

Jaan Sootak

Professor of Criminal Law, University of Tartu

The Civil Law Institutes as Part of Criminal Law

(Uniformity of the Legal Order and the Criminal Law
Reform in Estonia)

1. Principle of uniformity of legal order

The statement presented in the heading seems, *prima facie*, rather provocative as criminal and civil law, accompanied by public law, comprise three large components of legal order. Legal order, as it is well known, is an integrated whole. A.-T. Kliimann, Professor of Administrative Law at the University of Tartu defines legal order as a body of applicable law organising the life of a particular nation while the nature of legal order constitutes the uniformity and integrity of this body.^{*1} Two types of institutes may be identified in legal order: firstly, the institutes solely characteristic of this particular branch of law and thus constituting the main part thereof (*e.g.* contract in civil law, punishment in criminal law); secondly, similar or coinciding institutes (*e.g.* guilt). A large area where many civil and criminal law institutes coincide or are similar is the law of delict in civil law. As a result of the uniformity of legal order, an act having the necessary elements of a criminal offence may appear to be legitimate from the perspective of some civil law institute — for example, the owner's right to acquire a thing belonging to him or her but in arbitrary illegal possession (section 41 of the Law of Property Act).

Such examples may be presented in multitude. It is naturally impossible to provide an exhaustive analysis of all related and coinciding civil and criminal law institutes in one article. Nevertheless, it is clear that legal reform inevitably entails certain shifts and reorganisation also in this field. I will discuss the issue below from the aspect of the criminal law reform in Estonia, taking as the point of departure the problems related to criminal law and its reform and examining the existence of civil law institutes in criminal law, first and foremost, in the positions that have emerged sharply in the course of the reform. Hence, the question is not simply about a comparative analysis of criminal and civil law institutes but, above all, the problems and changes related to the reform, which, in turn, reflect the views of the authors of the drafts, their opponents and the legislator, their legal consciousness.^{*2} First I will examine the civil law institutes in the foundations of criminal law, then in the general part of criminal law and finally in relation with the elements of the special part.

¹ A.-T. Kliimann. *Õiguskord (Legal Order)*. Tartu: Akadeemilise Kooperatiivi Kirjastus, 1939, lk. 79–89 (in Estonian).

² About the same issue with regard to punishment theories: J. Sootak. *Theories of Punishment and Reform of Criminal Law (Reform as a Change of Mentality)*. – *Juridica International. Law Review*. University of Tartu, V, 2000, p. 68 *ff.*

2. Bases of criminal law

2.1. Material definition of crime and civil law remedy

One of the most central issues of the foundations of criminal law is crime theory, particularly the material definition of crime. The material definition of crime means the concept of a crime adopted in a particular society and legal order. The materially defined notion of crime has also been referred to as **the consciousness of positive law**.^{*3}

Upon the material definition of crime through its dangerousness to society, F. Liszt plays an important role: according to him, a crime may be materially explained by two features. Firstly, only such an act is punishable pursuant to criminal procedure in the case of which the state considers the restoring function of private law (compulsory discharge of obligations and compensation for damage) insufficient to remedy injustice. Secondly, criminal law interferes when condemnation is aimed not only at the act but also at the offender involved in the act and dangerous to society. According to Liszt, the content of the unlawfulness of an act does not depend on any judgement but exists metalegally and objectively: the legal provision does not create this but finds it already there. Yet he emphasises that if formal and material unlawfulness fail to coincide, the formal aspect must be taken as a point of departure — the judge is bound by law and the adjustment of the applicable law does not fall within his or her competence.^{*4} In such treatment, the principles of *nullum crimen nulla poena sine lege* and *nullum crimen sine periculo sociali* are not in conflict as they belong to different levels of the notion of crime and their areas of application need not overlap.

