniformity of insolvency law of this sort.³⁰

As appears evident from the above, the uniformity of proceedings characteristic of insolvency systems such as the French or Swiss system, by virtue of its structure, rules out the problem related to a switch of proceedings, as it allows selection of the proceedings that are most appropriate in light of the facts of the business operator's solvency problems in the first phase of the proceedings. It appears thus that the procedural structure of the insolvency system may have an important role in ensuring that options for reorganisation are assessed before the bankruptcy of the business operator is declared. It is the uniform structure of an insolvency system that brings about flexibility in terms of the decision between alternative proceedings, contributing to the reaching of the objective of liquidating only those business operators whose reorganisation is not possible.

Proceedings upon whose initiation a decision has to be made as to whether to apply for reorganisation or file a bankruptcy petition, and during which the possibilities for reorganisation are not considered in the first phase of the proceedings, if at all, do not make it possible to facilitate the reorganisation of viable business operators via the structure of the insolvency system. Additionally, it has been correctly pointed out that excessive separation between the proceedings may, in the final instance, cause delay, increase the expenses incurred in the proceedings, and be ineffective.³¹

It cannot be ignored, however that uniform insolvency systems too have imperfections. One reason for dysfunction of Estonian rehabilitation proceedings could be the negative connotations of bankruptcy that accompany rehabilitation taking place as a part of bankruptcy proceedings—the question arises of whether uniformity of the insolvency law might have, due to the connectedness of reorganisation and bankruptcy proceedings, influence on a debtor's desire to file for any proceedings at all since the final outcome, in terms of the type of the proceedings that are to be conducted, cannot be foreseen at the initiation phase of the proceedings. However, the duty of filing a petition to initiate proceedings in the case of insolvency should prevent the debtor's complete lack of concern for obligations deriving from insolvency provisions. The main reason for preferring a uniform insolvency system regardless of its flaws is that a uniform insolvency system guarantees at least the consideration of the possibility of reorganisation, which has been ruled out in the case of the insolvency system of strictly separated proceedings since the reorganisation proceedings can only be initiated if the debtor has applied it and no conversion from bankruptcy to reorganisation can be done once the bankruptcy petition has filed. Thus, uniformity of the insolvency system helps to minimise the risk of initiating the inappropriate proceedings for the nature of business operator's solvency problems.

²⁹ *Insolvenzordnung*, as entering into force on 1.1.1999. German text available at <http://www.gesetze-im-internet.de/inso/> (most recently accessed on 3.6.2012).

³⁰ D. Smith, P. Strömberg. *Systemic Financial Crises: Containment and Resolution*. – P. Honohan, L. Laeven (eds). USA: Cambridge University Press 2005, p. 233.

³¹ Legislative Guide on Insolvency Law (see Note 1), p. 18.

4. Insolvency as a prerequisite for the initiation of reorganisation proceedings

Under Estonian insolvency law, the prerequisites for the initiation of bankruptcy and reorganisation proceedings diverge: the general standard is that bankruptcy proceedings may be initiated only with respect to an insolvent business operator^{*32} (§31 (1) of BA) and it is the responsibility of the business operator to file for bankruptcy with a court in the event of permanent insolvency. The duty to file for bankruptcy arises under §36 of the General Part of the Civil Code Act^{*33} (for a private limited company, for instance, more specifically under §180 (5¹) of the Commercial Code^{*34} (ComC) and for a public limited company under §306 (3¹) of the ComC). In contrast, reorganisation proceedings may be initiated only if the business operator faces financial difficulties that might result in insolvency coming about later (§8 (1) of ERA). Accordingly, in cases of permanent insolvency of the business operator, applying the petition for initiation of bankruptcy proceedings is obligatory even if sustainable management of the business operator after reorganisation would likely be possible despite insolvency.

Threshold requirements for the initiation of reorganisation proceedings differ from one state to the next. In this respect, there are states that view insolvency as the prerequisite for the initiation of proceedings and those where mere impending insolvency is sufficient. These differences are fundamental with respect to the insolvency system overall.^{*35}

Where reorganisation is involved, however, the issue of insolvency is actually secondary. It is more important to ask whether the business operator has potential to resume successful operations. Hence, under certain circumstances, reorganisation of an already insolvent business operator should be permitted, as this allows for the objective of insolvency law—liquidation of only irreversibly non-viable business operators—to be met. Consequently, an insolvency system that rules out reorganisation of an insolvent business operator need not allow the desired implementation of the institution of reorganisation.

Whether it is possible via insolvency law to encourage the reorganisation of business operators or whether that would result in inappropriate use of the insolvency system depends in part precisely on the system's structure. For example, under French insolvency law, the initiation of one type of the alternative proceedings directed at reorganisation—*redressement judiciaire*—is possible also in a situation wherein the business operator is insolvent.^{*36} In the context of the structure of the French insolvency system, under which the appropriateness of reorganisation is decided upon during the observation period designated at the beginning of proceedings, allowing reorganisation of insolvent business operators makes it possible to reach insolvency law's objective of conducting reorganisation if it is, in comparison to liquidation, an appropriate solution to the case-specific solvency issues.

Allowing reorganisation of insolvent business operators in insolvency systems with detached proceedings such as that in Estonia, however, could bring the risk of reorganisation being used only as the preliminary phase of bankruptcy proceedings, in order to defer bankruptcy.^{*37} With the separation of the alternative proceedings, the structure of the Estonian insolvency system creates a situation wherein allowing reorganisation with respect to insolvent business operators would enable a business operator acting in bad faith to use reorganisation proceedings to the end of deferring bankruptcy. Although a business operator has to establish, upon filing for reorganisation, that its sustainable management will be likely after its reorganisation (§8 (1) 3) of ERA), said prerequisite does not entirely eliminate the risk of reorganisation proceedings nonetheless being initiated to the benefit of an irreversibly insolvent business operator whose intention is only to defer bankruptcy.

³² Under §31 (3) of the BA, it is nevertheless possible, upon the debtor filing for bankruptcy, to declare bankruptcy even if insolvency is likely to occur in the future.

³³ Tsiviilseadusliku üldosa seadus. – RT I 2002, 35, 216; RT I, 6.12.2010, 1 (in Estonian). English text available via <http://www.legaltext.ee/> (most recently accessed on 7.4.2012).

³⁴ Äriseadustik. – RT I 1995, 26, 355; RT I, 28.12.2011, 1 (in Estonian). English text available via <http://www.legaltext.ee/> (most recently accessed on 7.4.2012).

³⁵ J. Omar. *International Insolvency Law: Themes and Perspectives*. United Kingdom: Ashgate Publishing Press 2008, p. 87.

³⁶ R. Cork, M. Santoi. *France: Restructuring and Insolvency Procedures*. Available at <http://www.iflr.com/Article/2166556/France-Restructuring-and-insolvency-procedures.html> (most recently accessed on 3.6.2012).

³⁷ The ineffectiveness of the Reorganisation Act as a means to defer bankruptcy and the resulting insolvency has been pointed out by Prit Manavald. See P. Manavald. *Economic Crises and the Effectiveness of Insolvency Regulation*. – *Juridica International* 2010 (XVI), p. 214.

A unitary insolvency system, in which the choice of appropriate proceedings is made during the first phase of the proceedings initiated, unlike the Estonian insolvency system, rules out the potential risks attendant to the legalisation of reorganisation of an insolvent business operator, as the appropriateness of reorganisation is identified immediately after the commencement of the proceedings. Thus uniformity in an insolvency system helps to prevent the filing of applications for reorganisations that are impelled by the objective of deferral. However, in, for instance, French insolvency law, an extra guarantee to prevent proceedings from becoming drawn out and the associated cost in situations wherein proceedings have been initiated with respect to a business operator who is clearly irreversibly insolvent has been granted by regulations that designate no observation period if, by the time the application is filed, the business operator has ceased operations or if reorganisation is, for some other reason, clearly impossible.³⁸ In systems that allow the reorganisation of an insolvent business operator, complementary conditions that help to prevent unnecessary spending of time on consideration of the reorganisation options are certainly relevant.

Those insolvency systems with detached proceedings, such as the Estonian one, have to implement other means to prevent abuse of the reorganisation regulation. One solution for the problem might be sanctions for failure of a member of a business operator's management board to fulfil the obligation of submitting a bankruptcy petition in cases wherein the business operator is irreversibly insolvent and applies for reorganisation only so as to defer bankruptcy. However, evidence of intent to abuse reorganisation regulations is probably difficult to produce.

By virtue of its structure and prerequisite of initiated reorganisation proceedings, the Estonian insolvency system, insofar as a business operator that has become insolvent is required to file for bankruptcy, creates a situation wherein options for reorganisation are not considered even with respect to those insolvent business operators whose successful operations could, in fact, resume. However, in insolvency systems wherein the alternative sets of proceedings are detached from each other, the possibility of reorganising insolvent business operators with potential to resume successful operations might compensate for the system's lack of ability to support reorganisation on the appropriate occasions.

5. Conclusions

The issue of the procedural structure of insolvency law has not only formal significance, since the flexibility characteristic of uniform insolvency systems with a phase providing recognised chances to reorganise the business operator makes it possible to encourage the reorganisation of business operators in situations wherein this would be a more appropriate solution than liquidation. This kind of insolvency system also enables prevention of drawn-out, cumbersome, and costly proceedings that in no way can contribute to the reaching of insolvency law's objectives.

Although the structure of a procedural system alone cannot ensure effectiveness of the practical implementation of the institution of reorganisation, its role as a guarantee of reorganisation of viable business operators cannot be overlooked.

Insolvency systems with proceedings strictly separated from each other, permitting initiation of either reorganisation or liquidation proceedings on the basis of distinct applications and imposing different threshold requirements for the two types of proceedings, do not support consideration of the option to reorganise a viable business operator. On the contrary, the system might push a business operator into applying for reorganisation only when its solvency problem has become irreversible and liquidation is the only option left, or preclude reorganisation of a viable business operator whose bankruptcy petition has been filed. This adds to the ineffectiveness of insolvency law overall. Hence, the procedural structure of the insolvency system is of significant importance in ensuring that the options for reorganisation are assessed before the liquidation of a business operator.

However, the disadvantages of those insolvency systems with detached reorganisation and liquidation proceedings can be, at least partly, compensated for by allowing reorganisation of the insolvent business operators who have potential to resume successful operations.

³⁸ Israël (see Note 9), p. 25.

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International Legal Norms

The political developments in the years after World War II have led to a considerable number of rules and views at the international level, the complex of which is now recognised as ‘international law’. In this article, the domain as such, rather than a specific part of this whole, is examined from a meta-legal perspective. The meaning of ‘international law’ is considered here; how should this be qualified?

In order to ascertain this, a general analysis of the basis of positive law (i.e., the law as it is established) is useful. To that end, I will indicate in Section 1 how ‘natural law’ may be interpreted. The ideas of ‘natural law’ and ‘international law’ are, after all, often connected. In Section 2, the way in which rules at the international level operate is dealt with; it will be shown how these are observed and whether they may be enforced. Finally, in Section 3, the topic of human rights is discussed, because of its connection with cross-border legal issues. Coming to the fore here is the question of the extent to which human rights are relevant to this subject.

1. The legal basis at the national level

It is important to determine which elements are constantly (implicitly) present in national law. Through this approach, a possible contrast with the rules at the international level may come to light. Because of the general theme of this article, I cannot address all possible perspectives on natural law; I will merely deal with the most important positions for the present discussion.

I mention the term ‘natural law’; the approaches of two philosophers in particular, Hart and Hobbes, provide clarification with regard to this matter. A familiar interpretation of ‘natural law’ is the ‘classical’ approach; this consists of a standard indicating that a natural law exists in an absolute, immutable, sense and should (in moral terms) be acknowledged as the directive for actual legislation¹, the truth or rectitude being the same for all and equally known to all insofar as the collective principles of reason are involved.²

It may accordingly be said that ‘every posited human law contains the rationale of the law to the degree in which it is derived from the law of nature. If it, however, in any way, discords with the natural law, it will no longer be a law, but a corruption of law’³. The right to, for example, a fair trial could from this perspective be taken to exist before it is laid down by a (human) legislator.

¹ T. Aquinas. *Summa Theologiae* [1274]. Complete Works, Vol. 7: 1a2ae, *Summae Theologiae a quaestione 71 ad quaestionem 114*. Rome: Ex Typographia Polyglotta S. C. de Propaganda Fide 1892, Q 90, Article 2 (p. 150); Q 93, Article 3 (p. 164); Q 94, Article 2 (pp. 169, 170); Q 94, Article 5 (pp. 172, 173).

² *Ibid.*, Q 94, Article 4 (p. 171).

³ Aquinas (see Note 1) wrote: ‘Unde omnis lex humanitus posita intantum habet de ratione legis, inquantum a lege naturae derivatur. Si vero in aliquo a lege naturali discordet, iam non erit lex, sed legis corruptio’. – Q 95, Article 2 (p. 175).

This perspective differs from Hart's. He argues that any social organisation must contain a '*minimum content of Natural Law*'⁴, consisting of 'universally recognized principles of conduct which have a basis in elementary truths concerning human beings, their natural environment, and aims [...]'⁵.

This means that basic rules (according to Hart, even 'truisms') have to be present in order for human coexistence to be possible. There has to be 'approximate equality', for example: people must be approximately equally strong, since some exceptionally powerful individual could easily dominate the others, without observing the law.⁶ 'Natural law' is clearly given a different meaning from the usual one mentioned above; Hart connects this with the laws of nature, such as the law of gravity.⁷

The second philosopher who should be mentioned here is Hobbes. For him, 'natural law' refers to no more or less than the way in which one acts on the basis of reason.⁸ In this sense, there are natural laws, the most important of which is that one should attempt to live peacefully alongside others as far as possible, and might resort to war if this should turn out to be untenable.⁹ Hence, there is significant agreement between Hobbes's viewpoint and that of Hart, at least in this respect.

Although Hart's minimum content of natural law pertains to circumstances that apply independently of agents whereas Hobbes focuses on reason and, consequently, the agent, both make it clear that actual circumstances are the issue. Natural law is transposed into positive law; the contents are even alike: 'The Law of Nature, and the Civill Law, contain each other, and are of equall extent. For the Lawes of Nature [...] are not properly Lawes, but qualities that dispose men to peace, and to obedience. When a Common-wealth is once settled, then are they actually Lawes, and not before [...]'¹⁰

Both thinkers make an important contribution to determining the basic elements of law. If someone should, for example, be capable of subjugating all others to himself, it may be argued that the existence of legislation would be irrelevant to him. After all, it would not be in his interest to submit to rules that impede him.

Is this approach to natural law the most credible one? As I have said, the treatment of this topic must be of a summary nature, but it is in order to pay some attention to an alternative. This consists in positive law being ideally modelled after 'classical' natural law, or natural law in the narrow sense, as it may be called. This alternative is adhered to by many, amongst whom Hugo Grotius is an important exponent. He argues that natural law follows from human nature¹¹ but specifies this differently than (for example) Hobbes, by indicating that it is inherent in natural law to keep one's promises¹² and that people would also have sought each other out if the situation did not involve mutual dependence.¹³ It is important that not merely reason is involved here but also 'right reason'.¹⁴

It is difficult to make explicit how natural law would compel in this case, as Hobbes observes¹⁵—who doesn't, incidentally, oppose Grotius but Aristotle, whose work exhibits a similar account of human nature¹⁶ (people, in Hobbes's view, can live together firmly only if the state of nature is abolished and a

⁴ H.L.A. Hart. *The Concept of Law*. Oxford: Clarendon Press 1961, p. 189.

⁵ *Ibid.*

⁶ *Ibid.*, pp. 190, 191.

⁷ *Ibid.*, p. 184.

⁸ The (subjective) 'right of nature' is not specified (as, for example, is the right to life), as Hobbes defines the liberty that is part of this right negatively as 'the absence of externall Impediments'. See T. Hobbes. *Leviathan* [1651]. Cambridge: Cambridge University Press 2007 with R. Tuck (ed.), p. 91 (in Chapter 14); see p. 145 (in Chapter 21).

⁹ *Ibid.*, pp. 91, 92 (in Chapter 14). His premise in this respect is similar to Hart's when he emphasizes the (approximate) equality between people. See Hobbes (see Note 8), pp. 86, 87 (in Chapter 13).

¹⁰ *Ibid.*, p. 185 (in Chapter 26).

¹¹ H. Grotius. *De Iure Belli ac Pacis* [1625] (On the right of war and peace). Aalen, Germany: Scientia Verlag 1993, p. 9 (Prolegomena, §8).

¹² *Ibid.*, p. 11 (Prolegomena, §15). Hobbes also promulgates this—Hobbes (see Note 8), p. 100 (in Chapter 15)—but not in the same way as Grotius (that is, on the basis of a 'social appetite'; see Grotius (*ibid.*), p. 8 (Prolegomena, §7)), since without a sovereign to preserve the peace, people don't (stably) unite (Hobbes (see Note 8), p. 88 (in Chapter 13)). Instead, they do so on the basis of self-interest—e.g., Hobbes (see Note 8), p. 93 (in Chapter 14).

¹³ Grotius (see Note 11), p. 12 (Prolegomena, §16).

¹⁴ Grotius states that natural law is the dictate of right reason ('*Ius naturale est dictatum rectae rationis*') (see Note 11), on p. 34 (Book 1, Chapter 1, §10). The term 'right reason' is used by Hobbes too (see Note 8), p. 32 (in Chapter 5), for whom the notion lacks the moral connotation it has with Grotius.

¹⁵ Hobbes (see Note 8), p. 471 (in Chapter 46).

¹⁶ Aristotle. *Politica* [c. 350 BCE]. Opera, Vol. 2. Darmstadt: Wissenschaftliche Buchgesellschaft 1960 with I. Bekker (ed.), 1253a.

sovereign is present^{*17}) and, so, echoes a specific part of the latter's political philosophy? In Section 2, this topic, the enforceability of law, will receive attention.

As for the question of whether this opinion is tenable, it is difficult to ascertain how the existence of natural law in the narrow sense may be maintained. Natural law in Hart's and Hobbes's sense can be defended empirically, but the alternative's claims exceed the means of its proponents to justify them. It is at least possible to describe a system of law that does not involve this sort of natural law. Even if this isn't criticised as to its content, an important criticism can thus be made^{*18} of positions that argue for its existence. It cannot be refuted, but its presence can be shown to be redundant.

The situation Hart and Hobbes describe is a valuable starting point for qualification of the national domain. The question arises of whether this applies to the international domain as well. With respect to the 'approximate equality', for example, it is obvious that this is not found between states. Section 2 expounds on the consequences of this state of affairs.

2. Enforceability as a necessary element in a system of law

In the previous section, some problems with natural law in the narrow sense were pointed out. Accordingly, it does not seem to provide a viable basis in argument for the existence of 'international law'. In this section, the issue is approached from a different perspective, enquiry into the relevance of enforceability. I will start again with the analysis at the national level; this time, the contrast with 'international law' receives more attention than it did in the first section.

It is, among other things, characteristic of **national** legislation that it can be enforced. An example at that level can be found in Article 310 of the Dutch Penal Code, which makes theft punishable—this has no value if a perpetrator of this felony cannot be tried before a court of law. How is the issue settled internationally? If one wants to summon a state before the International Court of Justice, that state must itself have recognised the jurisdiction of said court (Article 36, Section 2 of the Statute of the International Court of Justice). The same rule applies to a situation in which parties appear before the International Criminal Court (Article 12, Section 2 of the Rome Statute of the International Criminal Court).

The International Court of Justice and the International Criminal Court lack, in this respect, the unconditional authority of national courts of law, whose decisions can actually be enforced, irrespective of the will of the parties involved (see, for example, Article 553 of the Dutch Criminal Proceedings Act for the Dutch situation). A sovereign at the international level is lacking; the consequences of this are evident: there is no instance to which parties have transferred their competencies, and the judge, accordingly, merely rules in the cases that are willingly submitted to his discretion. One may wonder whether this state of affairs may be deemed a practice of law.

This case, of course, involves not the (supposed) *basic* contract on the basis of which, in Hobbes's model, the contracting parties appoint a sovereign^{*19} but the fact that rules must be enforceable. Hart distinguishes between primary and secondary rules; the first sort of rules indicate what one must do or is forbidden to do, while rules of the second sort determine, besides the coming about and changing of the primary rules—in the form of 'rules of adjudication'—that judges are given the power to judge.^{*20} This has no merit without the additional possibility of imposing sanctions.

Hart resists the idea that the sovereign is above the law.^{*21} In his model, moreover, the position of a sovereign is not a central issue, because of the following reasoning: 'There are [...] two minimum conditions necessary and sufficient for the existence of a legal system. On the one hand those rules of behaviour which

¹⁷ Hobbes (see Note 8), p. 88 (in Chapter 13).

¹⁸ By means of the approach known as Occam's razor, after an interpretation of part of William of Ockham's epistemology. See G. de Ockham, *Scriptum in Librum Primum Sententiarum Ordinatio* [c. 1319], *Distinctiones* 19–48. *Opera Philosophica et Theologica: Opera Theologica*, Vol. 4. St. Bonaventure University, New York: St. Bonaventure University 1979 with G. Etzkorn, F. Kelley (eds), *Distinctio* 30, *Quaestio* 1 (p. 317), *Quaestio* 2 (p. 322); cf. *Distinctio* 27, *Quaestio* 2 (p. 202).

¹⁹ Hobbes (see Note 8), p. 120 (in Chapter 17).

²⁰ Hart (see Note 4), p. 94.

²¹ *Ibid.*, p. 218.

are valid according to the system's ultimate criteria of validity must be generally obeyed, and, on the other hand, its rules of recognition specifying the criteria of legal validity and its rules of change and adjudication must be effectively accepted as common public standards of official behaviour by its officials.'²²

If these conditions are indeed met, a sovereign may not be required (although it should still be possible to sanction a transgression of the rules). At the international level, this situation does not apply, as is apparent from the behaviour of some (powerful) states. There, the lack of a sovereign is problematical: what exists is licence. It turns out that there is only a conditional relationship at this level: the parties agree on something and accept that a judge may render a verdict.

The fact that there is a judge seems nonetheless to imply the presence of law. Still, how should this be appraised? The following from the Charter of the United Nations is illustrative: 'If any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council' (Article 94, Section 2 of the UN Charter). Since the permanent members have the right of veto (Article 27, Section 3 of the UN Charter), in a number of cases there will be no legal enforcement.²³

This also applies to sanctions that may be imposed by the Security Council: members of the United Nations 'may be suspended from the exercise of the rights and privileges of membership by the General Assembly upon the recommendation of the Security Council' (Article 5 of the UN Charter) and 'may be expelled from the Organization by the General Assembly upon the recommendation of the Security Council' if they have not acted in accordance with the principles of the charter (Article 6 of the UN Charter). Those who are permanent members may prevent sanctions being imposed against them. This already points to an important given: some states being more powerful than others. While, as described in the previous section, not a decisive factor at the national level, it impedes the enforcement of decisions or renders them impossible.²⁴ It is not without reason that countries such as Japan attempt to acquire permanent membership, while it would at the moment probably be unrealistic to expect countries such as Belgium, Finland, and Estonia to fulfil this role.

The status of the member states appears to be decisive for the position they occupy. Similar issues may present themselves at the national level, but in those cases they are excesses. If a national court of law were to punish a successful businessman differently from a beggar (*ceteris paribus*), this would be considered unacceptable. At the international level, in contrast, that one state is more powerful than another is not only accepted but evidently an established principle.

As for disputes about judgements by the International Criminal Court, the cases are, insofar as they don't concern the judicial functions of the Court, referred to the International Court of Justice if the states cannot come to an understanding amongst themselves (Article 119, Section 2 of the Rome Statute of the International Criminal Court), so the problem just noted occurs here as well.

This is also apparent at the European Union level. If a Member State doesn't adhere to an obligation that is incumbent on it on the basis of the consolidated version of the Treaty on the Functioning of the European Union, the European Commission may, having called upon said Member State to take the appropriate measures, bring the case before the Court of Justice of the European Union (Article 258 of the treaty). If the Court rules in favour of the European Commission, the Member State in question is to take the necessary measures to comply with the Court's judgement (see the treaty's Article 260, Section 1).

This is a straightforward practice. However, should the relevant Member State subsequently fail to comply with the Court's judgement or not pay a 'lump sum or penalty payment' that the Court imposes on it (see Article 260, Section 2) of the treaty, there are no further legal means for inducing action by the Member State. There are, of course, political means by which to manoeuvre, but these exist irrespective of the rules, such that an appeal to them doesn't enhance the status of European legislation. The provisions of the consolidated version of the Treaty on the Functioning of the European Union directed at the Member States may be invoked by individuals before a national court of law, but this shifts crucial entity to the nation, such that, via a detour, national law is concerned: European legislation is here accepted and applied.

It is not just the position of the judge that is illustrative of the dubious standing of international legislation. An organ of the executive of the United Nations, the Security Council (mentioned above), appears

²² *Ibid.*, p. 113.

²³ Hart (see Note 4, p. 227) considers this to be an important objection.

²⁴ See Hart (see Note 4), pp. 191, 214.

not to be able to operate on its own. This is clear from the fact that five of the 15 members had to be given the status of permanent member (Article 23, Section 1 of the UN Charter) and thus, moreover, acquired the right of veto, as mentioned above, apparently because they would not have obeyed decisions that run counter to their interests. This pragmatic solution is commendable, but in this way politics are decisive and there seems to be no room for a (separate) domain of law.

It is, then, difficult to demonstrate that international law exists. Agreements have been made, but it cannot consistently be inferred from states' behaviour that they acknowledge these as having legal force. Problems seldom ensue, since the issues involved are such that it is to the states' advantage that the agreements be followed, or since one wants to prevent political difficulties from arising^{*25}, but that doesn't indicate the recognition of international norms as law.

Hegel points to the problems at the international level as resulting from a lack of enforceability: 'There is no magistrate; there are at best arbitrators and mediators between states, and these merely coincidentally, i.e., according to specific wishes.'^{*26} Although many supranational organisations have been established, this observation still seems to be correct. In Hegel's view, there can only be a command (expressed with the *Sollen* modality) to obey the rules^{*27}, and the problems might be resolved through moral standards.^{*28} For Hegel, moreover, positive law and natural law coincide.^{*29}

Similar characteristics feature in the current situation: 'A clear weakness of international law [...] is that the enforcement mechanisms of international law continue to be unsatisfactory and the Security Council does not offer an adequate substitute.'^{*30} This is not all there is to say on this issue; international law may originate in the same manner as national law. Once international law is realised, it is abided by because enforceability is a given. Accordingly, it is not in the nature of international law that it could not exist; it would be more apt to say that it must follow the same course as national law if it is to function. Franck rightly points out that incidental non-compliance is not decisive. This is manifested even at the national level.^{*31} However, there is a crucial difference: actors at the national level that do not observe the law can be punished against their will.^{*32}

It may be objected that in the above discussion no definition was given of 'law' or of 'right'. This task is not only difficult but perhaps even impossible. To this predicament one may add, as does G.L. Williams, that 'there is no such thing as an intrinsically "proper" or "improper" meaning of a word'^{*33} and that 'the idea of a true definition is a superstition'^{*34}, such that the matter of whether 'international law' is law is merely a verbal^{*35} one and needs to be abjured^{*36} (no pun intended). These observations have merit. A definition is in many cases an inadequate tool for argumentation—viz., if one develops a definition and subsequently asks what follows from it. Various lines of thought may arise thereby that are not mutually compatible or consistent; they may even conflict with each other. Alternatively, a definition may enter common use if justified, as is that of a triangle.

²⁵ The latter situation may account for behaviour that seems to be at odds with the thesis that international law is observed by states even if this seems to conflict with their interests. See S.V. Scott. *International law as ideology: Theorizing the relationship between international law and international politics*. – *European Journal of International Law* 1994 (5)/1, p. 314.

²⁶ 'Es giebt keinen Prätor, höchstens Schiedsrichter und Vermittler zwischen Staaten, und auch diese nur zufälligerweise, d.i. nach besondern Willen', states G.W.F. Hegel. *Grundlinien der Philosophie des Rechts oder Naturrecht und Staatswissenschaft im Grundrisse* [1821]. Bad Cannstatt, Stuttgart: Friedrich Frommann Verlag 1964, §333, note on p. 443.

²⁷ *Ibid.*, §333 (p. 443).

²⁸ Such a way out doesn't suffice, in my opinion, but I won't elaborate on that here.

²⁹ There is, from Hegel's perspective, only positive law (Hegel (see Note 26), §3 (p. 42)), but this merely follows from the fact that there is no difference between positive law and natural law (see his note in §3, on pp. 42, 43).

³⁰ A. Carty. *Philosophy of International Law*. Edinburgh: Edinburgh University Press 2007, p. 81.

³¹ T.M. Franck. *The power of legitimacy and the legitimacy of power: International law in an age of power disequilibrium*. – *American Journal of International Law* 2006 (100)/1, p. 91; see A. D'Amato. *International Law: Process and Prospect*. Irvington, New York: Transnational Publishers 1995, p. 9.

³² As Hobbes puts it, 'if any man had so farre exceeded the rest in power, that all of them with joynd forces could not have resisted him, there had been no cause why he should part with that Right which nature had given him'. T. Hobbes. *De Cive* [1651] (English version, entitled in the first edition 'Philosophicall Rudiments Concerning Government and Society'). Oxford: Clarendon Press 1983 with H. Warrender (ed.), Chapter 15, §5 (on p. 186).

³³ G.L. Williams. *International law and the controversy concerning the word 'law'*. – *British Yearbook of International Law* 1945 (22), p. 148.

³⁴ *Ibid.*, p. 159.

³⁵ *Ibid.*, p. 157.

³⁶ *Ibid.*, p. 163.

The question is, then, which of these two situations—one proceeds from a definition and constructs a line of thought on this basis or one uses a definition justifiedly—applies. In my opinion, it is the second, so that the remarks of Williams are enervated, at least with regard to **this** issue. To illustrate this, I point to the way the word ‘law’ is used. If someone were to say that the *Corpus Iuris Civilis* is law at present, he would have a hard time explaining why this is so, whereas it would be easy to argue that (part of) it *was* law during the 6th century AD.^{*37}

This approach does not necessarily entail ‘international law’ not being law, of course: there are people who use the word ‘law’ to refer to ‘international law’ (otherwise there would be little point in the present article, after all). This usage appears to result from an unwarranted expansion of the domain to which ‘law’ may be said to refer. One easily brings the political process into the discussion when referring to the international domain, thus confounding politics and law: [A]ssurances for securing compliance with [customs, principles, and norms that function as rules to regulate conduct by persons in their mutual relations as members of a political community] need not be predicated on the assertion of force or the promise of swift, certain punishment of wrongdoers. In the international dimension, guarantees of law for regulating states remain primarily couched in international public opinion and the political will of governments to make the law work in their national interest.^{*38} If such a position is opted for, the discussion comes to an end prematurely, since ‘international law’ is then supposed to include international politics, which evidently do exist.

In any event, it seems clear that the obligations that the law imposes need to be enforceable; lack of permissiveness is characteristic of the law. D’Amato presents an admirably nuanced view in dealing with the matter with regard to the international level, but his interpretation of ‘enforcement’ seems too broad; pointing out that some punishments are not physical (e.g., a monetary fine), one may conclude that ‘when we think of legal enforcement, we need not imagine the use of physical force against the person of the law violator, although, of course, in some cases physical force is appropriate’.^{*39} Yet (physical) force is invariably needed if the initial punishment is not effective (if the fine is not paid, enforcement will still be necessary). So even if force is not always immediately required, its presence in the form of a means of backup is needed.

Does this mean that the state of nature, for the time being at least, continues to exist between states? Hobbes affirms this.^{*40} This, according to his line of thought, does not mean that actual battle need arise, for he distinguishes between war and battle: ‘WARRE, consisteth not in Battell onely, or the act of fighting; but in a tract of time, wherein the Will to contend by Battell is sufficiently known [...]’.^{*41}

The objection that the differences between states are greater than those between individuals, which is sometimes offered as evidence that Hobbes’s depiction of the state of nature doesn’t apply to the international level^{*42}, is not decisive, since various reasons may exist for countries not attacking other countries—e.g., the danger that they will, in turn, be attacked themselves by countries that have a special interest in retaliatory measures, or the value they accord to the economic interests that can be satisfied peacefully being greater than the gains that may result from an act of aggression.

Here also, Grotius’s position is not a realistic alternative. He too emphasises the role of enforcement: it is the law that enforces.^{*43} The power to sanction flows, in his opinion, from natural law itself^{*44}; sovereigns impose sanctions, but this is a result of natural law rather than of their positions as rulers.^{*45} Natural law itself lacks force but is still effective (*‘Neque [...] quamvis a vi destitutum ius omni caret effectu’*).^{*46} Natural law would then, in the absence of authority for taking action, have to ‘force’, which is difficult to support rationally without an appeal to a (presupposed) human nature (see Note 11).

³⁷ The legislation was initially limited to the Eastern Roman Empire; upon the recapture of the provinces of the Western Roman Empire that had fallen to the Ostrogoths, it was introduced there as well. The restored unity did not last, however, as the empire was invaded by the Lombards in 568 AD. It is doubtful whether the legislation was predominant even before 568 AD—*inter alia*, since it did not constitute a systematic whole.

³⁸ C.C. Joyner. *International Law in the 21st Century*. Lanham, Maryland, US: Rowman & Littlefield Publishers 2005, pp. 5, 6.

³⁹ D’Amato (see Note 31), pp. 14, 15.

⁴⁰ Hobbes (see Note 8), p. 90 (in Chapter 13); p. 163 (in Chapter 22).

⁴¹ *Ibid.*, p. 88 (in Chapter 13).

⁴² A.N. Yurdusev. Thomas Hobbes and international relations: From realism to rationalism. – *Australian Journal of International Affairs* 1996 (60)/2, p. 316.

⁴³ Grotius (see Note 11), p. 34 (Book 1, Chapter 1, §9).

⁴⁴ *Ibid.*, p. 511 (Book 2, Chapter 20, §40).

⁴⁵ *Ibid.*, p. 509 (Book 2, Chapter 20, §40).

⁴⁶ *Ibid.*, p. 13 (Prolegomena, §20).

Hart points out that the law can't be reduced to 'general orders backed by threats given by one generally obeyed'⁴⁷ and that the enforceability that, as indicated above, is characteristic of the national level is a necessary condition for distinguishing between rules of law and requests or commandments⁴⁸ as long as the law has not been internalised by the subjects of law (or, rather, prospective subjects of law). Hart does not want to infer from the fact that there is no enforceability at the international level that international law does not exist⁴⁹, but he doesn't make it clear what this lack of enforceability might mean. A reference to the fact that states actually keep to the rules is not sufficient here, since they do this on the basis of self-interest.

In this regard, one may argue that states, acting only if gains are to be expected⁵⁰, are not bound in the same way individuals are at the national level. The conclusion that '[t]here is no easy or clear way to distinguish international law from either politics or mere norms'⁵¹ seems justified, with the caveat that this implies the conceptual existence of separate domains of 'international law' and 'norms'. The difficulty of the former I have attempted to expound upon above; the problems with the latter require a treatment that would lead to too great a digression. Still, in the last section a relevant issue will be discussed that borders on this.

3. The import of human rights

In the foregoing, it was shown that it is difficult to demonstrate the existence of international law owing to a lack of enforceability at the international level. Yet the existence of universal human rights seems to point to international law. Many agreements have been signed to protect human rights, among them the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Convention on the Rights of the Child. Should the presence of international law, if one sets the enforceability issue to the side, not be concluded on the basis of this given?

Those who contend that international law has been settled in these documents seem to overlook an important factor. They are indeed universal treaties, in that they focus on the rights of human beings the world over. On the other hand, the universality is obviously limited: they are universal treaties on *human* rights. There are principles that transcend the systems of law of countries, such as the principle that something being punishable should proceed from a legal basis, which is established in both national legislation and international treaties—e.g. in Article 15 of the International Covenant on Civil and Political Rights (ICCPR). Does this imply the presence of an international domain of principles, to be codified by legislators, or is there another basis of law than the universal human rights?

In virtually every society, there seems to be a basic set of standards (see Section 1), though one may call even this into question.⁵² I will not address the opinions of those who argue for fundamental relativism in this respect. This stance can't be refuted *a priori* and is more radical than what I put forward here. If such a position is accepted, it will only have even more extensive consequences for the appraisal of law.

There seem to be (or to have been) primitive societies wherein necessary fundamental norms, such as the duty to abstain from killing one another, are (or were) not maintained, but what is the relevance of this? It is unclear whether one may really call these societies; the matter depends on one's definition of 'society'. To what extent do affinities or alliances justify employing the concept of society? If one merely associates at times of mutual dependence, an atomic whole (given that one does not consider oneself, at least primarily, to be a part of a greater whole) remains the background for each relationship.

At any rate, the fact that societies acknowledge basic standards independently of each other is no proof of the existence of natural law in the narrow sense. One can point to—besides the minimum content of natural law⁵³ or the laws of nature⁵⁴, in which the domain for positive law to have a breeding ground at all is

⁴⁷ Hart (see Note 4), p. 24.

⁴⁸ Apart from the Ten Commandments, which are not supposed to be without consequences if not obeyed.

⁴⁹ Hart (see Note 4), p. 215.

⁵⁰ See A.T. Guzman. *How International Law Works: A Rational Choice Theory*. Oxford: Oxford University Press 2008, pp. 121, 180.

⁵¹ *Ibid.*, p. 217.

⁵² See P. Winch. *Ethics and Action*. London: Routledge & Kegan Paul 1972, p. 58.

⁵³ See Hart (see Note 4).

⁵⁴ See Hobbes (see Note 8).

made explicit (see Section 1)—a number of values, such as the right to life (Article 6 of the ICCPR) and a fair trial (Article 14 of the ICCPR), which are indeed necessary conditions. If one should, for example, not deem one's life protected properly by (the enforcers of) the law, anarchy might be imminent. From this it may be concluded that the basic rights and laws that appear in each system of law owe their existence to their being required for a system of law to be possible at all.

This can be illustrated by a (global) description of the development of the rights of individuals. Those who could exert the greatest power in society were able, once rights had been established, to determine which rights would be enshrined in social systems and to whom they would be allotted. It may be argued that gender and race were pivotal factors in this development, which is clear from, for instance, the respective moments at which women received suffrage in Europe and the USA, and the subordinate position of minorities in various places.

At some point (the moments varied), rights of women and minorities were acknowledged. One may wonder whether universal principles were then transmitted into positive law. This would mean that it was recognised that these groups of people should not be disfavoured. This thesis is difficult to support. It seems more likely that the position of these groups could no longer be ignored as they gained power, partly because of their ability to unite. To deny them their rights would undermine the system of law.

This is, of course, not the only possible way to explain the rise of these rights. One may, alternatively, appeal to human life as being 'of intrinsic importance'⁵⁵, or the idea may be advanced that in some cases reason was acknowledged as a criterion. With respect to the first of these two possibilities, it is difficult, if not impossible, to clarify the meaning of the notion of intrinsic value⁵⁶, and, apart from that, why, even if it is acknowledged to be correct, it does not extend to other beings than human beings. In the second case (an appeal to reason), one may grant reason its role as the criterion but maintain that this is done only because certain rights could no longer be withheld. If a being apparently endowed with reason were not granted the basic rights, the grounds for the rights of those already in possession of them would at some point become subject to debate. Reason would no longer serve as a standard and would have to be replaced by another one. A new standard is absent, however, which is why this issue was brought up in the first place. It is reasonable beings who maintain reason as a criterion⁵⁷, since this is a property they share (and through which they can distinguish themselves in relevant respects from other beings), a factor that continually serves as a minimum condition for claiming of a particular right. In this case, it is important to distinguish between being able to apply one's reason in establishment of rights on the one hand and acknowledging reason as a criterion for assignment of certain rights on the other. That this distinction is not always made does not detract from its merit.

It is decisive that reasonable creatures are the ones formulating the rights and norms. They allocate a specific domain for themselves and those like them, wherein more rights can be appealed to than elsewhere. Only they, by the way, are of course able to accomplish this. Animals (apparently) not only lack the intelligence to reach the level of abstraction required to draft laws but are even unable to realise the systematic organisation that serves as a prerequisite for a forum to produce laws. As far as they are concerned, it seems, there is merely a community. This may be quite large, as seems to be the case for a number of species of bees. There is no need here to realise legislation: mutual competition which is characteristic of humans is absent, for one reason because these creatures don't (or even can't) observe a difference between private and public interests.⁵⁸

At any rate, what is under debate is not that it is acknowledged that the rights of reasonable beings ought to be respected, in accordance with natural law in the narrow sense, but that a minimum domain can be isolated, wherein one is safe. Those beings without access to this domain cannot appeal to these rights. In this way, one may, if one, in fact, also acts on this basis (and doesn't oneself act upon the conviction—which, as noted above, I do not share—that natural law in the narrow sense applies), withhold basic rights from beings deemed not to employ reason.

⁵⁵ R. Dworkin. *Is Democracy Possible Here?* Princeton, New Jersey, Oxford: Princeton University Press 2006, p. 35.

⁵⁶ Dworkin does not, in any case, succeed in doing this. He appeals merely to a principle (the 'principle of intrinsic value') that 'almost all of us' are said to share (*ibid.*, p. 9). This does not seem to be more than an appeal to common sense, which cannot, in my opinion, serve as a basis.

⁵⁷ Schopenhauer already points to this. See A. Schopenhauer. *Die beiden Grundprobleme der Ethik* [1840]. *Sämtliche Werke*, Vol. 4. Wiesbaden: Eberhard Brockhaus Verlag 1950, p. 162.

⁵⁸ See Hobbes (see Note 8), pp. 119–120 (in Chapter 17).

The difficult matter of what reason is and which beings may be said to dispose of it is not explicated here; this is not necessary, as only the factual situation is considered (i.e., what ‘reason’ has been taken—roughly—to be), although conceptions as to its nature may have been prompted, however inadvertently, by a desire to find a distinguishing feature. The need for a specific domain as mentioned above would in that case have an even more fundamental precursor here.

