



## Dear reader,

This fourth edition of *Juridica International* is by far the finest and most comprehensive of the series while also featuring articles with more depth and analysing power, at least I hope so. One should not undertake the publishing of an academic journal unless quality is the aim. The only thing to complain about, perhaps, is that *Juridica International* continues to be in Estonia the only outlet to summarise the current status of Estonian law.

The first special English-language issue of the journal *Juridica International* by the Faculty of Law of the University of Tartu (est. 1632) was published towards the end of 1996. That compilation of articles was primarily oriented to foreign readers and mainly reflected the ongoing and completed changes (legal reform) in the Estonian legal system of the time. The second issue concentrated on a scientific analysis of specific legal problems, a part of which reflected the current situation of European integration. The special issue of 1998 focused on Estonian applicable law and problems thereto through the Estonian Constitution in the context of European integration.

The subject matter of this edition – protection of personal rights and freedoms – is a key issue treated in a majority of its 23 articles. The editorial board of the journal feels that these issues should be of interest to other Central and East European countries and also to the developed Western democracies. We share many of the problems and therefore contribution to legal thought is always appreciated. Besides articles that analyse a certain topic in depth, one can find overviews of several areas in this *Juridica International* never before dealt with previously through the history of the journal (e.g. Problems of International Judicial Assistance from an Estonian Perspective; On the Development of Bankruptcy Law in Estonia; Church Autonomy and Religious Liberty in Estonia). Besides, treatments of subjects which continue to be topical in Estonia are offered (e.g. on the possibility of being a jurist in society), as well as major events – activities of the Estonian Law Philosophy Society. We should mention here that on 29 June 1999, the New-York World Congress on Philosophy of Law and Social Philosophy (IVR) accepted the Law Philosophy Society of Estonia a member of IVR as the 45th country section. As far as we know, Estonia is the only Baltic country which is represented with its own section in IVR. No doubt, this is recognition of the development of domestic law in the post-reindependence period in which this journal has also had its role.

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**Peep Pruks**



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# Comprehension of the Constitution

(from the Communitarian Point of View)

Legal theory has always been aimed at attaining adequate cognition of law. Figuratively speaking, this means the creation of the organic integer image of law. Thus, bearing in mind the legal order, the theory of law should also conduce to cognise the constitution as a certain independent whole. Furthermore, "comprehension of the national legal order must always be based on the idea of oneness or coherence of the legal order as a whole and its supreme law — the constitution".<sup>1</sup> Bearing in mind the achievements of cognition in legal theory, it can be said that it has provided the applier of law with a wide-range complex of cognitive means. However, with regard to the use of cognitive means elaborated by the theory of law, two basic principles should be pointed out: firstly, the principle of ensuring consistency and, secondly, the contextual principle. The constitution must be interpreted in such a way (using cognitive means at that) that no conflicts with other constitutional provisions would occur (consistency) and that one could have a clear idea of a constitutional provision as to its place in the text of the constitution (contextuality).<sup>2</sup>

The understanding of the constitution is connected with another very important problem concerning court decisions made on the basis of constitutional law or in other words, interpretation of the constitution by constitutional courts<sup>3</sup> and acceptance of these decisions. And although not much is written on the problem of accepting the decisions of constitutional court review in legal literature, the problem as such exists. "Here we also have to deal with the question," writes J. Limbach, the Chief Justice of the Federal Constitutional Court of Germany, "how to improve the real power of integration and validity of law."<sup>4</sup> In every respect it is natural to acknowledge that namely

the decisions of constitutional courts as compared to those of other court instances must be the highest in the hierarchy of value decisions. But the question is not only in the hierarchy of decisions. Instead it is *vice versa*, as first and foremost the decisions of constitutional courts must be supposedly acceptable. It is naturally debatable whether and to what extent the law (i.e. the constitution) and judicial decisions altogether need public or informal recognition (acceptance).<sup>5</sup> But still objectified forms of comprehension of the constitution, especially the decisions of constitutional courts, as to their acceptance are of importance to the society organised as a state. The best decision from the lawyers' point of view and for lawyers need not be the best for other members (for many or even the majority) of the society. The opening report of the 61st German-wide Lawyers' Day was dedicated to the activities of the German Constitutional Court (*Bundesverfassungsgericht*, hereafter BVerG). The report, *inter alia*, dealt with a 1995 decision of the BVerG by which it was forbidden to hang up crucifixes in the classrooms of German schools. The reason for this prohibition lies in the fact that children of parents with different creed attend school and this, if we bear in mind the freedom of religion, may be distressing for them. And at the same time, senior students may already have a certain theological conception of the world of their own. There are no signs of cooling down of the discussion over the afore-mentioned decision by the German public and this reveals that many as to their level of legal conscience and of conscience as a whole do not approve the decision. It is admitted that although the BVerG has followed the letter of the law it has not been able to understand the actual purport of the law. The Constitutional

Court got into conflict with the legal conscience of the silent majority, thus, with these circles of population whose obedience to the law and loyalty to the state and constitution were generally self-evident.<sup>6</sup> And although the only determiner of the quality of constitutional review decisions is not and cannot be general acceptability thereof, the fact as such cannot be just ignored. This article does not mainly analyse the interpreter and interpretation of the constitution in connection with the entire open society. It is quite clear that the cognition of the constitution in an open society is an open process in which alternative possibilities become manifest. Specialist literature refers to citizens, social groups, state bodies and the public as interpreters of the constitution in an open society.<sup>7</sup> Anyway, this should be clear: the text of the constitution in itself is not sufficient for its cognition and the circle of interpreters of the constitution in an open society is broad.<sup>8</sup> One more aspect should be stressed. Namely, comprehension of the constitution and actual operation of constitutional courts are directly connected with the problems of the protection of a person. This connection is most directly revealed between the cognition and authentic interpretation of Chapter II of the Constitution of the Republic of Estonia.<sup>9</sup> Chapter II of the valid Constitution of the Republic of Estonia differentiates fundamental rights, freedoms and duties. But many other constitutional provisions that are not incorporated in Chapter II also contain fundamental rights and freedoms (§ 57, § 60(1) and others). In connection with that we can say that the whole Constitution deals with the problem of the protection of a person. Without referring hereby to the communitarian approach, it is absolutely clear that contemporary societies are organised as states and beyond that organisation — the state — it is difficult, if even impossible, to imagine a person.

Let us now turn to a possible<sup>10</sup>, achievement of cognition of the constitution — to communitarianism. Since the 1980s, foremost in the United States,<sup>11</sup> and more recently also in continental European legal culture,<sup>12</sup> communitarianism has become a rather frequently discussed theory of society and state<sup>13</sup> among jurists. (Communitarianism is a social theory that revived some decades ago in the United States to counterbalance prevailing individualism. Communitarianism reproaches individualism that the latter treats a person and personality one-sidedly and reduces everything to the level of a person and personality. It should be added that although communitarianism is connected with ethics, it expresses the counter direction to the Rawlsian moral theory.) As we have to deal with a comparatively novel sphere of interest in jurisprudence we do not find much on the treatment of communitarianism as a constitutional theory of the constitution in specialist literature. At the same time it is clear that just in recent decades an important convergence of continental-European legal thinking and that of common law has taken place. It seems

that cognition of such "integrated" legal thinking is in itself of great help for the interpretation of the constitution, especially in the relatively young national legal order of Estonia. Whereat it has to be considered that denotation "young" does not mean "embryonic". It rather refers to a short period during which we have been able and managed to, firstly, shape and, secondly, cognise (interpret) the legal order.<sup>14</sup> Estonia remembers well the discussion on "the letter of law" and "the spirit of law" arisen in 1997. The essence of the discussion was, and still is, that the values on which the law relies must be seen behind or above the text of the law. With regard to the constitution when in many cases, we have to deal with so-called norms-principles the cognition thereof without the use of cognitive methods elaborated by the theory of law is absolutely impossible. Namely communitarianism can be one of the possible approaches here.

In addition to the relative novelty of communitarianism, its emphasis on homogeneity, on certain equability including minor groups of the society as well as the state itself is imposing. Nowadays, rather, the opposite trends the accents of which cause ever-growing individualisation of persons, including their alienation from society, expose problems.

What is characteristic of communitarianism as a systematic understanding (cognition) of society? First of all it has to be stressed that communitarianism must not be reduced to a single (homogeneous) understanding because the pertinent theory is miscellaneous (polymorphous) or integrant.

Firstly, one should find an answer to the question what it is that unites people and their associations. Why are people together? Different answers are possible depending on what we understand under coinciding interests (identities). For example, we can speak of Christian value ethos, European identity or even world solidarity. By this analysis we emphasise the idea of unity.<sup>15</sup> The opposite of unity is difference. For example, with regard to human rights, the questions of race, religion and nationality are irrelevant. But if we consider, for example, citizenship as a criterion of unity then one should see the difference between the people of the state and so-called non-people. Certain differentiations can be actually drawn with regard to every criterion of unity. But in the case of communitarianism it is important to contribute to certain unity in the society: belonging to the society, possibility to be socialised, the society as a certain unitary membership, etc. Clearly distinctive is a communitarian position that the freedom of unitary forms of existence rather than the freedom from society is in the foreground.<sup>16</sup> Communitarianism pays attention to the fact that the development of personality needs not only freedom for something (so-called negative freedom), the freedom must also "have a certain content"<sup>17</sup> By way of and with the help of communitarianism it is pos-

sible to explain the forms of human coexistence as well as structures of social coexistence. Communitarianism acts as a mediator between an isolated individual and centralised state power.<sup>18</sup> The quality of organisation of the society in the form of the state must be such that it would enable to realise one of the person's basic needs — a need to socialisation. As it has been expressed in specialist literature, the state may even use coercion in order to guarantee this need.<sup>19</sup> This means the possibility to use coercion. As a rule, the pertinent processes still take place with the help of permits, co-ordination, etc. But naturally the legal order must comprise the pertinent norms. For example, in Germany, thanks to the operation of the constitutional court a communitarian understanding of a person in the society has been formulated in the following way: "An understanding of a person contained in the Constitution is not that of an isolated sovereign individual, on the contrary, the constitution has eliminated the tension between an individual and society by the involvement of a person in the society and by his or her connection with the society without testing these values."<sup>20</sup>

## Forms of Communitarianism

The following three forms of communitarianism can be distinguished:

- substantial or conservative communitarianism;
- liberal communitarianism; and
- egalitarian or universalistic communitarianism.<sup>21</sup>

It should be mentioned at once that all these forms of communitarianism are democratic by their nature and directed against any political totalitarian state. For an individual the aforementioned forms of communitarianism offer both freedom to make decisions of his or her own and, what is even more important in the pertinent context, the possibility for the protection of fundamental rights and freedoms. It has been pointed out in literature that in this case we do not have to deal with a mere doctrine of liberalism as the stress is not on the "freedom from something" but on "freedom of something"<sup>22</sup>.

Prior to the analysis of relations between the forms of communitarianism and the constitution, the main forms of communitarianism as to their nature should be characterised.

According to **conservative communitarianism** an individual is tightly connected with the society (a conservative connection). All individuals have been and are connected with the society by a certain period of time that contains the previous course of development of society. For reasonable existence an individual simply needs the forms of human life descended to him or her. Only in such a way the development of the society and that of an individual is possible. "To a great degree the person's freedom consists of the freedom of something, i.e. freedom of life fulfilled with the descended forms of life".<sup>23</sup> This situation does not preclude in any way the freedom of choice including even

so-called decisions made against culture. Nevertheless, conservative communitarianism does not overestimate individual self-determination. Namely, not everything that the forms of human life have descended is worth of choice. But one has to be attentive to everything that has lasted for a long time.<sup>24</sup> Therefore this form of communitarianism prefers traditions, conventionality and morals. In the case of a society organised in the form of the state one should begin with the fact that the state and law can function only as long as there is such harmony of conditions that guarantees the loyalty of citizens to the state (an essential aspect) and at the same time allows both distance and difference in comparison with other states (an external aspect).<sup>25</sup> If there are really homogeneous conditions in the society that conservative communitarianism in every respect values then there exists homogeneity or at least contractual relationship between classes, religions, languages, races and forms of human life. Nevertheless, the real world is different. For example, the existence of various cultures continuously causes cultural conflicts.<sup>26</sup> It should be added that conservative communitarianism does not know exactly what to do in such situations. Distinctions could be made on the "friend-enemy" principle. It seems that thinking in the "friend-enemy" dimension has its place also in Estonia. Reasons for that can be found in the 50-year period under Soviet power. But conservative communitarianism does not draw radical conclusions even in such a situation. For the achievement of homogeneity the idea of integration rather than that of assimilation must be used and developed. At the same time it is an objective fact that various cultures are represented in Estonia. On the basis of the principles of conservative communitarianism we have to head at least for contractual forms of life. The state and its "tool" — law — must be able to be abstracted from such criteria as race, religion and others and offer various associations a full-value place in the society. The state as a frame society cannot propagate only one lifestyle. But a drawback of the conservative societal model is that the state organises these homogeneous associations and groups necessary for the society on the bases of a so-called close horizon.

The essence of **universalistic communitarianism** is that people are autonomous individuals who make decisions of their own. The right as well as the duty to make decisions is simultaneously vested in them. This conception has its logic because, be that as it may, with the descended forms of human life, finally an individual is the one who must improve and develop his or her mind diverging in this or that way from the "descended" society.<sup>27</sup>

Thus, a full-value life is achieved by making free choices that cover all forms of associations. Thereby the internal relations of associations are also taken into consideration. While conservative communitarianism values first of all morals then universalistic communitarianism is critical of the morals "descended" to us. Conventional

morality claims to universality but at the same time the prerequisite of loyalty is the person's freedom to purpose.<sup>28</sup> This means foremost that life, needs and interests of every separate person are equally valuable. Therefore, the aforementioned "close horizon" of ethics (care for close persons, care for similar persons) as well as the "distant horizon" of ethics (care for everyone) and the forms of mediation thereof (for example, European solidarity) would rather be surmised. The aforesaid horizons may be reformed into ethnocentrism, intolerance of not "our folks". "Solidarity requires, above of all, ... permanent overcoming of preliminary decisions shaped by only egocentric primitive ethnocentrism."<sup>29</sup> J. Rawls has proposed a solution to face the described conception or rather a deficiency. He interprets law as fairness, wherein fairness is a political and not metaphysical conception. Naturally it is a moral conception but it cannot be derived from a kind of universal morality. The conception eventually and intuitively tries to grasp and interpret what is legitimised by the democratic constitution in state institutions and public traditions.<sup>30</sup> In the United States this caused polemics as moral reflection in this case would mean that we ourselves do not know who we as personalities actually are when we make moral decisions or when we decide on the ways and scope of solidarity. True, the described understanding of a person has its positive side. Namely, there must always be a so-called fair balance in the society. Thus, it is not possible that, for example, the predominance of only a certain majority (those who are in power) is realised. Nevertheless, the theory of a person as the centre of society is not realised easily. It is true that the more abstractly we define the person by his or her morals the more attractive the theory seems. Let us imagine ourselves sitting in a comfortable armchair in front of a colour TV-set watching other people's troubles. In fact, we find ourselves in a virtual world that is quite far away from the one in which we actually bear responsibility. Treatments of law contrasting with internal conventional morals should serve as a mirror image of critical (universal) morality that safeguards equality of any lifestyle in the society where bigger associations as well as minorities have comprehensive equality-rights and protection-rights. "Only with the radical setting free of individual biographies and particularities the universalism guarantees equal attention to everyone and solidarity with everything that is embodied in humanity."<sup>31</sup>

The presented standpoints of universalistic communitarianism speak manifestly in support of a common "world-state". But it seems that actual political organisation developed by nation states does not coincide with the above treatment. In Estonia much is spoken namely about a nation state and the fact that Estonia is indeed a small country (with a population of 1.5 million of whom 1 million are Estonians) apparently amplifies these trends even more. But communitarianism introduced in the United

States and primarily its egalitarian substantiation demand understanding of worldwide social-public responsibility.

If conservative communitarianism contributes to "close horizon" where the organisation of state is based on mutually close associations then it ignores the fact that the state is something bigger than a family or even a clan. The principle suitable for the organisation of state must be far more abstract. And here universalistic communitarianism counterbalances on its part conservative communitarianism but at the same time it overdoes it. Namely, in connection with egalitarian communitarianism there is a tendency to keep away from anything on the basis of which it is possible to distinguish people from groups, groups from cultures and so on. In such a way universalistic communitarianism renders a "distant horizon" far too much significance: rights and duties are distributed in the world as such. The fact that namely the state is an important mediator between "close horizon" and "distant horizon", involving both the human environment and political decision-makers, is overlooked.<sup>32</sup>

**Liberal communitarianism**<sup>33</sup> tries to avoid the metaphysical nature of conservative and egalitarian communitarianism. It is a fact that an individual is socialised. Socialisation in itself is neither a linear nor a one-level process. On the contrary, socialisation has taken place and is taking place through various antagonisms and is multi-level. Figuratively speaking, a person needs various socialisations. Different societal structures involve individuals in different forms of life in social, supranational, public and other spheres. This leads to the empirical truth that liberal communitarianism differently from other norms of communitarianism does not *a priori* recognise the primacy of the "close horizon" and "distant horizon". For liberal communitarianism any form of socialisation has the potential to enable a full-value life. It seems that the abovementioned standpoint reveals more adequately the reality. Social life consists of many common forms involving the elements of "close horizon" (including the initial element thereof — the family) as well as these of "distant horizon". There are very many forms of social life (the results of socialisation) between the two horizons anyone of which has its purport, scope and structure. It is important to notice that the level of personal responsibility is just higher in a closer circle (belonging to the "close horizon"). For example, people are usually ready to give, risk and answer more for their countrymen than for aliens. Liberal communitarianism judges this situation positively: if a person gets to know responsibility first in a closer circle (to which naturally conventional morality is added), then the last stage of responsibility, in the sense of the reflection of morality, means overcoming of conventional morality and so-called subsidence of morality of the mankind. The latter crystallises primarily into human rights. It has been observed in specialist literature that for liberal communitarianism this



last stage is a morally necessary one that, true, entails some "expenses" for law. This concerns aid programmes, realisation of asylum and others. But the abovementioned step for overcoming conventional morals is possible only if the preceding steps have been passed. Everything must start with the "close horizon" and logically achieve the "distant horizon". This evolutionary view is not sufficiently followed by egalitarian communitarianism that, for example, calls for urgent and global aid programmes.<sup>34</sup>

Liberal communitarianism shapes an image of a person that is based on morals and that applies to political and legal spheres as well. Therefore, a (political) decision put into the legal form has often a substantial meaning because it finds its place in the text of the constitution. It seems that communitarianism tries to explain constitutional provisions taking into account the relations thereof and at the same time also justifying them.

#### **On the Communitarian Constitutional Theory in the Light of Liberal Communitarianism**

Contemporary constitutions enable the formation of various associations. The task of politics, thereat, is just to find the corresponding forms of organisation. A form of organisation itself must have its place between the "close horizon" and "distant horizon". Hereby one must see to it that in the course of such concretisation no so-called negative norms would be established in nation states,<sup>35</sup> but naturally the specification is connected with internal collective identity of people and nations. Everything goes normally if the positive experience is taken over from history.<sup>36</sup> Liberal communitarianism alleges that a nation state must be able to open both inwards and outwards. Outward openness is nowadays connected with (bearing in mind continental-Europe) three tendencies: moving to the European Union, enhancement of the role of international law and continuous legitimisation of human rights<sup>37</sup>. Moving to the European Union can be characterised as an entrance into the European Union structures, effective management and formation and the shaping of a European identity. In the case of the latter it is not absolutely clear when and to what extent the European identity overcomes regional and national identities. There is even no clarity in what should be the final goal of converging Europe. At least one important conclusion can be drawn from it: nowadays the democratic nature of national legal orders is transparent, but in the case of the European Union it is often very difficult to decide who is responsible for what. Outward openness has found its way to the supreme law, the constitution of national legal orders through the pertinent regulations (norms-principles). Thus, the Constitution of the Republic of Estonia provides that generally recognised principles and norms of international law are an inseparable part of the Estonian legal system (§ 3(1) of the Constitution). As primarily these norms legitimise everything humane (moral) then they especially go with the

ideas of liberal communitarianism. Along with constitutions, international treaties and agreements play an important role in the process of outward opening of the state. Without any further deeper analysis it can be alleged that a constitutional state must resort to international treaties in so far as they guarantee the protection of human rights. The Republic of Estonia has moved here in parallel with the idea of liberal communitarianism acceding to or concluding corresponding treaties and agreements. It should be added that "generally recognised norms" in the meaning of § 3 of the Estonian Constitution stand for international customary law, the current universal international customary law. Norms of international customary law are the norms that most of the states recognise as obligatory. The notion "generally recognised principles of international law" could be interpreted as general principles stemming from national legal systems and recognised by civilised nations.

But along with European law and international law there is another important way of openness (both inwards and outwards) for the state: this is the situation where most of the fundamental rights cannot be connected only with the people (citizens) of the state. At the same time there is nothing surprising in the fact that, on the one hand, conservative and liberal communitarianism and, on the other hand, universalistic communitarianism value the category "patriotism" differently. We try to illustrate this with the help of citizenship as a legal and constitutional category that as a natural element belongs to a nation state.<sup>38</sup> As is known, under the influence of the French Revolution the "nation" became the source of state sovereignty. Every nation must henceforth have the right to use law as a means of its self-determination. A democratic volitional association replaces an ethnic association. The nation of a state finds its identity not in the ethnic-cultural association but in actual activities of its citizens who actively use their rights in various forms (participation democracy, representative democracy, direct democracy).<sup>39</sup> Anyway, for a long time legal language has interpreted the notion "*kodakondsus*" (added — R. N.), "*Staatsbürgerschaft*", "*citoyenneté*" or "citizenship" only in the meaning of nationality and just more recently the notion has been extended to denote the status of a citizen of the state written by the citizens' rights<sup>40</sup>. Thus, the institution of citizenship regulates the rights and duties of persons as members of the people of the state, wherein the people of the state is also recognised by international law. At the same time two different cognitive levels of citizenship stand in opposition. A liberal tradition of natural law based on Lock's ideas crystallises in individualism while a so-called republican tradition of political law based on Aristotle's ideas crystallises in the communitarian-ethic understanding of the citizen's role. As to the first tradition, citizenship is connected with the membership of an organisation on the basis of which the rights and duties are derived from. With regard to the

republican tradition, we have to deal with such a model of belonging where an ethical-cultural association determines itself. Thus, in one case persons are, figuratively speaking, externals to the state and make their contribution by participating in the elections, paying taxes, etc. But in the other case citizens are connected with a political association as individuals in general, or to be more precise, citizens are integrated into a political association and they can achieve their personal as well as social identities together by forming, for example, political institutions. Pursuant to the liberal position a citizen does not essentially differ from a private person. With regard to the republican position citizenship gains its proper meaning only in the course of collective self-determination practice. Ch. Taylor describes the two aforementioned citizenship conceptions in the following way: "One (model) focuses mainly on individual rights and equal treatment, as well as on a government performance which takes account of citizen's preferences. This is what has to be secured. Citizen capacity consists mainly in the power to retrieve these rights and ensure equal treatment, as well as to influence the effective decision-makers... These institutions have an entirely instrumental significance... No value is put on participation in rule for its own sake... The other model, by contrast, defines participation in self-rule as of the essence of freedom, as part of what must be secured. This is ... an essential component of citizen capacity... Full participation in self-rule is seen as being able, at least part of the time, to have some part in the forming of a ruling consensus, with which one can identify along with others. To rule and be ruled in turn means that at least some of the time the governors can be "us" and not always "them"."<sup>41</sup>

In specialist literature it has been observed that the following standpoint clearly stems from the distinction of the two conceptions: "political autonomy is an object in itself because no one alone ... but only together can realise (accomplish) the inter-subjectively divided practice. Citizens' legal status constitutes itself through the recognition of egalitarian relations".<sup>42</sup> Consequently, it stems from the republican model of citizenship that the value of freedom of constitutionally secured institutions is only as high as the population's customary political freedoms to use them. The role of a citizen institutionalised by law must always exist in the context of free political culture. Namely, because of that, communitarians worry that the citizens would identify the "patriotic" with their form of life. Constitutional principles are adopted and rooted in the public practice only in the context of history, history of nationalities, and history of citizens. The reality of multicultural societies clearly reveals that political culture, which should contain the "roots" of constitutionality, must protect not merely the ethnic, linguistic and cultural descent of citizens. Liberal political culture forms constitutional patriotism as a common denominator for different

coexisting forms of life and multicultural societies. Consequently, democratic citizenship must not be rigidly stuck to national identity of only one nationality but it surely insists on socialisation of all citizens into common political culture.

The author of this article is of the opinion that, in converging Europe, various national influences must be considered while developing European statehood. And in perspective, "our own" cultural tradition must still be reflected in European constitutional culture. At the same time we can allege that democratic citizenship must not be legitimised on the basis of national identity of only one nationality ignoring the plurality of different forms of life — states are, in one way or another, multiethnic. Nevertheless, European citizenship requires that any citizen could participate in the socialisation process of common political culture.

It seems that the biggest advantage of communitarianism lies in the fact that it treats the development of political will as an ethical discourse in the course of which the best solution for citizens and their forms of life (considering traditions) will be found. Assimilation of political will with the ethical-political one is directly connected with legislation process. The issues dealt with in this article must be among the teleological goals of legal drafting. In other words, it is important to cognise what society organised into a state we like to live in, what traditions we want to go on with, and what our attitude towards minorities, refugees, marginal social associations and others is. All that is part of public policy, including legal policy. And as we have acknowledged, these issues are subjected to moral problems being at the same time closely connected with pragmatic issues and bearing in mind hereby that for communitarianism the discourse that is aimed at achieving collective self-realisation goals is the valid (rational) one. Quite naturally further analysis of the theme is connected with questions of justice in law but this is another subject because justice and ethics do not stem from one and the same source and, thus, the problems of justice are not directly derived from a certain association or its form of life.

Finally, the fact that both law and legal theories develop and change or to be more precise, that they both are connected with social changes must not be overlooked. Consequently not only legal systems but also the reflection thereof, the meta-level of law is in permanent evolution.<sup>43</sup>

The aim of this article was not to criticise communitarianism but it seems that the social reality of the end of the 20th-century-Europe forces to do so in many aspects.

We have referred in our treatment to the fact that, for example, German legal practice while interpreting the constitution from communitarian positions has not always been able to guarantee the acceptance of pertinent legal decisions by people belonging to different forms of life.

## Notes:

<sup>1</sup> R. Narits, K. Merusk. *Constitutional Law. Estonia*, The Hague, London, Boston: Kluwer, 1998, p. 186.

<sup>2</sup> Thus, it can be contextually alleged that the active right to vote (§ 57(1) of the present Constitution) is not, pursuant to the Constitution of the Republic of Estonia, a fundamental right because the corresponding provision is placed in Chapter III of the Constitution (entitled "The People") instead of Chapter II (entitled "Fundamental Rights, Freedoms and Duties"). But bearing in mind the consistency of the treatment of fundamental rights, this must be objected to. Namely, it is absolutely not possible to realise the idea of a democratic republic without providing for the right to vote.

<sup>3</sup> Pursuant to § 149(3) of the Constitution of the Republic of Estonia, the Supreme Court is also the court of constitutional review. In accordance with section 9 of the Constitutional Review Court Procedure Act, the Constitutional Review Chamber or General Assembly of the Supreme Court operates as the Court of Constitutional Review. — For more details, q.v.: P. Roosma, "Constitutional Review under 1992 Constitution" (1998) III *Juridica International. Law Review University of Tartu* 35-43.

<sup>4</sup> J. Limbach. *Die Akzeptanz verfassungsrechtlicher Entscheidungen*. — In: *Soziologie des Rechts: Festschrift für Erhard Blankenburg zum 60. Geburtstag*. Baden-Baden: Nomos Verlag-Ges., 1998, pp. 209.

<sup>5</sup> For example, it has been opined in specialist literature that the recognition of a norm by the public or by the addressee of the norm does not form the foundation of validity of law in the modern legal system. It will be sufficient to act in a norm-conformable manner irrespective of the motives. W. Krawietz, *Anerkennung als Geltungsgrund des Rechts in den moderner Rechtssystemen*. Gerd Haney u.a. (Hrsg.), *Recht und Ideologie. Festschrift für Hermann Klenner*, Freiburg, Berlin, 1996, pp. 104, 139. W. Krawietz draws attention to the fact that "acceptance" of the word and concept is, thus, differently from their serious and elder sister — **recognition** —, first of all a legal-political conception that serves primarily, as proved by its use in diverse political, economic and social contexts, a critical explanation with regard to the law in force." — Krawietz, W. *Akzeptanz von Recht und Richterspruch? Geltungsgrundlagen normativen Kommunikation im Bereich des Rechts*. — In: *Rechtssprechungslehre*. W. Hoppe u.a. (Hrsg.) Carl Heymanns Verlag. Köln u.a., p. 459.

<sup>6</sup> R. Wassermann. *Prüffeld Rechtspolitik// Die Welt*, 18. Sept. 1996. Critics of decisions of the BVerG of the mid 1990s have often referred to the lack of the acceptance of these decisions. Q.v. Limbach, J. Ibid. p. 214.

<sup>7</sup> Q.v. P. Häberle. *Die offene Gesellschaft der Verfassungsinterpreten*. In: *Juristen Zeitung*, 1975, pp. 297, 298, 300, 301.

<sup>8</sup> It should be added that in addition to its national aspect the problem has at least in Europe a considerably broader meaning. On the one hand, it is obvious that constitutions form the legal foundation of states. International treaties and agreements regulate inter-state relations. At least that has been the case for a long time. But if we bear in mind the European Union, such a division seems almost untenable. "Although no one considers it a state, much has been spoken about its constitution. Thereby, at any rate, quite different treatments meet." Q.v.R. Grimm. *Braucht Europa ein Verfassung?* München. Carl Friedrich von Siemens Stiftung, 1995, p. 11.

<sup>9</sup> Eesti Vabariigi Põhiseadus. (Constitution of the Republic of Estonia.) — Riigi Teataja toimetuse väljaanne (Publication of the Editorial Board of the Riigi Teataja). Tallinn, 1994.

<sup>10</sup> For an overview on the interpretation theories of the constitution, q.v. E.-W. Böckenförde. *Die Methoden der Verfassungsinterpretation*. In: *Staat, Verfassung, Demokratie*. 2. Aufl. Fr. a. M., 1992, pp. 53, 58; R. Narits, K. Merusk. *Constitutional Law. Estonia*. Kluwer, The Hague, London, Boston, 1998, pp. 63-65.

<sup>11</sup> Q.v., for example: A. MacIntyre. *After Virtue. A Study in Moral Theory*. 1981; M. Walzer. *Spheres of Justice. A Defence of Pluralism and Equality*. 1983; B. Barber. *Strong Democracy. Participatory Politics for a New Age*. 1984; R. Bellah. et al. *Habits of the Heart. Individualism and Commitment in American Life*, 1985; A. Etzioni. *The Spirit of Community. Rights,*

*Responsibilities and the Communitarian Agenda*, 1993; S. Mulhall. Swift, A. *Liberals and Communitarians*, 1992 and others.

<sup>12</sup> Q.v., for example: *Kommunitarismus: Eine Debatte über die moralischen Grundlagen moderner Gesellschaft*. A. Honneth (Hrsg.) Fr. a. M., Campus Verlag GmbH, 1993; R. Forst. *Kontexte der Gerechtigkeit. Politische Philosophie jenseits von Liberalismus und Kommunitarismus*, 1994 and others.

<sup>13</sup> Since 1990 a special journal dedicated to communitarianism is published — "The Responsive Community. Rights and Responsibilities".

<sup>14</sup> Specialist literature reveals that authors have also been astonished at the fact that theoretical discussions on communitarianism have been "imported" from the United States. Q.v., for example: W. Brugger. *Kommunitarismus als Verfassungstheorie des Grundgesetzes*. — *Archiv des öffentlichen Rechts*. 123. Band, 1998, p. 339.

<sup>15</sup> Q.v. W. Brugger. *Ibid.*, p. 340.

<sup>16</sup> On these headwords of communitarianism, q.v.P. Selznick, P. The Idea of a Communitarian Morality. *California Law Review*, 1997, 75, p. 445 ff. A communitarian morality is not at its core philosophy of liberation. The control value is not freedom or independence but belonging.

<sup>17</sup> *Staatswissenschaft im Grundrisse*. Stuttgart-Bad Cannstatt: Fr. Frommann Verlag, 1984, pp. 50-87.

<sup>18</sup> Also in the modern theory of state in itself elements of communitarianism can be found. Conception of a contemporary state has made its way in the continental-European political thinking already from the beginning of the 17th century. This means that since Althusius we can speak of a pluralist new organisation of political and social process in which everyone shares the responsibility that the society in the form of a state guarantees to people through their "place" and "vote". Quests for alternative political and social organisations are denoted in theory as post-etatistic, post-sovereign or post-modern. — Q.v. S. Hall. *The State in Question*. — In: *Idea of the Modern State*. G. McLennan. (Eds.) Philadelphia: Open University Press, 1984, pp. 1-28; S. K. White. *Political Theory and Postmodernism*. Cambridge: Cambridge University Press, 1994; Th. O. Hüglin. *Das Westfälische System aus der Föderalismus – Perspektive des Althusius: Frühmoderne Konzepte für die spätmoderne soziale Welt*. — In: *Rechtstheorie*. 29. Band, Heft 2, Berlin: Duncker&Humblot, 1999, pp. 153-175.

<sup>19</sup> W. Kymlicka. *Community*. — In: R. Goodin, P.Pettit (Eds.). *A Companion to Contemporary political Philosophy*, 1993, pp. 366, 373.

<sup>20</sup> W. Brugger. *Ibid.*, p. 343.

<sup>21</sup> For example, R. Forst distinguishes between substantial and democratic-republican communitarianism. Q.v. R. Forst. *Kontexte der Gerechtigkeit. Politische Philosophie jenseits von Liberalismus und Kommunitarismus*, Fr. a. M., Suhrkamp, 1994.

<sup>22</sup> Q.v. W. Brugger. *Ibid.*, p. 344.

<sup>23</sup> W. Brugger. *Ibid.*, p. 345.

<sup>24</sup> F. A. Hayek. *v. Verfassung der Freiheit*. 3. Aufl. 1991, Tübingen: J. C. B. Mohr, p. 65 ff.

<sup>25</sup> On factors themselves in their classical form, q.v.: F. Tönnies. *Gemeinschaft und Gesellschaft. Grundbegriffe der Reinen Soziologie*. Neudruck der 8. Aufl. von 1935, Darmstadt, 1991, § 9.

<sup>26</sup> One of the last and extremely regrettable conflicts took place in Kosovo (a part of Yugoslavia) where public policy was aimed at ethnic purification of Albanians from one of the regions of the country. This entailed a military intervention by NATO in order to protect the established forms of life and individuals' rights irrespective of their nationality and creed.

<sup>27</sup> B. Baumann writes, referring to v. Hayek's social theory, that in an open society conditions of voluntary-contractual and open co-ordination processes of independent individuals hold a special place. Q.v. B. Baumann. *Offene Gesellschaft, Marktprozess und Staatsaufgaben*. Nomos Verlag. Baden-Baden, 1993, p. 71.

<sup>28</sup> R. Dworkin. *Taking Rights Seriously*. 1978, p. 180.



- <sup>29</sup> E. Denninger. Menschenrechte und Grundgesetz. 1994, p. 46.
- <sup>30</sup> J. Rawls. Gerechtigkeit als Fairness: politisch und nicht metaphysisch. — In: A. Honneth (Hrsg.) Kommunitarismus: Grundlagen moderner Gesellschaften: Campus Verlag, GmbH, Fr. a. M., 1994, pp. 36-68.
- <sup>31</sup> J. Habermas. Vom pragmatischen, ethischen und moralischen Gebrauch der Vernunft. - In: Erläuterungen zur Diskursethik. 1991, p. 100.
- <sup>32</sup> W. Brugger. Ibid., p. 353.
- <sup>33</sup> P. Selznick used the corresponding denotation for the first time. Q.v. P. Selznick. Kommunitaristischer Liberalismus — Der Staat. 1995, 34, p. 487 ff.
- <sup>34</sup> W. Kersting. Gerechtigkeit und demokratische Tugend. 1997, Kap. 11-13.
- <sup>35</sup> With regard to Nazi Germany q.v.: W. Brugger. Ibid., p. 358.
- <sup>36</sup> Q.v. also M. Walzer. Lokale Kritik, globale Standards. Zwei Formen moralischer Auseinandersetzung. 1996, p. 109.
- <sup>37</sup> A. Bleckmann. Europarecht. 6. Aufl., 1997.
- <sup>38</sup> For example, in Germany one can notice the thinking characteristic to communitarianism in connection with substantiation of fundamental rights. Q.v. P. Häberle. Verfassung als öffentlicher Prozess. Fr. a. M., 1978; A. Blankenagel. Tradition und Verfassung. Baden-Baden, 1987.
- <sup>39</sup> But theoretically the conception of citizenship is considerably older and connected with Rousseau's notion of self-determination whereat the sovereignty of people was understood as the restriction of prince's sovereignty.
- <sup>40</sup> J. Habermas. Faktizität und Geltung. Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats. 3. Aufl., Fr. a. M.: Suhrkamp, 1993, p. 638.
- <sup>41</sup> Ch. Taylor. The Liberal-Communitarian Debate. — In: N. Rosenblum. (Ed.), Liberalism and the Moral Life, Cambridge, Mass. 1989, 178 ff.
- <sup>42</sup> J. Habermas. Ibid., p. 641.
- <sup>43</sup> W. Krawietz. Theoriesubstitution in der Jurisprudence. — In: Das Naturrechtsdenken heute und morgen. D. Mayer-Maly u.a. (Hrsg.) Berlin: Duncker&Humblot. 1983, p. 359.



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# Holders and Addressees of Basic Rights in the Constitution of the Republic of Estonia\*

## I. INTRODUCTION

The aim of the following article is to analyse two chosen topics of the general dogmatics of the basic rights<sup>1</sup> of the *Põhiseadus* (hereinafter referred to as the Constitution): the holders and the addressees of the basic rights. Those two different topics could be treated in two different articles. The reason to treat them in a single one is to identify both sides of the legal relations created by a basic right as a subjective right.<sup>2</sup>

It is recommendable to distinguish between three dimensions of legal problems: empirical, analytical, and normative.<sup>3</sup> The empirical dimension concerns the recognition of the positive valid law. The positive valid law used here consists mainly of basic rights of the Estonian Constitution. The analytical dimension comprises a conceptual and systematic investigation of the valid law. The normative dimension includes criticism of the valid law, especially of court decisions, and proposals for better solutions *de lege ferenda*. The main emphasis of this paper shall lie on the analytical dimension. Particular interest shall hereby belong to two kinds of arguments. Since German basic rights discussion will be used, the comparative arguments play a significant role. Besides, systematic arguments will be used frequently, since one of the starting points of the present paper is the requirement that a legal system should be consistent, i.e. contain no contradictions, and be coherent, i.e. be connected. This requirement

derives from the principle of *Rechtsstaat*<sup>4</sup> which is as a constitutional principle anchored in § 10 of the Constitution.

## II. HOLDERS OF BASIC RIGHTS

### A. CONCEPT OF THE HOLDER OF A RIGHT

A holder of a right is the beneficiary of the right, the entitled subject.

### B. HOLDERS OF BASIC RIGHTS

The holders of the basic rights are the entitled subjects of the basic rights. Somebody can only be entitled to a right if he has the corresponding capacity to carry that right. A holder of a basic right is consequently somebody who has the corresponding passive legal capacity.

In the law the passive legal capacity is attached to persons. Every human being is a person in the sense of the law, a natural person. In addition according to the law there are legal persons, e.g. a public limited company. These are artificial persons created by the law itself. In following it shall be clarified as to what kinds of persons are holders of basic rights under the Constitution of the Republic of Estonia.

### 1. Natural Persons

According to § 9 first paragraph of the Constitution the rights, freedoms and duties of each and every person,

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as set out in the Constitution, shall be equal for Estonian citizens and for citizens of foreign states and stateless persons. This provision makes two important statements.

First of all it states that the holders of basic rights of each and everybody are natural persons. Only natural persons can be citizens or stateless persons. Every natural person is either a citizen of some state or a stateless person, every citizen is either an Estonian citizen or a citizen of a foreign state. Therefore, the mentioned rights are provided for every natural person or respectively every natural person shall have these rights.

Secondly, the provision states that following the concept of the holdership of basic rights there are two kinds of rights: there are rights of each and every person and there are rights that do not apply to each and every person.

#### A. CATEGORIES OF HOLDERSHIP

Basic rights can be divided on the basis of the holdership of the right into rights of each and every person on the one hand and citizen's rights on the other hand. Whether there are other kinds of rights, shall be clarified as well.

##### (1) Rights of Each and Every Person

The rights of each and every person are rights borne by every person. The rights of each and every person can also be called human rights because every human being is a holder of these rights. However, they should be called rights of each and every person to avoid a possible confusion between the constitutional rights and rights included in the European Convention on Human Rights.<sup>5</sup>

##### (a) "Everyone" or "No One"

The rights of each and every person derive primarily from the following paragraphs of the second chapter of the Constitution: §§ 12, 13 second sentence of the first paragraph, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 28 first paragraph, 29 second paragraph, 32, 35, 37, 40, 41, 43, 44 first paragraph, 45, 46, 47, 48 first sentence of the first paragraph, 49, 51 of the Constitution. In these provisions "everyone" or "no one" is mentioned *expressis verbis*. In §§ 27, 28 paragraph 4, 29 paragraph 5, 33, 38, 39, 113 of the Constitution "everyone" is not directly referred to but since the number of justified subjects is not restricted, it must be perceived that also these provisions are the basis for rights of each and every person which are equally borne by Estonian citizens, foreigners and persons without citizenship.

Rights described in § 28 first sentence of the second paragraph together with the third sentence of the second paragraph of the Constitution, § 29 first sentence of the first paragraph together with the third sentence of the first paragraph of the Constitution, § 31 first sentence together with third sentence of the Constitution, § 44 second and third paragraphs together with the fourth paragraph of the Constitution are also provisions containing rights of each and every person. Sections 28 third sentence of the second paragraph, third sentence of the first paragraph, 31 third sentence, 44 fourth paragraph of the Constitution mean that

the legislator may restrict the corresponding rights of non-citizens only on the basis of non-possession of Estonian citizenship. But in order to restrict something, the corresponding rights of non-citizens shall result from these provisions of the Constitution. These provisions are therefore *lex specialis* with respect to the principle of equality which is anchored in § 12 first sentence of the first paragraph of the Constitution.

The Constitutional Review Chamber of the Estonian Supreme Court has defined everyone in a passage as "all natural persons (individuals) who are subject to the jurisdiction of a legal act".<sup>6</sup> In so far as all natural persons and individuals respectively are meant, I fully agree with the Court. The question is what does it mean if these individuals are required to be subject to the jurisdiction of a legal act? Does a legal act have a jurisdiction? And what legal act is actually meant? If the term "legal act" means an act of parliament that encroaches upon the rights of individuals, then the question is concerned, whether the parliament is an addressee of that right. In any case it is superfluous to enlarge the definition of everyone with the feature "subject to the jurisdiction of a legal act".

##### (b) Rights to Estonian Citizenship, § 8 first and second Paragraphs of the Constitution

Although in § 8 second paragraph of the Constitution everyone is mentioned, it may seem problematic to classify § 8 first and second paragraphs of the Constitution as rights of each and every person. Since in these provisions Estonian citizenship is mentioned, citizen's rights may be concerned. However it is not so, since the legal consequence of § 8 first and second paragraphs of the Constitution is the gaining of Estonian citizenship. The preconditions of a norm cannot logically stipulate the existence of some precondition that itself derives from the legal consequence of the same norm. This kind of norm would be senseless.

Moreover, § 8 first paragraph of the Constitution brings forward a question concerning the meaning of the term "every child". According to this provision every child shall be the entitled person. At first glance it may seem that this provision contains a particular child-right. Unfortunately it is not determined, how old a person shall be in order to be a child in the sense of § 8 first paragraph of the Constitution. Is a person a child until he goes to school, until he gets a passport, until he is a major, or does he stay a child of someone else forever? Since § 8 first paragraph of the Constitution is a right to Estonian citizenship, there is no rational reason why this right should not be exercised after reaching some certain age. This formulation should rather be understood that even a child has the right to Estonian citizenship. Of course, an adult has the right as well.

Therefore, § 8 first and second paragraphs of the Constitution are to be considered as rights of each and

every person. According to § 8 first paragraph of the Constitution every child of whose parents one is an Estonian citizen has the right to Estonian citizenship by birth.<sup>7</sup> The wording does not determine at what point of time the parent has to be an Estonian citizen. On the one hand one may follow from the formulation "citizenship by birth" that a parent has to have Estonian citizenship at the time of birth. On the other hand it is possible to interpret the provision in this way that one may get the right to Estonian citizenship by birth even years after his own birth if one of the parents gains Estonian citizenship later. The latter interpretation requires a different understanding of the Estonian citizenship by birth and again rises the problem until what age is a person a child.

Since the beginning of being a child is birth then the end is — as already mentioned — uncertain. Interpreting § 8 first paragraph of the Constitution word by word it is possible to grant the right to Estonian citizenship by birth e.g. to a 65-year-old person if his 90-year-old mother is naturalised. However, this interpretation seems to be too wide. While a person of whose parents one is at the time of his birth an Estonian citizen shall have the right to Estonian citizenship by birth, it shall be let open whether an infant will gain the right to Estonian citizenship by birth if one of his parents is naturalised. According to the wording of § 8 first paragraph of the Constitution this interpretation is possible.<sup>8</sup>

The most interesting problem of § 8 first paragraph of the Constitution is the question whether according to the wording one of the parents shall be an Estonian citizen or is it sufficient if one of the parents has the right to Estonian citizenship by birth. The latter interpretation is not covered by the wording of the provision. However, the problem could arise in the case of persons who are born in exile from parents who had or would have had the right to Estonian citizenship by birth but who did not impose this right. The authors of the text of the Constitution intended to include the Estonian emigrants who left the country during the Second World War and their descendants. In the Constitutional Assembly it was clearly stated: "Estonian emigrants who come back of their free will ... shall inevitably have the right to Estonian citizenship."<sup>9</sup> It is not wrong to maintain that there was a general consensus on the Constitutional Assembly concerning this question. Thus, the genesis of the Estonian Constitution supports the interpretation beyond the wording of § 8 first paragraph of the Constitution.

Furthermore, it is justified from normative reasons to treat persons whose parents are Estonian citizens equally with persons whose parents have the right to Estonian citizenship by birth. Otherwise the rather accidental circumstance of the possibility of the realisation of the right would influence the existence of the right. A person whose parents would have had the right to Estonian citizenship by birth

but have died without the possibility to exercise that right has to be treated equally to a person whose parents are Estonian citizens. Any other solution would lead to an unjustified unequal treatment of these two persons. Therefore, § 8 first paragraph of the Constitution should be interpreted widely in the sense that a person of whose parents one was an Estonian citizen or had the right to Estonian citizenship by birth shall have the right to Estonian citizenship by birth.<sup>10</sup>

#### **(c) Freedom of Movement and Choice of Residence, § 34 of the Constitution**

The classification of § 34 of the Constitution, according to which everyone who is legally in Estonia has the right to freedom of movement and to choice of residence, is questionable. On the one hand, it is possible to classify the provision as a source of a right that belongs to a special group of holders which consists of everyone who is legally in Estonia. Unfortunately, according to this interpretation the legislator could define the group of holders of this basic right. But this would mean that § 34 of the Constitution is enabled only within the framework of an Act of parliament. In view of §§ 3 first sentence of the first paragraph, 11, 14, 102 of the Constitution, the legislator is entitled to enact laws only within the framework of the Constitution but he does not possess the competence to define the span of force of the Constitution. The clause "everyone who is legally in Estonia has the right" cannot empower the legislator to constitute the group of holders of that right, which belongs to the right as such. Therefore, it is recommended to understand the particular clause as an immediate constitutional limit<sup>11</sup> of freedom of movement and choice of residence. If the right as such and its limits shall be distinguished,<sup>12</sup> then the clause "who is legally in Estonia" shall be understood as a limiting clause which can be separated from the right as such. Consequently, everyone has the right deriving from § 34 of the Constitution. It is therefore a right of each and every person. And if the legislator may restrict this right by defining the requirements for a legal entry and legal stay in Estonia, it concerns only the question how far-reaching is that *prima facie* (i.e. not definite) right.

#### **(d) Right to Vote in Local Elections, § 156 of the Constitution**

According to § 156 second paragraph of the Constitution all persons who reside permanently in the territory of the local government and have attained eighteen years of age possess the right to vote in local elections. All persons means each and everyone. The distinctive criterion is not citizenship but preconditions that the person must reside permanently in the territory of the local government and have attained eighteen years of age. Thus the rights deriving from § 156 of the Constitution are rights of each and everyone.

**(2) Citizens' Rights**<sup>13</sup>

Section 9 first paragraph of the Constitution leaves it open to define who are the holders of rights that are not of each and everybody. However, certain basic rights are borne only by the citizens of the Republic of Estonia. These rights are the citizens' rights.

**(a) "Estonian Citizen(s)"**

Citizens' rights are first of all such rights where the term "Estonian citizen(s)" is mentioned, like §§ 30; 36 first and second paragraphs; 42; 48 second sentence of the first paragraph; 54 second paragraph of the Constitution. If § 13 second sentence of the first paragraph of the Constitution obliges the Estonian state to protect "its citizens" abroad, then certainly Estonian citizens are meant. Furthermore, §§ 57 first paragraph and 60 second paragraph of the Constitution contain according to their wording citizens' rights deriving from outside of the second chapter of the Constitution.

**(b) Rights Based on § 8 Paragraphs 3 and 4 of the Constitution**

It is important to pay attention to § 8 third and fourth paragraphs of the Constitution. According to § 8 third paragraph no one shall be deprived of Estonian citizenship acquired by birth. According to § 8 fourth paragraph no one shall be deprived of Estonian citizenship because of his beliefs.

Although the one protected by these rights is "no one", they protect against the deprivation of Estonian citizenship and are therefore citizen's rights. Since these rights protect Estonian citizenship which is the precondition of possessing the rights of citizens, a question arises: at which point in time does the person have to be a citizen? If one would interpret these provisions in a way that the person has to be a citizen at the point in time when he lodges a complaint against the deprivation of Estonian citizenship, then a person who has been expatriated because of his convictions cannot claim for restoration of his citizenship if he was not an infant at the time the administrative act came into force. In the latter case § 8 second paragraph of the Constitution would apply. To avoid the cancellation of the rights from § 8 third and fourth paragraphs of the Constitution, the decisive moment must only be the moment of coming into force of the expatriating administrative act. From there it follows that in case of § 8 third and fourth paragraphs of the Constitution, the person must have had Estonian citizenship immediately before the coming into force of an expatriating administrative act to be the holder of these rights.

**(c) Rights concerning the electoral procedure, § 60 second, third and fourth sentences of the first paragraph of the Constitution**

Section 60 second, third and fourth sentences of the first paragraph of the Constitution do not mention the term "citizen". They state that members of the Riigikogu<sup>14</sup> shall

be elected in free elections following the principle of proportionality, that elections shall be general, uniform and direct and that voting shall be secret.

Furthermore, according to their wording it may seem weird to interpret them as basic rights. These norms rather seem to prescribe the modalities of the electoral procedure of the Estonian parliament. However, they do not rule on any kind of internal procedure of the state organisation. Instead they rule on the participation of individuals at the formation of the legislative body. In consequence, they are of fundamental importance for the democratic process in Estonia, where the supreme power of state is vested in the people and shall be exercised by the people, §§ 1 first paragraph, 56 of the Constitution. Since the people consists of individuals and there is no higher authority who should supervise the exercise of the supreme power of the state, these provisions must contain individual rights. Therefore, if § 60 second, third and fourth sentences of the first paragraph of the Constitution are interpreted as basic rights provisions, the corresponding norms guarantee a right to free, proportional, general, uniform, direct, and secret voting. Since according to § 57 first paragraph of the Constitution the right to vote belongs only to Estonian citizens who have attained eighteen years of age, anything else cannot apply for the rights mentioned above. Therefore, § 60 second, third and fourth sentences of the first paragraph of the Constitution constitute citizens' rights.<sup>15</sup>

**(d) Right to Refuse to Serve in the Defence Forces for Religious or Moral Reasons, § 124 Paragraph 2 of the Constitution**

The wording of § 124 second paragraph of the Constitution does not support at first glance its classification as a basic right provision as well. According to this provision a person who refuses to serve in the Defence Forces for religious or moral reasons has a duty to perform alternative service pursuant to the procedure prescribed by law. However, empowering the parliament to rule an alternative service to the service in the Defence Forces, § 124 second paragraph of the Constitution constitutes a right to refuse to serve in the Defence Forces for religious or moral reasons. Since § 124 first paragraph of the Constitution empowers the parliament to oblige Estonian citizens by law to participate in national defence, § 124 second paragraph of the Constitution can logically be applied only for those who are obliged to participate in national defence, i.e. for citizens. Consequently, § 124 second paragraph of the Constitution contains a citizens' right as well.

**(3) § 36 Third Paragraph of the Constitution as an Estonian's Right?**

Section 36 third paragraph of the Constitution determines that every Estonian has the right to settle in Estonia. This is not a citizens' right, since such a right for citizens is already determined by § 36 first paragraph of the



Constitution. As a consequence, § 36 third paragraph of the Constitution would carry no independent meaning. One possibility of interpretation of § 36 third paragraph of the Constitution is that it constitutes a right of each and every person. Then, distinguishing the right and its limits, the immediate constitutional limit of this right would be that the person must be an Estonian. As a practical consequence everybody would have a *prima facie* right to settle in Estonia which includes the right to enter Estonia. This right is then excluded if the person is a non-Estonian. The other possible way to interpret § 36 third paragraph of the Constitution is as a third kind of basic right — an Estonian's right. Then, only Estonians would have the *prima facie* right to settle in Estonia. Both ways do not differ much. The crucial question will be in both cases, who is an Estonian in the sense of § 36 third paragraph of the Constitution? Does the group of Estonians consist of all Estonian citizens and somebody else, or are there some Estonian citizens who are not Estonians in that sense? These questions need closer research which does not fit into the framework of this article. Moreover, the author of this paper has doubts whether it can be sufficiently clarified at all.<sup>16</sup>

## B. THE APPLICABILITY OF BASIC RIGHTS FOR INFANTS

The holdership of basic rights means that a person has the basic rights' capacity, i.e. the person possesses the right concerned. Every natural person, no matter of what age or with what kind of skills, has the basic rights' capacity.<sup>17</sup> Following the famous German state lawyer Günter Dürig a certain parallelism to the passive legal capacity of private law can be recognised.<sup>18</sup>

The question is whether infants can exercise basic rights and if yes then to what extent? The main hurdle to the application of basic rights for infants in Estonian constitutional law derives from §§ 27 third paragraph; 37 third paragraph of the Constitution. These provisions state the right of the parents to raise and care for their children and the right to have the final decision in the choice of education for their children. How far does the right to raise or decide about education reach? Do children have any rights at all according to these provisions?

In private law one distinguishes between passive and active legal capacity. Only majors have both, infants lack passive legal capacity. Following the parallelism of Günter Dürig one may ask whether there is anything like the distinction between passive and active legal capacity in the basic rights law? Is there anything like "active basic rights capacity" that children lack? This is the discussion about the so-called basic rights' age which is the capability of individuals to exercise basic rights independently.<sup>19</sup> To try to clarify the problems it makes sense to start with the text of the Constitution. It is easy to find that out in some provisions, like §§ 57 first paragraph, 60 second paragraph,

156 second paragraph of the Constitution the age is mentioned *expressis verbis* as a precondition of exercising that particular right. For example, § 57 first paragraph of the Constitution guarantees the right to vote to every Estonian citizen who has attained eighteen years of age. In most provisions, however, no clause concerning the age can be found.

Then, several provisions mention a child or children, like §§ 8 first paragraph, 27 third and fourth paragraph, 37 third paragraph, 44 second sentence of the third paragraph, school-age children, like § 37 second sentence of the first paragraph, or minors, like §§ 20 fourth paragraph, 24 second sentence of the third paragraph, 34 second sentence. A relevant argument in this context could be drawn from the wording of § 8 first paragraph of the Constitution. Section 8 first paragraph of the Constitution mentions "every child" as the holder of that right. Since § 8 first paragraph of the Constitution is the only provision in the Constitution that mentions "every child" as the holder of the corresponding right, one could argue *e contrario* that if in other provisions a child is not mentioned as the holder of the right he shall not have it. Such an interpretation must be rejected. Firstly, as argued above, the term "every child" is to be interpreted as everyone. Therefore, § 8 first paragraph of the Constitution is understood correctly: "Everyone of whose parents one is an Estonian citizen has the right to Estonian citizenship by birth."<sup>20</sup> Secondly, the unacceptable consequence of such an interpretation would be that an infant would lack e.g. the right to life (§ 16 of the Constitution) or the right not to be subjected to torture or to cruel or degrading treatment (§ 18 of the Constitution). Such a restriction cannot be justified as long as the present constitution is in force. Therefore, § 8 first paragraph of the Constitution does not support the exclusion of children from the protection of basic rights.

Distinguishing *prima facie* and definite rights, it seems that there is no rational reason to exclude even newborn children from the *prima facie* protection of basic rights. Therefore, even a newborn child is *prima facie* entitled to exercise all basic rights except those deriving from §§ 57 first paragraph, 60 second paragraph, 156 second paragraph of the Constitution, which require *expressis verbis* an age-limit of eighteen or twenty-one years. Consequently, a child may *prima facie* not be hindered by the addressees of the corresponding rights e.g. to learn (§ 37 first sentence of the first paragraph of the Constitution) or to go to church (§ 40 third paragraph of the Constitution). Moreover, even a newborn child has *prima facie* e.g. the right to freely obtain information for public use (§ 44 first paragraph of the Constitution), the right to freely disseminate ideas, opinions, beliefs, and other information (§ 45 of the Constitution), the right to address state agencies, local governments, and their officials with memoranda and petitions (§ 46 of the Constitution), and the

right to assemble and to conduct meetings (§ 47 of the Constitution). In order to be the holder of these rights, it must be completely irrelevant that the newborn child does not understand the information he obtains, is not able to express itself by word, to write anything, or to walk. Even some adults lack some of these skills.

The Constitutional Review Chamber of the Estonian Supreme Court has decided in two cases that infants enjoy the protection of basic rights. The first case concerned the infant's right of association. The court decided: "The Constitution does not limit the individual's right to associate into non-profit undertakings to the individual's active legal capacity under civil law. Thus, pursuant to § 48 first paragraph of the Constitution, the right of association must be guaranteed also to infants."<sup>21</sup> The second case concerned § 34 of the Constitution which constitutes the freedom of movement. The court decided that persons even younger than sixteen would be protected by this constitutional guarantee.<sup>22</sup>

Since infants have these rights only *prima facie*, the question arises whether they may have any definite rights as well? The main question resides rather in the extent to which infants can exercise their basic rights. The extent infants may exercise their basic rights cannot be the same as that of adults since in that case, e.g. the legal rules restricting the infants' active legal capacity would be in conflict with the Constitution, they would restrict constitutionally guaranteed freedom of infants. It seems that the crucial provisions influencing the allowed extent of infants' exercise of basic rights are §§ 27 third paragraph and 37 third paragraph of the Constitution. Section 27 third paragraph of the Constitution guarantees parents the right to raise and care for their children, and according to § 37 third paragraph of the Constitution parents shall have the final decision in the choice of education for their children. These provisions require further examination.

#### **(1) Rights of Parents to Raise Their Children, § 27 Third Paragraph of the Constitution, and to the Final Decision in the Choice of Children's Education, § 37 Third Paragraph of the Constitution**

Section 27 third paragraph; 37 third paragraph of the Constitution are the main provisions in the Estonian Constitution that restrict the *prima facie* rights of infants.

First, the relation between § 27 third paragraph of the Constitution and § 37 third paragraph of the Constitution should be clarified. If § 27 third paragraph of the Constitution constitutes the right of parents to raise and care for their children, it certainly means bringing up the children in the broadest sense. The right includes therefore all kinds of influences of parents on their children. But § 37 third paragraph of the Constitution grants parents the final decision in the choice of their children's education. Since education is a part of the upbringing of children, § 37 third paragraph of the Constitution does not introduce anything

that is not already introduced by the right of parents to raise their children. Therefore, § 37 third paragraph of the Constitution is a *lex specialis* to the § 27 third paragraph of the Constitution.

May parents according to these rights influence their children as they like? How far reaching is the right to determine the education of a child? Distinguishing *prima facie* and definite rights, the rights of parents must be *prima facie* as well. There cannot be any definite right of parents to do anything they like with their children.

Both, § 27 third paragraph of the Constitution and § 37 third paragraph of the Constitution, show a similarly complicated structure of holders and addressees of these rights. According to the wording the holders of both rights are parents.<sup>23</sup> This covers in first order the natural mother and father if they are married. The mother should be the entitled person even if she is not married to the father of the child. But what about grandparents, adoptive or foster parents, the unmarried father of the child or the guardian? There are a plenty of unsolved problems left. The German Federal Constitutional Court has accepted adoptive parents<sup>24</sup> but excluded grandparents,<sup>25</sup> foster parents,<sup>26</sup> and guardians<sup>27</sup> as holders of the structurally similar parents' right in German *Grundgesetz*.<sup>28</sup> In the case of the unmarried father of a child the court accepted the holdership if he takes care of his child.<sup>29</sup> This rather differentiated solution shows the complexity of the matter.

Even more complicated is the question, against whom the right holds, i.e. the question of the addressees of the parents' rights. If public authorities interfere with the upbringing of children, they certainly are according to §§ 3 first sentence of the first paragraph, 14 of the Constitution the addressees of these rights. But are the children themselves addressees of these rights? Since this is a relationship between two individuals, it is a special case of the problem of *Drittwirkung*.<sup>30</sup>

#### **(2) Parents-Child-Relationship**

Whether an infant has any basic rights is not an all or nothing question. How much rights an infant has, depends on his parents. As long as the children and the parents agree there is no problem. A problem arises when they disagree.

Since infants are *prima facie* holders of all basic rights and parents have *prima facie* the right to raise them and to have the final decisions in all questions concerning the education, the rights of children and rights of parents collide. Since they collide, there cannot be any rigid age limit for exercising basic rights.<sup>31</sup> Therefore, no generalised answer could cover all cases and all basic rights. In a case of such collision of two principles a case by case decision is required.

The structural solution of the problem lies in understanding the constitutional age as a collision of principles. The basic rights are among others principles.<sup>32</sup> Principles are optimising commands. If two principles collide, then

the solution should be found on the basis of the principle of proportionality.<sup>33</sup>

To illustrate this result, an example is given. Assuming a father takes his eight-year-old son away from school to employ him in his enterprise full time. In such case the infant has on the one side a *prima facie* right according to § 37 first sentence of the first paragraph of the Constitution which everyone has: the right to education. On the other side, the father has a *prima facie* right according to § 27 third paragraph of the Constitution to bring up his child as he thinks is best. To solve the collision it is necessary to apply the three stages of the principle of proportionality.<sup>34</sup> In this case the solution does not depend on which principle is applied first.

If one starts off with the right of the infant, then the application of the principle of proportionality could look like this:

- Appropriateness: Father takes his son away from school to exercise his right to bring up his child. Taking his son away from school is an appropriate means of exercising that right.

- Necessity: A milder means would be if the father would let his child work in his enterprise besides going to school. But this is not as effective a means of exercising his right to bring up his child as taking his son away from school altogether, since his son cannot devote himself wholly to work because of school.

- Proportionality in the narrower sense: Parents' right to decide how to bring up their child is of important value since the way the child is brought up considerably affects the child's personality. On the other hand it is important that children attend school. At school they obtain knowledge necessary for their future life.

Taking the child away from school is a very serious encroachment of the child's right to education, since the child is left completely without the chance to exercise this right. At the same time attending school is not a serious encroachment of the father's right to bring up his child since the father can employ his child during school holidays. The father does not completely lose his right to bring up his child, this right is just restricted in some extent.

Both principles are important. If the father forbids his son to go to school so as to employ the child in his enterprise, then one principle is exercised to its full extent, while exercising the other is impossible. If the child is allowed to go to school, then also one principle is exercised to its full extent while the other is only slightly restricted and exercising is still possible. That leads to a conclusion that there is "more right" in the second case. Therefore the second situation is an ought and the first is forbidden. Consequently the father has no right to take his son away from school to employ him in his enterprise full time. Moreover, there shall be no father in Estonia who could forbid his child to go to school to employ the child full time in his enterprise.

Consequently, even an eight-year-old child has a definite right to education deriving from § 37 first sentence of the first paragraph of the Constitution.

For several reasons, particularly for reasons of legal certainty, it is impossible to clarify the basic rights age always from case to case. The legislator is asked to meet some general regulations. As the two most important examples in the Estonian statutory law are § 9 first paragraph of the General Part Act of the Civil Code<sup>35</sup> and § 7 first paragraph of the Estonian Act of Churches and Parishes.<sup>36</sup> According to § 9 first paragraph of the General Part Act of the Civil Code, an at least eighteen-year-old person has an unlimited active legal capacity. Thus, in private law the will of parents is decisive until attaining of one's majority, i.e. eighteen years. According to § 7 first paragraph of the Act of Churches and Parishes a person starting from the age of fifteen years may belong to a parish without any consent of his parents. Both acts of the parliament are in accordance with the requirements of the constitutional principle of proportionality. They enlighten two important fields of the exercise of basic rights and enact general rules which assume the basic rights age for areas like freedom of contract or freedom of religion.

### **(3) Capacity to Be a Party of Court Proceedings and Ability to Take Legal Action**

If a newborn child is a *prima facie* holder of all basic rights it is also a *prima facie* holder of § 15 first sentence of the first paragraph of the Constitution which guarantees the right of recourse to the courts to everyone whose rights and freedoms are violated. But what about the definite holdership which is connected to the particular basic rights' age?

Even a newborn child may be a party of court proceedings of course. It may e.g. be an owner and protect its ownership before a court against intrusions of third parties. But to take legal action requires some certain natural skills and qualities like e.g. the natural ability to make oneself understandable to other persons. This capacity should be called ability to take legal action. To exercise the right to recourse to court independently one must have the capacity to be a party of court proceedings and the ability to take legal action.

As a starting point, by attaining one's majority, a person is entitled to take all legal actions by himself because the law assumes that an eighteen-year-old person has all natural skills and qualities to manage his life independently. The exercise of all basic rights — but § 60 second paragraph of the Constitution<sup>37</sup> — can therefore be enforced by taking legal action since the person has attained the age of eighteen years and has reached the full active basic rights' capacity. The precondition is of course that basic rights are understood as subjective rights.<sup>38</sup>

On the other hand a person is unable to take legal action if he lacks the natural ability to make himself understandable to other persons. Thus, the ability to take legal

action depends on natural skills and qualities of the person, particularly on the ability to make oneself understandable to other persons. A newborn child cannot therefore have the ability to take legal action. Furthermore, the right to take legal action depends on the parents' right to raise their children and determine their education (§§ 27 third paragraph, 37 third paragraph of the Constitution).

Therefore, the means to find a definite solution is the principle of proportionality. Whether the solution differs from the definite basic rights' age in a particular case, remains open. However, smaller children who do not have the ability to take legal action should be represented by their parents. Older children should be able to take legal action by themselves even against the will of their parents. Unfortunately, there is no generalised answer that would cover all cases and all basic rights.

#### (4) Conclusions

If the persons who are of the age of basic rights — as described above — may exercise their basic rights independently, it should not be concluded *e contrario* that the persons who are not of the age of basic rights may not exercise their basic rights at all. Even small children may exercise basic rights, e.g. to go to church, but only pursuant to the instructions of their parents. Since on the other hand infants cannot have all the rights of adults, a golden mean must be established between the two extremes: having all rights and having no rights.

The basic rights' age shall be a legal institute *pro* and *not contra* children's rights. Not being of the age of basic rights should only, in this case, prevent the infant's independent exercise of basic rights if it would be disadvantageous for the infant itself. Although there are similarities, the basic rights age is not the same as active legal capacity of civil law according to § 9 of the General Part Act of the Civil Code. It requires a case by case decision. Therefore, the basic rights age is an institute for which the right solution can be found applying the principle of proportionality. Consequently it is not possible to set an age limit from which constitutional age starts, but it always depends on the specific case and the colliding principles.

#### C. WAIVER OF BASIC RIGHTS

A person waives a right if he disclaims or renounces a right that he may have otherwise had. Since the basic rights are subjective rights of individuals, a question arises, whether a holder of the basic rights can waive the protection guaranteed by basic rights against state encroachment. An example occurs when somebody allows the police to search his flat without the police having a search warrant (§ 33 of the Constitution), or allows without the court's authorisation to tap his phone (§ 43 of the Constitution), or if a suspect living alone waives his right to notify those closest to him according to § 21 third sentence of the first paragraph of the Constitution to keep the arrest secret from his acquaintances.

There are two senses of waiving a right. In the broader sense one waives a right always if one omits to exercise the right. In the narrower sense one waives a right if one agrees with the violation of a basic right. To be even more precise there would be a violation of a basic right without the agreement of the holder but as there is an agreement there is none. Thus, the waiver in the narrower sense eliminates the violation of a right. In following the concept the waiver of basic rights will be used in the narrower sense. Consequently, one does not waive a basic right if one e.g. does not start a family (§ 27 first paragraph of the Constitution), if one does not choose any profession (§ 29 first paragraph of the Constitution), if one does not attend meetings (§ 47 of the Constitution), or if one does not enter any non-profit organisation (§ 48 first paragraph of the Constitution). These are cases of a simple non-exercise of the rights.

May a holder of basic rights waive one or more of his rights? This question has been passionately discussed in Germany. There is a general consensus that it is possible to waive basic rights.<sup>39</sup> The crucial questions are, how far one can go in waiving one's rights, are there any limits of waiving basic rights, and if yes how far do they reach?

At first glance of the text of the Estonian Constitution, free will is anticipated *expressis verbis* in §§ 18 second paragraph, 24 first paragraph, 29 second paragraph, 42 of the Constitution. According to the wording it is possible to waive at least these particular basic rights. If these provisions are to be interpreted in the way that all possibilities of waivers of the basic rights are exhaustively listed in the Constitution, then all other waivers of basic rights are invalid. But this solution is not satisfactory, since there seems to be no rational reason why the right against collecting information about somebody's beliefs (§ 42 of the Constitution) may be validly waived, while if such collection of information takes place by tapping a citizen's telephone with his consent, the waiver is invalid.

Therefore, the clauses of free will cannot be considered to be an exhaustive list and the solution should be found in another way. It is certain that in the cases where the clauses of free will apply, the waiver of the basic rights is allowed and therefore valid. If no one shall be subjected to medical or scientific experiments against his free will (§ 18 second paragraph of the Constitution) then this means that scientists may carry out experiments with volunteers.

If one starts to look for answers to these questions one has to recall that the waiver of basic rights is exercise of basic rights.<sup>40</sup> The decision whether one wants to give up his position belongs to the corresponding freedom. On the other hand there are positions that one is not allowed to give up. For example, no one may waive the position that no other is allowed to kill him because killing of someone else is punishable as homicide. Thus, there are limits of waiving one's rights.



Basic rights are not only subjective rights. They have an objective side as well.<sup>41</sup> There is a minimum content in basic rights that is necessary for peaceful coexistence in a society. Because of this aspect the minimum content necessary for coexistence in society cannot be waived by the holders of basic rights.<sup>42</sup> These limits are not definite rules but depend on several aspects. In order to solve the problem it is necessary to return to the principle side of basic rights. Basic rights are, among others, optimising commands, which require as far-reaching fulfilment as possible with respect to factual and legal possibilities. This means, that also in this case the optimum for basic rights should be found using the principle of proportionality.<sup>43</sup>

According to this a case by case solution is required. The dividing line shall be ascertained separately for every basic right.<sup>44</sup> The intensity of the encroachment, duration of the waiver of a basic right, existence of the possibility to annul it, and the extent of voluntariness must also be taken into account while weighing.<sup>45</sup> German constitutional lawyers Bodo Pieroth and Bernhard Schlink propose furthermore a rule for weighing. Should the object of the particular basic right only be personal freedom then the waiver should be as a rule valid. Should the particular basic right be amongst others important for the development of the political opinion in society then the waiver should be as a rule void.<sup>46</sup> Such attempts should not be taken as final solutions but just as guidelines for weighing. Therefore, one should be generous while judging the validity of a waiver of e.g. the right to freely choose one's profession (§ 29 first paragraph of the Constitution) or the property right (§ 32 of the Constitution). On the other hand, the right to secret voting (§ 60 fourth sentence of the first paragraph of the Constitution) should be unwaivable because the secrecy of voting is a precondition for the functioning of the whole democratic system.<sup>47</sup> Thus, there are some violations that cannot be eliminated by a waiver of basic rights.

#### **D. BEGINNING AND ENDING OF THE HOLDERSHIP OF BASIC RIGHTS**

According to § 8 first paragraph of the General Part Act of the Civil Code<sup>48</sup> passive legal capacity begins with the live birth of a human being and ends with death. There is no similar provision for the basic rights in the Constitution.

In principle, individuals have subjective rights derived from the basic rights from birth to death. The questions whether the protection by the basic rights extends also to a nasciturus before birth or after death are actually a separate topic each. Therefore, only a brief guideline of these problems shall be given.

##### **(1) Before Birth**

The holdership begins, at the latest, with the birth of a human being. Whether the holdership can begin before birth is an unsolved problem.

In Germany the Federal Constitutional Court has let

the question open, whether a nasciturus is a holder of basic rights or not.<sup>49</sup> At the same time most authors declare the nasciturus for a holder of at least the basic right to life.<sup>50</sup> On the other hand the supporters of the minor opinion<sup>51</sup> deny the holdership of the nasciturus with considerable arguments.

It is not possible to go into this discussion very deeply here. However, there seem to be some crucial questions on a very basic level that might help to clarify the matter. The protection of life is not an all or nothing question but rather a question of optimal protection. The *prima facie* right to life is colliding with other *prima facie* rights and the solution should be found with help of the principle of proportionality case by case. However, in order to qualify for such a *prima facie* protection of life one has to be someone who lives. But who is someone who lives? If that someone shall be described as a human being we have to answer two questions. First, what is the rational distinguishing feature that requires and justifies the protection of life of humans and does not require the protection of life of e.g. chimpanzees? Second, does a nasciturus already have this distinguishing feature? The German philosopher Norbert Hoerster undertakes an attempt to find the answers for these difficult questions. According to him following on from the biological point of view and declaring the species "homo sapiens" one would crucially end up in a case of "speciesism" which is according to Norbert Hoerster analogous e.g. to the racism.<sup>52</sup> To avoid this, one has to look for another criterion than the biological one to distinguish humans from animals. According to Norbert Hoerster the crucial criterion is the long-term interest to survive.<sup>53</sup> Nasciturus lacks a corresponding sufficiently strong interest. Therefore, a nasciturus shall not be protected by the right to life.<sup>54</sup>

Even if one does not agree with his arguments it seems that the declaration of the nasciturus for a holder of at least the right to life shall be avoided. The holdership of basic rights as used here presupposes that the held rights are subjective rights. Correspondingly a holder is the entitled subject. It seems to be very problematic if a nasciturus has the subjective right to life against its mother. Since all subjective rights may according to § 15 first sentence of the first paragraph of the Constitution be protected by a complaint a nasciturus would in the case of an abortion have the right to recourse to the courts against its mother.<sup>55</sup> This result is disconcerting. Without being able to offer the final solution for the problem, the holdership of unborn children under the Estonian Constitution shall be rejected. The nasciturus does not have any subjective rights and it is therefore not a holder of basic rights.<sup>56</sup>

##### **(2) After Death**

The question whether a deceased could be a holder of basic rights seems to be at first glance peculiar because the person in question does not exist anymore. However, the German Federal Constitutional Court has decided that



human dignity and its protection shall not end with death.<sup>57</sup> Following the Court in Germany several authors declare the dead as holders of at least human dignity.<sup>58</sup> On the other hand the basic rights' holdership of the dead has been denied.<sup>59</sup> It does not mean that the second opinion will allow the disparagement of the dead. According to this view instead of a hardly imagineable basic rights' holdership by the dead, the respect of the living for the dead shall be protected.

It seems to be the better solution not to accept the dead's holdership of basic rights under the Estonian Constitution. There will still be enough reasons for protecting the memory of survivors. The holder of a right cannot be just an abstraction but shall be a person — natural or legal — who does exist.

## 2. Legal Persons

All natural persons ("everyone", "Estonian citizen") are holders of the basic rights. Natural persons continue to be holders of basic rights even if they e.g. found a non-profit association. If the public authorities restrict operations of such an association then that instrument at the same time encroaches every member's basic rights. Thus, every member of the organisation has according to § 15 first sentence of the first paragraph of the Constitution the right to recourse to the court. But it is questionable whether the organisation itself can seek the court's protection in its own name. This question will be answered by § 9 second paragraph of the Constitution. According to that clause the rights, freedoms and duties set out in the Constitution shall extend to legal persons in so far as this lies in accordance with the general aims of legal persons and with the nature of such rights, freedoms and duties. Thus, certain superindividualistic units of organisation may be holders of basic rights as well. As argumentum *e contrario* it can be derived, that the basic rights should be understood individually without this clause.

The German *Grundgesetz* contains a similar provision to § 9 first paragraph of the Constitution. According to Article 19 third paragraph of the German Constitution basic rights also apply to domestic legal persons to the extent that the nature of such rights permits. The main difference between the analogous provisions in Estonian and German Constitutions is that in Germany only domestic legal persons will be protected while the Estonian Constitution does not make any difference between domestic or foreign legal persons.<sup>60</sup>

Section 9 second paragraph of the Constitution extends the protection of basic rights. It shall be distinguished from § 154 first paragraph of the Constitution according to which all local issues shall be resolved and managed by local governments, which shall operate independently. The latter provision constitutes no basic right but a *prima facie* competence of local governments to

solve local problems independently. Since the provision contains only a *prima facie* right, it is structurally similar to basic rights.

Section 9 second paragraph of the Constitution contains three main requirements. First, the organisation shall be a legal person in the sense of the Constitution. Second, the application of basic rights shall be in accordance with the general aims of legal persons. Third, the application must be in accordance with the nature of the rights.

### A. LEGAL PERSONS IN THE SENSE OF § 9 PARAGRAPH 2 OF THE CONSTITUTION

The concept of a legal person is not a concept of constitutional law but derives from the statutory law. If the legal order gives e.g. a union of individuals legal capacity then the consequence will be that the corresponding formation can independently bear rights and duties, e.g. be an owner or sue in its own name.<sup>61</sup>

#### (1) Legal Persons of Private Law

Since in the wording of § 9 second paragraph of the Constitution the concept of legal person has been used, the legal persons of private law are certainly included. Legal persons of private law are, according to § 2 first and third paragraphs of Estonian Commercial Code, in the first order a general partnership, limited partnership, private limited company, public limited company and commercial co-operative.<sup>62</sup> Legal persons of private law are furthermore, according to § 1 first and second paragraphs of the Foundations Act,<sup>63</sup> foundations, and according to § 2 first paragraph of the Non-profit Associations Act,<sup>64</sup> non-profit associations.

#### (2) Other Organisational Formations of Private Law that Are not Legal Persons

Legal persons in the strictest sense are only those organisational formations with full legal capacity. In private law there may be formations with just a partial legal capacity as well. An entity has partial legal capacity if the legal order recognises them as individual holders of at least one right. It is questionable, whether § 9 second paragraph of the Constitution applies only to entities with full legal capacity or whether other organisational formations with only partial legal capacity may be holders of basic rights too.

If one interprets § 9 second paragraph of the Constitution as a principle, then finding the solution is not difficult. The basic rights require *prima facie* full enforcement. Therefore, the question whether organisational formations with partial legal capacity can rely on basic rights must be answered in the affirmative. Consequently, also organisational formations with partial legal capacity that are not legal persons may be holders of basic rights. It cannot be in any other way since in the opposite case the capacity to bear basic rights would depend on the discretion of the lawgiver.<sup>65</sup> But basic rights are on the contrary individual rights against the state and therefore also against the legislator. In addition, the line between full and partial

legal capacity is not clear at all, since no legal person can have all the rights of an individual.<sup>66</sup> It is clear that a legal person can neither be the holder of the right to life (§ 16 of the Constitution) nor the holder of the right to protection of health (§ 28 first paragraph of the Constitution).

From the organisational formations with partial legal capacity social groups and organs of legal persons must be distinguished. Social groups and bodies of legal persons cannot be holders of rights and duties. They only can be addressees of organisational norms.<sup>67</sup> Social groups in that sense are e.g. a meeting, employees of an enterprise or a football team. In general, the bodies of legal persons of private law are according to § 44 first paragraph of the General Part Act of the Civil Code<sup>68</sup> the general meeting and the management board. E.g. in the case of a public limited company, which is a legal person of private law, according to Estonian Commercial Code<sup>69</sup> the bodies are the general meeting of stockholders (§ 290), the management board (§ 306 first paragraph) or the supervisory board (§ 316). Groups and bodies like those mentioned are not legal persons in the sense of § 9 second paragraph of the Constitution.

### **(3) Legal Persons of Public Law<sup>70</sup>**

The wording of § 9 second paragraph of the Constitution mentions legal persons without making any difference between the legal persons of public and private law. According to the general and the professional legal usage of language the concept of legal person without any further specification means both legal person of public and private law.<sup>71</sup> However, it does not mean that the protection of basic rights expands also to legal persons of public law, since that expansion must occur in accordance with the general purposes of the legal person and the nature of such basic rights. Therefore the term "legal persons" can be neither an argument *pro* nor *contra* the basic rights' holdership of public law legal persons.

## **B. IN SO FAR AS THIS IS IN ACCORDANCE WITH THE GENERAL AIMS OF LEGAL PERSONS**

The second part of the sentence of § 9 second paragraph of the Constitution sets limits to the extension of the holdership of basic rights to legal persons. First, the extension must occur in accordance with the general aims of legal persons. But what are the general aims of the legal persons? What are legal persons for?

The aim may be interpreted subjectively, according to the real will of the creator, or objectively, according to a reasonable solution from the point of view of the interpreter. The first argument is called a subjective-teleological or a genetic argument,<sup>72</sup> the second is called an objective-teleological argument.<sup>73</sup>

### **(1) General Aims of Legal Persons**

The general aim cannot mean the purposes laid down in the rules of the legal person. These rules cannot contain

general aims of legal persons but only the specific aim of the particular legal person. Therefore, we need to look for the general aims somewhere else.

The first answer is that a legal person is a purpose by itself. This is the case if it has a real personality. A legal person just exists and there are no further aims of its existence. This is the theory of the real personality of an association.<sup>74</sup> According to this theory, all legal persons would have their own passive and active legal capacity. Therefore, all entities which are legal persons in the sense of § 9 paragraph 2 of the Constitution would enjoy the full protection of all basic rights as far as such application is in accordance with the nature of the rights.

The second alternative is that a legal person is a simple legal abstraction which does not really exist. It is rather an imaginable entity, which is treated as a subject of rights and obligations.<sup>75</sup> According to this solution the general aim of legal persons as such is the simplification of individual action. Therefore, legal persons could enjoy the protection of basic rights only to the extent that these rights protect the natural persons who stand behind the legal persons.

If a legal person should have a real personality then every legal person should be protected because it has a value by itself. First of all, all the creations with a value by themselves should have the right to existence. That would lead to the conclusion that no legal person may ever be dissolved and e.g. the bankruptcy law would be unconstitutional. Such a solution would be peculiar. Therefore, the legal person shall be understood as a construction of legal science.<sup>76</sup> If there would be nothing like legal persons, the relations between individuals would get too complicated. If several natural persons join together e.g. to do business, questions like who owns how much of which part of the enterprise will arise. To avoid the overcomplexity of such relations and to simplify the application of legal norms to organised natural persons, the legal institute of legal person has been created. Therefore it is wrong to imagine legal person as some creation to which rights extend just because of its existence.<sup>77</sup> Thus, the most general aim of legal persons as such is the simplification of human action or, even more generally to confer more freedom. The legal person is therefore nothing else than just a means to an end and not a purpose by itself.<sup>78</sup>

But how does this solution fit to the general aims clause in § 9 second paragraph of the Constitution? If the general aim of legal persons is to confer more freedom to individuals, the applicability of basic rights to legal persons depends on whether there are individuals behind the legal person and whether they are concerned. Basic rights extend to legal persons only as far as the freedom of natural persons is protected. This solution corresponds to the theory of personal substratum.

### **(2) Theory of Personal Substratum**

According to the theory of personal substratum one

always has to ask whether there are natural persons behind the legal person. This will be a rule for legal persons of private law but not for legal persons of public law. Thus, in principle legal persons of private law are holders of basic rights while legal persons of public law are not.<sup>80</sup> By this solution one has to remember that the distinction between legal persons of public and private law does not give a satisfactory answer to the question.<sup>81</sup> Often it is just a historical coincidence or legislator's arbitrariness whether a corporation or organisation is one of public or private law.<sup>82</sup> Thus, whether a legal person is a legal person of private or public law is just an indication *pro* or *contra* its basic rights' holdership. The real criterion is whether there is private freedom or public power behind the legal person. Only such legal persons can be holders of basic rights which exist because of private autonomy.<sup>83</sup>

The theory of personal substratum is not indisputable, since it excludes the basic rights' holdership of the legal persons of public law. Therefore, it has been criticised by several authors, who hold that legal persons of public law should be holders of basic rights as well.<sup>84</sup>

First, it has been argued that the constitutional provision which extends the holdership of basic rights to legal persons would be superfluous if the theory of personal substratum would really apply.<sup>85</sup> Indeed, it is possible to construct a legal system with effective protection of individual rights without any protection of legal persons. A comparable provision lacked e.g. in the earlier Estonian Constitutions from 1920,<sup>86</sup> 1933<sup>87</sup> and 1938<sup>88</sup>. From the present day legal systems e.g. in the Finnish legal system legal persons are not protected by basic rights at all.<sup>89</sup> But it does not mean that § 9 second paragraph of the Constitution is superfluous. Legal persons are holders of basic rights only thanks to this constitutional provision and only to that extent as stated in it. Without § 9 second paragraph of the Constitution there would be no holdership of basic rights under the Constitution. Thus, the theory of personal substratum does not make § 9 second paragraph of the Constitution superfluous.

Second, since a contractual transfer of basic rights should be excluded because of the highly personal nature of basic rights, the theory of personal substratum would break this rule.<sup>90</sup> Admittedly, basic rights should not be transferable. But § 9 second paragraph of the Constitution does not cause any transfer of basic rights. Like the legal institute of legal person is a fiction, § 9 second paragraph of the Constitution is a fiction as well. The norm constitutes simply the holdership of fictive subjects of the law but only insofar as is in accordance with the general aim of legal persons, according to which individual action is simplified. Section 9 second paragraph of the Constitution is not in contradiction with the highly personal nature of basic rights but it just creates a modification of this principle.

Third, a legal person, e.g. a foundation, might not have

any persons behind it whose freedom of action should be protected.<sup>91</sup> To go even further, there are legal persons of public law which do not have natural persons behind them at all, but only the public power. But it is possible to distinguish private foundations which derive their competency from the private freedom from foundations which are just organisationally independent sub-units of public authorities. It is true that there are not specific individuals behind a foundation but it has once been created by somebody. And this act of creation gives us information to classify the foundation either as a holder of basic rights or not. And if the legal nature of the foundation has been changed during its existence, this act should be considered as well.

To argue even more in favour of the theory of personal substratum the main arguments brought out in the German discussion are presented.

The first is the so-called confusion argument which says that the state cannot be the holder and the addressee of basic rights at the same time.<sup>92</sup> The confusion argument is the weakest. It has been shown, that the confusion argument is no longer appropriate if there is more than one legal entity carrying public power involved.<sup>93</sup> And even if there was a single entity of state opposed to individuals, the confusion argument would not hold, because one norm may create rights and duties to one and the same person.<sup>94</sup> Of course, one norm may confer rights and duties to the same person. But there is still a reasonable content left if we understand basic rights as pre-state individual rights which are directed against the state to protect the sphere of individual freedom. Interpreted like this, basic rights cannot at the same time confer protection to the state itself or to its sub-units.

This is a combination of the confusion argument with the argument of individualism which has been brought out as the second argument to support the theory of personal substratum.<sup>95</sup> Against the latter it has been maintained that a legal person of public law can be in a similar position with respect to the public power as an individual, e.g. in private law relations.<sup>96</sup> This assertion is not true because legal persons are not purposes by themselves but means to an end while natural persons are purposes by themselves. Thus, legal persons can never be in a similar position to natural persons, even if e.g. the property of a public limited company is concerned. There is still a difference if e.g. both a natural person and a company have the right to property (§ 32 of the Constitution) because the legal person is an owner only to simplify the action of the shareholders. Since the state has the monopoly of power, basic rights are to balance it and not to confer some kind of protection to its sub-units.

According to the third argument basic rights' holdership of the legal persons fulfilling the functions of public power would lead to the paralysis and petrification of the organisational power of the public authorities. The state

has to be effective and should therefore be able to organise and reorganise itself without any restriction of the basic rights.<sup>97</sup>

If legal persons derive their competency from public authorities the relations between them and their creators are based on certain competency. Legal persons of public law act according to competency and not by exercising freedom. Therefore, the conflicts between them cannot be solved on the basis of basic rights but on the basis of their competency.<sup>98</sup> The extension of holdership of basic rights to legal persons fulfilling the functions of public power cannot expand their competency.<sup>99</sup> Thus, there cannot be any further protection for legal persons which derive their competency from public authorities.

### (3) Modification of the Theory of Personal Substratum

According to the theory of personal substratum the criterion of distinguishing legal persons who are holders of basic rights from non-holders is whether there is private freedom or public power behind the legal person. Therefore, in principle the legal persons of private law are holders of basic rights and the legal persons of public law are not. The Estonian Constitution modifies this criterion and excludes the basic rights' holdership of legal persons of public law.

In German discussion there is a general consensus that universities, churches, and broadcasting corporations enjoy the protection of basic rights even if they are legal persons of public law.<sup>100</sup> The reason for that is that all of them have some special close relation to a specific basic right: universities to the freedom of science, churches to the freedom of conscience and religion, and broadcasting corporations to the freedom of press.

Since there is no state church in Estonia (§ 40 second sentence of the second paragraph of the Constitution),<sup>101</sup> all churches have to be considered as legal entities of private law.<sup>102</sup> Thus, they are holders of the freedom of conscience and religion (§ 40 first paragraph of the Constitution) according to § 9 second paragraph of the Constitution. But what about universities and broadcasting corporations of public law? The Estonian Constitution gives an answer to this question, stating in § 38 second paragraph of the Constitution that universities and research institutions are autonomous within the restrictions prescribed by law.

Section 38 second paragraph of the Constitution is a peculiarity of the Estonian Constitution with historical tradition. It can systematically and historically only mean the universities and research institutions of public law. Private universities and scientific organisations are as legal persons of private law (§ 9 second paragraph of the Constitution) the entitled subjects of the freedom of science, § 38 first paragraph of the Constitution. From the systematic position of § 38 second paragraph of the Constitution in the second chapter of the Constitution with

the title "Basic Rights, Freedoms and Duties" it does not follow that this provision foresees a *lex specialis* for all kinds of universities and research institutions. Moreover, such a *lex specialis* would be superfluous because of § 9 second paragraph of the Constitution. For example there is no special rule about autonomy for newspaper publishers in § 45 of the Constitution either. The wording of § 38 second paragraph of the Constitution speaks of research institutions<sup>103</sup> which indicates that scientific organisations of public law are meant. And finally, the autonomy of university clause has historically come into being as a guarantee of the independence of the public university<sup>104</sup> and as such took over in the Constitution from 1992.<sup>105</sup> Thus, although the norm has a similar structure as a basic right it is not one. It is like the autonomy clause for local government (§ 154 first paragraph of the Constitution) a competence that belongs to the sphere of state organisation and which has as its object the guarantee of some independence for some certain units of the public power.

If the universities of public law are the only units of public law except the local governments (§ 154 first paragraph of the Constitution) which have a special constitutional guarantee of autonomy, then it follows *argumentum e contrario* that the other units which fulfil functions of public power shall not be autonomous. Section 38 second paragraph of the Constitution makes sense only if it is exhaustive. If § 38 second paragraph of the Constitution is exhaustive, the legal persons which have public power behind them cannot be holders of basic rights at the same time.<sup>106</sup> The conclusion is that the legal persons of public law are always excluded from the holdership of basic rights under the Estonian Constitution.<sup>107</sup>

### (4) Conclusion

The basic rights' holdership of legal persons is only then in accordance with the general aim of legal persons if such legal persons provide individual freedom. Legal persons who have public power behind them can never be holders of basic rights, they can be only autonomous. This means that, first, legal persons of public law cannot be holders of basic rights and, second, that legal persons of private law that represent public authorities or that fulfil functions of public power are not holders of basic rights.

Legal persons of public law cannot be holders of basic rights, they can only be autonomous if this has been stated explicitly. There are only two kinds of entities of public law which shall be autonomous according to the Constitution: local governments (§ 154 first paragraph of the Constitution) and universities (§ 38 second paragraph of the Constitution). All the other legal persons of public law are neither autonomous nor holders of basic rights.

Legal persons of private law that represent public authorities are not holders of basic rights because there is no individual freedom to be protected by basic rights. Such a legal person is e.g. a public limited company if the state



owns all shares. If a private person owns at least one share, there will be private freedom to be protected behind the company and the company will be a holder of basic rights.

If there is at least one private person behind a legal person of private law which fulfils functions of public power, then the legal person will not be a holder of basic rights as far as it performs functions of public power. In all other cases the legal person would be a holder of basic rights.

Other legal persons of private law are holders of basic rights. The crucial question is whether the extension of basic rights is in accordance with the nature of these rights.

### C. NATURE OF RIGHTS

A legal person can rely on a basic right in so far as it is in accordance with the nature of that right. The extension of basic rights to legal persons is in accordance with the nature of rights if the basic right can be exercised by legal persons. This is the case when the action of a legal person can fall into the protectorate of the particular basic right.<sup>108</sup> Due to this limitation legal persons cannot rely on the right to life (§ 16 first sentence of the Constitution) or to protection of health (§ 28 first paragraph of the Constitution). They cannot marry or create a family (§ 27 first paragraph of the Constitution) nor may they have the right of parents to raise children (§ 27 third paragraph of the Constitution). On the other hand the subjective rights of legal persons do derive in first order from the basic rights related to profession (§ 29 first paragraph of the Constitution), free enterprise (§ 31 of the Constitution) and property (§ 32 first paragraph of the Constitution). Legal persons who are holders of basic rights certainly have the right to recourse to the courts deriving from § 15 first sentence of the first paragraph of the Constitution.

### D. EXTENT OF THE HOLDERSHIP OF BASIC RIGHTS OF A LEGAL PERSON

The basic rights' holdership of legal persons is determined by their competency. They cannot have more competency on the basis of the Constitution than they already have on the basis of their creation act and rules.<sup>109</sup> Therefore, the extent of the legal capacity of a legal person determines also its Constitutional capacity.<sup>110</sup> As a consequence, organisational formations with partial legal capacity cannot extend their legal capacity according to § 9 second paragraph of the Constitution and turn it into a universal one. The protection of basic rights extends to them only to the extent of their legal capacity.

## III. ADDRESSEES OF BASIC RIGHTS

### A. CONCEPT OF THE ADDRESSEE OF A RIGHT

An addressee of a right is the obliged subject of a right.

### B. ADDRESSEES OF BASIC RIGHTS, § 14 OF THE CONSTITUTION

The question of addressees of basic rights may seem at first glance easy to answer, since according to § 19 second paragraph of the Constitution everyone is obliged to honour and consider the rights and freedoms of others. Interpreting this provision in the widest possible way basic rights would apply in all legal relations, even in the so-called horizontal relations between individuals. If basic rights would apply between individuals everyone would be an addressee of basic rights. However, it is not so. Basic rights have not been included in the Constitution to oblige everybody e.g. not to forcibly enter someone else's dwelling, real or personal property under his control, or place of employment, except in the cases and pursuant to procedure provided by law, to protect public order, health or the rights and freedoms of others, to prevent a criminal offence, to apprehend a criminal offender, or to ascertain the truth in a criminal proceeding (§ 33 of the Constitution). The primary function of the basic rights is to give individuals protection against encroachments by the state.<sup>111</sup> Thus, § 19 second paragraph of the Constitution shall not be interpreted as the provision that constitutes the addressees of the basic rights but rather as a general constitutional duty of everyone to honour and to consider the rights and freedoms of others.<sup>112</sup>

The crucial provision for the addressees is § 14 of the Constitution according to which the guarantee of rights and freedoms is the duty of the legislative, executive and judicial powers, and of local governments. In the following it shall be clarified which rights and freedoms are meant, who are the obliged subjects behind the formulation "the legislative, executive and judicial powers, and of local governments", and how the concept of guarantee should be interpreted.

### 1. Rights and Freedoms in the Sense of § 14 of the Constitution

Since § 14 of the Constitution refers only to rights and freedoms without any further precision, rights laid down in the Constitution itself must be meant. Therefore, rights and freedoms in the sense of § 14 of the Constitution are all basic rights contained in the second chapter of the Estonian Constitution. But rights and freedoms are also constitutional rights outside of the second chapter, e.g. §§ 57 first paragraph, 60 second, third and fourth sentences of the first paragraph, 60 second paragraph, 113, 124 second paragraph, 156 first, second and third sentences of the first paragraph, 156 second paragraph. All these provisions contain constitutional rights of individuals since subjective rights derive from them.



## 2. The Duty of the Legislative, Executive and Judicial Powers, and of Local Governments

According to § 14 of the Constitution the legislative, executive and judicial powers and local governments shall be obliged. Under the law, only a natural or legal person can be obliged. The powers are not subjects under the law but functions of the state. According to the principle of separation and balance of power the state power is divided among the organs mentioned in § 4 of the Constitution, i.e. among the Riigikogu (the parliament), the President of the Republic, the Government of the Republic and the courts. Therefore, as far as the legislative, executive and judicial powers are concerned, the legal person Republic of Estonia is meant.

### A. LEGISLATIVE POWER

Section 14 of the Constitution states the duty of the legislation to guarantee basic rights. Indeed, the function of the basic rights is in the first order to give protection to individuals against the legislative power. From a constitutional point of view, these positions are so important that their granting or non-granting may not be left for the simple parliamentary majority to decide.<sup>113</sup> The basic rights are therefore a limitation of the competence of the legislative power.<sup>114</sup>

The concept of the legislation includes in the first place laws in the formal sense, i.e. acts of parliament.<sup>115</sup> A problem will thereby be whether the so-called ratification acts in the sense of § 121 of the Constitution are covered. The question is relevant, since § 123 second paragraph of the Constitution states that if laws or other legislation of Estonia are in conflict with international treaties ratified by the Riigikogu, the provisions of the international treaty shall apply, i.e. the ratified treaties are directly applicable without any further transformation.<sup>116</sup> Thus, the Riigikogu may violate basic rights by ratifying an international treaty.

Now, on the one hand according to § 14 of the Constitution the legislation is bound by the basic rights and furthermore according to § 123 first paragraph of the Constitution it is forbidden to conclude international treaties which are in conflict with the Constitution. On the other hand there is the general principle of international law *pacta sunt servanda*.<sup>117</sup> Thus it is, for the Republic of Estonia, forbidden to conclude an international treaty that could violate the Constitution or particularly the basic rights, and in international relations, forbidden to break or violate an international treaty. If the legislator breaks the first rule, it would mean a dilemma that could not be solved in a satisfactory way considering both requirements. Therefore, such situation should be avoided by an intensive previous control. And if it should still happen since all cases cannot be foreseen, the treaty has to be interpreted in accordance with basic rights because §§ 14 and 123 first

paragraph of the Constitution are the limits of the competence of the state in international relations and therefore also limits of the general principle of *pacta sunt servanda*.

According to the Estonian Constitution the President of the Republic may issue decrees which have the force of law (§§ 78 No. 7, 109, 110 of the Constitution). It is questionable whether these acts are covered by the concept of legislation. Furthermore, it is questionable whether the regulations of the Government of the Republic, local governments and other autonomous bodies are covered by the concept of legislation.<sup>118</sup> However, since they belong either to the legislative or to the executive power and § 14 of the Constitution binds both, no definite answer is needed here. The same applies for the internal rules of the legal persons of public law. Finally, the customary law is bound by § 14 of the Constitution as well.<sup>119</sup>

### B. EXECUTIVE POWER

The executive power comprises in the first order the government and the administration.<sup>120</sup> Thus, the Government of the Republic and the administration are always bound by basic rights while exercising the public power. Moreover, legal persons of public law that fulfil functions of public power belong to the executive power as well.<sup>121</sup>

Apart from that there are two problems. Firstly, it is questionable whether the executive power includes even private persons who fulfil functions of public power, e.g. a notary public. Secondly, it has to be clarified whether the administrative authorities are included if they make business.

#### (1) Public Law Action of Persons of Private Law

If private persons fulfil functions of public power,<sup>122</sup> it is questionable whether they have to consider basic rights. If e.g. a notary public fulfils the function of legal certification which is a function of public power, is he then a part of the executive power in the sense of § 14 of the Constitution?

In § 14 of the Constitution the concept of executive power instead of the concept of administrative bodies has been used. The wording is therefore neutral. However, the state has the monopoly of public power and should actually fulfil all the functions of public power by itself. Since according to § 3 first sentence of the first paragraph of the Constitution the powers of state shall be exercised solely pursuant to the Constitution and laws which are in conformity therewith, the meaning of § 14 of the Constitution can only be that all public power shall be bound by basic rights. Therefore, it cannot make a difference who exercises it. If the state transfers a part of the public power to a person of private law, that person cannot be exempted from its constitutional obligation.<sup>123</sup> And private persons cannot have more power than transferred to them by the state. Consequently, persons of private law, like e.g. a notary public, belong to the executive power in the sense of § 14 of the Constitution.

As a consequence of this, the concept of the executive power in § 14 of the Constitution reaches even beyond the legal person Republic of Estonia and includes other legal subjects as well.

### **(2) Private Law Action of Legal Persons of Public Law**

If the state, other legal persons of public law or even private persons exercise public power, they are included in executive power in the sense of § 14 of the Constitution. But what about the legal persons of public law while acting on the basis of private law? In German discussion three cases have been identified when the state or other legal persons of public law may act according to private law. The first type includes the fulfilment of functions of public power in the form of private law, like e.g. a waterworks as a public limited company.<sup>124</sup> The second case concerns the so-called enterprise of public administration, the only purpose of which is to earn money.<sup>125</sup> To this category belongs as a rule e.g. the state as shareholder. The third category contains the so-called assisting purchase of public administration, which covers the purchase of the material goods necessary for the administrative action, like e.g. office machines, cars, or real estate.<sup>126</sup>

Fulfilment of the functions of public power in the forms of private law cannot free the administration from being bound to the basic rights. Otherwise, for the state, a back door would be opened to escape into private law to bypass the duty of following the basic rights.<sup>127</sup> Thus, the fulfilment of functions of public power in the forms of private law belongs to the executive power in the sense of § 14 of the Constitution.<sup>128</sup>

Whether the state will be bound in the second and the third case, is questionable. The German *Bundesgerichtshof für Zivilsachen* has argued that the state is acting in the field of private law as a purchaser of office machines or acts as an entrepreneur on the market, it can refer to the private autonomy like any other participant of the market and is therefore not bound by basic rights.<sup>129</sup> However, according to the wording of § 14 of the Constitution all three state powers without any exceptions are bound by basic rights.

The Constitution accepts only constituted exercise of public power. Nowhere does the constituted state have the right to arbitrariness like a private person. The basic rights shall therefore bind the state in all its forms and activities.<sup>130</sup> Thus, even the assisting purchase and commercial enterprise of the state belong to the executive power in the sense of § 14 of the Constitution. Particularly the principle of equality (§ 12 first paragraph of the Constitution) may become relevant in practice.

### **(3) Conclusions**

The executive power in the sense of § 14 of the Constitution comprises first the government, the state administration and all legal persons of public law, no matter whether they act in the forms of public or private law.

Furthermore, all private persons who fulfil functions of public power are covered.

### **C. JUDICIAL POWER**

According to § 14 of the Constitution the judicial power has to guarantee rights and freedoms. The judicial power shall first protect the basic rights of the individuals against both the legislative and the judicial powers. Courts shall according to §§ 15 second paragraph, 152 of the Constitution not even apply any act of parliament that is in conflict with the Constitution. Furthermore, according to §§ 14, 15 second paragraph of the Constitution the judicial power is bound to the basic rights. This boundness consists of two aspects: it exists for both the court proceedings and the decision as the material result.<sup>131</sup> The judicial power is therefore obliged to guarantee the basic rights on the one hand in court proceedings and on the other hand to respect them in courts' decisions through following them and applying the statutory law in accordance therewith. Hereby the procedural basic rights of the Estonian Constitution, namely §§ 21, 22, 23 and 24, are of particular importance. They are special guarantees addressed directly to the judicial power. Under the material aspect all three — civil, criminal, and administrative justice — are bound.<sup>132</sup>

### **D. LOCAL GOVERNMENTS**

Section 14 of the Constitution mentions separately the local governments. Since the local governments are legal persons of public law and the concept of executive power includes all legal persons of public law, special reference to local governments would be superfluous. The reason, why they are pointed out lays in the autonomy of local government. According to § 154 first paragraph of the Constitution all local issues shall be resolved and managed by local governments. Thus, § 154 first paragraph of the Constitution declares the local governments autonomous and grants them an original Constitution-based competence to solve local issues independently. Although this autonomy is not unrestricted, the definite classification of the local governments as a part of executive power may cause difficulties.<sup>133</sup>

Unfortunately, the emphasis of local governments is still puzzling rather than clarifying. While § 14 of the Constitution points out local governments as autonomous units, it does not mention universities and research institutions. According to § 38 second paragraph of the Constitution these institutions are autonomous as well. Does § 14 of the Constitution mean that e.g. public law universities are not bound to basic rights? If one would understand the emphasis of local governments as an exhaustive list of autonomous units who are bound to basic rights, as an *argumentum e contrario* it could be easily followed that other autonomous units are not bound. Since such an interpretation cannot be in accordance with § 3 first sentence of the first paragraph of the Constitution that forbids the exercising of the powers of state beyond the

competency laid down in the Constitution, such an interpretation would be wrong. Therefore, the separate mentioning of local governments in § 14 of the Constitution should be understood as a non-exhaustive and exceptional clause.

#### **E. THE LEGAL CHANCELLOR AND THE STATE AUDIT OFFICE**

Not mentioned in § 14 of the Constitution are the Legal Chancellor (§§ 139ff. of the Constitution) and the State Audit Office (§§ 132ff. of the Constitution). Furthermore, they are not easy to classify as belonging to one of the three functions of power.<sup>134</sup> Although the Legal Chancellor and the State Audit Office are not included in the text of § 14 of the Constitution, they are organs of the public power and thus addressees of basic rights as well.<sup>135</sup>

#### **F. CONCLUSIONS**

According to § 3 first sentence of the first paragraph of the Constitution the powers of state shall be exercised solely pursuant to the Constitution and laws which are in conformity therewith. Section 14 of the Constitution states the first provision more precisely and stresses the boundness of state powers to the basic rights. Therefore, all state powers, including the Legal Chancellor and the State Audit Office are bound to the basic rights according to § 14 of the Constitution.

### **3. Guarantee**

The institutions listed in § 14 of the Constitution have to guarantee rights and freedoms. What does it mean to guarantee? Are they not allowed to violate the rights and freedoms of the citizens or are they even obliged to protect the holders of rights and freedoms against infringements from third parties? The correct answer can only be that they have to fulfil both functions. Only if they abstain from violating the basic rights of individuals and protect them against infringements from third parties (or powers) can they guarantee the basic rights.

