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# On Options of Law-interpretation in the Context of the General Part of the Civil Code Act

## Comprehension of law and aspects thereof

In social terms, every law serves as one of the means aimed at the achievement of the functioning and reproduction of the society as a whole. This objective is accomplishable for the society if the activities of the people living in the society are co-ordinated at least within the framework provided by law. It is correct that, differently from several other means of social regulation, the functioning of law is based on its authoritative character.<sup>1</sup> However, it is also evident that laws are not created in order to provide parliaments with work or to be understood by only a narrow circle of members of the society.<sup>2</sup> Legislation, and law contained in the legislation, have always been the state's most important tool for informing practically all members of society about the behaviour expected from them by the society organised as a state. Hence we reach the logical conclusion that behaviour in compliance with laws is immanently based on the assumption that laws are **understood**.

For understanding the law, it is rational to distinguish between two aspects thereof. The first aspect is related to the requirement of comprehensibility established for laws — *ius scriptum* — themselves. Common sense tells us that every law must be written in a language which is comprehensible to the addressees of the law. At the same time, it is well known that the language of law, like any other technical language, is more accurate than general language. The text of law is furnished with the necessary exactitude by means of terminology, including legal terminology. In Estonian legal literature, it has been stressed that “the need to interpret a legal norm, *i.e.* to open its content, arises from the possible ambiguity of its formulation. In theory, it is correct to state that no norm is absolutely univocal”.<sup>3</sup> And hence a conclusion is drawn: “Interpretation should, thus, be an

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<sup>1</sup> See M. Maripuu. Seaduse arusaadavuse arusaadavus (Understandability of the Understandability of Law). – Riigikogu Toimetised, 2000, No. 2, p. 90 (in Estonian) (The author of that article is a member of the Riigikogu — R.N.).

<sup>2</sup> See also: R. Narits, K. Merusk. Õiguse olemusest ja seaduse võimalustest (On the Nature of Law and Options of Laws). – Riigikogu Toimetised, 2000, No. 2, p. 100 (in Estonian).

<sup>3</sup> M. Luts. Lünnga vastu tõlgendamise või analoogiaga? (Diskussioonist juriidilises meetodiõpetuses) (Against Gaps — by means of Interpretation or Analogy? (On discussion in jurisprudential methodology)). – Juridica, 1996, nr. 7, lk. 348 (in Estonian).

immanent part of the activities of the implementer of a norm.”<sup>4</sup> Linguistic problems or, more exactly, the problems of legal language are undoubtedly related to interpretation of law. This applies particularly in Estonia, where a dialogue between a qualitatively new way of thinking and language is going on in connection with building a qualitatively new social system organised as a state.

However, interpretation of law cannot be reduced solely to ambiguity of formulation.

The main emphasis of this article is laid not so much on circumstances relating to the language of law but, rather, on the complicated problem of understanding the law — on the skill to interpret laws. Such skill cannot be reduced to merely the knowledge and use of the rules of language — semantics, syntax, *etc.* The problem is of a serious theoretical content and relates, in the final stage, to legal philosophy. Namely, understandings of the relationship between a norm and its interpretation have had a substantial influence on the development of interpretation theories and even concepts of legal philosophy.<sup>5</sup> It must be specified, in this point, that the author does not share the “scientific” pessimism, which has been expressed, to some extent, in specialist literature with regard to interpretation. In specific terms, in some cases interpretation is not considered to be a theoretical problem but, rather, a problem arising directly in practice. In that respect, there are some disputable aspects, but this does not render interpretation characteristically theoretical.<sup>6</sup>

Additionally, attention must be directed to the fact that making a law comprehensible through interpretation correlates to understanding law as such. The core of the problem actually lies in the question of which means and techniques should be applied to reach, through the provisions of the law, the purpose of the law, *i.e.* an understanding which is accordant with law. Thereby, I want to state that interpretation is in immediate relation with the interpreter’s person and views or even convictions regarding the principal parameters of law. On the basis of historical experience and modern views, these would, very briefly, be as follows: the legal positivist position, which regards law as a system of legal norms; the realist position, which lays emphasis on the social dimensions of law; within the last decades, however, a position regarding law as a communicational phenomenon has been gaining strength rapidly. As a generalisation, it can probably be stated that law is a normative communicational and social structure. Law encompasses all aspects relating to that part of human behaviour which is relevant in legal terms. Therefore, in order to cognise law, one must be able to see and, naturally, recognise the normative correlation between law and the society. Law cannot be, and is not, merely a result of the decisions of individuals or groups of individuals. However, the legislator, *i.e.* the parliament in the states established upon the so-called Western democracy, can furnish law with some formulations about methods and techniques which can be used by a subject for making law comprehensible (or more comprehensible) for himself or herself.

