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Dear reader,

In 2022, we are celebrating several important anniversaries related to the adoption of laws important for the building of the Estonian legal order. Against the backdrop of a major forum for the Estonian legal profession – Estonian Lawyers' Days 100 – this year's edition is dedicated to another important anniversary: the 70th birthday of the University of Tartu's Professor Emeritus Paul Varul.

It is difficult to overestimate Prof. Varul's contribution to the rebuilding of the Estonian legal system after regaining of independence. In this connection, I would like to draw special attention to his belief in young lawyers. Thanks to his support, many of the students from those days now hold positions that play an essential role in the legal profession. It is precisely this belief in young people alongside respect for more seasoned peers that Prof. Varul's colleagues and students alike have inherited from him. In addition, there are many important qualities to be learnt from his example, such as the importance of infinite kindness and patience, the fundaments of academic ability, and the value of charm and personality. While he was the main architect of Estonia's civil-law system in general, Prof. Varul's favourite area of attention over the years has always been bankruptcy law, which he has been intimately involved in reforming. His willingness to speak up and actively contribute to the legislative process is testimony to the jubilarian's thoughtfulness and continuing high level of professionalism.

In this edition of the journal, readers will find an article by Chirstoph G. Paulus, a long-time colleague of Prof. Varul, which is dedicated to bankruptcy law. It provides a historical overview of the relationship between debtors and creditors and analyzes the contracting process as eternal struggle for supremacy. Silvia Kaugia and Raul Narits devote their article to finding an answer to the question of how to create a law that corresponds to the idea of law. In this issue, the reader can also find a paper written by Katre Luhamaa and Merike Ristikivi about the role of the judiciary in the transitional debates, judicial reform, and changes in the professional requirements set for judges in Estonia. Modern problems of the independence of the judiciary are reflected upon specifically in an article contributed by Jesús Manuel Villegas Fernández and Victoria Rodríguez-Blanco, and Anneli Albi's article examines another angle of the ongoing evolution: the changing role of courts in Europe – which is shifting from protecting the fundamental rights of individuals toward protection of the neoliberal economic order. Alongside these pieces are three articles dedicated to matters of criminal law. Mari-Liis Tohvelmann and Kristjan Kask have focused their contribution on interviews with children as evidence in criminal proceedings; Carri Ginter and Anneli Soo offer the reader a meaningful analysis of the arguments for and against the criminalisation of hate speech; and, finally, Mario Truu discusses the principle of foreseeability of liability and punishment in the practice of the ECHR. The volume meshes well with Prof. Varul's ethos in one other respect too: doctoral students have had a say in the publication, representing younger voices. One can find a discussion centred on the need to use artificial intelligence in the context of deciding on the patentability of an invention, provided by Liva Rudzite, and the concept of the duty of diligence in procurement law from the standpoint of CJEU practice is tackled by Kadri Härginen. Finally, the fine tradition of publishing opinions by official opponents in public defence of doctoral dissertations has been maintained, with the opinion written by Marta Otto on the dissertation of Seili Suder.

Congratulations to Professor Emeritus Paul Varul and to all who have had the opportunity to know him. We are all richer for your work.

Irene Kull
Professor of Civil Law

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Anneli Albi*

Professor of European Law
University of Kent

A Paradigm Shift in the Role of Courts?

Disappearance of Judicial Review through Mutual Trust and other Neofunctionalist Tenets of EU Law

The article submits that EU law has profoundly been changing the role of courts in Europe, from protecting the fundamental rights of individuals – especially in the event of coercive exercise of public power – towards being seen as agents of, or obstacles to, integration, as well as towards a focus on trust, effectiveness and enforcement, and protection of the market and of the neoliberal economic order. The article postulates for the consideration of the discourse that this change is one aspect of a more fundamental, ongoing Kuhnian paradigm shift in European constitutionalism, from the broader classic comparative (especially continental) European understanding of constitutional law to autonomous EU governance. The latter – contrary to the prevailing assumptions – is predicated on different foundational ideas for the exercise of public power, especially functionalism, neofunctionalism, neoliberalism and market integration, and concepts of international law. The growing tensions around the EU law principle of mutual trust exemplify the 'incommensurabilities' between the two paradigms; the article devotes a chapter to Birgit Aasa's EUI doctoral thesis on the CJEU case law on mutual trust, summarising Aasa's compelling concerns about the systemic unsuitability of trust in the courtroom in Western democratic constitutionalism. The article links Aasa's research findings to concerns that have been raised with regard to other areas and ways in which judicial review has been disappearing through EU law, including through the neofunctionalist doctrine of 'Integration through Law' and through the replication of the US constitutional thinking on the role of courts. The article additionally points to concerns about the resulting far-reaching changes in material constitutional law and fundamental rights protection; these are particularly acute for the post-totalitarian and post-authoritarian constitutional tradition, which, whilst adhered to by more than half of the Member States in both Western and Central and Eastern parts of Europe, is little known in the mainstream EU discourses. The article suggests that questions about the role of courts in European constitutionalism, as well as about the broader paradigm shift, need joined-up, inclusive discussion as part of the debate on the future of Europe. For this to be made possible, a number of structural issues in the EU law scholarly discourse must first be addressed.

1. Introduction: Concerns about the obsolescence of national constitutions and a paradigm shift in the exercise of public power, with radical alterations of European constitutional law, including in the role of courts

The present article seeks to invite joined-up discussion between the national legal communities and the somewhat 'closed epistemic community' of EU lawyers[*1] about the changing role of courts through autonomous EU law. The article was inspired by profoundly important research about the systemic unsuitability of trust in courtrooms by a young Estonian legal scholar, Birgit Aasa, in her doctoral thesis 'The Principle of Mutual Trust in EU Law: What is in a Name?', defended at the European University Institute (EUI) in Florence.[*2] The importance of Aasa's work has been recognised by two awards: the Estonian national award for the best doctoral thesis in the field of social sciences, and a special award of the Constitutional Law Foundation of the Estonian Academy of Sciences. This article has its origin in the evaluation report that I wrote as a member of the doctoral thesis defence committee. I was subsequently asked by the Editorial Board of *Juridica International* to convert the report into a publication, to which I gladly agreed, as I found Aasa's thesis to be a ground-breaking, fascinating and courageous work that critically explores, and compellingly questions, the suitability of the principle of mutual trust – developed by the European Court of Justice (CJEU) and increasingly elevated to constitutional status in the EU – to the realm of law and judicial adjudication.

The contribution subsequently evolved into the present, expanded article, where I will outline Aasa's main research findings (Chapter 2), and link these to broader concerns that have been voiced by scholars and judges about the changing role of courts through EU law, and which have hitherto not been discussed in a joined-up manner. These include concerns about other areas and ways in which judicial review has been disappearing through EU law (Chapters 5, 7), and about a reorientation of the role of courts from the protection of fundamental rights of the individual – especially in the event of coercive use of public power – towards being seen as agents of, or obstacles to, integration, as well as towards a focus on enforcement, efficiency, trust, protection of market values and of the neoliberal economic order (Chapter 5). Furthermore, throughout the article, I will briefly point out that in numerous other areas of comparative (especially substantive, continental) European constitutional law, scholars have observed radical alterations and even disappearance of long-standing constitutional rules through judicial interpretation grounded in autonomous

* Professor of European Law, University of Kent (Canterbury, UK). Some early parts of this paper (especially the material in Chapters 5, 7, 8 and 9) were presented as part of a keynote speech entitled 'Judicial protection, due process and trends towards efficiency: Remarks in the light of Europe's post-totalitarian constitutional tradition' at the ACA-Europe (Association of Supreme Administrative Courts in Europe) seminar 'Due Process', held on 18-19 October 2018 in Tallinn, <http://www.aca-europe.eu/index.php/en/evenements-en/645-tallinn-18-and-19-october-2018-seminar-due-process> (accessed 30 August 2022). The author is grateful for the discussion that followed, including the remarks by some judges that they had not been aware about the way in which their role is seen in neofunctionalism and other EU integration theories (as summarised below in notes 136-137 and the accompanying text), and that they see their role in the protection of fundamental rights. The author is additionally grateful for the comments of the two anonymous referees and Birgit Aasa, and for the linguistic editing and substantive comments by Siiri Aulik. The author would also like to extend heartfelt thanks to the large number of kind Estonian and other colleagues and researchers who have not dismissed this research offhand as Euroscepticism or populism, and have over the years engaged in constructive discussions and provided thoughtful feedback, which eventually led to identification of the Kuhnian paradigm shift. Any errors are solely the responsibility of the author. The article has resulted from the research project 'The Role and Future of National Constitutions in European and Global Governance', funded by European Research Council grant No 284316. The views cannot be attributed to the European Research Council. Due to the very extensive scope of the theme and limited space available in the present article, the reader is kindly asked to bear in mind the following note with regard to referencing: where the work of further authors has been cited or used in other publications of the present writer or by other scholarly papers referred to in this article, only the names of further authors will be written out; in case of citing, the reader is kindly asked to look up the full publication details from the papers indicated.

1 See Päivi Leino-Sandberg and Janne Salminen, 'Languages and EU Law Discourse: A View from a Bilingual Periphery' *VerfBlog*, 2 June 2014, <https://verfassungsblog.de/languages-eu-law-discourse-view-bilingual-periphery/> (accessed 30 August 2022), and below notes 123-125 and the accompanying text regarding Daniel Thym's observation about a 'disconnect' between the national and EU legal discourses.

2 Birgit Aasa, *The Principle of Mutual Trust in EU Law: What is in a Name?* PhD thesis defended at the EUI on 26 February 2021. Version dated 7 February 2021, available at the EUI library and on file with the present writer; cited with the permission of the author. The thesis was supervised by Prof Urška Šadl (EUI). The members of the defence committee were Prof Bruno De Witte (EUI), AG Michal Bobek (CJEU) and the present writer.

EU law, which has equally received limited attention. These include changes in the standard and logic of protection of fundamental rights, including under the EU Charter, the 'lost' and 'forgotten' protections in classic European criminal law dating back to the Enlightenment era, and concerns about the destruction of the social state (Chapters 8, 5, 6).

Indeed, a growing number of scholars have voiced concerns about the 'twilight' of constitutionalism, 'the end of constitutionalism as we know it', the obsolescence of national constitutions, and even a shift of paradigm from constitutional law to autonomous EU governance where formal legal constraints on public power have been replaced by economic and executive exigencies.[*3]

The central contribution of this article, submitted for the consideration of both the Estonian as well as wider European and international readership, is that the concerns raised by Aasa with regard to the EU law principle of mutual trust – as well as the other above-mentioned developments – are part of a more fundamental, **ongoing Kuhnian paradigm shift in European constitutionalism**, where there are two parallel and to a significant extent incommensurable worlds of constitutionalism: the epistemic world operating with the broader national and comparative (especially continental) European understanding of constitutional law, and the epistemic world of autonomous EU law and governance (Chapter 4). I will argue that contrary to the long-standing assumption that national and EU constitutional law are part of a multi-level system with broadly congruent values, autonomous EU governance is, in fact, predicated on entirely different foundational ideas for the exercise of public power, especially functionalism and neofunctionalism, market integration and neoliberalism, theories of transnational governance, and concepts of international law, which have had the effect of profoundly changing classic European constitutional law, including the role of courts.

Regarding neofunctionalism, I will in particular flag for awareness and discussion the little known (at least beyond the EU epistemic communities) but in practice widely influential doctrine of 'Integration through Law', which helps to better understand the underlying logic and broader objectives of the CJEU mutual trust requirements that in practice have been leading to a large-scale dismantling of national constitutional rules and judicial controls (Chapter 6). I will also briefly point out the different understanding of the role of courts in the United States (US) constitutional thinking, and the impact of its replication through the EU legal order.

I will further seek to flag for cognizance that the profound changes that have unfolded through the paradigm shift have by and large not been discussed because of numerous structural issues in the EU scholarly and legal discourses, which have been elucidated in the research on the epistemology of EU law (Chapter 3). These include the agenda to shift 'European' law, research and discourse from national and comparative European constitutional law to autonomous, self-referential EU law, the 'silencing' and 'exclusion' of critical voices, and what scholars have described as the 'disconnect' between the national and EU legal discourses.[*4]

To illustrate issues around judicial protection that arise in classic European constitutionalism but which to a great extent lose their relevance in autonomous EU governance, including under the EU Charter, I will bring examples mainly from Estonia. However, contrary to the prevailing assumptions, these constitutional problems are not idiosyncratic and, indeed, have been widely encountered especially in the post-totalitarian and post-authoritarian constitutional systems both in Western and Central and Eastern parts of Europe, as I have documented in other publications. I will, in particular, devote a chapter to the Estonian public debate on the case of Neeme Laurits where, in hindsight, the automatic extradition without judicial review of an innocent individual who had compelling alibis can be regarded as emblematic of the ongoing paradigm shift (Chapter 9).

I will end with a suggestion that questions around what ought to be the role of courts in European constitutionalism need informed, joined-up and inclusive discussion as part of the debate on the future of Europe. This, in turn, requires broader discussion about the growing obsolescence of national constitutions and a paradigm shift to an entirely different system of public power (Chapter 10). Essentially, my concern is that with idealistic aspirations in the name of 'Europe', something very valuable in terms of European constitutional achievements in the exercise of public power is hastily being consigned to history, with no wider awareness and with extremely limited possibilities for open discussion due to the above-mentioned structural issues in the EU discourse.

3 See below notes 56-59 and the accompanying text.

4 See eg below notes 21, 26-29 and 123-125 and the accompanying text

As a preliminary note to the text that follows, it is important to emphasise at the outset that this article does not concern the European Court of Human Rights in Strasbourg or other international courts, which typically have a more subsidiary and specific mandate to ensure a basic standard of fundamental rights protection where this has failed in the national legal orders. Indeed, the argument in this article is partly also written with a concern that the growing difficulties caused to the Member States' constitutional orders specifically by the EU legal order and the something akin to 'super agent'[*5] remit of the EU Courts may be one of the reasons behind the growing backlash in the United Kingdom (UK) and elsewhere against the European Convention on Human Rights system, not least because it is difficult to explain the differences and specificities to the wider public.

2. The importance of Birgit Aasa's doctoral thesis 'The Principle of Mutual Trust in EU Law: What is in a Name?' for the discourse on national courts in European constitutionalism

I read the above-mentioned doctoral thesis of Birgit Aasa on the CJEU requirement for mutual trust with great interest, as I have been grappling with similar questions in recent years when working on a comprehensive, forthcoming comparative monograph[*6] – hereinafter referred to as the '*Comparative Study*' – in the aftermath of the European Research Council (ERC) funded large-scale research project 'The Role of National Constitutions in European and Global Governance' (hereinafter 'The Role of Constitutions' project). The *Comparative Study* is based on 29 in-depth national reports, written by leading constitutional law scholars and published in the two-volume, open access book *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law*.[*7] One key theme addressed in the national reports and in the *Comparative Study* is the requirement of mutual trust in relation to extraditions under the European Arrest Warrant (EAW) system and beyond. Both books collate extensive concerns expressed in the Member States by legal scholars, judges (especially by a large number of dissenting judges), ombudsmen and other institutions in relation to the automaticity of extraditions, whereby no substantive judicial review is allowed by the CJEU even in cases where there is compelling evidence of innocence, or serious human rights issues have been raised. However, typically the assumption seems to be that the problem affects only the respective individual Member State, the constitutional rules of which are presumed to be idiosyncratic compared to the shared 'European' approach. In many Member States, for a long time there was no awareness that the concerns in these and many other areas of EU law are, in fact, widely shared, as typically such concerns have not been discussed in a joined-up manner. In practice, the automaticity of extraditions required by the CJEU has become the new 'normal'.

The above broader findings, which focus more on the national constitutional side of the theme, tally with and corroborate the analysis and conclusions of Birgit Aasa, who in her doctoral thesis has carried out remarkably comprehensive and systematic research on the mutual trust case law of the CJEU. Aasa's thesis astutely identifies and articulates the manifold broader legal, philosophical, semantic and other paradoxes and contradictions in the conceptualisation of mutual trust in EU law and CJEU case law.

As Aasa notes, there has been a growing scholarly and judicial backlash against the CJEU requirement of mutual trust, especially as regards '**blind trust**', and in the field of criminal law and the European Arrest Warrant; this literature is synthesised in the thesis. However, Aasa's critique goes beyond merely the 'blind trust': in essence, it **questions the suitability of the principle of trust in the courtroom**. Aasa's

5 Alec Stone Sweet and Thomas L Brunell, 'Trustee Courts and the Judicialization of International Regimes: The Politics of Majoritarian Activism in the ECHR, the EU, and the WTO' (2013) 1(1) Journal of Law and Courts pp 61-88. – DOI: https://doi.org/10.2139/ssrn.2024889; see below note 153 and the accompanying text.

6 Anneli Albi, *A Comparative Study on National Constitutions in EU Governance* (TMC Asser Press and Springer, forthcoming 2023).

7 Anneli Albi and Samo Bardutzky (eds) *National Constitutions in European and Global Governance: Democracy, Rights, the Rule of Law – National Reports*. Volumes I and II (The Hague: TMC Asser Press and Springer 2019). – DOI: https://doi.org/10.1007/978-94-6265-273-6.

thesis further makes a completely original contribution to the existing research in several respects, of which the following three are of particular centrality.

The first main original contribution is that Aasa has undertaken the identification and **systematic analysis of a total of 115 CJEU judgments involving mutual trust over forty-five years**, which form the foundational data of the thesis. Aasa perceptively traces the evolution of the principle and classifies the cases into four generations of case law, teasing out paradigmatic shifts and changes. Through these four generations, Aasa shows how mutual recognition travelled from the internal market to criminal law and beyond. I doubt that the sheer scale of the mutual trust requirements – and their far-reaching consequences in terms of dismantling the respective national rules and autonomy, which will be explored below – is fully understood by the legal and scholarly communities. In any event, the present writer was surprised to read that mutual recognition has been extended to such a scale as to **require trust – in the abstract – in the Member States' legal systems, including criminal justice systems, as well as in the EU administration of justice as such**.[*8] Aasa shows that in the more recent case law on the *sui generis* constitutional questions, the principle of mutual trust has been deployed further – in line with CJEU's well-established tendency towards instrumental creep of competences – to establish for the EU a role in enforcing the rule of law in the Member States. Additionally, the principle has become part of the *raison d'être* of the autonomous EU constitutional order. Aasa perceptively grasps the patterns emerging and the gist of the problems and paradoxes, and articulates these to the reader in a clear, incisive and engaging style of writing. In a nutshell, **mutual trust 'in effect prioritises the speedy and simplified application and effectiveness of EU law over meaningful judicial controls** […] **and prevents Member States from applying their higher constitutional standards of fundamental rights protection'**.[*9] Aasa also brings numerous examples of basic legal errors and miscarriages of justice that have ensued in the cases she has explored. The present writer would add that the above dimensions – trust by courts, speedy application and effectiveness of EU law, and disapplication of higher national fundamental rights protection – have thus also become part of the EU concept of the rule of law, to be enforced by the CJEU. The profound differences compared to the more classic European *Rechtsstaat*-tradition of the rule of law will be briefly outlined when exploring the case of the automatic extradition of Neeme Laurits in Chapter 9.

The second main innovative contribution in Aasa's thesis lies in the extensive research on the **interdisciplinary literature** regarding the notion of trust, and the subsequent analysis of the CJEU case law in the light of these perspectives. The interdisciplinary literature studied ranges from economic behavioural theories of rational choice, and organisation and management theory, to perspectives from the literature in the field of sociology, philosophy, psychology and beyond. This is complemented by a fascinating linguistic and semantic analysis that explores the differences between facets of trust and related conceptual cognates such as **gullibility, hope, faith and confidence**, and the different degrees of epistemic basis, such as evidence, expected in each. Aasa observes that where the CJEU requires trust despite the existence of contrary evidence, this is 'more akin to a degree of faith, as faith can be conceptualised as a trusting belief despite contrary evidence'; where mutual trust prohibits the obtaining of evidence, this has similarities with hope and gullibility, and 'results in recklessness'.[*10] Aasa finds that 'mutual trust transforms to an illusion or utopia which has little to do with evidence, confidence, or rationality'.[*11]

Aasa's third and overarching original contribution is the argument that is gradually and carefully built throughout the thesis: that whilst required by the CJEU and enforced as an increasingly constitutional principle of the EU, **trust is not, in fact, at all suitable for governing legal relations and courtroom matters**. In particular with reference to Piotr Sztompka's monograph on a sociological theory of trust, Aasa explains that institutionalisation of distrust is a precondition for the architecture of liberal democratic constitutionalism. Since power corrupts, distrust is especially necessary with regard to those in power; monitoring and control mechanisms have been introduced to create an overall system of trust. As part of this, there are **certain professions that entail the exercise of suspicion and distrust as a professional duty**, including the police, border guards, attorneys, ticket controllers and, crucially, judges; scholars are also placed in this list. Courts are expected to be neutral, objective, professional

8 Aasa, supra note 2, pp 139-147.

9 Aasa, supra note 2, p 183. Emphasis added.

10 Aasa, supra note 2, pp 298-299.

11 Aasa, supra note 2, p 252.

institutions settling societal disputes, not adjudging on the basis of trust, which brings in subjectivity, bias and the colouring of evidence to one or the other side. The broader principles of institutionalised distrust include regular elections, accountability, legitimacy, division of powers, limited competences, etc, to which there is a precommitment through constitutions and international agreements.[*12]

The above analysis leads Aasa to conclusions which entail a good deal of courage and a strong conscience in the context of mainstream EU discourses, which I commend and will return to below. The thesis observes, with reference to the publications of Sztompka and others, that the legalisation, institutionalisation and universalised obligation of trust is characteristic of autocratic regimes. The requirement of trust, which prohibits criticism and scepticism, **leads to a culture of naiveness and dysfunctionality**.[*13] Aasa goes on to observe that '[t]he way in which the principle of mutual trust plays out in the EU legal order and simultaneously affects national constitutional orders has more in common with **institutionalised trust as an autocratic principle** than it does with institutionalised distrust as a democratic principle'.[*14] Whilst many are likely to brush off Aasa's concerns about the EU being 'autocratic' as unusual, aberrant and isolated views of a young scholar from a peripheral, post-Soviet Member State, the present writer would point out that a growing number of eminent academics have raised similar concerns with regard to different developments in EU governance, especially in the euro crisis management, eg that EU crisis governance is marked by 'executive authoritarian managerialism'[*15] and 'authoritarian liberalism'.[*16]

In general, whilst Aasa's thesis begins with somewhat emotive language – the author explains that trust is an emotionally loaded concept that belongs to the realm of personal relations[*17] – the thesis goes on to develop a very serious and compelling argument about profound, systemic flaws in the CJEU requirements for national courts, and the use of the principle of mutual trust in an instrumental way to advance the integrationist agenda. The issues and paradoxes raised are deeply disquieting, especially for those who are used to operating more within the paradigm of a continental European – and especially post-totalitarian or post-authoritarian – understanding of constitutionalism, particularly in the rights-sensitive area of criminal law.

Indeed, one broader contribution of Aasa's doctoral thesis is that it makes it harder for the mainstream EU discourse to carry on ignoring the concerns that have been expressed in a long-standing and growing stream of critical EU law scholarship about the integrationist agenda, teleological interpretation methods and the corresponding excessive judicial activism of the CJEU. An overview of the historical debates (eg the publications of Hjalte Rasmussen and Trevor Hartley) and of more recent critical literature (especially the monograph by (the former London SOAS scholar) Gunnar Beck, and a monograph by Gerard Conway) has been provided by Michal Bobek, who inter alia explores scholarly concerns that the CJEU carries out judicial review in a way where 'anything goes', and asks whether 'a body consistently deciding in one direction' can be called a court.[*18] The present writer has elsewhere provided an overview of some further critical concerns, especially as regards the effects on national courts.[*19] The most well-known criticism in recent times is probably that expressed by the former President of the German Constitutional Court, Roman Herzog. In an article with a strongly worded title 'Stop the European Court of Justice', Herzog wrote that 'the ECJ deliberately and systematically ignores fundamental principles of the Western interpretation of law, that its decisions are based on sloppy argumentation, that it ignores the will of the legislator, or even turns

12 Aasa, supra note 2, pp 289-295, with references to literature, especially Piotr Sztompka, *Trust: A Sociological Theory* (Cambridge: CUP 1999).

13 Aasa, supra note 2, pp 289-299, with reference to Sztopmka, supra note 12.

14 Aasa, supra note 2 pp 291ff. Emphasis added.

15 C Joerges and M Weimer, 'A Crisis of Executive Managerialism in the EU: No Alternative?' *Maastricht Working Paper 2012/7*. – DOI: https://doi.org/10.2139/ssrn.2190362.

16 Alexander Somek, *The Cosmopolitan Constitution* (Oxford: OUP 2014) pp 23-24. – DOI: https://doi.org/10.1093/acprof:oso/9780199651535.001.0001; Michael Wilkinson, *Authoritarian Liberalism and the Transformation of Modern Europe* (Oxford: OUP 2021). – DOI: https://doi.org/10.1093/oso/9780198854753.001.0001.

17 Aasa, supra note 2, pp 11-12.

18 Michal Bobek, 'The Legal Reasoning of the Court of Justice of the EU' (2014) 39 European Law Review pp 419ff, 423, 426.

19 See the two-part article Anneli Albi, 'Erosion of Constitutional Rights in EU Law: A Call for "Substantive Co-operative Constitutionalism"', Part 1: (2015) 9(2) Vienna Journal of International Constitutional Law pp 151-185. – DOI: https://doi.org/10.1515/icl-2015-0203. Part 2: (2015) 9(3) Vienna Journal of International Constitutional Law pp 291-343. – DOI: https://doi.org/10.1515/icl-2015-0302. Concerns about the CJEU are collated in Part 2, pp 332-339, and concerns about the effects on national courts are collated in Part 1, pp 175-179; see also below notes 131-137 and the accompanying text.

it into its opposite […]'.*[20] Observations about the CJEU being something akin to a judicial, executive and legislative 'super agent' will be briefly outlined in Chapter 5.

Why such questions have hitherto not been more widely discussed and addressed has been elucidated by scholars researching the epistemology of EU law, whose work will be outlined in different parts of this article. They have shown that for a long time, there has been scarcity of critical discussion on EU integration, which professors Ian Manners and Richard Whitman have described as 'silencing' and 'exclusion' of 'dissident voices'*[21]. In relation to the historical evolution of EU law and scholarship, different scholars have mentioned the 'stifling and defensive intellectual environment characterised by the self-identification with the project of integration perceived as […] precarious and fragile'.*[22] The limited critical work that has been published in the past with regard to the Court of Justice has generally not been well received or has been vehemently criticised.*[23]

Against this background, I strongly commend Aasa's conscience and courage to voice the concern that in this area, the EU acts in accordance with autocratic rather than democratic principles, undermining democratic constitutionalism and fundamental rights. Equally, she has forthrightly documented instances where the CJEU case law is 'illogical', 'circular', 'a juridical legal fiction without basis in reality', or even 'a conscious misrepresentation of fact, rules, and reality' so as to turn from a legal fiction 'to a lie'.*[24] I also noted with interest Aasa's remark that scholars, similarly to judges, have a particular role in which they are required, within the purport of their task, 'to treat the trusted with distrust and regard any reports of trustworthiness with distrust', and that exercise of suspicion is their professional duty.*[25]

A further broader contribution is that whereas the critical EU law discourse has hitherto focused on the CJEU, Aasa's thesis in essence shows that the CJEU case law has also fundamentally been changing the role of courts and of judges in the Member States, as well as the logic of law and, more generally and alarmingly, what is regarded as 'European' legal thinking – questions around which I have seen very limited discussion thus far.

As noted in the introductory section, in the rest of this article, I will link Aasa's research findings to other issues that have been raised by scholars and judges about the changing role of courts through autonomous EU law, in order to invite joined-up discussion about the future direction of travel. In particular, I will submit for the consideration of the readers that the issues raised in Aasa's thesis are part of a broader, ongoing Kuhnian paradigm shift in European constitutionalism.

3. Structural issues in EU law research, including the agenda to shift from national and comparative European constitutional law to autonomous, self-referential EU law: Real-life consequences

In order to understand the scale of the changes in the role of courts through EU law, it is important to draw attention to some structural issues and methodological flaws in the operational setting of EU law research. In the present writer's view, these are in need of wider acknowledgment and corrective redirection, so as to enable meaningful discussions with regard to the role of courts as well as other profound alterations in European constitutional law that will be outlined throughout the article.

The most profoundly impactful structural issue is illustrated well in the choice of methodology in Aasa's thesis: the thesis is in the main based on the study of autonomous EU law, and the analysis of the

[20] Roman Herzog and Lüder Gerken, 'Stop the European Court of Justice' *EUobserver* (10 September 2008) <www.euobserver.com> (accessed 1 July 2015).

[21] Ian Manners and Richard Whitman, 'Another Theory is Possible: Dissident Voices in Theorising Europe' (2016) 54(1) Journal of Common Market Studies pp 3, 5-9, 12. – DOI: https://doi.org/10.1111/jcms.12332.

[22] Harm Schepel and Rein Wesseling, 'The Legal Community: Judges, Lawyers, Officials and Clerks in the Writing of Europe' (1997) 3(2) European Law Journal p 169. – DOI: https://doi.org/10.1111/1468-0386.00025.

[23] For an overview of the literature, see Schepel and Wesseling, supra note 22, pp 169, 184, 186.

[24] Aasa, supra note 2, pp 188, 243, 244.

[25] Aasa, supra note 2, p 292, with reference to publications of Niklas Luhmann and Piotr Sztompka.

above-mentioned interdisciplinary literature on the concept of trust. For a thesis on courts, it is somewhat striking that comparative European constitutional law, including Estonian constitutional law, is missing beyond generic, minimal references. The dimension of democratic constitutionalism does not, in fact, enter into the text until towards the final parts of the thesis, and is approached through the work of a sociological theory of trust by Sztompka.

The above point is not made here to single out this particular thesis; instead the aim is to flag for wider cognizance that this approach is representative not only of the influential research carried out at the EUI, College of Europe in Bruges and other leading centres of EU law, but of an increasingly prevalent, default methodological approach, whereby the baseline for much of 'European' legal research has shifted to autonomous, self-referential EU law. National and comparative European law tend to be mentioned only briefly in footnotes, or even entirely omitted, at least beyond the narrow, neofunctionalist lens of assessing compliance and correct implementation, or generic, reductionist references to 'sovereignty' and 'national constitutional identity'.

A growing number of scholars have started to express concern about this type of approach, and have sought to bring light to the underlying dynamics. For example, Antoine Vauchez has documented that historically, the European Commission has promoted and funded specialised EU law journals and university centres, with the aim of shifting EU studies away from a comparative analysis of national laws (which would aim to identify common principles) to the study of the 'specificity' of EU law, focusing on the relationships between EU law (and the CJEU) and national law (and courts).*[26] In the context of private law, Simone Glanert has explored debates amongst private law experts regarding the European Commission's programme of gradually replacing national laws, which have been embedded in a tradition and culture, by a unique 'European' law and a transnational legal 'neo-language' devoid of national cultures and histories. In her extensive comparative research and with reference to similar concerns by Pierre Legrand, Glanert compellingly shows why this direction of travel is wholly misguided.*[27] The present writer has sought to explain the different dimensions of the sidelining of comparative European law in favour of autonomous, self-referential EU law, including through the types of articles that get past gatekeepers for publication in leading journals of European and international constitutional law, which on a closer look tend to be oriented towards autonomous EU and global constitutional law.*[28] The reorientation of research from comparative to autonomous EU law may also have its origins in the colonial roots of international law, whereby research was deployed to legitimise a central authority instead of reliance on 'comparative colonial administration', as will be briefly outlined in Chapter 4.

There is a further related dimension, which is the scarcity of possibilities to publish national, comparative and/or critical research on EU law in the main, high visibility journals. Concerns about the 'stifling and defensive intellectual environment' regarding research on EU law were noted in the preceding chapter. More generally, Ian Manners and Richard Whitman, in a special issue of the *Journal of Common Market Studies*, have observed that in EU integration scholarship, all (at the time) 28 Member States' systems have been dissolved as easily as the administrative regions in French politics, and that in the mainstream journals of EU studies, alternative voices have rarely been published; publication in other journals leads to limited visibility and citations.*[29] The above dynamics also reinforce what scholars have described as a **'disconnect' between EU and national legal discourses**, which is caused by practical obstacles, such as language barriers and lack of manpower in smaller Member States, as will be outlined in Chapter 4.

One should also briefly mention that EU law and research are marked by depoliticisation in terms of the 'right-left' political dichotomy; the division has instead been between 'integration friendly' and 'integration sceptical' camps.*[30] This helps to understand why growing literature about the EU having entrenched

[26] Antoine Vauchez, 'The Transnational Politics of Judicialization. *Van Gend en Loos* and the Making of the EU Polity' (2009) 16(1) European Law Journal pp 20-21. – DOI: https://doi.org/10.1111/j.1468-0386.2009.00494.x.

[27] Simone Glanert, 'Speaking Language to Law: The Case of Europe' (2008) 28(2) Legal Studies pp 163ff. – DOI: https://doi.org/10.1111/j.1748-121x.2008.00084.x.

[28] See also below note 70 and the accompanying text, and more fully Albi, 'Erosion of Constitutional Rights', Part 2, supra note 19, pp 307ff.

[29] Manners and R Whitman, supra note 21, p 7, with reference to the work of A Kreppel regarding comparison with the French system.

[30] Armin Von Bogdandy, 'A Birds-eye View on the Science of European Law: Structures, Debates and Development Prospects of Basic Research on the Law of the European Union in a German Perspective' (2000) 6(3) European Law Journal p 210. – DOI: https://doi.org/10.1111/1468-0386.00105. More generally on depoliticisation of EU integration, see Gian-Giacomo Fusco

something akin to 'authoritarian neoliberalism', which will be briefly outlined in Chapter 5, has by and large been overlooked in the mainstream discourses and especially in the national legal discourses.

More generally, a conversation needs to be started about the wide-ranging implications of the prevailing operational setting where EU scholarly research is part of a broader political project in which there is only one admissible end-vision for the EU. In the field of political science, Quincy Cloet, in her research on 'hegemonic' and 'peripheral' narratives in EU discourse, observes that European studies are set apart from other disciplines, as they 'are geared towards a political project rather than an entire branch of knowledge or sphere of society'.[*31] Scholars researching the epistemology of EU law have elucidated that the EU has to a significant extent been a 'juristic' project – written by a 'community' of lawyers, clerks, scholars and judges, and thus legal expertise is effectively a precondition for participating in the policy debates.[*32]

In this regard, the growing community of more critically oriented EU law scholars – who would like to see democratic constitutionalism retained at the national level or are concerned about the entrenchment of neoliberalism or other various problematic developments in EU integration – must have observed with disquiet that the *European Law Journal*, which was specifically established to enable critical and contextual study of EU law and integration, has recently been overhauled to seemingly advance the neofunctionalist 'Integration through Law' doctrine that will be explored in Chapter 6. In 2020, the Journal's Editorial and Advisory Boards resigned *en masse* from their positions in protest after the publisher, Wiley, sought to appoint Editors-in-Chief without consulting them.[*33] Impressionistically, the new editorial team seems to be composed of more traditionally oriented EU law scholars, many of whom are staff, visiting professors and/or alumni of the College of Europe in Bruges, or work in EU institutions or Brussels universities. Indeed, one of the first initiatives envisaged is a project on the future of Europe organised by the Bruges College of Europe.[*34] The introductory Editorial, entitled 'What European Law Journal stands for?', explains the redefined mission as follows: 'The editorial line of the ELJ is based on the conviction that integration through law […] represents one of the best means at our disposal to ensure a European, if not global, liberal and sustainable way of life. This is what the ELJ stands for.'[*35] For academic freedom and for exploration of different visions for the future of the EU, it is particularly commendable that the former editorial board has meanwhile embarked on establishing a new journal, *European Law Open*, the 2022 mission statement of which mentions openness to questioning the 'dogmas' of EU law.[*36]

For the purposes of the rest of this article, which postulates an ongoing Kuhnian paradigm shift in European constitutionalism, the prevailing academic landscape that is described above will be referred to as the systemically neofunctionalist operational setting of EU law research; neofunctionalism will be explored in Chapter 4.

I would submit for the consideration of European legal research communities that the combined structural issues in EU research need joined-up attention by national associations of legal scholars and lawyers, national academies of sciences, ministries of justice, grant funding bodies, editorial boards of journals, job and fellowship panels, etc. In the numerous formal and informal accounts that I have collated about the experience of scholars working on national and comparative law, it is a common experience that they tend to be penalised for not regularly publishing in high-visibility European and international journals or, indeed, in the English language. A strikingly large number of colleagues have informally mentioned that if they have submitted to a leading EU law journal an article that has a starting point in national or comparative constitutional law or in national criminal law, social law, etc, especially if they document problems posed by

and Michalis Zivanaris, 'The Neutralisation of the Political. Carl Schmitt and the Depoliticisation of Europe' Republished (2022) 30(2) Journal of Contemporary European Studies pp 363ff. – DOI: https://doi.org/10.1080/14782804.2021.1873109.

31 Quincy Cloet, 'Two Sides to Every Story(teller): Competition, Continuity and Change in Narratives of European Integration' (2017) 25(3) Journal of Common Market Studies p 295. – DOI: https://doi.org/10.1080/14782804.2017.1348339.

32 Schepel and Wesseling, supra note 22, p 165; Francis Snyder, 'New Directions in European Community Law' (1987) 14(1) Journal of Law and Society p 167. – DOI: https://doi.org/10.2307/1410304, cited in Jo Shaw, 'European Union Legal Studies in Crisis? Towards a New Dynamic' (1996)16(2) Oxford Journal of Legal Studies p 231, 234. – DOI: https://doi.org/10.1093/ojls/16.2.231; Vauchez, 'The Transnational Politics of Judicialization', supra note 26, pp 4 and 26ff.

33 See a manifesto of the previous Editorial Board in *Verfassungsblog*: Joana Mendes and Harm Schepel, 'What a Journal Makes: As We Say Goodbye to the *European Law Journal*' *VerfBlog* (4 February 2020) <https://verfassungsblog.de/what-a-journal-makes-as-we-say-goodbye-to-the-european-law-journal/> (accessed 30 August 2022).

34 Karine Caunes, 'What the European Law Journal stands for?' (2020) 26(1-2) European Law Journal pp 2-8.

35 Caunes, supra note 34.

36 'Editorial: Introducing European Law Open' (2022) 1(1) European Law Open pp 1-5.

EU law to the national legal system, the referees have either rejected the piece outright or have asked them to rewrite the entire article to explain the constitutional matters more fully to EU lawyers, to shift the starting point to the literature on 'Europeanisation of law', or to provide a fuller and more 'balanced' account of the CJEU case law; this has also been the present writer's experience. It is not clear how the existence of a systemic problem could formally be researched and documented, also since referee reports are confidential. Above it was noted that statistical research of the leading EU political science journals by Ian Manners and Richard Whitman has revealed 'silencing' or 'exclusion' of critical and comparative voices.*[37]

In any event, the adverse impacts are then compounded by the impression (although this needs to be corroborated with statistical data) that a very large proportion of grants, especially EU grants – including the very large and prestigious European Research Council grants – tend to be awarded to scholars working on EU law, in English and in the academic 'centre' countries. This compounds the structural problems faced by national and comparative research communities, who are not deemed to be sufficiently 'world-leading' and 'competitive'. There is a real need to support and reward, rather than penalise, scholars who work on national and comparative (and other areas) of law, often in two or more languages, which is very time-consuming and requires far more extensive specialist knowledge of multiple legal systems, advanced language skills, etc.

In terms of possible ways forward, one practical question is how to make funding available for pan-European comparative constitutional law journals and meeting forums where the starting point would be classic European constitutional law, and where concerns about EU law could be put forward openly and discussed in a joined-up manner. EU-funded scholarly and judicial projects and networks come with subtle but effective peer pressure. Scholars have observed that in supranational expert networks, co-optation by the networks creates 'a nearly irrebuttable presumption of competence', whereas those who do not abide are 'marked with the stigma of the outsider', and have to collate a lot more evidence for their arguments, which then nevertheless often tend to be regarded as 'outlandish'.*[38] In the present writer's observation, those who advocate retaining the diversity of the national legal orders tend to be placed in these categories. But there is also a need for a review of the publication policies of the existing high-visibility journals, in that critical and comparative articles ought to be included as a standard practice. This is important not only from the viewpoint of academic freedom and scholarly integrity, but also as legal scholarship is of direct relevance to shaping EU law and policy. If articles outlining the problems caused by EU law in national legal orders are routinely excluded from high-visibility journals, there is no – or limited – wider awareness about the existence of the problems and, furthermore, that the problems are often widely shared. Those problems that do occasionally make it to the mainstream attention are then typically dismissed as 'particularistic' or 'idiosyncratic' and, eventually, prospects and possibilities for addressing them are extremely limited. A further practical matter is that funding is also needed for the translation of key works from less known languages into English, and for more extensive comparative projects and publications. Through the 'Role of Constitutions' project it emerged that EU state aid rules prohibit the use of public grant funding to subsidise the publication of large-scale comparative books (except where these are made available open access, which is very costly), as this would distort the market. Yet the reality is that it is much easier and economically viable to publish a book simply on some aspect of autonomous EU law, which then has the effect of distorting knowledge about 'European' law.

There are many additional reasons why the above structural issues in the EU discourse need to be addressed by the mainstream scholarly and legal communities. For one, if these were to come to wider public scrutiny, this could significantly reduce trust in academic research and expertise as well as trust in law, courts and lawyers more widely. Indeed, this has happened to some extent in the United Kingdom, eg with media criticism regarding EU Jean Monnet funding. There is also widening discontent on the part of voters all over Europe, an issue which will be explored in the final chapter.

All of the above is also of further direct practical importance for constitutional law and the role of courts: the structural problems and methodological flaws in the EU discourse have had far-reaching, real-life consequences in terms of disappearing awareness and understanding – and consequently judicial protection – of classic tenets of (continental) European constitutional law. Anne-Lise Kjaer has expressed concern 'what will happen to the mutually divergent national languages and cultures of law' when European

37 Manners and R Whitman, supra note 21, pp 3, 5-9, 12.

38 Alexander Somek, *Individualism: An Essay on the Authority of the European Union* (Oxford: OUP 2008) pp 166-168. – DOI: https://doi.org/10.1093/acprof:oso/9780199542086.001.0001.

lawyers 'involve themselves in an increasingly self-referential European legal discourse' where 'communicating about law and speaking the law are no longer conducted in divergent national legal languages, but in a Europeanized legal language with no reference to the domestic laws of the Member States'.[*39] Kjaer additionally shows how such developments are changing 'what people believe is real'.[*40]

One such practical, real-life consequence is that **the role of courts seems to be undergoing a profound change through EU law, but by and large without discussion so far**. This will be explored more fully in Chapter 5; here one could briefly note that regarding the requirement of trust for courts, scholars with grounding in more classic European constitutional law and criminal law have pointed out why trust is not suitable in systems of criminal justice. For example, Ester Herlin-Karnell has extensively explained that whilst 'trust has been the driving assumption in EU criminal law cooperation', trust has been regarded as wholly misplaced and even dangerous in classic criminal law.[*41] A study by the Centre for European Policy Studies observes that criminal justice systems are

> designed to operate on the basis of distrust among the actors. If judges and juries had mutual trust in the police, then there would be no need for a trial, the defendant would obviously be guilty because the police say so and the judge and the jury trust the police.[*42]

I would add that the above concerns are particularly acute in relation to what I have in result of the above-mentioned 'Role of Constitutions' project categorised as the **post-totalitarian and post-authoritarian constitutional systems** amongst the EU Member States. These include the constitutions of Germany, Italy, Spain, Portugal, Greece, and Central and Eastern European countries (including Hungary before 2010 and Poland before 2015).[*43] In fact, the post-totalitarian and post-authoritarian constitutional tradition is shared by more than half of the Member States, but awareness about it has by and large been missing in the mainstream EU discourses. Most of the constitutions of this type, including the Constitution of Estonia, contain extensive, detailed provisions on constitutional fundamental rights, and especially as regards safeguards for deprivation of liberty and access to courts, which are often worded notably more stringently and offer more extensive protection than the relatively generic provisions set out in the ECHR and the EU Charter of Fundamental Rights.[*44] This is because of historical experience where authorities exercised power over individuals in an arbitrary, repressive and coercive manner, and countless innocent individuals sat in jails, were sent to concentration camps or penal colonies or were deported to Siberia, or lost their lives. As the Czech Constitutional Court has recalled in a well-known ruling, the totalitarian system 'made the judiciary a submissive and unthinking instrument in the enforcement of totalitarian power'.[*45] As an aside, can this and other parts of history really be written out of law as per the above-mentioned EU agenda to create new, transnational law devoid of national histories?

At the same time, it is important to note that these types of safeguards are less developed in the political and historical types of constitutions, which are generally described as more flexible and pragmatic (eg UK, the Netherlands, Nordic countries), as well as in the traditional legal type of constitutions (eg France, Belgium, Ireland). An important difference that needs greater cognizance is that in the political type of constitutional cultures, courts are distinctly more deferential and pragmatic, and that as a result, EU and

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39 Anne Lise Kjaer, 'Theoretical Aspects of Legal Translation in the EU: The Paradoxical Relationship between Language, Translation and the Autonomy of EU Law' in Susan Šarčević (ed) *Language and Culture in EU Law. Multidisciplinary Perspectives* (Routledge 2015) p 98. – DOI: https://doi.org/10.4324/9781315591445.

40 Kjaer, supra note 39, p 105.

41 Ester Herlin-Karnell, 'The Integrity of European Criminal Law Co-operation: The Nation State, the Individual, and the Area of Freedom, Security and Justice' in Fabian Amtenbrink and Peter AJ van den Berg (eds) *The Constitutional Integrity of the European Union* (The Hague: Asser Press 2010) pp 237-262. – DOI: https://doi.org/10.1007/978-90-6704-445-5_10.

42 Sergio Carrera, Elspeth Guild and Nicholas Hernanz, 'Europe's Most Wanted? Recalibrating Trust in the European Arrest Warrant System', CEPS Special Report No 76 (March 2013) <https://ssrn.com/abstract=2275268> (accessed 17 April 2015) p 20.

43 The three broader types of constitutions are explained in greater detail in Anneli Albi and Samo Bardutzky, 'Revisiting the Role and Future of National Constitutions in European and Global Governance: Introduction to the Research Project', in Albi and Bardutzky, *National Constitutions*, supra note 7, pp 12ff, with particular reference to Cesare Pinelli. The theme is developed more fully in the forthcoming *Comparative Study*, supra note 6.

44 Albi and Bardutzky, 'Revisiting the Role and Future of National Constitutions', supra note 43, pp 13ff.

45 See the judgment of 17 December 1997, file No Pl ÚS 33/97; translation by Zdeněk Kühn, 'Czech Republic: From a Euro-Friendly Approach of the Constitutional Court to Proclaiming a Court of Justice Judgment *Ultra Vires*' in Albi and Bardutzky, *National Constitutions*, supra note 7, p 797.

ECHR law have, in fact, significantly expanded judicial review.*[46] Since many of the countries with political or traditional legal constitutions are at the 'centre' in terms of influence in EU discourses, this may have contributed to the fact that the concerns raised about the curtailment of judicial review through EU law in the context of post-totalitarian and post-authoritarian constitutional systems have hitherto largely been overlooked. In particular, given the high level of influence and authority that British scholars have in EU discourses, there is a need for greater awareness that their commentary typically proceeds from a legal background in which EU law has led to a 'juridification' of the national constitutional system and has enhanced fundamental rights protection. Indeed, in the UK there is no written constitution, fundamental rights protection is based on the Human Rights Act (1998) that in essence transposes the ECHR, judicial review is limited, parliamentary legislation cannot be annulled, the concept of the rule of law is more ambiguous and procedural, there is executive dominance with wide discretion, adjudication by the courts is casuistic and based on precedent, and there is a somewhat state-phobic orientation whereby many social state structures and protections that are in place in other parts of Europe are left to the market or to charities.*[47] In any event, for clarity, it ought to be noted that the present article is written with grounding in Estonian and wider post-totalitarian constitutionalism, modelled on the German constitutional *Rechtsstaat*.

Indeed, one practical consequence of the methodological shift from comparative to autonomous, self-referential EU law is that the differences in the constitutional cultures of the Member States have by and large been overlooked, and all constitutions tend to be generically reduced to notions of sovereignty and idiosyncratic national constitutional identity. I noted with interest that Signe Rehling Larsen has also observed that even EU pluralist discourses have been 'blind' to profound differences in the constitutional cultures of the Member States.*[48]

4. What should be the baseline for assessment of the role of courts: A Kuhnian paradigm shift from (continental) European constitutional law to autonomous, neofunctionalist EU governance?

There is a further profound dimension to the preceding discussion on the CJEU requirement of mutual trust and the shift in the research methodology from national and comparative European constitutional law to autonomous, self-referential EU law. It is submitted for the consideration of the readers that these are part of a more fundamental change: an **ongoing Kuhnian paradigm shift** from the broader classic, comparative (especially continental) European understanding of constitutional law to autonomous EU governance, which is predicated on new and very different foundational ideas for the exercise of public power.

Returning to Birgit Aasa's thesis, it raises the question of **what should be the baseline** to trace the paradigm changes, and also which fundamental rights ought to apply – national constitutional rights, EU Charter or international human rights.*[49] Aasa briefly observes that mutual trust is part of **a governance regime**, and used in a **functional** manner to achieve borderless Europe.*[50] Regarding the CJEU, Aasa's thesis discusses, and takes issue with, the underlying integrationist rationale of the CJEU, and shows how the CJEU has used the principle of mutual trust in an instrumental way to enhance the constitutional dimension of the EU legal order.*[51] The principle of mutual trust has been used in relation to the '*raison d'être*' of the Area of Freedom, Security and Justice (AFSJ) and, more broadly, as an existential principle of the European Union, which functions for the purposes of primacy, autonomy, unity and effectiveness of EU

46 Albi and Bardutzky, 'Revisiting the Role and Future of National Constitutions', supra note 43, p 20.

47 For 'juridification', pragmatism and several of the other aspects listed, see Alison L Young, Patrick Birkinshaw, Valsamis Mitsilegas and Theodora A Christou, 'Europe's Gift to the United Kingdom's Unwritten Constitution – Juridification' in Albi and Bardutzky, *National Constitutions*, supra note 7, pp 83ff.

48 Signe Rehling Larsen, 'Varieties of Constitutionalism in the European Union' (2021) 84(3) Modern Law Review p 478. – DOI: https://doi.org/10.1111/1468-2230.12614. See also below notes 102-103, 108 and 127, and the accompanying text.

49 Aasa, supra note 2, eg pp 119, 166.

50 Aasa, supra note 2, p 42, with reference to the work of Cecilia Rizcallah.

51 Aasa, supra note 2, eg pp 26-28, 49-50, 226-227.

law.[*52] It strengthens the EU's 'actorness'.[*53] The principle has a top-down, structuring-constitutionalising function.[*54] Aasa concludes that the CJEU has used the principle in a way where the ends justify the means, and practical difficulties have been brushed aside in the name of the noble goal of ever closer union.[*55]

I noted with interest that Aasa's thesis partly drew on my earlier article 'Erosion of Constitutional Rights in EU Law: A Call for 'Substantive Co-operative Constitutionalism'' (hereinafter 'Erosion of Constitutional Rights'), where I concluded that EU constitutionalism represents a thin, weak, procedural version of constitutionalism, which centres around a very different type of constitutional keywords, such as supremacy, uniformity, direct effect, autonomy, effectiveness and trust.[*56] I had reached this conclusion with reference to a growing number of scholars who have voiced concerns about the 'twilight' of constitutionalism (Petra Döbner and Martin Loughlin), 'the end of constitutionalism as we know it' (Ming-Sung Kuo), the obsolescence of national constitutions (Andrea Simoncini); Carol Harlow and Susana Galera have both noted the emergence of a **thin, weak, procedural version of judicial review**, as well as of the rule of law and democratic control, in the context of EU and global economic co-operation, with reduced opportunities for citizens to challenge public decisions.[*57]

In my subsequent research based on the above-mentioned 'Role of Constitutions' project, it emerged that what is at stake is, in fact, even more profound. I have come to share the finding of a small but growing number of scholars that what has been underway is **a paradigm shift from constitutional law to autonomous EU governance**.[*58] This paradigm shift has been most clearly posited by Alexander Somek, who finds that the EU's euro crisis management represents a change from a constitutional law paradigm to a paradigm of governance, where formal legal constraints on public power have been replaced by economic and executive necessities; we have entered into '[t]he brave new world of exigencies'.[*59] On a closer look, autonomous EU governance is predicated on an eclectic mix of **entirely different foundational ideas for the exercise of public power**; these will be collated and explored more fully in another publication, along with how these have been altering comparative European constitutional law, including through foundational changes.[*60] It has been well-established since the early seminal rulings of the CJEU that EU law is decoupled and independent from national constitutions; what has received little attention is that it is thereby also disconnected from, and not based on, the broader comparative European understanding of constitutional law.

For the purposes of the present article on the role of courts, the following foundational ideas for the exercise of public power in autonomous EU governance are the most relevant: functionalism and neofunctionalism; market integration and neoliberalism; origins of EU law in international law, including roots of international law and of functionalism in colonial administration; the US federal constitutional system, including fiduciary constitutionalism from the private law on trusts; theories of transnational governance; and cosmopolitanism.[*61]

The new foundational ideational setting has not hitherto been clearly stated or discussed, at least beyond references to US federal constitutionalism. Indeed, with regard to the impact of functionalism, Jan Klabbers has elucidated that 'lawyers and others working in or with international organizations have all been speaking the language of functionalism without realizing it';[*62] 'the theory of functionalism is rarely

52 Aasa, supra note 2, eg pp 26, 162-163, 181-182, 222-228, with references to case law and literature.

53 Aasa, supra note 2, pp 228-229, with reference to the work of Marise Cremona.

54 Aasa, supra note 2, pp 226-229, with references to further literature.

55 Aasa, supra note 2, p 252.

56 Albi, 'Erosion of Constitutional Rights', Part 2, supra note 19, pp 291ff.

57 For a summary of, and references to, the respective publications, see Albi, 'Erosion of Constitutional Rights', Part 2, supra note 19, pp 304ff.

58 Albi and Bardutzky, 'Revisiting the Role and Future of National Constitutions', supra note 43, p 24, with references to scholarly writings by eg Alexander Somek (see also below note 59 and the accompanying text), Agustin Menéndez, Joana Mendes and others. This theme is developed more fully in the forthcoming *Comparative Study*, supra note 6.

59 Somek, *The Cosmopolitan Constitution*, supra note 16, pp 22ff.

60 A brief summary is available in Albi and Bardutzky, 'Revisiting the Role and Future of National Constitutions' supra note 43, pp 25ff; this theme is developed more fully in the forthcoming *Comparative Study*, supra note 6.

61 These will be more fully explored in the *Comparative Study*, supra note 6; some references to respective literature will be provided below in this and subsequent chapters.

62 Jan Klabbers, 'The Emergence of Functionalism in International Institutional Law: Colonial Inspirations' (2014) 25(3) The European Journal of International Law p 651. – DOI: https://doi.org/10.1093/ejil/chu053.

spelt out in any detail' and 'its intellectual origins have always remained hidden from view', including origins in colonial administration.[*63]

This is important to note, as much of European legal scholarship has hitherto proceeded from the assumption that the values of European and EU constitutionalism are congruent, and are broadly part of the same, multi-level system. Those specialising in EU and global constitutional law do, however, note that national and post-national constitutional law are intrinsically different; often a mention is made of Joseph Weiler's widely quoted remark (in the context of democracy) that if one were to use botanical language, they are different like apples and oranges.[*64] What has not received attention is that – if one were to extend this metaphor to the constitutional orders – the different varieties of apples are gradually being replaced by one orange, as EU law has expanded from the single market into virtually all areas of law, having thereby also profoundly changed the national law of the Member States.

With regard to neofunctionalism, I would like to gratefully acknowledge the enormously enlightening observations about the overall state of play in the European constitutional discourses, which were made by another young Estonian doctoral student, Maris Moks, at the Hertie School of Governance in Berlin,[*65] and for whom the main normative point of reference had come to be EU law. As part of her draft PhD thesis 'Guardianship of the Constitution versus the Expectations of European Integration: Judicial Review of the Euro-crisis Management', Moks carried out an extensive literature review, especially on the euro crisis accounts by EU constitutionalists. As part of this work, Moks perceptively pointed out that **EU law and integration discourses operate in the mindset of neofunctionalism**. Moks reached the conclusion that there are two parallel discourses – amongst scholars whose work is based on neofunctionalism and amongst scholars whose work is based on comparative constitutional law – who are both critical of the relevant court judgments but on entirely different, contrasting grounds. Moks made the following observation: whilst 'European constitutionalists and comparative constitutional lawyers are both deeply concerned' by the courts' judgments in the economic crisis, this is

> for completely different reasons, underpinned by contradicting normative tensions. The first criticize the crisis-caused case law as an **obstacle to further EU integration**, whilst the latter raise an alarm on the account of the failed protection of citizens' constitutional rights.[*66]

Moks observed that 'the representatives of one side do not seem to be fully aware of their counterparts' position'.[*67] She further brought examples of writings of neofunctionalist scholars who see the role of law and of the judiciary as being 'agents' of integration. According to Moks' literature review, the leading neofunctionalist legal scholars, especially in terms of publications on the role of courts, include Joseph Weiler[*68] and Renaud Dehousse. As a side note, the present writer would add that both are current or former presidents of the EUI; Joseph Weiler has been found to be the most influential legal scholar in the field of EU law on the basis of a comprehensive survey carried out in the framework of an ERC research project by Jan Komárek.[*69] Weiler is also one of the authors of the 'Integration through Law' doctrine, which will be explored in Chapter 6, and has, amongst many influential posts, been a long-standing Editor-in-Chief of the world-leading *International Journal of Constitutional Law*. The mission statement of the affiliated 'breakaway' scholarly association has pondered on the 'death' of 'Comparative Law' and affirmed its broader orientation 'by choice' towards 'Global Constitutional Law' and 'Global Administrative Law'.[*70]

63 Klabbers, supra note 62, pp 645, 675.

64 Joseph HH Weiler, *The Constitution of Europe. 'Do the New Clothes Have an Emperor' and Other Essays on European Integration* (Cambridge: CUP 1999) p 268.

65 Maris Moks, draft (discontinued) PhD thesis *Guardianship of the Constitution versus the Expectations of European Integration: Judicial Review of the Euro-crisis Management* (Hertie School of Governance in Berlin, 2017), on file with the author and cited with the permission of Maris Moks.

66 Moks, supra note 65. Emphasis added.

67 Moks, supra note 65.

68 See also the observations by Torres Pérez about neofunctionalist writings on courts by Weiler, below note 136 and the accompanying text.

69 Preliminary results presented by Jan Komárek and Michał Krajewski, 'So, who is influential? Methodological reflections', at IMAGINE project workshop 'Freedom and Power of European Scholarship' (23 June 2021, Prague/Copenhagen/Zoom) <https://imagine.sites.ku.dk/> (accessed 30 August 2022); the results are being prepared for publication.

70 'ICON·S – The International Society of Public Law. Mission Statement' <http://icon-society.org/site/mission> (accessed 2 August 2022).

Impressionistically, the neofunctionalist terminology of law, where any deviation on the part of national courts tends to be reduced to sovereignty, national identity, Euroscepticism or 'obstacles to integration', also tends to prevail in the publications and events of FIDE (*Fédération Internationale pour le Droit Européen*), ECSA (European Community Studies Association) and other scholarly associations in the field of EU law and integration, and their national branches (eg UACES in the UK). A recent ECSA-Austria funded anthology on Member States' constitutions, while providing an impressively comprehensive account on national constitutions, in the book description nevertheless frames the lens of the study through the question 'Do individual constitutions, and the legal cultures underlying them, pose an obstacle to future EU integration?'[*71]

The observations by Maris Moks about the different perspectives of EU constitutionalists and comparative constitutional lawyers tally with those of Peer Zumbansen who has, on the basis of a comprehensive overview of the literature, pointed out that state-based and comparative constitutional law have 'little in common' with the transnational constitutionalisation processes and the 'autonomous', 'beyond' state constitutional language.[*72] Whilst the former limit and place constraints on public power, transnational constitutionalisation removes the accountability mechanisms and frees space for the dynamic forces of constantly newly emerging functional and specialised fora of law-making.[*73]

In subsequent ongoing research, the above profound observations by Maris Moks eventually led me to articulate that the conflicts between national and EU constitutionalism that I and many other scholars and judges have been grappling with for so many years represent an **ongoing Kuhnian paradigm shift in European constitutional law**. Professor Thomas Kuhn, in his world-leading book on the history of science,[*74] articulated how scientific revolutions often come about as a result of a competition between two 'incommensurable' paradigms. Puzzled by the fact the arguments of some scholarly work he studied seemed ignorant and full of egregious errors, Kuhn came to the insight that scholars tend to be part of something akin to scientific 'tribes' or sub-cultures, clustering around the shared intellectual traditions of their disciplines. Following a period of turmoil, uncertainty, debate over fundamentals and expression of explicit discontent, this eventually tends to lead to a 'paradigm shift', with the discourses settling into the new dominant paradigm and the new conceptual framework.[*75] Such Kuhnian paradigm shifts are often invisible, at least initially.

I would submit for the consideration of the readers that in the context of European constitutional law, the Kuhnian paradigm shift finds expression in that there are, broadly speaking, **two parallel worlds of constitutionalism**.

The first is **the world of the broader national and comparative European understanding of constitutional law**, where the constitutions continue to be the principal normative point of reference, along with the classic understanding of European constitutional law and corresponding substantive values, such as fundamental rights, the rule of law, democracy, separation of powers, the social state and public good, judicial protection and constitutional review, and where the people are the ultimate source of public power.

The second and increasingly predominant is **the world of autonomous EU law and governance**, where the mindset, legal thinking and epistemic communities operate with keywords that are predicated on the new foundational ideas for the exercise of public power noted above, especially functionalism, neofunctionalism, neoliberalism, the tenets of international law and theories of transnational governance. The keywords include effectiveness, direct effect, uniformity, coherence, trust, enforcement, teleological

71 Stefan Griller, Lina Papadopoulou and Roman Puff (eds) *National Constitutions and EU Integration* (Hart Bloomsbury, 2022); the description is available at <www.bloomsbury.com/uk/national-constitutions-and-eu-integration-9781509906765/> (accessed 30 August 2022).

72 Peer Zumbansen, 'Comparative, Global and Transnational Constitutionalism: The Emergence of a Transnational Legal-pluralist Order' (2012) 1(1) Global Constitutionalism p 47. – DOI: https://doi.org/10.1017/s2045381711000037. See also pp 31 and 38, with further references, especially to Martin Loughlin.

73 Zumbansen, supra note 72, p 47, with reference to Martin Loughlin.

74 Thomas Kuhn, *The Structure of Scientific Revolutions. 50th Anniversary Edition with an Introductory Essay by Ian Hacking* (Chicago: University of Chicago Press 2012) – DOI: https://doi.org/10.7208/chicago/9780226458144.001.0001. For a summary, see John Naughton, 'Thomas Kuhn: the Man Who Changed the Way the World Looked at Science' *The Guardian* (19 August 2012) <https://www.theguardian.com/science/2012/aug/19/thomas-kuhn-structure-scientific-revolutions> (accessed 30 August 2022).

75 As summarised by Naugthon, supra note 74.

interpretation and the market. There are further underlying neofunctionalist tenets and doctrines which will be outlined below, especially 'Spillover' and 'Integration through Law', and precepts of neoliberalism, such as prioritisation of market values, deregulation, privatisation, replacement of public good by universal commodification, etc. In theories of transnational governance, there has been a paradigmatic shift from polity to society; '[t]he constitutional state operating through formal law making and political representation is allegedly dated', having been replaced by 'technical administration of depoliticized rational decisions', which are also dejuridified.*[76] In the new broader foundational ideational setting, it is not entirely clear what the source of public power is: in functionalism, it is based on apolitical, technical expertise;*[77] in theories of transnational governance, self-constituted authority has been noted;*[78] in neoliberalism, regulation is based on the presumed economic 'rationality' and the expertise of the technocratic institutions, but many have observed that, in reality, there has been a foundational change from accountability to the people to accountability to the markets or, essentially, to the international creditor community*[79].

One key underlying source of tensions and incommensurabilities seems to be that broadly speaking, the epistemic communities of autonomous EU law and governance regard the EU legal order as one single and unitary legal order,*[80] from Dublin to Rome and from Paris to Tallinn, apart from some strands of constitutional pluralism. As Agustín Menéndez has observed with concern, the consensus that 'European governance should become the *new grammar* of European law' means, 'in more pedestrian English', 'replacing supposedly quaint or obsolete constitutional law, tainted by its relationship with the nation-state, with a new array of procedures and institutional formations'.*[81] At the same time, for the epistemic communities of national and comparative law, the constitutional orders of the Member States have continued to co-exist, with powers having been delegated – on the basis of the respective national constitutions – to the EU, subject to certain limits and conditions and in specified fields, mainly in the internal market although with subsequent (and much contested) expansions to ever wider fields.

Although the broader classic understanding of constitutionalism is still mostly the norm in the Member States, it has strangely and increasingly come to be reduced to idiosyncratic national constitutional identity, as the epistemic communities of EU governance tend to have much more power and visibility due to the structural issues and the prevailing operational setting in EU law research that was outlined in Chapter 3. The reality is that EU law communities have a clear set of leading journals that are widely read and where discussion is continued; they have a much greater proportion of high-ranking publications. There is very generous EU funding for research grants, research centres, meeting forums, professional associations, as well as funding for doctoral and post-doctoral fellowships in the field of EU law and integration. All this contributes to EU law and integration communities having far better transnational networks and mobilisation capacities, which is especially evident in the sharp reprimand of any deviant national constitutional courts. According to one interpretation of Kuhn's work, a paradigm shift succeeds not because of rational disagreement but because those who adopt it 'are **systemically influential** and end up dominating the academic discourse and indoctrinating the new generation of practitioners with the new paradigm'.*[82] The present writer would submit that scholars and lawyers of autonomous EU law and governance have become such systemically influential and predominant epistemic communities.

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76 As per transnational governance literature insightfully summarised and elucidated by Jiří Přibáň 'The Concept of Self-limiting Polity in EU Constitutionalism: A Systems Theoretical Outline' in Jiří Přibáň (ed) *Self-Constitution of European Society: Beyond EU Politics, Law and Governance* (Routledge 2016) pp 39, 42-44, 48, 51. – DOI: https://doi.org/10.4324/9781315608273.

77 Eg Klabbers, supra note 62, pp 664-665.

78 As per transnational governance literature summarised by Přibáň, supra note 76, pp 42-44, 51ff.

79 Harvey, below note 166, eg 72-73; Michael Wilkinson, 'The Reconstitution of Postwar Europe: Lineages of Authoritarian Liberalism' *LSE Working Paper 05/2016* <http://www.lse.ac.uk/law/working-paper-series> (accessed 30 August 2022) pp 22 and 27ff, with reference to the publications of Chris Bickerton and Wolfgang Streeck. See also below note 174 and the accompanying text, and the debates regarding the Portuguese Constitutional Court, below notes 201-203 and the accompanying text. See also below notes 163-166 and the accompanying text on the entrenchment of neoliberalism.

80 Paul J Cardwell, 'The End of Exceptionalism and a Strengthening of Coherence? Law and Legal Integration in the EU Post-Brexit' (2019) 57(6) Journal of Common Market Studies p 1408. – DOI: https://doi.org/10.1111/jcms.12959.

81 Agustin Menéndez, 'Book review on Alexander Somek *Individualism*' (2009) 7(3) International Journal of Constitutional Law p 550. – DOI: https://doi.org/10.1093/icon/mop018. Emphasis original.

82 As Kuhn's key themes have been summarised by Nigel Stobbs, 'The Nature of Juristic Paradigms Exploring the Theoretical and Conceptual Relationship Between Adversarialism and Therapeutic Jurisprudence' (2011) 97(4) Washington University

Indeed, I would submit that something akin to a systemically neofunctionalist operational setting has come to be embedded in EU law research, at least beyond national law journals which are rarely read and cited by EU law scholarship. The 'exclusion' and 'silencing' of critical and comparative voices – which was noted in Chapter 3 – also means exclusion of much of the legal thinking and conceptual apparatus of the paradigm of classic European constitutional law. In such an operational setting, issues which for national legal communities are basic constitutional common sense typically need extensive explanation, pleading and justification in EU law journals and scholarly forums, and there is often an atmosphere where defending national constitutions is regarded as somehow inherently nationalist or populist. Moreover, such constitutional issues have become even harder to raise after the illiberal turn of Poland and Hungary.

That neofunctionalism is, indeed, the key ideational component underlying autonomous EU governance as well as EU law and integration studies becomes evident when one turns from the focus on comparative constitutional law to reading more extensively the work of EU law and integration scholars.*[83] Whilst there is no space here to delve further into neofunctionalism, many readers will be familiar with the main tenets of neofunctionalism, such as 'Spillover', 'Never let a good crisis go to waste', the characterisation of the European Court of Justice as a 'motor of integration', the doctrine of 'Integration through Law', and the instrumental mobilisation of scholarly and other epistemic communities to advance the European project. What is important for the purposes of this article is that in neofunctionalism, the exercise of public power is oriented towards fundamentally different reference points and broader objectives in comparison with national and comparative European constitutional law.

One profound difference is, as Jan Klabbers has elucidated, that in the theory of functionalism that governs much of international law thinking, international and supranational organisations are regarded as 'purely beneficial creatures' and as a 'a higher form of being', and any co-operation is inherently good.*[84] There are no pathways of thinking about how to deal with situations where supranational or international organisations undermine fundamental rights or the rule of law, or may even display autocratic or authoritarian tendencies. This also helps to explain a somewhat puzzled observation in Aasa's thesis that the EU constitutional principles are structural and not concerned with the substantive content of policies.*[85] Examples of how this plays out eg in fundamental rights protection or in EU enforcement proceedings can be found throughout this paper.

The present writer would add that the presumption of inherent benevolence and rationality of international institutions has led to a larger-scale structural problem whereby causes of problems tend to be attributed to the national level, with blindness to deeper underlying causalities that often lie in the policies of the international institutions, leading to misguided policy prescriptions that may well exacerbate the problem.*[86] This could perhaps tentatively be referred to as a vicious cycle caused by the presumption of inherent rationality of international institutions and blindness to the underlying causalities. By way of a topical example, I have rarely seen discussion on whether the underlying causes of the widening rule of law crisis in Central and Eastern Europe may include some of the neoliberal policies imposed by the EU or IMF, such as the harsh austerity measures, privatisation, commodification and financialisation that have led to unaffordable housing and public services, and which have caused a lot of resentment. Notably, before the illiberal turn in Hungary, 1.7 million citizens – or more than one-sixth of the population – had taken out foreign currency-denominated mortgages and loans from subsidiaries of Western European banks, which often became unmanageable after exchange rate increases.*[87] What has also been very under-researched is the human suffering and long-term effects of the so-called 'shock therapy' that was administered to the whole region by the IMF in the transition years, which the Nobel Prize laureate economist Joseph Stiglitz

Jurisprudence Review <https://openscholarship.wustl.edu/law_jurisprudence/vol4/iss1/4> (accessed 30 August 2022) pp 105-106 and footnote 37. Emphasis added.

83 Generally on neofunctionalism and EU law, see Graínne De Búrca,'Rethinking Law in Neofunctionalist Theory' (2005) 12(2) Journal of European Public Policy p 310. – DOI: https://doi.org/10.1080/13501760500044082; and Alec Stone Sweet, 'Neofunctionalism and Supranational Governance (unabridged version)' *Faculty Scholarship Series, Paper 4628/2012*, <http://digitalcommons.law.yale.edu> (accessed 30 August 2022).

84 Klabbers, supra note 62, pp 665-666, 646, with references to literature.

85 Aasa, supra note 2, eg pp 225-229.

86 Cf also Anghie, below note 110 and the accompanying text.

87 The data is from 'Hungary', in *Encyclopaedia Britannica* (2010) p 409.

and others have seen as a cause of the rise in poverty, inequality and non-emergence of a strong middle class and healthy civil society in some Central and Eastern European countries. Indeed, in light of the war in Ukraine, Stiglitz' chapter 'Who Lost Russia' would seem to warrant closer public attention.[*88]

Further differences in the thinking of the epistemic communities of autonomous EU governance, in comparison with those of national and comparative European constitutional law, include the following. In the neofunctionalist ideational setting, national constitutions, courts and other institutions are approached from the perspective of whether they advance or pose 'obstacles' to integration.[*89] The 'national' tends to be equated with nationalism and sovereignty, which are deemed to be the underlying problems that need to be overcome. As a consequence, there is a very limited attention span for anything 'national' beyond compliance, correct implementation and loyal co-operation.[*90] There is a tunnel vision whereby progress is to be achieved through 'Europeanisation', in the specific meaning of a gradual transfer of law and power from the nation-states to the EU level,[*91] along with a shift to autonomous EU law and legal language. More generally, neofunctionalism tends to redirect policy, law and even fundamental rights protection from finding optimal solutions – eg to the needs of a people of a country – to what best achieves successive shifts of law and competences to the EU level. On the national level, much of the political, legal, policy-making, scholarly and other talent and energy has over many decades been directed to the narrow cause of advocating, or opposing, new, successive transfers of power to the EU level.

Ultimately, the underlying dogmatic premise in neofunctionalism and in much of EU law, policy and discourse is the belief that the path to human progress lies in leaving behind nation-states. Indeed, this assumption is present in one way or another, for somewhat differing reasons, in most of the new foundational ideas for the exercise of public power in autonomous EU governance listed above. As Alexander Somek has observed with regard to EU discourses, the '[m]ainstream discourse … is blinded by the belief that the one remaining obstacle to human progress is the nation state'.[*92] Signe Rehling Larsen has documented that the project of unification of Europe in a way where nation-states need to be left behind has been in particular promoted by German scholars, politicians and the legal community as part of post-fascist constitutionalism, due to the origin of the Nazi atrocities in nationalism and excesses of people power and democracy.[*93] Rehling Larsen takes issue with this broader objective, and perceptively points out that many other Member States, eg the Nordic countries and the UK, do not find that the problem is the nation-state or the people, as they have not had such drastic experiences with the people. Furthermore, Rehling Larsen points out that the peoples of Central and Eastern Europe have historically been oppressed by foreign imperial powers, especially during the Soviet era, having barely managed to preserve their languages and cultures, and thus the respective constitutions do not see people and the nation-state as a threat but rather commit to upholding the nation-state and democratic self-determination.[*94]

As a side remark, it is likely that the scholarly and legal communities in Estonia, the other Baltic states and other countries of Central and Eastern Europe have not consciously considered the practical implications of the ultimate objectives of EU law and integration, and may wish to add their support to Rehling Larsen's observations. Indeed, the present writer's broader sense is that there has been a battle against the wrong enemy. Instead, another lesson incorporated in the German post-war Basic Law – that the root causes of the rise of authoritarian governments lie in economic insecurity and dependence, due to which strong protections were put in place for the social state – has received negligible attention; this theme will

88 Joseph Stiglitz, *Globalization and its Discontents* (London: Penguin 2002) pp 167, 141, 162, 133ff, and chapter 5. For a summary of Stiglitz's work in Estonian, see book review by Anneli Albi, 'Stiglitz: Vaja on uut majandusmudelit ja finantssüsteemi' ['Stiglitz: A New Economic Model and a Financial System Are Needed'] *Sirp* (20 October 2011) <https://www.sirp.ee/s1-artiklid/c9-sotsiaalia/stiglitz-vaja-on-uut-majandusmudelit-ja-finantssuesteemi/> (accessed 30 August 2022). For a similar critique with regard to IMF policies in relation to developing countries, see Anghie, below note 104ff and the accompanying text. On entrenchment of 'neoliberal authoritarianism', see below notes 163-166 and the accompanying text.

89 See also observations by Moks, supra note 66, Avbelj, below note 187, and the book description by Griller, Papadopoulou and Puff, supra note 71, and the accompanying text.

90 See also Scharpf's remark that EU law has no language to describe the normative weights of the national concerns at stake, below note 185 and the accompanying text.