Animal rights have been laid down in legislation rudimentarily.⁵⁹ Fundamental animal rights are in some places recognised—the German Constitution addresses them, for instance (in §20a)—but in these cases only very general rights are covered. Many rights are irrelevant for animals, such as freedom of expression. The most important ones, such as the right to life, however, are important. Perhaps some animal rights will eventually be established structurally.

An ever greater number of rights may in this way be laid down, such that the domain of subjects of law gradually expands from white men to human beings to sentient beings. It cannot be inferred from this that universal principles would function as a driving force, as it is unclear how the process in which an increasing number of rights are acknowledged develops and why. If the route allowing insight into this process is not clear, only the resultant visible development can be properly observed.

The consideration mentioned in Section 1 is relevant here. I argued there that the absence of natural law in the narrow sense cannot be demonstrated, which did not prove to be a decisive objection. The present discussion adds that it cannot be proved that universal principles exist. Of course, this is not the challenge; on the contrary, it is up to those who maintain the concept of natural law in the narrow sense to demonstrate to what extent they **would** exist. Accordingly, the issue revolves around the question of whether it is more credible for such principles to serve as a basis in establishment of human rights or, instead, they should be considered to be generalisations made in hindsight; the choice is between a top-down and a bottom-up approach. I have indicated above that the second approach seems to me to be the more persuasive.

What does this imply for the issue of whether international principles are decisive for law? Rules at the international level are no indication of the existence of natural law in the narrow sense. In international relations, one does not suppose that certain principles of natural law in the narrow sense should be transposed into positive law. If this plays any role, it merely points to a possible justification of natural law in the narrow sense, but if it **doesn’t** play any role, the debate is concluded even sooner.

4. Conclusions

In this article, I have outlined a number of aspects of the domain referred to as ‘international law’ and on that basis problematised the idea that ‘international law’ exists. The first section explored what the minimal conditions are if a system of law is to be considered as such. I pointed out the characteristics that can be found in any system of law. Of special importance is that none of the subjects of law are able to ignore the rules.

Section 2 elaborated upon this, also describing what it means at the international level. It emerged from the discussion that difficult questions arise from the fact that a great number of rules cannot be enforced at that level. If a state can simply ignore certain rules, it is difficult to maintain that there is law, particularly if this situation is compared with that obtaining at the national level, where a relatively clear process of law can be discerned.

Finally, human rights, which were discussed in Section 3, exhibit international patterns. It doesn’t follow from this, however, that international principles are involved. It is more credible to argue that one is motivated by one’s own needs. People appear to want to optimise their position and can only realise this in a seemingly credible manner by respecting the rights they wish to have bestowed upon them as rights of others as well.

This article’s purport is primarily academic: problems at the international level are often—pragmatically—resolved by means to which many parties can assent. That this is not a merely theoretical issue is clear from the fact that those solutions are invariably of a political nature. For example, if a relatively pow-

⁵⁹ If one opines, perhaps on the basis of an account similar to the one described above, that the deciding criterion is whether a being can suffer, which Bentham famously advanced as the pivotal issue (J. Bentham. *An Introduction to the Principles of Morals and Legislation* [1789]. *The Works of Jeremy Bentham*, Vol. 1. New York: Russell & Russell 1962 with J. Bowring (ed.), note on p. 143), animals’ suffering is to be avoided, at least to some degree.

erful state acknowledges the authority of the International Court of Justice, it does so because this yields more favourable results, economically or politically, than does the alternative of not acknowledging its authority.

For resolution of this state of affairs, conglomerates were formed, such as Europe, but this doesn't produce a consistent solution and leads to *ad hoc* approaches. This situation—international politics being decisive in the stead of alleged 'international law'—will remain until a supranational system of law emerges that is modelled after those in developed countries. Whether such a system will, in fact, appear is difficult to predict.



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Who Has the Last Word on the Protection of Human Rights in Europe?

Nobody today questions the importance of, and the need for, high standards in the protection of human rights. Political power and its activities in the democratic states of Europe are obliged to respect and observe fundamental rights and freedoms.

With respect to the question ‘Who has the last word on the protection of human rights in Europe?’, it is possible to look, on one hand, at international, supranational, and national interaction in jurisprudence and, on the other, at the legislative, executive, and judicial, and to a certain degree the actions of the media. In this article, I address the former aspects, while drawing forth some other possible angles.

The question is topical for several reasons: discussion has again emerged in Estonia on the constitutionality of the relationship between the European Union (EU) and Estonia, and the Supreme Court has recently rendered its judgment on the constitutionality of the treaty establishing the European Stability Mechanism (Supreme Court judgment of 12 July 2012); the member states of the Council of Europe on 20 April 2012 approved the Brighton Declaration, on the future of the European Court of Human Rights (ECtHR, or ‘the Court’), which, among other things, addresses the relationships between the Council of Europe member states’ courts and that of the ECtHR; and at the end of May and beginning of June 2012, hundreds of well-known jurists from Europe and beyond gathered in Tallinn to discuss at the XXV Congress of the International Federation of European Law (FIDE) various pertinent topics. These included protection of fundamental rights after the Lisbon Treaty’s entry into force; the interaction among the Charter of Fundamental Rights of the European Union (EU Charter), the European Convention on Human Rights (ECHR, or ‘the Convention’), and the national constitutions; and topics in the areas of freedom, security, and justice, including information society issues.

¹ All views expressed are those of the author alone.

1. Examples of international, supranational, and national legal sources' interaction in the protection of human rights in Europe, from court cases

1.1. Hungary's red five-pointed star in the human rights triangle

Hungary's criminal code prohibits the distribution and exhibition of the swastika, SS symbols, the hammer and sickle, and the red five-pointed star, except for educational, scientific, and artistic purposes.^{*2} Hungary's Constitutional Court stated in 2000 that the named article in the criminal code is in compliance with the Constitution, referring also to the state's discretionary authority in the Council of Europe and to Hungary's historical experience.^{*3}

The deputy chairman of Hungary's Workers' Party, Attila Vajnai, was penalised by the first-tier court for wearing an approx. 5 cm large red five-pointed star—a totalitarian symbol—on a garment at a demonstration that took place on 2 February 2003, in Budapest. Vajnai appealed the decision to the second-tier court, which made Hungary the first among the states that had joined the EU in 2004 to ask the Court of Justice of the EU (CJEU) for a preliminary ruling. The Hungarian court wanted to know whether Hungary's statute is discriminatory in comparison to the other EU member states' laws, and it asked the CJEU to rule on whether the prohibition in Hungary's legislation is contrary to the principles of freedom of expression and equal treatment. The CJEU replied that making a ruling on this matter is not within its competence and did not explain its decision.^{*4} At that time, the EU Charter was not in force, nor did the question pertain to the free movement of persons and goods across EU borders.

Budapest's second-tier court then agreed with the first-tier court's ruling and Vajnai's sentence remained in force.

Vajnai took his case to the ECtHR. The latter handed down its decision on 8 June 2008, stating that, according to Article 10 of the ECHR, Vajnai's right to freedom of expression had been violated. The Court stated that, although the prohibition against the five-pointed star was based on law and served a legitimate aim—to guarantee public order and the safety of others—it was unnecessary in a democratic society.^{*5} In his particular case, the red five-pointed star was a multifaceted symbol (that is, a symbol with multiple meanings) that cannot be unequivocally equated only to totalitarian ideas, for it is at the same time the sign for the international labour movement. In addition, a concrete indication was lacking that would have given cause to believe that the wearing of the red five-pointed star on clothing would result in violence. Therefore, a universal prohibition against wearing of the five-pointed star was in conflict with the Convention.

Only a couple of months before the ECtHR rendered the above judgement, a first-tier court in Hungary had found another person—Janos Fratanoló—guilty of wearing a red five-pointed star as an act endangering public order. Later, a higher Hungarian court found that Hungarian justice does not allow the courts to appeal to ECtHR practices, and it let Fratanoló's sentence stand. Finally, Fratanoló's case reached the ECtHR in Strasbourg, which again found that Article 10 of the Convention had been violated.^{*6}

Apparently, the relevant law in Hungary has still not been changed.

The above example reflects all those elements presented in this article: the national level (Hungary), the EU (supranational) level, and the Council of Europe (international/regional) level, and, in addition, the domestic courts, the CJEU, and the ECtHR. Also illustrative are the conflicts between the Hungarian legislators and the pan-European^{*7} judicial authority—even the differences of opinion within the Hungarian judicial authority: the constitutional court's decision that considered Hungary's statute to be legitimate

² Section 269/B of the Criminal Code: 'The use of totalitarian symbols'.

³ Decision no. 14/2000 (V. 12.) of the Constitutional Court, dealing with the constitutionality of Section 269/B of the Criminal Code.

⁴ Order of the CJEU (Fourth Chamber) of 6.10.2005, C-328/04 ('Vajnai'). – European Court Reports (ECR) 2005, I-08577.

⁵ *Vajnai v. Hungary* (Second Section), no. 33629/06, judgement of 8.7.2008.

⁶ *Fratanoló v. Hungary* (Second Section), no. 29459/10, judgement of 3.11.2011, with further references to the above-mentioned national court decisions.

⁷ Hereinafter, 'pan-European' is used as an overall term for the EU Charter and the Convention, as well as for the so-called Luxembourg (CJEU) and Strasbourg (ECtHR) courts.

juxtaposed with the doubts of the so-called regular courts. The question of the five-pointed star went beyond Hungary's borders.*⁸

As a result, the case gives cause to ponder and creates a whole series of questions: Why was the prohibition against wearing the red five-pointed star so important for Hungary? Was the absolute prohibition and the criminalisation of its wearing justified and balanced, and is freedom of expression sufficiently protected in Hungary? Why did the EU not take a position on this matter? Was this due to lack of competence, and would it do so now that the EU Charter has become a legally binding document, or is a cross-border element still missing in this particular case? Did the ECtHR have the authority to go against the position of Hungary's constitutional court, which had found that Hungary has sufficient room to make its own decision, supported by historical background? It has to be borne in mind that for the ECtHR, Article 10 of the Convention, on freedom of expression, represents one of the basics of a democratic society and all forms of restrictions thereof have to be considered very carefully. The restricting of freedom of expression is justified only when necessary and balanced in a democratic society. Why did Hungary's highest court not consider ECtHR practice? And, most importantly, what did the case give to the applicants? One and the same right—freedom of expression—had been understood differently. What would have happened had the applicants not recognised the issues, known their options, or wanted to appeal to the pan-European court(s)?

With respect to judicial proceedings, the matter was definitely demanding of time—in Vajnai's case five years and Fratanoló's almost eight years—and, no doubt, expensive. But who had the last word in the end? With the given concrete matters, it appears that the ECtHR had the last word, but at the same time the Hungarian legislators did not make changes, and the next Vajnai or Fratanoló will be found guilty of wearing a red five-pointed star and will still have to turn to the ECtHR in order to secure his right decisively.

1.2. Asylum-seekers as a ball tossed between the European Court of Human Rights and the Court of Justice of the European Union: Trust but verify

For case law and jurisprudence, it should be a priority to see everything through the prism of human rights protection, because, as the human being is most valuable, the protection of his or her rights should not be compromised. That includes assessing the EU law, although at first glance it may appear that the application of EU law in the Member State court somewhat presumes automatic acceptance.

One of the problems is connected with the principle, noble in itself, that the EU should to a certain extent be constructed on trust among the Member States. In reality, such trust may not be sufficient, as is evident in, for example, times of economic crisis. The EU seems to foster trust, as is apparent in the reciprocity of court decisions under the Dublin II Regulation on the right of asylum*⁹ and also in relation to matters such as marriage and parental responsibility.*¹⁰ But experience has shown, and ECtHR practice has confirmed, that even in these cases it is necessary to approach each incident individually.

On 21 January 2011, the Grand Chamber of the ECtHR rendered a judgement regarding the implementation of the EU Dublin II Regulation (on examination of an asylum application).*¹¹ The applicant was an Afghan citizen who left Kabul in 2008 and entered the EU via Greece. He moved on to Belgium, where he applied for asylum. Belgium did not examine the application and, citing the Dublin II Regulation, sent the applicant back to Greece. The Dublin II Regulation, issued in 2003 by the EU, includes the principle that an asylum-seeker's application can be examined in only one member state of the European Union. When it becomes clear that the applicant has entered the EU via another Member State or has already applied for asylum in another state, the applicant is returned to that state and the process is handled by that state's authorities. The applicant argued that Belgium, by sending him back to Greece, had violated Articles 3 (on prohibition of torture and of inhumane or degrading treatment), 2 (on the right to life), and 13 (on the right

⁸ See, for example, Á. Domahidi. Politische Symbole und Meinungsäußerungsfreiheit – Der Weg des roten Sterns als politisches Symbol im gesamteuropäischen Grundrechtsschutz. – *Europarecht* 2009, pp. 410–422.

⁹ Council Regulation (EC) No. 343/2003 of 18.2.2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national. – *OJ L* 222, 5.9.2003, pp. 3–23.

¹⁰ Council Regulation (EC) No. 2201/2003 of 27.11.2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility. – *OJ L* 338, 23.12.2003, pp. 1–29.

¹¹ *M.S.S. v. Belgium and Greece* (Grand Chamber), no. 30696/09, judgement of 21.1.2011.

to an effective remedy) of the Convention, in view of the humiliating and inhuman conditions in the detention facilities and the living conditions in Greece, and that in Greece it was not possible for him to have an effective remedy in respect of his complaints under Articles 2 and 3 of the ECHR. The applicant alleged that it was not possible to have his rights protected in Belgium either.

The ECtHR found that Greece had violated the Convention by maintaining detention and living conditions that offend a person's dignity. Also, the ECtHR noted that the processing of asylum applications was inadequate. In addition, it found that Belgium had violated the Convention as well, by sending the applicant back to Greece and causing him to endure inhuman detention and living conditions there. Likewise, the ECtHR decided that the applicant lacked in Belgium an adequate right to effective remedy in order to protect his rights.

The above-mentioned judgement was very important for many EU states, such as the Netherlands, Denmark, Sweden, Finland, and Austria, since they encounter daily the implementation of Dublin II Regulation terms. It is interesting to note that some Member States' courts—Austria's, for example—had already criticised the Greek asylum system and asylum-seekers' living conditions in Greece.^{*12}

With its decision *M.S.S. v. Belgium and Greece*, the ECtHR pointed a finger at the EU.

The CJEU replied on 21 December 2011 in the case of *NS v. United Kingdom*. The CJEU considered the right to asylum so important that its Grand Chamber deliberated it, and, in addition, 13 EU member states, Switzerland, the UN High Commissioner for Refugees, Amnesty International, and the Centre for Advice on Individual Rights in Europe submitted their observations on the matter.^{*13} All of them agreed that in 2010 Greece was the point of entry to the European Union of almost 90% of illegal immigrants, resulting in a disproportionate burden being borne by that state as compared to other Member States and the inability of the Greek authorities to cope with the situation in practice. The CJEU noted that the EU common asylum system (Dublin II Regulation) was created in a context that considered it possible for all Member States to respect human rights. The aim of the Dublin II Regulation was to expedite the examination of asylum-seekers' applications in the interest of both the asylum applicant and the respective Member States. It was considered important to prevent a situation wherein multiple Member States process applications by one and the same applicant. The aim was to increase that regulation that determines the single Member State responsible for examining the asylum application. However, Member States may not transfer an asylum-seeker to a 'responsible Member State' if they know that in said state an asylum-seeker could face a real risk of being subjected to inhuman or degrading treatment within the meaning of Article 4 of the EU Charter. The CJEU found that the Member States have at their disposal sufficient instruments to allow them to assess compliance with fundamental rights and, thereby, should be aware of the real dangers to which an asylum-seeker would be subjected in the event that he or she is sent to the country in question. Additionally, the CJEU found that the matter belongs to the domain of EU rights application, that Member States must apply the EU Charter's principles, and that the application of the EU Charter in the United Kingdom (UK) is not questioned—regardless of the protocol referring to the UK.^{*14} In its ruling, the CJEU references the ECtHR decision in *M.S.S. v. Greece and Belgium*.

The above-mentioned decisions recognise the attempts made by the ECtHR and CJEU to harmonise their relations. Heretofore, most essential to ECtHR and CJEU relations had been the so-called *Bosphorus* judgement of the ECtHR, which states that the EU offers human rights protection equivalent to that of the Convention.^{*15}

¹² For example, in its judgement of 7.10.2010 (judgement U694/10, available in the Legal Information System of the Republic of Austria (<http://www.ris.bka.gv.at/>)), the Austrian *Verfassungsgerichtshof* (Constitutional court) found, in connection with a review of the constitutionality of the transfer to Greece under Regulation no. 343/2003 of an Afghan single woman with three children, that whilst there is, in principle, the possibility of state provision where vulnerable persons are returned to Greece for implementation of the asylum procedure, this cannot be automatically assumed without a specific individual assurance on the part of the competent authorities. See §103 of the Opinion of Advocate General Trstenjak delivered on 22.9.2011, C-411/10 (*N.S. v. Secretary of State for the Home Department*).

¹³ Judgement of the CJEU (Grand Chamber) of 21.12.2012, joined cases C-411/10 (*N.S. v. Secretary of State for the Home Department*) and C-493/10 (*M.E. and Others v. Refugee Applications Commissioner, Minister for Justice, Equality and Law Reform*).

¹⁴ Protocol (No. 30) on the application of the Charter to Poland and to the United Kingdom. – OJ 2010 C 83, p. 313.

¹⁵ *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi (Bosphorus Airways) v. Ireland* (Grand Chamber), no. 45036/98, judgement of 30.6.2005. – ECtHR 2005-VI.

1.3. Protecting the right to privacy v. freedom of expression: The *Bundesverfassungsgericht* passing an exam on the second try before the European Court of Human Rights

The *Von Hannover v. Germany* case¹⁶ before the ECtHR pertained to freedom of expression: the right to publish photos of Monaco's Princess Caroline. The ECtHR asked the following questions in its 2004 decision, addressing the topic for the first time: Does a public figure have the right to privacy, and to what extent? Does the publication of photos contribute to debate in the public interest, and to the formation and discussion of opinion in society, or does it purely satisfy yellow journalism's curiosity? The ECtHR found that protection of privacy prevails (likewise, in the case of *Tammer v. Estonia*¹⁷ it was found that freedom of expression had not been violated), while at the same time the Federal Constitutional Court of Germany, the *Bundesverfassungsgericht* (BVerfG), had decided in the same case that the **word** has priority; i.e., there is press freedom to publish photos of the princess even though this is discretionary (many photos of her love life, children, shopping, etc.).

After the ECtHR's decision, the BVerfG changed its position and then started to analyse whether the publication of certain photos did, in fact, contribute to the development of public debate or simply satisfy curiosity. In the later case *Von Hannover v. Germany No. 2*¹⁸, the BVerfG found, on the basis of such analysis, that the publication of photos was justified, so when this case too reached the ECtHR, the latter this time agreed with the BVerfG. In the *Von Hannover No. 2* case, in 2012, the contested photos showing Monaco's Princess Caroline and her husband skiing were accompanied with a story about the health of her father, Prince Rainier, and how his children take turns caring for their elderly and ill father. The ECtHR decided that the question of the health of Prince Rainier III of Monaco as the head of the principality was, without doubt, a matter of interest to the general public. The inclusion of the photo of the family skiing holiday in that context added value to the information. The applicants were public figures and had to consider heightened interest in their personal lives. The photos in question had not been taken in secret or by harassment. As a result, the Court found that the right to privacy had not been violated. The ECtHR emphasised that the BVerfG had analysed the case in detail and in the context of ECtHR judicial practice.

The Princess Caroline of Monaco court cases are good examples of dialogue between the constitutional court of a Member State and the European Court of Human Rights.

1.4. National identity's controversial success story before the Court of Justice of the European Union

Returning to the CJEU, let us look at the relations between the EU and Member States' laws. A new and interesting topic in itself is Article 4 (2) of the Treaty on European Union ('the EU Treaty') (in Article 4 (2) EU), which refers to the EU's respect for its member states' national identity. This could, in concrete court cases, come into conflict with EU basic freedoms (the free movement of goods, capital, services, and people—the EU's 'four freedoms') and even with fundamental rights. In its 22 December 2010 decision in the case *Ilonka Sayn-Wittgenstein v. Landeshauptmann von Wien*¹⁹, the CJEU found for the first time that it is in harmony with Article 4 (2) of the EU Treaty to permit or justify a Member State's reliance on constitutional identity when restricting an EU citizen's freedom to move. Thereby, the EU's obligation to respect a Member State's constitutional identity was recognised. According to Austria's constitutional court (*Verfassungsgerichtshof*), the use of a title of nobility in one's surname is in conflict with the Constitution, under the principle of equality and written into the law on the abolition of the nobility, which is of Constitutional status and implements the principle of equal treatment in this field. In Germany, Austrian citizen Ilonka Sayn-Wittgenstein, who worked in the luxury real-estate sector, could use the title 'Fürstin von Sayn-Wittgenstein', but this was not permissible in Austria. However, a person's name is part of his or her identity and private life (see Article 7 of the EU Charter and Article 8 of the ECHR). In addition, the

¹⁶ *Von Hannover v. Germany* (Third Section), no. 59320/00, judgement of 24.6.2004. – ECtHR 2004-VI.

¹⁷ *Tammer v. Estonia*, no. 41205/98, judgement of 6.2.2001. – ECtHR 2001-I.

¹⁸ *Von Hannover v. Germany (No. 2)* (Grand Chamber), no. 40660/08 and 60641/08, judgement of 7.2.2010.

¹⁹ Judgement of the CJEU (Second Chamber) of 22.12. 2010, C-208/09 (*Ilonka Sayn-Wittgenstein v. Landeshauptmann von Wien*).

CJEU had previously found that if one Member State does not recognise a person's legal name from another Member State, causing that person to have different names in those two Member States, that person's right to free movement belonging to all EU citizens is violated. Also in the case of Sayn-Wittgenstein it was found that a restriction was present and that a 15-year span existed between the person starting to use the name and the correction of the name in the registry by the authorities. Nevertheless, the CJEU arrived at the decision that the violation was justified in order to protect the principle of equal treatment, which is a general principle of law in the EU (Article 20 of the EU Charter) and also an essential fundamental right. Hence, the case demonstrates a potential collision of EU law and an EU member state's law on the one hand—the principle of equal treatment v. a fundamental freedom of the EU: free movement of the individual (not to be confused with fundamental rights)—and on the other hand the collision of the principle of equality with the protection of identity and private life.

The judgement of the Court of Justice of the EU is an important indication that in certain cases the EU is obliged to respect national identity.

In this context, many questions emerge, such as what national identity is (constitutional identity being part of the national identity).

The XXV FIDE Congress general report on the topic of fundamental rights cites examples of national identity, such as core fundamental rights in general and human dignity (Germany and Estonia); language rights (Belgium); cultural and national heritage protection (Slovenia and Hungary); and elimination and prohibition of titles of nobility (Austria, Ireland, and Italy).^{*20} France's secularism principle, *laïcité*, would fit well among these.

And who decides what constitutes a Member State's national/constitutional identity?

According to Article 4 (3) of the EU Treaty, the EU and its member states accord each other full mutual respect and assistance in carrying out the tasks that flow from the founding treaties of the EU. The principle of sincere co-operation (loyal co-operation principle) applies also in the case of constitutional rights. This has been emphasised by Estonia's Supreme Court decisions, such as the judgement deciding about the constitutionality of the prohibition of outdoor parliamentary campaign advertisements.^{*21} Member States' courts may not make decisions independently on Article 4 (2) of the EU Treaty; the CJEU has to interpret it, though, at the same time, the interpretation may supply only the structure for the national identity concept and must leave sufficient room for the Member States' courts to fill in the framework. For best results, that should occur procedurally via the preliminary references and rulings system, whereas it is open to the Member States' constitutional/supreme courts to present their own views to the CJEU when asking for a preliminary ruling from the same.^{*22}

The practice described above points to a development according to which the CJEU no longer needs to fight for its role in the Member States' legal space and, instead, can place emphasis on the distribution of competencies in the delivery of justice. CJEU Advocate General Sharpston has even suggested that for certain matters the proportionality test can be left to the competence of domestic courts.^{*23} It appears that national identity is the border for EU actions. The protection of fundamental rights should be included in each Member State's constitutional order. Article 4 (2) of the EU Treaty helps to overcome the absolute supremacy of the EU's law over the constitutions of its member states.

Can it be said on the basis of the above example that the question of who is the highest constitutional court in Europe yields to the tendency of increasingly less hierarchy? Perhaps, but only to a certain extent. The case law of the CJEU is not completely consistent in this respect. Although the Member States' constitutional courts try to be the watchdogs of national identity, they often make decisions only when dramatic instances arise and on matters of core principles of the relevant national system. Likewise, the CJEU keeps watch to see that when attempts are made to bring Member States' constitutional norms into EU juris-

²⁰ L.F.M. Besselink. General report—the protection of fundamental rights post-Lisbon: The interaction between the Charter of Fundamental Rights of the European Union, the European Convention on Human Rights and National Constitutions. – J. Laffranque (ed.). XXV FIDE Congress Tallinn 2012 proceedings, Volume 1. Tallinn: Tartu Ülikooli Kirjastus 2012, p. 71.

²¹ Supreme Court of Estonia *en banc* decision of 1.7.2010, 3-4-1-33-09. Available at <http://www.nc.ee/?id=1157> (most recently accessed on 26.5.2012).

²² See also L.F.M. Besselink. Respecting Constitutional identity in the EU. Case Law A. Court of Justice Case C-208/09; *Ilonka Sayn-Wittgenstein v. Landeshauptmann von Wien*, judgement of the Court (Second Chamber) of 22.12.2010. – Common Market Law Review 2012 (49), pp. 1–22.

²³ Opinion of Advocate General Sharpston delivered on 14.10.2010, C-208/09 (*Ilonka Sayn-Wittgenstein v. Landeshauptmann von Wien*), reference for a preliminary ruling: Verwaltungsgerichtshof, Austria.

prudence, the national identity does not become abused. Examples in contrast to the *Ilonka Sayn-Wittgenstein* judgement can be found also in CJEU practice: Member States' national identity protection arguments were not considered convincing—e.g., in Greece's attempts to combat media magnates' domination of the public procurement sector (the *Michaniki* case^{*24}) through amendments to the Constitution. The CJEU did not accept the constitutional identity argument and recognised the measure (amendment of the Greek Constitution) as being contrary to the EU's secondary law and, also, disproportionate.

It should be noted here that whenever one considers the relationship between a Member State and the EU from the angle of protection of human rights, what may be in an EU state's interest need not always be in the interest of all inhabitants of that state. The right of a Member State's national identity need not be understood necessarily and rigorously as affecting a fundamental right, and, therefore, referring and appealing to national identity need not always take place in the interest of human rights. Unfortunately, a state could sometimes use a universal fundamental right as a shield in order to justify the violation of other fundamental rights, by pleading difficulty in defining/justifying public interest.^{*25}

Let us now move from the practical examples to the theoretical and fundamental aspects of the triangle of fundamental rights' protection in Europe.

2. Human rights, fundamental rights, and freedoms on three levels: The European Convention on Human Rights, Charter of Fundamental Rights of the European Union, and Constitution of Estonia—and the courts that interpret them

The three most important levels of human rights protection in respect of Estonia are the following: the European Convention on Human Rights, the Charter of Fundamental Rights of the European Union, and the Constitution of the Republic of Estonia.

2.1. The European Convention on Human Rights and the European Court of Human Rights

The European Convention on Human Rights^{*26}, signed in 1950 and in force since 1953, became effective in Estonia in 1996.^{*27} Of primary importance in the Convention are the right to life, human dignity, prohibition of torture and slavery, and a fair trial, along with the inviolability of private life and freedom of expression, religion, and assembly. The European Court of Human Rights (because of its seat, also called the Strasbourg court) interprets the European Convention on Human Rights and on 30 April 2012 had approx. 150,000 pending applications.^{*28}

²⁴ Judgement of the CJEU (Grand Chamber) of 16.12.2008, C-213/07 (*Michaniki AE v. Ethniko Simvoulío Radiotileorasis and Ipourgós Epikratis*). – ECR 2008, I-9999.

²⁵ Besselink (see Note 22), p. 89.

²⁶ Council of Europe Treaty Series (CETS), No. 5, latest amendments by the provisions of Protocol 14 (CETS, No. 194).

²⁷ Ratification by Estonia of the European Convention on Human Rights on 16.4.1996.

²⁸ See the statistics on pending applications allocated to a judicial formation, available on the Web site of the ECtHR at http://www.echr.coe.int/NR/rdonlyres/D552E6AD-4FCF-4A77-BB70-CBA53567AD16/o/CHART_30042012.pdf (most recently accessed on 26.5.2012).

2.2. The Charter of Fundamental Rights of the European Union and the Court of Justice of the European Union

The EU Charter originally proclaimed at the European Council meeting in Nice on 7 December 2000 became legally binding in 2009, when the Lisbon Treaty came into force, on 1 December.^{*29} The most significant chapters of the EU Charter address dignity, freedom, equality, solidarity, a citizen's rights, and administration of justice. The charter is interpreted by the Court of Justice of the European Union (because of its seat, also called the Luxembourg court), which consists of the Court of Justice, the General Court, and the Civil Service Tribunal. Of critical importance is Article 47 of the EU Charter—on the right to effective remedy and to a fair trial.

2.3. The Constitution of Estonia and the Estonian Supreme Court

The Constitution of Estonia, adopted by the Estonian people on 28 June 1992^{*30}, contains a special Chapter II on fundamental rights, which is influenced largely by the ECHR.

In addition to the catalogue of fundamental rights, freedoms, and duties, §10 of the Estonian Constitution stipulates that the rights, freedoms, and duties set out in the Constitution shall not preclude other rights, freedoms, and duties that arise from the spirit of the Constitution or are in accordance therewith and that conform to the principles of human dignity and of a state based on social justice, democracy, and the rule of law.

Prior to accession to the EU, the Constitution was supplemented with the Constitution of the Republic of Estonia Amendment Act, which is annexed to the Constitution as a separate act having the same value as the main text of the Constitution.^{*31} Section 1 of said act states that Estonia may belong to the European Union, provided that the fundamental principles of the Constitution of the Republic of Estonia are respected.

The Constitution and its amendment act are interpreted by Estonian courts, the Supreme Court being the leading one. The Supreme Court includes, along with its Chamber of Administrative Law, criminal law chamber, and civil law chamber, also a separate Chamber for Constitutional Review and therefore acts not only as the highest court but also as the Constitutional court of the country. The Constitutional Review Chamber of the Supreme Court or the Supreme Court deciding *en banc* can declare legislation of general application that has entered into force or a provision thereof to be in conflict with the Constitution and repeal it.^{*32}

There are also rights that are not written into such documents, found in the charter and documents on minority rights. Some rights belong to neither international agreements nor in Member States' rights but are protected nevertheless in the EU, as developed by the case law of the Court of Justice of the European Union. Examples are the *Hoechst* judgement^{*33}, from 1989, in which the then Court of Justice of the European Communities protected, next to the right to respect for one's home, the inviolability of business premises, and the judgement in 2005's *Mangold* case, wherein the Court of Justice developed the prohibition of discrimination based on age, which is not cited as prohibited either in the ECHR or explicitly in the Estonian Constitution.^{*34}

²⁹ OJ C 83, 30.3.2010, pp. 389–403.

³⁰ Passed by a referendum held on 28.6.1992 (RT 1992, 26, 349), which entered into force on 3.7.1992 and was amended by acts on the following dates: 5.10.2003, entering into force on 6.1.2004 (RT I 2003, 64, 429); 25.2.2003, with entry into force on 17.10.2005 (RT I 2003, 29, 174); 12.4.2007, with entry into force on 21.7.2007 (RT I 2007, 33, 210), 13.4.2011, with entry into force on 22.7.2011 (RT I, 27.4.2011, 1).

³¹ Passed by the referendum of 14.9.2003 (RT I 2003, 64, 429), with entry into force on 6.1.2004. See J. Laffranque. A glance at the Estonian legal landscape in view of the Constitution Amendment Act. – *Juridica International* 2007 (XIV), pp. 55–66; J. Laffranque, R. Laffranque. Les modifications apportées à la Constitution estonienne du fait de l'adhésion à l'Union Européenne et leur mise en oeuvre par la Cour d'Etat. – *Revue d'études politiques et constitutionnelles est-européennes* 2008/1, pp. 91–103.

³² See Constitutional Review Court Procedure Act, passed 13.3.2002 (RT I 2002, 29, 174; in Estonian), which entered into force on 1.7.2002 and was later amended by several acts –§15, about the authority of the Supreme Court.

³³ Judgement of the Court of Justice of the European Communities of 21.9.1989, joined cases 46/87 and 227/88 (*Hoechst AG v. Commission of the European Communities*). – ECR 1989, 2859.

³⁴ Judgement of the CJEU (Grand Chamber) of 22.11.2005, C-144/04 (*Werner Mangold v. Rüdiger Helm*). – ECR 2005, I-9981.

2.4. Increase in the importance of the European Union's fundamental rights charter in connection with acquisition of a legal status

According to Article 6 (1) Treaty of EU, the European Union recognises the rights, freedoms, and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adopted in Strasbourg, on 12 December 2007. The Court of Justice of the European Union confirmed on 19 January 2010, in its judgement in the *Küçükdeveci* case, that the EU Charter has the same legal standing as the EU's founding treaties.^{*35}

Although the charter of fundamental rights of the EU rose to a leading position, acquiring legally binding status in the EU when the Lisbon Treaty came into effect, the EU Charter does not create new competencies for the EU. Also, the EU Charter cannot be viewed in isolation either from the ECHR or from the common constitutional values derived from fundamental rights of the Member States, to which the EU Treaty also makes a reference.

It is important to keep in mind that the EU Charter is no substitute for a Member State's catalogue of fundamental rights and that the EU Charter is binding on the Member States only when European Union law is applied—although one must admit that for the most part the Member States do implement EU law and the line between the application of a purely national law and law with EU influence is very thin. In general terms, it seems that 'implementation of EU law' is given a rather broad definition in the practice of the Court of Justice of the EU.^{*36}

The relevant practical question to study in the future is this: What has the EU Charter changed for the daily life of the individuals living in the EU? The latest information about the EU Charter's influence on the general fundamental rights culture in the EU is to be found in the European Commission's Annual Report 2011 on the application of the EU Charter of Fundamental Rights.^{*37} This report, in turn, refers to a recent Eurobarometer survey (Eurobarometer 340: The Charter of Fundamental Rights of the European Union), which revealed that 64% of all Europeans knew in 2011 that such an EU charter exists, whereas in 2007 the general awareness about the EU Charter reached only 48%. However, knowledge about the content of the EU Charter is not as great. The greatest confusion surrounds whether the EU Charter is to be applied to all actions of Member States, including matters of national competence. The majority of EU inhabitants think that the EU Charter is applicable to the activities of Member States, including those that are clearly within domestic competence and are not subject to EU law's application (in 2011, citizens' letters to the European Commission on fundamental rights in 55% of cases fell outside the remit of EU competencies).

3. Issues related to the hierarchy of fundamental rights documents in Europe and collisions between pan-European courts

3.1. Logical distribution of competence in theory

At first glance, everything appears logical between the three layers of human rights protection analysed above: international, supranational, and national. Should problems emerge, the ECtHR is engaged with the European Convention on Human Rights; the CJEU is engaged with the EU Charter; and Estonia's courts, with the Supreme Court being the leading one, are engaged with the Constitution. All of them are so-called pan-European courts: the ECtHR; the CJEU; and, without a doubt, the Member States' courts, as they are irreplaceable on account of the assignments they carry out.

³⁵ Judgement of the CJEU (Grand Chamber) of 19.1.2010, C-555/07 (*Seda Küçükdeveci v. Swedex GmbH & Co. KG*). – ECR 2010, I-365.

³⁶ See also A. Rosas, H. Kaila. L'application de la Charte des droits fondamentaux de l'Union européenne par la Cour de justice: un premier bilan. – *Il Diritto dell'Unione Europea* 2011 (16)/1, p. 15.

³⁷ Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the regions. 2011 Report on the Application of the EU Charter of Fundamental Rights, Brussels, 16.4.2012, COM(2012) 169 final. Available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2012:0169:FIN:EN:PDF> or http://ec.europa.eu/justice/fundamental-rights/files/2011-report-fundamental-rights_en.pdf (most recently accessed on 26.5.2012).

Certain rules have been worked out for helping one find one's way, at least in part, in the triangle of ECHR, EU Charter, and Constitution. The ECtHR has adopted the concept of subsidiarity—human rights protection must be guaranteed initially on the Member State level; if that has failed, only then does the ECtHR come to assist.^{*38} Likewise, in certain instances, the ECtHR applies the concept of a degree of Member States' room for assessment/discretion—e., 'margin of appreciation'—which is applicable to some cases wherein the common minimum standard is not very certain.^{*39} In such cases, it is considered whether, and to what degree, pan-European consensus is present. In ECtHR practice, counterbalancing references to the Convention as a living instrument exist.^{*40}

Both the ECtHR and the CJEU use autonomous concepts, displaying rather evolutionary and dynamic court practices.

The EU Charter applies only when the Member States implement EU law. Only the CJEU can decide questions of the application and the final interpretation of EU law. The Estonian court must first check the compliance of Estonia's laws with the European law, and then, and only in certain instances, Estonian law's compliance with the Estonian Constitution must be checked.^{*41} The latter is checked, of course, when no connection exists with EU law.

Distribution of the workload among courts is essential. For example, the ECtHR says in its constant case law that the primary assignment for domestic courts is the evaluation of facts (factual material).^{*42} The same is true for application and interpretation of national laws; in general, neither the ECtHR nor the CJEU performs this function, and both leave that assignment to Member States' courts. Certain exceptions do exist, however; for example, the ECtHR is to check, according to Article 5 (1) of the ECHR, a Member State's law's compliance with the European Convention on Human Rights.

As the above examples show, the borders between EU law and national laws are sometimes vague. Hence, although each court has its own competence, courts in general do not always stick to them in practice, since many incidents take place at the boundaries and those can contribute to the confusion. As a result, we are confronted with a justified question: should one norm be preferred to another; i.e., does a hierarchy of documents on human rights protection exist? How are we to avoid collisions and to resolve them?

³⁸ See, for example, the contribution to the Conference on the Principle of Subsidiarity (Skopje, 1.–2.10.2010) 'Strengthening subsidiarity: Integrating the Strasbourg court's case law into national law and judicial practice', a presentation by Christos Pourgourides, Chairperson of the Committee on Legal Affairs and Human Rights, Parliamentary Assembly of the Council of Europe, and compilation of background materials on the interpretive authority (*res interpretata*) of the Strasbourg court's judgements. Available at http://assembly.coe.int/CommitteeDocs/2010/20101125_skopje.pdf (most recently accessed on 26.5.2012). Also relevant is a guest lecture given by former President of the European Court of Human Rights Jean-Paul Costa on 10.12.2011 (International Human Rights Day) at the Leiden Law School, in which Costa delivered the first Raymond and Beverly Sackler Distinguished Lecture on Human Rights. His lecture, entitled 'The current challenges facing the European Court of Human Rights', stated that there is deep misunderstanding of the principle of subsidiarity; while it is primarily for the national authorities to apply the Convention, this does not mean that the Court plays no role at all. Available at <http://law.leiden.edu/news/guest-lecture-by-former-president-of-the-european-court-of-human-rights.html> (most recently accessed on 26.5.2012).

³⁹ One extensive recent publication on the margin of appreciation can be found in the Centre for European Legal Studies Working Paper Series, University of Cambridge, Faculty of Law, February 2012, by Section President of the ECtHR Dean Spielmann. *Allowing the Right Margin, the European Court of Human Rights and the National Margin of Appreciation Doctrine: Waiver or Subsidiarity of European Review*. Available at <http://www.law.cam.ac.uk/press/news/2012/03/judge-dean-spielmann-allowing-the-right-margin-the-european-court-of-human-rights-and-the-national-margin-of-appreciation-doctrine-waiver-or-subsidiarity-of-european-review/1821> (most recently accessed on 26.5.2012).

⁴⁰ About the ECHR as a living instrument concept in ECtHR case law, see G. Letsas. *The ECHR As a Living Instrument: Its Meaning and Its Legitimacy*, a University College London working paper, 14.3.2012. Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2021836 (most recently accessed on 26.5.2012).

⁴¹ See the case law of the Supreme Court of Estonia—in particular, the Supreme Court Constitutional Review Chamber decision of 26.6.2008 in the so-called *Aspen* case, no. 3-4-1-5-08, wherein the chamber concurs with the opinion of the Supreme Court Administrative Law Chamber expressed in the latter's decision of 7.5.2008 in case 3-3-1-85-07. English text available on the Web site of the Estonian Supreme Court in English at <http://www.nc.ee/?id=927&print=1> (most recently accessed on 26.5.2012).

⁴² E.g., in *Varnava and Others v. Turkey* (Grand Chamber), no. 16064/90, a judgement of 18.9.2009, the Court stated the following: '164. [...] [I]n line with the principle of subsidiarity, it is best for the facts of cases to be investigated and issues to be resolved in so far as possible at the domestic level. It is in the interests of the applicant, and the efficacy of the Convention system, that the domestic authorities, who are best placed to do so, act to put right any alleged breaches of the Convention.'

3.2. Does a hierarchy of documents on human rights protection exist?

The European Court of Justice (now part of the CJEU) deliberated the question of hierarchy of norms in EU and international laws in the *Kadi* case, which could be instructive here.^{*43} The *Kadi* case had to do with a UN Security Council resolution. The Court of Justice referred to the autonomy of the Community (EU) legal order but also to the fact that the Court of Justice in its observance of fundamental rights leans on international and Member States' laws. The CJEU found that respect for responsibilities taken on by the UN is obligatory for the preservation of international peace and security but also noted that responsibilities established by international agreements cannot lead to violation of the EU's general principles. Thus the CJEU gallantly avoided a problem by specifying that the given case affects CJEU legal control over EU law with which an international agreement is implemented but not the agreement itself, and that complete review of the lawfulness of the implementation act is permitted from the perspective of fundamental rights (compare Member States' tactic of analysing laws on ratification of treaty amendments and not changes in EU founding treaties themselves). The CJEU made reference to ECtHR practice pertaining to similar questions. As a result, the CJEU annulled Council of the European Union Regulation (EC) No. 881/2002 of 27 May 2002 imposing certain specific restrictive measures directed against certain persons and entities associated with Osama bin Laden, the Al-Qaeda network, and the Taliban, insofar as it concerns Mr. Kadi and the Al Barakaat International Foundation.