Still it is not clear in what way institutions have to guarantee basic rights. Basic rights norms constitute subjective rights. If there is a subjective right it must hold against a second party, since subjective rights are positions and relations between two parties. A holder of the basic rights is the first party, he is the entitled person. But who is the second party, the obliged person? Section 14 of the Constitution answers this question. According to § 14 of the Constitution legislative, executive and judicial powers, i.e. the Republic of Estonia and all its sub-units with own legal capacity are obliged. But even the persons of private law fulfilling functions of public power are obliged as well. For example a public limited tram company is bound by the general principle of equality (§ 12 first paragraph of the Constitution).<sup>136</sup> The company performs the function of guaranteeing public transport to town-dwellers and is therefore not entitled to e.g. take without any reason dif-

ferent prices from the clients because it would be a violation of the general principle of equality. The concept "guarantee" therefore addresses the second party in the subjective basic rights relations. Thus, § 14 of the Constitution defines the addressees of the basic rights.

### **4. Conclusions**

If the law is valid it shall be followed. If the constitution is valid then all institutions exercising public power shall follow its regulations. Although these statements are self-evident, § 14 of the Constitution is not only declarative. Section 14 of the Constitution defines the addressees of the basic rights and emphasises the obliged parties of subjective basic rights.

#### **C. PRIVATE PERSONS AS ADDRESSEES OF BASIC RIGHTS, § 19 PARAGRAPH 2 OF THE CONSTITUTION?**

Private persons are not the obliged subjects of basic rights. Section 14 of the Constitution determines the addressees of basic rights while obliging all three powers. The relations between private persons are relations of free and equal individuals. These relations are regulated by the private law which is determined by the private autonomy.<sup>137</sup>

However, according to § 19 second paragraph of the Constitution everyone shall honour and consider the rights and freedoms of others in exercising his rights and freedoms. Obviously basic rights have some influence even on the relations between individuals. This is the problem that has been named *Drittwirkung* in Germany.<sup>138</sup> What is, then, hidden behind the German expression "*Drittwirkung*"? Translating it literally into third-party application no clarity is reached. Therefore, another approach is needed.

The crucial questions are whether basic rights influence the relations between the individuals and if, then how do they influence these relations? These two problems have been called the problem of construction and the problem of collision.<sup>139</sup>

### **1. Construction of the Relations of *Drittwirkung***

In the following the problems will be analysed with the help of a famous case of the German Federal Constitutional Court. According to that case a Journal B published an article with an interview with a Princess A that described very personal details of private life of the princess. This interview never took place. A seeks for damages from B because of the violation of her right to privacy. But Journal B holds that its freedom of press would be violated then. How should the civil court decide?<sup>140</sup>

#### **A. IMMEDIATE THIRD-PARTY APPLICATION OF BASIC RIGHTS**

Logically it is possible to construct a legal relationship between two private persons on the basis of a basic rights

norm. In this case the state is not involved, there is only one legal relationship between two persons.

We can formulate the right as from the perspective of A as follows:

[1] A has a *prima facie* right against B to pay damages (conduct).

B's right would be formulated as follows:

[2] B has a *prima facie* right against A to omission of the encroachment of its freedom of press.

The example illustrates the theory of immediate third-party application of basic rights which has been established by Hans Carl Nipperdey. The main request of the theory of immediate third-party application is that basic rights provisions create immediately subjective rights of individuals.<sup>142</sup> Thus, applying the immediate *Drittwirkung*, both parties of a legal relation, the holder and the addressee, can be private persons. As in the present case, there will be two contrary subjective rights.

Such a construction has the fascination of its simplicity. However, it has been criticised by several authors. According to the first argument the immediate *Drittwirkung* could be dangerous for private autonomy.<sup>143</sup> If there is a confrontation between two private persons then private law applies. But when rights deriving from the Constitution become involved, then there would be in every private law relation at least two confronting basic rights. The means to solve the cases of basic rights is the principle of proportionality. Consequently, the standard of private autonomy will be replaced by the standard of principle of proportionality.

If one starts applying basic rights immediately in the relationships among individuals one has to generalise this idea and apply all of these rights in horizontal relations. But it is not possible. To carry it to extremes, one will face the situation where everybody has the right to be equally treated by everybody (§ 12 first paragraph of the Constitution). If somebody gets married or makes his last will and testament, he has to consider the rights of everybody. It is obvious that it would not only be dangerous for the private autonomy and the market economy but also for privacy. Furthermore, there are rights in the Constitution that in fact cannot be fulfilled by private persons. E.g. no private person is able to fulfil the requirements of the right deriving from § 44 third paragraph of the Constitution according to which Estonian citizens have the right to access information about themselves held in state agencies and local governments and in state and local government archives. No private person has, as a private person, access to these archives. Then, there are rights that in fact could be fulfilled by private persons, e.g. § 37 first paragraph of the Constitution (right to education), but immediately the problem arises who should be obliged to fulfil this duty. In consequential application everybody is (*prima facie*) obliged to grant education to everybody.

Additionally, the argument of monopoly of force of the State can be presented. Because the State is practically the only one that may legally use violence, the basic rights shall protect individuals against the superior strength of the State. There is no such relationship of superiority between two individuals.

Finally, it has been argued that in cases like employer-employee relations or lessor-tenant relations a comparable situation arises on the basis of social power.<sup>144</sup> At the same time no tangible criteria are presented on the content of social power and why it should be relevant in this context. Therefore, this argument seems to have a political background. Declaring private persons to be the addressees of basic rights would in consequential application lead to a State without liberal market economy. On the other hand, the contrary point of view does not exclude an extensive social security system but only points out the importance of the individual freedom as the cornerstone of the functioning of a democratic *Rechtsstaat*.<sup>145</sup>

## B. MEDIATE THIRD-PARTY APPLICATION OF BASIC RIGHTS

Solving the problem according to the theory of immediate *Drittwirkung* is one possibility to construct the third-party application of basic rights. The other is the mediate third-party application of basic rights. The mediate third-party application was first pointed out by the German constitutional lawyer Günter Dürig.<sup>146</sup>

First of all, there is always an obligation of the legislator to enact laws that would protect private persons against others, e.g. criminal law or tort law.<sup>147</sup> This obligation exists regardless of the fact whether other private persons in fact commit offences or not, since the legislation is one of the basic functions of the state.

This relationship can be formulated:

[3] X has a definite right against S to enact protecting laws.<sup>148</sup>

The State or the legislator in the concrete case has a wide range of possible measures or discretion how to form this protection. In most cases of *Drittwirkung* the state has already fulfilled this duty and enacted the necessary protecting laws but there are also cases where exactly this is the main problem.<sup>149</sup>

To start with the relationships between the participants of the case, we can distinguish among three legal relations following the three participants.<sup>150</sup>

### (1) The Horizontal Relationship between Two Private Persons

First of all, there must be a horizontal relationship between two individuals. In the case presented above we can formulate this relationship as follows:

[4] A has a *prima facie* right against B on damages.

When the State has fulfilled its duty to enact protecting laws, this relationship arises from the norms of the particular private law statute. It then has a form of a subjective



right of private law.

## (2) The Vertical Relationship between the Claiming Private Person and the State

If the journal B publishes fabricated intimate details about the private life of A, A's right to privacy needs to be protected. The means for protection is damages. Basic rights contain norms that do not only require the omission of every encroachment but also protection, i.e. conduct. Therefore, the vertical relationship between the claiming party and the State can be abstractly formulated as follows:

[5] A has a *prima facie* right against S to protection. The idea to construct *Drittwirkung* with the help of the state's obligation to protection derives from German constitutional lawyer Günter Dürig.<sup>151</sup> Today, there are several authors who follow the construction proposed by him<sup>152</sup>. Furthermore, it has been recently clearly pointed out that rights to protection are subjective rights of individuals.<sup>153</sup>

## (3) The Vertical Relationship between the Other Private Person and the State

The problem is that not only the claiming party has rights. The representatives of Journal B can argue that the payment of damages to A would violate their freedom of expression or press.

To formulate the right of the other private person abstractly:

[6] B has a *prima facie* right against S to omission of encroachment of his right.

Rights to omission of state encroachments are the classical function of basic rights.<sup>154</sup>

## (4) Conclusions

To sum up, we have three kinds of relations among three parties. The relationship between the private persons usually consists of a private law claim. One of the private persons has a right to protection against the state and the other a right to keep away every encroachment of their freedom sphere. Both of the rights against the state lead, taken separately, to contradicting results. Therefore neither of them can be definite but only *prima facie*.

## 2. Construction of Collision of Rights by *Drittwirkung*

Taking A's right to privacy, the article of the journal was forbidden; taking the freedom of expression of the journal, it was allowed without any restrictions and B has not to pay any damages. This implicates already that we cannot solve such a case correctly without taking the rights of both private parties into account. Both norms behind these rights are to be considered as *prima facie* norms, which do not require their definite realisation but only an optimal realisation. This optimal realisation can only be reached applying the principle of proportionality<sup>155</sup>. According to this, the civil court which, pursuant to § 14 of the Constitution, is bound by the basic rights in the first case has to weigh A's right of privacy against B's right of

expression and decide about the success of the claim and the sum of damages.

Since the structural solution of the problem of collision will still be the principle of proportionality, no matter if one applies the theory of immediate or mediate *Drittwirkung*, it is questionable whether these theories lead to different results at all. According to Robert Alexy all constructions lead to the same result.<sup>156</sup>

## 3. Conclusions

As a conclusion it is preferable to start out from the mediate third-party application of basic rights as defined above. Although, there should be no difference in the result, the theory of immediate third party application is exposed to theoretical problems as shown above.

Thus, according to § 19 second paragraph of the Constitution everyone shall honour and consider the rights and freedoms of others in exercising his rights and freedoms.<sup>157</sup> But still private persons are not addressees of the basic rights, since their rights and duties are influenced only by the third-party application of basic rights that is mediated by the state.<sup>158</sup>

## IV. CONCLUSION

Holders of basic rights are first of all natural persons, i.e. individuals. These rights can be divided into rights of each and everybody and citizens' rights. Besides, there is a particular Estonians' right in § 36 third paragraph of the Constitution.

The holdership of basic rights begins with birth and ends with death. Basic rights are waiveable and they entitle even minors.

Furthermore, legal persons are holders of basic rights. But it applies only to the extent as they have rights of private persons behind them.

Addressees of basic rights are the State, other legal persons of public law, and even private persons who fulfil functions of public power. Other private persons are not addressees of basic rights although basic rights influence even the relations between individuals.

## Bibliography:

- Robert Alexy, 1991: *Theorie der juristischen Argumentation* (1978), 2nd edition, Frankfurt am Main: Suhrkamp
- 1994: *Theorie der Grundrechte* (1985), 2nd edition, Frankfurt am Main.: Suhrkamp
- 1997: *Die Grundrechte der estnischen Verfassung*, (manuscript), Kiel
- Peter Badura, 1986: *Staatsrecht*, München: C.H. Beck
- Karl A. Bettermann, 1969: *Juristische Personen des öffentlichen Rechts als Grundrechtsträger*, *Neue Juristische Wochenschrift*, 1321-1328
- Albert Bleckmann, 1988: *Probleme des Grundrechtsverzichts*, *Juristenzeitung*, 57-62



- Ernst-Wolfgang Böckenförde, 1992: Freiheitssicherung gegenüber gesellschaftlicher Macht. Aufriß eines Problems (1975), in: himself, Staat, Verfassung, Demokratie (1991), 2nd edition, Frankfurt am Main: Suhrkamp, 264-285
- Claus-Wilhelm Canaris, 1984: Grundrechte und Privatrecht, Archiv für die zivilistische Praxis, volume 184, 201-246
- Ralf Dreier, 1973: Zur Grundrechtssubjektivität juristischer Personen des öffentlichen Rechts, in: Norbert Achterberg (ed.), Öffentliches Recht und Politik, Festschrift für Hans Ulrich Scupin, Berlin: Duncker & Humblot, 81-106
- 1981a: Einleitung, in: himself, Recht — Moral — Ideologie, Frankfurt am Main: Suhrkamp, 8-16
  - 1981b: Zum Selbstverständnis der Jurisprudenz als Wissenschaft (1971), in: himself, Recht — Moral — Ideologie, Frankfurt am Main: Suhrkamp, 48-69
  - 1981c: Zur Theoriebildung in der Jurisprudenz (1978), himself, Recht — Moral — Ideologie, Frankfurt am Main: Suhrkamp, 70-105
- Günter Dürig, 1958a: Art. 1 Abs. I, in: Theodor Maunz and himself, Grundgesetz, 2nd volume, München: C.H. Beck, 1991
- 1958b: Art. 1 Abs. III, in: Theodor Maunz and himself, Grundgesetz, 2nd volume, München: C.H. Beck, 1991
  - 1958c: Art. 2 Abs. II, in: Theodor Maunz and himself, Grundgesetz, 2nd volume, München: C.H. Beck, 1991
  - 1959/1977: Art. 19 Abs. III, in: Theodor Maunz and himself, Grundgesetz, 2nd volume, München: C.H. Beck, 1991
- Dirk Ehlers, 1995: Verwaltung und Verwaltungsrecht im demokratischen und sozialen Rechtsstaat, in: Hans-Uwe Erichsen (ed.), 10th edition, Berlin and New York: Walter de Gruyter, 1-110
- Erichsen, Hans-Uwe 1997: Grundrechtliche Schutzpflichten in der Rechtsprechung des Bundesverfassungsgerichts, Jura, 85-89
- Madis Ernits, 1996: Põhiõiguste mõiste ja tähtsuse õigussüsteemis (Concept and Importance of Basic Rights in a Legal System), Juridica, 463-471
- Otto Gierke, 1902: Das Wesen der menschlichen Verbände, Berlin: Buchdruckerei von Gustav Schade (Otto Francke)
- Konrad Hesse, 1995: Grundzüge des Verfassungsrechts der Bundesrepublik Deutschland, 20th edition, Heidelberg: C.F. Müller Juristischer Verlag
- Mikael Hidén, 1971: Perusoikeudet Hallitusmuodon II luvussa. Yleisiä oppeja (The Fundamental Rights in the Constitution Act of Finland. General Considerations), Oikeustiede. Jurisprudencia I, 3-117
- 1996: Perusoikeuksien yleiset opit — muuttuvaa ja muuttumatonta (General Doctrines of Basic Rights — Changing and Unchanging), Lakimies, 753-769
- Mikael Hidén, and Ilkka Saraviita, 1994: Valtiosääntöoikeuden pääpiirteet (General Doctrines of Finnish Constitutional Law) (1977), 6th edition, Helsinki: Lakimiesliiton Kustannus
- Wolfram Höfling, 1991: Vertragsfreiheit, Heidelberg: C.F. Müller Juristischer Verlag
- 1995: Grundrechtsbindung der Staatsgewalt, Juristische Arbeitsblätter, 431-437
  - 1996: Art. 1, in: Michael Sachs (ed.), Grundgesetz, München: C.H. Beck
- Norbert Hoerster, 1989: Ein Lebensrecht für die menschliche Leibesfrucht?, Juristische Schulung, 172-178 and 1031-1032
- 1991: Abtreibung im säkularen Staat, Frankfurt am Main: Suhrkamp
- Karl-Heinz Hohm, 1986: Grundrechtsträgerschaft und "Grundrechtsmündigkeit" Minderjähriger am Beispiel öffentlicher Heimerziehung, Neue Juristische Wochenschrift, 3107-3115
- Jörn Ipsen, 1997: Staatsrecht II (Grundrechte), Neuwied, Kriftel and Berlin: Luchterhand
- Josef Isensee, 1992a: Das Grundrecht als Abwehrrecht und als staatliche Schutzpflicht (§ 111), in: himself and Paul Kirchhof (eds.), Handbuch des Staatsrechts der Bundesrepublik Deutschland, volume 5, Heidelberg: C.F. Müller Juristischer Verlag, 143-241
- 1992b: Anwendung der Grundrechte auf juristische Personen (§ 118), in: himself and Paul Kirchhof (eds.), Handbuch des Staatsrechts der Bundesrepublik Deutschland, volume 5, Heidelberg: C.F. Müller Juristischer Verlag, 563-615
- Hans D. Jarass, 1995a: Bausteine einer umfassenden Grundrechtsdogmatik, Archiv des öffentlichen Rechts, volume 120, 345-381
- 1995b: Vorbemerkungen vor Art. 1: Allgemeine Grundrechtslehren, in: himself and Bodo Pieroth, Grundgesetz für die Bundesrepublik Deutschland, 3rd edition, München: C.H. Beck
  - 1995c: Art. 1, in: himself and Bodo Pieroth, Grundgesetz für die Bundesrepublik Deutschland, 3rd edition, München: C.H. Beck
  - 1995d: Art. 2, in: himself and Bodo Pieroth, Grundgesetz für die Bundesrepublik Deutschland, 3rd edition, München: C.H. Beck
  - 1995e: Art. 19, in: himself and Bodo Pieroth, Grundgesetz für die Bundesrepublik Deutschland, 3rd edition, München: C.H. Beck
  - 1995f: Art. 25, in: himself and Bodo Pieroth, Grundgesetz für die Bundesrepublik Deutschland, 3rd edition, München: C.H. Beck
- Hans Kelsen, 1960: Reine Rechtslehre, 2nd edition, Wien: Verlag Franz Deuticke
- Eckart Klein, 1989: Grundrechtliche Schutzpflicht des Staates, Neue Juristische Wochenschrift, 1633-1640
- Hans H. Klein, 1994: Die grundrechtliche Schutzpflicht, Deutsches Verwaltungsblatt, 489-497
- Walter Krebs, 1992: Art. 19, in: Ingo von Münch and Philip Kunig (eds.), Grundgesetz-Kommentar, volume 1, 4th edition, München: C.H. Beck
- Kröger, Klaus 1981: Juristische Personen des öffentlichen Rechts als Grundrechtsträger, Juristische Schulung, 26-29
- Hartmut Krüger, 1996: Art. 19, in: Michael Sachs (ed.), Grundgesetz, München: C.H. Beck
- Philip Kunig, 1991: Grundrechtlicher Schutz des Lebens, Jura, 415-423
- 1992a: Art. 1, in: Ingo von Münch and himself (eds.), Grundgesetz-Kommentar, volume 1, 4th edition, München: C.H. Beck
  - 1992b: Art. 2, in: Ingo von Münch and himself (eds.), Grundgesetz-Kommentar, volume 1, 4th edition, München: C.H. Beck
- Eduard Laaman, 1937: Kodaniku põhiõigused ja kohused (Basic Rights and Duties of a Citizen), in: Põhiseadus ja Rahvuskogu (The Constitution and the National Assembly), Tallinn, 342-358
- Dieter Lorenz, 1989: Recht auf Leben und körperliche Unversehrtheit (§ 128), in: Josef Isensee and Paul Kirchhof (eds.), Handbuch des Staatsrechts der Bundesrepublik Deutschland, volume 6, Heidelberg: C.F. Müller Juristischer Verlag, 3-39
- Rait Maruste, 1994: Põhiseaduslikkuse kohtulik järelevalve (The Judicial Review of Constitutionality), Juridica, 242-245
- 1996: Põhiseaduse tõlgendamise meetodid (Methods of

Constitutional Interpretation), *Juridica*, 75-81

- 1997: Põhiseadus ja selle järelvalve (The Estonian Constitution and Its Review), Tallinn: Õigusteabe AS Juura

Theodor Maunz, 1960-1991: Art. 38, in: himself and Günter Dürig, *Grundgesetz*, 3rd volume, München: C.H. Beck, 1991

Theodor Maunz, and Zippelius, Reinhold 1994: *Deutsches Staatsrecht*, 29th edition, München: C.H. Beck

Hartmut Maurer, 1995: *Allgemeines Verwaltungsrecht*, 10th edition, München: C.H. Beck

Kalle Merusk, 1995: 1. osa (1st Part), in: himself and Indrek Koolmeister, *Haldusõigus (Administrative Law)*, Tallinn: Õigusteabe AS Juura, 9-127

- 1996: Avalik-õiguslik juriidiline isik avaliku halduse organisatsioon (Legal Person of Public Law in the Organisation of Public Administration), *Juridica*, 174-178

- 1997: Administratsiooni diskretsioon ja selle kohtulik kontroll (The Administrative Discretion and Its Judicial Review), Tallinn: Õigusteabe AS Juura

Ingo von Münch, on 1992: Vorbemerkungen zu den Art. 1-19, in: himself and Philip Kunig (eds.), *Grundgesetz-Kommentar*, volume 1, 4th edition, München: C.H. Beck

Dietrich Murswiek, 1996: Art. 2, in: Michael Sachs (ed.), *Grundgesetz*, München: C.H. Beck

Albert von Mutius, 1983: *Grundrechtsfähigkeit*, Jura, 30-42

- 1987: *Grundrechtsmündigkeit*, Jura, 272-275

Raul Narits, 1998: Põhiõigused ja põhivabadused (Basic Rights and Basic Freedoms), in: Kalle Merusk and himself, *Eesti konstitutsiooniõigusest (About the Estonian Constitutional Law)*, Tallinn: Õigusteabe AS Juura

Hans C. Nipperdey, 1962: *Grundrechte und Privatrecht*, in: himself (ed.), *Festschrift für Erich Molitor*, München and Berlin: C.H. Beck, 17-33

Bodo Pieroth, 1995: Art. 38, in: Hans D. Jarass and himself, *Grundgesetz für die Bundesrepublik Deutschland*, 3rd edition, München: C.H. Beck

Bodo Pieroth, and Bernhard Schlink, 1996: *Grundrechte. Staatsrecht II*, 12th edition, Heidelberg: C.F. Müller Verlag

Fritz Rittner, 1987: *Juristische Person*, in: Görres-Gesellschaft (ed.), *Staatslexikon*, volume 3, 7th edition, Freiburg/Basel/Wien: Herder

Gerhard Robbers, 1985: *Der Grundrechtsverzicht*, *Juristische Schulung*, 925-931

Wolfgang Rüfner, 1992a: *Grundrechtsträger (§ 116)*, in: Josef Isensee and Paul Kirchhof (eds.), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, volume 5, Heidelberg: C.F. Müller Juristischer Verlag, 485-524

- 1992b: *Grundrechtsadressaten (§ 117)*, in: Josef Isensee and Paul Kirchhof (eds.), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, volume 5, Heidelberg: C.F. Müller Juristischer Verlag, 525-562

Michael Sachs, 1985: "Volenti non fit iniuria", *Verwaltungsarchiv*, volume 76, 398-426

- 1996: *Vorbemerkungen zu Abschnitt I*, in: himself (ed.), *Grundgesetz*, München: C.H. Beck

Martin Scheinin, 1996: *General Introduction*, in: himself (ed.), *International Human Rights Norms in the Nordic and Baltic Countries*, The Hague, London and Boston: Martinus Nijhoff Publishers (Kluwer Law International), 11-26

Carl Schmitt, 1985a: *Freiheitsrechte und institutionelle Garantien der Reichsverfassung (1931)*, in: himself, *Verfassungsrechtliche Aufsätze aus den Jahren 1924-1954 (1958)*, 3rd edition, Berlin: Duncker & Humblot, 140-173

- 1985b: *Grundrechte und Grundpflichten (1932)*, in: himself, *Verfassungsrechtliche Aufsätze aus den Jahren 1924-1954 (1958)*, 3rd edition, Berlin: Duncker & Humblot, 181-231

Friedrich E. Schnapp, 1984: *Grundrechtsträger*, in: *Ergänzbare Lexikon des Rechts, Gruppe 5: Staats- und Verfassungsrecht*, Neuwied and Darmstadt: Luchterhand, 5/360

Heinrich Schneider, 1995: Õiguskantsler: tema koht riigigorganite süsteemis (The Legal Chancellor: His Position in the System of the State Organs), *Eesti Akadeemilise Õigusteaduse Seltsi Aastaraamat (Yearbook of the Estonian Academic Society for Jurisprudence)* 1991-1992, Tallinn 1995, 19-25.

Christian Starck, 1981: *Die Grundrechte des Grundgesetzes, Juristische Schulung*, 237-246

Klaus Stern, 1988: *Das Staatsrecht der Bundesrepublik Deutschland*, 3rd volume, 1st halfvolume, München: C.H. Beck

- 1992: *Idee und Elemente eines Systems der Grundrechte (§ 109)*, in: Josef Isensee and Paul Kirchhof (eds.), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, volume 5, Heidelberg: C.F. Müller Juristischer Verlag, 45-100

- 1994: *Das Staatsrecht der Bundesrepublik Deutschland*, 3rd volume, 2nd halfvolume, München: C.H. Beck

Bernhard Windscheid, and Theodor Kipp, 1906: *Lehrbuch des Pandektenrechts*, 1st volume, 9th edition, Frankfurt am Main: Literarische Anstalt Rütten und Loening

## Notes:

<sup>1</sup> In the English translation of the Estonian Constitution (Estonian Legislation in Translation, No 1, 1996), the concept "fundamental rights" is used instead of the concept "basic rights". The author uses the term "basic rights" in order to distinguish conceptually between the rights of the põhiseadus (literally: basic law), i.e. the Constitution of the Republic of Estonia from 28 June 1992, and the fundamental freedoms of the Convention for the Protection of Human Rights and Fundamental Freedoms from 4 November 1950.

<sup>2</sup> About the concept of subjective right, q.v.: Alexy 1994, p. 159 ff. All basic rights of the Estonian Constitution are subjective rights. (Detailed argumentation by: Ernits 1996, p. 464 ff.; disagreeing: Merusk 1995, p. 54.) E.g. in Germany there is a general consensus, that basic rights of the Grundgesetz (literally: basic law), i.e. the Constitution for the German Federative Republic from 23 May 1949, are subjective rights. (Jarass 1995c, mn. 14; Stern 1988, pp. 530 ff., 1201; Stern 1992, mn. 38 ff. [The abbreviation "mn." stands here and furthermore for margin number.]) Klaus Stern speaks even from self-evidence of the qualification of the basic rights as subjective rights today. (Stern 1992, mn. 40.) The German Federal Constitutional Court adds that in the case of a doubt, a subjective right shall be recognised. (BVerfGE [Decisions of German Federal Constitutional Court] vol. 6, pp. 386 [387].)

<sup>3</sup> Alexy 1991, p. 308 ff.; himself 1994, p. 23 ff.; Dreier 1981a, p. 10 ff.; himself 1981b, p. 51 ff.; himself 1981c, p. 88 ff.

<sup>4</sup> The equivalent of Rechtsstaat in English could be "rule of law" or to be more exact "state of law" principle.

<sup>5</sup> Convention for the Protection of Human Rights and Fundamental Freedoms from 4 November 1950.

<sup>6</sup> Decision of the Constitutional Review Chamber of the Estonian Supreme Court from 10 May 1996, RT (Riigi Teataja = the State Gazette — the official publication for the legal acts of Estonia) I 1996, No 35, Art. 737.

<sup>7</sup> From the presumption of the right to Estonian citizenship by birth that one of the parents shall be an Estonian citizen does not follow that there is no right to Estonian citizenship by birth if both parents are Estonian citizens. If both par-

ents are Estonian citizens then one of the parents is an Estonian citizen (*argumentum a fortiori*). Thus, a child whose parents are Estonian citizens has the right to Estonian citizenship by birth.

<sup>8</sup> Interpreting § 8 first paragraph of the Constitution narrowly, the relevant parent shall be a natural parent in the legal sense. Adoptive parents would not count. It would be sufficient if e.g. the father of an illegitimate child is an Estonian citizen. Choosing the wide interpretation, natural and adoptive parents shall be treated equally.

<sup>9</sup> Põhiseadus ja Põhiseaduse Assamblee. (The Constitution and the Constitutional Assembly. [Materials of the Constitutional Assembly.]) Tallinn 1997, p. 135; cf. also pp. 176, 179, 415 ff., 421 ff., 456 ff., 580, 812 ff., 843.

<sup>10</sup> Interpreted in this way, § 8 first paragraph of the Constitution comprises the principle of *ius sanguinis* as the opposite to *ius soli* and declares it for the constitutional principle of the Constitution.

<sup>11</sup> About immediate constitutional limits in the sense as used here, see: Alexy 1994, p. 258 ff.

<sup>12</sup> Q.v. the theoretical reasoning of this distinction: Alexy 1994, pp. 250 ff.

<sup>13</sup> Taking the distinction between a right and its limits seriously, the criterion of citizenship belongs to the limits of a right (Alexy 1994, p. 260.). That means that theoretically it is possible to construct the citizens' rights as rights of each and everyone restricting them through the exclusion of the non-citizens from the protection of such rights later.

<sup>14</sup> Literally: "state assembly". Riigikogu is the parliament of the Republic of Estonia.

<sup>15</sup> Article 38 first sentence of the first paragraph of the German *Grundgesetz* has a similar structure constituting the electoral principles for the German *Bundestag*. These elections shall be general, direct, free, equal, and secret. This provision constitutes at the same time a basic right of individuals, since it can be according to Article 93 first paragraph No 4a of the *Grundgesetz* protected by the individual constitutional complaint. (Cf.: Pieroth 1995, mn. 1; himself/Schlink 1996, mn. 1118 ff.)

<sup>16</sup> If it is not possible to give any adequate definition of the concept of Estonian, there would be *de lege ferenda* two possibilities to solve this problem: either to abolish § 36 third paragraph of the Constitution or to define the concept of Estonian in the Constitution as e.g. the German *Grundgesetz* contains in Article 116 first paragraph a definition of the term "*Deutscher*" (German).

<sup>17</sup> About German discussion, q.v.: Dürig 1959/1977, mn. 13; Jarass 1995e, mn. 8.

<sup>18</sup> Dürig 1959/1977, mn. 16.

<sup>19</sup> In German: Grundrechtsmündigkeit. Cf.: to the German discussion: Dürig 1959/1977, mn. 16 ff.; v. Münch 1992, mn. 11 ff.; v. Mutius 1987, p. 272 ff.; Pieroth/Schlink 1996, mn. 134 ff.

<sup>20</sup> Q.v. above II A 1 b (1) (b).

<sup>21</sup> Decision of the Constitutional Review Chamber of the Estonian Supreme Court from 10 May 1996, RT I 1996, No 35, Art. 737.

<sup>22</sup> Decision of the Constitutional Review Chamber of the Estonian Supreme Court from 6 October 1997, RT I 1997, No 74, Art. 1268.

<sup>23</sup> Since according to § 27 third paragraph of the Constitution parents have the duty to raise and care for their children as well, the holders of this right are children too. This part of the right shall not be the object of the scrutiny here.

<sup>24</sup> BVerfGE (fn. 2) vol. 24, pp. 119 (150).

<sup>25</sup> BVerfGE (fn. 2) vol.19, pp. 323 (329).

<sup>26</sup> BVerfGE (fn. 2) vol. 79, pp. 51 (60).

<sup>27</sup> BVerfGE (fn. 2) vol. 10, pp. 302 (328).

<sup>28</sup> Article 6 first sentence of the second paragraph of the German *Grundgesetz*: "Care and upbringing of children are the natural rights of the parents and primarily their duty."

<sup>29</sup> BVerfGE (fn. 2) vol. 56, pp. 363 (383 ff.); vol. 79, pp. 203 (210); vol. 84, pp. 168 (179).

<sup>30</sup> About the problem of *Drittwirkung*, q.v. below: III C.

<sup>31</sup> In German discussion the predominant opinion is that there shall be no definite age limit for the exercise of basic rights. Cf.: Maunz/Zippelius 1994, p. 143; v. Münch 1992, mn. 12 ff.; v. Mutius 1987, p. 274; Pieroth/Schlink 1996, mn. 135; Stern 1988, p. 1065.

<sup>32</sup> Alexy 1994, p. 122 ff.

<sup>33</sup> This has been recognised in an *obiter dictum* of a decision of the Estonian Riigikohus. (Decision of the Constitutional Review Chamber of the Estonian Supreme Court from 6 October 1997, RT I 1997, No 74, Art. 1268.)

<sup>34</sup> Alexy 1994, p. 78 ff., 100 ff., 143 ff. Cf.: to the principle of proportionality in Estonian literature: Maruste 1997, p. 98; Merusk 1995, p. 32; himself 1997, p. 55; Narits 1998, p. 192.

<sup>35</sup> English translation in: Estonian Legislation in Translation, No 12, 1996. The title of the law has been translated into English as "General Principles of the Civil Code Act". This translation is misleading. It is recommendable to translate the Estonian title "*Tsiviilseadustiku üldosa seadus*" into English as "General Part Act of the Civil Code" because a Civil Code Act does not exist yet.

<sup>36</sup> Kirikute ja koguduste seadus. (Churches and Congregations Act.) RT I 1993, No 30, Art. 510.

<sup>37</sup> Section 60 second paragraph of the Constitution requires candidates to the Riigikogu to have attained the age of twenty-one years.

<sup>38</sup> Ernits 1996, p. 464 ff.

<sup>39</sup> Bleckmann 1988, pp. 57 ff.; Ipsen 1997, mn. 71; Jarass 1995b, mn. 27; Maunz/Zippelius 1994, p. 152; v. Münch 1992, mn. 62 ff.; Pieroth/Schlink 1996, mn. 142 ff.; Robbers 1985, pp. 925 ff.; Sachs 1985, p. 418 ff.; himself 1996, mn. 33 ff.; Stern 1994, p. 887 ff.

<sup>40</sup> Cf. Pieroth/Schlink 1996, mn. 146.

<sup>41</sup> The idea derives from Carl Schmitt 1985a, p. 149 ff.; 160 ff.

<sup>42</sup> Cf. Pieroth/Schlink 1996, mn. 146.

<sup>43</sup> Cf.: to a similar solution: Robbers 1985, p. 930; Stern 1994, p. 921 ff.

<sup>44</sup> Pieroth/Schlink 1996, mn. 148; Robbers 1985, p. 927; Sachs 1985, p. 419 ff.; Stern 1994, p. 911, 925.

<sup>45</sup> Pieroth/Schlink 1996, mn. 150; Stern 1994, p. 912 ff.

<sup>46</sup> Pieroth/Schlink 1996, mn. 148. Compare to similar attempts: Stern 1994, pp. 911 ff.; Robbers 1985, pp. 927 ff.

<sup>47</sup> Cf.: to the German discussion: Maunz 1960-1991, mn. 54.

<sup>48</sup> English translation in: Estonian Legislation in Translation, No 12, 1996.

<sup>49</sup> BVerfGE (fn. 2) vol. 39, p. 1 (41); vol. 88, pp. 203 (251 ff.).

<sup>50</sup> First: Dürig 1958a, mn. 24; himself 1958c, mn. 21 ff. Him following: Höfling 1996, mn. 49, 51; Hohm 1986, p. 3108; Jarass 1995d, mn. 46a; Kunig 1991, pp. 417 ff.; himself 1992b, mn. 47 ff.; Murswiek 1996, mn. 144 ff.; v. Mutius 1983, p. 32; Lorenz 1989, mn. 10; Rübner 1992a, mn. 17; Stern 1988, pp. 1056 ff., 1063; Schnapp 1984, p. 1.

<sup>51</sup> Hoerster 1989, p. 172 ff.; himself 1991, p. 55 ff.; Ipsen 1997, mn. 213, 233, 239.

<sup>52</sup> Hoerster 1991, p. 55 ff.

<sup>53</sup> Hoerster 1991, p. 69 ff.; 88 ff.

<sup>54</sup> Hoerster 1991, p. 131 ff.

<sup>55</sup> In the German discussion explicitly: Rübner 1992a, mn. 17 and fn. 30.

<sup>56</sup> The question whether unborn life shall according to the Constitution be protected at all against abortion is an open one. Perhaps there is no definite legal

answer at all but the law is just able to define the limits within which the question should be let for the parliamentary majority to decide.

<sup>57</sup> BVerfGE (fn. 2) vol. 30, p. 173 (194).

<sup>58</sup> Höfling 1996, mn. 54; Kunig 1992a, mn. 15.

<sup>59</sup> Maunz/Zippelius 1994, p. 143. Confusing: Rübner 1992a, mn. 18.

<sup>60</sup> In this sense also: Narits 1998, p. 175.

<sup>61</sup> About the concept of legal person in general q.v.: Rittner 1987.

<sup>62</sup> English translation in: Estonian Legislation in Translation, No 4-6, 1996.

<sup>63</sup> English translation in: Estonian Legislation in Translation, No 4-5, 1997.

<sup>64</sup> English translation in: Estonian Legislation in Translation, No 4-5, 1997.

<sup>65</sup> Cf.: Jarass 1995e, mn. 14.

<sup>66</sup> Cf.: Krebs 1992, mn. 31; Schnapp 1984, pp. 4 ff.

<sup>67</sup> Cf.: v. Mutius 1983, p. 38.

<sup>68</sup> English translation in: Estonian Legislation in Translation, No 12, 1996.

<sup>69</sup> English translation in: Estonian Legislation in Translation, No 4-6, 1996.

<sup>70</sup> Cf.: to the concept of legal person of public law in general: Merusk 1996, pp. 174 ff.

<sup>71</sup> Dreier 1973, p. 85.

<sup>72</sup> Alexy 1991, p. 291 ff.

<sup>73</sup> Alexy 1991, p. 295 ff.

<sup>74</sup> Gierke 1902, p. 12 ff.

<sup>75</sup> Windscheid/Kipp 1906, p. 255 ff.

<sup>76</sup> Kelsen 1960, p. 193.

<sup>77</sup> Cf.: Kelsen 1960, p. 182.

<sup>78</sup> Isensee 1992b, mn. 10.

<sup>79</sup> Founded by Günter Dürig 1959/1977, mn. 1 ff. It has been also adopted by the German Federal Constitutional Court: BVerfGE (fn. 2) vol. 21, pp. 362 (369).

<sup>80</sup> Cf.: Rübner 1992a, mn. 64.

<sup>81</sup> Kröger 1981, p. 29; Rübner 1992a, mn. 64; Stern 1988, pp. 1114 ff, 1158 ff.

<sup>82</sup> Bettermann 1969, p. 1324.

<sup>83</sup> Similar result in the German discussion: BVerfGE (fn. 2) vol. 21, pp. 362 (369 ff.); vol. 68, pp. 193 (206); Dürig 1959/1977, mn. 37; Isensee 1992b, mn. 24 ff. (slightly confusing because of remark in mn. 3); Krebs 1992, mn. 40 ff.; Kröger 1981, p. 28 ff.; Rübner 1992a, mn. 64 ff.

<sup>84</sup> Bettermann 1969, pp. 1324 ff.; v. Mutius 1983, p. 38 ff.; Pieroth/Schlink 1996, mn. 175 ff.

<sup>85</sup> v. Mutius 1983, p. 40.

<sup>86</sup> RT 1920, No 113/114. German translation in: Die Verfassung der Republik Estland, Reval: Estländische Verlagsgesellschaft Wold. Kentmann & Co., 1928; Das Grundgesetz des Freistaats Estland, ed. by: Eugen Maddison and Oskar Angelus, Berlin: Carl Heymanns Verlag, 1928.

<sup>87</sup> RT 1933, No 86, Art. 628. German translation in: Die Verfassung des Estländischen Freistaats, Reval: Verlag der Revalschen Verlagsgenossenschaft, 1933.

<sup>88</sup> RT 1937, No 71, Art. 590. German translation in: Die Verfassung der Republik Estland, Tallinn: Estländische Druckerei AG, 1937.

<sup>89</sup> Hidén 1996, p. 759 ff. Look also to the old text of the Finnish Constitution: Hidén/Saraviita 1994, p. 276; Hidén 1971, p. 49 ff.

<sup>90</sup> v. Mutius 1983, p. 40.

<sup>91</sup> v. Mutius 1983, p. 40.

<sup>92</sup> BVerfGE (fn. 2) vol. 21, pp. 362 (370).

<sup>93</sup> Bettermann 1969, p. 1323.

<sup>94</sup> Bettermann 1969, p. 1323.

<sup>95</sup> Cf.: BVerfGE (fn. 2) vol. 21, p. 362 (369 ff.); Dürig 1959/1977, mn. 36.

<sup>96</sup> Bettermann 1969, p. 1326.

<sup>97</sup> BVerfGE (fn. 2) vol. 21, p. 362 (368 ff.).

<sup>98</sup> BVerfGE (fn. 2) vol. 21, p. 362 (370 ff.); Ipsen 1997, mn. 53; Jarass 1995e, mn. 16.

<sup>99</sup> Dürig 1959/1977, mn. 39; Rübner 1992a, mn. 69.

<sup>100</sup> BVerfGE (fn. 2) vol. 15, pp. 256 (262); vol. 31, pp. 314 (322); vol. 42, pp. 312 (321 ff.); Badura 1986, C mn. 13; Dürig 1959/1977, mn. 41 ff.; Hesse 1995, mn. 286; Ipsen 1997, mn. 54; Jarass 1995e, mn. 18; Krebs 1992, mn. 44; Kröger 1981, p. 29; Krüger 1996, mn. 86 ff.; Maunz/Zippelius 1994, p. 142; Pieroth/Schlink 1996, mn. 174; Rübner 1992a, mn. 73 ff.; Stern 1988, p. 1151 ff.

<sup>101</sup> The corresponding provision of the German Constitution finds itself in art. 137 subarticle 1 of the Weimar Constitution (The Constitution of the German Reich from 11 August 1919) which is according to art. 140 of the German Grundgesetz a part of the latter one. This principle of separation of state and church in Germany is broken by art. 140 of the *Grundgesetz* in conjunction with art. 137 subarticle 5 of the Weimar Constitution which allow under certain circumstances religious societies of public law. As a consequence of this, the problem arises whether a church of public law may be a holder of the freedom of religion. A similar mechanism as in the present day Germany found itself in § 14 third paragraph of the Estonian Constitution from 1938 (RT 1937, No 71, Art. 590). Whereas the second sentence states the general principle that there shall be no state church, the first sentence made an exception allowing the legislator to put "bigger churches ... on the basis of public law". In contrast to that the 1992 Constitution — like the 1920 Constitution (RT 1920, No 113/114) — does not contain any exceptions to the prohibition clause of the state church. Since under the 1920 Constitution it was a general consent that religious societies of public law would violate the principle of separation of state and church the author pleads for the same solution under the 1992 Constitution.

<sup>102</sup> The Churches and Congregations Act. (Kirikute ja koguduste seadus. RT I 1993, No 30, Art. 510) should be interpreted in this sense.

<sup>103</sup> In Estonian "teadusasutused".

<sup>104</sup> Cf.: Laaman 1937, pp. 352 ff.

<sup>105</sup> Põhiseadus ja Põhiseaduse Assamblee (fn. 9), p. 137.

<sup>106</sup> The Estonian legal system differs therefore from the German one in that broadcasting corporations of public law are not holders of basic rights. Different view for the public broadcasting companies: Alexy 1997, § 9 I 2 b (4).

<sup>107</sup> Cf.: Narits 1998, p. 176.

<sup>108</sup> Cf.: Badura 1986, C mn. 12; Bettermann 1969, p. 1324; Dürig 1959/1977, mn. 32; Krebs 1992, mn. 34; Maunz/Zippelius 1994, p. 141; Pieroth/Schlink 1996, mn. 163 ff.; Rübner 1992a, mn. 37 ff.

<sup>109</sup> Cf.: to the Estonian discussion: Merusk 1996, p. 175.

<sup>110</sup> Cf.: to the German discussion: Dürig 1959/1977, mn. 29; v. Mutius 1983, p. 37.

<sup>111</sup> Cf.: BVerfGE (fn. 2) vol. 7, p. 198.

<sup>112</sup> Alexy 1997, § 4 II 2 a (1).

<sup>113</sup> Alexy 1994, p. 407.

<sup>114</sup> Whether the law violating the basic rights is null and void from the beginning or shall be first declared invalid, is a further problem and shall not be discussed here.



<sup>115</sup> Cf.: Dürig 1958a, mn. 101; Höfling 1995, p. 434; himself 1996, mn. 83; Stern 1988, p. 1267 ff.

<sup>116</sup> The concept of transformation applied here corresponds to that of Scheinin 1996, p. 13.

<sup>117</sup> Compare to this general principle: Jarass 1995f, mn. 3.

<sup>118</sup> For the legislative function: Merusk 1995, p. 13.

<sup>119</sup> Cf. to the solution offered here: Höfling 1995, p. 434; himself 1996, mn. 84; Rübner 1992b, mn. 16 ff.; Stern 1988, p. 1269 ff.

<sup>120</sup> Cf.: Dürig 1958a, mn. 107; Höfling 1995, p. 435; Kunig 1992a, mn. 60; Rübner 1992b, mn. 19. Estonian administrative lawyer Kalle Merusk does not distinguish between government and administration. (Merusk 1995, p. 12.)

<sup>121</sup> Stern 1988, p. 1334.

<sup>122</sup> Cf.: to the Estonian discussion: Merusk 1995, p. 68.

<sup>123</sup> Cf.: Ehlers 1995, § 2 mn. 80.

<sup>124</sup> Maurer 1995, § 3 mn. 9.

<sup>125</sup> Maurer 1995, § 3 mn. 8.

<sup>126</sup> Maurer 1995, § 3 mn. 7.

<sup>127</sup> Maunz/Zippelius 1994, p. 137. Cf. also: Maurer 1995, § 3 mn. 9; Rübner 1992b, mn. 41; Stern 1988, pp. 1401, 1415 ff.

<sup>128</sup> Cf.: Ehlers 1995, § 2 mn. 76; Hesse 1995, mn. 347 ff.; Höfling 1995, p. 435; himself 1996, mn. 94; Jarass 1995c, mn. 18; Maunz/Zippelius 1994, p. 137; Maurer 1995, § 3 mn. 9; Pieroth/Schlink 1996, mn. 207; Rübner 1992b, mn. 43; Stern 1988, p. 1415 ff.

<sup>129</sup> BGHZ (the German Federal Court for Civil Cases) vol. 36, pp. 91 (95 ff.); Badura 1986, I mn. 112; similarly Maunz/Zippelius 1994, p. 137.

<sup>130</sup> Hesse 1995, mn. 347 ff.; Höfling 1995, p. 435 ff.; himself 1996, mn. 95 ff.; Jarass 1995c, mn. 18; Pieroth/Schlink 1996, mn. 207; Stern 1988, pp. 1412 ff., 1416 ff.

<sup>131</sup> Dürig 1958, mn. 119 ff. Him follow: Höfling 1995, p. 436; himself 1996, mn. 97; Kunig 1992a, mn. 62; Stern 1988, p. 1429.

<sup>132</sup> About the exceptional features of the boundness of the civil justice, q.v. below: III C.

<sup>133</sup> Cf.: Stern 1988, pp. 1336, 1339 ff.

<sup>134</sup> The Legal Chancellor e.g. has been classified as an organ of the executive power (Põhiseadus ja Põhiseaduse Assamblee [fn. 9], p. 208), or of the legislative power (Schneider 1995, p. 25). According to §§ 139, 142 of the Constitution he could be even considered as a special kind of first instance of the constitutional court.

<sup>135</sup> As the State Audit Office deals with financial audit of the administration according to § 133 of the Constitution, the encroachment of the basic rights of individuals is improbable. A practical problem could arise with the Legal Chancellor. According to § 139 of the Constitution the competence of the Legal Chancellor is to implement control over legislation. E.g. § 12 No 2 of the Constitutional Review Court Procedure Act (Põhiseaduslikkuse järelevalve kohtumenetluse seadus. RT I 1993, No 25, Art. 435). English translation published in: *International Human Rights Norms in the Nordic and Baltic Countries*, ed. by Martin Scheinin, The Hague, London and Boston: Martinus Nijhoff Publishers, 1996, pp. 63-69) forbids the Constitutional Review Chamber of the Estonian Supreme Court to grant leave to an individual constitutional complaint. At the same time according to § 15 first sentence of the first paragraph of the Constitution everyone whose rights and freedoms are violated has the right of recourse to the courts. It is at least doubtful whether § 12(2) of the Constitutional Review Court Procedure Act is constitutional because someone whose basic right has been violated has according to this provision no right to recourse to the constitutional court. Therefore, the Legal Chancellor should proceed according to § 142 of the Constitution, i.e. first propose to the Riigikogu to bring the law into conformity with the Constitution and then propose to the Supreme Court to declare it invalid. The crucial prob-

lem is that if the Legal Chancellor does not fulfil his duty and violates a basic right there are no remedies against it.

<sup>136</sup> Cf.: Maurer 1995, § 3 mn. 9.

<sup>137</sup> Compare to the private autonomy: Höfling 1991, p. 1 ff.

<sup>138</sup> About the history of the concept of *Drittwirkung*, see: Stern 1988, p. 1513.

<sup>139</sup> Alexy 1994, p. 480.

<sup>140</sup> Modified: BVerfGE (fn. 2) vol. 34, p. 269 ff.

<sup>141</sup> Nipperdey 1962, p. 17 ff.

<sup>142</sup> Nipperdey 1962, p. 24.

<sup>143</sup> Dürig 1956, p. 167 ff.; himself 1958, mn. 129. Compare to the private autonomy: Höfling 1991, pp. 1 ff.

<sup>144</sup> Böckenförde 1992, p. 272.

<sup>145</sup> Cf.: Canaris 1984, p. 206 ff.

<sup>146</sup> Dürig 1956, p. 176 ff. The German Federal Constitutional Court adopted this theory. (BVerfGE [fn. 2] vol. 7, pp. 198 [203 ff.].)

<sup>147</sup> Cf.: Alexy 1994, pp. 410 ff.; Canaris 1984, p. 245; Rübner 1992b, mn. 59, 61 ff.; Stern 1988, pp. 1565 ff.

<sup>148</sup> "X" will be used for everybody and "S" for the State.

<sup>149</sup> Then the case would get more complicated because the question arises whether individuals may have subjective rights against the omission of the legislator.

<sup>150</sup> Cf.: Alexy 1994, p. 484 ff.

<sup>151</sup> Dürig 1958, mn. 131.

<sup>152</sup> Alexy 1994, p. 484 ff.; Canaris 1984, p. 228 ff.; Höfling 1991, pp. 52 ff.; Isensee 1992a, mn. 5, 134 ff.; Jarass 1995a, p. 351 ff.; Eckart Klein 1989, p. 1639 ff.; Rübner 1992b, mn. 60; Starck 1981, p. 244; Stern 1988, pp. 1560 ff., 1570, 1573 ff.

<sup>153</sup> Alexy 1994, p. 414; Erichsen 1997, p. 88 ff.; Isensee 1992a, mn. 183 ff.; Eckart Klein 1989, p. 1637; Hans H. Klein 1994, p. 493.

<sup>154</sup> See further: Alexy 1994, p. 174 ff.

<sup>155</sup> Alexy 1994, p. 78 ff., 100 ff., 143 ff.

<sup>156</sup> Alexy 1994, p. 483 with indication of further sources in footnote 48. German constitutional lawyer Christian Starck has already, 1981, indicated the possibility of equal consequences of the different constructions. (Starck 1981, p. 243.)

<sup>157</sup> Q.V. also: Maruste 1994, p. 242 ff.

<sup>158</sup> Alexy 1994, p. 490



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# Protection of Fundamental Rights and Freedoms in Estonian Constitutional Jurisprudence

## Introduction

In the continental legal tradition the task of a judge has been seen in application of abstract legal rules to a specific factual pattern to achieve the results foreseen by the legislature. This process of subsumption is not purely logical although such claims have been made. In reality, the process of application of law is more complicated, since any legal regulation cannot be absolutely comprehensive and coherent without gaps and contradictions. A question whether or how adequately the rationale of a law can be written down at all — because of the incompleteness of the human language — has been erected.<sup>1</sup> In any case, the common understanding seems to be that legal interpretation is inevitably necessary in the process of application of law.

One of the most influential theories of interpretation in the continental legal thought, recognised until today in German jurisprudence as "classical theory of interpretation" is the teaching of Friedrich Carl von Savigny which was first published in 1840 under the title "System des heutigen Römischen Rechts".<sup>2</sup> The aim of interpretation according to Savigny was reconstruction of the rationale in the law. Four elements of interpretation had to be applied simultaneously to achieve this purpose — grammatical, logical, historical and systematic. It is interesting to mention that different scholars have classified Savigny's theo-

ry of interpretation both as subjective and objective theories of interpretation, or as standing outside both of them.<sup>3</sup>

In principle, similar methods of interpretation are applicable in the process of interpretation, including constitutional interpretation, today, as well,<sup>4</sup> although different authors offer slightly different classifications of the methods.<sup>5</sup> On a more general level, the theories of interpretation can also be divided into the classes of subjective and objective theories, the basis of the distinction being the intent of the legislator while passing the relevant act, and the reasonable purpose of the law, respectively.<sup>6</sup>

Generally, the courts are free to use the methods of interpretation they deem proper in a specific case, there are only a few laws which stipulate how they should be interpreted. In Germany some older codifications contain such provisions.<sup>7</sup> In the United States, however, many states have passed special laws, determining how statutes adopted by the legislature of the respective states must be interpreted.<sup>8</sup> It has been mentioned that there is also difference between ordinary statutory interpretation and construction of the Constitution in the United States.<sup>9</sup>

The Estonian Constitution does not mention any specific methods of interpretation, but a few laws do.<sup>10</sup> In the case of the General Part of the Civil Code Act, Professor Raul Narits has criticised the inclusion of ways of inter-

pretation into a law. He argues that by such legal enactment of specific techniques of interpretation the legislator has chosen some elements from a number of theories of interpretation and has made those selected legally binding. According to Narits the methods of interpretation belong rather to legal science than to the general provisions of a law.<sup>11</sup>

Attempts have been made to find rules of interpretation also in the text of the Estonian Constitution. Professor Peter Häberle found that § 42 of the draft Constitution of December 1991 (§ 10 of the valid 1992 Constitution)<sup>12</sup> sets forth a rule of interpretation, quite similarly with the 1979 Peruvian or the 1985 Guatemalan Constitutions, and, in fact, with the Ninth Amendment to the Constitution of the United States.<sup>13</sup> Häberle calls this provision a "fundamental rights development clause" and claims that the reference to the "spirit of the Constitution" and the clause "or are in accordance therewith", enable the Constitution to develop more freely and allows better to create new fundamental rights.<sup>14</sup> Maybe it would be interesting to call attention to the fact that the section mentioned speaks about "duties" also. It could be called "constitutional duties development clause" as well, if the constitutional rights and legal obligations would not subject traditionally to different ways of interpretation — broad and narrow, respectively.

Generally, it is hard to fix the different methods of interpretation into a strict hierarchy. They can be applied in different degrees in one court decision, as well. There are, however, slight dissimilarities between the traditions in particular countries. For example, in Germany the intention of the framers of the Basic Law and the history of specific constitutional provisions is only of additional importance besides reasonings supported by textual, structural or teleological arguments.<sup>15</sup> This may be a result of the originally provisional character of the German Basic Law,<sup>16</sup> I guess. Concerning Estonia, there is no clarity in this question, no case law referring to the drafting of the Constitution is known to the author. This, of course, does not preclude the possibility that some courts have taken advantage of *travaux préparatoires* silently. It would, however, be interesting if a court had to apply a constitutional provision to which a clearly intentional interpretation of the drafters had been attached. A peculiar example of the kind is the interpretation of § 122 of the 1992 Constitution agreed upon by the members of the Constituent Assembly.<sup>17</sup> Such interpretation is hardly binding for a court, but the court would not feel comfortable to construe the provision of the Constitution in a different way, as well.

In German Constitutional jurisprudence, under the concept of the objective value order, the principle of human dignity has been given a higher priority in comparison with other principles.<sup>18</sup> One could ask if any similar principles of higher rank can be found also in the Estonian

Constitution.<sup>19</sup> I am quite dubious in this respect. It has been mentioned in some scholarly works that the Preamble of a Constitution may contain "a *precis* of the essential contents of the constitution" or that the Preamble may include values and principles which can be useful for the interpretation of the whole Constitution.<sup>20</sup> In the practice of the Supreme Court of Estonia, we can meet some references to the Preamble. The Preamble is not, however, referred to separately, but together with application of other provisions of the Constitution.

The following treatise attempts to present a short overview of the constitutional jurisdiction of Estonia in the field of fundamental rights and freedoms. A few introductory remarks must be made, first. The most authoritative source of constitutional jurisdiction is, of course, the body of decisions of the Constitutional Review Chamber of the Supreme Court. True, the decisions of the Plenary Session of the Supreme Court would have even greater judicial value, but until 1999 the Plenary Session has made only five decisions. In one of the decisions both the opinion of the Court and a dissenting opinion referred to the Constitution,<sup>21</sup> and in two more decisions dissenting opinions dealt with constitutional issues.<sup>22</sup>

The decisions of other Chambers of the Supreme Court — Criminal, Civil and Administrative Law Chambers — are also of some interest. Constitutional questions are not concerned very frequently in these cases, but since the decisions of all Chambers are published, they have still influence of general importance. All the Chambers of the Supreme Court are normally the last judicial bodies hearing a case, thus, although the decisions do not have a formal force of precedent, they are guiding interpretations of law.<sup>23</sup>

The case law of neither the Constitutional Review Chamber nor of the other Chambers of the Supreme Court is too voluminous. The first has made 38 decisions, the latter taken together refer to constitutional norms more often than not over the six years of their existence, but in most cases the interpretations of the Constitution by the other Chambers are rather superficial. Thus, the insight into the principles applied by the Supreme Court in the process of protection of fundamental rights and freedoms, cannot go very deep yet. The structure of the present paper below follows an attempt to group the relevant decisions of the Constitutional Review Chamber according to the rights and freedoms mainly concerned. The case law developed by the other Chambers is used as supplementary material.

## Fundamental Rights

### A. PRIVACY

There are three decisions of the Constitutional Review Chamber where the privacy issue is among the key questions of the case. The first case was initiated by the President,<sup>24</sup> the other two — by the Legal Chancellor.<sup>25</sup>

The President proposed the Supreme Court to declare the Taxation Act, passed by the Riigikogu<sup>26</sup> unconstitutional. The President had already refused to proclaim it once, but the parliament adopted it, unamended, again. The President turned to the Supreme Court, contesting the constitutionality of the law.

Among the grounds for declaring the Taxation Act unconstitutional were the powers given by it to officers of the tax administrator, irrespective of the fundamental rights of everyone. Sections 33 and 43 of the Constitution guarantee inviolability of everyone's dwelling, property and place of employment, and confidentiality of correspondence. These rights extend also to legal persons.<sup>27</sup> The Taxation Act empowered officers of the tax administrator to install cameras and devices of measurement on the property of a taxpayer without the taxpayer's consent and without any proper legal procedure to be observed, violating, thus, the principle of privacy in the private life and in one's business.

Pursuant to the opinion of the tax administration officer himself, he could enter and control the buildings and territories of a legal person. He needed the permission of a judge, but that was deemed by the Supreme Court to be insufficient for considering the activities of a tax administration officer constitutional. The permission of the judge would be formal, if there were no grounds for the control, based on objective criteria. The opinion of the tax administration officer that the taxpayer may avoid paying the taxes could not be treated as a constitutional ground for the restriction of fundamental privacy rights and the constitutional principle of inviolability of property.

The proceedings in the two other cases were initiated upon proposals of the Legal Chancellor, thus, abstract *a posteriori* review was exercised. The legislation contested by the Legal Chancellor, included a law amending the Police Act and a governmental regulation by which the Statute of the Defence Police and the Regulation on the Use of Special Technical Means were enacted.

The Constitutional Review Chamber reproached the law amending the Police Act with superficiality. The right of a person to informed self-determination means that she can choose her way of conduct and protect herself.<sup>28</sup> Absent or hidden legal regulation does not enable the person to exercise this right. Thus, an important principle of the requirement of sufficiently detailed legal regulation in the areas where fundamental rights may be infringed, was pronounced by the Court. The amendment law under scrutiny did not specify what exactly was meant by the "special technical means".

The law enabled officers of the Defence Police to restrict by the use of special technical means the freedoms guaranteed by the Constitution, for example, the right to inviolability of private and family life, inviolability of home and confidentiality of correspondence.<sup>29</sup> All the pro-

visions of the Constitution guaranteeing the rights named above, include certain restriction clauses, allowing, inter alia, limitation of the rights in order to prevent a criminal offence or to ascertain the truth in a criminal proceeding<sup>30</sup>. Under the Constitution such restrictions can be made in the cases and pursuant to procedure provided by law, but the amendment law did not specify either the cases or the procedure in a satisfactory manner. The cases were actually not specified at all, being limited only to the general competencies of the Defence Police. The permission for the use of the "special means" under the amendment law had to be given by a justice of the Supreme Court appointed by the Chief Justice. However, due to the vagueness of the terminology, insufficient regulation and incompleteness of the procedures, the justice of the Supreme Court would not have had any substantial power of control. Besides, the Constitution empowers the legislature to determine cases and procedures of permissible restrictions of rights. Due to the vagueness of the regulation, this power was essentially delegated to the officers of the Defence Police and a Supreme Court justice. The lack of proper criteria for the use of the "special means" could result in arbitrary exercise of state power, whereas according to the Constitution, the law shall protect everyone from that. Delegation of the legislative powers in the field of restriction of the fundamental rights is not permissible under the Constitution. Legislative powers cannot be delegated to the executive, not even under the supervision of the judiciary. Also, lack of control mechanisms and provisions concerning the responsibility of the officials involved in the contested activities, leaves the fundamental rights too vulnerable.

In the second case, the one concerning the governmental regulation named above, the Constitutional Review Chamber pointed out that the Government has issued rules under which fundamental rights can be restricted. According to the Constitution rights and freedoms can be restricted only pursuant to law, not in accordance with inferior legal acts. Furthermore, the governmental regulation under discussion was a *praeter legem* regulation, whereas under § 87(6) of the Constitution, the Government is empowered to issue regulations and orders on the basis of and for the implementation of law.

Thus, the Constitutional Review Chamber outlined in these early decisions some important principles it has elaborated later. Among them, the inadmissibility of the *praeter legem* governmental regulations in the areas which under the Constitution should be covered by laws, is one of importance. Principles concerning specifically permissible limitations of fundamental rights, privacy rights in particular, could be summarised as follows:

(1) the term "law" used in the restriction clauses of the Fundamental Rights and Freedoms Chapter of the Constitution has to be interpreted as an act of the Riigikogu;



(2) the Riigikogu cannot delegate the legislative powers vested in it by the Constitution;

(3) the restrictions to the fundamental rights and freedoms are unconstitutional if they are not provided for in a way detailed enough to enable the subjects of law to determine their conduct on the basis of informed choice;

(4) the requirement of the permission of a judge does not conform the limitations of fundamental rights with the Constitution per se, especially if the judge cannot evaluate the need for the restrictions substantially. The grounds provided in the restriction clauses of the Constitution must be satisfied for the application of the restrictions to be constitutional.

Most of the principles are, in one way or another, characteristic to the German Constitutional Court practice, as well.<sup>31</sup>

Several interpretative methods have been used in these rulings. Firstly, the term "law" has been construed, on one hand, purely textually — the main meaning of it is an act of parliament. On the other hand, construction of "law" as an act of the Riigikogu, ensures the best possible protection for the fundamental rights, thus the elements of purposive interpretation can be seen, as well. Secondly, a general rule of contemporary interpretation in the field of fundamental rights has been applied — the rule of construing the fundamental rights in a broad manner. Thirdly, although we cannot speak about a system of strict separation of powers in a parliamentary system, some dividing lines between the branches of power have been sketched by the assertion that the Riigikogu should create rules exact enough for proper application and not delegate almost unlimited powers to the executive under no proper control of the judiciary.

The way of determining influences by identification of the sources which were available may be a rather slippery one, since it is still mainly based on some guesswork. However, certain examples may be rather inviting. For example, during the time a law on special measures of prosecution was drafted, Professor Eerik Kergandberg published an article<sup>32</sup> concerning this subject and briefly commenting the draft, as well. He also refers to a problem arisen in Germany, namely the absence of a specific fundamental right in the Basic Law which would have been violated by the application of the special measures.<sup>33</sup> Kergandberg refers to a decision of the German Constitutional Court where this fundamental right was identified as "the right to informational self-determination". The German case was rather different from the Estonian cases concerning the special measures. However, in the decision of the Constitutional Review Chamber the right to informational self-determination was mentioned also. The common principle behind these arguments seems to be the person's right to determine what kinds of information concerning himself can be collected by the powers-that-be. In case it cannot be left to him to decide upon, he

has at least the right to be aware of the possibilities, cases and procedure of the non-consensual data collection, to have an ability of determining his conduct, based on this knowledge. Perhaps such construction of the influence of German jurisprudence is artificial, but it is an appealing coincidence, at least.

## B. PROPERTY

The right to property has been a central or an additional issue in several cases before the Constitutional Review Chamber. One could explain this fact by the legacy of the times gone — the principle of inviolability of property was often and in several forms not respected. This resulted, perhaps, in an "over-reaction" — perception that property is something almost divine. Other sources generating constitutional controversies are, of course, the property restitution and privatisation processes.

The inviolability of property is guaranteed by § 32 of the Constitution. This guarantee is not absolute, under certain conditions private property may be expropriated or the use of the property may be restricted. The first property cases the Supreme Court confronted, concerned limitations on the use of property.

A resolution of the Tallinn City Council<sup>34</sup> and two regulations of the Tallinn City Government<sup>35</sup> arranging paid car parking in Tallinn were protested by the Legal Chancellor. The resolution of the City Council empowered the City Government to regulate on the matter, thus, most of the motives of the two decisions of the Supreme Court apply equally to all three acts contested.

The Court argued that under the Constitution everyone has the right to freely possess, use, and dispose his or her property, whereas limitations to the right can be set by law.<sup>36</sup> Although the local governments are entitled to manage all local issues independently pursuant to law,<sup>37</sup> the acts under discussion were found unconstitutional. The local authorities — when mandating locking of the wheels of cars parked without proper certificate or in a place not designated for parking — were really regulating an issue of local character, but at the same time the use of property — a car — was restricted. No law — in the meaning of an act of parliament — granted local authorities the power to restrict the use of property in this way. Thus, the acts of the City Council and City Government conflicted the constitutional right to freely use one's property.

In another ruling concerning the right to freely use one's property,<sup>38</sup> the Supreme Court held a governmental regulation restricting the use of constitutional property, since that regulation concerned state property. The right and duty to manage the possession, use, and disposal of the state property lies with the Government. Since the title to the property in the original civil case was disputable, the court also explained that the property protection clauses of § 32 of the Constitution apply only to property obtained in a legal way. The property which had been in the possession

of the armed forces of the Soviet Union was deemed to belong to the state, due to several legal acts enacted during the transition period, and mainly with reference to the IV Hague Convention under which the occupying country cannot obtain real property of the occupied country.

However, a remarkable decision concerning the right to use property has been issued by the Administrative Law Chamber of the Supreme Court. It differs greatly from the usual practice, since restrictions to the use of property, imposed by an act of lower rank than law were considered to be lawful.<sup>39</sup> Rules concerning fire arms, enacted by a governmental regulation were held valid because unrestricted carrying of fire arms would have endangered everyone's life. Thus, the application of a balancing test led the Court to the conclusion that particular restrictions, although they were not imposed by a formal law, were necessary in a democratic society and were not distorting the nature of the freedom restricted. The primary constitutional value endangered otherwise — everyone's life — was considered to outweigh the right to use the property.

In a recent decision concerning a governmental regulation allegedly restricting the right to dispose of one's property, the requirement imposed on market sellers to keep in the marketplace the documents concerning consignment, purchase, origin and quality of the goods sold was at stake.<sup>40</sup> According to the administrative court which initiated the constitutional review proceedings, the restriction was set forth by an administrative act and was unlawfully restricting the right to dispose of property. The Constitutional Review Chamber established that the regulation was merely repeating provisions of the Consumer Protection Act which imposed essentially the same requirements. Moreover, the Chamber ruled that the requirement of keeping the said documents in the selling place did not restrict the constitutional right to dispose of one's property, and that absence of the documents did not hinder selling the goods.

The requirements for the expropriation of property to be constitutional are considerably higher than those necessary to be met when restrictions to the use of property are imposed. Under the Constitution, property can be expropriated only in the public interest, in the cases and pursuant to procedure provided by law, and for fair and immediate compensation.<sup>41</sup> The Constitutional Review Chamber has issued two decisions concerning expropriation of property, both of the cases were connected with the ownership reform, or, to be more exact, with privatisation of dwelling rooms.

The background necessary for understanding the cases was, in brief, as follows. The dwelling rooms were privatised under the Dwelling Rooms Privatisation Act for vouchers to persons renting the rooms. Most of the houses were state-owned and were either municipalised first with the obligation of the local governments to privatise the dwelling rooms for vouchers, or the state property was

privatised directly, without intermediate municipalisation, the local governments acting only as agents of privatisation. In the course of the ownership reform, property of some private legal persons was also re-nationalised. This concerned some property transferred by the state to some consumers' co-operatives, free of charge. The dwelling rooms among such property had to be privatised to their tenants for the vouchers similarly to the rest of the dwelling rooms. (Formally the dwelling rooms were not re-nationalised, but the co-operatives were legally obliged to privatise this property under the conditions set forth by the law). The problem arose, since not all of the houses possessed by the co-operatives were transferred to them by the state, free of charge — building of some was financed by the co-operatives themselves. The Dwelling Rooms Privatisation Act overlooked this fact.

The Constitutional Review Chamber ruled<sup>42</sup> that such obligation of privatisation amounted to expropriation of the property which had to comply with the requirements of § 32(1) of the Constitution.<sup>43</sup> The Court analysed adherence to the constitutional criteria of permissible expropriation. It found that the requirement of public interest was not met, since imposition of one private law subject to transfer its property to another private law subject does not stem from any public interest. Although the lack of public interest would have been enough for the act to be unconstitutional, the Court also considered the compensation to be unfair. According to the Property Act, property is to be evaluated on the basis of its usual value, the latter being local average market value. The amount of the vouchers under the regulation of the Dwelling Rooms Privatisation Act and their market value did not cover the actual market price of the property.

In the other ownership reform case<sup>44</sup> (differently from the first case which was initiated by an ordinary court, the second petition was submitted by the Legal Chancellor and, thus, abstract norm control was carried out by the Supreme Court) the Constitutional Review Chamber interpreted the conditions of expropriation in a more detailed manner. It asserted its previous standpoint that, in general, expropriation of the property of one private law subject in the benefit of another cannot be justified with public interest. In the course of the privatisation of the dwelling rooms, however, the Court specified, public and private interests are interwoven with each other. The public interest has been expressed repeatedly by the parliament in the necessities of the ownership reform. The Riigikogu has passed legislation for the privatisation of dwelling rooms twice — this refers to a weighty public interest. Thus, the Constitutional Review Chamber concluded that it is not possible to contest the public interest in this case in the procedure of abstract norm control.

In regard to the fairness of the compensation the Supreme Court concluded that the Riigikogu had acted in

accordance with the Court's previous decision, since under the Dwelling Rooms Privatisation Act, as amended, the vouchers obtained as a compensation for expropriation of the property could be used further, e.g., for privatisation of land. The Court pointed out that by this the value of the vouchers was enhanced, so that the compensation could be just, if the parties would consider it to be. Again, the Court mentioned that it is not possible to determine in abstracto, if a concrete compensation in a specific case would be just and the parties satisfied with it.

The Supreme Court construed the requirement of the compensation to be immediate, meaning that the compensation should be received at the end of the expropriation procedure, at the latest. In case of disagreement of the parties, the expropriation can be exercised only after a court decision has been issued, and a compensation determined by the decision delivered.

Principles pronounced by the Supreme Court in the area of property protection are somewhat different from those concerning, for example, privacy. Generally, the level of its protection is lower than in case of some other rights. Firstly, although the restrictions to the constitutionally protected rights can be imposed only by a law (a parliamentary statute), the only decision of the Supreme Court accepting limitation of a constitutional right by a governmental regulation, concerns use of property.<sup>45</sup> Secondly, only property obtained legally is constitutionally protected. Thirdly, the existence of public interest and fair compensation is to be determined by a court taking into account particular circumstances. In abstract review proceedings the Supreme Court took a rather deferential stance. As it can be concluded from the above, the Supreme Court has interpreted the scope of the property rights in a more narrow way compared to the other rights.

### C. OTHER RIGHTS

Some other constitutional rights, in addition to the privacy and property rights treated above, have been at stake in the Supreme Court cases. Since the case-law covering the topics is too thin to enable dedication of separate subdivisions of this paper to the other cases concerning distinct fundamental rights, they are dealt with all together hereinafter.

The Supreme Court has asserted everyone's right of recourse to the courts. In the Taxation Act case<sup>46</sup> the Court determined that regulation under which decisions of an administrative body had to be protested first inside that body itself, and only after going through the pre-court procedure of dispute settlement, a person could turn to the courts, conflicted with the Constitution. The pre-court dispute settlement procedure was not unconstitutional *per se*; the Court determined, however, that under § 15(1) of the Constitution everyone had the right of recourse to the courts. In the opinion of the Court the procedure of the pre-court dispute settlement and the procedural guarantees

for the taxpayer had been regulated insufficiently. It is not clear from the Supreme Court's argument, if the obligatory pre-court dispute settlement procedure would have been unconstitutional also in the case when the procedure and the guarantees had been elaborated precisely enough, or should the complainant always have a choice whether to appeal inside the administration or to turn to the courts.

The Administrative Law Chamber of the Supreme Court has also made a decision of constitutional character in this field. With reference to § 24(5) of the Constitution which guarantees everyone the right of appeal to a higher court against the judgement in his or her case, the Court introduced a new participant to the administrative court procedure — an interested person.<sup>47</sup> The Court argued that a person whose rights may be affected by a court decision must be a participant of the proceedings although an administrative act had been contested by someone else. In principle, it would have been suitable to initiate constitutional review proceedings, but there was no provision in the Administrative Court Procedure Act which could have been declared unconstitutional.<sup>48</sup> Legislative omission is not an object of constitutional review in Estonia.

In a decision concerning the Non-profit Associations Act<sup>49</sup> the Supreme Court pronounced several principles concerning the freedom of association guaranteed by § 48(1) of the Constitution. According to the Constitution the right to form non-profit associations belongs to everyone, but the Non-profit Associations Act, contested by the President, stipulated that individuals of full legal competence could form non-profit associations (the latter being private legal persons). Thus, the Act unconstitutionally restricted the right of children (under 18 years of age) to associate, since the word "everyone" in the Constitution means every individual, and the Constitution does not limit the right to associate, depending on the private law full legal competence of the individuals.

In addition, according to the Supreme Court the freedom of association was regulated insufficiently by the Non-profit Associations Act, since the Constitution presupposed plurality of legal forms of associations, while the Act prescribed only the private legal person as a relevant legal form. True, the Act additionally referred to the provisions of the Civil Code concerning society contract, but the purposes of the latter were limited and did not cover the whole scope of conceivable purposes under § 48(1) of the Constitution. Such contracts could not be concluded by minors, either.

The freedom of association has to be legally protected, the Supreme Court declared. A clause under which a member of an association could be expelled from the association, disregarding the provisions of the association's statute, was considered not to be in conformity with the duty of the legislative power to guarantee the rights and freedoms of everyone.<sup>50</sup> This clause distorted the nature of

the freedom of association and the freedom to belong to religious societies.<sup>51</sup>

Under the Non-profit Associations Act the organisations which possessed weapons, were militarily organised or performed military exercises, could be established only by law, whereas the Constitution requires merely prior permission, issued in accordance with the conditions and procedure provided by law.<sup>52</sup>

An important principle concerning international law was proclaimed by the Supreme Court in the context of the Non-profit Associations Case. The Non-profit Associations Act was held to contradict also the UN Convention on the Rights of the Child. Estonia is a party to the Convention, but the text of the Convention was not published in the State Gazette. The Court's position was that the binding nature of the Convention to Estonia does not depend on the publication of it. It remains, however, unclear if such an unpublished instrument is binding only to the state or also to the citizens, since under § 3(2) of the Constitution only published laws have obligatory force. I interpret the position of the Supreme Court in a way that unpublished international instruments are binding to the State, and both the international community and the individuals of the State can require adherence to the international norms by the State, but the State itself cannot demand observance of the norms of unpublished international conventions by the individuals. This is probably not the only possible way of interpretation. One could argue that "[g]enerally recognised principles and rules of international law are an inseparable part of the Estonian legal system"<sup>53</sup> and, thus, these international norms are binding to everyone. However, there is no consensus on the meaning of the provision of the Constitution quoted, while some authors support the opinion that the meaning of the word "law" in § 3(2) of the Constitution is broader than only "acts of parliament", extending to all normative acts.<sup>54</sup>

In two successive decisions the Constitutional Review Chamber treated the right to choose freely one's sphere of activity, profession and place of work.<sup>55</sup> In both cases<sup>56</sup> courts referred to the Supreme Court an issue that questions which had to be determined by laws under the Constitution were regulated by legal acts of lower rank in the hierarchy of normative acts — by regulations (of police service and of service of custodial officials, respectively). The Court ruled that the constitutional right to choose one's sphere of activity, profession and place of work does not extend to already existing working or service relations, or to the conditions of termination thereof. The same interpretation of § 29(1) of the Constitution was repeated by the Court in another decision next year.<sup>57</sup>

Concerning the freedom of movement,<sup>58</sup> the Constitutional Review Chamber has ruled<sup>59</sup> that prohibition imposed on minors not to stay in public places from 11 p.m. till 6 a.m. unless accompanied by a grown-up, is to be

construed as a restriction of the freedom of movement. The restriction of the freedom of movement must be interpreted to include restrictions to individuals to stay in certain places in certain time. Otherwise, for example, enactment of official closing hours in the time of martial or police law in force could not be legally evaluated through § 34 of the Constitution.

With both the non-profit associations case and the freedom of movement case the question of the age of the subject of fundamental rights arises. The court did not answer the question in either of the cases. It really seems that it has to be decided in specific cases separately.<sup>60</sup> The acts under scrutiny in these cases were held to be unconstitutional because restrictions imposed by them were of absolute character and did not foresee any exceptions.

The last case concerning freedom of movement<sup>61</sup> was initiated by the Legal Chancellor. He proposed that the Supreme Court declare a regulation of a local government, imposing a charge on motor vehicles for driving into the old town, invalid. The Court did not share the opinion of the Legal Chancellor that such a charge would have been restricting the right to freedom of movement. The Constitutional Review Chamber ruled that the conflict between imposition of such charge and the right to freedom of movement is seeming, since the right to freedom of movement is above all a right to reach the destination, and the disputed charge does not violate that right.

One more case involving § 34 of the Constitution has been decided by the Constitutional Review Chamber.<sup>62</sup> This decision concerned the right to choice of residence. The Police Service Act enabling transferral of a police officer to another permanent place of service without his or her consent also in such cases when the transferral caused the need to change the residence was considered to restrict the officer's right to choice of residence. Under the wording of the Police Service Act it could be concluded that both transferral and change of residence would have been mandatory for a police officer. The Court noted also that such transferral could cause harm to the officer's and his or her family members' right to family life.<sup>63</sup>

In one of its latest decisions,<sup>64</sup> the Constitutional Review Chamber made an allusion to a new, probably inevitable, but still interesting development in its jurisprudence. The right to engage in enterprise and to form commercial undertakings and unions<sup>65</sup> was at stake. According to the Constitution, "[c]onditions and procedure for the exercise of this right may be provided by law."<sup>66</sup> The Court concluded that since the law may provide relevant conditions and procedure, the law may also restrict that freedom. The Court held that the law (parliamentary legislation) need not describe in detail all the restrictions; it is enough for a law to determine the boundaries within which the executive may specify the provisions of the law.

The idea that norms of lower rank than formal laws



may be still relevant and can be utilised for determination of the scope of restrictions of the fundamental rights and freedoms seems to be a new development in the until that decision quite conservative stance of the Constitutional Review Chamber. It is clear that especially the rules concerning engaging in enterprise and commercial undertakings cannot be provided solely by laws. Probably the Supreme Court would be more reluctant to accept regulation or limitation of some other (some "more fundamental") freedom by executive regulations. It is feasible that every single right or group of rights would have its own minimal rank of norms (law, governmental regulation, etc.) required for limitation of it to be considered legitimate. But the door seems to be open and it is to be seen if and to what extent executive regulations will be tolerated in the field of fundamental rights and freedoms.

Two decisions of the Constitutional Review Chamber deal with enactment of requirements of knowledge of the Estonian language for candidates to the Riigikogu and to the local government councils.<sup>67</sup> The Supreme Court ruled that the Preamble of the Constitution and several relevant sections of the Constitution provide that one of the duties of the state is to preserve the Estonian nation and culture through the ages. Preservation of the Estonian nation and culture is not possible without the Estonian language. Thus, the Court ruled that §§ 6, 52(1) and 51(1) of the Constitution<sup>68</sup> justify the enactment of requirements of knowledge of the Estonian language for the candidates to the Riigikogu and to the local government councils as an electoral qualification. Compliance of this restriction to the right to be elected with Article 25 of the International Covenant on Civil and Political Rights has been contested, but it seems that the possible controversy has to reach a political rather than a legal solution.

From a purely legal point of view, the Supreme Court ruled in these decisions that references to ordinary laws or delegation for enactment of executive regulations in constitutional laws are not permitted in matters which essentially belong to the sphere of relevant constitutional laws. It remains to be seen how puristically this principle can be carried out. It cannot be excluded that a qualification similar to the one concerning the requirement that fundamental rights and freedoms may be restricted solely by laws, has to be made.

In decisions concerning several of the "other" fundamental rights the Supreme Court has referred to the principle that the state has to take certain legislative measures to ensure some specific rights. In one case the Administrative Law Chamber itself virtually created a new norm. The Supreme Court has not declared legislative omissions *expressis verbis* unconstitutional, however, it has pointed out that certain rights cannot be effectively guaranteed without the positive action of the state.

## Notes:

<sup>1</sup> Q.v. e.g.: Meris Sillaots. Kohtunikuõiguse võimalikkusest ja vajalikkusest kontinentaal-euroopalikus õiguskorras. (On Possibility and Necessity for Judge Made Law in the Continental European Legal Order.) at 18-19 (1997).

<sup>2</sup> Marju Luts. Friedrich Carl von Savigny meetodi ja süsteemiõpetus. (Friedrich Carl von Savigny's Theory on Method and System.) at 57 (1994).

<sup>3</sup> Ibid. at 58-59.

<sup>4</sup> Q.v. e.g.: Matthias Hartwig. Konstitutsioonikohtute roll ja areng põhiõiguste ja vabaduste tagamisel. Põhiõiguste ja vabaduste tõlgendamine. (The Role and Position of Constitutional Courts in Securing Fundamental Rights and Freedoms. Interpretation of Fundamental Rights and Freedoms), in: Konstitutsioonikohtud põhiõiguste ja vabaduste kaitsel. (Constitutional Courts Protecting Fundamental Rights and Freedoms.) 25, 34 (Heinrich Schneider ed., 1997). Hartwig mentions three ways of understanding legal text applied in the last century: grammatical, historical and systematic interpretation, and adds teleological interpretation as one which has emerged later.

<sup>5</sup> Q.v. e.g.: Robert Alexy & Ralf Dreier. Statutory Interpretation in the Federal Republic of Germany, in *Interpreting Statutes: A Comparative Study* 73, 82-89 (D. Neil MacCormick & Robert S. Summers eds., 1991). Alexy and Dreier distinguish semiotic, genetic, historical, comparative, systematic and teleological ways of interpretation.

<sup>6</sup> Ibid. at 77.

<sup>7</sup> Ibid. at 109.

<sup>8</sup> Robert S. Summers. Statutory Interpretation in the United States, in *Interpreting Statutes: A Comparative Study* 407, 451-452 (D. Neil MacCormick & Robert S. Summers eds., 1991).

<sup>9</sup> Zenon Bankowski et al. On Method and Methodology, in *Interpreting Statutes: A Comparative Study* 9, 11 (D. Neil MacCormick & Robert S. Summers eds., 1991).

<sup>10</sup> E.g. §§ 2-4 of the General Part of the Civil Code Act provide particular rules of interpretation to be applied. Some elements of grammatical, teleological and systematic methods, relationship between general norms and provisos, analogies of statute and law are mentioned. Q.v. The General Part of the Civil Code Act. (Tsiviilseadustiku üldosa seadus.) RT (Riigi Teataja = State Gazette) I 1993, No.53, Article 889.

<sup>11</sup> Raul Narits. Tõlgendamine: teadus või seadus. (Interpreting: Science or Law.), *Juridica* 228, 229-230 (1994).

<sup>12</sup> Section 10: "The rights, freedoms and duties set out in this Chapter shall not preclude other rights, freedoms and duties which arise from the spirit of the Constitution or are in accordance therewith, and conform to the principles of human dignity and of a state based on social justice, democracy and the rule of law."

<sup>13</sup> Peter Häberle. Constitutional Developments in Eastern Europe from the Point of View of Jurisprudence and Constitutional Theory, 46 *Law and State* 64, 78-79 (1992).

<sup>14</sup> Ibid. at 78. Walter F. Murphy et al present twelve rights unlisted in the Constitution which the United States Supreme Court has recognised as fundamental. Q.v. Walter F. Murphy et al., *American Constitutional Interpretation* 1083-1084 (1986).

<sup>15</sup> Donald P. Kommers. The Constitutional Jurisprudence of the Federal Republic of Germany 49 (1989).

<sup>16</sup> About the adoption of the Basic Law, q.v. e.g.: Karlheinz Nieclaus. Political Reconstruction at Bonn, in *From Dictatorship to democracy* 39, 39-40 & 55 (John H. Herz ed.), and Nevil Johnson. Territory and Power: Some Historical Determinants of the Constitutional Structure of the Federal Republic of Germany, in: *German Federalism Today* 8, 13-14 (Charlie Jeffery & Peter Savigear eds., 1991).

<sup>17</sup> After the voting of the redaction of § 124 (§ 122 in the valid 1992 Constitution), the Chairman noted that "the Assembly agreed that it interprets § 124(1) not hindering a relevant commission to hold border negotiations with

Russia, in order to change the border determined by the Tartu Peace Treaty of 2 February 1920." Q.v. the Record of the 28th Session of the Constituent Assembly on 27 March 1992, in: Põhiseadus ja Põhiseaduse Assamblee. (The Constitution and the Constituent Assembly.) 924, 975 (Viljar Peep ed., 1997).

<sup>18</sup> Q.v. e.g., Kommers, note 15, at 53-54.

<sup>19</sup> Häberle, note 13, at 76.

<sup>20</sup> Heinrich Schneider. Põhiseaduse preambula: tema tähtsus ja õiguslik loomus. (Preamble of a Constitution: Its Legal Nature and Implications.) Juridica 442, 446 (1996).

<sup>21</sup> The Court derived from the presumption of innocence (§ 22 of the Constitution) the principle that all unresolved suspicions should always and indisputably be interpreted in favour of the accused. Justice Kalm noted in her dissent that according to § 149(3) of the Constitution and according to the system of administration of justice and court procedure of Estonia, the Plenary Session of the Supreme Court, while reviewing a concrete case in the cassation proceedings, cannot ignore previous decisions of the Criminal Chamber of the Supreme Court in the same case. Q.v. Decision of the Plenary Session of the Supreme Court, 3-1-1-123-97, 22 January 1998. RT III 1998, No. 23, Article 228.

<sup>22</sup> A dissenting opinion of Chief Justice Maruste was delivered in a criminal case before the Plenary Session, urging that death penalty conflicts the principles of the Constitution. Maruste mentioned that a judge, a justice of the Supreme Court, in particular, cannot reduce himself to a technical machine of norm application. "These are value judgements which are binding on the legislature and which it cannot change. These value judgements are included in the principles of the Constitution." Maruste referred to human dignity as a value protected by the Constitution (§ 10) and to the principle of proportionality. The opinion of the Court, however, was limited merely to criminal issues; constitutional values or principles were not mentioned at all. Q.v. Decision of the Plenary Session of the Supreme Court, 3-1-1-97-96, 25 September 1996. RT III 1996, No. 28, Article 369. The other dissenting opinion of Chief Justice Maruste concerned freedom of expression in a criminal charge against a journalist. Q.v. Decision of the Plenary Session of the Supreme Court, 3-1-2-1-98, 9 April 1998. RT III 1998, No. 19, Article 190.

<sup>23</sup> As the Administrative Law Chamber pointed out with a reference to one of its earlier decisions, it "does not include court precedent, but a judicial interpretation of a law." Q.v. Decision of the Administrative Law Chamber of the Supreme Court, 3-3-1-13-97, 25 April 1997. RT III 1997, No. 17, Article 182. It is disputable if the Supreme Court creates law and to which extent are the decisions binding (except for the decisions in the constitutional review procedure - these decisions are binding to everyone under § 23 of the Constitutional Review Court Procedure Act; the binding force is clear also in cases when a lower court re-examines a case referred back to it by a higher court), but, in fact, in some decisions the legislation is treated quite freely. Q.v. e.g.: Decision of the Administrative Law Chamber of the Supreme Court, III-3/1-11/94, 25 November 1994. Riigikohtu lahendid 1993/1994. (Decisions of the Supreme Court 1993/1994.) 100 (1995). By this decision, an interested person ("third person") was introduced into the administrative law court procedure, in addition to the participants of the proceedings named in the Administrative Court Procedure Act. Q.v.: p. 13. Justice Salmann in his dissent admitted the need for such change, but he criticised the Court doing that by a court precedent, instead of the Riigikogu through an amendment to the law.

<sup>24</sup> Decision of the Constitutional Review Chamber of the Supreme Court, III-4/A-4/93, 4 November 1993. RT I 1993, No. 72/73, Article 1052.

<sup>25</sup> Decision of the Constitutional Review Chamber of the Supreme Court, III-4/A-1/94, 12 January 1994. RT I 1994, No. 8, Article 129, and Decision of the Constitutional Review Chamber of the Supreme Court, III-4/A-2/94, 12 January 1994. RT I 1994, No. 8, Article 130.

<sup>26</sup> Riigikogu = the parliament of Estonia.

<sup>27</sup> The Constitution § 9(2).

<sup>28</sup> This is a right not mentioned *expressis verbis* in the text of the Constitution and can, thus, be treated as an outcome of an application of the "fundamental rights development clause". Q.v. p. 2.

<sup>29</sup> The Constitution §§ 26, 33 and 43.

<sup>30</sup> There are some differences in the lists of permissible grounds for restriction of different rights (e.g., § 26 of the Constitution does not mention "ascertaining the truth in a criminal proceeding", but "to apprehend a criminal offender") which, in principle, must be taken into account when limiting the rights, but which are not crucially important for the present analysis.

<sup>31</sup> Q.v. e.g., Dieter Grimm. Human Rights and Judicial Review in Germany, in: Human Rights And Judicial Review: A Comparative Perspective 267, 289-290 (David M. Beatty ed., 1994).

<sup>32</sup> Erik Kergandberg. Organiseeritud kuritegevus ja jälituslikud erimeetmed: Operatiiv- ja jälitustegevuse seaduse eelnõust ajendatud kirjutis. (Organized Crime and Special Measures of Prosecution: A Writing Provoked by the Draft Law on Special Measures of Prosecution.), Juridica 132 (1993).

<sup>33</sup> Freedom of an individual to determine the data he discloses for a census was under question in this case. Q.v. Kergandberg, supra note 32, at 134.

<sup>34</sup> Decision of the Constitutional Review Chamber of the Supreme Court, III-4/A-7/94, 2 November 1994. RT I 1994, No. 80, Article 1377.

<sup>35</sup> Decision of the Constitutional Review Chamber of the Supreme Court, III-4/A-8/94, 2 November 1994. RT I 1994, No. 80, Article 1378.

<sup>36</sup> The Constitution § 32(3).

<sup>37</sup> Ibid. § 154(1).

<sup>38</sup> Decision of the Constitutional Review Chamber of the Supreme Court, III-4/A-10/94, 21 December 1994. RT I 1995, No. 2, Article 34.

<sup>39</sup> Decision of the Administrative Law Chamber of the Supreme Court, 3-3-1-14-97, 30 May 1997. RT III 1997, No. 21/22, Article 234.

<sup>40</sup> Decision of the Constitutional Review Chamber of the Supreme Court, 3-4-1-1-99, 17 March 1999. RT III 1999, No. 9, Article 89.

<sup>41</sup> The Constitution § 32(1).

<sup>42</sup> Decision of the Constitutional Review Chamber of the Supreme Court, III-4/A-1/95, 12 April 1995. RT I 1995, No. 42, Article 655.

<sup>43</sup> This conclusion is similar to the interpretation of Article 14(3) of the German Basic Law. If the rights protected under that provision are transferred to someone else, it is a question of expropriation. The Constitutional Court has also treated measures which are equivalent to expropriation. Q.v. Jochen Abr. Frowein, Vara kaitse Saksa põhiseaduses. (Protection of Property under the German Basic Law.) in: Konstitutsioonikohtud põhiõiguste ja vabaduste kaitse. (Constitutional Courts Protecting the Fundamental Rights and Freedoms.) 70, 74-75 (Heinrich Schneider ed., 1997).

<sup>44</sup> Decision of the Constitutional Review Chamber of the Supreme Court, 3-4-1-2-96, 8 November 1996. RT I 1996, No. 87, Article 1558.

<sup>45</sup> It must be reminded that this decision was made by the Administrative Law Chamber of the Supreme Court. There can be no certainty that the Constitutional Review Chamber would have decided the case in the same way, although it seems highly probable to the author.

<sup>46</sup> Q.v. supra note 24.

<sup>47</sup> Q.v. supra note 23.

<sup>48</sup> Jüri Pöld. Eesti kohtupraktikat põhiõiguste ja vabaduste kaitsmisel. (Estonian Court Practice in Protection of Fundamental Rights and Freedoms) in: Konstitutsioonikohtud põhiõiguste ja vabaduste kaitse. (Constitutional Courts Protecting the Fundamental Rights and Freedoms.) 55, 60-62 (Heinrich Schneider ed., 1997). Pöld mentions that an analogous problem in administrative court proceedings arose also in the beginning of the 1920s. Although based on different motives, the Administrative Law Chamber of the Supreme Court also applied analogy with the civil law proceedings and passed a decision legalising the interested person's participation in the proceedings in 1922.

<sup>49</sup> Decision of the Constitutional Review Chamber of the Supreme Court, 3-4-1-1-96, 10 May 1996. RT I 1996, No. 35, Article 737.

<sup>50</sup> The Constitution § 14.

<sup>51</sup> Ibid. § 40(2).

<sup>52</sup> Ibid. § 48(2).

<sup>53</sup> Ibid. § 3(1).

<sup>54</sup> Rait Maruste and Eerik-Juhan Truuväli, Teooria ja praktika probleeme seonduvalt põhiseaduslikkuse järelevalvega. (Problems of Theory and Practice in Connection with Constitutional Review.), *Juridica*, 304, 306 (1995).

<sup>55</sup> The Constitution § 29(1): "An Estonian citizen has the right to freely choose his or her sphere of activity, profession and place of work. Conditions and procedure for the exercise of this right may be provided by law. Citizens of foreign states and stateless persons who are in Estonia have this right equally with Estonian citizens, unless otherwise provided by law."

<sup>56</sup> Decision of the Constitutional Review Chamber of the Supreme Court, 3-4-1-1-97, 11 June 1997. RT I 1997, No. 50, Article 821, and Decision of the Constitutional Review Chamber of the Supreme Court, 3-4-1-2-97, 6 October 1997. RT I 1997, No. 74, Article 1267.

<sup>57</sup> Decision of the Constitutional Review Chamber of the Supreme Court, 3-4-1-4-98, 27 May 1998. RT I 1998, No. 49, Article 752.

<sup>58</sup> The Constitution § 34.

<sup>59</sup> Decision of the Constitutional Review Chamber of the Supreme Court, 3-4-1-3-97, 6 October 1997. RT I 1997, No. 74, Article 1268.

<sup>60</sup> Q.v. e.g., Madis Ernits. Eesti Vabariigi põhiseaduse põhiõigused: Üldosa. (Fundamental Rights of the Constitution of the Republic of Estonia: General Part.) 31 (1996) (unpublished manuscript, on file with the Ministry of Justice of the Republic of Estonia, Tallinn).

<sup>61</sup> Decision of the Constitutional Review Chamber of the Supreme Court, 3-4-1-11-98, 22 December 1998. RT I 1998, No. 113/114, Article 1887.

<sup>62</sup> Decision of the Constitutional Review Chamber of the Supreme Court, 3-4-1-9-98, 25 November 1998. RT I 1998, No. 104, Article 1742.

<sup>63</sup> The right to family life is not mentioned *expressis verbis* in the Constitution, and can also be considered an outcome of the "fundamental rights development clause". Q.v. *supra*, p. 2.

<sup>64</sup> Q.v. *supra*, note 40.

<sup>65</sup> The Constitution § 31.

<sup>66</sup> Ibid.

<sup>67</sup> Decision of the Constitutional Review Chamber of the Supreme Court, 3-4-1-1-98, 5 February 1998. RT I 1998, No. 14, Article 230, and Decision of the Constitutional Review Chamber of the Supreme Court, 3-4-1-7-98, 4 November 1998. RT I 1998, No.98/99, Article 1618.

<sup>68</sup> These sections concern Estonian as the official (state) language, the official language of state agencies and local governments, and everyone's right to address state agencies, local governments, and their officials in Estonian and to receive responses in Estonian.

<sup>69</sup> Q.v. *supra* p. 16.



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# Protection of Persons' Rights and Freedoms by Estonian Administrative Courts: Development and Key Problems

## 1. Outline of Developments of Administrative Court Jurisdiction

### 1.1. GENERAL INTRODUCTION

On 19 February this year 80 years have passed from the beginning of administration of justice by administrative courts in Estonia. Conditionally these years can be divided into two big stages. The first stage covers the period from 1919 to 1940 and coincides with the first period of Estonian statehood. In 1940, in connection with the occupation and annexation of the Republic of Estonia by the Soviet Union, the jurisdiction of administrative courts was liquidated. Its restoration became possible only after the re-establishment of Estonia's independence. The Constitution adopted in 1992 foresaw the formation of administrative courts. Next year the Administrative Court Procedure Code was adopted and in autumn of the same year administrative courts began to operate. But actually their work began in the autumn of 1993. In February 1993 the parliament passed a qualitatively new Administrative Court Procedure Code that will come into force on 1 January 2000. Thus, Estonia will enter a new century with the new Administrative Court Procedure Code.

### 1.2. JURISDICTION OF ADMINISTRATIVE COURTS IN THE FIRST PERIOD OF ESTONIAN STATEHOOD (1919-1940)

In 1919 the Administrative Court Procedure Act was passed which was substantially amended in 1929 and which served as the basis for the administration of justice in the field of administrative law.<sup>1</sup> There were no organisationally independent administrative courts established in Estonia. General courts and their departments administered justice in the field of administrative law. The administrative court system consisted of district courts (55), circuit courts (4) and the administrative law department of the Supreme Court.

A district court was the first-instance administrative court and apart from administrative cases it heard civil and criminal cases. Justice was administered in a district court by a single judge. Circuit courts operated within their jurisdiction also as the courts of first instance. Circuit courts were allowed to form departments according to the type of cases to be tried, thus including administrative law departments, but actually the latter were not established and a bench of three judges of civil departments resolved administrative disputes. The administrative law department of the Supreme Court was the highest administrative court that



operated as the final court of appeal for both district and circuit courts. The acts of the following persons and institutions fell within the competence of an administrative court:

(1) at the central state administration level - acts of ministers and ministries, governments and departments thereof and structural units equated with the latter two subdivisions;

(2) at the local state administration level – acts of county governments, structural units and members thereof, chief constables and others;

(3) at the local government level — acts of rural municipality, township and city governments and cultural governments of national minorities as well as structural units and members thereof.

Administrative courts were entitled to review both legislation (regulations, orders and resolutions) and the actual activity (including inactivity and delay) of an administration. The activities of the Government of the Republic were beyond the judicial control of administrative courts.

Complaints against the acts of rural municipality and township councils and governments as well as the departments and pertinent officials thereof fell within the competence of a district court.

A circuit court dealt with the complaints filed against the acts of city and county councils and cultural boards of national minorities as well as of city and county governments and cultural governments of national minorities and the departments and officials thereof.

The Supreme Court as the final court of appeal reviewed the cassation protests and complaints lodged against the decisions of district and circuit courts. The main task of these review proceedings was to control whether a first-instance court had properly and uniformly implemented the law in force. Review proceedings involved the elements of both cassation and appeal procedure.<sup>2</sup> In certain administrative cases (when dealing with ministerial regulations, etc.) the Supreme Court operated as the court of first instance.

An administrative court exercised relatively extensive powers while resolving the cases before it. A court might:

(1) reject the complaint;

(2) rescind the regulation, order or resolution in full or in part. A court might also require the issuance of a new administrative act instead of the rescinded one;

(3) order the pertinent administrative agency or official to perform a certain act if the law or regulation obliged it or him or her to perform the act. In order to safeguard the complainant's rights, a court might also require abstention from or abandonment of performing the act;

(4) remove officials from their office in the cases prescribed by law.

In summary it can be said that a relatively perfect

jurisdictional administrative control functioned in that period. In the administrative law sphere, the judicial protection of rights and freedoms of natural as well as legal persons was guaranteed.

### 1.3. JURISDICTION OF ADMINISTRATIVE COURTS AFTER THE RE-ESTABLISHMENT OF ESTONIA'S INDEPENDENCE

The Constitution of the Republic of Estonia adopted by the referendum of 29 June 1992 foresaw a three-stage court system. Pursuant to § 149 of the Constitution, county and city courts, and administrative courts are courts of first instance. Circuit courts review judgements of the first-instance courts by way of appeal proceedings. The Supreme Court is the highest court in the state that reviews court judgements by way of cassation.<sup>3</sup>

On 21 June 1993, the Administrative Court Procedure Code was adopted by the parliament and in autumn of the same year the administrative courts began to operate.<sup>4</sup> Pursuant to the Code, the administrative court system can be described as follows:

(1) separate administrative courts or administrative judges who serve in county or city courts constitute the first-instance administrative courts. At the present moment there are two separate administrative courts in Estonia — in Tallinn and in Tartu; there are 23 administrative judges working in county and city courts. The total number of administrative judges in the first-instance courts is 36;

(2) administrative chambers of circuit courts operate as the courts of second instance whereat, pursuant to the law, the circuit courts are not obliged to establish administrative chambers. In the case no administrative chamber has been formed, the civil chamber will review administrative cases. Out of the three circuit courts of Estonia (the Tallinn, Tartu and Viru Circuit Courts) only the Tallinn Circuit Court contains a separate administrative chamber.

The 1993 Administrative Court Procedure Code belongs to so-called transitional-period laws characterised by the then understandings and the legal regulation of which was based on the then objective situation and existing possibilities. Besides essential deficiencies the Code is of a comparatively low norm-technical level. In order to guarantee the protection of persons' rights and freedoms in the sphere of administrative action, the Administrative Law Chamber of the Supreme Court has tried to eliminate the drawbacks of the Code in its decisions by extending the administrative judicial protection of persons.

On 25 February 1999, the parliament adopted a new Administrative Court Procedure Code that will come into force on 1 January 2000.<sup>5</sup> In the elaboration of the Code our current court practice, problems arisen in connection with court proceedings and court decisions, proposals made by administrative judges, the relevant procedure codes and court practice of other states (Germany, Austria, Switzerland, France and others) as well as treatments and

positions presented in the pertinent legal-theoretical literature were taken into account. The requirements of the Convention for the Protection of Human Rights and Fundamental Freedoms were also taken as the basis. Practitioners and legal scholars of Germany, Austria and other states gave their expert opinions on the draft Code.

The part of the Code dealing with the organisation of administrative courts will come into force on 1 January 2001. The Code foresees the establishment of separate administrative courts of first instance. Proceeding from that, an administrative court may review more serious administrative cases collegially, i.e. with the participation of three judges. At the present moment, a single judge tries administrative cases in a court of first instance.

## 2. Competence of an Administrative Court and the Protection of Persons' Rights

### 2.1. GENERAL BASES

Subsections 3(1) and 4(1) and (2) of the Administrative Court Procedure Code currently in force has tried to establish the competence of an administrative court mainly by listing the types of pleadings, administrative agencies and officials. The fact that the list is incomplete and non-exhaustive, has often caused disputes in court practice on whether it is possible to file an appeal with an administrative court against the act of one or the other administrative agency, and which disputes fall within the competence of an administrative court and which ones fall within the competence of a county or city court, etc. Such method of determining the competence of an administrative court does not guarantee and is not in compliance with the constitutional principle of judicial protection. Pursuant to § 15(1) of the Constitution everyone whose rights and freedoms are violated has the right of recourse to the courts. This principle has been elaborated by §§ 3 and 4 of the Courts Act pursuant to which the task of the courts is to protect everyone's rights and freedoms in accordance with the Constitution and laws. Citizens have the right to be protected by the courts if their life, health, personal liberty, property, honour and dignity or other rights and freedoms guaranteed by the Constitution, are violated.<sup>6</sup> § 3(1) 1) of the new Administrative Court Procedure Code defines the competence of an administrative court by the method of a general clause – the resolution of disputes in public law falls within the competence of an administrative court. Subsection 3(2) of the Code fixes the disputes in public law for which the law prescribes another way of procedure and which are because of this excluded from the competence of an administrative court. According to § 4(1) of the Constitutional Review Court Procedure Act, the Constitutional Review Chamber of the Supreme Court reviews the constitutionality of enforced laws passed by the parliament, the conformity of

parliamentary resolutions with the Constitution and the law, the constitutionality of laws that have not been promulgated by the President and that have not yet become effective, the constitutionality of presidential legislation, the conformity of enforced legislation of general application of the executive state power and local governments with the Constitution and the law, and the constitutionality of international treaties that have not yet become effective. An administrative court does not review the complaints procedure for resolution of which is provided by the Civil and Criminal Court Procedure Codes. Thus, the disputes in public law contained in the latter codes do not fall within the competence of an administrative court. Although the legislator has not excluded any more disputes that may be caused by the relations in public law from the competence of an administrative court, still, for example, the President's decisions by which the laws are promulgated as well as some other disputes stemming from the relations in political law do not, in essence, fall under the jurisdiction of an administrative court. An administrative court is primarily entitled to deal with the disputes proceeding from the relations in administrative law. At the same time it should be mentioned that, on the basis of the constitutional principle of judicial protection, the Administrative Law Chamber of the Supreme Court has extended its competence also to disputes that, in essence, are not disputes in administrative law. For example, an administrative court proceeded with a complaint filed against a procedure carried out in the preliminary investigation of a criminal case. This concerns the complaint submitted to the Public Prosecutor against a prosecutor's performed procedure and rejected by the former. The Administrative Law Chamber of the Supreme Court observed in its decision that as the Criminal Procedure Code does not provide for the resolution of complaints filed with the Public Prosecutor against his or her subordinate prosecutors then the resolution of such complaints filed against Public Prosecutor's legislation or act falls within the competence of an administrative court. Further, the Supreme Court pointed out that, at the same time an administrative court does not interfere with the criminal proceeding and does not control the observance of law by the institutions carrying out preliminary investigation. Pursuant to the Administrative Court Procedure Code, an administrative court reviews only whether the Public Prosecutor has acted lawfully while resolving the complaint.<sup>7</sup> Although with regard to the above-mentioned case the position of the Administrative Law Chamber of the Supreme Court was justified, the court decision, one way or the other, touched the substantial aspects of criminal procedure. Therefore, first of all the pertinent gaps should be eliminated in the Criminal Procedure Code and not left to be filled by an administrative court because otherwise it may happen that an administrative court will, one way or the other, interfere with the

criminal procedure.