91 See also remarks about 'expansion of European law as an end in itself' by Joerges, below note 182 and the accompanying text.

92 Somek, *The Cosmopolitan Constitution*, supra note 16, p vii.

93 Rehling Larsen, supra note 48, 482ff.

94 Rehling Larsen, supra note 48, 488ff.

be explored in Chapter 5. It is additionally worth recalling that this is not the first time that the Estonian legal system and legal community – and those of other countries in the broader post-Soviet area – have experienced the effects of an ideational setting that sees progress in leaving behind the national legal cultures. Tõnu Tannberg, Professor of Estonian history at the University of Tartu, has extensively researched how in the Soviet Union the goal was to fight against nationalism, including in law and legal science, and to shift law and legal science discourses to the (Soviet) Union level, along with ideological muzzling.[*95]

Beyond neofunctionalism, a brief mention should be made of the origin of the EU legal order in international law, and the fact that EU law scholars tend to have their educational and research background in international law.[*96] It is important to flag for wider awareness that as Martti Koskenniemi had extensively elucidated, international law is a field that has its own language, 'grammar', 'constitutive assumptions', 'conceptual matrix' and 'deep structure'; these are very different from what Martin Loughlin describes as the 'vernacular language' of public law, including the resulting legal thinking and operating methods.[*97] Regarding the influential discourses of international and global constitutional law, Aoife O'Donoghue has written a highly insightful monograph documenting how their vocabulary differs from traditional constitutionalism: the former have a starting point in, and use parameters of, international law, and are marked more generally by a thin understanding of constitutionalism as merely consisting of organisational rules, legalisation and depoliticisation, juridification, hierarchy, coherence, etc.[*98] O'Donoghue suggests that as global constitutionalism is not based on the constitutional values of democracy, separation of powers and (a substantive understanding of) the rule of law, at this stage it is better described as an 'entirely novel form of governance', instead of using the vocabulary of constitutionalism.[*99]

For the purposes of the present paper, what is important is that in the EU legal order, many of the keywords have been transplanted from international law, such as effectiveness, direct effect and enforcement, along with the thin understanding of constitutionalism and of the rule of law. For example, the principle of effectiveness – a key tenet of functionalism – has been regarded as the '"basis" of the normativity of international law'.[*100] There is also the replication in the EU legal order of the international law orientation towards pragmatism and *ad hoc* solutions. Crucially, the above international law concepts, keywords and understanding of constitutionalism were meant for treaties and inter-state co-operation, to advance peace and ensure basic standards of human rights. The international law concepts, keywords and the thin understanding of constitutionalism were never meant – and, indeed, are intrinsically unsuitable – for gradually replacing, through the EU legal order, much of the national legal orders of the states, including the complex and carefully fine-tuned formal and substantive constitutional norms, legal thinking and terminology. The resulting distorted logic of law is particularly evident and acute in the disappearance of the delicate balances, rule of law safeguards and judicial protections for the individual in the field of criminal law, and their replacement by the principle of effectiveness and *ad hoc* measures.[*101] The lack of attention to this so far (as a tentative thought that needs further exploration) may partly have its cause in the drive in international law literature towards universalisation, whereby complex national jurisdictions with constitutional, legal, social, economic and other systems and political and institutional organisation often seem to be

95 Tõnu Tannberg, presentation 'Õigussüsteemi rakendamine poliitilise režiimi teenistusse Eestis 1950. aastatel' ['The deployment of the legal system in the service of the political regime in Estonia in the 1950s'] at the Estonian Lawyers 35th Congress 'Eesti Vabariik 100 – Kaasaegne riik' ['Republic of Estonia 100 – Modern State'] (4 October 2018) <https://www.uttv.ee/naita?id=27592> (accessed 30 August 2022).

96 This has been observed eg by Giuseppe Martinico, 'Constitutionalism, Resistance and Openness: Comparative Law Reflections on Constitutionalism in Global Governance' (2015) STALS (Sant'Anna Legal Studies, Pisa) Research Paper No 5/2015, pp 5ff and 10-11, as cited in Albi, 'Erosion of Constitutional Rights', Part 2, supra note 19, pp 299-300. This was so in particular in the early days, and explains the importance attributed to enforcement and sanctions in the accounts on the 'constitutionalisation' of the EU legal order, compared to weakness of enforcement in international law; see Joseph HH Weiler, 'A Quiet Revolution: The European Court of Justice and its Interlocutors' (1994) 26(4) Comparative Political Studies, pp 530-531. – DOI: https://doi.org/10.1177/0010414094026004006.

97 See Martti Koskenniemi, *From Apology to Utopia. The Structure of International Legal Argument. Reissue with a New Epilogu*e (Cambridge: CUP 2005). – DOI: https://doi.org/10.1017/cbo9780511493713, especially pp 6-12, 183, 503, 558, 589. For differences compared to Martin Loughlin's account of public law as a 'vernacular language', see p 586 and footnote 8.

98 See Aoife O'Donoghue, *Constitutionalism in Global Constitutionalism* (Cambridge: CUP 2014). – DOI: https://doi.org/10.1017/cbo9781107279377. See also Martinico, supra note 96, as cited in Albi, 'Erosion of Constitutional Rights', Part 2, supra note 19, pp 299-300.

99 O'Donoghue, supra note 98, p 243.

100 Koskenniemi, supra note 97, p 220 footnote 217, and p 523 footnote 15.

101 See eg below notes 213-215, as well as 194 and 205, and the accompanying text; see also Chapter 9.

reduced to somewhat Hobbesian sounding sovereignty, 'national egoism' and the state's 'private realm'.[*102] The 'national' dimension has even been seen as the 'subconscious' or 'unconscious', with international law being the public, 'conscious' realm.[*103]

A further dimension of international law is that its origins lie partly in colonial administration, as has come to be more widely acknowledged in recent years, especially thanks to the seminal monograph of Antony Anghie, whose work started the Third World Approaches to International Law (TWAIL).[*104] Anghie documents how the formative stages of development of international institutions – along with their operational methods and techniques – were profoundly shaped by the League of Nations Mandate System, which established an intricate trusteeship system of colonial administration and management, with institutions such as the Permanent Mandates Commission.[*105] Anghie documents how the core elements of the system have subsequently been replicated in global financial and economic governance, especially through IMF and World Bank governance, which, in essence, are widely seen in the developing countries to represent neo-colonialism.[*106] Several elements elucidated in Anghie's book have striking similarities with EU governance, and merit attention due to their far-reaching effects on the system of public power. For the purposes of the issues raised in the present article, the following will be briefly flagged. Colonial and neo-colonial administration entrench what Anghie calls the "economization' of government', with references to Foucault's notion of 'governmentality',[*107] whereby the role of the national governments is reoriented from responsibility to the people to protecting the neoliberal economic order – and in the interests of multinational corporations and their financiers. The internal matters of the states are reduced to 'national identity', particularism, backwardness and 'cultural difference', which have to be replaced by a new, universal law and order.[*108] The Mandate System was a new system of international law,[*109] marked by top-down imposition of conditionality, especially of neoliberal economic policies, and by far-reaching monitoring and management through progress reports, backed up by disciplinary proceedings. Anghie additionally draws attention to the 'peculiar cycle' that 'creates a situation whereby international institutions present themselves as a solution to a problem of which they are an integral part.' He adds that '[s]uch a situation is very much part of contemporary international relations';[*110] indeed, examples of such dynamics in the context of the current rule of law crisis were brought above. In terms of fundamental rights, some interesting parallels with EU governance that the present writer spotted in Anghie's book include '[a] distorted, economistic version of human rights' when mediated through governance, with a shift away from human dignity;[*111] the conceptualisation of non-discrimination and equality in a way that benefits foreign traders, entrepreneurs and investors, without regard to adverse effects or growing social inequality for the local residents;[*112] the quest to create an individualistic and liberated 'economic man';[*113] and the conceptualisation of the rule of law in a way that advances commerce and where the international institutions themselves are not subject to any rule of law requirements.[*114] One recurring theme is the subjugating and debilitating effect of large debt commitments, the meeting of which necessitates specific policies that are harsh for the people and the country, as well as requiring harmful exploitation of the environment and natural resources.

102 On Hobbesian sovereignty, see eg Koskenniemi, supra note 97, pp 90-92, 192; on national and state 'egoism', see ibid pp 476-483; on state jurisdiction as 'private realm', see ibid pp 5, 248.

103 Literature on the 'interior life' and internal systems of the state as 'subconscious' is noted in Anghie, below note 104, pp 134-135.

104 Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: CUP 2007) – DOI: https://doi.org/10.1017/cbo9780511614262.

105 Anghie, supra note 104, eg pp 123, 140, 183.

106 Anghie, supra note 104, eg pp 117-118.

107 Anghie, supra note 104, especially pp 179ff and footnote 254.

108 Anghie, supra note 104, eg pp 4, 6, 177, 312.

109 Anghie, supra note 104, pp 123ff, 180.

110 Anghie, supra note 104, eg p 178.

111 Anghie, supra note 104, eg pp 263, 270-272.

112 Anghie, supra note 104, eg pp 270-271.

113 Anghie, supra note 104, eg p 167. Cf also below notes 167 and 230-231 and the accompanying text.

114 Anghie, supra note 104, eg pp 267, 272.

Crucially for central themes in the present article, Anghie elucidates that the Mandates System created an entirely new science of 'colonial administration based on a deductive and experimental method'*[115], which provided legitimisation for the new, 'extraordinarily intrusive' techniques of monitoring and management on the part of the central authority – the Permanent Mandates Commission – which removed the need for scholars to rely on the cruder science of 'comparative colonial administration'.*[116] The new science of colonial administration was marked by centrality of the economy, which was understood to be a universal discipline that transcended cultural particularities, and thus all mandate countries could be assessed by **the same, homogenised criteria, against which any deviations or particular native practices had to be justified**.*[117]

Anghie's concern is that the above and other IMF and World Bank methods and policies are the underlying cause of 'the deep and enduring inequalities that afflict this planet'; he notes that articulation of the historical and conceptual origins allows identification of the source of the problem and to bring about a change to further justice and increase the well-being of humanity.*[118] Whilst one of Anghie's concerns is that what has been imposed on the developing countries is the law of European countries, the present writer would submit for the consideration of the readers that a form of neo-colonialism seems to have rebounded vis-à-vis the EU Member States through EU and IMF governance and conditionality, including the imposition of very large – and increasingly indeterminate – debt liabilities. Indeed, many aspects of the EU legal order seem to be closer to the above, neo-colonial operating techniques and processes rather than federalism. It was seen above that functionalism also has intellectual origins in US colonial administration, as pointed out by Klabbers.*[119] That colonialism was present in the drafting process of the EC Treaties has extensively been documented in the context of the now forgotten 'Eurafrica' project.*[120]

Turning briefly to the United States federal system as the model which has gradually and somewhat on auto-pilot been replicated through the EU legal order, elsewhere I have called for discussion with regard to the wide-ranging concerns of scholars about the profound differences in US constitutional law and in (especially material continental) European constitutional law, and the ways in which US constitutional thinking, through its effects on EU law, has been changing continental European constitutionalism.*[121] In the present paper, the concerns that 'America is a harsh place' as regards criminal justice and social welfare,*[122], as well as the different understanding of the role of courts, will be briefly explored in Chapter 5.

Whilst the above and other conceptual and historical origins of autonomous EU governance will have to be explored more fully in another publication due to space constraints, the ways in which various components of the ongoing paradigm shift have been leading to a very different understanding of the role of courts, along with profound changes to the well-established tenets and achievements of substantive comparative (especially continental) European constitutional law and the system of exercise of public power, will be briefly outlined in the chapters that follow.

One might wonder why it has not come to light earlier that an underlying reason for many tensions in EU/European constitutional law is that there is entirely different legal thinking in the two broader, parallel epistemic communities, with scholars talking past one another. Besides the numerous structural issues in the mainstream EU law discourse mentioned throughout this article, one could add that scholars have noted a '**disconnect**' or a lack of meaningful dialogue between the national and EU legal discourses. Daniel Thym, for example, has evocatively summarised many of the issues in his *Verfassungsblog* post 'The

115 Citation of Wright, by Anghie, supra note 104, p 184 in footnote 271.

116 Anghie, supra note 104, pp 184-186.

117 Anghie, supra note 104, pp 184-185. For the present writer's remarks about similarities of this dynamic with EU law, see the text that follows supra note 82, the text accompanying below note 127, and Chapter 10.

118 Anghie, supra note 104, eg pp 311-313, 317, 320. For similar concerns regarding IMF neoliberal conditionality from a non-colonial perspective, see Stiglitz, supra note 88.

119 Klabbers, supra note 62, pp 645, 675.

120 Peo Hansen and Stefan Jonsson, *Eurafrica: The Untold History of European Integration and Colonialism* (Bloomsbury Academic 2014). – DOI: https://doi.org/10.5040/9781472544506.

121 Albi and Bardutzky, 'Revisiting the Role and Future of National Constitutions', supra note 43, pp 32-34. See also Somek's research below note 129, and Avbelj, below note 248, along with the accompanying text.

122 James Q Whitman,'"Human Dignity" in Europe and the United States', in Georg Nolte (ed) *European and U.S. Constitutionalism. European Commission for Democracy Through Law* (Venice Commission CDL-STD (2003)037) <http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-STD(2003)037-e> (accessed 30 August 2022) p 81. Also published in Georg Nolte (ed) *European and US Constitutionalism* (Cambridge: CUP 2003). – DOI: https://doi.org/10.1017/cbo9780511493904.008. See further below notes 158-160 and 169, and the accompanying text.

Solitude of European Law Made in Germany': foreign languages as 'an [...in]surmountable hurdle', the lack of citations of national literatures in influential EU law journals, the situation where 'smaller jurisdictions do not have enough manpower to sustain debates about specialised questions of EU law', etc.[*123] Thym suggests that 'we have to find ways to link national and European debates' in order 'to overcome the disconnect'. In a follow-on blog post, Päivi Leino and Janne Salminen share similar concerns in the context of Finland, and observe, inter alia, that much of the research in European law published in national languages in national journals risks being 'ignored simply because important knowledge might be shut in rather closed circles'. They argue that

> [k]eeping in mind the close relationship between law, legal research and culture, a situation where the European legal elites would discuss and publish legal research only in one language and in international fora could risk research being increasingly isolated from everyday societal debates and develop the results of such studies into being something for a closed epistemic community.[*124]

Even in the UK, where the issue of language barriers is not present, Danny Nicol observed (pre-Brexit) that 'British constitutional scholarship for the most part tends to focus on Britain's internal institutions'. He further observed a 'reluctance to engage with globalisation' and especially with the constitutional entrenchment of neoliberalism through EU law.[*125]

The 'disconnect' and other structural issues in EU research and discourse also reinforce the problem that EU epistemic communities often do not, in fact, have a good understanding of national and comparative (continental) European constitutional law, which may well also be one of the reasons why constitutional issues arising at the national level tend to be simplistically blurred into notions of sovereignty, national constitutional identity and Euroscepticism. National constitutional matters are widely presumed to be idiosyncratic, particularistic, emotive, backward and irrational, and can only be invoked in exceptional cases where national constitutional identity is at stake, although even such cases are still regarded by many as negative and as posing regrettable 'obstacles to integration'.[*126] Indeed, recent decades have been marked by a deeply embedded generic, dogmatic assumption that progress is achieved through a replacement of Westphalian constitutionalism – that is based on nation-states and territorial rule – with supranational, international and global governance that are deemed to be inherently superior and of a higher order. On a closer reading of the literature, it emerges that much of the respective discourse has been oblivious or blind to the level of development and quality of, and the values protected by, the complex national rules and systems, and which are gradually being consigned to history. There is a particularly marked absence of awareness about the substantive, material constitutional law of the EU Member States.[*127]

Indeed, there appears to be a profound, systemic flaw in the mainstream discourses, which have by and large been blind to the fact that what is being consigned to history through the drive towards denationalisation, is, in fact, **an advanced, carefully fine-tuned system of public power** that is based on complex formal, institutional, procedural and substantive constitutional rules. Furthermore, it has also hitherto been overlooked that discarding national constitutional orders has the further profound but largely undiscussed effect of **abandoning much of the broader comparative (especially continental) European understanding of constitutionalism, including shared tenets and advanced 'constitutional achievements'**[*128]. These in several aspects quite possibly represent **the most advanced**

123 Daniel Thym, 'The Solitude of European Law Made in Germany' *VerfBlog* (29 May 2014) <https://verfassungsblog.de> (accessed 30 August 2022).

124 Leino-Sandberg and Salminen, supra note 1.

125 See Nicol, below note 163, pp 5ff.

126 This view, which is very widely held in EU scholarship, has recently culminated in the argument of R Daniel Kelemen and Laurent Pech that scholars who developed the theory of constitutional pluralism and the related notion of national constitutional identity are guilty of the fact that the illiberal regimes of Poland and Hungary have abused these concepts to justify undermining the rule of law. They find that the theory of constitutional pluralism is 'inherently dangerous' and needs to be recalled altogether, and replaced with traditional primacy of EU law; 'the time has come to dismantle constitutional pluralism'. R Daniel Kelemen, Laurent Pech, 'The Uses and Abuses of Constitutional Pluralism: Undermining the Rule of Law in the Name of Constitutional Identity in Hungary and Poland' (2019) 21 Cambridge Yearbook of European Legal Studies, pp 61, 74. – DOI: 10.1017/cel.2019.11.

127 Cf also above notes 48, 102-103, 108 and 117, and the accompanying text regarding national jurisdictions as 'national egoism' and 'private realm' in international law discourse, and as 'particularistic' and backward in colonial administration.

128 The expression 'constitutional achievements' is borrowed from Dieter Grimm, who uses it more generally in relation to the democracy and rule of law elements in modern constitutions. Dieter Grimm, 'Types of Constitutions' in Michel Rosenfeld and

constitutionally codified and judicially protected fundamental rights, social rights and rule of law safeguards in the world, especially the post-totalitarian and post-authoritarian constitutional protections and rule of law safeguards for the individual, as well as the Nordic approach to the social state. Indeed, Somek regards especially the constitutions based on the German model as representing the emancipation of constitutionalism, especially if one compares this to the US system, as well as the EU paradigm shift to decision-making on the basis of exigencies, with a corresponding regression in constitutionalism.[*129] The present writer would add that the constitutional protections have resulted from '[t]he Battles That Won Our Freedoms', to use an expression from an evocatively entitled BBC Radio 4 programme, which recalled that the protection of fundamental rights has gradually been achieved in result of human suffering and prolonged battles which so many individuals in history have fought.[*130]

But with the reality of national constitutions being reduced to idiosyncratic matters of national identity, 'European' constitutional law has come to denote autonomous EU law predicated on a neofunctionalist ideational setting, and not the broader comparative (especially continental) European understanding of constitutional law. Some of the examples of how autonomous EU governance has changed and displaced key achievements and tenets of comparative European constitutional law in different areas of constitutional law, from fundamental rights to criminal law and the social state, will be brought in Chapters 5, 8 and 9, after first taking a closer look at the way in which autonomous EU governance has been changing the role of national courts.

5. The role of national courts in neofunctionalism and beyond: Agents of integration; trust, efficiency and loyal co-operation; enforcement and shielding an economic order from contestation?

Returning to questions around the role of courts, the broader ideational setting of neofunctionalism and other new foundational ideas for the exercise of public power also help to make sense of the rather different understanding of the role of courts in autonomous EU law, which I first sought to articulate in the abovementioned 'Erosion of Constitutional Rights' article. In that article, I observed that 'the role of courts is increasingly shifting towards a framework of trust, loyal co-operation, and effectiveness in the context of EU law'.[*131] I referred to a Czech scholar, Michael Švarc, who has noted a wider 'shift of paradigm' through the EU mutual recognition instruments which require automatic execution and trust by courts that fundamental rights and fair trial requirements have been observed.[*132] I also summarised Gareth Davies' concerns that the CJEU's approach in advancing the EU free movement rights has led to very disorientating, destabilising and contemptuous effects on the national constitutional structures;[*133] that the CJEU case law represents 'the humiliation of the state as a constitutional tactic' and has attempted 'to turn national courts upon each other; to reverse the hierarchy; to instruct lower judges to judge higher ones'; and that all this has led to 'a world turned upside down for the traditional constitutionalist'.[*134] I additionally referred to Michal Bobek's concern, in the broader context of preliminary rulings and the focus on uniformity, about

András Sajó (eds) *The Oxford Handbook of Comparative Constitutional Law* (Oxford: OUP 2012) p 104. – DOI: https://doi.org/10.1093/law/9780199578610.003.0001.

129 Somek, *The Cosmopolitan Constitution*, supra note 16, p 10 and pp 85-86 footnotes 38 and 42 (summary of writings of authors comparing German and US constitutionalism). On Somek's finding about a paradigm shift, see above note 59 and the accompanying text.

130 'The Battles that Won our Freedoms' *BBC Radio 4* (March-April 2021), <www.bbc.co.uk/programmes/m0001xq1> (accessed 30 August 2022). See also below notes 177 and 178, and the accompanying text.

131 Albi, 'Erosion of Constitutional Rights', Part 1, supra note 19, pp 175ff.

132 Michael Švarc et al, 'Czech Republic' in Julia Laffranque (ed) *Reports of the XXV FIDE Congress Tallinn 2012*, *Volume 3: The Area of Freedom, Security and Justice, Including Information Society Issues* (Tartu: Tartu University Press 2012) p 269.

133 Gareth Davies, 'The Humiliation of the State as a Constitutional Tactic' in Amtenbrink and van den Berg, supra note 41, pp 147ff. – DOI: https://doi.org/10.2139/ssrn.4132514.

134 Davies, 'The humiliation', supra note 133, p 165.

the hollowing out of the essential function and intrinsic value of the courts, which is to protect individual rights.*135

In the above-mentioned article, I further collated extensive examples of the extremely negative and harsh comments in EU law publications with regard to those national constitutional courts who have voiced constitutional concerns in relation to some aspect of EU law, especially the effects of the European Arrest Warrant on fundamental rights. I documented how in much of EU law literature, such concerns were simplistically reduced to Euroscepticism and old-fashioned protection of sovereignty, with substantive constitutional issues by and large having been overlooked. In hindsight, this is squarely representative of neofunctionalist legal thinking, where a measure is assumed to be superior merely because it is supranational rather than national, without much regard to its substance, especially as regards the classic fundamental rights and rule of law parameters for constitutional validity.

I further pointed out that the intellectual framework of this type of simplistic framing has been elucidated, inter alia, in the work of Aida Torres Pérez. Torres Pérez has traced the origin of the research frame that focuses on resistance and compliance by judges to accounts in the literature which might be classified as (a) neo-realist, which portray courts as delegates of state governments voicing national interests; (b) neo-functionalist, which focus on judicial self-empowerment, with seminal research by Joseph Weiler; and (c) Karen Alter's influential competition of courts theory premised on the view that '[j]udges are primarily interested in promoting their independence, influence and authority'.*136 I also referred to Arthur Dyevre's article 'European Integration and National Courts: Defending Sovereignty under Institutional Constraints?', which is widely representative of this type of legal thinking. Using the frame of Eurocentrism/Natiocentrism, Dyevre's article provides seven hypotheses to explain the stance of national constitutional courts towards the EU, none of which include references to constitutional values beyond sovereignty, such as fundamental rights or the rule of law.*137

Turning to the perspective of the epistemic communities in the parallel world of (especially continental) European constitutional law, I would venture to say, based on the extensive concerns that emerged from the 'Role of Constitutions' project national reports, that in a purely national context, the requirements of near-automatic extraditions without judicial review would be deemed unconstitutional in at least half of the Member States, especially those which have constitutional courts. In the national reports in the abovementioned *National Constitutions* book, the following observations have been made to describe the effect of EU law, and especially of mutual recognition, on courts:

- In Slovenia, scholarship has warned that the 'uncritical application of the principle of mutual recognition bears the danger of transforming the judge into a kind of a "ticking box" automaton checking only pre-established criteria and neglecting his/her duty of a critical assessment and safeguarding fundamental (constitutional) rights to the defendant'. This argument is grounded in the principle of separation of powers.*138
- The report on France notes that 'the principle of mutual recognition certainly risks transforming the role of the judge into a more passive one. However, this transformation is not inevitable and should in any case not be easily accepted by the judges themselves'.*139
- The criminal law experts in the report on the UK (pre-Brexit) note that 'the role of the judiciary has shifted to an administrator whose hands, particularly at first instance, are largely tied by the

135 Michal Bobek, 'Landtová, Holubec, and the Problem of an Uncooperative Court: Implications for the Preliminary Rulings Procedure' (2014) 10(1) European Constitutional Law Review p 89. – DOI: https://doi.org/10.1017/s1574019614001047.

136 Aida Torres Pérez, *Conflicts of rights in the European Union. A Theory of Supranational Adjudication* (Oxford: OUP 2009) pp 106-107, 100. – DOI: https://doi.org/10.1093/acprof:oso/9780199568710.003.0001, referring to Weiler, 'A Quiet Revolution', supra note 96, pp 510, 523. In footnote 49 at p 107 Torres Pérez cites Karen Alter, *Establishing the Supremacy of European Law. The making of an International Rule of Law in Europe* (Oxford: OUP 2001) p 45. – DOI: https://doi.org/10.1093/acprof:oso/9780199260997.001.0001.

137 Arthur Dyevre, 'National Courts and European Integration: Defending Sovereignty under Institutional Constraints' (2013) 9(1) European Constitutional Law Review pp 150 and 162. – DOI: https://doi.org/10.1017/s157401961200106x.

138 Anže Erbežnik, 'Mutual Recognition in EU Criminal Law and Its Effects on the Role of a National Judge' in Nina Peršak (ed) *Legitimacy and Trust in Criminal Law, Policy and Justice Norms, Procedures, Outcomes* (Farnham: Ashgate Publishing Limited 2014) p 131, as cited in Samo Bardutzky, 'The Future Mandate of the Constitution of Slovenia: A Potent Tradition Under Strain' in Albi and Bardutzky, *National Constitutions*, supra note 7, p 710.

139 Laurence Burgorgue-Larsen, Pierre-Vincent Astresses and Véronique Bruck, 'The Constitution of France in the Context of EU and Transnational Law: An Ongoing Adjustment and Dialogue to Be Improved' in Albi and Bardutzky, *National Constitutions*, supra note 7, p 1201.

principle of mutual recognition. However with time, judges have been gaining 'confidence' in questioning the presumptions created by mutual recognition'.[*140]

- The criminal law expert in the report on Croatia notes on the basis of relevant national judgments that 'the only role of the Croatian courts was to be actors of loyal co-operation, efficiency and trust. They have expressly assumed this role themselves'.[*141]
- In Spain, in the context of constitutional challenges to the EU and IMF austerity and welfare state restructuring programmes, the Constitutional Court is said to have remained 'a passive spectator'.[*142]

Birgit Aasa's thesis also repeatedly notes that there are increasingly acute tensions in the Member States with regard to mutual trust, that there is confusion about national courts as guardians of legality, and that national courts have embarked on 'creative legal thinking' and inventing other innovative ways to surpass mutual recognition, eg by preferring not to ask the CJEU.[*143]

One could add concerns expressed by judges in dealing with EU law matters more generally on the basis of interviews carried out in the research of Ursula Jaremba with Polish judges (before the 2015 illiberal turn).[*144] For example, despite an overall euro-friendly orientation, the judges' anonymous answers to a questionnaire were nonetheless critical of the CJEU's teleological methods, which some found illegitimate, as they undermine legal certainty, change the role of the courts from applying law to creating law, and at times result in contra legem interpretations.[*145] Since a high proportion of judges were concerned about the complexity and 'time-consuming, laborious and troublesome' process of applying EU law, the unpredictable judgments of the CJEU were seen as a further alienating factor. As one judge noted, 'you don't know what to expect, you don't know where you are standing'.[*146] The teleological interpretation also reminded some older judges of the communist times, with one judge noting, 'I don't like crossing the same river twice'.[*147] Another judge observed that '[i]n my opinion, the Court goes too far in its jurisprudence. No one can control them and they do what they want. […] There are no checks and balances there […]. [A]t present it starts to become absurd, it touches upon a normal citizen in an absurd way'.[*148]

Michal Bobek has noted with regard to the extensive use of teleological interpretation and e*ffet utile* (the principle of effectiveness) in the CJEU's case law that '[h]eretical though it may sound, there are some striking similarities between the communist/Marxist and Community approaches to legal reasoning …'[*149]. The early Stalinist phase of Marxist law required judges to disregard the remnants of the old bourgeois legal system. They had to apply the law in an anti-formalistic, teleological way, directing their aim towards the victory of the working class and the communist revolution. In EU law, the purpose also comes first, leading to reasoning that consequentially follows from the purpose, using open-ended clauses such as *effet utile*; these take precedence over a textual interpretation of the written law.[*150] Bobek has further observed that the use of the doctrine of *effet utile* in EU law entitles the EU judges 'to do pretty much anything'; 'purposive reasoning is often reduced to one and only one purpose: the full effectiveness of Community law, which is turned into the crucial principle not allowing for any balancing or opposition'.[*151]

140 Young, Birkinshaw, Mitsilegas and Christou, supra note 47, p 108.

141 Iris Goldner Lang, Zlata Đurđević and Mislav Mataija, 'The Constitution of Croatia in the Perspective of European and Global Governance' in Albi and Bardutzky, *National Constitutions*, supra note 7, p 1163.

142 Joan Solanes Mullor and Aida Torres Pérez, 'The Constitution of Spain: The Challenges for the Constitutional Order Under European and Global Governance' in Albi and Bardutzky, *National Constitutions*, supra note 7, p 582.

143 Aasa, supra note 2, eg pp 30, 250, quoting, and with references to, Madalina Moraru.

144 Urszula Jaremba, *National Judges as EU Law Judges: The Polish Civil Law System* (Brill 2014). – DOI: https://doi.org/10.1163/9789004261471.

145 Jaremba, supra note 144, chapters 4 and 5, especially pp 222, 232-233, 264, 270, 274, 276.

146 As cited in Jaremba, supra note 144, pp 222, 233.

147 As cited in Jaremba, supra note 144, p 222.

148 As cited in Jaremba, supra note 144, pp 222, 232-233, 264, 270, 274, 276.

149 Michal Bobek, 'On the Application of European Law in (Not Only) the Courts of the New Member States: "Don't Do as I Say"?' (2007) 10 Cambridge Yearbook of European Legal Studies p 23. – DOI: https://doi.org/10.5040/9781472564610.ch-001.

150 Bobek, 'On the Application', supra note 149, pp 23 ff.

151 Bobek, 'On the Application', supra note 149, pp 1, 10, 21, citing Radoslav Procházka, 'Prekážka rozhodnutej veci – judikatúra Súdného dvora ES a jej dopad *na konanie vnútroštátnych súdov*' ['*Res iudicata* – the Case law of the Court of Justice and its Impact on the Procedure before National Courts'] (2007) 10 *Justičná revue* pp 1240, 1248.

Crucially, from the perspective of the paradigm of autonomous EU governance, the above-mentioned issues, broadly speaking, do not arise, since – in line with the underlying neofunctionalist ideational setting – progress is to be achieved through the gradual shift of power to supranational level, leaving behind the old-fashioned, nation-state-based Westphalian constitutionalism. Indeed, in neofunctionalist thinking, the principal mission of the CJEU is seen as being a 'motor of integration', and national courts are assessed as being either agents of, or obstacles to, integration.*[152]

There is a further stream of literature by US based political science scholars – whose work has been influential in EU law – which sees the CJEU as a 'trustee court' and 'super agent'. The origins of this theory lie in '[c]ontemporary delegation theory, with its emphasis on principal, agents, and dilemmas of agency control', which 'is an adaptation of concepts of contract law to the political world', including concepts from fiduciary constitutionalism, the law of trusts and other private law concepts.*[153] In this school of thought, scholars view the fact that the European Commission 'almost always wins' in enforcement proceedings and that the defendant states lost in 95% of the proceedings in 928 rulings in the 1978-99 period as a central aspect of the constitutionalisation of the EU.*[154] Damian Chalmers has also made the observation that the mission of enforcement proceedings and imposition of severe fines on Member States is turning the CJEU 'into an active agent of EU executive government'.*[155] A further dimension of the CJEU remit, as scholars have widely observed in hindsight, is that over the decades, the CJEU has acted as a far-reaching legislator, sidelining democratic processes.

The very different understanding of the role of courts in the two parallel worlds of constitutionalism squarely illustrates what in Kuhnian terms is an 'incommensurability' of the paradigms, and that the same concepts and vocabularies have entirely different meanings; crucially, therefore, there can also be no meaningful communication and debate about the content, ending in 'communication breakdowns'.*[156] From the perspective of classic European constitutionalism, where the role of courts is to apply law, to constrain public power and to protect fundamental rights vis-à-vis the exercise of public power – as part of the separation of powers and with the aim to ensure the freedom of the individual – the above roles of the CJEU as a sort of 'super agent' – combining the roles of an integration motor, adjudicator, legislator, enforcer and imposer of hefty fines – seems, in fact, rather dystopian. From the point of view of the classic European system of exercise of public power and the increasingly sharp tensions, it may be worth considering a broader differentiation of the vocabulary of governance from the long-standing 'vernacular' of constitutionalism, including to convey the different mission and very broad remit of the EU judiciary.*[157] Regarding Kuhn's observations about the difficulty of a meaningful communication about the content, perhaps this is why disagreeing voices simply tend to be dismissed in mainstream EU discourses as Euroscepticism, as old-fashioned protection of sovereignty or national constitutional identity, or by sharply attacking the individual judges and scholars whose judgments or writings are out of line.

Given that one of the main points of reference for the development of the EU legal order is the US federal system, it additionally seems important to draw attention to considerable differences in the US approach to the role of courts in the field of criminal law, which is marked by coercive efficiency and is generally described as 'harsh'. Yale Law School professor James Q Whitman, summarising his monograph *Harsh Justice: Criminal Punishment and the Widening Divide between America and Europe*, observes that '[c]riminal justice offers many … examples of American practices that Europeans reject as not only

[152] I am grateful to Maris Moks for this explanation regarding national courts; see Moks, supra note 65.

[153] Stone Sweet and Burnell, supra note 5, pp 62, 67, with further references, including the influential writings of Giandomenico Majone and Karen Alter.

[154] Stone and Brunell, supra note 5, pp 70-71, referring to the research by Tanja A Börzel, Tobias Hofmann and Diana Panke. See also on the role of sanctions in the understanding of the 'constitutionalisation' of the EU legal order, Weiler, 'A Quiet Revolution', supra note 96.

[155] Damian Chalmers, 'The European Court of Justice is Now Little More than a Rubber Stamp for the EU' *EUROPP Blog* (8 March 2012) <http://blogs.lse.ac.uk/europpblog/2012/03/08/ecj-rubber-stamp-replacement/> (accessed 19 April 2015).

[156] Kuhn, supra note 74, pp 94, 148-149, 197-203.

[157] In British media headlines, the CJEU has been described as an 'imperial court' due to its quest for primacy vis-à-vis the democratic constitutional orders of the Member States. See Ambrose Evans-Pritchard, 'Europe's Imperial Court Is a Threat to All Our Democracies' *The Daily Telegraph* (14 January 2015) <www.telegraph.co.uk/finance/comment/ambroseevans_pritchard/11346512/Europes-imperial-court-is-a-threat-to-all-our-democracies.html> (accessed 30 August 2022). As an aside, the same article recalls earlier media commentary on a CJEU case where an Advocate General found that criticism of the EU is akin to 'blasphemy' and may legitimately be suppressed.

harsh, but no less than barbarous'.*[158] He continues: 'American society *is* harsh, and nowhere more so than in its criminal punishment'. … [T]he differences are profound, and indeed often shocking'.*[159] Examples include the length of prison sentences, which are about ten times as long as for comparable offences in Germany and France; the rate of imprisonment which is the highest in the world, that a much wider range of offences are criminalised than in Europe, and the degrading treatment of prisoners.*[160] One could add that in the US, it is a standard practice to have out-of-court proceedings, especially plea-bargaining. The US judicial terminology includes the notions of trusteeship and a strong focus on enforcement; this seems to partly reflect the US concept of fiduciary constitutionalism that was mentioned above, and which seems to have profoundly shifted European constitutional thinking towards the role of the CJEU being one of enforcement and disciplining of the Member States. These and other aspects of US judicial thinking and terminology – including the notion of 'judicial governance'*[161] as well as the casuistic approach based on the law of precedent and the repressive orientation in criminal law – have also increasingly engulfed Europe, through the EU legal order as well as through the Anglo-American legal thinking and terminology that prevails in English-language law journals.

As an aside, all of the above is also of direct relevance to the EU agenda to train 700,000 judges and legal practitioners with a view to creating a 'true European judicial culture'. In this regard, Herman van Harten has perceptively articulated reasons to be 'afraid of' a top-down educating of judges by European Commission appointed experts, as national judges 'are not executive "parts" of European governance'.*[162]

There is a further profound dimension in the reorientation of the role of courts, which will be explored in a separate publication due to space constraints, and will only be flagged here briefly for cognizance. It is that a growing number of scholars have started to voice concerns that through EU governance, as well as the IMF and World Bank conditionality, **the role of the legal order and of courts has, in fact, come to be to constitutionally entrench and protect the neoliberal economic order**, and to shield it from contestation.*[163] Ian Bruff and Cemal Burak Tansel have used the term 'authoritarian neoliberalism', which 'is fast becoming an established part of critical social science scholarship', to highlight

> how contemporary capitalism is governed in a way which tends to reinforce and rely upon practices that seek to **marginalize, discipline and control dissenting social groups** and oppositional politics rather than strive for their explicit consent or co-optation. Such practices include **the repeated invocations of 'the market' or 'economic necessity' to justify a wide range of restructurings** across various societal sites […], the growing tendency **to prioritize constitutional and legal mechanisms** rather than democratic debate and participation, **the centralization of state powers by the executive branch** at the expense of popular participation […], **the mobilization of state apparatuses for the repression of oppositional social forces** […], and the heightened pressures and responsibilities shifted onto households by repeated bouts of crisis and the restructuring of state's redistributive mechanisms.*[164]

In the context of the EU legal order, Alexander Somek and Michael Wilkinson both sum up similar developments as 'authoritarian liberalism', and in one way or another invite the legal community to engage with the dogma of 'There is no Alternative'.*[165] Typical neoliberal policies include dismantling the role of the state; prioritisation of the market; deregulation; privatisation of public services; sell-off of public assets; universal commodification and 'financialisation of everything'; increase in personal and public debt, including

158 JQ Whitman, supra note 122, p 81, with reference to a monograph by the same author.

159 JQ Whitman, supra note 122, p 84.

160 JQ Whitman, supra note 122, p 84.

161 I am grateful to Fabio Ratto Trabucco for this observation.

162 Herman van Harten, 'Who's Afraid of a True European Judicial Culture? On Judicial Training, Pluralism and National Autonomy' (2012) 5(2) Review of European Administrative Law, pp 132-133, 147-148ff. – DOI: https://doi.org/10.2139/ssrn.2117842.

163 See eg Danny Nicol, *The Constitutional Protection of Capitalism* (Hart 2010) pp 152-153, 159-164. – DOI: https://doi.org/10.5040/9781472560698. More generally, see Somek, *The Cosmopolitan Constitution*, supra note 16, and Wilkinson, *Authoritarian Liberalism*, supra note 16.

164 Ian Bruff and Cemal Burak Tansel, 'Authoritarian Neoliberalism: Trajectories of Knowledge Production and Praxis' in Ian Bruff and Cemal Burak Tansel (eds) *Authoritarian Neoliberalism. Philosophies, Practices, Contestations* (Routledge 2020) pp 233-235. – DOI: https://doi.org/10.1201/9780429355028. Emphases added.

165 Somek, *The Cosmopolitan Constitution*, supra note 16, pp 23-24; Wilkinson, *Authoritarian Liberalism*, supra note 16.

by converting private debt into public debt through bank bailouts during financial crises; prioritisation of debt payments to creditors over the needs of the people; consequent austerity programmes; curtailing of social rights, worker protection and protests; and entrenchment of the values of exploitative profit-seeking, competition and efficiency. In neoliberalism, the role of courts is oriented, in particular, towards efficiency and enforcement, especially enforcement of contracts for debt recovery.[*166] The human being is reduced to a *homo economicus* – a competitive market actor who pursues narrow, individualistic self-interest with a view to maximising wealth and utility;[*167] examples of how this treatment of the individual plays out in the field of criminal law will be brought in Chapter 9.

The above concerns about judicial protection of neoliberalism find corroboration in the *National Constitutions* book: in the field of social state and social rights, there are about one hundred cases in the national reports of different Member States where an EU or IMF measure imposing one or another neoliberal policy has been challenged in the courts and where in most cases the measure has eventually been prioritised over national constitutional protection; the cases will be collated in the *Comparative Study*. By way of similar findings from other scholars, Maria Tzanakapoulou has shown that the externally imposed austerity measures 'render domestic constitutional principles of social justice virtually void of content'.[*168] Fritz Scharpf's concern about the destruction of the Member States' social systems through CJEU negative integration case law will be outlined in Chapter 6.

In terms of the broader picture, it would seem that through EU law and integration, the national courts, as well as the legal and scholarly communities more generally, may have, broadly speaking, been involved in a gradual process of dismantling the nation-state and the social state, and in the entrenchment of a competitive, coercive, profit-seeking and exploitative neoliberal market order. What is consigned to history with the nation-state includes some of the most advanced social state protections in the world, especially if one compares with the US federal constitutional system, which is regarded as state-phobic and does not have a social element. That 'America is a harsh place' has been noted by James Whitman not only in the field of criminal justice but also in relation to social welfare.[*169] The US does not have many seemingly basic (continental) European entitlements, such as paid maternity leave, free university education and publicly funded media; universal health insurance was introduced only in 2010 following the 'Obamacare' reforms. One important but largely overlooked historical lesson incorporated in the overall design of the German post-war Basic Law, which contains an unamendable provision on the social state (Art 20), is the recognition that the root causes of the emergence of authoritarian regimes are economic insecurity and dependence, and that a life lived with human dignity and with freedom of choice requires that a basic level of material needs is met.[*170] The post-totalitarian and post-authoritarian types of constitutions mostly contain extensive social rights, especially in Southern Europe. Furthermore, the Nordic countries have aimed to ensure a high level of social equality and social integration for all citizens by providing universal public services.[*171] Conflicts with market-oriented EU law have played out in several fields, including in a Swedish housing dispute where the European Commission required Sweden and some other Member States to dismantle their universal, subsidised rental housing policies as incompatible with EU state aid law due to distortion of competition on the market, beyond means-tested, British style 'residual' social housing measures to those in need. The Commission rejected the Swedish Government's arguments that '[t]he goal of housing policy is to create conditions for everyone to live in good housing at reasonable cost and in a safe and stimulating environment', that the policy also has 'a social integration function', and that the right to a home is protected in the Swedish Constitution and 'has long been an important part of Swedish welfare policy'.[*172] As a tentative thought for further exploration,

166 On neoliberalism and corresponding policies of 'the neoliberal state', see eg David Harvey, *A Brief History of Neoliberalism* (Oxford: OUP 2007), especially chapters 1 and 3 and p 3. See also Wilkinson, *Authoritarian Liberalism*, supra note 16. Earlier with regard to developing countries, see Stiglitz, supra note 88, and Anghie, supra note 104, and the accompanying texts.

167 For respective literature, see below notes 230-231 and the accompanying text.

168 Maria Tzanakopoulou, 'Europe and Constituent Powers: Ruptures with the Neoliberal Consensus?' in Eva Nanopoulos and Fotis Vergis (eds) *The Crisis Behind the Eurocrisis: The Eurocrisis as a Multidimensional Systemic Crisis of the EU* (Cambridge: CUP 2019) p 156. – DOI: https://doi.org/10.1017/9781108598859.008.

169 JQ Whitman, supra note 122, p 81.

170 For historical background, see eg Somek, *The Cosmopolitan Constitution*, supra note 16, pp 10-13, 85-86 and 155.

171 See eg Scharpf, below note 185, p 25, and the Swedish Ministry of Sustainable Development, below note 172.

172 See Swedish Ministry of Sustainable Development, 'Response to complaint from European Property Federation' (CP 115/02) (8 November 2005), cited in – and with an outline of respective EU and comparative rules – Alexis Mundt, 'EU-Legislation

whilst nation-states often have a constitutionally mandated duty to advance the well-being of the entire population,[*173] neoliberal transnational governance seems to entail an element of class system and to prioritise the interests of wealthy, transnationally mobile investors and capital holders.[*174]

The present writer would suggest that instead of dismantling the nation-state, the constitutional protections and achievements that have existed and were operational until recent years – including in the field of the social state – ought to be restored, retained and advocated for consideration more widely. Furthermore, thinking is needed on how to reorient both the national as well as the EU and international legal orders towards a fundamentally more human-centric paradigm, which would value each and every individual on the grounds of their humanity and human dignity, and where the objectives would be around creating conditions for human and community flourishing, with organisational structures and constitutional and institutional culture that would be centred around compassion, supportiveness, meaningful democratic participation and responsiveness.[*175] There is a need for much stronger social state structures that would create material conditions which – in line with Maslow's theory of the pyramid of needs – would allow individuals to have freedom to devote their time, attention and life energies to the pursuit of intrinsically valuable and meaningful causes, higher values and reaching their greatest potential or 'self-actualisation'.[*176]

Instead, there has been growing realisation that the EU and global financial governance have sharply exacerbated social inequalities, eg in result of increasingly unaffordable public services privatised on the impetus of the EU, IMF and the OECD, and with people in ordinary employment on local salaries facing an out-of-reach cost of housing. The room for democratic self-government and contestation is severely constrained by little known but far-reaching rules of EU and global financial and economic governance, as well as by the way in which large debt burdens predetermine the policy choices. Many scholars, including the present writer, see these as the main causes of the widening popular discontent, rather than nationalism and populism as per EU promoted narratives; indeed, in Southern Europe, the protests were regarded as 'indignant citizen' movements. There is a growing sense that at this day and age, as humanity we should be much further along in terms of overcoming poverty, social injustice and other readily avoidable means of human suffering. Somek and Wilkinson make the important point that whereas popular sovereignty has widely come to be dismissed due to connotations with nationalism and populism, it has in fact been 'geared towards emancipation from any form of oppression, to avoid succumbing to circumstances that individuals or groups cannot control'. They see the return to popular sovereignty and democratic mobilisation by the people in the state as the principal way to bring about human emancipation from 'the coercive force of economic circumstance' that is 'tantamount to being subject to an anonymous and alien force', in order to shift to a 'fully authentic life and autonomous existence'.[*177] Maria Tzanakapoulou in her book 'Reclaiming Constitutionalism' makes a similar case that the conditions for citizens' fight for social equality and social progress in the context of the concentration of power and wealth to a narrow range of actors through the 'global neoliberal governmentality' in reality only exist in democratic constitutionalism in the states.[*178]

and Social Housing – An Overview'. Paper presented at the ENHR conference 'Housing in Expanding Europe: Theory, Policy, Participation and Implementation' (Ljubljana, 2-5 July 2006) pp 13ff, on file with the author and cited with the permission of Alexis Mundt.

173 In addition to the above Swedish example, see eg the Preamble of the Constitution of Spain, which mentions 'fair economic and social order' with the aim 'to promote the wellbeing of all its members'.

174 The issue is explicitly formulated in class terms, with neoliberalism said to specifically prioritise upper classes, international elites and financial communities, in the book by Harvey, supra note 166, eg pp 31ff, 72-73, and more generally by Tzanakapoulou, *Reclaiming Constitutionalism*, below note 178 and the accompanying text. See also more generally on prioritisation of the market and international creditor community Wilkinson, 'The Reconstitution', supra note 79 and the accompanying text; Anghie, supra notes 107 and 112, and Stiglitz, supra note 88.

175 For a paradigm shift in the field of criminal law from punishment and deterrence towards a humanistic, integrated and therapeutic approach to the individual, see Stobbs, supra note 82, pp 138-140. See also the example of Sweden, James, below note 229 and the accompanying text.

176 On Maslow's pyramid of needs and 'self-actualisation', see the Editors of Encyclopaedia, 'Abraham Maslow' in *Encyclopedia Britannica*, 23 June 2022, <https://www.britannica.com/biography/Abraham-H-Maslow> (accessed 21 July 2022). On philosophers who have explored human dignity and moral, emotional, social and other aspects of human emancipation, see Somek, *The Cosmopolitan Constitution*, supra note 16, ch 3.

177 Alexander Somek and Michael Wilkinson, 'Unpopular Sovereignty?' *LSE Law, Society and Economy Working Papers* 2020/3, pp 18-19. – DOI: https://doi.org/10.2139/ssrn.3556666. On the importance of 'the place', see also Somek, *The Cosmopolitan Constitution*, supra note 16, pp 264-283.

178 Maria Tzanakapoulou, *Reclaiming Constitutionalism. Democracy, Power and the State* (Hart Publishing 2020), eg chapters 6, 7 and pp 193ff. – DOI: https://doi.org/10.5040/9781509916153. In her further article referred to in supra note 168,

In any event, the need to shift away from the neoliberal, market-prioritising paradigm is also increasingly pressing due to rapidly accelerating climate change. A growing chorus of organisations and movements have been calling for systemic changes towards a more environmentally sustainable and socially just economic and financial system, and are perplexed about why something has not urgently been done. The national judicial as well as legal and scholarly communities might well hold a key role: whilst hitherto they have seen EU and international co-operation almost exclusively in idealistic terms, perhaps the time has come to start asking some important questions about what is it that they are, in fact, correctly and loyally implementing at the national level.*[179] Whilst there are many valuable EU environmental protection directives, EU law and the CJEU have entrenched a fundamentally market-based system that has prioritised eg the long-distance transport of food and basic goods that can be produced locally, a carbon trading system that has had negligible effect on curbing greenhouse gas emissions, and intensive farming by large agribusiness that puts small farmers producing natural, organic food out of business. Furthermore, the CJEU case law has curtailed the scope for public protests.*[180] In particular, the ongoing mutualisation of debt in the name of 'Europe' will make it harder – and maybe even impossible – for the concerned communities and citizens of one or more Member States to democratically decide to switch to an alternative economic and financial system that would be socially just and not require ever more profit and economic growth.

6. The neofunctionalist doctrine of 'Integration through Law' as a conceptual basis for the CJEU's 'negative integration' approach, including mutual trust, resulting in the dismantling of national autonomy and judicial controls

Returning to the effects of neofunctionalism on the role of courts, one important doctrine – which also helps to understand the ongoing Kuhnian paradigm shift and the ways in which the CJEU mutual trust requirement for courts curtails judicial review – is the 'Integration through Law' doctrine, which is little known outside specialist EU law communities but has a very broad and profound impact; indeed, scholars have increasingly called for its curtailment.

The 'neo-functionalist paradigm of integration-through-law', as extensively documented by Antoine Vauchez, has been one of the EU's most established and powerful meta-narratives, which has become the 'new common sense' of the EU legal and political discourses.*[181] The 'Integration through Law' doctrine was developed at the EUI by leading EU law scholars (including Joseph Weiler), who in broad lines envisaged the gradual transplanting of the US federal legal order to the EU. Five dimensions of the 'Integration through Law' doctrine are of particular relevance to the Kuhnian paradigm shift postulated in Chapter 4 and to the changing role of courts through EU law, and also help to understand the underlying dynamics of the problematic effects of CJEU mutual trust case law explored in Aasa's thesis.

The first such dimension is explained clearly by the eminent EU law scholar Christian Joerges, who sees the origin of the somewhat 'insensitive' drive towards 'ever-more-Europe' in '[t]he institutional framework of this project', which 'fosters the expansion of European law as an end in itself […] equating ever more law

Tzanakapoulou sees the constituent power as 'a living emancipatory body', pp 156ff. For historical 'battles that won our freedoms' see supra note 130 and the accompanying text.

179 Among others, Danny Nicol has in an extensively researched monograph built a compelling case for lawyers of constitutional and public law to take greater interest in possibilities to shift the transnational constitutional system in a direction that would press for greater autonomy and space for democratic contestation and for the use of a greater range of alternative economic strategies, instead of pre-committing the states in perpetuity to the severe, democracy-limiting constraints of neoliberalism. Nicol, supra note 163, pp 159-164.

180 See eg Case C-112/00 *Schmidberger* [2003] ECR I-05659; Case C-265/95 *Commission v France (Spanish Strawberries)*. ECR 1997 I-06959, ECLI:EU:C:1997:595.

181 Antoine Vauchez, '"Integration-through-Law". Contribution to a Socio-history of EU Political Commonsense' *EUI RSCAS Working Paper No 2008/10*, pp 1ff, 21ff. – DOI: https://doi.org/10.2139/ssrn.1260166. The 'neo-functionalist paradigm' of 'integration-through-law' is explained by Vauchez in footnote 4 of the paper.

with ever more Europe and the promotion of the benefit of its citizens'.[*182] In the field of criminal law, a scholarly manifesto has put forward a plea that passing (increasingly repressive) legislation by the EU to answer every social problem should not be considered 'as a value in itself'.[*183]

The second dimension is that a core element of the 'Integration through Law' doctrine is the specificity of EU law and disconnect from comparative law, and the quest to shift law towards autonomous EU law;[*184] this also helps to explain the developments around research methodology explored in Chapter 3. As Fritz Scharpf has observed, the 'Integration through Law' doctrine helps to understand why 'European law has no language to describe and no scales to compare the normative weights of the national and European concerns at stake'.[*185]

The third is that this doctrine specifically views **national differences as one of the main problems, and one which has to be overcome**. This is insightfully explained by Matej Avbelj, who has pointed out that the 'Integration through Law' project has had 'a wide and strong impact on the epistemology of EU law',[*186] in result of which the classic EU constitutional narrative has centred around '[h]armonisation, if not unification', where

> all the differences and diversity existing in the integration were perceived as obstacles, originally to free trade and then to integration as such. They were expected to give way, albeit incrementally, to the supreme Community law requiring uncompromised uniformity of its application across all the Member States.[*187]

With regard to the above point, Alexander Somek has further observed that the EU focus on the eradication of differences in national regulation, along with the CJEU emphasis on the principle of equality of citizens, represent the quest to build the autonomous legal order of the EU in a way that is independent from the co-existence of nation-states.[*188]

The fourth dimension – closely related to the previous one and directly relevant to Aasa's thesis on mutual trust – is that the 'Integration through Law' doctrine is the intellectual and conceptual basis for the so-called 'negative integration' approach, whereby the CJEU has systematically dismantled national protections, autonomy and judicial controls, initially in the single market fields and increasingly in ever wider areas of law, including through the requirement of mutual trust. Fritz Scharpf has raised this issue sharply in relation to the destruction of the Member State's social systems through CJEU negative integration case law; he finds that 'Integration through Law' needs to be 'contained'.[*189]

I would add that a similar dynamic seems to be at play in relation to the Member States' criminal law. Birgit Aasa's thesis, when exploring the problems posed to the legal orders of the Member States through the expansion of mutual trust from internal market to criminal law, notes that **the principle of mutual trust limits Member States' legislative, executive and judicial jurisdiction, with a corresponding loss of regulatory autonomy**.[*190] Aasa's thesis also mentions the race to the bottom.[*191] The 'negative integration' approach, including the underlying assumption that the nation-state needs to be abandoned, helps to understand the broader dynamics of the CJEU case law, which is necessary for identification of the problem and for discussion on how to bring about a change.

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182 Christian Joerges, 'Three Transformations of Europe and the Search for a Way Out of its Crisis' in Christian Joerges and Carola Glinski (eds) *The European Crisis and the Transformation of Transnational Governance. Authoritarian Managerialism versus Democratic Governance* (Hart 2014) pp 38-39. – DOI: https://doi.org/10.5040/9781474201117.ch-001.

183 'Manifesto on the European Criminal Policy' (2009) (No 12) Zeitschrift für Internationale Strafrechtsdogmatik <www.crimpol.eu/> (accessed 8 September 2015) pp 707-716, at p 715.

184 Vauchez, '"Integration-through-Law"', supra note 181, pp 21-22.

185 Fritz Scharpf, 'The Double Asymmetry of European Integration Or: Why the EU Cannot Be a Social Market Economy' *MPIfG Working Paper* 09/12 (2009) <http://www.mpifg.de/pu/workpap/wp09-12.pdf> (accessed 17 April 2015) p 22.

186 For details, see Matej Avbelj, 'The Pitfalls of (Comparative) Constitutionalism for European Integration' *Eric Stein Working Paper No 1/2008,* p 15. – DOI: https://doi.org/10.2139/ssrn.1334216.

187 As summarised by Matej Avbelj, 'Questioning EU Constitutionalisms' (2008) 9(1) German Law Journal p 8. – DOI: https://doi.org/10.1017/s2071832200006283.

188 Somek, *Individualism,* supra note 38, pp 213ff, 226.

189 Scharpf, supra note 185, p 34.

190 Aasa, supra note 2, eg pp 29, 140-143.

191 Aasa, supra note 2, eg pp 20, 33, 242.

The fifth element, and of particular importance to the ongoing Kuhnian paradigm shift, is the combined ways in which the neofunctionalist 'Integration through Law' doctrine changes the logic of 'European' law and 'European' legal thinking, including what is regarded as constitutionalism, and the logic of fundamental rights protection.

The above-mentioned and other scholars have called for greater awareness about, and curtailment of, the 'Integration through Law' doctrine. For example, Scharpf has observed that the EU law community has cheered the 'Integration through Law' approach without meaningful discussion, and finds that 'good Europeans' need to reconsider this underlying theory.*[192]

7. Outline of other areas where concern has been expressed about curtailment or disappearance of judicial review through EU law

Whilst so far the focus has been on the dismantling of judicial protection through the CJEU rules on mutual trust, protection of the neoliberal market order, and through the quest in the 'Integration through Law doctrine' to eradicate national differences, this chapter seeks to briefly flag for awareness that these are only some aspects of far wider-ranging ways in which judicial review has been disappearing through neofunctionalism and other new foundational ideas for the exercise of public power in autonomous EU law and governance. This reinforces concerns about more radical ongoing changes and the existence of a systemic problem, and that there is a need for a joined-up discussion on what ought to be the role of courts in European constitutionalism. Indeed, earlier scholarly concerns were noted about the emergence of a **thin, weak, procedural version of judicial review**, with reduced opportunities for citizens to challenge public decisions.*[193]

Due to space constraints, only a brief bullet-point list can be included here. Concerns about displacement and elimination of judicial review in direct ways in other areas of EU law include the following:

- In European Arrest Warrant cases and other areas, whereas many (especially post-totalitarian and post-authoritarian) national constitutions expressly require judicial review by a court, especially in cases of deprivation of liberty, in EU law the respective institution can be a 'judicial authority', which may be eg a ministry of justice or a prosecutor in EAW cases.
- There has been a sidelining of classic judicial protections in criminal law through the shift, in the implementation of EU measures, to a grey area of 'criministrative law', which removes the need for a higher standard of judicial and fundamental rights protection that has traditionally applied in the field of criminal law in Europe.*[194]
- Former Italian Constitutional Court judge Sabino Cassese has raised the concern whether fundamental rights 'are left without any safeguards at all' in the aftermath of the 'de-judicialisation' and shift to new out-of-court proceedings through EU banking resolution instruments, with review having shifted to administrative authorities at the expense of courts.*[195] There are similar concerns about a greater role for extra-judicial proceedings in other areas, including in the field of criminal law.
- Concerns have increasingly widely been voiced about 'displacement' of constitutional courts and constitutional review though EU law.*[196] In fact, it will be seen in the *Comparative Study* that the

[192] Scharpf, supra note 185, p 34.

[193] See Harlow and Galera, as referred to by Albi, 'Erosion of Constitutional Rights', supra note 57 and the accompanying text.

[194] Anneli Soo, Alexander Lott, Andreas Kangur, 'Võimalused Euroopa Liidu halduskaristuste ülevõtmiseks Eestis' ['Possibilities for Adoption of European Union Administrative Punishments in Estonia'] (2020) (Issue 4) Juridica pp 242ff, with references to 'criministrative law' at p 243. See also panel 'Euroopa Liidu halduskaristuste sisseviimine Eesti õigusruumi: kas sobitamatu sobitamine sobivaimas võtmes?' ['Introduction of European Union administrative penalties into the Estonian legal order: Seeking to fit the unsuitable in the most suitable key?'] at the 36th Estonian Lawyers Congress, 8 October 2020. On 'criministrative law', see the presentation and slides of Markus Kärner, 'Euroopa Liidu sanktsioonide sobitamine Eesti riigisisesesse õigusesse: kümme aastat diskussiooni' ['Fitting European Union sanctions into Estonian national law: Ten years of discussions'] <www.uttv.ee/naita?id=30538#> (accessed 30 August 2022).

[195] Sabino Cassese, 'A New Framework of Administrative Arrangements for the Protection of Individual Rights' (2017) (Issue 6) Rivista Italiana di Diritto Pubblico Comunitario pp 1330, 1334ff.

[196] See eg Jan Komárek, 'Why National Constitutional Courts Should Not Embrace EU Fundamental Rights' *LSE Law, Society and Economy Working Paper No 23/2014*, pp 16ff. – DOI: https://doi.org/10.2139/ssrn.2510290.

type of constitutional review exercised in post-totalitarian and post-authoritarian constitutional systems has by and large been deactivated in the extensive areas of law that fall within the scope of EU law. The widely contested EU Data Retention Directive was only the second ever directive to be annulled by the CJEU – in 2014 – on fundamental rights grounds; this came in a second challenge following extensive national constitutional contestation. In post-totalitarian and post-authoritarian constitutional orders, the annulment rate is about one-third to more than one-half of all constitutional review cases, especially in abstract review proceedings where a motion is brought by a public body or institution (but with a low percentage in individual complaint cases). The annulments are predominantly based on the grounds of fundamental rights and general principles of law; annulments by the CJEU are based more on competence, procedural and technical grounds, and strikingly often tend to result in expanding the scope of EU law. The institutions and persons who bring constitutional review challenges – especially in abstract proceedings – have by and large been sidelined; the persons and institutions who tend to bring cases to the CJEU are different, being typically interested in contesting some national rule or measure. Through the preliminary rulings system, there has additionally been a reorientation from judicial review and constitutional review to questions of correct interpretation of EU law.[*197]

- Following on from the previous point, there is widespread political, scholarly and media reprimand of any sign of retaining constitutional review in EU law related matters on the part of Member States' constitutional courts. Whilst the comments against the German Constitutional Court have typically been particularly vitriolic, the stark criticisms of the Portuguese Constitutional Court clearly illustrate the foundational changes from accountability to the people to accountability to the international creditor community, and from the social state to neoliberalism through autonomous EU governance, along with blindness to possible causalities of the public debt caused by bank bailouts arising from EU law.[*198] In 2010–2015, the Portuguese Constitutional Court identified unconstitutionality in 9 of 13 cases regarding economic crisis austerity measures, and rejected at least 15 different legislative and executive acts regarding austerity, especially on the grounds of fundamental rights and the general principles of equality, proportionality and legitimate expectations.[*199] Amongst an avalanche of criticism directed at the Court, a leaked internal briefing document of the European Commission was essentially seen by the public as putting 'direct pressure' on the Court, using 'a blackmailing tone',[*200] and even as hinting at the potential abolition of the Portuguese Constitutional Court. The briefing document refers to the (neofunctionalist) research on courts by Prof Alec Stone Sweet, and then goes on to cite Prof Eduoardo Vera-Cruz, Director of the Faculty of Law of the University of Lisbon, who remarked that 'the only way to have politically neutral constitutional jurisdiction would be to place this area under the Supreme Court of Justice'.[*201] The briefing document additionally observes that the situation is 'worrying international creditors', that 'the Constitutional Court's decisions are […] perceived as a potential problem, with international implications' and that 'the CC is having an echo among the international partners and rating agencies'.[*202] The briefing document was covered in an article by the *Financial Times*, which through numerous quotes from economists and professors of political science and law strongly echoed the Commissions' viewpoints.[*203]
- There are EU and Council of Europe initiatives towards simplified judicial proceedings, advocating the example of those countries that have simplified their rules as a model of good practice for

197 For initial data, including research of the CJEU annulment cases by Takis Tridimas and Gabriel Gari, see Albi, 'Erosion of Constitutional Rights', Part 1, supra note 19, pp 176ff. Extensive data on annulment in the Member States is collated in the forthcoming *Comparative Study*, supra note 6.

198 See above notes 79, 86, 166 and 168, and the accompanying text.

199 Francisco Pereira Coutinho and Nuno Piçarra, 'Portugal: The Impact of European Integration and the Economic Crisis on the Identity of the Constitution', in Albi and Bardutzky, *National Constitutions*, supra note 7, sects 2.7.3 and 2.8.3.

200 MEPs Edite Estrela (S&D) and Rui Tavares (Verts/ALE), Question for written answer to the Commission 'Interference by the Commission in the domestic affairs of a Member State', Ref No E-011999-13, on file with the author.

201 'Will the Constitutional Court Put at Risk the MOU Implementation?' *Internal Briefing Document of European Commission Representation in Portugal, DG Communication* (15 October 2013) p 3, on file with the author.

202 *Internal Briefing Document*, supra note 201, pp 1, 3.

203 Peter Wise, 'Portugal's Constitutional Court Threatens Country's Bailout' *Financial Times* (24 October 2013) </www.ft.com/content/884f61d2-3bfb-11e3-b85f-00144feab7de> (accessed 30 August 2022).

other countries that have retained more stringent judicial protections.*[204] Regarding the efficiency of judiciaries, in a more general context, the Consultative Council of European Judges (CCJE) in Opinion No 6 (2004) has suggested that '"quality" of justice should not be understood as a synonym for mere "productivity" of the judicial system; a qualitative approach should address rather the ability of the system to match the demand of justice in conformity with the general goals of the legal system, of which speed of procedures is only one element'. These views have also been echoed by Estonian judges.*[205]

- Through the global rule of law reform promoted by the US, plea-bargaining has been promoted in Europe and worldwide, with a shift to out-of-court proceedings. The alarming consequences have been explored in the evocatively entitled reports 'The Disappearing Trial' and 'Efficiency over Justice' by Fair Trials International.*[206]

In addition to the direct examples of disappearance of judicial review, there are numerous more subtle dimensions of curtailing or removing judicial review and judicial protection:

- The national reports in the *National Constitutions* book contain hundreds of cases where an applicant has sought protection of one or another constitutional fundamental right or rule, which is very often also a shared, long-standing tenet of comparative European constitutional law. Whereas in a purely national context, the well-established jurisprudence has been to protect such constitutional provisions, in the context of EU law, supremacy, effectiveness and uniform application of EU law have been prioritised, often after a preliminary ruling by the CJEU. Whilst normally it is the constitutional courts that are activist in protecting fundamental rights, in EU related cases, the lower instance courts have often been more protective of fundamental rights, but their decisions have subsequently been overturned by the highest courts in order to ensure the supremacy and effectiveness of EU law.
- Related to the preceding point, many issues of judicial protection that arise under the national constitutions simply lose their relevance if the normative point of reference shifts to the EU Treaties and the EU Charter; examples will be brought in the next chapter. This has a very large-scale effect, as EU law only allows for protection of the few most important constitutional rules that amount to national constitutional identity, or in limited areas where national laws have not been fully harmonised.
- Whereas especially in the post-totalitarian and post-authoritarian constitutional systems, constitutional norms and fundamental rights are binding, prescriptive and part of an integral system of constitutional law that is to be protected by the courts, through EU law there has been a shift to Anglo-American casuistic, precedent-based law that is ad hoc, pragmatic and markedly less clear in terms of legal certainty. Autonomous EU law muddles elements of numerous profoundly different legal systems, is difficult to access, and ultimately very few can understand it, let alone mount a critical analysis of it in a foreign language or organise and finance a campaign in 27 Member States to bring about a change. For citizens, the law, legal system and its objectives have increasingly become incomprehensible, unintelligible and remote, failing to provide protections that they had hitherto expected. There is also a sense of a loss of law-making that would aim to deal with deeper causes of problems and provide joined-up, long-term solutions.
- Overall, the word 'schizophrenic' has increasingly been used to describe the position of national courts and judges who have to deliver judgments that comply with EU law (and with further – at times conflicting – requirements of international law such as the ECHR, trade and investment treaties, etc), while also ensuring respect for at least the core rules of the national constitution.

[204] For a comparative overview, see Liina Reisberg, Maarja Oras and Liis Lindström, 'Due Process. General Report' (Supreme Court of Estonia, 2018), prepared for the ACA-Europe seminar 'Due Process' noted in the opening footnote (*), available at <www.riigikohus.ee/sites/default/files/kohtupraktika%20anal%C3%BC%C3%BCs/2018_TLL_GeneralReport.pdf> (accessed 8 August 2022).

[205] CCJE (2004) Op. No 6 of 24 November 2004, <https://rm.coe.int/168074752d> (accessed 5 September 2009), para 42. Similar observations have also repeatedly been made by Estonian judges at the Estonian Judges Forum <www.riigikohus.ee/et/oigusalased-materjalid/avalikud-esinemised-ja-artiklid> (accessed 5 September 2022). I am grateful to Ivo Pilving, Justice of the Supreme Court of Estonia, for bringing these points to my attention.

[206] 'The Disappearing Trial. Towards a Rights-based Approach to Trial Waiver Systems', Report by the Fair Trials International (2017) <www.fairtrials.org/articles/publications/the-disappearing-trial/> (accessed 5 September 2022). On US influence, see p 9. See also 'Efficiency over Justice: Insights into Trial Waiver Systems in Europe', Report by Fair Trials International (December 2021) www.fairtrials.org/articles/publications/the-disappearing-trial/ (accessed 5 September 2022).

Furthermore, they often face not only the risk of condemnation and humiliation from the EU law community if they deviate from EU law on constitutional grounds, but also of triggering the machinery of EU enforcement proceedings, state liability and hefty fines, including in situations where they seek to protect long-standing, classic European constitutional fundamental rights. This predicament was perhaps most clearly exemplified by the EU fines or threats of fines for delays in implementing the EU Data Retention Directive that were caused by widespread public and judicial concerns that introduction of mass surveillance would be incompatible with national constitutional fundamental rights regarding the inviolability of the home and communications. This is also one element that has led to the EU legal order increasingly being perceived as oppressive.

8. Examples of radical alterations in fundamental rights protection through EU law, and dimensions of judicial review that do not arise under the EU Charter

In the preceding section, it was noted that one aspect of the disappearance of judicial review is that many fundamental rights issues that arise under the national constitutions do not arise under the Charter; this will be explored more fully here.

To this end, there is a need to address one broader question that the present writer is frequently asked, including in the review process that preceded the publication of this article: it is whether the protection of fundamental rights – especially beyond the specific area of mutual trust and the European Arrest Warrant system – has not broadly remained the same, even if the adjudication has shifted from national courts to the CJEU, and the paradigm of constitutional law has been changing towards functionalism.

That there has been a broader erosion of constitutional fundamental rights and of the *Rechtsstaat*-based tradition of the rule of law through EU law has been extensively documented by the present writer in other publications; space constraints do not allow exploring this broader theme here. In particular, the above-mentioned, two-part article 'Erosion of Constitutional Rights in EU Law' documents constitutional adjudication in a large number of Member States, in different areas of law, including the European Arrest Warrant, the EU Data Retention Directive, general principles of law, the treatment of fundamental rights in EU law as 'restrictions' to economic and free movement rights which must be interpreted strictly, and the standard of constitutional review.*[207] The article additionally refers to literature on the epistemology of EU law, where it has been explained why these issues have not received wider attention; some of the reasons have been outlined in Chapter 3 of the present article. The 'Erosion of Constitutional Rights' article further outlines literature on some of the long-standing, structural criticisms regarding EU fundamental rights protection, which include the following four main concerns. First, there is the issue of 'double standards', which has several dimensions, including that the CJEU case law tends to advance vis-à-vis the Member States – in an activist manner – those fundamental rights and market freedoms that arise from EU law, while not allowing higher or more extensive protection under national constitutions. Another dimension is that measures of the Member States are frequently found to be in breach of the Treaties, whereas EU measures are rarely annulled. Secondly, if one looks at the actual outcomes of CJEU judgments, it emerges that the protection of classic fundamental rights has by and large remained rhetorical, having been trumped by market freedoms or other aspects of EU policy. Thirdly, the standard of protection is often set by the CJEU at the ECHR level despite the fact that the ECHR system is meant to provide the basic floor of protection rather than the ceiling; this tends to lead to ossification of a low level of protection, whereas under international human rights treaties a higher standard of protection under national constitutions is typically allowed. Fourthly, there is the general prioritisation of uniformity, autonomy and effectiveness of EU law over fundamental rights.

Following subsequent research through the 'Role of Constitutions' project, a clarification ought to be added that the issues around EU law lowering the standard of protection of fundamental rights arise more sharply in the context of the post-totalitarian and post-authoritarian constitutional systems. In the Member States that have a political, historical or traditional legal type of constitution – many of which have an older

[207] Albi, 'Erosion of Constitutional Rights', Part 1, supra note 19.

or laconic bill of fundamental rights – the protection of fundamental rights, as well as judicial review, has often been enhanced through EU law.

In the introductory chapter to the *National Constitutions* book, a summary of further major changes through autonomous EU law has been provided on the basis of material in the national reports. The changes include the following: a very different interpretation through CJEU case law of the general principles of law, such as legitimate expectations and non-retroactivity as well as the principle of proportionality; strains on legal certainty and on the clarity and 'quality of law'; significant changes to the cumulative rules which have traditionally been required for limitation of fundamental rights; manifold shifts of power to the executive branch, including a shift from the classic rule of parliamentary reservation of law to a wide use of governmental regulations; erosion of the social state; etc.[*208]

Other scholars have also started to voice sharp concerns that EU law has 'radically altered' classic European constitutional protections. Agustín Menéndez has summarised his 'structural critique' of constitutional review by the CJEU as follows:

> [...] the European Court of Justice has **radically altered the substance of European constitutional law**. In particular, the right to private property and entrepreneurial freedom (as operationalized through the four economic freedoms and the principle of undistorted competition) have been assigned an abstract and a concrete constitutional weight that places key public policies (social policies, tax policies, regulatory policies) off the realm of what is constitutionally possible. As a result, some of the collective goods at the core of the Democratic and Social Rechtsstaat have become extremely vulnerable.[*209]

With regard to the social state, Maria Tzanakapoulou's finding that domestic constitutional principles of social justice have been rendered 'virtually void of content' was mentioned in Chapter 5, and Fritz Scharpf's concerns about destruction of the social state through CJEU negative integration case law were noted in Chapter 6. As a side remark, this area also illustrates a somewhat distorted EU law dynamic whereby national protection – here of social rights – is first dismantled by one set of EU measures, being then gradually shifted to the EU level. This then triggers compliance monitoring through European Commission annual reports and, in many areas, is backed up by the threat of EU enforcement proceedings. Informally, many scholars have grumbled about how the European Commission officials can do this with a straight face, especially following the treatment of Greece. In any event, this also seems to be an example of the operation of the neofunctionalist 'spillover' dynamic[*210] in the field of fundamental rights, in that, on a closer look, a very large proportion of scholarly publications in EU law tend to focus primarily on the question of the extent to which the protection of fundamental rights has shifted from the national constitutions to the EU Charter, rather than what is the actual standard of protection.

With regard to alterations in the general principles of law, a Spanish scholar notes through an article title that legal certainty is 'A Missing Piece of European Emergency Law', and observes that in financial crisis adjudication 'legal certainty and legitimate expectations have succeeded in ... some Constitutional Courts and in the European Committee of Social Rights, but the European Court of Justice appears still to remain rather impervious to them'.[*211]

Observations by Estonian scholars and lawyers about profound changes to Estonian material constitutional law caused by EU law have been collated in the book chapter 'Estonia: From Rules to Pragmatism'. These include extensive concerns expressed by nine dissenting judges with regard to the effects of the large financial liabilities imposed under the ESM Treaty on the social-democratic state based on the rule of law,

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208 Albi and Bardutzky, 'Revisiting the Role and Future of National Constitutions', supra note 43, pp 17ff. The respective adjudication in different Member States in each respective area is synthesised in the forthcoming *Comparative Study*, supra note 6.

209 Agustin Menéndez, 'Constitutional Review, Luxembourg Style: A Structural Critique of the Way in Which the European Court of Justice Reviews the Constitutionality of the Laws of the Member States of the European Union' 2017 9(2) Contemporary Readings in Law and Social Justice, p 116. – DOI: http://dx.doi.org/10.22381/CRLSJ9220178. Emphasis added.