Wolfgang Weiss asks, quite rightly, what the relationship is between different sources of human rights in the EU: the fundamental rights, as they result from the constitutional traditions common to the Member States; the fundamental rights defined by the EU Charter; and those that are guaranteed by the ECHR?^{*44} Furthermore, Article 6 (3) of the EU Treaty stipulates that the fundamental rights as guaranteed by the ECHR and as proceeding from the constitutional traditions common to the Member States shall constitute general principles of EU law.

An answer might be that these diverse sources of rights co-exist and complement each other. The ECHR influences EU law in three ways: it is the minimum standard, the source of general principles of EU law, and a source of protection for international fundamental rights (an international treaty to which the EU will accede). The ECHR serves as a minimum standard for EU law. The general principles of EU law and the EU Charter take precedence over the Convention only in instances wherein they present a higher standard of fundamental rights protection. Also, EU law has to take into account ECtHR practice. Hence, all of the above are interconnected.

If a certain right is regulated in only one of these three sources, fewer problems result. However, if in all three, it would be correct to use all three—the European Convention on Human Rights, the Charter of Fundamental Rights of the European Union, and Member States' constitutions—in parallel with the respective courts' relevant practices. If the right is protected similarly in all of these documents, the parallel role of the use of the documents would only enhance the legitimacy of the court judgement. However, the CJEU appears to favour the EU Charter and uses the Convention in a subsidiary manner when the issue does not involve the EU.^{*45} Likewise, the Member States' courts are not obliged to refer to the EU Charter in purely domestic cases; in the latter situations, the Constitution suffices.

⁴³ Judgement of the Court of Justice of 3.9.2008, joined cases C-402/05 P and C-415/05 P (*Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities*). – ECR 2008, I-6351.

⁴⁴ W. Weiss. Human rights in the EU: Rethinking the role of the European Convention on Human Rights after Lisbon. – *European Constitutional Law Review* 2011 (7)/1, pp. 64–95.

⁴⁵ See, for example, the judgement of the CJEU (Grand Chamber) of 15.11.2011, C-256/11 (*Murat Dereci, Vishaka Heiml, Alban Kokollari, Izunna Emmanuel Maduiké, Dragica Stevic v. Bundesministerium für Inneres*), which states in its paragraph 72: 'Thus, in the present case, if the referring court considers, in the light of the circumstances of the disputes in the main proceedings, that the situation of the applicants in the main proceedings is covered by European Union law, it must examine whether the refusal of their right of residence undermines the right to respect for private and family life provided for in Article 7 of the Charter. On the other hand, if it takes the view that that situation is not covered by European Union law, it must undertake that examination in the light of Article 8 (1) of the ECHR.'

3.3. How to overcome conflict in the protection of fundamental rights?

Collisions can occur when fundamental rights are protected differently. Conflicts can occur between the CJEU and ECtHR, between the ECtHR and Member States' courts, between the CJEU and Member States' courts, and also between the superior courts of different Member States (provided that inter-court arguments between tiers are resolved adequately within the state in accordance with uniform court practice). ECtHR practice has been attempting to resolve recent conflicts by applying, *de facto*, the right of precedence to decisions made against a particular state also beyond cases concerning this state, to other states, with similar problems.^{*46} Some of the possible and actual conflict situations were described and analysed with the aid of examples at the beginning of this piece. Now I wish to present a possible recipe for overcoming conflicts.

When potential conflicts emerge, one cannot avoid trying to overcome them with the aid of legal techniques. But finding a balance requires sensitivity too. Even within one state, the collision of two fundamental rights is complicated; now imagine the case of that happening Europe-wide. It is not possible to approach written rules in a black-and-white manner when so much depends on concrete situations. In a conflict situation, one right is protected more than another, in view of prior weighing of the situation. This is not a matter of protecting one right and not the other, as in the case cited above of protection of privacy set opposite freedom of expression.

The main techniques for resolving different level conflicts are

- 1) recognition of European rights' supremacy and precedence over national law (certain national/constitutional identities as a limit) and
- 2) the less painful version (which could be demanded by the Member State's constitution: national law to be interpreted in harmony with European principles and law).

In their study, Mads Andenas and Eirik Bjorge notice a development among the Member States' courts that points to their not only falling in line behind the Strasbourg court but often taking the initiative to advance the rights set forth in the Convention.^{*47} In the case of *Cadder v. Her Majesty's Advocate*^{*48}, the UK Supreme Court had to overturn a long-standing case in Scottish case law addressing whether a person detained by the police on suspicion of having committed an offence has, before being interviewed, the right of access to a solicitor.^{*49} That decision had potential to affect 76,000 court cases. The UK Supreme Court had the courage in 2010 to agree unanimously on ending that practice putting an end to that practice regardless of the consequences, because the UK may not violate the ECHR and be different from the other Member States in this respect. In its interpretation of the Convention, the ECtHR has relied on universally applicable principles, with the aim of achieving harmonious protection of human rights in all of Europe—i.e., not the protection that would be dictated by national choices and preferences. It cannot be that one set of rules applies to Eastern Europe and to Turkey, and another set to Western Europe and to Scotland. Lord Hope, who authored the UK court's unanimous opinion, concluded that pride in one's legal system is one thing but isolation is quite another.^{*50}

Member States' courts often give legitimacy to their decisions by citing Strasbourg. Alec Stone Sweet and Helen Keller have noted correctly that Member States' courts have taken the lead in incorporating the Convention into their domestic legal systems.^{*51}

⁴⁶ To that extent, see also the Action Plan of the Interlaken Declaration for reforming the European Court of Human Rights, from 19.2.2010, Section B.4. c), which calls the states to commit themselves to taking into account the Court's developing case law, also with a view to considering the conclusions to be drawn from a judgement finding a violation of the Convention by another state, where the same problem of principle exists within their own legal system. Available at <http://afsj.wordpress.com/2010/02/21/interlaken-declaration-and-action-plan-to-reform-the-european-court-of-human-rights/> (most recently accessed on 27.5.2012).

⁴⁷ M. Andenas, E. Bjorge. National implementation of ECHR rights: Kant's categorical imperative and the Convention. – University of Oslo Faculty of Law Legal Studies Research Paper Series 2011/15. Electronic copy available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1818845 (most recently accessed on 27.5.2012).

⁴⁸ 2010 Scots Law Times 1125.

⁴⁹ Andenas, Bjorge (see Note 47), p. 3.

⁵⁰ Lord Hope's speech entitled 'Scots law seen from south of the border', before the Scottish Young Lawyers' Association – 11.4.2011, p. 27. Available at http://www.supremecourt.gov.uk/docs/speech_110401.pdf (most recently accessed on 27.5.2012).

⁵¹ A. Stone Sweet, H. Keller. Assessing the impact of the ECHR on national legal systems. – A. Stone Sweet, H. Keller (eds). *A Europe of Rights: The Impact of the ECHR on National Legal Systems*. Oxford University Press 2008, p. 687.

Collision can occur not so much from differences of opinion among the courts as also because of legislators failing to attend to their work. The Council of Europe, therefore, recommends to its member states that their legislators pay more attention to the Convention and its interpretations.^{*52} On the other hand, the European Commission emphasises the EU's pan-European legislative role, which includes national legislators in its decision-making process.^{*53}

The UK's court practice can also be cited for an example of harmonious interpretation with European law: The House of Lords interpreted domestic law in conformity with the Convention in such a way that a surviving spouse is treated the same as a surviving (homosexual) partner.^{*54}

Also important are the means used to reach a goal. If they are identical across the different courts, the result could also be the same; for instance, France's *Conseil Constitutionnel* has adopted the ECtHR proportionality test.^{*55}

3.4. How do the hierarchy of fundamental rights and the question of conflicts affect Estonia?

Estonia has adopted the European Convention on Human Rights and has been a member of the EU since 2004. Consequently, we are subject to the Convention, the Charter of Fundamental Rights of the European Union, and the Estonian Constitution. Thereby, the Constitution of the Republic of Estonia Amendment Act, allowing Estonia's accession to the EU in accordance with the rule of law, can be seen as a bridge between Estonia's law and EU law. Article 6 (3) of the EU Treaty, on the other hand, can be seen as a door and a bridge by which national constitutional rights enter EU law. This should be a two-way street. Unfortunately, professional literature recognises that the EU does not get sufficient inspiration from Member States' constitutional customs; i.e., the EU is too reserved in this area.^{*56} However, some essential procedural rights have come into EU law thanks to the beneficial influence of Member States: the right to be heard in administrative procedure, the principle of good administration, and the right to transparency outside the classical fundamental rights classification.^{*57}

According to the 10 Commandments, we know that one should have only one god. I apologise for using such a metaphor, but most Estonian judges have received their education through metaphors according to which Estonian judges' god is the Constitution of the Republic of Estonia. Now the European Convention on Human Rights and the Charter of Fundamental Rights of the European Union must be added. In adjudication, a judge cannot use only hierarchical norms in a case and has to see which of the documents best protects fundamental rights. Already 10 years before accession to the EU, Estonia's Supreme Court cited the fundamental principles of the EU and the European Council, as well as the general principles in Estonia's law.^{*58}

⁵² Brighton Declaration. High Level Conference on the Future of the European Court of Human Rights of April 19–20, 2012, Part A. Available at <http://www.coe.int/en/20120419-brighton-declaration> (most recently accessed on 27.5.2012).

⁵³ See also C. Ladenburger. European Union institutional report – The protection of fundamental rights post-Lisbon: The interaction between the Charter of Fundamental Rights of the European Union, the European Convention on Human Rights and National Constitutions (see Note 20), pp. 214–215.

⁵⁴ See the House of Lords (UKHL) in the case of *Ghaidan v. Godin-Mendoza* (2004), UKHL 30.

⁵⁵ Olivier Dutheillet de Lamothe, Constitutional Court Judges' Roundtable, 2005, 4 I-CON 550; V. Goesel-Le Bihan. Le contrôle de proportionnalité dans la jurisprudence du Conseil constitutionnel: figures Récentes. – *Revue française de droit constitutionnel* 2007, pp. 284–285.

⁵⁶ Besselink (see Note 22), p. 65.

⁵⁷ *Ibid.*, p. 81.

⁵⁸ Supreme Court Constitutional Review Chamber decision of 30.9.1994, III-4/1-5/94. – RT I 1994, 80, 1159 (in Estonian). English text available in English on the Supreme Court's Web site, at <http://www.nc.ee/?id=482> (most recently accessed on 27.5.2012).

3.4.1. Estonia's constitution and the European Convention on Human Rights

Formally the Convention is a ratified international agreement and is positioned between Estonia's constitution and the Estonian laws. In practice, it is the standard together with the Constitution by which violation of human rights is ascertained by the Supreme Court.^{*59}

By accessing the Supreme Court's Web site, one can become familiar with the analysis of ECtHR practice in the decisions of the Supreme Court.^{*60} Most of the references made to ECtHR judgements in Supreme Court decisions pertain to criminal cases and, in particular, reasonable time of proceedings, admissibility of statements as evidence given in preliminary investigation, and the guarantee of the right of defence in criminal proceedings. As for constitutional review, the Convention's practices are applied chiefly in cases to do with the right to appeal a decision, individual constitutional complaint proceedings (which are not known in the Estonian legal order *de lege lata*), and excessive state fees. For administrative matters, the main subject of references to the case law of the ECtHR has been the treatment of imprisoned persons with human dignity. In some instances, some Supreme Court decisions contain comprehensive references to the Convention, especially to ECtHR practice—e.g., a constitutional analysis of preventive detention (detention after service of the sentence).^{*61} Given that an abundance of ECtHR practice exists and is constantly developing, and, in addition, often depends on concrete situations, it is not easy for the Supreme Court to compile such analyses, even more so in court decisions. Citizens have also raised questions about availability in Estonia of the ECtHR practices referred to in Supreme Court decisions.^{*62} Summaries of essential ECHR practices have, by now, become included in *Riigi Teataja* (The State Gazette) and on the Foreign Ministry's Web site.^{*63}

Estonia has recognised the importance of the Strasbourg court's broad reach, starting with the Supreme Court decision in the *Giga* case, in 2004^{*64}, in which the Supreme Court recognised the reopening of court cases when the ECtHR finds a violation, and now the possibility of reopening is also part of Estonia's procedural codes.^{*65} In general, entering the Strasbourg court's jurisdiction is considered less painful than becoming a member of the EU. Estonia's constitution is justifiably inspired by the ECHR, and very little opposition exists. Reform is still needed for remedying the unreasonably long court procedures; it is too early for assessment of the practical improvements made via the recently established mechanism to expedite the process^{*66}, and no legal basis for compensation exists in current legislation.

From examination of the situation in Estonia, it can be said that most of the decisions wherein the ECtHR has recently found violations had not reached the Supreme Court of Estonia (they were rejected at the leave-to-appeal level). Those were cases in which the Supreme Court had ruled the lower courts' decisions to be correct. Fewer disagreements with the Supreme Court's own decisions were seen, and in a couple of the latest cases the ECtHR^{*67} has made positive references to the Supreme Court's rulings—e.g., the

⁵⁹ See also R. Maruste. *Konstitutsionalism ning põhiõiguste ja -vabaduste kaitse* (Constitutionalism and Protection of Fundamental Rights and Freedoms). Tallinn: Juura 2004, p. 238 (in Estonian).

⁶⁰ E. Rohtmetts. *Euroopa Inimõiguste Kohtu praktika Riigikohtu lahendites. Kohtupraktika analüüs. Riigikohtu õigusteabe osakond* (Case-law of the European Court of Human Rights in the Supreme Court Decisions. Analysis of Court Practice. Department of Legal Information of the Supreme Court). January 2012. Available at http://www.riigikohus.ee/vfs/1285/EIK%20praktika%20RK%20lahendites_analuus_jaan2012_E_Rohtmetts.pdf (most recently accessed on 27.5.2012) (in Estonian).

⁶¹ See Supreme Court *en banc* decision of 21.6.2011, 3-4-1-16-10 (in Estonian). English text available at <http://www.riigikohus.ee/?id=1302> (most recently accessed on 27.6.2012).

⁶² T. Raatsin: *Tõlkes röövitud inimõigused ehk miks kohtunik pimedust kardab?* (Human Rights Lost in Translation or Why is the Judge Afraid of Darkness?). – *Eesti Ekspress*, 29.6.2011. Available at <http://www.ekspress.ee/news/arvamus/arvamus/teet-raatsin-tolkes-roovitud-inimoigused-ehk-miks-kohtunik-pimedust-kardab.d?id=48502157> (most recently accessed on 27.5.2012).

⁶³ Respectively, https://www.riigiteataja.ee/oigusudised/kohtuudiste_nimekiri.html and <http://www.vm.ee/?q=taxonomy/term/229> (most recently accessed on 27.5.2012).

⁶⁴ Supreme Court *en banc* decision of 6.1.2004, 3-1-3-13-03 (in Estonian). English text available at <http://www.nc.ee/?id=410> (most recently accessed on 27.5.2012) (in Estonian).

⁶⁵ Clause 240 (2) 8) of the Code of Administrative Court Procedure (RT I, 23.2.2011, 3; 28.12.2011, 7); §702 (2) 8) of the Code of Civil Court Procedure (RT I 2005, 26, 197; RT I, 28.12.2011, 44); Code of Misdemeanour Procedure, §180 (4¹) (RT 2002, 50, 313; RT I, 29.12.2011, 1); Code of Criminal Procedure, §366 (7) (RT I, 2003, 27, 166; RT I, 17.4.2012, 6).

⁶⁶ See §333¹ of the Code of Civil Court Procedure; §274¹ of the Code of Criminal Procedure, in force since 1.9.2011; §100 of the Code of Administrative Procedure, in force since 1.1.2012.

⁶⁷ See *Raudsepp v. Estonia*, no. 54191/07, judgement of 8.11.2011.

latter's ruling in the *Osmjorkin*⁶⁸ case, addressing the compensation for unreasonably lengthy court procedure, and the rulings that have taken into account the unreasonably long criminal proceedings by reducing the sentence.⁶⁹ These developments give witness to the fact that the ECtHR and the Supreme Court's practice have entered constructive dialogue. However, some substantiated violations that the ECtHR has found to be committed by other Member States, as in the finding that the absolute ban on a detainee exercising his or her voting right violates the Convention⁷⁰, have not been taken into consideration by the Estonian legislature (in Estonia, a similar absolute ban exists).

3.4.2. The Estonian Constitution and EU law

Matters are somewhat more complicated where the relationship between Estonian law and EU law is concerned. At this point, the previous considerations are not repeated (in-depth examination of the references to the case law of the CJEU in the Supreme Court's practice even before it came into force and before Estonia joined the EU, and, also, the application of EU law in the Supreme Court's case law, as well as references of the Estonian courts for preliminary rulings).⁷¹ In the realm of the most recent developments in EU law and its influence on Estonian legislation, the Anti-Counterfeiting Trade Agreement (called ACTA) has been an object of discussion of late, and so has the Treaty on the European Stability Mechanism (ESM).

It can be deduced from the examples that were presented at the beginning of this article that some EU member states find certain principles and values not recognised by EU law to be so unique and essential to their statehood and laws that they must be protected at all costs. An amendment to the Estonian Constitution (Republic of Estonia Amendment Act, Article 1) contains a protection clause according to which Estonia may belong to the European Union with the proviso that the fundamental principles of the Estonian Constitution are respected. However, the Supreme Court has not explained to date what these fundamental principles are. The Supreme Court was not asked for its opinion before Estonia joined the EU, before the failed Treaty establishing a Constitution for Europe, or at the ratification of the Lisbon Treaty by the Estonian parliament. At the same time, the parliament has since 2006 had the possibility of seeking the Supreme Court's opinion in certain instances, but it has done so only once. In the latter case, the Supreme Court's opinion was positive and pragmatic as to EU law.⁷² Regrettably, many questions remained unresolved, especially the question of where the limits to EU law lie.

How far can EU activities reach in accordance with Estonia's constitution? The Supreme Court itself has, in essence, stated (in 2008) that it is not to be ruled out that the treaties amending the founding treaties of the EU and such stipulations of EU law as delegate to the EU new competencies will be scrutinised (reviewed) by the Supreme Court in view of their concordance with the fundamental Constitutional principles inherent to Estonia.⁷³

It is good to recognise that, thanks to the Chancellor of Justice questioning the ESM treaty, the Supreme Court could state its position (Supreme Court judgment of 12 July 2012). But, of course, a separate issue is that the ESM treaty has been drafted and agreed upon outside the classical autonomous EU law system and thus has the character of an international agreement. Therefore, it would be difficult to deal with the question of the extent to which the ESM treaty gives the EU additional competencies at all and/or creates the new international financial office as an independent international organ. In any event, the agreement

⁶⁸ Supreme Court *en banc* decision of 22.3.2011, 3-3-1-85-09. Available at <http://www.riigikohus.ee/?id=1257> (most recently accessed on 27.5.2012).

⁶⁹ *Malkov v. Estonia*, no. 31407/07, judgement of 4.2.2010.

⁷⁰ *Hirst v. the United Kingdom* (no. 2), no. 74025/01, judgement of 30.3.2004.

⁷¹ See, for example, J. Laffranque, Rose D'Sa. Getting to know you: The developing relationship between national courts of the 'newer' Member States and the European Court of Justice with particular reference to Estonia. – *European Business Law Review* 2008 (19), pp. 311–320; J. Laffranque. A glance at the Estonian legal landscape in view of the Constitution Amendment Act. – *Juridica International* 2007 (IV), pp. 55–66; J. Laffranque. 'Community, identity, stability': Ideals and practice in building a bridge between the legal systems of the European Union and one of the smallest of the 'Brave New World'. – A. Lazowski (ed.). *The Application of EU Law in the New Member States—Brave New World*. The Hague: T.M.C. Asser Press 2010, pp. 157–207.

⁷² Supreme Court Constitutional Review Chamber opinion of 11.5.2006 on the interpretation of the Constitution, 3-4-1-3-06. – RT III 2006, 19, 176 (in Estonian). English text available at <http://www.nc.ee/?id=663> (most recently accessed on 27.5.2012).

⁷³ Supreme Court Administrative Law Chamber ruling of 7.5.2008, 3-3-1-85-07 (*OÜ Aiva Baltic*), paragraph 39. Available at <http://www.nc.ee/?id=11&tekst=RK%2F3-3-1-85-07&print=1> (most recently accessed on 27.5.2012) (in Estonian).

can enter force even without Estonia's consent, because it does not, as is the case with changes made to the EU's founding treaties, require all signatory states to agree upon it.

Personally, I find it regrettable that the only time that attempts were made by the Supreme Court to examine the ties between EU law and Estonia's constitution more thoroughly—i.e., in 2006, the preparations for adopting the euro, along with the present work in relation to the ESM treaty—the issue was division of competencies in the area of money and materialism. It would have been of greater relevance to question whether values such as Estonian language and culture, and also human dignity and justice, are under the same protection in the EU as they are in Estonia. Many matters in the functioning of the European Union are based on solidarity: if the richer countries did not help the poorer, the EU as we know it today would not exist. Regrettably, the concept of solidarity has hardly spread in Estonia.

4. Conclusions and the future: Accession of the European Union to the European Convention on Human Rights

In conclusion, it can be stated that conflicts among the three gods (ECHR, EU Charter, and Estonian Constitution) do not exist in Estonia, because Estonia's constitution and court practice have taken into consideration the European Convention on Human Rights and the EU Charter.

Under these circumstances, the question of a hierarchy is eliminated. The Estonian judge has one god that is simultaneously a trinity: Father, Son, and Holy Ghost co-existing in harmony. Which of the three has each of these roles—among the European Convention on Human Rights, Charter of Fundamental Rights of the European Union, or Estonian Constitution—remains for anybody to decide for him- or herself. However, they have to be seen in harmony. The trinity does not consist only of the above-mentioned entities, for the European Court of Human Rights, Court of Justice of the European Union, and Estonian Supreme Court's practice are included. There is no need for petty talk about subjugation to EU law, or the flag-waving of populist sovereignty. The principal element and value that all persons of the trinity have to consider is the protection of human rights.

Legal bases and their multiple interpretations can cause conflicts, but these could be prevented through co-operation. Extremely necessary and important in this context are a competent body of jurists, training of judges and lawyers, raising people's awareness of justice, centres for analysis of European law at Member States' courts, an EU law competence centre at the Strasbourg court, and a centre focusing on the ECHR (as well as ECtHR jurisprudence) at the Luxembourg court.

In many respects, prevention of conflicts depends on the approach. In the opinion of German lawyer Armin von Bogdandy, the national judge deciding in a case touching on European law must not lose sight of the decision's *Verallgemeinerungsfähigkeit*, its generalisability, and should remember that the decision could also be used in the courts of other European states.^{*74}

The courts have to be open to dialogue among themselves across Europe, and the various powers of the state as well as media. ECtHR judge Mark Villiger has presented several dialogues that the judges of the Court have: with other ECtHR judges, the Court's registry and lawyers, parties to the case at hand, judges of domestic courts, judges of other European and international courts, European society, and finally themselves.^{*75} Only as a result of the above is it possible to make an informed, objective, and fair decision; therefore, judges have to acknowledge to themselves the need for such dialogues.

ECtHR President Sir Nicolas Bratza has emphasised that dialogue also has to proceed through judgments.^{*76} Permitting Member States' courts to ask for opinions from the ECtHR has been suggested as one

⁷⁴ A. von Bogdandy. Prinzipien der Rechtsfortbildung im europäischen Rechtsraum: Überlegungen zum Lissabon-Urteil des BVerfGE. – *Neue Juristische Wochenzeitung* 2010 (63), pp. 1 ff. See also A. von Bogdandy, S. Schill. Die Achtung der nationalen Identität unter dem reformierten Unionsvertrag. Zur unionsrechtlichen Rolle nationalen Verfassungsrechts und zur Überwindung des absoluten Vorrangs. – *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 2010 (70), pp. 701–734.

⁷⁵ M.E. Villiger. The dialogue of judges. – C. Hohmann-Dennhardt, P. Masuch, M. Villiger (eds). *Festschrift für Renate Jaeger, Grundrechte und Solidarität. Durchsetzung und Verfahren*. Kehl am Rhein: Engel Verlag 2011, pp. 195–209.

⁷⁶ N. Bratza. The relationship between the UK courts and Strasbourg. – *European Human Rights Law Review* 2011/5, p. 511.

of the possibilities for advancing dialogue. A somewhat similar mechanism in the EU is references by Member States' courts to the CJEU for a preliminary decision.

As the above examples have shown, the answer to the question 'Who has the last word on the protection of human rights in Europe?' often depends on the specific court decision. Legal bases have no hierarchy, nor do the courts that interpret those bases.

It is regrettable that the press commented on the recent ECtHR judgement *Leas v. Estonia*^{*77} that the former mayor of the rural municipality in Kihnu whom the Estonian courts had found guilty of accepting a bribe had been acquitted by the ECtHR.^{*78} After all, the ECtHR cannot rule on the guilt or innocence of anybody; the ECtHR decides whether a Member State has violated the European Convention on Human Rights in a concrete case, and it brings attention to certain deficiencies—e.g., regulation and judicial control of the surveillance activities.

In the contemporary world, one does not speak in terms of hierarchical categories. New theories have emerged, such as multilevel constitutionalism, the network of EU and Member States' constitutional rights, constitutional pluralism, judicial dialogue, a common minimum standard, and a polycentric system.^{*79} Advocate General Maduro has said that European democracy also entails achieving a delicate balance between the national and European dimensions of democracy, without either one necessarily prevailing over the other.^{*80} BVerfG Chairman Andreas Voßkuhle maintains that the CJEU and Member States' constitutional courts are parts of one large union of constitutional courts and that internationalisation and europeanisation have given comparative constitutional law a new quantitative and qualitative dimension.^{*81}

The prevalence of EU law has become more relative in nature because of the important role of the above-mentioned Article 4 (2) of the EU Treaty. The fundamental rights should be part of EU constitutional identity *via* Article 2 of said treaty, but regardless of what the EU does, it has to guarantee that fundamental rights are protected.

In conclusion, I would like to mention an essential element in the regulation of a common European legal space: the accession of the European Union to the European Convention on Human Rights. The financial crisis has shown that *ad hoc* solutions, which do not belong in a rule-of-law state, may become a problem in the EU. It would be dangerous for the EU to abandon its own values. The European Union should have an external control mechanism of international standing, and the European Court of Human Rights could fill that role. To prevent hierarchy, the ECtHR should be seen in such instance not as a higher court but as a court specialising in human rights that makes sure that EU activities are in line with fundamental rights.

The greatest benefit of EU linking-up with the Convention would be the availability of better opportunities for the individual to argue against EU arbitrariness, thus enhancing the accountability of EU institutions in the protection of fundamental rights.

Former Finnish Chancellor of Justice Paavo Nikula has said that if the EU itself would want to join the EU, it would not qualify, because it has not signed the European Convention on Human Rights.^{*82} Regrettably, the accession of the EU to the ECHR has stalled. Whilst the draft agreement^{*83} was written last year, it has not been approved. Many questions still remain: those of the EU contribution to the Council of Europe's budget, EU voting rights in the Committee of Ministers of the Council of Europe, and appointment of an EU judge to the ECtHR, to name a few. The key question is that of the preservation of the autonomy of EU law.

⁷⁷ *Leas v. Estonia*, no. 59577/08, judgement of 6.3.2012.

⁷⁸ Euroopa Inimõiguste Kohus mõistis Kihnu endise vallavanema õigeks (The European Court of Human Rights Acquitted the Former Mayor of Kihnu Municipality), news published by Estonian Public Broadcasting (ERR) on 7.3.2012. Available at <http://uudised.err.ee/index.php?06247664> (most recently accessed on 27.5.2012) (in Estonian).

⁷⁹ On the concept of 'new monism', see also A.E. Kellermann. Comparative aspects on constitutions: Theory and practice. – European Journal of Law Reform 2011 (13), pp. 126–127.

⁸⁰ Opinion of Advocate General Poiares Maduro, delivered on 26.3.2009, C-411/06 (*Commission of the European Communities v. European Parliament and Council of the European Union*).

⁸¹ A. Voßkuhle. Der europäische Verfassungsgerichtsverbund. – Neue Zeitschrift für Verwaltungsrecht 2010 (29); A. Voßkuhle. Europa als Gegenstand wissenschaftlicher Reflexion – eine thematische Annäherung in 12 Thesen. – C. Franzius, F.C. Mayer, J. Neyer (eds). Strukturfragen der Europäischen Union. Nomos 2010, pp. 44–45.

⁸² Paavo Nikula's speech 'The human rights within [the] EU – key issue in political integration', in Athens in February 2000, at the conference Towards a Political Unification of Europe?.

⁸³ Final version of the draft legal instruments on the accession of the European Union to the European Convention on Human Rights. Available at http://www.coe.int/t/dghl/standardsetting/hrpolicy/CDDH-UE/CDDH-UE_documents_en.asp (most recently accessed on 27.5.2012).

The most significant judicial nuances of the accession involve the so-called co-respondent institution and the rendering possible of prior involvement for the Court of Justice of the European Union.^{*84}

The longer the accession process takes, the greater are the risks of disagreements surfacing in relation to human rights protection. At least in the Brighton Declaration, the importance of EU accession to the European Convention on Human Rights is emphasised.^{*85}

Finally, it is not so much a matter of who has the power to get in the last word. The answer resides in the protection of human rights themselves—protection that has to be guaranteed identically by Member States, the EU, the Council of Europe, and the courts of the pan-European system of justice, with complementarity and respect for each other in the process.

⁸⁴ See, for example, A. Tizzano. *Les Cours européennes et l'Adhésion de l'Union à la CEDH. – Il Diritto dell'Unione Europea*, no. 1, 201129-57; C. Landenburger. *Vers l'adhésion de l'Union européenne à la Convention européenne des droits de l'homme. – Revue trimestrielle de droit européen (RTD Eur)* 2011 (47)/1 (Jan.–Mar.), pp. 19–26; J.P. Jacque. *The accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms. – Common Market Law Review* 2011 (48), pp. 995–1023; P. Gragl. *Accession revisited: Will fundamental rights protection trump the European Union's legal autonomy? – European Yearbook on Human Rights* 2011, pp. 159–173; T. Lock. *Walking on a tightrope: The draft ECHR accession agreement and the autonomy of the EU legal order. – The Common Market Law Review* 2011 (48)/4, pp. 1025–1054; Robert Schuman Foundation: *Adhésion de l'Union européenne à la Convention européenne des droits de l'homme: analyse juridique du projet d'accord d'adhésion du 14 octobre 2011* (Auteurs: Xavier Groussot, Laurent Pech, Tobias Lock). *Françoise Tulkens, Pour et vers une organisation harmonieuse. – RTD Eur* 2011 (47)/1 (Jan.–Mar.).

⁸⁵ High Level Conference... (see Note 52), paragraph 36: 'The accession of the European Union to the Convention will enhance the coherent application of human rights in Europe. The Conference therefore notes with satisfaction progress on the preparation of the draft accession agreement, and calls for a swift and successful conclusion to this work.'



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The Constitutional Requirements for Averting of a Danger:

The Principles of a State Based on Democracy,
and the Rule of Law v. Averting of a Danger^{*1}

1. Introduction

After the terrorist attacks of 11 September 2001 in the US, countries the world over face new challenges related to terrorism issues. Also, organised crime in the Schengen countries is able to move easily from one country to another. Both of the above will force governments and legislators to think more and more about internal security. There is a continuum with fundamental rights and freedoms at one extreme and internal security on the other. The values representing both ends of the continuum are both essential—internal security and also fundamental rights and freedoms. History has shown that views focusing on either extreme have not been useful from a long-term perspective. For that reason, balance must be achieved, and it is not useful if one value is elevated at the expense of the other value.

The Police Act^{*2} was passed by the Supreme Council of the Republic of Estonia (Eesti Vabariigi Ülemnõukogu) on 20th September 1990 and entered into force on 8 October 1990, before the restoration of Estonian independence. The basics elements of the Police Act remained unchanged until the parliament of Estonia (Riigikogu) enacted the Police and Border Guard Act^{*3} (PBGA), in 2009, and then the Order Protection Act^{*4} (OPA), in 2011. It should be mentioned here that the OPA has not yet entered into force.

In 2006, the Supreme Court of Estonia issued its informal opinion on a draft of the OPA and averting of a danger^{*5}:

The law is based on the concept of a danger and danger-handling. But it is not a suitable basis nor a proper criterion for the Estonian legal system in the field of the protection of order and supervision. [...] The central, basic concept of the draft Order Protection Act is danger, and it handles state

¹ In Estonian *ohutõrjeõigus*. In German *die Gefahrenabwehr*. The author also uses in the text the term defence against danger as a synonym for averting of a danger.

² Politseiseadus. – RT 1990, 10, 113; 2007, 62, 394 (in Estonian). English text available via <http://www.legaltext.ee/> (most recently accessed on 23.3.2012).

³ Politsei ja piirivalve seadus. – RT I 2009, 26, 159; RT I, 29.12.2011, 28 (in Estonian).

⁴ Korrakaitse seadus. – RT I, 22.3.2011, 4 (in Estonian).

⁵ In some occasions the parliament of Estonia (Riigikogu) or Ministry of Justice has involved the Supreme Court in legislative drafting and asked the Supreme Court's opinion of the concrete draft act. That opinion is not binding and usually it is put together by the advisers.

supervision as danger-oriented activities; this is an approach outside our current tradition. Such an approach is possible, but in the Estonian legal landscape it is a new and unfamiliar one, and in our view unreasonable.^{*6}

The question is important because averting of a danger creates both material and procedural rules that restrict fundamental rights. On the other hand, the state is bound by a duty of protection.^{*7} This means that the state must protect people's fundamental rights and not interfere with those fundamental rights excessively. But also it means that the state must protect a person from third-party attack, as well as other risks.

The minimum standard for the rule of law in a democratic state must be defined if one is to understand the nature of averting of a danger. Without this minimum standard, we cannot speak about the principle of a state based on democracy and the rule of law. If averting of a danger meets the relevant minimum standards, it is consistent with, rather than counter to, the rule of law and democracy. However, should the defence against danger not meet the minimum standards, it is appropriate to ask whether the concept of averting of a danger is legitimate and in accordance with the Constitution. The answer to that question presupposes a precise formulation of averting of a danger. Since German legal doctrine served as an example in creation of the OPA and PBGA^{*8}, it is necessary to take German legal doctrine too into consideration.

This article focuses on the demands that the Constitution of the Republic of Estonia^{*9} (hereinafter also 'the Constitution') creates for the PBGA and OPA in the field of internal security and averting of a danger. The scope of the PBGA is narrower (only police activity) than that of the OPA (authorities' every action directed at the protection of public order).

2. Internal security through averting of a danger

According to the Constitution, internal security is part of the Constitutional order. The preamble of the Constitution refers to 'unwavering faith and a steadfast will to strengthen and develop the state, [...] which shall protect internal and external peace [...]'. This means that internal peace must be achieved through protection of the legal order and fundamental rights and freedoms and that this peace is the best way to make fundamental rights reality.^{*10} In the legal literature, internal peace is considered to be one of the aims of Estonian statehood, which encompasses both internal political stability and public order.^{*11} Under protection of internal security, which is enshrined in the preamble of the Constitution, the state of Estonia has a duty not only to deal with infringements of law but to strive for their avoidance.^{*12} Avoidance in this context means nothing else than prevention—in other words, the state's proactive activity. The Supreme Court of Estonia has noted that internal peace as referred to in the preamble of the Constitution is one of the Constitutional values and consists of the guaranteeing of social security and protection of the legal order.^{*13} Accordingly, it is possible to distinguish between, on the one hand, the state's proactive activity (prevention of problems) and, on the other, reactive activity (response to an event).

⁶ The text is published as M. Ernits. Preventiivhaldus kui tulevikumudel (Proactive administration as a future model). – Riigikogu Toimetised 2008 (17), p. 162 (in Estonian).

⁷ P.M. Huber. Risk decisions in German constitutional and administrative law. – G.R. Woodman, D. Klippel (eds). Risk and the Law. Routledge-Cavendish 2008, p. 29.

⁸ Korraikaitseaduse eelnõu (eelnõu nr 49 SE I) seletuskiri (Explanatory memorandum to the draft Act of Order Protection (draft 49 SE I)), p. 6. Available at <http://www.riigikogu.ee/?page=eelnou&op=ems&emshelp=true&eid=93502&u=20120331103845> (in Estonian).

⁹ Eesti Vabariigi põhiseadus (the Estonian Constitution as passed by a referendum held on 28.6.1992). – RT I 1992, 26, 349; RT I 27.4.2011, 2 (in Estonian). English text available via <http://www.legaltext.ee/> (most recently accessed on 23.3.2012).

¹⁰ See also K. Jaanimägi. Politsei sisemise rahu tagajana (The Police as a Keeper of Public Peace). – Juridica 2004/7, p. 453 (in Estonian).

¹¹ R. Maruste. Konstitutsionalism ning põhiõiguste ja -vabaduste kaitse (Constitutionalism and the Protection of Fundamental Rights and Freedoms). Tallinn: Juura 2004, p. 92 (in Estonian). On states' duty to protect internal security, see also V. Götz. Innere Sicherheit. – J. Isensee, P. Kirchhof (eds). Handbuch des Staatsrechts Band IV (HStR IV). C.F. Müller, 2003, §85, column number 1 ff.

¹² E.-J. Truuväli *et al.* (eds). Eesti Vabariigi põhiseadus. Kommenteeritud väljaanne. Teine, täiendatud trükk (Constitution of the Republic of Estonia, Commented Edition, Second, Revised Edition). Tallinn: Juura 2008, p. 35 (in Estonian).

¹³ Supreme Court *en banc* decision of 7.12.2009, 3-3-1-5-09, paragraph 31 (in Estonian).

Averting of a danger can be considered to be one of the state's proactive activities, with the aim of ensuring internal security. Averting of a danger is related to supporting, directing, forward-looking, and preventive state activity, which has to take into account and accept Constitutional requirements, European and international law also address the needs of society to ensure public order and security.^{*14} This is part of the legal model for police- and order-related laws and has defence against concrete and abstract danger at its core.^{*15} Therefore, averting of a danger is centred on the concept of danger.^{*16} It delimits the tasks of the police and also sets a threshold for intervention and legitimises infringement of fundamental rights in certain conditions.^{*17} The scope of both the legislator and the executive power's activities depends on the probability of danger, the nature of the protected and threatened good, and the fundamental rights at stake.^{*18} Where the existence of a danger is the premise for legitimate infringement of a person's fundamental rights and freedoms, the competence and authorisation norms should be precisely and carefully defined.^{*19}

There may also be other legal models addressing prevention of threats to good and dealing with prognosis decisions (e.g., the legislator may enact authorisation norms that regulate every concrete situation in life with specific implementation measures). Such a legal model would certainly be more in accordance with the concept of legal certainty: the law and police officers' decisions are clear, precise, and definite, and the legal implications are foreseeable for the addressees.^{*20} But this would entail a closed and rigid system, because the legislator cannot foresee all situations in which a police officer ought to act proactively to prevent, for instance, harm to a person's life or health. It also limits discretion as to whether to act and the kinds of measures to be employed for prevention of damage.^{*21}

Several authors have indicated that Estonia's Police Act^{*22} did not meet many of the important criteria. Criminal proceedings and state supervision procedure were not clearly separated, competence norms were not supported by specific authorisation norms, and often police actions were based only on the competence norms—which were too abstract and therefore rendered it hard to know what was allowed and what was not.^{*23} The Administrative Law Chamber of the Supreme Court has noted that regulation of the use of force by police officers was scanty.^{*24} Those shortcomings indicated that the actions of the executive power could be illegal in specific cases. It gave rise to debate as to whether such regulation would have been in accordance with the Constitution or not. To eliminate the above-mentioned drawbacks, the legislator passed new laws (the PBGA and OPA, referred to above). These laws distinguish between police activities related to criminal proceedings and state supervision procedure (also averting of a danger)^{*25}, and they draw a clear distinction between competence norms^{*26} and authorisation norms^{*27}, with competence norms being supported by specific authorisation norms.^{*28}

¹⁴ F. Schoch. *Polizei- und Ordnungsrecht*. – E. Schmidt-Aßmann (ed.). *Besonderes Verwaltungsrecht*, 14. Ausgabe. Berlin: De Gruyter 2008, p. 132.

¹⁵ *Ibid.*, p. 136.

¹⁶ B. Pieroth, B. Schlink, M. Kiesel. *Polizei- und Ordnungsrecht*. Munich: C.H. Beck 2002, p. 56.

¹⁷ A. Voßkuhle. *Grundwissen – Öffentliches Recht: Der Gefahrenbegriff im Polizei- und Ordnungsrecht*. – JuS 2007/10, p. 908; D. Kugelmann. *Polizei- und Ordnungsrecht*. 2006, Chapter 4, column number 82, and, there cited, D. Kugelmann. *Der polizeiliche Gefahrenbegriff in Gefahr? – Anforderungen an die Voraussetzungen polizeilicher Eingriffsbefugnisse – Die Öffentliche Verwaltung (DÖV)*, Heft 19, 2003, pp. 781–782.

¹⁸ Huber (see Note 7), p. 29.

¹⁹ H. Schwemer. *Põhiseaduse nõuded politseiõigusele (The Constitutional Requirements for the Police Law)*. – *Juridica* 2004/7, p. 447 (in Estonian).

²⁰ Legal certainty is recognised as one of the general principles of European law. See P. Craig, G. de Búrca. *EU Law: Text, Cases, and Materials*, 5th ed. Oxford University Press 2011, pp. 525, 533–538.