## 2.2. AN ADMINISTRATIVE ACT AND THE PROTECTION OF PERSONS' RIGHTS

As at present we do not have an Administrative Procedure Code then we cannot find the definition of an administrative act in substantive law in the Estonian legal order either. Subsection 4(3) of the valid Administrative Court Procedure Code has tried to define a legal act against which a complaint may be submitted to an administrative court: a resolution, order, directive or other legislation of no normative content issued by the body, agency or official referred to in this section as well as an administrative agreement denote a legal act against which a complaint or protest may be filed with an administrative court. Such a definition is of course a failure. Firstly, the above provision foresees that such legislation may be issued only by the agencies of executive state power the list of which is given in § 4(1) of the pertinent Act. As it has been mentioned already, the corresponding list is not exhaustive. For example, it does not contain the President and others. At the same time other state bodies, such as the parliament, exercising the administrative function assigned to them by law as a secondary function are absolutely left aside. With regard to this, the administrative court has made certain corrections in its decisions and interpreted the pertinent provision extensively. The following case serves as an example here. On 21 September 1994 the Riigikogu (the parliament of Estonia) removed, by its resolution and on the basis of § 26 5) of the Status of Judges Act, from office the judge S. D. because of the reorganisation of courts. S. D. submitted a complaint against it to an administrative court and later an appeal to a circuit court. The circuit court repealed the judgement of the administrative court and terminated the proceeding as it held that the complaints against the resolutions of the Riigikogu did not fall within the competence of an administrative court. S. D. appealed to the Supreme Court. The Administrative Law Chamber of the Supreme Court observed in its decision that the resolution of the Riigikogu to remove a judge from his or her office is an individual act of public law character that terminates the service relations with a civil servant. Consequently, the Supreme Court admitted that in the above-mentioned court case it dealt with an administrative act. Subsequently the Supreme Court emphasised that such a dispute may not be resolved by way of constitutional review because, stemming from § 6(1) of the Constitutional Review Court Procedure Act, only the President of the Republic, the Legal Chancellor and the courts and not the person who considers that his or her rights are violated are entitled to initiate constitutional review proceedings in the Supreme Court. Consequently, only an administrative court is competent to review the complaint pertaining to the resolution of the Riigikogu on the issues of service.<sup>8</sup>

Secondly, the essential criterion of a legal act against which it is possible to submit a complaint to an administrative court, i.e. the criterion that the act is not, in content, legislation of general application, is improper and confusing. Estonian legal doctrine and legal practice treat legislation that contains rules of law as legislation of general application.<sup>9</sup> Consequently, § 4(3) of the Administrative Court Procedure Code bears in mind the legislation that does not contain rules of law. But at the same time certain legislation that does not contain rules of law is issued in the sphere of relations of political law. Such legislation should fall within the competence of the court of constitutional review. The new Administrative Court Procedure Code has tried to resolve the problem. Subsection 4(1) of the Code offers a substantive definition of an administrative act: an order, directive, resolution, precept or other legislation of an agency, official or other person performing administrative tasks in public law that have been issued in public law relations for the regulation of an individual case denote an administrative act against which it is possible to file a complaint or protest with an administrative court. Here the notion of an administrative act tries to reveal as closely as possible the notion of an administration act known in theory.<sup>10</sup>

Compared with the definition of an administrative act embodied in § 35 of the German Administrative Procedure Code (*Verwaltungsverfahrensgesetz*) there is one difference, namely the Estonian definition of an administrative act lacks the characteristic of "being directed beyond administration".<sup>11</sup> In Germany, the contest of legislation of an administration that has no "beyond-effect" is generally excluded by the restriction established on the recourse to an administrative court. Pursuant to § 7(1) of the German Administrative Procedure Code, a person who considers that legislation or action of an administration has violated his or her rights or restricted his or her freedoms, i.e. his or her subjective rights in public law, has the right of recourse to an administrative court. At the same time this definition enables such resolutions (expressions of will) of an administration that have no direct "beyond-effect" but that, one way or the other, invade personal rights to be contested in court.

In the initial period (1993-1994) of operation of Estonian administrative courts the problems arose in connection with the qualification and determination of these resolutions of an administration on the basis of which the administration used the forms in private law. The same problem in German legal doctrine has been dealt with in relation to a so-called two-stage theory (*zwei-Stufen Theorie*).<sup>12</sup> The question was whether the decision "whether" made at the first stage and based on public law, and followed by "how" with regard to which form of private law is used, could be treated as an administrative act and contested in an administrative court. Present court practice holds that if the decision made at the first stage is

directly determined by the norms of public law then we are dealing with an administrative act that can be contested in an administrative court.<sup>13</sup> In connection with this, two main fields have become topical in our court practice — privatisation of property in the ownership of the state or a local government and public procurement, and to a lesser extent the resolutions pertaining to the accomplishment of administrative tasks by an administration in the forms of private law and the delegation of these tasks to persons in private law. Pursuant to the Privatisation Act, the privatisation of state property is arranged by the Privatisation Agency (a government agency) the board of which determines, for example, by its decision and pursuant to § 9(2) 11) of the aforementioned Act, the most successful tender in negotiated limited tendering and on the basis of this decision enters into a contract of purchase and sale (a contract in private law) with the person whose tender was the best.<sup>14</sup>

Administrative courts regard such decisions of the Board of the Privatisation Agency as administrative acts and they have reviewed the pertinent complaints. But disputes pertaining to the contract of purchase and sale fall within the competence of county or city courts. The organisation of public procurement procedures is regulated by the Public Procurement Act pursuant to which the contracting authority (a state or local government agency or other legal person in public law on behalf of the state or local government) determines by its decision and pursuant to § 28(1) of the Act, the most successful tender on the basis of which the procurement contract (a contract of purchase and sale or any other contract entered into after the acceptance of a tender) will be concluded.<sup>15</sup> Interested parties, primarily other participants in tendering, have filed complaints against such decisions. Administrative courts have regarded these decisions as administrative legislation. The reason for that lies foremost in the fact that these decisions are also determined by the norms of public law. The grounds for the contest of these acts are the infringement of tendering procedures, the ignoring of the principle of equality and others.

However, in the cases when the decision of an administration (an expression of will) is not directly determined by the norms of public law, the courts have not dealt with them. For example, they have not reviewed resolutions (orders) of city or rural municipality governments that serve as the basis for the conclusion of lease contracts or contracts of purchase and sale of municipal property and that do not fall within the sphere of the Public Procurement Act.

Decisions of the administration the essence of which is the delegation of administrative tasks in public law to persons in private law or the accomplishment thereof by an administration in the forms of private law should also be contested in administrative courts. At present there is no relevant court practice but as administrative tasks are these in public law then the disputes concerning them should

naturally fall within the competence of administrative courts. For example, a local government council decides by its resolution that is based on § 7(2) of the Common Waterworks and Sewerage Act who will be the water undertaker (the one who guarantees the water supply from common waterworks and the drainage and cleaning of wastewater with the help of common sewerage).<sup>16</sup> If a legal act that serves as the basis for granting special or exclusive rights does not provide for the procedure of special or exclusive rights then, pursuant to § 15(3) of the Competition Act, the council must organise for the granting of the pertinent right a public competition pursuant to the procedure established by the Government of the Republic.<sup>17</sup> The relevant decision of a council may be contested in an administrative court.

### 2.3. ADMINISTRATIVE AGREEMENT AS AN ADMINISTRATIVE ACT

With regard to administrative agreements, the situation in the Estonian legal order is somewhat peculiar. Namely, at present we have neither defined an administrative agreement in substantive law nor established the requirements for the content and form thereof. At the same time special laws allow certain administrative agreements to be entered into and local government units also use them rather often for the delegation of administrative tasks in public law to persons in private law. Court practice has not been able to develop this institute as no administrative agreement has been contested hitherto. In order to fill the gap at least in some way, § 4(1) of the new Administrative Court Procedure Code defines an administrative agreement as an agreement regulating relations in public law. Thus, agreements in public law regulating individual cases fall within the competence of an administrative court. In the new Administrative Court Procedure Code an administrative agreement is equated to an administrative act. Subsection 4(1) of the Code provides that, in the meaning of the present Code, an administrative agreement is also regarded as an administrative act. Undoubtedly this equalising causes certain complications for the administrative court procedure. An analogous legal construction can be found in the German Administrative Court Procedure Code (*Verwaltungsgerichtsordnung*). Hereby one cannot but agree with the position of the German legal researcher G. Ress that both these forms of administrative acts include different aspects of unlawfulness and that they differ in substantive law as well as in procedure law.<sup>18</sup> The consequences of unlawfulness thereof are also different. As the legislator has not provided for the requirements of invalidity of an administrative agreement then here the application of analogy of law, primarily the provisions of the General Part of the Civil Code Act pertaining to transactions, helps to fill the gap to some extent.<sup>19</sup> The General Part of the Civil Code Act distinguishes between void and voidable transactions. Pursuant to §§ 66(1) and (2) of the



Act, a transaction that is contrary to the constitutional order or good morals or law, save if the law is not significantly violated, is void. Besides the aforementioned essential mistakes, a transaction may be, pursuant to the General Part of the Civil Code Act, void because of the failure to comply with the form of a transaction (§ 93(1)), because of the agency without mandate (§ 103(1)) or because of other reasons. A void transaction is invalid from inception and it need not be performed (§§ 66(3) and (4)). The General Part of the Civil Code Act does not prescribe that the court must declare a transaction invalid although certain grounds of invalidity of a transaction may sometimes be quite ambiguous (a conflict with good morals, a significant infringement of law) and disputable and require additional interpretation. Therefore, the Civil Chamber of the Supreme Court has, for example, declared in one of its decisions the invalidity of a void transaction in civil law.<sup>20</sup> Obviously an administrative court should similarly declare the invalidity of a void administrative agreement so much the more as a significant violation of law mentioned in the General Part of the Civil Code Act has different meanings in civil law (a civil contract) — generally a prohibition proceeding from the law — and in administrative law (an administrative agreement) — an activity not permitted by the law. Thus, not only the pertinent provisions of the General Part of the Civil Code Act come into consideration as the criteria of invalidity of an administrative agreement but also the infringement of requirements stemming from the principle of administrative legality. Pursuant to § 6(3) 3) of the new Administrative Court Procedure Code it is possible to seek declaration of invalidity of an administrative agreement.

Pursuant to § 67(1) of the General Part of the Civil Code Act, a transaction that a court may declare invalid at the request of an interested person on the bases provided by law is a voidable transaction. A party may demand performance of a voidable transaction until the transaction is declared invalid. Subsection 67(2) of the same Act provides that if a court declares a voidable transaction invalid, it shall be deemed invalid from inception. The same principle applies to void transactions. Consequently, there are no differences between void and voidable transactions as to their legal consequences. The General Part of the Civil Code Act establishes the following grounds for the contest of a transaction: misrepresentation, duress, error, a transaction exceeding passive legal capacity of a legal person and others. But the Act does not fix the unlawfulness as a ground for the contest of a transaction. That is not the case with an administrative agreement that, pursuant to the provisions of the new Administrative Court Procedure Code, may be contested from the aspect of its unlawfulness. Hereby the time limits for submission of complaints provided for in § 9(1) of the new Code must be taken into consideration. A complaint against an administrative act or action may be filed with an administrative court within 30

days as of the date the person filing the complaint becomes or should have become aware of the contested administrative act or action unless otherwise provided by law. Thus, it is possible to seek entire or partial invalidation of an administrative act within 30 days. Subsection 6(2) 1) of the new Administrative Court Procedure Code enables in principle to seek conclusion of an administrative agreement also in the cases where there is a pertinent prior resolution in public law to that effect. Subsection 6(3) 1) of the new Code enables the unlawfulness of an administrative agreement to be ascertained. Thus, an administrative agreement may, from the aspects of administrative procedure, be void, voidable and unlawful.

#### **2.4. OTHER ACTS OF AN ADMINISTRATION AND THE PROTECTION OF PERSONS' RIGHTS**

Both, the existing and the new Administrative Court Procedure Codes prescribe the possibility to submit a complaint against other forms of action of an administration. Pursuant to § 4(2) of the new Code, an action against which it is possible to file a complaint or protest is the activity or inactivity or delay in public law relations of an agency, official or other person performing administrative tasks in public law. The action of an administration means here the real acts of an administration that besides actual activities include other forms of action. For example, in the Estonian legal order it is possible to submit a complaint against single procedural steps of administrative procedure, not only against final decisions. For example, § 55(1) of the Public Procurement Act provides that a participant in a tendering procedure has the right to submit a complaint against acts performed or decisions made in a tendering procedure before acceptance of the successful tender. The above provision foresees that the protest be filed with the Public Procurement Office or an arbitral tribunal but taking into account the fact that no obligatory out-of-court procedure for resolution of disputes of the kind has been established, a person may still choose between out-of-court and judicial procedures. Most important here is whether or not the corresponding act of an administration invades the person's rights and freedoms. The new Administrative Court Procedure Code enables complaints to be submitted against such acts of an administration as the concordance, approval and others that are real acts in case they invade persons' rights. For example, § 17(2) 2) of the Planning and Building Act prescribes that prior to being publicly displayed, comprehensive plans (i.e. a plan which is prepared for the territory of a rural municipality or city and the drawing of which is administered by a local government) must be in concordance with the local governments neighbouring on the planning area. Pursuant to § 22(6) of this Act, a person exercising supervision over the planning must approve a plan prior to its adoption.<sup>21</sup> In accordance with § 6(2) 2) of the new Administrative Court Procedure

Code, a person may seek both the concordance and approval of a plan in case it is not concordant or approved (the right to seek performance of the act not performed). Also complaints against the concordance and approval are relevant. For example, one may seek declaration of these acts unlawful and the review or substitution (reversal) thereof.

### 3. System of Types of Complaints and Scope of Judicial Protection

#### 3.1. INTRODUCTION

The Administrative Court Procedure Code currently in force does not establish the types of requests embodied in a complaint. Pursuant to § 20(1) 1) (types of court decisions) of the Code, an administrative judge may declare the complained or protested legal act or action unlawful in full or in part. From § 71(5) of the Code it stems that the court decision also contains a binding precept to an administration as to what the latter must do. Thus, a person may, firstly, seek declaration of the legal act or action unlawful and, secondly, he or she himself or herself must substantiate the remaining part of the request — what he or she endeavours that the administration should do. As administrative court practice shows, such relatively insufficient regulation has restricted the possibilities of protection of persons' rights and freedoms in an administrative court because the complainants often cannot formulate the request essentially precisely. But the valid Administrative Court Procedure Code as well as the new one embody a principle according to which the court must stay within the limits of the submitted request. The new Administrative Court Procedure Code has tried to fill this gap. True, the new Code does not expressis verbis mention the types of complaints but it enumerates in § 6 the types of requests. By a complaint or protest it is possible to seek:

- (1) annulment of an administrative act or a part thereof;
- (2) implementation of the suspended administrative act or the issuance of an administrative act that has not been issued, performance of an action that has been suspended or not performed;
- (3) ascertainment of unlawfulness of an administrative act or action;
- (4) compensation for damages caused by an unlawful administrative act or action;
- (5) ascertainment of the existence or non-existence of the relation in public law.

Dogmatically, the following types of complaints may be derived from the requests embodied in a complaint:<sup>22</sup>

- (1) a complaint seeking annulment;
- (2) a complaint seeking the imposition of an obligation;
- (3) a complaint seeking ascertainment.

If we compare the essence of this system of types of

complaints with that incorporated in the administrative court procedure codes of Germany and Austria then we can see the difference. Although the terms used for the denotation of types of complaints in the new Estonian Administrative Court Procedure Code greatly coincide with those in the German Administrative Court Procedure Code, their content is still different.

#### 3.2. COMPLAINT SEEKING ANNULMENT

The new Administrative Court Procedure Code (§ 26(1) 1)) vests an administrative court with the right to invalidate an unlawful administrative act. Here it is important to mention that the existing Administrative Court Procedure Code does not foresee this possibility — a court may just declare that an unlawful administrative act or action is unlawful. Thus, a person may seek by his or her complaint annulment of an administrative act or a part thereof. Besides an administrative act we can speak of an "annulment-complaint" with regard to an administrative agreement (equated to an administrative act in the new Code). An "annulment-complaint" may not be submitted against other forms of activity of an administration that may restrict persons' rights (real acts). An "annulment-complaint" may be filed with an administrative court within the time limits established for submission of appeals to an administrative court, i.e. within 30 days as of the date the person becomes or should have become aware of the appealed administrative act unless otherwise provided by special laws. After the expiration of the deadline for submission of appeals to an administrative court, an administrative act generally has the force of law and pursuant to the principle of legal certainty may not be repealed. This is not an absolute rule because the court has the right, at the request of the appellant, to restore the term if it finds that the deadline has been exceeded for due reason (§ 12(3) of the new Code). Proceeding from § 26(1) 1) of the new Code (the competence of an administrative court), a person may, in addition to seeking annulment of an administrative act, seek reversal of an administrative act in order to eliminate the consequences caused by the act.

#### 3.3. COMPLAINT SEEKING THE IMPOSITION OF AN OBLIGATION

By this type of complaint a person may seek the issuance of an administrative act that was not issued, implementation of the suspended administrative act, and performance of an act that was not performed. A person may also seek the abstaining from the issuance of an administrative act or of the performance of an act. The complaint may be aimed at the reversal of the real act in case it is done together with the requirement of ascertaining the unlawfulness of the performed act (a complaint seeking ascertainment). With the help of a complaint seeking the imposition of an obligation a person may also require the conclusion of an administrative agreement when there is the pertinent prior resolution of an adminis-

tration and the administration delays the entrance or refuses to enter into a contract. If in the person's opinion the conclusion of an administration agreement prejudices his or her interests, he or she may seek abstention from the conclusion of an administrative agreement. Pursuant to the new Administrative Court Procedure Code, a person may also seek compensation for damages caused by an administrative act, administrative agreement or other action of an administration. The valid Code does not foresee this possibility. It means that a person must first seek declaration of unlawfulness of a legal act or action by an administrative court and only after that he or she may submit a claim for damages to a county or city court. A person may also seek by this type of complaint other pecuniary compensation to be paid by an administration.

### **3.4. COMPLAINT SEEKING ASCERTAINMENT**

With the help of an "ascertainment-complaint" a person may seek ascertainment of unlawfulness of an administrative act, administrative agreement or action. He or she may also require assertion of invalidity of an administrative act or administrative agreement. By this complaint it is also possible to seek ascertainment of the existence or non-existence of the relation in public law. Substantially this type of complaint also includes claims for ascertainment of rights and duties and legal status in the relations of public law.

### **3.5. TYPES OF COMPLAINTS AND THE LEGAL MEANING THEREOF**

The distinction of types of complaints is of importance primarily from the systematic aspects. Practically the new Code does not limit the number of different requests in one complaint. Hereby it is essential that the requests would be directed at only one participant in the procedure (the one and the same whose legislation or act has caused the submission of the complaint). An appellant may without changing the object of the complaint substitute one request for another or change the object pending the trial if other participants in the procedure consent to it or the court decides that this is expedient (§ 19(8) of the new Code). But one must bear in mind that different types of complaints have different legal meanings and consequences. As it has been mentioned already, a person may seek annulment of an administrative act within 30 days after the date he or she becomes or should have become aware of the appealed administrative act (a complaint seeking annulment). The same time limits apply to the complaints by which the issuance of an administrative act that has not been issued, implementation of a suspended administrative act, also performance of an act that has not been performed or abstention from the issuance of an administrative act or performance of an act are sought (a complaint seeking the imposition of an obligation). If a person seeks ascertainment of unlawfulness of the performed action (a complaint

seeking ascertainment) together with a claim for its reversal (a complaint seeking the imposition of an obligation) then he or she must also consider the aforementioned time limits. A complaint seeking the imposition of a compensation obligation for damages caused by an administration may be submitted within three years as of the date the person becomes aware of the damage but not later than after 10 years from the date the administrative act was issued or other action performed. There are no fixed deadlines for submission of "ascertainment-complaints". Also other specific requirements apply to different types of complaints. A complaint seeking annulment and that seeking the imposition of an obligation may be filed by a person who considers that his or her rights have been violated by an administrative act or other action. An "ascertainment-complaint" may be lodged by a person who has the pertinent grounded interest (§ 7(1)).

## **4. Appeal for Judicial Review of a Specific Norm**

Pursuant to § 15(1) of the Estonian Constitution everyone has the right, while his or her case is before the court, to petition for any relevant law, other legislation or procedure to be declared unconstitutional. The right to appeal to an administrative court for judicial review of a specific norm is provided more thoroughly in both the existing and the new Administrative Court Procedure Codes. Although § 15(1) of the Constitution refers besides laws to other legislation and procedures the § bears in mind the laws and legislation of general application (acts containing legal norms) issued by an administration. The pertinent judicial review in an administrative court may be initiated by a natural or a legal person as well as the court. Pursuant to § 25(5) of the new Administrative Court Procedure Code, an administrative court, when deciding a case before it, does not apply any law or legislation of general application that is in conflict with the Constitution. The Constitution has not vested the courts with the right to invalidate the laws or other legislation of general application that are in conflict with the Constitution. Only the Supreme Court (the Court of Constitutional Review) is competent to do this. From the aspects of uniformity and stability of the legal order, judicial review decisions concerning specific norms must get their final evaluation in the Constitutional Court. If an administrative act or other procedure declared unlawful by the decision of the court was issued or performed on the basis of an unconstitutional law or other legislation that an administrative court did not apply then pursuant to § 26(6) of the new Code the court informs the Supreme Court and the Legal Chancellor of its decision whereby a constitutional review proceeding in the Supreme Court is initiated. As our court practice shows, appellants have many a time resorted to this possibility. This right stemming from the Constitution offers

additional guarantees for the protection of persons' rights. A problem here is that an administrative court takes the corresponding position in its substantial court decision without awaiting the decision of the Supreme Court. If, for example, the decision of a first-instance court is not appealed against (the decision comes into force) and the Supreme Court rejects the request of an administrative court then the unlawful decision of the first-instance court remains in force. That is undoubtedly not in compliance with the principle of uniform application of law (the principle of equality). If an administrative court comes to the conclusion that an unconstitutional law or other legislation of general application has served as the basis for an administrative act or procedure, it should have the right to suspend the proceeding until the Supreme Court will make its decision.

In connection with the judicial review of norms by administrative courts the problem whether to vest administrative courts with the right to exercise, to a certain extent and at a certain level, abstract judicial control over the legislation of general application of an administration, has come under discussion among lawyers. Such legislation includes, for example, the regulations (by-laws) of a local government, regulations of corporations, agencies and foundations in public law and others. This issue needs more thorough analysis and discussion including among other things such questions as who should have the right to initiate an abstract norm review, on what grounds the proceedings should be initiated and so on. The Estonian Constitution is not an impediment here.

## Conclusion

The new Administrative Court Procedure Code has substantially expanded the protection of persons' rights and freedoms by administrative courts and created conditions for operative rehabilitation of infringed rights. So the new Code foresees a possibility of annulment of an administrative act as well as reversal of the implemented administrative act. Persons are entitled to seek compensation for damages caused by an administration, the issuance of an administrative act that has not been issued, ascertainment of unlawfulness of administrative real acts together with the reversal thereof, ascertainment of a relation in public law, etc. On the basis of the system of requests the following types of complaints can be mentioned: complaints seeking annulment, complaints seeking the imposition of an obligation, complaints seeking ascertainment, and complaints for judicial control of a specific norm. At the same time the fact that the development of administrative procedure is somewhat ahead of substantive law has caused problems for administrative court procedure. For example, there are no provisions establishing the requirements for the content and form of administrative acts and administrative agreements. Especially difficult is the situation with administrative agreements in the case of which it is not

possible to entirely apply legal analogy in the form of provisions of the General Part of the Civil Code pertaining to transactions because the aspects of invalidity and unlawfulness of an administrative agreement and those of a transaction in civil law differ greatly. There is nothing more than hope that the administrative law reform in progress (the Administrative Procedure Code is being elaborated) will fill this gap in the near future. But meanwhile, this is the task of court practice.

One of the further development trends of administrative court procedure could be the exercise of abstract norm control over the legislation of general application of the administration.

## Notes:

<sup>1</sup> RT (Riigi Teataja = State Gazette) 1919, 10, 23; 1929, 16, 110.

<sup>2</sup> A.-T. Kliimann, *Haldusprotsess*. (Administrative Procedure.) Tartu, 1937, p. 276.

<sup>3</sup> Eesti Vabariigi Põhiseadus. Riigi Teataja toimetuse väljaanne. (Constitution of the Republic of Estonia. Publication of Editorial Board of Riigi Teataja.) Tallinn, 1994.

<sup>4</sup> RT I 1993, 50, 694; 1998, 61, 981.

<sup>5</sup> RT I 1999, 31, 425.

<sup>6</sup> RT I 1991, 38, 472; RT I 1998, 4, 62.

<sup>7</sup> Court Order of the Administrative Law Chamber of the Supreme Court in administrative case No. III-3/1-32/95. — Riigikohtu lahendid. (Decisions of the Supreme Court.) 1995. Tallinn, 1996.

<sup>8</sup> Court Order of the Administrative Law Chamber of the Supreme Court in administrative case No. III-3/1-33/97. — Riigikohtu lahendid. (Decisions of the Supreme Court.) 1997. Tallinn, 1998.

<sup>9</sup> K. Merusk, *Kehtiv õigus ja õigusakti teooria põhiküsimusi*. (Law in Force and Principal Issues of the Theory of Legal Act.) Second amended edition. Tartu, 1995, pp. 6-8.

<sup>10</sup> I. Pilving, *Halduskohtute korraldus ja pädevus halduskohtumenetluse seadustiku eelnõus*. (Administration and Competence of Administrative Courts in Draft Administrative Court Procedure Code.) — *Juridica*, 1998, 10, p. 518.

<sup>11</sup> F. O.Kopp, *Verwaltungsverfahrensgesetz*. 6. wesentl. überarb. Aufl., München, 1996, p. 606.

<sup>12</sup> H. J. Wolff, O.Bachof, R.Stober, *Verwaltungsrecht I*. 10. Aufl., München, 1994, pp. 214-216; F.-J. Peine, *Allgemeines Verwaltungsrecht*. Heidelberg, 1994, pp. 185-187; H.-U. Erichsen, (Hrsg.), *Allgemeines Verwaltungsrecht*. 10. Aufl., Berlin, New York, 1995, pp. 41-44; W. Schmitt Glaeser *Verwaltungsprozessrecht*. 12. Aufl., Stuttgart, München, Hannover, 1993, p. 42.

<sup>13</sup> Court Order of the Administrative Law Chamber of the Supreme Court in administrative case No. III-3/1-4/94. — Riigikohtu lahendid. (Decisions of the Supreme Court.) 1993/1994. Tallinn, 1995; Court Order of the Administrative Law Chamber of the Supreme Court in administrative case No. III-3/1-14/94. — Riigikohtu lahendid. (Decisions of the Supreme Court.) 1993/1994. Tallinn, 1995.

<sup>14</sup> RT I 1997, 9, 78.

<sup>15</sup> RT I 1997, 9, 79.

<sup>16</sup> RT I 1999, 25, 363.

<sup>17</sup> RT I 1998, 30, 410.



<sup>18</sup> G. Ress, *Handlungsformen der Verwaltung und Rechtsschutz in der Bundesrepublik Deutschland*. — *Forschungen aus Staat und Recht* 89. Entwicklungstendenzen im Verwaltungsverfahrensrecht und in der Verwaltungsgerechtsbarkeit. Wien, New York, 1990, pp. 15-16.

<sup>19</sup> RT I 1994, 53, 889; 1999, 40, 773.

<sup>20</sup> Decision of the Civil Chamber of the Supreme Court in civil case No. III-2/1-126/97. — *Riigikohtu lahendid*. (Decisions of the Supreme Court.) 1997. Tallinn, 1998.

<sup>21</sup> RT I 1995, 59, 1006; 1999, 29, 399.

<sup>22</sup> I. Pilving Q.v. note 10, p



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# Right of Action in Estonian Administrative Procedure

## Introduction

After constitutional order was restored in the territory of the Republic of Estonia, the administrative court system, liquidated under the Soviet occupation, restarted its activities in 1993.<sup>1</sup> The Administrative Court Procedure Code<sup>2</sup> was enacted at the same time. In order to remove deficiencies, which had mainly emerged in practice, the Riigikogu<sup>3</sup> passed in February 1999 a new amended version of the Administrative Court Procedure Code (ACPC),<sup>4</sup> which after its entry into force on 1 January 2000 will provide a multitude of facilities for more efficient protection of persons. The new Code will not only smooth out minor unwanted angularities but remarkably restructure the fundamental system of Estonian administrative procedure.<sup>5</sup> On the other hand, the reformation of administrative adjective law in Estonia cannot be considered complete for a long time yet, as a range of questions need more in-depth analysis than could be afforded in removing urgent deficiencies<sup>6</sup>. The circle of persons entitled to bringing an action to administrative court, i.e. the question of the right of action, can, *inter alia*, provide a subject of deeper analysis. In this point, the process of acceding to the European Union is also one of the initiating factors.

## 1. Right of Action in Essence

The opportunity to contest administrative acts in court is an inseparable part of the constitutional order of Estonia as well as many other states. The judicial control is well characterised by the fact that courts do not begin to exercise control on their own initiative but rather in the event of an action.<sup>7</sup> One of the key questions in the system<sup>8</sup> of judicial control over administration is the decision on who has the right to initiate administrative control procedures in

court, i.e. the right of action, also known as the right of initiative. The right of action regulation determines the persons who are competent to challenge administrative acts in court. In Estonian legal literature, the right of action has also been regarded as "active legitimization" or title of interest. "Title of interest means a justification or right to initiate proceedings on the specific presumption of connection between the initiating party and the subject matter of dispute."<sup>9</sup> These concepts overlap to a large extent but it must be taken into consideration that in principle, the right of action may also be vested in a person without a personal connection with the administrative act in dispute.<sup>10</sup> The right of action must, however, be certainly distinguished from passive and active legal capacity in administrative procedure. Passive legal capacity in administrative procedure means the general capacity to be a party to the procedure while active legal capacity in administrative procedure means the right to independently act in the court on one's own behalf.<sup>11</sup>

In every legal order, certain limits are established with regard to bringing actions against the executive but, as shown by comparative analysis, quite different solutions are possible in that aspect. The regulation of competence for action may also be differentiated on national level, e.g. on the basis of causes of action and the field of substantive law from which the action originates. In regarding possible models of the right of initiative in administrative procedure, four action categories can be distinguished abstractly: actions for protection of rights, actions based on interests, popular actions and association actions.<sup>12</sup> In the aspect of comparative analysis of major legal orders, mainly two solutions exist:

(1) the system of subjective rights protection, in

which only actions for protection of rights are permitted;

(2) the system of objective control over administration, in which also actions based on interests are permitted<sup>13</sup>.

The first system sees the general objective of the administrative court procedure primarily in protecting individuals' rights and freedoms and, consequently, grants the right of action only for the purpose of protecting subjective rights. In wider terms, this is based on the understanding that although the executive has a general obligation to act in accordance with law, judicial enforcement of that obligation may be demanded only by competent persons.<sup>14</sup> That solution is characteristic of particularly German and Austrian law of administrative procedure.<sup>15</sup> In the administrative procedure in France<sup>16</sup> and the United States<sup>17</sup>, however, provisions concerning competence for action are much more "generous", as the right of action is generally ensured also in the event of violation of justified interests, in addition to violation of rights. That "generosity" is accordant with other fundamentals underlying administrative procedure law in those legal orders and does not necessarily mean more extensive control over administration<sup>18</sup>. Furthermore, the objective of administrative procedure is much more seen in ensuring the legitimacy of the executive's activities in those countries. Judicial protection in the judicial bodies of the European Union has also been largely influenced by French law; in addition, opportunities by far wider than in the system of subjective rights protection must be ensured for contesting national administrative acts which are in conflict with EU legislation.<sup>19</sup>

## 2. Right of Action under the Reviewed Administrative Court Procedure Act

In Estonia, administrative courts may be addressed by submitting either an action or a protest (ACPC § 6(1)). By means of an action, administrative court procedures may be initiated by individuals (ACPC § 7(1)) or associations of individuals, and by means of protest, the procedures may be initiated by supervising agencies or officials (ACPC § 7(2)). The ACPC does not directly refer to categories of action but, dogmatically, actions for avoidance, actions for performance and actions for declaratory judgement, in which the conditions for addressing the administrative court, including the right of action, are different, can be distinguished on the basis of applications contained in actions. Under §§ 6(2) and (3) of the ACPC, actions may be brought to the administrative court for avoidance of an administrative act<sup>20</sup> or a part thereof (actions for avoidance), enforcement of an administrative act, conducting an act — to compel the performance of an administrative act or a factual measure — and compensation for damages caused by an administrative act or measure (actions for performance), and for ascertainment of unlawfulness of an administrative act and the existence or absence of a rela-

tionship under public law (actions for declaratory judgement). Supervising agencies or officials may have the right of protest only under a special Act in the exercise of supervision over the legitimacy of the activities of an administrative body in a specific field.<sup>21</sup> By protest, the same applications as in the event of action may be presented to the administrative court, except the ascertainment of unlawfulness of an administrative act and the compensation for damages (ACPC § 6(2)). During the first years after the restoration of the administrative court procedure, state and local government agencies made several attempts to initiate administrative disputes by virtue of action. However, since state and local government agencies are not independent legal subjects in Estonia<sup>22</sup> (unlike the former Soviet legal order), such actions were denied. An administrative body may challenge the activities of another administrative body in the administrative court only in the form of protest but therefor it must be specifically authorised to do so by law.<sup>23</sup>

In preparing the new ACPC, the former solution for the right of action served as a basis — the drafters only attempted to make more specifications therein and adjust it to the new categories of action (actions for avoidance and actions for performance) in Estonian administrative procedure. Under the ACPC applicable at the time of writing this article as well as the new ACPC, actions for protection of rights are a rule — the rights of actions for avoidance and actions for performance as the main categories of action are, in general, vested only in such persons whose rights are violated by the contested administrative act.<sup>24</sup> An action may be brought on condition that subjective public rights have been violated by the administration.<sup>25</sup> Thus, in its principal part, Estonian administrative procedure is founded on the idea of subjective rights protection. As regards actions for declaratory judgement, the idea has been abandoned in the new ACPC, as in this aspect, justified interests are sufficient for creating the right of action (ACPC § 7(1), second sentence).<sup>26</sup> In contrast, the second sentence of the Administrative Court Procedure of 1919 vested the right of action in a significantly wider circle of persons: "actions may be presented by all persons, associations and local government agencies should their lawful or material interests be touched in an unlawful manner". A.-T. Kliimann concluded from the cited provision that, in addition to protection of private interests, popular actions — actions against violations of legal order and public interest — are also possible.<sup>27</sup>

The ACPC defines the right of action as the condition for the admissibility of action.<sup>28</sup> Nevertheless, whether, in addition to objective unlawfulness of an administrative act, subjective rights of a person have been violated thereby or whether the interest of a person presenting an action for declaratory judgement is worth protection or not will become evident only in the course of the essential examination of the case. The competence for action is not a

requirement in respect of an action, on which the administrative court could adopt the final decision in preparing the examination of the case<sup>29</sup> but rather a question, which must be evaluated in the judgement after having conducted the essential examination at a hearing.<sup>30</sup> At the same time, it must be taken into consideration that the right of action as a precondition for the admissibility of action must be verified in each administrative case. The formal requirement is provided in clause 10(2) 4) of the ACPC, which imposes on the claimant the obligation to indicate, in addition to why the administrative act is unlawful, also the rights or freedoms violated by the administrative body. When the claimant fails to show the alleged violation of rights even after being additionally requested so by the court, the action may be dismissed without examination (ACPC § 11(3)). The provision is aimed at avoiding unjustified actions but it fails to imply that the administrative court verifies only the justifiedness of allegations made in the action. Estonian administrative procedure is based on the principle of investigation<sup>31</sup> and thereunder, the court must check that the administration has also respected other rights of the claimant. If the administrative court establishes that the claimant's rights have not been violated, the court cannot grant the action because the requirements for admissibility of action are not satisfied.<sup>32</sup> The reasons need not include the specific right or legal basis therefor but rather the factual circumstances underlying the claimant's consideration of his rights being violated by the administration's activities. For example, the reason that violation of auction rules impaired "the right to participate in an auction and the opportunity to win the auction" has been regarded by the Supreme Court as sufficient grounds for admissibility in preliminary procedure.<sup>33</sup> This does not mean, however, that such reasoning would actually be appropriate or true, which must be determined in the course of, rather than in preparing, the proceedings.

## 2.1. ACTIONS FOR AVOIDANCE AND IMPOSING AN OBLIGATION

Actions for avoidance and actions for performance are admissible only if the rights or freedoms of a person bringing the action are violated by an administrative act made by an administrative body or by its refusal to make an administrative act (ACPC § 7(1)). In that provision, "person" means individuals as well as legal entities,<sup>34</sup> including, in a limited number of cases, legal persons under public law, who are wishing to protect their rights or freedoms.<sup>35</sup> Under § 9(2) of the Constitution, fundamental rights and freedoms extend to legal persons in so far as this is in accordance with the general aims of legal persons and with the nature of such rights and freedoms. The construction "rights or freedoms" originates from § 15(1) of the Constitution. In this aspect, "freedoms" however mean the freedoms protected under objective law, i.e. the so-called freedom rights, which do not form separate legal positions

besides subjective rights but are rather a category of the latter. R. Alexi concludes that "[...] it is evident that freedoms are, nonetheless, fundamental rights protecting special benefits. Therefore, one could cease regarding freedoms as an independent category and proceed with generally referring to fundamental rights, which protect the benefits of freedoms (and hence acts) or natural situations or legal positions".<sup>36</sup>

### 2.1.1. Subjective Rights in General. The Protective Norm Theory

What should be regarded in Estonian administrative procedure as a right of the protected individual? In general legal theory, subjective rights mean the legal power (opportunity, competence), vested in a legal subject, to demand, from another, certain behaviour, inaction or tolerance in the first subject's interests.<sup>37</sup> Any subjective right logically derives from another person's legal obligation, while legal obligations can also exist without corresponding subjective rights.<sup>38</sup>

Administrative courts are competent to settle only disputes under public law, and only subjective rights under public law can be protected in administrative courts. According to German judicial practice, property of local government entities and other legal persons under public law, unlike that of individuals, is not protected under the Constitution (in Germany, § 14 I GG) and therefore, in administrative courts, local government entities cannot have resort, as a subjective right under civil law, to violation of ownership.<sup>39</sup> From the viewpoint of individuals, a subjective public right is an opportunity, provided by public law, to demand from the state certain behaviour as regards the individual.<sup>40</sup> In private law, subjective rights primarily mean legal power vested in an individual for realisation of certain interests,<sup>41</sup> or can also mean an interest protected by law.<sup>42</sup> In private law, legal obligations are established usually for protecting interests of the other party and this is accompanied by the partner's right to performance. Public administration, however, mostly acts in the public interest rather than in that of an individual, and provisions regulating the administration's activities also realise public interests, to a large extent. Nevertheless, even in the field of public law a subjective right is constituted in the event of imposing on the administration an obligation to protect, besides public interests, also someone's private interests. According to the so-called protective norm theory (German *Schutznormtheorie*), which is prevalent in substantiating the concept of subjective rights in Germanic legal system, an allegedly violated provision of law must (besides at least public interests) also protect the claimant's private interests.<sup>43</sup> No subjective right is constituted when a person's interests are coincidentally aimed at the same result which would have been achieved by the administration's lawful behaviour as well.<sup>44</sup> On that basis, economic and political interests, geographic or infrastruc-



ture advantages as well as intangible interests such as the appeal of a city or good reputation of a company, in so far as they are not protected under subjective rights, cannot be protected in administrative courts.<sup>45</sup>

According to the so-called newer protective norm theory, the protection objective of a provision need not be entirely and primarily manifested from the will expressed by the legislator. In addition, the protection objective may appear in the surrounding provisions and its "institutional framework". And lastly, even fundamental rights may play a role of explanation and systematisation of values in the creation of a protection objective.<sup>46</sup> Hence the fundamental rights have the ability to so-to-say "subjectivate" provisions of ordinary laws.

Placing fundamental rights themselves directly as a category of subjective rights has been disputable. According to R. Wahl, fundamental rights are specific constitutional subjective rights, yet to be formed into subjective rights on the level of ordinary Acts.<sup>47</sup> At least one part of the fundamental rights, however, exist in the legal order as equal to subjective rights. According to K. Merusk, "it is important that the appropriate provision has the quality of realising itself, i.e. it is adequately accurate, clear and specific in order to be implemented."<sup>48</sup> R. Alexi concludes in his analysis that fundamental rights referred to in the Estonian Constitution exist, as a rule, in the form of subjective rights. "When in the Chapter of fundamental rights, an obligation is imposed on the state, that obligation is principally reflected in a subjective right of an individual. [...] A provision contained in the catalogue of fundamental rights is purely objective only when sufficient reasons can be given for that the state's obligation need not be reflected by a subjective right of a citizen. That is so when, if and in so far as that provision explicitly serves collective purposes rather than individual interests, as the wording of § 27(1) of the Constitution, or when the provision is exclusively of an organisational nature, as § 28(3) of the Constitution."<sup>49</sup>

### 2.1.2. Vestedness of the Right in the Claimant

Any violated right must belong to the claimant itself: an action may not be filed on behalf of other persons,<sup>50</sup> least of all for protecting public interests, i.e. as a popular action. In other words, the claimant must belong to the circle of persons protected by the violated provision. According to the practice of the German Supreme Administrative Court, a subjective right may arise out of only such legal provisions the elements of which allow determination of the circle of persons which is distinguished from the public in general. However, such position of the court is problematic, given today's technologies of considerable influence (nuclear energy, genetic technology).<sup>51</sup>

The so-called association actions are not absolutely precluded in Estonian administrative procedure. An association of persons, including associations without the status

of a legal person, may turn to administrative courts for the purpose of protecting its members' or other persons' interests only in the events provided in a special Act (ACPC § 7(3)).<sup>52</sup> In this aspect, § 7(3) of the ACPC is a special provision, leaving to the legislator a reservation to provide for availability of association actions in certain events. Such exceptional association actions may be presented in the interests of one's own members (egoistic association action) or other persons (altruistic association action)<sup>53</sup>. However, protection of the association's rights by a member or shareholder thereof is precluded. Likewise, a resident of a rural municipality or town may not challenge state acts which are in violation of local government guarantees.

### 2.1.3. Connection between Violation of Rights and Administrative Activity

Proof of the existence of a right of action cannot be provided only by a successful demonstration by the claimant that the administrative body has committed a violation of law and that subjective rights are vested in the claimant, unless the claimant satisfies the court that the case of violation has resulted in consequences to the claimant's rights. In order that the right of action be created, the claimant's rights must have been violated namely by the challenged administrative act. In the case of administrative act, this requires the existence of an adequate causal relationship between the regulation of the administrative act and the changes in the claimant's personal sphere of rights. No right of action exists when the administrative act in question brings about only factual influence but is not legally binding on the claimant.<sup>54</sup> On the other hand, a violation of rights need not be reflected in the factual status of the subject: a violation or restriction need not result in factual consequences.<sup>55</sup> It is the deterioration of the legal status that is important. In disputing an administrative act, resort may be had only to such rights as were vested in the claimant at the moment of making such act; protection cannot be afforded to a right that has been created subsequently or that had been extinguished for other reasons before the moment of making the act.<sup>56</sup> However, if rights were not created for the very reason of an act, such act can be admitted as an adequate reason violating the sphere of the claimant's rights.

Direct relationships often lapse in the event of making preliminary rulings in multi-stage administrative procedures. Disputes concerning the ownership reform can be pointed out as an example in the situation of Estonia. Restitution of unlawfully expropriated property is practically carried out in a two-stage procedure: at the first stage, the fact of unlawful expropriation of property during the Soviet occupation is ascertained (the former owner or his or her successor is declared an entitled subject), and at the second stage, restitution of property is determined by an administrative act. The rights of the present user of the property (the right to privatise the property) can be violat-

ed by the final decision on restitution of the property but not by declaring somebody an entitled subject with regard to the property, as the question concerning restitution of the property is not yet decided thereby.<sup>57</sup>

#### **2.1.4. Exceptions**

The following paragraphs address the suitability of solutions offered by foreign authors for settling some of the exceptional cases in Estonian administrative procedure.

##### **2.1.4.1. The Addressee Theory**

According to the so-called addressee theory offered by German authors, an illegitimate burdening administrative act can always be regarded as violating a subjective right of the addressee<sup>58</sup> because it touches at least the general freedom of activity, which is protected in Germany under Article 2(1) of the German Constitution.<sup>59</sup> The direct addressee of a burdening administrative act may always refer to the administrative court and the objective illegitimacy of the administrative act is, in essence, sufficient for granting an action for avoidance of the burdening administrative act.

In criticising the addressee theory, D. Ehlers finds that this theory is inapplicable to problematic cases, such as challenge of a building permit by a neighbour. In the opinion of Ehlers, the addressee of a burdening administrative act is not always entitled to action since not all such administrative acts interfere with the sphere of the addressee's rights.<sup>60</sup> Such criticism, however, remains doubtful as the neighbour of the developed immovable property is not the addressee of the administrative act but rather a third party whose rights may be influenced disadvantageously by the administrative act favourably addressed to the addressee.<sup>61</sup>

The task of the addressee theory is, however, not to provide an exhaustive answer in respect of all administrative acts but to save further checks on the competence for action in the event of a burdening administrative act. But on the other hand, the addressee theory cannot be overestimated from in particular its practical side: the question of when a person can be regarded as an addressee of a burdening administrative act and when that person can be regarded as a third party, i.e. towards whom the will of the issuer of the administrative act was directed, can be unanswerable by means of one single determination. In the event of doubt, the existence of the protection objective of the provision must nevertheless be rechecked under general criteria. The Administrative Council of the Supreme Court has recognised the existence of a right to action in disputing the restitution of property, previously given to a person, to the former owner thereof namely because of burdening character.<sup>62</sup>

##### **2.1.4.2. Administrative Acts Refusing to Grant Preferences**

Besides the addressee theory, the application theory has been proposed, whereunder any person who has applied for a favourable administrative act from the admin-

istration but whose application has been denied is competent for action. Such vision cannot, however, be approved of. An administrative act whereby the issue of an administrative act favourable to a certain person is refused cannot be regarded as burdening although it does not accord with the addressee's interests. Such administrative acts are, in fact, directed towards leaving the addressee's rights and obligations unaltered. An application for preference may be submitted by anyone but the subjective right to preference is enjoyed only by a specified circle of persons.<sup>63</sup>

When a person has been refused a certain preference, the appropriate category of action would be an action for performance rather than an action for avoidance. In the event of an action for performance, competence for action is vested only in the person who has a subjective right to demand the issue of an administrative act or the conduct of a factual measure. The ultimate goal of the person applying for preference is, after all, not to get rid of the refusing administrative act but to be granted the preference. That must also be the objective of the action brought to the administrative court; in the event of disputing a refusing act, the requirement of protection of rights is not met and hence no violation of rights can be referred to. The existence of such right must be ascertained on the basis of additional criteria, otherwise anyone would be entitled to demand favourable administrative acts.<sup>64</sup> In the case of actions for performance, the general law of freedoms is not applicable and in this point, one must demonstrate that the administration is legally bound to take active steps and that the obligation has been established in the claimant's interests. The foregoing assertion should, however, not be applied in such narrow manner to the so-called control permits,<sup>65</sup> which in formal terms are favourable administrative acts but virtually belong in the field of restrictive administration. The control permits only restore an initial former freedom that has been restricted by law rather than grant additional benefits (e.g. pension). In this point, the actual illegitimacy of an administrative act and a violation of subjective rights overlap. When, however, subjective rights have not been violated, i.e. there are no grounds for receiving a permit, no attention should either be paid to any procedural and formal errors occurred in making the decision of refusal. The same result is achieved also when an action for performance is preferred to an action for avoidance; in the case of an action for performance the court only checks whether the claimant has grounds for demanding an administrative act and not whether the refusal to make the administrative act has been legitimate. Nevertheless, an authentic burdening administrative act must, when disputed, be set aside also in the event of formal or procedural errors.

Among other formal requirements, significance can be attributed to the obligation to motivate (indicate reasons for) an administrative act — that obligation is related to the

right to judicial protection set out in § 15(1) of the Constitution. Judicial protection can be used efficiently only when the administrative act indicates reasons therefor. On that basis, the Supreme Court has considered the absence of reasons in an administrative act, even in the event of issuing a favourable administrative act, per se a violation of subjective rights: "In order that the legitimacy of an administrative act be disputable, a person must know the reasons for issuing that act. Otherwise the exercise of the constitutional right of action, which also encompasses challenge of the legitimacy of such reasons, would be rendered impossible. The order in question has been issued in violation of the right to know and dispute the essential basis of refusal." In addition, the Supreme Court concluded, in the same case, that the right to equal treatment had been violated: "As no reasons were indicated for not granting citizenship to the claimants while the refusal to grant citizenship to others was substantiated by reasons, this constitutes unequal treatment, which is in conflict with the equal treatment principle."<sup>66</sup>

#### **2.1.4.3. Administrative Acts with Collateral Effect**

Administrative acts with collateral effect are those influencing one person favourably and another unfavourably at the same time, but the unfavourable effect is not yet burdening, as was the case with the addressee theory,<sup>67</sup> i.e. the unfavourable effect is not in conflict with general freedom. In such event, the claimant must demonstrate that a claimant's specific right has been violated — the claimant has the so-called right of defence. In this aspect, no general criteria exist, and environmental law<sup>68</sup> and building law are among particularly problematic fields, in which the collateral effect of permits under administrative law can reach both closer and more distant neighbours.

When a preference (activity licence, tax allowance, subvention, concession) granted to a competitor is disputed, the question will arise of whether this constitutes only a prejudice to economic interests or also violates subjective rights in the case of objective conflict with law. In Estonia, this could be regarded only in terms of restricting the freedom of enterprise, set out in § 31 of the Constitution, or ignoring the principle of equal treatment. The former usually cannot be used as an argument because § 31 of the Constitution affords protection to, not against, the enterprise. However,<sup>69</sup> § 31 of the Constitution may offer protection when activities in the given field are precluded or rendered meaningless by a preference granted to a competitor; but a mere decrease in income will not be sufficient for this purpose. As equal treatment of market players is one of the conditions for fair competition, a person can indeed have resort thereto in disputes concerning competition. However, this constitutes a basis for disputing not the preference granted to the competitor but rather the refusal to grant a preference to the claimant if no legitimate grounds for differentiated treatment exist. And indeed,

problematic cases have emerged in Estonia with regard to preferences granted to competitors. For example, the owner of a competing radio station disputed a Directive of the Minister of Culture, whereunder Eesti Raadio, an institution under public law, was allowed to use an additional radio frequency area. The Supreme Court, however, took the position that on the basis of the public-law status of Eesti Raadio, the equal treatment principle had not been violated.<sup>70</sup>

## **2.2. ACTIONS FOR DECLARATORY JUDGEMENT**

In Estonian law, the limitation of the circle of persons entitled to turn to the administrative court by the criterion of subjective rights protection extends only to actions for avoidance and actions for performance. In accordance with the second sentence of § 7(1) of the ACPC, a justified interest is sufficient for filing an action for declaratory judgement. In this aspect, the new Code has taken a remarkable step towards expanding the right of action — in the Code of 1993, actions may be filed only by a person who finds that his or her rights or freedoms have been violated by the activities of the administration (§ 5(1))<sup>71</sup>. Expansion of the right of action was not among the independent objectives of establishing the new Code. By § 6(3) 3) of the ACPC, the scope of application of actions for declaratory judgement was expanded by allowing submission of applications to administrative courts for ascertaining the existence or absence of relationships under public law. It would be erroneous to make that option available only for the purpose of protecting subjective rights. The wording of § 43(1) of the German VwGO, which served as one of the comparative models in drafting the new ACPC, also expressly provides for actions for declaratory judgement only in the event of justified interests but the subjective rights protection requirement is also applied thereto by analogy with actions for avoidance and actions for performance. In the event of actions for declaratory judgement in German administrative procedure, justified interests are only a precondition additional to violation of rights.<sup>72</sup> Under the new Estonian ACPC, however, the subjective rights protection principle should not be applied to actions for declaratory judgement by analogy. If a person does have justified interests but that person's subjective rights have not been violated, that person cannot demand that the administrative act be set aside but may apply for declaring the administrative act unlawful, like for the ascertainment of any other fact in public law. In this aspect, German professional literature has noticed the danger that when the right of action is expanded, actions for declaratory judgement may become a shortcut with regard to avoiding actions for avoidance and actions for performance, which are regulated under more stringent admissibility requirements.<sup>73</sup> R. Wahl, on the other hand, sees no harmful consequences in this, as in his opinion, the legal consequences

of a successful action for avoidance or action for performance are sufficiently different from those resulting from an action for declaratory judgement. An action for declaratory judgement is a declaration which need not result in setting aside the administrative act or an obligation to issue an unissued administrative act. In settling an action for declaratory judgement, the administrative court will much less intervene in the executive's activities, and therefore, the less stringent restrictions on submission of actions for declaratory judgement are consistent with the system logic.<sup>74</sup>

Actions for declaratory judgement with a wider availability of initiative cannot, however, be regarded as popular actions in Estonian administrative procedure. Actions for declaratory judgement are actions based on interests rather than popular actions. Although justified interest as a criterion for creation of the right of action expands the circle of persons having the right of initiative, it does not make it unlimited. The presentation of a popular action is not barred by any obstructions relating to the claimant but two aspects are still required for justified interests: first, certain personal relationship with the contested act, and second, the need for ascertainment, i.e. the presumed advantage of ascertaining a legal fact in protecting the claimant's interests.<sup>75</sup>

#### 2.2.1. Personal Connection

Estonian administrative courts are yet to open the meaning of the personal connection aspect of justified interests. On the basis of the experience gained by other countries, it can still be expected that the conception of justified interests will not include just any interests pointed out by the claimant but rather only those worth protection under legal order. Economic, personal, cultural or ideal interests may be taken into consideration.<sup>76</sup> In French administrative procedure, which is aimed at objectively controlling the legitimacy of the administration's activities, the existence of interest (*intérêt pour agir*) is the main criterion for the right of action. The interest must be direct and personal (*intérêt direct et personnel*).<sup>77</sup> In this field, the French regulation of the right of action has strongly influenced the law of the European Union.<sup>78</sup> Actions against legislation adopted by an institution of the European Union may be filed with the Court of Justice by the addressees but also by third parties who are directly and personally influenced by the piece of legislation in such comparable manner as is the addressee.<sup>79</sup> The direct nature of personal contiguity in European law must manifest itself in the direct effect of the piece of legislation, i.e. the creation of influence must not require adoption of additional legislation, except when the issuer of the implementing act has no independent space to decide.<sup>80</sup> In order to prove personal contiguity under French as well as European law, the claimant must demonstrate that the claimant belongs in the group of persons concerned, unless the claimant is a direct addressee of the administrative measure in dispute.<sup>81</sup>

Merely being a national of a state does not provide the right to challenge any act of the state, as this would lead to popular action.<sup>82</sup>

#### 2.2.2. Need for Ascertainment

In addition to personal contiguity, a grant of an action for declaratory judgement must provide the claimant by a real advantage. An admission that an administrative act is unlawful need not result in any consequences to even that person whose rights are violated by such act. For example, the person has no demand to set aside the unlawful administrative act which has come into effect.

This aspect is similar to the requirement of legitimate interest in § 43(1) of the VwGO as it is regarded as additional to the subjective rights violation requirement. In order to bring an action, a mere uncertainty in the claimant's sphere of interests is not sufficient: there must be a specific need to determine the circumstances, such as in a dispute between the claimant and an administrative body in a question which is of importance to the claimant. This may arise when, for example, the administrative body intends to begin the procedure of enforcing a void administrative act.<sup>83</sup> With regard to terminated legal relationships, justified interests may exist upon continuance of legal influence, e.g. upon the danger of recurrence of an unlawful act, upon a need for rehabilitation or in the event of claim for damages.<sup>84</sup>

### 3. Criticism of the Right of Action Provisions

#### 3.1. INFLUENCE OF THE LAW OF THE EUROPEAN UNION

In criticising the system of subjective rights protection, influences arising out of the law of the European Union have often been used as an argument. Owing to the accession negotiations, Estonian jurists cannot escape from determining these influences on Estonian administrative procedure. The influence forcing to consider expansion of the right of action has been caused by the organisation of enforcement of EU legislation. The law of the European Union is mostly implemented by bodies of the Member States themselves (indirect enforcement), and disputes arising in that regard are, to a large extent, also settled in national courts of the Member States.<sup>85</sup> In order to ensure legislative implementation by the Member States, many acts provide for the persons concerned the opportunity of having recourse to national courts. The criteria of the right of action are often prescribed as similar to the conditions for having recourse to judicial institutions of the EU — thus these criteria are wider than in the countries which apply the system of subjective rights protection. "Legal positions created by Community law may not be provided with less advantageous conditions in national adjective law regardless of what is regarded as such advantages [provided to individuals] by Community law."<sup>86</sup> Fields in which



such developments can be noted include granting of subventions (with regard to competitor actions), state procurements, environmental protection and agricultural law.<sup>87</sup> In many aspects, the confrontation between national and Community law can be removed by expanding the sphere of subjective rights on account of the positions protected under Community law.<sup>88</sup> Failing this, the body of EU provisions ensuring the right of action can also be treated as specific regulation which does not influence purely national competence for action. At the same time, regarding the increasing role of Community law, an implementation of two parallel competence for action models is of doubtful reasonableness.

On the other hand, in analysing the problem fields of German administrative procedure discussed by e.g. C. D. Classen, the conclusion can be reached that upon Estonia's accession to the European Union, the conflict of right of action provisions would maybe not be so serious as it was in the case of Germany. As mentioned above, the equal treatment requirement substantially subjectivates provisions concerning the grant of preferences by the state. Provisions of environmental law are subjectivated by § 28 and 53 in the fundamental rights Chapter of the Constitution.<sup>89</sup> In implementing the law of the European Union, the phrase "rights and freedoms" contained in § 7(1) of the ACPC should be interpreted as closely as possible in accordance with Community law, and not necessarily in accordance with the protection norm theory.<sup>90</sup> Moreover, the law of the European Union may not require that recourse to courts be necessarily permitted in the form of actions for avoidance; this is not required either by § 15(1) of the Constitution, concerning protection of subjective rights. Although the introduction of two models in parallel would be unreasonable, special regulation of the right of action may, however, be provided in certain fields, e.g. environmental law.

### 3.2. NEED TO RESTRICT RIGHTS OF ACTION

Regardless of the certain expansion of the competence for action with regard to actions for declaratory judgement, Estonian administrative procedure will still remain oriented towards the protection of the rights of individuals. Leaving out the above-discussed problems relating to European integration, a comparative analysis will nevertheless bring about the question of whether the system of subjective rights protection is the best solution for Estonia. Maybe the activities of Estonian administrative courts should be regarded in future as a security for the principle of legitimacy of administration, just as the opportunity to refer to national courts is regarded as a factor coercing into enforcement of the law of the European Union. After all, the general legitimacy of administration is aimed at ensuring the liberty of individuals. Likewise, popular actions should not be regarded undesirable. Despite that, opinions prevalent in scientific legal literature of the countries

applying the system of subjective rights protection are opposed to expanding the right of action.

The need to protect administrative courts from excessive amounts of actions is often used as an argument for the subjective right of action model. The effect that restricting the competence for action produces on the number of actions is, however, doubtful. Even inadmissible actions reach administrative courts and, instead of dealing with essential questions, disputes are held over competence for action. Even this can pass through more than one instances of court and waste the courts' time as much as or even more than settlement of problems under substantive law. Moreover, evaluation of additional admissibility requirements lays an additional burden on the courts — given, particularly, that violation of subjective rights fails to be a category of very clear definition and judges have to waste more of their energy on substantiation.<sup>91</sup>

The argument that limiting the competence for action to subjective rights protection is necessary for increasing the importance of subjective rights in comparison with other interests in legal order cannot be considered very seriously either.<sup>92</sup> The advocates of that position are of the opinion that those enjoying a subjective right to demand certain action from the state cannot be placed in the same position with those who only want the state to adhere to the applicable law. The argument is inappropriate in that form, as expansion of the right of action would improve, not impair, an individual's position with regard to the state power.<sup>93</sup> On the other hand, it may be applicable in relationships involving protection of third persons' rights. In simplified terms, only the subordination relationship between the administration and a citizen is, as a rule, taken as a basis in administrative law. In real terms, however, the application of administrative law must additionally take into consideration the colliding interests of different individuals, which results in the involvement of third persons in administrative disputes. It is possible that a person turns to the court only out of interest, spite or a wish to attract political attention but the grant of such action would cause a deterioration in another's rights. In many events, they should be protected in Estonian legal circumstances regardless of the fact that the administrative act underlying such rights is unlawful (on the basis of lawful expectancy or protection of ownership). It is true, however, that, in this regard, the European Court of Justice has attributed more priority to efficient implementation of Community law.

### 3.3. SYSTEM ARGUMENTS

The conception proceeding from system decisions of the administrative court procedure and presented in comments by R. Wahl, seeks arguments for subjective rights<sup>94</sup> protection from the connection between the right of action and other fundamental decisions in the administrative process.

The minimum standard of the right of action is consti-

tuted by the fundamental right to judicial protection in case of violation of subjective rights. As mentioned above, the requirement of subjective rights protection does not preclude more generous opportunities of action. The problem with judicial control over administration is, however, that of separate and balanced powers. Under the separation of powers principle, one branch of power may not be provided with arbitrary competence with regard to another branch. The mutual control between branches of power must ensure the protection of individuals' rights and freedoms without breaking the balance between the branches of power. Interference with the activities of another branch must be minimal in order to ensure the protection of individuals. General control exercised by the courts (i.e. judges separated from the legislative and executive powers) over the activities of the administration is not an inherent part of the mutual control of powers principle nor a natural function of judicial power. The initial function of the courts was limited to general judicial functions (civil and criminal cases), protection from violation of subjective rights by the executive was added later, when the rule of law principle was rooted.<sup>95</sup> The system of objective control of administration, characteristic of France, originates from the very self-control of the administration — *Conseil d'État*, the highest instance of the administrative court system, is a control authority that has grown out of the executive.<sup>96</sup>

Evaluation of the legitimacy of the administration's activities depends much upon considering different interests and values. When protection of individuals' rights is not necessary, public interests may be given more weight in making the evaluation decisions, the matter may be reduced more to political decisions. Under the separation of powers principle, pursuits should undoubtedly be directed towards the ideal, in which case political decisions are taken by the parliament. It is, however, impossible to reach the pure ideal model, as the administration will remain confined to the position to concretise general decisions of the parliament. When no restrictions of individuals' rights are involved, it would be wrong to entrust administrative courts with absolute control over using the space to decide. The administrative court system cannot be placed on the same level of specialisation as the administration. In addition, important role in the realisation of powers in considering the public interests is played by the political control exercised over the executive by ministers and, through them, the parliament. Political control over courts is, however, precluded under the Estonian model of separate powers. Thus, in expanding the competence for action, the scope of administrative judicial control or at least the arsenal of powers vested in administrative courts must be restricted.

One has to agree with K. Merusk that discretion can be exercised only under lawful authorisations and that discretion is a question of law, i.e. a question of abidance by

laws.<sup>97</sup> The fact that, in exercising discretion, the administration is tied to the discretion rules does not necessarily result in judicial control thereof. In Estonian constitutional order, the administration's activities are subjected to judicial control by the requirement of judicial protection of subjective rights (§ 15(1) of the Constitution). "This also applies [...] to cases when the administration, in exercising discretion or applying undefined legal concepts, violates persons' rights and freedoms."<sup>98</sup>

It must be taken into account that judicial control always functions with a temporal delay after the administration's activities. By the moment of entry into force of the judgement, the objective reality may have already been significantly changed by the initial decision of the administration. Removal of an offence retroactively may in many cases be much more burdensome than sustaining the initial decision. Again, an example can be pointed out from the procedure of privatisation, reverse enforcement of which may result in substantially more serious consequences to the state than possible damage caused by the unlawfulness of privatisation.<sup>99</sup> Unless subjective rights have been violated, sustainment or retroactive removal of an unlawful decision should depend on the administration's discretion. Thus, in the case of actions for declaratory judgement, the expansion of right to initiative is accordant, because merely declaring an administrative act unlawful under the new ACPC does not put the administrative body under an obligation of annulment or reverse enforcement of the act. The action for avoidance, granting which would penetrate most deeply into the sphere of administrative power, is particularly characteristic of the system of subjective rights protection<sup>100</sup> without its existence being required *per se* by § 15(1) of the Constitution.<sup>101</sup>

## Conclusion

In Estonia, the main elements of the reformed administrative procedure, including the body of provisions concerning the competence for action, are designed on the basis of the model of subjective rights protection. The right of action is the condition of admissibility of an action, verified in making the substantial adjudication after having discussed the case at a hearing. Under the principle of investigation, the court is not only bound by the claimant's allegations on violation of subjective rights but must also determine the possible violation under its official duties.

Actions for avoidance and actions for performance, as the major categories of action, are available in the event of violation of the claimant's subjective rights. In order to determine a violation of subjective rights, account must be taken of the protection norm theory by checking whether:

- (1) the violated provision creates a subjective right or simply a favourable position;
- (2) the subjective right in question is vested in the claimant;

(3) any connection exists between the administrative act and the violation of subjective rights.

The addressee theory is applicable to Estonian administrative procedure: the addressee of an administrative act that decreases rights or increases obligations may be regarded as competent for action even without considering the general criteria. Besides the specific rights of defence and claim, account must be taken of the equal treatment principle and the requirement to indicate reasons for an administrative act in the event of challenging administrative acts concerning refusal to grant preferences or having a collateral effect. In ascertaining the right of action, fundamental rights may usually be regarded as subjective public rights.

Actions for declaratory judgement are available in the event of justified interests — this expands the circle of persons competent for action but also requires them to be in an actual need for judicial statement in order that the action be granted.

In near future, it will not be directly necessary, in further development of the administrative court procedure, to amend the fundamental rules for the competence for action; accession to the European Union should not make it necessary either. Possible requirements more favourable with regard to the claimant can be met by means of provisions regulating the right of initiative in respect of actions for declaratory judgement.

The decision in favour of the subjective rights protection has been induced in Estonia by the fundamental right of recourse to courts when one's rights have been violated (§ 15(1) of the Constitution) and this applies in accordance with the principle of separate and balanced powers (§ 4 of the Constitution). However, this does not preclude an expansion of the competence for action in specific fields of activity.

## Notes:

<sup>1</sup> An administrative court system related to courts of general jurisdiction but acting under separate rules of procedure was created in Estonia in 1919: the year when the Administrative Court Procedure (AKK - RT 1919, 10, 23) was also adopted. For further information about administrative procedure in pre-Soviet occupation Estonia, q.v.: A.-T. Kliimann. *Haldusprotsess (Administrative Procedure)*. Akadeemilise Kooperatiivi Kirjastus. Tartu, 1937.

<sup>2</sup> The Administrative Court Procedure Code - RT (Riigi Teataja = State Gazette) I 1993, 50, 694; 1994, 16, 290; 28, 425; 1995, 29, 358 and 359. For comments thereon q.v.: K. Merusk. *Halduskohtu mõiste, organisatsioon ja pädevus haldusvaidluste lahendamisel*. (The Concept, Organisation and Competence of Administrative Court in Settlement of Administrative Disputes.) Juridica No. 2 1994, p. 47.

<sup>3</sup> Riigikogu = the parliament of Estonia.

<sup>4</sup> The Administrative Court Procedure Code - RT I 1999, 31, 425.

<sup>5</sup> About the changes, q.v.: I. Pilving. *Halduskohtute korraldus ja pädevus halduskohtumenetluse seadustiku eelnõus*. (Organisation and Competence of Administrative Courts in the Draft Administrative Court Procedure Code.) Juridica No. 10. 1998, p. 515; and K. Merusk. *Halduskohtumenetluse seadustiku eelnõu olulisematest muudatustest menetluses*. (About the More

Important Amendments to the Draft Administrative Court Procedure Code as Regards the Procedure.) Juridica No. 10. 1998, p. 523.

<sup>6</sup> The Letter of Explanation for the Administrative Court Procedure Code. Ministry of Justice, 1998, p. 1. Q.v. <http://www.riigikogu.ee/ems/index.html>

<sup>7</sup> K. Merusk. *Halduskohtu mõiste...*, the above-cited work, p. 47.

<sup>8</sup> About system decisions (German *Systementscheidung*) in the administrative procedure generally and the right of action as one of the aspects of the system decision, q.v.: Fr. Schoch. *Individualrechtsschutz im deutschen Umweltrecht unter dem Einfluß des Gemeinschaftsrechts*. Neue Zeitschrift für Verwaltungsrecht. 1995, 5, p. 457; Fr. Schoch, E. Schmidt-Aßmann, R. Pietzner (Hrsg). *Verwaltungsgerichtsordnung. Kommentar*. Beck. Stand Mai, Munich, 1997. Vorb § 42 Abs 2 Rn 4-6, 11 ff.

<sup>9</sup> A.-T. Kliimann, the above-cited work, p. 206.

F. Hufen recommends that the term "active legitimation" originating from the civil process not be used in the administrative procedure, as it is inaccurate in its meaning. — F. Hufen. *Verwaltungsprozeßrecht*. 3., überarb. Aufl. Beck, Munich, 1998, p. 452.

<sup>10</sup> I. Koolmeister. *Protsessionaliseeritud halduskohtumenetlused*. (Parties to Administrative Court Procedure.) Juridica No. 2. 1994, p. 51. A.-T. Kliimann, the above-cited work, p. 206.

<sup>11</sup> Fr. Schoch, E. Schmidt-Aßmann, R. Pietzner (Hrsg.), the above-cited work, Vorb § 42 Abs 2 Rn 10.

<sup>12</sup> This classification is tentative because, as indicated above, the right of action may be regulated differently also on national level.

<sup>13</sup> About the relationship between the legitimacy of administration principle and subjective rights, q.v.: H. Maurer. *Allgemeines Verwaltungsrecht*. 11., überarb. und erg. Aufl. Beck, Munich, 1997, pp. 149 and 150.

<sup>14</sup> Cf.: § 42 II of VwGO (German Administrative Court Procedure). *Verwaltungsgerichtordnung vom 21.1.1960 (BGBI. I p. 17)*.

<sup>15</sup> J. Koch. *Die Verfahrensarten im französischen Verwaltungsprozeß*. — *Verwaltungs-Archiv*, 1998, 4, p. 566.

<sup>16</sup> D. Ehlers, *Die Klagebefugnis nach deutschem, europäischem Gemeinschafts- und U.S.-amerikanischem Recht*. *Verwaltungs-Archiv*, 1993, 2, pp. 168-169.

<sup>17</sup> Fr. Schoch, E. Schmidt-Aßmann, R. Pietzner (Hrsg.), the above-cited work, Vorb § 42 Abs 2 Rn 36.

<sup>18</sup> In Germany, this has led to a situation in which the circle of persons competent to file actions must be regarded differently on the basis of whether a violation of national law or Community law is in question. D. Ehlers, the above-cited work, p. 156. J. Kokott. *Europäisierung des Verwaltungsprozessrechts*. *Die Verwaltung*, 1998, 31, p. 348.

<sup>19</sup> An administrative act [...] is any order, directive, decision, prescription or other legal act given by an authority [...] of public administration for the regulation of any individual case in relationships under public law. (ACPC § 4(1).

<sup>20</sup> E.g. a county governor may file with an administrative court a protest against a legislative act of the local government when the latter itself has not abided by the county governor's proposal to align it with law (§ 85 (4) of the Government of the Republic Act. - The Government of the Republic Act, RT I 1995, 94, 1628; 1996, 49, 953; 88, 1560; 1997, 29, 447; 40, 622; 52, 833; 73, 1200; 81, 1361 and 1362; 87, 1468; 1998, 28, 356; 36/37, 552; 40, 614; 107, 1762; 111, 1833; 1999, 10, 155; 16, 271 and 274; 27, 391.

<sup>21</sup> Legal persons are the state and local governments themselves.

<sup>22</sup> Adjudication of the Supreme Court Administrative Council (RKHK) 3-3-1-19-97, RKHK 3-3-1-21-97, RKHK 3-3-1-28-97.

<sup>23</sup> An action may be filed with administrative courts by a person who finds that his or her rights or freedoms have been violated by an administrative act (first sentence of § 7(1) of the ACPC of 1993).

<sup>24</sup> K. Merusk, R. Narits. *Eesti konstitutsiooniõigusest*. (About Estonian

Constitutional Law.) Õigusteabe AS Juura, Tallinn, 1998, p. 201.

<sup>26</sup> Q.v. paragraph 2.2 below.

<sup>27</sup> A.-T. Kliimann, the above-cited work, p. 214.

<sup>28</sup> In German administrative procedure, the existence of this condition is checked in two stages: the possibility of violation of the right in the event of admissibility of the action and the causal relationship between the administrative act and the violation if the action is justified. Q.v.: F. Hufen, the above-cited work, pp. 276 and 482.

<sup>29</sup> These requirements have been provided separately in § 10 of the ACPC. Fulfilment of the requirements is checked by the administrative court in preparing the judicial proceeding of the case (§ 11 (1) 1) of the ACPC). When an action fails to be in conformity with the requirements provided in § 10 of the ACPC, the court will give a time-limit for removing such deficiencies. When the deficiencies are not removed, the action will be dismissed under a court order without examination.

<sup>30</sup> RKHK 3-3-1-25-99. This may also be concluded from adjudications RKHK 3-3-1-10-95, RKHK 3-3-1-19-97, RKHK 3-3-1-24-98.

<sup>31</sup> K. Merusk. Halduskohtu mõiste..., the above-cited work, p. 47.

<sup>32</sup> RKHK 3-3-1-4-95. During the first years after the administrative court system was restored, courts of lower instance disregarded that rule in many cases. Courts declared administrative acts unlawful without verifying whether the admissibility requirements for actions were satisfied or not.

<sup>33</sup> RKHK 3-3-1-24-98.

<sup>34</sup> K. Merusk, R. Narits, the above-cited work, p. 201. Q.v. also: RKHK 3-3-1-12-94, RKHK 3-3-1-19-97, RKHK 3-3-1-28-97.

<sup>35</sup> Q.v. also: note 38.

<sup>36</sup> The position has been stated in the legal analysis of the Estonian Constitution. - R. Alexi. Põhiõigused Eesti põhiseaduses. (Fundamental Rights in the Estonian Constitution.) Kiel, 1997, p. 27.

<sup>37</sup> H. Maurer, the above-cited work, p. 149.

<sup>38</sup> Ibid. p. 152.

<sup>39</sup> D. Ehlers, the above-cited work, p. 145 (Fußn 25). H. D. Jarass. B. Pieroth. Grundgesetz für die Bundesrepublik Deutschland. Kommentar. 4. Aufl. Beck. Munich, 1997, p. 339.

<sup>40</sup> H. Maurer, the above-cited work, p. 149.

<sup>41</sup> H. Köhler. Tsiviilseadustik. Üldosa. (Civil Code. General Part.) 23rd fully revised version. Õigusteabe AS Juure. Tallinn, 1995, p. 29.

<sup>42</sup> According to R. Ihering. Q.v.: R. Narits. Õiguse entsüklopeedia. (Encyclopedia of Law.) Õigusteabe AS Juura. Tallinn, 1995, p. 60.

<sup>43</sup> C. D. Classen. Die Europäisierung der Verwaltungsgerichtsbarkeit: eine vergleichende untersuchung zum deutschen, französischen und europäischen Verwaltungsprozeß. Mohr. Tübingen, 1996, p. 40.

<sup>44</sup> In such event, this would constitute a so-called legal reflex (Rechtsreflex). A legal reflex is only factual burdening or favourable (not intended as normative) functioning of a legal provision. E. Eyermann. Verwaltungsgerichtsordnung. Kommentar. 10., völlig neu erarb Aufl. Beck. Munich, 1998, p. 268. H. Maurer, the above-cited work, p. 152.

<sup>45</sup> F. Hufen, the above-cited work, p. 280.

<sup>46</sup> H. Bauer. Altes und Neues zur Schutznormtheorie. Archiv des öffentlichen Rechts, 1986, 113, p. 590.

<sup>47</sup> Fr. Schoch, E. Schmidt-Aßmann, R. Pietzner (Hrsg.), the above-cited work. Vorb § 42 Abs 2 Rn 54.

<sup>48</sup> K. Merusk, I. Koolmeister. Haldusõigus. (Administrative Law.) Õigusteabe AS Juura. Tallinn, 1995, p. 54.

<sup>49</sup> R. Alexi, the above-cited work, p. 22.

<sup>50</sup> Except, of course, filing the action on behalf of the principal.

<sup>51</sup> E. Eyermann, the above-cited work, pp. 268-269.

<sup>52</sup> Until now, such opportunity has not been provided for in any Acts. The provisions of 1993 are much more generous in this regard; the opportunity to refer to protection of one's members may also be provided in the statute or Articles of Association, in addition to the law. However, general provisions of the statute will not suffice, e.g. "the objective of the apartment association is to represent common interests of its members". The Supreme Court has stated that "the right to turn to the court in the interests of one's members or other persons must be provided *expressis verbis*." — RKHK 3-3-1-40-96.

<sup>53</sup> F. Hufen, the above-cited work, p. 301.

<sup>54</sup> F. Eyerman, the above-cited work, p. 274.

<sup>55</sup> I. Koolmeister, the above-cited work, p. 52.

<sup>56</sup> RKHK 3-3-1-19-97, RKHK 3-3-1-21-97.

<sup>57</sup> RKHK 3-3-1-34-96, RKHK 3-3-1-32-97.

<sup>58</sup> In the Estonian context, a burdening administrative act is an administrative act that imposes on the addressee a legal obligation or interferes with the addressee's rights. About burdening administrative acts in German law, q.v.: H. Maurer, the above-cited work, p. 203.

<sup>59</sup> In Estonia, under § 19(1) of the Constitution, everyone has the right to free self-realisation.

<sup>60</sup> D. Ehlers, the above-cited work, p. 146.

<sup>61</sup> The addressee of an administrative act means any persons about whose rights or obligations the administrative act has been issued. However, an administrative act can also influence third parties' rights but as the issuer of the administrative act has not intended to change the sphere of such persons' rights, such persons cannot be treated as addressees of the administrative act.

<sup>62</sup> "Specific obligations are imposed on the said persons by that administrative act." — RKHK 3-3-1-27-96.

<sup>63</sup> D. Ehlers, the above-cited work, p. 147.

<sup>64</sup> F. Hufen, the above-cited work, p. 278.

<sup>65</sup> Permits issued in the course of supervision, whereunder a person is authorised to develop activities principally permitted under general freedoms or fundamental rights but restricted by law — e.g. building permits, activity licences. H. Maurer, the above-cited work, pp. 205-208.

<sup>66</sup> RKHK 3-3-1-5-97.

<sup>67</sup> H. Maurer, the above-cited work, p. 204.

<sup>68</sup> Q.v.: Fr. Schoch, the above-cited work, p. 458.

<sup>69</sup> C. D. Classen, the above-cited work, p. 44.

<sup>70</sup> RKHK 3-3-1-14-99.

<sup>71</sup> The ACPC of 1993 indeed provides only for the opportunity to file actions for declaratory judgement, more specifically, the opportunity to demand that a legislative act be declared unlawful (§ 20(1) 1)). The administrative court is authorised only to declare the contested or protested legislative act unlawful, in full or in part.

<sup>72</sup> In the event of German appeals for ascertainment under VwGO § 43 (1), q.v.: E. Eyermann, the above-cited work, p. 309. R. Wahl has taken a critical position (the above-cited work, § 42 Abs 2 Rn 23 ff.) H. Rupp. Kritische Bemerkungen zur Klagebefugnis im Verwaltungsprozeß. Deutsches Verwaltungsblatt, 1982, 1, p. 146. A similar position regarding the right of action under the applicable ACPC was taken in adjudication RKHK 3-3-1-28-99: "Under § 5(1) of the ACPC, anyone may file an action against an administrative act only when he or she has justified interests therefor."

<sup>73</sup> D. Ehlers, the above-cited work, p. 144.

<sup>74</sup> Fr. Schoch, E. Schmidt-Aßmann, R. Pietzner (Hrsg.), the above-cited work. Vorb § 42 Abs 2 Rn 25, 26.

<sup>75</sup> Principally, popular actions are also unavailable in e.g. France and the



European Court of Justice, where interest or personal connectedness are the criteria for the right of action.

<sup>76</sup> In the event of German actions for declaratory judgement under VwGO § 43(1), q.v.: E. Eyermann, the above-cited work, p. 309. About *recours pour excès de pouvoir* - the principal action category in France — q.v.: C. D. Classen, the above-cited work, p. 59.

<sup>77</sup> J. Koch, the above-cited work, p. 566. C. D. Classen, the above-cited work, p. 59. R. Wahl, the above-cited work, p.10.

<sup>78</sup> J. Kokott, the above-cited work, p. 348.

<sup>79</sup> C. D. Classen, the above-cited work, p. 66.

<sup>80</sup> Ibid. p. 67.

<sup>81</sup> J. Koch, the above-cited work, p. 567. Fr. Schoch, E.Schmidt-Aßmann, R. Pietzner (Hrsg.), the above-cited work. Vorb § 42 Abs 2 Rn 124.

<sup>82</sup> On the other hand, for example, any taxpayer may dispute an increase in the tax rate. - J. Koch, the above-cited work, p. 567.

<sup>83</sup> F. Hufen, the above-cited work, p. 373 ff.

<sup>84</sup> E. Eyermann, the above-cited work, p. 310-311.

<sup>85</sup> Fr. Schoch, the above-cited work, p. 459 ff.; J. Kokott, the above-cited work, p. 335.

<sup>86</sup> C. D. Classen, the above-cited work, p. 80.

<sup>87</sup> Ibid. pp. 73-76.

<sup>88</sup> J. Kokott, the above-cited work, p. 349.

<sup>89</sup> Section 28 of the Constitution establishes everyone's right to the protection of health. Section 53 imposes on everyone the obligation to preserve environment.

<sup>90</sup> For the same about § 42(2) of the VwGO, q.v.: C. D. Classen, the above-cited work, p. 80.

<sup>91</sup> H. H. Rupp, the above-cited work, p. 145.

<sup>92</sup> Although it can be agreed that the recognition of subjective public rights as such distinguishes a democratic rule of law from a rule of fear, absolutism, administrative state, etc.. About the importance of subjective public rights, q.v.: K. Merusk, I. Koolmeister, the above-cited work, pp. 51–52. H. Maurer, the above-cited work, pp. 150-151.

<sup>93</sup> C. D. Classen, the above-cited work, p. 85.

<sup>94</sup> Subsection 15(1) of the Estonian Constitution; § 19(4) of the Constitution of the Federal Republic of Germany (GG).

<sup>95</sup> Fr. Schoch. Vorb § 42 Abs 2 Rn 2-3. About transition from administrative self-control to judicial control, q.v.: F. Hufen, the above-cited work, p. 30.

<sup>96</sup> Fr. Schoch, E.Schmidt-Aßmann, R. Pietzner (Hrsg.), the above-cited work. Vorb § 42 Abs 2 Rn 7.

<sup>97</sup> K. Merusk. Administratsiooni diskretsioon ja selle kohtulik kontroll. (Discretion of and Judicial Control Over the Administration.) Õigusteabe AS Juura. Tallinn, 1997, p. 102.

<sup>98</sup> Ibid. pp. 102-103.

<sup>99</sup> Adjudication of the Tallinn Circuit Court, 2-3-69-99.

<sup>100</sup> Fr. Schoch, E.Schmidt-Aßmann, R. Pietzner (Hrsg.), the above-cited work. Vorb § 42 Abs 2 Rn 8.

<sup>101</sup> For the same assertion about § 19(44) of the GG, q.v.: Fr. Schoch, E.Schmidt-Aßmann, R. Pietzner (Hrsg.), the above-cited work. Vorb § 42 Abs 2 Fußn 12.



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# Legislative Acts of Local Government Bodies and the Protection of Personal Rights and Freedoms

The problem posed by the author of the present article requires that we first turn to the Constitution of the Republic of Estonia.<sup>1</sup> The idea of freedom is known to be the basic principle of Estonian statehood. Pursuant to the second postulate of the preamble of the Constitution, the people of Estonia, with unwavering faith and a steadfast will, wish to strengthen and develop a state, which is founded on liberty, justice and law. Pursuant to the aforesaid and § 10 of the Constitution, which establishes the principle of a state based on democracy, social justice and the rule of law, the general principles of law are valid in Estonia. As R. Maruste has noted, the former principle is directly connected to paragraphs 1 and 2 of § 1 of the Constitution, which stipulate that "Estonia is an independent and sovereign democratic republic", and that "the independence and sovereignty of Estonia are timeless and inalienable", and to § 3, which establishes the principle of legality as follows: "The powers of state shall be exercised solely pursuant to the Constitution and laws which are in conformity therewith. Generally recognised principles and rules of international law are an inseparable part of the Estonian legal system...".<sup>2</sup> Paragraph 1 of § 19 of the Constitution provides that everyone has the right to free self-realisation.<sup>3</sup> Thus, the general right to freedom is given the status of a subjective constitutional right. Pursuant to paragraph 2 of the same section, everyone must honour and consider the rights and freedoms of others and observe the

law in exercising his or her rights and freedoms and in fulfilling his or her duties.<sup>4</sup> Thus, the legislator has been given the right to restrict, by law, the right to freedom in accordance with the Constitution. Without engaging in a philosophical analysis of the idea of freedom, I would refer to only two documents, which are of fundamental importance in international law. The preamble of the Universal Declaration of Human Rights postulates that "... recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world, ...".<sup>5</sup> The preamble of the International Covenant on Civil and Political Rights also stresses that "... the recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world...", and that "... these rights derive from the inherent dignity of the human person".<sup>6</sup> Consequently, personal rights and freedoms are of natural law origin (*jus naturale*), and it is the function of positive law, primarily of the constitution and laws, to guarantee these rights and freedoms.<sup>7</sup> The catalogue of human rights and freedoms is, for example, included in the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter "ECHR").<sup>8</sup> The Riigikogu<sup>9</sup> ratified the ECHR on 13 March 1996. The convention became internationally binding on Estonia on 16 April 1996.<sup>10</sup> There are no principal variances between

Chapter II of the Estonian Constitution entitled "Fundamental Rights, Freedoms and Duties" and the catalogue of fundamental rights of the ECHR. As the fundamental rights enumerated in the ECHR and in the Constitution have enjoyed comparative analysis in legal literature,<sup>11</sup> and the present article is intended to stress somewhat different aspects, I will only refer to the fact that for Estonia the requirement of respect to human rights and freedoms springs from international legal instruments as well as from the preamble and several provisions of the Constitution.<sup>12</sup>

Within the context of the present article it is essential to point to § 14 of the Constitution, pursuant to which the guarantee of rights and freedoms is **the duty** of the legislative, executive and judicial powers, and **of local governments** [added emphasis]. Thus, the powers of state of Estonia are bound by the obligation to guarantee rights and freedoms. Section 3(2) of the Local Government Organisation Act (hereinafter "LGOA") corresponds to the said constitutional provision, as it provides, inter alia, that one of the principles on which a local governments is founded, is the mandatory guarantee of everyone's lawful rights and freedoms in the rural municipality and city.<sup>13</sup> Essentially the same obligation is contained in § 2(1) of the same Act, pursuant to which a local government is the right, authority and **duty** of the democratically formed bodies of power of a local government provided for in the Constitution, a rural municipality or city, **to independently organise and manage local issues pursuant to law and based on the legitimate needs and interests of the residents of the rural municipality or city** [added emphasis], and considering the specific development of the rural municipality or city.<sup>14</sup>

Subsection 155(1) of the Constitution stipulates that the units of local government are rural municipalities and towns. Pursuant to § 154 of the Constitution the local governments, which operate independently pursuant to law, shall resolve and manage all local issues. Duties may be imposed on a local government only pursuant to law or by agreement with the local government.<sup>15</sup> Article 3(1) of the European Charter of Local Self-government establishes, that local self-government denotes the right and the ability of local authorities within the limits of the law, to regulate and manage substantial share of public affairs under their own responsibility and in the interests of the local population.<sup>16</sup> Section 56 of the Constitution provides that the supreme power of state shall be exercised by the people through citizens with the right to vote 1) by electing the Riigikogu; 2) through a referendum. As we can see, the said provision does not include electing local government councils. Still, the people exercise the power of state by electing local government councils. Law literature considers it a generally recognised fact that local governments exercise state power (indirect state administration).<sup>17</sup> The

Constitutional Review Chamber of the Supreme Court has voiced the same view.<sup>18</sup> The fact that local government is specifically referred to, alongside with the legislative, executive and judicial powers in § 14 of the Constitution, is not accidental but rather indicates the importance, which the constituent pouvoir has attributed to local governments in guaranteeing rights and freedoms. The constitutional provisions of the European countries, which regulate the guarantee of personal (human) rights, usually employ the general notion of "public authorities" (e.g. Article 9(2) of the Spanish Constitution<sup>19</sup>), the name of the state (Article 4(2) of the Bulgarian Constitution<sup>20</sup>), refer to the Constitution (Article 1(1) of the Finnish Constitution<sup>21</sup>), etc. There is no essential difference as compared to the Estonian Constitution.

Bearing in mind the classification of the basic functions of a legal order, the activities of a local government as a territorial corporation exercising public administration can be divided in two. A.-T. Kliimann, a famous Estonian administrative law scholar, relying upon A. Merkel, has put it as follows: "The functions of one group are fulfilled with the help of so called normative procedures, because the objective of such procedures is the creation of sets of norms. The functions of the other group are fulfilled with the help of such procedures, which are termed as factual or material, but also free of norms, because their objective is not the creation of norms but rather the creation or transformation of lawful factual conditions."<sup>22</sup>

A local government is a democratic, decentralised and autonomous government. According to Kliimann, autonomous administration is the administration of all such corporate units, who have been attributed the right of self-regulation, which is manifested in the right to issue acts of general application. It goes without saying that an administrative unit must be able to exercise the administrative function in its material sense, i.e. to resolve the issues arising within its administration by legislation of specific application. Naturally, it must also be able to issue certain acts of general application. In order to be autonomous, the self-administrative unit's right to issue regulations must enable to issue *praeter legem* regulations, which have the same co-ordination level as the regulations of the central administration of the state.<sup>23</sup> The power of local government to issue the statutes in its own affairs is an expression of its *Satzungshoheit* (right to issue regulations) immanent to the local self-government law and an essential prerequisite for legal concretising of fulfilment of local functions. As R. Stober, a German scholar of municipal law has noted, the right to issue regulations is an essential component of a local self-government.<sup>24</sup> If a local government lacked the right to issue regulations, it would not be able to realise its constitutional status. The Administrative Law Chamber of the Supreme Court has even held that in issues, which fall within the exclusive competence of a

council, it shall only issue regulations.<sup>25</sup>

Consequently, under Estonian legal order, the rural municipality and town councils issue regulations as legislation of general application. In the capacity of legislation of specific application a council issues decisions and a government issues orders (§§ 7(1) and (2) of the LGOA).<sup>26</sup>

With their legislative activity the local governments guarantee the protection of personal (human) rights and freedoms only if they observe the provisions and the spirit of the Constitution. The following are examples to that effect.

Subsection 3(2) of the Constitution establishes that laws shall be published in the prescribed manner. Only published laws have obligatory force.<sup>27</sup> The same requirement applies to regulations. If regulations took force upon adoption or before publication, it would give rise to a situation where the interested persons would not be able to learn about the contents of the regulation affecting their rights and obligations (lack of *vacatio legis*). The LGOA stipulates that council regulations shall be disclosed prior to the entry into force thereof pursuant to the procedure provided for in the statutes of the rural municipality or city. The council regulations of general importance shall be sent to the State Chancellery for publication in the form of authorised copy both on paper and electronically, pursuant to the technical instructions of the State Chancellery, within a week after the act is signed. Council regulations of general importance enter into force on the third day after they have been published pursuant to the procedure provided for in the statutes of the local government unit, if the act itself does not stipulate for a different date. If a different date for entry into force is provided for in a regulation, such regulation enters into force on the date provided for therein (LGOA § 23(1)-(3)).<sup>28</sup> The different date can only be longer than three days. A council resolution enters into force on the date provided for therein and shall be forwarded to the person who shall execute such resolutions and to other persons concerned. Council regulations and resolutions and minutes of council sessions shall be accessible to everyone pursuant to the procedure provided by law and the statutes of the rural municipality or city (LGOA § 23(5)-(7)). With regard to the regulations and orders of a rural municipality and city government the LGOA establishes the following procedure: regulations and orders shall be made public prior to the entry into force thereof and made accessible to everyone pursuant to the procedure provided for in the statutes of the rural municipality or city. Data, the issue of which is prohibited by law or which is intended only for the internal use of rural municipality or city agencies, shall not be disclosed. Regulations enter into force on the third day after they are made public, if a later date for entry into force is not provided for in the regulation. Government orders enter into force on the date prescribed therein and shall be forwarded to the persons who shall execute such resolutions and other

persons concerned (LGOA §§ 31(1), (2), (4) and (5)).<sup>29</sup> Unfortunately, local governments are not always guided by the principle of legality, instead they interpret the constitutional and legal norms arbitrarily, which results in unlawful restrictions of persons' (human) rights and freedoms. For example, § 81(1) of an earlier version of Statutes of Tallinn established that **as a rule**, the council regulations shall be made public before they enter into force and pursuant to procedure provided for by the statutes and the working regulations of the city council.<sup>30</sup>

As I already noted, it is Chapter II of the Constitution that contains the catalogue of fundamental human rights and freedoms.<sup>31</sup> Rights and freedoms may be restricted only in accordance with the Constitution. Such restrictions must be necessary in a democratic society and shall not distort the nature of the rights and freedoms restricted (§ 11 of the Constitution).<sup>32</sup> Pursuant to the Constitution the fundamental rights and freedoms may be restricted by law. The Legal Chancellor has observed that this is the basic guarantee of a parliamentary system of government and its preservation.<sup>33</sup> The Constitutional Review Chamber of the Supreme Court has also pointed out that although the guarantee of rights and freedoms is the obligation of local government bodies, they must fulfil this obligation in accordance with the law. The exercise of state power must be legal, regarding both the content of legislation issued by the power, and the mode and form of the exercise of power.<sup>34</sup> Unfortunately, the activities of local governments have substantial drawbacks in this respect. Regulations are being issued without pertinent legal basis and without taking into consideration the fact that fundamental rights and freedoms are to be restricted by law(s). The Legal Chancellor has also highlighted this situation.<sup>35</sup> Essentially, this constitutes arbitrary exercise of state authority in the sense of § 13 of the Constitution, and everyone has the right of recourse to the courts against this (§ 15 of the Constitution).<sup>36</sup> Let me give a few pertinent examples. Among the motivations of the Constitutional Review Chamber of the Supreme Court to decision no. 3-4-1-3-79 (the decision declared null and void subsection 3.19 of section 1 of Valga City Rules, approved by Valga City Council regulation No. 1, dated 10 January 1996, to the extent that it restricts the right to freedom of movement of persons under 16 years of age) the following has been stated: "Section 34 of the Constitution provides for the possibility to restrict the freedom of movement in the cases and pursuant to procedure provided by law. In this constitutional provision the law means a law in its formal sense and not just any legislative act. The decision of the Constitutional Review Chamber of the Supreme Court of 12 January 1994 deals with the rights guaranteed in §§ 11, 26, 33 and 43 of the Constitution and states that the rights and freedoms may be restricted solely in accordance with the Constitution and in the cases and pursuant to procedure



provided by law. In another decision, made by the same Chamber the same day, it is stressed that the possible restrictions on basic rights and freedoms may be imposed only by legislative acts having the force of law. The Chamber found in its decision of 2 November 1994, that locking a wheel of a car, which has been parked improperly or without a valid ticket, constitutes both a local issue and restriction of ownership, and as there was no law giving local governments the right to restrict ownership by such means, the pertinent acts of local government were unconstitutional. Pursuant to the decision of 21 December 1994, the procedure for restricting basic rights and freedoms must be established by law. In the latter decision reference is made to § 34 of the Constitution, which regulates the freedom of movement. Thus, the Constitutional Review Chamber has consistently been of the opinion that the rights established in Chapter II of the Constitution, which have been referred to in the said decisions, may be restricted solely in accordance with law.<sup>37</sup> Another pertinent fact: until recently 35 local government bodies (29 city and rural municipality councils and six governments) had issued regulations approving unified fees for construction supervision procedures, which constituted unlawful payments.<sup>38</sup> As is known, § 113 of the Constitution establishes that state taxes, duties, fees, fines and compulsory insurance payments shall be provided by law.<sup>39</sup> Let me also refer to an example from Paide where, in order to determine the composition of offences against public order, the pertinent compositions of offences of the Criminal Code<sup>40</sup> and the Code of Administrative Offences<sup>41</sup> were compiled into a new composition together with administrative liability sanctions,<sup>42</sup> etc.

Pursuant to § 26 of the Constitution everyone has the right to the inviolability of private and family life. State agencies, local governments, and their officials shall not interfere with the private or family life of any person, except in the cases and pursuant to procedure provided by law to protect health, morals, public order, or the rights and freedoms of others, to prevent a criminal offence, or to apprehend a criminal offender.<sup>43</sup> Sections 29 and 31 of the Constitution<sup>44</sup> establish the right and freedom to engage in enterprise, and the Commercial Code<sup>45</sup> and Consumer Protection Act,<sup>46</sup> which correspond to the provisions, stipulate the general conditions and procedure for the exercise of the right. In conflict with the aforesaid the local governments have arbitrarily established payment for the issuance of authorisations to trade (in fact a local government fee), unlawfully restricting and ignoring everyone's constitutional and legal rights and freedoms.<sup>47</sup>

Section 47 of the Constitution provides that everyone has the right, without prior permission, to assemble peacefully and to conduct meetings. This right may be restricted in the cases and pursuant to procedure provided by law to ensure national security, public order, morals, traffic safe-

ty, and the safety of participants in the meeting, or to prevent the spread of an infectious disease.<sup>48</sup> The Public Meetings Act<sup>49</sup> corresponds to this constitutional provision. Before the enactment of the said Act several local governments had established systems of permits by their regulations.

The motivation (justification) of legislative acts of local governments, which is to guarantee everyone's right of recourse to the courts, in case their rights and freedoms are violated, as stipulated in § 15 of the Constitution,<sup>50</sup> is a different topic. The legal literature on administrative and municipal law contains fixed viewpoints in this regard. It is not accidental that R. Stober, a recognised German legal scholar has used the words "**Special** [added emphasis] observance of the obligation to motivate".<sup>51</sup> The requirement to motivate also proceeds from § 3 of the Constitution, according to which the powers of state shall be exercised solely pursuant to the Constitution and laws which are in conformity therewith.<sup>52</sup> There is a considerable amount of case law pertaining to the obligation to motivate administrative acts. Pertinent admissions can be referred to in the motivations of the Supreme Court decisions. "Administrative acts have to be motivated, because this is the only way to ensure that the acts can be reviewed as to their substance. When motivating an administrative act a reference must be made to a pertinent provision of law, and arguments have to be stated as to why the decision was reached. It is especially important to motivate such administrative acts, by which persons' rights and freedoms are restricted".<sup>53</sup> "It is necessary to motivate an administrative act in order that a person, to whom the act is addressed, would understand why and on what legal basis the act has been issued. The motivation of an administrative act is a means to ensure that a person, to whom the act is addressed, would understand whether his or her rights have been restricted lawfully and that he or she would be able to protect his or her rights if necessary. Also, the motivation of an administrative act enables the authority who is to review the legality of the act, including the courts, to decide whether the administrative act is legal. [...] An administrative act without motivation is illegal because it is not possible to check why and on what legal bases the act has been issued."<sup>54</sup> "If persons' rights and obligations, which are based on public law, are determined by an order, the order has to be motivated, i.e. in addition to reference to a provision of law the order must also contain arguments as to why the order was issued. To dispute an order a person has the right to know on what reasons the order, which affects his or her rights or interests, has been issued. This is the way to guarantee that orders can be reviewed."<sup>55</sup> The way local government bodies motivate their legal acts is — to put it mildly — far from satisfactory. Very often these contain no reference to the law's provision, which serves as a legal basis, or the reference is supplemented by a mean-

ingless phrase, such as "Having given a fair hearing to the rural municipality mayor X, the rural municipality council of Y hereby rules (or decides)...". It is rather common that by way of legal motivation a reference is made to an act as a whole or to a section, without taking into consideration the existence of subsections. The lack of factual motivation is also rather widespread. The Legal Chancellor has characterised the situation quite strikingly: "The preparation of correct legislation of local governments is impeded by extremely poor legal literacy, poor knowledge of the positive law of the state. As a result, on the territories of local governments, acts are being promulgated that are free in form, written in local language and according to local understanding."<sup>56</sup> In fact a few years ago approximately 50% of cases examined by administrative courts were protests against implementation legislation of specific application of local government bodies.<sup>57</sup>

From the point of view of protection of personal (human) rights and freedoms the review of local government legislation is of essential importance. Under Estonian legal order the review of the constitutionality and legality of local governments' legislative acts is exercised by the Legal Chancellor (§ 139(1) of the Constitution;<sup>58</sup> Legal Chancellor Act). Copies of all legislative acts of local governments will be sent to the legal Chancellor within ten days of their adoption, signature or entry into force (Legal Chancellor Act<sup>59</sup> § 16). If the Legal Chancellor finds that legislation, in its entirety or partially, is in conflict with the Constitution or a law, he or she shall propose to the body which passed the legislation to bring the legislation into conformity with the Constitution or the law within twenty days. If a body which passed legislation has not brought the legislation or a provision thereof into conformity with the Constitution or the law within twenty days after the date of receipt of a proposal of the Legal Chancellor, the Legal Chancellor shall propose to the Supreme Court that the legislation or a provision thereof be declared invalid (§ 142 of the Constitution,<sup>60</sup> §§ 17 and 18(1) of the Legal Chancellor Act<sup>61</sup>). The actual situation of review is the following: pursuant to the Legal Chancellor's report of 1995, the amount of unconstitutional and illegal legislative acts adopted that year was regrettably large — i.e. 18.<sup>62</sup> In the report for 1996 it is said that during that year the Legal Chancellor made 23 proposals to bring local governments' acts into conformity with the Constitution and the laws.<sup>63</sup> It appears from the report for 1997 that during the year 170 local governments had sent 1760 legislative acts to the Legal Chancellor. Considering all the additional local government regulations, which are published in the Riigi Teataja, it is only possible to review three quarters of the local governments' legislation. Conflict between the Constitution and these acts was ascertained in 52 cases, which is more than the year before.<sup>64</sup> The given data has to be viewed in the light of the fact that not every piece of

local government legislation, which is in conflict with the Constitution or the laws, implies the unlawful restriction of personal rights and freedoms.

In relation to judicial review, § 15 of the Constitution stipulates: "Everyone whose rights and freedoms are violated has the right of recourse to the courts. Everyone has the right, while his or her case is before the court, to petition for any relevant law, other legislation or procedure to be declared unconstitutional. The courts shall observe the Constitution and shall declare unconstitutional any law, other legislation or procedure which violates the rights and freedoms provided by the Constitution or which is otherwise in conflict with the Constitution."<sup>65</sup>

The judicial review of legality of the legislation of local governments is exercised by the Constitutional Review Chamber of the Supreme Court (§ 4(4) of the Constitutional Review Court Procedure Act<sup>66</sup>). The legal Chancellor and the courts are entitled to directly petition the Supreme Court for the review of constitutionality or legality of a legislation of a local government. The courts shall do so if they have, by a decision, declared a legislation of a local government to be unconstitutional and have not applied it. In such cases the courts inform the Supreme Court and the Legal Chancellor of the decision, whereby the constitutional review proceedings in the Supreme Court are initiated (§ 5(2) of the Constitutional Review Court Procedure Act<sup>67</sup>). So far the courts have only once submitted a petition to this effect.<sup>68</sup>

Section 160 of the Constitution establishes, that the supervision of the activities of local governments shall be provided by law.<sup>69</sup> Under Estonian legal order a county governor has the right to exercise supervision over the legality of legislation of specific application of the councils and governments of local government units of the given county (§ 85(1) of the Government of the Republic Act<sup>70</sup>). A county governor has the right to demand copies of legislation of the councils and governments of local government units of the county which have entered into force (§ 85(2) of the Government of the Republic Act<sup>71</sup>). Consequently, this constitutes subsequent control (review of acts which have entered into force). Local councils and governments are required to submit the copies not later than on the seventh day after receipt of the demand of the county governor. If a county governor finds that legislation of specific application of a local government council or government is, in full or in part, in conflict with the Constitution, a law or other legislation issued pursuant to law, he or she may submit a proposal in writing to bring the legislation of specific application or a provision thereof into conformity with the Constitution, the law or other legislation within fifteen days. If the council or government does not or refuses to bring the legislation of specific application or a provision thereof into conformity with the Constitution, a law or other legislation within fifteen days

after receipt of the written proposal of the county governor, the county governor shall file a protest with an administrative court pursuant to procedure prescribed in the Code of Administrative Court Proceedings (hereinafter "CACP") (§ 85(4) of the Government of the Republic Act ). Administrative courts review the legislation of specific application of the local government bodies.<sup>74</sup> As more detailed discussion of the presently valid administrative court proceedings is outside the scope of the present article, and presuming that a subsequent issue of *Juridica International* will contain a thorough treatment of the new CACP<sup>75</sup>, let us hereby confine ourselves to a brief overview of such review.<sup>76</sup>

Everyone who finds that a legislation [which is not law-creating in content — § 4(3) of the CACP<sup>77</sup>] of a local government body violates his or her rights or restricts his or her freedoms, has the right to file a complaint with an administrative court to protect himself or herself. Associations of persons, including associations which are not legal persons, may have the recourse to an administrative court in the interests of its members or other persons if the founding act or statutes of the association or the law provide for such a right (§ 5(1) of the CACP).<sup>78</sup> The legislation of specific application of a local government body (i.e. rural municipality or city council or government) may be protested in an administrative court by a county governor (§ 5(3) of the CACP<sup>79</sup>, see also the aforesaid). A complaint or protest shall be filed with an administrative court within the period provided by law. If no such period is provided by law, a complaint or protest shall be filed within one month after the date the person became or should have become aware of a violation of his or her rights or freedoms (§ 7(1) of the CACP).<sup>80</sup> The principle of investigation is dominant in the administrative court proceedings. An administrative judge may decide not to satisfy a complaint or a protest or to declare the complained or protested legislation illegal fully or in part (§§ 20(1) and (2) of the CACP).<sup>81</sup> If an administrative court declares the complained or protested act illegal, it shall propose, in its decision, that the pertinent body review the issue and make a new decision (§ 20(2) of the CACP).<sup>82</sup> Subsection 5(4) of the CACP establishes that if the law prescribes for a pre-trial procedure for resolution of certain categories of complaints or protest, it is possible to have a recourse to an administrative court only after the complaint or protest concerning the violation of rights or restriction of freedoms was denied in whole or in part under pre-trial procedure.<sup>83</sup> Pursuant to the Local Government Organisation Act everyone has the right to apply to a rural municipality or city government for the amendment or repeal of legislation passed by the rural municipality or city government if such legislation unlawfully restricts the rights of the applicant. If a rural municipality or city government does not amend or repeal such legislation, the applicant has the right of

recourse to the courts for resolution of the issue (§ 33).<sup>84</sup> It is important to stress with regard to this provision that it does not establish an obligatory pre-trial procedure for the examination of complaints against legislation of local governments. The Administrative law Chamber of the Supreme Court has taken the same position.<sup>85</sup> The right to initiate legislation is related to the problem under discussion. Namely, not less than one per cent of the residents of a rural municipality or city with the right to vote, however not less than five residents with the right to vote, have the right to initiate the passage, amendment or repeal of legislation of the rural municipality or city council or government concerning local issues; such initiatives shall be debated not later than within three months (§ 32(1) of the Local Government Organisation Act).<sup>86</sup>

In relation to the proportion of local government bodies' legislation of specific application disputed pursuant to the administrative court procedure it has already been said that it constitutes approximately one half of all disputed acts. This has been attributed to the fact that the county governors' review has become more effective.<sup>87</sup>

It can be noted, by way of conclusion, that within the process of law creation the local governments, just like other institutions exercising powers of state, are to observe the provisions and the spirit of the Constitution. There is no qualitative difference between these institutions. The protection of personal rights and freedoms must have a central role in the activities of a local government. A prerequisite for the fulfilment of this constitutional obligation by local governments is essential improvement of legal knowledge among the employees of rural municipalities and cities, as well as of national policies, especially fiscal policy, which observes the principles of the European Charter of Local Self-government.

