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Fundamental Rights, Right of Recourse to the Courts and Problems Connected with the Guaranteeing of the Right of Recourse to the Courts in Estonian Criminal Procedure

I

1. The analysis of a certain element of the system of fundamental rights is complicated because of the fact that, as is known, there is no uniquely acceptable understanding of the structure of genetic “area of origin” of fundamental rights, i.e. of the system of basic values of mankind. There is even no minimum universally acceptable way to rank the (basic) values according to their significance. And obviously they cannot be ranked at all. Hereby it would be appropriate to refer to Eero Loone who gives a possible explanation to that in Estonian specialist literature. Having first of all explained that the opposite of rational is extra-rational as well as irrational, he observes that so far there is no generally adopted and well-grounded answer to the question whether the “genuine”, intrinsic values exist. As is known, David Hume claimed that value-decisions cannot be derived from factual theses and corroborated empirically by the examination of the phenomenon under evaluation. If Hume is right then there is no possibility to ground

the choice of something as the basic good and consequently to ground the choice of main goals (differently from the examination of the relationship of elements of variety of goals). In this case the valuation and the choice of goals would contain an extra-rational component and the classification of values and goals into extra-rational and irrational would be unreasonable (non-applicable).¹

Let us admit that at first sight the acknowledgement that it is not in principle possible to rationally construct the hierarchy of values of man’s world may seem rather unacceptable. But if we consider that the pertinent hierarchy should reflect human nature then, upon calm consideration, the extra-rational element should not irritate us. Or can anyone give an exhaustive and rational explanation to human nature? I hope not.

2. But the aforesaid does not mean that there have been no attempts to establish the hierarchy of universal values in the history of human thought — the task is far too tempting lest to try. It is almost as tempting as the creation

of *perpetuum mobile*.

2.1. One of the finest attempts to establish the pertinent hierarchy was made by John Mitchell Finnis, one of the most famous contemporary jurists of natural law who, surprising indeed, considers that a rational approach to natural law is possible. Finnis holds that his approach is rational because, relying on purely practical rationality, it is possible to explain certain self-evident basic values (humane goods) that can be and must be protected by law and the institutions thereof.² Finnis's self-evidence of the basic goods means that in his opinion we will all reach the affirmation of these basic goods if we have adequate life experience and if we bother to cogitate thereupon.³ According to Finnis the following constitute the basic goods of human beings: life, knowledge, game, aesthetic experience, communication and friendship, practical rationality and lastly religion.⁴ Finnis regards all these basic values as objective (they are respected in every society), fundamental (all other goods — courage, goodness, etc. — stem from them) and absolute. The latter, according to Finnis, means that there is no hierarchy between them.⁵

Accepting, in principle, in every respect such man's world of ontological "poly-value" one cannot but notice in the context of our theme that from the aspect of protection of basic values it is not possible to manage without gradating them, without raising a question of hierarchy thereof.

2.2. The Estonian philosopher of law Ilmar Tammelo has also, in principle, admitted the possible existence of the hierarchy of values. He has, *inter alia*, alleged that justice as the good stands at the same level as the benevolent, true, correct, beautiful and fair and only spiritual values such as the noble, holy and celebrated are of higher level.⁶

3. If the study of a basic-values level of human existence has been, as a rule, treated with a certain piety (what could be more unattainable than human nature!) then the treatment of a human-rights level has been considerably sweeping. Commentators and advocates of human rights do not willingly want to confess that ultimately the question is just about the model of basic values of human existence. In itself, there is nothing condemnable in such modelling. On the contrary, in shaping the protection mechanism of basic values of human existence such modelling is evidently unavoidable. But hereby we should also admit that "the biggest disservice was done to the thought of natural law by the natural law codifications of the 18th and 19th centuries. The establishment of natural law by positive laws subjected natural law to human will and turned natural law into written law. Law established by the laws is not natural law any more".⁷ There is no reason to allege that there is no element of disservice to natural law in the adoption of the European Convention on Human Rights (hereafter the ECHR) and in the quite positivist-bureaucratic mechanism established to guarantee the implementation of the ECHR - there absolutely is. Proceeding from

that, the main problem in my opinion is to find an "independent third" that would every now and then be able to compare the basic-values level of human existence with the model thereof, e.g. with the mechanism of guaranteeing the implementation of the ECHR, and amend the model if necessary. True, this proposal may seem inconsistent. One may ask if codification of natural law is a disservice to the latter then how can the amendment to codification reduce the disservice? On a general theory level the problem as such undoubtedly exists. But here rather more pragmatic considerations, if they altogether exist in this field, should be taken as the basis.

Namely, there is no reason to believe that the ECHR should be final and constant and that, e.g., practice of the Court of Human Rights develops spontaneously and always linearly with natural law. Apparently it is not easy to refute the understanding that an essential aim of the study and interpretation of even the most perfect model must be its elaboration. This paragraph could end with the question: would not the right not to foreknow one's future, cognised in recent decades by mankind as **the basic good**, and the right to informational self-determination, connected with the former, deserve codification in natural law?

4. All the aforesaid applies to the treatment of fundamental rights in so far as the system of fundamental rights of a state must, pursuant to contemporary generally recognised understanding, involve human rights. It should be admitted that there is no generally recognised conception in the current Estonian writings of political law as to how many fundamental rights (and/or human rights) a person living in Estonia has and what the system of these fundamental rights looks like.