From the point of view of the criminal law reform in Estonia as well as in other Eastern European countries, the solution to the issue of petty offences is important here. In most cases, people are ready to abandon the concept of danger to society as “a relict of Stalinist criminal law” and treat the notion of crime **materially and formally**, bearing in mind material unlawfulness in the former and the need to maintain the principle of *nullum crimen sine lege* in the latter case.^{*5}

At the same time, the new 1997 Criminal Code of Poland has abandoned the former concept of danger to society; nevertheless, the crime has been materially defined by means of the concept of **damage posed to society**.^{*6} Namely, section 1 (2) of the Code provides that an act is not a crime if the damage that it poses to society is minor (*społeczna szkodliwość jest znikoma*).^{*7} According to subsection 115 (2) of the Code, the court must, upon assessing the degree of the danger that the act poses to society, take into account the type and nature of the damaged benefit, the amount of the damage incurred or threatening, the manner and circumstances of committing the act, the weight and significance of the obligation violated as well as the form of intent, the motives of the actor, the type of the duty of care and the extent to which it was violated. The court takes account of the minor damage posed to society by the act upon conditional suspension of the proceeding (section 66 (1)) as well as upon imposition of punishment (section 53 (1)).^{*8}

The criminal law reform of Estonia conducted in 1992 abandoned the concept of danger to society and largely the material definition of crime *per se* in criminal law. Such solution has been also preserved in the draft Penal Code. The issue of petty offences will be resolved by the procedural principle of opportuneness.

From the aspect of private law, this means that for material criminal law there is no such dilemma as **the restoring function of private law — punishable injustice**. At least in the case of the so-called inauthentic petty offences, material criminal law considers it necessary to define an act as punishable injustice and leaves no place for the remedial function of private law. It is true that this function actually emerges as a procedural opportunity and particularly as the function of remedy. It is also so in section 153a of the German *StPO* where the monetary payments of the offender are of such nature. The new draft Penal Code of Estonia also lacks an analogue to section 46a of *StGB* (reduction in

³ About the material definition of crime, see, e.g.: C. Roxin. *Strafrecht. Allgemeiner Teil*. Vol. 1. Munich, 1994, section 2.

⁴ F. Liszt. *Lehrbuch des deutschen Strafrechts*. Bd. 1. Berlin: Walter de Gruyter, 1932, S. 146–147.

⁵ See, e.g.: L. Bavcon. *Stand und Tendenzen der Strafrechtsreform in Slovenien. – Von totalitärem zu rechtsstaatlichen Strafrecht*. Freiburg: Max-Planck Institut, 1992, p. 33; A. Wasek. *Wesentliche Strafbarkeitsvoraussetzungen aus polnischer Sicht*. *Ibid.*, p. 187.

⁶ Enacted by the Act of 6 June 1997. See, e.g.: *Das polnische Strafgesetzbuch. Kodeks karny. Zweisprachige Ausgabe*. Freiburg: edition iuscrim, 1998.

⁷ In German: *Sozialschädlichkeit geringfügig ist*.

⁸ About the concept of damage posed to society in new criminal law of Poland in detail: E. Weigend. *Einführung. – Das polnische Strafgesetzbuch* (Note 6), pp. 7–8 (= *ZStW* 1998, No. 110, p. 114 ff.).

punishment or exemption from punishment in the case of remedy).⁹ In the case of conditional imprisonment section 56b II of *StGB* provides for several monetary remedial duties (community service, monetary payment to state, the State Treasury or to the account of a community association, etc.), which are neither included in sections 47–47¹ of the Criminal Code applicable in Estonia nor in sections 77–79 of the draft Penal Code (they only contain an obligation to compensate for the damage incurred by crime). Thus, we may state that the criminal law reform in Estonia distances itself through its material crime theory from the remedial function of criminal law that falls entirely within the scope of private law.