²¹ The Supreme Court has declared legal norms unconstitutional because they did not allow discretion; see Supreme Court *en banc* decision of 21.10.2001, 3-4-1-7-01; Supreme Court Constitutional Review Chamber decision of 21.6.2004, 3-4-1-9-04 (in Estonian).

²² It was in force until 31.12.2009.

²³ Schwemer (see Note 19), p. 444; Jaanimägi (see Note 10), p. 459; O. Kask. *Korrakaitse seaduse eelnõust (On the Draft Act of Order Protection)*. – *Juridica* 2004/7, p. 468 (in Estonian).

²⁴ Supreme Court Constitutional Review Chamber decision of 10.1.2008, 3-3-1-65-07, paragraph 19 (in Estonian).

²⁵ Subsection 1 (4) of OPA, §1 (4) of PBGA.

²⁶ E.g., §§ 30–53 of OPA; §§ 7¹⁵–7⁴¹ of PBGA.

²⁷ E.g., §2, §6 (2) of OPA; §3 and §7¹ of PBGA.

²⁸ *Ibid.*

2.1. The concept of danger

Reservation of statutory powers, provided for in §3 of the Constitution, is one aspect of democracy.^{*29} It demands that the legal norms enacted and their consequences be detailed and precise.^{*30} Thus it should be applied also to the concept of danger.

According to the PBGA and OPA, the central concept for police actions is danger, because the specific authorisation norms allow a police officer to apply a measure only when danger occurs. A danger is a situation wherein the objectively assessed facts reveal the probability of an offence taking place in the near future.^{*31} According to German law, danger is a situation in which circumstances, if not prevented from taking their course, could in the foreseeable future be expected with sufficient likelihood to lead to violation of the protected good (public security and order).^{*32} Both the Estonian and the German law understand danger as sufficiently probable violation of the protected good. At the same time, however, the assessment of danger and its temporal dimensions differ between the two systems.

According to the PBGA and OPA, the offence or violation of the protected good must be probable in the near future (*lähitulevik*). In contrast, under German law, it must take place in the foreseeable future (*absehbarer Zeit*). Therefore, a danger does not exist under Estonian law when the probability is of the offence taking place in the distant future, whilst using the temporal criterion of ‘foreseeable future’ ensures that danger is seen as existing when a violation is probable in the longer term. It is understandable for a police officer to intervene at the last minute, because when the threat to good is near, the probability of its occurrence is obviously greater. However, it is questionable whether a preventive measure should be limited with a time-based criterion in such a way, especially in situations wherein very important good is at stake (e.g., life and health). It is also possible to assess the temporal dimension not only when the matter involves the premise of legal norm (a question of danger). It may also be estimated through discretion whether to act or not (a question of legal consequences).^{*33} If the concept of danger is not limited in its composition in the temporal dimension, it is possible to apply discretion and the principle of proportionality for exclusion of all such measures as may not, in the relevant case, be suitable, necessary, or moderate (proportional in the narrow sense of the term). In summary, it is not always necessary to limit the concept of danger in the temporal dimension, but the temporal dimension can be taken into account through discretion. However, it is questionable whether such a legal norm is in accordance with the reservation of statutory powers, if it is not sufficiently precise and detailed.

It is possible through various concepts of danger (real, apparent, and suspected) and levels of danger to make legal norms more precise and detailed.

2.1.1. Real danger and apparent danger

For one to distinguish a real danger from an apparent danger, it is important to know the perspective (*ex ante* or *ex post*) from which a police action’s legality must be assessed. Apparent danger is present if the officer was sure, from an *ex ante* perspective, that damage to the protected good is likely but a new danger assessment, made from the *ex post* perspective, shows that no danger exists^{*34}—that is, there was a danger situation when the officer made the assessment but subsequent estimation showed it no longer to exist. In German law, a measure taken is considered to be legitimate when an officer employed it in a situation wherein apparent danger was present.^{*35} It is a matter of debate whether in that situation the measure should be considered legitimate or illegal. On one hand, the measure taken was used in a situation in which no real danger objectively existed. On the other hand, it is also important to note that the facts as known to

²⁹ See also R. Alexy. *Põhiõigused Eesti põhiseaduses* (Fundamental Rights in the Constitution of the Republic of Estonia). – Juridica, special edition, 2001, p. 36 (in Estonian).

³⁰ See also Truuväli *et al.* (see Note 12), p. 53.

³¹ Subsection 5 (2) of OPA; §7³ (2) of PBGA.

³² Schoch (see Note 14), p. 156; F.-L. Knemeyer. *Polizei- und Ordnungsrecht*, 11th ed. Munich: C.H. Beck 2007, p. 63. See also the English-language version addressing the definition of danger, translated by Huber (see Note 7), p. 25.

³³ Averting of a danger involves two kinds of discretion: resolution discretion (*otsuse kaalutus, das Entschließungsermessen*) and selection or choice discretion (*valiku kaalutus, das Auswahlermessen*). See W.-R. Schenke. *Polizei- und Ordnungsrecht*, 4th ed. Heidelberg: C.F. Müller 2005, column number 94; see also Pieroth *et al.* (see Note 16), pp. 74–75.

³⁴ Schoch (see Note 14), p. 159.

³⁵ Knemeyer (see Note 32), p. 67.

the officer held at the time when he or she made the decision to act. The purpose of averting of a danger is to prevent damage, not to punish. Also the time available and the importance of the protected good affect the behaviour of an officer.

A legal definition of apparent danger is not set forth in the PBGA or OPA. The Supreme Court in its practice has not recognised clearly the concept of apparent danger. But the Supreme Court has held generally that the legality of administrative action is to be assessed from an *ex ante* perspective.^{*36} In view of the above-mentioned (i.e., from an *ex ante* perspective), it may also be possible to distinguish between real and apparent danger.^{*37} Resting on such a distinction are also the legality of the police action and questions of compensation. That is why it is necessary to distinguish between apparent and real danger.

The question of compensation for damage is one of the major problems with the notion of apparent danger. Should the damage be compensated for, or not? If there is to be compensation, should it be in full or only limited in its extent?

Neither the PBGA nor the OPA includes specific rules for claims of compensation for damage. The legislator's clear intention was that compensation for damage take place on general grounds.^{*38} When a measure is applied in a situation wherein apparent danger exists, the damage is caused by a lawful administrative act or measure. According to the State Liability Act (SLA), a person may claim compensation, to a fair extent, for proprietary damage caused by a lawful administrative act or measure that in an extraordinary manner restricts the fundamental rights or freedoms of said person.^{*39} Therefore, a person may in such a case claim compensation only when the administrative measure or act caused extreme restriction to his or her fundamental rights and freedoms. The Supreme Court has held that a person may claim compensation for damages on the above-mentioned grounds when a lawful administrative act or measure has seriously restricted the fundamental right to property that is inviolable and equally protected.^{*40} However, the compensation for damage is to be claimed only to a fair extent. Unless the law provides otherwise, compensation shall not be claimed to the extent to which the restriction of fundamental rights or freedoms was caused by, or the restriction was in the interests of, the aggrieved person; special treatment of persons is prescribed by law; the person can receive compensation elsewhere, including from insurance; or the issue of payment of compensation is regulated by other acts of law.^{*41} In granting of compensation, the benefit gained by the public authority or the advance in public interests that is a result of the restriction of fundamental rights and freedoms, the gravity of the restriction, the unforeseeability of damage, and other relevant circumstances shall be taken into consideration.^{*42} When we accept the above logic also in cases of apparent danger, it may be alleged that a person can claim compensation for damage that was caused by a measure stemming from apparent danger, but only with narrow scope and in limited circumstances. Such an interpretation may not always be in accordance with the principle that the damage should be subject to compensation especially in a situation wherein it later becomes clear that no real danger existed.^{*43}

2.1.2. Suspected danger

If the probability of a danger's materialisation is unknown and the officer only has doubts about the matter, it is a suspected danger.^{*44} In that case, the officer is not sure about the danger, so it is necessary to clarify the situation further. In general, this is done through a clarification measure, which usually does not intensively restrict fundamental rights and freedoms and helps to clarify whether the danger exists or not.

³⁶ Supreme Court *ad hoc* panel decision of 29.1.2010, 3-3-1-72-09, paragraph 18; Supreme Court Constitutional Review Chamber decision of 21.5.2002, 3-3-1-29-02, paragraph 12; 18.6.2002, 3-3-1-33-02, paragraph 11; 5.11.2008, 3-3-1-49-08, paragraph 11 (in Estonian).

³⁷ See also §5 (2) of OPA; §7³ (2) of PBGA.

³⁸ Explanatory memorandum to the draft Act of Order Protection (see Note 8).

³⁹ Riigivastutuse seadus (State Liability Act), §16 (1). – RT I 2001, 47, 260; 2006, 48, 360 (in Estonian). English text available via <http://www.legaltext.ee/> (most recently accessed on 23.3.2012).

⁴⁰ Supreme Court Civil Chamber decision of 24.11.2009, 3-2-1-123-09, paragraph 12.

⁴¹ Subsection 16 (2) of SLA.

⁴² Subsection 16 (3) of SLA.

⁴³ Section 25 of the Constitution states that everyone has the right to compensation for moral and material damage caused by the unlawful action of any person.

⁴⁴ Knemeyer (see Note 32), p. 68.

It should be mentioned that the German legal literature also discusses the possibility of applying such clarification measures in a situation wherein very important good (e.g., life or health) is at stake.^{*45} Question arises because it may not be in accordance with the concept of averting of a danger while the core of it is to avert existing danger not to clarify whether the danger exists or not. Also the prerequisite for such a measure (suspicion of danger) may not be defined well enough to justify intensive restriction of fundamental rights and freedoms, for which reason it may not be in accordance with the Constitutional requirements.^{*46}

The PBGA does not provide a legal definition of suspected danger; instead, it regulates various authorisation norms that entitle an officer to find out whether danger exists or not. When the officer will implement a measure to clarify whether there is a danger, he or she is not sure about the danger and only has doubts about it. This is nothing else than a suspected danger. By contrast, the OPA regulates the legal definition of suspected danger: ‘Suspected danger is a situation wherein the facts revealed show on the basis of objective assessment that the probability of offence is not sufficient but there is reason to suppose that the offence is not precluded.’^{*47}

In Estonian law, the officer is authorised to take measures when suspecting a danger: inform the public of suspected danger^{*48}; disclose personal data^{*49}; detain a person, question him or her, and require documents^{*50}; summon a person to an office^{*51}; verify a person’s identity and bring him or her to an office for identification^{*52}; process personal data with equipment^{*53}; process and require data that a communication company has in its possession^{*54}; prohibit residence^{*55}; stop a vehicle^{*56}; impose security controls^{*57}; examine a person, item of movable property, or possession^{*58}; to take possession^{*59}; and use compulsion.^{*60}

Thus the Riigikogu has regulated a broad range of authorisations applicable when there is danger suspected. Some of the above-mentioned authorisation norms restrict fundamental rights and freedoms very intensively—e.g., examining a person’s clothing and body cavities restricts his or her physical integrity and free self-realisation intensively, controlling a person’s movable property restricts his or her right to property intensively, and entering a person’s residence and examining it restricts his or her private and family life. It is also problematic to allow use of compulsion in a situation wherein the existence of danger is unclear. Such authorisation norms may not be in accordance with the principle of proportionality and democracy. The purpose of such a measure would be questionable when it may have no useful results. Suspicion of danger is a phase before danger, and the officer has no solid facts as to the probability of harm.^{*61} Also it is questionable whether the concept of suspected danger in the given situation is precise and detailed. It is unclear also when the officer has a right to act and to restrict a person’s fundamental rights and freedoms and what the legal consequences of this are. In conclusion, whether an officer should have such extensive measures available for clarification of whether danger exists is problematic.

⁴⁵ Schoch (see Note 14), p. 161.

⁴⁶ See also Subsection 2.2 of this article.

⁴⁷ Subsection 5 (6) of OPA.

⁴⁸ Subsection 26 (1) of OPA.

⁴⁹ Subsection 26 (2) of OPA.

⁵⁰ Subsection 30 (1) of OPA, (3); §7¹⁶ (1), (3) of PBGA.

⁵¹ OPA §31 (1) of OPA; §7¹⁷ (1) of PBGA.

⁵² Subsections 32 (1), (6) of OPA; §7¹⁸ (1), (6) of PBGA.

⁵³ Subsection 34 (1) of OPA; §7²¹ (1) of PBGA.

⁵⁴ Subsection 35 (1) of OPA; §7²¹ (1) of PBGA.

⁵⁵ Subsection 44 (1) 3) of OPA; §7³¹ (1) 3) of PBGA.

⁵⁶ Subsection 45 (1) of OPA; §7³² (1) of PBGA.

⁵⁷ Subsection 47 (1) 3) of OPA; §7³⁴ (1) 3) of PBGA.

⁵⁸ Subsections 48 (1) 2), §49 (1) 5) of OPA, §51 (1) 2); §7³⁵ (1) 2), §7³⁶ (1) 5), §7³⁸ (1) 2) of PBGA.

⁵⁹ Subsection 50 (1), (2) of OPA; §737 (1) 2), (2) of PBGA.

⁶⁰ Subsection 76 (1) of OPA.

⁶¹ Explanatory memorandum to the draft Act of Order Protection (see Note 8), p. 23.

2.1.3. Levels of danger

According to the PBGA and OPA, the danger levels are distinguished through the value of the protected good.^{*62} Estonian law knows significant danger, urgent danger, and present danger.^{*63} Significant danger is a high probability of harm to a person's life, physical integrity, and freedom; to high-value proprietary benefit; to public safety; or to the environment, or other particularly serious offence.^{*64} Urgent danger is a high probability of harm to a person's health, to the high value of material goods, or to the environment, or, again, other serious offence.^{*65} Urgent danger lies between significant and present danger,^{*66} where present danger is a situation wherein the offence is already taking place or there is a high probability that it will begin immediately.^{*67} Although no specific levels are set for the danger to life or body, common danger, and imminent danger, it may still be possible to interpret the content of significant, urgent and present danger broadly (e.g., the concept of significant danger may also comprise a danger to a person's life or body). Thus the different levels distinguished for danger make the general concept of danger more precise and detailed and allow the legal consequences that arise to be seen.

2.2. General clauses and the principle of legal certainty

It is possible to distinguish between a general clause and standard measures.^{*68} Both types of legal norms legitimate interference with fundamental rights and freedoms. The purpose of a general clause is to provide the legal basis for interference in fundamental rights and freedoms to prevent so-called unforeseen dangers.^{*69} It is a measure intended for atypical danger situations, and its application is broader.^{*70} If there is no standard measure but a danger exists, the officer is entitled to consider whether to act, and how.^{*71} In contrast, standard measures too create a legal base upon which one may restrict fundamental rights and freedoms but they are more precisely specified than are terms of a general clause.^{*72} Thus the standard measure serves the interests of legal clarity.^{*73} Speaking against the use of a general clause is its lack of legal certainty: it may not be defined adequately for interference in fundamental rights and freedoms to be justified. Greater abuse of authority may arise when an officer applies a general clause. Both the PBGA and the OPA recognise the concept of a general clause^{*74}; therefore, its existence is one of the major problems.

The principle of legal certainty can be considered one part of the rule of law.^{*75} The Supreme Court has pointed out that the principle of legal certainty demands that a person be able to foresee the legal consequences of his or her acts adequately.^{*76} The Federal Constitutional Court of Germany affirmed that the general clause was in Germany sufficiently well-defined and in accordance with the rule of law since its development through the decades of legal practice and theory have sufficiently clarified and explained its

⁶² *Ibid.*

⁶³ Comparison with German law: It knows present danger (*gegenwärtige Gefahr*), significant danger (*erhebliche Gefahr*), urgent danger (*dringende Gefahr*), danger to life or body (*Gefahr für Leib oder Leben*), common danger (*gemeine Gefahr*), and imminent danger (*Gefahr im Verzug*). See F. Schoch. Grundfälle zum Polizei- und Ordnungsrecht. – JuS 1994, p. 670; Schenke (see Note 33), pp. 41–42.

⁶⁴ Subsection 5 (4) of OPA; §7³ (3) of PBGA.

⁶⁵ Subsection 5 (3) of OPA.

⁶⁶ Explanatory memorandum to the draft Act of Order Protection (see Note 8), p. 23.

⁶⁷ Subsection 5 (5) of OPA; §7³ (4) of PBGA. See also the explanatory memorandum to the draft Act of Order Protection (see Note 8), pp. 23–24.

⁶⁸ Schoch (see Note 14), p. 150; Pieroth *et al.* (see Note 16), p. 111.

⁶⁹ Pieroth *et al.* (see Note 16), pp. 106–107; Schenke (see Note 33), p. 22. See also the explanatory memorandum to the draft Act of Order Protection (see Note 8), p. 49.

⁷⁰ Schoch (see Note 14), p. 242. On the general clause structure, see also Schoch. Bürgerliches Recht in der Fallbearbeitung. – JuS 1994, Part VI, p. 570.

⁷¹ Pieroth *et al.* (see Note 16), pp. 106–107.

⁷² For details on standard measures, see Schenke (see Note 33), p. 60.

⁷³ Schoch (see Note 14), p. 242.

⁷⁴ OPA §28, §29; PBGA §7¹³, §7¹⁴. See also the explanatory memorandum to the draft Act of Order Protection (see Note 8), pp. 51–52.

⁷⁵ See also The Constitution of the Republic of Estonia, Commented Edition (see Note 12), pp. 119, 121–122.

⁷⁶ Constitutional Review Chamber of the Supreme Court decision of 31.1.2007, 3-4-1-14-06, paragraph 23.

content, purpose, and scope.^{*77} The arguments of the Federal Constitutional Court of Germany are insufficient in the context of Estonia since the legal theory and practice related to averting of a danger are poorly formed and still very elementary and young. The Supreme Court found in a case to do with the constitutionality of post-sentence detention that with concept of sufficiently defined legal norms the hypothesis of the legal norm and the legal consequences must be clear especially in a situation wherein the legal norm allows intensive infringement of fundamental rights and freedoms.^{*78} Every general clause allows evaluative interpretation in a situation in which substantial fundamental rights are at stake—the right to free self-realisation^{*79}, private and family life^{*80}, etc. Also, judicial control over an officer's activity may be limited when the measure is only slightly based on the general clause.^{*81} On the other hand, the legislator cannot foresee everything and enact all of the specific regulations that are always needed, because actual situations of danger vary too greatly.^{*82} In a situation wherein no legal norm exists that allows action but there objectively exists a real probability of harm occurring in the near future, the state does not fulfil its duty of protecting a holder of fundamental rights.^{*83} It should be pointed out that the purpose here is not to punish but to prevent harm. In such a case, the officer implementing a measure has a right of discretion and it shall be exercised in accordance with the limits of authorisation, the purpose of discretion, and the general principles of justice, in account of the relevant facts and in view of legitimate interests.^{*84} Therefore, action under the general clause should be a last resort and applied only in emergency situations wherein very substantial good is at stake. Still, activity based on a general clause may not be clear, distinct, or definite, because too much room is allowed for evaluative interpretation in the field wherein fundamental rights are restricted. This raises the question of whether the general clause is accordant with the principle of legal certainty.

2.3. Judicial control of prognosis decisions

One feature of the principle of a state based on democracy and the rule of law is that the individual institutions (the legislature, executive bodies, and courts) perform their activities on the principle of separation and balance of powers.^{*85} The Supreme Court has noted that the administrative court system is tasked not only with resolving disputes between a person and the state but also with controlling the activities of both the Riigikogu and the executive power in order to implement the principle of separation and balance of powers.^{*86} The Riigikogu has decided to link police law and the state supervision procedure with defence against danger.^{*87} As defence against danger is a typical administrative system that restricts fundamental rights and freedoms, judicial review of executive-body activity is one of the main pillars for implementation of the principle of a state based on democracy and the rule of law. A system without judicial control is inherent to what is known as a police state. On the one hand, the court must be able to verify whether the relevant officer's conduct was consistent with the norms of competence and authority. At the same time, the court should be able to examine whether the legal norms in question are consistent with the basic law or Constitution.^{*88}

Preventive measures are based on the prognosis decision. The officer who implements a measure is not sure whether event X will occur or not. But the officer has established facts A, B, and C, which together

⁷⁷ BverfGE 54, 143/144 f. §29 of the Law on the Duties and Powers of Regulatory Agencies (OBG) of Nordrhein-Westfalen. See also Schenke (Note 33), p. 22.

⁷⁸ See the Supreme Court of Estonia *en banc* decision of 21.6.2011, 3-4-1-16-10, paragraph 66 (in Estonian).

⁷⁹ See §19 of the Constitution.

⁸⁰ *Ibid.*, §26.

⁸¹ For more in-depth discussion of judicial control, see Subsection 3.3.

⁸² M. Niemeier. Nõuded õigusriiklikule politseiõigusele – proportsionaalsuse põhimõte ja Euroopa õigus (Requirements for Police Law: The Principle of Proportionality and European Law). – *Juridica* 2004/7, p. 461 (in Estonian).

⁸³ For more on the duty of protection, see O. Lepsius. The problem of de-individualisation in the risk society. – G. R. Woodman, D. Klippel (eds). *Risk and the Law*. Routledge-Cavendish 2008, pp. 46–48.

⁸⁴ *Haldusmenetluse seadus* (Administrative Procedure Act), §4. – RT I 2001, 58, 354; 23.2.2011, 3 (in Estonian). English text available via <http://www.legaltext.ee/> (most recently accessed on 23.3.2012).

⁸⁵ The institutional principle of separation and balance of powers is enshrined in §4 of the Constitution and the functional in §14. See also Constitution of the Republic of Estonia, Commented Edition (see Note 12), p. 64.

⁸⁶ Supreme Court of Estonia *en banc* decision of 21.6.2011, 3-3-1-22-11, paragraph 29.2 (in Estonian).

⁸⁷ See Section 2 and the explanatory memorandum to the draft Act of Order Protection (see Note 8), pp. 7–9.

⁸⁸ Subsection 15 (2) of the Constitution: 'The courts shall observe the Constitution and shall declare unconstitutional any law, other legislation or procedure which violates the rights and freedoms provided by the Constitution or which is otherwise in conflict with the Constitution.' See also Constitution of the Republic of Estonia, Commented Edition (see Note 12), pp. 163–164.

indicate the probability of arrival at the event. The key question of the prognosis decision is how to come to an accurate prognosis of the future. Thus legal theory and practice utilise a concept of danger that generally consists of three dimensions: a time dimension (near or distant future, also *ex ante* and *ex post*), a spatial dimension (protected good and value), and probability (high, intermediate, or low).^{*89}

Whether the concept of danger is a question of legal consequences or of fact-finding is a matter of some debate. The answer to this question is important because the degree and extent of judicial review depend on it. For example, a judgement of the Supreme Court is based on the facts established by the judgement of a lower court and the Supreme Court does not establish the facts that constitute the cause of an appeal. Since in general the Supreme Court does not take up and evaluate the evidence, it cannot establish facts. The existence of danger shall be a question of legal consequences and conclusions, not one of facts.^{*90} The concrete circumstances (e.g., a person's behaviour) are a factual issue and can point to danger.

Judicial review of executive power cannot remain merely formal, controlling only formalities. Measures that are taken on the basis of a prognosis may also very intensively infringe fundamental rights and freedoms.^{*91} Purely formal judicial review remains illusory and would not guarantee real protection. Therefore, the scope of judicial review should cover the content and also material legality (whether, where a danger existed, also the measure was exercised in accordance with the limits of authority, the purpose of discretion, and the general principles of justice).^{*92} The judicial review consists of analysis and control over those three dimensions: the time dimension, the spatial dimension, and probability. At the same time, the court can consider only those facts that were known and present when the officer rendered the decision (*ex ante* perspective), not those facts and circumstances actualised after the officer activity (*ex post* perspective).^{*93}

One should take into account also a second level when judging the rightness of a prognosis decision—the view of a person who is not tied to or connected with the situation (a third party). In Estonian law, this is referred to as the perspective of an average objective law-enforcement officer. The evaluation of the facts should be objective and based on social experience. Evaluation is objective when all necessary facts indicating that harm is probable are established. Thus, occurrence of harm should be probable in the view of an average law-enforcement officer.^{*94} Social experience, therefore, refers to such a person's life experience, including knowledge of his or her specific area of expertise or activity.^{*95} In particular, the officer's everyday activities, previous training, and professional skills should be considered. It is disputable whether the later assessment should be based on the perspective of an average law-enforcement officer or an average person. Under German law, a situation of danger is assessed through the lens of a putative objective observer's knowledge.^{*96} The threshold in evaluation from an average person's perspective is lower than that for the average law-enforcement officer. An average person does not deal every day with the protection of public order, and his or her training and skills may be insufficient and inadequate in the field of averting of a danger. Assessment of danger situations through a 'professional-standard' criterion allows a more accurate prognosis, and the threshold for later analysis of the measure's legality is higher. Therefore, the professional-standard criterion will provide better protection of fundamental rights than will assessment from an average person's perspective.

When an officer performing administrative functions in defence against danger is authorised to act on the basis of discretion, the court shall only verify whether the officer's activity was in compliance with the limits and purpose of discretion, the principles of proportionality and equal treatment, and other generally recognised principles of law.^{*97} Judicial review does not include judgement of whether the measure applied was expedient or advisable.^{*98}

⁸⁹ There are also different concepts; see R. Poscher. *Gefahrenabwehr. Eine dogmatische Rekonstruktion*. Berlin: Duncker & Humblot 1999, pp. 114–125.

⁹⁰ H. Maurer. *Allgemeines Verwaltungsrecht*. Munich: C.H. Beck 2002, p. 109.

⁹¹ See also Sections 3.1.1, 3.1.2, and 3.2.

⁹² Supreme Court Constitutional Review Chamber decision of 13.10.2010, 3-3-1-44-10, paragraph 15 (in Estonian).

⁹³ Supreme Court Constitutional Review Chamber decision of 2.6.2010, 3-3-1-33-10, paragraph 12; 13.11.2009, 3-3-1-63-09, paragraph 16 (in Estonian). See also Schoch (see Note 63), p. 667.

⁹⁴ Explanatory memorandum to the draft Act of Order Protection (see Note 8), p. 22.

⁹⁵ *Ibid.*

⁹⁶ Poscher (see Note 89), p. 123.

⁹⁷ On discretion, see Maurer (Note 90), §7. K. Pikamäe. *Kaalutusvigadest (Abuses of Discretion)*. – *Juridica* 2006/2, p. 77 (in Estonian).

⁹⁸ Schoch (see Note 14), p. 164.

Finally, if judicial review encompasses all of the above-mentioned criteria, it will be not only formal but also material. Such an approach will guarantee a person whose rights and freedoms may be violated a real and an effective right of recourse to the courts. It also allows fulfilment of the principle of separation and balance of powers.

3. Conclusions

Internal security is one of the Constitutional values. Internal security and the duty of protection mean that the state is also obliged to act not only reactively but also proactively. One way to act proactively is to prevent harm to the protected good. Averting of a danger is one of the preventive legal models. It should be noted that the activities of administrative authorities cannot be solely based on prevention, because it is not practically possible to prevent all harm that may occur in the future. This would also require measures that very intensively restrict fundamental rights and freedoms. Therefore, it should be deemed reasonable to find a balance between reactive and proactive activity. Finding that balance depends merely on concrete time and space.

Reservation of statutory powers is one expression of democracy—one that demands that the legal norms enacted be detailed and precise and that the legal consequences be foreseeable. If the concept of danger is limited in three dimensions (time, space, and probability) and also delimited in terms of real, apparent, and suspected danger and by levels of danger, the behaviour of the authorities will not be restricted unduly. Also, the behaviour of authorities is more predictable in these terms, presenting a situation that allows better protection of fundamental rights, because the legal norm is more precise and detailed and thereby in accordance with reservation of statutory powers.

Indisputably, the terrorist attacks on the US World Trade Center and organised crime in the Schengen area have led the legislator more and more to consider internal security and, through this, expansion of the measures that allow acting in a situation wherein there is only suspicion of the existence of danger (i.e., suspected danger). The Riigikogu has enacted authorisation norms that cover a broad scale and thus allow acting when suspected danger exists. It is disputable whether such expanding authorisation is in accordance with the Constitution (e.g., examining a person's clothing and body cavities etc.). When it is not precisely clear whether the danger is present, a situation can arise in consequence wherein such a measure and restriction is not necessary in a democratic society and may distort the nature of the rights and freedoms restricted. At the core of averting of a danger is not the prevention of dangers, only protection. Restriction of fundamental rights shall not lead the democratic state to become a state what recognises no limits to its authority. Application of various degrees for danger will provide more detail-level regulation and help to guarantee that interference with fundamental rights is moderated.

The general clause is one of the main problems with averting of a danger. The main question is whether it can be precise and definite enough to be considered constitutionally valid. The scope of adjustment may be too broad and extensive, which may not be in accordance with the principle of legal certainty, because people are not able to foresee adequately the legal consequences that their acts may have. That is why it is disputable whether such a clause is in keeping with the rule of law.

The judicial review of averting of a danger is very important, because this defence is a material basis for restriction of fundamental rights and freedoms. Therefore, legislative and executive actions should be formally and materially subject to review by the judiciary. Estonia has implemented a system of administrative courts that are charged with resolving disputes between persons and the state (administration). The judiciary must be able to review whether the activity of the administration was formally and materially legitimate. The courts must be able to take a position on the existence of a danger as well as to assess the rightness and accuracy in the prognosis decision.

In conclusion, all of the above-mentioned elements set minimal standards for averting of a danger. That is why also the OPA and PBGA should take those minimum standards into consideration, if it wants to be in accordance with the principle of a state based on democracy and the rule of law.



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Prospectus Liability v. Criminal Punishment:

The Case of Public v. Private (But without Enforcement)

1. Introduction

In an analysis conducted by the Estonian Ministry of Justice, a clear conclusion was drawn that both the sanctions laid down by the Securities Market Act^{*1} (SMA) for misdemeanours in the financial sector and also the case law on sanctioning left Estonia in the bottom tier amongst EU member states with respect to the punishments prescribed and also to actual case law on punishment. Fines imposed by Estonian courts on juridical persons are rather small; one can fine a company for a misdemeanour in the financial sector to a maximum of only 32,000 EUR.^{*2} Although this is not stated by the author of the analysis, Estonia—at least where punishments are concerned—could be regarded as a safe harbour for financial crime if compared to other Member States. Such a tendency puts much pressure on the shoulders of the regulator—introduction of larger punishments and/or broader wording of offences in the law may follow as political pressure outstrips dogmatic considerations.

The stipulations regarding investment fraud in §211 of the Penal Code^{*3} (PC) are aimed at giving incentive to issuers not to proffer false information during offer of securities—i.e., addressing the ‘promoter’s problem’ (the risk that corporate issuers sell bad securities to the public).^{*4} Prospectus liability (in its widest sense, including also grey capital markets^{*5}) and disclosure requirements (either during initial offering or in post-listing) are aimed at solving the same problem.

The broad, whether either intentionally or unintentionally, wording of §211 compels one to ask whether the legislator has gone too far in nourishing public enforcement through the means of criminal liability instead of letting market participants resolve possible issues through private litigation (i.e., via private enforcement). The present article concentrates on answering this question by first giving an overview of the theoretical discussion in the literature regarding the use of public enforcement instead of market participants’ regulation of the market through private litigation, then comparing prerequisites for liability

¹ Väärtpaberituruseadus. – RT I 2001, 89, 532; RT I, 28.6.2012, 5 (in Estonian). English text available via <http://www.legaltext.ee/>.

² A. Ahven. Finantsalaste rikkumiste eest kohaldatavad sanktsioonid Euroopa Liidu riikides (Sanctions Imposed for Financial Misdemeanours in EU Member States). Tallinn 2011 (in Estonian, not publicly distributed).

³ Karistuseseadustik. – RT I 2001, 61, 364; RT I, 4.4.2012, 3 (in Estonian). English text available via <http://www.legaltext.ee/>.

⁴ R. La Porta, F. López de Silanes, A. Schleifer. What works in securities laws? – *Journal of Finance* 2006 (61), p. 2. Available at <http://www.afajof.org/afa/forthcoming/laporta.pdf>; D. Schiele. Über den Haftungsfreiraum bei prognostischer Publizität am Kapitalmarkt. Baden-Baden 2011, pp. 28–34.

⁵ See Subsection 3.2 for definition of the concept.

under civil law for giving of false information during offer of securities with the liability framework established by §211 of the PC.

2. The race between public and private enforcement

The promoter's problem at the time of either making a public offering or then disclosing information after an offering could, in principle, be regulated in three ways:

- 1) Provision of grounds for civil-law claims for the investors harmed (as §25 of the SMA does) against issuers.
- 2) Disclosure obligations imposed by public law: both disclosure requirements regarding prospectuses established under Directive 2003/71/EC⁶ ('the Prospectus Directive') and Commission Regulation 809/2004⁷ and then disclosure requirements for securities admitted to trading on regulated markets within the framework imposed by Directive 2004/109/EC⁸ ('the Transparency Directive').
- 3) Specification of provision of false information in either prospectuses or other information given to investors as a criminal offence.⁹

If one is to follow the principle of *ultima ratio*, the last listed should be the final means and hence applied only if express need can be justified.¹⁰ Disclosure requirements (backed by administrative means) and/or private litigation should provide enough incentive for the issuers to act honestly when facing the promoter's problem.

The discussion of whether one should emphasise the role of public or private enforcement in capital markets law was stimulated greatly in pre-crisis academic literature.¹¹ Discussion cooled down after the turmoil on stock exchanges throughout the world in 2009–2010. In the aftermath, many regulators opted for an *ex post* approach and rediscovered the criminal sanctions long in force from their law books.¹² This draws attention to the fact that one has to draw a clear line between enforcement and rules in a law book—the existence of detailed mechanisms of disclosure, rights of a financial supervision authority (FSA) (such as that of conducting search), or any specific sanctions does not mean that they are actively used.

The discussion comes down to the question of whether any one case demands public interference from the market supervisor and, if so, to what extent. The answer to the first part of this question is quite obvious—securities markets (and probably the financial sector as a whole) would be untenable without some rules enabling the regulator to interfere.¹³ The answer to the second half of the question is more complicated. According to R. La Porta *et al.*, strong public enforcement is needed only in emerging markets but no significant link seems to be evident between overall market growth and strong public enforcement: 'Public enforcement plays, at best, a modest role in the development of stock markets. In contrast, the development of stock markets is strongly associated with extensive disclosure requirements and a relatively low burden of proof on investors seeking to recover damages resulting from omissions of material information from the prospectus. Risk of private investor claims, reputation risk and so on provide sufficient pressure to act honestly.'¹⁴ It is questionable whether criminal rules provide sufficient means at all: 'Criminal deterrence

⁶ OJ L 345, 31.12.2003, p. 64.

⁷ OJ L 149, 30.4.2004, p. 1.

⁸ OJ L 390, 31.12.2004, p. 38.

⁹ H. Aschenbach. Zur Aktuelle Lage des Wirtschaftsstrafrechts in Deutschland. Goldtdammer's Archiv für Strafrecht 2004, p. 562.

¹⁰ *Ibid.*

¹¹ For an overview, see H.E. Jackson, M.J. Roe. Public and private enforcement of securities laws: Resource-based evidence. – *Journal of Financial Economics* 2009 (93). Also published in H.E Jackson, M.J. Roe. Public and private enforcement of securities laws: Resource-based evidence. – Harvard Public Law Working Paper No. 0-28; Harvard Law and Economics Discussion Paper No. 638, pp. 5–8. Available at <http://ssrn.com/abstract=1000086>.

¹² Pre-crisis literature emphasised that strong public enforcement was more intrinsic of the US SEC. See J.C. Coffee. Law and the market: The impact of enforcement. – Columbia Law and Economics Working Paper No. 304, pp. 16 *ff.*

¹³ Jackson, Roe (see Note 11), pp. 23 *ff.*

¹⁴ La Porta, López de Silanes, Schleifer (see Note 4), pp. 16–19.

may be ineffective because proving criminal intent of directors, distributors, or accountants in omitting information from the prospectus is difficult.^{*15}

Such an approach has been attacked with claims that private litigation is too expensive; outcomes are not predictable. M.J. Roe and H.E. Jackson are the frontrunners in the academic literature^{*16}:

- ‘There’s no significant evidence here that liability standards play a role in developing financial markets.’^{*17}
- *Ex post* private litigation is unpredictable, ineffective, and dependent on whether mass lawsuits are endorsed by civil procedure, and they may in many cases mean, at base, damage payments between the major and minor shareholders as issuers and investors.

If one is to take the viewpoint of La Porta *et al.*, the issue between the need of an active public enforcement would be evident only in the case of disclosure during public offerings (or then post-listing reporting). Promoting less public enforcement is needed only in the cases where the promoter’s problem arises most evidently—public offerings or during post-listing reporting. At the same time no one could imagine acts such as market manipulation or insider trading to be left without a strong public enforcement mechanism.^{*18} Hence the question whether nourishing criminal liability to solve the promoter’s problem must be analysed.

3. Private litigation: Regulated markets v. grey capital markets

3.1. Prospectus liability under §25 (1) of the SMA

As already indicated, the promoter’s problem is intrinsic to initial offering of securities but also to periodic or *ad hoc* disclosure arising from the Transparency Directive (see also §§ 184¹⁰–184¹³ of the SMA). This article does not concentrate on liability for false post-listing disclosure. The question of what the grounds for civil liability are would be subject to a separate analysis, as it is somewhat unclear whether liability would have a contractual basis (issuer disclosing false information to the owner of a bond as creditor or a shareholder) or whether it is liability based on delict^{*19}, and to what extent damage should be remedied (it is questionable whether the ‘fraud on the market theory’, originating from the US, also now clearly recognised by Section 90A of the UK Financial Services and Markets Act 2000^{*20}, should be endorsed).^{*21}

According to §25 (1) of the SMA, if the prospectus (or the summary of the prospectus if the summary is misleading, inaccurate, or inconsistent when read in connection with the other parts of the prospectus) contains information that is significant for the purpose of assessment of the value of the securities and said information proves to deviate from the actual circumstances, the issuer shall compensate the owner of the security for damage sustained thereby due to the difference between the actual circumstances and the information presented in the prospectus, provided that the issuer was or should have been aware of said difference. The provision applies also if the prospectus is incomplete on account of omission of relevant facts, provided that the incompleteness of the prospectus results from the issuer or the offeror hiding the facts.

Subsection 25 (1) of the SMA provides a separate basis for a claim for damage under §3 of the Law of Obligations Act^{*22} (LOA). As there is close to no publicly available case law—a mere 26 prospectuses have

¹⁵ *Ibid.*, pp. 16–19.

¹⁶ This approach seems to be preferred by the UK government as well, as the 2007 analysis by P. Davies, emphasising public enforcement, was accepted by that government. See P. Davies. *Davies Review of Issuer Liability: Final Report* (June 2007) (especially paragraph 18). Available at http://www.hm-treasury.gov.uk/d/issuerliability_170708.pdf.

¹⁷ Jackson, Roe (see Note 11), p. 28.

¹⁸ *Ibid.*, pp. 27–34.

¹⁹ See this overview of the issues that have arisen in German law: A. Hellgardt. *Kapitalmarktdeliktsrecht*. Tübingen 2008, pp. 28–32.

²⁰ Available at <http://www.legislation.gov.uk/ukpga/2000/8/contents>.

²¹ H. Tijo. *Enforcing corporate disclosure*. – *Singapore Journal of Legal Studies* 2009, p. 335. On the problems in the area between liability for disclosure and enforcement matters, consult M. Fox. *Why civil liability for disclosure violations when issuers do not trade*. – *Wisconsin Law Review* 2009, pp. 297–319.

²² Võlaõigusseadus. – RT I 2001, 81, 487; RT I, 8.7.2011, 6 (in Estonian). English text available via <http://www.legaltext.ee/>.

been approved by the Estonian Financial Supervision Authority (EFSA) under the prospectus directive^{*23}—one can only give theoretical guidelines as to how the elements laid down in §25 (1) should be interpreted. The objective elements of the claim should be as follows^{*24}:

- **False information or omission of facts:** Both clear-cut facts ought to be covered. False information regarding accounting information is a clear matter. Case law has to establish a clear-cut rule as to whether any prognosis shall be handled as false and, if so, which prognosis and in which cases.^{*25} In sum, German literature has concluded that false disclosure can reveal itself in the following fundamental distinct forms: incorrect fact, incorrect general impression, and provision of incomplete data.^{*26}
- **Significance requirement (with the wording ‘significant meaning’):** The notion seems to exclude obvious mistakes in balance sheets that have no significance to the overall outcome or mistakes that are clearly understandable.^{*27} It is unclear whether data prescribed by the Prospectus Directive are *ipso jure* significant.^{*28}
- **Unawareness on the part of the person claiming damage as to the false information or omission:** According to §26 (2) of the SMA, an issuer or offeror shall not have the obligation to compensate for damage if the person who sustained the damage was aware (or, in the case of a qualified investor, should have realised at the moment of acquiring the security and by exercising due care in its activities, except when the issuer’s intent can be established), at the moment of acquiring the security, that the prospectus serving as the basis for the offer was incomplete or contained inaccurate information.