4.1. Rait Maruste has listed 16 allegedly effective fundamental rights in Estonia and then added that this catalogue is not exhaustive, *inter alia*, because, proceeding from § 10 of the Constitution, there may be other rights (read: fundamental rights), freedoms and duties "which arise from the spirit of the Constitution or are in accordance therewith, and conform to the principles of **human dignity** (emphasis added - E. K.) and of a state based on social justice, democracy, and the rule of law".⁸ The quotation of the Constitution is precise and on the basis of § 10 of the Constitution we really cannot doubt that we may have more fundamental rights than *expressis verbis* fixed in the Constitution. Is it good or bad? Certainly the predominant and first reaction is that it is good. It is always good to think that somewhere there may be some more rights, such rights that the drafters of the Constitution could not think out while drafting the Constitution. But let us fancy that someone wants, relying on § 10 of the Constitution, to introduce a new fundamental right that is not explicitly fixed therein. I might be wrong but it seems to me that the wish to realise such a novel fundamental right may actually arise only in a conflict with a certain

other and *expressis verbis* fixed fundamental right. In principle, hereby there may be two possibilities to realise the novel fundamental right.

4.1.1. Pursuant to the first possibility, a so-called novel fundamental right “will be found” in the ECHR or other international treaty. And now it is difficult to agree with R. Maruste’s statement that, pursuant to § 123(2) or § 3(2) of the Constitution, in the case of a conflict the provisions of the international treaty apply.⁹ I have not heard of any “legal-national” agreement acknowledging the primacy of international treaties over the Estonian Constitution.¹⁰

4.1.2. The other possibility naturally is that a so-called novel fundamental right will be found, let us say, somewhere else. I tend to think that this kind of so-called fundamental right as compared to the one *expressis verbis* fixed in the Constitution will have even less hope to get realised than the novel fundamental right described in 4.1.1. But evidently a more thorough discussion of these issues should await the “emergence” of these so-called novel fundamental rights.

4.2. Raul Narits alleges that the catalogue of fundamental rights and freedoms contained in the Constitution of the Republic of Estonia is in compliance with the internationally recognised catalogue of human rights and freedoms. But at the same time he notes that although there is no internationally recognised catalogue of human rights this could be derived from valid international treaties.¹¹ R. Narits, as is expected, states that the classification of our fundamental rights depends on various grounds and says that if the ground is the content of fundamental rights then we may distinguish freedom-rights and equality-rights as well as liberal and social rights. After the presentation of this classification, R. Narits confesses that “this classification is conventional because apart from general freedom-rights and general equality-rights there are also general protection-rights.”¹² Prior to the analysis of these protection-rights I would like to address some issues pertaining to the entire system of fundamental rights.

4.3. Madis Ernits holds that fundamental rights valid in the Republic of Estonia are presented in §§ 8-55 of the Constitution. In addition to that he thinks that “many other provisions scattered over the Constitution perform the same function as fundamental rights. Primarily this concerns §§ 57, 60(1) and (2) and 124(2) and § 146 of the Constitution. By wording, the rights equal to fundamental rights may also be derived from §§ 149 and 152 of the Constitution the function and interpretation of which let hereby remain open. As all these provisions may on certain conditions have an effect of fundamental rights then let us regard them as the rights equal to fundamental rights.”¹³ In the footnote M. Ernits essentially holds that any provision of the Constitution that develops into a subjective right of a citizen must be regarded as the provision establishing a fundamental right.¹⁴ What the precise number of such pro-

visions in our Constitution is, M. Ernits does not say.

4.4. Let us ask whether the catalogue of fundamental rights and freedoms contained in the Estonian Constitution is in every respect blameless. Has it accidentally happened that some basic values of human activity have not been dealt with or written in the law? R. Narits would probably answer in the negative if we presume that the internationally recognised catalogue of human rights and freedoms “covers” all the basic values of human activity. In my opinion, the reply of the Committee on Legal Expertise of the Constitution (that has worked under the guidance of the Ministry of Justice and that quite recently completed its work) was, in essence, also negative. I consider such position odd and regrettable because the Estonian Constitution does not explicitly and independently provide for such a fundamental right as the right of human dignity. Unfortunately I can only conditionally agree with R. Maruste who writes that Estonia and Germany are equal at least in this respect that both states have fixed human dignity as a constitutional principle. As is known, § 1 of the German Constitution contains a famous sentence: “*Die Würde des Menschen ist unantastbar. Sie zu achten und zu schützen, ist Verpflichtung aller staatlichen Gewalt.*” Or in translation: “Human dignity is inviolable. The obligation of the state power is to respect and protect human dignity.” It is really regretful that our Constitution does not start with such a fine sentence and that in a political situation which our Constitution was drafted in (where undoubtedly the restoration of statehood was of primary importance) it was probably not possible to raise human dignity to the foremost position. Still it is difficult to understand that human dignity was not altogether *expressis verbis* provided by the Constitution as a fundamental right and that the Committee on Legal Expertise of the Constitution neither considered it necessary.¹⁵ It is possible, indeed, as R. Maruste alleges, that the presence of human dignity can be derived from §§ 10 and 18(1) of the Estonian Constitution. Hereby it should be emphasised that R. Maruste does not regard human dignity as a fundamental right. Namely, he talks about fundamental rights in the fourth chapter, entitled “Principles of the Constitution”, of his book. This means that pursuant to his understanding the respect for human rights and freedoms is a constitutional principle. The treatment of the principle of democracy including, *inter alia*, (the importance of) the freedom of the press is placed at the beginning of the aforementioned chapter while that of human dignity is the last principle within the framework of the chapter. True, R. Maruste emphasises that “human dignity is the highest value that has developed in the progress of civilisation. In extreme cases it can even be regarded higher than life and liberty as a value because the dignity of a criminal under sentence of death and that of a prisoner must also be respected.”¹⁶ As I am a jurist supporting basically the positivist treatment of law, then the fact that our Constitution

does not consider it appropriate to *expressis verbis* protect human dignity as a fundamental right worries me. But this is the very point where I am ready to co-operate in all respects with no matter how convinced a jurist of natural law. I sincerely and enthusiastically welcome that supporters of value jurisprudence (who absolutely groundedly hold that “human dignity is the highest value”) are ready to consider Estonia as a human-centred society and resultantly to restrict, ever and again, in the case of a conflict of interrelated fundamental rights (the basic values), any fundamental right in the interests of safeguarding human dignity.