## Text of law as object of interpretation

The object of interpretation can be only a text with a binding (normative) meaning, interpretation of which results in a necessary legal norm expressed by means of legal text.<sup>7</sup> A norm can be used as a basis for actual behaviour, or ignored, only after we have cognised it. A legal norm as such cannot, however, be interpreted. Nevertheless, the situation becomes interesting when instructions for understanding law have been fixed by the legislator in a legal text as a formal legal norm. Figuratively, this extends the route “**legal text — making it understandable (interpretation) — behaviour**” by one important stage: “**legal text — legal text as an instruction for interpretation — interpretation of the rest of the legal text — behaviour**”.

In this point, several questions can be posed. For example, should instructions for interpretation be presented at all in the text of a law? To what extent are the instructions for interpretation provided in one legal text binding on other legal texts where such or other kind of instructions for interpretation cannot be found? To what extent must instructions for interpretation be positivised in the established legal order? We can even ask whether instructions for interpretation need interpretation themselves.

In the journal *Juridica*, M. Rosentau has touched on the subject of distinguishing between interpretation and understanding in the context of contractual certainty and trust between the parties. He

<sup>4</sup> *Ibid.*

<sup>5</sup> T. A. O. Endicott. Linguistic Indeterminacy. – Oxford Journal of Legal Studies, Spring, 1999, Vol. 19, No. 1, p. 690.

<sup>6</sup> S. Fish. Response: Interpretation Is Not a Theoretical Issue. – Yale J. L. & Human, Summer, 1999, Vol. 11, No. 2, pp. 514–515.

<sup>7</sup> A. Mõttus. Seaduse sõnastamine ja terminoloogia (Wording of Laws and Terminology). – Õiguskeel, 1997, nr. 3, lk. 34 (in Estonian); R. Narits. Keel ja õigus (Language and Law). – Õiguskeel, 1998, nr. 1, lk. 9 (in Estonian).

wrote: “We can imagine a situation of precontractual negotiations, in which the parties have no problems with understanding each other; we can also imagine the other extreme, in which parties come to negotiate questions completely unknown to the other party — unknown concepts, goods or traditions /.../. The handling of such unknown circumstances involves two aspects: *knowing* such circumstances and *understanding* such circumstances.”<sup>8</sup> Rosentau finds that **interpretation** is necessary only for understanding new and unknown concepts. Indeed, there are practical grounds for the opinion that an implementer of law is not under the obligation to interpret each legal norm separately. In legal order, we can find, so-to-say, univocal norms allowing routine decisions. In addition, interpretation may have become evident from the previous law-interpretation practice and be so convincing that there is no need to correct or adjust the existing version of interpretation.<sup>9</sup>

However, in a situation in which the adopter of a legal decision faces something new and unknown, there will be a question of where to find fulcra for interpreting the law. How unknown are, then, the rules for understanding the law itself — the “laws of jurisprudence”?

Actually, that question was answered, with sufficient principality and “strictness”, by C. F. von Savigny, who stated that of all laws faced by lawyers, the laws of their own science are those that they know least. Such observation would require that at least those generally accepted interpretation norms which have a principal meaning should find their way to laws. At the same time, there will still be the problem of how extensively, both in qualitative and quantitative terms, techniques for the interpretation of law should be fixed in a law. After all, this is principally *hermeneutica iuris*, of which at least an implementer of law must have a systematic picture.<sup>10</sup> Description of interpretation theories is oriented, first of all, to the scope of our cognisance rather than to stressing the normativity of one theory or another.<sup>11</sup> It is obvious, however, that laws are written not only for lawyers and must be understood by at least those for whom the law is intended.