210 For 'spillover' in EU fundamental rights, see Herwig CH Hofmann and Morgane Tidghi, 'Rights and Remedies in Implementation of EU Policies by Multi-Jurisdictional Networks' (2014) 20(1) European Public Law pp 147-148, 162. – DOI: https://doi.org/10.54648/euro2014011.

211 Pablo M Rodríquez, 'A Missing Piece of European Emergency Law: Legal Certainty and Individuals' Expectations in the EU Response to the Crisis' (2016) 12(2) European Constitutional Law Review pp 265ff, 282. – DOI: https://doi.org/10.1017/s1574019616000158.

the far-reaching effects of the change towards 'criministrative law' that have evoked parallels with Soviet law amongst leading lawyers, and the profound reinterpretation of the principle of legitimate expectations.*[212] One might recall that for the neofunctionalist EU law epistemic communities, all such issues tend to blur into 'obstacles to integration' and protection of sovereignty and national constitutional identity.

The displacement of comparative (continental) European constitutional protections is perhaps most plainly evident in the field of criminal law where several sharply worded manifestos have been published by the more classically oriented criminal law scholars about the deeply problematic practical effects of EU criminal law measures. Indeed, in an 'Alternative Draft for a European Criminal Law', eleven German criminal law professors, led by Professor Bernd Schünemann from the University of Munich, have expressed concern that 'the rule of law as well as the indispensable democratic fundamentals underlying the criminal law' were principles 'developed as early as during the period of Enlightenment, but have been disregarded in the prevailing discussion on EU criminal law' and that '[o]ne must put one's illusions aside and acknowledge that, in the area of criminal justice, Europe is presently in the process of undermining much of the rule of law'.*[213] Ester Herlin-Karnell has written that in EU criminal law co-operation, 'important values once recognised within the nation state are lost in the transition to the European level' and, especially pre-Lisbon, 'in the pursuit of substantive changes at the EU level even basic concepts such as fair trial and legality, which traditionally are recognised in national criminal law, seem to be forgotten'.*[214] An academic group of fourteen criminal law professors from ten Member States, in their joint 'Manifesto on the European Criminal Policy', have expressed concern about 'alarming tendencies' with 'increasingly repressive acts'; they write that '[i]f the entailed risks are not acknowledged in time, we fear to be confronted with criminal laws that contradict our fundamental principles'.*[215]

In the light of the ongoing Kuhnian paradigm shift postulated in Chapter 4, it seems that **EU criminal law also represents neofunctionalist as well as neoliberal legal thinking**, as the focus is on 'Europeanisation' of criminal law in the meaning of a shift of regulation to the EU level, and with orientation towards effectiveness – including of effective and repressive sanctions and wider criminalisation; there is blindness to, and disappearance of, the classic (continental) European constitutional values and safeguards for the individual.*[216]

In what follows in this chapter, I will add to the existing research observations about why the EU Charter does not resolve many of the fundamental rights issues. These include the fact that the EU Charter and the surrounding discourses about fundamental rights are also grounded in the above-mentioned paradigm of autonomous EU governance, predicated on neofunctionalism, neoliberalism and the other new foundational ideas for public power. Since national constitutions are reduced in these to matters of national identity, this also means that manifold advanced aspects and nuances in continental European constitutional protection of fundamental rights have been displaced and lost, as they do not arise if the normative point of reference shifts from the national constitutions to the EU Charter of Fundamental Rights; indeed, many measures which under national constitutions would be deemed unconstitutional are considered perfectly legal if assessed under the Charter. In the next chapter, this will be illustrated with the example of the case of Neeme Laurits.

Returning to Birgit Aasa's thesis and the question of what should be the baseline, Aasa shows that after the *Zarraga* case, the CJEU has placed the epistemic base for trust in the EU Charter. That is, mutual trust must be adhered to, without further judicial review, on the basis of 'the fact that their respective national legal systems are capable of providing an equivalent and effective protection of fundamental rights, recognised at European Union level, in particular, in the Charter of Fundamental Rights'.*[217] On the one hand, Aasa rightly finds that the CJEU's assumption of fundamental rights compliance is flawed because the reality on the ground is different. On the other hand, Aasa identifies the essence of the flaw in the view, which is also prevalent in EU discourses, that fundamental rights protection generically is deficient

[212] Hent Kalmo and Anneli Albi, 'Estonia: From Rules to Pragmatism' in Griller, Papadopoulou and Puff, supra note 71; the chapter is available open access at <http://ssrn.com/author=1246144> (accessed 30 August 2022).

[213] Bernd Schünemann, 'Alternative-Project for a European criminal law and procedure' (2007) 18(2) Criminal Law Forum pp 243-244. – DOI: https://doi.org/10.1007/s10609-007-9031-z.

[214] Herlin-Karnell, 'The Integrity of European Criminal Law Co-operation', supra note 41, pp 238, 240.

[215] 'Manifesto on the European Criminal Policy', supra note 183, p 715.

[216] That EU criminal law is neoliberal, see also Walsh, below note 236 and the accompanying text.

[217] Case C-491/10 PPU *Zarraga*, ECLI:EU:C:2010:828, para 70, as cited and discussed in Aasa, supra note 2, pp 162ff.

in several, especially new Member States from Central and Eastern Europe, in particular after the illiberal turn in Hungary and Poland. Whilst this is accurate in some respects (eg as regards recent illiberal developments, as well as prison conditions), what is missing in Aasa's thesis, and typically in the broader EU discourse, is that the countries of Central and Eastern Europe (including, before the illiberal turn, Hungary and Poland), along with the post-totalitarian and post-authoritarian countries in Western Europe, have in cases of deprivation of personal liberty given heightened protection to a range of classic fundamental constitutional rights, which have been sidelined in EU mutual trust cases. These include *nulla poena sine lege*, the presumption of innocence, parliamentary reservation of law in criminal law matters, and the classic (continental) European rule of law safeguards requiring maximum precision and certainty in criminal law, as well as interpretation in favour of the individual (the principle of *in dubio pro mitiore*). Crucially, irrespective of whether a Member State generically grants a high level of fundamental rights protection, there is a subjective, individual constitutional right to judicial protection (eg Art 15 of the Estonian Constitution, as also pointed out in a remark by the Chancellor of Justice of Estonia below in Chapter 9). More than fifty cases and numerous institutional inquiries regarding the impact of the EU mutual trust regime on these and other constitutional fundamental rights and rule of law safeguards in different Member States are synthesised in the above-mentioned, forthcoming *Comparative Study*, showing that in most cases, supremacy and effectiveness of EU law have eventually been prioritised.

There are many further dimensions regarding the differences in fundamental rights protection under the EU Charter and under the post-totalitarian and post-authoritarian constitutions in particular, which have equally been entirely overlooked in the EU discourse. Examples of aspects that have been lost in the shift in the normative point of reference from national constitutions to the EU Charter include that the fundamental rights provisions in the EU Charter are much more laconic, generic and limited in scope than those found in many – especially post-totalitarian and post-authoritarian – constitutions.[*218] Further dimensions of fundamental rights protection in post-totalitarian and post-authoritarian constitutionalism include that fundamental constitutional rights are directly applicable and justiciable, the limitation of rights is subject to stringent, cumulative conditions, including the rule of parliamentary reservation of law, and that fundamental rights are protected *qua* binding rules rather than as general principles which are subject to greater discretionary balancing in the light of the proportionality principle. This last point, with reference to the work of the pre-eminent Professor Robert Alexy, has been subject to fascinating discussion between Estonian legal scholars Hent Kalmo and Madis Ernits; however, to illustrate the structural issue of 'disconnect' in the EU discourse that was mentioned earlier, these legal issues have been virtually unknown outside Estonia.[*219] Indeed, in another publication, a broader shift in Estonian constitutionalism from binding constitutional rules to pragmatism through EU integration has been postulated.[*220]

The combined constitutional protections are ultimately based on **human dignity**, which is the foundation of the value order especially in post-totalitarian and post-authoritarian constitutionalism, modelled on the German Basic Law. Furthermore, constitutions of this type typically include provisions providing that the authorities and the courts have a constitutional duty to protect fundamental rights.

The overall system is well captured by the doctrine of 'guarantism' in Italy, which is used to denote the constitutional guarantees for individual liberty and for collective freedoms against potential arbitrary activity by public authorities, with a central role held by guarantees in the penal process for the prevention of arbitrariness in the exercise of political and judicial power, in particular in the context of emergency legislation.[*221]

The CJEU requirement of mutual trust by and large has the broader effect of disabling and displacing much of the above constitutional protections, in line with the 'Integration through Law' and the 'negative integration' doctrines that seek to eradicate national differences, as was outlined in Chapter 6.

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218 For examples, see Albi and Bardutzky, 'Revisiting the Role and Future of National Constitutions', supra note 43, p 15.

219 On the protection *qua* binding rules, see the academic debate in Estonia between Madis Ernits and Hent Kalmo, as summarised in Madis Ernits, 'Constitutional Review in the Age of Balancing' in *The 6th International Scientific Conference 'Konstitucionālās vērtības mūsdienu tiesiskajā telpā I' ['Constitutional Values in the Modern Legal Space I'], Riga 10-11 November 2014* (Riga: University of Latvia Press 2016) p 127.

220 Kalmo and Albi, supra note 212.

221 See Giuseppe Martinico, Barbara Guastaferro and Oreste Pollicino, 'The Constitution of Italy: Axiological Continuity between the Domestic and International Levels of Governance?' in Albi and Bardutzky, *National Constitutions*, supra note 7, sect 2.3.5.3.

A further disquieting development that emerged from several national reports in the *National Constitutions* book is that the European Commission, in its evaluation reports on national implementation, has specifically criticised countries that provide greater protection of fundamental rights under the national constitution or legislation than what is allowed under the European Arrest Warrant Framework Decision (eg Ireland, Cyprus, Italy). Crucially, several countries have narrowed down the 'human rights' clause and/or judicial protection in the context of the European Arrest Warrant merely to a clause on **non-discrimination on the grounds of nationality, race and ethnic origin** (eg Cyprus, Austria).

Regarding mutual trust and the European Arrest Warrant system, there is another important dimension that has been overlooked in the mainstream EU discourse. It is that whilst there has been considerable focus on harmonisation to improve the standards of defence rights in those Member States where they may be lacking, and exceptions have in more recent CJEU case law been allowed in relation to prison conditions and general rule of law deficiencies in individual Member States, very little attention has been given to the **intrinsic, compounded difficulties for individuals who have to defend themselves in a foreign legal system**.[*222] This involves linguistic barriers, unfamiliarity with other legal systems, and more generically what Valsamis Mitsilegas has described as the 'journey into the unknown'.[*223] These intrinsic difficulties would seem to necessitate enhanced, rather than minimal judicial review in cross-border cases. In the UK, concern has been expressed that defendants and their defence rights may 'vanish down the cracks that exist between different national systems'.[*224] Dermot Walsh, on the basis of a study of Irish EAW cases, has raised the question whether the system of mutual recognition will 'contribute to miscarriages of justice which will be more difficult to detect and remedy'. He highlights a range of constitutional rights that have seen a reduced or even 'anaemic' level of protection, and finds that courts are taking 'a more purposive, and even a teleological, approach' to the application of criminal law legislation.[*225]

This is also a context where the idea of the EU as a single legal order seems particularly starkly out of touch with the realities on the ground, especially given the harsh effects of the compounded difficulties for individuals who have to defend themselves in a foreign legal system. Criminal law is one of the areas of law that has the most drastic consequences for the individuals, with custodial sentences entailing 'the eradication of the citizen's social existence'.[*226] Indeed, this is in clearest terms an area where in the underlying quest to dismantle the nation-state and its sovereignty, numerous advanced aspects of constitutional protection for citizens by the state and its institutions have also come to be dismantled.

In the light of these issues and proceeding more generally from the perspective of the broader comparative (continental) European understanding of constitutional law, I have suggested in the 'Erosion of Constitutional Rights' article that at least partial judicial review ought to be restored in the courts of the country of residence of the person affected, which are typically the most accessible and comprehensible to them. I also referred to a report of the UK House of Lords, which called for extradition to be made 'an instrument of last, rather than first, resort'.[*227]

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222 See Anneli Albi, 'The European Arrest Warrant, Constitutional Rights and the Changing Legal Thinking: Values Once Recognised Lost in Transition to the EU Level?' in Maria Fletcher, Ester Herlin-Karnell and Claudio Matera (eds) *The European Union as an Area of Freedom, Security and Justice* (Routledge, 2016) pp 137-175. – DOI: https://doi.org/10.4324/9781315738284-15.

223 Valsamis Mitsilegas, 'The Constitutional Implications of Mutual Recognition in Criminal Matters in the EU' (2006) 43(5) Common Market Law Review p 1309. – DOI: https://doi.org/10.54648/cola2006074.

224 Andrew Sanger, 'Force of Circumstance: The European Arrest Warrant and Human Rights' (2010) 6(1) Democracy and Security p 25. – DOI: https://doi.org/10.1080/17419160903535301, citing John Spencer, 'European Criminal Procedure – Fantasy or a Fact?' (2003) (Issue 4) *Archbold News* p 5.

225 Dermot PJ Walsh, 'The European Arrest Warrant in Ireland: Surrendering Our Standards to a European Criminal Law Area' in Ivana Bacik and Liz Heffernan (eds) *Criminal Law and Procedure: Current Issues and Emerging Trends* (Dublin: First Law 2009), see especially pp 13, 22, 33.

226 Schünemann, supra note 213, pp 230ff.

227 House of Lords Select Committee on Extradition Law,'Extradition: UK Law and Practice' (10 March 2015) <www.publications.parliament.uk/pa/ld201415/ldselect/ldextradition/126/126.pdf> (accessed 7 July 2015) p 8.

9. The case of Neeme Laurits as emblematic of the paradigm shift – and the role of the lawyers and journalists who brought the case to wider attention

All of the above constitutional issues are well exemplified by the case of Neeme Laurits, which was brought to wider public attention by '*Pealtnägija*', the investigative journalistic programme of the Estonian public broadcaster ETV.[*228] In hindsight, it is also clearly an **emblematic case of the ongoing paradigm shift**. Mr Laurits had claimed his innocence and had compelling alibis, and yet was extradited to Finland without judicial review. After being held in a Finnish prison for nine months, losing his job and his wife and seeing his health deteriorate, Mr Laurits was eventually found innocent. Given the high standards in Finland, the concern here was not about the prison conditions.

Instead, the concern was about **the neglect of human dignity through arbitrary deprivation of liberty, without judicial review and with disregard of the constitutional duty of the courts and state institutions to protect fundamental rights**. Indeed, in the investigative TV report, the perplexed Mr Laurits drew parallels with the forced deportation of Estonians to Siberia during the Soviet occupation.

The absence of judicial protection, which led to unnecessary suffering that could have readily been avoided, clearly illustrates a key difference in the treatment of individuals in the two paradigms. Classic (especially continental) European constitutionalism has, since the Enlightenment, been marked by the commitment in the 1789 French Declaration of the Rights of Man and of the Citizen to avoid 'all harshness not essential'. Furthermore, post-totalitarian and post-authoritarian constitutionalism are founded on human dignity. The Nordic countries go even further by seeking to achieve a high level of social equality and integration. For example, the focus in Sweden is on prisoner rehabilitation and relatively short sentences, with the goal of getting offenders 'back out into society in better shape than they were when they came in' and addressing the underlying issues, such as drugs, alcohol and psychiatric problems.[*229]

By contrast, scholars have observed that autonomous EU governance, which has its foundations in market integration and is oriented towards neoliberalism, in different ways entrenches an approach that treats individuals as competitive market actors or *homo economicus* – workers as commodified means of production, entrepreneurs, investors or consumers.[*230] Even EU citizenship has been observed to denote apolitical, passive individuals who delegate increasingly sensitive matters to the EU to decide, not only as language and other practical barriers prevent meaningful political debate and participation, but also as they are too busy to competitively pursue their individualistic life goals.[*231] In the Greek report in the *National Constitutions* book, the criminal law expert writes that it is not acceptable that 'fundamental liberties and rights [...] at stake in criminal law matters', and criminal court decisions, 'have to be assimilated to freely circulating consumer goods'; orders pertaining to deprivation of freedom are 'inherently resistant to any kind of commodification'.[*232] What is more, according to the national report on Germany, German commentators have expressed concern that whereas EU market liberalisation and laws on the free movement of goods usually contain exceptions in order to respect considerations of the '*ordre public*' of the Member States, such reservations are missing in the field of criminal law.[*233] As an aside, the provision on human dignity in the EU Charter has not changed such 'commodification'.

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228 ETV program 'Pealtnägija' ['Eyewitness'], summarised by Sven Randlaid, 'Narkoparuniks tembeldatud eestlane pisteti 9 kuuks Soome vanglasse' ['An Estonian who was labelled a drug baron sat in a Finnish prison for 9 months'] *ERR* (1 February 2012) <www.err.ee/363810/narkoparuniks-tembeldatud-eestlane-pisteti-9-kuuks-soome-vanglasse> (accessed 30 August 2022).

229 Erwin James, 'Prison is not for punishment in Sweden. We get people into better shape' *The Guardian* (26 November 2014) <www.theguardian.com/society/2014/nov/26/prison-sweden-not-punishment-nils-oberg> (accessed 07 September 2015).

230 Fusco and Zivanaris, supra note 30, pp 369-372, citing in footnote no 15 Rafał Manko's observations about '*homo oeconomicus passivus*'. See also Somek, *Individualism*, supra note 38, eg p 219; Wilkinson, 'The Reconstitution', supra note 79, p 22; in global governance, see Anghie, supra note 113 and the accompanying text. On neoliberalism, see supra note 166-167 and the accompanying text.

231 Somek, *Individualism*, supra note 38, eg p 219; Fusco and Zivanaris, supra note 30, pp 369-372.

232 Xenophon Contiades, Charalambos Papacharalambous and Christos Papastylianos, 'The Constitution of Greece: EU Membership Perspectives' in Albi and Bardutzky, *National Constitutions*, supra note 7, sect 2.3.5.1.

233 H Satzger, as summarised by Tobias Reinbacher in Dieter Grimm, Mattias Wendel and Tobias Reinbacher, 'European Constitutionalism and the German Basic Law' in Albi and Bardutzky, *National Constitutions*, supra note 7, sect 2.3.5.1.

Additionally, as the EU legal order is oriented towards replicating the US constitutional order, it should be recalled that the US criminal justice system has been described as 'harsh' compared to the justice systems of (continental) Europe.[*234] I would add that the case of Neeme Laurits also exemplifies a profound change in the understanding of the rule of law, from the post-totalitarian *Rechtsstaat* approach that is protective of the individual's fundamental rights, especially in the event of coercive use of public power, towards an orientation of enforcement, effectiveness and formalism that marks the EU approach to the rule of law.[*235]

The eminent Irish professor Dermot Walsh has summed up the effects of the various aspects of EU criminal law on national law as '**expanding of the coercive powers of the State and recalibrating procedural requirements to make it easier and faster for the State to secure convictions**.' Walsh finds that this is part of instilling neoliberal ideology to criminal law, thus replacing classic rules that have protected the individual vis-à-vis public power and have been applied for the last 150 years.[*236]

A further important dimension of the Neeme Laurits case concerns the issue of how to raise constitutionally problematic issues in a context where the EU legal order requires correct implementation, backed up by the threat of European Commission enforcement proceedings, rules on state liability and corresponding hefty fines. In the above-mentioned TV documentary, Neeme Laurits explained that **he had written numerous letters to various institutions both in Estonia and Finland, which all responded that they were unable to assist him due to the mutual recognition rules**. This seems to exemplify the concern expressed by Gareth Davies that the EU has become 'a tool for infantilisation' of the Member States and their institutions, since in so many fields of law and policy their only task is compliance and implementation of EU law, which admits no compromise.[*237]

In the view of the present writer, a profoundly important legacy to the Estonian and wider European constitutional discourse on the role of courts has been left by the following individuals and organisations who chose not to remain silent or complicit: the team of journalists who took the trouble to investigate Laurits' claims and bring the case to public attention; defence attorney Kaido Pihlakas, who subsequently pointed out in the daily *Postimees* that such cases are common and that extradition decisions are 'rubber-stamped' by judges;[*238] defence attorney Siim Roode, who raised similar issues in the context of mutual trust in administrative proceedings in the case of Aivo Piirsoo;[*239] the Estonian Bar Association which subsequently asked the then Chancellor of Justice to initiate a wider inquiry into respect of fundamental rights in European Arrest Warrant proceedings; and the then Chancellor of Justice, Indrek Teder, who indeed initiated such formal review. Chancellor of Justice Teder emphasised, inter alia, the above-mentioned individual right to judicial protection: even if it could be assumed that rights protection is endangered only in exceptional cases, 'it is the obligation of the state to guarantee a fair trial to everyone. The true aim of the right to be heard and its impact on the decision taken in surrender proceedings is also relevant'.[*240] These proceedings were eventually discontinued though by the new Chancellor of Justice.

The concerns expressed in public by these conscientious Estonian lawyers, journalists, institutions and organisations, as well as articles published in the UK and European media by lawyers from Fair Trials International about numerous UK cases where innocent individuals had been extradited automatically without the possibility to provide evidence of their innocence in the domestic court, led the present writer to identify a broader change in the role of courts. This was initially noted in the 'Erosion of Constitutional Rights' article; subsequently such concerns were systematically collated and documented from all Member States through the above-mentioned 'Role of Constitutions' project. The present' writer's concern

234 See JQ Whitman, supra notes 158-160 and the accompanying text.

235 For an outline of the key differences, see Albi, 'Erosion of Constitutional Rights', Part 2, supra note 19, pp 295-299. See also Dimitry Kochenov, 'EU Law without the Rule of Law: Is the Veneration of Autonomy Worth It?' (2015) 34(1) Yearbook of European Law, pp 74ff. – DOI:10.1093/yel/yev009.

236 Dermot PJ Walsh, *Walsh on Criminal Procedure* (2nd Edition, Round Hall 2016), p ix. Emphasis added.

237 Gareth Davies, 'Social Legitimacy and Purposive Power: The End, the Means and the Consent of the People' in Dimitry Kochenov, Graínne De Búrca and Andrew Williams (eds) *Europe's Justice Deficit* (Hart 2015) pp 272, 274. – DOI: https://doi.org/10.5040/9781474201193.ch-018.

238 'Advokaat: Eesti täidab Euroopa vahistamismäärusi liiga püüdlikult' ['An attorney: Estonia fulfils European Arrest Warrants too eagerly'] *Postimees* (29 February 2012) <www.postimees.ee> (accessed 17 April 2015).

239 'Saksamaa nõuab eestlaselt miljoneid kroone' ['Germany demands millions of kroons from an Estonian']. *Postimees* (4 November 2009) <www.postimees.ee> (accessed 17 April 2014).

240 As cited in Madis Ernits, Carri Ginter, Saale Laos, Marje Allikmets, Paloma Krõõt Tupay, René Värk and Andra Laurand, 'The Constitution of Estonia: The Unexpected Challenges of Unlimited Primacy of EU Law' in Albi and Bardutzky, *National Constitutions*, supra note 7, sect 2.3.1.2.

that trust is not part of the role of courts in classic European constitutionalism was subsequently noted, and developed further, by Birgit Aasa, whose doctoral thesis demonstrates that the CJEU requirements for mutual trust are systemically unsuitable in the courtroom. It is heartening to see that both of these scholarly works have been recognised by awards from the Constitutional Law Foundation of the Estonian Academy of Sciences; in the view of this author, the individuals who first brought the problematic cases to public scrutiny deserve some form of formal recognition. Their contribution is of particular importance for three reasons.

First, the mainstream EU discourses, as well as national judges and scholars, especially of the younger generations, have increasingly come to operate within the mindset of autonomous EU law and governance – with keywords such as effectiveness, uniformity, trust and teleological interpretation. In Kuhnian paradigm shift terms, they simply do not 'see' the problem,[*241] and are not attuned to the underlying classic constitutional protections; they regard these as something that is part of old-fashioned sovereignty or parochial, idiosyncratic national constitutional identities, as the understanding of comparative (continental) European constitutional law has been fading away. Thus, the issues can only be raised by those who still understand classic European constitutional law and criminal law. This is a dwindling community of lawyers: the reduction of the duration of the undergraduate law degree curriculum to three years in the aftermath of the so-called Bologna Process has in Estonia led to public discussion about the fact that younger generations of lawyers now lack a basic understanding of the fundamentals of law, and of a more integral and systemic understanding of the Estonian legal system and its core values and features.[*242]

Secondly, raising critical concerns with regard to EU law requires a considerable dose of conscience and courage. In the 'Erosion of Constitutional Rights' article, I have extensively documented how those national judges and institutions who expressed concerns with regard to the European Arrest Warrant in the earlier years were extensively rebuked as Eurosceptics or as deviant, which can be very discouraging for the individual. Indeed, often the criticism is directed against the individual scholar or individual national judge, instead of engaging with their substantive concerns. This has been exacerbated in the recent climate of illiberal turns and the rise of anti-establishment parties, whereby it is even harder to avoid the conflation of critical analysis of EU law with general populism, nationalism, etc.

The third reason why the contribution of these lawyers and journalists is important is that they have enabled others to identify and corroborate that a broader problem does indeed exist, not only from the perspective of the Estonian but also the broader comparative (especially post-totalitarian and post-authoritarian) European understanding of constitutionalism. This, in turn, allows debate to be initiated about whether and how a corrective redirection could be brought about in the EU rules, to which we will turn next in the final chapter.

10. The need for a joined-up, inclusive discussion about the role of courts – along with the paradigm shift in European constitutionalism – as part of the debate on the future of Europe

Whilst this article critically explores the way in which EU law has changed the role of courts from the perspective of Estonia and the wider post-totalitarian and post-authoritarian constitutional area, it is important to emphasise that Estonians have been highly appreciative of EU membership, and have been keen to be 'good Europeans'. In another publication, it was shown that in terms of constitutional adaptations, Estonia has taken one of the most exemplary approaches to the full application of EU law, as the national constitution has by and large been suspended in areas that fall within the scope of EU law, and the courts have granted EU law exceptionless primacy. However, this has come at a considerable cost to the country's constitutional system: a profound but largely undiscussed shift from the binding rules of the post-totalitarian

241 Cf eg Kuhn, supra note 74, p 149.

242 'Eesti õigushariduse ja juristikutse probleemidest ning võimalikest lahendustest' ['Problems and potential solutions to Estonian legal education and the profession of lawyers'], Report by the Supreme Court, prepared by Villu Kõve, Ivo Pilving and Ene Andersen, 2021 <www.riigikohus.ee> (accessed 30 August 2022).

constitutional *Rechtsstaat* to pragmatism was postulated. In that publication, it was suggested that one constructive way forward would be to put the concerns about the far-reaching effects of EU law on national constitutions – including about their obsolescence – on the agenda of the debate on the future of Europe.[*243] Here I would add that the question of what ought to be the role of courts in European constitutionalism also ought to be included in the debate on the future of Europe. This, in turn, cannot meaningfully be done without a discussion about the merits and demerits of the ongoing paradigm shift.

Indeed, what is needed is wider acknowledgement that due to the structural issues in the EU discourse, which have been highlighted throughout this article, a fundamentally misguided legal thinking has come to prevail in the mainstream EU scholarly and public discourses, whereby Europe's national constitutions have erroneously been reduced to idiosyncratic and emotive national identities, overlooking the fact that they establish advanced, democratically agreed systems for the exercise of public power, with carefully fine-tuned formal, institutional, procedural and substantive constitutional rules, including complex requirements around democracy, fundamental rights, the rule of law, separation of powers, the social state, judicial protection and constitutional review. Furthermore, through treating individual national constitutions as idiosyncratic, what has happened on the panoramic picture is that advanced, widely shared achievements of substantive comparative European constitutional law have come to be radically altered or are disappearing, most visibly in the post-totalitarian and post-authoritarian constitutional tradition which is adhered to by more than half of the Member States. 'European' law has increasingly come to denote autonomous, functionalist, neofunctionalist and neoliberal EU law, and overall an eclectic and 'somewhat rudimentary legal system'[*244] where keywords such as effectiveness, uniformity, direct effect, enforcement and the market trump all other considerations. Autonomous EU governance is a new and very different system of public power that is distinctly top-down, coercive, and market and debt oriented, and, indeed, increasingly seen by scholars of law and economics as entrenching 'authoritarian neoliberalism'. The individual is reduced to market actor or a *homo economicus* who has to live in coercively competitive conditions and has no real chance to shape decision-making centralised to Brussels. In scholarly, legal, judicial, policy and other discourses, any attempts to retain national constitutional protections – which are very often part of shared, classic European constitutional rules and tenets – require careful pleading and explanation, imposing an onerous burden of justification, as the 'norm' has shifted to the epistemic thinking in the paradigm of autonomous, neofunctionalist EU law and governance. The reduction of the national constitutional orders to particularistic national identities, the need to justify any deviant national rules, and the disappearance of comparative research and understanding of European law may in fact be a replication of key aspects of (neo-)colonial administration, as seen in Chapter 4.

These issues are harder to raise since Poland and Hungary instated illiberal regimes; however, a corrective redirection needs to be brought about to avoid national constitutions becoming ever more associated with nationalism and populism. Special responsibility has to lie with mainstream lawyers and scholars in those Member States that have not backslided, and where the legal education and legal thinking are still predominantly grounded in classic European constitutionalism, especially in post-totalitarian and post-authoritarian constitutional systems. Indeed, impressionistically, the scholars who have raised sharp concerns about EU constitutionalism often tend to have legal educational grounding in Germany, Italy, Greece, Spain, Portugal or Central and Eastern Europe but work, in the main, in the English language and on EU law in universities in the United Kingdom, the Netherlands or other 'centre' countries.

On a point about the decision-making process, such immensely profound questions about a shift to an entirely different system for the exercise of public power cannot in a sufficiently informed way or indeed legitimately be decided by randomly selected citizens as part of the European Citizens' Panels established to decide on the future of Europe. Indeed, in order to make it possible to have a meaningful, joined-up, informed and inclusive debate on the future of Europe, there is a need to first rectify the numerous structural issues in the mainstream EU discourse on national constitutions, which, as seen, include the orchestration of a shift from comparative law to autonomous, self-referential EU law, the scarcity of publication and funding opportunities for critical and comparative research on EU law, and the 'disconnect' between EU and national discourses. Their compounded effects mean that large parts of the national scholarly and legal communities have by and large been excluded from discussions on shaping the EU legal order. This is

[243] Kalmo and Albi, supra note 212.

[244] For the quote on 'rudimentary legal system' see Kochenov, 'EU Law without the Rule of Law', supra note 235, p 75, with further references to literature.

simply no longer tenable, as the EU legal order was designed in the historical context of the 1950s and 60s by a narrow group of lawyers with background predominantly in international law, for a single market, and possibly with replication of some operating methods originating from colonial administration, as noted in Chapter 4. In recent decades, EU law has been extended to virtually every area of law, often with profound changes that are causing particularly acute problems to the classic (continental) European approach to constitutionalism, as well as to criminal law, the social state and beyond.

Whilst many would respond that any such discussion would mark the end of the EU – the sort of dramatic language that has been used since the early days in 1960 as per Vauchez' historical accounts[*245] – one should bear in mind that the existing direction of travel has also been leading to ever-wider discontent among voters across Europe. Indeed, in the United Kingdom, which has meanwhile left the Union, one salient theme in the media debates leading up to Brexit was that of 'a slow and invisible process of legal colonisation, as the EU infiltrates just about every area of public policy'.[*246] The marginalisation of national constitutions and corresponding democratic and judicial procedures in the quest to shift to autonomous EU governance is also likely to be one of the deeper, underlying reasons for Brexit and the wider turn of citizens to anti-establishment parties all over Europe, and may even pose a risk to the future of Western liberal constitutionalism. Indeed, there has been an emerging backlash against all 'juristocracy', without differentiating between those scholars and lawyers who uphold classic constitutional values – which are ultimately based on a national constitutional social contract and which can be democratically changed – and those scholars and lawyers who have in a top-down and somewhat instrumentalised manner been super-imposing a new legal order the ultimate objectives of which are not entirely clear, which may be based on flawed foundational assumptions, and the merits and demerits of which cannot readily be debated.

To conclude with some possible alternative visions for the future of Europe, a growing number of scholars have called for retaining the broader classic, comparative European understanding of constitutional law. For example, Agustín Menéndez finds that the euro crisis may be an opportune time to 'reconstruct European constitutional law with the help of 'classical' democratic constitutional theory, as developed for decades in national Social and Democratic *Rechtsstaats*'.[*247] Matej Avbelj has suggested that the dominant constitutional narrative, which equates the constitutionalisation of the EU with US-style federalism, has been transplanted in a misconceived way that is unsuited to the European constitutional landscape, and that 'work must begin' on the EU's 'own, genuine and authentic constitutional theory' that would be oriented towards a pluralist legal entity with twenty-eight autonomous legal orders.[*248] Alexander Somek has put forward a vision where the states may, under their national constitutions, legitimately brace themselves against the negative effects of the international economic governance and retain responsiveness to their residents and their social freedom; this would be subject to submission to 'international peer review' in human rights protection, along with a strong protection against discrimination on the grounds of nationality.[*249] The present writer has elsewhere propounded the concept of 'substantive co-operative constitutionalism', in which the aim would be to uphold the established standard of protection of fundamental rights, the rule of law and other constitutional values, and also to retain the diversity of national constitutional orders, instead of transition to autonomous, self-referential, uniform sets of EU norms in all areas of law.[*250]

Based on subsequent panoramic, comparative research on the basis of the 'Role of Constitutions' project, through which a large-scale disappearance of widely shared, advanced formal and substantive rules of comparative European constitutional law was identified, I would add that the direction of travel ought to be to stay, in the main and especially beyond the single market, within the paradigm of the broader classic understanding of European constitutionalism, including in the role of courts, and to retain the Member States' social-democratic constitutional orders. Instead, a conversation needs to be started about reforming

245 Vauchez, '"Integration-through-Law", supra note 181, p 18.

246 Boris Johnson, 'There is only one way to get the change we want – Vote Go' *The Daily Telegraph* (22 February 2016) p 18. The word 'colonisation' has been used with regard to EU law in the work of a number of leading UK EU law scholars.

247 Agustin Menéndez, 'Editorial: A European Union in Constitutional Mutation?' (2014) 20(2) European Law Journal p 140. – DOI: https://doi.org/10.1111/eulj.12080.

248 Avbelj, 'The Pitfalls of (Comparative) Constitutionalism', supra note 186, pp 4ff, 15ff, 23, 24.

249 Somek, *The Cosmopolitan Constitution*, supra note 16, p vii, 25, 26, 33-35.

250 Albi, 'Erosion of Constitutional Rights', Part 2, supra note 19, sect VIII ff.

the EU legal order with a view to making it more attuned to the comparative European constitutional landscape and substantive values. Whilst Russia's war against Ukraine shows the importance of the EU as a strong global actor, it should be possible to develop defence co-operation without eradicating the national constitutional orders. As a final practical remark, the Estonian and other national legal communities can only feasibly seek to bring about such reforms of the EU if the respective peoples remain the ultimate holders of public power, the national constitutions remain the ultimate sources of authority and the individual states remain in existence.

Corrigendum

The author has made the following correction to the above article. On page 35, line 3, 'measure' has been replaced by 'directive'. Thus, the corrected sentence reads as follows:

'The widely contested EU Data Retention Directive was only the second ever directive to be annulled by the CJEU – in 2014 – on fundamental rights grounds; this came in a second challenge following extensive national constitutional contestation.'

The article has been updated to reflect this.

The author apologises for the error.

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Carri Ginter*
Associate Professor of European Law
University of Tartu

Anneli Soo**
Associate Professor of Criminal Law
University of Tartu

The 'Public Order' Parachute in Combating Racism and Xenophobia

1. Introduction

The fight against racism and xenophobia and its relationship with other freedoms has been a hot topic both in academia and at family dinners. Newspapers report that an Austrian man, Helmut Griese, at the age of 63, was fined approx. 700 euros by a local judge for yodelling while mowing the grass in his back yard.[*1] The accusation was of this being ridiculing of the religious beliefs of the Muslim family living next door. In 2021 a Belgian quartet was convicted of hate speech after wearing a 'Stop Islamisation' banner at the market of Mechelen. Basing the decision on Belgian criminal law, the 'Correctional' Court of Mechelen convicted four members of the right-wing organisation Voorpost to six months in prison for inciting hate and violence during a protest last year. The people in question had banners with the following text (freely translated): 'Is this the future of Flanders? No, thank you!' and 'Stop Islamisation'. The banners also showed women wearing a burka or niqab. Combining these two slogans and the women displayed on the banners was a bridge too far for the Belgian court.[*2] The warning label '[C]ontains language and attitudes of the time that may offend some' at the beginning the beloved BBC comedy *'Allo 'Allo!* caused bewilderment among nostalgic TV viewers.[*3]

At EU level, these discussions show links to the Framework Decision (FD) on Combating Racism and Xenophobia (2008/913/JHA)[*4], to synchronise rules on crimes with a racist or xenophobic background.

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* Carri Ginter is Associate Professor of European Law and holds the Jean Monnet chair at the University of Tartu, Estonia, and he is a partner heading the Dispute Resolution and Risk Management practice area at the Sorainen law firm. This article has been written with the support of the Erasmus+ programme of the EU within the #UProEU programme (see https://sisu.ut.ee/uproeu/).

** Anneli Soo is Associate Professor of Criminal Law, University of Tartu, Estonia.

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1 Allan Hall. 'Neighbour's yodelling offends Muslim family' (*Express*, 17 December 2020) Available at https://www.express.co.uk/news/uk/217875/Neighbour-s-yodelling-offends-Muslim-family (most recently accessed on 19 March 2022).

2 Decision of Antwerp Court of First Instance - Mechelen Department, Dossier 21M000027, of 26.5.2021. We thank associate Céline Goedhart from Conway & Partners for the help in understanding the case discussed.

3 Tom Pyman. 'No laughing matter! Woke censors slap offensiveness warning on classic *'Allo 'Allo* episodes because zey take ze mickey out of ze French and German accents' (*Mail* Online, 6 August 2021). Available at https://www.dailymail.co.uk/news/article-9866919/Woke-censors-slap-offensiveness-warning-classic-Allo-Allo-episodes.html (most recently accessed on 19 March 2022).

4 Council Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law, [2008] OJ L 328/55.

The FD stands on the founding principle that nothing less than a criminal offence with a maximum sentence of at least 1–3-year imprisonment is sufficient to address serious racist or xenophobic acts. With the initial proposal dated 26 March 2001, it certainly took a long time to negotiate.[*5] The FD refers to race, colour, religion, descent, or national or ethnic origin as characterising types of groups public incitement of violence against which must be penalised. It calls for the criminalisation of incitement of violence or hatred; the public dissemination or distribution of writings, images, or other materials with racist or xenophobic content; and the public endorsement, denial, or gross downplaying of genocide or crimes against humanity.

In October 2020, the European Commission decided to send letters of formal notice to Estonia and Romania. According to their assessment, the national laws do not fully and accurately transpose the EU rules on combating certain forms of expression of racism and xenophobia through criminal law.[*6] By the end of 2021, similar proceedings had been started against 13 Member States, or 48.15% of them all, and the list may not yet be complete. Among those the Commission has decided to open infringement proceedings against are Germany, Hungary, and Luxembourg. One of the general accusations presented by the Commission is a failure by the Member State to take the necessary measures to ensure that racist and xenophobic hate crimes are effectively criminalised.[*7]

This article focuses on the possibility of the Member States limiting the criminalisation to only conduct that is either carried out in a manner likely to disturb public order or threatening, abusive, or insulting.[*8] In our opinion, including this exception in national criminal law would in most cases reduce the threat of 'taking it too far' in relation to the risk of people getting punished in cases that do not by nature deserve intervention by criminal law and that of excessively limiting the freedom of speech and expression. It would also reduce the risks related to some fundamental principles of criminal law.

The 'Estonian angle' is presented to the reader to provide context related to 'public order' from the standpoint of international law being confused with 'public nuisance' within the context of national law. Namely, Estonian penal law perceives 'public order' in the context of a public nuisance, thus expressing a concept vastly different from the understanding of the term in international law. The criminal law's sections about 'hate speech' will be applied not by professors of international or EU law but by national criminal-court judges. This generates a severe risk of spill-over from the world of misdemeanours. We argue that said risk can be mitigated if the courts restrict themselves to the narrower interpretation of 'public order' in cases of hate crimes.

2. The Estonian 'hate speech rules' and their application

Hate speech is something that Estonia has condemned at Constitutional level.[*9] Art. 12(1) of the Constitution states that

> [e]veryone is equal before the law. No one shall be discriminated against based on nationality, race, colour, sex, language, origin, religion, political or other beliefs, property or social status, or on other grounds.

According to Art. 12(2) of the Constitution,

> [t]he incitement of national, racial, religious or political hatred, violence or discrimination shall be prohibited and punishable by law. The incitement of hatred, violence or discrimination between social strata shall also be prohibited and punishable by law.

5 Proposal for a Council Framework Decision on combating racism and xenophobia, COM/2001/0664 final, [2002] OJ C 75E/269. Available at https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52001PC0664:en:HTML (most recently accessed on 19 March 2022).

6 BNS. 'European Commission launches infringement proceedings against Estonia' (*news.err.ee*, 30 October 2020). Available at https://news.err.ee/1153405/european-commission-launches-infringement-proceedings-against-estonia (most recently accessed on 19 March 2022).

7 European Commission. December infringements package: key decisions (2 December 2021). Available at https://ec.europa.eu/commission/presscorner/detail/en/inf_21_6201 (most recently accessed on 19 March 2022).

8 See Art. 1(2) of the FD.

9 The Constitution of the Republic of Estonia, revised translation. Available at https://www.riigiteataja.ee/en/eli/ee/530122020003/consolide/current (most recently accessed on 19 March 2022).

Of course, the Constitution itself does not turn any act into a punishable one. In the logical structure of laws, criminal offences, among them a number of misdemeanours, have their home in the Penal Code. 'Hate speech' as a term in its own right is not expressly used in the Estonian Penal Code but is employed in informal communication (in the vernacular sense). Instead, similarly to the FD, Section 151 speaks of incitement of hatred. The current Subsection 151(1) of the Estonian Penal Code[*10] (in Section 151, titled 'Incitement of hatred') reads:

> Activities which publicly incite to hatred, violence or discrimination based on nationality, race, colour, sex, language, origin, religion, sexual orientation, political opinion, or financial or social status if this results in danger to the life, health or property of a person are punishable by a fine of up to three hundred fine units or by detention.

The so-called qualified offence is provided for in the second subsection, which refers to

> (2) [t]he same act if:
> 1) it causes the death of a person or results in damage to health or other serious consequences; or
> 2) committed by a person who has previously been punished by such act;
> is punishable by a pecuniary punishment or up to three years' imprisonment.

Similarly to many other Member States', Estonia's law distinguishes between misdemeanours and criminal offences. Accordingly, the first subsection of Section 151 characterises a misdemeanour for reason of the foreseen punishment of a fine or detention up to 30 days. The second subsection foresees a pecuniary punishment or up to three years in prison, hence representing a criminal offence. Accordingly, incitement of hatred is a criminal offence in Estonia only if it either causes the death of a person or damage to health or other serious consequences or is committed by a person who has previously been convicted for incitement of hatred (per Subsection 151 (2)).

The offence of hate speech has gone through several changes since Estonia regained independence in 1991. Until 2004, publicly inciting hatred or violence was a crime punishable by pecuniary punishment or up to three years' imprisonment. On 30 June 2004 it was downgraded to a misdemeanour punishable by a fine of up to three hundred 'fine units' or by detention, and on 16 July 2006 it was downgraded once again, with incitement of hatred or violence becoming punishable as a misdemeanour only on the condition that it has caused a danger to a person's life, health, or property. Since then, Section 151 has remained, in essence, the same. However, this does not mean that it has remained uncontested. Amending Section 151 has been discussed many times (2005, 2012–2013, 2020, 2022), in most cases with the aim of converting it back to a criminal offence and replacing the criterion of danger to a person's life, health, or property with a less restrictive characteristic such as violation of public peace, a systematic nature to the act, or a threat to public order.[*11] A recent proposal to amend Section 151, made in 2022, covered moving the result – danger to life, health, or property – from Subsection 151(1) to Subsection 151(2).[*12] In the explanatory memorandum, the following was stated:

> Incitement to hatred that does not lead to a clearly identifiable and causal consequence still jeopardizes the legal interests protected by rendering this an offence and has potential to contribute to dangerous hostile attitudes in the society. That is why incitement to hatred without a consequence too should be a misdemeanour.[*13]

Statistics show that hate speech offences are not widespread in Estonia. In this country with approximately 1.3 million inhabitants, 25,800 crimes registered per annum, and a crime index of 23.38 in

10 Penal Code. Available at https://www.riigiteataja.ee/en/eli/ee/502062021003/consolide/current (most recently accessed on 19 March 2022).

11 'Vaenukõne karistusõiguslik regulatsioon Eestis' ['Hate speech offences in Estonia']. Available at https://www.kriminaalpoliitika.ee/sites/krimipoliitika/files/elfinder/dokumendid/vaenukone_karistusoiguslik_regulatsioon_eestis.pdf (most recently accessed on 20 July 2022) (in Estonian).

12 This proposal was made in spring 2022 in the bill banning aggression symbols. Initiation of work on the bill was due to the war in Ukraine and aimed at criminalising the use of symbols justifying the aggressor and joining the aggressor's armed forces. Initially, the proposal to amend Section 151 was incorporated into this bill but was removed during the legislative process as leaving this controversial subject in it would have impeded adoption of the bill.

13 Explanatory Memorandum to the Bill on Amendments to the Penal Code, the Code of Criminal Procedure and the Code of Misdemeanour Procedure (support for aggression and related hostilities), 576 SE.

2021[*14], the section penalising hate speech is rarely applied. Ten instances of criminal offence in this regard were registered between 2003 and 2020, the most recent in 2015. During this period, six people were convicted, five of them for a crime committed before 30 June 2004. The last conviction was handed down in 2005. In all, 26 misdemeanours were registered between 2004 and 2020, with 16 proceedings being terminated and 13 convictions made.[*15] The only judgement the Supreme Court has made on hate speech was one in 2006 regarding the wording of Section 151 of the Penal Code, which entered into force in 2004.[*16]

It could be that Estonian society is very tolerant and serious cases of hate speech are rare. It could equally well be that the cases that fall under the hate speech section of the Penal Code are defined too narrowly (discussed shortly below). No empirical research is available to help. Since 2016, the Ministry of Justice has collected data on other crimes committed with the motive of hatred, finding that 38 such crimes were registered in 2016–2020, motivated by hatred among other things. Most of these offences were criminal offences qualified under Section 263 of the Penal Code, on aggravated breach of public order, under Section 121 of the Penal Code, on physical abuse, and Section 120 of the Penal Code, on threat.[*17] In addition, the 2018 Victims' Survey shows that almost 2.6% of the 1002 respondents had been victims of crime because of their nationality, race, colour, religion, disability, or sexual orientation.[*18] These data do not reveal the spread of hate speech in the society. Data collection is further complicated by the fact that the Penal Code does not include racist and xenophobic motivation as an aggravating circumstance, although it can be taken into consideration by the courts in the determination of the penalties.

3. The 'Estonian problem'

Being inhabitants of a country forcefully included in the Soviet Union for fifty years, Estonians vividly remember the absence of freedom of expression and the strict censorship involved. Perhaps a fear of taking the first steps back in that direction drives the resistance to criminalisation of hate speech in general terms. In other words, there is strong opposition in Estonian society to making the hate speech rules stricter. The debate in and beyond the parliament has been fierce. Supporters of criminalisation argue that a need to criminalise hate speech arises not only from EU law but also from the Constitution. However, this argument can be contested, as the Constitution states only that such activities should be forbidden and punishable, without specifying the field of law that should impose such a ban with relevant consequences. In any case, even the supporters of criminalisation tend to feel that the pressure from the EU to expedite the process is too strong to allow constructive discussions and well-considered decisions.

The infringement proceedings initiated by the European Commission against Estonia added fuel to the fire surrounding what is seen as tightening the screws around freedom of expression. One of the root causes of this confrontation is the requirement in Art. 3(2) of the FD for Member States to provide criminal penalties as a minimum and indicating thereby that lesser penalties are insufficient. As we discussed above, the FD requires the Member States to impose criminal penalties of a maximum of at least 1–3 years of imprisonment for hate speech offences, a criterion that Subsection 151(1) of the Penal Code does not meet. In addition, and again as discussed above, when it comes to hate speech as a crime, Subsection 151(2) of the Penal Code foresees preconditions of 'death', 'damage to health', or 'other serious consequences'– conditions not present in or permitted by the FD – as prerequisite for criminal liability.

So it is rather likely that Estonian law does not meet the minimum standards foreseen by the FD, yet the Estonian Government has consistently rejected the Commission's arguments in the infringement

14 'Northern Europe: Crime index by country 2021'. Available at https://www.numbeo.com/crime/rankings_by_country.jsp?title=2021&region=154 (most recently accessed on 19 March 2022).

15 'Vaenukõne karistusõiguslik regulatsioon Eestis' ['Hate speech offences in Estonia']. Available at https://www.kriminaalpoliitika.ee/sites/krimipoliitika/files/elfinder/dokumendid/vaenukone_karistusoiguslik_regulatsioon_eestis.pdf (most recently accessed on 20 July 2022) (in Estonian).

16 See Judgment of the Criminal Chamber of the Supreme Court of Estonia 3-1-1-117-05, of 10 April 2006.

17 'Vaenukõne karistusõiguslik regulatsioon Eestis' ['Hate speech offences in Estonia']. Available at https://www.kriminaalpoliitika.ee/sites/krimipoliitika/files/elfinder/dokumendid/vaenukone_karistusoiguslik_regulatsioon_eestis.pdf (most recently accessed on 20 July 2022) (in Estonian).

18 Per the Victims' Surveys conducted by the Ministry of Justice (available only in Estonian). Available at https://www.kriminaalpoliitika.ee/et/uuringud-ja-analuusid/ohvriuuring (most recently accessed on 19 March 2022).

proceedings.[*19] The issue itself became political long before the official infringement proceedings started. In 2015, Minister of Justice Urmas Reinsalu repeatedly expressed the view that it is not wise to criminalise hate speech.[*20] He referred to people who think that criminal law is a way to rearrange people's attitudes when stating:

> For such people, I'd recommend more readings of «The Gulag Archipelago» where Aleksandr Solzhenitsyn is writing about a teacher at military academy jailed for laughing while reading the party paper. A mental murder.[*21]

The minister continued by stating that

> [i]nciting hatred, hostility and discrimination is provided by penal power as it is, but it needs to contain [the] objective necessary elements of offence – real danger must have occurred. If we will undertake to rapidly enforce fresh regulation and take the labelling attitude, what we may achieve is very forceful contradictory emotions which may pose danger in society.

The infringement proceedings were perceived as a slap in the face and added fuel to the fire. The Reform Party, in opposition at the time, filed a proposal for a bill to criminalise hate speech. Its leader, Kaja Kallas, who was to become prime minister in 2021, explained:

> The government coalition has made inciting hatred against various minorities increasingly commonplace. However, this should not be the case in a state based on the rule of law[,] and incitement of hatred and public calls for violence should be punishable in criminal procedure, even if victims do not immediately follow.[*22]

The leader of coalition party Isamaa, Helir-Valdor Seeder, criticised the hate speech bill of the Reform Party, saying that it would curtail free speech and free media:

> Isamaa believes that a free society does not need to solve playground issues via a militia and a criminal code. A democratic society honours the rights of the people and of the media, to express themselves freely.

The leader of Isamaa further explained:

> The attempted further criminalization of hate speech represents a creeping introduction of censorship. The rights of people and the media to free speech may not be put under ideological pressures. Opinions and expression cannot be influenced solely by the law. Reform's proposals would be a welcome means of intimidation, one which would provide the chance to silence many fundamental debates. The state cannot dictate to people what and how they can think or speak.[*23]

Estonia's Prosecutor General Andres Parmas also intervened and emphasised that freedom of speech is a very important value for society. He also expressed fears, stressing the limited resources of the Prosecutor's Office:

> [For me a]s the head of the prosecutor's office, it cannot be ignored that such a change in the law means an additional workload for both the prosecutor's office and the police and the court. This resource [burden] must be borne by the prosecutor's office at the expense of other crimes.[*24]

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19 Henry-Laur Allik. 'Euroopa Komisjon hindab siiani, kas Eesti vihakõne seadus on piisav' (*Postimees*, 12 November 2021). Available at https://www.postimees.ee/7384589/euroopa-komisjon-hindab-siiani-kas-eesti-vihakone-seadus-on-piisav (most recently accessed on 19 March 2022). As the infringement proceedings are not public, unfortunately, we do not know the concrete arguments of the Estonian Government.

20 Priit Pullerits. 'Justice minister says soundness of mind needed with hate speech issue' (*Postimees* News, 13 October 2015). Available at https://news.postimees.ee/3361015/justice-minister-says-soundness-of-mind-needed-with-hate-speech-issue (most recently accessed on 19 March 2022).

21 Ibid.

22 BNS. 'Reform Party presents hate speech criminalization bill' (*news.err.ee*, 19 October 2020). Available at https://news.err.ee/1148908/reform-party-presents-hate-speech-criminalization-bill (most recently accessed on 19 March 2022).

23 BNS. 'Isamaa opposes Reform Party's hate speech bill' (*news.err.ee*, 28 October 2020). Available at https://news.err.ee/1152278/isamaa-opposes-reform-party-s-hate-speech-bill (most recently accessed on 19 March 2022).

24 BNS. 'Prosecutor general: I oppose the criminalization of hate speech' (*news.err.ee*, 17 February 2021). Available at https://news.err.ee/1608112696/prosecutor-general-i-oppose-the-criminalization-of-hate-speech (most recently accessed on 19 March 2022).

The bill submitted by the opposition Reform Party with a proposal to criminalise hate speech was voted down by members of the *Riigikogu* in December 2020, 50 against 39.[*25]

In April 2022 after the proposal to amend Section 151 was dropped from the bill banning aggression symbols, Minister of Justice Maris Lauri lamented:

> Are we really doing this in such a way that use of symbols is punishable but if people are attacked with words, insulted, or victims of agitation to be beaten, there is nothing wrong?[*26]

In summary, infringement proceedings are ongoing, Estonia has not accepted the allegation of being in breach of its EU obligations, and a large proportion of its politicians and general population strongly disagree on whether hate speech should be criminalised.[*27]

4. The clarity (*certa*) issue

Although there are conflicting moods in the society, it is a fact that international pressure to criminalise hate speech exists. Just recently, in late 2021, the Commission launched its initiative to extend the list of Euro-crimes to hate speech and hate crime via the Treaty on the Functioning of the European Union.[*28] Therefore, the need for and possibility of criminalising hate speech must be discussed with open cards in consideration of all relevant circumstances.

From the perspective of criminal law, criminalising 'hate speech' can only happen when the phenomenon is defined in a manner that is in line with the principle of legal certainty, also known as the principle *nullum crimen nulla poena sine lege certa*. According to this principle, the characteristics of the punishable act must be comprehensible to the addressees of the law and the person applying the law at least to the extent that their content can be understood via interpretation.[*29] In short, the wording of the law should enable people to choose the right behaviour and the courts to avoid arbitrariness. As one of the fundamental principles of criminal law, the *certa* principle requires that substantial vagueness in defining crimes be avoided at all cost. In sum, whether the criminal norm fulfils the legal-certainty principle substantially depends on the composition and wording of the norm.

The 'Estonian problem' is that the law contains preconditions for a hate crime that the FD does not recognise. If these presumptions were removed, possible contradiction with the principle of certainty would arise. Let us be more precise: currently, in order for hate speech to be punished as a misdemeanour, the law requires the presence of specific results – danger or real damage. In light of the FD, these preconditions should be removed. Here, the European Commission against Racism and Intolerance in 2015 recommended that the Estonian authorities introduce without delay in 'parliamentary proceedings a draft amendment to

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25 BNS. 'Reform's "hate speech" draft bill voted out of *Riigikogu*' (*news.err.ee*, 17 December 2020). Available at https://news.err.ee/1210267/reform-s-hate-speech-draft-bill-voted-out-of-riigikogu (most recently accessed on 19 March 2022).

26 A. Raiste. 'Vaenukõne paragrahv jääb agressioonisümbolite keelustamise eelnõust välja' (*err.ee*, 7 April 2022). Available at https://www.err.ee/1608558457/vaenukone-paragrahv-jaab-agressioonisumbolite-keelustamise-eelnoust-valja (most recently accessed on 13 June 2022).

27 Several examples from the fierce public discussion (in Estonian) are available: Mikk Salu, 'Reformierakonna pikk samm vales suunas: vihakõne eelnõu mõjub sõnavabaduse reetmisena' (*Eesti Ekspress*, 18 November 2020), available at https://ekspress.delfi.ee/artikkel/91680023/reformierakonna-pikk-samm-vales-suunas-vihakone-eelnou-mojub-sonavabaduse-reetmisena (most recently accessed on 19 March 2022); 'Andres Karnau: vihakõne ja sõnavabadus' (*Postimees*, 25 September 2020), available at https://leht.postimees.ee/7070415/andrus-karnau-vihakone-ja-sonavabadus (most recently accessed on 19 March 2022); 'Varro Vooglaid: "vihakõne" kriminaliseerimine oleks ränk rünnak sõnavabaduse vastu' (*Postimees*, 14 December 2020), available at https://leht.postimees.ee/7131551/varro-vooglaid-vihakone-kriminaliseerimine-oleks-rank-runnak-sonavabaduse-vastu (most recently accessed on 19 March 2022); 'Rait Maruste: sõnavabadus, vaenukõne ja vihakuriteod' (*err.ee*, 1 March 2021), available at https://www.err.ee/1608126385/rait-maruste-sonavabadus-vaenukone-ja-vihakuriteod (most recently accessed on 19 March 2022).

28 Communication from the Commission to the European Parliament and the Council. 'A more inclusive and protective Europe: Extending the list of EU crimes to hate speech and hate crime', COM/2021/777 final. Available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52021DC0777 (most recently accessed on 19 March 2022).

29 Jaan Sootak. *Karistusõigus. Üldosa*. Juura 2018, pp. 189–190; Judgment of the Criminal Chamber of the Supreme Court of Estonia 1-16-5792, of 9 November 2017, para. 12; *Veeber v. Estonia (no. 2)*, appl. no. 45771/99 (ECHR, 21 January 2003), para. 31.

section 151 of the Criminal Code, removing the restriction whereby an offence cannot be deemed to have taken place unless it is proven that it entails a risk to the health, life or property of the victim'.[*30]

Partially in line with the goal for the FD to limit itself only to *particularly serious forms of racism and xenophobia by means of criminal law*, Estonian law already criminalises hate speech if it causes the death of a person or damage to health or other serious consequences or is committed by a person who has previously been convicted for incitement of hatred.

However, criminalisation of incitement of hatred without any reference to a (potentially) harmful consequence[*31] would widen the space of potentially punishable activities tremendously and lay a burden on the judges handling criminal cases to determine what incitement to hatred, violence, or discrimination covers. Everything here points to a severe risk of breaching the principle of legal certainty.

This would create ambiguity in the society as to which cases may be prosecuted and which not and have serious potential to bring with it arbitrary decisions. Common sense foresees a flow of complaints to the police from people about what they read, see, or hear in their day-to-day life. It would create both additional fear of expressing one's opinion and additional opportunities to silence opponents whose views are not welcome. Until 2006, Section 151 did not require a specific consequence, and questions were raised in relation to its wording. What activities does incitement to hatred, violence, or discrimination cover? Does the incitement have to be addressed to a specific group? Must the group or persons to whom the call is addressed also be specified? The answers to these questions, now more than 15 years old, are provided in only one Supreme Court judgement and were by no means unanimous.[*32]

Accordingly we see the risks involved in criminalisation of hate speech in a generalist manner as outweighing the potential added benefits. It may lead to stronger division of the society instead of greater understanding and harmony. Tensions in society, which already exist without the criminalisation of hate speech, could be exacerbated. We also see that such risks could be significantly alleviated with the introduction of a threat to public order as a precondition for the crime. Therefore, we feel that the FD contains the filters necessary to limit its impact to cases with a 'real danger' present, which will be discussed below.

5. The risk of misunderstanding what 'public order' is

While making a claim that the FD contains the filter necessary for conforming to the principle of certainty – public order – we point to the vast difference between what is understood as public order in national penal law and the concept of public order on EU level. Why would such a point be relevant? Because judges dealing with criminal law may be misled by the term 'public order', which is very familiar to them but in a wholly different context.

In essence, the term 'public order' in national criminal law refers to general requirements for behaviour in public places – in other words, to creating a 'public nuisance'. The case law of the Criminal Chamber of the Supreme Court explains 'public order' in the context of misdemeanours and petty crimes as 'relations between persons enshrined in customs, good morals, norms or rules in society, which ensure for everyone public confidence and the opportunity to exercise one's rights, freedoms and obligations'.[*33] The Estonian Law Enforcement Act, which regulates the protection of public order, resonates with the case law of the Criminal Chamber by defining public order as 'a state of society in which the adherence to legal provisions

30 ECRI Report on Estonia (fifth cycle). Adopted on 16 June 2015 and published on 13 October 2015. Available at https://rm.coe.int/fifth-report-on-estonia/16808b56f1 (most recently accessed on 19 March 2022). In 2018, the ECRI concluded that, notwithstanding its recommendations, such amendments have not been made. See 'ECRI conclusions on the implementation of the recommendations in respect of Estonia subject to interim follow-up', adopted on 21 March 2018 and published on 15 May 2018. Available at https://rm.coe.int/interim-follow-up-conclusions-on-estonia-5th-monitoring-cycle/16808b5705 (most recently accessed on 19 March 2022).

31 That is: 'Activities which publicly incite to hatred, violence or discrimination on the basis of nationality, race, colour, sex, language, origin, religion, sexual orientation, political opinion, or financial or social status are punishable by…'

32 In the above-referenced case 3-1-1-117-05, the Criminal Chamber of the Supreme Court expressed dissenting opinions on application of the law, which is why the case was submitted for consideration to the full panel of the Criminal Chamber. Finally, the full panel of the Criminal Chamber presented a conservative interpretation of incitement of hatred, which was disagreed with by two of the six judges, who also wrote a dissenting opinion.

33 Judgment of the Criminal Chamber of the Supreme Court of Estonia 3-1-1-7-07, of 21 May 2007, para. 7.1.

and the protection of legal rights and persons' subjective rights are guaranteed'.[*34] Here, the link between the protection of public order and law of misdemeanours is strong, as the latter deals with those acts against public order that have gone 'too far'.

It is obvious that the above-described concept of public order is rather vague, as it seems to cover law and order as such in the society. Such vagueness stems from the nature of law enforcement and the need for flexibility of administrative law, the emphasis of which lies in prevention. Offences against public order are also provided for by the Penal Code. As previously stated, these offences also reflect the general nature of law enforcement; i.e., these are that infringement of the law and order that the legislators have considered serious enough to call for different degrees of punishment. In general, these are rather small-scale sorts of offences, such as breach and aggravated breach of public order (a misdemeanour and criminal offence, respectively), violation of the requirements for holding public meetings (a misdemeanour), an unauthorised public meeting (a criminal offence), and trespassing (a misdemeanour or criminal offence). As such, they are less serious and deemed less reprehensible than the serious offences against public order and security in the terms in which we understand it in EU law. In comparison, for instance, to public security as a universal legal interest, the local understanding of public order is related more to the values of a particular society.[*35]

Accordingly, on national level internally the term 'public order' is related primarily to minor offences that disturb other people. Rumbling in public, insulting passers-by, playing music too loudly and disturbing the neighbours, fighting in public, or (in extreme cases) just being drunk in public – these are breaches of public order that are dealt with daily as misdemeanours by judges of district courts. These very same judges decide criminal cases. Therefore, if a new crime whose precondition is a threat to the public order is introduced to them without further explanation and clarification, they intuitively, on the basis of their professional experience, consider this crime to belong to the category 'public nuisance'. Also, there is no case law to point them in a different direction.

6. Public order in EU law

The Commission did not include the term 'threat to public order' in the original proposal for the FD. Accordingly, the *travaux préparatoires* do not contain much to help us understand the origin of the thought and meaning of the exception. Comparing the various language versions of the FD seems to indicate that the use of the term is consistent. The English version refers to 'a manner likely to disturb public order'. In French the wording is 'exercé d'une manière qui risque de troubler l'ordre public', in German 'die in einer Weise begangen werden, die geeignet ist, die öffentliche Ordnung zu stören', and the Spanish version refers to 'del orden público'.

The fact that both the French and the English version, as well as other language versions, refer to 'public order' in a consistent manner leads us to believe that the FD does not invite us to discuss the broader concept of public policy and what the differences in their scope are, if any, in different legal cultures.[*36] There is a certain difference in the scope of public order and *l'ordre public*, which is often translated as public policy. For example, in the context of free movement of persons, the European Court of Justice (ECJ) refers to public policy and *l'ordre public* interchangeably.[*37] The term 'public order' is not synonymous with 'public policy'.[*38]

A.G. Sharpston makes a convincing argument identifying public order as something narrower and more concretely limited than public policy in the broader concept. In addition to public order, public policy

34 Law Enforcement Act, Subsection 4 (1). Available at https://www.riigiteataja.ee/en/eli/ee/503032021004/consolide/current (most recently accessed on 19 March 2022).

35 Jaan Sootak and Priit Pikamäe (eds). *Karistusseadustik. Kommenteeritud väljaanne* (5th ed.). Juura 2021, Section 262, commentary 1.1.

36 Catherine Kessedjian. 'Public order in European law'. *Erasmus Law Review* 2007(1)/1, p. 25. Available at http://www.erasmuslawreview.nl/tijdschrift/ELR/2007/1/ELR_2210-2671_2007_001_001_003.pdf (most recently accessed on 19 March 2022).

37 Case C-100/01, *Aitor Oteiza Olazabal* [2002] ECLI:EU:C:2002:712.

38 See, for example, the discussion by Advocate General Sharpston in Case C-554/13, *Z. Zh. and O*, ECLI:EU:C:2015:94 [2015], para. 29 and following.

encompasses acts that are considered to be against the policy of the law.[*39] Public order is narrower in nature and 'broadly covers crimes or acts that interfere with the operations of society'.[*40]

In the case of the FD, both languages, English and French, consistently refer to 'public order': 'It is settled case-law that the meaning and scope of terms for which EU law provides no definition must be determined by considering their usual meaning in everyday language, while also taking into account the context in which they occur and the purposes of the rules of which they are part.'[*41] Noted, a recital does not in itself constitute a legal rule and thus has no binding legal force of its own. However, the preamble of an EU law instrument may explain the measure's content.[*42] The preamble of the FD does exactly this, emphasising the limited scope of the harmonisation intended by stating (emphasis added):

> This Framework Decision is limited to combating *particularly serious forms of racism and xenophobia by means of criminal law*. Since the Member States' cultural and legal traditions are, to some extent, different, particularly in this field, *full harmonisation of criminal laws is currently not possible*.[*43]

An indication of targeting harmonisation of 'particularly serious' situations allows for an interpretation wherein 'threat to public order' serves the purpose of eliminating the less serious forms of activities from the scope of the rules introduced. This leads us to a narrower context.[*44]

Most cases of the ECJ address public order in the context of the internal market and free movement, a context wherein 'the protection of national security and public order also contributes to the protection of the rights and freedoms of others' with particular reference to everyone's 'right not only to liberty but also to security of person'.[*45] This in turn should obviously exclude a liberal interpretation of what does and does not constitute a threat to public order. Showing up drunk in a public space may disturb public order for the purposes of national misdemeanour law, but it does not include a threat to the 'security of person' within the meaning of EU law. When labelling someone as a threat to public security, we are discussing the existence of a real threat such a person represents to public security.[*46]

Hence, in the *Oteiza Olazabal* case, restrictions to a person living close to the Spanish border were considered justified with a reference to potential terrorist ties and the risk of him living in the proximity of the ETA.[*47] Evidently, the risk of realising terrorist ties is something that constitutes a risk of a highly serious nature.

If the 'public order' referred to by the FD can be interpreted with a parallel to the cases dealing with free movement of persons, the ECJ has held that a mere disturbance of the social order is clearly insufficient.[*48] Public order, as employed in the *Bouchereau* judgement, presupposes the existence of 'a genuine and sufficiently serious threat to the requirements of public order affecting one of the fundamental interests of society'.[*49] If interpreted in keeping with these examples, the existence of a risk to public order as a precondition for a crime significantly changes the picture.

39 Ibid., para. 31.

40 Ibid., para. 30.

41 Case C-554/13, *Z. Zh. and O* [2015] ECLI:EU:C:2015:94, para. 42.

42 Case C-549/07, *Wallentin-Hermann* [2008] EU:C:2008:771, para. 17.

43 Recital 6 of the *preambula* with the authors' emphasis.

44 For example, C-601/15 PPU, *J. N. v Staatssecretaris voor Veiligheid en Justitie* [2016] ECLI:EU:C:2016:84, para. 53 and following.

45 Ibid.

46 Ibid., para. 55.

47 Case C-100/01, *Aitor Oteiza Olazabal* [2002] ECLI:EU:C:2002:712.

48 Case C-601/15 PPU, *J. N. v Staatssecretaris voor Veiligheid en Justitie* [2016] ECLI:EU:C:2016:84, para. 65, and the case law referred to therein, including the judgements in Case C-554/13, *Z. Zh. and O* [2015] ECLI:EU:C:2015:94, para. 60, and the case law cited as regards Article 7(4) of Directive 2008/115, and Case C-373/13, *H. T. v Land Baden-Württemberg*, EU:C:2015:413 [2015], para. 79.

49 Case 30/77, *Bouchereau* [1977] EU:C:1977:172, para. 35; Case C-145/09, *Tsakouridis* [2010] EU:C:2010:708, para. 25; and discussion by Advocate General Sharpston in Case C-554/13, *Z. Zh. and O* [2015] ECLI:EU:C:2015:94, para. 36 and following.

7. Conclusions

It is fair to say that an attempt to internationally define hate speech crimes involves an element of clash of cultures. Some societies readily criminalise a wide range of disturbing statements since they feel that in history similar statements have caused catastrophes in their country or that the statements cause unfair suffering to people in connection with dramatic events from history. Others avoid labelling such statements as hate speech as far as possible, and criminalising these statements, as their history has revealed to them the fragility of freedom of speech and expression.

Estonia belongs to the latter set on account of the fact that for almost 50 years it was involuntarily incorporated into the Soviet Union. In consequence, to Estonian society any attempt to restrict freedom of expression in a generic manner sounds like an attempt to reduce plurality of opinions in the society. Dissenting opinions may not be pleasant to hear, but they fuel the development of society. Estonians know that very well because without such opinions having flourished there might not be an independent Estonia today. Therefore, the idea of criminalising hate speech has not been warmly and unanimously welcomed. External pressure to do so has not helped but, to the contrary, increased conflicts in the society.

The need to fight serious forms of xenophobia and racism is obvious, and criminal penalties may be necessary. Accordingly, the society needs assurances and defensive mechanisms if it is to be sure that only particularly serious forms of racism and xenophobia are combated by means of criminal law. This expectation is in line with the *raison d'être* of the FD.

Were hate speech crime defined merely as 'incitement of hatred, violence or discrimination', it would most likely fall short of the principle of legal certainty. Very intense questioning about the meaning of incitement would arise. We do see a solution, whereby the criminalisation of hate speech is combined with the strict precondition of applying only to cases of actions carried out in a manner likely to disturb the public order. We reiterate that the law could define the crime of hate speech as incitement of hatred, violence, or discrimination carried out in a manner likely to disturb the public order. The minimum requirements of the FD would be fulfilled, and the rest of the articles of national law, foreseeing lesser offences as, for example, misdemeanours, would no longer contradict the FD. Instead they could be seen as gold-plating in the desired general direction.

This would resolve the bigger risk, leaving us still to deal with the national-law puzzle of how to distinguish the 'public order' in the FD and EU law from the very same words contained in the very same penal code referring, for example, to activities similar to being drunk and disorderly. There remains the puzzle of how to help the same judges who decide on the minor offences treat the same terms very differently when they decide on criminal cases of hate speech. Once again, risks of legal certainty are on the table.

If the judges opt for the liberal, wide interpretation equating public order to public nuisance, vast numbers of cases of hate speech could arise overnight. The public-nuisance concept would give hate speech the character of a petty offence, which would even further widen the circle of punishable acts of incitement of hatred. Any public outrage, outburst of resentment, or insult would immediately fall within the sphere of hate speech and thus of criminal punishment as all these activities go against law and order. Expressing thoughts that are unpleasant or inconvenient to other people or to the public – for example, reading insulting poems naked on a town square – could become punishable. This would go strongly against the principle of *ultima ratio*, whereby criminal sanctions should be the last resort in dealing with unwanted behaviour.

This would be detrimental to the society for several other reasons. Potentially, arbitrary decisions could follow and confusion be created among citizens about what activities are in fact prohibited, leading them to fear expressing themselves. It has potential to create a system in which penalties are based not on people's actions but on their attitudes. A dramatic increase in hate speech cases would demand vast resources. The resources needed to deal with hate speech would come at the expense of other cases. At the same time, lesser forms of punishments for smaller matters could easily resolve this negative impact. Thirdly, conflicts in the society would increase further as many would feel unfair pressure on freedom of expression.

In conclusion, if the crime of hate speech were to be limited in terms of a threat to public order, this has to be done in a manner ensuring that national courts understand that it is not a case of public nuisance but of real danger. The latter characterises the EU's approach to public order. How the legislators technically approach this is another matter. If the EU's approach to public order is applied, the situation with legal

certainty is significantly improved and the solution is much more in line with the fundamental principles of criminal law. Accordingly, it would be perfectly acceptable to apply the FD’s public-order condition since freedom of expression would remain protected.

The old man could continue yodelling, and people would remain free to express their opinions and fears. And risks to public order still could be adequately addressed.

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Christoph G. Paulus

Professor

The Eternal Struggle for Supremacy between Creditor and Debtor*

1. Beginnings

1.1. From search for peace to contract

Talking about a power game in credit relationships might be seen as a *contradictio in adiecto* since there is necessarily a contractual link between at least two persons, a debtor and a creditor. Given this prerequisite, it seems like a surprise that this role is and always has been determined by a struggle for power. After all, a contract appears to be by definition a peace-maker: the Latin word 'pactum' is derived from the notion of *pacisci* (to make peace), and the German word 'Vertrag' is based on the root of the verb 'vertragen' (i.e., to get along). There is no better evidence for the equalising effect of a contract than the Old Testament and God's relationship with the Hebrews therein: once God has entered into the agreement with Noah to never again destroy mankind, Abraham is in a position to remind the Lord to keep this promise also in the case of Sodom and Gomorrah.*[1] But alas, irrespective of such most venerable precedents, human reality has it that the creditor–debtor relationship always has been and most probably will remain a power game, now and forever. This insight was presented in masterly fashion quite some time ago by Prof. Rudolf von Ihering in his seminal treatise *Der Kampf ums Recht* ('The Struggle for Law').*[2]

A few snapshots from the constant fluctuation entailed by this struggle are presented below, with emphasis placed on the most dramatic situation arising in a contractual relationship – namely, the debtor's inability to comply with his contractual obligation, a situation that we are used to branding today as bankruptcy, insolvency, or the like.*[3] From a Romanistic stance, it would be most natural to begin this historical description with the Romans: after all, they are the ones who discovered and instrumentalised the two-person relationship of creditor–debtor and of plaintiff–defendant, respectively, as the 'atom' of legal science, and they are known for their notorious brutality in the Twelve Tables legislation from around 450 BC.

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* This article is a revised version of a chapter in a book edited by Abel B. Veiga Copo and Miguel Martínez Muñoz: *El Acreedor en el Derecho Concursal y Preconursal a la luz del Texto Refundido de la Ley Concursal*, 2020, p. 39 ff. I dedicate this article to my friend Professor **Paul Varul** on his 70th birthday.