II

5. Pursuant to § 15(1) of the Estonian Constitution, everyone whose rights and freedoms are violated has the right of recourse to the courts, and pursuant to § 24(5) of the Constitution, everyone has the right of appeal to a higher court against the judgement in his or her case pursuant to procedure provided by law. Although these two provisions are not placed side by side in the Constitution the content thereof should, as I hope, make without any further arguments a certain whole. Moreover, such a “constitutional whole” raises a number of questions. Let us enumerate some of them.

5.1. Is this a logical whole? Are its both elements (“sub-rights”) inevitably necessary? Is it not so that the right of recourse to the courts if someone’s rights and freedoms are violated immanently includes (proceeding from the established instances of the court system) the right of appeal to a higher court? Does not the right of appeal to a higher court (that could be called as the right to disagree with the result, i.e. the court decision, of the right of recourse to the courts) actually discredit the right of recourse to the courts? How is it possible to logically contest an allegation of a certain group presumably fighting for human rights that everyone must have the right to appeal to a higher court against the judgement in his or her case at least two or three times? Let us agree that we will deal with the second element of the pertinent logical whole after we have asked some questions on the first element and tried to find answers to them.

5.2. For example, whether in a contemporary democratic state based on separation of powers it is necessary to speak of the possibility of recourse to the courts as a fundamental right. If “yes” then, is there anything deeply characteristic of natural law in this possibility? A very unique and directly affirmative answer would probably be out of question. It is hardly possible to talk in detail about a dream in the shape of the current court system before the organisation of human society has helped to form a comprehension of state power and the necessity of separation thereof. But certainly we could speak of the hope characteristic of a human being by natural law, the hope that an

independent third person would help to resolve the conflicts arising in the society. Connecting the issue with human nature would be appropriate, as this possibility should help to avoid the disastrous effect of human conflicts on the human race. But in my opinion it would be extremely questionable to draw a sign of equation between the aforementioned phenomenon of natural law and the right of recourse to the courts. As paradoxical as it may be, it seems that here we rather have to deal with the restriction of natural law by a state. More and more an “omnibus understanding” is rooting (or being restored?) that court procedure is not the optimum way to resolve conflicts of the human society. Various factors have prepared the formation of this “omnibus understanding”. Thus, court practice has forced us to acknowledge that certain conflicts (e.g., juvenile criminal cases) should not, in principle, be resolved by way of (at least not the classical) judicial procedure. Court practice tends more and more to corroborate an assertion that, on average, the time period within which the courts are able to resolve the cases before them is dragging. All this has compelled us to deal more seriously with the alternatives to judicial procedure.

Consequently, the right of recourse to the courts is not a fundamental right of human-right base. But what kind of fundamental right is it then? Or perhaps the right of recourse to the courts should not be regarded as a fundamental right altogether?

6. As the provisions establishing the right of recourse to the courts are embodied in Chapter II (entitled “Fundamental Rights, Freedoms and Duties”) of the Constitution then we should not actually ask whether the pertinent right could also be considered as one of these three rights (either a fundamental right, fundamental freedom or fundamental duty). Let us still ask it and, in order to get the answer, let us first apply to the most thorough textbook of political law published after the re-establishment of Estonia’s independence. R. Narits has noticed in the textbook that “§ 15(1) of the Constitution is a guaranteeing provision and at the same time it also lays down the fundamental right of everyone, whose rights and freedoms have been violated, to have recourse to the courts.”²¹⁷ What does it mean that something is simultaneously a fundamental right and a guaranteeing provision? Or let us ask whether the right of recourse to the courts would be regarded as a fundamental right if it did not simultaneously have a guaranteeing effect (for the realisation of other fundamental rights)? R. Narits does not give a direct answer to this and does not consider it necessary to explain what it means if a certain fundamental right “operates” at the same time as a guarantee of other fundamental rights. On the basis of allegations presented by M. Ernits, it seems that in German political law (consequently also in Estonian political law, as could be concluded by the conception of M. Ernits) the following understanding predominates: in con-

sidering the content fixed in a provision of the Constitution as a fundamental right or freedom the fact, **whether the result emanating from the pertinent provision can be regarded as a subjective right and whether in the case of its infringement a person will have the right of recourse to the courts**, is determinant.¹⁸ On the basis of this logic the right of recourse to the courts should also be a fundamental right provided that the violation thereof can be regarded as the violation of a subjective right and that in order to put an end to the violation a person will have the right of recourse to the courts. It is easy to notice that, firstly, the result of this line of reasoning will be an endless row of rights of recourse to the courts, and secondly, by constructing such meta-levels we will drift farther away from the basic problem — from the fundamental right the alleged violation of which has made a person go to the court first of all. Without any deeper analysis of the problem I would just like to assert that maybe it would still be reasonable to differentiate the right of recourse to the courts from so-called substantive fundamental rights and regard it (possibly together with some other provisions of the Constitution) absolutely independently **just as a guarantee of fundamental rights**. But if this proposal seems far too radical then perhaps we could really accept the following approach of R. Narits. According to R. Narits the right of recourse to the courts falls within a specific field of fundamental rights — within the protection-rights — and he refers to it as a protection-right stemming from the norms of court procedure (literally — “the protection stemming from the norms of court procedure”).¹⁹ In R. Narits’s opinion (and evidently to a certain extent relying on Robert Alexy’s ideas²⁰) we should distinguish the general protection-right provided for in the first sentence of § 13(1) of the Constitution (“everyone has the right to the protection of the state and of the law”) and so-called special protection-rights provided for in other sections of the Constitution (including also § 15(1)).²¹ The general protection-right is defined as “the universal right to be protected by the state against the attacks of other persons”.²² R. Narits also states that “the general protection-right is aimed at the protection of all the interests provided by the Constitution”.²³ But now I would like to repeat one of my earlier motives and ask: is it not so that in the end the right of recourse to the courts is also aimed at the protection of all the interests provided by the Constitution and therefore is it not also a general protection-right?