2.2. Liability – common basic institute?

The notion of criminal liability was one of the most central institutes of Soviet criminal law. It proceeded from a discussion that had commenced as early as in the 1930s and ended in the 1950s, as a result of which a view was formed that the general elements of a crime served as the basis for the criminal liability of a person.¹⁰ One of the leading jurists in Estonia I. Rebane has also engaged himself in the issues concerning criminal liability.¹¹ P. Varul introduced civil law liability, as well as the general theoretical problems of liability, into Estonian scientific literature.¹² He also made an attempt to analyse the theory of criminal liability formulated by Rebane on a new level, namely on the metalevel of legal liability.¹³ Hence, a favourable situation developed in Estonian jurisprudence for the development of the theory of legal liability, in which both the elements of criminal liability and civil liability would have been integrated.¹⁴

Unfortunately, the criminal law reform in Estonia soon took a different course. Namely, the criminal law reform of 1992 largely abandoned the institute of criminal law. Thus, for example, it is impossible, under the applicable Criminal Code, to exempt a person from criminal liability (as it could be done according to section 50 of the Criminal Code by a preliminary investigator or prosecutor and to put the offender on probation), but the offender must be convicted in court and then exempted from liability. At the same time, the notion of **criminal liability** preserved, for example, in the institute of limitation periods (section 53) and in some provisions of the special part (e.g. section 168: charging of a knowingly innocent person with a criminal offence by a preliminary investigator or prosecutor). A discussion about the notion of liability commenced in relation with the Acts of the Criminal Liability of the Higher State Persons. It follows from them that the bringing of a person to justice commences with charging him or her with a criminal offence.¹⁵ The Supreme Court, however, has adopted a position that criminal liability can be nothing but a criminal punishment (the decision was supplemented by the dissenting opinions of two justices of the Supreme Court). At the same time, the Supreme Court admitted that with regard to limitation periods, charging with a criminal offence was a process in time that commenced from the prosecution of the accused.¹⁶ The first versions of the draft Penal Code contained the notion of liability (Chapter 2 of the general part: **Bases of Liability the Violation of which is Punishable**). Due to the pressure exerted by opponents and relying on the above-mentioned judgement by the Supreme Court, the notion was erased from the draft, and the criminal law reform in Estonia and obviously also legal language was ready to abandon the notion of liability.¹⁷

⁹ In closer detail: *Alternativ-Entwurf Wiedergutmachung*. Munich: Beck, 1992.

¹⁰ In detail: J. Sootak. *Verbrechensbegriff und Tatbestand*. – *Osteuropa Recht*, 1998, No. 1, p. 57 ff.

¹¹ For example, his doctorate thesis: I. Rebane. *Ubezhdniye i prinuzhdniye v borbe s posyagatelstvami na sovetiski pravoporyadok* (Dictation and Convicting in the Fighting against the Assaults to the Soviet Legal Order). – TRÜ Toimetised, 1966, Vol. 182. See also: *Idem*. *Õigusliku vastutuse aluste õpetuse metodoloogilistest ja gnoseoloogilistest aspektidest* (About the Methodological and Gnosiological Aspects of the Theory of Legal Liability). – TRÜ Toimetised, 1989, Vol. 852, p. 7 ff. (in Estonian).

¹² P. Varul. *Metodologicheskiye problemy issledovaniya grazhdansko-pravovoi otvetstvennosti* (Methodological Problems of Liability in the Civil Law). Tallinn: Eesti Raamat, 1986.

¹³ P. Varul. *Professor Ilmar Rebane ja õigusliku vastutuse teooria* (Professor Ilmar Rebane and the Theory of Legal Liability). – J. Sootak (toim). *Eesti kriminaalõiguse arenguteedest*. Tartu: Juristide Täienduskeskus, 1997, lk. 12 jj. (in Estonian).

¹⁴ P. Varul claimed that even “the Tartu school of legal liability” existed. See: P. Varul (Note 13), p. 17.

¹⁵ In detail: J. Sootak. *Kõrgemate riigiametnike kriminaalvastutusele võtmise korra seadused* (The Acts of the Criminal Liability of the Higher State Persons). – *Juridica*, 1995, No. 10, p. 426 ff. (in Estonian); R. Maruste. *Veel kõrgemate riigiametnike kriminaalvastutusele võtmise korra seadustest ehk häämine vastutuse kategooriaga* (Again about the Acts of the Criminal Liability of the Higher State Persons or Blethering with the Category of the Liability). – *Juridica*, 1996, No. 3, p. 134 ff. (in Estonian).

¹⁶ Judgement of the Supreme Court from 12.03.1996. – *Riigikohtu lahendid*, 1996, No. 76 (in Estonian).