1 Very instructive with regard to this evolution is Erich Fromm. *Ihr werdet sein wie Gott*, 2018 reprint, p. 250 ff.

2 Rudolf von Ihering. *Der Kampf ums Recht*, 1872.

3 See also Jay Lawrence Westbrook. 'The control of wealth in bankruptcy'. *Texas Law Review* 2004(82)/4, pp. 795–862 (who includes security interests in his deliberations).

1.2. Mesopotamia and the Near East

But before one turns to these, it is advisable to start earlier and with a geographically somewhat shifted location – Mesopotamia – for their example's better classification. More precisely, we begin with the Codex Hammurapi, of some 4,000 years ago.[*4] In its Art. 117, one finds this rule[*5]:

> If anyone fail to meet a claim for debt, and sell himself, his wife, his son, and [his] daughter for money or give them away to forced labor: they shall work for three years in the house of the man who bought them, or the proprietor, and in the fourth year they shall be set free.

Surprisingly, one finds here a rather tame concept of sanctioning; by modern categorisation, this rule is a very debtor-friendly one. Not dissimilar to this, the hand behind the Old Testament of the Bible devised a nearly more magnificent concept. Accordingly, debt bondage was limited to seven years:

> If thou buy an Hebrew servant, six years he shall serve: and in the seventh he shall go out free for nothing.[*6]

Additionally, a loan could be reclaimed within the limits of a seven-year period only[*7]:

> (1) At the end of every seven years thou shalt make a release.
> (2) And this is the manner of the release: Every creditor that lendeth ought unto his neighbor shall release it; he shall not exact it of his neighbor, or of his brother; because it is called the LORD's release.
> (3) Of a foreigner thou mayest exact it again: but that which is thine with thy brother thine hand shall release.

And, finally, every fifty years there was something of an all-encompassing release[*8]:

> (8) And thou shalt number seven sabbaths of years unto thee, seven times seven years; and the space of the seven sabbaths of years shall be unto thee forty and nine years. (9) Then shalt thou cause the trumpet of the jubilee to sound on the tenth day of the seventh month, in the day of atonement shall ye make the trumpet sound throughout all your land. (10) And ye shall hallow the fiftieth year and proclaim liberty throughout all the land unto all the inhabitants thereof: it shall be a jubilee unto you; and ye shall return every man unto his possession, and ye shall return every man unto his family. (11) A jubilee shall that fiftieth year be unto you: ye shall not sow, neither reap that which groweth of itself in it, nor gather the grapes in it of thy vine undressed. (12) For it is the jubilee; it shall be holy unto you: ye shall eat the increase thereof out of the field. (13) In the year of this jubilee ye shall return every man unto his possession. (14) And if thou sell ought unto thy neighbor, or buyest ought of thy neighbor's hand, ye shall not oppress one another: (15) According to the number of years after the jubilee thou shalt buy of thy neighbor, and according unto the number of years of the fruits he shall sell unto thee:

That so-called Jubilee tradition is probably even older than this Biblical report.[*9] Much later, from 1300 AD, it played a certain role within Christianity[*10] and gained great attention again within certain circles in the

4 For what follows, see esp. Stephan Madaus. 'Schulden, Entschuldung, Jubeljahre – vom Wandel der Funktion des Insolvenzrechts'. *Juristenzeitung* (JZ) 2016(71)/11, pp. 548–556, on p. 552 ff. – DOI: https://doi.org/10.1628/002268816x14570156355636; Christoph Paulus. 'Historische Betrachtungen zur Restschuldbefreiung des Schuldners'. *Zeitschrift für das gesamte Insolvenz- und Sanierungsrecht* (ZInsO) 2019, p. 1153 ff.

5 Per http://www.general-intelligence.com/library/hr.pdf, translated by L.W. King.

6 Exodus (2nd Moses) 21: 2, available at http://www.htmlbible.com/kjv30/B02C021.htm.

7 Deuteronomy (5th Moses) 15: 1–3.

8 Leviticus (3rd Moses) 25: 8–15. A comprehensive historical and theological interpretation is offered by J.S. Bergsma. *The Jubilee from Leviticus to Qumran*, 2007. – DOI: https://doi.org/10.1163/ej.9789004152991.i-353; see, additionally, A. Michel (ed.). *Èthique du Jubilé – vers une réparation du monde?*, 2005.

9 See G. Scheuermann (ed.). *Das Jobeljahr im Wandel*, 2000.

10 It was Pope Boniface VIII who introduced this Jewish concept into Christianity, by the bull *Antiquorum habet fide relatio*; see Herbert Thurston. 'Holy Year of the Jubilee' in Charles G. Herbermann (ed.), *The Catholic Encyclopedia (1907–1912), Vol. 7*, available at https://en.wikisource.org/wiki/Catholic_Encyclopedia_(1913)/Holy_Year_of_Jubilee.

transition from the 20th to the 21st century, thanks to Pope John Paul II's 'Urbi et Orbi' speech of 1 January 2000.[*11]

It is fair to conclude from these sources that in this region of the ancient world the idea was prevalent (or at least widespread) that non-fulfilment of one's obligations was neither a crime that rose to the level of capital punishment nor a misdemeanour that stigmatised the culprit for the rest of his life (and his relations as well); it was obviously rather a phenomenon that justified the creditor making a claim for the debtor's effort of repairment but just for a limited period of time.

2. Further developments – brutal and harsh

2.1. Ancient Rome

Almost diametrically opposed to that Mesopotamian approach is the one we find – and are nearly accustomed to – from ancient Roman law, which has formed a deep and lasting impression on our attitude. It is a well-known fact that the first expression of what creditors are allowed to do with a non-performing debtor is to take revenge[*12]; in the above-mentioned famous Twelve Tables legislation from roughly 450 BC we read:

> On the third market day the creditors shall cut shares. If they have cut more or less than their shares it shall be without prejudice.[*13]

This brutal approach, which laid the foundation for the strong European belief in the stigma of insolvency and which still was echoed some 2,000 years later in Shakespeare's play *The Merchant of Venice*[*14], was somewhat softened in that the creditor could, alternatively, sell the debtor abroad – more precisely, across the Tiber, to what is today Trastevere. Modern authors (or at least some of them) remain doubtful as to whether Quintilian's and Cassius Dio's statements that the brutal sanction was never actually applied are historically correct.[*15] Given the brutality of the popularly beloved circus and gladiatorial games[*16] in the centuries before and, even more, in those that followed, these doubts seem to be well-founded.

The option of seeking economic benefit rather than taking a purely avenging approach indicates a future trend insofar as general interest, probably around 100 BC (presumably sparked by the praetor Rutilius in 118[*17]), increasingly became focused on the distribution of the debtor's remaining assets. However, this 'victory' of economic reason over blind revenge did not go so far that the debtor would have been spared from sanction; he incurred *infamia*, under a shaming mechanism that, particularly in societies such as the Mediterranean ones with their strong concept of honour, is grave and comes close to what in later times was called a civilian death.[*18] It was some 100 years after

11 The Pope recommended general forgiving of all debts of the developing countries, which sparked discussion of the need to establish insolvency proceedings for sovereigns; see Christoph Paulus. 'Taugt das Insolvenzrecht als Vorlage für ein Staaten-Resolvenzrecht?'. Zeitschrift für das internationale Wirtschaftsrecht (IWRZ) 2017, p. 99 ff.

12 See also Christoph Paulus. 'Ausdifferenzierungen im Insolvenz- und Restrukturierungsrecht zum Schutz der Gläubiger'. JZ 2019, p. 11 ff. – DOI: https://doi.org/10.1628/jz-2018-0280.

13 Taken from https://avalon.law.yale.edu/ancient/twelve_tables.asp.

14 Towards the end of the 19th century, there was a famous debate in German scholarship about this play (which even led to a breach of friendship) between J. Kohler (see the article 'Shakespeare vor dem Forum der Jurisprudenz', 1883) and Ihering (see *Der Kampf ums Recht*, 1872); details are available at http://www.wjg.at/geschichte/.

15 Quintilian. *Institutio Oratoria*, Book 6, Chapter 3, §84; Cassius Dio. *Historia Romana*, frag. 16.8.

16 On this, see Keith Hopkins. *Death and Renewal*. Cambridge 1983. – DOI: https://doi.org/10.1017/cbo9780511552663, reviewed by Christoph Paulus for *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Romanistische Abteilung* (ZSS: Rom. Abt.) 1986(103), p. 514 ff.

17 With reference to this discussion, see E. Huschke. 'Über die Rutilische Concursordnung und das fraudatorische Interdict'. *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte: Germanistische Abteilung* (ZSS: Germ. Abt.) 1870(9), p. 329 ff. – DOI: https://doi.org/10.7767/zrgga.1870.ix.1.329; Okko Behrends. *Der Zwölftafelprozeß*, 1974, p. 184 ff.; Pilar Pérez Álvarez. *La Bonorum Venditio*, 2000, pp. 75, 78 ff. See also Inge Kroppenberg's journal article 'Die Insolvenz im klassischen römischen Recht: Tatbestände und Wirkungen außerhalb des Konkursverfahrens', from 2001, p. 68 ff. See also Louis Edward Levinthal. 'The early history of bankruptcy law'. *University of Pennsylvania Law Review* 1917–18(66), pp. 223–250, on pp. 223, 235 f. – DOI: https://doi.org/10.2307/3314078.

18 Cf. Fabian Klinck. 'Die vorklassische Personalvollstreckung wegen Darlehensschulden nach der lex Poetelia'. ZSS: Rom. Abt. 2013(130), pp. 393, 403 f. – DOI: https://doi.org/10.7767/zrgra.2013.130.1.393.

this[*19] that *princeps* Augustus took a closer look at exactly this sanction and modified it in an interesting manner by introducing the invention of *cessio bonorum*.[*20]

It is fair to assume that those roughly 100 years of civil war had thinned out the highest stratum of the society (from which the leaders and the societal elite had always been recruited) to such a degree that the *princeps* was bound to think about measures to stop that shrinking and, still better, expand this social group again. The main tool for the latter was the famous marriage legislation *leges Iulia et Papia*[*21], and the former was handled, i.a., by said *cessio bonorum*, which prevented bankrupt persons from being subjected to *infamia*. Thus, when and if the debtor volunteered to assign all his assets to his creditors, he was allowed to keep his honour. The *cessio* is, accordingly, the root of what we today take as a matter of fact: the right of the debtor to initiate a proceeding.

However, the debtor-friendliness did not survive so long; the creditors were not yet ready to relinquish the revenge part. After some indications already around the time of Emperor Iustinian, later centuries retained the term 'cessio bonorum'[*22] but introduced stigmatising signs of branding. To wear a green or in some cases a white cap was a rather innocuous one. In some regions, the bankrupt person had to go to a public central location in the town while completely undressed and beat his posterior three times against a stone (an example is still visible in Padova, Italy) while shouting 'cedo bonis'.[*23]

2.2. The Middle Ages and early modern times

The stigma of insolvency dominated the attitude toward a bankrupt person throughout. It is possibly a consequence of the above-mentioned Roman-law-grounded concentration on the legal technicality of a debt whereby the debtor is obliged to perform what he owes and the creditor is empowered to claim what is owed that the humanistic aspect of the two-person relationship between creditor and debtor got somewhat lost. The preponderance of the creditor's position becomes visible in many facets of the treatment of a failing debtor: thus, insolvency law became increasingly seen as part of criminal law, with the consequence of the emergence of debtors' prisons,[*24] of equating the bankrupt with a thief,[*25] of capital punishment, etc.[*26] Even though the often-declared explanation that the word 'bancarotta' stems from the breaking of a banker's bank is presumably wrong,[*27] this assumption does give a hint of the direction in which people tended to think when talking about a ruined creditor–debtor relationship. It was no wonder that debtors

19 Some decades before Augustus, Servius Sulpicius Rufus had already permitted a somewhat unorthodox method to escape from that *infamia*; see David Daube. *Roman Law: Linguistic, Social, and Philosophical Aspects* 1969, p. 93 f. – DOI: https://doi.org/10.2307/839205.

20 See Dig. 42, 3; on *cessio bonorum* in general, consult in particular Walter Pakter. *Festschrift für Sten Gagnér*, 1991, p. 327 ff.; W. Pakter. The mistery of 'cessio bonorum'. *Index* 1994(22), pp. 323–342, on p. 323; Christoph Paulus & Cornelius Renner. 'Ein weiteres Plädoyer für unscheinbare Normen'. *Juristische Schuldung* (JuS) 2004, p. 1051; Christoph Paulus. 'Ein Kaleidoskop der Geschichte des Insolvenzrechts'. JZ 2009, p. 1148 ff. – DOI: https://doi.org/10.1628/002268809790030312. The Swiss insolvency law has in its Art. 317 SchKG (Gesetz über die Schuldbetreibung und Konkurs) the 'Nachlassstundung mit Vermögensabtretung', which is, as a matter of fact, almost a copy of the Roman *cessio bonorum*.

21 On this, see, for example, Dieter Nörr. 'The matrimonial legislation of Augustus'. *The Irish Jurist* 1981(16), p. 350; Riccardo Astolfi. *La lex Iulia et Papia*, 2nd ed., 1986; Angelika Mette-Dittmann. *Die Ehegesetze des Augustus*, 1991.

22 References given by, for instance, Adolph Wach. 'Der Manifestationseid in Italien'. ZSS: Germ. Abt. 1868(7), pp. 439–474, on p. 446 ff. – DOI: https://doi.org/10.7767/zrgga.1868.vii.1.439. Cf. particularly David Mevius. *Theatri Concursus Creditorum Diaskepsis de Cessione Bonorum*, 1637, in reaction to the 30 Years' War.

23 See James Q. Whitman. 'The moral menace of Roman law and the making of commerce: Some Dutch evidence'. *The Yale Law Journal* 1996(105)/7, pp. 1881–1889, on p. 1873 (referring to the *Tractatus Matthaei Bruni Ariminensis de ceβione Bonorum*). – DOI: https://doi.org/10.2307/797235; additionally, see Friedrich Hellmann: *Lehrbuch des deutschen Konkursrechts*, 1907, p. 15 f.; *Zur Geschichte des Konkursrechts der Reichsstadt Ulm*, 1909, p. 25; *Das Konkursrecht der Reichsstadt Augsburg*, 1905, p. 98. Also see Christoph Becker. 'Bancarottierer'. KTS 2008(69)/1, pp. 3–20, on p. 8 ff. For the Netherlands, see also Johannes Wilhelmus Wessels. *History of the Roman-Dutch Law*, 1908, p. 661 ff. – DOI: https://doi.org/10.2307/3313446.

24 See Julia Anna Maria Schmitz-Koep. *Die Schuldhaft in der Geschichte des Rechts in Deutschland, England und den USA*, 2019, p. 47 ff.

25 Just see Christoph Paulus. 'Antwerpen 1515 – ein europäischer Urknall des Konkursrechts', KTS 2019, pp. 125, 130 f.

26 In Balzac's France, many traces of this criminalisation still can be studied.

27 Consult Sandor E. Schick. 'Globalization, bankruptcy and the myth of the broken bench'. *American Bankruptcy Law Journal* 2006(80)/2, pp. 219–260, on p. 252 ff.

preferred to flee from such harsh consequences[*28]; for centuries, the notion of *fugitivus* was nothing but an alternative brand for one who is bankrupt.[*29]

What is more, even the Christian Church did not arrive at a milder concept; thus, even the Church accepted the unshakeably strong position of the creditor. The Novella of Emperor Constantine XVII Porphyrogenetus from 947 AD[*30] is exceptional insofar as it refers to Jesus Christ's sacrifice and its model character in rendering of a debtor-friendly judgement. And, irrespective of the above-mentioned adoption of the concept of the Jubilee year by the Christian Church in 1300, even the eminent School of Salamanca with its incredibly open-minded liberal and progressive priests, scholars, and lawyers never did advocate debt relief; a prolonged term for repayment or delivery was all they pleaded for.[*31]

2.3. Modern times

(a) Debtors gain ground

Thus, in the power game between creditor and debtor it was the former who stayed in control throughout the various ages of European thought. It was only economic necessities that led to a change. Even though certain elements of what nowadays is commonly known as a legal entity or juridic person had been discovered in previous eras – e.g., the existence of a transpersonal something beyond the individuals in an association – it is only in modern times that this legal fiction became fully developed as an instrument by which a debtor's assets are removed from the reach of the creditors, at least in part. The method of paring back the creditors' rights is somewhat ingenious in its simplicity: the natural person with all of said person's assets is replaced by a virtual replica with only limited assets; the natural person and the virtual replica are treated as completely distinct legal entities. This power shift unleashed economic entrepreneurship visible on dramatic scale almost ever since the days of the British East India Company.[*32]

However, creditors were not ready or willing to give up easily. Not only was the stigma of insolvency kept alive, as it still is nowadays, thereby pushing the debtor into a defensive role, but law was, moreover, more often than not used to recapture the natural person behind the fictitious debtor, returning that person to the liability system. Accordingly, it is only a slight exaggeration to say that, for instance, in Germany there is almost no limited liability. To be sure, the GmbH (i.e., the private limited-liability company) is extremely popular and, accordingly, widespread, but when it comes to taking out a loan from a bank or another business partner, the unlimited liability of the natural person enters in by means of a surety, a guarantee, or the like, which has to be presented by the CEO or another member of the board.

But the struggle goes on even beyond this. The above-mentioned economic reasonableness experienced its most consistent realisation in the US when, after tentative steps in this direction since the middle of the 19th century, in 1978 the famous Chapter 11 was introduced in the new Bankruptcy Code. Since there was no requirement for the commencement of such proceedings – i.e., there was no need to prove the existence of a reason for initiation, such as overindebtedness of the debtor or its inability to pay debts as they fall due, these proceedings could be used by debtors to escape the creditors' grasp. And since Chapter 11 was designed to help the debtor rather than achieve the debtor's liquidation, this was a welcomed shift of power in the old game between creditors and debtors. Among the latter, the airline carriers were the most prominent ones that in the beginning happily and extensively made use of this newly gained option.[*33] This led to

28 Informative in this regard is Dirk Streuber. *Die Flucht des Schuldners und die Reaktionstechniken eines Gesamtvollstrekkungsrechts – der fallitus fugitivus als Rechtsproblem*, Berlin 2014. – DOI: https://doi.org/10.1515/9783110340969.

29 Interestingly enough, this term reappears on occasion even today, when a debtor migrates from one EU member state to another for getting a better discharge option. The branding of this use of guaranteed freedom as flight – rather than forum shopping – reminds one of a basic understanding according to which in late Antiquity peasants (and others) were legally bound to the soil, *glebae adscripti*, in aims of safeguarding the state's or municipality's tax income.

30 JGR (Zepos) I 214f; Alexander Dölger, Reg. 656.

31 On this, see Wim Decock. 'Law, religion, and debt relief: Balancing above the "Abyss of Despair" in early modern canon law and theology'. *American Journal of Legal History* 2017(57), pp. 125–141. – DOI: https://doi.org/10.1093/ajlh/njx003.

32 Per Alberto Mazzoni & Maria Chiara Malaguti. *Diritto del Commercio Internazionale*, 2019, p. 10.

33 Cf. the current 'good-faith' requirement, under §§ 1112(b) and 1129(b)(3) BC. On this, see, for instance, In re Integrated Telecom Express, Inc., 384 F.3d 108 (3rd Cir. 2004); In re Liberate Technologies, 314 B.R. 206 (Bankr. N.D. Cal. 2004).

deliberations about the need for alignment between such areas, seeming mutually distant at first blush, as competition law and insolvency law.[*34]

Things are somewhat different outside the United States; the approach there whereby insolvency law is seen as a tool to provide the debtor with a second chance was quite unique and revolutionary in the 1970s and 1980s, in light of the strong tradition of the stigma of insolvency. Yet the debtor-helping model of Chapter 11 became copied almost all over the globe.[*35] The latest step visible right now in this direction is the European Directive 2019/1023 on the Preventive Restructuring Framework. Whereas other member states of the EU, such as the UK, France, Spain, and Poland, have little difficulty in offering a tool that only the debtor can trigger, precisely this element gave rise to heated debate in Germany.[*36] There, fear of the abuse potential is enormous and led to intense discussion about how to ring-fence this possibility. Seen from the historical perspective, this discussion was just a continuation of the time-honoured and, thereby, subcutaneous equation of the bankrupt with a culprit. And this discussion only echoed the one that emerged some decades ago in the context of the introduction of a discharge. In nearly millennia-old traditions, discharge was subject to the statute of limitations; in most cases, a generation (i.e., 30 years) had to pass before a debtor would be freed from the obligations. Now, the above-mentioned EU directive insists on a three-year period uniformly across all member states of the EU.

In sum, the historical development of the last two or three centuries reveals a considerable power shift in favour of the debtor. Limited liability, a rescue option rather than mandatory liquidation, and a short discharge period add up to fostering of entrepreneurship (indeed, the explicit purpose of the US and of the UK insolvency law), which is indicative of the contemporaneous economisation of life in general.

(b) Creditors react

Not too long ago, the debtor–creditor tango saw yet another twist. It is one that evolved from something as deeply rooted and essential as freedom of contract and the associated private autonomy (*Privatautonomie*). Based on the idealistic assumption that there is a level playing field for both the creditor and the debtor, this doctrine is a concept as grand as it is idealistic: two parties agree on their announced offer and acceptance, and they are henceforth bound by their promises. However, reality in day-to-day life is a bit more nuanced: namely, upon closer inspection, the terrain of that playing field appears to be rather hilly if not mountainous. In terms of power, it is a matter of fact that regularly one party is superior to the other, be it intellectually, in terms of need, or with regard to whatever other circumstances or properties might obtain. Therefore, it has always been that the stronger party has seen private autonomy as a chance to improve its position in that relationship. General terms of contract are but one quintessential example of this: they were a welcomed tool to shift burdens unilaterally to the other party. It took President Kennedy's initial spark to ignite consumer-protection law, which is designed to reorder the power distribution among parties to contracts with regard to, *inter alia*, the fair use of those general terms.

Outside the realm of general terms of contract and beyond cutting back their effect on consumers, the idea of making use of contract clauses for one's own benefit not only remained alive but prospered considerably; under the name of 'covenants', these clauses nowadays enjoy widespread, even global use. Hence, whereas academic textbooks usually teach the students that a loan contract obliges the lender to transfer the promised amount of money to free disposability by the borrower, who, in turn, is obliged to pay interest and to return the amount received to the lender at the promised time, reality looks quite different: covenants impose all sorts of additional obligations on the borrower, which extend from reporting duties through business decisions and even to offering positions on the supervisory board to the lender's staff. In group contexts, these obligations might become quite expansive. In terms of the topic of this paper, every additional obligation imposed by the creditor on the debtor increases the creditor's powers implicitly.

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[34] See Christoph Paulus. 'Competition law vs. insolvency law: When legal doctrines clash'. *Uniform Law Review* 2013, p. 65 ff. – DOI: https://doi.org/10.1093/ulr/unt002.

[35] Deliberations about the reasons for this astonishing fact have been offered by Christoph Paulus. 'Ausdifferenzierungen im Insolvenz- und Restrukturierungsrecht zum Schutz der Gläubiger'. JZ 2019, p. 11 ff. – DOI: https://doi.org/10.1628/jz-2018-0280.

[36] Cf. Christoph Paulus. 'Die Einbettung des präventive Restrukturierungsrahmens in ein breiteres Umfeld' in Clemens Jaufer et al. (eds), *Unternehmenssanierung mit Auslandsbezug*, 2019, pp. 3, 10 ff.

And it is exactly at this point where things get somewhat obscure but are in actuality very real at the same time: Nowhere openly acknowledged, let alone discussed, a notion spreads rumour-like in undercurrents suggesting a rather unpleasant scenario: weaponisation of financial instruments. This term, allegedly coined in the early 1990s on Wall Street, seems to point to the drafter's intent to use a specific contractual relation as a tool to defeat or conquer the counterparty. It is no wonder that nobody describes exactly what is meant by this term.[*37] Still, the phenomenon is not, in fact, a new one as such. It has always been part of the power game that short-term as well as long-term strategies are pursued by those entering into a contractual relationship with someone else. What might possibly be new, however, is the method: it is no longer a singular advantage that is sought – a tactical move, as it were. There is now an obvious change into a strategy or into a business model.

So far, I have been able to discover just two forms in which such weaponisation appears, though others might be (or, rather, are likely to) exist.[*38] In both, the creditor has an interest in the debtor going bankrupt. Most definitely, it has always been the case that the creditors of a given debtor have widely differing interests: one might be interested in establishing a long-term relationship while another just wants rapid fulfilment of its claim, workers have different ideas than the lending bank, etc. However, the primary interest of none of those traditional creditors is in having the common debtor entering, let alone being pushed into, insolvency proceedings. But it is exactly this toward which those creditors aim when they pursue a 'loan to own' strategy or when they are 'secured' by a credit-default swap (CDS). A brief description of both contract types follows.

The loan-to-own strategy is based on the existence of a secondary market for non-performing loans plus the option of a debt/equity swap.[*39] Investors search for companies that are viable but in financial difficulties. In the secondary market, they buy claims[*40] against the target company for a discount. Once they have collected a sufficient amount this way, they make use of the power usually conferred on them by the covenants that come along with the freshly acquired claims. Thereby, they keep the management so busy that the daily economic operations begin to suffer, so the company is driven still closer to the brink of insolvency. It is usually then that the investor begins to talk about a debt/equity swap, which can be done either on a voluntary basis or by means of a restructuring[*41] or insolvency procedure. When this is done 'properly', the only option for the current owners and board members is the liquidation of the company. Should they decide against this, the loan-to-own strategy might result in no less than a takeover in the guise of restructuring or insolvency proceedings.

Whereas the loan-to-own strategy more often than not is intended to make use of or even to improve the viability of the company, the CDS's primary aim is just the debtor company's insolvency (no matter whether the outcome is liquidation or reorganisation). The CDS is a hybrid between loan collateral and an insurance contract.[*42] A creditor buys the right to claim from a third party (the seller) compensation in an agreed-upon amount when and if the buyer's claim suffers non-performance from the debtor due to default. Here, when and if the amount to be paid by the seller is larger than what the buyer would receive in the event of full performance by the debtor, there is a strong incentive on the creditor's (buyer's) part to see the debtor enter default and go bankrupt. One need not point out that a CDS-holder's manner of

37 But see Rebecca Harding. *The Weaponization of Trade: The Great Unbalancing of Politics and Economics*, 2017; Clifford Bob. *Rights As Weapons: Instruments of Conflict, Tools of Power*, 2019. – DOI: https://doi.org/10.1515/9780691189055; Mark Galeotti. *Weaponisation of Everything*, 2022, p. 140 ff. – DOI: https://doi.org/10.12987/9780300265132.

38 Credit bidding might be an additional appearance of this phenomenon; on this, compare Christoph Paulus & Nicholas R. Palenker. 'Mit Krediten bieten – Credit Bidding: Überlegungen zum Selbsteintrittsrecht der Gläubiger nach § 168 ABS'. ZInsO 2020(3), Wertpapier-Mitteilungen (WM), p. 1181 ff.

39 Addressed comprehensively by Nicholas R. Palenker. *Loan-to-own, Schuldenbasierte Übernahmen in Zeiten moderner Restrukturierungen und mangelnder Gläubigertransparenz*, 2019. – DOI: https://doi.org/10.5771/9783845299594; D. Baird & R. Rasmussen. 'Antibankruptcy'. *The Yale Law Journal* 2010(119), p. 648 ff.; Donald S. Bernstein. 'Toward a new corporate reorganisation paradigm'. *Journal of Applied Corporate Finance* 2007(19)/4, p. 8 ff. – DOI: https://doi.org/10.1111/j.1745-6622.2007.00156.x.

40 When the strategy is initiated only after the respective company's insolvency, the search for other creditors of this debtor has recently been alleviated by the Landgericht (District Court) of Munich: it decided that a creditor who had become a creditor by a purchase on the secondary market has the right to inspection of the creditor list set up by the insolvency administrator, per a decision of 9.9.2019 – 14 T 10502/19. See *Zeitschrift für Wirtschaftsrecht* (ZIP) 2020, p. 230.

41 Note that the EU's new Directive 2019/1023, on, i.e., a preventive restructuring framework, provides for such a possibility.

42 A notion treated comprehensively by Kenny Koa. *Gläubiger ohne Risiko: Der Empty Creditor im deutschen Insolvenzrecht*, 2020. – DOI: https://doi.org/10.5771/9783748905509; Angeliki Mavridou. *Credit Default Swaps in Bankruptcy Proceedings under US Law*, 2016. – DOI: https://doi.org/10.5771/9783845283470.

using the voting right granted to each and every creditor of an insolvent debtor in insolvency proceedings is powered by motivation that differs from that of almost all other traditional creditors; the CDS-holders are therefore also called 'empty creditors',[*43] since they have severed the connection between liability and dominion.

It should be mentioned here, though only as an aside, that this phenomenon of weaponisation of financial instruments is almost certainly not confined to private-law contracts; there is no reason not to assume that sovereigns too are interested in instrumentalising this method of modern[*44] warfare. Certain indications suggest that this horrifying scenario is already well on its way to actualisation.[*45]

3. *Résumé du développement*

After our tour through the historical development of the power game between creditors and debtors, we have reached a place to stop and summarise the observations and to draw some conclusions: Western legislation and common thinking seem to have accepted throughout that the creditor is automatically in the stronger position. The example of the ancient Middle East and the Old Testament, however, provides impressive evidence that this is by no means a God-given necessity.

In the Western world, centuries passed before the law reached out its helping hand to a debtor who could not fulfil his obligations. It was only in the time of Emperor Augustus that debtors were allowed to initiate insolvency proceedings. Before that, they were merely subjected to a procedure and had to suffer either being cut into pieces or losing not only their goods and assets but also their civil dignity. A few centuries after the time of Augustus, revenge-orientation took over again and inflicted on the debtors a wide range of sanctions beyond distribution of their assets, stretching from public shaming to debtors' prison and even to capital punishment.

A counter-movement came not from religious or ethical sources but from economic insights in the times of the origins of nation-states. Both the French-style *dirigisme* and the free-trade attitude of the English pointed to the wealth-maximisation potential of entrepreneurship, thus paving the way for the development of limited liability as protection for the debtor. The complexity of modern corporate and company law is the blossom of that little flower that was planted in the times of the East India Company. It has grown into modern insolvency law that includes the option of the debtor's rescue and guarantees debt-freeness after a rather short span of time.

The most recent reaction from the creditor's side is instrumentalisation of private autonomy. This manifests itself in the form of so-called covenants and conceding all manner of rights to the creditor. It is almost logical that this latest twist brings the power game nearly back to its starting point from around 450 BC: In the times of the notorious Twelve Tables legislation of ancient Rome, the creditors were allowed to kill the debtor. Today, freedom of contract does not constitute an impediment when and if the creditors wage a war against the debtors by means of a contract (neither does public international law contradict this with its prohibition of 'the use of force' in Art. 2(4) of the Charter of the United Nations[*46]). Admittedly, we are not talking about physical harm, but the ruin of the other side is the goal in both settings.

In light of this evolution running full circle and bringing back what appeared to have been overcome forever, a reminder for the legislator seems to be in order. The most noble task of the law has always been,

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43 See, for instance, H. Hu & B. Black. 'The new vote buying – empty voting and hidden (morphable) ownership'. *Southern California Law Review* 2006(79), p. 811 ff.; H. Hu. 'Equity and debt decoupling and empty voting II – importance and extensions'. *University of Pennsylvania Law Review* 2008(156), p. 625 ff. – DOI: https://doi.org/10.2139/ssrn.1030721.

44 Again, the phenomenon is old: US President John Adams (1797–1801) once said: 'There are two ways to enslave a country. One is by the sword, the other is by debt.' What appears to be new is the systematisation of the possibilities.

45 See Mark Galeotti. *Weaponisation of Everything* (see Note 37); Christoph Paulus. 'Von zahlungsunfähigen Staaten und tickenden Bomben'. *Zeitschrift für Rechtspolitik* (ZRP) 2018, p. 151 ff.; Juan Zarate. 'Conflict by other means: The coming financial wars'. *Parameters* 2013(43)/4, pp. 87–97; David J. Katz. 'Waging financial war', available via https://press.armywarcollege.edu/parameters/vol43/iss4/24/; Anna Gelpern. 'Russia's contract arbitrage'. *Capital Markets Law Journal* 2014(9), p. 308 ff. – DOI: https://doi.org/10.1093/cmlj/kmu012; Uri Friedman. 'Smart sanctions: A short history', available at http://foreignpolicy.com/2012/04/23/smart-sanctions-a-short-history/.

46 But see, for example, Lee C. Buchheit. 'The use of nonviolent coercion: A study in legality under Article 2(4) of the Charter of the United Nations' in Richard B. Lillich (ed.), *Economic Coercion and the New International Economic Order*, 1976, p. 41 ff.

still is, and presumably forever will be to protect the weak. Law will, at the same time, always be used by the shrewd as a means to win the power game. Therefore, this very law has to react and outbalance such unilateral usurpation of power. If or when we find ourselves back where we were in 450 BC, it would merit taking time to look at the much more human model of power distribution in the Near East jurisdictions.[*47]

This is all the more true in the shadow of our most recent experiences of such global disasters as a pandemic: a cataclysm of this nature is bound to lead to many insolvencies because people, private ones as well as those in the business domain, cannot (or soon will be unable to) pay their bills.[*48] To survive, they have to borrow money, which creates an enormous burden for any fresh start after the global disaster recedes.[*49] Any legislator would be well advised to study those ancient Middle Eastern concepts carefully.

47 This task has an egregious dimension in the context of sovereigns as debtors; see Christoph Paulus. 'Warum benötigen wir ein Resolvenzverfahren?'. ZIP 2019, p. 637 ff.

48 What is needed is a 'bad weather' insolvency law; with regard to this, see Christoph Paulus. 'Gutwetter-Insolvenzrecht und Schlechtwetter-Insolvenzrecht: Über die ökonomischen Grundbedingungen des Insolvenzrechts.' ZIP 2016, p. 1657 ff.; Christoph Paulus. 'Der Solidargedanke als Grundlage des Katastrophenrechts – Lehren aus der Pandemie'. JZ 2021, p. 931 ff. – DOI: https://doi.org/10.1628/jz-2021-0318.

49 Additionally, this might lead to a new increase in non-performing loans, which, in turn, might burden banks. When they start to stumble, history and most recent experiences with the euro crisis teach, states too are endangered; see Christoph Paulus. 'Euroland'. *South Square Digest* 2020/June.

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Silvia Kaugia
Lecturer of Comparative Jurisprudence
University of Tartu

Raul Narits
Professor Emeritus
University of Tartu

On the Field of Application of Sociology of Law[*1] to Law-making and Impact Assessment (The Experience of Estonia)

1. About law as the rule in communality

The 'roots' of continental European legal culture go back to ancient times, and from them 'sprouted' the law. But just as important as the law itself is the content of the law[*2] – as the ancient Roman jurist Celsus aptly stated, *ius est ars boni et aequi*. The aim for this article is to emphasise the significance and importance of legal sociology as a fruitful scientific method in Estonian law-making, especially in the search for solutions that are necessary for the legal order, that are enshrined in the law, and that are appropriate for the purview of the law itself. To reach this goal, we draw on the potential of legal sociology as a field of study, in combination with recent developments in the Estonian legal order itself, which enable harnessing the potential of legal sociology.

1 The discourse on the object and meaning of the sociology of law itself is relevant even today, and this interference with the sociology of law in the scientific world can be observed not only in European jurisdictions. The respective debates have a transnational character. In Europe, in any case, the birth of the sociology of law can be traced back to the beginning of the 20th century, when there was a certain confrontation between the legal sciences and the self-consolidating sociology. A good example of the 'timeless' character of the discourse is a journal special issue, published last year, that focused on the disciplinary distinction controversies: 'Jurisprudence and Sociology at the Beginning of the 20th Century', *Zeitschrift für Rechtssoziologie* 2021(41)/2. – DOI: https://doi.org/10.1515/zfrs-2021-frontmatter2. But the distinction itself leaves a number of important questions open. In Estonia too, there have been questions about whether there is any point in a sociology of law that goes beyond jurisprudence, and as to whether combining sociology and jurisprudence would enable us to gain new knowledge about law in society. As did those first posing these questions, the authors of this article have no doubts about the capacity of sociology of law to contribute as relatively independent jurisprudence to solution of the problems it faces. See M. Müürsepp. Õigussotsioloogia tulevik Eestis – kas on lootust? ['The future of sociology of law in Estonia – is there hope?']. *Riigikogu Toimetised* ('The Proceedings of the *Riigikogu*'), 2001/3, pp. 115–122 (in Estonian).

2 For finding the right solutions, several methods need to be known and used. It seems that, for the most part, we find in the legal literature approaches that point to the potential of law itself, even if the methods are outside the realm of dogmatic pressures. See, for instance, J.Veigel. 'Die funktionale Method bei der Rechtsvergleichung'. *Juridica International* 2021(30), pp. 71–80. – DOI: https://doi.org/10.12697/ji.2021.30.09; R. Narits & K. Merusk. 'Über das funktionale Wesen der Rechtsprinzipien und über ihre Anwendung in der estnischen Rechtsordnung beim finden einer dem Recht entsprechenden Entscheidung'. *Positivität, Normativität und Institutionalität des Rechts*. Berlin: Duncker & Humblot 2013, pp. 419–433. – DOI: https://doi.org/10.3790/978-3-428-54278-9.

By its very nature, law is a social normative institution with a number of specific functions. It is (1) a medium of moral standards[*3], serving as a means of communication between the members of society themselves and between the members of society and the legislator; (2) an instrument of legislative power for the governance of society and the exercise of power[*4]; and (3) a shaper of a protected, secure social space.[*5] For fulfilment of these functions, it is necessary to create a 'multi-level law'. Law is valid in many, quite different senses and forms, and the content of validity is not identical across them all. Above all, it is important to emphasise in this connection the distinction between the legal and the social validity of law.

A legal norm is legally valid if it has been enacted by the appropriate body in the manner prescribed for that purpose and is not unconstitutional.[*6] At issue here is the legal validity of a norm of social behaviour in light of the legislative action of the state. However, a legally valid norm can also be a 'dead law'; i.e., while not legally invalidated, it may have no social effect. This implies that for a law to be alive, as expressed in its realisation by society, it must also be socially valid. Therefore, it can be said that 'if a system of rules or a norm has no social effect, that system of rules or that norm cannot have legal validity. The concept of legal validity also includes elements of social validity'.[*7]

These functions and levels of validity of law are supported by the following factors. (1) In order for the legal order to regulate the various institutions of society and the general social community adequately, it is necessary to achieve a correlation between the legal order and social reality and a correspondence with the needs of life. This means that the legislator must avoid a situation in which the law regulates something that does not need to be regulated, or in which the regulations and rules laid down are too vague and do not take account of social reality. (2) Above all, if the law is to function as a medium for a moral standard, it is necessary for the legal texts to be comprehensible and clear to those to whom they are addressed. This encompasses the language of the law and the structure of the norm, as well as the structure of the law. It should be borne in mind that the language of the law ought to be more precise than general language and that such precision is given to the language of the law by means of professional terms.[*8] One should also remember, however, that specific terms may ensure the accuracy of the text but make it more difficult to understand. (3) There is a need to enforce the law, monitoring its implementation and compliance with it. The first two of these aims can be met primarily through the legislative process.

The need for legislation arises from relations in society that need to be regulated by law. The question of the extent to which legislation should intervene in the regulation of social relations is perennially topical. With this question, the legislator is aided by an ability to discern the optimal scope of the law, to recognise what it is necessary to regulate and to what extent, and to judge which social relations should remain within the scope of non-legal social norms.

Identifying the boundary between social relations that need legal regulation and those that do not can be quite difficult. This raises questions about the origin of law or, rather, the degree or extent of the social content of the matters addressed in law and the possibilities for representation of the component of justice that must be embodied in the law.

The emergence of legal norms from social structures has been vividly described by E. Ehrlich, who, considering law to be primarily social in origin, held that a legal norm is originally a judicial decision, shaped by the courts. If the 'unnecessary' part of each judicial decision is filtered out, leaving only the relevant, generally applicable part, we arrive at what is in essence a rule[*9]. This is also connected to the fact that a court can decide on a specific case while the legislature can only regulate those issues that have come to its awareness. In other words, any regulation presupposes the existence of a conflict or situation in society[*10], so the legal norms and law-making are directly derived from society, not from the state as legislator.

3 J. Dickinson. 'Legislation and the effectiveness of law'. *American Bar Association Journal* 1931(17)/10, p. 648.

4 E. Raska. Õiguse apoloogia. Sissejuhatus regulatsiooni sotsioloogiasse. ['Apology of law. Introduction to the Sociology of Regulation']. Tartu: Fontes 2004 (in Estonian), p. 143.

5 Ibid., p. 57.

6 R. Alexy. *Begriff und Geltung des Rechts*. Freiburg, Breisgau, München: Alber 2002, p. 143.

7 Ibid., p. 142.

8 R. Narits, K. Merusk. Õiguse olemusest ja seaduse võimalustest. [On the nature of law and the possibilities of law]: *Riigikogu Toimetised* , 2000/2, pp. 100–105 (in Estonian).

9 E. Ehrlich. The Sociology of law. *Harvard Law Review* 1922(36)/2 p. 135. – DOI: https://doi.org/10.2307/1329737.

10 Ibid., p. 140.

Ehrlich argues that the most fundamental features of legal orders are the same across different countries, if one proceeds from a social order rather than simply a legal provision. The social order in this sense is the rules and practices by which the society operates. The social order is based on certain institutions – marriage, property, inheritance, contracts, etc. – which have existed in society longer than the current legal order has, and the members of society act in accordance with them, whether or not they are written rules of law.[*11] In support of this conceptualisation, Ehrlich refers back to history and argues that society functioned as we know it today because of the social order even before the introduction of legal norms.[*12]

Legal norms began to take shape and to become more important with the rise of property and commerce, growth in the number of people, and the consequent increase in the complexity of relationships, because these developments were accompanied by an increase in the level of organisation of society on one hand and complexity on the other. Problems that individuals could not solve among themselves and that required the intervention of a third party multiplied. The role of the courts and the volume of case law increased, and so did the number of legal norms as rules for dealing with similar cases,[*13] which brings us back to the principle that the legal order is derived from society and that the legal norms are born through the action of the courts. Thus, in Ehrlich's view, law comes primarily from society, not from the state.

By this, he does not deny the existence of state law. Indeed, state law simply contains regulations enforced by the coercive power of the state in arenas such as the military, the police, finance, and welfare. It is above all a matter of administrative instructions and 'rules of decision'.[*14] The latter are procedural rules in the modern sense of the term, which are the law of lawyers.[*15]

By looking for links with today's law-making, we return to foundations in the fact that substantive law is based on society itself and that, accordingly, it is important to identify the norm that already exists in society. At the same time, however, these norms are also in a state of constant change,[*16] which is why the legal order that seeks to fix and enforce these rules should also be subject to constant renewal.

However, we must not lose sight of the fact that the autopoiesis of each legal system[*17] is normatively closed in the sense that only the legal system can give a legally normative quality to its elements and thus create them as elements. No legally relevant event can derive its normativity from outside the legal system. Cognitively, though, the legal system is an open system; i.e., it depends on the facts surrounding the legal system. Every legal operation, every act of legal information's processing, therefore adopts simultaneously a normative and a cognitive orientation.[*18]

In the process of renewal of the legal order, the component of justice incorporated into the law must not be lost. The essence of this matter has been formulated well by J. Rawls. The conditions that the theory of Rawls suggests should be met for a just legal order are (1) all acts that the law requires or forbids being those that people can reasonably be expected to perform or avoid, which, in turn, entails two presuppositions – the legislator must act in good faith and the good faith must be recognisable to the recipients of the law – where one indicator of the fulfilment of these presuppositions is that the person subjected to the relevant norms perceives those norms as enforceable; (2) similar treatment being meted out for similar cases, which entails a duty to state reasons; and (3) the principle of *nullum crimen sine lege* (i.e., without the relevant law, there can be no infringement) being applied, where the principle's content is broader than the mere requirement that a law exist. Furthermore, the final condition encompasses the need for the addressees to be aware of the law, and the laws must be clearly defined and published while also not deliberately harming any person or group. An additional element that Rawls included in the third condition is prohibition of the retroactive effect of the law.[*19]

11 Ibid., p. 131.

12 Ibid., p. 132.

13 Ibid., p. 134.

14 Ibid., pp. 136–137.

15 S. Kaugia. Õigusteadvuse olemus ja arengudeterminandid. ['The Essence of Legal Consciousness and Determinants of Development']. University of Tartu Press 2011, p. 70 (in Estonian).

16 E. Ehrlich (see Note 9), p. 139.

17 The word 'autopoiesis' is derived from the Greek *auto* (self, one's own) + *poiesis* (making, shaping) = self-made.

18 N. Luhmann. 'The unity of legal system' in *Autopoietic Law: A New Approach to Law and Society*. Berlin, De Gruyter 1987. – DOI: https://doi.org/10.1515/9783110876451.12.

19 J. Rawls. *A Theory of Justice*. Cambridge, MA: The Belknap Press of Harvard University Press 1971, on pp. 237–239. – DOI: https://doi.org/10.4159/9780674042605.

Legislation is, with regard to normativeness, collaboration of national organisations alone socially, it is a product of collaboration among numerous state bodies and social forces. It involves the main domains of society: the political, economic, and ideological-cultural spheres. However, the legislative process is triggered not by regulatory needs but by specific individuals and groups of individuals.

Law-making is associated primarily with power. Legally, the legislator is the executor of the will of the people; sociologically, the legislator's aim is to satisfy the interests of dominant groups. On one hand, power has produced a dominant position in society, while, at the same time, power as a social resource is unequally distributed in society and concentrated in the hands of individual groups. These powerful groups use both the control of cultural symbols and information channels and the imposition of new norms as means of securing power. Alongside the dominant group, other groups in the social structure have rights to decide on social processes, but they do not have the opportunity to do so such that they steer specific decisions in their own favour. Neither do they hold sufficient influence to do so.

Overall, the legislative activity of public authorities is triggered by impulses from outside, and there is a clash of interests between social groups with differing aims. In the case of law-making, therefore, the ability to organise interests within a group is an important factor, as is the ability of the group as a whole to impose its interests and the possibility of sanctions.

The capacity to assert one's interests depends on the internal discipline of the organisation. Through the process of harmonising diverging interests within the organisation, only those interests are organised that represent the social needs of a given social group.

In material terms, law-making is really in the hands of the administration.[*20] The administration prepares the draft decision by gathering and processing information and by checking for consensus of political parties and influential interest groups. The participation of political parties and interest groups in the legislative process is widely recognised today. Still, greater openness of the legislative process would be helpful, not only to ensure better political scrutiny but also to increase the (often paltry) amount of popular support.

To prevent the legislator and the people to whom the law is addressed from coming into sharp conflict that results from non-observance of laws that are far removed from life's realities, the legislator needs to develop ever better contact with society, to co-operate with it. The mechanisms of the origin and sources of law in the life of society continue to be a topical issue.

From the standpoint of understanding law, the objective basis for the creation of legal norms is the general elements of freedom and equality expressed in social norms. From a sociological perspective, it is important to identify the essential features of those social norms that have acquired or are acquiring the status of law, and why some norms deserve this status while others do not.

To support the drafting of laws that are in tune with social realities, Estonia has established rules for law-making, which are set out in the relevant normative documents: the Rules for Draft Legislation Submitted for Legislative Proceedings in the Riigikogu, which are rules laid down by the board of Parliament[*21]; the Riigikogu Rules of Procedure and Internal Rules Act[*22]; and the Rules for Good Legislative Practice and Legislative Drafting (i.e., for *hea õigusloome ja normitehnika eeskiri*, or 'HÕNTE'). The last of these sets of rules is a regulation of the Government of the Republic that entered into force in 2012 and is addressed to government agencies[*23].

20 In Estonia, roughly 90% of draft laws are drafted by the Government of the Republic.

21 Decision 136 of the Board of the *Riigikogu*, of 27 December 2011.

22 State Gazette (*Riigi Teataja*, or RT) I 2003, 24, 148.

23 RT I 29.12.2011, 228.

2. On the formal aspects of law-making[*24]

HÕNTE lays out important steps in the law-making process in pursuit of higher-quality, more effective laws. Among other things, these rules introduced the obligation to prepare a drafting proposal and to create a concept for the draft law. The drafting proposal itself expresses the obligation to analyse the impacts and reflect on the corresponding results in the explanatory memorandum on the draft law. This not only extended the opportunities for stakeholders to participate in the various stages of the legislative process but also formed a major and necessary step in overcoming the 'fact/norm' divide.[*25] The standards document added several other requirements for the legislative process alongside these.

In fact, the main problem with law-making / legislative drafting, or legislative sociology, was precisely its normativity. The logic was simplistic: one could collect any quantity of concrete data, but one could not derive from those data the obligatory, the imperative. A norm cannot be deduced from facts. There is, in metaphorical terms, a separation of powers between the sociological and the legislative[*26]. To arrive at better understanding of this so-called mediated link between facts and legislation, we should begin by briefly considering the structural logic of the legislative acts of the Estonian legal order.

In its legal culture, Estonia follows a Continental legal system. Here, general legal acts – acts containing legal norms – are the sources of law holding primary significance. Doctrine, customary law, and case law are of secondary importance. In the Republic of Estonia, legislation is one of the core functions of state power, which the state may not delegate pursuant to Subsection 3 (1) of the Constitution, in conjunction with Section 59 and Subsection 65 (1). In Estonia, the law is both a means of ensuring order and security in society and a mechanism for reaching political objectives. Institutionally, the *Riigikogu* has the power to adopt laws in accordance with the Constitution for all matters related to the exercise of state power[*27]. The negative content of the clause on the exercise of state power stemming from the laws that are in conformity with the Constitution is the principle of the priority of the law. This principle of priority requires that a rule of less legal force be consistent with the rules that hold greater legal force – for example, that a regulation be consistent with an act of law. The principle of priority of the law has two sides: according precedence to application of the higher rule and giving priority to application of a lower-level, more specific rule. The former implies that no lower rule can dictate or furnish the content of a higher-level rule. In Estonia, it also means that the concepts articulated in the Constitution have independent meaning in their own right, with the power of interpretation lying with the Constitutional Review Chamber of the Supreme Court. On the other hand, if a lower standard with more specific subject matter exists, it must be applied as a matter of priority. In this connection, it is important to note that, although the Riigikogu, as the legislature with direct legitimacy from the people, has a prerogative of law-making under the rule of law, it does not hold a monopoly on law-making. The people too perform a normative function, by adopting by referendum those laws that the Riigikogu has decided to put to a referendum (see the Constitution's Section 56, para. 2 and Sections 105 and 106) and by amending the Constitution (per its Subsection 163 (1), para. 1, and Section 164).

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24 Recently, Estonian scholars have published articles in which we find, among other things, further development of the norm/fact approach (pioneered by Habermas), a characterisation of the sociology of law-making, empirical data (on various relevant social facts) that the authors try to make sense of, etc. For instance, see A. Kasemets. 'Institutionalization of better regulation principles in Estonian draft legislation: The rules of lawmaking, procedural democracy and political accountability between norm and facts'. *The Theory and Practice of Legislation* 2018(6), pp. 75–11. – DOI: https://doi.org/10.1080/20508840.2018.1430105; A. Kasemets. *Institutionalisation of Knowledge-based Policy Design and Better Regulation Principles in Estonian Draft Legislation*. Doctoral dissertation, University of Tartu 2018; J. Ginter et al. 'Legislation in Estonia' in Ulrich Karpen & Helen Xanthaki (eds), *Legislation in Europe: A Country to Country Study*. Oxford, UK: Hart Publishing 2020, pp. 151–165. – DOI: https://doi.org/10.5040/9781509924684.ch-009.

25 Attempts have been made to overcome the contradiction between fact and norm by means of various arguments: ontological, typological, logical, philological. However, the result has been that sociology remains primarily a desirable science for law-making. See H. Käärik. Õigussotsioloogia ja õigusloome ['Sociology of law and law-making']. *Riigikogu Toimetised* 2000/1, pp. 125–138 (in Estonian). It should be added that the article referred to was one of the first in Estonia to represent an attempt, proceeding from the views of M. Weber and moving through Luhmann and Habermas, to concrete studies linking jurisprudence, sociology of law, and law-making. Legal scholars themselves have been accused of wilful separation from other sciences. Reference is made, for example, to two conferences – Rule of Law and Law-making - Meeting Place for Legal Scholars and Social Scientists and the first annual conference of social sciences Boundaries of Legal Science (I.II) – where, allegedly, the most pre-eminent people in the profession were not present. See M. Müürsepp (see Note 1), p. 117.

26 See, for instance, J. Carbonnier. *Sociologie juridique*. Paris: Presses Universitaires de France 1978.

27 It is true that laws are not the only general legal acts in the Estonian legal order. There are other acts containing legal norms. The place of each of them, or its hierarchy, in the 'pyramid of the national legal order' is determined by the Constitution of the Republic of Estonia.

Likewise, the President of the Republic has the power to legislate (per the Constitution's Section 109 and Section 110). The *Riigikogu* can delegate to the Government of the Republic the power to issue decrees (see Section 87, para. 6). The power of a minister, in turn, to issue decrees is derived from the Constitution, per Section 94, para. 2, and the local government's power to issue decrees stems from its Section 154, para. 1. Other entities are relevant too; although we find the normative competence of the Bank of Estonia nowhere in the Constitution, it nevertheless issues regulations[*28]. According to the second sentence of Subsection 3 (1) of the Constitution, the immanent part of the Estonian legal order is composed of the universally recognised norms and principles of international law. This may be interpreted in favour of either a monistic or a dualistic solution. In any case, it reflects the formal aspect of the understanding of law and of law-making.[*29]

Obviously, however, 'precision' of the formal aspects of law-making does not supply the substantive 'precision' required for law-making; i.e., it is not possible to arrive at legal rules that reflect (contain) the substantive criteria of law by adhering to the formal aspects of law-making. We would say that, were we to divide the legislative process into a 'pre-project' and a 'project-based' phase, the formal requirements of law-making are able to guarantee the realisation merely of formal legality. To create a socially valid law that corresponds to the idea of law, one must proceed from mapping out the requirements of the 'pre-project' phase, legitimising them, and then adhering to them. And it is here that HÕNTE plays a major positive role, some of the positions of which are discussed below.

3. Knowledge-based as a necessary prerequisite to good law-making

The discourse in Estonia on the quality of legal norms / law-making, its knowledge-based nature, the assessment of legal and regulatory impact, the gap between legislative norms and the facts of real life, assessment of the impact of law-making and the involvement of stakeholders, and the corresponding knowledge-based policies started some time ago, long before the adoption of HÕNTE. Debates displaying particular intensity seem to have existed at least since the first years of the millennium[*30]. One of the first strong formal reactions to the 'pre-project' phase consists of guidance on *ex-ante* assessment of the impacts of draft legislation and strategy papers and on providing information on stakeholder involvement via the explanatory memorandum accompanying draft legislation and strategy papers (Procedure for the Preparation and Processing of Draft Legislative Acts)[*31], and another was a set of requirements formalised for impact assessment

[28] Sections 1(5) and 11 (5 and 6) of the Bank of Estonia Act allow the President of that institution (Eesti Pank) to issue regulations as general acts. By granting such a power, the legislator (i.e., the Riigikogu) has arbitrarily extended the powers of Eesti Pank beyond the limits allowed by the Constitution. See – Eesti Vabariigi põhiseadus. Kommenteeritud väljaanne ['The Constitution of the Republic of Estonia, Annotated Edition']. Tallinn: Juura 2017 (in Estonian), p. 752, comment on Section 112, para. 6.

[29] In principle, the rules of international law are directly applicable. At the same time, Estonian courts have been rather reticent in applying international law. If one tries to situate the norms of international law in the 'national pyramid' of the Estonian legal order, then, interpreting the second sentence of §3 (1) and (2) of the Constitution as meaning that the purpose of the provision is to ensure the compatibility of the Estonian legal system with the generally recognised norms and principles of international law, these norms should also be given priority over national laws. It is clear, however, that the hierarchy of the various legal acts, based on the position of the bodies competent to legislate in the organisation of the state, is inherent to domestic law and is not transferable to international law. Consequently, rules of international law that are derived from different sources (international treaties, customary law, and general principles of law) are *a priori* of equal legal force.

[30] See, for example, H. Käärik. 'Sociology of law and law-making' (see Note 25); A. Kasemets. Seadusloome kvaliteedi ja mõjude hindamise probleeme. ['Challenges to the quality and impact assessment of law-making']. *Riigikogu Toimetised* 2001/4, pp. 102–112 (in Estonian); R. Narits. Seadusloome õigusliku ja regulatiivse mõju hindamine. ['Assessing the legal and regulatory impact of law-making']. *Riigikogu Toimetised* 2001/4, pp. 97–101 (in Estonian); R. Narits. 'Good law making practice and legislative drafting conforming to it in the Republic of Estonia']. *Juridica International* 2004(IX), pp 4–13; E. Illing. Õigusaktide mõjude analüüsi areng Euroopas. ['Developments in the analysis of the impact of legislation in Europe']. *Riigikogu Toimetised* 2004/9, pp. 136–142 (in Estonian); A. Kasemets. Lõhe õigusloome normide ja faktide vahel mõjude hindamise ja huvirühmade kaasamise teabe esitamisel. ['The gap between legislative norms and facts in presenting impact assessment and stakeholder involvement information']. *Riigikogu Toimetised* 2009/19, pp. 104–115 (in Estonian); A. Kasemets et al. 'Parema õigusloome põhimõtete rakendamine Eesti sisejulgeolekupoliitikas. ['Implementation of better regulation principles in Estonian internal security policy']. *Riigikogu Toimetised* 2011/23, pp. 83–96 (in Estonian); A. Kasemets. Teadmistepõhise poliitika ja õigusloome kaksteist institutsionaalset eeldust. ['Twelve institutional prerequisites for knowledge-based policies and law-making']. *Riigikogu Toimetised* 2016/34, pp. 149–162 (in Estonian).

[31] The guide was based on points 5, 9, 10, 11, and 19 of the Decree of the Minister of the Environment Procedure for the Preparation and Processing of Draft Legislative Acts (*Õigusaktide eelnõude ettevalmistamise ja menetlemise kord*) and on

and involvement, set out in the Rules on Draft Legislation as approved by the Board of the Riigikogu on 6 March 2001 by Decision 59. The purpose of this code was to strengthen the system for assessing the efficiency and effectiveness of the drafting of legislation and strategy documents in the ministries' various areas of responsibility and their implementation; to improve compliance with the requirements set for assessment of social, economic, environmental, administrative, and budgetary impacts and the involvement of stakeholders; and to facilitate quality control related to explanatory memoranda for draft legislation. This normative document required that impact assessment and stakeholder involvement be considered for legislation in the cases of drafts for new regulations, concepts or draft amendments related to existing regulation, and reports on assessment of the effectiveness and efficiency of existing regulation. In the case of strategy papers – which are, after all, the basis for future legislation – impact assessments and stakeholder involvement need to be addressed in cases of cross-sector, sector-specific, or organisation-specific strategic development plans; budget strategies; and investment programmes.

4. On Assessing the impact of legal solutions

Above, we noted that, in the course of its development of knowledge-based law-making, Estonia adopted the HÕNTE system in 2011. Today, a little more than a decade has passed since the adoption of the relevant normative document. In a sense, it is a holistic solution, for guiding law-making as a whole. Since its passage, impact assessments have begun to take into account multiple target groups, to consider both direct and indirect effects, and to familiarise the legislator with sector-specific impacts. Already in 2016, however, A. Kasemets was asking why the norms and facts of law-making are still not in line with each other and why it is taking so long for a knowledge-based legislative culture to emerge that respects people, businesses, and nature.

A. Kasemets was asking why the norms and facts of law-making are still not in line and why it is taking so long to develop a knowledge-based legislative culture that respects people, businesses, and nature. Kasemets, asking why the norms and facts of law-making are still not in line and why it is taking so long to develop a knowledge-based legislative culture that respects people, businesses and nature: '[I]t is time to analyse and update the Rules for Good Law Making Practice and Legislative Drafting [...] including looking for opportunities for simplification in HÕNTE and distinguishing between short/quick and in-depth/time-consuming legislative procedures on the basis of clear criteria (e.g., a "fast track" for regulations with a smaller and known scope of impact and a more thorough impact assessment and involvement procedure for new drafts for which there is insufficient knowledge to assess the direct and indirect impacts/risks).'*[32]

A normative response to this problem and a robust – albeit merely principled – solution can be found in §1 (1), clauses 7–8 of the HÕNTE document. The regulations here require that the drafting proposal for the draft act contain answers for solving, *inter alia*, two sets of problems. The first involves what significant effects, in terms of frequency of occurrence, magnitude, size of the target population, and risk of undesirable effects, may result from the implementation of the law. Secondly, how are the significant effects to be analysed, and what is the rationale for not analysing those significant effects?*[33]

This problematic position is due to the fact that, apparently, there is no such thing as pure legal effect. However, law in the hands of the state is a means by which and through which that state can say something (*expressis verbis*) to all those subject to the law so as to achieve a certain quality of effect. If this is to occur, it is necessary to translate a part of real life into the language of the law at the outset and add a

Decree of the Government of the Republic 279, of 28.9.1999, titled 'Õigustloovate aktide eelnõude normitehnika eeskiri', or 'Technical Rules for Drafts of Legislative Acts'.

[32] A. Kasemets. 'Twelve institutional prerequisites' (see Note 30), especially p. 158. A few years earlier, the same author expressed concern about the gap between the norms and the facts when it comes to presenting information on impact assessment and stakeholder involvement; see A. Kasemets. 'The gap between legislative norms and facts' (see Note 30) In particular, the HÕNTE as a legislative normative document has been analysed in the literature. See S. Kaugia. 'Legislative intent of act in Estonia'. *Juridiskā zinātne / Law*. Journal of the University of Latvia 2019/12, pp. 162–172. – DOI: https://doi.org/10.22364/jull.12.11.

[33] In international practice, it is not exactly common for impact assessments to be carried out during the preparation of every draft law. Alongside Estonia, there are only eight other OECD member states with impact-assessment arrangements of this sort: Austria, Canada, Finland, France, Germany, Lithuania, South Korea, and Spain. See the OECD's Regulatory Policy Outlook 2021, p. 116. Available at https://www.oecd.org/publications/oecd-regulatorypolicy-outlook-2021-38b0fdb1-en.htm (most recently accessed on 25.2.2022).

legal consequence to the description of the facts of life thus produced. This implies, among other things, that law-making cannot be the exclusive preserve of lawyers. What is needed are experts whose knowledge-based proposals are to be translated into legal language. Since law cannot and indeed must not be separated from the larger picture of (normative) social regulation – after all, we know very well that there are several mechanisms available for regulating social life, of varying quality – sociologists and specialists with an even narrower field of specialisation, legal sociologists, must be regarded as the experts in this domain. It is in the legislative process that the state must think about how society can function in such a way as to ensure that the social environment and the members of the society work together successfully. Behind success are guarantors: the creation of decent living conditions for all social groups, the acceptance of objective justice, etc. Legislation too is certainly among these conditions guaranteeing success. For finding the social rules that suit the people best, J.-J. Rousseau considered it necessary even to have a 'higher mind' that is able to see all human passions yet not experiment with any of them – that is, to have no connection with human nature while at the same time possessing thorough knowledge of fundamental human nature. It is not the specialists who must take up this challenge.

5. On the nature of impact analysis and some of its methodological aspects

Impact analysis is only one of the methods used to shape legislation, alongside expert opinions, political positions, etc. The key point in this connection is that the value of impact analysis lies not in justifying decisions already taken but in using the analysis to inform the taking of decisions in the present.[*34] This requires solid grounding; however, the uneven level of detail in specific guidance material has created problems for this process in Estonia[*35].

Immediately after the adoption of HÕNTE, the Government of the Republic's regulations were supplemented with a provision for impact analysis[*36], found in Section 5 of ('Impact assessment'), which specifies that the preparation of draft laws, strategic development plans, and Estonia's positions referred to in subsections 20[1] (1– 2) of Section 201 of the Government of the Republic Act shall assess the effects of said laws, plans, and positions, with the same being true for preparations addressing other important matters to be decided upon by a ministry or submitted to the Government of the Republic for consideration.

To minimise inconsistencies, the Government of the Republic approved specific impact-assessment methodology in 2012, with the aim of thus providing guidance to government agencies on how to organise impact analysis in order to improve and harmonise the capacity for planning, implementing, and evaluating

34 In Estonia, the requirement for an impact assessment has been laid down in several pieces of legislation for some time, but it was initially very abstract, which has made it difficult to decide in practice when and to what extent it should be carried out. In fact, the legal basis for the analysis of the effects of legislation was created by the Decree of the Government of the Republic No. 279 of 28 September 1999 Technical Rules for Drafts of Legislative Acts, Subsections 28 (1), (6), Section 34 (obligation to analyse the effects of a law) and Subsection 53 (5) (obligation to analyse the effects of a regulation). Section 28 set out the parts of the explanatory memorandum of the draft Act, and according to Subsection 1 (6), one of the parts of the explanatory memorandum is an overview of the analysis of the effects of the Act. Section 34 specifies what should be dealt with in more detail in the section on the effects of the Act, outlining the types of effects for which an explanation is mandatory, including social effects, effects on national security, international relations, the economy, the environment, regional development, the organisation of public authorities and local government, including the training needs associated with the implementation of the Act. The list of impacts was left open, probably because it was mandatory to explain other direct or indirect consequences of the adoption of the law. The form of the impact analysis report was set out in the Annex to the Rules. – Technical Rules for Drafts of Legislative Acts. – RT I, 1999, 73, 695.

35 Thus, the guidelines for the assessment of economic impacts, environmental impacts, and social impacts required a focus on individual aspects of the analysis of impacts. This made it difficult to use such analyses in legislative practice. A few years ago, the Ministry of Justice's Development Plan (2012) articulated the harsh criticism that Estonian law-making is characterised by a lack of impact analysis. The drafting proposals for legislation were found to be vague and not include an assessment of the accompanying impacts. The critique stated that even where there is an impact analysis, it does not cover all stages of analysis required for draft legislation, since it is carried out after the preparation of the draft (not to be confused with *ex-post* impact assessment – S.K. and R.N.). The analysis is often limited to description of the subject of the analysis and rarely includes any estimation of the associated impacts. As a rule, there is no comparison across the range of alternative solutions either; only those within the competence of the central institution of the agency are assessed. The plan pointed to a lack of clear definition of responsibilities, obligations, and rights in connection with carrying out an impact analysis. See http://www.just.ee/33313 (most recently accessed on 20.11.2021).

36 See RT I, 19.01.2011.

government policies across all agencies. In 2021, the articulation of that methodology was updated to bring it fully in line with the current form of the regulation of which it is a part, and the structure, terminology, and stages for impact assessment were further clarified.

At present, the objectives for impact assessment state that its role in the development of the Estonian legal order are that it

(a) aids in critically assessing the need for public intervention;
(b) enhances the credibility and transparency of the policy-making process, in terms of such elements as results, costs, and side effects, and thereby helps preclude unintended consequences;
(c) improves the quality of policy decisions by increasing decision-makers' awareness of the policy options available and of their positive and negative impacts both, inclusive of how the policy decision and each option contributes to reaching the strategic objectives of the state;
(d) helps to reduce the subjectivity of the analysis and conclusions by means of compliance with the requirements for an appropriate impact assessment; and
(e) contributes to knowledge-informed policy-making.

We can see that impact assessment has a meaning far beyond simply drafting one or another piece of legislation. It is a process of gathering evidence of the merits and drawbacks of decision-makers' policy choices for, thereby, assessing the possible consequences. In Estonia, the systematic assessment itself has even come to be referred to as the 'core policy-making process'.

It is not only crucial to policy but also to some extent a universal approach, applicable to EU law, national strategy papers, and legislation. The methodological model employed for impact assessment, at least in the European legal area, is encapsulated in the European Commission's Impact Assessment Guidelines[*37]. The steps can be summarised thus:

(a) defining the problem
(b) setting the target(s)
(c) analysing the policy options
(d) performing *ex-post* evaluation

The analysis of impacts should be proportionate to the importance of the issue to be decided upon. To this end, the areas of impact must be mapped, (in step *a*), for which purpose appropriate checklists must be developed, to be used as the process proceeds. A more in-depth impact assessment may require studies to be carried out in these early stages.

In the legislative process, impact assessments may be initiated at any of several stages. The timing depends upon, for example, whether the need is for a preliminary impact assessment or, instead, building on any previous impact assessments. At the latest, preliminary impact-mapping should be initiated at the stage that involves drafting of the legislative proposal.[*38]

It cannot be left unsaid that the problem is linked to the crisis that has already prevailed for years now in relation to COVID-19. In particular, making an exception to a general rule – i.e., the requirement of having completed an impact assessment – should not entail *carte blanche* for emergency rules adopted in a hurry, without any consideration of their impact. Once the immediate pressures of the crisis have relaxed, public administrations may use any of several instruments to ensure that the impact of these emergency measures does get assessed (the universal importance of this is accentuated by the 2012 OECD recommendation citing *ex-post* evaluation as an essential tool to 'close the policy cycle'). Legislation adopted through fast-track procedures can be subject to **careful *ex-post* scrutiny** or post-implementation reviews to examine their effectiveness. Where the emerging phenomenon is an epidemic or pandemic, policy officials should take every opportunity to gather information on the virus, its impact on particular population groups across the landscape, and the effectiveness of the various crisis-response mechanisms available.[*39] In practice, during the drafting process, each of the ministries concerned would have to check the implications for its respective area of responsibility and, if necessary, make proposals addressing these. Let us add that, as stakeholders usually are involved, they can come forward with their own proposals.

37 Available at http://ec.europa.eu/smart-regulation/impact/commission_guidelines/docs/iag_2009_en.pdf (most recently accessed on 7.7.2022).

38 In the case of a description of the effects of a law already set out in the Explanatory Memorandum document for the draft, the guidelines for drafting it are presented at https://www.just.ee/sites/www.just.ee/files/eelnou_seletuskirja_mojude_osa_koostanise_juhend.pdf (most recently accessed on 12.2.2022).

39 See https://www.oecd.org/coronavirus/policy-responses/regulatory-quality-and-covid-19-the-use-of-regulatory-management-tools-in-a-time-of-crisis-b876d5dc/ (most recently accessed on 12.2.2022).

6. Another quick look at the potential of sociology of law to 'participate' in the law-making process and one effective method of impact research

The literature on sociology of law points to the two-pronged nature of putting social information to use in law-making. Firstly, some of the information is a result of surveys that reflect both the society's value orientations and the individual respondents' judgements and implicit attitudes. Secondly, it can involve quite narrowly scoped sociological studies, which may be focused, for example, on mapping (i.e., measuring) the performance of laws. Hence, the legitimacy of the law resting with the people and the effectiveness of the law (assessed in the experts' terms instead) may even be out of phase with each other to some extent. Some have argued that one cannot rule out the possibility that the adoption of laws that lack legitimacy for the citizen undermines the legitimacy of the legal system as a whole. Admittedly, a definitive answer to this question would require specific empirical studies*[40]. In the meantime, however, the perception that legal sociology in law-making is something non-egalitarian has been overcome. Notwithstanding the corresponding sense that it has a legitimate place, many legal scholars and legal sociologists alike are of the opinion that the power of the sociology of law is limited to only offering **recommendations** for law-making. The proposal J. Habermas offered for the design of the legislative process stands out here. To the end of legitimately informing legislation the system must employ a principle of discursivity – i.e., of a form of communication based solely on argumentation, in which discourse itself is conceived of as the normative realisation of all social information in law-making*[41].

If one tries to generalise the differential relevance of empirical research (in the broad sense) in law-making, one can view the law-making process in Estonia as expressing the third class in the following set of categories of application: the use of social information in law-making is not legally regulated; the use of social information in law-making is not mandatory; the use of the social information collected has moved (or is moving) toward the information's use being mandatory. Therefore, the authors of this article do not share the pessimistic view that, although attempts to realise the principle of discursiveness have been made, they have been reduced to instances of the dominant system trying to collect the information the system needs; that is, we do not find that it strives to motivate individuals in its own service, to do what the system needs and to channel tensions without any real discursive communication taking place.*[42]

The multi-criteria method*[43] is designed to assess the positive and negative impacts of particular possible developments arising from the conditions, specifically in a situation wherein the information (mostly of a qualitative nature) may be incomplete and indicators with a possibly quite problematic qualitative element need to be taken into account. In this method, it is useful to assign 'weights' to the impacts assessed (i.e., accord each a given value).

This method has advantages:

(a) It can take into account the complexity of the problem.
(b) It allows analysis and comparison of data of multiple types. The method even takes into account variability in the level of uncertainty.
(c) One is able to formulate the questions in a clear and transparent way and to highlight the 'right' points for consideration.
(d) It enables the highlighting of distribution-related issues.

It also displays disadvantages:

(a) There is a subjective stage: a part of the process in which experts have to decide on the relevance of each criterion.

40 H. Käärik (see Note 25), p. 137.

41 Ibid., p. 138.

42 Ibid.

43 In many disciplines, multi-criteria decision-making, or MCDM, has been one of the most rapidly growing areas for addressing problems. The central problem is how to evaluate a set of alternatives against multiple criteria. Although this problem is very relevant in practice, few methods are available, and their quality is difficult to ascertain. Therefore, the question of which method is best for a given problem has become one of the most important and challenging; e.g., see *Multi-Criteria Decision Making Methods: A Comparative Study*. Kluwer 2000.

(b) For some types of data, it is not always possible to establish clarity as to the scale of the benefit/harm.
(c) It is difficult to take into account the time dimension.

Multi-criteria analysis is particularly suited to examining impacts in situations wherein both qualitative and quantifiable data are scarce. The method is intended for systematically contrasting information on the effects of each policy option. The contrasts can be developed, for example, by stakeholder group or impact type, or one might articulate the positive vs. negative impacts of each option considered. It is appropriate to complement this method with an evaluation framework, whereby the qualitatively expressed impacts identified via the multi-criteria analysis are rendered comparable by rating each impact on the framework-based scale of 'importance'. The rating itself is, of course, rooted in experts' judgement, which involves human analysis of the array of information.

A typical multi-criteria method usually proceeds in accordance with the following process:

(a) defining the target;
(b) describing the means of reaching that target;
(c) agreeing on the criteria to be used in assessing the options;
(d) assigning weights to the criteria that correlate with the decisions;
(e) weighing the options against the criteria;
(f) ranking the options by combining them with scores;
(g) if deemed necessary, performing a 'sensitivity analysis' to test the adequacy of the ranking;
(h) ranking the options;
(i) verifying that, somewhere along the line, those involved have obtained a 'bottom-up' sense of the impact of uncertainty in the decision-making process.[*44]

7. Some observations motivated by legal policy

Finally, we would like to make a few observations on legal policy tied in with the theme of this article: the relevance of the use of legal sociology in Estonian law-making. Firstly, approval of the Basic Principles for Legislative Policy until 2030 (*Õigusloomepoliitika põhialused aastani 2030*, or ÕPPA)[*45] has been agreed upon as part of the long-term vision for Estonian legislative policy. A corresponding general orientation for draft laws, the development of the country's legal language, and the organisation of legislation is to be developed over the next 10–12 years. Clearly articulating and enforcing policy directions is important for stakeholders and society at large if one truly wishes to ensure the visibility and openness of legislative policy. Point 12 of the above-mentioned normative document continues to place the emphasis on what the text of Article 1, paragraphs 7 and 8, of HÕNTE implies for the procedure for draft legislation: 'Preparation of a drafting proposal, involvement, impact analysis, and *ex-post* evaluation are essential elements of effective law-making.'

The Ministry of Justice of the Republic of Estonia compiled a review of the implementation following from the approval of the Basic Principles for Legislative Policy until 2030 through to the year 2021[*46]. The latter served as a substantive basis for the review presented to the Riigikogu by the Minister of Justice in March 2022. An especially noteworthy aspect of the Ministry of Justice's review of the legislative process in the context of the coronavirus crisis is that it also examined the quality of the draft laws submitted to the

44 The main requirements for the impact report are:
(a) An overview of the impact analysis process (who carried it out, details of the presentation of the report, details of the consultations, etc.);
(b) Background and scope of the analysis (description of the subject of the analysis and key concepts, description of the tools used, content and scope of the problem studied so far);
(c) The purpose of the analysis and the target audience (why the impact assessment was needed and what was of interest and on which topic). Include the analysis questionnaire (if available);
(d) The methodology applied for the impact analysis (what was/were the method(s) used, how and where were both primary and secondary data collected;
(e) The findings of the analysis, which forms the main body of the report (what were the results of the impact assessment?);
(f) Conclusions and recommendations.