7. In my opinion this question cannot be answered in the negative. Moreover, is it possible that this universal protection by the state against the attacks of other persons may finally and in principle be carried out in any other way than through the medium of the court? Finally and in principle evidently not. Finally no one but the court may decide which of the conflicting parties should be deprecated and the right of which should be acknowledged. Thus, it could

be alleged, by correcting R. Narits’s standpoint, that namely the right of recourse to the courts is the general constitutional protection-right of a contemporary democratic state. But before we stick to the allegation that the right of recourse to the courts is really a right also **in the context of criminal procedure**, one more problem proceeding from the principle of legality should be resolved.

III

8. The problem is that pursuant to the principle of legality the right of recourse to the courts of a person injured by the crime in order to defend himself or herself is rather limited. According to the principle of legality, the investigator and prosecutor must within the limits of their competence institute the criminal proceeding when the essential elements of the crime become manifest irrespective of the injured person’s or any other person’s opinion. This applies to the majority of crimes. And subsequently (after the preliminary investigation), in most of the crimes only the prosecutor is entitled (actually obliged) to bring the case directly to the court. There are various ways to ground such situation and it has been grounded differently. But in my opinion it is, in principle, difficult to confute the statement that in the context of criminal procedure a fundamental right provided for in § 15(1) of the Constitution is realised only by very essential restrictions. True, we have to admit that in recent years several tendencies attacking this prevailing and unavoidably paternalistic attitude and re-producing the pertinent fundamental right have become manifest also in the sphere of criminal procedure. Hereby we should first of all mention the triumphal progress of the principle of opportunity as the corrector of the principle of legality.²⁴ There is also another essential manifestation that unfortunately is not present in the present Estonian criminal procedure. This is a phenomenon that in German criminal procedure is known under the name of “*Klageerzwingungsverfahren*”. This is a proceeding initiated at the request of the injured person after the prosecutor has desisted from the criminal proceeding, and in the course of which the court reviews the legality of the prosecutor’s steps.

9. But evidently there are limits to the emancipation of the right of recourse to the courts in criminal procedure. We can hardly consider it acceptable that in the preliminary investigation of a criminal case the interested person would have the right of immediate recourse to the courts if he or she disagrees with any of the procedural steps (seizure, interrogation). Criminal procedure law currently in force allows filing of a complaint against an act of the investigator in the preliminary investigation with the prosecutor. If the complainant is not satisfied with the prosecutor’s decision then the Public Prosecutor will finally resolve the complaint.²⁵ But Estonian administrative court practice has not agreed with such a position accepted in criminal pro-

cedure. The Administrative Law Chamber of the Supreme Court says in its order of 3 November 1995 pertaining to the review of the cassation appeal by I. Z., *inter alia*, the following: "As the Public Prosecutor is, pursuant to § 4(1) 1) of the Administrative Court Procedure Code an official against whose legislation or act it is possible to file a complaint with an administrative court and as the Criminal Procedure Code does not provide how the Public Prosecutor must resolve the complaints submitted to him or her against his or her subordinate prosecutors, then the resolution of complaints lodged against such legislation or act of the Public Prosecutor falls within the competence of an administrative court. Thereby an administrative court shall not interfere with the criminal proceeding and shall not review whether the institutions of preliminary investigation have observed the law. An administrative court shall, pursuant to the Administrative Court Procedure Code, review only whether the Public Prosecutor has acted legally while resolving the complaint."

Consequently, the court order, on the one hand, states that there must be the possibility to file a complaint with an administrative court also against an act of the Public Prosecutor as is the case with an act of any other official. But, on the other hand, it is fortunately understood that, in essence, "supervision over the prosecutor's supervision" terminates with the act of the Public Prosecutor and that an administrative court may only formally control this act. I am still of the opinion that the prosecutor's supervision over the legality of preliminary investigation of criminal cases should not be the object of administrative court procedure. On the basis of the aforementioned position of the Supreme Court, every procedural step of an investigator may give rise to an independent administrative court proceeding whereat the maximum that the court may say is whether or not the prosecutor's answer to the complainant on the legality of the investigator's procedural step is polite and thorough. In my view there is no reason to ask pathetically "why the Public Prosecutor is a different official so that we may not appeal against his or her acts". We have to bear in mind that the preliminary investigation is just by its nature the preliminary proceeding. This is the proceeding which naturally must guarantee the legality to the maximum possible extent but which at the same time must, as quickly as possible, "hand over the reins" to the main proceeding, to the proceeding in the course of which all rights are guaranteed in a considerably better way and which enables, *inter alia*, more thoroughly to discuss and contest the legality and argumentation of a Public Prosecutor's act. But at the same time we still have to confess that no matter how well we ground it, any preliminary investigation renders the absolute effect of a fundamental right provided for in § 15(1) of the Constitution questionable.