The issuer shall be liable if negligence can be proved (see §25 (1) of the SMA). One must take into account that §25 (1) specifically allows claims only by the owner of the security; hence, investors suffering damages from having to sell the security at a lower price because of the defects in the prospectus cannot claim damages on the basis of §25 (1) of the SMA.^{*29}

3.2. ‘Prospectus liability’ in cases where there is no prospectus within the meaning of the Prospectus Directive

With the introduction of Alternative Investment Markets (AIMs) and Multi Trading Facilities (MTFs), the classical notion of the grey capital market as a blanket market offer of securities not handled as securities under the Prospectus Directive (and subsequently §2 of the SMA) or then not listed on regulated markets cannot be applied.^{*30} The notion of grey capital markets (in German, *Grauer Kapitalmarkt*^{*31}; in Estonian, *hall kapitaliturg*) or unregulated markets has been used to describe this. Hence, a grey capital market is a

²³ Application of §25 (1) of the SMA is hindered by the low volume of prospectuses being filed for submission before the EFSA. In all, 26 prospectuses have been approved by the EFSA since 20 November 2005, according to the FSA Web site (see <http://www.fi.ee/index.php?id=14925>). Still more importantly, as recent tendencies show, issuers are more eager to list their prospectuses in nearby regulated markets such as Warsaw or Helsinki. The main issue here seems to be which law one should apply if false information has been given in a prospectus submitted before the Estonian FSA but presented for listing before OMX Warsaw. See S. Jäger. *Das Prospekthaftungsstatut*. Baden-Baden 2007, pp. 99 ff for insight into the issues of cross-border claims under the German law of conflicts.

²⁴ Because of lack of case law, no attempt is made in this article to give a comprehensive overview of the prerequisites for the claim and is aimed only at addressing basic elements to be dealt with in future case law. See the list, based on the example of German law, of typical cases of false/misleading information in prospectuses, from H. Keunecke. *Prospekte im Kapitalmarkt. Anforderungen, Prospekthaftung bei geschlossenen Fonds, Investmentfonds, Wertpapieren und Übernahmangeboten*, 2nd edition. Berlin 2009, pp. 448–453.

²⁵ German case law on §44 of the Börsengesetz seems to take into account the notion of the average investor. For an overview of the discussion, consult Jäger (see Note 23), pp. 56–57.

²⁶ Case law has to establish whether failures with respect to errors in formal or substantive matters shall be considered misleading as well, as has been mentioned in the German literature. See C. Brandt. *Prospekthaftung. Anlegerschutz durch Prospektpublizität*. Taunusstein 2005, pp. 105–110.

²⁷ Jäger (see Note 23), pp. 54–56.

²⁸ S. Kümpel, A. Wittig. *Bank- und Kapitalmarktrecht*, 4th edition. Cologne 2011, pp. 1804–1805; Brandt (see Note 26), p. 1975.

²⁹ In contrast, the interpretation of §44 of the Börsengesetz affirms such claims of persons not holding the security. Jäger (see Note 23), pp. 63–64.

³⁰ Kümpel, Wittig (see Note 28), pp. 1804–1805; Brandt (see Note 26), pp. 167–170.

³¹ M.H. Hagemann. ‘Grauer Kapitalmarkt’ und Strafrecht. Göttingen 2005, pp. 63–147.

market wherein no significant obligations apply as to disclosure obligations and no strong supervision by an FSA exists.^{*32}

Section 12 of the SMA nationally enacts the exemptions of Article 3 (2) of the Prospectus Directive. A prospectus is not demanded if the security offered is not a security in the meaning of §2 of the SMA or if an offer of securities is addressed solely to qualified investors, or fewer than 99 persons per contracting state who are other than qualified investors, or is addressed to investors who acquire securities for total consideration of at least 50,000 euros per investor, for each separate offer, or either an offer of securities with a nominal value or book value of at least 50,000 euros or an issue or offer of securities with a total consideration of less than 100,000 euros over a period of 12 months. Usually shorter placement documents are used instead of the prospectus in the case of the aforementioned securities (or securities not listed in §2 of SMA).

The notion of prospectus liability itself should also encompass liability for data disclosed in the offering of securities that fall outside the scope of §2 of the SMA. The theory of prospectus liability involving prospectus liability in a strict sense (§25 of SMA) and in a larger sense (all civil-law claims for disclosure of false information by the issuer, except under §25 of SMA) seems to be acknowledged in Estonian academic writing since 2011.^{*33}

If false information is given or information is omitted, provisions of contract law apply, with *culpa in contrahendo* being the main basis for claims.^{*34} Subsections 14 (1–2) of the LOA establishes the grounds for such a claim by obliging the parties engaging in pre-contractual negotiations or other preparations for entry into a contract to take reasonable account of one another's interests and rights. Information exchanged by the persons in the course of preparation for entering into the contract shall be accurate; each party is obliged to disclose information to the other party of all circumstances with regard to which that other party has, given the purpose of the contract, an identifiable essential interest. There is no obligation to inform the other party of circumstances of which the other party could not reasonably expect to be informed. The provision extends to offering of securities and written documents (and probably also correspondence) between the parties prior to subscription (although no actual negotiations regarding the terms of the securities take place).

Disclosure of false information by a party to the contract during the pre-contractual phase will become party warranties regarded as part of the contract.^{*35} Hence, a breach of such warranties provides grounds for claims for breach of obligations between the issuer and the acquirer of the security. One may, however, question the extent to which the principle developed in German case law enabling claims against not only the issuer but persons linked with the provision of false information would be recognised by the SMA.^{*36} As the claim is based on a sales agreement (offer of securities), the claim of a shareholder against the company as issuer ought to be affirmed.^{*37}

According to general case law, the purpose of the obligation or provision due to the non-performance of which the compensation obligation arose (§127 (2) of LOA), the causal link between the false information or omission of facts (§127 (4) of LOA), and the part of the aggrieved party in the damage (§139 of LOA) has to be considered in assessment of the damage claim.^{*38}

³² *Ibid.*

³³ U. Volens. Usaldusvastutus kui iseseisev vastutussüsteem ja selle avaldumisvormid (Liability for Trust As an Independent System of Liability and Its Manifestations). Doctoral thesis. Tartu 2011, pp. 355–360 (in Estonian).

³⁴ Brandt (see Note 26), pp. 49–71; Jäger (see Note 23), pp. 30–49, 81–91 (for a historical overview).

³⁵ Supreme Court Civil Chamber decision of 19.11.2007, 3-2-1-111-07, paragraph 14 (in Estonian).

³⁶ The theory was elaborated upon through some investment schemes used in Germany wherein the issuer itself was not a legal person and had no assets. Volens (see Note 33), pp. 356–358. It has been clearly called into question whether any claims can arise between the majority shareholder behind the issue of new shares and the acquirers of the shares. See M. Vutt. Aktsionäri derivatiivnõue kui õiguskaitsevahend ja ühingujuhtimise abinõu (The Derivative Claim of the Shareholder As a Legal Remedy and Measure of Company Direction). Doctoral thesis. Tartu 2011, pp. 29–39 (in Estonian).

³⁷ Vutt (see Note 36), p. 29.

³⁸ Supreme Court Civil Chamber decision of 12.12.2007, 3-2-1-113-07 (in Estonian).

4. Section 211 of the Penal Code—investment fraud

4.1. Grounding values behind the existence of the offence

Article 25 (1) of the Prospectus Directive respects Member States' discretion for criminalising breaches of obligations arising from rules based on said directive. It only states that 'Member States shall ensure, in conformity with their national law, that the appropriate administrative measures can be taken or administrative sanctions be imposed against the persons responsible, where the provisions adopted in the implementation of this Directive have not been complied with. Member States shall ensure that these measures are effective, proportionate and dissuasive'.

Section 211 of the PC is worded as follows:

§211. Investment fraud

(1) A person engaging in economic activities who receives an investment through presentation of false information in a prospectus or among other information addressed to the public shall be punished by a pecuniary punishment or up to 5 years' imprisonment.

(2) The same act, if committed by a legal person, is punishable by a pecuniary punishment.

Since 1 September 2002, Estonia has opted for criminalising misrepresentation given in documents aimed at gathering investments from either regulated (worded 'in a prospectus') or grey capital markets (with the language 'or among other information addressed to the public'). Section 211 was introduced together with the entry into force of the PC. Academic literature foresaw the protection of the ownership of investors^{*39} and also the general functioning of the financial markets as the two grounding values behind the section.^{*40} Such an approach is similar to the reasoning given for securities markets law: protection of functioning of the securities markets (or financial markets as a whole)—i.e., the public interest in well-functioning and effective markets—and protection of investors (provision of individual protection)^{*41}, concretised in rather poetic wording in §3 of the Financial Supervision Authority Act^{*42}, according to which financial supervision under the act is conducted in order to enhance the stability, reliability, transparency, and efficiency of the financial sector; to reduce systemic risks; and to promote prevention of the abuse of the financial sector for criminal purposes, with a view to protecting the interests of clients and investors by safeguarding their financial resources, and thereby supporting the stability of the Estonian monetary system.

This approach has been transposed to and applied for reasoning related to criminal offence in §211, largely on account of the word 'public' being used in the wording of §211 of the PC (and subsequently also §264a of the German *Strafgesetzbuch*^{*43} (StGB), with the latter being a role model, if not the only role model, for §211 of the PC. Such an approach is problematic for the following reasons:

- **The aim of the offence's definition:** Endorsement of functionality of the financial system is rather more a consequence of providing protection to the proprietary interests of the investor—the goal of establishment of the offence is the protection of property; mistrust will be established after loss of property, not vice versa or concurrently.^{*44}
- **The systematic argument:** Criminal law cannot be equated with securities market law. Hence, such transformation of values cannot be admitted.^{*45} It is questionable whether such a notion of functioning of a branch of the economy is compatible with the theory of individual and collective values (the Estonian *õigushüve* or German *Rechtsgut*) recognised by Estonian criminal-law theory.^{*46} Functionality as a value is highly debatable and hints at populist lawmaking rather than

³⁹ To be fully exact, the value is freedom to dispose of assets. See T.H. Hild. Grenzen einer strafrechtlichen Regulierung des Kapitalmarktes. Frankfurt 2004, p. 93.

⁴⁰ J. Sootak, P. Pikamäe. Karistusseadustik. Kommenteeritud väljaanne (Criminal Code. Commented Edition). Tallinn 2009, §211 (comment 1.1); Aschenbach (see Note 9), pp. 562–565.

⁴¹ Kümpel, Wittig (see Note 28), pp. 1826–1836.

⁴² Finantsinspektsiooni seadus. – RT 2001, 48, 267; RT I, 29.3.2012, 4 (in Estonian). English text available via <http://www.legaltext.ee/>.

⁴³ Strafgesetzbuch, 1.1.1871. BGBl. I S. 3322; B. Jähnke, H.-H. Laufhütte, W. Odersky (eds). Stragesetzbuch. Leipziger Kommentar. Grosskommentar, Band 7. Berlin 2005, §§ 264 bis 302., §264a, paragraph 13.

⁴⁴ W. Graf von Schönborn. Kapitalanlagebetrug. – Eine analyse unter besonderer Berücksichtigung von 264a StGB. Cologne 2003, pp. 18–19.

⁴⁵ On the problem of 'regulating securities markets through criminal law', see paragraph 5. See also Jähnke, Laufhütte, Odersky (Note 43), §264a, paragraph 13.

⁴⁶ J. Sootak. Karistusõiguse alused (The Grounds of Criminal Law). Tallinn 2003, pp. 69–74 (in Estonian).

clear-cut values.^{*47} Had the legislator wanted to broaden the offence to the overall protection of such broad values, the wording would have consisted only of a description such as ‘for deceiving investors’. This is not the case here.^{*48}

- Such broadening of values would mean that any restrictive interpretation of the offence would be unthinkable (§211 of the PC in any case criminalises roughly every misstatement, no matter if significant or not).^{*49}

Hence, the position expressed in the academic literature should be reconsidered thoroughly in order to avoid §211 becoming a catch-all provision (if it has not already become one).

4.2. Objective prerequisites

4.2.1. Misleading disclosure in a prospectus or other document

Information is false if it is untrue. Whether the criterion for information being revealed to be false is identical to that in §25 of the SMA or is different has not yet been established well enough in the literature and case law; therefore, no conclusions regarding the accessoriness of the offence can be drawn. As indicated above, if one is to consider the definition of the offence as having a broader aim than only the protection of proprietary interests of the investor (as is the aim of damage claims described in paragraph 3), any restrictive interpretation is problematic. The definition of the offence should also encompass prognosis and liquidity calculations if clearly unrealistic.^{*50}

The Estonian wording for the offence uses the word ‘emissiooniprosppekt’ for ‘prospectus’. Sadly, this word is not used in any other act—§14¹ (1) of the SMA and the translation of the Prospectus Directive uses the word ‘prospekt’. This leaves rather unclear what documents are actually covered by the notion, and, hence, the compatibility of such use of unclear terms with the principle of legal certainty^{*51} is somewhat unclear.^{*52} In the end, such analysis is rather pointless, as the second part of §211 encompasses any other information aimed at the public (incl. annual reports, *ad hoc* reports as long as they have been presented for purposes of gaining certain investments, etc.).^{*53}

4.2.2. Lack of a significance requirement and the requirement to be engaged in economic activities

Obviously, the main contrast between §211 PC and the liability standards described in paragraph 3 lies in the lack of a requirement of significance of the false information. The reasoning behind this omission is at first glance rather hard to explain and was already clearly pointed out in early expert opinion on the draft of the PC.^{*54} The requirement of significance is provided in §264a of the StGB, the alleged role model for §211. Lack of such a requirement would theoretically make possible rather strange situations wherein even fairly unimportant errors in prospectuses create grounds for criminal proceedings.

One may only claim that the significance requirement is enacted in §211 of the PC to some extent, even though it is not mentioned in the wording:

- Errors in unimportant data may not be intentional.^{*55} According to §15 (1) of the PC, only intentional acts are punishable as criminal offences under the PC if no criminalisation of recklessness is foreseen. Section 211 criminalises only intentional acts.

⁴⁷ Hild (see Note 39), pp. 94–95.

⁴⁸ Graf von Schönborn (see Note 44), pp. 18–19.

⁴⁹ *Ibid.*

⁵⁰ Sootak, Pikamäe (see Note 40), §211 (comment 2.3.1).

⁵¹ The principle is derived from §10 of the Estonian Constitution. See Eesti Vabariigi Põhiseadus (The Constitution of the Republic of Estonia). – RT 1992, 26, 349; RT I, 27.4.2011, 1 (in Estonian). English text available via <http://www.legaltext.ee/>.

⁵² See also *Sunday Times v. UK*. Decision of 26.4.1979 – 2 EHRR 245.

⁵³ Sootak, Pikamäe (see Note 40), §211 (comment 2.3.3).

⁵⁴ W. Joecks. *Majanduskriminaalõigus Saksamaal. Struktuurid ja probleemid (Economic Crime in Germany: Structures and Problems)*. – Öppematerjal kohtunike ja prokuröride järelkoolituse jaoks (Study Material for Follow-up Training of Judges and Prosecutors). Translated by O. Jaggo. Tallinn 2001 (dissemination material in manuscript form) (in Estonian).

⁵⁵ C. Schröder. *Handbuch Kapitalmarktsrafrecht*, 2nd edition. Cologne 2010, p. 23.

- The misleading statement has to be causal to receipt of the investment. The prevailing position in the legal literature treats §211 not as a formal action offence criminalising disclosure of wrong information but as an offence that requires materialisation of a certain consequence—receiving of an investment (see the next section of the paper).^{*56}

The broadness of the offence seems to have been limited somewhat by the requirement of the wrongdoer being involved in economic activities. The notion of economic activities has not been clarified in any legal act in Estonia. Hence, it is unclear whether the misrepresentation has to be somehow linked with the economic activities of the offender or the offender has to be engaged in some overall sphere of economic activity (i.e., exclusion of only some natural persons).

4.2.3. Receipt of an investment

The wording of §211 of the PC is constructed in such a way that the actual infringement seems not to be the disclosure itself but the receipt of the investment as a result of the disclosure. Section 211 is considered to involve two prerequisites: a) false disclosure and b) receipt of the investment. The offender is liable only for attempt until the investment is received.^{*57} No relevant case law related to this matter can be discerned. This causes two problems even on a theoretical level:

- It is hard to imagine in what situation no investment would follow. Any absurd statements obviously not leading to an investment (as in most ‘Nigerian scam’ letters) may already make the issuers not liable for obviously being disclosed without serious intent (the issuer may claim that it knew such claims were so unrealistic that it never expected someone to believe them).
- According to §237⁴, the SMA handles the following action as a misdemeanour: provision of incorrect or inaccurate information to possible investors in a prospectus or in any other manner by an offeror and violation of the requirement to inform all potential investors on equal terms during an offer of securities. As a prerequisite §3 (5) of the PC declared that any conduct punishable as a criminal act and a misdemeanour had to be considered to be a criminal act. The Estonian Supreme Court ruled in a quite recent judgement in the case 3-1-1-28-11 that in cases where it is clear that the language defining a misdemeanour is narrower, one must consider the act an intentional one by the regulator to treat such breaches as misdemeanours.^{*58} Such a solution is still unclear, as one could claim that §237⁴ of the SMA does not include receipt of investment. Hence, if one discloses false information in the prospectus and then receives an investment, one may still be liable under §211.

5. The post-crisis situation—pushing criminal interference?

The field of discussion has, as pointed out in Section 2, cooled down since the financial crisis—the importance of criminal-law sanctions seems to be growing in general. There has been a strong influence from the European Commission, pushing toward criminalising acts in securities markets related to market manipulation and insider trading^{*59}, as the Market Abuse Directive previously did not foresee any direct obligation to criminalise such deeds.^{*60} A strong incentive to criminalise as much as possible is evident at EU level. In addition, in a judgement in late 2011, in *Soros v. France*, the ECHR did not regard the notion of insider dealing in the French Penal Code as a criminal offence in conflict with Article 6 of the Convention on Human Rights. By doing so, it pushed away all obstructions whereby highly abstract offences could undercut legal certainty as a sub-principle of rule of law.^{*61}

⁵⁶ Sootak, Pikamäe (see Note 40), §211 (comment 2.4.3).

⁵⁷ *Ibid.*

⁵⁸ Supreme Court Criminal Law Chamber decision of 2.6.2011, 3-1-1-28-11 (in Estonian).

⁵⁹ The European Commission is proposing a market-abuse regulation foreseeing an obligation to criminalise market abuse. See the further list of recent developments from the EC as to market abuse, available at http://ec.europa.eu/internal_market/securities/abuse/index_en.htm.

⁶⁰ See paragraph 34 of the preamble to 2003/61/EC.

⁶¹ See *Soros v. France*, 6.10.2011 (application no. 50425/06). As this judgment has not been translated from the French, the author has referred to the public announcements from the ECHR at <http://www.echr.coe.int/echr/en/header/press/links/>

The incentive to regulate the abuse of the situation in the promoter's problem through criminal law is tempting, as it is clearly the least expensive way to regulate certain problems.^{*62} Regulation of capital markets through criminal law has been widely criticised for blurring the line between conduct needing to be criminally regulated and conduct subject to civil litigation.^{*63} In addition, the rather broad wording of §211 (an issue seen also in §264a of the StGB) has brought special attention to whether giving incentive by providing some lack of clarity (problems with 'prospectus' and lack of a significance requirement) is justifiable^{*64}, and hence a clear contradiction with the principle of legal certainty encompassed in §10 of the Constitution can be shown. One can even go further and claim that the use of such broad meanings brings about the regulation of capital markets not through the PC but via the discretion of the ones applying the PC.^{*65}

One should, nevertheless, refrain from grounding application of any definitions of criminal offences in considerations such as the overall need for protection of provision of sufficient general warning to persons disclosing false information during initial offering. The discussion of possible infringement of §10 of the Constitution comes down to the issue of the extent to which the investor acting outside regulated markets needs protection—instead of basing this on general values, one must assess the level of protection of each individual investor^{*66}:

- The existence of §25 (1) of the SMA (together with overall requirements for a prospectus), alongside the existence of post-listing rules, should provide enough protection to an investor in regulated markets. The need for an additional broadly worded criminal sanction, as in §211 of the PC (especially the lack of significance requirement), is somewhat questionable. Although still unclear, recent case law^{*67} may lead to a situation wherein §237⁴ of the SMA prevails over §211 of the PC in any event and hence any criminal liability is precluded. Such an approach is dependent on whether one handles §211 of the PC as a formal delict or one requiring occurrence of a consequence—receipt of an investment. No clear grounds may be established, and the risk of criminal liability is evident. Therefore, case law may have resolved the issue, rather surprisingly, itself.
- In grey capital markets, damage claims may prove insufficient, as there is no control over the investor, misleading disclosure is usually already made in conjunction with a clear plan to escape damage claims, and usually the mechanisms used are so complicated and cross-border that it is impossible to collect evidence without a criminal-law procedure.^{*68} Investors may be in a weaker position, so some level of measures akin to consumer protection has to be considered.^{*69} As indicated above, the grounds for any claims are somewhat unclear and, therefore, civil claims as means for investor protection may prove to be somewhat impotent.

The offence is still justified when one considers the lack of any public-law disclosure requirements and also the conceptual lack of clarity in the claims for damages, as described in Subsection 3.2 with respect to grey capital markets. Investors need the protection provided by §211 of the PC. The question of whether any incentive is provided is linked with the issue of enforcement—quite clearly, that of case law addressing, firstly, criminal proceedings actually initiated and punishments imposed. As the statistics indicate beyond doubt, the punishments imposed (at least in relation to misdemeanours) may be so lenient that the incentive to refrain from false disclosure may prove insufficient. The existence of a §211 of the PC that provides for protection of investors in grey capital markets may be irrelevant, while the actual way in which the offence will be dealt with at the enforcement level (and which punishments will be applied) remains a question.

archived+news/archivesnews_2010.htm. See also the case law preceding *Soros in Sunday Times v. UK*, 26.4.1979, in 2 EHRR 245.

⁶² Aschenbach (see Note 9), p. 560.

⁶³ S. Ransiek. Unternehmensstrafrecht. Strafrecht, Verfassungsrecht, Regelungsalternativen. Heidelberg 1996, p. 190.

⁶⁴ Aschenbach (see Note 9), pp. 562–565.

⁶⁵ See the criminological approach of H. Theile, for instance: H. Theile. Die Bedrohung prozessualer Freiheit durch materielles Wirtschaftsstrafrecht am Beispiel der § 264a, 265b StGB. *Wistra* 2004, p. 121.

⁶⁶ Jähnke, Laufhütte, Odersky (see Note 43), §264a, paragraph 4.

⁶⁷ Supreme Court Criminal Law Chamber decision of 2.6.2011, 3-1-1-28-11 (in Estonian).

⁶⁸ Hagemann (see Note 31), pp. 49–50.

⁶⁹ Jähnke, Laufhütte, Odersky (see Note 43), §264a, paragraph 4.



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Die schuldhafte strafrechtliche Verantwortung der juristischen Person

Theoretische Grundlagen und estnische Gerichtspraxis

1. Einleitung. Allgemeine Grundlagen der Verantwortlichkeit

1.1. Über die Entstehungsgeschichte

Mit der ersten Strafrechtsreform nach der Wiederherstellung der staatlichen Unabhängigkeit Estlands im Jahre 1992 wurde ein Hauptzweck berücksichtigt, das totalitäre sowjetische Strafrecht zu bewältigen. Unter anderen Änderungen wurden die ersten Schritte in die Richtung der strafrechtlichen Verantwortlichkeit der juristischen Personen vorgenommen. Nach dem Muster des deutschen Strafrechts hat die Verantwortlichkeit in den Rahmen des Ordnungswidrigkeitsrechts (nach der damaligen Bezeichnung „Verwaltungsstrafrecht“) eine Lösung gefunden, während das Strafrecht nur die Strafbarkeit der natürlichen Personen ausschließlich im Strafgesetzbuch wegen der Verbrechen vorgesehen hatte.^{*1} Der Allgemeine Teil des OWiG enthielt aber keine Bestimmungen betreffend der Grundlagen und Grenzen der Verantwortlichkeit der juristischen Personen; es gab nur die entsprechenden Tatbestände im Besonderen Teil, so dass es tatsächlich eher um eine objektive Verantwortung ging.

Die Frage der Strafbarkeit der juristischen Personen aktualisierte sich während der Vorbereitung der Strafrechtsreform 2002. Da die genannte Reform einen Zweck hatte, nach dem Muster des französischen Strafrechts alle strafbaren Taten – wie die Ordnungswidrigkeiten so auch die Verbrechen – mit der Regelung des Allgemeinen Teils des Strafrechts umzufassen, hatten auch die Grundlagen und Grenzen der Verantwortlichkeit der juristischen Personen auf ihre Lösung gewartet. Das am 1.09.2002 in Kraft getretene StGB hat erstmalig die entsprechenden Bestimmungen vorgesehen, wonach die Strafe gleich wegen der Ordnungswidrigkeiten und Verbrechen bedroht.^{*2} Nach dem § 14 StGB wird eine juristische Person wegen der Tat bestraft, wenn die Tat in ihrem Interesse und von ihrem Organ, dessen Mitglied, von ihrem Leitungsfunktionär (leitender Person) oder vom zuständigen Vertreter begangen wurde. Die Verantwortlichkeit wird nicht dem Staat, der kommunalen Verwaltung und öffentlich-rechtlichen juristischen Person angewandt. Die Bestrafung der juristischen Person schließt nicht die Bestrafung der natürlichen Person

¹ Eesti NSV Kriminaalkodeksi. Kommenteeritud väljaanne (Kommentar zum Strafgesetzbuch). Koostanud prof. I. Rebane. Tallinn: Eesti Raamat 1980, § 7/5c (auf Estnisch).

² Die englische Übersetzung des estnischen StGB ist zugänglich im Internet: www.legaltext.ee/et.

aus. Die Regelung beruht auf der Lösung des französischen *Code pénal* von 1994 als damals auf einem von den modernsten Strafgesetzbüchern Europas.^{*3} Neben den obengenannten Zurechnungskriterien gibt das StGB im § 37 die allgemeinen Grundlagen der Schuld der juristischen Person, wonach die juristische Person wegen ihrer Rechtsfähigkeit gleichzeitig schuldfähig ist.

1.2. Spezialitäts- oder Universalitätsprinzip?

Die allgemeinen Grundlagen der Verantwortlichkeit der juristischen Personen realisieren sich in der Strafbarkeit wegen der konkreten Straftat durch das Spezialitätsprinzip. Laut des § 14 Abs. 1 StGB wird die juristische Person nur in den im Gesetz direkt vorgeschriebenen Fällen bestraft, was gesetzestechisch sich in jedem entsprechenden Tatbestand des Besonderen Teils durch eine Bestimmung ... *wegen derselben Tat, wenn sie durch die juristische Person begangen ist...* äußert.

Das Spezialitätsprinzip ist zwar für den Anwender des Gesetzes hilfreich, da keine Notwendigkeit besteht, in jedem konkreten Fall über die Möglichkeit der Bestrafung der juristischen Person zu entscheiden. Jedoch gibt diese Lösung keine Richtlinien für den Gesetzgeber, wodurch seinerseits die Einführung der Strafbarkeit keine bestimmten Kriterien enthält und deswegen unter der Zufälligkeit leidet.

Aus den oben beschriebenen Erwägungen wird im Justizministerium ein Gesetzesentwurf mit dem Vorschlag vorbereitet, auf das Spezialitätsprinzip zugunsten des Universalitätsprinzips zu verzichten.^{*4} Das würde bedeuten, dass die juristischen Personen gleich der natürlichen für alle Taten strafbar wären – eine Lösung, die durch den Gesetzgeber der Niederlande, des Belgiens, Finnlands, Norwegens, Großbritanniens u. a. schon betroffen ist.^{*5} Der Schwerpunkt wird dadurch von dem Gesetzgeber auf die Rechtspraxis übertragen, die in jedem konkreten Fall (und nicht ohne die aus der Strafrechtsdogmatik stammenden Erwägungen) entscheiden soll, ob die Strafbarkeit der Tat auch bei der juristischen Person tatsächlich möglich ist. Zugleich sind die Probleme des Bestimmtheitsgebots nicht ausgeschlossen, da die Anwendung des konkreten Tatbestands zu viel Raum für die – und möglicherweise sehr weite – Auslegung bereitet. Aus der Seite des Unrechtsbewusstseins können weiter die Fragen vorkommen, ob man schon aufgrund des Strafgesetzes überhaupt entscheiden kann, ob es um eine verbotene oder zulässige Tat geht. Vor allem im Bereich der Wirtschaftskriminalität bedroht diese Lage eine große Belastung auf den Verbotsirrtum (§ 39 StGB) aufzulegen.

2. Anknüpfungstat und die Zurechnung der Tat der natürlichen Person zu der juristischen Person

2.1. Nur durch die natürliche Person

Die estnische Gerichtspraxis hat vielmal den Standpunkt geäußert, dass die primäre Voraussetzung der Verantwortung, also der Zurechnung der Tat für die juristische Person nur durch die sog persönliche Verbindung, die Anknüpfungstat der natürlichen Person ist.^{*6} Diese Tat muss ihrerseits allen Forderungen der Strafbarkeit der Tat nach dem StGB entsprechen – tatbestandsmäßig, rechtswidrig und schuldhaft sein (§ 2 Abs. 2 StGB).^{*7}

Nach der Theorie „der leitenden Vernunft“ kann die obengenannte natürliche Person vor allem ein Leitungsfunktionär, also die Person sein, die die Tätigkeit der juristischen Person bestimmt oder dazu beiträgt.

³ Näher: J. Sootak. Kaks aastat karistusseadustikku – uus õigus ja uued probleemid? (Zwei Jahre des Strafgesetzbuchs – neues Recht und neue Probleme?) – *Juridica* 2005/1, S. 40 (auf Estnisch).

⁴ Der Entwurf ist noch in der Vorbereitung und hat keinen Status des offiziellen Entwurfs.

⁵ J. Pradel. *Droit pénal comparé*. 2. Éd. Dalloz 2002, S. 361.

⁶ Über die Tat der natürlichen Person und das Prinzip *ne bis in idem* siehe näher: J. Ginter. *Criminal Liability of Legal Persons in Estonia*. – *Juridica International* 2009 (XVI), S. 155.

⁷ z. B: Entscheidungen des Staatsgerichts Nr. 3-1-1-7-04; 3-1-1-82-04; 3-1-1-137-04, 3-1-1-25-06. Die Entscheidungen des estnischen Staatsgerichts (des obersten Gerichts) sind nur elektronisch und auf Estnisch zugänglich: www.riigikohus/lahtendid/ee/ (Homepage des Staatsgerichts) oder www.riigiteataja.ee/ert/jsp (elektronischer Staatsanzeiger).

Nach dem Vorbild des französischen *Code pénal* schreibt auch § 14 Abs. 1 des estnischen StGB vor, dass neben dem Organ als direkten Täter auch der Anknüpfungstäter ein Leitungsfunktionär sein kann.^{*8}

Damit vereinigt das estnische Strafrecht sich mit der zivilrechtlichen Anschauung, dass die juristische Person an sich als eine bloße Fiktion durch ihre Vertreter tätig ist.^{*9} Ebenso ist nach dem § 31 Abs. 5 die Tätigkeit des Organs der juristischen Person als die Tätigkeit der juristischen Person zu sehen.

Neben dem Organ oder seinem Mitglied kann nach dem estnischen Strafrecht die strafrechtliche Verantwortung der juristischen Person auch auf der Tätigkeit des Leitungsfunktionärs beruhen. Wenn der Begriff des Organs im Strafrecht aus dem Zivilrecht stammt, hat der Begriff des Leitungsfunktionärs eine reine strafrechtliche Herkunft. Die Anwendung dieses autonomen strafrechtlichen Begriffs beruht auf der Notwendigkeit, die so genannte delegierte Verantwortungslosigkeit zu vermeiden, wenn die für die juristische Person wesentlichen Entscheidungen von der Person getroffen sind, die zwar leitende Stellung in der Korporation hat, aber kein Mitglied des Organs ist. Der Leitungsfunktionär kann Direktor, Abteilungsleiter oder andere, in den für die juristische Person wichtigen Tätigkeitsbereiche leitend wirkende Person sein. Dabei muss man aus der Sicht der Identifikationstheorie ausgehend feststellen, dass die Tätigkeit dieser Person mit der Tätigkeit der Korporation als gleiches anzusehen ist.^{*10}

Estnisches Staatsgericht hat dem obengenannten Standpunkt bestätigend erklärt, dass insbesondere bei den großen Korporationen verständlicherweise die Leitungsorgane nicht alle alltägliche Fragen lösen brauchen, sondern solche Zuständigkeit weiter auf die anderen Ebenen vertrauen können. Die auf diesen mittleren Ebenen betroffenen Entscheidungen wurden mit der Tätigkeit der leitenden Person gleichgestellt.^{*11} Dabei hat das Staatsgericht aber immer betont, dass die Tat der entsprechenden natürlichen Person – eine Entscheidung für die konkrete Handlung – sich eine unvermeidbare Voraussetzung der Strafbarkeit der juristischen Person darstellt.^{*12}

Die Bestrafung der juristischen Person wurde demgemäß wegen der Tat ihres gewöhnlichen Arbeiters unmöglich. Die Anwendungspraxis des StGB hatte aber bald gezeigt, dass es ganz oft Fälle gab, wenn die Durchschnittsarbeiter die Taten im Interesse der juristischen Person begangen haben. Erstmals stand das Staatsgericht vor diesem Problem in einem Fall, wo es um eine Werbung des Glückspiels ging. Die Ordnungswidrigkeit – eine Ausstellung der Werbung außerhalb des Casinos – wurde durch einen Arbeiter begangen, verurteilt wurde aber das Kasino als juristische Person. Im Amtsgericht (1. Instanz) wurde ein freisprechendes Urteil gefallen mit der Begründung, dass keine natürlichen Personen festgestellt waren, die die Werbung ausgestellt hatten. Staatsgericht ließ das Urteil in Kraft und betonte nochmal, dass die Verantwortung der juristischen Person nur von der Tat der natürlichen Person ausgehen kann. Dadurch hat das Staatsgericht zugestanden, dass die Strafbarkeit auch in den Fällen zu bejahen ist, wo die Tat zwar durch einen Durchschnittsarbeiter begangen wurde, aber nur durch eine Genehmigung oder Verfügung des Organs oder des Leitungsfunktionärs zustande gekommen ist.^{*13}

Wirklich muss man annehmen, dass die Ausstellung der Werbung eine Tätigkeit ist, die kaum von dem Leitungsfunktionär eigenhändig ausgeübt wird. Deswegen kann die Gerichtsentscheidung so ausgelegt werden, dass es gerecht ist, die Grenzen der Strafbarkeit der juristischen Person zu erweitern und als Anknüpfungstäter auch den Durchschnittsarbeiter zu sehen. Rechtsdogmatisch ist diese Lösungsgang mit der Figur der mittelbaren Täterschaft begründbar, und zwar in zwei Konstellationen – zum einen, wenn es um einen vorsatzlos oder im Verbotsirrtum (schuldlos) handelnden Werkzeug geht, und zum zweiten kann die juristische Person eine Tatherrschaft mittels organisatorischer Machtapparate erreichen.^{*14} Die Anwendung einer bloßen Identifikationstheorie kann zur Verantwortung der Korporation nicht führen, da

⁸ Über *Code pénal* siehe näher: J. Pradel (Fn. 5), S. 363.

⁹ K. Saare. Esindusorgani liikme käitumise omistamisest eraõiguslikule juriidilisele isikule seoses vastutuse küsimusega (Zurechnung der Tat des Mitgliedes des Vertretungsorgans betreffend der Verantwortung der juristischen Person). – *Juridica* 2003/10, S. 674 (auf Estnisch).

¹⁰ J. Sootak, P. Pikamäe. Karistuseseadustik. Kommenteeritud väljaanne. 3. vlj. (Kommentar zum Strafgesetzbuch. 3. Aufl.). Tallinn: Juura 2009, § 14/8 (auf Estnisch).

¹¹ Entscheidung des Staatsgerichts Nr. 3-1-1-9-05, P. 8.

¹² Entscheidung des Staatsgerichts Nr. 3-1-1-7-04, P. 10.

¹³ Entscheidung des Staatsgerichts Nr. 3-1-1-82-04, P. 11.

¹⁴ Ein neues Typus der mittelbaren Täterschaft: Die Schaffung und Ausnutzung der Rahmenbedingungen. Siehe näher: P. Randma. Organisatsiooniline teovalitsemine – *täideviija täideviija* taga kontseptsioon teoorias ja selle rakendamise praktikas. *Dissertationes Iuridicae Universitatis Tartuensis* 30. Tartu Ülikooli Kirjastus 2011. Deutsche Zusammenfassung, S. 146 ff; *idem*. Beteiligungsmodelle im neuen Estnischen Strafgesetzbuch. – *Juridica International* 2008 (XV), S. 131–132.

die Tätigkeit des Durchschnittsarbeiters an sich der Tätigkeit der juristischen Person nicht gleichgestellt werden kann; dagegen führt eine Genehmigung oder Verfügung des Organs oder des Leitungsfunktionärs zur Tatherrschaft der juristischen Person und dadurch weiter zur Identifikation der Tätigkeit des Durchschnittsarbeiters mit der Tätigkeit der Korporation.

Mit der Gesetzesänderung vom 19.06.2008 (in Kraft ab dem 28.07.2008) wurden die Grundlagen der Verantwortlichkeit der juristischen Person wesentlich erweitert.^{*15} Es geht um ein neues Subjekt der Anknüpfungstat, nämlich um den zuständigen Vertreter der juristischen Person. Gewiss ist die Vertretung ein zivilrechtlicher Begriff, der unmittelbar mit dem zivilrechtlichen Geschäft gebunden ist. Da das Geschäft keinesfalls als Gegenstand der strafrechtlichen Regelung sein kann, entsteht hierbei eine unvermeidliche Frage, um welche Vertretung es geht? Es liegt außer Zweifel, dass die Strafbarkeit als strafrechtliche Verantwortlichkeit nur streng individuell sein kann und im Unterschied zum Zivilrecht die Verantwortung einer Person für die Handlung der anderen völlig ausgeschlossen ist (z. B. § 1054 des Schuldrechtgesetzes). Zwar kennt das Strafrecht die dogmatischen Figuren der Mittäterschaft und mittelbaren Täterschaft, die aber in Rahmen der individuellen Verantwortung bleiben und keinen Raum für die Vertretung und das Geschäft lassen. Deswegen kann man die Gesetzesänderung kaum als gelungen halten, abgesehen von den Schwierigkeiten mit der schuldhaften Zurechnung. Jedenfalls hat man mit dem Begriff des zuständigen Vertreters vom Grundsatz abgesagt, dass der Anknüpfungstäter eine von den Personen sein muss, die den Willen der juristischen Person äußern und ihre Tätigkeit gestalten.^{*16}

Die obligatorische Anknüpfungstat der natürlichen Person bedeutet keine Mittäterschaft oder Teilnahme der natürlichen Person an der Straftat der juristischen Person.^{*17} Es geht um die parallele Verantwortung der beiden Personen, die keine Doppelbestrafung bedeutet und einen Zweck hat, die Möglichkeit des Mitglieds des Organs oder des Leitungsfunktionärs auszuschließen, seine Tat hinter den Schirm der juristischen Person zu decken und die Bestrafung zu vermeiden. Dieses Grundsatz ist schon in der Rekommandation der Europäischen Union enthalten (Beilage, P I.5).^{*18}

Das Prinzip der derivativen Verantwortung erweitert sich nicht auf den Strafprozess – die Einstellung des Verfahrens betreffend der natürlichen Person durch die Opportunität (§ 202 ff der estnischen StPO, § 153a der deutschen StPO) oder z. B. wegen ihres Todes schließt eine Weiterführung des Verfahrens betreffend der juristischen Person nicht aus.^{*19}

Zusammenfassend kann man feststellen, dass die Verantwortung der juristischen Person nur durch das Miteinbeziehen der natürlichen Person, also nicht ohne derivative Verantwortung möglich ist. Dabei betont das Staatsgericht zwar, dass die Verantwortung der natürlichen Person vorangehen sollte und die juristische Person nur ausnahmsweise zur Verantwortung gezogen werden kann. Diese Lösung gewährleistet eine klare Verbindung mit dem bisherigen strafrechtlichen Denken – dass die Strafbarkeit im Strafrecht ohne volldeliktisch handelnde natürliche Person unmöglich ist.^{*20}

2.2. Die Tat im Interesse der juristischen Person

Weitere Voraussetzung für die Zurechnung der Tat der natürlichen Person ist die Forderung, dass die Anknüpfungstat im Interesse der Korporation begangen wurde. Die Begrenzung beruht auf der Notwendigkeit, die Verantwortlichkeit der juristischen Person in den Fällen auszuschließen, welche außerhalb der Tätigkeitssphäre der Korporation bleiben.^{*21} Der Begriff *im Interesse der juristischen Person* ist ausweitung auszulegen; es reicht die Berücksichtigung der Zweck, die Tätigkeit oder den Zustand der Korporation zu bessern oder weiterzuentwickeln, ohne dabei die konkrete Gewinne oder Vorteile festzustellen. Das

¹⁵ Staatsanzeiger I 2008 Nr. 33 Art. 200.

¹⁶ P. Pikamäe. Kes on juriidilise isiku pädev esindaja karistusseadustiku § 14 mõttes? (Wer ist der zuständige Vertreter der juristischen Person im Sinn des § 14 StGB?) – *Juridica* 2010/1, S. 5 (auf Estnisch).

¹⁷ Entscheidung des Staatsgerichts Nr. 3-1-1-137-04, P. 14.3.

¹⁸ Im Internet zugänglich: <https://wcd.coe.int/com.instranet.InstraServlet?Command=com.instranet.CmdBlobGet&DocId=698702&SecMode=1&Admin=0&Usage=4&IntranetImage=44792>.

¹⁹ Entscheidung des Staatsgerichts Nr. 3-1-1-137-04, P. 16–17.

²⁰ Vor allem die Entscheidung des Staatsgerichts Nr. 3-1-1-137-04. Siehe auch E. Elkind, J. Sootak. The concept of corporate criminal responsibility and its further developments in the Estonian case law. – *Rikosoikeudellisia kirjoituksia VIII*. Raimo Lahtelä 12.1.2006 omistettu. Helsinki: Suomalainen Lakimiesyhdistys 2006, S. 429.

²¹ Entscheidung des Staatsgerichts Nr. 3-1-1-108-03, P. 5.