45 See the material on approving the Basic Principles for Legislative Policy until 2030: RT III, 17.11.2020.

46 See file:///C:/Users/User/Downloads/OPPA_taitmise_ulevaade_2021.a_kohta%20(1).pdf (most recently accessed on 11.3.2022).

ministry. The review report states: 'The vast majority of the drafts submitted to the Ministry of Justice for approval have few technical deficiencies and the drafts generally comply with the standard of the written language. Quality of the impact assessment (spacing by us S.K.; R.N) has been improving steadily. In international comparison, Estonia's impact assessment system is considered to be very good. According to the OECD's 2021 Legislative Policy Study, Estonia ranks fourth out of 37 countries in terms of the quality of its impact assessment system for draft legislation.'*[47] This speaks to the important positive developments manifested in the growing proportion of socio-legal approaches.

Irrespective of the positive assessments, there is room for improvement in impact research in Estonia. A case in point comes from 2021 when the *Riigikogu* was debating implementation of its decision 'Approval of the Basic Principles for Legislative Policy until 2030', one of the bases for which was the expert opinion prepared by the advisory board of the Estonian Constitutional Law Foundation at the Academy of Sciences (SA Riigiõiguse Sihtkapital) on that implementation,*[48] with assistance from the advisory board of the Estonian Academy of Sciences on behalf of the Ministry of Justice. For submission to the *Riigikogu* in connection with the report of the Government of the Republic to Parliament on the implementation of the rules of good legislative drafting and the drafting of proposals. Among other things, it presents analysis of the situations in which, in the case of drafts that are the subject of an opinion, the lack of identified effects led to no drafting proposal being prepared at all. The report stated:

With reference to the lack of significant effects of the draft within the meaning of Section 1, para. 2 and para. 5 of HÕNTE, a drafting proposal was not prepared on two occasions: for the draft Act amending the Anti-Corruption Act (re. compliance with GRECO recommendations and the Act restricting the publicity of declarations of interest of heads of security bodies) (323 SE) and the draft Act amending the Code of Civil Procedure (securing an action based on infringement of intellectual property) (231 SE) [...]. However, the situation was markedly different when the justification for the drafting proposal not being prepared was that the draft would not have a significant impact. Since this is by its very nature a highly evaluative criterion, if the reason for not preparing a drafting proposal is given in the explanatory memorandum for the draft only by a formal reference to said grounds and no substantive justification or analysis is provided, it is very difficult to determine *ex post* whether the drafting of the draft itself without going through the draft-planning stage was justified in substance. This conclusion is illustrated by the two drafts that are the subject of this opinion – the law on the Amendment of the Anti-Corruption Act (compliance with GRECO recommendations and the law on the restriction of the publicity of declarations of interests of heads of security authorities) (323 SE) and the law on the amendment of the Code of Civil Procedure (safeguarding actions based on infringement of intellectual property) (231 SE) – for which no drafting proposal was prepared, for the reason that they lack significant impact. Undoubtedly, in the case of these two draft laws (as in the case of any other draft law in general), one cannot speak of a lack of impact; otherwise, there would be no point in their processing and adoption. Accordingly, Section 1, para. 2 and para. 5 of HÕNTE and point 12.1.3(4) of the ÕPPA can only be interpreted in such a way that in the case of grounds for not drawing up the relevant development plan, the lack of significant effects as a quantifying characteristic is deemed to be the decisive factor. However, the explanatory memoranda for these two drafts do not provide the relevant justifications, which leads to the conclusion that the drafting intentions for these drafts were left unprepared arbitrarily.

We share the view of the authors of the expert opinion. The situation described in that opinion unjustifiably narrows the scope of application of sociology of law in legislative drafting, and it runs counter to good legislative practice and, moreover, to the Estonian legal order itself. One conclusion of the experts offering this opinion cannot be supported, however: 'As a rule, the preparation of a drafting proposal does not precede the preparation of draft legislation initiated by the Government of the Republic and adopted by the *Riigikogu*. To improve the situation, we recommend critically assessing the feasibility of the grounds for not preparing a development plan set out in §12.1.3 of the ÕPPA and Section 1, para. 2 of HÕNTE or, alternatively, waiving the requirement to prepare a development plan altogether.' We find our view to be supported by the fact that the 'Basic Principles of Legal Policy until 2030' instrument provides in its point 12.1.2 that the drafting proposal shall be submitted both for public consultation and to the *Riigikogu*. This refers to the relevant committees of the legislature, which, according to the Rules of Procedure and Internal

47 Report available at https://www.just.ee/uudised/justiitsminister-andis-hinnangu-oigusloomele-koroonakriisis (most recently accessed on 10.3.2022); OECD Regulatory Policy Outlook 2021, p. 71. See also https://www.oecd.org/publications/oecd-regulatory-policyoutlook-2021-38b0fdb1-en.htm (most recently accessed on 25.2.2022).

48 See file:///C:/Users/User/Downloads/Arvamus_6PPA-riigi6iguse-sihtkapital.pdf (most recently accessed on 14.3.2022).

Rules Act of the *Riigikogu*, are the steering committees involved in the procedure for the respective legislative drafts. Obviously, this change in legal policy has only increased the intrinsic importance of drafting proposals for our legal order. However, the advice from the foundation's board to abandon the drafting proposal contradicts a whole series of other provisions set forth in the Basic Principles for Legislative Policy until 2030 (in points 12.3.1, 12.3.2, 12.3.3, and 12.3.4). We hope that there is insufficient political will to abandon the drafting proposal in the manner suggested as one alternative in the opinion of the advisory board of the Estonian Constitutional Law Foundation at the Academy of Sciences. Above, we refer to the Justice Minister's presentation to Parliament. Looking at the minutes of the presentation, we find:

Before a draft law is drawn up, a drafting proposal (*väljatöötamiskavatsus*, abbr. VTK) is prepared. Its broader value is that it makes law-making more visible and transparent, [and it] allows for early public consultation and stakeholder involvement [...]. It is often argued that the preparation of a VTK is excessively bureaucratic, is too formal, and unnecessarily prolongs the legislative process. But no-one is saying that it should not be done in a substantive and useful way.

M. Jürgenson, a member of the Legal Affairs Committee of the *Riigikogu*, was of a similar opinion, stating that 'we expect the Government of the Republic to carry out drafting proposals [read: drafting] for the drafts they develop, and we do not consider it right to abandon this legislative stage. Of course, yesterday in the Legal Affairs Committee we discussed this with the Minister [M. Lauri]. I asked her personally, and the Minister confirmed that it is not reasonable to abandon drafting proposals'.[*49]

Of the policy documents, the long-term development strategy of the state, titled 'Estonia 2035'[*50], deserves special attention. This is a strategy-oriented document. The document, which sets forth strategic goals for the Estonian state and people for the coming years and indicates the changes needed for reaching them, outlines the development needs of Estonia's most important sectors – the tasks that need to be completed and taken into account in policy-making (including the setting of legal policy). In the area of governance, which can only operate in the legal environment, the capacity of the state to use research to bring about the necessary changes must be improved via researchers' involvement in policy-making. There is a direct implication that all legislative decisions must be knowledge-based.

Before concluding the article, we would like to emphasise once again that the situation that developed a decade ago, in which legislative 'tools' for quality in the sociology of law found their way into the legislative 'toolbox', has been vindicated. Our HÕNTE has stood the test of time. The pre-legislative function of the sociology of law has come into the legislative process so that it remains involved in the 'preparation' of planned legislation for an audience. We believe that the link between jurisprudence and law-making needs to be further strengthened. In fact, this is already referred to as a requirement, articulated in the above-mentioned long-term development strategy Estonia 2035, adopted by the *Riigikogu* on 12 May 2021: according to the OECD, Estonia does not make enough use of research and experts in the field when making decisions and the efficiency of the government agencies' activities is mediocre relative to that of other Member States. The body stated that the country's capacity to use research to bring about the necessary changes and to involve researchers in policymaking needs to improve. It is important to ensure that research is more closely geared to Estonia's development needs.[*51].

In conclusion, it should be noted that legal sociology, as a field of applied law-making, continues to exhibit potential, which Estonia has ample room to use. It is not enough to adopt a legal-dogmatic angle and related approaches in aims of arriving at a legal interpretation by means of and through the law. One would also hope that the example cited in this article of a call to, in essence, ignore the capacity of legal sociology is not in any way a tendency but, rather, a failed solution to a problem. We must not ignore, or call on others to ignore, the requirement for analysis of the significant effects of legislation, for this is inherent in the Estonian legal order itself and closely linked to legal sociology. At the same time, however, the analysis should be based on the frequency of occurrence of the significant impacts pinpointed in connection with the legislation, the scale of the impact in question, the size of the relevant target group, and the risk of the undesirable effects that may result from the implementation of the law. The strategic documents that have been drawn up to provide substantive solutions for legal policy in Estonia give reason to hope that it will not be possible to imagine law-making in Estonia without involving sociology of law.

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49 See https://stenogrammid.riigikogu.ee/et/202203091400 (most recently accessed on 14.3.2022).

50 RT III, 15.5.2021, 12.

51 See file:///C:/Users/User/Downloads/Eesti%202035_PUHTAND%20%C3%9CLDOSA_210512_1.pdf (most recently accessed on 14.3.2022).

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Katre Luhamaa

Lecturer, European Law and International Law
University of Tartu

Merike Ristikivi

Associate Professor of Legal History
University of Tartu

Rebuilding the Court System of Estonia after the Communist Regime[*1]

1. Introduction

The dismantling of the Estonian Soviet Socialist Republic (ESSR) judiciary and recreating a judiciary that would be able to implement the new but rapidly changing democratic legal system was a challenge that Estonia faced between 1987 and 1993. Following the breakdown of the Soviet Union, ending the occupation and regaining independence, Estonia modernised its laws and institutions through a comparatively democratic process without sudden disruption of the legal system or of the work of the judiciary. This process had two aspects – dismantling the interconnected legal systems of the Union of Soviet Socialist Republics (USSR) and ESSR and, secondly, building a new legal system and institutions that would lead to the re-establishment of the independent Estonian state.[*2] With this article we are able to discuss only a fraction of the events and developments of the time, and we focus on the problems related to the dissolution of the ESSR judiciary and creation of the new democratic judiciary.

The transition of the Estonian judiciary was comparatively uncomplicated for two main reasons: First, the ESSR judiciary was relatively small and compact. In 1987, the judiciary consisted of 79 People's Court (*rahvakohus*) judges and 20 ESSR Supreme Court (*ENSV Ülemkohus*) judges.[*3] In 2022, there are approximately 250 positions of judges in Estonia's three-level court system.[*4] Second, within the judicial system of the ESSR, the judges did not have independence or security of tenure. As in the rest of the Soviet Union, judges were periodically elected and subjected to scrutiny by the communist political system. Most of the judges elected in 1987 finished their term in 1992. Together these conditions made the selection of the new judges less controversial.

1 The research leading to this article was supported by the Estonian Academy of Sciences (SSVOI21349).

2 For more comprehensive accounts of the transition process of Estonia, see, for example, Rein Taagepera. *Estonia: Return to Independence* (1st edn). Routledge 2018. – DOI: https://doi.org/10.4324/9780429500725; Graham Smith. *The Baltic States: The National Self-Determination of Estonia, Latvia, and Lithuania*. St Martin's Press 1994; Walter R. Iwaskiw (ed.). *Estonia, Latvia and Lithuania: Country Studies* (Area Handbook Series 550–113, Library of Congress 1996).

3 'Eesti Ülemnõukogu otsus Eesti Nõukogude Sotsialistliku Vabariigi Ülemkohtu valimise kohta', *ENSV ÜVT* 735, 10, 176, 29.3.1985.

4 The number of district, administrative, and circuit court judges is determined by resolution of the Minister of Justice. 'Maa-, haldus- ja ringkonnakohtu kohtunike arv ja jagunemine kohtumajade vahel', RT I, 1.4.2022, 10. Subsection 25 (3) of the Courts Act establishes the number of Supreme Court justices as 19; see the Courts Act [*Kohtute seadus*], RT I 2002, 64, 390; RT I, 20.6.2022, 6.

At the same time, the task ahead of Estonia was very complex; it had to rebuild its whole legal and institutional system and separate itself legally and practically from the USSR. The communist legacy and the influence of the Estonian Communist Party (ECP) on the legal system were incompatible with the values of democracy and human rights that newly independent Estonia embraced. Notwithstanding seemingly smooth progress in reforming the judiciary and the absence of significant eruptions, stability and continuity in the enforcement of laws and maintaining the regular workings of the judiciary were key challenges of the transition both before and after the adoption of the 1992 Constitution (*Põhiseadus*).[*5]

The article analyses central factors and turning points of the transition of the Estonian judiciary and maps the theoretical and practical difficulties of the transition. For understanding of the context of the transition, the article starts with a short overview of the judicial system of the Estonian SSR. From then on, it follows chronological organisation.

2. The starting point – the legal system of the ESSR

Until 1990, the Estonian legal system was tightly intertwined with the legal system of the USSR. The central values of the legal system of the ESSR were fundamentally different from a democratic legal system's. Although power was formally vested in people, it was *de facto* held by the Communist Party and its members.[*6]

The ESSR Constitution required the separation of powers and stressed that the judiciary is independent and its work based on the rule of law.[*7] However, separation of powers was not fully realised, as the Soviet court system was dependent on the Ministry of Justice of the USSR and of the ESSR.[*8] The judiciary was governed in practice by the administrative division of the ECP, which decided on all the important issues, including the selection of personnel.[*9]

Courts were not the only institutions in the Soviet legal system that resolved legal disputes, as it was possible to resolve them also in political bodies – in the party institutions, 'comrade courts',[*10] juvenile-justice committees, and administrative commissions.[*11] Thus, the dispute resolution system was highly politicised and intertwined with the functioning of the Communist Party. Furthermore, most administrative matters and some political offences were decided upon by administrative Communist-Party-affiliated committees or communist 'comrades' that were neither courts of law nor bound by the obligation to abide by the law.[*12] At the same time, the scope of civil law and administrative law was very limited.

The ESSR national court system was two-tiered – People's Courts (essentially district courts) decided on most matters as a first-level court, and the ESSR Supreme Court was both a court of cassation and a first-level court for a number of first-degree criminal offences.[*13] The USSR Supreme Court and the Military Tribunals formed a supranational element of the legal system supervising national courts; the national legislator and national courts were bound by their decisions and general directions.[*14]

The judges of the People's Court were elected for five years by the people on the basis of 'universal, uniform and direct secret ballot'.[*15] In practice, this process was under the control of the Communist Party

5 Constitution of the Republic of Estonia [*Eesti Vabariigi põhiseadus*], RT 1992, 26, 349.

6 Section 2 of the 1977 Constitution of the USSR and §§ 2–4 and 6 of the Constitution of the ESSR. The ESSR Constitution was proclaimed on 13.4.1978. 'ENSV konstitutsiooni vastuvõtmine ja väljakuulutamine' ['Adoption and promulgation of the Constitution of the ESSR'], *ENSV ÜVT* 1978, 13, 147; E.-J. Truuväli. *Põhiseaduse teel*. Iloprint 2008, pp. 303–336.

7 Section 154. As an example, the plenum of the USSR Supreme Court adopted on 5.12.1986 a resolution aimed at improving legality and the rule of law in the decision-making of the judiciary and stressed the need to guarantee that judgments do not depend on the status or the position of the persons involved (para. 1), uniform application of *nulla poena sine lege* (para. 2), and the importance of judicial independence (para. 3). 'Seaduslikkuse edasisest tugevdamisest õigusemõistmisel' ['Further strengthening the rule of law in the judiciary'], *Nõukogude Õigus* 121/1 (January–February 1987), pp. 64–67.

8 Section 18 of the Court Organisation Act (COA) [*Seadus ENSV kohtukorralduse kohta*]. See *ENSV ÜVT* 1981, 38, 583.

9 Email from Rait Maruste (20.1.2020).

10 '"Seltsimehelike kohtute põhimääruse" ja "Seltsimehelike kohtute ühiskondlike nõukogude põhimääruse" kinnitamise kohta', *ENSV ÜVT* 1978, 8, 95.

11 Ülemnõukogu, or Supreme Soviet, on 26.9.1991, item 2.

12 Kalle Nigola. *Kohtukorraldus NSV Liidus*. Tartu Riiklik Ülikool 1989, p. 36. See also §161 of the ESSR Constitution.

13 Section 150 of the ESSR Constitution.

14 Sections 1–2 COA.

15 Section 152 USSR Constitution; §151 ESSR Constitution.

and every region had the same number of candidates as there were places for justices.[*16] The ESSR Supreme Soviet (*Ülemnõukogu*) elected justices to the ESSR Supreme Court for a renewable term of five years.[*17] The Supreme Soviet also decided the number of judges for each period. Public assessors for all national courts (lay judges) were elected for two and a half years in open voting in the area of their work or residence.

The last election of People's Court judges was held in conjunction with the elections to the local soviet councils on 21 June 1987.[*18] The participation rate in the election of the judges was 98.5%, and each of the candidates received 99% of the votes.[*19] In total, 79 People's Court judges[*20] (for 24 courts) and 5,685 public assessors were elected.

The election of the judiciary meant that the process was, in essence, a political process, where the party had the central role in putting forward the candidates.[*21] In practice, all judges had to be members of the Communist Party, as the nomination of candidates was done by the Communist Party.[*22] Hearings for the election of judges during the transition revealed that there were suspicions of several judges having co-operated with the KGB during the Soviet era and having followed party guidance in a highly politicised case.[*23] During the hearings, when asked whether the justices of the ESSR Supreme Court had told the truth when stating that they had not been influenced by 'telephone justice', one justice replied that truth was unlikely.[*24] However, there is a lack of documented evidence on which of the judges collaborated with the KGB. Even though special tribunals or special boards handled most of the political cases, the ESSR Supreme Court was an institution of Soviet repression that also handled political ones.[*25]

3. Transformation of the court system

3.1. The role of the former elite

The pre-constitutional transformation of the court system was characterised by the wish of the judicial elite (including the ESSR Supreme Court) to keep the existing structures and improve them as necessary. The ESSR Supreme Court members actively participated in the development of the Courts Act.[*26] At the same time, they were not included in the drafting of the Constitution and the court reform was criticised as reflecting Soviet values.[*27] In one example, the last appointed Chief Justice of the ESSR Supreme Court was put forward as a candidate to be the first Chief Justice of the new Supreme Court. Said nomination did not, however, gain the support of the Supreme Soviet.[*28] It is unclear whether they sincerely wished to go along with the renewal of the legal and court system or whether they wanted to influence the system so as to keep their power. The ESSR Supreme Court made several attempts to adapt to the situation before the establishment of the new Supreme Court. All such attempts were, still, peaceful and civilised.[*29]

16 A permanent executive body of the ESSR Supreme Soviet that acted on behalf of the legislator when it was not in session. See §§ 106–111 ESSR Constitution.

17 Section 152(2) ESSR Constitution; Section 29 COA.

18 'NSV kohalike rahvasaadikute nõukogude ning rajoonide (linnade) rahvakohtute valimiste tulemuste kohta', decision of the ESSR Plenum, 25.6.1987, ERA R.3.7.1656. The statistics also were published together with the list of elected judges in the legal journal of the Ministry of Justice: 'Rahvas valis rahvakohtunikud', *Nõukogude Õigus* 124/4 (July–August 1987), pp. 253–254.

19 'Rahvas valis rahvakohtunikud' (ibid.).

20 Out of the 79 judges, 24 were elected for their first term; 71 of the judges were members of the Communist Party, and the other 8 were candidates of the party.

21 Section 35 of the LEPC.

22 Riigikogu, 25.2.1993, item 12.

23 Riigikogu, 25.2.1993, item 9.

24 Informal influence or pressure excerted on the judiciary by the Communist Party. Ülemnõukogu, 8.5.1990, item 3.

25 International Commission for the Investigation of Crimes Against Humanity. 'Conclusion of the Commission. Phase III: The Soviet Occupation of Estonia from 1944' (2008), p. 10.

26 Explanations to the Courts Act [*Eesti Vabariigi kohtute seadus*] of 23.10.1991, ERA R-3.3.15918, p. 81.

27 Constitutional Assembly, 1.11.1991.

28 Supreme Soviet, 11.5.1992, item 1.

29 Maruste (see Note 9).

3.2. Depoliticising the judiciary

One of the first reforms focused on the party affiliation of the judges (especially filiation to the Communist Party). Already in 1990, candidate for Chief Justice of the ESSR Supreme Court J. Kirikal[*30] stressed that judges should not belong to any political party or movement, since their independence is possible only when they are subject to the law alone. Hence, it was deemed important that members of the judiciary and law-protection agencies in general, not be members of such parties and that they suspend their membership of these for the duration of holding the position of public trust.[*31] The practical obstacle at the time was that all the members of the judiciary belonged to the Communist Party. To resolve the matter, the Presidium of the Supreme Soviet adopted a decree depoliticising the law-enforcement bodies and prohibiting political unions in them,[*32] thus paving the way for the later requirement that judges not be members of political parties.[*33]

3.3. Foundations of the court reform

On 16 May 1990, the Supreme Soviet adopted general principles of transitional governance.[*34] The principles stated that all the laws in force in the Estonian SSR remained in force until they were nullified or changed (per Section 4). The law separated the Estonian courts from the courts of the USSR and declared that the courts of Estonia should follow only the laws in force in Estonia (Section 5). This legislation thus brought an end to the supervisory powers of the Supreme Court of the USSR, and the administration of justice and all adjudication in Estonian territory was separated from the judiciary of the USSR and conferred solely on the Estonian courts.[*35]

When the Chief Justice of the ESSR Supreme Court presented candidates for positions of justice to the interim ESSR Supreme Court in 1990, he also introduced the central requirements for the transitional court system:[*36]

(1) substantive protection of fundamental rights;[*37]
(2) the Supreme Court as a court of appeal and cassation only;[*38]
(3) a second-level court at least for criminal-law matters;
(4) redress for the legal injustice of the Soviet period.

The drafting of the Courts Act of 1991 followed these recommendations. Until then, the re-regulation of the court system was limited and demand-driven. As a first step in de-Sovietisation, the court system was consolidated and the names of the courts were changed to reflect their jurisdictional areas, to rebuild trust in and adherence to Estonian laws and policies.[*39]

30 Jaak Kirikal was appointed Chief Justice of the ESSR Supreme Court in 1988. From then onward, he actively supported the democratisation process both in his oral statements and in his writings. During his nomination process in 1990, he suspended his membership in the Communist Party for the term of his office. Ülemnõukogu, 3.4.1990, item 1.

31 Ibid.

32 'Eesti NSV õiguskaitseorganite osalisest depolitiseerimisest', *ENSV ÜVT* 1990, 16, 253.

33 Status of Judges Act [*Kohtuniku staatuse seadus*], RT 1991, 38, 473, §4(2)2.

34 'Eesti valitsemise ajutise korra alustest', *ENSV ÜVT* 1990, 15, 247.

35 'Eesti Vabariigi Ülemnõukogu tegevusprogramm üleminekuperioodil Eesti Vabariigi iseseisvuse taastamiseni ja valitsemise ajutisest korrast', *ENSV ÜVT* 1990, 15, 248 (Chapter III).

36 Ülemnõukogu, 8.5.1990, item 3.

37 The legal system of the ESSR did not include concrete legal mechanisms to help to enforce individuals' rights and freedoms, including protection against arbitrary state action. The Estonian legal system at the time lacked administrative courts.

38 The Supreme Court of the ESSR was a first-instance court (and the only instance) for some legal disputes.

39 'Rahvakohtute ümbernimetamise kohta' ['On the renaming of the People's Courts'], *ENSV ÜVT* 1990, 17, 270.

3.4. Election of judges

In 1988–1993, before the full reform of the judiciary, several judges were appointed both to People's Courts and to the ESSR Supreme Court. On 2 April 1990, the Supreme Soviet adopted the Rules of Procedure and Internal Rules Act,[*40] which regulated, among other issues, the nomination and appointment of judges to the ESSR Supreme Court.[*41]

The Chief Justice recommended that the transitionary ESSR Supreme Court consist of 19 judges; the majority of whom should have previous work experience in the judiciary.[*42] During the discussions, it was pointed out that the Court needed stability both as an institution and for the individual judges. Questions to the candidates ranged from their views on the independence of the judiciary to their views on the future of the Estonian legal system and the court system. For example, they had to answer questions on the use of 'telephone justice' in the Soviet era as well as on their loyalty to the Estonian state.[*43] The doubts about their honesty and their position as the ESSR legal elite remained an issue, and it was brought up again during the establishment of the Supreme Court and the election of its justices.[*44] The 1990 overview of the ESSR Supreme Court pointed out that it had been difficult to find persons outside the ESSR judiciary willing to be candidates for positions with the interim ESSR Supreme Court. A number of possible candidates had refrained from competing as the pay was low, these positions were seen as temporary, and there was political instability.[*45]

Until the adoption of the Constitution in 1992, the Supreme Soviet also appointed justices to the district courts (former People's Courts), basing the appointments on nomination by the Minister of Justice. For example, in 1990, the Supreme Soviet appointed four justices to district courts, and four justices were released from their positions.[*46] From 1991 onward, the nomination of justices required an evaluation by the judges' qualification commission wherein their professional and personal qualifications were assessed.[*47] From November 1991, all nominations were made jointly by the Minister of Justice and the Chief Justice of the ESSR Supreme Court. All the nominations to the ESSR Supreme Court were made by the Chief Justice or the Deputy Chief Justices. In 1991, the nature of the questions asked of the candidates focused on the current problems in the work of the judiciary and on the abolishment of the death penalty.[*48]

3.5. Practical problems faced by the court system

In 1990, the Chief Justice emphasised practical issues facing the judiciary that needed legislative and administrative attention.[*49] Firstly, there was a need to find and appoint new judges with high moral, personal, and professional standards as several judges of the People's Courts had left the court system for the private sector. The salary of judges was not commensurate with the private sector, and this resulted in small numbers of applicants for open positions; working for the courts was not a popular career option. Secondly, there was a need to improve the practical arrangements for the courts – from buildings and courtrooms, through the use of new technology, to court support personnel. These practical problems were addressed in 1991, with the Status of Judges Act, and the salaries of judges were linked with salaries of other state officials; e.g., the pay of the Chief Justice of the Supreme Court was made equal to that of the Prime Minister.[*50]

In its annual overview of 1990, the ESSR Supreme Court pointed out that Estonian courts had been given sufficient powers to act as independent enforcers of law.[*51] It saw as a possible violation of separation

40 'ENSV Ülemnõukogu ajutise töö- ja kodukorra kinnitamise kohta' ['Temporary rules of procedure and rules of procedure of the ESSR Supreme Soviet'], *ENSV ÜVT* 1990, 12, 181.

41 The alternative proposal to extend the term of office of the existing ESSR Supreme Court was not supported.

42 The Chief Justice, 11 members of the Criminal Law Chamber, and 7 members of the Civil Law Chamber. Ülemnõukogu, 8.5.1990, item 3; see also the proceedings of 29.5.1990, item 2.

43 Ibid.

44 Riigikogu, 8.12.1992, item 3, and 25.2.1992, items 2–16.

45 Ülemkohus, 'Eesti Vabariigi Ülemkohus 1990. aastal', *Eesti Jurist* 1991/2, p. 89.

46 The reasons for this are not available.

47 Ülemnõukogu, 31.1.1991, item 1.

48 E.g., Ülemnõukogu, 20.11.1991, item 2. The last death penalty decreed in Estonia was carried out in 1992.

49 Ülemnõukogu, 8.5.1990, item 3.

50 Section 29 of the Courts Act.

51 Ülemkohus (Note 45).

of powers the fact that the Ministry of Justice had nominated several judges as members of government committees. The overview also pointed out that problems related to training of the judges were not resolved.

Finally, the overview emphasised that the rapid legislative process meant that new laws were of poor quality, that several vital laws had not been adopted yet; and that the delays in publishing laws in the official gazette *Riigi Teataja* made law enforcement difficult as judges could not implement laws published in newspapers. Moreover, the overview noted, laws often set out only general principles and did not include implementation norms or further clarity that would secure their uniform application by the People's Courts.[*52]

4. Legislative reforms of the court system

4.1. Development of the Courts Act

When opening the Constitutional Assembly, the Minister of Justice set forth the following aim for reforming the court system: to create a constitution based on the separation of powers that could be applied in the courts with a focus on the protection of basic rights.[*53] His views were echoed by the chairman of the assembly,[*54] who stated that the Constitution had to be concrete enough to enable it to be enforced by the courts and, hence, there was a need to adopt clear principles that the courts could apply when they are faced with lacunae as would be inevitable in the transitional society.[*55] The regulation of the court system in the Constitution mirrored the development of the Courts Act and the ongoing reform. The central elements of the renewal were related to the constitutional review function of the Supreme Court.[*56]

The development of the draft Courts Act (CA)[*57] and the Status of Judges Act (SJA)[*58] started already in 1990, and it was finished before completion of the drafting of the Constitution. This process was led by the Ministry of Justice in collaboration with the ESSR Supreme Court. Because of these processes, run in parallel, the discussions over the structure of the Court system and the status of the judiciary in the assembly and the Supreme Soviet were similar and can be viewed together.[*59] The Constitutional Assembly left the practicalities of the court system to the legislator, and its discussions focused on the role of the court system in constitutional review alongside the independence of the judges and the judiciary.[*60]

The new court system had to be suitable for the social needs of this state in transition to democracy. Therefore, the court reform had to take into account the existing realities and the personnel available, as well as the surrounding institutional systems, and could not be modelled after any other state. Instead, the draft CA followed the Courts Act of 1938[*61] and intentionally excluded any rules of procedure, which were established in separate legal acts.[*62] The Courts Act was adopted in October 1991 together with the SJA and the Implementation Act.[*63]

52 Ibid., paras 102–104.

53 Constitutional Assembly, 13.9.1991.

54 Later a justice of the Administrative Chamber of the Supreme Court.

55 Constitutional Assembly, 20.9.1991.

56 See, for example, the discussion by Rait Maruste. 'Sissejuhatus. Kohtusüsteemi ülesehitamine iseseisvuse taastanud Eestis' in Priit Pikamäe and others (eds), *Kohtute seadus: kommenteeritud väljaanne*. Juura: Riigikohus 2018, pp. 17–18. See also Constitutional Assembly, 22.11.1991.

57 Courts Act [*Kohtute seadus*], RT 1991, 38, 472.

58 Status of Judges Act, RT 1991, 38, 473.

59 The Supreme Soviet discussed the co-operation with the Constitutional Assembly during the second reading of the draft Courts Act, and found that there already existed co-operation between these institutions as two persons were simultaneously members of the respective committees of the Supreme Soviet and the Constitutional Assembly. Ülemnõukogu, 23.10.1991, item 1.

60 About the work of the assembly, see Viljar Peep (ed.). *Põhiseadus ja Põhiseaduse Assamblee: koguteos*. Tallinn: Juura 1997.

61 Courts Act [*Kohtute seadustik*], RT 1938, 36, 321. Pre-war Estonia had a three-level court system. See further material on the election of the judiciary before WW II from Hannes Vallikivi. 'Kohtunike valiku kriteeriumid Eesti Vabariigis 1934–1940', *Ajalooline Ajakiri* 2017, p. 363. – DOI: https://doi.org/10.12697/aa.2017.2-3.07.

62 Ülemnõukogu, 26.9.1991, item 2.

63 The decision on the implementation of the Courts Act and the Status of Judges Act [*Otsus 'Eesti Vabariigi kohtute seaduse' ja 'Eesti Vabariigi kohtuniku staatuse seaduse' rakendamise kohta*], RT 1991, 38, 47.

4.2. A three-tier court system

The need to create administrative courts, define their tasks, and dissolve the arbitration court was discussed before the adoption of the CA.[*64] The CA created a three-tiered court system – district courts and administrative courts or judges on the first level, circuit courts as appellate courts, and the Supreme Court at the last level.[*65] The existing People's Courts were reorganised into district courts, and they continued their work at the same courthouses. Circuit courts were initially situated in conjunction with the district courts; they started to function only in 1993. Most of the court administrative personnel were retained. Both circuit and administrative courts required adoption of procedural legislation, and their tasks needed further clarification.[*66]

Responsibility for the management of the first-level courts, an issue that arose at the heart of the debates during the drafting of the Courts Act of 2002, was given to the Minister of Justice.[*67] This included the right to determine the number of judges for each courthouse, a right to regulate the administration of the courts, and an obligation for the courts to report on their work to the Ministry of Justice. The Supreme Court was the only self-governing court, working in chambers or as a court *en banc*, and it was given dual status as the court of cassation and of constitutional review.[*68]

The Minister of Justice initially had the right to be consulted on legislative matters and also to participate in the meetings of the Supreme Court *en banc* with speaking rights. Such rights were gradually abolished.[*69] In this format, the court mainly dealt with administration tasks. The jurisdiction of the Supreme Court *en banc* was wide-ranging, from the right to review the practice of its chambers to the right to initiate legislative drafting or offer opinions on draft legislation. It also made recommendations for the appointment of judges and regulated its internal work.

Whether the courts had the right to interpret law when there were lacunae, laws were unclear, or laws were in mutual conflict was highly debated.[*70] The draft Courts Act originally foresaw that when a court was faced with a difficult question of interpretation, the question would be transferred to the ESSR Supreme Court, which, as necessary, would consult the Supreme Soviet on the interpretation of the law. This position was vehemently opposed by the ESSR Supreme Court, which saw the right to interpret laws as a right inherently vested in courts.[*71] The requirement that the Supreme Soviet be consulted was still included in the CA[*72] since during the Soviet era the ESSR Supreme Court often substantively changed the meaning of the legal norms with its interpretation. This requirement remained a transitional regulation, but it was not enforced, and it was nullified already in 1993 since it was not compatible with the Constitution, which instrument gave all the courts the power to initiate constitutional review proceedings in such cases and the Supreme Court the power of constitutional review.[*73]

4.3. Nominating judges and supervision of the judiciary

There was no consensus on the method for formal nomination of the judges in the draft constitutions. The Courts Act gave the power to nominate judges to the Supreme Soviet. The Constitutional Assembly saw the right of Parliament to elect judges as a possible violation of the independence of the judiciary

64 Jaano Odar. 'Kohtu pädevuse probleemid', *Eesti Jurist* 1991/2, p. 107.

65 The Supreme Soviet had several discussion on whether the law should continue to call the third-level court an ESSR Supreme Court (*Ülemkohus*) or the Supreme Court (*Riigikohus*). The name 'Riigikohus' was decided on at the second reading of the Courts Act. Ülemnõukogu, 23.10.1991, item 1.

66 Riigikogu, 12.5.1994, item 1.

67 Maruste (Note 56), p. 16.

68 The Constitutional Review Court Procedure Act [*Põhiseaduslikkuse järelevalve kohtumenetluse seadus*] was adopted in 1993. RT 1993, 25, 435. In 1993, the Constitutional Review Chamber decided 4 cases.

69 See, for example, the Courts Act and Status of Judges Act Amendment and Supplementation Act [*'Kohtute seaduse' ja 'Kohtuniku staatuse seaduse' muutmise ja täiendamise seadus*], RT 1993, 1, 2. §14; Courts Act and Status of Judges Act amendment and supplementation per RT 1993, 24, 429. §9.

70 Ülemnõukogu, 26.9.1991, item 2.

71 Ibid.

72 Section 29 of the CA.

73 Courts Act and Status of Judges Act amendment and supplementation act, RT 1993, 1, 2. §15.

and the separation of powers.[*74] Nevertheless, the Constitution stipulates that Supreme Court justices are appointed by the parliament; other judges are appointed by the President on the recommendation of the Supreme Court. There was no security vetting of judges, so the President maintained control over the nominations and accepted only nomination made by two-thirds of the former justices.[*75] Judges must be Estonian citizens and be fluent in Estonian language; this requirement, in effect, excluded several acting judges from applying after 1993.

The SJA regulated the education requirements and age limits for judges. Judges are required to have a higher education in law acquired at a national university or an equivalent qualification, and all candidates are obliged to pass a judge's exam. The SJA further set age and professional-experience requirements for judges, including their age limits These practical professional requirements were not regulated in the Constitution and were left to be regulated by ordinary law. The discussions in the Constitutional Assembly focused on the length of the term of the judges and on whether the Constitution should set a specific retirement age for judges.[*76] It was, nevertheless, acknowledged that all reforms have to consider the social context.[*77] Finally, it was decided that judges are to be appointed for life. The Constitution further imposed employment restrictions on judges: they cannot hold any additional elected or other positions except in education, belong to a political party, or be a founder or member of the board of a company.

In December 1992, Rait Maruste was elected as Chief Justice of the newly established Supreme Court.[*78] His tasks were twofold – on one hand, he had to dissolve the ESSR judiciary and the ESSR Supreme Court; on the other, he had to build the new judiciary, including the new Supreme Court.

The first justices for the new Supreme Court were elected through an open call, and all the applications were received and analysed by a select committee of Parliament,[*79] which nominated 11 candidates for the Supreme Court.[*80] Then, Parliament heard the candidates and voted on their appointment. As the Chief Justice recalled, one of the aims for the elections was to expand the competencies of the judiciary and escape from old routines and practices by selecting persons with different backgrounds. On 25 February 1993, the parliament decided to appoint 10 of these 11 candidates as Supreme Court justices. The hearing of the candidate who was rejected focused on politically motivated cases he had previously decided upon in the course of his judge's practice. The Supreme Court, consisting of the Chief Justice and 10 other justices, held its first session on 27 May 1993.[*81]

4.4. De-Sovietisation and the oath of judges

During the presentation of the draft Courts Act, the Minister of Justice expressed his concern that while, on one hand, 80% of the judges would complete their term of office in summer 1992 and it was questionable whether they would be ethically and legally suitable for the reformed court system, at the same time it was vital for the system to retain those who had previous work experience in the courts.[*82] International experts recommended a full lustration process for higher civil servants, including the judiciary.[*83] This approach was not welcomed in Estonia. Instead, all elected state officials, along with candidates for such offices, including members of the judiciary,[*84] were required to swear an oath of conscience.[*85] The Constitution Implementation Act (CIA) required that, until 31 December 2000, all candidates for a judicial position must

74 E.g., the Constitutional Assembly on 31.10.1991.

75 Toomas Anepaio. 'Eesti kohtunikud' in *Akadeemiline õigusharidus ja juristide täienduskoolitus*. Tartu: Tartu Ülikool 1996, p. 135.

76 E.g., the Constitutional Assembly, 10.4.1992.

77 The Constitutional Assembly on 11.10.1991 and 8.11.1991.

78 Riigikogu, 8.12.1992, item 3.

79 The committee included 4 members of Parliament, the Chief Justice, the Minister of Justice, 2 judges, and an attorney at law.

80 'Riigikogu poolt Riigikohtusse kandideerimisavalduste läbivaatamiseks moodustatud komisjoni protokoll', *Eesti Jurist* 1993/3–4, p. 40.

81 *Eesti Jurist* 1993/5–6, p. 65.

82 Ülemnõukogu, 26.9.1991, item 2.

83 Maruste (Note 56), p. 17.

84 The same requirement applied to the members of Parliament and higher civil servants.

85 Maruste (Note 56), p. 17.

take a written oath of conscience in addition to the oath of office.[*86] This was a transitional measure, and 10 years was considered to be a sufficiently long time, after which such persons should not pose an immediate risk to the state.[*87] In essence, they had to affirm that they had not worked for or collaborated with the repressive security services of the USSR or ESSR or participated in the persecution or repression of citizens.

As the Constitution did not automatically end the terms of office of public servants, those who wanted to remain in office after the adoption of the Constitution had to give their oath within 30 days after the first meeting of the newly elected parliament in order to remain in office.[*88] However, in December 1992, the legal commission of Parliament pointed out that almost no written oaths of conscience had been submitted by judges.[*89] This situation was resolved with the new nominations and appointment process, wherein the written oath was one of the documents required for the application. Additionally, judges have an obligation to take an oath of office when taking up the post.[*90] As the term of office of most of the judges ended in 1993 and the positions were filled through a new competition, the lack of oaths in 1992 was not a practical problem for the judiciary.

The SJA did not propose any procedure for assessing the suitability of individual candidates. Neither did it grant the Internal Security Service a right to investigate the candidate for security clearance. It was presumed that the unlimited tenure and social guarantees for judges listed in the SJA – stable pay, security of office, accommodation, and judge's pension – would ensure the sustainability and independence of the court system.[*91] In addition, it was thought that the oath taken by judges provides a sufficient guarantee of their loyalty.[*92]

5. Conclusion

In hindsight, Estonia was successful in transforming an ideological judiciary. From administering 'telephone justice' and following the directions of the Communist Party, the judiciary transformed relatively rapidly into one that adheres to the values of human rights and the rule of law. The relative compactness of the judiciary, together with the lack of resistance from the former judges, was a key to the successful legal transition.[*93]

At the beginning of the transition, the role of the former judiciary and the ESSR Supreme Court was at the centre of the legislative process and reforms. It can even be claimed that they attempted to reform the existing system such that they would remain in power, and the first changes to the Courts Act and the fast pace of the reforms supported this aim. These attempts were not, however, fully successful, as the members of the last Supreme Soviet were more critical of the Soviet judicial elite and their role in the Soviet state. Similarly, although the Constitutional Assembly was critical of the court reforms, they recognised that the reforms of the judiciary had to take into account the realities. Therefore, their work focused on the position of the courts as institutions and on constitutional review. Furthermore, the Constitutional Assembly did not involve the ESSR Supreme Court in the drafting process, rather, it considered the opinions of the academic experts. Even though they recognised the problems related to appointing judges for life, they saw it as a necessary guarantee for the separation of powers.

The creation of the Supreme Court and the appointment of judges in 1993 both created an opportunity for the former judicial elite to apply and opened the doors for new applicants. While citizenship and language requirements limited the application process to some extent, the actual filter was the judicial committee of the Supreme Court and the President. In parallel with the appointment of the judges, the focus was still on the full functioning of the three-tier court system and the development of the necessary procedural legislation.

The transition of the Estonian judiciary did not bring significant disruption or setbacks to the system. While the creation of the new court levels and the election of all judges did present practical difficulties nevertheless, the process itself was straightforward.

86 The Constitution of the Republic of Estonia Implementation Act [*Eesti Vabariigi põhiseaduse rakendamise seadus*], RT 1992, 26, 350, §7.

87 Constitutional Assembly, 28.2.1992.

88 CIA, §7.

89 Riigikogu, 9.12.1992, item 2.

90 SJA, §8.

91 Ülemnõukogu, 26.9.1991, item 2.

92 Maruste (Note 56), p. 17.

93 See also Maruste (Note 56).

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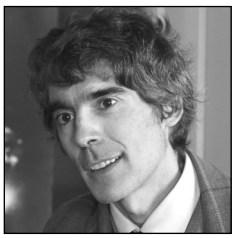

Jesús Manuel Villegas Fernández
Senior Judge

Victoria Rodríguez-Blanco
Assistant Professor
University Miguel Hernández

The Independence of the Judiciary: Meaning and Threats

1. The traditional concept of judicial independence

Defining 'judicial independence' is not an easy task. At the level of theory, formal obstacles exist that arise from the ideological preconception we choose to proceed from; on the practical level, we are confronted with polymorphous materials from the numerous legal experiences accumulated for each domestic law. Likewise, we are not dealing with a monolithic idea, since it is reasonable – and almost mandatory – to delve into multiple layers of semantics that mesh together in unexpected complexity. Whatever obstacles may exist, there is no way to circumvent these dilemmas either, given that judicial independence has been categorised as a key component of democracy and rule of law.

This conceptual background seems to point to a reasonable starting point, however, rooted in its wide and general scope. That is the 'Basic Principles on the Independence of the Judiciary' framework adopted in 1985 by the United Nations.[*1] It specifies the following underpinnings:

> The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.

As simple as this may appear, it enshrines *in nuce* the issues elaborated upon as the nucleus for the reasoning developed below, especially the opposition between 'facts' and 'law', alongside the contrast that sets 'proper' and 'improper' in mutual opposition. Taking into account that the UN approach shapes 'impartiality' into a precondition for 'independence', we need a further explanation: Independence applies to the judicial body, to the court of justice itself, whereas impartiality is connected with the person – *id est*, the individual judge entitled to settle the dispute between parties, who is supposed to decide without favouritism. An additional distinction involves 'neutrality', which has to do with the interests affecting a singular legal case[*2]. As we can already see, it is essential to clarify the meaning of the proper/improper binary, since

1 United Nations Human Rights Office, High Commissioner. 'Basic principles on the independence of the judiciary' (1985), adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, held in Milan from 26 August to 6 September 1985 and endorsed via General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985. Available at https://www.ohchr.org/en/professionalinterest/pages/independencejudiciary.aspx (most recently accessed on 1.3.2022).

2 Nicoló Zanon & Francesca Biondi. *Il Sistema Costituzionale della Magistratura*. Bologna, Italy: Zanichelli 2014, pp. 89–92.

the judicature is not isolated from society but confronted with a myriad of influences, interests, and interactions that, for some opinions, are to be not erased but metabolised in the pursuit of justice.

Traditional jurisprudence finds the foundation of independence in the parties' right to a fair trial[*3], as the Recommendation document issued by the Committee of Ministers of the Council of Europe on 17 November 2010 (CM/Rec (2010) 12) articulates:

> The purpose of independence, as laid down in Article 6 of the Convention, is to guarantee every person the fundamental right to have their case decided in a fair trial, on legal grounds only and without any improper influence.

Accordingly, it is not a judge's privilege but a citizen's right. Let us keep this remark in mind as, further on, we examine the issue of some aspects of judicial independence having sometimes been linked to corporatism – that is, to the professional interest of the judicature as a lobby or a self-contained group disconnected from society.

Once this principle is established, the following step leads us to specify the prerequisites for judicial independence: the conditions enabling its free implementation. The above-mentioned UN document offers a series of items related to the structure of the judicature: 'freedom of expression and association', 'qualification, selection and training', 'conditions of service and tenure', and 'professional secrecy and immunity'. The list is not closed (*numerus clausus*) or portrayed as exhaustive; it is open (*numerus apertus*) to other elements, such as 'judicial self-governance'[*4], which, in turn, may be subdivided into several dimensions: 'personal', 'administrative', 'financial', 'educational', 'ethical', 'information', 'digital', and 'regulatory'. As we deepen the concept, we find it growing increasingly complex, to the point that it is not completely clear whether we are speaking about its components or, rather, about the circumstances pertaining to the social milieu where it is supposed to flourish. Moreover, the same notion of 'self-governance' is at the centre of intense theoretical or even philosophical debate involving disagreement on the need for 'Councils of the Judiciary', as autonomous bodies entitled to its preservation. Hence, we must be very careful to avoid a circular approach, while simultaneously taking care to detect the underlying political biases constraining the various particular perspectives to be adopted.

In view of the above considerations, we work with a broad concept of judicial independence here, one that may even be deemed 'fuzzy', notwithstanding the further details to be added to the picture in aims of tackling the practical problems it poses.

2. An alternative view of judicial independence

The above-mentioned recommendation from the Committee of Ministers states that judicial independence is a 'fundamental aspect of the rule of law'. One might expect, accordingly, that both concepts are inextricably intertwined to weave the fabric of a free society. Things are not so easy, however.

Take Sweden as an example. Its government appoints judges, and there is nothing reminiscent of an autonomous Council of the Judiciary, since the judicial administration rests in the hands of the *Domstolsverket*, an organ whose members have equally governmental roots. In the international ranking produced from the Worldwide Governance Indicators dataset, Sweden lags well behind in judicial independence when compared to such countries as Italy and Spain[*5]. Even so, the overall score of the Economist's Democracy Index 2020 accords this kingdom an excellent position, putting it in third place, surpassed by only Norway and Iceland[*6]. Moreover, the perceived independence of courts and judges among Sweden's general public, according to the 2020 EU Justice Scoreboard, reaches an enviable fourth place out of 28 states[*7].

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3 ECHR case 4907/18, *Xero Flor v. Poland*, §121.

4 David Kosař. 'Beyond Judicial Councils: Forms, Rationales and Impact of Judicial Self-Governance in Europe'. *German Law Journal* 2018-19)/7, p 1567–1612, on p.1597. – DOI: https://doi.org/10.1017/s2071832200023178.

5 Carlo Guarnieri & Dianiela Piana. 'Judicial independence and the rule of laws: Exploring the European experience' (2009) a paper prepared for presentation of the Interim Meeting of the IPSA Research Committee on Comparative Judicial Politics (held in Bologna, Italy, on 21–23 June 2010), p 14.

6 Economist Intelligence Unit. *Democracy Index 2020: In Sickness and in Health* (2020) .

7 European Commission 'The 2020 EU Justice Scoreboard' (2020), a communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee, and the Committee

The United States too is worth mentioning. The American judiciary has reached nearly archetypal status. It has been said that it would provoke 'blushing' and 'hilarity' to cast doubts over its judicial independence[*8]. Still, federal judges are nominated by the President through a process wherein political parties 'play a significant role', per scholarly assessment, and only about three per cent of US judges enjoy lifetime tenure[*9].

These two cases are not isolated tokens. Astoundingly, comparison reveals that 'countries with a weak Rule of Law seem more likely to exhibit a higher level of court's [*sic*] institutional independence'[*10]. Should we conclude that independence is harmful for a free society?

Such scholars as Helmke and Rosenbluth defend the thesis that 'it is not obvious why a judiciary cordoned off from political accountability would protect rights and if it did, which minorities and which rights the judiciary would protect'[*11].

Politics and the judiciary, according to some theoretical reasoning, should be 'cordoned on' so as to prevent corporatism from the judges. That was the official reason cited in support of the 1985 legal reform in Spain through which judicial self-government was limited in favour of Parliament[*12]. It was at that time when Spanish judges were deprived of the right to vote for the nomination of the Council of the Judiciary (*Consejo General del Poder Judicial*, 'CGPJ'). Before the passage of the bill in question, 12 of its 20 members were chosen by the judges themselves; from that moment on, in contrast, the entire composition of the council would depend on legislative chambers.

Perhaps the most compelling rationale for connecting judges to politicians is the very nature of the adjudication mechanism. Continental legal history has concocted an ideal image: judges decide exclusively by referring to the law, without any kind of extra-legal contamination. They exist as a symbol of pureness incarnate, in which politics, religion, or ideology in general has nothing to say. It goes without saying that such old-fashioned theory has long been forgotten.

Legal philosopher Alexy explains that the 'application of norms' (*Anwendung der Gesetzregeln*) is not merely a question of 'logical adjudication' (*logische Subsumtion*), because sometimes inconsistencies obtain, such as the legal language suffering from vagueness (or *Vagheit*); conflicts arising between legal standards (*Normenkonflikten*); legal rules often manifesting loopholes; and, more importantly of all, it being possible in some cases to issue a decision that contradicts the wording of the normative text ('die Möglichkeit, in besonderen Fällen auch gegen den Worlaut einer Norm zu entscheiden')[*13].

'Open texture' is the well-known term coined by Herbert Hart to capture such intricacies of norms. He goes so far as to say that 'in any hard case' judges are bound to act as a **conscientious legislator** selecting from among competing principles[*14].

The final twist of the screw may well be Dworkin's remark that, on some occasions, 'it might be the judge's duty to lie and falsely to report what the law is, and that description supposes that the way may not be what it should be'[*15].

Is society to entrust the most cherished rights to gowned liars?

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of the Regions, COM (2020) 306, Luxembourg: Publications Office of the European Union 41. Available at https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52020DC0306&from=EN, most recently accessed on 1.3-2002.

8 Jorge Pérez Alonso. 'La independencia del Poder Judicial en la historia constitucional española'. *Revista electrónica de Historia Constitucional – Electronic Journal of Constitutional History* 2018/19, pp. 47–87, on p. 5. – DOI: https://doi.org/10.17811/hc.v0i19.534.

9 Ben Firschein. 'Judicial independence in the United States'. *Sistemas Judiciales* 2010(2)/4, on pp. 41, 43. Available at https://sistemasjudiciales.org/wp-content/uploads/2018/08/temacentral_bfirschein.pdf, most recently accessed on 1.3.2022.

10 Carlo Guarnieri & Dianiela Piana. 'Judicial independence and the rule of laws: Exploring the European experience' (2009), a paper prepared for presentation of the Interim Meeting of the IPSA Research Committee on Comparative Judicial Politics (held in Bologna on 21–23 June 2010), p 14.

11 Gretchen Helmke, Frances Rosenbluth 'Regimes and the rule of law: Judicial independence in comparative perspective', *Annual Review of Political Science* 2009(12), pp. 345–366. – DOI: https://doi.org/10.1146/annurev.polisci.12.040907.121521.

12 Rosario Serra Cristobal. 'La elección de los miembros del Consejo General del Poder Judicial. Una propuesta de Consejo más integrador e independiente'. *Teoría y Realidad Constitucional*, 2013/31, pp. 299–321, on p. 316. – DOI: https://doi.org/10.5944/trc.31.2013.10310.

13 Robert Alexy. *Theorie der juristichen Argumentation. Die Theorie des rationale Diskurses als theorie des juristichen Begrundung*. Frankfurt am Main: Suhrkamp Verlag 1983 (first published in 1978), p. 18.

14 Herbert Hart. *The Concept of Law*. Oxford University Press 1991 (first published in 1967), pp. 272–275.

15 Ronald Dworkin. *Taking Rights Seriously*. Cambridge, MA: Howard University Press 1978, p. 341.

Let us not take things so far, though. On the contrary, we are simply going to examine an alternative conception of judicial independence: the distinction between political and judicial powers here would be depicted not as a sharp break but as along a continuum where there is no choice but to build bridges between the two social fields. In other words, rather than a Continental system for the judiciary, comprising strong 'separation of powers', one could posit that a more democratically realistic approach resides in a Common Law model, in which the 'checks and balances' formula allows permeable boundaries between socio-political institutions. This is the hypothesis we shall test.

With the first section of this paper, we began with the Continental thesis, inspired by a European *Weltanschaung*; conversely, the discussion in Section II has exposed its antithesis, an approach angled more toward Anglo-Saxon culture. But there is no easy answer. Let us contrast this set of possibilities against real-world experiences.

3. Poland and Spain as cases for testing judicial independence

Judicial independence, *qua* a principle to aspire to, has gained the status of a worldwide tenet. The difficulties arise when one attempts to determine the meaning of such a fuzzy concept. One of the thorniest problems is the 'political accountability' of the judiciary. That is to say, if we admit the political nature of the jurisdiction, it is essential to ascertain what kinds of bonds should link the judicial power to the legislative and the executive, the latter being legitimate branches of democratic government. International texts on sound jurisprudence proscribe 'improper influences' on the judiciary, to preserve judicial independence. So are we allowed to qualify as 'improper' the influence emanating from the representatives of the will of the people? Let us try to clarify this subject by examining some examples.

Poland is a paradigmatic case. In recent years, the conservative majority in its government has deployed an array of legislative instruments to increase the influence of political powers over the judiciary. The Group of States against Corruption in the Council of Europe (GRECO) has pointed out some areas wherein the impact of such implements is especially deep: the National Council of the Judiciary (NCJJ), whose judge-members are directly appointed by Parliament; the disciplinary procedures, open to potential interference by the executive power; and the legal mechanisms by which the presidents and vice-presidents of ordinary courts are elected, also under the shadow of governmental pressure. These are only a few token examples, since the whole process exhibits endemic, far-reaching complexity[*16].

The philosophy offered to justify these 'reforms' flies the flag of 'democratisation' as a means of eradicating the remnants of Communist dictatorship. However, international observers, far from greeting the changes as representing evolution toward a more open society, are appalled by what they consider a weakening of judicial independence[*17] or even the 'fall and capture of the judicial self-government'[*18]. In fact, the ideology behind such approaches has been denounced as the very opposite – reactionary – in the wake of the Visegrád Group's development[*19].

Things have gone so far that in 2017 the European Commission activated the procedure foreseen under Article 7 (1) of the Treaty on European Union (TEU), which could lead to drastic and unprecedented sanctions on Poland as a member state of that union – so much so that it has been characterised as the 'nuclear option'[*20].

16 GRECO. *Fourth Evaluation Round: Corruption Prevention in Respect of Members of Parliament, Judges and Prosecutors*, second Interim Compliance Report, Poland.GrecoRC4 (2019)23, adopted by GRECO at its 84th plenary meeting (held in Strasbourg, France, on 2–6 December 2019), on pp. 9–12. Available at https://rm.coe.int/fourth-evaluation-round-corruption-prevention-in-respect-of-members-of/1680a3efa8, most recently accessed on 1.3.2022.

17 See p. 1 of the chapter on the rule-of-law situation in Poland presented in the European Commission's *2020 Rule of Law Report* (2020), a communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions (Commission staff working document.

18 Anna Śledzińska Simon. 'The fall and rise of judicial self-government in Poland: On judicial reform reversing democratic transition'. *German Law Journal* 2020(19) / 7 (special issue 'Judicial Self-Government in Europe', published on 1.12.2018), pp. 1839–1870, on pp. 1851, 1853. – DOI: https://doi.org/10.1017/s2071832200023257.

19 Juan Fernando López Aguilar. 'De nuevo (y todavía) Polonia: Rule of Law y Art.7 TUE en el Parlamento Europeo y el Tribunal de Justicia'. *Teoría y Realidad Constitucional* 2019/44, p. on 143–144. – DOI: https://doi.org/10.5944/trc.44.2019.25999.

20 Juan Fernando López Aguilar. 'De nuevo (y todavía) Polonia: Rule of Law y Art.7 TUE en el Parlamento Europeo y el Tribunal de Justicia'. *Teoría y Realidad Constitucional* 2019/44, on p. 156. – DOI: https://doi.org/10.5944/trc.44.2019.25999.

We glimpse a similar gloomy picture in Spain. In contrast, however, the ideological forces pushing for control of the judiciary in that country are not moved by right-wing inspiration but share leftist roots, engaged as they are in freeing the CGPJ from 'conservative domination'*[21]. Accordingly, as we have noted above, the council is appointed entirely from legislative chambers, thanks to a proposal by the Socialist Party, incumbent at the time of the 'reform'.

Spain's Council of the Judiciary is, as a Constitutional body, entitled to fill key judicial positions, but its performance in that area has been implemented in such a flawed manner that GRECO has detected signs of 'horse-trading'*[22]. Spanish public opinion incorporated outrage in 2018 when leaking of a mobile-phone text message sent by a Senate member uncovering of a plot to control the Supreme Court 'through the back door' (in what is known as the Cosidó affair)*[23]. Note that the politician was a member of the conservative party: the temptation to subjugate the judiciary exists irrespective of ideological constraints. The situation has deteriorated so greatly since that judicial governance in Spain has been downgraded to, in essence, quota-based apportionment among the major political parties. Moreover, when it comes to designation of the council's president, the latter role has been reduced to mere rubber-stamping of a decision concocted in advance by the main political leaders, who gladly filter to the press the name of the winning candidate as soon as the pact has been concluded*[24]. At present, the CGPJ is in a state of stagnation, unable to renew its membership and just exercising its functions *ad interim*. It is in an impasse referred to as an 'institutional anomaly'*[25].

So far, this section of the paper has only exposed what appears to be empirical evidence of how dangerous an excessively close relationship between the justice system and politics may end up. In this case, democracy seems to be weakened, not strengthened. But are we offering objective realities or mere subjective impressions?

As noted above, the US judiciary is famous for its independence*[26]. And even in this markedly different nation we find phenomena surprisingly reminiscent of those in Spain and Poland. Let us examine why.

Some scholars have identified as key elements of judicial independence lifetime tenure and financial compensation. Remember the statistic mentioned above, however – life service is bestowed on only three per cent of US judges. The rest serve for terms ranging from four to 15 years, and the majority must pass some sort of popular election or political intervention to retain the post. They may be removed through a system of parliamentary impeachment or via recall elections. Obtaining funds for financing the associated election campaign is sometimes necessary for reaching the level of popular support that is necessary for victory in these. On the other side of the balance, disciplinary proceedings and economic conditions usually are in the hands of parliamentary commissions*[27].

Here we have a paradigmatic structure of robust connections between political and judicial powers. The political control is heavier-handed than in Poland or Spain, but the legal architecture of the system

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21 Aida Torres Pérez. 'Judicial self-government and judicial independence: The political capture of the General Council of the Judiciary in Spain'. *German Law Journal* 2018(19) / 7 (special issue 'Judicial Self-Government in Europe', published on 1.12.2018), pp. 1839–1870, on p. 1777. – DOI: https://doi.org/10.1017/s2071832200023233.

22 GRECO. *Fourth Evaluation Round: Corruption Prevention in Respect of Members of Parliament, Judges and Prosecutors*, second Interim Compliance Report, Spain.GrecoRC4 (2019)12, adopted by GRECO at its 83rd plenary meeting (held in Strasbourg on 17–21 June 2019), p. 13. Available at https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52020SC0320&from=EN, most recently accessed on 1.3.2022.

23 See the 2021 report published by the Civic Platform for Judicial Independence in response to the European Commission's 2021 rule-of-law consultation, available at https://plataformaindependenciajudicial.es/2021/03/08/rule-of-law-report-2021/, most recently accessed on 1.3.2022.

24 Rosario Serra Cristobal. 'La elección de los miembros del Consejo General del Poder Judicial. Una propuesta de Consejo más integrador e independiente'. *Teoría y Realidad Constitucional*, 2013/31, pp. 299–321, on pp. 302–304. – DOI: https://doi.org/10.5944/trc.31.2013.10310.

25 See the European Commission's *2020 Rule of Law Report*, specifically p. 2 of the chapter on the national rule-of-law situation of Spain (a Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, a Commission staff working document available at https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:52020SC0308&from=EN, most recently accessed on 1.3.2022).

26 Gretchen Helmke & Frances Rosenbluth. 'Regimes and the rule of law: Judicial independence in comparative perspective'. *Annual Review of Political Science* 2009(12), pp. 345–366, on p. 351. – DOI: https://doi.org/10.1146/annurev.polisci.12.040907.121521.

27 Mira Gur-Arie et al. *Guidance for Promoting Judicial Independence and Impartiality* (2002). Washington, DC: Office of Democracy and Governance (part of the Bureau for Democracy, Conflict, and Humanitarian Assistance, U.S. Agency for International Development), pp. 133–147. Available at https://pdf.usaid.gov/pdf_docs/Pnacm003.pdf, most recently accessed on 1.3.2022.

finds praise rather than vilification. And this is true irrespective of the fact that complaints about 'political pressure' are recurrently voiced. For instance, the American Judicature Society, an association promoting judicial independence, has reported interference in such sensitive matters as religion in schools, affirmative action, the statute of limitations on crimes, and the death penalty[*28].

At this point, how is one to distinguish between 'proper' and 'improper' influences? In this regard, the difference in theoretical treatment between Continental and Common Law models is thought-provoking. We have spoken of accusations of 'horse-trading' in appointments for key judicial posts in Spain. In the United Kingdom, on the other hand, while bestowing high ranks on judges through corrupt practices such as 'taps on the shoulder' and 'secret soundings' are commonplace[*29], alarm bells are not so audible. The yardstick is not the same, and that is why we should do our best to seek stable ground on which to stand.

4. Perversion of the judicial adjudication process

So far, our analysis has yielded seemingly bizarre conclusions. Judicial independence is believed to be a mandatory precondition for the rule of law. Empirical data, very much to the contrary, appear to draw a different picture, for some countries, where the judiciary is extensively open to political influence, enjoy enviable levels of democratic health while some other countries, equipped with an impressive array of guarantees against political interference, perform much worse in the field of civil liberties.

One tentative explanation consists in distinguishing between *de iure* and *de facto* judicial independence[*30]. The former involves legal architecture, the latter to the facts of real practices in a real society, as opposed to a mere abstraction. Common Law countries benefit from a venerable history of civic education, so they do not really need to set the legal bar so high. After all, everything could boil down to a problem of democratic culture. If we dare take this view, it is understandable why the same legal structures exhibit such disparate results between the United States and some European nations. Presidential powers to select federal judges might be regarded as a manifestation of the will of the people, an advisable way to increase the democratic legitimacy of the judiciary in one setting. In contrast, the channels between Spanish or Polish politicians and 'their' judges lead only to corruption.

If one examines such a stance with a critical eye, though, it appears to be quite naïve. As we have remarked *supra*, 'improper' influences on the judiciary are widespread in American and British lands. Funnily enough, they are not considered a reason to disqualify the system as a whole. Perhaps the reason is purely ideological: Common Law holds a different understanding of what 'proper' and 'improper' may be, since its legal institutions subscribe more to a 'checks and balances' model than to 'separation of powers'. In continental Europe, pressures on judges to bend in favour of the electorate's opinion on matters such as abortion or the death penalty would cause the population to scream to the skies. Poland serves as a good example: those subjects are, in theory, reserved to the legislative power, in such a way that the courts are supposed to stick to the legal norms that Parliament will ultimately enact. Of course, in practice, things are not so easy, but what we are stressing now is the underling ideology of each legal tradition.

Alongside philosophical reflections, there is another reason we should not overlook, a technical factor. Empirical studies of the relations among judicial independence, the rule of law, and democracy follow co-variation methodology; that is, they outline correspondences between numerical variables. Such research is useful for descriptive purposes but lacks causally oriented explanatory power[*31]. It we forget this obvious mathematical caution, we end up misdirected to arbitrary inferences. In other words, one draws a risky conclusion if believing that the quality of Sweden's rule of law is due to the country's governmental interference on its judicial system.

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28 Ben Firschein. 'Judicial independence in the United States' *Sistemas Judiciales* 2010 4, on p.44. Available at https://biblio.dpp.cl/datafiles/14128.pdf, most recently accessed on 1.3.2022.

29 Rosa María Fernández Riveira. 'El modelo británico de nombramientos judiciales: Judicial Independence in Law'. *Teoría y Realidad Constitucional* 2019 44, pp 137–176. – DOI: https://doi.org/10.5944/trc.44.2019.26014.

30 Lars Feld and Stefan Voigt. 'Making Judges Independent: Some Proposals regarding the judiciary' (2004). Cesifo Working Paper 1260 Category 2: Public Choice) p 2. – DOI: https://doi.org/10.2139/ssrn.597721.

31 José Wilmar Pino Montoya. 'Metodología de investigación en la ciencia política: la mirada empírico-analítica' *Revista Fundación Universitaria Luis Amigó (histórico),* 2015, on p. 191. – DOI: https://doi.org/10.21501/23823410.1671.

Another distinction that facilitates tackling the problem is the one between 'formal' and 'material' judicial independence[*32]. Formal independence is connected with the legal functions of the judiciary; material independence, on the other hand, has to do with the actual circumstances surrounding the judicial job.

If judges are afraid of being reprimanded for ideological or political reasons, the judicial adjudication process is endangered. Diffuse but tangible co-action would permeate a system wherein the courts must keep an eye on political financing for re-election or on parliamentary commissions' capability of removing individuals through ideology-laden proceedings, as in the United States. A connection between the judiciary and politics brings the risk of conditioning the judicial decision with extra-legal factors. Remember that the United Nations links judicial independence to an impartial decision 'on the basis of facts and in accordance with the law'. Facts would be distorted were judges to fear for their professional future. And here we have the remedy to dissolve many misunderstandings: judicial independence is not a judge's privilege but a citizen's right. After all, the contending parties in a trial demand justice, not ideology. And justice calls for facts to be taken as they are, in an objective and neutral manner. That is why 'neutrality', with its caution against professional, political, or ideological interests of judges, has been deemed an ingredient to a fair trial[*33].

Hart's 'open texture' must not be mobilised as an alibi for manipulation. And politicisation is a way to manipulation like any other. Popular representativeness is no antidote to improper control of justice. Perhaps ideological influence could be accepted to a certain extent for guiding judges in some contexts who must decide between conflicting legal norms, but it is extremely dangerous in settling of facts, since it leads to institutionalised deception and judicial fabrication, no matter how fond of it Dworkin might be. Also, according to such scholars as Samuel Walker, it poses a risk of harm to minorities, since judges are exposed to biases associated with pressure from public opinion – that is to say, the prejudices of the majority. One may regard this as the paradox of popular justice[*34].

Thus far, we have warned extensively about the dangers of 'politicisation', but the issue of 'corporatism', no less vexing a deviation, should not be discounted either. If judges are isolated from democratic control, how can society be sure they would not put their vast powers in service of their professional, ideological, or personal self-interest? Neutrality is a double-edged sword. The solution is 'accountability' – but 'legal' rather than 'political' accountability. Judges must be held responsible for their misbehaviour, not for resisting ideological pressures from politicians or public opinion. Judges are human, not gods, so they are vulnerable to the same vices as all other mortals. Some of them are greedy for media prominence, an attribute harmful to public perceptions of judicial independence[*35], while others are 'gowned politicians', in that they yearn to use the courts as a springboard for political promotion, hence the importance of fair and balanced disciplinary proceedings[*36].

In this regard, we have another useful classification of judicial independence: external *versus* internal. The latter has its origin in the pressures emanating from the judiciary itself. Again, the Spanish CGPJ provides an example. This body has been labelled a 'conveyor belt' for passing from politics into the judiciary[*37]. Likewise, some Spanish judicial associations have received opprobrium for being unrepresentative tools of political control discriminating against non-affiliated judges[*38]. In sum, we can identify the likelihood of

32 Arenas García et al, 'Informe sobre la Independencia Judicial en España' (2021), on p. 4. Available via https://www.tolerancia.org/sociedad-bilingue-instituciones-bilingues-en-los-medios-del-16-al-30-de-junio/sociedad-bilingue-instituciones-bilingues-en-los-medios-del-1-al-15-de-junio/sociedad-bilingue-instituciones-bilingues-el-foro-de-profesores-analiza-el-estado-de-la-independencia-judicial-en-espaa/25914/, most recently accessed on 1.3.2022.

33 Arenas García et al. 'Informe sobre la Independencia Judicial en España' (2021), on p 5. Available via https://www.tolerancia.org/sociedad-bilingue-instituciones-bilingues-en-los-medios-del-16-al-30-de-junio/sociedad-bilingue-instituciones-bilingues-en-los-medios-del-1-al-15-de-junio/sociedad-bilingue-instituciones-bilingues-el-foro-de-profesores-analiza-el-estado-de-la-independencia-judicial-en-espaa/25914/, most recently accessed on 1.3.2022.

34 Samuel Walker. *Popular Justice: A History of American Criminal Justice*. Oxford University Press 1998, p. 6.

35 Victoria Rodríguez-Blanco; 'Justicia y política; una relación compleja' *Revista de Sociales y Jurídicas* 2014/10 (supp.) (ISSN-e 1886-6611, 'Ejemplar dedicado a: Realidades sociales desde miradas jurídico-políticas'), on p. 62. Available at https://revistasocialesyjuridicas.files.wordpress.com/2014/07/10-tm-03.pdf, most recently accessed on 1.3.2022.

36 Jesús Manuel Villegas Fernández (co-ord.). *Libro Blanco para la despolitización de la Justicia Española. Propuesta de la Plataforma Cívica por la Independencia Judicial*. Dykinson Editorial 2019, on p 5358 See https://www.dykinson.com/libros/libro-blanco-para-la-despolitizacion-de-la-justicia-espanola/9788413241708/, most recently accessed on 1.3.2022.

37 Jorge Pérez Alonso. 'La independencia del Poder Judicial en la historia constitucional española' *Historia Constitucional,* 2018/19, pp. 47–87 on p. 84. – DOI: https://doi.org/10.17811/hc.v0i19.534.

38 Rosario Serra Cristobal. 'La elección de los miembros del Consejo General del Poder Judicial. Una propuesta de Consejo más integrador e independiente', *Teoría y Realidad Constitucional* 2013/31, pp. 299–321, on p. 302. – DOI: https://doi.org/10.5944/trc.31.2013.10310.

Trojan horses planted to undermine judicial independence from within. Transparency and judicial democracy have been proposed as salves against such legal malaise*[39].

5. Conclusions

What are the corollaries of all these reflections?

First of all, we should take methodological precautions when dealing with judicial independence. Empirical approaches based on correlations of numerical data offer no answer as to the real causes behind the systemic malfunctioning of the judiciary and sometimes even give birth to absurd results. The real question, in contrast, is conceptual. When judicial independence is constructed as too fuzzy a notion, one depending on subjective conceptions such as 'proper' or 'improper', ideology is going to get the last word in its characterisation. In the end, there will be as many definitions as political stances: 'liberal independence', 'conservative independence', and any other wording whatsoever.

'*De iure* judicial independence' is an indispensable prerequisite for 'material judicial independence', since it creates the legal architecture for the latter's factual development. If a strong legal framework is lacking, the judiciary remains at the mercy of social contingencies, adrift on the seas of political, economic, or popular interests. However, again, judicial independence is a citizen's right. Consequently, it must be vigorous enough to resist pressures affecting the adjudication process, especially with regard to the objectivity of facts, which must be preserved from manipulation. And the sources of distortion stem not only from external powers but also from the judiciary itself, chiefly from corporatism. Transparency, internal judicial democracy, and legal accountability are remedies.

Finally, encouraging the influence of popular will on judicial decisions leads to disastrous consequences. As we have seen, it threatens to pervert the logic of judicial adjudication, to the detriment of vulnerable social groups and the whole society.

[39] Jesús Manuel Villegas Fernández (co-ord.). *Libro Blanco para la despolitización de la Justicia Española. Propuesta de la Plataforma Cívica por la Independencia Judicial*. Dykinson Editorial 2019, on p 59–61. Seehttps://www.dykinson.com/libros/libro-blanco-para-la-despolitizacion-de-la-justicia-espanola/9788413241708/ most recently accessed on 1.3.2022.

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Mario Truu

Junior Lecturer of Criminal Law, University of Tartu
Legal Adviser, Criminal Chamber, Supreme Court of Estonia

The European Court of Human Rights and the Principle of Foreseeability (*Lex Certa* and *Stricta*)

How to Determine Whether an Offence Is Clearly Defined in Criminal Law

1. Introduction: The scope of this article

The European Court of Human Rights (referred to also as the ECtHR or the Court below) has applied the principle of foreseeability on many occasions to ascertain whether the accused should have foreseen at the time of the act that the act matches the description of an offence in a criminal-law provision and is therefore punishable.[*1] Thus, a question arises that has been decisive for the outcome of many cases: how to determine whether a given wording for an offence is sufficiently clear to be understandable in its substance. The aim behind the preparation of this article was to ascertain what guidelines the ECtHR has given for the use of the principle of foreseeability and whether it is possible to speak of a standard for the wording for an offence and its interpretation so as to ensure that these are in accordance with that principle. The paper also examines what problems have arisen in connection with this and what questions are yet to be answered. Through analysis of the case law, the article examines, in other words, what could serve as a foundation for determining whether a person should have foreseen the punishability of the act in question. To fulfil the aims for the article, I lay out a comprehensive empirical textual analysis of the relevant case law of the ECtHR.[*2]

1 This is examined in more detail below.

2 The author searched for the judgements by using the search facility of the official ECHR Web site (specifically, https://hudoc.echr.coe.int/eng#{%22documentcollectionsid2%22:[%22GRANDCHAMBER%22,%22CHAMBER%22]}). The filters used are 'Case-law', 'Judgments', 'Article 7(1)', and the word 'foreseeability'; the language selected is English. Most of the judgements examined are those available in English or German; the ones whose full text can only be read in French or Italian, or in any other language(s) apart from English and German, are generally not considered. Some of the results returned are for decisions or judgements in which the ECtHR merely stated that the appeal was admissible. The latter are not used as source material for this paper's discussion, and documents that mention foreseeability but neither deal with it in the context of Article 7 nor are discussed at length by the ECtHR have been excluded. The examination covered, in total, 135 ECtHR judgements or decisions. In most of these cases, the ECtHR denied that a violation of Article 7 (paragraph 1) had occurred.

The contribution begins with an explanation of the significance of the case law of the ECtHR for resolving the matter of how to apply the principle of foreseeability in case wherein there is a question of whether it was foreseeable that commission of a particular act brings liability. The first portion of the discussion demonstrates that employing the principle of foreseeability might be decisive for determining what acts are punishable and, thereby, the outcome of the case. Then the article points to the important role of the ECtHR in applying the principle, including its value for the national legislator and the courts. Finally, I analyse how the ECtHR has applied the principle of foreseeability and whether there could be a standard rooted in the case law for how to specify the language for an offence and interpret it accordingly, a standard that the legislator and national courts could apply in order to follow the principle of foreseeability.