## Notes:

<sup>1</sup> Eesti Vabariigi Põhiseadus. (Constitution of the Republic of Estonia.) — Tallinn: Olion, 1992.

<sup>2</sup> R. Maruste. Põhiseadus ja selle järelevalve. Võrdlevad selgitused. Kommentaarid. Tekstid. (The Constitution and the Constitutional Review. Comparative Explanations. Commentaries. Texts.) — Tallinn: Juura Õigusteabe AS, 1997, p. 57.

<sup>3</sup> Eesti Vabariigi Põhiseadus (Constitution of the Republic of Estonia). — Tallinn: Olion, 1992.

<sup>4</sup> Ibid.

<sup>5</sup> Universal Declaration of Human Rights (1948). — Human Rights in International Law. Basic Texts. — Council of Europe Press, 1992, p. 9-17.

<sup>6</sup> International Covenant on Civil and Political Rights (1966). — Human Rights in International Law. Basic Texts. — Council of Europe Press, 1992, p. 31-57.

<sup>7</sup> Q.v. also R. Maruste. Op.cit., p.58.

<sup>8</sup> RT (Riigi Teataja = the State Gazette) II 1996, 11/12, 34.

<sup>9</sup> Riigikogu = the parliament of Estonia.

- <sup>10</sup> R. Maruste. Euroopa inimõiguste ja põhivabaduste kaitse konventsiooni staatus eesti õigussüsteemis. — Euroopa Nõukogu, Eesti Vabariigi Välisministeerium. Tallinnas 30.-31. mail 1996 toimunud seminari Eesti tegevjuristidele "Inimõiguste ja põhivabaduste kaitse konventsiooni" õiguslikest tagajärgedest ettekanded (The Status of the European Convention on Human Rights in the Estonian Legal System. — Council of Europe, The Foreign Ministry of the Republic of Estonia. Seminar for Estonia's practicing lawyers on legal consequences of the Convention for the Protection of Human Rights and Fundamental Freedoms, on 30-31 May in Tallinn). — Tallinn, 1996, p. 48.
- <sup>11</sup> Q.v. e.g. R. Maruste. Põhiseadus ja selle järelevalve. Võrdlevad selgitused. Kommentaarid. Tekstid. (The Constitution and the Constitutional Review. Comparative Explanations. Commentaries. Texts.) — Tallinn: Juura Õigusteabe AS, 1997, pp. 75-76. R. Narits, Fundamental Rights and Freedoms in Estonian Constitution. — *Juridica International*. III 1998, pp. 25-26.
- <sup>12</sup> Q.v. also R. Maruste. Op. cit., p. 77.
- <sup>13</sup> RT I 1993, 37, 558; 1994, 12, 200; 19, 340; 72, 1263; 84, 1475; 1995, 16, 228; 17, 237; 23, 334; 26-28, 355; 59, 1006; 97, 1664; 1996, 36, 738; 37, 739; 40, 773; 48, 942; 89, 1591; 1997, 13, 210; 29, 449 and 450; 69, 1113; 1998, 28, 356; 59, 941; 61, 984; 1999, 10, 155; 29, 401.
- <sup>14</sup> Ibid.
- <sup>15</sup> Eesti Vabariigi Põhiseadus. (Constitution of the Republic of Estonia.) — Tallinn: Olion, 1992.
- <sup>16</sup> RT II 1994, 26, 95.
- <sup>17</sup> Q.v. e.g. H. Maurer. Allgemeines Verwaltungsrecht, 10. Aufl. München, 1995, § 23; E. Forsthoff. Lehrbuch des Verwaltungsrecht. Band I Allgemeiner Teil, 10., Aufl. München, 1973, p. 490; also K. Merusk, I. Koolmeister. Haldusõigus. Õpik Tartu Ülikooli õigusteaduskonna üliõpilastele. (Administrative Law. Textbook for Students of the University of Tartu Faculty of Law.) Tallinn: Õigusteabe AS Juura, 1995, pp. 63, 69.
- <sup>18</sup> 3-4-1-3-97 — Supreme Court Judgements 1997. Tallinn: Juura, Õigusteabe AS, 1998, pp. 13-16.
- <sup>19</sup> Spain — Constitution. Available: <http://www.uni-wuerzburg.de/law/sp00000.html>, 8 April 1999.
- <sup>20</sup> Bulgaria — Constitution. Available: <http://www.uni-wuerzburg.de/law/bu00000.html>, 8 April 1999.
- <sup>21</sup> Finland — Constitution. Available: <http://www.uni-wuerzburg.de/law/fi00000.html>, 8 April 1999.
- <sup>22</sup> A.-T. Kliimann. Õiguskord. (Legal Order.) — Tartu: Akadeemilise Kooperatiivi Kirjastus, 1939, p. 205.
- <sup>23</sup> R. Eliaser. Haldusõiguse üldosa. Autoriseeritud konspekt. (General Principles of Administrative Law. Authorised lecture notes.) — Tartu, 1939, pp. 39-40.
- <sup>24</sup> R. Stober. Kommunalrecht in der Bundesrepublik Deutschland. 3. Auflage. — Stuttgart, Berlin, Köln: Verlag W. Kohlhammer, 1996, p. 259.
- <sup>25</sup> 3-3-1-38-96 - Riigikohtu lahendid 1996. (Supreme Court Judgements 1996.) — Tallinn: Juura Õigusteabe AS, 1996, pp. 140-143.
- <sup>26</sup> RT I 1993, 37, 558; 1994, 12, 200; 19, 340; 72, 1263; 84, 1475; 1995, 16, 228; 17, 237; 23, 334; 26-28, 355; 59, 1006; 97, 1664; 1996, 36, 738; 37, 739; 40, 773; 48, 942; 89, 1591; 1997, 13, 210; 29, 449 and 450; 69, 1113; 1998, 28, 356; 59, 941; 61, 984; 1999, 10, 155; 29, 401.
- <sup>27</sup> Eesti Vabariigi Põhiseadus. (Constitution of the Republic of Estonia.) — Tallinn: Olion, 1992.
- <sup>28</sup> RT I 1993, 37, 558; 1994, 12, 200; 19, 340; 72, 1263; 84, 1475; 1995, 16, 228; 17, 237; 23, 334; 26-28, 355; 59, 1006; 97, 1664; 1996, 36, 738; 37, 739; 40, 773; 48, 942; 89, 1591; 1997, 13, 210; 29, 449 and 450; 69, 1113; 1998, 28, 356; 59, 941; 61, 984; 1999, 10, 155; 29, 401.
- <sup>29</sup> Ibid.
- <sup>30</sup> RTL 1996, 123/124, 638.
- <sup>31</sup> Some other constitutional provisions, not located under Chapter II, also contain fundamental rights and freedoms (§§ 57, 60(1), etc.). — Q.v. K. Merusk, R. Narits. Eesti konstitutsiooniõigusest. (On Estonian Constitutional Law.) — Tallinn: Juura Õigusteabe AS, 1998, p. 172.
- <sup>32</sup> Eesti Vabariigi Põhiseadus. (Constitution of the Republic of Estonia.) — Tallinn: Olion, 1992.
- <sup>33</sup> VIII Riigikogu stenogramm. (Stenographs of the 8th Riigikogu.) Available: <http://www.riigikogu.ee/ems/stenograms/1997/09/t97092503.html>, 20 March 1999.
- <sup>34</sup> Eesti Vabariigi Põhiseadus (Constitution of the Republic of Estonia). — Tallinn: Olion, 1992.
- <sup>35</sup> VIII Riigikogu stenogramm. (Stenographs of the 8th Riigikogu.) Available: <http://www.riigikogu.ee/ems/stenograms/1997/09/t97092503.html>, 20 March 1999.
- <sup>36</sup> Eesti Vabariigi Põhiseadus. (Constitution of the Republic of Estonia.) — Tallinn: Olion, 1992.
- <sup>37</sup> 3-4-1-3-97 — Supreme Court Judgements 1997. — Tallinn: Juura Õigusteabe AS, 1998, pp. 13-16.
- <sup>38</sup> J. Liventaal. Tüüpilistest vigadest kohaliku omavalitsuse organite õigustegevusest (ettekanne EAÕS-i Tallinna sektsiooni koosolekul 26.11.1998 EV õiguskantsleri järelevalvemenetluses olnud probleemidest [On typical mistakes in the legislative activities of local government bodies (Report at the meeting of the Tallinn section of the Estonian Academic Law Society on 26 November 1998 on the problems under the review procedure of the legal Chancellor of the Republic of Estonia).] 25 November 1998, p. 5.
- <sup>39</sup> Eesti Vabariigi Põhiseadus. (Constitution of the Republic of Estonia.) — Tallinn: Olion, 1992.
- <sup>40</sup> RT 1992, 20, 288; RT I 1999, 38, 485.
- <sup>41</sup> RT 1992, 29, 396; RT I 1997, 66-68, 1109; 73, 1201; 81, 1361 and 1362; 86, 1459 and 1461; 87, 1466 and 1467; 93, 1561, 1563-1565; 1998, 2, 42; 17, 265; 23, 321; 30, 410; 34, 484; 36/37, 552 and 553; 38, 562; 51, 756 and 759; 52/53, 771; 60, 951 and 952; 64/65, 1004; 86/87, 1409; 98/99, 1574; 102, 1695; 108/109, 1783; 1999, 4, 53; 16, 271, 272 and 276; 23, 350; 29, 398 and 404; 30, 415; 31, 425.
- <sup>42</sup> J. Liventaal. Op. cit., p. 13.
- <sup>43</sup> Eesti Vabariigi Põhiseadus. (Constitution of the Republic of Estonia.) — Tallinn: Olion, 1992.
- <sup>44</sup> Ibid.
- <sup>45</sup> RT I 1995, 26-28, 355; 1996, 52-54, 993; 1998, 91/93, 1500; 1999, 10, 155; 23, 355; 24, 360.
- <sup>46</sup> RT I 1994, 2, 13; 1995, 20, 297; 1996, 49, 953; 1997, 93, 1561; 1999, 10, 156, 24, 359.
- <sup>47</sup> Q.v. J. Liventaal. Ettekanne kohtunike ja kohtutöötajate seminaril 28.10.97. (Report at the seminar for judges and court staff on 28 October 1997.) 27 October 1997, pp. 5-7.
- <sup>48</sup> Eesti Vabariigi Põhiseadus. (Constitution of the Republic of Estonia.) — Tallinn: Olion, 1992. Q.v. also 3-3-1-30-97 — Riigikohtu lahendid 1997. (Supreme Court Judgements 1997.) — Tallinn: Juura Õigusteabe AS, 1998, pp. 145-148. RT I 1997, 30, 472.
- <sup>49</sup> Eesti Vabariigi Põhiseadus. (Constitution of the Republic of Estonia.) — Tallinn: Olion, 1992. Q.v. also 3-3-1-30-97 — Riigikohtu lahendid 1997. (Supreme Court Judgements 1997.) — Tallinn: Juura Õigusteabe AS, 1998, pp. 145-148.
- <sup>50</sup> R. Stober. Op. cit., p. 265.
- <sup>51</sup> K. Merusk, I. Koolmeister. Op. cit., pp. 103-107.
- <sup>52</sup> III-3/1-26/95 — Riigikohtu lahendid 1995. (Supreme Court Judgements



1995.) — Tallinn: Juura Õigusteabe AS, 1996, pp. 89-93.

<sup>54</sup> 3-3-1-14-97 — Riigikohtu lahendid 1997. (Supreme Court Judgements 1997.) — Tallinn: Juura Õigusteabe AS, 1998, pp. 79-82.

3-3-1-32-97 — Ibid. pp. 153-158.

<sup>55</sup> III-3/1-35/95 — Riigikohtu lahendid 1995. (Supreme Court Judgements 1995.) — Tallinn: Juura Õigusteabe AS, 1996, pp. 124-127.

<sup>56</sup> VIII Riigikogu stenogramm (Stenographs of the 8th Riigikogu.) Available: <http://www.riigikogu.ee/ems.stenograms/1997/09/t97092503.html>, 20 March 1999.

<sup>57</sup> J. Liventaal. Tüüpilistest vigadest kohaliku omavalitsuse organite õigusloometegevuses. (Ettekanne EAÕS-i Tallinna sektsiooni koosolekul 26.11.1998 EV õiguskantsleri järelevalvemenetluses olnud probleemidest.) [On typical mistakes in the legislative activities of local government bodies. (Report at the meeting of the Tallinn section of the Estonian Academic Law Society on 26 November 1998 on the problems under the review procedure of the legal Chancellor of the Republic of Estonia.)] 25 November 1998, p. 1.

<sup>58</sup> Eesti Vabariigi Põhiseadus. (Constitution of the Republic of Estonia.) — Tallinn: Olion, 1992.

<sup>59</sup> Ibid.

<sup>60</sup> Eesti Vabariigi Põhiseadus. (Constitution of the Republic of Estonia.) — Tallinn: Olion, 1992.

<sup>61</sup> RT I 1999, 29, 406.

<sup>62</sup> VIII Riigikogu stenogramm. (Stenographs of the 8th Riigikogu.) Available: <http://www.riigikogu.ee/ems.stenograms/1995/09/t95092803.html>, 20 March 1999.

<sup>63</sup> VIII Riigikogu stenogramm. (Stenographs of the 8th Riigikogu.) Available: <http://www.riigikogu.ee/ems.stenograms/1996/09/t96092603.html>, 20 March 1999.

<sup>64</sup> VIII Riigikogu stenogramm. (Stenographs of the 8th Riigikogu.) Available: <http://www.riigikogu.ee/ems.stenograms/1997/09/t97092503.html>, 20 March 1999.

<sup>65</sup> Eesti Vabariigi Põhiseadus. (Constitution of the Republic of Estonia.) — Tallinn: Olion, 1992.

<sup>66</sup> RT I 1993, 25, 435.

<sup>67</sup> Ibid.

<sup>68</sup> 3-4-1-3-97 - Riigikohtu lahendid 1997. (Supreme Court Judgements 1997.) — Tallinn: Juura, Õigusteabe AS, 1998, pp. 13-16.

<sup>69</sup> Eesti Vabariigi Põhiseadus. (Constitution of the Republic of Estonia.) — Tallinn: Olion, 1992.

<sup>70</sup> RT I 1995, 94, 1628; 1996, 49, 953; 88, 1560; 1997, 29, 447; 40, 622; 73, 1200; 87, 1468; 52, 833; 81, 1361; 81, 1362; 1998, 28, 356; 36/37, 552; 40, 614; 107, 1762; 111, 1833; 1999, 10, 155; 16, 271 and 274; 27, 391; 29, 398 and 401.

<sup>71</sup> Ibid.

<sup>72</sup> RT I 1993, 50, 694; 1994, 16, 290; 28, 425; 1995, 29, 358 and 359; 1996, 37, 739; 1997, 16, 260; 30, 472; 87, 1468; 93, 1557; 95/96, 1575; 1998, 17, 265; 61, 981; 1999, 16, 271.

<sup>73</sup> RT I 1995, 94, 1628; 1996, 49, 953; 88, 1560; 1997, 29, 447; 40, 622; 73, 1200; 87, 1468; 52, 833; 81, 1361; 81, 1362; 1998, 28, 356; 36/37, 552; 40, 614; 107, 1762; 111, 1833; 1999, 10, 155; 16, 271 and 274; 27, 391; 29, 398 and 401.

<sup>74</sup> Proceeding from the title of the present article, it does not deal with real procedures of local governments, which fall under the jurisdiction of administrative courts.

<sup>75</sup> RT I 1999, 29, 406.

<sup>76</sup> Administrative court proceedings in Estonian legal order have more thor-

oughly been treated by K. Merusk, I. Koolmeister, and other. Q.v. K. Merusk, I. Koolmeister. Haldusõigus. Õpik Tartu Ülikooli õigusteaduskonna üliõpilastele. (Administrative Law. Textbook for the University of Tartu Faculty of Law Students.) Tallinn: Õigusteabe AS Juura, 1995, pp. 125-127; K. Merusk. Halduskohtu mõiste, organisatsioon ja pädevus haldusvaidluste lahendamisel. (The Notion, Organisation and Competence of Administrative Courts in Resolution of Administrative Disputes.) — Juridica 1994 No. 2, pp. 47-50; K. Merusk. Otsustusmenetlus. (Decision Proceedings.) Ibid., pp. 54-55; I. Koolmeister. Protsessiosalise halduskohtumenetluses. (Parties in Administrative Court Proceedings.) — Ibid., pp. 51-53.

<sup>77</sup> RT I 1993, 50, 694; 1994, 16, 290; 28, 425; 1995, 29, 358 and 359; 1996, 37, 739; 1997, 16, 260; 30, 472; 87, 1468; 93, 1557; 95/96, 1575; 1998, 17, 265; 1998, 61, 981; 1999, 16, 271.

<sup>78</sup> Ibid.

<sup>79</sup> Ibid.

<sup>80</sup> Ibid.

<sup>81</sup> Ibid.

<sup>82</sup> Ibid.

<sup>83</sup> Ibid.

<sup>84</sup> RT I 1993, 37, 558; 1994, 12, 200; 19, 340; 72, 1263; 84, 1475; 1995, 16, 228; 17, 237; 23, 334; 26-28, 355; 59, 1006; 97, 1664; 1996, 36, 738; 37, 739; 40, 773; 48, 942; 89, 1591; 1997, 13, 210; 29, 449 and 450; 69, 1113; 1998, 28, 356; 59, 941; 61, 984; 1999, 10, 155; 29, 410.

<sup>85</sup> III-3/1-9/94. — Riigikohtu lahendid 1993/1994. (Supreme Court Judgements 1993/1994.) — Tallinn: Õigusteabe AS Juura, 1995, pp. 93-95.

<sup>86</sup> RT I 1993, 37, 558; 1994, 12, 200; 19, 340; 72, 1263; 84, 1475; 1995, 16, 228; 17, 237; 23, 334; 26-28, 355; 59, 1006; 97, 1664; 1996, 36, 738; 37, 739; 40, 773; 48, 942; 89, 1591; 1997, 13, 210; 29, 449 and 450; 69, 1113; 1998, 28, 356; 59, 941; 61, 984; 1999, 10, 155; 29, 401.

<sup>87</sup> VIII Riigikogu stenogramm. (Stenographs of the 8th Riigikogu.) Available: <http://www.riigikogu.ee/ems.stenograms/1997/09/t97092503.html>, 20 March 1999.



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# Justice, Order and Anarchy: The Right of Peoples to Self-Determination and the Conflicting Values in International Law

## **Introduction. The Importance of the Right of Peoples to Self- Determination**

Since 1991, the Republic of Estonia is again a full member of the family of free and independent nations. It has vigorously started to rediscover its rights and duties under international law. However, it seems that most Estonians have dubious and uneasy feelings about the credibility of the law of nations. On the one hand, they have to admit that international law was unable to prevent the illegal annexation of their country for fifty years. On the other hand, most people acknowledge that international law was an extremely useful tool when the country succeeded in restoring its democracy and statehood peacefully.

In the 19th century when the awakened Estonian nation broke its way towards statehood, Jakob Hurt formulated the national imperative for Estonians: we cannot become strong in numbers, but we can become strong in spirit. For our independent nation at the end of 20th century, the modified version of this imperative might sound:

our State cannot become strong in might, but it can stand for its rights. Or, as President Lennart Meri has put it: the nuclear bomb of Estonia is international law. While this expressive saying may at first glance look like a well-sounding (although certainly well-meant) overstatement, it has a deeper meaning. For a small country, it is essential to know that its full membership in the family of nations is not merely a caprice of Fortuna but is rooted in universally recognised rights and principles of international law.

The right that has paved the Estonian way to independence, has been the right of its people to self-determination. The reliance on this right is solemnly proclaimed in the preamble of the constitution of the Republic of Estonia. The right of peoples to self-determination is the touchstone of Estonia's independence. Because of that, it would be important to find out what international legal implications does the principle of self-determination have.

Some decades ago, several prominent scholars doubted whether the principle of self-determination has become a part of international law, or is still just an important moral (political) principle. Today, the existence of such a legal

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right is indisputable. It is contained in the UN Charter and in both United Nations human rights covenants of 1966. There is a strong argument put forward that the right to self-determination has reached the status of the rule of customary international law. However, to say in advance — the exact meaning of this right in international law, whether of treaty or customary origin, is much more disputed.<sup>1</sup> A natural lawyer, Fernando R. Tesón has even submitted that “no area of international law is more confused, incoherent, and unsatisfactory than the law of self-determination.”<sup>2</sup>

If it is true, why is it so? The purpose of this essay is to take a philosophical-contextual look at the status of the right of peoples to self-determination, as it is crystallised in modern international law. I will try to demonstrate how the fulfilment of the right of peoples to self-determination fits together with the achievement of two fundamental goals of international society — order and justice. The conceptual problems that are connected with the right of peoples to self-determination may be reduced to the controversy of how to reconcile order with justice.<sup>3</sup> It becomes apparent that different philosophical approaches to international law value order and justice (and, consequently, the importance of the right to self-determination) differently. The construction and analysis of naturalist, positivist and realist views to self-determination may help us to understand the controversial status that this right plays in the international legal system.

## Natural Law *Versus* Positivism

Self-determination is a principle of justice. It means ultimately the right to determine one's fate freely. As such, the whole concept of self-determination may be said to be a concept of natural law, since the major concern for natural law tradition is justice. There was something very characteristic to natural law thinking in the idealistic way, how the U.S.-president Woodrow Wilson first eloquently articulated the concept of self-determination in his “Fourteen Points”.<sup>4</sup> Natural lawyers seem to indicate: self-determination is a fair principle and people will recognise it instinctively when it is violated. It is easily recognisable when a people is suppressed, even if the positivists are disputing — as they always do — about the exact meaning and consequences of the right of self-determination in particular circumstances. As an example may serve the NATO intervention in Kosovo which was in the first case support for the cause of self-determination (for the autonomy of Kosovars). Whatever other principles of international law (e.g. these relating to the use of force) may say, the Western intervention was necessary and legal, since it ultimately served the cause of justice. A radical natural lawyer would probably even argue that an intervention for a just cause (like self-determination) would be justified legally and not only morally, even if it would have been — from a formalistic point of view — in violation with (unjust) norms of

international law (as interpreted by positivists).

The inherent difficulty for a natural law approach is, of course, that there is no universal consensus about the question of what (in)justice is. Most Serbs, Russians and maybe some others would probably argue that not the situation of Albanians in Kosovo but rather the bombing of Yugoslavia has been unjust and illegal.

A natural lawyer would also find it difficult to prove that self-determination as a principle of justice is something that has transcended time and space. The right to self-determination as a concept of the 20th century is a good example to demonstrate how the understanding of justice has changed during the course of time. The international law of former centuries, *ius publicum Europeanum*, as it was dictated by European powers with colonial interests, did not make any reference to the will of peoples. If a people, looking for separation, was powerful enough to secede from its motherland, and to create a state with effective government that was recognised by the governments of already existing states, international law acknowledged the birth of such a new state. But in no way were the sentiments for separation encouraged by supportive concepts like self-determination.

Moreover, international law even recognised the right of conquest, without taking into account the will of the respective population.<sup>5</sup> There are reasons to believe that according to the State-centric worldview of the 18th and 19th centuries (that was particularly influenced by the philosophy of Georg Friedrich Wilhelm Hegel), such an order of things corresponded to the perception of justice of its time and should not be “stigmatised” from the point of view of today's prevailing understandings.

An escape for natural lawyers from such a relativist critique against the “universal applicability” of the self-determination principle would be to give up certain elements of the radical theory and to contend, for example, that while there may be no justice that transcends time, there is a just solution for every particular situation in concrete time.<sup>6</sup>

According to Hegel, a thesis needs an antithesis. The antithesis for a natural law approach is positivism. While natural law is concerned with justice, positivism definitely prefers order. The project of positivism is to interpret international law as it is currently in force. The reason why positivism is determined to give preference to the prevailing order is due to the fact that existing international law is made by States. There is a limit, to what degree it is in the interest of the “legislators of international law” to recognise the right of peoples to self-determination. States are by nature mostly interested in self-preservation (if not in the increase of their power and jurisdiction). They prefer preserving the *status quo* to a change in their detriment. While order as a goal seeks to preserve the *status quo*, justice — as far as it encourages the right to self-determination —,

stands for change. The needs for justice have given rise to the principle of self-determination. The needs for order have so far preserved the priority to the counter-principle — the right of States “to territorial integrity and political unity” — a right that derives from the principle of sovereignty.

The co-existence of the principles of self-determination and territorial integrity reveals a characteristic phenomenon of international law, namely that frequently legal norms in classical tradition travel in complementary opposites. This has correctly been considered as a source of ambiguity by the international legal scholars of Yale Law School.<sup>7</sup> It is worth mentioning though that this phenomenon is not only specific to modern international law. Already in Roman law, the famous maxim “*ex injuria ius non oritur*” was balanced by another principle “*ex facto ius oritur*”.

However, it is clear that complementary opposites do not add legal clarity to the complex issues of self-determination.<sup>8</sup> The UN General Assembly Declaration on the Granting of Independence to Colonial Countries and Peoples of 1960 acknowledges the right of self-determination, but adds quickly that “any attempt aimed at the partial or total disruption of the national unity or territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations”.<sup>9</sup> The principle of justice is “balanced” with the principle of order. Positivists have made many attempts to explain such a complicated state of law. Colonial and non-colonial situations of self-determination have been distinguished, by giving the right to secede in colonial, and denying it in non-colonial situations. In order to somehow support such a distinction theoretically, it has been argued that self-determination does not *eo ipso* mean the right to create an independent state. The concepts of “internal” (autonomy, no independence) and “external” (right to secede) self-determination have been developed.<sup>10</sup> National minorities have been distinguished from peoples. Differently from peoples, they are said not to be entitled to (external) self-determination, but only to the respect of their minority rights, and maybe to autonomy. The unsolvable problem is, of course, how to distinguish peoples and minorities “scientifically”.

For a natural lawyer, such distinctions may be necessary from a realistic point of view, yet they are inconsistent. The distinguishing line that positivist lawyers have to draw, is arbitrary. To argue that self-determination does not have to mean the right to statehood, is as inconsistent as to submit that the right to be free from slavery sometimes just means the right to autonomy for the slave.

On the other hand, some of the concerns for order that positivism sets forth, seem to be legitimate. For example, there should be a certain minimum number of people who would be entitled to independent statehood. International law should not support the creation of atomic units that would make the international system uncontrollable.

Preserving the order must remain an important factor in the search for just solutions in international law.

## The Realist Attack

The most challenging attack against the relevance of the right of self-determination comes from the realist camp. Classical realism is a theory of international relations that emerged in the post-World War II U.S.A. Influential scholars such as Hans Morgenthau, E. H. Carr, George F. Kennan and Stanley Hoffman questioned or even denied the relevance of international law in world power politics.<sup>11</sup> It is important not to mix classical realists up with the school of legal realism in international law (the so called Yale or McDougal-Lasswell approach). For current purposes, I will discuss only the views of classical realism, since its theory differs most fundamentally from the opposing, but still legalistic views of natural law and positivism.

While natural law lays emphasis on the achievement of justice and positivist tradition gives priority to order, classical realists characterise the decentralised international system as “anarchic”. Realists would question the relevance of the right to self-determination in the Hobbesian world of self-interest. Order and justice in international relations are achieved by means of international politics, and not by international law. After all, as States are by nature egoistic creatures, international justice is a very doubtful concept in international politics. Just as Pontius Pilate confronted Jesus with the sceptical question, “What is truth?”, classical realists are sceptical about the rhetoric of justice in international relations. States act in ways that are useful to them, and are willing to make some concessions to the cause of universal “justice” only when failing to do so would threaten their own position and interests.

Realists argue that ultimately, the basis for any change in the legal underpinnings of international society remains (the change in) power. People can hardly achieve independence by virtue of some sort of legal principle only. Usually, the victory for self-determination has been the result of a successful secessionist war (e.g. USA in 1775-1783, Estonia 1918-1920). Even the collapse of the British and French colonial empires was rather the result of the understanding achieved by the *élites* in London and Paris that it had practically become impossible to maintain the empire,<sup>12</sup> rather than the sincere support to a new principle in international law. Algeria did not win independence by virtue of principles, but because the Algerian people managed “convincingly” to express their will to become independent.

Power relations determined that the principle of self-determination — then not a legal principle *stricto sensu* — was applied selectively at the end of the First World War. Power relations determined that the leaders of the Western world issued the Atlantic Charter in August 1941<sup>13</sup> — and



at the same time agreed with Soviet dominance in Central and Eastern Europe at the Yalta Conference (in February 1945).<sup>14</sup> Power relations are the reason why China has been criticised because of its continued violation of the right to self-determination in Tibet by non-state (private) actors rather than States. Power relations, and not international law determine that peoples in similar situations are treated differently. If one wants, one may call such distinctions “legal”, but then law is merely apologetic. On the other hand, if one wants to take a very idealistic view about the content of the “right” to self-determination, this “international law” becomes “utopian” — a law that does not have a relevance with the real world.<sup>15</sup>

To sum up, self-determination is one of these controversial issues in international law, that realists can easily use in order to submit that “international law does not matter”. However, even if they rightly point out the controversies connected with this right, they fail to understand the importance that the right to self-determination has played in the 20th century. The complete reorganisation of the community of states during this century cannot be just the result of power relations only. If one attempts to ignore the importance of self-determination for development and change in world politics this century, one is not able to explain the increase of the number of independent states from some dozens to almost two hundred. Changed power relations have given rise to a new legitimising right.<sup>16</sup> The recent decision of Indonesia to respect the free choice of the people of East Timor may be one more piece of evidence for the crystallisation of such a right in international life.

## Conclusion

The question, whether the right to self-determination does “matter” is also a question of attitude, not only of academic proof. It is true that the real world is not identical with the world of law — and the world of normative order is not always identical with the world of justice. However, it may make a fundamental difference how one intends to handle this reality, whether (s)he considers a glass to be “half-empty” or “half-full”.

The analysis of international law and relations ultimately leads to the conclusion that there can be no stable order without justice in the long term. The demise of the Soviet Union marked the end of the relatively stable bipolar world order, and is an excellent example in this context. The Soviet Union was capable of securing peace and security within its borders but it failed to secure justice for its peoples. It was powerful enough “to freeze” the demands of justice so that the independence of Estonia only “found its last refuge in international law” (to use again the words of president Meri), but in the longer perspective it was determined to fail. Justice and the right of self-determination appeared to be stronger than the mighty but unjust order.

The collision between the values of order and justice in international law is not insurmountable. It resembles the tension between the slogans of the French revolution “*Liberté! Egalité! Fraternité!*”. Although there was and is an inherent tension between liberty and equality, both goals were deemed to belong together as inseparable reverse sides of one coin. Similarly, order and justice are inseparable, complementary rather than contradictory elements in the very idea of law.<sup>17</sup> In the struggle for the rule of law as opposed to anarchy, both the values of order and justice must be taken into account when the right of peoples to self-determination is implemented in international community. It should not terrify critical minds when the implementation of law in international affairs is not free of contradictions. As a lawyer opposed to contradictions and weaknesses in the law, one can always find support from the words of Gustav Radbruch who, trying to solve the puzzle with order and justice, finally recognized that some contradictions are inherent to the problems: *wie überflüssig wäre ein Dasein, wenn nicht die Welt letzten Endes Widerspruch und das Leben Entscheidung wäre!*<sup>18</sup>

## Notes:

<sup>1</sup> The literature on the issues of self-determination is extensive. Q.v. e.g. Aurelia Cristescu, *The Right of Self-Determination. Historical and Current Development on the Basis of United Nations Instruments* (New York: United Nations, 1981); Hurst Hannum, *Autonomy, Sovereignty and Self-Determination. The Accommodation of Conflicting Rights* (Philadelphia: University of Pennsylvania Press, 1990); Christian Tomuschat (ed.), *Modern Law of Self-Determination* (Dordrecht: Martinus Nijhoff Publishers, 1993).

<sup>2</sup> Fernando R. Tesón, *A Philosophy of International Law* 130 (Westview Press, 1998).

<sup>3</sup> On the dichotomy of order and justice in international affairs Q.v. Hedley Bull, *The Anarchical Society: a Study of Order in World Politics* (New York: Columbia University Press, 1977).

<sup>4</sup> Q.v. Umozurike Oji Umozurike, *Self-Determination in International Law* 18 (Archon Book: 1972).

<sup>5</sup> Q.v. Sharon Korman, *The Right of Conquest. The Acquisition of Territory By Force in International Law and Politics* (Oxford: Clarendon Press, 1996).

<sup>6</sup> Indeed, this has been the position taken by Professor Franck: “What the deep contextuality of all notions of fairness does tell us is that fairness is subjective; not as St Thomas Aquinas hoped, a “given” inculcated into the nature of things to be discovered or intuited by right-thinking humans.” Thomas M. Franck, *Fairness in International Law and Institutions* 14 (Oxford: Clarendon Press, 1995).

<sup>7</sup> Q.v. John Norton Moore, *Prolegomenon to the Jurisprudence of Myres McDougal and Harold Lasswell*, 54 *Virginia Law Review* 678 (1968).

<sup>8</sup> Q.v. also the discussion in Michla Pomerance, *Self-Determination in Law and Practice. The New Doctrine in the United Nations* 43 (The Hague: Martinus Nijhoff Publishers, 1982).

<sup>9</sup> UN General Assembly Res. 1514 (XV).

<sup>10</sup> Antonio Cassese, *Self-Determination of Peoples. A Legal Appraisal* 67 etc (Cambridge: Cambridge University Press, 1995).

<sup>11</sup> Robert J. Beck, Anthony Clark Arend, Robert D. Vander Lugt, *International Rules. Approaches from International Law and International Relations* 94 (Oxford: Oxford University Press, 1996).

<sup>12</sup> Cf. with the Grotius-lecture “In the Wake of the Empire”, held by Professor Nathaniel Berman at the annual meeting of American Society of International Law in April 1999.

<sup>13</sup> ...where Presidents Roosevelt and Churchill expressed their “desire to see no territorial changes that do not accord with the freely expressed wishes of the people concerned.” Korman sums up the controversy between ideals and reality in international relations at the end of the World War II: “But while these principles had a neat simplicity about them on paper, they would obviously prove difficult to apply in practice when after the war the interests of order would have to be balanced against the requirements of justice.” Korman, *supra* note 5 at 162.

<sup>14</sup> Q.v. Krzysztof Skubiszewski, *The End of Yalta*, in *International Law: Theory and Practice. Essays in Honour of Eric Suy*, Karel Wellens ed. 107 (The Hague: Martinus Nijhoff Publishers, 1998).

<sup>15</sup> The distinction “apologetic-utopian” has been eloquently introduced by a leading New Stream scholar in international law, Martti Koskenniemi. Q.v. Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* 170-178 (Helsinki: Finnish Lawyers’ Publishing Company, 1988). While the critique of New Stream scholars has come from the “legal camp”, the ultimate consequences of the adoption of their theory — especially for the eyes of the “wider public” are quite similar to the accepting of the views of classical realists — international law “does not matter”.

<sup>16</sup> In respect to order-justice controversy, Professor Crawford explains the new implications of this right that demonstrate the breakthrough of the right to self-determination: “Modern practice establishes a distinct connection between [the principle of self-determination and the rules relating to the illegal use of force], such that, even where a particular use of force is illegal, its effects may be treated as valid provided that they are inconsistent with the principle of self-determination in its application to the territory in question.” James Crawford, *The Creation of States in International Law* 364-365 (Oxford: Clarendon Press, 1979). Q.v. also Anthony Clark Arend, Robert J. Beck, *International Law and the Use of Force. Beyond the UN Charter Paradigm* 40-45 (London: Routledge, 1993).

<sup>17</sup> Cf. the influential concept of the idea of law of Gustav Radbruch in: Gustav Radbruch, *Rechtsphilosophie* 168 etc (Stuttgart: K.F. Koehler Verlag, fünfte Auflage, nach dem Tode des Verfassers besorgt und biographisch eingeleitet von D. Dr. Erik Wolf, 1956).

<sup>18</sup> *Ibid.* at 173. The translation to English: how superfluous would be an existence, when the world would not at the very end be a contradiction and the life a decision!



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# Some Problems of International Judicial Assistance from an Estonian Perspective

The terms **international legal assistance** have been used for various notions.<sup>1</sup> International judicial assistance can be distinguished from **international judicial co-operation**, which is a broader term, covering international law-creating, administrative and judicial activities for the purposes of facilitating service of documents, taking of evidence, recognition and enforcement of judgements, also as used in the EU, promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction.

International judicial assistance is the performing of a procedural act by a judicial authority of a State on request from another State, for a legal procedure, which is taking place in the requesting State. This may be service of summons abroad, taking of evidence abroad or recognition and enforcement of foreign judgements.

The need for a procedural action by authorities of another country is an important characteristic of international judicial assistance. The action is usually made to comply with a request, which can be in the form of Letter of Request. It can also be an expression of a wish for that action in another form. Differing from that, in judicial co-operation in criminal matters more and more conventions foresee in some cases actions taken without request, on own initiative.

Initially mechanisms of international judicial assis-

tance were created for the purposes of judicial procedure, in some cases they are used also for extrajudicial matters.

Other institutions that are related to international civil procedure, but are not international judicial assistance, are the procedural rights of a foreigner, such as prohibition to discriminate with *cautio judicatum solvi*, prohibition of detention in civil and commercial matters, immunity for witnesses and providing legal aid and advice to foreigners. These are rights, the usage of which does not call for a procedure of international judicial assistance. These rights are granted by law or by a treaty.

Also providing information about laws and judicial system on the request of another State is not within the scope of the term international judicial assistance.

Notions and mechanisms of private international law, international element and public order play an important role in international judicial assistance. The international element can here be defined as a circumstance which changes a "purely domestic procedure" into a procedure where a procedural act must be performed abroad. These are situations where the defendant or a witness or any other source of evidence is located abroad or the judgement debtor or his assets are in a State other than the one of the court from which the judgement originates. Co-operation and collision of two legal systems and being regulated by international and internal norms are typical both to conflict

of laws and international judicial assistance.

Principles, mechanisms and institutions specific to a civil procedure, as chronological and logical stages of activities of authorities and interested persons are relevant in the context of international judicial assistance as well.

Both methods of private international law and civil procedure have to be used to analyse international judicial assistance.

### **Is International Judicial Assistance Obligatory without a Treaty Obligation and to What Extent?**

When there is a treaty regulating international judicial assistance between two countries, complying with requests of international judicial assistance is considered to be obligatory to the extent as regulated by treaty.

No country has a treaty network covering all other countries. So there will always remain the question — should international judicial assistance be given, should the requests from those countries with whom no relevant treaty exists, be complied with? Even more important is the question: why should it be done?

For small countries like Estonia, who, in spite of being a contracting party to the Hague Conventions on the Service of Documents Abroad<sup>2</sup> and Taking of Evidence Abroad<sup>3</sup>, and having bilateral treaties of mutual legal assistance with some countries<sup>4</sup>, but finding it not practical to negotiate a large amount of bilateral treaties, it is a serious practical and theoretical question that has to be solved. The question is even more complicated in the case of enforcement of foreign judgements, as for Estonia at present this is regulated only on a bilateral basis. There has not been a multilateral convention suitable for Estonia to join up until now.<sup>5</sup>

The question of whether there is an obligation to comply with requests of international judicial assistance, should there be no treaty between the respective countries is a consequence of the answer to the question on why requests from another country are complied with at all, why summons of another country are served, why evidence is taken at the request of another country and why judgements of another country are enforced.

To find these grounds, conflict of laws and conflict of jurisdiction from one side and international judicial assistance on the other side should be compared. In the case of conflict of laws, a State is not always able to rule on the case applying its own internal law and in the case of conflict of jurisdiction, a State can not always judge the case; there are limits to its activities. In the case of international judicial assistance, instead, a State has to perform an act for a judicial procedure not accomplished by itself. It has, thus, to perform an activity not needed for its own functions. The consequence of this difference between conflict of laws and conflict of jurisdiction on the one hand, and inter-

national judicial assistance on the other hand is that only some theories in private international law, such as comity, universalist theories and reciprocity, can explain also international judicial assistance. Some theories, such as *res judicata* and vested rights' theory are applicable only to the enforcement of foreign judgements, but not to service of documents or taking of evidence.

As the opposite to theories treating international judicial assistance as done in the interests of another State, the contemporary explanation for international judicial assistance in civil matters is that it is the assistance given to a party having a court procedure in another State to facilitate finding and effecting justice for this party.<sup>6</sup>

If international judicial assistance is in the interests of an individual, it can be hard to justify, why, for example, State A should take action on the request to serve summons for the individual, whose court procedure is taking place in State B, but not for the individual, whose court procedure is taking place in State C, i.e. why interests of individuals in one State should be preferred.

The situation is different, when the act of international judicial assistance needs the use of measures of compulsion. Examples for this can be — compulsory service of summons to an unwilling addressee, or enforcing an unwilling witness to participate in a court procedure by § 106 of Estonian Civil Procedure Code. Enforcement of judgement is always related to coercion.

Usage of compulsion needs special justification. Treaty obligation can be ground for this, but it can also be reciprocity or binding obligation in another form.

Therefore, even without a treaty, requests for service of summons and taking of evidence should be complied with, if, as usually, in these cases there are no coercive measures involved. In the case of enforcement of judgements, measures of compulsion are always used, and therefore there should be a treaty, or else a binding obligation, established in another way between the two countries.

If to follow the principle that generally international judicial assistance is an obligation, there is a need for clear and strong rules specifying exceptional cases when it is not obligatory.

In the conflict of laws, there can be a situation where a law of another country can be contrary to public policy or unfair or conflicting with some important values that are recognised in the country. A similar situation can arise with a request for international judicial assistance from another country.

Also, there can exist a possibility that country A is not following the principle that generally it is an obligation to give international judicial assistance, creating absolute lack of reciprocity. On the one hand, country B should still comply with the requests originating from country A. On the other hand country B has to be able to arrange proper administration of justice on its territory in cases involving



an international element and also to arrange for complying with requests by country A.

In these cases the requested State has to make an exception to its obligation to fulfil the request. The term **value-related or political grounds** for refusal could be used for these reasons for exceptions.

These reasons are: complying with the request is a danger to the sovereignty or to the security of the State<sup>7</sup>; public order reasons<sup>8</sup>; contradiction with the legal system or with the legal principles<sup>9</sup> of the requested State and lack of reciprocity. Lack of reciprocity can have relevance also in the case of taking of evidence and service of summons, but is more often used in enforcement of judgements.

Other cases where international judicial assistance can not be given on purely technical grounds should be distinguished from **value-related or political grounds** for refusal.

The request being manifestly outside the scope of the treaty is specified as such ground in Article 6 of the EU Convention on the Service of Judicial and Extrajudicial Documents in Civil or Commercial Matters.<sup>10</sup>

A request not in compliance with the provisions of the treaty is dealt with by Article 4 of the Hague Convention on the Service Abroad and Article 5 of the Hague Convention on the Taking of Evidence Abroad.

The impossibility of fulfilling a request is foreseen in Article 6 of the EU Convention on the Service of Judicial and Extrajudicial Documents in Civil or Commercial Matters, and in Estonian treaties of legal assistance with Latvia, Lithuania, the Russian Federation and Ukraine.<sup>11</sup>

Special grounds only in the case of taking of evidence — in the State of execution, the execution of the Letter of Request does not fall within the functions of the judiciary — are foreseen in Article 12 of the Hague Convention on the Taking of Evidence Abroad.

If international judicial assistance is given on the basis of a treaty, these grounds for refusal are usually also specified in the treaty. If international judicial assistance is given also without treaty, the grounds for refusal should be contained in the internal law. The system should not be inflexible or autarchic, and therefore some of the grounds for refusal should be obligatory to use, others used at discretion of the courts.

## Use of Special Procedure

As a rule, each State applies its own procedural law when complying with requests for international judicial assistance from another State. However, sometimes the requesting State may require the results of the request in a specific form. For these cases, treaties on international judicial assistance have foreseen usage of a special procedure. The special procedure may be the procedural law of the requesting State, or another set of rules differing from internal procedural law, as e.g. a procedure specified in the

treaty itself, use of it is foreseen in Article 5b of the Hague Convention on the Service Abroad, Article 9 of the Hague Convention on the Taking of Evidence Abroad and also in the Estonian bilateral treaties of mutual legal assistance.

A special procedure may be followed if some specific conditions are fulfilled.

Firstly, the use of the special procedure has to be explicitly requested. Secondly, there has to be a legal ground, either in the form of a treaty or in the internal legislation. Thirdly, the law of the requested State must not forbid the use of it.<sup>12</sup> Simply being unknown in that State should not prevent use in a special procedure. Use of a special procedure should not be contradictory to public order, or a danger to the sovereignty or the security of the State. Fourthly, it should be neither irrelevantly expensive nor technically impossible.

## The Role of Interested Persons

For clarity, two notions here should be distinguished. The interested person is an individual being a party in judicial proceedings. The requesting person is the person who is presenting, sending the request to another State. Usually it is a State authority. It can also be a lawyer acting for the interested person or the interested person himself.

Depending on the legal system, on the traditional roles of parties and judge in an internal civil procedure, and also if international judicial assistance is considered as being in the interests of another State or for individuals, the role of interested person can be more or less active in the process of international judicial assistance.

An important question in the role of interested person is whether and to what extent he has the right to present the request or the application in some other form to another country.

Traditionally, international judicial assistance has been requested by State authorities.<sup>13</sup> However, under some treaties, for example by Article 10c of the Hague Convention on Service of Documents, an interested person is allowed to serve judicial documents directly through officials of the State of destination.

Traditionally it has been stated that a party does not have claims in international judicial assistance,<sup>14</sup> grounded on the view that only a State can submit the request. However, as the rights of individuals in an international context are increasingly discussed,<sup>15</sup> it should be justified also to raise a question about the rights of an individual towards another country, who has caused damages with its improper way of handling a request.

### THE LEGAL CHARACTER OF A REQUEST PRESENTED BY THOSE OTHER THAN A STATE AUTHORITY

If an interested person is allowed to present a request himself, there should also be asked the question, whether the legal character of that request will still remain the same

as it was in the case of a request presented by a State authority.

If the interested person is allowed by Article 10c of the Hague Convention on Service of Documents to serve judicial documents directly through officials of the other State, the Convention does not impose any specific rules on it. The request has an identical legal character to the request presented by State authorities, and the obligations and duties involved should be identical.

Also, the case of enforcement of foreign judgements in Estonia can serve as an example. The character of it is the same, whether the judgement originates from a State with whom enforcement is regulated by a bilateral treaty on international judicial assistance, or will be regulated by the principles that were embodied in the Lugano and Brussels Conventions. In the case of bilateral treaties the request is made by the State authority, in the other case an interested person presents it himself. Again, the Convention between the Member States of the European Communities on the Simplification of Procedures for the Recovery of Maintenance Payments,<sup>16</sup> foresees the possibility that requests under the Brussels Convention may also be forwarded by a Central Authority, instead of by the interested person.

### Additional Obligations in Complying with the Request

Executing a request, the authority has to serve the summons, take the evidence or to arrange the enforcement of the judgement. Both for the purposes of certainty for the interested persons and of guaranteeing standard of procedural rights, legal correctness, and administrative fluency, it is important to bear in mind some other obligations in the course of fulfilling the request.

Many treaties regulate the **obligation to inform the requesting authority and the interested person** about the time and location of fulfilling the request,<sup>17</sup> some of them also regulate the right of the judicial authority or of the interested person, or of both, to participate in performing the procedural act. It is important to keep interested persons and authorities informed. The right to participate has more relevance in the case of taking of evidence, where the exact way of executing the request is important.

For the case that the authority that has received the request is territorially not competent to comply with it, some treaties regulate the **obligation to forward the request to a competent authority**.<sup>18</sup>

When the request does not comply with the treaty — there is missing data, incorrect address, less copies of a document than needed, missing signature etc. — **the obligation to inform the requesting authority is foreseen in the case the request does not comply with the treaty**.<sup>19</sup> The authority can also specify a deadline for presenting the missing elements.<sup>20</sup> By the EU Convention on Service of

Documents, the requested authorities should avoid returning the requests, if it is possible to fulfil them.

The **obligation to use measures of compulsion** is foreseen in Article 10 of the Hague Convention on the Taking of Evidence Abroad. In the Estonian treaties of legal assistance with Latvia, Lithuania, Ukraine and the Russian Federation the use of measures of compulsion is not regulated. By comparing the relevant articles regulating the compliance with requests by diplomats, by whom use of measures of compulsion is not allowed, the conclusion should be that in other cases it could be possible.

As to specifying **an obligation to fulfil the request within a deadline**, there are three types of treaties. The first group does not mention any deadlines. The Hague Convention on the Service Abroad and also Estonian bilateral treaties of legal assistance belong to this group. In the second group, the treaty specifies the obligation to handle the request expeditiously, as in the Hague Convention on the Taking of Evidence Abroad.<sup>21</sup>

By Article 7 of the EU Convention on the Service of Judicial and Extrajudicial Documents in Civil or Commercial Matters, the service should be effected in one month. The additional protocol of the Estonian bilateral treaty of legal assistance with the Russian Federation expects the summons to be served within three months. These treaties mentioning length of deadlines do form the third group.

Regulating the **obligation to inform the parties about their procedural rights** is more elaborate in the case of service of summons. By Article 8 of the EU Convention on the Service of Judicial and Extrajudicial Documents in Civil or Commercial Matters, the receiving agency shall inform the addressee that he or she may refuse to accept the document to be served if it is in a language other than the specified one. Some contracting States to the Hague Convention on the Service Abroad, including Estonia, do follow this rule in practice, despite it not being an obligation deriving from the Convention itself. Article 9 of the Hague Convention on the Taking of Evidence Abroad specifies that the procedures and methods foreseen in the law of the requested country should be followed. So, having as an exception Article 8 of the EU Convention on the Service of Judicial and Extrajudicial documents in Civil or Commercial matters, informing the parties about their procedural rights remains regulated only by the internal laws of the requested State.

Often the authority complying with the request has also **an obligation to give information concerning the request and the course of complying with it**. This can be information about complying with the request or about the impossibility to do it,<sup>22</sup> and by some treaties they have to specify the reasons which made compliance impossible. The EU Convention on the Service of Judicial and Extrajudicial Documents in Civil or Commercial Matters

has a more elaborate system of keeping the requesting person informed. Notice also has to be sent about the receipt of a document, about the need for additional information for complying with the request and about forwarding the request to an authority having territorial jurisdiction to serve the document.

All these obligations are regulated in some treaties, in some of them for taking of evidence, in some for service of summons, in some for enforcement of foreign judgements. Most of these obligations are not directly related to a specific type of request. It is likely that international judicial assistance could profit from more systematic regulation of these obligations.

### Changes in Character of International Judicial Assistance in Time

There has been a shift in the way requests for international judicial assistance have been treated and handled. At the end of last century, it was a diplomatic and political act where the protection of State sovereignty and of own citizens was of utmost importance. Before the first convention on civil procedure worked out by the Hague Conference of Private International Law of 1894, it was regulated by bilateral treaties and only between very few countries, the overall situation being quite anarchic. Now for some countries it is a mere technical co-operation, aiming to facilitate civil procedure.

Partly these changes are caused by different political relations between States and by a grown mutual trust. An increase of the cases to be handled and thus a need to make swifter arrangements has had its influence.

Partly it has also been due to the development of new technologies. For example, if once public service of summons in Edinburgh was done by horn call at Leith Harbour, now it is more likely that the interested person shall read it from a newspaper published on the Internet.

Another change is represented by the fact that the requests are nowadays presented by authorities being administratively lower level. Use of diplomatic channels has become rare. In more cases a decentralised way of communication is used.

The field of international judicial assistance is more regulated, the number of treaties has increased. The rights and obligations of participants are more clearly foreseen. The notion of civil and commercial matters has widened, enabling thus to give international judicial assistance in more cases. More possibilities do exist to use, instead of the procedural laws of the requested country, a special procedure asked for by the requesting State.

After the entry into force of the Amsterdam Treaty, international judicial assistance in civil matters in the EU will be regulated in a more supranational way. With this, the character of international judicial assistance is likely to

change. Until now, even if being considered in some cases as an obligation, it still had traces of the notions of sovereignty and comity. It was still a decision of a judicial or other authority of one country either to perform or not to perform a procedural act. Hopefully, the citizens will profit from international judicial assistance becoming more exactly regulated and more available.

### Notes:

<sup>1</sup> D. McClean. *International Judicial Assistance*. Oxford, Clarendon Press, 1992 pp.1-2.

<sup>2</sup> Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters.

<sup>3</sup> Hague Convention of 18 March 1970 on the taking of evidence abroad in civil or commercial matters.

<sup>4</sup> The treaty of mutual legal assistance and legal relations between Estonia, Latvia and Lithuania, in force since 3 April 1994, RT (Riigi Teataja = State Gazette) II 1993, 6, 5. The treaty of mutual legal assistance and legal relations between Estonia and the Russian Federation, in force since 19. March 1995, RT II 1993, 16, 27, will be amended by the Additional Protocol to. The treaty of mutual legal assistance and legal relations between Estonia and Russian Federation, text of which is agreed by the parties but not yet signed. The treaty of mutual legal assistance and legal relations between Estonia and the Ukraine, in force since 19.06.1996, RT II 1995, 13, 63. The treaty of mutual legal assistance and legal relations between Estonia and Poland, signed and also ratified by Estonian Parliament, not yet by Polish Parliament.

<sup>5</sup> For arbitration the situation is different, Estonia is a party to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, (New York, 10 June 1958).

<sup>6</sup> International judicial assistance in criminal matters instead is given in the interest of another State, not in the interests of an individual.

<sup>7</sup> Used as grounds for refusal in Article 13 of the Hague Convention on the Service Abroad, Article 12 of the Hague Convention on the taking of evidence abroad, Article 7 of the New York Convention of 20 June 1965 on the Recovery Abroad of Maintenance and Bilateral Treaties of Legal Assistance between Estonia and Ukraine and Estonia and Russia, both Article 18. The tri-lateral treaty between Estonia, Latvia and Lithuania does not give any grounds for refusal of international judicial assistance.

<sup>8</sup> Used in Article 5 of the Convention on the Recognition and Enforcement of Decisions relating to Maintenance Obligations, the Hague, 2 October 1973.

<sup>9</sup> Treaties of Legal Assistance between Estonia and Poland, Article 19; Estonia and the Ukraine and Estonia and the Russian Federation Article 18.

<sup>10</sup> The Convention of 26 May 1997 on the Service in the Member States of the European Union of Judicial and Extrajudicial Documents in Civil or Commercial Matters, OJ C 261 of 17 August 1997 has not entered into force and will be replaced by a Council Directive.

<sup>11</sup> Article 8(4) in these treaties.

<sup>12</sup> Articles 8 of all Estonian Treaties of Legal Assistance, the Hague Convention of Service of Documents, Article 5 and the Hague Convention on Taking of Evidence, Article 9.

<sup>13</sup> I. Szász, *International Civil Procedure*. Budapest: 1967, p. 651.

<sup>14</sup> I. Szász, *International Civil Procedure*. Budapest: 1967, p. 651.

<sup>15</sup> R. Bruno, *Access of Private Parties to International Dispute* 1997. Available at: <http://www.law.harvard.edu/Programs/JeanMonnet/papers/97/97-13.html>

<sup>16</sup> Rome 1990.

<sup>17</sup> Article 7 of the Hague Convention on Taking of Evidence abroad, treaties of legal assistance between Estonia, Latvia and Lithuania, Article 8(3); Estonia

and the Ukraine Article 8(3); Estonia and the Russian Federation Article 8(3).

<sup>18</sup> Treaties of legal assistance between Estonia, Latvia and Lithuania, Estonia and the Ukraine and Estonia and Russia art-s 8, Article 6 of the Convention of 26 May 1997 on the Service in the Member States of the European Union of judicial and extrajudicial documents in civil or commercial matters, OJ C 261 of 17 August 1997, Convention on the taking of evidence abroad in civil or commercial matters. The Hague, 18 March 1970.

<sup>19</sup> Article 5 of the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters. The Hague, 18 March 1970, Article 4 of the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters. The Hague, 15 November 1965.

<sup>20</sup> Article 17 of the Convention on the Recognition and Enforcement of Decisions relating to Maintenance Obligations. The Hague, 2 October 1973, Articles 48 of the Convention on Jurisdiction and Enforcement of Judgements in Civil and Commercial Matters of 1968 and the Lugano Convention on Jurisdiction and Enforcement of Judgements in Civil and Commercial Matters, Lugano, 16 September 1988.

<sup>21</sup> Article 9.

<sup>22</sup> Article 8 p 4 of Treaties of Legal Assistance between Estonia, Latvia and Lithuania, Estonia and the Ukraine and Estonia and Russia, Article 13 of the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters. The Hague, 18 March 1970, Article 6 of the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters. The Hague, 15 November 1965, Article 6(2) of the New York Convention of 20 June 1965 on the Recovery Abroad of Maintenance.





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# Influence of European Community Law on Estonian Law and, in Particular, Law-making

In a closer analysis of Article 220<sup>1</sup> (former Article 164) of the Treaty establishing the European Community, it may be noted that regardless of different national laws of its Member States, the European Community is founded on one single Community law, applicable to Community activities and equally binding on the institutions, Member States and citizens of the Community.<sup>2</sup> Thus Article 220 of the EC Treaty constitutes a key to the conception of the European Community as a community of law, which ensures material integrity of the Community.<sup>3</sup> The community of law principle must be and is taken into consideration in preparing Estonia's accession to the European Union. Estonia must be ready for membership of the European Union in not only political and economic but also legal terms. Community law and harmonisation of Estonian law therewith must not be underestimated in the pre-accession process. It would be erroneous to consider legal matters as being of secondary importance in the European Community for the sole reason that it was created primarily in order to improve efficiency of economic co-operation between the Member States. Actually, the European Community is largely held together by the very existence of a strong legal framework, in which, *inter alia*, the Court of Justice of the European Communities has a very important role to play in exercising control and, partly, creating law.

The relationship of Estonian law, its creators and implementers, to European Community law can be conventionally divided into three stages. Firstly, one can regard adaptation to the European Community law, during which deeper knowledge is gained about the Community law. The next logical step onwards from gaining abstract knowledge will be taken in a far more practical direction — making European Community law a part of the everyday work of those involved in law-making. Increasingly, the Community law will begin to influence the work also of those who implement and enforce law. This will peak in Estonia's becoming a full member of the European Union. Prior to joining the European Union, we are only indirectly related to Community law, but upon accession, there will be a good reason to regard the relations between Estonia and the European Union through the third stage, at which Estonia is no longer a partner but rather a part of the European Union and will begin to actively participate in creating and developing European Community law.

During the initial years of the relationship between Estonia and the European Union, many EU experts regarded Estonia's application for accession and the subsequent approval thereof by the Commission as a marriage proposal.<sup>4</sup> In order to further illustrate the above-described stages, the author of this article would regard the period of adaptation to Community law as two future family members

becoming acquainted, the performance of obligations under the association agreement and the pre-accession preparations as betrothal, and Estonia's membership in the European Union as marriage, in which equality of rights between the spouses must be ensured.

## 1. Adaptation to European Community Law

### 1.1. UNDERSTANDING EUROPEAN COMMUNITY LAW

Upon the first acquaintance with European Community law, the approach adopted by the harmonisers of Estonian legislation with European law in its narrower sense, i.e. Community law,<sup>5</sup> is of conclusive importance. The following paragraphs regard in particular the state officials who harmonise Estonian legislation with Community law. Their very comprehension of Community law as such will to a large extent influence the consideration of Community law in the process of law-making in Estonia.

It is well understandable that at first, Community law is deemed alien: it seems rather a theoretical conception and distant future than a part of Estonian legal practice. Disregarding its supranational character, Community law is often treated as international law.<sup>6</sup> On the other hand, European law is presently applicable in Estonia as international law. The Association Agreement, or Europe Agreement, concluded between Estonia and the EC is applicable to Estonia as a foreign agreement ratified by the Riigikogu,<sup>7</sup> from the aspect of the Estonian Constitution, today, Community law cannot be regarded yet as directly applicable. In this point, it is nevertheless important that comprehension of Community law as supranational be created in Estonia and the attitude regarding Community law as international law be changed as from not later than the moment of accession.

The deepening of knowledge about Community law has been assisted by training in the field of European Community law organised for state officials, including judges and prosecutors.<sup>8</sup> Whilst, in the beginning of the 1990s, training in the field of Community law was of quite a casual nature, today training programmes have become more systematic, although a stronger emphasis could be laid on coordinating various training.

### 1.2. THE OBLIGATION TO TRANPOSE *ACQUIS COMMUNAUTAIRE*

Proof that adaptation to Community law is not only a hobby for state officials but rather the fulfilment of foreign obligations assumed by the Republic of Estonia is provided by the agreements concluded between Estonia and the European Communities and their Member States and by the formulation of the ultimate objective under the agreements — accession to the European Union — in the official statement issued by the Government of the Republic of Estonia to the European Commission on 28 November 1995.<sup>9</sup>

Until the entry into force of the Treaty of Amsterdam, any European state could, under Article O (1) of the Treaty on European Union (TEU), apply to become a member of the European Union. The Treaty of Amsterdam amends that Article, in the form of the present Article 49 of the TEU, as follows: "Any European State which respects the principles set out in Article 6 (1) may apply to become a member of the Union". Article 6 (1) of the TEU, as amended by the Treaty of Amsterdam, provides that the Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to all Member States. These new requirements in the Treaty of Amsterdam originate from the criteria, also known as the Copenhagen criteria, established for candidate countries by the European Council at its Copenhagen summit of 1993 as follows:

- political criteria: a Member State should have stable institutions which would ensure respect for democracy, the rule of law and fundamental freedoms as well as the protection of minority rights;

- economic criteria: a Member State should have a functioning market economy; it should be able to adapt to the competition and market trends prevalent in the Union;

- the main condition of accession is, however, the transposition of *acquis communautaire*, i.e. the transposition of the political objectives and in particular the entire applicable Community law (primary and secondary legislation, unwritten law and case law of the Court of Justice). A candidate country should be ready to fulfil the obligations arising out of membership.

Chapter 3 of Part 5 of the Association Agreement, concluded between Estonia and the European Communities and their Member States, provides for Estonia's obligation of legislative approximation.<sup>10</sup> Namely, under Article 68 of the Europe Agreement, Estonia will endeavour to ensure that its legislation will be gradually made compatible with that of the Community.

Regardless of the concretisation of Article 68 following in Article 69, which indicates the fields whereto the legislative approximation primarily extends, Estonia's obligations under the Europe Agreement are formulated very generally, without providing details. Already the very circumstance that, under the Europe Agreement, Estonia "endeavours" to make its legislation compatible with EU law, is confusing.<sup>11</sup> *Nolens volens*, the question will arise of where the limits of transposing *acquis communautaire* are. Estonia must align its law with another, the creation of which it has not participated in. Secondary legislation of the Community — Regulations, Directives and Decisions — are adopted, with more or less participation by the European Parliament, by the Council of the European Union, which is composed of ministers of the EU Member States. As of now, Estonia is not yet a Member State but is, however, already bound by decisions taken in Brussels

without any chance of being influenced by representatives of Estonia. The situation seems not to improve even after Estonia's becoming a Member State, as a deficit of democracy in the European Union is complained about in professional literature of Member States.<sup>12</sup> However, the role of the European Parliament in the decision-making process has been increased in each instance of amending the Treaties. The Treaty of Amsterdam also extended the rights of the Member States' national parliaments in the EU decision-making process — the parliaments must be given six weeks to state their position before the governments of the Member States meet in Brussels to adopt a decision.<sup>13</sup> Despite that, too wide a gap remains between the decision-maker and an ordinary citizen of a Member State.

Thus, having expressed our will to accede to the European Union and having bound ourselves by the Association Agreement, we face a situation in which we must familiarise our nationals with a hitherto unfamiliar law the rules for creating which we can only monitor as outsiders. It is also paradoxical that higher requirements have been established for namely the candidate countries than the Member States themselves, because the candidates must prove their capability of becoming members of the Union before the acquisition of rights equal to those of the Member States.<sup>14</sup>

On that basis, considerations of Community law have become an inseparable part of the day-to-day work of Estonian state officials involved in law-making — both in preparing new draft laws and amending the existing ones.

## 2. Working with European Community Law

### 2.1. THE PROCESS OF HARMONISING ESTONIAN LAW WITH EUROPEAN COMMUNITY LAW

Already by Estonian Government Order No. 79-k of 30 January 1996 "concerning the implementation of primary measures necessary for integration of the Republic of Estonia with the European Union",<sup>15</sup> a sound institutional foundation was laid for integration of Estonia with Europe, including the beginning and efficient implementation of the process of harmonising Estonian law with that of the Community.

As a matter of fact, the tasks of ministries as regards law-making are also set by action plans approved by the Government of the Republic for each year from 1996 onwards. The preparation of the Government action plans involves all ministries separately in their fields of regulation; areas of competence have been divided in accordance with the Europe Agreement and chapters of the European Commission's White Paper, which is recommendatory for the associated countries. Interministerial division of work in fields falling within the competence of more than one ministry is also left to the ministries. A Government action

plan is compiled by the European Integration Bureau acting within the area of regulation of the State Chancellery and approved by the Council of Higher Officials before its presentation to the Government. The European Integration Bureau also monitors the implementation of the action plan. The ministries receive the approval of the Ministry of Justice for the preparation or arranging the preparation of draft Acts and, after a draft is completed, it is submitted to the competent ministry for approval.<sup>16</sup> All draft Acts and Decisions of the Riigikogu must be sent to the Ministry of Justice.<sup>17</sup> The Ministry of Justice examines the drafts with regard to their conformity with the national law, and in the EU Law Division of the Legislative Drafting Methodology Department, conformity of Estonian draft Acts with European Community law is monitored. For that purpose, a table comparing the respective sources of EU law and the Estonian draft Act must be enclosed with the explanation on the draft Act by the ministry which has prepared the draft.<sup>18</sup>

In different Member States and associated countries, harmonisation of national law with European Community law has been arranged differently. In Finland, for example, a European Union Law Service has been established under the Ministry of Justice but its tasks do not include the examination of all Finnish draft laws but rather the more substantial drafts relating to Community law. In Lithuania, on the other hand, both laws and regulations are examined by the Europe Committee, which stands separately from the ministries and has been established specifically for the purpose of European integration. In Germany, questions concerning Community law were once intensively dealt with by the Ministry of Economic Affairs; by now, this has become routine and part of the competence was assigned to the Ministry of Finance in connection with the introduction of the Euro.

In addition to organisational issues, the development and implementation of harmonisation methodology is also important in harmonising Estonian law with Community law.

### 2.2. METHODOLOGY FOR HARMONISATION OF ESTONIAN LAW WITH EUROPEAN COMMUNITY LAW

The methodology for harmonising Estonian law with European Community law was drawn up in the Ministry of Justice in 1997. Materials of such kind have also been used in other associated countries to facilitate the work of state officials.<sup>19</sup> The methodology contains primarily more general constellations and was, at that time, certainly necessary in order to provide state officials with an overview of Community law. However, all problems arising out of the application of Community law could not be foreseen earlier and hence a multitude of questions keep emerging in the course of specific work. Therefore, a roundtable on European Union law has been regularly meeting in the Ministry of Justice since autumn 1998, attended by offi-

cials involved in the harmonisation and by a Swedish expert, who shares experience in respect of preparations for EU accession. The roundtable deals with horizontal questions but often it also regards specific drafts in preparation of which European Community Directives must be taken into consideration. Recently, the Ministry of Justice began to provide ministries, the Bank of Estonia, the European Integration Bureau and the Office of the Legal Chancellor with memorandums on harmonisation with Community law, which offer single solutions to problems that have arisen in the legislative harmonisation. A legal basis for drawing up the methodology and memorandums is provided for the Ministry of Justice under § 59 of the Government of the Republic Act, whereunder coordination of law-making falls within the area of government of the Ministry of Justice, and clauses 10 and 11 of the By-laws of the Ministry of Justice, whereunder the Ministry is entrusted with, *inter alia*, the task of drawing up general principles of legal technique and the methodology for harmonising Estonian law with the law of the European Union.<sup>20</sup>

How has European Community law specifically influenced law-making in Estonia and what kind of problems have arisen in the course of harmonisation? In some regards, the Republic of Estonia is in a unique position: as a young re-independent state it must enact a range of new laws and in seeking the best solution, it can automatically take account of new trends applicable and underway in the respective field, particularly within the European Union and its Member States. The new Law of Obligations Act, for example, has been prepared in this manner. But preparation of new laws under EU law may not always be only positive — sometimes law-makers, carried away by harmonisation enthusiasm, are willing to adopt artificial laws intended only for transposition of Directives, forgetting the unique characteristics of the national legal system. For example, one national law is often sufficient for transposing two different Directives concerning the same field, instead of burdening the legal order with two separate laws, each conforming to one Directive.

Thus, on the other hand, it can be asserted that the Member States which had already established their own stable legal order only had to channel the harmonisation of Directives into the existing structure, mostly amending the applicable laws, but Estonia must yet make a place in its legal system for the respective law prior to harmonisation.

In transposition of the so-called new approach Directives, which aim at mutual recognition of standards between the Member States, the question often arises whether to draw up one extensive Act consisting of general and specific provisions or to spread the specific provisions over different Acts.<sup>21</sup>

The process of harmonisation is certainly rendered more difficult by the absence of a hierarchy of provisions

in the European Union itself.<sup>22</sup> The division between the primary and the secondary legislation of the Community is distinct but no definitions exist in more detail with regard to relationships between different categories of Community legislation. That problem could not be solved by the Intergovernmental Conference either and, therefore, the Treaty of Amsterdam failed to bring clarity as to hierarchy of provisions under Community law.<sup>23</sup>

Another stumbling block can be posed by the language and wording used in Directives. The European Community has developed a specific kind of legal language, owing to differences between the legal systems and languages of different Member States. Concepts provided in Directives are sometimes difficult to comprehend in terms of both the language and the meaning. Officials involved in the harmonisation cannot always work with a translation into Estonian, and in such event, the text of the Directive in another language is used as a basis.<sup>24</sup> When conceptual problems arise, the situation is made even more complex by the principle, stated already in 1969 by the European Court of Justice in its judgement in the case of *Stauder*, that in linguistic interpretation of Community law, all official languages of the Community must be equally taken into account.<sup>25</sup> However, conceptual problems may also be other than linguistic: they may relate to differentiation between general and specific concepts or to how certain concepts are defined and distinguished in Community law.

Among the questions that have recently emerged in legislative harmonisation, two problems — references to Directives and harmonisation with Regulations — are worth longer discussion.

### 2.3. PROBLEMS WITH REFERRING TO DIRECTIVES

Estonian Government Regulation No. 199 of 1 July 1993 concerning the procedure of approval and legal examination of draft legislation presented to the Government of the Republic was amended by Government Regulation No. 16 of 27 January 1998. The amendment provided that “where Directives of the European Union have been taken into consideration in preparing a draft Act or Regulation, a list of such Directives accompanied by references to their publication in the Official Journal of the European Communities shall be indicated in the scope of application section of the draft Act or in the preamble of a Regulation”.

For EU Member States, references to Directives are obligatory and, in most events, such requirement is contained in Directives as a standard provision. Namely, in November 1990 the Council decided, in connection with the publication requirement for establishment of Directives, that a provision must be inserted in Directives whereunder the Member States must refer, in their national implementing provisions or in the process of publishing the Directive, to the Directives underlying the national pro-



visions. The method of such reference is decided by each Member State itself.<sup>26</sup> When one Directive is transposed into several national legislative acts, all of those must contain a reference to the Directive. The reference requirement is based on the reason that in the event of problems with interpreting the law harmonised with the Directive, the national courts of the Member State will know the underlying Directive and may, if necessary, request from the European Court of Justice a preliminary ruling on interpretation of the Directive. Such references provide individuals as well as the European Commission with information that the Member State has transposed the Directive in question. When the reference requirement is disregarded, the European Commission may file an action against the Member State with the Court of Justice under Article 226 of the EC Treaty for violating an obligation arising out of Community law.

Whether reference, in Acts passed by the Parliament of the Republic of Estonia, to legislation of a community of foreign states to which Estonia does not belong is correct or not is another question.<sup>27</sup> Therefore references to EU Directives, contained in the Government's draft, have sometimes been removed after the Act has been passed by the Riigikogu.

Although reference to but one "source of inspiration" in an Act may seem somewhat confusing, one should not forget that unlike many other circumstances — such as foreign agreements, judgements of the Supreme Court, etc. — taken into consideration by the Riigikogu in passing laws and not specifically pointed out in the law itself, Directives themselves contain the reference requirement. One alternative would be to limit reference to Directives only to letters of explanation accompanying draft Acts but, in contrast to many other European countries (like Sweden), letters of explanation are not subject to publication in Estonia and therefore it would later be very difficult to ascertain which Directive was transposed. Another alternative for reference to Directives in Acts would be to insert in the State Gazette the publication reference to the Directive and present Directives as technical notes. Introduction of the latter is still in an initial stage in Estonian legislative drafting methodology.

Thus, before accession to the European Union, references to Directives can serve primarily an informative purpose, and notations on taking Directives into consideration have no legal meaning.<sup>28</sup> However, as from the moment of accession, such references will become obligatory for Estonia and therefore, it is already important to find a uniform method for referring to Directives now.

#### **2.4. PROBLEMS WITH TRANSPOSITION OF REGULATIONS**

Several problems in drafting Estonian legislation have recently emerged in connection with European Community Regulations. As already noted, on the one hand, Estonia

must adopt the *acquis*, but on the other hand, Estonia is not an EU Member State yet and therefore, Regulations are not directly applicable in Estonia and can be taken into account only by their transposition into national laws. However, EU Member States may not duplicate Regulations in their national law.<sup>29</sup> Hence, Estonia will automatically be in violation of Community law when national provisions overlapping Community Regulations are applicable in Estonia after the accession and the Commission can initiate proceedings against Estonia for violation of the EC Treaty under Article 226 thereof.

Thus, drafters of Acts should refrain from rewriting European Community Regulations into Estonian draft legislative acts. When this proves to be impracticable — in particular for the reason that Estonia cannot develop and meet EU requirements in certain areas without establishing the structure provided in the respective Regulation — definitions of concepts and other provisions contained in the Regulations should be transposed into Estonian laws provisionally. Prior approval by the European Commission during the preliminary screenings or negotiations would be desirable.

Sometimes, Member States must make implementation provisions even for Regulations, with regard to establishment/definition of competent institutions or application of sanctions. This can happen because the Community may be lacking competence in those fields. In such events, the EC Regulation itself will provide that in certain questions, Member States may adopt implementing provisions and then a law of the Member State implementing the EC Regulation is not in conflict with Community law. In Estonia, such laws may be drawn up even now in order to fulfil the obligations for integration with the European Union. The Acts implementing Community Regulations may, however, not be enforced prior to Estonia's accession to the European Union and before the Regulations have been published in the Estonian language and are binding on Estonia. Therefore, at present, Acts implementing EC Regulations may be adopted only on condition that they enter into force upon Estonia's accession.<sup>30</sup> In drafting such Acts, a notation should be inserted in the implementing provisions that the Act will enter into force at a time prescribed in a separate Act, i.e. upon Estonia's accession to the EU, a range of Acts will be given effect by virtue of one Act. Such a method has also been used by Finland and approved by Swedish experts.

#### **2.5. NEED FOR FOLLOW-UP CHECKS**

A longer analysis is needed for possible introduction of follow-up checks on laws. Such checks could include the inspection of the already adopted Acts with regard to their conformity with Community law and, if necessary, initiation of Acts for amending Acts. Which institution would be competent for such activity and under which system the checks could be carried out remains, however,

unclear as yet.

## 2.6. IMPLEMENTATION OF EUROPEAN COMMUNITY LAW AND EUROPEAN COMMUNITY LAW AND LEGAL PROTECTION

Without moving beyond the framework of this article, in which harmonisation with Community law is discussed from the aspect of legislative preparation, the importance of enforcement of Acts harmonised with Community law and establishment of institutions related thereto must still be emphasised.

During the pre-accession stage, Estonian courts probably have the least contact with Community law.<sup>31</sup> At the same time, it is commendable that judgements of the Estonian Supreme Court and in particular the special opinions of the former Chief Justice of the Supreme Court have taken Community law into consideration and done so even before Estonia's membership in the European Union.<sup>32</sup> On the other hand, the Supreme Court Judgement of 30 September 1994<sup>33</sup> states, *inter alia*, that in working out general legal principles in Estonian law, account is taken, besides the Constitution of the Republic of Estonia, also of general legal principles developed by the institutions of the Council of Europe and the European Union. That naturally means respect for the principles of Community law created by the European Court of Justice and, therefore, the objectives of the Supreme Court Judgement are beyond criticism. However, consequences of such a judgement may be unintentionally serious from the viewpoint of Community law.

More specifically, uniform interpretation of Community law might be jeopardised when Estonian courts begin to interpret Community law under the judgement of the Supreme Court in creating Estonian legal principles, because as long as Estonia is not a member of the European Union, Estonian courts cannot request from the European Court of Justice preliminary rulings for interpreting Community law.

## 3. Participation in European Community Law

In the beginning of this article, participation in European Community law was referred to as the third and final stage in the relationship between Estonia and the European Union. As Estonia is not a member of the European Union yet, the author of this article will have the opportunity to discuss this subject from a practical viewpoint probably not earlier than in the year 2003(?). At present, Estonia can undergo only theoretical preparations for participation in Community law-making. That means amending the Constitution of the Republic of Estonia, so as to first enable Estonia's accession to the European Union, and regulating the relations between the Government of the Republic and the Riigikogu, in order to ensure that the

Government takes into consideration the positions of the Riigikogu.<sup>34</sup>

## Notes:

<sup>1</sup> In this article, references to Articles of the Treaty establishing the European Community are made in accordance with the new Article numbers introduced in the EC Treaty by the Treaty of Amsterdam, which entered into force on 1 May 1999. I would like to call attention to the fact that, in the translation to the Estonian language (Euroopa Liit. Amsterdami leping. Konsolideeritud lepingud. Eesti Õigustölk Keskus, 1998), Article 220 has been translated as follows: "Euroopa Kohus tagab, et käesoleva lepingu tõlgendamisel ja kohaldamisel peetakse kinni seadusest." [The term *seadus* being synonymous both with "law" in its objective, general sense as well as with "law" meaning an Act as a specific category of legislation. — Translator's note] In the English language, "law" means both law in general and a specific law indeed but, for example, the German or French texts of the EC Treaty use the terms *Recht* and *droit*, respectively, which mean law in its general, not specific sense (the latter would be *Gesetz* and *loi*, respectively). Therefore it should be understood that in the Article concerned, adherence to law in general — moreover, to Community law — is implied. Although the word *seadus* encompasses an extensive range of meaning in the Estonian language, there is no specific category of legislation designated as "law" or "Act" in the European Community and, secondly, in Estonia, *seadus* does not include court judgments; the Community law, however, also includes unwritten law and, in particular, judgments of the European Court of Justice. Therefore the author of this article is of the opinion that the term *seadus* as used in the Estonian-language version of the EC Treaty is somewhat confusing for the reader.

<sup>2</sup> In this point, reference should be made to some of the most important judgments of the European Court of Justice, namely, *Van Gend en Loos v. Nederlandse Administratie der Belastingen*, case 26/62 [1963], ECR 583, and *Costa v. Enel*, case 6/64 [1964], ECR 585, which stated that the Community has established a new legal order.

<sup>3</sup> Q.v.: Hallstein. *Europäische Reden*. 1979, pp. 341 ff.

<sup>4</sup> Such parallels were drawn, for example, by representatives of the Friedrich Naumann Foundation at the seminary held at Pühajärve in 1995 on European law for M.A. students of the University of Tartu Faculty of Law, but also at the seminary on European Community law held in 1996 by the German International Legal Cooperation Foundation for government officials and members of parliaments of the Baltic countries.

<sup>5</sup> One has to agree with Tanel Kerikmäe (Q.v.: *Supranational Law as International Law and Vice Versa*. *Juridica International* III. 1998, pp. 43 ff.) that in Estonia, the term *Euroopa Liidu õigus* ("European Union law") is often used for actually referring to "European Community law". In addition, the word *euroõigus* ("eurolaw"), which is often used by journalists and also state officials and has a prejudicial undertone, is also incorrect as unfortunately used to erroneously denote the entire Community law rather than provisions concerning the European single currency unit.

<sup>6</sup> Q.v.: Julia Vahing. *Euroopa Ühenduste Kohtu ja Euroopa Liidu liikmesriikide kohtute ning Eesti kui võimaliku liikmesriigi kohtute vaheline koostöö*. (Cooperation between the Court of Justice of the European Communities, courts of the Member States of the European Union and courts of Estonia as a candidate state) *Juridica*. No. 5. 1998, pp. 250 ff., in which the author is afraid that one of the factors influencing future requests for preliminary rulings from the European Court of Justice will be Estonian judges' attitude towards Community law as international law. Such a problem has also been observed in the case of Greece by Calogeropoulos in "The Greek Courts and the Preliminary Reference Procedure According to Article 177 of the EEC Treaty: Some Remarks". *Article 177 EEC: Experiences and Problems* (ed. by Schermers, Timmermans, Kellermann and Watson). Asser Institute. 1987, pp. 122-128.

<sup>7</sup> Riigikogu = the parliament of Estonia.

<sup>8</sup> One example thereof is the training programme on European law, implemented under the agreement between the Ministry of Justice and the Estonian Legal Centre and aimed at state officials involved in legislative harmonisation;

presently, the training is mostly carried out by Swedish professors and state officials. In parallel, local teachers are being trained, who could prospectively share their knowledge of European law with Estonian state officials in their native language.

<sup>9</sup> For further information about agreements between Estonia and the European Union and about European integration arrangements in Estonia, q.v.: Heiki Pisuke. Estonia and the European Union: European Integration in Estonia. *Juridica International* I. 1996, pp. 2-5.

<sup>10</sup> RT (Riigi Teataja = State Gazette) II 1995, 22-27, 120.

<sup>11</sup> In this point, a question of interpreting the Association Agreement arises. Although the Europe Agreement contains no provisions concerning the European Court of Justice and its jurisdiction, the Court of Justice has in practice also construed the provisions of the Association Agreement (*Haegeman v. Belgium*, case 181/74 [1974], ECR 449). Even though it can be noted, by relying on the referred precedent, that the European Court of Justice may construe agreements concluded with third countries, questions concerning those agreements may be presented to the Court of Justice for a preliminary ruling under Art. 234 of the EC Treaty only by national courts of the EU Member States rather than non-Member States being a party to such association agreement. Until now, no precedents exist in which any associated country would have wished to initiate amendment of the association agreement although theoretically, this should be possible.

<sup>12</sup> Q.v. e.g.: Matthias Pechstein, Christian Koenig. *Die Europäische Union: die Verträge von Maastricht und Amsterdam*. Tübingen. Mohr Siebeck, 1998.

<sup>13</sup> Q.v.: Sally Langerish. The Treaty of Amsterdam: Selected Highlights. *European Law Review* 23/1998, p. 5.

<sup>14</sup> For Estonia, this is more difficult than it was for Finland, Sweden and Austria, who became Member States in the recent wave of accession and had previous experience of participation in EFTA and in EEA and had transposed a part of the *acquis* already under the European Economic Area Agreement which included an obligation to harmonise part of the EU *acquis*. On the other hand, Spain, Greece and Portugal failed to transpose 100 per cent of the *acquis* prior to their accession, but at that time, the European Communities were at a stage of development rather different from the present.

<sup>15</sup> RT I 1996, 8, 170; amended in May 1997 and January 1998.

<sup>16</sup> Q.v.: The Government of the Republic Regulation No. 199 of 1 July 1993 concerning concordance and organisation of expert legal analysis of draft legislation to be submitted to the Government of the Republic of Estonia (RT I 1993, 68, 980).

<sup>17</sup> Q.v.: clause 8 of the procedure of concordance and organisation of expert legal analysis of draft legislation to be submitted to the Government of the Republic of Estonia confirmed by Regulation of the Government of the Republic No. 199 of 1 July 1993 (RT I 1993, 68, 980).

<sup>18</sup> That requirement was established under Regulation of the Government of the Republic No. 200 of 30 July 1996 amending the Regulation of 1 July 1993.

<sup>19</sup> E.g. in pre-accession Finland — Q.v.: Niilo Jääskinen. *Kohanemine euroopaliku seadusandlusega. Üldisi tähelepanekuid ja Soome kogemusi.* (Adaptation to European Legislation. General Observations and Finland's Experience.) Ministry of Foreign Affairs of Finland. Helsinki, 1996.

<sup>20</sup> RT I 1992, 45, 574.

<sup>21</sup> E.g. in the preparation of the Professions Act, discussions on the conception whether to transpose the specific Directives concerning the free movement of persons, beginning of a profession and provision of services, and mutual recognition of diplomas, certificates and other official evidence on qualification into one extensive Professions Act or into separate Acts. An argument against compiling one extensive Act is that in the EU, only some professions are regulated by specific Directives, and therefore, one Act would not be exhaustive.

<sup>22</sup> Q.v.: Pierre Yves Monjal. *La Conférence intergouvernementale de 1996 et la hiérarchie des normes communautaires*. RTDE. 1996.

<sup>23</sup> Q.v. also: Melanie Piepenschneider. *Der Vertrag von Amsterdam Analyse*

und Bewertung. Konrad Adenauer Stiftung. Sankt Augustin, 1998.

<sup>24</sup> The Estonian Translation and Legislative Support Centre is primarily involved in translating Regulations; translations of Directives are usually ordered by the ministries themselves from private translation companies.

<sup>25</sup> *Erich Stauder v. City of Ulm*, case 26-96 [1969], ECR 419.

<sup>26</sup> Niilo Jääskinen. *Kohanemine euroopaliku seadusandlusega. Üldisi tähelepanekuid ja Soome kogemusi.* (Adaptation to European Legislation. General Observations and Finland's Experience.) Ministry of Foreign Affairs of Finland. Helsinki, 1996, p. 17.

<sup>27</sup> For that reason, references to Directives are considered incorrect by the Legal Department of the Office of the Riigikogu.

<sup>28</sup> That has also been mentioned in the letter of explanation accompanying the Government Regulation of 1 July 1993 amending Regulation No. 199.

<sup>29</sup> In accordance with Art. 249 (2) of the EC Treaty, EC Regulations are generally applicable. Regulations are binding in entirety and directly applicable in all Member States. Therefore, it would be in conflict with the written Community law if a Member State incorporated a Regulation into national law by means of a legislative act. Moreover, duplication of Regulations into national law of a Member State is in conflict with rulings of the Court of Justice. In its rulings of 7 February 1973 in the case 39/72, *Commission v. Italy* and of 2 February 1977 in the case of *Amsterdam Bulb*, the Court of Justice has stated that Regulations enter the legal order of any Member State automatically and transposition of a Regulation would be not only unnecessary but also in conflict with Community law and the Member State's own constitution, whereunder the Community is vested with the right to enact directly applicable Regulations.

<sup>30</sup> One Act of such kind - the Act implementing the Council of the European Union Regulation (EEC) No. 2137/85 concerning European Economic Interest Groupings - was prepared by the Ministry of Justice in the beginning of 1999 and sent to Brussels for examination.

<sup>31</sup> About possible cooperation between Estonian courts and the European Court of Justice upon Estonia's accession to the European Union, Q.v.: Julia Vahing. *Euroopa Ühenduste Kohtu ja Euroopa Liidu liikmesriikide kohtute ning Eesti kui võimaliku liikmesriigi kohtute vaheline koostöö.* (Cooperation between the Court of Justice of the European Communities, courts of the Member States of the European Union and courts of Estonia as a candidate state.) *Juridica*. No. 5. 1998, pp. 250 ff.

<sup>32</sup> For example, the special opinion of Mr. Rait Maruste on the Supreme Court Judgment III/4-1-4/98 of 27 May 1998, in which he considered, in interpreting Estonian labour law, the former Articles 3 (c) and 48 (2) of the Treaty establishing the European Community, referring to Article 68 of the Association Agreement, whereunder approximation of laws is required. Also the special opinion of Mr. Rait Maruste on Judgment III/4-1-3/97 of 6 October 1997, in which he points out an example of the legal force of the Court of Justice rulings.

<sup>33</sup> Supreme Court Judgment III-4/A-5/94.

<sup>34</sup> Preparations for constitutional amendments were within the competence of the Committee for Legal Examination of the Constitution, established in 1996, which has proposed solutions for providing for these matters in the Constitution by inserting, in Chapter 9, § 1231 as follows: "Estonia may, under the principle of mutuality and equality, delegate state powers arising out of the Constitution to bodies of the European Union for their common exercise by the Member States of the European Union to such extent as is necessary for implementing the Treaties on which the Union is founded and provided that this will not conflict with the fundamental principles and tasks provided in the Preamble of the Constitution. The Government of the Republic shall as early and widely as possible inform the Riigikogu about questions concerning the European Union and shall, in the law-making of the European Union, take into consideration the positions of the Riigikogu. A more detailed procedure in the event of Estonia's membership shall be provided by law." Source: Public Law Department of the Ministry of Justice, Constitutional Amendment Proposals with reasons, as of March 1999.



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# Church Autonomy and Religious Liberty in Estonia<sup>1</sup>

## 1. Background

Today's religious picture in Estonia is a mosaic of different faiths and denominations. Along with traditional Christian churches, which have existed in Estonia for centuries, many new religious movements have appeared.

In Estonia the right to freedom of religion is protected by the Constitution of 1992 and by international instruments that have been incorporated into Estonian law. Starting with protection from international instruments, § 3 of the Estonian Constitution stipulates that universally recognised principles and standards of international law shall be an inseparable part of the Estonian legal system. Section 123 states that if Estonian Acts or other legal instruments contradict foreign treaties ratified by the Riigikogu (parliament), the provisions of the foreign treaty shall be applied. Estonia is party to most European and universal human rights documents.

The Estonian Constitution also provides express protection to freedom of religion. Section 40 sets out that: "Everyone has freedom of conscience, religion and thought. Everyone may freely belong to churches and religious associations. There is no state church.

Everyone has the freedom to practise his or her religion, both alone and in community with others, in public or in private, unless this is detrimental to public order, health or morals."

Section 40 of the Constitution is supplementary to § 45 concerning the right to freedom of expression, § 47 concerning the right to assembly and § 48 concerning the right to association. Section 9 paragraph 2 of the Constitution states that "The rights, freedoms and duties set out in the Constitution shall extend to legal persons in so far as this

is in accordance with the general aims of legal persons and with the nature of such rights, freedoms and duties."

The Churches and Congregations Act (hereinafter CCA) deems churches, congregations and associations of congregations to be legal persons and stipulates the legal bases for their activities. Churches, congregations and associations of congregations must be registered by the Ministry of Internal Affairs in the Estonian Church Register (an abbreviation of the Registry of Churches, Congregations, Associations of Congregations). Churches, congregations and their associations are considered to be non-profit organisations. The activities of religious societies are not regulated by the CCA but rather by the Non-profit Organisations Act and they must be registered by a court in the Register of Non-profit Organisations and Foundations. The Ministry of Internal Affairs has written a draft Act on Churches and Congregations (hereinafter the draft Act), according to which the Estonian Church Register and its respective functions are delegated to the courts. The law does not regulate the activity of religious organisations which are not registered. The main obstacle for these entities is the fact that they cannot present themselves as legal persons.<sup>2</sup>

Section 40 of the Constitution states, *inter alia*, that "there is no state church". The 1920 Constitution of the Estonian Republic set out that "there should be no state religion". The 1920 statement followed the principle of the separation of State and church more clearly. It was stated that all religious organisations had to be equally protected and that none of them could receive preferential treatment from the State. All religious organisations, including churches, had equal status with other private legal persons.<sup>3</sup> The 1938 Constitution stipulated that "there is no state



church” but added that the “state can grant status in public law to large churches”.

Estonia is re-establishing its legal order on the principle of restitution, taking into account the legal situation before the Soviet occupation, as well new developments and obstacles and the principles of European and International Law. Nevertheless, the question of the autonomy of the churches (religious organisations) is debatable in Estonia and finding a solution will take time.

## 2. Fundamental Understanding of Church Autonomy

The term “autonomy” is difficult to define and, as a result, the question of autonomy in Estonia is more than unclear. Legal theorists from the past and the present have different opinions. Autonomy in administrative law and theory is generally understood as the right to self-government and the right to issue regulations.<sup>4</sup> Both of these components have to be present for autonomy. The right to issue regulations means the delegation of legislation.<sup>5</sup> The opinions stem from different interpretations of the Constitution. Maruste and Truuväli are of the opinion that the Constitution of Estonia does not allow delegated legislation. According to them, state administration and autonomous corporations in public law have right to adopt only *intra legem* regulations (*Durchführungsverordnungen*) on the basis of a special delegation of authority.<sup>6</sup> In theory, researchers are of the opinion that *intra legem* regulations may only specify the regulation of areas which are regulated by law.<sup>7</sup> The delegation rule must precisely specify the content of the corresponding authority and the intended purpose and scope of the regulation. The Supreme Court also supports this position. However, the Supreme Court has not said anything about regulations issued within internal competence. The prevailing position is that the internal matters of an administrative organisation may be subject to *praeter legem* regulations on the basis of the general delegation of authority. Regulations of this type are not substitutes for laws in a specific area and their effect only extends to the point at which regulation by law commences. Autonomous subjects have the right to issue *praeter legem* regulations (*gesetzesvertretende Verordnungen*) on the basis of a general delegation of authority.<sup>8</sup> The right to issue *praeter legem* regulations is in theory restricted with the autonomy of the subject. The regulations adopted within such autonomy do not have to be in accordance with regulations of the Government or ministries, but they must be in accordance with the Constitution and with the principles of the delegating law and laws which regulate similar questions. Under the authorisation of the law state can delegate some of its functions to autonomous subject. For fulfilment of these functions, the State pursuant to the law, delegates to autonomous subject the authority to issue regulations.

These regulations have to be in accordance with regulations of the Government or ministries, because they are issued outside the scope of autonomy. The fulfilment of mentioned functions belong to supervision and co-ordination by the administration of the State.<sup>9</sup> These additional responsibilities can, for example, be the registration of marriages of civil validity by churches, social care, etc. The preferred position is that the competence of Government and autonomous subjects must be clear in order to avoid conflicts.<sup>10</sup> But sometimes it is difficult to identify what is the autonomous sphere of the subject and what is beyond the autonomy and belongs to State supervision.

## 3. The Normative Frame of Church Autonomy

3.1. Subsection 10(2) of the Churches and Congregation Act (CCA) states that boards of churches and associations of congregations have the right to adopt instruments which regulate their activities. It should firstly be mentioned that, from a linguistic point of view, this is a badly drafted provision. It leaves unanswered the question of whether these boards have the right to regulate their own or religious organisation activities. This is a matter of the inaccuracy of the legislator and, in practice, that provision has been interpreted as the right to regulate the activities of a church or association of congregations. Subsection 10 (2) excludes the boards of congregations (both congregations of churches and so-called single congregations) and religious societies from the aforementioned right. Section 2 of the CCA gives legal definitions of the following:

“(1) A church is a congregation or association of congregations which has episcopal structure and is didactically bound by three common church confessions, functioning on the basis of statutes under the elected or appointed leadership of a board and registered as provided by law.

(2) A congregation is a voluntary association of natural persons confessing the same faith, functioning on the basis of statutes under the elected or appointed leadership of a board and registered as provided by law.

(3) An association of congregations is a voluntary association of at least three congregations confessing the same faith, functioning on the basis of statutes under the elected or appointed leadership of a board and registered as provided by law.”

Section 3 of the CCA states that:

“A religious society has only partly the same characteristics as a congregation. Religious societies are voluntary associations of natural persons and the bases for their activities shall be regulated by the Non-profit Organisations Act.”

It is not hard to see that these legal definitions are problematic. They cause problems of interpretation and implementation, as well as the practical determination of religious organisations. The interpretation of terms and

phrases like “didactically bound by three common church confessions”, “episcopal structure”, “partly the same characteristics as congregation”, etc. are difficult for lawyers and theologians alike. For example, there was case in administrative practice where the Ministry of Internal Affairs refused to register the Estonian Christian Church because the name seemed to be too general and there was no mention of an episcopal structure in the statutes. After the church renamed itself the Estonian Christian Pentecostal Church and established a *pro forma* episcopal structure in its statutes, the ministry registered it.

The term “*kirik*” (church, *Kirche*) has been traditionally used for Christian organisations. The term “*kogudus*” (congregation) has been traditionally used for congregations of a church. Before the adoption of the CCA in 1993, there was a debate as to whether the extension of term “*kogudus*” (congregation) to other faiths would be insulting for them. According to the CCA, congregation means not only the church congregation but also the so-called single congregation. The single congregation in terms of the CCA can be association of natural persons confessing the Christian faith or any other religion. It could be concluded that the CCA defines term “congregation” in contradiction to the tradition.

The 1993 CCA was extensively based on the 1934 Churches and Religious Societies Act. Section 15 of the 1934 Churches and Religious Societies Act stated that deliberative organs of churches and associations of religious societies had the right to issue regulations within the own sphere or competence of a church or association of religious societies. That kind of right was not given to single religious societies or to congregations of the church.<sup>11</sup> But the 1934 Act did not try to give legal definitions of different religious organisations. It was up to each religious organisation to decide whether it wanted to be a church, religious society or association of religious societies and organise itself accordingly. The 1934 Act set out special provisions for churches. Churches were given additional rights but also restrictions, which will be discussed further. The 1925 Religious Societies and their Associations Act simply divided all religious organisations into two categories: religious societies and associations of religious societies. Under that law, churches were associations of religious societies.<sup>12</sup> In the draft of the new CCA, one more legal definition has been added — “convent”.

On the basis of the above, the legal definitions in present Estonian law seem to be unreasonable, and unfair to congregations and religious societies. (It has to be mentioned that the exclusion of church congregations from the right to regulate their own activities may be justified within the structure of the church, but the exclusion of single congregations and religious societies is questionable.)

When I once asked one “founding father” what the purpose of these legal definitions was, it was explained to

me that they have an educational goal. As Estonia had been a so-called atheist country for fifty years, people had forgotten the basic terms and it was necessary to educate them with the help of the law. I would just say that it is problematic. Recently I raised the same question on the work-group meeting of the draft Act. I got answer that purpose of the legal definitions is protection of mentioned terms (church, congregation, etc.). In my opinion neither the present and proposed law do not provide sufficient protection. Moreover, according to the opinion of Ilmo Au (the Head of the Department of Religious Affairs of Ministry of Internal Affairs) almost all religious organisations are registered. This means that almost all religious organisations have determined itself. Religious picture is stabile compare to the beginning of nineties and only few changes will likely to happen. It is questionable whether there still (if there was any) the practical need for legal definitions. Therefore, the first questions which arise on the basis of Estonian legislation are:

(1) Is there justification for not granting some religious organisations the right to autonomy (the right to self-government and the right to issue regulations on their own affairs)?

(2) Is it possible to define different religious organisations legally?

(3) Do the legal definitions make any sense?

(4) If the legal definitions do make sense, on what grounds should religious organisations be separated?

3.2. Section 10 of the 1993 CCA is problematic from another aspect as well. It is stated that boards of churches and associations of congregations have right to adopt instruments which regulate their activities. A literal interpretation leaves it open as to what kind of instruments these boards are entitled to issue: single acts or regulations (*praeter legem* and *intra legem*) or both. It is also not clear whether “their activities” means activities within the autonomy of mentioned religious organisations or all the activities of the church or association of congregations. *Sensus verborum est anima legis*. Of course, on the basis of systematic interpretation, the issuing regulations outside the autonomy can contradict the general principle of the rule of law and the principle of reservation of law (*Gesetzvorbehalt*). Subsection 6 (3) of the draft Act states that a board of a church, congregation, association of the congregations or their agency and the head of a convent has the right to adopt instruments concerning the activities of the religious organisation in accordance with the statutes. The draft Act expands the right to issue instruments to congregations (church congregations and single congregations) and to the heads of convents.

In the draft Act there is an attempt to define the limits to autonomy more clearly. Subsection 6(3) states that the aforementioned boards may issue instruments in accordance with the statutes. The competence to issue instru-

ments (regulations) will be determined by the statutes. Subsection 6(1) of the draft Act determines the main activities of churches, congregations, associations of congregations and convents. These main activities are: confession and manifestation of their own faith primarily in the form of services, religious meetings and offices; confessional or ecumenical moral, ethical, educational, cultural and diaconal activities, social rehabilitation and other activity outside the characteristic confessional offices or services of churches and congregations. Subsection 2(4) of the present CCA states that the main activities of churches and congregations are: confession and manifestation of their faith primarily in the form of services, religious meetings and offices. The above-mentioned provisions can be interpreted as attempt to identify the sphere of autonomy of religious organisations (except religious societies). The real scope of autonomy is determined together with other acts and regulations, administrative and court practice.

The other aspect is that the delegation of authority to issue regulations must in theory set out the content of authority (i.e. the issues to be governed by a regulation), its purpose (i.e. the purpose to be served by a regulation), and its scope.<sup>13</sup> The issue is whether these three may be set out in the statutes of religious organisations or if law itself must expressly provide them.

The further questions which arise on the basis of present and proposed Estonian law and legal theory are:

(1) Is it possible to set exact scope of autonomy in law?

(2) Is it necessary to set exact scope of autonomy in law or are they so obvious (i.e. traditionally or on the basis of experience) that further determination is unnecessary?

(3) If it is necessary to set exact scope of autonomy, should it be set out in the Constitution, in Acts or by other legislation?

(4) If it is necessary to determine the scope of autonomy, how precise can it be without restricting the activities of the religious organisation?

**3.3.** As was stated at the beginning of this paper, autonomy consists of two main components: self-government and the right to issue *praeter legem* regulations. A narrow interpretation of self-government can mean the right of a church (or other religious organisation) to determine the internal structure of the organisation. The legal definitions in § 2 of the CCA try to determine the general structure of churches, congregations and associations of congregations, but fail for the same reasons as that stated in point 1 of this paper. Section 12 of the CCA sets out that the statutes of a church, congregation or association of congregations shall include: the name, the location of the board, the structure and competence of the executive, the order of formation of the executive, the term of the authority of the executive, the status and hierarchy of the clergy, rules for the adoption and amendment of the statutes and

termination of activity, obligatory offices, etc. Subsection 15(1) of the CCA states that a person who has the right to vote at local government elections and who is not punished pursuant to the Criminal Code may be a member of the board of a church, congregation or association of congregations, and a member of the clergy. Internal structure and management of religious organisations is mainly left to their sphere of autonomy. Many basic requirements for democracy within the church and congregation are mandatory: openness of membership, existence of an elected executive, equality of members before the law, right to participate in elections to the executive and for official posts, right to leave the church or congregation by notifying the church or congregation executive beforehand.

Under the 1925 Religious Societies and their Associations Act, the internal management of churches was based on decentralisation and liberal democratic principles, but under the 1934 Churches and Religious Societies Act it was based more on principles of authoritarianism and centralisation. The 1934 Act set out special and detailed provisions for church management. For example: the bodies of the church, the competence of the bodies and clergy, the process of adoption and implementation of acts, the competence of the church courts, the enforcement of court decisions, etc. The authority of the administration of other religious organisations was not so limited.<sup>14</sup>

The questions so far are:

(1) Is it necessary to regulate church (religious organisation) structure?

(2) If it is necessary, then to what extent?

(3) If it is necessary, where should be they regulated: in the Constitution, an Act, other legislation, the statutes or in contracts or agreements with the church or other religious organisation?

## 4. Restrictions on Autonomy

**4.1.** Section 15 of the Estonian Constitution states that everyone has the right of recourse to the courts if his or her rights or freedoms have been violated. Any person whose case is being tried by a court of law is entitled to demand the determination of the constitutionality of any relevant law, other legal act or procedure.

The 1993 Code of Administrative Court Procedure sets out that everyone who believes that his or her rights have been violated by an act or activity of a body or official of a non-profit organisation is entitled to bring a case before a court. The body which, pursuant to law, has supervisory obligations over the activities of bodies or officials of non-profit organisations is entitled to submit a protest to the courts. The acts which can be proceeded in administrative courts are single acts not acts which regulate an abstract number of cases and impersonally create rights and duties (including *intra legem* and *praeter legem* regulations). Positive law does not provide a clear answer what

type are the acts or instruments of religious organisations. It also leaves open the possibility to contest them. Nevertheless it is always possible to bring civil or criminal matters before the ordinary courts. Section 48 of the Estonian Constitution states that everyone has the right to form non-profit associations and unions; the termination or suspension of the activities of an organisation, union or political party and the penalisation thereof may only be invoked by a court, in cases in which the law is violated.

Section 16 of the 1934 Churches and Religious Societies Act stated that instruments of a church or association of religious societies should be sent before publishing to the Ministry of Internal Affairs. The Ministry of Internal Affairs could suspend enforcement of the instrument if it found the instrument to contravene the law or regulations or the statutes of the church or association of religious societies. The Ministry of Internal Affairs had the right to veto acts of these religious organisations. Today, the entry into force of regulations of churches or other religious organisations no longer depends on previous approval by a state official.

**4.2.** Section 6 of the General Part of the Civil Code Act divides legal persons into legal persons in private law (non-profit organisations, foundations and profit-making organisations) and legal persons in public law (state and local government). Section 36 of the Code states that legal persons may be founded pursuant to Acts. Although the Code does not mention any legal persons in public law other than state and local governments, they can be founded and many of them are founded pursuant to an Act.

Section 20 of the CCA states that churches, congregations and associations of congregations are non-profit organisations. The Non-Profit Organisations Act and the Churches and Congregations Act are related as *lex generalis* and *lex specialis*. Thus, under Estonian law, religious organisations (including churches) are legal persons in private law. Whether it is possible to consider them or some of them (for example churches or associations of congregations) as corporations in public law or legal persons in public law is not clear. There have been proposed to complement the section 9 of the draft Act with the special provisions for churches and their congregations and convents which existed before 16 July 1940 on the basis of statutes which were approved by decisions of the Estonian Government. The State will enter into **agreements** with these churches recognising them and their congregations and convents as public legal persons. Subsection 2(1) of the 1934 Churches and Religious Societies Act stated that the statutes of churches with a membership of over 100, 000 would be approved by the decision of the Government. The statutes of churches with a membership of less than 100, 000 and other religious organisations would be approved by Ministry of Internal affairs. The churches with a membership greater than 100,000 were the Estonian

Evangelical Lutheran Church and the Estonian Apostolic-Orthodox Church. The 1938 Constitution stated that “the State can grant status in public law only to large churches”. Large churches were churches with over 100 000 members. But it is debatable whether the State actually granted them that status.

Subsection 9(4) of the proposed provision to draft-law states that State may (**but do not have to**) on the bases of proposal of Ministry of Internal Affairs, enter into **co-operation agreements** with churches and associations of congregations. The content of the co-operation agreements and agreements granting status in public law have not been discussed. It is now unpredictable how the proposed law will affect the autonomy of those religious organisations. The real distinction between the legal treatment of church that will be public legal person and church that will have co-operation agreement with the State is left open. In theory the co-operation agreement can also grant status in public law. With the co-operation agreement the State can delegate public functions and obligations to religious organisations. The main known distinction is that agreements with aforementioned churches have to be signed but entering into the co-operation agreements is the discretion of the Government. According to the one possible interpretation of proposed law, agreements with other religious organisations (single congregations and religious societies) will not be possible. Taking account that religious picture of Estonia is not anymore so homogeneous than it was before 1940. Only 11.3 % of population belongs to Estonian Lutheran Church and the number for Estonian Apostolic-Orthodox Church is ca three times smaller. The numbers consist both active and passive members of these churches. In my opinion it can be debated whether there exist the social need or tradition for preferential treatment of some religious organisations. Furthermore the Estonian constitution sets forth the principle of non-discrimination. The agreements between religious organisations and the State can only be welcomed. But the constitutional principles of equal treatment and non-discrimination have to be taken account. Furthermore the (co-operation) agreements between State and religious organisations are allowed by present Estonian law. So the practical need for further regulation is debatable.