10. If there are still some necessary steps to be taken in our criminal procedure in order to actually see to it that

the fundamental right established by § 15(1) of the Constitution be guaranteed to the person injured by the crime, then the possibilities of the injured person to contest the court decision (thus, the right of appeal pursuant to § 24(5) of the Constitution) are certainly broader in the present Estonian criminal procedure than in the average state based on the rule of law. An American professor has answered to my question why one cannot notice an injured person in American criminal procedure, that fair play must dominate in tennis. If the prosecutor is on this side of the net and the defence counsel is on that side then, he asked, where should the injured person be placed? In German criminal procedure the injured person is, if to put it briefly, just one of the possible witnesses on the most general level of the criminal proceeding. True, his or her role in private prosecution cases is substantially more active and in addition to this in a number of criminal cases (§ 395 of the Criminal Procedure Code of Germany, hereafter StPO) he or she may act as a so-called secondary prosecutor (*Nebenkläger*). But in any case, the situation is different as to compare with our situation where any person injured by the crime would have *a priori* a certain active procedural role. Germans have naturally discussed the issue of enhancing the procedural role of the injured person at various levels. As a counter-argument it has, *inter alia*, been alleged that the enhancement of the role of the injured person would mean the impairment of the re-socialising idea of criminal law and criminal procedure and yielding to the idea of revenge.²⁶

IV

11. In conclusion of the article I would like to set out and describe some of the problems connected with the right of recourse and the right of appeal to the courts which the Criminal Chamber of the Supreme Court has dealt with.

11.1. The Estonian legislator has neither considered it necessary to establish the grounds for appeal (from a decision of the first-instance court) nor to determine sufficiently thoroughly the substance of appellate procedure. The Criminal Chamber of the Supreme Court has tried to fill the gap by the following decision. First of all the Criminal Chamber of the Supreme Court has observed in its decision of 20 December 1994 concerning the criminal charge against T. J. under §§ 85(1) and 139(1) of the Criminal Code (hereafter the CC) that the main essence of current appellate proceedings regarding criminal cases is fixed in § 20 of the Appellate and Cassation Criminal Court Procedure Code (hereafter the ACCCPC). § 20(1) of this Code contains a conception generally recognised in continental European theory and practice of criminal procedure that, **in principle, an appellate proceeding may be a so-called second or repeated proceeding of a first-instance court.** A principled possibility to repeat the proceeding of a first-instance court in the course of an appellate proceed-

ing to the full extent and moreover, to examine in the course of it new pieces of evidence does not mean that a court of appeal should on its own initiative re-try the case to the full extent. This would be costly and inexpedient because a time limit undoubtedly has a negative impact on the examination of evidence and establishment of facts. Just for that reason the legislator has not established the “principle of revision”²⁷ for the valid appellate procedure of the Republic of Estonia. Pursuant to the entire text of § 20(1) of the ACCCPC the legislator’s will is aimed at emphasising the idea **that the limits for the trial of a criminal case by way of appeal proceedings are generally determined by the content of an appellate complaint or appellate protest — by the request that the complaint or protest contains.** Thus, pursuant to the legislator’s will, the appellant is the very person who determines the pertinent limits. In order to define the limits of appellate procedure, an appellant must follow any obligatory requirement embodied in § 8 of the ACCCPC and pertaining to the content of an appellate complaint or protest. If an appellant refers to only one ground for the repeal of the court decision set out in § 31 of the ACCCPC without specifying the content and motives of the request and without referring to the evidence he or she considers necessary to review by a circuit court then it can be said that the appellant has not determined the limits of an appellate proceeding. For example, if an appellant seeks the repeal of the court decision on the basis of § 31 2) of the ACCCPC, then he or she must mention which specific conclusion of the court does not correspond to a certain specific circumstance established by the court.

One more decision of the Supreme Court in which the essence of appellate procedure is analysed — the decision of the Criminal Chamber of the Supreme Court of 1 September 1998 concerning the criminal charge against S. B. and others under § 142(3) 4) of the CC. It is observed in the decision that the main assertion of appellants as if the circuit court had gone beyond the limits of an appellate protest while making the decision does not correctly reveal the substance of appellate proceedings and is therefore wrong. Pursuant to § 20(1) of the ACCCPC the limits for the trial of a criminal case by way of appeal proceedings are generally really determined by the content of an appellate complaint or appellate protest — by the request that the complaint or protest contains. Thereby the limits of appellate proceeding stand for this part of the entire object of criminal procedure that must be re-analysed by the appellate proceeding. The notion of an object of criminal procedure denotes an act or acts containing essential elements of crime and on what information is gathered in order to establish whether it will be possible to apply the criminal law with regard to the act or acts. Differently from assertions of appellants, an object of criminal procedure does not include the evidence used in the proceeding of a

criminal case — i.e. the means by which the object of criminal procedure is examined. Thus, on occasions when an appellant contests the decision of the first-instance court with regard to only one crime and seeks thereby, e.g., the re-evaluation of only one piece of evidence then a court of appeal may, for the decision of the case, in principle, rely on all the evidence examined by a first-instance court as well as a circuit court. A court of appeal is entitled to do so because pursuant to § 19 of the ACCCPC the requirement provided for in § 50(1) of the Criminal Procedure Code (hereafter CPC), according to which the court decision must be based on the evaluation of the set of evidence, extends to the activities of a circuit court.