2. The significance of the case law in question

2.1. Why it is important to study the principle's use in this connection

The principle of foreseeability is part of a broader principle, fundamental to criminal law: the legality principle, or *nullum crimen sine lege*[*3], which is enshrined in Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms[*4] (hereinafter 'the ECHR' or 'the Convention'), titled 'No punishment without law'. This principle is also articulated in Article 49 of the Charter of Fundamental Rights of the European Union[*5] and in many national constitutions, being regarded as a core constitutional principle.[*6] The ECHR's Article 7, in paragraph 1, declares that no-one shall be held guilty of any criminal offence on account of any act or omission that did not constitute a criminal offence under national or international law at the time when it was committed. The ECtHR has stated numerous times that this guarantee is an essential element of the rule of law and occupies a prominent place in the Convention's system of protection (no derogation from it is permissible under Article 15, on derogations in time of war or other public emergency), and it should be construed and applied in such a manner as to provide effective safeguards against arbitrary prosecution, conviction, and punishment.[*7] It follows that in a case of infringement of Article 7, a person cannot be held liable by the state for the act in question. This underscores the importance of the application of the principle.

The Court has expressed a view that Article 7 embodies the *nullum crimen* principle, holding that only the law can define a crime, implicit in which is the principle that any offence must be clearly defined in the law.[*8] The Court also stands behind the principle that criminal law must not be extensively construed to the accused's detriment – for instance, by analogy, *in malam partem*.[*9] In light of these views, the Court formulated the principle of foreseeability in criminal law in its decision in *Kokkinakis v. Greece*, stating that

3 Rendered in English as 'no punishable act without law'. This article focuses only on offences (punishable acts) and does not deal with penalties; this is why the text makes reference to *nullum crimen sine lege* rather than *nulla poena sine lege* (the latter meaning 'no punishing without law').

4 'Inimõiguste ja põhivabaduste kaitse konventsioon' ['Convention for the Protection of Human Rights and Fundamental Freedoms']. RT II 1996, 11, 34.

5 Charter of Fundamental Rights of the European Union (2012). *OJ C 326, pp. 391–407*.

6 See, for example, paragraph 23 of Section 1 of the Constitution of the Republic of Estonia. See 'Eesti Vabariigi põhiseadus'. RT I, 15.5.2015, 2, and see also Article 103, paragraph 2 of the Basic Law for the Federal Republic of Germany: 'Grundgesetz'. *Federal Law Gazette* I, p. 2048. Since this paper focuses only on the ECHR and the case law of the ECtHR, the discussion here does not deal with the Charter of Fundamental Rights of the European Union or with the member states' constitutions.

7 See, for example, the decisions on ECHR-related applications 20166/91 and 20190/92, of 22 November 1995, in *S.W. and C.R. v. United Kingdom*, paragraphs 34–35, 32–33; 45771/99, of 21 January 2003, in *Veeber v. Estonia*, para. 30; 55103/00, of 10 February 2004, in *Puhk v. Estonia*, para. 24; 9174/02, of 19 September 2008 (General Chamber, GC), in *Korbely v. Hungary*, para. 69; 12157/05, of 25 June 2009, in *Liivik v. Estonia*, para. 92; 36376/04, of 17 May 2010 (GC), in *Kononov v. Latvia*, para. 185; 54468/09, of 6 March 2012 (final 24 September 2012), in *Huhtamäki v. Finland*, para. 41; 26261/05 and 26377/06, of 14 March 2013 (final 14 June 2013), in *Kasymakhunov and Saybatalov v. Russia*, para. 76; 42750/09, of 21 October 2013 (GC), in *Del Rio Prada v. Spain*, para. 77; 35343/05, of 20 October 2015 (GC), in *Vasiliauskas v. Lithuania*, para. 153; 37462/09, of 4 October 2016 (final 4 January 2017), in *Žaja v. Croatia*, para. 90; 22429/07 and 25195/07, of 3 December 2019 (final 3 March 2020), in *Parmak and Bakir v. Turkey*, para. 57; 51111/07 and 42757/07, of 14 January 2020, in *Khodorkovskiy and Lebedev v. Russia* (No. 2), para. 568; 44612/13 and 45831/13, of 28 May 2020 (final 28 August 2020), in *Georgouleas and Nestoras v. Greece*, para. 55.

8 In the *Kokkinakis v. Greece* decision, on ECHR application 14307/88, of 25 May 1993, para. 52.

9 Ibid.

an offence is clearly defined when a person can know from the wording of the criminal-law provision and, if necessary, via the interpretation of the courts what act or omission renders him liable.[*10] The principle of foreseeability in criminal law is articulated in other terms as the *lex certa*[*11] (*nullum crimen sine lege certa*) and *stricta*[*12] (*nullum crimen sine lege stricta*) principle as part of the *nullum crimen* principle. *Lex certa* requires that a punishable act be defined clearly, and this requirement is met if a person foresees the punishability of the act from the wording for the offence in question or by the interpretation of a court.[*13] The *lex stricta* condition requires criminal law to be precise; more specifically, it implies prohibiting the application of analogy.[*14] This imposes limits on the interpretation of a penal provision for the (national) courts: the court may not interpret such a provision too broadly to the detriment of the individual. The ECtHR has not explicitly used the term 'lex certa' – it speaks instead of *nullum crimen* and foreseeability[*15] – but the Court has relatively recently employed the *lex stricta* notion explicitly, when referring to the prohibition of analogy in criminal law.[*16] By its nature, the principle of foreseeability is a rule with a high degree of abstraction and may be considered difficult to understand in terms of its content and scope. The legislator faces the question of how to describe an offence with sufficient clarity and precision. This is not merely a principle that a legislator must be guided by; it also serves as a basis for the courts' interpretation of the wording for an offence *in casu* to ensure that it is in accordance with the principle.[*17] In the course of the interpretation, a question arises as to whether it is possible to overcome potential vagueness in the definition of an offence if it is unclear (*lex incerta*) and, if so, how. Since the principle's application in the case law of the ECtHR has proved pivotal – as it still is – to ascertaining whether a person can foresee the punishability of his act and therefore can be held liable, examining the application of the principle is of considerable significance.

2.2. Why it is particularly important to examine the relevant ECtHR case law

Firstly, the Court's power to review how the national courts have applied Article 7 of the ECHR is vast. Article 7 speaks of the principle of the legality of criminal law as a human right. The Convention's Article 1 ('Obligation to respect human rights') obliges all parties to it to safeguard this (human) right in the implementation of national criminal law, and Article 13 ('Right to an effective remedy') obliges them to provide an effective remedy in the event of violation of this right. This demonstrates the importance of the *nullum crimen* principle and the need for each state party to honour it in its domestic law.[*18] Per Article 19 ('Establishment of the Court'), adherence to the obligations undertaken under the Convention is to be ensured

10 Ibid. The term 'foreseeability' in criminal law was first mentioned in the *S.W. and C.R. v. United Kingdom* ECHR case (applications 20166/91 and 20190/92), of 22 November 1995, paragraphs 35 and 33 (in actuality, based on case law addressing other Convention articles). It must be specified that the principle of foreseeability was, in fact, created in the context of not Article 7 but Article 10 ('Freedom of expression'). The Court's judgement of 26 April 1979 in *The Sunday Times v. United Kingdom* marks the starting point. In the sense of Article 10, paragraph 2, the exercise of freedom of expression may be restricted only if prescribed by law. In the judgement of *The Sunday Times*, it had been clarified that 'prescribed by law' entails the prerequisite of the law having been formulated with a degree of precision sufficient to enable a person to shape his conduct accordingly: he must be able reasonably to foresee – and, if necessary, then with the appropriate assistance – what the consequences of his conduct might be. See Judgment 6538/74, of 26 April 1979, in *The Sunday Times v. United Kingdom*, para. 49. See also Pieter van Dijk et al. *Theory and Practice of the European Convention on Human Rights*. Intersentia 2018, pp. 656, 658.

11 The word comes from the Latin *certus* or *certo*, which means 'certain or undoubted'. See Jaan Sootak. *Kriminaalpoliitika*. Juura 2015, p. 52.

12 This term is based on the word 'strictus', and it refers to something strict or tight. Ibid.

13 For details on this and also about the *lex certa* principle, see, for example, Winfried Hassemer. *Einführung in die Grundlagen des Strafrechts*. C.H. Beck 1990, pp. 254–255; Gabriel Hallevy. *A Modern Treaties on the Principle of Legality in Criminal Law*. Springer 2010, p. 138. – DOI: https://doi.org/10.1007/978-3-642-13714-3; Mikhel Timmermann. *Legality in Europe: On the Principle Nullum Crimen, Nulla Poena Sine Lege in EU Law and under the ECHR*. Intersentia 2018, p. 27.

14 For example, see Winfried Hassemer (see Note 13), p. 269; Mikhel Timmermann (see Note 13), p. 29.

15 See the materials cited in Note 7.

16 *Pantalon v. Croatia* (application no. 2953/14), ECHR, of 19 November 2020, para. 46.

17 It should be noted that the *lex certa* and *stricta* principles are not the only principles that the courts are guided by when they interpret a criminal-law provision. While the wording for an offence might be sufficiently clear and could be followed in a case, sometimes a person is not held liable for reason of, for example, the *ultima ratio* principle (i.e., the principle that criminal law is the last resort). This might be especially relevant in cases of *bagatelle* offences.

18 David Harris et al. *Law of the European Convention on Human Rights*. Oxford University Press 2014, p. 84.

by the ECtHR, whose decisions on the application and interpretation of the *nullum crimen* principle are, therefore, also crucial for all states that are party to the Convention.[*19] The Court considers its power of review of the application of Article 7 by the national courts wide-ranging because said article requires something with the weight of a legal basis behind any conviction and sentence. To accord it a lesser power of review would, in the Court's opinion, render Article 7 devoid of purpose.[*20] On this basis, the Court sees itself as functioning also to consider whether the act of a person fell within the lines of the definition of the offence for which that person was convicted and, consequently, whether it was foreseeable that the act could constitute such an offence.[*21] Although expressing the view that the Court is not a substitute for domestic instances or charged with addressing alleged errors of fact committed by a national court, the ECtHR nevertheless considers itself to have power to do just that if, for example, the national court's assessment is manifestly arbitrary.[*22] It is no exaggeration to say that the Court's intervention in the application, inclusive of interpretation, of domestic criminal law – more precisely, of the provision describing the punishable act – is relatively extensive.

For example, under dispute in the recent case *Pantalon v. Croatia* was whether a spear gun used for diving, which the police had found on a person with other beach equipment and for the possession of which he was fined, was a weapon within the meaning of Croatian law. The ECtHR found a violation of paragraph 1 of Article 7, holding that the conduct of that person, Pantalon, was not punishable in Croatia because (1) that nation's Weapons Act expressly excluded from the definition of a weapon underwater weapons intended for fishing, including spear guns; (2) there was no dispute over the fact that the spear gun was found with beach equipment indicative of fishing; (3) the national courts did not examine the spear gun or photographs of it to determine what propulsion mechanism it used; and (4) the spear gun did not require a weapons permit. With these arguments as a basis, the Court concluded that the national courts interpreted the law in a manner unforeseeable to the person concerned.[*23]

Secondly, although the European Union has not yet acceded to the Convention, the Convention and the case law of the ECtHR nevertheless play a significant role in the interpretation of European Union law undertaken by the Court of Justice of the European Union (hereinafter 'CJEU'). That includes its application of the principle of foreseeability in criminal law as outlined by the ECtHR. In fact, for its views on the application of the principle of foreseeability, the CJEU has taken the case law of the ECtHR as its main foundation.[*24] Therefore, one can conclude that the case law of the ECtHR on the principle of foreseeability in criminal law has contributed to the interpretation and development of European Union law. Thirdly, the Supreme Court of Estonia, in turn, has expressly applied the perspectives on application of the *lex certa* and *stricta* principle expressed by the ECtHR.[*25]

19 Estonia is a contracting party to the Convention, which entered into force in Estonia on 16 April 1996 (see Note 4).

20 See the GC decision in *Kononov v. Latvia* (application 36376/04), ECHR, of 17 May 2010, para. 198 and in *Rohlena v. Czech Republic* (application 59552/08), ECHR, of 27 January 2015, para. 52; the decision in *Pantalon v. Croatia* (application 2953/14), ECHR, of 19 November 2020, paragraphs 48 and 50; the decision in *Georgouleas and Nestoras v. Greece* (applications 44612/13 and 45831/13), ECHR, of 28 May 2020 (final 28 August 2020), para. 59. See also the GC decision in *Korbely v. Hungary* (application 9174/02), ECHR, of 19 September 2008, para. 73; the decision in *Žaja v. Croatia* (application 37462/09), ECHR, of 4 October 2016 (final 4 January 2017), para. 92; the decision in *Parmak and Bakir v. Turkey* (applications 22429/07 and 25195/07), ECHR, of 3 December 2019 (final 3 March 2020), para. 61.

21 *Pantalon v. Croatia* (application 2953/14), ECHR, of 19 November 2020, para. 50.

22 See the decisions in, for example, *Kononov v. Latvia* (application 36376/04), ECHR, GC, of 17 May 2010, para. 189; *Custers, Deveaux and Turk v. Denmark* (applications 11843/03, 11847/03, and 11849/03), ECHR, of 3 May 2007, para. 84; *Huhtamäki v. Finland* (application 54468/09), ECHR, of 6 March 2012 (final 24 September 2012), para. 51; *Georgouleas and Nestoras v. Greece* (applications 44612/13 and 45831/13), ECHR, of 28 May 2020 (final 28 August 2020), para. 58.

23 *Pantalon v. Croatia* (application 2953/14), ECHR, of 19 November 2020, paragraphs 51–52.

24 See, for example, the decision in case C-42/17, *M.A.S. & M.B.*, ECLI:EU:C:2017:936, para. 55; also joined cases C-189/02, C-202/02, C-205/02, C-208/02, and C-213/02, *Dansk Rørindustri and Others v. Commission*, ECLI:EU:C:2005:408, para. 216.

25 See, for example, the decision of the Criminal Chamber of the Supreme Court of 20 November 2015 in case 3-1-1-93-15, pp. 96–97. See also the decision of the same chamber of 9 November 2017 in case 1-16-5792/101, p. 2. The starting point was the decision of the Supreme Court *en banc* of 21 June 2011 in case 3-4-1-16-10, pp. 55–76, in which the Supreme Court expressly adopted the views of the ECtHR about the use of the principle of foreseeability in criminal law.

3. The use of the principle of foreseeability by the Court: Is there a standard?

3.1. The Court's main postulates

As stated above, the ECtHR formulated the principle of foreseeability in criminal law for the first time in the judgement from *Kokkinakis v. Greece*. The Court articulated that, under Article 7's paragraph 1, an offence must be clearly defined in criminal law and that criminal law must not be extensively construed to the accused's detriment by analogy. Then, the Court continued its explanation by stating that '[t]his condition is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him liable'.*[26] The Court also stated that 'the wording of many statutes is not absolutely precise and the need to avoid excessive rigidity and to keep pace with changing circumstances means that many laws are inevitably couched in terms which, to a greater or lesser extent, are vague'.*[27] The same is true of criminal-law provisions, the interpretation and application of which depends on (court) practice.*[28]

These views were further explained with reference to paragraph 1 of Article 7 in the case *S.W. and C.R. v. United Kingdom*. The Court based its reasoning on that in *Kokkinakis v. Greece* and on its case law on other articles of the Convention, and it stated that Article 7, when speaking of 'law', 'alludes to the very same concept as that to which the Convention refers elsewhere when using that term, a concept which comprises written as well as unwritten law and implies qualitative requirements, notably those of foreseeability and accessibility'.*[29] Also, the ECtHR stressed that, however clearly drafted a legal provision may be, any system of law – with criminal law being no exception – possesses an inevitable element of judicial interpretation, because there will always be a need for elucidation of doubtful points and for adaptation to changing circumstances. Therefore, gradual clarification of the rules of criminal liability through judicial interpretation from one case to another is necessary. Still, an essential requirement was articulated whereby the resultant development must in any case be consistent with the essence of the offence and reasonably foreseen.*[30] Such a requirement has long been established in practice and is subject to further discussion below.*[31] It is worth noting in addition that the Court has, in the years since, added a specification that the penumbra of doubt in relation to borderline facts does not in itself make a provision incompatible with Article 7, 'provided that it proves to be sufficiently clear in the large majority of cases'.*[32]

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26 *Kokkinakis v. Greece* (application 14307/88), ECHR, of 25 May 1993, para. 52. See also the references cited in Note 10.

27 Ibid., para. 40. See also *Cantoni v. France* (application 17862/91), ECHR, GC, of 11 November 1996, para. 29; *Larissis and Others v. Greece* (application 140/1996/759/958–960), ECHR, of 24 February 1998, para. 34; *Korbely v. Hungary* (application no. 9174/02), ECHR, GC, of 19 September 2008, para. 70; *Liivik v. Estonia* (application 12157/05), ECHR, of 25 June 2009, para. 95; *Huhtamäki v. Finland* (application 54468/09), ECHR, of 6 March 2012 (final 24 September 2012), para. 45; *Kasymakhunov and Saybatalov v. Russia* (applications 26261/05 and 26377/06), ECHR, of 14 March 2013 (final 14 June 2013), para. 78; *Khodorkovskiy and Lebedev v. Russia* (applications 26261/05 and 26377/06), ECHR, of 25 July 2013 (final 25 October 2013), para. 780; *Ashlarba v. Georgia* (application 45554/08), ECHR, of 15 July 2014, paragraphs 33–34; *Vasiliauskas v. Lithuania* (application 35343/05), ECHR, GC, of 20 October 2015, para. 155; *Parmak and Bakir v. Turkey* (applications 22429/07 and 25195/07), ECHR, of 3 December 2019 (final 3 March 2020), para. 59; *Khodorkovskiy and Lebedev v. Russia* (No. 2) (applications 51111/07 and 42757/07) ECHR, of 14 January 2020, para. 569; *Georgouleas and Nestoras v. Greece* (applications 44612/13 and 45831/13), ECHR, of 28 May 2020 (final 28 August 2020), para. 56.

28 *Kokkinakis v. Greece* (application 14307/88), ECHR, of 25 May 1993, para. 40.

29 *S.W. and C.R. v. United Kingdom* (applications 20166/91 and 20190/92), ECHR, of 22 November 1995, paragraphs 35–36 and 33–34.

30 Ibid., paragraphs 36 and 34.

31 See, for example, *Radio France v. France* (application 53984/00), ECHR, of 30 March 2004, para. 20; *Jorgic v. Germany* (application 74613/01), ECHR, of 12 July 2007, para. 103 *ff.*; *Kasymakhunov and Saybatalov v. Russia* (applications 26261/05 and 26377/06), ECHR, of 14 March 2013 (final 14 June 2013), para. 78; *Khodorkovskiy and Lebedev v. Russia* (applications 26261/05 and 26377/06), ECHR, of 25 July 2013 (final 25 October 2013), para. 780; *Navalnyye v. Russia* (application 101/15), ECHR, of 17 October 2017 (final 5 March 2018), para. 55; *Khodorkovskiy and Lebedev v. Russia* (No. 2) (applications 51111/07 and 42757/07), ECHR, of 14 January 2020, para. 569; *Georgouleas and Nestoras v. Greece* (applications 44612/13 and 45831/13), ECHR, of 28 May 2020 (final 28 August 2020), para. 56.

32 GC decision in *Cantoni v. France* (application 17862/91), ECHR, of 11 November 1996, para. 32. It is noteworthy that the Court has not explained in its practice what it means to 'be sufficiently clear in the large majority of cases'.

Another key facet of the application of the principle of foreseeability in criminal law was pointed out in the case of *Cantoni v. France*. The Court noted (again on the basis of case law dealing with other articles of the Convention) the following[*33]:

> [T]he scope of the notion of foreseeability depends to a considerable degree on the content of the text in issue, the field it is designed to cover and the number and status of those to whom it is addressed. A law may still satisfy the requirement of foreseeability even if the person concerned has to take appropriate legal advice to assess, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. This is particularly true in relation to persons carrying on a professional activity, who are used to having to proceed with a high degree of caution when pursuing their occupation. They can on this account be expected to take special care in assessing the risks that such activity entails.

According to the case law, special care and great caution are needed in such professional fields as banking, taxation, and the sale of medicines.[*34]

Next, we turn to how the ECtHR has applied these postulates, what problems have arisen from its practice in this regard, and what generalisations one may draw from the analysis of the relevant case law.

3.2. Thoughts for the legislator on wording a criminal-law provision for an offence

As the Court's view on the principle of foreseeability clearly indicates, it is the legislator's wording for an offence that is, or should be, of primary importance.[*35] Interpretation by the courts is to be resorted to only if necessary (per the language 'if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him liable'), and the courts may not interpret a wording too broadly. The interpretation must be strictly based on the formulation of the criminal-law provision and be consistent with the essence of the offence.[*36] It can be said that, albeit with some inconsistencies, the case law of the Court makes it possible to establish some sort of standard for how precise and unambiguous the wording of the provision for an offence must be.

Although *in principio* the legislator must ensure that the formulation itself enables a person reasonably to foresee the conduct for which he is to be held liable, the standard set for the degree of abstractness acceptable in the wording of a criminal-law provision is actually quite low. There are examples of the case law recognising the possibility of the legislator formulating an offence in a very abstract and vague manner. The complainant in *Cantoni v. France* was a supermarket-owner held liable for selling medicinal products (for example, vitamin C and antiseptic sprays) unlawfully. Cantoni complained that the notion of a medicinal product in French law was overly vague and that he could not determine what acts would incur liability, but the Court, in its response, pointed out that laws are of general application, adding that using general categorisations (as opposed to exhaustive lists) is one of the most typical legislative techniques and does not in itself result in a violation of Article 7 of the ECHR.[*37] In *Soros v. France*, a question arose as to whether

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33 GC decision in *Cantoni v. France* (application 17862/91), ECHR, of 11 November 1996, para. 35. See also the reference made in this judgement to *Groppera Radio AG and Others v. Switzerland* (application 10890/84), ECHR, of 28 March 1990, para. 68. See, among recent judgements, *Navalnyye v. Russia* (application 101/15), ECHR, of 17 October 2017 (final 5 March 2018), para. 56; *Khodorkovskiy and Lebedev v. Russia* (No. 2) (applications 51111/07 and 42757/07), ECHR, of 14 January 2020, para. 570; *Georgouleas and Nestoras v. Greece* (applications 44612/13 and 45831/13), ECHR, of 28 May 2020 (final 28 August 2020), para. 57.

34 Accordingly, see, for example, *Aras v. Turkey* (application 15065/07), ECHR, of 18 November 2014 (final 18 February 2014), para. 57; *Khodorkovskiy and Lebedev v. Russia* (applications 26261/05 and 26377/06), ECHR, of 25 July 2013 (final 25 October 2013), para. 784; *Isaksson and Others v. Sweden* (application 29688/09), an ECHR decision on the admissibility of an application.

35 From the *Kokkinakis v. Greece* (application 14307/88) ECHR decision, of 25 May 1993). See para. 52. Also see the GC decision in *Cantoni v. France* (application 17862/91), ECHR, of 11 November 1996, para. 35.

36 Ibid. Also *S.W. and C.R. v. United Kingdom* (applications 20166/91 and 20190/92), ECHR, of 22 November 1995, paragraphs 36 and 34.

37 *Cantoni v. France* (application 17862/91), ECHR, GC, of 11 November 1996, paragraphs 8, 22, 31–32. Other examples include *Khodorkovskiy and Lebedev v. Russia* (applications 26261/05 and 26377/06), ECHR decision of 25 July 2013 (final 25 October 2013), para. 791, and also *Georgouleas and Nestoras v. Greece* (applications 44612/13 and 45831/13), ECHR, of 28 May 2020 (final 28 August 2020), para. 61.

an understandable definition was employed for insider trading, the offence for which Soros had been convicted. By only a slim majority, the judges deemed the definition clear enough, while the other three (out of seven) judges criticised this stance, saying that the criminal-law provision could have been much more precise and arguing that there is a difference between avoidable and unavoidable inaccuracy (the latter argument gained all the more credence in that the law was amended right after the conviction, and even the relevant authority in France expressed doubt as to whether Soros should be deemed liable).[*38]

The ECtHR seems to be of the opinion that the mere vagueness of a criminal-law provision does not indicate in general that the person could not have reasonably foreseen liability. In the landmark case *Kokkinakis v. Greece*, the notion of proselytism (unlawful conversion of another person), which was punishable under Greek criminal law, came under consideration. Although the Court concluded that the wording for the associated offence was very vague, it nevertheless held that the national courts had explained the notion enough and there was no infringement of Article 7.[*39] It is important to draw attention to the dissenting opinions, though. For example according to one judge, L.-E. Pettiti, the definition of proselytism was so vague as to cover nearly any attempt to persuade another person to change religion, which, in turn, leaves too wide a margin for the courts to decide whether any given act is punishable.[*40] Likewise, Judge S.K. Martens found the notion of proselytism very unclear, stating that this is indicated by the use of the words 'in particular', 'any direct or indirect attempt', and 'to intrude on the religious beliefs'. Since the wording for the offence was so problematic, Martens considered the domestic case law unable to 'cure' such imprecision and apply supplemental guarantees against arbitrariness, which the text of the law in question did not provide.[*41] Despite criticism on such grounds, the Court maintained the views articulated in the *Kokkinakis v. Greece* judgement.[*42]

Moreover, the Court has even implied that if the legislator has formulated a penal provision in a vague and broad manner, the act of doing so might actually express the will of the lawmaker to leave a wide margin of interpretation to the courts.[*43] This manifests itself in the case law with regard to the legislator, in its apparent wish to encompass as many ways of committing the offence as possible, using the expression 'in any way' with regard to the conduct.[*44]

On the other hand, it is obvious that the more precisely the criminal-law provision is formulated, the more likely it is to not violate the principle of foreseeability. For example, in its decision in *Huhtamäki v. Finland*, the Court implied that liability is undoubtedly foreseeable if the criminal-law provision in question does not give rise to any ambiguity or lack of clarity as to its content. The provision itself, from the Finnish Criminal Code, states that 'a person who hides, procures, takes into his or her possession or conveys property obtained from another through, *inter alia*, aggravated debtor's fraud, or otherwise handles such property although he or she knows that the property was thus obtained shall be convicted of a receiving offence'.[*45] This was considered a criminal-law provision with unambiguous foreseeability.[*46]

One could also discuss better ensuring the clarity of a criminal-law provision through the legislator defining the key elements used in the wording for the offence. The Court has considered this decisive in such cases as *Ashlarba v. Georgia*, with the most important reasons for denying the existence of a violation of Article 7 there being that (1) an article in the criminal code clearly outlawed two separate offences related to the institution of a 'thieves' underworld' and (2) a law comprehensively explained to the public

38 *Soros v. France* (application 50425/06), ECHR, of 6 October 2011 (final 8 March 2012), paragraphs 55, 57, 59, and 62. Note also the dissenting opinion of judges M. Villiger, G. Yudkivska, and A. Nussberger.

39 *Kokkinakis v. Greece* (application 14307/88), ECHR, of 25 May 1993, paragraphs 16–20 and 40–41. The following definition of proselytism was given: 'By "proselytism" is meant, in particular, any direct or indirect attempt to intrude on the religious beliefs of a person of a different religious persuasion (eterodoxos), with the aim of undermining those beliefs, either by any kind of inducement or promise of an inducement or moral support or material assistance, or by fraudulent means or by taking advantage of his inexperience, trust, need, low intellect or naivety.'

40 See the dissenting opinion of Judge Pettiti.

41 See the dissenting opinion of Judge Martens, para. 5.

42 See *Larissis and Others v. Greece* (application 140/1996/759/958–960), ECHR, of 24 February 1998, paragraphs 34–35.

43 *Georgouleas and Nestoras v. Greece* (applications 44612/13 and 45831/13), ECHR, of 28 May 2020 (final 28 August 2020), paragraphs 61–62.

44 Ibid., para. 62.

45 *Huhtamäki v. Finland* (application 54468/09), ECHR, of 6 March 2012 (final 24 September 2012), para. 47.

46 Other examples include *G. v. France* (application 15312/89), ECHR, of 27 September 1995, paragraphs 7 and 25 (pertaining to indecent assault with violence or coercion) and *Flinkkilä v. Finland* (application 25576/04), ECHR, of 6 April 2010 (final 6 July 2010), para. 66 (involving invasion of privacy).

the definition of several terms already in colloquial use: 'thieves' underworld', 'being a member of the thieves' underworld', 'settlement of disputes using the authority of a thief in law', 'being a thief in law', and so on.[*47] Likewise, the Court based a finding on the rationale that liability under criminal law for belonging to a terrorist organisation is reasonably foreseen on the basis of a detailed definition of 'terrorist organisation', 'terrorism', and 'terroristic activities' in another legal act.[*48] The ECtHR considers it sufficient if the combination of several provisions makes it possible to answer the question of what act is punishable.[*49] In such a case, the margin for interpretation granted to the national courts in applying a criminal-law provision remains limited and the possibility of the courts interpreting that provision arbitrarily in such a way as to ultimately deviate from the legislature's intention in creating the provision would be considerably reduced. Were a provision to leave the courts with too wide a margin for interpretation, the foreseeability of liability would be highly debatable. In the *Kokkinakis v. Greece* and *Soros v. France* cases, the dissenting judges found that if the penal provision is too vague, it leaves the courts too much leeway to determine the precise limits of the notion of the offence in question.[*50] It would be preferable for the legislator to define key elements of the offence, should the scope for interpretation otherwise be too great. Of course, this must not necessitate rigidity and inflexibility in the wording of a criminal-law provision, but it could be argued that such definition would help preclude possible difficulties of interpretation by the courts and violation of the principle of foreseeability.

For deciding whether a person should have reasonably foreseen from the wording for an offence whether the act was punishable, it is important to take into account the seriousness of the act (how obvious its illegality and the threat of punishment could be considered), the field in which the act was committed, and the status of the person committing it. The Court has indicated that the more flagrant the offence, the lower the standard required (especially in international criminal law – for example, the crime of genocide).[*51] The more specifically delimited the field, the more a person operating in that field should be able to foresee the punishability of the act, irrespective of any vagueness of the criminal law.[*52] The more important the position held by the person (manager, shareholder, etc.), the more detailed that person's knowledge of the regulation of that field is generally required to be.[*53]

Finally, the Court seldom considers it decisive that the specific person himself be able to reasonably foresees the punishability of an act on the basis of his knowledge. Rather, the Court's understanding as expressed in many decisions is that it must be foreseeable with legal assistance.[*54] The Court's case law therefore seems to suggest that criminal law is written primarily for the understanding of the lawyer, who must be able to understand the conduct for which liability may arise. If even the lawyer has difficulty in determining the scope of the offence, there is a relatively strong argument in favour of the conclusion that foreseeability is lacking. However, this is not always true: sometimes the ECtHR has articulated arguments that the punishability of an act is common knowledge and already obvious through common sense (as in the case of belonging to the 'thieves' underworld' or falsifying a private company document).[*55] The value

47 *Ashlarba v. Georgia* (application 45554/08), ECHR, of 15 July 2014, paragraphs 38–39.

48 *Kasymakhunov and Saybatalov v. Russia* (applications 26261/05 and 26377/06), ECHR, of 14 March 2013 (final 14 June 2013), para. 82.

49 Ibid., para. 88. See also *Parmak and Bakir v. Turkey* (applications 22429/07 and 25195/07), ECHR, of 3 December 2019 (final 3 March 2020), paragraphs 63 and 65.

50 See the references in notes 38 and 41.

51 See, for example, the decisions in *Jorgic v. Germany* (application 74613/01), ECHR, of 12 July 2007, paragraphs 113 and 116; *Ashlarba v. Georgia* (application 45554/08), ECHR, of 15 July 2014, paragraphs 37 and 40; *Berardi and Mularoni v. San Marino* (applications 24705/16 and 24818/16), ECHR, of 10 January 2019 (final 10 April 2019), paragraphs 53–54.

52 For example, see *Cantoni v. France* (application 17862/91), ECHR, GC, of 11 November 1996, paragraphs 31–32; *Khodorkovskiy and Lebedev v. Russia* (applications 11082/06 and 13772/05), ECHR, of 25 July 2013 (final 25 October 2013), para. 784; *Aras v. Turkey* (application 15065/07), ECHR, of 18 November 2014 (final 18 February 2015), para. 57.

53 See *Khodorkovskiy and Lebedev v. Russia* (applications 11082/06 and 13772/05), ECHR, of 25 July 2013 (final 25 October 2013), para. 810.

54 See, for example, the decisions in *Achour v. France* (application 67335/01), ECHR, GC, of 29 March 2006, para. 54; *Jorgic v. Germany* (application 74613/01), ECHR, of 12 July 2007, para. 113; *Kasymakhunov and Saybatalov v. Russia* (applications 26261/05 and 26377/06), ECHR, of 14 March 2013 (final 14 June 2013), paragraphs 78 and 82; *Ashlarba v. Georgia* (application 45554/08), ECHR, of 15 July 2014, para. 40.

55 See *Ashlarba v. Georgia* (application 45554/08), ECHR, of 15 July 2014, para. 40; *Martirosyan v. Armenia* (application 23341/06), ECHR, of 5 February 2013 (final 5 May 2013), paragraphs 59–63. See also *Moiseyev v. Russia* (application 62936/00), ECHR, of 9 October 2008 (final 6 April 2009), para. 241; *Berardi and Mularoni v. San Marino* (applications 24705/16 and 24818/16), ECHR, of 10 January 2019 (final 10 April 2019), para. 54.

of those arguments should be considered questionable, though, because discerning their applicability is difficult and, hence, the arguments can be used to the detriment of the accused. On the other hand, it can probably be argued that reliance on them is confined to cases wherein the punishability of the act appears perfectly obvious.

3.3. Thoughts for the national courts: Guidelines for ascertaining whether the punishability of an act was reasonably foreseeable

On the basis of the Court's case law, the role of the national courts in ensuring the clarity of a criminal-law provision is generally decisive and, accordingly, important for the outcome of the case. The process consists of interpreting the wording for an offence and thereby dispelling any ambiguities.[*56] The case law shows that there are quite a few statements by the Court that the national courts can consult when determining whether liability could have been foreseen.

First of all, one of the most important observations is that the punishability of an act must be assessed from the point of view of the individual at the time of the act.[*57]

Secondly, the ECtHR has set a rule in place that it applies in almost all of the decisions in which it decides on the question of the foreseeability of the punishability of an act: the interpretation by the Court, as well as that of the national courts, must always, without exception, be consistent with the essence of the offence and reasonably foreseen at the time of the act.[*58] By articulating such a highly abstract rule, the Court has not laid down precise criteria for assessment of whether an interpretation is consistent with the nature of the offence and is reasonably foreseeable; instead, the Court has approached this on a case-by-case basis. If trying to find some guidance from the Court, one can state that the ECtHR has considered it necessary in some cases to identify the key elements (central characteristics) of the punishable act (for instance, in the *Parmak and Bakir v. Turkey* case, the Court found the key element of membership of a terrorist organisation to consist of the organisation's use of violence or the will to use violence, and this was decisive for the outcome of the case) and has taken this, in effect, as a foundation for assessing whether the interpretation is consistent with the essence of the offence.[*59] Still, the Court has not specifically laid down any other noteworthy guidelines. This state of affairs was quite rightly criticised by Judge P.P. de Albuquerque in his dissenting opinion in *Ilnseher v. Germany*: it makes application of the principle of foreseeability highly dependent on the particular circumstances of each case, which somewhat obscures the scope of this principle.[*60]

The need for courts' interpretation of some criminal-law provisions is clearly unavoidable.[*61] A requirement for interpretation does not in itself show that the liability was not foreseeable, however.[*62] Every criminal-law provision contains, to a greater or lesser extent, elements the content of which, being not entirely unambiguous or wholly precise, requires interpretation. Criminal law is in a state of constant development, so the institutions can gradually clarify a provision by delimiting it, even reinterpreting it as is necessary,

56 See the decision from *Kokkinakis v. Greece* (application 14307/88), ECHR, of 25 May 1993, para. 52.

57 See, for example, *Streletz, Kessler and Krenz v. Germany* (applications 34044/96, 35532/97, and 44801/98), ECHR, of 22 March 2001, para. 78; *Jorgic v. Germany* (application 74613/01), ECHR, of 12 July 2007, paragraphs 111–113; *Korbely v. Hungary* (application 9174/02), ECHR, GC, of 19 September 2008, paragraphs 90–94; *Huhtamäki v. Finland* (application 54468/09), ECHR, of 6 March 2012 (final 24 September 2012), para. 51; *Žaja v. Croatia* (application 37462/09), ECHR, of 4 October 2016 (final 4 January 2017), paragraphs 102–105; *Parmak and Bakir v. Turkey* (applications 22429/07 and 25195/07), ECHR, of 3 December 2019 (final 3 March 2020), para. 63.

58 See, for example, *S.W. and C.R. v. United Kingdom* (applications 20166/91 and 20190/92), ECHR, of 22 November 1995, paragraphs 36 and 34; *Radio France v. France* (application 53984/00), ECHR, of 30 March 2004, para. 20; *Kasymakhunov and Saybatalov v. Russia* (applications 26261/05 and 26377/06), ECHR, of 14 March 2013 (final 14 June 2013), para. 78; *Georgouleas and Nestoras v. Greece* (applications 44612/13 and 45831/13), ECHR, of 28 May 2020 (final 28 August 2020), para. 56.

59 See *Parmak and Bakir v. Turkey* (applications 22429/07 and 25195/07), ECHR, of 3 December 2019 (final 3 March 2020), para. 68. See also *Korbely v. Hungary* (application 9174/02), ECHR, GC, of 19 September 2008, paragraphs 81–83; *Navalnyye v. Russia* (application 101/15), ECHR, of 17 October 2017 (final 5 March 2018), paragraphs 63–68.

60 See the dissenting opinion of Judge de Albuquerque in *Ilnseher v. Germany* (applications 10211/12 and 27505/14), ECHR, GC, of 4 December 2018, para. 127.

61 *Kokkinakis v. Greece* (application 14307/88), ECHR, of 25 May 1993, para. 40.

62 See, for example, *Cantoni v. France* (application 17862/91), ECHR, GC, of 11 November 1996, para. 32.

while always bearing in mind at the same time the essence of the offence and the foreseeability of the interpretation that is relevant at the time of the act.[*63]

Analysis reveals that the Court has set some limits to the interpretation of an offence. The scope for interpretation depends firstly on the text of the relevant penal provision (the description of the offence) and on the text of any further provisions that assist in interpreting it.[*64] Only this approach can ensure that the interpretation is consistent with the essence of the offence and is reasonably foreseen. A *contra legem* interpretation of a provision (in this sense, a provision that aids in understanding the penal provision) by the national court indicates that the punishability of the act could not have been foreseeable.[*65] Also, liability for an act is not foreseeable if the quality of the law as a whole is poor – that is, in cases wherein the legal order is unclear with regard to the regulation of an area in general (this scenario manifested itself in *Vyerentsov v. Ukraine*: the state could not lay down clear legislation on the rules for holding peaceful demonstrations).[*66] The possibilities for interpreting a provision depend on ascertaining the legislator's intention, which makes it possible, in turn, to ascertain the (basic) nature of the punishable act as set out in the law and the reasonable foreseeability of its punishability.[*67] It could be argued that interpreting a criminal-law provision in a manner contrary to the will of the legislator constitutes an argument against the foreseeability of the act's punishability. The more serious and long-term or persistent the offence, the easier it is to be sure, by means of interpretation, that the person should have reasonably foreseen conviction and punishment for the offence.[*68] In some cases, the Court has stressed the need to specify the purpose of the criminal-law provision before one can ascertain its content (what, more precisely, the provision is intended to protect).[*69] Also, it may be necessary to weigh conflicting legal interests (e.g., in cases of invasion of privacy, freedom of expression *versus* the right to respect for one's private life in relation to the publication of information about another person) when one is assessing the punishability of an act.[*70]

The Court has put emphasis on the narrowness of the field: if the field is specific, the person must exercise extensive care or even, in the event of doubt, abstain. Also important is the status of the person: someone who holds a position of leadership must know the details of the relevant regulation and quite possibly be familiar with possible different interpretations.[*71] In almost all cases, the person concerned may be required to seek legal advice before the act in order to ascertain reliably whether that act is punishable at the time of its commission, both in the case of professionals and in other cases.[*72]

It is evident from the approach of the ECtHR that the Court has developed a test to answer the question related to interpretation of a criminal-law provision.[*73] Before interpretation by the court charged with

63 See the sources mentioned in notes 27 and 30.

64 *Cantoni v. France* (application 17862/91), ECHR, GC, of 11 November 1996, para. 35. See also the decision in *Kasymakhunov and Saybatalov v. Russia* (applications 26261/05 and 26377/06), ECHR, of 14 March 2013 (final 14 June 2013), para. 82; *Khodorkovskiy and Lebedev v. Russia* (applications 26261/05 and 26377/06), ECHR, of 25 July 2013 (final 25 October 2013), para. 780; *Georgouleas and Nestoras v. Greece* (applications 44612/13 and 45831/13), ECHR, of 28 May 2020 (final 28 August 2020), para. 65.

65 *Pantalon v. Croatia* (application 2953/14), ECHR, of 19 November 2020, para. 51.

66 See the *Vyerentsov v. Ukraine* (application 20372/11), ECHR, decision of 11 April 2013 (final 11 July 2013), paragraphs 54–55 and 66–67.

67 See, for example, *Flinkkilä v. Finland* (application 25576/04), ECHR, of 6 April 2010 (final 6 July 2010), para. 67; *Haarde v. Iceland* (application 66847/12), ECHR, of 23 November 2017 (final 23 February 2018), para. 128.

68 *Jorgic v. Germany* (application 74613/01), ECHR, of 12 July 2007, paragraphs 113 and 116; *Ashlarba v. Georgia* (application 45554/08), ECHR, of 15 July 2014, para. 40.

69 For an example involving the notion of commercial fraud (and, more precisely, the element of non-compliance with contractual obligations), see the decision in *Navalnyye v. Russia* (application 101/15), ECHR, of 17 October 2017 (final 5 March 2018), paragraphs 60–68. One pertaining to membership of a terrorist organisation can be found in the decision in *Parmak and Bakir v. Turkey* (applications 22429/07 and 25195/07), ECHR, of 3 December 2019 (final 3 March 2020), paragraphs 72 –73.

70 See, for example, the *Flinkkilä v. Finland* decision (application 25576/04), ECHR, of 6 April 2010 (final 6 July 2010), paragraphs 66–67 (pertaining to invasion of privacy).

71 See, for example, *Cantoni v. France* (application 17862/91), ECHR, GC, of 11 November 1996, paragraphs 31–32; *Khodorkovskiy and Lebedev v. Russia* (applications 26261/05 and 26377/06), ECHR, of 25 July 2013 (final 25 October 2013), paragraphs 784 and 810; *Aras v. Turkey* (application 15065/07), ECHR, of 18 November 2014 (final 18 February 2015), para. 57. See also references 52 and 53.

72 See, specifically, *Cantoni v. France* (application 17862/91), ECHR, GC, of 11 November 1996, para. 35; *Ashlarba v. Georgia* (application 45554/08), ECHR, of 15 July 2014, para. 40.

73 Explicit mention is made in the decision in *Parmak and Bakir v. Turkey* (applications 22429/07 and 25195/07), ECHR, of 3 December 2019 (final 3 March 2020), in para. 62 onward.

resolving the case, it is necessary to ask whether there was already, at the time of the act, any case law addressing interpretation of the punishable act. If such court practice exists and if it can be considered consistent and acceptable, then this is sufficient for stating that liability for the act in question was reasonably foreseeable. In all other cases, however, the court needs to interpret the provision and answer the question of whether considering the conduct at issue in this particular case to be encompassed by the penal provision corresponds to the essence of the offence and was reasonably foreseeable at the time of the conduct. In most cases, the ECtHR has not found a violation of paragraph 1 of Article 7, which indicates that states have a fairly wide margin of discretion to ensure that liability is sufficiently foreseeable. On one hand, the Court recognises relatively broad and vague wording of criminal-law provisions as valid, with leeway for interpretation left to the national courts; on the other hand, the Court requires an interpretation that is consistent with the essence of the offence, which may still remain relatively unclear on the basis of the provision. In principle, the interpretation may even change over time. The interpretation on the basis of which a person is convicted may be stated after the event (and, hence, might not have been foreseeable at the time of the act at all), although in such cases the question of relevance depends on the extent to which the case law has evolved since the act.[*74] If the case law indeed has developed significantly in the time since, the Court finds that infringement of paragraph 1 has taken place (e.g., in cases of persistent tax evasion).[*75] The existence of contradictory interpretations at the time of the act may imply both that the punishability of the act was not foreseeable and simultaneously that the person, when considering the act, had to take account of an interpretation unfavourable for him being applied.[*76] It should be pointed out also on the basis of the case law that the most important role in the interpretation of criminal law lies with the highest national court.[*77] The case law of the first- and second-instance courts does not have the same significance, and such case law may not suffice for speaking of foreseeability.[*78]

Not only the case law but also the opinions of legal scholars or other authorities may be taken into account when one is interpreting a criminal-law provision and settling the issue of its relevance. Even where such opinions exist, the person still must have been aware of them before committing the offence, though legal assistance may justifiably be considered incumbent on a person in his situation. That said, the Court has explicitly regarded case law as more important than the opinions of legal experts.[*79] Consistent national case law on the punishability of the act in question or a similar act indicates that the act is punishable, irrespective of whether the interpretation of the law offered by legal scholars (and, hence, obviously, by some other authorities) is consistent with the interpretation of the courts. On the other hand, when the court undertakes the first interpretation of the wording for the given offence (as relevant for the case) and relies on conflicting opinions among legal scholars, this might indicate that the punishability of the act could not have been reasonably foreseeable at the time of the act.[*80]

Finally, the Court seems to have had recourse to a wide variety of source types in its efforts to ascertain the possible interpretations of the relevant criminal law at the time of the act.[*81] Where interpretations have differed, it has expressed relative uncertainty as to the punishability of the act (unless there was consistent case law). In sum, where the court relies on a relevant source for its interpretation, that source can be said to be relevant, as a rule, only in that such a source existed at the time of the offence and (if such a person could have not reached the same conclusion by some other means) was in principle available to the accused. It can be concluded that the interpretation by the national courts should be aligned, firstly, with domestic case law, then (if necessary) other sources (such as opinions of legal scholars). In general, it should be con-

74 *S.W. v. United Kingdom* (application 20166/91), ECHR, of 22 November 1995, para. 43; *Radio France v. France* (application 53984/00), ECHR, of 30 March 2004, para. 20.

75 *Veeber v. Estonia* (application 45771/99), ECHR, of 21 January 2003, para. 36; *Puhk v. Estonia* (application 55103/00), ECHR, of 10 February 2004, para. 32.

76 See, for example, *Jorgic v. Germany* (application 74613/01), ECHR, of 12 July 2007, paragraphs 111–112.

77 For example, see *Cantoni v. France* (application 17862/91), ECHR, GC, of 11 November 1996, paragraphs 7 and 25; *Baskaya and Okçuoglu v. Turkey* (applications 23536/94 and 24408/94), ECHR, of 8 July 1999, para. 39.

78 See, for example, *Cantoni v. France* (application 17862/91), ECHR, GC, of 11 November 1996, para. 34.

79 *Georgouleas and Nestoras v. Greece* (applications 44612/13 and 45831/13), ECHR, of 28 May 2020 (final 28 August 2020), para. 64.

80 *Jorgic v. Germany* (application 74613/01), ECHR, of 12 July 2007, paragraphs 111–112.

81 Ibid. See also the *Streletz, Kessler and Krenz v. Germany* decision (applications 34044/96, 35532/97, and 44801/98), ECHR, of 22 March 2001, para. 78; the GC decision in *Korbely v. Hungary* (application 9174/02), ECHR, of 19 September 2008, para. 79 *ff*.

sidered necessary – and even beyond any question – that the interpretation be based on reliable, verifiable sources only and on views and conclusions that were foreseeable at the time of the act and that do not deviate from the essence of what constitutes an offence. Only then can the principle of foreseeability be said to be respected.

Lastly, it should be pointed out that the accessibility of the criminal-law provision and also of the sources (whether case law or other reliable sources) on which the court bases its interpretation of the wording for the offence is another qualitative requirement, alongside foreseeability and standing in close relationship to it.[*82] Judge de Albuquerque was right in maintaining that accessibility is presumed to be a rule in the case law, with it being subject to debate only where it is in dispute.[*83] The requirement of accessibility means that the criminal law must be published and accessible to the person, as must sources that aid in the interpretation of criminal law. This entails publication in an official location and not merely, for example, media coverage.[*84] The case law of the Court suggests that even if, for example, there is relevant case law of the first or second instance, this on its own is not necessarily sufficient for considering accessibility to exist and, therefore, also for meeting of the criterion of foreseeability of the act's punishability.[*85] It must have been published – the person must have had access to it.

4. Conclusions

The ECtHR's role both in directly applying the principle of foreseeability (i.e., the *lex certa* and *stricta* principle) and in explaining the use of this principle – mainly for the national courts' benefit but also for the national legislator – has been rather significant. In addition, the Court holds considerable power to review whether a state has acted in accordance with the principle and thus complied with the ECHR's Article 7, paragraph 1, in this regard. The importance of applying the principle of foreseeability is accentuated by the fact that whether a person may be held liable for a particular act (i.e., may be convicted and punished for it) may hinge on the use of this principle.

Therefore, I posed the question of whether a standard could be found on the basis of the case law of the ECtHR for the wording for an offence and the corresponding interpretation that the national legislator and courts could adhere to so as to follow the principle of foreseeability.

As the case law indicates, the legislator's articulation for the offence should be accorded primary importance, but the standard as to the degree of abstractness deemed acceptable for the wording of a criminal-law provision is low, and, according to the ECtHR, the legislator can formulate a criminal-law provision in a very abstract manner without violating the *lex certa* principle. Although the Court has stressed the importance of this principle on many occasions, its application in practice appears to have been somewhat less important. The mere vagueness of a criminal-law provision does not generally attest in itself that the person could not have reasonably foreseen the liability. Nevertheless, it can be argued on the basis of the case law that the wording should be rather precise and, moreover, that the legislator should define in law the key elements used in the wording for any offence. Otherwise the courts might have too broad a margin for interpretation, which could lead to potential for interpretation difficulties. This creates the possibility of the interpretation extending beyond the actual wording and, in consequence, the intention of the legislator and therefore violating the principle of foreseeability. The precision of the wording for a particular offence may be affected by the seriousness of the act, the field in which the act may be committed (recall that the more specialist the field, the more a person operating in that field is responsible for foreseeing the punishability of the act, irrespective of the vagueness of the provision), and the status of the person who committed it (again, the more important the position held by the person, the deeper that person's knowledge of the regulation applicable to the field is generally required to be). The punishability of an act may even be considered obvious irrespective of the law's specificity, by virtue of common knowledge or common sense, although this is

82 See, for example, *S.W. and C.R. v. United Kingdom* (applications 20166/91 and 20190/92), ECHR, of 22 November 1995, paragraphs 35 and 34; *Korbely v. Hungary* (application 9174/02), ECHR, GC, of 19 September 2008, paragraphs 74–75.

83 See the dissenting opinion of Judge de Albuquerque in *Ilnseher v. Germany* (applications 10211/12 and 27505/14), ECHR, GC, of 4 December 2018, para. 91.

84 *Kasymakhunov and Saybatalov v. Russia* (applications 26261/05 and 26377/06), ECHR, of 14 March 2013 (final 14 June 2013), paragraphs 88–95.

85 *Kokkinakis v. Greece* (application 14307/88), ECHR, of 25 May 1993, para. 40.

questionable. It seems that the accused need not always know from the wording whether the act is punishable; rather more important is that the person should have known if having sought legal assistance. When a lawyer has difficulty in determining the scope of the offence's articulation, this is a significant argument pointing to lack of foreseeability.

In most cases, the role of the national courts in ensuring that the wording for an offence is in accordance with the principle is decisive. It is very important to stress that the courts have to decide whether the punishability of the act was reasonably foreseeable from the point of view of the individual at the time of the act. When the court is interpreting a criminal-law provision, the outcome always must be consistent with the essence of the offence. The importance of the latter is particularly evident in borderline cases. Although this rule is an abstract one, might be hard to follow, and depends on the particulars of each specific case, the Court has implied that identifying the key elements of the offence and the scope they have may be important for assessment of whether a given act falls within the definition of the offence in question. The courts always have to proceed from the text of the law and cannot deviate from it. The only criteria they may turn to for assistance are the legislator's intention and the purpose of the relevant criminal-law provision (i.e., which legal interest it protects and to what extent). It bears reiterating that if the field of law concerned is specific (for instance, banking or medical law), a high degree of care is required of a person, with another vital factor being the above-mentioned consideration that a person in a leadership position must not only be intimately familiar with the regulation but also be aware of possible alternative interpretations. In almost all situations, a person can be expected to have sought legal assistance before carrying out the act, whether acting in a professional capacity or not.

The punishability of an act is foreseeable if there is relevant case law at the time of the conduct. While interpretations might change later, with some being officially issued after the act, this is not to be considered in isolation; it is important to note how much the case law has developed too. Connected with this is the issue that uncertainty arises with contradicting interpretations: their existence might mean that the punishability of the act was foreseeable, since there was an interpretation not in favour of the person, but it may indicate the opposite by the same token (the person might not have known which interpretation would get used). The most important element is the case law of the highest national court. Consistency in this demonstrates the foreseeability of liability. Other instances' case law is of rather secondary importance. If there is no case law, the courts have to interpret the offence's articulation (if this is possible and the wording is not too vague). For the courts to be able to state that the outcome of the interpretation (produced after the act) is something that the person should have foreseen when committing the act, it is vital that they rely on reliable and verifiable sources (these may include opinions of legal experts, but any other type of reliable source may be just as relevant) that were accessible at the time of the act in question.

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Kadri Härginen

Counsel, SORAINEN Law firm
Doctoral student, University of Tartu

The Duty of Diligence of a Tenderer in EU Public Procurement Law

1. Introduction

It is the obligation of each Member State and therefore each contracting authority to ensure that public procurements follow the principles behind the Treaty on the Functioning of the European Union (TFEU), particularly those of the free movement of goods, freedom of establishment, and the freedom to provide services, while also making sure that the principles derived therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality, and transparency, are followed.[*1] In the context of the EU's public procurement law, those principles are meant to protect the interests of the tenderers from unfair discrimination by the contracting authorities. Therefore, although the EU public procurement directives[*2] regulate many aspects of tenderers' rights, these regulations pertain primarily to the duties of said authorities.

The duty of diligence on the part of the contracting authority is for the most part not regulated in EU public procurement law. Nevertheless, the Court of Justice of the European Union ('CJEU' or 'the Court') has in several of its judgments held the contracting authority responsible for breaches of such a duty. The aim of the duty of diligence seems to be the creation of a universal set of obligations or a behavioural minimum that each procurement authority is expected to follow in specific cases, where the risk of the breach of equal treatment and transparency principles is the highest. In particular, the duty of diligence addresses certain behavioural demands that contracting authorities must meet to ensure that procurements are opened up to competition as widely as possible.[*3]

In the same way, many judgments of the CJEU indicate that a certain diligence level is expected from tenderers as well, although such a duty does not directly derive from the EU's public procurement directives. Neither are the consequences of failure to fulfil this duty regulated. Generally, the circumstances of

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1 See Recital 1 of Directive 2014/24/EU.

2 'Directive 2014/23/EU of the European Parliament and of the Council of 26 February 2014 on the award of concession contracts', OJ L 94, 2014; 'Directive 2014/24/EU of the European Parliament and of the Council of 26 February 2014 on public procurement and repealing Directive 2004/18/EC', OJ L 94, 2014; 'Directive 2014/25/EU of the European Parliament and of the Council of 26 February 2014 on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC', OJ L 94, 2014; 'Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC (Text with EEA relevance)', OJ L 216, 2009.

3 K. Härginen. 'Duty of diligence of a contracting authority in the E.U. public procurement law'. *Public Procurement Law Review* 2022(2), pp. 76–88.

the cases wherein the CJEU analyses the tenderer's duty of diligence indicate that being diligent is relevant mostly for the purpose of assessing either the tenderer's right to review or the acceptance of an offer.

However, the duty of diligence of a tenderer entails more considerations than this, such as making sure that there are no mistakes in an offer or that all required fields are fulfilled in the documentation submitted to the contracting authority. Furthermore, I submit that the duty of diligence necessitates the tenderer's honesty in disclosing information such as data about exclusion criteria etc.[*4] For example, in case C-387/19, *RTS infra and Aannemingsbedrijf Norré-Behaegel*, the CJEU stated that in the European Single Procurement Document submitted by the tenderers in public procurements to prove initial conformity with the qualification criteria and the absence of grounds for exclusion, the declarations by the tenderers are based on their honour. Therefore, I do not assume that the cases analysed in this article are the only possible circumstances wherein the tenderer has a duty of diligence.

In relation to the duty of diligence of a tenderer, the national administrative laws do not offer a reference point, as the administrative laws regulate the activities of contracting authorities, as a rule. However, Simovart has referred to the pre-contractual, contractual, and civil-law origins of the duty of diligence of tenderers.[*5] The confusion as to the essence of the tenderer's duty to be diligent in public procurement calls for research into the substance as well as the possible consequences of breaching such a duty. With this article, I address what types of obligations the duty of diligence imposes on a tenderer, which requirements a diligent tenderer cannot reasonably be subjected to, and in which cases obligations may occasionally arise under specific circumstances (such as in light of the tenderer's right to review).

The tenderer's duty of diligence under EU public procurement law has not been analysed in prior work except in passing – e.g., in a brief introduction of the topic by Simovart in 2009.[*6] For this reason, the article relies mainly on the body of CJEU case law that has directly analysed the duty of diligence on the tenderer's part.

2. The diligent tenderer in CJEU case law

The duties of diligence of tenderers and of contracting authorities are fundamentally intertwined. This is obvious, for example, from the *SIAC Construction* case, in which the CJEU explained that the equal-treatment requirement incumbent on tenderers entails the duty to formulate award criteria in the contract documents or contract notice in such a way as to allow all reasonably well-informed and normally diligent tenderers to interpret them in the same way.[*7] The CJEU has reiterated this notion in several cases since then.[*8]

Accordingly, the duty of diligence of a tenderer does not exist outside a public procurement in which the tender participates or wishes to take part. It is established only once a contracting authority has published a contract notice and set the terms and conditions of the procurement. As can be seen from the *T-Systems Magyarország and Others* case[*9], analysed in Subsection 2.4 of this article, the question of the duty of diligence of a tenderer can arise also in circumstances wherein the contracting authority's modifications to the public procurement contract are challenged. A tenderer's duty of diligence follows from a contracting authority's actions, without which the tenderer's duty of diligence has no relevance for the purposes of EU public procurement law.

4 Case C-387/19, *RTS infra and Aannemingsbedrijf Norré-Behaegel*, ECLI:EU:C:2021:13, para. 31.

5 M.A. Simovart. 'The new Remedies Directive: Would a diligent businessman enter into ineffective procurement contract?', a presentation at the 4th Public Procurement PhD conference, 7–8 September 2009 at the University of Nottingham, pp. 8–12. Available at https://www.nottingham.ac.uk/pprg/documentsarchive/phdconference2009/mari-ann-simovart.pdf (most recently accessed on 20 April 2022).

6 Ibid., pages 8–12.

7 Case C-19/00, *SIAC Construction*, ECR I-07725, 2001, ECLI:EU:C:2001:553, paragraphs 40–42.

8 K. Härginen (see Note 3). See, for example, case C-448/01, *EVN and Wienstrom*, ECR I-14527, 2003, paragraphs 56–58; case C-496/99 P, *Commission v. CAS Succhi di Frutta*, ECR I-03801, 2004, para. 111; case C-72/10, *Costa and Cifone*, ECLI:EU:C:2012:80, para. 73; case C-538/13, *eVigilo*, ECLI:EU:C:2015:166, paragraphs 54–57; case C-226/04, *La Cascina and Others*, ECR I-01347, 2006, para. 32; case C-27/15, *Pippo Pizzo*, ECLI:EU:C:2016:404, para. 37; case C-336/14, *Ince*, ECLI:EU:C:2016:72, para. 87; case C-298/15, *Borta* ECLI:EU:C:2017:266, paragraphs 69–77; case C-309/18, *Lavorgna*, ECLI:EU:C:2019:350, para. 18.

9 Case C-263/19, *T-Systems Magyarország and Others*, ECLI:EU:C:2020:373.

The CJEU has occasionally specified that a tenderer involved in public procurement needs to be informed reasonably well, normally or reasonably aware,[*10] or experienced.[*11] Therefore, depending on the circumstances, some characteristics are expected from an economic operator's actions each time it takes part in a tender process. However, there are only a few hints of what such characteristics mean or of what the consequences are when a tenderer is not reasonably well-informed, normally diligent, or reasonably aware. The following analysis examines the CJEU cases in groups, based on the subject matter of the cases, to inform understanding of the situations in which the duty to be diligent commences for the tenderer and what characteristics said duty then entails.

2.1. The tenderer's duty of diligence and its impact on the right to review

2.1.1. CJEU case law on the tenderer's duty of diligence and the right to review

The Remedies Directives[*12] are designed to safeguard economic operators' right to review by establishing deadlines for disputing contracting authorities' decisions. Although EU procurement law does not harmonise specific deadlines for disputing the procurement documents, CJEU case law repeatedly emphasises that, after the date for submission of tenders, the procurement conditions are obligatory for the contracting authority, to ensure equal treatment of all tenderers and transparency of the procurement process[*13]. Therefore, once the tenders have been submitted, the tender conditions are indisputable.

There have been several cases in CJEU case law wherein a tenderer discovered the discriminatory nature of procurement documents in the later phases of a tender procedure, once the deadline for disputing the tender documents under national law had passed. In such cases, as is discussed below, the CJEU has anchored the tenderer's right to dispute the tender conditions in later stages in the tenderer's duty of diligence linked to becoming aware of the irregularity before the time for contesting the procurement conditions had elapsed.

In the *Lämmerzahl* case, the CJEU analysed whether the tenderer had brought the correctness of the use of the procurement procedure into dispute at the right time. Only once the tenderer's offer was rejected by the contracting authority did the tenderer argue that the procurement procedure itself had been unlawful in that the contract notice should have been published EU-wide. The German national courts rejected the associated arguments for the reason of the tenderer having been in a position to identify the breach complained of in its application from the contract notice.[*14] In this reasoning, therefore, the tenderer lost its right to challenge the choice of procedure or the estimate of the contract price and also the right to be heard.[*15] One of the arguments behind the contracting authority's submission that the tenderer's claim did not merit being accepted was that the authority's alleged mistake should have been evident to the tenderer in light of the tenderer's experience.[*16]

In that 2007 decision, the CJEU found that it is contrary to EU public procurement law for the tenderer to lose its right to be heard once the deadline for disputing the procurement documents has passed when the contracting authority has not provided information about the total quantity or scope of the contract.[*17] On one hand, the conclusion that the right to review had not elapsed was based on the mistake of

10 Case C-19/00, *SIAC Construction* (see Note 7), paragraphs 40–42; case C-448/01, *EVN and Wienstrom* (see Note 8), paragraphs 56–58; case C-496/99 P, *Commission v. CAS Succhi di Frutta* (see Note 8), para. 111.

11 Case C-423/07, *Commission v. Spain*, ECLI:EU:C:2010:211, para. 58.

12 'Directive 2007/66/EC of the European Parliament and of the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts (Text with EEA relevance)', OJ L 335, 2007; 'Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts', OJ L 395, 1989; 'Council Directive 92/13/EEC of 25 February 1992 coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors', OJ L 76, 1992.

13 See, for example, case C-336/12, *Manova*, EU:C:2013:647, para. 40; case C-42/13, *Cartiera dell'Adda*, EU:C:2014:2345, paragraphs 42 and 43; case C-27/15, *Pippo Pizzo* (see Note 8), para. 39.

14 Case C-241/06, *Lämmerzahl*, ECLI:EU:C:2007:597, para. 23.

15 Ibid., para. 30.

16 Ibid., para. 24.

17 Ibid., para. 64.

the contracting authority, indicating that the tenderer's right to review was independent of the tenderer's actions. On the other hand, even without explicit reference, the same argument implies that the tenderer, in failing to learn about the irregularity, had not been sufficiently diligent.

Despite the Advocate General's suggestion, the CJEU did not analyse the tenderer's previous experience and, thereby, the fulfilment of the duty of diligence as a premise for *locus standi* to dispute the contracting authority's actions. In the opinion of the Advocate General, the evaluation of whether the tenderer still held the right to be heard should be based on the tenderer's level of diligence. The Advocate General discussed the main criterion for assessing whether the tenderer had lost its right to be heard as being the tenderer's knowledge or awareness of an irregularity. In cases wherein the tenderer is not aware of such an irregularity, the tenderer has not lost its right to review.*[18]

The Advocate General stated that the CJEU already applies an objective standard in respect of the tenderer's ability to interpret award criteria against the yardstick of equality of treatment in public procurement – namely, the ability of a 'reasonably well-informed and normally diligent tenderer'. Therefore, the same standard can be applied in cases wherein the right to review is assessed.*[19] However, the CJEU did not rely on such an interpretation fully, agreeing with the Advocate General that sufficient information was not published by the contracting authority but not explicitly agreeing that the assessment should be based on the level of diligence of the tenderer.

Eight years after the *Lämmerzahl* decision, in 2015, the CJEU similarly analysed the tenderer's right to review, in the *eVigilo* case. The cases are similar in the sense that the tenderer raised the question of the legality of procurement conditions in later stages of the procurement process when the deadline for disputing the procurement conditions had already passed. In a contrast against the *Lämmerzahl* decision, the CJEU in this evaluation of whether the tenderer then has lost its right to review or not, made direct mention of a tenderer's duty of diligence in becoming aware of an irregularity in the tender conditions before the submission of the tenders.

In the *eVigilo* case, the tenderer disputed the legality of the tender procedure as a whole and the evaluation criteria in particular, after the contracting authority had already evaluated the tenders and stated reasons for the exact evaluation results. Arguing that it had learnt that the evaluation criteria were unlawful only when it saw how the contracting authority had applied them, the tenderer claimed that the deadline for disputing the evaluation criteria had not passed.*[20]

The CJEU ruled that the tenderer indeed had a right to dispute the evaluation criteria in the later stages of the procurement procedure, if the tenderer truly was unable to understand the award criteria at issue and should not have been expected to understand them by applying the standard of a reasonably informed tenderer exercising ordinary care. Factors to consider in assessing this are other tenderers' ability to submit tenders and whether the tenderer concerned, before submitting its tender, has requested clarification from the contracting authority.*[21]

2.1.2. Characteristics of the tenderer's duty of diligence in relation to the right to review

The duty of diligence discussed in the *Lämmerzahl* and *eVigilo* cases represents what could be generally expected from a well-informed and normally diligent tenderer in the context of the tenderer's right to review. Paraphrasing the CJEU's conclusions, one can state that a diligent tenderer reviews the tender conditions before the submission of the tender so is able to contest the terms if doing so is needed. A diligent tenderer would therefore normally not need to contest the contracting authority's decisions in later stages in the procurement process. It may be assumed that, so as to do this, a diligent tenderer becomes familiar with and analyses the tender conditions within a reasonable span of time after the publication of the tender notice. Otherwise, the tenderer is unable to recognise whether the procurement documents are clear and proportional or otherwise ascertain the existence of an irregularity.

Additionally, as the Court stated in the *eVigilo* judgment, in the event of ambiguity or confusion, the duty of diligence of a tenderer may entail the obligation to seek clarifications from the contracting authority

18 See the opinion of Advocate General Sharpston in case C-241/06, *Lämmerzahl*, ECLI:EU:C:2007:329, paragraphs 55–56.

19 Ibid., para. 67.

20 Case C-538/13, *eVigilo* (see Note 8), para. 27.

21 Ibid., paragraphs 55–58.

as to the tender conditions before the deadline for submission of tenders has passed. Again, should it not do so, the tenderer may lose the right to review if it relies on the discriminatory nature of the tender conditions when making claims in the later phases of the procurement process.[*22] An exception to the tenderer's duty to request clarifications may exist in cases wherein the need to ask for clarifications was not evident during the preparation of the tender. For example, as seems to have occurred in the *eVigilo* case, the discriminatory nature of an evaluation criterion became evident only after the tenderer learned how the contracting authority had applied it.[*23]

The level of detail that can be expected with regard to the tenderer's duty of diligence in reviewing the tender documents can be disputed. That was not analysed by the CJEU in the above-mentioned cases but is a question that naturally arises from the CJEU's conclusions. It would certainly be unfair to suggest that any tenderer would need to conduct as thorough a review as usually carried out by a court or a supervisory organ to understand whether there is an irregularity in the procurement conditions. In the *Connexxion Taxi Services* case, the CJEU found that the existence of 'unambiguous terms, as is the case with regard to the contract documents at issue in the main proceedings, enables all economic operators which are reasonably well informed exercising ordinary care to be apprised of the requirements of the contracting authority and the conditions of the contract so they may act accordingly'.[*24] This means that being aware of the procurement conditions is normally expected from a diligent tenderer.

At the same time, normal awareness would mean at least spotting obvious mistakes that hinder the tenderer's possibility to submit an offer at all or submit one that the tenderer feels could be successful (when the competition factor is taken into account, of course). Nevertheless, for example, in 2021, the CJEU found in the *Simonsen & Weel* case that 'the contracting authority's failure to comply with its obligation to indicate the extent of a framework agreement is, in such circumstances, sufficiently noticeable for it to be detected by an economic operator who intended to submit a tender and who ought, as a result, to be regarded as being duly informed'.[*25] The contracting authority's mistake neither prevented the tenderers from taking part in the tender process nor kept them from being successful, at least in theory; rather, it involved the legality of the framework agreement and, thereby, the tenderer's right to review to dispute the validity of such a framework agreement. Therefore, it may be argued that in some cases the tenderer's duty of diligence involves also notifying of mistakes in the tender conditions that do not impair the tenderer's ability to submit a tender. Were one, then, to state conclusions as to what minimal normal awareness entails as part of the duty of diligence of a tenderer, it certainly encompasses becoming aware of any conditions in the procurement documents (an irregularity) that preclude submitting a tender or succeeding with it.

Similarly, it is questionable whether the duty of diligence would in such circumstances also entail an obligation to seek legal guidance. Given that the aim for the EU's public procurement regulation is to open the common market[*26] to a broad range of economic operators, the general rule still is that the contracting authority has an obligation to set conditions[*27] that are clear enough as to be understandable without recourse to legal counsel. Therefore, if the nature of the irregularity is beyond the understanding of a normally diligent tenderer, the right to review has not expired. Nevertheless, in assessment of this, as the CJEU pointed out in the *eVigilo* case, the activities of a tenderer subject to the duty of diligence are still to be evaluated. Hence, the scales in evaluating the right to review shift between the nature of the contracting authority's mistake and the tenderer's efforts to eliminate it (by seeking clarification, proposing changes to the tender conditions, or disputing the procurement documents) in due course. In any case, the CJEU has distinctly recognised the tenderer's duty of diligence in the procurement process and that it may have direct bearing on the tenderer's right to review.

However, the question of whether the tenderer requested clarifications at the right moment in the procurement process might not always become a tool whereby the contracting authorities are able to escape

22 See also S. Smith. 'C-538/13 eVigilo: dealing with bias and conflicts of interest, time limits for making a claim and acceptability of allegedly abstract award criteria'. *Public Procurement Law Review* 2015/4, pp. 104–108.

23 Case C-538/13, *eVigilo* (see Note 8), para. 48.

24 Case C-171/15, *Connexxion Taxi Services*, ECLI:EU:C:2016:948, para. 37.

25 Case C-23/20, *Simonsen & Weel*, ECLI:EU:C:2021:490, para. 89.

26 See, for example, H.J. Priess & P. Friton. 'Joint liability of a tenderer and its supporting third party'. *Public Procurement Law Review* 2018/4, pp. 141–151.

27 Case C-42/13, *Cartiera dell'Adda* (see Note 13), para. 44, and the case law referenced therein; case C-27/15, *Pippo Pizzo* (see Note 8), para. 36.

their responsibility for stipulating clear and proportional procurement conditions. For example, if a tender document is flawed but none of the tenderers has asked for any clarification or made the contracting authority aware of the mistakes in the documentation, the contracting authority might still be obliged to cancel the procurement on its own initiative and start again. Although the precise consequences of the tenderer's failure to be diligent still remain somewhat unclear, the consequence that must not follow is the contracting authority being able to conduct an illegal public procurement. Avoidance of such an outcome is safeguarded by the public procurement principles.

A valuable part of the Advocate General's opinion in the *Lämmerzahl* case describes the characteristics of a reasonably well-informed and normally intelligent tenderer. Although the CJEU did not echo the Advocate General's opinion with its decision, the description offered by the Advocate General nevertheless helps to put the tenderer's duty of diligence into a wider context within EU public procurement law, as is evident from the subsequent case law of the CJEU, discussed in the next subsection of the paper. Even when the CJEU did not wish to discuss the characteristics specific to a diligent tenderer in the cases involving the right to review, the subject still arises in connection with grounds for exclusion and the compliance of the tender.

The Advocate General stated that one distinguishing factor for deciding whether a tenderer is diligent is that tenderers can be deemed to be experienced in submitting tenders in their particular field. A well-informed and normally diligent tenderer is to have general knowledge and understanding of key legal considerations affecting the markets in which it operates. The Advocate General argued that in the *Lämmerzahl* case this meant that the tenderer had general knowledge of national and Community tender procedures and of relevant thresholds, including the possibilities for challenging decisions under both procedures and the time limits for raising such challenges.[*28]

2.2. The tenderer's duty to be reasonably aware of the applicable law and national case law

2.2.1. The duty to fulfil conditions arising from the interpretation of the national case law

The *Pippo Pizzo*[*29] and *Lavorgna*[*30] cases addressed the tenderer's awareness of the national law in force and the national case law interpreting it. In these cases, interpretations from case law were applied to the tenderers without the contracting authority explicitly stipulating them in the procurement documents. Accordingly, the question arose of the extent of a tenderer's duty of diligence in being aware of all applicable laws and regulations and of the case law pertaining to these.

If the duty of diligence of a tenderer entails a duty to be aware of such regulations and interpretations, approaching the question from the other side of the equation brings in the issue of the contracting authority's obligation to stipulate all relevant conditions in the procurement documents, including the substance of relevant case law, if needed. On that basis, two categories of tenderer awareness that the duty of diligence on a tenderer's part could encompass are awareness of the applicable law and of the national court practice interpreting that law. This matter is analysed next.

After a little more than a year, 2016's *Pippo Pizzo* case followed the *eVigilo* judgment. Among the main matters disputed in the *Pippo Pizzo* case was whether – and, if so, to what extent – the tenderer needs to be aware of the national legal requirements and the interpretation of them by the administrative courts where these are not specified in the procurement documents but may lead to the tenderer's exclusion.

The obligation the tenderer in this case needed to fulfil was derived from the interpretation of national legal regulation and the case law of national courts pertaining to paying annual fees to the state construction-supervision board as a precondition for submitting an acceptable tender in the procurement process for construction works.[*31] The procurement documents did not refer to such regulations being applied or state that a tenderer shall be excluded in consequence of not meeting their requirements. The Italian courts indicated that, in view of national case law, this was something that the tenderer should have known could

28 Opinion of Advocate General Sharpston in the *Lämmerzahl* case (see Note 18), para. 68.

29 Case C-27/15, *Pippo Pizzo* (see Note 8).

30 Case C-309/18, *Lavorgna* (see Note 8).

31 Case C-27/15, *Pippo Pizzo* (see Note 8), paragraphs 10, 35, and 41.

lead to its exclusion even though there was no hint to that effect in the procurement documents, since the interpretation of the courts relied on the 'mechanism by which mandatory provisions are automatically inserted into administrative measures'.[*32] As I understand it, the case law of the national courts was taken to function as an extension to the procurement documents. Therefore, the procurement conditions, in the context of the obligation to pay the fee and of the contracting authority's obligation to exclude such non-compliant tenderers, were interpreted as a whole, as a single piece of regulation.