Staatsgericht hat in diesem Bezug betont, dass man sich beim Feststellen der Interessen keinesfalls mit dem Vermögensvorteil beschränken muss und es um die Interessen gehen kann, die außerhalb der in das Handelsregister eingetragenen Tätigkeitsgebiete bleiben. Zwar ist es notwendig im Gerichtsurteil zu zeigen, in welcher Weise die Anknüpfungstat die Interessen der Korporation äußert.^{*22} Die Interessen der juristischen und unmittelbar handelnden natürlichen Person können übereinstimmen, wobei diese Fälle sich eher keine Ausnahme, sondern eine Regel darstellen.^{*23}

Rechtsdogmatisch ist zu beachten, dass das Interesse der juristischen Person kein selbständiges Element der Deliktsstruktur, sondern ein Element des Tatbestandes ist, das aus der objektiven Seite die Tat beschreibt, aus der subjektiven Seite aber vom Vorsatz der Anknüpfungstäter umfassen sein muss.^{*24} Wenn die Handlung im Interesse der juristischen Person zum Tatbestand gehört und auf der Ebene der Rechtswidrigkeit keine Sonderprobleme auftauchen, dann kommt man zur Frage der schuldhaften Seite der strafrechtlichen Haftung der juristischen Person. Auf der Tatbestandsebene wurde gezeigt, dass in gewissen Fällen trotz der Forderung der volldeliktischen Anknüpfungstat noch etwas zusätzliches aus der Seite der juristischen Person, genauer von ihrem Organ oder dem Leitungsfunktionär zukommen muss – nämlich eine die Tatherrschaft begründende Genehmigung oder Verfügung zu der Tat des Durchschnittsarbeiters. Dieser doppelgeschichtete Charakter des Tatbestandes wirft die Frage auf, reicht es auf der Schuldebene ebenso nur von der Schuld der unmittelbar wirkenden Person oder müssen dazu noch die zusätzlichen Schuldmerkmale zukommen?

3. Schuldprinzip und Zurechnung

3.1. Schuldprinzip im estnischen Strafrecht und Eigenart der juristischen Person

In der Praxis ist noch nicht die Frage aufgetaucht, ob das Schuldprinzip als eine Voraussetzung der strafrechtlichen Verantwortlichkeit zu den grundgesetzlichen Prinzipien gehört oder nicht. Jedenfalls wird in § 22 des Grundgesetzes Estlands gesagt, dass niemand als eines Verbrechens schuldig betrachtet werden darf, solange nicht ein schuldigsprechendes Gerichtsurteil gegen ihn Rechtskraft erlangt hat.^{*25} Das § 2 Abs. 2 StGB enthält das Schuldprinzip: die Tat ist nur strafbar, wenn sie tatbestandsmäßig, rechtswidrig und schuldhaft ist. § 32 Abs. 1 verlangt, dass die Person nur dann bestraft werden kann, wenn sie eine rechtswidrige Tat schuldhaft begangen hat.

Da das Deliktsstruktur des StGB keinen Unterschied zwischen den natürlichen und juristischen Personen macht, kann man davon eindeutig folgern, dass auch die Bestrafung der juristischen Person ohne schuldhaft Tat unmöglich ist. Die Schuldfähigkeit ausschließenden Umstände im Kapitel 2 Abschnitt 3 StGB gelten deswegen formell sowohl für die natürliche als auch für die juristische Person. Tatsächlich gibt es da nur einen die Schuldfähigkeit ausschließenden Umstand, nämlich sagt § 37 *a contrario*, dass eine juristische Person schuldfähig ist, wenn sie rechtsfähig ist. Privatrechtliche juristische Person bekommt eine Rechtsfähigkeit mit dem Eintragen in das Register, öffentlich-rechtliche juristische Person aber während der im Gesetz vorgeschriebenen Zeit (§ 26 des Gesetzes des Allgemeinen Teils des Bürgerlichen Gesetzbuches). Die Schuldfähigkeit der natürlichen Person besteht in der Zurechnungsfähigkeit (z. B. §§ 34-35: geistiger Zustand des Täters) und in den schuldausschließenden Gründen (z. B. § 39 Verbotsirrtum u. a.).^{*26}

Wenn man streng bei der Anknüpfungstat der natürlichen Person bleibt, kann man ohne weiteres feststellen, dass die Schuldhaft der Tat der juristischen Person sich in den Schuldmerkmalen der natürlichen Person völlig erschöpft. Die zusätzlichen Tatbestandsmerkmale leiten aber zur Frage, ob auch die Schuld-

²² z. B. Entscheidungen des Staatsgerichts Nr. 3-1-1-137-04, P. 20; 3-1-1-9-05, P. 9; 3-1-1-70-05, P. 6; 3-1-1-71-05, P. 5.

²³ z. B. Entscheidungen des Staatsgerichts Nr. 3-1-1-137-04, 3-1-1-9-05.

²⁴ Entscheidung des Staatsgerichts Nr. 3-1-1-137-04, P. 14.3.

²⁵ Deutsche Übersetzungen: Grundgesetz für die Republik Estland. Tallinn: Justizministerium, sine anno; Verfassung der Republik Estland. – Verfassungen der EU-Mitgliedstaaten. München: DTV 2005, S. 111 ff. Es gibt einige terminologische Unterschiede zwischen den Texten, die hier aber unwesentlich sind.

²⁶ Über das Schuldprinzip im estnischen Strafrecht siehe näher: J. Sootak. Grundelemente der subjektiven Verantwortlichkeit im estnischen Strafrecht. – A. Eser, J. Arnold, J. Trappe (Hrsg.). Strafrechtsentwicklung in Osteuropa. Zwischen Bewältigung und neuen Herausforderungen. Berlin: Duncker & Humblot 2005, S. 228–233.

frage zweifach gestellt werden soll; oder anders gefragt – reicht die Schuld der natürlichen Person wirklich aus, um über die Schuld der juristischen Person zu sprechen?

Hier ist grundsätzlich mit H. J. Hirsch zuzustimmen, dass für die Verbandsschuld die Schuld eines für sie handelnden Organs eine notwendige Voraussetzung ist, aber gleichzeitig müssen noch die gesetzwidrigen Schritte des Organs auch für den Verband vermeidbar sein.^{*27}

Neben der Vermeidbarkeit der Anknüpfungstat als der allgemeinen Schuldvoraussetzung ist allerdings zu prüfen, ob und in welcher Weise die Schuld des Anknüpfungstäters als Schuld der juristischen Person von den spezifischen Zügen des Täters abhängig ist.

3.2. Schuldhaft Zurechnung im Bezug zum Subjekt

Vermeidbarkeit der Tat und Unrechtsbewusstsein des Täters als allgemeine Schuldmerkmale der natürlichen Person reichen völlig aus, wenn die Anknüpfungstat durch das Organ, sein Mitglied oder einen Leitungsfunktionär begangen wurde. Die genannte Person äußert den Willen und die Rechtsfähigkeit der juristischen Person und ihre im Interesse der juristischen Person begangene Tat ist ohne weiteres der juristischen Person zuzurechnen. Eine solche Auffassung wurde beim Inkrafttreten des StGB als Grundlage der Verantwortlichkeit der juristischen Person festgelegt (siehe auch oben Zf. 2.1).

Wenn eine rechtswidrige Handlung für das Organ oder dem Leitungsfunktionär der juristischen Person vermeidbar war und damit die Schuldvoraussetzung erfüllt ist, wird die Tat der juristischen Person zugerechnet. Aber wenn der zuständige Vertreter und der Durchschnittsarbeiter in Rahmen ihrer Vertretungszuständigkeit oder der Arbeitsaufgaben tätig sind, werden sie zwar als im Interesse der juristischen Person wirkende Personen betrachtet, aber kann man auch ihre rechtswidrige Tat als Anknüpfungstat für die Verantwortlichkeit der juristischen Person sehen? Aus einer Seite kommt diese Folgerung *expressis verbis* von dem Wortlaut des § 14 Abs. 1 (zuständiger Vertreter) und von der Praxis des Staatsgerichts (Durchschnittsarbeiter) hervor, aus der anderen Seite kommt man jedoch zur Frage, wie können die Personen, die keinen Willen der Korporation äußern und ihre Tätigkeit nicht bestimmen, die Schuld der Korporation begründen?

Die Tat des Durchschnittsarbeiters wird der juristischen Person wie gewöhnlich bei der mittelbaren Täterschaft zugerechnet – gleich, ob es um den ohne den Vorsatz handelnden Vordermann oder um die organisatorische Tatherrschaft geht. Wie oben gesagt, führt eine Genehmigung oder Verfügung des Organs oder des Leitungsfunktionärs zur Tatherrschaft der juristischen Person und dadurch weiter zur Identifikation der Tätigkeit des Durchschnittsarbeiters mit der Tätigkeit der Korporation. Und umgekehrt – ohne Genehmigung oder Verfügung handelnder Durchschnittsarbeiter kann nur persönlich als eine natürliche Person zur Verantwortlichkeit gezogen werden, obwohl sie sogar die Tat zugunsten der juristischen Person begangen hat.

Kaum kann man aber beim zuständigen Vertreter die Schuldhaftigkeit der Tat der juristischen Person durch die mittelbare Täterschaft begründen. Die Vertretung an sich bildet keine Vermeidbarkeit der Tat der juristischen Person und ist deswegen für ihre Schuld unzureichend, obwohl die Tat im Interesse der juristischen Person begangen wurde. In der Literatur wird behauptet, dass in solchen Fällen die minimale Voraussetzung der Schuld darin besteht, dass die juristische Person (ihr Organ oder Leitungsfunktionär) wissen sollte, dass die Tat des Vertreters rechtswidrig ist. Ohne weiteres kann man über die Schuld der Korporation sprechen, wenn die Tat des Vertreters auf einer Anordnung von der Seite des Organmitgliedes oder Leitungsfunktionärs beruht; ebenso, wenn der Vertreter seine Tat mit der Leitung der Korporation in Einklang gebracht hat. Die Übereinstimmung muss nicht unbedingt vor der Tat vorhanden sein, aber bestimmt nicht später als während der Tatbegehung. Dagegen findet keine Verantwortung der juristischen Person wegen des Fehlens ihrer Schuld statt, wenn der Vertreter die Tat ohne Zustimmung der Leitung in der Hoffnung begeht, dass sie seine Tat danach gutheißt.^{*28}

Die gebrachten Erwägungen sind auch für den Durchschnittsarbeiter gültig, wenn seine Tat nicht aufgrund der mittelbaren Täterschaft der juristischen Person zugerechnet wird.

²⁷ H. J. Hirsch. Die Frage der Straffähigkeit von Personenverbänden. – H. J. Hirsch. Strafrechtliche Probleme. Berlin: Duncker & Humblot 1999, S. 621.

²⁸ P. Pikamäe (Fn. 16), S. 9.

3.3. Die Strafbarkeit beim Unterlassen

Die Genehmigung, Verordnung und Übereinstimmung als aktive Tatformen bestimmen die Schuldhaftigkeit der juristischen Person wegen des Tuns. Beim Unterlassen ist die Verantwortlichkeit der juristischen Person zweifellos vorhanden, wenn das Organ, sein Mitglied oder ein Leitungsfunktionär pflichtwidrig passiv bleibt und keine gebotene Handlung vornimmt (z. B. Steuerhinterziehung). Umstritten ist aber die Anknüpfungstat als Unterlassen im Falle, wenn der Durchschnittsarbeiter oder der zuständige Vertreter zwar im Interesse der Korporation, aber ohne direkte Genehmigung oder Übereinstimmung die strafbare Tat begeht und die gebotene Handlung nur als die Aufsicht zu sehen ist. Eine Garantenstellung kann in diesem Fall aus dem Gesetz, aber auch aus der Verordnung, Satzung usw. hervorgehen. Für den strafrechtlichen Schuldvorwurf ist aus den rechtsstaatlichen Erwägungen erforderlich, dass die Garantenpflicht aus dem Gesetz, nicht aber aus der inneren Regelung der Korporation hervorgeht.^{*29}

Eine Lösung wäre hier ähnelnd dem deutschen Ordnungswidrigkeitenrecht der Tatbestand der Verletzung der Aufsichtspflicht in Betrieben und Unternehmen einzuführen (§ 130 OWiG). Dadurch wären die Zurechnungsprobleme beim Unterlassen aus dem Allgemeinen Teil des StGB in den Besonderen Teil zu übertragen und aufgrund des echten Unterlassungsdelikts zu erledigt.

Der Gesetzgeber scheint hier jedoch einen anderen Weg vorzuziehen. Im Justizministerium ist ein Gesetzesentwurf in der Vorbereitung, in dem die Regelung im Allgemeinen Teil bleiben wird. Zum einen gibt man eine Definition des zuständigen Vertreters. Es geht um die Person, die eine Aufgabe hat, die wirtschaftlichen oder anderen Interessen der juristischen Person aufgrund der entgeltlichen oder unentgeltlichen Geschäft oder in anderer Weise unter der Kontrolle der juristischen Person stehend und die zum Einhalten der Aufgabe gegebene Zuständigkeit benutzend zu verteidigen (ein neuer Abs. 4 des § 14 StGB).^{*30}

Für die Schuld der juristischen Person ist von größerer Bedeutung der im Entwurf vorgeschlagene neue Absatz 5 des § 14 StGB. Danach trägt die juristische Person keine Verantwortlichkeit wegen der Tat des zuständigen Vertreters, wenn sie vor der Tat die für die Vorbeugung der rechtswidrigen und für die Gewährleistung der rechtmäßigen Handlung notwendigen Maßnahmen eingeführt hat. Die Strafbarkeit ist jedoch zu bejahen, wenn trotz den genannten Maßnahmen der zuständige Vertreter einen Grund voraussetzen hatte, dass die juristische Person seine Straftat gutheißt.

4. Zusammenfassung

Im nach dem Schuldprinzip wirkenden Strafrecht ist eine Entbindung der Verantwortlichkeit der juristischen Person von dem Verhalten der Personen, die ihren Willen und ihre Tätigkeit bestimmen, unmöglich. Dabei sind die verschiedenen rechtsdogmatischen Figuren im Gebrauch, wie die Verantwortung durch die Einzelperson (Leiter oder Leitungsfunktionär auf der mittleren Ebene), die mittelbare Täterschaft (Durchschnittsarbeiter); eine Anordnung von der Seite des Organmitgliedes oder der anderen leitenden Person oder wenn der Vertreter seine Tat mit der Leitung der Korporation in Einklang gebracht hat. Endlich kann die Verantwortung der juristischen Person sich durch die Unterlassung der Aufsichtspflicht äußern.

²⁹ *Ibid.*, S. 10.

³⁰ Über den Entwurf siehe Fn. 4.



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'I Use What I Use': Estonian Investigators' Knowledge of Investigative Interviewing^{*1}

1. Introduction

The information obtained from witnesses and victims in criminal investigation is important evidence, with a significant effect on the overall result.^{*2} In recent decades, the effect of structured interviewing methods, such as the cognitive interview, on both child and adult witnesses' accounts has been thoroughly studied; however, there has been less research examining which cognitive interview techniques are used more and how effective these techniques are.

The cognitive interview is one of the most effective procedures for enhancing witnesses' memory.^{*3} The original version of this technique consisted of four main elements: 1) reinstatement of mental context, 2) reporting of everything, 3) recall of events in different order, and 4) a change in perspective.^{*4} Later, the 'enhanced' cognitive interview was developed^{*5}, a form with additional instructions, establishment of rapport, transfer of control of the interview to the witness, ensuring of questions' compatibility with the witness's background and state, encouragement to use focused retrieval, and application of imagery.

Cognitive interviews have been effective when compared to standard police interviews.^{*6} Koehnken, Thurer, and Zoberbier^{*7} have found that cognitive interviews produced 35% more information than did standard interviews. Also, effectiveness of the 'enhanced' form has been demonstrated.^{*8} Although there is an increase in the absolute quantity of incorrect information when the cognitive interview is used, there is

¹ I wish to thank Hannes Hansalu, for gathering some of the data, and all of the investigators who participated in this research.

² C. Dando, R. Wilcock, R. Milne. The cognitive interview: Inexperienced police officers' perceptions of their witness/victim interviewing practices. – *Legal and Criminological Psychology* 2008/1, pp. 59–70.

³ R.P. Fisher, R.E. Geiselman. *Memory Enhancing Techniques for Investigative Interviewing: The Cognitive Interview*. Springfield, Illinois: Charles C. Thomas 1992.

⁴ R.E. Geiselman, R.P. Fisher, I. Firstenberg, L.A. Hutton, S.J. Sullivan, I.V. Avetissian, A.L. Prosk. Enhancement of eyewitness memory: An empirical evaluation of the cognitive interview. – *Journal of Police Science & Administration* 1984/3, pp. 74–80.

⁵ R.P. Fisher, R.E. Geiselman, M. Amador. Field test of the Cognitive Interview: Enhancing the recollection of actual victims and witnesses of crime. – *Journal of Applied Psychology* 1989/5, pp. 722–727; R.P. Fisher, R.E. Geiselman, D.S. Raymond, L.M. Jurkevich, M.L. Warhaftig. Enhancing enhanced eyewitness memory: Refining the cognitive interview. – *Journal of Police Science & Administration* 1987a/4, pp. 291–297.

⁶ R.P. Fisher, R.E. Geiselman, D.S. Raymond. Critical analysis of police interview techniques. – *Journal of Police Science & Administration* 1987b/3, pp. 177–185.

⁷ G. Koehnken, C. Thurer, D. Zoberbier. The cognitive interview: Are the investigators' memories enhanced too? – *Applied Cognitive Psychology* 1994/1, pp. 13–24.

⁸ Fisher, Geiselman (see Note 3); A. Memon, R. Bull. The cognitive interview: Its origins, empirical support, evaluation and practical implications. – *Journal of Community and Applied Social Psychology* 1991/4, pp. 291–307; G. Koehnken, R. Milne, A. Memon, R. Bull. The cognitive interview: A meta-analysis. – *Psychology, Crime & Law* 1999/1–2, pp. 3–27.

no evidence that the cognitive interview adversely affects accuracy rates.^{*9} A shorter version of the cognitive interview (in which the change in perspective and recall in different order were removed) did not decrease the amount of information substantially.^{*10} Also, some techniques of the cognitive interview are used more frequently than are others. For example, Clifford and George^{*11} found that officers trained in cognitive interviewing gave instructions for mentally reinstating context nine times more frequently than instructions to change perspective. Memon, Holley, Milne, Koehnken, and Bull^{*12} noted that context reinstatement was used relatively often as compared to recall in different order or transfer of control.

Although the techniques of the cognitive interview can be considered to be effective, there may be difficulties in applying them in practice. One factor might be time, as there are competing matters for the investigator to deal with.^{*13} According to Kebbell, Milne, and Wagstaff, police officers also believe frequently that the cognitive interview takes longer to complete than an ordinary police interview. A cognitive interview requires more concentration and places a large cognitive burden on the interviewer.^{*14} The interviewer also has to be flexible and able to change interviewing style very quickly, depending on the interviewee.^{*15} Also, Kebbell and colleagues^{*16} found that, as noted above, some cognitive interview components were used more often than the others were (examples being establishing rapport and reporting everything), and these techniques were rated as more useful. Clarke and Milne^{*17} reported that many of the memory-enhancing components of the cognitive interview were not used at all.

Though the cognitive interview is more widely used with adults, there is also research and practical application through the National Institute of Child Health and Human Development in the US (NICHD) protocol for interviewing sexually or physically abused children.^{*18} Elements of the cognitive interview employed include emphasis on the structure of the interview and giving attention to an increase in invitations and direct questions.^{*19} When the NICHD protocol is used, the proportion of invitations and direct questions in children's interviews increases, which indicate better quantity and quality results for these interviews.^{*20}

An important part of both cognitive interviews *per se* and the NICHD protocol is the skill of deciding which type of questions to use, and how. It is known that invitations (e.g., 'Tell me more') and direct questions (e.g., 'What happened next?') elicit more accurate information than do option-posing (e.g., 'Did he say...?') or leading questions (such as 'Did he push you several times?') from both adults and children.^{*21} Also, the information provided through the use of leading or option-posing questions can be less infor-

⁹ R.E. Geiselman. On the use and efficacy of the cognitive interview. – *Psychology* 1996/7, Witness Memory (2). Available at <http://www.cogsci.ecs.soton.ac.uk/cgi/psyc/newpsy?7.11> (most recently accessed on 14.8.2012).

¹⁰ M.R. Davis, M. McMahon, K.M. Greenwood. The efficacy of mnemonic components of the Cognitive Interview: Towards a shortened variant for time-critical investigations. – *Applied Cognitive Psychology* 2005/1, pp. 75–93.

¹¹ B.R. Clifford, R. George. A field evaluation of training in three methods of witness/victim investigative interviewing. – *Psychology, Crime & Law* 1996/3, pp. 231–248.

¹² A. Memon, A. Holley, R. Milne, G. Kohnken, R. Bull. Towards understanding the effects of interviewer training in evaluating the cognitive interview. – *Applied Cognitive Psychology* 1994/7, pp. 641–659.

¹³ M.R. Kebbell, R. Milne, G.F. Wagstaff. The cognitive interview: A survey of its forensic effectiveness. – *Psychology, Crime & Law* 1999/1–2, pp. 101–115.

¹⁴ R.P. Fisher, R.E. Geiselman (see Note 3); Kebbell *et al.* (see Note 13).

¹⁵ C. Clarke, R. Milne. National Evaluation of the PEACE Investigative Interviewing Course. London: Home Office 2001.

¹⁶ Kebbell *et al.* (see Note 13).

¹⁷ Clarke, Milne (see Note 15).

¹⁸ M.E. Lamb, I. Hershkowitz, Y. Orbach, P.W. Esplin. Tell Me What Happened: Structured Investigative Interviews of Child Victims and Witnesses. Wiley: Chichester 2008.

¹⁹ Y. Orbach, I. Hershkowitz, M.E. Lamb, K.J. Sternberg, P.W. Esplin. Assessing the value of structured protocols for forensic interviews of alleged abuse victims. – *Child Abuse and Neglect* 2000/6, pp. 733–752.

²⁰ *Ibid.*; M. Cyr, M.E. Lamb. Assessing the effectiveness of the NICHD investigative interview protocol when interviewing French-speaking alleged victims of child sexual abuse in Quebec. – *Child Abuse & Neglect* 2009/5, pp. 257–268; K.J. Sternberg, M.E. Lamb, Y. Orbach *et al.* Use of a structured investigative protocol enhances young children's responses to free-recall prompts in the course of forensic interviews. – *Journal of Applied Psychology* 2001/5, pp. 997–1005.

²¹ Fisher, Geiselman (see Note 3); I. Hershkowitz, M.E. Lamb, K.J. Sternberg, P.W. Esplin. The relationships among interviewer utterance type, CBCA scores and the richness of children's responses. – *Legal and Criminological Psychology* 1997/2, pp. 169–176; M.E. Lamb, I. Hershkowitz, K.J. Sternberg, P.W. Esplin, M. Hovav, T. Manor, L. Yudilevitch. Effects of investigative utterance types on Israeli children's responses. – *International Journal of Behavioral Development* 1996/3, pp. 627–637; K.J. Sternberg, M.E. Lamb, I. Hershkowitz, P.W. Esplin, A. Redlich, N. Sunshine. The relation between investigative utterance types and the informativeness of child witnesses. – *Journal of Applied Developmental Psychology* 1996/3, pp. 439–451.

mative and more inaccurate.^{*22} Sternberg, Lamb, Hershkowitz, Yudilevitch, Orbach, Esplin and Hovav^{*23} demonstrated that when the interview was conducted with more direct questions, the child provided more information about the crime. The use of invitations and direct questions increased the quantity of information without increasing the amount of misleading or inaccurate information.^{*24}

Although training in structured interviewing methods is widespread, the problem in application of these methods remains. For example, the investigator may know how one should conduct the interview 'according to the guidelines' but may in an actual situation of investigation revert to more habitual or commonplace methods. Cederborg, Orbach, Sternberg, and Lamb^{*25} have indicated that investigators gather large amount of information by using methods with which the probability of inaccurate information is too large.^{*26} Also, it is commonly found that option-posing questions are widely asked in police interviews of children.^{*27}

La Rooy, Lamb, and Memon^{*28} found that 97% of the Scottish investigators studied considered their training in interviewing to be good or very good and 88% believed that they will get enough information when interviewing someone; however, invitations and direct questions were not used very much in actuality. The authors also noted that after the one-week training session, feedback was rarely given to the investigators. This leads to the conclusion that, although the investigators may understand the essence of the various question types from a theoretical perspective, they do not know which questions they really use. Myklebust and Bjorklund^{*29} found that there were no differences in usage of direct and option-posing questions by investigators who were more trained and had had more practice than among those with less training and shorter practice. In training of investigators, the teaching has to be long-term and constant, with adequate feedback and supervision.^{*30} Finally, those officers who have received training try to use the newly acquired techniques more often, but if they fail to do so, the eagerness to use these techniques may wane over time.

1.1. Objective of the study

In the new form of the Estonian Code of Criminal Procedure, entering force in September 2011^{*31}, §290¹ states that interviews with children under the age of 14 should be video-recorded if the child victims' or witnesses' accounts given during preliminary investigation are to be used in court as evidence in criminal proceedings. Before this date, video recordings of interviews with children were made but for the context of preliminary investigation only, which could result in a situation wherein the child victim or witness still had to testify in court and repeat the testimony given during preliminary investigation. The change in law has created a situation wherein more investigators should be able to conduct video-recorded interviews.

For video-recorded interviews in Estonia, there are special rooms for interviewing children (and, if necessary, other vulnerable persons) in all prefectures. In comparison to regular interviewing, wherein the

²² S.J. Ceci, M. Bruck. *Jeopardy in the Courtroom: A Scientific Analysis of Children's Testimony*. – Washington, DC: American Psychological Association 1995; D.A. Poole, D.S. Lindsay. *Assessing the accuracy of young children's reports: Lessons from the investigation of child sexual abuse*. – *Applied and Preventive Psychology* 1998/1, pp. 1–26.

²³ K.J. Sternberg, M.E. Lamb, I. Hershkowitz, L. Yudilevitch, Y. Orbach, P.W. Esplin, M. Hovav. *Effects of introductory style on children's abilities to describe experiences of sexual abuse*. – *Child Abuse & Neglect* 1997/11, pp. 1133–1146.

²⁴ Hershkowitz *et al.* (see Note 21); Lamb *et al.* (see Note 21); Sternberg *et al.* (see Note 21).

²⁵ A.-C. Cederborg, Y. Orbach, K.J. Sternberg, M.E. Lamb. *Investigative interviews of child witnesses in Sweden*. – *Child Abuse and Neglect* 2000/10, pp. 1355–1361.

²⁶ J. Korkman, P. Santtila, M. Westeraker, N.K. Sandnabba. *Interviewing techniques and follow-up questions in child sexual abuse interviews*. – *European Journal of Developmental Psychology* 2008/1, pp. 108–128.

²⁷ K. Kask. *Dynamics in using different question types in Estonian police interviews of children*. – *Applied Cognitive Psychology* 2012/3–4, pp. 324–329.

²⁸ D. La Rooy, M.E. Lamb, A. Memon. *Forensic interviews with children in Scotland: A survey of interview practices among police*. – *Journal of Police and Criminal Psychology* 2011/1, pp. 26–34.

²⁹ T. Myklebust, R.A. Bjorklund. *The effect of long-term training on police officers' use of open and closed questions in field investigative interviews of children (FIIC)*. – *Journal of Investigative Psychology and Offender Profiling* 2006/3, pp. 165–181.

³⁰ M.E. Lamb, K.J. Sternberg, Y. Orbach, I. Hershkowitz, D. Horowitz, P.W. Esplin. *The effects of intensive training and ongoing supervision on the quality of investigative interviews with alleged sex abuse victims*. – *Applied Developmental Science* 2002/3, pp. 114–125.

³¹ *Kriminaalmenetluse seadustik*. – RT I 2003, 27, 166; RT I, 29.12.2011, 20 (in Estonian). English text available at <http://www.just.ee/23295> (12.3.2012).

accounts of victims or witnesses are handled via a protocol for written form, video-recording places greater demands on the investigator, requiring more knowledge and skills. The investigator is also responsible for the quality of the evidence fulfilling all relevant requirements of the Code of Criminal Procedure. If the evidence is of poor quality, it cannot be used in court (for example, if the voice of the child is not clearly audible in the recording or the interview is conducted in a leading manner). If some aspects of the evidence (place, time, and method) are not investigated thoroughly, the necessity could arise to interview the child again, which might traumatise the child^{*32} or have a negative effect on the accuracy of the child's memory.^{*33} Also, investigators who have not conducted video-recorded interviews may feel performance anxiety when being filmed by a camera.

The benefit of video-recorded interviews in addition to not traumatising the child is that both sides in court know what the victim or witness testified and, therefore, it is easier to form the tactics and arguments.^{*34} Westcott, Davis, and Bull argue that when the suspect sees the child giving testimony, it may influence him or her to plead guilty before the trial and the case might have a quicker outcome—for example, with simplified proceedings. However, the Code of Criminal Procedure gives no indication as to which techniques or methods (such as the cognitive interview) should be used in interviews of children. Similar problems have occurred under Swedish legislation.^{*35}

Therefore, the aim of the study reported on here was to examine Estonian investigators' knowledge of principles of the cognitive interview and question types, as structured interviewing methods are still very infrequently used in Estonia. First, the paper examines which techniques of the cognitive interview investigators use most and how effective these techniques were considered. Previous research indicates that investigators tend to use techniques they think are effective.^{*36} It is, therefore, hypothesised that investigators use techniques related to communication and the process of the interview more than techniques that involve memory improvement.

Second, investigators' knowledge of question types in investigative interviews is examined. It is known from investigative interviewing research that invitations and direct questions provide larger amounts of information than do option-posing and leading questions.^{*37} However, it is not clear how investigators understand what a direct question is, for example. Therefore, this notion is examined more thoroughly. It is hypothesised that investigators' knowledge of direct and option-posing questions is better than is knowledge of invitations and leading questions.

2. Method

2.1. Participants

In this study, two surveys were conducted, one about investigators' knowledge of principles of cognitive interviews and the other on investigators' knowledge of question types in investigative interviewing. Twenty-five investigators participated in the first survey (eight males and 17 females), with the mean age being 34.2 years (SD = 5.69, range: 24–52). The survey was sent to 29 investigators, but four did not return the form. The investigators were specialists in criminal procedure, investigating crimes against minors and/or adults. The work experience of the investigators ranged from one month to 15 years (M = 5.12, SD = 4.96).

In the second survey, 26 investigators participated (one male and 25 female) and the mean age was 35.7 years (SD = 5.31, range: 26 to 54). The survey was sent to 35 investigators, nine of whom did not respond. Again, all investigators specialised in criminal procedure and investigation of crimes against minors and/or adults. The amount of work experience ranged from four months to 20 years (M = 5.96, SD = 4.70). The

³² J. Henry. System intervention trauma to child sexual abuse victims following disclosure. – *Journal of Interpersonal Violence* 1997/4, pp. 499–512.

³³ M. Bruck, S.J. Ceci, H. Hembrooke. The nature of children's true and false narratives. – *Developmental Review* 2002/3, pp. 520–554; M.D. Leichtman, S.J. Ceci. The effects of stereotypes and suggestions on preschoolers' reports. – *Developmental Psychology* 1995/4, pp. 568–578.

³⁴ H.L. Westcott, G.M. Davis, R.H.C. Bull. Children's Testimony. *A Handbook of Psychological Research and Forensic Practice*. England: John Wiley & Sons Ltd 2002, p. 213.

³⁵ Cederborg *et al.* (see Note 25).

³⁶ Dando *et al.* (see Note 2); Kebbell *et al.* (see Note 13).

³⁷ Lamb *et al.* (see Note 18); Cederborg *et al.* (see Note 25); Korkman *et al.* (see Note 26); Kask (see Note 27).

first survey was conducted in April 2011 and the second in November 2011. It is important to note that some officers completed both surveys but, because the research was anonymous, the number of investigators who completed both surveys cannot be stated.

2.2. Procedure

The first survey was based on the research of Kebbell *et al.* and of Dando and colleagues.^{*38} Investigators filled in the form either with pencil-and-paper methods or over the Internet, via e-mail. The participants were asked about their gender, their position with the police (the main types of crimes they were investigating), and how long they had worked in their current position. Then they had to evaluate which of the 14 techniques they use in their everyday work on a five-point Likert scale, from 'never' (scoring 1) to 'always' (scoring 5) and how effective they consider these techniques, from 'not at all' (scored 1) to 'very effective' (5).

The techniques were the following: 1) establish rapport; 2) explain the goals and process of the interview to the interviewee; 3) create a good environment for concentration (e.g., decreasing tension and letting the interviewee know that it is OK to give a 'don't know' or 'don't remember' answer); 4) encourage concentration (e.g., 'Try hard to remember'); 5) use witness-compatible questioning (e.g., ask questions in the order that the witness remembers the event); 6) encourage mental reinstatement of context (e.g., 'Try to think about how you were feeling at the time' and 'Try to think of the physical environment where you witnessed the crime'); 7) encourage reporting everything (e.g., 'Tell me everything you can remember, even details you think are trivial and information you can only partially remember'); 8) encourage witnesses to say things in their own words, without interrupting; 9) work with recall in different orders (e.g., 'recall the event in a different order—for example, start at the end and work backwards from there'); 10) change perspective (e.g., 'Try to remember the incident from the perspective of someone else who was involved or from a different physical location'); 11) ask for imagery (e.g., 'Think of a mental image of what you wish to remember'); 12) transfer control of the interview to the witness (e.g., 'You are in charge of this interview, because you witnessed the event; I wasn't there'); 13) draw conclusions at the end of the interview; and 14) provide a final chance to recall more, at the end of the interview (e.g., asking whether the interviewee has anything to add before closure).

In the second survey, the investigators were handed a transcript of an interview of a 13-year-old boy, which was based on several real-life interviews. The investigators had to rate the question types in this transcription with pencil and paper. Although the term 'question types' is used in this paper to characterise utterance categories, some are not questions *per se* (for example, explanations and verbal affirmations).

Six distinct categories were used, stemming from the work of Lamb and colleagues.^{*39} **Invitations** were to prompt free-recall responses or making reference to the details mentioned by the child; letting the child provide a free-form account and indicating any direction in what the child should talk about (e.g., 'Please tell in your own words...', 'Let's talk more about...', or 'Describe...'). **Direct questions** dealt with the details the child had mentioned in a way that allows longer responses by the child (e.g. 'What did you say when...?'). **Option-posing questions** focused the child's attention on details or selection of an interviewer-given option, also clarifying matters (as in 'What was his name?' or 'Where (at what address) do you live?'). **Leading questions** were constructed in such a way that the interviewer indicates what response is expected from the child (e.g., 'Did he punch you several times?'). **Verbal affirmations** were interviewers' responses to children's answers (such as 'yes' or 'uh-uh'). **Explanations** were interviewer remarks during the interview such as references to the child's role, explaining the ground rules (e.g., 'Now I will tell you what's going to happen'). The interview transcript included 111 questions, of which six were invitations, 25 direct questions, 43 option-posing questions, seven leading questions, 17 verbal affirmations, and 13 explanations.

³⁸ Dando *et al.* (see Note 2); Kebbell *et al.* (see Note 13).

³⁹ Lamb *et al.* (see Note 21); M.E. Lamb, I. Hershkowitz, K.J. Sternberg, B. Boat, M.D. Everson. Investigative interviews of alleged sexual abuse victims with and without anatomical dolls. – *Child Abuse and Neglect* 1996/12, pp. 1239–1247.

3. Results

First, results pertaining to the perceived use and effectiveness of cognitive interview techniques among Estonian investigators are presented. Then the results related to investigators' knowledge of question types are analysed.

Table 1 presents the investigators' responses as to perceived frequency of use of cognitive interview techniques. It can be seen that the investigators indicate using some cognitive interview techniques more than others. According to the Friedman test⁴⁰, investigators' perceived use of the cognitive interview techniques varied significantly: $\chi^2(13, n = 25) = 212.71, p = .001$. The Kendall coefficient of concordance⁴¹ indicated that investigators were consistent in their use of the rankings, with $W(13, n = 25) = .65, p = .001$. Investigators stated that they use establishing rapport and last chance to recall most frequently, followed by explaining the goals and stating in one's own words. Less frequently used techniques were imagery and change of perspective.

Table 1: Frequencies and percentages of use ratings for cognitive interview techniques

Technique	Ratings					M (SD)
	Never n (%)	Rarely n (%)	Sometimes n (%)	Often n (%)	Always n (%)	
Establish rapport	0 (0%)	1 (4%)	0 (0%)	7 (28%)	17 (68%)	4.60 (.71)
Explain the goals	0 (0%)	1 (4%)	2 (8%)	9 (36%)	13 (52%)	4.36 (.81)
Create environment	0 (0%)	1 (4%)	9 (36%)	8 (32%)	7 (28%)	3.84 (.90)
Encourage concentration	0 (0%)	1 (4%)	7 (28%)	14 (56%)	3 (12%)	3.76 (.72)
Use witness-compatible questioning	0 (0%)	0 (0%)	5 (20%)	14 (56%)	6 (24%)	4.04 (.68)
Support mental reinstatement of context	0 (0%)	5 (20%)	3 (12%)	15 (60%)	2 (8%)	3.56 (.92)
Encourage to report everything	0 (0%)	1 (4%)	5 (20%)	11 (44%)	8 (32%)	4.04 (.84)
Use telling in one's own words	0 (0%)	1 (4%)	5 (20%)	9 (36%)	10 (40%)	4.12 (.88)
Use recall in different orders	5 (20%)	9 (36%)	8 (32%)	2 (8%)	1 (4%)	2.40 (1.04)
Change perspectives	12 (48%)	9 (36%)	4 (16%)	0 (0%)	0 (0%)	1.68 (.75)
Ask for use of imagery	10 (40%)	11 (44%)	3 (12%)	1 (4%)	0 (0%)	1.80 (.82)
Transfer control	2 (8%)	5 (20%)	10 (40%)	7 (28%)	1 (4%)	3.00 (1.00)
Draw conclusions	0 (0%)	2 (8%)	6 (24%)	8 (32%)	9 (36%)	3.96 (.98)
Provide a last chance to recall	0 (0%)	0 (0%)	2 (8%)	6 (24%)	17 (68%)	4.60 (.65)

n = number of participants, *M* = mean, and *SD* = standard deviation.

Table 2 indicates that investigators consider some of the cognitive interview techniques more effective than others. A Friedman test revealed that investigators' reports of the effectiveness of the components of a cognitive interview varied significantly: $\chi^2(13, n = 25) = 163.49, p = .001$. Again, the Kendall coefficient of concordance indicated significant consensus: $W(13, n = 25) = .50, p = .001$. Rankings for reported use of the cognitive interview techniques and perceived effectiveness were positively correlated, at $r(25) = .792, p = .001$, suggesting that those techniques rated as most useful were used most frequently. Investigators indicated that the most effective techniques are establishing rapport, last chance to recall, and drawing conclusions, followed by explaining the goals, reporting everything, and stating in one's own words. Change in perspectives and use of imagery were considered less effective.

⁴⁰ The Friedman test is a non-parametric statistical test that measures differences across multiple test attempts.

⁴¹ Kendall's coefficient of concordance is another non-parametric statistic. It is used for assessing agreement among raters (0 would denote no agreement and 1 complete agreement).

Table 2: Frequencies and percentages of effectiveness ratings for cognitive interview techniques

Technique	Ratings					M (SD)
	Not effective n (%)	Somewhat effective n (%)	On average, effective n (%)	Effective n (%)	Very effective n (%)	
Establish rapport	0 (0%)	0 (0%)	0 (0%)	8 (32%)	17 (68%)	4.68 (.48)
Explain the goals	0 (0%)	0 (0%)	3 (12%)	11 (44%)	11 (44%)	4.32 (.69)
Create environment	0 (0%)	1 (4%)	7 (28%)	9 (36%)	8 (32%)	3.96 (.89)
Encourage concentration	1 (4%)	3 (12%)	7 (28%)	8 (32%)	6 (24%)	3.60 (1.12)
Use witness-compatible questioning	0 (0%)	1 (4%)	4 (16%)	14 (56%)	6 (24%)	4.00 (.76)
Support mental reinstatement of context	0 (0%)	2 (8%)	5 (20%)	12 (48%)	6 (24%)	3.88 (.88)
Encourage to report everything	0 (0%)	2 (8%)	0 (0%)	12 (48%)	11 (44%)	4.28 (.84)
Use telling in one's own words	0 (0%)	2 (8%)	3 (12%)	10 (40%)	10 (40%)	4.12 (.93)
Use recall in different orders	0 (0%)	9 (36%)	9 (36%)	5 (20%)	2 (8%)	3.00 (.96)
Change perspectives	2 (8%)	14 (56%)	9 (36%)	0 (0%)	0 (0%)	2.28 (.61)
Ask for use of imagery	3 (12%)	9 (36%)	8 (32%)	4 (16%)	1 (4%)	2.64 (1.04)
Transfer control	1 (4%)	3 (12%)	11 (44%)	6 (24%)	4 (16%)	3.36 (1.04)
Draw conclusions	0 (0%)	0 (0%)	4 (16%)	7 (28%)	14 (56%)	4.40 (.76)
Provide a last chance to recall	0 (0%)	0 (0%)	2 (8%)	11 (44%)	12 (48%)	4.40 (.65)

n = number of participants, *M* = mean, and *SD* = standard deviation.

With chi-square analysis⁴², it was found that there were statistically significant effects present for all of the question types (see Table 3). Explanations were correctly rated in 90.7% (*n* = 225) of the cases, $\chi^2(5, n = 248) = 979.58, p = .001$. In 46.5% (*n* = 60) of the cases, the investigators correctly categorised invitations; however, investigators thought in 50.4% of cases (*n* = 65) that invitations were direct questions, $\chi^2(3, n = 129) = 113.95, p = .001$. Direct questions were correctly identified in 58% (*n* = 342) of the cases; to a lesser extent (28.3%, *n* = 167), direct questions were categorised as option-posing questions, $\chi^2(4, n = 590) = 661.20, p = .001$. Fifty-five per cent (*n* = 471) of the option-posing questions were correctly rated; to a lesser degree, the option-posing questions were considered to be either direct or leading questions, or verbal affirmations, $\chi^2(5, n = 854) = 1019.93, p = .001$. Verbal affirmations were correctly categorised in 88.8% (*n* = 342) of cases, $\chi^2(5, n = 385) = 1445.66, p = .001$. Finally, leading questions were correctly rated in 48.8% (*n* = 41) of the cases and were often considered to be either option-posing questions (22.6%, *n* = 19) or verbal affirmations (17.9%, *n* = 15), $\chi^2(3, n = 84) = 30.95, p = .001$. The overall rate of correct categorisation of question types was 64.7%.