## 5. Some Areas of Common Interest of State and Church

### 5.1. EDUCATION

According to § 4 of the Education Act, the study and teaching of religion in general education schools in Estonia is voluntary and non-confessional. Religious studies is compulsory for the school if fifteen pupils wish to be taught. The principles and topics of religious studies are set out in the curriculum approved by the Ministry of Education. Religious studies in schools is considered as an



elective subject, and is a subject where the views and contributions to the development of humanity of various religions are taught, thus providing knowledge of different religions.

Confessional instruction is provided for children by Sunday schools and church schools operated by congregations.

Section 33 of the Basic and Upper Secondary Schools Act provides an additional guarantee to parents who do not agree with the school regarding religious studies, enabling them to refer to the school's Board of Guardians and to the person responsible for the State supervision of the school.

## 5.2. PRACTISE OF RELIGION IN PRISONS

The realisation of religious freedom in prisons is regulated by § 5 of the CCA, according to which prisons must ensure that their inmates, if they so wish, may practise their religion according to their religious beliefs, if this does not disturb the prison or the interests of the other inmates, and that the services are organised by a church or congregation which has permission therefor from the local government or authority.

The Code of Enforcement Procedure prohibits hindering the distribution of church or religious publications in prisons, and prisoners may subscribe, at their own expense, to religious publications from outside the prison and receive them in the prison.

Section 171 of the Code is problematic since meetings with the clergy may occur only with the permission of the prosecutor, investigator, or courts. The general rule should be that it is permitted to meet with the clergy unless the investigator, prosecutor or court forbids it in the interest of the investigation.

As Estonia is party to the European Convention on Human Rights, Convention practice allows the restriction of the rights of prisoners in prison in the interests of public safety, public order, health and morals and for the protection of the interests and rights of their fellow prisoners.<sup>15</sup>

## 5.3. TREATMENT OF MINORITY RELIGIONS

In order to promote the exercise of the right to freedom of religion, conscience and thought for national minorities, the religious freedom of minorities is also regulated by the Cultural Autonomy for National Minorities Act.

According to the Cultural Autonomy for Minorities Act, minorities are Estonian citizens who reside in the territory of Estonia, have long-term or permanent ties in Estonia, differ from Estonians due to their ethnic background, cultural distinctiveness, religion or language, and are driven by the desire to preserve as a group their cultural customs, religions or language as the basis for their common identity.

Section 3 of this Act guarantees a person belonging to a minority the right to preserve "his or her ethnicity, cultural customs, mother tongue and religion". The Act stipulates a ban on the denigration or prohibition of national cul-

tural or religious customs.

## 5.4. MEDICINE

In Estonia, the area concerning the provision of medical assistance and the freedom of religion and thought is almost completely unregulated. This area includes such issues as mandatory vaccinations and cases where parents refuse for religious reasons to allow an operation on their ill child.<sup>16</sup>

Only § 5 of the CCA regulates the realisation of religious freedom in medical and care institutions. According to the Act, medical and care institutions must make it possible for their residents, if they so wish, to practise their religion according to their religious beliefs, if this does not disturb the order in these institutions or the interests of the other residents.

## 5.5. ARMED FORCES

Freedom of religion in the armed forces is regulated by only one provision in § 5 of the CCA, according to which the officer of the unit shall guarantee conscripts the opportunity to practise their religion, if they so wish. It is not clear whether, or how, this freedom is realised in practice.

Alternative service in Estonia is regulated by the Armed Forces Act (RT<sup>17</sup> I 1994, 23, 384). Section 10 of the Act stipulates that citizens who refuse on religious or moral grounds to perform military service are required to perform alternative service. Section 89 of the same Act stipulates that fulfilling the obligations of alternative service must not be in conflict with the religious or moral beliefs of those in alternative service, and that they must not be required against their wishes to handle weapons or other firearms, to practise using or maintain such firearms, or to handle other means and substances which are intended to kill people or to render the enemy harmless.

## 5.6. TAXATION

According to § 20 of the CCA, churches, congregations and associations of congregations are non-profit organisations. On the basis of the Income Tax Act<sup>18</sup> and by Government of the Republic Regulation No. 162 of 10 July 1996, the Estonian Government established an order which regulates the list of non-taxable organisations.<sup>19</sup> All religious organisations in Estonia which have applied for registration in the list of non-taxable organisations are registered in the list.

Furthermore, taking into account the fact that sacral church buildings usually have historical, cultural and artistic value, the State intends, at least to some extent, to support the churches (and other religious organisations). The Government of the Republic also strives to find means to support single projects, for instance the renovation of organs, etc.

Since there is no state church in Estonia, there are no direct church taxes. The State supports the Council of Estonian Churches financially, for example two million EEK (250,000 DM) was allocated from the 1998 state



budget. The Council decides according to its own statutes which churches it admits. The members of the Council are the following: the Estonian Evangelical Lutheran Church, the Roman Catholic Church, the Estonian Christian Pentecostal Church, the Estonian Methodist Church, the Estonian Union of Evangelical Christian and Baptist Congregations, and the Estonian Congregation of St. Gregory of the Armenian Apostolic Church. The Orthodox Church applied for membership in 1993 but was rejected. The Council of Churches decides upon the usage of money by itself.

### 5.7. AUTHORISATION TO PERFORM MARRIAGE OF CIVIL VALIDITY

Currently, no church or congregation in Estonia has the right or authorisation to register marriages of the civil validity. The Ministry of Internal Affairs in conjunction with the Ministry of Justice and the Council of Estonian Churches has initiated principal negotiations on the feasibility of granting authorisation.<sup>20</sup>

## Notes:

<sup>1</sup> This article is written on the basis of a written presentation by the author at the Second European/American Conference on Religious Freedom, 27-30 May 1999, University of Trier, Germany, on the topic "Church Autonomy and Religious Liberty".

<sup>2</sup> Compatibility of Estonian Law with the Requirements of the European Convention on Human Rights. Council of Europe. April 1997, p 88.

<sup>3</sup> E. Maddison, *Usüühingute ja nende liitude õiguslik iseloom*. (Legal character of Religious Societies and their Associations.) *Eesti Politseileht*. Nr. 11 (221) 13. märts 1926, 161-162.

<sup>4</sup> A regulation is viewed as a generally binding precept issued in a definite form which governs an abstract number of cases and impersonally creates rights and duties. A regulation is therefore substantive law.

<sup>5</sup> K. Merusk, *The Right to Issue Regulations and its Constitutional Limits in Estonia*. *Juridica International. Law Review University of Tartu*, 1996, p. 42.

<sup>6</sup> R. Maruste, E.-J. Truuväli, *Juridica* No. 7, 1995.

<sup>7</sup> K. Merusk, *The Right to Issue Regulations and its Constitutional Limits in Estonia*. *Juridica International. Law Review University of Tartu*, 1996, p. 38.

<sup>8</sup> K. Merusk, *Kehtiv õigus ja õigusakti teooria põhiküsimusi*. (Current Law and Main Issues in the Legislative Act Theory.) Tartu, 1995.

<sup>9</sup> Ibid.

<sup>10</sup> Ibid.

<sup>11</sup> A.-T. Kliimann, *Kehtiv Haldusõigus*. (Current Administrative Law.) Tartu. 1934, 57.

<sup>12</sup> W. Meder, *Ülevaade Eesti kirikuõigusest*. (Overview of Estonian Church Law.) *Õigus* nr.1 1938, 14.

<sup>13</sup> K. Merusk, *Op. cit.*, 41.

<sup>14</sup> W. Meder, *Op. cit.*

<sup>15</sup> Compatibility of Estonian Law with the requirements of the European Convention on Human Rights. Council of Europe. April 1997, p 89.

<sup>16</sup> Ibid.

<sup>17</sup> RT = Riigi Teataja = State Gazette.

<sup>18</sup> RT I 1993, 79, 1184.

<sup>19</sup> RT I 1996, 48, 946.

<sup>20</sup> The Right to Freedom of Religion and Religious Associations. A Survey with Recommendations. Council of the Baltic Sea States. January 1999, p 26-28.



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# Means Ensuring Protection of Taxpayers' Rights in Estonian Tax Law

This article provides an overview of the most important means ensuring protection of taxpayers' rights in Estonian tax law. The article begins with a review of constitutional requirements and restrictions on levying taxes, followed by an overview specifically concerning the protection of taxpayers' rights in the procedure of collection.

## Law Reservation Clause

Under § 113 of the Constitution, state taxes are provided by law in Estonia. The taxpayer's duty to pay a specific amount of tax is created upon the existence of the elements of an act fixed in law. All mandatory elements of a tax-law relationship must be fixed in law. The requirement provided in the Constitution has been further developed in § 8 of the Taxation Act, which states that "taxpayers are required to pay only such state and local taxes as are prescribed by law at the rates and pursuant to the procedure provided for in tax Acts and council regulations." Section 7 of the Taxation Act lists the circumstances that must be provided in a tax Act. In accordance with the definition of tax in § 2(1) of the Taxation Act, a tax is characterised, *inter alia*, by the fact that the obligation must be performed pursuant to the procedure, in the amount and during the terms prescribed in a tax Act or council regulation.

Section 157 of the Constitution entitles local governments to levy and collect taxes and to impose duties. Local taxes may be levied by rural municipality councils and city councils by tax regulations issued under the Local Taxes Act. In levying local taxes, the councils' freedom of decision is limited by the list of taxes (presently nine taxes) and the main characteristics set out in law.

The Decision of 23 March 1998 of the Constitutional Review Chamber of the Supreme Court (3-4-1-2-98 - RT<sup>1</sup> I 1998, 31/32, 432) holds that the requirement that "state taxes shall be provided by law", provided in § 113 of the Constitution, must be interpreted so that all mandatory elements of a tax-law relationship — taxpayer, object of tax, tax rate, tax recipient, the procedure for and due date of tax payment — must be fixed in law. The optional element of a tax-law relationship — allowances — must (if their application is wanted) also be provided by law.

Section 110 of the Constitution precludes the establishment of state taxes by decrees of the President. The adoption or amendment of tax Acts by a referendum is not permitted either (§ 106 of the Constitution). Therefore it can be asserted that in Estonia, the establishment of state taxes is the sovereign and unalienable right of the Parliament.

Before the Constitution entered into force, establishment of taxes (as well as solving other principal matters) by regulations of the Government was common in Estonia. This was permitted by § 3 of the Taxation Act passed on 28 December 1989 (ENSV ÜVT 1989, 41, 648; RT I 1994, 1, 5). In the rapidly changing life and unstable political and economic situation of those days, that was, without doubt, the only possible solution.

Unfortunately, it must be admitted that the law reservation clause has been violated in Estonia even after the entry into force of the Constitution. On 14 October 1997, the Riigikogu<sup>2</sup> passed the Customs Tariffs Act (RT I 1997, 78/79, 1321); § 15(3) of the Act entitled the Government to establish and abolish applicable customs tariff rates from

zero to maximum rates set out in the Appendix to the Act, if customs tariffs were established without a fixed limit or for a period exceeding six months. Under § 15(5) of that Act, the Government of the Republic was also entitled to establish and abrogate special customs tariff rates regardless of their period of applicability. The Legal Chancellor held the opinion that, under § 113 of the Constitution, such delegation was inadmissible and made a proposal to the Riigikogu to harmonise the Customs Tariffs Act with the Constitution. As the Riigikogu did not support the proposal, the Legal Chancellor initiated a constitutional review procedure in the Supreme Court. Under the Decision of 23 March 1998 of the Constitutional Review Chamber of the Supreme Court (3-4-1-2-98 - RT I 1998, 31/32, 432), §§ 15(3) and (5) of the Customs Tariffs Act were repealed.

The decision of the Supreme Court stated that establishment of a tax must result in a tax-law relationship between the taxpayer and the tax recipient (state or local government). Hence an Act establishing a tax must cover all important tax-law relationship conditions, without which the legal relationship cannot exist. These important conditions are the taxpayer, tax recipient, object of tax, tax rate and the procedure and due dates of tax payment.

Even if just one of the important characteristics is not provided for in an Act, the tax as such is not provided for by the Act. Thus the decision on the object of tax or tax rate may not be delegated to the executive power. Such an important state matter as the establishment of taxes may not be delegated to the executive, because that would be in conflict with the objective of regulation-making and violate the principle of separation and balance of powers. The establishment and modification of customs duties is related to very many persons' financial obligations to the state. The Riigikogu, without knowing the applicable customs duty rates, cannot adequately proceed with the state budget, which must reflect all state income and expenditure. The Supreme Court also noted that continuous modification of tax rates at short notice violates the principle of legal certainty, which is a fundamental underlying democratic rule of law.

The concept of tax is not defined in the Constitution but the absence of a definition does not imply that the concept may be interpreted in an arbitrary manner. The concept of tax, as used in the Constitution, may have only such meaning as is attributed thereto by the theory and practice of the branch of law concerned. The Constitution cannot be required to define concepts. [1, p. 43] Naturally, failure to conform to the provisions of the Taxation Act cannot automatically create a conflict with the Constitution. At the same time, it cannot be denied that the provisions of § 2(1) and §§ 3, 7 and 8 of the Taxation Act derive from the theoretical conception of the tax-law relationship and this can be regarded as the legislator's own interpretation of § 113 of the Constitution.

Section 113 of the Constitution does not *per se* require that tax rates should not be provided as maximum and minimum limits. However, the limits of the freedom of choice, the potential number of taxpayers, the amount of money collectable by taxation and the possible frequency of modifying tax rates must be observed in this respect. The higher the number of persons influenced by a modification in tax rates and the bigger are the changes brought about thereby, the more careful the legislator must be in granting a delegation.

The requirement that state taxes must be provided by law is today expressed in the constitutions of most European countries. In many states, this provision is even further specified and several requirements on tax Acts have been fixed constitutionally. Hence, for example, the constitutions of Italy (Article 53), Portugal (Article 107) and Spain (Article 133) even require that income tax be progressive. The Constitution of Spain provides, *inter alia*, one important tax-law principle — the ability-to-pay-principle. The constitutions of the states referred to list tax liability in the catalogue of the primary duties of citizens. The establishment of taxes is based on the law reservation clause even when this is not provided expressis verbis in the constitution. In Germany, for example, any legal provision is regarded as a law under the Taxation Act (*Abgabeordnung*) but, nevertheless, both in theory and in court practice, the opinion that taxes may be established only by formal Acts has been maintained. [2, pp 105, 107]

## The Principle of Supremacy of Law

The principle of legitimacy must also be followed in the implementation of tax Acts. In addition to the law reservation, **the supremacy of law** must also be taken into consideration. In collecting taxes, the text of the Act must be strictly adhered to; taxpayers' freedoms may not be restricted and the Act may not be construed in an arbitrary manner under any acts of the executive or under unwritten law. Tax liability may not be increased under any provision inferior to an Act. Tax liability is created immediately upon the existence of the elements of the act provided in the law.

The principle of legal certainty implies that a tax Act must be so specific as to result in the minimum number of possible different interpretations and choices. Any delegation of decisions and explanations to the executive power must be minimal. A tax Act must be of such intelligibility that the taxpayer can calculate his or her future taxes by reading the text of the Act. Regulations issued by ministers may serve only an auxiliary or explanatory function, offering examples, describing representative situations and providing precepts to tax officials for the purpose of harmonising their technical work.

The contents of regulations implementing tax Acts can be classified into three groups. Firstly, administrative reg-

ulations issued under the Act and intended for execution (e.g. the establishment of declaration forms or tax-free goods); secondly, instructions concerning the meaning of undefined legal concepts; and thirdly, instructions to the tax administrator for interpreting the Act and selection criteria for making discretionary decisions. Unfortunately, regulations of the Minister of Finance have become a source of law in Estonian practice, since in making decisions with a legal meaning, tax administrators use implementing regulations in parallel to or even instead of the Acts. The regulations often tend to interpret laws too extensively or restrictively with prejudice to the taxpayer and, in some cases, persons are put under obligations that are not at all provided in the law. In re-independent Estonia's tax-law practice, tens of examples may be pointed out in which the Minister of Finance has exceeded the limits of delegation established by the legislator and has begun to create a "new law". Another problem still prevalent in Estonia (and not only in tax law) is that administrative acts of a generally applicable nature are established by bodies which are not competent therefor (e.g. by means of directives of the Tax Board or the Director General of the Customs Board).

The disproportionately large role of administrative acts in comparison with Acts is characteristic of an authoritarian state. By passing laws that consist mostly of delegation provisions, the Riigikogu is gradually abandoning its legislative power for the benefit of the executive branch. This will result finally in divergence from the principle of the separation of powers set out in § 4 of the Constitution. In this respect, it can be asserted that the transition period in Estonia is far from over and, at least in the field of tax law, the proper proportion between Acts and inferior provisions has not yet been reached.

The large volume of administrative acts has also resulted in another distressing problem. Namely, a significant number of references to Government or ministerial regulations are inserted into Acts while such regulations are completed months or even years after the Act has entered into force.

The implementation of many Acts has been postponed because of the very absence of implementing provisions. The Supreme Court has also called attention to that problem. The Decision of 17 June 1998 of the Constitutional Review Chamber of the Supreme Court (3-4-1-5-98 - RT I 1998, 58, 939) stated that it is inadmissible to prevent an Act from realising itself because of the Government's inactivity. A delegation provision contained in an Act constitutes not only an authorisation to issue regulations for its enforcement but also orders the executive to issue the regulation needed for implementation of the Act. Regulations arising out of delegation provisions must be issued during *vacatio legis* in order that the law can be implemented immediately upon its entry into force. The major trend in

the development of tax legislation in re-independent Estonia has been a reduction in the meaning of implementing provisions and gradual transposition of their contents into the text of the tax Acts. While the tax Acts of the early 1990s were rather declarative and taxes were virtually provided for by instructions for their implementation, we have now reached the situation in which it can be declared that all the important elements of a tax-law relationship are provided in detail in the Acts. The situation is rather different, though, with regard to various tax categories.

In respect of regulation-making, it is worth noting that the Government or a minister may issue a regulation only if the relevant delegation provision exists in law. Law theory differentiates between delegation and the sanctioning of legislation issued earlier. The issue of a delegation provision does not, per se, legalise any earlier regulations that have been issued without a legal basis. Such a position has been expressed in the Decision of 17 June 1998 of the Constitutional Review Chamber of the Supreme Court (3-4-1-5-98 - RT I 1998, 58, 939). That decision repealed clauses 3.5, 3.6 and 7 of the Regulations for Transportation of Timber, which had been confirmed by Government of the Republic Regulation No. 95 of 7 March 1995. Clause 7 of the Regulations, pursuant to which a purchaser of forest materials was not permitted to deduct, from its taxable income, the costs of transactions completed without a record of acceptance, was one of the provisions repealed.

The case described was problematic also because taxpayers' tax liability was specified (the taxable base was extended) by a regulation not based on a tax Act. The Supreme Court held that, as the Forest Act was not a tax Act, no Government Regulation issued under the Forest Act could influence taxpayers' tax liability. The requirement provided for in § 8 of the Taxation Act, pursuant to which a taxpayer is required to pay only such state taxes as are prescribed by law at the rates and pursuant to the procedure provided for in tax Acts, gives the taxpayer a reason to believe that the duty to pay state taxes arises out of a tax Act and it may be specified by regulations issued pursuant to the tax Act. Maybe the taxpayer cannot even search the individual provision influencing its tax liability from beyond the bounds fixed in the tax Act.

## The Examination Principle

The tax administrator is required to collect taxes and it may not refuse to do so or assign tax claims to anybody else (§ 14(2) of the Taxation Act). The tax administrator may not conclude with a taxpayer any agreement on allowances or non-payment of taxes; similarly, a taxpayer cannot voluntarily pay additional taxes or choose the recipient or category of the tax. Tax claims are created under law, regardless of the tax administrator's activities. As long as the claim has not expired, it may be enforced at any time. A waiver of a tax claim, i.e. forgiveness of tax arrears,



or an extension of the time limit for tax payment (tax timing) is permitted only in cases provided by law. In no event can this constitute a contract, being rather a unilateral expression of will by the competent state body in the form of an administrative act.

In collecting taxes, the administration must apply the law in a non-discriminatory manner and ensure the lawfulness of the entire procedure. Doing so, the tax administrator itself must decide which legitimate means to use. In discovering the characteristics of offence, the tax administrator must determine the person at fault and apply the sanctions provided by law.

In the event of an application or complaint filed by a taxpayer, the tax administrator is not bound by the scope of the application but must thoroughly examine all the circumstances of the case. Therefore, the adoption of decisions which are more adverse to the taxpayer than the initial one is not precluded in tax dispute proceedings. On the other hand, the tax administrator must correct all errors made by the taxpayer that are unfavourable to the taxpayer, and do so even without the taxpayer's application to that effect. The competition principle, whereby the gathering of evidence or conduct of procedures is strictly related to the interested party's application, may never be applied in tax proceedings.

Nevertheless, the law provides for the taxpayer's duty to participate actively in the tax proceedings and provide the tax administrator with various information even without the tax administrator's specific request. As the correct levying of taxes is, in most cases, possible on the basis of data at the taxpayer's disposal, a range of duties have been imposed on the taxpayer by law to ensure the efficiency of the tax administrator's work and the equitable payment of taxes. Such duties include, for example, the registration duty, the accounting duty, the declaration duty, the duty to notify in individual cases, and the duty not to obstruct the tax administrator's activities.

The examination principle does not preclude the right of discretion. Tax law knows of many cases in which an administrative body has been vested with the right of decision or the right of discretion. In this respect, all principles of exercising discretion that are known in the administrative law theory must be followed: purposefulness, equal treatment, respect of fundamental rights and freedoms, limits of freedom of decision provided in law, principle of proportionality, etc. [2, pp. 171-173] Any administrative act (precept) issued by the tax administrator which violates the principles of exercising discretion is unlawful.

Examples of discretionary decisions in tax law include the timing of tax arrears (§§ 342-344 of the Taxation Act), forgiveness of tax arrears (§ 43 of the Taxation Act), suspension of the refund of overpaid taxes (§ 10(4) of the Taxation Act), permission to change the financial year (§ 6(1) of the Income Tax Act), deletion of a value-added tax

payer from the register pursuant to §§ 11(1), (2) or (3) of the Value Added Tax Act, permission to deduct value added tax provided for in § 23 of the Value Added Tax Act, permission to import goods temporarily into the customs territory without payment of import taxes (§ 38(2) of the Customs Act), demanding security from a declarant (§ 49 of the Customs Act), and permission for simplified customs clearance (§ 42(6) of the Customs Act). Discretionary decisions naturally include all decisions concerning administrative enforcement (e.g. the exercise of procedures provided for in §§ 16-20, 24, 26 and 32 of the Taxation Act).

## Interpretation of Acts and Application of Analogy in Tax Law

As a rule in tax law, laws may not be interpreted or analogy may not be applied against the taxpayer, i.e. so as to increase the tax burden. Unfortunately, this rule is often violated in Estonia. In regulations issued by the Minister of Finance for implementing various tax Acts, the Acts have often been interpreted extensively; even exhaustive lists have been complemented. The violations are amplified by intra-departmental instructions and traditions developed in administrative practice. As tax Acts have often been amended, even cases in which the Tax Boards have applied an invalid Act, a new Act retroactively or even one Act within the scope of application of another are not rare.

Interpretation is aimed at ensuring the uniform application of the Act and maintaining harmony with other Acts and general principles, objectives and values. Should doubts be interpreted in tax law for the benefit of the taxpayer? Under the idea that a state arises out of people, the position can be taken that the rights of state power must always be interpreted restrictively but the citizen's rights must be interpreted extensively (*in dubio pro libertate*). [1, p. 149] That principle is, however, not absolute. The position that in interpretation, preference must be given to the taxpayer is supported by the civil law principle whereby, in the event of doubt, transactions are interpreted for the benefit of the party under obligation (§ 64 (3) of the General Part of the Civil Code Act).

All interpretation methods are permitted in tax law. No conception exists whereby one method must be preferred to another in the event of different interpretation methods giving different results. Four different methods can always be used in interpretation: interpretation based on the text of the law (grammatical interpretation), interpretation based on the process of passing the law (historical interpretation), interpretation based on the system of the law (systematic interpretation) and interpretation based on the objective of the law (teleological interpretation).

The so-called economic interpretation method (*wirtschaftliche Betrachtungsweise* in German) is an important peculiarity which may in no event be left out of

consideration in interpreting tax laws. The method allows the civil-law form of transaction to be disregarded in assessing the taxable base and assessment to be founded on the nature of the transaction and its economic consequences for the parties. This method of interpretation originates from Germany, where the *Reichsabgabebestimmung* (RAO), adopted in 1919, provided that the objectives of the law, the economic significance of such objectives and the development of circumstances must be taken into consideration in interpreting a tax law. In the interpretation of civil-law concepts used in tax law, the meaning attributed to these concepts in civil law is not binding; instead, the concept may be defined in quite another manner under the meaning and objective of the tax law. Hence, for example, the court of cassation has interpreted tax Acts even contrary to their text. [1, p. 150; 2, pp. 7-8]

The economic interpretation method results from the special position of tax law in the legal system. On the one hand, tax law is public law (administrative law), but on the other hand it is also closely related to civil law and trade law. As objects of taxation usually result from economic activity, tax law is founded to a large extent on non-legal concepts. World practice has developed so that it is mostly non-lawyers who engage in tax law. There has been a growing tendency towards tax laws using an independent machinery of concepts which is moving, little by little, farther away from terminology used in other branches of law.

Undefined legal concepts are often used in tax laws. In such events, decisions of administrative bodies may always be disputed and final interpretation may be requested from the courts, given the specific situation and related circumstances.

Analogy means fulfilment of gaps in the law. In the absence of a provision regulating the legal relationship in question, assistance is sought from other provisions that regulate similar relationships. The aforementioned principle of certainty and requirements for the accurate formulation of legal provisions must ensure a situation in which the text of a tax Act allows an exhaustive overview of the nature of tax liability in its entirety to be provided. However, this is not always feasible and therefore the problem with regard to analogy arises.

Under § 8 of the Taxation Act, taxpayers are required to pay only such state and local taxes as are prescribed by law at the rates and pursuant to the procedure provided for in tax Acts and council regulations. This formulation implies the conclusion that in material tax law, analogy is prohibited in Estonia. In tax proceedings, the application of analogy is permitted and even indispensable, given the deficiencies of the Estonian Taxation Act. As a whole range of questions pertaining to the general part of tax law are unregulated in Estonia at the level of the Taxation Act, it is impossible to solve problems relating to, for example, the calculation of time-limits, representation, procedural and

legal capacity, presentation of documentation, etc., without applying analogy.

This leads to the question of which Act regulating relationships similar to tax proceedings should be applied. Presumably, it would be the Code of Administrative Court Procedure which, in many questions, refers to the Code of Civil Procedure. The application of the General Part of the Civil Code Act to tax proceedings would hardly be imaginable, as subordination exists between the parties to tax-law relationships and civil-law principles are inappropriate for regulating relationships of such kind. With no better solutions available, the General Part of the Civil Code Act must currently still be applied to many questions under tax law. The final solution for properly regulating tax proceedings can only be achieved by supplementing the Taxation Act with regard to currently non-existent institutes.

## General Principles of Tax Proceedings

The tax administrator's conduct in collecting taxes is a specific category of administrative proceeding. As administrative proceedings always involve inequality between the parties, the legislator must pay particular attention to protecting the rights of the weaker party (in this case, the taxpayer). Since the tax administrator's conduct results in the imposition of monetary obligations upon citizens, unlawful decisions and procedures in this field may, besides everything else, also cause direct material damage. Almost everyone has something to do with paying taxes. Therefore, any maladministration or lawlessness in this area is particularly notable.

Tax proceedings may include the determination of circumstances necessary for assessment, the assessment, made either by declaration or by an administrative act issued by the tax administrator, as well as the compulsory collection of a tax claim. The compulsory enforcement of a tax claim may be carried out by the tax administrator or enforcement agency. In the latter event, this can be regarded as a separate category of administrative proceeding: the enforcement procedure, which remains beyond the scope of application of tax Acts.

The taxpayer's duties in proceedings can be of either active nature (e.g. presentation of declarations) or passive nature (e.g. submission to tax audit or collection of tax arrears). The proceedings of a tax case may, in addition to the taxpayer, also involve third parties (e.g. tax withholding agents, credit institutions), who are required to provide additional information about the taxpayer. The rights and duties of all participants in the proceedings need to be regulated. The rights of the Tax Board in inspecting the taxpayer may not be unlimited: they must be in accordance with constitutional freedoms and must not excessively obstruct the taxpayer's activities or otherwise create excessive inconvenience for the taxpayer. Naturally, in the event

of tax proceedings as a special form of administrative proceedings, all constitutional rights and freedoms must be respected and the rule of law principles must be taken into account. In tax law, these are primarily expressed in the following fundamental principles of procedure [2, pp. 786-800]:

(1) Non-discriminatory application of legal provisions. If any circumstances causing a tax increase or deduction are applied to or recognised with regard to one taxpayer, they must also be applied, in similar situations, to all other taxpayers. The application of sanctions must also extend equally to all persons who have violated tax Acts.

(2) The examination principle. In the proceedings, the tax administrator must determine all circumstances pertaining to taxation (including circumstances alleviating the tax burden). The tax administrator determines all necessary procedures and decides which kind of evidence is gathered and considered. All this is done by the tax administrator on its own initiative without the request of the taxpayer or a third party.

(3) Hearing of the person concerned. Generally, the taxpayer must be provided with the opportunity to present comments and explanations about the question under examination, before a decision is made. The persons involved in the proceedings must know what is wanted of them and, if they so wish, they must be given the opportunity to assist the Tax Board. Only when it becomes evident that such person cannot or does not want to do so, may an *ex parte* examination be initiated.

(4) Pertinence of the procedure to the specific case. The tax administrator may not request documentation from the taxpayer or enter the taxpayer's property in order to discover unknown circumstances. These procedures are only permitted in order to check the correctness of data and statements presented by the taxpayer and relate only to the ascertainment of specific facts. Otherwise, this would constitute a search, which is a criminal procedure and may only be conducted by police officers in the investigation of a criminal case which has already been initiated.

(5) The principle of proportionality. The means chosen in an administrative procedure must be in conformity with the desired objective. The conduct of a procedure may not lay excessive burdens or inconveniences on the taxpayer or the tax administrator itself. The state may not exercise enforcement to a larger extent than is required under the circumstances that have caused such enforcement to be exercised. For example, if it becomes evident during an enforcement procedure that the enforcement procedure will yield no results or that the costs of the procedure are excessively high in relation to the collectable amount, the procedure must be closed immediately.

The principle of proportionality also requires a specific successive order of procedures. For example, presentation of documentation may be required only when other

information presented by the taxpayer is insufficient or has given rise to doubts. Information about the taxpayer may be requested from third persons only after such a request has been made to the taxpayer and if the taxpayer fails to provide all the necessary data.

(6) The principle of legal certainty and protection of trust is expressed by the binding nature of information and documentation issued by the tax administrator. The taxpayer has the right to assume that any information or interpretation of law given by the Tax Board is correct. That principle restricts retroactive amendment of administrative acts, prohibits repeated audits, etc.

Unfortunately, the Estonian Taxation Act fails to reflect the aforementioned principles. The examination principle can be derived from § 14 of the Taxation Act, whereby the tax administrator is required to verify the correctness of tax payments. The tax administrator must provide taxpayers with information concerning the taxes to be paid (§ 9 of the Taxation Act), refund tax overpaid by the taxpayer (§ 10 of the Taxation Act), maintain the confidentiality of information concerning a taxpayer (§ 11 of the Taxation Act), remove any implemented preventive measure immediately after the reason for the implementation of the preventive measure ceases to exist and compensate a taxpayer for any unjustified damage caused as a consequence of the implementation of such preventive measure (§ 27 of the Taxation Act), and review taxpayers' appeals for invalidation of precepts (§ 36 of the Taxation Act).

## Protection of Taxpayers' Rights in Tax Proceedings

The general principles of tax proceedings have been described above. The following overview discusses the more substantial means which ensure the protection of taxpayers' rights and which are presently unregulated or inadequately regulated by law. The deficient normative basis is favourable for maladministration by the tax administrator, allowing it to base its decisions on subjective factors, to abuse its powers, to use unlawfully gathered evidence, etc. A large number of institutes to ensure taxpayers' rights are unfamiliar to Estonia or have a limited use. Often, taxpayers cannot protect their rights because of the lack of necessary information. Therefore, firm guarantees need be fixed in Estonian laws to protect taxpayers' rights.

### Prohibition on using unlawfully gathered evidence.

Data received from persons with immunity (lawyers, notaries) or gathered by fraud or coercion or by violating the rules of procedure may not be used as evidence. Evidence may not be gathered on the territory of foreign states (except data received within the framework of an international exchange of information) and may not be purchased from anonymous persons for monetary considerations.

**Invalidity of inadequate or deficient administrative acts.** In Estonia, no provision exists which would invali-

date administrative acts containing material inadequacies (i.e. which would provide that such acts need not be disputed in the court). Material inadequacy is constituted, for example, by the issue of an administrative act by an incompetent person, by the absence of a date or signature, or by addressing an administrative act to the wrong person. However, an opportunity must be provided to correct clerical and computational errors in administrative acts under a simplified procedure.

**Prohibition on repeated modification of tax orders (precepts).** The number of cases in which an effective tax order may be changed must be kept to a minimum. As a general rule, orders may be modified for the taxpayer's benefit without any restrictions; orders adverse to the taxpayer may only be made when certain information has not been presented due to the taxpayer's fault. The prohibition on modification of precepts results in a prohibition on repeated audits. In the implementation of amendments to laws and in the modification of interpretations, the principle of lawful expectation must be followed, i.e. circumstances impairing the taxpayer's situation may not be applied retroactively.

**Removal of biased officials from proceedings.** The option to challenge participants in the proceedings is provided, for example, with regard to judges, registry secretaries, bailiffs and other officials of the court but this is also necessary in administrative proceedings (including tax proceedings). In tax disputes, where sums amounting to millions are often involved, a biased official may cause very serious consequences (bankruptcy of the undertaking, redundancies, etc.). The principle of fair procedure and equal treatment of participants must also be followed in extrajudicial proceedings. Moreover, as administrative proceedings involve one party who is also the body settling the dispute, more attention must be paid to the protection of the taxpayer's rights.

**Compensation by the state for damage caused to the taxpayer.** Such obligation should be expressed in the Taxation Act and it should cover all cases in which material damage has been caused by the unlawful conduct of an official. At present, the law provides for the obligation to compensate the taxpayer for any direct damage caused by incorrect implementation of preventive measures or delay in their removal (§ 27(2); clauses 18 2)-3) of the Taxation Act). The Code of Administrative Court Procedure, which will enter into force in the year 2000, will provide the opportunity to apply for damages concurrently with the proceedings of a dispute over the lawfulness of an administrative act or procedure, and it will no longer be necessary to file an additional civil action after the adjudication of the administrative court has become effective.

Provisions regulating the issue of, amendments to and cancellation of administrative acts are absent in the current law. Even the designations of documentation issued by the

tax administrator often lack clarity. The Taxation Act refers to e.g. precepts, decisions, tax notices. In the event of many decisions, the tax administrator is not required to issue a written administrative act. Such absence of regulation has led to a situation where, in practice, rather important decisions are issued in an arbitrary form (even via telephone), which renders it extremely difficult to dispute them. In addition to this, significant discrepancies can be observed in the form and contents of precepts and decisions issued by different tax authorities.

The issue of a written administrative act is unnecessary if the taxpayer's right or duty arises directly from law (payment of the tax amount, payment of interest, presentation of the declaration). In such events, the person under obligation may be sent a reminder which is of an informative nature and is, therefore, not an administrative act. Administrative acts are also unnecessary in the event of real procedures (e.g. forgiveness of debts, submission of bankruptcy petitions or claims, dispatch of letters or applications to another state agency).

The Taxation Act presently regulates only modification or cancellation of the tax administrator's precepts when a taxpayer has filed an appeal to that effect. The modification of administrative acts on the tax administrator's initiative is not regulated. In this regard, the following situations must be distinguished: [2, pp. 887-890]

- (1) modification of an administrative act before the time limit for appeal has lapsed, or thereafter;
- (2) modification of a lawful or unlawful administrative act;
- (3) modification of an administrative act by the agency which has issued it or by a superior authority or court;
- (4) modification of an administrative act for the taxpayer's benefit or adversely to the taxpayer;
- (5) modification, cancellation or repeal of an administrative act, correction of a deficient act, replacement of an invalid act with a new act;
- (6) modification of an administrative act on the initiative of either the taxpayer or the tax administrator, or under circumstances beyond the parties' control (retroactive amendment of an Act; international treaty; modification of another administrative act which underlies the administrative act in question, etc.).

All of the situations listed above give rise to different volumes, restrictions, time limits and other conditions. On the one hand, the principle of legal certainty must be taken into consideration, whereby retroactive modification of an administrative act towards an increase in the taxpayer's obligation must be precluded after a certain period has lapsed. On the other hand, the principle of non-discriminatory taxation and equal treatment of subjects, whereby all discovered errors must be removed, must also be taken into account.



The currently applicable law does not restrict the **extent and successive order of applying coercive measures**. Under the principle of proportionality, such restrictions must be established in any event. It must be kept in mind that the means chosen must be proportional to the desired objective; no excessive coercion or unjustified inconveniences may be caused to the taxpayer. In conducting inspection procedures, the person concerned (the taxpayer) must be consulted for assistance first of all. Third parties may be consulted only after it has become evident that the procedure has failed to yield any results. The third party has the right to know which person's tax case information is being requested from it. Taxpayers must always be given an opportunity to express their position. No information may be gathered *ex parte*, without the knowledge of the person concerned (tracking is not permitted in verifying the correctness of a tax payment).

The same applies to procedures related to one and the same person. In the beginning, less inconvenient means (correspondence, telephone conversations) must be employed and if they prove insufficient, more stringent measures must be applied (order to appear before the tax administrator, on-the-spot inspection of the undertaking). Exceptions are only permitted if there is a justified reason (e.g. when it is obvious that the taxpayer has committed an offence). The tax administrator must be able to justify the necessity of each administrative procedure; nobody may be forced to provide information "just in case". Each procedure must be related to specific circumstances. No procedure except tax audits and searches may be aimed at discovering circumstances yet unknown. During tax audits, circumstances which only concern only the taxpayer, not third parties, may be inspected. The taxpayer has the right to request that any evidence received in violation of the rules of procedure should not be used in deciding the case.

The distribution of the burden of proof or the evaluation of evidence are unregulated in Estonian tax law. Tax Acts provide for only some specific conditions concerning certificates which are mandatory for making certain tax allowances or deductions. Not much attention has been paid to the Tax Board's burden of proof. The law should regulate the admissibility of all categories of evidence (statements from witnesses, taxpayer's explanations, expert opinions, observations) in tax proceedings.

Tax Acts may contain special provisions which in certain cases preclude the use of some evidence categories or require only evidence of one certain category (for example, deduction of business expenses is permitted only upon the existence of written expense documentation).

The procedure of carrying out a tax audit as a specific act in proceedings must be regulated in detail. The procedure must contain the following items: [2, pp. 848-854]

(1) prior notice of the audit (and the cases in which prior notice is not necessary),

- (2) procedure for challenging the auditor,
- (3) postponement of the audit at the taxpayer's request,
- (4) duration of the audit and the extent of circumstances to be inspected,
- (5) the taxpayer's duty to provide working conditions and other assistance to the auditor at the taxpayer's own expense,
- (6) the successive order of audit procedures and interrogation of the taxpayer's employees,
- (7) procedure for conduct and registration of observations and inspection assessments,
- (8) the time of conducting audit procedures, and the attending persons,
- (9) documentation of the audit and the taxpayer's right to present applications and enter different opinions,
- (10) notification of the taxpayer of the legal consequences of the audit results,
- (11) registration of the final audit results and notification of the taxpayer.

It is important to emphasise that audit is a procedure providing the tax administrator with a rare opportunity to ascertain all possible circumstances which are related to taxation and were not known before. This opportunity must be used only once and to the maximum extent. The taxpayer must remain confident that, after the audit has been completed and the necessary corrections have been made to earlier decisions (if needed), the tax question will ultimately be solved and there will be no follow-up audits or modifications of the decision. Therefore, it is important to insert into the law a prohibition on repeated inspection of one and the same tax category or tax period. The state must ensure that its officials are competent to complete an audit once and for all. Any contrary presumption would legalise anarchy and maladministration. In addition, a prohibition must be established on auditing a taxpayer in the presence of a third party.

## Bibliography:

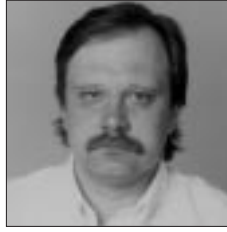
1. J. Vaabel. Eesti riigi maksundusõiguse põhiprobleeme. Riigi maksundusõiguse normistiku ehitus ja rakendus. (Main Problems in Estonian Taxation Law. Structure and Application of National Tax Law.) Tartu, 1995.
2. K. Tipke, J. Lang. Steuerrecht. 16. völlig überarbeitete Auflage. Köln, Dr. Otto Schmidt, 1998.

## Notes:

<sup>1</sup> RT = Riigi Teataja = the State Gazette

<sup>2</sup> Riigikogu = the parliament of Estonia





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# Right to the Environment in the Context of EC Approximation and Codification of Estonian Environmental Law

The Estonian environmental law is presently under great reform. We are largely at a crossroad. Although several important gaps in the Estonian environmental law have been filled and contradictions in the legislation eliminated in the last years, our environmental law is still developing chaotically and is rather fragmented. There are several reasons for this. This area of law has so far developed in a situation where there are no common grounds (principles) for legislative drafting and legal acts have been passed unsystematically. The lack of organisation in legislative drafting is especially apparent in the harmonisation of our law with that of the European Community. The latter presumes the establishment of a large number of legal acts in a relatively short time. If processes have no sound basis and framework in these conditions, such a mass production of law may go out of control. It might be believed that keeping the right course is guaranteed with the EC environmental *acquis* system — agreements, regulations, directives, principles, policies, court practice and other elements of it. Anyone familiar with the EC environmental law, however, knows that this is not the case.<sup>1</sup> The EC environmental *acquis* suffers the same shortcomings as the Estonian environmental law. Furthermore — fragmentation and contradiction can be found in the environmental

law and legislation of most other countries.<sup>2</sup> To get out of this unfortunate situation, efforts to create an environmental code have been taken in several countries since the end of the 1980s. This trend has evoked conflicting opinions, but the fact is that the world's first environmental code (*Miljöbalk*) was established in Sweden on 1 January 1999 and Germany will soon follow (*Umweltgesetzbuch*). The trend to establish environmental codes proves that environmental law has come to rank equally with other areas of law. In Estonia, a team was formed in 1998 to prepare the general part of the environmental code draft act. The author of this article has the honour to be the head of the team. The objective of the general part of the environmental code act is to lay down the theoretical bases of environmental law in legal norms, so as to guarantee a systematic development of our environmental law and prevent contradictions in both legislative drafting and in implementation of the law. The following article is largely inspired by certain problems which the team has faced in discussing the draft act.

The chief motive of the environmental legislative drafting in Estonia today is the transposition of the EC environmental *acquis*. Considering the fact that the EC environmental law does not by far cover all the regulations

necessary for environmental protection, it is necessary and possible in the context of EC environmental law transposition to meet two objectives simultaneously:

(1) to arrange the content and structure of the Estonian environmental law so that internationally recognised basic principles of environmental policy and law be taken into account on the one hand, and the social and economic realities of our society and the peculiarity of our environmental conditions and problems be given due regard on the other hand;

(2) to transpose the entire EC environmental *acquis* in our legal order and guarantee its implementation.

So, the EC law does not as a rule replace the national law but acts through it. Therefore the national legislation has to be reviewed to adequately adopt the EC law — any discrepancies, repetitions and gaps have to be corrected. An important means for achieving this is the environmental code.

Yet the direct legal effect of EC law, including directives, should not be forgotten. In the sphere of environmental protection, this aspect has a very important meaning, especially from the viewpoint of less developed and poorer countries. Although the role of the direct legal effect of EC law cannot be overestimated and several scientific discussions have been dedicated to it<sup>3</sup>, these problems will not be discussed in depth in this article.

The above two simultaneous processes — transposition of EC law and preparation of the environmental code — have a number of common traits, but they also differ in many aspects. One of the common traits is the main objective — to guarantee the right to a clean, habitable, quality environment and preserved natural resources.

It is hardly news that the right to a clean environment is listed among the fundamental rights in the constitutions of several countries. The relation between environmental protection and human rights has attracted more and more attention. Although this human right is not expressly provided in the Convention for the Protection of Human Rights, the practice of the European Court on Human Rights has recognised the right to a clean environment as a fundamental human right, as the deterioration of environmental conditions can lead to violation of the human rights expressly set out in the Convention, such as the right to privacy and inviolability of property.<sup>4</sup>

It can be said that the main objective human rights protection is to guarantee the immanent bases for the existence of an individual, including personal life and dignity. Let us recall the First Principle of the 1972 Stockholm UN Environmental Conference Declaration:

“Man has a fundamental right to freedom, equality and adequate living conditions in an environment the quality of which guarantees welfare; man also has the superior obligation to protect and improve environmental conditions for the benefit of present and future generations”.

The Stockholm Declaration also stresses that:

“Man is simultaneously a part and the former of the environment, and both components of the environment — the natural and the artificial — are important for the welfare of man and for exercising fundamental human rights, including the right to life”.

Human rights are inseparable and mutually dependent on each other — the full realisation of political rights is impossible if economic, social and cultural rights are not guaranteed. The requirement to guarantee the right to life and health cannot be separated from the requirement to achieve sustainable development.

The protection of human rights presumes that individuals, various collective legal subjects and the state bear certain obligations, or, otherwise said, that all sectors of the society participate. The bearer of human rights however is the individual, not the collective. Damage to the environment has usually large-scale consequences and cases where the damage (violation) only concerns a particular individual are rare. So, despite the fact that the relation between environmental condition and human rights is more and more recognised, the dispute — whether the right to a clean environment exists — has not by far come to an end. It has even been asked whether the right to a clean environment is good or bad for environmental protection — it is feared that the inclusion of environmental protection in the human rights context may further reinforce the anthropocentric conception of the world, which directly or indirectly has caused most of today's environmental problems.<sup>5</sup> Another problem that makes it more difficult to relate the environmental issues and human rights is the ambiguity of the terms. Defining the content of the terms “environment”, “environmental pollution”, “sustainable development” and other such main concepts of environmental law continues to cause problems in international law and in national legal orders. How to define clean environment — this would apparently require the establishment of appropriate quality norms and standards for all environment components not by country but globally, because as we know, neither environment nor human rights recognise state borders.

Related to environmental protection is the question of the rights of not only today's people, but the future generations. The concept of sustainable development is first of all related to the requirement that our generation must not use its time aggressively, but behave prudently and consider the rights and interests of future generations. Such rights have been called “group rights” and “generational rights”.<sup>6</sup> It is apparently impossible to associate these rights with human rights, as the latter are related to the individual, not the collective, as mentioned above. An interesting theory about the relations between generations has been formulated by Christopher Stone in his book “Earth and Other Ethics: The Case for Moral Pluralism”.<sup>7</sup> The cornerstone

for C. Stone's theory is distinguishing between two categories — "persons" and "nonpersons". The first category includes "normal adult humans", the other includes "unconventional entities" — from unborn babies, dead persons and animals to such collective subjects as tribes and peoples. Nonpersons include "future persons", including future generations. According to C. Stone, the interests of the latter should be taken into account from both moral and legal grounds. At first glance, the latter arises many suspicions, but when we recall the precautionary principle of environmental law and its implementation mechanisms, such as the procedure for assessment of environmental impact, it is not entirely impossible.

Due to the above reasons, the right to a clean environment can be first of all associated with procedural rights<sup>8</sup> — such as the right to environmental information, the right to participate in decisions concerning the environment. Last summer (23-25 June) the Fourth Ministerial Conference took place in Århus under the auspices of the UN Economic Commission for Europe, where the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters was signed. The document is based on the principle that each person has the right to live in an environment adequate to his or her health and well-being, and each person is individually and collectively obliged to protect and improve the environmental conditions for the benefit of the present and future generations, and everyone has the right to receive information and participate in environmental decision-making to exercise this right and obligation.

It can be said that the law in force (in Estonia and elsewhere) grants a person two main possibilities to guarantee the right to a clean environment:

(1) exercising control over environmental management by participating in decision-making and through these decisions, subjecting to court control;

(2) enforcement of his individual rights in private law (for example, property).<sup>9</sup>

One of the mechanisms which in the Estonian conditions contributes to guaranteeing the right to a clean environment is the transposition of the EC environmental acquis and even more importantly, its actual implementation. The main objectives of the EC environmental law include the protection of human health and the environment on a high level. It may be asked what else besides environmental protection can serve as the objective of environmental law. Other objectives are known to exist. One of the important objectives of the EC environmental law is the harmonisation of standards to guarantee the free movement of goods. The following is a discussion of the so-called transposition principles. These principles arise from the practice of the Court of Justice of the European Community. It is important to follow these principles throughout the course of transposition of the EC law to the

national law, as they reflect the views of the EC Court of Justice, an institution empowered to interpret the stipulations and determine the rights provided by EC law, and are helpful in determining which EC environmental provisions are to be transposed and which ones not. Transposition is thus first of all a process by which the rights and obligations established for individuals in directives or on the basis of directives are incorporated in the national law. National legislation also has to include measures to protect the rights of individuals, where a directive grants competent agencies the right to act, but on limited conditions (or according to certain conditions or restrictions) and where the exercise of such right on such conditions may lead to damaging the lawful rights and interests of persons. The above is justified by the need to guarantee the right of individuals to contest in their national courts the activities of public authorities, which is influenced by community law. The obligation to transpose the stipulations of a directive in national legislation does not imply merely the repetition of the text of the directive in the national legislation, but rather requires that the transposition should guarantee the achieving of the effect of the directive ("*effet utile*"). In this context, such "effect" may cover aspects of environmental protection, preservation and development.<sup>10</sup> As evident from the above, the relation between the principles of EC law transposition and the right of persons to a clean environment is direct and immediate. One can be sure that the actual implementation of the above principles in the transposition and implementation of, for example, the directive regulating the quality of drinking water, contributes to guaranteeing the protection of the environment and human health in the Estonian conditions.

In the following we shall tackle some of the problems that arose in preparation of the general part of the environmental code draft act. All these problems are directly or indirectly related to the right to a clean environment. We shall analyse the concept of the general part act and the role of the right to a clean environment in it. We shall also speak about the mechanisms which guarantee the exercise of the right — the implementation aspects of the precautionary principle, the assessment of environmental effect and the multifaceted role of environmental liability in controlling environmental risks.

The shortcoming of the "framework laws" concerning environment applicable in Estonia is the fact that they contain political rather than legally defined texts (provisions). At the same time, it is perhaps natural that the general part of the environmental code act should, due to its character, contain norms and principles with a lower efficiency<sup>11</sup> when compared to other norms. Nonetheless, the provisions of the general part act have to be formulated with as much implementing power as possible and legally undefined terms such as "a single beautiful tree" have to be avoided. We cannot do without a certain degree of declar-

activity, but it must be taken to a minimum. It is often said that environmental protection laws must, besides environmental protection norms, contain the spirit of environmental protection. One of the objectives of the general part act is to provide legal definitions to the main concepts of environmental law. Here we should consider practical needs rather than pure theory. For example, it is rational to define "environment" from the aspect of the scope of application of the act, not from scientific definitions, of which there is a multitude and where a consensus on the "correct" definition is extremely difficult to achieve. It is more correct to list objects, circumstances, etc. which are viewed as the environment for the purposes of the environmental code, and with which the scope of application of the code is determined. The same principle applies to other main concepts. When preparing the general part draft act, it should be taken into account that the act will first be established without a special part. Thus the general part act will for some time be effected together with other legal acts presently in force. The passing of the general part act presumes that amendments be made in the legislation in force.

The function of the general part of the environmental code act, besides defining the scope of application, the objective of environmental protection and the main principles of environmental law, is to define the main rights and obligations of persons, the organisational bases of environmental protection and the legal means of environmental risks control. The act establishes the legal bases for environment use proceeding from sustainable development principles. The set of measures for environmental damage prevention is also provided. The general part act provides the implementation mechanisms for international and EC environmental law. The law thus sets out the legal framework for environmental law and policy, and is the basis for the systematisation and further codification of environmental law in future.

The organisational bases of environment protection and the measures of environmental management have to be determined based on the social partnership principle. Environmental protection cannot be taken out of the market economy context. One of the basic principles in finding an adequate combination of regulation methods is the principle that requires as small as possible disturbance of spontaneous market mechanisms and the implementation of direct regulation means first of all in those areas where market mechanisms "do not work". Special literature points out the dangers that environmental protection faces in the context of neo-liberal economic globalisation.<sup>12</sup> Therefore, environmental problems can only be solved when producers (on the polluter-pays principle), the state and the local government (based on their duty to guarantee the environment as a public utility) and the consumers (based on their awareness of circumstances and market choices) all participate on equal grounds.

The general part of the act focuses on the environment (protection)-related rights and obligations of persons. The right to environment-related information and participation in decision-making has to be considered one of the most important mechanisms of environmental risk control in a democratic society. Through this the right of persons to a clean environment is realised. Through the environment-related obligations of persons, the main principles of environmental law can be changed from mere environmental policy slogans to legally applicable norms.

In determining the environment-related rights of persons, the draft act is based on the principles of the Århus Convention and Directive 90/313/EEC (Access to Environmental Information) and the idea that the defining of such rights is beneficial only where it is done in sufficient detail, providing not only the abstract content of the rights but also the mechanisms that guarantee them. The failure to regulate the latter has so far been one of the main shortcomings of Estonian law. For example, the right to environmental information is provided in the current Estonian legislation, but due to the above shortcoming the application of the respective provisions is extremely problematic.

The draft act lays down everyone's right to:

(1) live in an unpolluted, intact and norm-compliant environment and to demand the suspension and termination of activities which impair environmental conditions and the reviewing of norms regarding these activities — the right to a clean environment;

(2) receive information on the environmental condition and natural resources, as well as on any factors which may have a significant effect on them — the right to receive environmental information;

(3) participate in making decisions which have a significant impact on environmental conditions, and through environmental organisations, to participate in the preparation of legislation of general application concerning the environment — the right to participation.

The following paragraphs of the draft act provide in detail the logistics of realising these basic rights. Let us give just one example here regarding the right to a norm-compliant environment. Corresponding to this right is the obligation to guarantee compliance with environmental quality norms — for example the compliance of drinking or bathing water with determined quality requirements. The obligation concerns not only polluters but also public authorities who have to guarantee the respective legal regulation and the existence of competence institutions, as well as monitoring and surveillance. Every person has the right to demand the reviewing of norms where there is reason to presume that the norms are not strict enough.

Everyone's right to a norm-compliant environment can be realised through the right of everyone to address an environmental surveillance agency for compliance sampling and compliance measurements. The environmental

surveillance agency will organise the necessary measurements and sampling if there is reason to presume that norms have been violated. Where substantially higher than allowed levels of pollution are found, the environmental surveillance agency is obliged to clarify the source of pollution to whatever extent possible. An environment inspector is obliged to do the same if the pollution level does not exceed norms, but is significantly higher than the usual pollution in the area. Thus, the right of everyone to a clean environment is expressed in the detailed obligations of specific persons or agencies.

One of the most important and apparently most effective means of guaranteeing the right to a clean environment is the precautionary principle of environmental law (in German, *Vorsorgeprinzip*). It is a principle that best describes the essence and peculiarity of today's environmental law. According to this principle, the most reasonable and effective environmental policy entails not merely the liquidation of pollution and its consequences, but rather the prevention of pollution at the potential pollution source and the assessment of related environmental risks from human activities and the systematic collection of appropriate information. It should be especially stressed that these measures have to be applied in conditions of scientific uncertainty. The precautionary principle denies the traditional assimilative capacity approach. The latter is based on the premise that science can adequately predict and determine environmental risks and work out technical solutions for their elimination. If the former has succeeded, there is always enough time to act. This purports to be economically the most effective environmental policy.<sup>13</sup> Unfortunately, life has shown that scientific proof of the harmful effect of certain activities or substances to the environment usually comes too late, as it often takes scientists years to clarify and discuss the essence and emergence mechanisms of processes. The precautionary principle is a means of acting in conditions of uncertainty<sup>14</sup>, where intuition rather than the precise assessment of objective circumstances is the basis.

One of the main problems related to the codification of environmental law is the implementation aspects of the precautionary principle. Initially, possibilities for the implementation of the precautionary principle were only seen on the level of legislative drafting and policy. The administrative level was added later, which means that for example in issuing environmental permits, competent authorities have to take account of scientific uncertainty and the need to apply appropriate precautionary measures. The preparers of the general part of the Estonian environmental code act are convinced of the need to apply the precautionary principle on the personal level also - through defining the basic environmental obligations of persons. This way the precautionary principle is employed against environment polluters and not to their benefit as before.<sup>15</sup>

Certain dangers exist here, too. The precautionary principle taken to an extreme may become a paranoid principle. Therefore the precautionary principle has to be defined with due cautiousness on the environmental obligations level, or otherwise said — implemented reasonably. Before we come to the relation between the precautionary principle and reasonability, we have to look at the fundamental environmental obligations. The general part of the environmental code act should prescribe the following fundamental obligations for persons in the control of environmental risks and prevention of environmental damage:

(1) everyone who plans or carries out an activity which may have a significant effect on the environment or human health, has to take account of the interests of other persons and the need to protect the environment, and is obliged to notify the persons whose rights and interests such activity may influence, of such activity and its possible consequences in due time and in an as early a stage as possible;

(2) to take precautionary measures, a person has to have information on the possible impact of his planned activities on the environment and human health. Where there is no such information, the person is obliged to take all necessary measures to furnish such information and assess the possible effect on the environment;

(3) the taking of precautionary measures may not be postponed due to the fact that the adverse effect on the environment of the planned or performed activity has not been fully proven by (scientific) investigation;

(4) everyone who plans or performs an activity which may have a significant impact on the environment and human health, has to implement the best available technology and good environmental practice to prevent or reduce such effect, unless otherwise provided by law. The best available technology means the latest and most effective stage of development of a process, appliance or working method, which has proved effective in the practice of pollution prevention, or if this is not possible, in reducing the effect on the environment as a whole;

(5) the place for performing an activity which has a significant potential effect on the environment has to be chosen so that the possible adverse effect on the environment and human health is the minimum. In the choice of a suitable location or site, account shall be taken foremost of the sensitivity of the area to the activity planned, the distance of the area from residential areas, and its present and possible future use;

(6) everyone is obliged to avoid using genetically modified organisms and substances, preparations and products hazardous to the environment and human health, if they can be replaced with such substances, preparations, products or organisms from which a lower degree of hazardousness can be presumed.

To provide even more implementing power to the



above obligations, it is wise to establish the requirement that if the established maximum pollution level or rate of use of a natural resource does not allow to fully satisfy all the applications for a pollution permit or a resource use permit, persons who have fulfilled the above obligations to the maximum possible degree shall have a preferential right to receive such permits.

Now back to the rule of reasonability. The above fundamental obligations are applicable to the extent that they cannot be considered unreasonable. When an appropriate analysis is made, the benefit of precautionary measures must be weighed against their cost.<sup>16</sup> If a person with respect to whom the above obligations are applicable wants to be relieved of them in part or in full, he or she must prove that the costs of taking the prescribed measures are not justified from the aspect of protecting the environment or human health, and are economically irrational.<sup>17</sup> At the same time, it must certainly be taken into account that the requirement to achieve the environmental quality objectives prescribed in the legislation should always be considered reasonable regardless of the related costs.

In conclusion, it can be said that the precautionary principle must be applied while taking account of risk and the best possible scientific knowledge, and the application of the principle must be the stricter the larger and more irrecoverable the potential environmental damage.

In addition to the above, an important measure for guaranteeing the right to a clean environment is the procedure for environmental impact assessment. This guarantees the implementation of the precautionary principle of environmental law and is based on the premise that it is not the hazardousness of the planned activity that has to be proved, but the performer of such activity must himself, before a project is launched, warrant through environmental expertise that his activities do not cause a significant impairment of the environmental condition.

In the European Union, the assessment of environmental effects is regulated with Directive 85/337/EEC. The Directive is probably one of the most important sources of EC environmental law. The preparation of the Directive was not easy, as the positions of member states were indeed very different and it took much effort to reach a consensus. The same applies to the enforcement of the Directive — member states have often been criticised by the EC Court of Justice.<sup>18</sup> The Directive focuses on the harmonisation of procedural norms for the assessment of environmental impacts and requires that environmental aspects must be taken into consideration for all development projects. The objective of the Directive is not to prescribe for member states as to which projects are to be allowed or not, but harmonises the related procedures and principles. The objective of assessing environmental effects is not the prohibition of development projects, but the consideration of environmental protection aspects equally with other

aspects. Likewise, the objective of sustainable development is not to stop economic development, but to subject it to a certain framework. Regulation of the environmental impact assessment has to be based on the following principles:

(1) it is preferable to investigate and assess the environmental effects of planned projects before such projects are initiated, so as to reduce any harmful effects and prepare appropriate contingency plans for emergency;

(2) the public is entitled to receive information of all environmental effects of human activity. The principle “the right to know” is often taken further and not only the accessibility of information is required, but it is required that the public (on the local, regional or national level) be provided an opportunity to present comments and notes to any decisions related to such effects. In practice, this could mean that information is required from developers on the possible environmental effects of the planned project and the local, “affected” community is granted a possibility to provide comments on the project before the project is approved. In a wider meaning, it could also mean the notification of the general public of an environmental draft act of nation-wide application and the public discussion of the draft act before it is passed.

There is probably no European or North American country left where the environmental impact assessment is not one of the main legal instruments of environmental protection. So, it is quite a new, but a very powerfully developing procedure, which well reflects several developments of today’s environmental policy and law. The latter is one of the cornerstones of the integrated pollution prevention and control ideology.<sup>19</sup> Secondly, the assessment of environmental effects suits well the measures of self-control so widely promoted in the 1990s.<sup>20</sup> Unfortunately, the latter has not always been understood. In Estonia, undertakings and developers regard the assessment of environmental effects as a procedure clearly hostile and imposed on them. In fact this is not so. The Estonian environmental impact assessment and environmental audit draft act regards the developer as a client who orders the assessment of environmental effects, which is beneficial for the developer from at least two aspects:

(1) the results of environmental effect assessment are essential to adequately meet the obligations arising from the precautionary principle. Let us not forget that everyone is obliged to have information on the potential environmental effect of his or her activities;

(2) considering the strict liability principles applicable to environmental pollution, the timely and adequate assessment of environmental effect is crucial to eliminate environmental liability risks.

As a logical continuation of the latter empirical truth, let us now consider the last topic of this article — environmental liability. The role of environmental liability, first of all civil liability, in the prevention of damage and in the guaran-

teeing of a clean environment, cannot be overestimated.

Environmental civil liability has several functions. One of its purposes is certainly the fast and adequate compensation for damage. But besides this, civil liability (or rather, the related risk) serves the purpose of stimulating environment-friendly production and implementing the "polluter pays" principle. The liability schemes applicable today are so strict and damages to be compensated for are so great that even the most successful undertaking cannot afford a pollution that causes liability. An especially complex scheme of environmental liability is known to exist in the USA. The latter has often been accused of being unjustly strict and totalitarian.<sup>21</sup> An answer to such accusations is - the main objective of the environmental liability scheme is not to indemnify damage, but to prevent the application of the scheme - the liability has first of all an important preventive effect. The risk of liability is a stimulus to take all available measures to prevent damage.

Although civil liability is an effective means of pollution control, it should not be regarded as a cure-all. Civil liability is not applicable to many types of pollution, for example the pollution of ambient air by exhaust gases of motor vehicles. It should also be understood that despite the efforts to achieve effective schemes of environmental liability, court procedures regarding these issues are very slow and from the environmental protection aspect, the judgements may not always be productive<sup>22</sup>, especially where the causer of damage is identified and indemnification is exacted from him, but the defendant turns out to be unable to pay.

Besides the above fundamental truths, the peculiarity of our environmental problems must be taken into account in the regulation of environmental civil liability in Estonia. Account should be taken of the fact that most of our enterprises are privatised together with land, while a large part of environmental pollution originates from the Soviet period. The situation is complicated by the fact that many enterprises who have severely polluted the environment directly served the annexing powers and were subordinated to the central power in Moscow. Our environmental pollution is therefore largely an issue of international environmental law. It is apparent that due to many such special problems, Estonia and similar countries need a number of additional instruments besides civil liability — for example, special funds to finance the elimination of past pollution.<sup>23</sup>

The first half of this article poses the question whether the right to a clean environment exists, whether it is an actual right or only a slogan from political fashion trends. It is probably not just a slogan, but only if the actual exercise of this right is guaranteed with legal norms. As we saw, it is possible — fundamental environmental obligations of persons based on the precautionary principle, the procedure of environmental impact assessment, environmental civil liability and many other legal means give the necessary

implementing dimension to the right to a clean environment.

## Notes:

<sup>1</sup> Q.v. A. Nilsson. Environmental Protection within the Internal Market. — Third International Conference on European Union Environmental Law, Helsinki, May 7-8th 1998, pp. 53-62.

<sup>2</sup> Q.v. M. Kloepper. On the Codification of German Environmental Law. — The Codification of Environmental Law. Ed. by H. Bocken, D. Ryckbost. Kluwer Law International, 1996, pp. 87-100.

<sup>3</sup> Q.v. H. Somsen. Francovich and its Application to EC Environmental Law. — Protecting the European Environment: Enforcing EC Environmental Law. London: Blackstone Press Ltd., 1996, pp. 135-139.

<sup>4</sup> A. Kiss, D. Shelton. Manual of European Environmental Law. Cambridge University Press, 1997, pp. 73-79.

<sup>5</sup> Q.v. D. Shelton. The Right to Environment. — The Future of Human Rights Protection in a Changing World. Oslo: Norwegian University Press, 1991, pp. 197-202.

<sup>6</sup> Q.v. G.P. Supanich. The Legal Basis of Intergenerational Responsibility: An Alternative View — the Sense of Intergenerational Identity. — Yearbook of International Environmental Law, Vol. 3, 1992, pp. 95-96.

<sup>7</sup> C. Stone. Earth and Other Ethics: The Case for Moral Pluralism, 1987.

<sup>8</sup> R.V. Persival, A.S. Miller, C.H. Schroeder, J.P. Leape. Environmental regulation. Law, Science and Policy. Little, Brown and Co., 1996, p. 69.

<sup>9</sup> Q.v. E. Rehinder. Private Recourse for Environmental Harm — Federal Republic of Germany. — Environmental Pollution and Individual Rights: An International Symposium. Kluwer, 1978, p. 38.

<sup>10</sup> L. Krämer. E.C. Treaty and Environmental Law. London: Sweet and Maxwell, 1998, pp. 163-167.

<sup>11</sup> K. Merusk, R. Narits. Eesti konstitutsiooniõigusest (On the Estonian Constitutional Law). Tallinn: Juura, 1998, p. 168.

<sup>12</sup> Q.v. for example: R. Falk. Environmental Protection in an Era of Globalization. — Yearbook of International Environmental Law, Vol. 6, 1995, pp. 3-25.

<sup>13</sup> Q.v. P.J. Taylor. The Precautionary Principle — Implications for the Paris Commission. London: Greenpeace, 1988.

<sup>14</sup> O. McIntyre, T. Mosedale. The Precautionary Principle as a Norm of Customary International Law. — Journal of Environmental Law, Vol. 9, No. 2, 1997, pp. 221-222.

<sup>15</sup> H. Hohmann. Precautionary Legal Duties and Principles of Modern International Environmental Law. The Precautionary Principle: International Environmental Law Between Exploitation and Protection. Graham & Trotman/Martinus Nijhoff, 1994, p. 334.

<sup>16</sup> I. Hodge. Environmental Economics. Individual Incentives and Public Choices. London: Macmillan Press Ltd., 1995, pp. 44-49.

<sup>17</sup> K. Kuusiniemi. Environmental Standards and Pollution Control Law. — North European Environmental Law. Ed. by E.J. Hollo, K. Marttinen. Helsinki: Hakapaino, 1995, pp. 241-244.

<sup>18</sup> Q.v. The Enforcement of the Environmental Assessment Directive in the National Courts: A Breach in the "Dyke". — Journal of Environmental Law, Vol. 9, No. 1, 1997. Oxford university Press, pp. 119-138.

<sup>19</sup> L. Krämer. E.C. Treaty and Environmental Law. London: Sweet and Maxwell, 1998, pp. 6-8.

<sup>20</sup> Q.v. S.P. Johnson, G. Corcelle. — The Environmental Policy of the European Communities. Kluwer Law International, 1995, pp. 20-22.

<sup>21</sup> Q.v. E. T. James. An American Werewolf in London: Applying the Lessons of Superfund to Great Britain. — The Yale Journal of International Law, Vol. 19, No. 2, Summer 1994, pp. 383-393.

<sup>22</sup> R.H. Burnett-Hall. Non-Fault Liability in Germany. — Environmental Liability. Graham&Trotman, 1990, pp. 172-173.

<sup>23</sup> Liability for Environmental Damage. Washington: Environmental Law Institute, 1995, pp. 8-9.



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# Protection of Fundamental Rights in Estonian Criminal Law

## 1. Bases

Personal fundamental rights stand for the rights directly stemming from human dignity and expressing the constitutional legal status of a person. Emanating from the principle of human dignity the rights of an individual must guarantee his or her free development in his or her personal sphere of life and the inviolability of his or her personal or private sphere of life.

Attempts to classify personal rights or distinguish them according to their level can be noticed in specialist literature. For example, some authors have tried to distinguish a personal right in a narrower sense of the term (a personal right as the legal status directly connected with human dignity) from the ones in a broader sense (personal rights as the constitutional legal status).<sup>1</sup>

An attempt to present personal fundamental rights as a kind of hierarchy is also connected with the aforesaid. For example, firstly, comes the right to life and personal inviolability; secondly, the freedom of thought, conscience and religion; and thirdly, fundamental rights that stem from the principle of a state based on the rule of law (or political freedoms in a broader sense of the term) — the rights to constitutional state order, free political competition and independent administration of justice.<sup>2</sup>

A question in itself is whether human dignity has to be treated as an independent fundamental right. These who consider it a fundamental right think that human dignity should always be at the top, always the first in the hierarchy of all human rights. Another position (and in my opinion more grounded, at least from the point of view of the

protection in criminal law) holds that human dignity is the foundation of the person's legal status and the base of all rights that have different outputs as to the protection in criminal law. Arguments for the latter lie in the fact that human dignity is philosophically defined and, in this form, as a specific right hard to apply.<sup>3</sup>

In Estonian constitutional law the question of human dignity has remained in the background. For example, if § 1(1) of the German Constitution places human dignity to the top of the value system of human legal order then the Estonian Constitution mentions human dignity only in § 10 of Chapter II ("Fundamental Rights, Freedoms and Duties") pursuant to which fundamental rights, freedoms and duties do not preclude other rights, freedoms and duties that conform to the principles of human dignity.<sup>4</sup> But what can be derived from this provision is that human dignity is not a specific right but a general base from which other fundamental rights originate.

## 2. System of Fundamental Rights from the Point of View of Protection in Criminal Law

Classification and hierarchy of personal fundamental rights is substantially the problem of political law. The problem in criminal law is how to define legally protected interests or more precisely, whether and which fundamental right and freedom can be protected as an interest of independent quality or just as an expression of the person's legal status. Here, in my opinion, there are three possible levels.

1. Fundamental rights or freedoms as independent

interests. For example, the rights to life and personal integrity are protected as independent interests, not as rights. The same applies to the right of one's good name or the right to one's adequate presentation (the right to one's "picture") - this is protected as honour (by the *corpus delicti* of insult and defamation). One of the expressions of intimate sphere, sexual sphere, is also protected as an independent interest (sexual offences). By this criminal law wants to say that the object of the right or the interest itself rather than the belonging of the right to a person (the right to life) is essential.

2. Realisation of personal fundamental rights in a certain sphere that itself forms an independent and, from these aspects, more important legal interest than the right of an individual. For example, inviolability of a person or his or her good name may be blemished by acts that are performed in the sphere of administration of justice (false accusation and unlawful arrest) and that are incorporated in the chapter on offences against the administration of justice (§§ 170 and 174 of Chapter IX of the Special Principles of the Criminal Code). Personal integrity and health may be damaged by the excess of powers (§ 161<sup>1</sup>) that is a malfeasance, and others.

3. In between these two levels there are many other constitutional rights that, in essence, just emphasise the person's constitutional legal status and that are of importance from the aspects of protection in criminal law as person's **rights** as legal categories — the right to privacy, copyright, rights pertaining to one's profession, political rights and others.

The boundaries between these three levels are relative and depend on the systematics of the special part of the criminal code of an individual state. The catalogue of fundamental rights in itself proceeds primarily from two basic acts — the constitution of a state and the European Convention on Human Rights (hereinafter: "ECHR"). But hitherto the systematics of criminal law has not elaborated firm criteria for incorporating personal fundamental rights in the system of the special part of the criminal code. This means that the norms protecting the pertinent rights may be found in different chapters of the code.

### 3. Protection of Fundamental Rights in a Self-contained Chapter

#### 3.1. LAW IN FORCE

The valid Criminal Code contains a separate chapter that directly deals with personal rights — Chapter V of the Special Principles entitled "Offences Against the Person's Political Rights and Rights Pertaining to His or Her Profession". If we take paragraph 2c of the aforementioned classification as the basis, then we can say that most of the *corpora delicti* protecting fundamental rights are inserted in this chapter.

Constitutionally protected rights in the pertinent chapter of the Criminal Code and norms of criminal law corresponding to them can be classified in the following way: pursuant to the Criminal Code and the catalogue of fundamental rights in the Constitution of the Republic of Estonia (Chapter II entitled "Fundamental Rights, Freedoms and Duties").

1) Suffrage: Chapter II of the Constitution does not provide for such a fundamental right but it can be derived from §§ 1 and 56; §§ 131 (hindrance of the exercise of the right to vote), 132 (forgery of voting), and 1321 (defamation of a candidate) of the Criminal Code.

2) The right to inviolability of one's family and private life and the right to inviolability of the home: §§ 26 and 33 of the Constitution; §§ 133 (unlawful search or eviction), 133<sup>1</sup> and 133<sup>2</sup> (unlawful surveillance) of the Criminal Code.

3) The right to confidentiality of messages sent or received by commonly used means: § 43 of the Constitution; § 134 (the violation of confidentiality of messages sent or received by commonly used means) of the Criminal Code.

4) The freedom of criticism: the Constitution does not directly foresee it but it can be derived from §§ 41 (the freedom of opinions and beliefs) and 46 (the right to address agencies with petitions); § 134<sup>1</sup> (persecution of a person criticising someone or something) of the Criminal Code.

5) The right to secure work conditions: § 29(4) and indirectly also § 28 of the Constitution; §§ 135 (violation of occupational safety and health rules as a general *corpus delicti*), 206, 206<sup>3</sup> and 206<sup>4</sup> (violation of occupational safety and health rules in enterprises using dangerous technologies) of the Criminal Code.

6) The copyright: § 39 of the Constitution; Chapter XV of the Special Principles of the Criminal Code entitled "Offences Against Intellectual Property" (§§ 277-284).<sup>5</sup>

7) The freedom of religion: § 40 of the Constitution; § 138 (hindrance of the performance of a religious ceremony) of the Criminal Code.

#### 3.2. DRAFT CRIMINAL CODE

The draft uses here a double system (see also the aforementioned paragraph 2): the protection of rights stemming directly from human dignity is guaranteed by the *corpora delicti* contained in the chapter on offences against the person (Chapter V) and personal rights in a broader sense of the term are secured by a self-contained chapter (Chapter VI) entitled "Offences Against Social Rights". Chapter V embodies the following divisions: offences against life (Division I), offences against health (Division II), offences against honour (Division III), illegal abortion (Division IV), unlawful treatment of an embryo (Division VI), offences against liberty (Division VIII), offences against sexual self-determination (Division VIII) and



offences against the deceased (Division IX). Offences against social rights can be divided into offences against equality of rights (Division I) — instigation of social hostility and violation of equality of rights; violations of fundamental rights (Division II) — the *corpora delicti* embodied in it deal with the freedom of religion, confidentiality of personal data, freedom of assembly and association; offences against suffrage (Division III) — hindrance of the exercise of the right to vote, forgery of voting, purchase of a vote, deception of voting, hindrance of agitation and unlawful agitation.

#### 4. Protection in Other Chapters of the Special Principles of the Criminal Code

In addition to the rights and freedoms protected by a self-contained chapter, the following rights are protected as specific interests (see the aforementioned levels 2.1. and 2.2.):

1) equality of rights: § 12 of the Constitution; §§ 72 (instigation of national, racial, religious or political hatred or violence) and 72<sup>1</sup> (violation of equality of rights) of the Criminal Code;

2) the right of assembly: § 47 of the Constitution; § 76<sup>2</sup> (unlawful public meeting) of the Criminal Code;

3) the right to life: § 16 of the Constitution; §§ 100-106 (homicide and causing suicide) and 120 (illegal abortion) of the Criminal Code;

4) the right to personal integrity and health: § 18 and indirectly also § 28 of the Constitution; §§ 107-114, 119, 119<sup>1</sup>, and 119<sup>2</sup> (infliction of bodily harm, infecting with a venereal disease) of the Criminal Code;

5) sexual freedom: indirectly § 18 of the Constitution; §§ 115-118 (rape, sexual intercourse with a minor and other sexual offences) of the Criminal Code;

6) the protection of one's family and of a child: § 27 of the Constitution; §§ 121-124 (violation of maintenance liability, misuse of the guardianship right) of the Criminal Code;

7) the right to liberty and security of person: §§ 20 and 21 of the Constitution; §§ 124<sup>1</sup>-124<sup>3</sup> (unlawful taking of one's liberty and taking of hostages) of the Criminal Code;

8) the right to personal confidentiality: indirectly § 26 of the Constitution; §§ 128<sup>1</sup> and 276 2) (disclosure of professional secrets) of the Criminal Code;

9) the right to one's good name or honour: § 17 of the Constitution; §§ 129 and 130 (defamation and insult) of the Criminal Code;

10) the right to property: § 32 of the Constitution; §§ 139-145<sup>2</sup> or the entire Chapter VI of the Special Principles ("Offences Against Property") of the Criminal Code;

11) the right to healthy environment: § 53 of the Constitution; §§ 154<sup>3</sup>-158<sup>3</sup> (illegal felling of timber, illegal fishing, pollution of a water body and air and other

offences against environment) of the Criminal Code;

12) the right to protection against arbitrary action of an official: § 13(2) of the Constitution; §§ 161 and 161<sup>1</sup> (misprision) of the Criminal Code;

13) the right to fair trial: §§ 22-24 of the Constitution; §§ 168-171 (unlawful adjudication, unlawful arrest, compulsion to testify) of the Criminal Code;

14) the right to inviolability of one's dwelling: § 33 of the Constitution; § 195<sup>2</sup> (arbitrary trespassing on other people's room or fenced territory) of the Criminal Code.

#### 5. *De lege lata et ferenda* Protection of Specific Fundamental Rights

I am not going to analyse the entire system of protection of fundamental rights in criminal law because these problems would go beyond the scope of one article. I would rather try to analyse the protection of some rights with the aim to determine certain important tendencies that would help to characterise the development trends of the Estonian criminal law in the issue under discussion.

The Estonian Criminal Code currently in force stems basically from the 1961 Criminal Code of the Estonian Soviet Socialist Republic that was amended by the criminal law reform of 1992. Although the work on elaborating a new draft criminal code started immediately after that the entire text of the draft has been completed only recently.

##### 5.1. THE RIGHT TO LIFE

a) **An embryo as the bearer of human life.** In Estonia, artificial insemination and the protection of an embryo are regulated by the pertinent Act of 11 June 1997.<sup>6</sup> As to the protection of an embryo, the Act confines itself only to a pre-implantation or pre-nidation embryo — an embryo at the blastocyst stage of development — and the standpoint that we have to deal with an embryo as of the moment of the fertilisation of the ovum is taken as the basis (§ 3).

The legal protection of an *in utero* embryo can be equalised to the legal protection of human life and human dignity or at least it directly proceeds from it. But a pre-implantation embryo is a specific legal interest that is not equal to human life and the legal protection of which is not based on the existence of human dignity. An embryo becomes the bearer of human dignity after its implantation since when an embryo is at the specific stage of development and develops as a specific person. The Embryo Protection and Artificial Insemination Act does not regulate the protection of an embryo at the latter stage because the storage of an *in vitro* embryo for more than 14 days is forbidden (§ 34). But *in utero* foetus is legally protected by the abortion rules and corresponding provision of the Criminal Code (see paragraph 5.1.b).

By the implementation provisions of the Act two pertinent *corpora delicti* were inserted into the Criminal Code.



§ 120<sup>1</sup> of the Criminal Code establishes the responsibility for the transfer of the ovum or the resulting embryo to the woman that is performed contrary to the Embryo Protection and Artificial Insemination Act as well as the responsibility for the private mediation of the corresponding transfer; § 120<sup>2</sup> criminalises the forbidden procedures: sex selection, cloning, the creation of chimeras and hybrids.

Pursuant to the new draft Criminal Code the corresponding offences form a self-contained division (Division VI entitled “Unlawful Treatment of Human Embryo”) in Chapter V dealing with offences against the person. In addition to the aforementioned procedures, the damaging and maltreatment of an embryo (the creation of an embryo without the aim of transferring it to a woman, and ectogenesis) are also criminalised.

**b) Illegal abortion and the protection of life in criminal law.** Consideration of illegal abortion as an offence against life reveals the author’s opinion but that is not in compliance with prevailing law dogmatics. The pertinent provision is placed in the chapter on offences against the person (§ 120 of the Criminal Code) but Soviet criminal law dogmatics regarded it mostly as an offence **endangering** the woman’s life or health. Different opinions on the object of abortion have been expressed in legal literature mentioning, in addition to the life and health of a woman, also a foetus, pregnancy as the process of genesis and development of human life, increase in population, health of the contemporary and future generations and others as objects of abortion.<sup>7</sup> For example, in the Criminal Code of the former DDR the *corpora delicti* of abortion were placed in Chapter IV (“Offences Against Minors and the Family”) of the Special Part. This position was grounded by the assertion that in so far as abortion is not directed at a living human being but at the life that is only coming into being then the pertinent offence prejudices primarily the interests of the future generations.<sup>8</sup>

The issue of abortion itself is at present regulated by the Abortion and Sterilisation Act that is based on a so-called time limit version allowing abortion by a woman’s own wish until the 12th week of pregnancy if no medical contraindications exist, and in the 12th-20th week of pregnancy if the pertinent indications are present.<sup>9</sup> It should be mentioned that the 1996 Criminal Code of the Russian Federation is also based on the hitherto existing regulation and § 124 thereof does not essentially differ from its predecessor whereat the object of an offence is claimed to be the woman’s health.<sup>10</sup>

The *corpus delicti* of illegal abortion contained in the valid Estonian Criminal Code is based on the new Abortion Act (i.e. on the time limit version). Abortion is illegal and criminally punishable if it is performed later than prescribed (§ 120(1)) or by a person who has no right to perform it (§§ 120(2) and (3)). New provisions foresee

responsibility for the termination of pregnancy contrary to the will of a pregnant woman (§ 120(4)) as well as for sterilisation contrary to the will of a person (§ 120(5)). The principle that a woman herself is not responsible for illegal abortion is retained.

Generally the same regulation is retained in the draft Criminal Code in which illegal abortion forms a separate division (Division V) in the chapter on offences against the person (Chapter V). However, the draft Code establishes that a woman herself is also responsible for allowing the abortion. The author of the latter chapter in draft Code is of the opinion that in the case of malicious abortion, i.e. against the woman’s will, two legal interests are attacked — the right of a woman to have a baby and the right of a foetus to life. If the pregnancy is terminated at the woman’s will, but at the same time illegally and the duration of pregnancy is not more than 20 weeks then on the assertion (in my opinion on a very disputable assertion) of the author of the draft it is not an offence against the life of a foetus but against the health of a woman; in this case, as regards the foetus, its dignity or more precisely its right to die with dignity can be seen as the injured interest. But if a pregnancy of more than 21 weeks is terminated then we have to deal with the offence against the life of a foetus.<sup>11</sup>

According to the draft, sterilisation against the person’s will is not regarded as a *delictum sui generis* but as an act in the *corpus delicti* of unlawful medical treatment contained in the division pertaining to offences against liberty (Division VII of Chapter V).

## 5.2. THE RIGHT TO LIBERTY

Subsection 20(1) of the Constitution of the Republic of Estonia establishes the right to liberty and security of the person. Security of the person protected in criminal law means here only general security that is based on the aforementioned subsection of the Constitution — the right to liberty and security of the person. Other freedoms are protected in criminal law by the provisions incorporated in other chapters of the Special Principles of the Criminal Code. For example, sexual freedom is protected by the *corpus delicti* of rape and other sexual offences (§§ 115-118), the freedom of religion by the *corpus delicti* of § 138 (hindrance of the performance of a religious ceremony) and others.

Security of the person in the aforementioned meaning denotes a natural quality constituting the personal character of a human being to determine and control oneself.<sup>12</sup> Liberty as a legal interest must be interpreted as a social (although not a collective) interest — a so-called inter-social interest — differently, for example, from life as a **trans-social** interest the essence of which does not depend on social context and the protection of which is practically **absolute**. Thus, liberty as an interest must be interpreted as one the essence of which is comprehensible only in the social context and the protection of which is **relative** — freedom cannot be absolute because it can be realised only

in so far as it does not invade freedoms of other people.<sup>13</sup> Section 19 of the Estonian Constitution also states: “Everyone shall honour and consider the rights and freedoms of others ... in exercising his or her rights and freedoms ...”.

But this definition is too broad and therefore does not directly enable definition of a legally protected interest in criminal law. Rather, the broad definition can be regarded as a starting point or basic notion for the subsequent specification of the legal interest.

For the specific definition of a legal interest one must distinguish different aspects of security of person that give rise to different classifications. One of these aspects is the determination of freedom as **the general independence of person and as the freedom of movement**.<sup>14</sup> The first group would comprise, for example, kidnapping or deportation (compare §§ 234, 234a of the German Criminal Code), pursuant to the Estonian Criminal Code - threatening (§ 128), and pursuant to the draft Criminal Code - enslaving and conveying a person to the State that restricts security of person. The second group would contain the taking of the person's freedom of physical movement - his or her detaining, confinement into a closed room, also taking of hostages (§ 239 of the German Criminal Code; §§ 124<sup>1</sup> and 124<sup>2</sup> of the valid Criminal Code and similar *corpora delicti* in the draft Code). It should be mentioned that in existing criminal law the *corpora delicti* pertaining to security of the person are placed in the chapter on offences against the person while in the draft Criminal Code they form a separate 7th division (“Offences Against Liberty”) within that chapter.

### 5.3. PROTECTION OF THE FAMILY AND CHILDREN

**a) Offences against the family.** The right to the protection of the family and a child is embodied in § 27 of the Constitution. The Criminal Code currently in force does not contain a chapter on offences against the family, individual *corpora delicti*, such as a failure to perform alimony obligations (§§ 121 and 122) and abuse of guardianship or curatorship rights (§ 123), can be found in the chapter dealing with offences against the person (Chapter IV of the Special Principles).

But the draft Criminal Code incorporates a self-contained 7th chapter entitled “Offences Against the Family and Minors” the first division of which is entitled “Offences Against the Family” including, similarly to the existing law, the *corpora delicti* of the violation of maintenance obligation and abuse of curatorship rights. A novel *corpus delicti* is that of changing the relation of a child to his or her family — substitution of a child for another in order to get a false family relation or deprive someone of his or her family relation. Chapter VII also embodies the *corpus delicti* of stealing someone else's child. Consequently, it is presumed that the latter is the offence

against the family, not against the child.

**b) Offences against a child.** Offences against a child as a type of offence do not mean causing harm to a concrete child because in this case it would be the offence against the person, for example homicide. The prejudiced interest includes the child's status in family law as well as the parents' rights and duties to their child in family law.

These offences include the following *corpora delicti*: kidnapping of a child, abuse of family rights or parental power, or failure to perform custodian duties and others. Conditionally it could also include the failure to pay maintenance. For example, although the kidnapping is placed in Chapter XVIII (entitled “Offences Against Security of The Person”) of the Special Part of the German Criminal Code, then generally the freedom of a child (a baby and an infant practically do not have it and due to incapacity or restricted legal capacity the freedom thereof is legally restrained) is not considered the interest prejudiced by this offence. Instead, custody (*Sorgerecht*) and parental rights (the right of parents to legally and actually bring up their child) are regarded as the interest.<sup>15</sup>

In the valid Estonian Criminal Code there are two *corpora delicti* connected with the pertinent type: purchase or buying of a child (§ 123<sup>1</sup>) and substitution or stealing of a child (§ 124). As it has been mentioned, the failure to pay maintenance (§ 121) can conditionally be within this type as well as the abuse of guardianship and wardship rights (§ 123) in case these rights are abused with regard to the child. But the status of pertinent persons in family law (the corresponding rights) is the one that constitutes the legal interest attacked by these acts. The Supreme Court is also of the opinion that stealing of a child and kidnapping are different offences that attack different legal interests.<sup>16</sup>

The draft Criminal Code does not contain the above-mentioned group of offences. The pertinent *corpora delicti* are embodied either in the division pertaining to offences against the family or in the one pertaining to offences against a minor.

**c) Offences against a minor.** It is arguable whether there is such a type of offence at all in the meaning of the system of the Special Principles of the Criminal Code. Many offences may be directed against a minor whereat mostly some other interests are attacked and not a minor as such. For example, although **sexual** offences against a minor are directed against his or her normal development, still more important here is its direction against sexual development and in certain cases also against the sexual freedom of a minor.

The same applies, for example, to offences involving narcotics and pornographic offences. With regard to these offences, although they prejudice the normal development of a minor, another interest is more important — in the case of offences involving narcotics it is the health of the people, in the case of pornographic offences it involves moral

bases of the society and mental freedom of a person.

Nevertheless, for example in the case of pornographic offences and prostitution there is a clear tendency to connect these *corpora delicti* with the need to protect a minor. If this is taken as the basis then we do not have to deal, for example, with a pornographic offence in the meaning of the systematics of the Special Principles of the Criminal Code but with an offence against a minor.

Existing law is familiar with the following *corpora delicti*: involving a minor in a crime and prostitution (§ 202), inducing a minor to use a narcotic substance (§§ 202<sup>2</sup> and 202<sup>4</sup>) and *corpora delicti* that are connected with exploiting a minor in creating or distributing a pornographic work (so-called child pornography, §§ 200, 200<sup>3</sup>). All the aforementioned *corpora delicti* are situated in Chapter XI of the Special Principles of the Criminal Code entitled “Crimes Against the Public Order and Social Safety”. This very comprehensive and eclectic chapter reveals that the system of the Special Principles has been insufficiently elaborated in existing criminal law.

The Special Principles of the draft Criminal Code embody a self-contained chapter (Chapter VII) entitled “Offences Against the Family and a Minor”, whereat Division II of this chapter pertaining to minors is entitled “Offences Against Normal Social Adaptation of a Minor”. It should be mentioned that pornographic offences in the meaning of the draft Code are only the ones that are directed against a minor and included in the aforementioned division. The same position holds true to prostitution offences but here the draft Code makes one exception by incorporating one more *corpus delicti* in Division II (“Offences Against the Public Order”) of Chapter XII (“Offences Against Public Peace”) — the *corpus delicti* of enabling illegal activities by which the Code prescribes responsibility for the provision of rooms for the illegal use of narcotic substances, for illegal gambling and for prostitution.

#### 5.4. PROTECTION OF HONOUR IN CRIMINAL LAW

**a) Honour as a fundamental right.** Constitutional quality can be attributed to honour on two legal grounds — directly and indirectly. § 17 of the Estonian Constitution protects the person’s honour (no one’s honour and good name shall be defamed). Pursuant to article 10 of the ECHR freedom of expression may be restricted for the protection of the **reputation** of others. From this it can be derived that a good name or honour is a fundamental right in the meaning of both the ECHR and the Constitution of the Republic of Estonia.

Another way to consider honour as a fundamental right is to derive its quality from the notion of human dignity. Consequently, honour as a fundamental right is under protection as a part of human dignity. Human dignity as a fundamental right can be derived from § 10 (the rights set out in the Constitution do not preclude other rights that

conform to human dignity) and § 18(1) (no one shall be subjected to degrading treatment) of the Estonian Constitution.<sup>17</sup>

Thus, honour like other fundamental rights can essentially be derived from human dignity. But honour is merely one part of human dignity, an attribute belonging to the person and guaranteeing the person’s right to his or her good name.

**b) Factual and normative notion of honour.** As is known, the factual notion of honour is determined by two aspects of honour — by its internal and external aspects. In the first case honour means a **sense of honour**, self-dignity; in the second case — one’s good name, the reputation as it actually exists in the opinion of the holder of honour or other people. The Estonian Criminal Code currently in force is also based on the factual notion of honour — § 129 (defamation) protects external honour (dignity) or factual honour or honour in the objective sense of the term, while § 130 (insult) protects internal honour or the sense of honour (or honour in the narrower sense of the term) or honour in the subjective sense of the term.<sup>18</sup>

The normative notion of honour is based on the presumption that the person’s honour can be analysed from two aspects, namely, firstly, from **dignity of person** (derived in its turn from human dignity), and secondly, from the person’s moral and social behaviour. A justified claim of any person for the recognition and consideration of his or her dignity stems from these two factors. The person has the right to **demand** or presume that he or she **be estimated** in the way that he or she, on the basis of human dignity and his or her previous moral and social behaviour, i.e. he or she as a member of the society, **deserves**.<sup>19</sup> In Estonian criminal law and court practice the normative notion of honour has not rooted yet.<sup>20</sup>

**c) Existing law and the draft Criminal Code.** The valid Criminal Code contains two *corpora delicti* to this effect — defamation (§ 129) and insult (§ 130) — embodied in the chapter on offences against the person. The draft Code retains these *corpora delicti* placing them into a separate chapter — Chapter IV entitled “Offences Against Honour”. But differently from existing law the characteristics of these *corpora delicti* have been amended. Defamation is no longer “dissemination of deliberately false and discreditable fabrication on a person” but “publication of a fact prejudicing person’s rights or reputation, the non-veracity of which the offender was aware of”. Thus, “prejudicing person’s rights or reputation” substitutes the expression “discreditable”. Reprehensibility of the published data need not always be of importance from the injured person’s point of view. The publication of morally absolutely neutral false data on a person may also seriously damage him or her.<sup>21</sup>

Insult is not any more just “demeaning of one’s honour and dignity” but “vilification” which may include the

revelation of imperfection of person's appearance or character, aggressive and by-all-means criticism of his or her activities, deprecation of the profession and others.<sup>22</sup>

The protection of the deceased in criminal law is generally recognised. In many states this question is resolved by different *corpora delicti* (§ 189 of the German Criminal Code, *Rikoslaki* § 27:4). Pursuant to the interpretation of § 129 of the Estonian Criminal Code, the issue is covered by the *corpus delicti* of defamation.<sup>23</sup> The draft Criminal Code dedicates to the problem even a separate division in the chapter on offences against the person (Division IX entitled "Offences Against the Deceased") and foresees three *corpora delicti*: maltreatment of the corpse, disgracing the memory of the deceased, and illegal removal of cadaver organs with the aim of transplantation. The *corpus delicti* of disgracing the memory of the deceased is formulated as the hindrance of the performance of funeral ceremony, grave robbing or robbing of other last resting place or theft of an object thereof. Thus, it cannot be precluded that the act directed against the honour of the deceased may be qualified also in accordance with the *corpora delicti* of Division IV of the draft Code.

In legal literature it is widespread to consider a legal person as the holder of honour and, consequently, as the injured person. Although the notion "honour" is defined through human dignity, it has been expanded to cover legal persons on the grounds that the activities of legal persons are also socially assessed and this includes moral aspects - "they can operate normally only because they are not discredited".<sup>24</sup>

The German Criminal Code refers to the legal person's protection of honour in criminal law in §§ 194(3) and (4) that pertain to persons who are entitled to sue. The commentaries to the Estonian Criminal Code exclude this possibility.<sup>25</sup> Recently it has been alleged in legal literature that it is not possible to consider the prejudice of honour of a legal person as a crime.<sup>26</sup> As far as the draft Criminal Code foresees criminal responsibility of a legal person and stresses thereby the capacity of a legal person it can be assumed that the theory and court practice will begin to recognise a legal person as the person who has its honour.

## Notes:

<sup>1</sup> J. Peglau. Der Schutz des allgemeinen Persönlichkeitsrechts durch das Strafrecht. Frankfurt/M, 1997, p. 26 ff.

<sup>2</sup> Põhiõiguste süstematiseerimisest Eesti õiguses ja õigusteaduses. (On Systematisation of Fundamental Rights in Estonian Law and Jurisprudence.): R. Maruste. Põhiseadus ja selle järelevalve. (Constitution and its Review.) Tallinn, 1997, pp. 75-76; K. Merusk, R. Narits. Eesti konstitutsiooniõigusest. (On Estonian Constitutional Law.) Tallinn, 1998, pp. 172-189.

<sup>3</sup> Peglau, p. 6. Another position: E. Kergandberg. Au ja väärikus: kriminaalõiguslik kaitse. (Honour and Dignity: Protection in Criminal Law.) Report in a seminar of the Supreme Court. Tartu, 1998, p.1.

<sup>4</sup> Eesti Vabariigi Põhiseaduse eesti- ja inglisekeelne paralleeltekst. (Estonian and English Parallel Text of the Constitution of the Republic of Estonia.):

Republic of Estonia. Constitution. Tallinn, 1993.

<sup>5</sup> Inserted in the Criminal Code by the Act of 21 January 1999. — RT (Riigi Teataja = State Gazette) I 1999, 10, 156.

<sup>6</sup> RT I 1997, 51, 824. Q.v. for details: J. Sootak, M. Kurm. A Wish to have a Baby and the Dignity of the Child and Embryo. — European Journal of Health Law 1998, 5, 191 ff.

<sup>7</sup> E.g.: M. Shargorodski. Prestupleniya protiv zhizni i zdorovya. Moscow, 1948, p. 412 ff.

<sup>8</sup> Strafrecht der Deutschen Demokratischen Republik. Kommentar zum Strafgesetzbuch. Berlin, 1987, § 153, Komm 1.

<sup>9</sup> RT I 1998, 107, 1766.

<sup>10</sup> Novoye ugolovnoe pravo Rossii. Osobennaya tshast. Moskva, 1996, p. 56.

<sup>11</sup> Karistusseadustik. Eelnõu. Seletuskiri (Criminal Code. Draft. Explanatory Note) (M. Kurm), p. 35. Not published; manuscript is in the Department of Criminal Law of the Ministry of Justice of the Republic of Estonia

<sup>12</sup> R. Maurach, F. C. Schroeder, M. Maiwald. Strafrecht. Besonderer Teil. Tb. 1. 7. Aufl. Heidelberg, 1988, p. 123.

<sup>13</sup> A. Schönke, H. Schröder. Strafgesetzbuch. Kommentar. 25. Aufl. München, 1997, Vor § 234, Rn 2.

<sup>14</sup> Q.v. for details: F. Küper. Strafrecht. BT. Definitionen und Erläuterungen. München, 1996, pp. 86-88.

<sup>15</sup> Q.v. also: Strafgesetzbuch und Nebengesetze (Dreher/Tröndle). 46. Aufl. München, 1993, § 235, Rdn. 2.

<sup>16</sup> On the notion of "stealing of a child" (as to its differences from traditional theft) and its distinction from hostage taking and blackmail, q.v.: Riigikohtu lahendid. (Decisions of the Supreme Court.) 1997, 63. On stealing of a child, q.v. also: Eesti NSV Kriminaalkodeksi. Kommenteeritud väljaanne. (Criminal Code of the Estonian SSR. Commentaries.) Compiled by I. Rebane. Tallinn, 1980, commentaries on § 124.

<sup>17</sup> The Estonian legal literature accepts honour as a fundamental right. Q.v. for example: T. Sild. Kuriteod au ja väärikuse vastu. (Crimes Against Honour and Dignity.) — Juridica 1997, No. 9, p. 450; E. Kergandberg, pp. 1-2.

<sup>18</sup> This is also stressed in the commentaries to the Criminal Code: Criminal Code (Rebane), § 129, commentary 2a.

<sup>19</sup> Q.v. for example: F. Küper, p. 71; H. J. Hirsch. Grundfragen von Ehre und Beleidigung. — Festschrift für E. A. Wolff. Springer, 1998, p. 125 ff.

<sup>20</sup> This question also remains open in the chrestomathic Tammer case. Q.v.: Riigikohtu lahendid. (Decisions of the Supreme Court.) 1997, 115.

<sup>21</sup> Karistusseadustik. Eelnõu. Seletuskiri. (Criminal Code. Draft. Explanatory Note.) (M. Kurm), p. 34.

<sup>22</sup> Kurm, p. 35.

<sup>23</sup> Criminal Code (Rebane), § 129, commentary 2a.

<sup>24</sup> Küper, pp. 46-48.

<sup>25</sup> Criminal Code (Rebane), § 129, commentary 2b.

<sup>26</sup> T. Sild, p. 452.





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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).<sup>1</sup>

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.<sup>2</sup> 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.<sup>3</sup> 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.<sup>4</sup> 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.<sup>5</sup>

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.<sup>6</sup>

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".<sup>7</sup> 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".<sup>8</sup> 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.<sup>9</sup> I have not heard of any “legal-national” agreement acknowledging the primacy of international treaties over the Estonian Constitution.<sup>10</sup>

**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.<sup>11</sup> 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.”<sup>12</sup> 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.”<sup>13</sup> 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.<sup>14</sup> 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.<sup>15</sup> 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.”<sup>16</sup> 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.”<sup>217</sup> 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.<sup>18</sup> 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”).<sup>19</sup> In R. Narits’s opinion (and evidently to a certain extent relying on Robert Alexy’s ideas<sup>20</sup>) 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)).<sup>21</sup> The general protection-right is defined as “the universal right to be protected by the state against the attacks of other persons”.<sup>22</sup> R. Narits also states that “the general protection-right is aimed at the protection of all the interests provided by the Constitution”.<sup>23</sup> 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.<sup>24</sup> 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.<sup>25</sup> 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.<sup>26</sup>

#### 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”<sup>27</sup> 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”.<sup>28</sup> 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<sup>1</sup>, §§ 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.<sup>29</sup> 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. § 77(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 § 77 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 § 77 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:

<sup>1</sup> 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.

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

<sup>3</sup> Ibid.

<sup>4</sup> Ibid., p. 60.

<sup>5</sup> Ibid., p. 61.

<sup>6</sup> Ibid., p. 156.

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

<sup>8</sup> 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.

<sup>9</sup> Ibid., p. 77.

<sup>10</sup> 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.

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

<sup>12</sup> Ibid., pp. 179-180.

<sup>13</sup> M. Ernits, supra note 10, p. 464.

<sup>14</sup> Ibid., p. 470 footnote 7.

<sup>15</sup> 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.

<sup>16</sup> R. Maruste, supra note 8, p. 112.

<sup>17</sup> K. Merusk, R. Narits, supra note 11, p. 178.

<sup>18</sup> M. Ernits, supra note 10, pp. 465-467.

<sup>19</sup> 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.

<sup>20</sup> 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.

<sup>21</sup> K. Merusk, R. Narits, supra note 11, p. 184.

<sup>22</sup> Ibid., p. 185.

<sup>23</sup> 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.

<sup>24</sup> 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.

<sup>25</sup> 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.

<sup>26</sup> C. Roxin Strafverfahrensrecht. — München: Beck, 1991, p. 408.

<sup>27</sup> 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*").

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

<sup>29</sup> 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 ACCCPC, 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.





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# On the Possible Role and Status of the Defender in the Future Estonian Criminal Procedure

In view of the forthcoming reform in the Estonian criminal procedure, a principal discussion is necessary, amongst other things, on the role and status of the defender in the criminal procedure.

## **1. Choice of a New Model for Criminal Procedure in the Context of the Defending Function**

An important aspect to be considered when establishing a new order for criminal procedure is the guaranteeing of subject status for the suspect, the defendant and the accused, and the strengthening of their subject status through the right of defence. Attention should also be paid to the fact that the reform acts and draft acts of European countries concerning criminal procedure are aimed at strengthening the defendant's subject status.<sup>1</sup>

It cannot be said that according to legal regulation of the inquisitorial criminal procedure currently in force in Estonia, the suspect, the defendant and the accused are in the status of an "object" in the procedure. It would also be a mistake to believe that the subject status of these persons couldn't and shouldn't be strengthened in the future.

A principal decision to the benefit of one or another model of procedure should be made from the premise that the specific weakness of our inquisitorial procedure is in the fact that the investigating court leading the procedure

may be impartial to the disadvantage of the accused and the accused may be viewed as an "object", not a subject of the procedure.<sup>2</sup> The tendency to view the suspect or the defendant as an "object" rather than a subject may be clearly revealed already in the pre-court procedure stage.

Considering the above, solutions have to be found in choosing a procedural model and in its specific essential designing, which help to prevent the above shortcoming as much as possible.

When speaking about strengthening the subject status of the suspect, defendant and accused, it should naturally be taken into account that an optimum balance should be reached between public and private interests.

Criminal procedure law must, on the one hand, enable the guilt of the defendant to be established and implement the state's obligation to punish. On the other hand, legal regulation has to guarantee that an innocent person is not sentenced guilty and the rights of a person are limited as little as possible through the procedure.<sup>3</sup>

A certain conflict in the criminal procedure between public interests and the private interests of the suspect, defendant and accused is, and probably will be, inevitable. It is therefore all the more important that the order for criminal procedure provide good grounds for the realisation of fair procedure.

An inevitable element of a fair procedure is that the participants are not objects of the procedure, but have a

chance to defend their rights to influence the course and result of the procedure.<sup>4</sup>

According to the fairness principle, equal opportunities must be guaranteed for the prosecutor and the defendant in the criminal procedure (in German special literature, *Waffengleichheit*).<sup>5</sup> These opportunities, however, do not imply equal rights, but a balancing of these, taking into account the difference in procedural roles.<sup>6</sup> Since in the criminal procedure of a state governed by the rule of law, an accused is defined as a procedure subject “able for dialogue”, he must have a clear understanding of the meaning of his behaviour in the context of substantive and procedure law. The accused (as well as the suspect and the defendant) must understand his procedural situation.<sup>7</sup>

The criminal procedure can be called a fair procedure only if the rights of the suspect, defendant and accused to essentially contribute to the procedure and prevent the misuse of state power are not merely laid down on paper, but if such persons are able to exercise them effectively.<sup>8</sup>

As a rule, the suspect, defendant and accused do not know their procedural rights and their exercise of these rights is difficult without the help of an expert (defender).

The suspect, defendant, and accused, who know their case only from their subjective viewpoints, can defend themselves only in a dilettantish way, and are not able to achieve a full subject status in the procedure.<sup>9</sup> Due to the defendant's lack of understanding of the procedure, and caused by his partiality, his inability to turn the weaknesses in the accusation to his benefit, it is necessary that the defender help him with advice so that the defendant (accused) may be a serious opponent to the prosecutor.<sup>10</sup>

The defender can perform his function the more effectively, the more the principle of guaranteeing equal opportunities for the prosecutor and the defender has been followed in establishing the order for procedure.

The principle of equal opportunities does not require that the procedure-specific differences in the role distribution of the prosecutor and defender be levelled off in all respects. The principle does, however, require that more or less equal rights be provided for all litigating parties to make their impact within the procedural framework.<sup>11</sup>

The actual degree of the prosecutor's and defender's equal opportunities much depends on the specific procedural structure.