¹⁷ About that, see also: J. Sootak. *Kriminaalvastutus – kas õiguskeele võõraslaps?* (Criminal Liability — Stepchild of the Legal Language?). – *Õiguskeel*, 1996, No. 5, p. 46 ff. (in Estonian).

However, the notion of liability has been reinstated in the last versions of the draft Penal Code (*e.g.* section 13: Liability of Legal Person, *etc.*). We should agree to such a turn as the notion of liability is used also in the criminal law of many other countries (*e.g.* in the Finnish *rikoslaki* or French *code penal*). In jurisprudence, C. Roxin has based his notion of delict also on the category of liability. It is true that in this sense, he represents an exception in the crime dogmatics of German jurisprudence.^{*18} The notion of crime has been constructed on the notion of liability in the theory of U. Neumann, according to whom the self-determining ability of punishment as a repression arises from the fact that the punishment serves as an institution belonging among the foundations of the society and its inevitable existence criteria — liability.^{*19} In principle, it cannot be precluded that the punishment will at some time be replaced by any other sanction (in the case of unaccountable persons — children and persons of unsound mind — it is so already now; in addition thereto, non-punishing sanctions are frequently applied to accountable persons, *e.g.* minors). It will also be so in the case of criminal liability of legal persons — instead of the behavioural norm based on the *ex ante* perspective and the punishment accompanying the violation thereof, liability applied with regard to the *ex post* perspective is used, which is reminiscent of a punishment only on the surface.^{*20}

Time must tell whether the notion of liability will again be established also in Estonian criminal law and criminal law dogmatics. We may hope that, as a result of co-operation between jurists specialising in criminal and private law, the emergence of the Tartu school of legal liability need not be ruled out.

3. General part of criminal law

3.1. Level of necessary elements of criminal offence

According to the three-level delict structure, the first level comprises necessary elements of a criminal offence. Hence, the problem involves the necessary elements of the special part. Below (section 4), we will discuss this issue using only one striking example, namely in relation with the legal protection of honour.

On the level of the necessary elements of a criminal offence we have yet to discuss one issue, namely the one relating to the general part — intent and negligence. The criminal law applicable in Estonia that originates from Soviet criminal law uses a psychological notion of guilt, according to which intent and negligence are forms of guilt (section 3 I of the Criminal Code: only a person who has wrongfully — intentionally or negligently — committed a criminal offence shall be subject to criminal liability and punishment). Such treatment has also been adopted in private law where guilt also means intent or negligence.^{*21}

However, the criminal law reform in Estonia abandons the psychological notion of guilt and uses the regulatory notion of guilt. Hence, guilt is located on the third, that is, the last level of a three-level delict structure and means reproachableness of the intent that led the person to committing a criminal offence. Thus, guilt will have a different content in criminal and civil law in the Estonian legal order in the future. The public seems to have started to accept this pursuit which elicited serious objections at first. This must also be admitted from the point of view of the principle of uniformity of the legal order without any reservations.

3.2. Unlawfulness

Now we have reached a problem where there can be no reservations as regards the principle of uniformity of the legal order. Namely, on the second level of the delict structure, the level of unlawfulness, we have to admit that due to the uniformity of legal order, criminal law cannot consider prohibited and punishable the acts that are lawful in another branch of law.

¹⁸ C. Roxin (Note 3), p. 114.1.

¹⁹ U. Neumann. Hat die Strafrechtsdogmatik eine Zukunft? – C. Prittwitz, I. Manoledakis (Hrsg). Strafrechtsprobleme an der Jahrtausendwende. Rostock, 1999, S. 123.

²⁰ *Ibid.*, p. 127.

²¹ See, *e.g.*: P. Schlechtrim. Võlaõigus. Üldosa (Law of Obligation. General Part). Tallinn: Juura, 1999, paragraph No. 254 (in Estonian); *Idem*. Võlaõigus. Eriosa (Law of Obligation. Special Part). Tallinn: Juura, 2000, paragraph No. 778 ff. (in Estonian).