The CJEU, in contrast, found that the tenderer should not have been automatically excluded from the procurement because of not having fulfilled an obligation derived from administrative law and the interpretation of the national courts where the contracting authority had not stipulated such a condition in the procurement documents. The CJEU, therefore, rejected the reasoning that a tenderer should independently analyse what the other applicable conditions are that should be fulfilled in order for its tender to be accepted for the procurement. For that reason, the general rule is that all relevant grounds for exclusion need to be outlined in the procurement documents.

Such a conclusion might not, however, be applied to all national regulations relevant for the specific procurement at issue. The CJEU stated in the same *Pippo Pizzo*'s judgment that it runs counter to the principles of equal treatment and transparency for a tenderer to be excluded on grounds not clearly stipulated in the procurement documents or expressly arising from the national law in force.[*33] This implies that in cases wherein the obligation in question follows from the national law in force, the tenderer's duty of diligence still entails a requirement of being aware of all such generally applicable obligations in parallel to the conditions stipulated in the procurement conditions.

The Advocate General submitted that it is illogical for the contracting authorities to be obliged to specify conditions the fulfilment of which is required under generally applicable legislative provisions and of which a reasonably informed tenderer exercising ordinary care cannot be unaware. One example is the set of basic conditions that, in the context of civil and commercial law, affect the legal capacity of individuals and companies, conditions of which no economic operator may be ignorant or require explicit, detailed inclusion in documents relating to a public procurement procedure.[*34]

The Advocate General thus concluded that there is a minimum level of care that reasonably informed tenderers are required to be aware of and exercise: 'The levels of care and information that may be reasonably required of a tenderer constitute the decisive criteria for the purposes of a proper understanding of the intended spirit of Article 2 of Directive 2004/18 and the way the CJEU interprets the principles of equality and transparency in that context.'[*35] The Advocate General, therefore, found that the national court needs to establish whether undertakings bidding for public contracts have sufficient familiarity with the statement of the law and the case law of the national courts to suggest that a reasonably informed tenderer exercising normal care could not have been ignorant of it[*36]. In cases wherein the national courts find that the majority of the tenderers were aware of such an obligation, waiving the requirement to meet that obligation in relation to a particular tenderer would constitute discrimination.[*37] The CJEU did not explicitly employ the line of reasoning of the Advocate General in the *Pippo Pizzo* judgment, but it did rely on a similar conclusion already in the next relevant case, the *Lavorgna* case, only three years later. This is analysed below.

2.2.2. The duty to fulfil conditions arising from the national law

In a contrast against *Pippo Pizzo*, the CJEU found in the *Lavorgna* case[*38], from 2019, that the tenderer had breached its duty of diligence when not including information about labour costs in its financial offer. While the procurement conditions did not specifically require the tenderers to include information related

32 Ibid., para. 41.

33 Ibid., para. 51. The same was stated in non-published decisions from nearly identical cases: C-162/16, *Spinosa Costruzioni Generali and Melfi*, ECLI:EU:C:2016:870, paragraphs 30–32; C-140/16, *Edra Costruzioni and Edilfac*, ECLI:EU:C:2016:868, paragraphs 32–35; C-697/15, *MB*, ECLI:EU:C:2016:867, paragraphs 31–34.

34 See the opinion of Advocate General Campos Sánchez-Bordona in case C-27/15, *Pippo Pizzo*, ECLI:EU:C:2016:48, para. 52.

35 Ibid., para. 53.

36 See also M.A. Simovart's presentation 'The new Remedies Directive: would a diligent businessman enter into ineffective procurement contract?' (see Note 5), pp. 8–12.

37 Opinion of Advocate General Campos Sánchez-Bordona in case C-27/15 (see Note 34), para. 64.

38 Case C-309/18, *Lavorgna* (see Note 8).

to the labour costs, national procurement law did stipulate said general obligation.*[39] In the later stages of the procurement procedure, the contracting authority asked several of the tenderers, including the ultimate winner, to state the labour costs.*[40]

The Italian courts were inclined to favour the approach represented by the *Pippo Pizzo* case, which would allow the winner and other tenderers to submit such information after the tender submission deadline since the contracting authority had not set a requirement for stating the labour costs in its procurement conditions, given that the grounds for rejecting a tender need to be outlined in the procurement conditions.*[41]

This time, however, the CJEU found that, since the obligation to submit a statement of labour costs with the financial offer stemmed from national public procurement law, all reasonably informed tenderers exercising ordinary care were allowed to be in a position to be aware of the relevant rules, among them the obligation to list labour costs in conjunction with the financial offer.*[42] The CJEU, referring to the findings in the *Pippo Pizzo* case, took this opportunity to offer a reminder that the tenderers are not obliged to consider such information at the time of submitting a tender where the tenderer's obligations are derived from national courts' interpretation of the national law.*[43]

Hence, even though the obligation to submit labour costs was not repeated in the procurement conditions, it sufficed that the contracting authority had stipulated that the rules of Italy's national procurement law apply to matters not expressly provided for in the tender notice, documents, and specifications. Therefore, the tenderers were or at least should have been aware of their obligation to submit a statement of the labour costs alongside the tender. That is, if the obligation is stipulated in the law in force rather than being derived from national case law, the data at issue must be submitted by the tenderers on their own initiative.*[44]

It should be kept in mind also that the contracting authority did allow all of the tenderers to submit such data after the tender submission date, applying the equal-treatment principle. Still, the CJEU did not allow the contracting authority to accept the data that were submitted too late. The idea here is that if the obligation to submit such data with the tender stems from the law in force, the contracting authority is not permitted to relieve the tenderers of their duties, even by applying the equal-treatment principle and enabling all the tenderers to correct their alleged mistake equally.*[45] This would have meant that the contracting authority had in practical terms 'changed the law in force' and therefore still breached the equal-treatment principle.*[46]

Generally, the tenderer does not need to search for or request explanations from the contracting authority with regard to any other relevant conditions that may apply if it is clear from the tender conditions what those conditions are. That is, the tenderer does not need to assume that there might be some other conditions it needs to be aware of that are not listed in the procurement conditions. The CJEU case law nevertheless assumes a tenderer to be aware at least of the laws and regulations that the contracting authority has referred to in the tender documents. This was the opinion expressed by the Advocate General in 2016, in the *Pippo Pizzo* case, and a similar position had been adopted also by the CJEU itself already in 2019.

39 Ibid., para. 8.

40 Ibid., para. 12.

41 Ibid., paragraphs 13–16.

42 Ibid., paragraphs 21, 25, and 27.

43 Ibid., para. 20.

44 See also S. Smith. 'Supplementing, clarifying or completing tender documents after submission – permissibility of national rules limiting this opportunity (Lavorgna)'. *Public Procurement Law Review* 2019/5, pp. 195–197.

45 For further discussion, see M.A. Simovart. 'A contracting authority's powers to reject a con-compliant tender, or to opt for correction of mistakes therein: Global Translation Solutions Ltd v European Parliament (T-7/20)'. *Public Procurement Law Review* 2022/2, pp. 33–39.

46 The same is indicated by S. Smith. 'Optional ground for exclusion for grave professional misconduct and the requirements for proportionality, equal treatment and transparency: C-171/15 Connexxion Taxi Services'. *Public Procurement Law Review* 2017/3, pp. 86–90.

2.2.3. The tenderer's awareness of the applicable law and national case law in light of the Pippo Pizzo and Lavorgna rulings

In the context of the tenderer's duty of diligence and the tender exclusion criteria, the *Pippo Pizzo* decision states that the tenderer's duty of diligence is, at least in the context of exclusion criteria, narrow. The tenderer's duty of diligence does not extend to independent activities in searching for applicable obligations not explicitly mentioned by the contracting authority. At the same time, the tenderer's obligation to be aware of the national legal obligation that expressly arises out of the national law in force is not excluded from the duty of diligence, as was evident already in the conclusions from *Pippo Pizzo* and elaborated upon in the *Lavorgna* judgment.

The question that still has no clear answer in the CJEU case law is, whether the contracting authority should make a general reference to the national law for it to apply to the tenderers or not. The logical answer seems to be that where the national law explicitly regulates the tenderer's obligations and, in consequence, the possibility of being excluded, the contracting authority need not stipulate such conditions and it is assumed that the tenderer is aware of such regulations as part of fulfilling the duty of diligence. In cases of such conditions arising from such articulations as administrative acts/regulations, the duty of diligence of a tenderer does not oblige the tenderer to know and honour them. A distinction based on the nature of the regulation (secondary administrative regulation or act etc.) may not be a good means for ascertaining in which cases a duty of diligence obtains, however. Across the Member States, regulations are somewhat different, so discerning the duties of tenderers on the basis of the nature of the legal regulation may be problematic.

In *Pippo Pizzo*, the CJEU drew the line by means of comparison with foreign companies wanting to participate in the tender process. Where 'their level of knowledge of national law and the interpretation thereof and of the practice of the national authorities cannot be compared to that of national tenderers'[*47], in such cases the tenderer does not have to be aware of said regulation. The CJEU delineated the tenderer's duty of diligence not on the basis of the nature of the legal regulation but in terms of what should normally be known to domestic and foreign companies equally.[*48], [*49] It follows that the contracting authority needs to stipulate in the procurement documents the applicability of (or at least a reference to) such regulations that foreign tenderers would otherwise not be aware of. Therefore, the boundaries of the knowledge the tenderer ought to be aware of under the duty of diligence as to the applicability of national law are still ambiguous.

The CJEU did not, however, state that the tenderer must under all circumstances be familiar with the national case law. Nor did it explicitly reject that conclusion. The CJEU stated that a condition influencing the tenderer's acceptability or the acceptability of its tender may not arise from the interpretations of the national case law. Being aware of national case law and the prohibition of the contracting authority directly applying concepts from national case law without including these in the procurement documents are distinct from each other. Therefore, the answer to the question of whether the tenderer's duty of diligence entails an obligation to be aware of the national case law and, if so, the extent of that obligation remains inconclusive.

Because setting clear and proportional conditions is the obligation of the contracting authority, at this point in time and with the directions the CJEU's case law has provided, the answer is that the duty of diligence does not require a tenderer to be aware of national case law as a premise for submitting an acceptable tender. It may not, however, be ruled out that this interpretation could change in the future, as the Advocate General hinted already in 2007 by stating that a diligent tenderer would normally be expected to have 'general knowledge of national and Community tender procedures and relevant thresholds, including the possibilities for challenging decisions under both procedures and the time limits for bringing such challenges'.[*50] Such general knowledge could also entail the relevant court practice. So far, the CJEU has analysed the tenderer's duty to be aware of the national law in force but has not analysed the tenderer's duty to have more extensive knowledge of EU procurement law and also, therefore, of the practice of the CJEU itself.

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47 Case C-309/18, *Lavorgna* (see Note 8), para. 46.

48 For more on this, see T. Kotsonis. 'Case C-324/14 Partner Apelski Dariusz v Zarzad Oczyszczania Miasta: the circumstances in which it is permissible to restrict the ability of bidders to rely on third parties'. *Public Procurement Law Review* 2017/1, pp. 18–24.

49 For further discussion, see A. Sanchez-Graells. 'The emergence of trans-EU collaborative procurement: "living lab" for European public law'. *Public Procurement Law Review* 2020/1, pp. 16–41. – DOI: https://doi.org/10.2139/ssrn.3392228.

50 Case C-241/06, *Lämmerzahl* (see Note 14), para. 68.

Even though in the *Pippo Pizzo* case the CJEU was of the opinion that the contracting authority should have mentioned the conditions from the law in force and the case law of the national courts in the procurement conditions,[*51] it is evident that some level of knowledge of the general legal regulations, EU public procurement regulations among them, may still be expected from tenderers as a part of their duty of diligence.[*52] Whether particular obligations stemming from the law in force should have been known to the tenderer or not must be assessed case-specifically. Therefore, the CJEU's conclusions in the *Pippo Pizzo* case do not indicate that a contracting authority would be obliged to address all regulations in its procurement conditions; rather, it must cover the ones that are relevant and that may influence the tenderer's ability to take part in the tender process.

Another interesting aspect of the *Pippo Pizzo* case is that the CJEU firmly rejected the argument that the tenderer's prior experience in providing services that constitute the subject matter of the tender should be considered and that, hence, the tenderer should already be aware of such obligations. The CJEU stated that a clear breach of the equal-treatment principle and the transparency obligation exists when the tenderer is 'subject to criteria which are not established by the call for tenders and would not be applicable to new operators'[*53] – i.e. when the procurement conditions would be somehow assumed and applied on the basis of past procurement procedures in which the economic operator participated. This emphasises again the importance of the duty of diligence of the contracting authority in establishing clear and proportional procurement conditions and affirms that the consequences of the failure on the contracting authority's part shall not result in excluding the tenderer or rejecting its tender.

2.3. The duty of providing information on the tenderer's own initiative

2.3.1. CJEU case law on the tenderer's duty of diligence and voluntary submission of information

In the *Specializuotas transportas* case, two tenderers, both having the same parent company, submitted a tender in the relevant procurement process. The main question in the dispute was whether the tenderers were obliged to inform the contracting authority of the involvement between them, to rule out possible anti-competitive collusion between affiliated tenderers.[*54, *55] The tender of one of those subsidiary companies was rejected for unsuitability, and that action was not disputed. The other subsidiary company was declared successful, and the tenderer placing second challenged the decision. The main argument being that the two subsidiary companies, because of their alleged mutual involvement, were to be regarded as having submitted alternative tenders, not individual tenders. Since submitting alternative tenders was not allowed, the complainant argued that the contracting authority should have rejected the tenders of both of the subsidiary companies.[*56]

The national courts in Lithuania found that the subsidiary companies should have informed the contracting authority of their involvement, so as to rule out distortion of competition, although there was no such obligation articulated in Lithuanian national procurement law or the procurement conditions.[*57] The CJEU reiterated that it is contrary to EU law for subsidiary companies not to be allowed to submit tenders in the same procurement process. Additionally, in a case wherein no such conditions are set forth among the procurement conditions, the tenderers are not obliged to inform the contracting authority on their own initiative. Therefore, the contracting authority was to consider the tenders of both subsidiary companies compliant with the tender conditions.[*58]

51 Case C-27/15, *Pippo Pizzo* (see Note 8), paragraphs 43, 45, 46 and 51.

52 The same approach is offered on pp. 8–12 of M.A. Simovart's presentation on the new Remedies Directive (see Note 5).

53 Case C-27/15, *Pippo Pizzo* (see Note 8), para. 47.

54 For further details on this, see T. Kotsonis. 'Public procurement law concerns and competition law principles: some further reflections on tender co-ordination by affiliated entities in light of Specializuotas transportas (C-531/16)'. *Public Procurement Law Review* 2019/4, pp. 153–160.

55 See also case C-74/14, *Eturas and Others*, ECLI:EU:C:2016:42, para. 27.

56 Case C-531/16, *Specializuotas transportas*, ECLI:EU:C:2018:324, paragraphs 7–14.

57 Ibid., para. 16.

58 Ibid., paragraphs 23–26.

Three years later, the issue of the tenderer's right and obligation to submit information to the contracting authority was discussed again, in the 2021 *RTS infra* case.[*59] This time, the question stemmed from the tenderer's right to submit documentation about the self-cleaning measures taken and, thereby, prove that the contracting authority should not exclude said tenderer on the basis of previous breaches committed during the performance of a public procurement contract. Although the case pertained largely to the applicability of the EU's classical public procurement directive in the interim while the national legislator had not yet adopted the provisions necessary for enforcing the new directive, the judgment also touched on the contracting authority's and tenderer's duty of diligence. The Court reiterated similar reasoning seen already in the argumentation in the *Pippo Pizzo* and *Specializuotas transportas* cases: in the event that the obligation to submit documents about self-cleaning measures at a certain moment in a public procurement procedure is not directly derived from national law, the conditions connected with submitting such documents need to be outlined in the procurement documents. The Court even explained that, if the obligation to submit these documents so as to avoid exclusion stems from the law, the procurement documents should make reference in the procurement documents to the relevant national law.[*60]

2.3.2. Delimitation of the tenderer's duty of diligence with regard to voluntary submission of information

The CJEU's reasoning in both *Specializuotas transportas* and *RTS infra* was similar to that discussed with regard to the *Pippo Pizzo* case above. In the absence of specific requirements in the procurement documents, a tenderer is not obliged to offer any information to the contracting authority. Therefore, performing assessments of what might possibly interest the contracting authority is not part of the tenderer's duty of diligence. Thus, the tenderer's duty of diligence is restricted in light of what information is specifically required by the contracting authority per the procurement documents.[*61] Considering this alongside the conclusions from the *Lavorgna* judgment, one sees that the duty of diligence includes an obligation to submit information or data to the contracting authority on the tenderer's own initiative if such an obligation or opportunity is provided for by the law in force or explicitly in the procurement documents.

The *RTS infra* case is noteworthy in that the information in question was of a voluntary and not mandatory nature. The contracting authority may exclude a tenderer if a ground for exclusion exists, but that authority may neither oblige the tenderer to take self-cleaning measures nor demand submitting proof to it for ensuring that said tenderer does not get excluded from the competition. This would naturally lead to the conclusion that, in keeping with the tenderer's duty of diligence, the tenderer itself should make sure that the documents at issue are submitted, since otherwise the tenderer might be excluded. As the Advocate General stated in the *RTS infra* case, 'there is nothing to compel an economic operator to participate in a public procurement procedure. If it does, however, it must comply with the rules of that procedure.'.[*62] Accordingly, it is in the direct interest of the tenderer to safeguard remaining in consideration in the competition. Even then, the CJEU confirmed that, while the submission of information or documentation is voluntary for the tenderer, the contracting authority is still obliged to outline in the tender conditions that the tenderer, should it wish to appeal to its self-cleaning measures to avoid exclusion, has an obligation to submit proof.[*63] Hence, the CJEU expressed the same view as in the *Specializuotas transportas* case that the tenderer's duty of diligence with regard to providing information to the contracting authority during the procurement procedure is restricted by way of the information specifically required by the contracting authority per the procurement documents.

The case is even more noteworthy for the CJEU having denied that the tenderer would need to submit information about self-cleaning measures with the tender when the breach that constituted ground for exclusion had taken place in relation to the same contracting authority. The CJEU found that, in such a case, the tenderer 'could reasonably expect, solely on the basis of Article 57(6) of Directive 2014/24, that

59 Case C-387/19, *RTS infra and Aannemingsbedrijf Norré-Behaegel* (see Note 4).

60 Ibid., para. 36.

61 See also S. Smith. 'Disclosure and investigation of links between tenderers: case C-531/16 Specializuotas transportas'. *Public Procurement Law Review* 2018/5, pp. 131–135.

62 Opinion of Advocate General Campos Sánchez-Bordona in *RTS infra* (see Note 4), para. 86.

63 Case C-387/19, *RTS infra* (see Note 4), paragraphs 36 and 37.

they would subsequently be invited by the contracting authority to provide evidence of the corrective measures taken to remedy any optional ground for exclusion which that authority may have identified'.[*64] Consequently, although the tenderer's duty of diligence assumes the tenderer submitting the information listed in the tender conditions at the right time in the procurement procedure, the breach might still not necessarily yield negative outcomes for the tenderer itself as the contracting authority's duty of diligence requires that the tenderer in some circumstances be reminded of its duty and also of the documents accepted in connection with this.

As the circumstances of the *RTS infra* case are somewhat unique, it is debatable whether all the conclusions are transferable to cases wherein the national legislation does specify the exact point at which the tenderer is to submit the self-cleaning documentation. It is rather to be presumed that in cases wherein the national legislation directly obliges the tenderer to submit self-cleaning documents such an obligation would not require repetition in the procurement documents. The *Lavorgna* judgment suggests such a conclusion although the wording of it is not clear-cut.[*65] The nature of the tender conditions is not to dismiss or enforce the law in force, as a contracting authority does not have such legal capacity, but to inform of the possible obligations of the tenderer. Should the law contain provisions that directly oblige tenderers to submit information to the contracting authority, it would be hard to make the argument based on the CJEU's conclusions in *Lavorgna*[*66] and *RTS infra*[*67] that the general law in force is not applicable for the reason of the tender conditions not mentioning this.[*68] In any case, if the tender conditions refer to the national procurement legislation as applicable, the obligation to submit information exists[*69] as the tenderers are duly informed of their obligations and/or they had a possibility to ascertain them.

The *Specializuotas transportas* and *RTS infra* cases, therefore, affirm that the notion of the tenderer's duty of diligence is to be applied and interpreted narrowly since one of its purposes is to respond to the duties of the contracting authority – i.e., to those of the party that is the main subject and enforcer of EU public procurement law. As the foregoing discussion attests, the CJEU has been very conservative in any assignment of direct responsibility to the tenderer in cases of the mistake of the tenderer having followed a mistake by a contracting authority (or the national legislator). Even when the national courts had shown themselves to be more liberal in interpreting the tenderer's duty of diligence, as was evident in the *Specializuotas transportas* case[*70], the CJEU has rejected such expansive interpretations that put emphasis on the tenderer's duty of diligence rather than the contracting authority's own.

This emphasises again that the core purpose of EU public procurement law is to open the common market to all economic operators and that the responsibility for that rests with the contracting authority itself. The tenderer's duty of diligence should always be looked at through this lens first. Therefore, analysis of the tenderer's duty of diligence and any breach of it should always be 'second in line', meaning that the contracting authority's duties and actions should be analysed first. In the event of a mistake being established in the latter, the duty of diligence of the tenderer should not even be considered. This approach is consistent with the methodology of the CJEU in, for example, the *Lämmerzahl*, *Pippo Pizzo*, *eVigilo*, *Specializuotas transportas*, and *RTS infra* cases.

As for the intertwined relationship between the contracting authority's and the tenderer's duty of diligence, it may be suggested that there certainly are cases wherein a heightened duty by one party implies a lower level of required care on the part of the other. For example, as the obligation to set clear tender conditions is a duty of the contracting authority, the tenderer may assume that meeting the criteria set forth in the tender documentation is sufficient. Therefore, the tenderer does not need to search for and analyse any other, related regulations to ensure that its offer will be accepted. There may nevertheless be cases in which the duty of diligence of both the contracting authority and the tenderer are heightened, at the same time. This may occur when there is suspicion of an unreasonably low tender price. In such cases, the contracting authority is obliged to analyse the data surrounding the offered price thoroughly and ask for clarification

64 Ibid., para. 40.

65 Case C-309/18, *Lavorgna* (see Note 8), para. 25.

66 Ibid., paragraph 26.

67 Case C-387/19, *RTS infra* (see Note 4), para. 36.

68 See also S. Smith. 'Grounds for exclusion and evidence of "self-cleaning": RTS infra BVBA and Aannemingsbedrijf Norré-Behaegel (C-387/19)'. *Public Procurement Law Review* 2021/3, pp. 56–60.

69 Case C-309/18, *Lavorgna* (see Note 8), paragraphs 21, 25, and 27; case C-387/19, *RTS infra* (see Note 4), para. 36.

70 Case C-531/16, *Specializuotas transportas* (see Note 56), para. 16.

while the tenderer simultaneously has an obligation to offer such clarification if it wishes to see its offer accepted.

2.4. An economic operator's diligence connected with proposing a change to a procurement contract

A whole new layer has been added to the discussion by the most recent judgment, in the 2020 case *T-Systems Magyarország and Others*.[*71] From Hungary, the Budapest High Court referred a question to the CJEU regarding the possibility of holding a tenderer accountable for breaching the rules on agreeing to modifications in a public procurement contract[*72]. Not only did the CJEU consider it possible to hold a tenderer accountable for the unlawful modifications, but the Court also guided the national court to weigh the proportionality of the punishment to the tenderer in consideration of the tenderer's activities at the time of agreeing with the modifications.[*73] The Court did accept the argument that the subject of the obligation to make sure that any modifications to a public procurement contract are consistent with the applicable EU directives relies on the contracting authority, not on the tenderer.[*74] Nevertheless, the CJEU saw the tenderer as possessing responsibility in agreeing to and also in suggesting such modifications.[*75] The CJEU indicated that the national court is to establish whether the tenderer 'took the initiative to propose the modification of the contract or whether it suggested, or even demanded, that the contracting authority refrains from organising a public procurement procedure to meet the needs necessitating the modification of that contract'.[*76]

That being said, the tenderer's responsibility here does not follow EU-wide from either the public procurement or the remedies directives, though the Member States may foresee a misdemeanour in this regard in their national law. Such a responsibility of the tenderer is not harmonised in EU public procurement law.[*77] Nevertheless, the CJEU's decision points to new questions as to the boundaries of the tenderer's duty of diligence. Although regulations may differ between the Member States, usually the public procurement procedure ends upon concluding the public procurement contract. The contract itself is governed by the national civil law and, for the most part, not public law. Under civil-law regulation, as is the case in Estonia, for example, making declarations of intention in a contractual relationship is normal and legal contractual behaviour. The same is true of proposing modifications to a public procurement contract.

In the CJEU framing, to avoid any undesired responsibility for unlawful modifications to a public procurement contract, a tenderer would be required not to suggest such modifications at all and maybe even not to accept such modifications. Since civil-law regulation thus far has articulated the opposite of such an understanding, this would ultimately bring a turning point in the substance of the tenderer's duty of diligence. As noted above, this would require in the first place that each Member State establish such a misdemeanour in its law in force. Secondly, in my view, more detailed regulation pertaining to proposing and agreeing to modifications in public procurement contracts would need to be adopted as well. Tenderers would also require knowledge in advance of how to behave so as to avoid a fine and possibly, in addition, exclusion from the next 3–5 years' public procurement EU-wide.

The *T-Systems Magyarország and Others* judgment thus illustrates that the tenderer's duty of diligence has an independent meaning in EU public procurement law but one with developing substance and boundaries.

71 Case C-263/19, *T-Systems Magyarország and Others* (see Note 9).

72 Ibid., paragraphs 49, 59–61, 63–64, and 67.

73 Ibid., paragraphs 66 and 70.

74 Ibid., para. 74.

75 Ibid., paragraphs 72–73, 75.

76 Ibid., para. 73.

77 See also A. Brown. 'Further insights into the lawfulness of ex officio reviews by national supervisory authorities concerning modifications to a public contract during its term: T-Systems (C-263/19)'. *Public Procurement Law Review* 2020/5, pp. 194–198.

3. Conclusions

The duty of diligence of a tenderer is independent of the duty of diligence of the contracting authority. Even if the CJEU has described the duty of diligence of a contracting authority by outlining the expected influences on tenderers, it is evident from the cases analysed above that a certain level of care is demanded also from the tenderers. The CJEU case law discussed illustrates how the duty of diligence of the tenderer has slowly (and almost in the shadows) developed from a yardstick by which the diligence level of the contracting authority has been measured into an instrument that has a meaning quite independent of the tenderer's rights.

The CJEU characterises a normally diligent tenderer as an economic operator who is well-informed and reasonably aware. The duty of diligence of a tenderer entails at least the obligation of being aware of the tender conditions and, thereby, the expectation of being aware of its possible irregularity either hindering the tenderer's efforts to submit a tender or ruling out winning. A tenderer is to be aware of the relevant national law in force, although the CJEU's conclusions on the boundaries of said obligation are not clear. A diligent tenderer is not required to be acquainted with the relevant case law *per se*. Seeking clarification may form one part of the duty of diligence of a tenderer, but such a duty heretofore has shown relevance mainly in cases pertaining to the tenderer's right to review. Although the Advocate General of the CJEU has referred to diligent tenderers being experienced, said duty has not been confirmed by the CJEU.

The CJEU has been highly conservative with regard to attributing direct responsibility to the tenderer. Among the purposes of the duty of diligence on a tenderer's part is to respond to the contracting authority's duties, the latter being the main subject and enforcer of EU public procurement law. This is why the analysis of the tenderer's duty of diligence and therefore the existence and nature of any breach by the tenderer should almost always come second. The contracting authority's duties and actions should be analysed first, and if a mistake is identified in that stage, the duty of diligence of the tenderer should not even be subject to consideration. This is one of the fundaments most clearly established in CJEU case law.

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Liva Rudzite

Doctoral student
University of Tartu

Algorithmic Explainability and the Sufficient-Disclosure Requirement under the European Patent Convention

1. Introduction

Artificial intelligence, or AI, and its subfield machine learning (hereinafter 'ML') hold potential to bring vital benefits to society.[*1] Since ML differs from traditional programming in the way in which the program is built, it may entail issues of algorithmic explainability that are absent in traditional programming. Namely, algorithmic explainability represents a constellation of issues connected with difficulty in explaining how the data outcome has been generated from the input data.[*2]

Algorithmic explainability may create tensions with regard to the 'sufficient disclosure' criterion of the European Patent Convention[*3] (hereinafter 'EPC'). Under Article 83 EPC, the invention must be described clearly and completely, such that a person skilled in the art is enabled to realise it.

Although computer programs, if claimed as such, are excluded from patentability under Article 52(2) (c) and 3, the exception does not apply to creations involving software (which could comprise AI that is considered to be 'computer-implemented inventions' under the EPC) that demonstrates a 'further technical effect'. However, any creation nevertheless has to comply not only with the 'invention' requirement but with other criteria as well, including the 'sufficient disclosure' aspect, to be eligible for a patent under the EPC.[*4]

The sufficient-disclosure requirement in patent law was designed before the emergence of AI. Therefore, inventions involving unexplainable algorithms might, for instance, comply with the 'invention' requirement but not the 'sufficient-disclosure' criterion, or they may even fail to fulfil both, and, hence, be denied patentability under the EPC. This might tend to favour trade secret protection and the non-enrichment of general knowledge. Alternatively, these inventions could be rendered public for use by everyone. Neither of these options encourages the development of inventions involving sophisticated ML.

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1 European Commission. 'White Paper on Artificial Intelligence-A European Approach to excellence and trust', COM (2020) 65 final.

2 Ibid., p. 11.

3 See the Convention on the Grant of European Patents, of 1973.

4 European Patent Office. 'Guidelines for Examination', G.II.3.3.6, 2021. Available at https://www.epo.org/law-practice/legal-texts/html/guidelines/e/g_ii_3_6.htm (most recently accessed on 10 June 2022; European Patent Office. 'AI and Patentability', 2022. Available at https://www.epo.org/news-events/in-focus/ict/artificial-intelligence.html (most recently accessed on 10 June 2022).

This paper focuses on addressing challenges that stem particularly from the algorithmic explainability and sufficient disclosure requirement pursuant to the EPC. It presents support for an argument that the recognition of certification could be a preferable approach for achieving balance between an incentive to innovate and patentability when compared to introducing solutions that involve the deposit of the algorithm, the deposit of training data, or both. This recognition could help remedy the algorithmic explainability issue and alleviate the burden of meeting the 'sufficient disclosure' criterion under the EPC.

The argument relies on legal methods – analytical, descriptive, comparative, and historical. Within three sections, with their various subsections, the primary legal sources, secondary ones, and case law are referred to substantiate the claim articulated by the hypothesis of the article.

The scope of the article is restricted to the EPC; therefore, considerations on the issues outlined in the article outside the jurisdiction of EPC exceed the ambit of the paper. Likewise, analysis of those aspects of creations that must exist if the creation is to be considered an 'invention' under the EPC exceeds the scope of the article.

2. Machine learning

ML aims to facilitate self-learning operation of computers by recognising data patterns, constructing interpreting models, and enabling non-programmed predictions without built-in instructions.[*5] In other words, ML focuses on finding the right features to build the right models, namely, programs or algorithms, trained on data sets, that achieve the right tasks. It is in this respect that ML differs from traditional programming; that is, in ML, the program is constituted from the inputs and respective outputs resulting from the statistical correlations between the input data read by the algorithm. In traditional programming, in contrast, the rules are explicitly determined by humans, so the output results from the input data in alignment with previously programmed rules and models.[*6]

Types of ML algorithms range from those with defined functions to models that deploy neural networks and deep learning to achieve abstraction with deeper correlations and associations amongst data.[*7] More sophisticated ML models offer greater accuracy and generalisation, and these are more appropriate for processing data of a heterogeneous nature, such as genetic data. In this regard, ML has a significant role in various scientific fields, among them health care, in which it contributes to image analysis and diagnostics.[*8]

However, the more sophisticated the model is, the less comprehensible, explainable, and explicable it becomes. This is the so-called 'black box' phenomenon.[*9] Not all ML algorithms come across a 'black box' paradigm. The lack of algorithmic explicability may appear due to several factors: (a) sophistication of a model; (b) quantities of input data that are too large for a human to immediately comprehend; and (c) deficiencies in the model or data.[*10]

Issues with algorithmic explainability impose challenges also to comply with Article 83 EPC. For instance, for process patent claims in diagnostics[*11] that increases the tension between the advantages of ML, especially neural networks, and the desire for monopoly rights under the EPC.

5 Jyh-An Lee et al. (eds). *Artificial Intelligence & Intellectual Property*. Oxford University Press 2021, pp. 1, 26. – DOI: https://doi.org/10.1093/oso/9780198870944.001.0001.

6 Andre Esteva et al. 'A guide to deep learning in healthcare'. *Nature Medicine* 2019(25), pp. 24. – DOI: https://doi.org/10.1038/s41591-018-0316-z.

7 Vishal Maini & Samer Sabri. 'Machine Learning for Humans', 2017. Available at https://everythingcomputerscience.com/books/Machine%20Learning%20for%20Humans.pdf (most recently accessed on 3 January 2022).

8 Ryad Zemouri et al. 'Deep Learning in the Biomedical Applications: Recent and Future Status'. *Applied Sciences* 2019(9), pp. 8. – DOI: https://doi.org/10.3390/app9081526.

9 European Parliament. 'Report on a comprehensive European industrial policy on artificial intelligence and robotics'. INI 2018/2088.

10 Steven Baldwin & Gabriella Bornstein. 'Asking AI to explain itself – a problem of sufficiency'. *Managing IP* 2020, pp. 35, 36.

11 Joint Institute for Innovation Policy & IVIR. *Trends and Developments in Artificial Intelligence: Challenges to the Intellectual Property Rights Framework. Final report* (1st ed.). Publications Office of the European Union 2020, pp. 112.

3. The requirement of sufficient disclosure under the EPC

3.1. A general overview of the 'sufficient disclosure' criterion

The criterion of 'sufficient disclosure' in general is one of the essential prerequisites that has to be fulfilled, alongside those related to other aspects of patentability under the EPC (for instance, the creation has to qualify as an 'invention' and be 'non-obvious', 'novel', and 'commercially applicable'). Therefore, 'sufficient disclosure' is just as fundamental for patentability within the EPC framework as those other criteria. While a computer program *per se* is not patentable if claimed as such creations involving computer programs or computer-implemented inventions (not excluding those that involve AI) may nevertheless be considered patentable if they present 'further technical effect'[*12].

For this article, the fulfilment of the 'invention' criterion is not analysed in detail with regard to creations involving AI. This is because that criterion is not the nub of the issue addressed here and also in the further analysed practice of the European Patent Office (hereinafter 'EPO') is not evaluated in isolation: each patent claim under the EPC is considered on the basis of all the criteria mentioned. As the case law examined below elucidates, the evaluation of a claim might, for instance, identify deficiencies not solely in the fulfilment of the 'invention' criterion but also in meeting others, including 'sufficiency of disclosure', just as there may be defects only in the ability to satisfy the requirement that the invention be 'sufficiently disclosed'. In this regard, the satisfaction of each patentability element under the EPC is evaluated separately. In light of the specifics of AI, meeting the criterion of 'sufficient disclosure' might present particular difficulties and, hence, merits special attention.

Delineating the requirements of the 'sufficient disclosure' criterion under the EPC, Article 83 states that the application 'shall disclose the invention in a manner sufficiently clear and complete for it to be carried out by a person skilled in the art'. Article 83 EPC is linked with Article 84, which stipulates that 'the claims shall define the matter for which protection is sought. They shall be clear and concise and be supported by the description'. Further on, in Article 100(b), the EPC states the grounds for opposition aimed at revoking a patent; among those grounds are non-compliance with Article 83.

The level of sufficiency required of the disclosure depends on what kind of patent protection is claimed, for what and in what magnitude, or the monopoly conferred by the patent circumscribed by the claims should correspond with the respective technical contribution to general knowledge.[*13] Specifically, claims under the EPC can be divided into those for a product (apparatus, substance); process, such as manufacture or working processes; use (for instance, means adapted to realise the relevant function or steps in the case of computer programs); and 'product by process', with a new product being obtained by means of the new process.[*14]

Sufficiency is achieved if (a) the description allows one to obtain the product (in cases of product-patent claims); (b) it enables one to conduct the process (in cases of process-patent claims); or (c) the invention can be used for previously unknown purposes, or the stated technical effect can be credibly achieved (in cases involving use-patent claims).[*15]

Three aims are stated for the description: (1) to inform of the steps for realising the invention (per Article 83 EPC), (2) to support the claims (under Article 84), and (3) to disclose the invention (under Article 52).[*16]

Rule 42 of the Implementing Regulations[*17] stipulates requirements for the description, generally foreseeing disclosure in writing. The *ratio* of 'sufficient disclosure' is to convince of realisability, not to actually

12 European Patent Office (see Note 4).

13 Gerald Paterson. *The European Patent System: The Law and Practice of the European Patent Convention* (2nd ed.). Sweet & Maxwell 2001, on p. 310.

14 Ian Muir et al. *European Patent Law. Law and Procedure Under the EPC and PCT*. Oxford University Press 1999, pp. 147–148.

15 Paul England & Simon Cohen. *A User's Guide to Intellectual Property in Life Sciences*. Bloomsbury 2021, on p. 102. – DOI: https://doi.org/10.5040/9781526511782.

16 Consult the work of Paterson (see Note 13), on p. 314.

17 European Patent Office. *Implementing Regulations to the Convention on the Grant of European Patents* (17th ed.). EPO 2020, on p. 384.

carry out the invention (for instance, building and training the ML algorithm). Realisation necessitates (a) plausibility (not certainty) of reaching the outcome (the solution for the technical problem), ascertained on the basis of the description and supporting materials[*18]; (b) completeness (the ability for realisation to be carried out without an undue burden – it might involve simple verification tests that do not require additional experimentation); and (c) reproducibility (the invention being able to be repeated at the statistically expected frequency).[*19]

The sufficiency of the disclosure may be derived from the 'application', inclusive of any supporting documents, such as drawings, tables, and others. In this regard, the wording of Article 83 EPC is broader than that of Article 8(2) of the Strasbourg Convention[*20], or its predecessor[*21], which requires only the 'description' to disclose the invention. The term 'application' has allowed extending the description and incorporation of deposit of micro-organisms (see Article 28 EPC).[*22]

Furthermore, the wording of the 'sufficient disclosure' criterion set forth in the EPC and that of the preparatory documents of the EPC does not directly require legal/moral justification or explanation of the invention apart from technical realisability unless this is specifically claimed. Therefore, for the EPC, algorithmic scrutability (related to the complexity of their structure and to their decision-making process) and intuitiveness (the relevance of particular criteria to the output or a decision) in the sense of providing reasons for a particular outcome (legally or morally well-justifiable outcomes) are not the decisive factors in evaluating the sufficiency of disclosure.[*23] For the patent scheme of the EPC to be satisfied, the pivotal component is the technical explanation of the decision-making process unless a specific claim is made otherwise. For instance, in T 1153/02,[*24] a patent claim was filed for a computerised medical-diagnostics system able to interact with a patient without medical intervention. The application was rejected because 'the claimed method is neither necessary nor sufficient for achieving a quick, efficient and accurate diagnosis by direct interaction with the patient'.

Concluding, the respective justification may become a part of the examination of sufficiency of disclosure if the claim explicitly mentions or entails an inextricable requirement of verifying the specific technical implementation or application.[*25] For instance, technical plausibility is assessed by examining the corresponding therapeutic application, the efficacy of the invention in relation to the purpose-limited medical-use claims.[*26] Nonetheless, generally, moral and legal justification is evaluated under Article 53(a) EPC ('*ordre public* and morality' criterion) and Article 57 EPC ('industrial application' criterion).

3.2. A detailed picture of the criteria related to 'sufficient disclosure'

In respect of 'clear' disclosure, sufficiency entails (a) outlining all the crucial elements, (b) their function, (c) their internal links, and (d) the ultimate result within the lines of the claims precisely (without ambiguity, vague expressions, undefined or generally unaccepted terms, or details buried in other information). All technical steps and proper testing methods needed for achieving the outcome must be reflected, without significant inconsistencies.[*27] For instance, patent application PCT/EP2019/068722[*28], for simulation of

18 T 1581/12 ('Outer membrane protein immunogen Neisseria/GLAXOSMITHKLINE'). EPO BA 2016, point 6.

19 Maximillian W. Haedicke & Henrik Timmann (eds). *Patent Law: A Handbook on European and German Patent Law*. Nomos 2014, pp. 207–208, 210–211. – DOI: https://doi.org/10.5771/9783845259024.

20 Terence Prime & David Booton. *European Intellectual Property Law* (1st ed.). Routledge 2017, p. 175. – DOI: https://doi.org/10.4324/9781315211336.

21 Convention on the Unification of Certain Points of Substantive Law on Patents for Invention, 1963.

22 Paterson (see Note 13), p. 314.

23 Andrew D. Selbst & Solon Barocas. 'The Intuitive Appeal of Explainable Machines'. *Fordham Law Review* 2018(87), pp. 1085–1139, on pp. 1094-1097. – DOI: https://doi.org/10.2139/ssrn.3126971.

24 T 1153/02 ('Diagnostic System/ FIRST OPINION'). EPO BA 2006, point 3.6.

25 European Patent Office. 'Guidelines for Examination', G.II.3.3.1, 2021. Available at https://www.epo.org/law-practice/legal-texts/html/guidelines/e/g_ii_3_3_1.htm (most recently accessed on 10 January 2022).

26 T 0609/02 ('AP-1 complex, SALK INSTITUTE'). EPO BA 2004.

27 Haedicke & Timmann (see Note 19), p. 211; T 1568/15 ('Phase cut dimmer/Tridonic'). EPO BA 2020, points 23, 26–27, 32–33, 42.

28 PCT/EP2019/068722, 'Written Opinion of the International Searching Authority (Separate Sheet)'. EPO 2005, point 11.

patients developing medical conditions in an AI-based setting, was initially rejected. The rejection was also based on the consideration that 'the description merely talks about image-based and non-image information' and that there was a lack of information '*to establish an increased functionality suitable data set credibly*'. It should be noted that EPC also allows for the description to be disclosed, alternatively, in publicly available documents providing clear reference, as supporting material.[*29]

For inventions involving ML, the disclosure depends on the invention. Namely, if the inventive contribution is in the algorithm, it should be disclosed, whereas if it lies only in the data, the algorithm does not need to be disclosed. Accordingly, the steps to construct the model, training process, and respective training data should be disclosed. The substantiation here is that disclosing only the decision process does not guarantee identical repetition. However, the inventor has discretion to judge the means and the quantity of data deemed necessary for realising the invention without undue burden.[*30]

Concluding, currently, there is no requirement to disclose the training data in the form of a library or the algorithm in the form of the source code unless the invention could not be sufficiently disclosed otherwise. Hence, the description and supporting documents' working examples should (if possible, in written form) (1) describe the invention and, (2) depending on the claims, include – (a) the steps to construct and train the model[*31] and those to obtain and select the data; (b) the architecture of the model; (c) the decision-making process or other relationships between inputs and outputs; (d) the sequence of steps applied[*32]; (e) the essential parameters, weights, and functions, with their mutual connections; (f) the type and quantity of data involved; and (g) the source of data[*33] and other elements.

The criterion of 'completeness' requires that the description be scrupulous and disclose the underlying teaching of the invention entirely.[*34] Namely, terms related to data-processing that possess a technical component (for instance, 'kernel') should be outlined in detail and comprehensively reflect the system architecture, its internal mechanics, and the associated interaction.[*35] Additionally, for inventions employing ML, a specific, appropriate ML model should be disclosed if claimed as such, with avoidance of such vague expressions as 'artificial neural network' and the like.[*36] Analogous, suitable input, training, and testing data should be mentioned explicitly, again without unspecified indications such as 'wide range of seekers for a healthcare'.[*37]

In cases of minor errors (such as inadequate definition of a parameter) that can be remedied via application of general knowledge or simple verification tests that do not amount to an undue burden, the risk of harm does not influence the completeness demonstrated, since patentability is not contingent upon readiness for production.[*38] An undue burden is deemed to exist when the application foresees (a) reliance on chance; (b) the implementation of the functional features (in claims defined by way of functional features); (c) conducting ethically debatable and/or time-intensive tests (if the features could have been defined otherwise, for instance, for ascertaining whether there is a pharmaceutical effect or finding the technical solution to the problem);[*39] (d) and determination of a suitable method for testing datasets in cases with a large number of potential candidates.[*40] It should be concluded that the aspects mentioned here should be considered also in cases involving algorithmic explainability issues.

As the foregoing analysis confirms, the requirement of 'sufficient disclosure' has to be met irrespective of the satisfaction of other conditions for patentability under the EPC – among them the requirement for the creation to qualify as an 'invention' and be 'non-obvious', 'novel', and 'commercially applicable'. Hence,

29 T 0429/96 ('Serine protease inhibitors/AMGEN'). EPO BA 2001, point 4.

30 European Patent Office, 'Report from the IP5 expert round table on artificial intelligence', 2018. Available at https://www.fiveipoffices.org/material/AI_roundtable_2018_report (most recently accessed on 10 January 2022).

31 Guidelines for Examination (see Note 25).

32 PCT/EP2019/068722 (see Note 28), point 11.

33 T 0161/18 ('Äquivalenter Aortendruck/ARC SEIBERSDORF'). EPO BA 2020, point 2.2.

34 Kaisa Suominen & Peter de Lange. *Visser's Annotated European Patent Convention*. Wolters Kluwer 2021, p. 185.

35 Haedicke & Timmann (see Note 19), pp. 220, 222–223.

36 Lee et al. (see Note 5), p. 118.

37 T 0161/18 (see Note 33), point 2.2.

38 T 881/95 ('Einkaufswagen'). EPO BA 1997, point 3.2.

39 Suominen & de Lange (see Note 34), p. 187.

40 Catherine Seville. *EU Intellectual Property Law and Policy* (2nd ed.). Edward Elgar 2016, p. 234. – DOI: https://doi.org/10.4337/9781781003480.

even though a creation involving AI might demonstrate a 'further technical effect' and qualify as an 'invention', compliance issues might still arise in relation to the sufficiently-disclosed-invention angle, owing to the specifics of AI. Possible approaches for overcoming these hurdles therefore deserve detailed analysis.

4. Potential solutions to tackle the algorithmic explainability issue under Article 83 EPC

4.1. Deposit of the algorithm

For a solution under Article 83 EPC, some scholars have suggested[*41] the introduction of an algorithm-deposit system similar to the system applied for micro-organisms, including mechanisms under the Budapest Treaty.[*42] It should be noted that inventors might not find this proposed solution a preferable way to tackle the issue, for the reasons explained below.

The notion behind the deposit system for micro-organisms was developed to deal with difficulties in describing only a non-publicly-available micro-organism. If, for instance, an organism has been isolated from the soil, mutated, and further selected, a written description (of the strain itself and the further-selection process) could not in itself guarantee reproducibility.[*43] The canonical example involves cell lines that, compared with prokaryotic cells, are more complex and visually, morphologically very similar. It would prove exceptionally cumbersome to describe the cell line such that a person skilled in the art could obtain it in practice. Nonetheless, this only applies to situations where the cell line is not a combination of various cell lines or the substance that is not dependent on its properties, the end product, or the method of manufacture. That said, not every invention involving micro-organisms requires a deposit to suffice Article 83 EPC.[*44] A deposit merely supplements the written description; it is not a substitute for it.[*45]

On this basis, it can be concluded that the difficulty of describing the micro-organism lies in its morphological similarities with others that cannot be comprehensively expressed in words without a tangible sample. Proceeding from this reasoning, it can be found that the deposit system for micro-organisms is different from the deposit system proposed for algorithms to tackle the issue with explainability. Namely, micro-organisms that have their origins in nature without additional, non-routine modifications, technical extraction, or production under EPC are natural phenomena.[*46]

Thus, it should be concluded the hurdles describing a novel natural phenomenon (in this case, a particular micro-organism) lie either (a) in its randomness that cannot be precisely described with reference to existing knowledge – for instance, there might be a lack of appropriate genetic-sequence data related to the functionality of an organism as is evident in DNA coding with some antibodies[*47] – or (b) in its visual, morphological similarities with other objects, including altered versions thereof. In other words, novel micro-organisms cannot be sufficiently described either because there is nothing tangible to compare with or because there is so much to compare with that one cannot precisely distinguish those in question from the rest.

In summary, the deposit of micro-organisms serves 'distinguish[ing] from others'. The deposit may also serve the purposes of trials, especially with regard to broad claims centred on particular inventive results.[*48] In contrast, the proposed solution of depositing algorithms as a way to tackle the explainability issue seems to resemble partial substitution for the written description. Whilst an inventor in the case of

41 Shlomit Yanisky-Ravid & Regina Jin. 'Summoning a New Artificial Intelligence Patent Model: In the Age of Pandemic'. SSRN 2020/1, on pp. 42–43. – DOI: https://doi.org/10.2139/ssrn.3619069.

42 Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure, 1977.

43 World Intellectual Property Organization. 'WIPO'S Budapest Treaty Facilitates patenting'. *WIPO Magazine* 2015/4, on p. 1, 4.

44 Thomas D. Denberg & Ellen P. Winner. 'Requirements for deposits of biological materials for patents worldwide'. *Denver Law Review* 1991(68)/2, pp. 228–260, on p. 231.

45 Paterson (see Note 13), p. 314.

46 European Patent Office. 'Guidelines for Examination', G.II.5.2, 2021. Available at http://www.epo.org/law-practice/legal-texts/html/guidelines/e/g_ii_5_2.htm (most recently accessed on 10 January 2022).

47 Denberg & Winner (see Note 44), p. 230.

48 Ibid., p. 232.

micro-organisms can explain and describe the inventive and technical concepts that underlie the invention, merely reflecting them more clearly with the aid of the deposit, the issue with unexplainable algorithms is bound up with the ability to explain to others both the inventive and technical concepts behind the algorithm in their own right, not solely with the impossibility of reflecting a visible conceptual distinction from other algorithms. Hence, in the case of algorithms, the proposed deposit system would function not purely for visualisation but, rather, for constructing a major part of the substance of the description.

It should be opined that the proposed deposit system imposes an undue burden on a person skilled in the art with regard to realising the invention. It would initially require said expert to understand the working principles of the invention deposited, so as to be able to implement it repeatedly. The requirement of Article 83 EPC cannot be fulfilled if the written description is absent or contradicts the deposited material. In the scenario proposed, the written description does not wholly and correctly reflect the sample deposited. The same is true when the invention can be realised only upon multiple requests from the depositary or through know-how in excess of general public knowledge in the respective technical field.*[49] The stance should be taken that the deposit system recommended may well not be a preferable solution to resolve the issue, since the written description must still be intrinsic to the disclosure.

Furthermore, as noted above, the program in contexts of ML comprises also correlation between the data and the output.*[50] Hence, it should be found that only the deposit of the algorithm as such without the written description cannot provide sufficient guidance for a person skilled in the art in how to carry out the invention. Doing so would require, in addition, understanding of the logic underlying the program, the training and input data, and those correlations between them that are an essential part of the output.*[51] In this regard, the deposit of the algorithm on its own does not provide the crucial information on the invention, since the data comprised could not be considered general knowledge and could not be guessed without an undue burden in every case.*[52] In other words, conversely to micro-organisms, just because the algorithm being displayed does not automatically render it comprehensible. Hence, it must be concluded that algorithm deposits may not allow tackling the algorithmic explainability and that it might not afford the preferable balance between the incentive to innovate and the EPC framework in the relevant cases.

4.2. Deposit of the training data

Another proposed solution is depositing the training data. The *ratio* behind this suggestion is that said mechanism should facilitate transparency of the output generation by serving as a partial substitute for the explanation in words, with the publicly accessible deposit being starting material analogous to sequences of biological materials.*[53]

It should be noted, firstly, that considerations similar to those mentioned in the previous subsection also pertain to the proposed required deposit of the training data. In a nutshell, depositing only the training data would not entirely reveal the invention except when the invention lies solely in the training data due to further reasons. The ML model, as outlined before, comprises the correlation between the data and the output.*[54] Therefore, a deposit of purely the training data would neither explain how the particular output has been generated nor, in consequence, suffice for meeting the requirement of disclosing the entire algorithm*[55] in cases wherein the inventive step lies in not the training data but the algorithm. Also, only depositing the training data without actual input data would not demonstrate how the invention would behave outside the testing environment and whether it would function across the entire range claimed.*[56]

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49 T 0418/89 ('Monoklonaler Antikörper'). EPO BA 1991, points 3.12, 3.14–3.15.

50 Esteva et al. (see Note 6), p. 24.

51 T 0521/95 ('Pattern recognition/RDC JAPAN'). EPO BA 2000, point 4.8; T 1568/15 (see Note 27), points 100–111.

52 PCT/EP2019/068722 (see Note 28), point 11; T 0521/95 (see Note 51), point 4.9; T 0161/18 (see Note 33), point 2.2.

53 Tabrez Ebrahim. 'Artificial Intelligence Inventions & Patent Disclosure'. *Penn State Law Review* 2020(125), pp. 147–221, on pp. 215–217.

54 Esteva et al. (see Note 6), p. 24.

55 T 1827/06. EPO BA 2009, point IV; T 0521/95 (see Note 51), point 4.9; T 1568/15 (see Note 27), points 100–133.

56 T 1153/02 (see Note 24), point 3.7.

Furthermore, the practice of the EPO does not require revealing all the training and input data; rather, one must precisely describe and specify the data that would be considered suitable for construction of the claimed invention.[*57] Additionally, the training method chosen and the process should be described.[*58] It should be concluded, then, that it is left to the discretion of the inventor whether to disclose the full list of data in the libraries,[*59] with all the weight values, parameters,[*60] make reference to an existing relevant database[*61]; include an indication of the appropriate data, such as 'the invention can utilize data from repositories such as the Autism Genetic Resource Exchange'[*62]; and/or outline the basic features of the data, whether in such a form as 'data records describing telecommunication network events'[*63] or otherwise.

In summary, a training-data deposit mechanism may not satisfy Article 83 EPC in cases wherein the inventive step exists outside solely of the training data and general knowledge for building the product (as set forth in product claims). In other words, the expert would still need to determine the algorithmic components and input data.

Even a combination of the two – depositing both the algorithm and the training data – will not reveal the input data or substitute a necessity for a written description. Additionally, as outlined above, current EPO-related case law does not require disclosing the algorithm, training, and input data in deposit form. In fact, the deposit might, similarly to inventions involving micro-organisms,[*64] exert a chilling effect on its actual usage. Namely, *inter alia*, a deposit could provide too competitive advantage to others.[*65]

4.3. Certification

It can be proposed that certification might offer a solution that does address the algorithmic explainability issue under Article 83 EPC. The solution could be an alternative of, for instance, (a) the decomposition of algorithms or construction of model-agnostic interpreters[*66] that require additional resources; (b) reliance on limited general knowledge for product patents (that may not reproduce the algorithmic logic[*67]).

Delineating, the certification is currently used, for instance, for medical devices[*68] to verify, approve the appropriateness of the device for the intended purpose. Medical devices involving AI are also certified to tackle algorithmic explainability. Thus, apart from compliance with standards, certification includes testing the device with a variety of testing data to, for example, examine its performance across the intended range and ascertain causality in a supervised environment.[*69]

Additionally, certification for certain risk AI-based systems that are also not yet placed but intended to be placed in the market in the European Union (EU) has already been proposed by the so-called AI Act.[*70] Intended for systems posing certain risks, the certification procedure involved could entail mandatory confidential disclosure of the source code and underlying data to competent authorities and provision of a suitable testing environment.

In this regard, the AI Act *mutatis mutandis* follows the certification mechanism implemented for medical devices as a pre-condition for certain risk-linked algorithms, and it expresses an intention to render this

57 T 0521/95 (see Note 51), point 4.11; T 0183/95. EPO BA 1996; T 0677/17 ('Augmented reality, detecting position of apparatus/Sony'). EPO BA 2020, point 1.11; T 0161/18 (see Note 33), point 2.2.

58 EP2771863A2 ('Enhancing Diagnosis of Autism Trough Artificial Intelligence and Mobile Health Technologies Without Compromising Accuracy'). EPO 2020, points 0028, 00273, 00310.

59 EP1645631 ('Neisseria antigens and compositions'). EPO 1999, points 29–41.

60 Harm van der Heijden. 'AI inventions and sufficiency of disclosure – when enough is enough'. *IAM Yearbook*, 2020, on p. 39.

61 T 1285/10 ('Genetic Analysis computing system/IRIS BIOTECHNOLOGIES'). EPO BA 2014.

62 EP2771863A2 (see Note 58), point 0028; EP0850016 ('Heart monitoring apparatus and method'). EPO 1999, point 0010.

63 T 1784/06 ('Classification method/ COMPTEL'). EPO BA 2012; T 0076. EPO BA 2007, point 2.1.

64 Denberg & Winner (see Note 44), p. 231.

65 Ibid., pp. 232–233.

66 Johan Ordish et al. *Algorithms as medical devices*. PHG Foundation 2019, pp. 26, 38.

67 Baldwin & Bornstein (see Note 10), p. 38.

68 European Parliament and Council Regulation (EU) 2017/745 of 5 April 2017 on medical devices, amending Directive 2001/83/EC, Regulation (EC) No 178/2002 and Regulation (EC) No 1223/2009 and repealing Council Directives 90/385/EEC and 93/42/EEC, *Official Journal* L 117, 5.5.2017.

69 Ordish et al. (see Note 66), pp. 26, 38.

70 European Parliament and Council. 'Proposal for a Regulation of the Laying Down Harmonised Rules on Artificial Intelligence and Amending Certain Union Legislative Acts (Artificial Intelligence Act)'. COM (2021) 206 final.

a part of the public order. It follows that those AI systems that both are intended for placement in the market in the EU and are to be categorised as AI systems posing a particular risk will be subject to an obligation of undergoing certification and patent examination if a patent is desired.

Although criticism of the certification proposed as a mechanism under the AI Act[*71] has emerged, it should be noted that this certification could serve as a starting point and could, *mutatis mutandis*, be adjusted and recognised within the patent framework, at least for algorithms with issues of explainability to alleviate the problem of compliance with Article 83 EPC. One could look, for instance, at T 1164/11,[*72] for which the EPO concluded that a patent might be granted also in cases in which it has been demonstrated convincingly and with examples that a surprising technical effect is achieved by means of the claimed device even when there is unknown and inexplicable underlying scientifically sound substantiation. The certification may provide a convincing demonstration. Nonetheless, the rest of the description still must reflect a realisable invention.[*73]

Concluding, the EPO considers certification to be an appropriate, sufficient mechanism to provide evidence of a realistic invention.[*74] The certification could also be deemed an objective and impartial approach to demonstrate the intended result contrary to the statements by the inventor or by closely or permanently involved contributors whose extensive knowledge of the invention might create subjectivity issues.[*75] For instance, many aspects of the invention may have become apparent to a person with intimate knowledge of it, to such an extent that a vague explanation results. Product, product-by-process, and use-patent claim could avail themselves of this mechanism, hence addressing such issues.

Furthermore, it should be noted that certification may, in fact, provide a crucial testing environment, probably extending to the form of a regulatory sandbox involving multiple actors that could help prove the concept, or preliminary verification of the sufficiency of the description. This method of certification to overcome algorithmic explainability would not comprise purely a simulation; in addition, it would complement the initial vision of practical execution as imagined in the mind of an expert.[*76] To this end, the certification, similarly to that proposed by the AI Act, could involve confidential disclosure of the training, testing, and input data used and of the source code if this is agreed upon by the relevant parties and deemed necessary. The approach could prevent the disclosure of more information than is necessary for enabling a person skilled in the art to execute the invention, through evaluation – on a preliminary-examination basis and in a confidential environment – of what quantity of data the description should provide, in which form. This approach could help keep the rest of the details about the invention, for instance, as a trade secret. Thereby, it should not confer too competitive advantage on others when compared to the scenario of depositing and disclosing the algorithm along with all the data involved. It should be envisioned that this suggested path could aid particularly in cases of process patents and use claims.

Concluding, furthermore, this approach could assist in ascertaining the complexity of the invention since the EPO allows the 'person skilled in the art' to be a team of specialists.[*77] With the mechanism proposed here, the inventor would know in advance whether even with the involvement of a team of specialists an undue burden to enable the realisation of the invention thus, to amend the description accordingly.

The criterion of 'sufficient disclosure' does not *expressis verbis* require that the invention provide a fair outcome generated by means of the algorithm if the claim does not specifically indicate this. Nonetheless, justification for the outcome could be evaluated under Article 53(a) EPC, on the *ordre public*, and morality criteria in line with Article 57 EPC ('Industrial application').

To summarise, the certification proposed under the AI Act overall foresees a more extensive evaluation than the patent examination. Given that the latter certification and the certification proposed here for patent-application purposes are congruent in many respects, the two could be combined, and in their unified

71 Martin Ebers. 'Standardizing AI – The Case of the European Commission's Proposal for an Artificial Intelligence Act', 2021. – DOI: https://doi.org/10.2139/ssrn.3900378; Martin Ebers et al. 'The European Commission's Proposal for an Artificial Intelligence Act – A Critical Assessment by Members of the Robotics and AI Law Society (RAILS)'. *Multidisciplinary Scientific Journal* 2021(4)/4, pp. 589–603, on p. 595. – DOI: https://doi.org/10.3390/j4040043.

72 T 1164/11 EPO BA 2015, point VIII.

73 Ibid., point VIII.

74 T 0940/03 ('Combined DVD/CD ECC decoder/SAMSUNG'). EPO BA 2006, point 3.11.

75 T 1336/08 ('Trace data/ SAP'). EPO BA 2012, point 3.16.

76 Selbst & Barocas (see Note 23), p. 1096.

77 T 2220/14 ('Veloclmmune mouse/ REGENERON'). EPO BA 2015, point 59.

form they could be conducted by a legitimate central body. This approach might reduce the administrative burden involved, a burden that could be large since the language by the AI Act suggests that all AI systems that are also intended to be placed in the market in the EU (many member states of which are EPC signatories[*78]) and embody the specified risk must undergo certification.[*79] A unified certification scheme could provide either a single-purpose certificate or several official public certificates, as dictated by the aim, the content, and the evaluation requirements, especially since the EPO allows supporting an application with other, clearly referenced documents.[*80]

Finally, it should be noted that the certification for patent purposes is proposed as voluntary; therefore, it would not create an additional, unfavourable burden on inventors, especially in fields with existing certification systems in place (for instance, that of medical devices). Moreover, the suggested certification could help reduce the administrative burden for inventors and patent examiners alike, by facilitating rapid rectification of the deficiencies identified. Albeit designed, especially to overcome the challenges with unexplainable algorithms, this certification could be applied voluntarily also by inventors in cases involving explainable algorithms.

5. Conclusions

As noted above, although computer programs *per se* are not patentable if claimed as such under the EPC; creations incorporating AI may be considered for patentability and classed as an 'invention' if they demonstrate a 'further technical effect'. Under the EPC, all the facets of patentability – including 'invention', 'non-obviousness', 'novelty', 'commercial applicability', 'sufficiency of disclosure', and others – are evaluated separately. Therefore, creations involving AI might simultaneously display deficiencies not only in satisfaction of, for instance, the 'invention' requirement but also with regard to other aspects of patentability under the EPC. *Vice versa*, even though a creation involving AI might pass the 'further technical effect' threshold and qualify as an 'invention', that does not automatically mean that any other criteria for patentability under the EPC are met. Therefore, AI may bring in particularly issues connected with algorithmic explainability. For instance, in genetics, the nature of the associated data and deficiencies of the capacity of more simple ML models leads to tension with regard to the possibility of complying with Article 83 EPC. In light of the value AI brings for facilitating human prosperity, it is crucial to overcome the problem with algorithmic explainability so as to support incentives to patent inventions involving AI under the EPC and, through this, enrich general knowledge. Otherwise, patentability difficulties arising from algorithmic unexplainability may lead, for instance, to opting instead for trade-secret protection. Ultimately, scientific progress could thus be impeded.

Although the criterion of 'sufficient disclosure' under Article 83 EPC leaves room for supporting the description with other documents and even with a deposit in particular cases involving micro-organisms, the language does not foresee substitution for the written description. Therefore, it can be deemed that the solutions heretofore proposed to address algorithmic unexplainability – introducing the deposit of the algorithm, the training data, or both – might not be a preferable way to fulfil the requirements of Article 83 EPC from standpoint of an inventor.

Considering that certification is known in other fields, proposed in the AI Act, and permitted under the EPC, it can be concluded that certification could be accepted as a voluntary approach primarily for overcoming difficulties with algorithmic explainability and patentability under the EPC as well. Criticism of the certification proposed by the AI Act and certification, for example, for medical devices has been raised; however, since, in many aspects, the proposed certification by the AI Act and what is recommended here in many aspects are closely aligned, it should be regarded that the certification suggested under the AI Act might be taken *mutatis mutandis* as a suitable starting point.

Upon making of the appropriate adjustments, the certification proposed here could be considered preferably, in voluntary form and in centralised also for patent purposes. In this form, the certification proposed

78 European Patent Office. 'Member states of the European Patent Organisation', 2019. Available at https://www.epo.org/about-us/foundation/member-states.html (most recently accessed on 10 January 2022).

79 AI Act (see Note 70), Article 20.

80 Paterson (see Note 13), p. 314.

would not constitute an additional, non-preferred administrative burden on inventors, a factor that may be especially relevant for fields with existing certification systems, such as the medical-devices domain. In summary, it should be reiterated that the proposed mechanism is suggested as a voluntary instrument principally to overcome patentability hurdles that face inventions with algorithmic explainability issues, while also available for other inventions involving algorithms, at the discretion by an inventor.

Its legal implementation would not be prohibitively complex. The EPC allows the use of expert opinions, certificates as supporting documents (see Article 83), and evidence (see Article 117). Hence, the proposed certification would merely require recognition, rather than legal amendments to the EPC, and would not dilute the EPC framework.

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Mari-Liis Tohvelmann
MA
School of Natural Sciences and Health
Tallinn University

Kristjan Kask
PhD
School of Natural Sciences and Health
Tallinn University

From Child to Adult Victims and Witnesses:

Ways of Improving the Quality of Investigative Interviews

Witness statements[*1] are, in judicial practice, irreplaceable pieces of evidence in criminal proceedings. Still, interviewing both child and adult witnesses, though crucial, remains a difficult skill. A recent survey among adults demonstrates that most incidents of physical violence (70%) and harassment (89%) are not reported to the police[*2], and in crimes against children, online sexual exploitation is on the increase[*3]. With people of any age, witness statements may be easily influenced by inappropriate interviewing style, resulting in miscarriages of justice.[*4] With this paper, we begin by providing an overview of appropriate investigative interviewing techniques for interviews of child and adult witnesses. We continue by discussing training. There is more literature about interviewing child witnesses and training those investigators who conduct these interviews, and we make references to that child-witness literature where doing so is appropriate and necessary, both for its domain-specific relevance and – since there are similarities in investigative interviews of child and adult witnesses – for the light it sheds more broadly. Finally, we discuss particular ways in which investigators can be trained to increase and maintain the quality of interviews.

1. Investigative interviewing of witnesses

Witness statements are often the only evidence available to authorities.[*5] Whenever a witness account is the sole evidence in the case, the pivotal aspect is the statements' factuality. Although the evidence that witnesses provide can be tremendously helpful in developing leads, it may not always be accurate. The criminal-justice system places a great deal of faith in eyewitness testimony despite psychological research

1 When using the term 'witness', we refer to both victims and witnesses.

2 European Union Agency for Fundamental Rights. 'Crime, safety and victims' rights: Fundamental rights survey. Retrieved 26.03.2022 from https://fra.europa.eu/en/publication/2021/fundamental-rights-survey-crime.

3 United Nations Children's Fund (2021) Ending online child sexual exploitation and abuse: Lessons learned and promising practices in low- and middle-income countries. UNICEF: New York. Retrieved on March 26th 2022 from: https://www.unicef.org/media/113731/file/Ending%20Online%20Sexual%20Exploitation%20and%20Abuse.pdf.

4 R. Milne & R. Bull. *Investigative Interviewing: Psychology and Practice*. Chichester, UK: Wiley 1999.

5 U. Undeutsch. 'Courtroom evaluation of eyewitness testimony'. *International Review of Applied Psychology* 1984(33), pp. 51–67. – DOI: https://doi.org/10.1111/j.1464-0597.1984.tb01416.x; M.B. Powell R.P. Fisher, R. Wright. Investigative interviewing - In N. Brewer & K. D. Williams (Eds.), *Psychology and law: An empirical perspective,* 2005, pp. 11–42. The Guilford Press 2005, pp. 11–42.

showing that witness reports may be misleading even while appearing particularly credible.*[6] Any useful technique for the evaluation of witness testimony must work in both directions – it should have equal use in the detection of possible errors and for the verification of truthful and reliable accounts.*[7]

Many previous studies have contributed in regard to that matter – i.e., to trying to find a way to increase the amount of information elicited from witnesses through improved interview techniques in order to increase the accuracy of witness statements and improve the criminal-justice system's ability to evaluate it.*[8]

Investigative interviews are conducted at various points in the investigative process, but interviews conducted in the initial phase of the police investigation are usually the most critical*[9], especially when there is little or no physical evidence and only one witness to guide the investigation.*[10] Therefore, interviews conducted in an appropriate manner can advance the police investigation immeasurably by facilitating thorough, accurate records of the crime details. On the other hand, witnesses' memory of an event may be fragile, and the amount and accuracy of information obtained from a witness's testimony depends in part on the method of interviewing applied.*[11]

Eliciting reliable and detailed information from someone about an alleged offence is a unique and complex process that must take into account a broad range of both internal factors (age, cognitive ability, language skills, etc.) and external ones (such as events' sensitivity and the interview methods).*[12] These factors can influence what is said or omitted during an interview, including interviewees' willingness to disclose information and the ability to elicit that information. The questions asked by the interviewer are viewed as one of the most important variables.*[13] Children's immature cognitive abilities require additional consideration with regard to interview as compared to adults' faculties, but a special approach is needed also with elderly and other vulnerable people (e.g., mentally disabled or traumatised individuals).*[14] There is growing recognition that some elderly witnesses may require interviewers to utilise special skills for

6 S. Penrod & B. Cutler. 'Witness confidence and witness accuracy: Assessing their forensic relation'. *Psychology, Public Policy, and Law* 1995/1, pp. 817–845. – DOI: https://doi.org/10.1037/1076-8971.1.4.817; C.A. Morgan, 3rd, et al. 'Accuracy of eyewitness memory for persons encountered during exposure to highly intense stress'. *International Journal of Law and Psychiatry* 2004(27)/3, pp 265–279. – DOI: https://doi.org/10.1016/j.ijlp.2004.03.004; N. Brewer et al. 'Eyewitness identification' in N. Brewer (ed.), *Psychology and Law*. Guilford Publications 2005, pp. 177–221; C.A. Morgan, 3rd, et al. 'Efficacy of forensic statement analysis in distinguishing truthful from deceptive eyewitness accounts of highly stressful events'. *Journal of Forensic Sciences* 2011(56)/5, pp. 1227–1234. – DOI: https://doi.org/10.1111/j.1556-4029.2011.01896.x; B.L. Garrett. 'Contaminated confessions revisited'. *Virginia Law Review* 2015(101), pp. 395–454. Available at https://scholarship.law.duke.edu/faculty_scholarship/3846 (most recently accessed on 23.6.2022).

7 U. Undeutsch (see Note 5).

8 National Institute of Justice (US). 'Eyewitness evidence: A guide for law enforcement'. Washington, DC: US Department of Justice, Office of Justice Programs. Available at https://www.ojp.gov/pdffiles1/nij/178240.pdf (most recently accessed on 23.6.2022); B.L. Garrett (see Note 6); C.A. Morgan, 3rd, et al. 'Efficacy of forensic statement analysis' (see Note 6).

9 R.P. Fisher et al. 'Enhancing enhanced eyewitness memory: Refining the cognitive interview'. *Journal of Police Science & Administration* 1987(15)/4, pp. 291–297.

10 M.B. Powell et al. 'Investigative interviewing' (see Note 5).

11 E. Loftus & Z. Guido. 'Eyewitness testimony: The influence of the wording of a question'. *Bulletin of the Psychonomic Society* 1975(5), pp. 86–88. – DOI: https://doi.org/10.3758/bf03336715; National Institute of Justice (see Note 8); B.L. Garrett (see Note 6).

12 Y. Orbach et al. 'Assessing the value of structured protocols for forensic interviews of alleged child abuse victims'. *Child Abuse & Neglect* 2000(24)/6, pp. 733–752. – DOI: https://doi.org/10.1016/s0145-2134(00)00137-x; M. Lamb et al. 'Age differences in young children's responses to open-ended invitations in the course of forensic interviews'. *Journal of Consulting and Clinical Psychology* 2003(71)/5, pp. 926–934. – DOI: https://doi.org/10.1037/0022-006x.71.5.926; Y. Chae & S.J. Ceci. 'Individual differences in children's recall and suggestibility: The effect of intelligence, temperament, and self-perceptions'. *Applied Cognitive Psychology* 2005(19), pp. 383–407. – DOI : https://doi.org/10.1002/acp.1094; M. Burton et al. *Are Special Measures for Vulnerable and Intimidated Witnesses Working? Evidence from the Criminal Justice Agencies*. London: Home Office 2006; M.E. Lamb et al. 'Structured forensic interview protocols improve the quality and informativeness of investigative interviews with children: A review of research using the NICHD Investigative Interview Protocol'. *Child Abuse & Neglect* 2007(31), pp. 1201–1231. – DOI: https://doi.org/10.1016/j.chiabu.2007.03.021; S.P. Brubacher et al. 'The use of ground rules in investigative interviews with children: A synthesis and call for research'. *Developmental Review* 2015(36), pp. 15–33. – DOI: https://doi.org/10.1016/j.dr.2015.01.001.

13 G. Oxburgh et al. 'The question of question types in police interviews: A review of the literature from a psychological and linguistic perspective'. *International Journal of Speech, Language and the Law* 2010(17). – DOI: https://doi.org/10.1558/ijsll.v17i1.45.

14 Ibid.; M. Benson & M. Powell. 'Evaluation of a comprehensive interactive training system for investigative interviewers of children'. *Psychology, Public Policy, and Law* 2015(21), pp. 309–322. – DOI: https://doi.org/10.1037/law0000052; M. Powell & S. Brubacher. 'The origin, experimental basis, and application of the standard interview method: An informationgathering framework'. *Australian Psychologist* 2020(55), pp. 645–659. – DOI : https://doi.org/10.1111/ap.12468; M.B. Powell et al. 'Investigative interviewing' (see Note 5).

the interview because their communication skills and cognitive functioning have declined. It is common practice for the interviewer to impose limits on witnesses' time to recall the event and develop more precise answers, or they might not establish a starting point via preliminary information from closed-ended or guiding questions, such as multiple-choice probing. Vulnerable interviewees may be quite eager to help so, accordingly, might tend toward compliance efforts by going along with much of what they believe the interviewer wants to hear or is suggesting to them.[*15]

Ultimately, the quality of any forensic interview is determined by a wide range of interrelated factors, which can be conceptualised broadly as aspects related to the interviewee, aspects related to the interviewer, and facets of the interview itself. The interviewer must take into account the interviewee's physical, mental, and emotional state; the characteristics of the offence; and eyewitnessspecific speech and language skills, alongside the witness's age and any possible disabilities, when conducting the interview, following best-practice interview guidelines. This kind of approach also aids in avoiding eyewitnesses' secondary victimisation.[*16]

In the ideal case, a well-performed investigative interview maximises the quality and quantity of the information that the interviewee is able to provide. An interview that is conducted well increases the probability of obtaining corroborative evidence in support of the eyewitness's account, thereby increasing the likelihood of successful prosecution of the law. Research over the past few decades has clearly identified certain core elements of all interviews that lead to the best performance by the interviewee.[*17]

1.1. Question types

Previous studies have found that it is important to use free recall, open-ended questions, and 'facilitators' (e.g., certain recommended questions) when one is interviewing either children[*18] or adults[*19], so as to increase the amount of information elicited from the witnesses. Free recall and open-ended questions require multiple-word responses and allow interviewees to exercise flexible choice of which aspects of the event to describe.[*20] The most useful information obtained in any forensic interview is the information given in a general free-narrative response (e.g., replies to 'Tell me…' prompts) that later is elaborated upon with more cued recall narratives (with prompts such as 'You said that Bob pushed you; tell me more about that event'). The free-narrative account should be obtained before any specific questions get asked.[*21] Open questions are formed in such a way that the interviewee is able to give an unrestrained answer. These are to be combined well with specific closed questions – typically characterised as items starting with 'wh' words ('what?', "when?', 'where?', 'why?', and 'who?') plus 'how'.[*22] Open-ended questions must be employed throughout the interview, to create a structure that advances the interviewee's role as a valued informant.[*23] Facilitators reflect back to the interviewees what they have just said and encourage them to say more.