Let us ask now against the background of the above, which is more preferred from the aspect of equal opportunities — the continental European inquisitorial model, or the Anglo-American accusatorial model of criminal procedure?

As we know, the defending of human rights in a criminal procedure much depends on whether each defendant (suspect, accused) in each criminal proceeding is equipped with a well-taught, effective and “equal-with-the-prosecutor” defender or not. In the case of accusatorial procedure, it is chiefly up to the suspect, defendant and accused to

defend themselves.<sup>12</sup> Contradiction is essential to this type of procedure. The presentation and investigation of evidence is the duty of the parties. The parties govern the procedure and may dispose of the object of procedure by dropping the charge.<sup>13</sup>

Thus, when the defender, in an accusatorial procedure, is for some reason relatively ineffective, the suspect, defendant and accused are likely to remain without real protection.

The inquisitorial procedural structure suggests, at first glance, that the shortcomings in the defence are compensated for by the objectivity of the prosecutor and the active participation of the court in clarifying the truth. It should be said though that the effectiveness of the latter is limited in compensating for weaknesses in the defence.

Namely, the objectivity of the prosecutor, in its real form, cannot be of much help from the aspect of defending the defendant. This is supported by the experience that in the continental criminal procedure, the main question of the prosecutor's status is if and how one person can psychologically contain a prosecutor (as an inevitably one-sided performer) and an objective investigator.<sup>14</sup>

Help from the judge may also often prove to be questionable from the aspect of defending the accused. The joining of two procedural roles (investigator and adjudger) in one person — the judge — is another case of psychological overload, due to which his impartiality may suffer.<sup>15</sup>

The role of the court in compensating for shortcomings in defence may be effective only in the sense that the court has to stand for the exercise punishing power of the state in accordance with the provisions of law. This duty of the court, of course, may be viewed as a defence aspect for the accused.

So, if one is to presume that the duty of the defender is merely to stand for the exercise of the punishing power of the state in accordance with the provisions of law, then, considering that this is also the duty of the court, it may indeed be concluded that the court can, through its activity, compensate for shortcomings in the defence.

We must, however, admit that such an approach to the defence duty would limit the defence to presenting only the evidence which lightens or relieves the defendant of guilt, and would therefore cover only one aspect of defence. As a result of such a limitation, the defence would be a mere control instance. Such an approach would deny defence as the institution of the criminal procedure in which the autonomy of the defendant is realised and in which his subject status is founded.<sup>16</sup>

While stressing the need to realise the autonomy of the suspect, defendant and accused in the criminal procedure and to strengthen their subject status, it is not essentially correct to view the judge as the performer of defence as an independent duty, especially if we proceed from the position that a judge might not be related to the investigation principle in the future Estonian procedure.

Taking into account the rather largely acceptable need to increase the accusatorial element in our criminal procedure, the activity of the court in collecting evidence should be considerably reduced when compared to the present situation.<sup>17</sup> The complete detachment of the judge from collecting evidence would, however, contradict our established legal tradition.<sup>18</sup>

The fact that the Estonian legal order has belonged and belongs now to the continental European legal system,<sup>19</sup> suggests that it would not be justified to reform the Estonian criminal procedure entirely based on the model of Anglo-American accusatorial criminal procedure. This does not imply, however, that the share of accusatorial elements should not be increased in reforming our criminal procedure.

For example, to improve the communication structure of the criminal procedure, cross-examination could be introduced, which would free the judge from the role of active examiner and provide for a better balance in the communication situation. It seems that such a balance might imply a certain increase in the defender's chances of being effective within the procedural structure framework.

## 2. The Defender as a Guarantor of the Subject Status and Autonomy of His Mandator and a Representative of Public Interest

From the aspect of increasing the defence of private interests and strengthening the subject status of the suspect, defendant and accused, it should be considered when determining the legal status of the defender, whether components of public interest should be taken into account, or should the defender only be a representative of the private interests of the defendant.

As an important prerequisite for subject status is the guaranteeing of a certain autonomy of decision for a person, the question here is mainly about which legal status to the defender's function is the most in line with the "autonomy principle". If the importance of the autonomy principle in the criminal procedure is basically recognised, then the content and scope of that autonomy should be determined. Different opinions about autonomy can be found in special literature. According to the usual approach, "autonomy principle" in the criminal procedure means that the defendant, who as a rule knows best how his defence should be carried out, must freely and without pressure from the state decide how he wishes himself to be defended.<sup>20</sup> In his autonomy studies, J. Welp speaks about the self-defined procedural interest of the defendant,<sup>21</sup> whereas the defender, who defends the particular (private) interests of the defendant, is not an institution of legal protection (*Organ der Rechtspflege*), but a representative of interests.<sup>22</sup> As regards the public function of the defender, then

according to J. Welp, public interest for defence exists only insofar as this may reduce the risk of an incorrect proceeding result.<sup>23</sup> According to J. Welp, the conditions for a fair judgement should be placed outside of defence. The task of fair judgement should be achieved though the judge's being bound by the instruction maxim and the prosecutor's obligation to be objective. From the objective of procedure aspect, defence is not an essential function for achieving a fair judgement, but it is an additional guarantee for the defendant to handle his case himself as a procedure subject and exercise his right to interfere if the procedure threatens to ignore the requirements established for it.<sup>24</sup>

J. Welp's approach is based on the understanding that the mandator's trust is the factor that determines the effectiveness and quality of defence. The legal form in which the trust interest is realised is a free choice.<sup>25</sup> In this respect, J. Welp sees a certain danger to the defendant in the form of an obligatory defender. J. Welp believes that the obligation for defence is a partial ignoring of the defendant's autonomy.<sup>26</sup>

When looking at J. Welp's autonomy theory in the context of the future Estonian criminal procedure, it should be noted that the more accusatorial elements this procedure will include, the less J. Welp's approach can be used. It is not correct, in a criminal procedure with accusatorial elements, to proceed from the understanding that the prerequisites for a fair judgement be placed outside of defence. The accusatorial aspect of criminal procedure, by requiring a rather active role of the defender, provides an essential function for defence in reaching a fair judgement.

Although J. Welp's approach which stresses the autonomy of the defendant is remarkable and acceptable, one must also agree with the theoretical counterarguments found in specific literature, according to which the autonomy principle developed by J. Welp is "idealistic", i.e. autonomy seems to dominate where actually ignorance, overestimation of oneself, helplessness and fear, dependence and force prevail, which direct and block the seemingly autonomous decision making.<sup>27</sup> According to B. Haffke, a state governed by the rule of law should take into account the helplessness of the parties in a legal system which is increasingly complicated and of which they, as a rule, have no comprehensive understanding. Therefore, to empirically enable autonomous decisions at all, preconditions should be created for taking such autonomous decisions.<sup>28</sup> K.-H. Vehling has correctly noted that we cannot speak about equality of rights in a procedure where the defendant is ignorant in law. He is not autonomous in the procedure, but suffers an "autonomy deficit". According to K.-H. Vehling, the essence of the defendant's autonomy is actually in the social meaning of punishment regardless of the state's evaluation. As such evaluation is not possible due to the lack of the defendant's knowledge of law, he needs help, which he receives from a professional defend-

er. Criminal defence, including obligatory defence, thus serves to compensate for the above mentioned autonomy deficit, and stands for equal opportunities in the criminal procedure.<sup>29</sup>

The paradox that may arise here is that the defender, helping to guarantee the defendant's autonomy, may also limit that autonomy. Yet, it is that limitation to the autonomy which enables the defender to apply, for example, for a psychiatric examination of the defendant even if the defendant himself does not deem it necessary. Thus, by limiting the defendant's autonomy, the defender can achieve the declaring innocent of the defendant even if the latter has unfoundedly pleaded guilty.

The defendant should be left an independent and, to a certain extent, independent of the mandator, procedural role in the future Estonian criminal procedure. He must have the opportunity to sometimes go against the defendant's will, which does not mean ignoring the basic priority of the defendant's interest. But, when recognising the priority of the mandator's interest, it should be pointed out that the extensive recognition of the mandator's interest by the defender and also his autonomy may lead to the unfounded conviction of the mandator.

The unfounded conviction of a person, however, is a violation of human dignity. Thus, when the defendant threatens, by his decisions, to leave his dignity to his fate, the defender should be entitled and obliged to not regard the will of his client and take countermeasures. G. Heinicke has strikingly called it autonomy limited by human dignity.<sup>30</sup>

The defender's function should therefore be more than just defending the private interests of the mandator as defined by the mandator. The defender's function in a criminal procedure should be to defend, besides the mandator's private interests, his fundamental rights against violation by the state.

If we proceed from the premise that fundamental rights are not only individual rights (to be exercised privately) to defend against violation by the state, but also elements of an objective state order, then the defender, by standing for the mandator's fundamental rights, also guarantees state order.<sup>31</sup> Here the important public function of the defender is revealed.

### 3. The Defender's Obligation of Truth

The defining of the defender's procedural role and status is closely related to whether and to what extent the defender should be bound by the obligation of truth.

In these theoretical opinions, in which the defender is seen as a one-sided representative of interest, the defender is usually rendered so dependent on the mandator's orders that he is more or less granted the right to lie.<sup>32</sup>

It should, however, be mentioned that the most impor-

tant counterargument against such theoretical opinions is that the advocates to such theories grant the defender a certain degree of the right to lie.<sup>33</sup> If we proceed from the principle that the defender as the defendant's adviser is not only entitled, but obliged to be one-sided to the defendant's benefit, one can indeed at first glance reach the conclusion that everything which the mandator objectively needs or which, according to the defender's understanding, improves the defendant's situation, is allowed. One may thus assume that the defender's helping and repeating of the mandator's false statements is allowable or even recommended. Such an approach could naturally only be considered if the defender is seen as merely standing for the defendant's private interests. But if we also consider the public law aspects of the defender's activity, then proceeding from procedure law and the principles of professional ethics, the defender's activity in defending the defendant's private rights should be somewhat more limited. Such limits should certainly include the defender's obligation of truth, which chiefly implies a prohibition to lie.

If the advocate's word is no longer trusted, justice will be at great loss.<sup>34</sup> If there is no trust, nobody will attribute the necessary meaning to an advocate's statements. Other litigating parties would try to see that the defender knows as little as possible and has as little impact as possible on the course of the procedure.<sup>35</sup> The effectiveness of defence would be significantly reduced.

At the same time, it is not correct to understand the defender's obligation of truth as absolute.<sup>36</sup> Everything that the defender says must be true, but he need not, and must not, say everything that is true.<sup>37</sup>

The defender may on no condition present false statements about factual circumstances. Neither may he present his mandator's false statements as his own or as true according to his knowledge.<sup>38</sup> As a counterargument to this opinion popular in special literature, it has been proposed to differentiate the defender's obligation of truth so that the defender be prohibited from including false circumstances on his own initiative, but allowed to repeat the mandator's lie.<sup>39</sup> The presumption that the defendant has no obligation of truth has been used to conclude that the defender may assist the defendant in presenting false statements.<sup>40</sup>

The argument to allow the defender to repeat the defendant's lies is supported by the opinion that a moral liability of truth is not essential in criminal law. The defendant's right to lie would be threatened if the defender were not allowed to exercise the same right. A lie would presumably be revealed at the moment when the defender accepts the defendant's statements and present them so to say neutrally.<sup>41</sup>

By doubting the above arguments, it should be said that the premise has not been chosen correctly, because even the defendant does not have the "right" to lie.<sup>42</sup> In the case of voluntary statements, the general moral obligation



to speak the truth also applies to the defendant. The bringing of a criminal action does not free the defendant from following moral norms.<sup>43</sup> A lie will remain unpunished only in view of the emergency situation of the defendant (suspect, accused). This is a situation which the defender may not use to his advantage.<sup>44</sup> Although the defendant may lie unpunished, this is not grounds for allowing the defender to lie.<sup>45</sup>

According to the obligation of truth, the defender may not present the mandator's false statements as his own or present evidence which contradicts the truth. The defender may not advise the defendant to lie or be secretive. The defender acts in an unallowable manner by developing, together with the defendant, a defence strategy based on lies.<sup>46</sup> Regardless of what the specific structure of the Estonian criminal procedure will be and which proportion of Anglo-American accusatorial elements will be included in it, the defender's obligation of truth should remain one of the characteristic traits of his position,<sup>47</sup> if only due to the fact that the defender's obligation of truth is an important prerequisite for the impact of his statements in the procedure. The defender's obligation of truth should be viewed as an important precondition for effective defence.

#### 4. Defender in Summary Proceeding Based on Arrangement

In a sense, the proceeding based on arrangement<sup>48</sup> (summary proceeding) can be considered an expression of high recognition of the defendant's subject status. An arrangement on certain conditions grants the defendant quite a substantial opportunity to influence the course and result of the proceeding (especially from the aspect of punishment) in his desired direction sometimes even more effectively than in the case of a regular proceeding.

It is also important to note that the "orientation to consensus" is more in accordance with a "humane" criminal procedure and contributes to the readiness to accept the results.<sup>49</sup> An expression of recognition of the defendant's subject status in the case of a consensus-oriented and arrangement-based procedure is the fact that the defendant is given the opportunity to discuss the matter in a communication situation completely different from that of a regular procedure. It is a situation where the defendant is in the role of a negotiation partner though or aided by his defender.

The actual degree of recognition of the subject status naturally depends on how the arrangement proceeding is legally regulated and on how factually the defendant (accused) is accepted in the negotiations. In Germany, the danger has been pointed out that in the case of an arrangement (*Absprache*), the defendant may, more or less, remain in the role of a helpless object of procedure.<sup>50</sup>

The danger that the defendant may become the object of procedure is undoubtedly great in the case of an arrange-

ment-based proceeding.

In an arrangement, the defendant (accused) has to waive many rights, including the right to remain silent based on the *nemo tenetur se ipsum accusare* principle. The opportunity of taking the prosecutor to a position of difficulty in providing proof and achieving an innocent declaration in this way, must also be given up in this case. There is the danger that the presumption of innocence principle is ignored.<sup>51</sup>

The defendant must be able to decide which rights, when, and under which conditions he waives.

An important object of negotiation in a summary proceeding, besides the plea of guilt, is the degree of punishment. A fair "bargaining of punishment" requires equal partners.<sup>52</sup> As the basis for an arrangement is a prognosis of the proceeding result,<sup>53</sup> a negotiating party must be able to predict the proceeding result.

It is clear that the defendant alone is, as a rule, not able to be an equal negotiation partner to the prosecutor. Considering the above, it is therefore crucial that a defender's participation in a summary proceeding be obligatory by law. (According to § 38(2) of the Criminal Procedure Act currently in force in Estonia, the defender is obliged to participate in a summary proceeding from the commencement of negotiations).

Arrangement in a criminal proceeding offers an experienced and reliable defender an important chance to influence the procedure to the client's benefit.<sup>54</sup> In a summary proceeding, the defender influences not only the proceeding, but also its result.<sup>55</sup> To be more exact, the proceeding result forms in a mixture of opposition and cooperation between the defender and the prosecutor.<sup>56</sup> Through a summary proceeding, the defendant should try to strengthen his client's position. The positioning of the mandator's interests decides the rationality of arrangement.

To clarify the negotiating position, the defender and also the prosecutor have to assess the evidence situation and predict, to a certain extent, the chances for judgement (or rather, declaring innocent) based on the existing evidence.<sup>57</sup> Predicting the course and result of the proceeding requires excellent knowledge of the materials of the criminal case. Therefore the defendant has to have extensive rights to examine as many as possible of the materials collected on the case.<sup>58</sup>

To guarantee the defendant's subject status in a summary proceeding, the defendant must follow the principle that he is obliged to inform the mandator of the prosecutor's proposal for negotiations and the possible time of commencement of the negotiations. The defender may not imply in any way, behind the defendant's back and without the defendant's express consent, readiness to a possible conviction of the defendant.<sup>59</sup>

The timely and comprehensive informing of the mandator of the commencement of negotiations and of the

discussions held, is necessary not only because the mandator's consent is essential for holding negotiations, but also to give the mandator enough time to think about the proceeding results and develop proposals. To give the mandator enough time to consider the matter in depth, the defender must not let the court and prosecutor pressure him for time.<sup>60</sup>

The defendant's duty in guaranteeing the defendant's status subject in a summary proceeding certainly includes helping to protect the defendant's freedom of will.

As mentioned above, the defendant, when agreeing to a summary proceeding, has to waive many of his rights. Such waiver has to be strictly voluntary.

In accordance with the above principles, pursuant to § 364(2) 1), § 366(1), § 383(2) and (3) of the Criminal Procedure Act currently in force in Estonia, an obligatory prerequisite for a summary proceeding is the defendant's consent. The stressed importance of the freedom of will of the defendant in a summary proceeding is expressed in § 383(3) of the Criminal Procedure Act, which obliges the judge to clarify whether the defendant has expressed his actual will in reaching an arrangement in a summary proceeding. Such an obligation of the judge in a summary proceeding (or any other form of proceeding based on arrangement) should undoubtedly be provided in the future Estonian criminal procedure too.

But despite the establishment of the judge's obligation above, it should be kept in mind from the aspect of defence that in practice, clarification of the defendant's actual will may remain largely formal in court. Thus it is the defender's obligation to clarify the mandator's actual will through extensive advising both prior to and during negotiations.

Even if the defendant basically agrees to commence a summary proceeding, the defender should keep in mind that it is often more beneficial if the guilty plea is presented after a certain stage in the procedure.

It should always be kept in mind that as soon as the possibility of pleading guilty emerges, unlimited defence against accusation will lose credibility<sup>61</sup>

An arrangement made too early contains the danger for the defendant that chances for declaring innocent are given up in the stage where no sufficient information exists on the defendant's guilt.

## 5. Court Control Over Defender and His Activities

While admitting a certain degree of public interest to be essential to the defender's function, the determining of the defender's legal status should also cover the issue of if and to what extent the future Estonian criminal procedure should provide for court control over the defender and his activity. The problem here is that the state should, on the one hand, avoid any excessive outside limitations to the defendant's autonomy and the defender's defence activi-

ties, while on the other hand, the state cannot remain indifferent if the defendant misuses his position.

**5.1.** A complicated case<sup>62</sup> which may cause court interference and removal of the defender,<sup>63</sup> but which is not regulated by the current Criminal Procedure Act, is the suspicion that the defender may be an accomplice in crime.

A defender who has been accomplice in the crime in question, lacks the distance from the crime which would be necessary for effective defence.

While being basically in favour of the removal of a defendant who may be an accomplice in the crime, it must be admitted that the resolving of such removal issues is related to the difficult problem of establishing suitable criteria. It is important to establish the degree of suspicion against the defender. The Criminal Procedure Act currently in force does not expressly distinguish different degrees of suspicion. This is, however, provided in the German penal code.

In accordance with the differentiation of suspicion in the paradigm of German criminal procedure, a defender is removed from procedure if there is strong suspicion (*dringende Verdacht*) about his participation in crime, and a regular proceeding is commenced if there is probability (*hinreichende Verdacht*) of same (§ 138a I No. 1. StPO).

As degrees of suspicion are rationally difficult to distinguish,<sup>64</sup> it is probably practical to avoid such differentiation of suspicion in developing the future Estonian criminal procedure. When suspicion is not differentiated, the removal of the defendant cannot be decided on the basis of the degree of suspicion about his participation in the crime. Therefore the legal regulation of the defender's removal has to be based on whether suspicion of the defender's participation in the crime is sufficient for his removal. If the answer is yes, we have to admit that the defender may also be removed if there is insufficient suspicion. Although it is advisable to avoid differentiation of suspicion by linguistic means, the need for measuring suspicion cannot be denied. It will probably be necessary in the future Estonian criminal procedure to distinguish sufficient suspicion and insufficient suspicion, regardless of the fact that such distinguishing is, and will remain, vague.

When considering the above, it is clear that even if the existence of sufficient suspicion is established as the unconditional prerequisite of removal of the defender, this does not exclude the possibility of his unjust removal.

Let us ask here, is it still possible to find a solution to reduce the risk of unjust removal of the defender? It seems that one such possibility is to relate the deciding of the defender's removal to the existence of the accusatory act drawn up by the prosecutor. This means that a defendant may be removed only when he is not suspicious of being involved in the crime, but accused of same.<sup>65</sup>

**5.2.** One possible ground for removal of the defender in the future Estonian criminal procedure could be the

defender's misuse of his procedural position in communication with the detained or arrested mandator. But not any misuse by the defendant should be a basis for his removal, but only behaviour which may facilitate the commitment of a new crime or create conditions for damaging the security of the detention establishment.

A defender who, by exercising his extensive rights established for preparing for defence, facilitates possible attacks against the legal order and the security of persons, is acting so dangerously in purposes not related to the proceeding, that this should result in the removal of the defender.

In this case, suspicion that the defender has misused his position for objectives not related to the proceeding, is not sufficient. However, such suspicion can be the trigger to commence a removal process. The result of the removal process may be the removal of the defender only if it is identified in the course of the process that the defender indeed misused communication with the mandator for objectives not serving the procedure and that this may have facilitated the commitment of a new crime or created conditions which damage the security of the detention establishment. Whether a crime was actually committed using the opportunity created by the misuse by the defendant is immaterial. Regardless of what the specific process for removal of the defendant will be in the future Estonian criminal procedure, the issue of removal of a defender who is an advocate should be subject to notification of the management board of the bar association.

The future law should naturally also enable removal of the defender if he has been expelled from the bar association or prohibited from working as an advocate by court order, as well as in case he has been punished for disciplinary offences by temporary prohibition to carry out professional activities following a decision of the court of honour of the bar association.

**5.3.** Regarding public interest in effective defence (which compensates for the defendant's autonomy deficit), one of the questions that may arise is if and to what extent the court should be empowered to check the quality of defence and if, proceeding from such a control function, the court should be able to remove a defender who apparently does not perform his function sufficiently.

According to the regulation of the Criminal Procedure Act currently in force in Estonia, the court cannot initiate the removal of the defender if the court is convinced that the defender does not perform his defence function adequately. It is thus not impossible, now, that if the defender is incompetent and lacks the skills or preparation to ask the necessary questions and requests in a procedure, the defendant may be left practically undefended.

It must be admitted that a defender unable to perform his defence function damages public interest regarding the equal opportunities of parties in a procedure.<sup>66</sup> Adherence

to the fairness principle is rather questionable if the defendant only formally attends a proceeding without performing effective defence activities. Considering this, it may seem entirely justified that the court be granted certain powers to check fulfilment of the defender's minimum obligations.

Yet, when we speak about the court's possible control function over the quality of defence, we must not forget that any court control over the defender's activities would endanger the defender's independence.

In preparing the future Estonian criminal procedure, it has to be seriously considered whether such large-scale state intervention with the defender's and defendant's autonomy can be principally accepted.

It has to be kept in mind that quality control of the defender's activity by the court is largely evaluatory. Although in certain cases the defender may indeed be incompetent in performing his defence function, his incompetence is not easily verifiable. It is extremely hard to develop a convincing definition which is suitable for application to an essentially insufficient defence. It is difficult to find common criteria for distinguishing between sufficient and insufficient defence.

It is remarkable that despite these difficulties, attempts have been made in special literature to define insufficient defence. S. Barton proposed an interesting theory of the minimum standards of defence. Under these minimum standards, S. Barton means not the lawful maximum level of defence, but its minimum level. He focuses not on excellent defence, but on insufficient defence.<sup>67</sup> S. Barton has tried to find an answer to the question of whether binding legal obligations exist to guarantee the quality of defence,<sup>68</sup> and he has come to the conclusion that various minimum obligations can be defined not only depending on the context, but there are minimum obligations that have to be observed.<sup>69</sup>

Although S. Barton's theory of the minimum standards of defence can be basically agreed with, his suggested minimum standards cannot be viewed as a possible ground for the judge to decide on the sufficiency or insufficiency of defence. S. Barton himself has doubted whether his concept of minimum standards is applicable and allows relevant progress.<sup>70</sup>

Court control over the defender's activity poses the danger that external interference opportunities are used to disguise regulation of the competing defender.<sup>71</sup>

Even the smallest likelihood of that danger and any possibility that the judge is mistaken in evaluating the quality of the defender's activity due to the relative vagueness of the minimum standard line, should be a sufficient argument against empowering the judge to remove the defender from the procedure due to the insufficient quality of defence.

On the other hand, if we deny the court's powers to

remove an irresponsible or incompetent defender from the procedure, we should discuss whether the necessary minimum level of defence could be guaranteed so that the court appoints another defender in addition to the defender who performs his defence function insufficiently. According to § 36 (4) of the Criminal Procedure Act in force, an accused may have more than one defender.

It is interesting to note that in the German court practice, the appointment of an additional defender is considered necessary in extensive criminal cases where there is a danger that the defender is unable or unwilling to perform his duties.<sup>72</sup> This practice, however, has not gone without criticism.

Special literature has drawn attention to the fact that insofar as the defendant (accused), his selected defender and the appointed defender are not able to agree on a single defence strategy, the appointed defender who is left without his client's trust and information, has little chance to effectively defend the fundamental rights of his client.<sup>73</sup> The appointment of a second defender besides the selected defender may lead to an unsolvable conflict if the appointed defender does not have the mandator's trust. It may happen that such a defender is not a help, but a burden, to the defendant (accused) in the proceeding.<sup>74</sup>

In view of the above arguments, it is rather questionable whether such initiative by the court indeed helps to guarantee the minimum quality of defence in compensation for the defendant's (accused's) autonomy deficit. Rather, such an action triggered by the need to guarantee effective defence, can be considered an unallowable interference with the autonomy of the defendant (accused) and his defender.

## Conclusion

A cornerstone for the reformation of the Estonian criminal procedure should be the principle that the defendant (suspect, accused) should not be an object of procedure. He may have an actual opportunity to influence the course and result of the criminal proceeding through exercising his rights.

The status of the defendant (suspect, accused) in the criminal procedure can be substantially improved by strengthening the role of the "understanding guarantee" and the defender as a helper of the defendant (suspect, accused).<sup>75</sup>

To guarantee the subject status of the defendant (suspect, accused), he must be provided the means for effective defence by a defender who has opportunities approximately equal with those of the prosecutor under the procedural structure.

To create a better balance in the communication structure of the criminal procedure, and to also improve the procedural status of the defendant and his defender, the increasing of the share of accusatorial elements in the

future Estonian criminal procedure should be seriously considered.

Defence can be guaranteed more effectively if the defender is seen as a representative of private interests and indirectly also the representative of public interest. The latter means that the state and the public are not indifferent to whether and how the defendant (suspect, accused) is defended. In a procedure that includes accusatorial elements, the defender should, thanks to his active role in the evidencing process, have a factually important function in achieving a fair judgement.

The defender's obligation of truth as a characteristic feature of his status should be recognised not so much due to public interest in clarifying the truth, but in order that the defender's statements may be seriously regarded in the proceeding. This opinion is based on the understanding that a defender who is entirely dependent on the mandator and has the right to lie, can often perform defence much less effectively than a defender who is relatively independent of the mandator and bound by the obligation of truth.

Concerning the defender's role in a consensus-oriented, arrangement-based procedure, it has to be mentioned that in this form of procedure too, the defender is the guarantor of the subject status of the defendant (accused). The entire activity of the defendant in an arrangement proceeding should be carried out recognising the priority of the mandator's free will.

While entirely accepting the defender's independence of the court, the future Estonian criminal procedure, when compared to the present one, should somewhat extend the bases for a defender's removal, while legalisation of court control over the quality of the defender's performance should be avoided.

## Notes:

<sup>1</sup> T. Weigend. Die Reform des Strafverfahrens Europäische und deutsche Tendenzen und Probleme. — Zeitschrift für die gesamte Strafrechtswissenschaft, Band 104, 1992, p. 487.

<sup>2</sup> K. Tiedemann, Thesen zu einem modernen menschenrechtsorientierten Strafprozeß, Zeitschrift für Rechtspolitik, 1992, H. 3, p. 108.

<sup>3</sup> W. Siolek. Verständigung in der Hauptverhandlung, 1. Aufl. — Baden-Baden: Nomos Verl.-Ges., 1993, p. 95.

<sup>4</sup> T. Rönna. Die Absprache im Strafprozeß. Kiel: Nomos-Recht, 1990, p. 208.

<sup>5</sup> W. Siolek. Verständigung im Strafverfahren — eine verfassungswidrige Praxis! — Deutsche Richterzeitung 1989, 9, p. 325; T. Rönna, q.v. note 4 p. 209.

<sup>6</sup> T. Kleinknecht/L. Meyer-Gossner, Strafprozeßordnung, Gerichtsverfassungsgesetz, Nebengesetze und ergänzende Bestimmungen, 43. neubearbeitete Auflage, München: Beck, 1997, Einl. 88.

<sup>7</sup> K. Vehling. Die Funktion des Verteidigers im Strafverfahren — Ein Beitrag zum Selbstverständnis der Strafverteidigung. — Strafverteidiger, 1992, 2, p. 89.

<sup>8</sup> G. Heinicke. Der Beschuldigte und sein Verteidiger in der Bundesrepublik Deutschland: d. Geschichte ihrer Beziehung u.d. Rechtsstellung d. Verteidigers heute. München: Florentz, 1984, p. 425.



- <sup>9</sup> S. Barton. Mindeststandards der Strafverteidigung: Die strafprozessuale Fremdkontrolle der Verteidigung und weitere Aspekte der Gewährleistung von Verteidigungsqualität, 1. Aufl. — Baden-Baden: Nomos Verl.-Ges., 1994, p. 345.
- <sup>10</sup> A. Jolmes. Der Verteidiger im deutschen und österreichischen Strafprozeß — Eine rechtsvergleichende Studie zur Stellung des Verteidigers im Strafverfahren. Paderborn; München; Wien; Zürich: Schöningh, 1982, p. 65.
- <sup>11</sup> W. Siolek, q.v. note 3 p. 96.
- <sup>12</sup> K. Tiedemann, q.v. note 2 p. 108.
- <sup>13</sup> C. Roxin. Strafverfahrensrecht. Ein Studienbuch. 22., völlig neu bearb. Aufl., München: Beck, 1991, § 17, B. 2.
- <sup>14</sup> E. Kergandberg. Kümme märkust seoses prokuröri funktsionaalse rolliga Eesti täna ja tulevases kriminaalmenetluses. (Ten Remarks Concerning the Functional Role of the Prosecutor in the Present and Future Estonian Criminal Procedure.) Juridica 1999, No. 2, p. 64.
- <sup>15</sup> Q.v. Roxin, q.v. note 13, § 17 B. 1.
- <sup>16</sup> Q.v. E. Müller. Strafverteidigung. — Neue Juristische Wochenschrift, 1981, 34, pp. 1803-1804; E. Müller. Über die sog. gerichtliche Fürsorgepflicht im Strafverfahren. in Recht und Gesetz im Dialog II. Saarbrücker Vorträge. Hrsg. von Prof. Dr. Wolfgang Rütner. Carl Heymanns Verlag KG Köln; Berlin; Bonn; München, 1984, p. 127.
- <sup>17</sup> E. Kergandberg. Kohtuotsus kriminaalasjas, selle kujunemine ja kriitika. (Adjudication in a Criminal Case, its Formation and Critique.) Tallinn, 1999, p. 72.
- <sup>18</sup> It is interesting to note that for example an Italian judge, despite the accusatory nature of procedure, has the right to be unsatisfied with the evidence presented by the parties and may organise the collection of additional evidence (§ 507 of Codice di procedura penale). In the preliminary procedure (udienza preliminare), the court may show to the parties new issues for evidence (§ 422 of Codice di procedura penale). — Italienische Strafprozeßordnung mit Nebengesetzen. Zweisprachige Ausgabe. Verlagsanstalt Athesia-Bozen 1991. That is the extent to which the Italian procedure is a mixture of purely accusatorial and inquisitorial procedure. [Q.v. G. Müller. Rechtsprechung im Vergleich der Länder Europas. - Deutsche Richterzeitung, 1993, 10, p. 383].
- <sup>19</sup> R. Narits. Õigusteaduse metodoloogia I. (Methodology of Law I) Tallinn, 1997, p. 5.
- <sup>20</sup> K. Vehling, q.v. note 7 p. 88.
- <sup>21</sup> J. Welp. Der Verteidiger als Anwalt des Vertrauens. Zeitschrift für die gesamte Strafrechtswissenschaft, 1978, p. 117.
- <sup>22</sup> G. Heinicke, q.v. note 8 p. 317.
- <sup>23</sup> J. Welp, q.v. note 21 p. 119.
- <sup>24</sup> J. Welp, q.v. note 21 p. 119.
- <sup>25</sup> J. Welp, q.v. note 21 pp. 102-103.
- <sup>26</sup> J. Welp, q.v. note 21 p. 116.
- <sup>27</sup> B. Haffke. Zwangsverteidigung — notwendige Verteidigung — Pflichtverteidigung — Ersatzverteidigung. — Strafverteidiger, 1981, 9/10, pp. 480-481.
- <sup>28</sup> Ibid. p. 481.
- <sup>29</sup> K. Vehling, q.v. note 7 p. 89.
- <sup>30</sup> G. Heinicke, q.v. note 8 p. 380.
- <sup>31</sup> G. Heinicke, q.v. note 8 p. 373.
- <sup>32</sup> Q.v. e.g. H. Ostendorf. Strafvereitelung durch Strafverteidigung. - Neue Juristische Wochenschrift, 1978, 28, p. 1349; K. Lüderssen. in "Die Strafprozessordnung und das Gerichtsverfassungsgesetz: Grosskommentar / Löwe-Rosenberg. Hrsg. von Peter Riess. — Berlin; New York : de Gruyter, Rn. 141 vor § 137.
- <sup>33</sup> C. Roxin, q.v. note 13, § 19 A II, 3, b.
- <sup>34</sup> H. Dachs. Handbuch des Strafverteidigers / begr. von Hans Dachs. — 5., neu bearb. Aufl. / von Hans Dachs. — Köln: O. Schmidt, 1983, Rdnr. 39.
- <sup>35</sup> G. Brei. Grenzen zulässigen Verteidigerhandelns: ein Beitrag zur Wahrheitspflicht des Verteidigers unter besonderer Berücksichtigung des französischen, englischen und nordamerikanischen Strafverfahrens — München : VVF, 1991, p. 335.
- <sup>36</sup> G. Pfeiffer. Zulässiges und unzulässiges Verteidigerhandeln. — Deutsche Richterzeitung, 1984, 9, p. 343.
- <sup>37</sup> H. Dachs, q.v. note 34, Rdnr. 44.
- <sup>38</sup> G. Pfeiffer, q.v. note 36 p. 344.
- <sup>39</sup> H. Ostendorf, q.v. note 32 p. 1349.
- <sup>40</sup> K. Lüderssen, q.v. note 32, vor § 137, Rz 141.
- <sup>41</sup> H. Ostendorf, q.v. note 32 p. 1349.
- <sup>42</sup> G. Brei, q.v. note 35 p. 330.
- <sup>43</sup> J. Wessels. Schweigen und Leugnen im Strafverfahren. — Juristische Schulung 1966, 5, p. 173.
- <sup>44</sup> J. Seier, Die Trennlinie zwischen zulässiger Verteidigungstätigkeit und Strafvereitelung — OLG Frankfurt, NSTZ 1981, 144. — Juristische Schulung, 1981, 11, p. 808.
- <sup>45</sup> W. Bottke. Wahrheitspflicht des Verteidigers. — Zeitschrift für die gesamte Strafrechtswissenschaft 96, 1984, 3, p. 758.
- <sup>46</sup> T. Liemersdorf. Grenzziehung zwischen zulässigem und unzulässigem Verhalten eines Strafverteidigers im Umgang mit seinem Mandanten. — Monatschrift für Deutsches Recht, 1989, 3, p. 206.
- <sup>47</sup> It should be mentioned here that the need to limit the defender's freedom of defence activities with the obligation of truth has been basically recognised in both continental European legal orders and in those of the UK and USA — Q.v. G. Brei. Grenzen zulässigen Verteidigerhandelns: ein Beitrag zur Wahrheitspflicht des Verteidigers unter besonderer Berücksichtigung des französischen, englischen und nordamerikanischen Strafverfahrens — München : VVF, 1991, pp. 353, 175.
- <sup>48</sup> A form of procedure similar to the Anglo-American plea bargaining, the Italian *patteggiamento*, and the *Absprache* common in the German criminal procedure practice.
- <sup>49</sup> W. Hassemer. Pacta sunt servanda — auch im Strafprozeß? — Juristische Schulung 1989, 11, p. 893.
- <sup>50</sup> R. Möhlmann. Vereinbarungen im Strafverfahren — Rechtliche Möglichkeiten kooperativer Verfahrensbewältigung. — Deutsche Richterzeitung, 1990, 6, p. 204.
- <sup>51</sup> Q.v. M. Sillaots. Arrangement — Form of Procedure Based on Guilty Plea and Presumption of Guilt? — Juridica International. Law Review University of Tartu 1998 III, pp. 76-83.
- <sup>52</sup> T. Rönna, q.v. note 4 p. 280.
- <sup>53</sup> W. Schmidt-Hieber. Absprachen im Strafprozeß — Rechtsbeugung und Klassenjustiz? — Deutsche Richterzeitung, 1990, 9, p. 326.
- <sup>54</sup> H. Dachs. Absprachen im Strafprozess — Chancen und Risiken. Neue Zeitschrift für Strafrecht, 1988, 4, p. 159.
- <sup>55</sup> T. Weigend. Abgesprochene Gerechtigkeit — Effizienz durch Kooperation im Strafverfahren? Juristenzeitung, 1990, 17, p. 775.
- <sup>56</sup> Q.v. K. F. Schumann. Der Handel mit Gerechtigkeit: Funktionsprobleme der Strafjustiz und ihre Lösungen — am Beispiel des amerikanischen plea bargaining — Frankfurt am Main: Frankfurt am Main: Suhrkamp, 1977, S. 179.
- <sup>57</sup> H.J. Dielmann. "Guilty Plea" und "Plea Bargaining" im amerikanischen Strafverfahren — Möglichkeiten für deutschen Strafprozeß? — Goldammer's Archiv für Strafrecht, 1981, p. 564.
- <sup>58</sup> Although one should agree, to a certain extent, with the opinion voiced in

special literature that the advocate's prognosis of the procedure is often an insolvable task for the defendant, even if materials can be examined — V. Mehle. Anmerkungen zum Alternativ-Entwurf aus anwaltlicher Sicht. — *Neue Zeitschrift für Strafrecht*, 1982, 8, p. 309.

<sup>59</sup> R. Hamm. Absprachen im Strafverfahren? — *Zeitschrift für Rechtspolitik*, 1990, 9, p. 339.

<sup>60</sup> D. Deal. Der strafprozessuale Vergleich. — *Strafverteidiger*, 1982, 11, p. 551.

<sup>61</sup> Q.v. H. Dachs, q.v. note 54 p. 156.

<sup>62</sup> This article does not cover cases where the defender is removed by court, which is provided in the currently effective Criminal Procedure Act. Those bases which are, so-to-say, traditional to us for the removal of a defender, should also be prescribed in the future criminal procedure. Thus, a defender who has been or is another subject of criminal procedure; who has or does provide assistance in the criminal case to persons whose interests conflict the interests of the defendant; or who is personally related to officials conducting preliminary or court investigation, should also be removed according to the new criminal procedure.

<sup>63</sup> Removal is one of the most serious methods of court interference with defence.

<sup>64</sup> One can agree with the opinion of E. Kergandberg that the possibility to rationally differentiate suspicion is rather doubtful — Q.v. E. Kergandberg. *Sissejuhatus kohtumenetluse õpetusse*. (Introduction to court procedure) Tartu 1996, p. 75. Q.v. also E. Kergandberg. *Kümme märkust seoses prokurööri funktsionaalse rolliga Eesti tänases ja tulevases kriminaalmenetluses*. (Ten Remarks on the Prosecutor's Functional Role in the Present and Future Criminal Procedure of Estonia) — *Juridica* 1999, 2, pp. 68-69.

<sup>65</sup> Approach to the issue of drawing up an accusatory act should be based on the opinion of E. Kergandberg, which in brief is the following: only in the final stage of pre-trial investigation, i.e. after the investigator has concluded work, should the prosecutor decide, on the basis of the materials collected, whether there is sufficient grounds to exercise the accusatory function. If the prosecutor is convinced that the defendant has committed the crime under certain circumstances, he formulates his conviction in an accusatory act. — E. Kergandberg. *Kümme märkust seoses prokurööri funktsionaalse rolliga Eesti tänases ja tulevases kriminaalmenetluses*. (Ten Remarks on the Prosecutor's Functional Role in the Present and Future Criminal Procedure of Estonia.) — *Juridica* 1999, 2, pp. 67-68.

<sup>66</sup> W. Hassemer. Reform der Strafverteidigung. — *Zeitschrift für Rechtspolitik*, 1980, 12, p. 332.

<sup>67</sup> S. Barton, q.v. note 9 p. 36.

<sup>68</sup> *Ibid.* p. 361.

<sup>69</sup> *Ibid.* p. 365.

<sup>70</sup> *Ibid.* p. 367.

<sup>71</sup> *Ibid.* p. 31.

<sup>72</sup> J. Welp, q.v. note 21 p. 122; C. Roxin, q.v. note 13, §19 C 6.

<sup>73</sup> C. Roxin, q.v. note 13, §19 C 6.

<sup>74</sup> W. Hassemer, q.v. note 66 p. 327.

<sup>75</sup> R. Wassermann. Der Verminderung des Machtgefälles in der Strafgerichtsverhandlung als rechtspraktisches und rechtspolitisches Problem. — *Zeitschrift für Rechtspolitik* 1986, 6, p. 137.



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# Principle of Proportionality in Sentencing and Economic Approach in Criminology

Economic approach is not a novelty in criminological research. Two important contributors to criminology during the eighteenth and nineteenth centuries, Beccaria and Bentham, explicitly applied an economic calculus. Unfortunately, such an approach lost favour for a significant period of time from the end of the nineteenth century until during the 1960s when economists turned their attention to the field of criminology. Then followed a further period of relative silence in this field, but the second half of the nineties has witnessed a vitalisation of the economic approach in criminology.<sup>1</sup> In this paper application of the economic approach on the principle of proportionality in sentencing is analysed.

There is totally unanimous support for the idea that there must be proportionality between the crime committed and the sentence to be served. But as to what characteristic of the crime the sentence should be proportional to, opinions differ. There are at least three different viewpoints to measure the crime: one, from the viewpoint of the effect on the offender; second, on the society as a whole; and third, on the victim. From the different standpoints, the proportions are seen remarkably differently.

The first standpoint was proposed already by Jeremy Bentham. In his "Principles of Morals and Legislation" he asserted that "the value of the punishment [f] must not be less in any case than what is sufficient to outweigh that of the profit of the offence [c]".<sup>2</sup>

$$(1) \quad f \geq c$$

Gary S. Becker supports in his almost as famous "Crime and Punishment: An Economic Approach"<sup>3</sup> a much more sophisticated position: "a person commits an offence

if the expected utility to him exceeds the utility he could get by using his time and other resources at other activities" and that "[s]ome persons become 'criminals', therefore, not because their basic motivation differs from that of other persons, but because their benefits and costs differ". While considering only the effect on the offender, the last position would mean that the punishment should be as severe as needed to cause the offender disutility (d) that would outweigh the expected utility of the crime (c) minus utility he/she could get by using his/her time and other resources at the most efficient available legal activities (l).

The expected utility of the same offence is different for different offenders. E.g., the expected utility of speeding (saving a few minutes) is higher to the richer offender.<sup>4</sup> And consequently it is reasonable to punish him/her more severely (use of day-fine system serves very conveniently this purpose). But there are plenty of offences, where utility is almost exactly the same to all offenders independent of their extremely different attributes. E.g., stealing \$100 provides the same amount of money to a poor man as a rich man and consequently it is not so easy to demonstrate that the rich man should be punished more severely as it is effected by use of day-fine system.

As offenders usually do not have access to efficient, legally recognised means to achieve their goals and the time allotted for illegal activities is most often not extensive, we may presume that l is marginal. Hence, it should be achieved that,

$$(2) \quad d > c$$

Becker makes it quite blatantly clear<sup>5</sup> that, as we are able to punish only a fraction of all offenders, the disutili-

ty for a single offender is not the punishment meted out for the concrete offence committed ( $f$ ), but the punishment discounted for the (usually quite low) probability of conviction ( $p$ ).

$$(3) \quad d = pf > c$$

The probability of conviction depends on the probability of reporting an offence to police (the most recent Estonian studies on victimisation revealed that the probability of a theft to be reported is 0.276<sup>6</sup>) multiplied by the probability that the report will result in apprehension (0.078<sup>7</sup>) and conviction. Hence, if the offence is theft of \$100, the punishment should be a fine  $1/p * 100 = 46.5 * 100 = \$4650$

The effect of probability has been analysed most scrupulously. In his recent study, Richard Craswell points out that deterrent effect of punishment differs depending on whether the multiplier ( $p$ ) is calculated (I) case by case, to reflect each defendants actual probability of punishment, or (II) on an average probability of punishment facing all defendants, and that the deterrent effect will also be different if the law uses (III) a constant fine, based on the average probability of punishment and the average harm.<sup>8</sup> In this paper, the effect on the concrete offender is analysed. Hence, the latter two regimes will not be analysed here.

The first regime should be analysed in two different subregimes: a) defendants actual probability of punishment for the offence he/she is being punished for, ( $p'$ ); b) defendants probability of punishment for a similar offence if he/she commits the offence after (or while serving) the punishment for the primary offence, ( $p''$ ).

In the real world  $p'$  equals to  $p''$  infrequently. It is quite likely that,  $p'' > p'$  because for law-enforcement agencies, it is, as a rule, easier to identify and apprehend offenders who already have been punished. But in concrete cases,  $p''$  may be lower than  $p'$ , because the offender will become more experienced and more able to avoid risk of apprehension and punishment. While analysing from the utilitarian point of view the optimal amount of punishment ( $f$ ) to deter an individual offender from further similar criminal activities, we should use  $p''$ , because if  $p'' > p'$ , the offender would have been deterred already via use of  $f = 1/p'' * c$  and using  $f = 1/p' * c$  the amount of punishment  $f^0 = (1/p' - 1/p'') * c$  would be just wasted without any additional positive effect. And if  $p'' < p'$ , the use of  $f = 1/p' * c$  would result in a waste of  $f = 1/p' * c$ , because it would not be enough to outweigh the utility of the second offence and the offender would commit it anyway.

Furthermore,  $p''$  is objective probability, but the offender acts according to his/her perception of the probability. **Hence, in the formula (3) we should bear in mind the probability of punishment for a future similar crime as perceived by the offender.**

The probability of future punishment is perceived depending upon one's disposition to take risks.<sup>9</sup> Becker

acknowledges that the effect of punishment on an offender depends on whether the offender is risk preferrer, risk neutral or risk avoider.<sup>10</sup>

It has been asserted that:

$$(4) \quad d = pf,$$

only for risk neutral offenders, for risk avoiders:

$$(5) \quad d > pf,$$

and for risk preferrers:

$$(6) \quad d < pf.$$

Hence, we need to add in formula (3) an extra variable  $r$  to reflect the effect that an average offender is a risk preferrer and, as  $p$  is significantly less than 1, discounts considerably the punishment:

$$(7) \quad d = pf > rc.$$

Still, we should not be sure that if  $pf < rc$ , the offender will be effectively deterred. There is a period of time (as a rule not a short one) between the time, an offence was committed, and the time, the offender will be sentenced. And as we all are inclined to discount to some extent the future positive as well as negative consequences (e.g. if a person is offered \$100 for a certain performance, the probability that the offer is accepted depends significantly on the length of the period of time between the performance and the receipt of the \$100, if the period is e.g. longer than 3 years the offer will not very likely be accepted), we have to add the time effect<sup>11</sup> ( $t$ ) to the formula (7):

$$(8) \quad d = pf > trc.$$

But average offenders are most likely young males, who discount future negative consequences even more than average members of community. Furthermore, we should not forget the fact that the situations in which crimes are committed are not necessarily the situations in which we should assume that the actor is capable of reasonable foresight. Quite often the situations involve extreme emotions that significantly hinder the probability that all possible negative effects (including possible apprehension, conviction and punishment) of contemplated acts are scrupulously estimated. Hence, the formula (8) needs an extra variable ( $t'$ ) to represent these effects:

$$(9) \quad d = pf > t'rc.$$

An additional issue to be discussed is the possibility that an increase in the magnitude of punishment may not be in linear correlation with the disutility caused to an offender. It is possible (and seems to be quite likely) that for an offender the first year of imprisonment involves great disutility and the additional years involve lessening disutility per year, because the offender gets used to the conditions. In some cases it is also possible that disutility rises more than in proportion to the term (e.g. something causes imprisonment to become increasingly difficult to tolerate). A. Mitchell Polinsky and Steven Shavell analyse these two possible situations along with the situation where disutility rises proportionally with the magnitude of punishment. They conclude that in the situation, where the disutility



from punishment rises less than in proportion to the sentence, raising the magnitude of sanctions has a smaller deterrent effect than increasing their probability.<sup>12</sup> In real life, correlation between the magnitude of sentence and the caused disutility is likely to be not so simple. E.g. it is possible that disutility of imprisonment:

(i) rises more than in proportion to the length of it, so long as the period of incarceration increases from 0 to the length of imprisonment that already requires serious psychological adaptation to the conditions of captivity (A);

(ii) from this point the disutility rises less than in proportion until the imprisonment is becoming likely to produce considerable changes in the personality that will increasingly deteriorate the chances of successful life after the sentence is served (B);

(iii) during this period of increasing deterioration of chances for future success the disutility may be rising more than in proportion to the length of imprisonment (C);

(iv) if the chances of future success are already, close to zero, the possibility that disutility rises is most likely less than in proportion to the length of captivity.

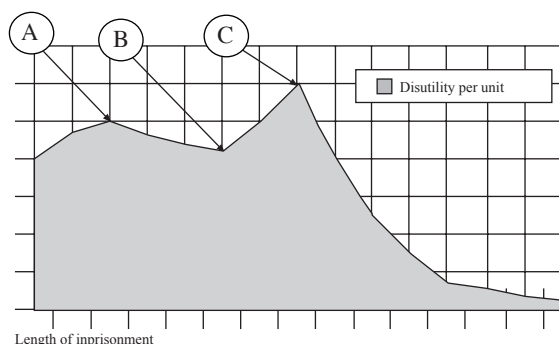


Figure 1. Imaginable correlation between the length of imprisonment and disutility of imprisonment per unit of imprisonment

It is extremely difficult to predict the future correlation between the disutility and the magnitude of punishment, but it seems to be very likely that the summary disutility generally rises less than in proportion to the magnitude and therefore the amount of punishment should be multiplied by  $m$  to reflect the effect.

$$(10) \quad d = pf (m \cdot t \cdot r \cdot c)$$

Considering all the multipliers, we have to conclude, that in most cases, society is not in a position to impose sanctions as severe as needed, according to formula (10), to deter all offenders effectively from further similar offences.<sup>13</sup> The most common argument against severe sanctions is that punishment should never exceed the amount offender deserves for his/her offence.<sup>14</sup> But how one could find out the exact magnitude of punishment an offender deserves has remained undetermined.

Another argument against extremely severe sentences is connected with proportionality of punishment from the point of view of society as a whole. That is that it would

cost the society much more to impose the sanctions (cost of apprehension, conviction and operating prisons) than the society would benefit from the imposition of the sanctions. In this line of argument one utilitarian conception that "the value of the punishment must not be less in any case than what is sufficient to outweigh that of the profit of the offence"<sup>15</sup> is disputed by another utilitarian conception that "[t]he economically correct rule is to prevent an offence if and only if the net cost from the offence occurring is greater than the cost of preventing it".<sup>16</sup>

This latter conception may be contested on the grounds of an equal protection clause. It is possible that the prevention of similar offences can have remarkably different costs for society. And if only the crime that is cheaper to prevent is prevented then both offenders may have a claim under an equal protection clause.

The offender, who was prevented from committing the crime may have a claim that he/she has unequally suffered from the prevention (he/she was punished to prevent further crime). And the offender, who was not prevented from committing the crime may also have a claim that he/she has unequally suffered, because nobody prevented him/her from committing the second offence and he/she got punished for the offence he/she would have never committed if he/she had been equally prevented from committing it.

The only technique to reconcile the conflict between utilitarianism and equal protection, seems to be, to estimate the harm caused to society if equal protection is not guaranteed and most likely, if this harm is also considered, the conclusions (to prevent or not to prevent?) will also be, from the utilitarian standpoint, alike for similar offences.

And third, proportionality from the standpoint of a victim. From this standpoint, it is possible to analyse proportion between:

a) punishment and the adverse effect a crime had on the victim, or

b) the adverse effect a crime had on the victim and the satisfaction he/she gets from the punishment imposed on the offender.

The proportion b) is truly victim-oriented. Even so strictly victim-oriented that even the most radical advocates for more concern about the status of the victim in criminal justice have not proposed to apply such proportion. Obviously, it is quite impossible to reason why society should cause suffering to a member of society to achieve a certain level of satisfaction for another member of the society. The closest ideas to the proportion b) are the proposals to reform criminal punishments in a way that maximises the victim's chances of receiving compensation from the offender. These proposals encourage use of non-custodial sentences that enhance the offender's capabilities to furnish compensation. Therefore this is in open disagreement with the ideas of proportionality from the offender's or a social standpoint that, as it was analysed

above, suggest use of extremely severe sentences.<sup>17</sup>

The proportion a) has been analysed most widely in connection with the use of victim impact statements that the United States Supreme Court at last approved in *Payne v. Tennessee*<sup>18</sup> overruling *Booth v. Maryland*<sup>19</sup> and *South Carolina v. Gathers*<sup>20</sup> that had very recently held that evidence and argument relating to the victim and the impact of the victim's death on the victim's family are per se inadmissible at a capital sentencing hearing.

David D. Friedman argues that *Payne v. Tennessee* "is rejecting one of the implications of the economic approach to criminal law [that w]here criminals are aware of characteristics that affect the value of the lives of their victims, selective punishment [considering the differences in the values] would provide selective deterrence and thus make the criminal law more efficient".<sup>21</sup> But there are no grounds to suggest that *Payne v. Tennessee* completely rejects all implications of the economic approach. Vice versa, upholding the victim impact statements *Payne v. Tennessee* enhances the possibilities to consider in sentencing the damages from the victim's perspective.

David D. Friedman suggests that the rule established by *Payne v. Tennessee* "would also permit such evidence to be introduced in cases where the offender was not aware of the relevant facts at the time of the murder".<sup>22</sup> In that case, it would be another example of a clear disagreement between proportionality from the offender's perspective and proportionality from the victim's perspective. Proportionality from the offender's perspective cannot be reconciled with the consideration in sentencing of facts that the offender did not and could not know.

## Conclusion

Overwhelming support for the idea that there must be proportionality between the crime committed and the sentence to be served cannot help us much as long as different supporters of proportionality view it from very different standpoints. Proportionality from the offender's standpoint should not be reduced to the requirement that the value of the punishment be not less in any case than what is sufficient to outweigh that of the profit of the offence. So lenient punishments could have effective deterrent effect only if 100 per cent of all offenders would be punished. It is impossible to impose severe enough punishments to deter all offences, hence, we have to look at proportionality also from the standpoint of society as a whole, and to acknowledge that the economically correct rule is to prevent an offence if and only if the net cost from the offence occurring is greater than the cost of preventing it. We have to consider also the damage from the victim's perspective, but only so far as we can reasonably expect that the offender was or should have been aware of the value of damages from the victim's perspective.

## Notes:

<sup>1</sup> Q.v. e.g. R. Craswell. Deterrence and Damages: The Multiplier Principle and its Alternatives.— *Michigan Law Review*, Vol. 97, No. 7, June 1999. — Available [http://papers.ssrn.com/sol3/paper.taf?ABSTRACT\\_ID=156809](http://papers.ssrn.com/sol3/paper.taf?ABSTRACT_ID=156809), 19.05.1999; J.J. Dilulio, Help Wanted: Economists, Crime and Public Policy. — *Journal of Economic Perspectives*, Vol. 10, 1996, pp. 43-67; J. Ehrlich, Crime Punishment and the Market for Offences. — *Journal of Economic Perspectives*, Vol. 10, 1996, pp. 43-67; R.B. Freeman, Why Do So Many Young American Men Commit Crimes and What Might We Do About It?. — *Journal of Economic Perspectives*, Vol. 10, 1996, pp. 25-42; E.L. Glaeser, B. Sacerdote, J.A. Scheinkman, Crime and Social Interactions. — *Quarterly Journal of Economics*, Vol. 111, 1996, pp. 507-548; J. Grogger, The Effect of Arrest on the Employment and Earnings of Young Men. — *Quarterly Journal of Economics*, Vol. 110, 1995, pp. 51-72; A. M. Polinsky, S. Shavell. On the Disutility and Discounting of Imprisonment and the Theory of Deterrence. — National Bureau of Economic Research Working Paper Series, Working Paper 6259. — Available, <http://www.nber.org/papers/w6259>, 18.05.1999.

<sup>2</sup> J. Bentham. *An Introduction to The Principles of Morals and Legislation*, New York. — Hafner Publishing Co. p. 179.

<sup>3</sup> G.S. Becker. Crime and Punishment: An Economic Approach. — *Journal of Political Economy*, Vol. 76, March-April, 1968, p. 176.

<sup>4</sup> David D. Friedman. Should the Characteristics of Victims and Criminals Count? *Payne v Tennessee* and Two Views of Efficient Punishment. — *Boston College Law Review*, Vol. 34 No. 4, July 1993.— Available <http://shell9.ba.best.com/~ddfr/Academic/Payne/Payne.html> 17.05.1999, p. 6.

<sup>5</sup> Ibid, at p 177; q.v. also Bentham at p. 184.

<sup>6</sup> Kauko Aromaa & Andri Ahven. Victims of Crime in Two Baltic Countries. Finnish and Estonian data from the 1992/1993 International Crime Victimization Survey. Helsinki, 1993, p. 30.

<sup>7</sup> Available, <http://www.pol.ee/politseistatistika/politseistatistika.html>, April 12, 1999.

<sup>8</sup> Richard Craswell. Deterrence and Damages: The Multiplier Principle and its Alternatives. - *Michigan Law Review*, Vol. 97, No. 7, June 1999. — Available [http://papers.ssrn.com/sol3/paper.taf?ABSTRACT\\_ID=156809](http://papers.ssrn.com/sol3/paper.taf?ABSTRACT_ID=156809), 19.05.1999.

<sup>9</sup> The perception depends also on factual errors in assessing the probability, but as we have no grounds to believe that offenders are more likely to make factual errors producing overestimation of the probability of future punishment or underestimation the same, the factual errors are not considered in this paper. Due to risk preference, offenders may be more likely to make factual errors producing underestimation of the probability of future punishment. This tendency may, if detected, be considered in the multiplier *r*, reflecting the effect of offenders' risk preference.

<sup>10</sup> Becker, at pp. 183-184. He suggests that if offenders were risk neutral the most efficient criminal policy could be to punish a minimal fraction of offenders, but to sentence them extremely severely so that the product *pf* would be high enough to deter offenders' further criminal activities. The apprehension and trial costs would be minimal and the cost of executing the sentences would be the same as if more offenders were sentenced more mildly. As offenders tend to be more risk preferers and therefore discount the disutility of probable future punishment, the suggested policy does not work.

<sup>11</sup> Jeremy Bentham employed the term "proximity" while discussing the time effect. See, Bentham at p 184.

<sup>12</sup> A. Mitchell Polinsky, Steven Shavell, On the Disutility and Discounting of Imprisonment and the Theory of Deterrence.— National Bureau of Economic Research Working Paper Series, Working Paper 6259.— Available, <http://www.nber.org/papers/w6259>, 18.05.1999, pp. 13-16.

<sup>13</sup> This suggestion does not rule out that in many cases society can provide severe enough punishments to prevent many crimes. It is even more true, because the adverse effect of punishment also includes stigmatisation.

<sup>14</sup> Q.v., Jaan Sootak. *Criminal Policy* (in Estonian).— Juura, Tallinn, 1997, p. 67.

<sup>15</sup> J. Bentham. *An Introduction to The Principles of Morals and Legislation*,

New York. — Hafner Publishing Co. p. 179.

<sup>16</sup> David D. Friedman, Should the Characteristics of Victims and Criminals Count? *Payne v Tennessee* and Two Views of Efficient Punishment. - Boston College Law Review, Vol. 34 No 4, July 1993.— Available <http://shell9.ba.best.com/~ddfr/Academic/Payne/Payne.html> 17.05.1999, p. 2.

<sup>17</sup> Non-custodial sentences (most commonly fines) cannot be, in most cases, severe enough, because offenders lack assets to pay extensive fines.

<sup>18</sup> *Payne v. Tennessee*, 501 U.S. 808 (1991)

<sup>19</sup> *Booth v. Maryland*, 482 U.S. 496 (1987)

<sup>20</sup> *South Carolina v. Gathers*, 490 U.S. 805 (1989)

<sup>21</sup> David D. Friedman, Should the Characteristics of Victims and Criminals Count? *Payne v Tennessee* and Two Views of Efficient Punishment. - Boston College Law Review, Vol. 34 No 4, July 1993.— Available <http://shell9.ba.best.com/~ddfr/Academic/Payne/Payne.html> 17.05.1999, p 7.

<sup>22</sup> *Ibid.*



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# Legal Remedies Provided in the Estonian Draft Law of Obligations Act for Breach of Contractual Obligations

Under § 13 of the Constitution of the Republic of Estonia, everyone has the right to the protection of the state and of the law. Under § 19 everyone has the right to free self-realisation. Everyone shall honour and consider the rights and freedoms of others, and shall observe the law, in exercising his or her rights and freedoms and in fulfilling his or her duties. Section 31 of the Constitution vests everyone with the right to engage in enterprise. The provision of the appropriate legal environment by the state is an important condition for conducting business. Nonconformity of the applicable civil law in its law of obligations part to the interests of free enterprise has become evident. The drafting of the new Law of Obligations Act was based on the approach that law of obligations and, in particular, contract law are fields the unification of which is requisite in the development of an actually functioning single European market. In the situation of today's competition economy, competition has also appeared between national legislations.<sup>1</sup> In choosing the law applicable to a contract, preference is inevitably given to a legislation that is efficient, comprehensible and provides adequate negative mandatory capacity, etc. The grounds for applying remedies (grounds of civil liability), the remedy categories, procedure and legal consequences of their use and the negative mandatory capacity are the questions of interest to any contracting party who must make the choice of national law applicable to the contrac-

tual relationship in the event of dispute. The drafters of the new Estonian Law of Obligations Act have sought to find such solutions and methods of regulation that would be as competitive as possible in comparison with the civil law of other European countries.<sup>2</sup>

Parties conclude contracts with a view to certain objectives that they wish to attain: the income that they hope to receive or the prevention of certain consequences or conduct. At the initial stage of a contractual relationship, both parties are, presumptively, interested in performing the assumed duties. As in other European countries, the *pacta sunt servanda* principle is also the cornerstone of Estonian contract law. Although contracts can be prepared with high thoroughness and expertise, the performance of a contract may still fail owing to the fault of the party in breach, the aggrieved party or a third party or to circumstances independent of the contracting parties. It is also said that a contract is exactly as good as the parties thereto. In order to ensure legal certainty and actually implement the freedom of enterprise guaranteed under the Constitution, the remedies available for breach and the procedure of their use must be as simple as possible and undistinguishing between persons breaching contractual obligations.

Protection must be afforded to any right, and anyone vested with the right is entitled to protection by means of remedies provided in the law. The right to claim judicial protection of violated rights is a part of personal rights

under civil law. The scope and extent of protection of rights depend on many circumstances relating to the nature of the protected rights and the circumstances of violation. Such circumstances include, in particular, the field of the violated right. Hence, for example, remedies provided for violation of real rights are inapplicable if relationship under law of obligations is determined as existent between the parties. In addition, the application of remedies may be limited by or related to proper performance by the creditor. The extent of a party's liability may also depend on that party's status or the counterparty's need for protection. For example, the extent of liability may vary according to whether the contract has been concluded within the bounds of professional or economic activity or not. In the latter event, for example, the liability for breach may be more stringent, remedy categories may be different from those allowed to other subjects and the properness of performance is often regulated by laws or other legislation.

The protection of parties' rights in the event of breach of contractual obligation means, first of all, the opportunity to use remedies provided in the law or stipulated in the contract. The doctrine of civil law has been entrusted with the task to work out the criteria for optimum and equitable protection of the aggrieved party's rights in the event of breach. This enables to ensure the stability and legal certainty of contractual relationships and the rationality of commerce.

The application of remedies may be aimed at removing or anticipating a breach, removal of harmful consequences, restoration of the former situation or compensation for damage caused by the breach. Some of the remedies are universal and available for any breach. Others are provided only for violations of certain categories of civil-law rights. While some remedies are applied only by the courts, certain others can be applied upon the expression of will by one party. The latter category of remedies serve their protective function extrajudicially.

In Estonian law, judicial intervention is usually needed to apply remedies. In certain civil-law relationships, the application of remedies should remain in the competence of the court because one of the parties to the relationship is apparently in a weaker position and, therefore, needs more protection and public control over the dynamics of the contractual relationship. At the same time, a situation in which but very few remedies are available for extrajudicial use is out of accordance with modern requirements and needs. The fundamental principle of legal regulation in the new Law of Obligations Act is to ensure opportunities for extrajudicial application of remedies. Use of remedies by the court is allowed where this is justified by the need to protect the weaker party. Hence, for example, in a residential lease the lessor may generally not use remedies extrajudicially.

## Concept and Categories of Breach

In drafting the Principles of European Contract Law (PECL), the question of how to regulate nonperformance and its legal consequences was among the most difficult problems in the situation in which large differences exist between the member states as regards the treatment of breaches, the system of remedies and the procedure of their application. The choice of a system for regulating breaches and remedies was one of the most problematic areas also in the preparation of the new Estonian Law of Obligations Act. In Estonia, like the PECL, the question was decided in favour of the common concept of breach. The decision was induced in particular by the need to harmonise Estonian national contract law with European contract law. In addition, it was certainly influenced by foreign experts' recommendations and law amendment proposals in the model countries (Germany and Switzerland).

In the PECL, nonperformance denotes any nonperformance, delayed performance, defective performance (including the absence of rights in the thing transferred) as well as the breach of collateral duties such as those concerning invoicing or confidentiality.<sup>3</sup> Performance by a contracting party is regarded as proper if that party performs its duties in accordance with the express and implied terms of the contract. Thus, under the PECL, any failure to meet contractual obligations or any nonperformance is deemed a breach. Although German law has, to a very large extent, served as a drafting model for a number of Estonian Acts, the choice of regulation for breach of obligations was made in favour of the harmonised law, supported by the fact that unlike German law<sup>4</sup>, Estonian law applies the common conception of breach. Under § 222(1) of the Civil Code, which dates back to 1965, breach is any nonperformance or improper performance of duties.<sup>5</sup> Hence the adoption of the new Law of Obligations Act will not bring about substantial changes regarding the conception of breach. According to the draft Law of Obligations Act<sup>6</sup>, breach means any nonperformance or improper performance, including any delay in the performance, of a duty arising out of an obligation. A breach of obligation may be excusable or inexcusable.<sup>7</sup>

## Grounds for Application of Remedies

Remedies are applied on the basis of the breaching party's liability for failure to perform or nonperformance. In Estonian civil-law theory, the elements of liability are damage, wrongful act by the party in breach, the causal relationship between the damage and the wrongful act, and culpability (fault) of the party in breach. This conception, largely built upon the Soviet civil-law theory, has become obsolete in many aspects and no longer meets the actual



needs of the legal practice.<sup>8</sup> In the aspect of wrongful act, the presently applicable conception does not substantially diverge from those known in the civil-law theories of developed countries. However, the difference presented by the element of culpability as a basis of liability is much more considerable. In so far as legal regulation in the Estonian draft Law of Obligations Act is also founded on the categorisation of breaches as excusable or inexcusable, the question of culpability is interesting from the very aspect whether the absence of culpability will release the party in breach from liability and whether culpability is of any importance at all in the application of liability.

In the Soviet civil-law theory, the theoretical conception of culpability was based on the criminal-law conception of guilt. In accordance with § 227 of the Civil Code, the categories of culpability are intent and incautiousness. Intent, as the person's subjective attitude to his or her act and its consequences, is a normally uniformly understandable basis of liability. In civil-law textbooks compiled by Estonian jurists<sup>9</sup>, culpability has been defined as the person's mental attitude towards his or her wrongful act, as the relationship between the person's consciousness and the consequence of the act. Culpability was primarily the question of whether the person had wanted the consequence or not, whether the person had foreseen or must have foreseen the consequence. In order that the liability could be applied, the person who had breached an obligation must have known that such act was prejudicial to the interests of the society or a member thereof, and that the person had wanted this to happen (intent) or had neither wanted nor foreseen although that person could and must have foreseen had he or she exercised the necessary caution and care (incautiousness).<sup>10</sup> The Civil Code also refers to degrees of incaution, i.e. the slighter and the greater degree of incaution. Thus we know the incaution degrees of *culpa levis* — a situation in which the person abides by the general rules but not higher requirements — and *culpa lata* — a situation in which the person fails to abide by even the general rules. Differently from the new Law of Obligations Act, even incaution was considered a subjective form of culpability, in which the person's subjective attitude was important, rather than objective adherence to care. For the sake of clarity, drafters of the Law of Obligations Act decided to define the concepts and degrees of intent and negligence. According to the draft, intent means wishing a wrongful consequence upon the inception, performance or termination of an obligation. Negligence, on the other hand, means the failure to exercise the necessary degree of care in commerce. Negligence is divided into material negligence, which is a material failure to exercise the necessary degree of care in commerce, and negligence, in which the person fails to exercise even such care as that person usually adheres to in his or her affairs. In the author's opinion, the definition of the forms and degrees of fault in the Law of

Obligations Act is justified by the need to emphasise changes in the conception that has hitherto existed. Obviously, the Act will also fulfil an educational function in this regard.

In drafting the PECL, a choice had to be made concerning the general rule of liability — whether the party in breach will be liable only if fault exists or regardless of fault.<sup>11</sup> In common law, a uniform conception of breach exists, whereunder breach of contract is constituted by such nonperformance that creates the right to use a remedy and that is not excusable.<sup>12</sup> In order to regard nonperformance as a breach, the fault of the party in breach need not be determined. The duty to compensate for damage may be created independently of the fault. Thus, in most cases, the party who has breached the contract is also liable for the breach. However, in the very event of a circumstance which frustrates the contract, the parties' duties are extinguished without the parties having to express their will to that effect.<sup>13</sup> The conception in French law is similar. In certain cases, fault of the party in breach is necessary for creating liability, but in other cases, the party is released from liability only upon a circumstance interpretable as *force majeure*. Whenever a circumstance beyond the will of the parties (*force majeure*) exists, contractual duties are extinguished under French law without the parties' expression of will.

In the law of the Nordic countries, the system of breaches is different from that described above. There breach is constituted by nonperformance that creates the right to use a remedy. A breach owing to *force majeure* does not result in the automatic termination of the contract. The party who wishes to terminate the contract must express its will for that purpose.<sup>14</sup> The CISG and the U.S. Restatement of Contracts, 2nd, have taken the same position.<sup>15</sup>

The Law of Obligations Act also provides for release from liability in the event of fault, as a derogation that needs to be provided in the law or stipulated in the contract. The party in breach is released from liability only in the event of such circumstances for which it is not responsible (*force majeure*). The Act provides for events when a breach of obligation results in the breaching party's liability only if fault exists. Hence, for example, the doctor-patient relationship created upon examination as well as during the treatment that follows is regarded as a service contract under the draft Law of Obligations Act. The doctor is liable to the patient only in the event of fault.

In Estonian civil law, under the first sentence of § 227 of the Civil Code, the party in breach of contract is responsible only upon the existence of culpability (intent or incautiousness), except in the cases provided by the law or stipulated in the contract. Under the second sentence of § 227, the absence of culpability must be proved by the person in breach of the obligation. Even a person who has caused damage extracontractually must, in order to be

released from liability, prove that the damage was caused not by his or her fault. Thus the presumption of fault of the person who has caused the damage is presently applied in Estonian law both to the cases of causing damage contractually and extracontractually.

In accordance with the draft Law of Obligations Act, a debtor is released from liability for breaching a duty when the debtor proves that it breached the duty because of a circumstance that was beyond its control and it could not, under the principle of reasonableness, have been expected to take that circumstance into account at the time of the conclusion of the contract, or to have avoided or overcome the impeding circumstance or its consequences. Hence the definition of *force majeure* is accordant with that provided in Article 8.108 (1) of the PECL.<sup>16</sup> Article 7.1.7 of the PICC also defines *force majeure* as a circumstance releasing from liability and contains wording identical to the formulation in the PECL. It is also important that the PECL and the PICC, as well as the new Estonian draft Law of Obligations Act, regard *force majeure* as a circumstance which releases from liability but at the same time does not prevent the application of certain remedies. Under Article 7.1.7 (4) of the PICC, the aggrieved party may terminate the contract or withhold performance or request interest on money due.<sup>17</sup> According to Article 8.101 of the PECL, the aggrieved party may, despite the existence of circumstances releasing from liability, still resort to remedies, except claiming performance and damages. The Estonian draft Law of Obligations Act also provides for the aggrieved party's right to apply remedies if the breach was excusable. That includes the rights to claim interest, withhold the performance, terminate the contract or reduce the price.

Under § 240 of the Civil Code, an obligation is terminated by the impossibility of its performance if that results from a circumstance beyond the responsibility of the debtor. Thus, in the event of *force majeure*, no expression of will by the parties is needed under Estonian law to terminate a contractual relationship. The contractual obligation terminates and the aggrieved party cannot use any remedies against the party in breach. As the obligation terminates, the other party's counterduties are also extinguished. The *force majeure* circumstances must be proved by the party in breach.

*Force majeure* circumstances may also be only temporary. The applicable Estonian law does not regulate temporary impossibility of performance. Nevertheless, in practice, this is a contractual stipulation of extensive use. The respective provision in the Estonian Law of Obligations Act is formulated identically to the wording of Article 8.108 (2) of the PECL, which provides that "where the impediment is only temporary the excuse has effect for the period during which the impediment exists."

The performance of the notification duty, which arises out of the law, is a very important condition in the applica-

tion of remedies. By the adoption of the new Law of Obligations Act, the notification procedure concerning breaches, which at present is extremely inexplicit and unsystematic, and the consequences of nonperformance of that duty will be put into order in Estonian law.

Thus, under the draft Law of Obligations Act, a debtor in breach of a duty must notify the creditor about the circumstance impeding the performance of the duty immediately after the debtor has or should have become aware of the impeding circumstance. Failing the notification, the debtor must indemnify the creditor for the damage caused.

Estonian civil law contains no general norm imposing the duty to give immediate notice of breach. The provisions regulating different categories of contracts nevertheless contain the aggrieved party's duty to give immediate (as a rule, within six months after the conclusion of the contract or the transfer of a thing) notice of a deficiency. If the aggrieved party fails to fulfil the notification duty, it is usually deprived of the right to rely on the breach. In the event of certain contracts, non-notification has no influence on the later right to claim. For example, under § 366(1) of the Civil Code, a thing transferred under a contractor's agreement must be immediately inspected by the purchaser, who must give notice of evident deficiencies discovered therein. If the purchaser fails to immediately give notice of deficiencies, it will be deprived of any later rights to claim based on deficiencies. As far as evident deficiencies are concerned, a purchaser may file a claim within six months after the day of receiving the work; as to latent deficiencies, claims may be made immediately after the discovery of such deficiencies within one year. In purchasing something, the purchaser is under no obligation to inspect the purchase. Nevertheless, the purchaser must notify the seller about any deficiencies immediately after discovering them. Failing to give notice of the deficiencies immediately after discovery, the purchaser may still file a claim concerning nonconformity of the purchase with the court within six months after the six months provided for presenting deficiencies have lapsed. Thus the Civil Code recognises the duty to give notice of deficiencies and the duty to inspect the thing as preconditions for entering claims against the party in breach. The new Law of Obligations Act also relates the right to use remedies to the inspection and notification duties. In accordance with the Law of Obligations Act, the creditor must notify the debtor about improper performance within reasonable time after the creditor has discovered or must have discovered the breach.

In the application of remedies, the question of their cumulativeness is also an important one.<sup>18</sup> The Estonian Civil Code presently provides for the right to performance even upon the existence of the right to claim penalties, interest and damages. The availability of several remedies concurrently is also provided for individual contract cate-

gories. Naturally, claims for damages are, as a rule, cumulative with other remedies. The new Law of Obligations Act entitles the creditor to avail itself, upon breach of obligation, of all lawful or contractual remedies, severally or in combination, that can be used concurrently unless otherwise provided by the law or stipulated in the contract. In particular, the resort to a remedy for breach of obligation does not deprive the creditor of the right to claim compensation for damage caused by the breach. When a remedy is unavailable under the law or contract, the aggrieved party may use other remedies. The same principle is contained in Article 8.102 of the PECL, which implies that compensation for damage does not deprive a party of the right to use other cumulative remedies.

## Remedy Categories

Civil-law remedies can be classified on different bases. The legal regulation of remedies is primarily aimed at ensuring the maximum protection of the aggrieved party's interests. In selecting a remedy for breach of contractual obligation, the aggrieved party has a view to certain objectives that it wishes to attain by making the claim, although in general, breached obligations can never be fully cured. However, in each specific case, it is possible to find a remedy that provides the highest possible satisfaction to the aggrieved party by, for example, allowing it to receive the agreed performance just a little later, to replace it with money, to repair the damaged thing, etc. On the basis of the objective of application, one group of remedies can be classified<sup>19</sup> as those aimed principally at the acknowledgement of rights or the extinguishment or alteration of duties (e.g. acknowledgement of a right; specific performance of a duty; termination or alteration of a legal relationship). Secondly, reference can be made to remedies aimed at anticipating a breach or directed towards termination (claims for ending the conduct that violates somebody's rights or that apparently can violate somebody's future rights; abatement of nuisance; claims for interest). In that event, the remedy is aimed at forcing a party to stop or anticipate the breach. The third group comprises remedies used mainly for the restoration of and indemnification for violated rights (restoration of the pre-breach situation, claims for annulment, determination of voidness, indemnification for damages, penalties).

In drafting the PECL, one of the debated issues was the choice of approach to the regulation of remedies. Namely, remedies can be regulated on the basis of breach categories by providing the remedies and methods of their application for each individual breach category respectively (the "cause approach"). The second possible approach was regulation on the basis of remedy categories (the "remedy approach"). It should be noted that remedies, by designation, include a range of very different lawful facilities for the protection of rights.<sup>20</sup> Regulation on the basis of

breach category is common to many national legal systems and also, partly, to the CISG. The same can be said about Estonian law, which regulates both the use of different remedies and the legal consequences of breaches of different categories. Hence, for example, delays in contractual performance are regulated as a category of breach, and respective provisions indicate the allowed remedies. At the same time, the consequences of nonperformance of a duty to perform certain works are also regulated as a category of breach by § 226 of the Civil Code.

A law system regulating remedies on the basis of breach categories has many positive qualities, including in particular the simplicity and intelligibility for those participating in contractual relationships. When a contract is not performed in due time, the aggrieved party will look up the law section describing delays in performance, and find there information on the available remedies. On the other hand, such regulation inevitably results in repetitions, as the same remedies are applicable to a number of breaches. The drafters of the Law of Obligations Act judged the repetitions resulting from the regulation based on breach categories to be unacceptable and therefore, that method was abandoned.

In order to describe which changes will be brought about by the new draft Law of Obligations Act in comparison with the applicable law, I deem it necessary to give a brief overview of the corresponding regulation in the Estonian Civil Code. First of all, no uniform system of remedies was established in drafting the Code. Instead, remedies are scattered throughout the general as well as specific provisions and the specific Acts of the law of obligations. As a rule, there are no general provisions on different remedy categories. By analysing the judicial practice, it can be asserted that such situation, in which no uniform conception of remedies exists with regard to their categories as well as their application, results in uncertainty of commerce and hence materially weakens the principles of legal certainty and freedom of contract. The courts are uncertain about to which extent and on which grounds agreements are permitted with regard to application of those remedies which are not provided for at all in the civil legislation. Moreover, minds differ on how remedies should be applied between the contracting parties themselves. In addition, reference should be made to uncertainty in the application of such important remedy as the right to terminate the contract. Even the formulation in the Civil Code fails to allow a uniform definition of cases in which the right to terminate is created, how the right to terminate contractual relationship is realised and whether the expression of will concerning the termination of a contract must be received or personally received by the party in breach.

The committee on preparation of the draft Law of Obligations Act considered it appropriate to transpose the PECL system, whereunder breaches of contract are regu-

lated on the basis of remedy categories. According to the PECL regulation, the risk of nonperformance is borne by the obliged party. The same principle underlies the regulation of contractual liability in the CISG. The new Estonian law of obligations also provides for the principle whereunder the creditor may not rely on the breach of duty by the debtor nor use any remedies arising out thereof if that breach results from the creditor's own act or a circumstance or event which was caused by the creditor and the risk of which was incumbent on the creditor.<sup>21</sup>

Together with the Law of Obligations Act, the preparation of a new General Principles of the Civil Code Act also got underway in order to replace the present General Principles of the Civil Code Act applicable from 1 September 1994. The present General Principles of the Civil Code Act, completed and passed in 1994, contains a substantial amount of provisions originating from the Soviet civil law. The choices then made are understandable, as the principles of preparation and the general principles of the law of obligations were lacking full definition at that time. However, when the new Law of Obligations Act passes into force, provisions of the applicable General Principles of the Civil Code Act would not conform to the principles underlying the Law of Obligations Act. In drafting the new General Principles of the Civil Code Act, full account has already been taken of the new Law of Obligations Act, the amendments made in other fields of law since 1994 and, anticipatorily, the need to amend legislation.

The application of remedies and their actual functioning in the regulation of contractual relationships under the principle of private autonomy depends largely on the legal regulation of expressions of will. The Estonian General Principles of the Civil Code Act, like the General Part of the German BGB, is based on the theory of expression of will and transaction, although legal relationships are regulated, differently from German law, through the concept of transaction rather than expression of will. During the preparation of the Act though, no attention was paid to regulating expressions of will so as to meet the needs of modern law of obligations and, in particular, contract law. The new draft General Principles of the Civil Code Act expressly provides that in order to be valid, an expression of will must have been expressed and it becomes valid as from receipt by the addressee. The regulation concerning the entry into validity of expressions of will is based on the objective receipt principle, i.e. an expression of will is considered received when it has reached the absent person's place of residence or location and can be examined by that person under reasonable circumstances. When an expression of will fails to reach, or timely reach, the addressee, it is still considered received if such situation results from circumstances for which the addressee is responsible. Thus the objective receipt principle, recognised in many European countries and also in Article 1.303 (3) of the

PECL, will become applicable in Estonian civil law.

Remedies are applied if the debtor breaches its duties assumed under contract. The new Estonian draft General Principles of the Civil Code Act, though, provides the principle, contained also in Article 1.303 (4) of the PECL, that an expression of will made with regard to breach becomes valid from its dispatch. Hence the draft states that "if one party gives notice to the other because of the other's non-performance or because such non-performance is reasonably anticipated by the first party and the notice is properly dispatched or given, a delay or inaccuracy in the transmission of the notice or its failure to arrive does not prevent it from having effect".

The draft Law of Obligations Act allows the aggrieved party to use the following remedies: right to performance, if the breach is inexcusable; right to withhold performance; right to damages, if the breach is inexcusable; dissolution or rescission of the contract; right to reduce price in reciprocal (synallagmatic) contracts; right to interest.<sup>22</sup>

### 1. CURE

Cure, as a remedy available to the aggrieved party in the event of breach of contract, is not unfamiliar to Estonian law. Although respective regulation existed in general provisions of the Civil Code, provisions on specific contract categories substantially restricted the use of this remedy. In addition, attention must be paid to the different roles of cure in the applicable civil law and in the forthcoming law of obligations. The duty to cure and the corresponding right were formerly regarded as only the creditor's right to demand reparation, replacement or other cure of the deficiency. However, the new draft Law of Obligations Act, like Article 8.104 of the PECL, provides for cure as the debtor's right to improve its situation.<sup>23</sup> Under the Law of Obligations Act, the right to cure is available until the dissolution or rescission of the contract and indemnification for damage (if damages serve the purpose of compensation and are paid to the extent of the unreceived performance). The draft also lists the circumstances in which cure is allowed.

Cure is allowed when it is reasonable under the existing circumstances, when no unjustified inconveniences or expenses are thereby caused to the aggrieved party. The aggrieved party's refusal to accept cure must be justified. With regard to cure, the procedure of notice, the nature and the consequences of curing deficiencies caused by improper performance are important. At first, the party in breach must offer cure by expression of will, describing the method and time of cure. For refusing cure, the aggrieved party must have a legitimate interest, of which the offeror must be notified within reasonable time. Thus the option of cure primarily protects the breaching party's status and enables to alleviate, for that party, the consequences of application of remedies. The fact that from receiving the notice of cure until the completion or failure of cure, the



aggrieved party may not use any remedies which are non-cumulative with cure is important to the party in breach. The aggrieved party may claim compensation for damage caused by the cure and/or delay and request the payment of interest or agreed penalty. Unlike the PICC, in which cure includes both the aggrieved party's right to demand cure and the nonperforming party's right to offer it, the Estonian Law of Obligations Act provides for cure, as an independent remedy, only as a right of the party in breach. The creditor's right to demand cure — i.e. the reparation, replacement or other removal of impropriety — is regulated as an independent demand for performance.

## 2. RIGHT TO PERFORMANCE

The right to performance is characteristic of particularly the Continental European legal systems as the remedy first applicable. In modern days, the right to performance has been losing its topicality, since traders are interested in fast commerce mainly, and therefore, specific performance may turn out to be inefficacious and unprofitable in economic terms. Nevertheless, the *pacta sunt servanda* principle has remained one of the fundamental principles underlying the regulation of contractual relationships in Continental Europe even today.

Two important principles are provided in the new Estonian Law of Obligations Act on the basis of Articles 9.101 and 9.102.<sup>24</sup> Under the first principle, monetary obligations are always performable. According to the second principle, demands for specific performance are not always justified, in particular when the performance is of a personal nature.

The legal provision for grounds whereon performance may not be demanded is important for Estonian civil law also because of the decision to abandon the principle of "realness of contracts". Thus, under the new Law of Obligations Act, loan contracts, transportation contracts and gift contracts will not remain real contracts but will rather be treated as consensual contracts. When loan contracts, but also gift contracts and transportation contracts, are regarded as consensual, the law must provide for the cases in which the rightful party is nevertheless prevented from demanding performance under the contract. In accordance with the draft Law of Obligations Act, the creditor may demand performance only when the performance of the duty is not unlawful or impossible, unreasonably burdensome or expensive for the debtor, when the performance cannot be reasonably obtained from another source and when the performance does not consist in the provision of services or work of a personal character.

A demand for specific performance also means that the debtor must be ready to fulfil the duties assumed under contract.

In the new Law of Obligations Act, the situation of the aggrieved party is also improved by the principal requirement that performance may be demanded only within a

reasonable time after the aggrieved party has or ought to have become aware of the breach. The debtor also may propose a time-limit within which the creditor must decide whether it is still interested in specific performance or wants monetary compensation. The time-limit set by the debtor must be reasonable so as to allow the creditor to decide which claim would be more useful to the creditor. The time given to the creditor for presenting a claim is, regardless of the set time-limit, deemed to be extended to a reasonable time-limit.

If the breach of duty occurred during a delay in reception or if the breach was caused by the other party (the aggrieved party), the other party may still remain bound by the contractual obligation even when specific performance may not be demanded from the party in breach. However, in no event may the creditor demand performance when it has received damages as a compensation for damage or in lieu of performance.

## 3. RIGHT TO WITHHOLD PERFORMANCE

During the performance of contractual duties it may become clear that regardless of performance by one party, the other fails to or cannot fulfil its duties. In economic activity, it is of utmost importance to ensure to the parties the right to use the said remedy under the law. The right to withhold performance protects the party under obligation to perform against crediting the party in breach and, at the same time, forces the party in breach to fulfil its duty.<sup>25</sup> According to Article 9.201 of the PECL, the party who is to perform simultaneously with or after the other party may withhold performance until the other has tendered performance or has performed.<sup>26</sup> Performance may be withheld with regard to a part of or the entire performance. Like Article 9.201 of the PECL, the draft Estonian Law of Obligations Act regulates the right to withhold performance as a general norm, and the right to withhold performance in reciprocal contracts as a special norm.<sup>27</sup>

Under Article 9.201 (2) of the PECL, a party may withhold performance for as long as it is clear that there will be a nonperformance by the other party when the other party's performance becomes due. The Estonian Law of Obligations Act provides for a party's right to withhold performance of its duties until the counterparty has fulfilled the first party's due claim, if the claim is not sufficiently secured. Under the PECL, the CISG as well as the Law of Obligations Act, the claim presented to withhold performance must be sufficiently connected with the debtor's duty. According to the Law of Obligations Act, connection between the claim and the duty is sufficient when reciprocal obligations arise from the same legal relationship or previous relationships between the persons or from other economic or temporal connections. In its character, the right to withhold performance is similar to the property-law right of retention, which exists in the event of insufficiently secured claims and which is regulated under



the provisions of the Law of Property Act.<sup>28</sup> Under the Law of Obligations Act, the provisions of the Law of Property Act also apply when withholding performance is concurrently accordant with the exercise of the right of retention provided in the Law of Property Act.

In parallel with the right to withhold performance with regard to insufficiently secured claims, the right to withhold performance in the event of reciprocal contracts is also regulated in the Law of Obligations Act. The provision, following the example of the PECL and the PICC, entitles the parties to withhold performance in the event of reciprocal contractual obligations until the counterparty has fulfilled its duties, tendered performance or furnished a sufficient security for performance or sufficiently guaranteed that it will perform the obligation. When an obligation must be performed to more than one person, the party under obligation may withhold performance with regard to all those persons until the entire obligation to that party is performed. The exercise of withholding performance must be reasonable and in accordance with the principle of good faith, taking into account all circumstances. Although the wording of the general provision contains no requirement that the other party's breach must be fundamental, the Act nevertheless provides for the principle whereunder no right to withhold performance can be assumed when the aggrieved party has fulfilled a substantial part of its duties or when the breach committed was not fundamental. Thus, the rather flexible formulation of that provision allows to assess the parties' right to withhold performance in each specific case.

In the realisation of the right to withhold performance, the sequence of performing duties must also be taken into consideration. Under Article 9.201 of the PECL, the right to withhold performance is available, first of all, to the party who is to perform simultaneously with or after the other party. In accordance with the draft Estonian Law of Obligations Act, performance may not be withheld by the party who must fulfil a duty before the other, except if circumstances that have become known after the conclusion of the contract constitute sufficient grounds to believe that the other party will not be able to perform its duties because of lacking monetary or other means for performance or nonperformance is caused by the other party's conduct in preparation or performance of the contract.<sup>29</sup> Under the Law of Obligations Act, in such event, the party entitled to withhold performance may demand simultaneous performance, set an additional time-limit for that or for the provision of a security, failing which the creditor becomes entitled to the dissolution of the contract. When, however, the creditor has sufficient grounds to believe that the debtor will be able to perform the duty in part or improperly, resort to withholding performance is justified only by the fundamentality of such breach. Thus the creditor must prove that the partial or improper performance of the con-

tract is of such fundamentality that entitles it to withhold performance.

The provision of the right to unilaterally withhold performance in the new Law of Obligations Act is an important change in comparison with the applicable law. Namely, § 174 of the Civil Code provides the right to unilaterally withhold performance for only such cases when that right is set out in the law. As no general provision exists to enable to withhold performance also in such cases that are not expressly provided in the law, the right to use the remedy in question is available to the creditor only in a very limited number of situations. For example, in accordance with § 230 of the Civil Code, the creditor may refuse to accept performance and claim damages if the debtor is in delay and, as a result, the creditor has lost its interest in performance. In addition, under § 248 of the Civil Code, a purchaser may decline to accept performance and refuse to perform when the seller fails to transfer the sold thing. Under § 249, the seller has the right to withhold performance if the purchaser, breaching the contract, refuses to take the purchased thing or to pay its determined price.

#### 4. RIGHT TO REDUCE PRICE

The reduction of price as *actio quanti minoris* is regulated as a remedy under Article 50 of the CISG and in Article 9.401 of the PECL. The right to reduce price becomes available when a party accepts improper performance. In accordance with the Law of Obligations Act, the party who has accepted improper performance has the right to reduce the price by the amount to the extent of which the value of the inappropriate performance was less than the value of proper performance at the time of performance. In order to reduce the price, the party who has accepted performance must give to the other party a statement to that effect. The right to reduce price is available to the party already before claimability if it is apparent that the other party commits a fundamental breach of contract. The other party must be notified of the reduction of price, to allow it to cure the improper performance and thus alleviate its situation.

In Estonian law, the reduction of price may be used only in cases provided in the law. The reduction of price as a remedy is regulated as a right to claim, which is judicially actionable only when one of the parties disagrees with the other's claim to reduce price. Hence, expression of will is not sufficient to reduce price unless the other party agrees. The person who has wished the reduction of price must turn to the court for the recognition of its right to that effect. The Act contains no instructions on how and for how long a party can exercise its right to reduce price. In the judicial practice, disputes over the right to reduce price exercised in the event of improper performance have arisen primarily under contractors' agreements. As the Civil Code does not contain provisions which would allow reduction of the agreed price of work completed with

improper quality, the parties themselves usually agree, in the contract, on the right to use the remedy in question. Often even the parties themselves are unable to agree on the realisation of such right. And disputes do arise in a situation in which the purchaser has accepted improper performance, the contractor claims payment for work, and the purchaser, for its part, objects that it has offset the contractor's claim by reducing the price. But the purchaser has not presented a claim to reduce price nor an expression of will to that effect. In connection with the presentation of the draft Law of Obligations Act to judges and carrying out the appropriate training, the situation described by Hartkamp in the overview of the preparation of the Netherlands Civil Code during 1947-1992<sup>30</sup> has arisen in Estonia. Namely, Hartkamp stresses that the preparation of the draft also influenced the development of judge law in the Netherlands, as the courts construed the applicable law so as it would be in conformity with the principles provided in the draft and with the relevant scientific commentaries. By analysing Estonian judicial practice in civil actions and particularly in disputes over contracts, it can be noted that courts interpret provisions which regulate contractual relationships and originate yet from the Soviet era in accordance with the fundamental principles and solutions in the new draft Law of Obligations Act.

## 5. INTEREST

Interest as a remedy available in the event of delay in performance of monetary duties is treated in the applicable law as a security, as a subcategory of penalty. The new Law of Obligations Act will bring about a rather important change in this respect.

Under the applicable Civil Code, interest is a subcategory of penalty, fixed in the law or contract and must be paid by the debtor to the creditor in the event of delay. According to § 231 of the Civil Code, a debtor in delay in the performance of a monetary obligation must pay, for the period of delay, three per cent of the amount in delay per annum unless another rate has been fixed in the contract or in the law. The applicable Civil Code does not provide for payment of default interest for delays in performing other than monetary obligations.

The draft Law of Obligations Act provides the right to claim interest as a remedy for late performance. The draft sets out a uniform procedure for determining both usage interests and default interests. Namely, the Law of Obligations Act also provides that when interest must be paid on an obligation, the interest rate is determined as the arithmetical average of two rates: the average interest rate paid by credit institutions for fixed-time deposits in the place and at the time of performance of the obligation and calculated with regard to the currency of the place of performance, and the average commercial bank short-term lending rate to prime borrowers prevailing for the contractual currency of payment at the place where payment is

due. However, the interest may not be lower than 6% per annum, unless otherwise provided in the law or stipulated in the contract. The above-referred arithmetical average will be fixed and notified by the Bank of Estonia. In the event of arrearage with the payment of interest over one year, the arrears of interest will be added to the amount of debt.

The duty to pay interest is created only in the event of delay in performing the principal obligation, which means that no interest may be claimed for delay in the payment of interest. Interest may also be claimed upon delay in performing nonmonetary duties; in that event, the interest is calculated from the time when the obligation was breached. Differently from the applicable law, the payment of interest does not depend on the fault of the person in delay. On the other hand, delay in acceptance and withholding performance release the person in delay from the duty to pay interest in the event of late performance.

The debtor's right to demand reduction in interest is an important remedy in the event of delay. The applicable Civil Code also provides for the right to demand reduction in interest when it is excessively high in relation to the losses incurred by the creditor. Here the court must take into account the extent of the creditor's performance, the parties' financial status and any other significant interests of the creditor. The draft Law of Obligations Act provides for the court's right to reduce penalties at the debtor's request when the penalties are unreasonably high, considering the extent of debtor's performance, the financial status of the participants in the obligation and the creditor's rightful interests. The debtor will lose the referred right after it has paid the interest. When the right to reduce interest, provided in the applicable law, is compared to the regulation in the new draft Law of Obligations Act, it is apparent that no substantial changes are envisaged in the regulation of this institute. In so far as the meaning of the unreasonably high interest is not set out with greater precision in the new reviewed text, it is apparent that the courts will follow the principle provided in the Civil Code, whereunder the losses and the demanded interest must be compared with each other to determine whether the interest is unreasonably high or not. This is supported by the fact that Article 9.509 of the PECL also allows to reduce interest when it is grossly excessive in relation to the loss resulting from the nonperformance and the other circumstances.

## 6. NOTICE FIXING ADDITIONAL PERIOD FOR PERFORMANCE

In Estonian civil law, a debtor need not be notified to be in breach of contract (*Mahnung* in German law). The same principle will remain applicable in the new Law of Obligations Act. In the applicable law, the termination of a contract is in the competence of the court, as a rule, but in certain cases provided in the law, one of the parties may itself terminate the contract upon its expression of will. In the applicable law, the right to unilaterally terminate the

contract is not regulated with a general provision extending to all contractual relationships in the absence of respective special provisions. However, provisions concerning specific contract categories entitle the creditor to terminate the contract when the debtor is in material breach of the contract. Hence, for example, a purchaser may under § 365(2) of the Civil Code repudiate a contractor's agreement during the performance of works and claim damages when it is obvious that the works are not carried out in conformity with the requirements. Repudiation of contract is, though, permitted only on condition that the purchaser has set a time-limit for removal of the deficiencies and the debtor has not fulfilled the creditor's request after that time-limit has lapsed. Thus it cannot be asserted that the right to notice fixing an additional period for performance as a remedy is absolutely unfamiliar to Estonian law, as the legislator also had a view to such remedy in regulating special contract categories. Here it must be noted that disputes arise in Estonian legal practice also over the application of this remedy since it is often considered unnecessary and parties resort to the right to terminate the contract without fixing an additional time-limit for removal of deficiencies.

The draft Law of Obligations Act provides the right to give the debtor an additional time-limit for performance of its duties. The set time-limit must be reasonable. In demanding performance it is assumed that a reasonable time-limit was fixed for that purpose and in the event of setting such time-limit that is not reasonable, taking into consideration all circumstances, it will extend to the time-limit which is deemed reasonable by the court.<sup>31</sup>

Regardless of fixing an additional time-limit, the creditor may demand compensation for its losses, demand interest and withhold performance of its duties. Under the draft Estonian Law of Obligations Act, the creditor, regardless of having set an additional time-limit, may still demand specific performance after that time-limit has lapsed without result. The creditor may not demand specific performance after it has been compensated for the unreceived performance by the debtor. In addition, the creditor may avail itself of other remedies, such as rescission or dissolution of the contract and the right to damages. Thus, differently from situations in which the debtor itself presents the creditor with a time-limit during which the creditor may demand specific performance and after which the creditor loses its right to demand performance, specific performance may be demanded from the debtor even upon the fixing of an additional time-limit by the creditor. Hence the regulation contained in the draft differs from the German law institute of *Nachfrist*, which was characterised by the extinguishment of the right to demand performance by fixing an additional time-limit. Rather, it is similar to the common-law principles, whereunder giving an additional time-limit did not extinguish the right to demand performance. A similar principle is provided in Articles 47,

49 (1)(b), 63 and 64 (1)(b) of the CISG, and a similar regulation can be found in Article 8.106 of the PECL.

The introduction of the institute of fixing additional time-limits also requires the provision of safeguards for the debtor under the law. Thus the creditor may not dissolve the contract without fixing an additional time-limit if the counterparty would thereby suffer unreasonably extensive losses in relation to the expenses it has incurred for the performance and the preparation of performance of the obligation. The setting of an additional time-limit may be subject to the stipulation that if that time-limit lapses without result, the contract will automatically terminate when the unperformed duty forms a substantial part of the entire contract. Thus the debtor's situation will become steadier — it knows that after the time-limit has passed without result, the creditor will not demand specific performance any more and therefore, the debtor need not be ready for performance.

## 7. RIGHT TO DAMAGES

The aggrieved party may claim damages for losses caused to it by breach of contract. Damages may be claimed with specific performance or in lieu thereof; in addition, the right to damages is usually also created with the right to use other remedies. No right to damages is created when the debtor is not responsible for the breach or the losses need not be compensated for under the law. Unlike other remedies, claims for damages need not be fulfilled in the events of excusable breach of contract. The right to damages is a remedy cumulative with virtually all other remedies. Damages may also be claimed without fixing an additional time-limit when it is obvious that even an additional time-limit will not give the desired result. In the event of partial performance, the creditor may nevertheless claim damages to the full extent if everything received is mutually restituted in accordance with the provisions concerning the dissolution of the contract. All benefits or claims for benefit must be subtracted from the compensable losses.

In the new Estonian Law of Obligations Act, all provisions regulating damages are contained in one Chapter. Those provisions are also applicable to damages payable for extracontractual losses. The draft Law of Obligations has abandoned the prohibition of competing actions, which underlies the Civil Code 1965. More substantial changes in comparison with the applicable regulation include the more precise regulation of damages and the provision of modern principles in the law. As in Article 9.502 of the PECL, the compensation for damage is aimed at putting the aggrieved person as nearly as possible into a situation in which that person would have been if the contractual obligation had not been breached. In the event of breach of contractual obligations, compensation for damages is restricted by the foreseeability principle, which is formulated in the draft like Article 9.503 of the PECL. Thus the

nonperforming party is liable only for loss which it foresaw or could reasonably have foreseen at the time of conclusion of the contract as a likely result of his nonperformance, unless the nonperformance was intentional or materially negligent. Damages do not cover losses caused or increased by circumstances independent of the party — in particular, force majeure or third-party act or a risk incumbent on a third party — unless otherwise provided or implied by the law.

The draft Law of Obligations Act provides the principle whereunder both material and moral damage must be compensated for. The applicable Civil Code does not provide the obligation to compensate for moral damage. However, under § 25 of the Estonian Constitution, everyone has the right to compensation for moral and material damage caused by the unlawful action of any person. As the Constitution was passed later than the Civil Code, the courts apply the Constitution as a legal basis for awarding moral damages. It is true that special Acts passed later also provide for the right to claim moral damages. Hence, for example, under clause 6) of § 4 of the Consumer Protection Act, a consumer may claim from the seller compensation for material and moral damage caused. The draft leaves the concept of moral damage undefined but indicates that moral damage includes, *inter alia*, physical and mental pain and suffering. Moral damages for breach of a contractual duty may be claimed if the duty was directed towards a moral interest and, depending on the circumstances of the conclusion or breach of the contract, the debtor understood or must have understood that the breach of duty could cause such damage, also in other cases when it committed a breach intentionally. In addition, the draft sets out the opportunity of compensation for future damage when such damage can be reasonably expected. The court may partly or fully postpone the determination of the extent of future damage or it may determine the extent of future damage by assessing the circumstances. Analogously to Article 9.506 of the PECL, the difference between the transaction concluded upon dissolution of the contract (coverage transaction) and the contract price may be claimed as damages if the cover transaction is concluded within a reasonable time after the dissolution and in a reasonable manner.

The applicable law does not provide for the right to claim compensation for future damage. The compensation obligation covers only the damage that has actually occurred. The provisions of the draft Law of Obligations Act allow to assess claims for compensable damages and the extent of their satisfaction much more flexibly. In addition, this enables courts to adopt more equitable adjudications, which will ensure legal certainty in such situation as compensation for damage.

The draft Law of Obligations Act also provides for the right to limit compensation by reducing the amount of damages. In reducing compensation, account must be

taken of the character of liability, relationships between the persons, the economic situation and the principles of equitableness and reasonableness. Under the applicable law, the amount of compensable damage may be reduced only when the damage has been caused also by the aggrieved party's fault, by connecting the application of the debtor's remedy with the question of fault of the parties.

## 8. DISSOLUTION OF CONTRACT

As a rule, the right to dissolve the contract is a remedy available in the event of material breach of contract. Estonian civil legislation has been extremely inconsistent in regulating dissolutions of contract. Namely, the wording in the law fails to define unambiguously whether unilateral termination is an *ex parte* transaction or the counterparty's consent is needed in order that the dissolution be valid. The draft Law of Obligations regards the right of dissolution as a transaction exercisable upon a unilateral expression of will, which, in order to be valid, must have been received by the counterparty.

The Civil Code refers to the aggrieved party's right to terminate the contractual relationship as the right to rescind the contract (§ 364 of the Civil Code — purchaser's right to rescind the contractor's agreement during the performance of works; § 399(2) of the Civil Code — mandatary's right to rescind the contract of mandate at any time) as well as the right to terminate the contract (§ 422(2) — depositor's right to terminate the contract of deposit at any time). However, in certain contracts, the aggrieved party may only demand termination of the contract, which means that remedies can be applied only by the court. Hence, for example, the Commercial Lease Act (1980) provides for the lessor's right to demand early termination of the lease when the lessee has committed a breach referred to in § 18 of the Commercial Lease Act. The same right is enjoyed by residential lessors under the residential lease contract. In such event, the lessor cannot terminate the residential lease contract, either, without a court order. Also, in the event of selling a thing the quality of which does not conform to the appropriate requirements, the purchaser is entitled to only demand termination of the contract but not to terminate the contract. In the applicable law, the right to dissolve the contract is created usually when the counterparty commits a material breach of its duty. In applying the provision, the court must determine whether the breach was material or not.

The definition of material breach provided in the draft Law of Obligations Act conforms, in its main part, to Article 8.103 of the PECL. Material breach is a situation in which strict compliance with the obligation is of the essence of the contract, or the nonperformance substantially deprives the aggrieved party of what it was entitled to expect under the contract, unless the other party did not foresee and could not reasonably have foreseen that result or the nonperformance is intentional and gives the aggrieved party reason to believe that it cannot rely on the



other party's future performance, and the obligation is not performed within an additional time-limit. Consequences of material breach with regard to some obligations or parts thereof are also regulated similarly to Article 9.302 of the PECL.<sup>32</sup>

The right to dissolve the contract may be created even before the obligation becomes claimable. The respective regulation in the draft Estonian Law of Obligations Act is partly based on Article 8.105 of the PECL. Thus, one party may terminate the contract even before the contractual obligation is breached if it is evident that the other party will commit a material breach. A similar right becomes available to the aggrieved party when the breach concerns only one part of the performance. The exercise of the right of dissolution may not cause unreasonable and excessive expenses to the counterparty and, therefore, the respective provision sets out that an intention to dissolve the contract is subject to prior notification. The statement of dissolution must be made within a reasonable time after the party has become or must have become aware of the breach, after the additional time-limit has lapsed or after the debtor's notice that it will not perform its duty. The aggrieved party becomes entitled to dissolve the contract if the contract has not been confirmed or secured within a reasonable time. A party is released from the duty to notify about dissolution upon the breaching party's notice that it will not perform its duty or upon other circumstances in which it is not reasonable to expect a prior dissolution notice. The flexibility of the duty to notify makes the situation more uncertain, on the one hand, because in case of dispute, the assessment of circumstances is left to the court. On the other hand, this allows checking of the parties' conduct under specific circumstances, assessing it objectively under the principle of reasonableness.<sup>33</sup>

The right to dissolve the contract may arise out of a breach of contract or an agreement between the parties. The Law of Obligations Act also provides for the opportunity to agree on paid rights of dissolution.