Civil law is a large legal area providing for the procedure of human behaviour, in which the participants are in equal, or co-ordinate, relationships. This means that subjects are free to enter into situations of legal significance, but then, they must already accept the legal rules. This mostly involves subjects without the required technical (*i.e.* legal) educational background, and for them, law is just one means of social order, a component of culture. Such a situation seems to create a need to furnish law with at least some more substantial rules for a better understanding of legal rules themselves.

In view of the situation in Estonia, it must be added that here, in replacing one legal system with another, legal and political decisions have been taken by selecting appropriate models for our laws from other legal systems. In world practice, such “borrowings” from others have been both usual and necessary.<sup>12</sup> I should also like to add that in private law, possibilities of reception are much greater than in public law or criminal law. At the scientific conference dedicated to the 80<sup>th</sup> anniversary of the Ministry of Justice, it was recognised that “our activities cannot be aimed at creating original law in Estonia, but it is also evident that in the event of any transpositions or application of any examples and models, materials serving as the basis must be analysed in order to decide to what extent one solution or another is suitable for us”.<sup>13</sup> All this, however, is accompanied by acceptance of behavioural norms which are, for us, yet either unfamiliar or unaccustomed. “To date our legal practice has been unsound, since we must partly rely on laws which originate from another social order and are no more in accordance with actual social relationships. Those areas in which laws conforming to the new legal order are already applicable suffer from an overall absence of theoretical studies and well-developed positions needed for the legal practice /.../. Hence, for example, the Estonian SSR Civil Code, which entered into force on 1 January 1965, serves as the source of general norms in one of the most important areas of private law, the law of obligations. Thus, implementers of law are in a situation in which general norms originate from a socialist society but specific laws have been adopted by principles characteristic of a free market economy.”<sup>14</sup>

<sup>8</sup> M. Rosentau. Lepingu kindluse ja poolte usalduse epistemoloogilised eeldused (Epistemological Presumptions of Contractual Certainty and Trust between Parties). – *Juridica*, 2001, nr. 6 (in Estonian).

<sup>9</sup> *Ibid.*

<sup>10</sup> R. Narits. Tõlgendamine: teadus või seadus? (Interpretation: a Science or a Law?). – *Juridica*, 1994, nr. 9, lk. 230 (in Estonian).

<sup>11</sup> However, sometimes this has been the understanding of the role of jurisprudence and jurists with regard to problems of interpretation. See M. Luts. Õigusnormide tõlgendamise meetoditest ja teooriatest (On Methods and Theories of Interpretation of Legal Norms). – *Juridica*, 1998, No. 3, p. 111 (in Estonian).

<sup>12</sup> P. De Cruz. *Comparative Law in a Changing World*. London, Sidney, 1999, pp. 485–486.

<sup>13</sup> P. Varul. Eesti õigusüsteemi taastamine (Restoration of Estonian Legal System). – *Juridica*, 1999, nr. 1, lk. 3 (in Estonian).

<sup>14</sup> I. Kull. Lepinguvabaduse põhimõte Euroopa ühtlustavas tsiviilõiguses ja Eesti tsiviilõiguse reform (The Principle of Freedom of Contract in the Harmonising European Civil Law and the Estonian Civil-Law Reform). – *Riigikogu Toimetised*, 2000, nr. 2, lk. 180.

And thus we have a situation in which courts must assume the role of a developer of law in the final instance. However, this requires knowledge of law-interpretation rules, those principles of private law which have not yet been regulated on the level of Acts. In the following paragraphs, we shall take a look at how interpretation of law is assisted by the provisions of the General Part of the Civil Code Act — the “constitution” of private law.

## Interpretation based on General Part of the Civil Code Act — *de lege lata* and *de lege ferenda*

The Estonian civil-law reform, aimed at developing a modern civil code, is still uncompleted today. The already reformed part of the civil law consists of the General Part of the Civil Code Act<sup>\*15</sup> (GPCCA), the Law of Property Act<sup>\*16</sup>, the Family Law Act<sup>\*17</sup> and the Law of Succession Act<sup>\*18</sup>, which are presently applicable. At the same time, the law of obligations part of the Estonian SSR Civil Code is still in force, but will soon be replaced by the Law of Obligations Act. Some provisions of the specific parts of the law of obligations have already been replaced by the Dwelling Act<sup>\*19</sup>, the Commercial Lease Act<sup>\*20</sup>, the Credit Institutions Act<sup>\*21</sup>, etc.