Best practice notwithstanding, many studies, conducted across various sorts of national settings (e.g., in Australia, England and Wales, Estonia, Israel, Norway, Sweden, Finland, and the USA)[*24], attest that

15 R. Bull. 'The investigative interviewing of children and other vulnerable witnesses: Psychological research and working/professional practice'. *Legal and Criminological Psychology* 2010(15), pp. 5–23. – DOI: https://doi.org/10.1348/014466509x440160.

16 E. Loftus & Z. Guido (see Note 11); M. Burton et al. (see Note 12); G. Oxburgh et al. (see Note 13).

17 National Institute of Justice (see Note 8); R. Bull & I. Blandon-Gitlin. *The Routledge International Handbook of Legal and Investigative Psychology*. New York: Routledge 2019. – DOI: https://doi.org/10.4324/9780429326530.

18 K.P. Roberts et al. 'The effects of rapport-building style on children's reports of a staged event'. *Applied Cognitive Psychology* 2004(18)/2, pp. 189–202. – DOI: https://doi.org/10.1002/acp.957; Y. Orbach et al. (see Note 12); M.E. Lamb et al. 'Age differences in young children's responses' (see Note 12).

19 R.E. Geiselman et al. 'Eyewitness memory enhancement in the police interview: Cognitive retrieval mnemonics versus hypnosis'. *The Journal of Applied Psychology* 1985(70)/2, pp. 401–412. – DOI: https://doi.org/10.1037/0021-9010.70.2.401; National Institute of Justice (see Note 8); T. Valentine & K. Maras. 'The effect of cross-examination on the accuracy of adult eyewitness testimony'. *Applied Cognitive Psychology* 2011(25)/4, pp. 554–561. – DOI: https://doi.org/10.1002/acp.1768.

20 M.B. Powell et al. 'Investigative interviewing' (see Note 5).

21 Ibid.

22 G. Oxburgh et al. (see Note 13).

23 M.B. Powell & S.P. Brubacher (see Note 14).

24 S. Moston et al. 'The incidence, antecedents and consequences of the use of the right to silence during police questioning'. *Criminal Behaviour and Mental Health* 1993(3)/1, pp. 30–47. – DOI: https://doi.org/10.1002/cbm.1993.3.1.30; D. Mildren. 'Redressing the imbalance against Aboriginals in the criminal justice system'. *Criminal Law Journal* 1997(21)/7,

numerous interviews feature mainly 'not-recommended questions' and infrequent use of open questions.[*25] Among non-recommended questions are closed questions, lists of options, and suggestive questions, which typically limit the witnesses' time to recall the event and their opportunity to answer in greater depth or more precisely or to provide initial information of a less fully formed sort.[*26] Option-restricted and other closed questions limit the witness's recall process by forcing him or her to answer 'yes' or 'no' or to choose from among only the alternatives offered. Via implications, using suggestive questions may distort eyewitnesses' memory and could encourage false testimony.[*27] For example, Casey and Powell's (2021)[*28] analyses revealed that 77.7% of the questions asked in their sample with children were closed ones, of which 49.2% were specific cued-recall questions (questions specifying the information the child was asked to report) and 28.4% specific yes/no questions.

1.2. The cognitive interview as a structured interviewing method

The criminal-justice system has to take into account that witnesses' memory is fragile. Research shows that the first interview with a witness is especially important, particularly when children are involved.[*29] With children, not accounting for developmental factors such as the interviewee's abilities and boundaries could result in inaccurate testimony.[*30] When the interview is targeted at confirming a specific investigative hypothesis, interviewers could end up asking even more closed and suggestive questions, which may well distort children's memories further.[*31] Studies indicate that interviewing children is the most complicated task for psychologists and police investigators alike.[*32]

There are many concerns associated with interviewing adults as well, especially with regard to more vulnerable witnesses.[*33] It is beyond doubt that the ability of police investigators to obtain accurate and detailed information from vulnerable witnesses constitutes a vital component of law enforcement. In practice, though, the interviewer often limits the time for answering or opportunities for starting with a foundation of more preliminary information by means of multiple-choice or other closed-ended questions.[*34]

Researchers have found that, relative to minors, adults provide more precise and more detailed information about what happened, but this should not be expected as a matter of course – it does not necessarily generalise to any specific interviewee.[*35] For example, adults may differ in their cognitive abilities, irrespective of their age, or in their abilities to understand speech; some have a mental or behavioural disorder,

pp 21–22; A.-C. Cederborg et al. 'Investigative interviews of child witnesses in Sweden'. *Child Abuse & Neglect* 2000(24), pp. 1355–1361. – DOI: https://doi.org/10.1016/s0145-2134(00)00183-6; C. Clarke & R.J. Milne. *National Evaluation of the PEACE Investigative Interviewing Course* (PRAS, no. 149). Home Office 2001. Available at http://www.researchgate.net/profile/Colin_Clarke3/publication/263127370_National_Evaluation_of_the_PEACE_Investigative_Interviewing_Course/links/53da3b620cf2e38c63366507.pdf (most recently accessed on 23.6.2022); T. Myklebust & R.A. Bjørklund. '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)/3, pp. 165–181. – DOI: https://doi.org/10.1002/jip.52; K. Kask. *Ways of Improving Child and Young Adult Witnesses' Performance*. Doctoral thesis, University of Leicester; J. Korkman et al. 'Interview techniques and follow-up questions in child sexual abuse interviews'. *European Journal of Developmental Psychology* 2008(5), pp. 108–128. – DOI: https://doi.org/10.1080/17405620701210460.

25 M. Benson & M. Powell (see Note 14); S. MacDonald. 'Witness interview training: A field evaluation'. *Journal of Police and Criminal Psychology* 2017(32), pp. 77–84. – DOI: https://doi.org/10.1007/s11896-016-9197-6; R. Bull & I. Blandon-Gitlin (see Note 17).

26 R. Bull (see Note 15).

27 G. Oxburgh et al. (see Note 13).

28 S. Casey & M.B. Powell. 'Usefulness of an e-Simulation in improving social work student knowledge of best-practice questions'. *Social Work Education* 2021. – DOI: https://doi.org/10.1080/02615479.2021.1948002.

29 F. Pompedda. *Training in Investigative Interviews of Children: Serious Gaming Paired with Feedback Improves Interview Quality*. Doctoral thesis, Åbo Akademi University, 2018.

30 Ibid.

31 M. Benson & M. Powell (see Note 14).

32 F. Pompedda (see Note 29).

33 For example, related to increased suggestibility and mental disorders. See M. Burton et al. (see Note 12); R. Bull (see Note 15); R. Bull & I. Blandon-Gitlin (see Note 17).

34 R. Bull (see Note 15).

35 M.R. Leippe et al. 'Eyewitness memory for a touching experience: Accuracy differences between child and adult witnesses'. *The Journal of Applied Psychology* 1991(76)/3, pp. 367–379. – DOI: https://doi.org/10.1037/0021-9010.76.3.367.

diagnosed or not, or a language barrier that may influence their understanding of a given question; and there may be obstacles due to the sensitivity of the situation.[*36]

One of the main structured methods used for interviewing adult witnesses is the cognitive interview.[*37] Initially developed principally for the interviewing of co-operative adults[*38], the cognitive interview is used primarily in situations wherein the witness is genuinely attempting to recall and describe what he or she knows but needs assistance to overcome difficulties in remembering and describing the alleged offence in detail. This style of interview is designed to assist the witness by making use of such memory-enhancing techniques as context reinstatement and imagery while further facilitating communication by encouraging the witness to convey his or her knowledge in non-verbal form too (e.g., with nods of the head, pauses, silence, and vocalisations such as 'mhmm').[*39] An open-ended style of interaction at this stage conveys the impression that the interview is interviewee-focused. Giving this impression from early on promotes more detailed responses to subsequent questions, posed during the main part of the interview, about the alleged offence.[*40]

Near the beginning of the interview, the witness describes the event in his or her own words and speaks freely about what he or she remembers. Then the interviewer helps to extend the memory, selecting from among the recommended question types and techniques. One of the most important techniques entails the interviewer remaining silent while the interviewee recalls experiences. However much interviewees appear to be drifting into irrelevancies, they should continue uninterrupted. Also, witnesses often are asked to consider all of their senses when recalling the event. This kind of approach may aid in re-creating the event and trigger more memories. An important pillar of the cognitive interview is to avoid leading questions and minimise the use of closed questions.[*41] In analyses examining the effectiveness of the cognitive interview as compared to unstructured interviewing methods, researchers found the use of recommended questions able to increase the amount of information by 35%, with only a 2% reduction in detail accuracy.[*42] In addition, the cognitive interview has been found to be effective also with interviewees who have learning disabilities and with children.[*43]

Several distinct interview protocols, depending in part on the country, are currently favoured by police and other investigative interviewers to support interviewing adults and/or children. Among them are the National Institute of Child Health and Human Development (NICHD) protocol[*44], Guidance for Achieving Best Evidence (ABE) in Criminal Proceedings[*45], Tom Lyon's 10-step approach[*46], the Step-Wise guidelines[*47], the National Children's Advocacy Center's Forensic Interview Structure (2019)[*48], the CornerHouse

36 Ibid.; R. Bull (see Note 15); R. Bull & I. Blandon-Gitlin (see Note 17).

37 R. Milne & R. Bull (see Note 4).

38 R.P. Fisher & R.E. Geiselman. *Memory-enhancing Techniques in Investigative Interviewing: The Cognitive Interview*. Springfield, IL: Thomas 1992.

39 R.E. Geiselman et al. (see Note 19); M.B. Powell et al. 'Investigative interviewing' (see Note 5).

40 M.B. Powell et al. 'Investigative interviewing' (see Note 5).

41 R.E. Geiselman et al. (see Note 19); National Institute of Justice (see Note 8); M.B. Powell et al. 'Investigative interviewing' (see Note 5); T. Valentine & K. Maras (see Note 19).

42 R.E. Geiselman et al. (see Note 19); K.P. Roberts et al. (see Note 18); M. Benson & M. Powell (see Note 14); R. Bull & I. Blandon-Gitlin (see Note 17).

43 R. Bull (see Note 15).

44 K.J. Sternberg et al. 'Using a structured protocol to improve the quality of investigative interviews' in M. Eisen et al. (eds), *Memory and Suggestibility in the Forensic Interview*. Mahwah, NJ: Erlbaum 2002, pp. 409–436; also see http://nichd-protocol.com/wp-content/uploads/2017/09/InteractiveNICHDProtocol.pdf (most recently accessed on 23.6.2022).

45 Ministry of Justice (UK). 'Achieving best evidence in criminal proceedings: Guidance on interviewing victims and witnesses, and guidance on using special measures', 2011. Available at https://www.cps.gov.uk/sites/default/files/documents/legal_guidance/best_evidence_in_criminal_proceedings.pdf (most recently accessed on 23.6.2022).

46 T.D. Lyon. 'Ten step investigative interview (version 3)', 2021. Available at http://works.bepress.com/thomaslyon/184/ (most recently accessed on 23.6.2022).

47 J.C. Yuille et al. 'The Step-Wise guidelines for child interviews: The new generation' in M. Casonato & Pfafflin (eds), *Handbook of Pedosexuality and Forensic Science*, 2009. Available at https://theforensicpractice.com/pdf/Step-Wise%20guidelines%20for%20child%20interviews%20-%20the%20next%20generation%202009.pdf (most recently accessed on 23.6.2022).

48 National Children's Advocacy Center (US). 'National Children's Advocacy Center's child forensic interview structure'. Huntsville, AL.

Forensic Interview Protocol*[49], Developmental Narrative Elaboration*[50], and various others. The structure and format of these sets of guidelines are quite similar, because they are grounded in the same body of experiment-based literature.*[51] There is still a need to find ways of increasing the use of recommended questions, however. Best-practice interviewing needs to be actively learnt because open-ended questions are seldom used in everyday conversation.*[52]

2. Training in interview skills

On account of previous findings, it appears important to find ways to improve the quality of investigative interviewing of both child and adult witnesses. On the basis of his extensive literature review, Pompedda has suggested that investigator-training formats can be grouped into three main types: short and intensive theory-based training, training that focuses on practice and ongoing feedback, and training sessions with computerised methods and 'serious gaming'.*[53] While addressing all three to some extent below, in this section we focus on the last of these, training that utilised computer-based methods and serious gaming. This choice is informed by the fact that we can benefit from a growing body of literature pertaining to training of investigators who interview child witnesses, particularly in light of the lack of similar applications for training those investigators who interview adult witnesses.

2.1. Brief and intensive theoretical-training courses

There is evidence that the traditional classroom-based mass training model is not successful in translating theoretical skills into practice.*[54] Even though going against research-based recommendations, short and intensive theory-based training is still one of the most common training formats.*[55] Research has shown that, while theoretically oriented training does improve interviewers' knowledge of interview skills, transference of this knowledge into practical skills applied in real investigative interviews is difficult.*[56] At the same time, these training programmes are often expensive, logistically difficult to arrange, and time-consuming, which facts together render it difficult to implement them.*[57]

2.2. Practical training and ongoing feedback

The most commonplace components of practical training consist of lectures about the use of a structured interview protocol and practising the interviewing skills in work with mock victims or witnesses. Interviewers obtain detailed feedback on their performance and supervision throughout all phases of this training. It is noteworthy that this type of training increases the proportion of open questions and reduces the use of suggestive questions in interviewers' speech.*[58] Lamb and colleagues have emphasised that, if the train-

[49] J. Anderson et al. 'The CornerHouse forensic interview protocol: RATAC®'. *The Thomas M. Cooley Journal of Practical and Clinical Law* 2010(12)/2, pp. 193–331.

[50] K. Saywitz & L. Camparo. *The Core Developmental Narrative Elaboration Interview: The Developmental Narrative Elaboration Interview*, 2013. – DOI: https://doi.org/10.1093/med:psych/9780199730896.003.0008.

[51] M. Powell & S. Brubacher (see Note 14).

[52] M.B. Powell et al. 'Investigative interviewing' (see Note 5).

[53] F. Pompedda (see Note 29).

[54] M. Lamb. *Difficulties Translating Research on Forensic Interview Practices to Practitioners: Finding Water, Leading Horses, but Can We Get Them To Drink?*, 2016. – DOI: https://doi.org/10.1037/amp0000039.

[55] F. Pompedda (see Note 29).

[56] J. Hattie & H. Timperley. 'The power of feedback'. *Review of Educational Research* 2007(77)/1, pp. 81–112. – DOI: https://doi.org/10.3102/003465430298487; M. Johnson et al. 'Best practice recommendations still fail to result in action: A national 10-year follow-up study of investigative interviews in CSA cases'. *Applied Cognitive Psychology* 2015(29)/5, pp. 661–668. – DOI: https://doi.org/10.1002/acp.3147.

[57] F. Pompedda (see Note 29); F. Pompedda et al. 'Transfer of simulated interview training effects into interviews with children exposed to a mock event'. *Nordic Psychology* 2020(73), pp. 43–67. – DOI: https://doi.org/10.1080/19012276.2020.1788417.

[58] F. Pompedda (see Note 29).

ing is to be effective, feedback must be provided on a continuous basis and be detailed and immediate.*[59] Interviewing skills exhibit improvement when the interviewers are given an opportunity to revisit the concepts from their learning. Obtaining more complex skills – e.g., in eliciting a narrative account well – requires more time and the application of practical exercises that include personalised feedback from interview assessments.*[60] The feedback should be detailed, including attention to individual questions, such as feedback on particular questions that features articulation of why another question might have been more appropriate and offering of suggested examples for better ones.*[61] It is important that the learners be able to target their weaknesses through the exercises, therefore benefiting from tailored content oriented to their actual needs. Researchers have been studying the importance of feedback for the quality of the questions asked and use of recommended questions, with their reports stating that participants who received feedback showed greater use of recommended questions and less use of closed questions.*[62]

2.3. Training with computerised methods and a serious-gaming element

We should stress that prior research attests that theoretical training in best practice does not improve interview quality.*[63] The training that has gained empirical validation often consists instead of multiple days of intensive workshops that include provision of continuous support and feedback to trainees. In these settings, the interviewers are supported also via one-on-one work and through 'covisions' that entail discussing the details of the interviews conducted. However effective they may be, interventions of these sorts are labour-intensive, and it is challenging to implement them on an ongoing basis.*[64] Hence, they do not constitute a practical way of tackling the above-mentioned shortcomings in other training formats.

Technological innovations open the doors to alternative possibilities for changes in practice within the criminal-justice system, though.*[65] Within the last decade, several computer-based methods and learning activities based on serious gaming have been created to offer an alternative to the facetoface training format. Serious gaming is a type of training that employs avatars of various kinds instead of actors and/or real interviews*[66], and it has already seen use for training in specific skills needed by adults working in emergency response and medicine, alongside some application in airline pilots' training and for cultural training in military settings.*[67] In some cases, the two methods are combined.*[68]

Studies have revealed that training methods that utilise computer-based approaches and/or serious gaming allow students to learn in an environment where there is no risk of harming actual witnesses while also reaping an emotional benefit. The setting's benefit stems from the anonymity of the simulation, which provides an opportunity to practice without fear of embarrassment or criticism. This opportunity, in turn,

59 K.J. Sternberg et al. (see Note 44).

60 S. Brubacher et al. 'Teaching child investigative interviewing skills: Long-term retention requires cumulative training'. *Psychology, Public Policy, and Law* 2021(28)/1, pp. 123–136. – DOI: https://doi.org/10.1037/law0000332.

61 S. Casey & M.B. Powell (see Note 28).

62 F. Pompedda et al. 'Simulations of child sexual abuse interviews using avatars paired with feedback improves interview quality'. *Psychology, Crime & Law* 2015(21)/1, pp. 28–52. – DOI: https://doi.org/10.1080/1068316x.2014.915323.

63 C. Thoresen et al. 'Forensic interviews with children in CSA cases: A large-sample study of Norwegian police interviews'. *Applied Cognitive Psychology* 2009(23)/7, pp. 999–1011. – DOI: https://doi.org/10.1002/acp.1534; C. Thoresen et al. 'Theory and practice in interviewing young children: A study of Norwegian police interviews 1985–2002'. *Psychology, Crime & Law* 2006(12)/6, pp. 629–640- - DOI: https://doi.org/10.1080/10683160500350546.

64 F. Pompedda (see Note 29).

65 D.A. Taylor & C.J. Dando. 'Eyewitness memory in face-to-face and immersive avatar-to-avatar contexts'. *Frontiers in Psychology* 2018(9)/507. – DOI: https://doi.org/10.3389/fpsyg.2018.00507.

66 F. Pompedda (see Note 29).

67 D.E. Brown et al. 'Design and evaluation of an avatar-based cultural training system'. *Journal of Defense Modeling and Simulation* 2019(16)/2, pp. 159–174. https://doi.org/10.1177/1548512918807593; M. Graafland et al. 'Systematic review of serious games for medical education and surgical skills training'. *British Journal of Surgery* 2012(99), pp. 1322–1330. – DOI: https://doi.org/10.1002/bjs.8819; D.J. Van Der Zee et al. 'Conceptual modeling for simulation-based serious gaming'. *Decision Support Systems* 2012(54), pp. 33–45. – DOI: https://doi.org/10.1016/j.dss.2012.03.006; D. Coleman et al. 'Kognito's avatar-based suicide prevention training for college students: Results of a randomized controlled trial and a naturalistic evaluation'. *Suicide and Life-Threatening Behavior* 2019(49)/6, pp. 1735–1745. – DOI: https://doi.org/10.1111/sltb.12550.

68 M.B. Powell et al. 'Improving child investigative interviewer performance through computer-based learning activities'. *Policing & Society* 2016(26)/4, pp. 365–374. – DOI: https://doi.org/10.1080/10439463.2014.942850.

helps the trainee gain confidence.*[69] Furthermore, the researchers found that training based online makes the learning more accessible, more flexible in terms of time, and less expensive, and it gives trainees the opportunity to learn and drill in their own time and at a pace they find comfortable.*[70] It differs from the traditional classroom setting in that it usually enables completion over a more extended time, with ongoing, incremental learning, and there is the possibility of giving personalised feedback to the trainees regularly.*[71] Also, using an online distancelearning format decreases travel costs and pares back the need to hire expensive actors or bring people together in one place for role-play activities.*[72]

In aims of providing solutions of this sort, several digital-avatar-mediated solutions have been introduced. The majority of work on avatar-based technological solutions in interviewer training has focused on the creation of algorithmically and computationally controlled avatars.*[73]

One of the studies reported upon investigated the effect of a long training program*[74] that included mock-interview-afforded practice in utilising open questions, implemented by means of Skype. The investigative interviewers participated in a training programme featuring modules focused on such topics as knowledge of different question types, child development, and techniques promoting disclosure. They also honed their interview skills through mock interviews that used trained actors pretending to be kindergarteners. The results revealed that the participants ended up using more open questions than in pre-training interviews and that this effect was still evident 12 months after the training period.

In another study, the trainees participated in computed-based activities over several months,*[75] studying various question types and best practice for interviewing, completing several tasks connected with ways of eliciting disclosure from a child, and interviewing a virtual child. In the interview settings, trainees were asked to choose the best questions from among the options presented, and they received immediate feedback on their performance. The proportion of open and of recommended questions in trainees' active use increased, with these improvements being sustained at least for between three and six months after the training period.

Avatar-based applications were introduced to serve as an alternative to mock witness interviews with actors. One of these, Avatar Based Interview Training (AvBIT), is an online technology that simulates a face-to-face conversation by means of a virtual representation of a child.*[76] This tool is used mainly to train professionals in conducting sensitive interviews with children. A further development of role-play training, AvBIT is an effort to overcome various limitations of traditional training methods and at the same time improve the effectiveness of standard human-to-human roleplay training methods.*[77] The usual model employed in interviewers' training includes an interview conducted in the form of role-playing, where one person plays the role of a child via an avatar and the trainee gets practice by conducting the interview. A major disadvantage of this method is that it is often perceived as not particularly realistic.

AvBIT online technology provides an opportunity to hone one's skills in conducting interviews by means of child avatars. The online tool makes it possible for the interviewer to interact with an adult behind the avatar of a child on a computer screen in real time. However, no studies have yet examined the effectiveness of this method for increasing the use of recommended questions as a proportion of interviewers' utterances.

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69 S. Casey & M.B. Powell (see Note 28).

70 M. Benson & M. Powell (see Note 14); F. Pompedda et al. 'A combination of outcome and process feedback' *Frontiers in psychology* 2017 (8). – DOI: https://doi.org/10.3389/fpsyg.2017.01474; F. Pompedda et al. 'Transfer of simulated interview training effects' (see Note 57).

71 M.B. Powell. 'Designing effective training programs for investigative interviewers of children'. *Current Issues in Criminal Justice* 2008(20)/2, pp. 189–208. – DOI: https://doi.org/10.1080/10345329.2008.12035804; S. Casey & M.B. Powell (see Note 28).

72 M. Benson & M. Powell (see Note 14).

73 Ibid.; M. Powell & S. Brubacher (see Note 12); S.P. Brubacher et al. 'The effects of e-simulation interview training on teachers' use of open-ended questions'. *Child Abuse & Neglect* 2015(43), pp. 95–103. – DOI: https://doi.org/10.1016/j.chiabu.2015.02.004; M.B. Powell et al. 'Improving child investigative interviewer performance' (see Note 68); F. Pompedda et al. 'Simulations of child sexual abuse interviews (see Note 62).

74 M. Benson & M. Powell (see Note 14); see also, on a study with a sample of teachers, S.P. Brubacher et al. 'The effects of e-simulation interview training' (see Note 73); M. Powell & S. Brubacher (see Note 12).

75 M.B. Powell et al. 'Improving child investigative interviewer performance' (see Note 68).

76 A. Dalli. *Technological Acceptance of an Avatar Based Interview Training Application*, 2021. Master's thesis, Linnaeus University.

77 Ibid.

Another noteworthy computer-assisted training method for improving interviews is In My Shoes[*78], intended to facilitate sensitive conversations between professionals and children. This solution helps the professional gain facility in leading the conversation while enabling the child to talk about his or her experiences, feelings, and views. During the interview, the trainee sits in front of the computer and engages in structured conversation (e.g., rapport-building and information-sharing). Research[*79] indicates that In-My-Shoes-style interviews were as effective as best-practice interviews by several metrics for accuracy.[*80] On the other hand, an interview based on the In My Shoes method usually takes longer than a traditional forensic interview. This difference arises on account of the additional time allocated for building rapport[*81]. The trade-off is that the rapport achieved may be especially beneficial for children who are shy or otherwise find it hard to open up in communication with professionals.

Numerous studies emphasise how crucial feedback is in the learning process.[*82] The type of feedback is important also. It should consist of information about the tasks and how to perform them more effectively; only then does it assist in reducing the discrepancy between the expected results and the interviewer's actual performance. Appropriate feedback does not consist merely of providing information – it can be defined as feedback only if the performance is better next time. In some cases, improvements in performance may necessitate repeating the task more than once.[*83]

Ongoing and immediate feedback is important for genuinely improving interviewers' skills in conducting interviews.[*84] One of the solutions created to train them in making use of different question types when interviewing child-abuse victims and other witnesses is Empowering Interviewer Training (EIT), developed at Finland's Åbo Akademi University.[*85] In this programme, there are two kinds of child avatars, programmed with either an abuse or a no-abuse scenario. Also, half of the avatars are emotional (e.g., crying) while the other half remain neutral.[*86] After reading a brief scenario description regarding an allegation, the interviewer has 10 minutes to interview the avatar shown. An operator listens to the question asked by the interviewer, classifies it in accordance with the question type, and inputs the category information to the simulation software through a graphical interface. As soon as it receives the operator's input, the software automatically displays an appropriate video clip, comprising the avatar response dictated by algorithms. Each child avatar has pre-specified memory content that it may or may not reveal during the interview. The algorithms that the program follows for determining how the avatars respond to interviewers' questions come from experiment-based research studying children's memory and suggestibility. This technique ensures that the avatar behaves in the same manner as a real child, analogously to well-trained actors in a role-play setting.

In real-world interview environments, it is almost impossible to state with certainty whether the child's testimony is factual or not. This renders it impossible to supply appropriate feedback to the interviewer on his or her performance.[*87] In the EIT software, the inherent knowledge of the avatarspecific memory contents makes it possible to give feedback not only on the types of questions the interviewer used (i.e., process feedback) but also on what really happened per the predefined reality and, hence, how close the interviewer got to the truth (i.e., outcome feedback).[*88]

78 K. Fängström et al. 'In my shoes – validation of a computer assisted approach for interviewing children'. - *Child Abuse & Neglect,* 58(2016), pp. 160–172. – DOI: https://doi.org/10.1016/j.chiabu.2016.06.022.

79 K. Fängström, P. Bokström, A. Dahlberg, R. Calam, S. Lucas, A. Sarkadi (see Note 78) Ibid.

80 See also Fängström et al. (ibid.); K. Fängström et al. '"And they gave me a shot, it really hurt." Evaluative content in investigative interviews with young children'. *Children and Youth Services Review* 2017(82), pp. 434–443. – DOI: https://doi.org/10.1016/j.childyouth.2017.10.017; P. Bokström et al. '"I felt a little bubbly in my tummy". Eliciting preschoolers' accounts of their health visit using a computer-assisted interview method'. *Child: Care, Health and Development* 2015(42), pp. 87–97. – DOI: https://doi.org/10.1111/cch.12293.

81 D. Wenke. 'Listen up! Creating conditions for children to speak and be heard: Professional communication with children at risk of exploitation and trafficking – experience and lessons learned from the Baltic Sea region'. Stockholm: Council of the Baltic Sea States Secretariat 2019.

82 S. Casey & M.B. Powell (see Note 28); S. Brubacher et al. (see Note 60).

83 D. Boud & E. Molloy. 'Rethinking models of feedback for learning: The challenge of design'. *Assessment & Evaluation in Higher Education* 2012(38), pp. 1–15. – DOI: https://doi.org/10.1080/02602938.2012.691462.

84 M.E. Lamb et al. 'Is ongoing feedback necessary to maintain the quality of investigative interviews with allegedly abused children?'. *Applied Developmental Science* 2002(6)/1, pp. 35–41. – DOI: https://doi.org/10.1207/s1532480xads0601_04.

85 F. Pompedda et al. 'Simulations of child sexual abuse interviews' (see Note 62).

86 F. Pompedda et al. 'Transfer of simulated interview training effects' (see Note 57).

87 Ibid.

88 N. Krause et al. 'The effects of feedback and reflection on the questioning style of untrained interviewers in simulated child sexual abuse interviews.'. *Applied Cognitive Psychology* 2017(31)/2, pp. 187–198. – DOI : https://doi.org/10.1002/

While several studies, with samples composed of professionals of several types[*89], attest that the proportions of recommended questions increase both in avatar interviews and in interviewing of real children, the EIT approach has proved to be effective also in transferring knowledge into practice[*90]. This is where other training formats have failed.

In addition, another widely used training intervention, behaviour modelling, is worth considering in this context.[*91] It is based on Bandura's social learning theory, addressing how well-defined behaviours (skills) can be learned by providing models that display the effective use of particular behaviours.[*92] Studies using EIT have shown that the proportion of recommended questions rises when the interviewers have, in addition to receiving feedback on their performance, watched a short video clip of best-practice behaviours interviewing child witnesses before conducting interviews themselves, compared to receiving only feedback.[*93]

Researchers assessing avatar-based training have found that, in the absence of extensive theoretical guidance, the quality of the interview improves significantly after just an hour of practice when the interviewer is provided with feedback after every interview conducted.[*94] Highlighting another relevant factor, most researchers agree that the more relaxed the interviewee feels while carrying out the interview, the more information the interviewee is likely to give. This is especially true when the topic is sensitive or connected with trauma, or when the interviewee is fearful of the consequences that could arise from reporting the offence.[*95] Results demonstrate that, even in such tricky conditions, the number of recommended questions increases both in simulated interviews and in later practice through training with the software.[*96] One way to provide feedback continuously is to implement 'booster sessions' using EIT after a certain span of time since the last training or interview.

3. Conclusions and directions for the future

With this paper, we have drawn attention to the room for improvement in the quality of investigative interviews with both child and adult victims/witnesses. Victims of and witnesses to any crime should receive a respectful, sensitive, professional, and non-discriminatory response from competent authorities. Therefore, the practitioners who are likely to receive and handle complaints should be trained accordingly.[*97] It is important that the witness trust the official who is responsible for the investigation, and every effort should be made to encourage and facilitate reporting of especially crimes against person, to allow the victims to break the cycle of repeat victimisation. If investigative interviews are conducted by skilled professionals, we can better avoid miscarriages of justice and witnesses' secondary victimisation.

The research to date indicates that the best outcome when one is interviewing either adult or child witnesses can be achieved when structured interviewing methods are followed. By means of structured interviewing methods, the interviewers ask more recommended questions, which let the interviewee recall details of what happened in greater accuracy, thereby enhancing the quality of the interview. The benefits can manifest themselves in reliable and accurate evidence in criminaljustice proceedings.

acp.3316; F. Pompedda et al. 'Simulations of child sexual abuse interviews' (see Note 62); F. Pompedda (see Note 29).

89 S. Brubacher et al. (see Note 60).

90 F. Pompedda et al. 'Simulations of child sexual abuse interviews' (see Note 62); F. Pompedda et al. 'A combination of outcome and process feedback' (see Note 64); N. Krause et al. (see Note 88); F. Pompedda et al. 'Transfer of simulated interview training effects' (see Note 57).

91 P.J. Taylor et al. 'A meta-analytic review of behavior modeling training'. *The Journal of Applied Psychology* 2005(90), pp. 692–709. – DOI: https://doi.org/10.1037/0021-9010.90.4.692.

92 A. Bandura. 'Self-efficacy: Toward a unifying theory of behavioral change'. *Psychological Review* 1977(84), pp. 191–215. – DOI: https://doi.org/10.1037/0033-295x.84.2.191.

93 S. Haginoya et al. 'The combination of feedback and modeling in online simulation training of child sexual abuse interviews improves interview quality in clinical psychologists'. Child Abuse & Neglect 2021(115). – DOI: https://doi.org/10.1016/j.chiabu.2021.105013.

94 F. Pompedda (see Note 29).

95 M.B. Powell et al. 'Investigative interviewing' (see Note 5).

96 M. Benson & M. Powell (see Note 14); S. Haginoya et al. 'Online simulation training of child sexual abuse interviews with feedback improves interview quality in Japanese university students'. *Frontiers in Psychology* 2020(11)/998. – DOI : https://doi.org/10.3389/fpsyg.2020.00998; S. Haginoya et al. 'The combination of feedback and modeling' (see Note 93).; F. Pompedda et al. 'Transfer of simulated interview training effects' (see Note 57).

97 See the 'Crime, safety and victims' rights' survey of the EU Agency for Fundamental Rights (see Note 2).

We have addressed the fact that interviewer training can be implemented in several formats. Short and intensive theory-oriented training tends to increase the participants' knowledge of the subject matter, but they then face difficulties in applying the knowledge in practice. Training with a practice element that involves immediate, continuous feedback is important to assist in overcoming that shortcoming and others discussed above. Often, however, immediate and ongoing feedback may not be available, especially after the investigator's completion of the training programme. In addition, frequent training sessions may exhibit limitations created by such factors as high costs and authorities' busy schedules. We have found a promising way forward nonetheless: one way to continue providing feedback on interviewers' performance is by using so-called booster sessions before the next investigative interview, to refresh interviewer skills (e.g., sessions several months after the last training or when a specified amount of time has passed since the previous interview).

Training with computerised methods and serious gaming is worthy of consideration also. Both techniques have been implemented to simulate investigative interviews, especially with child witnesses. There are diverse solutions, designed for training in particular skills, so considerable study both in the laboratory and in the field is still required. For example, what is the effect of using the AvBIT solution on the use of preferred question types and on adherence to structured-interview guidelines? Similarly, the EIT solution can be applied in training interviewers not only to use recommended questions and better question types but also to adhere fully to a given structuredinterviewing method, such as the NICHD protocol. There is a need to test the effectiveness of these solutions too, especially among such advanced-needs users as police investigators. Also, computerised methods aid in endeavours to find solutions for other methods' limitations. For instance, using them in addition to other approaches reduces the cost of training and is more flexible in its time demands while also catering to trainees in a more personalised manner.

Finally, there are numerous pieces of research conducted to examine the quality of investigative interviews, with adult witnesses as well as children. Regrettably, the results show a parallel to those from interviewing children: the quality remains low. Therefore, it would be beneficial to develop a computer-based solution to train investigators – police investigators, prosecutors, judges, and lawyers alike – in skills in interviewing adult witnesses. This should increase the proportion of recommended questions and improve adherence to the guidelines for interviewing adult witnesses in line with structured methods such as the cognitive interview. Practice of this nature also supports high quality of eyewitnesses' testimony in both pre-trial and judicial proceedings, thereby reducing the risk of wrongful conviction. As the quality of interrogation rises, so does the likelihood of victims and other persons reporting crimes to the authorities in the future.

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Marta Otto

Assistant Professor
University of Łódź

‘Protection of Employee Privacy in the Digital Workplace’:

Arguments and Comments Presented during the Defence of Seili Suder’s Doctoral Thesis

This contribution is based on the opinion I presented in my role as designated opponent for the doctoral dissertation of Seili Suder.[*1] The dissertation, a compilation-based work comprising five pieces published earlier, with Suder as sole author[*2] or in collaboration with other researchers[*3], alongside a framing compendium of the research conducted, which systematises but also to a considerable degree complements the deliberations contained in the relevant publications, was defended in proceedings hosted by the University of Tartu’s School of Law on 6 December 2021. It was accepted for commencement of awarding of the degree Doctor of Philosophy in Law on 27 September 2021 by a resolution of the council of that faculty.

The dissertation was designed to contribute to employment-specific discussion of privacy and data protection by exploring the main legal concerns and practical challenges posed by deployment of the ‘newest’ digital monitoring technologies (i.e., monitoring of social media, the monitoring of microchipped employees, and monitoring technologies of the sort used amid the SARS-CoV-2 pandemic – such as contact-tracing applications and health-monitoring technologies) within the current European privacy and data-protection framework. While these are, as Suder aptly observes, among ‘the most substantial and thus influential around the world’, there remains the unresolved question of the need, if any, for establishment of specific/sectoral provisions at the EU level that regulate privacy and data protection, by, *inter alia*, delineating more precise/strict conditions under which the latest technologies affording employee monitoring should be deemed permissible.

The digital age has revolutionised the operations of both huge corporations and small, family-run businesses. It is only by looking back a few decades into the past that we see how dramatic the changes have been that have shaped the modern workplace. The ‘new world of work’, with its urgent pursuit of

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1 Available at https://dspace.ut.ee/handle/10062/75422 (most recently accessed on 18 March 2022).

2 S. Suder. ‘Pre-employment background checks on social networking sites – may your boss be watching?’. *Masaryk University Journal of Law and Technology* 2014(8)/1; S. Suder. ‘Processing employees’ personal data during the Covid-19 pandemic’. *European Labour Law Journal* 2021(12)/3. – DOI: https://doi.org/10.1177/2031952520978994.

3 S. Suder & A. Siibak. ‘Employers as nightmare readers: An analysis of ethical and legal concerns regarding employer–employee practices on SNS’. *Baltic Journal of Law & Politics* 2017(10)/2. – DOI: https://doi.org/10.1515/bjlp-2017-0013; S. Suder & M. Erikson. ‘Microchipping employees – unlawful monitoring practice or a new trend in the workplace?’ in M. Ebers & M. Cantero Gamito (eds), *Algorithmic Governance and Governance of Algorithms: Legal and Ethical Challenges*, pp. 71–85. Springer International (Data Science, Machine Intelligence, and Law 1) 2020. – DOI: https://doi.org/10.1007/978-3-030-50559-2_4; S. Suder & A. Siibak. ‘Proportionate response to a COVID-19 threat? Use of apps and other technologies for monitoring employees under the EU data protection framework’. *International Labour Review* 2021 / Special Issue ‘COVID-19 and the World of Work’. – DOI: https://doi.org/10.1111/ilr.12331.

cost-efficiency, automation, and connectivity, has brought with it many legal and ethics-linked challenges, including several related to the erosion of once clear boundaries between professional and private life. Thanks to certain generally accessible new technologies, acquisition and processing of various types of personal data in the contemporary world of work takes place on an unprecedented scale. The acceptance of such a dynamic as a natural element of the *sui generis* institutional culture of modern workplaces is problematic, as the relevant data-processing practices visibly transcend the heretofore accepted limits of employers' control and supervision and, in consequence, considerably reinforce the inherent asymmetry between the parties in the employment relationship by furnishing employers with a reinvigorated source of power over employees – namely, that of information[*4].

Interestingly enough, despite voluminous literature on the right to privacy, the employment-specific doctrine thus far has focused mainly on analysis of those forms of privacy and data-protection infringements already perceived as more 'traditional' (such as monitoring, drug testing, and collection of personal data)[*5]. In addition, the still rather scarce academic discussion of emerging legal and ethics challenges ushered in by the newer technologies in the workplace is dominated by American scholars. At the same time, the protection of privacy in employment, as the outbreak of the pandemic clearly confirmed, remains in a process of developing regulation. The choice of the topic for the dissertation is, therefore, much welcomed, as it articulates a valid research objective of both theoretical and practical importance.

The 'framing portion of the dissertation is clearly structured around an introduction, four parts dedicated to addressing each of the research questions posed by the author[*6] in a separate manner, and conclusions. In the introduction, after appropriately delineating the context and significance (including the potential privacy- and data-protection-related problems) of incorporating the latest digital monitoring technologies into modern workplaces, A noteworthy aspect of Suder's presentation of the specific components of the research methodology is that the author decided to narrow the scope of the research to two building blocks of the European architecture – the ECHR and GDPR – while deliberately omitting the relevant provisions and institutional setting of the Charter of Fundamental Rights of the European Union from consideration. Suder also restricted the analysis of the GDPR to particular data-protection principles. Although the reasoning behind such a choice is sound in general, the treatment could be made more complete, *inter alia*, via the addition of a few reflections on the possible added value of the Charter with regard to privacy- and data-protection-connected standard-setting for the digital workplace, accompanied by brief explanation of why those GDPR principles not within the scope seem to be less important/problematic in the employment context and, therefore, do not constitute part of the 'core' when it comes to establishing the relevant standard of protection in the digital workplace. At the same time, although I generally do agree that 'the choice to focus both on privacy and data protection is inevitable because the discussion concerning digital monitoring technology should be based on both topics', it is difficult to accept the rather hasty assumption that 'data protection is considered as a part of privacy'. Given the complexity of the relationship between the two 'apparently distinctive rights'[*7], much discussed in the European literature, but even more importantly the potential implications of such a statement for the future and for the employment-specific

4 For general discussion, see M. Otto. *The Right to Privacy in Employment: A Comparative Analysis*. Oxford, UK: Hart Publishing 2016. – DOI: https://doi.org/10.5040/9781509906147.

5 See, for example, F. Hendrickx. *Employment Privacy Law in the European Union: Human Resources and Sensitive Data*. Intersentia 2003; F. Hendrickx. *Employment Privacy Law in the European Union: Surveillance and Monitoring*. Intersentia 2002; S. Nouwt et al. *Reasonable Expectations of Privacy? Eleven Country Reports on Camera Surveillance and Workplace Privacy*. Springer 2005; K. Klein & V. Gates. *Privacy in Employment: Control of Personal Information in the Workplace*. Thomson Canada 2005.

6 These are articulated thus: 'To achieve the research aim, the main research questions addressed in the context of digital workplace monitoring practices are as follows: 1) How does the ECHR protect employees if digital monitoring technologies are used by the employer in the digital workplace? 2) Under which conditions does the GDPR apply if the employer uses digital monitoring technologies? Which monitoring practices used by employers in the digital workplace under the GDPR could potentially invade the privacy and data protection rights of employees? Which monitoring practices used by employers in the digital workplace do not fall under the scope of the GDPR but should be regulated to protect employees' privacy? 3) Which legal bases used by employers in the digital workplace to monitor employees under the GDPR could potentially invade the privacy and data protection rights of employees? 4) What protection do the data protection principles offer to employees if the employer monitors employees in the digital workplace?'.

7 See, for instance, S. Rodota. 'Data protection as a fundamental right' in S. Gutwirth et al. (eds), *Reinventing Data Protection*, pp. 77–82. Springer 2009. – DOI: https://doi.org/10.1007/978-1-4020-9498-9_3; P. De Hert & S. Gutwirth. 'Data protection in the case law of Strasbourg and Luxemb[o]urg: Constitutionalisation in action' in S. Gutwirth et al. (eds), *Reinventing Data Protection*, pp. 3–44. Springer 2009. – DOI: https://doi.org/10.1007/978-1-4020-9498-9_1.

regulatory framework postulated by the author, I would have expected this issue to have been addressed with greater attention and depth in the introductory remarks.

The second and third part of the dissertation's framing portion are dedicated to critical analysis of employee privacy and data-protection standards, as encapsulated in the ECHR and the GDPR and further clarified in the relevant case law, from the perspective of particular challenges brought by digital monitoring at work. The analysis presented – *nota bene*, being considerably substantiated by 'hypothetical cases' involving new digital monitoring technologies, chosen by the author – is of great theoretical and practical importance, as it allows for better understanding of the potential shortcomings of the relevant framework with regard to the employment context as well as their implications for coherent setting of minimum standards across the EU. As the thorough discussion during the defence of the dissertation confirmed, the analysis in question could, however, further benefit from a brief explanation of potential implications of the accession of the EU to the ECHR (Art. 6 TEU) from the perspective of the current European standard of protection of privacy in the digital workplace.

The fourth and fifth part are devoted to examination of the standard of protection offered by the selected data-protection principles found in the GDPR (i.e., lawfulness, purpose limitation, fairness, and the transparency principle) with regard to digital monitoring in the workplace. Notably, the principle of lawfulness is given special attention by the author, reflected in the separate chapter devoted to analysing the legal bases for monitoring that are introduced in the GDPR. The approach chosen enables the thesis to provide insight as to which of the legal bases cited by employers for monitoring of employees in the digital workplace under the GDPR umbrella could potentially contravene the privacy and data-protection rights of employees. It should be noted that the author in this connection too consciously restricts the scope of the relevant examination to employment contracts, addressed in Article 6(1)(b); the legal obligation incurred, per Article 6(1)(c); the employee's consent, under Article 6(1)(a); and legitimate interests pursued by the employer, under Article 6(1)(f). The omission of other legitimate grounds in the compendium here is justified, given their generally very limited application in the employment context and the complementary analysis presented in the associated publications[*8]. More problematic, as already alluded to above, might be the omission of some of the 'fair information principles'. Compliance with all of these key principles constitutes a fundamental building block for the standard of protection set by the GDPR, as reflected also more specifically in its Article 83(5)(a), which states that infringements of the basic principles for processing of personal data are subject to the highest tier of administrative fines. Again, in light of the somewhat complementary nature of the relevant publications[*9] and the more technical character of some of the principles left to the side, the author's scoping decision could be backed up by the addition of more detailed explanation as to why the principles of lawfulness, purpose limitation, fairness, and transparency are perceived by the author as constituting the *sui generis* core of the relevant standard of protection in the digital workplace.

Notwithstanding the fact that some parts of the analysis presented in parts 4 and 5 may be less detailed than would have been ideal, the author, by nimbly manoeuvring between the arguments presented in the literature, Article 29 Working Party / European Data Protection Board guidance, and both international and national jurisprudence, manages to draw correct conclusions regarding the potential pitfalls of the technologically neutral yet far too generally couched standard of protection offered by the GDPR and, most importantly, to formulate some interesting suggestions pertaining to desirable norms for incorporation into future employment-specific legislation.

In the final part of the work, Suder delineates a set of original and generally well-argued *de lege ferenda* recommendations. Regrettably, despite signalling such an intent within the introductory remarks, the author does not clarify 'whether the EU legislature should enact a directive or a regulation that deals with employee's privacy rights'. It is, therefore, not so clear to the reader either what the basis and rationale for such an action at EU level could be or what kind of desirable institutional setting should be installed within such a framework (a generalist/traditional court-based scheme or, instead, a specialist approach or

[8] See, especially, the 'vital interest' analysis presented by S. Suder. 'Processing employees' personal data during the Covid-19 pandemic'. *European Labour Law Journal* 2021/12. – DOI: https://doi.org/10.1177/2031952520978994; S. Suder & A. Siibak. 'Proportionate response to a COVID-19 threat? Use of apps and other technologies for monitoring employees under the EU data protection framework'. *International Labour Review* 2021 / Special Issue 'COVID-19 and the World of Work'. – DOI: https://doi.org/10.1111/ilr.12331.

[9] See, in particular, S. Suder & A. Siibak. 'Employers as nightmare readers: An analysis of ethical and legal concerns regarding employer–employee practices on SNS'. *Baltic Journal of Law & Politics* 2017(10), pp. 76–106. – DOI: https://doi.org/10.1515/bjlp-2017-0013.

special/separate scheme) according to the author. I would recommend that future publications give special attention also to the most problematic elements of the current framework from the perspective of coherent implementation of the requirements of substantive fairness in the digital workplace context throughout the EU.

In conclusion, it must be noted that my critical observations presented above should be taken as an invitation for discussion only. There can be no doubt that the dissertation represents a scholarly work of high quality that integrates privacy discussion with data-protection and labour-law discourse in an admirable way while successfully implementing a socio-legal approach. The latter not only enriches the dissertation with an interesting portrayal of the social reality surrounding the data-processing practices in which employers recently have begun engaging but also, and far more importantly, supplies considerable support for the main hypothesis behind the dissertation in relation to the issue – so often raised yet rarely so comprehensively addressed in the literature – of the inadequacy of the current regulatory framework in the EU with regard to the employment context.

Abbreviations

AD	anno Domini
AI	Artificial Intelligence
AvBIT	Avatar Based Interview Training
BBC	British Broadcasting Corporation
BC	Before Christ
CA	Courts Act
CDS	credit-default swap
CEO	Chief Executive Officer
CGPJ	Council of the Judiciary
CIA	Constitution Implementation Act
CJEU	Court of Justice of the European Union
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECJ	European Court of Justice
ECP	Estonian Communist Party
ECtHR	European Court of Human Rights
EIT	Empowering Interviewer Training
EPC	European Patent Convention
EPO	European Patent Office
ESSR	Estonian Soviet Socialist Republic
ETA	Basque Euskadi Ta Askatasuna ('Basque Homeland and Liberty')
FD	Framework Decision
GDPR	General Data Protection Regulation
GRECO	Group of States against Corruption in the Council of Europe
HÕNTE	Rules for Good Legislative Practice and Legislative Drafting
ML	machine learning
NCJJ	National Council of the Judiciary
NICHD	National Institute of Child Health and Human Development
OECD	The Organisation for Economic Co-operation and Development
ÕPPA	Basic Principles for Legislative Policy until 2030
SJA	Status of Judges Act
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
USSR	Union of Soviet Socialist Republics
VTK	drafting proposal

Wednesday, 5 October

20:00–22:00 Welcoming evening at Tartu Widget Factory (Kolm Tilli, Kastani 42)

The welcoming evening will include an expression of gratitude for the reviews of company law and insolvency law.
Speech by Minister of Justice **Lea Danilson-Järg**.
In addition, thanks are also due to the contributors of the work 'Monograph on Legal Reforms'.
Authors: Karin Sein, Merike Ristikivi, Jaan Sootak, Ragne Piir, Katre Luhamaa, Gerda Johanson, Kadriann Ikkonen

Thursday, 6 October

9:00–10:00 Morning coffee
(University of Tartu Sports Hall, Ujula 4;
doors will open at 8:45)

Plenary meeting

(University of Tartu Sports Hall, Ujula 4)

10:00 Opening
Jüri Ratas, *President of the Riigikogu*

Hannes Vallikivi, *Attorney-at-Law and Partner, Advokaadibüroo WALLESS, Doctoral Student, School of Law, University of Tartu*
When Estonia was Governed by Lawyers. The Impact and Significance of the Estonian Lawyers' Days from 1922–1940 on the Estonian State and Law

The presentation will discuss whether and how much of an impact the Lawyers' Days could have had on Estonia and whether something similar could be achieved today.

30 Years of the Constitution. How was the Constitution Made?

(University of Tartu Sports Hall, Ujula 4)
Moderators: **Heiki Loot**, *Justice of the Supreme Court, Chairman of the Constitutional Law Endowment Panel, Estonian Academy of Sciences*
Mag. iur. **Nele Parrest**, *Justice of the Supreme Court*

Participants in the discussion: **Jüri Adams**, *Member of the Constitutional Assembly, Head of the Working Group on the Draft on which the Work of the Constitutional Assembly is Based, former Minister of Justice and Member of the Riigikogu;* **Tõnu Anton**, *Chairman of the Constitutional Assembly, former Chairman of the Administrative Law Chamber of the Supreme Court;* PhD **Liia Hänni**, *Chair of the*

Editing Committee of the Constitutional Assembly, former minister and Member of the Riigikogu, Chief Expert on E-democracy; PhD **Jüri Raidla**, *Expert of the Constitutional Assembly, Minister of Justice from 1990–1992, Attorney-at-Law and Senior Partner, Ellex Raidla Advokaadibüroo*

How were the foundations of the restored Estonian State, fundamental human rights, and legal reforms laid? What were the fundamental choices, the critical and dramatic moments, what worked and should anything have been done differently? The authors of the Constitution recall and express their thoughts 30 years later.

11:40–12:00 Awarding the "Õiguse eest seisja" prizes – **Lea Danilson-Järg**, *Minister of Justice*

12:00–12:30 Coffee break

Restoring the Rule of Law in Estonia from 1992–2002

(University of Tartu Sports Hall, Ujula 4)

Moderator: MA **Heili Sepp**, *Justice of the Supreme Court*

12:30–14:00 Introduction and historical overview: *dr. iur.* **Karin Sein**, *Professor, University of Tartu*; PhD **Merike Ristikivi**, *Associate Professor, University of Tartu*
Participants in the discussion: **Heiki Loot**, *Justice of the Supreme Court*; *dr. iur.* **Priit Pikamäe**, *Advocate General, Court of Justice, former Chief Justice of the Supreme Court*; *dr. iur.* **Priidu Pärna**, *former Deputy Secretary General of the Ministry of Justice*; **Märt Rask**, *former Minister of Justice*; PhD **Paul Varul**, *former Minister of Justice, Professor Emeritus, University of Tartu*

The panel discussion will look at the origins and background of the legal reforms carried out in Estonia between 1992 and 2002. The topic of legislation will focus in particular on the Law of Obligations Act and the Penal Code, which will be twenty years old in 2022. In terms of time, the focus is on the decade starting with the adoption of the Constitution and ending with the entry into force of the two major codes, i.e. the Law of Obligations Act and the Penal Code, in 2002. The participants in the plenary meeting discussion are key people who worked in the Ministry of Justice and led the reforms during the decade in question, who will open up the background to the decisions taken at the time, and give a retrospective assessment of what choices made at the time have stood the test of time, what should have been done differently, and what the health of the Estonian rule of law is like today.

14:00–15:15 Participants move to the sections where lunch will take place

Is Our Constitution Well Protected? Part 2

(University of Tartu Sports Hall, Ujula 4)

Moderator: PhD **Uno Lõhmus**, *former Chief Justice of the Supreme Court*

15:15–16:45 PhD **Madis Ernits**, *Judge, Tartu Circuit Court*
Main Problems with the Estonian Constitutional Review Model
Dr. iur. **Paloma Krõõt Tupay**, *Lecturer of Constitutional Law, University of Tartu*
The Will of the Legislator or the Decision of the Judge? An Attempt to Assess the Strength of Constitutional Review Against the Legislator
Mag. iur. **Aaro Mõttus**, *Visiting Lecturer of Constitutional Law, University of Tartu, Doctoral student, School of Law, University of Tartu*
Political Decision-Making and Constitutional Review: Roles and Procedures

The debate on constitutional review launched in the constitutional law section of the previous Lawyers' Days continues. Estonia has chosen a peculiar model for constitutional review. Pre-presidential control, ex-post control by the Chancellor of Justice, and the absence of a separate constitutional court are its hallmarks. What are the main problems with this model, what is good and what could be better, and most importantly, is our Constitution well protected – this is what

former and current constitutional law professors at the University of Tartu will discuss.

16:45–17:15 Coffee break

Quo Vadis, Future Work? Social Protection in Modern Employment Relations Regulation

(University of Tartu Sports Hall, Ujula 4)

Moderator: LLD **Annika Rosin**, *Assistant Professor of Labour and Social Law, University of Turku*

17:15–18:45 *Mag. iur.* **Thea Treier**, *Counsellor for Labour Affairs, Permanent Representation of Estonia to the EU*
Is the European Union Exceeding its Competence to Regulate Minimum Wage?
PhD **Seili Suder**, *Head of the Employment Relations and Working Environment Department, Ministry of Social Affairs*
What Regulation Does Teleworking Need?
Dr. iur. **Merle Erikson**, *Professor on Labour Law, University of Tartu*
Mandatory Vaccination in Employment Relationship
Liina Naaber-Kivisoo, *Judge, Viru County Court*
Challenges in Employment Relations Regulation in the Corona Crisis

Technological developments, globalisation, changing values, and other changes in society have changed the content of work and the way it is done. New forms and ways of working have become commonplace. Both the employee and the employer attach importance to greater freedom of agreement in regulating future work. However, the trend in the regulation of employment relations tends to be more towards setting out detailed rules of conduct for the parties to an employment relationship. Discussion focuses on whether and why detail is needed when setting and implementing minimum wages, teleworking as well as rules on safety and health at work.

Obligation to Enter into Contract and Anonymisation of Liability in 2022 – from Crowdfunding to Cryptocurrency in the Context of Contract Law

(V Spa conference centre, Riia 2)

Moderator: PhD **Marko Kairjak**, *Vice Chairman of the Estonian Legal Science Society, Attorney-at-Law and Partner, Ellex Raidla Advokaadibüroo*

15:15–16:45 Participants in the discussion: PhD **Nikita Divissenko**, *Utrecht University, The Netherlands*; **Siim Tammer**, *Member of the Management Board, Financial Supervision Authority, Doctoral student, School of Law, University of Tartu*; **Reimo Hammerberg**, *CEO, Ignium OÜ*

Over the last decade in particular, the financial sector has taken a different view of the obligation to conclude a contract. In today's world of financial services, everyone's right to a basic means of settlement, i.e. a bank account, has become a more diversified right to make affordable payments through a non-bank payment intermediary, to earn a daily supplement to the pension pillar through a fashionable mobile app, to finance things collectively and sustainably and, finally, to say goodbye to the centrally controlled and therefore boring ordinary means of payment and make transfers in cryptocurrency. This is the new normal and the Law of Obligations Act has had to keep pace. Has KYC/AML changed the obligation to enter into a contract and the right to terminate a contract? The theme of the section will be to what extent the legislator should safeguard investor rights in the world of alternative finance: protection under company law *vs.* contractual relations, the complex choices of supervision in the control of standard terms and conditions, the deconstruction of complex financial instruments. What is certain is that the flight from the obligations of a licence to operate has led to complex contractual relationships that can create risks for Estonia: crowdfunding, ICOs, payment services.

16:45–17:15 Coffee break

Punishment – Retribution or Prevention?

(V Spa conference centre, Riia 2)

Moderators: PhD **Anneli Soo**, *Associate Professor of Criminal Law, University of Tartu*
PhD **Andreas Kangur**, *District Prosecutor, Viru District Prosecutor's Office, Lecturer of Criminal Procedure, University of Tartu*

17:15–18:45 PhD **Anneli Soo**, *Associate Professor of Criminal Law, University of Tartu*
What are the Aims of Punishment in Accordance with § 56 of the Penal Code?
Mari-Liis Mägi, *Clinical Forensic Psychologist, Expert of Forensic Psychology*
Is the Change in Behaviour Triggered by a Whip or a Carrot?

Participants in the discussion: **Elina Elkind**, *Judge, Harju County Court*; **Mihkel Gaver**, *Attorney-at-Law, Advokaadibüroo GAVER*; **Toomas Liiva**, *Senior Prosecutor, Southern District Prosecutor's Office*; **Mari-Liis Mägi**, *Clinical Forensic Psychologist, Expert of Forensic Psychology*

It has been twenty years since the Penal Code entered into force. Subsection 56 (1) of the Penal Code provides a guiding hand to the sentencing of the offender to take into account not only the offence but also the person of the offender. Whether, how, and why to do it? Experts with a total of 68 years of experience in the application of punishments will take part in the debate.

Amendments to Lease Contract Regulation

(Tartu University library conference centre, Struve 1)

Moderator: PhD **Paul Varul**, *Professor Emeritus, University of Tartu, Attorney-at-Law and Senior Partner, Advokaadibüroo TGS*

15:15–16:45 **Tõnu Toompark**, *Member of the Management Board, Estonian Owners' Confederation*
What is Wrong with Tenancy Law Regulation and How can We Fix It?
Vaike Murumets, *Director of Private Law Division, Ministry of Justice*
Is a Definitive Solution to the Problem of Lessee Refusing to Leave Possible?
Dr. iur. **Karin Sein**, *Professor of Civil Law, University of Tartu*
Disputes Related to Lease Contracts in the Context of the COVID-19 Pandemic

The rules on residential lease contracts are perhaps the most reformed part of the Law of Obligations Act in its twenty-year history and, unlike the changes brought about by the transposition of EU consumer law directives, the changes to the regulation of lease contracts have been brought about by purely domestic developments. At the beginning of 2021, there was a major reform of tenancy law, preceded by lessors' representatives raising the issue of lessees refusing to leave and arguing that Estonia's tenancy regulation is too lessee-biased. The aim of the section is to critically assess the changes in the regulation of residential leases over the twenty years of the Law of Obligations Act and to ask whether the current regulation strikes a reasonable balance between the interests of the contracting parties. In addition to the reform of the lease of dwellings, the constraints imposed by the COVID-19 pandemic have raised the question of whether Estonia's lease regulation is flexible enough to deal with the problems raised by such an extraordinary crisis.

16:45–17:15 Coffee break

Role of Social Rights in the Constitution

(Tartu University library conference centre, Struve 1)

Moderator: *Dr. iur.* **Gaabriel Tavits**, *Professor of Social Law at the University of Tartu*

17:15–18:45 PhD **Katre Luhamaa**, *Lecturer of European Law, University of Tartu*
Responsibilities of the State to Ensure the Well-Being of Children from Vulnerable Families
LLM **Mari-Liis Viirsalu**, *Doctoral student, School of Law, University of Tartu*
Market-Based Organisation of Social Services on the Basis of Individual Choice – in Whose Interest?

Mag. iur. **Merle Malvet**, *Adviser, Social Rights Department, Office of the Chancellor of Justice*
Fundamental Right to Social Security
Peep Peterson, *Minister of Health and Labour*
Social Security and Fundamental Rights

The section will discuss the nature and importance of fundamental social rights. Social rights in the Estonian Constitution – 30 years of theory and practical experience. The focus is on the role and responsibility of both the state and the individual in providing social protection, and the scope of social protection guaranteed by the Constitution.

Supreme Court as an Interpreter of Criminal Law

(Hotel Lydia event centre, Ülikooli 14)

Moderator: **Markus Kärner**, *Deputy Secretary General, Criminal Policy Department, Ministry of Justice, Doctoral student at the School of Law, University of Tartu*

15:15–16:45 Participants in the discussion: PhD **Jaan Sootak**, *Professor Emeritus, University of Tartu*; PhD **Paavo Randma**, *Judge of the Criminal Chamber of the Supreme Court*; *dr. iur.* **Erkki Hirsnik**, *Judge of the Criminal Chamber of Tartu Circuit Court*; *mag. iur.* **Andres Parmas**, *Prosecutor General*

Inevitably, there is a space between the text of the law and real life that needs to be filled. During the twenty years of the existence of the Penal Code, the decisions of the Supreme Court have been of great importance in further developing the law and ensuring its uniform application. Although the legislator has not given the decisions of the Supreme Court precedential value in matters of substantive law, the jurisprudence of the Supreme Court de facto binds all those applying the law. Therefore, the Supreme Court's decision is often not limited to an individual case. The section deals with the role of the Supreme Court as an interpreter of criminal law. We discuss how the Supreme Court has developed criminal law over the past twenty years and how much room the legislator should leave for interpretation. What are the considerations on which the justice of the Supreme Court bases their decision? How does legal dogmatics develop and can it be borrowed from Germany, for example? What do legal scholars and practitioners expect from the Supreme Court? Where is the dividing line between interpreting the law and establishing it?

16:45–17:15 Coffee break

Protection of the Author and the Performer as the Weaker Party to an Author's Contract and the Renewed Regulation of This in the Copyright Act

(Hotel Lydia event centre, Ülikooli 14)

Moderator: PhD **Aleksei Kelli**, *Professor of Intellectual Property, University of Tartu*

17:15–18:45 Legislative perspective: **Kärt Nemvalts**, *Director, Intellectual Property and Competition Law Division, Ministry of Justice*
Regulation of Author's Contracts in Copyright Act, Background, and Selected Solutions
Academic perspective: *dr. iur.* **Irene Kull**, *Head of the Department of Private Law, School of Law, University of Tartu, Professor of Civil Law*
Suitability of the Amendments to the Copyright Act Within the General Contract Law Framework
Practical view by the authors: **Eeva Mägi**, *Member of the Management Board, Estonian Association of Audiovisual Authors, Attorney-at-Law and Partner, Maria Mägi Advokaadibüroo*
How will the Amendments Help Protect the Interests of Authors?
Practical view of rights by the user: **Toomas Seppel**, *Attorney-at-Law and Partner, Advokaadibüroo Hedman Partners & Co*
How Big a Change will the New Regulation Bring for Movie Producers?

The Copyright Act entered into force on 12 December 1992. This means that it is one of the longest-standing pieces of legislation in our legal order that has continuously regulated an area. However, the law has also been amended more than 40 times, often to transpose EU directives. Some of the more substantial amendments entered into force on 7 January 2022 in relation to the two 2019 directives (2019/789 and 2019/790). Authors' contracts have in fact been governed by the Copyright Act since its entry into force, but there have been no previous requirements at EU level. Now is the right time to take a look at these latest amendments and to discuss the extent to which the rules laid down in the Copyright Act are balanced in the light of EU law, whether and how the amendments affect, for example, employment relations, and the background to the creation of audiovisual works.

Friday, 7 October

Liability of Legal Persons

(University of Tartu Sports Hall, Ujula 4)

Moderator: **Juhan Sarv**, *Justice of the Supreme Court*

09:30–11:00 Participants in the discussion: *dr. iur.* **Priit Pikamäe**, *Advocate General, Court of Justice*; PhD **Laura Aiaots**, *State Prosecutor*; **Velmar Brett**, *Justice of the Supreme Court*

Derivative liability: justification of the catalogue in subsection 14 (1) of the Penal Code and alternatives to the catalogue solution. Do we need derivative liability and a closed list in subsection 14 (1) of the Penal Code? Execution and inaction: is there a *via media*, or third way, possible in the current classical generic approach?
Stigma and legal subjectivity – practical solutions still lacking.

11:00–11:30 Coffee break

National Law *versus* EU Law

(University of Tartu Sports Hall, Ujula 4)

Moderator: PhD **Rait Maruste**, *former Chief Justice of the Supreme Court*

11:30–13:00 Introduction to the topic: prof **Anneli Albi**, *University of Kent*, *Canterbury*, *United Kingdom*

Participants in the discussion: prof **Anneli Albi**, *University of Kent*, *Canterbury*, *United Kingdom*; PhD **Carri Ginter**, *Associate Professor of European Law, University of Tartu, Jean Monnet Chair Holder*; **Klen Jäärats**, *Director for European Union Affairs, Government Office*; *mag. iur.* **Nele Parrest**, *Justice of the Supreme Court*

Starting point for the EU: who created what and for what purpose? Is the primacy of EU law absolute, i.e. does it unconditionally cover all branches and fields of law, i.e. did the states give the EU a blank cheque to decide on its constitution?
If the primacy has its limits, where and how are they set and how are potential disputes resolved? Does the uniformity and rigid supremacy of EU law enrich or impoverish? What is the impact of this doctrine on the EU mindset and Euroscepticism?

Consumer Credit *in* 2022: the Completely Free Will of Completely Free People to be Completely Free to Take on Liabilities and Remain Completely Free in Debt?

(V Spa conference centre, Riia 2)

Moderator: PhD **Piia Kalamees**, *Associate Professor of Civil Law, University of Tartu*

09:30–11:00 Participants in the discussion: PhD **Piia Kalamees**, *Associate Professor of Civil Law, University of Tartu*; **Kilvar Kessler**, *Chairman of the Management Board, Estonian Financial Supervision and Resolution Authority;* **Vahur-Peeter Liin**, *Judge, Civil Chamber, Tartu Circuit Court*; **Martha Skirta**, *Bondora AS*; Maarita Meri, *Head of Department, Private Debt Management and Small Finance Decision-Making Department in Estonia, Swedbank AS*; Jüri Puust, *Head of the Judicial Proceedings Department, Swedbank AS*

Issues that have become topical in the aftermath of the financial crisis in 2009, such as the availability of instant loans, the application of the principle of responsible lending, the use of unfair standard terms, and procedural obstacles to consumer protection, will remain relevant in 2022. In addition, a number of new issues have emerged, such as the limitation of the credit burden, the possibility of applying consumer credit provisions in adversarial proceedings, the clarity of the rules, the possibilities for creditors to anticipate problems, and the use of IT solutions.
The section will answer the questions of whether the current provisions on consumer credit are sufficient to protect the interests of consumers, what the possible solutions are, and what the perspective of consumer credit law is.

11:00–11:30 Coffee break

Platforms Mediating the Sale of Goods and Provision of Services and Their Role as Intermediaries or Main Providers

(V Spa conference centre, Riia 2)

Moderator: **Sander Kärson**, *Attorney-at-Law and Leading Partner, Advokaadibüroo TGS Baltic*

11:30–13:00 Participants in the discussion: **Kristi Pent**, *Attorney-at-Law and Partner, Advokaadibüroo TGS Baltic*; *dr. iur.* **Martin Käerdi**, *Attorney-at-Law and Partner, Ellex Raidla Advokaadibüroo, Associate Professor of Civil Law, University of Tartu*; **Henri Arras**, *Head of Public Policy (tbc), BOLT*

Online platforms for the sale of goods or the provision of services have become increasingly common in the new economic environment and are gaining significant market power, replacing traditional individual distribution channels for businesses. The nature of the legal relationships involved in the use of such online platforms remains unclear in many cases. The moderator and the participants, together with the audience, will brainstorm together to dissect and make sense of these legal relationships. Answers will be sought to the question of liability for the provision of goods or services ordered through platforms, as well as to the justification for reclassifying the contracts of platform operators as employment contracts; competition law issues related to the operation of platforms will be addressed, as well as the means to control the market power of platforms, and economic governance issues related to the legal regulation of platforms.

Climate Law 2022. "We Know Where We Want to Go, But How do We Get There?"

(Tartu University library conference centre, Struve 1)

Climate law section is dedicated to Hannes Veinla, Docent Emeritus, University of Tartu

Moderator: *Dr. iur.* **Ivo Pilving**, *Chairman of the Administrative Law Chamber of the Supreme Court; Associate Professor of Administrative Law, University of Tartu*

09:30–11:00 **Kädi Ristkok**, *Head of Climate Department, Ministry of the Environment*
Setting Climate Targets in Legislation and Development Plans
Kärt Vaarmari, *Consultant, Estonian Environmental Law Center*

Climate Change and Human Rights
Jaan Lindmäe, *Theme Manager of Legislative Drafting, Estonian Forest and Wood Industries Association*
Entrepreneur's View on Climate Targets

In the climate section, we will discuss how we can achieve a society where our way of life is climate neutral. Does the state know the way to this goal? How to ensure the protection of people's rights in a changing climate and in the context of societal transition? What is the vision of entrepreneurs and what do they expect from the state?

11:00–11:30 Coffee break

Human Rights in Times of Crisis

(Tartu University library conference centre, Struve 1)
Moderator: **Minna-Liina Lind**, *Estonian Special Envoy for Human Rights and Migration*

11:30–13:00 LLM **Peeter Roosma**, *Judge, European Court of Human Rights*
View of the European Court of Human Rights of the Crisis from a Human Rights Perspective
PhD **Tiina Pajuste**, *Professor of International Law and Security, Tallinn University*
Protecting Human Rights in Times of Crisis from the Perspective of Private Companies
Dr. iur. **Mart Susi**, *Professor of Human Rights Law, Tallinn University*
Impact of Crises on the General Principles of Human Rights

The aim of the section is to discuss the impact of the global crises of recent years (COVID-19 and Russia's aggression in Ukraine) on the universality of human rights and to address the practical problems of ensuring human rights.

100 Years Since the First Estonian Lawyers' Days

(Hotel Lydia event centre, Ülikooli 14)
Moderator: *Dr. iur.* **Marju Luts-Sootak**, *Professor of Legal History at the University of Tartu*

09:30–11:00 *Mag. iur.* **Toomas Anepaio**, *Data Protection Specialist-Archivist, Supreme Court*
Baltic German Prologue. About the Lawyers' Days 160 Years Ago.
Dr. iur. **Priidu Pärna**, *Tallinn Notary*
Unknown Ferdinand Karlson, Initiator of the Estonian Lawyers' Days
Dr. iur. **Hesi Siimets-Gross**, *Associate Professor of Legal History and Roman Law, University of Tartu, Lawyer Linguist, European Court of Justice*
Jüri Uluots and the Estonian Lawyers' Days
Kai Amos, *Attorney-at-Law, Advokaadibüroo Amos*
Recollections on the Restoration of the Tradition of Organising the Estonian Lawyers' Days

The first Estonian Lawyers' Days were held in Tartu from 19–20 April 1922, under the auspices of the Tartu Lawyers' Society. The society was led by Ferdinand Karlson, an active lawyer, sportsman, and cultural figure, about whom Priidu Pärna will give a presentation. The German Lawyers' Days are still cited as a model, i.e. the first attempt to bring together local lawyers was made 60 years earlier, and Toomas Anepaio talks about it. From the presentation of Hesi Siimets-Gross, we will learn about the role played by Jüri Uluots in the Estonian Lawyers' Days that took place during the interwar period. Kai Amos recalls the difficulties and joys of re-establishing the tradition of the Lawyers' Days in the 1990s.

11:00–11:30 Coffee break

Role of the Judge in Adversarial Criminal Proceedings

(Hotel Lydia event centre, Ülikooli 14)

Moderator: **Taavi Pern**, *Chief State Prosecutor*

11:30–13:00 **Ingrid Kullerkann**, *Judge, Tartu County Court*
High-quality End Result or the Beauty of the Game, or Both? Expectations of the Judge of the Parties to a Proceeding
PhD **Andreas Kangur**, *District Prosecutor, Viru District Prosecutor's Office, Lecturer of Criminal Procedure, University of Tartu*
Let the Accuser Prosecute, the Counsel Defend, the Court Enjoy the Game
Dmitri Školjar, *Member of the Management Board, Estonian Bar Association, Attorney-at-Law and Partner, Advokaadibüroo CLARUS*
Court Lasts, Injustice Disappears (Estonian Proverb). The Right Decision is Not Made in Haste

Although the current Code of Criminal Procedure entered into force in 2004, it is in recent years that a number of adversarial proceedings have attracted public attention. Bystanders say that the procedures are slow, the accused-counsels say that they are unfair, and prosecutors say that they are ineffective. What should be changed? In the discussion, the prosecutor, the judge, and the lawyer will give their views and opinions on how judicial proceedings should and could be managed. They also discuss how the judge should position themselves in adversarial criminal proceedings and focus on how to strike a balance between ensuring the rights of the defence of the weaker party, the efficiency and speed of the proceedings, and not casting doubt on the impartiality of the court.

13:00–14:00 Lunch, participants moving to the closing session

Henn Jõks foundation scholarships

(University of Tartu Sports Hall, Ujula 4)

14:00–14:15 The winners will be announced by **Allar Jõks**, *Attorney-at-Law and Partner, Advokaadibüroo SORAINEN*.

Final Meeting. Science-Based Law

(University of Tartu Sports Hall, Ujula 4)

Moderator: **Märt Treier**

14:15–15:45 Debating at the podium: prof **Tarmo Soomere**, *President, Estonian Academy of Sciences*; **Kaja Tael**, *Ambassador, Special Envoy for Climate and Energy Policy*; **Helen Sooväli-Sepping**, *Vice-Rector for Green Transformation, Tallinn University of Technology;* **Marti Hääl**, *Entrepreneur*; **Raivo Vare**, *Economic Expert*

Unlike the plenary meeting of the Lawyers' Days, which looks to the past by recalling the history of legal reforms, followed by panels on topical legal issues of the present, the closing session aims to look towards the future. Undoubtedly, there is more than one challenge facing Estonian society and the legal system, but this time we are looking at the future through the prism of the green transition. If climate and environmental objectives need to be integrated into all aspects of life in order to be achieved, how should the law respond to this challenge? Should the art of goodness and justice, with a view to the goals of the green transition, be based more on the latest scientific facts and research, be science-based justice? Have the crises that Estonian society has been going through in recent years, such as the corona crisis, and the crises we continue to live through, including the climate crisis and Russia's military aggression against the peaceful European state of Ukraine, should lead to legal scholars and lawmakers to seek more help and ask for help from other disciplines? What should be the balance between lawyers and other professionals in shaping the law of the future?

Closing words