The harmonisation of remedies between European national legislations is one of the most important areas which enable the removal of barriers to trade between different countries.<sup>34</sup> It is important for market players to know their rights with regard to their contract partners under the laws applicable in specific legal systems. The drafters of the new draft Estonian Law of Obligations Act aimed at creating a law that would be in accordance with modern requirements and protect contracting parties' rights in a manner that would ensure equitableness and good manners in contractual relationships.

## Notes:

<sup>1</sup> Q.v.: Jürgen Basedow. A Common Contract Law for the Common Market. — F. Ferrari (ed.). The Unification of International Commercial Law. 1998, pp. 51-52.

<sup>2</sup> In drafting the Law of Obligations Act, German law (mainly the proposed amendments to BGB), Swiss Civil Code, the United Nations Convention on Contracts for the International Sale of Goods (CISG), signed in Vienna on 11 April 1980, the UNIDROIT Principles of International Commercial Contracts (1994) and the Principles of European Contract Law were used as models.

<sup>3</sup> O. Lando. Principles of European Contract Law: An Alternative to or a Precursor of European Legislation. — The American Journal of Comparative Law. A Quarterly. Vol. 40, 1992, p. 581.

<sup>4</sup> K. Zweigert, H. Kötz. An Introduction to Comparative Law. Vol. II: The Institutions of Private Law. — North-Holland Publishing Company, Amsterdam - New York - Oxford, 1977, p. 179.

<sup>5</sup> The Civil Code of the Estonian Soviet Socialist Republic. Adopted on 12 June 1964. Tallinn, 1971. Of that Code only the law of obligations part is applicable, as other parts (general principles of the Civil Code, law of property, law of succession and family law) have been replaced by respective Acts passed during the independence. The Civil Code itself was drafted upon the grounds of the Soviet Union civil legislation.

<sup>6</sup> For the text of the draft Law of Obligations Act in the Estonian language, q.v. <http://www.just.ee/volaigusseadus.html>

<sup>7</sup> O. Lando. Performance and Remedies in the Law of Contracts. — Towards a European Civil Code. Ed. A. S. Hartkamp, M. W. Hesselink, E.H. Hondius, C. E. du Perron, J. B. Vranken. 1994, p. 215.

<sup>8</sup> Hence, for example, there is no uniform and satisfactory conception of the causal relationship. Neither is there any developed and generally accepted conception regarding the interrelationship between elements of liability.

<sup>9</sup> Y. Ananyeva, P. Kask, V. Kelder, L. Lill, E. Ploom. Nõukogude tsiviilõigus (The Soviet Civil Law). Tallinn, 1971, p. 421; textbook 1975, p. 339.

<sup>10</sup> Y. Ananyeva, P. Kask, V. Kelder, L. Lill, E. Ploom. Nõukogude tsiviilõigus (The Soviet Civil Law). Tallinn, 1971, pp. 421, 422.

<sup>11</sup> O. Lando, 1994, pp. 212-215.

<sup>12</sup> M. P. Furmston. Breach of Contract. The American Journal of Comparative Law. A Quarterly. Vol. 40, 1992, p. 671.

<sup>13</sup> O. Lando, 1992, p. 582.

<sup>14</sup> O. Lando, 1992, p. 583.

<sup>15</sup> Art. 79 of the CISG does not regulate the termination of a contractual obligation but such conclusion is implied in the provisions of that Article.

<sup>16</sup> Art. 8.108 (1) of the PECL: A party's non-performance is excused if he proves that it is due an impediment beyond his control and that he could not reasonably have been expected to take the impediment into account at the time of the conclusion of the contract, or to have avoided or overcome the impediment or its consequences.

<sup>17</sup> Q.v.: UNIDROIT: Principles of International Commercial Contracts (International Institute for the Unification of Private Law, Rome, 1994).

<sup>18</sup> The cumulativeness of remedies is primarily based on their concurrent applicability. This is a field creating difficulties in the practical aspect as well as in the aspect of the harmonisation of laws. Q.v.: M. P. Furmston, 1992, pp. 673-674.

<sup>19</sup> Q.v.: M. I. Braginski, V. V. Vitryanski. Dogovornoye pravo (Contract Law). 1998, pp. 634-635.

<sup>20</sup> K. Zweigert, H. Kötz, 1977, p. 194.

<sup>21</sup> Under Art. 8.101 (3) of the PECL, "a party may not resort to any of the remedies set out in Chapter 9 to the extent that his own act caused the other party's non-performance".

<sup>22</sup> The new Estonian law of obligations did not transpose the punitive penalty called *astreinte*, which is unfamiliar to our national legal system, although known to the CISG as well as the PICC, and which means the imposition of a punitive duty on a party. The described remedy does not appear in the PECL either.



<sup>23</sup> A. S. Hartkamp. The UNIDROIT Principles for International Commercial Contracts and the Principles of European Contract Law. — *European Review of Private Law* 2, Netherlands, 1994, p. 350.

<sup>24</sup> A. S. Hartkamp. The UNIDROIT Principles for International Commercial Contracts and the Principles of European Contract Law. — *European Review of Private Law* 2, Netherlands, 1994, p. 352.

<sup>25</sup> O. Lando, H. Beale. The Principles of European Contract Law. Part I: Performance, Non-Performance and Remedies. 1995, p. 166.

<sup>26</sup> A. S. Hartkamp. The UNIDROIT Principles for International Commercial Contracts and the Principles of European Contract Law. — *European Review of Private Law* 2, Netherlands, 1994, p. 350.

<sup>27</sup> Q.v.: Art. 58 (1) and Art. 71 (1) of the CISG.

<sup>28</sup> Q.v.: § 320 of the Law of Property Act (passed on 9 September 1993), whereunder, if a claim is not sufficiently secured by a real right and the due date for its performance has arrived, the creditor has the right to retain movables and securities of the debtor which have legally come into possession of the creditor until the claim is satisfied if the claim is connected to the retained object. Q.v. also: P. Pärna, V. Kõve. *Asjaõigusseadus. Kommenteeritud väljaanne.* (Law of Property Act. Commented edition.) Tallinn, 1996.

<sup>29</sup> This provision corresponds to Art. 71 (1) of the CISG.

<sup>30</sup> A. S. Hartkamp. Civil Code Revision in the Netherlands 1947-1992. New Netherlands Civil Code. Patrimonial Law (Property, Obligations and Special Contracts). *Nieuw Nederlands Burgerlijk Wetboek Het Vermogensrecht (Zakenrecht, Verbintenissenrecht en Bijzondere Overeenkomsten)*. Transl. P. P. C. Haanappel. Kluwer Law and Taxation Publishers. Deventer. Boston, 1990.

<sup>31</sup> A. S. Hartkamp. The UNIDROIT Principles for International Commercial Contracts and the Principles of European Contract Law. — *European Review of Private Law* 2, Netherlands, 1994, p. 353.

<sup>32</sup> A. S. Hartkamp. The UNIDROIT Principles for International Commercial Contracts and the Principles of European Contract Law. — *European Review of Private Law* 2, Netherlands, 1994, p. 353.

<sup>33</sup> According to the draft Estonian Law of Obligations Act, reasonable in an obligation is what persons acting in the same situation in good faith would usually consider reasonable. In assessing reasonableness, account is taken of the nature of the obligation and the objective of the transaction and the traditions and practice in the field or profession concerned, as well as other circumstances.

<sup>34</sup> Q.v.: A. S. Hartkamp. The UNIDROIT Principles for International Commercial Contracts and the Principles of European Contract Law. — *European Review of Private Law* 2, Netherlands, 1994.



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# Defending the Rights of Minority Shareholders in Estonia

One of the main principles of company law is the protection of persons in a lower position. When we consider the position of shareholders in relation to third (all other) persons on such a preference scale, the principle has to be taken into account according to which shareholders are usually viewed as relatively passive investors (they are not engaged in the everyday activity of the public limited company and their possibilities to guide the activity of the company are rather indirect). That is why the possibilities of shareholders to protect their rights have to be provided by law. This is just one aspect of protecting the rights of shareholders. The second problem is that shareholders are not equally positioned due to the number of the shares they hold. The shares may grant different rights (mainly concerning voting<sup>1</sup>), and the number of shares held by a person (or, to be more exact, the number of votes granted by such shares) is also decisive. The need to protect minority shareholders is chiefly related to the fact that investment in a public limited company should not become pointless or too risky for a shareholder.<sup>2</sup> Thus, when speaking about protecting the rights of shareholders in relations with third persons, the need to protect minority shareholders against majority shareholders should also be considered, to guarantee as equal as possible rights for shareholders.

Section 272 of the Commercial Code<sup>3</sup> (hereinafter CC) passed on 15 February 1995 prescribes that shareholders are to be treated equally under equal circumstances. This rule has been transposed to guarantee the principle laid down in Article 42 of the 2nd Company Law Directive<sup>4</sup> — the laws of the Member States shall ensure equal treatment to all shareholders who are in the same position. The objec-

tive of this norm ought to prevent any discrimination of a shareholder. For example, before the Commercial Code entered into force, it was common practice that the founder shareholders were often granted rights different (greater) than these of other (newer) shareholders, such as special rights to receive dividends or the right to vote, which were not in proportion with the nominal value. In further analysis of the principle of equal treatment, it is important to keep in mind that “equal circumstances”, the existence of which is a prerequisite for equal treatment, means first of all the investment as the shareholder’s most direct link to the public limited company. The investment of course is not the sole prerequisite. Situations occur where the investment-related basis for treatment is equal, but legal inequality arises from other circumstances prescribed by law or the articles of association (for example, a shareholder may not vote where certain matters are being decided — the unequal treatment here is due to the fact that his or her interest in deciding certain matters may be partial; or a shareholder has to pay not only capital and capital over par, but also an interest — in this case, the basis for unequal treatment is the shareholder’s delay in making the contribution). The objective of the equal treatment provision is to lay down the most general principle for treating all these problems where the law does not provide a specific norm. The freedom to make decisions is thus partly limited. The general principle applicable in private law is that everything not forbidden is allowed. The difference between company law and, for example, contract law, is that the prerequisite for various legal transactions is not consensus between parties, but the majority can influence the minor-

ity through the majority of votes. The equal treatment principle imposes certain limits to such possibilities of influencing. At the same time, the shareholder is not prohibited from waiving his or her rights<sup>5</sup> — the freedom to make decisions is only partly limited.

In the protection of shareholders, the rights provided by law for each single shareholder and the rights provided for shareholders whose shares represent a certain part of the share capital have to be distinguished. It is clear that in certain matters, each shareholder has to be protected by providing individual rights for him or her. An example of such rights is the right of a shareholder to receive information, prescribed by CC § 287. The law does not, however, provide rights for each shareholder to influence the course and resolutions of the general meeting, but prescribes a minimum participation, which usually is one-tenth of the share capital.

## General Principles of Protection of Minority

The measures of minority protection established in Estonia chiefly regard the resolutions of the general meeting. According to CC § 303(1), a shareholder may not vote if release of the shareholder from obligations or liabilities, assertion of a claim against the shareholder or conclusion of a transaction between the shareholder and the public limited company or determination of a representative of the company in such claim or transaction is being decided. As opposed to the Swedish law, the Estonian law does not prohibit a shareholder from voting if the relations between the public limited company and a person concerning whom the shareholder has an important interest is being decided (Swedish Companies Act<sup>6</sup>, Chapter 9 § 3). Neither does the Estonian law prohibit a person from voting as a representative of a shareholder if he or she has a personal (partial) interest different from that of the company in a matter. The main reason why the right to vote is limited is to prevent situations where a shareholder can, through voting, influence decisions in matters where his or her personal interests dominate over the interests of the public limited company, and to provide a basis for asserting a claim against the majority shareholder if he or she has caused damage to the company by adopting such a resolution. However, the Estonian law is apparently not sufficient to guarantee the protection of minority shareholders, as practice suggests that it is transactions with persons connected with shareholders which constitute a problem. The only minority protection measure here is to demand that shareholders be treated equally as provided by CC § 272. The provision, however, has not been applied in the Estonian court practice so far. The Supreme Court of Estonia, in its judgments and in its forming of court practice thought that, has always referred to special norms when interpreting the Commercial Code, and has never referred to the general

norm providing “equal treatment”.

As a second measure to guarantee the protection of minority, the law provides for a qualified majority requirement in deciding certain matters. While resolutions of the general meeting are usually adopted with a simple majority of votes, it is necessary that at least two-thirds of the votes represented at the general meeting vote in favour in matters such as increasing or reducing share capital, amending the articles of association, or adopting a merger, division or transformation resolution. Further, if a public limited company has shares of different classes, resolutions on the increase and reduction of share capital and on the merger, division or transformation of the company have to be adopted separately for each class of shares, while it is necessary that at least two-thirds of the votes represented by each class of shares at the general meeting be in favour. The requirement has been transposed from Articles 25(3) and 31 of the 2nd Company Law Directive, Article 7(2) of the 3rd Company Law Directive<sup>7</sup> and Article 5(1) of the 6th Company Law Directive<sup>8</sup> on company law. Thus, the Estonian law not only protects the minority, but also protects the rights of owners of different classes of shares. It should also be kept in mind that the Commercial Code allows the establishment of a greater majority requirement in the articles of association. The qualified majority requirement as a minority protection measure works best for traditional public limited companies whose capital is divided into a large number of shares and which has many shareholders (with presumably different interests). If the capital of a public limited company is divided equally between, for example, three shareholders, there is no basic difference whether a two-thirds majority of votes or the usual “over one-half of the votes” is required to adopt a resolution — in both cases, the resolution can be influenced separately by each third of the capital.

In some cases the law provides for a greater than 2/3 majority requirement. Such is the case with the possibility prescribed in CC § 235(2) to amend the rights attached to a class of shares. A resolution can be adopted here if at least four-fifths of all votes are in favour, unless the articles of association prescribe a greater majority requirement. It is further necessary that at least nine-tenths of those shareholders, the rights attached to whose shares are being amended, vote in favour of such resolution. It should be pointed out that when we consider the requirements of law, such a resolution can be adopted only if at least nine-tenths of the votes attached to the respective class of shares are represented at the general meeting, otherwise the majority required by law cannot be achieved. This a special norm protecting the rights of even the most passive shareholders — the shareholders who do not participate in the meeting (either incidentally or deliberately). So, while usually the majority of votes is related to the number of votes of participants, in this case the votes of all shareholders are deci-

sive. It is a peculiar situation where even those shareholders vote who do not participate in the meeting.

In addition to the possibility to block the adoption of a resolution at a general meeting, the law provides for minority shareholders a possibility to demand the discussion of certain matters at the general meeting. Shareholders whose shares represent at least one-tenth of the share capital can submit such a demand to the supervisory board (which shall determine the agenda of the general meeting based on CC § 293(1)). As according to the generally accepted principle, the adoption of resolutions by the general meeting is limited to the agenda specified in the notice of the general meeting, the demand to add an item to the agenda has to be submitted before the notice of general meeting is sent to the shareholders or published (CC § 293(2)). The law prescribes the minimum period for notification of a general meeting in advance, but does not specify a maximum period, which means that the initiative of shareholders can be stopped by sending the notices very early (for example, 6 months prior to the general meeting). In such case, it may be argued that the management board is not prohibited from sending new notices with additional items of the agenda, but the law does not prescribe a direct obligation for the management board, therefore the situation fully depends on the will of the management board.<sup>9</sup> Attention should be drawn to the fact that the law provides for the minority shareholders the right to demand additions to the agenda of the general meeting, but does not directly prescribe that such demand be binding for the supervisory board in determining the agenda. Should the supervisory board choose not to satisfy the demand of the shareholders and not to include the item demanded by them in the agenda, the only thing the shareholders can do is sue. Considering the deadlines for court proceedings, this is a lengthy process and might not give the anticipated result regarding the possibility of enforcement of the judgement. § 156(1) 5) of the Code of Civil Procedure includes, among the measures for securing an action, a prohibition on the defendant from performing certain acts (in this case, it would be the prohibition to carry out a general meeting), and the enforcement of the judgement in this situation would indeed be difficult if the action were not secured. So, from a formal legal viewpoint, securing of the action would be justified, but no judge is likely to do that as the conduct or failure to conduct a general meeting (or rather, the approval of the annual reports at the general meeting) within a certain period of time is related to the compulsory dissolution of the public limited company (CC § 60(1)). In practice, it is not possible to apply the depositing of a specified amount of money with the court to prevent proprietary loss caused by securing the action as provided by § 155(3) of the Code of Civil Procedure, because it is difficult, if not impossible to estimate the damage caused by compulsory dissolution. This means that the shareholder

might achieve a court judgement favourable for him or her and eventually the discussion of his or her demanded item at the general meeting, but considering the pace of economic activities and the time spent on court procedure, it might not be effective in preventing the rights of the shareholder.

In addition to the above problem, situations have occurred in practice where shareholders submit a demand to add to the agenda such items which according to CC § 298(1) do not lay within the competence of the general meeting of shareholders. As the general meeting may adopt resolutions in other matters (i.e. matters not directly prescribed by law) only on the demand of the management board or supervisory board (CC § 298(2)), the supervisory board may, in such case, satisfy the demand of the shareholders to add to the agenda of the general meeting, by adding the item on the demand of the supervisory board itself. But the supervisory board is not obliged to do anything of the kind and hence the outcome of the problem merely depends on the will of the supervisory board members, and such addition to the agenda cannot be sued.

The third right related to the general meeting is the right granted to shareholders whose shares represent at least one-tenth of share capital to demand calling the general meeting (CC § 292(1) 2)). The management board has to satisfy such demand within one month, otherwise the shareholders have the right to call the general meeting themselves. The management board is not obliged to satisfy the demand of the shareholders if the demand is submitted less than two months prior to the annual general meeting. A number of problems arise concerning these rules. Firstly, it is questionable whether the shareholders should have the right to call a special general meeting. In practice, the exercise of such right is relatively burdening for shareholders, as the calling of a meeting has its expenses and it is not clear who should cover these expenses. Although it seems that the public limited company should cover the expenses, the end result again depends on the will of management board members. Neither does the law specify the procedure for calling a meeting in such case (preparation of agenda, notification, etc.). There is another aspect to the calling of a general meeting by shareholders — minority shareholders may grab the opportunity and call a general meeting without good reason. Therefore, it would be more rational if the law provided for such case that the court call a general meeting on the demand of shareholders. A similar procedure is provided by the *Societas Europaea* statute<sup>10</sup> (Article 83 (2)). According to Chapter 9 § 8 of the Swedish Companies Act, in such case the district government calls a special general meeting on the demand on shareholders.

An important minority protection measure is the right of the minority to demand the conduct of a special audit (CC § 330). A special audit can only be conducted by an auditor, thus the conductor of special audit can be called



the minority auditor. The law prescribes certain limitations to the conduct of a special audit. Firstly, it is prescribed that a special audit can be conducted only in matters regarding management or financial situation. A special audit can be decided by two methods. Firstly, shareholders whose shares represent at least one-tenth of the share capital may submit a demand concerning special audit to the general meeting. The demand of minority shareholders is, however, not binding for the general meeting and if the conduct of a special audit is not decided, shareholders may submit the same request to a court. Here, the law imposes two additional restrictions. Firstly, only those shareholders whose shares represent at least one-quarter of the share capital may submit a request to a court. Secondly, the court may decide on the conduct of a special audit only with good reason. Of course, this does not imply that shareholders may submit to the general meeting a demand to decide the conduct of a special audit without good reason.

It should also be taken into account that the situation where the general meeting discusses special audit but decides not to conduct one, is not the only basis for requesting special audit through a court. Special audit can be requested through a court also if the general meeting does not respond to the demand to decide on the conduct of a special audit and does not take any decision in the matter.

For the general meeting to adopt a resolution, the shareholders have to submit to the general meeting at least the matters concerning which a special audit should be conducted. As opposed to a court, the general meeting is not bound by the question of whether the reasons submitted are justified or not. Special audit is a minority protection measure, but the results of the special audit are not disclosed solely to the shareholders who submitted the demand — the results are disclosed at the general meeting of shareholders. In practice, the question of who should cover the expenses of special audit has also been a problem. In no way can the company be charged where a special audit is justified and the shareholders be charged where shareholders have demanded the audit. Such an approach would considerably limit the possibility of the minority to achieve the decision of a special audit and would also contradict the implications of law. Thus, it is the obligation of the public limited company to cover the expenses of special audit regardless of its results. If a special audit is demanded without good reason, the general meeting should reject the demand. Of course it should be taken into account that due to the relatively limited availability of information, the shareholders may not have enough verified information at the time of submitting the demand, and the question of whether the conduct of a special audit was decided with good reason or not, can be answered only after the results of the audit are disclosed.

## Protection of Shareholders in Allotment of Shares

When speaking about the regulation of allotment of shares, the first question that arises is whether it is a minority protection measure or a more general institution of shareholder protection. Here, Estonia can be compared with Sweden, where the matters of allotment of shares are rather thoroughly regulated and several minority protection measures are prescribed.<sup>11</sup>

Paragraph 29(1) of the 2nd Company Law Directive stipulates that where share capital is increased and shares are paid for in money, the shares have to be first offered to shareholders in proportion with their share of the share capital. If a public limited company has several classes of shares and additional shares of one class are issued, the pre-emptive right of purchase may be granted first to the owners of that class of shares and after that to other shareholders.

The Estonian law has transposed the norms laid down in the Directive quite similarly. CC § 345 stipulates that if new shares are paid for in money, shareholders have a pre-emptive right to subscribe for the new shares, while in the case of several classes of shares, the stipulations of the directive are transposed exactly. As mentioned above, the Commercial Code bars the pre-emptive right in case of contributions in kind and in case of increasing the share capital by the acquiring company upon merger (§ 422(1)), or the recipient company upon division (§ 466(1)). Such a distinction is essential, as the increase of share capital upon merger or division is needed for the shareholders of the company being acquired or divided to become shareholders of the acquiring or recipient company. The pre-emptive right is of course not barred where upon merger or division the share capital is increased to an amount exceeding that essential for performing the merger or division.

When we look at the conditions imposed on the allotment of shares, the law protects minority shareholders with a greater than usual majority requirement (according to CC § 345(1), the pre-emptive right of shareholders to subscribe for shares may be barred with three-quarters of the votes represented at the general meeting). At the same time, even this majority requirement is apparently insufficient to effectively prevent the majority shareholder from barring the shareholders' pre-emptive right. As at least a two-thirds majority of votes represented at the general meeting is necessary to adopt a resolution on the increase of share capital, this majority can be used to increase share capital by contributions in kind and thus bar the pre-emptive right of minority shareholders with a smaller majority of votes than the law establishes for the barring of the pre-emptive right.

## The Right of Shareholders to Receive Information and Examine Documents

As mentioned above, the right to receive information has been granted to every shareholder in Estonia. The Estonian law has generally adopted the principles of German law regulated by § 131 of the German Stock Corporation Act<sup>12</sup> — a shareholder has the right to receive from management board members information at the general meeting of the public limited company, while the management board has the right to refuse to give information if there is a basis to presume that this may cause significant damage to the interests of the public limited company (CC § 287(1)). Whether the giving of information may cause significant damage, and the significance of the damage are decided by the management board. An important difference between the Estonian and German law is that the receipt of information in Estonia is not limited to the items on the agenda of the general meeting, but includes all matters regarding the activity of the public limited company. As regards the right to examine the documents of the public limited company, this right is relatively limited and can be exercised only in cases expressly prescribed by law. According to law, a shareholder has the right to examine the annual report (CC § 332(4)), the share register (CC § 234(1)), the minutes of the general meeting (CC § 304(3)), the merger or division agreement and report and the auditor's report on the merger or division agreement (§§ 397(2), 440(3)), upon transformation the transformation report and the approved annual report for the last financial year (§ 496(1)) and upon liquidation, the final balance sheet and asset distribution plan (CC § 378(3)).

The right to receive information is also guaranteed by the right of every shareholder to examine the annual report prior to approval for at least two weeks before the general meeting (CC § 332(4)). Every shareholder has also the right to receive additional information on the public limited company if the shares of the company are listed on the Tallinn Stock Exchange. Information is received according to the publicity rules of the stock exchange. As receiving information on the company's activities directly concerns the interests of each shareholder and is the basis for his or her (investment) decisions, this right cannot be limited to the size of the shareholder's holding and each single shareholder has such rights regardless of the nominal value of his or her shares or the votes attached to them.

In addition to the right to examine the documents specified by law, the law provides for the shareholder's right to receive copies of certain documents. Such documents are the share register (CC § 234(2)), the minutes of the general meeting (CC § 304(4)), the merger agreement and resolution (CC § 397(3)), the division agreement and resolution (CC § 440(2)) and the transformation report (CC

§ 496(2)). The expenses of making and issuing copies are covered by the company. A certain discrepancy can be noted here between the different norms. Attention should be drawn to the fact that in addition to guaranteeing the receipt of information, the disclosure of documents guarantees, thorough issuing copies, for the shareholder the possibility to file claims against the company (both in court and out of court). However, the law does not oblige a public limited company to disclose to the shareholder the resolutions of the supervisory board, which the shareholder is entitled by law to contest. Thus, the right of a shareholder to contest a resolution of the supervisory board is largely formal, because the shareholder might not receive adequate information on actual violations. Neither does the Estonian law require the public limited company to give the shareholder a copy of the articles of association. Such a right is established for example in France in Article 153 of the Decree of 23 March 1967 on Commercial Companies.<sup>13</sup>

If a shareholder is not given the information prescribed by law or he or she is not allowed to examine documents, he or she may demand the elimination of such violations in court, despite the fact that the law does not expressly provide for suing.<sup>14</sup> Such suing can serve two different aims. In a situation where the provision of information or disclosure of documents is related to later resolutions of the general meeting, CC § 302 can be applied and a resolution of the general meeting requested to be declared invalid because the resolution is not in conformity with law. Upon merger, division and transformation, the law provides essentially similar norms as grounds of action (CC §§ 398(1), 441(1) and 481(1)). A certain limitation has to be taken into account in the latter cases — a merger, division or transformation cannot be contested after its entry in the commercial register (CC §§ 403(5), 446(7) and 487(4)). The second aim can be the acquiring of information as a right in itself. Both aims have to be achievable by law, because as said above, a violation might not always be apparent in a resolution of the supervisory board.

## Protection of Shareholders' Rights in Court

The matter of protection of a shareholder's right in court is somewhat more problematic. It is arguable whether each shareholder should have the right to sue, on which grounds he or she can be entitled to such a right and whether such right should be granted to those shareholders whose shares represent a certain percentage of the share capital (or at least, the exercise of this right made simple for them), whether "class actions" should be admitted, etc.<sup>15</sup> These issues are topical in the Estonian law too. If we look at the shareholder's right to sue a certain matter, first of all the right of every person to recourse to the courts to protect his or her violated or contested right should be taken into account (§ 4(1) of the Code of Civil Procedure).

This norm in turn arises out of § 15 of the Constitution of the Republic of Estonia.<sup>16</sup> The Estonian law generally accepts the right everyone, including every shareholder, to recourse to the courts if his or her rights have been violated or contested. At the same time, the principle is not so widely applicable to public limited companies in practice, as otherwise the actions brought by shareholders against the company might become so common that they may damage the interests of the company. The Commercial Code prescribes the cases in which only shareholders whose shares represent a certain proportion of the share capital may sue. A case like this is the request to decide on the conduct of a special audit, the prerequisite for which is the failure of the general meeting to satisfy a respective demand — in such case, only those shareholders whose shares represent at least one-quarter of the share capital may refer to a court (CC § 330(2)). The law provides no limits for other cases and each shareholder can sue. This regards requests that the resolution of the general meeting be declared void (CC § 296 and General Principles of the Civil Code Act<sup>17</sup>, § 66(2)) or invalid (CC § 302), substitute members be appointed to replace withdrawn members of the management board or supervisory board (CC §§ 310, 319(6)), the compulsory dissolution resolution (CC § 366(2)), merger resolution (CC § 398(1)), division resolution (CC § 441(1), transformation resolution (CC § 481(1) be declared invalid, and other requests. Such a situation entails a possibility that each shareholder's rights are protected by court equally with his or her other rights. On the other hand, such an unlimited right to sue can cause problems as the law leaves the public limited company unprotected against the shareholder. Although the damage caused by an unfounded action has to be compensated for, it is usually difficult to prove specific damage caused by the unfounded action, and unfounded actions are brought because the burden of proof in such a case is very severe for the company. It is not only the matter of proving — damage can often be apparent, but in addition to the existence of damage, the causal relation between the unfounded action as a violation and the damage as a consequence has to be proved. Economic activity is a dynamic process where all activities are interrelated in some way or another, and it is very difficult, often impossible, to eliminate a particular aspect of the activity that led to the end result — damage — and to indicate a direct relationship between the action and the damage (otherwise said — to prove that if the action were not brought, no damage would have arisen).

The contestation of the public limited company's resolutions by a shareholder is also allowed in Sweden (Chapter 9 § 17 of the Companies Act). It has been noted for Swedish practice that only minority shareholders sue.<sup>18</sup> The same tendency is apparent in the Estonian court practice.

## Notes:

<sup>1</sup> As a rule, disproportions between the nominal value of shares and the number of votes are not allowed in Estonia; problems may arise with shares issued before 01.09.1995, as until that time the matter was not regulated.

<sup>2</sup> Knut Rodhe. *Aktiesälselsiöigis Rootsi 1975. aasta aktiesälselsiseaduse alusel.* (Company Law based on the 1975 Companies Act of Sweden.) Stockholm 1992, p. 155.

<sup>3</sup> RT (Riigi Teataja = the State Gazette) I 1995, 1995, 26-28, 355; 1996, 40, 773; 51, 967; 1997, 16, 258; 48, 774; 77, 1313; 1998, 2, 48; 23;322; 30, 410; 36/37, 552; 59, 941.

<sup>4</sup> Second Council Directive of 13 December 1976 on co-ordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 85 of the Treaty, in respect of the formation of public limited liability companies and the maintenance and alteration of their capital, with a view to making such safeguards equivalent (77/91/EEC). OJ No. L 26 31.1.77.

<sup>5</sup> Erik Werlauff. *EC Company Law.* Copenhagen, 1993, p. 289.

<sup>6</sup> Aktiebolagslag (1975:1385).

Available: <http://www.jit.se/lagbok/9751385t.html> 17.05.1999.

<sup>7</sup> Third Council Directive of 9 October 1978 based on Article 54 (3) (g) of the Treaty concerning mergers of public limited liability companies (78/855/EEC). OJ No. L 295/36 20.10.78.

<sup>8</sup> Sixth Council Directive of 17 December 1982 based on Article 54 (3) (g) of the Treaty concerning the division of public limited liability companies (78/89/EEC). OJ No. L 378/47 31.12.82.

<sup>9</sup> Rodhe, p. 121.

<sup>10</sup> Proposal for a Council regulation (EEC) on the Statute for a European association 591PC0273(01). Commission Proposal — COM(91)0273 final.

<sup>11</sup> Rodhe, pp. 160-162.

<sup>12</sup> Aktiengesetz. The German Stock Corporation Act. Series of Legislation in Translation, Bilingual Edition with an Introduction to the Law. The Hague, London, Boston, 1996.

<sup>13</sup> Decree No. 67-236 of March 23, 1967 on Commercial Companies. French Law on Commercial Companies. As of 1 January 1988. Chicago, 1988, pp. 199-305.

<sup>14</sup> Such contestation is expressly provided for example in Article 172 of the French Law on Commercial Companies — Law No. 66-537 of 24 July 1966, on Commercial Companies. French Law on Commercial Companies. As of 1 January 1988. Chicago, 1998, pp. 33-197.

<sup>15</sup> André Tunc. *Corporate Law // European Business Law. Legal and Economic analyses on Integration and Harmonization.* Ed. by R.M. Buxbaum, G. Hertig, A. Hirsch, K.J. Hopt. Berlin, New York, Walter de Gruyter, 1991, p. 214.

<sup>16</sup> RT I 1992, 26, 349.

<sup>17</sup> RT I 1994, 53, 889; 1995, 26, 355; 49, 749; 87, 1540; 1996, 4, 773; 1996, 42, 881; 1998, 30, 409; 59, 941.

<sup>18</sup> Rodhe, p. 168.



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# Developments in Estonian Intellectual Property Law: Some Issues Concerning Copyright and Related Rights

The purpose of this article is to provide an overview of Estonian legislation pertaining to copyright and related rights, and its perspectives. The article aims to show the role of copyright in the Estonian cultural and legal tradition from a historical point of view and describe the main trends of development in Estonian copyright and related rights legislation, which are mainly based on international developments. The main emphasis in the article is on the aspect of “law in law books”. Implementation, enforcement and case law, which in practice are as important as legislation, constitute a topic to be dealt with in a separate article.

## 1. Historical Overview

In order to be able to answer the question of whether copyright is established in the Estonian cultural tradition and whether the society is psychologically ready to comply with international copyright principles as well as to understand the essence of piracy, a brief historical overview is necessary.

The first Copyright Act in the world was enacted in England in 1710<sup>1</sup>. In 1710, Estonia became part of the Russian Empire. The first few articles on authors' rights in Russia were enacted as part of the Censorship Act as late as in 1828. In an Act of 1830, the concept of author's right

was recognised as a property right, but it was only in 1887 that the corresponding provisions were transferred from the Censorship Act to the Property Act, which formed part of the Civil Code.<sup>2</sup> The 1911 Copyright Act of the Russian Empire, also enacted in the Baltic provinces, was one of the most modern Acts in Europe at the time.<sup>3</sup>

During the whole period of the independent Republic of Estonia (1918-1940), the Copyright Act of the Russian Empire of 1911 was in force. In the thirties, a draft Copyright Act was prepared based on the German model although it was never adopted.<sup>4</sup> Legal research in the field of copyright was very modest.

In 1927, Estonia became party to the Berne Convention for the Protection of Literary and Artistic Works (Berlin Act of 1908).<sup>5</sup> However, this was a political decision that was not widely supported in cultural circles or by cultural industries. The Estonian public at the time was not ready to accept international principles of copyright protection and favoured the free use of foreign works. In order to support local authors, a special fund — *Kultuurikapital* (Cultural Endowment Fund) — was created in 1925. The Cultural Endowment Fund provided support to writers, composers, artists and other creative people in the form of monthly stipends and pensions and enjoyed

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great popularity. Copyright was regarded as somewhat less important at the time.

In 1932, the *Eesti Autorikaitse Ühing, EAKÜ* (Estonian Authors Protection Association) was set up aimed at the collective management of authors' rights. The EAKÜ had agreements with several similar organisations in other countries.

After the occupation of Estonia by the Soviet Union in 1940, the Soviet copyright legislation and doctrine were in force until the restoration of Estonia's independence in 1991. Before the adoption of the Copyright Act of 1992, the provisions on copyright were included in Part IV of the Civil Code of 1964. In 1973, the USSR became party to the Universal Copyright Convention (UCC) signed in 1952 in Geneva.<sup>6</sup> Estonia was bound by the UCC until re-establishment of its independence on 20 August 1991. It is the official position that agreements to which the USSR or the Estonian SSR was party are not automatically valid in the re-established Republic of Estonia. The Ministry of Foreign Affairs officially announced that Estonia is no longer party to the UCC.<sup>7</sup> Accession to this convention was never seriously discussed.

## 2. Legislation in Force

### 2.1. CONSTITUTIONAL BASIS FOR COPYRIGHT

Estonia has a constitutional basis for the protection of copyright. Section 39 of the Constitution of 1992 reads: "An author has the inalienable right to his or her work. The state shall protect the rights of the<sup>8</sup> author."

This wording of the constitutional clause concerning the protection of intellectual property has brought about some criticism in Estonian legal literature<sup>10</sup>. For this reason, the Committee for the Legal Expert Analysis of the Constitution, set up by an order of the Estonian Government in 1996, has proposed that this clause be amended as follows: "An author has the right to his or her work. Such right shall be protected by law."

Another constitutional clause, § 25 of the Constitution, serves as a guarantee for authors: "Everyone has the right to compensation for moral or economic damage caused by the unlawful action of any other person." According to the Committee for the Legal Expert Analysis of the Constitution, this section also needs amendment. The new proposed version is as follows: "Everyone has, in the cases and pursuant to the procedure established by law, the right to compensation for moral or economic damage caused by the unlawful action of any other person." The new version restricts the possibilities to demand compensation for moral damage only to the cases directly established by law. As the current Copyright Act includes provisions on compensation for moral damage in the case of copyright infringement, this amendment does not affect copyright protection.

The provisions of an international agreement signed by the Republic of Estonia may have direct effect if the national law is contrary to the agreement. In such case, the provisions of the international agreement which form part of the Estonian legal system are directly applicable (§ 123 of the Constitution; § 2(2) of the Copyright Act).

### 2.2. GENERAL OVERVIEW OF COPYRIGHT LEGISLATION

The currently effective Copyright Act (CA) was passed on 11 November 1992 and entered into force on 12 December 1992<sup>11</sup>. Several implementation Acts were adopted by the Government based on the Copyright Act.<sup>12</sup> In January 1995, amendments were made to the Criminal Code (§ 136) and the Code of Administrative Offences.<sup>13</sup> Section 184<sup>3</sup> of the Code of Administrative Offences established administrative liability for infringement of copyright or related rights. On 21 January 1999, the Copyright Act, Code of Administrative Offences, Criminal Code, Consumer Protection Act and Customs Act Amendment Act was passed and entered into force on 15 February 1999.<sup>14</sup> Besides the aforementioned general copyright legislation, several provisions concerning copyright can be found in the Broadcasting Act (1994), Advertising Act (1998) and Industrial Designs Protection Act (1998).

On 26 October 1994, Estonia rejoined the Berne Convention in its last revision, the 1971 Paris Act.<sup>15</sup> Compared to 1927, national implementation of the re-accession decision was easier, although not unanimous. The first accession Act passed by the parliament on 6 April 1994 was not proclaimed by the President and only the second Act passed by the parliament on 18 May 1994 became law.<sup>16</sup> There was no major debate in the question of joining as such, rather about the retroactive protection of foreign works after accession.<sup>17</sup> The Berne Convention is administered by the World Intellectual Property Organisation (WIPO). Estonia is a member of the WIPO since 5 February 1994.<sup>18</sup>

In 1991, the Estonian Authors Association (*Eesti Autorite Ühing, EAÜ*) was established as a legal successor to the Authors Protection Association of 1932.<sup>19</sup> There are several other organisations uniting holders of copyright or related rights but their activities are still in the initial stages.

### 2.3. SOME REMARKS ON THE COPYRIGHT ACT OF 1992

The Copyright Act of 1992 is the first Estonian Copyright Act in the history of Estonia drafted by Estonian lawyers. It is based on the 1971 Paris Act of the Berne Convention and the WIPO's model copyright law. At the time of its passage in 1992, the Act complied with all international and a majority of European Union standards. The Act provided protection for computer programs and collections of data (databases). Authors were granted a broad catalogue of personal (moral) rights and economic rights, including rental and lending rights. No exhaustion was



applied to the distribution right (including rental right) held by the author of a computer program, audiovisual work or a fixation of a work on a phonogram. The economic rights of an author may be assigned or an exclusive or non-exclusive licence may be granted.<sup>20</sup>

As the Act contains a special chapter on related rights (Chapter VIII), it was drafted in compliance with the 1961 Rome Convention (International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations).

However, at present the Copyright Act no longer complies with some international and EU standards and needs amendment. During the six years from its adoption, no substantial amendments were made to the Act except for a few factual changes.

The first major revision occurred in January 1999 mainly concerning the enhancement of the fight against copyright piracy, and also the collective management of rights. Why has the Act not been amended for such a long period? During the last five years, little attention has been paid to copyright and related rights at state level. The Ministry of Culture which, according to its Statutes (1996), "co-ordinates and organises activities in the field of copyright pursuant to the Copyright Act" has not shown initiative in developing the field. A lack of specialists in the copyright field working for the government should also be mentioned. The Estonian Authors Association has been the main pressure group in recent years. Outside Estonia, the governments and non-governmental organisations of the USA, Finland and the European Commission, as well as bilateral and multilateral accession negotiations aimed at joining the World Trade Organisation (WTO) and the European Union have insisted on strengthening the legal basis and enforcement mechanism for fighting against piracy.<sup>21</sup>

#### **2.4. OVERVIEW OF SOME AMENDMENTS MADE TO THE COPYRIGHT ACT IN JANUARY 1999**

Amendments made by the 21 January 1999 Act are mainly directed towards the protection of rights and specification of liability (first and foremost, in the context of the fight against piracy), elaboration of the provisions concerning the collective management of rights and the implementation of the Act. Chapter IX Collective Management of Rights and Chapter X Protection of Rights and Liability of the Act have been thoroughly amended and Chapter XI Implementation of Act has been added. Amendments to the Code of Administrative Offences, Criminal Code, Consumer Protection Act and Customs Act cover, in addition to copyright, some industrial property and trade issues (including violations of rules for trading with intellectual property products at markets or in streets).

The 1992 text of the Copyright Act did not provide a direct answer to the question of whether works created

before the entry into force of the Act (12 December 1992) are also protected under copyright during the full term of protection. The 1999 amendments make it crystal clear (§ 88) that such works are protected under copyright within the whole term of copyright which, as a rule, is the life of the author plus 50 years after his or her death.

The issue concerning the retroactivity of related rights has also often been discussed: are related rights in performances, phonograms, radio and TV broadcasts which were created before 12 December 1992 protected? Related rights were not protected at all in Estonia before the entry into force of the Copyright Act of 1992. Now there is a clear answer: related rights are protected during the entire term of protection (as a rule, for fifty years (§ 88)).

Protection provided by the Copyright Act is retroactive; materials which were not protected before 12 December 1992 are now protected. However, the Act only applies to instances of use starting from 12 December 1992. The Act does not apply to use that occurred earlier (for example, no remuneration can be claimed retroactively for use of works or phonograms that occurred before 12 December 1992).

The majority of amendments made by the Act of 21 January 1999 concern infringements of copyright or related rights, including the fight against piracy.

The amended version of the Estonian Copyright Act contains the legal definition of pirated copy. According to § 10<sup>1</sup>:

"(1) For the purposes of this Act, "pirated copy" means a copy, in any form and with or without the corresponding packaging, of a work or object of copyright related rights which is reproduced without the consent of the author of the work, holder of copyright or holder of related rights.

(2) A copy of a work or object of related rights which has been reproduced in a foreign country with the consent of the author of the work, holder of copyright or holder of related rights but which is imported into Estonia without the consent of the author of the work, holder of copyright or holder of related rights is also deemed to be a pirated copy."

The definition is, in principle, in compliance with the definition laid down in Article 51, Footnote 14 (b) of the GATT TRIPS Agreement.<sup>22</sup> The amended version of § 26(2) of the Estonian Customs Act<sup>23</sup> also refers to the legal definition in the Copyright Act.

The main emphasis in the fight against violations of intellectual property rights by natural persons is on criminal law. Sections 184<sup>3</sup> (copyright and related rights) and 1845 (industrial property) of the Code of Administrative Offences have been repealed. Section 136 of the Criminal Code has also been repealed and its Special Part was amended by addition of Chapter 15 Criminal Offences against Intellectual Property.

Sections 82-84 of the amended Copyright Act provide

for the administrative liability of legal persons. For example, a fine between 250 000 - 500 000 kroons is imposed on a legal person for the manufacture of pirated copies (§ 83(6)).<sup>24</sup> A natural person is punished for the manufacture of pirated copies by a fine or by imprisonment for up to three years (§ 280(3) of the Criminal Code). The same applies to the unlawful reproduction of computer programs.

If a natural person infringes copyright or related rights in the interests of a legal person, the natural person may be held criminally liable concurrently with the application of administrative liability for the legal person (§ 82(1) of the Copyright Act).

Chapter 11 of the Code of Administrative Offences, Administrative Offences in the Field of Internal Market and Finance, contains several relevant amendments that also concern the fight against pirated goods. Under the General Rules for Trading at Markets or in Streets approved by the Government of the Republic Regulation of 18 February 1998<sup>25</sup>, it is prohibited to offer or sell pre-recorded or blank audio and video recording devices (tapes, cassettes, etc.) and sound carriers (vinyl records and CDs), and computer programs on discs or CD-ROMs or installed on hard drives, at markets or in streets. A fine or administrative detention is imposed for keeping such goods at a place of sale or for selling them (§ 133 of the Code of Administrative Offences).

The importation or exportation of pirated copies is treated as a violation of the customs rules (§ 82(2) of the Copyright Act); the liability of a legal person for such an offence is provided by the Customs Act (§ 69). The following controversial provision was removed from the Customs Act: "The customs authority shall prevent the importation or exportation of counterfeit goods and pirated goods at the written request of a court and shall inform the declarant of the prevention of the importation or exportation of such goods" (§ 26(5)). As the role of the court in customs procedures was not clear, the corresponding section of the Customs Act was not used in practice. Now the customs authorities must detain counterfeit and pirated goods. Furthermore, the customs authorities have the right to seize them (§ 69(8) of the Customs Act).

A fine or imprisonment for up to three years is imposed for the importation or exportation of pirated copies by a natural person (§ 280(4) of the Criminal Code).

The criminal liability of a natural person (§ 281 of the Criminal Code) and the administrative liability of a legal person (§ 83(4) of the CA) are prescribed for the manufacture, acquisition, possession, use, carriage, sale or transfer of technical means or equipment designed for the removal of protective measures against the illegal reproduction of works or against the illegal reception of signals transmitted via satellite or cable.

New amendments to the Copyright Act and related Acts also contain provisions on seizure, ascertainment of

pirated copies and other relevant issues which are important in fighting piracy.

### 3. Perspectives for Development of Estonian Copyright Law

#### 3.1. GENERAL REMARKS

Important changes and developments are envisaged for 1999, as was the case in 1992 when the Copyright Act presently in force was adopted. In addition to amendments made to the Copyright Act by the Act of 21 January 1999, new amendments are necessary. The aim of a new Act or Acts is to harmonise Estonian legislation with five effective copyright directives of the European Union, two new directives still to be adopted, the 1996 WIPO treaties and the GATT TRIPS Agreement. So, the future developments of Estonian copyright legislation stem directly from the duty to fulfil international obligations. A working group was established in 1998 at the Ministry of Culture to draft amendments to the Copyright Act and related Acts. The working group presented the new draft amendments to the Ministry of Culture in July 1999. Several foreign experts from Sweden and Germany participated in the harmonisation exercise.

As the new amendments affect the whole Copyright Act, the Ministry of Justice has proposed to pass a completely new Act instead of amending the 1992 text. The Ministry of Culture plans to draft the new Act after adoption of new EU copyright directives which are currently pending, and after a thorough analysis of the practice of implementation of the 1992 Act and of corresponding foreign experience.

#### 3.2. ESTONIA AND THE EU

The harmonisation of Estonian copyright legislation with the corresponding EU legislation is based on Article 66 and Annex IX of the Association Agreement (the Europe Agreement) which entered into force on 1 February 1998.<sup>26</sup> Article 66(2) reads: "Estonia shall continue to improve the protection of intellectual, industrial and commercial property rights in order to provide, by 31 December 1999, for a level of protection similar to that existing in the Community, including effective means of enforcing such rights."

Another requirement to be met by 31 December 1999 is that Estonia should join the conventions set out in Annex IX. As Estonia is party to the Berne Convention, this obligation also includes accession to the 1961 Rome Convention (International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organisations).

Negotiations with the EU regarding Estonia's possible accession started in March 1998 with the so-called screening exercise. During the negotiations, intellectual property is a topic to be dealt with under the chapter of company law. Two screening sessions were successfully completed

in 1998 and it was concluded that there should be no obstacles to prevent full harmonisation with the five EU directives. These directives are:

Council Directive of 14 May 1991 on the legal protection of computer programs (91/250/EEC);

Council Directive of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (92/100/EEC);

Council Directive of 27 September 1993 on the co-ordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission (93/83/EEC);

Council Directive of 29 October 1993 harmonising the term of protection of copyright and certain related rights (93/98/EEC);

Directive of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases (96/9/EC).

As for the draft directives<sup>27</sup>, they will be harmonised after their adoption.

In the documents underlying the harmonisation of legislation — the Accession Partnership and Estonian National Work Program for the Adoption of the *acquis* — intellectual property is mentioned as one of the priorities in 1999.

### 3.3. ESTONIA AND THE NEW WIPO TREATIES

On 20 December 1996, two new international agreements were concluded in Geneva: the WIPO Copyright Treaty<sup>28</sup>, and the WIPO Performances and Phonograms Treaty.<sup>29</sup> Estonia signed these treaties on 29 December 1997. By that date, the treaties had been signed by 51 and 50 countries, respectively. The treaties have not yet been ratified by the Riigikogu<sup>30</sup> as several amendments to the Copyright Act are necessary. According to the position of the Ministry of Culture, it would be more useful to adopt amendments to the Copyright Act as a package after the adoption of the European Parliament and Council Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society. This directive harmonises the WIPO Treaties within the EU.

### 3.4. ESTONIA AND THE WTO

In 1994, the most extensive international agreement on intellectual property was concluded as part of the Marrakesh Agreement Establishing the World Trade Organisation (WTO). This Agreement is commonly known as the GATT TRIPS Agreement (Agreement on Trade-related Aspects of Intellectual Property Rights) and it was drafted within the framework of the General Agreement on Tariffs and Trade (GATT) Uruguay Round.

Estonia has an observer status in GATT since June 1992 and applied for membership in March 1994. In January 1995, the WTO General Council transformed the GATT Accession Working Party into a WTO Accession

Working Party. The bilateral and multilateral negotiations for joining the WTO were concluded on 21 May 1999 with the signing of the Protocol of Accession of Estonia to the Marrakesh Agreement Establishing the World Trade Organisation by the Estonian Minister of Foreign Affairs.<sup>31</sup>

One of the special topics on the agenda during the negotiations has been intellectual property. In the field of copyright and related rights, three main formal requirements have been raised: an effective fight against piracy (adoption of corresponding legislation, and implementation and enforcement of the legislation), and accession to the 1961 Rome Convention and the 1971 Geneva Phonograms Convention (Convention for the Protection of Producers of Phonograms against Unauthorised Duplication of Their Phonograms). During the negotiations, the representative of Estonia stated that Estonia would fully apply all the provisions of the GATT TRIPS Agreement from the date of its accession to the WTO, without recourse to any transition period.<sup>32</sup>

The Act of 21 January 1999 has set a solid legal basis for the fight against piracy. The police, customs, courts and other enforcement institutions have made great progress, but more will still have to be done in the future. Preparations have been made to join the Rome Convention and the Geneva Convention in 1999. After the completion of national formalities by the Riigikogu, there would seem to be no obstacles to Estonia becoming a full member of the WTO in 1999.

### 3.5. NEW ESTONIAN CIVIL CODE

For various historical and political reasons, Estonia serves as an example of a country where classical civil law enjoys a particular privileged status and is, in some respects, a matrix in building up the entire legal system.

At present, the Civil Code consists of five separate laws: the General Part of the Civil Code Act (1994), the Law of Property Act (1993), the Family Law Act (1994) and the Law of Succession Act (1996), and the Civil Code of 1964 (where only Part III — Law of Obligations — is still in force). The fifth new part of the Estonian Civil Code — the Law of Obligations Act — and the sixth part — Private International Law Act — are expected to be passed in 1999 or early 2000, as well as a new version of the General Part of the Civil Code Act.

The new draft Law of Obligations Act with its nearly 1200 sections in the general and special part covers the whole law of obligations. The adoption of the Act will bring along several changes in copyright legislation. These changes mainly concern copyright contracts as the Law of Obligations Act will include a special chapter on licensing contracts.

## Conclusion

Copyright has quite a long history in the Estonian cultural and legal traditions although its history is somewhat

controversial. The 1990s have been the most effective period for new legislation and legal thinking, of which 1992 and 1999 have been years of major reforms.

It can be stated that the future development of Estonian copyright law and related rights law will mainly be determined by fulfilling obligations of international agreements. By the end of 1999, Estonia is expected to harmonise its legislation with the five EU copyright directives and the requirements of the GATT TRIPS Agreement, as well as to pass Acts to join the 1961 Rome Convention and the 1971 Geneva Convention. After the adoption of the EU directive on copyright in the information society, some fundamental amendments will be added, harmonising the two WIPO treaties of 1996 at the same time.

The development of Estonian copyright law is affected by general tendencies present in the Estonian legal system. The adoption of the Law of Obligations Act which forms Part 5 of the new Civil Code will bring along several changes in copyright legislation. These changes mainly concern copyright contracts. The new legislation on telecommunications, broadcasting, cable networks, libraries, etc. also has some influence on copyright. The Copyright Act in force needs some fundamental amendments arising from practical experience. Although new national legislation, in particular the Civil Code, affects copyright legislation, its influence is not as marked as that of international developments. It is likely that work on drafting a completely new Copyright Act will start in 1999 or 2000.

## Notes:

<sup>1</sup> A. Latman, R. Gorman, J. C. Ginsburg. Copyright for the Eighties. Cases and Materials. Second Edition. The Michie Company. Law Publishers, Charlottesville, Virginia, pp. 1-4.

<sup>2</sup> B.S. Antimonov, E.A. Fleishits. Avtorskoye pravo. (Copyright Law.) Moscow: Gosyurizdat, 1957, p. 20.

<sup>3</sup> J.A. Kantorovich. Avtorskoye pravo na literaturniye, muzikalniye, khudozhestvenniye i fotograficheskiye proizvedeniya. (Copyright on Works of Literature, Music, Art and Photography.) St. Petersburg, 1911, pp. 72-104, 374-415.

<sup>4</sup> P. Ambur. Märkmeld autoriõiguse kaitse seaduse projekti kohta. (Notes on Draft Copyright Act.) Õigus, 1939, No 9, pp. 410-431.

<sup>5</sup> H. Pisuke. Berni konventsioon ja Eesti: minevikust tulevikku. (The Berne Convention and Estonia: From Past to Future.) Eesti Jurist, 1993, No. 11, pp. 16-26. Latvia joined the Berne Convention in 1937.

<sup>6</sup> SP SSSR 1973, 24, 139. See also M. Boguslavski. Rahvusvahelise autoriõiguse kaitse NSV Liidus. (Protection of International Copyrights in the Soviet Union.) Tallinn, Eesti Raamat, 1976, pp. 16-18.

<sup>7</sup> Letter from the Estonian Minister of Foreign Affairs to the Director General of UNESCO of 16 June 1992. H. Pisuke. Berni konventsioon ja Eesti: minevikust tulevikku. (The Berne Convention and Estonia: From Past to Future.) Eesti Jurist, 1993, No.11, p. 19, 20, 26.

<sup>8</sup> The Constitution of the Republic of Estonia. RT (=Riigi Teataja = the State Gazette) 1992, 26, 349. English translation published in: Estonian Legislation in Translation. Legal Acts of Estonia. No 1. January 1996.

<sup>9</sup> The Constitution of the Republic of Estonia. RT 1992, 26, 349. English translation published in: Estonian Legislation in Translation. Legal Acts of Estonia.

No 1. January 1996.

<sup>10</sup> H. Pisuke. Kas autori õigusi saab võõrandada? (Are Author's Rights Alienable?) Juridica, 1994, No 4, pp. 89-90.

<sup>11</sup> RT 1992, 49, 615. The translation of the Act is published in Legal Acts of Estonia, 1993, 1, 614, and WIPO Copyright Bulletin, February 1994.

<sup>12</sup> RT I 1995, 13, 154; RT I 1995, 88, 1502; Annex to RT 1995, 23/24, pp. 796-801.

<sup>13</sup> RT I 1995, 11, 114.

<sup>14</sup> RT I 1999, 10, 156. The consolidated text of the Copyright Act is in RT I 1999, 36, 469.

<sup>15</sup> Berne Convention for the Protection of Literary and Artistic Works. Paris Act of July 24, 1971, as amended on September 28, 1979. World Intellectual Property Organisation. Geneva 1995.

<sup>16</sup> RT II 1994, 16/17, 49.

<sup>17</sup> RT I 1994, 31, 494. H. Pisuke. Eesti on taas Berni konventsiooni liige. (Estonia is Again a Member of the Berne Convention.) Eesti Jurist, 1994, No 11, pp. 47-52.

<sup>18</sup> RT II 1993, 25, 55.

<sup>19</sup> H. Pisuke. Estonian Authors' Society Operating. Teostory, 1992, No 2.

<sup>20</sup> An overview of the 1992 Copyright Act is in: H. Pisuke. Estonia Again on the World Copyright Map. Copyright World, March 1993, Issue 28, pp. 24-32.

<sup>21</sup> Estonia was a candidate for the Watch List determined by the United States Trade Representative. The Watch List includes countries where intellectual property rights of US right holders are infringed and where the US Government is authorised to imply economic sanctions under Section 182 of the Trade Act of 1974 (as amended, better known as "Special 301"). 1998 Special 301 Recommendations. Submitted to the United States Trade Representative on February 23, 1998. International Intellectual Property Alliance, 1998, pp. 2, 4.

<sup>22</sup> Agreement on Trade-related Aspects of Intellectual Property Rights. Annex 1C of the Agreement Establishing the World Trade Organisation (Marrakesh Agreement) concluded on 15 April 1994.

<sup>23</sup> RT I 1998, 3, 54; 36/37, 552; 51, 756; 1999, 10, 156.

<sup>24</sup> 1 US dollar equals 14.5 EEK as at 4 August 1999.

<sup>25</sup> RT I 1998, 70, 1179.

<sup>26</sup> RT II 1995, 22-27, 120.

<sup>27</sup> Proposal for a European Parliament and Council Directive on the resale right for the benefit of the author of an original work of art, and Proposal for a European Parliament and Council Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society.

<sup>28</sup> WIPO Copyright Treaty (WCT) (1996) with the agreed statements of the Diplomatic Conference that adopted the Treaty and the provisions of the Berne Convention (1971) referred to in the Treaty. WIPO, Geneva 1997.

<sup>29</sup> WIPO Performances and Phonograms Treaty (WPPT) (1996) with the agreed statements of the Diplomatic Conference that adopted the Treaty and the provisions of the Berne Convention (1971) and of the Rome Convention (1961) referred to in the Treaty. WIPO, Geneva 1997.

<sup>30</sup> Riigikogu = the parliament of Estonia

<sup>31</sup> Press Release No 113-E of 21.05.1999 of the Estonian Ministry of Foreign Affairs. <http://www.vm.ee/est/press/1999/0521wto.htm>

<sup>32</sup> Draft Report of the Working Party on the Accession of Estonia to the World Trade Organisation. WT/ACC/SPEC/EST/2/Rev.3. 6 November 1998.





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# On the Development of Bankruptcy Law in Estonia

## Historical Background

The Republic of Estonia did not have a bankruptcy act of its own before 1940. As the economy was based on market economy principles, bankruptcies were possible and bankruptcy proceedings took place. Bankruptcy proceedings were carried out on the basis of the Tsarist Russian laws still valid in Estonia in that period, such as the Commercial Procedure Act, Civil Procedure Act and the Russian Civil Act. A curious phenomenon was the Insolvency (Bankruptcy) Act drawn up by Aleksander Buldas and published in 1934, which despite its title was not a law, but a systematised presentation of the bankruptcy proceedings provisions of the above Russian acts.<sup>1</sup> Preparation of an Estonian bankruptcy act was started, but it was not passed before Estonia's independence was lost in 1940.

In the controlled economy conditions of the Soviet period, a bankruptcy act was not needed, as bankruptcy proceedings were not possible. In 1991 when Estonia regained independence and market economy became the basis for reorganisation of economy and proprietary relations, the need arose again for a bankruptcy act. The preparation of a bankruptcy act was quite a difficult task, as there was no court practice or experience concerning the country's own bankruptcy cases since 1940. Neither had anyone in Estonia been engaged in bankruptcy law since that time. A draft act was, however, successfully prepared and Estonia's first Bankruptcy Act was passed by the Riigikogu<sup>2</sup> on 10 June 1992 and entered into force on 1 September 1992 (RT,<sup>3</sup> 1992, 31, 403).<sup>4</sup> A new target was set at once to improve the Bankruptcy Act after a few years of practice and experience.<sup>5</sup>

This target was met — on 18 December 1996 the Riigikogu approved major amendments to the Bankruptcy Act, which entered into force on 1 February 1997 (RT,

1997, 5/6, 32).<sup>6</sup> We can thus conditionally speak about two bankruptcy acts in Estonia<sup>7</sup> — the 1992 Bankruptcy Act and the 1996 Bankruptcy Act (consolidated text: RT, 1997, 18, 302).<sup>8</sup> Officially and essentially there is one Act — the amendments and additions do not alter the basic provisions laid down in 1992 — the 1996 Act is an improved and elaborated version of the 1992 Act.

It can be said that the 1992 Bankruptcy Act has performed well and the 1996 amendments should make the application of the Act even more effective. It was stated in the conclusion of the expert analysis of the 1992 Act carried out in 1994 by the American Bar Association in the framework of the Central and East European Law Initiative (CEELI): "In conclusion, it should be once again emphasised that this draft is an excellent starting point. Indeed, even without further amendment, this Estonian Bankruptcy Code could be successful".<sup>9</sup>

## Source Principles of Bankruptcy Act

In 1991-1992, when the Bankruptcy Act was prepared, a large amount of material on the bankruptcy law of other countries was studied, because, as mentioned above, Estonia had no materials or experience of its own. The acts of Sweden, Finland, Germany, the USA and France providing for bankruptcy proceedings were especially analysed.

At the beginning of the 1990s, large-scale privatisation began in Estonia, many new enterprises emerged based on private capital, banking and credit institutions were in the early stages of development, the land reform was launched, land was not in commerce yet, and it was not possible to establish mortgages as loan security. The situation with creditors was uncertain and unstable. As no



correct and functioning system of securities had formed yet, the payment of debts depended on the debtor's ability to pay. The activity of debtors was also unstable in the early phase of reforms, there were many new entrepreneurs who had no experience in management or financing in market economy conditions. All this created the need to focus on the protection of the creditors' interests in the bankruptcy of the debtor. In choosing a model for the act, the examples of the USA and France were discarded, as the time was not ripe in Estonia to protect the interests of the debtor to the extent that this is done in these countries.<sup>10</sup> The main example was the Swedish Insolvency Act,<sup>11</sup> which was one of the newest acts in Europe at the time and provided for the protection of creditors' rather than debtors' interests.

By 1996, the conclusion was reached that the debtor's interests should be more protected than provided by the 1992 Act. This conclusion did not imply changes in the basic model of the Act or conversion to the US and French model. The general development in other countries is toward a greater protection of the debtor, as provided for instance by the latest example in Europe, the German Insolvency Act (*Insolvenzgesetz*) which entered into force on 1 January 1999 and has been an important example in improving the Estonian Bankruptcy Act.

This article focuses on the balance between the protection of the debtor's and creditor's rights and interests in the Estonian Bankruptcy Act (hereinafter: "BA"), as well as the debtor's liability according to the 1992 bankruptcy Act and the 1996 additions to it. The issues where the Estonian regulation differs from that of other countries will also be discussed.

## Commencement of Bankruptcy Proceeding

The commencement of bankruptcy proceeding can be petitioned by the debtor or the creditor. Any natural or legal person can be a debtor and a creditor. The state and local government cannot be debtors.

The Act does not provide the bases for a debtor's bankruptcy petition, therefore a debtor may always file a petition for its own bankruptcy, but must explain the cause of insolvency (BA § 8). As a rule, the court does declare bankruptcy on the basis of a debtor's petition, but might not do it if it finds the petition to be unjustified. In cases prescribed by law the debtor is obliged to file a bankruptcy petition, for example upon the death of a debtor, the successor is obliged to file a bankruptcy petition if the successor is the state or local government and the estate is insufficient to pay all the debts of the bequeathed. (BA § 10(2)). According to § 373 of the Commercial Code (RT, 1998, 59, 941),<sup>12</sup> liquidators have to submit a bankruptcy petition if it becomes evident in the course of liquidation of a public limited company that the assets of the company being liq-

uidated are insufficient to satisfy all claims of creditors. The debtor's obligation to file a bankruptcy petition arises from the equal treatment of creditors principle in conditions where the debtor does not have enough assets to fully satisfy all claims of creditors.

As concerns the filing of a debtor's bankruptcy petition, the Bankruptcy Act prescribes for the representation of a debtor which is a legal person requirements which are different to the general rules established for representation of legal persons. When compared to the 1992 Act, the requirements are stricter in the 1996 Act. A bankruptcy petition may be filed by all members of the management board of a legal person collectively, although as a general rule, they have the right to individually represent the legal person. The consideration here concerns better protection of the debtor, to prevent petitions which are unjustified and conflicting with the interests of the debtor.

A debtor is also protected by the fact that a creditor may file a bankruptcy petition only in circumstances prescribed in detail by law (BA § 9). No other person besides the debtor and creditor may file a bankruptcy petition, and the bankruptcy of a debtor cannot be declared on the court's own initiative.

According to the 1992 Act, a bankruptcy proceeding commenced automatically if the bankruptcy petition complied with requirements and was accepted by court. Such procedure was established in 1992 in order to save time, as the bankruptcy proceeding as a whole is rather time-consuming. Account was also taken of the fact that according to law, a bankruptcy petition was to be reviewed quickly — a debtor's petition immediately, or with good reason, within 20 days, and a creditor's petition within 20 days, or with good reason, within two months.

Such procedure for commencement of bankruptcy proceedings did not, however, prove effective in practice, and in many cases, became unjust with respect to the debtor. Bankruptcy proceedings initiated by the debtor did not present much problems, but were rare in Estonian court practice - in most cases, creditors file the bankruptcy petition. As the 1992 Bankruptcy Act did not specify the minimum sum of a claim, and the "clarity" of the claim was to be determined by the court only upon making the bankruptcy order, petitions based on arguable claims were often filed and the sums of claims were small. Due to the great work load (in reform conditions, the work load of courts has gradually increased over the years), courts were not able to comply with the general deadline of 20 days and the exception, 2 months, became the rule, which was also not always complied with. It became possible that the court made a decision only several months after commencement of the proceeding. If the court dismissed a bankruptcy petition either because the claim was not clear or, despite the clarity and justification of the claim, the debtor was not insolvent and terminated the bankruptcy proceeding, the

debtor's interests were still substantially damaged. The fact that a bankruptcy proceeding is taking place with regard to the debtor, even though bankruptcy is not declared, always has a negative effect on the debtor's economic situation and reputation. To better protect the debtor, the rules regarding the commencement of bankruptcy proceedings were substantially amended in 1996. The bankruptcy proceeding no longer automatically starts with acceptance by court of the petition, but the court decides on the commencement of a proceeding within 10 days after a petition is filed.

Section 11 of the Bankruptcy Act provides the circumstances due to which the court does not commence a bankruptcy proceeding — the bankruptcy petition is based on a claim which is not clear, the claim is entirely secured by a pledge, the sum of claim is not large enough (the Act specifies the minimum claim sums, which vary depending on whether the debtor is a commercial undertaking, other legal person, or a natural person). A claim is not deemed to be clear if it has been contested in court and there is no decision in force yet, or if the debtor objects to the claim on a reasoned basis and the court finds that the claim must be proved in a proceeding of action.

If none of the above bases exist which could bar the commencement of bankruptcy proceeding, the court will commence a bankruptcy proceeding and appoint an interim trustee whose main duty is to determine the economic situation of the debtor. In deciding on the declaration of bankruptcy, the financial situation — whether the debtor is permanently unable to pay the debt or not — is also important besides the assessment of claim.

## **Continuation of Activities of Debtor**

According to the 1992 Act, the first general meeting of creditors, which is held not earlier than 15 days and not later than one month after the debtor is declared bankrupt, decides on continuation of the activities of the debtor if the debtor is a legal person. If the general meeting of creditors decided to terminate the legal person, such decision could not practically be contested — the court was not competent to assess such a decision, only the procedure for making such a decision could be contested if any violations were found. The establishment of such procedure was mainly with regard to the interests of creditors — only they may decide which is more beneficial for them, to continue or terminate activities. If the creditors decided to continue the creditor's activities, such continuation was limited in time. The 1992 Act prescribed a bankruptcy proceeding to be terminated after the court had approved the distribution proposal. The time for submission and approval of the distribution proposal proceeded from law: claims to the trustee had to be submitted within two weeks after publication of the bankruptcy notice, not later than two months

after that the claims were to be defended at the general meeting of shareholders; where needed, several meetings were held for defending claims. Within ten days after the last of such meetings, the trustee had to submit a distribution proposal to the court for approval, objections regarding which were to be submitted within one month. After expiration of the deadline for submitting objections, the court approved the distribution proposal or granted to the trustee an additional ten days for adding to the distribution proposal and then approved it. As said, the bankruptcy proceeding was terminated with approval of the distribution proposal and according to BA § 57(4), the debtor if it was a legal person had to be terminated by that time. If the assets were not sold yet, the sale could continue after termination of the bankruptcy proceeding and the proceeds of sale were distributed according to the approved distribution proposal. In 1992, the basic idea was that the course of the lengthy bankruptcy proceeding should be regulated as strictly as possible. It is justified as regards the submission and defending of claims, while it is not practical to relate the time of defending claims and approving the distribution proposal to termination of the bankruptcy proceeding — this eliminates the possibility to continue the activities of a debtor, if it is a legal person, even if it would be reasonable and beneficial for the creditors.

Several important amendments were made here in 1996. Firstly, the procedure for deciding on the termination of a debtor if it is a legal person was amended and the protection of the debtor was significantly improved. The termination of the debtor is not only the problem of creditors, it is first of all an important social problem concerning the debtor's employees. According to the amendments made in 1996, more attention is paid to rehabilitation of the debtor. According to BA § 57, the trustee submits a rehabilitation plan to the first meeting of creditors for approval, or if he finds rehabilitation unfeasible, he submits a proposal to terminate the legal person. The general meeting may either approve the rehabilitation plan presented by the trustee or propose that the trustee present a new rehabilitation plan or replace the proposal to terminate the legal person with a rehabilitation plan.

If the general meeting decides to terminate the debtor, the court has to approve such a decision. If, regardless of the rehabilitation plan presented by the trustee, the general meeting of creditors decides to terminate the legal person, the court has the right to not approve the decision on termination of the legal person if the court finds that rehabilitation is possible. Thus, additional competence is granted for the court to protect the debtor.

If rehabilitation is undertaken but fails regardless of the rehabilitation plan, the general meeting may decide that the debtor be terminated. The court has to approve this decision and has the right to not approve the decision if the court finds that rehabilitation is possible.

The time for which the activity of the debtor is continued is not specified. The bankruptcy proceeding is no longer terminated with approval of the distribution proposal and may continue after that. The termination of bankruptcy proceedings is thus no longer determined by the time schedule for the submission and defence of claims, but depends on the progress of debtor rehabilitation and sale of assets. It is possible that claims are met through successful rehabilitation, the bankruptcy proceeding is terminated and the debtor continues activities (BA § 57<sup>2</sup>(4)). In most cases however, the assets of the debtor are sold either after or during rehabilitation, and its activities and then the bankruptcy proceeding are terminated. Only in exceptional cases, on the approval of the bankruptcy committee, may the sale of assets continue after termination of the bankruptcy proceeding. The attention that is paid to the rehabilitation of a debtor presumably serves the interests of creditors as well, since the quick termination of the debtor and quick sale of its assets might not always have the best result in satisfying the creditors' claims.

## Liability of Debtor

Together with passing the Bankruptcy Act in 1992, § 148<sup>2</sup> was added to the Penal Code, specifying intentional insolvency as a bankruptcy offence. Subsection 60(2) of the Bankruptcy Act prescribed the trustee's obligation to notify the prosecutor of any information that the trustee has concerning a bankruptcy offence, a criminal offence or other offences relating to the business of the debtor. This regulation was, however, insufficient, as neither the trustee nor the court were obliged to clarify the reasons for the debtor's insolvency or the persons responsible for it. The prohibition on business was also specified with too much restriction — only a debtor who was a natural person could not, after the declaration of his bankruptcy until the end of the bankruptcy proceeding, be a trader without the permission of the court (BA § 35).

The Bankruptcy Act was significantly improved in 1996 concerning the debtor's liability — the objective was to clarify the reasons for the debtor's insolvency and the persons responsible for it, and the application of liability to them. The reason for insolvency may be criminal offence, a grave error in management, or another reason. In the first two cases, the question arises of the liability of specific persons, the latter case does not provide for the holding liable of anyone.

The reasons for bankruptcy are clarified in all stages of the bankruptcy proceeding. If the respective circumstances have become evident before bankruptcy is announced, the court indicates in the bankruptcy order that the reason for insolvency was grave error in management, or notify the prosecutor or police of the offence to decide on the commencement of a criminal action. If the court has set out in its judgement or order, or it becomes evident in a

bankruptcy proceeding that the cause of insolvency of the debtor is a grave error in management of the debtor, the trustee is required to file a claim for compensation for damage against the person who is at fault for the grave error in management. A list of grave errors in management is provided in BA § 60(3). These are, first of all, use of the property of the legal person in one's own interests and thus damaging the legal person, as well as acts such as taking or granting a large loan if it is obvious that it is impossible to pay or receive repayment of the loan, procurement of capital on extremely unfavourable terms, an incorrect indication of the value of property on the balance sheet of the debtor, etc.

In the final report of the trustee presented to the court, with the approval of which the bankruptcy proceeding is terminated, the court has to indicate the reason for insolvency — whether an act with criminal elements, a grave error in management, or other fact. If the reason is an act with criminal elements or grave error in management, and the act with criminal elements has not been notified or a claim for compensation for damage is not filed against the person who is at fault for the grave error in management, the court itself will notify of the offence and the trustee is obliged to file a claim for compensation for damage. This should guarantee that the reason for insolvency is always clarified and registered by court and liability applied where applicable.

The prohibition on business specified in BA § 35 was significantly amended in 1996 toward extension of the prohibition. Firstly, the scope of the prohibition itself has been extended - now it prohibits a debtor to be not only a trader, but a member of a management board, liquidator or procurator of a legal person, or a trustee in bankruptcy. The court may now apply the prohibition on business not only to a natural person, but to a member of management board or supervisory board, liquidator, major shareholder, procurator, person responsible for accounting, partner of a general partnership or general partner of a limited partnership. The prohibition on business may be applied from declaration of bankruptcy to the termination of the bankruptcy proceeding, as well as for three years after the bankruptcy proceeding. The prohibition on business applied during the bankruptcy proceeding is different with respect to legal and natural persons. The prohibition to a natural person is valid pursuant to law and the court may give its permission not to apply the prohibition; in the case of a legal person, the court has to determine in each separate case whether to apply the prohibition and with regard to which one of the above responsible persons the prohibition is applied.

The prohibition on business applied after termination of the bankruptcy proceeding is the same for legal and natural persons. The application of the prohibition for three years after termination of the bankruptcy proceeding is more limited when compared to application of the prohibi-

tion during the proceeding. The prohibition can be applied after the bankruptcy proceeding only if the debtor caused solvency by criminal offence, or has destroyed, hidden or squandered its property, made grave errors in management or performed other acts as a result of which the debtor has become insolvent. The application of prohibition on business is decided by court, but only on the demand of the trustee, the basis for which is the decision of the bankruptcy committee.

## Claims and their Satisfaction

Upon the declaration of bankruptcy, the due date for payment of all debts of the debtor is deemed to have arrived; the calculation of interests and fines for delay is terminated. Thus, all creditors are in an equal position. Claims have to be submitted to the trustee within two months after declaration of bankruptcy. Claims are defended at the general meeting of creditors. A claim is deemed to be defended if neither the trustee nor any of the creditors objects to it. If a claim proves to be not defended, the creditor may file the claim in court within three months, whereas the defendant is the person who objected to the acceptance of the claim.

The main issue in the bankruptcy proceeding is the satisfaction of claims. One of the basic principles of bankruptcy proceeding is the principle of equal treatment of creditors, or to be more exact, the principle of proportional treatment, according to which, if the full satisfaction of all creditors' claims is not possible, all creditors should have the same percentile part of their claims satisfied. This principle, so accurately describing the essence of bankruptcy, has not been entirely followed in any country, because, due to various reasons and considerations, certain claims are granted preference. It may be said that the general tendency is toward reduction of preferred claims or their covering from sources other than the bankruptcy estate. A good example of such development is Finland, but it is probably not possible to entirely discard preferred claims. Estonia too has followed the principle that preferred claims should be considered exceptional and they should be as few as possible.

According to BA § 86(1) 1)-4), preferred claims are: (1) claims secured by a pledge; (2) salary, compensation for termination of an employment contract, holiday pay, compensation for mandatory health insurance, compensation for damage caused by an injury or any other damage to a person's health and compensation for damage arising from the loss of a provider; (3) tax arrears; (4) claims secured by a commercial pledge.

A claim secured by a pledge is a preferred claim with respect to the money received from the sale of the object of pledge to the extent of the claim secured by the pledge. The acceptance of a claim secured by a pledge as a preferred claim is justified. The fact that pledges secured by a com-

mercial pledge are in the fourth place among preferred pledges, arises out of the "floating" essence of commercial pledges — the object of a commercial pledge is all the movable assets of the company at the time of collection.<sup>13</sup> There is a danger that if a claim secured by a commercial pledge is satisfied as a preferred claim with a first ranking, other claims cannot be satisfied at all. Up to 1 January 2003, claims secured by commercial pledge are with a first ranking together with claims secured by other types of pledges. This is due to the practical reason that until the establishment of mortgages was limited due to the slow pace of land reform, commercial pledges were established in many cases, and until entering into force of the amendments in 1996, they were with a first ranking. The legal expectancy principle cannot be violated regarding those pledgees to whose benefit a commercial pledge was established before the amendments in 1996. The essence of the principle is that the situation of a person cannot be changed for the worse when compared to the situation which the person had grounds to presume, pursuant to law, at the time of establishment of the commercial pledge. By 1 January 2003 however, the deadline for submitting claims secured by a commercial pledge established before 18 December 1996 (the date of passing amendments to the Bankruptcy Act by the Riigikogu) will have passed in most cases. Persons who have not become land owners due to the pace of land reform and who have not had a chance to establish a mortgage, had to be reserved a possibility to receive a security in the form of commercial pledge on a basis equal with other types of pledges, including pledges on buildings on unregistered lands as movable property. Persons establishing a commercial pledge after 18 December 1996 may consider the fact that a commercial pledge is with a first ranking in the satisfaction of claims in a bankruptcy proceeding, only until 1 January 2003, and the principle of legal expectancy has therefore not been violated for them. Mortgage will presumably begin to dominate over commercial pledge in the next few years, whereas a mortgage covers, as essential parts and accessories of the land plot which is the immovable property, also to a considerable extent the property which is the object of commercial pledge.

The definition of the claims of employees as preferred claims with a second ranking is in accordance with the requirements of the 1992 ILO Convention<sup>14</sup> and is also justified from the aspect of social considerations. Section 58 of the Bankruptcy Act lays down the obligation of the state to compensate employees for salary, holiday pay and compensation for mandatory health insurance which were not received before the declaration of bankruptcy, as well as compensation which was not received upon termination of their employment. An employee may be paid a total of up to two times the employee's average monthly salary but not more than three times the national average



monthly salary.

When compared to the 1992 Act, two times the average monthly salary has increased to three times the average monthly salary, and it is additionally provided that such payments are made from the Government guarantee fund. Those rules are also in compliance with the 1992 ILO Convention and the 1992 Recommendation.<sup>15</sup> When the state has made payments to employers from the government guarantee fund, the state acquires, to a respective extent, the preferred claim and thus participates in the bankruptcy proceeding. In the part of such claim not covered by the state, the employee himself is a creditor with the preferred claim with a second ranking.

The definition of tax arrears as a preferred claim with a third ranking is problematic, as it is a political-economic rather than legal decision. The legislator so decided in 1992 and no amendments were made to the provision in 1996. In transfer economy conditions, where reforms are under way and the economy does not yet function normally, the wish to use all possibilities to contribute to the state budget is understandable, especially when this is done by tax collection. Therefore the definition of tax arrears as a preferred claim with a third ranking as a public interest requirement is now justified. In the long term, I believe that tax arrears should be regarded as an ordinary claim. In conditions of a bankruptcy proceeding, the state should not be preferred to other creditors. The state's claim is based on public interest and has a more general meaning, but the situation where the preferred satisfaction of the state's claims leaves the claims of other creditors unsatisfied or much less satisfied should be avoided. It is often the case in practice, as in most cases, a debtor if it is a legal person, has tax arrears among its claims, and after the full or partial satisfaction of this claim, there is no money left of the bankruptcy estate to satisfy the claims of those creditors whose claims are not preferred.

## Trustee in Bankruptcy

When commencing a bankruptcy proceeding, the court appoints an interim trustee. In the bankruptcy order, the court appoints a trustee later approved by the general meeting of creditors — the trustee must have the confidence of both the court and the creditors. The Estonian Bankruptcy Act contains two important differences regarding the trustee when compared to the legislation of other countries: (1) the requirements established for a trustee and (2) the fact that the trustee is also a legal representative of the debtor.

There was a curious situation in 1992 — after the Bankruptcy Act was passed, there were no persons with the experience and knowledge of a trustee in bankruptcy. Therefore a requirement was established that a person who holds a trustee's certificate issued by the trustee examination and evaluation board formed by the Government of

the Republic, may act as a trustee. The interest in a trustee's qualification was great, more than 500 trustee's certificates were issued in 1992-1996. A number of those persons have fully dedicated themselves to the job of a trustee — they are the so-called professional trustees who are engaged in most major bankruptcy proceedings. The Chamber of Estonian Bankruptcy Governors<sup>16</sup> was founded at the end of 1992, membership in which is voluntary and the main objective of which is to protect the interests and develop the professional skills of trustees. Several elaborations were made in the requirements established for trustees in 1996. According to BA § 29(1), an advocate may now be a trustee without having a trustee's certificate. The reasoning behind is that the status of an advocate presumes the skills of a trustee. In Estonia, when compared to other countries, advocates are seldom trustees, mainly owing to the existence of professional trustees. The requirement for evaluation and a trustee's certificate applies to other persons who are not advocates, as does the additional evaluation requirement — trustees are evaluated after every three years by a state evaluation board, an unevaluated person may not be appointed trustee by court. So, to become a trustee, first an examination has to be passed and a trustee's certificate acquired, and after that evaluation has to be passed after every three years, in the course of which both theoretical knowledge and practical experience are evaluated. If justified complaints have been received by the Chamber of Estonian Bankruptcy Governors or the evaluation board about a trustee's activity by debtors or creditors, that trustee may not be evaluated. The procedure for examination and evaluation of trustees is established by the Government of the Republic.<sup>17</sup>

I find that the procedure for preparation and evaluation of trustees in Estonia has justified itself and the specialising of professional trustees has contributed to the more professional conduct of bankruptcy proceedings. This should also help to protect the interests of both debtors and creditors.

## Notes:

<sup>1</sup> Maksuvõimetusajade (konkursi-) seadus. (Insolvency (Competition) Act.) Edited by Aleksander Buldas. Author's publication, 1934.

<sup>2</sup> Riigikogu = the parliament of Estonia.

<sup>3</sup> RT = Riigi Teataja = the State Gazette.

<sup>4</sup> Eesti Vabariigi pankrotiseadus. (Republic of Estonia Bankruptcy Act.) - RT, 1992, 31, 403.

<sup>5</sup> Juridica, 1994, No. 1, p. 1.

<sup>6</sup> Eesti Vabariigi pankrotiseaduse muutmise seadus. (Republic of Estonia Bankruptcy Act Amendment Act) — RT, 1997, 5/6, 32.

<sup>7</sup> This terminology is used in this article to distinguish between the original 1992 Bankruptcy Act and the 1996 amended version.

<sup>8</sup> Pankrotiseadus (terviktekst). (Bankruptcy Act (consolidated text).) — RT, 1997, 18, 302.



<sup>9</sup> Analysis of the Draft Bankruptcy Act of the Republic of Estonia. — The American Bar Association Central and East European Law Initiative (CEELI), 1994.

<sup>10</sup> We shall leave aside the question about the basic connection between the interests of the debtor and the creditor — to which extent the protection of the debtor's interests is justified to keep creditors sufficiently protected. The choice made in Estonia in 1992 was chiefly based on pragmatic considerations.

<sup>11</sup> Konkurslag. (Insolvency Act.) — SFS, 1987: 672.

<sup>12</sup> Äriseadustik. (Commercial Code.) — RT, 1998, 59, 941.

<sup>13</sup> Kommertspandi seadus. (Commercial Pledges Act.) — RT I, 1996, 45, 848.

<sup>14</sup> Convention concerning the protection of workers' claims in the event of the insolvency of their employer: Convention 173 of the International Labour Organisation, 1992.

<sup>15</sup> Recommendation concerning the protection of workers' claims in the event of the insolvency of their employer: Recommendation 180 of the International Labour Organisation, 1992.

<sup>16</sup> Eesti Pankrotihaldurite Koja põhikiri (Articles of Association of the Chamber of Estonian Bankruptcy Governors.) — Juridica, 1994, No. 1, pp. 28-29.

<sup>17</sup> Pankrotihalduri eksami tegemise ja pankrotihalduri atesteerimise kord (Procedure for examination and evaluation of trustees in bankruptcy.) — RT, 1997, 73, 1210.



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# Freedom of Contract in Labour Relations

## Introduction

Different countries have different approaches towards labour law and its position in the legal system. In this respect, no common standpoint has been reached to date. Before 1940, the prevalent approach in the Republic of Estonia was that labour law was a part of public law (1, p. 143). However these days, opinions to the effect that labour law belongs neither to public nor private law but is somewhere on the line between the two are also rather widespread (9, p. 38). It has been claimed that labour law is a special part of private law while the third standpoint placing labour law under a branch of private law, civil law, is not rare either (2, pp. 30-32).

Speaking about the current legal system in Estonia, the previously mentioned three approaches on the position of labour law within the domains of private and public law are prevailing. These approaches are new for Estonian labour law as during the Soviet era the classification of law into private and public was actually something that was irrelevant. There was no such thing as classification of law into two major areas: private and public law. The legal system at that time comprised individual great branches such as civil law, labour law, constitutional law, penal law, etc. In treatment of labour law, the emphasis was primarily on its relationship with civil and administrative law.

Recognition of two major branches of law within the legal system was bound to lead to the question about what areas are included in public and what in private law. Traditionally, labour law has been an area which, by the content of its norms, is not directly classifiable under public or private law. The approaches commonplace in several countries can serve as examples to the effect that labour law belongs both to private and public law. There is no clear-cut answer to the question about which norms are

more abundant in labour law. It is said that as a labour relationship involves private law elements (employment contract) while restrictions on it are prescribed by public law provisions, it is not possible to employ a uniform classification (9, p. 38).

According to the current approach in Estonia, labour law is considered to form a part of private law with certain reservations — it is called a special area of private law or a specialised private law (11). Such an approach is conditioned by the fact that a labour relationship is formed on the basis of a contract in private law — employment contract — and consequently the private law element is present one way or another. However, as different acts prescribe different minimum requirements for the parties to the labour relationship and as the parties cannot agree on conditions worse than those minimum requirements, labour law has been attributed a special status within private law.

In Estonia, employment contracts became important in the context of shaping labour relations after the adoption of the Employment Contracts Act back in 1992. Before that employees were hired on the basis of ordinances which, in essence, were administrative instruments. Such a method of hire was possible as the employers were state-owned companies and all the working conditions were virtually provided for by law. In a new economic situation it is however necessary for the parties to be able to negotiate the working conditions and freely enter into a contract. The State imposes just the minimum requirements. This demonstrates a principle of labour law according to which the State provides legal regulation of labour relations insofar as this is necessary to guarantee the co-operation of the subjects of the labour relationship based on social partnership and to protect the interests of employees who are, eco-

nomically, the weaker party (8, p. 13).

Matters connected with freedom of contract in labour relations are important in the Estonian context because according to the plans for the reform of the Estonian private law, employment contracts will become a part of the contracts in the law of obligations. Consequently, the application of the general principles of contract law will become directly relevant for employment contracts. It is, however, disputable whether the principles of the freedom of contract and private autonomy should at all times be applicable to employment contracts. At the same time, it can be claimed that although different laws restrict freedom of contract in labour relations, it nevertheless exists.

The existence of employment contracts is necessary in order to determine the scope of labour laws. Notwithstanding our point of departure in defining the scope of labour laws: be it the characteristic features of employees or of the employment contract, the voluntariness of working and the existence of an employment contract in private law are the features important in defining labour relations. Therefore, it is important to pay attention to freedom of contract in labour relations. Voluntariness of working is expressed by the existence of an employment contract. An employment contract is a transaction that involves two parties. What is important in a transaction is the will of a person as it is expressed. An expression of will, however, must concur with the actual and freely developed will of the person over time. The previously mentioned principles, used in civil law, are applicable in labour law too. The existence or non-existence of an employment contract is reducible primarily to the problem of whether the person who performs the work is an employee or not. An employment contract, which is the expression of the voluntariness of work performance, has the features characteristic of a contract. One such characteristic feature is, e.g., the written form of employment contract prescribed by § 28 of the Employment Contracts Act.

## 1. Private Autonomy and Freedom of Contract

Labour relationships built on private autonomy are the focal point of the entire labour law. At the same time, the individual right of self-determination is restricted in labour law while it is complemented by the autonomy of undertakings and collective agreements. The decisive starting point, however, is the employment contract in which the parties have agreed. The set of problems related to private autonomy in employment contract law is therefore the decisive issue for the entire labour law.

Private autonomy is understood as a possibility, granted to an individual via the legal system, to regulate his or her legal relations by concluding transactions under law (3, p. 532). Private autonomy means that an individual must be able to shape his or her legal relations by way of self-

determination and self-responsibility. The legal order must grant him or her maximum freedom in this realm of private life (7, p. 91). In a legal order built on private autonomy, contracts are an important tool in achieving the satisfaction of the needs of a private individual. Consequently, private autonomy means first and foremost freedom of contract. A private individual must have the possibility to decide freely whether he or she concludes a contract and with who he or she does it (freedom to conclude a contract) and what the content of the contract shall be (freedom to determine the content of contract) (7, p. 91).

Private autonomy also plays an important role in labour relations, particularly in employment contract relations. Although in Estonia the employment contract is not connected with other contracts in the law of obligations, it does not mean that the parties do not have the freedom to conclude a contract or to determine its content.

Private autonomy and freedom of contract exist insofar as the parties to the contract are granted, under law, a corresponding possibility to regulate their relations. Insofar as provisions of law are mandatory by nature, agreements deviating from law cannot be effective. In addition to the norms established by the State, private autonomy in labour relations is also restricted by collective agreements. Such an option can be rightfully considered a peculiarity of labour law sources (3, p. 533). Irrespective of the previous statement, it is possible in labour relations to deviate, by employment contracts, from the provisions established by laws or collective agreements, but only in the case where such arrangements are more favourable than the conditions prescribed by law or collective agreement (17, § 14).

The principle of private autonomy and one of its most important expressions — freedom of contract is guaranteed in Estonia under the Constitution. Under § 19 of the Constitution, everyone is guaranteed the right to free self-realisation. The principle provided for in § 29 of the Constitution, under which every citizen of Estonia has the right to freely choose his or her sphere of activity, profession and place of work, is especially significant in terms of labour law. The conditions and procedure for the exercise of this right may be provided for by law. The freedom to choose profession means, *inter alia*, that the parties to an employment contract are free to decide with who and whether at all the employment contract will be concluded. They may also decide on the content and conditions of the contract. What must be taken into account, of course, is that under § 29 of the Constitution restrictions may be by law established on the parties to the labour relation in the realisation of their freedom of contract. The possibility of setting restrictions by law is directly written into § 29 fourth paragraph of the Constitution, which provides that working conditions are controlled by the State. This principle means primarily that the State ensures that all the

working conditions prescribed by law are guaranteed and, if such conditions are not guaranteed or are guaranteed insufficiently, the State shall employ necessary measures. Such measures may be laws that restrict the freedom of contract of the parties. What is important is that such restrictions must be established by law. Under § 3 of the Constitution, the powers of state are exercised solely on the basis of the Constitution and the laws which comply with it.

Even in that case, private autonomy is a labour law principle under which the entire labour law is treated as integral control over freedom of contract. A legal basis is needed to restrict private autonomy. Insofar as no such provisions are established by law, the parties to the employment contract are free to decide on the content of the contract (3, p. 534).

## 2. General Bases of Freedom of Contract

Opinions about the nature of the labour relationship differ in special literature. The labour relationship has been treated as a personal legal relationship or a relationship in the law of obligations. Labour relations have also been treated as partnership relations (12). A widespread approach is that the labour relationship should be primarily treated as a special part of the law of obligations (5, p. 1). Although this standpoint has not always been considered right, the situation *de lege lata* is in some countries such that the provisions regulating employment contracts are included in the civil code, thus forming one part of the special part of the law of obligations (13). Estonia will in the near future be added to the countries in which provisions regulating employment contracts are found in the civil code. In certain Central and Eastern European countries, however, employment contracts are regulated by the labour code and there are no direct connections between labour law and civil law.<sup>1</sup>

Irrespective of whether labour law and employment contract law form a part of the law of obligations or not, the real situation is such that the employment contract involves an arrangement between the parties to which the principle of freedom of contract is applicable to a certain degree.

As a rule, the condition precedent to a relationship in the law of obligations is the existence of a contract (4, p. 15). A relationship in the law of obligations formed on the basis of contract requires the existence of a related expression of will. At that, the employment contract is a bipartite contract by which one of the parties undertakes a certain discharge of obligation because the other party likewise undertakes such discharge. With employment contracts, this principle is very clearly felt. The employee enters into an employment contract to earn a living. The employer, on the other hand, would not pay for nothing but expects the employee to perform the work; the employer expects the

employee to start working for the employer's benefit. Thus, there exists a bipartite mutual contract between the employee and the employer (4, p. 15). The contract is entered into to avoid the application of much worse contract conditions towards one of the parties compared with the other.

Bipartite contracts in particular have different goals. In, e.g., sales contracts, the seller wishes to receive the best price for the goods while the purchaser wants to pay as little as possible for the merchandise. The situation is similar with the employment contract. The employer attempts to keep the payroll and production costs as low as possible while the employee wants to receive the highest possible pay for the work. In addition, some employees certainly aim to get the highest possible salary for as little work as possible.

Freedom of contract means primarily two things: (1) the person is free to decide whether and with who he or she concludes a contract with (freedom to conclude contracts) and (2) which conditions of contract are agreed upon (freedom to formulate the contents of contract).

The freedom to conclude contracts gives an individual the chance to decide whether he or she concludes a contract and with whom he or she will conclude that contract. A person is free to decide whether he or she concludes an employment contract with his or her employer and he or she is also free to decide whether to enter or not to enter the labour market. The freedom to conclude contracts may in certain cases be restricted by the prohibition or obligation to conclude a contract. The prohibition to conclude a contract is clearly visible in labour law. Under the Estonian Employment Contracts Act it is prohibited to conclude a contract of employment with people who are less than a certain age. Neither is it allowed to employ women or minors in certain types of jobs. In addition to laws, restrictions on the conclusion of contract may arise out of the collective agreement. Under § 2(2) of the Employment Contracts Act, it is prohibited to conclude an employment contract with a minor to work in a job prohibited under the collective agreement. Restrictions to conclude an employment contract may be present also when a person is, by doctor's orders, prohibited from working in certain areas. Arrangements which are contrary to this prohibition are void. Under the Estonian Employment Contracts Act, such employment contracts can be terminated in certain cases due to violation of hiring regulations (17, § 113), in other cases, however, it is possible to revoke an employment contract. Those contracts are legally void not from inception but *ex nunc*. Thus, those contracts terminate in respect of the future. It is not possible to reclaim a work already performed or the payment of salary (5, pp. 51-52). The same principle is also provided for in the Estonian Employment Contracts Act in certain cases (17, §§ 132, 135).

Parties to a contract are also free to decide on how



they determine the content of the contract. In essence, this means that the parties themselves decide on the conditions they deem necessary to agree upon. In principle, the parties need not adhere to those types of contract expressly provided for by law but a relationship in the law of obligations may also arise out of contracts which are not provided for by law but which are not contrary to the meaning and content of the civil law (19, § 58). Even if the parties choose a contract, they may deviate from the conditions provided for by law on the premises that such an option is directly contained in the law. In other words, the parties have the freedom to choose which contract they conclude and in which conditions they agree upon.

With employment contracts the situation is somewhat different. In this respect, the Estonian Employment Contracts Act prescribes those minimum (obligatory) conditions in which the parties need to agree in to make it possible to speak about employment contract as such. In addition, the parties must comply with several different regulations which are provided in laws in protection of the employee as the weaker party to the labour relationship. It is clear that labour laws provide for minimum requirements and the parties to an employment contract cannot agree to conditions worse than those. Hence, the right to formulate an employment contract exists in the labour relationship albeit to a limited extent. Arrangements may be made which are more favourable to the employee but not, in any case, lower than those requirements prescribed by law. The Estonian Employment Contracts Act provides for the expansion of employee's rights principally in § 14, under which rights granted to the employee by law or administrative instrument can be expanded under a collective agreement or employment contract as well as in accordance with the unilateral decision of the employer. Section 15 of the Employment Contracts Act corresponds to the same section, under which those working conditions which are inferior to those prescribed by law or collective agreement are void.

One of the elements of freedom of contract is the free form of contract. According to the approach prevalent in contract law, contracts may be concluded in any form whatsoever. It is quite sufficient if the parties agree in a contract orally and obligations and rights evolve on the basis of such contract. At the same time, however, mandatory requirements of form may be prescribed by law, or the agreement of the parties, by which they agree in the form of the transaction (19, § 91(1)).

In a number of countries, the written form of employment contracts is generally not required. Estonia is an exception: under the Employment Contracts Act an employment contract must be as a general rule concluded in writing. But if the work lasts for less than two weeks, the Employment Contracts Act also provides for an oral employment contract. At the same time it should be

stressed that an employment relationship is deemed evolved also in the case when an employee has already been allowed to start work without the conclusion of a related agreement. Based on this provision, an employment contract may also be spoken about without making the employment contract relationship void. If an employment contract is never executed in the form required, the employer shall be held responsible. Responsibility arises out of public law - the Code of Administrative Offences (15, § 34).

As a rule, contracts evolve via the making of an offer and the acceptance of it (4, p. 37). Nevertheless, there is also a theory about factual contract relationship according to which a contractual relationship in the law of obligations may in certain cases evolve without a related expression of will purely via actual behaviour. A factual contractual relationship may emerge in the case of a labour relationship — as a relationship in the law of obligations — which has a lasting character. Under a lasting relationship in the law of obligations, there exists an obligation of lasting behaviour or repeated discharge of obligation (e.g. everyday working). If a lasting relationship in the law of obligations is based on a void contractual relationship, there are often consequences which cannot be easily solved. The principle of factual contractual relationship is especially important in the context of employment contracts. If there is a wish to annul an employment contract, the work already performed cannot be reclaimed. In order to alleviate such complications, the institution of factual contractual relationship is emphasised, of which contractual requirements arise out of. With employment contracts, this primarily means that until it is contested or revoked, the employee has all the rights and obligations arising out of an employment contract.

### 3. Aspects of Freedom of Contract in Labour Relations

#### 3.1. FREEDOM TO CONCLUDE CONTRACTS

In labour relations, freedom of contract has the greatest weight upon the conclusion of an employment contract. Naturally there exists a certain amount of factors which may *de facto* influence the freedom of decision of the person. Thus, a person who does not operate as an entrepreneur must live on subsidies received from the State, family or third persons or he or she may conclude an employment contract in order to earn a living. At the same time, the employer too must conclude an employment contract if he or she does not wish to be alone in running his or her business but wishes to do so together with employees who, in turn, must obey the orders of the employer. Taking into account the development of modern science and technology, an employer can no longer be a "Jack of all trades". In order to expand the business and continue to be competitive, the employer hires employees and they continue to

operate together. In such a situation, the employer must, pressed by the *de facto* situation, enter into an employment contract. Those factual decisions, however, do not concern the legal freedom of decision but build, *de facto*, frames around the guaranteed-by law freedom to conclude contracts. The freedom to conclude contracts is legally unlimited and guaranteed under § 29 of the Constitution, this is primarily the freedom of the employee to decide whether to conclude an employment contract or not. It also means that the employer is free to conclude (or not to conclude) the contract. The decision regarding the creation of jobs and the filling of vacancies with employees is not subject to any restrictions. Here the decision is made solely by the employer.

Freedom of contract in the context of employment contracts can, in principle, be restricted by law. In particular, here we mean §§ 35 and 36 of the Employment Contracts Act which provide for the prohibition to conclude employment contracts with women and minors for works in which women or minors cannot be applied. More specifically those sections provide for the right of the Government of the Republic to determine the lists of works prohibited for women or minors. Under the current Employment Contracts Act a contract is not deemed void if it is contrary to a prohibition prescribed by law but under § 113 of the Employment Contracts Act such a contract can be terminated due to violation of hiring rules.

The employee's right to choose an employer is, in principle, subject to no restrictions. Consequently, employees are free to decide which employers they conclude employment contracts with. Exclusions may appear insofar as certain labour relations require, to the extent provided by law, a special professional background, personality or other eligibility criteria. An example can be brought from the Security Service Act which prescribes that a security guard must be aged between 20 and 65 years (18, § 8(3)). Thus, the freedom of those people beyond the age range to conclude an employment contract is restricted because they are prohibited from working as security guards. In contrast to the freedom of choice of an employee to decide which employer to conclude an employment contract with, the employer's decision on which to conclude an employment contract with is subject to several restrictions - under laws, regulations and collective agreements. Taking into account the restrictions imposed in respect of an employer by law, some conclusions can be drawn from here for the Estonian legislation.

Firstly, Estonian legislation does not include the employer's obligation to conclude an employment contract with a particular employee. Hence, the employer is, in principle, free to decide with whom and whether to conclude an employment contract. Insofar as there are no discrimination prohibitions in existence arising out of law (e.g. § 10 of the Employment Contracts Act) the employer

is not prevented from choosing employees upon recruitment or hiring on the basis of any other criteria. On the other hand, the violation of the legal provisions restricting the employer's freedom of choice is not the basis that would bring along the obligation to conclude an employment contract (mandatory contract conclusion). Mandatory contract conclusion would primarily mean the employee's right to demand the conclusion of an employment contract and the employer's obligation to conclude the contract with the employee. Even where no employment contract is concluded, e.g. by violation of the discrimination prohibition, such a violation need not grant the right to demand the conclusion of a contract but just the right to claim compensation in money (14). Under § 10 of the Estonian Employment Contracts Act, it is illegal to allow or give preferences, or to restrict rights on the grounds of race, colour, sex, beliefs, etc. At the same time, the Employment Contracts Act does not specify what happens after such a violation has occurred. It is still not clear whether, e.g., an employee may demand the conclusion of an employment contract or just claim damage. Although the Estonian labour legislation guarantees freedom of choice to both the employee and the employer, it is still necessary to specify the situation after the violation of this freedom.

An employer may be prohibited from concluding employment contracts with certain categories of employees or impose certain assignments on employees in certain conditions (e.g. force a pregnant woman to work a night shift), but under the current labour law the employer is not obligated to conclude an employment contract with a particular employee.

### 3. 2. FREEDOM TO FORMULATE CONTENTS OF AGREEMENT

As mentioned above, under the private autonomy principle, the parties to an employment contract also have a legal option to determine the content of the labour relationship as agreed by them. In labour relations there exist quite many obligatory norms which are unilateral, and thus it can be concluded that there exists no option for the employer and employee to agree on individual working conditions (3, p. 535). At the same time, objections have been presented to it with a reasoning that the labour relationship is not shaped by law or collective agreement but primarily by the employment contract. The employment contract is not just a blank formula or just "a pass to the enterprise" which, if accepted, makes one subject to the already existing rules and regulations of the company (3, p. 535).

Without any lengthy explanations we can state that an employment contract is important in order to determine the work to be performed by the employee and describe the job. Work obligation can be defined, in the law of obligations, as a promise to discharge a certain obligation. In private autonomy, such a promise can evolve only via an individual employment contract and not via law or collective

agreement. Similarly, an employer can give the employee instructions regarding the work only within the framework agreed upon in the employment contract. The employer can unilaterally give the employee just those instructions which, via the type and place of work and working hours agreed in the employment contract, comply with the work to be performed under the employment contract. Giving the employee an assignment other than agreed in the employment contract would basically mean the transfer of the employee to another position. Under § 59 of the Employment Contracts Act, an employee may be transferred to another position only with the employee's consent. In cases explicitly provided by law, an employee may be transferred to another position without his or her consent. This, however, is possible only in extraordinary cases provided that the transfer does not last over one month. With such unilateral transfers, it is also important that the employee's proprietary liability does not increase (17, §§ 65-67).

In determining a work function, it is important to bear in mind that the more extensively and generally an employee's working function is defined, the more extensive is the employer's authority to give, on the basis of discretionary power, different assignments to the employee. The narrower and more specific the employee's work function, the narrower the extent of the employer's discretionary power.

An employment contract also specifies the work place. Where an employee works at the employer's specific enterprise or specific working place, the performance of principally the same work outside the agreed work place is not covered by the employer's discretionary power. The employer's discretionary power can extend only to the work agreed in the employment contract provided the work is performed at the place prescribed by the employment contract.

Working hours are also subject to the parties' agreement in an employment contract. In particular, this is true about the duration of working time. In the Estonian context, what should be specified in the first order or priority is the number of hours per day or week an employee works. The Working and Rest Time Act provides for the limits to be taken into account in determining the working time. Namely, working time cannot be longer than eight hours a day or 40 hours a week. Under the Working and Rest Time Act, Estonia generally uses a five-day working week, i.e. an employee must have at least two days off during a week. The employment contract also specifies the hours during which work is performed. This primarily denotes an agreement to the effect that a person will start work during day or night time as well as a principal agreement regarding the work in shifts (e.g. 24 hours at work and 48 hours off). The Working and Rest Time Act does not exclude the application of summarised working time accounting. The application of summarised working time

accounting means that the parties may agree on monthly, semi-annual and annual working time. However, even with summarised working time accounting, the working time agreed in the contract cannot be greater than the maximum amount provided for by law. With summarised working time accounting, the law also prescribes that where the summarised working time accounting period is longer than three months, the employer must obtain approval from the local labour inspector. This principle is required primarily to avoid employer's malpractice in imposing a working time regime on employees. But where the summarised working time accounting period is less than three months, no interference from the labour inspector is necessary and the parties are free to decide on the methods of working time accounting.

It has been claimed in special literature that if an employee can freely decide whether, where and for who he or she works, the employee must also be free to decide as from which day, for how long and at which hours he or she works (3, p. 536). This approach cannot be fully agreed with as in many respects the actual working time arrangements are conditioned by the organisation of work at the employer's premises. In addition, the Working and Rest Time Act contains a provision under which the employers must observe the precepts of local government executive bodies upon establishing the working time regimes of enterprises, agencies and organisations providing services to the public. This means that, with those enterprises, freedom of contract between the parties may be restricted by legislation imposed by the local government and both parties must observe those requirements and restrictions.

Employees have only a general say in the determination of the working time regime. An employee has sole discretion to decide on the time he or she works only in the cases provided for by law. For example, under § 14(2) of the Working and Rest Time Act, a person raising a child under fourteen years of age may only be required to work overtime or at night with his or her consent. In such case, the employer cannot demand from the employee to work at night or work overtime if the employee does not consent. At the same time, such a refusal of the employee cannot be treated as neglect of work obligations as the employee's freedom of choice is guaranteed by law. Where the employee agrees to work at the specified time, he or she must obey the instructions of the employer. In this example, working in general as well as working at a specified time is solely at the discretion of the employee.

The employment contract is also important in the determination of the wage. Wages may be viewed, in the law of obligations, as a counterdischarge for the work performed by the employee. However, the provisions regulating wages are normally specified in collective agreements. In Estonia, the number of collective agreements is relatively small and thus employment contracts are usually the

only basis in which wages are agreed upon. At that an employment contract is not just the instrument where a concrete amount of wage is agreed but other important conditions related to the payment and calculation of pay may be agreed in the employment contract. Thus, e.g., under the Estonian Wages Act (16), the employee's wage rate, additional remuneration and additional payments payable to employees, methods of calculation and procedures for payment of wages are determined by employment contracts, as under the Wages Act these are deemed to be wage conditions. Under § 3(2) of the Wages Act, the wage conditions and amendments to them are determined in the employment contract. While other wage conditions may be determined by the company's internal documents, e.g. the time, method and place of wage payment, the employee's wage rate must be set forth in the employment contract (16, § 10). Wage rate is an individual amount for each employee and cannot be imposed by collective agreement or corporate internal documents.