This means that the issue of unlawfulness or lawfulness must be solved against the background of the legal order as a whole. For criminal law, this gives rise to two conclusions.

Firstly, the permissibility of an act contained in other branches of law (civil and public law) always precludes unlawfulness of the act having the necessary elements with regard to criminal law. If it were *vice versa*, criminal law would no longer exist *ultima ratio* and would come into conflict with the principle of subsidiarity — it would consider punishable an act that is permissible in other branches of law. It would be clearly contrary to the principle of uniformity of legal order.

Secondly, prohibition of an act in civil or public law and the fact that the act is contained in the necessary elements of a criminal offence always means also illegality in criminal law, that is, the unlawful nature of the act. Criminal law — or the level of unlawfulness in criminal law — cannot, when returning to the beginning, consider lawful an act that was declared unlawful by a particular branch of law and the necessary elements of a criminal offence. This would also be in conflict with the principle of uniformity of legal order.

Hence, from the point of view of the criminal law reform and the renewing legal consciousness, it is important that the jurists acknowledge that the circumstances precluding unlawfulness of an act need not be positivised in criminal law. As an outcome of long debates, the draft Penal Code contains a provision (section 26), laying down that unlawfulness of an act may be precluded by that Act, any other act, international convention or international custom.^{*22} This means that the justifying circumstances arising from private law are directly applicable in criminal law.

The issue is not that burning as regards the circumstances that coincide in private and criminal law — self-defence and emergency situation. In the case of an act conforming to the necessary elements of a criminal offence the justifying circumstances contained in criminal law will be applied, while the provisions of private law are applicable in other cases.^{*23} It will be interesting to observe the development of criminal law in those cases when the justifying circumstances in private law fail to coincide with the ones in criminal law and are thus directly applicable. One of such institutes is the possessor's self-help (section 41 of the Law of Property Act). According to that, the possessor may protect the possessor's possession by force against arbitrary action, he or she also has the right to immediately deprive the movable from the user of arbitrary action who is apprehended in the act or pursued. An analogous regulation is contained in sections 229–231 of the German *BGB*. In principle, a difference appears in the fact that subsection 41 (1) of the Law of Property Act of Estonia imposes limits of self-defence on the protection of the possession (*/.../ without exceeding the limits of self-defence*)^{*24}, the relevant provisions of *BGB* do not mention self-defence. Namely, section 230 of *BGB* demands that self-defence may not go beyond fighting danger. Consequently, self-defence is an independent justifying circumstance, the legal regulation of which is autonomous and does not coincide with self-defence. It is treated as a totally independent justifying circumstance, namely a form of acting *pro magistratu* also in German legal writing on criminal law.^{*25} The fact that the act is actually a right of defence and that the institute is located side by side with self-defence in criminal law in the system of justifying circumstances^{*26} does not render it self-defence by nature. In this respect, the reference to self-defence in subsection 41 (1) of the Law of Property Act of Estonia is misleading and may cause inconvenience in practice. Namely, self-defence grants more extensive rights to the possessor than provided for in section 230 of *BGB*, for example. We have to consider that in such a case, criminal self-defence (section 13 of the Criminal Code) and self-defence in private law (section 41 of the Law of Property Act) relate to each other as a general and a special provision and in the case of competition, the latter one is applicable. Such solution is also supported by the reference to the principle of uniformity of legal order.

²² The general part of the draft has been published in: M. Ernits, P. Pikamäe, E. Samson, J. Sootak. Karistusseadustiku üldosa eelnõu (Draft of the General Part of the Criminal Code). Tallinn: Juura, 1999 (in Estonian). It has also been stated *expressis verbis* in the judgement of the Supreme Court of 12.09.2000: the circumstances precluding unlawfulness derive “either from criminal law or any other law”. – Riigi Teataja (The State Gazette) III 2000, 21, 235 (in Estonian).

²³ Imposition of restrictions on self-help and emergency situation in criminal and private law may, however, cause also problems. See, e.g. C. Roxin (Note 3), section 16, B and C. Such problems have not yet emerged in Estonian court practice.