11.2. Various problems have arisen in court practice in connection with the “right of special appeal”.²⁸ First of all, the Criminal Chamber of the Supreme Court observed in its order of 11 March 1997 (3-1-1-27-97) pertaining to the criminal charge against I. Ä. under §§ 17(4) and 164(1) of the CC that, in accordance with § 71(1) of the ACCCPC, the final resolution of a special complaint or protest filed against the detention order of a county or city court is made by a circuit court and thus, there **is no legal possibility and no practical necessity** to subsequently contest the pertinent decision of a circuit court ... Pursuant to the letter and spirit of § 68 of the ACCCPC, **the aim of the institute of special appeal** is to **exceptionally** enable an independent contest (separately from a criminal case as a whole) of certain court orders. The wording of § 71 of the ACCCPC uniquely reveals that the exceptionality of the institute of special appeal also means that, in order to expedite the resolution of a criminal case as a whole, **any court order enumerated in §§ 68 and 69 of the ACCCPC may be contested by way of special appeal only once.**

In the same court order, the Criminal Chamber of the Supreme Court held that because of the exceptionality of the institute of special appeal, **a special complaint or protest may be rejected on the ground that the substantial basis for a special appeal has ceased to exist.** In the aforementioned court case the substantial basis for a special appeal ceased to exist on 13 January 1997, the day when I. Ä. was released from detention. But in addition to that, the Supreme Court noticed that understandably it is not precluded that in this case an appellate or cassation complaint will refer to the unlawfulness of detention and claim for damages in connection with it. But the further development of the previously described so-called substantial basis criterion by the order of the Criminal Chamber of the Supreme Court of 9 March 1998, pertaining to the criminal charge against M. J. S. under §§ 15(1) and 101 1) of the CC, has caused considerable controversy. The Supreme Court held in its order that **a circuit court may reject a special complaint filed against the detention order if the contested order has meanwhile lost its legal substance because the person is detained under**

another pertinent order (i.e. if the term of detention has been extended by a new court order prior to the resolution of the special appeal).

In the context of the theme of the right of appeal we naturally cannot ignore the fact that the above-described order of the Supreme Court results in a considerably paradoxical situation: if an order for a short-term detention of the person is issued by a judge (who is trying to protect a fundamental right!) then it may happen that it will be impossible to contest the detention (i.e. to realise the right of appeal) because of time.

In conclusion it should be emphasised that if pursuant to grammatical interpretation the legislator has obviously wished to see the exhaustive list of opportunities for special appeals (§§ 68(1) and 69 of the ACCCPC) then, by using other methods of interpretation of law, the practice of the Supreme Court has changed this exhaustive list into an open one and extended the possibilities for special appeals “three steps further”.

Firstly, the Criminal Chamber of the Supreme Court holds in its order of 28 January 1998 pertaining to the criminal charge against M. V. under §§ 143(2) 1) and 1', §§ 185(2) and 186 of the CC that it must be possible to contest by way of special appeal the compulsory confinement into a medical institution (§ 159 of the CPC). This can be explained by the fact that such confinement is absolutely analogous to the detention and, thus, in order to guarantee the equal protection of the fundamental right there must be also the analogous possibility of appeal.

Secondly, the Criminal Chamber of the Supreme Court holds in its order of 9 March 1998 pertaining to a criminal charge against M. J. S. under § 15(1) and 101 1) of the CC that it must be possible to contest by way of special appeal **the decision to send the complaint back to the appellant for the elimination of deficiencies thereof as well as the decision to reject the complaint**. The pertinent order of the Supreme Court explains that although the text of § 68(1) 9) of the ACCCPC enables **only the decision by which the complaint is sent back to the complainant** to be contested, then pursuant to the spirit of the law namely the rejection of the complaint **should be** contestable.

And thirdly, the Criminal Chamber of the Supreme Court holds in its order of 13 April 1999 concerning the criminal charge against T. P. that a court order issued pursuant to § 412 of the CPC and permitting the transfer of property, e.g. as material evidence, to a foreign country must, in principle, be contestable even for the reason that the denial of a special appeal in this case would mean that a person whose property is transferred to a foreign country may not contest it in any way because the criminal proceeding of the case is carried out in a foreign state.

11.3. One of the peculiar phenomena of the Estonian right of appeal is the so-called right of unlimited cassation.

Namely in cases when a circuit court has used the possibility provided for in § 32(3) of the ACCCPC and made a decision deteriorating the condition of the accused at trial then participants in the proceeding (thus, contrary to expectations, not only the convicted person and his or her defence counsel!) are pursuant to § 40 of the ACCCPC entitled to file a cassation on the bases provided for in § 5 of the same Code, i.e. to contest also the establishment of factual circumstances (which in the case of a regular cassation may not be contested); to leave the cassation bail unpaid; and to get in any case the permission of the Appeals Selection Committee of the Supreme Court for the cassation proceeding.

It would be expected and in every respect logical if the review of an unlimited cassation could, differently from the review of a regular cassation, involve the examination of evidence. But actually, as § 40(3) of the ACCCPC provides, an unlimited cassation is also reviewed pursuant to the general rules of cassation procedure. This means that the court of cassation is actually not allowed to pay attention to this part of the appeal that concerns the establishment of the facts of the case.

The existence of an unlimited cassation has been explained by the necessity to treat every accused at trial equally. The logic here is that every accused at trial must have equal possibilities to file an appeal against the court decision deteriorating his or her condition. But the right of unlimited cassation in its present form does not guarantee this aspired equality. The realisation of an appeal would presuppose that the Supreme Court be granted the right to establish the facts of the case. But the latter step seems quite unrealistic. The fact that pursuant to § 24(5) of the Constitution (as mentioned previously) everyone has the right of appeal to a higher court against the judgement in his or her case **pursuant to procedure provided by law**, hereby deserves stressing. “Pursuant to procedure provided by law” does not presuppose that this possibility of appeal should always and in all cases be of the same scope. Let us also remind ourselves that, e.g., in Germany the court decisions pertaining to the most serious criminal cases may not be contested at all by way of appellate proceedings, this is possible only by way of cassation.