Even the GPCCA has become a “temporary” Act in a certain sense, as a new draft Act has been prepared for positivisation into Estonian legal order together with the new Law of Obligations Act. Full-scale codifications have not been planned for the coming years (at least until the year 2004) according to the programmes of the Ministry of Justice. Codification would, therefore, be a question of the more distant future.<sup>\*22</sup>

The role of the GPCCA in Estonian legal order is primarily to provide norms of general meaning. Owing to the Estonian situation, in which modern civil law has been, and is, adopted in parts, we have to accept that one of the laws is entitled the “General Part of the Civil Code Act”. In Estonian legal literature, opinions have been expressed that we shall need this until all of the so-called partial laws have been codified into one civil code.<sup>\*23</sup>

The importance of the GPCCA is certainly more than just being a general part in relation to other parts of the civil law. The GPCCA is also applicable to other legislation containing civil-law norms.

Apparently, the fact that the GPCCA — the “private-law constitution” of the Estonian national legal order — provides, in three sections of Part I, a whole range of rules for understanding law, and section 2, section 3 and section 4 thereof are entitled, respectively, “Interpretation of Acts”, “General and specific provisions” and “Analogy of Act and law”, should be considered as reasonable in every respect. Analogy of Acts and analogy of law were also recognised in the earlier applicable Estonian civil law, but no provisions regarding interpretation were formerly fixed in the civil legislation. At the same time, it must be specified that the provision of interpretation canons in the GPCCA does not cover all elements in the “catalogue” of classical interpretation methods.<sup>\*24</sup>

In the original version, two of the three subs (subs 1 and 2) of GPCCA section 2 (“Interpretation of Acts”) provided rules for linguistic interpretation. Namely, the first subs provided for the supremacy of general language over any specific meanings of words with regard to interpretation, and the second subs contained the requirement of interpretation in accordance with the meaning of the law in the event of polysemy. The third subs directed attention to the need for systematic interpretation. It must,

<sup>15</sup> Tsiviilseadustiku üldosa seadus (General Part of the Civil Code Act) – Riigi Teataja (The State Gazette) I 1994, 53, 889 (in Estonian).

<sup>16</sup> Asjaõigusseadus (Law of Property Act) – Riigi Teataja (The State Gazette) I 1993, 39, 590 (in Estonian).

<sup>17</sup> Perekonnaseadus (Family Law Act) – Riigi Teataja (The State Gazette) I 1994, 75, 1326 (in Estonian).

<sup>18</sup> Pärimiseseadus (Law of Succession Act) – Riigi Teataja (The State Gazette) I 1996, 38, 752 (in Estonian).

<sup>19</sup> Elamuseadus (Dwelling Act). – Riigi Teataja (The State Gazette) I 1992, 17, 254 (in Estonian).

<sup>20</sup> Rendiseadus (Commercial Lease Act) – Riigi Teataja (The State Gazette) I 1990, 12, 126 (in Estonian).

<sup>21</sup> Krediidiasutuste seadus (Credit Institutions Act). – Riigi Teataja (The State Gazette) I 1999, 23, 349 (in Estonian).

<sup>22</sup> Development strategy for private law until the year 2004. Available at: <http://www.just.ee/print.php3?cath=1508>; 24.05.2001 (in Estonian).

<sup>23</sup> P. Varul. Tsiviilseadustiku üldosa seadus (The General Part of the Civil Code Act). – Juridica, 1994, nr. 8, lk. 182 (in Estonian); H. Mikk. Tsiviilõiguse reformist Eestis (About the Civil-Law Reform in Estonia). – Kinnistusraamatu- ja notaripäevad: 13.–15. mai 1999, Tallinn, 2000, lk. 113 (in Estonian).