⁴² The chi-square test measures the difference between the frequency distributions of responses given by the groups compared.

Table 3: Percentages and frequencies of question type ratings

Category	Explanations	Invitations	Verbal affirmations	Direct questions	Option-posing questions	Leading questions
	n (%)	n (%)	n (%)	n (%)	n (%)	n (%)
Explanations	222 (90.7%)	6 (2.4%)	3 (1.2%)	6 (2.4%)	3 (1.2%)	5 (2.1%)
Invitations	1 (0.8%)	60 (46.5%)	0 (0%)	65 (50.4%)	3 (2.3%)	0 (0%)
Verbal affirmations	13 (3.4%)	1 (0.3%)	342 (88.8%)	4 (1%)	11 (2.9%)	14 (3.6%)
Direct questions	0 (0%)	36 (6.1%)	7 (1.2%)	342 (58%)	167 (28.3%)	38 (6.4%)
Option-posing questions	20 (2.3%)	6 (0.9%)	98 (11.5%)	155 (18.1%)	471 (55%)	104 (12.2%)
Leading questions	0 (0%)	0 (0%)	15 (17.9%)	9 (10.7%)	19 (22.6%)	41 (48.8%)

Question types are presented vertically, with investigators' ratings for different question types given horizontally;
n = number of participants.

4. Discussion

In this study, two main findings emerged. First, investigators more often indicated using techniques that they separately deemed to be effective and that were more related to the communication and process of the interview than techniques involving cognitive memory improvement. Second, investigators were more correct in categorising explanations and verbal affirmations than identifying invitations or leading questions.

In an echo of the findings of Dando *et al.* and Kebbell *et al.*⁴³, the investigators more often utilised those techniques related to the process of the interview. Techniques such as establishing rapport, giving a last chance to recall at the end of the interview, and explaining the goals of the interview were more often used than cognitive techniques such as change in perspectives or recall in different order. Clarke and Milne⁴⁴ too found that many of the memory-enhancing techniques of the cognitive interview are infrequently used. Use and perceived effectiveness were related; i.e., the techniques that are used more are considered to be more effective. This is a notion that should be clearly stressed in education of police officers and investigators in new interviewing techniques. That is, the essence of the technique should be fully understandable to the investigator; otherwise, these techniques are known of but not applied in practice. Therefore, the investigator may be aware of different techniques and even of the point in the interview at which the techniques should be applied but, since he or she does not believe in the technique's effectiveness, it is not used.

As for the question types, investigators were fairly correct in their categorisation of explanations and verbal affirmations. Direct and option-posing questions created more difficulties, and invitations and leading questions were the most difficult to categorise correctly. It is known that invitations and direct questions are used in a smaller proportion than are direct or option-posing questions.⁴⁵ However, as these two types of questions create categorisation difficulties among investigators, the problem may be that, although the investigators know which are 'more appropriate' questions to use and which are not, they have difficulties in deciding in their work as to the categories of various questions.

When one is interviewing a child in preliminary investigation, leading questions can have a large effect on the child's account in response to investigator questions. Therefore, investigators must learn to identify leading questions more clearly and during the interview rephrase leading or option-posing questions as invitations or open-ended questions. However, this task is mentally challenging, because a question is considered leading if it refers to something that the child has not said before⁴⁶ and at the time of the inter-

⁴³ Dando *et al.* (see Note 2); Kebbell *et al.* (see Note 13).

⁴⁴ Clarke, Milne (see Note 15).

⁴⁵ Kask (see Note 27).

⁴⁶ For example, the question 'How many times did the suspect hit you?' can be considered leading if the child has not mentioned the suspect at all up to this point in the interview; in contrast, when the suspect has been mentioned already in the context of hitting ('The man hit me several times'), the question can be categorised as an open-ended question.

view the investigator may possess a large amount of information (including other evidence than the child's statements), which places great demands on his or her information-processing during categorisation of the child's answers in terms of novel or already stated information.

To make investigative interviews with children more effective, good examples and best practice in interviews should be used in training wherein investigators have to evaluate the question types used, or they might evaluate the question types in their own interviews. The interviewer may even know that he or she is using an option-posing or a leading question during the interview but not necessarily possess the knowledge needed for responding accordingly and changing the style in view of different question types. Therefore, there is a strong need for a unified training programme for Estonian investigators in interviewing child or adult victims and witnesses (similarly to the PEACE model in England and Wales; see the work of Dando *et al.*⁴⁷). Investigators would benefit greatly from context-specific learning videos in Estonian (and in Russian). Also, constant feedback to the investigators on their own interviewing would help to maintain the newly acquired structured interviewing techniques' application in practice.

⁴⁷ Dando *et al.* (see Note 2).



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The Right of the Suspect to Counsel in Pre-trial Criminal Proceedings, Its Content, and the Extent of Application

1. Introduction

In order to guarantee that the rights of a suspect are respected throughout the criminal proceedings, he or she should have the right to counsel from the very early stages of the proceedings, at least immediately upon arrest.¹ Nevertheless, as soon as this principle is recognised, several questions arise. First, should this right be interpreted in such a way that the suspect has a right to counsel not only before procedural acts that involve him or her but also during these acts? Secondly, should the right be absolute in nature? In this article, it is suggested that the answer to the first question is 'yes', and the arguments supporting this perspective are brought out. Additionally, it is discussed that this right is subject to restrictions if the suspect him- or herself agrees therewith or there are compelling reasons for this. For us to answer the two questions mentioned above, firstly, the sources of the right of suspects to counsel in pre-trial proceedings are explicated. Here legal acts and judicial practice from both Europe and the United States (US) are used as examples, the latter being a state in which the principles of the right to counsel have been well under development for a long time. Next, the advantages and disadvantages of guaranteeing the right to counsel during pre-trial proceedings without any restrictions are analysed. Finally, warranted justifications for restriction of the right to counsel in pre-trial proceedings are discussed, with mindfulness of the judicial practice of the European Court of Human Rights (ECtHR), the Constitution of the Republic of Estonia², the (draft) legislation of the European Union (EU), and the experience of the US.

¹ Green Paper from the Commission—Procedural Safeguards for Suspects and Defendants in Criminal Proceedings throughout the European Union (19.2.2003, COM(2003) 75 final), Sections 4.1 and 4.3 (a).

² Eesti Vabariigi põhiseadus. – RT 1992, 26, 349; RT I, 27.4.2011, 2 (in Estonian). The Constitution of the Republic of Estonia. Unofficial translation available at <http://www.legaltext.ee/et/andmebaas/tekst.asp?loc=text&dok=X0000K1&keel=en&pg=1&ptyyp=RT&tyyp=X&query=p%F5hiseadus> (most recently accessed on 16.8.2012).

2. The sources of the right to counsel in pre-trial criminal proceedings

According to the judicial practice of the Estonian Supreme Court, the right to defence is one of the main procedural principles of the rule of law and gives a person the right to defend him- or herself against criminal charges with every means set forth by law.^{*3} One of the defence rights is suspects' right to counsel. The first two sentences of the Constitution of the Republic of Estonia's §21 (1) establish the following:

Everyone who is deprived of his or her liberty shall be informed promptly, in a language and manner which he or she understands, of the reason for the deprivation of liberty and of his or her rights, and shall be given the opportunity to notify those closest to him or her. A person suspected of a criminal offence shall also be promptly given the opportunity to choose and confer with counsel.

The second sentence of §21 (1) of the Constitution is the only sentence in the Constitution of the Republic of Estonia that considers the right to counsel.^{*4}

The suspect's right to choose counsel and confer with him or her is also provided for by the Estonian Code of Criminal Procedure^{*5} (CCP). According to §34 (1) 3) of the CCP, the suspect enjoys the right to counsel's assistance^{*6}, and, according to the fourth clause of the same subsection, he or she has the right to confer with counsel without the presence of other persons. These rights have to be promptly explained to the suspect (first sentence of §33 (2) of CCP). Additionally, the suspect has the right to the presence of counsel when interrogated or participating in confrontation, comparison of testimony to circumstances, or presentation for identification (§34 (1) 5) of CCP). Therefore, when interpreting the Constitution and the CCP together, one could conclude that in Estonia as soon as a person acquires the status of a suspect in criminal proceedings, he or she has the right to counsel, which comprises the right to confer with that person, receive his or her assistance, and have him or her present during the procedural acts that are performed in the presence of the suspect.

The ECtHR has acknowledged suspects' right to counsel in pre-trial proceedings for quite a long time.^{*7} However, the most important judgement, in the case *Salduz v. Turkey*^{*8}, was handed down by that court very recently. Unfortunately, the Court's conclusions in this judgement are not unambiguous: there is an on-going dispute in Europe about whether the ECtHR acknowledged with this judgement suspects' right to have counsel present during interrogations, the right the ECtHR had not acknowledged before. Some scholars say that it did so, while others think that the *Salduz* judgement is not clear on this point.^{*9}

In the *Salduz* judgement, the ECtHR reassured that the right to counsel provided for in Article 6, paragraph 3 of the European Convention on Human Rights^{*10} (ECHR) as one element of the concept of a fair trial set forth in Article 6, paragraph 1 of that convention may exist already before the case is sent to trial.^{*11} Next the Court explained that, under Article 6 of the ECHR, it is required that the accused (in the context of Estonian law, the suspect) be guaranteed the assistance of counsel already 'at the initial stages of police interrogation'.^{*12} As can be seen from the wording of the judgement, the Court has not stated directly that

³ Supreme Court Criminal Chamber ruling, 3-1-1-114-02, paragraph 7.3. – RT III 2002, 34, 370 (in Estonian).

⁴ E.-J. Truuväli *et al.* (eds). *Eesti Vabariigi põhiseadus: Kommenteeritud väljaanne* (The Constitution of the Republic of Estonia: Commented Edition), 2nd ed. Tallinn: Juura 2008, §21 (comment 6) (in Estonian).

⁵ *Kriminaalmenetluse seadustik*. – RT I 2003, 27, 166; RT I, 17.4.2012, 6 (in Estonian).

⁶ In accordance with §45 (1) of the CCP, counsel may participate in a criminal proceeding as of the moment at which a person acquires the status of a suspect in the proceedings.

⁷ *John Murray v. the United Kingdom*, application no. 18731/91, 8.2.1996; *Magee v. the United Kingdom*, application no. 28135/95, 6.6.2000; *Brennan v. the United Kingdom*, application no. 39846/98, 6.10.2001.

⁸ *Salduz v. Turkey*, application no. 36391/02, 27.11.2008.

⁹ A. Beijer. False confessions during police interrogations and measures to prevent them. – *European Journal of Crime, Criminal Law & Criminal Justice* 2010 (18), pp. 312–313; C. Brants. The reluctant Dutch response to *Salduz*. – *Edinburgh Law Review* 2011 (15), p. 302.

¹⁰ The European Convention on Human Rights and Fundamental Freedoms. Available at http://www.echr.coe.int/NR/rdon-lyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/o/CONVENTION_ENG_WEB.pdf (most recently accessed on 1.3.2012).

¹¹ See Note 8, p. 50.

¹² *Ibid.*, p. 52. But not during the initial questioning when the person is not yet suspect: see *Smolik v. Ukraine*, application no. 11778/05, 19.2.2012. In 2010, this court expanded the right to counsel to those situations wherein the suspect is deprived of his or her liberty irrespective of any questioning; see *Dayanan v. Turkey*, application no. 7377/03, 13.10.2009, p. 32. Additionally, the Court has found since that the guarantees described in *Salduz* have to be applied for witnesses also, when they are in reality suspected of a crime; see *Brusco v. France*, application no. 1466/07, 14.10.2010, p. 47.

suspects enjoy a right to have counsel present during interrogations. However, in several recent cases, the ECtHR has referred to the *Salduz* judgement and concluded that violation of Article 6 took place, on the basis of a finding that counsel was not present during interrogation.^{*13} This might be a basis for concluding that, according to the judicial practice of the ECtHR, suspects have the right to have counsel present during interrogations. Even though the wording of the *Salduz* judgement may not be very clear, one thing is certain: this judgement 'sent shock waves out across Europe'^{*14} and caused a number of changes in the interrogation rules of several European countries, although one has to admit that some of these changes are based on a narrow interpretation of the *Salduz* judgement. For instance, the Supreme Court of the Netherlands has interpreted the judgement in such a way that all suspects have a right to consult with a lawyer before interrogation but only minors have a right to have counsel present during interrogation.^{*15} Additionally, in Scotland a right of the detainee to have counsel's advice prior to police interrogation^{*16} was recognised by the decision of the Supreme Court of the United Kingdom in 2010.^{*17} Although it could be said that this was a moderate stance in comparison to what the Supreme Court could have found if it had interpreted the *Salduz* judgement more broadly, the decision immediately caused displeasure among Scots, who did not like the idea of the Supreme Court of the United Kingdom dictating the development of material principles of the Scottish criminal justice system without taking into account its particular features. Additionally, it was claimed in Scotland that as long as the procedure as a whole is fair, the issue of whether suspects should have a right to counsel is of a secondary nature.^{*18} In France, the *Salduz* judgement caused more radical steps and, after several decisions by the French Constitutional Court and the final appeal court with jurisdiction over criminal matters, the French Parliament adopted rules establishing the right of detainees to have counsel present during interrogation.^{*19}

The other aspect of the *Salduz* judgement that remains unclear is the interpretation of the notion of 'police interrogation'. In *Zaichenko v. Russia*^{*20}, the ECtHR held that there is no right to counsel if a person is questioned in the course of a road check, because 'the applicant was not formally arrested or interrogated in police custody'.^{*21} It has been suggested that, given this ruling, a suspect enjoys a right to counsel only when his or her liberty has been limited in a significant way.^{*22} Nevertheless, to be able to draw extensive conclusions, one should await additional judgements from the ECtHR.

The proposal for a directive of the European Parliament and the Council on the right of access to a lawyer in criminal proceedings and on the right to communicate upon arrest^{*23}, which has been drafted in line with the practice of the ECtHR and which is aimed at boosting mutual trust among the Member States^{*24}, emphasises that access to a lawyer must be granted upon questioning^{*25}, deprivation of liberty, or a proce-

¹³ *Aba v. Turkey*, applications no. 7638/02 and 24146/04, 3.3.2009; *Lazarenko v. Ukraine*, application no. 22313/04, 28.10.2010; *Hüseyin Habib Taşkın v. Turkey*, application no. 5289/06, 1.2.2011; *Šebalj v. Croatia*, application no. 4429/09, 28.6.2011.

¹⁴ J.S. Hodgson. Safeguarding suspects' rights in Europe: A comparative perspective. – *New Criminal Law Review* 2011 (14), p. 657.

¹⁵ HR, 30.6.2009, no. 2411.08 J, NbSr 2009, 249.

¹⁶ But not during interrogation, as seen when one analyses paragraph 48 of the judgement. See also F. Leverick. The Supreme Court strikes back. – *Edinburgh Law Review* 2011 (15), p. 290. However, after the *Cadder* judgement, Scotland changed its procedural rules, and now every detainee has a right to consult with his or her counsel before and during questioning (but presence is not required; consultation can be done by telephone also). For more about this, see F. Leverick. The right to legal assistance during detention. – *Edinburgh Law Review* 2011 (15), p. 360.

¹⁷ *Cadder v. HM Advocate* [2010], UKSC 43 (26.10.2010).

¹⁸ P.R. Ferguson. Repercussions of the *Cadder* case: The ECHR's fair trial provisions and Scottish criminal procedure. – *Criminal Law Review* 2011 (10), p. 756: 'It is submitted that the lack of adverse inferences from silence, the short detention period and the corroboration requirement, were all safeguards against miscarriages of justice, and thus reflected a fair criminal procedure—a fairer procedure than a system which lacks these elements, but provides a right of legal advice at the police station.'

¹⁹ A. Dorange, S. Field. Reforming defence rights in French police custody: A coming together in Europe. – *International Journal of Evidence and Proof* 2012 (16), p. 154.

²⁰ *Zaichenko v. Russia*, application no. 39660/02, 18.2.2010.

²¹ *Ibid.*, p. 47.

²² T.A.H.M. Van de Laar, R.L. De Graaff. *Salduz* and *Miranda*: Is the US Supreme Court pointing the way? – *European Human Rights Law Review* 2011 (3), p. 307.

²³ Brussels, 8.6.2011, COM(2011) 326 final, 2011/0154 (COD). Available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2011:0326:FIN:EN:PDF> (most recently accessed on 1.3.2012).

²⁴ *Ibid.*, explanatory memo, p. 4.

²⁵ Later on, the Presidency suggested use of the term 'official interview', explaining that it means 'the official questioning by competent authorities of a suspect or accused person regarding his involvement in a criminal offence, irrespective of the

dural or evidence-gathering act.^{*26} Therefore, the institutions of the EU have interpreted the *Salduz* judgement in such a way that it gives suspects the right to have counsel present during interrogations^{*27}, and, as they use the phrase ‘any questioning by the police’, they do not expect the suspect to be detained or his or her liberty to be restricted in any other way before enjoying the right to counsel. Additionally, in contrast to the judicial practice of the ECtHR, the proposal specifies the situations wherein suspects have a right to have counsel present in pre-trial proceedings: it points out not only questioning and deprivation of liberty but also any other evidence-gathering act in addition to questioning.

In the US, the right to counsel in pre-trial proceedings has historically been divided between two sources: the Fifth^{*28} and the Sixth Amendment.^{*29} In the case *Massiah v. United States*^{*30}, the US Supreme Court (USSC) held that statements deliberately elicited by authorities from the previously indicted accused in the absence of his or her counsel deprived the accused of his or her right to counsel under the Sixth Amendment and, therefore, such statements could not be used as evidence against him or her in trial.^{*31} The next case was *Miranda v. Arizona*^{*32}, in which the USSC held that the prosecution may not use statements made as a result of questioning initiated by authorities after a person has been taken into custody or otherwise deprived of his or her freedom of action in any significant way, unless it demonstrates the use of procedural safeguards effective for securing the Fifth-Amendment privilege against self-incrimination.^{*33} Where an interrogation is conducted without the presence of counsel and a statement is taken, the prosecution’s side has a burden of demonstrating that the defendant knowingly and intelligently waived his or her right to counsel.^{*34} Therefore, the Supreme Court concluded that if a person is held in custody and not yet indicted, the right to counsel is indispensable to the protection of the privilege against self-incrimination: the role of counsel here is to guarantee that people would not testify against themselves involuntarily.

At first, the USSC seemed to have the idea that the *Massiah* and *Miranda* rules are different, with one meant for situations wherein adversary proceedings have already begun and serving the principle of equality of arms and with the other being for the investigative stage of proceedings, wherein the privilege against self-incrimination prevails.^{*35} Nevertheless, the USSC has made a couple of decisions indicating that the *Massiah* and *Miranda* rules are not so different. For example, a statement obtained in breach of the Sixth or Fifth Amendment may be used for impeachment purposes^{*36}, and, also, its ‘fruits’ may be used as evidence during the trial^{*37}; in addition, there is no difference in the waiver rules.^{*38} This has led some authors to propose that there should be one uniform right to counsel from the very beginning of the proceedings^{*39}, which would be an approach similar to that applied in Europe.

place where it is conducted or the stage of the proceedings when it takes place’, according to the revised text of the proposal, document 7337/12, 9.3.2012, p. 14. Available at <http://eurocrim.jura.uni-tuebingen.de/cms/en/doc/1729.pdf> (most recently accessed on 1.4.2012).

²⁶ See Note 23, Article 3, paragraphs 1 (a), (b), and (c).

²⁷ Paragraph 6 of the directive proposal states that the directive ‘promotes the application of the Charter, in particular Articles 4, 6, 7, 47 and 48, by building upon Articles 3, 5, 6 and 8 of the ECHR as interpreted by the European Court of Human Rights’.

²⁸ The Constitution of the United States of America. Available at <http://supreme.justia.com/constitution/> (most recently accessed on 1.3.2012). According to the Fifth Amendment of the Constitution, no person ‘shall be compelled in any criminal case to be a witness against himself’.

²⁹ *Ibid.* According to the Sixth Amendment of the Constitution, in all criminal prosecutions, the accused shall enjoy the right to ‘have the Assistance of Counsel for his defence’.

³⁰ *Massiah v. United States*, 377 U.S. 201 (1964).

³¹ *Ibid.*, pp. 205–206.

³² *Miranda v. Arizona*, 384 U.S. 436 (1966).

³³ *Ibid.*, p. 477.

³⁴ *Ibid.*, p. 475.

³⁵ B.G. Hungate-Noland. *Texas v. Cobb: A narrow road ahead for the Sixth Amendment right to counsel*. – University of Richmond Law Review 2001–2002 (35), pp. 1205–1206.

³⁶ On the Sixth Amendment right to counsel: *Kansas v. Ventris*, 129 S. Ct. 1984, 1847 (2009). On the Fifth Amendment privilege against self-incrimination: *Harris v. New York*, 401 U.S. 222 (1971).

³⁷ On the Sixth Amendment right to counsel: *Nix v. Williams*, 467 U.S. 431 (1984). On the Fifth Amendment privilege against self-incrimination: *Oregon v. Elstad*, 470 U.S. 298, 311 (1985).

³⁸ In *Patterson v. United States*, the USSC decided that the Fifth Amendment waiver is sufficient for waiving the Sixth Amendment right to counsel (487 U.S. 285 (1988)).

³⁹ D.C. Dearborn. ‘You Have the Right to an Attorney’, But Not Right Now: Combating *Miranda*’s Failure by Advancing the Point of Attachment under Article XII of the Massachusetts Declaration of Rights. – Suffolk University Law Review 2011 (44), p. 363; Suffolk University Law School Research Paper No. 10-64, 2011 p. 363. Available at SSRN: <http://ssrn.com/>

3. To guarantee, or not to guarantee, that is the question

There are a number of arguments supporting the ECtHR's conclusion that the right to counsel should be guaranteed to suspects 'at the initial stages of police interrogation'.

Counsel provides the suspect with the technical skills to exercise his or her rights in the criminal proceedings. The suspect, who is usually a common person without expertise in substantive and procedural law, does not have full awareness of his or her rights and lacks skill in exercising them.^{*40} Here counsel contributes to the principle of equality of arms.^{*41} In the context of pre-trial proceedings, it is very difficult to exclude the right to counsel on the basis of an argument that the proceedings are not yet adversarial, as some justices of the USSC have tried to do.^{*42} As the larger body of evidence later presented in the trial is gathered during the pre-trial stage of proceedings—and if it is not presented as evidence in trial, at least the information about evidence (e.g., about witnesses) is obtained during pre-trial proceedings—it is most necessary for the suspect to have a legal professional by his or her side.^{*43} Although, for instance, according to §211 (2) of the Estonian CCP, an investigative body and a Prosecutor's Office shall ascertain in pre-trial procedure the facts both vindicating and speaking against the suspect, one can readily conclude that, because, in reality, both of these bodies have finding the guilty party as a goal, the suspect clearly needs a provider of assistance who is completely on his or her side.

Two purposes of the right to counsel in pre-trial proceedings should be mentioned separately when it comes to counsel's technical skills. First, counsel is the one who explains to the suspect his or her rights and whose assistance, therefore, serves as a 'procedural guarantee of the privilege against self-incrimination'.^{*44} Second, as counsel performs supervision of the activities of authorities, his or her presence also serves as a guarantee against ill-treatment of the suspect^{*45}, reducing its likelihood and ensuring that, if the authorities do engage in it, counsel can give testimony of this in court.^{*46} This purpose is closely related to that mentioned earlier, as authorities sometimes try to convince the suspect to waive the privilege against self-incrimination by using illicit means of coercion. It should be mentioned that the term 'illicit means of coercion' ought to be taken in a broad interpretation. At the top of the scale of these means is physical torture, highly disapproved of by many authors of law-review articles, but, in addition, means that do not fall into this category should be described here. In the US, research has shown that certain interrogation tactics (e.g., presenting misinformation about evidence connecting the suspect with the crime scene, using techniques to induce stress and discomfort in the suspect, or using multiple interrogation tactics simultaneously) sometimes coerce suspects to change their beliefs about their guilt, which may finally lead to a situation in which the suspect, while actually innocent, admits his or her guilt and even believes in it (these confessions are called internalised false confessions).^{*47} Additionally, the authorities may create a situation so stressful for the suspect (e.g., by restraining his or her access to a lawyer and interrogating him or her non-stop for a

abstract=1725546(most recently accessed on 1.3.2012). (They have preferred to have citation to the Suffolk University Law Review as well, the SSRN publishes faximile copy of the Law Review)

⁴⁰ S. Trechsel. *Human Rights in Criminal Proceedings*. Oxford: Oxford University Press 2005, p. 245; *Salduz v. Turkey* (see Note 8), p. 54.

⁴¹ *Salduz v. Turkey* (see Note 8), p. 53.

⁴² *Escobedo v. Illinois*, 378 U.S. 478 (1964), p. 494, Justice Stewart, dissenting.

⁴³ *Salduz v. Turkey* (see Note 8), p. 54. It could be claimed that the course of pre-trial proceedings determines the course of trial.

⁴⁴ *Lazarenko v. Ukraine* (see Note 13), p. 50: 'Having access to a lawyer ensures that the accused was able to make a good decision for his or her defence.' A.M. Torres Chedraui. An analysis of the exclusion of evidence obtained in violation of human rights in light of the jurisprudence of the ECtHR. – *Tilburg Law Review* 2010–2011 (15), pp. 223–224.

⁴⁵ *Salduz v. Turkey* (see Note 8), pp. 53–54.

⁴⁶ Beijer (see Note 9), p. 324.

⁴⁷ L.A. Henkel, K.J. Coffman. Memory distortions in coerced false confessions: A source monitoring framework analysis. – *Applied Cognitive Psychology* 2004 (18), pp. 569, 582. The more strongly the authorities believe that the suspect is, in fact, guilty, the more likely they are to use these techniques on him or her. However, there is not actually any reason to believe that they are able to assess correctly whether the suspect is guilty or not. On the contrary, there is considerable research concluding that interrogators are not accurate in that. M. Costanzo, E. Gerrity, M.B. Lykes. Psychologists and the use of torture in interrogations. – *Analyses of Social Issues and Public Policy* 2007 (7)/1, p. 11.

long time) that the suspect admits guilt although knowing that he or she is not guilty (these confessions are called compliant false confessions).^{*48}

One can easily see what the main objection is to providing the suspect with counsel's assistance during the pre-trial proceedings, mainly during interrogation (and any other evidence-gathering act wherein the suspect is expected to provide the police with information): counsel's advice and presence may impair authorities' chances of getting information from the suspect.^{*49} Custodial interrogation is considered to be 'the principal weapon in the investigative arsenal of the police', especially in the context of tight budgets and society's pressure to control crime.^{*50} As was discussed above, counsel as a legal professional knows the suspect's rights, including the privilege against self-incrimination, usually much better than the suspect him- or herself does and can advise him or her to exercise such a right during interrogation. Also, counsel as an observer of the lawfulness of the interrogation can intervene every time the authorities use coercive methods on the suspect. All of this may reduce the authorities' chance to obtain information from suspects. There are some situations in which the need to get the information from the suspect is especially urgent and wherein counsel's participation may, therefore, harm important legal rights in the relevant society: situations in which human lives or any other important legal values are in direct danger and the police have grounds to believe that the suspect possesses the information necessary for eliminating that danger. For the above-mentioned reasons, there is nothing surprising about the fact that there were strong objections to the *Miranda* decision in the US.^{*51} Moreover, in the US even contemporary interrogation materials emphasise that, in order to obtain a confession from the suspect, the interrogator has to be alone with him or her. Depending on the circumstances, the interrogator should try to develop a relationship in which he or she exerts dominance over the suspect, establishes a trustful connection with him or her, or convinces him or her that confession is his or her best choice. If counsel is present, it is likely that the interrogator will not have enough time to develop one of these relationships.^{*52}

There is an interesting dilemma faced by the justice system and, more specifically, the whole society, where the right to have counsel present during interrogations is concerned. It could be summarised as follows: 'The human craving for justice is evident from public reaction whenever a criminal evades capture and punishment—and whenever an innocent is wrongfully convicted and sent to prison.'^{*53} The more serious the charges the suspect faces, the more society is interested in him or her being caught and punished, which means that the best option would be to interrogate him or her without the presence of counsel, as counsel's assistance may prevent him or her from speaking. But, at the same time, the more serious the charges, the more society is interested in excluding the chance of an innocent person being convicted, which means that the assistance of counsel should be guaranteed to the suspect from the very beginning. This dilemma, which also arises with less serious crimes (although not so sharply), is a very difficult one to solve. So far, both the USSC and the ECtHR have addressed it on the basis of the specific facts of the case. In addition, the EU has tried to bring some clarity to the matter, as will be analysed in the next section of this article.

4. Situations in which counsel does not have to be present in pre-trial proceedings

According to the judicial practice of the ECtHR and the USSC, the right to counsel's presence in pre-trial proceedings may be waived by suspects. Research in the US shows that even after the *Miranda* decision, the number of waivers made in the interrogation room has been considerable. For example, R.A. Leo, who observed approx. 200 interrogations, concluded that 78% of the suspects ultimately waived their *Miranda*

⁴⁸ S.M. Kassin *et al.* Police-induced confessions: Risk factors and recommendations. – Law and Human Behavior 2010 (34)/3, pp. 14–15.

⁴⁹ Trechsel (see Note 40), p. 284.

⁵⁰ R.J. Toney. Disclosure of evidence and legal assistance at custodial interrogation: What does the European Convention on Human Rights require? – International Journal of Evidence and Proof 2001 (5), p. 40.

⁵¹ *Miranda v. Arizona* (see Note 32), p. 516, Justices Harlan, Stewart, and White, dissenting.

⁵² W.S. White. Deflecting a suspect from requesting an attorney. – University of Pittsburgh Law Review 2006–2007 (68), pp. 32–33.

⁵³ Kassin *et al.* (see Note 48), p. 49.

rights.⁵⁴ According to the *Miranda* decision, the waiver should be made ‘knowingly and intelligently’. Decisions that followed *Miranda* show that the USSC accepts waivers easily: when the suspect has waived his or her *Miranda* rights, it is presumed that the waiver is valid.⁵⁵ The police are even allowed to use trickery and deception in order to achieve waiver of the right to counsel during an interrogation⁵⁶, which has led legal theorists and practitioners to propose that the USSC should take Europe as an example in this field.⁵⁷

The ECtHR has a stricter approach to the matter, stating that ‘a waiver of the right [to counsel] must be established in an unequivocal manner and be attended by minimum safeguards commensurate to its importance’.⁵⁸ A waiver has to be voluntary, knowing, and intelligent, which means that ‘it must be shown that he or she [the suspect] could reasonably have foreseen what the consequences of his conduct would be’.⁵⁹ In its judgements, the ECtHR has also stressed a need to protect vulnerable suspects and explained that here the authorities should put extra effort into guaranteeing that the person understands the right and the consequences of the waiver of it.⁶⁰ This ECtHR stance is in accordance with research done in the US concluding that a substantial proportion of adolescents and adults with mental disabilities have impaired understanding of their *Miranda* rights and even if the adolescents seem to have an adequate understanding of these rights, they do not grasp the relevance of these to their own situation.⁶¹ In Estonia, waiver of the right to counsel in pre-trial proceedings is not allowed if the suspect has not reached the age of majority or has a mental disability (§45 (2) 1) and 2) of CCP). This means that the CCP, as does the ECtHR, assumes that vulnerable suspects need special protection.

The ECtHR allows exceptions to the right to have counsel in the pre-trial stage, stating that ‘a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right’. Still it has to be made sure that these restrictions do not unduly prejudice the suspect’s right to a fair trial.⁶² Any exception should be ‘clearly circumscribed and its application strictly limited in time’, the principles that should particularly be followed in the case of serious charges.⁶³ The ECtHR has not provided us with an example of what could constitute a compelling reason. In the US, the USSC has held that the police need not give the *Miranda* warnings when doing so would pose a threat to public safety—e.g., if the suspect’s silence might prevent police from discovering a dangerous weapon.⁶⁴

The proposal for a directive provides that the right to have counsel present during interrogation may be derogated from for compelling reasons related to urgent need to avert serious adverse consequences for the life or physical integrity of one or more persons.⁶⁵ Additionally, in an evidence-gathering act, the right

⁵⁴ R.A. Leo. Inside the interrogation room. – *Journal of Criminal Law & Criminology* 1995–1996 (86), pp. 276, 301.

⁵⁵ *E.g.*, *Connecticut v. Parrett*, 479 U.S. 523 (1987).

⁵⁶ *E.g.*, the USSC has held to be valid a confession made by a suspect who thought that as long as his or her statements were not in writing they could not be used against him or her (*North Carolina v. Butler*, 441 U.S. 369 (1979)). It has also refused to exclude confessions obtained after the police falsely told a suspect that his or her colleague had already confessed to the crime (*Frazier v. Cupp*, 394 U.S. 731 (1969)) and after the police deceived a suspect’s lawyer as to when interrogation would take place (*Moran v. Burbine*, 475 U.S. 412 (1986)).

⁵⁷ See, for example, C. Slobogin. An empirically based comparison of American and European regulatory approaches to police investigation. – *Michigan Journal of International Law* 2000–2001 (423) 22, pp. 423–456. This piece raised Germany as an example for the US. According to §136a (1) of the German Code of Criminal Procedure, available at http://www.gesetze-im-internet.de/englisch_stpo/englisch_stpo.html (most recently accessed on 1.3.2012), the accused’s freedom to make up his or her mind and to manifest his or her will shall not be impaired by ill-treatment, induced fatigue, physical interference, administration of drugs, torment, deception, or hypnosis. In Estonia, the CCP provides that evidence shall not be collected by torturing a person or using violence against him or her in any other manner, or through means affecting a person’s memory capacity or degrading his or her human dignity (§64 (1)).

⁵⁸ *Pishchalnikov v. Russia*, application no. 7025/04, 24.9.2009, p. 77.

⁵⁹ *Ibid.* The EU acknowledges the waiver in similar conditions in Article 9 of the proposal for a directive discussed above.

⁶⁰ *Panovits v. Cyprus*, application no. 4268/04, 11.12.2008. See also *Plonka v. Poland*, wherein the suspect was an alcoholic and the Court stated that ‘[i]n the circumstances of the present case, the assertion in the form stating her rights that the applicant had been reminded of her right to remain silent or to be assisted by a lawyer [...] cannot be considered reliable’ (application no. 20310/02, 31.3.2009, p. 37).

⁶¹ *Kassin et al.* (see Note 48), p. 8.

⁶² *Salduz v. Turkey* (see Note 8), p. 55: ‘The rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction.’

⁶³ *Ibid.*, p. 54.

⁶⁴ *New York v. Quarles*, 467 U.S. 649 (1984).

⁶⁵ Note 23, Article 8 (a).

to have counsel present should be guaranteed, unless this would prejudice the acquisition of evidence (an explanatory memorandum clarifies that this refers to situations wherein the evidence to be gathered could be altered, removed, or destroyed through the passage of time needed for the lawyer to arrive).^{*66} The Member States objected to these provisions, expressing their fear that the obligatory presence of counsel during evidence-gathering acts could lead to delays. Additionally, in their opinion, the closed list of compelling reasons is too strict, because often derogation would be necessary for investigative reasons.^{*67} Several Member States also stated that where the rules of criminal procedure are concerned, the rights of suspects are only one consideration: it also has to be taken into account that the rules of criminal procedure should enable criminal proceedings to be conducted effectively and efficiently, which is in the interest not only of the wider public who expect offenders to be investigated and prosecuted but also of suspects, ensuring that matters are to be resolved expeditiously.^{*68} This led the Presidency to propose that only the term 'compelling reasons' be provided for in the proposal, with the explanation that '[s]uch postponements could in particular be justified when there is an urgent need to avert serious adverse consequences for the life, liberty or physical integrity of a person, to prevent a substantial jeopardy to ongoing criminal proceedings, or when it is extremely difficult to provide a lawyer due to the geographical remoteness of the suspect, e.g. in overseas territories'.^{*69} As for the evidence-gathering acts, the Presidency proposes that it should be up to Member States to determine which evidence-gathering acts the suspect has the right for counsel to attend. Nevertheless, there are some acts for which the Presidency considers participation of counsel compulsory: identity parades, confrontations, and experimental reconstruction of the crime scene.^{*70}

From the developments in the EU described above, it can be concluded that both the ECtHR and the EU have left the concept of 'compelling reasons' to be defined by the Member States in light of the special circumstances of the case. In Estonia, the Supreme Court has interpreted §21 (1) of the Constitution and stressed that this right may be restricted only for purposes of protecting another fundamental right or value arising from the Constitution.^{*71} This could be, for example, the life of another person, physical integrity, freedom, property (dealt with in §§ 16, 18, 20, and 32 of the Constitution, respectively), or public order (the Constitution explicitly allows restriction of rights provided for in its §§ 26, 33, 40, 45, and 47 in order to protect public order). Nevertheless, the restriction must always be provided for by law.^{*72} According to the second sentence of §33 (2) of the CCP, interrogation may be postponed if this is necessary for ensuring the participation of counsel. To interpret this sentence in accordance with the Constitution, one has to conclude that whenever counsel cannot be present during the interrogation but the suspect wishes him or her to be or when the presence of counsel is mandatory, the interrogation has to be postponed. Therefore, it could be argued that in Estonia any restriction of suspects' right to have counsel present during interrogations is prohibited unless the suspect him- or herself waives the right to counsel. If the legislator finds any other restriction to be necessary, it should add it to the CCP.

5. Conclusions

The right to have counsel in pre-trial proceedings is not an absolute right, as one can conclude from analysis of the legal acts of Estonia, stances taken by the EU, and the judicial practice of the ECtHR and of the USSC. First, it is a right that can be waived, at least in the majority of criminal cases. Secondly, different values must be taken into account when this right is applied, which means that in some cases it could be concluded that the suspect does not have the right to have counsel present during a specific stage of the pre-trial proceedings even if he or she demands a lawyer's presence. According to the judicial practice of the Supreme

⁶⁶ *Ibid.*, Article 3, paragraph 1 (b) and explanatory memo, p 20.

⁶⁷ General comments on the proposal, document 12643/11, 13.7.2011. Available at <http://eurocrim.jura.uni-tuebingen.de/cms/en/doc/1590.pdf> (most recently accessed on 1.4.2012).

⁶⁸ Note by Belgium, France, Ireland, the Netherlands, and the United Kingdom on the proposal, document 14495/11, 22.9.2011. Available at <http://eurocrim.jura.uni-tuebingen.de/cms/en/doc/1625.pdf> (most recently accessed on 1.4.2012).

⁶⁹ See Note 25, p. 21.

⁷⁰ *Ibid.*, p. 19.

⁷¹ Judgement of the Constitutional Review Chamber of the Supreme Court of 18.6.2010, case 3-4-1-5-10, paragraph 38, 43. Available at <http://www.nc.ee/?id=1176> (most recently accessed on 1.3.2012).

⁷² Truuväli *et al.* (see Note 4), §11 (comment 3.3.2).

Court of Estonia, the values that may bring about this situation are the ones that are protected by the Constitution. The viewpoint of the EU and the ECtHR is that the restriction allowed to the right to have counsel in pre-trial proceedings is any compelling reason stemming from specific facts of the case. Nevertheless, in order for the right to have counsel present in pre-trial proceedings in Estonia to be restricted, the restriction has to come from the law. The CCP provides that a suspect may waive his or her right to have counsel unless that participation is mandatory under the CCP, but it does not give any other justifications for restrictions, which means that in Estonia the right to have counsel present in pre-trial proceedings is an absolute one, unless the suspect him- or herself agrees to participate without counsel.



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Mortality Rate and Causes of Death of Delinquent Individuals:

Data from the Estonian Longitudinal Study
of Criminal Careers*¹

1. Introduction

This paper focuses on the risk of early death and dying of natural and unnatural (external) causes among former juvenile delinquents in Estonia. We examine first the question of to what extent former juvenile delinquents have a greater risk of dying earlier and dying of different causes than the general population in Estonia do. Secondly, the paper looks at the differences in mortality rates and causes of death between persistent and desisting offenders. Thirdly, we compare mortality rates for cohort members and causes of death among Estonian and non-Estonian delinquents.

2. Delinquency and mortality

It is a well-established empirical fact that delinquent individuals have higher death rates than do non-delinquent individuals. In a longitudinal study of juvenile delinquency and adult crime up to age 32, the Gluecks found that the death rate for delinquents was twice that of matched non-delinquent individuals.*² Laub and Vaillant used the Gluecks' original data and followed almost 500 delinquent and 500 matched non-delinquent comparison males until age 65. According to their findings, delinquent subjects were more than twice as likely to die (51%) as the 196 boys with no unofficial delinquency (23%) from natural or unnatural causes.*³ In a 30-year follow-up, Robins and O'Neal found a mortality rate for problem children with conduct disorder by age 40 that was twice as high as that of control-group members.*⁴ Other longitudinal and follow-up studies that have followed delinquent boys into adulthood have observed similar trends.

¹ The research was supported by Estonian Science Foundation Grant 8074.

² S. Glueck, E. Glueck. *Delinquents and Nondelinquents in Perspective*. Cambridge, MA: Harvard University Press 1968.

³ J.H. Laub, E. Vaillant. *Delinquency and mortality: A 50-year follow-up study of 1,000 delinquent and nondelinquent boys*. – *American Journal of Psychiatry* 2000 (157), pp. 96–102.