Dealing with the problems of the right of unlimited cassation, the Criminal Chamber of the Supreme Court has observed the following in its decision of 2 December 1997 concerning the criminal charge against J. J. under § 204(1) of the CC. The barrister M.R. has filed a cassation using the right of unlimited cassation as provided for in § 40 of the ACCCPC and therefore, in accordance with § 40(1) of the same Code, legally contested, inter alia, the establishment of the facts of the case by a circuit court — whether or not the court has been able to determine the mechanism of a traffic accident on the basis of the evidence at the disposal of the court. Pursuant to § 40(3) of the ACCCPC, **the**

Criminal Chamber of the Supreme Court reviews cassation complaints and protests filed by way of unlimited cassation in the regular manner of cassation procedure. This means, *inter alia*, that in compliance with § 65(4) of the ACCCPC, the Supreme Court itself may not establish the facts of the criminal case even if the cassation complaint is filed by using the right of unlimited cassation. **Proceeding from the above-said, the Criminal Chamber of the Supreme Court holds that, by using the right of unlimited cassation, the cassation complaint or protest must include the reference to § 39 of the ACCCPC and explain what the infringement of the court of appeal in proceeding the criminal case was.**

11.4. Current Estonian court procedure also knows such an institute of appeal as the procedure of correcting court errors.²⁹ But the law has not explicitly prescribed whether the court mistakes in decisions of the Supreme Court may also be corrected. The valid position of the Supreme Court in this issue is negative. Such a standpoint is presented in the decision of 16 December 1997 of the entire composition of the Criminal Chamber of the Supreme Court pertaining to the criminal charge against H.K. under §§ 207(1) and (2) of the CC. This is an interesting court case because **the cassation complaint as well as the application for the correction of court errors was submitted to the Supreme Court simultaneously.** Thereby, the cassation complaint was drawn on 16 September 1997 and the application for the correction of court errors on 17 September 1997. These two appeals were inseparably interrelated, as the appendix to the cassation complaint contained the application for the correction of court errors and vice versa. The cassation complaint as well as the application for the correction of court errors **sought the simultaneous review** of both of them. The barrister N. S. explained the simultaneous and joint submission of the two appeals in the following way. First of all he stated in the cassation that as the decision of the circuit court has aggravated his defendant's condition then he files a cassation by using the right of unlimited cassation provided for in § 40 of the ACCCPC only against the aggregation of punishments by the circuit court. But as the appellant now also wants to contest (earlier, by way of appellate complaint he had not done it!) the conviction of his defendant under §§ 207(1) and (2) of the CC, he considers it necessary to submit simultaneously an application for the correction of court errors.

The Appeals Selection Committee of the Supreme Court, regarding the simultaneous proceeding of different appeals impossible, logically in every respect, granted the permit to proceed first with the cassation complaint. The Criminal Chamber of the Supreme Court left by its decision of 21 October 1997 the decision of the Criminal Chamber of the Tallinn Circuit Court of 20 August 1997 unreversed and did not satisfy the cassation. The Supreme

Court considered that the circuit court had not infringed the norms of procedure and had not applied criminal law improperly while dealing with the case and that it has groundedly and properly corrected an error of the first-instance court with regard to the type of punishment. After the review of the latter criminal case by way of cassation procedure, the Appeals Selection Committee of the Supreme Court also decided to grant a permit to proceed with the application for the correction of judicial mistakes. But as in the course of the review of the criminal case by a three-judge Criminal Chamber of the Supreme Court on 21 October 1997 there were principled dissents as to the application of law then in accordance with § 58(1) of the ACCCPC the criminal case was assigned to the entire composition of the Criminal Chamber of the Supreme Court to be tried.

The decision of the entire composition of the Criminal Chamber of the Supreme Court included the following statements. In compliance with the statements made in the decision of the Criminal Chamber of the Supreme Court of 7 June 1994 in a criminal charge against M. B., the entire composition of the Criminal Chamber of the Supreme Court holds that there is no legal ground for the proceeding of the application concerning the correction of court errors. The criminal case has already been resolved by way of cassation by the decision of the Criminal Chamber of the Supreme Court of 21 October 1997 and pursuant to § 65(5) of the ACCCPC the decision of the Supreme Court may not be appealed against. § 77¹(1) of the ACCCPC provides that an application for the correction of court errors may be filed with the Supreme Court within one year as of the date of enforcement of the court decision. The provision does not contain an answer to the question whether the correction of court mistakes may be sought in absolutely all court decisions including the ones made as a result of a cassation proceeding. Stemming from § 149(3) of the Constitution and § 77¹ of the ACCCPC and bearing in mind the system of court procedure in the Republic of Estonia the question must be replied in the negative. The proceeding for the correction of court errors may be regarded as an alternative proceeding in respect to the cassation proceeding rather than a higher appellate proceeding. Pursuant to § 77¹ of the ACCCPC, the Supreme Court reviews criminal cases for the correction of judicial errors by way of regular cassation procedure as provided for in §§ 49-66 of the ACCCPC and not in any specific manner. And pursuant to § 63 of the ACCCPC, the Supreme Court reviews by way of regular cassation procedure only decisions of the lower courts.