<sup>24</sup> Traditional interpretation canons have been codified in some European countries. This involves, in particular, the grammatical, systematic and historical methods of interpretation. See *Codice Civile* (Italy), *Allgemeines Bürgerliches Gesetzbuch* (Austria), *Zivilgesetzbuch* (Switzerland).

however, be added that even some days before the GPCCA was presented to the *Riigikogu* (Estonian parliament), the first subs of section 2 had the following formulation: “Interpretation of an Act shall be based on the ordinary meaning of words used in the Act unless the Act provides the words with another meaning.” This has been justifiably regarded as an attempt to legalise alienation of technical language from general language, and was considered impermissible by, first of all, the linguists. The criticism bore fruit and the provision was re-formulated: “Interpretation of an Act shall be based on the ordinary meaning of words used in the Act unless a specific meaning of the words is expressly used in the Act.” In connection with the Act amending the Commercial Code and Acts related to the Implementation of the Commercial Code, an amendment to GPCCA section 2 was also proposed. More exactly, the proposal regarded a new subs 1 to be formulated as follows: “A provision of an Act shall be interpreted primarily together with the other provisions of the Act on the basis of the meaning of the Act and the will of the legislator, and not on the basis of the grammatical meaning of the words.” Initially, that proposal received the approval of the *Riigikogu*. In essence, however, this meant a reevaluation of priorities (an explanation of why such action of the parliament should be regarded as a reevaluation of priorities will be provided below) in the rules of understanding the law. While the applicable text of the GPCCA obviously preferred linguistic interpretation to other forms of interpretation on the basis of the fact that law can be contained only in a written law (*ius scriptum*), the aspect of systematic understanding was foregrounded by the new solution. In accordance with subsection 78 (6) and sections 105 and 107 of the Constitution of the Republic of Estonia, laws approved by the *Riigikogu* must be proclaimed by the President of the Republic. In that situation, the President found that the proposal to amend the GPCCA, approved by the parliament, was in conflict with the Constitution. Namely, the Constitution provides that “Estonia is an independent and sovereign democratic republic” (section 1), where “the state authority shall be exercised solely pursuant to the Constitution and laws which are in conformity therewith. /.../ Laws shall be published in the prescribed manner. Only published laws have obligatory force” (section 3). On the basis of those arguments, the President left the Act unproclaimed.

The above-described episode in developing the legal order ended so that the *Riigikogu* re-discussed the Act amending the Commercial Code and Acts related to the Implementation of the Commercial Code and decided to amend the GPCCA as follows: subsection 2 (3) was changed into subsection 2 (1), and the former subsections 2 (1) and 2 (2) were changed into subsections 2 (2) and 2 (3), respectively.<sup>25</sup> The President of the Republic proclaimed the Act by his Decision No. 723 of 30 May 1996.

It is indeed difficult to comprehend how the proposers of the described amendment understood the character and, probably, the priorities of law-interpretation techniques. Linguistic interpretation has belonged and belongs today to the “catalogue” of classical interpretation methods. Moreover, the object of interpretation, *i.e.* its source can be only the very text of law. And although the above-described attempt to legislate (read: prohibit) consideration of the grammatical meaning of words in interpretation of laws failed, the legislator still changed, in some respects, the preferences with regard to interpretation methods by means of what first seems to be a mechanical rearrangement of paragraphs in section 2. In any case, the requirement of systematic interpretation comes first among the methods of law-interpretation in the presently applicable version of the GPCCA.

Nonetheless, the situation becomes particularly interesting upon a comparison of possible developments in GPCCA section 2 “Interpretation of Acts”. Specifically, a new draft General Part of the Civil Code Act<sup>26</sup> has been prepared with substantial changes in the regulation dedicated to interpretation of law. In the draft, the interpretation provisions are contained in section 3. The only provision left of the presently applicable text is that part of section 2 which, after the amendment of GPCCA section 2, found its way to the first paragraph, namely: “A provision of an Act shall be interpreted together with the other provisions of the Act on the basis of the meaning and purpose of the Act.” This may now provide some clarity with regard to the question whether the will of the legislator has been directed towards a substantial reevaluation of linguistic interpretation in comparison with the generally applicable principles, or towards a specification of its ranking in comparison with other methods of interpretation, or this has been just a formulation adjustment in the text of the Act.