²⁴ See also P. Pärna, V. Kõve (Ed.). Asjaõigusseadus. Kommenteeritud väljaanne (Law of Property Act. Commented Edition). Tallinn: Juura, 1996, section 41, comm. 1 and 2 (in Estonian).

²⁵ See, e.g. C. Roxin (Note 3), section 17, C; H.-H. Jescheck, T. Weigend. Lehrbuch des Strafrechts. Allgemeiner Teil. Berlin: Duncker & Humblot, 1996, section 35, IV.1.

²⁶ See, e.g.: W. Gropf. Strafrecht. Allgemeiner Teil. Berlin *etc.*: Springer, 2000, p. 174.

4. Special part — protection of honour in criminal and civil law

Honour is one of those legal benefits that can be protected both by way of criminal and civil proceedings. As the respective delicts in criminal law (sections 129 and 130 of the Criminal Code) are matters of private charges, the right of choice rests with the victim.

Criminal law protects the honour of an individual against such acts that involve misrepresentation (defamation) or degrading of the individual (insult). The honour of an individual is subject to protection also in private law. Thus, the individual may, according to section 23 of the General Part of the Civil Code Act demand that his or her honour be protected in three forms and to demand:

- (a) termination of defamation;
- (b) refutation of defamatory information, unless the defamer proves the accuracy of the information;
- (c) compensation for damage caused by the defamation.

In relation thereto, a dispute arose concerning whether an individual can protect himself or herself in civil law against any defamation or only when defamation has been committed by way of stating a fact (clause b). The latter was opted for by the Criminal Chamber of the Supreme Court in the *Tammer* case.^{*27} The court ruled that in the case of defamation of honour by an appraisal, the victim cannot choose between criminal or civil protection of honour, the victim can be defended only by way of criminal proceedings.

The Special Panel of the Supreme Court later adopted a different position, stating that the protection of honour by way of civil proceedings is possible in both instances. If the case involves appraisal with regard to the General Part of the Civil Code Act (insult), the victim has an opportunity to demand satisfaction prescribed by section 23 (a) and (c) of the General Part of the Civil Code Act by way of civil proceedings — termination of defamation and compensation for damage. Thus, the Special Panel was of the opinion that section 23 (1) of the General Part of the Civil Code Act contained a three-element alternative set for all cases of defamation and that they constituted three independent civil law remedies.^{*28}

The first version of the draft Penal Code retained the necessary elements contained in the applicable Code, placing them in division 4 “Offences against Honour”. Unlike in the applicable law, the features of the necessary elements had been altered.

Defamation was no longer “dissemination of knowingly wrong fabrication defaming the other person”, but “disclosure of a fact damaging the person’s rights or reputation, of the inaccuracy of which the offender was aware.” Thus, the expression “defaming the person” was replaced by the expression “damaging the person’s right or reputation”. The culpability of the information disclosed need not be important from the viewpoint of the victim. Serious damage may be incurred to a person even by disclosure of morally absolutely neutral false information.^{*29}

Insult was no longer “degradation of honour and dignity”, but “disparagement” that may be expressed in the inadequate description of the person’s appearance or personal characteristics, aggressive and indiscriminate criticising, derogation of the profession, *etc.*^{*30}

Unfortunately, we can speak about the respective provisions of the draft only in the past tense. In the course of the processing of the draft in the *Riigikogu* (Estonian parliament), the necessary elements of a criminal offence related to the protection of honour in criminal law have been deleted. Thus, Estonia is likely to face a unique situation where honour can be protected only by way of civil proceedings.

²⁷ Judgement of the Supreme Court 26.08.1997. – Riigikohtu lahendid 1997. Tallinn: Juura Õigusteabe AS, 1998, No. 115 (in Estonian).

²⁸ Riigikohtu lahendid 1997. Tallinn: Juura Õigusteabe AS, 1998, No. 352 (in Estonian).

²⁹ Seletuskiri karistusseadustiku eelnõu juurde (Explanatory Memorandum to draft Penal Code). Unpublished material in possession of the Ministry of Justice (the chapter is by M. Kurm), p. 34 (in Estonian).

³⁰ M. Kurm (Note 29), p. 35.