Notes:

¹ E. Loone. Mõistlik valik: probleemiseade. - Mõistlike valikute õigustamise filosoofilised eeldused. (Reasonable Choice: Set-up of a Problem. — Philosophical Assumptions of Justification of Reasonable Choices.) Compiled by E. Loone.— Tartu: AS Tartumaa trükk, 1995, p. 7.

² P. Jõgi. Õigus ja eetika: teooriaid õigusest ja õiglusest 20. sajandi õigusfilosoofias. (Law and Ethics: Theories of Law and Justice in 20th-century Legal Philosophy.) — Tallinn: Juura, 1997, p. 59.

³ Ibid.

⁴ Ibid., p. 60.

⁵ Ibid., p. 61.

⁶ Ibid., p. 156.

⁷ M. Luts. Õigusfilosoofia I. Sissejuhatus õigusfilosoofiasse. (Philosophy of Law I. Introduction to Philosophy of Law.) — Tallinn: Juura, 1997, p. 36.

⁸ R. Maruste. Põhiseadus ja selle järelevalve. Võrdlevad selgitused. Kommentaarid. Tekstid. (The Constitution and Constitutional Review. Comparative Explanations. Commentaries. Texts.) — Tallinn: Juura, 1997, pp. 75-76.

⁹ Ibid., p.77.

¹⁰ I mostly agree with the description of relations of the Constitution and international treaties presented by M. Ernits. I also agree that although there is no higher law in domestic law than the constitution, the international level will ultimately still require that the entire domestic law be subjected to the "international-treaty understanding". — Q.v. M. Ernits. Põhiõiguste mõiste ja tähtsus õigussüsteemis. (Notion of Fundamental Rights and Importance Thereof in Legal System.) - Juridica, 1996, No. 9, p. 469.

¹¹ K. Merusk, R. Narits. Eesti konstitutsiooniõigusest. (On Estonian Constitutional Law.) — Tallinn: Juura, 1998, p. 166.

¹² Ibid., pp. 179-180.

¹³ M. Ernits, supra note 10, p. 464.

¹⁴ Ibid., p. 470 footnote 7.

¹⁵ It is especially odd because a number of prominent German specialists (let us mention, e.g., Robert Alexy and Jochen Frowein) were consultants of the Committee.

¹⁶ R. Maruste, supra note 8, p. 112.

¹⁷ K. Merusk, R. Narits, supra note 11, p. 178.

¹⁸ M. Ernits, supra note 10, pp. 465-467.

¹⁹ See K. Merusk, R. Narits, supra note 11, p. 185. But it is still rather questionable whether the right of recourse to the courts "stems from the norms of court procedure". We could also allege that the right of recourse to the courts in a contemporary democratic society emanates from the separation of powers and that the pertinent right should exist irrespective of whether the corresponding state has a certain code of court procedure or not.

²⁰ This assumption is based on the fact that in the subparagraph entitled "Classification of Fundamental Rights" at page 179 there is a reference to the following works of R. Alexy that the author of this article unfortunately did not manage to find: Alexy, R. Theorie der Grundrechte. Frankfurt am Main, 1994; Alexy, R. Die logische Analyse von Prinzipien. Recht, Vernunft, Diskurs: Studien zur Rechtsphilosophie. Frankfurt am Main, 1995.

²¹ K. Merusk, R. Narits, supra note 11, p. 184.

²² Ibid., p. 185.

²³ Ibid. But as the problems pertaining to the mechanism of safeguarding the fundamental rights have hitherto not been very seriously analysed in Estonian literature of political law, then understandably the question of whether any efficacious guarantee of a fundamental right is at the same time a substantial constituent of this fundamental right could not arise. Pursuant to the German prevailing opinion the similar question is answered in the affirmative. — Q.v., for example Handbuch des Staatsrechts. Bd. 5. Allgemeine Grundrechtslehren. — Heidelberg: Müller, Jur. Verl., 1992, pp. 302-303.

²⁴ On the place of the principle of opportunity in Estonian criminal care, q.v. E. Kergandberg. Expedience of Arrangement in German and Estonian Criminal Care. — Juridica International. Law Review II University of Tartu,

pp. 76-89.

²⁵ Let us emphasise that here we really talk about contesting the **procedural steps of an investigator**. Naturally, a person may be detained in the course of preliminary investigation. but as this is done only by the permission of the court then an appeal against such procedure restricting the person's fundamental right may be submitted to a court of appeal.

²⁶ C. Roxin Strafverfahrensrecht. — München: Beck, 1991, p. 408.

²⁷ Hereby we talk about the principle valid in Soviet court procedure law pursuant to which the highest court was always obligated to review the complaint, irrespective of its content, to the full extent or figuratively speaking, the court had to arrange a full "audit" of the case. The "principle of revision" of Soviet court procedure did not mean as if the Supreme Court of the Estonian SSR had operated as a German supreme court ("*das Revisionsgericht*").

²⁸ Let us mention here in comparison that the equivalent of the right of special appeal in German criminal procedure is "*die Beschwerde*".

²⁹ The correction of court errors in Estonian criminal procedure could be compared with an appellate proceeding of Austrian criminal procedure that is known as "Nichtigkeitsbeschwerde zur Wahrung des Gesetzes". The circle of entitled subjects for the correction of judicial errors in Estonia is far broader than the corresponding circle in the above-mentioned proceeding in Austria. Namely, pursuant to § 77(1) of the ACCCCPC, the convicted person, his or her defence counsel or legal representative, the injured person or his or her legal representative and the prosecutor may file an application with the Supreme Court within a year for the correction of judicial errors if in his or her opinion the court has applied the criminal law improperly or essentially infringed the criminal procedure law.