Naturally, there are no absolute arguments against the fact that the drafters have considered the systematic element of interpretation to be the most important one. Recalling and supporting Savigny, it can be recognised that the systematic element “/.../ applies to the intrinsic connection linking all institutions of law into one large whole. The legislator had a view to that connection, just like the historical connection, and thus we are able to completely understand the legislator’s thought only by

<sup>25</sup> Riigi Teataja (The State Gazette) I 1996, 40, 773 (in Estonian).

<sup>26</sup> See: <http://www.just.ee/tsys.htm> (26.10.1999) (in Estonian).

learning how that law relates to the entire legal system and how that must efficiently intervene in the system”.<sup>\*27</sup> Obviously, the problem lies somewhere else. Different categories of interpretation are not of such character as to allow a choice between them on the basis of our preferences or discretion. These are mental activities of different quality, functioning in conjunction. “It is true that occasionally, one is more important than another and comes to the foreground more visibly so that the only inevitable requirement is a comprehensive direction of the attention, although in many individual cases, explicit reference to any element may be omitted as unnecessary and clumsy without jeopardising the thoroughness of interpretation.”<sup>\*28</sup>

It is most regrettable that the draft GPCCA leaves no place for linguistic interpretation as a classical interpretation method. Maybe this partly results from the fact that, already after the adoption of the GPCCA, the following opinion was expressed: “I would like to direct particular attention to GPCCA subsection 2 (3), whereunder a provision of an Act must be interpreted together with the other provisions of the Act. This means that if a provision of an Act remains unclear or ambiguous, the interpretation must be based on the context — the relations of the interpreted provision with the other provisions — to ascertain the intention of the legislator. An interpretation which is out of the context and based only on the wording of the legal norm may yield inexact results.”<sup>\*29</sup> I have mentioned above in this article that in different legal orders, interpretation canons have been positivised differently. However, wherever this has been done, at least the classical “catalogue” has been positivised. It must be added that the ancient Roman legal order — and it was the reception of Roman law that was conducted in private law — contained many norms intended for interpretation activities. Here we are talking about general and necessary interpretation methods and techniques, which were of import even regardless of their applicability in positive law.<sup>\*30</sup>

Of course, an attentive reader may ask why it is necessary to concentrate on a draft Act while only the text of an objective law can serve as a communicational medium. This is generally correct but the special nature of the Estonian situation is based on the fact that in our country, jurisprudence can and must be taught and analysed in the light of draft Acts, which should contain modern solutions that are in compliance with European legal standards and acceptable to the society.<sup>\*31</sup>

Sections 3 and 4 of the GPCCA have not been amended since their adoption. Namely, section 3 regulates the application of general and specific provisions: “If a provision of an Act qualifies another provision or establishes an exception thereto, the qualified provision shall be deemed to be a general provision and the qualifying provision a specific provision. In such case, the specific provision shall apply.” Here, the legislator has tried to direct attention to a generally known principle regulating the inner priorities of texts of law, namely the principle of *lex specialis derogat legi generali*. Of course, we can ask why the legislator has not directed attention, besides the above-mentioned principle, to other principles of same weight: *ius posterior derogat legi priori* (later laws repeal earlier laws); *lex superior derogat legi inferiori* (superior laws repeal inferior laws); *lex posterior generalis non derogat legi priori* (later general laws do not repeal earlier specific laws).

Section 4 provides the principles of analogy of Acts and analogy of law. In Estonia, opinions have been expressed that even problems related to analogy belong to the subject of interpretation of law.

<sup>27</sup> F. C. von Savigny. System des heutigen römischen Rechts. Bd. I, Berlin, 1840, S. 213.

<sup>28</sup> *Ibid.*, p. 215.

<sup>29</sup> P. Varul (Note 23), p. 182.

<sup>30</sup> However, in the motivations of the draft *BGB* (Germany), the unnecessaryness of the so-called general interpretation provisions has been justified as follows: “Specific provisions aimed at simplifying interpretation and ensuring the correctness of results may contain only source positions, but the study and depiction thereof belongs in the field of theory /.../. Instead of assisting interpretation, such legal sentences may easily become problems for interpretation. Even decisions on different opinions regarding the limits of permitted and prohibited interpretation must be left to jurisprudence, which is not hindered by positive norms.” – Motive, Vol. I, 1888, p. 14.