Wage-related issues is the area where there exist relatively few mandatory unilateral norms compared with the other areas of labour law. The parties have the greatest options to negotiate the amount of wage and other wage conditions and to apply the freedom of contract principle. Substantial restrictions prescribed by the Wages Act are, in part, the minimum rates of additional remuneration less than which an employee cannot be paid. Thus, the Wages Act provides for the minimum remuneration rates regarding the performance of certain additional work and working under special conditions where the parties cannot agree to lesser amounts (evening or night work, remuneration for overtime, working during national holidays). The most important restriction which all employers must take into account is the requirement of the Wages Act to the effect that where an employee is employed full-time, he or she must be guaranteed a minimum wage which is at least the minimum monthly wage established by the Government of the Republic (16, § 2(7)). This norm, however, is again a minimum requirement and the parties may always agree upon a higher rate.

### **3. 3. FREEDOM TO TERMINATE A CONTRACT**

In addition to the parties' freedom to conclude a contract, we should not forget the freedom to terminate a contract. Although the Employment Contracts Act foresees the bases upon which an employer may unilaterally terminate an employment contract, there still exists a possibility that an employment contract is terminated upon the parties' agreement or the contract expires due to the elapsing of its term. At the same time, the employer's freedom to terminate an employment contract is guaranteed under the Employment Contracts Act. For instance, an employer may, under § 86 5) of the Employment Contracts Act terminate the employment contract due to unsatisfactory

results of a probationary period during the whole probationary period if the employer is not satisfied with the performance of the employee. In such a case, the employer need not give prior notice or pay compensation. It is also possible to follow a simplified procedure for termination of the employment contract of a part-time employee. Upon terminating the employment contract with these classes of employees, the employer need not observe the guarantees which are generally foreseen in the event of termination of employment contracts (e.g. the prohibition to terminate the employment contract with a pregnant woman; during illness, etc.).

Insofar as otherwise provided for by law, the employer may freely terminate an employment contract at any time. Such an option is foreseen, e.g., in German and Swiss labour laws. In those countries, the employer need not justify the termination of an employment contract when the labour relation has lasted less than a period provided for by law and when the number of employees of the company is less than the number provided for by law (in Germany the respective conditions are, e.g., six months and less than five employees). In Estonia, the employer's freedom to terminate an employment contract is more restricted as the employer must always have a reason to terminate an employment contract on their own initiative. In other words, the termination of an employment contract must always be socially justifiable either by company-related reasons, reasons due to the person of the employee or for reasons due to conditions of the employees acts. The reasons are detailed in § 86 of the Employment Contracts Act. If the employer dismisses an employee due to reasons not provided for by law, the termination of the employment contract is unlawful. The employer's freedom upon the termination of the employment contract due to the employee's acts is restricted also by the fact that in such cases the employer must adhere to the procedure prescribed by law for imposing disciplinary punishments. This, however, means that the deadlines established for imposing disciplinary punishments and the regulations ruling the execution of disciplinary punishments must be complied with. Failure to comply with these requirements may lead to a situation where the termination of the employment contract is declared unlawful.

At the same time, the employee too is guaranteed the freedom to terminate the contract when the employee wishes to do so but the requirement is that the employee must give the employer a notification about his or her intent at least one month in advance (17, § 79). If so agreed with the employer, the employment contract may be terminated with immediate effect (i.e. before one month has elapsed) if the employee wishes so. The employee need not give a reason to terminate the employment contract on his or her own initiative. As a general rule, the law does not obligate the employee to give proof why he or she wishes



to leave work on his or her own free will.

The termination of the employment contract by agreement of the parties is one of the most important aspects in terms of the termination of employment contract that vividly demonstrates the private autonomy of the parties. The termination of an employment contract by agreement of the parties requires, under § 76 of the Employment Contracts Act, that one party presents a corresponding written request and the other party gives written consent to the termination of the contract. Upon such a termination of the contract, the reasons why the contract was terminated by agreement of the parties are irrelevant. Besides, the employer need not adhere to the provisions of law prohibiting the termination of the contract under particular circumstances (e.g. maternity leave, temporary inability to work, etc.) An employee cannot be forced to terminate the employment contract by agreement of the parties. On the basis of the Estonian court practice to date, it is possible to state that even if an employee signed the agreement to terminate the employment contract but there exists no written request and consent prescribed by § 76 of the Employment Contracts Act, the termination of the employment contract by the agreement of the parties is illegal. The termination of the employment contract by agreement of the parties requires that the parties to the contract have negotiated it and actually come to the related agreement.

Under the freedom to conclude contracts principle, besides the employment contracts entered into for an unspecified term, contracts for a specified term may also be concluded. However, with employment contracts entered into for a specified term it is required that there exist the bases provided for by law. Despite that employment contracts entered into for an unspecified term are widespread and admissible, employment contracts may be entered into for specified terms where there exists a justified basis under law. In accordance with the Employment Contracts Act, an employment contract may be entered into for a specified term to perform works that by character are temporary, i.e. the works end sooner or later one way or another. At the same time, contracts for a specified term may be concluded for works which by character are permanent. For instance termed contracts may be concluded where the employee is given special fringe benefits or, e.g., with university-level teaching staff and researchers. Under the Universities Act (20, § 39), employment contracts for a specified term are entered into with lecturers and researchers. Under this Act, employment contracts for a specified term may be entered into but not in excess of five years. Transformation of an employment contract entered into for a specified term into an employment contract entered into for an unspecified term in the midst of the labour relationship is generally not allowed. If this is done, it is principally possible only upon the agreement of the parties. The fact that a specific legal order allows, without

restrictions, termination of employment contracts by agreement of parties and the recognition of the option of termed contracts are deemed an expression of the self-determination of contract parties in private autonomy.

Although upon the termination of an employment contract on the initiative of the employer there exist various restrictions when the employer may not terminate the contract, the Estonian labour law nevertheless recognises the freedom to terminate employment contracts. This freedom is demonstrated by the admissibility of termination by agreement and after term of the contract.

#### **4. Freedom of Contract and Collective Agreement**

Section 29 of the Constitution guarantees the freedom to belong to associations of employees or employers. Associations and unions of employees and employers may protect their rights and lawful interests by means not prohibited by law. Collective agreement is one of the means for protection of rights and lawful interests

A collective agreement is a voluntary agreement between employees or a union or federation of employees and an employer or an association or federation of employers, and also state institutions or local governments, which regulates labour relations between employers and employees. Under § 2 of the Collective Agreements Act, a collective agreement is a voluntary agreement between the employees or the employees' union or association or between state institutions and local governments which regulates the labour relations between employers and employees. Thus, collective agreements are primarily voluntary agreements by which labour relations are supplementary to regulated law.

A collective agreement is basically an agreement in which the rules, according to the will of the parties, to be applied to the labour relationship are agreed upon (10, p. 366). It may be said that in collective agreements the rules are agreed which are subject to application to third parties who are not parties to the collective bargaining. If for the purpose of entering into a collective agreement, negotiations between the organisations of employees and employers are held, the agreement is concluded primarily in the interests of the members of such organisations although the members do not directly participate in the negotiations.

It has been argued in special literature that a collective agreement comprises two sets of norms. First, a collective agreement includes norms which are directly applicable to the labour relationship. This is the normative part of the collective agreement. On the other hand, a collective agreement includes norms in the law of obligations such as the obligation to preserve labour peace which the parties must fulfil without an explicit agreement. The obligation to preserve labour peace means that the parties to the collective agreement respect the collective agreement during the



period it is valid. Therefore, during that time it is not allowed to organise a strike or lockout to amend the collective agreement. In addition, an obligation to implement the collective agreement is also an obligation in the law of obligations in keeping with which the parties must see to the fulfilment of the collective agreement (10, pp. 366-367).

Under the Estonian Collective Agreements Act, it is possible to distinguish between two types of collective agreement conditions. Under § 6 of the Collective Agreements Act, one part of the arrangements agreed in the collective agreement is formed from conditions directly pertinent to the labour relationship. The conditions of collective agreement also include the conditions specifying the supervision of compliance, conclusion, renewal of the collective agreement, etc. Under § 11 of the Collective Agreements Act, during the validity of the agreement the parties must fulfil the conditions of the agreements and not impose a strike or lockout for the amendment of the conditions agreed in the collective agreement. Thus, by concluding a collective agreement, the parties thereto assume the obligation to fulfil the agreement and must refrain — as an obligation arising directly out of law, from measures by which it would be possible to demand unilateral amendment of the collective agreement.

As with any other agreement, a collective agreement comes into being after both parties have expressed their clear wish (10, p. 370 ff). Even when a State Arbitrator interferes with the process, he or she cannot demand that the parties conclude a collective agreements on the conditions offered by the Arbitrator or a third person. Collective agreements are concluded only as a result of the consensus arrived at after collective bargaining. The State Arbitrator is just a mediator who must contribute to achieving a consensus between the parties. Consequently, the freedom to conclude a contract is applicable to collective agreements too. Legal mechanisms cannot be used to force someone to enter into a collective agreement. A party to the agreement may, by strike or lockout, force the other party to conclude an agreement but in the law it is not written that a party should conclude the collective agreement on the conditions offered. Section 7 of the Collective Agreements Act sets out that a collective agreement is concluded by negotiations between the parties on the basis of mutual trust and presentation of related information. This provision excludes the obligation or coercion to conclude a collective agreement. If collective bargaining fails, no collective agreement is entered into. Consequently, mandatory contract conclusion is not applicable to collective agreements.

It should however be noted that requirements concerning the format of collective agreements may be established. A collective agreement must be concluded in writing or else it is void with all the related consequences (10, pp. 377-378). Under the Estonian Collective Agreements Act, a collective agreement must also be concluded in writ-

ing but the Act does not specify what happens if it is not. In the Estonian context, another problem is that generally collective agreements are not treated as other contracts and consequently the provisions regarding the voidness of contracts do not apply to collective agreements. Therefore, this is an open case in Estonian legislation, both theoretically and practically. Hence with collective agreements the parties' freedom to decide on the form of agreement is not applicable. We should however mention here that it is quite impossible to imagine that a collective agreement could in reality be concluded in spoken form.

The status of collective agreements through the prism of freedom of contract is to date a topic which in Estonia has not been treated as there was no need to do so and as, traditionally, collective agreements are viewed as not belonging to the general system of contracts.

At the same time we should however note that the Collective Agreements Act does not regulate the termination of collective agreements. If collective agreements are treated as one of many contracts, there should exist the freedom to terminate it. The current Estonian legal system provides no answer to the possibility of terminating a collective agreement and to the related conditions. Under the Collective Agreements Act, a collective agreement may be entered into for a specified term. If no term is specified, the agreement remains valid for one year. After the term has elapsed, the parties are relieved from the obligation to maintain labour peace but they must, under law, fulfil the conditions of the collective agreements until a new collective agreement is entered into. But the Collective Agreements Act does not regulate how a collective agreement is to be terminated ahead of term.

## Conclusion

On the basis of the issues treated above, it can be said that although at first sight private autonomy and freedom of contract seem to be restricted in labour relations, the parties to an employment contract are nevertheless entitled to shape the legal relationship between themselves. Bases set forth in labour laws are required to restrict the freedom of contract of the parties. The freedom of contract in labour relations is guaranteed under § 29 of the Constitution. In the context of this provision too, the restriction of this freedom requires the existence of a corresponding legal basis. Under the freedom to conclude contracts principle, the employer has no obligations, under the Estonian labour law, to conclude an employment contract with a concrete employee. The shaping of the contents of the labour relationship is the aspect which is of special significance in the context of the freedom to conclude an employment contract. The Employment Contracts Act enumerates six mandatory points which must be included in every employment contract. The parties cannot ignore those provisions of law. Hence, the employment contract determines

the character of the work to be performed, related working time, place and remuneration to the employee.

Freedom of contract and labour relations are closely intertwined. In labour relations, freedom of contract implies the freedom to conclude, formulate and terminate employment contracts. While regarding individual employment contracts we can find all the three freedoms in Estonia's legal system, the freedom to terminate a collective agreement is not regulated under Estonian law.

It is not possible to speak about absolute freedom of contract in the context of employment contracts. It is the result of developments throughout history that the parties to a labour relationship are not equal. As a rule, the employer has more economic advantages in conclusion of an employment contract. To balance the status of the parties to an employment contract, the government has imposed a number of restrictions to exclude employers' malpractice in exploiting labour.

It is necessary to apply freedom of contract to labour relations. At the same time, the realisation of this freedom is to a certain extent restricted by law - both for employees and employers. Those restrictions are not, however, of such a nature as to completely exclude the principle of freedom of contract in labour relations.

## Notes:

1. A.-T. Kliimann. *Õiguskord*. (Legal Order.) Tartu: Akadeemilise Kooperatiivi Kirjastus, 1939.
2. J. Baumann. *Einführung in die Rechtswissenschaft — Rechtssystem und Rechtstechnik*. 8. Auflage. Munich: C.H. Beck'sche Verlagsbuchhandlung, 1989.
3. B. Boemke. *Privatautonomie im Arbeitsverhältnis*. Neue Zeitschrift für Arbeitsrecht, Heft 12, 1993.
4. H. Brox. *Allgemeines Schuldrecht*. 24. Auflage. Munich: C.H. Beck'sche Verlagsbuchhandlung, 1997.
5. H. Brox, B. Rütters. *Arbeitsrecht*. 13. Auflage. Stuttgart, Berlin, Cologne: Verlag W. Kohlhammer, 1997.
6. W. Dütz. *Arbeitsrecht*. 3. Auflage. Munich: C.H. Beck'sche Verlagsbuchhandlung, 1997.
7. H. Köhler. *Tsiviilseadustik. Üldosa. Õpik*. 23. täielikult ümbertöötatud trükk. (Civil Code. General Part. Textbook. 23rd fully revised edition.) Tallinn, 1998.
8. I.-M. Orgo, H. Siigur. *Tööõigus: õpik Tartu Ülikooli õigusteaduskonna üliõpilastele*. (Labour Law: Textbook for Students of Law of the University of Tartu.) Tallinn, 1995.
9. G. Schaub. *Arbeitsrechts- Handbuch*. 8. Auflage. Munich: C. H. Beck'sche Verlagsbuchhandlung, 1996.
10. W. Zöllner, K. Loritz. *Arbeitsrecht*. 5. Auflage. Munich: C. H. Beck'sche Verlagsbuchhandlung, 1998.
11. Q.v. similar approaches: J. Peltonen. Approaches from the Finnish Legal System: Basic Terms, Court, Bar. *Fontes Iuris*, 1994. p.6; T. Mayer-Maly. *Einführung in die Rechtswissenschaft*. Springer Verlag: Berlin, Heidelberg, 1993, p. 93-99.
12. Q.v. similar approaches e.g. in: E. Wolf. *Das Arbeitsverhältnis: personenrechtliches Gemeinschaftsverhältnis oder Schuldverhältnis?* N.G. Verlag:

Marburg, 1970; S. Jochheim. *Das Arbeitsverhältnis — ein Personengesellschaftsverhältnis?* Dortmund, 1996.

13. Q.v. e.g. *Bürgerliches Gesetzbuch*. (German Civil Code.) § 611 ff; Swiss Code of Obligations (*Obligationenrecht*) Art. 319 ff.
14. Q.v. *BGB* (German Civil Code) § 611a(2) and (3).
15. *Haldusõigusrikkumiste seadustik*. (Code of Administrative Offences.) — RT (Riigi Teataja = State Gazette) 396; I 1999, 41, 496.
16. *Palgaseadus*. (Wages Act.) — RT I 1994, 11, 154; 1995, 12, 120.
17. *Eesti Vabariigi töölepingu seadus*. (Republic of Estonia Employment Contracts Act.) — RT 1992, 15/16, 241 as amended.
18. *Turvateenistusseadus*. (Security Services Act.) — RT I 1993, 75, 1100.
19. *Tsiviilseadustiku üldosa seadus*. (General Part of the Civil Code Act.) - RT I 1994, 53, 889 as amended.
20. *Ülikooliseadus*. (Universities Act.) — RT I 1995, 12, 119 as amended.

<sup>1</sup> Here a direct example is the regulation included in the Russian Labour Code.



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# Prohibition of Discrimination in Labour Relations

## Introduction

Voluntariness is characteristic of labour relations and employment contracts. This means, on the one hand, the freedom to choose one's place of work and sphere of activity<sup>1</sup> and, on the other hand, the parties to a labour relation can conclude an employment contract in concordance with their free will. With labour relations, however, the parties' freedom of contract is restricted by several provisions of public law: labour laws are imperative and the parties may also conclude agreements on conditions more favourable than those prescribed in law.<sup>2</sup>

With an employment contract relationship, however, it is also important that the internationally recognised principle of equal treatment be observed.<sup>3</sup> The principle of equality and prohibition of discrimination in labour relations are based on the both legal and moral standpoint that similar employees should be treated similarly.<sup>4</sup>

On the international level, a great number of acts have been enacted that prohibit discrimination in labour relations. Although the protection of workers' fundamental rights is provided for in several international agreements and the application of principles of human rights is guaranteed in all the developed countries with a number of legislative acts, this area is nevertheless not without problems as it is often difficult to guarantee the actual implementation of the principles stated in various documents. Therefore, it is understandable why, on the international level, so much attention has been paid to the protection of human rights and the avoidance of discrimination in labour relations.<sup>5</sup>

Of the international acts prohibiting discrimination, the following are currently binding on Estonia: the United Nations International Covenant on Economic, Social and Cultural Rights (1966), the United Nations Convention on

the Elimination of All Forms of Discrimination Against Women (1979) and ILO Convention No. 100 concerning Equal Remuneration for Men and Women Workers for Work of Equal Value (1951). In the near future, the Estonian parliament will ratify the European Social Charter (1961).

The elimination of discrimination is topical in many spheres of life, this article, however, focuses only on the equal treatment of workers. Within the context of labour relations, both international and domestic law pay special attention to the protection of certain groups of workers, e.g. the disabled, workers who have family obligations, and female employees. This is reasonable because in practice these groups of workers are those most often discriminated. The article treats the application of the principle of equal treatment of male and female employees in Estonia: it analyses the equal treatment of male and female workers in respect of hiring, remuneration, other working conditions and exclusions from the principle of equal treatment. The study is based on international covenants and conventions which prohibit discrimination.

In addition to international provisions binding upon Estonia, the article also analyses European Union (EU) legislation prohibiting discrimination insofar as the Europe Agreement<sup>6</sup> imposes on Estonia the obligation to approximate Estonia's legislation to that of the Community particularly in the areas of trade, economy and related areas, including the issues pertaining to the protection of workers (Articles 68-69). Thus, Estonian labour laws should comply with Community standards which is a condition precedent to accession. On the other hand, within the EU more and more attention is paid to the equal treatment of female and male employees: Article 141 of the Amsterdam Treaty (1997) considerably expands EU competence in this area.<sup>7</sup>

The White Paper on the Preparation of Associated Central and East European Countries for Integration with the Internal Market of the European Union defines the guaranteeing of equal treatment of men and women in labour relations as a priority, making mention of the following important legislative acts: Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, Directive 75/117/EEC on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women, and Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC).<sup>8</sup>

In Estonian legislation, the prohibition of discrimination has not been a major issue. No special acts to this effect have been adopted. The general principle of equal treatment is provided for in § 12 of the Constitution<sup>9</sup> under which everyone is equal before the law. No one is to be discriminated against on the basis of nationality, race, colour, sex, language, origin, religion, political or other opinion, property or social status or on other grounds. Discrimination is also prohibited in the Employment Contracts Act<sup>10</sup> and the Wages Act.<sup>11</sup>

### **Application of the Principle of Equal Treatment as Regards Hiring**

The UN Convention on the Elimination of All Forms of Discrimination Against Women,<sup>12</sup> which is binding on Estonia, sets out that States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights, in particular: the right to the same employment opportunities, including the application of the same criteria for selection in matters of employment (Article 11 paragraph 1(b)).

The following principle is provided for in Article 20 of the European Social Charter:<sup>13</sup> with a view to ensuring the effective exercise of the right to equal opportunities and equal treatment in matters of employment and occupation without discrimination on the grounds of sex, the Parties undertake to recognise that right and to take appropriate measures to ensure or promote its application in the following fields:

- (a) access to employment, protection against dismissal and occupational reintegration;
- (b) vocational guidance, training, retraining and rehabilitation;
- (c) terms of employment and working conditions,

including remuneration;

- (d) career development, including promotion.

The prohibition of discrimination of female and male employees is also set out in Article 3(1) of Council Directive 76/207/EEC<sup>14</sup> under which the application of the principle of equal treatment means that there shall be no discrimination whatsoever on grounds of sex in the conditions, including selection criteria, for access to all jobs or posts, whatever the sector or branch of activity, and to all levels of the occupational hierarchy.

Estonian legislation does not set out the concept of the principle of equal treatment. The principle of equal treatment can be derived from § 10(1) of the Employment Contracts Act which provides for the bases which can in no case justify the giving of preferences or the restriction of rights: it is illegal to allow or give preferences, or to restrict rights on the grounds of the sex, nationality, colour, race, native language, social origin, social status, previous activities, religion, political or other opinion, or attitude towards the duty to serve in the armed forces of employees or employers. It is also illegal to restrict the rights of employees or employers on the grounds of marital status, family obligations, membership in citizens' associations, or representation of the interests of employees or employers.

Insofar as the principle of equal treatment provided for in § 10(1) of the Employment Contracts Act is applicable only to a labour relationship which has already been conceived, the principle can be applied to a candidate for a post on the basis of analogy. The same opinion can be found in the commented edition of the Employment Contracts Act: disadvantages or restrictions are contrary to subsection 1 only after the conclusion of an employment contract. A recruitment notice referring to circumstances, on the basis of which subsection 1 prohibits different treatment of people, is also contrary to law.<sup>15</sup>

Section 30 of the Employment Contracts Act provides for documents requisite to enter into an employment contract:

- (1) identification;
- (2) an employment record book;
- (3) certificate (diploma) regarding the necessary qualifications or education;
- (4) certificate (health record) regarding health if the employment contract is entered into for work where prior and periodic medical examinations are prescribed, or upon hiring persons who are under twenty-one years of age for work prescribed in special rules;
- (5) the written consent of one parent or guardian and the labour inspector upon hiring a minor between thirteen and fifteen years of age;
- (6) the written consent of one parent or curator upon hiring a minor who has attained fifteen years of age;
- (7) a work permit upon hiring an alien or stateless person in the cases prescribed by law;



(8) other documents in the cases prescribed by law or regulations of the Government of the Republic (subsection 1). Upon hiring, it is prohibited to require documents which are not prescribed by law or regulations of the Government of the Republic. On their own initiative, employees have the right to present employers with references, recommendations and other documents which characterise their previous work performance and the existence and application of their professional skills (subsections 2 and 3).

Under this list, an employer cannot demand a curriculum vitae from an employee upon the employee's taking up a position insofar as it is prohibited to require, upon hiring, documents which are not prescribed by law or regulations of the Government of the Republic; and the presentation of a curriculum vitae is not prescribed by any of the legal acts. However, it is a common practice to demand the presentation of a curriculum vitae and thus this section is not adhered to. However, this is not a discriminating practice as what is important is the data the employer obtains from the employee's curriculum vitae. It is not excluded that those data does not concern an area not connected with employment and is not a basis of unequal treatment of men and women.

The implementation of equal treatment is not guaranteed in practice: the employer is, in choosing labour, absolutely free, and both direct and indirect discrimination can be met upon hiring. An example of direct discrimination is the job offers published in newspapers which set restrictions regarding age or sex. The public has not responded to the publication of such advertisements and there are no court precedents in this area.

Even if a job advertisement is correct in its contents, nevertheless it does not guarantee the equal treatment of all candidates. The employer exercises a great discretion in selecting the best candidate and the employer is the one who sets the rules of the game. It is very difficult for a discriminated candidate to prove, at a later date, that the sex of the candidate was the decisive factor in hiring.

## Implementation of the Principle of Equal Treatment in Remuneration

Article 7 of the UN International Covenant on Economic, Social and Cultural Rights,<sup>16</sup> which is binding on Estonia, sets out that the States Parties to the Covenant recognise the right of everyone to the enjoyment of just and favourable conditions of work which ensure, in particular remuneration which provides all workers, as a minimum, with fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work (Article 7 a) (i)).

A similar principle may be found in the UN

Convention on the Elimination of All Forms of Discrimination Against Women: States Parties shall take all appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the right to equal remuneration, including benefits, and to equal treatment in respect of work of equal value, as well as equality of treatment in the evaluation of the quality of work (Article 11 paragraph 1 (d)).

Article 4 third paragraph of the European Social Charter provides for the following principle: with a view to ensuring the effective exercise of the right to a fair remuneration, the Parties undertake to recognise the right of men and women workers to equal pay for work of equal value. The principle of equal remuneration is also provided for in Article 20 c) of the above-mentioned Social Charter.

The principle of equal remuneration is also provided for in ILO Convention No. 100 concerning Equal Remuneration for Men and Women Workers, binding on Estonia, under Article 2 paragraph 1.: each Member shall, by means appropriate to the methods in operation for determining rates of remuneration, promote and, in so far as is consistent with such methods, ensure the application to all workers of the principle of equal remuneration for men and women workers for work of equal value.

Under Article 2 paragraph 1 of Council Directive 75/117/EEC<sup>17</sup> the principle of equal pay for men and women outlined in Article 119 of the Treaty, hereinafter called the "principle of equal pay", means, for the same work or for work to which equal value is attributed, the elimination of all discrimination on grounds of sex with regard to all aspects and conditions of remuneration. In particular, where a job classification system is used for determining pay, it must be based on the same criteria for both men and women and so drawn up as to exclude any discrimination on grounds of sex.

Under § 5 of the Estonian Wages Act, it is prohibited to increase or reduce wages on the grounds of an employee's sex, nationality, colour, race, native language, social origin, social status, previous activities, religion, political or other opinion, or attitude towards the duty to serve in the armed forces. It is prohibited to reduce wages on the grounds of the marital status, family obligations, and membership in citizens' associations or representation of the interests of employees or employers. Thus, in the cases listed here, increase of wages is permitted. Generally, the idea of this section is to induce the implementation of the principle of equal pay for equal work.<sup>18</sup>

The remuneration of people employed by state agencies is regulated by the 1999 regulations of the Government of the Republic<sup>19</sup> No. 10 Remuneration of public servants<sup>20</sup> in 1999<sup>21</sup> and No. 11 Remuneration in 1999 of employees of state agencies administered by gov-

ernment agencies to which, under the State Budget Act, an appropriation for wage costs is made<sup>22</sup>.

Government Regulation No. 10 provides for 35 wage rates.<sup>23</sup> Ministries, county governments, State Chancellery and the authorities within their area of government or administration and the Office of Legal Chancellor and the Supreme Court must determine the wage rates of office and support staff positions prescribed for their staff compositions within the amounts appropriated for remuneration in the state budget (clause 2). Under the Regulation, each institution may, in preparing the wage guidelines of its own institution as well as the institution within its area of government of administration, differentiate the wage rate corresponding to a certain office and support staff position, applying wage rates by 30% higher than the wage rates prescribed by the Regulation. A wage rate may be differentiated for important office and support staff positions of the institution on the basis of qualification, specific nature of working conditions, locality of work place or other characteristics of the position. Wage guidelines indicate, with proper justification, office and support staff positions together with wage rates in respect of which the differentiation of wage rates is applied (clause 3).

Under clauses 4-8 of the Regulation, bonuses and additional remuneration may be paid to public servants as provided for by law whereas additional remuneration may be paid for the fulfilment of additional service duties and better performance which is designated according to the conditions and procedure set out in the wage guidelines as decided by the head of the institution or the person who has the right to hire people for public service.

The limit rate of additional remuneration for the fulfilment of additional work duties or for a better performance than required is 50% of the wage rate corresponding to the office position of the public servant. Additional work duties are deemed to be those work duties which are not set out in the servant's job description and the orders of the head of the institution or direct supervisor not included in work or service duties. The basis for the payment of additional remuneration for better performance is the assessment of the knowledge, skills and work results of the public servant in accordance with the procedure established by the minister or state secretary.

Government Regulation No. 11 prescribes thirty-one wage rates.<sup>24</sup> Ministries, county governments and the State Chancellery must prepare the classification of position-based wage rates for the employees of state authorities in their area of government or administration on the basis of which the state agency determines the wage rates for the positions specified in the staff composition within the amount of money appropriated therefor in the state budget. (clause 2). The Regulation is in other respects similar with previously mentioned Regulation No. 10.

Thus, under the Regulations, wage rate may be differ-

entiated on the basis of qualifications, specific characteristics of working conditions, location of work place and other characteristics of the position for important to the institution office and support staff positions. Additional remuneration may be provided for on the basis of performance results or for fulfilment of additional duties. Those criteria grant the head of institution a rather extensive discretion for differentiation of wage rates and payment of additional remuneration.

Under § 12 of the Wages Act too if, upon the request of an employer, an employee performs additional work during determined working hours as compared with work prescribed in the employment contract, his or her wages shall be increased or additional remuneration paid in an amount determined by agreement of the parties. It is difficult to check compliance with the principle of equal treatment upon application of the previously cited provisions but it is also impossible for the State to impose more specific wage rates.

The situation is especially complicated as regards the implementation of the principle of equal treatment in private companies where the amount of wage is not prescribed by collective agreements but is determined on the basis of the understanding achieved between the employer and employee. Under § 9 of the Wages Act, an employer establishes wage rates in an enterprise, agency or other organisation according to the differences in work and working conditions, based on a collective agreement entered into between the employer and employees. According to this, the employer has a great freedom to differentiate wage rates, taking into account that it is quite unusual for Estonia to regulate labour (and wage) conditions by collective agreements.

The Wages Act provides for overtime remuneration, compensation for work on days off, remuneration for work performed on public holidays and additional remuneration for evening and night work (§§ 14-17). If an employer pays additional remuneration within the range of minimum rates prescribed by law, the equal treatment of male and female employees is guaranteed. An employer may prescribe more favourable wage conditions to an employee than those established by law or collective agreement.<sup>25</sup> In prescribing more favourable wage conditions, the principle of equal treatment provided for in § 5 of the Wages Act must be taken into account. However, other employees are usually not aware of the amount of individual additional remuneration prescribed and differentiation on the basis of sex is possible.

The implementation of the principle of equal treatment is complicated by the fact that it is very difficult to appraise which work should be considered equal. No related mechanisms have been created and it is hard to do. It is easier to assess work in production companies where workers manually perform similar operations. It is virtually impossible to assess the equality of mental work. An

employer may assign an employee a task which in practice does not exist but the employee's wage is increased as a result. In such a case it is difficult to prove that the larger wage was due to preference given on the basis of sex.

## Implementation of the Principle of Equal Treatment as regards Other Working Conditions

The application of the principle of equal working conditions is provided for in Article 7 of the UN International Covenant on Economic, Social and Cultural Rights, Article 11 of the UN Convention on the Elimination of All Forms of Discrimination Against Women and in Article 20 of the European Social Charter.

Under Article 5 paragraph 1 of Council Directive 76/207/EEC the application of the principle of equal treatment with regard to working conditions, including the conditions governing dismissal, means that men and women shall be guaranteed the same conditions without discrimination on grounds of sex.

Working conditions in a broader sense are regulated by all labour laws of Estonia which, as a general rule, establish identical standards for both male and female staff. In certain cases (amendment of employment contracts, daily breaks, parent holidays, etc.) female employees enjoy greater benefits in connection with pregnancy and the raising of children less than three years of age.

Under § 14 of the Employment Contracts Act, the rights granted to employees by law or administrative legislation may be extended by collective agreements or employment contracts, or by unilateral decisions of employers. The rights granted to employees by collective agreements may be extended by employment contracts or unilateral decisions of employers (subsections 1 and 2). In expanding the rights, one must also take into account § 10 of the Employment Contracts Act which prohibits unequal treatment in labour relations.

Working conditions in the narrow sense are the work to be performed and its level of complexity, the working time, the wages, the location of employment, the term of validity of an employment contract for a specified term, the date of commencement of employment as set out in § 26(1) of the Employment Contracts Act. Of those conditions, the principle of equal treatment is the hardest to achieve with the wages.<sup>26</sup>

The following is an analysis of those provisions of labour laws which prescribe different standards for female and male staff as regards the working conditions.

The Working and Rest Time Act<sup>27</sup> prescribes that a woman raising a disabled child or child under fourteen years of age may only be required to work overtime, night shifts or work on a holiday with her consent (§§ 14, 19, 30). Under § 18(3) of the Working and Rest Time Act, at the request of a woman raising a disabled child or child

under fourteen years of age, an employer is required to apply part-time working time with respect to such person. The benefits also extend to a person raising a motherless disabled child or child under fourteen years of age (§ 8 1)). Those provisions of the Working and Rest Time Act discriminate male employees who can exercise those rights only in the case they raise, without contribution of child's mother, a disabled child or a child under fourteen years of age.

Under § 16 of the Republic of Estonia Holidays Act,<sup>28</sup> an employer is required to grant a holiday at the time requested by the employee to:

- (1) a woman before and after pregnancy or maternity leave or after parental leave;
- (2) a man during or after the pregnancy leave or maternity leave of his wife;
- (3) a woman raising a child of up to three years of age;
- (4) a man raising a child of up to three years of age alone (clauses 1-4).

This provision prefers a female employee: she can request from an employer a holiday after parental leave while a male employee cannot. Besides, a woman raising a child under three years of age can take the holiday at the time convenient for her while a male employee can request this only if he is a single parent to a child of up to three years of age.

A similar regulation can be found in § 34 of the Holidays Act, under which, at the request of the employee, the employer is required to grant a holiday without pay to:

- (1) a woman raising a child of up to fourteen years of age;
- (2) a man (guardian) raising a child of up to fourteen years of age alone (clauses 1 and 2).

The Employment Contracts Act provides for benefits to female employees in the following cases:

- (1) It is prohibited to send pregnant women and minors on business trips. A woman raising a disabled child or child under three years of age may be sent on a business trip with her consent (§ 51(2)).
- (2) On the basis of a decision of a state authority, an employer has the right to temporarily transfer an employee to a position at another enterprise, agency or other organisation in the same or another locality for the prevention of a natural disaster, expeditious elimination of the consequences thereof or prevention of the spread of disease, but for not more than one month. It is not permitted to transfer a pregnant woman, a woman who is raising a disabled child or a child under sixteen years of age, or a minor to another locality (§ 67(1), (2), (4)).
- (3) A woman raising a child less than three years of age may terminate an employment contract concluded for specified or unspecified time by giving a notification five calendar days in advance<sup>29</sup> (§ 79(2), § 80(1) 3)).

In all cases listed above, the same benefit extends to

male employees, under § 11 clause 1, only in the case he raises a disabled child or a child under three years of age alone. This discrimination on grounds of sex cannot be deemed justified.

The termination of an employment contract on the initiative of the employer (dismissal) is regulated by §§ 86-109 of the Employment Contracts Act.<sup>30</sup> These provisions as a rule provide for identical conditions to female and male employees. As an exception, restrictions on the termination of employment contract are provided for employees who have family obligations. Under § 91(1) 2), it is not allowed to terminate an employment contract on employer's initiative while the employee is on a holiday (including parental leave and holidays without pay). This principle does not apply to termination of employment contracts due to the liquidation of an enterprise, agency or other organisation, or the declaration of bankruptcy of the employer (§ 91(2)).

Under § 30(1) of the Holidays Act, a mother or father is granted parental leave at his or her request until the child attains three years of age. If a mother or father does not use a parental leave, the leave may be granted to the actual caregiver (subsections 1 and 2). In this way, an employee on parental leave is protected against dismissal irrespective of who takes the leave — mother or father.

The termination of an employment contract is also restricted in respect of a pregnant woman or a woman who raises a child under three years of age. Under § 92(1), it is prohibited for an employer to terminate an employment contract with a pregnant woman or a woman raising a child under three years of age, except on the bases prescribed in § 86 clauses 1)-2), 5)-8) and 11) (upon liquidation of the enterprise, agency or other organisation; upon the declaration of bankruptcy of the employer; upon lay-off of employees; due to unsatisfactory results of a probationary period; upon breach of duties by an employee; upon loss of trust in an employee; due to an indecent act by an employee; upon hiring an employee for whom the position is a principal job). Termination of employment contracts with the employees on the bases prescribed in § 86 clauses 1)-2) and 5)-8) (liquidation of a legal person, bankruptcy of the employer, unsatisfactory results of a probationary period, breach of duties by an employee, loss of trust in an employee and an indecent act of an employee) is only permitted with the consent of the labour inspector of the location (residence) of the employer (§ 92(2)). It is prohibited to terminate an employment contract with pregnant women and women raising a child under three years if age due to lay-off, unsuitability, long-term incapacity for work and age.

Under § 11 clause 1 of the Employment Contracts Act, the benefits prescribed in § 92 for women raising disabled children or children under three years of age also extend to persons raising motherless children who are disabled or under three years of age. This protects primarily female

workers raising children less than three years of age as the benefit is only applicable to the child's father in the case the father raises a child less than three years of age without the child's mother. Such a discrimination of male employees is not fair but the current regulation proceeds from the belief that should male employees be granted equal protection in this respect, it will be difficult for young fathers to find a job as the employer would fear that it would be difficult to get rid of him later, besides the protection is guaranteed to the employee until the child reaches three years of age.

In order to achieve the reintegration of female workers with small children into the labour market, men and women should be treated equally in the question treated in the previous paragraph. Although the legislator's purpose was to offer benefits to women raising small children, the current regulation discriminates both male and female employees: men can enjoy the benefits only in the case they raise children alone (without mother) and, on the other hand, as the underlying idea of the Act is to offer benefits to women but as women are also the main caretakers of family, it puts female employees in a worse position compared with men. As far as dismissals are concerned, one of the options would be to shorten prohibition period, however, it would have a backfiring effect on the social protection of workers.

## Exclusions to the Implementation of the Principle of Equal Treatment

Under international acts, prohibition, differentiation and preference in connection with the character of work, guaranteeing of national security or implementation of special means of protection is not considered contrary to the principle of equal treatment.<sup>31</sup> In labour relations, the giving of preferences in connection with a woman's pregnancy or the raising of a child is not deemed to be discriminating. Exclusions may also be made due to the character of work. Many acts provide for additional guarantees to female employees which are required, firstly, to protect the health of the employee and, secondly, they are needed to help female employees reintegrate on the labour market.

Article 11(2) of the UN Convention on the Elimination of All Forms of Discrimination Against Women sets out: in order to prevent discrimination against women on the grounds of marriage or maternity and to ensure their effective right to work, States Parties shall take appropriate measures:

(a) to prohibit, subject to the imposition of sanctions, dismissal on the grounds of pregnancy or of maternity leave and discrimination in dismissals on the basis of marital status;

(b) to introduce maternity leave with pay or with comparable social benefits without loss of former employment,



seniority or social allowances;

(c) to encourage the provision of the necessary supporting social services to enable parents to combine family obligations with work responsibilities and participation in public life, in particular through promoting the establishment and development of a network of child-care facilities;

(d) to provide special protection to women during pregnancy in types of work proved to be harmful to them.

Article 8 of the European Social Charter regulates the right of working women to protection of maternity as follows: with a view to ensuring the effective exercise of the right of employed women to the protection of maternity, the Parties undertake:

1. to provide either by paid leave, by adequate social security benefits or by benefits from public funds for employed women to take leave before and after childbirth up to a total of at least fourteen weeks;

2. to consider it as unlawful for an employer to give a woman notice of dismissal during the period from the time she notifies her employer that she is pregnant until the end of her maternity leave, or to give her notice of dismissal at such a time that the notice would expire during such a period;

3. to provide that mothers who are nursing their infants shall be entitled to sufficient time off for this purpose;

4. to regulate the employment in night work of pregnant women, women who have recently given birth and women nursing their infants;

5. to prohibit the employment of pregnant women, women who have recently given birth or who are nursing their infants in underground mining and all other work which is unsuitable by reason of its dangerous, unhealthy or arduous nature and to take appropriate measures to protect the employment rights of these women.

Council Directive 76/207/EEC is without prejudice to the right of Member States to exclude from its field of application those occupational activities and, where appropriate, the training leading thereto, for which, by reason of their nature or the context in which they are carried out, the sex of the worker constitutes a determining factor (Article 2 paragraph 2). The Directive is without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity (Article 2 paragraph 3).

Detailed rules concerning pregnant women, women who have recently given birth and women who are breastfeeding are provided for in EU Directive 92/85/EEC.<sup>32</sup> The most important principles provided for in the Directive are: if the results of the assessment of work reveal a risk to the safety or health or an effect on the pregnancy or breastfeeding of a worker, the employer shall take the necessary measures to ensure that, by temporarily adjusting the working conditions and/or the working hours of the worker concerned, the exposure of that worker to such risks is avoid-

ed. If the adjustment of her working conditions and/or working hours is not technically and/or objectively feasible, or cannot reasonably be required on duly substantiated grounds, the employer shall take the necessary measures to move the worker concerned to another job. If moving her to another job is not technically and/or objectively feasible or cannot reasonably be required on duly substantiated grounds, the worker concerned shall be granted leave in accordance with national legislation and/or national practice for the whole of the period necessary to protect her safety or health (Article 5 paragraphs 1-3).

Member States take the necessary measures to ensure that workers are not obliged to perform night work during their pregnancy and for a period following childbirth which shall be determined by the national authority competent for safety and health, subject to submission, in accordance with the procedures laid down by the Member States, of a medical certificate stating that this is necessary for the safety or health of the worker concerned (Article 7 paragraph 1).

Member States take the necessary measures to ensure that workers are entitled to a continuous period of maternity leave of at least 14 weeks allocated before and/or after confinement in accordance with national legislation and/or practice. (Article 8 paragraph 1).

In order to guarantee workers the exercise of their health and safety protection rights it is provided that Member States take the necessary measures to prohibit the dismissal of workers during the period from the beginning of their pregnancy to the end of the maternity leave save in exceptional cases not connected with their condition which are permitted under national legislation and/or practice and, where applicable, provided that the competent authority has given its consent (Article 11 paragraph 1).

Under § 10 of the Employment Contracts Act, preferences allowed and given based on pregnancy or the raising of children are not contrary to the prohibition of allowing or giving preferences, or restricting rights (subsection (2) clause 1). Thus, the Employment Contracts Act treats the protection of female employees wider than just in connection with pregnancy and birthgiving: under the law, female employees may also be given preferences in connection with the raising of children. Such a wide protection may cause indirect discrimination of female employees.<sup>33</sup>

In employing it is allowed to make restrictions in respect of female employees: under § 35 of the Employment Contracts Act it is prohibited to hire and employ women for heavy work, work which poses a health hazard or underground work. The list of work which is prohibited for women is determined by 1992 Government of the Republic Regulation No 214 About the fulfilment of the resolution on the implementation of the Republic of Estonia Employment Contracts Act,<sup>34</sup> which ratifies the list of heavy works, works which pose a health hazard in

which women are prohibited from working and the list of sanitary, catering and related underground works in which women may work. This Regulation prohibits women from working in physically heavy and hazardous works. This list applies to all women, including women who have recently given birth or are breastfeeding.

Under § 18(3) of the Working and Rest Time Act, at the request of a pregnant woman or a woman raising a disabled child or child under fourteen years of age, an employer is required to apply part-time working time with respect to such person.

Under § 63(1) of the Employment Contracts Act, pregnant women have the right to request easement of working conditions or temporary transfer to an easier position based on the decision of a doctor. Pregnant women are paid the difference in wages in accordance with the procedure provided for in the Republic of Estonia Health Insurance Act.<sup>35</sup> If the labour inspector of the location (residence) of the employer establishes that it is not possible for the employer to ease the working conditions of the pregnant woman or transfer her to an easier position, she is discharged from work and paid compensation from medical insurance funds in accordance with the procedure provided for in the Republic of Estonia Health Insurance Act<sup>36</sup> (§ 63 (2)).

On the basis of the above, both pregnant women and women raising a disabled child or child under fourteen years of age may demand part-time working time; only pregnant women have the right to request easement of working conditions or transfer to another position or discharge from work. The Working and Rest Time Act and the Employment Contracts Act treat the employment of related measures as a right of a female employee and not as an obligation of an employer and they are subject to the existence of a sick leave issued by a doctor. Similarly, the amendments to the Employment Contracts Act dated 09.12.98<sup>37</sup> do not protect women who have recently given birth or are breastfeeding.

Work during night time is regulated by § 19 of the Working and Rest Time Act, under subsection 2 of which pregnant women are not required to work during night time (22:00- 6:00). A woman raising a disabled child or child under fourteen years of age or a person taking care of a Category I disabled person may only be required to work during night time with his or her consent (§ 19 (3)).

Under § 28 of the Holidays Act, a woman is, based on a certificate for maternity leave, granted a pregnancy leave of 70 calendar days before giving birth and a maternity leave of 56 calendar days after giving birth. In the case of a multiple birth or a delivery with complications, a maternity leave of 70 calendar days is granted. Pregnancy leave and maternity leave are added together and granted in full, regardless of the date of birth of the child. Compensation for the period of pregnancy leave and maternity leave is paid pursuant to the Health Insurance Act.<sup>38</sup> Consequently

a woman is as a general rule entitled to 18 weeks of pregnancy and maternity leave or to 20 weeks of leave in case of a multiple birth or a delivery with complications. The Holidays Act does not provide for the obligatory duration of a pregnancy or maternity leave but under the Health Insurance Act<sup>39</sup> a certificate of incapacity for work is executed for the duration of 126 calendar days in case of pregnancy or maternity leave (140 calendar days in case of multiple birth or a delivery with complications) (§§7(2), 8(2), 9(3)). Under § 10<sup>1</sup> of the Health Insurance Act, an employer may not allow an employee to work during the time of leave specified in the certificate of incapacity for work.

The termination of an employment contract with a pregnant woman or woman raising a child under three years of age is regulated in § 92 of the Employment Contracts Act. Under § 92(1), it is prohibited for an employer to terminate an employment contract with a pregnant woman or a woman raising a child under three years of age, except on the bases prescribed in § 86 clauses 1)-2), 5)-8) and 11) (upon liquidation of the enterprise, agency or other organisation; upon the declaration of bankruptcy of the employer; upon lay-off of employees; due to unsatisfactory results of a probationary period; upon breach of duties an employee; upon loss of trust in an employee; due to an indecent act by an employee; upon hiring an employee for whom the position is a principal job). Thus, it is absolutely prohibited to terminate an employment contract with a pregnant woman or woman raising a child under three years of age on the following bases: lay-off, unsuitability, long-term incapacity for work of an employee, age. Such dismissal prohibition is reasonable as in all the cases previously described, the termination of employment contract is connected with the employee's person (health, skills, abilities). The termination of an employment contract on the bases provided for in § 86 clauses 1)-2) and 5)-8) (liquidation of legal person, bankruptcy of the employer, unsatisfactory results of a probationary period, breach of duties, loss of trust and indecent act) are only permitted with the consent of the labour inspector of the location (residence) of the employer (§ 92(2)). The consent of the labour inspector is necessary so that the labour inspector could make sure that the economic justifications (liquidation, bankruptcy) are present and that the unsuitability or culpable acts of an employee are proved and subject to termination of employment contract. These guarantees do not extend to the termination of employment contract due to a corruptive act of an employee. The termination of an employment contract due to the employee's corruptive act is not connected with the employee's pregnancy or the fact that the employee gave recently birth or is breastfeeding; such an act can be viewed as an employee's culpable act and may be a basis for termination of an employment contract but nevertheless the consent of the labour inspector should be acquired for this.

Estonian legislation grants a number of benefits to female employees which are not in keeping with the principle of equal treatment but which nevertheless cannot be treated as discriminatory of male employees. These benefits are necessary for the occupational safety and health protection of pregnant women and women raising children and also for facilitating the return of employees to work after pregnancy and maternity leave. In single issues, however, Estonian laws need to be improved to take into account the provisions of international agreements. At the same time, in many realms Estonian female employees enjoy a more extensive protection compared with those prescribed by international standards: while international agreements provide for benefits only in connection with pregnancy and birthgiving, in Estonia such benefits are applicable until the child reaches three years of age. This may cause indirect discrimination of women.

## Conclusion

Although several international agreements are binding on Estonia which prohibit discrimination in labour relations and as Estonian needs to insert the requirements of EU legislation in its laws for accession purposes, the implementation of the principle of equal treatment is nevertheless not guaranteed.

Section 10 of the Republic of Estonia Employment Contracts Act provides for a long list of bases on which benefits may be granted and rights may not be restricted but still the regulation of issues connected with the discrimination of employees is rather inadequate: the provisions which prohibit discrimination are not so much regulative as declarative and do not guarantee actual protection of employees.

Similarly, many current legal acts do not comply with the principle of equal treatment. Especially in the respect that female employees are granted greater rights: in several cases male employees can enjoy the rights granted in connection with the raising of children under three (or fourteen) years of age only if they raise the child alone, without the child's mother.

The problem with exclusions from the principle of equal treatment is that substantial rights granted to female employees in connection with pregnancy and child-raising have weakened their position on the labour market: employers do not wish to hire young women in birth-giving age.

It is also difficult to guarantee the laws providing for the principle of equal treatment. Employees may, in case of disputes related to the application of labour laws, refer the case to a labour dispute committee or court. This option may be purely theoretical in terms of the implementation of the principle of equal treatment, especially as regards the equal rights of men and women upon hiring and remuneration. In these issues it is very difficult to prove the presence of discriminatory acts. This leads to the question:

what is the awareness of Estonian labour dispute authorities in deciding on these issues. No precedents of the kind can be found. Besides, there is no mechanism to help evaluate equal treatment and the creation of equal opportunities at work.

The implementation of the principle of equal treatment is complicated in Estonia primarily because a lot of people are not aware of the problems brought along by equal treatment and the creation of equal opportunities. The fear of losing their jobs makes people work at any conditions whatsoever. Discrimination-related problems will perhaps become topical only after several years, after the economy and labour market have become stable and people start thinking of how to guarantee a better living standard.<sup>40</sup>

Currently the drafting of a special law which would prohibit discrimination is being contemplated in Estonia to guarantee the implementation of the principle of equal treatment. Although this idea has not been realised yet, one should offer nothing but support to it. The law should specify discriminatory and non-discriminatory acts. Equal treatment of all employees and candidates for employment should be an obligation of an employer. The law should also provide for penalties to be applied in case of evasion of the discrimination prohibition. Likewise should the law specify the authorities which (and to which extent) must guarantee compliance with legislation prohibiting discrimination.

## Bibliography:

1. The Treaty of Amsterdam. Consolidated Treaties. Tallinn, Estonian Translation and Legislative Support Centre, 1998.
2. R. Blanpain, C. Engels. Comparative Labour Law and Industrial Relations in Industrialized Market Economies. Sixth and revised edition. Kluwer Law International. The Hague, London, Boston, 1998.
3. M. Muda. Eesti tööseaduste täiustamisest integreerumisel Euroopasse. Magistritöö. (About the Improvement of Labour Laws upon Integration into Europe. Master's thesis.) Tartu, 1996.
4. I.-M. Orgo, H. Siigur. Tööõigus. Õpik Tartu Ülikooli õigusteaduskonna üliõpilastele. (Labour Law. Textbook for Students of Law Faculty of the University of Tartu.) Tallinn: Õigusteabe AS Juura, 1995.
5. Palgaseadus. Kommenteeritud väljaanne. (Wages Act. Commented Edition.) Compiled by H. Siigur. Tallinn: Õigusteabe AS Juura, 1997.
6. Töölepingu seadus. Kommenteeritud väljaanne. (Employment Contracts Act. Commented Edition.) Commentaries provided by I.-M. Orgo, H. Siigur, G. Tavits. Tallinn: Õigusteabe AS Juura, 1997.
7. The White Paper, on the Preparation of Associated Central and East European Countries for Integration with the Internal Market of the European Union. Tallinn, Estonian Translation and Legislative Support Centre, 1996.
8. Selection of European Union Social Legislation. Volume I. Tallinn, Estonian Translation and Legislative Support Centre, 1998.
9. European Social Charter, 1961. Available at: <http://www.coe.fr/eng/legaltxt/163e.htm>, 17.05.1999
10. United Nations International Covenant on Economic, Social and Cultural Rights — RT<sup>II</sup> 1993, 10, 13.

11. United Nations Convention on the Elimination of All Forms of Discrimination Against Women — RT II 1995, 5, 31.

12. Association Agreement between the European Communities, their Member States and the Republic of Estonia (Europe Agreement) — RT II 1995, 22-27, 120.

13. Act ratifying the International Labour Organisation Convention concerning Equal Remuneration for Men and Women Workers for Work of Equal Value — RT II 1996, 9/10, 31.

14. Constitution of the Republic of Estonia — RT 1992, 26, 349.

15. Republic of Estonia Health Insurance Act — RT 1991, 23, 272; 1992, 19, 276; RT I 1994, 23, 387; 1997, 28, 425; 1998, 1998, 111, 1829; 1999, 29, 397.

16. Republic of Estonia Employment Contracts Act — RT 1992, 15/16, 241; 1993, 10, 150; RT I 1993, 26, 441; 1995, 14, 170; 16, 228; 1996, 3, 57; 40, 773; 45, 850; 49, 953; 1997, 5/6, 32; 1998, 111, 1829; 1999, 16, 276.

17. Republic of Estonia Holidays Act — RT 1992, 37, 481; 1993, 10, 150; I 1994, 84, 1474; 1995, 16, 228; 1997, 74, 1229; 93, 1560.

18. Working and Rest Time Act — RT I 1994, 7, 70; 1995, 12, 120.

19. Wages Act — RT I 1994, 11, 154; 1995, 12, 120; 1999, 29, 397

20. Government Regulation No 214: About the Fulfilment of the Resolution on Implementation of the Republic of Estonia Employment Contracts Act — RT 1992, 34, 454.

21. Government Regulation No. 10: Remuneration of public servants in 1999 — RT I 1999, 5, 73.

22. Government Regulation No. 11: Remuneration in 1999 of employees of state agencies administered by government agencies to which, under the State Budget Act, an appropriation for wage costs is made — RT I 1999, 5, 74.

23. EU Council Directive 76/207/EEC on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions. (OJ L 39, 14.02.1976, p. 40).

24. EU Council Directive 75/117/EEC on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women. (OJ L 45, 19.02.1975, p. 19).

25. EU Council Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16(1) of Directive 89/391/EEC). (OJ L 348, 19.10.1992, p. 11).

## Notes:

<sup>1</sup> Under § 29 first paragraph of the Constitution of the Republic of Estonia, an Estonian citizen has the right to freely choose his or her sphere of activity, profession and place of work.

<sup>2</sup> Under § 15 of the Republic of Estonia Employment Contracts Act, employment contract terms which are less favourable to employees than those prescribed by law, administrative legislation or a collective agreement are invalid. The law, administrative legislation or collective agreement applies instead of the invalid employment contract terms unless the parties agree on new terms.

<sup>3</sup> In Estonian theory of labour law, the principle of equal treatment is deemed to be one of the principles of labour law. Q.v. I.-M. Orgo, H. Siigur. *Tööõigus. Õpik Tartu Ülikooli õigusteaduskonna üliõpilastele*. (Labour Law. Textbook for Students of Law Faculty of the University of Tartu.) Tallinn: Õigusteabe AS Juura, 1995, pp. 13-14).

<sup>4</sup> R. Blanpain, C. Engels. *Comparative Labour Law and Industrial Relations in Industrialized Market Economies*. Sixth and revised edition. Kluwer Law International. The Hague, London, Boston, 1998, p. 239.

<sup>5</sup> M. Muda. *Eesti tööseaduste täiustamisest integreerumisel Euroopasse*. Magistritöö. (About the Improvement of Labour Laws upon Integration into Europe. Master's thesis.) Tartu, 1996, p. 49.

<sup>6</sup> Association Agreement between the European Communities, their Member States and the Republic of Estonia (Europe Agreement) — RT II 1995, 22-27, 120.

<sup>7</sup> The Treaty of Amsterdam. Consolidated Treaties. Tallinn, Estonian Translation and Legislative Support Centre, 1998.

<sup>8</sup> Association Agreement between the European Communities, their Member States and the Republic of Estonia (Europe Agreement) Tallinn, Estonian Translation and Legislative Support Centre, 1996, p. 82-84.

<sup>9</sup> Constitution of the Republic of Estonia — RT 1992, 26, 349.

<sup>10</sup> Republic of Estonia Employment Contracts Act — RT 1992, 15/16, 241; 1993, 10, 150; RT I 1993, 26, 441; 1995, 14, 170; 16, 228; 1996, 3, 57; 40, 773; 45, 850; 49, 953; 1997, 5/6, 32; 1998, 111, 1829; 1999, 16, 276.

<sup>11</sup> Wages Act — RT I 1994, 11, 154; 1995, 12, 120; 1999, 29, 397.

<sup>12</sup> Convention on the Elimination of All Forms of Discrimination Against Women — RT II 1995, 5, 31.

<sup>13</sup> Available at: <http://www.coe.fr/eng/legaltxt/163e.htm>, 17. 05. 1999.

<sup>14</sup> Selection of European Union Social Legislation. Volume I. Tallinn, Estonian Translation and Legislative Support Centre, 1998, p. 51-61.

<sup>15</sup> *Töölepingu seadus. Kommenteeritud väljaanne*. (Employment Contracts Act. Commented Edition.) Commentaries provided by I.-M. Orgo, H. Siigur, G. Tavits. Tallinn: Õigusteabe AS Juura, 1997, p. 24.

<sup>16</sup> International Covenant on Economic, Social and Cultural Rights — RT II 1993, 10, 13.

<sup>17</sup> Selection of European Union Social Legislation. Volume I. Tallinn, Estonian Translation and Legislative Support Centre, 1998, p. 43-49.

<sup>18</sup> *Palgaseadus. Kommenteeritud väljaanne*. (Wages Act. Commented Edition.) Compiled by H. Siigur. Tallinn: Õigusteabe AS Juura, 1997, p. 18.

<sup>19</sup> The Government of the Republic normally issues analogous regulations for each calendar year.

<sup>20</sup> Under the Public Service Act, public servants are classified into public servants who have a service relationship in public law with the State and support staff who have a contractual relationship in private law.

<sup>21</sup> Government Regulation No. 10: Remuneration of public servants in 1999 — RT I 1999, 5, 73.

<sup>22</sup> Government Regulation No. 11: Remuneration in 1999 of employees of state agencies administered by government agencies to which, under the State Budget Act, an appropriation for wage costs is made — RT I 1999, 5, 74.

<sup>23</sup> According to the wage scale, the wage of a public servant is 1,250-12,500 kroons depending on the wage rate.

<sup>24</sup> According to the scale, the wage of an employee of a state agency is 1,250-7,300 kroons depending on the wage rate.

<sup>25</sup> Under § 7 of the Wages Act, more favourable wage conditions than prescribed in law may be provided for an employee under a collective agreement or employment contract.

<sup>26</sup> Q.v. previous subdivision of the article.

<sup>27</sup> Working and Rest Time Act - RT I 1994, 7, 70; 1995, 12, 120.

<sup>28</sup> Republic of Estonia Holidays Act - RT 1992, 37, 481; 1993, 10, 150; I 1994, 84, 1474; 1995, 16, 228; 1997, 74, 1229; 93, 1560.

<sup>29</sup> As a general rule, an employee must give a notice of the termination of a contract concluded for an unspecified time and specified time respectively one month and two weeks in advance.

<sup>30</sup> Section 86 of the Employment Contracts Act provides for twelve bases on which an employer may dismiss an employee (upon liquidation of the enter-



prise, agency or other organisation; upon the declaration of bankruptcy of the employer; upon lay-off of employees; upon unsuitability of an employee for his or her office or the work to be performed due to professional skills or for reasons of health; due to unsatisfactory results of a probationary period; upon breach of duties an employee; upon loss of trust in an employee; due to an indecent act by an employee; due to the long-term incapacity for work of an employee; due to the age of an employee; upon hiring an employee for whom the position is a principal job; due to a corruptive act of an employee). The employer may not terminate an employment contract on other bases.

<sup>31</sup> Q.v. R. Blanpain, C. Engels. *Comparative Labour Law and Industrial Relations in Industrialized Market Economies*. Sixth and revised edition. Kluwer Law International. The Hague, London, Boston, 1998, pp. 259-261.

<sup>32</sup> *Selection of European Union Social Legislation*. Volume I. Tallinn, Estonian Translation and Legislative Support Centre, 1998, pp. 99-125.

<sup>33</sup> Q.v. previous subdivision of the article.

<sup>34</sup> Government Regulation No. 214: About the fulfilment of the resolution on the implementation of the Republic of Estonia Employment Contracts Act — RT 1992, 34, 454

<sup>35</sup> Under § 9 6) and § 104 of the Health Insurance Act, a benefit equivalent to the wage difference is paid in case of the easement of working conditions or transfer to an easier position until the conclusion of such arrangements.

<sup>36</sup> Under § 9 5) and § 104 of the Health Insurance Act, in case of temporary discharge from work, a benefit equivalent to 80% of the average income of one calendar day is paid per each calendar day until the end of the discharge from work specified on the sick leave.

<sup>37</sup> RT I 1998, 111, 1829.

<sup>38</sup> Under § 9 of the Health Insurance Act, the insured is paid a benefit as from date of the certificate for maternity leave (including) in case of pregnancy and maternity leave for a maximum of 126 calendar days (140 calendar days in case of a multiple birth or a delivery with complications). Section 104 of the Health Insurance Act provides that the sick fund pays the insured, in case of pregnancy and maternity leave, a 100% benefit of the average income earned on a calendar day per each calendar day.

<sup>39</sup> Republic of Estonia Health Insurance Act — RT 1991, 23, 272; 1992, 19, 276; RT I 1994, 23, 387; 1997, 28, 425; 1998, 1998, 111, 1829; 1999, 29, 397.

<sup>40</sup> M. Muda *Eesti tööseaduste täiustamisest integreerumisel Euroopasse*. Magistritöö. (About the Improvement of Labour Laws upon Integration into Europe. Master's thesis.) Tartu, 1996, p. 59.

<sup>41</sup> RT = Riigi Teataja = the State Gazette.



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# Freedom via Acquired Profession? On the Possibility of Being a Jurist in an Estate Society

The transfer of the principal and universal freedom of an individual to act as a constituent basis of society can be considered the greatest achievement of the French Revolution and the modern era succeeding it. Among else, such universally recognised freedom that is basically owned by each individual comprises the right to educational and professional self-determination. The jurist profession is one of those professions in the Western World that had, to a greater or lesser extent, run in parallel with general structural changes in society. Thus, it is not surprising that its modernisation may be expressed almost as a slogan “From estate to profession or something” of the kind.<sup>1</sup>

At first glance, this seems to have been a relatively straightforward process at the end of which stands the present-day professional jurist. The jurist has acquired a special juridical knowledge through academic and theoretical education in university. The preparation of the jurist has been institutionalised into university; frequently through the following practical training and also through the corresponding institutions the jurist, among else, acquires certain professional ethics. In addition to that, institutionalised theoretical and practical preparation enables the jurist to master unexpected and complicated dilemmatic situations independently. He or she has proved his or her aptitude for the jurist profession by passing a publicly accepted examination. He or she has to use his or her professional competence and appropriate knowledge for the welfare of the

general public, rather than for his or her own benefit. The profession determines the contents of professional knowledge, competence and standards, as well as the patterns of behaviour of the professionals.<sup>2</sup>

At the same time, it is clear that the class of jurists characteristic of *ancien regime* on the one hand, and the class of jurists by social standing on the other hand did not “evolve” linearly into a professional class and free and equal jurisdiction.<sup>3</sup> The setbacks of and digressions from the general tendency of the jurist profession becoming increasingly professional may be detected both by time and by region. Generally, people speak of the first half of the 19th century as the period when the final evolution of the jurist profession took place and became influential.<sup>4</sup>

In the 19th century, the Baltic provinces (*Est-, Liv- und Kurland*)<sup>5</sup> belonged to the Russian Empire. The Acts of surrender, concluded in 1710 between the local estates and towns on the one side and the central power of Russia on the other side, confirmed that the old European organisation of estate society remained in force in those provinces. Thus, this area proves to be a colourful example of whether and to what extent the modern class of professional jurists, immediately interconnected with the right to personal self-determination could dominate in a traditional legal order based on the class system.

In fact, at the beginning of the 19th century, one of the central prerequisites for the rise of the modern jurist pro-

fession had been created in the Baltic provinces. Namely, the University of Tartu was reopened in 1802. After a period lasting almost a century, youth of the Baltic provinces had acquired a chance to study in a home university. Unlike the other universities in the Russian Empire, the German and Lutheran University of Tartu also comprised the Faculty of Theology and Law.<sup>6</sup> The purpose was, naturally, to train clergy and jurists for the local provinces. Consequently, the re-opening of the University provided the basis thanks to which representatives of any estate could study on the spot, to become jurists and start to earn a living aided by their professional knowledge. Together with modernising jurisprudence and the relevant education the Faculty of Law sought to fix its position as a single authority to judge the qualifications and appropriateness of future jurists. This gave rise to several tensions between the University and local estates, especially as both parties possessed judicial proof to their competence.

## Legal Basis for Legal Order in an Estate Society

In 1710, in the course of the Great Northern War, the troops of Peter I took over both the provinces of *Estland* and *Livland* from Sweden. Legally, their merger with the Russian Empire, while *Kurland* was merged in 1795, was formalised with the so-called Acts of surrender.<sup>7</sup> In his proclamation (*Universale*) to the inhabitants of the provinces of *Estland* and *Livland*, Peter I ascertained that he as a monarch of Russia,

*“nicht alleine ohne einige Innovation die im ganzen Lande und Städten bisherzu übliche Evangelische Religion, alle ihre alten Privilegien, Freiheiten, Rechte und Immunitäten, welche unter der Schwedischen Regierung zeithero weltkundig violiret worden, nach ihrem wahren Sinn und Verstand heilig zu conserviren und zu halten gesinnet sey, sondern auch gelobe dieselbigen mit noch ampleren und herrlicheren nach Gelegenheit zu vermehren”*.<sup>8</sup>

Naturally, the provincials gladly accepted the Emperor's generous offer concerning the increase in privileges and the right to autonomy, especially as the centralisation attempts by the Swedish central government, carried by enlightenment absolutism, had sharply touched the interests of the local nobility. Now they were pleased to rush to write down their grandiose demands. The estates naturally felt that they possessed a historical right to do so. Even the Swedish government had, upon seizure of the Baltic provinces, assured that all the privileges and rights remained in force. The later attempts of the Swedish royal power to limit the privileges of the nobility appeared to the parties as infringement of the treaty. Thus, the Acts of surrender concluded with the Government of Russia came to include sections that could not be treated as “privileges, freedoms, rights and immunities” that were in force under

the rule of the Swedish government.

One of such sections was about the structure and functioning of the legal system. On the one hand, it was assured that all the judicial instances that existed during the Swedish rule would remain in place. From this aspect, it really was “conservation” of the present situation. At the same time, clause 6 of the Acts of surrender of the *Livland* order set out that the courts may employ only

*“Personen aus dem Adel des Landes oder dazu geschickte Eingeborene Deutscher Nation” and determined that “Der Adel und die Landeseingeborenen sollen ein Vorzugsrecht haben bei der Anstellung zu allen Civil- und Kriegsämtern”* (clause 11).<sup>9</sup>

In the Acts of surrender of the Estonian order, the provision had been worded in an even more conservative manner,

*“... in den oberen wie den niederen Gerichten keine andere Richter als die bestehenden angeordnet.”*<sup>10</sup>

A captious person could interpret such wording as prescribing that after the death of the judges currently filling the positions their positions should be eliminated altogether as nobody else could be appointed as judge.

The Acts of surrender of the *Livland* order granted the local nobility the pre-emptive right to fill civil positions. However, the indigenous right was set out in a rather unambiguous manner. Besides the nobility, representatives of other estates could be appointed as judges; only on condition that they were local Germans and, in addition to that, “skilled for profession”. Let it remain unspecified whether this quality meant legal training as it remained unspecified in the following historical development of the Baltic provinces.

In the middle of the 18th century, the so-called peerage books were introduced to the Baltic provinces, and all manors were entered in the books. The owners of the manors who had not yet proved their noble descent had to do that. O. Schmidt claims that originally political merits and expansion of the nobility's rights bore no relation to the books.<sup>11</sup> Instead, it was intended that on the basis of the books the buildings of orders be decorated with the coats-of-arms of all the local noble families. Even in the diet of *Livland* (*Landtag*) in 1742 it was explicitly affirmed that the books to be drawn up would be merely a list of the local noble families. A new regulation adopted at the diet (*Landtagsordnung*), dated 1759, set out that participation in the diet is mandatory only for the matriculated nobility or the members of the order (Cap. II, § 4). Henceforth, only they possessed the active and passive vote in filling positions (Cap. VI, § 6).<sup>12</sup> In fact, the restriction contradicted the Acts of surrender of 1710, but proved to be a determinant in the following history of the Baltic provinces.

The fact that the privileges of the nobility in filling positions were expanded in the 18th century was actually not exceptional. Rather, this was a general tendency in Europe that had now reached also the shores of the Baltic

Sea. In historical context, this phenomenon is called “an aristocratic reaction” and R.R. Palmer even considers it to be an over-European phenomenon.<sup>13</sup> The nobility and its elite acquired a dominating position in all European courts, representations of estates and in many places even in city magistrates, occasionally outnumbering the other estates. The same tendency could be detected in German territories.<sup>14</sup> The nobility regarded themselves as being responsible for the well-being and welfare of the whole country and this task could actually be fulfilled only through respective positions. According to O. Brunner, the estates did not simply “represent” the country but they “were” their country.<sup>15</sup>

Self-consciousness of the orders was also characterised by this existential bond with their area of administration,

*“Die Ritterschaften fühlten sich als die berufenen Vertreter des ganzen Landes, als Patrone der evangelischen Landeskirche, als Wahrer der von den Vätern ererbten deutschen Kultur. Die Verfassung gab ihnen die Möglichkeit, in diesem Geiste zu wirken.”*<sup>16</sup>

The orders referred to their administrative, judicial and legislative power in the province as “self-government” (*Selbstverwaltung*) and occasionally as “country-state” (*Landesstaat*). As such, it contrasted, in respect of autonomy, with the central government of the Empire that could be analogously referred to as “*Reichsstaat*”.<sup>17</sup> Here it is not important whether *Reichsstaat* was established by the Holy Roman Empire (from 13th to 16th century), by the Kingdom of Denmark (in *Estland*, from 13th to 14th century), by the Kingdom of Poland (in *Livland*, from 16th to 17th century), by the Kingdom of Sweden (from 16th to 18th century), or by the Russian Empire (from 18th to 20th century). Throughout this time “the king was far away and God high above” as an Estonian ancient saying goes. Thus, it is not surprising that the right and also the obligation to attend to the welfare of the country was strongly expressed in self-consciousness of the local orders.

The self-government of the orders also covered judicial system. As this was in fact treated as self-government, the members of the order were obliged to undertake the tasks of a judge as an honorary position. Contemporaries regarded such locally arranged administrative and judicial system as justified in every way. Thus, J. Engelmann, a professor of Russian law in the University of Tartu, called attention to the Baltic provinces as to a positive example of their historically evolved and effectively operating local self-government system in his review of Russian constitutional law, published in 1889,

*“Die Bedeutung der Ostseeprovinzen für Rußland liegt vor Allem in der Tatsache, daß Rußland in denselben drei Landschaften besitzt, in welchen die Selbstverwaltung nicht erst von oben mühsam begründet, eingeführt und bevormundet zu werden braucht, sondern seit Jahrhunderten fest eingebürgert ist. Die Stände sind hier daran gewöhnt, die Angelegenheiten des Landes zu ver-*

*walten. ... Der Dienst ... ist stets als eine Ehrenpflicht angesehen worden und als eine erfolgreiche Thätigkeit im Landesdienste, eine Schule, in der auch die bedeutendsten und vornehmsten Repräsentanten des Adels ihre Laufbahn begonnen haben. ... Selbstverwaltung ist nicht glänzende, außergewöhnliche Repräsentation, sondern alltägliche Arbeit zur Aufrechterhaltung der Sicherheit, Ordnung und Wohlfahrt des Landes.”*<sup>18</sup>

It is clear that Engelmann treated the self-government of the Baltic orders as nearly equal to the so-called modern local government that became common in continental Europe only in the 19th century.

Holding any office naturally necessitates expenditure. If judicial or police functions had to be performed as obligations of an honorary position, it might have involved considerable expenditure for the holder of the position. In *Livland* and *Kurland*, a person elected to the police offices was allocated certain remuneration from the treasury of the order, whereas in *Estland*, the owner of a manor who had been elected had to fulfil the respective tasks without pay; moreover, he had to pay expenses from his own funds. At the same time, he was subject to the duty of office. If a person was elected to fill a position in the judicial system or in the police force, it rendered resignation from the office impossible. Instead, he acquired no less than a greatly admired position among his peers,

*“Richter und Verwaltungsbeamte wurden von ihren Standesgenossen Gewählt. Es galt für eine Ehre und als Pflicht, dem Lande zu dienen. ... Aber die Beamte waren eng vertraut mit Land und Leuten, sie sprachen deren Sprache, sie kannten deren Gefühlsleben, sie hatten dieselbe Rechtsvorstellungen. Vom Vertrauen ihrer Standesgenossen berufen, kannten sie keinen anderen Ehrgeiz, als dieses Vertrauen zu rechtfertigen. Da es für sie keine beförderung gab und keine andere Belohnung, als das erhöhte Ansehen, welches Pflichterfüllung und Treue verleihen, wurde ihre Beamtentätigkeit nur von sachlichen Erwägungen geleitet.”*<sup>19</sup>

While the 18th-century aristocratic reaction or “the renaissance of the estates” was a widespread phenomenon in all of Europe, the legislative approval of its results was still rather unusual in the middle of the 19th century. Within the framework of the codification attempts of the Russian Empire, some parts of the law of the Baltic provinces were also codified.<sup>20</sup> On 1 January 1846, two initial parts of “the Provincial Law of *Livland*, *Estland* and *Kurland*”: Administration of Offices<sup>21</sup> and Law of Estates<sup>22</sup> entered into force.

Cap. II, 3 of law of estates was dedicated to the rights of the nobility to fill positions. According to that, only the matriculated nobility or the members of the order were allowed to fill positions in all three provinces (§§ 364, 428-433, 450, 501); whereas the Acts of surrender of 1710 are pointed out as the original source of the provision, while



such restriction in fact did not arise from the wording of the Acts. Unlike in *Estland* (§ 451), no person in *Livland* was obliged to fill the position for which he was elected (§ 365).

So, among else, the judicial and administrative system had received imperial confirmation in the form of a legal act in the middle of the 19th century. Although order of *Livland*, for example, waived its exclusive right to offices<sup>23</sup> in 1871, the right was applied only to the so-called *Landschaft*. It consisted of landowners who possessed manors that were not matriculated. In this way, only a step was taken towards what was set out in the Acts of surrender of 1710.

Greater changes occurred during the so-called Russification reforms at the end of the century.<sup>24</sup> As to the filling of juridical positions, the judicial and police reforms of 1889 proved to be groundbreaking. It was only in the course of these reforms that a judicial system suitable for the emergence of the modern jurist profession also in the Baltic provinces was created. In this respect, these reforms may be regarded as a part of the modernisation process that also, with a slight delay, reached the Russian Empire in the 19th century.<sup>25</sup>

The Faculty of Law in the University had started fighting for prerequisites for the emergence of the modern jurist profession much earlier. It was one aspect of the process of acknowledgement and modernisation of legal studies that had started in the 1820s.<sup>26</sup> In this, the Faculty of Law could also rely on legal support.

### Legal Support to the Right of the Faculty of Law to Participate in Filling Juridical Positions

Already during the preparatory work for the re-opening of the University, an imperial order arrived from St. Petersburg that in the Baltic provinces, only persons who have previously studied in the University of Tartu for at least two years might be appointed to local offices that require juridical knowledge,

*“Damit nun ein stärkerer Antrieb zur Beziehung dieser Universität erweckt und die Studierenden zur Beschäftigung mit den Wissenschaften desto mehr aufgemuntert werden: so müßten nach Verlauf von zwey Jahren, von der Eröffnung der Universität ab gerechnet, von den im Liefländischen und Ehstländischen Gouvernemente gebornen Leuten, adlichen, bürgerlichen und andern Standes, bloß diejenigen zu Aemtern und Chargen in diesen Gouvernements angestellt werden, welche auf der gedachten Universität zwey Jahre lang studieret haben.”*<sup>27</sup>

In the same wording, this was also repeated in §18 of the Statutes compiled by the Board of Trustees of the orders who had been active in establishing the University. However, here the trustees had added a supplement,

*“Jeder aber, der auf dieser Universität studirt hat, ist nach Maaßgabe der erhaltenen Zeugnisse und vorherge-*

*gangenen Prüfung... in Civil-Dienste anzunehmen und als Registrator oder in ähnlichen Function anzustellen.”*<sup>28</sup>

Thus, according to the eminent trustees, the order did not apply to judges and higher administrative officials, for example. The orders were to elect them from among themselves as previously, and consequently, they also had to decide whether legal training was required at all. At the same time, it is noteworthy that the Statutes compiled by the trustees prescribed an examination as a test of juridical qualifications. Unfortunately, it is not possible to say whether this denoted an examination passed at the University or at an appropriate office. Due to opposition of the Enlightenment-minded professors the Statutes compiled by the Trustees did not receive imperial confirmation. Moreover, almost seven months after the opening of the University, the Emperor signed a new Foundation Act<sup>29</sup> of the University and assigned the right to compile the Statutes of the University to the academic corps.

The respective terms were changed with the Foundation Act, approved by the Emperor on 12 December 1802: the mandatory period of studies in the local University was extended to the term of three and the vacation period to the term of five years. The fact that studies in Tartu were equalised with studies in some other universities of the Russian Empire expressed the interests aimed at unifying the central government,

*“Jede Unserer Unterthanen in den oberwähnten Provinzen Liv- Ehst- und Kurland, ist verpflichtet, drey Jahre auf dieser oder irgend einer andern in Unserm Reiche errichteten Universität zu studieren, un zu irgend einem Amte, wozu juristische oder andere Studien erforderlich sind, in diesen drey Provinzen zu gelangen; diejenigen Beamte ausgenommen, die auf Unsern namentlichen befehl angestellt werden. Jedoch soll diese Verordnung, die Besetzung der Aemter durch angehende Beamte betreffend, erst nach fünf Jahren, von der Eröffnung der Universität an gerechnet, in Ausübung gebracht werden.”*<sup>30</sup>

The imperial order was repeated almost word for word in §3 of the Statutes, approved on 15 December 1803.<sup>31</sup>

Until the Statutes were in force (until 1820) the provision did not give rise to any discussions. One could graduate from the University without passing an examination. The certificates issued to those leaving the University were very different. During their three year studies, some students had listened to two or three lectures while some students had listened to twenty or more. In fact, a faculty curriculum did not exist at the time. Only in 1814 Dean Professor Meyer compiled a draft curriculum on the request of the imperial curator.<sup>32</sup> Namely, the Ministry of Education was about to establish a universal examination procedure for the whole Empire. That received imperial confirmation on 20 January 1819.<sup>33</sup> Jurists could obtain four scientific degrees: *gradus studiosi*, *candidatus iuris*,

*magister iuris* and *doctor iuris*. The first was actually the final examination. At the same time, the regulation dating from 1819 did not prescribe that such examination should be mandatory to every student about to graduate. However, this requirement soon came to be one of the central concerns in the name of which the Faculty itself took steps.

In 1814, the Academic Council of the University of Tartu had started preparing the new Statutes. The Emperor approved it on 4 June 1820.<sup>34</sup> Section 2 of the new Statutes repeated the already familiar requirement, but now the wording was different,

*“In den Gouvernements Livland, Esthland und Kurland, die den Bezirk dieser Universität ausmachen, dürfen zu Aemtern, die juristische und andere Kenntnisse erfordern, nur solche angestellt werden, welche Zeugnisse beibringen, dass sie auf der Dorpatischen oder einer andern Universität im Russischen Reiche ihre Studien begonnen, und wenigstens drei Jahre hinter einander mit Erfolge fortgesetzt haben.”*

The Faculty of Law derived support to its right to judge the juridical qualification of graduating students from the phrase “successful”. How else, apart from examinations, could one decide whether the mandatory studies in law had been completed successfully.

### Attempts of the Faculty of Law at the Introduction of Mandatory Examination

In 1820s, Christoph Christian Dabelow (1780-1830)<sup>35</sup> and Walter Friedrich Clossius (1795-1838)<sup>36</sup>, two professors who had come from Germany greatly contributed to reforming the Faculty of Law. Above all, their attempts were directed to acknowledging legal studies in the sense of modern jurisprudence.<sup>37</sup> Among else, this meant placing emphasis on the students’ independent work and their conscientiousness in general. The mandatory examination was perceived as an effective tool for that.

In 1825, Dean Clossius made a relevant proposal to his colleagues.<sup>38</sup> In doing so, he referred to clause 2 of the Statutes of the University, dating from 1820, and the phrase in it that legal studies should be completed “successfully”. Dabelow as a more experienced person tried to mitigate his young and energetic colleague’s enthusiasm. He pointed out that due to the class-based legal order of the local provinces the initiative of the Faculty of Law would remain only on paper and never be put into action. At the same time, he himself supported the introduction of mandatory examinations. Finally, the Faculty made a proposal and sought approval to it from higher authorities. Among else, they proposed that the nobility also be subjected to mandatory examinations. Namely, the Faculty of Law could not identify any reason why they should be exempted from the requirement. They relied on the interests of the Crown in their statement,

*“... da es eines Theils immer Interesse der hohen Krone ist, daß die Stellen, deren Besetzungsrecht sie auch gewissen Corporationen verliehen hat, von tüchtigen Subjecten bekleidet werden, andern Theils, unbeschadet der Privilegien vermöge des Oberaufsichtsrechts, welches keine Regierung entsagen wird und entsagen kann, Prüfungen bestehen können und auch in anderen Länder in gleichen Fällen bestehen.”*<sup>39</sup>

As this indicates, the Faculty of Law sought to find an ally in the central government of Russia. The Faculty did not regard the issue of honorary positions as an obstacle. They appealed to the nobility’s patriotic conscience, that they should not be discouraged by examinations.

On the one hand, the Faculty’s expectations aimed at the central government were justified in every aspect. The imperial curator confirmed during the same year that every student was to complete the whole curriculum of legal studies and should also be carefully examined in all the subjects<sup>40</sup> On the other hand, it was a mere prescript to the University. The local orders treated the Statutes of the University in the same manner — as a prescript to the University which lacked binding force on the orders.

Thus, it is not surprising that the Faculty regarded the legal and administrative order in force in the provinces as the main source of students’ laziness and lack of studiousness. The students lacked interest in subduing themselves to strict control of knowledge in an examination while the fact whether they were appointed to a particular job was independent of it. Moreover, the local authorities deliberately disregarded the fact that according to the imperial regulation the examination passed at the University should guarantee access to civil service for everyone.

In 1826, the Faculty had to complain about a new problem — the provincial authorities in *Kurland* had begun to re-examine those who had passed the examination at the University. It is unknown whether they aimed at imitating the Prussian state examination<sup>41</sup> or something else; legislation in force, however, provided no support for such procedure. Dean Dabelow bitterly appealed to the Board of the University, complaining about the harmful effect of such vocational examinations to students’ diligence,

*“Diese Gesezeswidrigkeit hat zu Folge, daß die Studierenden sich lieber hier gar nicht prüfen lassen, wenn sie nicht etwa der mit dem Grade verbundenen Klaffenrang besonders interessieren sollte, was selten der Fall ist, indem sie diesen auch auf dem Wege des Dienstes bald zu erwerben hoffen, oder ihn in der Provinz gar für etwas überflüssiges halten. Diese Folge könnte man noch hingehen lassen, obgleich nach meiner Meinung die Absicht der Regierung, daß sich jeder Studierende einen Grad und den damit verbundenen Rang aneignen solle, dadurch offenbar hintertrieben wird, allein die Gesezeswidrigkeit hat noch eine zweyte und wirklich recht schlimme Folge, indem sie den Unfleiß der Studierenden befördert. Die Behörden-*

*Prüfung ist rücksichtlich der Strenge mit der Facultäts-Prüfung gar nicht zu vergleichen, und verdrößt sich der Unwissenste damit, daß er bey der Behörden-Prüfung schon durchkommen werde.*<sup>742</sup>

However, the Faculty of Law did not question the authorities' right to test their future employee's practical abilities and skills. The right to judge the theoretical qualification and aptness of future jurists should reside in the competence of the Faculty of Law of the University.

According to the Faculty of Law the examinations arranged by the authorities were so uncomplicated that every beginner could have passed them successfully. This presented a threat to the quality of jurisdiction and legal procedures in general. In Dabelow's opinion the management of law in force in the Baltic provinces was very complicated due to its heterogeneous sources that dated from different periods in history, which necessitated the preceding exhaustive studies. Students lacked necessity and will to complete the studies for uncomplicated examinations designed by authorities. They confirmed this themselves.

The Faculty of Law sought to provide independent work for and require active participation from its students. In this respect, students' laziness could prove to be the main obstacle in modernising legal studies both in the light of Humboldtian ideas and introducing the modern legal procedure into the Faculty of Law itself. Thus, the approval of highest authorities to the request that the representatives of the local nobility not be exempted from the examination was to be sought once again. Or as Dabelow expressed, their privileges should not have provided them the right to work as jurists without sufficient juridical knowledge,

*“Eine gute Justitzverwaltung ist die Seele des Staats: eine solche läßt sich aber ohne gründliche RechtsKenntniß nicht denken. ... Niemand dürfte daher einen Justiz-Posten bekleiden, der nicht wenigstens den Studenten-Grad erhalten hätte. Von der Regel dürfen auch die hiesigen sogenannten Landes-Posten nicht auszunehmen seyn, denn in dem Privilegium, daß solche nur vom Adel bekleidet werden können, ist nicht sogleich das Privilegium der Rechtsunwissenheit erhalten, und wer Rechtsunwissend ist mag dem Wißen Plaz machen.”*<sup>743</sup>

The Faculty continued its quest to increase students' conscientiousness for decades. At times, the exhaustive examination was divided into parts in order to compel students to start working already at the beginning of their studies, at times the University attempted to limit the scope of the examination and merge various subjects. All these attempts proved fruitful only for those who were not of noble descent.

According to the part of the Codification of Provincial Law of the Baltic Provinces that dealt with the administration of positions<sup>44</sup> juridical training was required in several positions. For example, under this regulation all persons applying for lawyer's post were to possess a master's or

doctors degree taken in any university of the Russian Empire (§ 101). Consequently, a diligent representative of another estate could also rise at least to lawyer's position. However, this was not a concession initiated by the orders themselves. The demand for that originated from another imperial act.<sup>45</sup> A secretary to the town council was to have juridical training in two towns: in Tartu (§ 637) and in Pärnu (§ 717). This prescript relied on the regulations by the governor of *Livland*, dated 1811, 1817, 1827, 1830 and 1831. In towns of *Estland* Tallinn and Narva, the secretary had to belong to the so-called class of scholars or literates (§§ 1007 and 1530) only. In Tallinn, the prescript arose from the agreement between the town council and the Great Guild, concluded in 1672; in Narva, this was simply an “unbroken custom” (*ununterbrochene Gewohnheit*). But the class of scholars also comprised pharmacists, teachers etc.<sup>46</sup> Thus, their legal training was not essential; however, in the 19th century they had still studied law in most cases.<sup>47</sup> These few examples about the academic training required for filling juridical positions enable the assertion that even in an estate society the modern jurist profession could evolve and even dominate in some fields. In this case, however, interference by the central government was needed or the estates themselves should resign from their exclusive right to filling positions. The solitary efforts of the Faculty of Law of the University that trained jurists to establish a scholarly prepared class of professional jurists could serve as a merely supportive measure.

## Notes:

<sup>1</sup> Cf. F. Ranieri, *Vom Stand zum Beruf: Die Professionalisierung des Juristenstandes als Forschungsaufgabe der europäischen Rechtsgeschichte der Neuzeit*. - *Ius commune*, Bd. 13, Frankfurt a. M. 1985, p. 83 ff, or M. John, *Between Estate and Profession: Lawyers and the Development of the Legal Profession in Nineteenth Century Germany*. — R. J. Evans, D. Blackbourn (Ed.), *The German Bourgeoisie*. London 1991, p. 177 ff.

<sup>2</sup> The list of the features of the profession presented here is not exhaustive, neither is it historically or spatially differentiated. The notion of the profession was introduced into the contemporary sociological discussion by T. Parsons. A summary of his standpoints can be found: T. Parsons. *Professions*. — *International Encyclopedia of Social Sciences*. Vol. 12, 1968, p. 457 ff.

D. Rüschmeyer, for example, has examined the sociological theory of profession from the historical viewpoint, *Professionalisierung — Theoretische Probleme für die vergleichende Geschichtsforschung — Geschichte und Gesellschaft*. Heft 3. *Professionalisierung in historischer Perspektive*. Göttingen 1980, p. 311 ff. Together with relevant references and overviews of the discussion to date about the notion of the profession and its nature H. Siegrist, *Advokat, Bürger und Staat Sozialgeschichte der Rechtsanwälte in Deutschland, Italien und Schweiz (18.-20. Jh.)*. Bd. 1. Frankfurt a. M. 1996, p. 12 ff.

<sup>3</sup> This is also emphasised by F. Ranieri who demands that the faulty idea that historical-linear continuity could be identified in the development of the jurist profession be definitively discarded. Cf. F. Ranieri (Fn. 1), p. 101.

<sup>4</sup> Cf. about Germany, for example: G. Dilcher, *Der deutsche Juristenstand zwischen Ancien Régime und bürgerlicher Gesellschaft*. — G. Köbler, H. Nehlsen (Hg.), *Wirkungen europäischer Rechtskultur. Festschrift für K. Kroeschell zum 70. Geburtstag*. München 1997, p. 164 ff., as well as F. Ranieri (Fn. 1), p. 101.

<sup>5</sup> The present-day territories of the Republic of Estonia and Latvia.

<sup>6</sup> Theology was not taught in other Russian universities. The clergy for the Orthodox church were prepared by the educational establishments owned by churches - seminaries. Juridical subjects were still taught in universities, but on a limited scale and in so-called ethical-political faculty. Cf. M. Silnizki. Geschichte des gelehrten Rechts in Rußland. Jurisprudencija an den Universitäten des Russischen Reiches 1700-1835. Frankfurt a. M., 1997, p. 192 ff.

<sup>7</sup> The respective merger and surrender treaties were concluded with orders and districts of each province (*Ritter- und Landschaft*), or with whole nobility, and separately with towns. In fact, these treaties bore different names: *Kapitulation*, *Akkordpunkte*, *Vertragsartikeln*, *Punkte*. Cf. Geschichtliche Uebersicht der Grundlagen und der Entwicklung des Provinzialrechts in den Ostseegouvernements. Allgemeiner Teil. St. Petersburg 1845, p. 79 ff. It was only later that the concept 'Acts of surrender' as a general term came to denote all these treaties. More detailed information about the merger of the Baltic provinces with the Russian Empire and the Acts of surrender: R. Wittram. Peter I: Czar und Kaiser. Zur Geschichte Peters des Großen in seiner Zeit. Göttingen 1964, p. 323 ff.

<sup>8</sup> Geschichtliche Uebersicht (Fn. 7), p. 83 f.

<sup>9</sup> Geschichtliche Uebersicht (Fn. 7), p. 87.

<sup>10</sup> Geschichtliche Uebersicht (Fn. 7), p. 95.

<sup>11</sup> O. Schmidt. Zur Geschichte der Ritter- und Landschaft in Livland. — Dorpater Juristische Studien. Hrsg. von J. Engelmann, C. Erdmann und W. v. Rohland. Bd. 3. - Dorpat 1894, p. 25.

<sup>12</sup> O. Schmidt (Fn. 7), p. 25. In *Estland* and *Kurland*, the peerage book was institutionalised basically according to the same scenario.

<sup>13</sup> R. R. Palmer. The Age of Democratic revolution. Vol. 1. Princeton 1959, p. 29. K. Epstein. The Genesis of German Conservatism, Princeton 1966 relates the evolvement of this phenomenon with a reaction to Enlightenment ideas. However, literature of the Baltic provinces at the time and statements presented at *Landtag* indicate that Palmer's attempt to explain it is more feasible. Palmer treats aristocratic reaction in the middle of the 18th century as an attempt to justify the existing order, as its theoretical motive. Whether an entirely practical process in which the filling of certain positions is proclaimed to be a privilege of the nobility can be called "a theoretical motive" is another question.

<sup>14</sup> Cf. R. Vieraus. Ständewesen und Staatsverwaltung in Deutschland im späteren 18. Jahrhundert. — Dauer und Wandel der Geschichte. Festgabe für K. Raumer. 1966, p. 337 ff., who calls this phenomenon "the renaissance of the estates" (*ständische Renaissance*). Q.v. also D. Gerhard. Probleme ständischer Vertretungen im früheren achtzehnten Jahrhundert und ihre Behandlung in der gegenwärtigen internationalen Forschung. — D. Gerhard (Hg.), Ständische Vertretungen in Europa im 17. und 18. Jahrhundert. Göttingen 1969, p. 13 ff.

<sup>15</sup> O. Brunner. Land und Herrschaft. 5. Aufl., 1965, p. 422.

<sup>16</sup> A. v. Transehe-Roseneck, Geschichtlicher Rückblick. — Baltische Bürgerkunde. Teil 1. Riga 1908, p. 181 ff.

<sup>17</sup> Such notion was not used in contemporary sources. However, it seems to me that this contrastive use of notions enables to describe rather well the actual relationships and power structures and their mutual areas of tension.

<sup>18</sup> J. Engelmann. Das Staatsrecht des Russischen Reiches. Aus Marquardschens Handbuch des Oeffentlichen Rechts. Freiburg i. Br. 1889, p. 226 ff.

<sup>19</sup> A. v. Transehe-Roseneck. Geschichtlicher Rückblick (Fn. 16), p. 189.

<sup>20</sup> General overview of the codification of provincial law with references to sources: W. Kundert. Russische Ostseeprovinzen (Baltikum) ja B. Dölemeyer, Das Privatrecht Liv-, Est- und Kurlands von 1864. — H. Coing (Hg.). Handbuch der Quellen und Literatur der neueren europäischen Privatrechtsgeschichte. Bd. 3, Hbhd. 2. München 1982, p. 2071 ff. and 2076 ff.

<sup>21</sup> Provinzialrecht der Ostseegouvernements. Erster Theil. Behördenverfassung. St.-Petersburg 1845.

<sup>22</sup> Provinzialrecht der Ostseegouvernements. Zweiter Theil. Ständerecht. St.-Petersburg 1845.

<sup>23</sup> A. v. Transehe-Roseneck. Geschichtlicher Rückblick (Fn. 16), p. 192.

<sup>24</sup> General summary of the reforms: M. Haltzel. Der Abbau der deutschen ständischen Selbstverwaltung in den Ostseeprovinzen Russlands. Ein Beitrag zur Geschichte der russischen Unifizierungspolitik 1855 - 1905. Marburg 1977. With bibliography: G. Pistohlkors, Die Ostseeprovinzen unter russischen Herrschaft (1710/95 — 1914). — G. Pistohlkors (Hg.), Baltische Länder. Berlin 1994, p. 266 ff.

<sup>25</sup> On the same theme: T. Anepaio, Die Justizreform in der zweiten Hälfte des 19. Jh. in den Ostseeprovinzen — Russifizierung oder Modernisierung? — Acta Baltica. XXXV, Königstein 1997, p. 257 ff. However, who, if anybody, profited from court proceedings held in the Russian language in provinces where the majority of population spoke Estonian or Latvian and a minority German, is another question.

<sup>26</sup> About the attempts to acknowledge legal studies in University of Tartu in the 1820s in a greater detail: M. Luts. Integration as Reception: University of Tartu Faculty of Law Case in 19th Century. — Juridica International: Law Review University of Tartu, Vol. 3, 1998, p. 133 ff.

<sup>27</sup> Befehl Sr. Kayserlichen Majestät des Selbstherrschers aller Reußen aus dem dirigirenden Senat an den General von Infanterie, rigischen Kriegs-Gouverneur, Verwalter des Lief- Ehst- und Kurländischen Gouvernements und Ritter, Fürsten Sergei Feodorowitsch Golitzin. Den 21sten Januar 1802. Dorpat: Universitäts-Buchdruckerei (1802), p. 2.

<sup>28</sup> Statuten der Kayserlichen Universität zu Dorpat. Zum eigenen Gebrauch der Universität gedruckt. Dorpat 1802.

<sup>29</sup> Vene Impeeriumi Täielik Seadustekogu (PSZ) (Complete Collection of Acts of the Russian Empire), Vol. 27, art. 20 551.

<sup>30</sup> Fundationsakte der Dörptschen Universität. 12. dezember 1802. — Rußland unter Alexander dem Ersten. Eine historische Zeitschrift hg. von H. Storch. Bd. 2. St.Petersburg 1804, p. 85.

<sup>31</sup> Statuten der Kaiserlichen Universität zu Dorpat. 15. September 1803.

<sup>32</sup> Entwurf eines Cursus für Juristen. 12. Dezember 1814. — Eesti Ajaloohiiv (National Archives), fund 402, list 9, item 55, p 32 ff.

<sup>33</sup> PSZ, Vol. 36, art. 27 646.

<sup>34</sup> PSZ, Vol. 37, art. 28 302.

<sup>35</sup> Dabelow was a professor of Roman and German private law in Tartu from 1818 to 1830. About Dabelow's biography in general: Allgemeine Deutsche Biographie, Bd. 4, Leipzig 1876, p. 684 ff.

<sup>36</sup> Clossius was a professor of criminal law and law of criminal procedure and juridical literature in Tartu from 1824-1837. About Clossius's biography in general: Allgemeine Deutsche Biographie, Bd. 4, Leipzig 1876, p. 343 ff.

<sup>37</sup> I have written about the nature of modern jurisprudence and its bases also earlier: M. Luts, Scientific Legal Education and the Faculty of Law of the University of Tartu. — Juridica International: Law Review University of Tartu, Vol. 1, 1996, p. 129 ff.

<sup>38</sup> Umlauf für die Mitglieder der Juristenfakultät. 17. Oktober 1825. — Eesti Ajaloohiiv (National Archives), f. 402, l. 9, i. 71, p. 26 ff.

<sup>39</sup> Unterlegung der Juristenfakultät an Rektor. 31. Oktober 1825. — Eesti Ajaloohiiv (National Archives), f. 402, l. 9, i. 71, l. 28 p.

<sup>40</sup> Kurator Lieven an das Conseil der Universität Dorpat. 25. September 1825. — Eesti Ajaloohiiv (National Archives), f. 402, l. 9, i. 63, l.

<sup>41</sup> About administration of state examinations in Prussia and references to relevant sources, q.v. I. Ebert, Die Normierung der juristischen Staatsexamina und des juristischen Vorbereitungsdienstes in Preussen. Berlin 1995.

<sup>42</sup> Entwurf der Unterlegung der Juristenfakultät an Rektor. 22. April 1826. — Eesti Ajaloohiiv (National Archives), f. 402, l. 9, i. 72, p. 18 ff.

<sup>43</sup> Entwurf der Unterlegung der Juristenfakultät an Rektor. 5. April 1826. —



Eesti Ajalooarhiiv (National Archives) 23 ff.

<sup>44</sup> Provinzialrecht der Ostseegouvernements. Erster Theil. Behördenverfassung. St.-Petersburg 1845.

<sup>45</sup> Allerhöchst bestätigte Meinung des Reichsraths vom 5. Juli 1840. §§ 1 ff.

<sup>46</sup> About the notion of the class of scholars and its membership in the towns of the Baltic provinces: C. Redlich. "Literaten" in Riga und Reval im 17. und 18. Jahrhundert. — J. Hein, C. J. Kenéz (Hg.). Reval und die baltischen Länder. Festschrift für H. Weiss zum 80. Geburtstag. Marburg 1980, p. 295 ff.

<sup>47</sup> In fact, at the present stage of studies it is almost impossible to say who actually filled juridical positions in the Baltic provinces in the 19th century. To date, we lack appropriate social and historical research and works which would enable us to draw conclusions on the actual implementation of regulations.



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# Law Philosophy Society of Estonia

It is acknowledged that philosophy forms a cognitive basis for all areas of knowledge. Consequently, philosophy also serves as a foundation of jurisprudence, this being an area of systemic knowledge about reality. The questions raised by philosophy are characteristically questions of principles. Thus, the rationality of providing answers to the questions raised by philosophy in different time and space has been called into question. "On its incessant and excessive search for cognition, philosophy encounters its fundamental problem that human cognition lacks a fixed point of departure. Human cognition is not to be used as once fixed mental basis from which all models of cognition would develop themselves and enable to obtain knowledge."<sup>1</sup>

The Faculty of Law of the University of Tartu has not shared scepticism concerning the value of philosophy. On the contrary, the view that philosophy of law is an imminent constituent of jurisprudence as a so-called accumulating science has been supported both in research papers and in the teaching process. We are of the opinion that philosophy of law is capable of asking questions and seeking answers to the question about the idea of law in its broad sense.<sup>2</sup> As we know, the idea of law consists of justice, purposefulness and certainty in the law. In essence, philosophy of law epitomises the most profound idea of law — a search for justice. Philosophy of law can thus be called a justice-searching science. Naturally, the understanding of justice proper has greatly varied in different time and space, but this very fact has not, by any means, undermined the relevance of raising the question, and the cognitive nature of providing the answers.

Recalling what position philosophy of law and state occupy in the system of knowledge, we can assert that originally they were classical subsections of general phi-

losophy. They lost this role only in the 19th century. Since that time, appropriately trained jurists engage themselves in philosophy of law and state (which are more frequently identified also as philosophy of law); they have to be able to navigate in the problems and methods of general philosophy. In order to characterise the relationships between law and philosophy, the sources of the field claim acutely that in philosophy of law, the jurist asks a question and the philosopher provides an answer.<sup>3</sup> Basically, this means that a person who occupies himself or herself with philosophy of law has to possess systematic knowledge and skills for using methodology in both fields.

Jurists can participate in devising the relatively fresh legal order of Estonia. It seems that they have to bear the heavy load of knowledge on the basis of which it is possible to answer the question what law corresponds to the criteria of justice in Estonia at the moment. While searching for an answer to the question what, then, is the just law, philosophy of law seeks an answer to the ethically correct behaviour in the sphere of human behaviour that has been regulated by law. Thus, philosophy of law can not overlook legal reality and the already established patterns of behaviour, and their conformity with at least what is ethically minimal. However, the established patterns of behaviour should not be the only concern of a person who engages himself or herself in philosophy of law. He or she should be interested in established and generally approved dimensions of justice that are essential or even binding (obligatory) to a legislator or a person applying legal acts in his or her professional career. Thus, philosophy of law does not manifest itself in any way as 'philosophising', but, acting rationally, a specialist in philosophy of law is himself or herself interconnected with juridical reality, and, as a result

of reflection, is capable of providing his or her own solutions for identifying ways appropriate to develop this reality judicially.

In the light of the presented ideas and encouraged by the active support by Dr., h.c.mult. W. Krawietz<sup>4</sup> in 1997, a group of Estonian jurists assembled in *Iuridicum*, a newly opened building of the University of Tartu; intending to found the Law Philosophy Society of Estonia. Thus, 11 November 1997 can be considered the anniversary of the Law Philosophy Society of Estonia. Since founding, members of the Society and other interested people have met every other Tuesday in *Iuridicum* to participate in presentation meetings and in following discussions.<sup>5</sup>

In the following section I would like to present, relying on the headings of the presentations, the themes that have become central issues and given rise to discussions: theory of argumentation and integrated theory (Narits, R., PhD, Prof.); the nature of international law (Kerikmäe, T., LL.Lic.); law interpretation theories (Luts, M., mag. iur.); E. Durkheim and sociology of deviant behaviour (Kaugia, S., mag. iur., Ginter, J., PhD, Doc.); case law (Sillaots, M., mag. iur.); court judgement (Kergandberg, E., PhD, Prof.); main principles and developments of environmental law (Veinla, H. mag. iur.); the theory of concluding contracts and European *ius commune* (Kull, I. mag. iur.); legal provisions (Siigur, H. PhD, Prof. emer.); communitarianism as constitutional theory (Narits, R. PhD, Prof.), and discretion in public law (Merusk, K. PhD, Prof.).

Our foreign guests have also participated in and made presentations at the presentation meetings of the Law Philosophy Society of Estonia. At this point I would like to mention Professor W. Schlüter (Münster), whose paper concerned the nature of collective labour disputes, and Th. Kremer (a postgraduate student of Mannheim University) who analysed C. M. Bergbohm's life and activities as those of a legal positivist.

The activities of the Law Philosophy Society of Estonia have been regularly reflected in overviews published in the legal journal *Juridica*. In addition to that, people who have made presentations at our meetings have moulded their paper into an article published in the same journal.

In June of the present year, the world congress of the International Society for Philosophy of Law and Social Philosophy (IVR, from German *Internationale Vereinigung für Rechts- und Sozialphilosophie*) took place in New York. The Law Philosophy Society of Estonia prepared materials for the conference to be admitted as an independent section to IVR. On 29 June 1999, the Law Philosophy Society of Estonia was admitted to IVR as a section of the 45th country. According to Professor W. Krawietz, the question of admission of our Society was discussed both in the Executive Committee of IVR as well as among a more limited membership of the Managing

Committee. Professor Enrico Pattaro provided an overview of our aspirations. The Law Philosophy Society of Estonia was admitted to IVR unanimously. According to Professor W. Krawietz, we are the only republic of the Baltic States represented with its own section at IVR. At this point, it should be noted that it was Professor W. Krawietz who urged us to join IVR so that we would be able to communicate our existence in the international landscape of science. Naturally, we are greatly indebted to him for references and kind support.

At the same time we are pleased to announce and acknowledge that such an international scientific organisation as IVR has approved of Estonian legal studies as to admit us to its members.

Finally, I would like to include the list of members of the Law Philosophy Society of Estonia

T. Anepaio (mag. iur.); M. Ernits (BA); J. Ginter (PhD, Doc.); P. Kask (PhD); S. Kaugia (mag. soc.); A. Kiris (PhD, Prof.); I. Kull (mag. iur.); L. Lehis (mag. iur.); M. Luts (mag. iur.); K. Merusk (PhD, Prof.); M. Muda (mag. iur.); R. Narits (PhD, Prof.); V. Olle (mag. iur.); I.-M. Orgo (PhD, Prof.); P. Pruks (Dr. iur.); M. Sillaots (mag. iur.); J. Sootak (PhD, Prof.); G. Tavits (mag. iur.).

## Notes:

<sup>1</sup> Horn, N. Einführung in die Rechtswissenschaft und Rechtsphilosophie. Heidelberg: Müller, 1996, p. 36-37.

<sup>2</sup> Narits, R. Öigusteadus (Jurisprudence). — In: *Juridica* No 3, 1995, p. 86.

<sup>3</sup> Kaufmann, A.; Hassemer, W. Einführung in die Rechtsphilosophie und Rechtstheorie der Gegenwart. Heidelberg: Müller, 1980, p. 1.

<sup>4</sup> Prof. W. Krawietz visited Tartu in September 1997 in connection with Estonian-German academic week. Prof. W. Krawietz met undergraduate and postgraduate students and lecturers of the Faculty of Law and delivered a lecture to them. From that basis emerged the idea to form an organisation specialising in philosophy of law.

<sup>5</sup> The presentation meetings of the Law Philosophy Society of Estonia are recessed for June, July and August of the present year.