⁴ L.N. Robins, P. O'Neal. *Mortality, mobility, and crime: Problem children thirty years later*. – *American Sociological Review* 1958 (23), pp. 162–171.

Rydellius, in following 832 Swedish boys, inmates of probationary schools, noted a death rate by age 40 that was four times higher than statistically expected.^{*5} In a study of an unselected birth cohort of 12,058 children born live in Northern Finland in 1966, Räsänen and colleagues found that by their 27th birthday the mortality rate of men with combined personality disorders and criminality was more than three times higher than the average for the age cohort.^{*6}

Lattimore and colleagues examined the risk of death among young male serious offenders who were paroled from the California Youth Authority and followed for 11 years. Among 1,998 subjects, they found, 109 (5.5%) had died, for twice the expected rate.^{*7} Nieuwbeerta and Piquero found in their study that in the subsequent 25-year period in the Netherlands, convicted criminals run about 1.8 times as much risk of dying as the average citizen. The risk of dying of natural causes was 1.6 times as high, and the change of dying of unnatural causes was 2.5 times as high.^{*8} Another seven-year follow-up study, of 118 formerly incarcerated delinquents, revealed an extremely high mortality rate for the sample. Seven individuals (5.9%) among those studied died before their 25th birthday, putting them at 58 times the national average for individuals in their age group.^{*9} A study by Teplin *et al.* revealed the overall mortality rate among delinquents to be more than four times the general-population rate.^{*10}

Criminological theories and developmental or life-course theories anticipate a difference between life trajectories among offenders (desisting, persistent, etc.). Following these theories, one can hypothesise that serious offenders have a greater risk of premature and unnatural death when compared to non-offenders or sporadic offenders. However, as Nieuwbeerta and Piquero^{*11} note, surprisingly few studies have concentrated on exploration of the relationships among criminal careers, mortality rates, and causes of death. There are two very popular general perspectives that offer explanations as to why delinquent individuals might have a higher death rate. According to the first perspective, criminals die earlier and experience more premature deaths as a direct consequence of their delinquency and way of life. The same individual trait—a low level of self-control—accounts for the relationship of antisocial behaviour with premature death.^{*12} Gottfredson and Hirschi have argued that human behaviour is consistent across various situations. Individuals with low self-control have a high probability of succumbing to the temptations of short-term pleasures with little regard for the long-term negative consequences.

Indeed, it is relatively well known that, among other things, offenders engage in more risky sexual behaviour, are more often victims of violent crime, and are more involved in accidents of various types than non-offenders.^{*13} Standing out with a special role in the elevated mortality among delinquents is substance abuse. Offenders tend to die earlier because they engage more often in excessive alcohol and drug use, which increase the risk of premature death. Excessive drinking has a number of harmful effects. It increases the risk of cancer of the liver, stroke, cerebral infarcts, and damage to the coronary arteries.^{*14} Research

⁵ P.A. Rydellius. The development of antisocial behaviour and sudden violent death. – *Acta Psychiatrica Scandinavica* 1988 (78), pp. 398–403.

⁶ P. Räsänen, J. Tihonen, M. Isohanni, J. Moring, M. Koiranen. Juvenile mortality, mental disturbances and criminality: A prospective study of the Northern Finland 1966 birth cohort. – *Acta Psychiatrica Scandinavica* 1998 (97), pp. 5–9.

⁷ P.K. Lattimore, R.L. Linster, J.M. MacDonald. Risk of death among serious young offenders. – *Journal of Research in Crime and Delinquency* 1997 (34)/2, pp. 187–209.

⁸ P. Nieuwbeerta, A.R. Piquero. Mortality rates and causes of death of convicted Dutch criminals 25 years later. – *Journal of Research in Crime and Delinquency* 2008 (45)/3, pp. 256–286.

⁹ C.A. Yeager, D.O. Lewis. Mortality in a group of formerly incarcerated juvenile delinquents. – *American Journal of Psychiatry* 1990 (147), pp. 612–614.

¹⁰ L.A. Teplin, G.M. McClelland, K.M. Abram, D. Mileusnic. Early violent death among delinquent youth: A prospective longitudinal study. – *Pediatrics* 2005 (115), pp. 1586–1593.

¹¹ Nieuwbeerta, Piqueiro (see Note 8), p. 256.

¹² M. Gottfredson, T. Hirschi. *General Theory of Crime*. Stanford, CA: Stanford University Press 1990; T. Hirschi, M. Gottfredson (eds). *The Generality of Deviance*. New Brunswick, NJ: Transaction Publishers 1994.

¹³ D.P. Farrington. Crime and physical health: Illnesses, injuries, accidents, and offending in the Cambridge Study. – *Criminal Behaviour and Mental Health* 1995/5, pp. 221–255; D. Farrington. Developmental and life-course criminology: Key theoretical and empirical issues—the 2002 Sutherland Award Address. – *Criminology* 2003 (41), pp. 221–255; M. Junger, M. Dekovic. Crime as risk-taking: Co-occurrence of delinquent behavior, health endangering behaviors, and problem behaviors. – M.R. Gottfredson, C. Britt (eds). *Advances in Criminological Theory*. New Brunswick, NJ: Transaction Publishers 2003, pp. 213–248.

¹⁴ E.L. Abel, P. Zeidenberg. Age, alcohol and violent death: A postmortem study. – *Journal for the Study of Alcoholism* 1985 (46), pp. 228–231; S.P. Andreasson, P. Allebeck, A. Romelsjö. Alcohol and mortality among young men: Longitudinal study of Swedish conscripts. – *British Medical Journal* 1988 (296), pp. 1021–1025.

has found that offenders are more frequently involved in traffic accidents.^{*15} Studies have also found that involvement in crime was associated with more than double the likelihood of involvement in risky behaviour in traffic.^{*16} One of the strongest correlates of crime is the linkage between offending and victimisation, as offenders themselves are at a high risk of being victimised.^{*17} Lattimore and colleagues found in their study that 47% of premature deaths of paroled offenders were a result of homicide.^{*18} In the prospective study of the Northern Finland 1966 birth cohort, it was found that, for those individuals who had died by age 27, all deaths were of external causes and 95.5% of deaths were homicides or legal interventions.^{*19} There is evidence of a link between adolescent and youth suicides and delinquency.^{*20}

Summarising the research on mortality rates and causes of death, one can conclude that offenders are more likely to die in their early years and are more likely to die from unnatural causes (i.e., accident, homicide, or suicide) and natural causes (i.e., diseases). The lower self-control rate is related to a higher probability of delinquency and high-risk behaviour that, in turn, can lead to premature death. Accordingly, the mortality rates of serious offenders should be higher than those among sporadic delinquents or non-delinquents for both unnatural and natural causes. From these findings, we can hypothesise that involvement in criminality can predict risk of death; e.g., the longer and more serious the criminal involvement is, the higher is the risk of premature death.

The second perspective is based more on the fact that low socio-economic status and general deprivation lead individuals to poor education and low job status, which, in turn, lead to (chronic) illness and premature mortality.^{*21} Lack of self-care due to a dysfunctional upbringing, parental neglect, and social deprivation can result in increased and early mortality. Adolescents from dysfunctional families often have problems at school, are truant, and consume drugs or alcohol. Delinquency in such cases is a result of socio-economic deprivation. Offenders of this sort, who actually need social support, became subjects of social control and are sent to special institutions for juveniles.

The last perspective has received less attention and empirical support in the international literature. However, it seems to be important to discuss in the context of the large-scale socio-economic changes that Estonia has experienced over the last 20 years. The challenges of transition were especially great for the non-Estonian population. The study examining ethnic differences in mortality rates in Estonia has shown that in 1989–2000, ethnic differences in life expectancy increased from 0.4 years to 6.1 years among men and from 0.6 to 3.5 years among women. In 2000, Russians had higher mortality than Estonians in all age groups and for almost all causes of death selected for study. The authors conclude that political and economic upheaval, increasing poverty, and alcohol consumption can be considered the main underlying causes of the widening ethnic mortality gap.^{*22} Taking this into account, our next hypothesis is that we can expect higher mortality rates for non-Estonian delinquents as compared to Estonians in our sample.

¹⁵ M. Junger. Accidents. – T. Hirschi, M. Gottfredson (eds). *The Generality of Deviance*. New Brunswick, NJ: Transaction Publishers 1994, pp. 81–112; M. Junger, G.-J. Terlouw, P.G.M. van der Heijden. Crime, accidents and social control. – *Criminal Behaviour and Mental Health* 1995 (5), pp. 386–410; M. Junger, R. West, R. Timman. Crime and risky behavior in traffic: An example of cross-situational consistency. – *Journal of Research in Crime and Delinquency* 2001 (38), pp. 439–459.

¹⁶ M. Junger *et al.* Crime and risky behavior in traffic: An example of cross-situational consistency (see Note 15), p. 448.

¹⁷ J.L. Lauritsen, R.L. Sampson, J.H. Laub. The link between offending and victimization among adolescents. – *Criminology* 1991 (29)/2, pp. 265–292; K. Witterbrood, P. Nieuwbeerta. Criminal victimization during one's life course: The effect of previous victimization and patterns of routine activities. – *Journal of Research in Crime and Delinquency* 2000 (37), pp. 91–112.

¹⁸ Lattimore *et al.* (see Note 7).

¹⁹ Räsänen *et al.* (see Note 6).

²⁰ R.B. Cairns, B.D. Cairns. *Lifelines and Risks: Pathways of Youth of Our Time*. Cambridge, UK: Cambridge University Press 1994.

²¹ M.G. Marmot, G.D. Smith, S. Stansfeld, C. Patel, F. North, I. Head, I. White, E. Brunner, A. Feeney. Health inequalities among British civil servants: The Whitehall II study. – *Lancet* 1991 (337), pp. 1387–1393; J.M. Guralnik, K.C. Land, D. Blazer, G.G. Fillenbaum, L.G. Branch. Educational status and active life expectancy among older blacks and whites. – *New England Journal of Medicine* 1993 (329), pp. 110–116; G. Pappas, S. Queen, W. Hadden, G. Fisher. The increasing disparity in mortality between socioeconomic groups in the United States. – *New England Journal of Medicine* 1993 (329), pp. 103–109.

²² M. Leinsalu, D. Vagerö, A. Kunst. Increasing ethnic differences in mortality in Estonia after the collapse of the Soviet Union. – *Journal of Epidemiology and Community Health* 2004 (58), pp. 583–589.

3. Method

The Estonian Longitudinal Study of Criminal Careers (ELSCC) commenced in 1983. The initial sample of 317 delinquents aged 14–17 constituted the total population (the cohort) of male inmates at two special institutions for juveniles in Estonia. In the first wave of the study, all respondents were interviewed and data from personal files characterising their family background, path of education, and deviant behaviour were gathered and analysed. Three later waves (in 1990, 1995, and 1999) of the study were conducted without direct contact with respondents. Official data from criminal registers, the census bureau, and mortality statistics were collected.^{*23}

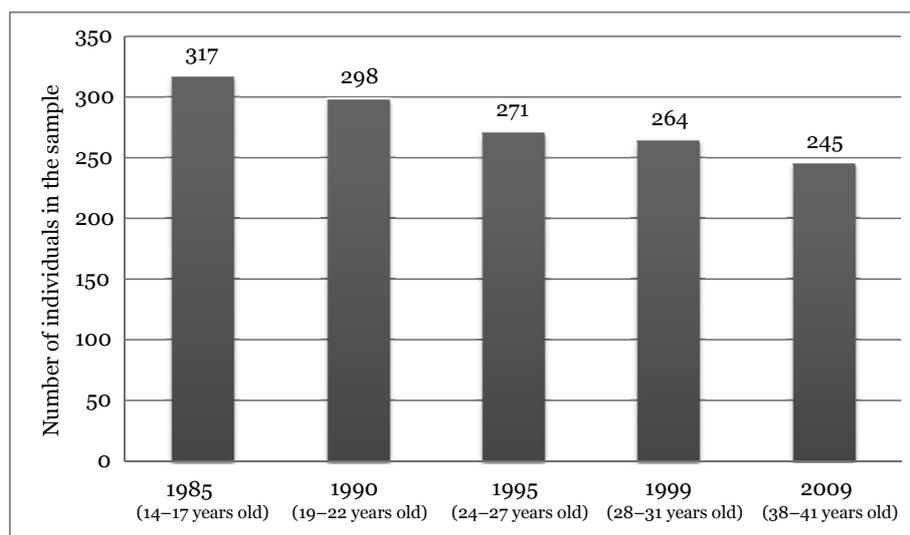


Figure 1. Five waves of data collection—age and number of individuals remaining in the sample.

The fifth wave of the ELSCC work started in 2009; the main aim was to develop a comprehensive picture of persistence of and desisting from criminal activity in middle age. An updated enquiry was dispatched to the Census Registry for all individuals in the sample. The data were obtained in April 2010, with the following information: whether or not the person was featured in the database, status (alive/dead), date of death, country of residence, and residential address (in cases of a foreign country, the state and date of departure). In all, there were 245 individuals in the sample in 2009, 229 individuals were still alive and living in Estonia, 48 had died, and there was no information about 24 individuals in the registers. The data on crimes and convictions over the past 10 years were obtained from penitentiary and criminal registers.

From the Estonian Causes of Death Registry, information was obtained for the date of death and the cause of death of the individual, following the International Classification of Causes of Death (ICD-10). Cause-of-death data were unavailable for three people; in all of these cases, the person had died abroad.

For evaluation of the mortality of sampled individuals, statistical analysis of data was conducted by the Department of Epidemiology and Biostatistics at the Estonian National Institute for Health Development. *The cohort was linked* with the Estonian Causes of Death Registry for gaining of information on date and cause of death in 1985–2009. Each member of the cohort contributed person-years from 1 January 1985 until the date of death, the date of emigration, or 31 December 2009, whichever was earliest. Then we calculated the standardised mortality ratio (SMR) and its 95% confidence interval (CI) for all causes of death, with external causes of death examined separately.^{*24}

The SMR compares the mortality experience of the cohort with that of the general male population of Estonia. The SMR is the ratio of deaths observed to deaths expected. The number of deaths observed and

²³ See J. Saar. *Õigusvastane alaealisena ja kriminaalsed karjäärid (Eesti 1985–1999 longituuduurimise andmetel)* (Delinquent Conduct in the Minority Age and the Subsequent Criminal Careers (as based on longitudinal research 1985–1999, Estonia)). *Dissertationes Iuridicae Universitatis Tartuensis* 9. Tartu, Estonia: Taru Ülikooli Kirjastus 2003 (in Estonian).

²⁴ D. Taeger, Y. Sun, U. Keil, K. Straif. A stand-alone Windows applications for computing exact person-years, standardized mortality ratios and confidence intervals in epidemiological studies. – *Epidemiology* 2000 (11), pp. 607–608; L. Gordis. *Epidemiology*, 4th ed. Philadelphia: Saunders 2004.

person-years in the cohort were calculated, by five-year age groups, separately for five calendar periods (1985–1989, 1990–1994, 1995–1999, 2000–2004, 2005–2009). The expected number of deaths was calculated by multiplying the number of person-years for the cohort by the appropriate mortality rate for the general male population on the basis of calendar periods and age groups.

An important question would be to what extent some groups of former juvenile delinquents with distinct offending trajectories (for example, persistent v. desisting offenders) run greater or smaller risks of dying of various causes.

Individuals in the sample are compared across two groups differentiated on the basis of offending trajectories up to 30 years of age. The first group is composed of individuals for whom a special institution remained the only punishment recourse. This group comprised 104 individuals (33.1%), who are called sporadic offenders below. The second group consists of individuals who were punished for committing offences at least twice. This group of 210 individuals (66.9%) in the further analysis is called ‘persisters’.²⁵

Of all delinquents in the initial cohort, 60.5% were Estonians ($n = 191$) and 39.5% of other nationalities ($n = 126$). Among the non-Estonians, the main group were Russians ($n = 110$) and 16 individuals were of other nationality (Ukrainians, Finns, Belarusians, and Armenians). Because all non-Estonian nationals were Russian-speakers, they were analysed as one group distinct from Estonians.

4. Results and discussion

The majority of causes of death (nearly 70%) was attributed to external circumstances, predominantly of a violent nature. Ranking first were homicide and suicide, accounting for, respectively, 17% and 13% of all cases. Alcohol poisoning and death in traffic accidents were each represented by three cases. Of all deaths from disease (non-violent deaths—nearly 30%), the absolute majority were accounted for by diseases related to way of life (cirrhosis of the liver, heart failure, tuberculosis, and epilepsy). The non-violent deaths too were often related to an unhealthy way of life and alcohol abuse.

Table 1: Causes of observed deaths in the former-juvenile-delinquent cohort in Estonia, 1985–2009

Cause of death	International Classification of Diseases (version 10 codes)	No. of cases	Percentage
Diseases of the circulatory system	I21, I42, D50	3	6.2
Diseases of the respiratory system	A15, A16, A19	3	6.2
Diseases of the digestive system	K70	3	6.2
Other non-violent causes	G40, W13, W78, W79	4	8.3
All natural causes		13	27.1
Assault or homicide	X93, X99, Y04	8	16.7
Self-injury or suicide	X60, X70, X78	6	12.5
Accidental poisoning by alcohol	X42, X45	3	6.2
Traffic accident	V03, V09	3	6.2
Undetermined and other external causes	R99, X31, X59, Y35	12	20.8
All external, unnatural causes		32	66.7
Unknown causes		3	6.2
All causes		48	100.0

²⁵ Three individuals were excluded from categorisation because of insufficiency of personal data.

During follow-up of 6,889 person-years, there were 40 persons who had left the country or who were lost for follow-up purposes. By 31 December 2009, 229 people in the sample were alive. We observed 48 deaths in the cohort while the expected number was 22.5. Therefore, *the SMR* was 2.13 (95% CI: 1.57–2.83) for all causes of death, showing that mortality in the cohort was significantly higher than that of the general male population of Estonia. Also, the members of the cohort had a 109% greater significant risk of death of external causes (32 deaths observed, 15.4 expected; $SMR = 2.09$, 95% CI: 1.42–2.96) than the reference population did.

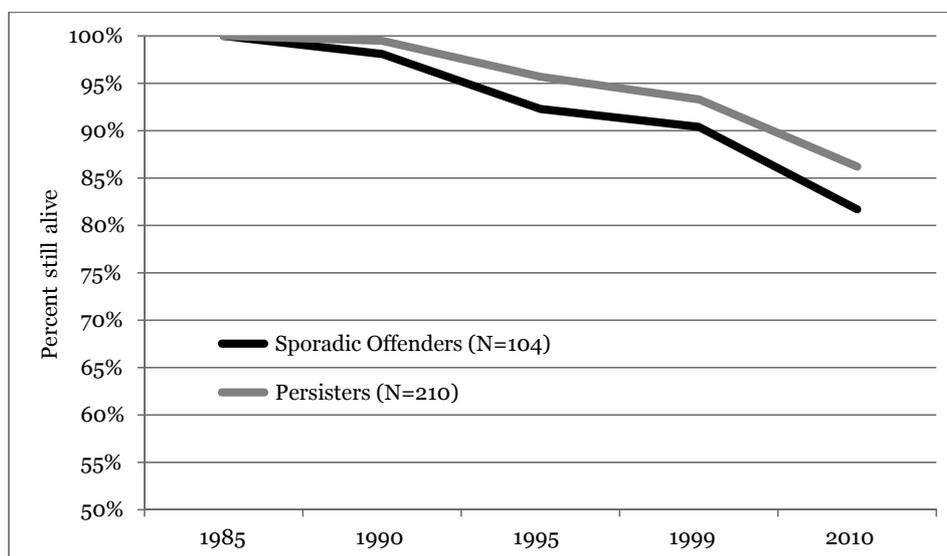


Figure 2. Survival rates for the two trajectory groups.

Looking at survival rates for sporadic offenders and persisters, we can see a somewhat higher survival rate for persisters and a lower one for sporadic offenders. By 2010, approximately 82% of sporadic offenders were still alive, while the equivalent figure for persisters was 87%. The difference between the groups is not statistically significant. Thus, the results have not confirmed the hypothesis of a higher survival rate among sporadic offenders. Furthermore, as the graph shows, they tend to have a lower survival rate than persisters do. There were more suicides committed and a higher percentage of death of natural causes among sporadic offenders. In general, persisters have had a higher risk of death from unnatural and external causes when compared to sporadic offenders.

Table 2: Risk of death due to various causes for the two trajectory groups

Cause of death	Risk of dying			
	Sporadic		Persistent	
	n	%	N	%
Natural causes of death	4	21.1	5	17.2
Unnatural causes of death	11	57.9	18	62.0
– murder and assault	3	15.8	5	17.2
– suicide	3	15.8	3	10.3
– other unnatural external causes	5	26.3	10	34.5
Unknown causes	4	21.1	6	20.7
Total deaths	19	100	29	100

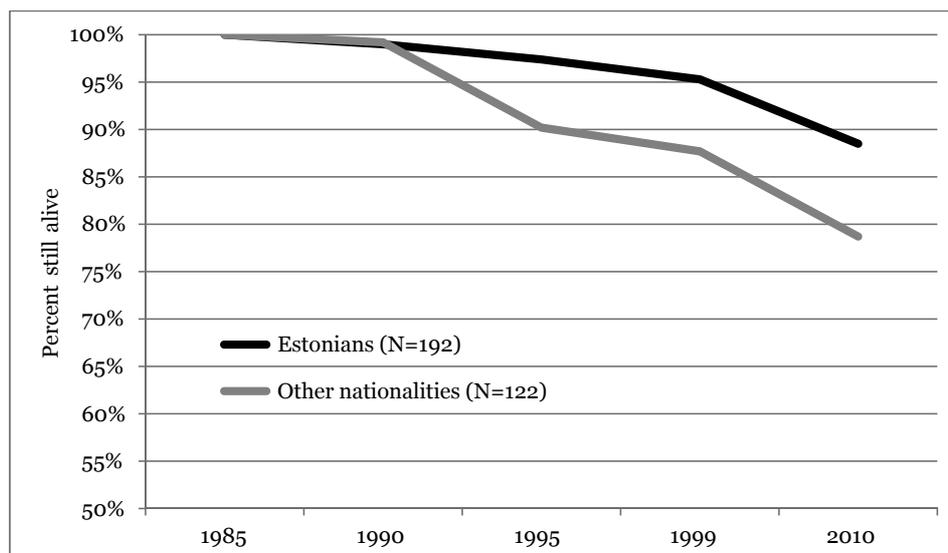


Figure 3. Survival rates among Estonian and non-Estonian delinquents.

The comparison between Estonians and non-Estonians indicated statistically significant differences ($p < 0.05$) between survival rates for the years 1995, 1999, and 2010. While 88% of Estonian delinquents in the cohort were still alive in 2010, the survival rate for the non-Estonian population was 78%. This result supports the hypothesis of a higher mortality rate for non-Estonian delinquents. The risk of death of natural causes was higher for Estonians, while non-Estonians had a greater risk of death from external and unnatural causes. Estonians had a somewhat higher rate of death through murder and assault and by suicide. Non-Estonians had a higher risk of death from other external causes. This category includes, among others, such causes of death as alcohol poisoning and freezing to death.

Table 3: Risk of death of various causes for Estonian and non-Estonian delinquents

Cause of death	Risk of dying			
	Estonians		Non-Estonians	
	N	%	n	%
Natural causes of death	5	22.7	4	15.4
Unnatural causes of death	12	54.5	17	65.4
– murder and assault	4	18.2	4	15.4
– suicide	3	13.6	3	11.5
– other unnatural external causes	5	22.7	10	38.5
Unknown causes	5	22.7	5	19.2
Total deaths	22	100	26	100

There are different and in some ways controversial positions with regard to the connection of morbidity and mortality of criminals. The way of life constituted by having a criminal career seems in general not to be good for an individual's health. On the one hand, an active criminal career is predictive of a higher mortality and morbidity rate in comparison to the non-delinquent population. However, if one examines causes of death in more detail, different circumstances related to mortality emerge. For example, favourable effects on inmates' health of serving the term in custody have sometimes been found. In prison, everybody is subject to a healthy daily routine and constant medical observation. This results in a better standard of physical health among inmates than with individuals of the same social status in the population at large. Incarceration may actually serve as a protective factor, as a shield for offenders, precluding an early natural

death. Furthermore, research in the USA and France has found that rates of mortality from natural causes are lower for prisoners than in the general population.^{*26}

The setting of standards for prison conditions is characteristic of Western democratic societies. The situation of Estonian prisons relative to that in those Western countries continues to be fundamentally different. Prison inmates in Estonia still have very high HIV and TBC rates. The analysis of causes of death (especially for the time until the mid-1990s) for individuals in the cohort of this study also characterises prison as an unfavourable environment. These data show that observed homicides (three cases) and suicides (three cases) among individuals in the sample population have been committed in substantial numbers in prisons.

Prison has a dual mortality-risk-reducing effect: in addition to a more organised and healthy lifestyle, a normally functioning prison protects inmates from violence. It was seen in Estonian data too that the health care that a delinquent receives in prison is better than that outside its walls. In Estonia, there is one more specific circumstance related to prisons. As prisons are considerably improved to meet European standards, there is a growing gap between living conditions and services available in prison, on one hand, and offenders' usual living conditions, in favour of prisons. In Estonia, prisons became a substitute for social-welfare institutions. This thesis is supported by the differences in mortality rates between Estonian and non-Estonian delinquents. The mortality risks for non-Estonians probably accumulate, with this being reflected in the higher mortality rates among them.

5. Conclusions

In summary, the Estonian survey data supported the premise of high mortality of criminals as compared to non-criminals. The indicators of mortality of former juvenile delinquents as measured by the SMR method are, for both general mortality and violent deaths, very high and significantly exceed the corresponding indicator values for the general population. Similarly to the research results in other countries, the mortality rate seen among individuals in the cohort was more than twice as high as that of the general population.

The Estonian situation is noteworthy for specific, dramatic social-economic changes having taken place since the early 1990s. A significant difference between mortality rates was found by nationality: non-Estonian delinquents had higher mortality rates than Estonians did. These results characterise the situation in Estonia, where non-Estonian delinquents experience more risks and are marginalised more often than are Estonians.

Studies of mortality of criminals had until now been carried out exclusively in the developed Western countries, and in other countries diverse circumstances may emerge. The important aspect of the study described here lies in its social-political context. The results presented here lead to analysis of some aspects of criminal careers in a rapidly changing environment of transition from authoritarian regime to democracy and market economy.

²⁶ S. Fazel, R. Benning, Natural deaths in male prisoners: A 20-year mortality study. – *European Journal of Public Health* 2006 (16)/4, pp. 441–444.



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BOOK REVIEW

Prof. Dr. Bob Wessels
International Insolvency Law
3rd ed., Kluwer, Deventer, 2012.

International insolvency cases can give rise to different complex legal questions. Typical examples are the international jurisdiction of a court, the law applicable to insolvency proceedings and the substantive and procedural effects of these proceedings. An additional dimension plays a role when relevant legal systems of insolvency law differ, because of the economic structure of the market, the policies underlying the general legal system, the interests protected in the insolvency law system and the order of the private law.

The book written by Bob Wessels is definitely a source to be commonly used in international insolvency practice. This publication contains some 1200 pages in all including bibliography, list of relevant websites, table of cases and tables of legislation and is a very useful source for the reader, whether an academic or a practitioner.

This publication, as the author states in the preface, is a revised and augmented edition of “International Insolvency Law” published in 2006. As with the 2nd edition in 2006, this 3rd edition appears as Volume X of the ten-volume series *Wessels Insolvency Law*. This book differs from other Volumes in its aim not only to be the first point of reference on any question on international insolvency law for specialists (such as practitioners, judges and scholars), but also for those, who are new to the subject, including legislators and students. It is inevitably obvious that substantial qualitative updates have been made to the previous edition of the book.

This book contains four main chapters:

- I International Insolvency Law,
 - II International Insolvency Law in the Netherlands,
 - III UNCITRAL Model Law on Cross-Border Insolvency, Legislative Guide on Insolvency Law and Practice Guide,
 - IV EU Insolvency Regulation
- IV 1 General Provisions
 - IV 2 Recognition of insolvency proceedings
 - IV 3 Secondary insolvency proceedings
 - IV 4 Provision of information to creditors and lodgement of their claims
 - IV 5 Transitional and final provisions
 - IV 6 The Insolvency Regulation as a model
- and an additional concluding chapter, V – To conclude

Every chapter (excluding V) starts with introductory remarks to the topic, which gives an opportunity for the new reader to get familiar with the scope of the ensuing themes and general problems to be focused on. Each theme contains sources which are included in the discussions and analysis throughout the book. In

considering opinions in legal literature Prof. Wessels refers extensively to sources written at least in English, German, Dutch and French.

In Chapter I the author describes different doctrinal perspectives and current global trends supported by sources and case law which, in our opinion, should be read by representatives of legislators and policy makers facing the gravest eurozone financial crisis. The author also continues the debate on principles and new dogmatic and pragmatic approaches to issues and disputes on international insolvency law, including several remarkable court decisions from all over the world.

In Chapter II the status of international insolvency law in the Netherlands has been updated. A remarkable number of court cases related to core matters of international insolvency law in the Netherlands are covered as well as recent trends in doctrinal perspectives in this chapter.

In Chapter III Professor Wessels describes and comments on the UNCITRAL Model Law of 1997, the Legislative Guide 2004, the Practice Guide of 2009 and the 2010 supplement to the Legislative Guide, being the UNCITRAL's recommendation regarding enterprise groups. In addition "The UNCITRAL Model Law on Cross-Border Insolvency: the judicial perspective" has been focused upon. Compared to the preceding 2006 edition, an enormous amount of USA and UK cases and literature from the USA, the UK and Australia have been analysed.

As in the previous edition of this book, the major focus (some 500 pages) in this book is given to EU Insolvency Regulation in Chapter IV. A detailed commentary and an extensive treatment of the EU Insolvency Regulation delivers clarity allowing academics, judges or practitioners to anticipate problems and provide solutions even in the most complex topics in recent debates such as the system of recognition and enforcement of other (insolvency related) judgments, the system of conflict of law rules in the EU Insolvency Regulation and last but not least the communication and coordination in cross-border insolvency proceedings.

In Chapter V some remarks on possible future development trends as conclusions to the preceding chapters within international insolvency law are made.

It is definitely a truly valuable asset of this book to have a comprehensive bibliography, table of some 350 cases and a list of relevant websites included.

It is obvious that we could only point at a few topics described and analysed in this marvellous publication. Professor Wessels' 3rd edition of the book "International Insolvency Law" is a masterpiece, a complete and accurate treatment of global legislative developments, very informative and highly recommended reading for every person who considers him- or herself to be a fan of the mysterious world of international insolvency law.

Eesti32. Õigusteadlaste päevad

Constitution 20. From the Pragmatism of Legal Practice to Constitutionalism Tartu, 4-5 October 2012

Thursday, October 4

9.00-10.00 Morning coffee (Vanemuise Concert Hall)

Plenary session

- 10.00-10.10 Opening speeches:
Dr. iur. **Priidu Pärna**, Notary in Tallinn, Acting President of Estonian Lawyers Union
Ph.D. **Eerik Kergandberg**, Justice of the Supreme Court, Visiting Professor, University of Tartu,
Chairman of the Estonian Academic Law Society
- 10.10-10.40 **Märt Rask**, Chief Justice of the Supreme Court
Constitution 20
- 10.40-11.10 **Jüri Adams**, Member of the Constituent Assembly
Tõnu Anton, Chairman of the Administrative Law Chamber of the Supreme Court
Jüri Raidla, Senior Partner, Law Firm Raidla Lejins & Norcous
Comments. Can Estonia Continue with the Constitution Adopted in 1992?
- 11.10-11.40 Prof. **Bernd Baron von Maydell**, Director Emeritus Max Planck Institute for Social Law and
Social Policy, Munich
- 11.40-12.15 Coffee break
- Moderators: **Indrek Teder**, Chancellor of Justice
Prof. **Lauri Mälksoo**, Head of the Institute of Constitutional and International Law, University of Tartu
- 12.15-12.45 Prof. **Julia Laffranque**, Judge of the European Court of Human Rights, Professor of European
Law, University of Tartu
If and How to Contest Poverty, Lack of Democracy and Lack of Access to Justice? State
Based on the Rule of Law Through the Eyes of the European Court of Human Rights
- 12.45-13.15 Prof. **Cesare Pinelli**, Professor of Public Law, Sapienza University of Rome
Populism – The Touchstone of Constitutional Democracy
- 13.15-15.00 Lunch, participants are divided into work groups
- 14.30 **Jüri Heinla**, Head of the State Gazette Division, Ministry of Justice, President of the Estonian
Lawyers Union
Accessibility to Justice and New Opportunities for State Gazette

Public Law I. Protection of Social Fundamental Rights and Thin State

- Moderators: **Ebe Sarapuu**, *Counsellor of the Public Law Division, Ministry of Justice*
Mag Erle Enneveer, *Head of the Secretariat and Counsellor of the Constitutional Committee of the Riigikogu*
- 15.00-15.20 **Dr. Lehte Roots**, *Holder of the Public Law Chair, Tallinn Law School, Tallinn University of Technology*
The Charter of Fundamental Rights and the Social System in Estonia
- 15.20-15.40 **Merle Malvet**, *Head of the Social Security Department, Ministry of Social Affairs*
The Thin State Matrix Effect on the Design of Social Fundamental Rights
- 15.40-16.00 LL.M. **Madis Ernits**, *Judge, Tartu Circuit Court*
The General Principle of Equality in the Service of the Social State
Discussion
- 16.30-16.50 Coffee break

Public Law II. Constitution and the European Union in Judicial Proceedings

- Moderators: **Viive Ligi**, *Chairperson of the Administrative Chamber of the Tallinn Circuit Court*
Allar Jõks, *Counsellor, Law Firm Sorainen*
- 16.50-17.10 Ph.D. **Carri Ginter**, *Docent of European Law, University of Tartu, Partner, Law Firm Sorainen*
Estonian Judge as a Super Judge in the European Union
- 17.10-17.20 Ph.D. **Jüri Põld**, *Justice of the Supreme Court, Visiting Professor, University of Tartu*
The Balance Between Estonian Law and European Union Law in the Commencement of Judicial Proceedings of Constitutional Supervision
- 17.20-17.40 Mag. iur. **Tiina Pappel**, *Judge, Tallinn Administrative Court*
The Probability of an Effective Application of the Preliminary Ruling in the Court of First Instance
Discussion

Private Law I. European Common Sales Law – Competitor for Estonian Law?

- Moderator: Prof. **Irene Kull**, *Professor of Civil Law, University of Tartu*
- 15.00-15.45 Prof. **Hugh Beale**, *University of Warwick*
The CESL Proposal: an Overview
- 15.45-16.15 Prof. **Morten Fogt**, *Aarhus University*
Pros and Cons of the CESL - Reactions from Consumers, Businesses and Member States
Discussion
- 16.30-16.50 Coffee break

Private Law II. European Common Sales Law – Competitor for Estonian Law?

- Moderator: **Tiit Sepp**, *Notary in Tallinn*
- 16.50-17.05 Prof. **Irene Kull**, *Head of the Chair of Commercial and Intellectual Property Law, University of Tartu*
Possible influence of CESL to Estonian Law of Obligations
- 17.05-17.20 Dr. iur. **Martin Käerdi**, *Counsellor, Law Firm Raidla Lejins & Norcous, Docent of Civil Law, University of Tartu*
CESL – Alternative for the Estonian Businesses?
- 17.20-17.35 Dr. iur. **Karin Sein**, *Acting Head of the Institute of Private Law, University of Tartu, Docent of Civil Law, University of Tartu*
The Level of Consumer Protection under Common European Sales Law – How High is it for Estonian Consumers?
Discussion

Criminal Law I. Developments in the Field of Procedural Law for Offences in Present Day Europe

- Moderator: LL.M. **Norman Aas**, *Chief Public Prosecutor*
- 15.00-15.30 Prof. **Martin Heger**, *Head of Chair of Criminal Law, Criminal Procedure, European Criminal Law and Law History, Humboldt-University of Berlin*
Adversatorial and Inquisitorial Elements in the Criminal Procedure Codes of the EU Member States as a Challenge for the Europeanization of the Criminal Procedure
- 15.30-16.00 Prof. **Laura Ervo**, *Professor of Procedural Law, Örebro University*
The Outlooks of Fair Trial in Europe - Current State and Future Visions
Discussion
- 16.30-16.50 Coffee break

Criminal Law II. Openly and with Hopeful Thoughts About Surveillance While Keeping in Mind the Proverbs

- Moderator: **Erkki Koort**, *Deputy General for Internal Security, Ministry of the Interior*
- 16.50-17.10 Ph.D. **Uno Lõhmus**, *Judge, European Court of Justice, Visiting Professor, University of Tartu*
Surveillance: Expectations and Risks
- 17.10-17.30 Mag. iur. **Saale Laos**, *Counsellor to the Chancellor of Justice*
On Surveillance – publicly
- 17.30-17.40 **Rutt Teeveer**, *Judge, Tartu County Court*
Some Problems a Judge Might Face Following the Estonian Proverb ‘Measure Nine Times and Cut Once’
Discussion
- 20.00 Festive Evening (AHHAA Science Centre, the doors will open at 19.30)

Friday, October 5

Public Law III. The Constitution and the European Union – Friends or Foes?

- Moderators: **Ulrika Eesmaa**, *Counsellor to the Constitutional Review Chamber of the Supreme Court*
Kari Käsper, *Lecturer, Tallinn Law School, Tallinn University of Technology*
- 9.00-9.30 Ph.D. **Rait Maruste**, *Chairman of the Constitutional Committee of the Riigikogu, Visiting Professor, University of Tartu*
- 9.30-10.00 Prof. **Tanel Kerikmäe**, *Director of Tallinn Law School, Tallinn University of Technology*
Is the European Union a State Based on the Rule of Law? Methods for Reciprocal Adaptation of the Legal Orders of a Member State of the European Union and the European Union
- 10.00-10.30 Ph.D. **Andres Tupits**, *Docent, Estonian Business School, Adjunct Lecturer of European Union Law and Banking Law, University of Tartu*
European Union Inside the European Union: Constitutional Problems When Being a Member of the Economic and Monetary Union
Discussion
- 11.00-11.30 Coffee break

Public Law IV. Bringing the State and the Local Municipality Closer to the People – Mission Impossible?

- Moderators: Prof. **Raul Narits**, *Head of the Institute of Public Law at the University of Tartu*
Priit Vinkel, *Counsellor, Chancellery of the Riigikogu*
- 11.30-11.50 LL.M. **Hent Kalmo**, *Adviser and Deputy to the Chancellor of Justice*
About the People and Being Close to the People
- 11.50-12.10 **Küllli Nõmm**, *Audit Manager, National Audit Office of Estonia*
An Overview of Public Administration. The Citizen Can't Be Reduced To a Client
- 12.10-12.30 **Tim Kolk**, *Counsellor to the Constitutional Review Chamber of the Supreme Court*
Judicial Local Municipality Reform!?
Discussion

Private Law III. Court Judgement Within 100 Days – Dream or Reality?

- Moderator: **Marko Aavik**, *Deputy General at the Ministry of Justice*
- 9.00–9.20 Dr. iur. **Meelis Eerik**, *Judge, Harju County Court, Chairman of the Estonian Association of Judges*
The Advantages and Disadvantages of Making Civil Procedures More Effective
- 9.20–9.40 **Andres Hallmägi**, *Attorney-at-Law*
Judicial Proceedings: Electricity, Paper and People
- 9.40–10.00 Dr. iur. **Anneli Alekand**, *Notary in Tallinn*
Notary as an Accelerator of Judicial Proceedings
- 10.00–10.20 **Mati Kadak**, *Vice-Chairman of the Chamber of Bailiffs and Trustees in Bankruptcy, a Bailiff*
Mag. iur. Toomas Saarma, *Member of the Presidency of the Chamber of Bailiffs and Trustees in Bankruptcy, a Trustee in Bankruptcy*
Is it Possible to have an Execution Proceeding and a Bankruptcy Proceeding Lasting 100 Days?
Discussion
- 11.00–11.30 Coffee break

Criminal Law III. Preventive Detention

- Moderator: Dr. iur. **Priit Pikamäe**, *Chairman of the Criminal Chamber of the Supreme Court*
- 9.00–9.30 Prof. **Jüri Saar**, *Professor of Criminology at the University of Tartu*
Legal Culture and Crime Control
- 9.30–10.00 **Mag. iur. Andres Parmas**, *Counsellor to the Criminal Chamber of the Supreme Court*
Future Outlook of the Penal Policy
Discussion
- 11.00–11.30 Coffee break

Procedural Law. Is the Management of Procedures a Measure or an Objective?

- Moderator: Prof. **Jaan Ginter**, *Dean of the Faculty of Law, University of Tartu*
- 11.30–11.50 Ph.D. **Eerik Kergandberg**, *Justice of the Supreme Court, Visiting Professor, University of Tartu*
Procedural Economizing: Definition of the Subject, Background System and Specific Problems in Criminal Procedure
- 11.50–12.10 Dr. iur. **Villu Kõve**, *Justice of the Supreme Court, Docent of Civil Law, University of Tartu*
Will the Wish for a Swift Solution of a Civil Case “Kill” the Principle of the Right Solution?
- 12.10–12.30 Dr. iur. **Ivo Pilving**, *Justice of the Supreme Court, Docent of Administrative Law, University of Tartu*
Procedural Economizing in Administrative Court
Discussion
- 13.00–14.00 Lunch

Podium Discussion

- Moderators: Prof. **Ülle Madise**, *Legal Counsellor to the President of the Republic, Professor of Constitutional Law, University of Tartu*
Sulev Valner, *Journalist*
- 14.10–14.30 Prof. **Marju Luts-Sootak**, *Head of the Chair of Legal History, University of Tartu*
Social and Liberal State Based on the Rule of Law in the 21st Century
The participants of the ensuing discussion are the Minister of Justice **Kristen Michal**, Chancellor of Justice **Indrek Teder** and other expected and unexpected opinion leaders from various professional domains.
- 15.30 Conclusion