<sup>31</sup> In connection with the activities of private-law legal persons through their bodies and the responsibility for the actions of those bodies and the principle of all-round responsibility, the following opinion has been expressed: “In connection with the provisions of the General Part of the Civil Code Act /.../, passed by the *Riigikogu* on 28 June 1994, regulating the activities of legal persons (Chapter 3) and with the development of the new draft GPCCA, a range of questions have emerged with regard to the legal status of the body expressing the will of the legal person and the members of such body and the relationships of that body and those persons to the legal person itself.” – K. Saare. Eraõigusliku juriidilise isiku tegutsemine oma organite kaudu ning vastutus nende tegude eest. Läbiva vastutuse printsiip (Activities of Private-Law Legal Persons through Their Bodies and Responsibility for Actions of Those Bodies. The Principle of All-Round Responsibility). – *Juridica*, 2000, No. 4, p. 203 (in Estonian). Moreover, an opinion has been expressed in specialist literature about the patent deficiency of the general rules in the GPCCA: “Why is it so that now, the general rules of active legal capacity and decisive capacity provided in the GPCCA with regard to the testamentary capacity are not enough for us?” – U. Liin. Testeerimisvõime vanuselise alampiirist Eesti pärimisseaduses (About the Minimum Age for Testamentary Capacity in the Estonian Law of Succession Act). – *Juridica*, 2000, No. 4, p. 343 (in Estonian). And the author answers that the drafters of the Estonian Law of Succession Act are of the position that wills may also be made by minors of 7–18 years of age. See E. Silvet, I. Mahhov. Kuidas pärida ja pärandada (How to Inherit and Bequeathe). – Tallinn, 1997, p. 36 (in Estonian).

“Classical dogmatic jurisprudence /.../ has offered very different theories for bridging gaps in laws (for interpreting laws) /.../”.<sup>32</sup> It is true that there are different legally correct options to bridge the gaps and that these options enable to reach lawful decisions. However, it is apparently not so correct to identify these options with the methods and techniques of interpretation of law in that context. The very problem is that traditional subsumption requires the existence of a legal norm, *i.e.* objective law, while a gap means the absence thereof. Therefore, we can regard analogy as a rational means for bridging a gap only after no desired results have been achieved from interpretation.<sup>33</sup> Thus, GPCCA sections 3 and 4 are not directly related to the subject but the reader may nevertheless be interested in what kind of developments can be expected in this legal order in the light of the new draft GPCCA.

The new draft GPCCA has developed as follows. The drafters have considered it unnecessary to regulate the relationship between general and specific provisions, apparently assuming that users of law, those complying with law and, in particular, implementers of law are acquainted to the so-called laws of jurisprudence. While such expectation is in all respects natural in the case of an implementer of law, it is maybe too much to expect the same from immediate realisers of law, all the more so because we are talking about private law, which applies the principle of non-mandatory capacity, which has been fixed in the general provisions of the draft GPCCA as a completely new section 2.

Section 4 of the draft is entitled “Analogy of law” and reads: “In the absence of a provision regulating a legal relationship, a provision which regulates relationships similar to the legal relationship shall be applied if leaving the legal relationship unregulated is not in accordance with the purpose of the Act. In the absence of such provision, the general purpose of the Act or law shall serve as the basis.” It is *prima facie* obvious that the drafters do not differentiate between analogy of Acts and analogy of law. On the basis of the presumption that principally, the solutions reached must always be in accordance with the law, it may not be too important to differentiate between those two categories of analogy. And what is maybe even more important, such solution directs our attention to the substantiality of observing the purpose of an Act and the principles of law in situations of legal significance and in taking decisions of legal significance. However, it is difficult to understand how it is possible to talk about relying on the purpose of law if a provision does not exist. Nonetheless, the second sentence of section 4 of the draft reads: “In the absence of such **provision** (my emphasis — R.N.), the general purpose of the Act or law shall serve as the basis.” Even upon the assumption that it is possible to rely on the purpose of the Act even in such situations, the formulation of the draft fails to deal with the question of priorities among analogies. In other words, we should ask whether, in the absence of a provision in an Act, there is indeed no difference as to what should be the initial basis: the purpose of the Act or the purpose of law. This question is not merely of theoretical importance. The essence of the problem lies in the fact that quite often, the choice of interpretation will have substantial consequences for the entire society.<sup>34</sup> By determining a lawful solution by means of certain interpretation techniques, an interpreter of law proclaims it as a motivated decision for the whole society. Or, in other words, in resolving a specific case, the interpreter declares what is right in the light of that case.

The skill of legal decision-making based on the principles of law must be considered to be of utmost importance. In terms of law, if a rule is applicable and intended for realisation (including implementation), it is also binding. Any way of action must be in compliance with the rule. The rules so understood are definitive determinations in legal terms and, naturally, within the limits of what is actually possible. In jurisprudence, this is designated as subsumption. Principles, however, are not definitive requirements but, rather, requirements to optimise — particular generalisations of rules (norms), the realisation of which means that the actual and legal options are realised to the largest possible extent. It must be added that a serious discussion about the structure and meaning of legal principles began a little more than twenty years ago. Maybe this is a source for answers to the questions of why Estonia has gone through this particular kind of development.

In conclusion I would like to note that although European legal integration in civil law is aimed at the so-called single civil law, the harmonisation of laws does not mean a convergence of legal systems. “Even if Estonia transposed the major institutions and regulations of the legal system of Germany or some other country, it should not be expected that the adopted laws are interpreted in the same manner as in the country of their origin or that the regulations would efficiently function

<sup>32</sup> E. Kergandberg. Kohtunikuõigus Saksamaal (Judge-Law in Germany). – *Juridica*, 1993, nr. 3, lk. 58 (in Estonian).

<sup>33</sup> R. Narits (Note 10), p. 229.

<sup>34</sup> A. Aarnio. On Legal Reasoning. Turku, 1977, p. 19.

outside the judicial practice.”<sup>35</sup> At the same time, “the major laws of jurisprudence” — the rules for interpretation — could well be positivised in the legal order itself in order to direct the attention of all realisers of law, up to the implementers, to the fact that adoption of a lawful decision requires, on the one hand, knowledge and, on the other hand, recognition of certain rules for understanding the law. In observation of the development of legal regulations in Estonia in the context of those provisions of the GPCCA which help to render some basic rules of understanding the law more meaningful, it must, however, be admitted that in Estonia, the legislator has tended to minimise the rules of law-interpretation fixed in the very text of law. Yes, it is true that the aspect of knowledge (cognition) prevails in interpretation of law. “Knowledge is something valuable, desired, in one way or another, by most people. However, motives and objectives with regard to gaining knowledge, as well as requirements regarding the amount and content of knowledge and the quality of its justification, can differ considerably.”<sup>36</sup> Thus, systematic knowledge of law-interpretation may be gained by scientific knowledge, which can be based on the science — jurisprudence. However, by positivising rules of interpretation, the legislator may provide such rules with the authority and force of law.

Jurists involved in the codification and improvement of national legislation should naturally be acquainted to the respective objective law of other countries and even follow the developments of civil law on the international level.<sup>37</sup> In my opinion, the described wishes have fulfilled (the draft Law of Obligations Act); in some cases, this process has, however, been more moderate, *e.g.* as regards the provisions of the draft GPCCA concerning interpretation.

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<sup>35</sup> I. Kull (Note 14), p. 182.

<sup>36</sup> M. Rosentau. Tõendamine teadmise standardmudelil (Proof in a Standard Model of Knowledge). – *Juridica*, 2001, nr. 3, lk. 199 (in Estonian).

<sup>37</sup> Some years ago, a justified opinion was expressed in Estonian legal literature that in the development of Estonian civil-law legislation, more attention should be paid in the legislative process to the positions of comparative law; it was also admitted that significant progress in harmonising and unifying European civil-law legislation is yet to come. See M. Kingissepp. Mõningaid mõtteid Eesti tsiviilseadusandluse arenguperspektiividest Hollandi näitel (Some Thoughts on the Development Prospectives of Estonian Civil-Law Legislation in the Light of the Example of the Netherlands). – *Juridica*, 1996, No. 5, p. 219 (in Estonian).